

respondents, including the use of automated collection techniques or other form of information technology.

#### *D. Deadlines and Instructions for Filing Comments*

237. Pursuant to 47 CFR 1.415, 1.419, interested parties may file comments on or before July 2, 1999 and reply comments on or before July 16, 1999. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

238. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554.

239. Parties must also send three paper copies of their filing to Sheryl Todd, Accounting Policy Division, 445 Twelfth Street S.W., 5-A523, Washington, D.C. 20554. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

#### *E. Ordering Clauses*

240. *It is ordered*, pursuant to sections 1, 4(i) and (j), 201-209, 218-222, 254, and 403 of the Communications Act, as amended, 47 U.S.C. 151, 154(i), 154(j),

201-209, 218-222, 254, and 403 that this Further Notice of Proposed Rulemaking is hereby adopted and comments are requested as described.

241. *It is further ordered* That the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this Further Notice of Proposed Rulemaking, including the Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

#### **List of Subjects**

##### *47 CFR Part 36*

Reporting and recordkeeping requirements, Telephone.

##### *47 CFR Part 54*

Universal service.

##### *47 CFR Part 69*

Communications common carrier.

Federal Communications Commission

**Magalie Roman Salas,**

*Secretary.*

[FR Doc. 99-15025 Filed 6-11-99; 8:45 am]

BILLING CODE 6712-01-U

## **DEPARTMENT OF COMMERCE**

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

#### **50 CFR Part 216**

[Docket No. 990324081-9081-01; I.D. 072098G]

RIN 0648-A185

#### **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:** Proposed rule; request for comments and notice of public hearings.

**SUMMARY:** NMFS proposes regulations to implement provisions of the International Dolphin Conservation Program Act (IDCPA). These regulations would allow the entry of yellowfin tuna into the United States under certain conditions from nations signatory to the International Dolphin Conservation Program (IDCP) that otherwise would be under embargo. It would also allow U.S. fishing vessels to participate in the fishery in the ETP on equivalent terms with the flag vessels of other IDCP signatory nations. A U.S. citizen employed on a purse seine vessel of another IDCP signatory nation with an

affirmative finding would not be in violation of U.S. prohibitions on the taking of marine mammals if that vessel takes marine mammals incidentally during fishing operations outside the U.S. exclusive economic zone (EEZ) in compliance with the requirements of the IDCP. The standard for use of "dolphin-safe" labels for tuna products would also change. General requirements also are proposed to ensure adequate tracking and verification of tuna imports from the ETP.

**DATES:** Comments on the proposed regulations must be received on or before July 14, 1999. Public hearings on this proposed rule will be held on Thursday, July 8, 1999, in Long Beach, CA, at 10:00 a.m.-1:00 p.m. and on Wednesday, July 14, 1999, in Silver Spring, MD, at 1:00 p.m.-4:00 p.m.

**ADDRESSES:** Send comments to J. Allison Routt, NMFS, Southwest Region, Protected Resources Division, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213. The locations of the public hearings on this proposed rule are: (1) Room 3400, 501 W. Ocean Blvd., Long Beach, CA 90802-4213; and (2) NOAA Building, SSMC IV, Room 1W611, 1305 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** J. Allison Routt, NMFS, Southwest Region, Protected Resources Division, (562) 980-4020. For additional information about the public hearing in Long Beach, CA, contact J. Allison Routt. For additional information about the public hearing in Silver Spring, MD, contact Cathy Eisele, NMFS, Headquarters, Marine Mammal Division, (301) 713-2322.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

In 1992, 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 dolphin mortality reduction schedule providing for significant reductions in dolphin mortalities. By 1995, nations fishing in the ETP under the La Jolla Agreement had reduced dolphin mortality to less than 5,000 dolphins annually, two 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 to strengthen and enhance the IDCP.

The program outlined in the Panama Declaration will provide greater

protection for dolphins, and enhance the conservation of yellowfin tuna and other living marine resources in the ETP ecosystem. The Panama Declaration anticipated that the United States would change the provisions of the Marine Mammal Protection Act (MMPA) 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 in order to allow U.S. vessels to participate in the ETP fishery on an equal basis with the vessels of other nations. Under the Declaration, signatory nations agreed to develop a legally binding, international agreement. In May 1998, eight nations, including the United States, signed such a binding, international agreement to implement the IDCP. This Agreement will go into force after either ratification, acceptance, or approval by four nations.

The IDCPA was signed into law on August 15, 1997, to recognize and implement the IDCP and to address related issues. The IDCPA was the domestic endorsement of an international management regime adopted during the last 20 years under the auspices of the Inter-American Tropical Tuna Commission (IATTC). The IDCPA primarily amends provisions in the MMPA governing marine mammal mortality in 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. Key provisions of the IDCPA will become effective when two certifications are made. The Secretary of State must certify to Congress that a binding legal instrument establishing the IDCP has been adopted and is in force (i.e., Agreement on the IDCP). In addition, the Secretary of Commerce must certify that a study has commenced on the effects of intentional encirclement (including chase) on dolphins and dolphin stocks incidentally taken in the course of purse seine fishing for yellowfin tuna in the ETP, and that funds are available to complete the first year of this study. On July 27, 1998, the Secretary of Commerce provided the required certification to Congress on the research study.

The Agreement on the IDCP becomes effective when four countries have deposited their instruments of either ratification, acceptance, or adherence with the United States. The United States, Panama, Ecuador, and Mexico have deposited their instruments of either ratification, acceptance, or

adherence with the Depositary. The Agreement on the IDCP became effective on February 15, 1999. On March 3, 1999, the Secretary of State provided the required certification to Congress that the Agreement on the IDCP has been adopted and is in force. The IDCPA became effective on this date. Provisions to implement the IDCPA and the new international agreement for dolphin conservation in the ETP are the subject of these proposed regulations.

Section 7 of the IDCPA amends the Tuna Conventions Act regarding a General Advisory Committee and a Scientific Advisory Committee, and provisions are proposed to address these changes. Section 6(c) of the IDCPA amends the permit sanction provisions in the MMPA applicable to permits issued to U.S. purse seine vessels in the ETP and their operators, and these changes will be addressed in a separate rulemaking.

#### Definitions

Definitions are added for "Administrator, Southwest Region," "Agreement on the International Dolphin Conservation Program," "Declaration of Panama," "Force majeure," "International Dolphin Conservation Program," "International Dolphin Conservation Program Act," "International Review Panel," and "Per-stock per-year dolphin mortality limit." In addition, the definitions of "ABI," "Director, Southwest Region," "ETP Fishing Area 1," "ETP Fishing Area 2," "ETP Fishing Area 3," "Fishing season," "Kill-per-set," "Kill-per-ton," and "Purse seine set on common dolphins" are removed because they are no longer necessary.

Although the Agreement on the IDCP applies in the Pacific Ocean west only to 150° W. meridian, the current definition of ETP is out to 160° W. meridian. This definition is not proposed to be changed because the existing definition is set by the Dolphin Protection Consumer Information Act (DPCIA) (16 U.S.C. 1305). This difference is expected to only affect a relatively small number of trips by U.S. purse seine vessels, when they extend their fishing activities under the Treaty that governs their fishing in the South Pacific into waters that overlap with the waters covered by the Agreement on the IDCP. This overlap will require these vessels to comply with the dolphin-safe requirements of the MMPA applicable to the ETP for fishing in the overlap area west of 150° W. meridian even though the Agreement on the IDCP has determined that fishing on dolphins does not occur in this area.

#### Requirements for U.S. Vessels

The certificate of inclusion process for U.S. vessel owners and operators under a general permit issued to the American Tunaboat Association would be replaced with a system of issuing permits directly to vessel owners and operators. Two permit categories would be retained for tuna purse seine vessels of greater than 400 short tons (362.8 metric tons (mt)) carrying capacity. One category would apply to purse seining involving the intentional taking of marine mammals, and the other category would apply to purse seining not involving the intentional taking of marine mammals. As mandated by the IDCPA, the latter category of permits would not require that the vessel be equipped with special equipment or gear. The terms and conditions for both categories of permits would be modified to require that observers be carried on every trip. Existing dolphin stock and species prohibitions would be replaced with a provision prohibiting sets on a stock when the mortality limit for that stock has been reached or exceeded. The authorization to take marine mammals during a set to protect catch or gear would be eliminated, retaining only the authorization to take marine mammals if necessary during a set to prevent personal injury. The authorizations proposed for elimination are no longer justified based upon the experience of the U.S. fleet and the low levels of dolphin mortality allowed under the IDCP.

The operator performance requirements are proposed to be removed and a subsection reserved for this subject. Because U.S. vessels have not been making intentional sets on dolphins in recent years, the existing performance requirements based upon older data do not reflect improvements in performance that should be expected from the U.S. operators based upon the performance of the international fleet in recent years. A subsection for operator performance requirements would be reserved to implement operator performance requirements when they are developed under the IDCP. Even without the performance requirements in effect now, the dolphin mortality limit (DML) system provides an effective incentive to both vessel owners and operators to achieve low dolphin mortalities, as demonstrated by the results since 1992. The implementation of operator performance standards under the IDCP is the best way to prevent substandard operators from moving among the vessels of various nations.

Implementing a provision in the Agreement on the IDCP, purse seine vessels of 400 st (362.8 mt) or less carrying capacity would be prohibited from intentionally deploying a net on or encircling dolphins. The U.S. vessels that are in this size range have not been obtaining certificates of inclusion to intentionally set on dolphins, so this new provision is not anticipated to affect the operations of any U.S. vessels.

The DML provisions are proposed to be revised to incorporate changes arising from the Agreement on the IDCP. These revisions include the following: adding a procedure for vessels that normally do not fish in the ETP to apply for a DML; removing the 15-percent limitation on adjusting DMLs as allocated by the IDCP; incorporating the DML re-allocation criteria in Annex IV of the Agreement on the IDCP; and reducing the allocation for a DML for the second half of a year to one-third of a full-year DML instead of the one-half of a full-year allocation previously provided.

The regulations would preclude a vessel that fails in two consecutive years to make at least one intentional set on dolphins by April 1 from obtaining a DML in the subsequent year. Similarly, a vessel with a second-semester DML that fails to make at least one intentional set on dolphins by December 31 of that year, or a vessel with a per-trip DML that fails to make at least one intentional set on dolphins during that trip, would lose its DML. After two consecutive losses of its DML, a vessel would not be eligible to receive a DML for the following year. Exceptions might be granted for *force majeure* or extraordinary circumstances.

The observers' access to certain vessel equipment and the working needs of observers on U.S. vessels would be elaborated upon in conformity with the Agreement on the IDCP.

The sections on permits for "Stationary gear," "Other gear," and "Commercial passenger fishing vessels" would be removed because the take of marine mammals incidental to these fisheries is now regulated by 50 CFR part 229.

#### Imports of Yellowfin Tuna and Yellowfin Tuna Products

The existing § 216.24(e) on imports would be revised for clarity, and would be redesignated as § 216.24(f). The observer provisions would be redesignated from § 216.24(f) to § 216.24(e) so that they would immediately follow the other sections applicable to U.S. vessels.

#### Harmonized Tariff Schedule (HTS) Numbers

Reflecting changes in the U.S. HTS, the list of HTS numbers in newly designated § 216.24(f)(2) would be updated.

All shipments, regardless of port of entry, identified by an HTS number in § 216.24, must be accompanied by a Fisheries Certificate of Origin (FCO). Unfortunately, the existing regulations are incorrect and appear to apply the MMPA § 101(a)(2) tuna embargo to encompass all shipments covered by these HTS numbers. Actually, the MMPA tuna embargos (for primary nations) cover only yellowfin tuna harvested by purse seines in the ETP. For instance, a shipment of skipjack harvested by longline may require an FCO because the importer has identified it with one of the HTS numbers listed under § 216.24(e). Such a shipment would not be subject to the MMPA embargo.

A provision would be added stating that no tuna or tuna products may be imported into the United States, even if there is an affirmative finding in place, if these tuna or tuna products were banned from importation under the MMPA before the effective date of section 4 of the IDCPA. The scope of the intermediary nation embargo on ETP yellowfin tuna and tuna products would be made the same as the scope of the embargo that applies to harvesting nations, conforming the regulations to changes made in the MMPA since the existing regulations were last changed. Dates related to tuna caught in large-scale driftnet fisheries, which are no longer relevant, would be removed.

#### Affirmative Findings

Yellowfin tuna or yellowfin tuna products imported from the ETP tuna purse seine fishery must meet the new standards established by the IDCPA. The finding section of the regulations, which would be redesignated as § 216.24(f)(9), would be revised to conform to the new standards and requirements of the IDCPA. No harvesting nation could export yellowfin tuna harvested by purse seine in the ETP into the United States unless the nation provided NMFS documentary evidence that it (1) participates in the IDCP; (2) is a member or applicant member of, and meeting the financial obligations of membership in, the IATTC; (3) keeps its fleet's stock-specific dolphin mortality within the IDCP's prescribed limits; and (4) keeps its fleet's annual dolphin mortality within the aggregate DMLs assigned to the fleet. The former two items are

explicit in the IDCPA. The third item does not have much relevance until the IDCP nations allocate per-stock mortality limits between nations. The fourth item is NMFS' proposed interpretation of ambiguous statutory language in § 101(a)(2)(B)(iii) of the MMPA as revised by the IDCPA:

...the total dolphin mortality limits \* \* \* permitted for that nation's vessels under the [IDCP] do not exceed the limits determined for 1997, or for any year thereafter ...

NMFS considered, but rejected, three alternative interpretations of § 101(a)(2)(B)(iii) of the MMPA: (1) the aggregate of the DMLs assigned to each of the harvesting nation's vessels ("fleet DML") for the upcoming year could not exceed the nation's fleet DML in 1997 or subsequent years; (2) the overall, international dolphin mortality cap set by the IDCP for the upcoming year could not exceed the cap in 1997 [i.e., 7,500 dolphins] or subsequent years [e.g., 6,500 dolphins in 1998]; and (3) the DML assigned to each vessel in the international fishery could never exceed the limit assigned in 1997 [i.e., 94 dolphins/vessel] or subsequent years [e.g., 66 dolphins/vessel in 1998, and 39.68 dolphins/vessel in 1999].

The first rejected alternative conforms best with the wording of § 101(a)(2)(B)(iii): "the total dolphin mortality limits ...for that nation's vessels...do not exceed the limits determined for 1997, or for any year thereafter \* \* \*." However, comparing a nation's aggregate (fleet) mortality limits to the nation's earlier limits would prejudice decisions under the IDCP. In the Panama Declaration, the United States pledged to lift embargoes against nations participating in accordance with the international program. While the international program intended to reduce overall dolphin mortality, the parties to the Panama Declaration and the IDCP did not contemplate limiting the size of any nation's fleet (at least not for the purpose of dolphin protection) or the size of any nation's aggregate DML. The IDCP has always allocated the annual international cap on a per-vessel basis, not on a per-nation basis. Under this rejected alternative, a nation could fish in strict compliance with the program but be embargoed by the United States if its fleet happened to be relatively large in the upcoming year and therefore receive a relatively large aggregate (fleet) DML. Penalizing a nation whose fleet has grown could discourage efficient utilization of resources (fishing vessels transferring between nations) without affecting overall international dolphin mortality. Harvesting nations that adopted good

dolphin conservation programs because of the IDCP might quit the IDCP if subjected to this type of embargo.

The second alternative interpretation was rejected because the statutory placement of an item relating to international management would not be logical or appropriate among a list of standards applicable to individual harvesting nations. While each IATTC participant could block a larger international cap (because the IATTC operates by consensus), imposing trade restrictions to penalize fellow harvesting nations would not be logical for the following reasons. First, the United States also participates in the IDCP, which operates by consensus. Therefore, this standard would only have significance (and result in an embargo) if the United States itself approved raising the international cap. In the statutory context, Congress certainly intended these importation standards to induce compliance with the IDCP by harvesting nations. Second, this is not the type of documentary evidence that the United States would require an individual harvesting nation to provide since the United States knows the international cap by virtue of our participation in the IDCP.

The third rejected alternative is not logical for the same reasons as the second alternative; vessel DMLs are set by consensus, so the United States could unilaterally prevent this standard from being violated; and since we participate in the IDCP also, the United States need not rely upon documentary evidence from harvesting nations.

The proposed interpretation makes the most sense in the context of § 101(a)(2)(B) of the MMPA because it focuses on a nation's compliance with the international regime. Only a nation that failed to keep its own fleet's annual dolphin mortality within the aggregate DMLs assigned to the fleet would be embargoed. That is the type of documentary evidence that the United States would not necessarily have without a submission from the harvesting nation. In the embargo context, this interpretation focuses NMFS' attention on a fleet's results in protecting dolphin, which should reflect on the success of the harvesting nation's management and enforcement program, rather than decisions by other parties to the IDCP. This encourages other harvesting nations to comply with the IDCP and threatens economic sanctions only against nations that do not control or manage their own fleets.

Although currently the IDCP does not assign per-stock dolphin mortality limits to individual nations, fleets, or vessels, if the IDCP assigns per-stock

limits in the future, we would compare the total per-stock dolphin mortality of a harvesting nation's fleet in a calendar year to the combined allocated annual per-stock mortality limits assigned to the fleet for that year. If the mortality exceeded the assigned limits, the United States would impose an ETP embargo against that nation for the subsequent April through March period.

While the existing concept of nations applying for and renewing annual affirmative findings is retained, the proposed regulations reflect the reality that the documentary evidence used to make findings may be provided by a combination of the exporting nation, the harvesting nation (if different from the exporting nation), and the IDCP and IATTC. In addition, to reflect the fact that the IDCP principally uses the calendar year as the basis for management, including the calculation and monitoring of annual DMLs, the period of validity of a finding in the regulations is proposed to be from April 1 through March 31 of the following year, relying upon data from the previous calendar year. To work effectively within this schedule, NMFS will reduce the processing time for complete applications from 120 days to 60 days. NMFS is considering a multi-year affirmative finding process and is seeking comments on this concept.

#### **Dolphin-safe Requirements**

As mandated by section 6(d) of the IDCPA, the proposed regulations would exclude yellowfin tuna and yellowfin tuna products harvested by vessels of a nation which is in compliance with the IDCP, and which also has met the IATTC application and membership requirements specified in the IDCPA, from the prohibition on the sale, purchase, offer for sale, transport or shipment of tuna products in the United States which is not dolphin-safe.

#### **Observers**

The language in redesignated § 216.24(e)(1) would be revised to clarify that all permitted vessels are required to carry observers on every trip. In addition, the section providing for an application and waiver process regarding women observers is removed because the time period has expired for its use.

#### **U.S. Citizens on Foreign Flag Vessels in the ETP**

A U.S. citizen employed on a foreign tuna purse seine vessel of a nation with an affirmative finding would not be subject to the MMPA's prohibitions on taking marine mammals while the vessel is engaged in fishing operations

outside the U.S. EEZ. Use of an affirmative finding determination for this purpose is the most effective way for a U.S. citizen to determine that a nation is qualified under the IDCPA's criteria.

#### **Dolphin-safe Labeling Requirements**

The labeling standard for use of the term "dolphin-safe" on the labels of tuna products would change under the proposed regulation. Currently, tuna products may be labeled "dolphin-safe" only if no intentional setting on dolphins occurred during the fishing trip. Under the IDCPA, the Secretary of Commerce (Secretary) would revise the labeling standard based upon the initial and final findings of a study mandated by the IDCPA on 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 ETP. Dolphin stocks in the ETP now designated as depleted under the MMPA are the eastern spinner dolphin, northeastern offshore spotted dolphin, and the coastal spotted dolphin. The initial finding is due between March 1, 1999, and March 31, 1999, and the final finding is due between July 1, 2001, and December 31, 2002. Under the proposed regulations, a "default standard" will be established before the Secretary makes an initial finding. Under the default standard, tuna products can only be labeled "dolphin-safe" if no dolphins are intentionally encircled during the entire fishing trip *and* no dolphin is killed or seriously injured during the set. After the initial finding, unless the Secretary *initially* finds a "significant adverse impact," the Assistant Administrator will apply the definition of "dolphin-safe" specified in paragraph (h)(1) of the Dolphin Consumer Protection Information Act (DCPIA) (16 U.S.C. 1385(h)(1)), i.e., that no dolphins were killed or seriously injured during the sets in which the tuna were caught. Similarly, if the Secretary's *final* finding by December 31, 2002, concludes that a significant adverse impact is either not occurring or has not been detected, the definition of "dolphin-safe" under paragraph (h)(1) of the DCPIA will apply. Alternatively, if the Secretary finds a "significant adverse impact," the definition would revert to the default standard. The proposed regulations provide that, by notification in the **Federal Register**, the Assistant Administrator will implement any required change in the labeling standard without additional rulemaking.

### Sundown Sets

Under a 1988 amendment to the MMPA (Pub. L. 100-711), the backdown procedure must be completed no later than one-half hour *after* sundown. Moreover, the La Jolla Agreement and the IDCP both specified that this procedure must be completed no later than one-half hour *after* sundown. In contrast, apparently due to a typographical error, section 303(a)(2)(B)(5) of the IDCPA states that backdown procedures must be completed no later than one-half hour *before* sundown. No Congressional reports or colloquy indicate that this "revision" was adopted purposefully. Furthermore, under the May 1998 Agreement on the IDCP, signatory nations agreed that the backdown procedure must be completed no later than one-half hour *after* sundown. Since the purpose of the May 1998 Agreement on the IDCP is to implement the IDCP, NMFS proposes that requiring the backdown procedure to be completed no later than one-half hour *after* sundown, best represents the language of the May 1998 Agreement on the IDCP and the spirit of the IDCP. Therefore, the proposed rule requires the backdown procedure be completed no later than one-half hour after sundown for every set encircling dolphin.

### Official Mark

The DPCIA, as revised by the IDCPA, requires the Secretary to develop an official mark that can be used to indicate a tuna product is "dolphin-safe." The Secretary is considering designating a commonly used "dolphin-safe" logo as the official mark and will make this designation in a later rulemaking. In the meantime, this rule would only "reserve" 50 CFR 216.96 as the section of the regulations that NMFS will use in the future to describe the official mark.

The DPCIA does not mandate the use of the official mark, or prohibit the use of a mark or label other than the official mark that suggests processed tuna is "dolphin-safe" ("alternative mark"). Although the DPCIA does not prohibit the use of alternative marks, paragraphs (d)(3)(C)(i)-(iii) of the DPCIA appear to establish standards applicable only to processed tuna labeled with alternative marks or labels that refer to marine mammals. Those apparently separate standards are (1) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught; (2) the mark is supported by a tracking and verification program comparable in effectiveness to the program established by NMFS

regulations; and (3) the mark comports with applicable laws and regulations of the Federal Trade Commission.

Upon analysis, DPCIA paragraph (d)(3)(C) does not require a separate set of standards in these regulations. First, the labeling standards in paragraphs (d)(1) and (2) of the DPCIA apply to all processed tuna whether labeled with the official mark or with an alternative mark. Second, the DPCIA paragraphs (d)(3)(C)(i) and (iii) standards applicable to processed tuna labeled with alternative marks are either less stringent or identical to the standards that apply to processed tuna labeled with the official mark. Third, the standard described in DPCIA paragraph (d)(3)(C)(ii) would only be applicable if an alternative mark were supported by an alternative tracking and verification program. Instead of determining whether alternative tracking and verification programs meet the NMFS standards, NMFS proposes to require that anyone who imports, exports, or sells tuna in the United States that was harvested in the ETP comply with the tracking and verification program described in this rule. In other words, an alternative mark would be required to be supported by the official tracking and verification program. Therefore, NMFS need not determine that an alternative program is "comparable in effectiveness" to the official program. While nothing in these regulations is intended to inhibit a company or group from establishing an alternative tracking and verification program, such a program would not be a substitute for the program described here.

Therefore, NMFS proposes to establish a single standard for the use of labels on tuna product that refers to a marine mammal or suggests that the processed tuna was harvested by a method not injurious to dolphin. That standard would be the same, regardless of whether the label was the official mark that will be promulgated by the Secretary or an alternative mark.

### Tracking and Verification

Paragraph (f) of the DPCIA (16 U.S.C. 1385(f)), as revised by the IDCPA, requires the Secretary to issue regulations for a domestic program to track and verify tuna labeled "dolphin-safe." At the same time as NMFS is developing a U.S. domestic program, parties to the May 1998 Agreement on the IDCP are working together to develop an international tracking and verification system for tuna landed by purse seine vessels fishing in the ETP. Section 216.94 of the proposed regulations is intended to implement paragraph (f) of the DPCIA, while, to the

greatest extent practicable, keeping the domestic program in line with the still-developing international program.

The proposed domestic tracking and verification program provides for effective tracking of tuna harvested from the ETP by U.S. and foreign vessels. The proposed program would track tuna caught by U.S. purse seine vessels in the ETP from capture, to well, to processing, to final sale, while noting which tuna was "dolphin-safe" and which tuna was "non-dolphin-safe."

The fishing vessel observer will designate each well into which tuna is loaded as either "dolphin-safe," "non-dolphin-safe," or "mixed." The vast majority of wells are expected to be either "dolphin-safe" or "non-dolphin-safe." "Mixed" wells should be a rare occurrence. Under the interim labeling standard, the fishing vessel observer will designate a well "non-dolphin-safe" if any tuna loaded into the well was harvested (1) on a trip in which purse seines were intentionally set on dolphin, or (2) in a set in which any dolphin died or was seriously injured. The observer will designate a well as "dolphin-safe" if all the tuna loaded into the well was harvested during a trip without intentional sets on dolphins and during sets in which dolphins were intentionally encircled but no mortality or serious injury of dolphin was observed. If the labeling standard changes after March 1999, the observer would designate a well "non-dolphin-safe" if tuna is loaded into the well that was harvested during a set in which a dolphin died or was seriously injured. Conversely, the observer would designate a well "dolphin-safe" if all tuna loaded into that well was harvested during sets in which no dolphin died or was seriously injured.

Regardless of which labeling standard is in effect, if a "dolphin-safe" well, containing some amount of "dolphin-safe" tuna, is later loaded with tuna caught in a set in which a dead or seriously injured dolphin was discovered late in the loading process, that well would then be designated "mixed." The observer will record the estimated weight of the "dolphin-safe" tuna already in the well. The tuna already in the well will retain its status as "dolphin-safe" tuna even though "non-dolphin-safe" tuna is stored in the same well. Subsequently, only "non-dolphin-safe" tuna could be loaded into that well.

At least 48 hours before a scheduled arrival in port, including ports outside the United States, U.S. purse seine vessels would be required to report to NMFS the scheduled place and time of arrival. The purpose of this report

would be to give NMFS an opportunity to send a representative to meet the vessel and verify the contents of the wells and the "dolphin-safe" status of the tuna. The Captain would be required to submit a written report of each set made during the fishing trip to NMFS detailing the weights by species composition, estimated tons loaded, the dates of loading into the well, the "dolphin-safe" "non-dolphin-safe" or "mixed" designation of each well, set number, the trip number, the observer name, the captain name, the vessel name, and the trip dates.

Likewise, when tuna harvested in the ETP is scheduled to be delivered to a tuna canning company, the company would be required to provide 48-hour advance notice to NMFS of the location and arrival time of such shipment.

After unloading from the fishing vessel and throughout processing, "dolphin-safe" and "non-dolphin-safe" tuna would be strictly segregated. Can codes (that is, the unique number pressed onto each can of processed tuna) could be used to trace the tuna to a particular fishing trip by a particular vessel and, indirectly, to a particular well on the vessel. Fishing companies, importers, and cannerys would all be required to maintain relevant FCO and other records of the tuna for three years. NMFS would have the authority to request copies of relevant documents for inspection and could conduct audits and spot-checks of facilities.

In these tracking and verification regulations and the Environmental Assessment analyzing this program, NMFS has addressed each subsection of section (f) of the DPCIA, as follows: (1) Weight calculations of the amount of "dolphin-safe" and "non-dolphin-safe" tuna loaded into segregated wells after each set will be a required part of observers' reporting on forms to be revised by the IATTC in accordance with the international tracking and verification program. Tuna processors will use weight calculations to report "dolphin-safe" and "non-dolphin-safe" tuna received for immediate processing or cold storage and also for tuna being removed from cold storage for sale or processing; (2) the U.S. observer program has not been used in this fishery for years so these regulations do not propose changes to our domestic program, but the parties to the IDCP are working to improve the training, monitoring, and reporting components of the existing IATTC and other national observer programs; (3) the observer reports would indicate the "dolphin-safe" or "non-dolphin-safe" status of each well aboard the fishing vessel; however, NMFS is not proposing to

require wells be "sealed" because sealing wells effectively is not practicable and furtively moving significant quantities of frozen blocks of large tuna from well to well during a trip is very unlikely; (4) tracking and storage of radio and facsimile communications from vessels would not be useful to track or verify tuna products, but NMFS proposes to mandate the creation or maintenance of such records if the industry keeps the records anyway (for its own purposes); (5) shore-based verification coupled with IATTC records and other reports required by these regulations form the backbone of the proposed tracking and verification program; (6) as indicated in proposed § 216.94, NMFS would conduct periodic spot-checks and audits of tuna facilities; (7) negotiations with other ETP harvesting nations are expected to result in a cooperative, international tracking program under which participating nations will share data and inspect fish processing facilities under mutually agreeable protocols.

#### **Public Comments Solicited; Public Hearings**

NMFS is soliciting comments on this proposed rule. Oral comments, as well as written comments, may be presented at public hearings on the proposed rule (see **ADDRESSES** and **DATES**). Written comments on the proposed rule may also be submitted to J. Allison Routt (see **ADDRESSES** and **DATES**).

#### **Special Accommodations**

These hearings will be physically accessible to people with disabilities. Requests for sign language interpretation or other aids should be directed to J. Allison Routt at least 10 days prior to the hearing date (see **ADDRESSES**).

#### **Classification**

##### *Executive Order 12866*

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

##### *Regulatory Flexibility Act*

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. There are 15 to 17 small vessels in the U.S. purse seine fleet that fish most years; these have 363 mt or less carrying

capacity. These vessels are small business entities generating less than \$3 million in gross revenues each year from all landings. The only action in the proposed rule specifically intended to restrict small vessels is the formal prohibition of setting on dolphin. However, these vessels have not set on dolphin in the past. There would be no substantial compliance costs or paperwork burdens imposed on small vessels. Finally, while the proposed actions may result in increased supply of raw tuna to U.S. and foreign processors, it is not expected to result in lower prices being paid to fishing vessels, regardless of their size. With respect to the U.S. processing sector, there are no small processing firms. With respect to the wholesale and broker sectors, there are no known small U.S. firms involved in these sectors handling ETP-origin tuna or tuna products. Even if there were small entities involved in the business of brokering or wholesaling, they would be affected only minimally by recordkeeping requirements associated with tracking "dolphin-safe" tuna product. None of the other actions in this proposed rule would impose any costs nor affect revenues of such businesses.

##### *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 PRA, unless that collection of information displays a currently valid OMB control number.

This proposed rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). One existing requirement is repeated: 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 Certificates of Origin (NOAA Form 370). Approved by the OMB under control number 0648-0335, the public reporting burden for this collection is estimated to average 20 minutes per submission.

This proposed rule also contains new collection-of-information requirements which have been submitted to OMB for review and approval. The estimated burden for these requirements are 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; 20 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 complete the tuna tracking form; 5 minutes for a captain to complete the dolphin-safe certification; 10 minutes for a notification by a cannery 24 hours prior to receiving a shipment of domestic or imported ETP caught tuna; 10 minutes for a cannery to provide the processor's receiving report; 10 minutes for a cannery to provide the processor's storage removal report; 1 hour for a cannery to provide the monthly cannery receipt report; 30 minutes for an exporter; transshipper; 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.

Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility; and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to the Administrator, Southwest Region at the address above, and to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503 (Attention: NOAA Desk Officer).

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

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

Dated: June 8, 1999.

**Penelope D. Dalton,**

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

For the reasons set out in the preamble, 50 CFR part 216 is proposed to be 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, definitions of "ABI", "Director, Southwest Region", "ETP Fishing Area 1", "ETP Fishing Area 2", "ETP Fishing Area 3", "Fishing season", "Kill-per-set", "Kill-per-ton", and "Purse seine set on common dolphins" are removed, and definitions for "Administrator, Southwest Region", "Agreement on the International Dolphin Conservation Program", "Declaration of Panama", "Force majeure", "International Dolphin Conservation Program", "International Dolphin Conservation Program Act", "International Review Panel", and "Per-stock per-year dolphin mortality limit" are added in alphabetical order to read as follows:

#### § 216.3 Definitions.

\* \* \* \* \*

*Administrator, Southwest Region* means the Regional Administrator, Southwest Region, National Marine Fisheries Service, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213, or his or her designee.

*Agreement on the International Dolphin Conservation Program (Agreement on the IDCP)* means the Agreement establishing the formal binding IDCP that was signed in Washington, DC on May 21, 1998.

\* \* \* \* \*

*Declaration of Panama* means the declaration signed in Panama City, Republic of Panama, on October 4, 1995.

\* \* \* \* \*

*Force majeure* means forces outside the vessel operator's or vessel owner's control that could not be avoided by the exercise of due care.

\* \* \* \* \*

*International Dolphin Conservation Program (IDCP)* means the international program established by the agreement signed in La Jolla, California, in June 1992, as formalized, modified, and enhanced in accordance with the Declaration of Panama and the Agreement on the IDCP.

*International Dolphin Conservation Program Act (IDCPA)* means Public Law

105-42, enacted into law on August 15, 1997.

*International Review Panel (IRP)* means the International Review Panel established by the Agreement on the IDCP.

\* \* \* \* \*

*Per-stock per-year dolphin mortality limit* means the maximum allowable number of incidental dolphin mortalities and serious injuries from a specified stock per calendar year, as established under the IDCP.

\* \* \* \* \*

3. In § 216.24, the introductory Note to § 216.24 and paragraphs (e)(9), (f)(4), and (f)(7) are removed; paragraphs (e) and (f) are redesignated as paragraphs (f) and (e) respectively; newly designated paragraphs (e)(5) and (e)(6) are redesignated as paragraphs (e)(4) and (e)(5) respectively; newly designated paragraphs (f)(6) and (f)(8) are redesignated as paragraphs (f)(10) and (f)(11) respectively; and the section heading, paragraphs (a)(1), (a)(2)(i), (a)(2)(ii), (a)(3), (b) through (d), newly designated paragraphs (e)(1) through (e)(3), (f)(2), (f)(3) through (f)(5), and paragraph (g) are revised; and paragraphs (f)(6) through (f)(9), and (f)(12) are 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.

(a)(1) No marine mammal may be taken in the course of a commercial fishing operation by a United States 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 United States purse seine fishing vessel of 400 short tons (st) (362.8 metric tons (mt)) carrying capacity or less intentionally to 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 United States purse seine fishing vessel of greater than 400 short tons (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.

\* \* \* \* \*

(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 by radio to the Administrator, Southwest Region, the vessel's date of exit from or subsequent entry into the permit area, in order to transit the area with more than two speedboats.

(b) *Permits*—(1) *Vessel permit*. The owner or managing owner of a United States 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 this 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, except that a permit may be transferred to the new owner when the vessel ownership changes. 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 United States purse seine fishing vessel engaged in commercial fishing operations under a vessel permit must possess a valid operator permit issued under this 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 (c)(4) 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, or to U.S. Coast Guard officers, and to designated agents of NMFS and 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)(2) 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 or not 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 any training for the operator permit; and

(v) The applicant's signature or the signature of the applicants representative, if any.

(6) *Fees*. An application for a permit under paragraph (b)(1) of this section must include a fee of \$200.00 for each vessel. There is no fee for the operator certificate. The Assistant Administrator may change the amount of these fees 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. Notification of such change will be published in the **Federal Register**. The vessel permit holder will submit the fee

for the placement of observers, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region, by September 1 of the year prior to the year in which the vessel will be operated in the ETP, for transmittal by the date the application for a vessel permit is due.

(7) 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 and 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 to the IATTC or other designated international organization. The observers may be placed under an observer program of NMFS or of the IATTC, or under another international observer program approved by the IDCP and the Administrator, Southwest Region.

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

(iv) *Reporting requirements*. In accordance with paragraph (e) of this section, the vessel permit holder of each permitted vessel will 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 voyage to allow for observer placement on every voyage. After a fishing voyage is initiated, the vessel is obligated to carry an observer until the vessel completes its voyage. A vessel that fails to carry an observer in accordance with these observer placement requirements must not engage in fishing operations for which a vessel permit is required.

(v) *Data release*. By using a permit, the permit holder authorizes the release



to NMFS 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. 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.

(vi) *Protection from personal injury.* A permit holder must take all necessary steps to protect a person from personal injury without killing or injuring a marine mammal.

(vii) *Protection from personal injury.* Only if there are no alternative means to deter a marine mammal from causing personal injury, may a permit holder injure or kill the animal causing or about to cause immediate personal injury.

(viii) *Retention permit.* Marine mammals taken in the course of commercial fishing operations will be subject to the provisions of § 216.3 with respect to "incidental catch," and must not be retained except where a specific permit has been obtained authorizing the retention.

(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 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)(8) of this section and any operator permit when used on such a vessel are subject to the following terms and conditions:

(1) *General conditions.* (i) A vessel may be used to take marine mammals only if the taking is an incidental occurrence in the course of normal commercial tuna purse seine fishing operations and the fishing operations are under the immediate direction of the holder of a valid operator's permit.

(ii) Except as otherwise authorized by a specific permit, marine mammals incidentally taken must be immediately returned to the environment where captured 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 must not be brailled, sacked up, or hoisted onto the deck during or after retrieval.

(iii) The vessel permit holder will 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 trip. In the case of a change in operator due to an emergency, notification must be made within 72 hours of the change.

(2) *Gear, equipment, and release procedures 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 centimeter (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 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 are located, corkline hangings will be inspected by the vessel operator following each trip.

Hangings found to have loosened to the extent that a cylindrical 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 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 must 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.

(3) *Vessel inspection*—(i) *Annual.* At least once during each calendar year, purse seine nets and other gear and equipment required by these regulations 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) 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.

(4) *Operator permit holder training requirements.* An operator will 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 concerning the relevant provisions and regulatory requirements of the MMPA and the IDCP, and the fishing gear and techniques that are required for, or will contribute to, 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.

(5) *Marine mammal release requirements.* All operators 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 crewman 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 sufficiently in advance of sundown that the vessel should have been able to comply with the sundown set prohibition, 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.

(6) *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; and

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

(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 identified in paragraph (c)(6)(i) of this section and the comments received, will either issue a waiver to conduct the experiment which 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, 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.

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

(8) *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 United States 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 who desires a DML for the period July 1 to December 31 for a vessel that has not previously had a DML assigned for the year must provide the Administrator, Southwest Region, by September 1 of the prior year, the name of the United States 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 April 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-third 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) Within 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 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, and 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)(8)(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.

(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 Director 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 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:

(A) when the applicable per-stock per-year dolphin mortality limit for that stock of dolphins 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) when the vessel's DML, as adjusted, is reached or exceeded; or

(B) after the date and time provided in actual notification 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 in the absence of the notification to cease intentional sets on dolphins.

(xi) Sanctions recommended by the International Review Panel for any violation of these rules will be considered by NMFS and NOAA in enforcement actions brought under these regulations.

(xii) Intentionally deploying a purse seine net on, or to encircle, dolphins after a vessel's DML, as adjusted, has been reached will disqualify the vessel from consideration for a DML for the

following year. If already assigned, the DML for the following year will be withdrawn, and the Director of the IATTC will be notified by NMFS that the DML assigned to that vessel will be unutilized. Procedures found at 15 CFR part 904 apply to the withdrawal of the permit.

(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 will be immediately returned to the environment where captured without further injury, using release procedures such as hand rescue, and aborting the set at the earliest effective opportunity; 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 or certificate sanctions.

(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 report, in coded form, information by radio 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.

\* \* \* \* \*

(f) \* \* \*

(2)(i) *HTS numbers requiring a fisheries certificate of origin, subject to yellowfin tuna embargo.* The following U.S. Harmonized Tariff Schedule (HTS) numbers identify yellowfin tuna or yellowfin tuna products that are harvested in the ETP purse seine fishery and imported into the United States. All shipments containing tuna or tuna products imported into the United States under these HTS numbers must be accompanied by a Fisheries Certificate of Origin (FCO), NOAA Form 370. Yellowfin tuna harvested using a purse seine in the ETP, if exported from a nation with purse seine vessels that fish for tuna in the ETP, may not be imported into the United States unless the nation has an affirmative finding under paragraph (f)(9) of this section.

(A) *Frozen:*

0303.42.00.20 Yellowfin tuna, whole, frozen.

0303.42.00.40 Yellowfin tuna, eviscerated, head on, frozen.

0303.42.00.60 Yellowfin tuna, other, frozen.

(B) *Canned:*

1604.14.10.00 Tuna, non-specific, in airtight containers, in oil.

1604.14.20.40 Tuna, other than albacore, not over 7kg, in airtight containers.

1604.14.30.40 Tuna, other than albacore, in airtight containers, not in oil, over quota.

(C) *Loins:*

1604.14.40.00 Tuna, not in airtight containers, not in oil, over 6.8 kg.

1604.14.50.00 Tuna, other, not in airtight containers.

(D) *Other (only if the product contains tuna):*

0304.10.40.99 Other fish, fillets and other fish meat, fresh or chilled.

0304.20.20.66 Other fish, fillets, skinned, in blocks weighing over 4.5kg, frozen.

0304.20.60.99 Other fish, fillets, frozen.

0304.90.10.89 Other fish meat, in bulk or immediate containers, fresh or chilled.

0304.90.90.92 Other fish meat, fresh or chilled.

(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 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 a Fisheries Certificate of Origin (FCO), NOAA Form 370. The shipment may not be imported into the United States if harvested by a large-scale driftnet nation, unless accompanied by the official statement described in paragraph (f)(5)(x) of this section.

(A) *Frozen:*

0303.41.00.00 Albacore or longfinned tunas, frozen.

0303.43.00.00 Skipjack, frozen.

0303.49.00.20 Bluefin, frozen.

0303.49.00.40 Other tuna, frozen.

(B) *Canned:*

1604.14.20.20 Albacore tuna, in airtight containers, not in oil, not over 7kg, in quota.

1604.14.30.20 Albacore tuna, in airtight containers, not in oil, not in quota.

(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, other than 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 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)(5)(x) of this section.

(A) *Frozen:*

0303.10.00.12 Salmon, chinook, frozen.

0303.10.00.22 Salmon, chum, frozen.

0303.10.00.32 Salmon, pink, frozen.

0303.10.00.42 Salmon, sockeye, frozen.

0303.10.00.52 Salmon, coho, frozen.

0303.10.00.62 Salmon, Pacific, non-specific, frozen.

0303.21.00.00 Trout, frozen.

0303.22.00.00 Salmon, Atlantic and Danube, frozen.

0303.29.00.00 Salmonidae, other, frozen.

0303.75.00.10 Dogfish, frozen.

0303.75.00.90 Other sharks, frozen.

0303.79.20.41 Swordfish steaks, frozen.

0303.79.20.49 Swordfish, other, frozen.

0303.79.40.96 Fish, other, frozen.

0304.20.20.66 Fish, fillet, skinned, in blocks frozen over 4.5 kg.

0304.20.60.08 Salmonidae, salmon fillet, frozen.

0304.20.60.99 Fish, fillet, frozen.

0307.49.00.10 Squid, other, fillet, frozen.

(B) *Canned:*

1604.11.20.20 Salmon, pink, canned in oil, in airtight containers.

1604.11.20.30 Salmon, sockeye, canned in oil, in airtight containers.

1604.11.20.90 Salmon, other, canned in oil, in airtight containers.

1604.11.40.10 Salmon, chum, canned, not in oil.

1604.11.40.20 Salmon, pink, canned, not in oil.

1604.11.40.30 Salmon, sockeye, canned, not in oil.

1604.11.40.40 Salmon, other, canned, not in oil.

1604.11.40.50 Salmon, other, canned, not in oil.

1604.19.20.00 Fish, other, in airtight containers, not in oil.

1604.19.30.00 Fish, other, in airtight containers, in oil.

1605.90.60.55 Squid, loligo, prepared/preserved.

(C) *Other:*

0304.10.40.99 Other fish, fillets and other fish meat, fresh or chilled.

0304.20.20.66 Other fish, fillets, skinned, in blocks weighing over 4.5kg, frozen.

0304.20.60.98 Other fish, fillets, frozen.

0304.90.10.89 Other fish, fillets and fish meat, in bulk or in immediate containers, fresh or chilled.

0304.90.90.92 Other fish meat, fresh or chilled.

0305.30.60.80 Fish, non-specific, fillet, dried/salted/brine.

0305.49.40.40 Fish, non-specific, smoked.

0305.59.20.00 Shark fins.

0305.59.40.00 Fish, non-specific, dried.

0305.69.40.00 Salmon, non-specific, salted.

0305.69.50.00 Fish, non-specific, in immediate containers, salted, not over 6.8kg, other.

0307.49.00.50 Squid, non-specific, frozen/dried/salted/brine.

0307.49.00.60 Squid, non-specific, & cuttle fish frozen/dried/salted/brine.

(3) *Imports requiring a fisheries certificate of origin.*

Shipments containing the following may not be imported into the United States unless a completed FCO is filed with the Customs Service at the time of importation:

(i) Tuna classified under an HTS number listed in paragraphs (f)(2)(i) or (f)(2)(ii) of this section, or

(ii) Fish classified under an HTS number listed in paragraph (f)(2) of this section that was harvested by a vessel of a large-scale driftnet nation, as identified under paragraph (f)(8) of this section.

(4) *Disposition of fisheries certificates of origin.* The FCO form described in paragraph (f)(5) of this section may be obtained from the Administrator,

Southwest Region, or downloaded from the Internet at <http://swr.ucsd.edu/noaa370.htm>. The FCO required under paragraph (f)(3) of this section must accompany the tuna or tuna products from entry into the United States, through final processing for wholesale or retail sale, and it must be endorsed at each change in ownership. FCOs that require multiple endorsements must be submitted to the Administrator, Southwest Region, by the last endorser when all required endorsements are completed. An invoice must accompany the shipment at the time of importation or, in the alternative, must be made available within 30 days of a request by the Secretary or the Administrator, Southwest Region, to produce the invoice.

(5) *Contents of fisheries certificate of origin.* An FCO, certified to be accurate by the first exporter of the accompanying shipment, must include the following information:

(i) Exporter's full name and complete address;

(ii) Consignee's full name and complete address;

(iii) Species description (common and scientific names), product form, and HTS number;

(iv) Quantity in kilograms of the fish or fish products;

(v) Ocean area where the fish were harvested (ETP, Western Pacific Ocean, South Pacific Ocean, Atlantic Ocean, Caribbean Sea, Indian Ocean, or other);

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

(vii) 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;

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

(ix) If the shipment includes tuna or products from tuna harvested with a purse seine net in the eastern tropical Pacific, the name of the harvesting vessel; and

(x) For shipments harvested by vessels of a nation known to use large-scale driftnets, as determined by the Secretary pursuant to paragraph (f)(8) of this section, a statement must be included on the Fisheries Certificate of Origin, or by separate attachment, that is 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.

(6) *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.

(7) *Scope of embargoes*—(i) *ETP yellowfin tuna embargo.* Yellowfin tuna or yellowfin tuna products 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 the effective date of section 4 of the IDCPA by, or exported from, a nation that the Assistant Administrator has determined has 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)(9) 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)(viii) of this section; or

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

(ii) *Driftnet embargo.* A shipment containing an item listed in paragraph (f)(2) of this section may not be imported into the United States that:

(A) Was 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 the FCO is accompanied by an original statement by a responsible government official of the harvesting nation, signed and dated by that official, certifying that the fish or fish products were harvested by a method other than large-scale driftnet; or

(B) Is identified on the FCO as harvested by a large-scale driftnet.

(8) *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.

(9) *Affirmative finding procedure for yellowfin tuna harvested using a purse seine in the ETP.* (i) The Assistant Administrator will determine whether to make an affirmative finding based upon documentary evidence provided by the government of the exporting nation, by the government of the harvesting nation, if different, and by the IDCP and the IATTC, and will publish the finding in the **Federal Register**. An affirmative finding applies to tuna and tuna products that were harvested by vessels of the nation after the effective date of section 4 of the IDCPA. 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; and

(C) The annual total dolphin mortality and 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 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.

(ii) *Documentary evidence and compliance with the IDCP.*—(A) *Documentary evidence.* The Assistant Administrator will make an affirmative finding under paragraph (f)(9)(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)(9)(ii)(A) of this section, each party's funding of the IATTC, and any other relevant information, including

information that a nation is consistently failing to take enforcement actions on violations which 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.

(iii) 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)(9)(i) and (f)(9)(ii) of this section, allowing at least 60 days from the submission of complete information to NMFS for processing.

(iv) The Assistant Administrator will make or renew an affirmative finding for the period from April 1 through March 31, or portion thereof, if the harvesting nation has provided all the information and authorizations required by paragraphs (f)(9)(i) and (f)(9)(ii) of this section, and met the requirements of paragraphs (f)(9)(i) and (f)(9)(ii) of this section.

(v) *Period of validity.* 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.

(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)(9)(i) and (f)(9)(ii) of this section.

(vii) *Verification.* The Assistant Administrator may require the submission of supporting documentation or other verification of statements made in connection with requests to allow importations.

(viii) *Intermediary nation.* Except as authorized under this paragraph (f)(9)(viii), any tuna or tuna products in the classifications listed in paragraph (f)(2)(i) of this section from any intermediary nation, as that term is defined in section 3 of the MMPA, may not be imported into the United States, unless shown not to be yellowfin tuna or yellowfin tuna products harvested by purse seine in the ETP. Imports from an intermediary nation of tuna and tuna products in these classifications may be imported into the United States if the Assistant Administrator determines and publishes 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. Shipments of yellowfin tuna or yellowfin tuna products through a nation on a through bill of lading or in another manner that does not enter the shipments into that nation as an importation do not make that nation an intermediary nation. The Assistant Administrator will review decisions under this paragraph (f)(9)(viii) 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 (f)(9)(viii), 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.

(ix) *Pelly certification.* After 6 months of an embargo being in place against a nation under this section, that fact will be certified to the President for purposes of certification under section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)) for as long as the embargo remains in effect.

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

\* \* \* \* \*

(12) *Dolphin-safe requirements.*—(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 dolphin-safe or otherwise are covered by an affirmative finding made under paragraphs (f)(9)(i) through (f)(9)(v) of this section.

(ii) For purposes of this section, tuna or tuna products are dolphin-safe if they are dolphin-safe under subpart H of this part.

(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.

4. In Subpart D, a new § 216.46, is added to read as follows:

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

The MMPA's provisions will not apply to a citizen of the United States who incidentally takes any marine mammal during fishing operations in the ETP which 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 that has an affirmative finding under § 216.24(f) based upon the harvesting nation's participation in, and compliance with, the IDCP.

5. Sections 216.90 through 216.94 are revised to read as follows:

**§ 216.90 Purposes.**

This subpart governs the requirements for labeling tuna or tuna products offered for sale in or exported from the United States that uses the term "dolphin-safe" or that suggests the tuna were harvested in a manner not injurious to dolphins, or that uses any label or mark that refers to dolphins, porpoises, or marine mammals other than the official mark described in § 216.96.

**§ 216.91 Labeling requirements.**

(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) By a vessel engaged in large-scale driftnet fishing;

(2) 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 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 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 voyage on which the tuna was harvested;

(3) In the ETP by a purse seine vessel of greater than 400 st (362.8 mt) carrying capacity unless the tuna meets the requirements for being considered dolphin-safe under §§ 216.92 and 216.94; or

(4) By a vessel in a fishery other than one described in paragraphs (a)(1), (a)(2), or (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.

**§ 216.92 Tuna products harvested in the ETP by purse seine vessels greater than 400 st (362.8 mt) carrying capacity.**

(a) For purposes of § 216.91(a)(3), tuna products that contain tuna harvested in the ETP by a purse seine vessel greater than 400 st (362.8 mt) carrying capacity are dolphin-safe if accompanied by:

(1) A completed FCO;

(2) A written statement executed by the captain providing the certification required under paragraph (b) of this section;

(3) A written statement certifying that an observer approved by the IDCP was on board the vessel during the entire trip and that such observer provided the certification required under paragraph (b) of this section. The statement must be signed by:

(i) The Assistant Administrator or his/her designee; or

(ii) A representative of the IATTC; or

(iii) An authorized representative of a nation participating in the IDCP whose national observer program meets the requirements of the IDCP; or

(iv) An authorized representative of an international organization's observer program approved by the IDCP; and

(4) An endorsement on the FCO by each exporter, importer, and processor certifying that, to the best of his or her knowledge and belief, the FCO and attached documentation are complete and accurate.

(b) *Certifications.* (1) Both the written certifications of the captain and the observer must state that:

(i) 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; or

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

(2) After the date set by the Assistant Administrator in a notice in the **Federal Register** announcing an initial finding that does not conclude that the intentional deployment of purse seine nets on or encirclement of dolphins is having a significant adverse impact on any depleted dolphin stock, the written certifications of the captain and the observer need only provide the statement required in paragraph (b)(1)(ii) of this section.

(3) If, after publishing notification under paragraph (b)(2) of this section, the Assistant Administrator publishes notification in the **Federal Register** announcing a subsequent finding that the intentional deployment of purse seine nets on or encirclement of dolphins is having a significant adverse impact on any depleted stock, the written certifications of the captain and the observer must provide all of the statements set forth in paragraph (b)(1) of this section commencing with the effective date provided in the notice.

**§ 216.93 Submission of documentation.**

The documents required by § 216.91 and § 216.92 must accompany the tuna product whenever it is offered for sale or export, except that these documents need not accompany the product when offered for sale if:

(a) The documents do not require further endorsement by any importer or processor, and are submitted to officials of the U.S. Customs Service at the time of import; or

(b) the documents are endorsed as required by § 216.92 (a)(4) and the final processor must deliver the endorsed documents to the Administrator, Southwest Region, or to U.S. Customs as required.

**§ 216.94 Tracking and verification program.**

The Administrator, Southwest Region, has established a tracking and



verification program to accurately document the "dolphin-safe" condition of tuna as it is fished, processed, and sold to wholesale and retail markets in the United States and throughout the world. The tracking program includes procedures and reports for use when importing tuna into the U.S. and during domestic purse seine fishing, processing, and marketing in the U.S. and abroad. Verification of tracking system operations is attained through the establishment of audit and document review requirements.

(a) *Tracking fishing operations.* (1) During ETP fishing trips by purse seine vessels, 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, except as provided in paragraph (a)(2) of this section. 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" or "mixed well" is considered "non-dolphin-safe" tuna. Except as provided for in paragraph (a)(2) of this section, 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. The well designation "dolphin-safe" may change during a trip; however, a well designation of "non-dolphin-safe" cannot be changed for the duration of the trip.

(2) In the event that a set has been designated "dolphin-safe" by the observer, but late in the loading process dolphin mortality or serious injury is identified, the "dolphin-safe" designation of the set will change to "non-dolphin-safe." If one or more of the wells into which the newly designated "non-dolphin-safe" tuna are loaded already contains "dolphin-safe" tuna loaded during a previous set, the observer will note in his or her trip records the well numbers and the estimated weight of such "dolphin-safe" tuna and designate such well(s) as "mixed well(s)." Once a well has been

identified as "non-dolphin-safe" or "mixed" all tuna subsequently loaded into that well will be designated as "non-dolphin-safe." When the contents of such a "mixed well" are received by a processor, the tuna will be weighed and separated according to the observer's report of the estimated weight of "dolphin-safe" and "non-dolphin-safe" tuna contained in that well.

(3) *Tuna tracking form.* The observer will keep an IATTC tuna tracking form upon which an entry will be made for each set that includes identification by well number of "dolphin-safe," "non-dolphin-safe," and "mixed" wells; weights by species composition, estimated tons loaded, set number, date of loading, trip number and dates, observer name, captain name, vessel name.

(i) The Captain, managing owner, or vessel agent of a purse seine vessel 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.

(ii) A NMFS representative may meet the vessel to receive the IATTC tuna tracking form(s) from the vessel captain and to monitor the handling of "dolphin-safe" and "non-dolphin-safe" tuna.

(iii) The Captain must submit the completed, signed IATTC tuna tracking form that covers all tuna on board to the NMFS representative in person, or by mail to the Administrator, Southwest Region, within 5 working days of the end of the trip.

(4) Tuna off-loaded to trucks, storage facilities or carrier vessels must be loaded or stowed 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.

(b) *Tracking cannery operations.* (1) Whenever a tuna canning company is scheduled to receive a domestic or imported shipment of ETP-caught tuna for processing, the company must provide at least 48 hours notice of the location and arrival date and time of such a shipment, to the Administrator, Southwest Region, so that a NMFS representative can be present to monitor delivery and verify that "dolphin-safe" and "non-dolphin-safe" tuna are clearly identified and remain segregated.

(2) At the close of delivery activities, which may include weighing, boxing or containerizing, and transfer to cold storage or processing, the company must provide a copy of the processor's receiving report to the NMFS representative, if present. If a NMFS

representative is not present, the company must submit a copy of the processor's receiving report to the Administrator, Southwest Region, by mail or fax within 5 working days. The processor's receiving report must contain, at a minimum: date of delivery, catcher vessel name and flag, trip number and dates, storage container number(s), "dolphin-safe" or "non-dolphin-safe" designation of each container, species, fish condition, and weight of tuna in each container.

(3) Tuna canning companies will report on a monthly basis the amounts of ETP-caught tuna that are removed from cold storage. This report may be submitted in conjunction with the monthly report required in paragraph (b)(5) of this section. This report must contain:

- (i) The date of removal;
- (ii) Storage container number(s) and "dolphin-safe" or "non-dolphin-safe" designation of each container; 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 in its 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.

(5) Canned 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: species, condition (round, loins, dressed, gilled and gutted, other), weight in short tons to the fourth decimal, ocean area of capture (eastern tropical Pacific, 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 (b)(5)(i) of this section, a copy of the FCO for each imported receipt must be provided.

(c) *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).

(d) *Verification requirements.*—(1) *Record maintenance.* Any exporter,

transshipper, 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 3 years. These records include, but are not limited to: FCO and required certifications, any report required in paragraphs (a) and (b) 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, transshipper, importer, or

processor of any tuna or tuna products containing tuna harvesting in the ETP must submit to the Administrator any record required to be maintained under paragraph (d)(1) of this section.

(3) *Audits and spot-checks.* Upon request of the Administrator, Southwest Region, any such exporter, transshipper, 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, and processed tuna.

(e) *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."

6. In subpart H, § 216.96 is added and reserved as follows:

**§ 216.96 Official mark. [Reserved]**

[FR Doc. 99-15004 Filed 6-9-99; 5:05 pm]

BILLING CODE 3510-22-F