

but are not limited to, provisions regarding records, inventory segregation, reports, and inspection. The Secretary may charge a reasonable fee for processing such applications, including an appropriate apportionment of overhead and administrative expenses of the Department of Commerce.

(d) Notwithstanding the preceding provisions of this section, whenever, under the MMPA, the Secretary determines any species of stock of marine mammals to be depleted, he may prescribe regulations pursuant to section 103 of the MMPA upon the taking of such marine animals by any Indian, Aleut, or Eskimo and, after promulgation of such regulations, all takings of such marine mammals shall conform to such regulations.

[39 FR 1852, Jan. 15, 1974, as amended at 59 FR 50376, Oct. 3, 1994]

§216.24 Taking and related acts incidental to commercial fishing operations.

NOTE TO §216.24: The provisions of 50 CFR part 229, rather than §216.24, will govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States, other than vessels used in the eastern tropical Pacific yellowfin tuna purse seine fishery, and vessels which have valid fishing permits issued in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)). Other commercial fisheries remain subject to regulations under §216.24.

(a)(1) No marine mammals may be taken in the course of a commercial fishing operation unless: The taking constitutes an incidental catch as defined in §216.3, a general permit and certificate(s) of inclusion have been obtained in accordance with these regulations and such taking is not in violation of such permit, certificate(s), and regulations.

(2)(i) It is unlawful for any person using a Class I (400 short tons (362.8 metric tons) carrying capacity or less) or Class II (greater than 400 short tons (362.8 metric tons) carrying capacity, built before 1961) U.S. purse seine fishing vessel on a fishing involving the utilization of purse seines to capture yellowfin tuna, that is not operating under a Category 2 general permit and

certificate(s) of inclusion, to carry more than two speedboats if any part of its fishing trip is in the Pacific Ocean area described in the General Permit for gear Category 2 operations.

(ii) It is unlawful for any person using a Class III (greater than 400 short tons (362.8 metric tons) carrying capacity, built after 1960) U.S. purse seine fishing vessel that does not have and operate under a valid operator and vessel certificate of inclusion, to catch, possess, or land tuna from a fishing trip that includes the Pacific Ocean area described in the General Permit for gear Category 2 operations.

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

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

(3) Upon written request in advance of entering the General Permit area, the limitation in (a)(2) may be waived by the Director, Southwest Region for the purpose of allowing transit through the General Permit area. The waiver will provide in writing the terms and conditions under which the vessel must operate, including a requirement to report by radio to the Director, Southwest Region the vessel's date of exit from or subsequent entry to the permit area, in order to transit the area with more than two speedboats.

(b) [Reserved]

(c) *Certificates of inclusion*—(1) *Vessel certificates of inclusion*. The owner or managing owner of a vessel that participates in commercial fishing operations under the ATA permit must hold a valid vessel certificate of inclusion. Such certificates are not transferable and must be renewed annually. If a vessel certificate holder surrenders his/her certificate to the Director, Southwest Region, the certificate shall not be returned nor shall a new certificate be issued before the end of the calendar year. This provision does not

apply when a change of vessel ownership occurs.

(2) *Operator's certificate of inclusion.* The person in charge of and actually controlling fishing operations (hereinafter referred to as the operator) on a vessel engaged in commercial fishing operations under the ATA permit, must hold a valid operator's certificate of inclusion. Such certificates are not transferable, and must be renewed annually. In order to receive a certification of inclusion, the operator must have satisfactorily completed all required training.

(3) A vessel certificate issued pursuant to paragraph (c)(1) of this section must be on board the vessel while it is engaged in fishing operations and the operator's certificate issued pursuant to paragraph (c)(2) of this section must be in the possession of the operator to whom it was issued. Certificates must be shown upon request to an enforcement agent or other National Marine Fisheries Service (NMFS) designated agent. Vessels and operators at sea on a fishing trip on the expiration date of their certificate of inclusion, to whom or to which a certificate of inclusion for the next year has been issued, may take marine mammals under the terms of the new certificate. A vessel owner or operator is obligated to obtain or place the new certificate on board, as appropriate, when the vessel next returns to port.

(4) *Applications.* Owners or managing owners of purse seine vessels should make application for vessel certificates of inclusion to the Director, Southwest Region. Applications for vessel certificates of inclusion must contain:

- (i) The name of the vessel that is to appear on the certificate(s) of inclusion;
- (ii) The category of the general permit under which the applicant wishes to be included;
- (iii) The species of fish sought and general area of operations;
- (iv) The identity of state and local commercial fishing licenses, if applicable, under which vessel operations are conducted, and dates of expiration;
- (v) The name of the operator and date of training, if applicable; and
- (vi) The name and signature of the applicant, whether owner or managing

owner, address, and if applicable, the organization acting on behalf of the vessel.

(5) *Fees.* (i) Applications for certificates of inclusion under paragraph (c)(1) of this section must include a fee of \$200.00 for each vessel named in the application, unless the applicant's income is below Federal poverty guidelines and the applicant shows in the application that his/her income is below such guidelines, in which case a fee of \$20.00 must be included.

(ii) The Assistant Administrator may change the amount of the fee required at any time a different fee is determined to be reasonable, and notification of such change shall be published in the FEDERAL REGISTER.

(6) The Director, Southwest Region shall determine the adequacy and completeness of applications, and upon said determination that such applications are adequate and complete, shall approve such applications and issue the certificate(s).

(7) Failure to comply with provisions of the ATA permit, certificates of inclusion, or these regulations may lead to suspension, revocation, modification, or denial of a certificate of inclusion. It may also subject the certificate holder, vessel, vessel owner, operator, or master to the penalties provided under the MMPA. Procedures governing permit sanctions and denials are found at subpart D of 15 CFR part 904.

(8) By using an operator or vessel certificate of inclusion under the ATA permit, the certificate holder authorizes the release to NMFS of all data collected by observers aboard purse seine vessels during fishing trips under the Inter-American Tropical Tuna Commission observer program or any other international observer program in which the United States may participate. The certificate holder must furnish the international observer program all release forms required to provide the observer data to NMFS. Data obtained under such releases will be used for the same purposes as data collected directly by observers placed by the NMFS and will be subject to the same standards of confidentiality.

(d) Terms and conditions of certificates under general permits shall include, but are not limited to the following:

(1) [Reserved]

(2) *Encircling gear, purse seining involving the intentional taking of marine mammals—(i) Quotas:*

(A) A certificated vessel may take marine mammals only if the taking is an incidental occurrence in the course of normal commercial tuna purse seine fishing operations, and the fishing operations are under the immediate direction of a person who is the holder of a valid operator's certificate of inclusion, subject to the following conditions:

(1)–(2) [Reserved]

(3) No purse seine net may be deployed on or used to encircle any school of dolphins in which any eastern spinner dolphin (*Stenella longirostris*), coastal spotted dolphin (*Stenella attenuata*), or, in the area from 40° N. lat. to 5° N. lat. and from 120° W. long. to the coastline of Central and South America, any offshore spotted dolphin (*Stenella attenuata*), are observed in the school prior to the release of the net skiff.

(B) The incidental mortality of marine mammals permitted under the general permit for each category will be monitored according to the methodology published in the FEDERAL REGISTER. The Assistant Administrator shall determine on the basis of the evidence available to him the date upon which the allowable quotas will be reached or exceeded. Notice of the Assistant Administrator's determination shall be published in the FEDERAL REGISTER not less than seven days prior to the effective date.

(C) Except for the coastal spotted dolphin stock and the eastern spinner dolphin stock, if at the time the net skiff attached to the net is released from the vessel at the start of a set, and species or stocks that are prohibited from being taken are not reasonably observable, the fact that individuals of that species or stock are subsequently taken will not be cause for issuance of a notice of violation provided that all procedures required by the applicable regulations have been followed.

(D) The general permit is valid until surrendered by the permit holder or suspended or terminated by the Assistant Administrator provided the permittee and certificate holders under this part continue to use the best marine mammal safety techniques and equipment that are economically and technologically practicable. The Assistant Administrator may, upon receipt of new information which in his opinion is sufficient to require modification of the general permit or regulations, propose to modify such after consultation with the Marine Mammal Commission. These modifications must be consistent with and necessary to carry out the purposes of the MMPA. Any modifications proposed by the Assistant Administrator involving changes in the quotas will include the statements required by section 103(d) of the MMPA. Modifications will be proposed in the FEDERAL REGISTER and a public comment period will be allowed. At the request of any interested person within 15 days after publication of the proposed modification in the FEDERAL REGISTER, the Assistant Administrator may hold a public hearing to receive and evaluate evidence in those circumstances where he has determined it to be consistent with and necessary to carry out the purposes of the MMPA. Such request may be for a formal hearing on the record before an Administrative Law Judge. Within 10 days after receipt of the request for a public hearing, the Assistant Administrator will provide the requesting party or parties with his decision. If a request is denied, the Assistant Administrator will state the reasons for the denial. Within 10 days after receipt of a decision denying a request for a formal hearing, the requesting person may file a written notice of appeal with the Administrator. Based upon the evidence presented in the notice, the Administrator will render a decision within 20 days from receipt of the notice.

(ii) *General conditions:* (A) Marine mammals incidentally taken must be immediately returned to the environment where captured without further injury. The operators of purse seine vessels must take every precaution to refrain from causing or permitting incidental mortality or serious injury of

marine mammals. Live marine mammals must not be brailed or hoisted onto the deck during ortza retrieval.

(B) Operators may take such steps as are necessary to protect their gear or person from damage or threat of personal injury. However, all marine mammals taken in the course of commercial fishing operations shall be subject to the definition of "incidental catch" in §216.3 of this part and may not be retained except where a specific permit has been obtained authorizing the retention.

(C) The vessel certificate holder shall notify the Director, Southwest Region of any change of vessel operator within at least 48 hours prior to departing on the next scheduled trip.

(iii) *Reporting requirements:* In accordance with §216.24(f) of these regulations, the following specific reporting procedures shall be required:

(A) The vessel certificate holder of each certificated vessel, who has been notified via certified letter from NMFS that his/her vessel is required to carry an observer, shall notify the Director, Southwest Region at least 5 days in advance of the vessel's departure on a fishing voyage to allow for observer placement. After a fishing voyage is initiated, the vessel is obligated to carry an observer until the vessel returns to port and one of the following conditions is met:

(1) Unloads more than 400 tons of any species of tuna; or

(2) Unloads any amount of any species of tuna equivalent to one half of the vessel's carrying capacity; or

(3) Unloads its tuna catch after 40 days or more at sea from the date of departure.

Further, the Director, Southwest Region, may consider special circumstances for exemptions to this definition, provided written requests clearly describing the circumstances are received prior to the termination or the initiation of a fishing voyage. A response to the written request will be made by the Director, Southwest Region within five (5) days after receipt of the request. A vessel whose vessel certificate holder has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.

(B) [Reserved]

(C) The Director, Southwest Region, will provide to the public, periodic quota status reports summarizing the estimated incidental porpoise mortality by U.S. vessels of individual species and stock.

(iv) A vessel having a vessel certificate issued under paragraph (c)(1) may not engage in fishing operations for which a general permit is required unless it is equipped with a porpoise safety panel in its purse seine, and has and uses the other required gear, equipment, and procedures.

(A) *Class I and II Vessels:* For Class I purse seiners (400 short tons carrying capacity or less) and for Class II purse seiners (greater than 400 short tons carrying capacity, built before 1961), the porpoise safety panel must be a minimum of 100 fathoms in length (as measured before installation), except that the minimum length of the panel in nets deeper than 10 strips must be determined at a ratio of 10 fathoms in length for each strip that the net is deep. It must be installed so as to protect the perimeter of the backdown area. The perimeter of the backdown area is the length of the corkline which 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. The porpoise safety panel must consist of small mesh webbing not to exceed 1¼" stretch mesh, extending from the corkline downward to a minimum depth equivalent to one strip of 100 meshes of 4¼" 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.

(B) *Class III Vessels:* For Class III purse seiners (greater than 400 short tons carrying capacity, built after 1960), the porpoise 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 which 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 porpoise safety panel must consist of small mesh webbing not to exceed 1¼" stretch mesh extending downward from the corkline and, if present, the base of the porpoise apron to a minimum depth equivalent to two strips of 100 meshes of 4¼" 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.

(C) *Porpoise safety panel markers:* Each end of the porpoise safety panel and porpoise apron shall be identified with an easily distinguishable marker.

(D) *Porpoise safety panel hand holds:* Throughout the length of the corkline under which the porpoise safety panel and porpoise apron are located, hand hold openings are to be secured so that the insertion of a 1⅜" diameter cylindrical-shaped object meets resistance.

(E) *Porpoise safety panel corkline hangings:* Throughout the length of the corkline under which the porpoise safety panel and porpoise apron are located, corkline hangings shall be inspected by the vessel operator following each trip. Hangings found to have loosened to the extent that a cylindrical object with a 1⅜" diameter will not meet resistance when inserted between the cork and corkline hangings, must be tightened so that a cylindrical object with a 1⅜" diameter cannot be inserted.

(F) *Speedboats:* Certificated vessels engaged in fishing operations involving setting on marine mammals shall carry a minimum of two speedboats in operating condition. All speedboats carried aboard purse seine vessels and in operating condition shall be rigged with towing bridles and tows. Speedboat hoisting bridles shall not be substituted for towing bridles.

(G) *Raft:* A raft suitable to be used as a porpoise observation-and-rescue platform shall be carried on all certificated vessels.

(H) *Facemask and snorkel, or viewbox:* At least two facemasks and snorkels, or viewboxes, must be carried on all certificated vessels.

(I) *Lights:* All certificated vessels shall be equipped by July 1, 1986, 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 porpoise release are carried out and to monitor incidental porpoise mortality.

(v) *Vessel inspection:* (A) *Annual:* At least once during each calendar year, purse seine nets and other gear and equipment required by these regulations shall be made available for inspection by an authorized National Marine Fisheries Service Inspector as specified by the Director, Southwest Region.

(B) *Reinspection:* Purse seine nets and other gear and equipment required by these regulations shall be made available for reinspection by an authorized National Marine Fisheries Service Inspector as specified by the Director, Southwest Region. The vessel certificate holder shall notify the Director, 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 is required.

(C) Upon failure to pass an inspection or reinspection, a vessel having a vessel certificate of inclusion issued under paragraph (c)(1) may not engage in fishing operations for which a general permit is required until the deficiencies in gear or equipment are corrected as required by an authorized National Marine Fisheries Service inspector.

(vi) *Operator training requirements.* All operators shall maintain proficiency sufficient to perform the procedures required herein, and must attend and satisfactorily complete a formal training session conducted under the auspices of the National Marine Fisheries Service in order to obtain their certificate of inclusion. At the training session an attendee shall be instructed concerning the provisions of the Marine Mammal Protection Act of 1972, the regulations promulgated pursuant to the MMPA, and the fishing gear and techniques which are required or will contribute to reducing serious injury and mortality of porpoise 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 certificate of inclusion will not be required to attend additional formal training sessions unless there are substantial changes in the MMPA, the regulations, or the required fishing gear and techniques. Additional training may be required for any operator who is found by the Director, Southwest Region, to lack proficiency in the procedures required.

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

(A) *Backdown procedure*: Backdown shall be performed following a purse seine set in which marine mammals are captured in the course of catching and landing tuna, and shall be continued until it is no longer possible to remove live marine mammals from the net by this procedure. Thereafter, other release procedures required shall be continued until all live animals have been released from the net.

(B) *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.

(C) *Sundown sets prohibited*. On every set encircling porpoise, the backdown procedure must be completed and rolling of the net to sack-up must be begun before one-half hour after sundown, except as provided below. 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 view of the sun is obscured, the local time of sunset calculated from tables developed by the U.S. Naval Observatory. 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.

(I) A certificated operator may obtain an initial waiver from this prohibition, for trips with an observer, by

establishing to the satisfaction of the Director, Southwest Region, NMFS, based upon NMFS and Inter-American Tropical Tuna Commission (IATTC) observer records, that the operator's average kill of marine mammals per set in sundown sets involving marine mammals was 3.01 marine mammals or fewer.

(j) The application must include the following:

(A) Name of the operator as it appears on the certificate of inclusion;

(B) The dates of all observed trips any part of which occurred since July 1, 1986 and observed trips before that date, if necessary to include a minimum of three observed sundown sets;

(C) Names of the vessels operated during those trips;

(D) The number of marine mammals killed in sundown sets and the number of sundown sets involving marine mammals;

(E) Detailed description of the circumstances that support any request that the mortality associated with a particular sundown set be excluded from consideration; and

(F) The operator's signature or the signature of an individual authorized by the operator to make the application in the operator's absence.

(ii) All sundown sets since July 1, 1986 will be considered for this determination, except that the Director, Southwest Region will exclude one sundown set from each twelve month period from the calculations of average kill if the operator establishes to the satisfaction of the Director, Southwest Region that the kill in that sundown set was due to an unforeseeable equipment malfunction that could not have been avoided by reasonable diligence in operating or maintaining the vessel.

(iii) An operator must have a minimum of five observed sundown sets for the Director, Southwest Region to consider in determining whether or not the operator qualifies for an exemption. If an operator does not have five observed sundown sets since July 1, 1986, the Director, Southwest Region will consider records from observed trips before that date, starting with the most recent observed trip during which a sundown set was made and reviewing as many trips as necessary to

obtain at least five sundown sets for consideration.

(2) An operator fishing under an exemption from the sundown set prohibition must follow the marine mammal release requirements, including the use of high intensity lights for sets that continue one-half hour past sundown.

(3) An operator exemption is valid for one calendar year only on trips carrying a NMFS or IATTC observer and expires on December 31, unless renewed by the Director, Southwest Region.

(4) An exemption will be reviewed annually between November 1 and December 15 and the exemption will not be renewed if the operator's average mortality in sundown sets during trips completed in the previous twelve month period ending November 1 exceeds the United States fleet's average mortality rate in daylight sets for all of the observed trips completed in the same period.

(5) An operator who is notified that his or her exemption will not be renewed, or who anticipates not getting renewed, may petition the Director, Southwest Region in writing to reinstate the exemption based on excluding from the calculations one set where an unforeseeable equipment malfunction caused mortality in a sundown set that could not have been avoided by reasonable diligence in operating or maintaining the vessel. The Director, Southwest Region will reinstate the exemption if the evidence supports excluding the set and if the resulting recalculation of the operator's performance meets the standard required by these regulations.

(D) *Porpoise Safety Panel*: During backdown, the porpoise 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 which 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. Any super apron must be positioned at the apex of the backdown channel.

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

(viii) *Experimental fishing operations*: The Assistant Administrator may authorize experimental fishing operations and may waive, as appropriate, any requirements within §216.24(d)(2), except quotas on the incidental kill of marine mammals and the prohibition on setting nets on pure schools of certain porpoise species.

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

(1) Name(s) of the vessel(s) and the vessel certificate holder(s) to participate;

(2) 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;

(3) A description of how the proposed modification to the gear or procedures is expected to reduce incidental mortalities or serious injury of marine mammals;

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

(5) Planned design, time, duration, and general area of the experimental operation;

(6) Name(s) of the certificated operator(s) of the vessel(s) during the experiment;

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

(B) The Assistant Administrator will acknowledge receipt of the application and, upon determining that it is complete, publish notice in the FEDERAL REGISTER summarizing the application, making the full application available for inspection and inviting comments for a minimum period of thirty days from the date of publication.

(C) The Assistant Administrator, after considering the information identified in paragraph (d)(2)(viii)(A) of this section and the comments received, will deny the application giving the reasons for denial or issue a permit to conduct the experiment including restrictions and conditions as deemed appropriate.

(D) The permit 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 assigned by the NMFS, and when all the terms and conditions of the permit are met.

(E) The Assistant Administrator may suspend or revoke an experimental fishing permit by written notice to the permit holder if the terms and conditions of the permit or the provisions of the regulations are not followed, after providing an opportunity for the permit holder to discuss the proposed suspension or revocation.

(ix) *Operator Certificate of Inclusion Holder Performance Requirements.* (A) The certificate of inclusion of any operator who makes one or more purse seine sets on marine mammals resulting in an average kill-per-set for a fishing trip which exceeds 26.30 marine mammals is suspended. Such suspension shall be effective upon notification from the Director, Southwest Region and shall be for a period of one year. If the operator exceeds the 26.30 marine mammals killed per set average for a subsequent trip within three years of reinstatement, the certificate is suspended. Such suspension shall be effective upon notification by the Director, Southwest Region and shall be for a period of one year. If the operator's average mortality rate exceeds 26.30 marine mammals kill-per-set on a subsequent trip within five years of the second reinstatement, the certificate is revoked. The revocation shall be effective upon notification by the Director, Southwest Region and shall be permanent. An operator who is subject to a suspension or revocation under this paragraph may petition the Director, Southwest Region to review the operator's marine mammal mortality history. The Director, Southwest Region may reinstate the operator's certificate if the operator demonstrates that the operator has not exceeded a kill-per-set of 3.89 marine mammals during any of the eight consecutive observed trips immediately preceding the trip which caused the suspension. However, that trip will be considered as a single trip exceeding a kill-per-set of 3.89 marine mammals and subject to the con-

ditions described in paragraph (d)(2)(ix)(F) of this section. The Director, Southwest Region may exclude from the mortality calculation for a trip, those purse seine sets in which marine mammal mortality resulted from an unavoidable and unforeseeable equipment breakdown. The mortality rate calculated after exclusion of a set or sets under this paragraph will determine the action taken under this performance evaluation system.

(B) Fishing trips with five or fewer sets on marine mammals and an average kill-per-set less than or equal to 26.30 marine mammals are not subject to further action under the operator performance system. Such trips neither count as trips meeting the performance standard nor count as trips failing to meet the performance standard for the purpose of determining actions based on performance in consecutive fishing trips.

(C) Fishing trips with more than five sets on marine mammals resulting in an average kill-per-set of not greater than 26.30 marine mammals are subject to review under the operator performance system as follows:

(1) The operator's kill of marine mammals in purse seine sets on marine mammals will be determined from observer records.

(2) The kill-per-set will be determined by dividing the total kill of marine mammals by the number of sets involving marine mammals during the fishing trip.

(3) If the calculated kill-per-set for the trip is equal to or less than 3.89 marine mammals, the operator has met the performance standard and is not subject to further action under the performance system based on the current trip.

(4) If the calculated kill-per-set for the trip exceeds 3.89 marine mammals, the operator failed to meet the mortality performance standard and is subject to further action under the performance system.

(D) The Director, Southwest Region may exclude from the mortality calculation for a trip, those purse seine sets in which marine mammal mortality resulted from an unavoidable and unforeseeable equipment breakdown. Should exclusion of a set or sets cause

the operator's performance to fall within the standard performance, that trip will not be counted as a trip for the purposes of the performance evaluation system.

(E) An operator shall not serve as a certificated operator until the Director, Southwest Region has determined under this subpart and notified the operator that the operator's marine mammal mortality rate performance met or failed to meet the applicable performance standard on the previous observed trip. The Director, Southwest Region will make the determination within five days (excluding Saturdays, Sundays and Federal holidays) after receiving the observer data from the trip.

(F) An operator whose average marine mammal mortality rate exceeds 3.89 kill-per-set for a trip must have observer data and other pertinent records reviewed by the Director, Southwest Region and the Porpoise Rescue Foundation for the purpose of determining the causes of higher than acceptable mortality, must participate in supplemental marine mammal safety training as ordered by the Director, Southwest Region and must comply with actions for reducing marine mammal mortality which may be ordered by the Director, Southwest Region. The operator must carry an observer on the next trip for which he serves as the certificated operator. If the Director, Southwest Region determines that the required training or other ordered action has not been completed satisfactorily or is refused, the Director, Southwest Region will suspend the operator's certificate of inclusion for one year.

(G) An operator whose average marine mammal mortality rate exceeds 3.89 marine mammals killed per set on two consecutive trips or on three trips ending within a period of twenty-four months or on three trips within eight consecutive trips must have observer data and other pertinent records reviewed by the Director, Southwest Region and the Porpoise Rescue Foundation for the purpose of determining the causes of higher than acceptable mortality, must participate in supplemental marine mammal safety training as ordered by the Director, Southwest Region and must comply with ac-

tions for reducing marine mammal mortality which may be ordered by the Director, Southwest Region. The operator must carry an expert fisherman (*i.e.*, an experienced vessel operator with a history of low dolphin mortality), if required to do so by the Director, Southwest Region, to assist in perfecting marine mammal safety techniques, and must also carry an observer on the next trip for which he serves as the certificated operator. The selection of the expert fisherman will be provided by the General Permit holder or the Porpoise Rescue Foundation and subject to the approval of the Director, Southwest Region. If the Director, Southwest Region determines that the required training or other ordered action has not been completed satisfactorily or is refused, the Director, Southwest Region will suspend the operator's certificate of inclusion for one year.

(H) The operator certificate of inclusion or an operator whose average marine mammal mortality rate exceeds 3.89 kill-per-set on three *consecutive* trips, or on any four trips (of which no more than two are consecutive) completed within a period of twenty-four months or on four trips (of which no more than two are consecutive) within eight consecutively observed trips, is suspended upon notification to the operator from the Director, Southwest Region.

(I) Following a suspension and a reinstatement of a certification of inclusion, the operator certificate of inclusion is suspended for any operator whose average marine mammal mortality rate exceeds 3.89 marine mammals killed per set on any subsequent trip as required under the criteria for a suspension established in paragraph (d)(2)(ix)(H) of this section. Under this paragraph, trips completed by the operator prior to suspension will be carried over and counted along with trips completed subsequent to the suspension. Such suspension shall be effective upon notification from the Director, Southwest Region and shall be for a period of one year. For purposes of this paragraph only, each suspension under paragraph (d)(2)(ix)(A) of this section will be considered equivalent to and

counted as three consecutive trips exceeding the trip kill rate of 3.89 marine mammals killed per set.

(J) An operator may appeal suspension of revocation of a certificate of inclusion under paragraphs (d)(2)(ix)(A), (d)(2)(ix)(H), or (d)(2)(ix)(I) of this section to the Assistant Administrator. Appeals must be filed in writing within 30 days of suspension or revocation and must contain a statement setting forth the basis for the appeal. Appeals must be filed with the Director, Southwest Region. The appeal may be presented at the option of the operator at a hearing before a person appointed by the Assistant Administrator to hear the appeal. The Assistant Administrator will determine, based upon the record, including any record developed at a hearing, if the suspension or revocation is supported under the criteria set forth in these regulations. The decision of the Assistant Administrator will be the final decision of the Department of Commerce.

(K) An operator must carry an observer on the operator's first trip after a suspension under this performance system has expired. An operator must also participate in supplemental marine mammal safety training and comply with actions for reducing marine mammal mortality as ordered by the Director, Southwest Region before making another trip as a certified operator.

(L) A person obtaining an operator certificate of inclusion for the first time must carry an observer on the operator's first trip.

(x) *Vessel Certificate of Inclusion Holder Performance Requirements*—(A) vessel certificate of inclusion holder desiring a DML for the following year must provide to the Director, Southwest Region, NMFS, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213, by September 1, the name of the purse seine vessel(s) of carrying capacity greater than 400 short tons (362.8 mt) that the owner thinks will intentionally deploy purse seine fishing nets in the ETP to encircle dolphins in an effort to capture tuna during that year. NMFS will forward the list of purse seine vessels to the Director of the IATTC on or before October 1, or as required by the

IATTC, for assignment of a DML for the following year.

(B) Each vessel certificate of inclusion holder that desires a DML for the period July 1 to December 31, for a vessel that has not previously had a DML assigned for the year, must provide to the Director, Southwest Region, NMFS, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213, by March 15, the name of the purse seine vessel(s) of carrying capacity greater than 400 short tons (362.8 mt) that the owner thinks will intentionally deploy purse seine fishing nets in the ETP to encircle dolphins in an effort to capture tuna during the period. NMFS will forward the list of purse seine vessels to the Director of the IATTC on or before April 1, or as required by the IATTC, for assignment of a DML for the 6-month period July 1 to December 31. Under the Agreement adopted at the Annual Meeting of the IATTC June 16-18, 1992, the DML shall be assigned from the unutilized pool of DMLs described under paragraph (d)(2)(x)(D) of this section, divided among the applicants for the 6-month period, and shall not exceed 50 percent of the DML assigned to a vessel in the fishery with a DML for the entire year.

(C)(1) NMFS will notify vessel owners of the DML assigned for each vessel for the following year as determined by the IATTC.

(2) NMFS may adjust the DMLs, either upward or downward with 15 percent of the original DML, except that the adjusted DMLs for the U.S. fleet will not exceed the original total of the DMLs for the U.S. fleet as assigned by the IATTC. All adjustments shall be made prior to December 1, and NMFS shall notify the IATTC prior to December 15. DMLs as assigned on December 1 will be applicable to the following year.

(3) NMFS may make an adjustment of a vessel's DMLs 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 shall be considered a basis for adjustments.

(D)(1) Any vessel assigned a DML, that does not participate, by June 1, in this fishery by operating under valid certificates of inclusion, or that leaves the fishery, shall lose its right to utilize its DML for the remainder of the year.

(2) NMFS will determine, based on the available information, whether a vessel has left the fishery. A vessel lost at sea, undergoing extensive repairs, operating in an ocean area other than the ETP, or for which other information indicates will no longer be conducting purse seine operations in the ETP for the remainder of the period, shall be determined to have left the fishery. NMFS will make all reasonable efforts to determine the intentions of the vessel owner, and the owner of any vessel that has been preliminarily determined to have left the fishery will be provided notice of such preliminary determination and the opportunity to provide information on whether the vessel has left the fishery before NMFS makes a final determination and notifies the IATTC of this determination. The vessel owner will receive written notification of NMFS' final determination.

(3) Any unused DML for a vessel that has been determined to have left the fishery will be returned to the IATTC, to be added to the pool of unutilized DMLs.

(E) Any vessel that exceeds its assigned DML, after any applicable adjustment under paragraph (d)(2)(x)(C)(2) of this section, shall have its DML for the subsequent year reduced by the amount of overage.

(F)(1) The vessel operator and owner are responsible for ensuring that the DML for that vessel is not exceeded.

(2) Observers, either from the IATTC observer program or the NMFS observer program, will make their records available to the vessel operators at any time, including after each set, so that the operator can monitor the balance of the DML remaining for use during the trip.

(3) Vessel captains must cease deploying purse seine sets to encircle dolphins intentionally when the vessel's DML, as adjusted under paragraph

(d)(2)(x)(C)(2) of this section, is reached.

(G)(1) Sanctions recommended by the Review Panel for any violation of these rules shall be considered by NMFS in its enforcement of these regulations.

(2) Intentionally deploying a purse seine net on or to encircle dolphins after the vessel's DML is reached will disqualify the vessel from consideration for a DML for the following year. If already assigned, the DMLs for the following year will be withdrawn, and the IATTC notified by NMFS that the DML assigned to that vessel will be unutilized. The vessel owner will be provided an opportunity to provide information and comments on this issue before a final determination is made by NMFS.

(3) *Encircling gear, purse seining not involving the intentional taking of marine mammals.* (i) A certificate holder may take marine mammals so long as such taking is an incidental occurrence in the course of normal commercial fishing operations. Marine mammals taken incidental to commercial fishing operations shall be immediately returned to the environment where captured without further injury.

(ii) A certificate holder may take such steps as are necessary to protect his catch, gear, or person from depredation, damage or personal injury without inflicting death or injury to any marine mammal.

(iii) Only after all means permitted by paragraph (d)(3)(ii) of this section have been taken to deter a marine mammal from depredating the catch, damaging the gear, or causing personal injury, may the certificate holder injure or kill the animal causing the depredation or immediate damage, or about to cause immediate personal injury; however, in no event shall a certificate holder kill or injure an Atlantic bottlenosed dolphin, *Tursiops truncatus*, under the provisions of this paragraph. A certificate holder shall not injure or kill any animal permitted to be killed or injured under this paragraph unless the infliction of such damage is substantial and immediate and is actually being caused at the time such steps are taken. In all cases, the burden is on the certificate holder to report fully and demonstrate that

the animal was causing substantial and immediate damage or about to cause personal injury and that all possible steps to protect against such damage or injury as permitted by paragraph (d)(3)(ii) of this section were taken and that such attempts failed.

(iv) Marine mammals taken in the course of commercial fishing operations shall be subject to the provisions of §216.3 with respect to "Incidental catch," and may be retained except where a specific permit has been obtained authorizing the retention.

(v) All certificate holders shall maintain logs of incidental take of marine mammals in such form as prescribed by the Assistant Administrator. All deaths or injuries to marine mammals occurring in the course of commercial fishing operations under the conditions of a general permit shall be immediately recorded in the log and reported in writing to the Director, Southwest Region, where a certificate application was made, or to an enforcement agent or other designated agent of the National Marine Fisheries Service, at the earliest opportunity but no later than five days after such occurrence, except that if a vessel at sea returns to port later than five days after such occurrence, then it shall be reported within forty-eight hours after arrival in port. Reports must include:

(A) The location, time, and date of the death or injury;

(B) The identity and number of marine mammals killed or injured; and

(C) A description of the circumstances which led up to and caused the death or injury.

(4) *Stationary gear.* (i) A certificate holder may take marine mammals so long as such taking is an incidental occurrence in the course of normal commercial fishing operations. Marine mammals taken incidental to commercial fishing operations shall be immediately returned to the environment where captured without further injury.

(ii) A certificate holder may take such steps as are necessary to protect his catch, gear, or person from depredation, damage or personal injury without inflicting death or injury to any marine mammal.

(iii) Only after all means permitted by paragraph (d)(4)(ii) of this section

have been taken to deter a marine mammal from depredating the catch, damaging the gear, or causing personal injury, may the certificate holder injure or kill the animal causing the depredation or immediate damage, or about to cause immediate personal injury; however, in no event shall a certificate holder kill or injure an Atlantic bottlenosed dolphin, *Tursiops truncatus*, under the provisions of this paragraph. A certificate holder shall not injure or kill any animal permitted to be killed or injured under this paragraph unless the infliction of such damage is substantial and immediate and is actually being caused at the time such steps are taken. In all cases, the burden is on the certificate holder to report fully and demonstrate that the animal was causing substantial and immediate damage or about to cause personal injury and that all possible steps to protect against such damage or injury as permitted by paragraph (ii) were taken and that such attempts failed.

(iv) Marine mammals taken in the course of commercial fishing operations shall be subject to the provisions of §216.3 with respect to "Incidental catch," and may not be retained except where a specific permit has been obtained authorizing the retention.

(v) All certificate holders shall maintain logs of incidental take of marine mammals in such form as prescribed by the Assistant Administrator. All deaths or injuries to marine mammals occurring in the course of commercial fishing operations under the conditions of a general permit shall be immediately recorded in the log and reported in writing to the Director, Southwest Region, where a certificate application was made, or to an enforcement agent or other designated agent of the National Marine Fisheries Service, at the earliest opportunity but no later than five days after such occurrence, except that if a vessel at sea returns to port later than five days after such occurrence, then it shall be reported within forty-eight hours after arrival in port. Reports must include:

(A) The location, time, and date of the death or injury;

(B) The identity and number of marine mammals killed or injured; and

(C) A description of the circumstances which led up to and caused the death or injury.

(5) *Other gear.* (i) A certificate holder may take marine mammals so long as such taking is an incidental occurrence in the course of normal commercial fishing operations. Marine mammals taken incidental to commercial fishing operations shall be immediately returned to the environment where captured without further injury.

(ii) A certificate holder may take such steps as are necessary to protect his catch, gear, or person from depredation, damage or personal injury without inflicting death or injury to any marine mammal.

(iii) Only after all means permitted by paragraph (d)(5)(ii) of this section have been taken to deter a marine mammal from depredating the catch, damaging the gear, or causing personal injury, may the certificate holder injure or kill the animal causing the depredation or immediate damage, or about to cause immediate personal injury; however, in no event shall a certificate holder kill or injure an Atlantic bottlenosed dolphin, *Tursiops truncatus*, under the provisions of this paragraph. A certificate holder shall not injure or kill any animal permitted to be killed or injured under this paragraph unless the infliction of such damage is substantial and immediate and is actually being caused at the time such steps are taken. In all cases, the burden is on the certificate holder to report fully and demonstrate that the animal was causing substantial and immediate damage or about to cause personal injury and that all possible steps to protect against such damage or injury as permitted by paragraph (d)(5)(ii) of this section were taken and that such attempts failed.

(iv) Marine mammals taken in the course of commercial fishing operations shall be subject to the provisions of §216.3 with respect to "Incidental catch," and may not be retained except where a specific permit has been obtained authorizing the retention.

(v) All certificate holders shall maintain logs of incidental take of marine mammals in such form as prescribed by the Assistant Administrator. All deaths or injuries to marine mammals

occurring in the course of commercial fishing operations under the conditions of a general permit shall be immediately recorded in the log and reported in writing to the Director, Southwest Region, where a certificate application was made, or to an enforcement agent, or other designated agent of the National Marine Fisheries Service, at the earliest opportunity but no later than five days after such occurrence, except that if a vessel at sea returns to port later than five days after such occurrence, then it shall be reported within forty-eight hours after arrival in port. Reports must include:

(A) The location, time, and date of the death or injury;

(B) The identity and number of marine mammals killed or injured; and

(C) A description of the circumstances which led up to and caused the death or injury.

(vi) [Reserved]

(vii) The number of Dall's porpoise (*Phocoenoides dalli*) killed or injured by Japanese vessels operating in the U.S. EEZ is limited to an aggregate of 789 in the Bering Sea and 5250 in the North Pacific Ocean over the period 1987 to 1989, of which no more than 448 may be taken from the Bering Sea and no more than 2494 may be taken from the North Pacific Ocean in any single calendar year. The incidental take levels authorized by this subpart are reduced proportionately in the event that the Soviet Union reduces salmon quotas for 1988 or 1989 by more than 10 percent from the 1987 quota. Any permit issued under this part must indicate the measures by which the permit holder must comply with the conditions attached to the permit, and the reporting requirements of paragraph (d)(5)(v) of this section. Any permit issued under this part may allow retention of marine mammals for scientific purposes and will not require a separate permit under paragraph (d)(5)(iv) of this section.

(6) *Commercial passenger fishing vessels (CPFV).* (i) A certificate holder aboard the vessel may take marine mammals so long as the taking is limited to harassment and is an incidental occurrence in the course of the active sportfishing subject to the following

restrictions (paragraphs (d)(6) (ii) through (vi) of this section).

(ii) Takings are prohibited within 500 yards of a pinniped rookery or haul-out site.

(iii) A certificate holder aboard the CPFV must use only those non-lethal, non-injurious methods not including capture as approved in advance by the Assistant Administrator for Fisheries through publication in the FEDERAL REGISTER and stipulated in the General Permit for taking marine mammals.

(iv) Takings are allowed only while engaged in active sportfishing to prevent imminent marine mammal approaches to the vessel or to protect a passenger's catch or gear from depredation or damage, without inflicting death or injury to any marine mammal.

(v) All operators must ensure the safe use of the approved methods for preventing marine mammal sportfishing interaction and must satisfactorily complete such training as may be required by the Assistant Administrator for Fisheries.

(vi) All certificate holders must maintain records of incidental take of marine mammals in such form as prescribed by the Assistant Administrator for Fisheries. All incidents involving harassment of marine mammals must be immediately recorded and reported in writing to the Director, Southwest Region to whom the certificate application was made, or to an enforcement agent or other designated agent of the National Marine Fisheries Service, at the earliest opportunity, but no later than five days after such occurrence. At a minimum, reports must include:

(A) The time, date, and location of the taking;

(B) The type of harassment device used, and the number used at each occurrence;

(C) The number and species of affected marine mammals; and

(D) A description of any behavioral changes noted that may be due to using the harassment device.

(e) *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 re-

sults in the incidental kill or incidental serious injury of marine mammals in excess of that allowed under this part for U.S. fishermen or in excess of what is specified in subsection (e)(5) in the case of fishing for yellowfin tuna.

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

(2) The following fish and categories of fish, which the Assistant Administrator has determined may be involved with commercial fishing operations which cause the death or injury of marine mammals, are subject to the requirements of this section:

(i) *Tuna: yellowfin.* The following U.S. Harmonized Tariff Schedule Item Numbers identify the categories of yellowfin tuna and yellowfin tuna products that are harvested in the ETP purse seine fisher (some of which are also harvested with large-scale driftnet), are imported into the United States, and are subject to the restrictions of paragraphs (e)(3) and (e)(5) of this section:

(A) Tuna, frozen whole or in the round:

0303.42.00.20.0 Tuna, yellowfin, whole frozen.
0303.42.00.40.6 Tuna, yellowfin, eviscerated head-on, frozen.
0303.42.00.60.1 Tuna, yellowfin, eviscerated head-off, frozen.
0303.49.00.40.9 Tuna, non-specific, frozen.

(B) Tuna, canned:

1604.14.10.00.0 Tuna, non-specific, canned in oil.
1604.14.20.40.0 Tuna, non-specific, canned, not in oil, not over 7kg in quota.
1604.14.30.40.8 Tuna, non-specific, canned, not in oil, not over 7kg over quota.

(C) Tuna, loins:

1604.14.40.00.4 Tuna, non-specific, not in airtight container, not in oil, over 6.8kg.
1604.14.50.00.1 Tuna, non-specific, not in airtight container, not in oil, not over 6.8kg.

(ii) *Tuna: non-yellowfin.* The following U.S. Harmonized Tariff Schedule Item Numbers identify the categories of tuna and tuna products that are harvested with large-scale driftnet and imported into the United States and are

subject to the restrictions of paragraph (e)(3) of this section:

(A) Tuna, frozen whole or in the round:

- 0303.41.00.00.5 Tuna, albacore, frozen.
- 0303.43.00.00.3 Tuna, skipjack, frozen.
- 0303.49.00.20.3 Tuna, bluefin, frozen.

(B) Tuna, canned:

- 1604.14.20.20.4 Tuna, albacore, canned, not in oil, not over 7kg in quota.
- 1604.14.30.20.2 Tuna, albacore, canned, not in oil, not over 7kg over quota.

(iii) *Fish, other than tuna.* The following U.S. Harmonized Tariff Schedule Item Numbers identify the categories of fish and fish products that are imported into the United States and are subject to the restrictions of paragraph (e)(3) of this section:

(A) Salmon:

(1) Salmon, frozen whole or in the round:

- 0303.10.00.12.8 Salmon, chinook, frozen.
- 0303.10.00.22.6 Salmon, chum, frozen.
- 0303.10.00.32.4 Salmon, pink, frozen.
- 0303.10.00.42.2 Salmon, sockeye, frozen.
- 0303.10.00.52.9 Salmon, coho, frozen.
- 0303.10.00.62.7 Salmon, Pacific, non-specific, frozen.
- 0303.21.00.00.9 Trout, frozen.
- 0303.22.00.00.8 Salmon, Atlantic, Danube, frozen.
- 0303.29.00.00.1 Salmonidae, non-specific, frozen.
- 0304.20.60.07.9 Salmonidae, salmon fillet, frozen.
- 0305.69.40.00.2 Salmon, non-specific, salted.

(2) Salmon, canned:

- 1604.11.20.20.7 Salmon, pink, canned in oil.
- 1604.11.20.30.5 Salmon, sockeye, canned in oil.
- 1604.11.20.90.2 Salmon, non-specific, canned in oil.
- 1604.11.40.10.5 Salmon, chum, canned, not in oil.
- 1604.11.40.20.3 Salmon, pink, canned, not in oil.
- 1604.11.40.30.1 Salmon, sockeye, canned, not in oil.
- 1604.11.40.40.9 Salmon, non-specific, canned, not in oil.
- 1604.11.40.50.6 Salmon, non-specific, other.

(B) Squid:

- 0307.49.00.10.1 Squid, non-specific, fillet, frozen.
- 0307.49.00.50.2 Squid, non-specific, frozen/dried/salted/brine.
- 0307.49.00.60.0 Squid, non-specific, & cuttlefish frozen/dried/salted/brine.
- 1605.90.60.55.9 Squid, non-specific, prepared/preserved.

(C) Shark:

- 0303.75.00.00.4 Shark, dogfish and other sharks, frozen.

- 0305.59.20.00.8 Shark fins.

(D) Swordfish:

- 0303.79.20.40.8 Swordfish, frozen.

(E) Species not specifically identified:

- 0303.79.40.90.3 Marine fish, non-specific, frozen.
- 0304.20.20.66.6 Marine fish, non-specific, fillet blocks frozen over 4.5kg.
- 0304.20.60.85.4 Marine fish, non-specific, fillet, frozen.
- 0305.30.60.80.6 Fish, non-specific, fillet dried/salted/brine over 6.8kg.
- 0305.49.40.40.9 Fish, non-specific, smoked.
- 0305.59.40.00.4 Fish, non-specific, dried.
- 0305.69.50.00.9 Fish, non-specific, salted, not over 6.8kg.
- 0305.69.60.00.7 Fish, non-specific, salted, over 6.8kg.
- 1604.19.20.00.3 Fish, non-specific, in airtight containers, not in oil.
- 1604.19.30.00.1 Fish, non-specific, in airtight containers, in oil.

(3)(i) *Tuna—(A) All nations.* No shipment containing an item listed in paragraph (e)(2)(i) or (e)(2)(ii) of this section, from any nation, may be imported into the United States unless:

(1) Accompanied by a completed Fisheries Certificate of Origin described in paragraph (e)(3)(iii) of this section, or, for points of entry where the ABI system is available, the information required for the Certificate may be filed electronically by the ABI system in lieu of the paper form, provided that the electronic filing is made no later than at the time of entry and all documentation in support of the ABI entry is maintained by the importer or broker for not less than 5 years and is kept available for inspection by NMFS personnel upon request;

(2) The tuna or tuna product was not harvested with a large-scale driftnet after July 1, 1991; and

(3) An original invoice accompanies the shipment at the time of importation, or is made available within 30 days of a request by the Secretary to produce the invoice.

(B) *Harvesting nations.* No shipment containing an item listed in paragraph (e)(2)(i) of this section may be imported into the United States from a harvesting nation subject to paragraph (e)(5)(i) of this section unless a finding required for importation has been made.

(C) *Intermediary nations.* No shipment containing an item listed in paragraph (e)(2)(i) of this section may be imported into the United States from an intermediary nation subject to paragraph (e)(5)(xiv) of this section if a ban is currently in force prohibiting the importation.

(D) *Harvesting and intermediary nations.* No shipment containing an item in paragraph (e)(2)(i) of this section may be imported into the United States from a nation that is both a harvesting nation subject to paragraph (e)(5)(i) of this section and an intermediary nation subject to paragraph (e)(5)(xiv) of this section unless the necessary findings have been made under both provisions and a ban is not currently in force.

(E) Tuna or tuna products sold in or exported from the United States that suggest the tuna was harvested in a manner not injurious to dolphins are subject to the requirements of subpart H.

(ii) *Other fish.* After July 1, 1991, no shipment containing an item listed in paragraphs (e)(2)(iii)(B) through (E) of this section, and, after July 1, 1992, no shipment containing an item in the whole of paragraph (e)(2)(iii) of this section, that was harvested by any nation determined by the Assistant Administrator to be engaged in large-scale driftnet fishing, or exported from any such nation, either directly or through an intermediary nation, may be imported into the United States unless:

(A) Accompanied by a complete Fisheries Certificate of Origin, as described in paragraph (e)(3)(iii) of this section;

(B) The fish or fish product was not harvested with a large-scale driftnet, if the area of harvest, as described on the Fisheries Certificate of Origin was:

(1) The South Pacific Ocean, for harvests after July 1, 1991; or

(2) Anywhere on the high seas, for harvests after July 1, 1992; and

(C) An original invoice accompanies the shipment at the time of importation, or is made available within 30 days of a request by the Secretary to produce the invoice.

(iii) *Certificates of Origin.* A Fisheries Certificate of Origin (NOAA Form

370),¹ certified to be accurate by the first exporter of the accompanying shipment, must include the following information:

(A) Country under whose laws the harvesting vessel operated;

(B) Exporter (name and address);

(C) Consignee (name and address);

(D) Type and quantity of the fish or fish products to be imported, listed by U.S. Harmonized Tariff Schedule Number;

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

(F) Type of fishing gear used to harvest the fish (purse seine, longline, bait boat, large-scale driftnet, other type of gillnet, trawl, pole and line, other);

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

(H) If shipment is tuna or products from tuna that were harvested in the ETP with a purse seine net, the name of the harvesting vessel; and

(I) For shipments harvested by vessels of a nation known to use large-scale driftnets, as determined by the Secretary pursuant to paragraph (e)(4) of this section, a statement must be included on the Fisheries Certificate of Origin, or by separate attachment, that is dated and signed by a responsible government official of the harvesting nation, certifying that the fish or fish product was harvested by a method other than large-scale driftnet, if the shipment includes:

(1) Tuna or tuna products described in paragraph (e)(2) (i) or (ii) of this section that were harvested on the high seas after July 1, 1991; or

(2) Fish or fish products other than tuna described in paragraph (e)(2)(iii) of this section that were harvested in the South Pacific Ocean after July 1, 1991, or that were harvested anywhere on the high seas after July 1, 1992.

(4) *Large-scale driftnet nations.* Based upon the best information available, the Assistant Administrator will determine which nations have registered vessels that engage in fishing with

¹Copies of the form are available from the Director, Southwest Region (see §216.3).

large-scale driftnets. Such determinations shall 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 the nation's vessels engage in fishing with large-scale driftnets.

(5) *Yellowfin tuna.* (i) Any tuna or tuna products in the classifications listed in paragraph (e)(2)(i) of this section, from harvesting nations whose vessels of greater than 400 short tons (362.8 mt) carrying capacity operate in the ETP tuna purse seine fishery as determined by the Assistant Administrator, may not be imported into the United States unless the Assistant Administrator makes an affirmative finding under either paragraph (e)(5)(v), (e)(5)(viii) or (e)(5)(x) of this section and publishes the finding in the FEDERAL REGISTER that:

(A) The government of the harvesting nation has adopted a regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to the regulatory program of the United States; and

(B) The average rate of incidental mortality by the vessels of the harvesting nation is comparable to the average rate of incidental mortality of marine mammals by U.S. vessels in the course of such harvesting as specified in paragraphs (e)(5)(v)(E) and (e)(5)(v)(F) of this section.

(ii) A harvesting nation which desires an initial finding under these regulations that will allow it to import into the United States those products listed in paragraph (e)(2)(i) of this section must provide the Assistant Administrator with the following information:

(A) A detailed description of the nation's regulatory and enforcement program governing incidental taking of marine mammals in the purse seine fishery for yellowfin tuna, including:

(1) A description, with copies of relevant laws, implementing regulations and guidelines, of the gear and procedures required in the fishery to protect

marine mammals, including but not limited to the following:

(i) A description of the methods used to identify problems and to take corrective actions to improve the performance of individual fishermen in reducing incidental mortality and serious injury. By 1990 the methods must identify individual operators with marine mammal mortality rates which are consistently and substantially higher than the majority of the nation's fleet, and provide for corrective training and, ultimately, suspension and removal from the fishery if the operator's performance does not improve to at least the performance of the majority of the fleet in a reasonable time period;

(ii) By 1990, a description of a regulatory system in operation which ensures that all marine mammal sets are completed through backdown to rolling the net to sack-up no later than one-half hour after sundown, except that individual operators may be exempted, if they have maintained consistently a rate of kill during their observed sundown sets which is not higher than that of the nation's fleet average during daylight sets made during the time period used for their comparability finding; and

(iii) By 1990, a description of its restrictions on the use of explosive devices in the purse seine fishery which are comparable to those of the United States.

(2) A detailed description of the method (e.g., Inter-American Tropical Tuna Commission (IATTC) or other international program observer records) and level of observer coverage by which the incidental mortality and serious injury of marine mammals will be monitored.

(B) A list of its vessels and any certified charter vessels of greater than 400 short tons carrying capacity which purse seined for yellowfin tuna at any time during the preceding year in the ETP, indicating the status of each such vessel during that period (i.e., actively fishing in ETP, fishing in other waters; in port for repairs; inactive) and the status of each vessel expected to operate in the ETP in the year in which the submission is made.

(C) A compilation of the best available data for each calendar year on the

performance of any of its purse seine vessels (including certified charter vessels) fishing at any time for tuna associated with marine mammals within the ETP including the following:

(1) Total number of tons of yellowfin tuna observed caught in each fishing area by purse seine sets on:

(i) Common dolphin and

(ii) All other marine mammal species;

(2) Total number of marine mammals observed killed and the total number of marine mammals observed seriously injured in each fishing area by species/stock by purse seine sets on:

(i) Common dolphin and

(ii) All other marine mammal species;

(3) Total number of observed trips and total number of observed purse seine sets on marine mammals in each fishing area by the nation's purse seine fleet during the year;

(4) Total number of vessel trips and total number of purse seine sets on marine mammals in each fishing area by the nation's purse seine fleet during the year; and

(5) The total number of observed purse seine sets in each fishing area in which more than 15 marine mammals were killed.

(D) Data required by paragraph (e)(5)(ii)(C)(2) presented individually for the following marine mammal species/stocks: offshore spotted dolphin, coastal spotted dolphin, eastern spinner dolphin, whitebelly spinner dolphin, common dolphin, striped dolphin, and "other marine mammals".

(E) A description of the source of the data provided in accordance with paragraph (e)(5)(ii)(C) of this section. The observer program from which these data are provided must be operated by the IATTC or another international program in which the United States participates and must sample at least the same percentage of the fishing trips as the United States achieves over the same time period, unless the Assistant Administrator determines that an alternative observer program, including a lesser level of observer coverage, will provide a sufficiently reliable average rate of incidental taking of marine mammals for the nation.

(iii) A nation applying for its initial finding of comparability should apply at least 120 days before the desired effective date. The Assistant Administrator's determination on a nation's application for its initial finding will be announced and published in the FEDERAL REGISTER within 120 days of receipt of the information required in paragraph (e)(5)(ii) of this section.

(iv) A harvesting nation that has in effect a positive finding under this section may request renewal of its finding for the following calendar year by providing the Assistant Administrator, by December 1 of the current calendar year, an update of the information listed in §216.24(e)(5)(ii) summarizing all fishing trips completed during the 12-month period from October 1 of the previous calendar year through September 30 of the current year.

(v) The Assistant Administrator's determination of a nation's timely submitted request for renewal of an affirmative finding will be announced by December 31. A finding will be valid for the calendar year following the fishing season for which observer data was submitted for obtaining a finding. The Assistant Administrator will make an affirmative finding or renew an affirmative finding if:

(A) The harvesting nation has provided all information required by paragraphs (e)(5)(ii) and (e)(5)(iv) of this section;

(B) The nation's regulatory program is comparable to the regulatory program of the United States as described in paragraphs (a), (c), (d)(2), and (f) of this section and the nation has incorporated into its regulatory program such additional prohibitions as the United States may apply to its own vessels within 180 days after the prohibition applies to U.S. vessels;

(C) The data on marine mammal mortality and serious injury submitted by the harvesting nation are determined to be accurate;

(D) The observer coverage of fishing trips was equal to that achieved by the United States during the same time period or, if less, was determined by the Assistant Administrator to provide a sufficiently accurate sample of the nation's fleet mortality rate;

(E) For findings using data collected after 1988, the average kill-per-set rate for the longest period of time for which data are available, up to 5 consecutive years, or for the most recent year, whichever is lower, is no more than 25 percent greater than the U.S. average for the same time period, after the U.S. mortality rate is weighted to account for dissimilar amounts of fishing effort between the two nations in the three ETP fishing areas and for common dolphin and other marine mammal species, except as provided in paragraph (e)(5)(v)(F) of this section for findings made in 1990;

(F) For determining comparability where there are fewer than five sets (including no effort) on dolphin by the U.S. fleet in a fishing area on a species grouping that has fishing effort by the foreign nation requesting a comparability test, the mortality rates used for comparability will be the overall (i.e., unweighted) kill-per-set rate of the U.S. fleet and of the foreign nation's fleet.

(G) For the 1989 fishing year and subsequent years, the nation's observed kill of eastern spinner dolphin (*Stenella longirostris*) and coastal spotted dolphin (*Stenella attenuata*) is no greater than 15 percent and 2 percent, respectively, of the nation's total annual observed dolphin mortality; and

(H) The nation has complied with all reasonable requests by the Assistant Administrator for cooperation in carrying out dolphin population assessments in the ETP.

(vi) *Period of validity.* A finding is valid only for the period for which it was issued and may be terminated before the end of the year if the Assistant Administrator finds that the nation no longer has a comparable regulatory program or kill rate.

(vii) *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 paragraph (e)(5)(v) of this section. For a harvesting nation whose marine mammal mortality rate was found to exceed the acceptable levels prescribed in paragraphs (e)(5)(v)(E), (e)(5)(v)(F), or

(e)(5)(v)(G) of this section, the additional information must include data collected by an acceptable observer program, which must demonstrate that the nation's fleet marine mammal mortality rate improved to the acceptable level during the period submitted for comparison, which must include, at a minimum, the most recent:

(A) Twelve months of observer data if the species composition rate prescribed by paragraph (e)(5)(v)(G) of this section was not acceptable; or

(B) Six months of observer data if the average kill-per-set rate prescribed by paragraph (e)(5)(v)(E) of this section was not acceptable.

(viii) *Application for finding for non-marine-mammal intentional sets.* The Assistant Administrator's determination on a nation's application for a finding will be announced and published in the FEDERAL REGISTER. A harvesting nation which has implemented a regulatory program that prohibits the intentional setting of any purse seine net to encircle marine mammals and desires an initial finding under these regulations that will allow it to import into the United States those products listed in paragraph (e)(2)(i) of this section must provide the Assistant Administrator with the following:

(A) Documentary evidence establishing that its regulatory program includes:

(1) A law prohibiting the intentional setting of purse seine nets on marine mammals (a copy of the law must be submitted);

(2) A requirement that a certificate from an observer be obtained within 30 days of the completion of each and every trip of the nation's purse seine vessels greater than 400 short tons (362.8 mt) carrying capacity, stating that the observer was aboard the vessel during the entire trip and that there were no intentional purse seine sets on marine mammals; and

(B) A complete list of the nation's vessels and any certified charter vessels of greater than 400 short tons (362.8 mt) carrying capacity which purse seine for yellowfin tuna in the ETP, indicating the status of each vessel (i.e., actively fishing in the ETP, in port for repairs, etc.), and a list of changes to

this fleet within 30 days when changes occur.

(ix) *Application for renewal of finding for non-marine-mammal intentional sets.* A harvesting nation, which has in effect an affirmative finding under this section, may request a renewal of its finding for the subsequent calendar year by providing the Assistant Administrator an annual report by November 1, covering the previous October 1 to September 30 period, which includes the following:

(A) Vessel summary data, to include:

(1) The total number of observed trips;

(2) The percentage of all purse seine fishing trips that carried observers under a program approved by the Assistant Administrator;

(3) The total number, if any, of observed purse seine sets on marine mammals;

(4) A summary of the number and species, if any, of all marine mammals killed or seriously injured in intentional purse seine sets on marine mammals;

(5) A complete list of the nation's vessels and any certified charter vessels of greater than 400 short tons (362.8 mt) carrying capacity which purse seine for yellowfin tuna in the ETP, indicating the status of each vessels as of October 1;

(B) A summary, which copies of relevant laws, of any changes in the nation's laws or regulatory program regarding marine mammals for the purse seine fishery in the ETP; and

(C) A summary of any enforcement actions taken to ensure compliance with the nation's marine mammal protection laws.

(x) *Review of finding for non-marine-mammal intentional sets.* The Assistant Administrator will renew an affirmative finding obtained under paragraph (e)(5)(ix) of this section if:

(A) The harvesting nation has provided all of the information required by paragraph (e)(5)(ix) of this section and the conditions under which the original finding was made under paragraph (e)(5)(viii) of this section continue to exist; and

(B) Either 100-percent observer coverage is provided for all purse seine vessels as required by paragraph

(e)(5)(viii)(A)(2) of this section; or the harvesting nation is in a probationary status in accordance with paragraph (e)(5)(xi)(B)(1) of this section; and

(C) The harvesting nation meets the criteria of paragraphs (e)(5)(v)(E), and (e)(5)(v)(G) of this section; and

(D) Certificates have been provided to the Assistant Administrator within 30 days of the completion of each and every trip of the nation's purse seine vessels greater than 400 short tons (362.8 mt) carrying capacity from an observer approved by the Assistant Administrator or under the direction of the Inter-American Tropical Tuna Commission, and verified by the Inter-American Tropical Tuna Commission, stating that the observer was aboard the vessel during the entire trip and that there were no intentional purse seine sets on marine mammals or the nation received a positive reconsideration for an affirmative finding under paragraph (e)(5)(xii)(A) of this section.

(xi) *Probation and revocation.* (A)(1) If it is determined that, during any trip, a purse seine was intentionally set on marine mammals, the nation will enter into a probationary status for 180 days, effective upon the date the vessel returns to port to unload.

(2) If, during the probationary period of 180 days, there are any additional intentional purse seine sets made on marine mammals, the Assistant Administrator will immediately revoke the affirmative finding.

(B)(1) If it is determined that, during any trip, an observer is not aboard a nation's purse seine vessel greater than 400 short tons (362.8 mt) carrying capacity fishing in the ETP, that nation will enter into a probationary status for 1 year, effective upon the date the vessel returns to port to unload.

(2) If, during the 1-year probationary period, a nation's purse seine vessel returns to port to unload, and it is determined that an observer was not aboard the vessel during a trip in the ETP, the Assistant Administrator will immediately revoke an affirmative finding made under paragraphs (e)(5)(viii) or (e)(5)(x) of this section.

(xii) *Reconsideration.* (A) The Assistant Administrator will reconsider a revocation of an affirmative finding upon request from a harvesting nation

which had its affirmative finding revoked under paragraph (e)(5)(xi)(A) of this section if:

(1) The number of marine mammals taken in purse seine nets that were intentionally set on marine mammals does not exceed the comparability standards established in paragraphs (e)(5)(v)(E) and (e)(5)(v)(G) of this section; and

(2) That nation provides documentary evidence that no additional purse seines were intentionally set on marine mammals during the 90-day period immediately preceding the request for reconsideration.

(B) A harvesting nation which has its affirmative finding revoked under paragraph (e)(5)(xi)(B) of this section or its reconsideration under paragraph (e)(5)(xii)(A) of this section denied, may request reconsideration for an affirmative finding under paragraph (e)(5)(vii) of this section.

(xiii) *Verification.* The Assistant Administrator may require verification of statements made in connection with requests to allow importations.

(xiv) *Intermediary nation.* Any yellowfin tuna or yellowfin tuna products in the classifications listed in paragraph (e)(2)(i) of this section, from any intermediary nation, as that term is defined in section 3 of the MMPA, may not be imported into the United States unless the Assistant Administrator determines and publishes in the FEDERAL REGISTER that the intermediary nation has provided reasonable proof and has certified to the United States 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. A prohibition on imports under this paragraph may be lifted by the Assistant Administrator upon a determination announced in the FEDERAL REGISTER, based upon new information supplied by the government of the intermediary nation, that the nation has not imported, in the preceding 6 months, yellowfin tuna or yellowfin tuna products subject to a ban on direct imports under section 101(a)(2)(B) of the MMPA. Shipments of yellowfin tuna or yellowfin tuna products through a nation on a through bill of

lading or in another manner that does not enter the shipments into that nation as an importation do not make that nation an intermediary nation. The Assistant Administrator shall act on any request to review decisions under this paragraph (e)(5)(xiv) that are accompanied by specific and detailed supporting information or documentation, within 30 days of receipt of such request. For purposes of this paragraph (e)(5)(xiv), certification and reasonable proof means the submission 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 certificate attesting that the document is accurate.

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

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

(6) *Fish refused entry.* If fish is denied entry under the provisions of § 216.24(e)(3), the District Director of Customs shall refuse to release the fish for entry into the United States and shall issue a notice of such refusal to the importer or consignee.

(7) [Reserved]

(8) *Disposition of fish refused entry into the United States; redelivered fish.* Fish which is denied entry under § 216.24(e)(3) or which is delivered in accordance with § 216.24(e)(7) and which is not exported under Customs supervision within 90 days from the date of notice of refusal of admission or date of redelivery shall be disposed of under Customs laws and regulations. *Provided however,* That any disposition shall not result in an introduction into the United States of fish caught in violation of the Marine Mammal Protection Act of 1972.

(9) *Dolphin safe requirements.* (i) It is unlawful for any person to sell, purchase, offer for sale, transport, or ship

in the United States, any tuna or tuna product that is not dolphin safe.

(ii) For purposes of this section, tuna or a tuna product is dolphin safe if:

(A) It does not contain tuna that was harvested on the high seas by a vessel engaged in large-scale driftnet fishing;

(B) In the case of tuna or tuna product that contains tuna harvested in the ETP by a purse seine vessel, either the purse seine vessel is of less than 400 short tons (362.8 metric tons (mt)) carrying capacity or, if the purse seine vessel is of 400 short tons (362.8 mt) carrying capacity or greater, the tuna or tuna product is accompanied by:

(1) A completed Fisheries Certificate of Origin;

(2) A written statement by the captain of each vessel that harvested the tuna, certifying that the vessel did not intentionally deploy a purse seine net on, or to encircle, dolphins at any time during the trip; a written statement, signed by either the Secretary or a representative of the Inter-American Tropical Tuna Commission, certifying that an observer employed by or working under contract with the Inter-American Tropical Tuna Commission or the Secretary, was on board the vessel during the entire trip and that the vessel did not intentionally deploy a purse seine net on, or to encircle, dolphin at any time during the trip; and

(3) An endorsement on the Fisheries Certificate of Origin by each exporter, importer, and processor certifying that, to the best of his or her knowledge and belief, the Fisheries Certificate of Origin and attached documents, and the statements required by this paragraph (e)(9)(ii) accurately describe the tuna products;

(C) In the case of tuna or a tuna product containing tuna harvested outside the eastern tropical Pacific Ocean by a purse seine vessel, it is accompanied by a written statement, executed by the captain of the vessel, certifying that no purse seine net was intentionally deployed on, or to encircle, dolphins during the particular voyage on which the tuna was harvested; and

(D) In the case of tuna or a tuna product containing tuna harvested outside the ETP by a purse seine vessel in a fishery in which the Secretary has determined that a regular and signifi-

cant association occurs between marine mammals and tuna, and in which tuna is harvested through the use of purse seine nets deployed on, or to encircle, marine mammals, it is accompanied by a written statement, executed by the captain of the vessel and by an observer, certifying that no purse seine net was intentionally deployed on, or to encircle, marine mammals during the particular voyage on which the tuna was harvested.

(iii) *Submission of documentation—(A) Imported tuna or tuna product.* The documents required by paragraph (e)(9)(ii) of this section must accompany the imported tuna or tuna product until no further endorsements are required on the documentation and the documents have been submitted to officials of the U.S. Customs Service at the time of importation.

(B) *U.S. domestic shipments.* The documents required by paragraph (e)(9)(ii) of this section must accompany tuna or tuna product, other than imported, until no further endorsements are required on the documentation and the documents have been submitted to the Director, Southwest Region, National Marine Fisheries Service, 501 W. Ocean Boulevard, Suite 4200, Long Beach, CA 90802.

(f) *Observers.* (1) The vessel certificate holder of any certificated vessel shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.

(2) Research and observation duties shall be carried out in such a manner as to minimize interference with commercial fishing operations. The navigator shall provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. No owner, master, operator, or crew member of a certificated vessel shall impair or in any way interfere with the research or observations being carried out.

(3) Marine mammals killed during fishing operations which are accessible to crewmen and requested from the certificate holder or master by the observer shall be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals designated as biological specimens by the observer shall be retained in cold storage aboard the vessel until retrieved by authorized personnel of the National Marine Fisheries Service when the vessel returns to port for unloading.

(4) The Secretary shall provide for the payment of all reasonable costs directly related to the quartering and maintaining of such observers on board such vessels. A vessel certificate holder who has been notified that the vessel is required to carry an observer, via certified letter from the National Marine Fisheries Service, shall notify the office from which the letter was received at least five days in advance of the fishing voyage to facilitate observer placement. A vessel certificate holder who has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.

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

(6)(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 and must be followed during the entire trip.

(iii) In the event there are one or more female crew members, the female observer may 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.

(7)(i) A vessel certificate of inclusion holder (or vessel owner in the case of a new application) may seek an exemption from carrying a female observer on a vessel by applying to the Director, Southwest Region when applying for the vessel certificate of inclusion until July 10, 1989 and establishing the following:

(A) The vessel will have an all-male crew;

(B) The vessel has fewer than two private (one-person) and semi-private (two-person) cabins in total (excluding the captain's cabin);

(C) A temporary divider like a curtain cannot be installed in the private or semi-private cabin (excluding the captain's cabin) to provide reasonable privacy; and

(D) There are no other areas (excluding the captain's cabin) that can be converted to a sleeping room without either significant expense or significant sacrifice to the crew's quarters.

(ii) The exclusion criteria in paragraph (f)(7)(i) of this section can be met without having to provide the captain's cabin for the observer. The application for an exemption must also include an accurate diagram of the vessel's living areas, and other areas possibly suitable for sleeping. Additional documentation to support the application may also be required, as may an inspection of the vessel. The exemption, once granted, is

valid for the same calendar year as the vessel certificate of inclusion, and the exemption must be renewed annually to remain valid. The vessel certificate of inclusion holder is responsible for reporting to the Director, Southwest Region any changes aboard the vessel within 15 days of the change which might affect the continued eligibility for an exemption. The Director, Southwest Region will revoke an exemption if the criteria for an exemption are no longer met.

(g) *Penalties and rewards:* Any person or vessel subject to the jurisdiction of the United States shall be subject to the penalties provided for under the MMPA for the conduct of fishing operations in violation of these regulations. The Secretary shall recommend to the Secretary of the Treasury that an amount equal to one-half of the fine incurred but not to exceed \$2,500 be paid to any person who furnishes information which leads to a conviction for a violation of these regulations. Any officer, employee, or designated agent of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this section.

[45 FR 72187, Oct. 31, 1980]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 216.24, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 216.25 Exempted marine mammals and marine mammal products.

(a) The provisions of the MMPA and these regulations shall not apply:

(1) To any marine mammal taken before December 21, 1972¹, or

(2) To any marine mammal product if the marine mammal portion of such product consists solely of a marine mammal taken before such date.

(b) The prohibitions contained in § 216.12(c) (3) and (4) shall not apply to marine mammals or marine mammal products imported into the United

¹In the context of captive maintenance of marine mammals, the only marine mammals exempted under this section are those that were actually captured or otherwise in captivity before December 21, 1972.

States before the date on which a notice is published in the FEDERAL REGISTER with respect to the designation of the species or stock concerned as depleted or endangered.

(c) Section 216.12(b) shall not apply to articles imported into the United States before the effective date of the foreign law making the taking or sale, as the case may be, of such marine mammals or marine mammal products unlawful.

[39 FR 1852, Jan. 15, 1974, as amended at 56 FR 43888, Sept. 5, 1991; 59 FR 50376, Oct. 3, 1994]

§ 216.26 Collection of certain marine mammal parts without prior authorization.

Notwithstanding any other provision of this subpart:

(a) Any bones, teeth or ivory of any dead marine mammal may be collected from a beach or from land within ¼ of a mile of the ocean. The term *ocean* includes bays and estuaries.

(b) Notwithstanding the provisions of subpart D, soft parts that are sloughed, excreted, or discharged naturally by a living marine mammal in the wild may be collected or imported for bona fide scientific research and enhancement, provided that collection does not involve the taking of a living marine mammal in the wild.

(c) Any marine mammal part collected under paragraph (a) of this section or any marine mammal part collected and imported under paragraph (b) of this section must be registered and identified, and may be transferred or otherwise possessed, in accordance with § 216.22(c). In registering a marine mammal part collected or imported under paragraph (b) of this section, the person who collected or imported the part must also state the scientific research or enhancement purpose for which the part was collected or imported.

(d) No person may purchase, sell or trade for commercial purposes any marine mammal part collected or imported under this section.

(e) The export of parts collected without prior authorization under paragraph (b) of this section may occur