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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

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

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final decision and final rule.

SUMMARY: This final decision establishes regulations to govern the taking of marine mammals incidental to commercial tuna purse seine fishing in the eastern tropical Pacific Ocean (ETP). The regulations provide for a general permit to be issued allowing the taking of a maximum of 20,500 porpoises, as apportioned into individual species and stock quotas, for each of the five years 1981–1985. The National Marine Fisheries Service (NMFS) will monitor the affected fishery and will take appropriate action to reduce the maximum number of porpoises that may be taken consistent with the economic and technological feasibility of industry compliance with such reductions. The regulations also set requirements for the use of specific equipment and procedures that NOAA believes will continue to reduce the incidental mortality and serious injury of porpoises due to commercial tuna seining in the ETP.

DATES: The decision and revised § 216.24 become effective November 28, 1980. Applications for certificates of inclusion will not be considered until December 8, 1980. The agency anticipates that a general permit will be issued if appropriate on December 1, 1980. A Final Environmental Impact Statement (FEIS) has been filed with the Environmental Protection Agency simultaneously with this decision and can be reviewed by contacting Richard B. Roe at the address below.

ADDRESSES: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: Richard B. Roe, Acting Director, Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, Department of Commerce, Washington, D.C. 20235. Telephone: 202-634-7287. Office Location: Room 410, Page Building 2, 3300 Whitehaven Street, NW., Washington, D.C.

SUPPLEMENTARY INFORMATION: On February 15, 1980, NOAA published proposed amendments to the regulations governing the incidental taking of marine mammals in the ETP yellowfin tuna fishery (45 FR 10556). The proposal and other relevant available information were reviewed in a formal hearing before Administrative law Judge (ALJ) Hugh J. Dolan held in San Diego, California, from March 31 through April 5, 1980, and in Washington, D.C., on April 14, 15, and 18, and May 19, 1980. The following parties participated in the hearing: The Committee for Humane Legislation and Friends of Animals (CHL); The Marine Mammal Commission (MMC); The Environmental Defense Fund representing the Animal Protection Institute, Animal Welfare Institute, Center for Environmental Education, Defenders of Wildlife, Friends of the Earth, Fund for Animals, Humane Society of the United States, Sierra Club, and The Whale Center (EDF); the United States Tuna Foundation and American Tunaboat Association (ATA); the Assistant Administrator for Fisheries of NOAA; and the Commonwealth of Puerto Rico. The recommended decision of the ALJ was issued on July 18, 1980. A notice of availability was published on July 29, 1980 (45 FR 50375), and exceptions to the recommended decision were filed on August 8, 1980. In accordance with Rule 15 of the procedural rules published on February 15, 1980 (45 FR 10562), I am now publishing the final decision and regulations governing the taking of marine mammals incidental to commercial fishing operations.

Decision of the Administrator

Background

This decision is the latest in a series of decisions concerning the interaction of commercial yellowfin tuna fishing and the incidental take of marine mammals in the ETP. Prior to 1960, the most common method of fishing for yellowfin tuna was use of a pole and line. With the introduction of purse seines in the 1960's came an unwanted catch of dolphins that generally were found in close association with the tuna. Mortalities of dolphins increased significantly from 1960 and prompted the Congress to enact the Marine Mammal Protection Act in 1972 (the Act). 16 U.S.C. 1361 et seq.

The Act was based on a concern that certain species of marine mammals were in danger of depletion [1] and the belief that those animals should not be allowed to diminish below their optimum sustainable population. [2] The Act established a moratorium on the taking and importation of marine mammals (16 U.S.C. 1371), which can be waived by the Secretary only if takings would not be to the disadvantage of those species or population stocks. (16 U.S.C. 1373(a)) This determination must be based on the best scientific evidence available and must be consistent with the purposes and policies of the Act. The Act further requires that the Secretary must publish and make available to the public certain information on the stocks and the impact of takings on the OSP of the stocks on which takings are allowed. (16 U.S.C. 1373(d)) These procedural requirements have been complied with (45 FR 10556) and are republished here for clarity (Table I). If takings are allowed, the Act directs that "[i]n any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate" 16 U.S.C. 1371(a)(2). The authority of the Secretary of Commerce to administer the Act and make these determinations has been delegated to me. (D00 25-5A Section 301 V. June 3, 1977)

[1] The term "depletion" or "depleted" means any case in which the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under sub-chapter II of this chapter determines that the number of individuals within a species or population stock—

(A) has declined to a significant degree over a period of years;

(B) has otherwise declined and that if such decline continues, or is likely to resume, such species would be subject to the provisions of the Endangered Species Act of 1973; or

(C) is below the optimum carrying capacity for the species or stock within its environment. Section (3)(1).

[2] The Act defines optimum sustainable population as:

. . . with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the optimum carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element. Section (3)(9).

A working definition of this term was published in 50 C.F.R. Section 216.3 (1977) by the National Marine Fisheries Service.

. . . "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/or growth losses due to natural mortality.

Table I.—*Impact of quotas for 1981–85 on the Status of Porpoise Stocks*

Species/stock (management unit)	Estimated current population in 1979	Current status of population [1]	Expected status of population at close of 1985 [2]
Spotted dolphin (northern offshore)	3,150,000	0.63	0.72
Spotted dolphin (southern offshore)	638,700	.95	.97
Spotted dolphin (coastal)	193,200	.42	.53
Spinner dolphin (eastern) [3]	418,700	.27	.34
Spinner dolphin (northern whitebelly)	486,600	.78	.83
Spinner dolphin (southern whitebelly)	264,900	.90	.94
Common dolphin (northern tropical) [4]	216,900	.97	.92
Common dolphin (central tropical)	848,400	.89	.92
Common dolphin (southern tropical)	477,100	1.00	.98
Striped dolphin (northern tropical)	50,600	1.00	.97
Striped dolphin (central tropical)	213,300	.99	.99
Striped dolphin (southern tropical)	483,000	1.00	1.00

[1] Proportion of pre-exploited stock size.
[2] Includes assessments for non-U.S. porpoise mortality.
[3] Includes non-target Costa Rican stock.
[4] Includes Baja neritic.

On December 27, 1977, the National Marine Fisheries Service (NMFS) issued a general permit to the American Tunaboat Association (ATA). This general permit is subject to regulations promulgated on December 23, 1977 (42 FR 64548), codified at 50 CFR 216.24. The existing permit and regulations expire at 2400 hours, December 31, 1980, unless amended.

In anticipation of an industry request for a general permit and regulations to be applicable beyond 1980, NMFS announced a scoping-planning meeting and its intent to prepare a draft environmental impact statement on August 9, 1979 (44 FR 46903). At the scoping meeting, the agency also made known its intent to convene a workshop in La Jolla, California, August 27–31, 1979, to consider the current population status of eastern tropical Pacific porpoise stocks. The workshop was intended to be similar to the one held in 1976, the results of which formed the scientific basis for the existing general permit and regulations. The 1979 workshop was expected to form the scientific basis for any general permit and regulations to be proposed for 1981 and beyond.

The 1979 Status of Porpoise Stocks (SOPS) Workshop of scientific experts took place as scheduled. The availability of the report of the workshop (the Report) was announced on November 7, 1979 (44 FR 64480).

The Report contained important new information, some of which suggested that the northern offshore spotted porpoise stock was depleted. Because of its obligation to review new information periodically and modify existing regulations as necessary to carry out the purposes of the Act, NMFS published an Advance Notice of Proposed Rulemaking on November 23, 1979 (44 FR 67194). In the Advance Notice, the agency announced that it intended to hold a formal hearing before an Administrative Law Judge to address the remainder of the 1980 season and the 1981 season. Although the Act does not require a formal hearing to address adjustments for the 1980 season, NMFS determined that this was the best means of reviewing the Report and other relevant information.

On February 15, 1980, proposed regulations were published that included statements required by Section 103(d) of the Act. These proposed regulations would amend the current regulations. Simultaneously a Draft Environmental Impact Statement (DEIS), filed with the Environmental Protection Agency on February 5, 1980, was made available to other Federal agencies and the general public for comment. The February 15, 1980, proposal contemplated the designation of northern offshore spotted porpoise as a depleted stock in addition to eastern spinner porpoises which are currently designated as depleted. In summary the proposed regulations would amend the existing regulatory regime to: (1) authorize the reissuance of a general permit for the remainder of 1980 and 1981; (2) establish a revised allowable take schedule for non-prohibited species only for the remainder of 1980 and 1981; (3) restate the enforcement policy for accidental takings of depleted species/stocks; and, (4) amend gear, fishing procedure, and other requirements.

In accordance with Section 103(d) of the Act and the procedural rules published coincident with the proposal on February 15, 1980, the proposed regulations and all relevant available information were reviewed on the record in a hearing held pursuant to 5 U.S.C. 556 and 557 by an ALJ. The hearing was conducted in San Diego, California, from March 31 through April 5, 1980, and in Washington, D.C. on April 14, 15, and 18, and May 19, 1980.

The hearing focussed on the following issues: (a) estimates of existing levels of the species and population stocks of the marine mammals involved in purse seining yellowfin tuna; (b) the expected impact of the proposed regulations on the optimum sustainable populations of the species or population stocks involved; (c) the economic feasibility of implementing the proposed regulations; (d) the technological feasibility of implementing the proposed regulations; and (e) the impact of implementing the proposed regulations on the tuna stocks.

The ALJ, Hugh J. Dolan, issued his recommended decision on July 18, 1980. The recommended decision addresses all of the issues raised by the parties at the hearing, but does not reach a conclusion as to the status of northern offshore spotted porpoise stock or other stocks in the ETP. Despite the lack of a specific finding regarding depletion of any stock, the findings in the recommended decision strongly suggest a finding of non-depletion for the northern offshore spotted stock with an OSP in the range of 50–70% of the pre-exploitation population. Exceptions to the ALJ's findings were submitted to the Assistant Administrator for Fisheries by EDF, MMC, CHL, and ATA on August 8, 1980.

Summary of the Decision

I find, based on the record of the hearing, the ALJ's recommended decision, the exceptions filed thereto and the Environmental Impact Statement, that the northern offshore spotted porpoise stock is not depleted and that an allowable take of these animals will not be to the disadvantage of the stock or population as a whole. I find that the eastern spinner and the coastal spotted porpoise are depleted and no taking, other than that allowed under the accidental take policy, will be allowed. As to the remainder of the target stocks of porpoise in the ETP, I find that they are not depleted and that allowable takes will not be to the disadvantage of those stocks or populations as a whole. I further find that an annual quota of 20,500 is economically and technologically feasible and should be set for five years (1981 through 1985). I am directing the NMFS to monitor the activities of the tuna industry to determine whether it is technologically feasible to reduce further this quota during the next five years.

The record before me indicates that allowable incidental taking over the next five years will allow growth in

most non-depleted porpoise stocks in the ETP (See Table I). The 20,500 quota is a significant reduction as compared to quotas for the last three years. It is reflective of the industry's continued improvement in release of porpoises and demonstrates the industry's commitment to reduce mortalities. The quota of 20,500 for each of the next five years does not assume that the industry will not reduce mortalities further but rather is based on the record before me which demonstrates that the quotas will not be to the disadvantage of the affected stocks and are currently both technologically and economically feasible.

The record indicates that the northern offshore spotted stock will increase in size even if all of the mortalities in any given year were to be from this stock. Northern offshore spotted is the largest population in the ETP and the maximum replacement yield is over 100,000 animals per year. The maximum replacement yields for other stocks in the ETP for which takings will be allowed are also well in excess of the maximum take allowed for those stocks. There is no evidence which suggests that this growth trend will change. However, in the event that new evidence is discovered or that the continuing refinement of the NMFS resource assessment data suggests that takings may disadvantage any of these stocks, I am prepared to propose further amendments to the regulations, as was done in 1980. To insure that there will be no disadvantage to the stocks I am directing NMFS to continue to monitor and assess the status of all stocks in the ETP and to make a complete assessment of these stocks no later than 1984. If the evidence from that workshop or evidence developed prior to that workshop suggests that the takings of any stock may be to the disadvantage of the animals, NMFS will propose modifications to the regulations further to protect the populations.

In reaching my decision I have only adopted parts of the ALJ's recommended decision. Those parts of the recommended decision adopted are specifically referred to in my decision. Those parts that are not specifically adopted are rejected.

To make the disadvantage determination I have followed the approach used by the 1976 and 1979 workshops which requires an assessment of: (1) present abundance; (2) pre-exploitation stock size; (3) Optimum Sustainable Population (OSP); and (4) projected impact of takings. In summary, I find that the ratio of present population of northern offshore spotted (3.15 million to their pre-exploitation population (5.03 million) is above the lower end of OSP (60%). I find further that an allowable annual take of 20,500 animals in the aggregate will not disadvantage the stocks and is technologically and economically feasible. The application of my findings to other stocks under consideration, results in the eastern spinner and coastal spotted stocks being depleted, and the other ten not being depleted. Each of these parameters and the evidence supporting my conclusions are discussed below.

Detailed Findings

A. *Present Abundance.* There is no dispute that it is proper to calculate the present abundance of each porpoise stock by a computer model that combines the following factors:

(1) the mean size of porpoise schools;

(2) the density of porpoise schools in the inhabited area;

(3) area inhabited by stocks in the ETP;

(4) the proportion of schools that are "target" schools (i.e., spinner or spotted porpoise); and

(5) the proportion of target species within target schools.

All of the factors of the formula to compute present abundance were at issue in the hearing.

The Basic Data

The critical evidence for all of these factors is the data used to make the estimates. The four data sources in the record are—observers, tuna vessel records, aerial surveys, and research vessel surveys.

The observer data are recorded by Federal observers on tuna vessels. Those data are recorded on observer logs, which are sent to the Southwest Fisheries Center (F/SWC) for analysis.

Tuna vessel data are recorded by vessel employees who are required by the existing regulations (50 CFR 216.24(d)(3)(v)) to record the number, location and the size of the schools they encounter. These data are recorded on fishing logs which are forwarded to F/SWC for analysis.

Aerial survey data are collected by NMFS spotters from fixed wing aircraft. Aerial surveys were conducted in 1977 and 1979. Three spotters in each airplane collectively observed all porpoise schools and the size of the schools they encountered on a predetermined flight track. Due to the planes' limited range, only the eastern ETP was surveyed.

The research vessel surveys were conducted by the NOAA vessels *Cromwell* and the *Jordan* in 1977, 1979 and 1980. Porpoise school observations are collected from the bridge of the research vessels and like the aerial survey record, the data reflect the number and size of the schools encountered on a predetermined track line.

All these data are important as indicators of the present population size of the porpoise stocks in the ETP. Their use and the weight to be given to each data set were the subject of considerable controversy at the hearing. Each data set will be discussed in connection with the different elements that comprise the formula to estimate present abundance.

1. *Mean School Size.* The average school size in the population area may be determined by using any or all of the four data sources just described. The mean school size derived from each of these sources varies greatly. As the present population estimate and the pre-exploitation size depend to a great extent on mean school size estimates, their accurate calculation is crucial in determining disadvantage.

Each of the data sets that can be used to estimate mean school size has some bias. However, it is my judgment that the NMFS aerial survey data represents the best available scientific estimate of mean school size. This results in a mean school size of 201 animals. The basis for this judgment is set forth in the following paragraphs.

(a) *Observer Data.* There is record evidence that the observer data are biased, but there is no record evidence to establish how to correct for the bias in that data. Evidence indicates that tuna vessels selectively search for larger porpoise schools and, although observers record the schools accurately, they do not have the opportunity to see as many smaller schools, thereby biasing mean school size estimates upwards. (NOAA 29)[3] The 1979 workshop concluded that observer data were not statistically valid because they result in mean school size estimates that are 2 to 4 times higher than the mean school size derived from the aerial and vessel survey data (419–857); and therefore should not be used to compute mean school size. (NOAA 52) I have concluded on the basis of the record that the 1979 workshop was correct in excluding the observer data in view of its inability to correct for the bias in it.

[3] Citations in this decision are to exhibits introduced at the hearing. Citations to the transcript are made by the location of the hearing (San Diego or Washington) and the page number. Citations to the recommended decision are by findings or page number. Citations to the briefs of the parties are by name of the party and reference to the opening or reply brief.

While I have considered the arguments of the industry, accepted by the ALJ, that the data should be used, I cannot, on the basis of the record before me, quantify the bias, nor can I conclude that giving the average of observer data equal weight with the averages of the data from the aerial and vessel surveys is scientifically supportable.

(b) *Tuna Vessel Employees.* In addition to those biases noted for the observer data, there is substantial evidence that the tuna vessel employees do not record accurately the number of porpoises in the schools that they see. (NOAA 29) In addition, there is evidence suggesting that tuna vessel employees often do not count smaller schools at all. (NOAA 29) The effect of this is to introduce a bias into the data identical to that described in the preceding section on observer data. These data were also rejected by the workshop and in fact were not supported as useable data for school size estimates by any party to the proceeding. I find that these data are not the best scientific information available and therefore should not be used.

(c) *Research Vessel Data.* There were a total of four research vessel surveys which produced school size estimates in the record. In 1977, two cruises by the *Cromwell* and *Jordan* produced estimates of 137 and 186 respectively. The *Cromwell* cruise spent some time in the southern extreme of the ETP which is an area of lower density for porpoises. The *Cromwell* and *Jordan* data for 1979 were collected in the so-called inshore area (the area covered by the aerial survey) and the outside area. The cruises resulted in estimates of mean school size of 115 for the *Jordan* and 151 for the *Cromwell.* Two biases for these data are suggested by the record. The first is that the two vessels have bridges at different heights from the water and therefore the data may not be compatible. I find that there is substantial evidence in the record to show that this bias was accounted for. (SD 446–7, EDF/RB 5–6, NOAA/OB 25, NOAA 29: 37) The second is that the research vessels are slower than the tuna vessels and porpoise, particularly ones that have already been captured, may avoid any vessel. There is no evidence in the record to quantify this bias. These data were not used by the workshop for estimating mean school size, although they reinforce the accuracy of the aerial survey data. The workshop excluded the use of these data because they were not as reliable as the aerial survey data. I find that their exclusion, because of the uncertainty resulting from the speed of the research vessels, is supported by the record and that they are not the best available scientific evidence to estimate school size.

(d) *Aerial Surveys.* As indicated above, I have concluded that these data, which result in an estimate of 201, are the best data to derive mean school size. These data could be biased by adverse weather conditions causing lower estimates, and the inability of the aerial spotters to count submerged porpoises. There is evidence in the record on each of these potential biases.

The 1979 aerial survey was conducted by flying a plane on a predetermined trackline. If a school was seen off the trackline the plane would fly over the school and count the number of animals. Photographs were taken of some of the schools in order to validate aerial observers' ability to count accurately. Photos were taken in a time sequence so that all of the animals would be out of the water in one or more photos. This evidence demonstrates that the aerial observers can accurately count what they and the camera see independently. A second study (the so-called *Gina Anne* cruise in 1980) was conducted to determine if the camera recorded all of the porpoises in the school. (NOAA 76) After taking photos of the school from a helicopter and making visual estimates of school size, the school was set on and captured by the *Gina Anne.* The porpoises were released from the net during an extended backdown procedure and counted. This study demonstrates a high correlation between the photographic evidence and the actual number of porpoises in the school. It is my conclusion that the 1979 aerial survey data has a high degree of accuracy, and is the best available scientific evidence to determine mean school size.

2. *Density of Schools.* Density is the average number of schools found in a grid of 1,000 square nautical miles (nm^2). It is used as a multiplier of mean school size and is of equal importance with it. Even small errors in density can have a significant impact on present population size.

The 1979 workshop divided the ETP into an "inside" and an "outside" area, finding the former to have a density of 12.02 schools/1,000nm^2 and the latter a density of 6.26 schools/1,000nm^2. These densities were derived by calibrating the results of the 1979 aerial survey on the inside area to the results of research vessel surveys of both areas by the vessels *Jordan* and *Cromwell.* (NOAA 60: 13–15; NOAA 52: 17–19; NOAA/OB 11–25; EDF/OB 4–33; EDF/RB 3–8; EDF/EX 3–9) I conclude that the density estimate of the inside area in the 1979 workshop (12.02) is the best scientific evidence in the record. For the outside area, further refinement of an analysis introduced at the hearing results in the outside density estimate of 7.97. This is consistent with the ALJ's finding that the outside density was "underestimated" by NMFS. (Finding 116) As the arguments for the inside and outside densities differ, the remainder of this section will treat each separately.

(a) *Inside.* The inside area is determined by the range of an airplane capable of flying at slow speeds. It has no biological or ecological significance. The basic assumption of the aerial survey is that all large porpoise schools (those of more than 15 porpoises) on the airplane trackline are seen. (NOAA 60: 314, NOAA 29: 57–60, SD 366, 369) This assumption was the focus of most of the testimony on density.

The agency presented scientific opinion to show the correctness of its assumptions that schools do not move in response to the aircraft prior to being spotted and that the aerial sightings are independent events and are not biased by prior sightings. In addition, the agency submitted evidence to show that no biases could be demonstrated that were due to weather (sea state) or sunglare and that sighting conditions were similar in all statistical areas. (NOAA 52: 18–19, NOAA 29: 9–11) Factual and opinion evidence was submitted by Lt. Cmdr. Wayne Perryman to show that all large schools directly on the trackline were spotted. (SD 766–821) To counter this evidence, Gordon Broadhead, the industry expert and a former PBY pilot, argued that schools were missed on the trackline and that this did have a biasing effect and that the inside density should be raised from 12.02 to 23.4 schools/1,000 nm^2. (SD 921–922, ATA 39: 7, 15–16, SD 766–821)

NMFS's witness, Dr. Tim Smith, examined sea states by dividing the inside area into two areas, a "coastal band" and "offshore band." He noted that Beaufort 2, 3, and 4 conditions were more or less evenly distributed within the coastal band. This testimony shows that estimates of density for Beaufort 2, 3, and 4 sea states are approximately equal and, therefore, sea state does not have an effect. I conclude that Dr. Smith's analysis of weather effect is uncontroverted and is the best evidence in the record. (See also NOAA/OB 18–20; EDF/OB 5–15).

With respect to sun position, Dr. Smith analyzed densities for the four sun positions recorded by the observers in the 1979 aerial survey. The estimated densities by sun position do not show a consistent trend as might have been

expected if sun position had an effect. The ALJ found that sun glare does not have an effect. (Finding 15) His finding is supported by the record.

Finally, it is my judgment that the suggested bias for aerial observer differences is not substantial and that the proferred correction for it will not significantly affect the data.

(b) *Outside.* The outside density was computed by the 1979 workshop using the *Cromwell, Jordan* and the aerial survey data. NMFS showed that the vessel data which were collected in the inside and outside areas indicated a density gradient of approximately 2 to 1, inside to outside. It then applied this gradient to the aerial survey estimate of the inside density to arrive at the outside density.

The industry countered this approach by arguing that a gradient based on a ratio of outside and inside research vessel data tended to bias the outside density downward. The industry argued that the 1979 *Cromwell* cruise spent too much time in areas of known low density around the Equator. It suggested on brief that these data should be excluded as biased, and as a result, the outside density should be increased to 10.60. (ATA/OB 40–45) Its testimony on this point attempted to correct the *Cromwell* data mathematically, resulting in a density of 9.48. (ATA/OB 48)

When Dr. Tim Smith's analysis of "offshore" and "coastal bands" is applied to the inshore/offshore gradient, it changes the 1979 workshop estimate of an approximately 2 to 1 density ratio (inside to outside) to 3 to 2. Both the methodology and the data on which to apply it are in the record, although the actual analysis on research vessel data is not. This methodology represents a significant refinement to the outside density determination and results in an increase in the outside density to 7.97.

Two potential biases remain to be addressed. The ALJ found that a bias resulted in the research vessel surveys because the two vessels were not identical. I find that the evidence in the record indicates that the calibration exercise accounted for this potential bias by keeping data from the two boats separate. As to the remaining potential bias, I find that the industry's argument that in 1979 the *Cromwell* spent too much time along the Equator, which is a low porpoise density area, does not have merit. In order to determine density, the research survey had to take a representative sample of the entire area inhabited.

3. *Area Inhabited.* In the population estimation model that all parties used, the estimate of the total number of porpoise is obtained by multiplying density times the mean school size times the total area inhabited by the stocks. I have concluded that an area of 3.6 million nm^2 is the best available scientific estimate of the area inhabited by all stocks.

In the 1976 workshop, this area was taken to be the known historical range inhabited by each stock and was estimated from plots of locations where schools had been sighted from a variety of platforms. (NOAA 1) The 1979 workshop took the same basic approach, using accumulated sightings from research vessels to eliminate regions where porpoise were suspected but where none was revealed in the survey. (NOAA 60:18) Tuna vessel data from 1977 to 1979 were not used because they had not been analyzed and edited prior to the 1979 workshop. (SD 272–274)

The industry made two arguments: (1) the area of each stock was larger within the ETP and (2) the overall range was larger than recognized by the workshop. The industry introduced evidence of porpoise sightings by research vessels beyond the range used by the 1979 workshop. (ATA 41) the agency countered this argument with the explanation that the gradient theory suggested that if the ETP were further stratified the density of porpoises in the far western range would decrease and hence the impact of these far western sightings would be insignificant.

The industry also argued that the stock ranges within the total range were greater than those used by the 1979 workshop. It argued that the 1977, 1978, and 1979 observer data showed greater ranges of individual stocks. (ATA/OB 22) The agency admitted that these data had not been used by the workshop (NOAA/85:4a), but introduced an analysis of those data at the hearing (NOAA 71, 72 and 73) and argued that the data did not support extended stock ranges.

It is my judgment that the basic assumption that density increases nearshore and decreases offshore is supported by the evidence. As there is an inverse relationship between the western extension of the area inhabited and the number of porpoise schools sighted, far western sightings would only decrease the outside density if they were properly computed. Therefore, the net effect would be an insignificant increase in population size.

4. *Proportions of Stocks.* The three elements just discussed will only provide the number of porpoises in the aggregate. In order to determine the proportion of the aggregate that are attributable to each stock the 1979 workshop employed a two step process: (a) calculation of the proportion of all schools that are target schools (i.e, those that are fished on); (b) apportionment of target shools into component target stocks.

(a) *Proportion of all Schools that are Target Schools.* I conclude that the 1979 workshop approach to the proportion of all schools that are target schools is the best available scientific evidence. The 1979 workshop utilized data from the aerial and the research vessel surveys to determine the proportions of all schools which were target schools. (NOAA 29:48) The industry challenged NMFS' failure to use the observer data in determining the proportions of all schools which were target schools. (SD 929) The agency introuced evidence indicating that this calculation depends on an assumption that vessels from which the data are collected search for all species in a random manner. (SD 460–461) Tuna vessel observer data were not used because NMFS belived that the tuna vessels selectively search for target schools and ignored non-target schools. (NOAA 29, pp. 72–73; SD 460–461) I find this approach is proper.

(b) *Apportionment of Target Schools.* I conclude that the 1979 workshop approach to apportioning stocks within target schools is the best available scientific evidence. To determine the specific stocks in target schools, the 1979 workshop relied on the research vessel data in 1977 and 1979 and the tuna vessel observer data from 1977 to 1979. (NOAA 29) Aerial survey data were not used for the more detailed proportions because of difficulties in identification from the air. (Id.)

The industry did not counter the use of observer data to determine specific stocks and populations in target schools. EDF did not submit evidence but argued that if the observer data biases were correct, the use of such data in determining apportionment of stocks within target schools overestimates the current population of northern offshore spotted porpoise stock. (EDF/OB 43) EDF pointed to the 1979 workshop alternative approach to consider species proportions in target schools and the Inter-American Tropical Tuna Commission (IATTC) calculation of the same parameter, arguing that they are similar and are the best scientific evidence in the record. Despite EDF's contention that two calculation are better than one, the 1979 workshop chose to use observer data in combination with the research vessel data in making its calculation. It did this fully apprised of the deficiencies in the observer data. I have concluded that there is no strong evidence contrary to the workshop's scientific judgment and

that it is the best scientific evidence available.

5. *Summary of Present Abundance.* The findings in the preceding section result in a present population for northern offshore spotted porpoise of approximately 3.15 million animals. Though this is somewhat higher than the 1979 workshop estimate of 2.7 million, the findings above are generally consistent with the workshop conclusions, with the exception of the outside density. There are a number of uncertainties in predicting accurately the present abundance of the porpoise populations in the ETP. The model used and the data applied have, for the most part, resolved those uncertainties in favor of the porpoise populations. This inherent conservatism is important in order to ensure that takings will not be to the disadvantage of the stocks as a whole.

B. *Pre-exploitation Abundance.* Once present abundance for each stock is estimated, there must be a "back calculation" in order to determine the abundance of each stock in the first year the stock was exploited to a significant extent. 1959 is the year that the industry began using purse seines on a large scale, and most of the porpoise stocks are assumed to have been at their maximum size (by number and area) in that year. Back calculation involves a theoretical addition to present abundance of all porpoises incidentally killed since 1959 and a subtraction of the number of net recruits added to the stock in the interim years. The addition of historically killed porpoise involved three areas of controversy: number of sets in the early years of the fishery; kill per set; and, the species composition of the porpoises incidentally killed. The subtraction is determined solely by reference to an estimated maximum net reproductive rate for ETP porpoises, known as "Rmax".

1. *Additions.* a. *Number of Sets.* An estimate of the number of sets by the the tuna fleet between 1959 and 1979 is used to establish the total number of fishing mortalities to be added to the present population. This is derived using historical records from IATTC Logbooks.

For the 1971 season and beyond, the 1979 workshop used data that NMFS had collected. These data are for the most part uncontested. The data for 1959–70 from the Inter-American Tropical Tuna Commission show 3 types of sets—on porpoise, not on porpoise, and unknown. (NOAA 27 and NOAA 52) The workshop used a proportion of the number of sets from 1959 to 1970 that were either on porpoise or not on porpoise. It then applied this proportion to the unknown sets. The industry introduced evidence from Dr. Allen of the IATTC to show that this assumption was incorrect and that by using IATTC data, a more accurate estimate of the unknown sets could be made. (ATA 42)

The industry argued that NMFS overestimated the number of sets in the early years by 6500. It based this argument on evidence submitted by Dr. Allen. These data were not available to NMFS prior to the hearing. (ATA 2) In an attempt to resolve the matter, Drs. Smith and Allen and Mr. Alverson convened a scientific working session after the hearing. Their report to the ALJ was inconclusive and reiterated the original positions of the parties. (Letter to Dolan May 16, 1980; See also NOAA 85:7–8; NOAA/OB 37–39; ATA/OB 51–53; EDF/OB 53–58; MMC/OB 21–23)

On the state of the record, Dr. Allen's analysis is a better analysis of the early sets than the methodology applied by the workshop. This analysis is based on historical data not previously available and reflects with greater accuracy than the NMFS estimate the actual fishing effort in the 1960's. From this analysis, I have concluded that the workshop overestimated the additions to the stock by 6500 sets. These data should be further refined in the future but the analysis as it was introduced in the record is superior to the arbitrary apportionment applied by the workshop. In addition, it is based on data, which before the hearing had not been made available to NMFS to assist in its estimation of historic kills. I conclude that it is the best available scientific information.

b. *Number of porpoises killed in each set.* In order to estimate the total number of additions, it is also necessary to determine the number of porpoises killed in each set. Like the estimate of number of sets, good data exist for the 1971–79 period. However, little or no data exist for the 1959–70 period. Three factors are important—the data used to derive the estimate of kill per set; when and to what extent backdown was introduced in the fleet; and the treatment of serious injuries, unobserved injuries and cryptic kill.

i. *Data.* The 1979 workshop used data points from 1972, 1971, 1968, 1966 and 1964 to estimate the kill per set of sets for two vessel sizes, for successful and unsuccessful sets, and for sets with and without backdown. Because the workshop had substantially more data from 1971 and 1972 than from the other years and treated all the data equally, the data are skewed toward the 1971 and 1972 data. During the course of the hearing differences in those data were resolved and presented in a document proposed jointly by NMFS and the industry. (NOAA 87) Therefore, I have concluded that the best available scientific evidence is the kill per set figure in this exhibit.

ii. *Introduction of Backdown.* Since the kill per set estimates have a higher number of mortalities for sets without backdown than with, it is important to assess which sets used backdown and which did not.

The workshop concluded that the fleet used the backdown technique on 80% of the sets in 1964 and that the 80% was achieved linearly over these six fishing years from 1959. (NOAA 27) This conclusion differs from the 1976 workshop which concluded 100% in 3 years. This change was a result of the discovery of one letter (the Lopes letter, ATA 14), which establishes 80% use of backdown by one vessel on 110 sets in 1964. The industry did not present evidence to conclude otherwise but argued that the 1976 workshop was a more reasonable approach.

The 1976 workshop assumed 100% in three years based on interviews with people familiar with the fleet. (NOAA 27: 4–5) The industry presented evidence (Alverson SD 569 Lines 15–23) that the fleet did adopt the backdown procedure between 1959–62 and that the calculation should be amended to take this into consideration.

The issue here requires a factual determination. The competing views are the opinion of the industry's expert, Mr. Alverson, that there was an exponential rather than linear introduction of backdown reaching the 80% mark in 1964, versus the written and oral testimony of an agency scientist that a straight line drawn between two data points, zero in 1959 and 80% in 1964, is reasonable. Neither Mr. Alverson nor the agency witness on this point had any extensive experience on tuna vessels during the period, and the industry did not put a skipper on the stand to argue that there was a rapid introduction of backdown over the period 1959–1964. The existence of the Lopes letter is meager evidence on which to base the agency's assumption. Lopes saw only 110 sets on one vessel. He did not appear at the hearing, but there is no evidence in the record challenging the authenticity of the letter.

The evidence in the record suggests that the industry did go to 80% earlier than the linear approach used by the workshop. Therefore I have concluded that the industry employed backdown in 80% of all sets by 1962 and introduced backdown linearly from 1959 to 1962. Thereafter, it used backdown 80% of the time for 1962, 1963 and 1964.

iii. *Serious Injury.* In calculating kill, the basic assumption is that some or all of the injured animals die, resulting in an increase in overall mortality. This parameter is of minor significance to the formula, but can be used to accommodate for cryptic kill (i.e., unobserved mortalities resulting from the stress from chase and capture not occurring until after the animals are released from the net).

NMFS argued that the proper assumption was to include as mortalities all seriously injured animals, as this took into account cryptic kills and unobserved injuries. The industry argued that the assumption was incorrect and offered an alternative calculation to show how serious injuries could be taken into account. (ATA 37)

The ALJ found that it was reasonable to assume that not all animals seriously injured died, but was unable to apportion serious injuries as mortalities or survivals. (Finding 65) He went on to find that there was no evidence to quantify cryptic kill. (Finding 66) He concluded that the workshop approach of considering all serious injuries as mortalities was correct, because this took into account cryptic kill and unobserved injury. I adopt the conclusions of the ALJ on this point.

(c) *Apportioning Historic Kill.* Once there is a determination of how many animals were killed, it is still necessary to apportion the kill by species. The 1979 workshop used a species proportion based on the 1971 and 1972 kill figures and applied that proportion to the number of kills in the 1959–70 period. The industry argued that data from 1959–70 should be used to make the apportionment.

The industry submitted an analysis covering the period 1959–70 based on Dr. Allen's data in which there were 6,500 fewer sets on porpoise. (ATA 42, Appendix 4) The industry's witness testified that the fleet had expanded its geographical range to the west from near shore areas throughout the 60's. (ATA 42) It then went on to argue that the species mix inshore and offshore varies and would result in different mortality figures for given stocks depending on the area fished. There was no cross examination of the industry's witness on this point.

The NMFS approach to apportionment is not consistent with the westward progression of the fleet. It assumes that the stocks fished on in 1970 and 1971 were the same as for the prior 10 years. This would be true if the early fishery (1959–69) was in the same area as the 1970 and 1971 fishing areas or if the stocks were evenly distributed in all areas. Neither assumption is consistent with the evidence.

ATA 42 provides an analysis of the western movement of the fleet and the gradually increasing involvement of the northern offshore spotted stock in the fishery. From the charts presented I have concluded that the fleet could not have taken this stock in the numbers derived from the 1970–71 ratio. ATA 42 also provides an alternative estimate of this impact. (ATA 42:83) These data admittedly are not as precise as they could be given further refinements in the calculation, but they are substantially bettter evidence than that used in the 1979 workshop report and are the best available scientific evidence. ATA 42 indicates that 1,348,814 fewer northern offshore spotted porpoises were killed than the 1979 workshop indicates. This is a result of the 6500 set overestimation discussed above and a comparison of the fleet's activity in the early years in relation to the nearshore range of the northern offshore spotted porpoise. The workshop in making its analysis of the spotted data concluded that all spotted were northern offshore spotted porpoise. ATA 42 concludes that the majority were coastal spotted because the fishing effort was in their range and not the range of the northern offshore spotted. The effect of this is that 670,000 coastal spotteds were caught in the early years of the fishery.

These data can only be used for the apportionment of kills of northern offshore and coastal spotted porpoise. Since this information provides a specific number of coastal and northern offshore spotted porpoise killed, it is unnecessary to make findings for those stocks on number of sets and on kills per set. Number of sets and kills per set are only necessary for those stocks that do not have specific evidence. There is no other evidence in the record regarding historical apportionment of kills for the other stocks in the ETP. Therefore the apportionment used by the 1979 workshop is the best evidence in the record to apportion stocks other than coastal and northern offshore spotted.

2. *Subtractions.* Once the number of historic kills is determined, it is necessary to estimate the number of animals added to the population annually. This is computed by determining the maximum rate of reproduction for the stock. This number is subtracted from historic kills to arrive at the overall number to be added to the present population.

(a) *Rmax.* Rmax is the maximum rate of net reproduction by ETP porpoises on an annual basis. Rmax is derived by subtracting natural mortality from the gross annual reproductive rate. As noted above, this figure is used in the back calculation to determine pre-exploitation stock size. In the event a stock is not depleted, Rmax is also used to determine the replacement yield from which the applicable quota is determined. (NOAA 56)

The 1979 workshop determined that every Rmax in the 0–4% range was equally likely. This conclusion is based on the workshop's rejection of the 1976 workshop comparison to dolphin stocks near Japan and adoption of the view that no cetaceans have a known Rmax in excess of 4%. (NOAA 52) The industry pointed out several deficiencies in the data used in the 1979 workshop, specifically the statement with respect to no record of cetacean Rmax's above 4%. (ATA 38)

The industry argued that there was no evidence to suggest a change from the range of 2–6% adopted by the 1976 workshop and that the appropriate level could be as high as 6–10%. (ATA 38) The industry's witness pointed to several data sources to support his conclusion that Rmax's for other cetaceans were higher than the workshop estimate. NMFS countered this by presenting and analyzing life history data for marine mammals. (NOAA 52: 37–43) Other submissions pointed out difficulties in the way industry had relied on data showing higher Rmax estimates for other cetaceans. (MMC/OB)

The ALJ found that the Rmax was 4% and based his finding on the 1976 workshop report (NOAA 1) which concluded that Rmax could be from 2–6%. (Findings 137–143)

The 1979 workshop based its estimate on comparisons to known data for terrestrial mammals and some data for large whales. The lower end of the range, 0%–2%, reflects a concern over the effects of cryptic kill. The workshop took this into account in the serious injury mortality figures and its addition here would be overly conservative. The remaining portion of the range, 2–4%, is a more accurate estimate. The workshop concluded that scientifically any Rmax from 0–4% is equally likely. The ALJ's judgment was that 4% was the correct point estimate because he saw no reason to deviate from the 2–6% in the 1976 workshop. Which level of Rmax is appropriate requires an assessment of the expert opinions of the witnesses at the hearing. I conclude that the ALJ's assessment of the evidence is correct in that the evidence does not convince me that an Rmax of 2% has greater support than the midpoint of the range (4%) used in my 1977 decision. (Findings 136–143) Therefore, I find that an Rmax of 4%, as supported by the scientific conclusion of

the workshop, is the best available scientific point estimate.

3. *Summary of pre-exploitation stock size.* A computation of the findings above results in a pre-exploitation stock size for northern offshore spotted porpoise of approximately 5.03 million animals.

C. *OSP.* Optimum Sustainable Population is the standard by which a determination of disadvantage to a porpoise stock is made. The standard has been expressed as a range, which is a measure of the health of the various porpoise stocks relative to their environment. (NOAA 52 and NOAA 56)

When a population is below OSP, it is depleted. The upper end of the range of OSP is a stock size in relation to the original unexploited stock, that is, the maximum number of animals that the ecosystem can support. This is expressed by a percentage of original stock size.

The significant issue at the 1980 hearing involved determining the lower end of OSP. The lower end has been expressed as a range, so that the focus is on a range within a range. The lower end is determined theoretically by estimating what size stock in relation to the original stock size will produce the maximum net increase in population. Every population of animals has a size at which it will increase at a maximum rate. That level, known as the Maximum Net Productivity Level (MNPL), is the lower end of OSP. MNPL is expressed as a range to reflect uncertainties in the data. However, in 1977, the midpoint (60%) of this range (50–70%) was used to determine if the stock was depleted (42 F.R. 64548, Dec. 27, 1977).

At this year's hearing NMFS argued that a range of 65–80% was appropriate based on the 1979 workshop report. The report compares porpoises to other mammals and abandons the 1976 workshop approach of the linear relationship between stock growth and reproductive rates. This more conservative approach is based on the observation that large mammals are longer lived and reproduce later in life and, therefore, require a larger population to achieve MNPL, than smaller animals such as rodents.

The industry argued that the 1976 workshop's theoretical approach to MNPL was correct, and that no new evidence was available to suggest 65–80%, other than the shift in the approach of the workshop. In its cross-examination of the agency's lead witness, the industry pointed out that an MNPL of 60% is used by the International Whaling Commission. (SD 225–6)

The ALJ found that the lower bound of OSP was between 50–70% of original stock size. He found that the 50–70% range was already conservative and that a change to 65–80% range based on a change in population dynamics theory, rather than new data, was unwarranted. (Findings 144–50)

The empirical data for calculating OSP are admittedly scant. The agency put forward a new theoretical approach to OSP (NOAA 15) which results in a more conservative estimate of MNPL. The workshop found that biologically any number between 65–80% was equally likely. The industry testimony (ATA 36) shows that the MNPL levels for seven mammals with a low of 56 (for deer) and a high of 86 (for elephants). The industry's witness, Mr. Fredin, described these as "the best available evidence" on MNPL for seven populations of large mammals. (TR 188) By averaging these data using each point estimate, Mr. Fredin arrived at MNPL of 66.5.

The record reflects that there is dispute as to which concept should be used to find MNPL for porpoises, and that, under either concept, there is a scarcity of data to provide certainty for any MNPL calculation. I have concluded that the theoretical approach used by the 1979 workshop, that is, that there is a curvilinear density dependent relationship, is the best available scientific approach despite its narrow exposure in the scientific community. It seems more than plausible that porpoises, like other large mammals, are relatively long-lived and reproduce late in life.

Despite my agreement with the workshop's theoretical approach, I cannot conclude that the range used by the workshop (65–80%) is the best. There is no direct evidence that porpoise populations fit the theoretical model. Further, while the 1979 workshop concluded that MNPL is ". . . significantly higher than 50%. . . ." (NOAA 52:7), this does not ineluctably lead to a choice of a range of 65–80. The International Whaling Commission uses an MNPL of 60 for populations of longer lived and larger animals than those in question here. Although some persons before the IWC have questioned that level, as the level is being questioned here, the IWC, which includes experts from the world over, has not changed the MNPL for larger marine mammals. In addition, the ALJ was not persuaded by the selection of the range of 65–80. Like the ALJ, I do not believe that a departure from the prior point estimate of MNPL is warranted from the population comparisons used by the workshop. Therefore, I conclude that the best scientific evidence in the record is that 60 is the point where the lower range of OSP should be set.

D. *Impacts of Takings.* There are two issues that must be resolved in the event a species is not depleted. The first is to determine the level of take that will satisfy the Act's immediate goal objective. It is satisfied by establishing quotas that are economically and technologically feasible and that will not be to the disadvantage of the stocks. I have concluded that an aggregate take of 20,500 animals is technologically and economically feasible and will not be to the disadvantage of stocks from which takings are allowed. In this regard I have taken into account the lengthy discussion of the industry and its activities in both the DEIS and the FEIS. In particular, I incorporate by reference in this decision the discussion of the industry at pages 39–43 of the FEIS. The aggregate quota is apportioned as set out in Table II. The second issue is to determine the length of the regulatory regime and permit. I have concluded that the regulations should be in place indefinitely and that a five year permit can be issued.

1. *Quotas.* In the event of a determination of non depletion, the Act reuires a finding that the stocks will not be disadvantaged by allowing any takings. This determination is made by estimating the maximum replacement yield of each stock. (Rmax times present stock size). The replacement yield for each stock is then divided between anticipated foreign and domestic takes.

Once this aggregate number is established, there can be an apportionment of the total quota to obtain allowable takes for each stock. After apportionment it can be determined what take is economically and technologically feasible in order to meet the MMPA's immediate goal test. The application of this test results in the actual quotas.

The kill of porpoises per ton of tuna caught has been used in the past as an indicator of economic and technological feasibility. The DEIS used the period of 1977–79 as representative of the expected tuna catch for future projections. (NOAA 56) The industry argued that the period from 1970–79 was more appropriate. (ATA 43) The average catch in the 1977–79 period was 69,000 tons of tuna, while the average for the 1970–79 period was 98,000 tons of tuna. I have concluded that fishing during the 1970–79 period does not reflect fishing patterns projected for the next five years. There was no regulation of the incidental take of marine mammals for a significant portion of the period. In addition, the ban to be adopted on sundown sets and the previous ban on the take of eastern spinners alter the fishing pattern over this period.

Table II.—*Quotas for Each Calendar Year 1981–85*

Species/stock (management unit)	Maximum replacement yield	U.S. allowable mortality [1]	Encirclement	Take
Spotted dolphin (northern offshore)	85,335	11,890	5,993,000	9,606,000
Spotted dolphin (southern offshore)	11,395	410	206,000	331,000
Spinner dolphin (northern whitebelly)	10,643	3,075	403,000	695,000
Spinner dolphin (southern whitebelly)	4,970	205	27,000	46,000
Common dolphin (northern tropical) [2]	3,781	1,230	293,000	471,000
Common dolphin (central tropical)	16,225	2,870	298,000	927,000
Common dolphin (southern tropical)	8,091	615	64,000	198,000
Striped dolphin (northern tropical)	858	62	3,000	4,000
Striped dolphin (central tropical)	3,644	103	5,000	7,000
Striped dolphin (southern tropical)	8,190	40	2,000	3,000
Total		20,500		

[1] The U.S. allowable mortality in any of the years 1981–85 shall next exceed 20,500.
[2] Includes Baja neritic dolphin stock.

I am cognizant of the concern that the quota should accommodate for a good fishing year. Therefore, I find that the highest annual catch (93,000) during the 1977–79 period is the best indicator of the projected catch of tuna. In addition, I find that the 1977–79 period is the best period from which to apportion the modified replacement yield to arrive at individual stock quotas. This figure multiplied by a kill/ton rate of .24 results in a quota of 22,320. This quota is further modified by 8.5% to reflect the lost catch due to my adoption of the ban on sundown sets. This results in a quota of 20,500.

2. *Length of the Regulatory Regime and Permit.* The disadvantage test is a continuing obligation of the agency. It requires that the agency must assure itself that takings over the period of the permit will not disadvantage the stocks. Historically, the length of the regulatory regime has coincided with the length of the permit, but this is not required by the Act.

At the hearing, NMFS argued that northern offshore spotted porpoise were depleted and therefore did not address the length of the regulatory regime or permit if they were not depleted. The industry asked for a five year permit. On brief, it argued for a multi year permit because of the costs to the agency and the industry in preparing for the hearing. (ATA OB 105–6)

The length of the regime and permit requires a policy, as well as a scientific judgment. I am concerned that the effort to compile a record in proceedings like this one, places a significant burden on the agency and the parties. However, this burden must be subservient to the Act's requirement that the health of animals be considered prior to the effects of the regulations on the industry. So long as there is an assurance that the populations will not be disadvantaged by the proposed takings, there is no need to adjust the taking regulations except for modifications to the existing quotas to achieve the Act's immediate goal objective. If the stocks are not now depleted (with the exception of the eastern spinner and coastal spotted stocks), the record reflects that most of the stocks should grow. Therefore, I have made a determination that the level of takes allowed in Table II will not disadvantage the stocks in any subsequent years. This finding is made until there is evidence to the contrary. In order to ensure that there is a mechanism in place within which to review the quota, I have concluded that a five year permit is appropriate.

Regulations

NMFS proposed 24 separate regulatory amendments to the existing regulations. The recommended decision of the ALJ in this proceeding contains recommendations pertaining to each of the 24 proposed amendments and, additionally, to the regulations governing this proceeding and to Section 216.24(d)(2)(iv) (numbered 25 and 26 on pages 92 and 93, respectively).

Of the proposed amendments to the regulations, the ALJ recommended adoption of 1, 2, 4, 8, 10, 11, 12, 13, 15, 16, 18, 22, 23, and 24. For the reasons stated by the ALJ, I adopt those amendments.

The ALJ also recommended adoption of the following modified proposed amendments to the regulations: (ALJ Recommended Decision pp. 64–69, 70–71, and 75–79) those numbered 6 and 7, assuming that the northern offshore spotted stock of porpoises is not depleted; that numbered 9 with the retention of the words "threat of"; and that numbered 14 with the provision of some discretion to the Regional Director, Southwest Region, in determining the necessity for an additional trial set(s). I hereby adopt those modifications to the amendments to the regulations.

The ALJ did not recommend adoption of the proposed amendments numbered 3, 20, and 21 because of lack of record support. All of these proposals were included in the notice of proposed regulations and ample opportunity for comment was provided during this proceeding. In the absence of any comments, these proposals are uncontested and I therefore adopt them according to the identical test employed by the ALJ in recommending adoption of the proposed amendments number 11, 16, and 23. Proposed amendment number 21 has been rewritten to reflect that countries of origin that do not have current findings may submit information and request a finding at any time of the year and not be bound to a September 1 deadline for filing. Countries of origin for which there is a finding must submit information for review by September 1, that pertains to the preceding calendar year.

Proposed amendment 17 contained two substantive changes to Section 216.24(d)(2)(vii), marine mammal release requirements. First, the ALJ recommended a modified amendment to the required use of speedboats which I hereby adopt. Secondly, the ALJ recommended adoption of the proposed prohibition on setting at sundown only if there is concurrently adopted a program of observer placement on all purse seining tuna fishing vessels. Such a condition is no more appropriately applied to this particular procedural requirement than it is to other such requirements and is inconsistent with the industry's sustained and successful efforts to reduce porpoise mortalities. I therefore adopt the proposed prohibition on setting at sundown without modification.

Proposed amendment numbered 19 contained the additional requirement for certain non-yellowfin tuna imports to be accompanied by a bill of lading. I have concluded that this additional requirement is unnecessary at this time because it would apply to very few cases and provide information that is available by other means. Therefore, the existing language in Section 216.24(e)(3) will remain, with the following

exception. The reference to pilchards from South Africa has become obsolete as this country has sought and been granted an import finding referred to under 50 CFR 216.24(e)(1) for such imports. Reference to pilchards from South Africa is deleted from 50 CFR 216.24(e)(3) and consequently from Section 216.24(e)(2)(i).

It is unnecessary to address ALJ recommendation 25 which dealt with the expedited procedures under which these regulations were developed, since the regulations in Part 216 Appendix terminate with the issuance of this decision.

The recommended amendment to Section 216.24(d)(2)(iv) numbered 26 (page 93 of the ALJ's recommended decision) is not adopted. The methodology for monitoring the incidental mortality of marine mammals referred to in Section 216.24(d)(2)(B) relies on fishing gear and procedural requirements that are standardized for the entire U.S. fleet. To compromise this standardization in any substantial manner would remove the existing basis for extrapolating known incidental porpoise takings reported by observers to those fishing trips that are not assigned an observer.

I have made certain additional editorial amendments to Section 216.24 for purposes of further simplification and clarification. They are non-substantive in nature. Many portions of Section 216.24 have not been amended. However, for ease of understanding, the entire section is republished herein.

In addition to the alternative I have adopted, I have considered those regulatory alternatives contained in the FEIS and the DEIS. I have concluded as a result of the review of all of the alternatives, that the regulatory regime adopted is the environmentally preferred alternative and represents the best approach under the Act. I concur in the analysis of the alternatives at pages 11–14 of the FEIS and incorporate it by reference in this final decision. The evidence simply does not support the first alternative. The quota in the second alternative far exceeds the quota that the fleet can technologically achieve. The third alternative is inconsistent with my finding that the northern offshore spotted stock is not depleted. The fourth alternative is impractical at this time, although efforts to achieve this objective will continue. Lastly, the fifth alternative, like the first, is not supported by the evidence.

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 exceptions to the ALJ decision with me.

Dated: October 21, 1980.

Richard A. Frank,

Administrator, NOAA.

50 CFR § 216.24 is revised to read as follows:

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

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

(2) A vessel engaged in commercial fishing operation involving the utilization of purse seines to capture yellowfin tuna and which does not operate under a general permit and certificates of inclusion shall not carry more than two speedboats.

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

(iii) *Category 3: Encircling Gear, Pursue Seining not Involving the International Taking of Marine Mammals.* Commercial fishing operations utilizing pursue 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, hooks 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 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 of class of commercial fishermen must be included;

(ii) A description 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 operations 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 Sec. 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 act 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, Department of Commerce, 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 Office of Marine Mammals and Endangered Species, telephone number 202-634-7461.

(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 Sec. 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 Sec. 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. Provided five (5) days advance written notice is given, a vessel certificate holder may surrender his certificate to the Regional Office from which the certificate was issued. 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) of this section shall be aboard the vessel while it is engaged in fishing operations and the operator's certificate issued pursuant to paragraph (c)(2) of this section 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 and operators at sea on a fishing trip on the expiration date of their certificate of inclusion, to whom or to which a certificate of inclusion for the next year has been issued, may take marine mammals under the terms of the new certificate.

The vessel owners or operators are obligated to obtain physically 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, Washington 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, California 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, Massachusetts 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, Florida 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, California 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; and

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

(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 applications 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:

(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 provisions of the general permit or certificate of inclusion including, but not limited to, failure to submit the vessel, including required marine mammals 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.*—(i) *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 (*Dephinus 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 each of the calendar years 1981–1985 by U.S. vessels in the course of commercial fishing operations will be limited as follows:

Quotas for Each Calendar Year 1981–85

Species/stock (management unit)	Take	Encirclement	Mortality [1]
Spotted dolphin (northern offshore)	9,606,000	5,993,000	11,890
Spotted dolphin (southern offshore)	331,000	206,000	410
Spinner dolphin (northern whitebelly)	695,000	403,000	3,075
Spinner dolphin (southern whitebelly)	46,000	27,000	205
Common dolphin (northern tropical) [2]	471,000	293,000	1,230
Common dolphin (central tropical)	927,000	298,000	2,870

Quotas for Each Calendar Year 1981-85—Continued

Species/stock (management unit)	Take	Encirclement	Mortality [1]
Common dolphin (southern tropical)	198,000	64,000	615
Striped dolphin (northern tropical)	4,000	3,000	62
Striped dolphin (central tropical)	7,000	5,000	103
Striped dolphin (southern tropical)	3,000	2,000	40

[1] The U.S. allowable mortality in any of the years 1981-85 shall not exceed 20,500.
[2] Includes Baja neritic dolphin stock.

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

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

(D) The general permit will be valid for a period not to exceed five years. The Assistant Administrator may, upon receipt of new information which in his opinion is sufficient to require modification of the general permit or regulations, propose to modify such after consultation with the Marine Mammal Commission. These modifications 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 presented in the notice, the Administrator shall render a decision within 20 days from receipt of the notice.

(ii) *General Conditions:* (A) Marine mammals incidentally taken shall be immediately returned to the environment where captured without further injury. In addition to the specific porpoise rescue requirements established in Sec. 216.24(d)(2), 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 set on marine mammals when conditions of wind, sea state, visibility, or the number of marine mammals and/or fish prevent the effective use of backdown and other required porpoise rescue procedures.

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

(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, California 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.

(D) The vessel certificate holder shall notify the field office, Southwest Region, National Marine Fisheries Service, 1140 North Harbor Drive, Room 7, San Diego, California 92101, telephone 714-293-6540, of any change of vessel operator within at least 48 hours prior to departing on the next scheduled trip.

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

(A) The vessel certificate holder of each certificated vessel, who has been notified via certified letter from the National Marine Fisheries Service that his vessel is required to carry an observer, shall notify the field office, Southwest Region, National Marine Fisheries Service, San Diego, California, telephone 714-293-6540 at least five (5) days in advance of the vessel's departure on a fishing voyage to allow for observer placement. After a fishing voyage is initiated, the vessel is obligated to carry an observer until the vessel returns to port and one of the following conditions is met: (*1*) Unloads more than 400 tons of any species of tuna; or (*2*) unloads any amount of any species of tuna equivalent to one half of the vessel's carrying capacity; or (*3*) unloads its tuna catch after 40 days or more at sea from the date of departure. Further, the Regional Director, Southwest Region, may consider special circumstances for exemptions to this definition, provided written requests clearly describing the circumstances are received at leat ten (10) days prior to the termination or the initiation of a fishing voyage. A response to the written request will be made by the Regional Director within five (5) days after receipt of the request. A vessel whose vessel certificate holder has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.

(B) 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 take of marine mammals and other observer collected data at such times as specified by the Regional Director, Southwest Region. Individual vessel names and 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) 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 the vessel's 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 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.

(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 requirement for the porpoise safety panel and other gear and equipment are as follows:

(A) Porpoise Safety Panel—Class I and II Vessels: For Class I purse seiners (400 short tons carrying capacity or less) and for Class II purse seiners (greater than 400 short tons carrying capacity, built before 1961), the porpoise safety panel 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 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. The perimeter of the backdown area is the length of corkline which begins at the outboard end of the last bow bunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point. 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 (greater than 400 short tons carrying capacity, 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. The perimeter of the backdown area is the length of corkline which begins at the outboard end of the last bowbunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point. The porpoise safety panel 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 consisteing 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 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 porpoise 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 permanently marked so as to be clearly visible from the vessel. Each time a super apron is reinstalled after removal from a net or the net depth is altered, the vessel and gear shall be made available for reinspection by an authorized National Marine Fisheries Service Inspector as specified by the Regional Director, Southwest Region, who may require that another trial set(s) be made for proper apron alignment and adjustment. The vessel certificate holder shall provide at least five (5) days advance notification to the field office, Southwest Region, National Marine Fisheries Service, 1140 North Harbor Drive, Room 7, San Diego, California 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 a 1⅜" 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 1⅜" diameter will not meet resistance when inserted between the cork and corkline hangings, must be tightened so that a cylindrical object with a 1⅜" diameter cannot be inserted.

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

(B) Reinspection: Purse seine nets and other gear and equipment required by these regulations shall be made available for reinspection by an authorized National Marine Fisheries Service Inspector as specified by the Regional Director, Southwest Region. The vessel certificate holder shall notify the Fleet Assistance Section, Southwest Region, National Marine Fisheries Service, 1140 N. Harbor Drive, Room 7, San Diego, California 92101, telephone 714-293-6540 of any net modification at least five (5) days prior to departure of the vessel on its next scheduled trip in order to determine whether a reinspection or trial set would be required.

(C) Failure to Pass Inspection: 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 porpoise incidental to purse seining for tuna. Operators who have received a written certificate of satisfactory completion of training and who possess a current or previous calendar year certificate of inclusion will not be required to attend additional formal training sessions unless there are substantial changes in the 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 tuna.

(A) Use of Speedboats: On every set involving marine mammals, two speedboats equipped for towing shall be immediately available. At least one shall be manned and in the water. The second one, may be manned or unmanned, and may remain either in the water or in the davits. Both shall be ready for use until backdown commences. Speedboats shall tow on bunchlines whenever net collapse begins or on the corkline if canopies of loose webbing form whenever necessary to prevent marine mammal entrapment.

(B) 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.

(C) Hand Rescue: During backdown, a minimum of two rescuers shall aid with the release of marine mammals. If live marine mammals remain in the net after backdown, a minimum of two rescuers shall hand release them.

(D) 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.

(E) 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. The raft 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, if they are not, 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.

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

(G) Prohibited Setting at Sundown: On every set involving marine mammals, the net skiff shall be released at least one and one-half hours before sunset; release of the net skiff after this time 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.

(viii) *Penalties:* Failure to comply with the provisions 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 to 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 Sec. 216.24(c)(1).

(3) *Encircling Gear, Purse Seining Not Involving the Intentional Taking of Marine Mammals.* (i) A certificate holder may take marine mammals so long as such taking is an incidental occurrence in the course of normal commercial fishing operations. Marine mammals taken incidental to commercial fishing operations shall be immediately returned to the environment where captured without further injury.

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

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

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

(v) All certificate holders shall maintain logs of incidental take of marine mammals in such form as prescribed by the Assistant Administrator. All deaths or injuries to marine mammals occurring in the course of commercial fishing operations under the conditions of a general permit shall be immediately recorded in the log and reported in writing to the 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.

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

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

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

(iv) Marine mammals taken in the course of commercial fishing operations shall be subject to the provisions of Sec. 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 report fully and demonstrate that the animal was causing substantial and immediate damage or about to cause personal injury and that all possible steps to protect against such damage or injury as permitted by paragraph (d)(5)(ii) of this section were taken and that such attempts failed.

(iv) Marine mammals taken in the course of commercial fishing operations shall be subject to the provisions of Sec. 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, 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 and halibut. The following U.S. Tariff Schedule Item Numbers identify these categories of salmon and halibut 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.

(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, no oil—except cans marked as other than yellowfin tuna in a manner approved in advance by the Assistant Administrator.

(3) Salmon and Halibut. 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)(i) Yellowfin tuna: 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 withdrawn from warehouse for consumption unless a finding has been made pursuant to paragraph (e)(5)(i) of this section, and unless accompanied by the following documentation: (A) A separate Yellowfin Tuna Certificate of Origin (Standard Form 370–1) and (B) a bill of lading from each country whose flag vessels caught yellowfin tuna involved in the importation. (ii) 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 yellowfin 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 paragraph (e)(5) of this section; (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) 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 result from U.S. fishing operations under these regulations. Upon such a finding unloading may be allowed. Country of origin for the purposes of this section (Sec. 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, 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 U.S. Tariff Schedule Item Numbers listed in paragraph (e)(2)(i) 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 Sec. 216.24(d)(2) of these regulations can be made, or the effectiveness of any other equivalent 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; (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 with specific reference to any species or stock designated as depleted; and (F) A list of vessels which may be involved in the taking of marine mammals incidental to yellowfin tuna purse seining.

(iii) The Assistant Administrator will review each nation's findings annually upon receipt of information required under paragraph (e)(5)(ii) which pertains to a preceeding calendar year, and a request of a continuation of a finding by the country of origin. This information should be submitted by September 1 preceding the calendar year for which the exportation is requested. 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 Sec. 216.24(e)(3) or Sec. 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 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, National Marine Fisheries Service, National Oceanic and Atomspheric Administration, Department of Commerce, 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 entery under Sec. 216.24(e)(3) or Sec. 216.24(e)(4) or which is redelivered in accordance with Sec. 216.24(e)(7) and which is not exported under Customs supervision within 90 days from the date of notice of refusal of admission or date of redelivery shall be disposed of under Customs laws and regulations. *Provided however,* that any disposition shall not result in an introduction into the United States of fish caught in violation of the Marine Mammal Protection Act of 1972.

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

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

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

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

(5) It is unlawful for any person to forcibly assault, impede, intimidate, interfere with, influence or attempt to influence an observer placed aboard a vessel.

(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.

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50 CFR Part 652

Atlantic Surf Clam and Ocean Quahog Fisheries; Clarification to Regulations

AGENCY: National Oceanic and Atmospheric Administration (NOAA)/ Commerce.

ACTION: Notice of clarification to regulations.

SUMMARY: On January 3, 1980 (45 FR 786), final regulations were published implementing an amendment to the Fishery Management Plan for the Atlantic Surf Clam and Ocean Quahog Fisheries. In those regulations three Appendices (A, B, and C) were published on pages 794–97. References to those Appendices occurred at three places in § 652.23 on page 793.

Those regulations are being codified in the Code of Federal Regulations (the Code). The three Appendices will not be published in the Code. In addition, the three references to the Appendices which occur on page 793 are deleted.

EFFECTIVE DATE: This clarification is effective on September 30, 1980.

FOR FURTHER INFORMATION CONTACT: Denton R. Moore, Chief, Permits and Regulations Division, National Marine Fisheries Service, Washington, D.C. 20235. Telephone: (202) 634–7432.

(16 U.S.C. 1801 *et seq.*)

Signed at Washington, D.C. this 29th day of October, 1980.

Robert K. Crowell,

Deputy Executive Director, National Marine Fisheries Service.

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