

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Parts 217, 220, 221, 222, 223, 224, 225, 226, 227, 648, 679, and 697

[Docket No. 980113011-9049-02; I.D. 061896A]

RIN 0648-AK34

Endangered and Threatened Species; Regulations Consolidation

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

ACTION: Final rule.

SUMMARY: This final rule consolidates and reorganizes existing regulations regarding implementation of the Endangered Species Act (Act) by NMFS. The action is part of the President's Regulatory Reinvention Initiative (RRI).

DATES: Effective March 23, 1999, except that §§ 222.205(c)(1) and (2), 222.305(a), 223.206(d)(5), 223.207(a)(9)(ii)(A) and (B) will not become effective until the Office of Management and Budget (OMB) approves the information collection requirements contained in those sections. NMFS will publish a document in the **Federal Register** announcing the effective date for those sections.

ADDRESSES: Kevin Collins, Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Therese Conant, Office of Protected Resources, National Marine Fisheries Service, 1315 East West Highway, Silver Spring, MD 20910, Phone: (301) 713-1401.

SUPPLEMENTARY INFORMATION: NMFS is responsible for implementing the Act (16 U.S.C. 1531 *et seq.*) with respect to most marine species. Regulations implemented by NMFS are currently codified at 50 CFR parts 217 through 227. These regulations outline agency procedures and provide program administration information to other government agencies, interested groups, and individuals. To improve regulations under the President's RRI, NMFS is recodifying its Act regulations into three basic sections:

Revised part 222 deals with general provisions of the Act, including purpose, definitions, and other miscellaneous issues (subpart A),

certificates of exemption (subpart B), and permits (subpart C). Revised part 223 deals exclusively with threatened species. Revised part 224 deals exclusively with endangered species. Revised part 226 identifies critical habitat designated by the Secretary of Commerce. The consolidated text is reorganized into a more logical and cohesive order; duplicative and outdated provisions are eliminated; and editorial changes are made for readability and clarity. This final rule makes no substantive changes to the existing regulations. The purpose of this rule is to make the regulations more concise, better organized, and therefore easier for the public to use.

Specifically, regulations in part 217, concerning general provisions of the Act, purpose and scope of the regulations, definitions, and addresses, have been consolidated and are now codified in part 222, subpart A. Definitions in the new § 222.102 have been consolidated from definitions previously found in parts 217, 225, and 227, and all addresses have been updated and included in the definitions. Definitions for "Skimmer trawl", "Wing net", "Pusher-head trawl", "Summer flounder protection area", and "Leatherback conservation zone" have been revised, and definitions for "Beam trawl" and "Roller trawl" have been added for clarity. In addition, several terms are being deleted from the definitions because they are no longer pertinent or because they are self-evident. Such terms include "North Carolina restricted area", "Ongoing project(s)", "Country of origin", "Country of exportation", "Sea turtles(s)", "United States", "Whoever", "Wildlife", "Soft TED", "Hard TED", "Length", and "Plastron."

Regulations in part 221, concerning designated ports of entry for species listed in Appendix I or II to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, are now codified in § 222.205(a).

Several components of part 225, concerning Federal/state cooperation in the conservation of endangered and threatened species, are being eliminated under the RRI, because they do not provide further guidance or detail over the language contained in section 6 of the Act. The remaining portions of part 225, concerning applications and program evaluation procedures, are being recodified in § 222.104. These provisions have been clarified so that it is clear that NMFS may enter into a Cooperative Agreement with a state pursuant to either sections 6(c)(1)(A) through (E) or sections 6(c)(1)(i) and (ii) of the Act.

Provisions relating to Certifications of Exemption for pre-Act endangered species part permits have been streamlined and recodified in subpart B of part 222. In addition, technical changes were made to the existing provisions to make them consistent with the current provisions of section 10 of the Act. Specifically, in 1988, Congress amended section 10(f) to allow for one renewal of a Certificate of Exemption that was renewed after October 13, 1982, and was in effect on March 31, 1988. Congress again amended section 10(f) to provide that any valid Certificate of Exemption for pre-ESA scrimshaw products or raw material for such products shall remain valid for up to a 5-year period beginning April 30, 1994. These legislative amendments are now reflected in new § 222.202(a)(1) and (2).

Regulations in parts 217 and 220, concerning general permit procedures, have been greatly streamlined and are now codified in subpart C of part 222. Previously, general provisions relating to permits were found in part 217, while specific procedures for permits to take endangered species were found in part 220. Regulations relating to permits to take threatened species previously found in part 227 referred to the provisions in parts 220 and 222. These cross-references resulted in redundancy and some confusion in applicable regulations. New subpart C of part 222 contains provisions relating to all types of permits for endangered and threatened species for which section 9 of the Act applies. General requirements for permits have been streamlined and are provided in §§ 222.301 through 222.306. Specific requirements for incidental take permits are now found in § 222.307, and requirements for research and enhancement permits are now found in § 222.208.

In addition, the existing regulations had several inconsistencies that have been addressed where appropriate. For example, § 220.11 required a permit application to be submitted 90 days prior to the effective date, and § 222.23(b) recommended 45 days. The new regulations change the 45 day requirement to 90 days to be consistent with the general permit requirements.

Part 224 contains provisions relating to endangered species, including special prohibitions. While part 223 contains regulations relating to threatened species, including specified prohibitions and exceptions to those prohibitions. The text has been reorganized into a more logical and cohesive order; duplicative and outdated provisions have been

eliminated; and editorial changes have been made for readability and clarity.

Regulations found in § 227.72 are now under two sections, §§ 223.206 and 223.207, and covers exceptions against prohibitions relating to threatened species of sea turtles and technical requirements for turtle excluder devices. Minor changes to these regulations have been made to improve organization and readability. The following sections of text have been eliminated because the provisions are no longer applicable: 50 CFR 227.72(e)(3)(ii)(B) relating to the North Carolina restricted area for sea turtles; 50 CFR 227.72(f) relating to provisions relevant to the U.S. Trust Territories in the Pacific, and 50 CFR 227.72(a)(2) relating to ongoing research within 90 days of when species of turtles were listed as threatened. In addition, outdated provisions with sunset dates have been removed, and titles and addresses of NMFS offices have been updated.

Generally, the charts in part 226 depicting critical habitat areas are being removed under the RRI in order to reduce the volume of materials in the CFR. However, those charts providing clarification to descriptions will remain, such as the rookery site charts in part 227. Otherwise, these charts will continue to be available from the NMFS Office of Protected Resources upon request (see ADDRESSES). The tables and text containing specific boundaries of such areas will continue to appear in 50 CFR part 226. NMFS is amending the table in 15 CFR part 902 to update OMB control numbers for compliance with the Paperwork Reduction Act.

The following derivation table identifies the new parts and sections with corresponding sections of the existing regulations. This chart is intended to demonstrate the relationship of existing sections to new sections and to facilitate the public's understanding of the revisions. Several sections have been removed and are not identified in the chart. The removed sections or paragraphs are 222.1, 222.2, 222.11-9, 222.34, 225.2, 225.10, 225.11, 225.12, 225.13, 225.14, 227.72(a)(2) and 227.72(f).

New section	Old section
222.101(a)	217.1, 217.2, 217.4, 227.1, 227.2(c)
222.101(b)	217.3
222.102 ...	217.12, 217.21, 217.22, 217.23, 222.3, 225.3, 227.3
222.103(a)	225.4, 225.5
222.103(b)	225.5, 225.6, 225.8
222.103(c)	225.7, 225.9
222.201(a)	222.11-1, 222.13-4
222.201(b)	

New section	Old section
222.201(c)	222.11-8(a)
222.201(d)	222.11-8(b)
222.202 ...	222.11-2, 222.11-3, 222.11-4
222.203(a)	222.11-5
222.203(b)	222.11-6
222.203(c)	222.11-7
222.204(a)	222.12
222.204(b)	222.12-1
222.204(c)	222.12-2, 222.12-3, 222.12-4
222.204(d)	222.12-5
222.204(e)	222.12-6
222.204(f)	222.12-7
222.204(g)	222.12-8
222.205(a)	221.1
222.205(b)	222.12-9
222.205(c)	222.13, 222.13-1, 222.13-2, 222.13-3
222.301(a)	220.2, 220.3, 220.4
222.301(b)	220.22, 222.21
222.301(c)	220.1
222.301(d)	222.28
222.301(e)	220.42
222.301(f)	220.43
222.301(g)	220.44
222.301(h)	220.45
222.301(i)	220.46
222.301(j)	220.47
222.302(a)	220.11
222.302(b)	220.11
222.302(c)	220.13, 222.22, 222.23
222.303(a)	220.21(a)
222.303(b)	222.24(a)
222.303(c)	222.24(b)
222.303(d)	222.24(c)
222.303(e)	220.21(b)
222.303(f)	222.24(d)
222.303(g)	222.24(e)
222.304 ...	220.24
222.305(a)	220.25(a), 220.26
222.305(b)	220.25(b)
222.306(a)	222.25
222.306(b)	220.27, 220.28
222.306(c)	222.26
222.306(d)	220.31
222.306(e)	222.27
222.307 ...	222.22
222.308 ...	222.23
222.309 ...	220.50, 220.51, 220.52, 220.53
223.101 ...	227.1, 227.2(a), 227.2(b)
223.102 ...	227.4
223.201 ...	227.11
223.202 ...	227.12
223.203 ...	227.21
223.204 ...	227.22
223.205 ...	227.71
223.206 ...	227.72
223.207 ...	227.72(e)(4)
224.101 ...	222.23(a)
224.102 ...	222.21
224.103(a)	222.31, 222.32, 222.33
through (c).	
224.104 ...	222.41, 222.42
226.101 ...	226.1, 226.2
226.201 ...	226.11
226.202 ...	226.12
226.203 ...	226.13
226.204 ...	226.21
226.205 ...	226.22
226.206 ...	226.23
226.207 ...	226.71
226.208 ...	226.72

New section	Old section
226.209 ...	226.73

Under NOAA Administrative Order 205-11, 7.01, dated December 17, 1990, the Under Secretary for Oceans and Atmosphere has delegated to the Assistant Administrator for Fisheries, NOAA, the authority to sign material for publication in the **Federal Register**.

Classification

This rule has been determined to be not significant for purposes of E.O. 12866.

The Assistant Administrator for Fisheries, NOAA, under 5 U.S.C. 553(b)(B), finds for good cause to waive the requirement of a prior notice and an opportunity for public comment as such procedures are unnecessary. This rule does not make any substantive changes to existing regulations that, when issued, complied with notice-and-comment procedures. These changes are made solely to achieve greater clarity and organization and to eliminate provisions that are no longer necessary. Because this rule does not make any substantive changes to the existing regulations, it is not subject to the requirement in 5 U.S.C. 553(d) that its effective date be delayed.

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

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 217

Endangered and threatened species, Exports, Fish, Imports, Marine mammals, Reporting and recordkeeping requirements.

50 CFR Part 220

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

50 CFR Part 221

Endangered and threatened species, Exports, Fish, Harbors, Imports, Marine mammals.

50 CFR Part 222

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

50 CFR Part 223

Endangered and threatened species, Exports, Imports, Marine mammals, Transportation.

50 CFR Part 224

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

50 CFR Part 225

Endangered and threatened species, Grant programs—natural resources, Intergovernmental relations.

50 CFR Part 226

Endangered and threatened species.

50 CFR Part 227

Endangered and threatened species, Exports, Imports, Marine mammals, Transportation.

50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

50 CFR Part 679

Alaska Fisheries, Reporting and recordkeeping requirements.

50 CFR Part 697

Administrative practice and procedure, Fisheries, Fishing.

Dated: March 15, 1999.

Rolland A. Schmitt,

Assistant Administrator for Fisheries, National Marine Fisheries Services.

For the reasons set out in the preamble, 15 CFR chapter IX and 50 CFR chapters II and VI 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 15 CFR 902.1, in paragraph (b), the table is amended by removing, in the left column under 50 CFR, the entries “222.11-2”, “222.11-8”, “222.12-7”, “222.12-8”, “222.22”, and “227.72”, and, in the right column, the corresponding control numbers; and by

adding, in numerical order, the following entries to read as follows:

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

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers requirement with 0648-)
50 CFR	*
222.201(c) and (d)	-0079
222.202	-0078
222.204(f) and (g)	-0078
222.301(i)	-0084
222.307	-0230
222.308	-0084
223.206(a)	-0230
223.206(b) and (c)	-0178
223.207(e)	-0309

50 CFR Chapter II

PARTS 217, 220, 221, and 225— [REMOVED AND RESERVED]

3. Under the authority of Endangered Species Act of 1973 sec. 11(f), 87 Stat. 884, Pub. L. 93-205; 16 U.S.C. 742a *et seq.*, 1361 *et seq.*, and 1531-1544, parts 217, 220, 221, and 225 are removed and reserved.

4. Part 222 is revised to read as follows:

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

Subpart A—Introduction and General Provisions

- Sec.
- 222.101 Purpose and scope of regulations.
- 222.102 Definitions.
- 222.103 Federal/state cooperation in the conservation of endangered and threatened species.

Subpart B—Certificates of Exemption for Pre-Act Endangered Species Parts

- 222.201 General requirements.
- 222.202 Certificate renewal.
- 222.203 Modification, amendment, suspension, and revocation of certificates.
- 222.204 Administration of certificates.
- 222.205 Import and export requirements.

Subpart C—General Permit Procedures

- 222.301 General requirements.
- 222.302 Procedure for obtaining permits.
- 222.303 Issuance of permits.
- 222.304 Renewal of permits.
- 222.305 Rights of succession and transfer of permits.

222.306 Modification, amendment, suspension, cancellation, and revocation of permits.

222.307 Permits for incidental taking of species.

222.308 Permits for scientific purposes or for the enhancement of propagation or survival of species.

222.309 Permits for listed species of sea turtles involving the Fish and Wildlife Service.

Authority: 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701.

Section 222.403 also issued under 16 U.S.C. 1361 *et seq.*

Subpart A—Introduction and General Provisions

§ 222.101 Purpose and scope of regulations.

(a) The regulations of parts 222, 223, and 224 of this chapter implement the Endangered Species Act (Act), and govern the taking, possession, transportation, sale, purchase, barter, exportation, importation of, and other requirements pertaining to wildlife and plants under the jurisdiction of the Secretary of Commerce and determined to be threatened or endangered pursuant to section 4(a) of the Act. These regulations are implemented by the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce. This part pertains to general provisions and definitions. Specifically, parts 223 and 224 pertain to provisions to threatened species and endangered species, respectively. Part 226 enumerates designated critical habitat for endangered and threatened species. Certain of the endangered and threatened marine species enumerated in §§ 224.102 and 223.102 are included in Appendix I or II to the Convention on International Trade of Endangered Species of Wild Fauna and Flora. The importation, exportation, and re-exportation of such species are subject to additional regulations set forth at 50 CFR part 23, chapter I.

(b) For rules and procedures relating to species determined to be threatened or endangered under the jurisdiction of the Secretary of the Interior, see 50 CFR parts 10 through 17. For rules and procedures relating to the general implementation of the Act jointly by the Departments of the Interior and Commerce and for certain species under the joint jurisdiction of both the Secretaries of the Interior and Commerce, see 50 CFR Chapter IV. Marine mammals listed as endangered or threatened and subject to these regulations may also be subject to additional requirements pursuant to the Marine Mammal Protection Act (for

regulations implementing that act, see 50 CFR part 216).

(c) No statute or regulation of any state shall be construed to relieve a person from the restrictions, conditions, and requirements contained in parts 222, 223, and 224 of this chapter. In addition, nothing in parts 222, 223, and 224 of this chapter, including any permit issued pursuant thereto, shall be construed to relieve a person from any other requirements imposed by a statute or regulation of any state or of the United States, including any applicable health, quarantine, agricultural, or customs laws or regulations, or any other National Marine Fisheries Service enforced statutes or regulations.

§ 222.102 Definitions.

Accelerator funnel means a device used to accelerate the flow of water through a shrimp trawl net.

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

Adequately covered means, with respect to species listed pursuant to section 4 of the Act, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the Act for the species covered by the plan and, with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the Act that would otherwise apply if the unlisted species covered by the plan were actually listed. For the Services to cover a species under a conservation plan, it must be listed on the section 10(a)(1)(B) permit.

Alaska Regional Administrator means the Regional Administrator for the Alaska Region of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or their authorized representative. Mail sent to the Alaska Regional Administrator should be addressed: Alaska Regional Administrator, F/AK, Alaska Regional Office, National Marine Fisheries Service, NOAA, P.O. Box 21668 Juneau, AK 99802-1668.

Approved turtle excluder device (TED) means a device designed to be installed in a trawl net forward of the cod end for the purpose of excluding sea turtles from the net, as described in 50 CFR 223.207.

Assistant Administrator means the Assistant Administrator for Fisheries of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or his authorized representative. Mail sent to the Assistant Administrator should be

addressed: Assistant Administrator for Fisheries, National Marine Fisheries Service, NOAA, 1315 East-West Highway, Silver Spring, MD 20910.

Atlantic Area means all waters of the Atlantic Ocean south of 36°33'00.8" N. lat. (the line of the North Carolina/Virginia border) and adjacent seas, other than waters of the Gulf Area, and all waters shoreward thereof (including ports).

Atlantic Shrimp Fishery—Sea Turtle Conservation Area (Atlantic SFSTCA) means the inshore and offshore waters extending to 10 nautical miles (18.5 km) offshore along the coast of the States of Georgia and South Carolina from the Georgia-Florida border (defined as the line along 30°42'45.6" N. lat.) to the North Carolina-South Carolina border (defined as the line extending in a direction of 135°34'55" from true north from the North Carolina-South Carolina land boundary, as marked by the border station on Bird Island at 33°51'07.9" N. lat., 078°32'32.6" W. long.).

Authorized officer means:

- (1) Any commissioned, warrant, or petty officer of the U.S. Coast Guard;
- (2) Any special agent or enforcement officer of the National Marine Fisheries Service;
- (3) Any officer designated by the head of a Federal or state agency that has entered into an agreement with the Secretary or the Commandant of the Coast Guard to enforce the provisions of the Act; or
- (4) Any Coast Guard personnel accompanying and acting under the direction of any person described in paragraph (1) of this definition.

Bait shrimp means a shrimp trawler that fishes for and retains its shrimp catch alive for the purpose of selling it for use as bait.

Beam trawl means a trawl with a rigid frame surrounding the mouth that is towed from a vessel by means of one or more cables or ropes.

Certificate of exemption means any document so designated by the National Marine Fisheries Service and signed by an authorized official of the National Marine Fisheries Service, including any document which modifies, amends, extends or renews any certificate of exemption.

Changed circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and NMFS and that can be planned for (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

Commercial activity means all activities of industry and trade,

including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: Provided, however, that it does not include the exhibition of commodities by museums or similar cultural or historical organizations.

Conservation plan means the plan required by section 10(a)(2)(A) of the Act that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as "habitat conservation plans" or "HCPs."

Conserved habitat areas means areas explicitly designated for habitat restoration, acquisition, protection, or other conservation purposes under a conservation plan.

Cooperative Agreement means an agreement between a state(s) and the National Marine Fisheries Service, NOAA, Department of Commerce, which establishes and maintains an active and adequate program for the conservation of resident species listed as endangered or threatened pursuant to section 6(c)(1) of the Endangered Species Act.

Fishing, or to fish, means:

- (1) The catching, taking, or harvesting of fish or wildlife;
- (2) The attempted catching, taking, or harvesting of fish or wildlife;
- (3) Any other activity that can reasonably be expected to result in the catching, taking, or harvesting of fish or wildlife; or
- (4) Any operations on any waters in support of, or in preparation for, any activity described in paragraphs (1) through (3) of this definition.

Footrope means a weighted rope or cable attached to the lower lip (bottom edge) of the mouth of a trawl net along the forward most webbing.

Footrope length means the distance between the points at which the ends of the footrope are attached to the trawl net, measured along the forward-most webbing.

Foreign commerce includes, among other things, any transaction between persons within one foreign country, or between persons in two or more foreign countries, or between a person within the United States and a person in one or more foreign countries, or between persons within the United States, where the fish or wildlife in question are moving in any country or countries outside the United States.

Four-seam, straight-wing trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top panel, a bottom panel, and two side panels of webbing. The upper and lower edges of the side panels of

webbing are parallel over the entire length.

Four-seam, tapered-wing trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top panel, a bottom panel, and two side panels of webbing. The upper and lower edges of the side panels of webbing converge toward the rear of the trawl.

Gulf Area means all waters of the Gulf of Mexico west of 81° W. long. (the line at which the Gulf Area meets the Atlantic Area) and all waters shoreward thereof (including ports).

Gulf Shrimp Fishery-Sea Turtle Conservation Area (Gulf SFSTCA) means the offshore waters extending to 10 nautical miles (18.5 km) offshore along the coast of the States of Texas and Louisiana from the South Pass of the Mississippi River (west of 89°08.5' W. long.) to the U.S.-Mexican border.

Habitat restoration activity means an activity that has the sole objective of restoring natural aquatic or riparian habitat conditions or processes.

Headrope means a rope that is attached to the upper lip (top edge) of the mouth of a trawl net along the forward-most webbing.

Headrope length means the distance between the points at which the ends of the headrope are attached to the trawl net, measured along the forward-most webbing.

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 meaning of the tariff laws of the United States.

Inshore means marine and tidal waters landward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts, 1:80,000 scale) and as described in 33 CFR part 80.

Leatherback conservation zone means that portion of the Atlantic Area lying north of a line along 28°24.6' N. lat. (Cape Canaveral, FL).

Northeast Regional Administrator means the Regional Administrator for the Northeast Region of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or their authorized representative. Mail sent to the Northeast Regional Administrator should be addressed: Northeast Regional Administrator, F/NE, Northeast

Regional Office, National Marine Fisheries Service, NOAA, One Blackburn Drive, Gloucester, MA 01930-2298.

Northwest Regional Administrator means the Regional Administrator for the Northwest Region of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or their authorized representative. Mail sent to the Northwest Regional Administrator should be addressed: Northwest Regional Administrator, F/NW, Northwest Regional Office, National Marine Fisheries Service, NOAA, 7600 Sand Point Way NE, Seattle, WA 98115-0070.

Office of Enforcement means the national fisheries enforcement office of the National Marine Fisheries Service. Mail sent to the Office of Enforcement should be addressed: Office of Enforcement, F/EN, National Marine Fisheries Service, NOAA, 8484 Suite 415, Georgia Ave., Silver Spring, MD 20910.

Office of Protected Resources means the national program office of the endangered species and marine mammal programs of the National Marine Fisheries Service. Mail sent to the Office of Protected Resources should be addressed: Office of Protected Resources, F/PR, National Marine Fisheries Service, NOAA, 1315 East West Highway, Silver Spring, MD 20910.

Offshore means marine and tidal waters seaward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts, 1:80,000 scale) and as described in 33 CFR part 80.

Operating conservation program means those conservation management activities which are expressly agreed upon and described in a Conservation Plan or its Implementing Agreement. These activities are to be undertaken for the affected species when implementing an approved Conservation Plan, including measures to respond to changed circumstances.

Permit means any document so designated by the National Marine Fisheries Service and signed by an authorized official of the National Marine Fisheries Service, including any document which modifies, amends, extends, or renews any permit.

Person means an individual, corporation, partnership, trust, association, or any other private entity,

or any officer, employee, agent, department, or instrumentality of the Federal government of any state or political subdivision thereof or of any foreign government.

Possession means the detention and control, or the manual or ideal custody of anything that may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Possession includes the act or state of possessing and that condition of facts under which persons can exercise their power over a corporeal thing at their pleasure to the exclusion of all other persons. Possession includes constructive possession that which means not an actual but an assumed existence one claims to hold by virtue of some title, without having actual custody.

Pre-Act endangered species part means any sperm whale oil, including derivatives and products thereof, which was lawfully held within the United States on December 28, 1973, in the course of a commercial activity; or any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

Properly implemented conservation plan means any conservation plan, implementing agreement, or permit whose commitments and provisions have been or are being fully implemented by the permittee.

Pusher-head trawl (chopsticks) means a trawl that is spread by two poles suspended from the bow of the trawler in an inverted "V" configuration.

Resident species means, for purposes of entering into cooperative agreements with any state pursuant to section 6(c) of the Act, a species that exists in the wild in that state during any part of its life.

Right whale means, as used in part 224 of this chapter, any whale that is a member of the western North Atlantic population of the northern right whale species (*Eubalaena glacialis*).

Roller trawl means a variety of beam trawl that is used, usually by small vessels, for fishing over uneven or vegetated sea bottoms.

Scrimshaw product means any art form which involves the substantial etching or engraving of designs upon, or the substantial carving of figures, patterns, or designs from any bone or tooth of any marine mammal of the order Cetacea. For purposes of this part, polishing or the adding of minor superficial markings does not constitute

substantial etching, engraving, or carving.

Secretary means the Secretary of Commerce or an authorized representative.

Shrimp means any species of marine shrimp (Order Crustacea) found in the Atlantic Area or the Gulf Area, including, but not limited to:

- (1) Brown shrimp (*Penaeus aztecus*).
- (2) White shrimp (*Penaeus setiferus*).
- (3) Pink shrimp (*Penaeus duorarum*).
- (4) Rock shrimp (*Sicyonia*

brevirostris).

(5) Royal red shrimp (*Hymenopenaeus robustus*).

(6) Seabob shrimp (*Xiphopenaeus kroyeri*).

Shrimp trawler means any vessel that is equipped with one or more trawl nets and that is capable of, or used for, fishing for shrimp, or whose on-board or landed catch of shrimp is more than 1 percent, by weight, of all fish comprising its on-board or landed catch.

Skimmer trawl means a trawl that is fished along the side of the vessel and is held open by a rigid frame and a lead weight. On its outboard side, the trawl is held open by one side of the frame extending downward and, on its inboard side, by a lead weight attached by cable or rope to the bow of the vessel.

Southeast Regional Administrator means the Regional Administrator for the Southeast Region of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or their authorized representative. Mail sent to the Southeast Regional Administrator should be addressed: Southeast Regional Administrator, F/SE, Southeast Regional Office, National Marine Fisheries Service, NOAA, 9721 Executive Center Drive N., St. Petersburg, FL 33702-2432.

Southwest Regional Administrator means the Regional Administrator for the Southwest Region of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or their authorized representative. Mail sent to the Southwest Regional Administrator should be addressed: Southwest Regional Administrator, F/SW, Southwest Regional Office, National Marine Fisheries Service, NOAA, 501 West Ocean Blvd, Suite 4200, Long Beach, CA 90802-4213.

Stretched mesh size means the distance between the centers of the two opposite knots in the same mesh when pulled taut.

Summer flounder means the species *Paralichthys dentatus*.

Summer flounder fishery-sea turtle protection area means all offshore waters, bounded on the north by a line along 37°05' N. lat. (Cape Charles, VA) and bounded on the south by a line extending in a direction of 135°34'55" from true north from the North Carolina-South Carolina land boundary, as marked by the border station on Bird Island at 33°51'07.9" N. lat., 078°32'32.6" W. long. (the North Carolina-South Carolina border).

Summer flounder trawler means any vessel that is equipped with one or more bottom trawl nets and that is capable of, or used for, fishing for flounder or whose on-board or landed catch of flounder is more than 100 lb (45.4 kg).

Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.

Taper, in reference to the webbing used in trawls, means the angle of a cut used to shape the webbing, expressed as the ratio between the cuts that reduce the width of the webbing by cutting into the panel of webbing through one row of twine (bar cuts) and the cuts that extend the length of the panel of webbing by cutting straight aft through two adjoining rows of twine (point cuts). For example, sequentially cutting through the lengths of twine on opposite sides of a mesh, leaving an uncut edge of twines all lying in the same line, produces a relatively strong taper called "all-bars"; making a sequence of 4-bar cuts followed by 1-point cut produces a more gradual taper called "4 bars to 1 point" or "4b1p"; similarly, making a sequence of 2-bar cuts followed by 1-point cut produces a still more gradual taper called "2b1p"; and making a sequence of cuts straight aft does not reduce the width of the panel and is called a "straight" or "all-points" cut.

Taut means a condition in which there is no slack in the net webbing.

Test net, or *try net*, means a net pulled for brief periods of time just before, or during, deployment of the primary net(s) in order to test for shrimp concentrations or determine fishing conditions (e.g., presence or absence of bottom debris, jellyfish, bycatch, seagrasses, etc.).

Tongue means any piece of webbing along the top, center, leading edge of a trawl, whether lying behind or ahead of the headrope, to which a towing bridle can be attached for purposes of pulling the trawl net and/or adjusting the shape of the trawl.

Transportation means to ship, convey, carry or transport by any means whatever, and deliver or receive for

such shipment, conveyance, carriage, or transportation.

Triple-wing trawl means a trawl with a tongue on the top, center, leading edge of the trawl and an additional tongue along the bottom, center, leading edge of the trawl.

Two-seam trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top and a bottom panel of webbing that are directly attached to each other down the sides of the trawl.

Underway with respect to a vessel, means that the vessel is not at anchor, or made fast to the shore, or aground.

Unforeseen circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and NMFS at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse change in the status of the covered species.

Vessel means a vehicle used, or capable of being used, as a means of transportation on water which includes every description of watercraft, including nondisplacement craft and seaplanes.

Vessel restricted in her ability to maneuver has the meaning specified for this term at 33 U.S.C. 2003(g).

Wildlife means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

Wing net (butterfly trawl) means a trawl that is fished along the side of the vessel and that is held open by a four-sided, rigid frame attached to the outrigger of the vessel.

§ 222.103 Federal/state cooperation in the conservation of endangered and threatened species.

(a) *Application for and renewal of cooperative agreements.* (1) The Assistant Administrator may enter into a Cooperative Agreement with any state that establishes and maintains an active and adequate program for the conservation of resident species listed as endangered or threatened. In order for a state program to be deemed an adequate and active program, the Assistant Administrator must find, and annually reconfirm that the criteria of either sections 6(c)(1) (A) through (E) or

sections 6(c)(1) (i) and (ii) of the Act have been satisfied.

(2) Following receipt of an application by a state for a Cooperative Agreement with a copy of a proposed state program, and a determination by the Assistant Administrator that the state program is adequate and active, the Assistant Administrator shall enter into an Agreement with the state.

(3) The Cooperative Agreement, as well as the Assistant Administrator's finding upon which it is based, must be reconfirmed annually to ensure that it reflects new laws, species lists, rules or regulations, and programs and to demonstrate that it is still adequate and active.

(b) *Allocation and availability of funds.* (1) The Assistant Administrator shall allocate funds, appropriated for the purpose of carrying out section 6 of the Act, to various states using the following as the basis for the determination:

(i) The international commitments of the United States to protect endangered or threatened species;

(ii) The readiness of a state to proceed with a conservation program consistent with the objectives and purposes of the Act;

(iii) The number of federally listed endangered and threatened species within a state;

(iv) The potential for restoring endangered and threatened species within a state; and

(v) The relative urgency to initiate a program to restore and protect an endangered or threatened species in terms of survival of the species.

(2) Funds allocated to a state are available for obligation during the fiscal year for which they are allocated and until the close of the succeeding fiscal year. Obligation of allocated funds occurs when an award or contract is signed by the Assistant Administrator.

(c) *Financial assistance and payments.* (1) A state must enter into a Cooperative Agreement before financial assistance is approved by the Assistant Administrator for endangered or threatened species projects. Specifically, the Agreement must contain the actions that are to be taken by the Assistant Administrator and/or by the state, the benefits to listed species expected to be derived from these actions, and the estimated cost of these actions.

(2) Subsequent to such Agreement, the Assistant Administrator may further agree with a state to provide financial assistance in the development and implementation of acceptable projects for the conservation of endangered and threatened species. Documents to provide financial assistance will consist

of an application for Federal assistance and an award or a contract. The availability of Federal funds shall be contingent upon the continued existence of the Cooperative Agreement and compliance with all applicable Federal regulations for grant administration and cost accounting principles.

(3)(i) The payment of the Federal share of costs incurred when conducting activities included under a contract or award shall not exceed 75 percent of the program costs as stated in the agreement. However, the Federal share may be increased to 90 percent when two or more states having a common interest in one or more endangered or threatened resident species, the conservation of which may be enhanced by cooperation of such states, jointly enter into an agreement with the Assistant Administrator.

(ii) The state share of program costs may be in the form of cash or in-kind contributions, including real property, subject to applicable Federal regulations.

(4) Payments of funds, including payment of such preliminary costs and expenses as may be incurred in connection with projects, shall not be made unless all necessary or required documents are first submitted to and approved by the Assistant Administrator. Payments shall only be made for expenditures reported and certified by the state agency. Payments shall be made only to the state office or official designated by the state agency and authorized under the laws of the state to receive public funds for the state.

Subpart B—Certificates of Exemption for Pre-Act Endangered Species Parts

§ 222.201 General requirements.

(a) The Assistant Administrator may exempt any pre-Act endangered species part from the prohibitions of sections 9(a)(1)(A), 9(a)(1)(E), or 9(a)(1)(F) of the Act.

(1) No person shall engage in any activities identified in such sections of the Act that involve any pre-Act endangered species part without a valid Certificate of Exemption issued pursuant to this subpart B.

(2) No person may export, deliver, receive, carry, transport or ship in interstate or foreign commerce in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any pre-Act finished scrimshaw product unless that person has been issued a valid Certificate of Exemption and the product or the raw material for such product was held by

such certificate holder on October 13, 1982.

(3) Any person engaged in activities otherwise prohibited under the Act or regulations shall bear the burden of proving that the exemption or certificate is applicable, was granted, and was valid and in force at the time of the otherwise prohibited activity.

(b) Certificates of Exemption issued under this subpart are no longer available to new applicants. However, the Assistant Administrator may renew or modify existing Certificates of Exemptions as authorized by the provisions set forth in this subpart.

(c) Any person granted a Certificate of Exemption, including a renewal, under this subpart, upon a sale of any exempted pre-Act endangered species part, must provide the purchaser in writing with a description (including full identification number) of the part sold and must inform the purchaser in writing of the purchaser's obligation under paragraph (b) of this section, including the address given in the certificate to which the purchaser's report is to be sent.

(d) Any purchaser of pre-Act endangered species parts included in a valid Certificate of Exemption, unless an ultimate user, within 30 days after the receipt of such parts, must submit a written report to the address given in the certificate. The report must specify the quantity of such parts or products received, the name and address of the seller, a copy of the invoice or other document showing the serial numbers, weight, and descriptions of the parts or products received, the date on which such parts or products were received, and the intended use of such parts by the purchaser. The term "ultimate user", for purposes of this paragraph, means any person who acquired such endangered species part or product for his or her own consumption or for other personal use (including gifts) and not for resale.

§ 222.202 Certificate renewal.

(a) Any person to whom a Certificate of Exemption has been issued by the National Marine Fisheries Service may apply to the Assistant Administrator for renewal of such certificate. Any person holding a valid Certificate of Exemption which was renewed after October 13, 1982, and was in effect on March 31, 1988, may apply to the Secretary for one renewal for a period not to exceed 5 years.

(b) The sufficiency of the application shall be determined by the Assistant Administrator in accordance with the requirements of paragraph (c) of this section. At least 15 days should be

allowed for processing. When an application for a renewal has been received and deemed sufficient, the Assistant Administrator shall issue a Certificate of Renewal to the applicant as soon as practicable.

(c) The following information will be used as the basis for determining whether an application for renewal of a Certificate of Exemption is complete:

(1) Title: Application for Renewal of Certificate of Exemption.

(2) The date of application.

(3) The identity of the applicant, including complete name, original Certificate of Exemption number, current address, and telephone number. If the applicant is a corporation, partnership, or association, set forth the details.

(4) The period of time for which a renewal of the Certificate of Exemption is requested. However, no renewal of Certificate of Exemption, or right claimed thereunder, shall be effective after the close of the 5-year period beginning on the date of the expiration of the previous renewal of the certificate of exemption.

(5)(i) A complete and detailed updated inventory of all pre-Act endangered species parts for which the applicant seeks exemption. Each item on the inventory must be identified by the following information: A unique serial number; the weight of the item to the nearest whole gram; and a detailed description sufficient to permit ready identification of the item. Small lots, not exceeding five pounds (2,270 grams), of scraps or raw material, which may include or consist of one or more whole raw whale teeth, may be identified by a single serial number and total weight. All finished scrimshaw items subsequently made from a given lot of scrap may be identified by the lot serial number plus additional digits to signify the piece number of the individual finished item. Identification numbers will be in the following format: 00-000000-0000. The first two digits will be the last two digits of the appropriate certificate of exemption number; the next six digits, the serial number of the individual piece or lot of scrap or raw material; and the last four digits, where applicable, the piece number of an item made from a lot of scrap or raw material. The serial numbers for each certificate holder's inventory must begin with 000001, and piece numbers, where applicable, must begin with 0001 for each separate lot.

(ii) Identification numbers may be affixed to inventory items by any means, including, but not limited to, etching the number into the item, attaching a label or tag bearing the number to the

item, or sealing the item in a plastic bag, wrapper or other container bearing the number. The number must remain affixed to the item until the item is sold to an ultimate user, as defined in § 222.201(d).

(iii) No renewals will be issued for scrimshaw products in excess of any quantities declared in the original application for a Certificate of Exemption.

(6) A Certification in the following language: I hereby certify that the foregoing information is complete, true, and correct to the best of my knowledge and belief. I understand that this information is submitted for the purpose of obtaining a renewal of my Certificate of Exemption under the Endangered Species Act, as amended, and the Department of Commerce regulations issued thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001, or to the penalties under the Act.

(7) Signature of the applicant.

(d) Upon receipt of an incomplete or improperly executed application for renewal, the applicant shall be notified of the deficiency in the application for renewal. If the application for renewal is not corrected and received by the Assistant Administrator within 30 days following the date of receipt of notification, the application for renewal shall be considered abandoned.

§ 222.203 Modification, amendment, suspension, and revocation of certificates.

(a) When circumstances have changed so that an applicant or certificate holder desires to have any material, term, or condition of the application or certificate modified, the applicant or certificate holder must submit in writing full justification and supporting information in conformance with the provisions of this part.

(b) All certificates are issued subject to the condition that the Assistant Administrator reserves the right to amend the provisions of a Certificate of Exemption for just cause at any time. Such amendments take effect on the date of notification, unless otherwise specified.

(c) Any violation of the applicable provisions of parts 222, 223, or 224 of this chapter, or of the Act, or of a condition of the certificate may subject the certificate holder to penalties provided in the Act and to suspension, revocation, or modification of the Certificate of Exemption, as provided in subpart D of 15 CFR part 904.

§ 222.204 Administration of certificates.

(a) The Certificate of Exemption covers the business or activity specified

in the Certificate of Exemption at the address described therein. No Certificate of Exemption is required to cover a separate warehouse facility used by the certificate holder solely for storage of pre-Act endangered species parts, if the records required by this subpart are maintained at the address specified in the Certificate of Exemption served by the warehouse or storage facility.

(b) Certificates of Exemption issued under this subpart are not transferable. However, in the event of the lease, sale, or other transfer of the operations or activity authorized by the Certificate of Exemption, the successor is not required to obtain a new Certificate of Exemption prior to commencing such operations or activity. In such case, the successor will be treated as a purchaser and must comply with the record and reporting requirements set forth in § 222.201(d).

(c) The Certificate of Exemption holder must notify the Assistant Administrator, in writing, of any change in address, in trade name of the business, or in activity specified in the certificate. The Assistant Administrator must be notified within 10 days of a change of address, and within 30 days of a change in trade name. The certificate with the change of address or in trade name must be endorsed by the Assistant Administrator, who shall provide an amended certificate to the person to whom it was issued. A certificate holder who seeks amendment of a certificate may continue all authorized activities while awaiting action by the Assistant Administrator.

(d) A Certificate of Exemption issued under this subpart confers no right or privilege to conduct a business or an activity contrary to state or other law. Similarly, compliance with the provisions of any state or other law affords no immunity under any Federal laws or regulations of any other Federal agency.

(e) Any person authorized to enforce the Act may enter the premises of any Certificate of Exemption holder or of any purchaser during business hours, including places of storage, for the purpose of inspecting or of examining any records or documents and any endangered species parts.

(f) The records pertaining to pre-Act endangered species parts prescribed by this subpart shall be in permanent form and shall be retained at the address shown on the Certificate of Exemption or at the principal address of a purchaser in the manner prescribed by this subpart.

(g)(1) Holders of Certificates of Exemption must maintain records of all pre-Act endangered species parts they receive, sell, transfer, distribute or

dispose of otherwise. Purchasers of pre-Act endangered species parts, unless ultimate users, as defined in § 222.201(d), must similarly maintain records of all such parts or products they receive.

(2) Such records referred to in paragraph (g)(1) of this section may consist of invoices or other commercial records, which must be filed in an orderly manner separate from other commercial records maintained and be readily available for inspection. Such records must show the name and address of the purchaser, seller, or other transferor; show the type, quantity, and identity of the part or product; show the date of such sale or transfer; and be retained, in accordance with the requirements of this subpart, for a period of not less than 3 years following the date of sale or transfer. Each pre-Act endangered species part will be identified by its number on the updated inventory required to renew a Certificate of Exemption.

(i) Each Certificate of Exemption holder must submit a quarterly report (to the address given in the certificate) containing all record information required by paragraph (g)(2) of this section, on all transfers of pre-Act endangered species parts made in the previous calendar quarter, or such other record information the Assistant Administrator may specify from time to time.

(ii) Quarterly reports are due on January 15, April 15, July 15, and October 15.

(3) The Assistant Administrator may authorize the record information to be submitted in a manner other than that prescribed in paragraph (g)(2) of this section when the record holder demonstrates that an alternate method of reporting is reasonably necessary and will not hinder the effective administration or enforcement of this subpart.

§ 222.205 Import and export requirements.

(a) Any fish and wildlife subject to the jurisdiction of the National Marine Fisheries Service and is intended for importation into or exportation from the United States, shall not be imported or exported except at a port(s) designated by the Secretary of the Interior. Shellfish and fishery products that are neither endangered nor threatened species and that are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes are excluded from this requirement. The Secretary of the Interior may permit the importation or exportation at nondesignated ports in

the interest of the health or safety of the species for other reasons if the Secretary deems it appropriate and consistent with the purpose of facilitating enforcement of the Act and reducing the costs thereof. Importers and exporters are advised to see 50 CFR part 14 for importation and exportation requirements and information.

(b) No pre-Act endangered species part shall be imported into the United States. A Certificate of Exemption issued in accordance with the provisions of this subpart confers no right or privilege to import into the United States any such part.

(c)(1) Any person exporting from the United States any pre-Act endangered species part must possess a valid Certificate of Exemption issued in accordance with the provisions of this subpart. In addition, the exporter must provide to the Assistant Administrator, in writing, not less than 10 days prior to shipment, the following information: The name and address of the foreign consignee, the intended port of exportation, and a complete description of the parts to be exported. No shipment may be made until these requirements are met by the exporter.

(2) The exporter must send a copy of the Certificate of Exemption, and any endorsements thereto, to the District Director of Customs at the port of exportation, which must precede or accompany the shipment in order to permit the appropriate inspection prior to lading. Upon receipt, the District Director may order such inspection, as deemed necessary; the District will clear the merchandise for export, prior to the lading of the merchandise. If they are satisfied that the shipment is proper and complies with the information contained in the certificate and any endorsement thereto. The certificate, and any endorsements, will be forwarded to the Chief of the Office of Enforcement for NMFS.

(3) No pre-Act endangered species part in compliance with the requirements of this subpart may be exported except at a port or ports designated by the Secretary of the Interior, pursuant to § 222.103.

(4) Notwithstanding any provision of this subpart, it shall not be required that the Assistant Administrator authorizes the transportation in interstate or foreign commerce of pre-Act endangered species parts.

Subpart C—General Permit Procedures

§ 222.301 General requirements.

(a)(1) The regulations in this subpart C provide uniform rules and procedures for application, issuance, renewal,

conditions, and general administration of permits issuable pursuant to parts 222, 223, and 224 of this chapter. While this section provides generic rules and procedures applicable to all permits, other sections may provide more specific rules and procedures with respect to certain types of permits. In such cases, the requirements in all applicable sections must be satisfied.

(2) Notwithstanding paragraph (a)(1) of this section, the Assistant Administrator may approve variations from the requirements of parts 222, 223, and 224 of this chapter when the Assistant Administrator finds that an emergency exists and that the proposed variations will not hinder effective administration of those parts and will not be unlawful. Other sections within parts 222, 223, and 224 of this chapter may allow for a waiver or variation of specific requirements for emergency situations, upon certain conditions. In such cases, those conditions must be satisfied in order for the waiver or variation to be lawful.

(b) No person shall take, import, export or engage in any other prohibited activity involving any species of fish or wildlife under the jurisdiction of the Secretary of Commerce that has been determined to be endangered under the Act, or that has been determined to be threatened and for which the prohibitions of section 9(a)(1) of the Act have been applied by regulation, without a valid permit issued pursuant to these regulations. The permit shall entitle the person to whom it is issued to engage in the activity specified in the permit, subject to the limitations of the Act and the regulations in parts 222, 223, and 224 of this chapter, for the period stated on the permit, unless sooner modified, suspended or revoked.

(c) Each person intending to engage in an activity for which a permit is required by parts 222, 223, and 224 of this chapter or by the Act shall, before commencing such activity, obtain a valid permit authorizing such activity. Any person who desires to obtain permit privileges authorized by parts 222, 223, and 224 of this chapter must apply for such permit in accordance with the requirements of these sections. If the information required for each specific, permitted activity is included, one application may be accepted for all permits required, and a single permit may be issued.

(d)(1) Any permit issued under these regulations must be in the possession of the person to whom it is issued (or of an agent of such person) while any animal subject to the permit is in the possession of such person or agent. Specifically, a person or his/her agent

must be in possession of a permit during the time of the authorized taking, importation, exportation, or of any other act and during the period of any transit incident to such taking, importation, exportation, or to any other act.

(2) A duplicate copy of the issued permit must be physically attached to the tank, container, package, enclosure, or other means of containment, in which the animal is placed for purposes of storage, transit, supervision, or care.

(e) The authorizations on the face of a permit setting forth specific times, dates, places, methods of taking, numbers and kinds of fish or wildlife, location of activity, authorize certain circumscribed transactions, or otherwise permit a specifically limited matter, are to be strictly construed and shall not be interpreted to permit similar or related matters outside the scope of strict construction.

(f) Permits shall not be altered, erased, or mutilated, and any permit which has been altered, erased, or mutilated shall immediately become invalid.

(g) Any permit issued under parts 222, 223, and 224 of this chapter shall be displayed for inspection, upon request, to an authorized officer, or to any other person relying upon its existence.

(h) Permittees may be required to file reports of the activities conducted under the permit. Any such reports shall be filed not later than March 31 for the preceding calendar year ending December 31, or any portion thereof, during which a permit was in force, unless the regulations of parts 222, 223, or 224 of this chapter or the provisions of the permit set forth other reporting requirements.

(i) From the date of issuance of the permit, the permittee shall maintain complete and accurate records of any taking, possession, transportation, sale, purchase, barter, exportation, or importation of fish or wildlife pursuant to such permit. Such records shall be kept current and shall include the names and addresses of persons with whom any fish or wildlife has been purchased, sold, bartered, or otherwise transferred, and the date of such transaction, and such other information as may be required or appropriate. Such records, unless otherwise specified, shall be entered in books, legibly written in the English language. Such records shall be retained for 5 years from the date of issuance of the permit.

(j) Any person holding a permit pursuant to parts 222, 223, and 224 of this chapter shall allow the Assistant Administrator to enter the permit holder's premises at any reasonable hour to inspect any fish or wildlife held

or to inspect, audit, or copy any permits, books, or records required to be kept by these regulations or by the Act. Such person shall display any permit issued pursuant to these regulations or to the Act upon request by an authorized officer or by any other person relying on its existence.

§ 222.302 Procedure for obtaining permits.

(a) Applications must be submitted to the Assistant Administrator, by letter containing all necessary information, attachments, certification, and signature, as specified by the regulations in parts 222, 223, and 224 of this chapter, or by the Act. In no case, other than for emergencies pursuant to § 222.301(a)(2), will applications be accepted either orally or by telephone.

(b) Applications must be received by the Assistant Administrator at least 90 calendar days prior to the date on which the applicant desires to have the permit made effective, unless otherwise specified in the regulations or guidelines pertaining to a particular permit. The National Marine Fisheries Service will attempt to process applications deemed sufficient in the shortest possible time, but does not guarantee that the permit will be issued 90 days after notice of receipt of the application is published in the **Federal Register**.

(c)(1) Upon receipt of an insufficiently or improperly executed application, the applicant shall be notified of the deficiency in the application. If the applicant fails to supply the deficient information or otherwise fails to correct the deficiency within 60 days following the date of notification, the application shall be considered abandoned.

(2) The sufficiency of the application shall be determined by the Assistant Administrator in accordance with the requirements of this part. The Assistant Administrator, however, may waive any requirement for information or require any elaboration or further information deemed necessary.

§ 222.303 Issuance of permits.

(a)(1) No permit may be issued prior to the receipt of a written application unless an emergency pursuant to § 222.301(a)(2) exists, and a written variation from the requirements is recorded by the National Marine Fisheries Service.

(2) No representation of an employee or agent of the United States shall be construed as a permit unless it meets the requirements of a permit defined in § 222.102.

(3) Each permit shall bear a serial number. Upon renewal, such a number may be reassigned to the permittee to

whom issued so long as the permittee maintains continuity of renewal.

(b) When an application for a permit received by the Assistant Administrator is deemed sufficient, the Assistant Administrator shall, as soon as practicable, publish a notice in the **Federal Register**. Information received by the Assistant Administrator as a part of the application shall be available to the public as a matter of public record at every stage of the proceeding. An interested party, within 30 days after the date of publication of such notice, may submit to the Assistant Administrator written data, views, or arguments with respect to the taking, importation, or to other action proposed in the application, and may request a hearing in connection with the action to be taken thereon.

(c) If a request for a hearing is made within the 30-day period referred to in paragraph (b) of this section, or if the Assistant Administrator determines that a hearing would otherwise be advisable, the Assistant Administrator may, within 60 days after the date of publication of the notice referred to in paragraph (b) of this section, afford to such requesting party or parties an opportunity for a hearing. Such hearing shall also be open to participation by any interested members of the public. Notice of the date, time, and place of such hearing shall be published in the **Federal Register** not less than 15 days in advance of such hearing. Any interested person may appear at the hearing in person or through a representative and may submit any relevant material, data, views, comments, arguments, or exhibits. A summary record of the hearing shall be kept.

(d) Except as provided in subpart D to 15 CFR part 904, as soon as practicable but not later than 30 days after the close of the hearing. If no hearing is held, as soon as practicable but not later than 30 days from the publication of the notice in the **Federal Register**, the Assistant Administrator shall issue or deny issuance of the permit. Notice of the decision of the Assistant Administrator shall be published in the **Federal Register** within 10 days after the date of the issuance or denial and indicate where copies of the permit, if issued, may be obtained.

(e)(1) The Assistant Administrator shall issue the permit unless:

(i) Denial of the permit has been made pursuant to subpart D to 15 CFR part 904;

(ii) The applicant has failed to disclose material or information required, or has made false statements as to any material fact, in connection with the application;

(iii) The applicant has failed to demonstrate a valid justification for the permit or a showing of responsibility;

(iv) The authorization requested potentially threatens a fish or wildlife population; or

(v) The Assistant Administrator finds through further inquiry or investigation, or otherwise, that the applicant is not qualified.

(2) The applicant shall be notified in writing of the denial of any permit request, and the reasons thereof. If authorized in the notice of denial, the applicant may submit further information or reasons why the permit should not be denied. Such further information shall not be considered a new application. The final action by the Assistant Administrator shall be considered the final administrative decision of the Department of Commerce.

(f) If a permit is issued under § 222.308, the Assistant Administrator shall publish notice thereof in the **Federal Register**, including the Assistant Administrator's finding that such permit—

(1) Was applied for in good faith;

(2) Will not operate to the disadvantage of such endangered species; and

(3) Will be consistent with the purposes and policy set forth in section 2 of the Act.

(g) The Assistant Administrator may waive the 30-day period in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant. Notice of any such waiver shall be published by the Assistant Administrator in the **Federal Register** within 10 days following the issuance of the permit.

§ 222.304 Renewal of permits.

When the permit is renewable and a permittee intends to continue the activity described in the permit during any portion of the year ensuing its expiration, the permittee shall, unless otherwise notified in writing by the Assistant Administrator, file a request for permit renewal, together with a certified statement, verifying that the information in the original application is still currently correct. If the information is incorrect the permittee shall file a statement of all changes in the original application, accompanied by any required fee at least 30 days prior to the expiration of the permit. Any person holding a valid renewable permit, who has complied with the foregoing provision of this section, may continue such activities as were

authorized by the expired permit until the renewal application is acted upon.

§ 222.305 Rights of succession and transfer of permits.

(a)(1) Permits issued pursuant to parts 222, 223, and 224 of this chapter are not transferable or assignable. In the event that a permit authorizes certain activities in connection with a business or commercial enterprise, which is then subject to any subsequent lease, sale or transfer, the successor to that enterprise must obtain a permit prior to continuing the permitted activity, with the exceptions provided in paragraph (a)(2) of this section.

(2) Certain persons, other than the permittee, are granted the right to carry on a permitted activity for the remainder of the term of a current permit, provided that they furnish the permit to the issuing officer for endorsement within 90 days from the date the successor begins to carry on the activity. Such persons are the following:

(i) The surviving spouse, child, executor, administrator, or other legal representative of a deceased permittee, and

(ii) The receiver or trustee in bankruptcy or a court designated assignee for the benefit of creditors.

(b) Except as otherwise stated on the face of the permit, any person who is under the direct control of the permittee, or who is employed by or under contract to the permittee for purposes authorized by the permit, may carry out the activity authorized by the permit.

§ 222.306 Modification, amendment, suspension, cancellation, and revocation of permits.

(a) When circumstances have changed so that an applicant or a permittee desires to have any term or condition of the application or permit modified, the applicant or permittee must submit in writing full justification and supporting information in conformance with the provisions of this part and the part under which the permit has been issued or requested. Such applications for modification are subject to the same issuance criteria as original applications.

(b) Notwithstanding the requirements of paragraph (a) of this section, a permittee may change the mailing address or trade name under which business is conducted without obtaining a new permit or being subject to the same issuance criteria as original permits. The permittee must notify the Assistant Administrator, in writing within 30 days, of any change in address or of any change in the trade

name for the business or activity specified in the permit. The permit with the change of address or in trade name must be endorsed by the Assistant Administrator, who shall provide an amended permit to the person to whom it was issued.

(c) All permits are issued subject to the condition that the National Marine Fisheries Service reserves the right to amend the provisions of a permit for just cause at any time during its term. Such amendments take effect on the date of notification, unless otherwise specified.

(d) When any permittee discontinues the permitted activity, the permittee shall, within 30 days thereof, mail the permit and a request for cancellation to the issuing officer, and the permit shall be deemed void upon receipt. No refund of any part of an amount paid as a permit fee shall be made when the operations of the permittee are, for any reason, discontinued during the tenure of an issued permit.

(e) Any violation of the applicable provisions of parts 222, 223, or 224 of this chapter, or of the Act, or of a term or condition of the permit may subject the permittee to both the penalties provided in the Act and suspension, revocation, or amendment of the permit, as provided in subpart D to 15 CFR part 904.

§ 222.307 Permits for incidental taking of species.

(a) *Scope.* (1) The Assistant Administrator may issue permits to take endangered and threatened species incidentally to an otherwise lawful activity under section 10(a)(1)(B) of the Act. The regulations in this section apply to all endangered species, and those threatened species for which the prohibitions of section 9(a)(1) of the Act, under the jurisdiction of the Secretary of Commerce, apply.

(2) If the applicant represents an individual or a single entity, such as a corporation, the Assistant Administrator will issue an individual incidental take permit. If the applicant represents a group or organization whose members conduct the same or a similar activity in the same geographical area with similar impacts on listed species for which a permit is required, the Assistant Administrator will issue a general incidental take permit. To be covered by a general incidental take permit, each individual conducting the activity must have a certificate of inclusion issued under paragraph (f) of this section.

(b) *Permit application procedures.* Applications should be sent to the Assistant Administrator. The Assistant Administrator shall determine the

sufficiency of the application in accordance with the requirements of this section. At least 120 days should be allowed for processing. Each application must be signed and dated and must include the following:

- (1) The type of application, either:
 - (i) Application for an Individual Incidental Take Permit under the Act; or
 - (ii) Application for a General Incidental Take Permit under the Act;
- (2) The name, address, and telephone number of the applicant. If the applicant is a partnership or a corporate entity or is representing a group or an organization, the applicable details;
- (3) The species or stocks, by common and scientific name, and a description of the status, distribution, seasonal distribution, habitat needs, feeding habits and other biological requirements of the affected species or stocks;
- (4) A detailed description of the proposed activity, including the anticipated dates, duration, and specific location. If the request is for a general incidental take permit, an estimate of the total level of activity expected to be conducted;
- (5) A conservation plan, based on the best scientific and commercial data available, which specifies the following:
 - (i) The anticipated impact (i.e., amount, extent, and type of anticipated taking) of the proposed activity on the species or stocks;
 - (ii) The anticipated impact of the proposed activity on the habitat of the species or stocks and the likelihood of restoration of the affected habitat;
 - (iii) The steps (specialized equipment, methods of conducting activities, or other means) that will be taken to monitor, minimize, and mitigate such impacts, and the funding available to implement such measures;
 - (iv) The alternative actions to such taking that were considered and the reasons why those alternatives are not being used; and
 - (v) A list of all sources of data used in preparation of the plan, including reference reports, environmental assessments and impact statements, and personal communications with recognized experts on the species or activity who may have access to data not published in current literature.
- (c) Issuance criteria. (1) In determining whether to issue a permit, the Assistant Administrator will consider the following:
 - (i) The status of the affected species or stocks;
 - (ii) The potential severity of direct, indirect, and cumulative impacts on the species or stocks and habitat as a result of the proposed activity;
 - (iii) The availability of effective monitoring techniques;

(iv) The use of the best available technology for minimizing or mitigating impacts; and

(v) The views of the public, scientists, and other interested parties knowledgeable of the species or stocks or other matters related to the application.

(2) To issue the permit, the Assistant Administrator must find that—

- (i) The taking will be incidental;
- (ii) The applicant will, to the maximum extent practicable, monitor, minimize, and mitigate the impacts of such taking;
- (iii) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;
- (iv) The applicant has amended the conservation plan to include any measures (not originally proposed by the applicant) that the Assistant Administrator determines are necessary or appropriate; and
- (v) There are adequate assurances that the conservation plan will be funded and implemented, including any measures required by the Assistant Administrator.

(d) *Permit conditions.* In addition to the general conditions set forth in this part, every permit issued under this section will contain such terms and conditions as the Assistant Administrator deems necessary and appropriate, including, but not limited to the following:

- (1) Reporting requirements or rights of inspection for determining whether the terms and conditions are being complied with;
- (2) The species and number of animals covered;
- (3) The authorized method of taking;
- (4) The procedures to be used to handle or dispose of any animals taken; and
- (5) The payment of an adequate fee to the National Marine Fisheries Service to process the application.

(e) *Duration of permits.* The duration of permits issued under this section will be such as to provide adequate assurances to the permit holder to commit funding necessary for the activities authorized by the permit, including conservation activities. In determining the duration of a permit, the Assistant Administrator will consider the duration of the proposed activities, as well as the possible positive and negative effects on listed species associated with issuing a permit of the proposed duration, including the extent to which the conservation plan is likely to enhance the habitat of the endangered species or to increase the long-term survivability of the species.

(f) *Certificates of inclusion.* (1) Any individual who wishes to conduct an activity covered by a general incidental take permit must apply to the Assistant Administrator for a Certificate of Inclusion. Each application must be signed and dated and must include the following:

- (i) The general incidental take permit under which the applicant wants coverage;
 - (ii) The name, address, and telephone number of the applicant. If the applicant is a partnership or a corporate entity, the applicable details;
 - (iii) A description of the activity the applicant seeks to have covered under the general incidental take permit, including the anticipated dates, duration, and specific location; and
 - (iv) A signed certification that the applicant has read and understands the general incidental take permit and the conservation plan, will comply with their terms and conditions, and will fund and implement applicable measures of the conservation plan.
- (2) To issue a Certificate of Inclusion, the Assistant Administrator must find that:

- (i) The applicant will be engaged in the activity covered by the general permit, and
- (ii) The applicant has made adequate assurances that the applicable measures of the conservation plan will be funded and implemented.

(g) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (g) apply only to incidental take permits issued in accordance with paragraph (c) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to March 25, 1998. The assurances provided in incidental take permits issued prior to March 25, 1998, remain in effect, and those permits will not be revised as a result of this rulemaking.

(1) *Changed circumstances provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(2) *Changed circumstances not provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such

measures were not provided for in the plan's operating conservation program, NMFS will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(3) *Unforeseen circumstances.* (i) In negotiating unforeseen circumstances, NMFS will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(ii) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, NMFS may require additional measures of the permittee where the conservation plan is being properly implemented. However, such additional measures are limited to modifications within any conserved habitat areas or to the conservation plan's operating conservation program for the affected species. The original terms of the conservation plan will be maintained to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

(iii) NMFS has the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. NMFS will consider, but not be limited to, the following factors:

(A) Size of the current range of the affected species;

(B) Percentage of range adversely affected by the conservation plan;

(C) Percentage of range conserved by the conservation plan;

(D) Ecological significance of that portion of the range affected by the conservation plan;

(E) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and

(F) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of

survival and recovery of the affected species in the wild.

(h) Nothing in this rule will be construed to limit or constrain the Assistant Administrator, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at his or her own expense to protect or conserve a species included in a conservation plan.

§ 222.308 Permits for scientific purposes or for the enhancement of propagation or survival of species.

(a) *Scope.* The Assistant Administrator may issue permits for scientific purposes or for the enhancement of the propagation or survival of the affected endangered or threatened species in accordance with the regulations in parts 222, 223, and 224 of this chapter and under such terms and conditions as the Assistant Administrator may prescribe, authorizing the taking, importation, or other acts otherwise prohibited by section 9 of the Act. Within the jurisdiction of a State, more restrictive state laws or regulations in regard to endangered species shall prevail in regard to taking. Proof of compliance with applicable state laws will be required before a permit will be issued.

(b) *Application procedures.* Any person desiring to obtain such a permit may make application therefor to the Assistant Administrator. Permits for marine mammals shall be issued in accordance with the provisions of part 216, subpart D of this chapter. Permits relating to sea turtles may involve the Fish and Wildlife Service, in which case the applicant shall follow the procedures set out in § 222.309. The following information will be used as the basis for determining whether an application is complete and whether a permit for scientific purposes or for enhancement of propagation or survival of the affected species should be issued by the Assistant Administrator. An application for a permit shall provide the following information and such other information that the Assistant Administrator may require:

(1) Title, as applicable, either—
(i) Application for permit for scientific purposes under the Act; or

(ii) Application for permit for the enhancement of the propagation or survival of the endangered species Under the Act.

(2) The date of the application.

(3) The identity of the applicant including complete name, address, and telephone number. If the applicant is a partnership or a corporate entity, set forth the details. If the endangered species is to be utilized by a person

other than the applicant, set forth the name of that person and such other information as would be required if such person were an applicant.

(4) A description of the purpose of the proposed acts, including the following:

(i) A detailed justification of the need for the endangered species, including a discussion of possible alternatives, whether or not under the control of the applicant; and

(ii) A detailed description of how the species will be used.

(5) A detailed description of the project or program, in which the endangered species is to be used, including the following:

(i) The period of time over which the project or program will be conducted;

(ii) A list of the names and addresses of the sponsors or cooperating institutions and the scientists involved;

(iii) A copy of the formal research proposal or contract if one has been prepared;

(iv) A statement of whether the proposed project or program has broader significance than the individual researcher's goals. For example, does the proposed project or program respond directly or indirectly to recommendation of any national or international scientific body charged with research or management of the endangered species? If so, how?; and

(v) A description of the arrangements, if any, for the disposition of any dead specimen or its skeleton or other remains in a museum or other institutional collection for the continued benefit to science.

(6) A description of the endangered species which is the subject of the application, including the following:

(i) A list of each species and the number of each, including the common and scientific name, the subspecies (if applicable), population group, and range;

(ii) A physical description of each animal, including the age, size, and sex;

(iii) A list of the probable dates of capture or other taking, importation, exportation, and other acts which require a permit for each animal and the location of capture or other taking, importation, exportation, and other acts which require a permit, as specifically as possible;

(iv) A description of the status of the stock of each species related insofar as possible to the location or area of taking;

(v) A description of the manner of taking for each animal, including the gear to be used;

(vi) The name and qualifications of the persons or entity which will capture or otherwise take the animals; and

(vii) If the capture or other taking is to be done by a contractor, a statement

as to whether a qualified member of your staff (include name(s) and qualifications) will supervise or observe the capture or other taking.

Accompanying such statement shall be a copy of the proposed contract or a letter from the contractor indicating agreement to capture or otherwise take the animals, should a permit be granted.

(7) A description of the manner of transportation for any live animal taken, imported, exported, or shipped in interstate commerce, including the following:

- (i) Mode of transportation;
- (ii) Name of transportation company;
- (iii) Length of time in transit for the transfer of the animal(s) from the capture site to the holding facility;
- (iv) Length of time in transit for any planned future move or transfer of the animals;
- (v) The qualifications of the common carrier or agent used for transportation of the animals;
- (vi) A description of the pen, tank, container, cage, cradle, or other devices used to hold the animal at both the capture site and during transportation;
- (vii) Special care before and during transportation, such as salves, antibiotics, moisture; and
- (viii) A statement as to whether the animals will be accompanied by a veterinarian or by another similarly qualified person, and the qualifications of such person.

(8) Describe the contemplated care and maintenance of any live animals sought, including a complete description of the facilities where any such animals will be maintained including:

- (i) The dimensions of the pools or other holding facilities and the number, sex, and age of animals by species to be held in each;
- (ii) The water supply, amount, and quality;
- (iii) The diet, amount and type, for all animals;
- (iv) Sanitation practices used;
- (v) Qualifications and experience of the staff;
- (vi) A written certification from a licensed veterinarian or from a recognized expert who are knowledgeable on the species (or related species) or group covered in the application. The certificate shall verify that the veterinarian has personally reviewed the amendments for transporting and maintaining the animal(s) and that, in the veterinarian's opinion, they are adequate to provide for the well-being of the animal; and
- (vii) The availability in the future of a consulting expert or veterinarian meeting paragraph requirements of (b)(8)(vi) in this section.

(9) A statement of willingness to participate in a cooperative breeding program and maintain or contribute data to a stud book.

(10) A statement of how the applicant's proposed project or program will enhance or benefit the wild population.

(11) For the 5 years preceding the date of application, the applicant shall provide a detailed description of all mortalities involving species under the control of or utilized by the applicant and are either presently listed as endangered species or are taxonomically related within the Order to the species which is the subject of this application, including:

- (i) A list of all endangered species and related species that are the subject of this application that have been captured, transported, maintained, or utilized by the applicant for scientific purposes or for the enhancement of propagation or survival of the affected species, and/or of related species that are captured, transported, maintained, or utilized by the applicant for scientific purposes or for enhancement of propagation or survival of the affected species;
- (ii) The numbers of mortalities among such animals by species, by date, by location of capture, i.e., from which population, and the location of such mortalities;
- (iii) The cause(s) of any such mortality; and
- (iv) The steps which have been taken by applicant to avoid or decrease any such mortality.

(12) A certification in the following language: I hereby certify that the foregoing information is complete, true, and correct to the best of my knowledge and belief. I understand that this information is submitted for the purpose of obtaining a permit under the Endangered Species Act, as amended, and regulations promulgated thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001, or to penalties under the Act.

(13) The applicant and/or an officer thereof must sign the application.

(14) Assistance in completing this application may be obtained by writing Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 or calling the Office of Protected Resources at 301-713-1401. Allow at least 90 days for processing.

(c) *Issuance criteria.* In determining whether to issue a permit for scientific purposes or to enhance the propagation or survival of the affected endangered species, the Assistant Administrator

shall specifically consider, among other application criteria, the following:

- (1) Whether the permit was applied for in good faith;
 - (2) Whether the permit, if granted and exercised, will not operate to the disadvantage of the endangered species;
 - (3) Whether the permit would be consistent with the purposes and policy set forth in section 2 of the Act;
 - (4) Whether the permit would further a bona fide and necessary or desirable scientific purpose or enhance the propagation or survival of the endangered species, taking into account the benefits anticipated to be derived on behalf of the endangered species;
 - (5) The status of the population of the requested species and the effect of the proposed action on the population, both direct and indirect;
 - (6) If a live animal is to be taken, transported, or held in captivity, the applicant's qualifications for the proper care and maintenance of the species and the adequacy of the applicant's facilities;
 - (7) Whether alternative non-endangered species or population stocks can and should be used;
 - (8) Whether the animal was born in captivity or was (or will be) taken from the wild;
 - (9) Provision for disposition of the species if and when the applicant's project or program terminates;
 - (10) How the applicant's needs, program, and facilities compare and relate to proposed and ongoing projects and programs;
 - (11) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application; and
 - (12) Opinions or views of scientists or other persons or organizations knowledgeable about the species which is the subject of the application or of other matters germane to the application.
- (d) *Terms and conditions.* Permits applied for under this section shall contain terms and conditions as the Assistant Administrator may deem appropriate, including but not limited to the following:
- (1) The number and kind of species covered;
 - (2) The location and manner of taking;
 - (3) Port of entry or export;
 - (4) The methods of transportation, care, and maintenance to be used with live species;
 - (5) Any requirements for reports or rights of inspections with respect to any activities carried out pursuant to the permit;
 - (6) The transferability or assignability of the permit;

(7) The sale or other disposition of the species, its progeny, or the species product; and

(8) A reasonable fee covering the costs of issuance of such permit, including reasonable inspections and an appropriate apportionment of overhead and administrative expenses of the Department of Commerce. All such fees will be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the service.

§ 222.309 Permits for listed species of sea turtles involving the Fish and Wildlife Service.

(a) This section establishes specific procedures for issuance of the following permits: scientific purposes or to enhance the propagation or survival of endangered or threatened species of sea turtles; zoological exhibition or educational purposes for threatened species of sea turtles; and permits that requires coordination with the Fish and Wildlife Service. The National Marine Fisheries Service maintains jurisdiction for such species in the marine environment. The Fish and Wildlife Service maintains jurisdiction for such species of sea turtles in the land environment.

(b) For permits relating to any activity in the marine environment exclusively, permit applicants and permittees must comply with the regulations in parts 222, 223, and 224 of this chapter.

(c) For permits relating to any activity in the land environment exclusively, permit applicants must submit applications to the Wildlife Permit Office (WPO) of the U.S. Fish and Wildlife Service in accordance with either 50 CFR 17.22(a), if the species is endangered, or 50 CFR 17.32(a), if the species is threatened.

(d) For permits relating to any activity in both the land and marine environments, applicants must submit applications to the WPO. WPO will forward the application to NMFS for review and processing of those activities under its jurisdiction. Based on this review and processing, WPO will issue either a permit or a letter of denial in accordance with its own regulations.

(e) For permits relating to any activity in a marine environment and that also requires a permit under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (TIAS 8249, July 1, 1975) (50 CFR part 23), applicants must submit applications to the WPO. WPO will forward the application to NMFS for review and processing, after which WPO will issue a combination ESA/CITES permit or a letter of denial.

5. Part 224 is added to read as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

Sec.

224.101 Enumeration of endangered marine and anadromous species.

224.102 Permits for endangered marine and anadromous species.

224.103 Special prohibitions for endangered marine mammals.

224.104 Incidental capture of endangered sea turtles.

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

§ 224.101 Enumeration of endangered marine and anadromous species.

The marine and anadromous species determined by the Secretary of Commerce to be endangered pursuant to section 4(a) of the Act, as well as species listed under the Endangered Species Conservation Act of 1969 by the Secretary of the Interior and currently under the jurisdiction of the Secretary of Commerce, are the following:

(a) *Marine and anadromous fish.* Shortnose sturgeon (*Acipenser brevirostrum*); Totoaba (*Cynoscion macdonaldi*); Snake River sockeye salmon (*Oncorhynchus nerka*); Umpqua River cutthroat trout (*Oncorhynchus clarki clarki*); Southern California steelhead (*Oncorhynchus mykiss*), including all naturally spawned populations of steelhead (and their progeny) in streams from the Santa Maria River, San Luis Obispo County, California (inclusive) to Malibu Creek, Los Angeles County, California (inclusive); Upper Columbia River steelhead (*Oncorhynchus mykiss*), including the Wells Hatchery stock and all naturally spawned populations of steelhead (and their progeny) in streams in the Columbia River Basin upstream from the Yakima River, Washington, to the United States-Canada Border; Sacramento River winter-run chinook salmon (*Oncorhynchus tshawytscha*).

(b) *Marine mammals.* Blue whale (*Balaenoptera musculus*); Bowhead whale (*Balaena mysticetus*); Caribbean monk seal (*Monachus tropicalis*); Chinese river dolphin (*Lipotes vexillifer*); Cochito (*Phocoena sinus*); Fin or finback whale (*Balaenoptera physalus*); Hawaiian monk seal (*Monachus schauinslandi*); Humpback whale (*Megaptera novaeangliae*); Indus River dolphin (*Platanista minor*); Mediterranean monk seal (*Monachus monachus*); Right whales (*Eubalaena spp.*); Saimaa seal (*Phoca hispida saimensis*); Sei whale (*Balaenoptera borealis*); Sperm whale (*Physeter catodon*); Western North Pacific (Korean) gray whale (*Eschrichtius*

robustus); Steller sea lion, western population, (*Eumetopias jubatus*), which consists of Stellar sea lions from breeding colonies located west of 144° W. longitude.

(c) *Sea turtles.* Green turtle (*Chelonia mydas*) breeding colony populations in Florida and on the Pacific coast of Mexico; Hawksbill turtle (*Eretmochelys imbricata*); Kemp's ridley turtle (*Lepidochelys kempi*); Leatherback turtle (*Dermochelys coriacea*); Olive ridley turtle (*Lepidochelys olivacea*) breeding colony population on the Pacific coast of Mexico.

Note to § 224.101(c): Jurisdiction for sea turtles by the Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, is limited to turtles while in the water.

§ 224.102 Permits for endangered marine and anadromous species.

No person shall take, import, export, or engage in any activity prohibited by section 9 of the Act involving any marine species that has been determined to be endangered under the Endangered Species Conservation Act of 1969 or the Act, and that is under the jurisdiction of the Secretary, without a valid permit issued pursuant to part 222, subpart C of this chapter.

§ 224.103 Special prohibitions for endangered marine mammals.

(a) *Approaching humpback whales in Hawaii.* Except as provided in part 222, subpart C, of this chapter (General Permit Procedures), it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, within 200 nautical miles (370.4 km) of the Islands of Hawaii, any of the following acts with respect to humpback whales (*Megaptera novaeangliae*):

(1) Operate any aircraft within 1,000 feet (300 m) of any humpback whale;

(2) Approach, by any means, within 100 yard (90 m) of any humpback whale;

(3) Cause a vessel or other object to approach within 100 yd (90 m) of a humpback whale; or

(4) Disrupt the normal behavior or prior activity of a whale by any other act or omission. A disruption of normal behavior may be manifested by, among other actions on the part of the whale, a rapid change in direction or speed; escape tactics such as prolonged diving, underwater course changes, underwater exhalation, or evasive swimming patterns; interruptions of breeding, nursing, or resting activities, attempts by a whale to shield a calf from a vessel

or human observer by tail swishing or by other protective movement; or the abandonment of a previously frequented area.

(b) *Approaching North Atlantic right whales*—(1) *Prohibitions*. Except as provided under paragraph (b)(3) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, attempt to commit, to solicit another to commit, or cause to be committed any of the following acts:

(i) Approach (including by interception) within 500 yards (460 m) of a right whale by vessel, aircraft, or any other means;

(ii) Fail to undertake required right whale avoidance measures specified under paragraph (b)(2) of this section.

(2) *Right whale avoidance measures*. Except as provided under paragraph (b)(3) of this section, the following avoidance measures must be taken if within 500 yards (460 m) of a right whale:

(i) If underway, a vessel must steer a course away from the right whale and immediately leave the area at a slow safe speed.

(ii) An aircraft must take a course away from the right whale and immediately leave the area at a constant airspeed.

(3) *Exceptions*. The following exceptions apply to this section, but any person who claims the applicability of an exception has the burden of proving that the exception applies:

(i) Paragraphs (b)(1) and (b)(2) of this section do not apply if a right whale approach is authorized by the National Marine Fisheries Service through a permit issued under part 222, subpart C, of this chapter (General Permit Procedures) or through a similar authorization.

(ii) Paragraphs (b)(1) and (b)(2) of this section do not apply where compliance would create an imminent and serious threat to a person, vessel, or aircraft.

(iii) Paragraphs (b)(1) and (b)(2) of this section do not apply when approaching to investigate a right whale entanglement or injury, or to assist in the disentanglement or rescue of a right whale, provided that permission is received from the National Marine Fisheries Service or designee prior to the approach.

(iv) Paragraphs (b)(1) and (b)(2) of this section do not apply to an aircraft unless the aircraft is conducting whale watch activities.

(v) Paragraph (b)(2) of this section does not apply to the extent that a vessel is restricted in her ability to maneuver and, because of the restriction, cannot comply with paragraph (b)(2) of this section.

(c) *Special prohibitions relating to endangered Steller sea lion protection*. The regulatory provisions set forth in part 223 of this chapter, which govern threatened Steller sea lions, shall also apply to the western population of Steller sea lions, which consists of all Steller sea lions from breeding colonies located west of 144° W. long.

§ 224.104 Incidental capture of endangered sea turtles.

(a) Shrimp fishermen in the southeastern United States and the Gulf of Mexico who comply with rules for threatened sea turtles specified in § 223.206 of this chapter will not be subject to civil penalties under the Act for incidental captures of endangered sea turtles by shrimp trawl gear.

(b) Summer flounder fishermen in the Summer flounder fishery-sea turtle protection area who comply with rules for threatened sea turtles specified in § 223.206 of this chapter will not be subject to civil penalties under the Act for incidental captures of endangered sea turtles by summer flounder gear.

(c) Special prohibitions relating to leatherback sea turtles are provided at § 223.206(d)(2)(iv) of this chapter.

PART 226—DESIGNATED CRITICAL HABITAT

6. The authority citation for part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

PART 226—[AMENDED]

7. Subpart headings A through D, §§ 226.1 and 226.2, and Figures 1 through 9 to part 226 are removed.

§§ 226.11, 226.12, 226.13, 226.21, 226.22, 226.23, 226.71, 226.72 and 226.73 [Redesignated as §§ 226.201 through 226.209]

8. Sections 226.11 through 226.13, 226.21, 226.22, 226.23, 226.71, 226.72, and 226.73 are redesignated as §§ 226.201 through 226.209, respectively.

9. Section 226.101 is added to read as follows:

§ 226.101 Purpose and scope.

The regulations contained in this part identify those habitats designated by the Secretary of Commerce as critical under section 4 of the Act, for endangered and threatened species under the jurisdiction of the Secretary of Commerce. Those species are enumerated at § 223.102 of this chapter, if threatened and at § 224.101 of this chapter, if endangered. For regulations pertaining to the designation of critical habitat, see part 424 of this title, and for regulations pertaining to prohibitions

against the adverse modification or destruction of critical habitat, see part 402 of this title. Maps and charts identifying designated critical habitat that are not provided in this section may be obtained upon request to the Office of Protected Resources (see § 222.102, definition of “Office of Protected Resources”).

10. The section headings and table headings to part 226 are revised to read as follows:

PART 226—DESIGNATED CRITICAL HABITAT

226.101	Purpose and scope.
226.201	Critical habitat for Hawaiian monk seals.
226.202	Critical habitat for Steller sea lions.
226.203	Critical habitat for Northern right whales.
226.204	Critical habitat for Sacramento winter-run chinook salmon.
226.205	Critical habitat for Snake River sockeye salmon, Snake River fall chinook salmon, and Snake River spring/summer chinook salmon.
226.206	Critical habitat for Umpqua River cutthroat trout.
226.207	Critical habitat for leatherback turtle.
226.208	Critical habitat for green turtle.
226.209	Critical habitat for hawksbill turtle.

Tables to Part 226

Table 1 to Part 226—Major Steller Sea Lion Rookery Sites
Table 2 to Part 226—Major Steller Sea Lion Haulout Sites in Alaska
Table 3 to Part 226—Hydrologic Units Containing Critical Habitat for Snake River Sockeye Salmon and Snake River Spring/Summer and Fall Chinook Salmon
Table 4 to Part 226—Hydrologic Units Containing Critical Habitat for Endangered Umpqua River Cutthroat Trout and Counties Contained in Each Hydrologic Unit

§ 226.202 [Amended]

11. In newly redesignated § 226.202, in the first sentence of paragraph (c)(1), the phrase “which is identified in Figure 2” is removed; in the first sentence of paragraph (c)(2), the phrase “which is identified in Figure 3” is removed; and in paragraph (c)(3), the phrase “which is identified in Figure 4” is removed.

§ 226.203 [Amended]

12. In newly redesignated § 226.203, in paragraph (a), the reference “(Figure 6 to part 226)” and, in paragraph (b), the reference “(Figure 7 to part 226)” are removed.

§ 226.205 [Amended]

13. In newly redesignated § 226.205, in the introductory text, the third and fourth sentences are removed.

§ 226.206 [Amended]

14. In newly redesignated § 226.206, in paragraph (a), the third and fourth sentences are removed.

PART 227 [REDESIGNATED AS PART 223 AND AMENDED]

15. Part 227 is redesignated as part 223.

16. The heading for part 223 is revised to read as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

17. The authority citation for part 223 is revised to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701.

PART 223—[AMENDED]

18. Sections 223.1 through 223.4 and subpart headings C and D are removed.

§§ 223.11, 223.12, 223.21, 223.22, and 223.71 [Redesignated as §§ 223.201 through 223.205]

19–20. Sections 223.11, 223.12, 223.21, 223.22, and 223.71 are redesignated as §§ 223.201 through 223.205, respectively.

§ 223.72 [Redesignated as § 223.206]

21. Section 223.72 is redesignated § 223.206.

22. Subpart B heading is revised to read as follows:

Subpart B—Restrictions Applicable to Threatened Marine and Anadromous Species**§§ 223.203, 223.204 and 223.205 [Amended]**

23. Under subpart B, §§ 223.203, 223.204, and 223.205 headings are revised to read as: “Anadromous fish,” “Exceptions to prohibitions relating to anadromous fish,” and “Sea turtles,” respectively.

24. Sections 223.101 and 223.102 are added to subpart A to read as follows:

Subpart A—General Provisions**§ 223.101 Purpose and scope.**

(a) The regulations contained in this part identify the species under the jurisdiction of the Secretary of Commerce that have been determined to be threatened species pursuant to section 4(a) of the Act, and provide for the conservation of such species by establishing rules and procedures to governing activities involving the species.

(b) The regulations contained in this part apply only to the threatened species enumerated in § 223.102.

(c) The provisions of this part are in addition to, and not in lieu of, other regulations of parts 222 through 226 of this chapter which prescribe additional restrictions or conditions governing threatened species.

§ 223.102 Enumeration of threatened marine and anadromous species.

The species determined by the Secretary of Commerce to be threatened pursuant to section 4(a) of the Act, as well as species listed under the Endangered Species Conservation Act of 1969 by the Secretary of the Interior and currently under the jurisdiction of the Secretary of Commerce, are the following:

(a) *Marine and anadromous fish.* (1) Snake River spring/summer chinook salmon (*Oncorhynchus tshawytscha*). Includes all natural population(s) of spring/summer chinook salmon in the mainstem Snake River and any of the following subbasins: Tucannon River, Grande Ronde River, Imnaha River, and Salmon River.

(2) Snake River fall chinook salmon (*Oncorhynchus tshawytscha*). Includes all natural population(s) of fall chinook in the mainstem Snake River and any of the following subbasins: Tucannon River, Grande Ronde River, Imnaha River, Salmon River, and Clearwater River.

(3) Central California Coast Coho Salmon (*Oncorhynchus kisutch*). Includes all coho salmon naturally reproduced in streams between Punta Gorda in Humboldt County, CA, and the San Lorenzo River in Santa Cruz County, CA.

(4) Southern Oregon/Northern California Coast coho salmon (*Oncorhynchus kisutch*). Includes all coho salmon naturally reproduced in streams between Cape Blanco in Curry County, OR, and Punta Gorda in Humboldt County, CA.

(5) Central California Coast steelhead (*Oncorhynchus mykiss*). Includes all naturally spawned populations of steelhead (and their progeny) in streams from the Russian River to Aptos Creek, Santa Cruz County, California (inclusive), and the drainages of San Francisco and San Pablo Bays eastward to the Napa River (inclusive), Napa County, California. Excludes the Sacramento-San Joaquin River Basin of the Central Valley of California.

(6) South-Central California Coast steelhead (*Oncorhynchus mykiss*). Includes all naturally spawned populations of steelhead (and their progeny) in streams from the Pajaro River (inclusive), located in Santa Cruz County, California, to (but not including) the Santa Maria River.

(7) Snake River Basin steelhead (*Oncorhynchus mykiss*). Includes all naturally spawned populations of steelhead (and their progeny) in streams in the Snake River Basin of southeast Washington, northeast Oregon, and Idaho.

(8) Lower Columbia River steelhead (*Oncorhynchus mykiss*). Includes all naturally spawned populations of steelhead (and their progeny) in streams and tributaries to the Columbia River between the Cowlitz and Wind Rivers, Washington, inclusive, and the Willamette and Hood Rivers, Oregon, inclusive. Excluded are steelhead in the upper Willamette River Basin above Willamette Falls and steelhead from the Little and Big White Salmon Rivers in Washington;

(9) Central Valley, California steelhead (*Oncorhynchus mykiss*). Includes all naturally spawned populations of steelhead (and their progeny) in the Sacramento and San Joaquin Rivers and their tributaries. Excluded are steelhead from San Francisco and San Pablo Bays and their tributaries.

(10) Oregon Coast coho salmon (*Oncorhynchus kisutch*). Includes all naturally spawned populations of coho salmon in streams south of the Columbia River and north of Cape Blanco in Curry County, OR.

(11) Gulf sturgeon (*Acipenser oxyrinchus desotoi*).

(b) *Marine plants.* Johnson's seagrass (*Halophila johnsonii*).

(c) *Marine mammals.* Guadalupe fur seal (*Arctocephalus townsendi*); Steller sea lion, eastern population (*Eumetopias jubatus*), which consists of all Stellar sea lions from breeding colonies located east of 114° W. longitude.

(d) *Sea turtles.* Green turtle (*Chelonia mydas*) except for those populations listed under § 224.101(c) of this chapter; Loggerhead turtle (*Caretta caretta*); Olive ridley turtle (*Lepidochelys olivacea*) except for those populations listed under § 224.101(c) of this chapter.

Note to § 223.201(d): Jurisdiction for sea turtles by the Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, is limited to turtles while in the water.

§ 223.201 [Amended]

25. In newly redesignated § 223.201, in paragraph (b)(1), the phrase “part 222 subpart C—Endangered Fish or Wildlife Permits.” is removed and replaced with “part 222 subpart C—General Permit Procedures,” and in paragraph (b)(2)(iv), the phrase “Director, Southwest Region, National Marine Fisheries Service, 300

S. Ferry Street, Terminal Island, CA 90731." is removed and replaced with "Regional Administrator, Southwest Region, National Marine Fisheries Service, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802."

§ 223.202 [Amended]

26. In newly redesignated § 223.202, in paragraph (b)(1), the phrase "50 CFR part 222 subpart C—Endangered Fish or Wildlife Permits." is removed and replaced with "part 222 subpart C—General Permit Procedures." and in § 223.202, in Table 1, the table title is revised to read "Table 1 to § 223.202—Listed Steller Sea Lion Rookery Sites/1/".

§ 223.203 [Amended]

27. In newly redesignated § 223.203, in paragraph (a), the text "227.4 (f), (g), (h), and (i)" is removed and replaced with "223.102(a)(1) through (a)(4)"; and the last sentence "These prohibitions shall become effective for the threatened species of salmon listed in § 227.4(i) on August 18, 1997." is removed.

28. In newly redesignated § 223.203, paragraph (b)(1), the text "in part 222 of this chapter II" is added after the word "regulations"; the text "§ 227.4 (f), (g), (h), and (i)" is replaced with "§ 223.102(a)(1) through (a)(4)"; and the second sentence of paragraph (b)(1) is removed.

29. In newly redesignated § 223.203, paragraph (b)(2), the reference "§ 227.4(i)" is replaced with "§ 223.102(a)(4)".

30. In newly redesignated § 223.203, paragraph (b)(3), the reference "§ 227.4(i)" is replaced with "§ 223.102(a)(4)".

31. Newly redesignated § 223.204 is revised to read as follows:

§ 223.204 Exceptions to prohibitions relating to anadromous fish.

(a) The following exceptions to the prohibitions of § 223.203(a) of this part apply to the Southern Oregon/Northern California Coast (SONCC) coho salmon.

(1) Take of SONCC coho salmon within 3 miles (approximately 5 km) of the coast, and in the bay, estuarine or freshwater fisheries regulated under the sole authority of the State of Oregon is not prohibited, if the take results from a fisheries harvest program conducted in accordance with the Oregon Coastal Salmon Restoration Initiative of March 1997 (OCSRI). NMFS must have issued a written concurrence that the fisheries regulations are consistent with the OCSRI, using information provided through the April 1997 Memorandum of Agreement (MOA) between the State of Oregon and NMFS.

(2) Incidental take of SONCC coho salmon in ocean fisheries within 3 miles (approximately 5 km) of the coast that are regulated under the sole authority of the State of California is not prohibited, provided that the ocean salmon fishing regulations adopted by the California Fish and Game Commission and CDFG for recreational and commercial fisheries within 3 miles (approximately 5 km) of the coast are consistent with the Pacific Fishery Management Council's Fishery Management Plan for Ocean Salmon Fisheries and the annual ocean salmon fishing regulations issued by the Secretary of Commerce for the Federal EEZ.

(3) Take of SONCC coho salmon in a hatchery program regulated under the sole authority of the State of Oregon is not prohibited, if the take results from a hatchery program conducted in accordance with the OCSRI, and the take is counted against the total allocation of harvest-related mortality as specified in the OCSRI. NMFS must have issued a written concurrence stating that the hatchery program is consistent with the OCSRI including the hatchery and genetic management plan adopted pursuant to the OCSRI, using information provided through the MOA.

(4) Take of SONCC coho salmon in fisheries research and monitoring activities conducted in California and Oregon is not prohibited provided that:

(i) Research and monitoring involving directed take of coho salmon is conducted by CDFG personnel (in California) and ODFW personnel (in Oregon);

(ii) The CDFG and ODFW, respectively, provide NMFS with a list of all research and monitoring activities involving coho salmon directed take planned for the coming year for NMFS' review and approval. This report shall include an estimate of the total directed take that is anticipated, a description of the study design, including a justification for taking the species and a description of the techniques to be used, and a point of contact;

(iii) The CDFG and ODFW, respectively, provide NMFS annually with the results of research and monitoring studies directed at SONCC coho salmon, including a report of the directed take resulting from the studies;

(iv) The CDFG and ODFW, provide NMFS annually with a list of all research and monitoring studies permitted that may allow incidental take of listed coho salmon during the coming year and report the level of incidental take of listed coho salmon from the previous year's research and monitoring activities, for NMFS' review and approval.

(v) The research and monitoring activities do not include the use of electrofishing in any body of water known or suspected to contain coho salmon.

(5) Incidental take of the SONCC coho salmon in Oregon resulting from a habitat restoration activity is not prohibited, provided that:

(i) The activity is conducted pursuant to a watershed action or restoration plan that has been affirmed by the state in writing as consistent with NMFS' approved state watershed plan guidelines set forth in § 222.307(c) of this chapter. NMFS shall also concur in writing that the plan is consistent with the state watershed plan guidelines; or

(ii) Until a watershed action or restoration plan is approved by both Oregon and NMFS as described in paragraph (a)(5)(i) of this section, or until August 18, 1999, whichever occurs first, the ODFW has made a written finding that the activity is consistent with state restoration activity guidelines that NMFS has agreed, in writing, meet the standards set forth in § 222.307(c) of this chapter.

(6) Incidental take of the SONCC coho salmon in California resulting from a habitat restoration activity, as defined in paragraph (a)(6)(iii) of this section, is not prohibited, provided that California has a program in effect that NMFS finds will assure technically supported watershed assessments and coordinated long-term monitoring strategies for watershed protection plans and activities and:

(i) The activity is conducted pursuant to a watershed protection plan that CDFG has affirmed, in writing, is consistent with NMFS' approved state watershed plan guidelines set forth in § 222.307(c) of this chapter for California's Watershed Protection Program. NMFS must concur, in writing, that the plan is consistent with those guidelines; or

(ii) Until a watershed protection or restoration plan is certified by the State of California and NMFS as described in paragraph (a)(6)(i) of this section, or until August 18, 1999, whichever occurs first, when NMFS has made a written finding that the activity is consistent with State of California conservation guidelines previously found to meet the standards set forth in § 222.307(c) of this chapter by NMFS.

32. Newly redesignated § 223.205 is revised to read as follows:

§ 223.205 Sea turtles.

(a) The prohibitions of section 9 of the Act (16 U.S.C. 1538) relating to endangered species apply to threatened

species of sea turtle, except as provided in § 223.206.

(b) Except as provided in § 223.206, it is unlawful for any person subject to the jurisdiction of the United States to do any of the following:

(1) Own, operate, or be on board a vessel, except if that vessel is in compliance with all applicable provisions of § 223.206(d);

(2) Fish for, catch, take, harvest, or possess, fish or wildlife while on board a vessel, except if that vessel is in compliance with all applicable provisions of § 223.206(d);

(3) Fish for, catch, take, harvest, or possess, fish or wildlife contrary to any notice of tow-time or other restriction specified in, or issued under, § 223.206(d)(3) or (d)(4);

(4) Possess fish or wildlife taken in violation of paragraph (b) of this section;

(5) Fail to follow any of the sea turtle handling and resuscitation requirements specified in § 223.206(d)(1);

(6) Possess a sea turtle in any manner contrary to the handling and resuscitation requirements of § 223.206(d)(1);

(7) Fail to comply immediately, in the manner specified at § 600.730 (b) through (d) of this Title, with instructions and signals specified therein issued by an authorized officer, including instructions and signals to haul back a net for inspection;

(8) Refuse to allow an authorized officer to board a vessel, or to enter an area where fish or wildlife may be found, for the purpose of conducting a boarding, search, inspection, seizure, investigation, or arrest in connection with enforcement of this section;

(9) Destroy, stave, damage, or dispose of in any manner, fish or wildlife, gear, cargo, or any other matter after a communication or signal from an authorized officer, or upon the approach of such an officer or of an enforcement vessel or aircraft, before the officer has an opportunity to inspect same, or in contravention of directions from the officer;

(10) Assault, resist, oppose, impede, intimidate, threaten, obstruct, delay, prevent, or interfere with an authorized officer in the conduct of any boarding, search, inspection, seizure, investigation, or arrest in connection with enforcement of this section;

(11) Interfere with, delay, or prevent by any means, the apprehension of another person, knowing that such person committed an act prohibited by this section;

(12) Resist a lawful arrest for an act prohibited by this section;

(13) Make a false statement, oral or written, to an authorized officer or to

the agency concerning the fishing for, catching, taking, harvesting, landing, purchasing, selling, or transferring fish or wildlife, or concerning any other matter subject to investigation under this section by such officer, or required to be submitted under this part 223;

(14) Sell, barter, trade or offer to sell, barter, or trade, a TED that is not an approved TED; or

(15) Attempt to do, solicit another to do, or cause to be done, any of the foregoing.

(c) In connection with any action alleging a violation of this section, any person claiming the benefit of any exemption, exception, or permit under this subpart B has the burden of proving that the exemption, exception, or permit is applicable, was granted, and was valid and in force at the time of the alleged violation. Further, any person claiming that a modification made to a TED that is the subject of such an action complies with the requirements of § 223.207 (c) or (d) has the burden of proving such claim.

33. Newly redesignated § 223.206 is revised to read as follows:

§ 223.206 Exceptions to prohibitions relating to sea turtles.

(a) *Permits*—(1) *Scientific research, education, zoological exhibition, or species enhancement permits.* The Assistant Administrator may issue permits authorizing activities which would otherwise be prohibited under § 223.205(a) for scientific or educational purposes, for zoological exhibition, or to enhance the propagation or survival of threatened species of sea turtles, in accordance with and subject to the conditions of part 222, subpart C—General Permit Procedures.

(2) *Incidental-take permits.* The Assistant Administrator may issue permits authorizing activities that would otherwise be prohibited under § 223.205(a) in accordance with section 10(a)(1)(B) of the Act (16 U.S.C. 1539(a)(1)(B)), and in accordance with, and subject to, the implementing regulations in part 222 of this chapter. Such permits may be issued for the incidental taking of threatened and endangered species of sea turtles.

(b) *Exception for injured, dead, or stranded specimens.* If any member of any threatened species of sea turtle is found injured, dead, or stranded, any agent or employee of the National Marine Fisheries Service, the Fish and Wildlife Service, the U.S. Coast Guard, or any other Federal land or water management agency, or any agent or employee of a state agency responsible for fish and wildlife who is designated by his or her agency for such purposes,

may, when acting in the course of his or her official duties, take such specimens without a permit if such taking is necessary to aid a sick, injured, or stranded specimen or dispose of a dead specimen or salvage a dead specimen which may be useful for scientific study. Whenever possible, live specimens shall be returned to their aquatic environment as soon as possible. Every action shall be reported in writing to the Assistant Administrator within 30 days, and reports of further occurrence shall be made as deemed appropriate by the Assistant Administrator until the specimen is either returned to its environment or disposed of. Reports shall be mailed by registered or certified mail, return receipt requested, to the Assistant Administrator and shall contain the following information:

(1) Name and position of the official or employee involved;

(2) Description of the specimen(s) involved;

(3) Date and location of disposal;

(4) Circumstances requiring the action;

(5) Method of disposal;

(6) Disposition of the specimen(s), including, where the specimen(s) has been retained in captivity, a description of the place and means of confinement, and the measures taken for its maintenance and care; and

(7) Such other information as the Assistant Administrator may require.

(c) *Exception for research or conservation.* Any employee or agent of the National Marine Fisheries Service, the Fish and Wildlife Service, or a state fish and wildlife agency operating a conservation program pursuant to the terms of a Cooperative Agreement with the National Marine Fisheries Service or the Fish and Wildlife Service in accordance with section 6(c) of the Act, designated by his or her agency for such purposes, may, when acting in the course of his or her official duties, take any threatened species to carry out scientific research or conservation programs. All such takings shall be reported within 30 days of the taking to the Assistant Administrator who may request additional reports of the taking and research at the Assistant Administrator's discretion.

(d) *Exception for incidental taking.* The prohibitions against taking in § 223.205(a) do not apply to the incidental take of any member of a threatened species of sea turtle (i.e., a take not directed toward such member) during fishing or scientific research activities, to the extent that those involved are in compliance with all applicable requirements of paragraphs

(d)(1) through (d)(5) of this section, or in compliance with the terms and conditions of an incidental take permit issued pursuant to paragraph (a)(2) of this section.

(1) *Handling and resuscitation requirements.* (i) Any specimen taken incidentally during the course of fishing or scientific research activities must be handled with due care to prevent injury to live specimens, observed for activity, and returned to the water according to the following procedures:

(A) Sea turtles that are dead or actively moving must be released over the stern of the boat. In addition, they must be released only when trawls are not in use, when the engine gears are in neutral position, and in areas where they are unlikely to be recaptured or injured by vessels.

(B) Resuscitation must be attempted on sea turtles that are comatose or inactive but not dead by:

(1) Placing the turtle on its back (carapace) and pumping its breastplate (plastron) with hand or foot; or

(2) Placing the turtle on its breastplate (plastron) and elevating its hindquarter several inches for a period of 1 up to 24 hours. The amount of the elevation depends on the size of the turtle; greater elevations are needed for larger turtles. Sea turtles being resuscitated must be shaded and kept wet or moist. Those that revive and become active must be released over the stern of the boat only when trawls are not in use, when the engine gears are in neutral position, and in areas where they are unlikely to be recaptured or injured by vessels. Similarly, sea turtles that fail to move within several hours (up to 24, if possible) must be returned to the water in the same manner.

(ii) Any specimen taken incidentally during the course of fishing or scientific research activities must not be consumed, sold, landed, offloaded, transshipped, or kept below deck.

(2) *Gear requirements—(i) TED requirement for shrimp trawlers.* Any shrimp trawler that is in the Atlantic Area or Gulf Area must have an approved TED installed in each net that is rigged for fishing. A net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to any trawl door or board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the shrimp trawler. Exceptions to the TED requirement for shrimp trawlers are provided in paragraph (d)(2)(ii) of this section.

(ii) *Exemptions from the TED requirement—(A) Alternative tow-time restrictions.* A shrimp trawler is exempt from the TED requirements of paragraph

(d)(2)(i) of this section if it complies with the alternative tow-time restrictions in paragraph (d)(3)(i) of this section and if it:

(1) Has on board no power or mechanical-advantage trawl retrieval system (i.e., any device used to haul any part of the net aboard);

(2) Is a bait shrimper that retains all live shrimp on board in a container with a circulating seawater system, if it does not possess more than 32 pounds (14.5 kg) of dead shrimp on board, and if it has on board a valid original state bait-shrimp license (if in a state that requires such a license);

(3) Has only a pusher-head trawl, skimmer trawl, or wing net rigged for fishing; and

(4) Is in an area during a period for which tow-time restrictions apply under paragraphs (d)(3) (ii) or (iii) of this section, if it complies with all applicable provisions imposed under those paragraphs.

(B) *Exempted gear or activities.* The following fishing gear or activities are exempted from the TED requirements of paragraph (d)(2)(i) of this section:

(1) A single test net (try net) with a headrope length of 12 ft (3.6 m) or less and with a footrope length of 15 ft (4.6 m) or less, if it is either pulled immediately in front of another net or is not connected to another net in any way, if no more than one test net is used at a time, and if it is not towed as a primary net;

(2) A beam or roller trawl, if the frame is outfitted with rigid vertical bars, and if none of the spaces between the bars, or between the bars and the frame, exceeds 4 inches (10.2 cm); and

(3) A shrimp trawler fishing for, or possessing, royal red shrimp, if royal red shrimp constitutes at least 90 percent (by weight) of all shrimp either found on board, or offloaded from that shrimp trawler.

(iii) *Gear requirement—summer flounder trawlers—(A) TED requirement.* Any summer flounder trawler in the summer flounder fishery-sea turtle protection area must have an approved TED installed in each net that is rigged for fishing. A net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to any trawl door or board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the summer flounder trawler. Exceptions to the TED requirement for summer flounder trawlers are provided in paragraph (d)(2)(iii)(B) of this section.

(B) *Exemptions from the TED requirement.* Any summer flounder trawler north of 35°46.1' N. lat. (Oregon Inlet, NC) from January 15 through

March 15 annually is exempt from the TED requirement of paragraph (d)(2)(iii)(A) of this section, unless the Assistant Administrator determines that TED use is necessary to protect sea turtles or ensure compliance, pursuant to the procedures of paragraph (d)(4) of this section.

(C) *Monitoring.* Summer flounder trawlers must carry onboard a NMFS-approved observer if requested by the Southeast Regional Administrator or the Northeast Regional Administrator. A written notification will be sent to the address specified for the vessel in either the NMFS or state fishing permit application, or to the address specified for registration or documentation purposes, or upon written notification otherwise served on the owner or operator of the vessel. Owners and operators must comply with the terms and conditions specified in such written notification. All NMFS-approved observers will report any violations of this section, or other applicable regulations and laws. Information collected by observers may be used for enforcement purposes.

(D) *Additional sea turtle conservation measures.* The Assistant Administrator may impose other such restrictions upon summer flounder trawlers as the Assistant Administrator deems necessary or appropriate to protect sea turtles and ensure compliance, pursuant to the procedures of paragraph (d)(4) of this section. Such measures may include, but are not limited to, a requirement to use TEDs in areas other than summer flounder fishery-sea turtle protection area, a requirement to use limited tow-times, and closure of the fishery.

(iv) *Gear requirement—leatherback conservation zone—(A) Leatherback surveys.* From January 1 through June 30 of each year, weekly aerial surveys will be conducted in the leatherback conservation zone by NMFS or state agents, contingent upon weather conditions. If sighting rates of greater than 10 leatherback turtles per 50 nautical miles (92.6 km) of trackline are observed, the aerial surveys of that area will be replicated within 24 hours, or as soon as practicable thereafter.

(B) *TED requirements and registration.* If surveys pursuant to paragraph (d)(2)(iv)(A) of this section indicate a sighting rate within the leatherback conservation zone of greater than 10 leatherback sea turtles per 50 nautical miles (92.6 km) of trackline, NMFS will close an area of the leatherback conservation zone encompassing all, or a portion of, inshore waters and offshore waters 10 nautical miles (18.5 km) seaward of the

COLREGS demarcation line, bounded by 1° lat. coinciding with the trackline, within the leatherback conservation zone. This closure will be for a 2-week period. Within such closed area, fishing by any shrimp trawler required to have a NMFS-approved TED installed in each net rigged for fishing is prohibited, unless the TED installed is one described at § 223.207(a)(7)(ii)(B) or, prior to October 13, 1999, § 223.207(c)(1)(iv)(B), and the owner or operator of the shrimp trawler has notified the Southeast Regional Administrator of his or her intention to fish in that area, in accordance with the procedure provided in paragraph (d)(5) of this section. If requested in writing from the Southeast Regional Administrator, owners and operators of shrimp trawlers in the leatherback conservation zone must carry NMFS-approved observers aboard such vessel(s). A shrimp trawler in the leatherback conservation zone must comply with the terms and conditions specified in such written request, as well as provide information on trawling hours, gear modifications, and turtle captures.

(C) *Notification.* NMFS will immediately announce specific area closures on the NOAA weather radio channel, in newspapers, and other media. Specific area closures will be effective upon filing for public inspection at the Office of the Federal Register. Owners and operators of shrimp trawl vessels in the leatherback conservation zone are responsible for monitoring the NOAA weather radio channel for closure announcements. Shrimp trawlers may also call the Southeast Regional Office at (813) 570-5312 to receive updated area closure information.

(3) *Tow-time restrictions*—(i) *Duration of tows.* If tow-time restrictions are utilized pursuant to paragraph (d)(2)(ii), (d)(3)(ii), or (d)(3)(iii) of this section, a shrimp trawler must limit tow times. The tow time is measured from the time that the trawl door enters the water until it is removed from the water. For a trawl that is not attached to a door, the tow time is measured from the time the codend enters the water until it is removed from the water. Tow times may not exceed:

(A) 55 minutes from April 1 through October 31; and

(B) 75 minutes from November 1 through March 31.

(ii) *Alternative—special environmental conditions.* The Assistant Administrator may allow compliance with tow-time restrictions, as an alternative to the TED requirement of paragraph (d)(2)(i) of this section, if the

Assistant Administrator determines that the presence of algae, seaweed, debris or other special environmental conditions in a particular area makes trawling with TED-equipped nets impracticable.

(iii) *Substitute—ineffectiveness of TEDs.* The Assistant Administrator may require compliance with tow-time restrictions, as a substitute for the TED requirement of paragraph (d)(2)(i) of this section, if the Assistant Administrator determines that TEDs are ineffective in protecting sea turtles.

(iv) *Notice; applicability; conditions.* The Assistant Administrator will publish notification concerning any tow-time restriction imposed under paragraph (d)(3)(ii) or (iii) of this section in the **Federal Register** and will announce it in summary form on channel 16 of the marine VHF radio. A notification of tow-time restrictions will include findings in support of these restrictions as an alternative to, or as substitute for, the TED requirements. The notification will specify the effective dates, the geographic area where tow-time restrictions apply, and any applicable conditions or restrictions that the Assistant Administrator determines are necessary or appropriate to protect sea turtles and ensure compliance, including, but not limited to, a requirement to carry observers, to register vessels in accordance with procedures at paragraph (d)(5) of this section, or for all shrimp trawlers in the area to synchronize their tow times so that all trawl gear remains out of the water during certain times. A notification withdrawing tow-time restrictions will include findings in support of that action.

(v) *Procedures.* The Assistant Administrator will consult with the appropriate fishery officials (state or Federal) where the affected shrimp fishery is located in issuing a notification concerning tow-time restrictions. An emergency notification can be effective for a period of up to 30 days and may be renewed for additional periods of up to 30 days each if the Assistant Administrator finds that the conditions necessitating the imposition of tow-time restrictions continue to exist. The Assistant Administrator may invite comments on such an action, and may withdraw or modify the action by following procedures similar to those for implementation. The Assistant Administrator will implement any permanent tow-time restriction through rulemaking.

(4) *Limitations on incidental takings during fishing activities*—(i) *Limitations.* The exemption for incidental takings of sea turtles in paragraph (d) of this section does not authorize incidental

takings during fishing activities if the takings:

(A) Would violate the restrictions, terms, or conditions of an incidental take statement or biological opinion;

(B) Would violate the restrictions, terms, or conditions of an incidental take permit; or

(C) May be likely to jeopardize the continued existence of a species listed under the Act.

(ii) *Determination; restrictions on fishing activities.* The Assistant Administrator may issue a determination that incidental takings during fishing activities are unauthorized. Pursuant thereto, the Assistant Administrator may restrict fishing activities in order to conserve a species listed under the Act, including, but not limited to, restrictions on the fishing activities of vessels subject to paragraph (d)(2) of this section. The Assistant Administrator will take such action if the Assistant Administrator determines that restrictions are necessary to avoid unauthorized takings that may be likely to jeopardize the continued existence of a listed species. The Assistant Administrator may withdraw or modify a determination concerning unauthorized takings or any restriction on fishing activities if the Assistant Administrator determines that such action is warranted.

(iii) *Notice; applicability; conditions.* The Assistant Administrator will publish a notification of a determination concerning unauthorized takings or a notification concerning the restriction of fishing activities in the **Federal Register**. The Assistant Administrator will provide as much advance notice as possible, consistent with the requirements of the Act, and will announce the notification in summary form on channel 16 of the marine VHF radio. Notification of a determination concerning unauthorized takings will include findings in support of that determination; specify the fishery, including the target species and gear used by the fishery, the area, and the times, for which incidental takings are not authorized; and include such other conditions and restrictions as the Assistant Administrator determines are necessary or appropriate to protect sea turtles and ensure compliance. Notification of restriction of fishing activities will include findings in support of the restriction, will specify the time and area where the restriction is applicable, and will specify any applicable conditions or restrictions that the Assistant Administrator determines are necessary or appropriate to protect sea turtles and ensure compliance. Such conditions and restrictions may include,

but are not limited to, limitations on the types of fishing gear that may be used, tow-time restrictions, alteration or extension of the periods of time during which particular tow-time requirements apply, requirements to use TEDs, registration of vessels in accordance with procedures at paragraph (d)(5) of this section, and requirements to provide observers. Notification of withdrawal or modification will include findings in support of that action.

(iv) *Procedures.* The Assistant Administrator will consult with the appropriate fisheries officials (state or Federal) where the fishing activities are located in issuing notification of a determination concerning unauthorized takings or notification concerning the restriction of fishing activities. An emergency notification will be effective for a period of up to 30 days and may be renewed for additional periods of up to 30 days each. The Assistant Administrator may invite comments on such action, and may withdraw or modify the action by following procedures similar to those for implementation. The Assistant Administrator will implement any permanent determination or restriction through rulemaking.

(5) *Registration.* If the Assistant Administrator imposes restrictions under paragraph (d)(2)(iv), (d)(3)(ii), (d)(3)(iii), or (d)(4)(ii) of this section, the Assistant Administrator may require the owner and operator of a vessel to register before entering an area where, and during the time when, the restrictions apply. If registration is required, the vessel's owner and operator must submit the following information to the NMFS Regional Office:

- (i) The name and official number (or registration number) of the vessel;
- (ii) The names, mailing and street addresses, and telephone numbers of the vessel owner and operator;
- (iii) The permit number or other identification of relevant state or Federal fishing permit(s);
- (iv) Where and when the vessel intends to fish;
- (v) Where and when the vessel will depart on any fishing trip, with sufficient specificity to allow for an observer to embark on the trip; and
- (vi) Any changes in the information submitted under paragraphs (d)(5)(i) through (d)(5)(v) of this section. Failure to do so immediately will void the registration, rendering unlawful any subsequent entry of the fishing vessel into the area where and during the time when the restrictions apply.

34. Section 223.207 is added to subpart B to read as follows:

§ 223.207 Approved TEDs.

Any netting, webbing, or mesh that may be measured to determine compliance with this section is subject to measurement, regardless of whether it is wet or dry. Any such measurement will be of the stretched mesh size.

(a) *Hard TEDs.* Hard TEDs are TEDs with rigid deflector grids and are categorized as "hooped hard TEDs," such as the NMFS and Cameron TEDs (Figures 1 & 2 to this part), or "single-grid hard TEDs," such as the Matagorda and Georgia TEDs (Figures 3 & 4 to this part). Hard TEDs complying with the following generic design criteria are approved TEDs:

(1) *Construction materials.* A hard TED must be constructed of one or a combination of the following materials, with minimum dimensions as follows:

- (i) Solid steel rod with a minimum outside diameter of 1/4 inch (0.64 cm);
- (ii) Fiberglass or aluminum rod with a minimum outside diameter of 1/2 inch (1.27 cm); or
- (iii) Steel or aluminum tubing with a minimum outside diameter of 1/2 inch (1.27 cm) and a minimum wall thickness of 1/8 inch (0.32 cm) (also known as schedule 40 tubing).

(2) *Method of attachment.* A hard TED must be sewn into the trawl around the entire circumference of the TED with heavy twine.

(3) *Angle of deflector bars.* (i) The angle of the deflector bars must be between 30° and 55° from the normal, horizontal flow through the interior of the trawl, except as provided in paragraph (a)(3)(ii) of this section.

(ii) For any shrimp trawler fishing in the Gulf SFSTCA or the Atlantic SFSTCA, a hard TED with the position of the escape opening at the bottom of the net when the net is in its deployed position, the angle of the deflector bars from the normal, horizontal flow through the interior of the trawl, at any point, must not exceed 55°, and:

(A) If the deflector bars that run from top to bottom are attached to the bottom frame of the TED, the angle of the bottom-most 4 inches (10.2 cm) of each deflector bar, measured along the bars, must not exceed 45° (Figures 14a and 14b to this part);

(B) If the deflector bars that run from top to bottom are not attached to the bottom frame of the TED, the angle of the imaginary lines connecting the bottom frame of the TED to the bottom end of each deflector bar which runs from top to bottom must not exceed 45° (Figure 15 to this part).

(4) *Space between bars.* The space between deflector bars and between the deflector bars and the frame must not exceed 4 inches (10.2 cm).

(5) *Direction of bars.* The deflector bars must run from top to bottom of the TED, as the TED is positioned in the net, except that up to four of the bottom bars and two of the top bars, including the frame, may run from side to side of the TED.

(6) *Position of escape opening.* The entire width of the escape opening from the trawl must be centered on and immediately forward of the frame at either the top or bottom of the net when the net is in its deployed position. The escape opening must be at the top of the net when the slope of the deflector bars from forward to aft is upward, and must be at the bottom when such slope is downward. For a single-grid TED, the escape opening must be cut horizontally along the same plane as the TED, and may not be cut in a fore-and-aft direction.

(7) *Size of escape opening—(i) Hooped hard TED.* On a hooped hard TED, the escape opening must not be smaller than 25 inches by 25 inches (63.5 cm by 63.5 cm) in the Gulf Area, or 30 inches by 30 inches (76.2 cm by 76.2 cm) in the Atlantic Area. A door frame may not be used over the escape opening; however, a webbing flap may be used as provided in paragraph (e)(4)(iv)(C) of this section.

(ii) *Single-grid hard TED—(A) Escape opening for standard single-grid hard TED.* On a single-grid hard TED, the cut in the trawl webbing for the escape opening cannot be narrower than the outside width of the grid minus 4 inches (10.2 cm) on both sides of the grid, when measured as a straight line width. (Figure 13 to this part illustrates the dimensions of this cut.) The resulting escape opening in the net webbing must measure at least 32 inches (81.3 cm) in horizontal taut length and, simultaneously, 10 inches (25.4 cm) in vertical taut height in the Gulf Area; or 35 inches (88.9 cm) in horizontal taut length and, simultaneously, 12 inches (30.5 cm) in vertical taut height in the Atlantic Area. The vertical measurement must be taken at the midpoint of the horizontal measurement.

(B) *Escape opening for leatherback turtles.* A single-grid hard TED escape opening shall be enlarged to allow leatherback turtles to escape by cutting an exit hole in the extension forward of the TED frame 26 inches (66 cm) deep, on each side, by 83 inches (211 cm) across (Figures 12a and 12b to this part). Excess webbing is removed by cutting across 1/2 mesh forward of the TED frame. The exit hole cover is made by cutting a 133-inch (338-cm) by 58-inch (148 cm) piece of webbing no smaller than 1 1/2 inch (4 cm) stretch mesh and no larger than 1 5/8 inch (4.2 cm) stretch

mesh. The 133-inch (338 cm) edge of the cover is attached to the forward edge of the opening (83-inch (211-cm) edge) with a sewing sequence of 3:2. The cover should overlap 5 inches (13 cm) of the exit hole on each side. The side of the cover is attached, maintaining the 5-inch (13-cm) overlap, to the side of the opening by sewing 28 inches (71 cm) of the cover to 26 inches (66 cm) of the opening forward of the TED frame and by sewing 15 inches (38 cm) of the cover to 15 inches (38 cm) of the extension behind the TED frame. The cover may extend no more than 24 inches (61 cm) behind the posterior edge of the TED frame. The circumference of the exit opening must be 142 inches (361 cm) when stretched. If an accelerator funnel is used with a single-grid hard TED, modified as above, it must also have a minimum circumference of 142 inches (361 cm).

(8) *Size of hoop or grid*—(i) *Hooped hard TED*. (A) An oval front hoop on a hard TED must have an inside horizontal measurement of at least 32 inches (81.3 cm) and an inside vertical measurement of at least 20 inches (50.8 cm) in the Gulf Area, or an inside horizontal measurement of at least 35 inches (88.9 cm) and an inside vertical measurement of at least 30 inches (76.2 cm) in the Atlantic Area.

(B) A circular front hoop on a hard TED must have an inside diameter of at least 32 inches (81.3 cm) in the Gulf Area or 35 inches (88.9 cm) in the Atlantic Area.

(ii) *Single-grid hard TED*. A single-grid hard TED must have an inside horizontal and vertical measurement of at least 28 inches (71.1 cm) in the Gulf Area or 30 inches (76.2 cm) in the Atlantic Area. The required inside measurements must be at the mid-point of the deflector grid.

(9) *Flotation*. Floats must be attached to the top one-half of all hard TEDs with bottom escape openings. The floats may be attached either outside or inside the net, but not to a flap. Floats attached inside the net must be behind the rear surface of the TED. Floats must be attached with heavy twine or rope. Floats must be constructed of aluminum, hard plastic, expanded polyvinyl chloride, or expanded ethylene vinyl acetate unless otherwise specified. The requirements of this paragraph may be satisfied by compliance with either the dimension requirements of paragraph (a)(9)(i) of this section, or the buoyancy requirements of paragraph (a)(9)(ii) of this section, or the buoyancy-dimension requirements of paragraph (a)(9)(iii) of this section. If roller gear is used pursuant to paragraph (d)(5) of this

section, the roller gear must be included in the circumference measurement of the TED or the total weight of the TED.

(i) *Float dimension requirements*. (A) For hard TEDs with a circumference of 120 inches (304.8 cm) or more, a minimum of either one round, aluminum or hard plastic float, no smaller than 9.8 inches (25.0 cm) in diameter, or two expanded polyvinyl chloride or expanded ethylene vinyl acetate floats, each no smaller than 6.75 inches (17.2 cm) in diameter by 8.75 inches (22.2 cm) in length, must be attached.

(B) For hard TEDs with a circumference of less than 120 inches (304.8 cm), a minimum of either one round, aluminum or hard plastic float, no smaller than 9.8 inches (25.0 cm) in diameter, or one expanded polyvinyl chloride or expanded ethylene vinyl acetate float, no smaller than 6.75 inches (17.2 cm) in diameter by 8.75 inches (22.2 cm) in length, must be attached.

(ii) *Float buoyancy requirements*. Floats of any size and in any combination must be attached such that the combined buoyancy of the floats, as marked on the floats, equals or exceeds the weight of the hard TED, as marked on the TED. The buoyancy of the floats and the weight of the TED must be clearly marked on the floats and the TED as follows:

(A) *Float buoyancy markings*. Markings on floats must be made in clearly legible raised or recessed lettering by the original manufacturer. The marking must identify the buoyancy of the float in water, expressed in grams or kilograms, and must include the metric unit of measure. The marking may additionally include the buoyancy in English units. The marking must identify the nominal buoyancy for the manufactured float.

(B) *TED weight markings*. The marking must be made by the original TED manufacturer and must be permanent and clearly legible. The marking must identify the in-air, dry weight of the TED, expressed in grams or kilograms, and must include the metric unit of measure. The marking may additionally include the weight in English units. The marked weight must represent the actual weight of the individual TED as manufactured. Previously manufactured TEDs may be marked upon return to the original manufacturer. Where a TED is comprised of multiple detachable components, the weight of each component must be separately marked.

(iii) *Buoyancy-dimension requirements*. Floats of any size and in any combination, provided that they are

marked pursuant to paragraph (a)(9)(ii)(A) of this section, must be attached such that the combined buoyancy of the floats equals or exceeds the following values:

(A) For floats constructed of aluminum or hard plastic, regardless of the size of the TED grid, the combined buoyancy must equal or exceed 14 lb (6.4 kg);

(B) For floats constructed of expanded polyvinyl chloride or expanded ethylene vinyl acetate, where the circumference of the TED is 120 inches (304.8 cm) or more, the combined buoyancy must equal or exceed 20 lb (9.1 kg); or

(C) For floats constructed of expanded polyvinyl chloride or expanded ethylene vinyl acetate, where the circumference of the TED is less than 120 inches (304.8 cm), the combined buoyancy must equal or exceed 10 lb (4.5 kg).

(b) *Special Hard TEDs*. Special hard TEDs are hard TEDs which do not meet all of the design and construction criteria of the generic standards specified in paragraph (a) of this section. The following special hard TEDs are approved TEDs:

(1) *Flounder TED* (Figure 10 to this part). The Flounder TED is approved for use only in the Atlantic summer flounder bottom trawl fishery. The Flounder TED is not an approved TED for use by shrimp trawlers. The Flounder TED must be constructed of at least 1¼ inch (3.2 cm) outside diameter aluminum or steel pipe with a wall thickness of at least ⅛ inch (0.3 cm). It must have a rectangular frame with outside dimensions which can be no less than 51 inches (129.5 cm) in length and 32 inches (81.3 cm) in width. It must have at least five vertical deflector bars, with bar spacings of no more than 4 inches (10.2 cm). The vertical bars must be connected to the top of the frame and to a single horizontal bar near the bottom. The horizontal bar must be connected at both ends to the sides of the frame and parallel to the bottom bar of the frame. There must be a space no larger than 10 inches (25.4 cm) between the horizontal bar and the bottom bar of the frame. One or more additional vertical bars running from the bottom bar to the horizontal bar must divide the opening at the bottom into two or more rectangles, each with a maximum height of 10 inches (25.4 cm) and a maximum width of 14½ inches (36.8 cm). This TED must comply with paragraphs (a)(2), (a)(3), (a)(6), and (a)(7)(ii) of this section with respect to the method of attachment, the angle of the deflector bars, the position of the escape opening, and the size of the escape opening,

except that the deflector bars must be positioned in the net to deflect turtles to the escape opening in the top of the trawl. This TED may not be configured with a bottom escape opening. Installation of an accelerator funnel is not permitted with this TED.

(2) *Jones TED* (Figure 11 to this part). The Jones TED must be constructed of at least 1¼ inch (3.2 cm) outside diameter aluminum or steel pipe, and the pipe must have a wall thickness of at least ⅛ inch (0.3 cm). It must be generally oval in shape with a flattened bottom. The deflector bars must be attached to the frame at a 45° angle from the horizontal positioning downward and each bar must be attached at only one end to the frame. The deflector bars must be attached and lie in the same plane as the frame. The space between the ends of the bottom deflector bars and the bottom frame bar must be no more than 3 inches (7.6 cm). The spacing between the bottom three deflector bars on each side must be no greater than 2½ inches (6.4 cm). The spacing between all other deflector bars must not exceed 3½ inches (8.9 cm) and spacing between ends of opposing deflector bars also must not exceed 3½ inches (8.9 cm). This TED must comply with paragraphs (a)(2), (a)(3), (a)(6), (a)(7)(ii), (a)(8)(ii), and (a)(9) of this section with respect to the method of attachment, the angle of the deflector bars, the position of the escape opening, the size of the escape opening, the size of the grid, and flotation.

(c) *Soft TEDs*. Soft TEDs are TEDs with deflector panels made from polypropylene or polyethylene netting. Prior to October 13, 1999, the following soft TEDs are approved TEDs:

(1) *Parker TED*. The Parker TED is a soft TED, consisting of a single triangular panel, composed of webbing of two different mesh sizes, that forms a complete barrier inside a trawl and that angles toward an escape opening in the top of the trawl.

(i) *Excluder Panel*. (Figure 5 to this part) The excluder panel of the Parker TED must be constructed of a single triangular piece of 8-inch (20.3 cm) stretched mesh webbing and two trapezoidal pieces of 4-inch (10.2-cm) stretched mesh webbing. The webbing must consist of number 48 (3-mm thick) or larger polypropylene or polyethylene webbing that is heat-set knotted or braided. The leading edge of the 8-inch (20.3-cm) mesh panel must be 36 meshes wide. The 8-inch (20.3-cm) mesh panel must be tapered on each side with all-bar cuts to converge on an apex, such that the length of each side is 36 bars. The leading edges of the 4-inch (10.2-cm) mesh panels must be 8

meshes wide. The edges of the 4-inch (10.2-cm) mesh panels must be cut with all-bar cuts running parallel to each other, such that the length of the inner edge is 72 bars and the length of the outer edge is 89 bars and the resulting fore-and-aft edge is 8 meshes deep. The two 4-inch (10.2-cm) mesh panels must be sewn to the 8-inch (20.3-cm) mesh panel to create a single triangular excluder panel. The 72-bar edge of each 4-inch (10.2-cm) mesh panel must be securely joined with twine to one of the 36-bar edges of the 8-inch (20.3-cm) mesh panel, tied with knots at each knot of the 4-inch (10.2-cm) webbing and at least two wraps of twine around each bar of 4-inch (10.2-cm) mesh and the adjoining bar of the 8-inch (20.3-cm) mesh. The adjoining fore-and-aft edges of the two 4-inch (10.2-cm) mesh panels must be sewn together evenly.

(ii) *Limitations on which trawls may have a Parker TED installed*. The Parker TED must not be installed or used in a two-seam trawl with a tongue, nor in a triple-wing trawl (a trawl with a tongue along the headrope and a second tongue along the footrope). The Parker TED may be installed and used in any other trawl if the taper of the body panels of the trawl does not exceed 4b1p and if it can be properly installed in compliance with paragraph (c)(1)(iii) of this section.

(iii) *Panel installation—(A) Leading edge attachment*. The leading edge of the excluder panel must be attached to the inside of the bottom of the trawl across a straight row of meshes. For a two-seam trawl or a four-seam, tapered-wing trawl, the row of meshes for attachment to the trawl must run the entire width of the bottom body panel, from seam to seam. For a four-seam, straight-wing trawl, the row of meshes for attachment to the trawl must run the entire width of the bottom body panel and half the height of each wing panel of the trawl. Every mesh of the leading edge of the excluder panel must be evenly sewn to this row of meshes; meshes may not be laced to the trawl. The row of meshes for attachment to the trawl must contain the following number of meshes, depending on the stretched mesh size used in the trawl:

- (1) For a mesh size of 2¼ inches (5.7 cm), 152–168 meshes;
- (2) For a mesh size of 2⅛ inches (5.4 cm), 161–178 meshes;
- (3) For a mesh size of 2 inches (5.1 cm), 171–189 meshes;
- (4) For a mesh size of 1⅞ inches (4.8 cm), 182–202 meshes;
- (5) For a mesh size of 1¾ inches (4.4 cm), 196–216 meshes;
- (6) For a mesh size of 1⅝ inches (4.1 cm), 211–233 meshes;

(7) For a mesh size of 1½ inches (3.8 cm), 228–252 meshes;

(8) For a mesh size of 1⅓ inches (3.5 cm), 249–275 meshes; and

(9) For a mesh size of 1¼ inches (3.2 cm), 274–302 meshes.

(B) *Apex attachment*. The apex of the triangular excluder panel must be attached to the inside of the top body panel of the trawl at the centerline of the trawl. The distance, measured aft along the centerline of the top body panel from the same row of meshes for attachment of the excluder panel to the bottom body panel of the trawl, to the apex attachment point must contain the following number of meshes, depending on the stretched mesh size used in the trawl:

(1) For a mesh size of 2¼ inches (5.7 cm), 78–83 meshes;

(2) For a mesh size of 2⅛ inches (5.4 cm), 83–88 meshes;

(3) For a mesh size of 2 inches (5.1 cm), 87–93 meshes;

(4) For a mesh size of 1⅞ inches (4.8 cm), 93–99 meshes;

(5) For a mesh size of 1¾ inches (4.4 cm), 100–106 meshes;

(6) For a mesh size of 1⅝ inches (4.1 cm), 107–114 meshes;

(7) For a mesh size of 1½ inches (3.8 cm), 114–124 meshes;

(8) For a mesh size of 1⅓ inches (3.5 cm), 127–135 meshes; and

(9) For a mesh size of 1¼ inches (3.2 cm), 137–146 meshes.

(C) *Side attachment*. The sides of the excluder panel must be attached evenly to the inside of the trawl from the outside attachment points of the excluder panel's leading edge to the apex of the excluder panel. Each side must be sewn with the same sewing sequence, and, if the sides of the excluder panel cross rows of bars in the trawl, the crossings must be distributed evenly over the length of the side attachment.

(iv) *Escape opening*. The escape opening for the Parker soft TED must match one of the following specifications:

(A) *Longitudinal cut*. A slit at least 56 inches (1.4 m) in taut length must be cut along the centerline of the top body panel of the trawl net immediately forward of the apex of the panel webbing. The slit must not be covered or closed in any manner. The edges and end points of the slit must not be reinforced in any way; for example, by attaching additional rope or webbing or by changing the orientation of the webbing.

(B) *Leatherback escape opening*. A horizontal cut extending from the attachment of one side of the deflector panel to the trawl to the attachment of

the other side of the deflector panel to the trawl must be made in a single row of meshes across the top of the trawl and measure at least 96 inches (244 cm) in taut width. All trawl webbing above the deflector panel between the 96-inch (244-cm) cut and edges of the deflector panel must be removed. A rectangular flap of nylon webbing not larger than 2-inch (5.1-cm) stretched mesh may be sewn to the forward edge of the escape opening. The width of the flap must not be larger than the width of the forward edge of the escape opening. The flap must not extend more than 12 inches (30.4 cm) beyond the rear point of the escape opening. The sides of the flap may be attached to the top of the trawl but must not be attached farther aft than the row of meshes through the rear point of the escape opening. One row of steel chain not larger than $\frac{3}{16}$ inch (4.76 mm) may be sewn evenly to the back edge of the flap. The stretched length of the chain must not exceed 96 inches (244 cm). A Parker TED using the escape opening described in this paragraph meets the requirements of § 223.206(d)(2)(iv)(B).

(2) [Reserved]

(d) *Allowable modifications to hard TEDs and special hard TEDs.* Unless otherwise prohibited in paragraph (b) of this section, only the following modifications may be made to an approved hard TED or an approved special hard TED:

(1) *Floats.* In addition to floats required pursuant to paragraph (a)(9) of this section, floats may be attached to the top one-half of the TED, either outside or inside the net, but not to a flap. Floats attached inside the net must be behind the rear surface at the top of the TED.

(2) *Accelerator funnel.* An accelerator funnel may be installed in the trawl, if it is made of net webbing material with a stretched mesh size not greater than $1\frac{5}{8}$ inches (4.1 cm), if it has an inside horizontal opening of at least 39 inches (99.1 cm) when measured in a taut position, if it is inserted in the net immediately forward of the TED, and if its rear edge does not extend past the bars of the TED. The trailing edge of the accelerator funnel may be attached to the TED on the side opposite the escape opening if not more than $\frac{1}{3}$ of the circumference of the funnel is attached, and if the inside horizontal opening of at least 39 inches (99.1 cm) is maintained. In a bottom-opening TED, only the top $\frac{1}{3}$ of the circumference of the funnel may be attached to the TED. In a top-opening TED, only the bottom $\frac{1}{3}$ of the circumference of the funnel may be attached to the TED.

(3) *Webbing flap.* A webbing flap may be used to cover the escape opening under the following conditions: No device holds it closed or otherwise restricts the opening; it is constructed of webbing with a stretched mesh size no larger than $1\frac{5}{8}$ inches (4.1 cm); it lies on the outside of the trawl; it is attached along its entire forward edge forward of the escape opening; it is not attached on the sides beyond the row of meshes that lies 6 inches (15.2 cm) behind the posterior edge of the grid; and it does not extend more than 24 inches (61.0 cm) beyond the posterior edge of the grid, except for trawlers fishing in the Gulf SFSTCA or Atlantic SFSTCA with a hard TED with the position of the escape opening at the bottom of the net when the net is in its deployed position, in which case the webbing flap must not extend beyond the posterior edge of the grid.

(4) *Chafing webbing.* A single piece of nylon webbing, with a twine size no smaller than size 36 (2.46 mm in diameter), may be attached outside of the escape opening webbing flap to prevent chafing on bottom opening TEDs. This webbing may be attached along its leading edge only. This webbing may not extend beyond the trailing edge or sides of the existing escape opening webbing flap, and it must not interfere or otherwise restrict the turtle escape opening.

(5) *Roller gear.* Roller gear may be attached to the bottom of a TED to prevent chafing on the bottom of the TED and the trawl net. When a webbing flap is used in conjunction with roller gear, the webbing flap must be of a length such that no part of the webbing flap can touch or come in contact with any part of the roller gear assembly or the means of attachment of the roller gear assembly to the TED, when the trawl net is in its normal, horizontal position. Roller gear must be constructed according to one of the following design criteria:

(i) A single roller consisting of hard plastic shall be mounted on an axle rod, so that the roller can roll freely about the axle. The maximum diameter of the roller shall be 6 inches (15.24 cm), and the maximum width of the axle rod shall be 12 inches (30.4 cm). The axle rod must be attached to the TED by two support rods. The maximum clearance between the roller and the TED shall not exceed 1 inch (2.5 cm) at the center of the roller. The support rods and axle rod must be made from solid steel or solid aluminum rod no larger than $\frac{1}{2}$ inch (1.28 cm) in diameter. The attachment of the support rods to the TED shall be such that there are no protrusions (lips, sharp edges, burrs, etc.) on the front face

of the grid. The axle rod and support rods must lie entirely behind the plane of the face of the TED grid.

(ii) A single roller consisting of hard plastic tubing shall be tightly tied to the back face of the TED grid with rope or heavy twine passed through the center of the roller tubing. The roller shall lie flush against the TED. The maximum outside diameter of the roller shall be $3\frac{1}{2}$ inches (8.0 cm), the minimum outside diameter of the roller shall be 2 inches (5.1 cm), and the maximum length of the roller shall be 12 inches (30.4 cm). The roller must lie entirely behind the plane of the face of the grid.

(e) *Revision of generic design criteria, and approval of TEDs, of allowable modifications of hard TEDs, and of special hard TEDs.* (1) The Assistant Administrator may revise the generic design criteria for hard TEDs set forth in paragraph (a) of this section, may approve special hard TEDs in addition to those listed in paragraph (b) of this section, may approve allowable modifications to hard TEDs in addition to those authorized in paragraph (d) of this section, or may approve other TEDs, by regulatory amendment, if, according to a NMFS-approved scientific protocol, the TED demonstrates a sea turtle exclusion rate of 97 percent or greater (or an equivalent exclusion rate). Two such protocols have been published by NMFS (52 FR 24262, June 29, 1987; and 55 FR 41092, October 9, 1990) and will be used only for testing relating to hard TED designs. Testing under any protocol must be conducted under the supervision of the Assistant Administrator, and shall be subject to all such conditions and restrictions as the Assistant Administrator deems appropriate. Any person wishing to participate in such testing should contact the Director, Southeast Fisheries Science Center, NMFS, 75 Virginia Beach Dr., Miami, FL 33149-1003.

(2) Upon application, the Assistant Administrator may issue permits, subject to such conditions and restrictions as the Assistant Administrator deems appropriate, authorizing public or private experimentation aimed at improving shrimp retention efficiency of existing approved TEDs and at developing additional TEDs, or conducting fishery research, that would otherwise be subject to § 223.206(d)(2). Applications should be made to the Southeast Regional Administrator (see § 222.102 definition of "Southeast Regional Administrator").

**PART 648—FISHERIES OF THE
NORTHEASTERN UNITED STATES**

35. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

§ 648.106 [Amended]

36. In § 648.106, introductory text, remove the text, “parts 217 222, 227” and add in its place, “parts 222 and 223”.

37. In § 648.106(a), remove the text, “§ 227.72(e)(1)(i) and (ii)” and add in its place, “§ 223.206(d)(1)”.

38. In § 648.106(c), remove the text, “§ 227.72(e)(4)” and add in its place, “§ 223.207(b)(1)” and remove the text from the last sentence, “, and bounded on the east by a line 7 nm from the shoreward boundary of the EEZ.”.

§ 648.126 [Amended]

39. In § 648.126, remove the text, “217 and 227” and add in its place, “222 and 223”.

**PART 679—FISHERIES OF THE
EXCLUSIVE ECONOMIC ZONE OFF
ALASKA**

40. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*

§ 679.2 [Amended]

41. In § 679.2, in the definition for “Steller Sea Lion Protection Areas,” remove the text, “227.12” and add in its place, “223.202”.

§ 679.22 [Amended]

42. In Tables 4, 5, 6 to part 679 in the caption, remove the text, “227.12(a)(2)” and add in its place, “223.202”.

**PART 697—ATLANTIC COASTAL
FISHERIES COOPERATIVE
MANAGEMENT**

43. The authority citation for part 697 continues to read as follows:

Authority: 16 U.S.C. 1851 note; 16 U.S.C. 5101 *et seq.*

§ 697.2 [Amended]

44. In § 697.2, the definition “Approved TED”, remove the text, “217.12,” and add in its place, “222.102,”.

45. In § 697.2, in the definition for “Flynets”, remove the text, “227.72(e)(2)” and add in its place, “223.206”, wherever it occurs.

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