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**Part III**

## **Department of Commerce**

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**National Oceanic and Atmospheric  
Administration**

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**50 CFR Part 216**

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

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 216**

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

RIN 0648-AS45

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

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

**ACTION:** Final rule.

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

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

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

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

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

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

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

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

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

**Agreement on the IDCP**

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

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

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

**Proposed Rule and Interim Final Rule**

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

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

**Litigation: Labeling Standard**

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

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

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

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

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

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

injured during the sets in which the tuna were caught.

#### *Litigation: Implementing Regulations*

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

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

#### **Responses to Comments**

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

#### *Import Procedures*

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

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

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

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

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

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

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

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

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

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

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

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

destroyed after the 90-day period has elapsed.

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

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

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

#### Definitions

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

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

#### Application for Vessel Permit

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

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

#### Observer Placement

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

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

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

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

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

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

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

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

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

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

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

#### *Backdown Procedure*

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

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

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

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

#### *Sundown Sets Prohibition*

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

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

#### *Experimental Fishing Operations*

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

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

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

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

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

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

#### *Dolphin Sets After Reaching DML*

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

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

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

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

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

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

#### Observers

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

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

#### Affirmative Finding Procedures

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

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

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

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

#### Dolphin-safe Labeling Standards

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

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

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

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

#### Tuna Tracking and Verification Program

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

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

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

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

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

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

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

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

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

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

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

*Response:* See response to Comment 28.

#### *Tracking Cannery Operations*

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

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

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

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

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

#### *Miscellaneous Comments*

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

#### *Changes to Market Prohibitions*

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

#### *De-certification Under Pelly*

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

#### *Changes to Penalties*

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

#### *Changes to Observer Placement Fee*

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

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

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

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

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

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

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

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

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

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

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

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

inadvertently deleted from the interim final rule.

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

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

#### Classification

##### *Executive Order 12866*

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

##### *Regulatory Flexibility Act*

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

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

#### *Paperwork Reduction Act*

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

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

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

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

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

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

#### *National Environmental Policy Act*

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

#### *Endangered Species Act*

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

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

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

Dated: August 31, 2004.

**Rebecca Lent,**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

circumstances as determined by the International Review Panel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) *HTS numbers requiring a Fisheries Certificate of Origin, not subject to yellowfin tuna embargo.* The following HTS numbers identify tuna or tuna

products, (other than fresh tuna or yellowfin tuna identified in paragraph (f)(2)(i) of this section, known to be imported into the United States. All

shipments imported into the United States under these HTS numbers must be accompanied by an FCO.

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

(iii) *Exports from driftnet nations only: HTS numbers requiring a Fisheries Certificate of Origin and official*

*certification.* The following HTS numbers identify categories of fish and shellfish, in addition to those identified

in paragraphs (f)(2)(i) and (f)(2)(ii) of this section, known to have been harvested using a large-scale driftnet

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**§ 216.90 Purposes.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) *Imported tuna.*

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

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

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

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

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

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

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

**§ 216.93 Tracking and verification program.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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