

threatened species has OMB approval and is assigned clearance number 1018-0094. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. This rule does not alter that information collection requirement. For additional information concerning permits and associated requirements for endangered wildlife, see 50 CFR 17.22.

References Cited

A complete list of references cited in this rule is available upon request from the Ventura Fish and Wildlife Office of the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT** section).

Authors. The primary authors of this final rule are Carl Benz, Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section), and Barbara Behan, Regional Office, 911 N.E. 11th Avenue, Portland, Oregon 97232 (telephone 503/231-6131).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order under MAMMALS, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *
(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific Name						
* MAMMALS	*	*	*	*	*		*
Sheep, Sierra Nevada bighorn.	<i>Ovis canadensis californiana.</i>	U.S.A. (western conterminous states), Canada (southwest), Mexico (north).	U.S.A., CA-Sierra Nevada.	E	660E 675	NA	NA
*	*	*	*	*	*		*

Dated: December 22, 1999.
Jamie Rappaport Clark,
Director, Fish and Wildlife Service.
 [FR Doc. 99-34056 Filed 12-30-99; 8:45 am]
BILLING CODE 4310-55-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 216

[Docket 990324081-9336-02, ID072098G]
RIN 0648-A185

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

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

ACTION: Interim final rule; request for comments.

SUMMARY: NMFS issues an interim final rule to implement provisions of the International Dolphin Conservation

Program Act (IDCPA). This interim final rule allows the entry of yellowfin tuna into the United States under certain conditions from nations fully complying with the International Dolphin Conservation Program (IDCP). It also allows U.S. vessels to set their purse seines on dolphins in the ETP. The standard for the use of "dolphin-safe" labels for tuna products also is changed. This interim final rule also establishes a tuna-tracking program to ensure adequate tracking and verification of tuna harvested in the ETP.

DATES: Effective February 2, 2000. Comments must be received no later than 5 p.m., Pacific standard time, on April 3, 2000.

ADDRESSES: Written comments should be sent to J. Allison Routt, NMFS, Southwest Region, Protected Resources Division, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213. Comments also may be sent via facsimile (fax) to 562-980-4027. Comments will not be accepted if submitted via e-mail or Internet. Copies of the Environmental Assessment (EA) accompanying this interim final rule may be obtained by writing to the same address. Send comments regarding reporting burden estimates or any other

aspect of the collection-of-information requirements in this interim rule, including suggestions for reducing the burdens to J. Allison Routt and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503 (ATTN: NOAA Desk Officer).

FOR FURTHER INFORMATION CONTACT: J. Allison Routt, NMFS, Southwest Region, Protected Resources Division, (562) 980-4020, fax 562-980-4027.

SUPPLEMENTARY INFORMATION:

Background

In 1992, nations fishing for tuna in the ETP, including the United States, reached a non-binding international agreement (referred to as the La Jolla Agreement) that included, among other measures, a dolphin mortality reduction schedule providing for significant reductions in dolphin mortalities. By 1993, nations fishing in the ETP under the La Jolla Agreement had reduced dolphin mortality to less than 5,000 dolphins annually, 6 years ahead of the schedule established in that Agreement. In October 1995, the success of the La Jolla Agreement led the United States, Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama,

Spain, Vanuatu, and Venezuela to sign the Panama Declaration to strengthen and enhance the IDCP.

The program outlined in the Panama Declaration provides greater protection for dolphins and enhances the conservation of yellowfin tuna and other living marine resources in the ETP ecosystem. The Panama Declaration anticipated that the United States would amend 16 U.S.C. 1361 et seq., the Marine Mammal Protection Act (MMPA), to allow import of yellowfin tuna into the United States from nations that are participating in, and are in compliance with, the IDCP.

Implementation of the Panama Declaration by the United States was also anticipated in order to allow U.S. vessels to participate in the ETP fishery on an equal basis with the vessels of other nations. Under the Panama Declaration, signatory nations agreed to develop a legally binding international agreement.

Congress considered several bills to implement the Panama Declaration, ultimately passing the IDCPA. The IDCPA was signed into law on August 15, 1997. The IDCPA was the domestic endorsement of the La Jolla Agreement, incorporating elements of the Panama Declaration, under the auspices of the Inter-American Tropical Tuna Commission (IATTC). The IDCPA primarily amends provisions in the MMPA and the Dolphin Protection Consumer Information Act (DPCIA), 16 U.S.C. 1385, governing marine mammal mortality in the U.S. ETP tuna purse seine fishery and the importation of yellowfin tuna and yellowfin tuna products from other nations with vessels engaged in the ETP tuna purse seine fishery.

The IDCPA, together with the Panama Declaration, became the blueprint for the Agreement on the IDCP. In May 1998, eight nations, including the United States, signed a binding, international agreement to implement the IDCP. The Agreement on the IDCP became effective on February 15, 1999, after four nations (United States, Panama, Ecuador, and Mexico) deposited their instruments of ratification, acceptance, or adherence with the depository for the agreement. On March 3, 1999, the Secretary of State provided the required certification to Congress that the Agreement on the IDCP had been adopted and was in force. Consequently, the IDCPA became effective on that date. Provisions to implement the IDCPA and the new international agreement for dolphin conservation in the ETP are the subject of this interim final rule.

Proposed Rule

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

Public comments on the proposed rule were accepted through July 14, 1999. NMFS held two public hearings on the proposed rule: one in Long Beach, CA, on July 8, 1999, and one in Silver Spring, MD, on July 14, 1999. In addition to publishing the proposed rule in the **Federal Register**, NMFS sent it to industry representatives, environmental groups, vessel and operator certificate of inclusion holders, importers, IDCP member nations, Department of State, IATTC, U.S. Commissioners to the IATTC, Department of the Treasury, U.S. Customs Service, Marine Mammal Commission, Department of Justice, and the Federal Trade Commission. NMFS also issued a press release announcing the public hearings and summarizing the major issues contained in the proposed rule. Information in the press release was published in several national newspapers, NMFS websites, and broadcast on several radio stations.

Responses to Comments

NMFS received over two thousand comments during the comment period for the proposed rule. Comments were received from industry, environmental organizations, members of the public, the Marine Mammal Commission, the IATTC, the Department of State, the U.S. Customs Service, and foreign nations. Key issues and concerns are summarized below and responded to as follows:

Comments on Definitions

Comment 1: One commenter indicated that the ETP boundary in the regulations should reflect the boundary used by the IDCP. Another commenter indicated that the language in the Agreement on the IDCP does not state whether fishing on dolphin occurs west of 150° West. Another commenter requested that the language be clarified by inserting "in the Dolphin Protection Consumer Information Act (DPCIA)" in the preamble sentence of the proposed rule: "Although the Agreement on the IDCP applies in the Pacific Ocean west

only to 150° W. meridian, the current definition of ETP is out to 160° W." as well as by deleting "that overlap with the waters covered by the Agreement" from the preamble sentence "when they extend their fishing activities under the Treaty that governs their fishing in the South Pacific into waters that overlap with the waters covered by the Agreement on the IDCP." Another commenter suggested clarifying the sentence by inserting "between 160° W and 150° W" for the overlap area.

Response: Although the Agreement on the IDCP defines "ETP" as the area of the Pacific Ocean west to the 150° W, the DPCIA defines the "ETP" as the area of the Pacific Ocean out to the 160° West meridian. The recommended changes were not incorporated into the interim final rule since the background information on the "ETP" is not included in this preamble.

Comment 2: Many commenters recommended defining the term "serious injury" in the final rule.

Response: NMFS agrees and has defined a "serious injury" as an injury that will likely result in mortality. Individual reported injuries will be evaluated by the IATTC and NMFS using criteria developed by the International Program.

Comment 3: One commenter suggested modifying the definition of "IDCPA" in § 216.3 by adding the phrase "and any subsequent amendments thereto" to the end of the sentence.

Response: NMFS disagrees. The proposed definition for IDCPA is accurate.

Comment 4: Two commenters indicated that the term "significant adverse impact" must be defined since the definition of "dolphin-safe" is linked to the phrase.

Response: NMFS disagrees that this term needs to be defined in these regulations. In making the "findings" required by paragraph (g) of the DPCIA, NMFS considered, and will consider, a number of factors for determining whether the tuna purse seine fishery "is having a significant adverse impact" on the depleted dolphin stocks in the ETP. NMFS' focus is on the recovery and growth of depleted dolphin stocks in the ETP, as well as assessing changes in their population sizes over time.

Comment 5: One commenter suggested including a definition for "fishing operations" to avoid any misunderstandings as to when a permit is required.

Response: NMFS disagrees. The rule is clear when permits are required and exceptions are available for transiting the ETP.

Comment on Harmonized Tariff Schedule (HTS) Item Numbers

Comment 6: One commenter suggested removing the period from all the cited HTS numbers appearing before the HTS statistical suffixes for these numbers (e.g., 0303.42.00.20 should be 0303.42.0020) and under § 216.24(f)(2)(i)(D) change 0304.20.60.99 to 0304.20.6096 and change 0304.90.90.92 to 0304.90.9091; under § 216.24(f)(iii)(A) change 0303.79.40.96 to 0303.79.4097 and change 0304.20.60.99 to 0304.20.6096; and under § 216.24(f)(iii)(C) change 0304.20.60.98 to 0304.20.6096.

Response: NMFS agrees that the suggested numbers are correct and has made the changes.

Comments on Affirmative Findings and Embargoes

Comment 7: Several commenters indicated that the proposed rule does not contain a provision that would prevent a nation from being embargoed because of a disaster set or actions of a rogue vessel which might cause a nation to exceed its fleet Dolphin Mortality Limit (DML) even though the IDCP contains a provision to handle this type of situation. The commenters felt yellowfin tuna should not be embargoed if a nation is in compliance with the IDCP.

Response: NMFS agrees that if a nation's fleet's annual dolphin mortality or per-stock dolphin mortality exceeds its aggregate DMLs because of extraordinary circumstances beyond the control of the nation or of the vessel's captain, but otherwise is in conformance to the Agreement on the IDCP, that nation should not be embargoed. NMFS has made the change at § 216.24(f)(9)(i)(C). However, the nation must have immediately required all its vessels to cease fishing for tuna in association with dolphins for the remainder of the calendar year. This flexibility should encourage harvesting nations to comply with the Agreement on the IDCP, yet threaten economic sanctions against nations that do not control or manage their fleets.

Comment 8: One commenter questioned the accuracy of the title, "Affirmative finding procedure for yellowfin tuna harvested using a purse seine in the ETP" of § 216.24(f)(9) since under the IDCPA, an affirmative finding is made for a harvesting nation rather than for the yellowfin tuna that is harvested.

Response: NMFS agrees and has changed the title of § 216.24(f)(9) to read, "Affirmative finding procedure for nations harvesting yellowfin tuna using a purse seine in the ETP."

Comment 9: One commenter pointed out that § 216.24(f)(9)(i)(C) establishes different standards for United States and foreign fleets regarding the consequences of exceeding a nation's aggregate DMLs. A foreign nation would not receive an affirmative finding if it exceeded its aggregate DML the previous year. In contrast, as reflected by § 214.24(c)(8)(x)(B), the U.S. fleet would have to cease setting on dolphins if it reached or exceeded its aggregate DML, but yellowfin tuna caught by U.S. vessels could still be sold in the United States in subsequent years.

Response: NMFS agrees. Except in the case of a foreign nation that acts quickly to close its fishery after exceeding its national DML, as described in the response to Comment 7 above, the commenter's description is generally correct. The IDCPA does not require the United States to obtain an affirmative finding since U.S. vessels do not "import" tuna into the United States. Because of this, U.S. vessels still would be allowed to sell yellowfin tuna and yellowfin tuna products in the United States even if the United States had reached or exceeded its aggregate DML. However, appropriate sanctions would be taken against individual U.S. vessels that exceed their DML.

Comment 10: In §§ 216.24(f)(9)(iv) and 216.24(f)(9)(vi), the word "met" should probably be "meets" to reflect that the finding is to be based on current information.

Response: NMFS agrees in part and has changed the language to "has met" in § 216.24(f)(9)(iv). The phrase "has met" has been kept in § 216.24(f)(9)(vi) to be consistent with the verb tense of the sentence.

Comment 11: One commenter indicated the first sentence of § 216.24(f)(9)(viii) should be revised to indicate that yellowfin tuna is harvested "using" purse seine nets, rather than "by" purse seine nets.

Response: NMFS agrees that the participle "using" and has made the change.

Comment 12: One commenter indicated the second sentence of § 216.24(f)(9)(viii) would be clearer if the word "only" were inserted after the phrase "may be imported into the United States ..."

Response: NMFS agrees and has inserted the word "only" in the sentence.

Comment 13: One commenter indicated that the proposed regulations at § 216.24(f)(12) do not seem to allow the purchase or sale of non-dolphin-safe tuna caught by U.S. vessels fishing in the ETP pursuant to a DML since the vessels will not be covered by an

affirmative finding unless the United States issues an affirmative finding covering their own vessels.

Response: NMFS agrees that the IDCPA does not prohibit the purchase or sale of non-dolphin-safe tuna harvested by U.S. vessels fishing in compliance with the IDCP. The IDCPA prohibits the sale, purchase, offer for sale, transport or shipment of non-dolphin-safe tuna products in the United States unless the tuna is harvested in compliance with the IDCP and the harvesting nation is a member of the IATTC (MMPA section 307(a)(1)). For administrative convenience, NMFS proposed allowing only non-dolphin-safe tuna harvested by a nation with an affirmative finding to be sold, offered for sale, transported, purchased, or shipped in the United States. Upon further evaluation, NMFS has discovered that this requirement could inadvertently impact U.S. vessels because the U.S. does not give an affirmative finding to itself. The problem has been corrected by changing the title at § 216.24(f)(12) from "Dolphin-Safe Requirements" to "Market Prohibitions" and clarifying that the prohibition does not apply to tuna harvested by U.S. vessels in compliance with the IDCP.

Comment 14: Several commenters disagreed with NMFS' interpretation of the language in MMPA section 101(a)(2)(B)(iii) and believed that Congress intended to cap the total DMLs assigned to each harvesting nation's vessels at the total DMLs assigned to its vessels during 1997, or subsequent calendar years, even if the number of vessels has increased since then.

Response: NMFS disagrees that the IDCPA (or its legislative history) indicates Congress intended NMFS to compare a nation's aggregate (fleet) mortality limits to the nation's earlier limits. In the Panama Declaration, the United States pledged to lift embargoes against nations participating in accordance with the International Program. While the international program intended to reduce overall dolphin mortality, the Parties to the Panama Declaration and the IDCP did not contemplate limiting the size of any nation's fleet (at least not for the purpose of dolphin protection) or the size of any nation's aggregate DML. Under the La Jolla Agreement, the annual international cap was allocated on a per-vessel basis. However, under the Agreement on the IDCP, while the annual international cap on dolphin mortality is allocated on a per-nation basis, each nation's allocation is based on the number of its eligible purse seine vessels that are expected to set on dolphin in the upcoming year. As a

result, a nation could fish in strict compliance with the program but be embargoed by the United States if its fleet happened to be relatively large in the upcoming year and, therefore, receive a relatively large aggregate (fleet) DML. Penalizing a nation whose fleet has grown could discourage efficient utilization of resources (fishing vessel transfers between nations) without affecting overall international dolphin mortality. Harvesting nations that adopted good dolphin conservation programs because of the IDCP might quit the IDCP if subjected to this type of embargo. NMFS' interpretation is consistent with the Agreement on the IDCP and the intent of Congress to discourage mortalities.

Comment 15: One commenter suggested that, in addition to NMFS' proposal, an affirmative finding should also require that the DML assigned to each vessel in the international fishery never exceed the DML assigned in 1997. The commenter recommended inserting the language, "keeps its fleet's annual dolphin mortality within the aggregate DML assigned to the fleet, and that it did not assign an individual vessel a total annual DML in excess of the DML established in 1997."

Response: NMFS disagrees. NMFS proposes to focus on a nation's compliance with the international regime. Only a nation that fails to keep its own fleet's annual dolphin mortality within the aggregate DMLs assigned to the fleet would be embargoed, except in the case of extraordinary circumstances as described in the response to Comment 7. This focuses NMFS' attention on a fleet's results in protecting dolphin, which should reflect on the success of the harvesting nation's management and enforcement program, rather than on decisions by other Parties to the IDCP. This encourages other harvesting nations to comply with the IDCP and threatens economic sanctions against only those nations that do not control or manage their own fleets.

Comment 16: Commenters indicated that the intent of Congress in MMPA section 101(a)(2)(B)(iii) is to reduce dolphin mortality to a level approaching zero through the setting of annual limits and the goal of eliminating dolphin mortality. The commenters refer to the proposed rule at § 216.24(f)(9)(C) which would not condition affirmative findings on reducing international mortality limits to a "level approaching zero." Commenters indicated that the proposed rule does not ratchet down the dolphin mortality as intended by Congress but rather establishes an international DML cap of 5,000 annually as stated in the IDCP agreement.

Response: NMFS believes the language in the rule is consistent with the IDCPA and the Agreement on the IDCP. The IDCPA and the Agreement on the IDCP do not establish processes to reduce dolphin mortality in the ETP tuna purse seine fishery to zero. The proposed rule's interpretation makes the most sense in the context of MMPA section 101(a)(2)(B) because it focuses on a nation's compliance within the international regime. Under this interpretation, only a nation that failed to keep its own fleet's annual dolphin mortality within the aggregate DMLs assigned to the fleet would be embargoed, except for extraordinary circumstances as described in the response to Comment 7. This interpretation focuses NMFS' attention on a fleet's results in protecting dolphin, which should reflect on the success of the harvesting nation's management and enforcement programs, rather than on decisions by other Parties to the IDCP.

Comment 17: Commenters indicated that to get an affirmative finding, nations should not have to apply on an annual basis, especially with regard to information such as whether the nation is a member of the IATTC or of the IDCP since the information is available from other sources (e.g., the IATTC and Department of State). A nation seeking to maintain an affirmative finding should only have to authorize the release of the information instead of having to submit the information on an annual basis. NMFS also received comments that it should be the responsibility of the harvesting nation to obtain and provide supporting documentation to the Assistant Administrator, and not the Assistant Administrator's responsibility to obtain the documentation from the IATTC. In addition, several commenters opposed the concept of a multi-year affirmative finding process and supported the existing annual application process for an affirmative finding.

Response: NMFS will gather the necessary documentary information through other channels (e.g., the Department of State and/or the IATTC), provided nations authorize the release of the information, instead of having each nation submit the information to NMFS on an annual basis. NMFS will evaluate this evidence and continue to make affirmative findings on an annual basis. Beginning with the first year the regulations are effective and every 5 years thereafter, or if requested, nations will need to submit sufficient documentary evidence to NMFS for an affirmative finding. After considering alternatives, NMFS determined this is

an appropriate balance of burdens between NMFS and applicant nations.

Comment 18: One commenter recommended that NMFS require more detailed information than required by the IDCPA to be submitted by harvesting nations to obtain an affirmative finding. The commenter suggested keeping the previous implementing regulations at § 216.24(e)(5)(i) through (v) and updating the information as necessary to reflect the requirements in the IDCP.

Response: Many of the regulations listed under the previous implementing regulations at § 216.24(e)(5)(i) through (v) are not consistent with the IDCPA or are no longer applicable (e.g., comparability standards) and would be unnecessary and burdensome to the harvesting nation requesting an affirmative finding. Most of the information required to make an affirmative finding is available through the IATTC. The IDCPA sets new standards for affirmative findings and no longer requires much of the information in the previous implementing regulations.

Comment 19: One commenter suggested that, under the background information on affirmative findings in the proposed rule, language from Annex III to the Agreement on the IDCP that requires a system for allocating stock-specific quotas be established within 6 months of the entry of force of the Agreement on the IDCP (e.g., by August 15, 1999) should be included.

Response: NMFS recognizes that Annex III, Per-Stock, Per-Year Dolphin Mortality Caps, to the Agreement on the IDCP indicates that, within 6 months of the entry into force, the Parties agreed to establish a system for the allocation of the per-stock, per-year dolphin mortality cap for each stock for the ensuing year and years thereafter by August 15, 1999. The Parties have agreed on a global allocation system that will establish per-stock, per-year mortality limits that will be in effect during calendar year 2000, at a level of 0.2 percent of the minimum population estimate. In addition, the IATTC will monitor the per-stock, per-year mortality limits and notify nations when limits are being approached so that fishing will cease on the stock(s) whose limits have been reached.

Comment 20: In the Preamble, the final rule should clearly indicate what Secretarial findings have been made, what findings remain to be made, and how the regulations relate to those findings.

Response: The initial finding was published in the **Federal Register** on May 7, 1999 (64 FR 24590). NMFS found that there is insufficient evidence

to determine that chase and encirclement by the tuna purse seine fishery “[are] having a significant adverse impact” on depleted dolphin stocks in the ETP. Based on this finding, the Assistant Administrator will apply the “dolphin-safe” definition specified in paragraph (h)(1) of the DPCIA (16 U.S.C. 1385(h)(1)) to tuna harvested in the ETP by purse seine vessels with carrying capacity greater than 400 short tons (362.8 mt), e.g., that no dolphins were killed or seriously injured during the sets in which the tuna were caught. The final finding is due between July 1, 2001, and December 31, 2002.

Comment 21: One commenter urged NMFS to develop and define a better process under § 216.24(f)(5)(x), other than a statement from a responsible government official, to verify that shipments exported from designated “high seas driftnet nations” were not harvested by using large-scale driftnets.

Response: NMFS disagrees. This system has been in place since 1992 and was not proposed to be changed by this rule. In addition to statements from responsible government officials, the U.S. Coast Guard and NMFS will continue to monitor the world’s oceans for the use of high seas driftnets as required by the High Seas Driftnet Fisheries Enforcement Act of 1992 (Pub. L. No. 102–582).

Comment 22: One commenter asked whether the “certification and reasonable proof” required in § 216.24(f)(9)(viii) of the proposed rule for intermediary nations to export tuna to the United States is applicable to all yellowfin tuna or specifically to tuna harvested by purse seine in the ETP.

Response: The certification and reasonable proof required by § 216.24(f)(9)(viii) applies to intermediary nations exporting yellowfin tuna and yellowfin tuna products harvested with purse seine nets in the ETP. For the purposes of § 216.24(f)(9)(viii), the term “certification and reasonable proof” entails the nation’s customs records for the preceding 6 months, together with a certification attesting that the documents are accurate.

Comment 23: One commenter indicated that the proposed § 216.24(f)(9)(vi) was unclear whether determinations made by the Assistant Administrator and published in the **Federal Register** for intermediary nations are made only once or are made on an ongoing basis. The commenter suggested that NMFS conduct a periodic review of determinations rather than requiring the review only when requested by the intermediary nation.

Response: The Assistant Administrator will publish the determination for intermediary nations only once in the **Federal Register**. However, the Assistant Administrator will review decisions upon the request of an intermediary nation and will review documentary evidence that indicates a nation has 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.

Comment 24: One commenter felt that the United States should not require intermediary nations to prove that they did not import tuna that was caught by nations not subject to an embargo. The regulations should be clear that a nation will be considered to be an intermediary nation only when the Assistant Administrator becomes aware of credible evidence that the nation in question is importing yellowfin tuna from the ETP that are subject to a ban on direct importation into the United States. In addition, such nations should be provided an opportunity to refute any such allegations.

Response: NMFS agrees. The regulations at § 216.24(f)(9)(vi) have been revised to clarify that the Assistant Administrator will determine which nations are intermediary nations and publish such determinations in the **Federal Register**. After a nation is determined to be an “intermediary nation,” it will be the responsibility of the nation to provide the documentary evidence for a new determination by proving 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.

Comment 25: One commenter stated that yellowfin tuna or yellowfin tuna products subject to direct ban on importation to the United States may pass through a nation on a through bill of lading without causing the nation to be an intermediary nation.

Response: NMFS agrees since, under section 3 of the MMPA, an “intermediary nation” is defined as 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 MMPA section 101(a)(2)(B). Since shipments on a through bill of lading are not actually imported or exported from a nation under U.S. regulations at § 216.24(f)(9)(viii), the nation would not be considered an “intermediary nation” under the MMPA.

Comment 26: One commenter expressed concern that no nation whose vessels currently fish in the ETP are meeting their “financial obligations to the IATTC” as part of the requirement to receive an affirmative finding under § 216.24(f)(9)(i)(B). In addition, several commenters requested a list of the criteria used by the United States to determine whether the nations whose vessels are fishing in the ETP are meeting their financial obligations.

Response: The IDCPA does not specify what is meant by “financial obligations.” Under the Tuna Conventions Act (the Convention), the expenses of the IATTC are to be shared by the Contracting Parties in relation to the proportion of the total catch from the fisheries covered by the Convention utilized by each Party. “Utilized” is defined under the Tuna Conventions Act as tuna eaten fresh or processed for internal consumption or export. Thus, tuna landed by a Party and subsequently exported in the round are not included in computing that Party’s contribution, but those which are exported in canned form are included. NMFS will request the IATTC Director to verify that a nation is fulfilling its financial obligations. The IATTC intends to develop a new framework for determining contributions that will allow the IATTC to continue functioning at its current level under the new international agreement. The U.S. delegation will assist with the development of this new framework.

Comment 27: One commenter requested that NMFS include a table in the regulations indicating the “level of utilization” (e.g., amount of tuna eaten fresh or processed for internal consumption or export) in 1998 by each nation, the approximate amount of financial contribution required, and the type of documentation that will be required to prove the financial obligations have been met.

Response: NMFS will summarize the information used to make an affirmative finding for each nation at the time an affirmative finding notice is published in the **Federal Register**. Publishing information tables in regulations is not practical since information becomes obsolete too quickly. NMFS will rely on the IATTC staff to provide documentary information to determine whether Parties are meeting their financial obligations.

Comment 28: One commenter indicated that “financial obligations” should mean “equitable” funding as defined in the Convention for the establishment of an IATTC (“shall be related to the proportion of the total catch”) to obtain an affirmative finding.

The commenter also suggested the United States should pay no more than its share of the cost to operate the IATTC.

Response: This rule does not govern dues paid to the IATTC. By meeting the membership obligations of the IATTC, including all financial obligations, nations are complying with the Convention for the establishment of an IATTC. The financial obligations are determined by the proportion of the total catch from the fisheries covered by the Convention utilized by each Party. "Utilized" is defined as tuna eaten fresh or processed for internal consumption or export.

Comment 29: One commenter noted that, unless a harvesting nation is contributing an equitable amount to support the IATTC, the nation should be embargoed as required by the IDCPA.

Response: NMFS disagrees since the IDCPA does not require a nation to provide "equitable contributions" to support the IATTC in order to obtain an affirmative finding, but rather to meet its "financial obligations" of membership to the IATTC. However, under section 108(a)(2)(C) of the MMPA, the Secretary of Commerce through the Secretary of State may initiate negotiations to revise the Conventions for the Establishment of an Inter-American Tropical Tuna Commission which will incorporate a revised schedule of annual contributions to cover the expenses of the IATTC that is "equitable" to participating nations. As explained in the response to Comment 26, the State Department is proactively engaged in discussions on this topic with other IATTC member nations.

Comment 30: Three commenters indicated there needs to be a mechanism for verifying that harvesting nations have become members of, or have "initiated" the process of becoming a member in, the IATTC and are meeting the financial obligations of such membership.

Response: NMFS will be able to obtain the necessary information from the IATTC staff to verify whether harvesting nations have become members of, or have "initiated" the process of becoming members of, the IATTC and are meeting the financial obligations of such membership.

Comment 31: One commenter indicated that, if the United States is going to continue to fund the IATTC in excess of 90 percent, then the observer data collected by the IATTC staff should be available to U.S. citizens under the Freedom of Information Act (FOIA).

Response: NMFS disagrees since the FOIA does not apply to international organizations. U.S. money does not

transform the IATTC into a U.S. government agency. Therefore, observer data collected by the IATTC are not available under the FOIA.

Comments on "Dolphin-Safe" Requirements

Comment 32: One commenter wanted to confirm that U.S. customs would not be enforcing the labeling requirement.

Response: The Federal Trade Commission is responsible for enforcing the labeling requirement of the DPCIA because of its role in enforcing consumer protection laws. NMFS also enforces violations related to knowingly and willfully false statements by captains, observers/observer programs, importers, exporters, or processors, if used to support a dolphin-safe label under paragraph (d)(2)(B) of the DPCIA. The U.S. Customs Service and NMFS enforce tuna importation requirements and monitor compliance with the dolphin-safe labeling requirements.

Comment 33: One commenter does not understand why § 216.92(a) begins with the sentence "For purposes of § 216.91(a)(3) ..." rather than with the word "Tuna."

Response: NMFS agrees and has modified the sentence.

Comment 34: One commenter wanted clarification that non-dolphin-safe tuna, or tuna not accompanied by supporting documentation, could be imported and sold lawfully in the United States under the IDCPA, just not labeled as "dolphin-safe."

Response: Non-dolphin-safe tuna may be imported or sold in the United States under the IDCPA provided the tuna products were harvested in compliance with the IDCP by a vessel flagged with an IATTC member nation. All tuna imports must be accompanied by a completed Fisheries Certificate of Origin, NOAA Form 370. However, tuna products must have the documentation described in § 216.92 to be labeled "dolphin-safe."

Comment 35: One commenter indicated that the word "or" should be deleted between proposed §§ 216.92(b)(1)(i) and 216.92(b)(1)(ii) and the word "and" should be inserted. Another commenter suggested that the word "or" should be deleted to clarify the certifications required for tuna products harvested in the ETP by purse seine vessels greater than 400 st (362.8 mt) carrying capacity.

Response: NMFS has rewritten and restructured the certification provision to make it clearer.

Comment 36: One commenter indicated that § 216.92(b)(2) does not indicate that the initial finding effective date is the same as the effective date of

the interim final rule. The final rule should indicate the actual date after which a certification under proposed § 216.92(b)(1)(i) is no longer required.

Response: NMFS agrees. The initial finding required by paragraph (g)(1) of the DPCIA becomes effective when this interim final rule becomes effective. The interim final rule now states that, for tuna harvested by large purse seine vessels in the ETP, a dolphin-safe label need not be supported by statements certifying "no intentional encirclement during the trip" as of the effective date of this rule. Of course, the standard could revert back, depending on the final finding that is required to be made by the year 2002.

Comment 37: Two commenters indicated that the proposed rule requires tuna canneries to establish separate production facilities, one for dolphin-safe tuna and one for non-dolphin-safe tuna, a practice which would impose prohibitive capital and operational costs. The commenters recommend separate production times to facilitate monitoring and verification.

Response: The proposed rule did not suggest that tuna canneries would be required to establish separate production facilities for dolphin-safe and non-dolphin-safe tuna. However, the rule does require separate production times for processing the different types of tuna.

Comment 38: Commenters expressed concern that changing the definition of dolphin-safe tuna from the old definition of "no dolphins were intentionally set on to capture tuna" to the new definition "no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught" will be confusing to the general public. Moreover, commenters expressed the need to reserve the term "dolphin-safe" for tuna caught without any intentional encircling of dolphin.

Response: IDCPA mandates the change (for tuna harvested by large purse seine vessels in the ETP) unless the initial and/or final finding, based on NMFS' research, shows that intentional deployment on, or encirclement of, dolphins with purse seine nets "is having a significant adverse impact" on any depleted dolphin stock in the ETP. NMFS agrees that the public may be confused, and NMFS will make efforts to educate the public about the changes.

Comment 39: Commenters expressed a need for a certification system that will distinguish between tuna caught without intentionally encircling dolphins and tuna caught by intentionally encircling dolphins.

Response: NMFS disagrees. The IDCPA requires a domestic tuna tracking and verification system that provides for the effective tracking of tuna harvested in the ETP by U.S. and by foreign vessels that may be labeled as "dolphin-safe," which, for tuna harvested by large purse seine vessels in the ETP currently, means "no serious injury or mortality during sets." The IDCPA does not require the tuna tracking and verification program to distinguish between tuna caught by intentional encirclement of dolphin and tuna caught without the intentional encirclement of dolphin.

Comment 40: Some commenters indicated that the use of the term "dolphin-safe" is deceptive to the consumer since the term does not suggest that tuna can be labeled "dolphin-safe" even though dolphins may have been killed in the process of capturing the tuna.

Response: As required by the DPCIA, tuna product containing tuna harvested by large purse seine vessels in the ETP may only be labeled dolphin-safe if no dolphins were killed or seriously injured during the sets in which the tuna were caught.

Comment 41: One commenter indicated that as long as tuna is harvested in accordance with the IDCP, it should be labeled "dolphin-safe."

Response: NMFS lacks statutory authority to change the labeling standard to allow all tuna harvested in accordance with the IDCP to be labeled as "dolphin-safe."

Comment 42: One commenter opposes the importation of tuna into the United States that was caught by chasing or encircling dolphins.

Response: The IDCPA does not restrict ETP purse seine harvested tuna imported into the United States if the tuna is caught by a nation with an affirmative finding under MMPA § 101(a)(2)(B). Generally, a nation will qualify for an affirmative finding if tuna is caught in compliance with the Agreement on the IDCP, the harvesting nation is a member of the IATTC and meeting its financial obligations, and the nation does not exceed the total DMLs and per-stock per-year DMLs permitted for that nation's vessels under the IDCP. Furthermore, permitted U.S. vessels with DMLs are allowed to chase and encircle dolphins in the ETP under the IDCP.

Comment 43: One commenter believed that the term "default standard" (e.g., no intentional encirclement during a trip and no mortality and serious injury during sets) in the SUPPLEMENTARY INFORMATION section of the proposed

rule should not be used since it implies that there is a baseline against which other standards will be compared.

Response: The "default standard" was a term used by NMFS in the proposed rule to differentiate between two possible dolphin-safe definitions under the DPCIA. The term was just an informal shorthand definition and was not intended to have any legal or policy significance. The term was not meant to imply that it was a comparison for other standards.

Comment 44: One commenter indicated that the preamble to the proposed rule should have used more precise language to describe that the "no mortality or serious injury during the set" standard of "dolphin-safe" would remain in effect unless the Secretary makes a finding that there is a significant adverse impact caused by the current fishing practices in the tuna purse seine fishery.

Response: NMFS agrees that, in trying to describe the process in plain English, the preamble description could have been more precise. The commenter's description is correct.

Comment 45: One commenter indicated that there should be an opportunity for public comment at the time the Secretary makes the final finding. Another commenter indicated that any required change in the labeling standard should be made without additional rulemaking.

Response: The Secretary will publish the final finding in the **Federal Register**. However, the process of publishing a finding does not constitute a formal rulemaking and, therefore, there will be no formal comment period. Depending on the final finding, the dolphin-safe labeling standard could change.

Comment 46: One commenter indicated that the intent of the Congress was to base the initial finding on a reasonable conclusion rather than on definitive proof.

Response: NMFS does not necessarily require definitive proof, but the Secretary would be able to make a finding that the intentional deployment on or encirclement of dolphins with purse seine nets "is having a significant adverse impact" on any depleted dolphin stock in the ETP only if sufficient evidence were available to conclude that the significant impact is due to the fishery.

Comments on Dolphin Mortality Limits

Comment 47: Two commenters indicated that it would be a violation of the IDCPA to lift tuna embargoes until the per-stock per-year limits have been adopted.

Response: Per-stock per-year limits have been adopted. The Meeting of the Parties agreed to a global allocation system that will establish a per-stock per-year DML in calendar year 2000, at a level of 0.2 percent of the minimum population estimate. If the IDCP allocates per-stock per-year DMLs to the national level, then an affirmative finding will require a nation's per-stock mortality to stay within its per-stock limits, as described in the response to Comment 7.

Comment 48: One commenter indicated that the Secretary should make a finding not only on whether there is a significant adverse impact on any depleted dolphin stock in the ETP, but also on whether there is a significant adverse impact on any marine mammal stock.

Response: Under paragraph (g) of the DPCIA (16 U.S.C. 1385(g)), the Secretary is required to make a finding only on whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any "depleted dolphin stock" in the ETP.

Comment 49: One commenter expressed concern that it is not practical for vessel permit holders to request second semester DMLs by September 1, of the year before, more than 6 months in advance. The commenter recommended changing the application deadline to April 1, 3 months before the second semester begins.

Response: NMFS recognizes the difficulty and inconvenience caused by requesting vessel permit holders to request a half-year DML by September 1, approximately 10 months in advance. Nevertheless, under the Agreement on the IDCP (Annex IV, section 1, paragraph 1), nations are required to submit second semester DML requests to the Meeting of the Parties prior to October 1. However, per-trip DMLs are available for vessels which do not normally fish for tuna in the ETP, but which may occasionally desire to participate in the fishery on a limited basis, provided that such vessels and operators meet the permit requirements under § 216.24(b).

Comment 50: Commenters indicated that the IDCPA encourages vessel captains to make at least one intentional set on dolphins every year before April 1, which creates a "use or lose" mentality. This language contradicts the intent of the IDCPA and penalizes captains who try to reduce dolphin mortality instead of providing rewards and incentives. The commenter stated that the language at § 216.24(c)(8)(iv) needs to be deleted.

Response: Under the Agreement on the IDCP (Annex IV, section II, paragraph 1), any vessel which is assigned a full-year DML must make at least one set on dolphins prior to April 1 to keep from losing its DML allocation. An intentional set on dolphins does not necessarily lead to dolphin mortality. In addition, this requirement is part of the process established by the international program for deterring frivolous requests.

Comment 51: One commenter suggested revising § 216.24(c)(8)(ii) to read, "Each vessel permit holder that desires a DML only for the period July 1 to December 31, must provide to the Administrator, Southwest Region, by September 1, the name* * *. 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 6 month period ..."

Response: NMFS agrees and has made the changes to accurately reflect the requirement under the Agreement on the IDCP to forward a list of purse seine vessels to the Director of the IATTC on or before October 1, rather than April 1, as proposed.

Comment 52: One commenter recommended rewarding skippers who do not use all of their DMLs by reallocating additional DMLs, taken from those vessels with the worst performance. Operator performance could be measured by kill rate per set or kill rate per ton.

Response: The Meeting of the Parties to the Agreement on the IDCP resolved to establish a working group to develop captain incentives. However, NMFS has not developed incentives to include in the interim final rule.

Comment 53: One commenter recommended that NMFS propose a system of incentives to vessel captains in this rule as required by the IDCPA that could be used as a model by the international community. The commenter stated that DMLs are not an effective incentive to achieve low dolphin mortality since DMLs are not performance-based and do not provide incentives for good performance to reach the zero dolphin mortality rate goal.

Response: Recently, the Meeting of the Parties established a working group of which the United States is a member to develop incentives and rewards to encourage vessel operators to lower dolphin mortality and serious injury.

Comment 54: One commenter recommended that NMFS should wait to incorporate the DML utilization standard that will be developed by IATTC staff and the International

Review Panel (IRP) under the Agreement on the IDCP, rather than establish a utilization standard of its own (e.g., lose its DML and may not set on dolphins for the remainder of the year if no dolphin sets are made prior to April 1 of that year) and potentially undermine the IDCP.

Response: The language in the interim final rule reflects the current language in the Agreement on the IDCP and is consistent with the IDCPA.

Comment 55: One commenter indicated that the "trading in" of unused DMLs to vessels requesting a second semester DML is counter to the IDCPA intent to reduce dolphin mortality and serious injury to levels approaching zero.

Response: The procedure for issuing a second semester DML for the 6-month period July 1 to December 31, is in accordance with the procedure described in Annex IV of the Agreement on the IDCP and consistent with the goals of the IDCPA. In addition, second semester DMLs are only 2/3 of an annual DML.

Comment 56: One commenter strongly supported the provision that states, "Any vessel that exceeds its assigned DML after any applicable adjustment under paragraph (c)(8)(v) of this section will have its DML for the subsequent year reduced by 150 percent of the overage."

Response: NMFS agrees. This requirement is consistent with the Agreement on the IDCP, Annex IV, Section III, paragraph 6.

Comment 57: One commenter suggested the language, "By March 15, the Administrator, Southwest Region shall notify the Director of the IATTC of any unused DML, that will be returned to the IDCP, to be added to the pool of unutilized DML" at the end of § 216.24(c)(8)(iv).

Response: NMFS disagrees since under the Agreement on the IDCP, the Director of the IATTC will use data collected from the international observer program to determine whether any DMLs will not be used or whether any DMLs have been forfeited. In this case, the Administrator, Southwest Region will not need to notify the Director of the IATTC.

Comment 58: One commenter urged NMFS to delete the phrase "or exceeded" from paragraph 216.24(c)(8)(x)(A) ("when the vessel's DML, as adjusted, is reached or exceeded;") to make it clear that once a vessel has reached its DML, the vessel and operator permit holders must not intentionally deploy a purse seine net on or encircle dolphins.

Response: NMFS disagrees. Although a vessel operator must not intentionally deploy a purse seine net on or encircle dolphins intentionally when the vessel's DML is reached, sometimes in a single set a vessel unintentionally exceeds its DML. If so, the vessel must stop fishing after the DML is "exceeded." While this situation is discouraged and should be avoided, it is not in itself a violation of the IDCPA or the Agreement on the IDCP. In addition, as a penalty, the next year's DML for that vessel will be reduced by one and a half times the amount the previous year's DML was exceeded.

Comment 59: One commenter indicated that in paragraph 216.24(c)(8)(x)(B), the phrase "in the absence of the notification to cease intentional sets on dolphins" is confusing because it seems misplaced and suggested editing the paragraph.

Response: NMFS agrees and has deleted the phrase "in the absence of the notification to cease intentional sets on dolphins" since it does not provide any additional value to the paragraph.

Comments on Observers

Comment 60: Will observers provided by the Forum Fisheries Agency pursuant to the South Pacific Tuna Treaty be acceptable to the IATTC and NMFS for vessels fishing in the ETP whether or not the vessel intends to make intentional sets on dolphins?

Response: There is a provision in the Agreement on the IDCP that allows the Director of the IATTC to use a trained observer from another international program if the placement of an observer from the On-Board Observer Program is not practical and the vessel will not set on dolphins. However, Forum Fisheries Agency observers are not currently recognized by the Meeting of the Parties.

Comment 61: One commenter suggested modifying the language in the proposed rule to specify that the payment of observer placement fees are submitted to the Administrator, Southwest Region, and that the Administrator, Southwest Region will then forward the fees to the applicable international organization (e.g., the IATTC).

Response: The rule has been modified to indicate the fees for observer placement will be forwarded to the applicable international organization by the Administrator, Southwest Region.

Comment 62: One commenter indicated that the methods for communicating marine mammal mortality data by observers, as well as details as to whether the data will be coded or made secure in some other way, have yet to be finalized. Therefore,

the text under § 216.24(e)(2) "Masters must allow observers to report, in coded form, information by radio concerning the take of marine mammals and other observer collected data upon request of the observer" should be more general.

Response: NMFS agrees and has changed the language at § 216(e)(2) to read "Masters must allow observers to use vessel communication equipment to report information concerning the take of marine mammals and other observer collected data upon request of the observer."

Comment 63: One commenter felt that having observers collect information that may be used in civil or criminal penalty proceedings would jeopardize the safety of an observer and lead to data falsification.

Response: NMFS disagrees. NMFS has the authority to use observer data as evidence in civil or criminal cases and based on NMFS' experience observing U.S. tuna purse seine vessels from 1976 through 1995, using observer data during legal proceedings has not jeopardized the safety of an observer or led to data falsification.

Comment 64: One commenter objected to any type of national observer program being used other than the IATTC program as stated in § 216.24(b)(8)(ii).

Response: NMFS disagrees. The Agreement on the IDCP allows for each Party to maintain its own national observer program in accordance with the provisions of Annex II. However, at least 50 percent of the observers on the vessels of each Party shall be IATTC observers.

Comment 65: One commenter indicated that the observer reports are routinely falsified and that is the only reason the annual fishery-wide dolphin mortality statistics have appeared to drop below 5,000 animals.

Response: NMFS recognizes the possibility that the observer reports may be falsified, or incorrect for other reasons, and therefore continues to support and participate in the IRP's efforts to ensure observer objectivity and the collection of accurate and reliable scientific data.

Comments on Vessel and Operator Permits

Comment 66: One commenter suggested that a 45-day processing time for vessel permits and operator permits is excessive. In addition, the commenter expressed confusion why operators must attend a skipper education workshop if the vessel does not have a DML.

Response: NMFS would only require up to 45 days to process an application

in the case where a captain must schedule a skipper education workshop to qualify for an operator permit or a vessel owner must schedule a vessel inspection of the required vessel gear and equipment to obtain a vessel permit. Although the focus of the skipper education workshop will be on dolphin safety requirements and the IDCP, the operator may accidentally encircle a marine mammal and needs to know the requirements for releasing the animal under the MMPA and the IDCP.

Comment 67: One commenter believes that NMFS should require the release of marine mammals incidentally caught in a purse seine net by a vessel that does not have a DML. The following language was suggested to bring the proposed regulations into conformance with the Agreement on the IDCP's requirement under Annex VIII, paragraph 4: "Any vessel that captures marine mammals taken incidental to commercial fishing operations shall attempt to release the marine mammals using every means at its disposal, including aborting the set. Marine mammals shall be immediately returned to the environment where captured without further injury. The use of sharp or pointed instruments to remove any marine mammal from the net is prohibited."

Response: Comparable language already exists in § 216.24(d) which requires incidentally taken marine mammals to be released using procedures such as hand rescue and aborting the set without further injury at the earliest effective opportunity.

Comment 68: One commenter indicated the proposed regulatory text pertaining to the observer fee is confusing and should be clarified in the final rule. In addition, the commenter indicated that it is not clear whether the vessel permit application would be considered adequate and complete if the observer fee had not been paid. Moreover, proposed § 216.24(b)(8)(ii) included confusing language about the time of the submission of the observer fee since the language did not appear to require the observer fee to actually be paid, but rather to the consent to payment of the fee. These issues need to be clarified in the final rule.

Response: NMFS has rewritten this section to clarify that the payment of observer fees is not required as part of the application process, but is required for the permit to be considered valid. Under the IDCPA, issuing a vessel permit and collecting observers fees are not dependent upon each other.

Comment 69: Some commenters took issue with the provision that enforcement action will not be taken if

a prohibited marine mammal species is taken using a purse seine provided that the animals are not "reasonably observable" at the time the skiff attached to the net is released from the vessel at the start of a set and all the procedures required by the applicable regulations have been followed and recommended deleting the "reasonably observable" language from proposed § 216.24(c)(8)(ix).

Response: NMFS recognizes that occasionally a prohibited species is not detected prior to the time the skiff attached to the net is released from the vessel at the start of a set. To accommodate this unlikely event, NMFS is keeping the "reasonably observable" language in the regulatory text.

Comment 70: One commenter questioned whether it is the intent of NMFS to require a tuna purse seine vessel transiting the ETP to obtain a vessel permit if there is tuna aboard that was caught elsewhere (e.g., western Pacific) as indicated by § 216.24(a)(2)(ii) which states "(ii) It is unlawful for any person using a United States purse seine fishing vessel * * * 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."

Response: Under § 216.24(a)(3), vessels may obtain a waiver from the prohibition to possess or land tuna within the ETP without a vessel permit by submitting a written request in advance of entering the ETP to the Assistant Administrator, Southwest Region.

Comment 71: One commenter believed that the language at § 216.24(b)(8)(v) regarding the data release form should be modified to clarify that by using a permit, the permit holder authorizes the release of all data collected by observers aboard tuna purse seine vessels to NMFS and the IATTC.

Response: NMFS agrees and has modified the language.

Comment 72: One commenter indicated § 216.24(b)(8)(vi) is unclear as written and needs to be rewritten.

Response: NMFS agrees and has rewritten the provision.

Comment 73: One commenter does not understand why the provision for the Administrator, Southwest Region to produce periodic status reports summarizing stock specific dolphin mortalities and serious injuries is included in the regulations under the permit section. In addition, the commenter indicated it would be helpful to "explain" in the preamble to

the final rule how frequently these reports are expected to be issued.

Response: The provision for the Administrator, Southwest Region to produce periodic status reports summarizing stock specific dolphin mortalities and serious injuries is included under the permit section of the regulations since the permits are what allow U.S. tuna purse seine fishing vessels in the ETP to incidentally take marine mammals during the course of commercial fishing operations. The reports are intended to provide a mechanism to disseminate information on the number and species of marine mammals killed or seriously injured under the issued permits. The Administrator, Southwest Region intends to issue these reports quarterly.

Comment 74: One commenter recommended inserting a cross reference in § 216.24(c)(3)(i) to indicate what the specific requirements and conditions are for purse seine nets, gear and equipment under the vessel inspection provision for vessel permit holders.

Response: NMFS agrees and has added the cross reference.

Comment 75: One commenter recommended rewriting the introductory sentence of § 216.24(c)(8)(viii) to read, "It is unlawful for the holder of a vessel or operator permit to deploy ..."

Response: NMFS disagrees since similar language is included in § 216.24(a).

Comment 76: One commenter requested that § 216.24(d) explain how any accidental mortalities or serious injuries would be treated.

Response: NMFS disagrees that § 216.24(d) is the appropriate place to make that explanation. Under Annex IV, section I, paragraph 6 of the Agreement on the IDCP, incidental mortalities caused by tuna purse seine vessel permit holders operating in the ETP without an assigned DML shall be deducted from the Reserve DML Allocation set aside. Tuna harvested in a purse seine set in the ETP with an accidental dolphin mortality would be considered "non-dolphin-safe."

Comment 77: One commenter indicated that the language in 216.24(b)(1) seems to allow a vessel permit holder to transfer the vessel permit to a new owner when the vessel ownership changes, yet there is no language that requires the new owner to notify NMFS.

Response: Vessel permits are not transferable. The language in § 216.24(b)(1) has been modified by deleting "except that a permit may be

transferred to the new owner when the vessel ownership changes."

Comment 78: One commenter indicated that the regulations do not require the vessel and operator permit applicant to use a standardized form, nor does there seem to be a requirement for the applicant to certify the accuracy of the information contained in the application. The commenter also believed that the application form or regulations should include language that states that, if the applicant knowingly or materially falsified the information contained in the application, the permit will be denied or revoked.

Response: Applicants are required to use standardized vessel and operator permit application forms approved by the Office of Management and Budget. The forms require the applicants to certify, under penalty of perjury, that the information is true and complete.

Comment 79: One commenter believes vessels that do not intentionally take marine mammals should be required to carry all the special dolphin safety equipment and gear (e.g., rafts and face masks) so that accidentally caught dolphins may be released using every means at its disposal. The commenter would like the regulations modified to require vessels that do not practice purse seining fish on dolphins to carry a raft and face masks.

Response: Although the use of a raft and face mask could facilitate the release of an accidentally caught dolphin, the IDCPA does not require vessels not fishing on dolphin and not assigned a DML to carry the equipment. Furthermore, since accidental sets are rare events and the vessel operator is required to use procedures such as hand release and aborting the set at the earliest effective opportunity to prevent injury, NMFS decided the vessel operator and owner should determine whether having a raft and face mask aboard the vessel might eliminate the need to abort a set under some circumstances. However, NMFS recommends the use of one or more rafts and face masks or view boxes to aid in the rescue of dolphins.

Comment 80: One commenter suggested that § 216.24(b)(4) should cross reference the vessel inspection provisions that will be used to verify whether the vessel possesses the required dolphin safety gear.

Response: NMFS does not think the cross reference is necessary since the vessel inspection provision at § 216.24(c)(3) contains a cross reference to the required gear and equipment necessary for a valid vessel permit.

Comments on Sundown Sets

Comment 81: Commenters felt NMFS' interpretation of section 303(a)(2)(B)(V) of the MMPA is contrary to the intent and meaning of the law. The law clearly states that backdown procedures must be completed 30 minutes before sundown, whereas the proposed rule would have required backdown to be completed 30 minutes after sundown. If NMFS believes that Congress erred, NMFS should seek an amendment to the statute, rather than promulgating regulations weaker than required by the law to fix a potential typographical error. NMFS also received comments in support of the proposed rule on sunset sets because the language of the rule is consistent with the Agreement on the IDCP.

Response: NMFS disagrees since the previous regulations, previous amendments to the MMPA, the La Jolla Agreement and the IDCP all specify that backdown procedures must be completed no later than one-half hour after sundown. Furthermore, under the Agreement on the IDCP, signatory nations agreed that the backdown procedure must be completed no later than one-half hour after sundown. Since no congressional reports or colloquy indicated that this "revision" was adopted purposefully, NMFS concludes the language in the IDCPA stating that backdown procedures must be completed no later than one-half hour before sundown must have been a drafting error.

Comment 82: One commenter felt that "sufficiently in advance of sundown" should be clearly defined as a period of time such as 2 hours.

Response: NMFS agrees and has determined that "sufficiently in advance of sundown" is if the seine skiff is let go 90 or more minutes before sunset. This is based on earlier analysis of the length of daytime sets in the U.S. fleet in the late 1980s. The analysis showed that 96 percent of the daytime sets took no more than 120 minutes from the time the seine skiff was let go until the completion of backdown.

Comments on Official and Alternative Marks

Comment 83: The regulations should allow for alternative marks in addition to the official mark. The regulations should allow alternative marks to use a tracking and verification system other than the official tracking system and a method for obtaining a determination from the agency that the proposed alternative tracking and verification program is comparable to the official program. Other commenters indicated

that a single tuna tracking and verification mechanism should be used.

Response: The proposed rule does not prevent the use of alternative marks or an alternative tracking system. However, all tuna imported, exported, or sold in the United States that was harvested by purse seine vessels greater than 400 st (362.8 mt) carrying capacity in the ETP must comply with the tracking and verification program described in this rule. Any dolphin-safe label, whether the official label or an alternative label, must comply with the labeling standards in paragraphs (d)(1) and (2) of the DPCIA. Under paragraph (f) of the DPCIA, NMFS is required to establish a tracking and verification system to support any dolphin-safe label under paragraph (d). In other words, an alternative mark would be required to be supported by the official tracking and verification program. Nothing in these regulations is intended to inhibit a company or group from establishing an alternative tracking and verification program, however, such a program would not be a substitute for the program described here.

Comment 84: One commenter suggested that NMFS include a provision in the regulations as follows: "The Assistant Administrator may determine that an international tracking and verification program for certain tuna and tuna products meets or exceeds the minimum requirements for documentation set forth in § 216.94(b) upon a review of the program and written determination of approval and notice of that determination in the *Federal Register*. Upon publication of this notice, the Assistant Administrator will accept a determination by the approved program as satisfying the documentary evidence requirements of § 216.94(d). An approval of a program will remain in effect for the period of acceptance established by the Assistant Administrator, or until the Assistant Administrator determines that the program no longer qualifies for approval based upon new information or a lack of updated information. The Assistant Administrator will publish a notice in the **Federal Register** announcing any change in status of an approved program."

Response: NMFS disagrees since these regulations do not include foreign tuna tracking and verification programs. However, certain commitments were made in the Tracking and Verification Working Group and by the Meeting of the Parties to comply with the Agreement on the IDCP system for tracking and verifying dolphin-safe tuna from non-dolphin-safe tuna from the

time it is caught to the time it is ready for retail sale.

Comment 85: One commenter indicated that there should only be a single labeling standard and that no alternative labels should be permitted.

Response: There is only one currently applicable standard for dolphin-safe tuna (for ETP purse seine vessels: no dolphins were killed or seriously injured during the sets in which the tuna were caught). However, the IDCPA does allow for the use of alternative marks, and NMFS sees no basis for prohibiting the use of alternative marks.

Comment 86: One commenter felt that there is a distinction between "alternate" and "alternative" marks. An alternate mark could be used in conjunction with the official mark and an alternative mark could be used in lieu of the official mark.

Response: The IDCPA states that a tuna product that bears the official dolphin-safe mark shall not bear any other label or mark that refers to dolphins, porpoises, or marine mammals.

Comment 87: One commenter felt that the alternative mark must achieve a standard that, at a minimum, is equivalent to the official mark.

Response: NMFS agrees. Upon analysis of DPCIA paragraph (d)(3)(C), NMFS has concluded that the standards for using an alternative mark must meet, or exceed, the standards established for the official mark.

Comments on Tuna Tracking and Verification Program

Comment 88: One commenter expressed concern about the practicality of having the signed Tuna Tracking Form (TTF) delivered within 5 days of the end of the trip to the Regional Administrator, Southwest Region for remote or foreign ports. The commenter indicated that it may be unrealistic to have the form postmarked within 5 days of the end of the trip.

Response: In most cases, a representative of NMFS will meet the fishing vessel and receive the TTFs. In cases where the NMFS representative does not meet the vessel, the IATTC observer can deliver the TTFs to the IATTC office, and the forms can be forwarded to NMFS from that location within 5 working days of the end of the trip.

Comment 89: One commenter suggested including an explanation of "fish condition" similar to the explanation provided in 216.94(b)(5)(i) "round, loin, dressed, gilled and gutted, other" for § 216.94(b)(2) "designation of each container, species, fish condition, and weight of tuna in each container"

and that the term "fish condition" be used consistently throughout the final rule. Another commenter suggested using the term "fish status" instead of the term "fish condition."

Response: NMFS agrees that the meaning of the term "fish condition" as it appears in § 216.94(b)(2) is not consistent with the meaning of the term as it appears in § 216.94(b)(5)(i). The term "fish condition" in § 216.94(b)(2) has been changed to "product description."

Comment 90: One commenter felt that it was premature to specifically define the details of the observer duties pertaining to the tracking and verification of tuna since the tracking program has not been finalized by the Parties to the Agreement on the IDCP.

Response: An international tracking and verification program using TTFs has been adopted by the Parties to the Agreement on the IDCP. At the second Meeting of the Parties, in June 1999, a tuna tracking and verification working group was created to develop the elements of the international tracking and verification program. Nevertheless, NMFS must develop a tuna tracking and verification program in order to implement the IDCPA. This interim final rule establishes a tuna tracking and verification program that is consistent, to the maximum extent practicable, with both the IDCPA and the international program.

Comment 91: One commenter suggested it might be appropriate for vessel owners to share the burden of maintaining trip report records in addition to exporters, transshippers, importers, and processors as described in § 216.94(d).

Response: Section 216.94 of the regulations does not impose reporting requirements, beyond the certification of TTFs, compelling vessel captains to maintain records. The on-board observer is responsible for maintaining the TTFs, which vessel captains are required to sign, until the end of the trip.

Comment 92: Two commenters believed that the regulations will lift the embargo on non-dolphin-safe tuna before an international tracking system is in place. Furthermore, it would be contrary to the requirements of the IDCPA to institute final implementing regulations allowing tuna imports before the international tracking and verification programs have been agreed to and are in place.

Response: An international tracking and verification program using TTFs has been adopted by the Parties to the IDCP. At the second Meeting of the Parties, a tuna tracking and verification working group was created to develop the

elements of the international tracking and verification program. In addition, nations must apply for and receive an affirmative finding under the IDCPC before tuna may be imported into the United States. To receive an affirmative finding, nations must submit documentary evidence that will allow the Secretary to make a determination of compliance with the IDCPC.

Comment 93: One commenter recommended that a harvesting nation must have a tracking and verification system for all tuna it harvests, not just the tuna it imports.

Response: NMFS has no authority to require a nation to implement a tuna tracking and verification program. However, each party to the IDCPC agreement is required to implement a tuna tracking and verification program in its respective territory, on vessels subject to its jurisdiction and in marine areas with respect to which it exercises sovereignty with respect to ETP harvested tuna. The U.S. tracking and verification plan includes all U.S. caught tuna and all tuna imported into the United States from the ETP.

Comment 94: One commenter indicated that there needs to be two certification processes to allow tuna to be imported into the United States. One certification would be for tuna caught by purse seine vessels fishing within the ETP and the other certification would be for tuna caught by purse seine vessels, or by other fisheries, outside the ETP.

Response: NMFS agrees. The NOAA Form 370, Certificate of Origin, allows for the appropriate certification of tuna, except fresh tuna, imported into the United States. The DPCIA and these regulations require different certifications for tuna harvested in different ocean areas and by different gear types.

Comment 95: One commenter indicated that § 216.93(b) would be clearer and conform better to other provisions of the proposed rule if it were revised to read: "the documents are endorsed as required by § 216.92(a)(4) and the final processor delivers the endorsed documents to the Administrator, Southwest Region, or to the U.S. Customs Service."

Response: NMFS agrees and has made the suggested change.

Comment 96: One commenter believed that it would be impractical for U.S. Customs to receive the Fisheries Certificate of Origin at the time of import because of existing duties and responsibilities of the U.S. Custom Service and limited available personnel. The commenter suggested that the importer retain the required

documentation for later verification by either NMFS or U.S. Customs.

Response: NMFS has depended on U.S. Customs offices around the United States and in Puerto Rico for a number of years. Only the U.S. Customs Service can assure that the NOAA Form 370 accompanies imported shipments of tuna. Under the interim final rule, importers are required to include the NOAA Form 370, Certificate of Origin, with all other required import documents when the documents are filed with U.S. Customs. In addition, importers are required by §§ 216.94(d)(1) and 216.94(d)(2) to: (1) maintain their tuna import records for a period of 3 years, and (2) to provide copies of such records requested by the Administrator, Southwest Region within 30 days of receiving a written request.

Comment 97: One commenter asked whether the sentence in § 216.94, "The tracking program includes procedures and reports for use when importing tuna into the U.S. and during domestic purse seine fishing, processing, and marketing into the U.S. and abroad ..." was intended to include fishing by U.S. vessels in waters not subject to U.S. jurisdiction. If so, the commenter suggested it would be more accurate to revise this provision to read: "during purse seine fishing operations by U.S. vessels ..."

Response: NMFS agrees that one could misunderstand "domestic purse seine fishing" to mean that vessels are fishing within the U.S. Exclusive Economic Zone; therefore, the requested change has been made.

Comment 98: Commenters indicated that the IDCPC does not sanction the collection of information about gear type and method of capture on the Fisheries Certificate of Origin. In addition, the collection of such information is contrary to the intent of the Panama Declaration and inconsistent with the IDCPC. Collecting such information on the Fisheries Certificate of Origin will undermine the IDCPC. Finally, the regulations should not require observer data forms to accompany imported tuna.

Response: NMFS disagrees in part. Information collected on the Fisheries Certificate of Origin includes gear type because the use of some gear types indicates the tuna was not caught in association with dolphin, while the use of other gear types indicate interactions with dolphins (and require captain statements, etc.). Moreover, NMFS is not requiring observer data forms or TTFs to accompany imported tuna.

Comment 99: One commenter expressed concern that the proposed IATTC tracking system has no

provisions for international inspections or enforcement.

Response: The international tracking and verification system approved by the Parties to the Agreement of the IDCPC contains provisions for development of an international program to facilitate general reviews and spot checks of national tracking and verification programs. In addition, the Parties have agreed to make TTFs and documentation on national tracking and verification programs available to the IATTC's IRP. The IRP can then recommend a nation take enforcement action on a violation.

Comment 100: One commenter indicated that it is not clear what effort NMFS intends to undertake to observe and monitor offloading, deliveries, and processing of yellowfin tuna. It would be useful if NMFS were to provide an estimate of the effort (annual budget, total hours per year, percentage of off loadings and deliveries) expected to be made to track tuna under the tracking and verification program. If only a few off loadings are expected to be observed each year, then maybe the reporting burden to provide advance notice of the scheduled arrival in port may not be necessary.

Response: NMFS plans to monitor all off loadings by U.S. purse seine vessels fishing in the ETP and does not consider the time for a radio message and/or a phone call to be overly burdensome. NMFS requested and has received funding to operate the tuna tracking and verification program and hire two inspectors to monitor the unloading of tuna from U.S. tuna purse seine vessels.

Comment 101: One commenter indicated that the practicality of tracking tuna throughout a trip is not realistic for one observer. The commenter suggested mandatory use of wide-angle time-lapse cameras encoded with position data in addition to observers.

Response: NMFS disagrees since there is no data that supports the conclusion that any type of camera would be more efficient than a trained observer assigned to a vessel.

Comment 102: One commenter indicated NMFS should clarify that the requirement to notify NMFS at least 48 hours prior to unloading fish only pertains to U.S. vessels. In addition, the commenter indicated that NMFS does not have the authority to inspect and monitor U.S. vessels unloading in foreign nations because the Declaration of Panama and the Agreement on the IDCPC (Article XVI paragraph 1) reserves the right to the sovereign territory to exercise enforcement authority.

Response: The 48 hour notification requirement pertains only to U.S. vessels subject to U.S. law. NMFS would not expect to be notified of vessel landings on foreign shores other than landings of U.S. flag vessels. However, through their adoption of an international tuna tracking and verification plan, the Parties to the IDCPA have indicated their willingness to cooperate with each other, including allowing a representative of the national authority under whose jurisdiction a fishing vessel operates to meet its flag vessels wherever they land to receive TTFs and observe the vessel unloading.

Comment 103: The reporting requirements of U.S. canneries should be clarified to indicate that the reporting requirement does not apply to non-U.S. canneries operating within the sovereign territory of another nation.

Response: The regulation, by virtue of the fact that it is a U.S. regulation, applies only to U.S. canneries.

Comment 104: One commenter indicated that the regulations should specify whether prohibited importations would be seized or exported back to the nation of origin.

Response: NMFS agrees. Under existing regulations (recodified here at § 216.24(f)(11)), fish that is denied entry and has not been exported under U.S. Customs supervision within 90 days from the date of notice of refusal of admission or date of redelivery shall be disposed of under Customs laws and regulations.

Comment 105: One commenter questioned whether the sentence in § 216.24(f)(2)(i), "Yellowfin tuna harvested using a purse seine in the ETP, if exported from a nation with purse seine vessels that fish for tuna in the ETP, may not be imported into the United States unless the nation has an affirmative finding ..." accurately reflects the requirements under the IDCPA and suggested that the provision should prohibit all tuna harvested by that nation, whether exported from that nation or an intermediary nation, or imported directly from the harvesting vessel to a U.S. processor.

Response: Section 101(a)(2)(B) of the MMPA clearly states that the import restrictions apply to "yellowfin tuna harvested with purse seine nets in the eastern tropical Pacific Ocean." The purpose of § 216.24(f)(2)(i) is to present a list of Harmonized Tariff Schedule numbers for yellowfin tuna or tuna products that must be accompanied by a NOAA Form 370, Certificate of Origin. More detailed requirements for harvesting nations and intermediary nations importing yellowfin tuna

harvested by purse seiners fishing in the ETP are codified at § 216.24(f)(9).

Comment 106: One commenter suggested referencing the effective date of the Agreement on the IDCP in §§ 216.24(f)(7)(i)(A) and 216.24(f)(7)(i)(C) to facilitate the application of the provision.

Response: NMFS agrees and has added the date that section 4 of the IDCPA became effective (March 3, 1999) to those paragraphs of the regulations. March 3 was the date that the Secretary of State certified that the Agreement on the IDCP was effective and in force.

Comments on Mixed Wells

Comment 107: Several commenters questioned NMFS' proposal to (1) allow mixed wells, containing both dolphin-safe and non-dolphin-safe tuna; (2) not require sealed wells or some other equally effective method for tracking and verifying the tuna caught in the ETP; and (3) not require monitoring and certifying of the caught tuna brought aboard the vessel and the loading of the wells below deck.

Response: NMFS disagrees. Under the DPCIA, the Secretary may make adjustments as appropriate to the regulations to implement an international tracking and verification program that meets or exceeds the minimum requirements established under the DPCIA. NMFS has determined that the U.S. tracking and verification program meets the minimum requirements. Sealing and unsealing wells during a trip does not provide additional confidence of the well contents than having an observer record the contents of the well during the loading process and during periodic inspections. The observer will record the information on the TTF. The likelihood of fish being transferred between wells is rare and does not support the need for placing one observer above deck and another observer below deck. Having two observers aboard a vessel would be cost prohibitive and redundant. The two mixed well exceptions were added by the Parties to the Agreement on the IDCP to accommodate rare occurrences in a reasonable manner. The IATTC is monitoring the occurrence of mixed wells and will report at its June 2000 meeting on the frequency of a mixed well event. If this monitoring shows that the frequency of mixed wells is not a rare event, NMFS will reconsider whether it will allow the use of mixed wells. Also, paragraph (f) of DPCIA requires regulations to address all those points, but not necessarily that NMFS implement each of them.

Comment 108: Commenters expressed concern that dolphin-safe tuna in mixed wells would be based on observers' estimates of weight and that no provision is made for how an observer will make a weight estimate of tuna and the accuracy of such an estimate. This procedure is not "equally effective" to having separate, sealed wells as envisioned by Congress. NMFS should amend the proposed rule to prohibit the mixing of tuna and to require sealed wells. Any non-dolphin-safe tuna dumped into a previously dolphin-safe well should be treated as "non-dolphin-safe" since the cannery will not be able to distinguish dolphin-safe tuna from non-dolphin-safe tuna during the canning of the tuna. The consumer cannot be guaranteed that a particular fish is "dolphin-safe."

Response: NMFS disagrees and has decided to allow the use of mixed wells under two very specific and limited circumstances. Occasionally, a well already designated as "dolphin-safe" and containing some amount of dolphin-safe tuna may be loaded with tuna caught in a set in which a dead or seriously injured dolphin is discovered during the loading process. Once such non-dolphin-safe tuna is loaded into the well, it is re-designated as a "mixed" well, and all tuna loaded into that well for the remainder of the trip is "non-dolphin-safe." When the contents of such "mixed well" are unloaded, the tuna is weighed and separated according to the observer's report of the estimated weight of dolphin-safe and non-dolphin-safe tuna contained in that well. In addition, 15 percent of the dolphin-safe tuna will be designated as "non-dolphin-safe" at the time of unloading to provide a buffer between the dolphin-safe tuna and the non-dolphin-safe tuna. NMFS is allowing this exception, but will monitor the frequency of occurrence to determine whether this exception needs to be reconsidered. Moreover, as part of training, observers are taught to estimate the weight of fish loaded inside a brailer and the IATTC can provide the observer with information about the carrying capacity of the vessel and its wells. The second mixed well case would occur at the end of a trip if all available wells were used and an opportunity for one last set occurs. In this case dolphin-safe tuna could be loaded on top of non-dolphin-safe tuna provided a physical barrier such as netting is used to prevent the mixing of the non-dolphin-safe and dolphin-safe tuna. The use of mixed wells is consistent with the international tracking and verification program. Although there is no physical

barrier or other way of identifying a particular fish unloaded from a mixed well described in the first scenario as "dolphin-safe," the 15 percent weight buffer establishes a safety margin to ensure non-dolphin-safe tuna is not labeled "dolphin-safe," and it could compromise the quality of the fish.

Comment 109: One commenter indicated that the regulations should allow the observer to estimate the weight of loaded tuna and allow the operator to place a net or similar marker in the well to separate the dolphin-safe from the non-dolphin-safe tuna.

Response: Although the observer estimates the weight, species, and the status of fish loaded into each well, there are only two allowed circumstances for mixed wells. A net or similar marker may only be used to separate dolphin-safe tuna from non-dolphin-safe tuna during the last set of a trip when all the available wells are full, and there is an opportunity to load dolphin-safe tuna in a non-dolphin-safe designated well. Otherwise, indiscriminate use of nets or other materials throughout the wells could lead to confusion over what is "dolphin-safe."

Comments on Additional Topics

Comment 110: One commenter indicated that it would have been more accurate to state in the "supplementary information" section of the proposed rule that the annual dolphin mortality in the eastern Pacific Ocean had been reduced to below 5,000 animals by 1993, 6 years ahead of the schedule established under the La Jolla Agreement.

Response: NMFS agrees. The annual dolphin mortality in the ETP had been reduced to below 5,000 animals since 1993, 6 years ahead of the schedule established under the La Jolla Agreement.

Comment 111: One commenter indicated that the preamble of the proposed rule should have clearly indicated that the IDCP is in force by not using certain future tense verbs in the codified text of the rule.

Response: NMFS agrees.

Comment 112: One commenter asked why the difference in the definition of "ETP" between the DPCIA (east to 160° W) and the Agreement on the IDCP (east to 150° W) would not affect foreign vessels.

Response: Foreign vessels will not be affected by these regulations except when keeping records for dolphin-safe labels destined for the U.S. market and the harvests occur between 160° W and 150° W. However, tuna imports into the United States will be subject to the

DPCIA's ETP definition. The DPCIA defines the ETP as the area of the Pacific Ocean bounded by the 160° West meridian, whereas the Agreement on the IDCP defines the ETP as the area of the Pacific Ocean west to the 150°. According to the IATTC observer data, no intentional sets have been made on dolphin west of 150° W.

Comment 113: One commenter suggested deleting the phrase, "that would otherwise be under embargo" from the sentence "These regulations would allow the entry of yellowfin tuna into the United States under certain conditions from nations signatory to the IDCP that otherwise would be under embargo" in the summary section of the proposed rule since it doesn't add any meaning to the sentence.

Response: NMFS agrees. The summary section for this interim final rule reads "This interim final rule will allow the entry of yellowfin tuna into the United States under certain conditions from nations fully complying with the International Dolphin Conservation Program (IDCP)."

Comment 114: One commenter recommended expanding the penalties language codified at § 216.24(g) to include tuna imports and labeling violations.

Response: NMFS disagrees. 50 CFR 216.95, which is applicable to purse seine vessels greater than 400 st (362.8 mt) carrying capacity, specifically prohibits any person from making a knowing and willful false statement or false endorsement related to dolphin-safe tuna requirements, or the importation of dolphin-safe tuna, and specifies that a violator is liable for a civil penalty not to exceed \$100,000. Labeling violations would be prosecuted by the Federal Trade Commission which is responsible for enforcing the Federal Trade Commission Act (FTCA) and the DPCIA which states that violations of the labeling standard are violations of the FTCA.

Comment 115: Several commenters indicated that the regulations must be made fully consistent with the Declaration of Panama and the IDCP Agreement.

Response: NMFS agrees and will follow the Agreement on the IDCP to the extent allowable under the IDCPA. NMFS presumes Congress intended the IDCPA to be consistent with the IDCP and Declaration of Panama.

Comment 116: One commenter suggested replacing the word "skipjack" with the words "yellowfin tuna" in the "supplementary information" of the proposed rule under the rubric for Harmonized Tariff Schedule Numbers "For instance, a shipment of skipjack

harvested by longline may require an FCO because the importer ..." since skipjack tuna are not harvested by longline.

Response: NMFS disagrees because skipjack are occasionally caught using longline gear. The example is not used in the interim final rule.

Comment 117: One commenter indicated that the regulations should not be a forum to cover up the failure of the Clinton Administration to negotiate an agreement consistent with U.S. law.

Response: The Agreement on the IDCP is consistent with U.S. law.

Comment 118: One commenter suggested adding the phrases to the preamble discussion, "Congress considered several bills to implement the Panama Declaration, ultimately passing the IDCPA. The IDCPA was signed into law on August 15, 1997. The IDCPA together with the Panama Declaration became the blueprint for the IDCP." to clarify the linkage between the IDCP and the IDCPA.

Response: NMFS has included this language in the background information for the interim final rule.

Comment 119: One commenter disagrees that the IDCPA was the domestic endorsement of an international management regime adopted during the last 20 years under the auspices of the IATTC. Instead, the IDCPA codified the La Jolla Agreement, incorporated provisions of the Panama Declaration, and set the stage for the new binding international agreement embodied in the IDCP.

Response: NMFS concurs although the La Jolla Agreement embodied a number of measures developed over many years of regulating the ETP fishery to reduce dolphin mortality.

Comment 120: One commenter indicated that the U.S. tuna purse seine fleet should be treated fairly and equitably in the U.S. regulations implementing the IDCPA.

Response: NMFS agrees.

Comment 121: One commenter indicated that the proposed rule fails to provide substantial background information about DOC's and NMFS' failure to abide by the clear intent of marine mammal protection law, multiple court rulings against NMFS' administration of the MMPA's tuna-dolphin provisions, public opposition to the DOC interpretation of the MMPA, and multiple amendments to the MMPA by Congress in order to force compliance by the DOC and NMFS.

Response: The historical information provided in the background section of the proposed rule focuses mainly on the

key events leading to the passage of the IDCPA.

Comment 122: One commenter indicated that it is wrong that Vice President Al Gore, Secretary of Commerce William Daley, and Secretary of the Interior Bruce Babbitt actively campaigned for the passage of the IDCPA in Congress and now the DOC claims that the legislation mandates that the United States allow non-dolphin-safe tuna to be imported.

Response: This comment is not relevant to this rulemaking. The IDCPA does not completely prohibit the importation of non-dolphin-safe tuna into the United States but allows non-dolphin-safe tuna to be imported provided it was harvested in compliance with the IDCP by a vessel operating under the jurisdiction of a nation that is a member of the IATTC or has initiated an application to join the IATTC (and completes the process within 6 months).

Comment 123: One commenter indicated that the language in the proposed rule needs to be updated to reflect the current status with respect to the initial finding by the Secretary of Commerce and the international agreement signatory status.

Response: NMFS has updated all the sections in the interim final rule to reflect the current status of the initial finding (DPCIA paragraph (g)(1)) and the international agreement signatory status.

Comment 124: One commenter urged NMFS and the Department of State to renegotiate the Panama Declaration that has led to the redefinition of dolphin-safe tuna under the IDCP. The Panama Declaration undermines the MMPA and results in the injury and deaths of thousands of animals each year.

Response: NMFS does not agree. The IDCP provides a mechanism to reduce the level of incidental take of marine mammals associated with the yellowfin tuna purse seine fishery in the ETP to biologically sustainable levels. The comment is not focused on this rule per se, but it involves larger policy issues of international agreements and legislation.

Comment 125: One commenter requested clarification regarding when the coastal spotted dolphin was designated as depleted under the MMPA and the procedure by which such designation was made since the 1982 court ruling overturned the depleted status for this stock. If the coastal spotted dolphin is not officially depleted, the reference to the stock being depleted should be removed.

Response: NMFS designated the coastal spotted dolphin as depleted under the MMPA in **Federal Register**

(45 FR 72178, Oct. 31, 1980). The court ruling did not overturn the depleted status but rather required NMFS to recalculate the population estimates. The depleted status was not changed after recalculating the coastal spotted dolphin stock population estimates.

Comment 126: One commenter indicated that the proposed regulation reflects a strong influence of foreign interests and illegal drug trafficking activity in the foreign tuna fishery and the governments involved.

Response: The regulations implement the IDCPA. NMFS does not know if any commenters are involved in illegal drug trafficking, but comments from foreign organizations and persons were received and considered. The rulemaking process itself was conducted in an open manner in accordance with the Administrative Procedure Act.

Comment 127: One commenter felt that the regulations significantly impact small businesses by placing the burden of supporting and promoting an alternative mark standard on the small canneries and wholesalers while the official mark standard is subsidized by tax dollars.

Response: Alternative marks will have to be supported by comparable tracking and verification programs, but NMFS disagrees with the characterization that the official mark is subsidized by tax dollars. The IDCPA requires NMFS to establish a mark for dolphin safe tuna. The program for tracking the mark consists primarily of information collected by the IATTC and IATTC approved national observer programs and cooperation of the canning and processing industry in maintaining appropriate documentation. For U.S. vessels and processors, these programs are entirely industry funded. There are no tax dollars being expended for these activities. NMFS is neither funding nor supporting any promotion of the official dolphin safe mark. NMFS funds are being expended on staff to review and monitor documentation from these industry funded programs whether the information is submitted from the IDCP or alternate programs.

Comment 128: Some commenters requested that NMFS completely rewrite the proposed rule and submit the rule again for public comment, whereas other commenters praised NMFS for doing a good job drafting the rule.

Response: By publishing an interim final rule, NMFS will continue to accept additional public comments during a 90-day comment period while meeting programmatic and mission goals in a timely manner.

Comment 129: Commenters indicated that the proposed regulations try to

implement international programs that have not yet been finalized by tuna treaty Parties.

Response: The regulations implement, in part, the Agreement on the IDCP, which has been ratified by fishing nations in the ETP such as Ecuador, El Salvador, Mexico, Nicaragua, Panama, Venezuela, and the United States.

Comment 130: Many commenters requested an extension for public comments of at least 30 days due to the technical and complex issues that require research and analysis.

Response: NMFS disagrees that this is necessary. By publishing an interim final rule, NMFS will continue to accept additional public comments for 90 days while meeting programmatic and mission goals in a timely manner. Furthermore, commenters who did request an extension submitted extensive and comprehensive comments.

Comment 131: One commenter disagreed with the proposed rule which allows a permit holder to injure or kill a marine mammal if the animal is causing or is about to cause immediate personal injury.

Response: This provision of the regulations is only a restatement of the statute. According to section 101(c) of the MMPA, if there is imminent danger to a person, a dolphin may be injured or killed to prevent injury or death of that person.

Comment 132: Commenters suggested that the term "incidental take" not be used in the ETP tuna fishery since the MMPA refers to takes as incidental or accidental to distinguish them from intentional takes. The commenter believes that if dolphins are deliberately set on by purse seiners then any take should be considered intentional.

Response: NMFS disagrees since Congress used this term to describe the ETP purse seine fishery in section 104(h) of the MMPA.

Comment 133: One commenter suggested inserting the word "incidental" into the phrase in the U.S. Citizens on Foreign Flag Vessels in the supplementary information of the proposed rule, "A U.S. citizen employed on a foreign tuna purse seine vessel of a nation with an affirmative finding would not be subject to the MMPA's prohibition on incidental taking marine mammals while the vessel is engaged in fishing operations outside the U.S. EEZ ..." to be consistent with the IDCPA.

Response: NMFS agrees that it is only "incidental taking" that is authorized.

Comment 134: NMFS received numerous editorial comments on

typographical errors and suggestions on sentence wording.

Response: NMFS incorporated many of the suggestions.

Comment 135: In a March 24, 1999 letter to Senator Barbara Boxer, the DOC stated that the final finding in 2001 would include a public comment period for substantive comments. In addition, the Secretary promised Members of Congress that future dolphin-safe label standards would be a formal rulemaking action. However, in the "supplementary information" section of the proposed rule (at page 31809 of the **Federal Register** document) the sentence "The proposed regulations provide that, by notification in the **Federal Register**, the Assistant Administrator will implement any required change in the labeling standard without additional rulemaking ..." NMFS indicates that the Assistant Administrator will implement any required change in the labeling standard without additional rulemaking.

Response: NMFS will publish the final finding on whether the intentional deployment on, or encirclement of, dolphins with purse seine nets "is having a significant adverse impact" on any depleted dolphin stocks in the ETP between July 1, 2001, and December 31, 2002. There is no provision in the finding process to include public comment, and commenters apparently had a different understanding of the March 24 letter to Senator Boxer. In the response to Senator Barbara Boxer, NMFS indicated that supporting documentation for the initial finding and the research results as they become available would be posted on the Internet as at <http://swfsc.ucsd.edu/IDCPA/IDCPAfront.html>. In addition, NMFS indicated that, as usual, substantive comments on the initial finding will be considered throughout the remainder of the 3 year process toward the final determination. NMFS will accept public comment on changes to the dolphin-safe labeling standards under this interim final rule and any subsequent rulemakings.

Comment 136: One commenter felt that it was never the intent of Congress to require a high standard of proof that the tuna fishery is causing adverse impacts on the dolphin populations when making the initial and final finding, but rather to use the best available scientific information that clearly supports the conclusion that the two depleted stocks of dolphins are not recovering at the rate expected.

Response: Under the IDCPA, the Secretary is required to make findings regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having

a significant adverse impact on any depleted dolphin stock in the ETP. The finding shall be based on studies assessing the effect of intentional encirclement (including chase) on dolphins and dolphin stocks incidentally taken in the course of purse seine fishing for yellowfin tuna in the ETP, population abundance surveys, information obtained under the IDCP, and any other relevant information. NMFS has an obligation to conduct the research mandated by section 304(a) of the MMPA, and has an obligation to make the DPCIA findings using the best scientific information available at the time of the finding.

Changes From the Proposed Rule

Instead of publishing only the revised or new provisions of § 216.24, in the interim final rule, NMFS is publishing the revised § 216.24 in its entirety, for the convenience of readers, to correct cross-reference errors and to improve clarity. The interim final rule includes revised definitions for "Fisheries Certificate of Origin," "Import," and "Tuna product." In addition, a definition for "Serious injury" was added in response to comments. The language pertaining to taking a marine mammal to protect crew members from personal injury that appeared in § 216.24(b)(vi) and § 216.24(b)(vii) has been removed since, under section 101(c) of the MMPA, all persons are allowed to take a marine mammal in self-defense or to save the life of a person in immediate danger. Under § 216.91(c) (labeling requirements) a paragraph was added to include the requirement in the DPCIA that any tuna product that is labeled with the official mark cannot be labeled with any other label or mark that refers to dolphins, porpoises, or marine mammals.

Changes to Affirmative Findings

Every 5 years, the government of a harvesting nation must request an affirmative finding and submit documentary evidence to the Assistant Administrator. In addition, the Assistant Administrator will continue to determine on an annual basis whether to make an affirmative finding to allow a nation to import ETP yellowfin tuna into the United States. The annual finding will be based mostly upon documentary evidence provided by the IATTC and the Department of State, although documentary evidence may also be requested from the government of the exporting nation or the government of the harvesting nation. Documentary evidence will need to be submitted by the harvesting nation for the first affirmative finding after the

effective date of this interim final rule. Furthermore, NMFS has revised the affirmative finding criteria that require the annual total dolphin mortality of the nation's purse seine fleet not to exceed the aggregated total of the mortality limits assigned by the IDCP for the nations's purse seine vessels for the year preceding the year in which the finding would start. Under the revised language, nations could receive an affirmative finding if the total dolphin mortality of the nation's purse seine fleet exceeded the aggregated total of the mortality limits because of extraordinary circumstances beyond the control of the nation or vessel captains. However, the nation must immediately require all its vessels to cease fishing for tuna in association with dolphins for the remainder of the calendar year. In addition, nations may exceed the annual per-stock per-year limits assigned by the IDCP for that nation's purse seine vessels for the year preceding the year in which the finding would start provided there were extraordinary circumstances beyond the control of the nation or vessel captains that caused the per-stock per-year dolphin mortality to exceed the aggregated total of the per-stock per-year limits. Under this circumstance, the nation must immediately require all its vessels to cease fishing for tuna in association with dolphins for the remainder of the calendar year. Under these criteria, a nation will not be embargoed for exceeding its DML (e.g., by just one dolphin) if the nation is operating under the Agreement of the IDCP, and making good faith efforts to ensure compliance by all vessels operating under their flag. This flexibility will allow nations that are fully implementing the Agreement on the IDCP not to be embargoed if their DMLS are exceeded. This flexibility will encourage harvesting nations to comply with the Agreement on the IDCP, but it will threaten economic sanctions against nations that do not control or manage their own fleets.

Changes to Tuna Tracking and Verification

Instead of one rare event that would allow a mixed well to occur as described in the proposed rule, there are now two rare events in which mixed wells are allowed. In the first type of rare event described in the proposed rule where an observer has designated the set "dolphin-safe," but during the loading process dolphin mortality or serious injury is identified, the dolphin-safe status of the set changes to non-dolphin-safe, and the well changes to a mixed well designation. Fifteen percent of the dolphin-safe tuna unloaded (by

weight) from this type of mixed well will be designated as "non-dolphin-safe" to provide a buffer between the dolphin-safe and non-dolphin-safe tuna loaded into the well.

The second rare event would occur near the end of an ETP fishing trip if the only well space available is in a non-dolphin-safe well, and there is an opportunity to make one last set. Dolphin-safe tuna caught in that set may be loaded into the non-dolphin-safe well provided the dolphin-safe tuna is kept physically separate from the non-dolphin-safe tuna using netting or similar material. This will allow vessels to return to port completely full without compromising the status of the dolphin-safe tuna aboard the vessel. Although there is no physical barrier or other way of identifying a particular fish unloaded from a "mixed" well described in the first scenario as "dolphin-safe," the 15 percent weight buffer establishes a safety margin to ensure non-dolphin-safe tuna is not labeled "dolphin-safe." In the second scenario, the use of a physical barrier such as netting is considered sufficient to ensure non-dolphin-safe tuna is not labeled "dolphin-safe." The IATTC is monitoring the occurrence of mixed wells and will report at its June 2000 meeting on the frequency of a mixed well event. If this monitoring shows that the frequency of mixed wells is not a rare event, NMFS will reconsider whether it will allow the use of mixed wells.

Changes to the Tracking and Verification Program

The TTF developed by the IATTC will be used to track and verify tuna loaded as "dolphin-safe" and "non-dolphin-safe" aboard a vessel and will double as the captain and observer certifications that no dolphin were seriously injured or killed during the sets loaded in the dolphin-safe wells. Also, the TTF will confirm there was an observer approved by the IDCP aboard the vessel the entire trip. Two TTFs will be used for each trip: one for dolphin-safe sets and one for non-dolphin-safe sets. The two TTFs used on each trip will have a unique number assigned by the IATTC which will represent the cruise number assigned to the trip. The observer and vessel engineer will initial the entry after each set and the captain and observer will review and sign each TTF at the end of the fishing trip. The TTF will not include the set number as discussed in the proposed rule. The harvesting nation will retain the original TTF and the IATTC will receive a copy.

Another difference in the tuna tracking and verification program is that

each national authority is responsible for the tracking and verification of dolphin-safe tuna when it enters a processing plant located within that nation, regardless of the flag of the harvesting vessel. In other words, if a U.S. vessel unloads tuna in Ecuador, Ecuador is responsible for the tracking and verification of dolphin-safe tuna throughout its processing facilities. A representative of the national authority will receive the original TTFs from the observer, and copies of the TTFs will be forwarded to the Administrator, Southwest Region. When ETP caught tuna is offloaded from an U.S. purse seiner in any port and subsequently loaded aboard a carrier vessel for transport to a cannery outside the jurisdiction of the United States, a NMFS representative may meet the vessel to receive the TTFs from the observer and monitor the offloading. The U.S. caught tuna becomes the tracking and verification responsibility of the foreign buyer when it is offloaded from the U.S. vessel. Imports of tuna harvested by large purse seine vessels greater than 400 st (362.8 mt) carrying capacity in the ETP and labeled "dolphin-safe" must be accompanied by Fisheries Certificate of Origin endorsements by importers, exporters, and processors attesting to the accuracy of the captain's and observer's statements.

Changes to Captain Certification and Observer Certification

The DPCIA paragraph (d)(2)(B)(i) requires that tuna or tuna products imported into the United States and labeled "dolphin-safe" must be accompanied by a written statement executed by the vessel captain providing a certification that no dolphins were killed or seriously injured during the sets in which the tuna were caught by purse seine vessel greater than 400 st (362.8 mt) carrying capacity in the ETP. NMFS has determined that there is a practical limitation on this certification that limits its utility as a mechanism to track dolphin-safe tuna. Therefore, NMFS has developed an alternative mechanism to achieve the intended purpose of this certification.

Prior to amendment by the IDCPA, the DPCIA, required the captain and observer certify that "no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphin." This certification followed the tuna through processing and import into the United States. At the time of importation, NMFS could determine that the product was "dolphin-safe"

because the Fisheries Certificate of Origin contained information that allowed NMFS to determine which fishing vessels had contributed to the shipment and the captain and observer certifications applied to all the tuna on board each vessel for its referenced trip.

Under the amended DPCIA, the captain and observer are required to certify that no dolphin were killed or seriously injured in the sets in which the tuna were caught. The captain and observer are potentially verifying only a portion of the tuna on board the vessel is "dolphin-safe." In the event that a dolphin is killed or seriously in a set, tuna from that set will be loaded into a non-dolphin-safe well for which there would be no certification. After the tuna is off loaded at a processing plant, the responsibility for ensuring dolphin-safe tuna are separated from non-dolphin-safe tuna transfers from the vessel captain and observer to the processor. Presenting captain and observer certification at the time of import does not provide sufficient information to allow NMFS to determine that the tuna in the shipment is dolphin-safe, because the captain's and observer's statements do not necessarily apply to all of the tuna in the shipment and there is no certification by the processor or government body of the exporting nation that ensures that non-dolphin-safe tuna were not mixed with dolphin-safe tuna during processing.

NMFS has developed the following strategy to ensure its capability to track dolphin-safe tuna and comply with the intent of the DPCIA. Each shipment of tuna imported to the United States will be required to be accompanied by documentation signed by a representative of the appropriate IDCP member nation certifying that there was an IDCP approved observer on board the vessel(s) during the trip(s) and that the tuna contained in the shipment were caught according to the dolphin-safe labeling standard. This documentation will also be required to include a list of TTFs for all trips from which tuna in the shipment were taken. This mechanism links the requirements of the DPCIA paragraph (d)(2)(B)(i) to the international tracking program agreed to by the Parties to the Agreement on the IDCP.

The international tracking and verification program to which the United States has agreed, as a Party of the IDCP, lays out a system to enable dolphin-safe tuna to be distinguished from non-dolphin-safe tuna from the time it is caught to the time it is ready for retail sale. The international system is based on TTFs. TTFs used during a fishing trip are identified by a unique

number. Dolphin-safe and non-dolphin-safe tuna caught in sets in the course of a trip are recorded on separate TTFs. At the end of each set the observer records and the chief engineer initials the date of the set, estimated weight of tuna loaded by species, and well location on the appropriate TTF. At the end of each fishing trip, when no more sets are to be made, the observer and the captain review the TTF(s), and both sign the forms. The signing of the dolphin-safe only form by the captain and observer certifies that no dolphins were killed or seriously injured in the sets in which the tuna were caught. NMFS has determined that these signatures constitute a certification that no dolphins were killed or seriously injured in the sets in which the tuna were caught and therefore meets the requirements of the DPCIA.

A copy of the TTF is sent to the IATTC by the national authority of each member nation that is a Party to the IDCP agreement. NMFS will rely on the documentation provided by the representative of the IDCP member nation and the cooperation of the IATTC to verify that dolphin-safe tuna imported from member nations is supported by TTFs containing the required certification that the tuna is from sets in which no dolphins were killed or seriously injured.

Public Comments Solicited

NMFS is soliciting comments on this interim final rule. Written comments on the interim final rule may be submitted to J. Allison Routt (see **ADDRESSES** and **DATES**).

Classification

Executive Order 12866

Pursuant to the procedures established to implement section 6 of E.O. 12866, this rule has been determined to be significant.

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration when this rule was proposed that it would not have a significant economic impact on a substantial number of small entities. No comments were received regarding this certification. As a result, no regulatory flexibility analysis was prepared.

Paperwork Reduction Act

Notwithstanding any other provision of the law, no person is required to respond to, nor will any person be subject to a penalty for failure to comply with, a collection-of-information subject

to the requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number.

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

This interim final rule also contains new collection-of-information requirements. Approved under OMB control number 0648-0387, the public reporting burden for this collection is estimated to average as follows: 30 minutes for an application for a vessel permit; 10 minutes for an application for an operator permit; 30 minutes for a request for a waiver to transit the ETP without a permit; 10 minutes for a notification by a vessel permit holder 5 days prior to departure on a fishing trip; 10 minutes for the requirement that vessel permit holders who intend to make intentional sets on marine mammals must notify NMFS at least 48 hours in advance if there is a vessel operator change or within 72 hours if the change was made due to an emergency; 10 minutes for a notification by a vessel permit holder of any net modification at least 5 days prior to departure of the vessel; 15 minutes for a request for a DML; 20 hours for an experimental fishing operation waiver; 10 minutes for a notification by a captain; managing owner; or vessel agent 48 hours prior to arrival to unload; 1 hour for a captain to review and sign the TTF; 5 minutes for a captain to complete the dolphin-safe certification; 10 minutes for a notification by a cannery 24 hours prior to receiving a shipment of domestic or imported ETP caught tuna; 10 minutes for a cannery to provide the processor's receiving report; 10 minutes for a cannery to provide the processor's storage removal report; 1 hour for a cannery to provide the monthly cannery receipt report; 30 minutes for an exporter, transshipper, importer, or processor to produce records if requested by the Administrator, Southwest Region.

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

data needed, and completing and reviewing the collection of information. Send comments regarding reporting burden estimates or any other aspect of the collection-of-information requirements in this interim rule, including suggestions for reducing the burdens to J. Allison Routt and to the Office of Information and Regulatory Affairs, OMB, (see **ADDRESSES**).

National Environmental Policy Act

NMFS prepared an EA for this interim final rule and the Assistant Administrator concluded that there will be no significant impact on the human environment as a result of this rule. A copy of the EA is available from NMFS (see **ADDRESSES**).

Endangered Species Act

NMFS prepared a biological opinion for this rule. NMFS concluded that fishing activities conducted under this interim final rule are not likely to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS or result in the destruction or adverse modification of critical habitat. A copy of the biological opinion is available from NMFS (see **ADDRESSES**).

List of Subjects

15 CFR Part 902

Reporting and record keeping requirements.

50 CFR Part 216

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

Dated: December 21, 1999.

Penelope D. Dalton,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 15 CFR part 902 and 50 CFR part 216 are amended as follows:

15 CFR Chapter IX

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT; OMB CONTROL NUMBERS

1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

2. In § 902.1, in paragraph (b) the table under 50 CFR, in the left column, remove the entry "216.24(c)" and, in the right column in the corresponding position, the control number "-0083"; and add, in numeric order, the following entry to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

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(b) * * *

CFR part or section where the information is located	Current OMB control number (All numbers begin with 064809)
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50 CFR	

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216.24	-0387

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50 CFR Chapter II

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

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

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

4. In § 216.3:

a. Remove the definitions—"ABI", "Director, Southwest Region", "ETP Fishing Area 1", "ETP Fishing Area 2", "ETP Fishing Area 3", "Fishing season", "Kill-per-set", "Kill-per-ton", and "Purse seine set on common dolphins";

b. Revise the definitions—"Fisheries Certificate of Origin", "Import", and "Tuna product"; and

c. Add the definitions—"Administrator, Southwest Region", "Agreement on the International Dolphin Conservation Program (Agreement on the IDCP)", "Declaration of Panama", "Force majeure", "International Dolphin Conservation Program (IDCP)", "International Dolphin Conservation Program Act (IDCPA)", "International Review Panel (IRP)", "Per-stock per-year dolphin mortality limit" and "Serious injury" in alphabetical order to read as follows:

§ 216.3 Definitions.

* * * * *

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

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

* * * * *

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

* * * * *

Fisheries Certificate of Origin means NOAA Form 370, as described in § 216.24(f)(5).

* * * * *

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

* * * * *

Import means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the Customs laws of the United States; except that, for the purpose of any ban issued under 16 U.S.C. 1371(a)(2) on the importation of fish or fish products, the definition of "import" in § 216.24(f)(1)(ii) shall apply.

* * * * *

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

International Dolphin Conservation Program Act (IDCPA) means Public Law 105-42, enacted into law on August 15, 1997.

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

* * * * *

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

* * * * *

Serious injury means any injury that will likely result in mortality.

* * * * *

Tuna product means any food product processed for retail sale and intended for human or animal consumption that contains an item listed in § 216.24(f)(2)(i) or (ii), but does not include perishable items with a shelf life of less than 3 days.

* * * * *

5. Revise § 216.24 to read as follows:

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

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

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

(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 a 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 the DML assigned to that vessel has been reached, or when there is not a DML assigned to that vessel.

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

(b) *Permits*—(1) *Vessel permit*. The owner or managing owner of a United States purse seine fishing vessel of greater than 400 st (362.8 mt) carrying capacity that participates in commercial fishing operations in the ETP must possess a valid vessel permit issued under this paragraph (b) of this section. This permit is not transferable and must be renewed annually. If a vessel permit holder surrenders his/her permit to the

Administrator, Southwest Region, the permit will not be returned and a new permit will not be issued before the end of the calendar year. Vessel permits are valid through December 31 of each year.

(2) *Operator permit.* The person in charge of and actually controlling fishing operations (hereinafter referred to as the operator) on a United States purse seine fishing vessel engaged in commercial fishing operations under a vessel permit must possess a valid operator permit issued under 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)(4) of this section. The operator's permit is valid only when the permit holder is on a vessel with a valid vessel permit. Operator permits will be valid through December 31 of each year.

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

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

(i) The name, official number, tonnage, carrying capacity in short or metric tons, maximum speed in knots, processing equipment, and type and quantity of gear, including an inventory of equipment required under paragraph (c)(2) of this section if the application is for purse seining involving the intentional taking of marine mammals, of the vessel that is to be covered under the permit;

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

(iii) The type and identification number(s) of Federal, State, and local commercial fishing licenses under

which vessel operations are conducted, and the dates of expiration;

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

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

(5) *Application for operator permit.* A person wishing to operate a purse seine vessel may apply for an operator permit from the Administrator, Southwest Region, allowing at least 45 days for processing. The application must be signed by the applicant or the applicant's representative, if applicable, and contain:

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

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

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

(iv) The date, location, and provider of any training for the operator permit.

(6) *Fees.* (i) *Vessel permit application fees.* An application for a permit under paragraph (b)(1) of this section must include a fee for each vessel as specified on the application form. 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 and specified by the Administrator, Southwest Region, on the application form.

(ii) *Operator permit fee.* There is no fee for a operator permit under paragraph (b)(2) of this section. The Assistant Administrator may impose a fee or change the amount of this fee at any time if a different fee is determined in accordance with the NOAA Finance Handbook and specified by the Administrator, Southwest Region, on the application form.

(iii) *Observer placement fee.* The vessel permit holder must submit the fee for the placement of observers, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region, by September 1 of the year prior to the year in which the vessel will be operated in the ETP. The Administrator, Southwest Region, will forward all observer placement fees to the IATTC or to the applicable international organization approved by the Administrator, Southwest Region.

(7) *Application approval.* The Administrator, Southwest Region, will

determine the adequacy and completeness of an application and, upon determining that an application is adequate and complete, will approve that application and issue the appropriate permit, except for applicants having unpaid or overdue civil penalties, criminal fines, or other liabilities incurred in a legal proceeding.

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

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

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

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

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

(v) *Data release.* By using a permit, the permit holder authorizes the release to NMFS and the IATTC of all data collected by observers aboard purse seine vessels during fishing trips under the IATTC observer program or another international observer program approved by the Administrator, Southwest Region. The permit holder must furnish the international observer

program with all release forms required to authorize the observer data to be provided to NMFS and the IATTC. Data obtained under such releases will be used for the same purposes as would data collected directly by observers placed by NMFS and will be subject to the same standards of confidentiality.

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

(c) *Purse seining by vessels with DMLs.* In addition to the terms and conditions set forth in paragraph (b) of this section, any permit for a vessel to which a DML has been assigned under paragraph (c)(8) of this section and any operator permit when used on such a vessel are subject to the following terms and conditions:

(1) 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 Marine Mammals.* Except as otherwise authorized by a specific permit, 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 must not be brailled, sacked up, or hoisted onto the deck during ortza retrieval.

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

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

must consist of small mesh webbing not to exceed 1 1/4 inches (3.18 centimeter (cm)) stretch mesh extending downward from the corkline and, if present, the base of the dolphin apron to a minimum depth equivalent to two strips of 100 meshes of 4 1/4 inches (10.80 cm) stretch mesh webbing. In addition, at least a 20-fathom length of corkline must be free from bunchlines at the apex of the backdown channel.

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

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

(iv) *Dolphin safety panel corkline hangings.* Throughout the length of the corkline under which the dolphin safety panel and dolphin apron are located, corkline hangings must be inspected by the vessel operator following each trip. Hangings found to have loosened to the extent that a cylindrical object with a 1 3/8 inch (3.50 cm) diameter can be inserted between the cork and corkline hangings, must be tightened so as not to allow the insertion of a cylindrical object with a 1 3/8 inch (3.50 cm) diameter.

(v) *Speedboats.* A minimum of three speedboats in operating condition must be carried. All speedboats carried aboard purse seine vessels and in operating condition must be rigged with tow lines and towing bridles or towing posts. Speedboat hoisting bridles 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) *Face mask and snorkel, or view box.* At least two face masks and snorkels or view boxes must be carried.

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

(4) *Vessel inspection*—(i) *Annual.* At least once during each calendar year, purse seine nets and other gear and equipment required under § 216.24(c)(2) must be made available for inspection and for a trial set/net alignment by an authorized NMFS inspector or IATTC staff as specified by the Administrator, Southwest Region, in order to obtain a vessel permit.

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

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

(5) *Operator permit holder training requirements.* An operator must maintain proficiency sufficient to perform the procedures required herein, and must attend and satisfactorily complete a formal training session approved by the Administrator, Southwest Region, in order to obtain his or her permit. At the training session an attendee will be instructed on the relevant provisions and regulatory requirements of the MMPA and the IDCP, and the fishing gear and techniques that are required for, or will contribute to, reducing serious injury and mortality of dolphin incidental to purse seining for tuna. Operators who have received a written certificate of satisfactory completion of training and who possess a current or previous calendar year permit will not be required to attend additional formal training sessions unless there are substantial changes in the relevant provisions or implementing regulations of the MMPA or the IDCP, or in fishing gear and techniques. Additional training may be required for any operator who is found by the Administrator, Southwest Region, to lack proficiency in the required fishing procedures or familiarity with the relevant provisions or regulations of the MMPA or the IDCP.

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

(i) *Backdown procedure.* Backdown must be performed following a purse seine set in which dolphins are captured in the course of catching tuna, and must be continued until it is no longer possible to remove live dolphins from the net by this procedure. At least one crewman must be deployed during backdown to aid in the release of dolphins. Thereafter, other release

procedures required will be continued so that all live dolphins are released prior to the initiation of the sack-up procedure.

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

(iii) *Sundown sets prohibited.* On every set encircling dolphin, the backdown procedure must be completed no later than one-half hour after sundown, except as provided here. For the purpose of this section, sundown is defined as the time at which the upper edge of the sun disappears below the horizon or, if the view of the sun is obscured, the local time of sunset calculated from tables developed by the U.S. Naval Observatory or other authoritative source approved by the Administrator, Southwest Region. A sundown set is a set in which the backdown procedure has not been completed and rolling the net to sack-up has not begun within one-half hour after sundown. Should a set extend beyond one-half hour after sundown, the operator must use the required marine mammal release procedures including the use of the high intensity lighting system. In the event a sundown set occurs where the seine skiff was let go 90 or more minutes before sundown, and an earnest effort to rescue dolphins is made, the International Review Panel of the IDCP may recommend to the United States that in the view of the International Review Panel, prosecution by the United States is not recommended. Any such recommendation will be considered by the United States in evaluating the appropriateness of prosecution in a particular circumstance.

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

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

of this section except DMLs and the obligation to carry an observer.

(i) A vessel permit holder may apply to the Administrator, Southwest Region, for an experimental fishing operation waiver allowing for processing no less than 90 days before the date the proposed operation is intended to begin. An application must be signed by the permitted operator and contain:

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

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

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

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

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

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

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

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

(iii) The Administrator, Southwest Region, after considering the information in the application and the comments received on it, will either issue a waiver to conduct the experiment which includes restrictions or conditions deemed appropriate, or deny the application, giving the reasons for denial.

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

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

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

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

(i) By September 1 each year, a vessel permit holder desiring a DML for the following year must provide to the Administrator, Southwest Region, the name of the United States purse seine fishing vessel(s) of carrying capacity 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 following year. NMFS will forward the list of purse seine vessels to the Director of the IATTC on or before October 1, or as otherwise required by the IDCP, for assignment of a DML for the following year under the provisions of Annex IV of the Agreement on the IDCP.

(ii) Each vessel permit holder that desires a DML only for the period between July 1 to December 31 must provide the Administrator, Southwest Region, by September 1 of the prior year, the name of the United States purse seine fishing vessel(s) of greater than 400 st (362.8 mt) carrying capacity that the owner intends to use to intentionally deploy purse seine fishing nets in the ETP to encircle dolphins in an effort to capture tuna during the period. NMFS will forward the list of purse seine vessels to the Director of the IATTC on or before 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-third of an unadjusted full-year DML as calculated by the IDCP.

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

(B) The Administrator, Southwest Region, may adjust the DMLs in accordance with Annex IV of the Agreement on the IDCP. All adjustments of full-year DMLs will be made before January 1, and the Administrator, Southwest Region, will notify the Director of the IATTC of any adjustments prior to a vessel departing on a trip using its adjusted DML. The

notification will be no later than February 1 in the case of adjustments to full-year DMLs, and no later than May 1 in the case of adjustments to DMLs for the second half of the year.

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

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

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

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

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

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

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

(v) Any vessel that exceeds its assigned DML after any applicable adjustment under paragraph (c)(8)(iii) of this section will have its DML for the subsequent year reduced by 150 percent

of the overage, unless another adjustment is determined by the International Review Panel.

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

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

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

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

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

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

(x) Vessel and operator permit holders must not intentionally deploy a purse

seine net on or encircle dolphins intentionally:

(A) when the vessel's DML, as adjusted, is reached or exceeded; or

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

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

(xii) Intentionally deploying a purse seine net on, or to encircle, dolphins after a vessel's DML, as adjusted, has been reached will disqualify the vessel from consideration for a DML for the following year. If already assigned, the DML for the following year will be withdrawn, and the Director of the IATTC will be notified by NMFS that the DML assigned to that vessel will be unutilized. Procedures found at 15 CFR part 904 apply to the withdrawal of the permit.

(d) *Purse seining by vessels without assigned DMLs.* In addition to the requirements of paragraph (b) of this section, a vessel permit used for a trip not involving an assigned DML and the operator's permit when used on such a vessel are subject to the following terms and conditions: a permit holder may take marine mammals provided that such taking is an accidental occurrence in the course of normal commercial fishing operations and the vessel does not intentionally deploy its net on, or to encircle, dolphins; marine mammals taken incidental to such commercial fishing operations must be immediately returned to the environment where captured without further injury, using release procedures such as hand rescue, and aborting the set at the earliest effective opportunity; the use of one or more rafts and face masks or view boxes to aid in the rescue of dolphins is recommended.

(e) *Observers:* (1) The holder of a vessel permit must allow an observer duly authorized by the Administrator, Southwest Region, to accompany the vessel on all fishing trips in the ETP for the purpose of conducting research and observing operations, including collecting information that may be used in civil or criminal penalty proceedings, forfeiture actions, or permit sanctions. A vessel that fails to carry an observer in

accordance with these requirements may not engage in fishing operations.

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

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

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

(5)(i) All observers must be provided sleeping, toilet and eating accommodations at least equal to that provided to a full crew member. A mattress or futon on the floor or a cot

is not acceptable in place of a regular bunk. Meal and other galley privileges must be the same for the observer as for other crew members.

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

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

(f) *Importation, purchase, shipment, sale and transport.* (1)(i) It is illegal to import into the United States any fish, whether fresh, frozen, or otherwise prepared, if the fish have been caught with commercial fishing technology that results in the incidental kill or incidental serious injury of marine mammals in excess of that allowed under this part for U.S. fishermen, or as specified at paragraphs (f)(7) through (f)(9) 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 territory of the nation. For other purposes, "import" is defined in § 216.3.

(2)(i) *HTS numbers requiring a Fisheries Certificate of Origin, subject to yellowfin tuna embargo.* The following U.S. Harmonized Tariff Schedule (HTS) numbers identify yellowfin tuna or yellowfin tuna products that are harvested in the ETP purse seine fishery and imported into the United States. All shipments containing tuna or tuna products imported into the United States under these HTS numbers must be accompanied by a Fisheries Certificate of Origin (FCO), NOAA Form 370. Yellowfin tuna identified by any of the following HTS numbers that was harvested using a purse seine in the ETP may not be imported into the United States unless both the nation with jurisdiction over the harvesting vessel and the exporting nation (if different)

have an affirmative finding under paragraph (f)(9) of this section.

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(A) <i>Frozen:</i>	
0303.42.0020	Yellowfin tuna, whole, frozen.
0303.42.0040	Yellowfin tuna, eviscerated, head on, frozen.
0303.42.0060	Yellowfin tuna, other, frozen.
(B) <i>Canned:</i>	
1604.14.1000	Tuna, non-specific, in airtight containers, in oil.
1604.14.2040	Tuna, other than albacore, not over 7kg, in airtight containers.
1604.14.3040	Tuna, other than albacore, in airtight containers, not in oil, over quota.
(C) <i>Loins:</i>	
1604.14.4000	Tuna, not in airtight containers, not in oil, over 6.8kg.
1604.14.5000	Tuna, other, not in airtight containers.
(D) <i>Other (only if the product contains tuna):</i>	
0304.10.4099	Other fish, fillets and other fish meat, fresh or chilled.
0304.20.2066	Other fish, fillets, skinned, in blocks weighing over 4.5kg, frozen.
0304.20.6096	Other fish, fillets, frozen.
0304.90.1089	Other fish meat, in bulk or immediate containers, fresh or chilled.
0304.90.9091	Other fish meat, fresh or chilled.
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(ii) *HTS numbers requiring a Fisheries Certificate of Origin, not subject to yellowfin tuna embargo.* The following HTS numbers identify tuna or tuna products, other than fresh tuna or tuna identified in paragraph (f)(2)(i) of this section, known to be imported into the United States. All shipments imported into the United States under these HTS numbers must be accompanied by a FCO. The shipment may not be imported into the United States if harvested by a large-scale driftnet nation, unless accompanied by the official statement described in paragraph (f)(5)(x) of this section.

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(A) <i>Frozen:</i>	
0303.41.0000	Albacore or longfinned tunas, frozen.
0303.43.0000	Skipjack, frozen.
0303.49.0020	Bluefin, frozen.
0303.49.0040	Other tuna, frozen.
(B) <i>Canned:</i>	
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1604.14.2020	Albacore tuna, in airtight containers, not in oil, not over 7kg, in quota.	1604.11.4050	Salmon, other, canned, not in oil.
1604.14.3020	Albacore tuna, in airtight containers, not in oil, not in quota.	1604.19.2000	Fish, other, in airtight containers, not in oil.
		1604.19.3000	Fish, other, in airtight containers, in oil.
		1605.90.6055	Squid, loligo, prepared/preserved.
		(C) Other:	
		0304.10.4099	Other fish, fillets and other fish meat, fresh or chilled.
		0304.20.2066	Other fish, fillets, skinned, in blocks weighing over 4.5kg, frozen.
		0304.20.6098	Other fish, fillets, frozen.
		0304.90.1089	Other fish, fillets and fish meat, in bulk or in immediate containers, fresh or chilled.
		0304.90.9092	Other fish meat, fresh or chilled.
		0305.30.6080	Fish, non-specific, fillet, dried/salted/brine.
		0305.49.4040	Fish, non-specific, smoked.
		0305.59.2000	Shark fins.
		0305.59.4000	Fish, non-specific, dried.
		0305.69.4000	Salmon, non-specific, salted.
		0305.69.5000	Fish, non-specific, in immediate containers, salted, not over 6.8kg.
		0305.69.6000	Fish, non-specific, salted, other.
		0307.49.0050	Squid, non-specific, frozen/dried/salted/brine.
		0307.49.0060	Squid, non-specific, & cuttle fish frozen/dried/salted/brine.
(A) Frozen:			
0303.10.0012	Salmon, chinook, frozen.		
0303.10.0022	Salmon, chum, frozen.		
0303.10.0032	Salmon, pink, frozen.		
0303.10.0042	Salmon, sockeye, frozen.		
0303.10.0052	Salmon, coho, frozen.		
0303.10.0062	Salmon, Pacific, non-specific, frozen.		
0303.21.0000	Trout, frozen.		
0303.22.0000	Salmon, Atlantic and Danube, frozen.		
0303.29.0000	Salmonidae, other, frozen.		
0303.70.4097	Fish, other, frozen.		
0303.75.0010	Dogfish, frozen.		
0303.75.0090	Other sharks, frozen.		
0303.79.2041	Swordfish steaks, frozen.		
0303.79.2049	Swordfish, other, frozen.		
0304.20.2066	Fish, fillet, skinned, in blocks frozen over 4.5kg.		
0304.20.6008	Salmonidae, salmon fillet, frozen.		
0304.20.6096	Fish, fillet, frozen.		
0307.49.0010	Squid, other, fillet, frozen.		
(B) Canned:			
1604.11.2020	Salmon, pink, canned in oil, in airtight containers.		
1604.11.2030	Salmon, sockeye, canned in oil, in airtight containers.		
1604.11.2090	Salmon, other, canned in oil, in airtight containers.		
1604.11.4010	Salmon, chum, canned, not in oil.		
1604.11.4020	Salmon, pink, canned, not in oil.		
1604.11.4030	Salmon, sockeye, canned, not in oil.		
1604.11.4040	Salmon, other, canned, not in oil.		

and it must be endorsed at each change in ownership. FCOs that require multiple endorsements must be submitted to the Administrator, Southwest Region, by the last endorser when all required endorsements are completed. An invoice must accompany the shipment at the time of importation or, in the alternative, must be made available within 30 days of a request by the Secretary or the Administrator, Southwest Region, to produce the invoice.

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

- (i) Customs entry identification;
- (ii) Date of entry;
- (iii) Exporter's full name and complete address;
- (iv) Importer's or consignee's full name and complete address;
- (v) Species description, product form, and HTS number;
- (vi) Total net weight of the shipment in kilograms;
- (vii) Ocean area where the fish were harvested (ETP, Western Pacific Ocean, South Pacific Ocean, Atlantic Ocean, Caribbean Sea, Indian Ocean, or other);
- (viii) Type of fishing gear used to harvest the fish (purse seine, longline, baitboat, large-scale driftnet, gillnet, trawl, pole and line, or other);
- (ix) Country under whose laws the harvesting vessel operated based upon the flag of the vessel or, if a certified charter vessel, the country that accepted responsibility for the vessel's fishing operations;

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

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

(xii) Dolphin safe condition of the shipment;

(xiv) For shipments harvested by vessels of a nation known to use large-scale driftnets, as determined by the Secretary pursuant to paragraph (f)(8) of this section, a statement must be included on the Fisheries Certificate of Origin that is dated and signed by a responsible government official of the harvesting nation, certifying that the fish or fish products were harvested by a method other than large-scale driftnet; and

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

(3) *Imports requiring a Fisheries Certificate of Origin.* Shipments containing the following may not be imported into the United States unless a completed FCO is filed with the Customs Service at the time of importation:

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

(4) *Disposition of Fisheries Certificates of Origin.* The FCO form described in paragraph (f)(5) of this section may be obtained from the Administrator, Southwest Region, or downloaded from the Internet at <http://swr.ucsd.edu/noaa370.htm>. The FCO required under paragraph (f)(3) of this section must accompany the tuna or tuna products from entry into the United States, through final processing,

documentation accurately describe the shipment of fish that they accompany.

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

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

(A) Harvested on or after 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 purse seine vessels of greater than 400 st (362.8 mt) carrying capacity harvesting tuna in the ETP, unless the Assistant Administrator has made an affirmative finding required for importation for that nation under paragraph (f)(9) of this section;

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

(C) Harvested before 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 an item listed in paragraph (f)(2) of this section may not be imported into the United States if it:

(A) Was exported from or harvested on the high seas by any nation determined by the Assistant Administrator to be engaged in large-scale driftnet fishing, unless the FCO is accompanied by an original statement by a responsible government official of the harvesting nation, signed and dated by that official, certifying that the fish or fish products were harvested by a method other than large-scale driftnet; or

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

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

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

(9) *Affirmative finding procedure for 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 exporting nation, by the government of the harvesting nation, if different, 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 needs to be submitted by the harvesting nation for the first affirmative finding subsequent to the effective date of this rule. 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 tuna and tuna products that were harvested by vessels of the nation after February 15, 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) For calendar year 2000 and any subsequent 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)(9)(i) of this section only if the government of the harvesting nation provides directly to the Assistant Administrator, or authorizes the IATTC to release to the Assistant Administrator, complete, accurate, and timely information that enables the Assistant Administrator to determine whether the harvesting nation is meeting the obligations of the

IDCP, and whether ETP-harvested tuna imported from such nation comports with the tracking and verification regulations of subpart H of this part.

(B) *Revocation.* After considering the information provided under paragraph (f)(9)(ii)(A) of this section, each party's financial obligations to the IATTC, and any other relevant information, including information that a nation is consistently failing to take enforcement actions on violations which diminish the effectiveness of the IDCP, the Assistant Administrator, in consultation with the Secretary of State, will revoke an affirmative finding issued to a nation that is not meeting the obligations of the IDCP.

(iii) A harvesting nation may apply for an affirmative finding at any time by providing to the Assistant Administrator the information and authorizations required in paragraphs (f)(9)(i) and (f)(9)(ii) of this section, allowing at least 60 days from the submission of complete information to NMFS for processing.

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

(vi) *Intermediary nation.* Except as authorized under this paragraph, no tuna or tuna products 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. 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, unless shown not to be yellowfin tuna or yellowfin tuna products harvested using purse seine in the ETP. 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, these import restrictions shall apply. Shipments of yellowfin tuna or yellowfin tuna products shipped through a nation on a through bill of lading or in another manner that does not enter the shipments into that nation as an importation do not make that nation an intermediary nation.

(A) *Intermediary nation determination status.* Imports from an intermediary nation of tuna and 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 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.

(B) *Changing the status of intermediary nation determinations.* 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.

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

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

(10) *Fish refused entry.* If fish is denied entry under paragraph (f)(3) of this section, the District Director of Customs shall refuse to release the fish for entry into the United States and shall issue a notice of such refusal to the importer or consignee.

(11) *Disposition of fish refused entry into the United States; redelivered fish.* Fish which is denied entry under paragraph (f)(3) of this section and which is not exported under Customs supervision within 90 days from the date of notice of refusal of admission or date of redelivery shall be disposed of under Customs laws and regulations. Provided however, that any disposition shall not result in an introduction into the United States of fish caught in violation of the MMPA.

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

- (i) Dolphin-safe under subpart H; or
- (ii) harvested in compliance with the IDCP by vessels under the jurisdiction of a nation that is a member of the IATTC or has initiated, and within 6 months thereafter completes, all steps required by applicant nations to become members of the IATTC.

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

(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.

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

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

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

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

§ 216.90 Purposes.

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

§ 216.91 Dolphin-safe labeling standards.

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

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

(i) The documentation requirements for dolphin-safe tuna under §§ 216.92 and 216.94 are met;

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

(iii) If the Assistant Administrator publishes notification in the **Federal Register** announcing a finding that the intentional deployment of purse seine nets on or encirclement of dolphins is having a significant adverse impact on any depleted stock:

(A) No tuna products were caught on a trip using a purse seine net intentionally deployed on or to encircle dolphins; and

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

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

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

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

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

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

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

(c) A tuna product that is labeled with the official mark, described in § 216.96, may not be labeled with any other label or mark that refers to dolphins, porpoises, or marine mammals.

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

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

(1) "Dolphin-safe" Tuna Tracking Forms certified by the vessel captain and the observer are submitted to the Regional Administrator, Southwest Region, at the end of the fishing trip during which the tuna was harvested;

(2) The tuna has been processed by a U.S. tuna processor in a plant located in one of the 50 states, Puerto Rico, or American Samoa that is in compliance with the tuna tracking and verification requirements of § 216.94;

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

(4) The tuna or tuna products meet the dolphin-safe labeling standards under § 216.91; and

(5) The FCO is properly endorsed by each processor certifying that, to the best of his or her knowledge and belief, the FCO and attached documentation are complete and accurate.

(b) *Imported tuna*. Tuna or tuna products harvested in the ETP by purse seine vessels of greater than 400 st

(362.8 mt) carrying capacity and presented for import into the United States are dolphin safe if:

(1) The tuna was harvested by a U.S. vessel fishing in compliance with the requirements of the IDCP and applicable U.S. law, or by a vessel belonging to a nation that has obtained an affirmative finding of § 216.24(f)(9);

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

(3) The tuna or tuna products are accompanied by valid documentation signed by a representative of the appropriate IDCP member nation, certifying that:

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

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

(4) The documentation provided in paragraph (b)(3) of this section includes a listing of vessel names and identifying numbers of the associated Tuna Tracking Forms for each trip of which tuna in the shipment originates; and

(5) The FCO is properly endorsed by each exporter, importer, and processor certifying that, to the best of his or her knowledge and belief, the FCO and attached documentation are complete and accurate.

§ 216.93 Submission of documentation.

(a) Requirements for the submission of documents concerning the activities of U.S. flag vessels with greater than 400 st carrying capacity fishing in the ETP are contained in § 216.94.

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

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

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

§ 216.94 Tracking and verification program.

The Administrator, Southwest Region, has established a national tracking and verification program to accurately document the "dolphin-safe" condition of tuna, under the standards set forth in § 216.91(a). The tracking program

includes procedures and reports for use when importing tuna into the U.S. and during U.S. purse seine fishing, processing, and marketing in the U.S. and abroad. Verification of tracking system operations is attained through the establishment of audit and document review requirements. The tracking program is consistent with the international tuna tracking and verification program adopted by the Parties to the IDCP.

(a) *Tuna tracking forms.* Whenever a U.S. flag tuna purse seine vessel of greater than 400 st (362.8 mt) carrying capacity fishes in the ETP, IDCP approved Tuna Tracking Forms (TTFs), bearing the IATTC cruise number assigned to that trip, are used by the observer to record every set made during that trip. One TTF is used to record "dolphin-safe" sets and a second TTF is used to record "non-dolphin-safe" sets. The information entered on the TTFs following each set includes date of trip, set number, date of loading, name of the vessel, vessel Captain's name, observer's name, well number, weights by species composition, estimated tons loaded, and date of the set. The observer and the vessel engineer initial the entry for each set, and the vessel Captain and observer review and sign both TTFs at the end of the fishing trip certifying that the information on the form is accurate. The captain's and observer's certification of the TTF on which dolphin-safe sets are recorded complies with 16 U.S.C. 1385(h).

(b) *Tracking fishing operations.* (1) During ETP fishing trips by purse seine vessels, tuna caught in sets designated as "dolphin-safe" by the vessel observer must be stored separately from tuna caught in "non-dolphin-safe" sets from the time of capture through unloading, except as provided in paragraph (b)(2) of this section. Vessel personnel will decide into which wells tuna will be loaded. The observer will initially designate whether each set is "dolphin-safe" or not, based on his/her observation of the set. The observer will initially identify a vessel fish well as "dolphin-safe" if the first tuna loaded into the well during a trip was captured in a set in which no dolphin died or was seriously injured. The observer will initially identify a vessel fish well as "non-dolphin-safe" if the first tuna loaded into the well during a trip was captured in a set in which a dolphin died or was seriously injured. Any tuna loaded into a well previously designated "non-dolphin-safe" or "mixed well" is considered "non-dolphin-safe" tuna. Except as provided for in paragraph (b)(2)(i) of this section, the observer will

change the designation of a "dolphin-safe" well to "non-dolphin-safe" if any tuna are loaded into the well that were captured in a set in which a dolphin died or was seriously injured.

(2) *Mixed wells.* Only two acceptable conditions exist under which a "mixed" well can be created.

(i) In the event that a set has been designated "dolphin-safe" by the observer, but during the loading process dolphin mortality or serious injury is identified, the "dolphin-safe" designation of the set will change to "non-dolphin-safe." If one or more of the wells into which the newly designated "non-dolphin-safe" tuna are loaded already contains "dolphin-safe" tuna loaded during a previous set, the observer will note in his or her trip records the well numbers and the estimated weight of such "non-dolphin-safe" tuna and designate such well(s) as "mixed well(s)." Once a well has been identified as "non-dolphin-safe" or "mixed" all tuna subsequently loaded into that well will be designated as "non-dolphin-safe." When the contents of such a "mixed well" are received by a processor, the tuna will be weighed and separated according to the observer's report of the estimated weight of "dolphin-safe" and "non-dolphin-safe" tuna contained in that well. In addition, 15 percent of the "dolphin-safe" tuna unloaded from the "mixed well" will be designated as "non-dolphin-safe."

(ii) Near the end of an ETP fishing trip, if the only well space available is in a "non-dolphin-safe" well, and there is an opportunity to make one last set, "dolphin-safe" tuna caught in that set may be loaded into the "non-dolphin-safe" well. The "dolphin-safe" tuna must be kept physically separate from the "non-dolphin-safe" tuna already in the well, using netting or other material.

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

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

amount unloaded will be noted on the respective originals.

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

(6)(i) When ETP caught tuna is to be offloaded from a U.S. purse seiner directly to a U.S. canner within the 50 states, Puerto Rico, or American Samoa, or in any port and subsequently loaded aboard a carrier vessel for transport to a U.S. processing location, a NMFS representative may meet the U.S. purse seiner to receive the TTFs from the vessel observer and to monitor the handling of "dolphin-safe" and "non-dolphin-safe" tuna.

(ii) When ETP caught tuna is offloaded from an U.S. purse seiner in any port and subsequently loaded aboard a carrier vessel for transport to a cannery outside the jurisdiction of the United States, a NMFS representative may meet the vessel to receive copies of the TTFs from the observer and monitor the offloading. The U.S. caught tuna becomes the tracking and verification responsibility of the foreign buyer when it is offloaded from the U.S. vessel.

(iii) If a NMFS representative does not meet the vessel in port at the time of arrival, the observer may take the signed TTFs to the IATTC office and mail copies to the Administrator, Southwest Region, from that location within 5 working days of the end of the trip.

(iv) When ETP caught tuna is offloaded from a U.S. purse seiner directly to a processing facility located outside the jurisdiction of the United States in a country that is a party to the IDCP, the national authority in whose area of jurisdiction the tuna is to be processed will assume the responsibility for tracking and verification of the tuna offloaded. A representative of the national authority will receive copies of the TTFs from the observer, and copies of the TTFs will be forwarded to the Administrator, Southwest Region.

(c) *Tracking cannery operations.* (1) Whenever a tuna canning company in the 50 states, Puerto Rico, or American Samoa is scheduled to receive a domestic or imported shipment of ETP caught tuna for processing, the company must provide at least 48 hours notice of the location and arrival date and time of such a shipment, to the Administrator, Southwest Region, so that a NMFS representative can be present to monitor delivery and verify that "dolphin-safe" and "non-dolphin-safe" tuna are clearly identified and remain segregated.

(2) At the close of delivery activities, which may include weighing, boxing or containerizing, and transfer to cold storage or processing, the company must provide a copy of the processor's receiving report to the NMFS representative, if present. If a NMFS representative is not present, the company must submit a copy of the processor's receiving report to the Administrator, Southwest Region, electronically, by mail, or by fax within 5 working days. The processor's receiving report must contain, at a minimum: date of delivery, catcher vessel name and flag, trip number and dates, storage container number(s), "dolphin-safe" or "non-dolphin-safe" designation of each container, species, product description, and weight of tuna in each container.

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

- (i) The date of removal;
- (ii) Storage container number(s) and "dolphin-safe" or "non-dolphin-safe" designation of each container; and
- (iii) Details of the disposition of fish (for example, canning, sale, rejection, etc.).

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

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

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

(ii) *Import receipts*: In addition to the information required in paragraph (c)(5)(i) of this section, a copy of the

FCO for each imported receipt must be provided.

(d) *Tracking imports*. All tuna products, except fresh tuna, that are imported into the United States must be accompanied by a properly certified FCO as required by § 216.24(f).

(e) *Verification requirements*.—(1) *Record maintenance*. Any exporter, transshipper, importer, or processor of any tuna or tuna products containing tuna harvested in the ETP must maintain records related to that tuna for at least 3 years. These records include, but are not limited to: FCO and required certifications, any report required in paragraph (a) and (b) of this section, invoices, other import documents, and trip reports.

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

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

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

8. In subpart H, § 216.96 is added and reserved to read as follows:

§ 216.96 Official mark [Reserved]

[FR Doc. 99-33632 Filed 12-30-99; 8:45 am]

BILLING CODE 3510-22-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[I.D. 111099A]

Fraser River Sockeye and Pink Salmon Fisheries; Inseason Orders

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

ACTION: Inseason orders.

SUMMARY: NMFS publishes the Fraser River salmon inseason orders regulating fisheries in U.S. waters. The orders were issued by the Fraser River Panel (Panel) of the Pacific Salmon Commission (Commission) and subsequently approved and issued by NMFS during the 1999 sockeye and pink salmon fisheries within the Fraser River Panel Area (U.S.). These orders established fishing times, areas, and types of gear for U.S. treaty Indian and all-citizen fisheries during the period the Commission exercised jurisdiction over these fisheries. Due to the frequency with which inseason orders are issued, publication of individual orders is impracticable. The 1999 orders are therefore being published in this document to avoid fragmentation.

DATES: Each of the following inseason orders was effective upon announcement on telephone hotline numbers as specified at 50 CFR 300.97(b)(1). Comments will be accepted through January 18, 2000.

ADDRESSES: Comments may be mailed to William Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE., BIN C15700-Bldg. 1, Seattle, WA 98115-0070. Information relevant to this document is available for public review during business hours at the Office of the Regional Administrator, Northwest Region, NMFS.

FOR FURTHER INFORMATION CONTACT: William L. Robinson, 206-526-6140.

SUPPLEMENTARY INFORMATION: The Treaty between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon was signed at Ottawa on January 28, 1985, and subsequently was given effect in the United States by the Pacific Salmon Treaty Act (Act) at 16 U.S.C. 3631-3644.

Under authority of the Act, Federal regulations at 50 CFR part 300 subpart F provide a framework for implementation of certain regulations of the Commission and inseason orders of the Commission's Panel for sockeye and pink salmon fisheries in the Fraser River Panel Area (U.S.). These regulations apply to fisheries for sockeye and pink salmon in the Fraser River Panel Area (U.S.) during the period each year when the Commission exercises jurisdiction over these fisheries.

The regulations close the Fraser River Panel Area (U.S.) to sockeye and pink salmon fishing unless opened by Panel regulations or by inseason orders of NMFS that give effect to Panel orders. During the fishing season, NMFS may issue orders that establish fishing times and areas consistent with the annual