

[3510-12]

Title 50—Wildlife and Fisheries

CHAPTER II—NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

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

Taking of Marine Mammals Incidental to Commercial Fishing Operations—Permits, Etc.

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Final decision.

SUMMARY: This final decision establishes regulations to govern the taking of marine mammals incidental to tuna purse seine fishing in the eastern tropical Pacific Ocean (ETP) during 1978, 1979, and 1980. The regulations include declining individual species and stock porpoise quotas totaling 51,945, 41,610, 31,150, respectively, for each of the three years. The regulations also require the utilization of specific equipment and procedures which the NOAA believes will adequately reduce the incidental mortality and serious injury of porpoises.

DATES: Applications for certificates of inclusion will be considered commencing with December 23, 1977. However, a general permit will not be issued until December 25, 1977. A Final Impact Statement (FEIS) was filed with the Council on Environmental Quality on November 25, 1977, and a notice of availability was published in the FEDERAL REGISTER on December 2, 1977, at 42 FR 61298.

ADDRESSES: Assistant Administrator for Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

FOR FURTHER INFORMATION CONTACT:

Richard B. Roe, Acting Chief, Marine Mammal and Endangered Species Division, National Marine Fisheries Service, 3300 Whitehaven Street NW., Washington, D.C. 20235, telephone: 202-634-7287.

SUPPLEMENTARY INFORMATION: On July 20, 1977, the National Marine Fisheries Service (NMFS) proposed regulations to govern the taking of marine mammals incidental to purse-seine fishing in 1978, 1979, and 1980, and gave notice of a hearing therein, 42 FR 37217-37221. The hearing was presided over by an Administrative Law Judge (ALJ), the Honorable Frank W. Vanderheyden.

The Director, NMFS, published notice in the FEDERAL REGISTER (42 FR 58419) that on November 4, 1977, a recommended decision had been received from Judge Vanderheyden.

A notice was published in the FEDERAL REGISTER (42 FR 58419) that on November 6, 1977, the National Oceanic and Atmospheric Administration implemented a reorganization. In accordance with the delegation of authority under the new organization, the final decision in

this matter is hereby published by the Administrator, National Oceanic and Atmospheric Administration.

In accordance with procedural regulations published on July 13, 1977 (42 FR 35967), the final decision and regulations governing the taking of marine mammals incidental to commercial fishing operations are hereby published.

Dated: December 16, 1977.

RICHARD A. FRANK,
Administrator.

THE PROMULGATION OF REGULATIONS AUTHORIZING THE ISSUANCE OF PERMITS TO ALLOW THE TAKING OF MARINE MAMMALS INCIDENTAL TO COMMERCIAL FISHING OPERATIONS—DOCKET MMFA No. 1-1977

BACKGROUND

On July 20, 1977, proposed regulations were published (42 FR 37217-37221) that included statements required by Section 103 of the Marine Mammal Protection Act (Act). The proposed regulations would amend regulations promulgated on March 1, 1977 (42 FR 12010-12014).

A Draft Environmental Impact Statement (DEIS), filed on August 12, 1977, was made available to Federal agencies and the general public for comment on August 19, 1977. Comments on the DEIS were received from Charles A. Repenning and the Office of the Secretary, Department of the Interior, Pacific Northwest Region.

In accordance with the Act, and procedural regulations published on July 13, 1977 (42 FR 35967), the proposed regulations were the subject of the hearing on the record, presided over by Administrative Law Judge (ALJ) Frank W. Vanderheyden. The hearing was conducted in San Diego, Calif. August 22-27, 29, and 30, 1977, and in Washington, D.C., September 6-8, 1977. Oral closing arguments were heard in Washington, D.C., on October 5, 1977.

The following parties participated at the hearing: National Marine Fisheries Service; Marine Mammal Commission; Environmental Defense Fund; American Littoral Society; Animal Welfare Institute; Defenders of Wildlife; Environmental Policy Center; Fund for Animals; Friends of the Earth; Let Live; National Audubon Society; National Parks and Conservation Association; Sierra Club; Tuna Research Foundation; Fish Conference of the Seafarer's International Union of North America; AFL-CIO; American Tunaboat Association; United States Tuna Foundation; Committee for Humane Legislation, Inc.; Friends of Animals, Inc.; Humane Society of the United States; Commonwealth of Puerto Rico; County of San Diego; Industrial Paper Distributors, Inc.; Zapata Ocean Resources-Zapata Seafoods.

The hearing focused on the following issues:

1. Estimated existing levels of the species and population stocks of the marine mammals involved in purse seining for yellow fin tuna;

2. The expected impact of the proposed regulations on the optimum sustainable populations of the species or population stocks involved;

3. The economic feasibility of implementing the proposed regulations;

4. The technological feasibility of implementing the proposed regulations; and

5. The impact of implementing the proposed regulations on the tuna stocks.

CONSULTATION

The Act requires that I consult with the Marine Mammal Commission (MMC) in promulgating regulations. The MMC was consulted prior to publication of the proposal and was a party to the proceedings. The MMC filed briefs with the ALJ and has filed replies to exceptions to the ALJ decision with me.

Additionally, I have consulted with the Secretary of Commerce on this decision.

ALJ'S RECOMMENDED DECISION

The ALJ's Recommended Decision, delivered on November 4, 1977, concluded that "based upon the substantial, reliable and probative evidence in the record as a whole, it is the Recommended Decision in this matter that the proposed amendments to regulations of the National Marine Fisheries Service for the taking of marine mammals incidental to commercial fishing operations for the years 1978, 1979, and 1980 be adopted as the final regulations, as amended by any findings of the fact, conclusions of the law, and recommendations herein."

On November 9, 1977, public notice of receipt of the ALJ's recommended decision was published in the FEDERAL REGISTER (42 FR 58419). Exceptions and replies to exceptions to the ALJ's recommended decision were received by me from the parties involved until November 18, 1977.

I hereby adopt and incorporate by reference the ALJ's recommended decision except as it is inconsistent with that which is hereinafter set forth.

DETERMINATIONS

In each instance where a specific determination is made, the decision of the ALJ is referenced. In those instances in which I support the recommended decision of the ALJ and the justification supporting the decision is persuasive and convincing, I have adopted the decision and rationale without further elaboration. Where I differ, or concur but wish to modify or add to the ALJ's recommended decision, I have made appropriate comments.

Section 103(a) of the Act requires that my decision be supported by the evidence on the record. That evidence is to be the best scientific evidence available. After having reviewed the record, it is my conclusion that my decision is well substantiated by the record and is based on the best scientific evidence available at this time. I have determined that the proposal, procedures, and the decision satisfy the requirements of Section 103 of the Act that reasonable estimates of the existing population level of each spe-

cies affected, the optimum sustainable population of each species, and the expected impact of the regulations on an optimum sustainable population for each species be made available to the public. I must be assured that the allowed taking will not be to the disadvantage of the marine mammals involved and is otherwise consistent with the purposes and policies of the Act, and I have so concluded.

POPULATION LEVELS

As required by Section 103(d) (1) of the Act, the estimated levels of species and stock populations were published in the FEDERAL REGISTER on July 20, 1977 (42 FR 37218).

The only significant challenge to the estimated levels was from the tuna industry. They contend that the populations have been underestimated. The ALJ concluded and I agree that the challenge to the published estimates was unpersuasive and not adequately substantiated in the record.

I have therefore concluded that the requirements of Section 103(d) (1) of the Act have been met and the population estimates, which are based on the best scientific evidence available for the relevant species, are as follows:

Species/stock— management units	Estimated population level at beginning of 1978
1. Spotted dolphin (coastal)-----	(1)
2. Spotted dolphin (off-shore) ² ---	3,730,000
3. Spinner dolphin (Costa Rican)-----	(1)
4. Spinner dolphin (eastern)-----	1,327,000
5. Spinner dolphin (white-belly) ³ -----	690,000
6. Common dolphin (northern)---	400,000
7. Common dolphin (central)---	230,000
8. Common dolphin (southern) ⁴ -----	800,000
9. Striped dolphin (northern)---	18,000
10. Striped dolphin (north-equatorial) ⁵ -----	230,000
11. Bottlenosed dolphin-----	590,000
12. Rough-toothed dolphin ⁶ -----	450
13. Frazer's dolphin-----	7,800
14. Risso's dolphin-----	7,500
15. Pacific white-sided dolphin ⁷ -----	24,300
16. Short-finned pilot whale-----	60,000
17. Melon-headed whale-----	(1)
18. Pygmy killer whale-----	(1)

¹ Unknown.

² Including the tentatively identified southwestern stock.

³ Including the tentatively identified southwestern stock.

⁴ Including the tentatively identified equatorial-oceanic stock.

⁵ Including the tentatively identified south-equatorial stock.

⁶ Minimum estimate due to identification problems in differentiating between schools of rough-toothed and bottlenosed dolphins.

⁷ Population off northern Mexico only.

OPTIMUM SUSTAINABLE POPULATION

The expected impact of the regulations on the optimum sustainable popu-

lations (OSP) of the species and stocks involved was one of the more important issues of the proposed regulations addressed on the record.

As part of the proposal, the definition of optimum sustainable population as published at 41 FR 55536, December 21, 1976, was cited as a basis of the proposal regulations. That definition was not challenged in the hearing. Therefore, I have concluded that the definition should not be modified at this time and it is repeated herein to facilitate understanding my decision.

Optimum sustainable population is a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity. Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and growth less losses due to natural mortality.

I also reaffirm the determination made in connection with hearings conducted in 1976 and published at 42 FR 12016, March 1, 1977, that based on the evidence to date the range of 50-70 percent of the initial stock size best describes the lower bound of OSP.

DEPLETION

Section 101(a) (3) (B) of the Act requires that, except for purposes of scientific research, no permit may be issued during the moratorium for the taking of any stock or species of marine mammals designated as depleted. A determination of depletion must in significant part be based on the habitat's optimum carrying capacity and the species' optimum sustainable population as set forth in the Act.

Optimum carrying capacity is a characteristic of the habitat. This term, however, is defined in the Act as the "ability of a given habitat to support the optimum sustainable population of a species or population stock in a healthy state without diminishing the ability of the habitat to continue that function." Optimum sustainable population is defined in terms of the number of animals that may exist in a particular habitat. Therefore, I have concluded as a matter of law that a special or stock is below the habitat's optimum carrying capacity when the number of individuals is below the optimum sustainable population, and consequently is depleted.

The eastern spinner dolphin has been considered depleted for the purposes of the proposed regulations. Although the hearing covered this question extensively, the subject of eastern spinner depletion was addressed principally in terms of the relation of its present population to OSP. Thus, the selection of a particular percentage as the lower bound of OSP was

the key factor used by parties in arguing for or against deletion.

Two standards were used to determine depletion. The first of these standards is a comparison of the estimate of the percentage of initial unexploited population with the midpoint (60 percent) of the range (50-70 percent) of the lower bound of OSP. Estimates of the eastern spinner percentage of its initial unexploited population at the beginning of 1978, 1979, and 1980, are, respectively, 55, 57, and 58 percent. By this standard, the eastern spinner is depleted.

The second standard used is the probability of the population being depleted, given the range of initial population sizes, and the range for the lower bound of OSP. The probability that the eastern spinner exceeds the 50-70 percent range of its initial population is, respectively, 51, 56, and 59 percent for the years 1978, 1979, and 1980. By this standard, the eastern spinner is not depleted. However, it is my conclusion that both standards must be met to consider the stock not depleted.

The Marine Mammal Commission has also recommended that the eastern spinner be considered depleted.

The industry contended that even though the eastern spinner may be legally depleted, it is not biologically depleted. The ALJ found no valid distinction between legal and biological depletion. I cannot accept the industry's contention as an appropriate measure for determining depletion under the provisions of the Act.

The ALJ concluded, and I adopt his recommended decision that the clear-weight of the evidence supports a finding that the eastern spinner is not at or above the lower bound of OSP. Therefore, it is found and concluded that the eastern spinner is depleted.

However, in light of the ability of the eastern spinner stock to withstand some mortality without being disadvantaged, an accidental mortality is acknowledged in accordance with the specific provisions of the regulations. It is my conclusion that the stock will not be disadvantaged by adoption of these accidental take regulations.

LIMITATIONS ON MORTALITY

The major proposal at issue in the hearing, as reflected in the record, was the number of marine animals which could be incidentally killed in the course of commercial fishing if a permit was issued, and the resultant impact on optimum sustainable populations.

It was contended by the Committee for Humane Legislation, Friends of Animals, and Humane Society of the United States that the quotas were too high and should be rejected as being contrary to the pro-

RULES AND REGULATIONS

visions of the Act. The Committee for Humane Legislation and Friends of Animals proposed that quotas for each year be established based on the prior year's mortality or the proposed quota level, whichever was lower. This approach, although certain to reduce progressively the annual quotas, fails to address adequately the technological and economic feasibility of such quotas.

The industry advocated that annual quotas of 78,011 should be adopted because this level of take represents less than one percent of the estimated total population of 8,000,000 porpoises in the eastern tropical Pacific Ocean. They further contended that an annual quota of 78,011 would not disadvantage the stocks because the fleet would strive to stay well below that quota level.

Quotas are not a new issue. I am fully cognizant of the debate and legal challenges that over the past several years have continually shaped and defined the goal of the Act. The goal of the Act as it has been interpreted, and as I understand it, is to reduce the incidental mortality and serious injury to insignificant levels approaching a zero rate. Therefore, to prescribe level annual quotas would not conform to the goal of the Act if lower annual quotas are economically and technologically achievable.

As an alternative to the proposed quota system, the industry has suggested that a flexible rather than a rigid species composition of the declining aggregate quotas be instituted. This alternative was first introduced in testimony given at the hearing as a method which would minimize bias, increase precision, and facilitate NMFS monitoring of the allowed take. Such a system would ostensibly allow fishermen to fish on species as they encountered them, subject to the decreasing aggregate quota but further constrained by individual species and stocks quotas based on 1977 criteria.

The ALJ did not recommend that this alternative be adopted. A review of the record discloses little discussion on this particular point. This alternative remains untested, therefore it is difficult to determine its possible ramifications, and to incorporate it as part of the final regulations would be unjustified at this time without further review and analysis. Consequently, I am not accepting or rejecting this alternative at this time, but will reserve consideration of it until further comment and information can be obtained.

The MMC has stated that the proposed take would not disadvantage the populations.

It is my conclusion that the mortality limits proposed meet the goal of the Act to reduce mortality to the lowest possible levels, and will not disadvantage the populations involved. Therefore I have adopted the ALJ's recommendation that mortality limits be established as follows for the years 1978-80.

SPECIES/STOCK-MANAGEMENT UNITS	TAKE	ENCIRCLEMENT	MORTALITY
Quota For Calendar Year 1978			
1. Spotted dolphin (coastal)	0	0	0
2. Spotted dolphin (off-shore) ^{1/}	14,006,000	5,400,000	35,500
3. Spinner dolphin (Costa Rican)	0	0	0
4. Spinner dolphin (eastern)	0	0	0
5. Spinner dolphin (whitebelly) ^{2/}	4,365,000	1,400,000	13,500
6. Common dolphin (northern)	192,000	32,000	120
7. Common dolphin (central)	900,000	600,000	500
8. Common dolphin (southern) ^{3/}	2,688,000	450,000	1,700
9. Striped dolphin (northern)	48,000	3,200	50
10. Striped dolphin (north-equatorial) ^{4/}	480,000	32,000	470
11. Bottlenosed dolphin	72,000	4,800	70
12. Rough-toothed dolphin	6,000	400	5
13. Fraser's dolphin	6,000	400	5
14. Risso's dolphin	6,000	400	5
15. Pacific white-sided dolphin	3,000	200	15
16. Short-finned pilot whale	6,000	400	5
17. Melon-headed whale	0	0	0
18. Pygmy killer whale	0	0	0
Total			51,945
Quota For Calendar Year 1979			
1. Spotted dolphin (coastal)	0	0	0
2. Spotted dolphin (off-shore) ^{1/}	14,006,000	5,400,000	23,400
3. Spinner dolphin (Costa Rican)	0	0	0
4. Spinner dolphin (eastern)	0	0	0
5. Spinner dolphin (whitebelly) ^{2/}	4,365,000	1,400,000	10,800
6. Common dolphin (northern)	192,000	32,000	100
7. Common dolphin (central)	900,000	600,000	400
8. Common dolphin (southern) ^{3/}	2,688,000	450,000	1,500
9. Striped dolphin (northern)	48,000	3,200	40
10. Striped dolphin (north-equatorial) ^{4/}	480,000	32,000	380
11. Bottlenosed dolphin	72,000	4,800	60
12. Rough-toothed dolphin	6,000	400	5
13. Fraser's dolphin	6,000	400	5
14. Risso's dolphin	6,000	400	5
15. Pacific white-sided dolphin	3,000	200	10
16. Short-finned pilot whale	6,000	400	5
17. Melon-headed whale	0	0	0
18. Pygmy killer whale	0	0	0
Total			41,610
Quota For Calendar Year 1980			
1. Spotted dolphin (coastal)	0	0	0
2. Spotted dolphin (off-shore) ^{1/}	14,006,000	5,400,000	21,300
3. Spinner dolphin (Costa Rican)	0	0	0
4. Spinner dolphin (eastern)	0	0	0
5. Spinner dolphin (whitebelly) ^{2/}	4,365,000	1,400,000	8,100
6. Common dolphin (northern)	192,000	32,000	70
7. Common dolphin (central)	900,000	600,000	300
8. Common dolphin (southern) ^{3/}	2,688,000	450,000	1,000
9. Striped dolphin (northern)	48,000	3,200	30
10. Striped dolphin (north-equatorial) ^{4/}	480,000	32,000	280
11. Bottlenosed dolphin	72,000	4,800	40
12. Rough-toothed dolphin	6,000	400	5
13. Fraser's dolphin	6,000	400	5
14. Risso's dolphin	6,000	400	5
15. Pacific white-sided dolphin	3,000	200	10
16. Short-finned pilot whale	6,000	400	5
17. Melon-headed whale	0	0	0
18. Pygmy killer whale	0	0	0
Total			31,150

^{1/}Including the tentatively identified Southwestern stock.

^{2/}Including the tentatively identified Southwestern stock.

^{3/}Including the tentatively identified Equatorial-Oceanic stock.

^{4/}Including the tentatively identified South-Equatorial stock.

OBSERVERS

I have determined that the NMFS should continue to attempt to place observers on a minimum of 130 trips annually during 1978, 1979, and 1980. This is deemed necessary, among other things, to monitor accurately the technical feasibility of the regulations in the event that mid-course corrections are to be considered.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The ALJ's interpretation of the Act is that the economic and technological fea-

sibility of implementing regulations may be considered only after the interests of the marine mammals are served.

Many witnesses testified regarding the technological feasibility of implementing the proposed gear and technique modifications and adopting the quotas.

The industry contended that many adverse economic effects will result from the proposed regulations. However, economic data which is part of the record indicates that the imposition of the proposed quotas will not adversely affect the profitability of purse seiners to any great extent through 1980.

Porpoise mortality results to date in 1977, coupled with additional evidence in the record, have reaffirmed the technological feasibility of the proposal.

After reviewing the record, I am convinced that the interests of the marine mammals have been adequately considered, and that adoption of the quotas is economically and technologically feasible.

GEAR REQUIREMENTS

Except as noted below, I have adopted the ALJ's recommended decision and hereby promulgate regulations which will require: (1) the supervised installation of the "super-apron" system in 1978 which I believe to be the best available technology, followed by a supervised trial set; (2) the arrangement of bunchlines to establish towing points except sections of bunchlines which may obstruct the backdown area; (3) a minimum of two man speedboats to be in the water until backdown commences; and (4) exactly three bow bunches should be pulled (the language, however, has been modified to clarify the requirement and the intent of the regulation). The regulations will also allow vessel owners to petition for modification of gear requirements for purposes of experimenting with alternate equipment and techniques under specified conditions.

Many of the provisions of the proposed regulations regarding gear and techniques were carried over from the 1977 regulations without modification. They will be promulgated as proposed, without modification, except where clarifying language has been adopted.

MODIFICATION OF REGULATIONS AFTER ADOPTION

It was proposed that modifications during the term of a 3-year permit would be subject to hearings, however, the Acting Assistant Administrator for Fisheries would unilaterally determine whether modifications should be subject to a formal or informal hearing.

The ALJ recommended that regulations include an appeal process to the Secretary of Commerce if an interested party did not agree with the Assistant Administrator's decision not to hold formal hearings. The Assistant Administrator would be required to provide written notice of reasons for denial, after which parties could file an appeal with the Secretary for a final decision.

I have adopted the ALJ's recommendation, however, appeals will be filed with the Administrator, rather than the Secretary. Specific time periods have been adopted in order to allow expeditious consideration and disposition of appeals.

CERTIFICATES OF INCLUSION

It was proposed that vessel owners, rather than the operator, apply for and receive certificate of inclusion, however, the vessel would be operated only by fishermen who had met the training requirements.

The ALJ recommended a two certificate system; issuing one to the operator and one to the vessel owner.

I have adopted the ALJ's recommendation.

IDENTIFICATION OF PROHIBITED SPECIES

It was proposed to continue the policy adopted in 1977 which established the release of the net skiff as the point after which identification of a prohibited species would not require aborting the set. If a prohibited species was subsequently taken, such taking would not be cause for issuance of a notice of violation if all required procedures were followed.

The ALJ recommended that the policy be changed to allow greater reliability in identification of porpoise species or stocks about to be encircled. However, he did not make a specific recommendation as to how this could be effected.

I have not adopted the ALJ's recommendation. The release of the net skiff is an ir retrievable step. Once this step has been taken, the net must be fully deployed before retrieval of the net can begin. Once the net is in the water and partially encircles the school, there is danger of entanglement. I have concluded that porpoise are better protected by a full deployment, pursuing and retrieval of the net in compliance with the required porpoise protective measures than by an uncontrolled net in the water.

SKIPPER'S PANEL

Although it was not proposed to amend the 1977 permit requirement that the permit holder establish a skipper's panel, there was testimony at the hearing concerning the panel, and the ALJ recommended that a representative of the NMFS be included on the panel.

I have not adopted the ALJ's recommendation. NMFS has enforcement authority and exercises it independently of the skippers' panel. It is my conclusion that an NMFS representative on the skippers' panel would compromise its purpose. The panel should be a peer group that can correct a skipper's problem whether or not they are related to formal regulatory requirements. If the peer group feels that the individual skipper has serious problems, then they may recommend to the NMFS that his certificate be revoked. In that event, the NMFS would make an independent judgment based upon a recommendation of the skippers' panel and its own investigation in order to withstand any legal challenge by the certificate holder, if revocation or suspension occurred. Also, the ALJ appeared to have misunderstood the NMFS sponsorship of the present skippers training workshops. NMFS people participate directly in the skipper training sessions, data gathering and analysis, and have effective liaison with the Porpoise Rescue Foundation, Living Marine Resources, and individual skippers. Therefore, I do not believe that a NMFS representative on the skippers' panel will improve its function. With the advent of restricted quotas which affect the entire industry, increased observer coverage, and notices of violations, the concept of allowing industry an oppor-

tunity to correct its own members' problems without outside involvement is important to the ultimate solution of porpoise mortality.

HUMANENESS

I have adopted the ALJ's recommendation regarding the effect of pursuit and capture on porpoise populations, and the humaneness of the incidental take in tuna purse seine fishing.

I have concluded that the quotas are sufficiently low to account for any adverse effects of pursuit and encirclement, and will not disadvantage the populations.

I have also concluded, after reviewing the record and the ALJ's recommended decision, that the gear and techniques required represent the most practicable manner of taking which results in the least possible degree of pain and suffering to the animal involved.

IMPACT ON TUNA STOCKS

I have adopted the ALJ's recommendation that adoption of the quotas will have an insignificant impact on the tuna stocks in the eastern tropical Pacific Ocean.

[FR Doc.77-36381 Filed 12-22-77; 8:45 am]

[3510-12]

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

Taking and Related Acts Incidental to Commercial Fishing Operations

AGENCY: National Oceanic and Atmospheric Administration.

ACTION: Final rule.

SUMMARY: Final regulations are herein promulgated to implement the final decision as simultaneously published at page 64548. These regulations authorize the issuance of permits to allow the taking of marine mammals incidental to commercial fishing operations, including purse seine fishing within the eastern tropical Pacific Ocean, and further govern the importation of certain fish and fish products, including yellowfin tuna.

EFFECTIVE DATE: December 23, 1977.

ADDRESSES: Assistant Administrator for Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

FOR FURTHER INFORMATION CONTACT:

William P. Jensen, Marine Mammal Program Manager, Marine Mammal and Endangered Species Division, National Marine Fisheries Service, 3300 Whitehaven Street NW., Washington, D.C. 20235, telephone, 202-634-7461.

SUPPLEMENTARY INFORMATION: In order to further the immediate goal of the Marine Mammal Protection Act (the Act), that the incidental kill or serious injury rate of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate, proposed

amendments to 50 CFR 216.24 were published in the FEDERAL REGISTER on July 20, 1977 (42 FR 37217). Public hearings (Docket MMPAH No. 1-1977) were held, and a recommended decision was rendered by the Administrative Law Judge (ALJ), Frank W. Vanderheyden. This decision was certified by the ALJ to the Director for his final decision. The Administrator, however, reserved authority to adopt regulations under section 103 of the act, pursuant to which the final regulations herein are prescribed (see NOAA Directives Manual 05-60 (5), November 4, 1977).

Many portions of § 216.24 have not been amended. However, for ease of understanding, the entire section is re-published herein.

Dated: December 16, 1977.

RICHARD A. FRANK,
Administrator.

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

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

(b) *General Permits.*—(1) General permits to allow the taking of marine mammals, except those for which taking is prohibited under the Endangered Species Act of 1973, in connection with commercial fishing operations will be issued to persons using fishing gear in any one of the following categories:

(i) *Category 1: Towed Or Dragged Gear.* Commercial fishing operations utilizing towed or dragged gear such as bottom otter trawls, bottom pair trawls, multi-rig trawls, and dredging gear.

(ii) *Category 2: Encircling Gear, Purse Seining Involving the Intentional Taking of Marine Mammals.* Commercial fishing operations utilizing purse seines to capture tuna by intentionally encircling marine mammals. Only vessels that meet the fishing gear and equipment requirements contained in subpart 216.24 (d) (2) (iv) of these regulations may be included in this category.

(iii) *Category 3: Encircling Gear, Purse Seining not Involving the Intentional Taking of Marine Mammals.* Commercial fishing operations utilizing purse seining, which do not intentionally encircle marine mammals.

(iv) *Category 4: Stationary Gear.* Commercial fishing operations utilizing stationary gear such as traps, pots, weirs, and pound nets; and

(v) *Category 5: Other Gear.* Commercial fishing operations utilizing trolling, gill nets, hook and line gear, and any gear not classified under paragraph (b) (1) (i), (b) (1) (ii), (b) (1) (iii), or (b) (1) (iv) of this section.

(2) Permits shall be issued as general permits to a class of fishermen using one

of the general categories of gear set out above. Any member of such class may apply for a general permit on behalf of any members of the class. Subsequent to the granting of a general permit, vessel owners, managing owners, or operators (as required) may make application to be included under the terms of a general permit by obtaining a certificate of inclusion. Applications for a general permit shall contain:

(i) Name, address, and telephone number of the applicant. If the applicant is an organization or corporate entity, a copy of the corporate or organizational charter which sets forth the basis for application on behalf of a group or class of commercial fishermen must be included;

(ii) The category of permit for which application is being made;

(iii) A description of the fishing operations by which marine mammals are taken; and a statement explaining why the applicant cannot avoid taking marine mammals incidentally to commercial fishing operations;

(iv) The date when the general permit is requested to become effective;

(v) A list of the fish sought by persons requesting certificates under the general permit and the general areas of operation of their vessels.

(vi) A statement identifying the marine mammals and numbers of marine mammals which are expected to be taken under the general permit;

(vii) A statement by the applicant demonstrating that the requested taking of marine mammal species or stocks during commercial fishing operations is consistent with the purposes of the act and the applicable regulations established under section 103 of the act.

(viii) A description of the procedures and techniques that will be utilized in order that takings under the permit will be consistent with the purposes and policies of the Marine Mammal Protection Act of 1972, and these regulations; and

(ix) A certification, signed by the applicant, in the following language: I certify that the foregoing information is complete, true, and correct to the best of my knowledge and belief. I understand that this information is submitted for the purpose of obtaining a general permit under the Marine Mammal Protection Act of 1972 and regulations promulgated thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001, or the penalties provided under the Marine Mammal Protection Act of 1972.

(3) The original and four copies of the application for general permit shall be submitted to the Assistant Administrator for Fisheries (hereinafter, the Assistant Administrator), National Marine Fisheries Service, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street NW., Washington, D.C. 20235. Applications should be received not less than 180 days prior to the date upon which the permit is to become effective. Assistance may be obtained by writing the Assistant Administrator or by calling the Marine Mammal and En-

dangered Species Division, telephone number 202-624-7461.

(4) A general permit shall be valid for the time period indicated on the face of the permit. General permits shall be subject to modification, suspension or revocation and may contain terms and conditions prescribed in accordance with section 104(b) (2) of the act, 16 U.S.C. 1374(b) (2).

(5) The Assistant Administrator shall determine the adequacy and completeness of an application, and if found to be adequate and complete will promptly publish a notice of receipt of such application in the FEDERAL REGISTER. Interested parties will have thirty days from the date of publication in which to submit written comments with respect to the granting of such permit.

(6) If within thirty days after the date of publication of the FEDERAL REGISTER notice concerning receipt of an application for a general permit, any interested party or parties request a hearing on the application, the Assistant Administrator may within sixty days following the date of publication of the FEDERAL REGISTER notice afford such party or parties an opportunity for such a hearing. Any hearing held in connection with an application for a general permit shall be conducted in the same manner as hearings convened in connection with a scientific research or a public display permit application under § 216.33.

(7) There is no fee for filing an application for a general permit.

(c) *Certificates of Inclusion.*—(1) Vessel Certificates of Inclusion. The owner or managing owner of a vessel that participates in commercial fishing operations for which a general permit is required under this subpart shall be the holder of a valid vessel certificate of inclusion under that general permit. Such certificates shall not be transferable and shall be renewed annually. A vessel certificate holder may surrender his certificate to the Regional Office from which the certificate was issued at any time. However, once surrendered the certificate shall not be returned nor shall a new certificate be issued before the end of the calendar year. This provision shall not apply when a change of vessel ownership occurs.

(2) *Operator's Certificate of Inclusion.* The person in charge of and actually conducting fishing operations (hereinafter referred to as the operator) on any vessel engaged in commercial fishing operations for which a Category 2 general permit is required under this subpart, shall be the holder of a valid operator's certificate of inclusion. These certificates are not transferable and will be valid only on any purse seine vessel having a valid vessel certificate of inclusion for Category 2. In order to receive a certificate of inclusion, the operator shall have satisfactorily completed required training. An operator's certificate of inclusion shall be renewed annually.

(3) A vessel certificate issued pursuant to paragraph (c) (1) shall be aboard the vessel while it is engaged in fishing oper-

ations and the operator's certificate issued pursuant to paragraph (c) (2) shall be in the possession of the operator to whom it was issued. Certificates shall be shown upon request to an enforcement agent or other designated agent of the National Marine Fisheries Service. However, vessels or operators at sea on a fishing trip on the expiration date of their certificate of inclusion, to whom a certificate of inclusion for the next year has been issued, may take marine mammals under the terms of the new certificate. The vessel owners or operators are obligated to physically obtain or to place the new certificate aboard, as appropriate, when the vessel next returns to port.

(4) Application(s) for certificates of inclusion under paragraph (c) (1) of this section should be addressed as follows:

(i) Category 1, 3, 4, and 5 applications:

(A) Owners or managing owners of vessels registered in Colorado, Idaho, Montana, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming, should make application to the Regional Director, Northwest Region, National Marine Fisheries Service, 1700 Westlake Avenue, Seattle, Wash. 98102.

(B) Owners or managing owners of vessels registered in Arizona, California, Hawaii, Nevada, and the territories of American Samoa, Guam, and the Trust Territory of the Pacific Islands should make application to the Regional Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, Calif. 90731.

(C) Owners or managing owners of vessels registered in Alaska should make application to the Regional Director, Alaska Region, National Marine Fisheries Service, P.O. Box 1668, Juneau, Alaska 99802.

(D) Owners or managing owners of vessels registered in Connecticut, Delaware, District of Columbia, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin, should make application to the Regional Director, Northeast Region, National Marine Fisheries Service, 14 Elm Street, Federal Building, Gloucester, Mass. 01930.

(E) Owners or managing owners of vessels registered in Alabama, Arkansas, Florida, Georgia, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, and Virgin Islands, should make application to the Regional Director, National Marine Fisheries Service, Southeast Region, 9450 Gandy Boulevard North, Duval Building, St. Petersburg, Fla. 33702.

(ii) Category 2 applications: Owners or managing owners of purse seine vessels in this category shall make application to the field office, Southwest Region, National Marine Fisheries Service, 1140 North Harbor Drive, Room 7, San Diego, Calif. 92101.

(5) Applications for vessel certificates of inclusion under paragraph (c) (1) of this section shall contain:

(i) The name of the vessel which is to appear on the certificate(s) of inclusion.

(ii) The category of the general permit under which the applicant wishes to be included;

(iii) The species of fish sought and general area of operations.

(iv) The identity of State and local commercial fishing licenses, if applicable, under which vessel operations are conducted, and dates of expiration;

(v) The name of the operator and date of training, if applicable;

(vi) The name and signature of the applicant, whether owner or managing owner, address, and if applicable, the organization acting on behalf of the vessel.

(6) Fees. (i) Applications for certificates of inclusion under paragraph (c) (1) of this section shall contain a payment for each vessel named in the application in accordance with the following schedule:

(A) Categories 1: Towed Or Dragged Gear; 3: Encircling Gear, Purse Seining not Involving the Intentional Taking of Marine Mammals; 4: Stationary Gear; and 5: Other Gear—\$10.00.

(B) Category 2: Encircling Gear, Purse Seining Involving the Intentional Taking of Marine Mammals—\$200.00.

(ii) Except as provided herein, vessel owners or managing owners desiring a vessel certificate of inclusion under more than one category of the general permit will not be required to pay a full fee for each certificate. After the initial fee for a certificate is paid for each vessel, additional certificates will be issued for a fee of \$.50 (fifty cents) each. However, every application for a vessel certificate under Category 2 shall contain the full fee.

(iii) Notwithstanding the provisions of subparagraph (c) (6) (i) of this section, an applicant whose income is below Federal poverty guidelines may, upon showing in his application that his income is below such guidelines, be issued a certificate under the following schedule of fee payment:

(A) Categories 1: Towed Or Dragged Gear; 3: Encircling Gear, Purse Seining not Involving the Intentional Taking of Marine Mammals; 4: Stationary Gear; and 5: Other Gear—\$1.00.

(B) Category 2: Encircling Gear, Purse Seining Involving the Intentional Taking of Marine Mammals—\$20.00.

(iv) A fee is not required for an operator's certificate of inclusion.

(v) The Assistant Administrator may change the amount of these required fees at any time he determines a different payment to be reasonable, and said change shall be accomplished by publication in the FEDERAL REGISTER of the new fee schedule.

(7) The Regional Office receiving applications for certificates of inclusion from vessel owners, managing owners, or operators shall determine the adequacy and completeness of such applications, and upon its determination that such ap-

plications are adequate and complete, it shall approve such applications and issue the certificate(s).

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

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

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

(iii) Only after all means permitted by paragraph (d) (1) (ii) of this section have been taken to deter a marine mammal from depredating the catch, damaging the gear, or causing personal injury, may the certificate holder injure or kill the animal causing the depredation or immediate personal injury; however, in no event shall a certificate holder kill or injure an Atlantic bottlenosed dolphin, *Tursiops truncatus*, under the provisions of this paragraph. A certificate holder shall not injure or kill any animal permitted to be killed or injured under this paragraph unless the infliction of such damage is substantial and immediate and is actually being caused at the time such steps are taken. In all cases, the burden is on the certificate holder to fully report and demonstrate that the animal was causing substantial and immediate damage or about to cause personal injury and that all possible steps to protect against such damage or injury as permitted by paragraph (d) (1) (ii) of this section were taken and that such attempts failed.

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

(v) All certificate holders shall maintain logs of incidental take of marine mammals in such form as prescribed by the Assistant Administrator. All deaths or injuries to marine mammals occurring in the course of commercial fishing operations under the conditions of a general permit shall be immediately recorded in the log and reported in writing to the Regional Director to whom the certificate application was made, or to an enforcement agent or other designated agent of the National Marine Fisheries Service, at the earliest opportunity, but no later than five days after such occurrence, except that if a vessel at sea returns to port later than five days after such occurrence then it shall be reported within 48 hours after arrival in any port. Reports must include:

RULES AND REGULATIONS

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

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

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

(vi) Failure to comply with the provisions of the general permit or certificate of inclusion including, but not limited to, failure to submit the vessel, including required marine mammal logs and gear, to an inspection upon demand by an authorized Federal enforcement agent, or failure to adhere to the provisions of these regulations will subject the certificate holder to a revocation of his certificate and also subject the certificate holder, vessel, or master to the penalties provided for under the Act.

(2) *Encircling gear, purse seining involving the intentional taking of marine mammals.*—(1) *Quotas:*

(A) A certificated vessel may take marine mammals so long as the taking is an incidental occurrence in the course of

normal commercial tuna purse seine fishing operations, and the fishing operations are under the immediate direction of a person who is the holder of a valid operator's certificate of inclusion; except that a vessel shall not encircle either:

(1) Pure schools of the coastal spotted dolphin (*Stenella attenuata*) stock, the Costa Rican spinner, and the eastern spinner dolphin (*Stenella longirostris*) stocks, or mixed schools including these stocks;

(2) Pure schools of any species of dolphin except the offshore spotted dolphin (*Stenella attenuata*) stock, the striped dolphin (*Stenella coeruleoalba*) species, and the common dolphin (*Delphinus delphis*) species; or

(3) Any other species or stock of marine mammals that do not have an allowable take as listed below or whose allowable take has been exceeded. The numbers of marine mammals that may be taken during calendar years 1978, 1979, and 1980, by U.S. vessels in the course of commercial fishing operations will be limited as follows:

Species/Stock-Management Units:	Take	Encirclement	Mortality
Calendar year 1978			
1. Spotted dolphin (coastal).....	0	0	0
2. Spotted dolphin (offshore) ¹	0	0	0
3. Spinner dolphin (Coasta Rica).....	14,006,000	5,400,000	35,500
4. Spinner dolphin (eastern).....	0	0	0
5. Spinner dolphin (whitebelly) ²	0	0	0
6. Common dolphin (northern).....	4,365,000	1,400,000	13,500
7. Common dolphin (central).....	192,000	32,000	120
8. Common dolphin (southern) ³	900,000	600,000	500
9. Striped dolphin (northern).....	2,688,000	450,000	1,700
10. Striped dolphin (north equatorial) ⁴	48,000	3,200	50
11. Bottlenosed dolphin.....	480,000	32,000	470
12. Rough-toothed dolphin.....	72,000	4,800	70
13. Fraser's dolphin.....	6,000	400	5
14. Risso's dolphin.....	6,000	400	5
15. Pacific white-sided dolphin.....	6,000	400	5
16. Short-finned pilot whale.....	3,000	200	15
17. Melon-headed whale.....	6,000	400	5
18. Pygmy killer whale.....	0	0	0
Total.....			51,945
Calendar Year 1979			
1. Spotted dolphin (coastal).....	0	0	0
2. Spotted dolphin (offshore) ¹	0	0	0
3. Spinner dolphin (Coasta Rican).....	14,006,000	5,400,000	28,400
4. Spinner dolphin (eastern).....	0	0	0
5. Spinner dolphin (whitebelly) ²	0	0	0
6. Common dolphin (northern).....	4,365,000	1,400,000	10,800
7. Common dolphin (central).....	192,000	32,000	100
8. Common dolphin (southern) ³	900,000	600,000	400
9. Striped dolphin (northern).....	2,688,000	450,000	1,400
10. Striped dolphin (north equatorial) ⁴	48,000	3,200	40
11. Bottlenosed dolphin.....	480,000	32,000	380
12. Rough-toothed dolphin.....	72,000	4,800	60
13. Fraser's dolphin.....	6,000	400	5
14. Risso's dolphin.....	6,000	400	5
15. Pacific white sided dolphin.....	6,000	400	5
16. Short-finned pilot whale.....	3,000	200	10
17. Melon-headed whale.....	6,000	400	5
18. Pygmy killer whale.....	0	0	0
Total.....			41,610
Calendar Year 1980			
1. Spotted dolphin (coastal).....	0	0	0
2. Spotted dolphin (offshore) ¹	0	0	0
3. Spinner dolphin (Coasta Rican).....	14,006,000	5,400,000	21,300
4. Spinner dolphin (eastern).....	0	0	0
5. Spinner dolphin (whitebelly) ²	0	0	0
6. Common dolphin (northern).....	4,365,000	1,400,000	8,100
7. Common dolphin (central).....	192,000	32,000	70
8. Common dolphin (southern) ³	900,000	600,000	300
9. Striped dolphin (northern).....	2,688,000	450,000	1,000
10. Striped dolphin (north equatorial) ⁴	48,000	3,200	30
11. Bottlenosed dolphin.....	480,000	32,000	280
12. Rough-toothed dolphin.....	72,000	4,800	40
13. Fraser's dolphin.....	6,000	400	5
	6,000	400	5

Species/Stock-Management Units	Take	Encirclement	Mortality
Calendar year 1980			
14. Risso's dolphin.....	6,000	400	5
15. Pacific white-sided dolphin.....	3,000	200	10
16. Short-finned pilot whale.....	6,000	400	5
17. Melon-headed whale.....	0	0	0
18. Pygmy killer whale.....	0	0	0
Total.....			31,150

¹ Including the tentatively identified southwestern stock.
² Including the tentatively identified southwestern stock.
³ Including the tentatively identified equatorial-oceanic stock.
⁴ Including the tentatively identified south-equatorial stock.

notified via certified letter from the National Marine Fisheries Service that he is required to carry an observer, shall notify the field office, Southwest Region, National Marine Fisheries Service, San Diego, Calif., telephone 714-293-6540 at least five days in advance of the vessel's departure on a fishing voyage to allow for observer placement. A vessel whose vessel certificate holder has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.

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

presented in the notice, the Administrator shall render a decision within 20 days from receipt of the notice.

(B) Masters of all certificated vessels carrying National Marine Fisheries Service observers shall allow observers to report, in coded form, information by radio concerning the accumulated catch of tunas and take of marine mammals, at such times as specified by the Regional Director, Southwest Region. Individual vessel names and their tuna catch associated with coded information reported by radio by the National Marine Fisheries Service observers shall remain confidential unless their release is authorized in writing by the operator of the vessel.

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

(ii) *General Conditions:* (A) Marine mammals incidentally taken shall be immediately returned to the environment where captured without further injury. The operators of purse seine vessels shall take every possible precaution to refrain from causing or permitting incidental mortality and serious injury of marine mammals. Operators shall not knowingly initiate any set involving marine mammals when conditions of wind, sea state, visibility, or the number of marine mammals and/or fish concerned would, in his judgment, prevent the effective use of backdown and other required porpoise rescue procedures.

(C) The vessel certificate holder of each certificated vessel without an observer onboard, and fishing inside the Inter-American Tropical Tuna Commission's Yellowfin Regulatory Area is required to report within 48 hours prior to departure from port and within 48 hours after arrival in port, of their actual departure or arrival date, including any changes in schedules that may occur after the original notification. The report shall include the name of the vessel and the location of the port of the scheduled departure or arrival, and shall be telephoned to 714-233-5511, the Southwest Regional Office's 24-hour answering service.

(D) The general permit will be valid for a period not to exceed three years. The Assistant Administrator may, upon receipt of new information which in his opinion is sufficient to require modification of the regulations propose to modify such after consultation with the Marine Mammal Commission. These modifications shall be consistent with and necessary to carry out the purposes of the Act. Any modifications proposed by the Assistant Administrator involving changes in the quotas shall include the statements required by section 103(d) of the Act. Modifications shall be proposed in the FEDERAL REGISTER and a public comment period shall be allowed. At the request of any interested person within 15 days after publication of the proposed modification in the FEDERAL REGISTER, the Assistant Administrator may hold a public hearing to receive and evaluate evidence in those circumstances where he has determined it to be consistent with and necessary to carry out the purposes of the Act. Such request may be for a formal hearing on the record before an Administrative Law Judge. Within 10 days after receipt of the request for a public hearing, the Assistant Administrator shall provide the requesting party or parties with his decision. If a request is denied, the Assistant Administrator shall state the reasons for the denial. Within 10 days after receipt of a decision denying a request for a formal hearing, the requesting person may file a written notice of appeal with the Administrator. Based upon the evidence

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

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

(C) Operators of all certificated vessels shall maintain daily marine mammal logs provided by the Regional Director, Southwest Region, National Marine Fisheries Service. Such logs shall be subject to inspection at the discretion of the Southwest Regional Director, or his designated personnel. Certified copies of completed marine mammal logs shall be mailed or delivered at the conclusion of each fishing voyage to the field office, Southwest Region, National Marine Fisheries Service, 1140 North Harbor Drive, Room 7, San Diego, Calif. 92101, within 48 hours after arrival in any port. If no sets involving marine mammals were made during a voyage, a marine mammal log stating such shall be submitted.

(iv) *Vessel Gear and Equipment Requirements:* A vessel certificate issued pursuant to paragraph (c) (i) of this section will be valid only for a vessel equipped with a porpoise safety panel in its purse seine, and which uses the other gear, equipment, and procedures described herein. The vessel certificate holder shall be held responsible for providing and maintaining, in a functional and seaworthy condition, the required porpoise safety panels and all other required gear and equipment used in the course of catching and landing tuna. The requirements for the porpoise safety panel and other gear and equipment are as follows:

(D) The vessel certificate holder shall notify the field office, Southwest Region, National Marine Fisheries Service, 1140 North Harbor Drive, Room 7, San Diego, Calif. 92101, telephone 714-203-6540, of any change of vessel operator within at least 48 hours prior to departing on the next scheduled trip.

(A) *Porpoise Safety Panel—Class I and II Vessels:* For Class I purse seiners (400 short tons carrying capacity or less) and for Class I purse seiners (400 short tons carrying capacity or greater, built before 1961), the porpoise safety panel shall be a minimum of 100 fathoms in length (as measured before installation), except that the minimum length of the panel in nets deeper than 10 strips shall

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

(A) The vessel certificate holder of each certificated vessel, who has been

be determined at a ratio of 10 fathoms in length for each strip that the net is deep. It shall be installed beginning 75 to 100 fathoms from the bow ortza, and shall extend toward the stern of the net protecting the perimeter of the backdown area. Between the bow ortza and the porpoise safety panel, three bow bunchlines shall be installed. The perimeter of the backdown area is the length of corkline which begins at the outboard end of the last bow bunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tie-down point. The porpoise safety panel shall consist of small mesh webbing not to exceed 1¼" stretch mesh, extending from the corkline downward to a minimum depth equivalent to one strip of 100 meshes of 4¼" stretch mesh webbing.

(B) Porpoise Safety Panel—Class III Vessels: For Class III purse seiners (400 short tons carrying capacity or greater, built after 1960), the porpoise safety panel shall be a minimum of 180 fathoms in length (as measured before installation). It shall be installed beginning 60 to 100 fathoms from the bow ortza and shall extend toward the stern of the net protecting the perimeter of the backdown area. Between the bow ortza and the porpoise safety panel, one and one-half, to two bow bunchlines shall be installed. The perimeter of the backdown area is the length of corkline which begins at the outboard end of the last bowbunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tie-down point. The porpoise safety panel shall consist of small mesh webbing not to exceed 1¼" stretch mesh extending downward from the corkline and the base of the porpoise apron to a minimum depth equivalent to two strips of 100 meshes of 4¼" stretch mesh webbing.

(C) Porpoise Apron: Each Class III vessel shall have installed in its purse seine net, a triangular-shaped porpoise apron consisting of small mesh not to exceed 1¼" stretch mesh, 85 to 95 fathoms in length, laced between the corkline and the porpoise safety panel. The bow end of the porpoise apron shall begin approximately 10 to 15 fathoms (depending on the depth of the net) outboard of the end of the third bunchline and extend toward the stern of the net such that the peak of the porpoise apron triangle shall coincide with the apex of the backdown channel in the net. The base of the porpoise apron shall be laced to the upper edge of the porpoise safety panel. The upper edges of the porpoise apron shall be tapered at a 5 mesh, 2 bar rate from each end such that the tapers intersect at the center of the porpoise apron. The depth of the porpoise apron at its center shall be 443 to 463 meshes.

(D) Porpoise Apron Approval: The porpoise apron shall be installed during 1978 under the supervision of a National Marine Fisheries Service designated representative. A trial set(s) shall be conducted under supervision of a National Marine Fisheries Service designated representative after installation of the por-

poise apron to insure proper installation and operation of the apron. During the trial set(s), the stern tiedown point and outboard bow bunchline mark shall be determined, and marked so as to be clearly visible. The approved porpoise apron shall be installed by July 1, 1978, unless a limited time extension is granted for good cause by the Regional Director, Southwest Region, following a written request by the vessel certificate holder. The vessel certificate holder shall provide at least five days advance notification to the field office, Southwest Region, National Marine Fisheries Service, 1140 North Harbor Drive, Room 7, San Diego, Calif. 92101, telephone 714-293-6540, of the time and place of installation of the porpoise apron system. The certificate of inclusion for any vessel whose certificate holder has failed to notify the National Marine Fisheries Service of the date of installation, shall be invalid until completion of the apron inspection and trial set(s).

(E) Porpoise Safety Panel Markers: Each end of the porpoise safety panel and porpoise apron shall be identified with an easily distinguishable marker.

(F) Porpoise Safety Panel Hand Holds: Throughout the length of the corkline under which the porpoise safety panel and porpoise apron are located, hand hold openings are to be secured so that the insertion of the 1½" diameter cylindrical-shaped object meets resistance.

(G) Porpoise Safety Panel Corkline Hangings: Throughout the length of the corkline under which the porpoise safety panel and porpoise apron are located, corkline hangings shall be inspected by the vessel operator following each trip. Hangings found to have loosened to the extent that a cylindrical object with a 1½" diameter will not meet resistance when inserted between the cork and corkline hangings, must be tightened so that a cylindrical object with a 1½" diameter cannot be inserted.

(H) Bunchlines: Bunchlines, other than bow bunchlines, shall be arranged around the perimeter of the net to allow at least three towing points to be established near one-quarter, one-half, and three-quarter net from the bow ortza. A towing point must be established between two adjacent bunchlines; one bunchline reversed or unattached at both ends. Six bunchlines, other than bow bunchlines are necessary to establish three towing points: The towing ends of all bunchlines which can be utilized as towing points shall be marked so as to be clearly visible to speedboat drivers. At least a 20 fathom length of corkline shall be free from bunchlines at the apex of the backdown channel.

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

(J) Rubber Raft: An inflatable rubber raft suitable to be used as a porpoise observation-and-rescue platform, shall be carried on all certificated vessels.

(K) Facemask and Snorkel: At least two facemasks and snorkels shall be carried on all certificated vessels.

(L) Floodlights and Spotlight: All certificated vessels shall be equipped with adequate floodlights suitable for use in darkness to attract fish toward the main vessel and a spotlight to intermittently illuminate the backdown channel and apex.

(M) Vessel certificate holders may petition for an exemption from the regulations regarding vessel gear and equipment for the purpose of experimenting with alternate gear or procedures designed to reduce serious injury and incidental mortalities of marine mammals in the course of commercial fishing. The petition shall be made in writing to the Director, Southwest Region, 300 South Ferry Street, Terminal Island, Calif. 90731, and shall include detailed specifications of the proposed gear and procedure modifications. Modifications may be granted upon review and approval, on a trip by trip basis, only if a National Marine Fisheries Service designated representative is available and accompanies the vessel on the approved trip.

(v) Annual Vessel Inspection: Purse seine nets and other gear and equipment, utilized to catch and land fish under this section and to conduct backdown and other procedures herein required, shall be subject to inspection and examination at least once annually by an authorized National Marine Fisheries Service inspector at a time and location determined by the Regional Director, Southwest Region. A certificate of inclusion for a vessel with gear which is not in compliance with these regulations or maintained in a functional and seaworthy condition, shall be invalid until such deficiencies in gear or conditions are corrected and approved by an authorized National Marine Fisheries Service inspector.

(vi) Operator Training Requirements: All operators shall maintain proficiency sufficient to perform the procedures required herein, and must attend and satisfactorily complete a formal training session conducted under the auspices of the National Marine Fisheries Service in order to obtain their certificate of inclusion. At the training session an attendee shall be instructed concerning the provisions of the Marine Mammal Protection Act of 1972, the regulations promulgated pursuant to the Act, and the fishing gear and techniques which are required or will contribute to reducing serious injury and mortality of porpoises incidental to purse seining for tuna. Operators who have received a written certificate of satisfactory completion of training in 1977 or later, will not be required to attend additional formal training sessions unless there are substantial changes in the Act, the regulations, or the required fishing gear and techniques. Additional training may be required for

any operator who is found by the Regional Director, Southwest Region, to lack proficiency in the procedures required.

(vii) **Marine Mammal Release Requirements:** All operators shall use the following procedures during all sets involving the incidental taking of marine mammals in association with the capture and landing of turia.

(A) Use of Speedboats:

(1) Except as provided herein, on every set involving marine mammals, a minimum of two manned speedboats shall be in the water until backdown commences. Speedboats shall be prepared to hook onto either the bunchline towing points established along the perimeter of the net or onto the corkline, in order to tie the net to prevent net collapse and the formation of pockets of loose webbing, such as stern bends, which might entrap marine mammals. Other speedboats that are in operating condition shall be prepared for immediate use to tow if needed.

(2) Vessels of 400 tons carrying capacity or less which have an observer duly authorized by the Secretary aboard, may have a minimum of one manned speedboat in the water until backdown commences, provided that, prior to departure, the operator has presented the Regional Director with a signed statement declaring that the presence of an observer will displace the crewman who would operate the second speedboat during sets on marine mammals.

(3) Actual towing on the net shall be performed when, in the opinion of the operator, towing is necessary to prevent net collapse or the formation of pockets of loose webbing. If towing the net has been necessary, the speedboats may unhook their towlines when towing is no longer needed.

(B) **Bow Bunches Pulled:** For all class vessels, exactly three bow bunches shall be pulled on every set involving marine mammals to insure that the perimeter of the backdown area is protected by the porpoise safety panel and, for Class III vessels, the porpoise apron is properly positioned. The perimeter of the backdown area is the length of corkline which begins at the outboard end of the last bow punch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tie-down point.

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

(D) **Continuous Hand Rescue:** During any set in which marine mammals are captured, a minimum of two rescuers shall be engaged in hand removal until all live marine mammals have been released from the net. A minimum of two

rescuers shall hand release marine mammals commencing with backdown. If live marine mammals remain in the net after backdown, a minimum of two rescuers shall continue hand release through the sacking up operation.

(E) **Prohibited Use of Sharp or Pointed Instrument:** The use of a sharp or pointed instrument to remove any marine mammal from the net is prohibited.

(F) **Use of Rubber Raft, Facemask, and Snorkel:** A rubber raft suitable as a porpoise observation and rescue platform, shall be launched inside the net near the time of tying down for the backdown maneuver and shall be used by a crewman to assist the other rescuer(s) in disentangling and releasing live marine mammals from the net. The crewman in the raft shall use the facemask and snorkel to determine whether all live marine mammals are out of the net and make every effort to remove them before backdown is terminated. Taking into consideration the safety of all personnel, all live marine mammals that remain in the net after backdown shall be herded to areas where they can be easily released.

(G) **Prohibited Brailing of Live Marine Mammals:** All release procedures shall continue until all live marine mammals are removed from the net prior to initiating brailing operation. Brailing live marine mammals from the net is prohibited.

(H) **Use of Lights:** If the backdown maneuver or other required release procedures continue past one-half hour after sunset, lights shall be used to insure that release procedures are properly performed and that all live marine mammals are removed from the net. Floodlights shall be used to attract fish toward the main vessel. A spotlight shall be intermittently used to illuminate the backdown channel and apex until all live marine mammals are removed from the net.

(vii) **Penalties:** Failure to comply with the provision of the general permit or these regulations, including but not limited to: failure to submit upon demand to vessel, gear, equipment, or proficiency inspection or examination by authorized National Marine Fisheries Service personnel; falsification of any required logs and reports; or failure to satisfy the requirements of any provisions of these regulations will subject vessel owners, managing owners, masters, or operators to revocation of the vessel certificate of inclusion and/or the right to be included under a general permit, and further subject vessel owners, managing owners, masters, and operators to penalties provided for under the Act, including revoking the right to be an operator as defined in § 216.24 (c) (1).

(3) **ENCIRCLING GEAR, PURSE SEINING NOT INVOLVING THE INCIDENTAL TAKING OF MARINE MAMMALS.** (i) A certificate holder may take marine mammals so long as such

taking is an incidental occurrence in the course of normal commercial fishing operations. Marine mammals taken incidental to commercial fishing operations shall be immediately returned to the environment where captured without further injury.

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

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

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

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

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

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

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

(vi) Failure to comply with the provisions of the general permit or certificate

RULES AND REGULATIONS

of inclusion including, but not limited to, failure to submit to an inspection of the vessel, marine mammal logs and required gear, upon demand by an authorized Federal enforcement agent, or failure to adhere to the provisions of these regulations will subject the certificate holder to a revocation of his certificate and also subject the certificate holder, vessel owner or master to the penalties provided for under the Act.

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

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

(iii) Only after all means permitted by paragraph (d) (4) (ii) of this section have been taken to deter a marine mammal from depredating the catch, damaging the gear, or causing personal injury, may the certificate holder injure or kill the animal causing the depredation or immediate damage, or about to cause immediate personal injury; however, in no event shall a certificate holder kill or injure an Atlantic bottlenosed dolphin, *Tursiops truncatus*, under the provisions of this paragraph. A certificate holder shall not injure or kill any animal permitted to be killed or injured under this paragraph unless the infliction of such damage is substantial and immediate and is actually being caused at the time such steps are taken. In all cases, the burden is on the certificate holder to fully report and demonstrate that the animal was causing substantial and immediate damage or about to cause personal injury and that all possible steps to protect against such damage or injury as permitted by paragraph (ii) were taken and that such attempts failed.

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

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

later than five days after such occurrence, then it shall be reported within forty-eight hours after arrival in port. Reports must include:

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

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

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

(vi) Failure to comply with the provisions of the general permit or certificate of inclusion including, but not limited to, failure to submit to an inspection of the vessel, marine mammal logs and required gear, upon demand by an authorized Federal enforcement agent, or failure to adhere to the provisions of these regulations will subject the certificate holder to a revocation of his certificate and also subject the certificate holder, vessel, owner or master to the penalties provided for under the Act.

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

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

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

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

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

or injuries to marine mammals occurring in the course of commercial fishing operations under the conditions of a general permit shall be immediately recorded in the log and reported in writing to the Regional Director, National Marine Fisheries Service, where a certificate application was made, or to an enforcement agent or other designated agent of the National Marine Fisheries Service, at the earliest opportunity but no later than five days after such occurrence, except that if a vessel at sea returns to port later than 5 days after such occurrence, then it shall be reported within forty-eight hours after arrival in port. Reports must include:

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

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

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

(vi) Failure to comply with the provisions of the general permit or certificate of inclusion including, but not limited to, failure to submit to an inspection of the vessel, marine mammal logs and required gear, upon demand by an authorized Federal enforcement agent, or failure to adhere to the provisions of these regulations will subject the certificate holder to a revocation of his certificate and also subject the certificate holder, vessel, or master to the penalties provided for under the Act.

(e) **IMPORTATION:** (1) It shall be illegal to import into the United States any fish, whether fresh, frozen or otherwise prepared, if such fish were caught in a manner prohibited by these regulations or in a manner that would not be allowed in circumstances where a person subject to the jurisdiction of the United States would be required to have a certificate of inclusion in a general permit hereunder, whether or not any marine mammals were in fact taken incidental to the catching of the fish, unless the Assistant Administrator makes a finding and publishes such finding in the FEDERAL REGISTER, that such fishing, although not in conformity with the specific requirements of these regulations, is accomplished in a manner which does not result in an incidental mortality and serious injury rate in excess of that which results from fishing operations under these regulations.

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

(i) Salmon, halibut, and pilchards from South Africa. The following U.S. Tariff Schedule Item Numbers identify these categories of salmon, halibut, and pilchard products which are imported into the United States and are to be covered by the documentation and certification regulations of § 216.24(e) (3):

- 110.20-25 Halibut, fresh or chilled.
- 110.20-30 Halibut, frozen.
- 110.20-45 Salmon, fresh or chilled.
- 110.10-50 Salmon, frozen.
- 110.70-40 Halibut, other—except portion controlled steaks.
- 111.48-00 Salmon, salted.
- 111.88-00 Salmon, smoked or kippered.
- 112.18-00 Salmon, preserved, not in oil.
- 112.20-00 Canned sardines/pilchards (from S. Africa).
- 112.22-00 Canned sardines/pilchards (from S. Africa).

(ii) Yellowfin tuna. The following U.S. Tariff Schedule Item Numbers identify the categories of tuna and tuna products under which yellowfin tuna is imported into the United States, and are subject to the importation restrictions of paragraph (e) (4) of this section after December 31, 1977:

- 110.10-20 Tuna; yellowfin, whole fish.
- 110.10-25 Tuna; yellowfin, eviscerated, head on.
- 110.10-30 Tuna; yellowfin, eviscerated, head off.
- 110.10-37 Tuna; yellowfin, other.
- 112.30-40 Tuna; canned, other than white meat, no oil—except cans marked as other than yellowfin tuna in a manner approved in advance by the Assistant Administrator.
- 112.34-00 Tuna; canned, other, no oil—except cans marked as other than yellowfin tuna in a manner approved in advance by the Assistant Administrator.
- 112.90-00 Tuna; canned, other, in oil—except cans marked as other than yellowfin tuna in a manner approved in advance by the Assistant Administrator.

(3) Salmon, Halibut, and Pilchards from South Africa. All fish and categories of fish listed in paragraph (e) (2) (i) of this section shall be denied entry into the United States unless accompanied by a separate Fisheries Certificate of Origin (Standard Form 369-1) from each country whose flag vessels caught fish involved in the importation. The Fisheries Certificate of Origin should include the following information:

- (i) The country of origin; and
- (ii) The identity and quantity of fish; and, either

(iii) After the Assistant Administrator has published the finding referred to in paragraph (e) (1) of this section, a statement from a responsible official of the country of origin that the fishing technology permitted by the country of origin with respect to the species of fish presented for importation into the United States does not result in a rate of serious injury or death to marine mammals in excess of that which results from U.S. commercial fishing operations as prescribed by these regulations. Country of origin for the purposes of this section shall mean the country under whose flag the fish catching vessels are documented and whose fish are a part of any cargo or shipment of fish to be imported into the U.S. regardless of any transshipments; or

(iv) A statement by a responsible official of the country of origin or the master of the vessel which caught the fish that such fish were not caught in a

manner prohibited for U.S. fishermen by these regulations. The statement shall identify the species, quantity, and exporter of the fish to which the statement refers; or

(v) Any nation may certify to the Assistant Administrator either (A) that all of its vessels fishing under its flag are fishing in conformance with these regulations; or (B) a list of the vessels, by name and official number, fishing under such nation's flag which are fishing in conformance with these regulations; or (C) that all of the vessels fishing under such nation's flag, with the exception of any vessels specifically listed by name and official number, are fishing in conformance with these regulations. If methods (B) or (C) are used, the shipping documentation must also show the name and official number of the vessel which caught the fish presented for importation. The Assistant Administrator may then make a finding, and publish such finding in the FEDERAL REGISTER, that fish imports listed in paragraphs (e) (2) (i) from a nation or from an identified segment of a nation's fishing fleet, are exempted from the documentation provisions of this section.

(4) Yellowfin tuna. Prior to January 1, 1978, all yellowfin tuna listed in paragraph (e) (2) (i) of the 40 FR 56904, December 5, 1975, will continue to be subject to the importation restrictions of paragraph (e) (3) in 39 FR 32124, September 5, 1974, as amended. After December 31, 1977, all shipments of fish and products listed in paragraph (e) (2) (ii) of this section, from any nation, shall not be entered into the United States for consumption or subsequently withdrawn from warehouse for consumption unless a finding has been made pursuant to paragraph (e) (5) (i) below, and unless accompanied by the following documentation: (i) A separate Yellowfin Tuna Certificate of Origin (Standard Form 370-1) from each country whose flag vessels caught yellowfin tuna involved in the importation. The Yellowfin Tuna Certificate of Origin must include the following information: (A) Country of origin of the fishing vessel(s) involved; (B) Exporter (name and address); (C) Consignee (name and address); (D) Identity and quantity of the yellowfin tuna to be imported, listed by U.S. Tariff Schedule Number; (E) Name of vessel(s) which caught the yellow fin tuna; (F) Fishing method used (i.e., purse seine, longline, pole and line, etc.); (G) Other documentation as may be required by the Assistant Administrator, subsequent to granting a finding in section (e) (5); (H) Must be signed by either a responsible government official of the country whose flag vessel caught the fish or the vessel master, below the following certification statements:

I certify that the yellowfin tuna described in (D) above was caught by flag vessels of a country either, (1) not required to obtain a finding from the United States Department of Commerce (National Marine Fisheries Service) under 50 CFR 216.24(e) (5), and the fish was not caught in a manner prohibited for United States fishermen by the United States Marine Mammal Regulations 50 CFR

216.24(d) (2); or (2) which has been found by the United States Department of Commerce (National Marine Fisheries Service) to be in conformance with the United States Marine Mammal Regulations 50 CFR 216.24 (e) (5).

I certify that the above information is complete, true and correct to the best of my knowledge and belief. I understand that my making a false statement may subject me to the criminal penalties under the Marine Mammal Protection Act of 1972.

(I) Must also be signed by the exporter, under the following declaration:

The undersigned hereby declares that, based on the above statements, the yellowfin tuna herein offered for importation into the United States, was caught by flag vessels of (country), in conformance with the United States Marine Mammal Regulations 50 CFR 216.24.

(5) (i) After December 31, 1977 any tuna or tuna products in the classifications listed in paragraph (e) (2) (ii) of this section, from countries of origin (as documented under (e) (4) above) whose vessels operate in the yellowfin tuna purse seine fishery in the eastern tropical Pacific Ocean, as determined by the Assistant Administrator; shall not be entered into the United States for consumption or subsequently withdrawn from warehouse for consumption unless the Assistant Administrator makes a finding in consultation with the U.S. Department of State, and publishes such finding in the FEDERAL REGISTER that fishing operations in the country of origin are conducted in conformance with U.S. regulations and standards as stated in paragraph (d) (2) of this section. The Assistant Administrator may make a finding that, although not in conformity with these regulations, such fishing is accomplished in a manner which does not result in an incidental mortality and serious injury in excess of that which results from U.S. fishing operations under these regulations. Upon such a finding unloading may be allowed. Country or origin for the purposes of this section (§216.24(e)) shall mean the country under whose flag the fish catching vessels are documented and whose fish are a part of any cargo or shipment of fish to be imported into the U.S. regardless of any transshipments.

(ii) Countries of origin desiring to obtain a finding which will allow the importation of products listed in paragraph (e) (2) (ii) of this section must submit, by appropriate government official, to the Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Washington, D.C. 20235, the following information: (A) A statement of the quantity and type (identified by tariff schedule numbers listed in paragraph (e) (2) (ii) of this section) of fish or fish products expected to be imported into the U.S.; (B) A detailed description of the fishing technology and procedures utilized in tuna purse seine fishing to protect marine mammals so that a determination of conformance with § 216.24 (d) (2) of these regulations can be made, or the effectiveness of any other equiv-

alent technology or procedures can be assessed; (C) A statement of the number of marine mammals killed or seriously injured (by species) incidental to the yellowfin tuna purse seine operations on porpoise for the previous year, and the manner in which the information was obtained (logbooks, observers, interviews, or other procedures); (D) A statement of the number of marine mammals which will be allowed to be killed or seriously injured annually, incidental to yellowfin tuna purse seine operations and the impact of such mortality or serious injury on the existing populations of marine mammals by species; (E) A statement of the procedures to be required, including quotas and other controls, which will meet the U.S. requirements to limit the level of mortality, and procedures for prohibiting sets on marine mammals after the level of mortality allowed is reached; (F) Copies of laws and regulations which protect and conserve marine mammals involved in fishing operations; and (G) A list of vessels which may be involved in the taking of marine mammals incidental to yellowfin tuna purse seining, and a list of United States citizens working on these vessels. Should a finding be made, the Assistant Administrator intends to require a periodic update of the above list of U.S. citizens as a condition of the finding. The Assistant Administrator may require verification of statements made in connection with requests to allow importations. The Assistant Administrator will reconsider a finding upon a request from, and the submission of additional information from, the country of origin.

(6) *Fish refused entry.* If fish is denied entry under the provisions of § 216.24 (e)(3) or § 216.24(e)(4), the District Director of Customs shall refuse to release the fish for entry into the United States and shall issue a notice of such refusal to the importer or consignee.

(7) *Release under bond.* *Provided however,* That fish not accompanied or covered by the required documentation or certification when offered for entry may be entered into the United States if the importer or consignee gives a bond on Customs Form 7551, 7553, or 7595 for the production of the required documentation or certification. The bond shall be in the amount required under 19 CFR 25.4(a). Within 90 days after such Customs entry, or such additional period as the District Director of Customs may allow for good cause shown, the importer or consignee shall deliver a copy of the required documentation or certification

to the District Director of Customs, and an original of the required documentation or a copy of the certification to the Regional Director of the National Marine Fisheries Service, unless the District Director of Customs has received notification from the National Marine Fisheries Service that the fish is covered by a certification. If such documentation, certification, or notification is not delivered to the District Director of Customs for the port of entry of such fish within 90 days of the date of Customs entry or such additional period as may have been allowed by the District Director of Customs for good cause shown, the importer or consignee shall redeliver or cause to be redelivered to the District Director of Customs those fish which were released in accordance with this paragraph. In the event that any such fish is not redelivered within 30 days following the date specified in the preceding sentence, liquidated damages shall be assessed in the full amount of a bond given on Form 7551. When the transaction has been charged against a bond given on Form 7553 or 7595, liquidated damages shall be assessed in the amount that would have been demanded under the preceding sentence under a bond given on Form 7551. Fish released for entry into the United States through use of the bonding procedure provided in this paragraph shall be subject to the civil and criminal penalties and the forfeiture provisions provided for under the Act if (i) the required documentation or certification is not delivered to the Regional Director of the National Marine Fisheries Service within 90 days of the date of Customs entry, or such additional period as may have been allowed by the District Director of Customs for good cause shown, or (ii) the required certification is not on file in the office of the Assistant Administrator for Fisheries, National Marine Fisheries Service, Washington, D.C. 20235, within this 90 day period or such additional period as may have been allowed by the District Director of Customs for good cause shown. Fish refused entry into the United States shall also be subject to the civil and criminal penalties and the forfeiture provisions provided for under the Act.

(8) *Disposition of fish refused entry into the United States; redelivered fish.* Fish which is denied entry under § 216.24 (e)(3) or § 216.24(e)(4) or which is redelivered in accordance with § 216.24(e)(7) and which is not exported under Customs supervision within 90 days from the date of notice of refusal of admission or date of redelivery shall be disposed of

under Customs laws and regulations. *Provided however,* That any disposition shall not result in an introduction into the United States of fish in violation of the Marine Mammal Protection Act of 1972.

(f) *Observers.*—(1) The vessel certificate holder of any certificated vessel shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations.

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

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

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

[FR Doc. 77-36382 Filed 12-22-77; 8:45 am]