Species Covered in This Notice

This notice is relevant to the following eight threatened and two endangered salmonid ESUs: threatened Southern Oregon/northern California Coasts coho salmon (*Oncorhynchus kisutch*), threatened Central California Coast coho salmon, threatened California Coastal Chinook salmon (*O. tshawytscha*), threatened Central Valley Spring-run Chinook salmon, endangered Sacramento River Winter-run Chinook salmon, threatened Northern California steelhead (*O. mykiss*), threatened Central California Coast steelhead, threatened Central Valley steelhead, threatened South-central California Coast steelhead, and endangered Southern California steelhead.

Modification Request Received

SWFSC requests a modification to permit 1044 for takes of adult and juvenile ESA-listed coho salmon, chinook salmon, and steelhead associated with population studies, carcass counts, redd surveys, genetic analyses, and habitat association studies. Presently, permit 1044 authorizes intentional takes of adult and juvenile threatened Southern Oregon/ northern California Coasts coho salmon, and threatened Central California Coast coho salmon for projects in northern California. This requested modification would add intentional takes of threatened California Coastal chinook salmon, threatened Central Valley Spring-run chinook salmon, endangered Sacramento River Winter-run chinook salmon, threatened Northern California steelhead, threatened Central California Coast steelhead, threatened Central Valley steelhead, threatened South-central California Coast steelhead, and endangered Southern California steelhead to the SWFSC permit.

Dated: August 19, 2002.

Susan L. Pultz,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 021102C]

Taking and Importing of Marine Mammals

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

ACTION: Final organized decision process.

SUMMARY: The Dolphin Protection Consumer Information Act (DPCIA) requires the Secretary of Commerce (Secretary), subject to certain conditions, to amend the ''dolphin-safe'' labeling standard so that tuna from the eastern tropical Pacific Ocean (ETP) purse seine fishery caught in sets in which no dolphins were killed or seriously injured may be labeled ''dolphin-safe.'' The Secretary is required by the Marine Mammal Protection Act (MMPA) to conduct specified scientific research and to make a finding, based on the results of that research, information obtained under the International Dolphin Conservation Program (IDCP), and any other relevant information, as to whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a ''significant adverse impact'' on any depleted dolphin stock in the ETP. ''Significant adverse impact'' is not defined in the statute. On February 15, 2002, NMFS proposed an organized decision process (ODP) for outlining the types of information that will be available to the Secretary and the context in which the Secretary will consider the information in arriving at a final finding. NMFS accepted public comment on the proposed ODP for 60 days. This notice responds to comments and contains the final ODP to be used by the Secretary in making the finding.

FOR FURTHER INFORMATION CONTACT: Nicole R. Le Boeuf, Office of Protected Resources, NMFS, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Background

Since its enactment in 1972, the MMPA (16 U.S.C. 1361 *et seq.*) has been amended several times to address the issue of dolphin mortality in the ETP tuna purse seine fishery. As concern among U.S. consumers grew, the DPCIA (16 U.S.C. 1385) was enacted in 1990 to establish the dolphin-safe labeling standard. The International Dolphin Conservation Program Act (IDCPA), (Public Law 105–42), was enacted in 1997, in response to the success of the ETP tuna purse seine fishery in dramatically reducing dolphin mortality caused by normal fishing operations. The IDCPA amended both the MMPA and the DPCIA. The MMPA, as amended by the IDCPA, requires the Secretary to conduct specified scientific research on dolphin stocks in the ETP. The DPCIA, as amended by the IDCPA, requires the Secretary to make a finding, based on the scientific research, information obtained under the IDCP (the international program of dolphin conservation established by the nations participating in the ETP purse seine fishery), and any other relevant information, as to whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a ''significant adverse impact'' on any depleted dolphin stock in the ETP. There are three depleted dolphin stocks in the ETP: northeastern offshore spotted, eastern spinner, and coastal spotted. The ETP is the area of the Pacific Ocean bounded by 40° N. lat., 40° S. lat., 160° W. long., and the western coastlines of North, Central, and South America.

The Secretary's finding will determine the definition of ''dolphin-safe'' as applicable to tuna harvested by purse seine vessels with carrying capacities of greater than 400 short tons operating in the ETP. Refer to the **Federal Register** Notice at 64 FR 24590 (May 7, 1999), for more information on the dolphin-safe labeling standard.

The DPCIA requires the Secretary to make an initial finding regarding the dolphin-safe label in 1999, and a final finding by December 31, 2002. On April 29, 1999, NMFS made an initial finding that there was insufficient evidence at that time to determine whether the chase and encirclement of dolphins by the tuna purse seine fishery was having a significant adverse impact on any depleted dolphin stock in the ETP (NMFS 1999) (64 FR 24590). The U.S. District Court for the Northern District of California in *Brower* v. *Daley*, 93 F. Supp. 2d 1071 (N. D. Ca. 2000), set aside this determination, and that ruling was affirmed by the Ninth Circuit Court of Appeals in *Brower* v. *Evans*, 257 F. 3d 1058 (9th Cir. 2001). As a result, the dolphin-safe labeling standard (from section (h)(2) of the DPCIA) is currently in effect.

NMFS' IDCPA research activities will provide substantial additional information for the final finding relative to what was available for the initial finding in 1999. Some of this new information will include: dolphin abundance data from 1999 and 2000, updated mortality estimates based on observer data, an updated review of scientific literature on stress in marine mammals, results from a necropsy study of dolphins killed in the fishery, a review of historical demographic and biological data related to dolphins involved in the fishery, results from a required chase-recapture experiment, as well as information regarding variability

in the biological and physical parameters of the ETP ecosystem over time. To accommodate this newly available scientific and other relevant information and based on input received on the initial finding in 1999, NMFS has revised its decision-making process for the final finding.

Responses to Comments

In order to provide the public an opportunity to review and give input regarding the Secretary's revised decision-making process, NMFS solicited public comment on the proposed ODP (67 FR 7134) on February 15, 2002. Prior to publishing the proposed ODP in the **Federal Register**, NMFS provided a copy to the Marine Mammal Commission (MMC), an independent agency created by Congress to review and make recommendations on domestic and international actions and policies of federal agencies charged with marine mammal conservation and protection, and the Inter-American Tropical Tuna Commission (IATTC), the international body responsible for the conservation and management of tuna, dolphins, and billfish found in the ETP, for their initial input. During the public comment period, NMFS received approximately 400 comments on the proposed ODP. Comments were received from environmental organizations, the tuna industry, members of the public, the MMC, the IATTC, the U.S. Department of State, two members of the U.S. House of Representatives, and several foreign nations. While the majority of the comments were duplicates, the substance of all comments on the proposed ODP and responses to comments are described in this notice.

As indicated in the proposed ODP, NMFS required all additional scientific information for the Secretary's consideration to be submitted by May 1, 2002. Along with comments on the proposed ODP, some commenters submitted information for the Secretary's consideration. This information will be considered along with the results of the required research, information obtained under the IDCP, and other relevant information for the final finding. However, only comments pertaining to the proposed ODP are described here. Editorial and/or technical comments are not described in this document. As indicated in the proposed ODP, comments were not accepted when submitted via electronic mail or the Internet. Key issues and concerns are summarized below along with responses:

General Comments

Comment 1: One commenter indicated that NMFS must accommodate comments on the proposed ODP from the IATTC and its members outside of the public comment period, with assurances that those comments will be effectively taken into consideration and made a part of the administrative record on the finding process. Similarly, another commenter stated that all of the views expressed by the IATTC should be fully and effectively taken into account and serve as a basis to make all the necessary corrections that have been identified.

Response: Pursuant to section 304(a)(1) of the MMPA, NMFS is required to consult with the MMC and the IATTC regarding the required scientific studies related to the Secretary's findings. In doing so, NMFS has met with both entities on several occasions throughout the planning and execution of the required research program. While the ODP is a policy guidance document and not directly a part of the research process described in section 304(a), NMFS will take into consideration all comments received from the MMC and the IATTC, as well as other comments received during the 60–day public comment period. As is standard in the public comment process, NMFS will incorporate comments with which it concurs and will explain its rationale for not incorporating the remaining comments. All comments and any other materials used by NMFS as a part of the decision-making process will be a part of the administrative record.

Comment 2: One commenter recommended that the ODP be re-written to consider ''potential unknown'' infractions of the Agreement on the International Dolphin Conservation Program (AIDCP) by foreign tuna vessels.

Response: NMFS believes that infractions of the AIDCP are cause for concern. However, it is not possible for NMFS to quantify or anticipate potential unknown infractions of the AIDCP. For this reason, they have not been considered in the ODP.

Comment 3: One commenter noted that the ODP should reflect a balance between conservation and utilization.

Response: NMFS recognizes the need to balance conservation and management goals with sustainable use of marine living resources. In this particular case, the DPCIA requires the Secretary to focus on the impact of the ETP tuna purse seine fishery on depleted dolphin stocks. The ODP will reflect this mandate and the associated provisions of the IDCPA.

Comment 4: One commenter noted that the IATTC should be meaningfully consulted in the development of the ODP. Two other commenters suggested that the development of a sound ODP can only be done in close cooperation with the IATTC and that discussions should be set up between NOAA and the IATTC Secretariat before adopting the final ODP in order to establish guidelines based on sound science and international standards. Another commenter similarly noted that the ODP should be consistent with the development of regional fisheries bodies.

Response: NMFS agrees that the ODP can benefit from meaningful input from the IATTC, the competent regional fisheries organization in this case, and has consulted with the IATTC as described in the response to comment 1. Additionally, NMFS received and carefully considered comments from the IATTC, including input from its member nations, during the public comment period on the proposed ODP.

Comment 5: One commenter indicated that the ODP should be consistent with goals of ecosystem management and multi-lateral cooperation. Another commenter suggested that the ODP should be developed consistent with the general expectations from the parties involved in the spirit of international cooperation.

Response: NMFS believes that principles of sound ecosystem management and multi-lateral efforts are the key to the long-term conservation of dolphins and other living marine resources in the ETP. As indicated in the response to comment 4, NMFS considered comments submitted by the IATTC that included input from its member nations, as well as comments provided from IATTC-member nations directly, during the public comment period on the proposed ODP.

Comment 6: One commenter indicated that issues of uncertainty and probability must be assessed on balance and handled in an even way in the ODP. Another commenter made a similar statement and went on to note that the proposed ODP departs from such notion.

Response: NMFS agrees that some level of uncertainty is inherent in all aspects of science, including data collection. NMFS will provide this information to the Secretary for his consideration. However, NMFS disagrees that the ODP runs contrary to this concept or should be changed.

Comment 7: One commenter suggested that it is not necessary for the ODP to contain a detailed description of the dolphin-safe definition and recent court cases because this information can be found elsewhere and could easily be mischaracterized.

Response: NMFS agrees and limited discussion of the court rulings to the Background section of the ODP and did not include it within the body of the ODP itself.

Comment 8: One commenter was concerned that the proposed ODP contained elements that could provide a foundation for litigation that might reverse the Secretary's finding with no genuine scientific grounds. The commenter went on to state that the proposed ODP could provide a strong foundation for entities that have historically opposed any modification to the dolphin-safe label to promote adverse litigation and significantly enhance the potential to reverse the final finding by the courts on no genuine scientific grounds.

Response: NMFS disagrees. NMFS believes that the proposal to present the Secretary with the appropriate information for consideration in the final finding conforms with the requirements of the DPCIA.

Comment 9: One commenter indicated that it would be useful if the acronyms such as IDCP, ETP, DPCIA, and others are more clearly explained in the document.

Response: NMFS agrees and has inserted additional language to further explain these and other terms.

Comments on Overview: How to Determine Significance

Comment 10: Two commenters indicated that while the proposed ODP identifies the types of information that will be considered, it does not provide sufficient guidance and/or criteria as to what will be or will not be deemed to be significant. As an example, one commenter noted that there was no indication of what NMFS believes would constitute an ''appreciable delay'' in recovery time in the proposed ODP.

Response: NMFS believes that the ODP provides the Secretary with a sound basis for weighing various types of complex information in a manner that will be informative and transparent. The term ''appreciably delay'' will be interpreted in a manner that is consistent with NMFS policies for managing that recovery of depleted marine mammal stocks that interact with commercial fisheries.

Comments on the Role of Direct Mortality in the Decision Process

Comment 11: One commenter indicated that the Direct Mortality Question and the Abundance Question [now renamed the Growth Rate Question] are narrowly drawn and recommended that this issue be thoroughly reviewed for its legal propriety and impact.

Response: NMFS disagrees that these questions are narrowly drawn or that they should be changed based on legal grounds.

Comments on the Role of Indirect Effects on the Decision Process

Comment 12: NMFS received a comment that direct and indirect mortality should not automatically be considered to have an adverse impact on dolphin stocks, and that doing so would be inconsistent with the Potential Biological Removal (PBR) standard. The commenter went on to suggest that the proposed ODP makes unsubstantiated assumptions that direct mortality caused by the fishery is adverse to dolphin stocks. The commenter indicated that reducing population levels can have beneficial impacts for the stocks.

Response: NMFS disagrees. In the 1970s and 1980s, dolphin mortality caused by the ETP tuna purse seine fishery resulted in the three dolphin stocks at issue here being designated as depleted under the MMPA. Because of this, NMFS sees no plausible way to conclude that either direct mortality or indirect effects can be considered beneficial to these stocks of dolphin. Further, the Secretary is not charged with confirming that mortality is adverse, but with determining whether such adverse impacts are significant to any depleted dolphin stock.

Comment 13: One commenter indicated that the ODP should consider injuries to dolphins and should consider the repeated chase of dolphins.

Response: NMFS agrees. Using criteria developed by the IDCP and the IATTC, NMFS is including in the estimation of mortality, individual injuries that are deemed to be ''serious injuries'' or those which will likely result in mortality. Further, the ODP includes consideration of stress and other indirect effects of the fishery on dolphins. With respect to the repeated chase of dolphins, NMFS is attempting to estimate the rate of capture of individual dolphins and that for each depleted dolphin stock. NMFS will consider these estimates in its evaluation of overall impact.

Comment 14: One commenter indicated that NMFS' evaluation of indirect mortality must take into account the types and magnitude of any stress to dolphins caused by the tuna purse seine fishery and quantify such stresses to the population level using current data. The commenter recommended that the Indirect Effects Question in the ODP must seek to answer, and wherever possible, quantify to the population level using current data on sets per year: (1) estimates of the number of times an individual dolphin may be set upon; (2) mortality attributable to the fishery; and (3) dolphin school size in sets made on dolphins.

Response: NMFS agrees and is making every effort to quantify indirect effects of the fishery on dolphin stocks, including making estimates of the three parameters indicated by the commenter.

Comment 15: One commenter noted that NMFS should consider unobserved and uncounted dolphin mortality for the final finding. The commenter also indicated that stress may be causing serious harm and cryptic death in dolphins and may affect reproduction and physiology and should be considered in the ODP. Two other commenters similarly indicated that cow-calf separation should be considered in the ODP.

Response: NMFS agrees and believes that Indirect Effect Question in the ODP addresses the concern that the tuna purse seine fishery may be impacting depleted dolphin stocks in ways other than through direct and observed mortality, including through cryptic mortality and cow-calf separation.

Comment 16: One commenter recommended that NMFS delete the list of possible indirect effects that the fishery may be having on depleted dolphin stocks found in the proposed ODP.

Response: NMFS disagrees. NMFS believes that the issue of cryptic mortality and indirect effects of the fishery on dolphins may not be entirely intuitive and therefore it is helpful to include examples of indirect mortality and other possible indirect effects in the ODP.

Comment 17: One commenter indicated that the phrase ''cause for concern'' in the Indirect Effects Question was too open-ended.

Response: NMFS agrees and reworded the Indirect Effects Question to read: ''For each stock, is the estimated number of dolphins affected by the tuna fishery, considering data on sets per year, mortality attributable to the fishery, indicators of stress in blood, skin and other tissues, cow-calf separation and other relevant indirect effects information, at a magnitude and

degree that would not risk recovery or appreciably delay recovery to its OSP level (how and to what degree)?≥

Comments on the Role of Ecosystem Change in the Decision Process

Comment 18: One commenter recommended that the ODP take into consideration whether more or less dolphin mortality impacts the health of the entire ETP ecosystem.

Response: Pursuant to the DPCIA, the Secretary is charged with making a determination regarding the impact of the tuna purse seine fishery on any depleted dolphin stock. The Secretary is not required to make a determination on the health of the entire ETP ecosystem. However, ETP ecosystem health is considered in the ODP as it relates to the status of dolphin stocks.

Comment 19: One commenter suggested that NMFS add the phrase, ''taking into consideration the reliability of the abundance estimates and other questions such as the possibility that stock boundaries have changed,'' to the end of the first sentence of the section entitled the ''Role of Ecosystem Change in the Decision Process'' in the proposed ODP.

Response: NMFS disagrees but is aware of the dynamic nature of both dolphin stock distribution and boundaries in the ETP. The definition of dolphin stocks, using distributional, morphological, genetic, and demographic information, is a matter of continuing research. Decades of data provide strong evidence that no such large shifts in dolphin distributions have occurred that would invalidate NMFS abundance estimates. If larger shifts in distribution occurred, they would be detected both by sightings from tuna vessels and by sightings from research vessels. However, dolphin stock boundaries have changed in the past and may change again in the future as more data become available. Because distribution of dolphins also changes each year in response to perturbations in oceanographic conditions, NMFS research vessel surveys were designed to produce valid estimates of abundance even if annual changes in distribution occur. Additionally, NMFS thoroughly considered the reliability of the abundance estimates and will explicitly address the uncertainty in the population model.

Comment 20: Another commenter indicated that the ODP contains an error in logic with respect to the fishery potentially being penalized if there is either an increase or a decrease in carrying capacity of the ETP.

Response: NMFS disagrees. Given the depleted status of ETP dolphin stocks and the mandate of the MMPA to recover depleted stocks to optimum sustainable population (OSP) levels, any adverse impacts that the fishery is having on the stocks must be evaluated for significance in the context of the dolphins' habitat and their subsequent ability to recover. With that in mind, the expectations for dolphin population growth will be appropriately scaled to the information obtained about the state of the ETP carrying capacity. If the carrying capacity has substantially diminished in such a way that would make it more difficult for a depleted stock to recover, then any given effect of the fishery would be considered more significant. Conversely, if the carrying capacity has substantially increased in such a way that is beneficial to the dolphin stocks, then expectations for growth (i.e. recovery) in those stocks will be higher. In either case, apparent carrying capacity changes will be considered in evaluating whether current OSP ranges should continue to apply.

Comment 21: One commenter indicated that NMFS' approach to evaluating changes in the ETP ecosystem and its carrying capacity in the proposed ODP is too simplistic as it is difficult to estimate both historic and current carrying capacity. The commenter went on to note that there are rarely sufficient scientific data available for scientists to examine both ecological changes and marine mammal population trends and the linkages between the two. The commenter suggested that NMFS' scheme set forth in the 1992 Proposed Regime to Govern Interactions Between Marine Mammals and Commercial Fishing Operations, which proposed making determinations with respect to OSP levels using current carrying capacity as adjusted to account for human-caused habitat degradation and destruction, would be more appropriate than the currently proposed approach. The commenter indicated that this was because a lack of dolphin recovery could be due to a change in carrying capacity that has resulted in a density-dependent change through lower population growth levels, compensation, or stabilization. Another commenter expressed concern that the Ecosystem Question is the first question to be addressed by the Secretary, as there is general agreement that scientists know less about the ecosystem and the potential impacts on dolphins than any of the other questions. Another commenter indicated that should the Secretary find that the ecosystem changes have occurred in the ETP, this would indicate a need to provide additional protection to the depleted dolphin populations.

Response: To determine whether a substantial change in the ETP ecosystem has occurred, NMFS has collected a large amount of scientific information, which is undergoing an independent peer review process. NMFS and external expert reviewers are evaluating all available and relevant information to determine whether sufficient information exists to detect a regime shift or change in carrying capacity, should such changes have occurred. With respect to providing depleted dolphin stocks additional protection, NMFS has provided for this in the ODP by indicating that if the ETP carrying capacity for dolphins has substantially declined, dolphin stocks could sustain fewer mortalities and other adverse impacts than if the carrying capacity has remained constant or increased or if the ecological structure of the ETP has not changed.

Comment 22: One commenter indicated that both the Direct and Indirect Effects Questions should not be considered in light of the Ecosystem Question. The commenter indicated that once the status of the dolphin stocks is re-evaluated in light of the ETP's current carrying capacity, an appropriate recovery factory can be inserted into the PBR calculation to take this into account without requiring a separate evaluation of this point in each question in the ODP.

Response: NMFS disagrees with this comment and believes that both the Indirect Effects and Direct Mortality Questions are essential for the Secretary to consider, regardless of the answer to the Ecosystem Question. However, it may not be feasible to quantify the extent to which any changes in the ETP ecosystem have affected the depleted dolphin stocks, and therefore not feasible to assign a value to be inserted into a PBR calculation. Also, as the Secretary will choose the appropriate standard of mortality, PBR levels for the dolphin stocks may or may not be applicable.

Comment 23: One commenter noted that the proposed ODP places too much emphasis on environmental change, and that there is no evidence to support this as a cause of lack of dolphin recovery.

Response: NMFS disagrees because, as indicated in the response to comment 20, substantial changes in an ecosystem can affect the ability of a population or stock of organisms to thrive and/or recover from a previous period of overexploitation such as occurred with these depleted dolphin stocks. As indicated in response to comment 21, NMFS has collected a large amount of

scientific information to determine whether a substantial change in the ecosystem has occurred. Additionally, a panel of independent experts (described at 67 FR 31279) will determine whether evidence exists to attribute ecosystem changes as a cause of any observed lack of dolphin recovery.

Comment 24: One commenter suggested that the following question be added to the end of the Ecosystem Question: ''Or has the carrying capacity increased substantially or has the ecological structure changed in any way that could promote depleted dolphin stocks to grow at rates faster than expected in a static ecosystem?≥

Response: NMFS disagrees that this change is necessary.

Comments on Methods For Determining Significance of Estimated Mortality

Comment 25: One commenter suggested that NMFS should adopt only one appropriate mortality standard against which to measure significance and that doing otherwise could potentially undermine the domestic implementation of the PBR system in U.S. commercial fisheries and could have wide-ranging policy implications.

Response: The ODP does not prescribe that the Secretary use more than one standard of mortality and other impacts in making the final finding. Instead, based on the circumstances of the scientific findings and other relevant information, the ODP allows the Secretary to choose the most appropriate mortality standard with which to assess significance.

Comment 26: One commenter stated that both PBR and stock mortality limit (SML) standards are flawed and violate the MMPA standards for dolphin mortality. The commenter added that the standard for dolphin mortality in the tuna fishery is ''levels approaching zero mortality.'' The commenter went on to indicate that the major cause for concern for these depleted dolphin populations is that the observed mortality is not accurate, and therefore the use of either the PBR or SML standard in the ODP is inappropriate because true mortality levels are unknown.

Response: Both the PBR and the SML systems have proven to be effective at managing fishery impact on marine mammals, and NMFS is making every effort to quantify total impact on the dolphin stocks, including direct mortality and indirect effects.

Comment 27: NMFS received a comment regarding the provision of the ODP that allows the Secretary to consider a mortality standard lower than PBR because a decline in carrying capacity may actually be causing the dolphin stocks to not grow. The commenter indicated that if dolphin populations are declining in connection with a decline in the carrying capacity, the fishery should not be penalized.

Response: See response to comment 20.

Comment 28: One commenter indicated that the ODP fails to define the methodology for calculating PBR, and that this should be established in advance and must be scientifically supportable.

Response: As indicated in the proposed ODP, the standard method for calculating PBR can be found at: *http://nmml.afsc.noaa.gov/library/gammsrep/gammsrep.htm*. Calculating PBR in some other way would only be necessary if the abundance estimates each had very different levels of precision, and they do not.

Comment 29: Several commenters indicated that PBR is the most appropriate standard for assessing the impact of the fishery on dolphin stocks and that references to other mortality standards should be removed from the ODP.

Response: NMFS agrees that the PBR standard is an effective standard for measuring the impact of fisheries on marine mammals, however, NMFS believes the Secretary should have the flexibility to consider other standards of mortality as appropriate.

Comment 30: Three commenters stated that the use of SMLs in the ODP as a measure of mortality is arbitrary and/or irrelevant. The commenters suggested that the use of SMLs in the Secretary's decision would result in the United States not being able to comply with its obligations under the AIDCP. Another commenter went on to indicate that SMLs were not intended to be a standard for measuring impacts on dolphin populations, but reflected a commitment to reduce dolphin mortality to the lowest levels believed to be achievable on a continuing basis and are not biological thresholds for sustainability of dolphin populations.

Response: The SML standard for mortality was developed as a part of the IDCP, and in this respect, NMFS agrees that it represents the lowest levels of mortality believed to be achievable on a continuing basis by the ETP tuna purse seine fishery. However, NMFS disagrees that the SML system is arbitrary, irrelevant, or is not intended to be a standard for managing impacts of the fishery on dolphin populations. In fact, the SML system has proven to be an effective tool for managing dolphin mortality in the ETP tuna purse seine fishery and has been embraced by the ratifying nations of the AIDCP. Moreover, Congressional intent within the MMPA, as amended by the IDCPA, and the goals of the nations that are party to the AIDCP are consistent with the SML standard as more conservative than steps taken under other provisions of the MMPA for reducing marine mammal takes in other commercial fisheries. The applicability of SMLs is found in sections 301(b)(2), 302(a)(1), and 304(b)(2)(A) of the MMPA, with virtually identical statements being found in Article II, sections 1 and 2, and also in Article V, section 1(a) of the AIDCP, further indicating international support for the SML standard as a measure of the impacts of the tuna purse seine fishery on dolphins in the ETP. This system is designed to ensure that a stock's recovery is not appreciably delayed over time. Therefore, NMFS disagrees that the use of the SML system as a measure of the significance of fishery impacts on ETP dolphin stocks lacks biological merit or would prevent the United States from complying with its obligations under the AIDCP.

Comments on the Organized Decision Process

Comment 31: One commenter suggested that even though the data to be used in the final finding have already been collected and analyzed, NMFS should describe its decision framework in detail, including its choices of measures of significance, in the final determination.

Response: NMFS will publish the final ODP and the IDCPA Science Report in advance of the final finding. The latter will contain various confidence intervals and probabilities for the Secretary's consideration in the final finding. Those used by the Secretary to make the final finding will be published in the final decision and made available to the public at that time.

Comment 32: Two commenters indicated that the proposed ODP significantly diminishes the Secretary's ability to consider valuable information and limits his flexibility in making the final finding. Similarly, two other commenters indicated that the proposed ODP constrains the presentation of data to the Secretary and severely limits his ability to benefit from the knowledge of the IATTC. Two commenters noted that the 50–year knowledge of the IATTC should be taken into consideration in the ODP, particularly with respect to the definitions of dolphin stock depletion and stress.

Response: NMFS disagrees that the ODP constrains the Secretary to considering an unduly limited amount

of information for the final finding, especially with respect to input from the IATTC. NMFS works with the IATTC, as the competent regional fisheries organization in the ETP, on many aspects of this issue and has benefitted from its input throughout the IDCPA Research Program, including the consideration of its comments on the proposed ODP. Indeed, NMFS relied upon on the IATTC's data regarding fishing effort and sets on dolphins, as well as on its evaluation of the use of TVOD in estimating dolphin abundance among other things. NMFS is unaware of any IATTC-defined terms for dolphin stock depletion and stress. NMFS relies on the MMPA definition of ''depleted'' and will define stress as appropriate in the IDCPA Science Report.

Comment 33: One commenter stated that the ODP should guide the Secretary's decision, using science, instead of leaving him to make up his own mind.

Response: The DPCIA requires the Secretary to make the final finding based on the scientific research required under section 304(a) of the MMPA, information obtained under the IDCP, and any other relevant information. NMFS believes that the ODP reflects this by providing ample guidance for the Secretary regarding the scope and weighting of such information.

Comment 34: One commenter stated that weaknesses and scientific inconsistencies in the ODP could lead to a conclusion that would further impede the United States' ability to fulfill its obligations under the AIDCP and further endanger the protection of the marine ecosystem and living marine resources.

Response: NMFS disagrees. In fact, NMFS believes that the ODP provides the Secretary with a sound basis for weighing various types of complex information in a manner that will be informative and transparent, and will further confirm the United States' commitment to the AIDCP and other multi-lateral efforts to conserve living marine resources.

Comment 35: One commenter noted that the ODP does not reflect important aspects of NMFS research and should be re-written to reflect the important conclusions previously made by NMFS scientists.

Response: NMFS disagrees. The ODP is specifically tailored to include results from all NMFS research activities conducted under the IDCPA, as well as associated research efforts undertaken in conjunction with the IDCP, and any other relevant information that NMFS believes will address the question of whether the intentional chase and encirclement of dolphins by the ETP tuna purse seine fishery is having a significant adverse impact on any depleted dolphin stock.

Comment 36: One commenter indicated that the questions used in the ODP should be: (1) During the period of the purse seine fishery, has the carrying capacity of the ETP changed? (2) Has this change resulted in a density-dependent response in the depleted dolphin stocks? and (3) Given a change in the carrying capacity, what is the status of the dolphin stocks with respect to optimum sustainable population levels using both current and historic carrying capacity?

Response: NMFS believes that, while worded somewhat differently, the intent of the first question is already included in the ODP. NMFS generally considered questions similar to the remaining two during the development of the ODP, but rejected them because NMFS believes that they do not sufficiently address the statutory question and may be unanswerable with the available data.

Comment 37: Three commenters noted that the third and fourth sentences of the third paragraph under the Organized Decision Process section were in direct contradiction with one another.

Response: NMFS agrees. This contradiction was an oversight and has been corrected by replacing the words ''Direct Mortality Question'' with ''Growth Rate Question.''

Comment 38: Two commenters were concerned that the proposed ODP was not conducive to a sound scientific approach through which the Secretary can obtain adequate guidance. Similarly, another commenter noted that the ODP's questions are not clearly grounded in scientific decision-making, will not answer the statutory question, and should be re-written to provide clear benchmarks for the Secretary.

Response: See responses to comments 33 and 34, as NMFS believes the ODP is specifically tailored to include NMFS research activities under the IDCPA, as well as associated research efforts conducted in conjunction with the IDCP, and any other relevant research that NMFS believes will address the question of whether the intentional chase and encirclement of dolphins by the ETP tuna purse seine fishery is having a significant adverse impact on any depleted dolphin stock.

Comment 39: One commenter suggested that the evaluation of direct mortality in the ODP should be separate from evaluation of quantifiable estimates of indirect mortality.

Response: NMFS disagrees that quantifiable levels of indirect mortality should be considered separately from direct mortality as they will contribute to the total estimate of impact of the fishery on dolphin stocks.

Comment 40: One commenter indicated that the Abundance Question [now the Growth Rate Question] does not easily lend itself to a ''yes'' or ''no'' answer due to the high level of uncertainty inherent in efforts to measure abundance and to estimate growth rates in marine mammal populations. The commenter added that this is especially true given the short 3–year set of observations in the very large ETP. Further, the commenter noted that the ODP is silent on how the Secretary would treat a situation where the abundance data is not definitive in either direction, and that the proposed ODP does not specify how the uncertainty in the data will be taken into account if the Secretary must answer ''yes'' or ''no.'' The commenter indicated that the ODP must take this circumstance into consideration, and that in this case, the Secretary should defer to the answers to the Direct and Indirect Effects Questions in comparison with PBR for each depleted stock.

Response: NMFS agrees that some level of uncertainty is inherent in estimating abundance of marine mammals stocks, however, these levels of uncertainty will be appropriately assessed, accounted for, and presented to the Secretary for consideration. NMFS data include a 12–year time series of abundance estimates covering a 23–year time span: 1979–83, 1986–1990, and 1998–2000, for the best estimates of dolphin growth rates. With regard to a possible less than definitive answer to this question, the Secretary will consider whether each dolphin stock's growth rate is sufficient so as not to risk recovery or appreciably delay recovery to its OSP level with an appropriate level of probability, to be determined by the Secretary.

Comment 41: One commenter indicated that the potential for the courts to overturn the Secretary's finding is dramatically magnified in the ''secretive'' process associated with the assessment model being developed to ''filter'' the science even before it is reviewed under the proposed ODP.

Response: NMFS disagrees. The ODP has been specifically developed with an eye to providing an appropriate level of guidance to the Secretary in making a final finding that is informed, transparent, and defensible. The assessment model is being developed as a part of the IDCPA Research Program and is undergoing rigorous independent peer review. The assessment model and all other aspects of NMFS' IDCPA

Research Program will be fully described in the IDCPA Science Report.

Comment 42: One commenter suggested adding the statement, ''and what are the reliability of the abundance estimates given the probability of changes in stock distribution resulting from environmental and other factors without concomitant adjustments in the NMFS population cruise patterns during the three most recent years of research'' to the end of the Abundance Question [now the Growth Rate Question].

Response: NMFS disagrees. See the response to comment 18 for NMFS views on the likely effects on abundance estimates of dolphin stock distribution.

Comment 43: One commenter suggested that NMFS delete the two sentences following the Abundance Question [now the Growth Rate Question] containing references to the population model, the possible use of TVOD, and the pending analyses of abundance data.

Response: NMFS disagrees and sees no reason to delete this text.

Comment 44: One commenter indicated that the proposed ODP ignores NMFS' 1999 Report to Congress. Another commenter expressed concern that the proposed ODP might cause the Secretary to arrive at an answer inconsistent with the findings of the 1999 Report to Congress.

Response: The ODP is designed to take into consideration all of the research findings in the 1999 IDCPA Science Report as well as the remaining results obtained under the IDCPA and the IDCP, along with other relevant information in the final finding.

Comment 45: Two commenters noted that the proposed ODP contains less specific decision guidelines than the decision analysis framework used in 1999. In a similar statement, another commenter encouraged NMFS to draw upon its previous efforts to the greatest extent possible to develop specific decision criteria to assess whether dolphin stocks are being adversely affected by the fishery and whether any such impacts are significant. The latter commenter went on to indicate that the development and use of explicit decision-making criteria would provide the best way to ensure that the Secretary's finding is well supported, understandable to the public, and likely to withstand judicial scrutiny if challenged under the Administrative Procedure Act.

Response: NMFS believes that the ODP provides the Secretary with a sound basis for weighing many different types of complex information in an appropriate manner so as to result in a final finding that is informed, transparent, and defensible.

Comment 46: Two commenters indicated that the proposed ODP focused on a biased precautionary principle in order to overprotect individual dolphins by any means, without taking into account whether the overall dolphin populations are growing, or whether other living marine species in the ecosystem are being adversely affected.

Response: NMFS believes that the ODP is based on sound conservation and decision-making principles and follows the letter and spirit of the DCPIA and the MMPA, as amended by the IDCPA.

Comment 47: One commenter suggested changing the name of the Abundance Question to the Growth Rate Question as this name better describes the nature of the question.

Response: NMFS agrees and made the change.

Comments on the Appointment of Scientific Expert Panels

Comment 48: One commenter was concerned about the independence of the expert panels and wanted the panel selection criteria to be explained in the ODP.

Response: NMFS agrees that the expert panels should be comprised of independent experts and has developed a process for selecting the panelists in a way that allows for much outside involvement of established scientific organizations. On May 9, 2002, NMFS published a notice in the **Federal Register** to solicit nominations for scientists to serve on the Ecosystem and the Indirect Effects Expert Panels (67 FR 31279). The notice solicits nominations and describes the process that NMFS, the IATTC, the MMC, and an individual from an independent reviewing agency with advice from professional societies will follow to select qualified candidates for each panel and recommend them for appointment by the Secretary. NMFS sees no reason to repeat this description in the ODP.

Comment 49: One commenter recommended removing language associating the appointment of the Scientific Expert Panels with NMFS and instead inserting reference to the U.S. Department of Commerce (DOC), suggesting that the appointments should be made by the DOC directly without NMFS input.

Response: NMFS disagrees with this suggestion as one of NMFS' primary roles is to provide guidance to the Secretary on technical matters under its purview. Given the highly technical fields of expertise of the panelists, NMFS believes it to be appropriate for NMFS and established professional organizations to assist the Secretary in the panelist selection process.

Comments on the Consideration of Available Scientific Information

Comment 50: One commenter indicated that the phrase ''and has been published in a reputable scientific journal, to include the IATTC Fishery Bulletin'' be added to the third part of the paragraph before the description of how scientific information will be weighed.

Response: NMFS disagrees with this comment. As is often the case, the most up-to-date and peer-reviewed information may not have yet been published in a journal, a process that can take some time. Therefore, NMFS believes that including the first part of the suggested language may unduly diminish the weight of important and up-to-date information from being considered by the Secretary.

Comment 51: One commenter indicated that the description of how scientific information will be weighed in the proposed ODP limits the discretion of the Secretary to consider valuable and valid information in making the final finding. Similarly, another commenter suggested that the proposed ODP would put the Secretary at risk of taking into account irrelevant information and not taking into account other relevant information, specifically indicating that the description of how scientific information will be weighed should be removed from the ODP.

Response: NMFS disagrees. While the Secretary will consider all information submitted, a mechanism for weighing scientific information is essential to the Secretary's ability to make the most informed decision. Rather than limit the information before the Secretary, explicit weighting criteria will enhance the quality and integrity of the final finding. The Secretary will consider the best scientific information available. The relative weight that any particular scientific information will carry in the Secretary's decision process will be based on the degree to which it satisfies the criteria set forth and defined at the end of this notice. Information that does not meet any of the criteria will be considered, but will be given less weight as information that meets some or all of the criteria.

Comment 52: One commenter indicated that the ODP must outline what we know and how the best scientific evidence can be used to make the final finding.

Response: NMFS agrees and believes that the ODP fully outlines that the

Secretary will consider the best available scientific information in making the final finding. Further, the ODP fully describes how that information will be weighed to provide the Secretary with an informed and appropriate decision-making environment.

Comment 53: One commenter suggested that the Secretary should be able to look at information first-hand and not have it vetted through NMFS first because doing so would put the Secretary at risk of not considering relevant information.

Response: NMFS disagrees. One of NMFS' primary roles is to provide guidance to the Secretary on technical matters under its purview. Given the large amount of highly technical information that will likely be under consideration, it is important that NMFS be able to review and assess this information so that it can be appropriately incorporated into its analyses and provided to the Secretary.

Comment 53: One commenter indicated that the MMPA clearly calls for the Secretary to consider not only information collected by NMFS but ''any other relevant information.'' The commenter went on to note that the information developed by NMFS has been subjected to considerable scrutiny, both by its own scientists and by panels of outside experts, and that the weight accorded information provided by outside sources should reflect the quality of the methods used to collect it and the extent to which it has passed peer review. The commenter further indicated that data should not be discounted entirely because they have yet to pass peer review. However, the commenter noted that it is imperative that, before any information is factored into the Secretary's final determination, NMFS be given the opportunity to review it for purposes of verification.

Response: NMFS agrees for the reasons outlined by the commenter, as well as those stated in response to comments 48 and 51.

Comment 55: One commenter suggested that the ODP require that only information that is determined to be the best available science be considered by the Secretary in making the final finding, as was required by the *Brower* v. *Evans* ruling, and that this standard should be reflected in the ODP.

Response: NMFS agrees that the Secretary should utilize the best available science and will apply the description of how information will be weighed to all scientific information that will be considered by the Secretary.

Comment 56: One commenter indicated that the May 1, 2002, deadline for submitting information to NMFS is reasonable and should enable NMFS to complete its review and verification of outside information in time to consider it in making the final determination.

Response: NMFS agrees for the reasons articulated by the commenter and in the response to comment 51.

Comment 57: One commenter indicated that the deadline of May 1, 2002, could preclude valuable information from being submitted to the Secretary and would significantly limit the Secretary's ability to make an informed decision. The commenter stated that as long as the information is received within reasonable time, it should be considered by the Secretary. Another commenter indicated that the deadline of information to be submitted to the Secretary is an arbitrary and unnecessary restriction.

Response: NMFS disagrees. Setting a deadline for submission of all information will ensure that NMFS has sufficient opportunity to review, assess, and verify the information, for the Secretary's informed consideration. As indicated in the response to comment 50, one of NMFS' primary roles is to provide guidance to the Secretary on technical matters under its purview. Given the large amount of complex and technical information that will likely be submitted for the Secretary's consideration, sufficient time is required for NMFS to adequately review the materials and to properly consider them along with information already in-hand. Additionally, NMFS believes that the May 1, 2002, definition of timely for submission of outside information is reasonable given that the DPCIA allows the Secretary to make the final finding as early as July 1, 2001, but no later than December 31, 2002.

Comment 58: Two commenters indicated that the time between the adoption of the final ODP and the submission of information prior to the May 1, 2002, deadline is unclear.

Response: As indicated in the proposed ODP, the May 1, 2002, deadline for submitting information for the Secretary's consideration is final, even though the proposed ODP itself was still under development upon the announcement of the deadline.

Overview: How to Determine Significance

It is widely known that the tuna fishery in the ETP, using intentional deployment on or encirclement of dolphins in tuna purse seine nets, causes dolphin mortality. The question for the Secretary is whether the fishery is having a ''significant adverse impact'' on any depleted dolphin stock in the ETP. There is also general agreement that the number of mortalities and other adverse effects that can be sustained by the dolphin stocks before they become significant depends on the state of the ETP ecological structure for dolphins. In essence, if the ETP carrying capacity for dolphins has declined or the ecological structure of the ETP has substantially changed, dolphin stocks could sustain fewer mortalities and other effects than if the carrying capacity has remained constant or increased or if the ecological structure of the ETP has not changed. Moreover, because it is clear that direct mortality (and potentially some level of indirect effects) can be attributed to the fishery, the population growth rates of the dolphin stocks should be sufficient so as not to indicate a risk or an appreciable delay in recovery. The remainder of this document describes how these factors will be assessed by the Secretary in making the final finding regarding whether the tuna purse seine fishery is having a significant adverse impact on any depleted dolphin stock in the ETP.

The Role of Ecosystem Changes in the Decision Process

Because substantial changes in an ecosystem can affect a depleted population or stock's recovery, the Secretary will consider scientific evidence of whether a significant ecosystem change has occurred in the ETP. Particularly, the Secretary will determine whether any change is likely to have increased or decreased (1) the ecological structure or carrying capacity for the three depleted stocks or (2) the rate at which the stocks are able to reach their OSP level. OSP is the level at which the number of animals in a population are sufficient to achieve the maximum productivity of the population or species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.

The Role of Direct Mortality in the Decision Process

To assist the Secretary in reaching a final finding in 2002, NMFS is examining various effects of the tuna purse seine fishery on depleted ETP dolphin stocks, pursuant to the MMPA. The Secretary will consider information on direct mortality in making the final finding. The Role of Indirect Effects in the Decision ProcessWhile direct mortality by the tuna fishery is a known impact on dolphin stocks, there are several other possible means by which the fishery could be impacting them. These possible means are often not observed (sometimes termed ''cryptic''

or indirect) and may include: (1) delayed mortality from effects of stress or injuries caused by chase and capture; (2) impaired reproduction from effects of stress or injuries resulting from chase and capture; (3) calf mortality owing to cow-calf separation during fishing operations; (4) social structure disruption attributable to chase and capture; (5) facilitated mortality by making the dolphins more vulnerable to predation after the chase; and (6) interference with dolphin feeding. To measure the impact of indirect effects, the MMPA specifically requires the Secretary to conduct stress studies, including: (1) a review of stress-related research; (2) a 3–year necropsy study of dolphins killed in the tuna fishery; (3) a 1–year review of relevant historical demographic and biological data; and (4) an experiment involving the repeated chasing and capturing of dolphins by means of intentional encirclement. Results of studies conducted under the MMPA, as amended by the IDCPA, information obtained under the IDCP, and other available scientific information should provide insights into the nature and the magnitude of fishery-induced impacts related to these specific sources in addition to those caused by direct mortality. Upon reviewing this information, the Secretary will determine whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the ETP.

The Role of Dolphin Growth Rates in the Decision Process

In addition to measuring direct mortality, estimating abundance and growth rates of the depleted dolphin stocks involved in the ETP tuna purse seine fishery is necessary to understand the impacts of the fishery on dolphin stocks. This is because potential subtle effects of chase and encirclement, such as on reproduction or survival, may be difficult to detect and may not be directly observed. For this reason, the MMPA, as amended by the IDCPA in 1997, specifically requires NMFS to conduct annual abundance surveys. Estimates of abundance and projected growth rates for the depleted dolphin stocks, given quantifiable levels of mortality caused by the fishery, will be assessed to determine if the dolphin stocks are growing (i.e. recovering to OSP levels) at an acceptable rate. The impact of the fishery on dolphin abundance and growth rates will be evaluated, while taking into consideration natural mortality and environmental factors that may also be affecting dolphin recovery.

Methods For Determining Significance of Estimated Mortality

To assess the significance of estimated mortality in the fishery, the Secretary will use established standards of marine mammal mortality under the MMPA. These ''mortality standards'' may include the PBR and the SML systems, as well as other standards as appropriate.

NMFS relies on the PBR system, developed as a tool for implementation of the MMPA, for regulating incidental mortality of marine mammal stocks by U.S. fisheries other than the tuna purse seine fishery in the ETP. The PBR level of a marine mammal stock is the maximum number of animals, in addition to natural mortalities, that may be removed while allowing that stock to reach or maintain OSP. The PBR system was developed in a series of workshops with participation of experts from NMFS and was refined following input from the MMC, outside experts, and the public. PBR serves as a valuable mortality standard to measure significance of mortality in marine mammal-fishery interactions because it is a risk averse method of incorporating uncertainty in management models for marine mammals. The formula for calculating PBR can be found in Wade and Angliss (1997), available at: *http://nmml.afsc.noaa.gov/library/gammsrep/gammsrep.htm*.

In examining estimated mortality, the Secretary may also consider other systems for calculating dolphin mortality standards, such as those utilized under the AIDCP, to manage fishery-induced dolphin mortality levels in the ETP. The AIDCP, a legally binding instrument for dolphin conservation and ecosystem management in the ETP, was negotiated in 1998. The SML system was conceived by nations participating in the IDCP and several non-governmental conservation organizations, in consultation with the IATTC. Nations participating in the AIDCP currently use the SML system for managing dolphin mortality in the ETP. The SML system uses substantially lower limits for dolphin mortality than the PBR approach. Pursuant to the MMPA, as amended by the IDCPA, the SMLs (per-stock per-year dolphin mortality limits) beginning in calendar year 2001 are set at less than or equal to 0.1 percent of the minimum population estimate of each dolphin stock. Additional information on SMLs can be found in Annex III of the AIDCP, available at: *http://www.nmfs.noaa.gov/prot__res/PR2/Tuna__Dolphin/AIDCP.html*

The established standards of PBR and SML are incorporated into the ODP as a mechanism for assessing whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the ETP. Similar to previous work (Gerrodette 1996), NMFS will make calculations of PBR levels and SMLs for the final finding, based on recent dolphin abundance estimates from surveys conducted under the IDCPA research program. Further discussion of how the PBR, SML, or other appropriate mortality standards will be used in the final finding decision process can be found below.

The Organized Decision Process

NMFS has developed the ODP to provide the Secretary with a systematic approach for evaluating multiple types of data in a situation complicated by uncertainty. The decision process described here consists of separate measures of fishery and environmental effects on dolphins that the Secretary will consider in reaching a final decision on whether the fishery is having a significant adverse impact on any depleted dolphin stock in the ETP.

The ODP consists of a series of questions that the Secretary will consider in reaching a final decision. These questions are as follows:

(1) Ecosystem Question
(2) Direct Mortality Question
(3) Indirect Effects Question
(4) Growth Rate Question

The answer to the Ecosystem Question will provide an ecological context (as described above) for the Secretary to consider the remaining three questions. For the Direct Mortality and the Growth Rate Questions, the ODP provides basic thresholds that will result in a ''yes'' or ''no'' answer. If the Secretary answers ''yes'' to the Direct Mortality Question, the Secretary will conclude that the fishery is having a significant adverse impact. If the Secretary answers ''no'' to the Growth Rate Question, the Secretary will conclude that the fishery is having a significant adverse impact. For the Ecosystem and the Indirect Effects Questions, the Secretary will review the available information as well as the evidence presented by members of two expert panels (see below) in reaching final conclusions.

Details on how the Secretary will consider the four questions are as follows:

(1) *The Ecosystem Question*. During the period of the fishery, has the

carrying capacity of the ETP for dolphins declined substantially or has the ecological structure of the ETP changed substantially in any way that could impede depleted dolphin stocks from growing at rates expected in a static ecosystem? Or has the carrying capacity increased substantially or has the ecological structure changed in any way that could promote depleted dolphin stocks to grow at rates faster than expected in a static ecosystem?

To determine the answer to these questions, the Secretary will consider scientific information collected and/or evaluated by NMFS, as well as information rendered individually from members of a panel of independent scientific experts in biological oceanography and ecology (the Ecosystem Panel). The panel members' assessments will be based on their review of relevant oceanographic and ecosystem data (physical and biological habitat and distribution, abundance, and ecology of other organisms in the ETP) from the period of the fishery.

(2) *The Direct Mortality Question*. For any depleted stock, does the estimate of the total fishery-attributed dolphin mortality, obtained by adding together estimates of direct mortality and, where appropriate, quantifiable levels of indirect mortality, exceed the mortality standard considered appropriate by the Secretary?

NMFS scientists will calculate, from the three recent abundance estimates (1998, 1999, and 2000), the PBR levels for each depleted dolphin stock in the ETP and provide them, along with measures of uncertainty, to the Secretary. Estimates of direct mortality and indirect mortality (where appropriate) will be compared to the PBR and other mortality standards to be considered by the Secretary. The Secretary will also take into account the assessments from the Ecosystem Panel members regarding possible changes in the carrying capacity and/or the ecosystem structure of the ETP. When evaluating the impact of mortality levels on dolphin stocks, the Secretary may also consider the SML standard as well as other standards as appropriate. The Secretary will consider the information with the understanding that adverse effects from unfavorable changes in the ecosystem may require the use of a mortality standard below PBR.

(3) *The Indirect Effects Question*. For each stock, is the estimated number of dolphins affected by the tuna fishery, considering data on sets per year, mortality attributable to the fishery, indicators of stress in blood, skin and other tissues, cow-calf separation, and other relevant indirect effects information, at a magnitude and degree that would risk recovery or appreciably delay recovery to its OSP level (how and to what degree)?

The answer to this question will be based on information collected and/or evaluated by NMFS, as well as from information rendered individually from members of a panel of independent scientific experts in veterinary science, physiology, and other stress-related fields (Indirect Effects Panel). The panel members' assessments will be based on their review of relevant behavioral, ecological, immunological, pathological, and other information with respect to the dolphin stocks involved. For this question, the Secretary will also consider the evidence presented by the Ecosystem Panel members regarding possible changes in the carrying capacity and/or the ecosystem structure of the ETP and how the evidence relates to indirect adverse effects attributable to the fishery on dolphins stocks as described above.

(4) *The Growth Rate Question*. For each depleted dolphin stock, is the observed population growth rate sufficient to ensure that each stock's recovery to OSP is not risked or appreciably delayed?

To answer this question, the Secretary will consider results from calculations in which NMFS scientists fit a population model to the time series of NMFS research vessel abundance estimates using the time series of estimates of the incidental mortality from the TVOD collected by IATTC and national program observers. If pending analysis indicates that the time series of relative abundance estimates from the TVOD are sufficiently reliable, they will also be used to estimate trends in dolphin abundance. NMFS scientists will estimate growth rates for each dolphin stock and determine measures of uncertainty for each estimate and provide this information to the Secretary. The Secretary will also take into account assessments from the members of the Ecosystem Panel when considering the estimated growth rates.

Appointment of Scientific Expert Panels

As indicated above in explanations of the Ecosystem and the Indirect Effects Questions, the Secretary will appoint two panels of independent scientific experts to provide individual assessments in determining the answers to these two questions. The independent experts will base their conclusions on a review of the results from the IDCPA research program, information obtained under the IDCP, and other relevant information. The use of independent expert judgment in obtaining guidance on complex and highly technical bodies of information, such as those relevant to the Ecosystem and the Indirect Effects Questions, is consistent with science-based, decision-making processes like that described here. NMFS published a notice in the **Federal Register** (67 FR 31279) soliciting nominations for the Ecosystem Expert Panel and the Indirect Effects Expert Panel. Based on these nominations, NMFS selected panelists in close consultation with professional scientific organizations.

Consideration of Available Scientific Information

The Secretary will make the final finding based on information available from studies conducted under the IDCPA research program, information obtained under the IDCP, and other relevant information. While NMFS is conducting much of the research that will form the basis of the final finding, there may be other sources of information that the Secretary will consider pursuant to the MMPA. Since NMFS will need time to properly assess and evaluate information to be considered by the Secretary, the deadline for submission of information was May 1, 2002, as indicated in the proposed ODP. The Secretary will consider and weigh all quantitative information, as accompanied by associated statistical measures of certainty and confidence, as appropriate in making the final finding.

The weight given to the available scientific information will be determined by the degree to which it meets the following elements: (1) relevance, (2) timeliness, (3) passed independent peer-review, and (4) available to NMFS for verification.

Scientific information means the results of properly designed scientific research. *Author(s)* means the originator(s) of the scientific information whose names appear on the written document. *Independent(ly)* means that the action was undertaken by one or more individuals that do not have any fiduciary, supervisory, subordinate, or other geographically close organizational relationship to the author(s). *Peer* means a scientist practicing in the same or very closely related field of study as the scientific information. *Relevance* means the scientific information is pertinent to the use of the information. *Timeliness* means the relevancy of scientific information least degraded by the passage of time. *Passed independent peer review* means the scientific information has been published in a refereed scientific journal in its field or independently read and criticized in

writing by at least two peers; the criticism was disposed of either by acceptance or rebuttal, as appropriate, by the author(s); and the disposition of the criticism by the author(s) was independently determined to be appropriate and adequate. *Verification* means that the data, procedures, methods, equipment, mathematics, statistics, models, computer software, and anything else used to produce the scientific information are to be submitted to NMFS in a timely manner such that the scientific information may be replicated or rejected. For the final finding, ''in a timely manner'' means as of May 1, 2002.

References

Gerrodette, T. 1996. A comparison of mortality limits for eastern tropical Pacific dolphins under the Declaration of Panama and under Potential Biological Removal (PBR) management. NMFS Administrative Report LJ–96–18.

NMFS 1999. Report to Congress on the initial finding, required under the Marine Mammal Protection Act of 1972 as amended by the International Dolphin Conservation Program Act of 1997, regarding whether the intentional deployment on or encirclement of dolphins with purser seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean. Southwest Fisheries Science Center, National Marine Fisheries Service, National Oceanic Atmospheric Administration.

Wade, P.R. and R.P. Angliss. 1997. Guidelines for assessing marine mammal stocks: Report of the GAMMS workshop April 3–5, 1996, Seattle, Washington. U.S. Department of Commerce, NOAA Technical Memorandum NMFS–OPR–12.

Dated: August 13, 2002.

Donald R. Knowles,

Director, Office of Protected Resources, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 081402C]

Endangered Species; File No. 1374; Marine Mammals; File Nos. 781–1666, 1035–1688

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

ACTION: Withdrawal of application, return of application, and receipt of application for permit.

SUMMARY: Notice is hereby given that the following applicants have applied in due form for a permit to take marine mammals and/or endangered species for the purposes of scientific research:

Dr. Andrew J. Read, Duke University Marine Laboratory, 135 Duke Marine Lab Road, Beaufort, NC 28516–9721 (File No. 1374);

NMFS Northwest Fisheries Science Center, 2725 Montlake Blvd. E, Seattle, WA 98112–2097 (Dr. Cynthia Tynan, Principal Investigator) (File No. 781–1666); and

Dr. Cynthia Tynan, School of Oceanography, University of Washington, Box 357940, Seattle, WA 98195–7940 (File No. 1035–1688).

DATES: Written or telefaxed comments on the new application must be received on or before September 23, 2002.

ADDRESSES: The applications and related documents are available for review upon written request or by appointment (See **SUPPLEMENTARY INFORMATION**).

FOR FURTHER INFORMATION CONTACT: Carrie Hubard or Ruth Johnson, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permits are requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–227), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

Application Withdrawn

On March 25, 2002 a notice was published in the **Federal Register** (67 FR 13607) that an application had been filed by Dr. Andrew J. Read of Duke University Marine Laboratory. The purpose of this research was to describe relationships between the movements of sea turtles and the fall gillnet flounder fishery as well as habitat use of loggerhead, green and Kemp's ridley sea turtles. Up to 30 loggerhead, 10 green and 10 Kemp's ridley sea turtles would be monitored via satellite telemetry. The applicant has requested that the application be withdrawn and will now work on a similar project already authorized under NMFS Southeast Region scientific research Permit No. 1260.

Application Returned

On April 25, 2002 a notice was published in the **Federal Register** (67 FR 20491) that an application had been filed by NMFS, Northwest Fisheries Science Center, (Dr. Cynthia Tynan, Principal Investigator). The applicant requested permission to conduct photo-identification, prey sampling and line-transect surveys of marine mammals in U.S. waters of the North Pacific. Because the principal investigator on the permit application has changed affiliations and no longer works at NWFSC, the application has been returned.

Application Received

For File No. 1035–1688, the applicant requests permission to conduct shipboard line-transect surveys of marine mammals in U.S. waters of the North Pacific. The applicant proposes to take various species of cetaceans and five species of pinnipeds via harassment during photo-identification from small boats or larger research vessels, line-transect surveys from ships, and collection of prey near cetaceans. Cetacean prey will be collected via dip nets and towed zooplankton nets. The goal of this research is to provide temporal (seasonal) and spatial (mesoscale and fine-scale) variability in euphausiid and forage fish occurrence patterns necessary to identify the important bio-physical linkages between top-predator distributions and the density and availability of their prey. Line-transect data will also provide updated abundance estimates.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the