

HARVEST TABLE—Continued

5-year population averages	“High” growth rate	“Intermediate” growth rate	“Low” growth rate	Expected Mortality Limit
550–574	20 strikes in 5 years	15 strikes in 5 years	5 strikes in 5 years	33
575–599	22 strikes in 5 years	16 strikes in 5 years	5 strikes in 5 years	35
600–624	24 strikes in 5 years	17 strikes in 5 years	6 strikes in 5 years	36
625–649	26 strikes in 5 years	18 strikes in 5 years	6 strikes in 5 years	38
650–699	28 strikes in 5 years	19 strikes in 5 years	7 strikes in 5 years	39
700–779	32 strikes in 5 years	20 strikes in 5 years	7 strikes in 5 years	42
780 +	Consult with co-managers to expand harvest levels while allowing for the population to grow			

(C) At the beginning of each 5-year period, an Expected Mortality Limit is determined from the Harvest Table using the 5-year average abundance. During the course of each calendar year, the number of beach casts carcasses and carcasses found floating either reported to NMFS or observed by NMFS personnel will be the number of mortalities for that year. If at the end of each calendar year this number exceeds the Expected Mortality Limit, then an unusual mortality event has occurred. The Estimated Excess Mortalities will be calculated as twice the number of reported dead whales above the Expected Mortality Limit. The harvest will then be adjusted as follows:

(1) The harvest level for the remaining years of the current 5-year period will be recalculated by reducing the 5-year average abundance from the previous 5-year period by the Estimated Excess Mortalities. The revised abundance estimate would then be used in the harvest table for the remaining years and the harvest adjusted accordingly.

(2) For the subsequent 5-year period, for the purpose of calculating the 5-year average, the Estimated Excess Mortalities would be subtracted from the abundance estimates of the year of the excess mortality event so that the average would reflect the loss to the population. This average would then be used in the table to set the harvest level.

[39 FR 1852, Jan. 15, 1974, as amended at 59 FR 50376, Oct. 3, 1994; 64 FR 27927, May 24, 1999; 69 FR 17980, Apr. 6, 2004; 73 FR 60985, Oct. 15, 2008]

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

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

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

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

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

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

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

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

(3) Upon written request made in advance of entering the ETP, the limitations in paragraphs (a)(2)(ii) and (e)(1) of this section may be waived by the Administrator, West Coast Region, for the purpose of allowing transit through the ETP. The waiver will provide, in writing, the terms and conditions under which the vessel must operate, including a requirement to report to the Administrator, West Coast Region, the vessel's date of exit from or subsequent entry into the permit area.

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

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

Operator permits will be valid through December 31 of each year.

(3) *Possession and display*. A valid vessel permit issued pursuant to paragraph (b)(1) of this section must be on board the vessel while engaged in fishing operations, and a valid operator permit issued pursuant to paragraph (b)(2) of this section must be in the possession of the operator to whom it was issued. Permits must be shown upon request to NMFS enforcement agents, U.S. Coast Guard officers, or designated agents of NMFS or the Inter-American Tropical Tuna Commission (IATTC) (including observers). A vessel owner or operator who is at sea on a fishing trip when his or her permit expires and to whom a permit for the next year has been issued, may take marine mammals under the terms of the new permit without having to display it on board the vessel until the vessel returns to port.

(4) *Application for vessel permit*. ETP tuna purse seine vessel permit application forms and instructions for their completion are available from NMFS. To apply for an ETP vessel permit, a vessel owner or managing owner must complete, sign, and submit the appropriate form via fax to (562) 980-4047, by email to wcr.hms@noaa.gov, or through an online permit system, allowing at least 15 days for processing. To submit an ETP vessel permit application online, a request must first be made to wcr.hms@noaa.gov, and NMFS will give instructions about whether and how an online application can be made. To request that a vessel in excess of 400 st (362.8 mt) carrying capacity be categorized as active on the Vessel Register under §300.22(b)(4)(ii) of this title in the following calendar year, the owner or managing owner must submit the vessel permit application, payment of the vessel permit application fee, and payment of the vessel assessment fee no later than September 15 for vessels for which a DML is requested for the following year, and no later than November 30 for vessels for which a DML is not requested for the following year.

(5) *Application for operator permit*. An applicant for an operator permit must complete, sign, and submit the appropriate form obtained from NMFS and

submit payment of the permit application fee to the Administrator, West Coast Region, allowing at least 45 days for processing. Application forms and instructions for their completion are available from NMFS.

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

(ii) *Operator permit fee*. The Assistant Administrator may require a fee to be submitted with an application for an operator permit. The level of such a fee shall be determined in accordance with the NOAA Finance Handbook and specified by the Administrator, West Coast Region, on the application form.

(iii) *Vessel assessment fee*. The vessel assessment fee supports the placement of observers on individual tuna purse seine vessels, and maintenance of the observer program, as established by the IATTC or other approved observer program.

(A) The owner or managing owner of a purse seine vessel for which a DML has been requested must submit the vessel assessment fee to the IATTC, no later than September 15 of the year prior to the calendar year for which the DML is requested. Payment of the vessel assessment fee must be consistent with the fee for active status on the Vessel Register under § 300.22(b)(4) of this title.

(B) The owner or managing owner of a purse seine vessel for which active or inactive status on the Vessel Register, as defined in § 300.21 of this title, has been requested, but for which a DML has not been requested, must submit payment of the vessel assessment fee to the IATTC, no later than November 30 of the year prior to the calendar year in which the vessel will be listed on the Vessel Register. Payment of the vessel assessment fee is required only if the vessel is listed as active and is required to carry an observer, or if the vessel is listed as inactive and exceeds 400 st (362.8 mt) in carrying capacity.

Payment of the vessel assessment fee must be consistent with the vessel's status, either active or inactive, on the Vessel Register in § 300.22(b)(4) of this title.

(C) The owner or managing owner of a purse seine vessel that is permitted and authorized under an alternative international tuna purse seine fisheries management regime in the Pacific Ocean must submit the vessel assessment fee to the IATTC, prior to obtaining an observer and entering the ETP to fish. Consistent with § 300.22(b)(1) of this title, this class of purse seine vessels is not required to be listed on the Vessel Register under § 300.22(b)(4) of this title in order to purse seine for tuna in the ETP during a single fishing trip per calendar year of 90 days or less. Payment of the vessel assessment fee must be consistent with the fee for active status on the Vessel Register under § 300.22(b)(4)(ii) of this title.

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

(E) The owner or managing owner of a purse seine vessel not listed on the Vessel Register at the beginning of the calendar year and who requests to replace a vessel removed from active status on the Vessel Register under § 300.22(b)(4) of this title during the year, must pay the vessel assessment fee associated with active status only if the vessel is required to carry an observer, before NMFS will request the IATTC Director change the status of the vessel to active.

(F) Payments will be subject to a 10 percent surcharge if received under paragraph (b)(6)(iii)(E) of this section for vessels that were listed as active on the Vessel Register in the calendar year prior to the year for which active

status was requested; or if received after the dates specified in paragraph (b)(6)(iii)(A) or (B) of this section for vessels for which active status is requested if the vessel was listed as active during the year the request was made. Payments will not be subject to a 10 percent surcharge if received under paragraph (b)(6)(iii)(C) or (D) of this section, or if received under paragraph (b)(6)(iii)(E) of this section for vessels that were not listed as active on the Vessel Register in the calendar year prior to the year for which active status was requested. Payments will also not be subject to a 10 percent surcharge if received after the date specified in paragraph (b)(6)(iii)(B) of this section for vessels for which inactive status is requested, or for vessels for which active status is requested if the vessel was not listed as active during the year the request was made. Payment of all vessel assessment fees described in this section must be made to the IATTC.

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

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

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

server program of NMFS, IATTC, or another observer program approved by the Administrator, West Coast Region.

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

(iv) *Reporting requirements.* (A) The vessel permit holder of each permitted vessel must notify the Administrator, West Coast Region, or the IATTC contact designated by the Administrator, West Coast Region, at least 5 days in advance of the vessel's departure on a fishing trip to allow for observer placement on every trip. If the vessel permit holder would like to use an IATTC and Western and Central Pacific Fisheries Commission (WCPFC) cross-endorsed observer when fishing in the IATTC Convention Area, the notification must also include a request for the placement of a cross-endorsed observer pursuant to the Memorandum of Cooperation between the IATTC and WCPFC.

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

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

(9) *Mortality and serious injury reports.* The Administrator, West Coast Region, will provide to the public periodic status reports summarizing the estimated

incidental dolphin mortality and serious injury by U.S. vessels of individual species and stocks.

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

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

(2) *No retention of live marine mammals*. Except as otherwise authorized by a specific permit, live marine mammals incidentally taken must be immediately returned to the ocean without further injury. The operator of a purse seine vessel must take every precaution to refrain from causing or permitting incidental mortality or serious injury of marine mammals. Live marine mammals may not be brailed, sacked up, or hoisted onto the deck during ortza retrieval.

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

(i) *Dolphin safety panel*. The dolphin safety panel must be a minimum of 180 fathoms in length (as measured before installation), except that the minimum length of the panel in nets deeper than 18 strips must be determined in a ratio of 10 fathoms in length for each strip of net depth. It must be installed so as to protect the perimeter of the backdown area. The perimeter of the backdown area is the length of corkline that begins at the outboard end of the last bowbunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point. The dolphin safety panel must consist of small mesh web-

bing not to exceed 1¼ inches (3.18 centimeters (cm)) stretch mesh extending downward from the corkline and, if present, the base of the dolphin apron to a minimum depth equivalent to two strips of 100 meshes of 4¼ inches (10.80 cm) stretch mesh webbing. In addition, at least a 20-fathom length of corkline must be free from bunchlines at the apex of the backdown channel.

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

(iii) *Dolphin safety panel hand holds*. Throughout the length of the corkline under which the dolphin safety panel and dolphin apron are located, hand hold openings must be secured so that they will not allow the insertion of a 1⅝ inch (3.50 cm) diameter cylindrical-shaped object.

(iv) *Dolphin safety panel corkline hangings*. Throughout the length of the corkline under which the dolphin safety panel and dolphin apron if present, are located, corkline hangings must be inspected by the vessel operator following each trip. Hangings found to have loosened to the extent that a cylindrical-shaped object with a 1⅝ inch (3.50 cm) diameter can be inserted between the cork and corkline hangings, must be tightened so as not to allow the insertion of a cylindrical-shaped object with a 1⅝ inch (3.50 cm) diameter.

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

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

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

(viii) *Lights*. The vessel must be equipped with long-range, high-intensity floodlights with a sodium lamp of at least 1000 watts, or a multivapour lamp of at least 1500 watts, for use in darkness to ensure sufficient light to

observe that procedures for dolphin release are carried out and to monitor incidental dolphin mortality.

(4) *Vessel inspection*—(i) *Twice per year*. At least twice during each calendar year, purse seine nets and other gear and equipment required under §216.24(c)(3) must be made available for inspection and for a trial set/net alignment by an authorized NMFS inspector or IATTC staff as specified by the Administrator, West Coast Region, in order to obtain a vessel permit. The first such inspection shall be carried out before the vessel's request for a DML is submitted to the IATTC. The second such inspection shall be carried out before notification of any reallocation of DMLs for vessels with full-year DMLs or during the last quarter of the year for vessels with second-semester DMLs.

(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, West Coast Region. The vessel permit holder must notify the Administrator, West Coast Region, of any net modification at least 5 days prior to departure of the vessel in order to determine whether a reinspection or trial set/net alignment is required.

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

(5) *Operator permit holder training requirements*. An operator must maintain proficiency sufficient to perform the procedures required herein, and must attend and satisfactorily complete a formal training session approved by the Administrator, West Coast Region, in order to obtain his or her permit. At the training session, an attendee will be instructed on the relevant provisions and regulatory requirements of the MMPA and the IDCP, and the fishing gear and techniques that are required for reducing serious injury and mortality of dolphin incidental to purse seining for tuna. Operators who have received a written certificate of

satisfactory completion of training and who possess a current or previous calendar year permit will not be required to attend additional formal training sessions unless there are substantial changes in the relevant provisions or implementing regulations of the MMPA or the IDCP, or in fishing gear and techniques. Additional training may be required for any operator who is found by the Administrator, West Coast Region, to lack proficiency in the required fishing procedures or familiarity with the relevant provisions or regulations of the MMPA or the IDCP.

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

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

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

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

hour after sundown. Should a set extend beyond one-half hour after sundown, the operator must use the required marine mammal release procedures including the use of the high intensity lighting system. In the event a sundown set occurs where the seine skiff was let go 90 or more minutes before sundown, and an earnest effort to rescue dolphins is made, the International Review Panel of the IDCP may recommend to the United States that in the view of the International Review Panel, prosecution by the United States is not recommended. Any such recommendation will be considered by the United States in evaluating the appropriateness of prosecution in a particular circumstance.

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

(7) *Experimental fishing operations.* The Administrator, West Coast 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, West Coast 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, West Coast Region, no less than 90 days before the date the proposed operation is intended to begin:

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

(B) A statement of the specific vessel gear and equipment or procedural requirement to be exempted and why

such an exemption is necessary to conduct the experiment;

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii)(A) The Administrator, West Coast 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, West Coast 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, West Coast Region, will notify the Director of the IATTC of any adjustments prior to a vessel departing on a trip using its adjusted DML. The notification will be no later than February 1 in the case of adjustments to full-year DMLs, and no later than May 1 in the case of adjustments to DMLs for the second half of the year.

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

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

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

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

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

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

the DML will be determined to have left the fishery.

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

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

(vi) A vessel that is covered by a valid vessel permit and that does not normally fish for tuna in the ETP but desires to participate in the fishery on a limited basis may apply for a per-trip DML from the Administrator, West Coast Region, at any time, allowing at least 60 days for processing. The request must state the expected number of trips involving sets on dolphins and the anticipated dates of the trip or trips. The request will be forwarded to the Secretariat of the IATTC for processing in accordance with Annex IV of the Agreement on the IDCP. A per-trip DML will be assigned if one is made available in accordance with the terms of Annex IV of the Agreement on the IDCP. If a vessel assigned a per-trip DML does not set on dolphins during that trip, the vessel will be considered to have lost its DML unless this was a result of force majeure or other extraordinary circumstances as determined by the International Review Panel. After two consecutive losses of a DML, a vessel will not be eligible to receive a DML for the next fishing year.

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

(viii) Vessel and operator permit holders must not deploy a purse seine net on or encircle any school of dol-

phins containing individuals of a particular stock of dolphins for the remainder of the calendar year:

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

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

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

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

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

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

(d) *Purse seining by vessels without assigned DMLs.* In addition to the requirements of paragraph (b) of this section, a vessel permit used for a trip not involving an assigned DML and the operator's permit when used on such a vessel are subject to the following terms and conditions: a permit holder may take marine mammals provided that such taking is an accidental occurrence in the course of normal commercial fishing operations and the vessel does not intentionally deploy its

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net on, or to encircle, dolphins; marine mammals taken incidental to such commercial fishing operations must be immediately returned to the environment where captured without further injury, using release procedures such as hand rescue, or aborting the set at the earliest effective opportunity; and the use of one or more rafts and facemasks or viewboxes to aid in the rescue of dolphins is recommended.

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

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

(3) Any marine mammals killed during fishing operations that are accessible to crewmen and requested from the permit holder or master by the observer must be brought aboard the vessel and retained for biological proc-

essing, until released by the observer for return to the ocean. Whole marine mammals or marine mammal parts designated as biological specimens by the observer must be retained in cold storage aboard the vessel until retrieved by authorized personnel of NMFS or the IATTC when the vessel returns to port for unloading.

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

(i) Requirements for owners and operators of U.S. purse seine vessels for reporting and actions in response to observer safety are at §300.29 of this title.

(ii) [Reserved]

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

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

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

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

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

(2) *Imports requiring a Fisheries Certificate of Origin and an International Fisheries Trade Permit.* Shipments of tuna, tuna products, and certain other fish products identified in paragraphs (f)(2)(i) through (iii) of this section may not be imported into the United States unless: a scanned copy of a properly completed Fisheries Certificate of Origin (FCO), NOAA Form 370, associated certifications and statements described in § 216.91(a), and required data set are filed electronically with U.S. Customs and Border Protection (CBP) at the time of, or in advance of, importation as required under § 300.323; and the importer of record designated on the entry summary (Customs Form 7501) holds a valid International Fisheries Trade Permit as specified at § 300.322 of this title. “Required data set” has the same meaning as § 300.321 of this title (*see* definition of “Documentation and data sets required”).

(i) *Imports requiring a Fisheries Certificate of Origin, subject to yellowfin tuna embargo.* All shipments containing yellowfin tuna or yellowfin tuna products (other than fresh tuna) imported into the United States must be accompanied by an FCO, including, but not limited to, those imported under the following Harmonized Tariff Schedule

of the United States (HTS) numbers. Updated HTS numbers can be identified by referencing the most current HTS in effect at the time of importation, available at *www.usitc.gov*. The scope of yellowfin tuna embargoes and procedures for attaining an affirmative finding are described under paragraphs (f)(6) and (f)(8) of this section, respectively.

(A) *Frozen:* (products containing Yellowfin).

0303.42.0020 Yellowfin tunas, whole, frozen
 0303.42.0040 Yellowfin tunas, head-on, frozen, except whole
 0303.42.0060 Yellowfin tunas, other, frozen, except whole, head-on, fillets, livers and roes
 0304.87.0000 Tuna fish fillets, frozen, not elsewhere specified or indicated (NESOI)
 0304.99.1190 Tuna, frozen, in bulk or in immediate containers weighing with their contents over 6.8 kg each

(B) *Airtight Containers:* (products containing Yellowfin).

1604.14.1010 Tunas and skipjack, in oil, in airtight containers, in foil or other flexible containers weighing with their contents not more than 6.8 kg each
 1604.14.1099 Tunas and skipjack, in oil, in airtight containers, NESOI
 1604.14.2291 Other tunas and skipjack, no oil, in foil/flexible airtight containers, not over 6.8 kg, 4.8% of U.S. consumption of canned tuna during preceding year
 1604.14.2299 Tunas, NESOI and skipjack, not in oil, in other airtight containers not over 7 kg, 4.8% of U.S. consumption of canned tuna during preceding year
 1604.14.3091 Tunas and skipjack, NESOI, not in oil, in foil or other flexible airtight containers, weighing with their contents not more than 6.8 kg each
 1604.14.3099 Other tunas and skipjack, not in oil, in airtight containers, NESOI

(C) *Loins:* (products containing Yellowfin).

1604.14.4000 Tunas and skipjacks, prepared or preserved, not in airtight containers, not in oil, in bulk or immediate containers with their contents over 6.8 kg each
 1604.14.5000 Tunas and skipjack, prepared or preserved, not in airtight containers, NESOI

(D) *Other:* (products containing Yellowfin).

0511.91.0090 Fish, shellfish products unfit for human consumption
 1604.20.1000 Fish pastes
 1604.20.1500 Fish balls, cakes and puddings, in oil
 1604.20.2000 Fish balls, cakes and puddings, not in oil, less than 6.8 kg, in airtight containers

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- 1604.20.2500 Fish balls, cakes and puddings, not in oil, not in airtight containers, in immediate containers weighing with their contents not over 6.8 kg each
- 1604.20.3000 Fish balls, cakes and puddings, NESOI
- 1604.20.4000 Fish sticks, not cooked, nor in oil
- 1604.20.5010 Fish sticks, cooked and frozen
- 1604.20.5090 Fish sticks, NESOI
- 2309.10.0010 Dog or cat food, in airtight containers

(ii) *Imports requiring a Fisheries Certificate of Origin, not subject to yellowfin tuna embargo.* All shipments containing tuna or tuna products (other than fresh tuna or yellowfin tuna identified in paragraph (f)(2)(i) of this section) imported into the United States must be accompanied by an FCO, including, but not limited to, those imported under the following HTS numbers. Updated HTS numbers can be identified by referencing the most current HTS in effect at the time of importation, available at www.usitc.gov.

(A) *Frozen:* (other than Yellowfin).

- 0303.41.0000 Albacore or longfinned tunas, frozen, except fillets, livers and roes
- 0303.43.0000 Skipjack tunas or stripe-bellied bonito, frozen, except fillets, livers and roes
- 0303.44.0000 Bigeye tunas, frozen, except fillets, livers and roes
- 0303.45.0110 Atlantic Bluefin, frozen, except fillets, livers and roes
- 0303.45.0150 Pacific Bluefin, frozen, except fillets, livers and roes
- 0303.46.0000 Southern bluefin tunas, frozen, except fillets, livers and roes
- 0303.49.0200 Tunas, frozen, except fillets, livers and roes, NESOI
- 0304.87.0000 Tuna fish fillets, frozen, NESOI
- 0304.99.1190 Tuna, frozen, in bulk or in immediate containers weighing with their contents over 6.8 kg each, NESOI

(B) *Airtight Containers:* (other than Yellowfin).

- 1604.14.1010 Tunas and skipjack, in oil, in airtight containers, in foil or other flexible containers weighing with their contents not more than 6.8 kg each
- 1604.14.1091 Tunas, albacore, in oil, in airtight containers, NESOI
- 1604.14.1099 Tunas and skipjack, in oil, in airtight containers, NESOI
- 1604.14.2251 Albacore tuna, not in oil, in foil/flexible airtight containers, weighing not over 6.8 kg, 4.8% of U.S. consumption of canned tuna during preceding year
- 1604.14.2259 Albacore tuna, not in oil, in airtight containers weighing not over 7 kg, NESOI, 4.8% of U.S. consumption of canned tuna during preceding year

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- 1604.14.2291 Other tunas and skipjack, no oil, in foil/flexible airtight containers, not over 6.8 kg, 4.8% of U.S. consumption of canned tuna during preceding year
 - 1604.14.2299 Tunas, NESOI and skipjack, not in oil, in other airtight containers, not over 7 kg, 4.8% of U.S. consumption of canned tuna during preceding year
 - 1604.14.3051 Tuna, albacore not in oil, in foil or other flexible airtight containers, weighing with contents not more than 6.8 kg each, NESOI
 - 1604.14.3059 Tuna, albacore not in oil, in airtight containers, NESOI
 - 1604.14.3091 Tunas and skipjack, NESOI, not in oil, in foil or other flexible airtight containers, weighing with their contents not more than 6.8 kg each
 - 1604.14.3099 Other tunas and skipjack, not in oil, in airtight containers, NESOI
- (C) *Lains:* (other than Yellowfin).
- 1604.14.4000 Tunas and skipjacks, prepared or preserved, not in airtight containers, not in oil, in bulk or immediate containers with their contents over 6.8 kg each
 - 1604.14.5000 Tunas and skipjack, prepared or preserved, not in airtight containers, NESOI

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

- 0511.91.0090 Fish, shellfish products unfit for human consumption
- 1604.20.1000 Fish pastes
- 1604.20.1500 Fish balls, cakes and puddings, in oil
- 1604.20.2000 Fish balls, cakes and puddings, not in oil, less than 6.8 kg, in airtight containers
- 1604.20.2500 Fish balls, cakes and puddings, not in oil, not in airtight containers, in immediate containers weighing with their contents not over 6.8 kg each
- 1604.20.3000 Fish balls, cakes and puddings, NESOI
- 1604.20.4000 Fish sticks, not cooked, nor in oil
- 1604.20.5010 Fish sticks, cooked and frozen
- 1604.20.5090 Fish sticks, NESOI
- 2309.10.0010 Dog or cat food, in airtight containers

(iii) *Exports from driftnet nations only, requiring a Fisheries Certificate of Origin and official certification.* The following HTS numbers identify categories of fish and shellfish, in addition to those identified in paragraphs (f)(2)(i) and (f)(2)(ii) of this section, known to have been harvested using a large-scale driftnet and imported into the United States. Shipments exported from a large-scale driftnet nation, as identified under paragraph (f)(7) of this section, and imported into the United

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States, including but not limited to those imported into the United States under any of the HTS numbers listed in paragraph (f)(2) of this section, must be accompanied by an FCO and the official statement described in paragraph (f)(4)(xiii) of this section.

(A) *Frozen:*

- 0303.11.0000 Sockeye (red) salmon (*Oncorhynchus nerka*), frozen, except fillets, livers and roes
- 0303.12.0012 Chinook (King) salmon (*Oncorhynchus tshawytscha*), frozen, except fillets, livers and roes
- 0303.12.0022 Chum (dog) salmon (*Oncorhynchus keta*), frozen, except fillets, livers and roes
- 0303.12.0032 Pink (humpie) salmon (*Oncorhynchus gorbuscha*), frozen, except fillets, livers and roes
- 0303.12.0052 Coho (silver) salmon (*Oncorhynchus kisutch*), frozen, except fillets, livers and roes
- 0303.12.0062 Pacific salmon (*Oncorhynchus masou*, *Oncorhynchus rhodurus*), frozen, except fillets, livers and roes, NESOI
- 0303.13.0000 Atlantic salmon (*Salmo salar*) and Danube salmon (*Hucho hucho*), frozen, except fillets, livers and roes
- 0303.14.0000 Trout (*Salmo trutta*; *Oncorhynchus mykiss*, *clarki*, *aguabonita*, *gilae*, *apache*, and *chrysogaster*), frozen, except fillets, livers and roes
- 0303.19.0100 Salmonidae, frozen, except fillets, livers and roes, NESOI
- 0303.57.0010 Swordfish steaks, frozen, except fillets
- 0303.57.0090 Swordfish, frozen, except steaks, fillets, livers and roes
- 0303.81.0010 Dogfish (*Squalus* spp.), frozen, except fillets, livers and roes
- 0303.81.0090 Sharks, frozen, except dogfish, fillets, livers and roes
- 0303.89.0079 Fish, other, frozen, except fillets, livers and roes, NESOI
- 0304.81.5010 Atlantic Salmonidae (*Salmo salar*) fillets, frozen, NESOI
- 0304.81.5090 Salmonidae fillets, frozen, except Atlantic salmon, NESOI
- 0304.89.1090 Fish fillets, skinned, frozen blocks weighing over 4.5 kg each, to be minced, ground or cut into pieces of uniform weights and dimensions, NESOI
- 0304.91.1000 Swordfish, frozen, in bulk or in immediate containers weighing over 6.8 kg each
- 0304.91.9000 Swordfish, frozen, NESOI
- 0304.99.9191 Fish fillets, ocean, frozen, NESOI
- 0307.49.0010 Squid fillets, frozen
- 0307.49.0022 Squid, *Loligo opalescens*, NESOI
- 0307.49.0024 Squid, *Loligo pealei*, NESOI
- 0307.49.0029 Squid, *Loligo*, other, NESOI
- 0307.49.0050 Squid, other, NESOI

(B) *Canned:*

- 1604.11.2020 Pink (humpie) salmon, whole or in pieces, but not minced, in oil, in airtight containers
- 1604.11.2030 Sockeye (red) salmon, whole or in pieces, but not minced, in oil, in airtight containers
- 1604.11.2090 Salmon NESOI, whole or in pieces, but not minced, in oil, in airtight containers
- 1604.11.4010 Chum (dog) salmon, not in oil, canned
- 1604.11.4020 Pink (humpie) salmon, not in oil, canned
- 1604.11.4030 Sockeye (red) salmon, not in oil, canned
- 1604.11.4040 Salmon, NESOI, not in oil, canned
- 1604.11.4050 Salmon, whole or in pieces, but not minced, NESOI
- 1604.19.2100 Fish, NESOI, not in oil, in airtight containers
- 1604.19.3100 Fish, NESOI, in oil, in airtight containers
- 1605.54.6020 Squid, *Loligo*, prepared or preserved
- 1605.54.6030 Squid, except *Loligo*, prepared or preserved

(C) *Other:*

- 0305.39.6080 Fish fillets, dried, salted or in brine, but not smoked, NESOI
- 0305.41.0000 Pacific salmon (*Oncorhynchus* spp.), Atlantic salmon (*Salmo salar*), and Danube salmon (*Hucho hucho*), including fillets, smoked
- 0305.49.4041 Fish including fillets, smoked, NESOI
- 0305.59.0000 Fish, dried, whether or not salted but not smoked, NESOI
- 0305.69.4000 Salmon, salted but not dried or smoked; in brine
- 0305.69.5001 Fish in immediate containers weighing with their contents 6.8 kg or less each, salted but not dried or smoked; in brine, NESOI
- 0305.69.6001 Fish, salted but not dried or smoked; in brine, NESOI
- 0305.71.0000 Shark fins, dried, whether or not salted but not smoked
- 0305.49.0010 Squid, frozen, fillets
- 0307.49.0022 Squid, *Loligo opalescens*, frozen (except fillets), dried, salted or in brine
- 0307.49.0024 Squid, *Loligo pealei*, frozen (except fillets), dried, salted or in brine
- 0307.49.0029 Squid, *Loligo*, frozen (except fillets), dried, salted or in brine, NESOI
- 0307.49.0050 Squid, other, frozen (except fillets), dried, salted or in brine, except *Loligo* squid
- 0307.49.0060 Cuttle fish (*Sepia officinalis*, *Rossia macrosoma*, *Sepiola* spp.), frozen, dried, salted or in brine

(3) *Disposition of Fisheries Certificates of Origin.* The FCO described in paragraph (f)(4) of this section may be obtained from the Administrator, West

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Coast Region, or downloaded from the internet at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/noaa-form-370-fisheries-certificate-origin>.

(i) A properly completed FCO, and its attached certifications and statements as described in §216.91(a), must accompany the required CBP entry documents that are filed at the time of, or in advance of, importation.

(ii) FCOs and associated certifications and statements as described in §216.91(a) must be provided electronically to CBP as indicated in paragraph (f)(2) of this section.

(iii) FCOs that accompany imported shipments of tuna destined for further processing in the United States must be endorsed at each change in ownership and submitted to the Administrator, West Coast Region, by the last endorser when all required endorsements are completed. Such FCOs must be submitted as specified in §216.93(d)(2).

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

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

- (i) CBP entry identification;
- (ii) Date of entry;
- (iii) Exporter's full name and complete address;
- (iv) Importer's or consignee's full name and complete address;
- (v) Species description, product form, and HTS number;
- (vi) Total net weight of the shipment in kilograms;
- (vii) Ocean area where the fish were harvested (ETP, western Pacific Ocean, south Pacific Ocean, north Pacific Ocean, eastern Atlantic Ocean, western Atlantic Ocean, Caribbean Sea, Indian Ocean, or other);
- (viii) Type of fishing gear used to harvest the fish (purse seine, longline, baitboat, large-scale driftnet, gillnet, pole and line/hook and line, or other);

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

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

(xi) The name of the harvesting vessel;

(xii) Dolphin-safe condition of the shipment, described by checking the appropriate statement on the form and attaching additional certifications as described in §216.91(a) if required;

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

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

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

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

(A) Harvested on or after March 3, 1999, the effective date of section 4 of the IDCPA, and harvested by, or exported from, a nation that the Assistant Administrator has determined has jurisdiction over purse seine vessels of

greater than 400 st (362.8 mt) carrying capacity harvesting tuna in the ETP, unless the Assistant Administrator has made an affirmative finding required for importation for that nation under paragraph (f)(8) of this section;

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

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

(ii) *Driftnet embargo.* A shipment containing fish or fish products identified by an HTS number listed in paragraph (f)(2) of this section may not be imported into the United States if it is harvested by a large-scale driftnet, or if it is exported from or harvested on the high seas by any nation determined by the Assistant Administrator to be engaged in large-scale driftnet fishing, unless a government official of the large-scale driftnet nation completes, signs and dates the High Seas Driftnet section of the FCO certifying that the fish or fish products were harvested by a method other than large-scale driftnet.

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

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

(7) *Large-scale driftnet nation: determination.* Based upon the best information available, the Assistant Administrator will determine which nations have registered vessels that engage in fishing using large-scale driftnets. Such determinations will be published in the FEDERAL REGISTER. A responsible government official of any such

nation may certify to the Assistant Administrator that none of the nation's vessels use large-scale driftnets. Upon receipt of the certification, the Assistant Administrator may find, and publish such finding in the FEDERAL REGISTER, that none of that nation's vessels engage in fishing with large-scale driftnets.

(8) *Affirmative finding procedure for nations harvesting yellowfin tuna using a purse seine in the ETP.* (i) The Assistant Administrator will determine, on an annual basis, whether to make an affirmative finding based upon documentary evidence provided by the government of the harvesting nation or by the IDCP and the IATTC, and will publish the finding in the FEDERAL REGISTER. A finding will remain valid for 1 year or for such other period as the Assistant Administrator may determine. An affirmative finding will be terminated if the Assistant Administrator determines that the requirements of this paragraph are no longer being met. Every 5 years, the government of the harvesting nation must submit such documentary evidence directly to the Assistant Administrator and request an affirmative finding. Documentary evidence must be submitted by the harvesting nation for the first affirmative finding application. The Assistant Administrator may require the submission of supporting documentation or other verification of statements made in connection with requests to allow importations. An affirmative finding applies to yellowfin tuna and yellowfin tuna products that were harvested by vessels of the nation after March 3, 1999. To make an affirmative finding, the Assistant Administrator must find that:

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

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

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

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

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

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

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

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

(ii) Immediately after the national authorities discovered the aggregate per-stock mortality limits of its fleet

had been exceeded, the nation required all its vessels to cease fishing for tuna in association with the stocks whose limits had been exceeded, for the remainder of the calendar year.

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

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

(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)(8)(i) and (f)(8)(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 of the following year, or portion thereof, if the harvesting nation has provided all the information and authorizations required by paragraphs (f)(8)(i) and (f)(8)(ii) of this section, and has met the requirements of paragraphs (f)(8)(i) and (f)(8)(ii) of this section.

(v) *Reconsideration of finding*. The Assistant Administrator may reconsider

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

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

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

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

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

(iv) *Changing the status of intermediary nation determinations.* Imports from an intermediary nation of yellowfin tuna and yellowfin tuna products classified under any of the HTS numbers in paragraph (f)(2)(i) of this section may be imported into the United States only if the Assistant Administrator determines, and publishes a notice of such determination in the FEDERAL REGISTER, that the intermediary nation has provided certification and reasonable proof that it has not imported in the preceding 6 months yellowfin tuna or yellowfin tuna products that are subject to a ban on direct importation into the United States under Section 101(a)(2)(B) of the MMPA. At that time, the nation shall

no longer be considered an “intermediary nation” and these import restrictions shall no longer apply.

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

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

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

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

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

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

(ii) It is unlawful for any exporter, transshipper, importer, processor, or wholesaler/distributor to possess, sell, purchase, offer for sale, transport, or ship in the United States, any tuna or tuna products bearing a label or mark that refers to dolphins, porpoises, or marine mammals unless the label or

mark complies with the requirements of 16 U.S.C. 1385(d).

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

(h) *Taking and related acts of marine mammals in foreign commercial fishing operations not governed by the provisions related to tuna purse seine vessels in the eastern tropical Pacific Ocean—(1) Prohibitions.* (i) As provided in section 101(a)(2) and 102(c)(3) of the MMPA, the importation of commercial fish or fish products which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards or caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States are prohibited. For purposes of paragraph (h) of this section, a fish or fish product caught with commercial fishing technology which results in the incidental mortality or incidental serious injury of marine mammals in excess of U.S. standards is any fish or fish product harvested in an exempt or export fishery for which a valid comparability finding is not in effect.

(ii) Accordingly, it is unlawful for any person to import, or attempt to import, into the United States for commercial purposes any fish or fish product if such fish or fish product:

(A) Was caught or harvested in a fishery that does not have a valid comparability finding in effect at the time of import; or

(B) Is not accompanied by a Certification of Admissibility where such Certification is required pursuant to paragraph (h)(9)(iv) of this section or by such other documentation as the Assistant Administrator may identify

and announce in the FEDERAL REGISTER that indicates the fish or fish product was not caught or harvested in a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section.

(iii) It is unlawful for any person, including exporters, transshippers, importers, processors, or wholesalers/distributors to possess, sell, purchase, offer for sale, re-export, transport, or ship in interstate or foreign commerce in the United States, any fish or fish product imported in violation of paragraph (h) of this section.

(2) *Exemptions.* (i) Exempt fisheries are exempt from requirements of paragraphs (h)(6)(iii)(B) through (E) of this section.

(A) For the purposes of paragraph (h) of this section, *harvesting nation* means the country under whose flag or jurisdiction one or more fishing vessels or other entity engaged in commercial fishing operations are documented, or which has by formal declaration or agreement asserted jurisdiction over one or more authorized or certified charter vessels, and from such vessel(s) or entity(ies) fish are caught or harvested that are a part of any cargo or shipment of fish or fish products to be imported into the United States, regardless of any intervening transshipments, exports or re-exports.

(B) [Reserved]

(ii) The prohibitions of paragraph (h)(1) of this section shall not apply during the exemption period.

(iii) Paragraph (h) of this section shall not apply to a commercial fishing operation subject to section 101(a)(2)(B) of the MMPA and its implementing regulations set out in the relevant provisions of paragraph (f) of this section which govern the incidental take of delphinids in course of commercial purse seine fishing operations for yellowfin tuna in the eastern tropical Pacific Ocean and restrictions on importation and sale of fish and fish products caught or harvested in that commercial fishing operation. Paragraph (h) of this section shall not apply with respect to large-scale driftnet fishing, which is governed by paragraph (f)(7) of this section and the restrictions it sets out on importation and sale of fish and

fish products harvested by using a large-scale driftnet.

(3) *Procedures to identify foreign commercial fishing operations with incidental mortality and serious injury of marine mammals as exempt or export fisheries.* In developing the List of Foreign Fisheries in paragraph (h)(4) of this section, the Assistant Administrator:

(i) Shall periodically analyze imports of fish and fish products and identify commercial fishing operations that are the source of exports of such fish and fish products to the United States that have or may have incidental mortality or serious injury of marine mammals in the course of their commercial fishing operations.

(A) For the purposes of paragraph (h) of this section, a *commercial fishing operation* means vessels or entities that catch, take, or harvest fish (as defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)) from the marine environment (or other areas where marine mammals occur) that results in the sale or barter of all or part of the fish caught, taken or harvested. The term includes aquaculture activities that interact with or occur in marine mammal habitat.

(B) [Reserved]

(ii) Shall notify, in consultation with the Secretary of State, each harvesting nation that has commercial fishing operations identified pursuant to paragraph (h)(3)(i) of this section and request that within 90 days of notification the harvesting nation submit reliable information about the commercial fishing operations identified, including as relevant the number of participants, number of vessels, gear type, target species, area of operation, fishing season, any information regarding the frequency of marine mammal incidental mortality and serious injury and any programs (including any relevant laws, decrees, regulations or measures) to assess marine mammal populations and to reduce incidental mortality and serious injury of marine mammals in those fisheries or prohibit the intentional killing or injury of marine mammals.

(iii) Shall review each harvesting nation's submission, evaluate any information it contains (including descrip-

tions of its regulatory programs) and, if necessary, request additional information.

(iv) May consider other readily available and relevant information about such commercial fishing operations and the frequency of incidental mortality and serious injury of marine mammals, including: fishing vessel records; reports of on-board fishery observers; information from off-loading facilities, port-side officials, enforcement agents and officers, transshipment vessel workers and fish importers; government vessel registries; regional fisheries management organizations documents and statistical document programs; and appropriate certification programs. Other sources may include published literature and reports on fishing vessels with incidental mortality and serious injury of marine mammals from government agencies; foreign, state, and local governments; regional fishery management organizations; nongovernmental organizations; industry organizations; academic institutions; and citizens and citizen groups.

(4) *List of Foreign Fisheries.* (i) Within one year of January 1, 2017, and the year prior to the expiration of the exemption period and every four years thereafter, the Assistant Administrator, based on the information obtained in paragraph (h)(3) of this section, will publish in the FEDERAL REGISTER:

(A) A proposed List of Foreign Fisheries by harvesting nation for notice and comment; and

(B) A final List of Foreign Fisheries, effective upon publication in the FEDERAL REGISTER.

(ii) To the extent that information is available, the List of Foreign Fisheries shall:

(A) Classify each commercial fishing operation that is the source of exports of fish and fish products to the United States based on the definitions for export fishery and exempt fishery set forth in § 216.3 and identified in the List of Foreign Fisheries by harvesting nation and other defining factors including geographic location of harvest, gear-type, target species or a combination thereof;

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(B) Include fishing gear type, target species, and number of vessels or other entities engaged in each commercial fishing operation;

(C) List the marine mammals that interact with each commercial fishing operation and indicate the level of incidental mortality and serious injury of marine mammals in each commercial fishing operation;

(D) Provide a description of the harvesting nation's programs to assess marine mammal stocks and estimate and reduce marine mammal incidental mortality and serious injury in its export fisheries; and

(E) List the harvesting nations that prohibit, in the course of commercial fishing operations that are the source of exports to the United States, the intentional mortality or serious injury of marine mammals unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger.

(5) *Consultations with Harvesting Nations with Commercial Fishing Operations on the List of Foreign Fisheries.* (i) Within 90 days of publication of the final List of Foreign Fisheries in the FEDERAL REGISTER, the Assistant Administrator, in consultation with the Secretary of State, shall consult with harvesting nations with commercial fishing operations identified as export or exempt fisheries as defined in §216.3 for purposes of notifying the harvesting nation of the requirements of the Marine Mammal Protection Act and this subpart.

(ii) The Assistant Administrator, in consultation with the Secretary of State, may consult with harvesting nations for the purposes of providing notifications of deadlines under this section, ascertaining or reviewing the progress of the harvesting nation's development, adoption, implementation, or enforcement of its regulatory program governing the incidental mortality and serious injury of marine mammals in the course of commercial fishing operations for an export fishery, supplementing or clarifying information needed in conjunction with the List of Foreign Fisheries in paragraphs (h)(3) and (4) of this section, the progress report in paragraph (h)(10) of

this section or an application for or reconsideration of a comparability finding in paragraphs (h)(6) and (8) of this section.

(iii) The Assistant Administrator shall, in consultation with the Secretary of State and the United States Trade Representative, consult with any harvesting nations that failed to receive a comparability finding for one or more of commercial fishing operations or for which a comparability finding is terminated and encourage the harvesting nation to take corrective action and reapply for a comparability finding in accordance with paragraph (h)(9)(iii) of this section.

(6) *Procedure and conditions for a comparability finding—(i) Procedures to apply for a comparability finding.* On March 1st of the year when the exemption period or comparability finding is to expire, a harvesting nation shall submit to the Assistant Administrator an application for each of its export and exempt fisheries, along with documentary evidence demonstrating that the harvesting nation has met the conditions specified in paragraph (h)(6)(iii) of this section for each of such fishery, including reasonable proof as to the effects on marine mammals of the commercial fishing technology in use in the fishery for fish or fish products exported from such nation to the United States. The Assistant Administrator may request the submission of additional supporting documentation or other verification of statements made in an application for a comparability finding.

(ii) *Procedures to issue a comparability finding.* No later than November 30th of the year when the exemption period or comparability finding is to expire, the Assistant Administrator, in response to an application from a harvesting nation for an export or exempt fishery, shall determine whether to issue to the harvesting nation, in accordance with the procedures set forth in paragraph (h)(8) of this section, a comparability finding for the fishery. In making this determination, the Assistant Administrator shall consider documentary evidence provided by the harvesting nation and relevant information readily available from other sources. If a harvesting nation provides insufficient

documentary evidence in support of its application, the Assistant Administrator shall draw reasonable conclusions regarding the fishery based on readily available and relevant information from other sources, including where appropriate information concerning analogous fisheries that use the same or similar gear-type under similar conditions as the fishery, in determining whether to issue the harvesting nation a comparability finding for the fishery.

(iii) *Conditions for a comparability finding.* The following are conditions for the Assistant Administrator to issue a comparability finding for the fishery, subject to the additional considerations set out in paragraph (h)(7) of this section:

(A) For an exempt or export fishery, the harvesting nation:

(1) Prohibits the intentional mortality or serious injury of marine mammals in the course of commercial fishing operations in the fishery unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger; or

(2) Demonstrates that it has procedures to reliably certify that exports of fish and fish products to the United States are not the product of an intentional killing or serious injury of a marine mammal unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger; and

(B) For an export fishery, the harvesting nation maintains a regulatory program with respect to the fishery that is comparable in effectiveness to the U.S. regulatory program with respect to incidental mortality and serious injury of marine mammals in the course of commercial fishing operations, in particular by maintaining a regulatory program that includes, or effectively achieves comparable results as, the conditions in paragraph (h)(6)(iii)(C), (D), or (E) of this section as applicable (including for transboundary stocks).

(C) *Conditions for an export fishery operating under the jurisdiction of a harvesting nation within its EEZ (or the equivalent) or territorial sea.* In making

the finding in paragraph (h)(6)(ii) of this section, with respect to an export fishery operating under the jurisdiction of a harvesting nation within its EEZ (or the equivalent) or territorial sea, the Assistant Administrator shall determine whether the harvesting nation maintains a regulatory program that provides for, or effectively achieves comparable results as, the following:

(1) Marine mammal assessments that estimate population abundance for marine mammal stocks in waters under the harvesting nation's jurisdiction that are incidentally killed or seriously injured in the export fishery.

(2) An export fishery register containing a list of all fishing vessels participating in the export fishery, including information on the number of vessels participating, the time or season and area of operation, gear type and target species.

(3) Regulatory requirements that include:

(i) A requirement for the owner or operator of a vessel participating in the export fishery to report all intentional and incidental mortality and injury of marine mammals in the course of commercial fishing operations; and

(ii) A requirement to implement measures in the export fishery designed to reduce the total incidental mortality and serious injury of a marine mammal stock below the bycatch limit; and

(iii) with respect to any transboundary stock or any other marine mammal stocks interacting with the export fishery, measures to reduce the incidental mortality and serious injury of that stock that the United States requires its domestic fisheries to take with respect to that transboundary stock or marine mammal stock.

(4) Implementation of monitoring procedures in the export fishery designed to estimate incidental mortality or serious injury in the export fishery, and to estimate the cumulative incidental mortality and serious injury of marine mammal stocks in waters under its jurisdiction resulting from the export fishery and other export fisheries interacting with the

same marine mammal stocks, including an indication of the statistical reliability of those estimates.

(5) Calculation of bycatch limits for marine mammal stocks in waters under its jurisdiction that are incidentally killed or seriously injured in the export fishery.

(6) Comparison of the incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery in relation to the bycatch limit for each stock; and comparison of the cumulative incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery and any other export fisheries of the harvesting nation showing that these export fisheries:

(i) Do not exceed the bycatch limit for that stock or stocks; or

(ii) Exceed the bycatch limit for that stock or stocks, but the portion of incidental marine mammal mortality or serious injury for which the export fishery is responsible is at a level that, if the other export fisheries interacting with the same marine mammal stock or stocks were at the same level, would not result in cumulative incidental mortality and serious injury in excess of the bycatch limit for that stock or stocks.

(D) *Conditions for a harvesting nation's export fishery operating within the jurisdiction of another state.* In making the finding in paragraph (h)(6)(ii) of this section, with respect to a harvesting nation's export fishery operating within the jurisdiction of another state, the Assistant Administrator shall determine whether the harvesting nation maintains a regulatory program that provides for, or effectively achieves comparable results as, the following:

(1) Implementation in the export fishery of:

(i) With respect to any transboundary stock interacting with the export fishery, any measures to reduce the incidental mortality and serious injury of that stock that the United States requires its domestic fisheries to take with respect that transboundary stock; and

(ii) With respect to any other marine mammal stocks interacting with the export fishery while operating within

the jurisdiction of the state, any measures to reduce incidental mortality and serious injury that the United States requires its domestic fisheries to take with respect to that marine mammal stock; and

(2) For an export fishery not subject to management by a regional fishery management organization:

(i) An assessment of marine mammal abundance of stocks interacting with the export fishery, the calculation of a bycatch limit for each such stock, an estimation of incidental mortality and serious injury for each stock and reduction in or maintenance of the incidental mortality and serious injury of each stock below the bycatch limit. This data included in the application may be provided by the state or another source; and

(ii) Comparison of the incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery in relation to the bycatch limit for each stock; and comparison of the cumulative incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery and any other export fisheries of the harvesting nation showing that these export fisheries do not exceed the bycatch limit for that stock or stocks; or exceed the bycatch limit for that stock or stocks, but the portion of incidental marine mammal mortality or serious injury for which the export fishery is responsible is at a level that, if the other export fisheries interacting with the same marine mammal stock or stocks were at the same level, would not result in cumulative incidental mortality and serious injury in excess of the bycatch limit for that stock or stocks; or

(3) For an export fishery that is subject to management by a regional fishery management organization, implementation of marine mammal data collection and conservation and management measures applicable to that fishery required under any applicable intergovernmental agreement or regional fisheries management organization to which the United States is a party.

(E) *Conditions for a harvesting nation's export fishery operating on the high seas*

under the jurisdiction of the harvesting nation or another state. In making the finding in paragraph (h)(6)(ii) of this section, with respect to a harvesting nation's export fishery operating on the high seas under the jurisdiction of the harvesting nation or another state, the Assistant Administrator shall determine whether the harvesting nation maintains a regulatory program that provides for, or effectively achieves comparable results as, the U.S. regulatory program with respect to the following:

(1) Implementation in the fishery of marine mammal data collection and conservation and management measures applicable to that fishery required under any applicable intergovernmental agreement or regional fisheries management organization to which the United States is a party; and

(2) Implementation in the export fishery of:

(i) With respect to any transboundary stock interacting with the export fishery, any measures to reduce the incidental mortality and serious injury of that stock that the United States requires its domestic fisheries to take with respect that transboundary stock; and

(ii) With respect to any other marine mammal stocks interacting with the export fishery while operating on the high seas, any measures to reduce incidental mortality and serious injury that the United States requires its domestic fisheries to take with respect to that marine mammal stock when they are operating on the high seas.

(7) *Additional considerations for comparability finding determinations.* When determining whether to issue any comparability finding for a harvesting nation's export fishery the Assistant Administrator shall also consider:

(i) U.S. implementation of its regulatory program for similar marine mammal stocks and similar fisheries (*e.g.*, considering gear or target species), including transboundary stocks governed by regulations implementing a take reduction plan (§ 229.2 of this chapter), and any other relevant information received during consultations;

(ii) The extent to which the harvesting nation has successfully implemented measures in the export fishery

to reduce the incidental mortality and serious injury of marine mammals caused by the harvesting nation's export fisheries to levels below the bycatch limit;

(iii) Whether the measures adopted by the harvesting nation for its export fishery have reduced or will likely reduce the cumulative incidental mortality and serious injury of each marine mammal stock below the bycatch limit, and the progress of the regulatory program toward achieving its objectives;

(iv) Other relevant facts and circumstances, which may include the history and nature of interactions with marine mammals in this export fishery, whether the level of incidental mortality and serious injury resulting from the fishery or fisheries exceeds the bycatch limit for a marine mammal stock, the population size and trend of the marine mammal stock, and the population level impacts of the incidental mortality or serious injury of marine mammals in a harvesting nation's export fisheries and the conservation status of those marine mammal stocks where available;

(v) The record of consultations under paragraph (h)(5) of this section with the harvesting nation, results of these consultations, and actions taken by the harvesting nation and under any applicable intergovernmental agreement or regional fishery management organization to reduce the incidental mortality and serious injury of marine mammals in its export fisheries;

(vi) Information gathered during on-site inspection by U.S. government officials of a fishery's operations;

(vii) For export fisheries operating on the high seas under an applicable intergovernmental agreement or regional fishery management organization to which the United States is a party, the harvesting nation's record of implementation of or compliance with measures adopted by that regional fishery management organization or intergovernmental agreement for data collection, incidental mortality and serious injury mitigation or the conservation and management of marine mammals; whether the harvesting nation is a party or cooperating non-party to such

intergovernmental agreement or regional fishery management organization; the record of United States implementation of such measures; and whether the United States has imposed additional measures on its fleet not required by an intergovernmental agreement or regional fishery management organization; or

(viii) For export fisheries operating on the high seas under an applicable intergovernmental agreement or regional fisheries management organization to which the United States is not a party, the harvesting nation's implementation of and compliance with measures, adopted by that regional fisheries management organization or intergovernmental agreement, and any additional measures implemented by the harvesting nation for data collection, incidental mortality and serious injury mitigation or the conservation and management of marine mammals and the extent to which such measures are comparable in effectiveness to the U.S. regulatory program for similar fisheries.

(8) *Comparability finding determinations*—(i) *Publication*. No later than November 30th of the year when the exemption period or comparability finding is to expire, the Assistant Administrator shall publish in the FEDERAL REGISTER, by harvesting nation, a notice of the harvesting nations and fisheries for which it has issued or denied a comparability finding and the specific fish and fish products that as a result are subject to import prohibitions under paragraphs (h)(1) and (9) of this section.

(ii) *Notification*. Prior to publication in the FEDERAL REGISTER, the Assistant Administrator, in consultation with the Secretary of State and, in the event of a denial of a comparability finding, with the Office of the U.S. Trade Representative, shall notify each harvesting nation in writing of the fisheries of the harvesting nation for which the Assistant Administrator is:

(A) Issuing a comparability finding;

(B) Denying a comparability finding with an explanation for the reasons for the denial of such comparability finding; and

(C) Specify the fish and fish products that will be subject to import prohibi-

tions under paragraphs (h)(1) and (9) of this section on account of a denial of a comparability finding and the effective date of such import prohibitions.

(iii) *Preliminary comparability finding consultations*. (A) Prior to denying a comparability finding under paragraph (h)(8)(ii) of this section or terminating a comparability finding under paragraph (h)(8)(vii) of this section, the Assistant Administrator shall:

(1) Notify the harvesting nation that it is preliminarily denying or terminating its comparability finding and explain the reasons for that preliminary denial or termination;

(2) Provide the harvesting nation a reasonable opportunity to submit reliable information to refute the preliminary denial or termination of the comparability finding and communicate any corrective actions it is taking to meet the applicable conditions for a comparability finding set out in paragraph (h)(6)(iii) of this section subject to the additional considerations set out in paragraph (h)(7) of this section.

(B) The Assistant Administrator shall take into account any information it receives from the harvesting nation and issue a final comparability finding determination, notifying the harvesting nation pursuant to paragraph (h)(8)(ii) of this section of its determination and, if a denial or termination, an explanation of the reasons for the denial or termination of the comparability finding.

(C) A preliminary denial or termination of a comparability finding shall not result in import prohibitions pursuant to paragraphs (h)(1) and (9) of this section.

(iv) *Duration of a comparability finding*. Unless terminated in accordance with paragraph (h)(8)(vii) of this section or issued for a specific period pursuant to a re-application under paragraph (h)(9)(iii) of this section, a comparability finding shall remain valid for 4 years from publication or for such other period as the Assistant Administrator may specify.

(v) *Renewal of comparability finding*. To seek renewal of a comparability finding, every 4 years or prior to the expiration of a comparability finding, the harvesting nation must submit to

the Assistant Administrator the application and the documentary evidence required pursuant to paragraph (h)(6)(i) of this section, including, where applicable, reasonable proof as to the effects on marine mammals of the commercial fishing technology in use in the fishery for fish or fish products exported to the United States, by March 1 of the year when its current comparability finding is due to expire.

(vi) *Procedures for a comparability finding for new foreign commercial fishing operations wishing to export to the United States.* (A) For foreign commercial fishing operations not on the List of Foreign Fisheries that are the source of new exports to the United States, the harvesting nation must notify the Assistant Administrator that the commercial fishing operation wishes to export fish and fish products to the United States.

(B) Upon notification the Assistant Administrator shall issue a provisional comparability finding allowing such imports for a period not to exceed 12 months.

(C) At least 120 days prior to the expiration of the provisional comparability finding the harvesting nation must submit to the Assistant Administrator the reliable information specified in paragraph (h)(3)(ii) of this section and the application and the applicable documentary evidence required pursuant to paragraph (h)(6)(i) of this section.

(D) Prior to expiration of the provisional comparability finding, the Assistant Administrator shall review the application and information provided and classify the commercial fishing operation as either an exempt or export fishery in accordance with paragraphs (h)(3)(iii) through (iv) and (h)(4)(ii) of this section and determine whether to issue the harvesting nation a comparability finding for the fishery in accordance with paragraph (h)(6)(ii) through (iii) of this section.

(E) If the harvesting nation submits the reliable information specified in paragraph (h)(3)(ii) of this section at least 180 days prior to expiration of the provisional comparability finding, the Assistant Administrator will review that information and classify the fish-

ery as either an exempt or export fishery.

(vii) *Discretionary review of comparability findings.* (A) The Assistant Administrator may reconsider a comparability finding that it has issued at any time based upon information obtained by the Assistant Administrator including any progress report received from a harvesting nation; or upon request with the submission of information from the harvesting nation, any nation, regional fishery management organizations, nongovernmental organizations, industry organizations, academic institutions, citizens or citizen groups that the harvesting nation's exempt or export fishery no longer meets the applicable conditions in paragraph (h)(6)(iii) of this section. Upon receiving a request, the Assistant Administrator has the discretion to determine whether to proceed with a review or reconsideration.

(B) After such review or reconsideration and consultation with the harvesting nation, the Assistant Administrator shall, if the Assistant Administrator determines that the basis for the comparability finding no longer applies, terminate a comparability finding.

(C) The Assistant Administrator shall notify in writing the harvesting nation and publish in the FEDERAL REGISTER a notice of the termination and the specific fish and fish products that as a result are subject to import prohibitions under paragraphs (h)(1) and (9) of this section.

(9) *Imposition of import prohibitions.* (i) With respect to a harvesting nation for which the Assistant Administrator has denied or terminated a comparability finding for a fishery, the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, shall identify and prohibit the importation of fish and fish products into the United States from the harvesting nation caught or harvested in that fishery. Any such import prohibition shall become effective 30 days after the of publication of the FEDERAL REGISTER notice referenced in paragraph (h)(8)(i) of this section and shall only apply to fish and fish products caught or harvested in that fishery.

(ii) *Duration of import restrictions and removal of import restrictions.* (A) Any import prohibition imposed pursuant to paragraphs (h)(1) and (9) of this section with respect to a fishery shall remain in effect until the Assistant Administrator issues a comparability finding for the fishery.

(B) A harvesting nation with an export fishery with a comparability finding that expired, was denied or terminated may re-apply for a comparability finding at any time by submitting an application to the Assistant Administrator, along with documentary evidence demonstrating that the harvesting nation has met the conditions specified in paragraph (h)(6)(iii) of this section, including, as applicable, reasonable proof as to the effects on marine mammals of the commercial fishing technology in use in the fishery for the fish or fish products exported from such nation to the United States.

(C) The Assistant Administrator shall make a determination whether to issue the harvesting nation that has re-applied for a comparability finding for the fishery within 90 days from the submission of complete information to the Assistant Administrator. The Assistant Administrator shall issue a comparability finding for the fishery for a specified period where the Assistant Administrator finds that the harvesting nation meets the applicable conditions in paragraph (h)(6)(iii) of this section, subject to the additional consideration for a comparability finding in paragraph (h)(7) of this section.

(D) Upon issuance of a comparability finding to the harvesting nation with respect to the fishery and notification in writing to the harvesting nation, the Assistant Administrator, in cooperation with the Secretaries of Treasury and Homeland Security, shall publish in the FEDERAL REGISTER a notice of the comparability finding and the removal of the corresponding import prohibition effective on the date of publication in the FEDERAL REGISTER.

(iii) *Certification of admissibility.* (A) If fish or fish products are subject to an import prohibition under paragraphs (h)(1) and (9) of this section, the Assistant Administrator, to avoid circumvention of the import prohibition, may require that the same or similar fish and

fish products caught or harvested in another fishery of the harvesting nation and not subject to the prohibition be accompanied by a certification of admissibility by paper or electronic equivalent filed through the National Marine Fisheries Service message set required in the International Trade Data System. No certification of admissibility shall be required for a fish product for which it is infeasible to substantiate the attestation that the fish or fish products do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition. The certification of admissibility may be in addition to any other applicable import documentation requirements.

(B) The Assistant Administrator shall notify the harvesting nation of the fisheries and the fish and fish products to be accompanied by a certification of admissibility and provide the necessary documents and instruction.

(C) The Assistant Administrator, in cooperation with the Secretaries of Treasury and Homeland Security, shall as part of the FEDERAL REGISTER notice referenced in paragraph (h)(8)(i) of this section, publish a list of fish and fish products, organized by harvesting nation, required to be accompanied by a certification of admissibility. Any requirement for a certification of admissibility shall be effective 30 days after the publication of such notice in the FEDERAL REGISTER.

(D) For each shipment, the certification of admissibility must be properly completed and signed by a duly authorized official or agent of the harvesting nation and subject to validation by a responsible official(s) designated by the Assistant Administrator. The certification must also be signed by the importer of record and submitted in a format (electronic facsimile [fax], the Internet, etc.) specified by the Assistant Administrator.

(iv) *Intermediary nation.* (A) For purposes of this paragraph (h)(9), and in applying the definition of an “intermediary nation,” an import into the intermediary nation occurs when the fish or fish product is released from a harvesting nation’s customs jurisdiction and enters the customs jurisdiction of the intermediary nation or

when the fish and fish products are entered into a foreign trade zone of the intermediary nation for processing or transshipment. For other purposes, "import" is defined in § 216.3.

(B) No fish or fish products caught or harvested in a fishery subject to an import prohibition under paragraphs (h)(1) and (9) of this section, may be imported into the United States from any intermediary nation.

(C) Within 30 days of publication of the FEDERAL REGISTER notice described in paragraph (h)(8)(i) of this section specifying fish and fish products subject to import prohibitions under paragraphs (h)(1) and (9) of this section, the Assistant Administrator shall, based on readily available information, identify intermediary nations that may import, and re-export to the United States, fish and fish products from a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section and notify such nations in writing that they are subject to action under paragraph (h)(9)(iv)(D) of this section with respect to the fish and fish products for which the Assistant Administrator identified them.

(D) Within 60 days from the date of notification, an intermediary nation notified pursuant to paragraph (h)(9)(iv)(C) of this section must certify to the Assistant Administrator that it:

(1) Does not import, or does not offer for import into the United States, fish or fish products subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section; or

(2) Has procedures to reliably certify that exports of fish and fish products from the intermediary nation to the United States do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section.

(E) The intermediary nation must provide documentary evidence to support its certification including information demonstrating that:

(1) It has not imported in the preceding 6 months the fish and fish products for which it was notified under paragraph (h)(9)(iv)(C) of this section; or

(2) It maintains a tracking, verification, or other scheme to reliably certify on either a global, individual shipment or other appropriate basis that fish and fish products from the intermediary nation offered for import to the United States do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section and for which it was notified under paragraph (h)(9)(iv)(C) of this section.

(F) No later than 120 days after a notification pursuant to paragraph (h)(9)(iv)(C) of this section, the Assistant Administrator will review the documentary evidence provided by the intermediary nation under paragraphs (h)(9)(iv)(D) and (E) of this section and determine based on that information or other readily available information whether the intermediary nation imports, or offers to import into the United States, fish and fish products subject to import prohibitions and, if so, whether the intermediary nation has procedures to reliably certify that exports of fish and fish products from the intermediary nation to the United States do not contain fish or fish products subject to import prohibitions under paragraphs (h)(1) and (9) of this section, and notify the intermediary nation of its determination.

(G) If the Assistant Administrator determines that the intermediary nation does not have procedures to reliably certify that exports of fish and fish products from the intermediary nation to the United States do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section, the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, will file with the Office of the Federal Register a notice announcing the fish and fish products exported from the intermediary nation to the United States that are of the same species as, or similar to, fish or fish products subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section that may not be imported into the United States as a result of the determination. A prohibition under this

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paragraph shall not apply to any fish or fish product for which the intermediary nation was not identified under paragraph (h)(9)(iv)(C) of this section.

(H) The Assistant Administrator will review determinations under this paragraph upon the request of an intermediary nation. Such requests must be accompanied by specific and detailed supporting information or documentation indicating that a review or reconsideration is warranted. Based upon such information and other relevant information, the Assistant Administrator may determine that the intermediary nation should no longer be subject to an import prohibition under paragraph (h)(9)(iv)(G) of this section. If the Assistant Administrator makes such a determination, the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, shall lift the import prohibition under this paragraph and publish notification of such action in the FEDERAL REGISTER.

(10) *Progress report for harvesting nations with export fisheries.* (i) A harvesting nation shall submit, with respect to an exempt or export fishery, a progress report to the Assistant Administrator documenting actions taken to:

(A) Develop, adopt and implement its regulatory program; and

(B) Meet the conditions in paragraph (h)(6)(iii) of this section, including with respect to reducing or maintaining incidental mortality and serious injury of marine mammals below the bycatch limit for its fisheries.

(ii) The progress report should include the methods the harvesting nation is using to obtain information in support of a comparability finding and a certification by the harvesting nation of the accuracy and authenticity of the information contained in the progress report.

(iii) The first progress report will be due two years prior to the end of exemption period and every four years thereafter on or before July 31.

(iv) The Assistant Administrator may review the progress report to monitor progress made by a harvesting nation in developing its regulatory program or to reconsider a comparability

finding in accordance with paragraph (h)(8)(vi) of this section.

(11) *International cooperation and assistance.* Consistent with the authority granted under Marine Mammal Protection Act at 16 U.S.C. 1378 and the availability of funds, the Assistant Administrator may:

(i) Provide appropriate assistance to harvesting nations identified by the Assistant Administrator under paragraph (h)(5) of this section with respect to the financial or technical means to develop and implement the requirements of this section;

(ii) Undertake, where appropriate, cooperative research on marine mammal assessments for abundance, methods to estimate incidental mortality and serious injury and technologies and techniques to reduce marine mammal incidental mortality and serious injury in export fisheries;

(iii) Encourage and facilitate, as appropriate, the voluntary transfer of appropriate technology on mutually agreed terms to assist harvesting nations in qualifying for a comparability finding under paragraph (h)(6) of this section; and

(iv) Initiate, through the Secretary of State, negotiations for the development of bilateral or multinational agreements with harvesting nations to conserve marine mammals and reduce the incidental mortality and serious injury of marine mammals in the course of commercial fishing operations.

(12) *Consistency with international obligations.* The Assistant Administrator shall ensure, in consultation with the Department of State and the Office of the United States Trade Representative that any action taken under this section, including any action to deny a comparability finding or to prohibit imports, is consistent with the international obligations of the United States, including under the World Trade Organization Agreement.

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