

NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

Date 10/19/2010

Department of Commerce  
National Oceanic and Atmospheric Administration  
FOR CERTIFYING OFFICIAL: Simon Szykman  
FOR CLEARANCE OFFICER: Diana Hynek

In accordance with the Paperwork Reduction Act, OMB has taken action on your request received 07/15/2010

ACTION REQUESTED: Extension without change of a currently approved collection  
TYPE OF REVIEW REQUESTED: Regular  
ICR REFERENCE NUMBER: 201006-0648-006  
AGENCY ICR TRACKING NUMBER:  
TITLE: Fisheries Certificate of Origin  
LIST OF INFORMATION COLLECTIONS: See next page

OMB ACTION: Approved without change  
OMB CONTROL NUMBER: 0648-0335

The agency is required to display the OMB Control Number and inform respondents of its legal significance in accordance with 5 CFR 1320.5(b).

EXPIRATION DATE: 10/31/2013

DISCONTINUE DATE:

BURDEN:	RESPONSES	HOURS	COSTS
Previous	11,000	3,667	3,397
New	12,500	4,167	4,054
Difference			
Change due to New Statute	0	0	0
Change due to Agency Discretion	0	0	0
Change due to Agency Adjustment	1,500	500	657
Change Due to Potential Violation of the PRA	0	0	0

TERMS OF CLEARANCE:

OMB Authorizing Official: Kevin F. Neyland  
Deputy Administrator,  
Office Of Information And Regulatory Affairs

List of ICs

IC Title	Form No.	Form Name	CFR Citation
Fisheries Certificate of Origin	NAA 370	Fisheries Certificate of Origin	

# PAPERWORK REDUCTION ACT SUBMISSION

**Please read the instructions before completing this form. For additional forms or assistance in completing this form, contact your agency's Paperwork Clearance Officer. Send two copies of this form, the collection instrument to be reviewed, the supporting statement, and any additional documentation to: Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.**

<p>1. Agency/Subagency originating request</p>	<p>2. OMB control number <span style="float: right;">b. <input type="checkbox"/> None</span>                  a. _____ - _____</p>
<p>3. Type of information collection (<i>check one</i>)</p> <p>a. <input type="checkbox"/> New Collection</p> <p>b. <input type="checkbox"/> Revision of a currently approved collection</p> <p>c. <input type="checkbox"/> Extension of a currently approved collection</p> <p>d. <input type="checkbox"/> Reinstatement, without change, of a previously approved collection for which approval has expired</p> <p>e. <input type="checkbox"/> Reinstatement, with change, of a previously approved collection for which approval has expired</p> <p>f. <input type="checkbox"/> Existing collection in use without an OMB control number</p> <p>For b-f, note Item A2 of Supporting Statement instructions</p>	<p>4. Type of review requested (<i>check one</i>)</p> <p>a. <input type="checkbox"/> Regular submission</p> <p>b. <input type="checkbox"/> Emergency - Approval requested by _____ / _____ / _____</p> <p>c. <input type="checkbox"/> Delegated</p>
	<p>5. Small entities                  Will this information collection have a significant economic impact on a substantial number of small entities? <input type="checkbox"/> Yes <input type="checkbox"/> No</p>
	<p>6. Requested expiration date</p> <p>a. <input type="checkbox"/> Three years from approval date b. <input type="checkbox"/> Other Specify: _____ / _____</p>
<p>7. Title</p>	
<p>8. Agency form number(s) (<i>if applicable</i>)</p>	
<p>9. Keywords</p>	
<p>10. Abstract</p>	
<p>11. Affected public (<i>Mark primary with "P" and all others that apply with "x"</i>)</p> <p>a. <input type="checkbox"/> Individuals or households d. <input type="checkbox"/> Farms</p> <p>b. <input type="checkbox"/> Business or other for-profit e. <input type="checkbox"/> Federal Government</p> <p>c. <input type="checkbox"/> Not-for-profit institutions f. <input type="checkbox"/> State, Local or Tribal Government</p>	<p>12. Obligation to respond (<i>check one</i>)</p> <p>a. <input type="checkbox"/> Voluntary</p> <p>b. <input type="checkbox"/> Required to obtain or retain benefits</p> <p>c. <input type="checkbox"/> Mandatory</p>
<p>13. Annual recordkeeping and reporting burden</p> <p>a. Number of respondents _____</p> <p>b. Total annual responses _____</p> <p>    1. Percentage of these responses collected electronically _____ %</p> <p>c. Total annual hours requested _____</p> <p>d. Current OMB inventory _____</p> <p>e. Difference _____</p> <p>f. Explanation of difference</p> <p>    1. Program change _____</p> <p>    2. Adjustment _____</p>	<p>14. Annual reporting and recordkeeping cost burden (<i>in thousands of dollars</i>)</p> <p>a. Total annualized capital/startup costs _____</p> <p>b. Total annual costs (O&amp;M) _____</p> <p>c. Total annualized cost requested _____</p> <p>d. Current OMB inventory _____</p> <p>e. Difference _____</p> <p>f. Explanation of difference</p> <p>    1. Program change _____</p> <p>    2. Adjustment _____</p>
<p>15. Purpose of information collection (<i>Mark primary with "P" and all others that apply with "X"</i>)</p> <p>a. <input type="checkbox"/> Application for benefits e. <input type="checkbox"/> Program planning or management</p> <p>b. <input type="checkbox"/> Program evaluation f. <input type="checkbox"/> Research</p> <p>c. <input type="checkbox"/> General purpose statistics g. <input type="checkbox"/> Regulatory or compliance</p> <p>d. <input type="checkbox"/> Audit</p>	<p>16. Frequency of recordkeeping or reporting (<i>check all that apply</i>)</p> <p>a. <input type="checkbox"/> Recordkeeping b. <input type="checkbox"/> Third party disclosure</p> <p>c. <input type="checkbox"/> Reporting</p> <p>    1. <input type="checkbox"/> On occasion 2. <input type="checkbox"/> Weekly 3. <input type="checkbox"/> Monthly</p> <p>    4. <input type="checkbox"/> Quarterly 5. <input type="checkbox"/> Semi-annually 6. <input type="checkbox"/> Annually</p> <p>    7. <input type="checkbox"/> Biennially 8. <input type="checkbox"/> Other (describe) _____</p>
<p>17. Statistical methods</p> <p>Does this information collection employ statistical methods</p> <p style="text-align: center;"><input type="checkbox"/> Yes <input type="checkbox"/> No</p>	<p>18. Agency Contact (person who can best answer questions regarding the content of this submission)</p> <p>Name: _____</p> <p>Phone: _____</p>

## 19. Certification for Paperwork Reduction Act Submissions

On behalf of this Federal Agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9

**NOTE:** The text of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), appear at the end of the instructions. *The certification is to be made with reference to those regulatory provisions as set forth in the instructions.*

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

- (a) It is necessary for the proper performance of agency functions;
- (b) It avoids unnecessary duplication;
- (c) It reduces burden on small entities;
- (d) It used plain, coherent, and unambiguous terminology that is understandable to respondents;
- (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;
- (f) It indicates the retention period for recordkeeping requirements;
- (g) It informs respondents of the information called for under 5 CFR 1320.8(b)(3):
  - (i) Why the information is being collected;
  - (ii) Use of information;
  - (iii) Burden estimate;
  - (iv) Nature of response (voluntary, required for a benefit, mandatory);
  - (v) Nature and extent of confidentiality; and
  - (vi) Need to display currently valid OMB control number;
- (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected (see note in Item 19 of instructions);
- (i) It uses effective and efficient statistical survey methodology; and
- (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of the provisions, identify the item below and explain the reason in Item 18 of the Supporting Statement.

Signature of Senior Official or designee

Date

Agency Certification (signature of Assistant Administrator, Deputy Assistant Administrator, Line Office Chief Information Officer, head of MB staff for L.O.s, or of the Director of a Program or StaffOffice)

Signature

Date

Signature of NOAA Clearance Officer

Signature

Date

**SUPPORTING STATEMENT  
FISHERIES CERTIFICATE OF ORIGIN  
OMB CONTROL NO. 0648-0335**

**A. JUSTIFICATION**

**1. Explain the circumstances that make the collection of information necessary.**

The purpose of this collection of information is to comply with the requirements of the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361, and the Dolphin Protection Consumer Information Act (DPCIA), 16 U.S.C. 1385, as amended by the International Dolphin Conservation Program Act (IDCPA), 16 U.S.C. 1414. The MMPA and the DPCIA required the Secretary of Commerce to promulgate regulations that restricted the fishing, sale, importation, and transportation of tuna that is not dolphin-safe and of certain other fish and fish products when they have been harvested by high seas driftnets. The IDCPA primarily amends provisions in the MMPA and the DPCIA governing marine mammal mortality in the United States (U.S.) Eastern Tropical Pacific Ocean (ETP) tuna purse seine fishery and the importation of yellowfin tuna and yellowfin tuna products from other nations with vessels engaged in the ETP tuna purse seine fishery.

A final rule, affecting 50 CFR Part 216, published in the Federal Register on September 13, 2004 (amended by final rules affecting 50 CFR Parts 216 and 300 published on April 12, 2005 and January 13, 2009). The rule implemented provisions of the IDCPA which allows the entry of ETP-caught yellowfin tuna into the U.S. under certain conditions and establishes a tuna tracking program to ensure adequate tracking and verification of dolphin-safe labeled tuna. This information collection documents the dolphin-safe status of tuna import shipments; verifies that import shipments of fish were not harvested by large scale, highseas driftnets; and verifies that tuna was not harvested by a nation under embargo or otherwise prohibited from exporting tuna to the U.S.

**2. Explain how, by whom, how frequently, and for what purpose the information will be used. If the information collected will be disseminated to the public or used to support information that will be disseminated to the public, then explain how the collection complies with all applicable Information Quality Guidelines.**

The Fisheries Certificate of Origin (FCO) provides the National Marine Fisheries Service (NMFS) with information concerning the origin, type, and quantity of the imported tuna. The FCO provides a mechanism for foreign exporters and government officials to document and certify the fishing method and dolphin-safe status of the accompanying shipment. It requires U.S. importers to provide this information to the U.S. Customs and Border Protection (CBP) at the time of importation, thus, assisting the CBP in preventing tuna that is not properly documented from entering the U.S. In addition, the CBP importer of record is required to send a copy of the FCO to NMFS within 10 days of the shipment. All parties that submit FCOs are required to retain a copy of the FCO for a period of two years and to provide such copies to the NMFS within thirty days of receiving a written request from the NMFS Regional Administrator, Southwest Region.

If the importer of record is not the final destination of the entire shipment, additional importers or processors who take custody of the shipment are asked to endorse and date the form to certify that the form and attached documentation accurately describes the accompanying shipment. The additional endorsers are required to file the form but need not submit it unless it is requested at a later time during a tuna tracking audit.

If an importation includes tuna and/or tuna products harvested by a purse seine net outside of the ETP (where there is no requirement for an onboard observer), then a statement signed by the vessel captain certifying that no purse seine net was intentionally deployed on, or to encircle, dolphins during the fishing trip must be attached to the FCO.

If the importation includes tuna and/or tuna products harvested in the ETP by a purse seine vessel of more than 400 short tons carrying capacity, then valid documentation signed by a representative of the appropriate IDCP-member nation must be attached to the FCO certifying that: 1) there was an IDCP-approved observer on board the vessel during the entire trip; 2) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught. The member nation must also provide a listing of the numbers for the associated Tuna Tracking Forms which contain the captain's and observer's certifications.

The National Oceanic Atmospheric Administration (NOAA) has made use of the FCO in documenting the entry of tuna and certain other fish products into the U.S. for a number of years. NOAA has also used the information collected on the FCO in litigation, fisheries management decisions, and international negotiation decisions.

The information collected will not be disseminated to the public since the individual forms contain no information useful to anyone outside of the involved federal agencies. The main purpose of the form is to satisfy the legal mandates of Congress.

In the event summarized information is used to support publicly disseminated information, then, as explained in the preceding paragraphs, the information gathered can be shown to have utility. NOAA Fisheries will retain control over the information and safeguard it from improper use, modification, and destruction, consistent with NOAA standards for confidentiality, privacy, and electronic information. See response to Question 10 of this Supporting Statement for more information on confidentiality and privacy. The information collection is designed to yield data that meet all applicable information quality guidelines. Prior to dissemination, the information will be subjected to quality control measures and a pre-dissemination review pursuant to Section 515 of Public Law 106-554.

**3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological techniques or other forms of information technology.**

The FCO form is available for online completion or downloading from the NMFS Southwest Region web site and the DolphinSafe.gov web site for use on the respondent's own computer system. Respondents are encouraged to provide electronic copies to NMFS via a secure FTP server. Currently, approximately 20% of the responses are received in this manner.

**4. Describe efforts to identify duplication.**

The FCO was one of the first forms developed by NMFS to document information regarding the importation of tuna products, to certify that certain fishery products were not harvested using high seas driftnets, and to declare the dolphin-safe status of the tuna import. The same or similar information is not available through any other known information collection.

**5. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.**

This collection does not have a significant impact on small entities.

**6. Describe the consequences to the Federal program or policy activities if the collection is not conducted or is conducted less frequently.**

The Secretary of Commerce would not be able to meet the mandates of the applicable laws if the information collection was not conducted. Litigation against the Federal Government would likely ensue.

**7. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with OMB guidelines.**

This information collection is consistent with OMB guidelines (5 CFR 1320.6), except that submission is required for each shipment of tuna and covered fish products that enters the US. This may be more frequent than quarterly for some importers.

**8. Provide information on the PRA Federal Register Notice that solicited public comments on the information collection prior to this submission. Summarize the public comments received in response to that notice and describe the actions taken by the agency in response to those comments. Describe the efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.**

A Federal Register Notice published on January 15, 2010 (75 FR 2482) solicited public comment on this collection. No comments applicable to the information collection requirements were received.

**9. Explain any decisions to provide payments or gifts to respondents, other than remuneration of contractors or grantees.**

No payments or gifts are provided.

**10. Describe any assurance of confidentiality provided to respondents and the basis for assurance in statute, regulation, or agency policy.**

The information collection is considered confidential as per the Dolphin Protection Consumer Information Act and is treated as such in accordance with NOAA Administrative Order 216-100. Information collected is handled in compliance with agency filing and retention policy.

**11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.**

No questions of a sensitive nature are included in this information collection.

**12. Provide an estimate in hours of the burden of the collection of information.**

In 2009, preliminary program data shows approximately 440 different respondents submitted approximately 12,500 responses. It is estimated that each response averages 20 minutes. Therefore, the estimate in hours of the burden of the collection of information is:

12,500 responses (including submission of forms (2,500), and signed statements and other supporting documentation (10,000) as described in Question 2.  $12,500 \times 20 \text{ minutes} / 60 \text{ minutes} = 4,167 \text{ hours}$ .

**13. Provide an estimate of the total annual cost burden to the respondents or record-keepers resulting from the collection (excluding the value of the burden hours in Question 12 above).**

Approximately 20% of responses are submitted electronically, so for those respondents, there would be only the cost of one copy for Customs and Border Protection submission with the entry package. Also, respondents average 3 responses per mailing. Therefore, if 12,500 responses per year are received, then the cost might be:

Copying of statements and supporting documentation:  $2,500 \times \$0.10/\text{copy} = \$250/\text{yr}$   
Copying of forms  $10,000 \times 2 \times \$0.10/\text{copy} = \$2,000/\text{yr}$   
Envelopes:  $10,000 \text{ divided by } 3 \times \$0.10/\text{envelope} = \$334/\text{yr}$   
Postage:  $10,000 \times \text{divided by } 3 \times \$0.44 \text{ (stamp)} = \$1,470/\text{yr}$   
**Total annual cost burden estimate:  $\$250 + \$2,000 + \$334 + \$1,470 = \$4,054$ .**

**14. Provide estimates of annualized cost to the Federal government.**

Staff hours to collect, analyze, input, & file 12,500 collections per year:

$12,500 \text{ forms} \times 8 \text{ minutes/form} = 1,667 \text{ staff hours/year}$

4 minutes analysis per collection @  $\$39.19/\text{hr}$  (GS-11/12)

4 minutes  $\times \$39.19/\text{hr} = \$2.61$

3 minutes data entry per collection @  $\$12.00/\text{hr}$  (Student Intern)

3 minutes  $\times \$12.00/\text{hr} = \$0.60$

1 minute for filing per collection @ \$12.00/hr (Student Intern)  
1 minute = 0.0166 hrs x \$12.00/hr = \$0.20

12,500 responses/yr x (\$2.61 + \$0.60 + \$0.20) = \$42,625.

**15. Explain the reasons for any program changes or adjustments.**

The adjustments to responses and hours are due to an increase in the total number of responses received each year since the last estimation was made, resulting in an estimated annual 1,500 additional responses, 500 hours and \$657 in reporting/recordkeeping costs.

**16. For collections whose results will be published, outline the plans for tabulation and publication.**

Not applicable.

**17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons why display would be inappropriate.**

Not applicable.

**18. Explain each exception to the certification statement.**

Not applicable.

**B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS**

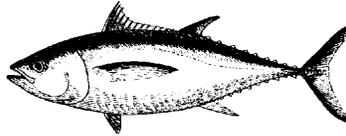
This collection does not employ statistical methods.

U.S. DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC  
ADMINISTRATION

NATIONAL MARINE FISHERIES SERVICE

## Fisheries Certificate of Origin



1. Customs Entry Identification

\_\_\_\_\_  
Customs Entry Number (11 digits)

\_\_\_\_\_  
Date of Entry

2. Exporter (Name and Address)

Telephone Number: \_\_\_\_\_

3. Importer (Name and Address)

Telephone Number: \_\_\_\_\_

### 4. DESCRIPTION OF FISH

U.S. Tariff Schedule Number, Species Description, and Product Form	Weight (kg.)	Ocean Area	Fishing Gear	Vessel Flag	Trip Dates Begin-End	Vessel Name

### 5. DOLPHIN SAFE STATUS - check the statement that applies.

A. The tuna or tuna products described herein are not certified to be dolphin safe and contain no marks or labels that indicate otherwise.

B. The tuna or tuna products described herein are certified to be dolphin safe:

- (1) Tuna not harvested with a purse seine net, and not harvested in any fishery that has been identified by the Assistant Administrator as causing a regular and significant mortality or serious injury to dolphins.
- (2) Tuna harvested using a purse seine net outside the Eastern Tropical Pacific Ocean (ETP), with valid documentation by the captain of the vessel certifying that no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip. **Captain's statement attached.**
- (3) Tuna harvested by purse seine vessel outside the ETP in a fishery in which there is a regular and significant association occurring between marine mammals and tuna, with valid documentation by an authorized observer and the captain of the vessel, certifying that no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught. **Observer's and captain's statements attached.**
- (4) Tuna harvested in the ETP by a purse seine vessel having a carrying capacity of 400 short tons (362.8mt) or less.
- (5) Tuna harvested in the ETP by a purse seine vessel of more than 400 short tons (362.8mt) carrying capacity with valid documentation signed by a representative of the appropriate IDCP-member nation certifying that: (1) there was an IDCP-approved observer on board the vessel during the entire trip; (2) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught; (3) listing the numbers for the associated Tuna Tracking Forms which contain the captain's and observer's certifications. **IDCP Member Nation Certification attached.**

6. EXPORTER CERTIFICATION - I certify that the above information is complete, true, and correct to the best of my knowledge and belief.

Exporter Name (Print or Type) \_\_\_\_\_

Signature and Date: \_\_\_\_\_

7. HIGH SEAS DRIFTNET CERTIFICATION - For fish or fish products harvested by, or exported from, a designated large-scale driftnet nation. I attest that the fish or fish products described herein were not harvested by a large-scale driftnet on the high seas.

Name and title of Government Representative (Print or Type) \_\_\_\_\_

Signature and Date: \_\_\_\_\_

### 8. IMPORTER/PROCESSOR ENDORSEMENT

(Name and Address) \_\_\_\_\_

Signature and Date: \_\_\_\_\_

(Name and Address) \_\_\_\_\_

Signature and Date: \_\_\_\_\_

(Name and Address) \_\_\_\_\_

Signature and Date: \_\_\_\_\_

GENERAL INFORMATION – The information requested on this form is necessary to substantiate the origin and method of harvest of tuna and certain other fish products as required by 50 CFR Part 216.24(f). This form is required for all tuna and tuna products entered into the United States under an HTS number listed in 216.24(f)(2)(i) or (ii) and for any fish exported from a large-scale driftnet nation entered under any of the HTS numbers listed in 216.24(f)(2). This form may also be used to document U.S. domestic landings and shipments of certain tuna and tuna products as required by 50 CFR Part 216.92(a). The information submitted on the form will be used to determine whether or not the listed shipment will be allowed entry into the United States. The information provided will be treated as confidential in accordance with NOAA Administrative Order 216-100. Mail a copy of each form and attached statements, within 10 days of the shipment's entry into U.S. commerce, to: National Marine Fisheries Service, Southwest Region, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213. Questions concerning the use of the form may be directed to (562) 980-4030. This form may be downloaded from the Internet at <http://swr.nmfs.noaa.gov/noaa370.htm> and reproduced as necessary.

## **INSTRUCTIONS.**

1. CUSTOMS ENTRY IDENTIFICATION - Importer must enter the shipment's assigned U.S. Customs Entry Number and the projected date of entry (day/month/year, i.e., 15/Jan/2000)
2. EXPORTER - Enter company name and address of exporter and contact phone number of responsible company representative.
3. IMPORTER - Enter name and address of importer or consignee and contact phone number of responsible company representative.
4. DESCRIPTION OF FISH -

U.S. HARMONIZED TARIFF SCHEDULE NUMBER, SPECIES DESCRIPTION AND PRODUCT FORM - Enter U.S. HTS Number of fish or fish product, the species description and product form in English. HTS numbers are listed in 50 CFR 216.24(f)(2). Only shipments from countries that use large-scale driftnets are required to be accompanied by this form for other species of fish and fish products. **This form is not required for fresh tuna.**

WEIGHT - Enter the total **net** weight of the shipment **in kilograms.**

OCEAN AREA OF CATCH - Enter the ocean area in which the fish contained in this shipment were harvested:

- EA - Eastern Atlantic (east of 45E W. longitude)
- WA - Western Atlantic (west of 45E W. longitude)
- ETP - Eastern Tropical Pacific (east of 160E W. longitude, between 40E N. and 40E S. latitude)
- NP - North Pacific Ocean (north of 40EN. latitude)
- SP - South Pacific Ocean (west of 160E W. longitude, south of 15E S. latitude and east of 160E W. longitude, south of 40E S. latitude)
- WP - Western Pacific Ocean (west of 160E W. longitude and north of 15E S. latitude)
- IND - Indian Ocean
- CAR - Caribbean Sea
- OTH - Other- Describe Area \_\_\_\_\_

FISHING GEAR - Enter gear used to harvest fish

- PL - Pole and Line, Hook and Line
- PS - Purse Seine Net
- GN - Gillnet less than 1.5 miles (2.4 km) in total length
- DN - Large Scale Driftnet (High Seas)
- LL - Longline
- OTH - Other Type. Describe \_\_\_\_\_

VESSEL FLAG - Enter the country under whose laws the fishing vessel operated, or for certified charter vessels, enter the country that accepted responsibility for the vessels' fishing operations.

TRIP DATES - Enter the **exact** beginning and ending dates (day/month/year, i.e., 15/Jan/2000) of the fishing trip during which the described shipment of fish was harvested.

VESSEL NAME - Enter the name of the **fishing vessel.**

5. DOLPHIN SAFE STATUS - Must be completed for all tuna or tuna products. Check only **one** appropriate statement. Use a separate form if more than one statement applies. Statements or certifications required when box No. 5B(2), 5B(3), or 5B(5) is checked must accompany this form at all times.
6. EXPORTER CERTIFICATION - Must be signed and dated (day/month/year, i.e., 15/Jan/2000) by a responsible official of the export company listed in block 2.
7. HIGH SEAS DRIFTNET CERTIFICATION - If the shipment includes fish harvested by vessels of, or exported from a nation identified by NOAA in a Federal Register notice as a nation fishing with large-scale driftnets, a responsible government official of the large-scale driftnet nation must certify here.
8. IMPORTER/PROCESSOR ENDORSEMENT - Each importer or processor who takes custody of the shipment must sign and date the form to certify that the form and attached documentation accurately describe the shipment of fish that they accompany.

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Public reporting burden for this collection of information is estimated to average 20 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the above address. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

## Findings and Declaration of Policy

### *16 U.S.C. 1361*

*Sec. 2.* The Congress finds that—

(1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;

(2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions;

(3) there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully;

(4) negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals;

(5) marine mammals and marine mammal products either—

(A) move in interstate commerce, or

(B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce,

and that the protection and conservation of marine mammals and their habitats is therefore necessary to insure the continuing availability of those products which move in interstate commerce; and

(6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

# Dolphin Protection

16 U.S.C. 1385

Sec. [ ] (a) SHORT TITLE. — This section may be cited as the "Dolphin Protection Consumer Information Act".

(b) FINDINGS. — The Congress finds that—

(1) dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern tropical Pacific Ocean and high seas driftnet fishing in other parts of the world;

(2) it is the policy of the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins; and

(3) consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.

(c) DEFINITIONS. — For the purposes of this section—

(1) the terms "driftnet" and "driftnet fishing" have the meanings given those terms in section 4003 of the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 (16 U.S.C. 1822 note);

(2) the term "eastern tropical Pacific Ocean" means the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of North, Central, and South America;

(3) the term "label" means a display of written, printed, or graphic matter on or affixed to the immediate container of any article;

(4) the term "Secretary" means the Secretary of Commerce; and

(5) the term "tuna product" means a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life less than 3 days.

(d) LABELING STANDARD. —

(1) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "dolphin safe" or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins if the product contains tuna harvested--

(A) on the high seas by a vessel engaged in driftnet fishing;

(B) outside the eastern tropical Pacific Ocean by a vessel using purse seine nets--

(i) in a fishery in which the Secretary has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the eastern tropical Pacific Ocean), unless such product is accompanied by a written statement, executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught; or

(ii) in any other fishery (other than a fishery described in subparagraph (D)) unless the product is accompanied by a written statement executed by the captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested;

(C) in the eastern tropical Pacific Ocean by a vessel using a purse seine net unless the tuna meet the requirements for being considered dolphin safe under paragraph (2); or

(D) by a vessel in a fishery other than one described in subparagraph (A), (B), or (C) that is identified by the Secretary as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Secretary determines that such an observer statement is necessary.

(2) For purposes of paragraph (1)(C), a tuna product that contains tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets is dolphin safe if--

(A) the vessel is of a type and size that the Secretary has determined, consistent with the International Dolphin Conservation Program, is not capable of deploying its purse seine nets on or to encircle dolphins; or

(B)(i) the product is accompanied by a written statement executed by the captain providing the certification required under subsection (h);

(ii) the product is accompanied by a written statement executed by--

(I) the Secretary or the Secretary's designee;

(II) a representative of the Inter-American Tropical Tuna Commission; or

(III) an authorized representative of a participating nation whose national program meets the requirements of the International Dolphin Conservation Program,

which states that there was an observer approved by the International Dolphin Conservation Program on board the vessel during the entire trip and that such observer provided the certification required under subsection (h); and

(iii) the statements referred to in clauses (i) and (ii) are endorsed in writing by each exporter, importer, and processor of the product; and

(C) the written statements and endorsements referred to in subparagraph (B) comply with regulations promulgated by the Secretary which provide for the verification of tuna products as dolphin safe.

(3)(A) The Secretary of Commerce shall develop an official mark that may be used to label tuna products as dolphin safe in accordance with this Act.

(B) A tuna product that bears the dolphin safe mark developed under subparagraph (A) shall not bear any other label or mark that refers to dolphins, porpoises, or marine mammals.

(C) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to label a tuna product with any label or mark that refers to dolphins, porpoises, or marine mammals other than the mark developed under subparagraph (A) unless--

(i) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught;

(ii) the label is supported by a tracking and verification program which is comparable in effectiveness to the program established under subsection (f); and

(iii) the label complies with all applicable labeling, marketing, and advertising laws and regulations of the Federal Trade Commission, including any guidelines for environmental labeling.

(D) If the Secretary determines that the use of a label referred to in subparagraph (C) is substantially undermining the conservation goals of the International Dolphin Conservation Program, the Secretary shall report that determination to the United States Senate Committee on Commerce, Science, and Transportation and the United States House of Representatives Committees on Resources and on Commerce, along with recommendations to correct such problems.

(E) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) willingly and knowingly to use a label referred to in subparagraph (C) in a campaign or effort to mislead or deceive consumers about the level of protection afforded dolphins under the International Dolphin Conservation Program.

(e) ENFORCEMENT. — Any person who knowingly and willfully makes a statement or endorsement described in subsection (d)(2)(B) that is false is liable for a civil penalty of not to exceed \$100,000 assessed in an action brought in any appropriate district court of the United States on behalf of the Secretary.

(f) REGULATIONS. —The Secretary, in consultation with the Secretary of the Treasury, shall issue regulations to implement this Act, including regulations to establish a domestic tracking and verification program that provides for the effective tracking of tuna labeled under subsection (d). In the development of these regulations, the Secretary shall establish appropriate procedures for ensuring the confidentiality of proprietary information the submission of which is voluntary or mandatory. The regulations shall address each of the following items:

(1) The use of weight calculation for purposes of tracking tuna caught, landed, processed, and exported.

(2) Additional measures to enhance current observer coverage, including the establishment of criteria for training, and for improving monitoring and reporting capabilities and procedures.

(3) The designation of well location, procedures for sealing holds, procedures for monitoring and certifying both above and below deck, or through equally effective methods, the tracking and verification of tuna labeled under subsection (d).

(4) The reporting, receipt, and database storage of radio and facsimile transmittals from fishing vessels containing information related to the tracking and verification of tuna, and the definition of set.

(5) The shore-based verification and tracking throughout the fishing, transshipment, and canning process by means of Inter-American Tropical Tuna Commission trip records or otherwise.

(6) The use of periodic audits and spot checks for caught, landed, and processed tuna products labeled in accordance with subsection (d).

(7) The provision of timely access to data required under this subsection by the Secretary from harvesting nations to undertake the actions required in paragraph (6) of this paragraph.

The Secretary may make such adjustments as may be appropriate to the regulations promulgated under this subsection to implement an international tracking and verification program that meets or exceeds the minimum requirements established by the Secretary under this subsection.

(g) SECRETARIAL FINDINGS.--(1) Between March 1, 1999, and March 31, 1999, the Secretary shall, on the basis of the research conducted before March 1, 1999, under section 304(a) of the Marine Mammal Protection Act of 1972, information obtained under the International Dolphin Conservation Program, and any other relevant information, make an initial finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean. The initial finding shall be published immediately in the Federal Register and shall become effective upon a subsequent date determined by the Secretary.

(2) Between July 1, 2001, and December 31, 2002, the Secretary shall, on the basis of the completed study conducted under section 304(a) of the Marine Mammal Protection Act of 1972, information obtained under the International Dolphin Conservation Program, and any other relevant information, make a finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean. The finding shall be published immediately in the Federal Register and shall become effective upon a subsequent date determined by the Secretary.

(h) CERTIFICATION BY CAPTAIN BY OBSERVER.--

(1) Unless otherwise required by paragraph (2), the certification by the captain under subsection (d)(2)(B)(i) and the certification provided by the observer as specified in subsection (d)(2)(B)(ii) shall be that no dolphins were killed or seriously injured during the sets in which the tuna were caught.

(2) The certification by the captain under subsection (d)(2)(B)(i) and the certification provided by the observer as specified under subsection (d)(2)(B)(ii) shall be that no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that no

dolphins were killed or seriously injured during the sets in which the tuna were caught, if the tuna were caught on a trip commencing--

(A) before the effective date of the initial finding by the Secretary under subsection (g)(1);

(B) after the effective date of such initial finding and before the effective date of the finding of the Secretary under subsection (g)(2), where the initial finding is that the intentional deployment on or encirclement of dolphins is having a significant adverse impact on any depleted dolphin stock; or

(C) after the effective date of the finding under subsection (g)(2), where such finding is that the intentional deployment of or encirclement of dolphins is having a significant adverse impact on any such depleted stock.

*16 U.S.C. 1414*

**Sec. 304. (a) REQUIRED RESEARCH.--**

(1) IN GENERAL.--The Secretary shall, in consultation with the Marine Mammal Commission and the Inter-American Tropical Tuna Commission, conduct a study of the effect of intentional encirclement (including chase) on dolphins and dolphin stocks incidentally taken in the course of purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean. The study, which shall commence on October 1, 1997, shall consist of abundance surveys as described in paragraph (2) and stress studies as described in paragraph (3), and shall address the question of whether such encirclement is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean.

(2) POPULATION ABUNDANCE SURVEYS.--The abundance surveys under this subsection shall survey the abundance of such depleted stocks and shall be conducted during each of the calendar years 1998, 1999, and 2000.

(3) STRESS STUDIES.--The stress studies under this subsection shall include--

(A) a review of relevant stress-related research and a 3-year series of necropsy samples from dolphins obtained by commercial vessels;

(B) a 1-year review of relevant historical demographic and biological data related to dolphins and dolphin stocks referred to in paragraph (1); and

(C) an experiment involving the repeated chasing and capturing of dolphins by means of intentional encirclement.

(4) REPORT.--No later than 90 days after publishing the finding under subsection (g)(2) of the Dolphin Protection Consumer Information Act, the Secretary shall complete and submit a report containing the results of the research described in this subsection to the United States Senate Committee on Commerce, Science, and Transportation and the United States House of Representative Committees on Resources and on Commerce, and to the Inter-American Tropical Tuna Commission.

**(b) OTHER RESEARCH.--**

(1) IN GENERAL.--In addition to conducting the research described in subsection (a), the Secretary shall, in consultation with the Marine Mammal Commission and in cooperation with the nations participating in the International Dolphin Conservation Program and the Inter-American Tropical Tuna Commission, undertake or support appropriate scientific research to further the goals of the International Dolphin Conservation Program.

(2) SPECIFIC AREAS OF RESEARCH.--Research carried out under paragraph (1) may include--

(A) projects to devise cost-effective fishing methods and gear so as to reduce, with the goal of eliminating, the incidental mortality and serious injury of marine mammals in connection with commercial purse seine fishing in the eastern tropical Pacific Ocean;

(B) projects to develop cost-effective methods of fishing for mature yellowfin tuna without setting nets on dolphins or other marine mammals;

(C) projects to carry out stock assessments for those marine mammal species and marine mammal stocks taken in the purse seine fishery for yellowfin tuna in the eastern tropical Pacific Ocean, including species or stocks not within waters under the jurisdiction of the United States; and

(D) projects to determine the extent to which the incidental take of nontarget species, including juvenile tuna, occurs in the course of purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean, the geographic location of the incidental take, and the impact of that incidental take on tuna stocks and nontarget species.

(c) AUTHORIZATION OF APPROPRIATIONS.--

(1) There are authorized to be appropriated to the Secretary the following amounts, to be used by the Secretary to carry out the research described in subsection (a):

(A) \$4,000,000 for fiscal year 1998.

(B) \$3,000,000 for fiscal year 1999.

(C) \$4,000,000 for fiscal year 2000.

(D) \$1,000,000 for fiscal year 2001.

(2) In addition to the amount authorized to be appropriated under paragraph (1), there are authorized to be appropriated to the Secretary for carrying out this section \$3,000,000 for each of the fiscal years 1998, 1999, 2000, and 2001.

## **Reports by the Secretary**

### ***16 U.S.C. 1415***

**Sec. 305.** Notwithstanding section 103(f), the Secretary shall submit annual reports to the Congress which include—

(1) results of research conducted pursuant to section 304;

(2) a description of the status and trends of stocks of tuna;

(3) a description of the efforts to assess, avoid, reduce, and minimize the bycatch of juvenile yellowfin tuna and bycatch of nontarget species;

(4) a description of the activities of the International Dolphin Conservation Program and of the efforts of the United States in support of the program's goals and objectives, including the protection of dolphin stocks in the eastern tropical Pacific Ocean, and an assessment of the effectiveness of the program;

(5) actions taken by the Secretary under section 101(a)(2)(B) and section 101(d);

(6) copies of any relevant resolutions and decisions of the Inter-American Tropical Tuna Commission, and any regulations promulgated by the Secretary under this title; and

(7) any other information deemed relevant by the Secretary.



# Federal Register

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**Monday,  
September 13, 2004**

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**Part III**

## **Department of Commerce**

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**National Oceanic and Atmospheric  
Administration**

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**50 CFR Part 216**

**Taking of Marine Mammals Incidental to  
Commercial Fishing Operations; Tuna  
Purse Seine Vessels in the Eastern  
Tropical Pacific Ocean (ETP); Final Rule**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 216

[Docket No. 040806232-4232-01, I.D. 041404C]

RIN 0648-AS45

**Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP)**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule to implement provisions of the International Dolphin Conservation Program Act (IDCPA). This rule replaces the interim rule published in the **Federal Register** on January 3, 2000. This final rule makes technical changes and clarifications to the interim final rule which is already in effect. The interim final rule allows the entry of yellowfin tuna into the United States under certain conditions from nations fully complying with the International Dolphin Conservation Program (IDCP) and the Agreement on the IDCP. The interim final rule establishes a standard for the use of "dolphin-safe" labels for tuna products and also establishes a tuna-tracking and verification program to ensure that the dolphin-safe status of tuna domestically produced and imported into the United States is documented. This final rule does not contain substantive changes to the actions implemented in the interim final rule unless suggested by commenters.

**DATES:** Effective October 13, 2004.

**ADDRESSES:** Written comments on the collection-of-information requirements should be sent to Jeremy Rusin, NMFS, Southwest Region, Protected Resources Division, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213. Comments also may be sent via facsimile (fax) to (562) 980-4027.

**FOR FURTHER INFORMATION CONTACT:** Jeremy Rusin, NMFS, Southwest Region, Protected Resources Division, (562) 980-3248.

**SUPPLEMENTARY INFORMATION:****Background**

In 1992, ten nations fishing for tuna in the ETP, including the United States, reached a non-binding international agreement (referred to as the La Jolla Agreement) that included, among other

measures, a schedule for significantly reducing dolphin mortality. (These nations included Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Spain, Panama, Vanuatu, Venezuela and the United States.) By 1993, nations fishing in the ETP under the La Jolla Agreement had reduced dolphin mortality to less than 5,000 dolphins annually, 6 years ahead of the schedule established in that Agreement. In October 1995, the success of the La Jolla Agreement led the United States, Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, Vanuatu, and Venezuela to sign the Panama Declaration, another voluntary measure, to strengthen and enhance the IDCP.

The program outlined in the Panama Declaration provided greater protection for dolphins and enhanced the conservation of yellowfin tuna and other living marine resources in the ETP ecosystem. The signers of the Panama Declaration anticipated that the United States would amend the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) to allow import of yellowfin tuna into the United States from nations that are participating in, and are in compliance with, the IDCP. Implementation of the Panama Declaration by the United States was also anticipated to allow U.S. vessels to participate in the ETP fishery on an equal basis with the vessels of other nations. Under the Panama Declaration, signatory nations agreed to develop a legally binding, international agreement.

The IDCPA was signed into law August 15, 1997, and became effective March 3, 1999. The IDCPA was the United States' domestic endorsement of the Panama Declaration. The IDCPA amends the MMPA, the Dolphin Protection Consumer Information Act (DPCIA) (16 U.S.C. 1385), and the Tuna Conventions Act, 16 U.S.C. 951 *et seq.* It provides a framework for governing marine mammal mortality incidental to the U.S. ETP tuna purse seine fishery and the importation of yellowfin tuna and yellowfin tuna products from other nations with vessels engaged in the ETP tuna purse seine fishery.

**Agreement on the IDCP**

The IDCPA, together with the Panama Declaration, became the blueprint for the Agreement on the IDCP. In May 1998, eight nations, including the United States, signed a binding, international agreement to implement the IDCP. The Agreement on the IDCP became effective on February 15, 1999, after Mexico became the fourth nation to ratify the Agreement.

The nations who are Parties to the Agreement on the IDCP agreed that 1999

would be a transition year and that 2000 would be the first year the Agreement would be fully implemented and nations would operate under the Agreement. This final rule is intended to implement the IDCPA and the Agreement for dolphin conservation in the ETP.

**Proposed Rule and Interim Final Rule**

On June 14, 1999, NMFS published proposed regulations to implement the IDCPA (64 FR 31806). These regulations proposed to: (1) allow the entry of yellowfin tuna into the United States under certain conditions from nations fully complying with the IDCP; (2) allow U.S. vessels to set their purse seines on dolphins in the ETP; (3) change the standard for the use of dolphin-safe labels for tuna products and; (4) establish a system of tracking and verification for tuna harvested by U.S. and foreign vessels in the ETP that enter the commerce of the United States.

Public comments on the proposed rule were accepted through July 14, 1999. Several commenters on the proposed rule stated that the 30-day comment period for this proposed rule was too short and requested an extension of the public comment period. To accommodate this, NMFS published an interim final rule (65 FR 31, January 3, 2000) with a 90-day comment period, instead of a final rule. Public comments on the interim final rule were accepted through April 3, 2000. NMFS held two public hearings on the proposed rule: one in Long Beach, CA on July 8, 1999, and one in Silver Spring, MD on July 14, 1999. In addition to publication of the interim final rule in the **Federal Register**, NMFS sent the proposed rule and the interim final rule to industry representatives, environmental organizations, vessel and operator permit holders, importers, IDCP member nations, Department of State (DoS), Inter-American Tropical Tuna Commission (IATTC), U.S. Commissioners to the IATTC, Department of the Treasury, U.S. Customs Service, Marine Mammal Commission, Department of Justice, and the Federal Trade Commission. NMFS also issued press releases announcing the availability of the proposed rule and the interim final rule. Information in the press release was published in several national newspapers and on NMFS websites and was broadcast on several radio stations.

**Litigation: Labeling Standard**

On August 17, 1999, in response to NMFS' issuance of the initial finding mandated under paragraph (g)(1) of the DPCIA, twelve environmental

organizations and individuals filed a complaint against the Department of Commerce and NMFS alleging that NMFS violated the MMPA, the DPCIA, the IDCPA and the National Environmental Policy Act (NEPA). The plaintiffs in *Brower v. Daley* sought to prevent the change of the dolphin-safe labeling standard that had resulted from NMFS' initial finding. The plaintiffs alleged that NMFS failed to follow the requirements of these Acts in its April 29, 1999, initial finding that there was insufficient evidence to conclude that the encirclement of dolphins with purse seine nets by fishing vessels in the ETP was having a significant adverse impact on depleted ETP dolphin stocks. Under NMFS' initial finding, the dolphin-safe labeling standard changed to the definition under paragraph (h)(1) of the DPCIA. This definition states that tuna harvested by "large purse seine vessels," i.e. vessels with carrying capacity greater than 400 short tons (st), in the ETP may be labeled dolphin-safe only if no dolphins were killed or seriously injured during the sets in which the tuna were caught.

On April 11, 2000, the U.S. District Court for the Northern District of California reversed NMFS' initial finding and reinstated the dolphin-safe labeling standard under paragraph (h)(2) of the DPCIA (*Brower v. Daley*, 93 F.Supp.2d 1071). Under this ruling, tuna harvested in the ETP could be labeled dolphin-safe only if no dolphins were intentionally encircled during the fishing trip and if no dolphins were killed or seriously injured during the sets in which the tuna were caught. On May 18, 2000, the Federal defendants appealed the order of the District Court. On July 23, 2001, the U.S. Court of Appeals for the Ninth Circuit upheld the District Court decision (*Brower v. Evans*, 257 F.3d 1058). The appellate court ruled that (1) NMFS had not made sufficient progress in the required scientific research and (2) NMFS' decision was inconsistent with the DPCIA, which requires the Secretary of Commerce (Secretary) to determine whether or not there was an adverse impact on depleted dolphin stocks from chase and encirclement.

On December 31, 2002, NMFS, on behalf of the Secretary, made a final finding, based on the results of required research, information obtained under the IDCP, and other relevant information, that the intentional deployment on or encirclement of dolphins with purse seine nets is not having a "significant adverse impact" on any depleted dolphin stock in the ETP (68 FR 2010, January 15, 2003). This finding meant that tuna harvested

by large purse seine vessels in the ETP could be labeled dolphin-safe even if dolphins were encircled or chased, provided that no dolphins were killed or seriously injured in the set in which the tuna was harvested. The finding, and the change in the labeling standard, became effective immediately on December 31, 2002. This determination was based largely on the results of research projects mandated by Section 304 of the MMPA. NMFS conducted the research to determine if, despite the relatively low levels of observed mortality, the intentional chase and encirclement of dolphins by the tuna industry is having a significant adverse impact on any of the depleted dolphin stocks. The research results, including those of a chase-recapture experiment on dolphins in the ETP and other relevant information, were considered by the Secretary for the final dolphin-safe determination.

Also on December 31, 2002, Earth Island Institute, eight other environmental groups, and one individual filed a lawsuit against the Secretary in an effort to overturn the final finding. On January 22, 2003, the United States District Court for the Northern District of California issued an order that stayed the implementation of the final finding (*Earth Island Institute et al. v. Evans et al.*, C 03-0007 TEH, N.D.Cal.). Under the terms of the order, the dolphin-safe labeling standard for tuna harvested by large purse seine vessels in the ETP reverted to the standard in effect immediately prior to the December 31, 2002, final finding. The terms of the order, outlined in the **Federal Register** (68 FR 4449, January 29, 2003), further provide that this labeling standard shall remain in effect for 90 days from the date of the order or until a ruling is issued on a motion for a preliminary injunction, which will also be published in the **Federal Register**. The stay was agreed to by all parties involved in the Earth Island Institute lawsuit. On April 10, 2003, the District Court issued a preliminary injunction that orders NMFS not to implement the final finding or the new dolphin-safe labeling standard (*Earth Island Institute et al. v. Evans et al.*, C 03-0007 THE, N.D.Cal.). In an August 9, 2004, decision, the District Court set aside the final finding and declared that "dolphin-safe" may be used only on tuna products harvested by large purse seine vessels in the ETP if the tuna were caught on a trip in which (1) the purse seine was never intentionally deployed on or to encircle dolphins, and (2) no dolphins were killed or seriously

injured during the sets in which the tuna were caught.

#### *Litigation: Implementing Regulations*

On February 8, 2000, Defenders of Wildlife and other environmental organizations filed suit against the Assistant Administrator for Fisheries, NMFS, in the U.S. Court of International Trade. The plaintiffs alleged that NMFS did not lawfully follow the IDCPA, NEPA, and the Administrative Procedure Act in the implementation of the IDCPA. The plaintiffs motioned the Court for a preliminary injunction to prevent NMFS from making "affirmative findings" that would lift embargoes against Mexico or other ETP tuna fishing nations. This motion was denied on April 14, 2000.

On December 7, 2001, the Court of International Trade denied plaintiffs' motion for summary judgement and dismissed the lawsuit against NMFS (*Defenders of Wildlife v. Hogarth*, 177 F.Supp.2d 1336). The Court agreed with NMFS' interpretation of the IDCPA and upheld the legality of the January 2000 interim final rule in regard to several very specific allegations. The Court also affirmed that the Federal government complied with NEPA in promulgating the interim final rule and in negotiating the 1999 Agreement on the IDCP. Finally, the Court held that NMFS' affirmative finding for Mexico was not arbitrary and capricious. The affirmative finding allows Mexico to export to the United States yellowfin tuna and yellowfin tuna products harvested in the ETP using purse seine vessels. The U.S. Court of Appeals for the Federal Circuit upheld the Court of International Trade's decision. Plaintiffs appealed to the U.S. Supreme Court and the Court declined to entertain the appeal on May 3, 2004.

#### **Responses to Comments**

NMFS received over 800 comments during the comment period for the interim final rule. Comments were received from tuna industry organizations, environmental organizations, members of the public, DoS, U.S. Customs Service, and foreign nations. Key issues and concerns are summarized below and responded to as follows:

#### *Import Procedures*

*Comment 1:* For clarification purposes, revise the last sentence of § 216.24(f)(9)(vi) to read as follows: "Since shipments destined for the United States on a through bill of lading at the time of the original shipment are neither imported for consumption in the 'intermediary nation' nor exported

therefrom under 50 CFR 216.24(f)(9)(viii), the nation would not be considered an 'intermediary nation' under the MMPA.≥

*Response:* NMFS has revised the sentence to clarify its meaning. This sentence appears in § 216.24(f)(9)(ii) of this final rule.

*Comment 2:* NMFS has never requested that the U.S. Customs Service monitor compliance with the dolphin-safe labeling requirements. This would involve a significant increase in Customs Inspection workload. Before any Customs enforcement actions could be taken both agencies would have to concur in the development of a practical implementation plan.

*Response:* U.S. Customs' monitoring of imports of certain frozen and canned tuna shipments enables NMFS to monitor compliance with the dolphin-safe labeling requirements. NMFS is working with U.S. Customs to develop a practicable implementation plan for enforcement of NMFS tuna import requirements.

*Comment 3:* Over 95 percent of all U.S. Customs entries are electronic. Therefore, requiring submission of a paper Fisheries Certificate of Origin ((FCO), NOAA Form 370) at the time of importation inhibits the automation initiative of the U.S. Custom Service.

*Response:* NMFS and U.S. Customs have agreed that, for the foreseeable future, import shipments of tuna and tuna products that require an accompanying FCO may not be entered electronically.

*Comment 4:* If fish is denied entry, that action per se constitutes a U.S. Customs refusal of admission and no formal notice of such refusal is issued by Customs. Please remove the phrase "and shall issue a notice of such refusal to the importer or consignee" at the end of § 216.24(f)(10). The issue of 'notice of refusal' and 'redelivery' should be discussed by Customs and NMFS further.

*Response:* NMFS consulted with U.S. Customs and made the requested changes.

*Comment 5:* The regulations describe the old FCO that references non-encirclement of dolphins instead of the new FCO that references the Tuna Tracking Form and non-mortality or serious injury.

*Response:* The regulations are fully up to date. Section 216.24(f)(3) and (4) describe, in general terms, the requirements for processing and maintaining the FCOs.

*Comment 6:* The regulations should include a provision for seizure of a product that is neither exported nor

destroyed after the 90-day period has elapsed.

*Response:* NMFS revised § 216.24(f)(11) accordingly.

*Comment 7:* U.S. Customs has informed NMFS that Harmonized Tariff Schedule (HTS) number 1605.90.6055 (which appears in § 216.24(f)(2)(iii)(B)) has changed from "Squid, loligo, prepared/preserved" to "Squid, other, prepared/preserved." U.S. Customs also informed NMFS that the current HTS number for "Squid, loligo, prepared/preserved" is 1605.90.6050. The commenter indicated that these changes should be reflected in the regulations.

*Response:* NMFS has reviewed and updated all HTS numbers applicable to this final rule and has made the appropriate changes in § 216.24(f)(2)(iii)(B).

#### Definitions

*Comment 8:* The definition of "Serious injury" under § 216.3 is not descriptive enough to be used by official observers to determine whether or not a dolphin is seriously injured.

*Response:* The definition will enable officials to determine whether or not a dolphin is seriously injured. Further, an overly descriptive definition has the potential to restrict one's ability to categorize an injury as serious. Observers are responsible for noting information regarding any interactions with marine mammals; however, observers are not expected to determine whether or not a dolphin is seriously injured. The IATTC reviews and evaluates the Observer Forms, and the IATTC and NMFS evaluate individual reported injuries using criteria developed by the international program.

#### Application for Vessel Permit

*Comment 9:* Section 216.24(b)(4) should specifically require the name and address of the owner of the vessel if it is different from the applicant.

*Response:* MMPA section 306(a)(1)(A), 16 U.S.C. 1416(a)(1)(A), directs the Secretary to require the submission of the name and address of the owner of each vessel for which a vessel permit is sought. NMFS has addressed this issue in these regulations and the vessel permit application process. The vessel permit application specifically requires the name and address of the owner of the vessel if it is different from the applicant.

#### Observer Placement

*Comment 10:* In order to ensure the competitiveness of U.S. purse seine vessels fishing pursuant to the South Pacific Tuna Treaty in the western Pacific Ocean, the Forum Fisheries

Agency (FFA) observers should be approved for use in the ETP by the IDCP and the Administrator.

*Response:* A vessel that does not normally fish for tuna in the ETP (for example, a vessel that typically fishes in the western Pacific Ocean) but desires to participate in the ETP fishery on a limited basis may do so after complying with § 216.24. FFA observers have been approved for use in the Agreement Area of the Agreement on the IDCP. The IATTC is currently training FFA observers to record data on IATTC forms for compatibility and consistency.

Mortality and Serious Injury Reports  
*Comment 11:* Section 216.24(b)(9) requires that the Secretary provide to the public "periodic status reports summarizing the estimated incidental dolphin mortality and serious injury by U.S. vessels." These reports should be completed on either a quarterly or bi-annual basis.

*Response:* NMFS provides this information on an annual basis. This information can be found in the Marine Mammal Protection Act Annual Reports. Historically, NMFS issued weekly reports of dolphin mortality in the ETP tuna purse seine fishery to assist the public in observing compliance with dolphin mortality quotas; however, U.S. vessels have not made intentional sets on dolphins since February 1994. While U.S. vessels continue to abstain from intentionally setting on dolphins, NMFS believes annual reports are adequate. In the event that U.S. vessels begin setting on dolphins, the regulations provide the flexibility for NMFS to issue more frequent reports.

#### Purse Seining by Vessels With Dolphin Mortality Limits (DMLs)

*Comment 12:* There is no requirement or mechanism for any reduction in dolphin mortality in the regulations. We recommend that the regulations provide incentives to the vessels to reduce DMLs. Two possible incentives are (1) monetary reimbursement for unused DMLs or (2) ability to sell unused DMLs to other vessels. In addition, there should be civil and criminal penalties against persons who exceed their DML.

*Response:* The Parties to the Agreement on the IDCP, of which the United States is a member, established a working group to develop incentives and rewards to encourage vessel operators to reduce dolphin mortality. Recently, this working group selected vessel operators who had met or exceeded the criteria for high performing captains in reducing dolphin mortality in this fishery and awarded them with plaques recognizing

their performance. This working group will continue to develop incentives for vessel captains and methods to reduce dolphin mortality. Additionally, while penalties are not part of these regulations, § 216.24(c)(9)(v) provides that a DML assigned to a U.S. vessel that exceeded its DML in a given year will be reduced by 150 percent of the overage in the following year.

*Comment 13:* These regulations create incentives for tuna fishermen to set on and potentially kill the maximum number of dolphins allowed under the international system.

*Response:* These regulations do not create an incentive for tuna fishermen to set on dolphins. Since the implementation of these regulations, no U.S. purse seine vessels have made intentional sets on dolphins. Under the Agreement on the IDCP (Annex IV, section II, paragraph 1), any vessel that is assigned a full-year DML must make at least one set on dolphins prior to April 1 to keep from losing its DML allocation; however, an intentional set on dolphins does not necessarily lead to dolphin mortality. This requirement is part of the process established by the international program to deter frivolous requests for DMLs.

#### *Backdown Procedure*

*Comment 14:* Although the regulations provide for the use of a backdown procedure, they do not address how the procedure will be carried out and do not provide vessels with the opportunity to implement a more effective procedure to avoid mortality or serious injury to dolphins.

*Response:* Vessel operators receive formal training through either NMFS or the IATTC Captains training program on the requirements and execution of this procedure. In addition, new vessel operators participate in a lengthy apprentice program in which they master all operations of a vessel (including the backdown procedure) before becoming a Captain or vessel operator. The backdown process is a dynamic procedure that requires an in-depth knowledge and understanding of the net construction and design to effectively deploy this maneuver. Because of the complexities of the procedure and the training programs in place to ensure vessel operators learn the procedure, it is unnecessary to describe this procedure in these regulations. Further, NMFS has not determined that tuna purse seine fishers fail to adhere to the training they receive. In fact, they have an incentive to successfully perform the procedure and to avoid dolphin mortalities.

The regulations allow for experimental fishing operations, consistent with the IDCP, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce or eliminate dolphin mortality or serious injury, or do not require the encirclement of dolphins in the course of fishing operations.

NMFS has funded research to test various methods of finding and fishing for yellowfin tuna not in association with dolphins. For example, funding priorities for the Saltonstall-Kennedy Grant Program include proposals that address marine mammal and fishery interactions.

#### *Sundown Sets Prohibition*

*Comment 15:* The rule ignores the IDCPA requirement that backdown procedures be completed by 30 minutes before sundown.

*Response:* NMFS research, previous NMFS regulations and previous amendments to the MMPA, the La Jolla Agreement and the IDCP specify that the backdown procedure must be completed no later than one-half hour after sundown. Furthermore, under the Agreement on the IDCP, signatory nations agreed that the backdown procedure must be completed no later than one-half hour after sundown, thus prohibiting sundown sets. Because early drafts of the IDCPA used the word "after" and no congressional reports or colloquy indicated that the change to "before" was adopted purposefully, NMFS concludes the language in the IDCPA stating that backdown procedures must be completed no later than one-half hour before sundown must have been a drafting error. Furthermore, the IDCPA gives NMFS discretion to promulgate, and adjust through regulations, this requirement to carry out U.S. obligations under the Agreement on the IDCP. This interpretation was upheld by the Court of International Trade in the *Defenders of Wildlife* litigation (discussed above). Therefore, NMFS is retaining the "30 minutes after" language that appeared in the interim final rule.

#### *Experimental Fishing Operations*

*Comment 16:* Section 216.24(c)(7) should specify which requirements may be waived for experimental fishing activities.

*Response:* Section 216.24(c)(7) specifies that NOAA's Assistant Administrator for Fisheries, NMFS, may not waive the DML requirements and the obligation to carry an observer. The regulations allow the Administrator flexibility to waive other requirements

of § 216.24 as appropriate. This flexibility is critical to encourage a variety of alternative experimental designs and techniques that might be effective.

#### *Per-stock, Per-year Limits*

*Comment 17:* The regulations state that if the per-stock, per-year limits are exceeded for a depleted stock, then fishing on dolphin shall cease for all vessels for the year. The regulations should be changed to state that fishing on that particular dolphin stock should cease.

*Response:* The commenter misunderstood this part of the regulations, which already focuses on fishing for tuna in association with particular dolphin stocks. Section 216.24(c)(9)(viii) of the regulations states that if a per-stock, per-year quota is exceeded, then fishing for tuna in association with the stock(s) whose limits had been exceeded would cease for the remainder of the calendar year.

#### *Dolphin Sets After Reaching DML*

*Comment 18:* The IDCPA states that regulations must be adopted to prevent the occurrence of intentional sets after reaching the DML. However, disqualifying the vessel from obtaining a DML for the following year is clearly not a preventive measure that will prohibit additional takes. A more immediate penalty is needed.

*Response:* A vessel that reaches its DML must immediately cease fishing on dolphins in accordance with these regulations and the international program. If, after due process, it is determined that a vessel exceeded its DML, these regulations and the international program provide for the disqualification of the vessel from receiving a DML for the following year under certain circumstances. Also, any vessel that exceeds its assigned DML, if not disqualified, will have its DML for the subsequent year reduced by 150 percent of the overage. These measures conform to the Agreement on the IDCP and serve as a deterrent or preventative measure for vessels to not exceed their DMLs.

#### *Purse Seining by Vessels Without Assigned DMLs*

*Comment 19:* Section 216.24(d) is invalid because the IDCPA requires every vessel to have a DML assigned. Section 216.24(d) is unclear regarding whether it applies only to vessels that are not engaging in tuna fishing operations or to tuna fishing vessels that do not have a DML or to both.

*Response:* The heading of § 216.24 makes clear that the section deals with

commercial fishing operations by tuna purse seine vessels in the ETP. Section 216.24(d) applies only to vessels without assigned DMLs, i.e. only vessels that do not intentionally deploy nets on or encircle dolphins. Under § 216.24(a)(2), vessels that do not have DMLs may not make intentional sets on dolphins. The IDCPA does not require every vessel to have a DML assigned. MMPA section 303(a)(2)(B)(ix) prohibits a vessel without an assigned DML from intentionally setting on dolphins.

#### Observers

*Comment 20:* While § 216.24(e) of the proposed regulation addresses the role of the observer of the vessel, it fails to address the inherent problems associated with observer programs or to describe what criteria must be met in order to qualify as an observer. If these criteria are mentioned elsewhere in the Code of Federal Regulations, the section should either be referenced or restated in § 216.24.

*Response:* For the tuna purse seine fishery in the ETP, the IATTC trains observers so that they are qualified to perform observer duties. The IATTC observer program and its training requirements remain in effect.

#### Affirmative Finding Procedures

*Comment 21:* In order for a country to receive an affirmative finding, nations should be required to supply documentary evidence of their fishing fleets' actions on an annual basis, not every 5 years as described in the interim final rule.

*Response:* The MMPA does not specifically require a yearly submission of documentary evidence specifically from harvesting nations. NMFS' interpretation of the MMPA is reasonable because it enables NMFS to verify compliance while minimizing the burden on other nations. It places the burden on NMFS to make or renew an affirmative finding annually, if the harvesting nation has provided all of the information and authorizations required by § 216.24 (f)(8)(i) and (ii). An annual review allows NMFS to verify compliance with the IDCP. Through these regulations NMFS is authorized in the annual renewal process to seek out documentation from the harvesting nation, DoS and IATTC.

*Comment 22:* Allowing countries to exceed DMLs for "extraordinary circumstances beyond the control of the nation and the vessel captain..." undermines the IDCPA by allowing fishing nations to exceed DMLs without fear of enforcement actions by the U.S. Government.

*Response:* NMFS does not have the authority to take enforcement actions against foreign nations. However, if a nation's fleet's annual dolphin mortality or per-stock dolphin mortality exceeds its aggregate DMLs because of extraordinary circumstances beyond the control of the nation or of the vessel's captain, but otherwise is in conformance to the Agreement on the IDCP, that nation should not be embargoed. Section 216.24(f)(8)(i)(C) further explains that the nation must have immediately required all its vessels to cease fishing for tuna in association with dolphins for the remainder of the calendar year. This encourages harvesting nations to comply with the Agreement on the IDCP, yet threatens economic sanctions against nations that do not control or manage their fleets.

#### Dolphin-safe Labeling Standards

*Comment 23:* These regulations burden U.S. purse seine vessel operators who do not intentionally set on dolphin. Under previous regulations, tuna could be labeled dolphin-safe, even if an accidental dolphin mortality occurred. Under the new regulations, U.S. vessels will not be able to sell their tuna to canneries as dolphin-safe if a single accidental fatality occurs during the trip.

*Response:* Before the IDCPA was enacted, tuna could be labeled dolphin-safe even if dolphins were observed killed in a set in which they were accidentally captured. The IDCPA, however, changed the labeling standard such that no tuna product harvested in the ETP by a large purse seine vessel may be labeled dolphin-safe if an observed dolphin mortality, or serious injury, occurs during a set, whether or not the vessel intentionally deployed its nets on dolphin. (This part of the dolphin-safe labeling standard remains constant regardless of the "significant adverse impact" finding under paragraph (g) of the DPCIA.) Therefore, if an accidental dolphin mortality occurs in a set, that set is by definition non-dolphin-safe. The determination of whether tuna is dolphin-safe is made on a set-by-set basis; only tuna caught in a set in which a net was intentionally deployed on a marine mammal or in which dolphin mortality or serious injury occurs would be considered non-dolphin-safe. The U.S. canned tuna industry is not required by the final rule to refuse tuna caught in association with dolphins so long as all the requirements of the rule are met. That the U.S. canned tuna industry chooses to do so, is a private, corporate decision and not a requirement of this final rule.

*Comment 24:* Section 216.92(a) seems to preclude a U.S. processor from labeling fish as dolphin-safe if the U.S. processor processes the fish at some location other than those listed in the paragraph. This would preclude a U.S. processor from ever processing such fish at a plant in a country that has entered into a Compact of Free Association with the United States. Because these states now have limited "duty free" access to the United States, it is possible that U.S. processors may establish plants there in the future. The paragraph should allow the fish to enter the United States as dolphin-safe from Compact of Free Association locations if it otherwise meets the dolphin-safe requirements of the IDCPA and has been processed in a plant that is in compliance with the tuna tracking and verification requirements of § 216.94 (now found at § 216.93 of this final rule).

*Response:* Nothing in the rule precludes tuna processed in a Compact of Free Association nation (i.e., the Republic of Palau, Federated States of Micronesia or the Republic of the Marshall Islands) from being labeled dolphin-safe or from being imported into the United States. The requirements for tuna caught in the ETP and imported into the United States to carry a dolphin-safe label are described in § 216.92(b). All Compact of Free Association nations are located outside the U.S. Custom's territory and, therefore, tuna processed in those nations are subject to the procedures for imported tuna regardless of the nation's duty-free status.

#### Tuna Tracking and Verification Program

*Comment 25:* These regulations fail to implement adequate monitoring systems for ensuring the separation and tracking of imported dolphin-safe and non-dolphin-safe tuna.

*Response:* The regulations implement adequate monitoring systems for ensuring the separation and tracking of imported dolphin-safe and non-dolphin-safe tuna. All imports of tuna harvested in the ETP by large purse seine vessels must be accompanied by a certificate signed by an IDCP-member government official attesting to the dolphin-safe status of the tuna in that shipment. Shipments of tuna that are not declared to be dolphin-safe and that are imported into the United States from a nation that has an affirmative finding are spot-checked to ensure that no dolphin-safe logo appears on the product. In addition, NMFS tuna tracking and verification specialists perform spot-checks of canned tuna on grocery shelves. In this final rule, NMFS

requires processors to provide documentary proof of the origin of that tuna. Finally, U.S. canned tuna processors report all purchases of imported frozen tuna to NMFS on a regular basis.

*Comment 26:* The handling of the Tuna Tracking Forms is confusing and cumbersome. NMFS, the cannery, and the country where the tuna is offloaded all require the original tuna tracking forms. Furthermore, the regulations require that it be submitted in an unreasonably short time frame. In Mexico, the dolphin-safe certificate is duplicated and notarized, and the certified copies are distributed to various entities.

*Response:* The final regulations require changes in the handling of Tuna Tracking Forms that streamline the process and are consistent with changes made to the International Tuna Tracking and Verification Program. Between February 3, 2000, and the effective date of this final rule, several improvements were made in the U.S. tuna tracking system. Changes also improve the process by which canned tuna processors report their activities. For example, early in the operation of the tuna tracking program it was recognized that requiring a separate report every time a canner received tuna for processing was unwieldy and did not provide useful information. Report forms and schedules were then revised so that systems could be automated and reports would include the information needed to assure the dolphin-safe status of canned tuna production in the United States. The links between NMFS and U.S. Customs were improved to provide faster and more easily usable tuna import information. Verification of the dolphin-safe status of tuna being sold in the United States was improved by development of a program to sample products on grocery store shelves around the country. Other changes were made in order to remain consistent with the requirements of the international tuna tracking system.

The AIDCP Permanent Working Group on Tuna Tracking was formed to oversee the operation of the international tuna tracking system. As time passed, improvements were made in that system, which were subsequently incorporated in the U.S. program. Some of the changes included improved tuna tracking form handling procedures, the elimination of any "mixed wells" on tuna purse seine vessels, and requirements for safeguarding dolphin-safe status of tuna harvested by vessels that fish inside and outside the convention area during one trip.

*Comment 27:* Observers may not see some seriously injured and killed dolphins and falsely report the catch as dolphin-safe.

*Response:* The possibility for observers to miscount dolphin mortality and serious injury exists in all fishery observer programs worldwide. However, IATTC trained observers are well trained, and any miscounts that may occur would be negligible.

*Comment 28:* Section 216.94(b)(2)(i) (now found at § 216.93 of this final rule) should be rewritten to clarify that dolphin-safe and non-dolphin-safe tuna are segregated during the unloading of mixed-wells.

*Response:* A study of the need for and frequency of the use of fish wells in which dolphin-safe and non-dolphin-safe tuna are both stored aboard tuna purse seine vessels revealed that there is virtually no need for such "mixed-wells." Therefore, the provisions for the use of mixed-wells have been removed from the final rule.

*Comment 29:* Tuna caught by methods that kill and seriously injure dolphins should not be mixed with dolphin-safe tuna aboard tuna boats.

*Response:* See response to Comment 28.

#### *Tracking Cannery Operations*

*Comment 30:* In order to reduce paperwork and simplify the reporting process, receiving reports should be submitted on a monthly basis, along with the submissions contained in (3) and (5) of paragraph 216.94(c)(3) and (5) (now found at § 216.93 of this final rule). This would not have any negative impact on NMFS' monitoring role and will ensure that all reports are received together on a timely, monthly basis.

*Response:* Instead of requiring a report within 5 days of delivery and a separate report every month, receiving reports are now required only on a monthly basis. The NMFS tuna tracking and verification staff, in cooperation with the U.S. canned tuna industry, tested various reporting methods for completeness and accuracy. Section 216.93 of this final rule contains changes and refinements to the reporting procedures that provide complete information to NMFS without over-burdening the industry contributors of those reports.

*Comment 31:* The receiving report requires identifying containers (scows) by serial number for tracking; however, some systems of sizing tuna come after the unloading, thus possibly causing a perceived loss of identity of the original unloaded fish. This would require the issuance of two reports, one with the initial scow serial numbers and weights,

and a second report (same total weight) with sized scow serial numbers and weights.

*Response:* The requirement that receiving reports be submitted monthly, rather than within 5 working days of delivery, should alleviate this problem.

#### *Miscellaneous Comments*

*Comment 32:* By the passage of the IDCPA and the entry into force of the Agreement on the IDCP in February 1999, can the United States ensure that all U.S. flag vessels act in accordance with the provisions of the Agreement on the IDCP at all times and enforce the provisions of the MMPA with respect to U.S. vessels operating in the territorial sea of another country?

*Response:* The U.S. Government has the statutory authority to apply the provisions of the Agreement on the IDCP to the operation of U.S. vessels wherever they operate within the Agreement Area. The Agreement Area is defined as the waters of the Pacific Ocean bounded by the following: to the east, the coastline of North, Central and South America; to the north, the 40° N parallel; to the west, the 150° W meridian and to the south, the 40° S parallel. This includes the waters under the jurisdiction of the coastal states, including their exclusive economic zones and territorial seas.

The United States has jurisdiction over U.S. flag vessels wherever they operate, even in the territorial seas of other countries. Specifically, § 303(a), 306, and 307 of the MMPA clearly require the Secretary to implement and enforce the provisions of the IDCPA for all U.S. vessels anywhere in the Agreement Area.

*Comment 33:* The DML cap of 5,000 animals per year is inconsistent with the MMPA and its goal of reducing incidental dolphin mortality to insignificant levels approaching zero mortality rate.

*Response:* Section 302(1) of the MMPA provides that "the total annual dolphin mortality in the purse seine fishery for yellowfin tuna in the eastern tropical Pacific Ocean shall not exceed 5,000 animals with a commitment and objective to progressively reduce dolphin mortality to a level approaching zero through the setting of annual limits." Further, section 302(1) of the MMPA only establishes an annual mortality limit of 5,000 animals; this is a cap rather than a goal.

NMFS is striving to further reduce dolphin mortalities associated with the tuna purse seine fishery in the ETP. It is also important to note that no U.S. purse seine vessels are currently intentionally chasing or deploying purse

seine nets on dolphins. In addition, annual dolphin mortality in the ETP tuna purse seine fishery, including both the domestic and foreign fleets, has averaged less than 2,000 dolphins since 2000. An annual dolphin mortality limit is one of a suite of tools being used by NMFS and Parties to the Agreement on the IDCP to conserve dolphin stocks, as well as other components of the ETP ecosystem.

*Comment 34:* Replace the current IDCPA and regulations with a different system that would end purse seining as a fishing method in the ETP and establish other mechanisms to protect dolphins and pursue fishing in the ETP.

*Response:* These regulations implement the IDCPA as passed by Congress in 1997, which allows purse seining in the ETP as a method to harvest tuna and provides protection to dolphin stocks.

#### *Changes From the Interim Final Rule*

In this final rule, NMFS is publishing 50 CFR 216.24, 216.46, 216.90, 216.91, 216.92, and 216.93 in their entirety (including provisions that were not changed from the interim final rule) for the convenience of readers, to correct cross-referencing errors, and to improve clarity.

The interim final rule contained a generic provision for NMFS to consider for potential enforcement action of alleged violations of the Agreement on the IDCP and/or these regulations that are identified by the International Review Panel (codified in the interim final rule in § 216.24(c)(9)(xi)). The provision is maintained in this final rule except that it now appears in § 216.24(a)(2)(vi). NMFS changed the position of the provision because it was concerned that in its previous position at the end of § 216.24(c)(9) the provision might be overlooked. The current position of the provision is intuitive; the provision appears in a list of other, general prohibitions at the beginning of § 216.24. NMFS also amended § 216.24(a)(2)(vi) (formerly § 216.24(c)(9)(xi)) to clarify that the International Review Panel may identify and recommend cases to NOAA for possible enforcement action as is provided in the Agreement on the IDCP. The International Review Panel is a panel created under Article XII of the Agreement on the IDCP to identify, review and make recommendations on potential violations of the Agreement on the IDCP. The former language of this section could have been read to imply that the International Review Panel would also recommend sanctions or penalties for those potential violations, which is not the case.

#### *Changes to the Tracking and Verification Program*

Section 216.93 of the interim final rule has been revised as the result of comments received and in order to remain consistent with changes made to the Agreement on the IDCP System of Tracking and Verification of Tuna. NMFS believes that the changes described enhance the effectiveness of the NMFS Tuna Tracking and Verification Program.

The international tuna tracking and verification system adopted by the Parties to the Agreement on the IDCP in June 1999 contained conditional provisions under which dolphin-safe and non-dolphin-safe tuna could be mixed in the same well aboard large purse seine vessels fishing in the ETP. Representatives of some environmental organizations expressed concern that any mixing of dolphin-safe and non-dolphin-safe tuna would compromise the effectiveness of the Agreement. Nonetheless, the Parties instituted the use of two mixed-well exceptions for a trial period, during which time the Secretariat of the IATTC would track their use. During the trial period, from January until June 2000, only five occurrences of a mixed-well exception were noted on over 200 IATTC-observed trips. Citing a desire to maintain a fully credible system and acknowledging the low usage of mixed-well exceptions, the Permanent Working Group on Tuna Tracking and Verification recommended that all mixed-well exceptions be eliminated from the international system for tracking and verification of tuna. The Meeting of the Parties to the Agreement on the IDCP approved the recommendation at the June 2000 meeting. Therefore, the mixed-well language at § 216.94(b)(2) was removed from the regulations.

At the meeting of the Parties to the Agreement on the IDCP held in June 2001, in San Salvador, El Salvador, the Parties adopted a voluntary IDCP Dolphin-Safe Tuna Certification Program. This program establishes a framework for member nations to issue a dolphin-safe certificate and to apply the IDCP dolphin-safe logo to tuna harvested by their flag vessels and offered for sale in international markets. The new program also provides that, upon request by a member nation, the Secretariat for the Agreement on the IDCP will evaluate such shipments of tuna that are labeled with the IDCP dolphin-safe logo and affirm, as appropriate, that they are dolphin-safe as defined by the Agreement.

Under current U.S. law, the definition of “dolphin-safe” tuna is different from

the definition adopted by the Parties to the Agreement on the IDCP. Thus, the United States is unable, at present, to adopt the voluntary IDCP Dolphin-Safe Tuna Certification Program. However, a NMFS dolphin-safe certificate is available.

Upon request, the Office of the Administrator, Southwest Region, will provide written certification that tuna harvested by U.S. purse seine vessels greater than 400 st (362.8 mt) carrying capacity is dolphin-safe, but only if NMFS’ review of the tuna tracking forms (TTFs) for the subject trip shows that the tuna for which the certification is requested is dolphin-safe under the requirements of the Agreement on the IDCP and U.S. law. These new procedures are included in the final rule at § 216.93(b).

The Parties to the Agreement on the IDCP have also adopted several technical and procedural modifications that have improved the international tuna tracking and verification program. These modifications include a change in § 216.93(a) where the word “observer” was changed to “additional”. This change was made because observers are not the only ones that can make notes on TTFs; engineers or captains may also do so.

Additional changes were made in § 216.93(c)(5) (formerly 216.94(b)(6)) to the procedures for handling and disposition of TTFs. In § 216.93(c)(5)(ii), (iii) and (iv) of the final rule, NMFS specified that the captain of the vessel or the vessel’s managing office is responsible for assuring delivery of the TTFs to the Administrator, Southwest Region, unless the TTF is retrieved by a NMFS representative meeting the vessel in port at the time of arrival. Sections 216.94(b)(6)(ii) and (iii) of the interim final rule now appear in § 216.93(c)(5)(iii) and (ii) in the final rule; the order of the two paragraphs has been reversed. Section 216.93(c)(5)(ii) of the final rule includes an added provision allowing the captain to entrust the observer to deliver the signed TTFs to a local IATTC office, provided the captain notifies the Southwest Regional Administrator of this decision.

In § 216.93(c)(5), paragraphs (iii) and (iv) clarify the entity responsible for delivering completed TTFs to the Southwest Regional Administrator. Paragraph (iii) describes a situation in which a vessel lands in a country that is a Party to the Agreement on the IDCP; in this case, a representative of the country has first responsibility for the TTFs. Paragraph (iv) describes a situation in which the vessel lands in a country that is not a Party to the Agreement. In this

case, NMFS does not expect that a representative of the country will meet the vessel. Therefore, when landing in such a country, the vessel captain has responsibility for delivering the TTFs to the Southwest Regional Administrator.

Paragraph (v) was added to § 216.93(c)(5) pursuant to the IDCP Rules of Confidentiality to emphasize the confidential status of the TTFs as international documents that are the property of the Secretariat to the Agreement on the IDCP. Other modifications incorporated into the NMFS tuna tracking system in § 216.93 (formerly § 216.94) include clarification of partial unloading procedures.

NMFS has made certain changes to the tuna tracking procedures that will enable NMFS to track and verify the dolphin-safe status of canned tuna processed in U.S. canneries while not being overly burdensome to the U.S. canning industry. NMFS found that requiring canners to report the receipt of every shipment of raw tuna 48 hours in advance was not necessary because spot-checks and unscheduled visits by representatives of the Administrator, Southwest Region, coupled with monthly reports of all cannery activities, were already provided for in regulations.

NMFS removed the requirement for U.S. purse seine vessels greater than 400 st (362.8 mt) harvesting tuna in the ETP to submit an FCO under 216.92(a) because this information is already available to NMFS through tuna processors.

NMFS removed the requirement for an invoice to accompany the FCO at the time of import (§ 216.24(f)(3)(i)). Importers are required to keep all documents, including the invoice, that accompany import shipments, and to make the documents available to the Secretary or the Administrator, Southwest Region, on request. The requirement that an invoice accompany FCOs was found to be burdensome to U.S. Customs and did not provide any additional information needed for tracking and verifying import shipments.

#### *Changes to Vessel Permit Holder, Dolphin Mortality Limits*

NMFS modified the heading of § 216.24(c)(2) to clarify that live marine mammals may not be retained. In the interim final rule, "live" was not included in the heading, but was used in the regulatory text of § 216.24(c)(2), and continues to be in this final rule. Therefore, this modification does not change the meaning of paragraph (c)(2); it just provides clarification.

NMFS added a requirement in § 216.24(c)(7)(i) of this final rule that the signature of the permitted operator or the operator's representative applying for an experimental fishing operation waiver be included in the application. This requirement was added to indicate ownership of the experimental fishing operation waiver application, as well as ensure the validity of such applications and maintain consistency with other applications, such as those for vessel and operator permits described in § 216.24(b)(4) and (b)(5), respectively.

NMFS amended § 216.24(c)(9) to identify the policy of NOAA's Office of the General Counsel that, in any enforcement action, the appropriate sanction to be assessed should be determined by referring to a NOAA civil administrative penalty schedule and the discretion of the prosecutor, except where a specific penalty is mandated by an international agreement. Specific sanctions and fines cannot be established by regulation. Accordingly, NMFS deleted § 216.24(c)(9)(xii) because it created a specific penalty by regulation, contrary to NOAA's policy, and added language to § 216.24(c)(9)(v) to identify that the sanction of reducing a vessel's DML, which is identified in that section, was mandated by an international agreement.

In addition, NMFS modified § 216.24(c)(9)(x)(A) to clarify the point at which vessel and operator permit holders on vessels with assigned DMLs must refrain from intentionally setting purse seine nets on or encircling dolphins because the DML was reached or exceeded. The interim final rule was ambiguous in that it used the term "when", which could have been interpreted to mean that vessel and operator permit holders would be in violation of this rule at the moment their DMLs were reached or exceeded. The intent of § 216.24(c)(9)(x)(A) was to prohibit vessel and operator permit holders from intentionally setting on or encircling dolphins in sets subsequent to that in which their DMLs were reached or exceeded. To achieve this clarity, "when" was changed to "after a set in which."

#### *Changes to Market Prohibitions*

Section 216.24(f)(120)(iii) of the interim final rule described the dolphin-safe standard. This paragraph was removed from the final rule because the provision was redundant. The dolphin-safe standard appears in § 216.91 and is already cross referenced in § 216.24(f)(12)(i).

#### *De-certification Under Pelly*

NMFS added a provision that the Secretary will initiate a Pelly certification under section 8(a) of the Fisherman's Protective Act (22 U.S.C. 1978(a)) against any nation embargoed for 6 months under § 216.24(f)(6) of this final rule (formerly § 216.24(f)(7)). A new provision in § 216.24(f)(6)(iii) provides that after the embargo is lifted, the Secretary will terminate the Pelly certification.

#### *Changes to Penalties*

NMFS expanded § 216.24(g) to identify the various options for enforcement action available to NOAA to respond to violations of these regulations. For example, options for enforcement action may include civil monetary fines, permit suspension or revocation, and reductions in current or future DMLs. In addition, NMFS added language to inform the reader that recommended sanction levels for the various violations are listed in NOAA's Civil Administrative Penalty Schedule and that the regulations detailing the procedures for the various enforcement actions can be found at 15 CFR part 904. This language was added to clarify the enforcement process and to allow readers to conduct their own research on the processes and penalties.

#### *Changes to Observer Placement Fee*

Small Class 1–5, as well as large Class 6 (in excess of 400 st (362.8 mt) carrying capacity), purse seine vessels classified as either active or inactive on the register of vessels authorized to purse seine for tunas in the ETP are now required to pay observer fees, or vessel assessments, as a result of the Resolution on Vessel Assessments and Financing, adopted at the Meeting of the Parties to the Agreement on the IDCP in June 2003. Therefore, NMFS modified § 216.24(b)(6)(iii) of the interim final rule to be consistent with the June 2003 Resolution. As a result, the due date for payment of the observer placement fee, previously September 1, was changed to December 1 in the final rule. The final rule also provides for a late payment surcharge of 10 percent, consistent with that specified in the June 2003 Resolution. NMFS added language to § 216.24(b)(6)(iii) to clarify that observer fees may be used to maintain the IATTC observer program, generally, rather than solely for placement of observers on individual vessels.

#### *Corrections, Updates, and Technical Changes*

Section 216.24(c)(9)(ii) of the interim final rule incorrectly described the second semester DML calculation by the

IDCP as not to exceed “one-third” of an unadjusted full-year DML. Annex IV of the Agreement on the IDCP clearly states that “one-half” of an unadjusted full-year DML shall constitute the amount of a second semester DML. Therefore, NMFS has corrected § 216.24(c)(9)(ii) to state “one-half” instead of “one-third” in this final rule.

The Harmonized Tariff Schedule (HTS) of the United States is revised and updated periodically. NMFS revised the HTS codes listed in § 216.24(f)(2) to reflect those updates and changes.

The HTS codes for fresh/chilled products were included in the interim final rule in error. Fresh/chilled products under these HTS codes do not require a Fisheries Certificate of Origin. Fresh and chilled tuna and tuna products are always dolphin-safe because they are harvested only by methods that do not involve the presence of dolphins. Therefore, the HTS codes for fresh/chilled products have been removed in this final rule.

In addition, NMFS revised § 216.24(f)(2)(i) to remedy a drafting error that appeared to require nations that are mere conduits of tuna harvested in the ETP by purse seine vessels of other nations to receive an affirmative finding to export that yellowfin tuna to the U.S. Language that appeared in the interim final rule indicated that both the harvesting nation and exporting nation were required to have an affirmative finding to export yellowfin tuna or yellowfin tuna products harvested by purse seine vessels in the ETP to the United States. A harvesting nation, as defined in 50 CFR 216.3, is subject to a primary nation embargo unless it obtains an affirmative finding. Under 50 CFR 216.24(f)(7) (now § 216.24(f)(6)), it is clear that an exporting nation, if it is not also a harvesting nation, is not required to obtain an affirmative finding to export yellowfin tuna to the United States. However, exporting nations are subject to intermediary nation embargoes if they currently, or in the previous 6 months, imported, as defined in 50 CFR 216.3, any yellowfin tuna or yellowfin tuna products subject to a direct ban under section 101(a)(2)(B) of the MMPA. The scope of yellowfin tuna embargoes and procedures for obtaining an affirmative finding are described in § 216.24(f)(6) and (f)(8), respectively, of this final rule.

In § 216.24(f)(8)(i) of the final rule, NMFS clarified that affirmative findings are based on documentary evidence provided by the governments of harvesting nations, or by the IDCP and IATTC. Language that appeared in the interim final rule indicated that

documentary evidence would be provided by harvesting nations or exporting nations. However, nations that serve as mere conduits for tuna harvested by purse seine vessels of other nations in the ETP are not required to obtain affirmative findings. This change is consistent with § 216.24(f)(2)(i) and (f)(6) of this final rule.

In § 216.24(f)(4) (formerly § 216.24(f)(5)), the words “described by checking the appropriate statement on the form and attaching additional certifications if required” were added to further describe the contents of an FCO. The language added to paragraph (f)(4)(xi) of this section, a technical change, requires that the dolphin-safe condition of the shipment must be indicated on the Certificate by checking a box, and that additional certifications may be required depending on which box is checked. Although descriptive language has been added to the final rule, the FCO and boxes to be checked remain unchanged.

In the first sentence of § 216.24(f)(9) (formerly codified at § 216.24(f)(9)(vi)), NMFS added the words “yellowfin”, “ETP”, and “purse seine” to clarify the scope of the intermediary nation embargo within the explanation of procedures for embargoing certain tuna from “intermediary nations.” This clarification is consistent with the MMPA. In the interim final rule the words “yellowfin”, “ETP”, and “purse seine” were unintentionally left out of this explanation, which appeared to prevent an intermediary nation from exporting to the United States any tuna or tuna products classified under an HTS number listed in § 216.24(f)(2)(i). That error was corrected in this final rule. § 216.24(f)(9) now correctly describes the scope of the embargo, i.e., intermediary nations may not export to the United States only yellowfin tuna and yellowfin tuna products harvested by purse seine in the ETP classified under an HTS number listed in § 216.24(f)(2)(i). This conforms with § 216.24(f)(6)(i)(B) (formerly § 216.24(f)(7)(i)(B)), which correctly describes the scope of an intermediary nation embargo. The description of intermediary nation embargoes in § 216.24(f)(6)(i)(B) included the words “yellowfin”, “ETP”, and “purse seine” in the proposed and interim final rules; it was always correct.

NMFS modified § 216.93(d)(2)(i) (formerly § 216.94(c)(5)(i)) to require processors to include the dolphin-safe status of the tuna in their monthly cannery receipt reports (the monthly reports were required in the interim final rule). This requirement was

inadvertently deleted from the interim final rule.

NMFS reduced the length of time that records must be maintained by exporters, trans-shippers, importers, or processors under § 216.93(f)(1) (formerly § 216.94(e)) in this rule from 3 to 2 years to be consistent with the length of time required to maintain records throughout this final rule.

NMFS has removed § 216.93 “Submission of documentation,” as the requirements for the submission of documentation were repeated elsewhere in the final rule. The requirements for the submission of documents concerning the activities of U.S. flag purse seine vessels greater than 400 st (362.8 mt) carrying capacity fishing in the ETP are contained in newly designated § 216.93 “Tracking and verification program.” Requirements for the submission of import documents referred to in § 216.91 and 216.92 are contained in § 216.24(f)(3).

#### Classification

##### *Executive Order 12866*

Pursuant to the procedures established to implement section 6 of Executive Order 12866, the Office of Management and Budget (OMB) has determined that this rule is significant.

##### *Regulatory Flexibility Act*

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration when this rule was proposed that it would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule. Specifically, the expected impacts to 15 to 17 small (less than 362.8 metric tons carrying capacity) purse seine vessels that participate on a seasonal basis in the fishery, domestic and foreign tuna processors, and tuna wholesalers and brokers were discussed in the proposed rule. Possible compliance costs, paperwork burdens, and other restrictions on these small business entities were expected to be minimal or nonexistent at the time the proposed rule was published. Experience since that time indicate that our expectations were correct, as there has not been a significant economic impact on a substantial number of small entities. In fact, any impacts to small purse seine vessels are expected to have decreased, as the number of small purse seine vessels participating in the ETP fishery has decreased from approximately 16 in 1999, the year in which this rule was proposed, to approximately 6 in 2004.

The per vessel impact is expected to be equal to the impact anticipated when this rule was proposed. Further, no comments have been received regarding the certification. As a result, no regulatory flexibility analysis was prepared.

#### *Paperwork Reduction Act*

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

This final rule contains collection of information requirements subject to the PRA. Exporters from all countries importing tuna and tuna products, except some fresh products, into the United States must provide information about the shipment to U.S. Customs using the Fisheries Certificate of Origin (NOAA Form 370). Approved by OMB under control number 0648-0335, the public reporting burden for this collection is estimated to average 20 minutes per submission.

This final rule also contains a collection-of-information requirement that was discussed at the proposed and interim final rule stages for this rule and is being repeated here for the convenience of readers and to improve clarity. This revised collection-of-information requirement has been approved by OMB under control number 0648-0387. The public reporting burden for this collection is estimated to average as follows: 30 minutes for an application for a vessel permit; 10 minutes for an application for an operator permit; 30 minutes for a request for a waiver to transit the ETP without a permit; 10 minutes for a notification by a vessel permit holder 5 days prior to departure on a fishing trip; 10 minutes for the requirement that vessel permit holders who intend to make intentional sets on marine mammals must notify NMFS at least 48 hours in advance if there is a vessel operator change or within 72 hours if the change was made due to an emergency; 10 minutes for a notification by a vessel permit holder of any net modification at least 5 days prior to departure of the vessel; 15 minutes for a request for a DML; 10 hours for an experimental fishing operation waiver; 10 minutes for a notification by a captain, managing owner, or vessel agent 48 hours prior to arrival to unload; 1 hour for a captain to review and sign the tuna tracking form; 10 minutes for a cannery to provide the monthly

processor's storage removal report; 1 hour for a cannery to provide the monthly cannery receipt report; 30 minutes for an exporter, trans-shipper, importer, or processor to produce records if requested by the Administrator, Southwest Region.

The preceding public reporting burden estimates for collections of information include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden to NMFS (see **ADDRESSES**) and OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attention: NOAA Desk Officer).

#### *National Environmental Policy Act*

NMFS prepared an environmental assessment (EA) for the interim final rule, and the Administrator for Fisheries concluded that there will be no significant impact on the human environment as a result of this final rule. A copy of the EA is available at: [http://www.nmfs.noaa.gov/prot\\_res/PR2/Tuna\\_Dolphin/IDCPA.html](http://www.nmfs.noaa.gov/prot_res/PR2/Tuna_Dolphin/IDCPA.html)

#### *Endangered Species Act*

NMFS prepared a Biological Opinion for the interim final rule, concluding that fishing activities conducted under the interim final rule are not likely to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS or result in the destruction or adverse modification of critical habitat. NMFS is unaware of any new information that would indicate the effects of the action may affect listed species in a manner or to an extent not previously considered, nor does the final rule modify the fishery in a manner that causes an effect to listed species not previously considered in the Opinion. Therefore, NMFS has determined that the conclusions and incidental take statement of the Biological Opinion remain valid and reinitiation of consultation is not required.

#### **List of Subjects in 50 CFR Part 216**

Exports, Fish, Imports, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Transportation.

Dated: August 31, 2004.

**Rebecca Lent,**

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

■ For the reasons set out in the preamble, 50 CFR part 216 is amended as follows:

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

■ 1. The authority citation for part 216 continues to read as follows:

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

■ 2. Section 216.24 is revised to read as follows:

#### **§ 216.24 Taking and related acts incidental to commercial fishing operations by tuna purse seine vessels in the eastern tropical Pacific Ocean.**

(a)(1) No marine mammal may be taken in the course of a commercial fishing operation by a U.S. purse seine fishing vessel in the ETP unless the taking constitutes an incidental catch as defined in § 216.3, and vessel and operator permits have been obtained in accordance with these regulations, and such taking is not in violation of such permits or regulations.

(2)(i) It is unlawful for any person using a U.S. purse seine fishing vessel of 400 short tons (st) (362.8 metric tons (mt)) carrying capacity or less to intentionally deploy a net on or to encircle dolphins, or to carry more than two speedboats, if any part of its fishing trip is in the ETP.

(ii) It is unlawful for any person using a U.S. purse seine fishing vessel of greater than 400 st (362.8 mt) carrying capacity that does not have a valid permit obtained under these regulations to catch, possess, or land tuna if any part of the vessel's fishing trip is in the ETP.

(iii) It is unlawful for any person subject to the jurisdiction of the United States to receive, purchase, or possess tuna caught, possessed, or landed in violation of paragraph (a)(2)(ii) of this section.

(iv) It is unlawful for any person subject to the jurisdiction of the United States to intentionally deploy a purse seine net on, or to encircle, dolphins from a vessel operating in the ETP when there is not a DML assigned to that vessel.

(v) It is unlawful for any person subject to the jurisdiction of the United States to intentionally deploy a purse seine net on, or to encircle, dolphins from a vessel operating in the ETP with an assigned DML after a set in which the DML assigned to that vessel has been reached or exceeded.

(vi) Alleged violations of the Agreement on the IDCP and/or these regulations identified by the International Review Panel will be considered for potential enforcement action by NMFS.

(3) Upon written request made in advance of entering the ETP, the limitations in paragraphs (a)(2)(i) and (a)(2)(ii) of this section may be waived by the Administrator, Southwest Region, for the purpose of allowing transit through the ETP. The waiver will provide, in writing, the terms and conditions under which the vessel must operate, including a requirement to report to the Administrator, Southwest Region, the vessel's date of exit from or subsequent entry into the permit area.

(b) *Permits*—(1) *Vessel permit*. The owner or managing owner of a U.S. purse seine fishing vessel of greater than 400 st (362.8 mt) carrying capacity that participates in commercial fishing operations in the ETP must possess a valid vessel permit issued under paragraph (b) of this section. This permit is not transferable and must be renewed annually. If a vessel permit holder surrenders his/her permit to the Administrator, Southwest Region, the permit will not be returned and a new permit will not be issued before the end of the calendar year. Vessel permits will be valid through December 31 of each year.

(2) *Operator permit*. The person in charge of and actually controlling fishing operations (hereinafter referred to as the operator) on a U.S. purse seine fishing vessel engaged in commercial fishing operations under a vessel permit must possess a valid operator permit issued under paragraph (b) of this section. Such permits are not transferable and must be renewed annually. To receive a permit, the operator must have satisfactorily completed all required training under paragraph (c)(5) of this section. The operator's permit is valid only when the permit holder is on a vessel with a valid vessel permit. Operator permits will be valid through December 31 of each year.

(3) *Possession and display*. A valid vessel permit issued pursuant to paragraph (b)(1) of this section must be on board the vessel while engaged in fishing operations, and a valid operator permit issued pursuant to paragraph (b)(2) of this section must be in the possession of the operator to whom it was issued. Permits must be shown upon request to NMFS enforcement agents, U.S. Coast Guard officers, or designated agents of NMFS or the Inter-American Tropical Tuna Commission (IATTC) (including observers). A vessel owner or operator who is at sea on a

fishing trip when his or her permit expires and to whom a permit for the next year has been issued, may take marine mammals under the terms of the new permit without having to display it on board the vessel until the vessel returns to port.

(4) *Application for vessel permit*. The owner or managing owner of a purse seine vessel may apply for a permit from the Administrator, Southwest Region, allowing at least 45 days for processing. An application must contain:

(i) The name, official number, tonnage, carrying capacity in short or metric tons, maximum speed in knots, processing equipment, and type and quantity of gear, including an inventory of equipment required under paragraph (c)(3) of this section if the application is for purse seining involving the intentional taking of marine mammals, of the vessel that is to be covered under the permit;

(ii) A statement of whether the vessel will make sets involving the intentional taking of marine mammals;

(iii) The type and identification number(s) of Federal, state, and local commercial fishing licenses under which vessel operations are conducted, and the dates of expiration;

(iv) The name(s) of the operator(s) anticipated to be used; and

(v) The name and signature of the applicant, whether he/she is the owner or the managing owner, his/her address, telephone and fax numbers, and, if applicable, the name, address, telephone and fax numbers of the agent or organization acting on behalf of the vessel.

(5) *Application for operator permit*. An applicant for an operator permit must provide the following information to the Administrator, Southwest Region, allowing at least 45 days for processing:

(i) The name, address, telephone and fax numbers of the applicant;

(ii) The type and identification number(s) of any Federal, state, and local fishing licenses held by the applicant;

(iii) The name of the vessel(s) on which the applicant anticipates serving as an operator;

(iv) The date, location, and provider of training required under paragraph (c)(5) of this section for the operator permit; and

(v) The applicant's signature or the signature of the applicant's representative.

(6) *Fees*.—(i) *Vessel permit application fees*. An application for a permit under paragraph (b)(1) of this section will include a fee for each vessel. The Assistant Administrator may change the amount of this fee required

at any time if a different fee is determined in accordance with the NOAA Finance Handbook and specified by the Administrator, Southwest Region, on the application form.

(ii) *Operator permit fee*. There is no fee for the operator permit. The Assistant Administrator may require a fee at any time if a fee is determined in accordance with the NOAA Finance Handbook and specified by the Administrator, Southwest Region, on the application form.

(iii) *Observer placement fee*. The vessel owner or managing owner must submit the fee for the placement of observers, and maintenance of the observer program, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region by December 1 of the year prior to the year in which the vessel will be operated in the ETP. Payments received after December 1 will be subject to a 10-percent surcharge. The Administrator, Southwest Region, will forward all observer placement fees to the IATTC or to the applicable organization approved by the Administrator, Southwest Region.

(7) *Application approval*. The Administrator, Southwest Region, will determine the adequacy and completeness of an application and, upon determining that an application is adequate and complete, will approve that application and issue the appropriate permit, except for applicants having unpaid or overdue civil penalties, criminal fines, or other liabilities incurred in a legal proceeding.

(8) *Conditions applicable to all permits*—(i) *General conditions*. Failure to comply with the provisions of a permit or with these regulations may lead to suspension, revocation, modification, or denial of a permit. The permit holder, vessel, vessel owner, operator, or master may be subject, jointly or severally, to the penalties provided for under the MMPA. Procedures governing permit sanctions and denials are found at subpart D of 15 CFR part 904.

(ii) *Observer placement*. By obtaining a permit, the permit holder consents to the placement of an observer on the vessel during every trip involving operations in the ETP and agrees to payment of the fees for observer placement. No observer will be assigned to a vessel unless that vessel owner has submitted payment of observer fees to the Administrator, Southwest Region. The observers may be placed under an observer program of NMFS, IATTC, or another observer program approved by the Administrator, Southwest Region.

(iii) *Explosives*. The use of explosive devices is prohibited during all tuna purse seine operations that involve marine mammals.

(iv) *Reporting requirements*. (A) The vessel permit holder of each permitted vessel must notify the Administrator, Southwest Region or the IATTC contact designated by the Administrator, Southwest Region, at least 5 days in advance of the vessel's departure on a fishing trip to allow for observer placement on every trip.

(B) The vessel permit holder must notify the Administrator, Southwest Region, or the IATTC contact designated by the Administrator, Southwest Region, of any change of vessel operator at least 48 hours prior to departing on a fishing trip. In the case of a change in operator due to an emergency, notification must be made within 72 hours of the change.

(v) *Data release*. By using a permit, the permit holder authorizes the release to NMFS and the IATTC of all data collected by observers aboard purse seine vessels during fishing trips under the IATTC observer program or another international observer program approved by the Administrator, Southwest Region. The permit holder must furnish the international observer program with all release forms required to authorize the observer data to be provided to NMFS and the IATTC. Data obtained under such releases will be used for the same purposes as would data collected directly by observers placed by NMFS and will be subject to the same standards of confidentiality.

(9) *Mortality and serious injury reports*. The Administrator, Southwest Region, will provide to the public periodic status reports summarizing the estimated incidental dolphin mortality and serious injury by U.S. vessels of individual species and stocks.

(c) *Purse seining by vessels with Dolphin Mortality Limits (DMLs)*. In addition to the terms and conditions set forth in paragraph (b) of this section, any permit for a vessel to which a DML has been assigned under paragraph (c)(9) of this section and any operator permit when used on such a vessel are subject to the following terms and conditions:

(1) A vessel may be used to chase and encircle schools of dolphins in the ETP only under the immediate direction of the holder of a valid operator's permit.

(2) *No retention of live marine mammals*. Except as otherwise authorized by a specific permit, live marine mammals incidentally taken must be immediately returned to the ocean without further injury. The operator of a purse seine vessel must

take every precaution to refrain from causing or permitting incidental mortality or serious injury of marine mammals. Live marine mammals may not be brailed, sacked up, or hoisted onto the deck during ortza retrieval.

(3) *Gear and equipment required for valid permit*. A vessel possessing a vessel permit for purse seining involving the intentional taking of marine mammals may not engage in fishing operations involving the intentional deployment of the net on or encirclement of dolphins unless it is equipped with a dolphin safety panel in its purse seine, has the other required gear and equipment, and uses the required procedures.

(i) *Dolphin safety panel*. The dolphin safety panel must be a minimum of 180 fathoms in length (as measured before installation), except that the minimum length of the panel in nets deeper than 18 strips must be determined in a ratio of 10 fathoms in length for each strip of net depth. It must be installed so as to protect the perimeter of the backdown area. The perimeter of the backdown area is the length of corkline that begins at the outboard end of the last bowbunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point. The dolphin safety panel must consist of small mesh webbing not to exceed 1 1/4 inches (3.18 centimeters (cm)) stretch mesh extending downward from the corkline and, if present, the base of the dolphin apron to a minimum depth equivalent to two strips of 100 meshes of 4 1/4 inches (10.80 cm) stretch mesh webbing. In addition, at least a 20-fathom length of corkline must be free from bunchlines at the apex of the backdown channel.

(ii) *Dolphin safety panel markers*. Each end of the dolphin safety panel and dolphin apron, if present, must be identified with an easily distinguishable marker.

(iii) *Dolphin safety panel hand holds*. Throughout the length of the corkline under which the dolphin safety panel and dolphin apron are located, hand hold openings must be secured so that they will not allow the insertion of a 1 3/8 inch (3.50 cm) diameter cylindrical-shaped object.

(iv) *Dolphin safety panel corkline hangings*. Throughout the length of the corkline under which the dolphin safety panel and dolphin apron if present, are located, corkline hangings must be inspected by the vessel operator following each trip. Hangings found to have loosened to the extent that a cylindrical-shaped object with a 1 3/8 inch (3.50 cm) diameter can be inserted between the cork and corkline hangings,

must be tightened so as not to allow the insertion of a cylindrical-shaped object with a 1 3/8 inch (3.50 cm) diameter.

(v) *Speedboats*. A minimum of three speedboats in operating condition must be carried. All speedboats carried aboard purse seine vessels and in operating condition must be rigged with tow lines and towing bridles or towing posts. Speedboat hoisting bridles may not be substituted for towing bridles.

(vi) *Raft*. A raft suitable to be used as a dolphin observation-and-rescue platform must be carried.

(vii) *Facemask and snorkel, or viewbox*. At least two facemasks and snorkels or viewboxes must be carried.

(viii) *Lights*. The vessel must be equipped with lights capable of producing a minimum of 140,000 lumens of output for use in darkness to ensure sufficient light to observe that procedures for dolphin release are carried out and to monitor incidental dolphin mortality.

(4) *Vessel inspection*—(i) *Annual*. At least once during each calendar year, purse seine nets and other gear and equipment required under § 216.24(c)(3) must be made available for inspection and for a trial set/net alignment by an authorized NMFS inspector or IATTC staff as specified by the Administrator, Southwest Region, in order to obtain a vessel permit.

(ii) *Reinspection*. Purse seine nets and other gear and equipment required by these regulations must be made available for reinspection by an authorized NMFS inspector or IATTC staff as specified by the Administrator, Southwest Region. The vessel permit holder must notify the Administrator, Southwest Region, of any net modification at least 5 days prior to departure of the vessel in order to determine whether a reinspection or trial set/net alignment is required.

(iii) *Failure to pass inspection*. Upon failure to pass an inspection or reinspection, a vessel may not engage in purse seining involving the intentional taking of marine mammals until the deficiencies in gear or equipment are corrected as required by NMFS.

(5) *Operator permit holder training requirements*. An operator must maintain proficiency sufficient to perform the procedures required herein, and must attend and satisfactorily complete a formal training session approved by the Administrator, Southwest Region, in order to obtain his or her permit. At the training session, an attendee will be instructed on the relevant provisions and regulatory requirements of the MMPA and the IDCP, and the fishing gear and techniques that are required for

reducing serious injury and mortality of dolphin incidental to purse seining for tuna. Operators who have received a written certificate of satisfactory completion of training and who possess a current or previous calendar year permit will not be required to attend additional formal training sessions unless there are substantial changes in the relevant provisions or implementing regulations of the MMPA or the IDCP, or in fishing gear and techniques. Additional training may be required for any operator who is found by the Administrator, Southwest Region, to lack proficiency in the required fishing procedures or familiarity with the relevant provisions or regulations of the MMPA or the IDCP.

(6) *Marine mammal release requirements.* All operators fishing pursuant to paragraph (c) of this section must use the following procedures during all sets involving the incidental taking of marine mammals in association with the capture and landing of tuna.

(i) *Backdown procedure.* Backdown must be performed following a purse seine set in which dolphins are captured in the course of catching tuna, and must be continued until it is no longer possible to remove live dolphins from the net by this procedure. At least one crewmember must be deployed during backdown to aid in the release of dolphins. Thereafter, other release procedures required will be continued so that all live dolphins are released prior to the initiation of the sack-up procedure.

(ii) *Prohibited use of sharp or pointed instrument.* The use of a sharp or pointed instrument to remove any marine mammal from the net is prohibited.

(iii) *Sundown sets prohibited.* On every set encircling dolphin, the backdown procedure must be completed no later than one-half hour after sundown, except as provided here. For the purpose of this section, sundown is defined as the time at which the upper edge of the sun disappears below the horizon or, if the view of the sun is obscured, the local time of sunset calculated from tables developed by the U.S. Naval Observatory or other authoritative source approved by the Administrator, Southwest Region. A sundown set is a set in which the backdown procedure has not been completed and rolling the net to sack-up has not begun within one-half hour after sundown. Should a set extend beyond one-half hour after sundown, the operator must use the required marine mammal release procedures including the use of the high intensity

lighting system. In the event a sundown set occurs where the seine skiff was let go 90 or more minutes before sundown, and an earnest effort to rescue dolphins is made, the International Review Panel of the IDCP may recommend to the United States that in the view of the International Review Panel, prosecution by the United States is not recommended. Any such recommendation will be considered by the United States in evaluating the appropriateness of prosecution in a particular circumstance.

(iv) *Dolphin safety panel.* During backdown, the dolphin safety panel must be positioned so that it protects the perimeter of the backdown area. The perimeter of the backdown area is the length of corkline that begins at the outboard end of the last bow bunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point.

(7) *Experimental fishing operations.* The Administrator, Southwest Region, may authorize experimental fishing operations, consistent with the provisions of the IDCP, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce or eliminate dolphin mortality or serious injury, or do not require the encirclement of dolphins in the course of fishing operations. The Administrator, Southwest Region, may waive, as appropriate, any requirements of this section except DMLs and the obligation to carry an observer.

(i) A vessel permit holder may apply for an experimental fishing operation waiver by submitting the following information to the Administrator, Southwest Region, no less than 90 days before the date the proposed operation is intended to begin:

(A) The name(s) of the vessel(s) and the vessel permit holder(s) to participate;

(B) A statement of the specific vessel gear and equipment or procedural requirement to be exempted and why such an exemption is necessary to conduct the experiment;

(C) A description of how the proposed modification to the gear and equipment or procedures is expected to reduce incidental mortality or serious injury of marine mammals;

(D) A description of the applicability of this modification to other purse seine vessels;

(E) The planned design, time, duration, and general area of the experimental operation;

(F) The name(s) of the permitted operator(s) of the vessel(s) during the experiment;

(G) A statement of the qualifications of the individual or company doing the analysis of the research; and

(H) Signature of the permitted operator or of the operator's representative.

(ii) The Administrator, Southwest Region, will acknowledge receipt of the application and, upon determining that it is complete, will publish a notice in the **Federal Register** summarizing the application, making the full application available for inspection and inviting comments for a minimum period of 30 days from the date of publication.

(iii) The Administrator, Southwest Region, after considering the information submitted in the application identified in paragraph (c)(7)(i) of this section and the comments received, will either issue a waiver to conduct the experiment that includes restrictions or conditions deemed appropriate, or deny the application, giving the reasons for denial.

(iv) A waiver for an experimental fishing operation will be valid only for the vessels and operators named in the permit, for the time period and areas specified, for trips carrying an observer designated by the Administrator, Southwest Region, and when all the terms and conditions of the permit are met.

(v) The Administrator, Southwest Region, may suspend or revoke an experimental fishing waiver in accordance with 15 CFR part 904 if the terms and conditions of the waiver or the provisions of the regulations are not followed.

(8) *Operator permit holder performance requirements.* [Reserved]

(9) *Vessel permit holder dolphin mortality limits.* For purposes of this paragraph, the term "vessel permit holder" includes both the holder of a current vessel permit and also the holder of a vessel permit for the following year.

(i) By September 1 each year, a vessel permit holder desiring a DML for the following year must provide to the Administrator, Southwest Region, the name of the U.S. purse seine fishing vessel(s) of carrying capacity greater than 400 st (362.8 mt) that the owner intends to use to intentionally deploy purse seine fishing nets in the ETP to encircle dolphins in an effort to capture tuna during the following year. NMFS will forward the list of purse seine vessels to the Director of the IATTC on or before October 1, or as otherwise required by the IDCP, for assignment of a DML for the following year under the provisions of Annex IV of the Agreement on the IDCP.

(ii) Each vessel permit holder that desires a DML only for the period between July 1 to December 31 must provide the Administrator, Southwest Region, by September 1 of the prior year, the name of the U.S. purse seine fishing vessel(s) of greater than 400 st (362.8 mt) carrying capacity that the owner intends to use to intentionally deploy purse seine fishing nets in the ETP to encircle dolphins in an effort to capture tuna during the period. NMFS will forward the list of purse seine vessels to the Director of the IATTC on or before October 1, or as otherwise required under the IDCP, for possible assignment of a DML for the 6-month period July 1 to December 31. Under the IDCP, the DML will be calculated by the IDCP from any unutilized pool of DMLs in accordance with the procedure described in Annex IV of the Agreement on the IDCP and will not exceed one-half of an unadjusted full-year DML as calculated by the IDCP.

(iii)(A) The Administrator, Southwest Region, will notify vessel owners of the DML assigned for each vessel for the following year, or the second half of the year, as applicable.

(B) The Administrator, Southwest Region, may adjust the DMLs in accordance with Annex IV of the Agreement on the IDCP. All adjustments of full-year DMLs will be made before January 1, and the Administrator, Southwest Region, will notify the Director of the IATTC of any adjustments prior to a vessel departing on a trip using its adjusted DML. The notification will be no later than February 1 in the case of adjustments to full-year DMLs, and no later than May 1 in the case of adjustments to DMLs for the second half of the year.

(C) In accordance with the requirements of Annex IV of the Agreement on the IDCP, the Administrator, Southwest Region, may adjust a vessel's DML if it will further scientific or technological advancement in the protection of marine mammals in the fishery or if the past performance of the vessel indicates that the protection or use of the yellowfin tuna stocks or marine mammals is best served by the adjustment, within the mandates of the MMPA. Experimental fishing operation waivers or scientific research permits will be considered a basis for adjustments.

(iv)(A) A vessel assigned a full-year DML that does not make a set on dolphins by April 1 or that leaves the fishery will lose its DML for the remainder of the year, unless the failure to set on dolphins is due to force majeure or other extraordinary

circumstances as determined by the International Review Panel.

(B) A vessel assigned a DML for the second half of the year will be considered to have lost its DML if the vessel has not made a set on dolphins before December 31, unless the failure to set on dolphins is due to force majeure or extraordinary circumstances as determined by the International Review Panel.

(C) Any vessel that loses its DML for 2 consecutive years will not be eligible to receive a DML for the following year.

(D) NMFS will determine, based on available information, whether a vessel has left the fishery.

(1) A vessel lost at sea, undergoing extensive repairs, operating in an ocean area other than the ETP, or for which other information indicates that vessel will no longer be conducting purse seine operations in the ETP for the remainder of the period covered by the DML will be determined to have left the fishery.

(2) NMFS will make all reasonable efforts to determine the intentions of the vessel owner. The owner of any vessel that has been preliminarily determined to have left the fishery will be provided notice of such preliminary determination and given the opportunity to provide information on whether the vessel has left the fishery prior to NMFS making a final determination under 15 CFR part 904 and notifying the IATTC.

(v) Any vessel that exceeds its assigned DML after any applicable adjustment under paragraph (c)(9)(iii) of this section will have its DML for the subsequent year reduced by 150 percent of the overage, unless another adjustment is determined by the International Review Panel, as mandated by the Agreement on the IDCP.

(vi) A vessel that is covered by a valid vessel permit and that does not normally fish for tuna in the ETP but desires to participate in the fishery on a limited basis may apply for a per-trip DML from the Administrator, Southwest Region, at any time, allowing at least 60 days for processing. The request must state the expected number of trips involving sets on dolphins and the anticipated dates of the trip or trips. The request will be forwarded to the Secretariat of the IATTC for processing in accordance with Annex IV of the Agreement on the IDCP. A per-trip DML will be assigned if one is made available in accordance with the terms of Annex IV of the Agreement on the IDCP. If a vessel assigned a per-trip DML does not set on dolphins during that trip, the vessel will be considered to have lost its

DML unless this was a result of force majeure or other extraordinary circumstances as determined by the International Review Panel. After two consecutive losses of a DML, a vessel will not be eligible to receive a DML for the next fishing year.

(vii) Observers will make their records available to the vessel operator at any reasonable time, including after each set, in order for the operator to monitor the balance of the DML(s) remaining for use.

(viii) Vessel and operator permit holders must not deploy a purse seine net on or encircle any school of dolphins containing individuals of a particular stock of dolphins for the remainder of the calendar year:

(A) after the applicable per-stock per-year dolphin mortality limit for that stock of dolphins (or for that vessel, if so assigned) has been reached or exceeded; or

(B) after the time and date provided in actual notification or notification in the **Federal Register** by the Administrator, Southwest Region, based upon the best available evidence, stating when any applicable per-stock per-year dolphin mortality limit has been reached or exceeded, or is expected to be reached in the near future.

(ix) If individual dolphins belonging to a stock that is prohibited from being taken are not reasonably observable at the time the net skiff attached to the net is released from the vessel at the start of a set, the fact that individuals of that stock are subsequently taken will not be cause for enforcement action provided that all procedures required by the applicable regulations have been followed.

(x) Vessel and operator permit holders must not intentionally deploy a purse seine net on or encircle dolphins intentionally:

(A) after a set in which the vessel's DML, as adjusted, has been reached or exceeded; or

(B) after the date and time provided in actual notification by letter, facsimile, radio, or electronic mail, or notice in the **Federal Register** by the Administrator, Southwest Region, based upon the best available evidence, that intentional sets on dolphins must cease because the total of the DMLs assigned to the U.S. fleet has been reached or exceeded, or is expected to be exceeded in the near future.

(d) *Purse seining by vessels without assigned DMLs.* In addition to the requirements of paragraph (b) of this section, a vessel permit used for a trip not involving an assigned DML and the operator's permit when used on such a vessel are subject to the following terms

and conditions: a permit holder may take marine mammals provided that such taking is an accidental occurrence in the course of normal commercial fishing operations and the vessel does not intentionally deploy its net on, or to encircle, dolphins; marine mammals taken incidental to such commercial fishing operations must be immediately returned to the environment where captured without further injury, using release procedures such as hand rescue, or aborting the set at the earliest effective opportunity; and the use of one or more rafts and facemasks or viewboxes to aid in the rescue of dolphins is recommended.

(e) *Observers*—(1) The holder of a vessel permit must allow an observer duly authorized by the Administrator, Southwest Region, to accompany the vessel on all fishing trips in the ETP for the purpose of conducting research and observing operations, including collecting information that may be used in civil or criminal penalty proceedings, forfeiture actions, or permit sanctions. A vessel that fails to carry an observer in accordance with these requirements may not engage in fishing operations.

(2) Research and observation duties will be carried out in such a manner as to minimize interference with commercial fishing operations. Observers must be provided access to vessel personnel and to dolphin safety gear and equipment, electronic navigation equipment, radar displays, high powered binoculars, and electronic communication equipment. The navigator must provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. Observers must be provided with adequate space on the bridge or pilothouse for clerical work, as well as space on deck adequate for carrying out observer duties. No vessel owner, master, operator, or crew member of a permitted vessel may impair, or in any way interfere with, the research or observations being carried out. Masters must allow observers to use vessel communication equipment necessary to report information concerning the take of marine mammals and other observer collected data upon request of the observer.

(3) Any marine mammals killed during fishing operations that are accessible to crewmen and requested from the permit holder or master by the observer must be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals or marine mammal parts designated as biological specimens by the observer must be retained in cold storage aboard the vessel until retrieved by authorized personnel of NMFS or the IATTC when the vessel returns to port for unloading.

(4) It is unlawful for any person to forcibly assault, impede, intimidate, interfere with, or to influence or attempt to influence an observer, or to harass (including sexual harassment) an observer by conduct that has the purpose or effect of unreasonably interfering with the observer's work performance, or that creates an intimidating, hostile, or offensive environment. In determining whether conduct constitutes harassment, the totality of the circumstances, including the nature of the conduct and the context in which it occurred, will be considered. The determination of the legality of a particular action will be made from the facts on a case-by-case basis.

(5)(i) All observers must be provided sleeping, toilet and eating accommodations at least equal to that provided to a full crew member. A mattress or futon on the floor or a cot is not acceptable in place of a regular bunk. Meal and other galley privileges must be the same for the observer as for other crew members.

(ii) Female observers on a vessel with an all-male crew must be accommodated either in a single-person cabin or, if reasonable privacy can be ensured by installing a curtain or other temporary divider, in a two-person cabin shared with a licensed officer of the vessel. If the cabin assigned to a female observer does not have its own toilet and shower facilities that can be provided for the exclusive use of the observer, then a schedule for time-sharing common facilities must be established before the placement meeting and approved by NMFS or

other approved observer program and must be followed during the entire trip.

(iii) In the event there are one or more female crew members, the female observer must be provided a bunk in a cabin shared solely with female crew members, and provided toilet and shower facilities shared solely with these female crew members.

(f) *Importation, purchase, shipment, sale and transport.* (1)(i) It is illegal to import into the United States any fish, whether fresh, frozen, or otherwise prepared, if the fish have been caught with commercial fishing technology that results in the incidental kill or incidental serious injury of marine mammals in excess of that allowed under this part for U.S. fishermen, or as specified at paragraph (f)(6) of this section.

(ii) For purposes of this paragraph (f), and in applying the definition of an "intermediary nation," an import occurs when the fish or fish product is released from a nation's Customs' custody and enters into the commerce of the nation. For other purposes, "import" is defined in § 216.3.

(2) *Imports requiring a Fisheries Certificate of Origin.* Shipments of tuna, tuna products, and certain other fish products identified by the U.S. Harmonized Tariff Schedule (HTS) numbers listed in paragraphs (f)(2)(i), (f)(2)(ii) and (f)(2)(iii) of this section may not be imported into the United States unless a properly completed Fisheries Certificate of Origin (FCO), NOAA Form 370, is filed with the U.S. Customs Service at the time of importation.

(i) *HTS numbers requiring a Fisheries Certificate of Origin, subject to yellowfin tuna embargo.* The following HTS numbers identify yellowfin tuna or yellowfin tuna products (other than fresh tuna) known to be imported into the United States. All shipments imported into the United States under these HTS numbers must be accompanied by an FCO. The scope of yellowfin tuna embargoes and procedures for attaining an affirmative finding are described under paragraphs (f)(6) and (f)(8) of this section, respectively.

(A) <i>Frozen:</i> .....	.
0303.42.0020 .....	Yellowfin tuna, whole, frozen.
0303.42.0040 .....	Yellowfin tuna, eviscerated, head on, frozen.
0303.42.0060 .....	Yellowfin tuna, other, frozen.
(B) <i>Airtight Containers: (products containing Yellowfin)</i> .....	.
1604.14.1010 .....	Tuna, non-specific, in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each.
1604.14.1090 .....	Tuna, non-specific, in oil, in airtight containers, other.

1604.14.2291 .....	Tuna, other than albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, under quota.
1604.14.2299 .....	Tuna, other than albacore, not in oil, in airtight containers, under quota.
1604.14.3091 .....	Tuna, other than albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, over quota.
1604.14.3099 .....	Tuna, other than albacore, not in oil, in airtight containers, over quota.
<i>(C) Loins: (Yellowfin)</i> .....	
1604.14.4000 .....	Tuna, not in airtight containers, not in oil, weighing with their contents over 6.8 kg.
1604.14.5000 .....	Tuna, not in airtight containers, other.
<i>(D) Other: (products containing Yellowfin)</i> .....	
0304.20.2066 .....	Other fish, fillets, skinned, in blocks weighing over 4.5 kg, frozen.
0304.20.6096 .....	Other fish, fillets, frozen.
1604.20.2500 .....	Balls and cakes, not in oil, in airtight containers, other.
1604.20.3000 .....	Balls and cakes, other.

*(ii) HTS numbers requiring a Fisheries Certificate of Origin, not subject to yellowfin tuna embargo.* The following HTS numbers identify tuna or tuna products, (other than fresh tuna or yellowfin tuna identified in paragraph (f)(2)(i) of this section, known to be imported into the United States. All shipments imported into the United States under these HTS numbers must be accompanied by an FCO.

<i>(A) Frozen:</i> .....	
0303.41.0000 .....	Albacore or longfinned tunas, frozen.
0303.43.0000 .....	Skipjack, frozen.
0303.44.0000 .....	Bigeye, frozen.
0303.45.0000 .....	Bluefin, frozen.
0303.46.0000 .....	Bluefin Southern, frozen.
0303.49.0100 .....	Other tuna, frozen.
<i>(B) Airtight Containers: (Other than Yellowfin)</i> .....	
1604.14.1010 .....	Tuna, non-specific, in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each.
1604.14.1090 .....	Tuna, non-specific, in oil, in airtight containers, other.
1604.14.2251 .....	Tuna, albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, under quota.
1604.14.2259 .....	Tuna, albacore, not in oil, in airtight containers, other, under quota.
1604.14.2291 .....	Tuna, other than albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, under quota.
1604.14.2299 .....	Tuna, other than albacore, not in oil, in airtight containers, other, under quota.
1604.14.3051 .....	Tuna, albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, over quota.
1604.14.3059 .....	Tuna, albacore, not in oil, in airtight containers, other, over quota.
1604.14.3091 .....	Tuna, other than albacore, not in oil, in foil or other flexible airtight containers weighing with their contents not more than 6.8 kg each, over quota.
1604.14.3099 .....	Tuna, other than albacore, not in oil, in airtight containers, other, over quota.
<i>(C) Loins: (Other than Yellowfin)</i> .....	
1604.14.4000 .....	Tuna, not in airtight containers, in bulk or in immediate containers weighing with their contents over 6.8 kg, in oil.
1604.14.5000 .....	Tuna, not in airtight containers, other.
<i>(D) Other: (only if the product contains tuna)</i> .....	
0304.20.2066 .....	Other fish, fillets, skinned, in blocks weighing over 4.5 kg, frozen.
0304.20.6096 .....	Other fish, fillets, frozen.
1604.20.2500 .....	Balls and cakes, not in oil, in airtight containers, other.
1604.20.3000 .....	Balls and cakes, other.

*(iii) Exports from driftnet nations only: HTS numbers requiring a Fisheries Certificate of Origin and official certification.* The following HTS numbers identify categories of fish and shellfish, in addition to those identified in paragraphs (f)(2)(i) and (f)(2)(ii) of this section, known to have been harvested using a large-scale driftnet

and imported into the United States. Shipments exported from a large-scale driftnet nation, as identified under paragraph (f)(7) of this section, and

imported into the United States under any of the HTS numbers listed in paragraph (f)(2) of this section must be accompanied by an FCO and the official

statement described in paragraph (f)(4)(xiii) of this section.

(A) <i>Frozen:</i> .....	
0303.19.0012 .....	Salmon, chinook, frozen.
0303.19.0022 .....	Salmon, chum, frozen.
0303.19.0032 .....	Salmon, pink, frozen.
0303.19.0052 .....	Salmon, coho, frozen.
0303.19.0062 .....	Salmon, Pacific, non-specific, frozen.
0303.21.0000 .....	Trout, frozen.
0303.22.0000 .....	Salmon, Atlantic and Danube, frozen.
0303.29.0000 .....	Salmonidae, other, frozen.
0303.75.0010 .....	Dogfish, frozen.
0303.75.0090 .....	Other sharks, frozen.
0303.79.2041 .....	Swordfish steaks, frozen.
0303.79.2049 .....	Swordfish, other, frozen.
0303.79.4097 .....	Fish, other, frozen.
0304.20.2066 .....	Fish, fillet, skinned, in blocks, frozen over 4.5 kg.
0304.20.6008 .....	Salmonidae, salmon fillet, frozen.
0304.20.6092 .....	Swordfish fillets, frozen.
0304.20.6096 .....	Fish, fillet, other, frozen.
0307.49.0010 .....	Squid, other, fillet, frozen.
(B) <i>Canned:</i> .....	
1604.11.2020 .....	Salmon, pink, canned in oil, in airtight containers.
1604.11.2030 .....	Salmon, sockeye, canned in oil, in airtight containers.
1604.11.2090 .....	Salmon, other, canned in oil, in airtight containers.
1604.11.4010 .....	Salmon, chum, canned, not in oil.
1604.11.4020 .....	Salmon, pink, canned, not in oil.
1604.11.4030 .....	Salmon, sockeye, canned, not in oil.
1604.11.4040 .....	Salmon, other, canned, not in oil.
1604.11.4050 .....	Salmon, other, canned, not in oil.
1604.19.2000 .....	Fish, other, in airtight containers, not in oil.
1604.19.3000 .....	Fish, other, in airtight containers, in oil.
1605.90.6050 .....	Squid, loligo, prepared/preserved.
1605.90.6055 .....	Squid, other, prepared/preserved.
(C) <i>Other:</i> .....	
0305.30.6080 .....	Fish, other, fillet, dried/salted/brine.
0305.49.4040 .....	Fish, other, smoked.
0305.59.2000 .....	Shark fins, dried.
0305.59.4000 .....	Fish, other, dried.
0305.69.4000 .....	Salmon, other, salted (or in brine).
0305.69.5000 .....	Fish, other, salted (or in brine), in immediate containers, not over 6.8 kg.
0305.69.6000 .....	Fish, other, salted (or in brine).
0307.49.0050 .....	Squid, other, frozen/dried/salted/brine.
0307.49.0060 .....	Squid, other, & cuttle fish frozen/dried/salted/brine.

(3) *Disposition of Fisheries Certificates of Origin.* The FCO described in paragraph (f)(4) of this section may be obtained from the Administrator, Southwest Region, or downloaded from the Internet at <http://swr.nmfs.noaa.gov/noaa370.htm>.

(i) A properly completed FCO and its attached certificates, if applicable, must accompany the required U.S. Customs entry documents that are filed at the time of import.

(ii) FCOs that accompany imported shipments of tuna destined for further processing in the United States must be endorsed at each change in ownership and submitted to the Administrator, Southwest Region, by the last endorser when all required endorsements are completed.

(iii) Importers and exporters are required to retain their records,

including FCOs, import or export documents, invoices, and bills of lading for 2 years, and such records must be made available within 30 days of a request by the Secretary or the Administrator, Southwest Region.

(4) *Contents of Fisheries Certificate of Origin.* An FCO, certified to be accurate by the exporter(s) of the accompanying shipment, must include the following information:

- (i) Customs entry identification;
- (ii) Date of entry;
- (iii) Exporter's full name and complete address;
- (iv) Importer's or consignee's full name and complete address;
- (v) Species description, product form, and HTS number;
- (vi) Total net weight of the shipment in kilograms;
- (vii) Ocean area where the fish were harvested (ETP, western Pacific Ocean,

south Pacific Ocean, eastern Atlantic Ocean, western Atlantic Ocean, Caribbean Sea, Indian Ocean, or other);

(viii) Type of fishing gear used to harvest the fish (purse seine, longline, baitboat, large-scale driftnet, gillnet, trawl, pole and line, or other);

(ix) Country under whose laws the harvesting vessel operated based upon the flag of the vessel or, if a certified charter vessel, the country that accepted responsibility for the vessel's fishing operations;

(x) Dates on which the fishing trip began and ended;

(xi) If the shipment includes tuna or products harvested with a purse seine net, the name of the harvesting vessel;

(xii) Dolphin-safe condition of the shipment, described by checking the

appropriate statement on the form and attaching additional certifications if required;

(xiii) For shipments harvested by vessels of a nation known to use large-scale driftnets, as determined by the Secretary pursuant to paragraph (f)(7) of this section, the High Seas Driftnet Certification contained on the FCO must be dated and signed by a responsible government official of the harvesting nation, certifying that the fish or fish products were harvested by a method other than large-scale driftnet; and

(xiv) If the shipment contains tuna harvested in the ETP by a purse seine vessel of more than 400 st (362.8 mt) carrying capacity, each importer or processor who takes custody of the shipment must sign and date the form to certify that the form and attached documentation accurately describe the shipment of fish they accompany.

(5) *Dolphin-safe label.* Tuna or tuna products sold in or exported from the United States that include on the label the term "dolphin-safe" or any other term or symbol that claims or suggests the tuna were harvested in a manner not injurious to dolphins are subject to the requirements of subpart H of this part (§ 216.90 *et seq.*).

(6) *Scope of embargoes*—(i) *ETP yellowfin tuna embargo.* Yellowfin tuna or products of yellowfin tuna harvested using a purse seine in the ETP identified by an HTS number listed in paragraph (f)(2)(i) of this section may not be imported into the United States if such tuna or tuna products were:

(A) Harvested on or after March 3, 1999, the effective date of section 4 of the IDCPA, and harvested by, or exported from, a nation that the Assistant Administrator has determined has jurisdiction over purse seine vessels of greater than 400 st (362.8 mt) carrying capacity harvesting tuna in the ETP, unless the Assistant Administrator has made an affirmative finding required for importation for that nation under paragraph (f)(8) of this section;

(B) Exported from an intermediary nation, as defined in Section 3 of the MMPA, and a ban is currently in force prohibiting the importation from that nation under paragraph (f)(9) of this section; or

(C) Harvested before March 3, 1999, the effective date of Section 4 of the IDCPA, and would have been banned from importation under Section 101(a)(2) of the MMPA at the time of harvest.

(ii) *Driftnet embargo.* A shipment containing fish or fish products identified by an HTS number listed in paragraph (f)(2) of this section may not be imported into the United States if it

is harvested by a large-scale driftnet, or if it is exported from or harvested on the high seas by any nation determined by the Assistant Administrator to be engaged in large-scale driftnet fishing, unless a government official of the large-scale driftnet nation completes, signs and dates the High Seas Driftnet section of the FCO certifying that the fish or fish products were harvested by a method other than large-scale driftnet.

(iii) *Pelly certification.* After 6 months of an embargo being in place against a nation under this section, the Secretary will certify that nation under section 8(a) of the Fishermen's Protective Act (22 U.S.C. 1978(a)). When such an embargo is lifted, the Secretary will terminate the certification under Section 8(d) of that Act (22 U.S.C. 1978(d)).

(iv) *Coordination.* The Assistant Administrator will promptly advise the Department of State and the Department of Homeland Security of embargo decisions, actions, and finding determinations.

(7) *Large-scale driftnet nation: determination.* Based upon the best information available, the Assistant Administrator will determine which nations have registered vessels that engage in fishing using large-scale driftnets. Such determinations will be published in the **Federal Register**. A responsible government official of any such nation may certify to the Assistant Administrator that none of the nation's vessels use large-scale driftnets. Upon receipt of the certification, the Assistant Administrator may find, and publish such finding in the **Federal Register**, that none of that nation's vessels engage in fishing with large-scale driftnets.

(8) *Affirmative finding procedure for nations harvesting yellowfin tuna using a purse seine in the ETP.* (i) The Assistant Administrator will determine, on an annual basis, whether to make an affirmative finding based upon documentary evidence provided by the government of the harvesting nation or by the IDCP and the IATTC, and will publish the finding in the **Federal Register**. A finding will remain valid for 1 year or for such other period as the Assistant Administrator may determine. An affirmative finding will be terminated if the Assistant Administrator determines that the requirements of this paragraph are no longer being met. Every 5 years, the government of the harvesting nation must submit such documentary evidence directly to the Assistant Administrator and request an affirmative finding. Documentary evidence must be submitted by the harvesting nation for the first affirmative finding application. The Assistant

Administrator may require the submission of supporting documentation or other verification of statements made in connection with requests to allow importations. An affirmative finding applies to yellowfin tuna and yellowfin tuna products that were harvested by vessels of the nation after March 3, 1999. To make an affirmative finding, the Assistant Administrator must find that:

(A) The harvesting nation participates in the IDCP and is either a member of the IATTC or has initiated (and within 6 months thereafter completed) all steps required of applicant nations, in accordance with article V, paragraph 3, of the Convention establishing the IATTC, to become a member of that organization;

(B) The nation is meeting its obligations under the IDCP and its obligations of membership in the IATTC, including all financial obligations;

(C)(1) The annual total dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) did not exceed the aggregated total of the mortality limits assigned by the IDCP for that nation's purse seine vessels for the year preceding the year in which the finding would start; or

(2)(i) Because of extraordinary circumstances beyond the control of the nation and the vessel captains, the total dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) exceeded the aggregated total of the mortality limits assigned by the IDCP for that nation's purse seine vessels; and

(ii) Immediately after the national authorities discovered the aggregate mortality of its fleet had been exceeded, the nation required all its vessels to cease fishing for tuna in association with dolphins for the remainder of the calendar year; and

(D)(1) In any years in which the parties agree to a global allocation system for per-stock per-year individual stock quotas, the nation responded to the notification from the IATTC that an individual stock quota had been reached by prohibiting any additional sets on the stock for which the quota had been reached;

(2) If a per-stock per-year quota is allocated to each nation, the annual per-stock per-year dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) did not exceed the aggregated total of the per-stock per-year limits assigned by the IDCP for that nation's purse seine vessels (if any) for

the year preceding the year in which the finding would start; or

(3)(i) Because of extraordinary circumstances beyond the control of the nation and the vessel captains, the per-stock per-year dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) exceeded the aggregated total of the per-stock per-year limits assigned by the IDCP for that nation's purse seine vessels; and

(ii) Immediately after the national authorities discovered the aggregate per-stock mortality limits of its fleet had been exceeded, the nation required all its vessels to cease fishing for tuna in association with the stocks whose limits had been exceeded, for the remainder of the calendar year.

(iii) *Documentary Evidence and Compliance with the IDCP.*—(A)

*Documentary Evidence.* The Assistant Administrator will make an affirmative finding under paragraph (f)(8)(i) of this section only if the government of the harvesting nation provides directly to the Assistant Administrator, or authorizes the IATTC to release to the Assistant Administrator, complete, accurate, and timely information that enables the Assistant Administrator to determine whether the harvesting nation is meeting the obligations of the IDCP, and whether ETP-harvested tuna imported from such nation comports with the tracking and verification regulations of subpart H of this part.

(B) *Revocation.* After considering the information provided under paragraph (f)(8)(ii)(A) of this section, each party's financial obligations to the IATTC, and any other relevant information, including information that a nation is consistently failing to take enforcement actions on violations that diminish the effectiveness of the IDCP, the Assistant Administrator, in consultation with the Secretary of State, will revoke an affirmative finding issued to a nation that is not meeting the obligations of the IDCP.

(iv) A harvesting nation may apply for an affirmative finding at any time by providing to the Assistant Administrator the information and authorizations required in paragraphs (f)(8)(i) and (f)(8)(ii) of this section, allowing at least 60 days from the submission of complete information to NMFS for processing.

(v) The Assistant Administrator will make or renew an affirmative finding for the period from April 1 through March 31 of the following year, or portion thereof, if the harvesting nation has provided all the information and authorizations required by paragraphs (f)(8)(i) and (f)(8)(ii) of this section, and

has met the requirements of paragraphs (f)(8)(i) and (f)(8)(ii) of this section.

(vi) *Reconsideration of finding.* The Assistant Administrator may reconsider a finding upon a request from, and the submission of additional information by, the harvesting nation, if the information indicates that the nation has met the requirements under paragraphs (f)(8)(i) and (f)(8)(ii) of this section.

(9) *Intermediary nation.* Except as authorized under this paragraph, no yellowfin tuna or yellowfin tuna products harvested by purse seine in the ETP classified under one of the HTS numbers listed in paragraph (f)(2)(i) of this section may be imported into the United States from any intermediary nation.

(i) An "intermediary nation" is a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation into the United States pursuant to Section 101(a)(2)(B) of the MMPA.

(ii) Shipments of yellowfin tuna that pass through any nation (e.g. on a 'through Bill of Lading') and are not entered for consumption in that nation are not considered to be imports to that nation and thus, would not cause that nation to be considered an intermediary nation under the MMPA.

(iii) The Assistant Administrator will publish in the **Federal Register** a notice announcing when NMFS has determined, based on the best information available, that a nation is an "intermediary nation." After the effective date of that notice, the import restrictions of this paragraph shall apply.

(iv) *Changing the status of intermediary nation determinations.* Imports from an intermediary nation of yellowfin tuna and yellowfin tuna products classified under any of the HTS numbers in paragraph (f)(2)(i) of this section may be imported into the United States only if the Assistant Administrator determines, and publishes a notice of such determination in the **Federal Register**, that the intermediary nation has provided certification and reasonable proof that it has not imported in the preceding 6 months yellowfin tuna or yellowfin tuna products that are subject to a ban on direct importation into the United States under Section 101(a)(2)(B) of the MMPA. At that time, the nation shall no longer be considered an "intermediary nation" and these import restrictions shall no longer apply.

(v) The Assistant Administrator will review decisions under this paragraph

upon the request of an intermediary nation. Such requests must be accompanied by specific and detailed supporting information or documentation indicating that a review or reconsideration is warranted. For purposes of this paragraph, the term "certification and reasonable proof" means the submission to the Assistant Administrator by a responsible government official from the nation of a document reflecting the nation's customs records for the preceding 6 months, together with a certification attesting that the document is accurate.

(10) *Fish refused entry.* If fish is denied entry under paragraph (f)(2) of this section, the Port Director of Customs shall refuse to release the fish for entry into the United States.

(11) *Disposition of fish refused entry into the United States.* Fish that is denied entry under paragraph (f)(2) of this section and that is not exported under Customs supervision within 90 days shall be disposed of under Customs laws and regulations at the importer's expense. Provided, however, that any disposition shall not result in an introduction into the United States of fish caught in violation of the MMPA.

(12) *Market Prohibitions.* It is unlawful for any person to sell, purchase, offer for sale, transport, or ship in the United States, any tuna or tuna products unless the tuna products are either:

(i) Dolphin-safe under subpart H of this part; or

(ii) Harvested in compliance with the IDCP by vessels under the jurisdiction of a nation that is a member of the IATTC or has initiated, and within 6 months thereafter completes, all steps required by an applicant nation to become a member of the IATTC and the nation has an affirmative finding.

(g) *Penalties.* Any person or vessel subject to the jurisdiction of the United States will be subject to the penalties provided for under the MMPA for the conduct of fishing operations in violation of these regulations. Penalties for violating these regulations may include, but are not limited to, civil monetary fines, permit suspension or revocation, and reductions in current and future DMLs. Recommended sanctions are identified in the IDCPA/DPCIA Tuna/Dolphin Civil Administrative Penalty Schedule. Procedures for the imposition of penalties under the MMPA are found at 15 CFR part 904.

■ 3. Section 216.46 is republished to read as follows:

**§ 216.46 U.S. citizens on foreign flag vessels operating under the International Dolphin Conservation Program.**

The MMPA's provisions do not apply to a citizen of the United States who incidentally takes any marine mammal during fishing operations in the ETP that are outside the U.S. exclusive economic zone (as defined in Section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)), while employed on a fishing vessel of a harvesting nation other than the United States that is participating in, and is in compliance with, the IDCP.

■ 4. In subpart H, § 216.93 is removed, §§ 216.94 through 216.96 are redesignated as §§ 216.93 through 216.95, and §§ 216.90 through 216.92 and the newly redesignated § 216.93 are revised to read as follows:

**§ 216.90 Purposes.**

This subpart governs the requirements for using the official mark described in § 216.95 or an alternative mark that refers to dolphins, porpoises, or marine mammals, to label tuna or tuna products offered for sale in or exported from the United States using the term dolphin-safe or suggesting the tuna were harvested in a manner not injurious to dolphins.

**§ 216.91 Dolphin-safe labeling standards.**

(a) It is a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any producer, importer, exporter, distributor, or seller of any tuna products that are exported from or offered for sale in the United States to include on the label of those products the term "dolphin-safe" or any other term or symbol that claims or suggests that the tuna contained in the products were harvested using a method of fishing that is not harmful to dolphins if the products contain tuna harvested:

(1) *ETP large purse seine vessel.* In the ETP by a purse seine vessel of greater than 400 st (362.8 mt) carrying capacity unless:

(i) the documentation requirements for dolphin-safe tuna under § 216.92 and 216.93 are met;

(ii) No dolphins were killed or seriously injured during the sets in which the tuna were caught; and

(iii) None of the tuna were caught on a trip using a purse seine net intentionally deployed on or to encircle dolphins, provided that this paragraph (a)(1)(iii) will not apply if the Assistant Administrator publishes a notification in the **Federal Register** announcing a finding under 16 U.S.C. 1385(g)(2) that the intentional deployment of purse seine nets on or encirclement of

dolphins is not having a significant adverse impact on any depleted stock.

(2) *Non-ETP purse seine vessel.* Outside the ETP by a vessel using a purse seine net:

(i) In a fishery in which the Assistant Administrator has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the ETP), unless such products are accompanied by a written statement, executed by the Captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught; or

(ii) In any other fishery unless the products are accompanied by a written statement executed by the Captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna was harvested;

(3) *Driftnet.* By a vessel engaged in large-scale driftnet fishing; or

(4) *Other fisheries.* By a vessel in a fishery other than one described in paragraphs (a)(1) through (a)(3) of this section that is identified by the Assistant Administrator as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement, executed by the Captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Assistant Administrator determines that such an observer statement is necessary.

(b) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to willingly and knowingly use a label referred to in this section in a campaign or effort to mislead or deceive consumers about the level of protection afforded dolphins under the IDCP.

(c) A tuna product that is labeled with the official mark, described in § 216.95, may not be labeled with any other label or mark that refers to dolphins, porpoises, or marine mammals.

**§ 216.92 Dolphin-safe requirements for tuna harvested in the ETP by large purse seine vessels.**

(a) *U.S. vessels.* Tuna products that contain tuna harvested by U.S. flag purse seine vessels of greater than 400 st (362.8 mt) carrying capacity in the ETP may be labeled dolphin-safe only if the following requirements are met:

(1) Tuna Tracking Forms containing a complete record of all the fishing activities on the trip, certified by the vessel Captain and the observer, are submitted to the Administrator, Southwest Region, at the end of the fishing trip during which the tuna was harvested;

(2) The tuna is delivered for processing to a U.S. tuna processor in a plant located in one of the 50 states, Puerto Rico, or American Samoa that is in compliance with the tuna tracking and verification requirements of § 216.93; and

(3) The tuna or tuna products meet the dolphin-safe labeling standards under § 216.91.

(b) *Imported tuna.*

(1) Yellowfin tuna or tuna products harvested in the ETP by vessels of greater than 400 st (362.8 mt) carrying capacity and presented for import into the United States may be labeled dolphin-safe only if the yellowfin tuna was harvested by a U.S. vessel fishing in compliance with the requirements of the IDCP and applicable U.S. law, or by a vessel belonging to a nation that has obtained an affirmative finding under § 216.24(f)(8).

(2) Tuna or tuna products, other than yellowfin tuna, harvested in the ETP by purse seine vessels of greater than 400 st (362.8 mt) carrying capacity and presented for import into the United States may be labeled dolphin-safe only if:

(i) The tuna was harvested by a U.S. vessel fishing in compliance with the requirements of the IDCP and applicable U.S. law, or by a vessel belonging to a nation that is a Party to the Agreement on the IDCP or has applied to become a Party and is adhering to all the requirements of the Agreement on the IDCP Tuna Tracking and Verification Plan;

(ii) The tuna or tuna products are accompanied by a properly completed FCO; and

(iii) The tuna or tuna products are accompanied by valid documentation signed by a representative of the appropriate IDCP member nation, containing the harvesting vessel names and tuna tracking form numbers represented in the shipment, and certifying that:

(A) There was an IDCP approved observer on board the vessel(s) during the entire trip(s); and

(B) The tuna contained in the shipment were caught according to the dolphin-safe labeling standards of § 216.91.

**§ 216.93 Tracking and verification program.**

The Administrator, Southwest Region, has established a national tracking and verification program to accurately document the dolphin-safe condition of tuna, under the standards set forth in §§ 216.91 and 216.92. The tracking program includes procedures and reports for use when importing tuna into the United States and during U.S. purse seine fishing, processing, and marketing in the United States and abroad. Verification of tracking system operations is attained through the establishment of audit and document review requirements. The tracking program is consistent with the international tuna tracking and verification program adopted by the Parties to the Agreement on the IDCP.

(a) *Tuna tracking forms.* Whenever a U.S. flag tuna purse seine vessel of greater than 400 st (362.8 mt) carrying capacity fishes in the ETP, IDCP approved Tuna Tracking Forms (TTFs), bearing a unique number assigned to that trip, are used by the observer to record every set made during that trip. One TTF is used to record dolphin-safe sets and a second TTF is used to record non-dolphin-safe sets. The information entered on the TTFs following each set includes the date, well number, weights by species composition, estimated tons loaded, and additional notes, if any. The observer and the vessel engineer initial the entry as soon as possible following each set, and the vessel captain and observer review and sign both TTFs at the end of the fishing trip certifying that the information on the forms is accurate. TTFs are confidential official documents of the IDCP, consistent with Article XVIII of the Agreement on the IDCP, and the Agreement on the IDCP Rules of Confidentiality.

(b) *Dolphin-Safe Certification.* Upon request, the Office of the Administrator, Southwest Region, will provide written certification that tuna harvested by U.S. purse seine vessels greater than 400 st (362.8 mt) carrying capacity is dolphin-safe, but only if NMFS' review of the TTFs for the subject trip shows that the tuna for which the certification is requested is dolphin-safe under the requirements of the Agreement on the IDCP and U.S. law.

(c) *Tracking fishing operations.* (1) During ETP fishing trips by purse seine

vessels greater than 400 st (362.8 mt) carrying capacity, tuna caught in sets designated as dolphin-safe by the vessel observer must be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading. Vessel personnel will decide into which wells tuna will be loaded. The observer will initially designate whether each set is dolphin-safe or not, based on his/her observation of the set. The observer will initially identify a vessel fish well as dolphin-safe if the first tuna loaded into the well during a trip was captured in a set in which no dolphin died or was seriously injured. The observer will initially identify a vessel fish well as non-dolphin-safe if the first tuna loaded into the well during a trip was captured in a set in which a dolphin died or was seriously injured. Any tuna loaded into a well previously designated non-dolphin-safe is considered non-dolphin-safe tuna. The observer will change the designation of a dolphin-safe well to non-dolphin-safe if any tuna are loaded into the well that were captured in a set in which a dolphin died or was seriously injured.

(2) The captain, managing owner, or vessel agent of a U.S. purse seine vessel greater than 400 st (362.8 mt) returning to port from a trip, any part of which included fishing in the ETP, must provide at least 48 hours notice of the vessel's intended place of landing, arrival time, and schedule of unloading to the Administrator, Southwest Region.

(3) If the trip terminates when the vessel enters port to unload part or all of its catch, new TTFs will be assigned to the new trip, and any information concerning tuna retained on the vessel will be recorded as the first entry on the TTFs for the new trip. If the trip is not terminated following a partial unloading, the vessel will retain the original TTFs and submit a copy of those TTFs to the Administrator, Southwest Region, within 5 working days. In either case, the species and amount unloaded will be noted on the respective originals.

(4) Tuna offloaded to trucks, storage facilities, or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe designation of the tuna as it left the fishing vessel.

(5)(i) When ETP caught tuna is offloaded from a U.S. purse seine vessel greater than 400 st (362.8 mt) directly to a U.S. canner within the 50 states, Puerto Rico, or American Samoa, or in any port and subsequently loaded aboard a carrier vessel for transport to a U.S. processing location, a NMFS

representative may meet the U.S. purse seine vessel to receive the TTFs from the vessel observer and to monitor the handling of dolphin-safe and non-dolphin-safe tuna.

(ii) If a NMFS representative does not meet the vessel in port at the time of arrival, the captain of the vessel or the vessel's managing office must assure delivery of the TTFs to the Administrator, Southwest Region, from that location within 5 working days of the end of the trip. Alternatively, if the captain approves and notifies the Administrator, Southwest Region, the captain may entrust the observer to deliver the signed TTFs to the local office of the IATTC.

(iii) When ETP caught tuna is offloaded from a U.S. purse seine vessel greater than 400 st (362.8 mt) carrying capacity directly to a processing facility located outside the jurisdiction of the United States in a country that is a Party to the Agreement on the IDCP, the national authority in whose area of jurisdiction the tuna is to be processed will assume the responsibility for tracking and verification of the tuna offloaded. If a representative of the national authority meets the vessel in port, that representative will receive the original TTFs and assume the responsibility for providing copies of the TTFs to the Administrator, Southwest Region. If a representative of the national authority does not meet the vessel, the fishing vessel captain or the vessel's managing office must assure delivery of the completed TTFs in accordance with paragraphs (ii) and (v) of this section.

(iv) When ETP caught tuna is offloaded from a U.S. purse seine vessel greater than 400 st (362.8 mt) carrying capacity in a country that is not a Party to the Agreement on the IDCP, the tuna becomes the tracking and verification responsibility of the national authority of the processing facility when it is unloaded from the fishing vessel. The captain or the vessel's managing office must assure delivery of the completed TTFs in accordance with paragraphs (ii) and (v) of this section.

(v) TTFs are confidential official documents of the IDCP. Vessel captains and managing offices shall not provide copies of TTFs to any representatives of private organizations or non-member states.

(d) *Tracking cannery operations.* (1) Whenever a U.S. tuna canning company in the 50 states, Puerto Rico, or American Samoa receives a domestic or imported shipment of ETP caught tuna for processing, a NMFS representative may be present to monitor delivery and verify that dolphin-safe and non-

dolphin-safe tuna are clearly identified and remain segregated. Such inspections may be scheduled or unscheduled, and canners must allow the NMFS representative access to all areas and records.

(2) Tuna processors must submit a report to the Administrator, Southwest Region, of all tuna received at their processing facilities in each calendar month whether or not the tuna is actually canned or stored during that month. Monthly cannery receipt reports must be submitted electronically or by mail before the last day of the month following the month being reported. Monthly reports must contain the following information:

(i) *Domestic receipts*: dolphin-safe status, species, condition (round, loin, dressed, gilled and gutted, other), weight in short tons to the fourth decimal, ocean area of capture (ETP, western Pacific, Indian, eastern and western Atlantic, other), catcher vessel, trip dates, carrier name, unloading dates, and location of unloading.

(ii) *Import receipts*: In addition to the information required in paragraph (d)(2)(i) of this section, a copy of the FCO for each imported receipt must be provided.

(3) Tuna processors must report on a monthly basis the amounts of ETP-caught tuna that were immediately

utilized upon receipt or removed from cold storage. This report may be submitted in conjunction with the monthly report required in paragraph (d)(2) of this section. This report must contain:

(i) The date of removal from cold storage or disposition;

(ii) Storage container or lot identifier number(s) and dolphin-safe or non-dolphin-safe designation of each container or lot; and

(iii) Details of the disposition of fish (for example, canning, sale, rejection, etc.).

(4) During canning activities, non-dolphin-safe tuna may not be mixed in any manner or at any time during processing with any dolphin-safe tuna or tuna products and may not share the same storage containers, cookers, conveyers, tables, or other canning and labeling machinery.

(e) *Tracking imports*. All tuna products, except fresh tuna, that are imported into the United States must be accompanied by a properly certified FCO that is submitted to the Administrator, Southwest Region, as required by section 216.24(f).

(f) *Verification requirements*.—(1) *Record maintenance*. Any exporter, trans-shipper, importer, or processor of any tuna or tuna products containing tuna harvested in the ETP must

maintain records related to that tuna for at least 2 years. These records include, but are not limited to: FCO and required certifications, any report required in paragraphs (a), (b) and (d) of this section, invoices, other import documents, and trip reports.

(2) *Record submission*. Within 30 days of receiving a written request from the Administrator, Southwest Region, any exporter, trans-shipper, importer, or processor of tuna or tuna products containing tuna harvested in the ETP must submit to the Administrator, Southwest Region, any record required to be maintained under paragraph (f)(1) of this section.

(3) *Audits and spot-checks*. Upon request of the Administrator, Southwest Region, any such exporter, trans-shipper, importer, or processor must provide the Administrator, Southwest Region, timely access to all pertinent records and facilities to allow for audits and spot-checks on caught, landed, stored, and processed tuna.

(g) *Confidentiality of proprietary information*. Information submitted to the Assistant Administrator under this section will be treated as confidential in accordance with NOAA Administrative Order 216-100 "Protection of Confidential Fisheries Statistics."

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contain any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 48 CFR Part 237

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

#### Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR Part 237, which was published at 69 FR 55991 on September 17, 2004, is adopted as a final rule without change.

[FR Doc. 05-7089 Filed 4-11-05; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 216 and 300

[Docket No. 040920271-5083-02, I.D. 102004A]

RIN 0648-AS05

#### Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP)

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule to implement resolutions adopted by the Inter-American Tropical Tuna Commission (IATTC) and by the Parties to the Agreement on the International Dolphin Conservation Program (IDCP). The final rule prohibits activities that undermine the effective implementation and enforcement of the Marine Mammal Protection Act (MMPA), Dolphin Protection Consumer Information Act (DPCIA), and International Dolphin Conservation Program Act (IDCPA).

**DATES:** Effective May 12, 2005.

**ADDRESSES:** Written comments on the collection-of-information requirements should be sent to Jeremy Rusin, NMFS, Southwest Region, Protected Resources Division, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213. Comments may also be sent via facsimile (fax) to (562) 980-4027 or via E-mail. The mailbox address for providing E-mail comments is

0648\_AS05@noaa.gov. Include in the subject line of the E-mail the following document identifier: RIN 0648-AS05. The Environmental Assessment (EA) prepared for this rule is available on the Internet at the following address: <http://swr.nmfs.noaa.gov/>.

#### FOR FURTHER INFORMATION CONTACT:

Jeremy Rusin, NMFS, Southwest Region, Protected Resources Division, (562) 980-4020.

#### SUPPLEMENTARY INFORMATION:

##### Background

The United States is a member of the IATTC, which was established in 1949 under the Convention for the Establishment of an Inter-American Tropical Tuna Commission (Convention). The IATTC provides an international forum to ensure the effective international conservation and management of highly migratory species of fish in the Convention Area. The Convention Area is defined to include waters of the ETP bounded by the coast of the Americas, the 40° N. and 40° S. parallels, and the 150° W. meridian. The IATTC has maintained a scientific research and fishery monitoring program for many years and annually assesses the fisheries and the status of tuna stocks to determine appropriate harvest limits or other measures to prevent overexploitation of the stocks and promote viable fisheries. More recently, the IATTC has moved into other fishery management issues, such as managing the cumulative capacity of vessels fishing in the Convention Area, addressing bycatch of non-target and protected species, and imposing time-area closures to conserve tuna stocks.

In support of fleet capacity control, the United States agreed to an IATTC resolution that limited total ETP purse seine fleet capacity. Currently, the United States is committed to limiting the active aggregate capacity of its domestic tuna purse seine fleet in the ETP to 8,969 metric tons (mt) carrying capacity. The U.S. limit was originally based on the cumulative capacity of U.S. vessels actively fishing in the ETP in the years leading up to 1999. In addition, U.S. purse seine vessels based in the western Pacific Ocean (WPO) were allowed to make 32 trips into the ETP without counting against the 8,969 mt limit. Recent resolutions adopted by the IATTC member nations have addressed limits on fleet capacity. The United States and other IATTC member nations and Parties to the Agreement on the IDCP (Agreement) are responsible for domestic implementation of resolutions adopted each year. Under the U.S. Tuna Conventions Act (16

U.S.C. 951 *et seq.*), the Secretary of Commerce is authorized to promulgate regulations implementing the recommendations of the IATTC. This final rule implements the recent capacity resolutions adopted by the IATTC member nations.

The IDCPA was signed into law August 15, 1997, and became effective March 3, 1999. The IDCPA amends the MMPA, DPCIA (16 U.S.C. 1385), and Tuna Conventions Act. The IDCPA, together with previous declarations, became the blueprint for the Agreement on the IDCP. In May 1998, eight nations, including the United States, signed a binding, international agreement to implement the IDCP. The Agreement became effective on February 15, 1999, after four nations (United States, Panama, Ecuador, and Mexico) deposited their instruments of ratification, acceptance, or adherence with the depository for the Agreement. The IDCPA (16 U.S.C. 1413) mandates the Secretary of Commerce to issue and revise regulations, as appropriate, to implement the IDCP.

On October 29, 2004, NMFS published a proposed rule in the **Federal Register** (69 FR 63122), which would have: (1) established a register of U.S. vessels with a history of fishing in the ETP prior to June 28, 2002 (Vessel Register), and authorized only those vessels to purse seine for tuna in the ETP; (2) limited the aggregate active capacity of U.S. purse seine vessels in the ETP to 8,969 mt per year; (3) revised the requirements for maintaining and submitting tuna tracking and verification records; (4) ensured owners of U.S. vessels on the Vessel Register pay annual assessments; (5) prohibited commerce in tuna or tuna products bearing a label or mark referring to dolphins, porpoises, or marine mammals if the label or mark does not comply with the labeling and marking requirements of 16 U.S.C. 1385(d); and (6) prohibited interference with enforcement and inspection activities, submission of false information, and other activities that would undermine the effectiveness of the MMPA, IDCPA, and DPCIA.

This final rule is largely unchanged from the proposed rule. In this final rule, NMFS responds to public and government comments, and makes technical modifications.

#### Responses to Comments

NMFS solicited comments on the proposed rule. NMFS received seven comments letters during the 30-day comment period from U.S. Customs and Border Protection and the general public. Key issues and concerns are

summarized below and responded to as follows:

*Importation, Purchase, Shipment, Sale, and Transport*

*Comment 1:* The new paragraph proposed in 50 CFR 216.24(f)(3)(ii) will help NMFS monitor tuna shipments and may act as a deterrent to importers who may consider undermining current law.

*Response:* NMFS proposed this new paragraph to achieve the purposes described in the comment.

*Comment 2:* The proposed changes to require the name of the vessel on the Fisheries Certificate of Origin (FCO) regardless of the gear type used and to require importers, exporters, or processors who take custody of tuna shipments to sign and date FCOs in § 216.24(f)(4)(xi) and (f)(4)(xiv), respectively, should assist enforcement efforts.

*Response:* NMFS proposed these changes to achieve the purposes described in the comment.

*Comment 3:* The proposed rule will allow NMFS to enforce the dolphin-safe labeling standard at the wholesale, distribution and retail levels and not just against the party responsible for placing a dolphin related label on the product. This authority should increase pressure on businesses that distribute or sell labeled products to ensure that the product complies with the dolphin-safe labeling standard.

*Response:* The regulations at § 216.93(f) extend the recordkeeping and document submission requirements to wholesalers/distributors, but not to retailers. NMFS determined that extending these requirements to wholesalers/distributors is necessary to enforce the dolphin-safe labeling standard. However, extending this requirement to the retailers is overly burdensome due to the number of entities that would be affected by these recordkeeping and submission requirements. NMFS agrees with the commenter that the regulations should improve compliance with the dolphin-safe labeling standard through increased enforcement pressure at the wholesaler/distributor level of commerce.

*Comment 4:* Current regulations requiring importers to submit paper copies of import documents, specifically NOAA Form 370, to U.S. Customs and Border Protection (USCBP), Department of Homeland Security, are burdensome to that agency because the documentation then had to be transferred to NMFS. The proposed change to § 216.24(f)(3)(ii) requiring that documentation be submitted directly to NMFS, will reduce this burden and

allow for USCBP resources to be directed to other objectives.

*Response:* NMFS proposed this change to achieve the purposes described in the comment.

*Verification Requirements*

*Comment 5:* The proposed prohibition against distribution of Tuna Tracking Forms (TTFs) to private organizations in § 216.93(c)(5)(v) is not consistent with calls for transparency in the International Dolphin Conservation Program Act (IDCPA). This proposed prohibition undercuts the tracking and enforcement efforts NMFS is attempting to strengthen through this proposed rule. As an alternative, NMFS could eliminate the name of the vessel owner or captain on TTFs to protect the privacy of these individuals while providing the public with basic but important information.

*Response:* The Parties to the Agreement established, and are bound by, Rules of Confidentiality and a System for Tracking and Verifying Tuna. Section 3, paragraph 7 of the Agreement's System for Tracking and Verifying Tuna (available at <http://www.iattc.org/IDCPDocumentsENG.htm>) states: "TTFs shall be treated by the competent national authority as confidential official documents of the IDCP, consistent with Article XVIII of the [Agreement], and the [Agreement's] Rules of Confidentiality." Under paragraph (1)(b) of the Agreement's Rules of Confidentiality (available at <http://www.iattc.org/IDCPDocumentsENG.htm>), "information relating to unloadings or trade which is associated with individual vessels and/or companies, including Tuna Tracking Forms (TTFs) for those vessels" is treated as confidential.

Because TTFs are documents of the Secretariat to the Agreement and not NMFS, NMFS cannot distribute these documents even if certain sensitive information is eliminated. Further, TTFs are confidential documents with no provision for part, let alone all, of these documents to be released. Section 216.93(c)(5)(v) of the regulations, which is now finalized, is consistent with policies adopted by the Parties to the Agreement and remains unchanged in these final regulations.

*Comment 6:* The proposed changes to § 216.93(e) requiring the submittal and maintenance of records on all tuna imports (not just those from the ETP) should enhance NMFS' ability to track and verify shipments of tuna products.

*Response:* NMFS proposed these changes to achieve the purposes described in the comment.

*Comment 7:* The proposed changes to § 216.93(f) to include wholesalers and distributors of tuna products in the list of entities that must maintain records should complement enforcement efforts and in particular allow for more frequent audits and spot checks.

*Response:* NMFS proposed these changes to achieve the purposes described in the comment.

**Changes From the Proposed Rule**

*Changes to Vessel Permit Application Fees*

NMFS clarified in § 216.24(b)(6)(i) of this final rule that: (1) the amount of the vessel permit application fee may change and (2) the amount of the fee is determined by the Assistant Administrator, NMFS, in accordance with the NOAA Finance Handbook and printed on the vessel permit application form provided by the Administrator, Southwest Region. This was always NMFS' intent in § 216.24(b)(6)(i), but the intent may have not been clear in the way the proposed regulations were drafted.

*Changes to Observer Placement Fee*

NMFS clarified in § 216.24(b)(6)(iii) of this final rule that the observer placement fee supports both the placement of observers on individual vessels and the maintenance of the IATTC observer program or other approved observer program.

*Changes to Disposition of Fisheries Certificates of Origin*

NMFS added a mailing address for the Tuna Tracking and Verification Program, Southwest Region, in § 216.24(f)(3).

*Changes to Vessel Register*

NMFS clarified in § 300.22(b)(1)(ii) that purse seine vessels of 400 short tons (st) (362.8 mt) or less carrying capacity for which landings of tuna caught in the ETP comprise 50 percent or less of the vessel's total landings for a given calendar year are exempted from being listed on the Vessel Register. In the proposed rule, only purse seine vessels less than 400 st were included in this exception. This clarification is consistent with the description of vessels required to be listed on the Vessel Register provided in the preamble of the proposed rule.

NMFS clarified in § 300.22(b)(4) that each of the payments and permit applications listed in § 216.24(b) must be submitted in order for a vessel to be listed on the Vessel Register in the following calendar year. If the required payments and permit applications are not submitted to the Regional

Administrator, the vessel will not be listed on the Vessel Register in the following year. This was NMFS' original intention, but this was not clear in the proposed rule.

NMFS clarified in § 300.22(b)(4)(iii) that a vessel owner or managing owner may, at any time during the year, request that a vessel qualified to be listed on the Vessel Register be categorized as inactive for the remainder of the calendar year by submitting to the Administrator, Southwest Region, payment of the associated observer placement fee plus a 10 percent surcharge of the fee. In § 300.22(b)(6)(i), it was already clear that a vessel qualified to be listed on the Vessel Register may be added back to the Vessel Register as inactive at any time during the year.

In § 300.22(b)(5), NMFS removed paragraphs (iii) and (iv) because vessel owners are required to take specific actions (i.e., pay fees and submit permit applications) for vessels to be listed on the Vessel Register each year. The proposed rule incorrectly indicated that the default condition was for vessels to remain on the Vessel Register from year to year unless an owner did not meet these requirements in which case the vessel would be removed from the Vessel Register. In this final rule, NMFS also divided § 300.22(b)(5)(vi) of the proposed rule into two paragraphs. They appear in § 300.22(b)(5)(iii) and (iv) of this final rule.

NMFS changed § 300.22(b)(5)(v) to allow the Regional Administrator to remove a vessel from the Vessel Register if notified by either the United States Maritime Administration (MARAD) or the United States Coast Guard (USCG) that either the owner has submitted an application for transfer of the vessel to foreign registry and flag or that the documentation of the vessel will be or has been deleted for any reason. The failure to include MARAD in this provision in the proposed regulations was an oversight. NMFS made the change in the final rule because deletion of a vessel from U.S. documentation by the USCG can be immediate after MARAD provides its approval of the action.

NMFS' policy and intention is to remove each vessel from the Vessel Register upon notification by MARAD or USCG that either agency has determined that all requirements for flag transfer have been met and the only step remaining is for USCG to complete final paperwork to delete U.S. documentation for that vessel. NMFS maintains this policy in order to prevent U.S. capacity from transferring with the vessel on the Vessel Register and increasing the

capacity of the tuna purse seine fleet fishing in the ETP.

In this final rule, NMFS added a new § 300.22(b)(6) to clarify the process for removing vessels from the Vessel Register. According to the process, the Regional Administrator will promptly notify the vessel owner in writing of the removal of the vessel and the reasons for its removal. For vessel removals under § 300.22(b)(5)(iii), the Regional Administrator will not accept a request to reinstate the vessel to the Vessel Register for the term of the permit sanction. For vessel removals under § 300.22(b)(5)(iv), the Regional Administrator will not accept a request to reinstate the vessel to the Vessel Register until such time as payment is made on the penalty or penalty agreement, or other duration agreed upon between NOAA and the vessel owner. Section 300.22(b)(6) of the proposed rule is renumbered as § 300.22(b)(7) in this final rule.

NMFS clarified in § 300.22(b)(7)(v) (formerly 300.22(b)(6)(v)) that an owner or managing owner may request that a vessel replace a vessel of equal or greater carrying capacity previously removed from active status on the Vessel Register by submitting the observer placement fee, vessel permit application, and permit application processing fee in accordance with § 216.24(b). In addition, in order for the replacement vessel to be listed as active on the Vessel Register, the captain of the vessel must possess an operator permit issued under § 216.24(b).

#### **Classification**

##### *Executive Order 12866*

This final rule has been determined to be not "significant" under Executive Order 12866. NMFS prepared a Regulatory Impact Review (RIR)/Final Regulatory Flexibility Analysis (FRFA) for this action, included as Appendix A to the Environmental Assessment (EA) prepared on the proposed regulations. The EA, including the FRFA, is available on the Internet at the following address: <http://swr.nmfs.noaa.gov/>.

##### *Regulatory Flexibility Act*

Pursuant to procedures established to implement the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), NMFS prepared a RIR/FRFA for this action, included as Appendix A to the EA. The purposes of this action were described earlier in the preamble to the proposed rule, published on October 29, 2004 (69 FR 63122).

NMFS prepared an RIR/Initial Regulatory Flexibility Analysis (IRFA) for the proposed rule, which was

described in the classification section of the preamble to the proposed rule. The public comment period ended on November 29, 2004. Comments received and NMFS responses thereto are contained in the preamble. No comments were received on the economic impacts of the rule.

NMFS considered but rejected two alternatives to the preferred alternative which, (1) establishes a register of U.S. vessels with a history of fishing in the ETP prior to June 28, 2002, and requires only those vessels be authorized to purse seine for tuna in the ETP; (2) enables the National Marine Fisheries Service (NMFS) to maintain the Vessel Register annually, including to establish procedures for removing vessels for serious violations and to prevent U.S. capacity from increasing the regional capacity of the tuna purse seine fleet in the ETP; (3) limits the aggregate active capacity of U.S. purse seine vessels in the ETP to 8,969 mt per year; (4) revises the requirements for maintaining and submitting tuna tracking and verification records; (5) ensures owners of U.S. vessels on the Vessel Register pay annual assessments; (6) prohibits commerce in tuna or tuna products bearing a label or mark referring to dolphins, porpoises, or marine mammals if the label or mark does not comply with the labeling and marking requirements of 16 U.S.C. 1385(d); and (7) prohibits interference with enforcement and inspection activities, submission of false information, and other activities that would undermine the effectiveness of the MMPA, IDCPA and DPCIA.

The first alternative NMFS analyzed and rejected was the "no action" alternative. This alternative would not have implemented recommendations of the IATTC member nations or resolutions adopted by the Parties to the Agreement on the IDCP. The second alternative NMFS considered and rejected was the "variations of the preferred alternative" alternative. This alternative would retain the clearly required elements of the preferred alternative, but it would also include other measures not specifically required by internationally adopted resolutions. Generally, the objectives of resolutions adopted by the IATTC member nations and the Parties to the Agreement on the IDCP are clear; however, some provisions allow for agency discretion, either in implementing or interpreting the intent of the resolution. These discretionary areas provided the basis for this third alternative. For example, under this alternative NMFS considered discretionary areas with respect to management of fleet capacity, such as:

(1) limiting the annual aggregate active capacity of the U.S. purse seine vessels participating in the ETP tuna fishery to an amount less than 8,969 mt, (2) allowing all vessels owners to have an equal opportunity to be categorized as active on the Vessel Register from year to year regardless of the vessel's status in the prior year (i.e., there would be no incentive for a vessel being active in a prior year); and (3) not deterring against frivolous requests for vessels to be categorized as active on the Vessel Register.

NMFS rejected the "no action" alternative because it would not restrict annual participation by U.S. flag purse seine vessels in the fishery and would not implement needed prohibitions or refine tuna tracking procedures. Under the "no action" alternative, the United States would not be fulfilling its obligations under the IATTC and Agreement. Adopting this alternative would provide a precedent for other nations to ignore future international recommendations. NMFS rejected the second alternative which would entail taking independent action to address tuna conservation (e.g., quota, area closures, or other variations of the preferred alternative) because these approaches fail to address the potential for fleet capacity growth. Further, the United States does not have independent sources of information that would provide a sufficiently sound approach to support a departure from recommendations of the IATTC member nations and the Parties to the Agreement.

NMFS selected the preferred alternative, which imposes some new burdens on small entities. Specifically, the preferred alternative regulates several (i.e., one or two) small purse seine vessels (i.e., vessels of 400 st carrying capacity or less and classified as small business entities). Under the rule, several small vessels that have historically targeted tuna on a full-time basis, as well as large tuna purse seine vessels (in excess of 400 st carrying capacity), would be required to be listed as active on the Vessel Register and pay associated annual vessel assessments in order to fish for tuna in future years.

Updates to the tuna tracking and verification program; prohibitions against commerce in tuna or tuna products bearing a label or mark that refers to dolphins, porpoises, or marine mammals if the label or mark does not comply with the labeling and marking requirements of 16 U.S.C. 1385(d); and prohibitions against activities that undermine the implementation and enforcement of the MMPA, IDCPA and DPCIA will not significantly impact

small business entities. However, the rule will impose some new or increased burdens to small businesses that will ensure NMFS' continued ability to verify the dolphin-safe status of tuna. These burdens are largely related to new tuna tracking and verification procedures and will affect importers, exporters, wholesalers/distributors and transshippers.

NMFS selected the preferred alternative because it achieves NMFS' primary objectives to establish domestic measures consistent with international resolutions adopted by the IATTC and the Parties to the Agreement, as well as other procedural modifications that NMFS determined to be necessary after several years experience managing the U.S. tuna purse seine fleet in the ETP and implementing a domestic tuna tracking and verification program. Specifically, the preferred alternative both minimizes the potential for significant economic impacts to a variety of entities and implements measures to (1) establish a register of U.S. vessels with a history of fishing in the ETP prior to June 28, 2002, and require only those vessels be authorized to purse seine for tuna in the ETP; (2) enable NMFS to maintain the Vessel Register annually, including to establish procedures for removing vessels for serious violations and to prevent U.S. capacity from increasing the regional capacity of the tuna purse seine fleet in the ETP; (3) limit the aggregate active capacity of U.S. purse seine vessels in the ETP to 8,969 mt per year; (4) revise the requirements for maintaining and submitting tuna tracking and verification records; (5) ensure owners of U.S. vessels on the Vessel Register pay annual assessments; (6) prohibit commerce in tuna or tuna products bearing a label or mark referring to dolphins, porpoises, or marine mammals if the label or mark does not comply with the labeling and marking requirements of 16 U.S.C. 1385(d); and (7) prohibit interference with enforcement and inspection activities, submission of false information, and other activities that would undermine the effectiveness of the MMPA, IDCPA and DPCIA.

As discussed in previous paragraphs, the "no action" and "independent action" alternatives were rejected because they would impose greater burdens than the preferred alternative and/or would not implement the seven measures stated above. Four specific examples of the burdens NMFS considered in selecting the preferred alternative follow. First, in selecting the preferred alternative NMFS provides reasons for removing vessels from the

Vessel Register (e.g., the owner of the vessel is applying to transfer the vessel to a foreign flag, the vessel has sunk, etc.) in order to free up opportunities for other vessels to participate in the fishery. Second, the preferred alternative contains a deterrent for a vessel owner who requests to have a vessel listed as active on the Vessel Register but does not utilize that active status. Vessels for which these frivolous requests for active status were made would receive the lowest priority consideration for active status the following year, allowing other vessel owners to attain higher priority. Third, NMFS considered but rejected taking independent action to increase the length of time that records must be maintained by exporters, transshippers, importers, processors and wholesalers/distributors from 2 years to 3 years because this action would be overly burdensome to these entities. Fourth, NMFS considered but rejected taking independent action to decrease the length of time within which these entities are required to submit tracking and verification documentation to the Regional Administrator to less than 30 days. This action was rejected because NMFS found it would create an additional burden to these entities without substantially strengthening NMFS' ability to track and verify the dolphin-safe status of tuna.

#### *Paperwork Reduction Act*

This final rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) that were discussed in the proposed rule. In Section 216.93(f) of this final rule, wholesalers/distributors are included in the list of entities required to produce records relative to tracking and verification of tuna to the Administrator, Southwest Region. This collection-of-information requirement was approved by the Office of Management and Budget (OMB) on February 6, 2003, under control number 0648-0387. The public reporting burden for this collection is estimated to average 30 minutes for a wholesaler/distributor to produce records.

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

The preceding public reporting burden estimates for collections of information include time for reviewing instructions, searching existing data sources, gathering and maintaining the

data needed, and completing and reviewing the collection of information.

Send written comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden to NMFS (see ADDRESSES) and David Rostker, OMB, by e-mail at David\_Rostker@omb.eop.gov or by fax to 202-395-7285.

Endangered Species Act

NMFS prepared a Biological Opinion for the interim final rule to implement the IDCPA in December 1999, concluding that fishing activities conducted under the interim final rule are not likely to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS or result in the destruction or adverse modification of critical habitat. NMFS is unaware of any new information that would indicate this action may affect listed species in a manner or to an extent not previously considered, nor do the final regulations modify the fishery in a manner that causes an effect to listed species not previously considered in the Biological Opinion. Therefore, NMFS has determined that the conclusions and incidental take statement of the Biological Opinion remain valid and reinstitution of consultation is not required. NMFS continues to monitor annual sea turtle takes and mortalities in the U.S. tuna purse seine fishery operating in the ETP to ensure that levels are within those analyzed in the Biological Opinion and authorized in the amended Incidental Take Statement.

National Environmental Policy Act

NMFS prepared a draft Environmental Assessment (EA) for the proposed rule. NMFS did not receive any comments on the draft EA. As a result, NMFS prepared an EA for these final regulations and the Assistant Administrator for Fisheries concluded that there will be no significant impact on the human environment as a result of this final rule. A copy of the EA is available from NMFS (see ADDRESSES) or at: http://swr.nmfs.noaa.gov.

List of Subjects

50 CFR Part 216

Fish, Marine mammals, Reporting and recordkeeping requirements.

50 CFR Part 300

International fisheries regulations; Pacific tuna fisheries.

Dated: April 5, 2005.

Rebecca Lent, Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 216 and 300 are amended as follows:

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

1. The authority citation for part 216 continues to read as follows:

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

2. In § 216.3 the definition for “Fisheries Certificate of Origin” is revised and a definition for “South Pacific Tuna Treaty” is added to read as follows:

§ 216.3 Definitions.

Fisheries Certificate of Origin, or FCO, means NOAA Form 370, as described in § 216.24(f)(4).

South Pacific Tuna Treaty means the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America (50 CFR part 300, subpart D).

3. A new § 216.17 is added to subpart B to read as follows:

§ 216.17 General prohibitions.

It is unlawful for any person to: (a) Assault, resist, oppose, impede, intimidate, threaten, or interfere with any authorized officer in the conduct of any search, inspection, investigation or seizure in connection with enforcement of the MMPA, DPCIA, or IDCPA.

(b) Interfere with, delay, or prevent by any means the apprehension of another person, knowing that such person has committed any act prohibited by the MMPA.

(c) Resist a lawful arrest for any act prohibited under the MMPA.

(d) Make any false statement, oral or written, to an authorized officer concerning any act under the jurisdiction of the MMPA, DPCIA, IDCPA, or attempt to do any of the above.

(e) Interfere with, obstruct, delay, or prevent by any means an investigation, search, seizure, or disposition of seized property in connection with enforcement of the MMPA, DPCIA, or IDCPA.

4. In § 216.24 paragraphs (b)(4) introductory text, (b)(6)(i), (b)(6)(iii), the

introductory text to (f)(3), (f)(3)(ii) and (iii), (f)(4)(xi), (f)(4)(xiv) and (f)(12) are revised and a new (f)(3)(iv) is added to read as follows:

§ 216.24 Taking and related acts incidental to commercial fishing operations by tuna purse seine vessels in the eastern tropical Pacific Ocean.

\* \* \* \* \*

(b) \* \* \* (4) Application for vessel permit. The owner or managing owner of a purse seine vessel may apply for a permit from the Administrator, Southwest Region, allowing at least 15 days for processing. All vessel permit applications must be faxed to (562) 980-4027. An owner or managing owner requesting to have a vessel in excess of 400 st (362.8 mt) carrying capacity for which a DML was requested categorized as active on the Vessel Register under § 300.22(b)(4)(i) of this title must submit to the Administrator, Southwest Region, the vessel permit application, payment of the observer placement fee under paragraph (b)(6)(iii) of this section and payment of the vessel permit application processing fee no later than September 15 of the year prior to the year for which the DML was requested. The owner or managing owner of a vessel in excess of 400 st (362.8 mt) carrying capacity not requesting a DML must submit the vessel permit application, payment of the observer placement fee, and payment of the vessel permit application processing fee no later than November 30 of the year prior to the year for which the vessel permit was requested. An application must contain:

\* \* \* \* \*

(6) \* \* \* (i) Vessel permit application fees. Payment of the permit application fee is required before NMFS will issue a permit. The Assistant Administrator may change the amount of this fee at any time if a different fee is determined in accordance with the NOAA Finance Handbook. The amount of the fee will be printed on the vessel permit application form provided by the Administrator, Southwest Region.

\* \* \* \* \*

(iii) Observer placement fee. The observer placement fee supports the placement of observers on individual vessels, and maintenance of the observer program, as established by the IATTC or other approved observer program.

(A) The owner or managing owner of a vessel for which a DML has been requested must submit the observer placement fee, as established by the IATTC or other approved observer

program, to the Administrator, Southwest Region, no later than September 15 of the year prior to the calendar year for which the DML was requested. Payment of the observer placement fee must be consistent with the fee for active status on the Vessel Register under § 300.22(b)(4) of this title.

(B) The owner or managing owner of a vessel for which a DML has not been requested, but that is listed on the Vessel Register, as defined in § 300.21 of this title, must submit payment of the observer placement fee, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region, no later than November 30 of the year prior to the calendar year in which the vessel will be listed on the Vessel Register. Payment of the observer placement fee must be consistent with the vessel's status, either active or inactive, on the Vessel Register in § 300.22(b)(4) of this title.

(C) The owner or managing owner of a purse seine vessel that is licensed under the South Pacific Tuna Treaty must submit the observer placement fee, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region, prior to obtaining an observer and entering the ETP to fish. Consistent with § 300.22(b)(1)(i) of this title, this class of purse seine vessels is not required to be listed on the Vessel Register under § 300.22(b)(4) of this title in order to purse seine for tuna in the ETP during a single fishing trip per calendar year of 90 days or less. Payment of the observer placement fee must be consistent with the fee for active status on the Vessel Register under § 300.22(b)(4) of this title.

(D) The owner or managing owner of a purse seine vessel listed as inactive on the Vessel Register at the beginning of the calendar year and who requests to replace a vessel removed from active status on the Vessel Register under § 300.22(b)(4) of this title during the year, must pay the observer placement fee associated with active status less the observer placement fee associated with inactive status that was already paid before NMFS will request the IATTC Secretariat change the status of the vessel from inactive to active.

(E) The owner or managing owner of a purse seine vessel not listed on the Vessel Register at the beginning of the calendar year and who requests to replace a vessel removed from active status on the Vessel Register under § 300.22(b)(4) of this title during the year, must pay the observer placement fee associated with active status before

NMFS will request the IATTC Secretariat change the status of the vessel to active.

(F) Payments received after the dates specified in paragraphs (b) (6) (iii)(A) or (B) of this section will be subject to a 10 percent surcharge. The Administrator, Southwest Region, will forward all observer placement fees described in this section to the IATTC or to the applicable organization approved by the Administrator, Southwest Region.

\* \* \* \* \*

(f) \* \* \*

(3) *Disposition of Fisheries Certificates of Origin.* The FCO described in paragraph (f)(4) of this section may be obtained from the Administrator, Southwest Region, or downloaded from the Internet at <http://swr.nmfs.noaa.gov/noaa370.htm>. \* \* \*

(ii) FCOs and associated certifications, if any, that accompany imported shipments of tuna must be submitted by the importer of record to the Tuna Tracking and Verification Program, Southwest Region, within 30 days of the shipment's entry into the commerce of the United States. FCOs submitted via mail should be sent to Tuna Tracking and Verification Program, Southwest Region, P.O. Box 32469, Long Beach, CA 90832-2469. Copies of the documents may be submitted electronically using a secure file transfer protocol (FTP) site. Importers of record interested in submitting FCOs and associated certifications via FTP may contact a representative of the Tuna Tracking and Verification Program at the following email address:

*SWRTuna.Track@noaa.gov*. The Tuna Tracking and Verification Program will facilitate secure transfer and protection of certifications by assigning a separate electronic folder for each importer. Access to the electronic folder will require a user identification and password. The Tuna Tracking and Verification Program will assign each importer a unique user identification and password. Safeguarding the confidentiality of the user identification and password is the responsibility of the importer to whom they are assigned. Copies of the documents may also be submitted via mail either on compact disc or as hard copies. All electronic submissions, whether via FTP or on compact disc, must be in either Adobe Portable Document Format (PDF) or as an image file embedded in a Microsoft Word, Microsoft PowerPoint, or Corel WordPerfect file.

(iii) FCOs that accompany imported shipments of tuna destined for further processing in the United States must be

endorsed at each change in ownership and submitted to the Administrator, Southwest Region, by the last endorser when all required endorsements are completed.

(iv) Importers and exporters are required to retain their records, including FCOs, import or export documents, invoices, and bills of lading for 2 years, and such records must be made available within 30 days of a request by the Secretary or the Administrator, Southwest Region.

(4) \* \* \*

(xi) The name of the harvesting vessel;

\* \* \* \* \*

(xiv) Each additional importer, exporter, or processor who takes custody of the shipment must sign and date the form to certify that the form and attached documentation accurately describes the shipment of fish that they accompany.

\* \* \* \* \*

(12) *Market Prohibitions.* (i) It is unlawful for any person to sell, purchase, offer for sale, transport, or ship in the United States, any tuna or tuna products unless the tuna products are either:

(A) Dolphin-safe under subpart H of this part; or

(B) Harvested in compliance with the IDCP by vessels under the jurisdiction of a nation that is a member of the IATTC or has initiated, and within 6 months thereafter completes, all steps required by an applicant nation to become a member of the IATTC.

(ii) It is unlawful for any exporter, transshipper, importer, processor, or wholesaler/distributor to possess, sell, purchase, offer for sale, transport, or ship in the United States, any tuna or tuna products bearing a label or mark that refers to dolphins, porpoises, or marine mammals unless the label or mark complies with the requirements of 16 U.S.C. 1385(d).

\* \* \* \* \*

■ 5. In § 216.93, paragraphs (c)(5)(v), (e) and (f) are revised to read as follows:

**§ 216.93 Tracking and verification program.**

\* \* \* \* \*

(c) \* \* \*

(5) \* \* \*

(v) TTFs are confidential documents of the IDCP. Vessel captains and managing offices may not provide copies of TTFs to any representatives of private organizations or non-member states.

\* \* \* \* \*

(e) *Tracking imports.* All tuna products, except fresh tuna, that are imported into the United States must be

accompanied by a properly certified FCO as required by § 216.24(f)(2). For tuna tracking purposes, copies of FCOs and associated certifications must be submitted by the importer of record to the Administrator, Southwest Region, within 30 days of the shipment's entry into the commerce of the United States as required by § 216.24(f)(3)(ii).

(f) *Verification requirements*—(1) *Record maintenance.* Any exporter, transshipper, importer, processor, or wholesaler/distributor of any tuna or tuna products must maintain records related to that tuna for at least 2 years. These records include, but are not limited to: FCOs and required certifications, any reports required in paragraphs (a), (b) and (d) of this section, invoices, other import documents, and trip reports.

(2) *Record submission.* Within 30 days of receiving a shipment of tuna or tuna products, any exporter, transshipper, importer, processor, wholesaler/distributor of tuna or tuna products must submit to the Administrator, Southwest Region, all corresponding FCOs and required certifications for those tuna or tuna products.

(3) *Audits and spot checks.* Upon request of the Administrator, Southwest Region, any exporter, transshipper, importer, processor, or wholesaler/distributor of tuna or tuna products must provide the Administrator, Southwest Region, timely access to all pertinent records and facilities to allow for audits and spot-checks on caught, landed, stored, and processed tuna.

\* \* \* \* \*

**PART 300—INTERNATIONAL FISHERIES REGULATIONS**

■ 1. The authority citation for part 300 continues to read as follows:

**Authority:** 16 U.S.C. 951–961 and 971 *et seq.*, unless otherwise noted.

■ 2. In § 300.21 definitions for “South Pacific Tuna Treaty” and “Vessel Register” are added to read as follows:

**§ 300.21 Definitions.**

\* \* \* \* \*

*South Pacific Tuna Treaty* means the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America (50 CFR part 300, subpart D).

\* \* \* \* \*

*Vessel Register* means the regional register of vessels authorized to purse seine for tuna in the Convention Area, as established by the Inter-American

Tropical Tuna Commission on June 28, 2002.

■ 3. In § 300.22 the section heading and paragraph (b) is revised to read as follows:

**§ 300.22 Yellowfin tuna—recordkeeping and written reports.**

\* \* \* \* \*

(b) *Vessel register.* Except as provided under paragraph (b)(1) of this section, vessels must be listed on the Vessel Register and categorized as active under paragraph (b)(4)(i) of this section in order to purse seine for tuna in the Convention Area.

(1) *Exceptions.* The following classes of vessels are exempted from being listed on the Vessel Register to purse seine for tuna in the Convention Area:

(i) Vessels licensed under the South Pacific Tuna Treaty that exercise an option to fish in the Convention Area for a single trip each year, provided that the total number of optional trips does not exceed 32 in a given calendar year. Each optional trip in the Convention Area may not exceed 90 days in duration.

(ii) Vessels of 400 st (362.8 mt) or less carrying capacity for which landings of tuna caught in the Convention Area comprise 50 percent or less of the vessel's total landings, by weight, for a given calendar year.

(2) *Requirements for inclusion on the vessel register.* The Vessel Register shall include, consistent with resolutions of the IATTC, only vessels that fished in the Convention Area prior to the creation of the Vessel Register on June 28, 2002. New vessels may be added to the Vessel Register at any time to replace those previously removed by the Regional Administrator, provided that the total capacity of the replacement vessel or vessels does not exceed that of the vessel or vessels being replaced.

(3) *Vessel information.* The owner of any fishing vessel that uses purse seine, longline, drift gillnet, harpoon, or troll fishing gear to harvest tuna in the Convention Area for sale or a person authorized in writing to serve as agent for the owner must provide such information about the vessel and its characteristics as requested by the Regional Administrator, to conform to IATTC actions relative to the Vessel Register. This information initially includes, but is not limited to, vessel name and registration number; a photograph of the vessel with the registration number showing and legible; vessel length, beam and moulded depth; gross tonnage and hold capacity in cubic meters and tonnage; engine horsepower; date and place

where built; and type of fishing method or methods used.

(4) *Vessel register status.* For a vessel to be categorized as either “active” or “inactive” on the Vessel Register in the following calendar year, the vessel owner or managing owner must submit to the Regional Administrator under § 216.24(b) of this title, the observer placement fee, vessel permit application, and permit application processing fee for the vessel.

(i) *Active status.* As early as August 1 of each year, vessel owners or managing owners may submit to the Regional Administrator, a vessel permit application and payment of the permit application fee and observer placement fee for each vessel in excess of 400 st (362.8 mt) carrying capacity qualified to be listed on the Vessel Register under paragraph (b)(2) of this section to have a vessel categorized as active for the following calendar year. Vessel permit applications may not be submitted via regular mail; they must be faxed to (562) 980–4027. Owners or managing owners of vessels of 400 st (362.8 mt) carrying capacity or less must only submit payment of the observer placement fee associated with active status in order to request a small purse seine vessel be categorized as active for the following calendar year. The Regional Administrator must receive the faxed vessel permit application and payment of the observer placement fee and permit application processing fee no later than September 15 for vessels for which a DML was requested for the following year and no later than November 30 for vessels for which a DML was not requested for the following year. Submission of the vessel permit application and payment of the observer placement fee and permit application processing fee will be interpreted by the Regional Administrator as a request for a vessel to be categorized as active. The following restrictions apply to active status:

(A) The cumulative carrying capacity of all vessels categorized as active on the Vessel Register may not exceed 8,969 mt in a given year;

(B) A vessel may not be added to active status on the Vessel Register unless the captain of the vessel has obtained a valid operator permit under § 216.24(b)(2) of this title;

(C) For 2005 only, requests for vessels will be prioritized on a first-come, first-served basis according to the date and time the fax is received in the office of the Regional Administrator;

(D) Requests for active status for 2006 and subsequent years will be prioritized according to the following hierarchy:

(1) Requests received for vessels that were categorized as active in the previous year, beginning with the vessel's status in 2005, unless the request for active status was determined to be frivolous by the Regional Administrator under paragraph (b)(4)(ii) of this section;

(2) Requests received for vessels that were categorized as inactive under paragraph (b)(4)(iii) of this section in the previous year, beginning with the vessel's status in 2005;

(3) Requests for vessels not described in paragraphs (b)(4)(i) or (2) of this section will be prioritized on a first-come, first-served basis according to the date and time stamp printed by the incoming fax machine upon receipt, provided that the associated observer placement fee is paid by the applicable deadline described in § 216.24(b)(6)(iii) of this title; and

(4) Requests received from owners or managing owners of vessels that were determined, by the Regional Administrator, to have made a frivolous request for active status under paragraph (b)(4)(ii) of this section.

(i) *Frivolous requests for active status.* Beginning with requests made for 2005, a request for active status under paragraph (b)(4)(i) of this section will be considered frivolous, unless as a result of force majeure or other extraordinary circumstances as determined by the Regional Administrator if, for a vessel categorized as active in a given calendar year, less than 20 percent of the vessel's total landings, by weight, in that same year is comprised of tuna harvested by purse seine in the Convention Area.

(iii) *Inactive status.* From August 1 through November 30 of each year, vessel owners or managing owners may request that vessels qualified to be listed on the Vessel Register under paragraph (b)(2) of this section be categorized as inactive for the following calendar year by submitting to the Regional Administrator payment of the associated observer placement fees. At any time during the year, a vessel owner or managing owner may request that a vessel qualified to be listed on the Vessel Register under paragraph (b)(2) of this section be categorized as inactive for the remainder of the calendar year by submitting to the Regional

Administrator payment of the associated observer placement fee plus a 10 percent surcharge of the fee. Payment of the observer placement fee consistent with inactive status will be interpreted by the Regional Administrator as a request for the vessel to be categorized as inactive.

(5) *Removal from the vessel register.* A vessel may be removed from the Vessel Register by the Regional Administrator:

- (i) If the vessel has sunk;
- (ii) Upon written request by the vessel's owner or managing owner;
- (iii) Following a final agency action on a permit sanction for a violation;
- (iv) For failure to pay a penalty or for default on a penalty payment agreement resulting from a final agency action for a violation; or

(v) If the U.S. Maritime Administration or the U.S. Coast Guard notifies NMFS that:

(A) The owner has submitted an application for transfer of the vessel to foreign registry and flag; or

(B) The documentation for the vessel will be or has been deleted for any reason.

(6) *Process for Removal from the Vessel Register.* When a vessel is removed from the Vessel Register under paragraph (b)(5) of this section, the Regional Administrator shall promptly notify the vessel owner in writing of the removal and the reasons therefor. For a removal from the Vessel Register under § 300.22(b)(5)(iii), the Regional Administrator will not accept a request to reinstate the vessel to the Vessel Register for the term of the permit sanction. For a removal from the Vessel Register under § 300.22(b)(5)(iv), the Regional Administrator will not accept a request to reinstate the vessel to the Vessel Register until such time as payment is made on the penalty or penalty agreement, or such other duration as NOAA and the vessel owner may agree upon.

(7) *Procedures for replacing vessels removed from the Vessel Register.* (i) A vessel previously listed on the Vessel Register, but not included for a given year or years, may be added back to the Vessel Register and categorized as inactive at any time during the year, provided the owner of the vessel pays the observer placement fee associated

with inactive status plus a 10 percent surcharge of the fee.

(ii) A vessel may be added to the Vessel Register and categorized as active in order to replace a vessel removed from active status under paragraph (b)(5) of this section, provided the total carrying capacity of active vessels does not exceed 8,969 mt and the owner submits a complete request under paragraph (b)(7)(iv) or (v) of this section.

(iii) After a vessel categorized as active is removed from the Vessel Register, the Regional Administrator will notify owners or managing owners of vessels categorized as inactive that replacement capacity is available on the active list of the Vessel Register. In the event that owners of inactive vessels do not request to replace a removed vessel, the Regional Administrator will notify owners of vessels eligible for, but not included on, the Vessel Register that replacement capacity is available on the active list of the Vessel Register.

(iv) The owner or managing owner of a purse seine vessel of 400 st (362.8 mt) carrying capacity or less may request a vessel be categorized as active to replace a vessel removed from the Vessel Register by submitting payment of the observer placement fee to the Regional Administrator.

(v) The owner or managing owner of a purse seine vessel in excess of 400 st (362.8 mt) carrying capacity may request a vessel be categorized as active to replace a vessel removed from the Vessel Register by submitting to the Regional Administrator under § 216.24(b) of this title, the observer placement fee, vessel permit application, and permit application processing fee for the replacement vessel. The replacement vessel will be eligible to be categorized as active on the Vessel Register if it has a carrying capacity equal to or less than the vessel being replaced, and the captain of the replacement vessel possesses an operator permit under § 216.24(b) of this title.

(vi) The Regional Administrator will forward requests to replace vessels removed from the Vessel Register within 15 days of receiving each request.

[FR Doc. 05-7312 Filed 4-11-05; 8:45 am]

BILLING CODE 3510-22-S

Safety of Railroad Bridges, which FRA is completing expeditiously as a non-regulatory proceeding, will benefit railroad bridge owners by giving them prompt advice regarding the development of their bridge safety programs, and that the early work to be done railroad bridge owners in conformance with this recommendation will benefit the owners and the public when FRA issues regulations conforming to the legislative mandate.

#### *Effect of the Amendment to This Statement of Policy*

This amendment to Policy contains guidelines for the development of effective programs for the management and safety of railroad bridges. It is meant to be advisory in nature. It does not have the force of regulations under which FRA ordinarily issues violations and assesses civil penalties. The guidelines contained herein represent the general criteria against which FRA will evaluate each railroad's bridge inspection and management program.

Even without specific bridge safety regulations, FRA maintains authority to perform safety inspections of any railroad facility and to issue emergency orders under 49 U.S.C. 20104, 49 U.S.C. 20107, and 49 CFR part 209. This amendment to the Policy does not change FRA's statutory emergency order authority with respect to railroad bridge safety. This emergency order authority permits FRA, if necessary, to remove from service, or otherwise impose conditions on any railroad operation which, in the judgment of the agency, poses an emergency situation involving a hazard of death or personal injury. FRA will not hesitate to use this authority if circumstances warrant.

#### **List of Subjects in 49 CFR Part 213**

Penalties, Railroad safety, Railroads.

#### **PART 213—[AMENDED]**

■ 1. The authority citation for part 213 continues to read as follows:

**Authority:** 49 U.S.C. 20102–20114 and 20142; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

■ 2. Section 14 is added to Appendix C, Part 213 to read as follows:

#### **Appendix C to Part 213—Statement of Agency Policy on the Safety of Railroad Bridges**

\* \* \* \* \*

#### *14. Railroad Implementation of Bridge Safety Programs*

FRA recommends that each track owner or other entity which is responsible for the integrity of bridges which support its track

adopt and implement an effective and comprehensive program to ensure the safety of its bridges. The bridge safety program should incorporate the following essential elements, applied according to the configuration of the railroad and its bridges. The basis of the program should be in one comprehensive and coherent document which is available to all railroad personnel and other persons who are responsible for the application of any portion of the program.

The program should include:

(a) Clearly defined roles and responsibilities of all persons who are designated or authorized to make designations regarding the integrity of the track owner's bridges. The definitions may be made by position or by individual;

(b) Provisions for a complete inventory of bridges that carry the owner's track, to include the following information on each bridge:

(1) A unique identifier, such as milepost location and a subdivision code;

(2) The location of the bridge by nearest town or station, and geographic coordinates;

(3) The name of the geographic features crossed by the bridge;

(4) The number of tracks on the bridge;

(5) The number of spans in the bridge;

(6) The lengths of the spans; and

(7) Types of construction of:

(i) Substructure;

(ii) Superstructure; and

(iii) Deck;

(8) Overall length of the bridge.

(9) Dates of:

(i) Construction;

(ii) Major renovation; and

(iii) Strengthening;

(10) Identification of entities responsible for maintenance of the bridge or its different components;

(c) Known capacity of its bridges as determined by rating by competent engineer or by design documents;

(d) Procedures for the control of movement of high, wide or heavy loads exceeding the nominal capacity of bridges;

(e) Instructions for the maintenance of permanent records of design, construction, modification, and repair;

(f) Railroad-specific procedures and standards for design and rating of bridges;

(g) Detailed bridge inspection policy, including:

(1) Inspector Qualifications.

(i) Bridge experience or appropriate educational training.

(ii) Training on bridge inspection procedures.

(iii) Training on Railroad Workplace Safety.

(2) Type and frequency of inspection.

(i) Periodic (at least annually).

(ii) Underwater.

(iii) Special.

(iv) Seismic.

(v) Cursory inspections of overhead bridges that are not the responsibility of the railroad.

(3) Inspection schedule for each bridge.

(4) Documentation of inspections.

(i) Date.

(ii) Name of inspector.

(iii) Reporting Format.

(iv) Coherence of information.

(5) Inspection Report Review Process.

(6) Record retention.

(7) Tracking of critical deficiencies to resolution;

(h) Provide for the protection of train operations following an inspection, noting a critical deficiency, repair, modification or adverse event and should

(1) Include a listing of qualifications of personnel permitted to authorize train operations following an adverse event; and

(i) Detailed internal program audit procedures to ensure compliance with the provisions of the program.

Issued in Washington, DC, on January 7, 2009.

**Clifford C. Eby,**

*Acting Administrator.*

[FR Doc. E9–436 Filed 1–12–09; 8:45 am]

**BILLING CODE 4910–06–P**

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## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Parts 216 and 300**

[Docket No. 070717339–81648–02]

**RIN 0648–AV37**

#### **International Fisheries; Pacific Tuna Fisheries; Revisions to Regulations for Vessels Authorized to Fish for Tuna and Tuna-like Species in the Eastern Tropical Pacific Ocean and to Requirements for the Submission of Fisheries Certificates of Origin**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to revise regulations governing vessels authorized by the United States to fish for tuna and tuna-like species in the eastern tropical Pacific Ocean (ETP). This final rule updates and clarifies regulations promulgated by NMFS to implement the Marine Mammal Protection Act, the Tuna Conventions Act, the Dolphin Protection Consumer Information Act, and resolutions adopted by the Inter-American Tropical Tuna Commission (IATTC) and by the Parties to the Agreement on the International Dolphin Conservation Program (AIDCP). This rule modifies the procedures and requirements for the Vessel Register, the list of vessels authorized to fish for tuna and tuna-like species in the ETP. Requirements for the submission of certifications by importers are also revised. This rule is intended to clarify the regulations, facilitate management of U.S. vessels,

and update the regulations to be consistent with resolutions adopted by the members of the IATTC and the Parties to the AIDCP.

**DATES:** This final rule is effective February 12, 2009.

**ADDRESSES:** Supporting documents (including the Categorical Exclusion memo, Regulatory Flexibility Act certification memo, and Regulatory Impact Review) regarding this final rule can be found at the Federal eRulemaking Portal Web site at <http://www.regulations.gov>. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS, Southwest Regional Office, 501 West Ocean Blvd, Suite 4200, Long Beach, CA 90802, and by e-mail to [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov), or by fax to (202) 395-7285.

**FOR FURTHER INFORMATION CONTACT:** Susan Wang, NMFS, Southwest Region, Protected Resources Division, at (562) 980-4199.

**SUPPLEMENTARY INFORMATION:**

**Background**

The United States is a member of the IATTC, established in 1949 under the Convention for the Establishment of an Inter-American Tropical Tuna Commission (Convention). The IATTC provides an international forum to ensure the effective conservation and management of highly migratory species of fish in the Convention Area. The Convention Area is defined to include waters of the ETP bounded by the coast of the Americas, the 40° N. latitude and 40° S. latitude, and the 150° W. longitude (50 CFR 300.21). Resolutions under the IATTC are adopted by consensus and are binding on the members of the IATTC. The Tuna Conventions Act (16 U.S.C. 951 *et seq.*) authorizes the Secretary of Commerce to promulgate regulations implementing IATTC resolutions. The Secretary's authority has been delegated to the Assistant Administrator for Fisheries, NMFS.

The United States is also a Party to the AIDCP. The AIDCP was established in May 1998 when eight nations, including the United States, signed a binding, international agreement to implement the International Dolphin Conservation Program (IDCP). The agreement became effective on February 15, 1999, and provides greater protection to dolphin stocks and enhanced conservation of yellowfin tuna and other living marine resources in the ETP. The IDCP and resolutions adopted by the Parties to the AIDCP are

implemented domestically under the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*).

Regulations implementing the International Dolphin Conservation Program, Tuna Conventions Act, DPCIA, and resolutions adopted by the IATTC and AIDCP concerning tuna fisheries in the ETP are codified at 50 CFR parts 216 and 300. On July 11, 2008, NMFS published a proposed rule in the **Federal Register** (73 FR 39915), to revise these regulations in order to facilitate management of U.S. vessels authorized to fish for tuna and tuna-like species in the Convention Area and to ensure consistency between the operation of these vessels and resolutions adopted by the IATTC and the IDCP. In that proposed rule, NMFS solicited public comment on revisions to the regulations to require: (1) the collection of a vessel photograph and vessel information from all commercial fishing vessels and commercial passenger fishing vessels (CPFVs) authorized to fish for tuna and tuna-like species in the Convention Area; (2) annual written notification to list a small purse seine vessel as active or inactive; (3) written notification of the intent to transfer a purse seine vessel appearing on the IATTC's Vessel Register to foreign registry and flag; (4) payment of an ETP purse seine vessel operator permit application fee; (5) for vessels authorized to set on dolphins, vessel inspections twice per year and the use of high-intensity floodlights; (6) requests for active status on the IATTC Vessel Register to be treated as frivolous if a purse seine vessel was listed as active but did not fish for tuna at all in the Convention Area; (7) removal of vessels from the Vessel Register if the owner lacks valid vessel documentation, or, for tuna purse seine vessels, if the owner has made a frivolous request or has notified NMFS of the intent to transfer the vessel to foreign registry and flag; (8) submission of certifications by importers to be within 10 days of importing a shipment into the United States, rather than within 30 days; and (9) electronic submissions of certifications to be in Portable Document Format (PDF). Public comment was also solicited on numerous non-substantive modifications and clarifications to the regulations.

In this final rule, NMFS adopts most of the revisions in the proposed rule, as described above. In this final rule, NMFS responds to public comments and makes technical modifications, described in more detail under the section titled "Changes from the Proposed Rule."

**Responses to Comments**

NMFS solicited public comments on the proposed rule. A public hearing was held on July 28, 2008, and the public comment period closed on August 11, 2008. One comment was received at the public hearing and 4 comments by fax, standard mail, or electronically from representatives of the tuna import and tuna fishing industry, the Marine Mammal Commission (an independent agency of the U.S. government), and non-profit organizations. The key issues and concerns are summarized below and responded to as follows:

*General Comments on the Purpose of the Proposed Revisions*

*Comment 1:* One commenter asked for additional explanation regarding the need for and appropriateness of the proposed changes, especially those governing the tuna purse seine portion of the Vessel Register, given the low level of participation in the U.S. ETP tuna purse seine fishery. In particular, the commenter noted that: (1) the U.S. ETP purse seine fleet has not come near to approaching its 8,969-metric ton (mt) capacity limit; (2) currently, there are only two purse seine vessels categorized as active on the Vessel Register; and (3) the majority of U.S. Vessels on the IATTC Vessel Register are non-purse seine vessels, but the proposed regulations would have limited effects on the operations of these vessels.

*Response:* Even if our vessel numbers are relatively few, the United States is still obligated by the AIDCP and the Convention to ensure that U.S. vessels and persons operate in compliance with our treaty obligations. Participation of U.S. vessels in the ETP tuna purse seine fishery has fluctuated over the years. Although current participation is low, NMFS recognizes that conditions could change and participation increase again. It is also important to prevent the transfer of capacity to other nations to fulfill our commitment to limiting the total purse seine fleet capacity in the ETP (IATTC Resolution on the capacity of the tuna fleet operating in the eastern Pacific Ocean; C-02-03, June 2002). Finally, the IATTC requires that all vessels (purse seine and non-purse seine) authorized to fish for tuna and tuna-like species in the ETP be listed on the Vessel Register (IATTC Resolution on a Regional Vessel Register; C-00-06, June 2000). The IATTC imposes additional requirements for purse seine vessels listed on the Vessel Register, but not for non-purse seine vessels. Thus, the regulations being revised by this rule focus primarily on the ETP tuna purse seine fleet. The regulations

governing non-purse seine vessels are not being changed at this time and are located at other sections of the CFR.

#### *Definition of Tuna Product*

*Comment 2:* One commenter opposed the revision to the definition of the term “tuna product” that would limit the definition to products intended for human consumption, stating that such a definition would be inconsistent with the intent of Congress in the DPCIA. The commenter recommended that NMFS not adopt the revised definition.

*Response:* Upon consideration of the comment, the definition for the term “tuna product” will not be revised and will remain as it is currently defined at 50 CFR 216.3.

#### *Vessel Register Requirements*

*Comment 3:* NMFS received one comment that the preamble to the proposed rule incorrectly stated that the capacity limit of the U.S. tuna purse seine fleet under the IATTC capacity resolution is 8,969 mt. The commenter recommended filing an amended **Federal Register** notice with a new public comment period to correct this error. The commenter emphasized that the United States agreed to limit the U.S. tuna purse seine fleet to a capacity of 8,969 mt so long as the June 2002 Resolution on the capacity of the tuna fleet operating in the ETP (Revised; C-02-03) remained in force and was respected by all Parties (referencing a letter written in 2002 by Mary Beth West, U.S. Department of State, to Robin Allen, Director of the IATTC). The commenter contended that the resolution to limit the capacity of the tuna purse seine fleet in the ETP has not been respected by all Parties, and thus the U.S. tuna purse seine fleet should not be bound to the capacity limit of 8,969 mt.

*Response:* We agree with the commenter and clarify here that the U.S. ETP tuna purse seine fleet’s capacity limit of 8,969 mt is a self-imposed capacity limit agreed to by the United States, and is not the capacity limit established for the United States in the IATTC’s 2002 resolution on capacity (C-02-03). We do not believe it is necessary or required, however, to file an amended **Federal Register** notice with a new public comment period. The regulatory provisions regarding the capacity limit of 8,969 mt were already established in regulation and were not proposed to be revised. The current regulations at 50 CFR 300.22(b)(4)(i)(A) state that “[t]he cumulative carrying capacity of all vessels categorized as active on the Vessel Register may not exceed 8,969 mt in a given year.” The

current regulations also allow additional U.S. purse seine vessels to be added to the Vessel Register and categorized as active to replace a vessel removed from the active list, “provided the total carrying capacity of active vessels does not exceed 8,969 mt” (50 CFR 300.22(b)(7)(ii)). These provisions were adopted in 2005 by notice-and-comment rulemaking (70 FR 19004, April 12, 2005).

*Comment 4:* One commenter stated that the current size categories distinguishing purse seine vessels capable of setting on or encircling dolphins (“large” vessels exceeding 400 short tons (st) (362.8 mt) carrying capacity) from those that are not capable (“small” vessels of 400 st (362.8 mt) carrying capacity or less) are no longer valid. The commenter noted that the proposed rule maintains this distinction and does not address the directive in the 2005 Consolidated Appropriations Act (Pub. L. No. 108-447) instructing NMFS to dedicate funding toward revising the definition for a vessel that is not capable of setting on or encircling dolphins. The commenter recommended that NMFS propose a new definition or at least explain what has been done and what NMFS is doing to address the directive from the 2005 Consolidated Appropriations Act.

*Response:* Revising the definition for a purse seine vessel that is not capable of setting on or encircling dolphins is not within the scope of this rulemaking. Researchers at the Southwest Fisheries Science Center (SWFSC), however, have been working on studies to address this issue in response to the directive given in the 2005 Consolidated Appropriations Act. Since 2006, the SWFSC has been contracting with the IATTC staff to sample the landed catch of Class 4 - 5 (“small”) purse seine vessels in international ports. The SWFSC has also been collecting data on various characteristics of the sampled Class 4 - 5 purse seine vessels (e.g., number of speed boats, presence of a dolphin safety panel) to collect more refined information on what characteristics, beyond size class and horsepower, make a vessel capable of setting on dolphins. The SWFSC examined the catch composition data to try to predict whether tuna sets were made on dolphins or not, based on the idea that yellowfin tuna caught in association with dolphins are larger and generally comprise a much larger percentage of the catch compared to other set types. From the data, the SWFSC can identify tuna sets that do not fit the usual profile of a sample not caught in association with dolphins. The analyses are not final, however, nor

do the data provide definitive proof of whether a vessel is setting on dolphins or not. In addition, although funding was set aside to provide for observers on Class 4 - 5 purse seine vessels, no vessels have agreed to participate in the voluntary observer program. Without observer data for these vessels, there is insufficient data to support a finding that vessels of 400 st (362.8 mt) carrying capacity or less have a regular and significant association with dolphins in the fishery.

NMFS will continue to work on addressing this issue. It is important to note, however, that developing a revised definition is but one step in the process. Several aspects of the approval and implementation of a revised definition are beyond the authority of NMFS. For international purposes, revised definitions for purse seine vessels capable of setting on or encircling dolphins (i.e., “large” vessels) and for those not capable of setting on or encircling dolphins (i.e., “small” vessels) would have to be approved by the Parties to the AIDCP. An example of this would be requiring observer coverage on what are now considered “small vessels.”

*Comment 5:* One commenter stated that reporting a vessel’s fish hold capacity in cubic meters is not currently a requirement under the Pacific Fishery Management Council’s (PFMC) Highly Migratory Species (HMS) Fishery Management Plan (FMP), the Western PFMC’s Pelagic Fisheries FMP, or the High Seas Fisheries Compliance Act (HSFCA), and that requiring the reporting of this information is unnecessary and burdensome given that there is no IATTC resolution on capacity for these vessels.

*Response:* The IATTC Vessel Register, established in June 2000 by the IATTC Resolution on a Regional Vessel Register (C-00-06), is the list of all vessels authorized by the member nations to fish for tuna and tuna-like species in the Convention Area. As a member of the IATTC, the United States is required to submit specific information on such vessels, in order to update and maintain the Vessel Register. To meet this requirement, the revised regulations would require collection of vessel information from all commercial fishing vessels and CPFVs authorized by the United States to fish for tuna and tuna-like species in the Convention Area. One piece of information required for the Vessel Register is the vessel’s fish hold capacity in cubic meters. For vessels authorized to fish for tuna and tuna-like species in the Convention Area under the HMS FMP, the fish hold capacity in cubic meters is already

collected on the Pacific HMS permit application. For all other non-purse seine vessels, NMFS is planning a separate rulemaking action to collect this and other required Vessel Register information through the HSFCA permit application. The commenter is correct that fish hold capacity in cubic meters is not currently collected on the HSFCA permit application. However, as stated above, this information is required to be collected for the purposes of the IATTC Vessel Register.

*Comment 6:* One commenter questioned why the 10-percent surcharge for late payment of the vessel assessment fee would apply to ETP tuna purse seine vessels for which active or inactive status is requested during the calendar year and requested clarification on when the 10-percent surcharge applies.

*Response:* According to the minutes for the 16th Meeting of the Parties to the AIDCP (October 26, 2006), the 10-percent late fee applies to vessels entering the fishery during the course of the year only if the vessel fished in the Convention Area in the previous calendar year. Thus, payment of the vessel assessment fee is considered late and subject to the 10-percent late fee for vessels for which active status is requested: (1) during the calendar year, only if the vessel was listed as active in the previous calendar year and was not listed as inactive at the beginning of the calendar year; or (2) for the following calendar year, only if payment of the fee is received after the applicable dates (September 15 if a dolphin mortality limit (DML) is requested and November 30 if a DML is not requested) and the vessel was listed as active in the year the request was made. The 10-percent late fee would not apply to purse seine vessels for which inactive status is requested or to purse seine vessels licensed under the South Pacific Tuna Treaty (SPTT) that are exercising their option to make a single trip into the ETP per year. The regulatory text has been corrected and revised to clarify when the 10-percent late fee would apply (see the section titled "Changes from the Proposed Rule" for more details).

*Comment 7:* One commenter stated that it is unfair to impose a penalty for frivolous requests because there are economic (e.g., fuel prices, fish prices) or other reasons (e.g., ocean conditions) for why a vessel may not land any tuna or why tuna would make up less than 20 percent of its total catch by weight in a given year. The commenter noted that this would be particularly unfair if it applied to small purse seine vessels, longline vessels, and troll vessels.

*Response:* The frivolous request criteria apply only to owners of tuna purse seine vessels who have requested that a vessel be categorized as active on the Vessel Register, but did not fish for tuna at all in the Convention Area in that same year, or when less than 20 percent of the vessel's total landings was comprised of tuna harvested by purse seine in the Convention Area in that same year. The main purpose of the frivolous request determinations is to deter vessel owners who are not planning to actively fish for tuna from requesting active status and occupying a portion of the U.S. fleet's limited capacity. Factors such as those mentioned by the commenter should be taken into account before applying for active status. In addition, the regulations allow for the consideration of extraordinary circumstances, or circumstances beyond the control of the vessel owner, in determining whether a request is frivolous. We also note that, although frivolous requests apply to small purse seine vessels, there would be little to no effects on small purse seine vessels, because they are not required to be categorized as active on the Vessel Register as long as tuna caught in the Convention Area comprise 50 percent or less of the vessel's total landings in a given year.

#### *Revised Floodlight Requirements for Tuna Purse Seine Vessels with Dolphin Mortality Limits (DMLs)*

*Comment 8:* Two comments were received regarding the revised floodlight requirements for tuna purse seine vessels with DMLs. One commenter requested clarification that these requirements apply only to Class 6 purse seine vessels and not to troll or long line vessels. Another commenter requested that more explanation be added to reiterate that the prohibitions on making sundown sets and on initiating sets at night still apply.

*Response:* The revised floodlight requirements apply only to tuna purse seine vessels greater than 400 st (362.8 mt) carrying capacity to which a DML has been assigned. The floodlight requirements do not alter the prohibition on making sundown sets, codified at 50 CFR 216.24(c)(6)(iii). Instead, the floodlights are required to ensure that dolphins are released successfully from any sets that have not been completed by sundown.

#### *Fisheries Certificates of Origin and Verification of Dolphin-Safe Labeling Standards*

*Comment 9:* One commenter questioned why NMFS proposed to shorten the maximum time (the

deadline) for submitting Fisheries Certificates of Origin (FCOs) from within 30 days to within 10 days of the shipment's entry into U.S. commerce. The commenter asked if there have been enforcement issues that led to this proposed revision and expressed concern that 10 days may not provide sufficient time to submit the certifications.

*Response:* NMFS proposed to reduce the time required for submitting FCOs and associated certifications from within 30 days to within 10 days to aid in enforcement of the regulations. NMFS routinely identifies importers of record that fail to comply with the regulations to submit the FCO form, or that submit incomplete forms. As stated in the preamble of the proposed rule, by 30 days the tuna or products may already be offered for sale, purchased, or consumed before violations of the requirements governing certification are determined. Requiring the submission of FCOs and associated certifications within 10 days of the shipment's import into U.S. commerce would allow NMFS to determine violations of the certification requirements early enough to more effectively respond with any necessary enforcement actions and options (e.g., holding the tuna or tuna products if a violation of dolphin-safe standards has been determined). Regarding whether 10 calendar days is sufficient time for importers to submit the forms to NMFS, we note that importers are already required to submit completed FCOs to U.S. Customs and Border Protection (CBP) upon import of a shipment into the United States. The only additional piece of information required prior to submitting the form to NMFS is the Customs Entry Number and date of entry (required to link the forms to the electronic import data received from CBP). Most importers already submit their forms within 10 days of the shipment's entry into U.S. commerce. The remaining importers currently submit their forms monthly, but should have sufficient time to submit their forms within the 10 day time period.

*Comment 10:* One commenter identified two problems with the regulations at 50 CFR 216.91(a)(2)(i) requiring written certification of the dolphin-safe status of tuna caught by purse seine: (1) the falsification of dolphin-safe verification forms by observers; and (2) the requirement that observers issue or endorse only documents approved by the Parties to the AIDCP (this was identified as a problem, because the Parties to the AIDCP do not recognize United States standards for dolphin-safe tuna). The

commenter recommended holding a workshop to discuss these problems.

*Response:* NMFS recognizes the issues raised by the commenter; however, these issues are beyond the scope of this rule, as well as beyond the authority of NMFS. These issues would be more appropriately addressed by the International Review Panel established by the AIDCP. The AIDCP routinely assesses and evaluates these issues to determine whether any amendments to resolutions should be considered. In addition, the paragraph of the regulations referred to by the commenter at 50 CFR 216.91(a)(2)(i) deals with tuna purse seine vessels operating outside of the ETP. These regulations are not yet applicable because the Assistant Administrator has not determined that a regular and significant association occurs between dolphins and tuna outside of the ETP. However, these regulations provide provisions for dolphin-safe labeling standards should such a determination be made in the future.

#### *Direct Notification Regarding IATTC Management Recommendations and Resolutions*

*Comment 11:* Two commenters questioned the removal of the requirement at 50 CFR 300.25(a) that the Regional Administrator, Southwest Region, must directly notify owners or agents of U.S. tuna vessels regarding IATTC recommendations. The commenters stated that direct notification is a more effective method of providing notice than publishing the information in the **Federal Register**.

*Response:* The main purpose of the revisions to 50 CFR 300.25(a) is to clarify that the IATTC recommendations and resolutions are implemented through appropriate notice-and-comment rulemaking in the **Federal Register** and that the **Federal Register** document would serve as the public notification. NMFS plans to continue providing direct notification to affected entities regarding IATTC management recommendations and resolutions as a courtesy to these entities, but not as a requirement under the regulations.

#### *Live Fish Transfers*

*Comment 12:* Two comments were received stating that this rule does not address the issue of the transshipment of tuna caught by purse seine from one vessel to another vessel at sea in the Convention Area. One commenter recommended that this rule should address the prohibition on the transshipment of live tuna.

*Response:* The issue of the transshipment of live tuna at sea in the

Convention Area is outside of the scope of this rule. This rule was not intended as the vehicle to deal with this issue. NMFS plans to address this issue in a future rulemaking.

#### *Additional Updates to the Regulations*

*Comment 13:* One commenter suggested updating the regulations at 50 CFR 300.22(b)(4)(i) by removing the provisions referencing the years 2005 and 2006, because these provisions are no longer applicable.

*Response:* NMFS agrees with the suggested revisions to remove the outdated provisions in 50 CFR 300.22(b)(4)(i). The revisions are included in this final rule and described in more detail in the “Changes from the Proposed Rule” section below.

#### **Changes from the Proposed Rule**

##### *Definitions for Tuna Product and Tuna Species*

In response to the public comments, the definition of the term “tuna product” will not be revised as described in the proposed rule. The definition for “tuna product” will remain as defined at 50 CFR 216.3 to mean “any food product processed for retail sale and intended for human or animal consumption that contains an item listed in § 216.24(f)(2)(i) or (ii), but does not include perishable items with a shelf life of less than 3 days.”

In addition, the proposed rule would have added to 50 CFR 216.3 a definition for “Bluefin tuna” to mean the species *Thunnus thynnus*, in order to define the term as used in the Harmonized Tariff Schedule of the United States (HTS). This definition was meant to include both Atlantic and Pacific bluefin tuna, because the HTS uses the general term “Bluefin tuna” to refer to both. It was brought to our attention, however, that Atlantic bluefin tuna are referred to as *Thunnus thynnus*, whereas Pacific bluefin tuna are referred to as *Thunnus orientalis*. In order to include both the Atlantic and Pacific bluefin tuna, this final rule revises the definition of “Bluefin tuna” to mean the species *Thunnus thynnus* or *Thunnus orientalis*.

##### *Clarification on Late Fees for Vessel Assessment Fees*

In 50 CFR 216.24(b)(6)(iii)(F), we clarified under what circumstances payment of the vessel assessment fee would be considered late and would be subject to a 10-percent surcharge. However, the proposed rule contained some errors that are clarified and corrected in this final rule.

In this final rule, we clarify that payment of the vessel assessment fee is

considered late and subject to a 10-percent surcharge for purse seine vessels: (1) for which active status is requested to replace a vessel removed from active status on the Vessel Register during the year, if the vessel was listed as active in the previous calendar year and was not listed as inactive at the beginning of the calendar year; or (2) for which active status is requested for the following calendar year, if payment is made after the applicable deadline (September 15 if a DML is requested and November 30 if a DML is not requested) and the vessel was listed as active in the same year the request was made. Payment of the vessel assessment fee is not considered late and not subject to the 10-percent surcharge for purse seine vessels: (1) for which inactive status is requested; (2) for which active status is requested to replace a vessel removed from active status on the Vessel Register during the year, if the vessel was not listed as active in the previous calendar year or the vessel was listed as inactive at the beginning of the calendar year; or (3) for which active status is requested for the following calendar year, if the vessel was not listed as active in that same year the request was made. Payment of the vessel assessment fee is also not considered late and not subject to the 10-percent surcharge for purse seine vessels licensed under the South Pacific Tuna Treaty (SPTT) that exercise their option to make a single trip into the ETP per calendar year. This final rule revises 50 CFR 216.24(b)(6)(iii)(F), 300.22(b)(4)(iii), and 300.22(b)(7) accordingly.

##### *Additional Non-Substantive Revisions and Updates*

In response to the public comments, this final rule revises 50 CFR 300.22(b)(4)(i) to remove outdated provisions that were established to specify how requests for active status would be handled in 2005 and 2006, because these provisions are no longer applicable. Revisions are made to 50 CFR 300.22(b)(4)(i) to: (1) remove paragraph § 300.22(b)(4)(i)(C), which states that for 2005 only, requests for active status on the purse seine list will be prioritized on a first-come, first-served basis; (2) remove the references to the years 2005 and 2006 in the introductory paragraph of § 300.22(b)(4)(i)(D) and paragraphs § 300.22(b)(4)(i)(D)(1) and (2); and (3) redesignate paragraph § 300.22(b)(4)(i)(D) as paragraph § 300.22(b)(4)(i)(C). This final rule also revises the introductory paragraph to 50 CFR 300.22(b)(4)(ii) to remove the phrase “Beginning with requests made

for 2005", because this is an outdated provision.

This final rule also adds to 50 CFR 216.24(f)(2)(i)(D) and 216.24(f)(2)(ii)(D) the HTS number 1604.20.1000 for fish pastes, to clarify that products imported into the United States under this HTS number that contain yellowfin tuna or other tuna must be accompanied by a properly completed FCO. This addition is within the scope of the proposed rule, which clarified at 50 CFR 216.24(f)(2)(i) and 216.24(f)(2)(ii) that all shipments containing tuna or tuna products (except fresh tuna) imported into the United States must be accompanied by an FCO.

This final rule revises 50 CFR 300.22(b)(7)(iv) and 300.22(b)(7)(v) to clarify that a replacement vessel can be categorized as active on the Vessel Register to replace one or more vessels removed from the Vessel Register, rather than just one vessel. The regulatory language at 50 CFR 300.22(b)(7)(iv) and 300.22(b)(7)(v) will be revised to read: "The replacement vessel will be eligible to be categorized as active on the Vessel Register if it has a carrying capacity equal to or less than the vessel or vessels being replaced." Also, the final rule adds to 50 CFR 300.21 a definition for "Regional Administrator" to clarify that the term refers to the Regional Administrator, Southwest Region.

### Classification

Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866. NMFS prepared a Regulatory Impact Review for the proposed rule, available at the Federal E-Rulemaking Portal Web site at <http://www.regulations.gov>. No comments were received regarding the Regulatory Impact Review, and no further analyses were conducted for this final rule.

### Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

### Paperwork Reduction Act

This final rule contains new and revised collection-of-information

requirements subject to the Paperwork Reduction Act (PRA) and which have been approved by the Office of Management and Budget (OMB) under control number 0648-0387. The following collection-of-information requirements have been approved by OMB: (1) collection of a vessel photograph as part of the ETP tuna purse seine vessel permit application; (2) annual written notification to request a tuna purse seine vessel of 400 st (362.8 mt) carrying capacity or less be categorized as active on the Vessel Register, including the owner or managing owner's signature and business telephone and fax numbers and the required Vessel Register information (i.e., the vessel name, registration number, and previous name(s) and flag(s); a vessel photograph with the vessel registration number legible; the name and business address of the owner(s) and managing owner(s); port of registry; International Radio Call Sign; where and when built; length, beam, and moulded depth; gross tonnage, fish hold capacity, and carrying capacity; engine horsepower; and type of fishing method(s)); (3) annual written notification to request that a tuna purse seine vessel of 400 st (362.8 mt) carrying capacity or less be categorized as inactive on the Vessel Register, including the vessel name, registration number, and vessel owner or managing owner's name, signature, business address, and business telephone and fax numbers; and (4) written notification prior to submitting an application to transfer a purse seine vessel listed on the Vessel Register to foreign registry and flag, including the vessel name and registration number, the estimated submission date of the application, and the vessel owner or managing owner's name and signature. Public reporting burdens per individual response for the new and revised collection-of-information requirements are estimated to average 35 minutes for the ETP tuna purse seine vessel permit application; 35 minutes for the written notification to request active status; 5 minutes for the written notification to request inactive status; and 5 minutes for the written notification of the intent to transfer a vessel to foreign registry and flag. These reporting burden estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

This final rule also contains a non-substantive change subject to the PRA and which has been approved by OMB under control number 0648-0335. The

non-substantive change request submitted to and approved by OMB requires that the CBP importer of record submit a copy of the FCO and associated certifications to NMFS within 10 days of a shipment's entry into U.S. commerce, rather than within 30 days (except when the tuna will be processed in the United States, in which case the forms must be submitted to NMFS after endorsement by the final processor or exporter). The public reporting burden for the revised collection of information requirement would remain the same (estimated to average 20 minutes per individual response), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e-mail to [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov), or by fax to 202-395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

### Endangered Species Act

NMFS prepared a Biological Opinion for an interim final rule (65 FR 30, January 3, 2000) to implement the IDCP in December 1999, and in July 2004 issued an amended Incidental Take Statement after taking into account the revisions made in the 2004 final rule (69 FR 55288, September 13, 2004). In the 1999 Biological Opinion, NMFS concluded that fishing activities conducted under the interim final rule are not likely to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS or result in the destruction or adverse modification of critical habitat. This rule would not result in any effects beyond those considered in the 1999 Biological Opinion and 2004 Incidental Take Statement.

### National Environmental Policy Act

NMFS prepared an Environmental Assessment (EA) for a final rule (70 FR 19004, April 12, 2005) to implement resolutions adopted by the IATTC and the IDCP. The Assistant Administrator for Fisheries concluded that fishing activities conducted under the 2004 final rule would not be expected to

result in significant effects on the human environment. This rule would not be expected to result in modifications to fisheries operations or effects on the human environment beyond those considered under the alternatives in the EA. This action has been categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement. A memo to the record was prepared for the proposed rule memorializing this decision and is available at the Federal E-rulemaking Portal Web site: <http://www.regulations.gov>. No comments were received regarding the categorical exclusion memo, and no further analyses were conducted under NEPA for this rule.

#### Marine Mammal Protection Act

Incidental take of dolphins and other marine mammals may occur during fishing operations by U.S. tuna purse seine vessels in the ETP. The take of dolphins incidental to the operation of the U.S. ETP tuna purse seine fishery is authorized and managed under the IDCP. This rule would not affect the administration of that program, which is implemented under the MMPA.

#### List of Subjects

##### 50 CFR Part 216

Fish, Marine mammals, Reporting and recordkeeping requirements.

##### 50 CFR Part 300

International fisheries regulations, Pacific tuna fisheries.

Dated: January 7, 2009.

#### Samuel D. Rauch III,

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

■ For the reasons set out in the preamble, NMFS amends 50 CFR parts 216 and 300 as follows:

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

■ 1. The authority citation for part 216 continues to read as follows:

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

■ 2. In § 216.3, add definitions for “Albacore tuna”, “Bigeye tuna”, “Bluefin tuna”, “Longtail tuna”, “Skipjack tuna”, “Southern bluefin tuna”, “Tuna”, and “Yellowfin tuna” in alphabetical order to read as follows:

#### § 216.3 Definitions.

\* \* \* \* \*

*Albacore tuna* means the species *Thunnus alalunga*.

\* \* \* \* \*

*Bigeye tuna* means the species *Thunnus obesus*.

*Bluefin tuna* means the species *Thunnus thynnus* or *Thunnus orientalis*.

\* \* \* \* \*

*Longtail tuna* means the species *Thunnus tonngol*.

\* \* \* \* \*

*Skipjack tuna* means the species *Euthynnus (Katsuwonus) pelamis*.

\* \* \* \* \*

*Southern bluefin tuna* means the species *Thunnus maccoyii*.

\* \* \* \* \*

*Tuna* means any fish of the genus *Thunnus* and the species *Euthynnus (Katsuwonus) pelamis*.

\* \* \* \* \*

*Yellowfin tuna* means the species *Thunnus albacares* (synonymy: *Neothunnus macropterus*).

■ 3. In § 216.24, redesignate paragraph (f)(8)(i)(D)(3)(iii) as paragraph (f)(8)(ii) and redesignate paragraphs (f)(8)(iv), (f)(8)(v), and (f)(8)(vi) as paragraphs (f)(8)(iii), (f)(8)(iv), and (f)(8)(v); and revise paragraphs (a)(3), (b)(4), (b)(5), (b)(6)(ii), (b)(6)(iii), (c)(3)(viii), (c)(4)(i), (f)(2), (f)(3), (f)(4), (f)(10), and (f)(11), to read as follows:

#### § 216.24 Taking and related acts incidental to commercial fishing operations by tuna purse seine vessels in the eastern tropical Pacific Ocean.

(a) \* \* \*

(3) Upon written request made in advance of entering the ETP, the limitations in paragraphs (a)(2)(ii) and (e)(1) of this section may be waived by the Administrator, Southwest Region, for the purpose of allowing transit through the ETP. The waiver will provide, in writing, the terms and conditions under which the vessel must operate, including a requirement to report to the Administrator, Southwest Region, the vessel's date of exit from or subsequent entry into the permit area.

(b) \* \* \*

(4) *Application for vessel permit.* ETP tuna purse seine vessel permit application forms and instructions for their completion are available from NMFS. To apply for an ETP vessel permit, a vessel owner or managing owner must complete, sign, and submit the appropriate form via fax to (562) 980-4047, for prioritization purposes as described under § 300.22(b)(4)(i)(D)(3) of this title, allowing at least 15 days for processing. To request that a vessel in excess of 400 st (362.8 mt) carrying capacity be categorized as active on the

Vessel Register under § 300.22(b)(4)(i) of this title in the following calendar year, the owner or managing owner must submit the vessel permit application via fax, payment of the vessel permit application fee, and payment of the vessel assessment fee no later than September 15 for vessels for which a DML is requested for the following year, and no later than November 30 for vessels for which a DML is not requested for the following year.

(5) *Application for operator permit.*

An applicant for an operator permit must complete, sign, and submit the appropriate form obtained from NMFS and submit payment of the permit application fee to the Administrator, Southwest Region, allowing at least 45 days for processing. Application forms and instructions for their completion are available from NMFS.

(6) \* \* \*

(ii) *Operator permit fee.* The Assistant Administrator may require a fee to be submitted with an application for an operator permit. The level of such a fee shall be determined in accordance with the NOAA Finance Handbook and specified by the Administrator, Southwest Region, on the application form.

(iii) *Vessel assessment fee.* The vessel assessment fee supports the placement of observers on individual tuna purse seine vessels, and maintenance of the observer program, as established by the IATTC or other approved observer program.

(A) The owner or managing owner of a purse seine vessel for which a DML has been requested must submit the vessel assessment fee, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region, no later than September 15 of the year prior to the calendar year for which the DML is requested. Payment of the vessel assessment fee must be consistent with the fee for active status on the Vessel Register under § 300.22(b)(4) of this title.

(B) The owner or managing owner of a purse seine vessel for which active or inactive status on the Vessel Register, as defined in § 300.21 of this title, has been requested, but for which a DML has not been requested, must submit payment of the vessel assessment fee, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region, no later than November 30 of the year prior to the calendar year in which the vessel will be listed on the Vessel Register. Payment of the vessel assessment fee is required only if the vessel is listed as active and is required to carry an

observer, or if the vessel is listed as inactive and exceeds 400 st (362.8 mt) in carrying capacity. Payment of the vessel assessment fee must be consistent with the vessel's status, either active or inactive, on the Vessel Register in § 300.22(b)(4) of this title.

(C) The owner or managing owner of a purse seine vessel that is licensed under the South Pacific Tuna Treaty must submit the vessel assessment fee, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region, prior to obtaining an observer and entering the ETP to fish. Consistent with § 300.22(b)(1)(i) of this title, this class of purse seine vessels is not required to be listed on the Vessel Register under § 300.22(b)(4) of this title in order to purse seine for tuna in the ETP during a single fishing trip per calendar year of 90 days or less. Payment of the vessel assessment fee must be consistent with the fee for active status on the Vessel Register under § 300.22(b)(4) of this title.

(D) The owner or managing owner of a purse seine vessel listed as inactive on the Vessel Register at the beginning of the calendar year and who requests to replace a vessel removed from active status on the Vessel Register under § 300.22(b)(4) of this title during the year, must pay the vessel assessment fee associated with active status, less the vessel assessment fee associated with inactive status that was already paid, before NMFS will request the IATTC Director change the status of the vessel from inactive to active. Payment of the vessel assessment fee is required only if the vessel is required to carry an observer.

(E) The owner or managing owner of a purse seine vessel not listed on the Vessel Register at the beginning of the calendar year and who requests to replace a vessel removed from active status on the Vessel Register under § 300.22(b)(4) of this title during the year, must pay the vessel assessment fee

associated with active status only if the vessel is required to carry an observer, before NMFS will request the IATTC Director change the status of the vessel to active.

(F) Payments will be subject to a 10 percent surcharge if received under paragraph (b)(6)(iii)(E) of this section for vessels that were listed as active on the Vessel Register in the calendar year prior to the year for which active status was requested; or if received after the dates specified in paragraphs (b)(6)(iii)(A) or (b)(6)(iii)(B) of this section for vessels for which active status is requested if the vessel was listed as active during the year the request was made. Payments will not be subject to a 10 percent surcharge if received under paragraph (b)(6)(iii)(C) or (b)(6)(iii)(D) of this section, or if received under paragraph (b)(6)(iii)(E) of this section for vessels that were not listed as active on the Vessel Register in the calendar year prior to the year for which active status was requested. Payments will also not be subject to a 10 percent surcharge if received after the date specified in paragraph (b)(6)(iii)(B) of this section for vessels for which inactive status is requested, or for vessels for which active status is requested if the vessel was not listed as active during the year the request was made. The Administrator, Southwest Region, will forward all vessel assessment fees described in this section to the IATTC or to the applicable organization approved by the Administrator, Southwest Region.

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(viii) *Lights.* The vessel must be equipped with long-range, high-intensity floodlights with a sodium lamp of at least 1000 watts, or a multivapour lamp of at least 1500 watts, for use in darkness to ensure sufficient light to observe that procedures for dolphin release are carried out and to monitor incidental dolphin mortality.

(4) *Vessel inspection*—(i) *Twice per year.* At least twice during each calendar year, purse seine nets and other gear and equipment required under § 216.24(c)(3) must be made available for inspection and for a trial set/net alignment by an authorized NMFS inspector or IATTC staff as specified by the Administrator, Southwest Region, in order to obtain a vessel permit. The first such inspection shall be carried out before the vessel's request for a DML is submitted to the IATTC. The second such inspection shall be carried out before notification of any reallocation of DMLs for vessels with full-year DMLs or during the last quarter of the year for vessels with second-semester DMLs.

\* \* \* \* \*

(f) \* \* \*

(2) *Imports requiring a Fisheries Certificate of Origin.* Shipments of tuna, tuna products, and certain other fish products identified in paragraphs (f)(2)(i), (f)(2)(ii), and (f)(2)(iii) of this section may not be imported into the United States unless a properly completed Fisheries Certificate of Origin (FCO), NOAA Form 370, is filed with U.S. Customs and Border Protection (CBP) at the time of importation.

(i) *Imports requiring a Fisheries Certificate of Origin, subject to yellowfin tuna embargo.* All shipments containing yellowfin tuna or yellowfin tuna products (other than fresh tuna) imported into the United States must be accompanied by an FCO, including, but not limited to, those imported under the following Harmonized Tariff Schedule of the United States (HTS) numbers. Updated HTS numbers can be identified by referencing the most current HTS in effect at the time of importation, available at [www.usitc.gov](http://www.usitc.gov). The scope of yellowfin tuna embargoes and procedures for attaining an affirmative finding are described under paragraphs (f)(6) and (f)(8) of this section, respectively.

(A) *Frozen:* (products containing Yellowfin).

0303.42.0020 .....	Yellowfin tunas, whole, frozen.
0303.42.0040 .....	Yellowfin tunas, head-on, frozen, except whole.
0303.42.0060 .....	Yellowfin tunas frozen, except whole, head-on, fillets, livers and roes.
0304.29.6097 .....	Tuna fish fillets, frozen, Not elsewhere specified or indicated (NESOI).
0304.99.1090 .....	Tuna, frozen, in bulk or in immediate containers weighing with their contents over 6.8 kg each, NESOI.

(B) *Airtight Containers:* (products containing Yellowfin).

1604.14.1010 .....	Tunas and skipjack, in oil, in airtight containers, in foil or other flexible containers weighing with their contents not more than 6.8 kg each.
1604.14.1099 .....	Tunas and skipjack, in oil, in airtight containers, NESOI.
1604.14.2291 .....	Other tunas and skipjack, no oil, in foil/flexible airtight containers, not over 6.8 kg, 4.8% of U.S. consumption of canned tuna during preceding year.

1604.14.2299 .....	Tunas, NESOI and skipjack, not in oil, in other airtight containers not over 7 kg, 4.8% of U.S. consumption of canned tuna during preceding year.
1604.14.3091 .....	Tunas and skipjack, NESOI, not in oil, in foil or other flexible airtight containers, weighing with their contents not more than 6.8 kg each.
1604.14.3099 .....	Other tunas and skipjack, not in oil, in airtight containers, NESOI.
(C) <i>Loins</i> : (products containing Yellowfin).	
1604.14.4000 .....	Tunas and skipjacks, prepared or preserved, not in airtight containers, not in oil, in bulk or immediate containers with their contents over 6.8 kg each.
1604.14.5000 .....	Tunas and skipjack, prepared or preserved, not in airtight containers, NESOI.
(D) <i>Other</i> : (products containing Yellowfin).	
1604.20.1000 .....	Fish pastes.
1604.20.2500 .....	Fish balls, cakes and puddings, not in oil, not in airtight containers, in immediate containers weighing with their contents not over 6.8 kg each.
1604.20.3000 .....	Fish balls, cakes and puddings, NESOI.

(ii) *Imports requiring a Fisheries Certificate of Origin, not subject to yellowfin tuna embargo.* All shipments containing tuna or tuna products (other than fresh tuna or yellowfin tuna

identified in paragraph (f)(2)(i) of this section) imported into the United States must be accompanied by an FCO, including, but not limited to, those imported under the following HTS

numbers. Updated HTS numbers can be identified by referencing the most current HTS in effect at the time of importation, available at [www.usitc.gov](http://www.usitc.gov).

(A) *Frozen*: (other than Yellowfin).

0303.41.0000 .....	Albacore or longfinned tunas, frozen, except fillets, livers and roes.
0303.43.0000 .....	Skipjack tunas or stripe-bellied bonito, frozen, except fillets, livers and roes.
0303.44.0000 .....	Bigeye tunas, frozen, except fillets, livers and roes.
0303.45.0000 .....	Bluefin tunas, frozen, except fillets, livers and roes.
0303.46.0000 .....	Southern bluefin tunas, frozen, except fillets, livers and roes.
0303.49.0100 .....	Tunas, frozen, except fillets, livers and roes, NESOI.
0304.29.6097 .....	Tuna fish fillets, frozen, NESOI.
0304.99.1090 .....	Tuna, frozen, in bulk or in immediate containers weighing with their contents over 6.8 kg each, NESOI.

(B) *Airtight Containers*: (other than Yellowfin).

1604.14.1010 .....	Tunas and skipjack, in oil, in airtight containers, in foil or other flexible containers weighing with their contents not more than 6.8 kg each.
1604.14.1091 .....	Tunas, albacore, in oil, in airtight containers, NESOI.
1604.14.1099 .....	Tunas and skipjack, in oil, in airtight containers, NESOI.
1604.14.2251 .....	Albacore tuna, not in oil, in foil/flexible airtight containers, weighing not over 6.8 kg, 4.8% of U.S. consumption of canned tuna during preceding year.
1604.14.2259 .....	Albacore tuna, not in oil, in airtight containers weighing not over 7 kg, NESOI, 4.8% of U.S. consumption of canned tuna during preceding year.
1604.14.2291 .....	Other tunas and skipjack, no oil, in foil/flexible airtight containers, not over 6.8 kg, 4.8% of U.S. consumption of canned tuna during preceding year.
1604.14.2299 .....	Tunas, NESOI and skipjack, not in oil, in other airtight containers, not over 7 kg, 4.8% of U.S. consumption of canned tuna during preceding year.
1604.14.3051 .....	Tuna, albacore not in oil, in foil or other flexible airtight containers, weighing with contents not more than 6.8 kg each, NESOI.
1604.14.3059 .....	Tuna, albacore not in oil, in airtight containers, NESOI.
1604.14.3091 .....	Tunas and skipjack, NESOI, not in oil, in foil or other flexible airtight containers, weighing with their contents not more than 6.8 kg each.
1604.14.3099 .....	Other tunas and skipjack, not in oil, in airtight containers, NESOI.

(C) *Loins*: (other than Yellowfin).

1604.14.4000 .....	Tunas and skipjacks, prepared or preserved, not in airtight containers, not in oil, in bulk or immediate containers with their contents over 6.8 kg each.
1604.14.5000 .....	Tunas and skipjack, prepared or preserved, not in airtight containers, NESOI.

(D) *Other*: (only if the product contains tuna).

1604.20.1000 .....	Fish pastes.
1604.20.2500 .....	Fish balls, cakes and puddings, not in oil, not in airtight containers, in immediate containers weighing with their contents not over 6.8 kg each.
1604.20.3000 .....	Fish balls, cakes and puddings, NESOI.

(iii) Exports from driftnet nations only, requiring a Fisheries Certificate of Origin and official certification. The following HTS numbers identify categories of fish and shellfish, in addition to those identified in paragraphs (f)(2)(i) and (f)(2)(ii) of this

section, known to have been harvested using a large-scale driftnet and imported into the United States. Shipments exported from a large-scale driftnet nation, as identified under paragraph (f)(7) of this section, and imported into the United States, including but not

limited to those imported into the United States under any of the HTS numbers listed in paragraph (f)(2) of this section, must be accompanied by an FCO and the official statement described in paragraph (f)(4)(xiii) of this section.

## (A) Frozen:

0303.19.0012	Chinook (King) salmon ( <i>Oncorhynchus tshawytscha</i> ), frozen, except fillets, livers and roes.
0303.19.0022	Chum (dog) salmon ( <i>Oncorhynchus keta</i> ), frozen, except fillets, livers and roes.
0303.19.0032	Pink (humpie) salmon ( <i>Oncorhynchus gorbuscha</i> ), frozen, except fillets, livers and roes.
0303.19.0052	Coho (silver) salmon ( <i>Oncorhynchus kisutch</i> ), frozen, except fillets, livers and roes.
0303.19.0062	Pacific salmon ( <i>Oncorhynchus masou</i> , <i>Oncorhynchus rhodurus</i> ), frozen, except fillets, livers and roes, NESOI.
0303.21.0000	Trout ( <i>Salmo trutta</i> ; <i>Oncorhynchus mykiss</i> , <i>clarki</i> , <i>aguabonita</i> , <i>gilae</i> , <i>apache</i> , and <i>chrysogaster</i> ), frozen, except fillets, livers and roes.
0303.22.0000	Atlantic salmon ( <i>Salmo salar</i> ) and Danube salmon ( <i>Hucho hucho</i> ), frozen, except fillets, livers and roes.
0303.29.0000	Salmonidae, frozen, except fillets, livers and roes, NESOI.
0303.61.0010	Swordfish steaks, frozen, except fillets.
0303.61.0090	Swordfish, frozen, except steaks, fillets, livers and roes.
0303.75.0010	Dogfish ( <i>Squalus</i> spp.), frozen, except fillets, livers and roes.
0303.75.0090	Sharks, frozen, except dogfish, fillets, livers and roes.
0303.79.0079	Fish, frozen, except fillets, livers and roes, NESOI.
0304.21.0000	Swordfish fillets, frozen, NESOI.
0304.29.2066	Fish fillets, skinned, frozen blocks weighing over 4.5 kg each, to be minced, ground or cut into pieces of uniform weights and dimensions, NESOI.
0304.29.6006	Atlantic Salmonidae ( <i>Salmo salar</i> ) fillets, frozen, NESOI.
0304.29.6008	Salmonidae fillets, frozen, except Atlantic salmon, NESOI.
0304.29.6099	Fish fillets, frozen, NESOI.
0307.49.0010	Squid fillets, frozen.
(B) Canned:	
1604.11.2020	Pink (humpie) salmon, whole or in pieces, but not minced, in oil, in airtight containers.
1604.11.2030	Sockeye (red) salmon, whole or in pieces, but not minced, in oil, in airtight containers.
1604.11.2090	Salmon NESOI, whole or in pieces, but not minced, in oil, in airtight containers.
1604.11.4010	Chum (dog) salmon, not in oil, canned.
1604.11.4020	Pink (humpie) salmon, not in oil, canned.
1604.11.4030	Sockeye (red) salmon, not in oil, canned.
1604.11.4040	Salmon, NESOI, not in oil, canned.
1604.11.4050	Salmon, whole or in pieces, but not minced, NESOI.
1604.19.2000	Fish, NESOI, not in oil, in airtight containers.
1604.19.3000	Fish, NESOI, in oil, in airtight containers.
1605.90.6050	Loligo squid, prepared or preserved.
1605.90.6055	Squid except Loligo, prepared or preserved.
(C) Other:	
0305.30.6080	Fish fillets, dried, salted or in brine, but not smoked, NESOI.
0305.41.000	Pacific salmon ( <i>Oncorhynchus</i> spp.), Atlantic salmon ( <i>Salmo salar</i> ), and Danube salmon ( <i>Hucho hucho</i> ), including fillets, smoked.
0305.49.4040	Fish including fillets, smoked, NESOI.
0305.59.2000	Shark fins, dried, whether or not salted but not smoked.
0305.59.4000	Fish, dried, whether or not salted but not smoked, NESOI.
0305.69.4000	Salmon, salted but not dried or smoked; in brine.
0305.69.5000	Fish in immediate containers weighing with their contents 6.8 kg or less each, salted but not dried or smoked; in brine, NESOI.
0305.69.6000	Fish, salted but not dried or smoked; in brine, NESOI.
0307.49.0022	Squid, <i>Loligo opalescens</i> , frozen (except fillets), dried, salted or in brine.
0307.49.0024	Squid, <i>Loligo pealei</i> , frozen (except fillets), dried, salted or in brine.
0307.49.0029	Loligo squid, frozen (except fillets), dried, salted or in brine, NESOI.
0307.49.0050	Squid, frozen (except fillets), dried, salted or in brine, except Loligo squid.
0307.49.0060	Cuttle fish ( <i>Sepia officinalis</i> , <i>Rossia macrosoma</i> , <i>Sepiolo</i> spp.), frozen, dried, salted or in brine.

(3) *Disposition of Fisheries Certificates of Origin.* The FCO described in paragraph (f)(4) of this section may be obtained from the Administrator, Southwest Region, or downloaded from the Internet at <http://swr.nmfs.noaa.gov/noaa370.htm>.

(i) A properly completed FCO and its attached certificates as described in § 216.91(a), if applicable, must accompany the required CBP entry documents that are filed at the time of import.

(ii) FCOs and associated certifications as described in § 216.91(a), if any, that accompany imported shipments of tuna must be submitted by the importer of record to the Tuna Tracking and Verification Program, Southwest Region, within 10 calendar days of the shipment's entry into the commerce of the United States. FCOs submitted via mail should be sent to the Tuna Tracking and Verification Program, Southwest Region, P.O. Box 32469, Long Beach, CA 90832-2469. Copies of the documents may be submitted electronically using a secure file transfer protocol (FTP) site. Importers of record interested in submitting FCOs and associated certifications via FTP may contact a representative of the Tuna Tracking and Verification Program at the following email address: SWRTuna.Track@noaa.gov. The Tuna Tracking and Verification Program will facilitate secure transfer and protection of certifications by assigning a separate electronic folder for each importer. Access to the electronic folder will require a user identification and password. The Tuna Tracking and Verification Program will assign each importer a unique user identification and password. Safeguarding the confidentiality of the user identification and password is the responsibility of the importer to whom they are assigned. Copies of the documents may also be submitted via mail either on compact disc or as hard copies. All electronic submissions, whether via FTP or on compact disc, must be in Portable Document Format (PDF).

(iii) FCOs that accompany imported shipments of tuna destined for further processing in the United States must be endorsed at each change in ownership and submitted to the Administrator, Southwest Region, by the last endorser when all required endorsements are completed.

(iv) Importers and exporters are required to retain their records, including FCOs, import or export documents, invoices, and bills of lading for 2 years, and such records must be made available within 30 days of a

request by the Secretary or the Administrator, Southwest Region.

(4) *Contents of Fisheries Certificate of Origin.* An FCO, certified to be accurate by the exporter(s) of the accompanying shipment, must include the following information:

- (i) CBP entry identification;
- (ii) Date of entry;
- (iii) Exporter's full name and complete address;
- (iv) Importer's or consignee's full name and complete address;
- (v) Species description, product form, and HTS number;
- (vi) Total net weight of the shipment in kilograms;
- (vii) Ocean area where the fish were harvested (ETP, western Pacific Ocean, south Pacific Ocean, north Pacific Ocean, eastern Atlantic Ocean, western Atlantic Ocean, Caribbean Sea, Indian Ocean, or other);
- (viii) Type of fishing gear used to harvest the fish (purse seine, longline, baitboat, large-scale driftnet, gillnet, pole and line/hook and line, or other);
- (ix) Country under whose laws the harvesting vessel operated based upon the flag of the vessel or, if a certified charter vessel, the country that accepted responsibility for the vessel's fishing operations;
- (x) Dates on which the fishing trip began and ended;
- (xi) The name of the harvesting vessel;
- (xii) Dolphin-safe condition of the shipment, described by checking the appropriate statement on the form and attaching additional certifications as described in § 216.91(a) if required;
- (xiii) For shipments containing fish or fish products exported from, or harvested on the high seas by vessels of a nation known to use large-scale driftnets, as determined by the Secretary pursuant to paragraph (f)(7) of this section, the High Seas Driftnet Certification contained on the FCO must be dated and signed by a responsible government official of the large-scale driftnet nation, certifying that the fish or fish products were harvested by a method other than large-scale driftnet; and
- (xiv) Each importer, exporter, or processor who takes custody of the shipment must sign and date the form to certify that the form and attached documentation accurately describes the shipment of fish that they accompany.

\* \* \* \* \*

(10) *Fish refused entry.* If fish is denied entry under paragraph (f)(2) of this section, the Port Director of CBP shall refuse to release the fish for entry into the United States.

(11) *Disposition of fish refused entry into the United States.* Fish that is

denied entry under paragraph (f)(2) of this section and that is not exported under CBP supervision within 90 days shall be disposed of under CBP laws and regulations at the importer's expense. Provided, however, that any disposition shall not result in an introduction into the United States of fish caught in violation of the MMPA.

\* \* \* \* \*

■ 4. In § 216.91, revise paragraphs (a)(2)(i), (a)(2)(ii), and (a)(4) to read as follows:

**§ 216.91 Dolphin-safe labeling standards.**

- (a) \* \* \*
- (2) \* \* \*

(i) In a fishery in which the Assistant Administrator has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the ETP), unless such products are accompanied as described in § 216.24(f)(3) by a written statement, executed by the Captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught; or

(ii) In any other fishery unless the products are accompanied as described in § 216.24(f)(3) by a written statement executed by the Captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna was harvested;

\* \* \* \* \*

(4) *Other fisheries.* By a vessel in a fishery other than one described in paragraphs (a)(1) through (a)(3) of this section that is identified by the Assistant Administrator as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied as described in § 216.24(f)(3) by a written statement, executed by the Captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Assistant Administrator determines that such an observer statement is necessary.

\* \* \* \* \*

■ 5. In § 216.92, revise paragraph (b)(2)(ii) and the introductory text of paragraph (b)(2)(iii) to read as follows:

§ 216.92 Dolphin-safe requirements for tuna harvested in the ETP by large purse seine vessels.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) The tuna or tuna products are accompanied as described in § 216.24(f)(3) by a properly completed FCO; and

(iii) The tuna or tuna products are accompanied as described in § 216.24(f)(3) by valid documentation signed by a representative of the appropriate IDCP member nation, containing the harvesting vessel names and tuna tracking form numbers represented in the shipment, and certifying that:

\* \* \* \* \*

■ 6. In § 216.93, revise paragraphs (c)(5), (e), and (f)(2) to read as follows:

§ 216.93 Tracking and verification program.

\* \* \* \* \*

(c) \* \* \*

(5) The handling of TTFs and the tracking and verification of tuna caught in the Convention Area by a U.S. purse seine vessel greater than 400 st (362.8 mt) carrying capacity shall be conducted consistent with the international tuna tracking and verification program adopted by the Parties to the Agreement on the IDCP.

\* \* \* \* \*

(e) Tracking imports. All tuna products, except fresh tuna, that are imported into the United States must be accompanied as described in § 216.24(f)(3) by a properly certified FCO as required by § 216.24(f)(2). For tuna tracking purposes, copies of FCOs and associated certifications must be submitted by the importer of record to the Administrator, Southwest Region, within 10 calendar days of the shipment's entry into the commerce of the United States as required by § 216.24 (f)(3)(ii).

(f) \* \* \*

(2) Record submission. Within 10 calendar days of receiving a shipment of tuna or tuna products, any exporter, transshipper, importer, processor, or wholesaler/distributor of tuna or tuna products must submit to the Administrator, Southwest Region, all corresponding FCOs and required certifications for those tuna or tuna products.

\* \* \* \* \*

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart C—Pacific Tuna Fisheries

■ 7. The authority citation for part 300, subpart C, continues to read as follows:

Authority: 16 U.S.C. 951–961 et seq.

■ 8. In § 300.21, remove the definition for “Vessel Register” and add definitions for “Commercial passenger fishing vessel”, “Regional Administrator”, “Regional Vessel Register”, and “Tuna” in alphabetical order to read as follows:

§ 300.21 Definitions.

\* \* \* \* \*

Commercial passenger fishing vessel means any vessel licensed for commercial passenger fishing purposes within the State out of which it is operating and from which, while under charter or hire, persons are legally permitted to conduct sportfishing activities.

\* \* \* \* \*

Regional Administrator means the Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213, or a designee.

Regional Vessel Register (hereafter referred to as Vessel Register) means the regional register of vessels authorized to fish for tuna and tuna-like species in the Convention Area, as established by the Inter-American Tropical Tuna Commission in June 2000.

\* \* \* \* \*

Tuna means any fish of the genus Thunnus and the species Euthynnus (Katsuwonus) pelamis.

■ 9. In § 300.22, revise the section heading and paragraphs (a), (b) introductory text, and (b)(2), (b)(3), (b)(4), (b)(5)(iv), and (b)(7); and add new paragraphs (b)(5)(vi), (b)(5)(vii), (b)(5)(viii), and (b)(8) to read as follows:

§ 300.22 Eastern Pacific fisheries recordkeeping and written reports.

(a) The master or other person in charge of a commercial fishing vessel or commercial passenger fishing vessel (CPFV) authorized to fish for tuna and tuna-like species in the Convention Area, or a person authorized in writing to serve as the agent for either person, must keep an accurate log of operations conducted from the fishing vessel. For vessels greater than 400 st (362.8 mt) carrying capacity that are authorized to purse seine for tuna in the Convention Area, the log must include for each day the date, noon position (stated in latitude and longitude or in relation to known physical features), and the

tonnage of fish on board, by species. The record and bridge log maintained and submitted at the request of the IATTC shall be sufficient to comply with this paragraph, provided the items of information specified by the IATTC are accurately entered in the log. For purse seine vessels of 400 st (362.8 mt) carrying capacity or less and for non-purse seine vessels, maintaining and submitting any logbook required by existing state or federal regulation shall be sufficient to comply with this paragraph.

(b) Vessel Register. The Vessel Register shall include, consistent with resolutions of the IATTC, all commercial fishing vessels and CPFVs authorized to fish for tuna and tuna-like species in the Convention Area. Except as provided under paragraph (b)(1) of this section, tuna purse seine vessels must be listed on the Vessel Register and categorized as active under paragraph (b)(4)(i) of this section in order to fish for tuna and tuna-like species in the Convention Area.

\* \* \* \* \*

(2) Requirements for inclusion of purse seine vessels on the vessel register. The tuna purse seine portion of the Vessel Register shall include, consistent with resolutions of the IATTC, only vessels that fished in the Convention Area prior to June 28, 2002. Inclusion on the tuna purse seine portion of the Vessel Register is valid through December 31 of each year. New tuna purse seine vessels may be added to the Vessel Register at any time to replace those previously removed by the Regional Administrator, provided that the total capacity of the replacement vessel or vessels does not exceed that of the tuna purse seine vessel or vessels being replaced.

(3) Vessel information. Information on each commercial fishing vessel or CPFV authorized to use purse seine, longline, drift gillnet, harpoon, troll, rod and reel, or pole and line fishing gear to fish for tuna and tuna-like species in the Convention Area for sale shall be collected by the Regional Administrator to conform to IATTC resolutions governing the Vessel Register. This information initially includes, but is not limited to, the vessel name and registration number; the name and business address of the owner(s) and managing owner(s); a photograph of the vessel with the registration number legible; previous vessel name(s) and previous flag (if known and if any); port of registry; International Radio Call Sign; vessel length, beam, and moulded depth; gross tonnage, fish hold capacity in cubic meters, and carrying capacity

in metric tons; engine horsepower; date and place where built; and type of fishing method or methods used. The required information shall be collected as part of existing information collections as described in this and other parts of the CFR.

(4) *Purse seine vessel register status.* For a purse seine vessel to be listed on the Vessel Register and to be categorized as either "active" or "inactive" in the following calendar year, the vessel owner or managing owner must submit to the Regional Administrator the required permit applications, written notifications, and fees as described under § 216.24(b) of this title and under paragraphs (b)(4)(i) and (b)(4)(iii) of this section.

(i) *Active status.* As early as August 1 of each year, vessel owners or managing owners may request that a purse seine vessel qualified to be listed on the Vessel Register under paragraph (b)(2) of this section be categorized as active for the following calendar year. To request a purse seine vessel in excess of 400 st (362.8 mt) carrying capacity be listed on the Vessel Register and be categorized as active, the vessel owner or managing owner must submit to the Regional Administrator the vessel permit application and payment of the permit application fee and vessel assessment fee. To request a purse seine vessel of 400 st (362.8 mt) carrying capacity or less be listed on the Vessel Register and be categorized as active, the vessel owner or managing owner must submit to the Regional Administrator written notification including, but not limited to, a vessel photograph, the vessel information as described under paragraph (b)(3) of this section, and the owner or managing owner's signature and business telephone and fax numbers. If a purse seine vessel of 400 st (362.8 mt) carrying capacity or less is required by the Agreement on the IDCP to carry an observer, the vessel owner or managing owner must also submit payment of the vessel assessment fee to the Regional Administrator. Vessel permit applications and written notifications must be submitted by fax to (562) 980-4047. The Regional Administrator must receive the vessel permit application or written notification and payment of the permit application fee and vessel assessment fee no later than September 15 for vessels for which a DML was requested for the following year and no later than November 30 for vessels for which a DML was not requested for the following year. Submission of the vessel permit application or written notification and payment of the vessel assessment fee and permit application

fee will be interpreted by the Regional Administrator as a request for a vessel to be categorized as active. The following restrictions apply to active status:

(A) The cumulative carrying capacity of all purse seine vessels categorized as active on the Vessel Register may not exceed 8,969 mt in a given year;

(B) A purse seine vessel may not be added to active status on the Vessel Register unless the captain of the vessel has obtained a valid operator permit under § 216.24(b)(2) of this title;

(C) Requests for active status will be prioritized according to the following hierarchy:

(1) Requests received for vessels that were categorized as active in the previous year, unless the request for active status was determined to be frivolous by the Regional Administrator under paragraph (b)(4)(ii) of this section;

(2) Requests received for vessels that were categorized as inactive under paragraph (b)(4)(iii) of this section in the previous year;

(3) Requests for vessels not described in paragraphs (b)(4)(i)(C)(1) or (2) of this section will be prioritized on a first-come, first-served basis according to the date and time stamp printed by the incoming fax machine upon receipt, provided that the associated vessel assessment fee is paid by the applicable deadline described in § 216.24(b)(6)(iii) of this title; and

(4) Requests received from owners or managing owners of vessels that were determined by the Regional Administrator to have made a frivolous request for active status under paragraph (b)(4)(ii) of this section.

(ii) *Frivolous requests for active status.* A request for active status under paragraph (b)(4)(i) of this section will be considered frivolous, unless as a result of force majeure or other extraordinary circumstances as determined by the Regional Administrator if, for a vessel categorized as active in a given calendar year,

(A) Less than 20 percent of the vessel's total landings, by weight, in that same year is comprised of tuna harvested by purse seine in the Convention Area; or

(B) The vessel did not fish for tuna at all in the Convention Area in that same year.

(iii) *Inactive status.* From August 1 through November 30 of each year, vessel owners or managing owners may request that purse seine vessels qualified to be listed on the Vessel Register under paragraph (b)(2) of this section be categorized as inactive for the following calendar year. To request a purse seine vessel in excess of 400 st

(362.8 mt) carrying capacity be listed on the Vessel Register and categorized as inactive for the following calendar year, the vessel owner or managing owner must submit to the Regional Administrator payment of the associated vessel assessment fee. Payment of the vessel assessment fee consistent with inactive status will be interpreted by the Regional Administrator as a request for the vessel to be categorized as inactive. To request a purse seine vessel of 400 st (362.8 mt) carrying capacity or less be listed on the Vessel Register and categorized as inactive for the following calendar year, the vessel owner or managing owner must submit by mail to the Regional Administrator a written notification including, but not limited to, the vessel name and registration number and the vessel owner or managing owner's name, signature, business address, and business telephone and fax numbers. Payment of the vessel assessment fee is not required for vessels of 400 st (362.8 mt) carrying capacity or less to be categorized as inactive. At any time during the year, a vessel owner or managing owner may request that a purse seine vessel qualified to be listed on the Vessel Register under paragraph (b)(2) of this section be categorized as inactive for the remainder of the calendar year. To request a purse seine vessel in excess of 400 st (362.8 mt) carrying capacity be listed on the Vessel Register and categorized as inactive for the remainder of the calendar year, the vessel owner or managing owner must submit to the Regional Administrator payment of the associated vessel assessment fee. To request a purse seine vessel of 400 st (362.8 mt) carrying capacity or less be listed on the Vessel Register and categorized as inactive for the remainder of the calendar year, the vessel owner or managing owner must submit to the Regional Administrator written notification as described in this paragraph (payment of the vessel assessment fee is not required).

(5) \* \* \*

(iv) For failure to pay a penalty or for default on a penalty payment agreement resulting from a final agency action for a violation;

\* \* \* \* \*

(vi) If the vessel does not have a valid state registration or U.S. Coast Guard certificate of documentation;

(vii) For tuna purse seine vessels, upon receipt of written notification from the owner or managing owner of the intent to transfer the vessel to foreign registry and flag, as described in paragraph (b)(8) of this section; or

(viii) For tuna purse seine vessels, if the request for active status on the

Vessel Register has been determined to be a frivolous request.

\* \* \* \* \*

(7) *Procedures for replacing purse seine vessels removed from the Vessel Register.*

(i) A purse seine vessel in excess of 400 st (362.8 mt) carrying capacity that was previously listed on the Vessel Register, but not included for a given year or years, may be added back to the Vessel Register and categorized as inactive at any time during the year, provided the owner or managing owner of the vessel pays the vessel assessment fee associated with inactive status. A purse seine vessel of 400 st (362.8 mt) carrying capacity or less that was previously listed on the Vessel Register, but not included for a given year or years, may be added back to the Vessel Register and categorized as inactive at any time during the year, provided the owner or managing owner of the vessel submits written notification as described in paragraph (b)(4)(iii) of this section.

(ii) A purse seine vessel may be added to the Vessel Register and categorized as active in order to replace a vessel removed from active status under paragraph (b)(5) of this section, provided the total carrying capacity of the active vessels does not exceed 8,969 mt and the owner submits a complete request under paragraph (b)(7)(iv) or (b)(7)(v) of this section.

(iii) After a purse seine vessel categorized as active is removed from the Vessel Register, the Regional Administrator will notify owners or managing owners of vessels categorized as inactive that replacement capacity is available on the active list of the Vessel Register. In the event that owners of inactive vessels do not request to replace a removed vessel, the Regional Administrator will notify owners of vessels eligible for, but not included on, the Vessel Register that replacement capacity is available on the active list of the Vessel Register.

(iv) Vessel owners or managing owners may request a purse seine vessel of 400 st (362.8 mt) carrying capacity or less be categorized as active to replace a vessel or vessels removed from the Vessel Register by submitting to the Regional Administrator written notification as described in paragraph (b)(4)(i) of this section and, only if the vessel is required by the Agreement on the IDCP to carry an observer, payment of the vessel assessment fee within 10 business days after submission of the faxed written notification. The replacement vessel will be eligible to be categorized as active on the Vessel

Register if it has a carrying capacity equal to or less than the vessel or vessels being replaced. Payments received will be subject to a 10 percent surcharge for vessels that were listed as active on the Vessel Register in the previous calendar year, but not listed as inactive at the beginning of the calendar year for which active status was requested.

(v) Vessel owners or managing owners may request a purse seine vessel in excess of 400 st (362.8 mt) carrying capacity be categorized as active to replace a vessel or vessels removed from the Vessel Register by submitting to the Regional Administrator the vessel permit application as described under § 216.24(b) of this title and payment of the vessel assessment fee and permit application fee within 10 business days after submission of the faxed vessel permit application for the replacement vessel. The replacement vessel will be eligible to be categorized as active on the Vessel Register if it has a carrying capacity equal to or less than the vessel or vessels being replaced, and the captain of the replacement vessel possesses an operator permit under § 216.24(b) of this title. Payments received will be subject to a 10 percent surcharge for vessels that were listed as active on the Vessel Register in the previous calendar year, but not listed as inactive at the beginning of the calendar year for which active status was requested.

(vi) The Regional Administrator will forward requests to replace vessels removed from the Vessel Register within 15 days of receiving each request.

(8) The owner or managing owner of a purse seine vessel listed on the Vessel Register must provide written notification to the Regional Administrator prior to submitting an application for transfer of the vessel to foreign registry and flag. Written notification must be submitted by mail and received by the Regional Administrator at least 10 business days prior to submission of the application for transfer. The written notification must include the vessel name and registration number; the expected date that the application for transfer will be submitted; and the vessel owner or managing owner's name and signature. Vessels that require approval by the U.S. Maritime Administration prior to transfer of the vessel to foreign registry and flag will not be subject to the notification requirement described in this paragraph.

■ 10. In § 300.23, revise the section heading to read as follows:

**§ 300.23 Eastern Pacific fisheries – Persons and vessels exempted.**

\* \* \* \* \*

■ 11. In § 300.24, remove the semicolons at the end of paragraphs (b), (e), (f), and (g) and replace them with periods; remove “; or” at the end of paragraph (h) and replace it with a period; and add a new paragraph (j) to read as follows:

**§ 300.24 Prohibitions.**

\* \* \* \* \*

(j) Fail to provide written notification as described under § 300.22(b)(8) to the Regional Administrator at least 10 business days prior to submission of an application to transfer a purse seine vessel listed on the Vessel Register to foreign registry and flag, unless transfer of the vessel requires approval by the U.S. Maritime Administration.

■ 12. In § 300.25, revise paragraph (a), the heading for paragraph (e) and revise paragraph (e)(1) to read as follows:

**§ 300.25 Eastern Pacific fisheries management.**

(a) *Notification of IATTC recommendations and resolutions.* Fishery management resolutions made by the IATTC and approved by the Department of State will be promulgated in the **Federal Register** via appropriate rulemaking. The publication in the **Federal Register** will summarize the fishery management resolutions and respond to any public comments received by NMFS.

\* \* \* \* \*

(e) *Bycatch reduction measures—(1)* All purse seine vessels must retain on board and land all bigeye, skipjack, and yellowfin tuna brought on board the vessel after a set, except fish deemed unfit for human consumption for other than reason of size. This requirement shall not apply to the last set of a trip if the available well capacity is insufficient to accommodate the entire fish catch brought on board.

\* \* \* \* \*

[FR Doc. E9–499 Filed 1–12–09; 8:45 am]

BILLING CODE 3510–22–S

[Code of Federal Regulations]  
[Title 5, Volume 3]  
[Revised as of January 1, 2009]  
From the U.S. Government Printing Office via GPO Access  
[CITE: 5CFR1320.6]

[Page 168-169]

TITLE 5--ADMINISTRATIVE PERSONNEL

CHAPTER III--OFFICE OF MANAGEMENT AND BUDGET

PART 1320\_CONTROLLING PAPERWORK BURDENS ON THE PUBLIC--Table of Contents

Sec. 1320.6 Public protection.

(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to the requirements of this part if:

(1) The collection of information does not display, in accordance with Sec. 1320.3(f) and Sec. 1320.5(b)(1), a currently valid OMB control number assigned by the Director in accordance with the Act; or

(2) The agency fails to inform the potential person who is to respond to the collection of information, in accordance with Sec. 1320.5(b)(2), that such person is not required to respond to the collection of information unless it displays a currently valid OMB control number.

(b) The protection provided by paragraph (a) of this section may be raised in the form of a complete defense, bar, or otherwise to the imposition of such penalty at any time during the agency administrative process in which such penalty may be imposed or in any judicial action applicable thereto.

(c) Whenever an agency has imposed a collection of information as a means for proving or satisfying a condition for the receipt of a benefit or the avoidance of a penalty, and the collection of information does not display a currently valid OMB control number or inform the potential persons who are to respond to the collection of information, as prescribed in Sec. 1320.5(b), the agency shall not treat a person's failure to comply, in and of itself, as grounds for withholding the benefit or imposing the penalty. The agency shall instead permit respondents to prove or satisfy the legal conditions in any other reasonable manner.

(1) If OMB disapproves the whole of such a collection of information (and the disapproval is not overridden under Sec. 1320.15), the agency shall grant the benefit to (or not impose the penalty on) otherwise qualified persons without requesting further proof concerning the condition.

(2) If OMB instructs an agency to make a substantive or material change to such a collection of information (and the instruction is not overridden under Sec. 1320.15), the agency shall permit respondents to prove or satisfy the condition by complying with the collection of information as so changed.

(d) Whenever a member of the public is protected from imposition of a penalty under this section for failure to comply with a collection of information, such penalty may not be imposed by an agency directly, by an agency through judicial process, or by any

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other person through administrative or judicial process.

(e) The protection provided by paragraph (a) of this section does not preclude the imposition of a penalty on a person for failing to comply with a collection of information that is imposed on the person by statute--e.g., 26 U.S.C. Sec. 6011(a) (statutory requirement for person to file a tax return), 42 U.S.C. Sec. 6938(c) (statutory requirement for person to provide notification before exporting hazardous waste).

United States Chemical Safety and Hazard Investigation Board (CSB) announces that it will hold a public meeting on February 4, 2010, in Garner, North Carolina to consider urgent recommendations to the National Fire Protection Association (NFPA), the American Gas Association (AGA) and the Chair of the NFPA 54/ANSI Z223.1 Committee that result from its investigation of this incident.

The meeting will begin at 6 p.m. in the Oak Forrest Ballroom at the Sheraton Raleigh Hotel, 421 Salisbury St., Raleigh, North Carolina. The meeting is free and open to the public. Pre-registration is not required, but to assure adequate seating, attendees are encouraged to pre-register by emailing their names and affiliations to [ConAgra@CSB.gov](mailto:ConAgra@CSB.gov) by January 29, 2010.

On June 9, 2009, the ConAgra Slim Jim production facility in Garner, North Carolina, experienced a catastrophic natural gas explosion that caused four deaths, three critical life-threatening burn injuries, an amputation, and other injuries that sent a total of 71 people to the hospital. The explosion caused serious structural damage to 100,000 square feet of the packaging area of the plant, including wall and roof collapse, which had the potential to cause additional deaths and serious injuries.

The accident occurred during the installation and commissioning of a new gas-fired industrial water heater, manufactured by Energy Systems Analysts, Inc. (ESA). On the day of the accident, an ESA worker was attempting to purge the new gas piping of air by opening the supply of gas, prior to the start-up of the water heater. The purged gas was piped directly into the room rather than being vented to the outside. Some ConAgra employees smelled gas in the packaging area, others did not. Personnel who were in and out of the utility room noticed the gas odor but most were not seriously concerned and considered the purging activity to be a normal part of the start-up process. The ESA and ConAgra employees were not aware that as a result of the purging, a dangerous release of natural gas had occurred into the building, exceeding the lower explosive limit (LEL).

The vicinity of the utility room contained numerous potential ignition sources, including multiple unclassified electrical devices. Nonessential personnel were neither aware of the water heater start-up nor instructed to leave the plant during the gas line purging activity. Over 200 people who had no role in the installation were in the building at the time of the explosion.

At the meeting, the CSB investigative team will present its preliminary findings supporting the need for urgent recommendations arising from this incident to the CSB Board and the public. The Board will then ask questions of the team. At the end of the panel discussion, the Board will consider the urgent recommendations proposed by the staff. At the end of the Board's deliberations, the Board may decide to proceed to vote to formally approve the draft urgent recommendations.

The meeting will be videotaped and an official transcript will be included in the investigative file. All staff presentations are preliminary and are intended solely to allow the Board to consider the issues and factors involved in this case in a public forum. No factual analyses, conclusions, findings or recommendations of the staff should be considered final. Only after the Board has considered and approved the urgent recommendations will there be an approved final record.

**Christopher W. Warner,**

*General Counsel.*

[FR Doc. 2010-840 Filed 1-13-10; 4:15 pm]

**BILLING CODE 6350-01-P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* Bureau of Industry and Security (BIS).

*Title:* Chemical Weapons Convention Declaration and Report Handbook and Forms.

*OMB Control Number:* 0694-0091.

*Form Number(s):* Form 1-1, Form 1-2, Form 1-2A, Form 1-2B, etc.

*Type of Request:* Extension without change of a currently approved collection.

*Burden Hours:* 16,047.

*Number of Respondents:* 816.

*Average Hours per Response:* 30 minutes to 577 hours (depending on the required documentation).

*Needs and Uses:* This information is required for the United States to comply with the Chemical Weapons Convention (CWC), an international arms control treaty. The Chemical Weapons Convention Implementation Act of 1998 and Commerce Chemical Weapons

Convention Regulations (CWCR) specify the rights, responsibilities and obligations for submission of declarations, reports and inspections.

*Affected Public:* Business or other for-profit organizations.

*Frequency:* Annually or on occasion.

*Respondent's Obligation:* Mandatory.

*OMB Desk Officer:* Jasmeet Seehra, (202) 395-3123.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482-0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at [dHynek@doc.gov](mailto:dHynek@doc.gov)).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB Desk Officer, via the Internet at [Jasmeet.K.Seehra@omb.eop.gov](mailto:Jasmeet.K.Seehra@omb.eop.gov) or Fax to (202) 395-5167.

Dated: January 12, 2010.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2010-654 Filed 1-14-10; 8:45 am]

**BILLING CODE 3510-33-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Proposed Information Collection; Comment Request; Fisheries Certificate of Origin

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA).

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before March 16, 2010.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at [dHynek@doc.gov](mailto:dHynek@doc.gov)).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection

instrument and instructions should be directed to William G. Jacobson, (562) 980-4035 or [bill.jacobson@noaa.gov](mailto:bill.jacobson@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

*The information required by the International Dolphin Conservation Program Act, amendment to the Marine Mammal Protection Act, is needed to:* (1) Document the Dolphin-safe status of tuna import shipments; (2) verify that import shipments of fish not harvested by large scale, high seas driftnets; and (3) verify that imported tuna not harvested by an embargoed nation or one that is otherwise prohibited from exporting tuna to the United States. Forms are submitted by importers and processors.

##### II. Method of Collection

Respondents have a choice of either electronic or paper forms. Methods of submittal include e-mail of electronic forms, and mail and facsimile transmission of paper forms.

##### III. Data

*OMB Control Number:* 0648-0370.

*Form Number:* NOAA Form 370.

*Type of Review:* Regular submission.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 440.

*Estimated Time per Response:* 20 minutes.

*Estimated Total Annual Burden Hours:* 4,167.

*Estimated Total Annual Cost to Public:* \$4,050.

##### IV. Request for Comments

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 12, 2010.

#### Gwellnar Banks,

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2010-726 Filed 1-14-10; 8:45 am]

BILLING CODE 3510-22-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-570-909]

#### Certain Steel Nails from the People's Republic of China: Notice of Preliminary Results of the New Shipper Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce ("Department") is conducting a new shipper review ("NSR") of the antidumping duty order on certain steel nails from the People's Republic of China ("PRC"). See *Notice of Antidumping Duty Order: Certain Steel Nails From the People's Republic of China*, 73 FR 44961 (August 1, 2008) ("Order"). We preliminarily find that Qingdao Denarius Manufacture Co., Ltd ("Qingdao Denarius") sold subject merchandise at less than normal value ("NV") during the period of review ("POR"), January 23, 2008, through January 31, 2009. If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on entries of subject merchandise during the POR for which the importer-specific assessment rates are above de minimis.

**EFFECTIVE DATE:** January 15, 2010.

**FOR FURTHER INFORMATION CONTACT:** Tim Lord or Matthew Renkey, Office 9, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482-7425 and (202) 482-2312, respectively.

#### SUPPLEMENTARY INFORMATION:

##### General Background

On February 25, 2009, pursuant to section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended ("Act"), and 19 CFR 351.214(c), the Department received a NSR request from Qingdao Denarius. Qingdao Denarius certified that it is a producer and exporter of the subject merchandise upon which the request was based. On March 20, 2009, the Department initiated the requested antidumping duty NSR. See *Certain*

*Steel Nails from the People's Republic of China: Initiation of Antidumping Duty New Shipper Review*, 74 FR 11909 (March 20, 2009). On June 11, 2009, the Department extended the deadline for the preliminary results of this review by 120 days, to January 11, 2010. See *Certain Steel Nails from the People's Republic of China: Extension of Time Limit for the Preliminary Results of the New Shipper Review ("Extension")*<sup>1</sup>, 74 FR 27777 (June 11, 2009).

Between April 3, 2009, and August 4, 2009, Qingdao Denarius submitted responses to the original sections A, C, and D questionnaires and supplemental sections A, C, and D questionnaires.

##### Surrogate Values

On October 29, 2009, the Department sent interested parties a letter requesting comments on surrogate country selection and information pertaining to valuing factors of production ("FOP"). On November 24, 2009, Petitioner<sup>2</sup> submitted surrogate value data. No other party submitted surrogate country or surrogate value data.

##### Verification

Pursuant to 19 CFR 351.307(b)(iv), we conducted verification of the sales and factors of production ("FOP") for Qingdao Denarius between November 9-12, 2009. See Memorandum to the File from Tim Lord, Case Analyst through Alex Villanueva, Program Manager, Verification of the Sales and Factors Response of Qingdao Denarius Manufacture Co., Ltd in the Antidumping New Shipper Review of Certain Steel Nails from the People's Republic of China, dated, January 8, 2010 ("Qingdao Denarius Verification Report").

##### Scope of the Order

The merchandise covered by this order includes certain steel nails having a shaft length up to 12 inches. Certain steel nails include, but are not limited to, nails made of round wire and nails that are cut. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating

<sup>1</sup> Where a statutory deadline falls on a weekend, federal holiday, or any other day when the Department is closed, the Department will reach its determination on the next business day, pursuant to 19 CFR 351.303(b). In this instance, the preliminary results will be due no later than January 11, 2010.

<sup>2</sup> Mid-Continent Nail Corporation.

proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 21, 2010.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2010-1449 Filed 1-25-10; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Correction: Proposed Information Collection; Comment Request; Fisheries Certificate of Origin

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA).

**ACTION:** Correction.

**SUMMARY:** On January 15, 2010, a notice was published in the **Federal Register** (75 FR 2482) on the proposed information collection, Fisheries Certificate of Origin.

In the third paragraph under **SUPPLEMENTARY INFORMATION, III. Data**, the OMB Control No. is *corrected to read*, "0648-0335."

All other information in the notice is correct and remains unchanged.

Dated: January 21, 2010.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2010-1448 Filed 1-25-10; 8:45 am]

**BILLING CODE 3510-13-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[Docket Number 100115026-0026-01]

#### Science Advisory Board; Draft Report of the NOAA Science Advisory Board Oceans and Health Working Group

**AGENCY:** Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric

Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Notice of availability and request for public comment.

**SUMMARY:** NOAA Research (OAR) publishes this notice on behalf of the NOAA Science Advisory Board (SAB) to announce the availability of the draft report of the SAB Oceans and Health Working Group (here called the OHWG) for public comment. The draft report of the OHWG has been prepared pursuant to the request initiated from NOAA for an external panel of experts to explore opportunities to enhance NOAA's ongoing ocean health efforts and their impacts on ecosystem and public health and well-being.

**DATES:** Comments on this draft report must be received by 5 p.m. on February 25, 2010.

**ADDRESSES:** The Draft Report of the OHWG will be available on the NOAA Science Advisory Board Web site at <http://www.sab.noaa.gov/Reports/ohwg>.

The public is encouraged to submit comments electronically to [noaa.sab.comments@noaa.gov](mailto:noaa.sab.comments@noaa.gov). For individuals who do not have access to the Internet, comments may be submitted in writing to: NOAA Science Advisory Board (SAB) c/o Dr. Cynthia Decker, 1315 East-West Highway-R/SAB, Silver Spring, Maryland 20910.

**FOR FURTHER INFORMATION CONTACT:** Dr. Cynthia Decker, Executive Director, Science Advisory Board, NOAA, 1315 East-West Highway-R/SAB, Silver Spring, Maryland 20910. (Phone: 301-734-1156, Fax: 301-734-1459) during normal business hours of 9 a.m. to 5 p.m. Eastern Time, Monday through Friday, or visit the NOAA SAB Web site at <http://www.sab.noaa.gov>.

**SUPPLEMENTARY INFORMATION:** As part of its charge, the OHWG was tasked to consider the following questions and any others that the Working Group may decide to entertain:

- (1) What are NOAA's unique and important scientific roles in addressing ocean health issues?
- (2) What are the right ocean health science questions, products and services for NOAA?
- (3) Are there additional ocean health science issues that should be included in the NOAA research portfolio? If so, what are these?
- (4) What are the appropriate steps for NOAA to incorporate and advance ocean health as part of its core mission?
- (5) How could NOAA more systematically develop ocean health products and services to enhance ecosystem, organism, human, and community health?

(6) How can NOAA better integrate among its major programs, including activities conducted within the agency and those supported in the external community, to better define and assess ocean health issues?

The complete terms of reference for the working group can be found at: [http://www.sab.noaa.gov/Working\\_Groups/current/oceans\\_health/OCEANSHEALTH\\_TOR\\_FINAL.pdf](http://www.sab.noaa.gov/Working_Groups/current/oceans_health/OCEANSHEALTH_TOR_FINAL.pdf).

The SAB is chartered under the Federal Advisory Committee Act and is the only Federal Advisory Committee with the responsibility to advise the Under Secretary on long- and short-term strategies for research, education, and application of science to resource management and environmental assessment and prediction.

NOAA welcomes all comments on the content of the draft report. We also request comments on any inconsistencies perceived within the report, and possible omissions of important topics or issues. This draft report is being issued for comment only and is not intended for interim use. For any shortcoming noted within the report, please propose specific remedies. Suggested changes will be incorporated where appropriate, and a final report will be posted on the SAB Web site.

Please follow these instructions for preparing and submitting comments. Using the format guidance described below will facilitate the processing of comments and assure that all comments are appropriately considered. Overview comments should be provided first and should be numbered. Comments that are specific to particular pages, paragraphs or lines of the section should follow any overview comments and should identify the page and line numbers to which they apply. Please number each page of your comments.

Dated: January 20, 2010.

**Mark E. Brown,**

*Chief Financial Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.*

[FR Doc. 2010-1417 Filed 1-25-10; 8:45 am]

**BILLING CODE 3510-KD-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-XT92

#### Endangered Species; File No. 14396

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and