

contain any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 48 CFR Part 237

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

#### Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR Part 237, which was published at 69 FR 55991 on September 17, 2004, is adopted as a final rule without change.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 216 and 300

[Docket No. 040920271-5083-02, I.D. 102004A]

RIN 0648-AS05

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

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule to implement resolutions adopted by the Inter-American Tropical Tuna Commission (IATTC) and by the Parties to the Agreement on the International Dolphin Conservation Program (IDCP). The final rule prohibits activities that undermine the effective implementation and enforcement of the Marine Mammal Protection Act (MMPA), Dolphin Protection Consumer Information Act (DPCIA), and International Dolphin Conservation Program Act (IDCPA).

**DATES:** Effective May 12, 2005.

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

0648\_AS05@noaa.gov. Include in the subject line of the E-mail the following document identifier: RIN 0648-AS05. The Environmental Assessment (EA) prepared for this rule is available on the Internet at the following address: <http://swr.nmfs.noaa.gov/>.

#### FOR FURTHER INFORMATION CONTACT:

Jeremy Rusin, NMFS, Southwest Region, Protected Resources Division, (562) 980-4020.

#### SUPPLEMENTARY INFORMATION:

##### Background

The United States is a member of the IATTC, which was established in 1949 under the Convention for the Establishment of an Inter-American Tropical Tuna Commission (Convention). The IATTC provides an international forum to ensure the effective international conservation and management of highly migratory species of fish in the Convention Area. The Convention Area is defined to include waters of the ETP bounded by the coast of the Americas, the 40° N. and 40° S. parallels, and the 150° W. meridian. The IATTC has maintained a scientific research and fishery monitoring program for many years and annually assesses the fisheries and the status of tuna stocks to determine appropriate harvest limits or other measures to prevent overexploitation of the stocks and promote viable fisheries. More recently, the IATTC has moved into other fishery management issues, such as managing the cumulative capacity of vessels fishing in the Convention Area, addressing bycatch of non-target and protected species, and imposing time-area closures to conserve tuna stocks.

In support of fleet capacity control, the United States agreed to an IATTC resolution that limited total ETP purse seine fleet capacity. Currently, the United States is committed to limiting the active aggregate capacity of its domestic tuna purse seine fleet in the ETP to 8,969 metric tons (mt) carrying capacity. The U.S. limit was originally based on the cumulative capacity of U.S. vessels actively fishing in the ETP in the years leading up to 1999. In addition, U.S. purse seine vessels based in the western Pacific Ocean (WPO) were allowed to make 32 trips into the ETP without counting against the 8,969 mt limit. Recent resolutions adopted by the IATTC member nations have addressed limits on fleet capacity. The United States and other IATTC member nations and Parties to the Agreement on the IDCP (Agreement) are responsible for domestic implementation of resolutions adopted each year. Under the U.S. Tuna Conventions Act (16

U.S.C. 951 *et seq.*), the Secretary of Commerce is authorized to promulgate regulations implementing the recommendations of the IATTC. This final rule implements the recent capacity resolutions adopted by the IATTC member nations.

The IDCPA was signed into law August 15, 1997, and became effective March 3, 1999. The IDCPA amends the MMPA, DPCIA (16 U.S.C. 1385), and Tuna Conventions Act. The IDCPA, together with previous declarations, became the blueprint for the Agreement on the IDCP. In May 1998, eight nations, including the United States, signed a binding, international agreement to implement the IDCP. The Agreement became effective on February 15, 1999, after four nations (United States, Panama, Ecuador, and Mexico) deposited their instruments of ratification, acceptance, or adherence with the depository for the Agreement. The IDCPA (16 U.S.C. 1413) mandates the Secretary of Commerce to issue and revise regulations, as appropriate, to implement the IDCP.

On October 29, 2004, NMFS published a proposed rule in the **Federal Register** (69 FR 63122), which would have: (1) established a register of U.S. vessels with a history of fishing in the ETP prior to June 28, 2002 (Vessel Register), and authorized only those vessels to purse seine for tuna in the ETP; (2) limited the aggregate active capacity of U.S. purse seine vessels in the ETP to 8,969 mt per year; (3) revised the requirements for maintaining and submitting tuna tracking and verification records; (4) ensured owners of U.S. vessels on the Vessel Register pay annual assessments; (5) prohibited commerce in tuna or tuna products bearing a label or mark referring to dolphins, porpoises, or marine mammals if the label or mark does not comply with the labeling and marking requirements of 16 U.S.C. 1385(d); and (6) prohibited interference with enforcement and inspection activities, submission of false information, and other activities that would undermine the effectiveness of the MMPA, IDCPA, and DPCIA.

This final rule is largely unchanged from the proposed rule. In this final rule, NMFS responds to public and government comments, and makes technical modifications.

#### Responses to Comments

NMFS solicited comments on the proposed rule. NMFS received seven comments letters during the 30-day comment period from U.S. Customs and Border Protection and the general public. Key issues and concerns are

summarized below and responded to as follows:

*Importation, Purchase, Shipment, Sale, and Transport*

*Comment 1:* The new paragraph proposed in 50 CFR 216.24(f)(3)(ii) will help NMFS monitor tuna shipments and may act as a deterrent to importers who may consider undermining current law.

*Response:* NMFS proposed this new paragraph to achieve the purposes described in the comment.

*Comment 2:* The proposed changes to require the name of the vessel on the Fisheries Certificate of Origin (FCO) regardless of the gear type used and to require importers, exporters, or processors who take custody of tuna shipments to sign and date FCOs in § 216.24(f)(4)(xi) and (f)(4)(xiv), respectively, should assist enforcement efforts.

*Response:* NMFS proposed these changes to achieve the purposes described in the comment.

*Comment 3:* The proposed rule will allow NMFS to enforce the dolphin-safe labeling standard at the wholesale, distribution and retail levels and not just against the party responsible for placing a dolphin related label on the product. This authority should increase pressure on businesses that distribute or sell labeled products to ensure that the product complies with the dolphin-safe labeling standard.

*Response:* The regulations at § 216.93(f) extend the recordkeeping and document submission requirements to wholesalers/distributors, but not to retailers. NMFS determined that extending these requirements to wholesalers/distributors is necessary to enforce the dolphin-safe labeling standard. However, extending this requirement to the retailers is overly burdensome due to the number of entities that would be affected by these recordkeeping and submission requirements. NMFS agrees with the commenter that the regulations should improve compliance with the dolphin-safe labeling standard through increased enforcement pressure at the wholesaler/distributor level of commerce.

*Comment 4:* Current regulations requiring importers to submit paper copies of import documents, specifically NOAA Form 370, to U.S. Customs and Border Protection (USCBP), Department of Homeland Security, are burdensome to that agency because the documentation then had to be transferred to NMFS. The proposed change to § 216.24(f)(3)(ii) requiring that documentation be submitted directly to NMFS, will reduce this burden and

allow for USCBP resources to be directed to other objectives.

*Response:* NMFS proposed this change to achieve the purposes described in the comment.

*Verification Requirements*

*Comment 5:* The proposed prohibition against distribution of Tuna Tracking Forms (TTFs) to private organizations in § 216.93(c)(5)(v) is not consistent with calls for transparency in the International Dolphin Conservation Program Act (IDCPA). This proposed prohibition undercuts the tracking and enforcement efforts NMFS is attempting to strengthen through this proposed rule. As an alternative, NMFS could eliminate the name of the vessel owner or captain on TTFs to protect the privacy of these individuals while providing the public with basic but important information.

*Response:* The Parties to the Agreement established, and are bound by, Rules of Confidentiality and a System for Tracking and Verifying Tuna. Section 3, paragraph 7 of the Agreement's System for Tracking and Verifying Tuna (available at <http://www.iattc.org/IDCPDocumentsENG.htm>) states: "TTFs shall be treated by the competent national authority as confidential official documents of the IDCP, consistent with Article XVIII of the [Agreement], and the [Agreement's] Rules of Confidentiality." Under paragraph (1)(b) of the Agreement's Rules of Confidentiality (available at <http://www.iattc.org/IDCPDocumentsENG.htm>), "information relating to unloadings or trade which is associated with individual vessels and/or companies, including Tuna Tracking Forms (TTFs) for those vessels" is treated as confidential.

Because TTFs are documents of the Secretariat to the Agreement and not NMFS, NMFS cannot distribute these documents even if certain sensitive information is eliminated. Further, TTFs are confidential documents with no provision for part, let alone all, of these documents to be released. Section 216.93(c)(5)(v) of the regulations, which is now finalized, is consistent with policies adopted by the Parties to the Agreement and remains unchanged in these final regulations.

*Comment 6:* The proposed changes to § 216.93(e) requiring the submittal and maintenance of records on all tuna imports (not just those from the ETP) should enhance NMFS' ability to track and verify shipments of tuna products.

*Response:* NMFS proposed these changes to achieve the purposes described in the comment.

*Comment 7:* The proposed changes to § 216.93(f) to include wholesalers and distributors of tuna products in the list of entities that must maintain records should complement enforcement efforts and in particular allow for more frequent audits and spot checks.

*Response:* NMFS proposed these changes to achieve the purposes described in the comment.

**Changes From the Proposed Rule**

*Changes to Vessel Permit Application Fees*

NMFS clarified in § 216.24(b)(6)(i) of this final rule that: (1) the amount of the vessel permit application fee may change and (2) the amount of the fee is determined by the Assistant Administrator, NMFS, in accordance with the NOAA Finance Handbook and printed on the vessel permit application form provided by the Administrator, Southwest Region. This was always NMFS' intent in § 216.24(b)(6)(i), but the intent may have not been clear in the way the proposed regulations were drafted.

*Changes to Observer Placement Fee*

NMFS clarified in § 216.24(b)(6)(iii) of this final rule that the observer placement fee supports both the placement of observers on individual vessels and the maintenance of the IATTC observer program or other approved observer program.

*Changes to Disposition of Fisheries Certificates of Origin*

NMFS added a mailing address for the Tuna Tracking and Verification Program, Southwest Region, in § 216.24(f)(3).

*Changes to Vessel Register*

NMFS clarified in § 300.22(b)(1)(ii) that purse seine vessels of 400 short tons (st) (362.8 mt) or less carrying capacity for which landings of tuna caught in the ETP comprise 50 percent or less of the vessel's total landings for a given calendar year are exempted from being listed on the Vessel Register. In the proposed rule, only purse seine vessels less than 400 st were included in this exception. This clarification is consistent with the description of vessels required to be listed on the Vessel Register provided in the preamble of the proposed rule.

NMFS clarified in § 300.22(b)(4) that each of the payments and permit applications listed in § 216.24(b) must be submitted in order for a vessel to be listed on the Vessel Register in the following calendar year. If the required payments and permit applications are not submitted to the Regional

Administrator, the vessel will not be listed on the Vessel Register in the following year. This was NMFS' original intention, but this was not clear in the proposed rule.

NMFS clarified in § 300.22(b)(4)(iii) that a vessel owner or managing owner may, at any time during the year, request that a vessel qualified to be listed on the Vessel Register be categorized as inactive for the remainder of the calendar year by submitting to the Administrator, Southwest Region, payment of the associated observer placement fee plus a 10 percent surcharge of the fee. In § 300.22(b)(6)(i), it was already clear that a vessel qualified to be listed on the Vessel Register may be added back to the Vessel Register as inactive at any time during the year.

In § 300.22(b)(5), NMFS removed paragraphs (iii) and (iv) because vessel owners are required to take specific actions (i.e., pay fees and submit permit applications) for vessels to be listed on the Vessel Register each year. The proposed rule incorrectly indicated that the default condition was for vessels to remain on the Vessel Register from year to year unless an owner did not meet these requirements in which case the vessel would be removed from the Vessel Register. In this final rule, NMFS also divided § 300.22(b)(5)(vi) of the proposed rule into two paragraphs. They appear in § 300.22(b)(5)(iii) and (iv) of this final rule.

NMFS changed § 300.22(b)(5)(v) to allow the Regional Administrator to remove a vessel from the Vessel Register if notified by either the United States Maritime Administration (MARAD) or the United States Coast Guard (USCG) that either the owner has submitted an application for transfer of the vessel to foreign registry and flag or that the documentation of the vessel will be or has been deleted for any reason. The failure to include MARAD in this provision in the proposed regulations was an oversight. NMFS made the change in the final rule because deletion of a vessel from U.S. documentation by the USCG can be immediate after MARAD provides its approval of the action.

NMFS' policy and intention is to remove each vessel from the Vessel Register upon notification by MARAD or USCG that either agency has determined that all requirements for flag transfer have been met and the only step remaining is for USCG to complete final paperwork to delete U.S. documentation for that vessel. NMFS maintains this policy in order to prevent U.S. capacity from transferring with the vessel on the Vessel Register and increasing the

capacity of the tuna purse seine fleet fishing in the ETP.

In this final rule, NMFS added a new § 300.22(b)(6) to clarify the process for removing vessels from the Vessel Register. According to the process, the Regional Administrator will promptly notify the vessel owner in writing of the removal of the vessel and the reasons for its removal. For vessel removals under § 300.22(b)(5)(iii), the Regional Administrator will not accept a request to reinstate the vessel to the Vessel Register for the term of the permit sanction. For vessel removals under § 300.22(b)(5)(iv), the Regional Administrator will not accept a request to reinstate the vessel to the Vessel Register until such time as payment is made on the penalty or penalty agreement, or other duration agreed upon between NOAA and the vessel owner. Section 300.22(b)(6) of the proposed rule is renumbered as § 300.22(b)(7) in this final rule.

NMFS clarified in § 300.22(b)(7)(v) (formerly 300.22(b)(6)(v)) that an owner or managing owner may request that a vessel replace a vessel of equal or greater carrying capacity previously removed from active status on the Vessel Register by submitting the observer placement fee, vessel permit application, and permit application processing fee in accordance with § 216.24(b). In addition, in order for the replacement vessel to be listed as active on the Vessel Register, the captain of the vessel must possess an operator permit issued under § 216.24(b).

#### Classification

##### *Executive Order 12866*

This final rule has been determined to be not "significant" under Executive Order 12866. NMFS prepared a Regulatory Impact Review (RIR)/Final Regulatory Flexibility Analysis (FRFA) for this action, included as Appendix A to the Environmental Assessment (EA) prepared on the proposed regulations. The EA, including the FRFA, is available on the Internet at the following address: <http://swr.nmfs.noaa.gov/>.

##### *Regulatory Flexibility Act*

Pursuant to procedures established to implement the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), NMFS prepared a RIR/FRFA for this action, included as Appendix A to the EA. The purposes of this action were described earlier in the preamble to the proposed rule, published on October 29, 2004 (69 FR 63122).

NMFS prepared an RIR/Initial Regulatory Flexibility Analysis (IRFA) for the proposed rule, which was

described in the classification section of the preamble to the proposed rule. The public comment period ended on November 29, 2004. Comments received and NMFS responses thereto are contained in the preamble. No comments were received on the economic impacts of the rule.

NMFS considered but rejected two alternatives to the preferred alternative which, (1) establishes a register of U.S. vessels with a history of fishing in the ETP prior to June 28, 2002, and requires only those vessels be authorized to purse seine for tuna in the ETP; (2) enables the National Marine Fisheries Service (NMFS) to maintain the Vessel Register annually, including to establish procedures for removing vessels for serious violations and to prevent U.S. capacity from increasing the regional capacity of the tuna purse seine fleet in the ETP; (3) limits the aggregate active capacity of U.S. purse seine vessels in the ETP to 8,969 mt per year; (4) revises the requirements for maintaining and submitting tuna tracking and verification records; (5) ensures owners of U.S. vessels on the Vessel Register pay annual assessments; (6) prohibits commerce in tuna or tuna products bearing a label or mark referring to dolphins, porpoises, or marine mammals if the label or mark does not comply with the labeling and marking requirements of 16 U.S.C. 1385(d); and (7) prohibits interference with enforcement and inspection activities, submission of false information, and other activities that would undermine the effectiveness of the MMPA, IDCPA and DPCIA.

The first alternative NMFS analyzed and rejected was the "no action" alternative. This alternative would not have implemented recommendations of the IATTC member nations or resolutions adopted by the Parties to the Agreement on the IDCP. The second alternative NMFS considered and rejected was the "variations of the preferred alternative" alternative. This alternative would retain the clearly required elements of the preferred alternative, but it would also include other measures not specifically required by internationally adopted resolutions. Generally, the objectives of resolutions adopted by the IATTC member nations and the Parties to the Agreement on the IDCP are clear; however, some provisions allow for agency discretion, either in implementing or interpreting the intent of the resolution. These discretionary areas provided the basis for this third alternative. For example, under this alternative NMFS considered discretionary areas with respect to management of fleet capacity, such as:

(1) limiting the annual aggregate active capacity of the U.S. purse seine vessels participating in the ETP tuna fishery to an amount less than 8,969 mt, (2) allowing all vessels owners to have an equal opportunity to be categorized as active on the Vessel Register from year to year regardless of the vessel's status in the prior year (i.e., there would be no incentive for a vessel being active in a prior year); and (3) not deterring against frivolous requests for vessels to be categorized as active on the Vessel Register.

NMFS rejected the "no action" alternative because it would not restrict annual participation by U.S. flag purse seine vessels in the fishery and would not implement needed prohibitions or refine tuna tracking procedures. Under the "no action" alternative, the United States would not be fulfilling its obligations under the IATTC and Agreement. Adopting this alternative would provide a precedent for other nations to ignore future international recommendations. NMFS rejected the second alternative which would entail taking independent action to address tuna conservation (e.g., quota, area closures, or other variations of the preferred alternative) because these approaches fail to address the potential for fleet capacity growth. Further, the United States does not have independent sources of information that would provide a sufficiently sound approach to support a departure from recommendations of the IATTC member nations and the Parties to the Agreement.

NMFS selected the preferred alternative, which imposes some new burdens on small entities. Specifically, the preferred alternative regulates several (i.e., one or two) small purse seine vessels (i.e., vessels of 400 st carrying capacity or less and classified as small business entities). Under the rule, several small vessels that have historically targeted tuna on a full-time basis, as well as large tuna purse seine vessels (in excess of 400 st carrying capacity), would be required to be listed as active on the Vessel Register and pay associated annual vessel assessments in order to fish for tuna in future years.

Updates to the tuna tracking and verification program; prohibitions against commerce in tuna or tuna products bearing a label or mark that refers to dolphins, porpoises, or marine mammals if the label or mark does not comply with the labeling and marking requirements of 16 U.S.C. 1385(d); and prohibitions against activities that undermine the implementation and enforcement of the MMPA, IDCPA and DPCIA will not significantly impact

small business entities. However, the rule will impose some new or increased burdens to small businesses that will ensure NMFS' continued ability to verify the dolphin-safe status of tuna. These burdens are largely related to new tuna tracking and verification procedures and will affect importers, exporters, wholesalers/distributors and transshippers.

NMFS selected the preferred alternative because it achieves NMFS' primary objectives to establish domestic measures consistent with international resolutions adopted by the IATTC and the Parties to the Agreement, as well as other procedural modifications that NMFS determined to be necessary after several years experience managing the U.S. tuna purse seine fleet in the ETP and implementing a domestic tuna tracking and verification program. Specifically, the preferred alternative both minimizes the potential for significant economic impacts to a variety of entities and implements measures to (1) establish a register of U.S. vessels with a history of fishing in the ETP prior to June 28, 2002, and require only those vessels be authorized to purse seine for tuna in the ETP; (2) enable NMFS to maintain the Vessel Register annually, including to establish procedures for removing vessels for serious violations and to prevent U.S. capacity from increasing the regional capacity of the tuna purse seine fleet in the ETP; (3) limit the aggregate active capacity of U.S. purse seine vessels in the ETP to 8,969 mt per year; (4) revise the requirements for maintaining and submitting tuna tracking and verification records; (5) ensure owners of U.S. vessels on the Vessel Register pay annual assessments; (6) prohibit commerce in tuna or tuna products bearing a label or mark referring to dolphins, porpoises, or marine mammals if the label or mark does not comply with the labeling and marking requirements of 16 U.S.C. 1385(d); and (7) prohibit interference with enforcement and inspection activities, submission of false information, and other activities that would undermine the effectiveness of the MMPA, IDCPA and DPCIA.

As discussed in previous paragraphs, the "no action" and "independent action" alternatives were rejected because they would impose greater burdens than the preferred alternative and/or would not implement the seven measures stated above. Four specific examples of the burdens NMFS considered in selecting the preferred alternative follow. First, in selecting the preferred alternative NMFS provides reasons for removing vessels from the

Vessel Register (e.g., the owner of the vessel is applying to transfer the vessel to a foreign flag, the vessel has sunk, etc.) in order to free up opportunities for other vessels to participate in the fishery. Second, the preferred alternative contains a deterrent for a vessel owner who requests to have a vessel listed as active on the Vessel Register but does not utilize that active status. Vessels for which these frivolous requests for active status were made would receive the lowest priority consideration for active status the following year, allowing other vessel owners to attain higher priority. Third, NMFS considered but rejected taking independent action to increase the length of time that records must be maintained by exporters, transshippers, importers, processors and wholesalers/distributors from 2 years to 3 years because this action would be overly burdensome to these entities. Fourth, NMFS considered but rejected taking independent action to decrease the length of time within which these entities are required to submit tracking and verification documentation to the Regional Administrator to less than 30 days. This action was rejected because NMFS found it would create an additional burden to these entities without substantially strengthening NMFS' ability to track and verify the dolphin-safe status of tuna.

#### *Paperwork Reduction Act*

This final rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) that were discussed in the proposed rule. In Section 216.93(f) of this final rule, wholesalers/distributors are included in the list of entities required to produce records relative to tracking and verification of tuna to the Administrator, Southwest Region. This collection-of-information requirement was approved by the Office of Management and Budget (OMB) on February 6, 2003, under control number 0648-0387. The public reporting burden for this collection is estimated to average 30 minutes for a wholesaler/distributor to produce records.

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

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

data needed, and completing and reviewing the collection of information.

Send written comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden to NMFS (see ADDRESSES) and David Rostker, OMB, by e-mail at David\_Rostker@omb.eop.gov or by fax to 202-395-7285.

Endangered Species Act

NMFS prepared a Biological Opinion for the interim final rule to implement the IDCPA in December 1999, concluding that fishing activities conducted under the interim final rule are not likely to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS or result in the destruction or adverse modification of critical habitat. NMFS is unaware of any new information that would indicate this action may affect listed species in a manner or to an extent not previously considered, nor do the final regulations modify the fishery in a manner that causes an effect to listed species not previously considered in the Biological Opinion. Therefore, NMFS has determined that the conclusions and incidental take statement of the Biological Opinion remain valid and reinstitution of consultation is not required. NMFS continues to monitor annual sea turtle takes and mortalities in the U.S. tuna purse seine fishery operating in the ETP to ensure that levels are within those analyzed in the Biological Opinion and authorized in the amended Incidental Take Statement.

National Environmental Policy Act

NMFS prepared a draft Environmental Assessment (EA) for the proposed rule. NMFS did not receive any comments on the draft EA. As a result, NMFS prepared an EA for these final regulations and the Assistant Administrator for Fisheries concluded that there will be no significant impact on the human environment as a result of this final rule. A copy of the EA is available from NMFS (see ADDRESSES) or at: http://swr.nmfs.noaa.gov.

List of Subjects

50 CFR Part 216

Fish, Marine mammals, Reporting and recordkeeping requirements.

50 CFR Part 300

International fisheries regulations; Pacific tuna fisheries.

Dated: April 5, 2005.

Rebecca Lent,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 216 and 300 are amended as follows:

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

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

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

2. In § 216.3 the definition for “Fisheries Certificate of Origin” is revised and a definition for “South Pacific Tuna Treaty” is added to read as follows:

§ 216.3 Definitions.

\* \* \* \* \*

Fisheries Certificate of Origin, or FCO, means NOAA Form 370, as described in § 216.24(f)(4).

\* \* \* \* \*

South Pacific Tuna Treaty means the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America (50 CFR part 300, subpart D).

\* \* \* \* \*

3. A new § 216.17 is added to subpart B to read as follows:

§ 216.17 General prohibitions.

It is unlawful for any person to:

(a) Assault, resist, oppose, impede, intimidate, threaten, or interfere with any authorized officer in the conduct of any search, inspection, investigation or seizure in connection with enforcement of the MMPA, DPCIA, or IDCPA.

(b) Interfere with, delay, or prevent by any means the apprehension of another person, knowing that such person has committed any act prohibited by the MMPA.

(c) Resist a lawful arrest for any act prohibited under the MMPA.

(d) Make any false statement, oral or written, to an authorized officer concerning any act under the jurisdiction of the MMPA, DPCIA, IDCPA, or attempt to do any of the above.

(e) Interfere with, obstruct, delay, or prevent by any means an investigation, search, seizure, or disposition of seized property in connection with enforcement of the MMPA, DPCIA, or IDCPA.

4. In § 216.24 paragraphs (b)(4) introductory text, (b)(6)(i), (b)(6)(iii), the

introductory text to (f)(3), (f)(3)(ii) and (iii), (f)(4)(xi), (f)(4)(xiv) and (f)(12) are revised and a new (f)(3)(iv) is added to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(4) Application for vessel permit. The owner or managing owner of a purse seine vessel may apply for a permit from the Administrator, Southwest Region, allowing at least 15 days for processing. All vessel permit applications must be faxed to (562) 980-4027. An owner or managing owner requesting to have a vessel in excess of 400 st (362.8 mt) carrying capacity for which a DML was requested categorized as active on the Vessel Register under § 300.22(b)(4)(i) of this title must submit to the Administrator, Southwest Region, the vessel permit application, payment of the observer placement fee under paragraph (b)(6)(iii) of this section and payment of the vessel permit application processing fee no later than September 15 of the year prior to the year for which the DML was requested. The owner or managing owner of a vessel in excess of 400 st (362.8 mt) carrying capacity not requesting a DML must submit the vessel permit application, payment of the observer placement fee, and payment of the vessel permit application processing fee no later than November 30 of the year prior to the year for which the vessel permit was requested. An application must contain:

\* \* \* \* \*

(6) \* \* \*

(i) Vessel permit application fees. Payment of the permit application fee is required before NMFS will issue a permit. The Assistant Administrator may change the amount of this fee at any time if a different fee is determined in accordance with the NOAA Finance Handbook. The amount of the fee will be printed on the vessel permit application form provided by the Administrator, Southwest Region.

\* \* \* \* \*

(iii) Observer placement fee. The observer placement fee supports the placement of observers on individual vessels, and maintenance of the observer program, as established by the IATTC or other approved observer program.

(A) The owner or managing owner of a vessel for which a DML has been requested must submit the observer placement fee, as established by the IATTC or other approved observer

program, to the Administrator, Southwest Region, no later than September 15 of the year prior to the calendar year for which the DML was requested. Payment of the observer placement fee must be consistent with the fee for active status on the Vessel Register under § 300.22(b)(4) of this title.

(B) The owner or managing owner of a vessel for which a DML has not been requested, but that is listed on the Vessel Register, as defined in § 300.21 of this title, must submit payment of the observer placement fee, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region, no later than November 30 of the year prior to the calendar year in which the vessel will be listed on the Vessel Register. Payment of the observer placement fee must be consistent with the vessel's status, either active or inactive, on the Vessel Register in § 300.22(b)(4) of this title.

(C) The owner or managing owner of a purse seine vessel that is licensed under the South Pacific Tuna Treaty must submit the observer placement fee, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region, prior to obtaining an observer and entering the ETP to fish. Consistent with § 300.22(b)(1)(i) of this title, this class of purse seine vessels is not required to be listed on the Vessel Register under § 300.22(b)(4) of this title in order to purse seine for tuna in the ETP during a single fishing trip per calendar year of 90 days or less. Payment of the observer placement fee must be consistent with the fee for active status on the Vessel Register under § 300.22(b)(4) of this title.

(D) The owner or managing owner of a purse seine vessel listed as inactive on the Vessel Register at the beginning of the calendar year and who requests to replace a vessel removed from active status on the Vessel Register under § 300.22(b)(4) of this title during the year, must pay the observer placement fee associated with active status less the observer placement fee associated with inactive status that was already paid before NMFS will request the IATTC Secretariat change the status of the vessel from inactive to active.

(E) The owner or managing owner of a purse seine vessel not listed on the Vessel Register at the beginning of the calendar year and who requests to replace a vessel removed from active status on the Vessel Register under § 300.22(b)(4) of this title during the year, must pay the observer placement fee associated with active status before

NMFS will request the IATTC Secretariat change the status of the vessel to active.

(F) Payments received after the dates specified in paragraphs (b) (6) (iii)(A) or (B) of this section will be subject to a 10 percent surcharge. The Administrator, Southwest Region, will forward all observer placement fees described in this section to the IATTC or to the applicable organization approved by the Administrator, Southwest Region.

\* \* \* \* \*

(f) \* \* \*

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

(ii) FCOs and associated certifications, if any, that accompany imported shipments of tuna must be submitted by the importer of record to the Tuna Tracking and Verification Program, Southwest Region, within 30 days of the shipment's entry into the commerce of the United States. FCOs submitted via mail should be sent to Tuna Tracking and Verification Program, Southwest Region, P.O. Box 32469, Long Beach, CA 90832-2469. Copies of the documents may be submitted electronically using a secure file transfer protocol (FTP) site. Importers of record interested in submitting FCOs and associated certifications via FTP may contact a representative of the Tuna Tracking and Verification Program at the following email address:

*SWRTuna.Track@noaa.gov*. The Tuna Tracking and Verification Program will facilitate secure transfer and protection of certifications by assigning a separate electronic folder for each importer. Access to the electronic folder will require a user identification and password. The Tuna Tracking and Verification Program will assign each importer a unique user identification and password. Safeguarding the confidentiality of the user identification and password is the responsibility of the importer to whom they are assigned. Copies of the documents may also be submitted via mail either on compact disc or as hard copies. All electronic submissions, whether via FTP or on compact disc, must be in either Adobe Portable Document Format (PDF) or as an image file embedded in a Microsoft Word, Microsoft PowerPoint, or Corel WordPerfect file.

(iii) FCOs that accompany imported shipments of tuna destined for further processing in the United States must be

endorsed at each change in ownership and submitted to the Administrator, Southwest Region, by the last endorser when all required endorsements are completed.

(iv) Importers and exporters are required to retain their records, including FCOs, import or export documents, invoices, and bills of lading for 2 years, and such records must be made available within 30 days of a request by the Secretary or the Administrator, Southwest Region.

(4) \* \* \*

(xi) The name of the harvesting vessel;

\* \* \* \* \*

(xiv) Each additional importer, exporter, or processor who takes custody of the shipment must sign and date the form to certify that the form and attached documentation accurately describes the shipment of fish that they accompany.

\* \* \* \* \*

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

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

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

(ii) It is unlawful for any exporter, transshipper, importer, processor, or wholesaler/distributor to possess, sell, purchase, offer for sale, transport, or ship in the United States, any tuna or tuna products bearing a label or mark that refers to dolphins, porpoises, or marine mammals unless the label or mark complies with the requirements of 16 U.S.C. 1385(d).

\* \* \* \* \*

■ 5. In § 216.93, paragraphs (c)(5)(v), (e) and (f) are revised to read as follows:

**§ 216.93 Tracking and verification program.**

\* \* \* \* \*

(c) \* \* \*

(5) \* \* \*

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

\* \* \* \* \*

(e) *Tracking imports.* All tuna products, except fresh tuna, that are imported into the United States must be

accompanied by a properly certified FCO as required by § 216.24(f)(2). For tuna tracking purposes, copies of FCOs and associated certifications must be submitted by the importer of record to the Administrator, Southwest Region, within 30 days of the shipment's entry into the commerce of the United States as required by § 216.24(f)(3)(ii).

(f) *Verification requirements*—(1) *Record maintenance.* Any exporter, transshipper, importer, processor, or wholesaler/distributor of any tuna or tuna products must maintain records related to that tuna for at least 2 years. These records include, but are not limited to: FCOs and required certifications, any reports required in paragraphs (a), (b) and (d) of this section, invoices, other import documents, and trip reports.

(2) *Record submission.* Within 30 days of receiving a shipment of tuna or tuna products, any exporter, transshipper, importer, processor, wholesaler/distributor of tuna or tuna products must submit to the Administrator, Southwest Region, all corresponding FCOs and required certifications for those tuna or tuna products.

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

\* \* \* \* \*

**PART 300—INTERNATIONAL FISHERIES REGULATIONS**

■ 1. The authority citation for part 300 continues to read as follows:

**Authority:** 16 U.S.C. 951–961 and 971 *et seq.*, unless otherwise noted.

■ 2. In § 300.21 definitions for “South Pacific Tuna Treaty” and “Vessel Register” are added to read as follows:

**§ 300.21 Definitions.**

\* \* \* \* \*

*South Pacific Tuna Treaty* means the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America (50 CFR part 300, subpart D).

\* \* \* \* \*

*Vessel Register* means the regional register of vessels authorized to purse seine for tuna in the Convention Area, as established by the Inter-American

Tropical Tuna Commission on June 28, 2002.

■ 3. In § 300.22 the section heading and paragraph (b) is revised to read as follows:

**§ 300.22 Yellowfin tuna—recordkeeping and written reports.**

\* \* \* \* \*

(b) *Vessel register.* Except as provided under paragraph (b)(1) of this section, vessels must be listed on the Vessel Register and categorized as active under paragraph (b)(4)(i) of this section in order to purse seine for tuna in the Convention Area.

(1) *Exceptions.* The following classes of vessels are exempted from being listed on the Vessel Register to purse seine for tuna in the Convention Area:

(i) Vessels licensed under the South Pacific Tuna Treaty that exercise an option to fish in the Convention Area for a single trip each year, provided that the total number of optional trips does not exceed 32 in a given calendar year. Each optional trip in the Convention Area may not exceed 90 days in duration.

(ii) Vessels of 400 st (362.8 mt) or less carrying capacity for which landings of tuna caught in the Convention Area comprise 50 percent or less of the vessel's total landings, by weight, for a given calendar year.

(2) *Requirements for inclusion on the vessel register.* The Vessel Register shall include, consistent with resolutions of the IATTC, only vessels that fished in the Convention Area prior to the creation of the Vessel Register on June 28, 2002. New vessels may be added to the Vessel Register at any time to replace those previously removed by the Regional Administrator, provided that the total capacity of the replacement vessel or vessels does not exceed that of the vessel or vessels being replaced.

(3) *Vessel information.* The owner of any fishing vessel that uses purse seine, longline, drift gillnet, harpoon, or troll fishing gear to harvest tuna in the Convention Area for sale or a person authorized in writing to serve as agent for the owner must provide such information about the vessel and its characteristics as requested by the Regional Administrator, to conform to IATTC actions relative to the Vessel Register. This information initially includes, but is not limited to, vessel name and registration number; a photograph of the vessel with the registration number showing and legible; vessel length, beam and moulded depth; gross tonnage and hold capacity in cubic meters and tonnage; engine horsepower; date and place

where built; and type of fishing method or methods used.

(4) *Vessel register status.* For a vessel to be categorized as either “active” or “inactive” on the Vessel Register in the following calendar year, the vessel owner or managing owner must submit to the Regional Administrator under § 216.24(b) of this title, the observer placement fee, vessel permit application, and permit application processing fee for the vessel.

(i) *Active status.* As early as August 1 of each year, vessel owners or managing owners may submit to the Regional Administrator, a vessel permit application and payment of the permit application fee and observer placement fee for each vessel in excess of 400 st (362.8 mt) carrying capacity qualified to be listed on the Vessel Register under paragraph (b)(2) of this section to have a vessel categorized as active for the following calendar year. Vessel permit applications may not be submitted via regular mail; they must be faxed to (562) 980–4027. Owners or managing owners of vessels of 400 st (362.8 mt) carrying capacity or less must only submit payment of the observer placement fee associated with active status in order to request a small purse seine vessel be categorized as active for the following calendar year. The Regional Administrator must receive the faxed vessel permit application and payment of the observer placement fee and permit application processing fee no later than September 15 for vessels for which a DML was requested for the following year and no later than November 30 for vessels for which a DML was not requested for the following year. Submission of the vessel permit application and payment of the observer placement fee and permit application processing fee will be interpreted by the Regional Administrator as a request for a vessel to be categorized as active. The following restrictions apply to active status:

(A) The cumulative carrying capacity of all vessels categorized as active on the Vessel Register may not exceed 8,969 mt in a given year;

(B) A vessel may not be added to active status on the Vessel Register unless the captain of the vessel has obtained a valid operator permit under § 216.24(b)(2) of this title;

(C) For 2005 only, requests for vessels will be prioritized on a first-come, first-served basis according to the date and time the fax is received in the office of the Regional Administrator;

(D) Requests for active status for 2006 and subsequent years will be prioritized according to the following hierarchy:

(1) Requests received for vessels that were categorized as active in the previous year, beginning with the vessel's status in 2005, unless the request for active status was determined to be frivolous by the Regional Administrator under paragraph (b)(4)(ii) of this section;

(2) Requests received for vessels that were categorized as inactive under paragraph (b)(4)(iii) of this section in the previous year, beginning with the vessel's status in 2005;

(3) Requests for vessels not described in paragraphs (b)(4)(D)(1) or (2) of this section will be prioritized on a first-come, first-served basis according to the date and time stamp printed by the incoming fax machine upon receipt, provided that the associated observer placement fee is paid by the applicable deadline described in § 216.24(b)(6)(iii) of this title; and

(4) Requests received from owners or managing owners of vessels that were determined, by the Regional Administrator, to have made a frivolous request for active status under paragraph (b)(4)(ii) of this section.

(ii) *Frivolous requests for active status.* Beginning with requests made for 2005, a request for active status under paragraph (b)(4)(i) of this section will be considered frivolous, unless as a result of force majeure or other extraordinary circumstances as determined by the Regional Administrator if, for a vessel categorized as active in a given calendar year, less than 20 percent of the vessel's total landings, by weight, in that same year is comprised of tuna harvested by purse seine in the Convention Area.

(iii) *Inactive status.* From August 1 through November 30 of each year, vessel owners or managing owners may request that vessels qualified to be listed on the Vessel Register under paragraph (b)(2) of this section be categorized as inactive for the following calendar year by submitting to the Regional Administrator payment of the associated observer placement fees. At any time during the year, a vessel owner or managing owner may request that a vessel qualified to be listed on the Vessel Register under paragraph (b)(2) of this section be categorized as inactive for the remainder of the calendar year by submitting to the Regional

Administrator payment of the associated observer placement fee plus a 10 percent surcharge of the fee. Payment of the observer placement fee consistent with inactive status will be interpreted by the Regional Administrator as a request for the vessel to be categorized as inactive.

(5) *Removal from the vessel register.* A vessel may be removed from the Vessel Register by the Regional Administrator:

(i) If the vessel has sunk;

(ii) Upon written request by the vessel's owner or managing owner;

(iii) Following a final agency action on a permit sanction for a violation;

(iv) For failure to pay a penalty or for default on a penalty payment agreement resulting from a final agency action for a violation; or

(v) If the U.S. Maritime Administration or the U.S. Coast Guard notifies NMFS that:

(A) The owner has submitted an application for transfer of the vessel to foreign registry and flag; or

(B) The documentation for the vessel will be or has been deleted for any reason.

(6) *Process for Removal from the Vessel Register.* When a vessel is removed from the Vessel Register under paragraph (b)(5) of this section, the Regional Administrator shall promptly notify the vessel owner in writing of the removal and the reasons therefor. For a removal from the Vessel Register under § 300.22(b)(5)(iii), the Regional Administrator will not accept a request to reinstate the vessel to the Vessel Register for the term of the permit sanction. For a removal from the Vessel Register under § 300.22(b)(5)(iv), the Regional Administrator will not accept a request to reinstate the vessel to the Vessel Register until such time as payment is made on the penalty or penalty agreement, or such other duration as NOAA and the vessel owner may agree upon.

(7) *Procedures for replacing vessels removed from the Vessel Register.* (i) A vessel previously listed on the Vessel Register, but not included for a given year or years, may be added back to the Vessel Register and categorized as inactive at any time during the year, provided the owner of the vessel pays the observer placement fee associated

with inactive status plus a 10 percent surcharge of the fee.

(ii) A vessel may be added to the Vessel Register and categorized as active in order to replace a vessel removed from active status under paragraph (b)(5) of this section, provided the total carrying capacity of active vessels does not exceed 8,969 mt and the owner submits a complete request under paragraph (b)(7)(iv) or (v) of this section.

(iii) After a vessel categorized as active is removed from the Vessel Register, the Regional Administrator will notify owners or managing owners of vessels categorized as inactive that replacement capacity is available on the active list of the Vessel Register. In the event that owners of inactive vessels do not request to replace a removed vessel, the Regional Administrator will notify owners of vessels eligible for, but not included on, the Vessel Register that replacement capacity is available on the active list of the Vessel Register.

(iv) The owner or managing owner of a purse seine vessel of 400 st (362.8 mt) carrying capacity or less may request a vessel be categorized as active to replace a vessel removed from the Vessel Register by submitting payment of the observer placement fee to the Regional Administrator.

(v) The owner or managing owner of a purse seine vessel in excess of 400 st (362.8 mt) carrying capacity may request a vessel be categorized as active to replace a vessel removed from the Vessel Register by submitting to the Regional Administrator under § 216.24(b) of this title, the observer placement fee, vessel permit application, and permit application processing fee for the replacement vessel. The replacement vessel will be eligible to be categorized as active on the Vessel Register if it has a carrying capacity equal to or less than the vessel being replaced, and the captain of the replacement vessel possesses an operator permit under § 216.24(b) of this title.

(vi) The Regional Administrator will forward requests to replace vessels removed from the Vessel Register within 15 days of receiving each request.

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