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NOTE TO PART 216: See also 50 CFR parts 228 and 229 for regulations governing certain incidental takings of marine mammals.

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

SOURCE: 39 FR 1852, Jan. 15, 1974, unless otherwise noted.

EDITORIAL NOTE: At 56 FR 21096, May 7, 1991, 56 FR 41308, Aug. 20, 1991, and 56 FR 48115, Sept. 24, 1991, findings of nonconformance, embargo and revocation were published in the FEDERAL REGISTER.

Subpart A—Introduction

§ 216.1 Purpose of regulations.

The regulations in this part implement the Marine Mammal Protection Act of 1972, 86 Stat. 1027, 16 U.S.C. 1361–1407, Pub. L. 92–522, which, among other things, restricts the taking, possession, transportation, selling, offering for sale, and importing of marine mammals.

§ 216.2 Scope of regulations.

This part 216 applies solely to marine mammals and marine mammal products as defined in § 216.3. For regulations under the MMPA, with respect to other marine mammals and marine mammal products, see 50 CFR part 18.

[39 FR 1852, Jan. 15, 1974, as amended at 59 FR 50375, Oct. 3, 1994]

§ 216.3 Definitions.

In addition to definitions contained in the MMPA, and unless the context otherwise requires, in this part 216:

ABI means Automated Broker Interface, the electronic product-entry filing system under the control of the U.S. Customs Service, Department of the Treasury.

Acts means, collectively, the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1361 *et seq.*, the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*, and the Fur Seal Act of 1966, as amended, 16 U.S.C. 1151 *et seq.*

Active sportfishing means paying passengers have their terminal fishing gear (lures, hooks, etc.) in the water in an attempt to catch fish or, in the case of fishing involving chumming, fishing is considered to be in progress from the instant fish have been sighted taking bait (boiling) during that chumming process.

Alaskan Native means a person defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1602(b)) (85 Stat. 588) as a citizen of the United States

who is of one-fourth degree or more Alaska Indian (including Tsimishian Indians enrolled or not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood or combination thereof. The term includes any Native, as so defined, either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or group, of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any Native village or Native group. Any such citizen enrolled by the Secretary of the Interior pursuant to section 5 of the Alaska Native Claims Settlement Act shall be conclusively presumed to be an Alaskan Native for purposes of this part.

Article of handicraft means items made by an Indian, Aleut or Eskimo from the nonedible byproducts of fur seals taken for personal or family consumption which—

(1) Were commonly produced by Alaskan Natives on or before October 14, 1983;

(2) Are composed wholly or in some significant respect of natural materials, and;

(3) Are significantly altered from their natural form and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern tanning techniques at a tannery registered pursuant to §216.23(c) may be used so long as no large scale mass production industry results. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups, such as a cooperative, is permitted so long as no large scale mass production results.

Assistant Administrator means the Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Silver Spring, MD 20910, or his/her designee.

Authentic native articles of handicrafts and clothing means items made by an Indian, Aleut or Eskimo which (a) were commonly produced on or before December 21, 1972, and (b) are composed wholly or in some significant respect of natural materials, and (c) are significantly altered from their natural form and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern tanning techniques at a tannery registered pursuant to §216.23(c) may be used so long as no large scale mass production industry results. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups, such as a cooperative, is permitted so long as no large scale mass production results.

Bona fide scientific research: (1) Means scientific research on marine mammals conducted by qualified personnel, the results of which:

(i) Likely would be accepted for publication in a refereed scientific journal;

(ii) Are likely to contribute to the basic knowledge of marine mammal biology or ecology. (Note: This includes, for example, marine mammal parts in a properly curated, professionally accredited scientific collection); or

(iii) Are likely to identify, evaluate, or resolve conservation problems.

(2) Research that is not on marine mammals, but that may incidentally take marine mammals, is not included in this definition (see sections 101(a)(3)(A), 101(a)(5)(A), and 101(a)(5)(D) of the MMPA, and sections 7(b)(4) and 10(a)(1)(B) of the ESA).

Carrying capacity means the Regional Director's determination of the maximum amount of fish that a vessel can carry in short tons based on the greater of the amount indicated by the builder of the vessel, a marine surveyor's report, or the highest amount reported landed from any one trip.

Certified charter vessel means a fishing vessel of a non-U.S. flag nation, which is operating under the jurisdiction of

the marine mammal laws and regulations of another, harvesting, nation by a formal declaration entered into by mutual agreement of the nations.

Co-investigator means the on-site representative of a principal investigator.

Commercial fishing operation means the lawful harvesting of fish from the marine environment for profit as part of an ongoing business enterprise. Such terms may include licensed commercial passenger fishing vessel (as defined) activities, but no other sportfishing activities, whether or not the fish so caught are subsequently sold.

Commercial passenger fishing vessel means any vessel licensed for commercial passenger fishing purposes within the State out of which it is operating and from which, while under charter or hire, persons are legally permitted to conduct sportfishing activities.

Custody means holding a live marine mammal pursuant to the conditional authority granted under the MMPA, and the responsibility therein for captive maintenance of the marine mammal.

Director, Office of Protected Resources means Director, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

Director, Southwest Region means the Director, Southwest Region, NMFS, 501 W. Ocean Blvd., Long Beach, CA 90802, or his/her designee.

Dolphin Mortality Limit (DML) means the maximum allowable number of incidental dolphin mortalities per calendar year assigned to a vessel, unless a shorter time period is specified.

Endangered Species means a species or subspecies of marine mammal listed as ''endangered'' pursuant to the Endangered Species Act of 1973, 87 Stat. 884, Pub. L. 93–205 (see part 17 of this title).

ESA means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

ETP means the eastern tropical Pacific Ocean which includes the Pacific Ocean area bounded by 40° N. latitude, 40° S. latitude, 160° W. longitude and the coastlines of North, Central and South America.

ETP Fishing Area 1 means the northern coastal portion of the ETP east of 117° W. longitude, north of 5° N. latitude, and west of 86° W. longitude.

ETP Fishing Area 2 means the offshore area south of 14° N. latitude, north of 6° N. latitude, east of 150° W. longitude, and west of 123° W. longitude.

ETP Fishing Area 3 means all other areas within the ETP not included in Fishing Areas 1 and 2.

Facility means, in the context specific to captive marine mammals,: (1) One or more permanent primary enclosures used to hold marine mammals captive (i.e., pools, lagoons) and associated infrastructure (i.e., equipment and supplies necessary for the care and maintenance of marine mammals) where these enclosures are either located within the boundaries of a single contiguous parcel of land and water, or are grouped together within the same general area within which enclosure-to-enclosure transport is expected to be completed in less than one hour; or

(2) A traveling display/exhibit, where the enclosure(s) and associated infrastructure is transported together with the marine mammals.

Feeding is offering, giving, or attempting to give food or non-food items to marine mammals in the wild. It includes operating a vessel or providing other platforms from which feeding is conducted or supported. It does not include the routine discard of bycatch during fishing operations or the routine discharge of waste or fish byproducts from fish processing plants or other platforms if the discharge is otherwise legal and is incidental to operation of the activity.

First exporter means the person or company that first exports the fish or fish product, or, in the case of shipments that are subject to the labeling requirements of 50 CFR part 247 and that only contain fish harvested by vessels of the United States, the first seller of the fish or fish product.

Fisheries Certificate of Origin means NOAA Form 370, as described in 50 CFR 216.24(e)(3)(iii).

Fishing season means, for the purposes of § 216.24(e), those sets made on trips that are completed between October 1 and September 30 of the following calendar year.

FSA means the Fur Seal Act of 1966, as amended, 16 U.S.C. 1151 *et seq.*

Fur seal means North Pacific fur seal, scientifically known as *Callorhinus ursinus.*

Hard part means any bone, tooth, baleen, treated pelt, or other part of a marine mammal that is relatively solid or durable.

Harvesting nation means the country under whose flag one or more fishing vessels are documented, or which has by formal declaration agreed to assert jurisdiction over one or more certified charter vessels, from which vessel(s) fish are caught that are a part of any cargo or shipment of fish to be imported into the United States, regardless of any intervening transshipments.

Humane means the method of taking, import, export, or other activity which involves the least possible degree of pain and suffering practicable to the animal involved.

Import means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the Customs laws of the United States; except that, for the purpose of any ban issued under 16 U.S.C. 1371(a)(2) on the importation of fish or fish products, the definition of ''import'' in § 216.24(e)(1)(ii) shall apply.

Incidental catch means the taking of a marine mammal (1) because it is directly interfering with commercial fishing operations, or (2) as a consequence of the steps used to secure the fish in connection with commercial fishing operations: *Provided,* That a marine mammal so taken must immediately be returned to the sea with a minimum of injury and further, that the taking of a marine mammal, which otherwise meets the requirements of this definition shall not be considered an incidental catch of that mammal if it is used subsequently to assist in commercial fishing operations.

Intentional purse seine set means that a tuna purse seine vessel or associated vessels chase marine mammals and subsequently make a purse seine set.

Intrusive research means a procedure conducted for bona fide scientific research involving: A break in or cutting of the skin or equivalent, insertion of an instrument or material into an orifice, introduction of a substance or object into the animal's immediate environment that is likely either to be ingested or to contact and directly affect animal tissues (i.e., chemical substances), or a stimulus directed at animals that may involve a risk to health or welfare or that may have an impact on normal function or behavior (i.e., audio broadcasts directed at animals that may affect behavior). For captive animals, this definition does not include:

(1) A procedure conducted by the professional staff of the holding facility or an attending veterinarian for purposes of animal husbandry, care, maintenance, or treatment, or a routine medical procedure that, in the reasonable judgment of the attending veterinarian, would not constitute a risk to the health or welfare of the captive animal; or

(2) A procedure involving either the introduction of a substance or object (i.e., as described in this definition) or a stimulus directed at animals that, in the reasonable judgment of the attending veterinarian, would not involve a risk to the health or welfare of the captive animal.

Kill-per-set means the number of small, toothed cetaceans (marine mammals) killed per purse seine set made involving marine mammals.

Kill-per-ton means the number of small toothed cetacean marine mammals killed per ton of yellowfin tuna caught in sets made on marine mammals.

Label means a display of written, printed, or graphic matter on or affixed to the immediate container of any article.

Land or *landing* means to begin offloading any fish, to arrive in port with the intention of offloading fish, or to cause any fish to be offloaded.

Large-scale driftnet means a gillnet that is composed of a panel or panels of webbing, or a series of such gillnets, with a total length of 2.5 kilometers or more that is used on the high seas and allowed to drift with the currents and winds for the purpose of harvesting fish

by entangling the fish in the webbing of the net.

Level A Harassment means any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild.

Level B Harassment means any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering but which does not have the potential to injure a marine mammal or marine mammal stock in the wild.

Marine environment means the oceans and the seas, including estuarine and brackish waters.

Marine mammal means those specimens of the following orders, which are morphologically adapted to the marine environment, whether alive or dead, and any part thereof, including but not limited to, any raw, dressed or dyed fur or skin: Cetacea (whales and porpoises), Pinnipedia, other than walrus (seals and sea lions).

MMPA means the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1361 *et seq.*

Native village or town means any community, association, tribe, band, clan or group.

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 less losses due to natural mortality.

Pregnant means pregnant near term.

Pribilovians means Indians, Aleuts, and Eskimos who live on the Pribilof Islands.

Principal investigator means the individual primarily responsible for the taking, importation, export, and any related activities conducted under a permit issued for scientific research or enhancement purposes.

Public display means an activity that provides opportunities for the public to view living marine mammals at a facility holding marine mammals captive.

Purse seine set on common dolphins means a purse seine set in which more than 50 percent of the marine mammals killed are common dolphins or, in sets with no dolphins killed, more than 50 percent of the dolphins captured are common dolphins.

Regional Director means the Director, Southwest Region, NMFS, 501 W. Ocean Blvd., Long Beach, CA 90802, or his/her designee.

Rehabilitation means treatment of beached and stranded marine mammals taken under section 109(h)(1) of the MMPA or imported under section 109(h)(2) of the MMPA, with the intent of restoring the marine mammal's health and, if necessary, behavioral patterns.

Secretary shall mean the Secretary of Commerce or his authorized representative.

Sexual harassment means any unwelcome sexual advance, request for sexual favors, or other verbal and physical conduct of a sexual nature which has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Soft part means any marine mammal part that is not a hard part. Soft parts do not include urine or fecal material.

South Pacific Ocean means any waters of the Pacific Ocean that lie south of the equator.

Stranded or *stranded marine mammal* means a marine mammal specimen under the jurisdiction of the Secretary:

(1) If the specimen is dead, and is on a beach or shore, or is in the water within the Exclusive Economic Zone of the United States; or

(2) If the specimen is alive, and is on a beach or shore and is unable to return to the water, or is in the water within the Exclusive Economic Zone of the United States where the water is so shallow that the specimen is unable to return to its natural habitat under its own power.

Subsistence means the use of marine mammals taken by Alaskan Natives for food, clothing, shelter, heating,

transportation, and other uses necessary to maintain the life of the taker or those who depend upon the taker to provide them with such subsistence.

Subsistence uses means the customary and traditional uses of fur seals taken by Pribilovians for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fur seals taken for personal or family consumption; and for barter, or sharing for personal or family consumption. As used in this definition—

(1) *Family* means all persons related by blood, marriage, or adoption, or any person living within a household on a permanent basis.

(2) *Barter* means the exchange of fur seals or their parts, taken for subsistence uses—

(i) For other wildlife or fish or their parts, or

(ii) For other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

Take means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal. This includes, without limitation, any of the following: The collection of dead animals, or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild.

Threatened species means a species of marine mammal listed as ''threatened'' pursuant to the Endangered Species Act of 1973, 87 Stat. 884, Pub. L. 93–205.

Trip means a voyage starting when a vessel leaves port with all fish wells empty of fish and ending when a vessel unloads all of its fish.

Tuna product means any food product processed for retail sale and intended for human or animal consumption that contains an item listed in §216.24(e)(2)(i) or (ii), but does not include perishable items with a shelf life of less than 3 days.

Wasteful manner means any taking or method of taking which is likely to result in the killing of marine mammals beyond those needed for subsistence, subsistence uses, or for the making of authentic native articles of handicrafts and clothing, or which results in the waste of a substantial portion of the marine mammal and includes, without limitation, the employment of a method of taking which is not likely to assure the capture or killing of a marine mammal, or which is not immediately followed by a reasonable effort to retrieve the marine mammal.

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §216.3, see the List of Sections Affected in the Finding Aids section of this volume.

§216.4 Other laws and regulations.

(a) *Federal.* Nothing in this part, nor any permit issued under authority of this part, shall be construed to relieve a person from any other requirements imposed by a statute or regulation of the United States, including any applicable statutes or regulations relating to wildlife and fisheries, health, quarantine, agriculture, or customs.

(b) *State laws or regulations.* See part 403 of this chapter.

[39 FR 1852, Jan. 15, 1974, as amended at 41 FR 36662, Aug. 31, 1976; 58 FR 65134, Dec. 13, 1993]

§216.5 Payment of penalty.

The respondent shall have 30 days from receipt of the final assessment decision within which to pay the penalty assessed. Upon a failure to pay the penalty, the Secretary may request the Attorney General to institute a civil action in the appropriate United States District Court to collect the penalty.

[39 FR 1852, Jan. 15, 1974. Redesignated at 46 FR 61652, Dec. 18, 1981]

§216.6 Forfeiture and return of seized property.

(a) Whenever any cargo or marine mammal or marine mammal product has been seized pursuant to section 107 of the MMPA, the Secretary shall expedite any proceedings commenced under these regulations.

(b) Whenever a civil penalty has been assessed by the Secretary under these

regulations, any cargo, marine mammal, or marine mammal product seized pursuant to section 107 of the MMPA shall be subject to forfeiture. If respondent voluntarily forfeits any such seized property or the monetary value thereof without court proceedings, the Secretary may apply the value thereof, if any, as determined by the Secretary, toward payment of the civil penalty.

(c) Whenever a civil penalty has been assessed under these regulations, and whether or not such penalty has been paid, the Secretary may request the Attorney General to institute a civil action in an appropriate United States District Court to compel forfeiture of such seized property or the monetary value thereof to the Secretary for disposition by him in such manner as he deems appropriate. If no judicial action to compel forfeiture is commenced within 30 days after final decision-making assessment of a civil penalty, pursuant to § 216.60, such seized property shall immediately be returned to the respondent.

(d) If the final decision of the Secretary under these regulations is that respondent has committed no violation of the MMPA or of any permit or regulations issued thereunder, any marine mammal, marine mammal product, or other cargo seized from respondent in connection with the proceedings under these regulations, or the bond or other monetary value substituted therefor, shall immediately be returned to the respondent.

(e) If the Attorney General commences criminal proceedings pursuant to section 105(b) of the MMPA, and such proceedings result in a finding that the person accused is not guilty of a criminal violation of the MMPA, the Secretary may institute proceedings for the assessment of a civil penalty under this part: *Provided,* That if no such civil penalty proceedings have been commenced by the Secretary within 30 days following the final disposition of the criminal case, any property seized pursuant to section 107 of the MMPA shall be returned to the respondent.

(f) If any seized property is to be returned to the respondent, the Regional Director shall issue a letter authorizing such return. This letter shall be dispatched to the respondent by registered mail, return receipt requested, and shall identify the respondent, the seized property, and, if appropriate, the bailee of the seized property. It shall also provide that upon presentation of the letter and proper identification, the seized property is authorized to be released. All charges for storage, care, or handling of the seized property accruing 5 days or more after the date of the return receipt shall be for the account of the respondent: *Provided,* That if it is the final decision of the Secretary under these regulations that the respondent has committed the alleged violation, all charges which have accrued for the storage, care, or handling of the seized property shall be for the account of the respondent.

[39 FR 1852, Jan. 15, 1974. Redesignated at 46 FR 61652, Dec. 18, 1981, and amended at 59 FR 50375, Oct. 3, 1994]

§ 216.7 Holding and bonding.

(a) Any marine mammal, marine mammal product, or other cargo seized pursuant to section 107 of the MMPA shall be delivered to the appropriate Regional Director of the National Marine Fisheries Service (see § 201.2 of this title) or his designee, who shall either hold such seized property or arrange for the proper handling and care of such seized property.

(b) Any arrangement for the handling and care of seized property shall be in writing and shall state the compensation to be paid. Subpart F of 15 CFR part 904 contains additional procedures that govern seized property that is subject to forfeiture or has been forfeited under the MMPA.

[39 FR 1852, Jan. 15, 1974. Redesignated at 46 FR 61652, Dec. 18, 1981, and amended at 50 FR 12785, Apr. 1, 1985; 59 FR 50375, Oct. 3, 1994]

§ 216.8 Enforcement officers.

Enforcement Agents of the National Marine Fisheries Service shall enforce the provisions of the MMPA and may take any actions authorized by the MMPA with respect to enforcement. In addition, the Secretary may utilize, by agreement, the personnel, services, and facilities of any other Federal Agency for the purposes of enforcing this MMPA. Pursuant to the terms of section 107(b) of the MMPA, the Secretary

may also designate officers and employees of any State or of any possession of the United States to enforce the provisions of this MMPA.

[39 FR 1852, Jan. 15, 1974. Redesignated at 46 FR 61652, Dec. 18, 1981, and amended at 59 FR 50375, Oct. 3, 1994]

Subpart B—Prohibitions

§216.11 Prohibited taking.

Except as otherwise provided in subparts C, D, and I of this part 216 or in part 228 or 229, it is unlawful for:

(a) Any person, vessel, or conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas, or

(b) Any person, vessel, or conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States, or

(c) Any person subject to the jurisdiction of the United States to take any marine mammal during the moratorium.

[39 FR 1852, Jan. 15, 1974, as amended at 47 FR 21254, May 18, 1982; 54 FR 21921, May 19, 1989]

§216.12 Prohibited importation.

(a) Except as otherwise provided in subparts C and D of this part 216, it is unlawful for any person to import any marine mammal or marine mammal product into the United States.

(b) Regardless of whether an importation is otherwise authorized pursuant to subparts C and D of this part 216, it is unlawful for any person to import into the United States any:

(1) Marine mammal:

(i) Taken in violation of the MMPA, or

(ii) Taken in another country in violation to the laws of that country;

(2) Any marine mammal product if

(i) The importation into the United States of the marine mammal from which such product is made would be unlawful under paragraph (b)(1) of this section, or

(ii) The sale in commerce of such product in the country of origin if the product is illegal.

(c) Except in accordance with an exception referred to in subpart C and §§216.31 (regarding scientific research permits only) and 216.32 of this part 216, it is unlawful to import into the United States any:

(1) Marine mammal which was pregnant at the time of taking.

(2) Marine mammal which was nursing at the time of taking, or less than 8 months old, whichever occurs later.

(3) Specimen of an endangered or threatened species of marine mammal.

(4) Specimen taken from a depleted species or stock of marine mammals, or

(5) Marine mammal taken in an inhumane manner.

(d) It is unlawful to import into the United States any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner proscribed by the Secretary of Commerce for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident to the catching of the fish.

[39 FR 1852, Jan. 15, 1974, as amended at 59 FR 50375, Oct. 3, 1994]

§216.13 Prohibited uses, possession, transportation, sales, and permits.

It is unlawful for:

(a) Any person to use any port, harbor or other place under the jurisdiction of the United States for any purpose in any way connected with a prohibited taking or an unlawful importation of any marine mammal or marine mammal product; or

(b) Any person subject to the jurisdiction of the United States to possess any marine mammal taken in violation of the MMPA or these regulations, or to transport, sell, or offer for sale any such marine mammal or any marine mammal product made from any such mammal.

(c) Any person subject to the jurisdiction of the United States to use in a commercial fishery, any means or method of fishing in contravention of regulations and limitations issued by the Secretary of Commerce for that fishery to achieve the purposes of this MMPA.

(d) Any person to violate any term, condition, or restriction of any permit issued by the Secretary.

[39 FR 1852, Jan. 15, 1974, as amended at 59 FR 50375, 50376, Oct. 3, 1994; 61 FR 21933, May 10, 1996]

§ 216.14 Marine mammals taken before the MMPA.

(a) Section 102(e) of the MMPA provides, in effect, that the MMPA shall not apply to any marine mammal taken prior to December 21, 1972, or to any marine mammal product, consisting of or composed in whole or in part of, any marine mammal taken before that date. This prior status of any marine mammal or marine mammal product may be established by submitting to the Director, National Marine Fisheries Service prior to, or at the time of importation, an affidavit containing the following:

(1) The Affiant's name and address;

(2) Identification of the Affiant;

(3) A description of the marine mammals or marine mammal products which the Affiant desires to import;

(4) A statement by the Affiant that, to the best of his knowledge and belief, the marine mammals involved in the application were taken prior to December 21, 1972;

(5) A statement by the Affiant in the following language:

> The foregoing is principally based on the attached exhibits which, to the best of my knowledge and belief, are complete, true and correct. I understand that this affidavit is being submitted for the purpose of inducing the Federal Government to permit the importation of—under the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 through 1407) and regulations promulgated thereunder, and that any false statements may subject me to the criminal penalties of 13 U.S.C. 1001, or to penalties under the Marine Mammal Protection Act of 1972.

(b) Either one of two exhibits shall be attached to such affidavit, and will contain either:

(1) Records or other available evidence showing that the product consists of or is composed in whole or in part of marine mammals taken prior to the effective date of the MMPA. Such records or other evidentiary material must include information on how, when, where, and by whom the animals were taken, what processing has taken place since taking, and the date and location of such processing; or

(2) A statement from a government agency of the country of origin exercising jurisdiction over marine mammals that any and all such mammals from which the products sought to be imported were derived were taken prior to December 21, 1972.

(c) No pre-Act marine mammal or pre-Act marine mammal product may be imported unless the requirements of this section have been fulfilled.

(d) This section has no application to any marine mammal or marine mammal product intended to be imported pursuant to §§ 216.21, 216.31 or § 216.32.

[39 FR 1852, Jan. 15, 1974, as amended at 59 FR 50375, 50376, Oct. 3, 1994]

§ 216.15 Depleted species.

The following species or population stocks have been designated by the Assistant Administrator as depleted under the provisions of the MMPA.

(a) Hawaiian monk seal *(Monachus schauinslandi).*

(b) Bowhead whale *(Balaena mysticetus).*

(c) North Pacific fur seal *(Callorhinus ursinus).* Pribilof Island population.

(d) Bottlenose dolphin (*Tursiops truncatus*), coastal-migratory stock along the U.S. mid-Atlantic coast.

(e) Eastern spinner dolphin (*Stenella longirostris orientalis*).

(f) Northeastern offshore spotted dolphin (*Stenella attenuata*).

[53 FR 17899, May 18, 1988, as amended at 58 FR 17791, Apr. 6, 1993; 58 FR 45074, Aug. 26, 1993; 58 FR 58297, Nov. 1, 1993; 59 FR 50376, Oct. 3, 1994]

§ 216.16 Prohibitions under the General Authorization for Level B harassment for scientific research.

It shall be unlawful for any person to:

(a) Provide false information in a letter of intent submitted pursuant to § 216.45(b);

(b) Violate any term or condition imposed pursuant to § 216.45(d).

[59 FR 50376, Oct. 3, 1994]

Subpart C—General Exceptions

§ 216.21 Actions permitted by international treaty, convention, or agreement.

The MMPA and these regulations shall not apply to the extent that they are inconsistent with the provisions of any international treaty, convention

or agreement, or any statute implementing the same relating to the taking or importation of marine mammals or marine mammal products, which was existing and in force prior to December 21, 1972, and to which the United States was a party. Specifically, the regulations in subpart B of this part and the provisions of the MMPA shall not apply to activities carried out pursuant to the Interim Convention on the Conservation of North Pacific Fur Seals signed at Washington on February 9, 1957, and the Fur Seal Act of 1966, 16 U.S.C. 1151 through 1187, as in each case, from time to time amended.

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

§216.22 Taking by State or local government officials.

(a) A State or local government official or employee may take a marine mammal in the normal course of his duties as an official or employee, and no permit shall be required, if such taking:

(1) Is accomplished in a humane manner;

(2) Is for the protection or welfare of such mammal or for the protection of the public health or welfare; and

(3) Includes steps designed to insure return of such mammal, if not killed in the course of such taking, to its natural habitat. In addition, any such official or employee may, incidental to such taking, possess and transport, but not sell or offer for sale, such mammal and use any port, harbor, or other place under the jurisdiction of the United States. All steps reasonably practicable under the circumstances shall be taken by any such employee or official to prevent injury or death to the marine mammal as the result of such taking. Where the marine mammal in question is injured or sick, it shall be permissible to place it in temporary captivity until such time as it is able to be returned to its natural habitat. It shall be permissible to dispose of a carcass of a marine mammal taken in accordance with this subsection whether the animal is dead at the time of taking or dies subsequent thereto.

(b) Each taking permitted under this section shall be included in a written report to be submitted to the Secretary every six months beginning December 31, 1973. Unless otherwise permitted by the Secretary, the report shall contain a description of:

(1) The animal involved;

(2) The circumstances requiring the taking;

(3) The method of taking;

(4) The name and official position of the State official or employee involved;

(5) The disposition of the animal, including in cases where the animal has been retained in captivity, a description of the place and means of confinement and the measures taken for its maintenance and care; and

(6) Such other information as the Secretary may require.

(c) Salvage of dead stranded marine mammals or parts therefrom and subsequent transfer.

(1) *Salvage.* In the performance of official duties, a state or local government employee; an employee of the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, or any other Federal agency with jurisdiction and conservation responsibilities in marine shoreline areas; or a person authorized under 16 U.S.C. 1382(c) may take and salvage a marine mammal specimen if it is stranded and dead or it was stranded or rescued and died during treatment, transport, captivity or other rehabilitation subsequent to that stranding or distress if salvage is for the purpose of utilization in scientific research or for the purpose of maintenance in a properly curated, professionally accredited scientific collection.

(2) *Registration.* A person salvaging a dead marine mammal specimen under this section must register the salvage of the specimen with the appropriate Regional Office of the National Marine Fisheries Service within 30 days after the taking or death occurs. The registration must include:

(i) The name, address, and any official position of the individual engaged in the taking and salvage;

(ii) A description of the marine mammal specimen salvaged including the scientific and common names of the species;

(iii) A description of the parts salvaged;

(iv) The date and the location of the taking;

(v) Such other information as deemed necessary by the Assistant Administrator.

(3) *Identification and curation.* The Regional Director will assign a single unique number to each carcass, and the parts thereof, that are salvaged under the provisions of this section. The person who salvaged the specimen may designate the number to be assigned. After this number is assigned, the person who salvaged the specimen must permanently mark that number on each separate hard part of that specimen and must affix that number with tags or labels to each soft part of that specimen or the containers in which that soft part is kept. Each specimen salvaged under this section must be curated in accordance with professional standards.

(4) *No sale or commercial trade.* No person may sell or trade for commercial purposes any marine mammal specimen salvaged under this section.

(5) *Transfer without prior authorization.* A person who salvages a marine mammal specimen under this section may transfer that specimen to another person if:

(i) The person transferring the marine mammal specimen does not receive remuneration for the specimen;

(ii) The person receiving the marine mammal specimen is an employee of the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, or any other Federal agency with jurisdiction and conservation responsibilities in marine shoreline areas; is a person authorized under 16 U.S.C. 1382(c); or is a person who has received prior authorization under paragraph (c)(6) of this section;

(iii) The marine mammal specimen is transferred for the purpose of scientific research, for the purpose of maintenance in a properly curated, professionally accredited scientific collection, or for educational purposes;

(iv) The unique number assigned by the National Marine Fisheries Service is on, marked on, or affixed to the marine mammal specimen or container; and

(v) Except as provided under paragraph (c)(8) of this section, the person transferring the marine mammal specimen notifies the appropriate Regional Office of the National Marine Fisheries Service of the transfer, including notification of the number of the specimen transferred and the person to whom the specimen was transferred, within 30 days after the transfer occurs.

(6) *Other transfers within the United States.* Except as provided under paragraphs (c)(5) and (c)(8) of this section, a person who salvages a marine mammal specimen, or who has received a marine mammal specimen under the provisions of this section, may not transfer that specimen to another person within the United States unless the Regional Director of the appropriate Regional Office of the National Marine Fisheries Service grants prior written authorization for the transfer. The Regional Director may grant authorization for the transfer if there is evidence that the conditions listed under paragraphs (c)(5)(i), (c)(5)(iii), and (c)(5)(iv) of this section are met.

(7) *Tranfers outside of the United States.* A person who salvages a marine mammal specimen, or a person who has received a marine mammal specimen under the provisions of this section, may not transfer that specimen to a person outside of the United States unless the Assistant Administrator grants prior written authorization for the transfer. The Assistant Administrator may grant authorization for the transfer if there is evidence that the conditions listed under paragraphs (c)(5)(i), (c)(5)(iii), and (c)(5)(iv) of this section are met.

(8) *Exceptions to requirements for notification or prior authorization.* A person may transfer a marine mammal specimen salvaged under this section without the notification required in paragraph (c)(5)(v) of this section or the prior authorization required in paragraph (c)(6) of this section if:

(i) The transfer is a temporary transfer to a laboratory or research facility within the United States so that analyses can be performed for the person salvaging the specimen; or

(ii) The transfer is a loan of not more than 1 year to another professionally

accredited scientific collection within the United States.

[39 FR 1852, Jan. 15, 1974, as amended at 56 FR 41307, Aug. 20, 1991]

§216.23 Native exceptions.

(a) *Taking.* Notwithstanding the prohibitions of subpart B of this part 216, but subject to the restrictions contained in this section, any Indian, Aleut, or Eskimo who resides on the coast of the North Pacific Ocean or the Arctic Ocean may take any marine mammal without a permit, if such taking is:

(1) By Alaskan Natives who reside in Alaska for subsistence, or

(2) For purposes of creating and selling authentic native articles of handicraft and clothing, and

(3) In each case, not accomplished in a wasteful manner.

(b) *Restrictions.* (1) No marine mammal taken for subsistence may be sold or otherwise transferred to any person other than an Alaskan Native or delivered, carried, transported, or shipped in interstate or foreign commerce, unless:

(i) It is being sent by an Alaskan Native directly or through a registered agent to a tannery registered under paragraph (c) of this section for the purpose of processing, and will be returned directly or through a registered agent to the Alaskan Native; or

(ii) It is sold or transferred to a registered agent in Alaska for resale or transfer to an Alaskan Native; or

(iii) It is an edible portion and it is sold in an Alaskan Native village or town.

(2) No marine mammal taken for purposes of creating and selling authentic native articles of handicraft and clothing may be sold or otherwise transferred to any person other than an Indian, Aleut or Eskimo, or delivered, carried, transported or shipped in interstate or foreign commerce, unless:

(i) It is being sent by an Indian, Aleut or Eskimo directly or through a registered agent to a tannery registered under paragraph (c) of this section for the purpose of processing, and will be returned directly or through a registered agent to the Indian, Aleut or Eskimo; or

(ii) It is sold or transferred to a registered agent for resale or transfer to an Indian, Aleut, or Eskimo; or

(iii) It has first been transformed into an authentic native article of handicraft or clothing; or

(iv) It is an edible portion and sold (A) in an Alaskan Native village or town, or (B) to an Alaskan Native for his consumption.

(c) Any tannery, or person who wishes to act as an agent, within the jurisdiction of the United States may apply to the Director, National Marine Fisheries Service, U.S. Department of Commerce, Washington, DC 20235, for registration as a tannery or an agent which may possess and process marine mammal products for Indians, Aleuts, or Eskimos. The application shall include the following information:

(i) The name and address of the applicant;

(ii) A description of the applicant's procedures for receiving, storing, processing, and shipping materials;

(iii) A proposal for a system of bookkeeping and/or inventory segregation by which the applicant could maintain accurate records of marine mammals received from Indians, Aleuts, or Eskimos pursuant to this section;

(iv) Such other information as the Secretary may request;

(v) A certification in the following language:

> I hereby 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 the benefit of an exception under the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 through 1407) and regulations promulgated thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001, or to penalties under the Marine Mammal Protection Act of 1972.

(vi) The signature of the applicant.

The sufficiency of the application shall be determined by the Secretary, and in that connection, he may waive any requirement for information, or require any elaboration or further information deemed necessary. The registration of a tannery or other agent shall be subject to such conditions as the Secretary prescribes, which may include,

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

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

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

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

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

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

(2)(i) It is unlawful for any person using a Class I (400 short tons (362.8 metric tons) carrying capacity or less) or Class II (greater than 400 short tons (362.8 metric tons) carrying capacity, built before 1961) U.S. purse seine fishing vessel on a fishing involving the utilization of purse seines to capture yellowfin tuna, that is not operating under a Category 2 general permit and certificate(s) of inclusion, to carry more than two speedboats if any part of its fishing trip is in the Pacific Ocean area described in the General Permit for gear Category 2 operations.

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

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

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

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

(b) [Reserved]

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

apply when a change of vessel ownership occurs.

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

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

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

(i) The name of the vessel that is to appear on the certificate(s) of inclusion;

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

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

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

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

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

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

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

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

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

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

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

(1) [Reserved]

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

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

(*1*)–(*2*) [Reserved]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) [Reserved]

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

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

(A) *Class I and II Vessels:* For Class I purse seiners (400 short tons carrying capacity or less) and for Class II purse seiners (greater than 400 short tons carrying capacity, built before 1961), the porpoise safety panel must be a minimum of 100 fathoms in length (as measured before installation), except that the minimum length of the panel in nets deeper than 10 strips must be determined at a ratio of 10 fathoms in length for each strip that the net is deep. It must be installed so as to protect the perimeter of the backdown area. The perimeter of the backdown area is the length of the corkline which begins at the outboard end of the last bow bunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point. The porpoise safety panel must consist of small mesh webbing not to exceed 1¼″ stretch mesh, extending from the corkline downward to a minimum depth equivalent to one strip of 100 meshes of 4¼″ stretch mesh webbing. In addition, at least a 20-fathom length of corkline must be free from bunchlines at the apex of the backdown channel.

(B) *Class III Vessels:* For Class III purse seiners (greater than 400 short tons carrying capacity, built after 1960), the porpoise safety panel must be a minimum of 180 fathoms in length (as measured before installation), except that the minimum length of the panel in nets deeper than 18 strips must be determined in a ratio of 10 fathoms in length for each strip of net depth. It must be installed so as to protect the perimeter of the backdown area. The perimeter of the backdown area is the length of corkline which begins at the

outboard end of the last bowbunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point. The porpoise safety panel must consist of small mesh webbing not to exceed 1¼″ stretch mesh extending downward from the corkline and, if present, the base of the porpoise apron to a minimum depth equivalent to two strips of 100 meshes of 4¼″ stretch mesh webbing. In addition, at least a 20-fathom length of corkline must be free from bunchlines at the apex of the backdown channel.

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

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

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

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

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

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

(I) *Lights:* All certificated vessels shall be equipped by July 1, 1986, with lights capable of producing a minimum of 140,000 lumens of output for use in darkness to ensure sufficient light to observe that procedures for porpoise release are carried out and to monitor incidental porpoise mortality.

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

(B) *Reinspection:* Purse seine nets and other gear and equipment required by these regulations shall be made available for reinspection by an authorized National Marine Fisheries Service Inspector as specified by the Director, Southwest Region. The vessel certificate holder shall notify the Director, Southwest Region of any net modification at least 5 days prior to departure of the vessel in order to determine whether a reinspection or trial set is required.

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

(vi) *Operator training requirements.* All operators shall maintain proficiency sufficient to perform the procedures required herein, and must attend and satisfactorily complete a formal training session conducted under the auspices of the National Marine Fisheries Service in order to obtain their certificate of inclusion. At the training session an attendee shall be instructed concerning the provisions of the Marine Mammal Protection Act of 1972, the regulations promulgated pursuant to the MMPA, and the fishing gear and techniques which are required or will contribute to reducing serious injury and mortality of porpoise incidental to purse seining for tuna. Operators who have

received a written certificate of satisfactory completion of training and who possess a current or previous calendar year certificate of inclusion will not be required to attend additional formal training sessions unless there are substantial changes in the MMPA, the regulations, or the required fishing gear and techniques. Additional training may be required for any operator who is found by the Director, Southwest Region, to lack proficiency in the procedures required.

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

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

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

(C) *Sundown sets prohibited.* On every set encircling porpoise, the backdown procedure must be completed and rolling of the net to sack-up must be begun before one-half hour after sundown, except as provided below. For the purpose of this section, *sundown* is defined as the time at which the upper edge of the sun disappears below the horizon or, if view of the sun is obscured, the local time of sunset calculated from tables developed by the U.S. Naval Observatory. A *sundown set* is a set in which the backdown procedure has not been completed and rolling the net to sack-up has not begun within one-half hour after sundown. Should a set extend beyond one-half hour after sundown, the operator must use the required marine mammal release procedures including the use of the high intensity lighting system.

(*1*) A certificated operator may obtain an initial waiver from this prohibition, for trips with an observer, by establishing to the satisfaction of the Director, Southwest Region, NMFS, based upon NMFS and Inter-American Tropical Tuna Commission (IATTC) observer records, that the operator's average kill of marine mammals per set in sundown sets involving marine mammals was 3.01 marine mammals or fewer.

(*i*) The application must include the following:

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

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

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

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

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

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

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

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

obtain at least five sundown sets for consideration.

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

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

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

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

(D) *Porpoise Safety Panel:* During backdown, the porpoise safety panel must be positioned so that it protects the perimeter of the backdown area. The perimeter of the backdown area is the length of corkline which begins at the outboard end of the last bow bunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point. Any super apron must be positioned at the apex of the backdown channel.

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

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

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

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

(*2*) A statement of the specific vessel gear and equipment or procedural requirement to be exempted and why such an exemption is necessary to conduct the experiment;

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

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

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

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

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

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

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

(D) The permit for an experimental fishing operation will be valid only for the vessels and operators named in the permit, for the time period and areas specified, for trips carrying an observer assigned by the NMFS, and when all the terms and conditions of the permit are met.

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

(ix) *Operator Certificate of Inclusion Holder Performance Requirements.* (A) The certificate of inclusion of any operator who makes one or more purse seine sets on marine mammals resulting in an average kill-per-set for a fishing trip which exceeds 26.30 marine mammals is suspended. Such suspension shall be effective upon notification from the Director, Southwest Region and shall be for a period of one year. If the operator exceeds the 26.30 marine mammals killed per set average for a subsequent trip within three years of reinstatement, the certificate is suspended. Such suspension shall be effective upon notification by the Director, Southwest Region and shall be for a period of one year. If the operator's average mortality rate exceeds 26.30 marine mammals kill-per-set on a subsequent trip within five years of the second reinstatement, the certificate is revoked. The revocation shall be effective upon notification by the Director, Southwest Region and shall be permanent. An operator who is subject to a suspension or revocation under this paragraph may petition the Director, Southwest Region to review the operator's marine mammal mortality history. The Director, Southwest Region may reinstate the operator's certificate if the operator demonstrates that the operator has not exceeded a kill-per-set of 3.89 marine mammals during any of the eight consecutive observed trips immediately preceding the trip which caused the suspension. However, that trip will be considered as a single trip exceeding a kill-per-set of 3.89 marine mammals and subject to the conditions described in paragraph (d)(2)(ix)(F) of this section. The Director, Southwest Region may exclude from the mortality calculation for a trip, those purse seine sets in which marine mammal mortality resulted from an unavoidable and unforeseeable equipment breakdown. The mortality rate calculated after exclusion of a set or sets under this paragraph will determine the action taken under this performance evaluation system.

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

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

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

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

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

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

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

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

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

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

(G) An operator whose average marine mammal mortality rate exceeds 3.89 marine mammals killed per set on two consecutive trips or on three trips ending within a period of twenty-four months or on three trips within eight consecutive trips must have observer data and other pertinent records reviewed by the Director, Southwest Region and the Porpoise Rescue Foundation for the purpose of determining the causes of higher than acceptable mortality, must participate in supplemental marine mammal safety training as ordered by the Director, Southwest Region and must comply with actions for reducing marine mammal mortality which may be ordered by the Director, Southwest Region. The operator must carry an expert fisherman (*i.e.*, an experienced vessel operator with a history of low dolphin mortality), if required to do so by the Director, Southwest Region, to assist in perfecting marine mammal safety techniques, and must also carry an observer on the next trip for which he serves as the certificated operator. The selection of the expert fisherman will be provided by the General Permit holder or the Porpoise Rescue Foundation and subject to the approval of the Director, Southwest Region. If the Director, Southwest Region determines that the required training or other ordered action has not been completed satisfactorily or is refused, the Director, Southwest Region will suspend the operator's certificate of inclusion for one year.

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

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

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

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

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

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

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

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

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

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

(*3*) NMFS may make an adjustment of a vessel's DMLs if it will further scientific or technological advancement in the protection of marine mammals in the fishery, or if the past performance of the vessel indicates that the protection or use of the yellowfin tuna stocks or marine mammals is best served by the adjustment, within the mandates of the MMPA. Experimental fishing operation waivers or scientific

research permits shall be considered a basis for adjustments.

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

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

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

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

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

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

(*3*) Vessel captains must cease deploying purse seine sets to encircle dolphins intentionally when the vessel's DML, as adjusted under paragraph (d)(2)(x)(C)(*2*) of this section, is reached.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vi) [Reserved]

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

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

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

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

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

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

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

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

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

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

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

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

(e) *Importation, purchase, shipment, sale and transport.* (1)(i) It is illegal to import into the United States any fish, whether fresh, frozen, or otherwise prepared, if the fish have been caught with commercial fishing technology that results in the incidental kill or incidental serious injury of marine mammals in excess of that allowed under this part for U.S. fishermen or in excess of what is specified in subsection (e)(5) in the case of fishing for yellowfin tuna.

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

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

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

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

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

(B) Tuna, canned:

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

(C) Tuna, loins:

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

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

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

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

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

(B) Tuna, canned:

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

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

(A) Salmon:

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

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

(*2*) Salmon, canned:

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

(B) Squid:

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

(C) Shark:

0303.75.00.00.4 Shark, dogfish and other sharks, frozen.
0305.59.20.00.8 Shark fins.

(D) Swordfish:

0303.79.20.40.8 Swordfish, frozen.

(E) Species not specifically identified:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) *Certificates of Origin.* A Fisheries Certificate of Origin (NOAA Form 370),[1] certified to be accurate by the first exporter of the accompanying shipment, must include the following information:

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

(B) Exporter (name and address);

(C) Consignee (name and address);

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

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

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

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

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

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

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

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

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

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

large-scale driftnets. Such determinations shall be published in the FEDERAL REGISTER. A responsible government official of any such nation may certify to the Assistant Administrator that none of the nation's vessels use large-scale driftnets. Upon receipt of the certification, the Assistant Administrator may find, and publish such finding in the FEDERAL REGISTER, that none of the nation's vessels engage in fishing with large-scale driftnets.

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

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

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

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

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

(*1*) A description, with copies of relevant laws, implementing regulations and guidelines, of the gear and procedures required in the fishery to protect marine mammals, including but not limited to the following:

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

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

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

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

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

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

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

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

(*i*) Common dolphin and

(*ii*) All other marine mammal species;

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

(*i*) Common dolphin and

(*ii*) All other marine mammal species;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vii) *Reconsideration of finding*. The Assistant Administrator may reconsider a finding upon a request from and the submission of additional information by the harvesting nation, if the information indicates that the nation has met the requirements under paragraph (e)(5)(v) of this section. For a harvesting nation whose marine mammal mortality rate was found to exceed the acceptable levels prescribed in paragraphs (e)(5)(v)(E), (e)(5)(v)(F), or (e)(5)(v)(G) of this section, the additional information must include data collected by an acceptable observer program, which must demonstrate that the nation's fleet marine mammal mortality rate improved to the acceptable level during the period submitted for comparison, which must include, at a minimum, the most recent:

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

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

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

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

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

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

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

this fleet within 30 days when changes occur.

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

(A) Vessel summary data, to include:

(*1*) The total number of observed trips;

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

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

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

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

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

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

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

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

(B) Either 100-percent observer coverage is provided for all purse seine vessels as required by paragraph (e)(5)(viii)(A)(*2*) of this section; or the harvesting nation is in a probationary status in accordance with paragraph (e)(5)(xi)(B)(*1*) of this section; and

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

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

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

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

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

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

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

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

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

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

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

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

(xiv) *Intermediary nation*. Any yellowfin tuna or yellowfin tuna products in the classifications listed in paragraph (e)(2)(i) of this section, from any intermediary nation, as that term is defined in section 3 of the MMPA, may not be imported into the United States unless the Assistant Administrator determines and publishes in the FEDERAL REGISTER that the intermediary nation has provided reasonable proof and has certified to the United States that it has not imported, in the preceding 6 months, yellowfin tuna or yellowfin tuna products that are subject to a ban on direct importation into the United States under section 101(a)(2)(B) of the MMPA. A prohibition on imports under this paragraph may be lifted by the Assistant Administrator upon a determination announced in the FEDERAL REGISTER, based upon new information supplied by the government of the intermediary nation, that the nation has not imported, in the preceding 6 months, yellowfin tuna or yellowfin tuna products subject to a ban on direct imports under section 101(a)(2)(B) of the MMPA. Shipments of yellowfin tuna or yellowfin tuna products through a nation on a through bill of lading or in another manner that does not enter the shipments into that nation as an importation do not make that nation an intermediary nation. The Assistant Administrator shall act on any request to review decisions under this paragraph (e)(5)(xiv) that are accompanied by specific and detailed supporting information or documentation, within 30 days of receipt of such request. For purposes of this paragraph (e)(5)(xiv), certification and reasonable proof means the submission by a responsible government official from the nation of a document reflecting the nation's customs records for the preceding 6 months, together with a certificate attesting that the document is accurate.

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

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

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

(7) [Reserved]

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

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

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

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

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

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

(*1*) A completed Fisheries Certificate of Origin;

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

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

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

(D) In the case of tuna or a tuna product containing tuna harvested outside the ETP by a purse seine vessel in a fishery in which the Secretary has determined that a regular and significant association occurs between marine mammals and tuna, and in which tuna is harvested through the use of purse seine nets deployed on, or to encircle, marine mammals, it is accompanied by a written statement, executed by the captain of the vessel and by an observer, certifying that no purse seine net was intentionally deployed on, or to encircle, marine mammals during the particular voyage on which the tuna was harvested.

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

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

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

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

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

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

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

(6)(i) All observers must be provided sleeping, toilet and eating accommodations at least equal to that provided to a full crew member. A mattress or futon on the floor or a cot is not acceptable in place of a regular bunk. Meal and other galley privileges must be the same for the observer as for other crew members.

(ii) Female observers on a vessel with an all-male crew must be accommodated either in a single-person cabin or, if reasonable privacy can be ensured by installing a curtain or other temporary divider, in a two-person cabin shared with a licensed officer of the vessel. If the cabin assigned to a female observer does not have its own toilet and shower facilities that can be provided for the exclusive use of the observer, then a schedule for time-sharing common facilities must be established before the placement meeting and approved by NMFS and must be followed during the entire trip.

(iii) In the event there are one or more female crew members, the female observer may be provided a bunk in a cabin shared solely with female crew members, and provided toilet and shower facilities shared solely with these female crew members.

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

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

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

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

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

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

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

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

[45 FR 72187, Oct. 31, 1980]

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

§216.25 Exempted marine mammals and marine mammal products.

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

(1) To any marine mammal taken before December 21, 1972[1], or

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

(b) The prohibitions contained in §216.12(c) (3) and (4) shall not apply to marine mammals or marine mammal products imported into the United States before the date on which a notice is published in the FEDERAL REGISTER with respect to the designation of the species or stock concerned as depleted or endangered.

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

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

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

Notwithstanding any other provision of this subpart:

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

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

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

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

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

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

if consistent with the provisions at § 216.37(d) under subpart D.

[39 FR 1852, Jan. 15, 1974, as amended at 59 FR 50376, Oct. 3, 1994; 61 FR 21933, May 10, 1996]

§ 216.27 Release, non-releasability, and disposition under special exception permits for rehabilitated marine mammals.

(a) *Release requirements.* (1) Any marine mammal held for rehabilitation must be released within six months of capture or import unless the attending veterinarian determines that:

(i) The marine mammal might adversely affect marine mammals in the wild;

(ii) Release of the marine mammal to the wild will not likely be successful given the physical condition and behavior of the marine mammal; or

(iii) More time is needed to determine whether the release of the marine mammal to the wild will likely be successful. Releasability must be reevaluated at intervals of no less than six months until 24 months from capture or import, at which time there will be a rebuttable presumption that release into the wild is not feasible.

(2) The custodian of the rehabilitated marine mammal shall provide written notification prior to any release into the wild.

(i) Notification shall be provided to:

(A) The NMFS Regional Director at least 15 days in advance of releasing any beached or stranded marine mammal, unless advance notice is waived in writing by the Regional Director; or

(B) The Office Director at least 30 days in advance of releasing any imported marine mammal.

(ii) Notification shall include the following:

(A) A description of the marine mammal, including its physical condition and estimated age;

(B) The date and location of release; and

(C) The method and duration of transport prior to release.

(3) The Regional Director, or the Office Director as appropriate, may:

(i) Require additional information prior to any release;

(ii) Change the date or location of release, or the method or duration of transport prior to release;

(iii) Impose additional conditions to improve the likelihood of success or to monitor the success of the release; or

(iv) Require other disposition of the marine mammal.

(4) All marine mammals must be released near wild populations of the same species, and stock if known, unless a waiver is granted by the Regional Director or the Office Director.

(5) All marine mammals released must be tagged or marked in a manner acceptable to the Regional Director or the Office Director. The tag number or description of the marking must be reported to the Regional Director or Office Director following release.

(b) *Non-releasability and postponed determinations.* (1) The attending veterinarian shall provide the Regional Director or Office Director with a written report setting forth the basis of any determination under paragraphs (a)(1)(i) through (iii) of this section.

(2) Upon receipt of a report under paragraph (b)(1) of this section, the Regional Director or Office Director, in their sole discretion, may:

(i) Order the release of the marine mammal;

(ii) Order continued rehabilitation for an additional 6 months; or

(iii) Order other disposition as authorized.

(3) No later than 30 days after a marine mammal is determined unreleasable in accordance with paragraphs (a)(1)(i) through (iii) of this section, the person with authorized custody must:

(i) Request authorization to retain or transfer custody of the marine mammal in accordance with paragraph (c) of this section, or;

(ii) Humanely euthanize the marine mammal or arrange any other disposition of the marine mammal authorized by the Regional Director or Office Director.

(4) Notwithstanding any of the provisions of this section, the Office Director may require use of a rehabilitated marine mammal for any activity authorized under subpart D in lieu of animals taken from the wild.

(5) Any rehabilitated beached or stranded marine mammal placed on public display following a non-releasability determination under paragraph (a)(1) of this section and pending disposition under paragraph (c) of this section, or any marine mammal imported for medical treatment otherwise unavailable and placed on public display pending disposition after such medical treatment is concluded, must be held in captive maintenance consistent with all requirements for public display.

(c) *Disposition for a special exception purpose.* (1) Upon receipt of an authorization request made under paragraph (b)(3)(i) of this section, or release notification under (a)(2), the Office Director may authorize the retention or transfer of custody of the marine mammal for a special exception purpose authorized under subpart D.

(2) The Office Director will first consider requests from a person authorized to hold the marine mammal for rehabilitation. The Office Director may authorize such person to retain or transfer custody of the marine mammal for scientific research, enhancement, or public display purposes.

(3) The Office Director may authorize retention or transfer of custody of the marine mammal only if:

(i) Documentation has been submitted to the Office Director that the person retaining the subject animal or the person receiving custody of the subject animal by transfer, hereinafter referred to as the recipient, complies with public display requirements of 16 U.S.C. 1374(c)(2)(A) or, for purposes of scientific research and enhancement, holds an applicable permit, or an application for such a special exception permit under §216.33 or a request for a major amendment under §216.39 has been submitted to the Office Director and has been found complete;

(ii) The recipient agrees to hold the marine mammal in conformance with all applicable requirements and standards; and

(iii) The recipient acknowledges that the marine mammal is subject to seizure by the Office Director:

(A) If, at any time pending issuance of the major amendment or permit, the Office Director determines that seizure is necessary in the interest of the health or welfare of the marine mammal;

(B) If the major amendment or permit is denied; or

(C) If the recipient is issued a notice of violation and assessment, or is subject to permit sanctions, in accordance with 15 CFR part 904.

(4) There shall be no remuneration associated with any transfer, provided that, the transferee may reimburse the transferor for any and all costs associated with the rehabilitation and transport of the marine mammal.

(5) Marine mammals undergoing rehabilitation or pending disposition under this section shall not be subject to public display, unless such activities are specifically authorized by the Regional Director or the Office Director, and conducted consistent with the requirements applicable to public display. Such marine mammals shall not be trained for performance or be included in any aspect of a program involving interaction with the public; and

(6) Marine mammals undergoing rehabilitation shall not be subject to intrusive research, unless such activities are specifically authorized by the Office Director in consultation with the Marine Mammal Commission and its Committee of Scientific Advisors on Marine Mammals, and are conducted pursuant to a scientific research permit.

(d) Reporting. In addition to the report required under §216.22(b), the person authorized to hold marine mammals for rehabilitation must submit reports to the Regional Director or Office Director regarding release or other disposition. These reports must be provided in the form and frequency specified by the Regional Director or Office Director.

[61 FR 21933, May 10, 1996]

Subpart D—Special Exceptions

§216.30 [Reserved]

§216.31 Definitions.

For the purpose of this subpart, the definitions set forth in 50 CFR part 217 shall apply to all threatened and endangered marine mammals, unless a

more restrictive definition exists under the MMPA or part 216.

[61 FR 21935, May 10, 1996]

§ 216.32 Scope.

The regulations of this subpart apply to:

(a) All marine mammals and marine mammal parts taken or born in captivity after December 20, 1972; and

(b) All marine mammals and marine mammal parts that are listed as threatened or endangered under the ESA.

[61 FR 21935, May 10, 1996]

§ 216.33 Permit application submission, review, and decision procedures.

(a) *Application submission.* Persons seeking a special exemption permit under this subpart must submit an application to the Office Director. The application must be signed by the applicant, and provide in a properly formatted manner all information necessary to process the application. Written instructions addressing information requirements and formatting may be obtained from the Office Director upon request.

(b) *Applications to export living marine mammals.* For applicants seeking a special exception permit to export living marine mammals, the application must:

(1) Be submitted through the Convention on International Trade in Endangered Fauna and Flora management authority of the foreign government or, if different, the appropriate agency or agencies of the foreign government that exercises oversight over marine mammals.

(2) Include a certification from the foreign government that:

(i) The information set forth in the application is accurate;

(ii) The laws and regulations of the foreign governmentinvolved allow enforcement of the terms and conditions of the permit, and that the foreign government will enforce all terms and conditions; and

(iii) The foreign government involved will afford comity to any permit amendment, modification, suspension or revocation decision.

(c) *Initial review.* (1) NMFS will notify the applicant of receipt of the application.

(2) During the initial review, the Office Director will determine:

(i) Whether the application is complete.

(ii) Whether the proposed activity is for purposes authorized under this subpart.

(iii) If the proposed activity is for enhancement purposes, whether the species or stock identified in the application is in need of enhancement for its survival or recovery and whether the proposed activity will likely succeed in its objectives.

(iv) Whether the activities proposed are to be conducted consistent with the permit restrictions and permit specific conditions as described in § 216.35 and § 216.36(a).

(v) Whether sufficient information is included regarding the environmental impact of the proposed activity to enable the Office Director:

(A) To make an initial determination under the National Environmental Policy Act (NEPA) as to whether the proposed activity is categorically excluded from preparation of further environmental documentation, or whether the preparation of an environmental assessment (EA) or environmental impact statement (EIS) is appropriate or necessary; and

(B) To prepare an EA or EIS if an initial determination is made by the Office Director that the activity proposed is not categorically excluded from such requirements.

(3) The Office Director may consult with the Marine Mammal Commission (Commission) and its Committee of Scientific Advisors on Marine Mammals (Committee) in making these initial, and any subsequent, determinations.

(4) Incomplete applications will be returned with explanation. If the applicant fails to resubmit a complete application or correct the identified deficiencies within 60 days, the application will be deemed withdrawn. Applications that propose activities inconsistent with this subpart will be returned with explanation, and will not be considered further.

(d) *Notice of receipt and application review.* (1) Upon receipt of a valid, complete application, and the preparation of any NEPA documentation that has been determined initially to be required, the Office Director will publish a notice of receipt in the FEDERAL REGISTER. The notice will:

(i) Summarize the application, including:

(A) The purpose of the request;

(B) The species and number of marine mammals;

(C) The type and manner of special exception activity proposed;

(D) The location(s) in which the marine mammals will be taken, from which they will be imported, or to which they will be exported; and

(E) The requested period of the permit.

(ii) List where the application is available for review.

(iii) Invite interested parties to submit written comments concerning the application within 30 days of the date of the notice.

(iv) Include a NEPA statement that an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an EA or EIS, that an EA was prepared resulting in a finding of no significant impact, or that a final EIS has been prepared and is available for review.

(2) The Office Director will forward a copy of the complete application to the Commission for comment. If no comments are received within 45 days (or such longer time as the Office Director may establish) the Office Director will consider the Commission to have no objection to issuing a permit.

(3) The Office Director may consult with any other person, institution, or agency concerning the application.

(4) Within 30 days of publication of the notice of receipt in the FEDERAL REGISTER, any interested party may submit written comments or may request a public hearing on the application.

(5) If the Office Director deems it advisable, the Office Director may hold a public hearing within 60 days of publication of the notice of receipt in the FEDERAL REGISTER. Notice of the date, time, and place of the public hearing will be published in the FEDERAL REGISTER not less than 15 days in advance of the public hearing. Any interested person may appear in person or through representatives and may submit any relevant material, data, views, or comments. A summary record of the hearing will be kept.

(6) The Office Director may extend the period during which any interested party may submit written comments. Notice of the extension must be published in the FEDERAL REGISTER within 60 days of publication of the notice of receipt in the FEDERAL REGISTER.

(7) If, after publishing a notice of receipt, the Office Director determines on the basis of new information that an EA or EIS must be prepared, the Office Director must deny the permit unless an EA is prepared with a finding of no significant impact. If a permit is denied under these circumstances the application may be resubmitted with information sufficient to prepare an EA or EIS, and will be processed as a new application.

(e) *Issuance or denial procedures.* (1) Within 30 days of the close of the public hearing or, if no public hearing is held, within 30 days of the close of the public comment period, the Office Director will issue or deny a special exception permit.

(2) The decision to issue or deny a permit will be based upon:

(i) All relevant issuance criteria set forth at §216.34;

(ii) All purpose-specific issuance criteria as appropriate set forth at §216.41, §216.42, and §216.43;

(iii) All comments received or views solicited on the permit application; and

(iv) Any other information or data that the Office Director deems relevant.

(3) If the permit is issued, upon receipt, the holder must date and sign the permit, and return a copy of the original to the Office Director. The permit shall be effective upon the permit holder's signing of the permit. In signing the permit, the holder:

(i) Agrees to abide by all terms and conditions set forth in the permit, and all restrictions and relevant regulations under this subpart; and

(ii) Acknowledges that the authority to conduct certain activities specified in the permit is conditional and subject to authorization by the Office Director.

(4) Notice of the decision of the Office Director shall be published in the FEDERAL REGISTER within 10 days after the date of permit issuance or denial and shall indicate where copies of the permit, if issued, may be reviewed or obtained. If the permit issued involves marine mammals listed as endangered or threatened under the ESA, the notice shall include a finding by the Office Director that the permit:

(i) Was applied for in good faith;

(ii) If exercised, will not operate to the disadvantage of such endangered or threatened species; and

(iii) Is consistent with the purposes and policy set forth in section 2 of the ESA.

(5) If the permit is denied, the Office Director shall provide the applicant with an explanation for the denial.

(6) Under the MMPA, the Office Director may issue a permit for scientific research before the end of the public comment period if delaying issuance could result in injury to a species, stock, or individual, or in loss of unique research opportunities. The Office Director also may waive the 30-day comment period required under the ESA in an emergency situation where the health or life of an endangered or threatened marine mammal is threatened and no reasonable alternative is available. If a permit is issued under these circumstances, notice of such issuance before the end of the comment period shall be published in the FEDERAL REGISTER within 10 days of issuance.

(7) The applicant or any party opposed to a permit may seek judicial review of the terms and conditions of such permit or of a decision to deny such permit. Review may be obtained by filing a petition for review with the appropriate U.S. District Court as provided for by law.

[61 FR 21935, May 10, 1996]

§ 216.34 Issuance criteria.

(a) For the Office Director to issue any permit under this subpart, the applicant must demonstrate that:

(1) The proposed activity is humane and does not present any unnecessary risks to the health and welfare of marine mammals;

(2) The proposed activity is consistent with all restrictions set forth at § 216.35 and any purpose-specific restrictions as appropriate set forth at § 216.41, § 216.42, and § 216.43;

(3) The proposed activity, if it involves endangered or threatened marine mammals, will be conducted consistent with the purposes and policies set forth in section 2 of the ESA;

(4) The proposed activity by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock;

(5) Whether the applicant's expertise, facilities, and resources are adequate to accomplish successfully the objectives and activities stated in the application;

(6) If a live animal will be held captive or transported, the applicant's qualifications, facilities, and resources are adequate for the proper care and maintenance of the marine mammal; and

(7) Any requested import or export will not likely result in the taking of marine mammals or marine mammal parts beyond those authorized by the permit.

(b) The opinions or views of scientists or other persons or organizations knowledgeable of the marine mammals that are the subject of the application or of other matters germane to the application will be considered.

[61 FR 21936, May 10, 1996]

§ 216.35 Permit restrictions.

The following restrictions shall apply to all permits issued under this subpart:

(a) The taking, importation, export, or other permitted activity involving marine mammals and marine mammal parts shall comply with the regulations of this subpart.

(b) The maximum period of any special exception permit issued, or any major amendment granted, is five years from the effective date of the permit or major amendment. In accordance with the provisions of § 216.39, the period of a permit may be extended by a minor amendment up to 12 months

beyond that established in the original permit.

(c) Except as provided for in §216.41(c)(1)(v), marine mammals or marine mammal parts imported under the authority of a permit must be taken or imported in a humane manner, and in compliance with the Acts and any applicable foreign law. Importation of marine mammals and marine mammal parts is subject to the provisions of 50 CFR part 14.

(d) The permit holder shall not take from the wild any marine mammal which at the time of taking is either unweaned or less than eight months old, or is a part of a mother-calf/pup pair, unless such take is specifically authorized in the conditions of the special exception permit. Additionally, the permit holder shall not import any marine mammal that is pregnant or lactating at the time of taking or import, or is unweaned or less than eight months old unless such import is specifically authorized in the conditions of the special exception permit.

(e) Captive marine mammals shall not be released into the wild unless specifically authorized by the Office Director under a scientific research or enhancement permit.

(f) The permit holder is responsible for all activities of any individual who is operating under the authority of the permit;

(g) Individuals conducting activities authorized under the permit must possess qualifications commensurate with their duties and responsibilities, or must be under the direct supervision of a person with such qualifications;

(h) Persons who require state or Federal licenses to conduct activities authorized under the permit must be duly licensed when undertaking such activities;

(i) Special exception permits are not transferable or assignable to any other person, and a permit holder may not require any direct or indirect compensation from another person in return for requesting authorization for such person to conduct the taking, import, or export activities authorized under the subject permit;

(j) The permit holder or designated agent shall possess a copy of the permit when engaged in a permitted activity, when the marine mammal is in transit incidental to such activity, and whenever marine mammals or marine mammal parts are in the possession of the permit holder or agent. A copy of the permit shall be affixed to any container, package, enclosure, or other means of containment, in which the marine mammals or marine mammal parts are placed for purposes of transit, supervision, or care. For marine mammals held captive and marine mammal parts in storage, a copy of the permit shall be kept on file in the holding or storage facility.

[61 FR 21936, May 10, 1996]

§216.36 Permit conditions.

(a) *Specific conditions.* (1) Permits issued under this subpart shall contain specific terms and conditions deemed appropriate by the Office Director, including, but not limited to:

(i) The number and species of marine mammals that are authorized to be taken, imported, exported, or otherwise affected;

(ii) The manner in which marine mammals may be taken according to type of take;

(iii) The location(s) in which the marine mammals may be taken, from which they may be imported, or to which they may be exported, as applicable, and, for endangered or threatened marine mammal species to be imported or exported, the port of entry or export;

(iv) The period during which the permit is valid.

(2) [Reserved]

(b) *Other conditions.* In addition to the specific conditions imposed pursuant to paragraph (a) of this section, the Office Director shall specify any other permit conditions deemed appropriate.

[61 FR 21937, May 10, 1996]

§216.37 Marine mammal parts.

With respect to marine mammal parts acquired by take or import authorized under a permit issued under this subpart:

(a) Marine mammal parts are transferrable if:

(1) The person transferring the part receives no remuneration of any kind for the marine mammal part;

(2) The person receiving the marine mammal part is:

(i) An employee of NMFS, the U.S. Fish and Wildlife Service, or any other governmental agency with conservation and management responsibilities, who receives the part in the course of their official duties;

(ii) A holder of a special exception permit which authorizes the take, import, or other activity involving the possession of a marine mammal part of the same species as the subject part; or

(iii) In the case of marine mammal parts from a species that is not depleted, endangered or threatened, a person who is authorized under section 112(c) of the MMPA and subpart C of this part to take or import marine mammals or marine mammal parts;

(iv) Any other person specifically authorized by the Regional Director, consistent with the requirements of paragraphs (a)(1) and (a)(3) through (6) of this section.

(3) The marine mammal part is transferred for the purpose of scientific research, maintenance in a properly curated, professionally accredited scientific collection, or education, provided that, for transfers for educational purposes, the recipient is a museum, educational institution or equivalent that will ensure that the part is available to the public as part of an educational program;

(4) A unique number assigned by the permit holder is marked on or affixed to the marine mammal part or container;

(5) The person receiving the marine mammal part agrees that, as a condition of receipt, subsequent transfers may only occur subject to the provisions of paragraph (a) of this section; and

(6) Within 30 days after the transfer, the person transferring the marine mammal part notifies the Regional Director of the transfer, including a description of the part, the person to whom the part was transferred, the purpose of the transfer, certification that the recipient has agreed to comply with the requirements of paragraph (a) of this section for subsequent transfers, and, if applicable, the recipient's permit number.

(b) Marine mammal parts may be loaned to another person for a purpose described in paragraph (a)(3) of this section and without the agreement and notification required under paragraphs (a)(5) and (6) of this section, if:

(1) A record of the loan is maintained; and

(2) The loan is for not more than one year. Loans for a period greater than 12 months, including loan extensions or renewals, require notification of the Regional Director under paragraph (a)(6).

(c) Unless other disposition is specified in the permit, a holder of a special exception permit may retain marine mammal parts not destroyed or otherwise disposed of during or after a scientific research or enhancement activity, if such marine mammal parts are:

(1) Maintained as part of a properly curated, professionally accredited collection; or

(2) Made available for purposes of scientific research or enhancement at the request of the Office Director.

(d) Marine mammal parts may be exported and subsequently reimported by a permit holder or subsequent authorized recipient, for the purpose of scientific research, maintenance in a properly curated, professionally accredited scientific collection, or education, provided that:

(1) The permit holder or other person receives no remuneration for the marine mammal part;

(2) A unique number assigned by the permit holder is marked on or affixed to the marine mammal specimen or container;

(3) The marine mammal part is exported or reimported in compliance with all applicable domestic and foreign laws;

(4) If exported or reimported for educational purposes, the recipient is a museum, educational institution, or equivalent that will ensure that the part is available to the public as part of an educational program; and

(5) Special reports are submitted within 30 days after both export and reimport as required by the Office Director under § 216.38.

[61 FR 21937, May 10, 1996]

§216.38 Reporting.

All permit holders must submit annual, final, and special reports in accordance with the requirements established in the permit, and any reporting format established by the Office Director.

[61 FR 21937, May 10, 1996]

§216.39 Permit amendments.

(a) *General.* Special exception permits may be amended by the Office Director. Major and minor amendments may be made to permits in response to, or independent of, a request from the permit holder. Amendments must be consistent with the Acts and comply with the applicable provisions of this subpart.

(1) A *major amendment* means any change to the permit specific conditions under §216.36(a) regarding:

(i) The number and species of marine mammals that are authorized to be taken, imported, exported, or otherwise affected;

(ii) The manner in which these marine mammals may be taken, imported, exported, or otherwise affected, if the proposed change may result in an increased level of take or risk of adverse impact;

(iii) The location(s) in which the marine mammals may be taken, from which they may be imported, and to which they may be exported, as applicable; and

(iv) The duration of the permit, if the proposed extension would extend the duration of the permit more than 12 months beyond that established in the original permit.

(2) A *minor amendment* means any amendment that does not constitute a major amendment.

(b) *Amendment requests and proposals.* (1) Requests by a permit holder for an amendment must be submitted in writing and include the following:

(i) The purpose and nature of the amendment;

(ii) Information, not previously submitted as part of the permit application or subsequent reports, necessary to determine whether the amendment satisfies all issuance criteria set forth at §216.34, and, as appropriate, §216.41, §216.42, and §216.43.

(iii) Any additional information required by the Office Director for purposes of reviewing the proposed amendment.

(2) If an amendment is proposed by the Office Director, the permit holder will be notified of the proposed amendment, together with an explanation.

(c) *Review of proposed amendments.* (1) *Major amendments.* The provisions of §216.33(d) and (e) governing notice of receipt, review and decision shall apply to all proposed major amendments.

(2) *Minor amendments.* (i) After reviewing all appropriate information, the Office Director will provide the permit holder with written notice of the decision on a proposed or requested amendment, together with an explanation for the decision.

(ii) If the minor amendment extends the duration of the permit 12 months or less from that established in the original permit, notice of the minor amendment will be published in the FEDERAL REGISTER within 10 days from the date of the Office Director's decision.

(iii) A minor amendment will be effective upon a final decision by the Office Director.

[61 FR 21937, May 10, 1996]

§216.40 Penalties and permit sanctions.

(a) Any person who violates any provision of this subpart or permit issued thereunder is subject to civil and criminal penalties, permit sanctions and forfeiture as authorized under the Acts, and 15 CFR part 904.

(b) All special exception permits are subject to suspension, revocation, modification and denial in accordance with the provisions of subpart D of 15 CFR part 904.

[61 FR 21938, May 10, 1996]

§216.41 Permits for scientific research and enhancement.

In addition to the requirements under §§216.33 through 216.38, permits for scientific research and enhancement are governed by the following requirements:

(a) *Applicant.* (1) For each application submitted under this section, the applicant shall be the principal investigator

responsible for the overall research or enhancement activity. If the research or enhancement activity will involve a periodic change in the principal investigator or is otherwise controlled by and dependent upon another entity, the applicant may be the institution, governmental entity, or corporation responsible for supervision of the principal investigator.

(2) For any scientific research involving captive maintenance, the application must include supporting documentation from the person responsible for the facility or other temporary enclosure.

(b) *Issuance Criteria*. For the Office Director to issue any scientific research or enhancement permit, the applicant must demonstrate that:

(1) The proposed activity furthers a bona fide scientific or enhancement purpose;

(2) If the lethal taking of marine mammals is proposed:

(i) Non-lethal methods for conducting the research are not feasible; and

(ii) For depleted, endangered, or threatened species, the results will directly benefit that species or stock, or will fulfill a critically important research need.

(3) Any permanent removal of a marine mammal from the wild is consistent with any applicable quota established by the Office Director.

(4) The proposed research will not likely have significant adverse effects on any other component of the marine ecosystem of which the affected species or stock is a part.

(5) For species or stocks designated or proposed to be designated as depleted, or listed or proposed to be listed as endangered or threatened:

(i) The proposed research cannot be accomplished using a species or stock that is not designated or proposed to be designated as depleted, or listed or proposed to be listed as threatened or endangered;

(ii) The proposed research, by itself or in combination with other activities will not likely have a long-term direct or indirect adverse impact on the species or stock;

(iii) The proposed research will either:

(A) Contribute to fulfilling a research need or objective identified in a species recovery or conservation plan, or if there is no conservation or recovery plan in place, a research need or objective identified by the Office Director in stock assessments established under section 117 of the MMPA;

(B) Contribute significantly to understanding the basic biology or ecology of the species or stock, or to identifying, evaluating, or resolving conservation problems for the species or stock; or

(C) Contribute significantly to fulfilling a critically important research need.

(6) For proposed enhancement activities:

(i) Only living marine mammals and marine mammal parts necessary for enhancement of the survival, recovery, or propagation of the affected species or stock may be taken, imported, exported, or otherwise affected under the authority of an enhancement permit. Marine mammal parts would include in this regard clinical specimens or other biological samples required for the conduct of breeding programs or the diagnosis or treatment of disease.

(ii) The activity will likely contribute significantly to maintaining or increasing distribution or abundance, enhancing the health or welfare of the species or stock, or ensuring the survival or recovery of the affected species or stock in the wild.

(iii) The activity is consistent with:

(A) An approved conservation plan developed under section 115(b) of the MMPA or recovery plan developed under section 4(f) of the ESA for the species or stock; or

(B) If there is no conservation or recovery plan, with the Office Director's evaluation of the actions required to enhance the survival or recovery of the species or stock in light of the factors that would be addressed in a conservation or recovery plan.

(iv) An enhancement permit may authorize the captive maintenance of a marine mammal from a threatened, endangered, or depleted species or stock only if the Office Director determines that:

(A) The proposed captive maintenance will likely contribute directly to

the survival or recovery of the species or stock by maintaining a viable gene pool, increasing productivity, providing necessary biological information, or establishing animal reserves required to support directly these objectives; and

(B) The expected benefit to the species or stock outweighs the expected benefits of alternatives that do not require removal of marine mammals from the wild.

(v) The Office Director may authorize the public display of marine mammals held under the authority of an enhancement permit only if:

(A) The public display is incidental to the authorized captive maintenance;

(B) The public display will not interfere with the attainment of the survival or recovery objectives;

(C) The marine mammals will be held consistent with all requirements and standards that are applicable to marine mammals held under the authority of the Acts and the Animal Welfare Act, unless the Office Director determines that an exception is necessary to implement an essential enhancement activity; and

(D) The marine mammals will be excluded from any interactive program and will not be trained for performance.

(vi) The Office Director may authorize non-intrusive scientific research to be conducted while a marine mammal is held under the authority of an enhancement permit, only if such scientific research:

(A) Is incidental to the permitted enhancement activities; and

(B) Will not interfere with the attainment of the survival or recovery objectives.

(c) *Restrictions.* (1) The following restrictions apply to all scientific research permits issued under this subpart:

(i) Research activities must be conducted in the manner authorized in the permit.

(ii) Research results shall be published or otherwise made available to the scientific community in a reasonable period of time.

(iii) Research activities must be conducted under the direct supervision of the principal investigator or a co-investigator identified in the permit.

(iv) Personnel involved in research activities shall be reasonable in number and limited to:

(A) Individuals who perform a function directly supportive of and necessary to the permitted research activity; and

(B) Support personnel included for the purpose of training or as backup personnel for persons described in paragraph (c)(1)(iv)(A).

(v) Any marine mammal part imported under the authority of a scientific research permit must not have been obtained as the result of a lethal taking that would be inconsistent with the Acts, unless authorized by the Office Director.

(vi) Marine mammals held under a permit for scientific research shall not be placed on public display, included in an interactive program or activity, or trained for performance unless such activities:

(A) Are necessary to address scientific research objectives and have been specifically authorized by the Office Director under the scientific research permit; and

(B) Are conducted incidental to and do not in any way interfere with the permitted scientific research; and

(C) Are conducted in a manner consistent with provisions applicable to public display, unless exceptions are specifically authorized by the Office Director.

(vii) Any activity conducted incidental to the authorized scientific research activity must not involve any taking of marine mammals beyond what is necessary to conduct the research (i.e., educational and commercial photography).

(2) Any marine mammal or progeny held in captive maintenance under an enhancement permit shall be returned to its natural habitat as soon as feasible, consistent with the terms of the enhancement permit and the objectives of an approved conservation or recovery plan. In accordance with section 10(j) of the ESA, the Office Director may authorize the release of any population of an endangered or threatened species outside the current range of

such species if the Office Director determines that such release will further the conservation of such species.

[61 FR 21938, May 10, 1996]

§ 216.42 Photography. [Reserved]

§ 216.43 Public display. [Reserved]

§ 216.44 Applicability/transition.

(a) *General.* The regulations of this subpart are applicable to all persons, including persons holding permits or other authorizing documents issued before June 10, 1996, by NMFS for the take, import, export, or conduct of any otherwise prohibited activity involving a marine mammal or marine mammal part for special exception purposes.

(b) *Scientific research.* Any intrusive research as defined in § 216.3, initiated after June 10, 1996, must be authorized under a scientific research permit. Intrusive research authorized by the Office Director to be conducted on captive marine mammals held for public display purposes prior to June 10, 1996, must be authorized under a scientific research permit one year after June 10, 1996.

[61 FR 21939, May 10, 1996]

§ 216.45 General Authorization for Level B harassment for scientific research.

(a) *General Authorization.* (1) Persons are authorized under section 104(c)(3)(C) of the MMPA to take marine mammals in the wild by Level B harassment, as defined in § 216.3, for purposes of bona fide scientific research *Provided,* That:

(i) They submit a letter of intent in accordance with the requirements of paragraph (b) of this section, receive confirmation that the General Authorization applies in accordance with paragraph (c) of this section, and comply with the terms and conditions of paragraph (d) of this section; or

(ii) If such marine mammals are listed as endangered or threatened under the ESA, they have been issued a permit under Section 10(a)(1)(A) of the ESA and implementing regulations at 50 CFR parts 217–227, particularly at § 222.23 through § 222.28, to take marine mammals in the wild for the purpose of scientific research, the taking authorized under the permit involves such Level B harassment of marine mammals or marine mammal stocks, and they comply with the terms and conditions of that permit.

(2) Except as provided under paragraph (a)(1)(ii) of this section, no taking, including harassment, of marine mammals listed as threatened or endangered under the ESA is authorized under the General Authorization. Marine mammals listed as endangered or threatened under the ESA may be taken for purposes of scientific research only after issuance of a permit for such activities pursuant to the ESA.

(3) The following types of research activities will likely qualify for inclusion under the General Authorization: Photo-identification studies, behavioral observations, and vessel and aerial population surveys (except aerial surveys over pinniped rookeries at altitudes of less than 1,000 ft).

(b) *Letter of intent.* Except as provided under paragraph (a)(1)(ii) of this section, any person intending to take marine mammals in the wild by Level B harassment for purposes of bona fide scientific research under the General Authorization must submit, at least 60 days before commencement of such research, a letter of intent by certified return/receipt mail to the Chief, Permits Division, F/PR1, Office of Protected Resources, NMFS, 1335 East-West Highway, Silver Spring, MD 20910–3226.

(1) The letter of intent must be submitted by the principal investigator (who shall be deemed the applicant). For purposes of this section, the principal investigator is the individual who is responsible for the overall research project, or the institution, governmental entity, or corporation responsible for supervision of the principal investigator.

(2) The letter of intent must include the following information:

(i) The name, address, telephone number, qualifications and experience of the applicant and any co-investigator(s) to be conducting the proposed research, and a curriculum vitae for each, including a list of publications by each such investigator relevant to the

objectives, methodology, or other aspects of the proposed research;

(ii) The species or stocks of marine mammals (common and scientific names) that are the subject of the scientific research and any other species or stock of marine mammals that may be harassed during the conduct of the research;

(iii) The geographic location(s) in which the research is to be conducted, e.g., geographic name or lat./long.;

(iv) The period(s) of time over which the research will be conducted (up to five years), including the field season(s) for the research, if applicable;

(v) The purpose of the research, including a description of how the proposed research qualifies as bona fide research as defined in §216.3; and

(vi) The methods to be used to conduct the research.

(3) The letter of intent must be signed, dated, and certified by the applicant as follows:

In accordance with section 104(c)(3)(C) of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and implementing regulations (50 CFR part 216), I hereby notify the National Marine Fisheries Service of my intent to conduct research involving only Level B harassment on marine mammals in the wild, and request confirmation that the General Authorization for Level B Harassment for Scientific Research applies to the proposed research as described herein. I certify that the information in this letter of intent is complete, true, and correct to the best of my knowledge and belief, and I understand that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001, or penalties under the MMPA and implementing regulations. I acknowledge and accept that authority to conduct scientific research on marine mammals in the wild under the General Authorization is a limited conditional authority restricted to Level B harassment only, and that any other take of marine mammals, including the conduct of any activity that has the potential to injure marine mammals (i.e., Level A harassment), may subject me to penalties under the MMPA and implementing regulations.

(c) *Confirmation that the General Authorization applies or notification of permit requirement.*

(1) Not later than 30 days after receipt of a letter of intent as described in paragraph (b) of this section, the Chief, Permits Division, NMFS will issue a letter to the applicant either:

(i) Confirming that the General Authorization applies to the proposed scientific research as described in the letter of intent;

(ii) Notifying the applicant that all or part of the research described in the letter of intent is likely to result in a taking of a marine mammal in the wild involving other than Level B harassment and, as a result, cannot be conducted under the General Authorization, and that a scientific research permit is required to conduct all or part of the subject research; or

(iii) Notifying the applicant that the letter of intent fails to provide sufficient information and providing a description of the deficiencies, or notifying the applicant that the proposed research as described in the letter of intent is not bona fide research as defined in §216.3.

(2) A copy of each letter of intent and letter confirming that the General Authorization applies or notifying the applicant that it does not apply will be forwarded to the Marine Mammal Commission.

(3) Periodically, NMFS will publish a summary document in the FEDERAL REGISTER notifying the public of letters of confirmation issued.

(d) *Terms and conditions.* Persons issued letters of confirmation in accordance with paragraph (c) of this section are responsible for complying with the following terms and conditions:

(1) Activities are limited to those conducted for the purposes, by the means, in the locations, and during the periods of time described in the letter of intent and acknowledged as authorized under the General Authorization in the confirmation letter sent pursuant to paragraph (c) of this section;

(2) Annual reports of activities conducted under the General Authorization must be submitted to the Chief, Permits Division (address listed in paragraph (b) of this section) within 90 days of completion of the last field season(s) during the calendar year or, if the research is not conducted during a defined field season, no later than 90 days after the anniversary date of the letter of confirmation issued under paragraph (c) of this section. Annual reports must include:

(i) A summary of research activities conducted;

(ii) Identification of the species and number of each species taken by Level B harassment;

(iii) An evaluation of the progress made in meeting the objectives of the research as described in the letter of intent; and

(iv) Any incidental scientific, educational, or commercial uses of photographs, videotape, and film obtained as a result of or incidental to the research and if so, names of all photographers.

(3) Authorization to conduct research under the General Authorization is for the period(s) of time identified in the letter of intent or for a period of 5 years from the date of the letter of confirmation issued under paragraph (c) of this section, whichever is less, unless extended by the Director or modified, suspended, or revoked in accordance with paragraph (e) of this section;

(4) Activities conducted under the General Authorization may only be conducted under the on-site supervision of the principal investigator or co-investigator(s) named in the letter of intent. All personnel involved in the conduct of activities under the General Authorization must perform a function directly supportive of and necessary for the research being conducted, or be one of a reasonable number of support personnel included for the purpose of training or as back-up personnel;

(5) The principal investigator must notify the appropriate Regional Director, NMFS, (Regional Director) in writing at least 2 weeks before initiation of on-site activities. The Regional Director shall consider this information in efforts to coordinate field research activities to minimize adverse impacts on marine mammals in the wild. The principal investigator must cooperate with coordination efforts by the Regional Director in this regard;

(6) If research activities result in a taking which exceeds Level B harassment, the applicant shall:

(i) Report the taking within 12 hours to the Director, Office of Protected Resources, or his designee as set forth in the letter authorizing research; and

(ii) Temporarily discontinue for 72 hours all field research activities that resulted in the taking. During this time period, the applicant shall consult with NMFS as to the circumstances surrounding the taking and any precautions necessary to prevent future taking, and may agree to amend the research protocol, as deemed necessary by NMFS.

(7) NMFS may review scientific research conducted pursuant to the General Authorization. If requested by NMFS, the applicant must cooperate with any such review and shall:

(i) Allow any employee of NOAA or any other person designated by the Director, Office of Protected Resources to observe research activities; and

(ii) Provide any documents or other information relating to the scientific research;

(8) Any photographs, videotape, or film obtained during the conduct of research under the General Authorization must be identified by a statement that refers to the General Authorization or ESA permit number, and includes the file number provided by NMFS in the confirmation letter, the name of the photographer, and the date the image was taken. This statement must accompany the image(s) in all subsequent uses or sales. The annual report must note incidental scientific, educational, or commercial uses of the images, and if there are any such uses, the names of all photographers; and

(9) Persons conducting scientific research under authority of the General Authorization may not transfer or assign any authority granted thereunder to any other person.

(e) *Suspension, revocation, or modification.* (1) NMFS may suspend, revoke, or modify the authority to conduct scientific research under the General Authorization if:

(i) The letter of intent included false information or statements of a material nature;

(ii) The research does not constitute bona fide scientific research;

(iii) Research activities result in takings of marine mammals other than by Level B harassment;

(iv) Research activities differ from those described in the letter of intent submitted by the applicant and letter of confirmation issued by NMFS; or

(v) The applicant violates any term or condition set forth in this section.

(2) Any suspension, revocation, or modification is subject to the requirements of 15 CFR part 904.

[59 FR 50376, Oct. 3, 1994]

§§216.46–216.49 [Reserved]

Subpart E—Designated Ports

§216.50 Importation at designated ports.

(a) Any marine mammal or marine mammal product which is subject to the jurisdiction of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce and is intended for importation into the United States shall be subject to the provisions of 50 CFR part 14.

(b) For the information of importers, designated ports of entry for the United States are:

New York, N.Y.
Miami, Fla.
Chicago, Ill.
San Francisco, Calif.
Los Angeles, Calif.
New Orleans, La.
Seattle, Wash.
Honolulu, Hi.

(c) Additionally, marine mammals or marine mammal products which are entered into Alaska, Hawaii, Puerto Rico, Guam, American Samoa or the Virgin Islands and which are not to be forwarded or transhipped within the United States may be imported through the following ports:

Alaska—Juneau, Anchorage, Fairbanks
Hawaii—Honolulu
Puerto Rico—San Juan
Guam—Honolulu, Hi.
American Samoa—Honolulu, Hi.
Virgin Islands—San Juan, P.R.

(d) Importers are advised to see 50 CFR part 14 for importation requirements and information.

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

Subpart F—Pribilof Islands, Taking for Subsistence Purposes

§216.71 Allowable take of fur seals.

Pribilovians may take fur seals on the Pribilof Islands if such taking is

(a) For subsistence uses, and

(b) Not accomplished in a wasteful manner.

[51 FR 24840, July 9, 1986. Redesignated at 61 FR 11750, Mar. 22, 1996]

§216.72 Restrictions on taking.

(a) The harvests of seals on St. Paul and St. George Islands shall be treated independently for the purposes of this section. Any suspension, termination, or extension of the harvest is applicable only to the island for which it is issued.

(b) By April 1 of every third year, beginning April 1994, the Assistant Administrator will publish in the FEDERAL REGISTER a summary of the preceding 3 years of harvesting and a discussion of the number of seals expected to be taken annually over the next 3 years to satisfy the subsistence requirements of each island. This discussion will include an assessment of factors and conditions on St. Paul and St. George Islands that influence the need by Pribilof Aleuts to take seals for subsistence uses and an assessment of any changes to those conditions indicating that the number of seals that may be taken for subsistence each year should be made higher or lower. Following a 30-day public comment period, a final notification of the expected annual harvest levels for the next 3 years will be published.

(c)(1) No fur seal may be taken on the Pribilof Islands before June 23 of each year.

(2) No fur seal may be taken except by experienced sealers using the traditional harvesting methods, including stunning followed immediately by exsanguination. The harvesting method shall include organized drives of subadult males to killing fields unless it is determined by the NMFS representatives, in consultation with the Pribilovians conducting the harvest,

that alternative methods will not result in increased disturbance to the rookery or the increased accidental take of female seals.

(3) Any taking of adult fur seals or pups, or the intentional taking of subadult female fur seals is prohibited.

(4) Only subadult male fur seals 124.5 centimeters or less in length may be taken.

(5) Seals with tags and/or entangling debris may only be taken if so directed by NMFS scientists.

(d) The scheduling of the harvest is at the discretion of the Pribilovians, but must be such as to minimize stress to the harvested seals. The Pribilovians must give adequate advance notice of their harvest schedules to the NMFS representatives to allow for necessary monitoring activities. Scheduling must be consistent with the following restrictions:

(1) *St. Paul Island*—Seals may only be harvested from the following haulout areas: Zapadni, English Bay, Northeast Point, Polovina, Lukanin, Kitovi, and Reef. No haulout area may be harvested more than once per week.

(2) *St. George Island*—Seals may only be harvested from the following haulout areas: Northeast and Zapadni. Neither haulout area may be harvested more than twice per week.

(e)(1) The Assistant Administrator is required to suspend the take provided for in § 215.31 when:

(i) He determines, after reasonable notice by NMFS representatives to the Pribilovians on the island, that the subsistence needs of the Pribilovians on the island have been satisfied;

or

(ii) He determines that the harvest is otherwise being conducted in a wasteful manner; or

(iii) The lower end of the range of the estimated subsistence level provided in the notice issued under paragraph (b) of this section is reached.

(2) A suspension based on a determination under paragraph (e)(1)(ii) of this section may be lifted by the Assistant Administrator if he finds that the conditions which led to the determination that the harvest was being conducted in a wasteful manner have been remedied.

(3) A suspension issued in accordance with paragraph (e)(1)(iii) of this section may not exceed 48 hours in duration and shall be followed immediately by a review of the harvest data to determine if a finding under paragraph (e)(1)(i) of this section is warranted. If a the harvest is not suspended under paragraph (e)(1)(i) of this section, the Assistant Administrator must provide a revised estimate of the number of seals required to satisfy the Pribilovians' subsistence needs.

(f) The Assistant Administrator shall terminate the take provided for in § 215.31 on August 8 of each year or when it is determined under paragraph (e)(1)(i) of this section that the subsistence needs of the Pribilovians on the island have been satisfied, whichever occurs first.

[51 FR 24840, July 9, 1986, as amended at 57 FR 33902, July 31, 1992; 59 FR 35474, July 12, 1994. Redesignated at 61 FR 11750, Mar. 22, 1996]

§ 216.73 Disposition of fur seal parts.

Except for transfers to other Alaskan Natives for barter or sharing for personal or family consumption, no part of a fur seal taken for subsistence uses may be sold or otherwise transferred to any person unless it is a nonedible byproduct which:

(a) Has been transformed into an article of handicraft, or

(b) Is being sent by an Alaskan Native directly, or through a registered agent, to a tannery registered under 50 CFR 216.23(c) for the purpose of processing, and will be returned directly to the Alaskan Native for conversion into an article of handicraft, or

(c) Is being sold or transferred to an Alaskan Native, or to an agent registered under 50 CFR 216.23(c) for resale or transfer to an Alaskan Native, who will convert the seal part into a handicraft.

[51 FR 24840, July 9, 1986. Redesignated at 61 FR 11750, Mar. 22, 1996]

§ 216.74 Cooperation with Federal officials.

Pribilovians who engage in the harvest of seals are required to cooperate with scientists engaged in fur seal research on the Pribilof Islands who may need assistance in recording tag or

other data and collecting tissue or other fur seal samples for research purposes. In addition, Pribilovians who take fur seals for subsistence uses must, consistent with 5 CFR 1320.7(k)(3), cooperate with the NMFS representatives on the Pribilof Islands who are responsible for compiling the following information on a daily basis:

(a) The number of seals taken each day in the subsistence harvest,

(b) The extent of the utilization of fur seals taken, and

(c) Other information determined by the Assistant Administrator to be necessary for determining the subsistence needs of the Pribilovians or for making determinations under §215.32(e).

[51 FR 24840, July 9, 1986. Redesignated at 61 FR 11750, Mar. 22, 1996]

Subpart G—Pribilof Islands Administration

§216.81 Visits to fur seal rookeries.

From June 1 to October 15 of each year, no person, except those authorized by a representative of the National Marine Fisheries Service, or accompanied by an authorized employee of the National Marine Fisheries Service, shall approach any fur seal rookery or hauling grounds nor pass beyond any posted sign forbidding passage.

[41 FR 49488, Nov. 9, 1976. Redesignated at 61 FR 11750, Mar. 22, 1996]

§216.82 Dogs prohibited.

In order to prevent molestation of fur seal herds, the landing of any dogs at Pribilof Islands is prohibited.

[41 FR 49488, Nov. 9, 1976. Redesignated at 61 FR 11750, Mar. 22, 1996]

§216.83 Importation of birds or mammals.

No mammals or birds, except household cats, canaries and parakeets, shall be imported to the Pribilof Islands without the permission of an authorized representative of the National Marine Fisheries Service.

[41 FR 49488, Nov. 9, 1976. Redesignated at 61 FR 11750, Mar. 22, 1996]

§216.84 [Reserved]

§216.85 Walrus and Otter Islands.

By Executive Order 1044, dated February 27, 1909, Walrus and Otter Islands were set aside as bird reservations. All persons are prohibited to land on these islands except those authorized by the appropriate representative of the National Marine Fisheries Service.

[41 FR 49488, Nov. 9, 1976. Redesignated at 61 FR 11750, Mar. 22, 1996]

§216.86 Local regulations.

Local regulations will be published from time to time and will be brought to the attention of local residents and persons assigned to duty on the Islands by posting in public places and brought to the attention of tourists by personal notice.

[41 FR 49488, Nov. 9, 1976. Redesignated at 61 FR 11750, Mar. 22, 1996]

§216.87 Wildlife research.

(a) Wildlife research, other than research on North Pacific fur seals, including specimen collection, may be permitted on the Pribilof Islands subject to the following conditions:

(1) Any person or agency, seeking to conduct such research shall first obtain any Federal or State of Alaska permit required for the type of research involved.

(2) Any person seeking to conduct such research shall obtain prior approval of the Director, Pribilof Islands Program, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, 1700 Westlake Avenue North, Seattle, WA 98109, by filing with the Director an application which shall include:

(i) Copies of the required Federal and State of Alaska permits; and

(ii) A resume of the intended research program.

(3) All approved research shall be subject to all regulations and administrative procedures in effect on the Pribilof Islands, and such research shall not commence until approval from the Director is received.

(4) Any approved research program shall be subject to such terms and conditions as the Director, Pribilof Islands Program deems appropriate.

(5) Permission to utilize the Pribilof Islands to conduct an approved research program may be revoked by the Director, Pribilof Islands Program at any time for noncompliance with any terms and conditions, or for violations of any regulation or administrative procedure in effect on the Pribilof Islands.

[43 FR 5521, Feb. 9, 1978. Redesignated at 61 FR 11750, Mar. 22, 1996]

Subpart H—Dolphin Safe Tuna Labeling

AUTHORITY: 16 U.S.C. 1385.

SOURCE: 61 FR 27794, June 3, 1996, unless otherwise noted.

§ 216.90 Purpose.

This subpart governs the requirements for labeling of tuna or tuna products sold in or exported from the United States that suggest the tuna was harvested in a manner not injurious to dolphins.

§ 216.91 Labeling requirements.

It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any person subject to U.S. jurisdiction, including any producer, exporter, importer, distributor, or seller of any tuna product exported from the United States or offered for sale in the United States to include on the label of that product the term ''dolphin safe'' or any other term, phrase, or symbol that claims or suggests that the tuna contained in the product was harvested using a fishing method that is not harmful to dolphins, if the product:

(a) Contains tuna harvested with a large-scale driftnet; or

(b) Contains tuna harvested in the ETP by a purse seine vessel 400 short tons (362.8 metric tons) carrying capacity or greater and is labeled in a manner that violates the standards set forth in § 216.92 or § 216.93.

§ 216.92 Purse seine vessels greater than 400 short tons (362.8 metric tons).

For purposes of § 216.91(b), any tuna product containing tuna that were harvested in the ETP by a purse seine vessel 400 short tons (362.8 metric tons) carrying capacity or greater, must be accompanied by:

(a) A completed Fisheries Certificate of Origin;

(b) A written statement by the captain of each vessel that harvested the tuna, certifying that the vessel did not intentionally deploy a purse seine net on or to encircle dolphins at any time during the trip;

(c) A written statement certifying that an observer, employed by or working under contract with the Inter-American Tropical Tuna Commission or the Secretary, was on board the vessel during the entire trip and that the vessel did not intentionally deploy a purse seine net on or to encircle dolphin at any time during the trip. The statement must be signed by either:

(1) The Secretary; or

(2) A representative of the Inter-American Tropical Tuna Commission; and

(d) An endorsement on the Fisheries Certificate of Origin by each exporter, importer, and processor certifying that, to the best of his or her knowledge and belief, the Fisheries Certificate of Origin and attached documentation, accurately describe the tuna products.

§ 216.93 Submission of documentation.

The documents required by § 216.92 must accompany the tuna product whenever it is offered for sale or export, except that these documents need not accompany the product when offered for sale if:

(a) The documents do not require further endorsement by any importer or processor, and are submitted to officials of the U.S. Customs Service at the time of import; or

(b) The documents are endorsed as required by § 216.92(d) and delivered to the Director, Southwest Region, or to the U.S. Customs Service at the time of exportation.

§ 216.94 Requests to review documents.

At any time, the Assistant Administrator may request, in writing, any exporter, importer, processor, distributor, or seller of any tuna or tuna product labeled in a manner subject to the

requirements of §216.91, to produce, within a specified time period, all documentary evidence concerning the origin of any product that is offered for sale as ''dolphin safe,'' including the original invoice.

§216.95 False statements or endorsements.

Any person who knowingly and willfully makes a false statement or false endorsement required by §216.92 is liable for a civil penalty not to exceed $100,000, that may be assessed in an action brought in any appropriate District Court of the United States on behalf of the Secretary.

Subpart I—General Regulations Governing Small Takes of Marine Mammals Incidental to Specified Activities

SOURCE: 61 FR 15887, Apr. 10, 1996, unless otherwise noted.

§216.101 Purpose.

The regulations in this subpart implement section 101(a)(5) (A) through (D) of the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1371(a)(5), which provides a mechanism for allowing, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographic region.

§216.102 Scope.

The taking of small numbers of marine mammals under section 101(a)(5) (A) through (D) of the Marine Mammal Protection Act may be allowed only if the National Marine Fisheries Service:

(a) Finds, based on the best scientific evidence available, that the total taking by the specified activity during the specified time period will have a negligible impact on species or stock of marine mammal(s) and will not have an unmitigable adverse impact on the availability of those species or stocks of marine mammals intended for subsistence uses;

(b) Prescribes either regulations under §216.106, or requirements and conditions contained within an incidental harassment authorization issued under §216.107, setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species or stock of marine mammal and its habitat and on the availability of the species or stock of marine mammal for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance; and

(c) Prescribes either regulations or requirements and conditions contained within an incidental harassment authorization, as appropriate, pertaining to the monitoring and reporting of such taking. The specific regulations governing certain specified activities are contained in subsequent subparts of this part.

§216.103 Definitions.

In addition to definitions contained in the MMPA, and in §216.3, and unless the context otherwise requires, in subsequent subparts to this part:

Arctic waters means the marine and estuarine waters north of 60° N. lat.

Citizens of the United States and *U.S. citizens* mean individual U.S. citizens or any corporation or similar entity if it is organized under the laws of the United States or any governmental unit defined in 16 U.S.C. 1362(13). U.S. Federal, state and local government agencies shall also constitute citizens of the United States for purposes of this part.

Incidental harassment, incidental taking and *incidental, but not intentional, taking* all mean an accidental taking. This does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable or accidental. (A complete definition of ''take'' is contained in §216.3).

Negligible impact is an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Small numbers means a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.

Specified activity means any activity, other than commercial fishing, that takes place in a specified geographical region and potentially involves the taking of small numbers of marine mammals.

Specified geographical region means an area within which a specified activity is conducted and that has certain biogeographic characteristics.

Unmitigable adverse impact means an impact resulting from the specified activity:

(1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by:

(i) Causing the marine mammals to abandon or avoid hunting areas;

(ii) Directly displacing subsistence users; or

(iii) Placing physical barriers between the marine mammals and the subsistence hunters; and

(2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

§ 216.104 Submission of requests.

(a) In order for the National Marine Fisheries Service to consider authorizing the taking by U.S. citizens of small numbers of marine mammals incidental to a specified activity (other than commercial fishing), or to make a finding that an incidental take is unlikely to occur, a written request must be submitted to the Assistant Administrator. All requests must include the following information for their activity:

(1) A detailed description of the specific activity or class of activities that can be expected to result in incidental taking of marine mammals;

(2) The date(s) and duration of such activity and the specific geographical region where it will occur;

(3) The species and numbers of marine mammals likely to be found within the activity area;

(4) A description of the status, distribution, and seasonal distribution (when applicable) of the affected species or stocks of marine mammals likely to be affected by such activities;

(5) The type of incidental taking authorization that is being requested (i.e., takes by harassment only; takes by harassment, injury and/or death) and the method of incidental taking;

(6) By age, sex, and reproductive condition (if possible), the number of marine mammals (by species) that may be taken by each type of taking identified in paragraph (a)(5) of this section, and the number of times such takings by each type of taking are likely to occur;

(7) The anticipated impact of the activity upon the species or stock of marine mammal;

(8) The anticipated impact of the activity on the availability of the species or stocks of marine mammals for subsistence uses;

(9) The anticipated impact of the activity upon the habitat of the marine mammal populations, and the likelihood of restoration of the affected habitat;

(10) The anticipated impact of the loss or modification of the habitat on the marine mammal populations involved;

(11) The availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, and on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance;

(12) Where the proposed activity would take place in or near a traditional Arctic subsistence hunting area and/or may affect the availability of a species or stock of marine mammal for Arctic subsistence uses, the applicant must submit either a plan of cooperation or information that identifies what measures have been taken and/or will be taken to minimize any adverse effects on the availability of marine mammals for subsistence uses. A plan must include the following:

(i) A statement that the applicant has notified and provided the affected subsistence community with a draft plan of cooperation;

(ii) A schedule for meeting with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding any

aspects of either the operation or the plan of cooperation;

(iii) A description of what measures the applicant has taken and/or will take to ensure that proposed activities will not interfere with subsistence whaling or sealing; and

(iv) What plans the applicant has to continue to meet with the affected communities, both prior to and while conducting the activity, to resolve conflicts and to notify the communities of any changes in the operation;

(13) The suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species, the level of taking or impacts on populations of marine mammals that are expected to be present while conducting activities and suggested means of minimizing burdens by coordinating such reporting requirements with other schemes already applicable to persons conducting such activity. Monitoring plans should include a description of the survey techniques that would be used to determine the movement and activity of marine mammals near the activity site(s) including migration and other habitat uses, such as feeding. Guidelines for developing a site-specific monitoring plan may be obtained by writing to the Director, Office of Protected Resources; and

(14) Suggested means of learning of, encouraging, and coordinating research opportunities, plans, and activities relating to reducing such incidental taking and evaluating its effects.

(b)(1) The Assistant Administrator shall determine the adequacy and completeness of a request and, if determined to be adequate and complete, will begin the public review process by publishing in the FEDERAL REGISTER either:

(i) A proposed incidental harassment authorization; or

(ii) A notice of receipt of a request for the implementation or reimplementation of regulations governing the incidental taking.

(2) Through notice in the FEDERAL REGISTER, newspapers of general circulation, and appropriate electronic media in the coastal areas that may be affected by such activity, NMFS will invite information, suggestions, and comments for a period not to exceed 30 days from the date of publication in the FEDERAL REGISTER. All information and suggestions will be considered by the National Marine Fisheries Service in developing, if appropriate, the most effective regulations governing the issuance of letters of authorization or conditions governing the issuance of an incidental harassment authorization.

(3) Applications that are determined to be incomplete or inappropriate for the type of taking requested, will be returned to the applicant with an explanation of why the application is being returned.

(c) The Assistant Administrator shall evaluate each request to determine, based upon the best available scientific evidence, whether the taking by the specified activity within the specified geographic region will have a negligible impact on the species or stock and, where appropriate, will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses. If the Assistant Administrator finds that the mitigating measures would render the impact of the specified activity negligible when it would not otherwise satisfy that requirement, the Assistant Administrator may make a finding of negligible impact subject to such mitigating measures being successfully implemented. Any preliminary findings of ''negligible impact'' and ''no unmitigable adverse impact'' shall be proposed for public comment along with either the proposed incidental harassment authorization or the proposed regulations for the specific activity.

(d) If, subsequent to the public review period, the Assistant Administrator finds that the taking by the specified activity would have more than a negligible impact on the species or stock of marine mammal or would have an unmitigable adverse impact on the availability of such species or stock for subsistence uses, the Assistant Administrator shall publish in the FEDERAL REGISTER the negative finding along with the basis for denying the request.

§ 216.105 Specific regulations.

(a) For all petitions for regulations under this paragraph, applicants must provide the information requested in § 216.104(a) on their activity as a whole, which includes, but is not necessarily limited to, an assessment of total impacts by all persons conducting the activity.

(b) For allowed activities that may result in incidental takings of small numbers of marine mammals by harassment, serious injury, death or a combination thereof, specific regulations shall be established for each allowed activity that set forth:

(1) Permissible methods of taking;

(2) Means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting, including requirements for the independent peer-review of proposed monitoring plans where the proposed activity may affect the availability of a species or stock for taking for subsistence uses.

(c) Regulations will be established based on the best available information. As new information is developed, through monitoring, reporting, or research, the regulations may be modified, in whole or in part, after notice and opportunity for public review.

§ 216.106 Letter of Authorization.

(a) A Letter of Authorization, which may be issued only to U.S. citizens, is required to conduct activities pursuant to any regulations established under § 216.105. Requests for Letters of Authorization shall be submitted to the Director, Office of Protected Resources. The information to be submitted in a request for an authorization will be specified in the appropriate subpart to this part or may be obtained by writing to the above named person.

(b) Issuance of a Letter of Authorization will be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under the specific regulations.

(c) Letters of Authorization will specify the period of validity and any additional terms and conditions appropriate for the specific request.

(d) Notice of issuance of all Letters of Authorization will be published in the FEDERAL REGISTER within 30 days of issuance.

(e) Letters of Authorization shall be withdrawn or suspended, either on an individual or class basis, as appropriate, if, after notice and opportunity for public comment, the Assistant Administrator determines that:

(1) The regulations prescribed are not being substantially complied with; or

(2) The taking allowed is having, or may have, more than a negligible impact on the species or stock or, where relevant, an unmitigable adverse impact on the availability of the species or stock for subsistence uses.

(f) The requirement for notice and opportunity for public review in § 216.106(e) shall not apply if the Assistant Administrator determines that an emergency exists that poses a significant risk to the wellbeing of the species or stocks of marine mammals concerned.

(g) A violation of any of the terms and conditions of a Letter of Authorization or of the specific regulations shall subject the Holder and/or any individual who is operating under the authority of the Holder's Letter of Authorization to penalties provided in the MMPA.

§ 216.107 Incidental harassment authorization for Arctic waters.

(a) Except for activities that have the potential to result in serious injury or mortality, which must be authorized under § 216.105, incidental harassment authorizations may be issued, following a 30-day public review period, to allowed activities that may result in only the incidental harassment of a small number of marine mammals. Each such incidental harassment authorization shall set forth:

(1) Permissible methods of taking by harassment;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting, including requirements for

the independent peer-review of proposed monitoring plans where the proposed activity may affect the availability of a species or stock for taking for subsistence uses.

(b) Issuance of an incidental harassment authorization will be based on a determination that the number of marine mammals taken by harassment will be small, will have a negligible impact on the species or stock of marine mammal(s), and will not have an unmitigable adverse impact on the availability of species or stocks for taking for subsistence uses.

(c) An incidental harassment authorization will be either issued or denied within 45 days after the close of the public review period.

(d) Notice of issuance or denial of an incidental harassment authorization will be published in the FEDERAL REGISTER within 30 days of issuance of a determination.

(e) Incidental harassment authorizations will be valid for a period of time not to exceed 1 year but may be renewed for additional periods of time not to exceed 1 year for each reauthorization.

(f) An incidental harassment authorization shall be modified, withdrawn, or suspended if, after notice and opportunity for public comment, the Assistant Administrator determines that:

(1) The conditions and requirements prescribed in the authorization are not being substantially complied with; or

(2) The authorized taking, either individually or in combination with other authorizations, is having, or may have, more than a negligible impact on the species or stock or, where relevant, an unmitigable adverse impact on the availability of the species or stock for subsistence uses.

(g) The requirement for notice and opportunity for public review in paragraph (f) of this section shall not apply if the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals concerned.

(h) A violation of any of the terms and conditions of an incidental harassment authorization shall subject the holder and/or any individual who is operating under the authority of the holder's incidental harassment authorization to penalties provided in the MMPA.

§ 216.108 Requirements for monitoring and reporting under incidental harassment authorizations for Arctic waters.

(a) Holders of an incidental harassment authorization in Arctic waters and their employees, agents, and designees must cooperate with the National Marine Fisheries Service and other designated Federal, state, or local agencies to monitor the impacts of their activity on marine mammals. Unless stated otherwise within an incidental harassment authorization, the holder of an incidental harassment authorization effective in Arctic waters must notify the Alaska Regional Director, National Marine Fisheries Service, of any activities that may involve a take by incidental harassment in Arctic waters at least 14 calendar days prior to commencement of the activity.

(b) Holders of incidental harassment authorizations effective in Arctic waters may be required by their authorization to designate at least one qualified biological observer or another appropriately experienced individual to observe and record the effects of activities on marine mammals. The number of observers required for monitoring the impact of the activity on marine mammals will be specified in the incidental harassment authorization. If observers are required as a condition of the authorization, the observer(s) must be approved in advance by the National Marine Fisheries Service.

(c) The monitoring program must, if appropriate, document the effects (including acoustical) on marine mammals and document or estimate the actual level of take. The requirements for monitoring plans, as specified in the incidental harassment authorization, may vary depending on the activity, the location, and the time.

(d) Where the proposed activity may affect the availability of a species or stock of marine mammal for taking for

subsistence purposes, proposed monitoring plans or other research proposals must be independently peer-reviewed prior to issuance of an incidental harassment authorization under this subpart. In order to complete the peer-review process within the time frames mandated by the MMPA for an incidental harassment authorization, a proposed monitoring plan submitted under this paragraph must be submitted to the Assistant Administrator no later than the date of submission of the application for an incidental harassment authorization. Upon receipt of a complete monitoring plan, and at its discretion, the National Marine Fisheries Service will either submit the plan to members of a peer review panel for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan. The applicant must submit a final monitoring plan to the Assistant Administrator prior to the issuance of an incidental harassment authorization.

(e) At its discretion, the National Marine Fisheries Service may place an observer aboard vessels, platforms, aircraft, etc., to monitor the impact of activities on marine mammals.

(f)(1) As specified in the incidental harassment authorization, the holder of an incidental harassment authorization for Arctic waters must submit reports to the Assistant Administrator within 90 days of completion of any individual components of the activity (if any), within 90 days of completion of the activity, but no later than 120 days prior to expiration of the incidental harassment authorization, whichever is earlier. This report must include the following information:

(i) Dates and type(s) of activity;

(ii) Dates and location(s) of any activities related to monitoring the effects on marine mammals; and

(iii) Results of the monitoring activities, including an estimate of the actual level and type of take, species name and numbers of each species observed, direction of movement of species, and any observed changes or modifications in behavior.

(2) Monitoring reports will be reviewed by the Assistant Administrator and, if determined to be incomplete or inaccurate, will be returned to the holder of the authorization with an explanation of why the report is being returned. If the authorization holder disagrees with the findings of the Assistant Administrator, the holder may request an independent peer review of the report. Failure to submit a complete and accurate report may result in a delay in processing future authorization requests.

(g) Results of any behavioral, feeding, or population studies, that are conducted supplemental to the monitoring program, should be made available to the National Marine Fisheries Service before applying for an incidental harassment authorization for the following year.

Subpart J—Taking of Ringed Seals Incidental to On-Ice Seismic Activities

SOURCE: 63 FR 5283, Feb. 2, 1998, unless otherwise noted.

EFFECTIVE DATE NOTE: At 63 FR 5283, Feb. 2, 1998, subpart J was revised, effective Feb. 2, 1998, to Dec. 31, 2002.

§ 216.111 Specified activity and specified geographical region.

Regulations in this subpart apply only to the incidental taking of ringed seals (*Phoca hispida*) and bearded seals (*Erignathus barbatus*) by U.S. citizens engaged in on-ice seismic exploratory and associated activities over the Outer Continental Shelf of the Beaufort Sea of Alaska, from the shore outward to 45 mi (72 km) and from Point Barrow east to Demarcation Point, from January 1 through May 31 of any calendar year.

§ 216.112 Effective dates.

Regulations in this subpart are effective from February 2, 1998 through December 31, 2002.

§ 216.113 Permissible methods.

The incidental, but not intentional, taking of ringed and bearded seals from January 1 through May 31 by U.S. citizens holding a Letter of Authorization, issued under § 216.106, is permitted during the course of the following activities:

(a) On-ice geophysical seismic activities involving vibrator-type, airgun, or other energy source equipment shown to have similar or lesser effects.

(b) Operation of transportation and camp facilities associated with seismic activities.

§ 216.114 Mitigation.

(a) All activities identified in § 216.113 must be conducted in a manner that minimizes to the greatest extent practicable adverse effects on ringed and bearded seals and their habitat.

(b) All activities identified in § 216.113 must be conducted as far as practicable from any observed ringed or bearded seal or ringed seal lair. No energy source must be placed over an observed ringed seal lair, whether or not any seal is present.

§ 216.115 Requirements for monitoring and reporting.

(a) Holders of Letters of Authorization are required to cooperate with the National Marine Fisheries Service and any other Federal, state, or local agency monitoring the impacts on ringed or bearded seals.

(b) Holders of Letters of Authorization must designate qualified on-site individuals, as specified in the Letter of Authorization, to observe and record the presence of ringed or bearded seals and ringed seal lairs along shot lines and around camps, and the information required in paragraph (d) of this section.

(c) Holders of Letters of Authorization must conduct additional monitoring as required under an annual Letter of Authorization.

(d) An annual report must be submitted to the Assistant Administrator for Fisheries within 90 days after completing each year's activities and must include the following information:

(1) Location(s) of survey activities.

(2) Level of effort (e.g., duration, area surveyed, number of surveys), methods used, and a description of habitat (e.g., ice thickness, surface topography) for each location.

(3) Numbers of ringed seals, bearded seals, or other marine mammals observed, proximity to seismic or associated activities, and any seal reactions observed for each location.

(4) Numbers of ringed seal lairs observed and proximity to seismic or associated activities for each location.

(5) Other information as required in a Letter of Authorization.

§ 216.116 Applications for Letters of Authorization.

(a) To incidentally take ringed and bearded seals pursuant to these regulations, each company conducting seismic operations between January 1 and May 31 in the geographical area described in § 216.111, must apply for and obtain a Letter of Authorization in accordance with § 216.106.

(b) The application must be submitted to the National Marine Fisheries Service at least 90 days before the activity is scheduled to begin.

(c) Applications for Letters of Authorization and for renewals of Letters of Authorization must include the following:

(1) Name of company requesting the authorization;

(2) A description of the activity including method to be used (vibroseis, airgun, watergun), the dates and duration of the activity, the specific location of the activity and the estimated area that will actually be affected by the exploratory activity;

(3) Any plans to monitor the behavior and effects of the activity on marine mammals;

(4) A description of what measures the applicant has taken and/or will take to ensure that proposed activities will not interfere with subsistence sealing; and

(5) What plans the applicant has to continue to meet with the affected communities, both prior to and while conducting the activity, to resolve conflicts and to notify the communities of any changes in the operation.

(d) A copy of the Letter of Authorization must be in the possession of the persons conducting activities that may involve incidental takings of ringed and bearded seals.

§ 216.117 Renewal of Letters of Authorization.

(a) A Letter of Authorization issued under § 216.106 for the activity identified in § 216.111 will be renewed annually upon:

(1) Timely receipt of the reports required under § 216.115(d), which have been reviewed by the Assistant Administrator and determined to be acceptable; and

(2) A determination that the mitigation measures required under § 216.114(b) and the Letter of Authorization have been undertaken.

(b) A notice of issuance of a Letter of Authorization or of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER within 30 days of issuance.

§ 216.118 Modifications to Letters of Authorization.

(a) In addition to complying with the provisions of § 216.106, except as provided in paragraph (b) of this section, no substantive modification, including withdrawal or suspension, to a Letter of Authorization issued pursuant to § 216.106 and subject to the provisions of this subpart shall be made until after notice and an opportunity for public comment. For purposes of this paragraph, renewal of a Letter of Authorization under § 216.117, without modification, is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 216.111, the Letter of Authorization issued pursuant to § 216.106, or renewed pursuant to this section may be substantively modified without prior notice and an opportunity for public comment. A notice will be published in the FEDERAL REGISTER subsequent to the action.

§ 216.119 [Reserved]

Subparts K–L [Reserved]

Subpart M—Taking of Bottlenose Dolphins and Spotted Dolphins Incidental to Oil and Gas Structure Removal Activities

SOURCE: 60 FR 53145, Oct. 12, 1995, unless otherwise noted. Redesignated at 61 FR 15887, Apr. 10, 1996.

EFFECTIVE DATE NOTE: At 60 FR 53145, Oct. 12, 1995, subpart E to part 228 was added, effective Nov. 13, 1995 through Nov. 13, 2000. At 61 FR 15887, Apr. 10, 1996, subpart E to part 228 was redesignated as subpart M to part 216.

§ 216.141 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of marine mammals by U.S. citizens engaged in removing oil and gas drilling and production structures in state waters and on the Outer Continental Shelf in the Gulf of Mexico adjacent to the coasts of Texas, Louisiana, Alabama, Mississippi, and Florida. The incidental, but not intentional, taking of marine mammals by U.S. citizens holding a Letter of Authorization is permitted during the course of severing pilings, well conductors, and related supporting structures, and other activities related to the removal of the oil well structure.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited annually to a combined total of no more than 200 takings by harassment of bottlenose dolphins (*Tursiops truncatus*) and spotted dolphins (*Stenella frontalis* and *S. attenuata*).

§ 216.142 Effective dates.

Regulations in this subpart are effective from November 13, 1995 through November 13, 2000.

§ 216.143 Permissible methods of taking; mitigation.

(a) The use of the following means in conducting the activities identified in § 216.141 is permissible: Bulk explosives, shaped explosive charges, mechanical or abrasive cutters, and underwater arc cutters.

(b) All activities identified in § 216.141 must be conducted in a manner that minimizes, to the greatest extent practicable, adverse effects on bottlenose dolphins, spotted dolphins, and their habitat. When using explosives, the following mitigation measures must be utilized:

(1)(i) If bottlenose or spotted dolphins are observed within 3,000 ft (910 m) of the platform prior to detonating charges, detonation must be delayed

until either the marine mammal(s) are more than 3,000 ft (910 m) from the platform or actions (e.g., operating a vessel in the vicinity of the dolphins to stimulate bow riding, then steering the vessel away from the structure to be removed) are successful in removing them at least 3,000 ft (910 m) from the detonation site;

(ii) Whenever the conditions described in paragraph (b)(1)(i) of this section occur, the aerial survey required under § 216.145(b)(1) must be repeated prior to detonation of charges if the timing requirements of § 216.145(b)(1) cannot be met.

(2) Detonation of explosives must occur no earlier than 1 hour after sunrise and no later than 1 hour before sunset;

(3) If weather and/or sea conditions preclude adequate aerial, shipboard or subsurface surveillance, detonations must be delayed until conditions improve sufficiently for surveillance to be undertaken; and

(4) Detonations must be staggered by a minimum of 0.9 seconds for each group of charges.

[60 FR 53145, Oct. 12, 1995. Redesignated and amended at 61 FR 15887, 15890, Apr. 10, 1996]

§ 216.144 Prohibitions.

Notwithstanding takings authorized by § 216.143 or by a Letter of Authorization issued under § 216.106, the following activities are prohibited:

(a) The taking of a marine mammal that is other than unintentional, except that the intentional passive herding of dolphins from the vicinity of the platform may be authorized under section 109(h) of the Act as described in a Letter of Authorization;

(b) The violation of, or failure to comply with, the terms, conditions, and requirements of this part or a Letter of Authorization issued or renewed under § 216.106 or § 216.146;

(c) The incidental taking of any marine mammal of a species either not specified in this subpart or whenever the incidental taking authorization for authorized species has been reached; and

(d) The use of single explosive charges having an impulse and pressure greater than that generated by a 50–lb (22.7 kg) explosive charge detonated outside the rig piling.

[60 FR 53145, Oct. 12, 1995. Redesignated and amended at 61 FR 15887, 15890, Apr. 10, 1996]

§ 216.145 Requirements for monitoring and reporting.

(a) Observer(s) approved by the National Marine Fisheries Service in advance of the detonation must be used to monitor the area around the site prior to, during, and after detonation of charges.

(b)(1) Both before and after each detonation episode, an aerial survey by NMFS-approved observers must be conducted for a period not less than 30 minutes within 1 hour of the detonation episode. To ensure that no marine mammals are within the designated 3,000 ft (1,000 yd, 941 m) safety zone nor are likely to enter the designated safety zone prior to or at the time of detonation, the pre-detonation survey must encompass all waters within one nautical mile of the structure.

(2) A second post-detonation aerial or vessel survey of the detonation site must be conducted no earlier than 48 hours and no later than 1 week after the oil and gas structure is removed, unless a systematic underwater survey, either by divers or remotely-operated vehicles, dedicated to marine mammals and sea turtles, of the site has been successfully conducted within 24 hours of the detonation event. The aerial or vessel survey must be systematic and concentrate down-current from the structure.

(3) The NMFS observer may waive post-detonation monitoring described in paragraph (b)(2) of this section provided no marine mammals were sighted by the observer during either the required 48 hour pre-detonation monitoring period or during the pre-detonation aerial survey.

(c) During all diving operations (working dives as required in the course of the removals), divers must be instructed to scan the subsurface areas surrounding the platform (detonation) sites for bottlenose or spotted dolphins and if marine mammals are sighted to inform either the U.S. government observer or the agent of the holder of the Letter of Authorization immediately upon surfacing.

(d)(1) A report summarizing the results of structure removal activities, mitigation measures, monitoring efforts, and other information as required by a Letter of Authorization, must be submitted to the Director, NMFS, Southeast Region, 9721 Executive Center Drive N, St. Petersburg, FL 33702 within 30 calendar days of completion of the removal of the rig.

(2) NMFS will accept the U.S. Government observer report as the activity report if all requirements for reporting contained in the Letter of Authorization are provided to that observer before the observer's report is complete.

§ 216.146 Letters of Authorization.

(a) To incidentally take bottlenose and spotted dolphins pursuant to these regulations, each company operating or which operated an oil or gas structure in the geographical area described in § 216.141, and which is responsible for abandonment or removal of the platform, must apply for and obtain a Letter of Authorization in accordance with § 216.106.

(b) A copy of the Letter of Authorization must be in the possession of the persons conducting activities that may involve incidental takings of bottlenose and spotted dolphins.

[60 FR 53145, Oct. 12, 1995. Redesignated and amended at 61 FR 15887, 15890, Apr. 10, 1996]

§ 216.147 Renewal of Letters of Authorization.

(a) A Letter of Authorization issued under § 216.106 for the activity identified in § 216.141 will be renewed annually upon:

(1) Timely receipt of the reports required under § 216.145(d), which have been reviewed by the Assistant Administrator and determined to be acceptable;

(2) A determination that the maximum incidental take authorizations in § 216.141(b) will not be exceeded; and

(3) A determination that the mitigation measures required under § 216.143(b) and the Letter of Authorization have been undertaken.

(b) If a species' annual authorization is exceeded, the Assistant Administrator will review the documentation submitted with the annual reports required under § 216.145(d), to determine that the taking is not having more than a negligible impact on the species or stock involved.

(c) Notice of issuance of a renewal of the Letter of Authorization will be published in the FEDERAL REGISTER.

[60 FR 53145, Oct. 12, 1995. Redesignated and amended at 61 FR 15887, 15890, Apr. 10, 1996]

§ 216.148 Modifications to Letters of Authorization.

(a) In addition to complying with the provisions of § 216.106, except as provided in paragraph (b) of this section, no substantive modification, including withdrawal or suspension, to the Letter of Authorization issued pursuant to § 216.106 and subject to the provisions of this subpart shall be made until after notice and an opportunity for public comment. For purposes of this paragraph, renewal of a Letter of Authorization under § 216.147, without modification, is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 216.141(b), the Letter of Authorization issued pursuant to § 216.106, or renewed pursuant to this section may be substantively modified without prior notice and an opportunity for public comment. A notice will be published in the FEDERAL REGISTER subsequent to the action.

[60 FR 53145, Oct. 12, 1995. Redesignated and amended at 61 FR 15887, 15890, Apr. 10, 1996]

Subpart N—Taking of Marine Mammals Incidental to Underwater Detonation of Conventional Explosives by the Department of Defense

SOURCE: 59 FR 5126, Feb. 3, 1994, unless otherwise noted. Redesignated at 61 FR 15887, Apr. 10, 1996.

EFFECTIVE DATE NOTE: At 59 FR 5126, Feb. 3, 1994, subpart F to part 228 was added, effective March 3, 1994 through March 3, 1999. At 61 FR 15887, Apr. 10, 1996, subpart F of part 228 was redesignated as subpart N of part 216.

§ 216.151 Specified activity, geographical region, and incidental take levels.

(a) Regulations in this subpart apply only to the incidental taking of marine mammals specified in paragraph (b) of this section by U.S. citizens engaged in the detonation of conventional military explosives within the waters of the Outer Sea Test Range of the Naval Air Warfare Center, Pt. Mugu, Ventura County, CA.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited annually to the following species and species groups:

	Lethal	Injury	Harassment
California Sea Lion	2	38	173
Harbor Seal.	2	16	68
Northern Elephant Seal	9	158	724
Northern Fur Seal	2	13	57
Common Dolphin	1	16	67
Striped Dolphin	0	2	5
Risso's Dolphin	0	1	2
Pacific White-Sided Dolphin	3	52	236
Northern Rt. Whale Dolphin	2	24	108
Dall's Porpoise	0	6	18
Bottlenose Dolphin	0	4	15
Killer Whale	0	0	1
Sperm Whale	0	6	20
Beaked Whales	0	0	3
Minke Whale	0	0	4
Blue Whale	0	1	11
Fin Whale	0	0	6
Sei Whale	0	0	1
Humpback Whale	0	0	4
Gray Whale	0	3	40
Right Whale	0	0	1

§ 216.152 Effective dates.

Regulations in this subpart are effective from March 3, 1994, through March 3, 1999.

§ 216.153 Permissible methods of taking; mitigation.

(a) U.S. citizens holding a Letter of Authorization issued pursuant to § 216.106 may incidentally, but not intentionally, take marine mammals by harassment, injury or killing in the course of the detonation of conventional explosives up to the following maximum annual level within the area described in § 216.151(a):

(1) 12 detonations of 10,000 lbs (4,536 kg);

(2) 2 detonations of 1,200 lbs (544 kg);

(3) 10 detonations of 100 lbs (45 kg);

(4) 10 detonations of 10 lbs (4.5 kg); and

(5) 20 detonations of 1 lb (0.45 kg), provided all terms, conditions, and requirements of these regulations and such Letter of Authorization are complied with.

(b) The activity identified in paragraph (a) of this section must be conducted in a manner that minimizes, to the greatest extent possible, adverse impacts on marine mammals and their habitat. When detonating explosives, the following mitigation measures must be utilized:

(1) If marine mammals are observed within the designated safety zone prescribed in the Letter of Authorization, or on a course that will put them within the safety zone prior to detonation, detonation must be delayed until the marine mammals are no longer within the safety zone.

(2) If weather and/or sea conditions preclude adequate aerial surveillance, detonation must be delayed until conditions improve sufficiently for aerial surveillance to be undertaken.

(3) If post-test surveys determine that an injurious or lethal take of a marine mammal has occurred, the test procedure and the monitoring methods must be reviewed and appropriate changes must be made prior to conducting the next project.

[59 FR 5126, Feb. 3, 1994. Redesignated and amended at 61 FR 15887, 15890, Apr. 10, 1996]

§ 216.154 Prohibitions.

Notwithstanding takings authorized by § 216.153 or by a Letter of Authorization issued under § 216.106, the following activities are prohibited:

(a) The taking of a marine mammal that is other than unintentional;

(b) The violation of, or failure to comply with, the terms, conditions, and requirements of this part or a Letter of Authorization issued or renewed under § 216.106 or § 216.156; and

(c) The incidental taking of any marine mammal of a species either not specified in this subpart or whose taking authorization for the year has been reached.

[59 FR 5126, Feb. 3, 1994. Redesignated and amended at 61 FR 15887, 15890, Apr. 10, 1996]

§ 216.155 Requirements for monitoring and reporting.

(a) The holder of the Letter of Authorization is required to cooperate with the National Marine Fisheries Service and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals. The holder must notify the Director, Southwest Region, National Marine Fisheries Service, 501 West Ocean Boulevard, suite 4200, Long Beach, CA (Telephone: (310) 980–4001), at least 2 weeks prior to activities involving the detonation of explosives in order to satisfy paragraph (f) of this section.

(b) The holder of the Letter of Authorization must designate a qualified on-site individual(s) to record the effects of explosives detonation on marine mammals that inhabit the Outer Sea Test Range.

(c) The primary test area, and if necessary, secondary and tertiary test areas, in the Outer Sea Test Range, must be surveyed by marine mammal biologists and other trained individuals, and the marine mammal populations monitored, approximately 48 hours prior to a scheduled detonation, on the day of detonation, and for a period of time specified in the Letter of Authorization after each test or project. Monitoring shall include, but not necessarily be limited to, aerial surveillance sufficient to ensure that no marine mammals are within the designated safety zone nor are likely to enter the designated safety zone prior to or at the time of detonation.

(d)(1) Under the direction of a certified marine mammal veterinarian, examination and recovery of any dead or injured marine mammals will be conducted. Necropsies will be performed and tissue samples taken from any dead animals. After completion of the necropsy, animals not retained for shoreside examination, will be tagged and returned to the sea. The occurrence of live marine mammals will also be documented.

(2) Activities related to the monitoring described in paragraph (d)(1) of this section or the Letter of Authorization issued under this part may include the retention of marine mammals without the need for a separate scientific research permit. The use of such marine mammals in other scientific research may be authorized pursuant to 50 CFR parts 216 and 220.

(e) At its discretion, the National Marine Fisheries Service may place an observer on either the towing vessel, target vessel, or both, and on any ship or aircraft involved in marine mammal reconnaissance, or monitoring either prior to, during, or after explosives detonation in order to monitor the impact on marine mammals.

(f) A summary report must be submitted to the Assistant Administrator for Fisheries, NOAA, within 90 days after the conclusion of any explosives detonation project. This report must include the following information:

(1) Date and time of the test(s);

(2) A summary of the pre-test and post-test activities related to mitigating and monitoring the effects of explosives detonation on marine mammal populations; and

(3) Results of the monitoring program, including numbers by species/stock of any marine mammals noted injured or killed as a result of the detonation and numbers that may have been harassed due to presence within the safety zone.

(g) An annual report must be submitted to the Assistant Administrator for Fisheries, NOAA, no later than 120 days prior to the date of expiration of the annual Letter of Authorization in order for issuance of a Letter of Authorization for the following year. This annual report must contain the following information:

(1) Date and time of all tests conducted under the expiring Letter of Authorization;

(2) A description of all pre-test and post-test activities related to mitigating and monitoring the effects of explosives detonation on marine mammal populations;

(3) Results of the monitoring program, including numbers by species/stock of any marine mammals noted injured or killed as a result of the detonation and numbers that may have been harassed due to presence within the designated safety zone;

(4) If one or more species' take levels have been reached or exceeded during the previous year, additional documentation must be provided on the

taking and a description of any measures that will be taken in the following year to prevent exceeding the authorized incidental take level.

(5) Results of any population assessment studies made on marine mammals in the Outer Sea Test Range during the previous year.

§216.156 Renewal of Letter of Authorization.

(a) A Letter of Authorization issued under §216.106 for the activity identified in §216.151(a) will be renewed annually upon:

(1) Timely receipt of the reports required under §216.155(f) and (g), which have been reviewed by the Assistant Administrator for Fisheries, NOAA, and determined to be acceptable;

(2) A determination that the maximum incidental take authorizations in §216.151(b) will not be exceeded; and

(3) A determination that the mitigation measures required under §216.153(b) and the Letter of Authorization have been undertaken.

(b) If a species' annual authorization is exceeded, the National Marine Fisheries Service will review the documentation submitted with the annual report required under §216.155(g), to determine that the taking is not having more than a negligible impact on the species or stock involved.

(c) Notice of issuance of a renewal of the Letter of Authorization will be published in the FEDERAL REGISTER.

[59 FR 5126, Feb. 3, 1994. Redesignated and amended at 61 FR 15887, 15890–15891, Apr. 10, 1996]

§216.157 Modifications to Letter of Authorization.

(a) In addition to complying with the provisions of §216.106, except as provided in paragraph (b) of this section, no substantive modification, including withdrawal or suspension, to the Letter of Authorization issued pursuant to §216.106 and subject to the provisions of this subpart shall be made until after notice and an opportunity for public comment. For purposes of this paragraph, renewal of a Letter of Authorization under §216.146, without modification, is not considered a substantive modification.

(b) If the National Marine Fisheries Service determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §216.151, or that significantly and detrimentally alters the scheduling of explosives detonation within the area specified in §216.151, the Letter of Authorization issued pursuant to §216.106, or renewed pursuant to this section may be substantively modified without prior notice and an opportunity for public comment. A notice will be published in the FEDERAL REGISTER subsequent to the action.

[59 FR 5126, Feb. 3, 1994. Redesignated and amended at 61 FR 15887, 15891, Apr. 10, 1996]

Subparts O–Q [Reserved]

PART 217—GENERAL PROVISIONS

Subpart A—Introduction

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217.2 Scope of regulations.
217.3 Other applicable laws.
217.4 When regulations apply.

Subpart B—Definitions

217.12 Definitions.

Subpart C—Addresses

217.21 Assistant Administrator.
217.22 Office of Marine Mammals and Endangered Species.
217.23 Enforcement Division.

AUTHORITY: 16 U.S.C. 742a *et seq.*, 1361 *et seq.*, and 1531–1544, unless otherwise noted.

Subpart A—Introduction

§217.1 Purpose of regulations.

The regulations of parts 216 through 227 are promulgated to implement the following statutes enforced by the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, which regulate the taking, possession, transportation, sale, purchase,

barter, exportation, and importation of wildlife.

(Endangered Species Act of 1973, section 11(f), 87 Stat. 884, Pub. L. 93–205; Fish and Wildlife Act of 1956, 16 U.S.C. 742a–1)

[39 FR 41370, Nov. 27, 1974, as amended at 52 FR 24250, June 29, 1987]

§ 217.2 Scope of regulations.

The various provisions of parts 216 through 227 of this chapter are interrelated, and particular note should be taken that the parts must be construed with reference to each other. The regulations in parts 216 through 227 apply only for fish or wildlife under the jurisdictional responsibilities of the Secretary of Commerce for the purpose of carrying out the Endangered Species Act of 1973 (see part 222, § 222.23(a)). Endangered species of fish or wildlife other than those covered by these regulations are under the jurisdiction of the Secretary of the Interior. For rules and procedures relating to such species, see 50 CFR parts 10 through 17.

[39 FR 41370, Nov. 27, 1974, as amended at 52 FR 24250, June 29, 1987]

§ 217.3 Other applicable laws.

No statute or regulation of any State shall be construed to relieve a person from the restrictions, conditions, and requirements contained in parts 216 through 227 of this chapter. In addition, nothing in parts 216 through 227 of this chapter, nor any permit issued under parts 217 through 228 of this chapter, shall be construed to relieve a person from any other requirements imposed by a statute or regulation of any State or of the United States, including any applicable health, quarantine, agricultural, or customs laws or regulations, or other National Marine Fisheries Service enforced statutes or regulations.

[39 FR 41370, Nov. 27, 1974, as amended at 52 FR 24250, June 29, 1987]

§ 217.4 When regulations apply.

The regulations of parts 216 through 227 of this chapter shall apply to all matters, including the processing of permits, arising after the effective date of such regulations, with the following exception:

(a) *Civil penalty proceedings.* Except as otherwise provided in § 218.25, the civil penalty assessment procedures contained in parts 216 through 227 of this chapter shall apply only to any proceeding instituted by notice of violation dated subsequent to the effective date of these regulations, regardless of when the act or omission which is the basis of a civil penalty proceeding occurred.

(b) [Reserved]

[39 FR 41370, Nov. 27, 1974, as amended at 52 FR 24250, June 29, 1987]

Subpart B—Definitions

§ 217.12 Definitions.

Accelerator funnel means a device used to accelerate the flow of water through a shrimp trawl net.

Act means the Endangered Species Act of 1973, as amended (Pub. L. 93–205).

Approved TED means:

(1) A hard TED that complies with the generic design criteria set forth in 50 CFR 227.72(e)(4)(i). (A hard TED may be modified as specifically authorized by 50 CFR 227.72(e)(4)(iv)); or

(2) A soft TED that complies with the provisions of 50 CFR 227.72(e)(4)(iii); or

(3) A special hard TED which complies with the provisions of 50 CFR 227.72(e)(4)(ii).

Assistant Administrator means the Assistant Administrator for Fisheries of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, or his authorized representative.

Atlantic Area means all waters of the Atlantic Ocean south of 36°33′00.8″ N. latitude (the line of the North Carolina/Virginia border) and adjacent seas, other than waters of the Gulf Area, and all waters shoreward thereof (including ports).

Atlantic Shrimp Fishery-Sea Turtle Conservation Area (Atlantic SFSTCA) means the inshore and offshore waters extending to 10 nautical miles (18.5 km) offshore along the coast of the States of Georgia and South Carolina from the Georgia-Florida border (defined as the line along 30°42′45.6″ N. lat.) to the North Carolina-South Carolina border

(defined as the line extending in a direction of 135°34′55″ from true north from the North Carolina-South Carolina land boundary, as marked by the border station on Bird Island at 33° 51′07.9″ N. lat., 078°32′32.6″ W. long.).

Authorized officer means:

(1) Any commissioned, warrant, or petty officer of the U.S. Coast Guard;

(2) Any special agent or enforcement officer of the National Marine Fisheries Service;

(3) Any officer designated by the head of a Federal or state agency that has entered into an agreement with the Secretary or the Commandant of the Coast Guard to enforce the provisions of the Act; or

(4) Any Coast Guard personnel accompanying and acting under the direction of any person described in paragraph (1) of this definition.

Bait shrimper means a shrimp trawler that fishes for and retains its shrimp catch alive for the purpose of selling it for use as bait.

Commercial activity means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include the exhibition of commodities by museums or similar cultural or historical organizations.

Country of exportation means the last country from which the animal was exported before importation into the United States.

Country of origin means the country where the animal was taken from the wild, or the country of natal origin of the animal.

Fish or wildlife means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

Fishing, or to fish, means:

(1) The catching taking or harvesting of fish or wildlife;

(2) The attempted catching, taking, or harvesting of fish or wildlife;

(3) Any other activity that can reasonably be expected to result in the catching, taking, or harvesting of fish or wildlife; or

(4) Any operations on any waters in support of, or in preparation for, any activity described in paragraphs (1) through (3) of this definition.

Footrope means a weighted rope or cable attached to the lower lip (bottom edge) of the mouth of a trawl net along the forwardmost webbing.

Footrope length means the distance between the points at which the ends of the footrope are attached to the trawl net, measured along the forwardmost webbing.

Foreign commerce includes, among other things, any transaction (1) between persons within one foreign country, or (2) between persons in two or more foreign countries, or (3) between a person within the United States and a person in one or more foreign countries, or (4) between persons within the United States, where the fish or wildlife in question are moving in any country or countries outside the United States.

Four-seam, straight-wing trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top panel, a bottom panel, and two side panels of webbing. The upper and lower edges of the side panels of webbing are parallel over the entire length.

Four-seam, tapered-wing trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top panel, a bottom panel, and two side panels of webbing. The upper and lower edges of the side panels of webbing converge toward the rear of the trawl.

Gulf Area means all waters of the Gulf of Mexico west of 81° W. longitude (the line at which the Gulf Area meets the Atlantic Area) and all waters shoreward thereof (including ports).

Gulf Shrimp Fishery-Sea Turtle Conservation Area (Gulf SFSTCA) means the offshore waters extending to 10 nautical miles (18.5 km) offshore along the coast of the States of Texas and Louisiana from the South Pass of the Mississippi River (west of 89°08.5′ W. long.) to the U.S.-Mexican border.

Hard TED means a rigid deflector grid and associated hardware designed to be installed in a trawl net forward of the codend for the purpose of excluding sea turtles from the net.

Headrope means a rope that is attached to the upper lip (top edge) of the mouth of a trawl net along the forewardmost webbing.

Headrope length means the distance between the points at which the ends of the headrope are attached to the trawl net, measured along the forewardmost webbing.

Import means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the tariff laws of the United States.

Inshore means marine and tidal waters landward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts, 1:80,000 scale) and as described in 33 CFR part 80.

Leatherback conservation zone means all inshore and offshore waters bounded on the south by a line along 28°24.6′ N. lat. (Cape Canaveral, FL), and bounded on the north by a line along 36°30.5′ N. lat. (North Carolina-Virginia border).

Length in reference to a shrimp trawler, means the distance from the tip of the vessel's bow to the tip of its stern.

North Carolina restricted area means that portion of the offshore waters bounded on the north by a line along 34°17.6′ N. latitude (Rich Inlet, North Carolina) and 34°35.7′ N. latitude (Browns Inlet, North Carolina) to a distance of 1 nautical mile seaward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972).

Offshore means marine and tidal waters seaward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts, 1:80,000 scale) and as described in 33 CFR part 80.

Permit or *''Certificate of exemption''* means any document so designated by the National Marine Fisheries Service and signed by an authorized official of the National Marine Fisheries Service, including any document which modifies, amends, extends or renews any permit or certificate of exemption.

Person means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

Possession means the detention and control, or the manual or ideal custody of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Possession includes the act or state of possessing and that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. Possession includes constructive possession which means not actual but assumed to exist, where one claims to hold by virtue of some title, without having actual custody.

Pre-Act endangered species part means any sperm whale oil, including derivatives and products thereof, which was lawfully held within the United States on December 28, 1973 in the course of a commercial activity; or any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

Pusher-head trawl (chopsticks) means a trawl that is spread by poles suspended in a ''V'' configuration from the bow of the trawler.

Right whale, as used in subpart D of this part, means any whale that is a member of the western North Atlantic population of the northern right whale species (*Eubalaena glacialis*).

Scrimshaw product means any art form which involves the substantial etching or engraving of designs upon,

or the substantial carving of figures, patterns, or designs from any bone or tooth of any marine mammal of the order Cetacea. For purposes of this part, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving or carving.

Secretary means the Secretary of Commerce or his authorized representative.

Shrimp means any species of marine shrimp (Order Crustacea) found in the Atlantic Area or the Gulf Area, including, but not limited to:

(1) Brown shrimp (*Penaeus aztecus*);

(2) White shrimp (*P. setiferus*);

(3) Pink shrimp (*P. duorarum*);

(4) Rock shrimp (*Sicyonia brevirostris*);

(5) Royal red shrimp (*Hymenopenaeus robustus*); and

(6) Seabob shrimp (*Xiphopenaeus kroyeri*).

Shrimp trawler means any vessel that is equipped with one or more trawl nets and that is capable of, or used for, fishing for shrimp, or whose on-board or landed catch of shrimp is more than 1 percent, by weight, of all fish comprising its on-board or landed catch.

Skimmer trawl means a trawl that extends from the outrigger of a vessel with a cable and a lead weight holding the trawl mouth open.

Soft TED means a panel of polypropylene or polyethylene netting designed to be installed in a trawl net forward of the codend for the purpose of excluding sea turtles from the net.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

Stretched mesh size means the distance between the centers of the two opposite knots in the same mesh when pulled taut.

Summer flounder means the species *Paralichthys dentatus.*

Summer flounder fishery-sea turtle protection area means:

(1) All offshore waters, bounded on the north by a line along 37°05′ N. latitude (Cape Charles, VA) and bounded on the south by a line along 33°35′ N. latitude (North Carolina-South Carolina border), except as provided in paragraph (2) of this definition.

(2) [Reserved]

Summer flounder trawler means any vessel that is equipped with one or more bottom trawl nets, and that is capable of, or used for, fishing for flounder, or whose on-board or landed catch of flounder is more than 100 pounds (45.4 kg).

Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.

Taper, in reference to the webbing used in trawls, means the angle of a cut used to shape the webbing, expressed as the ratio between the cuts that reduce the width of the webbing by cutting into the panel of webbing through one row of twine (bar cuts) and the cuts that extend the length of the panel of webbing by cutting straight aft through two adjoining rows of twine (point cuts). For example, sequentially cutting through the lengths of twine on opposite sides of a mesh, leaving an uncut edge of twines all lying in the same line, produces a relatively strong taper called ‘‘all-bars’’; making a sequence of 4-bar cuts followed by 1-point cut produces a more gradual taper called ‘‘4 bars to 1 point’’ or ‘‘4b1p’’; similarly, making a sequence of 2-bar cuts followed by 1-point cut produces a still more gradual taper called ‘‘2b1p’’; and making a sequence of cuts straight aft does not reduce the width of the panel and is called a ‘‘straight’’ or ‘‘all-points’’ cut.

Taut means a condition in which there is no slack in the net webbing.

TED (turtle excluder device) means a device designed to be installed in a trawl net forward of the codend for the purpose of excluding sea turtles from the net.

Test net, or try net, means a net pulled for brief periods of time just before, or during, deployment of the primary net(s) in order to test for shrimp concentrations or determine fishing conditions (e.g., presence or absence of bottom debris, jellyfish, bycatch, seagrasses, etc.).

Tongue means any piece of webbing along the top, center, leading edge of a trawl, whether lying behind or ahead of

the headrope, to which a towing bridle can be attached for purposes of pulling the trawl net and/or adjusting the shape of the trawl.

Transportation means to ship, convey, carry or transport by any means whatever, and deliver or receive for such shipment, conveyance, carriage, or transportation.

Triple-wing trawl means a trawl with a tongue on the top, center, leading edge of the trawl and an additional tongue along the bottom, center, leading edge of the trawl.

Two-seam trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top panel and a bottom panel of webbing that are directly attached to each other down the sides of the trawl.

Underway, with respect to a vessel, means that the vessel is not at anchor, or made fast to the shore, or aground.

United States means the several States of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

Vessel includes every description of watercraft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water.

Vessel restricted in her ability to maneuver has the meaning specified for this term at 33 U.S.C. 2003(g).

Whoever means the same as person.

Wildlife means the same as fish or wildlife.

Wing net (butterfly trawl) means a trawl with a rigid frame, rather than trawl door, holding the trawl mouth open.

(Sec. 3(d), Fish and Wildlife Act of 1956, as amended, 88 Stat. 92 (16 U.S.C. 742b); sec. 11(f), Endangered Species Act of 1973, Pub. L. 93–205, 87 Stat. 884 (16 U.S.C. 1540))

[45 FR 57132, Aug. 27, 1980]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §217.12, see the List of CFR Sections Affected in the Finding Aids section of this volume.

Subpart C—Addresses

AUTHORITY: Sec. 3(d), Fish and Wildlife Act of 1956, as amended, 88 Stat. 92 (16 U.S.C. 742b); sec. 11(f), Endangered Species Act of 1973, Pub. L. 93–205, 87 Stat. 884 (16 U.S.C. 1540).

SOURCE: 45 FR 57133, Aug. 27, 1980, unless otherwise noted.

§ 217.21 Assistant Administrator.

Mail forwarded to the Assistant Administrator for Fisheries should be addressed:

Assistant Administrator for Fisheries, F
National Marine Fisheries Service
Washington, DC 20235.

§ 217.22 Office of Marine Mammals and Endangered Species.

Mail in regard to permits should be addressed to:

Office of Marine Mammals and Endangered Species, F/MM
National Marine Fisheries Service
Washington, DC 20235.

§ 217.23 Enforcement Division.

Mail in regard to enforcement and certificates of exemption should be addressed to:

Enforcement Division, F/CM5
National Marine Fisheries Service
Washington, DC 20235.

PART 220—GENERAL PERMIT PROCEDURES

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AUTHORITY: Endangered Species Act of 1973, sec. 11(f), 87 Stat. 884, Pub. L. 93–205; act of August 31, 1951, Ch. 376. Title 5, sec. 501, 65 Stat. 290 (31 U.S.C. 483a).

SOURCE: 39 FR 41373, Nov. 27, 1974, unless otherwise noted.

Subpart A—Introduction

§220.1 General.

Each person intending to engage in an activity for which a permit is required by parts 217 through 222 of this chapter or the Endangered Species Act of 1973 shall, before commencing such activity, obtain a valid permit authorizing such activity. Each person who desires to obtain the permit privileges authorized by parts 217 through 222 of this chapter must make application for such permit in accordance with the requirements of this part 220 of this chapter and the other regulations in parts 217 through 222 of this chapter which set forth the additional requirements for the specific permits desired. If the activity for which permission is sought is covered by the requirements of more than one part of parts 217 through 222 of this chapter, the requirements of each part must be met. If the information required for each specific permitted activity is included, one application may be accepted for all permits required, and a single permit may be issued.

§220.2 Purpose of regulations.

The regulations contained in this part will provide uniform rules and procedures for application, issuance, renewal, conditions, and general administration of permits issuable pursuant to parts 217 through 222 of this chapter.

§220.3 Scope of regulations.

The provisions in this part are in addition to, and are not in lieu of, other permit regulations of parts 217 through 222 of this chapter and apply to all permits issued thereunder, including ''Endangered Fish or Wildlife'' (part 222).

§220.4 Emergency variation from requirements.

The Director may approve variations from the requirements of this part when he finds that an emergency exists and that the proposed variations will not hinder effective administration of parts 217 through 222 of this chapter, and will not be unlawful.

Subpart B—Application for Permits

§220.11 Procedure for obtaining a permit.

The following general procedures apply to applications for permits:

(a) *Forms.* Applications must be submitted by letter containing all necessary information, attachments, certification, and signature. In no case will oral or telephone applications be accepted.

(b) *Forwarding instructions.* Applications must be submitted to the Director, National Marine Fisheries Service. The address is listed in §217.21.

(c) *Time requirement.* Applications must be received by the appropriate official of the National Marine Fisheries Service at least 90 calendar days prior to the date on which the applicant desires to have the permit made effective. The National Marine Fisheries Service will, in all cases, attempt to process applications deemed sufficient in the shortest possible time. The National Marine Fisheries Service does not, however, guarantee 90 days issuance after publication in the FEDERAL REGISTER of receipt of a permit application and some permits cannot be issued within that time period.

§220.12 [Reserved]

§220.13 Abandoned application.

Upon receipt of an insufficiently or improperly executed application, the

applicant shall be notified of the deficiency in the application. If the applicant fails to supply the deficient information or otherwise fails to correct the deficiency within 60 days following the date of notification, the application shall be considered abandoned.

Subpart C—Permit Administration

§ 220.21 Issuance of permits.

(a) No permit may be issued prior to the receipt of a written application therefor, unless a written variation from the requirements, as authorized by § 220.4 is inserted into the official file of the National Marine Fisheries Service. Any representation of an employee or agent of the United States Government shall not be construed as a permit unless it meets the requirements of a permit as defined in 50 CFR 217.12.

(b) The Director shall issue the appropriate permit unless—

(1) Denial of a permit has been made pursuant to subpart D of 15 CFR part 904;

(2) The applicant has failed to disclose material information required, or has made false statements as to any material fact, in connection with his application;

(3) The applicant has failed to demonstrate a valid justification for the permit or a showing of responsibility;

(4) The authorization requested potentially threatens a wildlife population, or

(5) The Director finds through further inquiry or investigation, or otherwise, that the applicant is not qualified.

(c) Each permit shall bear a serial number. Such number may be reassigned to the permittee to whom issued so long as he maintains continuity of renewal.

(d) The applicant shall be notified in writing of the denial of any permit request, and the reasons therefor. If authorized in the notice of denial, the applicant may submit further information, or reasons why the permit should not be denied. Such further submissions shall not be considered a new application. The final action by the Director shall be considered the final administrative decision of the Department.

[39 FR 41373, Nov. 27, 1974, as amended at 49 FR 1042, Jan. 6, 1984]

§ 220.22 Duration of permit.

Permits shall entitle the person to whom issued to engage in the activity specified in the permit, within the limitations of the applicable statute and regulations contained in parts 217 through 222 of this chapter for the period stated on the permit, unless sooner modified, suspended, or revoked pursuant to subpart D of 15 CFR part 904.

[49 FR 1042, Jan. 6, 1984]

§ 220.23 [Reserved]

§ 220.24 Renewal of permit.

Where the permit is renewable and a permittee intends to continue the activity described in the permit during any portion of the year ensuing its expiration, he shall, unless otherwise notified in writing by the Director, file a request for permit renewal, together with a certified statement that the information in his original application is still currently correct, or a statement of all changes in the original application, accompanied by any required fee at least 30 days prior to the expiration of his permit. Any person holding a valid renewable permit, who has complied with the foregoing provision of this section, may continue such activities as were authorized by his expired permit until his renewal application is acted upon.

§ 220.25 Permits not transferable; agents.

(a) Permits issued under parts 220 through 222 are not transferable or assignable. Some permits authorize certain activities in connection with a business or commercial enterprise and in the event of any lease, sale, or transfer of such business entity, the successor must obtain a permit prior to continuing the permitted activity. However, certain limited rights of succession are provided in § 220.26.

(b) Except as otherwise stated on the face of a permit, any person who is under the direct control of the permittee, or who is employed by or under

contract to the permittee for the purposes authorized by the permit, may carry out the activity authorized by the permit.

§220.26 Right of succession by certain persons.

(a) Certain persons, other than the permittee, are granted the right to carry on a permitted activity for the remainder of the term of a current permit provided they comply with the provisions of paragraph (b) of this section. Such persons are the following:

(1) The surviving spouse, child, executor, administrator, or other legal representative of a deceased permittee; and

(2) A receiver or trustee in bankruptcy or a court designated assignee for the benefit of creditors.

(b) In order to secure the right provided in this section, the person or persons desiring to continue the activity shall furnish the permit to the issuing officer for endorsement within 90 days from the date the successor begins to carry on the activity.

§220.27 Change of mailing address.

During the term of his permit, a permittee may change his mailing address without procuring a new permit. However, in every case notification of the new mailing address must be forwarded to the issuing official within 30 days after such change. This section does not authorize the change of location of the permitted activity for which an amendment must be obtained.

§220.28 Change in name.

A permittee continuing to conduct a permitted activity is not required to obtain a new permit by reason of a mere change in trade name under which a business is conducted or a change of name by reason of marriage or legal decree: *Provided*, That such permittee must furnish his permit to the issuing official for endorsement within 30 days from the date the permittee begins conducting the permitted activity under the new name.

§§220.29–220.30 [Reserved]

§220.31 Discontinuance of activity.

When any permittee discontinues his activity, he shall, within 30 days thereof, mail his permit and a request for cancellation to the issuing officer, and said permit shall be deemed void upon receipt. No refund of any part of an amount paid as a permit fee shall be made where the operations of the permittee are, for any reason, discontinued during the tenure of an issued permit.

Subpart D—Conditions

§220.42 Permits are specific.

The authorizations on the face of a permit which set forth specific times, dates, places, methods of taking, numbers and kinds of fish or wildlife, location of activity, authorize certain circumscribed transactions, or otherwise permit a specifically limited matter, are to be strictly construed and shall not be interpreted to permit similar or related matters outside the scope of strict construction.

§220.43 Alteration of permits.

Permits shall not be altered, erased, or mutilated, and any permit which has been altered, erased, or mutilated shall immediately become invalid.

§220.44 Display of permit.

Any permit issued under parts 220 through 222 shall be displayed for inspection upon request to the Director or his agent, or to any other person relying upon its existence.

§220.45 Filing of reports.

Permittees may be required to file reports of the activities conducted under the permit. Any such reports shall be filed not later than March 31 for the preceding calendar year ending December 31, or any portion thereof, during which a permit was in force, unless the regulations of parts 217 through 222 of this chapter or the provisions of the permit set forth other reporting requirements.

§ 220.46 Maintenance of records.

From the date of issuance of the permit, the permittee shall maintain complete and accurate records of any taking, possession, transportation, sale, purchase, barter, exportation, or importation of fish or wildlife pursuant to such permit. Such records shall be kept current and shall include names and addresses of persons with whom any fish or wildlife has been purchased, sold, bartered, or otherwise transferred, and the date of such transaction, and such other information as may be required or appropriate. Such records, unless otherwise specified, shall be entered in books, legibly written in the English language. Such records shall be retained for 5 years from the date of issuance of the permit.

§ 220.47 Inspection requirement.

Any person holding a permit under parts 217 through 222 of this chapter shall allow the Director's agent to enter his premises at any reasonable hour to inspect any fish or wildlife held or to inspect, audit, or copy any permits, books, or records required to be kept by regulations of parts 217 through 222 of this chapter or by the Endangered Species Act of 1973.

Subpart E—Permits Involving Endangered or Threatened Sea Turtles

SOURCE: 43 FR 32809, July 28, 1978, unless otherwise noted.

§ 220.50 Purpose.

This subpart establishes procedures for issuance of permits for scientific purposes or to enhance the propagation or survival of ''endangered'' or ''threatened'' sea turtles and zoological exhibition or educational purposes for ''threatened'' sea turtles.

§ 220.51 Permit applications.

Applications for permits to take, import, export or engage in any other prohibited activity involving any species of sea turtle listed in 50 CFR 17.11 shall be submitted to the Wildlife Permit Office (WPO) of the U.S. Fish and Wildlife Service in accordance with either, 50 CFR 17.22(a) (Endangered Species) or 50 CFR 17.32(a) (Threatened Species) as appropriate. Applications involving activities under the jurisdiction of the National Marine Fisheries Service (NMFS) as defined in 50 CFR 222.23(a) and 50 CFR 227.4 shall be forwarded by the WPO to NMFS.

§ 220.52 Issuance of permits.

(a) Applications under the jurisdiction of the WPO shall be reviewed and acted upon in accordance with 50 CFR 17.22 or 50 CFR 17.32 as appropriate.

(b) NMFS shall make a complete review of applications forwarded to it by the WPO in accordance with § 220.51 and determine the appropriate action to be taken in accordance with 50 CFR 220.21(b) and 222.23(c). In instances where the application involves activities solely within NMFS jurisdiction, NMFS shall issue permits or letters of denial and provide WPO with copies of its actions.

(c) Where a permit application involves activities under both NMFS and FWS jurisdiction, each agency will process the application for activities under its jurisdiction. WPO will issue either a permit or a letter of denial.

(d) Where a permit application for activities under NMFS jurisdiction also requires a permit under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (TIAS 8249, July 1, 1975) (CITES) (50 CFR part 23), NMFS will process the application for activities under its jurisdiction. WPO will issue the final document by means of a combination ESA/CITES permit or a letter of denial.

§ 220.53 Other requirements.

Permits issued by NMFS under this subpart shall be administered and comply with the provisions of 50 CFR parts 217 through 227 as appropriate.

PART 221—DESIGNATED PORTS

AUTHORITY: Endangered Species Act of 1973, sec. 11(f), 87 Stat. 884, Pub. L. 93–205.

§ 221.1 Importation and exportation at designated ports.

Any fish or wildlife (other than shellfish and fishery products which (a) are

not endangered or not threatened species, and (b) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) which is subject to the jurisdiction of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce and is intended for importation into or exportation from the United States, shall not be imported or exported except at a port or ports designated by the Secretary of the Interior. The Secretary of the Interior may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or for other reasons if he deems it appropriate and consistent with the purpose of facilitating enforcement of the Endangered Species Act and reducing the costs thereof. Importers and exporters are advised to see 50 CFR part 14 for importation and exportation requirements and information.

[39 FR 41375, Nov. 27, 1974]

PART 222—ENDANGERED FISH OR WILDLIFE

Subpart A—Introduction

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Subpart D—Special Prohibitions

222.31 Approaching humpback whales in Hawaii.
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Subpart E—Incidental Capture of Endangered Sea Turtles

222.41 Policy regarding incidental capture of sea turtles.
222.42 Special prohibitions relating to leatherback sea turtles.

AUTHORITY: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

Subpart A—Introduction

§222.1 Purpose of regulations.

The regulations contained in this part identify the species or subspecies of fish or wildlife determined to be endangered under either the Endangered Species Conservation Act of 1969 or the Endangered Species Act of 1973, and presently deemed endangered species under the Endangered Species Act of 1973, which are under the jurisdiction of the Secretary of Commerce, and establish procedures and criteria for

issuance of permits for the taking, importation, exportation, or otherwise prohibited acts, involving endangered fish or wildlife. The regulations of this part implement, in part, the Endangered Species Act of 1973, 87 Stat. 884, Pub. L. 93–205, as amended.

[45 FR 57133, Aug. 27, 1980]

§ 222.2 Scope of regulations.

(a) The regulations of this part apply only to endangered fish or wildlife.

(b) The provisions in this part are in addition to, and are not in lieu of, other regulations of parts 217 through 222 of this chapter which may require a permit or prescribe additional restrictions or conditions for the taking, importation, exportation, and interstate transportation of fish or wildlife. (See also parts 220 and 221 of this chapter.)

[45 FR 57133, Aug. 27, 1980]

§ 222.3 Definitions.

These definitions apply only to § 222.22:

Adequately covered means, with respect to species listed pursuant to section 4 of the ESA, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA for the species covered by the plan and, with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA that would otherwise apply if the unlisted species covered by the plan were actually listed. For the Services to cover a species under a conservation plan, it must be listed on the section 10(a)(1)(B) permit.

Changed circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and NMFS and that can be planned for (*e.g.*, the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

Conserved habitat areas means areas explicitly designated for habitat restoration, acquisition, protection, or other conservation purposes under a conservation plan.

Conservation plan means the plan required by section 10(a)(2)(A) of the ESA that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as ''habitat conservation plans'' or ''HCPs.''

Operating conservation program means those conservation management activities which are expressly agreed upon and described in a conservation plan or its Implementing Agreement, if any, and which are to be undertaken for the affected species when implementing an approved conservation plan, including measures to respond to changed circumstances.

Properly implemented conservation plan means any conservation plan, Implementing Agreement and permit whose commitments and provisions have been or are being fully implemented by the permittee.

Unforeseen circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and NMFS at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse change in the status of the covered species.

[63 FR 8872, Feb. 23, 1998]

Subpart B—Certificates of Exemption for Pre-Act Endangered Species Parts

SOURCE: 45 FR 57134, Aug. 27, 1980, unless otherwise noted.

§ 222.11–1 General certificate of exemption requirements.

(a) The Assistant Administrator, pursuant to the provisions of the Endangered Species Act, and pursuant to the provisions of this paragraph, may exempt any pre-Act endangered species part from one or more of the following:

(1) The prohibition, as set forth in section 9(a)(1)(A) of the Act, to export any such species part from the United States;

(2) The prohibitions, as set forth in section 9(a)(1)(E) of the Act, to deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of

a commercial activity any such species part;

(3) The prohibitions, as set forth in section 9(a)(1)(F) of the Act, to sell or offer for sale in interstate or foreign commerce any such species part.

(b) No person shall engage in any of the above activities involving any pre-Act endangered species part without a valid certificate of exemption, or evidence of a right thereunder, issued pursuant to this subpart B.

(c) After January 31, 1984, no person may export; deliver, receive, carry, transport or ship in interstate or foreign commerce in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any pre-Act finished scrimshaw product unless that person has been issued a valid certificate of exemption and the product or the raw material for such product was held by such certificate holder on October 13, 1982.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12808, Apr. 1, 1985]

§ 222.11–2 Application renewal procedure.

(a) Any person to whom a certificate of exemption has been issued by the National Marine Fisheries Service and who desires to obtain a renewal of such certificate of exemption may make application therefor to the Assistant Administrator. The sufficiency of the application shall be determined by the Assistant Administrator in accordance with the requirements of this part and, in that connection, he may waive any requirement for information, or require any elaboration for further information deemed necessary.

(b) One copy of a completed application for renewal shall be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, Washington, DC 20235.

(c) The outside of the envelope should be marked, ATTENTION: Enforcement Division, ''Certificate of Exemption Request.'' Assistance may be obtained by writing or calling the Enforcement Division, NMFS, in Washington, DC (AC 202, 634–7265). At least 15 days should be allowed for processing. An application for a certificate of exemption shall provide the information contained in § 222.11–3 (when the information requested is not applicable, put ''N.A.'') and such other information that the Assistant Administrator may require.

[45 FR 57134, Aug. 27, 1980]

§ 222.11–3 Application renewal requirements.

(a) The following information will be used as the basis for determining whether an application for renewal of a certificate of exemption is complete:

(1) Title: Application for Renewal of Certificate of Exemption Under Pub. L. 97–304.

(2) The date of application.

(3) The identity of the applicant including complete name, original certificate of exemption number, current address, and telephone number, including zip and area codes. If the applicant is a corporation, partnership, or association set forth the details.

(4) The period of time for which a renewal of the certificate of exemption is requested; however, no renewal of certificate of exemption, or right claimed thereunder, shall be effective after the close of the three-year period beginning on the date of the expiration of the previous renewal of the certificate of exemption.

(5)(i) A complete and detailed updated inventory of all pre-Act endangered species parts for which the applicant seeks exemption. Each item on the inventory must be identified by the following information: a unique serial number; the weight of the item in grams, to the nearest whole gram; and a description in detail sufficient to permit ready identification of the item. Small lots, not exceeding five pounds (2,270 grams), of scraps or raw material, which may include or consist of one or more whole raw whale teeth, may be identified by a single serial number and total weight. All finished scrimshaw items subsequently made from a given lot of scrap may be identified by the lot serial number plus additional digits to signify the piece number of the individual finished item. Identification numbers will be in the following format: 00–000000–0000. The first two digits will be the last two digits of the appropriate certificate of exemption number; the next six digits, the serial number of the individual piece or lot of scrap or

raw material; and the last four digits, where applicable, the piece number of an item made from a lot of scrap or raw material. The serial numbers for each certificate holder's inventory must begin with 000001, and piece numbers, where applicable, must begin with 0001 for each separate lot.

(ii) Identification numbers may be affixed to inventory items by any means, including, but not limited to, etching the number into the item, attaching a label or tag bearing the number to the item, or sealing the item in a plastic bag, wrapper or other container bearing the number. Provided that, the number must remain affixed to the item until it is sold to an ultimate user, as defined in § 222.11–8(b) of this part.

(iii) No renewals will be issued for scrimshaw products in excess of any quantities declared in the original application for a certificate of exemption.

(6) A certification in the following language:

I hereby 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 renewal of my certificate of exemption under the Endangered Species Act of 1973, as amended by Pub. L. 94–359, 90 Stat. 911, Pub. L. 96–159, 93 Stat. 1225, Pub. L. 97–304, 95 Stat. 715, and the Department of Commerce regulations issued thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001, or to the penalties under the Endangered Species Act of 1973.

(7) Signature of the applicant.

(b) Upon receipt of an incomplete or improperly executed application for renewal, the applicant shall be notified by Certified Mail of the deficiency in the application for renewal. If the application for renewal is not corrected and received by the Assistant Administrator within 30 days following the date of receipt of notification, the application for renewal shall be considered as having been abandoned.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12808, Apr. 1, 1985]

§ 222.11–4 Procedures for issuance of renewals of certificates of exemption.

Whenever application for a renewal of a certificate of exemption is received by the Assistant Administrator which the Assistant Administrator deems sufficient, he shall, as soon as practicable, issue a certificate of renewal to the applicant.

§ 222.11–5 Application for modification of certificate of exemption by holder.

Where circumstances have changed so that an applicant or certificate of exemption holder desires to have any material term or condition of his application or certificate modified, he must submit in writing full justification and supporting information in conformance with the provisions of this part.

§ 222.11–6 Amendment of certificates of exemption.

All certificates are issued subject to the condition that the Assistant Administrator reserves the right to amend the provisions of a certificate of exemption for just cause at any time. Such amendments take effect on the date of notification, unless otherwise specified.

§ 222.11–7 Procedures for suspension, revocation, or modification of certificates of exemption.

Any violation of the applicable provisions of parts 217 through 222 of this chapter, or of the Act, or of a condition of the certificate of exemption may subject the certificate holder to the following:

(a) The penalties provided in the Act; and

(b) Suspension, revocation, or modification of the certificate of exemption, as provided in subpart D of 15 CFR part 904.

[49 FR 1042, Jan. 6, 1984]

§ 222.11–8 Purchaser provisions.

(a) Any person granted a certificate of exemption, including a renewal, under this subpart, upon a sale of any exempted pre-Act endangered species part, must provide the purchaser in writing with a description (including full identification number) of the part sold, and must inform the purchaser in writing of the purchaser's obligation

under paragraph (b) of this section, including the address given in the certificate to which the purchaser's report is to be sent.

(b) Any purchaser of pre-Act endangered species parts included in a valid certificate of exemption, unless an ultimate user, must within 30 days after the receipt of such parts submit a written report to the address given in the certificate specifying the quantity of such parts or products received, the name and address of the seller, a copy of the invoice or other document showing the serial numbers, weight, and descriptions of the parts or products received, the date on which such parts or products were received, and the intended use of such parts by the purchaser. An ultimate user, for purposes of this paragraph, means any person who acquired such endangered species part or product for his own consumption or personal use (including as gifts), and not for resale.

(c) After January 31, 1984, no purchaser may export; deliver, receive, carry or transport in interstate or foreign commerce in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered species part or product even though such part or product was acquired under a certificate of exemption either prior to or subsequent to that date.

[50 FR 12808, Apr. 1, 1985]

§ 222.11–9 Duration of certificate of exemption.

A certificate of exemption is valid only if renewed in accordance with the procedures set forth in § 222.11–3 of this part. All certificates so renewed will be valid for a period beginning April 1, 1985, and ending no later than March 31, 1988. A renewed certificate of exemption entitles the holder to engage in the business or activity specified in the certificate of exemption, within the limitations of the Act and the regulations contained in this subpart, for the period stated in the certificate of exemption, unless sooner terminated.

[50 FR 12808, Apr. 1, 1985, as amended at 50 FR 25713, June 21, 1985]

§ 222.12 Locations covered by certificate of exemption.

The certificate of exemption covers the business or activity specified in the certificate of exemption at the address described therein. No certificate of exemption is required to cover a separate warehouse facility used by the certificate of exemption holder solely for storage of pre-Act endangered species parts, if the records required by this subpart are maintained at the address specified in the certificate of exemption which is served by the warehouse or storage facility.

[50 FR 12809, Apr. 1, 1985]

§ 222.12–1 Certificate of exemption not transferable; exception.

Certificates of exemption issued under this subpart are not transferable: *Provided*, That in the event of the lease, sale or other transfer of the operations or activity authorized by the certificate of exemption the successor is not required by this subpart to obtain a new certificate of exemption prior to commencing such operations or activity. In such case, the successor will be treated as a purchaser and must comply with the record and reporting requirements set forth in § 222.11–8.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12809, Apr. 1, 1985]

§ 222.12–2 Change of address.

A certificate of exemption holder may during the term of the certificate of exemption move his business or activity to a new location at which he intends regularly to carry on such business or activity, without obtaining a new certificate of exemption. However, in every case, notification of the new location of the business or activity must be given in writing within 10 days of such move to the Assistant Administrator. In each instance, the certificate of exemption must be endorsed by the Assistant Administrator. After endorsement of the certificate of exemption the Assistant Administrator will provide an amended certificate of exemption to the person to whom issued.

§ 222.12–3 Certain continuance of business.

A certificate of exemption holder who requests that his certificate of exemption be amended by the Assistant Administrator for corrections or endorsement in compliance with the provisions contained in this subpart, may continue his operations while awaiting action by the Assistant Administrator.

§ 222.12–4 Change in trade name.

A certificate holder continuing to conduct business at the location shown on his certificate of exemption is not required to obtain a new certificate of exemption by reason of a change in trade name under which he conducts his business: *Provided,* That such certificate of exemption holder requests in writing that his certificate of exemption be endorsed to reflect such change of name to the Assistant Administrator within 30 days from the date the certificate of exemption holder begins his business under the new name.

§ 222.12–5 State or other law.

A certificate of exemption issued under this subpart confers no right or privilege to conduct a business or an activity contrary to State or other law. Similarly, compliance with the provisions of any State or other law affords no immunity under any Federal laws or regulations of any other Federal Agency.

§ 222.12–6 Right of entry and examination.

Any person authorized to enforce the Act may enter during business hours the premises, including places of storage, of any holder of a certificate of exemption or of any purchaser for the purpose of inspecting or examining any records or documents required to be kept by such certificate of exemption holder or successor under this subpart, and any endangered species parts at such premises of location.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12809, Apr. 1, 1985]

§ 222.12–7 Records.

The records pertaining to pre-Act endangered species parts prescribed by this subpart shall be in permanent form, and shall be retained at the address shown on the certificate of exemption, or at the principal address of a purchaser in the manner prescribed by this subpart.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12809, Apr. 1, 1985]

§ 222.12–8 Record of receipt and disposition.

(a) Holders of certificates of exemption must maintain records of all pre-Act endangered species parts they receive, sell, transfer, distribute or dispose of otherwise. Purchasers of pre-Act endangered species parts, unless ultimate users, must similarly maintain records of all such parts or products they receive.

(b) Such records as referred to in paragraph (a) of this section may consist of invoices or other commercial records which must be filed in an orderly manner separate from other commercial records maintained, and be readily available for inspection. Such records must (1) show the name and address of the purchaser, seller, or other transferor; (2) show the type, quantity, and identity of the part or product; (3) show the date of such sale or transfer; and (4) be retained, in accordance with the requirements of this subpart, for a period of not less than three years following the date of sale or transfer. Each pre-Act endangered species part will be identified by its number on the updated inventory required to renew a certificate of exemption.

(c)(1) Each certificate of exemption holder must submit a quarterly report (to the address given in the certificate) containing all record information required by paragraph (b) on all transfers of pre-Act endangered species parts made in the previous calendar quarter, or such other record information the Assistant Administrator may specify from time to time.

(2) Quarterly reports are due on January 15, April 15, July 15, and October 15. The first report is due on October 15, 1985.

(d) The Assistant Administrator may authorize the record information to be submitted in a manner other than that prescribed in paragraph (b) of this section when it is shown by the record

holder that an alternate method of reporting is reasonably necessary and will not hinder the effective administration or enforcement of this subpart.

[45 FR 57134, Aug. 27, 1980, as amended at 50 FR 12809, Apr. 1, 1985]

§222.12–9 Importation.

No pre-Act endangered species part shall be imported into the United States, and a certificate of exemption issued in accordance with the provisions of this subpart confers no right or privilege to import into the United States any such part.

§222.13 Exportation.

(a) Any person desiring to export from the United States any pre-Act endangered species part or scrimshaw product, must possess a valid certificate of exemption issued in accordance with the provisions of this subpart.

(b) In addition to other information, which may be required by this subpart, the exporter will notify the Assistant Administrator by letter which shall show the name and address of the foreign consignee, the intended port of exportation, and a complete description of the parts to be exported. Such information should reach the Assistant Administrator not less than 10 days prior to shipment.

(c) No pre-Act endangered species part or scrimshaw product which is to be exported from the United States under a certificate of exemption issued therefor, shall be exported except at a port or ports designated by the Secretary of the Interior. The Secretary of the Interior may permit the exportation at non-designated ports for any reason if he deems it appropriate and consistent with the purposes of the Endangered Species Act, as amended, or it will facilitate the administration or enforcement of the Act and reducing the costs thereof. Exporters are advised to see 50 CFR part 14 for a listing of the designated ports.

§222.13–1 Procedure by exporter.

Shipment may not be made until the requirements of §222.13 are met by the exporter. A copy of the certificate of exemption, and any endorsements thereto, must be sent by the exporter to the District Director of Customs at the port of exportation, and must precede or accompany the shipment in order to permit appropriate inspection prior to lading.

§222.13–2 Action by Customs.

Upon receipt of a certificate of exemption authorizing the exportation of pre-Act endangered species parts or scrimshaw products, the District Director of Customs may order such inspection as deemed necessary prior to lading of the merchandise. If satisfied that the shipment is proper and agrees with the information contained in the certificate, and any endorsement thereto, the District Director of Customs will clear the merchandise for export. The certificate, and any endorsements, will be forwarded to the Chief, Enforcement Division, F/CM5 National Marine Fisheries Service, Washington, DC 20235.

§222.13–3 Transportation to effect exportation.

Notwithstanding any provision of this subpart, it shall not be required that authorization be obtained from the Assistant Administrator for the transportation in interstate or foreign commerce of pre-Act endangered species parts to effect an exportation of such parts authorized under the provisions of this subpart.

§222.13–4 Burden of proof; presumption.

Any person claiming the benefit of any exemption or certificate of exemption under the Act or regulations, shall have the burden of proving that the exemption or certificate is applicable, has been granted, and was valid and in force at the time of the alleged violation.

Subpart C—Endangered Fish or Wildlife Permits

SOURCE: 39 FR 41375, Nov. 27, 1974, unless otherwise noted.

§222.21 General permit requirement.

No person shall take, import, export, or engage in any other prohibited activity involving, any species or subspecies of fish or wildlife which the Secretary has determined to be endangered under the Endangered Species

Act of 1973, as evidenced by its inclusion on the list of endangered fish or wildlife (see 50 CFR chapter I, part 17) or which the Secretary of the Interior determined to be endangered under the Endangered Species Conservation Act of 1969 and which are now under the jurisdictional responsibilities of the Secretary of Commerce, without a valid permit issued pursuant to this part.

(Pub. L. 94–359)

[41 FR 36028, Aug. 26, 1976]

§ 222.22 Permits for the incidental taking of endangered species.

(a) *Scope.* (1) The Assistant Administrator may issue permits to take endangered marine species incidentally to an otherwise lawful activity under section 10(a)(1)(B) of the Endangered Species Act of 1973. The regulations in this section apply only to those endangered species under the jurisdiction of the Secretary of Commerce identified in § 222.23(a).

(2) If the applicant represents an individual or a single entity, such as a corporation, the Assistant Administrator will issue an individual incidental take permit. If the applicant represents a group or organization whose members conduct the same or a similar activity in the same geographical area with similar impacts on endangered marine species, the Assistant Administrator will issue a general incidental take permit. To be covered by a general incidental take permit, each individual conducting the activity must have a certificate of inclusion issued under paragraph (f) of this section.

(b) *Permit application procedures.* Applications should be sent to the Assistant Administrator for Fisheries, National Marine Fisheries Service, 1335 East West Highway, Silver Spring, MD 20910. The sufficiency of the application will be determined by the Assistant Administrator in accordance with the requirements of this section. At least 120 days should be allowed for processing. Each application must be signed and dated and include the following:

(1) The type of application, either:

(i) Application for an Individual Incidental Take Permit under the Endangered Species Act of 1973, or

(ii) Application for a General Incidental Take Permit under the Endangered Species Act of 1973.

(2) The name, address and telephone number of the applicant. If the applicant is a partnership, corporate entity or is representing a group or organization, the applicable details.

(3) The species or stocks, by common and scientific name, and a description of the status, distribution, seasonal distribution, habitat needs, feeding habits and other biological requirements of the affected species or stocks.

(4) A detailed description of the proposed activity, including the anticipated dates, duration and specific location. If the request is for a general incidental take permit, an estimate of the total level of activity expected to be conducted.

(5) A conservation plan, based on the best scientific and commercial data available, which specifies

(i) The anticipated impact (*i.e.*, amount, extent and type of anticipated taking) of the proposed activity on the species or stocks;

(ii) The anticipated impact of the proposed activity on the habitat of the species or stocks and the likelihood of restoration of the affected habitat;

(iii) The steps (specialized equipment, methods of conducting activities, or other means) that will be taken to monitor, minimize and mitigate such impacts, and the funding available to implement such measures; and

(iv) The alternative actions to such taking that were considered and the reasons why those alternatives are not being used.

(v) A list of all sources of data used in preparation of the plan, including reference reports, environmental assessments and impact statements, and personal communications with recognized experts on the species or activity who may have access to data not published in current literature.

(c) *Issuance criteria.* (1) In determining whether to issue a permit, the Assistant Administrator will consider the following:

(i) The status of the affected species or stocks;

(ii) The potential severity of direct, indirect and cumulative impacts on the

species or stocks and habitat as a result of the proposed activity;

(iii) The availability of effective monitoring techniques;

(iv) The use of the best available technology for minimizing or mitigating impacts; and

(v) The views of the public, scientists and other interested parties knowledgeable of the species or stocks or other matters related to the application.

(2) To issue the permit, the Assistant Administrator must find that:

(i) The taking will be incidental;

(ii) The applicant will, to the maximum extent practicable, monitor, minimize and mitigate the impacts of such taking;

(iii) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;

(iv) The applicant has amended the conservation plan to include any measures (not originally proposed by the applicant) that the Assistant Administrator determines are necessary or appropriate; and

(v) There are adequate assurances that the conservation plan will be funded and implemented, including any measures required by the Assistant Administrator.

(d) *Permit conditions.* In addition to the general conditions set forth in part 220 of this chapter, every permit issued under this section will contain such terms and conditions as the Assistant Administrator deems necessary and appropriate, including, but not limited to the following:

(1) Reporting requirements or rights of inspection for determining whether the terms and conditions are being complied with;

(2) The species and number of animals covered;

(3) The authorized method of taking;

(4) The procedures to be used to handle or dispose of any animals taken; and

(5) The payment of a fee to reimburse the National Marine Fisheries Service the cost of processing the application.

(e) *Duration of permits.* The duration of permits issued under this section will be such as to provide adequate assurances to the permit holder to commit funding necessary for the activities authorized by the permit, including conservation activities. In determining the duration of a permit, the Assistant Administrator will consider the duration of the proposed activities, as well as the possible positive and negative effects associated with issuing a permit of the proposed duration on listed species, including the extent to which the conservation plan is likely to enhance the habitat of the endangered species or increase the long-term survivability of the species.

(f) *Certificates of inclusion.* (1) Any individual who wishes to conduct an activity covered by a general incidental take permit must apply to the Assistant Administrator for a certificate of inclusion. Each application must be signed and dated and include the following:

(i) The general incidental take permit under which the applicant wants coverage.

(ii) The name, address and telephone number of the applicant. If the applicant is a partnership or a corporate entity, the applicable details.

(iii) A description of the activity the applicant seeks to have covered under the general incidental take permit including the anticipated dates, duration, and specific location; and

(iv) A signed certification that the applicant has read and understands the general incidental take permit and the conservation plan, will comply with their terms and conditions, and will fund and implement applicable measures of the conservation plan.

(2) To issue a certificate of inclusion, the Assistant Administrator must find that:

(i) The applicant will be engaged in the activity covered by the general permit and

(ii) The applicant has made adequate assurances that the applicable measures of the conservation plan will be funded and implemented.

(g) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (g) apply only to incidental take permits issued in accordance with paragraph (c) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the

conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to March 25, 1998. The assurances provided in incidental take permits issued prior to March 25, 1998 remain in effect, and those permits will not be revised as a result of this rulemaking.

(1) *Changed circumstances provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(2) *Changed circumstances not provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, NMFS will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(3) *Unforeseen circumstances.* (i) In negotiating unforeseen circumstances, NMFS will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(ii) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, NMFS may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

(iii) NMFS will have the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. NMFS will consider, but not be limited to, the following factors:

(A) Size of the current range of the affected species;

(B) Percentage of range adversely affected by the conservation plan;

(C) Percentage of range conserved by the conservation plan;

(D) Ecological significance of that portion of the range affected by the conservation plan;

(E) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and

(F) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(h) Nothing in this rule will be construed to limit or constrain the Assistant Administrator, any Federal, State, local, or tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

[55 FR 20606, May 18, 1990, as amended at 63 FR 8872, Feb. 23, 1998]

§ 222.23 Permits for scientific purposes or to enhance the propagation or survival of the affected endangered species.

(a) The Director, National Marine Fisheries Service, may issue permits for scientific purposes or to enhance the propagation or survival of the affected endangered species which authorize, under such terms and conditions as he may prescribe, taking, importation, or certain other acts with respect to endangered species otherwise prohibited by section 9 of the Endangered Species Act of 1973. The

species listed as endangered under either the Endangered Species Conservation Act of 1969 or the Endangered Species Act of 1973 and currently under the jurisdiction of the Secretary of Commerce are: Shortnose sturgeon (*Acipenser brevirostrum*); Totoaba (*Cynoscian macdonaldi*), Snake River sockeye salmon (*Oncorhynchusnerka*), Umpqua River cutthroat trout (*Oncorhynchus clarki clarki*); Southern California steelhead (*Oncorhynchus mykiss*), which includes all naturally spawned populations of steelhead (and their progeny) in streams from the Santa Maria River, San Luis Obispo County, California (inclusive) to Malibu Creek, Los Angeles County, California (inclusive); Upper Columbia River steelhead (*Oncorhynchus mykiss*), which includes the Wells Hatchery stock and all naturally spawned populations of steelhead (and their progeny) in streams in the Columbia River Basin upstream from the Yakima River, Washington, to the United States-Canada Border; Sacramento River winter-run chinook salmon (*Oncorhynchus tshawytscha*); Western North Pacific (*Korean*) gray whale (*Eschrichtius robustus*), Blue whale (*Balaenoptera musculus*), Humpback whale (*Megaptera novaeangliae*), Bowhead whale (*Balaenamysticetus*), Right whales (*Eubalaena spp.*), Fin or finback whale (*Balaenoptera physalus*), Sei whale (*Balaenoptera borealis*), Sperm whale (*Physeter catodon*); Cochito (*Phocoena Sinus*), Chinese river dolphin (*Lipotes vexillifer*); Indus River dolphin (*Platanista minor*); Caribean monk seal (*Monachus tropicalis*) Hawaiian monk seal (*Monachus schauinslandi*); Mediterranean monk seal (*Monachus monachus*); Saimaa seal (*Phoca hispida saimensis*); Steller sea lion (*Eumetopias jubatus*), western population, which consists of Steller sea lions from breeding colonies located west of 144° W. long.; Leatherback sea turtle (*Dermochelys coriacea*), Pacific hawksbill sea turtle (*Eretmochelys imbricata bissa*), Atlantic hawksbill sea turtle (*Eretmochelys imbricata imbricata*), Atlantic ridley sea turtle (*Lepidochelys kempii*). Green sea turtle (*Chelonia mydas*) breeding colony populations in Florida and on the Pacific coast of Mexico, and the olive ridley sea turtle (*Lepidochelys olivacea*) breeding colony population on the Pacific coast of Mexico. Of these, the National Marine Fisheries Service has sole agency jurisdiction for sea turtles while the turtles are in the water and the U.S. Fish and Wildlife Service has jurisdiction for sea turtles while the turtles are on land. Within the jurisdiction of a State, more restrictive State laws or regulations in regard to endangered species shall prevail in regard to taking. Proof of compliance with applicable State laws will be required before a permit will be issued.

(b) *Application procedures.* To obtain such a permit, an application must be made to the Director in accordance with this subpart, except for marine mammal permits which shall be issued in accordance with the provisions of part 216, subpart D of this chapter, and sea turtle permits which shall be issued in accordance with part 220, subpart E of this chapter. The sufficiency of the application shall be determined by the Director in accordance with the requirements of this part and, in that connection, he may waive any requirement for information, or require any elaboration or further information deemed necessary. The following information will be used as the basis for determining whether an application is complete and whether a permit for scientific purposes or to enhance the propagation or survival of the affected endangered species should be issued by the Director. An original and four copies of the completed application shall be submitted to the Director, National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce, Washington, DC 20235. Assistance may be obtained by writing the Director or calling the Marine Mammal and Endangered Species Division in Washington, DC (202–343–9445 and effective December 2, 1974, it will become 202–634–7529). At least 45 days should be allowed for processing. An application for a permit shall provide the following information (when the information requested is not applicable put ''N.A.'') and such other information that the Director may require:

(1) Title: As applicable, either:

(i) Application for Permit for Scientific Purposes under the Endangered Species Act of 1973; or

(ii) Application for Permit to Enhance the Propagation or Survival of the Endangered Species Under the Endangered Species Act of 1973.

(2) The date of the application.

(3) The identity of the applicant including complete name, address, and telephone number. If the applicant is a partnership or a corporate entity set forth the details. If the endangered species is to be utilized by a person other than the Applicant, set forth the name of that person and such other information as would be required if such person were an Applicant.

(4) A description of the purpose of the proposed acts, including:

(i) A detailed justification of the need for the endangered species, including a discussion of possible alternatives, whether or not under the control of the applicant; and

(ii) A detailed description of how the species will be used.

(5) A detailed description of the project, or program, in which the endangered species is to be used, including:

(i) The period of time over which the project or program will be conducted;

(ii) A list of the names and addresses of the sponsors or cooperating institutions and the scientists involved;

(iii) A copy of the formal research proposal or contract if one has been prepared;

(iv) A statement of whether the proposed project or program has broader significance than the individual researcher's goals (i.e., does the proposed project or program respond directly or indirectly to recommendation of any national or international scientific body charged with research or management of the endangered species, and, if so, how?); and

(v) A description of the arrangements, if any, for the disposition of any dead specimen or its skeleton or other remains, for the continued benefit to science, in a museum or other institutional collection.

(6) A description of the endangered species which is the subject of the application, including the following:

(i) A list of each species and the number of each, including the common and scientific name; the subspecies (if applicable); population group, and range;

(ii) A physical description of each animal, including the age, size, and sex;

(iii) A list of the probable dates of capture or other taking, importation, exportation, and other acts which require a permit, for each animal, and the location of capture or other taking, importation, exportation, and other acts which require a permit, as specifically as possible;

(iv) A description of the status of the stock of each species related insofar as possible to the location or area of taking;

(v) A description of the manner of taking for each animal, including the gear to be used;

(vi) The name and qualifications of the persons or entity which will capture or otherwise take the animals;

(vii) If the capture or other taking is to be done by a contractor, a statement as to whether a qualified member of your staff (include name(s) and qualifications) will supervise or observe the capture or other taking. Accompany such statement with a copy of the proposed contract or a letter from the contractor indicating agreement to capture or otherwise taken the animals, should a permit be granted;

(7) A description of the manner of transportation of any live animal taken, imported, exported, or shipped in interstate commerce, including:

(i) Mode of transportation;

(ii) Name of transportation company;

(iii) Length of time in transit for the transfer of the animal(s) from the capture site to the holding facility;

(iv) Length of time in transit for any future move or transfer of the animal(s) that is planned;

(v) The qualifications of the common carrier or agent used for transportation of the animals;

(vi) A description of the pen, tank, container, cage, cradle, or other devices used, both to hold the animal at the capture site and during transportation;

(vii) Special care before and during transportation, such as salves, antibiotics, moisture; and

(viii) A statement as to whether the animals will be accompanied by a veterinarian or other similarly qualified person, and the qualifications of such person.

(8) Describe the contemplated care and maintenance of any live animals sought, including a complete description of the facilities where any such animals will be maintained including:

(i) The dimensions of the pools or other holding facilities and the number, sex, and age of animals by species to be held in each;

(ii) The water supply, amount, and quality;

(iii) The diet, amount and type, for all animals;

(iv) Sanitation practices used;

(v) Qualifications and experience of the staff; and

(vi) A written certification from a licensed veterinarian knowledgeable about the species (or related species) or group which is the subject of the application, or from a recognized expert on the species (or related species) or group covered in the application that he has personally reviewed the amendments for transporting and maintaining the animal(s) and that in his opinion they are adequate to provide for the well-being of the animal; and

(vii) The availability in the future of a consulting expert or veterinarian meeting paragraph (b)(8)(vi) requirements of this section;

(9) A statement of willingness to participate in a cooperative breeding program and maintain or contribute data to a stud book.

(10) A statement of how the applicant's proposed project or program will enhance or benefit the wild population.

(11) For the 5 years preceding the date of this application, provide a detailed description of all mortalities involving species which were under the control of or utilized by the applicant and are either presently listed as endangered species or are taxonomically related within the Order to the species which is the subject of this application, including:

(i) A list of all endangered species and species related to the species which is the subject of this application; captured, transported, maintained, or utilized by the applicant for scientific purposes or to enhance the propagation or survival of the affected species, and/or for all such species caused to be captured, transported, maintained, or utilized for scientific purposes or to enhance the propagation or survival of the affected species, by the Applicant;

(ii) The numbers of mortalities among such animals by species, by date, location of capture, i.e., from which population, and location of such mortalities;

(iii) The cause(s) of any such mortalities; and

(iv) The steps which have been taken by Applicant to avoid or decrease any such mortalities.

(12) A certification in the following language:

> I hereby 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 permit under the Endangered Species Act of 1973 (87 Stat. 864, Pub. L. 93–205, 16 U.S.C. 1531 et seq.) and regulations promulgated thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001, or to penalties under the Endangered Species Act of 1973.

(13) The applicant and/or an officer thereof must sign the application.

(c) *Issuance criteria.* The Director shall specifically consider, among other criteria, the following in determining whether to issue a permit for scientific purposes or to enhance the propagation or survival of the affected endangered species:

(1) Whether the permit was applied for in good faith;

(2) Whether the permit if granted and exercised will not operate to the disadvantage of the endangered species;

(3) Whether the permit would be consistent with the purposes and policy set forth in section 2 of the Act;

(4) Whether the permit would further a bona fide and necessary or desirable scientific purpose or enhance the propagation or survival of the endangered species, taking into account the benefits anticipated to be derived on behalf of the endangered species;

(5) The status of the population of the requested species, and the effect of the proposed action on the population, both direct and indirect;

(6) If a live animal is to be taken, transported, or held in captivity—the applicant's qualifications for the proper care and maintenance of the species and the adequacy of his facilities;

(7) Whether alternative non-endangered species or population stocks can and should be used;

(8) Whether the animal was born in captivity or was (or will be) taken from the wild;

(9) Provision for disposition of the species if and when the applicant's project or program terminates;

(10) How the applicant's needs, program, and facilities compare and relate to proposed and ongoing projects and programs;

(11) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application;

(12) Opinions or views of scientists or other persons or organizations knowledgeable of the species which is the subject of the application or of other matters germane to the application; and

(d) Permits applied for under this section shall contain terms and conditions as the Director may deem appropriate, including:

(1) The number and kind of species which are covered;

(2) The location and manner of taking;

(3) Port of entry or export;

(4) The methods of transportation, care and maintenance to be used with live species;

(5) Any requirements for reports or rights of inspections with respect to any activities carried out pursuant to the permit;

(6) The transferability or assignability of the permit;

(7) The sale or other disposition of the species, its progeny or the species product;

(8) A reasonable fee covering the costs of issuance of such permit, including reasonable inspections and an appropriate apportionment of overhead and administrative expenses of the Department of Commerce. All such fees will be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the service.

[39 FR 41375, Nov. 27, 1974]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 222.23, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 222.24 Procedures for issuance of permits.

(a) Whenever application for a permit is received by the Director which the Director deems sufficient, he shall, as soon as practicable, publish a notice thereof in the FEDERAL REGISTER. Information received by the Director as a part of the application shall be available to the public as a matter of public record at every stage of the proceeding. An interested party may within 30 days after the date of publication of such notice, submit to the Director his written data, views, or arguments with respect to the taking, importation, or other action proposed in the application and may request a hearing in connection with the action to be taken thereon.

(b) If a request for a hearing is made within the 30–day period referred to in paragraph (a) of this section, or if the Director determines that a hearing would otherwise be advisable, the Director may, within 60 days after the date of publication of the notice referred to in paragraph (a) of this section, afford to such requesting party or parties an opportunity for a hearing. Such hearing shall also be open to participation by any interested members of the public. Notice of the date, time, and place of such hearing shall be published in the FEDERAL REGISTER not less than 15 days in advance of such hearing. Any interested person may appear in person or through representatives at the hearing and may submit any relevant material, data, views, comments, arguments, or exhibits. A summary record of the hearing shall be kept.

(c) Except as provided in subpart D of 15 CFR part 904, as soon as practicable but not later than 30 days after the close of the hearing (or if no hearing is held, as soon as practicable after the end of the 30 days succeeding publication of the notice referred to in paragraph (a) of this section) the Director

shall issue or deny issuance of the permit. Notice of the decision of the Director shall be published in the FEDERAL REGISTER within 10 days after the date of the issuance or denial and indicate where copies of the permit, if issued, may be obtained.

(d) If a permit is issued, the Director shall publish notice thereof in the FEDERAL REGISTER, including his finding that (1) such permit was applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in section 2 of the Endangered Species Act of 1973. The requirements of this paragraph pertain solely to the permits issued under §222.23.

(e) The Director may waive the thirty-day period in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Director in the FEDERAL REGISTER within ten days following the issuance of the certificate of exemption or permit.

[39 FR 41375, Nov. 27, 1974, as amended at 42 FR 28139, June 2, 1977; 49 FR 1042, Jan. 6, 1984; 55 FR 20607, May 18, 1990]

§222.25 Applications for modification of permit by permittee.

Where circumstances have changed so that an applicant or permittee desires to have any term or condition of his application or permit modified, he must submit in writing full justification and supporting information in conformance with the provisions of this part and the part under which the permit has been issued or requested. Such applications for modification are subject to the same issuance criteria as are original applications, as provided in §§222.22(c) and 222.23(c).

[39 FR 41375, Nov. 27, 1974, as amended at 55 FR 20607, May 18, 1990]

§222.26 Amendment of permits by NMFS.

All permits are issued subject to the condition that the National Marine Fisheries Service reserves the right to amend the provisions of a permit for just cause at any time during its term. Such amendments take effect on the date of notification, unless otherwise specified.

[39 FR 41375, Nov. 27, 1974]

§222.27 Procedures for suspension, revocation, or modification of permits.

Any violation of the applicable provisions of parts 217 through 222 of this chapter, or of the Act, or of a condition of the permit may subject the certificate holder to the following:

(a) The penalties provided in the Act; and

(b) Suspension, revocation, or modification of the permit, as provided in subpart D of 15 CFR part 904.

[49 FR 1043, Jan. 6, 1984, as amended at 55 FR 20607, May 18, 1990]

§222.28 Possession of permits.

(a) Any permit issued under these regulations must be in the possession of the person to whom it is issued (or an agent of such person) during:

(1) The time of the authorized taking, importation, exportation, or other act;

(2) The period of any transit of such person or agent which is incident to such taking, importation, exportation, or other act; and

(3) Any other time while any animal under such permit is in the possession of such person or agent.

(b) A duplicate copy of the issued permit must be physically attached to the tank, container, package, enclosure, or other means of containment, in which the animal is placed for purposes of storage, transit, supervision, or care.

[39 FR 41375, Nov. 27, 1974]

Subpart D—Special Prohibitions

§222.31 Approaching humpback whales in Hawaii.

Except as provided in subpart C (Endangered Fish or Wildlife Permits) of this part it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, within 200 nautical miles (370.4 km) of the Islands of Hawaii, any of the following acts with respect to humpback whales (*Megaptera novaeangliae*):

(a) Operate any aircraft within 1,000 ft (300 m) of any humpback whale; or

(b) Approach by any means, within 100 yd (90 m) of any humpback whale; or

(c) Cause a vessel or other object to approach within 100 yd (90 m) of a humpback whale; or

(d) Disrupt the normal behavior or prior activity of a whale by any other act or omission. A disruption of normal behavior may be manifested by, among other actions on the part of the whale, a rapid change in direction or speed; escape tactics such as prolonged diving, underwater course changes, underwater exhalation, or evasive swimming patterns; interruptions of breeding, nursing, or resting activities, attempts by a whale to shield a calf from a vessel or human observer by tail swishing or by other protective movement; or the abandonment of a previously frequented area.

[60 FR 3775, Jan. 19, 1995]

§ 222.32 Approaching North Atlantic right whales.

(a) *Prohibitions.* Except as provided under paragraph (c) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, attempt to commit, to solicit another to commit, or cause to be committed any of the following acts:

(1) Approach (including by interception) within 500 yards (460 m) of a right whale by vessel, aircraft, or any other means;

(2) Fail to undertake required right whale avoidance measures specified under paragraph (b) of this section.

(b) *Right whale avoidance measures.* Except as provided under paragraph (c) of this section, the following avoidance measures must be taken if within 500 yards (460 m) of a right whale:

(1) If underway, a vessel must steer a course away from the right whale and immediately leave the area at a slow safe speed;

(2) An aircraft must take a course away from the right whale and immediately leave the area at a constant airspeed.

(c) *Exceptions.* The following exceptions apply to this section, but any person who claims the applicability of an exception has the burden of proving that the exception is applicable:

(1) Paragraphs (a) and (b) of this section do not apply if a right whale approach is authorized by NMFS through a permit issued under subpart C (Endangered Fish or Wildlife Permits) of this part or through a similar authorization.

(2) Paragraphs (a) and (b) of this section do not apply where compliance would create an imminent and serious threat to a person, vessel, or aircraft.

(3) Paragraphs (a) and (b) of this section do not apply when approaching to investigate a right whale entanglement or injury, or to assist in the disentanglement or rescue of a right whale, provided that permission is received from NMFS or a NMFS designee prior to the approach.

(4) Paragraphs (a) and (b) of this section do not apply to an aircraft unless the aircraft is conducting whale watch activities or is being operated for that purpose.

(5) Paragraph (b) of this section does not apply to the extent that a vessel is restricted in her ability to maneuver, and because of the restriction, cannot comply with paragraph (b) of this section.

[62 FR 6738, Feb. 13, 1997]

§ 222.33 Special prohibitions relating to endangered Steller sea lion protection.

General. The regulatory provisions set forth in part 227, which govern threatened Steller sea lions, shall also apply to the western population of Steller sea lions, which consists of all Steller sea lions from breeding colonies located west of 144 °W. long.

[62 FR 24355, May 5, 1997]

Subpart E—Incidental Capture of Endangered Sea Turtles

§ 222.41 Policy regarding incidental capture of sea turtles.

Shrimp fishermen in the southeastern United States and the Gulf of Mexico who comply with rules for threatened sea turtles specified in § 227.72(e) of this subchapter will not be subject

to civil penalties under the Act for incidental captures of endangered sea turtles by shrimp trawl gear.

[52 FR 24251, June 29, 1987]

§222.42 Special prohibitions relating to leatherback sea turtles.

Special prohibitions relating to leatherback sea turtles are provided at §227.72(e)(2)(iv) of this chapter.

[60 FR 25623, May 12, 1995]

PART 225—FEDERAL/STATE COOPERATION IN THE CONSERVATION OF ENDANGERED AND THREATENED SPECIES

Sec.

225.1 Purpose of regulations.
225.2 Scope of regulations.
225.3 Definitions.
225.4 Cooperation with the States.
225.5 Cooperative agreement.
225.6 Allocation of funds.
225.7 Financial assistance.
225.8 Availability of funds.
225.9 Payments.
225.10 Assurances.
225.11 Submission of documents.
225.12 Project evaluation.
225.13 Contracts.
225.14 Inspection.

AUTHORITY: Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531–1543, Pub. L. 93–205.

SOURCE: 41 FR 24354, June 16, 1976, unless otherwise noted.

§225.1 Purpose of regulations.

The regulations in this part implement section 6 of the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531 through 1543, Pub. L. 93–205 which provides, under certain circumstances, for cooperative agreements with and financial assistance to the States.

§225.2 Scope of regulations.

This part applies to endangered and threatened species under the jurisdiction of the Department of Commerce (see 50 CFR 222.23(a)).

§225.3 Definitions.

In addition to the definitions contained in the Act, and unless the context otherwise requires, in this part 225:

(a) *Act* means the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531 through 1543, Pub. L. 93–205.

(b) *Agreements* mean signed documented statements of the actions to be taken by the State(s) and the Director in furthering certain purposes of the Act. They include:

(1) A Cooperative Agreement entered into pursuant to section 6(c) of the Act and, where appropriate, containing provisions found in section 6(d)(2) of the Act.

(2) A Grant-In-Aid Award which includes a statement of the actions to be taken in connection with the conservation of endangered or threatened species receiving Federal financial assistance, objectives and costs of such actions, and costs to be borne by the Federal Government and by the State(s).

(c) *Application for Federal Assistance* means a description of work to be accomplished, including objectives and needs, expected results and benefits, approach, cost, location and time required for completion.

(d) *Director* means the Director of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, or his authorized designee.

(e) *Program* means a State-developed plan for the conservation and management of all resident species which are deemed by the Secretary to be endangered or threatened and those which are deemed by the State to be endangered or threatened, which includes goals, priorities, strategies, actions, and funding necessary to accomplish the objectives on an individual species basis.

(f) *Project* means a substantial undertaking to conserve the various endangered or threatened species.

(g) *Project segment* means an essential part or a division of a project, usually separated as a period of time, occasionally as a unit of work.

(h) *Resident species* means, for purposes of these regulations, with respect to a State, a species which exists in the wild in that State during any part of its life.

(i) *Secretary* means the Secretary of Commerce or his authorized designee.

§ 225.4 Cooperation with the States.

The Director shall cooperate with any State which establishes and maintains an adequate and active program for the conservation of endangered and threatened species. In order for a State program to be deemed an adequate and active program, the Director must find and reconfirm, on an annual basis, that:

(a) Authority resides in a State agency to conserve resident species determined by the State agency or the Director to be endangered or threatened;

(b) The State agency has established an acceptable conservation program, consistent with the purposes and policies of the Act, for all resident species in the State which are deemed by the Director to be endangered or threatened; and has furnished a copy of such program together with all pertinent details, information and data requested to the Director;

(c) The State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species;

(d) The State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species; and

(e) Provisions are made for public participation in designating resident species as endangered or threatened.

§ 225.5 Cooperative agreement.

Following receipt of an application by a State for a Cooperative Agreement and a determination by the Director that the State program for endangered and threatened species is adequate and active, the Director shall enter into an Agreement with the State. A Cooperative Agreement is necessary before a Grant-In-Aid Award can be approved for endangered or threatened species projects. The Cooperative Agreement must be reconfirmed annually to insure that it reflects new laws, species lists, rules or regulations, and programs, and to demonstrate that the program is still active and adequate. In order for a State to receive financial assistance, such Cooperative Agreement must also contain:

(a) The actions that are to be taken by the Director and the State;

(b) The benefits that are expected to be derived in connection with the conservation of endangered or threatened species; and

(c) The estimated cost of these actions.

§ 225.6 Allocation of funds.

The Director shall allocate funds, appropriated for the purpose of carrying out section 6 of the Act, to various States using the following as the basis for his determination:

(a) The international commitments of the United States to protect endangered or threatened species;

(b) The readiness of a State to proceed with a conservation program consistent with the objectives and purposes of the Act;

(c) The number of federally listed endangered and threatened species within a State;

(d) The potential for restoring endangered and threatened species within a State; and

(e) The relative urgency to initiate a program to restore and protect an endangered or threatened species in terms of survival of the species.

§ 225.7 Financial assistance.

(a) Before any Federal funds may be obligated for any project to be undertaken in a State, the State must have entered into a Cooperative Agreement. Subsequent to such agreement, the Director may further agree with a State(s) to provide financial assistance in the development and implementation of acceptable projects for the conservation of endangered and threatened species. Documents to provide financial assistance will consist of an Application for Federal Assistance and a Grant-In-Aid Award. The availability of Federal funds under a Grant-In-Aid Award shall be contingent upon the continued existence of the Cooperative Agreement.

(b) To meet the requirements of the Act, the Application for Federal Assistance shall certify that the State agency submitting the project is committed to its execution and that it has been reviewed by the appropriate State officials and is in compliance with other

requirements of the Office of Management and Budget Circular No. A–95 (as revised and published in the FEDERAL REGISTER on January 13, 1976 (41 FR 2052)).

(c) The mutual obligations by the cooperating agencies will be set forth in a Grant-In-Aid Award executed between the State and the Director. The Grant-In-Aid Award shall cover the proposed financing and the work items described in the documents supporting it. The form and content for both the Application for Federal Assistance and the Grant-In-Aid Award are provided in the Federal Aid Handbook No. 22.

§225.8 Availability of funds.

Funds allocated to a State are available for obligation during the fiscal year for which they are allocated and until the close of the succeeding fiscal year. For the purpose of this section, obligation of allocated funds occurs when a Grant-In-Aid Award is signed by the Director.

§225.9 Payments.

The payment of the Federal share of costs incurred in the conduct of activities included under a Grant-In-Aid Award shall be in accordance with the Treasury Circular 1075.

(a) Federal payments under the Act shall not exceed 75 percent of the program costs as stated in the agreement; except, the Federal share may be increased to 90 percent when two or more States having a common interest in one or more endangered or threatened resident species, the conservation of which may be enhanced by cooperation of such States, jointly enter into an agreement with the Director.

(b) The State share of program costs may be in the form of cash or in-kind contributions, including real property, subject to standards established by the Director as provided in Federal Management Circular 74–7.

(c) Payments of funds, including payment of such preliminary costs and expenses as may be incurred in connection with projects, shall not be made unless all documents that may be necessary or required in the administration of the Act shall have first been submitted to and approved by the Director. Payments shall be made for expenditures reported and certified by the State agency. Payments shall be made only to the State office or official designated by the State agency and authorized under the laws of the State to receive public funds for the State.

(d) Vouchers and forms provided by the Director and certified as therein prescribed, showing amounts expended and the amount of Federal Aid funds claimed to be due on account thereof, shall be submitted to the Director by the State agency.

[41 FR 24354, June 16, 1976, as amended at 49 FR 30074, July 26, 1984]

§225.10 Assurances.

A State shall certify that it will comply with all applicable Federal laws, regulations, and requirements as they relate to the application, acceptance, and use of Federal funds for projects under the Act in accordance with Federal Management Circular 74–7.

§225.11 Submission of documents.

Documents required by section 6 of the Act or by these regulations shall be addressed to the Director, National Marine Fisheries Service, Washington, DC 20235.

§225.12 Project evaluation.

Any difference of opinion about a proposed project or appraised value of land to be acquired or any other related matter will be considered by qualified representatives of the Director and the State. Final determination in the event of continued disagreement rests with the Director.

§225.13 Contracts.

The State may use its own regulations in obtaining services provided they adhere to Federal laws and the requirements set forth in Federal Management Circular 74–7. The State is the responsible authority without recourse to the Director regarding settlement of contractual issues.

§225.14 Inspection.

Supervision of each project by the State shall include adequate and continuous inspection. The project will be subject to periodic Federal inspection.

PART 226—DESIGNATED CRITICAL HABITAT

Subpart A—Introduction

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226.1 Purpose of regulations.
226.2 Scope of regulations.

Subpart B—Critical Habitat for Marine Mammals

226.11 Northwestern Hawaiian Islands.
226.12 North Pacific Ocean.
226.13 North Atlantic Ocean.

Subpart C—Critical Habitat for Fish

226.21 Sacramento River winter-run chinook salmon (*Oncorhynchus tshawytscha*).
226.22 Snake River sockeye salmon (*oncorhynchus nerka*), Snake River spring/summer chinook salmon (*oncorhynchus tshawytscha*), Snake River fall chinook salmon (*oncorhynchus tshawytscha*).
226.23 Umpqua River cutthroat trout (Oncorhynchus clarki clarki).

Subpart D—Critical Habitat for Marine Reptiles

226.71 Sandy Point, St. Croix, U.S. Virgin Islands.
226.72 Green Sea Turtle (Chelonia mydas).
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TABLE 1 TO PART 226
TABLE 2 TO PART 226
TABLE 3 TO PART 226
TABLE 4 TO PART 226
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FIGURE 2 TO PART 226
FIGURE 3 TO PART 226
FIGURE 4 TO PART 226
FIGURE 5 TO PART 226
FIGURE 6 TO PART 226
FIGURE 7 TO PART 226
FIGURE 8 TO PART 226
FIGURE 9 TO PART 226

AUTHORITY: 16 U.S.C. 1533.

SOURCE: 44 FR 17711, Mar. 23, 1979, unless otherwise noted.

Subpart A—Introduction

§ 226.1 Purpose of regulations.

The regulations contained in this part identify those habitats designated as critical under section 7 of the Endangered Species Act, as amended, by the Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, for those endangered and threatened species under the jurisdiction of the Secretary of Commerce. The list of these species is found in 50 CFR 222.23(a) for endangered species and 50 CFR 227.4 for threatened species.

§ 226.2 Scope of regulations.

(a) The critical habitat designations contained in this part apply only to the endangered and threatened species listed in this part.

(b) Regulations implementing section 7 of the Endangered Species Act, as amended, are found in 50 CFR part 402.

(c) The provisions in this part are in addition to, and not in lieu of other regulations of parts 217 through 227 and 402 of this chapter.

Subpart B—Critical Habitat for Marine Mammals

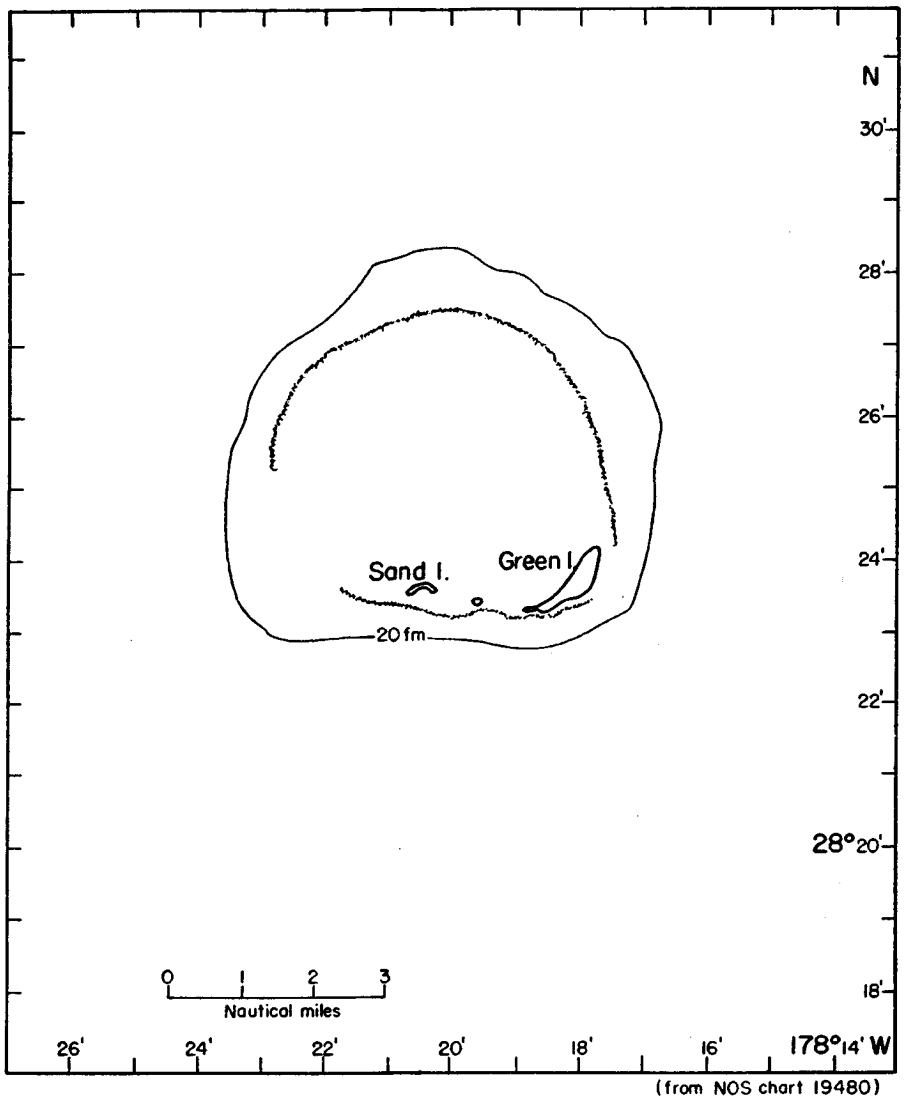
§ 226.11 Northwestern Hawaiian Islands.

HAWAIIAN MONK SEAL

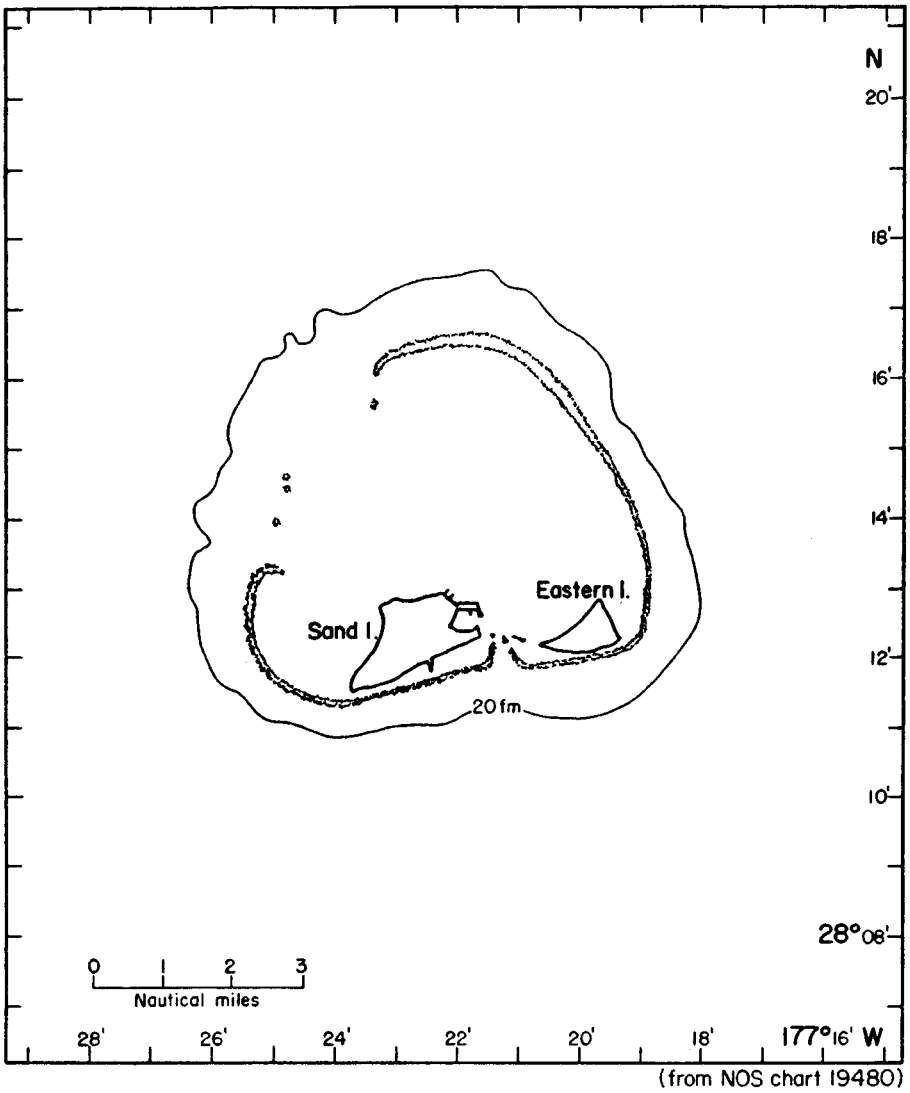
(Monachus schauinslandi)

All beach areas, sand spits and islets, including all beach crest vegetation to its deepest extent inland, lagoon waters, inner reef waters, and ocean waters out to a depth of 20 fathoms around the following:

Kure Atoll (28°24′ N, 178°20′ W)
Midway Islands, except Sand Island and its harbor (28°14′ N, 177°22′ W)
Pearl and Hermes Reef (27°55′ N, 175° W)
Lisianski Island (26°46′ N, 173°58′ W)
Laysan Island (25°46′ N, 171°44′ W)
Maro Reef (25°25′ N, 170°35′ W)
Gardner Pinnacles (25°00′ N, 168°00′ W)
French Frigate Shoals (23°45′ N, 166°00′ W)
Necker Island (23°34′ N, 164°42′ W)
Nihoa Island (23°03.5′ N, 161°55.5′ W).

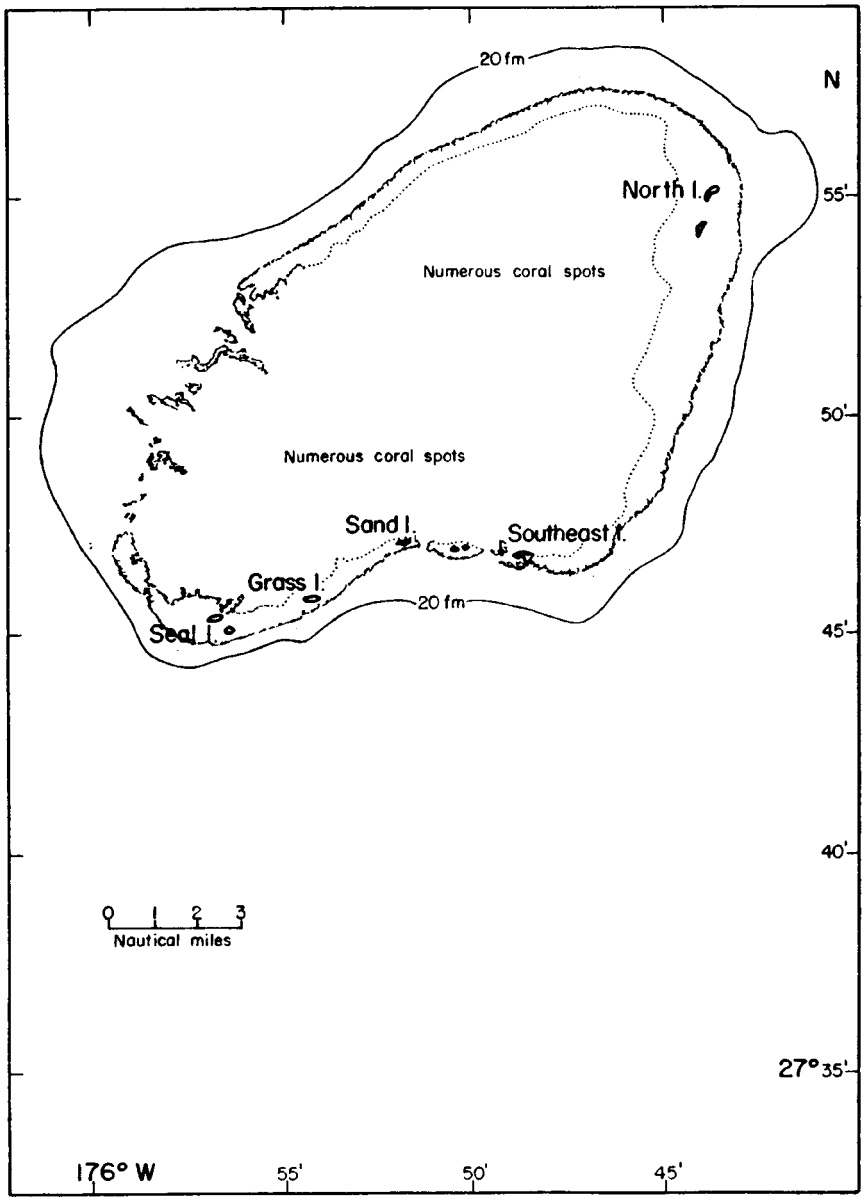

N
30'
28'
26'
24'
22'
28°20'
18'
Sand I.
Green I.
20 fm
0 1 2 3
Nautical miles
26'
24'
22'
20'
18'
16'
178°14' W
(from NOS chart 19480)

KURE ATOLL

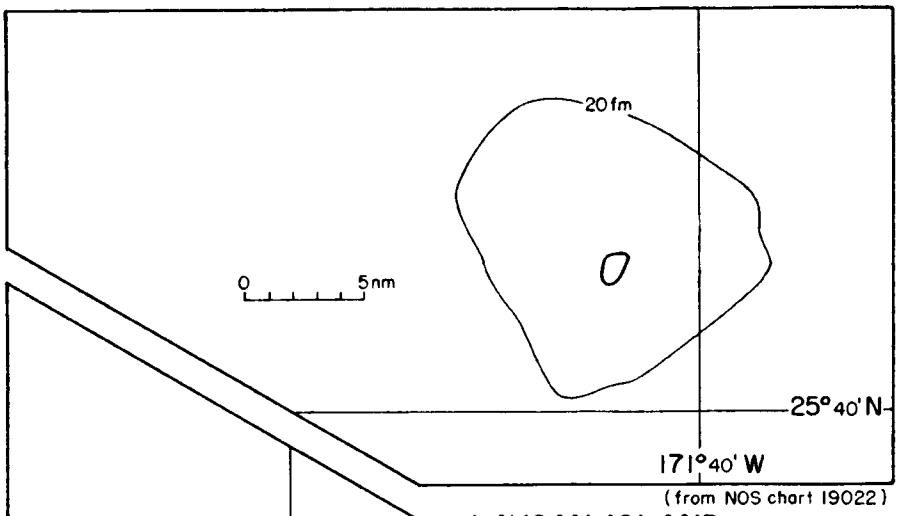


(from NOS chart 19480)

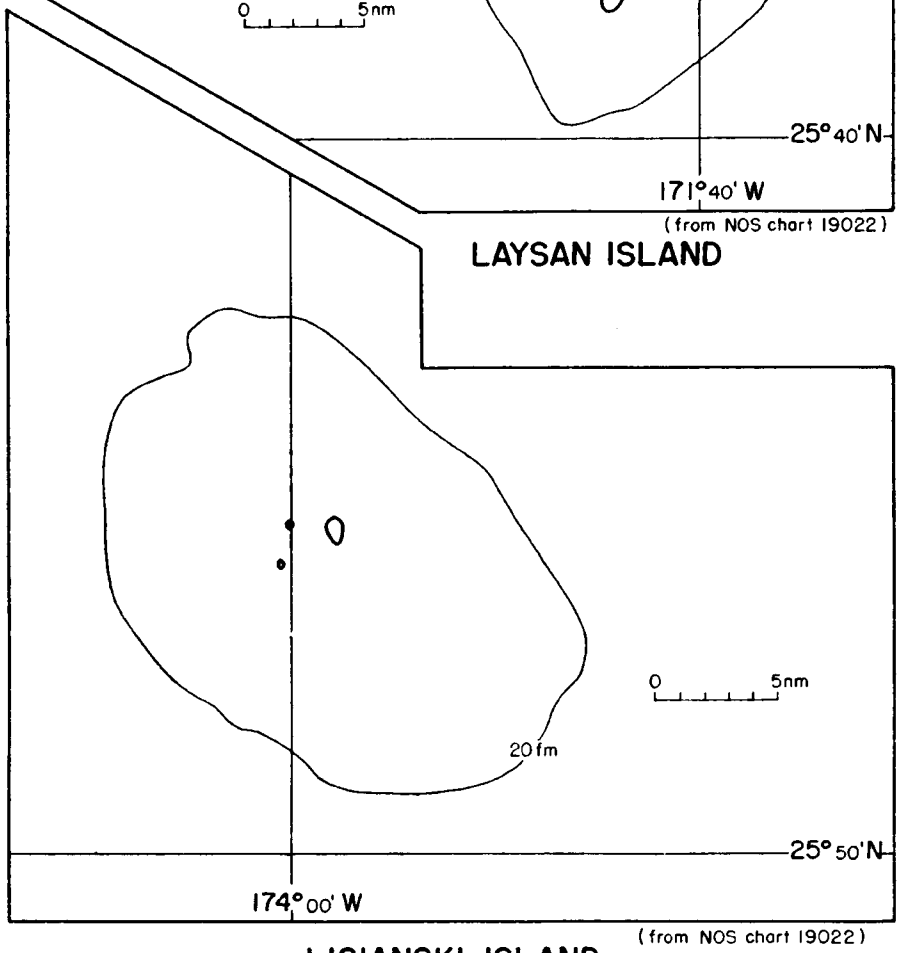
MIDWAY ISLANDS



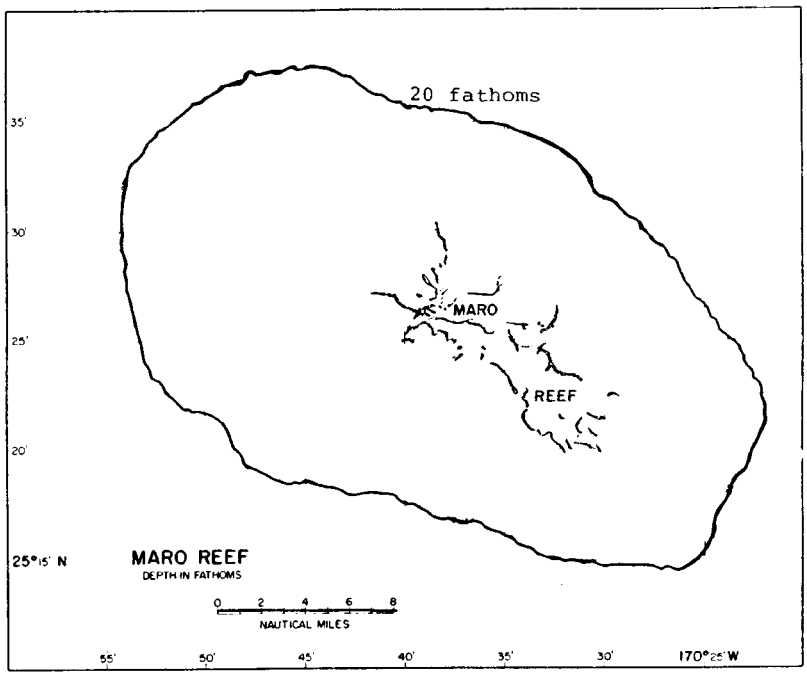
PEARL and HERMES REEF

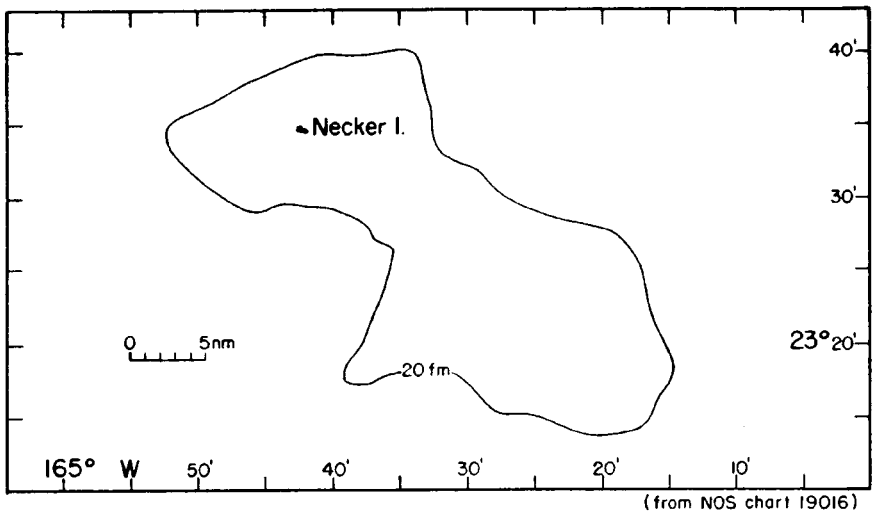


LAYSAN ISLAND

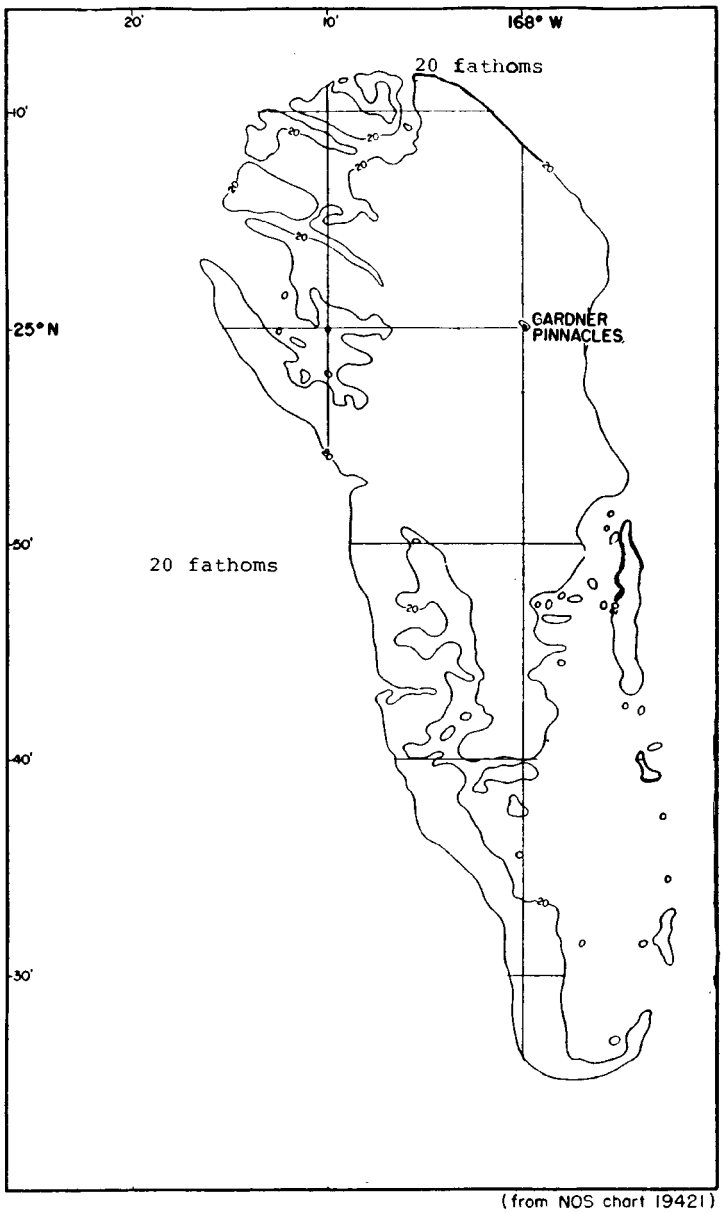


LISIANSKI ISLAND

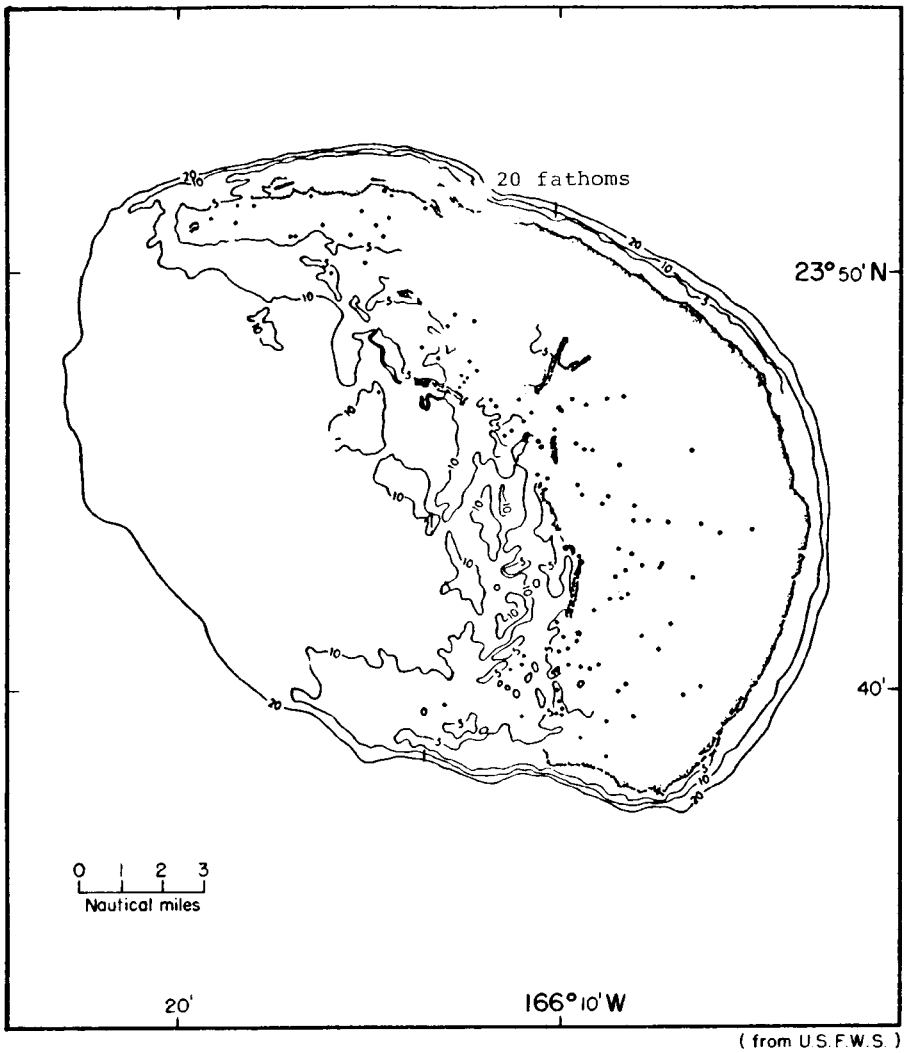




NECKER ISLAND



GARDNER PINNACLES



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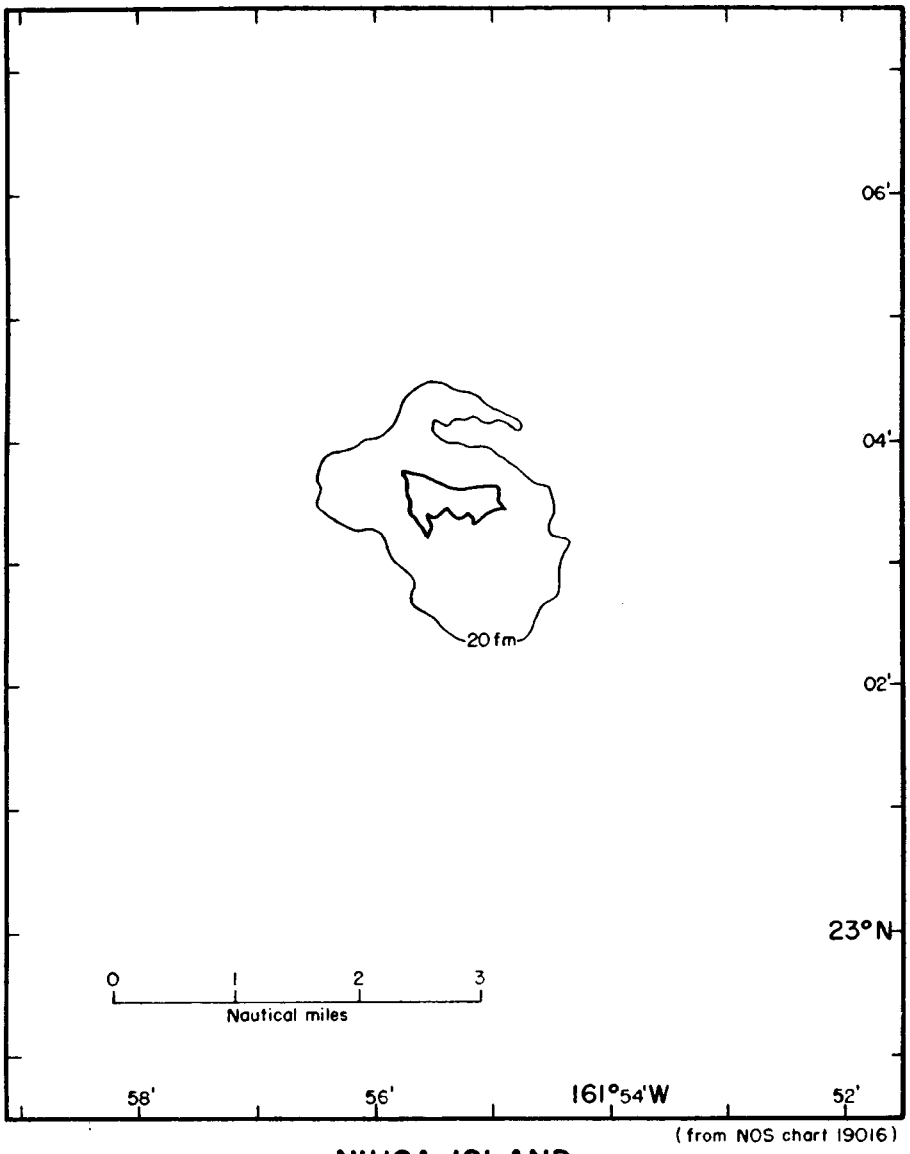
FRENCH FRIGATE SHOALS



NIHOA ISLAND

[53 FR 18990, May 26, 1988]

§226.12 North Pacific Ocean.

Steller Sea Lion (*Eumetopias jubatus*)

(a) *Alaska rookeries, haulouts, and associated areas.* In Alaska, all major Steller sea lion rookeries identified in Table 1 and major haulouts identified in Table 2 and associated terrestrial, air, and aquatic zones. Critical habitat includes a terrestrial zone that extends 3,000 feet (0.9 km) landward from the baseline or base point of each major rookery and major haulout in Alaska. Critical habitat includes an air zone that extends 3,000 feet (0.9 km) above the terrestrial zone of each major rookery and major haulout in Alaska, measured vertically from sea level. Critical habitat includes an aquatic zone that extends 3,000 feet (0.9 km) seaward in State and Federally managed waters from the baseline or basepoint of each major rookery and major haulout in Alaska that is east of 144° W. longitude. Critical habitat includes an aquatic zone that extends 20 nm (37 km) seaward in State and Federally managed waters from the baseline or basepoint of each major rookery and major haulout in Alaska that is west of 144° W. longitude.

(b) *California and Oregon rookeries and associated areas.* In California and Oregon, all major Steller sea lion rookeries identified in Table 1 and associated air and aquatic zones. Critical habitat includes an air zone that extends 3,000 feet (0.9 km) above areas historically occupied by sea lions at each major rookery in California and Oregon, measured vertically from sea level. Critical habitat includes an aquatic zone that extends 3,000 feet (0.9 km) seaward in State and Federally managed waters from the baseline or basepoint of each major rookery in California and Oregon.

(c) *Three special aquatic foraging areas in Alaska.* Three special aquatic foraging areas in Alaska, including the Shelikof Strait area, the Bogoslof area, and the Seguam Pass area.

(1) Critical habitat includes the Shelikof Strait area in the Gulf of Alaska which is identified in Figure 2 and consists of the area between the Alaska Peninsula and Tugidak, Sitkinak, Aiaktilik, Kodiak, Raspberry, Afognak and Shuyak Islands (connected by the shortest lines); bounded on the west by a line connecting Cape Kumlik (56°38″/157°27′W) and the southwestern tip of Tugidak Island (56°24′N/154°41′W) and bounded in the east by a line connecting Cape Douglas (58°51′N/153°15′W) and the northernmost tip of Shuyak Island (58°37′N/152°22′W).

(2) Critical habitat includes the Bogoslof area in the Bering Sea shelf which is identified in Figure 3 and consists of the area between 170°00′W and 164°00′W, south of straight lines connecting 55°00′N/170°00′W and 55°00′N/168°00′W; 55°30′N/168°00′W and 55°30′N/166°00′W; 56°00′N/166°00′W and 56°00′N/164°00′W and north of the Aleutian Islands and straight lines between the islands connecting the following coordinates in the order listed:

52°49.2′N/169°40.4′W
52°49.8′N/169°06.3′W
53°23.8′N/167°50.1′W
53°18.7′N/167°51.4′W
53°59.0′N/166°17.2′W
54°02.9′N/166°03.0′W
54°07.7′N/165°40.6′W
54°08.9′N/165°38.8′W
54°11.9′N/165°23.3′W
54°23.9′N/164°44.0′W

(3) Critical habitat includes the Seguam Pass area which is identified in Figure 4 and consists of the area between 52°00′N and 53°00′N and between 173°30′W and 172°30′W.

[58 FR 45278, Aug. 27, 1993]

§226.13 North Atlantic Ocean.

Northern Right Whale *(Eubalaena glacialis)*

(a) *Great South Channel.* The area bounded by 41°40′ N/69°45′ W; 41°00′ N/69°05′ W; 41°38′ N/68°13′ W; and 42°10′ N/68°31′ W (Figure 6 to part 226).

(b) *Cape Cod Bay, Massachusetts.* The area bounded by 42°04.8′ N/70°10′ W; 42°12′ N/70°15′ W; 42°12′ N/70°30′ W; 41°46.8′ N/70°30′ W and on the south and east by the interior shore line of Cape Cod, Massachusetts (Figure 7 to part 226).

(c) *Southeastern United States.* The coastal waters between 31°15′ N and 30°15′ N from the coast out 15 nautical miles; and the coastal waters between 30°15′ N and 28°00′ N from the coast out 5 nautical miles (Figure 8 to part 226).

[59 FR 28805, June 3, 1994]

Subpart C—Critical Habitat for Fish

SOURCE: 58 FR 33218, June 16, 1993, unless otherwise noted.

§ 226.21 Sacramento River winter-run chinook salmon (Oncorhynchus tshawytscha).

The following waterways, bottom and water of the waterways and adjacent riparian zones: The Sacramento River from Keswick Dam, Shasta County (River Mile 302) to Chipps Island (River Mile 0) at the westward margin of the Sacramento-San Joaquin Delta, all waters from Chipps Island westward to Carquinez Bridge, including Honker Bay, Grizzly Bay, Suisun Bay, and Carquinez Strait, all waters of San Pablo Bay westward of the Carquinez Bridge, and all waters of San Francisco Bay (north of the San Francisco/Oakland Bay Bridge) from San Pablo Bay to the Golden Gate Bridge.

§ 226.22 Snake River sockeye salmon (oncorhynchus nerka), Snake River spring/summer chinook salmon (oncorhynchus tshawytscha), Snake River fall chinook salmon (oncorhynchus tshawytscha).

The following areas consisting of the water, waterway bottom, and adjacent riparian zone of specified lakes and river reaches in hydrologic units presently or historically accessible to listed Snake River salmon (except reaches above impassable natural falls, and Dworshak and Hells Canyon Dams). Adjacent riparian zones are defined as those areas within a horizontal distance of 300 feet (91.4 m) from the normal line of high water of a stream channel (600 feet or 182.8 m, when both sides of the stream channel are included) or from the shoreline of a standing body of water. Figure 5 identifies the general geographic extent of larger rivers, lakes, and streams within hydrologic units designated as critical habitat for Snake River sockeye, spring/summer chinook, and fall chinook salmon. Note that Figure 5 does not constitute the definition of critical habitat, but instead is provided as a general reference to guide Federal agencies and interested parties in locating the general boundaries of critical habitat for listed Snake River salmon. The complete text delineating critical habitat for each species follows. Hydrologic units (table 3) are those defined by the Department of the Interior (DOI), U.S. Geological Survey (USGS) publication, ''Hydrologic Unit Maps, United States Geological Survey Water Supply Paper 2294, 1987'', and the following DOI, USGS, 1:500,000 scale hydrologic unit map: State of Oregon, 1974; State of Washington, 1974; State of Idaho, 1974, which are incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the USGS publication and maps may be obtained from the USGS, Map Sales, Box 25286, Denver, CO 80225. Copies may be inspected at NMFS, Endangered Species Branch, Environmental and Technical Services Division, 911 NE. 11th Avenue, room 620, Portland, OR 97232, NMFS, Office of Protected Resources, 1335 East-West Highway, Silver Spring, MD 20910, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(a) *Snake River Sockeye Salmon (Oncorhynchus nerka).* The Columbia River from a straight line connecting the west end of the Clatsop jetty (south jetty, Oregon side) and the west end of the Peacock jetty (north jetty, Washington side) and including all Columbia River estuarine areas and river reaches upstream to the confluence of the Columbia and Snake Rivers; all Snake River reaches from the confluence of the Columbia River upstream to the confluence of the Salmon River; all Salmon River reaches from the confluence of the Snake River upstream to Alturas Lake Creek; Stanley, Redfish, Yellow Belly, Pettit, and Alturas Lakes (including their inlet and outlet creeks); Alturas Lake Creek, and that portion of Valley Creek between Stanley Lake Creek and the Salmon River. Critical habitat is comprised of all river lakes and reaches presently or historically accessible (except reaches above impassable natural falls, and Dworshak and Hells Canyon Dams) to Snake River sockeye salmon in the following hydrologic units: Lower Salmon, Lower Snake, Lower Snake-Asotin,

Lower Snake-Tucannon, Middle Salmon-Chamberlain, Middle Salmon-Panther, and Upper Salmon. Critical habitat borders on or passes through the following counties in Oregon: Clatsop, Columbia, Gillium, Hood River, Morrow, Multnomah, Sherman, Umatilla, Wallowa, Wasco; the following counties in Washington: Asotin, Benton, Clark, Columbia, Cowlitz, Franklin, Garfield, Klickitat, Pacific, Skamania, Wahkiakum, Walla, Whitman; and the following counties in Idaho: Blaine, Custer, Idaho, Lemhi, Lewis, Nez Perce.

(b) *Snake River Spring/Summer Chinook Salmon (Oncorhynchus tshawytscha).* The Columbia River from a straight line connecting the west end of the Clatsop jetty (south jetty, Oregon side) and the west end of the Peacock jetty (north jetty, Washington side) and including all Columbia River estuarine areas and river reaches proceeding upstream to the confluence of the Columbia and Snake Rivers; all Snake River reaches from the confluence of the Columbia River upstream to Hells Canyon Dam. Critical habitat also includes river reaches presently or historically accessible (except reaches above impassable natural falls, and Dworshak and Hells Canyon Dams) to Snake River spring/summer chinook salmon in the following hydrologic units: Hells Canyon, Imnaha, Lemhi, Little Salmon, Lower Grande Ronde, Lower Middle Fork Salmon, Lower Salmon, Lower Snake-Asotin, Lower Snake-Tucannon, Middle Salmon-Chamberlain, Middle Salmon-Panther, Pahsimeroi, South Fork Salmon, Upper Middle Fork Salmon, Upper Grande Ronde, Upper Salmon, Wallowa. Critical habitat borders on or passes through the following counties in Oregon: Baker, Clatsop, Columbia, Gillium, Hood River, Morrow, Multnomah, Sherman, Umatilla, Union, Wallowa, Wasco; the following counties in Washington: Asotin, Benton, Clark, Columbia, Cowlitz, Franklin, Garfield, Klickitat, Pacific, Skamania, Wahkiakum, Walla, Whitman; and the following counties in Idaho: Adams, Blaine, Custer, Idaho, Lemhi, Lewis, Nez Perce, Valley.

(c) *Snake River Fall Chinook Salmon (Oncorhynchus tshawytscha).* The Columbia River from a straight line connecting the west end of the Clatsop jetty (south jetty, Oregon side) and the west end of the Peacock jetty (north jetty, Washington side) and including all Columbia River estuarine areas and river reaches proceeding upstream to the confluence of the Columbia and Snake Rivers; the Snake River, all river reaches from the confluence of the Columbia River, upstream to Hells Canyon Dam; the Palouse River from its confluence with the Snake River upstream to Palouse Falls; the Clearwater River from its confluence with the Snake River upstream to its confluence with Lolo Creek; the North Fork Clearwater River from its confluence with the Clearwater River upstream to Dworshak Dam. Critical habitat also includes river reaches presently or historically accessible (except reaches above impassable natural falls, and Dworshak and Hells Canyon Dams) to Snake River fall chinook salmon in the following hydrologic units; Clearwater, Hells Canyon, Imnaha, Lower Grande Ronde, Lower North Fork Clearwater, Lower Salmon, Lower Snake, Lower Snake-Asotin, Lower Snake-Tucannon, and Palouse. Critical habitat borders on or passes through the following counties in Oregon: Baker, Clatsop, Columbia, Gillium, Hood River, Morrow, Multnomah, Sherman, Umatilla, Wallowa, Wasco; the following counties in Washington: Adams, Asotin, Benton, Clark, Columbia, Cowlitz, Franklin, Garfield, Klickitat, Lincoln, Pacific, Skamania, Spokane, Wahkiakum, Walla, Whitman; and the following counties in Idaho: Adams, Benewah, Clearwater, Idaho, Latah, Lewis, Nez Perce, Shoshone, Valley.

[58 FR 68551, Dec. 28, 1993, as amended at 63 FR 1393, Jan. 9, 1998]

§226.23 Umpqua River cutthroat trout (Oncorhynchus clarki clarki).

(a) The following areas consisting of the water, waterway bottom, and adjacent riparian zone of specified lakes and river reaches in hydrologic units presently accessible to listed Umpqua River cutthroat trout. Adjacent riparian zones are defined as those areas within a slope distance of 300 ft. (91.4 m) from the normal line of high water of a stream channel (600 ft. or 182.8 m,

when both sides of the stream channel are included) or from the shoreline of a standing body of water. Figure 9 to this part identifies the general geographic extent of larger rivers, lakes, and streams within hydrologic units designated as critical habitat for Umpqua River cutthroat trout. Note that Figure 9 does not constitute the definition of critical habitat but, instead, is provided as a general reference to guide Federal agencies and interested parties in locating the general boundaries of critical habitat for listed Umpqua River cutthroat trout. The complete text delineating the critical habitat for the species follows. Hydrologic units are those defined by the Department of the Interior (DOI), U.S. Geological Survey (USGS) publication, ''Hydrologic Unit Maps, Water Supply Paper 2294, 1986, and the following DOI, USGS, 1:500,000 scale hydrologic unit map: State of Oregon (1974) which is incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the USGS publication and maps may be obtained from the USGS, Map Sales, Box 25286, Denver, CO 80225. Copies may be inspected during normal business hours at NMFS, Protected Resources Division, 525 NE Oregon St., Suite 500, Portland, OR 97232–2737, or NMFS, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

(b) *Geographic boundaries.* All river reaches accessible to listed Umpqua River cutthroat trout in the Umpqua River from a straight line connecting the west end of the South jetty and the west end of the North jetty and including all Umpqua River estuarine areas (including the Smith River) and tributaries proceeding upstream from the Pacific Ocean to the confluence of the North and South Umpqua Rivers; the North Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to Soda Springs dam; the South Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to its headwaters (including Cow Creek, tributary to the South Umpqua River). Critical habitat includes all river reaches below longstanding, naturally impassable barriers (i.e., waterfalls in existence for several hundred years) in the following hydrologic units: North Umpqua, South Umpqua, and Umpqua. Critical habitat borders on or passes through the following counties in Oregon: Douglas, Lane, Coos, Jackson, and Klamath counties. Perennial rivers and creeks within the defined areas are also included in the critical habitat designation (but are not specifically named), unless otherwise noted. Critical habitat maps are available upon request from NMFS, Protected Resources Division, 525 NE Oregon St., Suite 500, Portland, OR 97232–2737, telephone (503/230–5422).

[63 FR 1393, Jan. 9, 1998]

Subpart D—Critical Habitat for Marine Reptiles

§ 226.71 Sandy Point, St. Croix, U.S. Virgin Islands.

LEATHERBACK SEA TURTLE
(DERMOCHELYS CORIACEA)

The waters adjacent to Sandy Point, St. Croix, U.S. Virgin Islands, up to and inclusive of the waters from the hundred fathom curve shoreward to the level of mean high tide with boundaries at 17°42′12″ North and 64°50′00″ West.

§ 226.72 Green Sea Turtle (Chelonia mydas).

(a) Culebra Island, Puerto Rico—Waters surrounding the island of Culebra from the mean high water line seaward to 3 nautical miles (5.6 km). These waters include Culebra's outlying Keys including Cayo Norte, Cayo Ballena, Cayos Geniquí, Isla Culebrita, Arrecife Culebrita, Cayo de Luis Peña, Las Hermanas, El Mono, Cayo Lobo, Cayo Lobito, Cayo Botijuela, Alcarraza, Los Gemelos, and Piedra Steven.

(b) [Reserved]

[63 FR 46701, Sept. 2, 1998]

EFFECTIVE DATE NOTE: At 63 FR 46701, Sept. 2, 1998, § 226.72 was added, effective Oct. 2, 1998.

§226.73 Hawksbill Sea Turtle (Eretmochelys imbricata).

(a) Mona and Monito Islands, Puerto Rico—Waters surrounding the islands of Mona and Monito, from the mean high water line seaward to 3 nautical miles (5.6 km).

(b) [Reserved].

[63 FR 46701, Sept. 2, 1998]

EFFECTIVE DATE NOTE: At 63 FR 46701, Sept. 2, 1998, §226.73 was added, effective Oct. 2, 1998.

TABLE 1 TO PART 226

Major Steller sea lion rookery sites are identified in the following table. Where two sets of coordinates are given, the baseline extends in a clockwise direction from the first set of geographic coordinates along the shoreline at mean lower-low water to the second set of coordinates. Where only one set of coordinates is listed, that location is the base point.

State/region/site	Boundaries to—			
	Latitude	Longitude	Latitude	Longitude
Alaska:				
Western Aleutians:				
Agattu I.:				
Cape Sabak [1]	52 23.5N	173 43.5E	52 22.0N	173 41.0E
Gillon Point [1]	52 24.0N	173 21.5E.		
Attu I.[1]	52 54.5N	172 28.5E	52 57.5N	172 31.5E
Buldir I.[1]	52 20.5N	175 57.0E	52 23.5N	172 51.0E
Central Aleutians:				
Adak I.[1]	51 36.5N	176 59.0W	51 38.0N	176 59.5W
Agligadak I.[1]	52 06.5N	172 54.0W.		
Amchitka I.:[1]				
Column Rock [1]	51 32.5N	178 49.5E.		
East Cape [1]	51 22.5N	179 28.0E	51 21.5N	179 25.0E
Ayugadak I.[1]	51 45.5N	178 24.5E.		
Gramp Rock [1]	51 29.0N	178 20.5W.		
Kasatochi I.[1]	52 10.0N	175 31.5W	52 10.5N	175 29.0W
Kiska I.:				
Lief Cove [1]	51 57.5N	177 21.0E	51 56.5N	177 20.0E
Cape St. Stephen [1]	51 52.5N	177 13.0E	51 53.5N	177 12.0E
Seguam I./Saddleridge [1]	52 21.0N	172 35.0W	52 21.0N	172 33.0W
Semisopochnoi I.:				
Pochnoi Pt [1]	51 58.5N	179 45.5E	51 57.0N	179 46.0E
Petrel Pt [1]	52 01.5N	179 37.5E	52 01.5E	179 39.0E
Tag I.[1]	51 33.5N	178 34.5W.		
Ulak I.[1]	51 20.0N	178 57.0W	51 18.5N	178 59.5W
Yunaska I.[1]	52 42.0N	170 38.5W	52 41.0N	170 34.5W
Eastern Aleutian:				
Adugak I.[1]	52 55.0N	169 10.5W.		
Akun I./Billings Head [1]	54 18.0N	165 32.5W	54 18.0N	165 31.5W
Akutan I./Cape Morgan [1]	54 03.5N	166 00.0W	54 05.5N	166 05.0W
Bogoslof I.[1 2]	53 56.0N	168 02.0W.		
Ogchul I.[1]	53 00.0N	168 24.0W.		
Sea Lion Rocks. (Amak) [1]	55 28.0N	163 12.0W.		
Ugamak I.[1]	54 14.0N	164 48.0W	54 13.0N	164 48.0W
Bering Sea:				
Walrus I.[1]	57 11.0N	169 56.0W.		
Western Gulf of Alaska:				
Atkins I.[1]	55 03.5N	159 18.5W.		
Chernabura I.[1]	54 47.5N	159 31.0W	54 45.5N	159 33.5W
Clubbing Rocks (N) [1]	54 43.0N	162 26.5W.		
Clubbing Rocks (S) [1]	54 42.0N	162 26.5W.		
Pinnacle Rock [1]	54 46.0N	161 46.0W.		
Central Gulf of Alaska:				
Chirikof I.[1]	55 46.5N	155 39.5W	55 46.5N	155 43.0W
Chowiet I.[1]	56 00.5N	156 41.5W	56 00.5N	156 42.0W
Marmot I.[1]	58 14.5N	151 47.5W	58 10.0N	151 51.0W

State/region/site	Boundaries to—			
	Latitude	Longitude	Latitude	Longitude
Outer I.[1]	59 20.5N	150 23.0W	59 21.0N	150 24.5W
Sugarloaf I.[1]	58 53.0N	152 02.0W.		
Eastern Gulf of Alaska:				
Seal Rocks[1]	60 10.0N	146 50.0W.		
Fish I.[1]	59 53.0N	147 20.5W.		
Southeast Alaska:				
Forrester I.	54 51.0N	133 32.0W	54 52.5N	133 35.5W
Hazy I	55 52.0N	134 34.0W	55 51.5N	134 35.0W
White Sisters	57 38.0N	136 15.5W.		
Oregon:				
Rogue Reef: Pyramid Rock	42 26.4N	124 28.1W.		
Orford Reef:				
Long Brown Rock	42 47.3N	124 36.2W.		
Seal Rock	42 47.1N	124 35.4W.		
California:				
Ano Nuevo I.	37 06.3N	122 20.3W.		
Southeast Farallon I.	37 41.3N	123 00.1W.		
Sugarloaf I. & Cape Mendocino	40 26.0N	124 24.0W.		

[1] Includes an associated 20 NM aquatic zone.
[2] Associated 20 NM aquatic zone lies entirely within one of the three special foraging areas.

[58 FR 45278, Aug. 27, 1993]

TABLE 2 TO PART 226

Major Steller sea lion haulout sites in Alaska are identified in the following table. Where two sets of coordinates are given, the baseline extends in a clockwise direction from the first set of geographic coordinates along the shoreline at mean lower-low water to the second set of coordinates. Where only one set of coordinates is listed, that location is the basepoint.

State/region/site	Boundaries to—			
	Latitude	Longitude	Latitude	Longitude
Alaska:				
Western Aleutians:				
Alaid I.[1]	52 45.0N	173 56.5E	52 46.5N	173 51.5E
Attu/Chirikof Pt.[1]	52 30.0N	173 26.7E		
Shemya I.[1]	52 44.0N	174 09.0E		
Central Aleutians:				
Amatignak I.[1]	51 13.0N	179 08.0E		
Amlia I:				
East[1]	52 05.0N	172 58.5W	52 06.0N	172 57.0W
Sviech. Harbor[1]	52 02.0N	173 23.0W		
Amukta I. & Rocks[1]	52 31.5N	171 16.5W	52 26.5N	171 16.5W
Anagaksik I.[1]	51 51.0N	175 53.5W		
Atka I.[1]	52 23.5N	174 17.0W	52 24.5N	174 07.5W
Bobrof I.[1]	51 54.0N	177 27.0W		
Chagulak I.[1]	52 34.0N	171 10.5W		
Chuginadak I.[1]	52 46.5N	169 44.5W	52 46.5N	169 42.0W
Great Sitkin I.[1]	52 06.0N	176 10.5W	52 07.0N	176 08.5W
Kagamil I.[1]	53 02.5N	169 41.0W		
Kanaga I:				
North Cape[1]	51 56.5N	177 09.0W		
Ship Rock[1]	51 47.0N	177 22.5W		
Kavalga I.[1]	51 34.5N	178 51.5W	51 34.5N	178 49.5W
Kiska I./Sirius Pt.[1]	52 08.5N	177 36.5E		
Kiska I./Sobaka & Vega[1]	51 50.0N	177 20.0E	51 48.5N	177 20.5E
Little Sitkin I.[1]	51 59.5N	178 30.0E		
Little Tanaga I.[1]	51 50.5N	176 13.0W	51 49.0N	176 13.0W
Sagigik I.[1]	52 00.5N	173 08.0W		
Seguam I:				
South[1]	52 19.5N	172 18.0W	52 15.0N	172 37.0W
Finch Pt.[1]	52 23.5N	172 25.5W	52 23.5N	172 24.0W
Segula I.[1]	52 00.0N	178 06.5E	52 03.5N	178 09.0E
Tanaga I.[1]	51 55.0N	177 58.5W	51 55.0N	177 57.0W
Tanadak I. (Amlia)[1]	52 04.5N	172 57.0W		
Tanadak I. (Kiska)[1]	51 57.0N	177 47.0E		
Ugidak I.[1]	51 35.0N	178 30.5W		
Uliaga I.[1]	53 04.0N	169 47.0W	53 05.0N	169 46.0W
Unalga & Dinkum Rocks[1]	51 34.0N	179 04.0W	51 34.5N	179 03.0W
Eastern Aleutians:				
Akutan I./Reef-Lava[1]	54 10.5N	166 04.5W	54 07.5N	166 06.5W
Amak I.[1]	55 24.0N	163 07.0W	55 26.0N	163 10.0W
Cape Sedanka & Island[1]	53 50.5N	166 05.0W		
Emerald I.[1]	53 17.5N	167 51.5W		
Old Man Rocks[1]	53 52.0N	166 05.0W		
Polivnoi Rock[1]	53 16.0N	167 58.0W		
Tanginak I.[1]	54 13.0N	165 19.5W		
Tigalda I.[1]	54 08.5N	164 58.5W		

Umnak I./Cape Aslik[1]	53 25.0N	168 24.5W		
Bering Sea:				
Cape Newenham[1]	58 39.0N	162 10.5W		
Hall I.[1]	60 37.0N	173 00.0W		
Round I.[1]	58 36.0N	159 58.0W		
St. Paul I:				
Northeast Point[1]	57 15.0N	170 06.5W		
Sea Lion Rock[1]	57 06.0N	170 17.5W		
St. George I:				
S Rookery[1]	56 33.5N	169 40.0W		
Dalnoi Point[1]	56 36.0N	169 46.0W		
St. Lawrence I:				
S Punuk I.[1]	64 04.0N	168 51.0W		
SW Cape[1]	63 18.0N	171 26.0W		
Western Gulf of Alaska:				
Bird I.[1]	54 40.5N	163 18.0W		
Castle Rock[1]	55 17.0N	159 30.0W		
Caton I.[1]	54 23.5N	162 25.5W		
Jude I.[1]	55 16.0N	161 06.0W		
Lighthouse Rocks[1]	55 47.5N	157 24.0W		
Nagai I.[1]	54 52.5N	160 14.0W	54 56.0N	160 15.0W
Nagai Rocks[1]	55 50.0N	155 46.0W		
Sea Lion Rocks (Unga)[1]	55 04.5N	160 31.0W		
South Rock[1]	54 18.0N	162 43.5W		
Spitz I.[1]	55 47.0N	158 54.0W		
The Whaleback[1]	55 16.5N	160 06.0W		
Central Gulf of Alaska:				
Cape Barnabas[1]	57 10.0N	152 55.0W	57 07.5N	152 55.0W
Cape Chiniak[1]	57 35.0N	152 09.0W	57 37.5N	152 09.0W
Cape Gull[1 2]	58 13.5N	154 09.5W	58 12.5N	154 10.5W
Cape Ikolik[1 2]	57 17.0N	154 47.5W		
Cape Kuliak[1 2]	58 08.0N	154 12.5W		
Cape Sitkinak[1]	56 32.0N	153 52.0W		
Cape Ugat[1 2]	57 52.0N	153 51.0W		
Gore Point[1]	59 12.0N	150 58.0W		
Gull Point[1]	57 21.5N	152 36.5W	57 24.5N	152 39.0W
Latax Rocks[1]	58 42.0N	152 28.5W	58 40.5N	152 30.0W
Long I.[1]	57 45.5N	152 16.0W		
Nagahut Rocks[1]	59 06.0N	151 46.0W		
Puale Bay[1 2]	57 41.0N	155 23.0W		
Sea Lion Rocks (Marmot)[1]	58 21.0N	151 48.5W		
Sea Otter I.[1]	58 31.5N	152 13.0W		
Shakun Rock[1 2]	58 33.0N	153 41.5W		
Sud I.[1]	58 54.0N	152 12.5W		
Sutwik I.[1]	56 32.0N	157 14.0W	56 32.0N	157 20.0W
Takli I.[1 2]	58 03.0N	154 27.5W	58 03.0N	154 30.0W
Two-headed I.[1]	56 54.5N	153 33.0W	56 53.5N	153 35.5W
Ugak I.[1]	57 23.0N	152 15.5W	57 22.0N	152 19.0W
Ushagat I.[1]	58 55.0N	152 22.0W		
Eastern Gulf of Alaska:				
Cape Fairweather	58 47.5N	137 56.3W		

State/region/site	Boundaries to—			
	Latitude	Longitude	Latitude	Longitude
Cape St. Elias [1]	59 48.0N	144 36.0W		
Chiswell Islands [1]	59 36.0N	149 34.0W		
Graves Rock	58 14.5N	136 45.5W.		
Hook Point [1]	60 20.0N	146 15.5W		
Middleton I. [1]	59 26.5N	146 20.0W		
Perry I. [1]	60 39.5N	147 56.0W		
Point Eleanor [1]	60 35.0N	147 34.0W		
Point Elrington [1]	59 56.0N	148 13.5W		
Seal Rocks [1]	60 10.0N	146 50.0W		
The Needle [1]	60 07.0N	147 37.0W		
Southeast Alaska:				
Benjamin I.	58 33.5N	134 54.5W		
Biali Rock	56 43.0N	135 20.5W		
Biorka I.	56 50.0N	135 34.0W		
Cape Addington	55 26.5N	133 49.5W		
Cape Cross	57 55.0N	136 34.0W.		
Cape Ommaney	56 10.5N	134 42.5W.		
Coronation I.	55 56.0N	134 17.0W.		
Gran Point	59 08.0N	135 14.5W.		
Lull Point	57 18.5N	134 48.5W.		
Sunset I.	57 30.5N	133 35.0W		
Timbered I.	55 42.0N	133 48.0W		

[1] Includes an associated 20 NM aquatic zone.
[2] Associated 20 nm aquatic zone lies entirely within one of the three special foraging areas.

[58 FR 45279, Aug. 27, 1993, as amended at 59 FR 30716, June 15, 1994]

TABLE 3.—HYDROLOGIC UNITS[1] CONTAINING CRITICAL HABITAT FOR ENDANGERED SNAKE RIVER SOCKEYE SALMON AND THREATENED SNAKE RIVER SPRING/SUMMER AND FALL CHINOOK SALMON

Hydrologic unit name	Hydrologic unit number		
	Sockeye salmon	Spring/summer chinook salmon	Fall chinook salmon
Hells Canyon	.....	17060101	17060101
Imnaha	.....	17060102	17060102
Lower Snake—Asotin	17060103	17060103	17060103
Upper Grande Ronde	.....	17060104	.....
Wallowa	.....	17060105	.....
Lower Grande Ronde	.....	17060106	17060106
Lower Snake—Tucannon	17060107	17060107	17060107
Palouse	.....	.....	17060108
Lower Snake	17060110	17060110	17060110
Upper Salmon	17060201	17060201	.....
Pahsimeroi	.....	17060202	.....
Middle Salmon—Panther	17060203	17060203	.....
Lemhi	.....	17060204	.....
Upper Middle Fork Salmon	.....	17060205	.....
Lower Middle Fork Salmon	.....	17060206	.....
Middle Salmon—Chamberlain	17060207	17060207	.....
South Fork Salmon	.....	17060208	.....
Lower Salmon	17060209	17060209	17060209
Little Salmon	.....	17060210	.....
Clearwater	.....	.....	17060306
Lower North Fork Clearwater	.....	.....	17060308

[1] Hydrologic units and names taken from DOI, USGS 1:500,000 scale hydrologic unit maps (available from USGS); State of Oregon, 1974; State of Washington, 1974; State of Idaho, 1974.

[58 FR 68552, Dec. 28, 1993]

TABLE 4.—HYDROLOGIC UNITS[1] CONTAINING CRITICAL HABITAT FOR ENDANGERED UMPQUA RIVER CUTTHROAT TROUT AND COUNTIES CONTAINED IN EACH HYDROLOGIC UNIT.

Hydrologic unit name	Hydrologic unit No.	Counties contained in hydrologic unit
North Umpqua	17100301	Douglas, Lane, Klamath.
South Umpqua	17100302	Douglas, Jackson, Coos.

TABLE 4.—HYDROLOGIC UNITS[1] CONTAINING CRITICAL HABITAT FOR ENDANGERED UMPQUA RIVER CUTTHROAT TROUT AND COUNTIES CONTAINED IN EACH HYDROLOGIC UNIT.—Continued

Hydrologic unit name	Hydrologic unit No.	Counties contained in hydrologic unit
Umpqua	17100303	Douglas, Lane, Coos.

[1] 1 Hydrologic units and names taken from DOI, USGS 1:500,000 scale State of Oregon (1974) hydrologic unit map (available from USGS).

[63 FR 1394, Jan. 9, 1998]

FIGURES TO PART 226

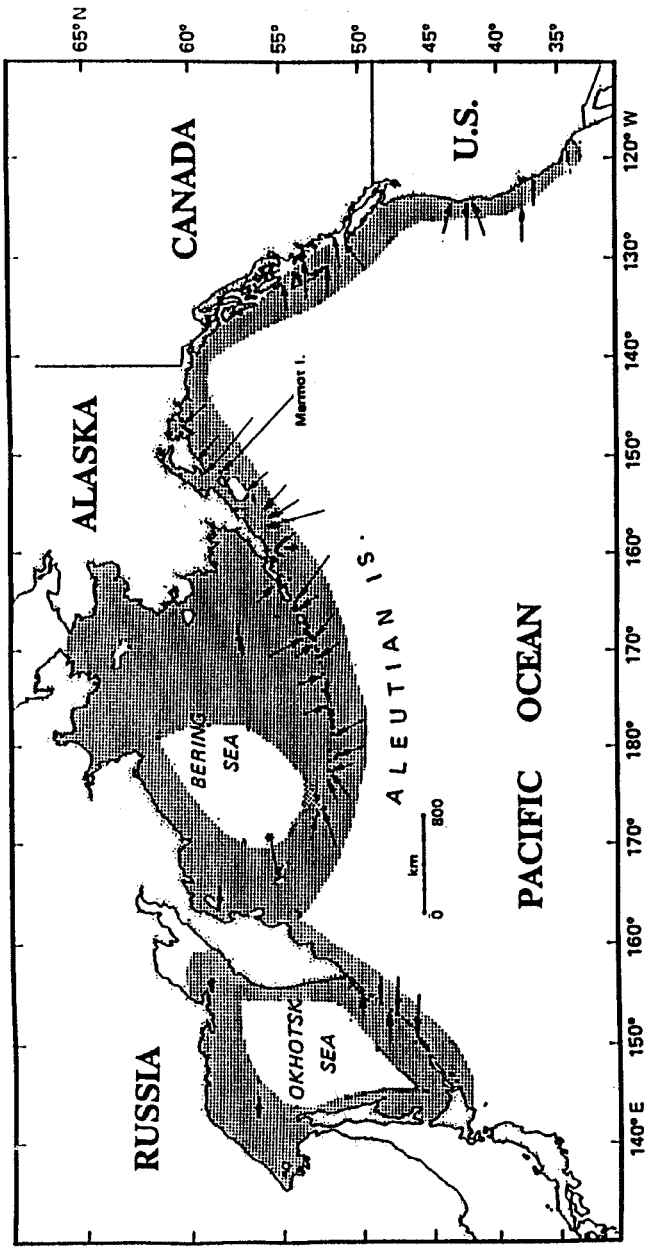


Figure 1: Map of the North Pacific Ocean showing the general range of Steller sea lions (stippled area) and the location of major rookeries (arrows).

[58 FR 45282, Aug. 27, 1993]

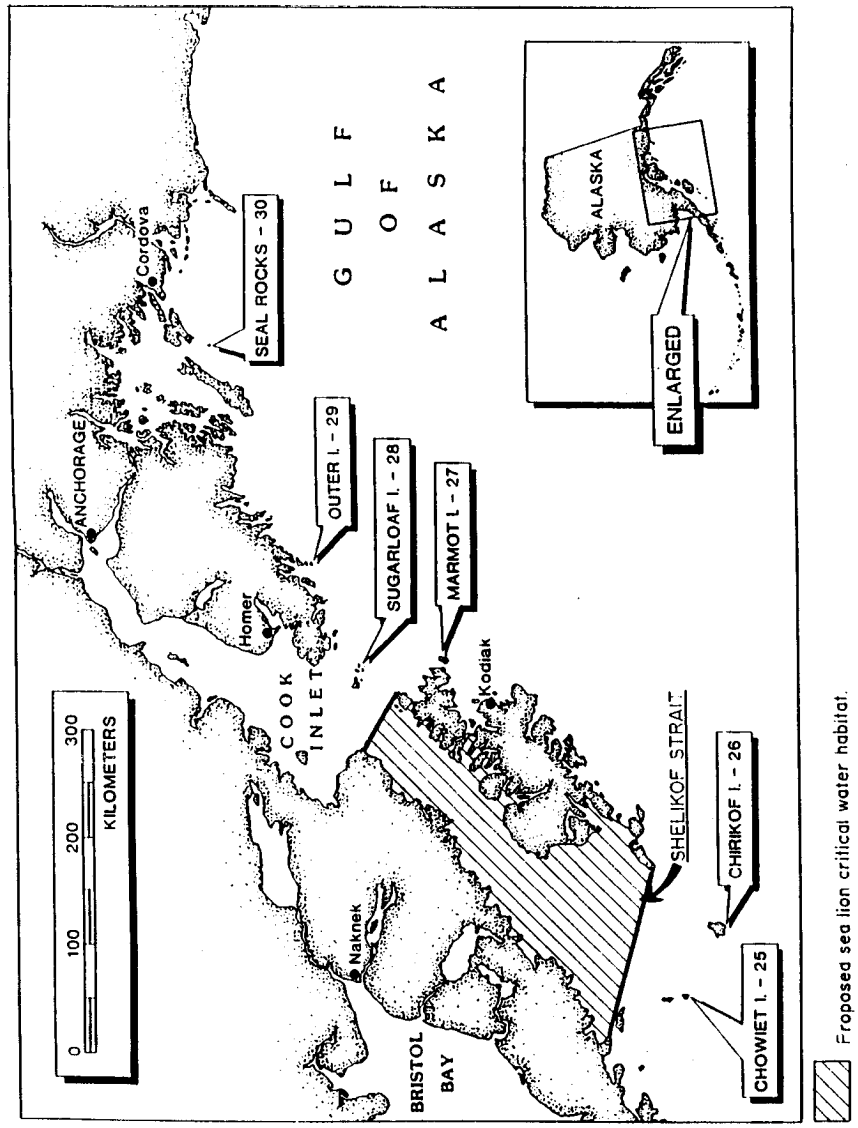


Figure 2: Steller sea lion critical habitat in Shelikof Strait. Locations indicated are major Steller sea lion rookeries.

[58 FR 45283, Aug. 27, 1993]

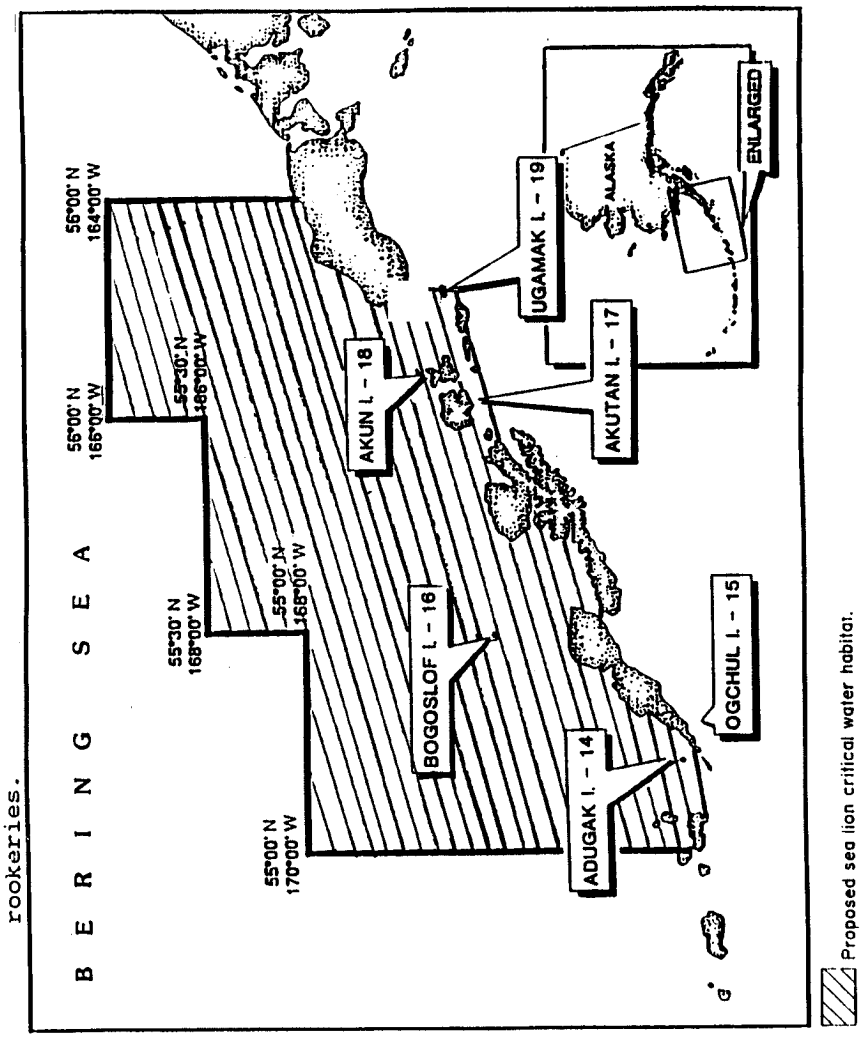


Figure 3: Steller sea lion critical habitat in the vicinity of Bogoslof Island. Locations indicated are major Steller sea lion rookeries.

[58 FR 45284, Aug. 27, 1993]

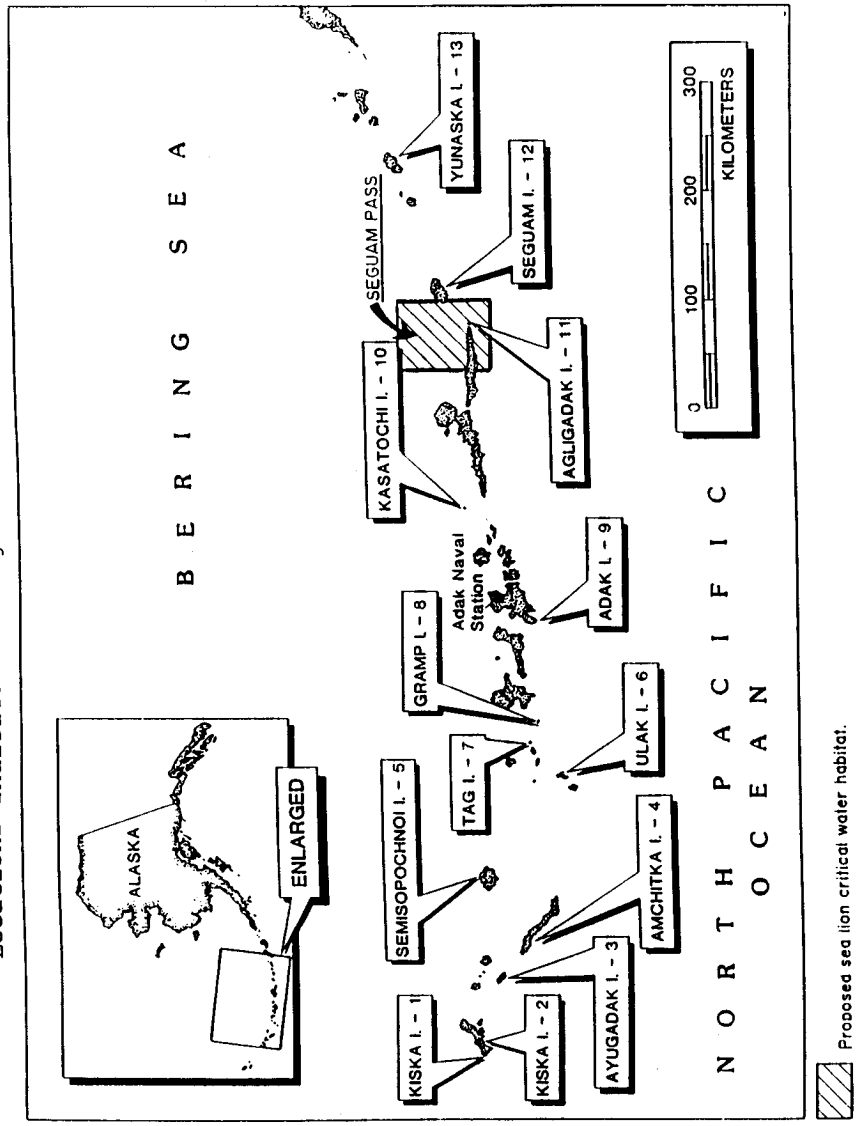
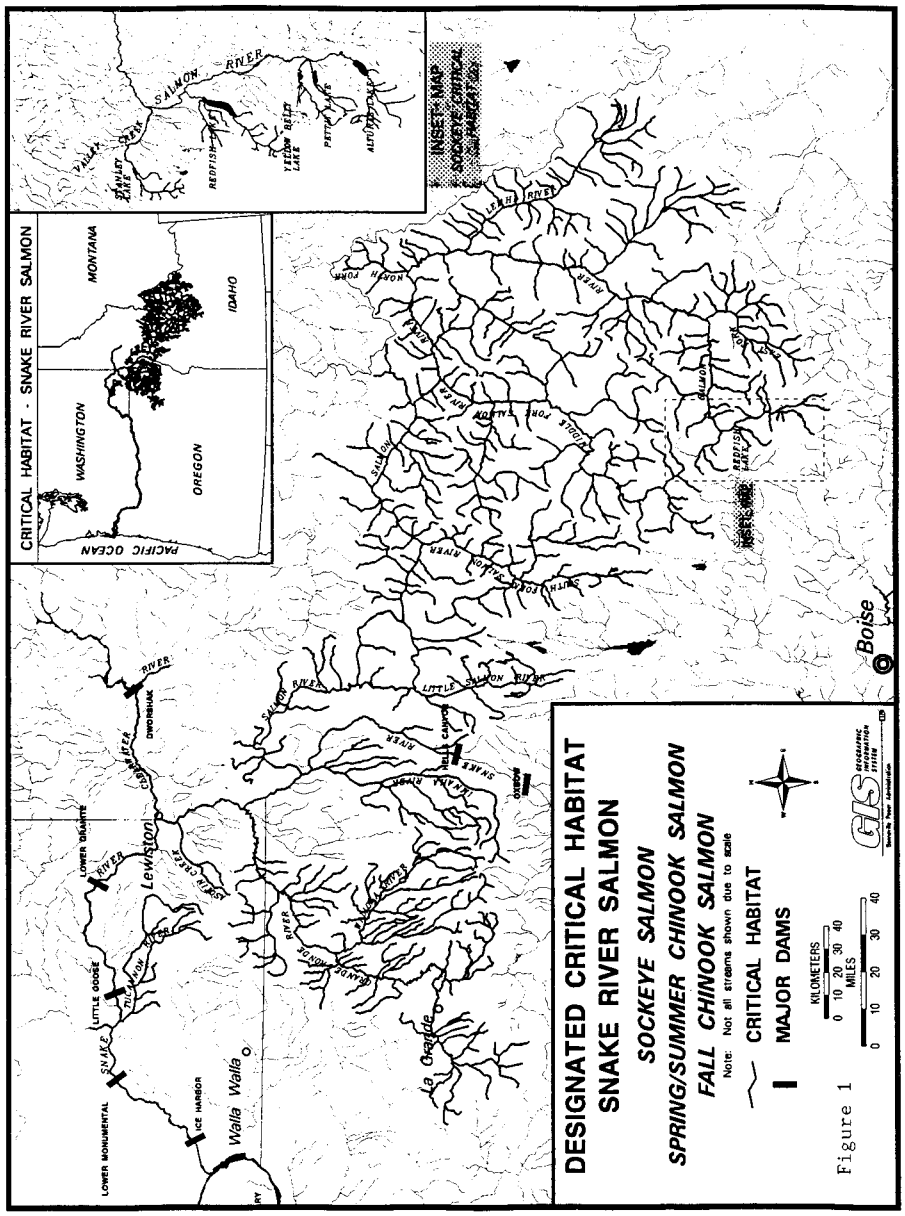


Figure 4: Steller sea lion critical habitat in vicinity of Seguam Pass. Locations indicated are major Steller sea lion rookeries.

[58 FR 45285, Aug. 27, 1993]

FIGURE 5: DESIGNATED CRITICAL HABITAT, SNAKE RIVER SALMON



[58 FR 68552, Dec. 28, 1993]

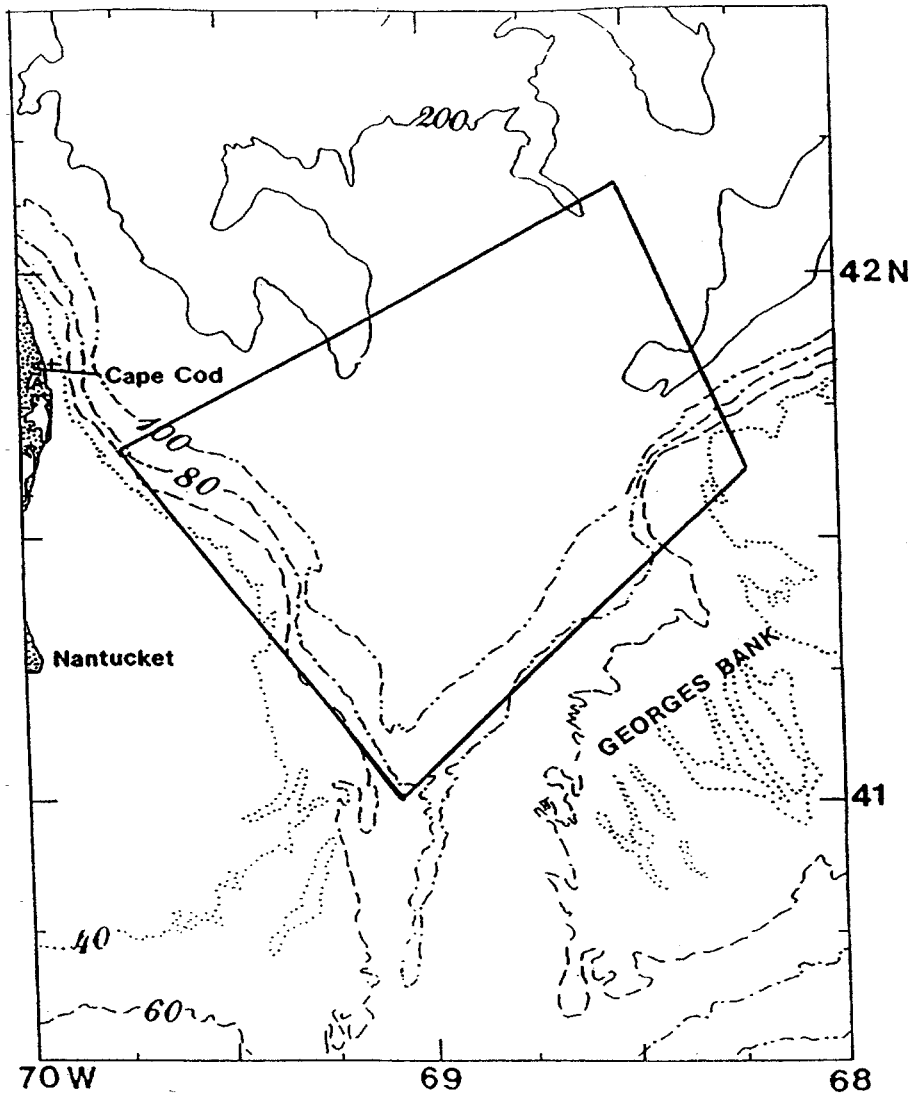


Figure 6. The area designated as critical habitat in the Great South Channel includes the area bounded by 41°40'N/69°45'W; 41°00'N/69°05'W; 41°38'N/68°13'W; and 42°10'N/68°31'W.

[59 FR 28805, June 3, 1994]

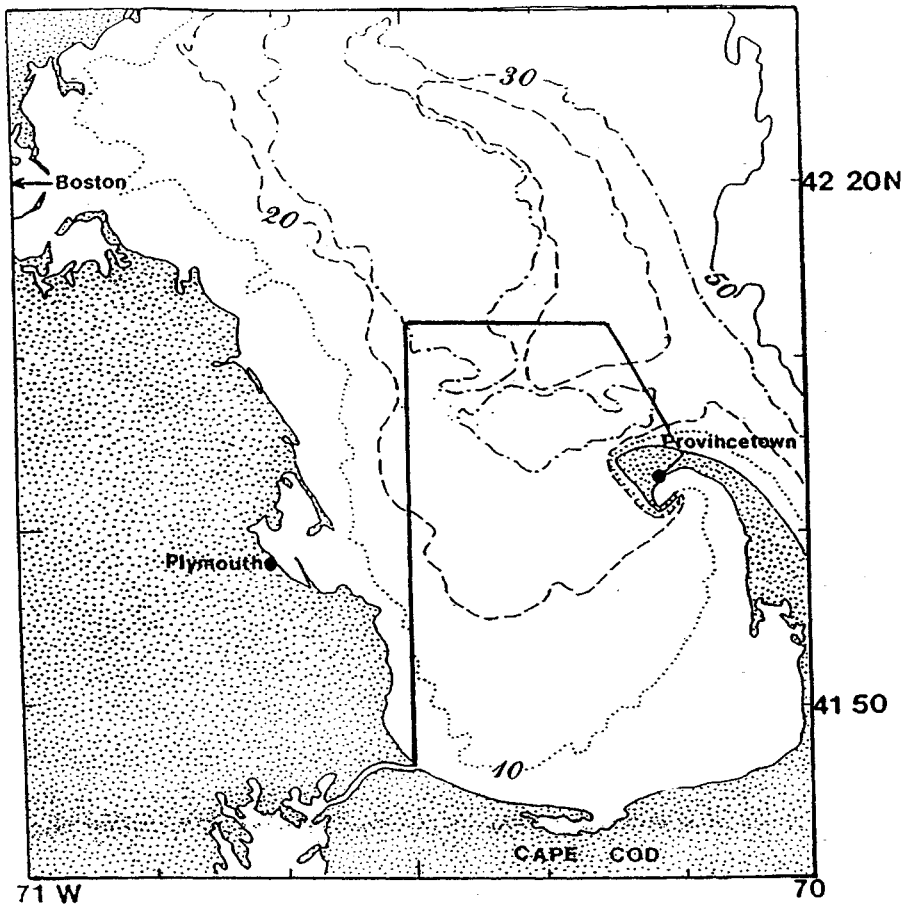


Figure 7. The area designated as critical habitat in Cape Cod Bay/Massachusetts Bay includes the area bounded by 42°04.8'N/70°10'W; 42°12'N/70°15'W; 42°12'N/70°30'W; 41°46.8'N/70°30'W; and on the south and east by the interior shore line of Cape Cod, MA.

[59 FR 28805, June 3, 1994]

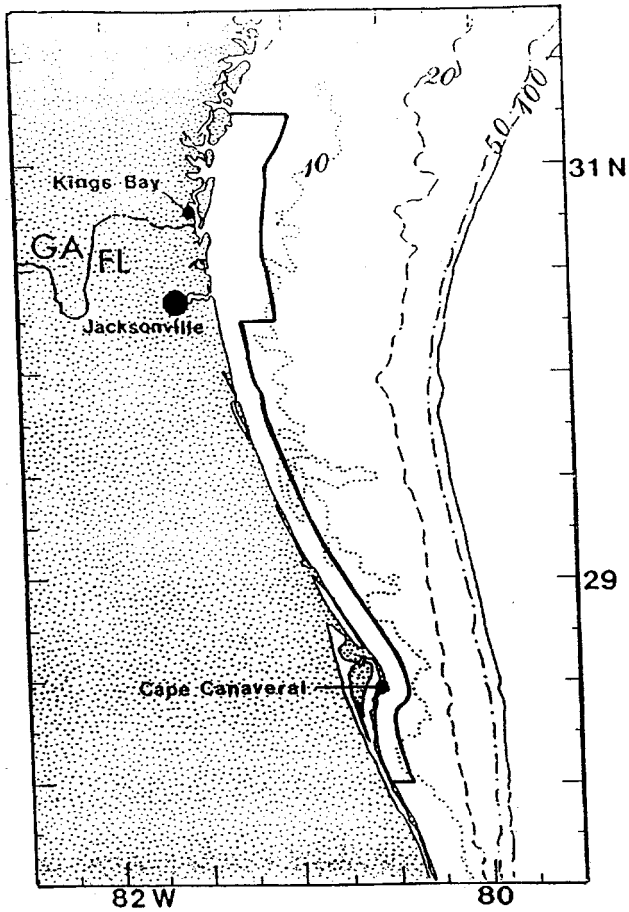


Figure 8. The area designated as critical habitat in the Southeastern United States includes waters between 31°15'N (approximately located at the mouth of the Altamaha River, GA) and 30°15'N (approximately Jacksonville, FL) from the shoreline out to 15 nautical miles offshore, and the waters between 30°15'N and 28°00'N (approximately Sebastian Inlet, FL) from the shoreline out to 5 nautical miles.

[59 FR 28805, June 3, 1994]

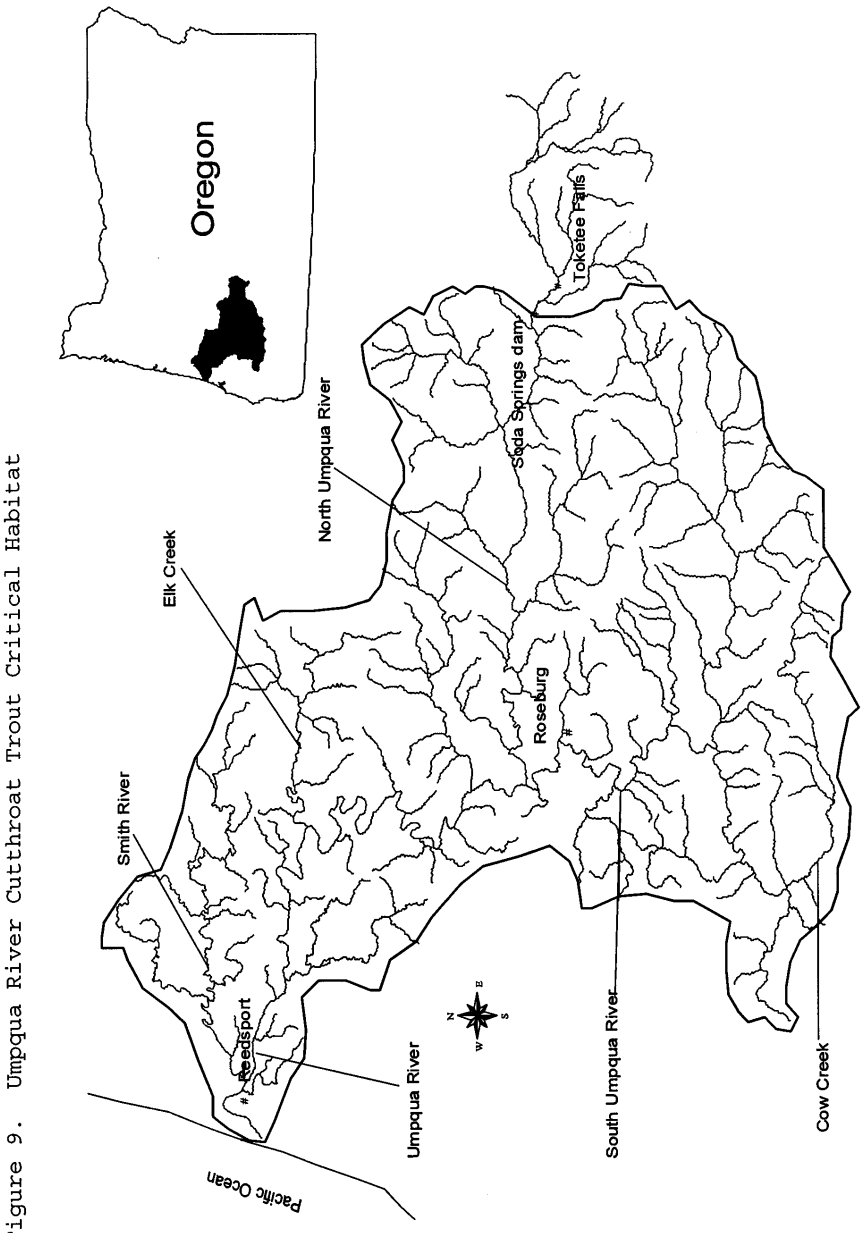


Figure 9. Umpqua River Cutthroat Trout Critical Habitat

[63 FR 1394, Jan. 9, 1998]

PART 227—THREATENED SPECIES

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AUTHORITY: 16 U.S.C. 1531–1543; subpart B, §227.12 also issued under 16 U.S.C. 1361 *et seq.*

SOURCE: 43 FR 32809, July 28, 1978, unless otherwise noted.

EDITORIAL NOTE: For a document relating to adoption of alternative scientific testing protocol for evaluating TEDs see 55 FR 41092, Oct. 9, 1990.

Subpart A—General Provisions

§227.1 Purpose.

The regulations contained in this part identify the species, subspecies, or any other group of fish and wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature, under the jurisdiction of the Secretary of Commerce which have been determined to be threatened species under the Endangered Species Act of 1973 and provide for the conservation of such species by establishing rules and procedures to govern activities involving the species.

§227.2 Scope.

(a) The regulations contained in this part apply only to the threatened species enumerated in §227.4.

(b) The provision of this part are in addition to, and not in lieu of other regulations of parts 217 through 222 and part 225 of this chapter II which prescribe additional restrictions or conditions governing threatened species.

(c) Certain of the threatened fish or wildlife listed in 50 CFR 17.11 and enumerated in 50 CFR 227.4 are included in Appendix I or II to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The importation, exportation, and reexportation of such species are subject to additional regulations provided in part 23, chapter I (title 50).

§227.3 Definitions.

In addition to the definitions contained in the Act, and in parts 217 and 225 of this chapter, and unless the context otherwise requires, in this part 227:

(a) *Act* means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 through 1547;

(b) *Assistant Administrator* means the Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, Department of Commerce, or his authorized delegate. The Assistant Administrator for Fisheries is in charge of the National Marine Fisheries Service;

(c) *Ongoing project(s)* means an activity for scientific purposes or to enhance the propagation or survival of such species which are not conducted in the course of a commercial activity initiated before the listing of the effected species;

(d) *Plastron* means the ventral part of the shell of a sea turtle consisting typically of nine symmetrically placed bones overlaid by horny plates; and

(e) *Sea turtle(s)* means those sea turtle species enumerated in § 227.4 and any part(s), product(s), egg(s) or offspring thereof, or the dead body or part(s) thereof.

§ 227.4 Enumeration of threatened species.

The species listed as threatened under the Act which are under the jurisdiction of the Secretary of Commerce are:

(a) Green sea turtle (*Chelonia mydas*) except for those populations listed under 50 CFR 222.23(a).[1]

(b) Loggerhead sea turtle (*Caretta caretta*).[1]

(c) Pacific ridley sea turtle (*Lepidochelys olivacea*) except for those populations listed under 50 CFR 222.23(a).[1]

The effective date of the listing of the species in paragraphs (a), (b), and (c) of this section is September 6, 1978.

(d) Guadalupe fur seal (*Arctocephalus townsendi*).

(e) Steller (northern) sea lion (*Eumetopias jubatus*), eastern population, which consists of all Steller sea lions from breeding colonies located east of 144 °W. longitude.

(f) Snake River spring/summer chinook salmon (*Oncorhynchus tshawytscha*). Includes all natural population(s) of spring/summer chinook salmon in the mainstream Snake River and any of the following subbasins: Tucannon River, Grande Ronde River, Imnaha River, and Salmon River.

(g) Snake River fall chinook salmon (*Oncorhynchus tshawytscha*). Includes all natural population(s) of fall chinook in the mainstem Snake River and any of the following subbasins: Tucannon River, Grande Ronde River, Imnaha River, Salmon River, and Clearwater River.

(h) Central California Coast Coho Salmon. Includes all coho salmon naturally reproduced in streams between Punta Gorda in Humboldt County, CA, and the San Lorenzo River in Santa Cruz County, CA.

(i) Southern Oregon/Northern California Coast coho salmon (*Oncorhynchus kisutch*). Includes all coho salmon naturally reproduced in streams between Cape Blanco in Curry County, OR, and Punta Gorda in Humboldt County, CA.

(j) Central California Coast steelhead (*Oncorhynchus mykiss*). Includes all naturally spawned populations of steelhead (and their progeny) in streams from the Russian River to Aptos Creek, Santa Cruz County, California (inclusive), and the drainages of San Francisco and San Pablo Bays eastward to the Napa River (inclusive), Napa County, California. Excludes the Sacramento-San Joaquin River Basin of the Central Valley of California;

(k) South-Central California Coast steelhead (*Oncorhynchus mykiss*). Includes all naturally spawned populations of steelhead (and their progeny) in streams from the Pajaro River (inclusive), located in Santa Cruz County, California, to (but not including) the Santa Maria River;

(l) Snake River Basin steelhead (*Oncorhynchus mykiss*). Includes all naturally spawned populations of steelhead (and their progeny) in streams in the Snake River Basin of southeast Washington, northeast Oregon, and Idaho.

(m) *Lower Columbia River steelhead (Oncorhynchus mykiss).* Includes all naturally spawned populations of steelhead (and their progeny) in streams and tributaries to the Columbia River between the Cowlitz and Wind Rivers, Washington, inclusive, and the Willamette and Hood Rivers, Oregon, inclusive. Excluded are steelhead in the upper Willamette River Basin above Willamette Falls and steelhead from the Little and Big White Salmon Rivers in Washington;

[1] Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, jurisdiction for sea turtles is limited to turtles while in the water.

(n) *Central Valley, California steelhead (Oncorhynchus mykiss).* Includes all naturally spawned populations of steelhead (and their progeny) in the Sacramento and San Joaquin Rivers and their tributaries. Excluded are steelhead from San Francisco and San Pablo Bays and their tributaries.

(o) Oregon Coast coho salmon (*Oncorhynchus kisutch*). Includes all naturally spawned populations of coho salmon in streams south of the Columbia River and north of Cape Blanco in Curry County, OR.

(p) Johnson's seagrass (*Halophila johnsonii*)

[43 FR 32809, July 18, 1978, as amended at 45 FR 29055, May 1, 1980; 50 FR 51258, Dec. 16, 1985; 55 FR 46523, Nov. 5, 1990; 55 FR 49210, Nov. 26, 1990; 57 FR 14662, Apr. 22, 1992; 59 FR 450, Jan. 4, 1994; 59 FR 42532, Aug. 18, 1994; 60 FR 19342, Apr. 17, 1995; 61 FR 56149, Oct. 31, 1996; 62 FR 1297, Jan. 9, 1997; 62 FR 24355, May 5, 1997; 62 FR 24609, May 6, 1997; 62 FR 43953, Aug. 18, 1997; 63 FR 13371, Mar. 19, 1998; 63 FR 42591, Aug. 10, 1998; 63 FR 49041, Sept. 14, 1998]

EFFECTIVE DATE NOTE: 1. At 63 FR 42591, Aug. 10, 1998, in §227.4, paragraph (o) was added, effective Oct. 9, 1998.

2. At 63 FR 49041, Sept. 14, 1998, in §227.4, paragraph (p) was added, effective Oct. 14, 1998.

Subpart B—Threatened Marine Mammals

§227.11 Guadalupe fur seal.

(a) *Prohibitions.* The prohibitions of section 9 of the Act (16 U.S.C. 1538) relating to endangered species apply to the Guadalupe fur seal except as provided in paragraph (b) of this section.

(b) *Exceptions.* (1) The Assistant Administrator may issue permits authorizing activities which would otherwise be prohibited under paragraph (a) of this section in accordance with the subject to the provisions of part 222 subpart C—Endangered Fish or Wildlife Permits.

(2) Any Federal, State or local government official, employee, or designated agent may, in the course of official duties, take a stranded Guadalupe fur seal without a permit if such taking:

(i) Is accomplished in a humane manner;

(ii) Is for the protection or welfare of the animal, is for the protection of the public health or welfare, or is for the salvage or disposal of a dead specimen;

(iii) Includes steps designed to ensure the return of the animal to its natural habitat, if feasible; and

(iv) Is reported within 30 days to the Director, Southwest Region, National Marine Fisheries Service, 300 S. Ferry Street, Terminal Island, CA 90731.

(3) Any animal or specimen taken under paragraph (b)(2) of this section may only be retained, disposed of, or salvaged in accordance with directions from the Director, Southwest Region.

[50 FR 51258, Dec. 16, 1985]

§227.12 Steller sea lion.

(a) *General prohibitions.* The prohibitions of section 9 of the Act (16 U.S.C. 1538) and the following regulatory provisions shall apply to the eastern population of Steller sea lions:

(1) *No discharge of firearms.* Except as provided in paragraph (b) of this section, no person subject to the jurisdiction of the United States may discharge a firearm at or within 100 yards (91.4 meters) of a Steller sea lion. A firearm is any weapon, such as a pistol or rifle, capable of firing a missile using an explosive charge as a propellant.

(2) *No approach in buffer areas.* Except as provided in paragraph (b) of this section:

(i) No owner or operator of a vessel may allow the vessel to approach within 3 nautical miles (5.5 kilometers) of a Steller sea lion rookery site listed in paragraph (a)(3) of this section;

(ii) No person may approach on land not privately owned within one-half statutory miles (0.8 kilometers) or within sight of a Steller sea lion rookery site listed in paragraph (a)(3) of this section, whichever is greater, except on Marmot Island; and

(iii) No person may approach on land not privately owned within one and one-half statutory miles (2.4 kilometers) or within sight of the eastern shore of Marmot Island, including the Steller sea lion rookery site listed in paragraph (a)(3) of this section, whichever is greater.

(3) *Listed sea lion rookery sites.* Listed Steller sea lion rookery sites consist of the rookeries in the Aleutian Islands

and the Gulf of Alaska listed in Table 1.

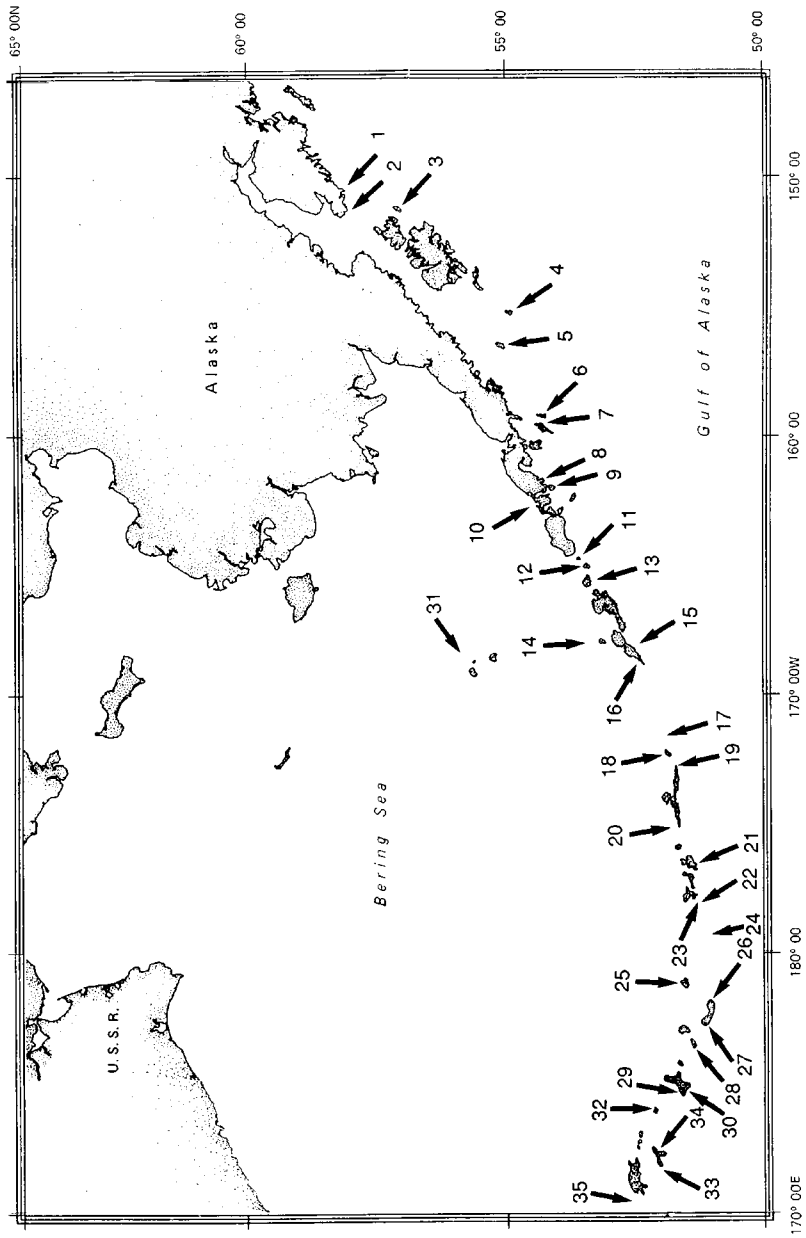
TABLE 1. LISTED STELLER SEA LION ROOKERY SITES [1]

Island	From		To		NOAA chart	Notes
	Lat.	Long.	Lat.	Long.		
1. Outer I.	59°20.5 N	150°23.0 W	59°21.0 N	150°24.5 W	16681	S quadrant.
2. Sugarloaf I.	58°53.0 N	152°02.0 W			16580	Whole island.
3. Marmot I.	58°14.5 N	151°47.5 W	58°10.0 N	151°51.0 W	16580	SE quadrant.
4. Chirikof I.	55°46.5 N	155°39.5 W	55°46.5 N	155°43.0 W	16580	S quadrant.
5. Chowiet I.	56°00.5 N	156°41.5 W	56°00.5 N	156°42.0 W	16013	S quadrant.
6. Atkins I.	55°03.5 N	159°18.5 W			16540	Whole island.
7. Chernabura I.	54°47.5 N	159°31.0 W	54°45.5 N	159°33.5 W	16540	SE corner.
8. Pinnacle Rock	54°46.0 N	161°46.0 W			16540	Whole island.
9. Clubbing Rks (N)	54°43.0 N	162°26.5 W			16540	Whole island.
Clubbing Rks (S)	54°42.0 N	162°26.5 W			16540	Whole Island.
10. Sea Lion Rks	55°28.0 N	163°12.0 W			16520	Whole island.
11. Ugamak I.	54°14.0 N	164°48.0 W	54°13.0 N	164°48.0 W	16520	E end of island.
12. Akun I.	54°18.0N	165°32.5W	54°18.0N	165°31.5W	16547	Billings Head Bight.
13. Akutan I.	54°03.5 N	166°00.0 W	54°05.5 N	166°05.0 W	16520	SW corner, Cape Morgan.
14. Bogoslof I.	53°56.0 N	168°02.0 W			16500	Whole island.
15. Ogchul I.	53°00.0 N	168°24.0 W			16500	Whole island.
16. Adugak I.	52°55.0 N	169°10.5 W			16500	Whole island.
17. Yunaska I.	52°42.0 N	170°38.5 W	52°41.0 N	170°34.5 W	16500	NE end.
18. Seguam I.	52°21.0 N	172°35.0 W	52°21.0 N	172°33.0 W	16480	N coast, Saddleridge Pt.
19. Agligadak I.	52°06.5 N	172°54.0 W			16480	Whole island.
20. Kasatochi I.	52°10.0N	175°31.5W	52°10.5N	175°29.0W	16480	N half of island.
21. Adak I.	51°36.5N	176°59.0W	51°38.0N	176°59.5W	16460	SW Point, Lake Point.
22. Gramp rock	51°29.0 N	178°20.5 W			16460	Whole island.
23. Tag I.	51°33.5 N	178°34.5 W			16460	Whole island.
24. Ulak I.	51°20.0 N	178°57.0 W	51°18.5 N	178°59.5 W	16460	SE corner, Hasgox Pt.
25. Semisopochnoi	51°58.5 N	179°45.5 E	51°57.0 N	179°46.0 E	16440	E quadrant, Pochnoi Pt.
Semisopochnoi	52°01.5 N	179°37.5 E	52°01.5 N	179°39.0 E	16440	N quadrant, Petrel Pt.
26. Amchitka I.	51°22.5N	179°28.0E	51°21.5N	179°25.0E	16440	East Cape.
27. Amchitka I.	51°32.5N	178°49.5E			16440	Column Rocks.
28. Ayugadak Pt.	51°45.5 N	178°24.5 E			16440	SE coast of Rat Island.
29. Kiska I.	51°57.5 N	177°21.0 E	51°56.5 N	177°20.0 E	16440	W central, Lief Cove.
30. Kiska I.	51°52.5 N	177°13.0 E	51°53.5 N	177°12.0 E	16440	Cape St. Stephen.
31. Walrus I.	57°11.0 N	169°56.0 W			16380	Whole island.
32. Buldir I.	52°20.5 N	175°57.0 E	52°23.5 N	175°51.0 E	16420	Se point to NW point.
33. Agattu I.	52°24.0 N	173°21.5 E			16420	Gillion Point.

TABLE 1. LISTED STELLER SEA LION ROOKERY SITES [1]—Continued

Island	From		To		NOAA chart	Notes
	Lat.	Long.	Lat.	Long.		
34. Agattu I.	52°23.5 N	173°43.5 E	52°22.0 N	173°41.0 E	16420	Cape Sabak.
35. Attu I.	52°54.5N	172°28.5E	52°57.5N	172°31.5E	16681	S Quadrant.

[1] Each site extends in a clockwise direction from the first set of geographic coordinates along the shoreline at mean lower low water to the second set of coordinates; or, if only one set of geographic coordinates is listed, the site extends around the entire shoreline of the island at mean lower low water.


65° 00N
60° 00
55° 00
50° 00
150° 00
160° 00
170° 00W
180° 00
170° 00E
Alaska
Gulf of Alaska
Bering Sea
U.S.S.R.
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
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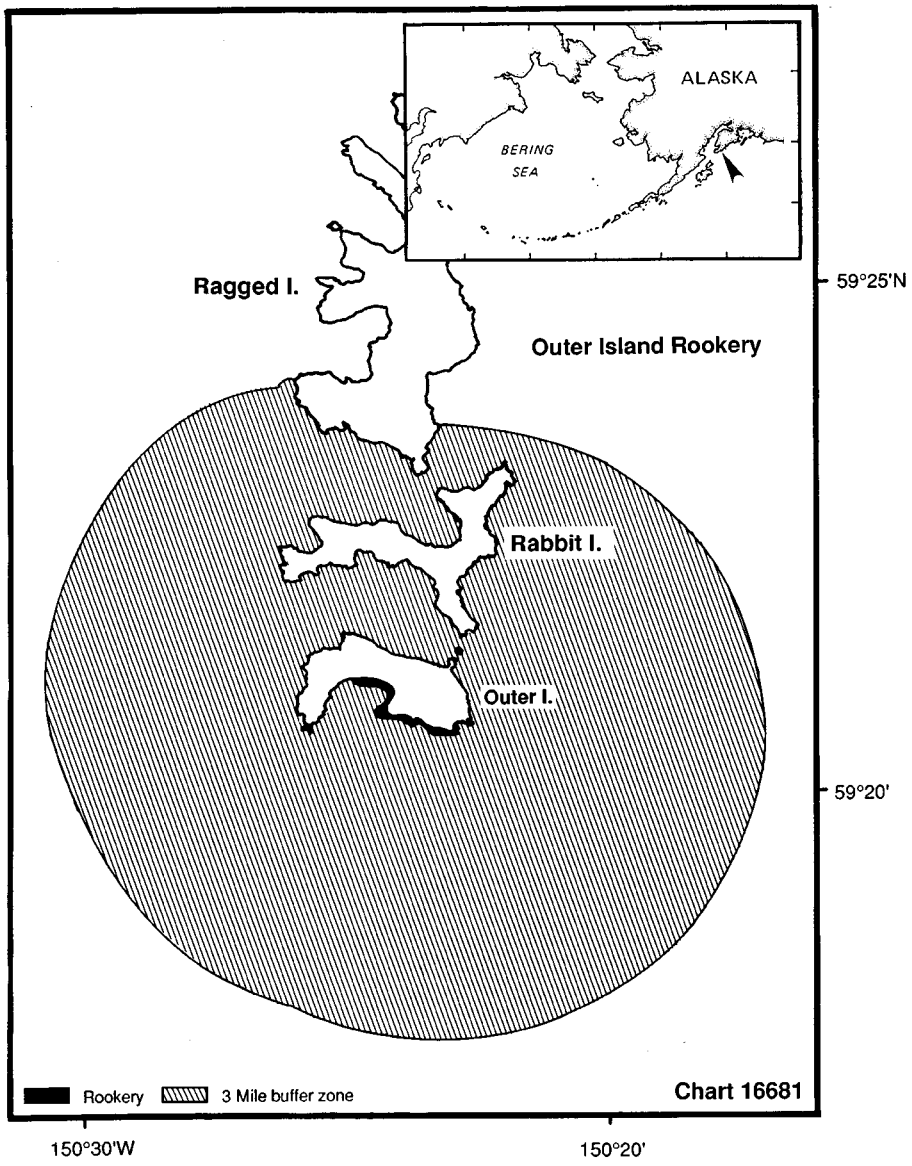
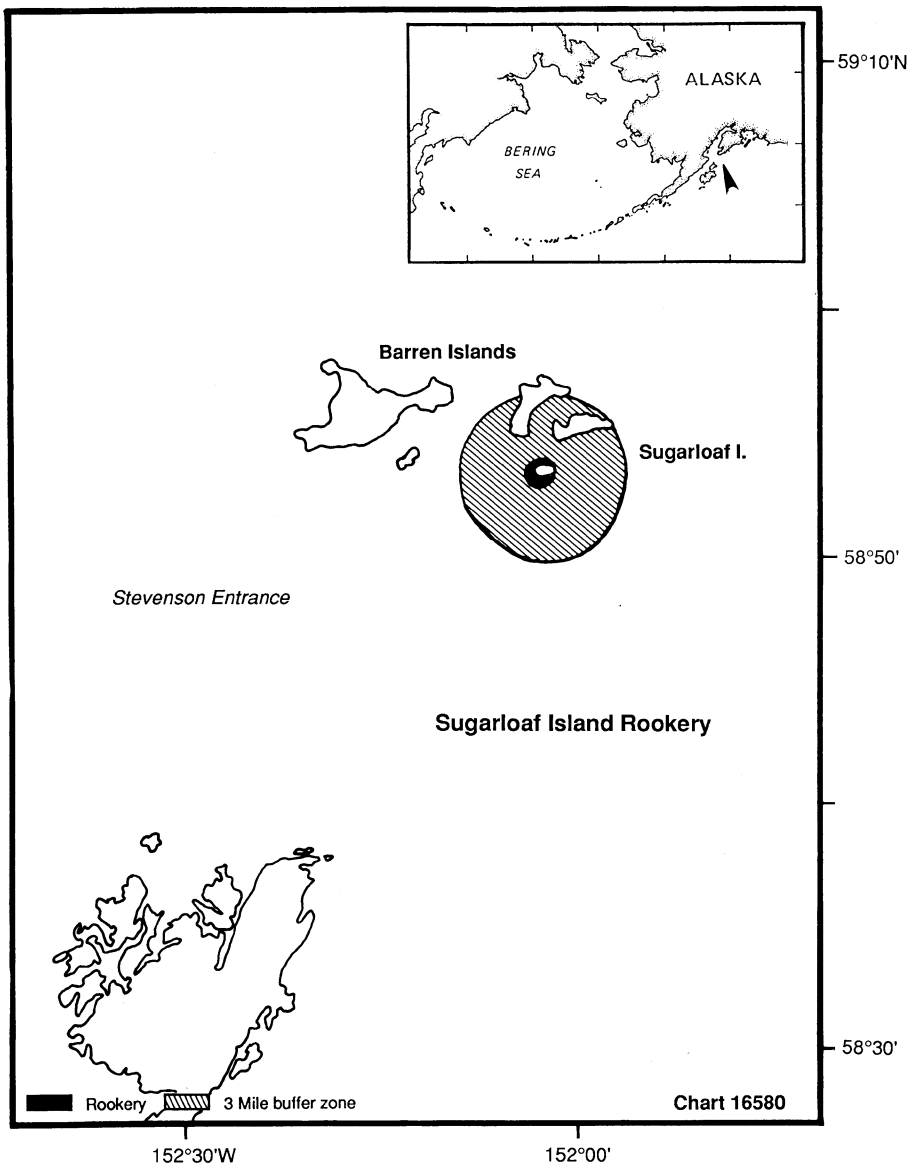
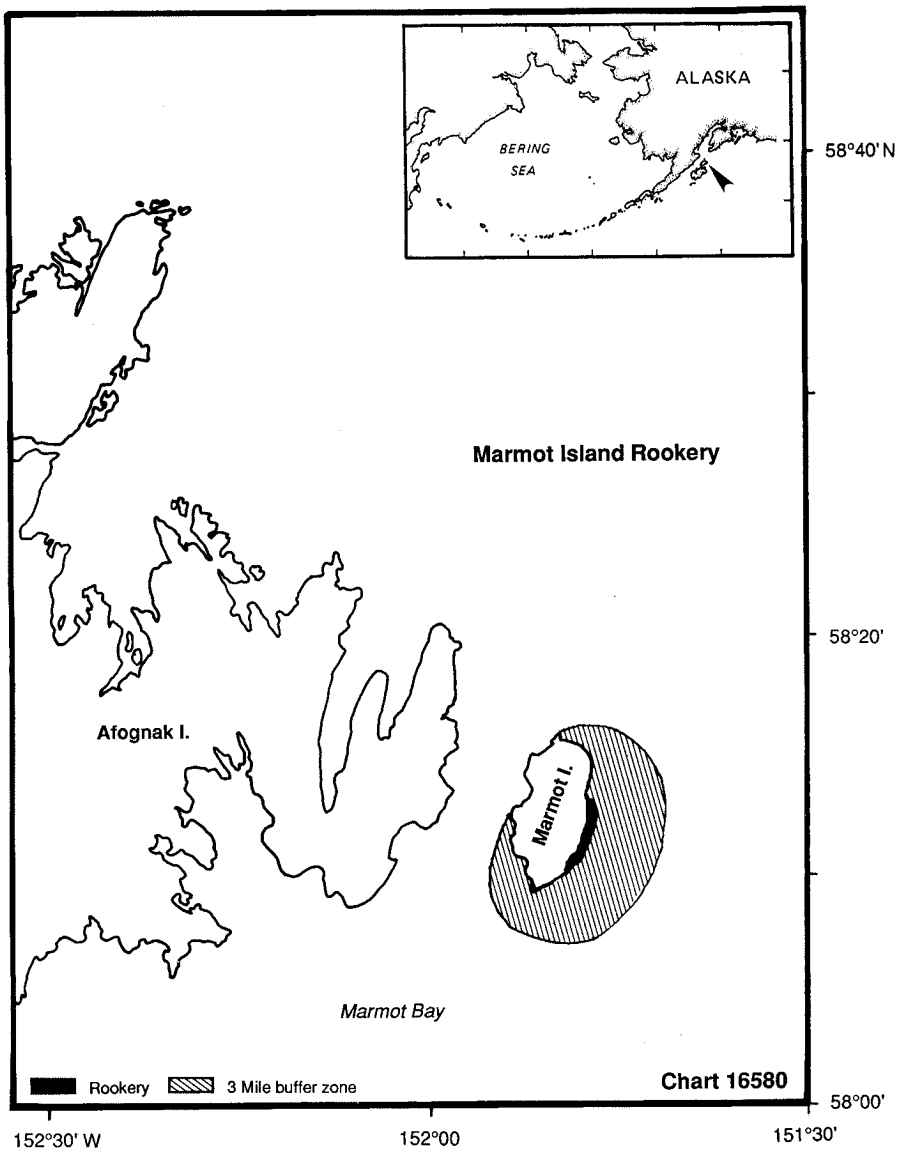
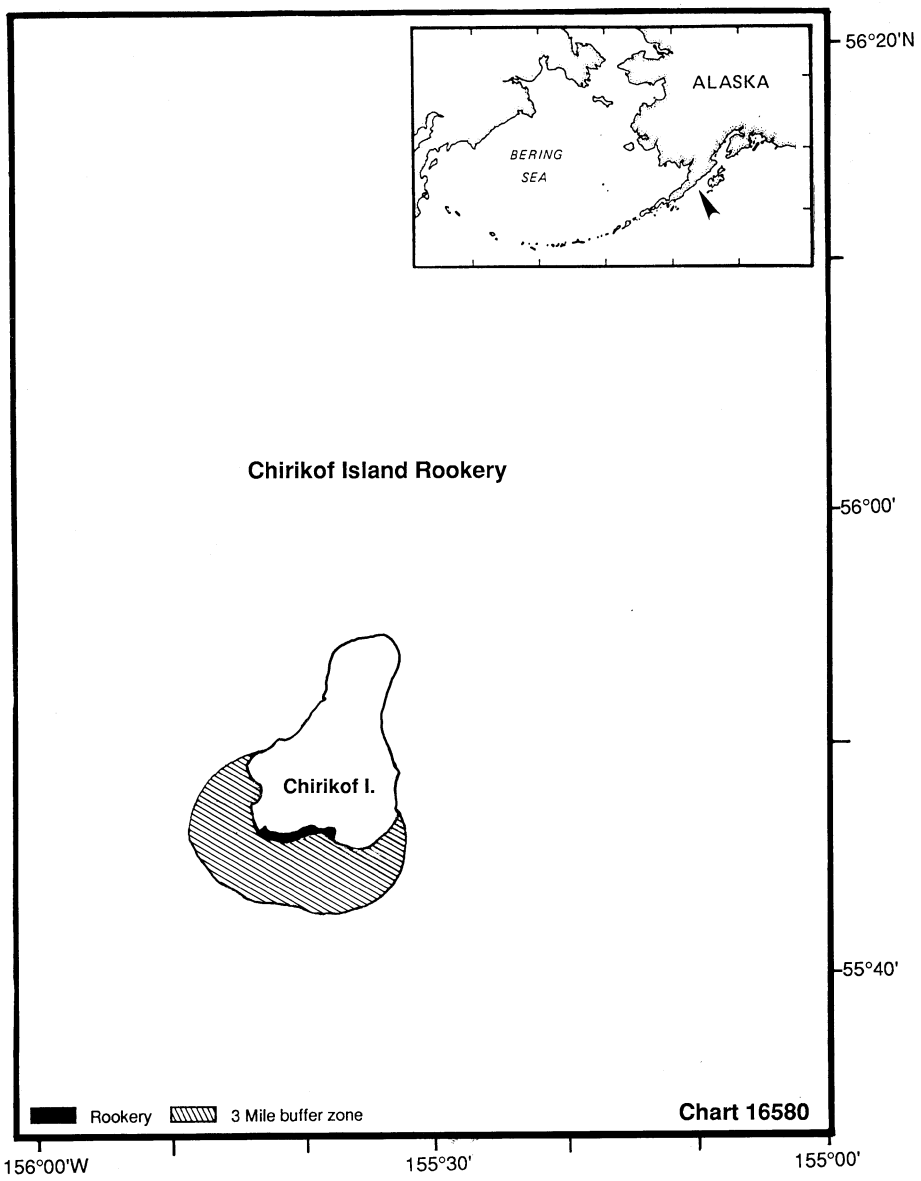
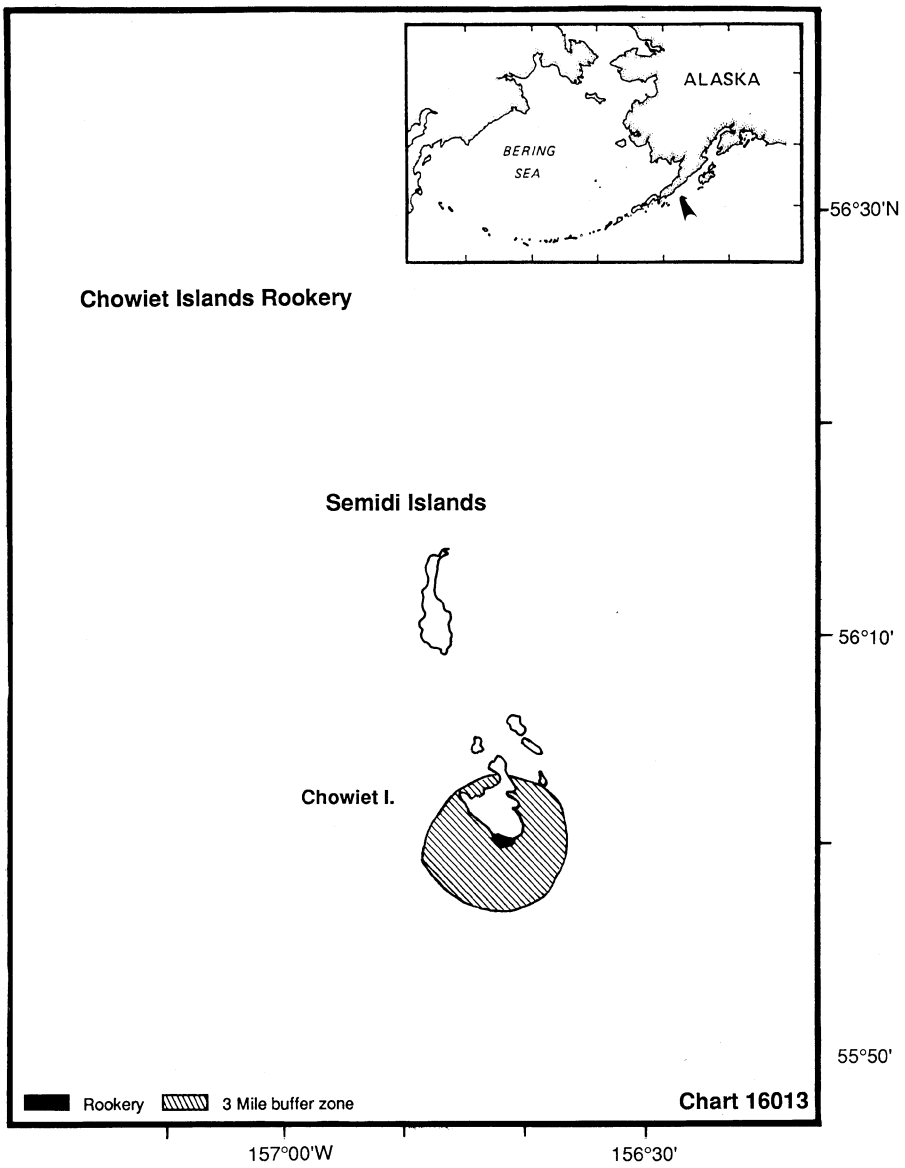
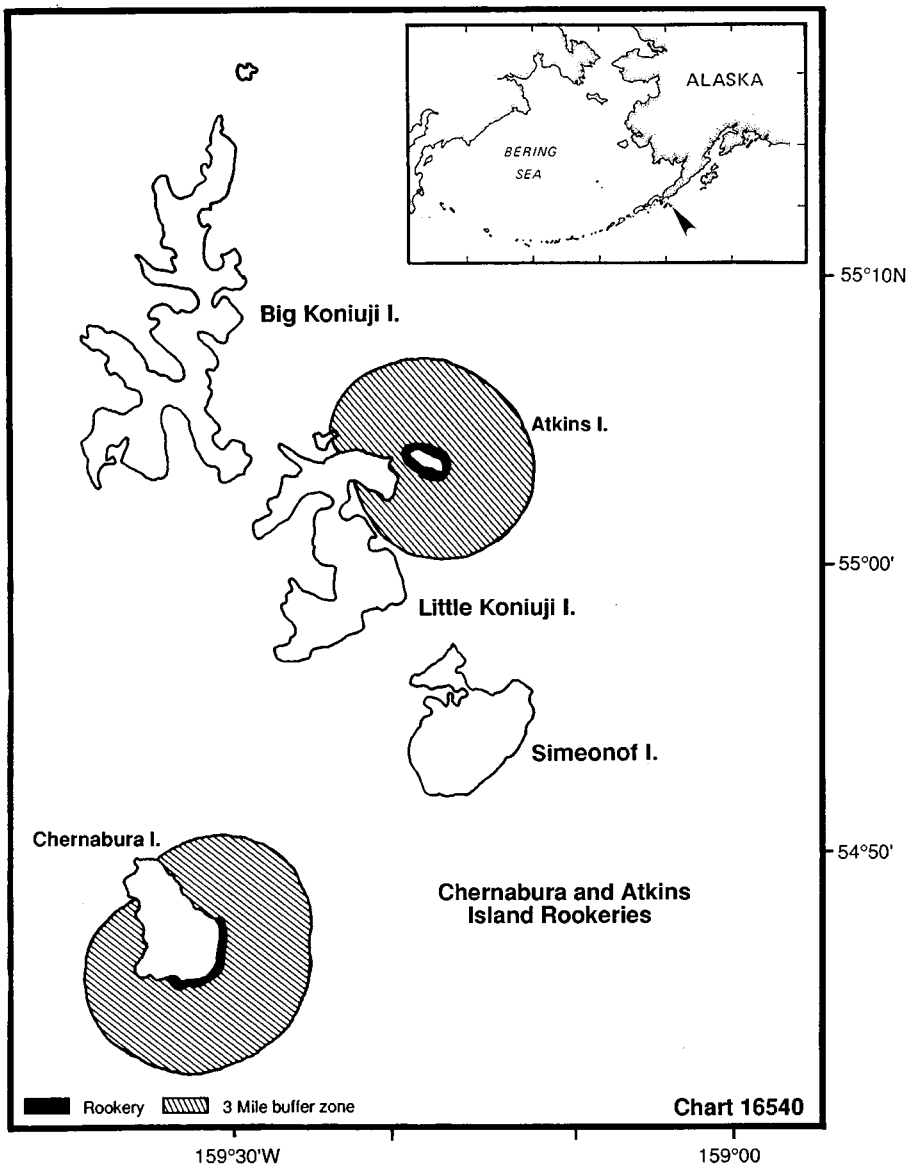

ALASKA
BERING SEA
Ragged I.
Outer Island Rookery
Rabbit I.
Outer I.
59°25'N
59°20'
Rookery
3 Mile buffer zone
Chart 16681
150°30'W
150°20'

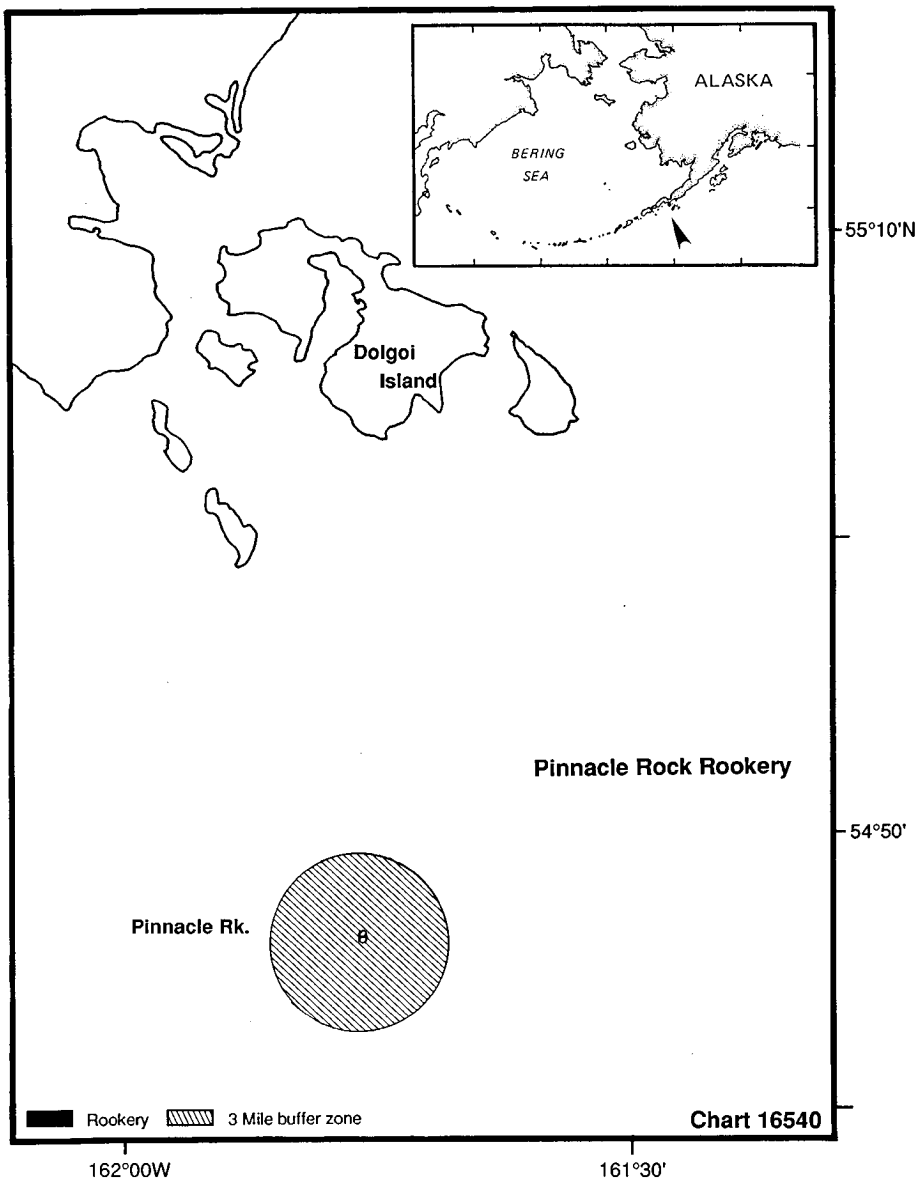

ALASKA
BERING SEA
59°10'N
Barren Islands
Sugarloaf I.
58°50'
Stevenson Entrance
Sugarloaf Island Rookery
58°30'
Rookery
3 Mile buffer zone
Chart 16580
152°30'W
152°00'

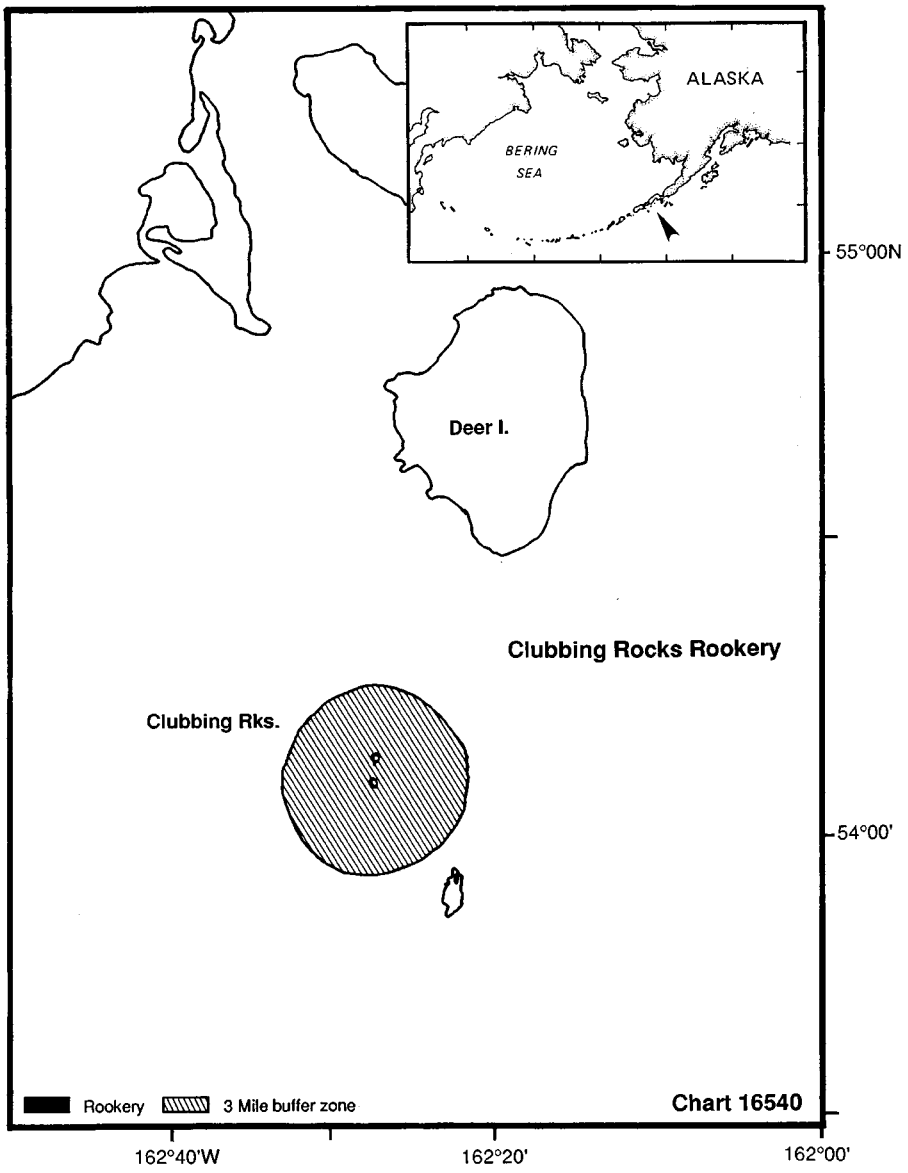

ALASKA
BERING SEA
58°40' N
Marmot Island Rookery
58°20'
Afognak I.
Marmot I.
Marmot Bay
Rookery
3 Mile buffer zone
Chart 16580
58°00'
152°30' W
152°00
151°30'

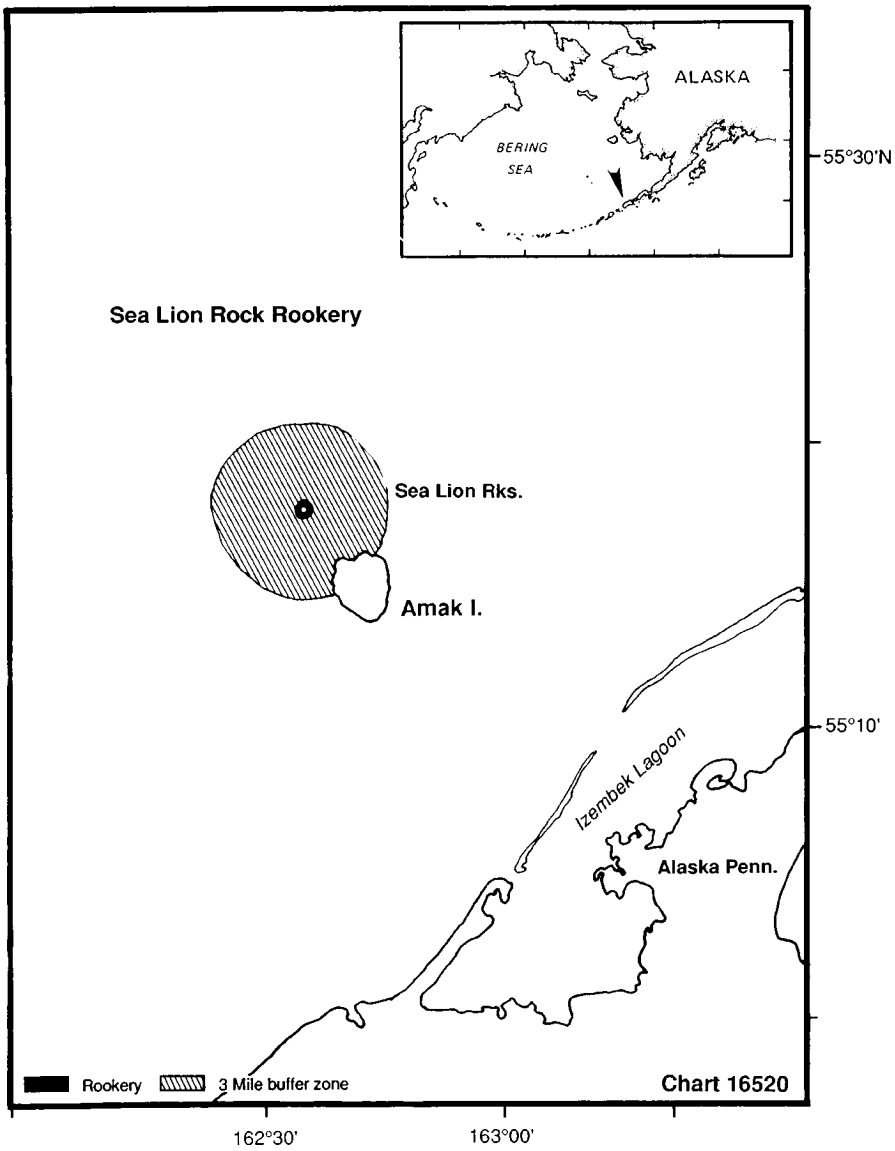

ALASKA
BERING SEA
Chirikof Island Rookery
Chirikof I.
56°20'N
56°00'
55°40'
Rookery
3 Mile buffer zone
Chart 16580
156°00'W
155°30'
155°00'

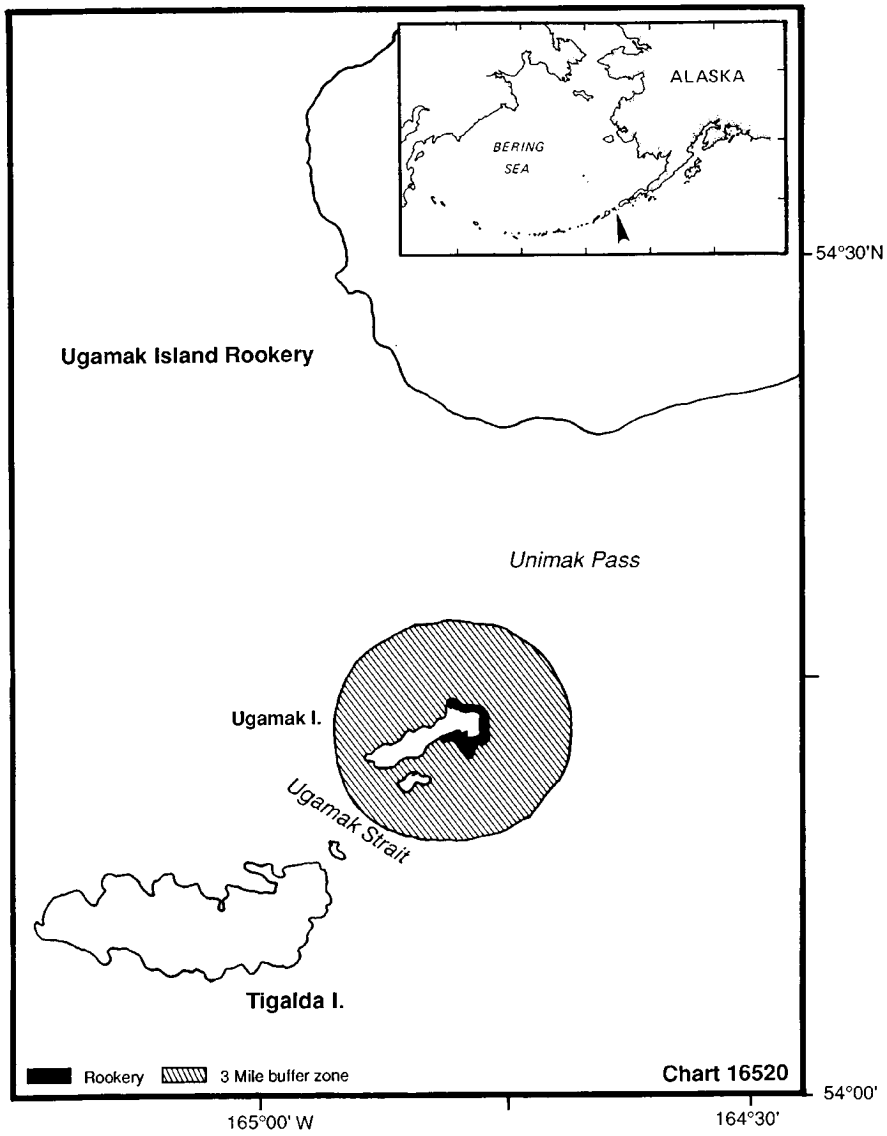

ALASKA
BERING SEA
56°30'N
Chowiet Islands Rookery
Semidi Islands
56°10'
Chowiet I.
55°50'
Rookery
3 Mile buffer zone
Chart 16013
157°00'W
156°30'

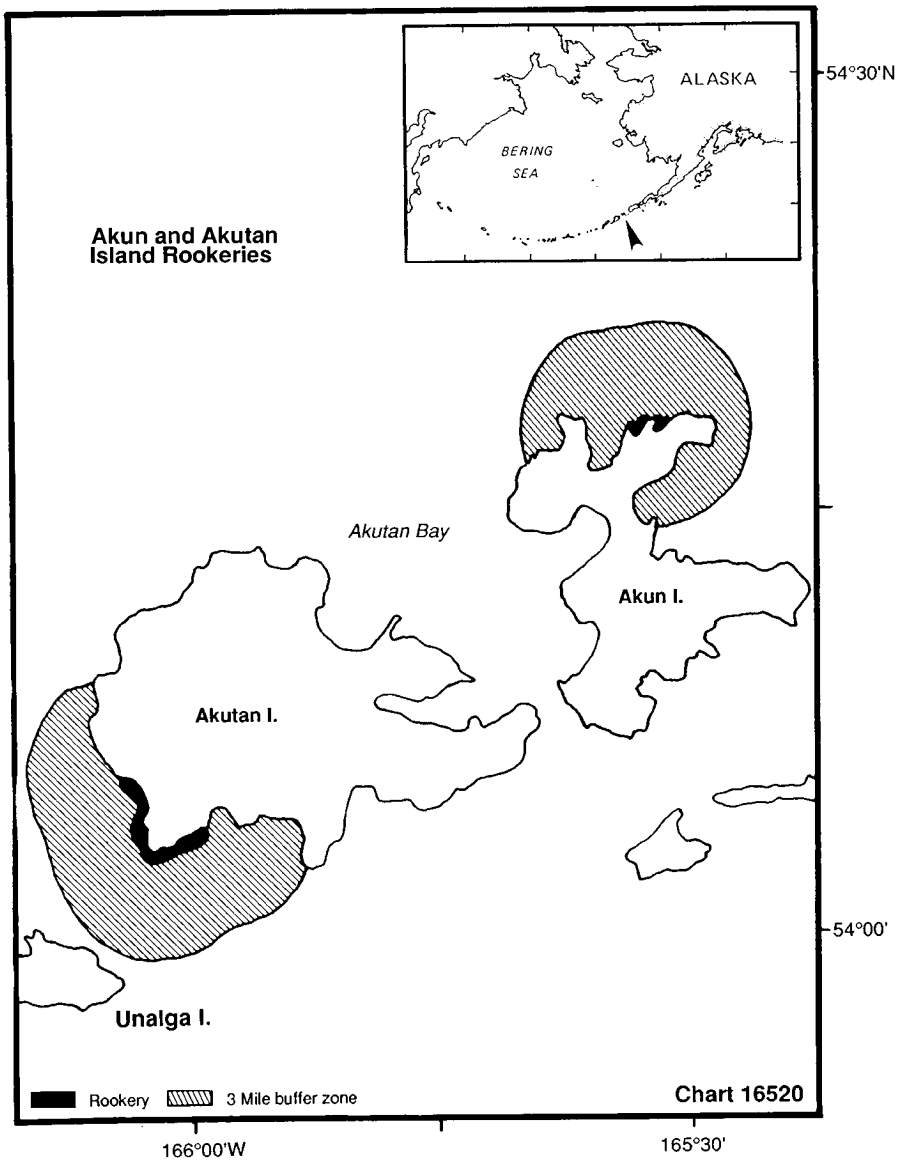

ALASKA
BERING SEA
55°10N
Big Koniuji I.
Atkins I.
55°00'
Little Koniuji I.
Simeonof I.
Chernabura I.
54°50'
Chernabura and Atkins Island Rookeries
Rookery
3 Mile buffer zone
Chart 16540
159°30'W
159°00

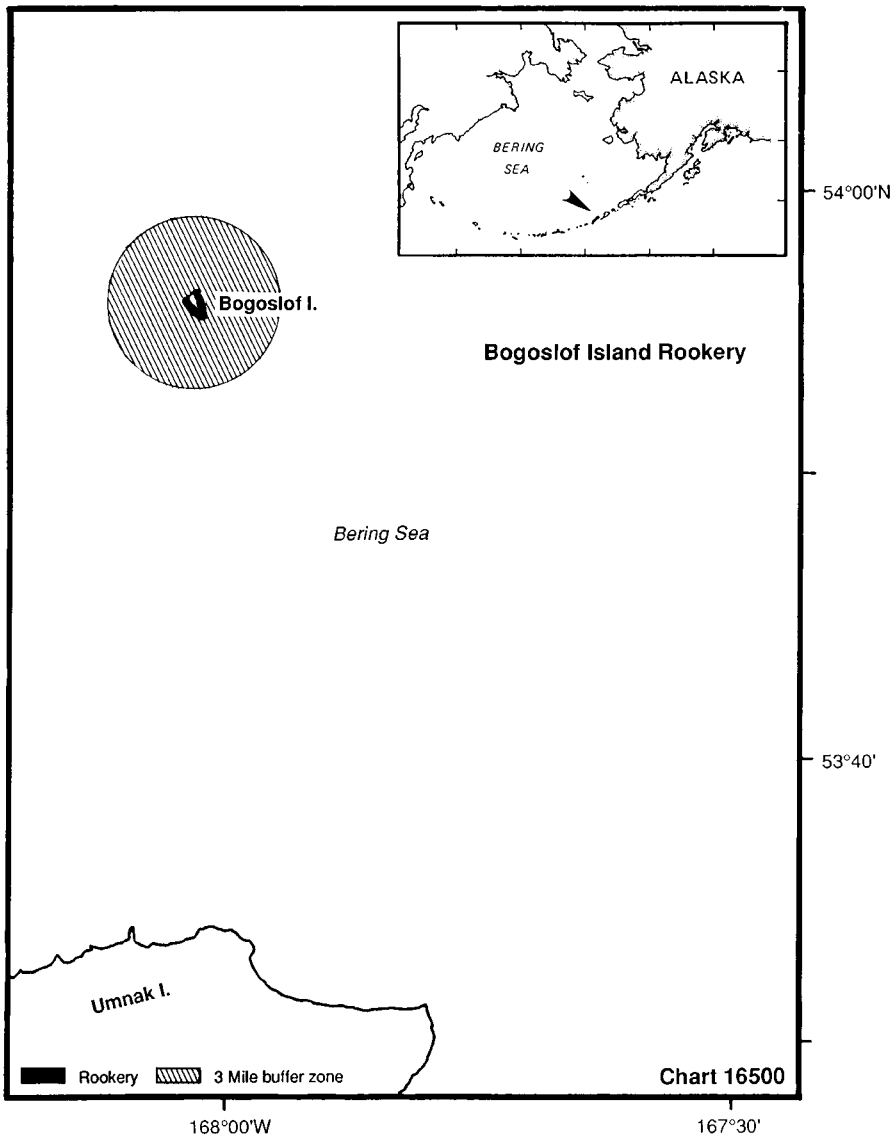

ALASKA
BERING SEA
55°10'N
Dolgoi Island
Pinnacle Rock Rookery
54°50'
Pinnacle Rk.
Rookery
3 Mile buffer zone
Chart 16540
162°00W
161°30'

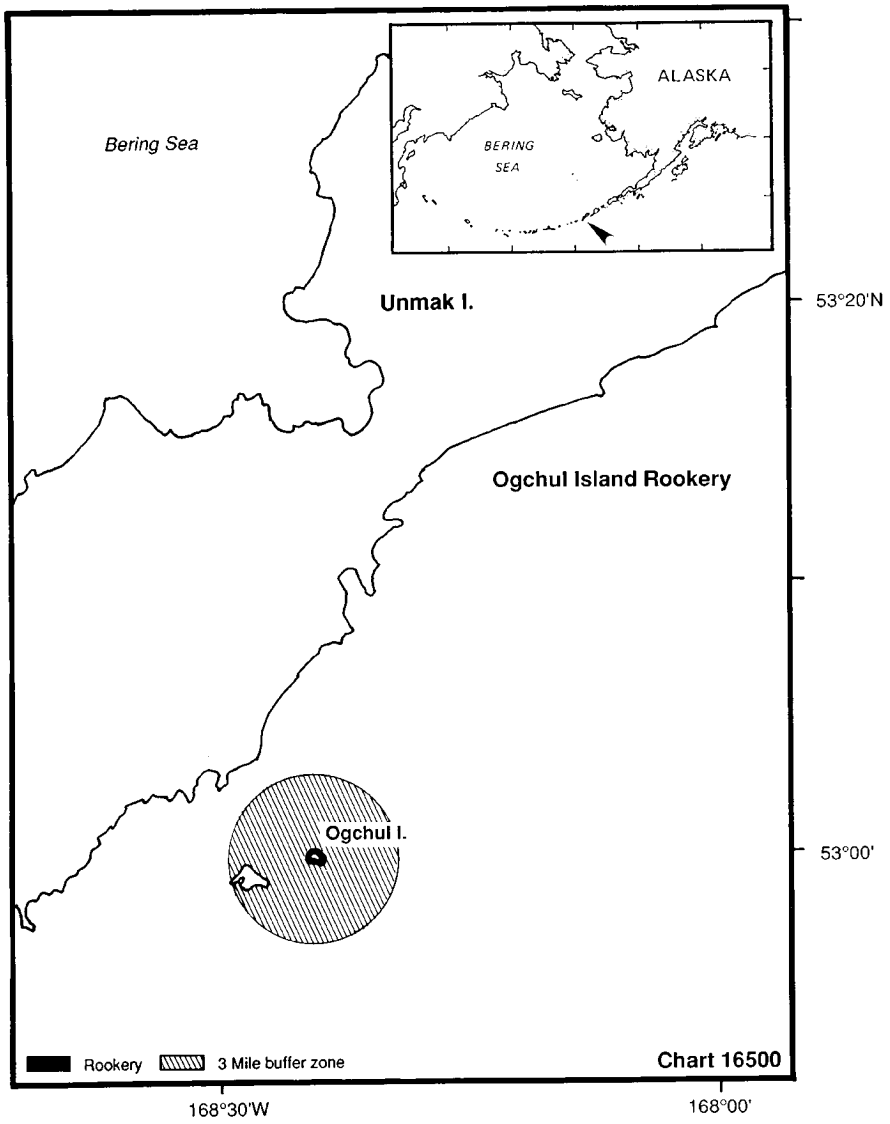

ALASKA
BERING SEA
55°00N
Deer I.
Clubbing Rocks Rookery
Clubbing Rks.
54°00'
Rookery
3 Mile buffer zone
Chart 16540
162°40'W
162°20'
162°00'

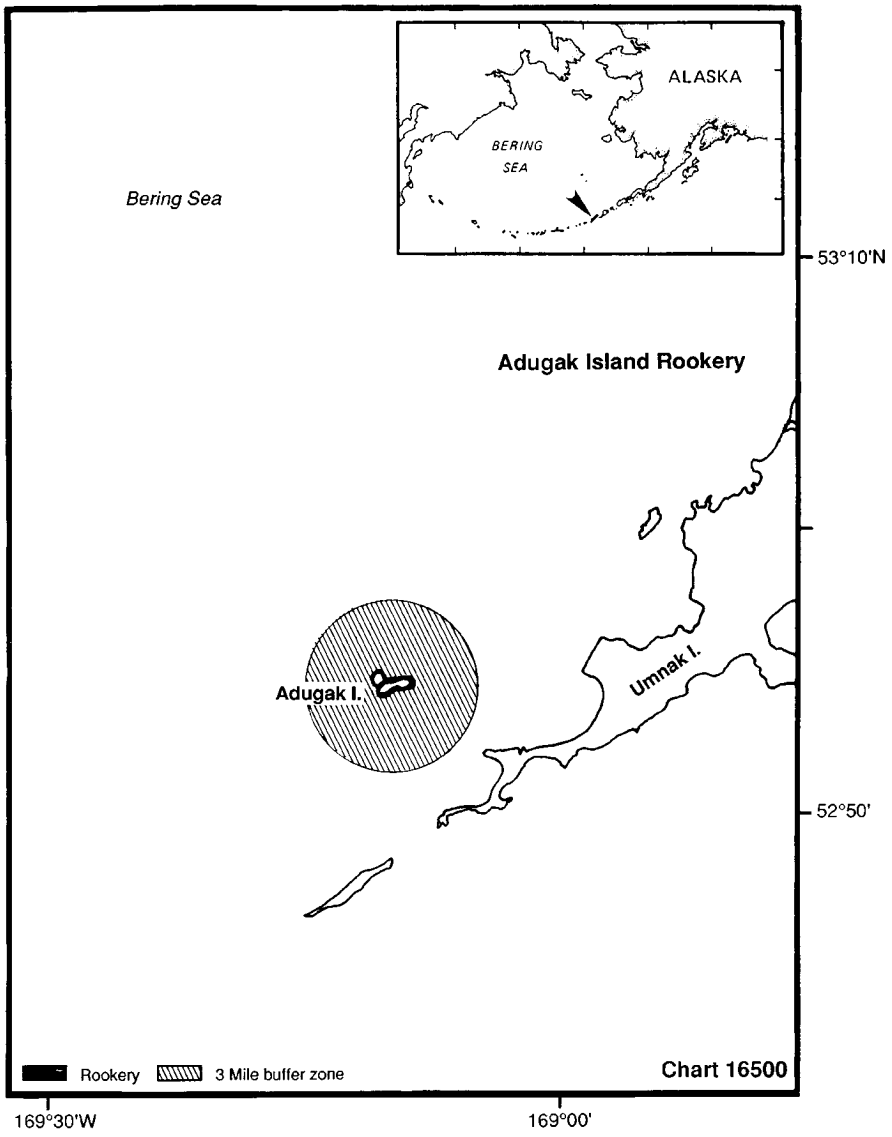

ALASKA
BERING SEA
55°30'N
Sea Lion Rock Rookery
Sea Lion Rks.
Amak I.
55°10'
Izembek Lagoon
Alaska Penn.
Rookery
3 Mile buffer zone
Chart 16520
162°30'
163°00'

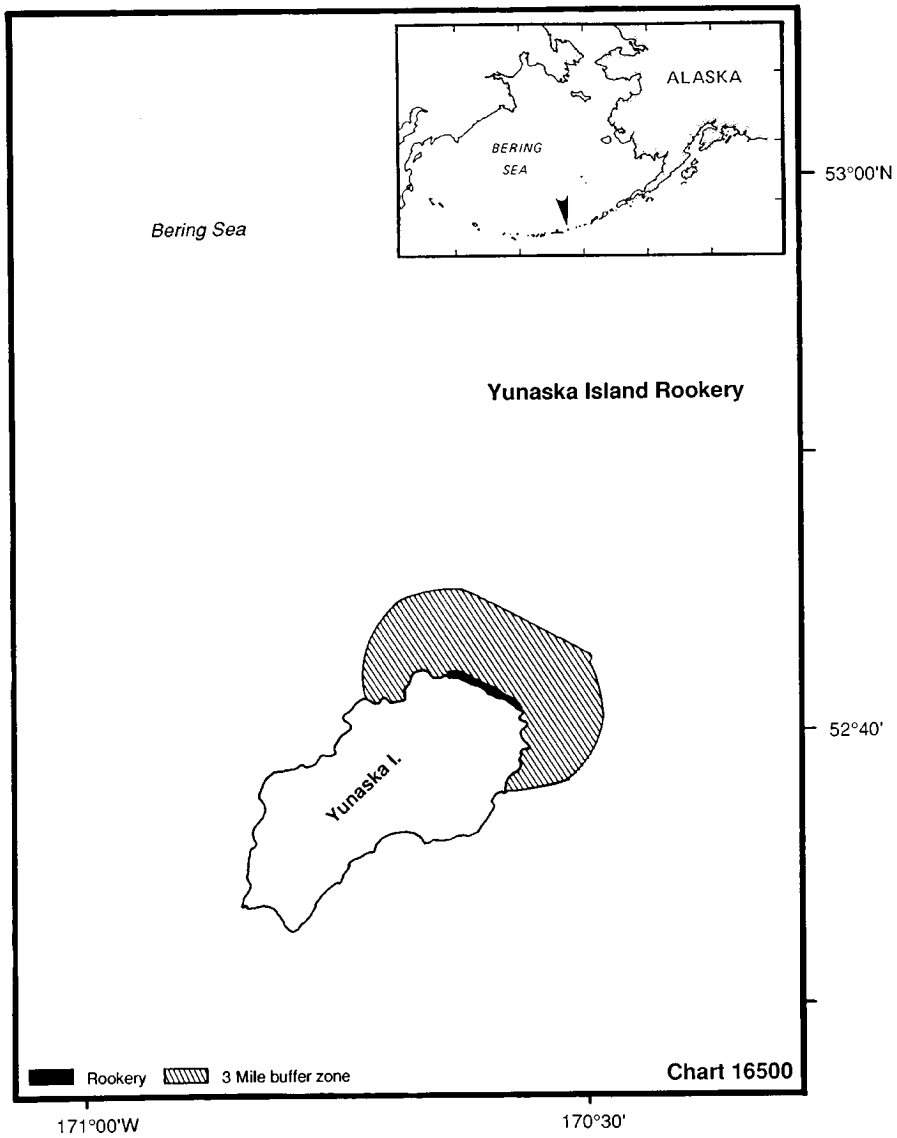

ALASKA
BERING SEA
54°30'N
Ugamak Island Rookery
Unimak Pass
Ugamak I.
Ugamak Strait
Tigalda I.
Rookery
3 Mile buffer zone
Chart 16520
54°00'
165°00' W
164°30'

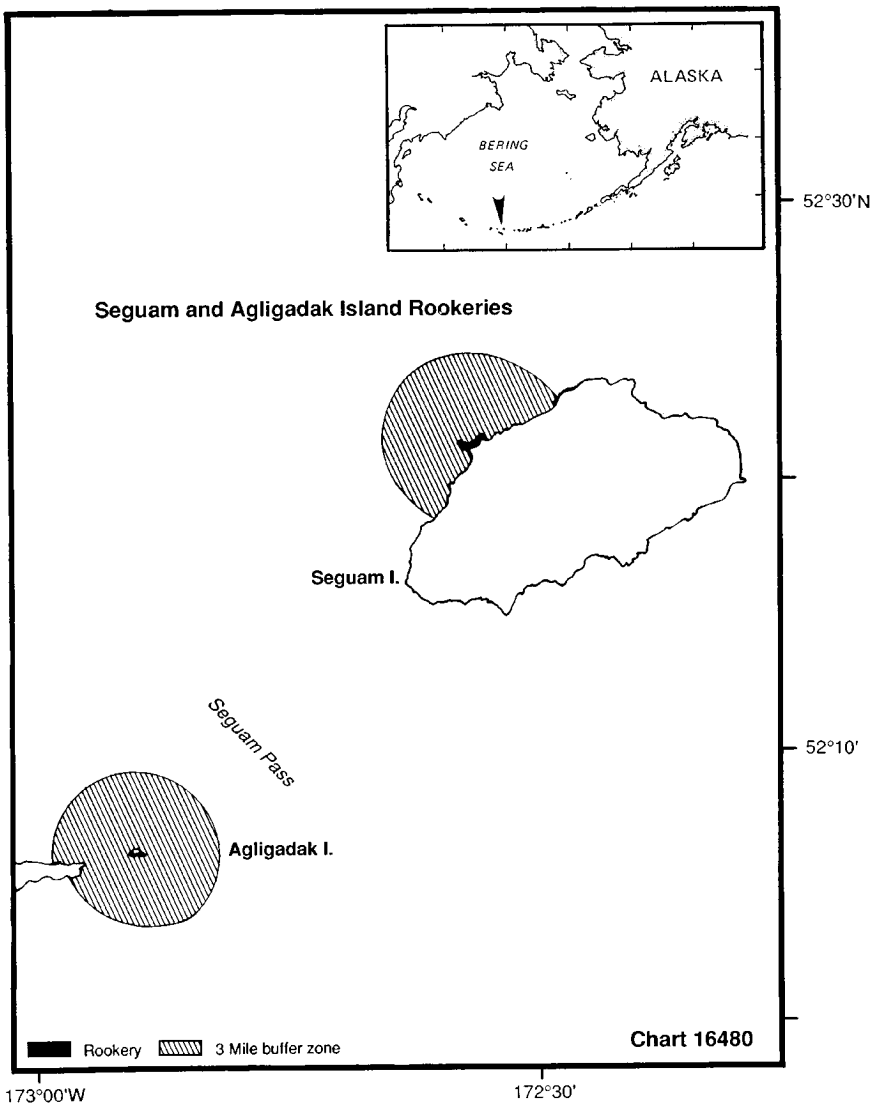

ALASKA
BERING SEA
54°30'N
Akun and Akutan Island Rookeries
Akutan Bay
Akun I.
Akutan I.
54°00'
Unalga I.
Rookery
3 Mile buffer zone
Chart 16520
166°00'W
165°30'

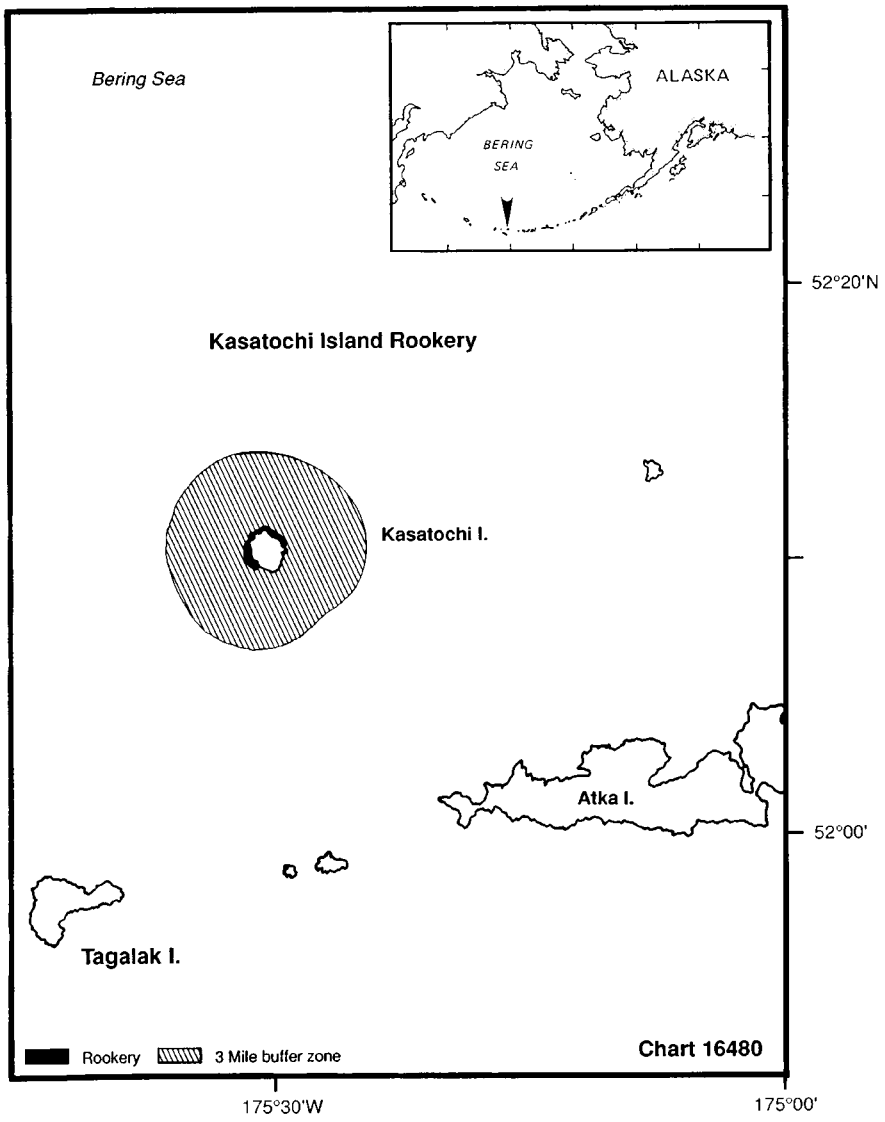

ALASKA
BERING SEA
54°00'N
Bogoslof I.
Bogoslof Island Rookery
Bering Sea
53°40'
Umnak I.
Rookery
3 Mile buffer zone
Chart 16500
168°00'W
167°30'

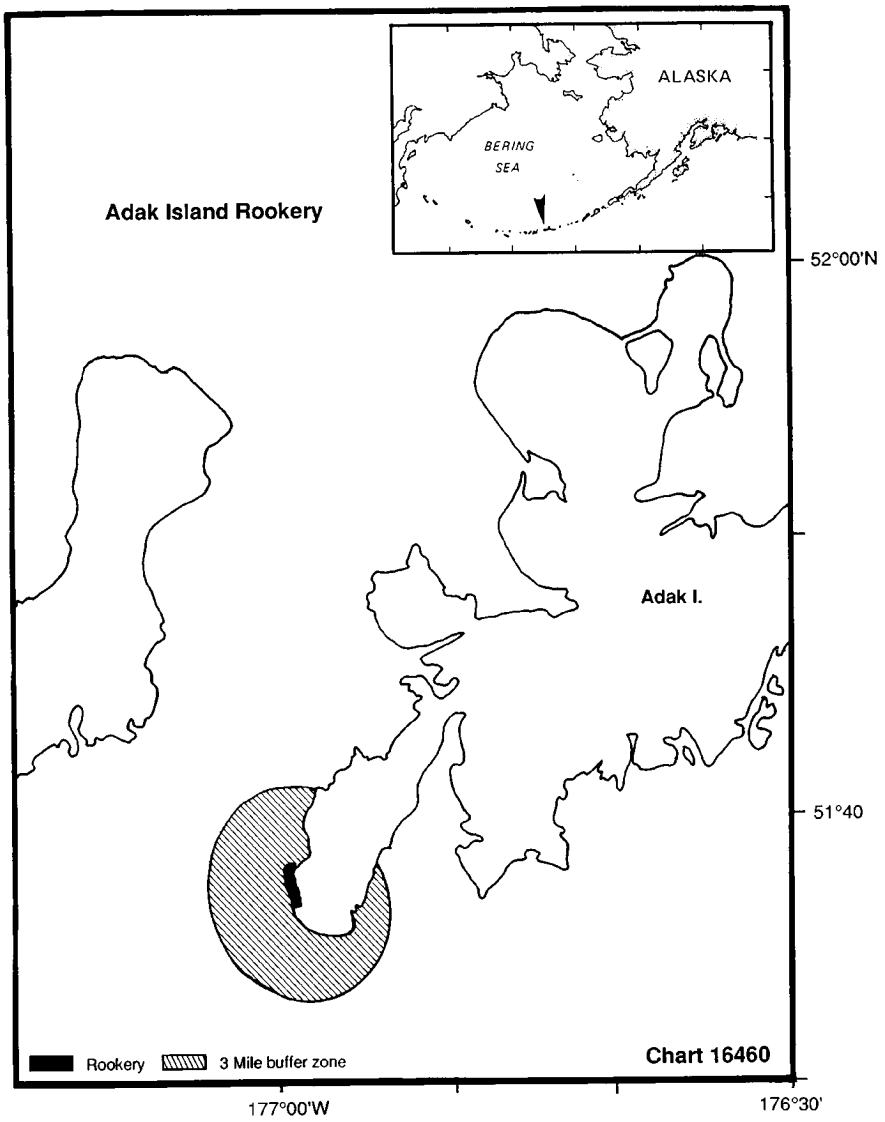

Bering Sea
ALASKA
BERING SEA
Unmak I.
53°20'N
Ogchul Island Rookery
Ogchul I.
53°00'
Rookery
3 Mile buffer zone
Chart 16500
168°30'W
168°00'

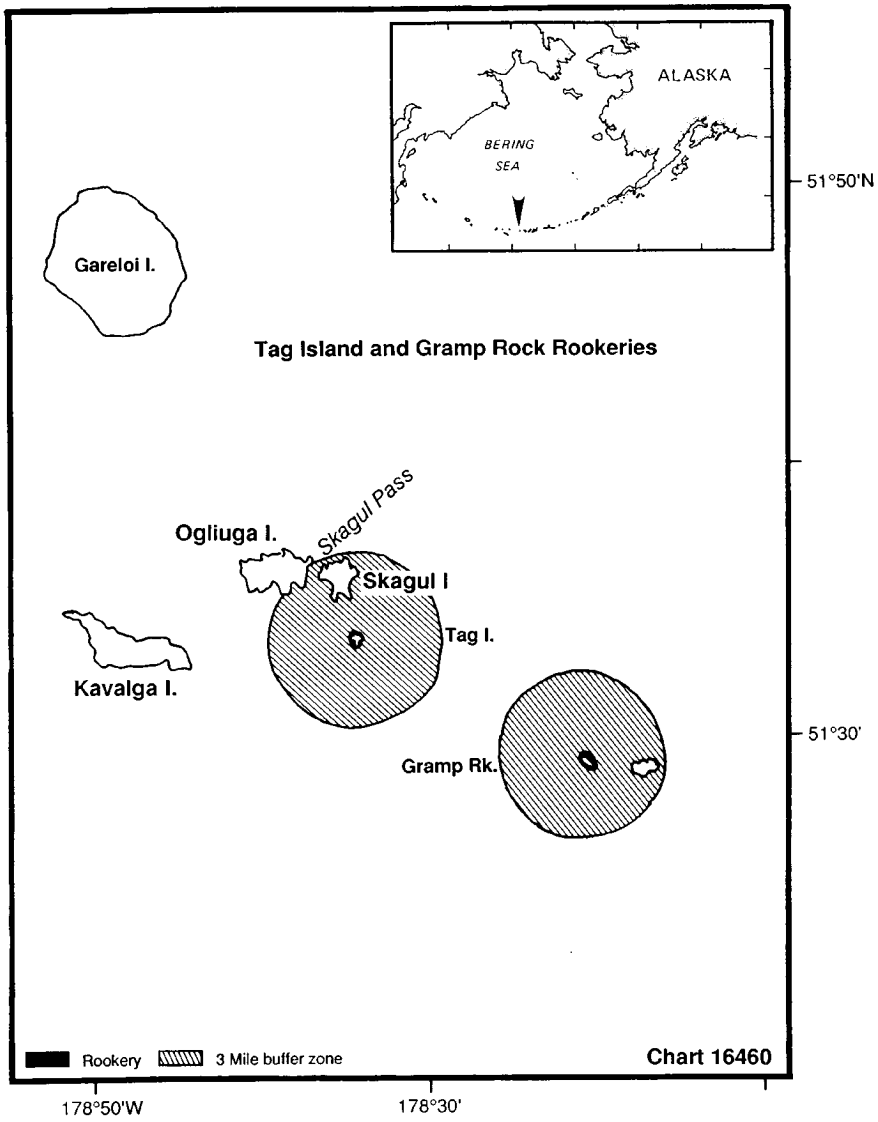

ALASKA
BERING SEA
Bering Sea
53°10'N
Adugak Island Rookery
Adugak I.
Umnak I.
52°50'
Rookery
3 Mile buffer zone
Chart 16500
169°30'W
169°00'

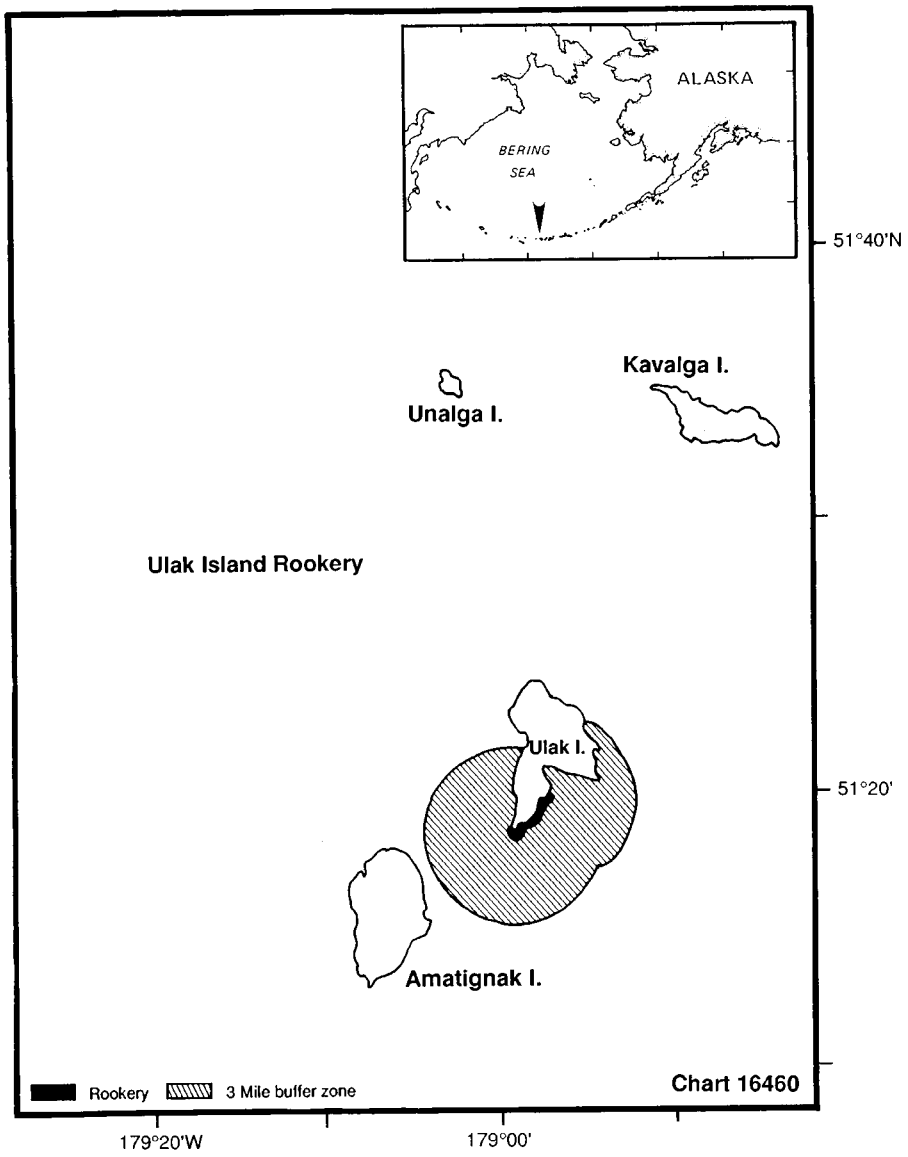

ALASKA
BERING SEA
Bering Sea
Yunaska Island Rookery
Yunaska I.
53°00'N
52°40'
Rookery
3 Mile buffer zone
Chart 16500
171°00'W
170°30'

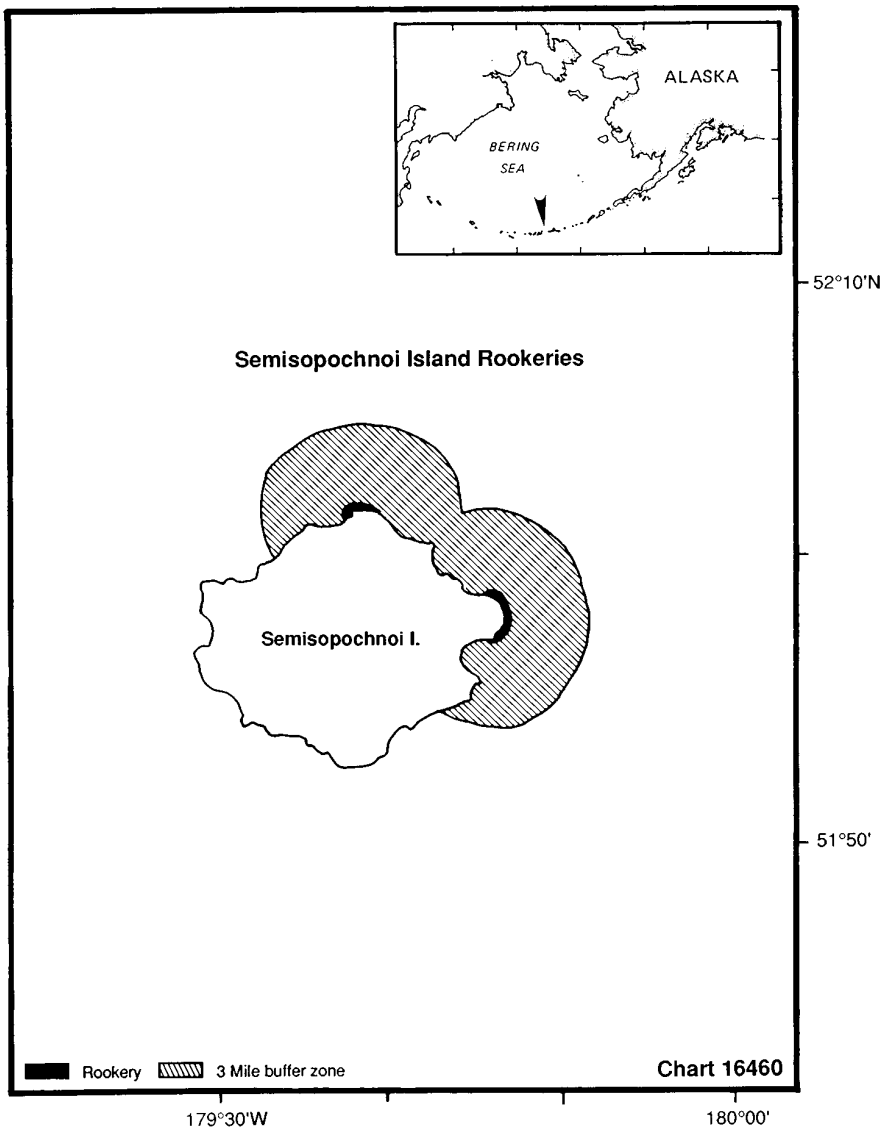

ALASKA
BERING SEA
52°30'N
Seguam and Agligadak Island Rookeries
Seguam I.
Seguam Pass
52°10'
Agligadak I.
Rookery
3 Mile buffer zone
Chart 16480
173°00'W
172°30'

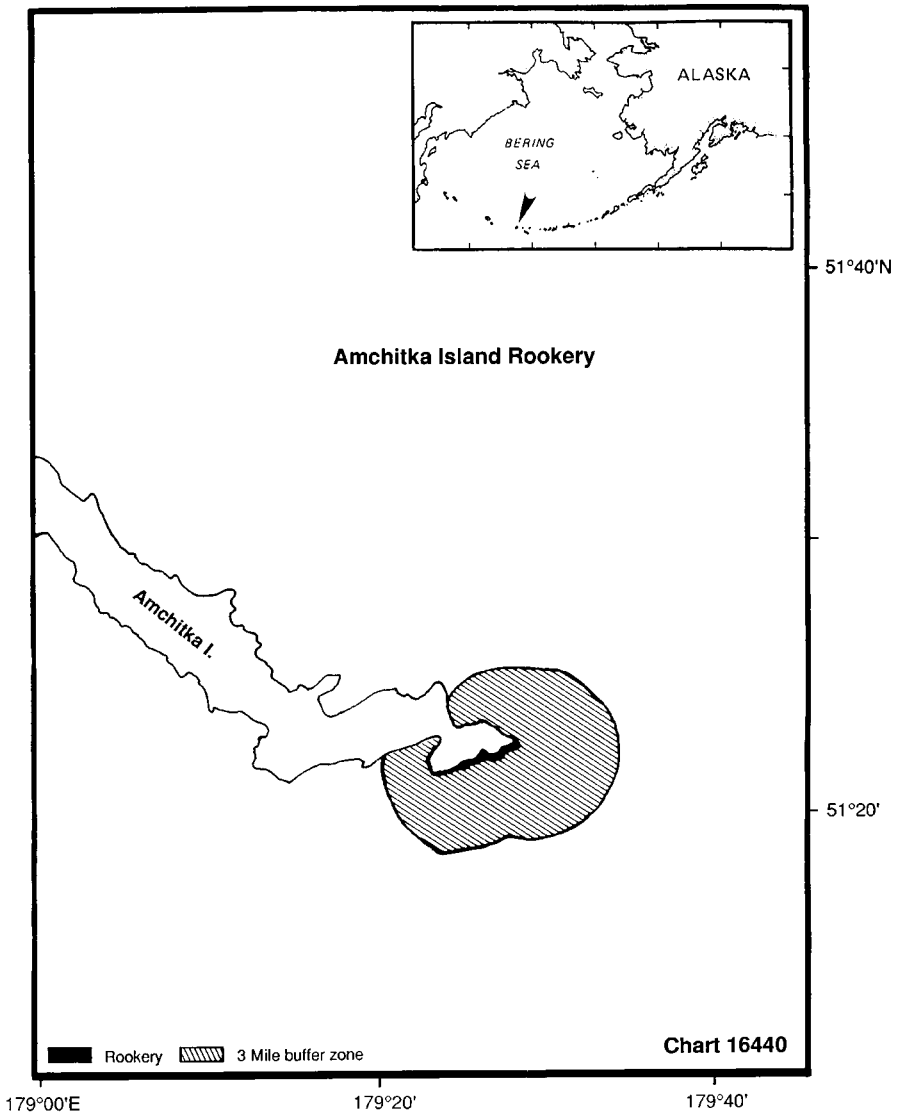

Bering Sea
ALASKA
BERING SEA
52°20'N
Kasatochi Island Rookery
Kasatochi I.
Atka I.
52°00'
Tagalak I.
Rookery
3 Mile buffer zone
Chart 16480
175°30'W
175°00'

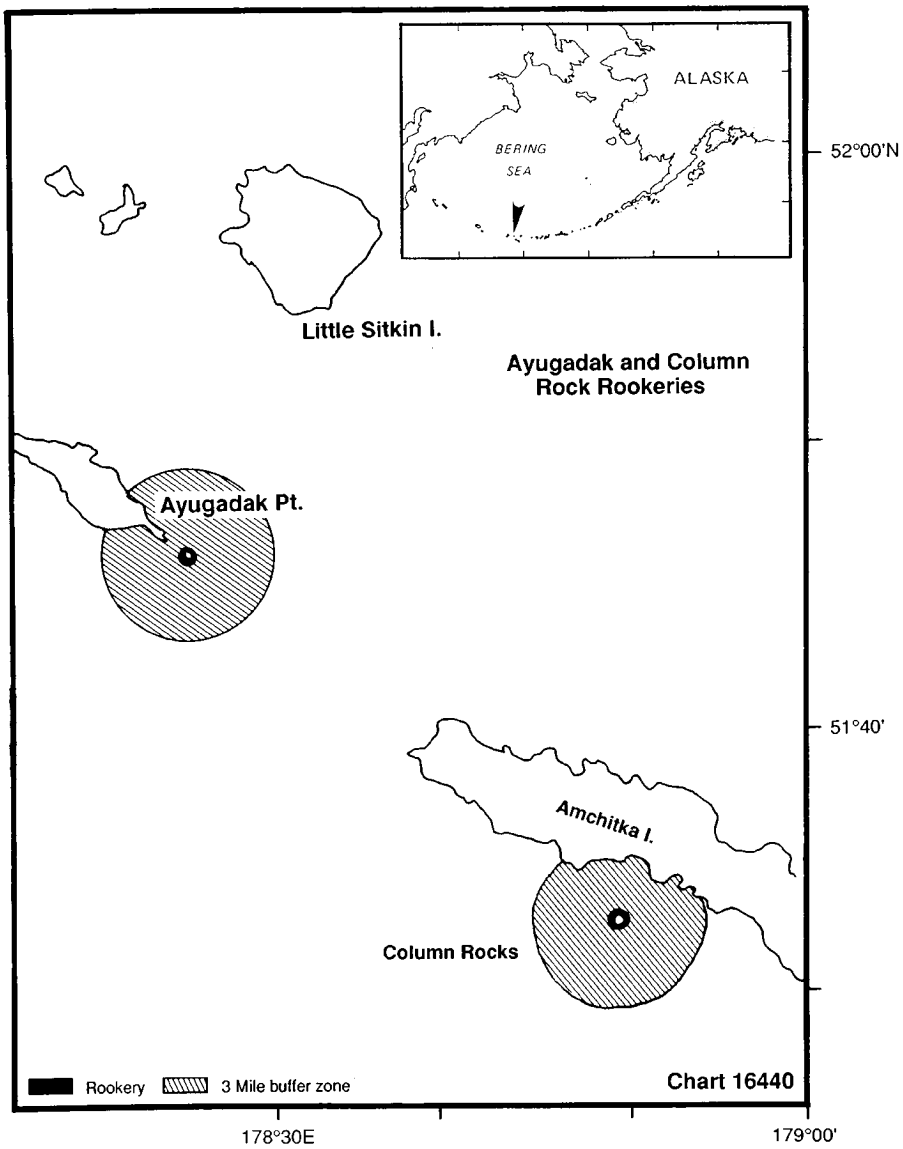

ALASKA
BERING SEA
Adak Island Rookery
52°00'N
Adak I.
51°40
Rookery
3 Mile buffer zone
Chart 16460
177°00'W
176°30'

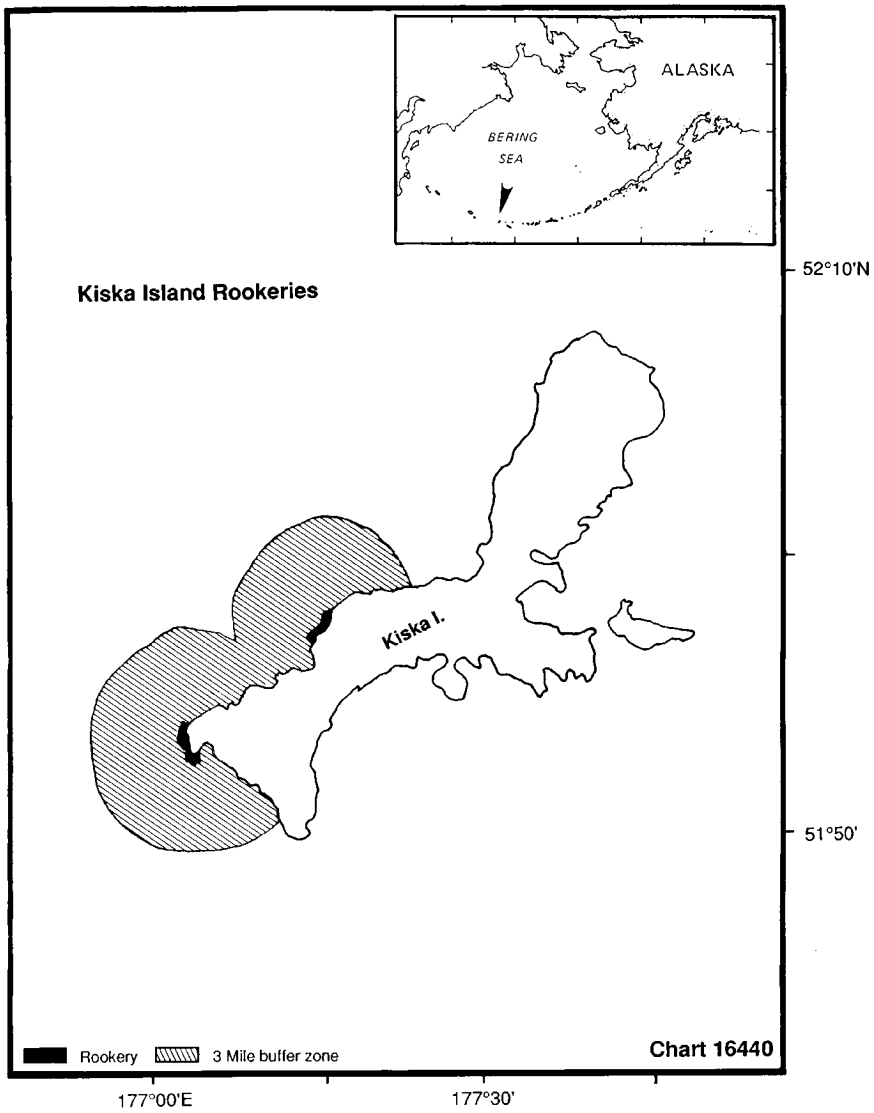

ALASKA
BERING SEA
51°50'N
Gareloi I.
Tag Island and Gramp Rock Rookeries
Skagul Pass
Ogliuga I.
Skagul I
Tag I.
Kavalga I.
51°30'
Gramp Rk.
Rookery
3 Mile buffer zone
Chart 16460
178°50'W
178°30'

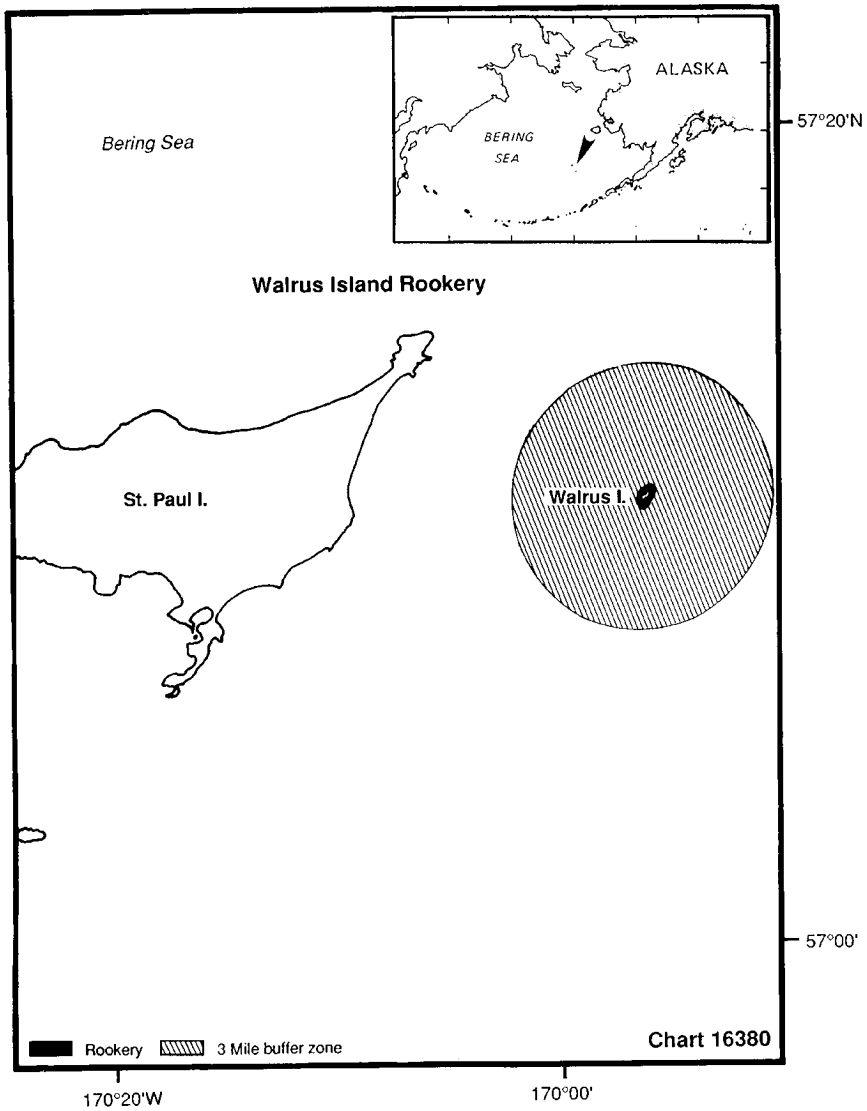

ALASKA
BERING SEA
51°40'N
Kavalga I.
Unalga I.
Ulak Island Rookery
Ulak I.
51°20'
Amatignak I.
Rookery
3 Mile buffer zone
Chart 16460
179°20'W
179°00'

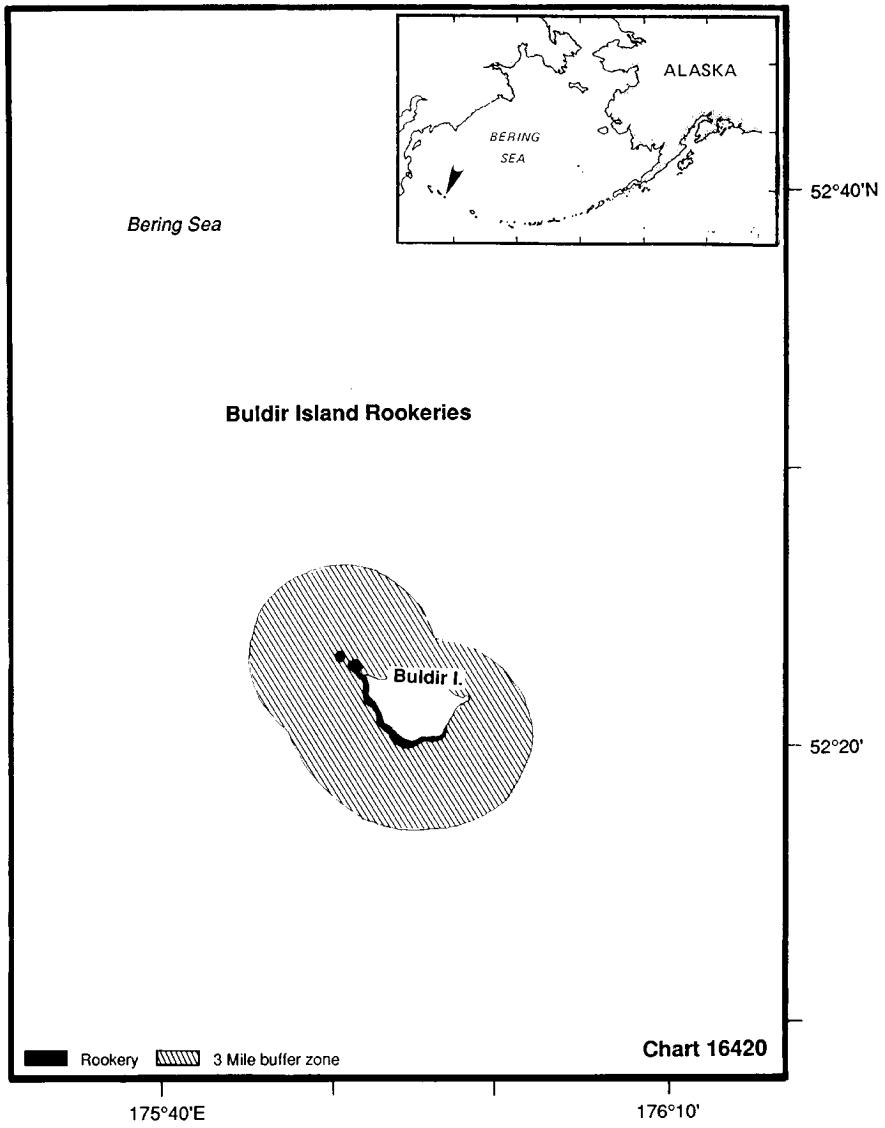

ALASKA
BERING SEA
52°10'N
Semisopochnoi Island Rookeries
Semisopochnoi I.
51°50'
Rookery
3 Mile buffer zone
Chart 16460
179°30'W
180°00'

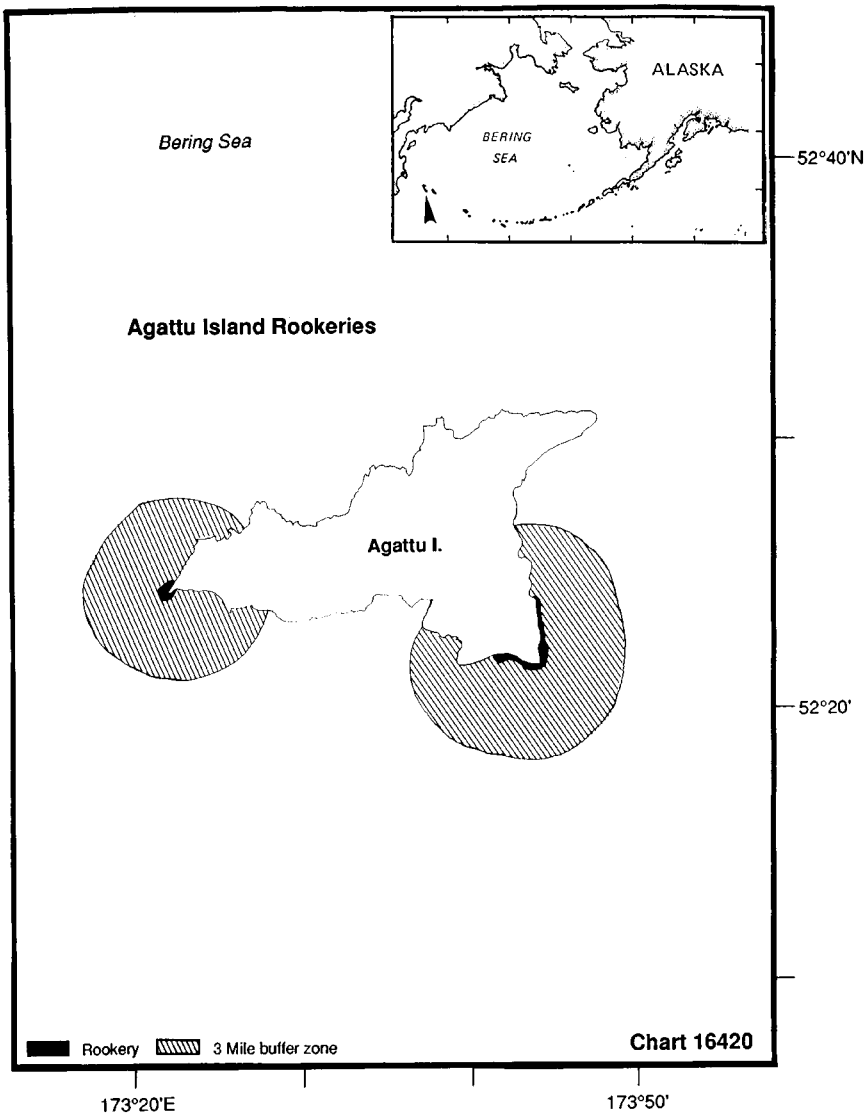

ALASKA
BERING SEA
51°40'N
Amchitka Island Rookery
Amchitka I.
51°20'
Rookery
3 Mile buffer zone
Chart 16440
179°00'E
179°20'
179°40'

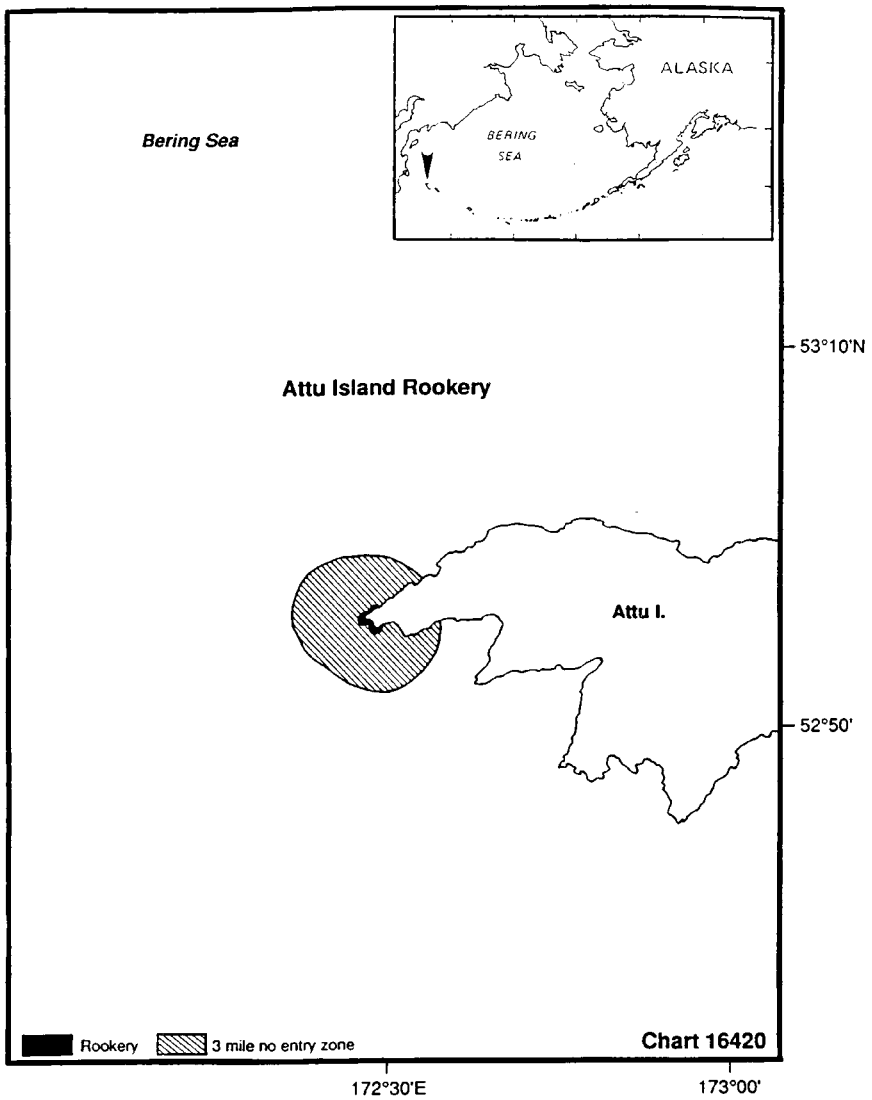

ALASKA
BERING SEA
52°00'N
Little Sitkin I.
Ayugadak and Column Rock Rookeries
Ayugadak Pt.
51°40'
Amchitka I.
Column Rocks
Rookery
3 Mile buffer zone
Chart 16440
178°30E
179°00'


ALASKA
BERING SEA
Kiska Island Rookeries
52°10'N
Kiska I.
51°50'
Rookery
3 Mile buffer zone
Chart 16440
177°00'E
177°30'


ALASKA
BERING SEA
Bering Sea
57°20'N
Walrus Island Rookery
St. Paul I.
Walrus I.
57°00'
Rookery
3 Mile buffer zone
Chart 16380
170°20'W
170°00'


ALASKA
BERING SEA
52°40'N
Bering Sea
Buldir Island Rookeries
Buldir I.
52°20'
Rookery
3 Mile buffer zone
Chart 16420
175°40'E
176°10'


Bering Sea
ALASKA
BERING SEA
52°40'N
Agattu Island Rookeries
Agattu I.
52°20'
Rookery
3 Mile buffer zone
Chart 16420
173°20'E
173°50'


ALASKA
BERING SEA
Bering Sea
53°10'N
Attu Island Rookery
Attu I.
52°50'
Rookery
3 mile no entry zone
Chart 16420
172°30'E
173°00'

(4) *Commercial Fishing Operations.* The incidental mortality and serious injury of endangered and threatened Steller sea lions in commercial fisheries can be authorized in compliance with sections 101(a)(5) and 118 of the Marine Mammal Protection Act.

(b) *Exceptions*—(1) *Permits.* The Assistant Administrator may issue permits authorizing activities that would otherwise be prohibited under paragraph (a) of this section in accordance with and subject to the provisions of 50 CFR part 222, subpart C—Endangered Fish or Wildlife Permits.

(2) *Official activities.* The taking of Steller sea lions must be reported within 30 days to the Regional Administrator, Alaska Region. Paragraph (a) of this section does not prohibit or restrict a Federal, state or local government official, or his or her designee, who is acting in the course of official duties from:

(i) Taking a Steller sea lion in a humane manner, if the taking is for the protection or welfare of the animal, the protection of the public health and welfare, or the nonlethal removal of nuisance animals; or

(ii) Entering the buffer areas to perform activities that are necessary for national defense, or the performance of other legitimate governmental activities.

(3) *Subsistence takings by Alaska natives.* Paragraph (a) of this section does not apply to the taking of Steller sea lions for subsistence purposes under section 10(e) of the Act.

(4) *Emergency situations.* Paragraph (a)(2) of this section does not apply to an emergency situation in which compliance with that provision presents a threat to the health, safety, or life of a person or presents a significant threat to the vessel or property.

(5) *Exemptions.* Paragraph (a)(2) of this section does not apply to any activity authorized by a prior written exemption from the Director, Alaska Region, National Marine Fisheries Service. Concurrently with the issuance of any exemption, the Assistant Administrator will publish notice of the exemption in the FEDERAL REGISTER. An exemption may be granted only if the activity will not have a significant adverse affect on Steller sea lions, the activity has been conducted historically or traditionally in the buffer zones, and there is no readily available and acceptable alternative to or site for the activity.

(6) *Navigational transit.* Paragraph (a)(2) of this section does not prohibit a vessel in transit from passing through a strait, narrows, or passageway listed in this paragraph if the vessel proceeds in continuous transit and maintains a minimum of 1 nautical mile from the rookery site. The listing of a strait, narrows, or passageway does not indicate that the area is safe for navigation. The listed straits, narrows, or passageways include the following:

Rookery	Straits, narrows, or pass
Akutan Island	Akutan Pass between Cape Morgan and Unalga Island.
Clubbing Rocks.	Between Clubbing Rocks and Cherni Island.
Outer Island ..	Wildcat Pass between Rabbit and Ragged Islands.

(c) *Penalties.* (1) Any person who violates this section or the Act is subject to the penalties specified in section 11 of the Act, and any other penalties provided by law.

(2) Any vessel used in violation of this section or the Endangered Species Act is subject to forfeiture under section 11(e)(4)(B) of the Act.

[55 FR 49210, Nov. 26, 1990, as amended at 56 FR 42542, Aug. 28, 1991; 56 FR 58184, Nov. 18, 1991; 58 FR 16371, Mar. 26, 1993; 58 FR 53139, 53141, Oct. 14, 1993; 58 FR 58594, Nov. 2, 1993; 62 FR 24355, May 5, 1997]

Subpart C—Threatened Marine and Anadromous Fish

§227.21 Threatened salmon.

(a) *Prohibitions.* The prohibitions of section 9 of the ESA (16 U.S.C. 1538) relating to endangered species apply to the threatened species of salmon listed in §227.4 (f), (g), (h), and (i), except as provided in paragraph (b) of this section. These prohibitions shall become effective for the threatened species of salmon listed in §227.4(i) on August 18, 1997.

(b) *Exceptions.* (1) The exceptions of section 10 of the ESA (16 U.S.C. 1539) and other exceptions under the Act relating to endangered species, including

regulations implementing such exceptions, also apply to the threatened species of salmon listed in § 227.4 (f), (g), (h), and (i). This section supersedes other restrictions on the applicability of parts 217 and 222 of this chapter, including, but not limited to, the restrictions specified in §§ 217.2 through 222.22(a) of this chapter with respect to the species identified in § 227.21(a).

(2) The prohibitions of paragraph (a) of this section relating to threatened species of salmon listed in § 227.4(i) do not apply to activities specified in an application for a permit for scientific purposes or to enhance the propagation or survival of the species, provided that the application has been received by the Assistant Administrator for Fisheries, NOAA (AA), by September 16, 1997. This exception ceases upon the AA's rejection of the application as insufficient, upon issuance or denial of a permit, or on Janury 20, 1998 whichever occurs earliest.

(3) The prohibitions of paragraph (a) of this section relating to threatened species of salmon listed in § 227.4(i) do not apply to any employee or agent of the NMFS, any other Federal land management agency, or the Oregon Department of Fish and Wildlife (ODFW) or the California Department of Fish and Game (CDFG), who is designated by his/her agency for such purposes, when that employee or agent, acting in the course of his/her official duties, takes a coho salmon in California or Oregon without a permit if such action is necessary to: (1) Aid a sick, injured, or stranded individual, (2) dispose of a dead individual, or (3) salvage a dead individual, which may be useful for scientific study.

[62 FR 38483, July 18, 1997]

§ 227.22 Southern Oregon/Northern California Coast (SONCC) coho salmon.

The following exceptions to the prohibitions of section 227.21(a) apply to SONCC coho salmon:

(a) Take of SONCC coho salmon within three miles (approximately 5 km) of the coast, and in bay, estuarine or freshwater fisheries regulated under the sole authority of the State of Oregon is not prohibited, if the take results from a fisheries harvest program conducted in accordance with the Oregon Coastal Salmon Restoration Initiative of March 1997 (OCSRI), provided that NMFS has issued written concurrence that the fisheries regulations are consistent with the OCSRI using information provided through the April 1997 Memorandum of Agreement (MOA) between the State of Oregon and NMFS.

(b) Incidental take of SONCC coho salmon in ocean fisheries within 3 miles (approximately 5 km) of the coast that are regulated under the sole authority of the State of California is not prohibited, provided that the ocean salmon fishing regulations adopted by the California Fish and Game Commission and CDFG for recreational and commercial fisheries within 3 miles (approximately 5 km) of the coast are consistent with the Pacific Fishery Management Council's Fishery Management Plan for Ocean Salmon Fisheries and the annual ocean salmon fishing regulations issued by the Secretary of Commerce for the Federal EEZ.

(c) Take of SONCC coho salmon in a hatchery program regulated under the sole authority of the State of Oregon is not prohibited, if the take results from a hatchery program conducted in accordance with the OCSRI, and the take is counted against the total allocation of harvest-related mortality as specified in the OCSRI, provided that NMFS has issued written concurrence that the hatchery program is consistent with the OCSRI including the hatchery and genetic management plan adopted pursuant to the OCSRI, using information provided through the MOA.

(d) Take of SONCC coho salmon in fisheries research and monitoring activities conducted in California and Oregon is not prohibited *provided that*:

(1) Research and monitoring involving directed take of coho salmon is conducted by CDFG personnel (in California) and ODFW personnel (in Oregon).

(2) The CDFG and ODFW, respectively, provide NMFS with a list of all research and monitoring activities involving coho salmon directed take planned for the coming year for NMFS' review and approval, including an estimate of the total directed take that is anticipated, a description of the study

design including a justification for taking the species and a description of the techniques to be used, and a point of contact.

(3) The CDFG and ODFW, respectively, annually provide NMFS with the results of research and monitoring studies directed at SONCC coho salmon, including a report of the directed take resulting from the studies.

(4) The CDFG and ODFW, respectively, provide NMFS annually with a list of all research and monitoring studies each permits that may incidentally take listed coho salmon during the coming year and report the level of incidental take of listed coho salmon from the previous year's research and monitoring activities, for NMFS' review and approval.

(5) The research and monitoring activities do not include the use of electrofishing in any body of water known or suspected to contain coho salmon.

(e) Incidental take of the SONCC coho salmon in Oregon that results from a habitat restoration activity, as defined in paragraph (4), is not prohibited, *provided that*:

(1) The activity is conducted pursuant to a watershed action or restoration plan that the state has affirmed in writing is consistent with state watershed plan guidelines that NMFS has found meet the standards set forth in 50 CFR 222.22(c), and NMFS concurs in writing that the plan is consistent with those guidelines; or

(2) Until a watershed action or restoration plan is approved by both Oregon and NMFS as described in paragraph (e)(1) of this section, or until August 18, 1999, whichever occurs first, the ODFW has made a written finding that the activity is consistent with state restoration activity guidelines that NMFS has agreed in writing meet the standards set forth in 50 CFR 222.22(c); or January 19, 1998.

(3) Until January 20, 1998, the activity is any restoration action listed in the Southwest Oregon Salmon Restoration Initiative (OCSRI ch. 17F), provided that any action involving in-water work receives written approval from ODFW as to timing, scope, and methods.

(4) ''Habitat restoration activity'' is defined as an activity that has the sole objective of restoring natural aquatic or riparian habitat conditions or processes.

(f) Incidental take of the SONCC coho salmon in California that results from a habitat restoration activity, as defined in paragraph (3) of this section, is not prohibited, provided that California has a program in effect that NMFS finds will assure technically supported watershed assessments and coordinated long-term monitoring strategies for watershed protection plans and activities and:

(1) The activity is conducted pursuant to a watershed protection plan that CDFG has affirmed in writing is consistent with state watershed plan guidelines for California's Watershed Protection Program that NMFS has found meet the standards set forth in 50 CFR 222.22(c), and NMFS concurs in writing that the plan is consistent with those guidelines; or

(2) Until a watershed protection or restoration plan is certified by the State of California and NMFS as described in paragraph (f)(1) of this section, or until August 18, 1999, whichever occurs first, NMFS has made a written finding that the activity is consistent with State of California conservation guidelines that NMFS has previously found meet the standards set forth in 50 CFR 222.22(c).

(3) ''Habitat restoration activity'' is defined as an activity that has the sole objective of restoring natural aquatic or riparian habitat conditions or processes.

[62 FR 38484, July 18, 1997]

Subpart D—Threatened Marine Reptiles

§227.71 Prohibitions.

(a) Except as provided in §227.72, the prohibitions of section 9 of the Act (16 U.S.C. 1538) relating to endangered species apply to any species of sea turtle enumerated in §227.4.

(b) Except as provided in §227.72, it is unlawful for any person subject to the jurisdiction of the United States to do any of the following:

(1) Own, operate, or be on board a vessel, except if that vessel is in compliance with all applicable provisions of § 227.72(e);

(2) Fish for, catch, take, harvest, or possess, fish or wildlife while on board a vessel, except if that vessel is in compliance with all applicable provisions of § 227.72(e);

(3) Fish for, catch, take, harvest, or possess, fish or wildlife contrary to any notice of tow-time or other restriction specified in, or issued under, § 227.72(e) (3) or (6);

(4) Possess fish or wildlife taken in violation of paragraph (b) of this section;

(5) Fail to follow any of the sea turtle handling and resuscitation requirements specified in § 227.72(e)(1);

(6) Possess a sea turtle in any manner contrary to the handling and resuscitation requirements of § 227.72(e) (1);

(7) Fail to comply immediately, in the manner specified at 50 CFR 620.8 (b)–(d), with instructions and signals specified therein issued by an authorized officer, including instructions and signals to haul back a net for inspection;

(8) Refuse to allow an authorized officer to board a vessel, or to enter an area where fish or wildlife may be found, for the purpose of conducting a boarding, search, inspection, seizure, investigation, or arrest in connection with enforcement of this section;

(9) Destroy, stave, damage, or dispose of in any manner, fish or wildlife, gear, cargo, or any other matter after a communication or signal from an authorized officer, or upon the approach of such an officer or of an enforcement vessel or aircraft, before the officer has an opportunity to inspect same, or in contravention of directions from the officer;

(10) Assault, resist, oppose, impede, intimidate, threaten, obstruct, delay, prevent, or interfere with an authorized officer in the conduct of any boarding, search, inspection, seizure, investigation, or arrest in connection with enforcement of this section;

(11) Interfere with, delay, or prevent by any means, the apprehension of another person, knowing that such person committed an act prohibited by this section;

(12) Resist a lawful arrest for an act prohibited by this section;

(13) Make a false statement, oral or written, to an authorized officer or to the agency concerning the fishing for, catching, taking, harvesting, landing, purchasing, selling, or transferring fish or wildlife, or concerning any other matter subject to investigation under this section by such officer, or required to be submitted under this part 227;

(14) Sell, barter, trade or offer to sell, barter, or trade, a TED that is not an approved TED; or

(15) Attempt to do, solicit another to do, or cause to be done, any of the foregoing.

(c) In connection with any action alleging a violation of this section, any person claiming the benefit of any exemption, exception, or permit under this subpart D has the burden of proving that the exemption, exception, or permit is applicable, was granted, and was valid and in force at the time of the alleged violation. Further, any person claiming that a modification made to a TED that is the subject of such an action complies with the requirements of § 227.72(e) (4)(iii) has the burden of proving such claim.

[57 FR 57354, Dec. 4, 1992]

§ 227.72 Exceptions to prohibitions.

(a) *Scientific, propagation, or survival permits.* (1) The Assistant Administrator may issue permits authorizing activities which would otherwise be prohibited under § 227.71 for scientific purposes or to enhance the propagation or survival of such species. Applications for these permits are subject to the provisions of part 220 of this chapter II.

(2) Ongoing scientific, propagation, or survival projects, which would otherwise be prohibited by § 227.71 may continue without a permit until an application for a permit has been denied or 90 days from the effective date of the listing of the effected species, whichever comes first. If a permit has not been denied, ongoing projects may continue beyond this 90-day period provided that the individual responsible for such project(s) has applied for a permit and receives a letter from the Assistant Administrator stating that

the application is complete and sufficient for processing within the 90-day period. Projects not receiving a permit or letter indicating sufficiency by the 90th day must cease. Within 30 days of receipt of an application, the Assistant Administrator will determine the completeness and sufficiency of the application for processing. If an application is deemed complete and sufficient for processing, a permit will be issued or denied within the next 90 days beginning with the date of the letter informing the applicant that the application is sufficient. Approved projects shall continue in accordance with the conditions of the permit.

(b) *Permits for zoological exhibition or educational purposes.* The Assistant Administrator may issue permits authorizing activities which would be otherwise prohibited under §227.71 for zoological exhibition or educational purposes. Applications for these permits are subject to the provisions of part 220 of this chapter II.

(c) *Exceptions for injured, dead, or stranded specimens.* If any member of any threatened species listed in §227.4 is found injured, dead, or stranded, any agent or employee of the National Marine Fisheries Service, the Fish and Wildlife Service, the U.S. Coast Guard, or any other Federal land or water management agency, or any agent or employee of a State agency responsible for fish and wildlife who is designated by his or her agency for such purposes, may, when acting in the course of his or her official duties, take such specimens without a permit if such taking is necessary to aid a sick, injured, or stranded specimen or dispose of a dead specimen or salvage a dead specimen which may be useful for scientific study. Wherever possible, live specimens shall be returned to their aquatic environment as soon as possible. Every action shall be reported in writing to the Assistant Administrator within 30 days, and reports of further occurrence shall be made as deemed appropriate by the Assistant Administrator until the specimen is either returned to its environment or disposed of. Reports shall be mailed by registered or certified mail, return receipt requested, to the Assistant Administrator for Fisheries, National Marine Fisheries Service, Washington, DC 20235, and shall contain the following information:

(1) Name and position of the official or employee involved;

(2) Description of the specimen(s) involved;

(3) Date and location of disposal;

(4) Circumstances requiring the action;

(5) Method of disposal;

(6) Disposition of the specimen(s), including, where the specimen(s) has been retained in captivity, a description of the place and means of confinement, and the measures taken for its maintenance and care; and

(7) Such other information as the Assistant Administrator may require.

(d) *Exception for research or conservation.* Any employee or agent of the National Marine Fisheries Service, the Fish and Wildlife Service, or a State fish and wildlife agency operating a conservation program pursuant to the terms of a Cooperative Agreement with the National Marine Fisheries Service or the Fish and Wildlife Service in accordance with section 6(c) of the Act, designated by his or her agency for such purposes, may, when acting in the course of his or her official duties, take any threatened species to carry out scientific research or conservation programs. All such takings shall be reported within 30 days of the taking to the Assistant Administrator who may request additional reports of the taking and research at his discretion.

(e) *Exception for incidental taking*—(1) *General.* The prohibitions against taking in §227.71(a) do not apply to the incidental take of any member of any species of sea turtle listed in §227.4 (i.e., a take not directed toward such member) during fishing or scientific research activities, to the extent that those involved are in compliance with the requirements of paragraphs (e)(1), (2), (3), and (6) of this section, or in compliance with the terms and conditions of an incidental take permit issued pursuant to paragraph (e)(7) of this section.

(i) Any specimen so taken must be handled with due care to prevent injury to live specimens, observed for activity, and returned to the water according to the following procedures:

(A) Sea turtles that are dead or actively moving must be released over the stern of the boat. In addition, they must be released only when trawls are not in use, when the engine gears are in neutral position, and in areas where they are unlikely to be recaptured or injured by vessels.

(B) Resuscitation must be attempted on sea turtles that are comatose or inactive but not dead by:

(*1*) Placing the turtle on its back (carapace) and pumping its breastplate (plastron) with hand or foot; or

(*2*) Placing the turtle on its breastplate (plastron) and elevating its hindquarter several inches for a period of 1 up to 24 hours. The amount of the elevation depends on the size of the turtle; greater elevations are needed for larger turtles. Sea turtles being resuscitated must be shaded and kept wet or moist. Those that revive and become active must be released over the stern of the boat only when trawls are not in use, when the engine gears are in neutral position, and in areas where they are unlikely to be recaptured or injured by vessels. Similarly, sea turtles that fail to move within several hours (up to 24, if possible) must be returned to the water in the same manner.

(ii) Any specimen so taken must not be consumed, sold, landed, offloaded, transshipped, or kept below deck.

(2) *Gear requirements*—(i) *TED requirement*. Except as provided in paragraph (e)(2)(ii) of this section, any shrimp trawler that is in the Atlantic Area or Gulf Area must have an approved TED (as defined in § 217.12 of this subchapter) installed in each net that is rigged for fishing. A net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to any trawl door or board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the shrimp trawler.

(ii) *Exemptions from the TED requirement*. (A) A shrimp trawler is exempt from the TED requirements of paragraph (e)(2)(i) of this section if it complies with the alternative tow-time restrictions in paragraph (e)(3)(i) of this section and if it:

(*1*) Has on board no power or mechanical-advantage trawl retrieval system (i.e., any device used to haul any part of the net aboard);

(*2*) Is a bait shrimper that retains all live shrimp on board in a container with a circulating seawater system, if it does not possess more than 32 pounds (14.5 kg) of dead shrimp on board, and if it has on board a valid original state bait-shrimp license (if in a state that requires such a license);

(*3*) Has only a pusher-head trawl, skimmer trawl, or wing net rigged for fishing;

(*4*) Is in an area during a period for which tow-time restrictions apply under paragraphs (e)(3)(ii) or (iii) of this section, if it complies with all applicable provisions imposed under those paragraphs;

(*5*) Prior to December 1, 1994, is in inshore waters, if it has no more than one net rigged for fishing (other than a test (or try) net), if that net has both a headrope length of less than 35 feet (10.7 m) and a footrope length of less than 44 feet (13.4 m).

(B) The following fishing gear or activities are exempted from the TED requirements of paragraph (e)(2)(i) of this section:

(*1*)(*i*) For any shrimp trawler fishing in the Gulf SFSTCA or the Atlantic SFSTCA, a single test net (try net) with a headrope length of 12 ft (3.6 m) or less and with a footrope length of 15 ft (4.6 m) or less, if it is either pulled immediately in front of another net or is not connected to another net in any way, if no more than one test net is used at a time, and if it is not towed as a primary net.

(*ii*) Prior to December 19, 1997, in areas other than the Gulf SFSTCA or the Atlantic SFSTCA, a single test net (try net) with a headrope length of 20 ft (6.1 m) or less, if it is either pulled immediately in front of another net or is not connected to another net in any way, if no more than one test net is used at a time, and if it is not towed as a primary net.

(*iii*) Applicable after December 19, 1997, a single test net (try net) with a headrope length of 12 ft (3.6 m) or less and with a footrope length of 15 ft (4.6 m) or less, if it is either pulled immediately in front of another net or is not connected to another net in any way, if no more than one test net is used at a

time, and if it is not towed as a primary net.

(*2*) A beam or roller trawl fished without doors, boards, or similar devices, that has a mouth formed by a rigid frame and rigid vertical bars, if none of the spaces between the bars, or between the bars and the frame, exceed 4 inches (10.2 cm); and

(*3*) A shrimp trawler fishing for, or possessing, royal red shrimp, if at least 90 percent (by weight) of all shrimp either found on board, or offloaded from that shrimp trawler, is royal red shrimp.

(iii) *Gear requirement—summer flounder trawlers*—(A) *TED requirement.* Except as provided in paragraph (e)(2)(iii)(B) of this section, any summer flounder trawler in the summer flounder fishery-sea turtle protection area must have an approved TED (as defined in §217.12 of this chapter) installed in each net that is rigged for fishing. A net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to any trawl door or board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the summer flounder trawler.

(B) *Exemptions from the TED requirement.* Any summer flounder trawler north of 35°46.1′ N. lat. (Oregon Inlet, NC) from January 15 through March 15 annually is exempt from the TED requirement of paragraph (e)(2)(iii)(A) of this section, unless the Assistant Administrator determines that TED use is necessary to protect sea turtles or ensure compliance, pursuant to the procedures of paragraph (e)(6) of this section.

(C) *Monitoring.* Summer flounder trawlers must carry onboard a NMFS-approved observer if requested upon written notification from the Director, Southeast Region, NMFS, or the Director, Northeast Region, NMFS, sent to the address specified for the vessel in either the NMFS or state fishing permit application, or to the address specified for registration or documentation purposes, or upon written notification otherwise served on the owner or operator of the vessel. Owners and operators must comply with the terms and conditions specified in such written notification. All NMFS-approved observers will report any violations of this section, or other applicable regulations and laws; such information may be used for enforcement purposes.

(D) *Additional sea turtle conservation measures.* The Assistant Administrator may impose other such restrictions upon summer flounder trawlers as he or she deems necessary or appropriate to protect sea turtles and ensure compliance, pursuant to the procedures of paragraph (e)(6) of this section. Such measures may include, but are not limited to, a requirement to use TEDs in areas other than summer flounder fishery-sea turtle protection area, a requirement to use limited tow-times, and closure of the fishery.

(iv) *Gear requirement—leatherback conservation zone*—(A) *Leatherback surveys.* From January 1 through June 30 of each year, weekly aerial surveys will be conducted (contingent upon weather conditions) by NMFS or state agents in the leatherback conservation zone (defined in §217.12 of this chapter). If sighting rates of greater than 10 leatherback turtles per 50 nautical miles (92.6 km) of trackline are observed, the aerial surveys of that area will be replicated within 24 hours, or as soon as practicable thereafter.

(B) *TED requirements and registration.* If surveys pursuant to (e)(2)(iv)(A) of this section indicate a sighting rate within the leatherback conservation zone of greater than 10 leatherback sea turtles per 50 nautical miles (92.6 km) of trackline, NMFS will close, for a 2-week period, an area of the leatherback conservation zone encompassing all, or a portion of, inshore waters and offshore waters 10 nautical miles (18.5 km) seaward of the COLREGS demarcation line, bounded by 1° lat. coinciding with the trackline, within the leatherback conservation zone. Within such closed area, fishing by any shrimp trawler required to have a NMFS-approved TED installed in each net rigged for fishing is prohibited, unless the TED installed is one described at paragraph (e)(4)(i)(G)(*2*)(*ii*) or, prior to October 13, 1999, paragraph (e)(4)(iii)(A)(*4*)(*ii*) of this section, and the owner or operator of the shrimp trawler has notified the Director, Southeast Region, NMFS (Regional Director) of his or her intention to fish in that area, in accordance

with the procedure provided in paragraphs (e)(6)(iv) (A) through (F) of this section. If requested in writing from the Regional Director, owners and operators of shrimp trawlers in the leatherback conservation zone must carry NMFS-approved observers aboard such vessel(s). A shrimp trawler in the leatherback conservation zone must comply with the terms and conditions specified in such written request, as well as provide information on trawling hours, gear modifications, and turtle captures.

(C) *Notification.* NMFS will immediately announce specific area closures on the NOAA weather radio channel, in newspapers, and other media. Specific area closures will be effective upon filing for public inspection at the Office of the Federal Register. Owners and operators of shrimp trawl vessels in the leatherback conservation zone are responsible for monitoring the NOAA weather radio channel for closure announcements. Shrimp trawlers may also call the Southeast Regional Office at (813) 570–5312 to receive updated area closure information.

(3) *Tow-time restrictions*—(i) *Duration of tows.* If tow-time restrictions are utilized pursuant to paragraphs (e)(2)(ii), (e)(3)(ii), or (e)(3)(iii) of this section, a shrimp trawler must limit tow times to no more than 55 minutes from April 1 through October 31; and to no more than 75 minutes from November 1 through March 31. A shrimp trawler in the North Carolina restricted area must limit tow times to no more than 30 minutes from May 16 through August 15. The tow time is measured from the time that the trawl door enters the water until it is removed from the water. For a trawl that is not attached to a door, the tow time is measured from the time the codend enters the water until it is removed from the water.

(ii) *Alternative—special environmental conditions.* (A) The Assistant Administrator may allow compliance with tow-time restrictions, as an alternative to the TED requirement of paragraph (e)(2)(i) of this section, if he/she determines that the presence of algae, seaweed, debris or other special environmental conditions in a particular area makes trawling with TED-equipped nets impracticable.

(B) *North Carolina restricted area.* From June 27, 1994 through November 30, 1994, a shrimp trawler in the North Carolina restricted area, as an alternative to complying with the TED requirement of paragraph (e)(2)(i) of this section, may comply with the tow-time restrictions set forth in paragraph (e)(3)(i) of this section. The owner or operator of a shrimp trawler who wishes to operate his or her shrimp trawler in the North Carolina restricted area must register pursuant to paragraph (e)(3)(v) of this section, with registration received by the Director, Southeast Region, NMFS, at least 24 hours before the first use of such tow times. Registration may be made by telephoning (813) 893–3141 or writing to 9721 Executive Center Drive, St. Petersburg, FL 33702. The owner or operator of a shrimp trawler in the North Carolina restricted area must carry onboard a NMFS-approved observer upon written notification by the Director, Southeast Region, NMFS. Notification shall be made to the address specified for the vessel in either the NMFS or state fishing permit application, the registration or documentation papers, or otherwise served upon the owner or operator of the vessel. The owner or operator must comply with the terms and conditions specified in such written notification. All observers will report any violations of this section, or other applicable regulations and laws; such information may be used for enforcement purposes.

(iii) *Substitute—ineffectiveness of TEDs.* The Assistant Administrator may require compliance with tow-time restrictions, as a substitute for the TED requirement of paragraph (e)(2)(i) of this section, if he/she determines that TEDs are ineffective in protecting sea turtles.

(iv) *Notice; applicability; conditions.* The Assistant Administrator will publish notification concerning any tow-time restriction imposed under paragraphs (e)(3) (ii) or (iii) of this section in the FEDERAL REGISTER and will announce it in summary form on channel 16 of the marine VHF radio. A notification of tow-time restrictions will include findings in support of these restrictions as an alternative to, or as

substitute for, the TED requirements of paragraph (e)(2)(i) of this section. The notification will specify the effective dates, the geographic area where tow-time restrictions apply, and any applicable conditions or restrictions that the Assistant Administrator determines are necessary or appropriate to protect sea turtles and ensure compliance, including, but not limited to, a requirement to carry observers, or for all shrimp trawlers in the area to synchronize their tow times so that all trawl gear remains out of the water during certain times. A notification withdrawing tow-time restrictions will include findings in support of that action.

(v) *Registration.* If the Assistant Administrator imposes restrictions under paragraph (e)(3) (ii) or (iii) of this section, he/she may require the owner and operator of a shrimp trawler to register before entering an area where, and during the time when, the restrictions apply. If registration is required, the trawler's owner and operator must submit the following information to the NMFS Regional Office:

(A) The name and official number (or registration number) of the shrimp trawler;

(B) The names, mailing and street addresses, and telephone numbers of the trawler owner and operator;

(C) The permit number or other identification of relevant state or Federal fishing permit(s);

(D) Where and when the trawler intends to fish;

(E) Where and when the trawler will depart on any fishing trip, with sufficient specificity to allow for an observer to embark on the trip; and

(F) Any changes in the information submitted under paragraphs (e)(3)(v)(A) through (E) of this section. Failure to do so immediately will void the registration, which will render unlawful any subsequent entry of the shrimp trawler into the area where and during the time when the restrictions apply.

(vi) *Procedures.* The Assistant Administrator will consult with the appropriate fishery officials (state or Federal) where the affected shrimp fishery is located in issuing a notification concerning tow-time restrictions. An emergency notification can be effective for a period of up to 30 days and may be renewed for additional periods of up to 30 days each if the Assistant Administrator finds that the conditions that necessitated the imposition of tow-time restrictions continue to exist. The Assistant Administrator may invite comments on such an action, and may withdraw or modify the action by following procedures similar to those for implementation. The Assistant Administrator will implement any permanent tow-time restriction through rulemaking.

(4) *Approved TEDs.* Any netting, webbing, or mesh that may be measured to determine compliance with this paragraph (e)(4) is subject to measurement, regardless of whether it is wet or dry. Any such measurement will be of the stretched mesh size.

(i) *Hard TEDs.* Hard TEDs are TEDs with rigid deflector grids and are categorized as ''hooped hard TEDs,'' such as the NMFS and Cameron TEDs (Figures 1 & 2), or ''single-grid hard TEDs,'' such as the Matagorda and Georgia TEDs (Figures 3 & 4). Hard TEDs complying with the following generic design criteria are approved TEDs:

(A) *Construction materials.* A hard TED must be constructed of one or a combination of the following materials, with minimum dimensions as follows:

(*1*) Solid steel rod with a minimum outside diameter of ¼ inch (0.64 cm);

(*2*) Fiberglass or aluminum rod with a minimum outside diameter of ½ inch (1.27 cm); or

(*3*) Steel or aluminum tubing with a minimum outside diameter of 1/2 inch (1.27 cm) and a minimum wall thickness of 1/8 inch (0.32 cm) (also known as schedule 40 tubing).

(B) *Method of attachment.* A hard TED must be sewn into the trawl around the entire circumference of the TED with heavy twine.

(C) *Angle of deflector bars.* (*1*) Except as provided in paragraph (e)(4)(i)(C)(*2*) of this section, the angle of the deflector bars must be between 30° and 55° from the normal, horizontal flow through the interior of the trawl.

(*2*) For any shrimp trawler fishing in the Gulf SFSTCA or the Atlantic SFSTCA, a hard TED with the position of the escape opening at the bottom of

the net when the net is in its deployed position, the angle of the deflector bars from the normal, horizontal flow through the interior of the trawl, at any point, must not exceed 55°, and:

(*i*) If the deflector bars that run from top to bottom are attached to the bottom frame of the TED, the angle of the bottom-most 4 inches (10.2 cm) of each deflector bar, measured along the bars, must not exceed 45° (Figures 14a and 14b);

(*ii*) If the deflector bars that run from top to bottom are not attached to the bottom frame of the TED, the angle of the imaginary lines connecting the bottom frame of the TED to the bottom end of each deflector bar which runs from top to bottom must not exceed 45° (Figure 15).

(D) *Space between bars.* The space between deflector bars, and between the deflector bars and the frame, must not exceed 4 inches (10.2 cm).

(E) *Direction of bars.* The deflector bars must run from top to bottom of the TED, as the TED is positioned in the net, except that up to four of the bottom bars and two of the top bars, including the frame, may run from side to side of the TED.

(F) *Position of escape opening.* The entire width of the escape opening from the trawl must be centered on and immediately forward of the frame at either the top or bottom of the net when the net is in its deployed position. The escape opening must be at the top of the net when the slope of the deflector bars from forward to aft is upward, and must be at the bottom when such slope is downward. For a single-grid TED, the escape opening must be cut horizontally along the same plane as the TED, and may not be cut in a fore-and-aft direction.

(G) *Size of escape opening.* (*1*) On a hooped hard TED, the escape opening must not be smaller than 25 inches by 25 inches (63.5 cm by 63.5 cm) in the Gulf Area, or 30 inches by 30 inches (76.2 cm by 76.2 cm) in the Atlantic Area. A door frame may not be used over the escape opening; however, a webbing flap may be used as provided in paragraph (e)(4)(iv)(C) of this section.

(*2*)(*i*) On a single-grid hard TED, the cut in the trawl webbing for the escape opening cannot be narrower than the outside width of the grid minus 4 inches (10.2 cm) on both sides of the grid, when measured as a straight line width. (Figure 13 of this part illustrates the dimensions of this cut.) The resulting escape opening in the net webbing must measure at least 32 inches (81.3 cm) in horizontal taut length and, simultaneously, 10 inches (25.4 cm) in vertical taut height in the Gulf Area; or 35 inches (88.9 cm) in horizontal taut length and, simultaneously, 12 inches (30.5 cm) in vertical taut height in the Atlantic Area. The vertical measurement must be taken at the midpoint of the horizontal measurement.

(*ii*) *Escape opening for leatherback turtles.* A single-grid hard TED escape opening shall be enlarged to allow leatherback turtles to escape by cutting an exit hole in the extension forward of the TED frame 26 inches (66 cm) deep, on each side, by 83 inches (211 cm) across (Figures 12a and 12b of this part). Excess webbing is removed by cutting across ½ mesh forward of the TED frame. The exit hole cover is made by cutting a 133-inch (338-cm) by 58-inch (148 cm) piece of webbing no smaller than 1½ inch (4 cm) stretch mesh and no larger than 1⅝ inch (4.2 cm) stretch mesh. The 133-inch (338 cm) edge of the cover is attached to the forward edge of the opening (83-inch (211-cm) edge) with a sewing sequence of 3:2. The cover should overlap 5 inches (13 cm) of the exit hole on each side. The side of the cover is attached, maintaining the 5-inch (13-cm) overlap, to the side of the opening by sewing 28 inches (71 cm) of the cover to 26 inches (66 cm) of the opening forward of the TED frame and by sewing 15 inches (38 cm) of the cover to 15 inches (38 cm) of the extension behind the TED frame. The cover may extend no more than 24 inches (61 cm) behind the posterior edge of the TED frame. The circumference of the exit opening must be 142 inches (361 cm) when stretched. If an accelerator funnel is used with a single-grid hard TED, modified as above, it must also have a minimum circumference of 142 inches (361 cm).

(H) *Size of hoop or grid—(1) Hooped hard TED.* (*i*) An oval front hoop on a

hard TED must have an inside horizontal measurement of at least 32 inches (81.3 cm) and an inside vertical measurement of at least 20 inches (50.8 cm) in the Gulf Area, or an inside horizontal measurement of at least 35 inches (88.9 cm) and an inside vertical measurement of at least 30 inches (76.2 cm) in the Atlantic Area.

(*ii*) A circular front hoop on a hard TED must have an inside diameter of at least 32 inches (81.3 cm) in the Gulf Area or 35 inches (88.9 cm) in the Atlantic Area.

(*2*) *Single-grid hard TED.* A single-grid hard TED must have an inside horizontal and vertical measurement of at least 28 inches (71.1 cm) in the Gulf Area or 30 inches (76.2 cm) in the Atlantic Area. The required inside measurements must be at the mid-point of the deflector grid.

(I) *Flotation.* Floats must be attached to the top one-half of all hard TEDs with bottom escape openings. The floats may be attached either outside or inside the net, but not to a flap. Floats attached inside the net must be behind the rear surface. Floats must be attached with heavy twine or rope. Floats must be constructed of aluminum, hard plastic, expanded polyvinyl chloride, or expanded ethylene vinyl acetate unless otherwise specified. The requirements of this paragraph may be satisfied by compliance with either the dimension requirements of paragraph (e)(4)(i)(I)(*1*) of this section, or the buoyancy requirements of paragraph (e)(4)(i)(I)(*2*) of this section, or the buoyancy-dimension requirements of paragraph (e)(4)(i)(I)(*3*) of this section. If roller gear is used pursuant to paragraph (e)(4)(iv)(E), the roller gear must be included in the circumference measurement of the TED or the total weight of the TED.

(*1*) *Float dimension requirements.* (*i*) For hard TEDs with a circumference of 120 inches (304.8 cm) or more, a minimum of either one round, aluminum or hard plastic float, no smaller than 9.8 inches (25.0 cm) in diameter, or two expanded polyvinyl chloride or expanded ethylene vinyl acetate floats, each no smaller than 6.75 inches (17.2 cm) in diameter by 8.75 inches (22.2 cm) in length, must be attached.

(*ii*) For hard TEDs with a circumference of less than 120 inches (304.8 cm), a minimum of either one round, aluminum or hard plastic float, no smaller than 9.8 inches (25.0 cm) in diameter, or one expanded polyvinyl chloride or expanded ethylene vinyl acetate float, no smaller than 6.75 inches (17.2 cm) in diameter by 8.75 inches (22.2 cm) in length, must be attached.

(*2*) *Float buoyancy requirements.* Floats of any size and in any combination must be attached such that the combined buoyancy of the floats, as marked on the floats, equals or exceeds the weight of the hard TED, as marked on the TED. The buoyancy of the floats and the weight of the TED must be clearly marked on the floats and the TED as follows:

(*i*) *Float buoyancy markings.* Marking must be made in clearly legible raised or recessed lettering by the original manufacturer. The marking must identify the buoyancy of the float in water, expressed in grams or kilograms, and must include the metric unit of measure. The marking may additionally include the buoyancy in English units. The marking must identify the nominal buoyancy for the manufactured float.

(*ii*) *TED weight markings.* The marking must be made by a registered TED manufacturer and must be permanent and clearly legible and must be accompanied by the identifying symbol of the registered manufacturer. The marking must identify the in-air, dry weight of the TED, expressed in grams or kilograms, and must include the metric unit of measure. The marking may additionally include the weight in English units. The marked weight must represent the actual weight of the individual TED as manufactured. Previously manufactured TEDs may be marked upon return to a registered TED manufacturer. Where a TED is comprised of multiple detachable components, the weight of each component must be separately marked. A TED manufacturer may become registered to mark TEDs by requesting registration in writing from the NMFS Southeast Regional Director. To request registration, the manufacturer should write to the Director, Southeast Region, NMFS, 9721 Executive Center Dr.

North, St. Petersburg, FL 33702, and include the manufacturer's name, address, and telephone number; the sizes, styles, and anticipated number of TEDs to be produced annually; the method of marking; and a description of the manufacturer's distinctive, identifying symbol. Upon receipt of a complete request, the Director, Southeast Region, NMFS, will notify the manufacturer in writing of their registration.

(*3*) *Buoyancy-dimension requirements.* Floats of any size and in any combination, provided that they are marked pursuant to paragraph (e)(4)(i)(I)(*2*)(*i*) of this section, must be attached such that the combined buoyancy of the floats equals or exceeds the following values:

(*i*) For floats constructed of aluminum or hard plastic, regardless of the size of the TED grid, the combined buoyancy must equal or exceed 14 lb (6.4 kg);

(*ii*) For floats constructed of expanded polyvinyl chloride or expanded ethylene vinyl acetate, where the circumference of the TED is 120 inches (304.8 cm) or more, the combined buoyancy must equal or exceed 20 lb (9.1 kg); or

(*iii*) For floats constructed of expanded polyvinyl chloride or expanded ethylene vinyl acetate, where the circumference of the TED is less than 120 inches (304.8 cm), the combined buoyancy must equal or exceed 10 lb (4.5 kg).

(ii) *Special Hard TEDs.* Special hard TEDs are hard TEDs which do not meet all of the design and construction criteria of the generic standards. The following special hard TEDs are approved TEDs:

(A) *Flounder TED (Figure 10 of this part).* The Flounder TED must be constructed of at least 1 1/4 inch (3.2 cm) outside diameter aluminum or steel pipe with a wall thickness of at least 1/8 inch (0.3 cm). It must have a rectangular frame with outside dimensions which can be no less than 51 inches (129.5 cm) in length and 32 inches (81.3 cm) in width. It must have at least five vertical deflector bars, with bar spacings of no more than 4 inches (10.2 cm). The vertical bars must be connected to the top of the frame and to a single horizontal bar near the bottom. The horizontal bar must be connected at both ends to the sides of the frame and parallel to the bottom bar of the frame. There must be a space no larger than 10 inches (25.4 cm) between the horizontal bar and the bottom bar of the frame. An additional vertical bar runs from the middle of the bottom bar to the middle of the horizontal bar dividing the opening at the bottom into two rectangles with an opening height of no more than 10 inches (25.4 cm) and an opening width of no more than 14 1/2 inches (36.8 cm). If, because of the width of the TED, the opening width of the bottom rectangles exceeds the maximum allowed, additional vertical bars must be added. This TED must comply with paragraphs (e)(4)(i)(B), (e)(4)(i)(C), (e)(4)(i)(F), and (e)(4)(i)(G) of this section with respect to the method of attachment, the angle of the deflector bars, the position of the escape opening, and the size of the escape opening, except that the deflector bars must be positioned in the net to deflect turtles to the escape opening in the top of the trawl. This TED may not be configured with a bottom escape opening. Installation of an accelerator funnel is not permitted with this TED. Use of this TED is restricted to the Atlantic summer flounder bottom trawl fishery.

(B) *Jones TED (Figure 11 of this part).* The Jones TED must be constructed of at least 1 1/4 inch (3.2 cm) outside diameter aluminum or steel pipe, and the pipe must have a wall thickness of at least 1/8 inch (0.3 cm). It must be generally oval in shape with a flattened bottom. The deflector bars must be attached to the frame at a 45° angle from the horizontal positioning downward and each bar must be attached at only one end to the frame. The deflector bars must be attached and lie in the same plane as the frame. The space between the ends of the bottom deflector bars and the bottom frame bar must be no more than 3 inches (7.6 cm). The spacing between the bottom three deflector bars on each side must be no greater than 2 1/2 inches (6.4 cm). The spacing between all other deflector bars must not exceed 3 1/2 inches (8.9 cm) and spacing between ends of opposing deflector bars also must not exceed 3 1/2 inches (8.9 cm). This TED must comply with paragraphs (e)(4)(i)(B),

(e)(4)(i)(C), (e)(4)(i)(F), (e)(4)(i)(G), (e)(4)(i)(H)(*2*), and (e)(4)(i)(I) of this section with respect to the method of attachment, the angle of the deflector bars, the position of the escape opening, the size of the escape opening, the size of the grid, and flotation.

(iii) *Soft TEDs.* Soft TEDs are TEDs with deflector panels made from polypropylene or polyethylene netting. Prior to October 13, 1999, the following soft TEDs are approved TEDs:

(A) *Parker TED.* The Parker TED is a soft TED, consisting of a single triangular panel, composed of webbing of two different mesh sizes, that forms a complete barrier inside a trawl and that angles toward an escape opening in the top of the trawl.

(*1*) *Excluder Panel.* (Figure 5) The excluder panel of the Parker TED must be constructed of a single triangular piece of 8-inch (20.3 cm) stretched mesh webbing and two trapezoidal pieces of 4-inch (10.2-cm) stretched mesh webbing. The webbing must consist of number 48 (3-mm thick) or larger polypropylene or polyethylene webbing that is heat-set knotted or braided. The leading edge of the 8-inch (20.3-cm) mesh panel must be 36 meshes wide. The 8-inch (20.3-cm) mesh panel must be tapered on each side with all-bar cuts to converge on an apex, such that the length of each side is 36 bars. The leading edges of the 4-inch (10.2-cm) mesh panels must be 8 meshes wide. The edges of the 4-inch (10.2-cm) mesh panels must be cut with all-bar cuts running parallel to each other, such that the length of the inner edge is 72 bars and the length of the outer edge is 89 bars and the resulting fore-and-aft edge is 8 meshes deep. The two 4-inch (10.2-cm) mesh panels must be sewn to the 8-inch (20.3-cm) mesh panel to create a single triangular excluder panel. The 72-bar edge of each 4-inch (10.2-cm) mesh panel must be securely joined with twine to one of the 36-bar edges of the 8-inch (20.3-cm) mesh panel, tied with knots at each knot of the 4-inch (10.2-cm) webbing and at least two wraps of twine around each bar of 4-inch (10.2-cm) mesh and the adjoining bar of the 8-inch (20.3-cm) mesh. The adjoining fore-and-aft edges of the two 4-inch (10.2-cm) mesh panels must be sewn together evenly.

(2) Limitations on which trawls may have a Parker TED installed. The Parker TED must not be installed or used in a two-seam trawl with a tongue, nor in a triple-wing trawl (a trawl with a tongue along the headrope and a second tongue along the footrope). The Parker TED may be installed and used in any other trawl if the taper of the body panels of the trawl does not exceed 4b1p and if it can be properly installed in compliance with paragraph (c)(1)(iii) of this section.

(3) Panel installation—(i) Leading edge attachment. The leading edge of the excluder panel must be attached to the inside of the bottom of the trawl across a straight row of meshes. For a two-seam trawl or a four-seam, tapered-wing trawl, the row of meshes for attachment to the trawl must run the entire width of the bottom body panel, from seam to seam. For a four-seam, straight-wing trawl, the row of meshes for attachment to the trawl must run the entire width of the bottom body panel and half the height of each wing panel of the trawl. Every mesh of the leading edge of the excluder panel must be evenly sewn to this row of meshes; meshes may not be laced to the trawl. The row of meshes for attachment to the trawl must contain the following number of meshes, depending on the stretched mesh size used in the trawl: for a mesh size of 2¼ inches (5.7 cm), 152–168 meshes; for a mesh size of 2⅛ inches (5.4 cm), 161–178 meshes; for a mesh size of 2 inches (5.1 cm), 171–189 meshes; for a mesh size of 1⅞ inches (4.8 cm), 182–202 meshes; for a mesh size of 1¾ inches (4.4 cm), 196–216 meshes; for a mesh size of 1⅝ inches (4.1 cm), 211–233 meshes; for a mesh size of 1½ inches (3.8 cm), 228–252 meshes; for a mesh size of 1⅜ inches (3.5 cm), 249–275 meshes; and for a mesh size of 1¼ inches (3.2 cm), 274–302 meshes.

(ii) Apex attachment. The apex of the triangular excluder panel must be attached to the inside of the top body panel of the trawl at the centerline of the trawl. The distance, measured aft along the centerline of the top body panel from the same row of meshes for attachment of the excluder panel to the bottom body panel of the trawl, to the apex attachment point must contain the following number of meshes,

depending on the stretched mesh size used in the trawl: for a mesh size of 2¼ inches (5.7 cm), 78–83 meshes; for a mesh size of 2⅛ inches (5.4 cm), 83–88 meshes; for a mesh size of 2 inches (5.1 cm), 87–93 meshes; for a mesh size of 1⅞ inches (4.8 cm) , 93–99 meshes; for a mesh size of 1¾ inches (4.4 cm) , 100–106 meshes; for a mesh size of 1⅝ inches (4.1 cm), 107–114 meshes; for a mesh size of 1½ inches (3.8 cm), 114–124 meshes; for a mesh size of 1⅜ inches (3.5 cm), 127–135 meshes; and for a mesh size of 1¼ inches (3.2 cm), 137–146 meshes.

(iii) Side attachment. The sides of the excluder panel must be attached evenly to the inside of the trawl from the outside attachment points of the excluder panel's leading edge to the apex of the excluder panel. Each side must be sewn with the same sewing sequence, and, if the sides of the excluder panel cross rows of bars in the trawl, then the crossings must be distributed evenly over the length of the side attachment.

(4) Escape opening. The escape opening for the Parker soft TED must match one of the following specifications:

(i) Longitudinal cut. A slit at least 56 inches (1.4 m) in taut length must be cut along the centerline of the top body panel of the trawl net immediately forward of the apex of the panel webbing. The slit must not be covered or closed in any manner. The edges and end points of the slit must not be reinforced in any way; for example, by attaching additional rope or webbing or by changing the orientation of the webbing.

(ii) Leatherback escape opening. A horizontal cut extending from the attachment of one side of the deflector panel to the trawl to the attachment of the other side of the deflector panel to the trawl must be made in a single row of meshes across the top of the trawl and measure at least 96 inches (244 cm) in taut width. All trawl webbing above the deflector panel between the 96-inch (244-cm) cut and edges of the deflector panel must be removed. A rectangular flap of nylon webbing not larger than 2-inch (5.1-cm) stretched mesh may be sewn to the forward edge of the escape opening. The width of the flap must not be larger than the width of the forward edge of the escape opening. The flap must not extend more than 12 inches (30.4 cm) beyond the rear point of the escape opening. The sides of the flap may be attached to the top of the trawl but must not be attached farther aft than the row of meshes through the rear point of the escape opening. One row of steel chain not larger than 3⁄16 inch (4.76 mm) may be sewn evenly to the back edge of the flap. The stretched length of the chain must not exceed 96 inches (244 cm). A Parker TED using the escape opening described in this paragraph meets the requirements of paragraph (e)(2)(iv)(B) of this section.

(B) [Reserved]

(iv) *Allowable modifications to TEDs.* No modifications may be made to an approved soft TED. Unless otherwise prohibited in paragraph (e)(4)(ii) of this section, only the following modifications may be made to an approved hard TED and an approved special hard TED:

(A) *Floats.* In addition to floats required pursuant to paragraph (e)(4)(i)(I) of this section, floats may be attached to the top one-half of the TED, either outside or inside the net, but not to a flap. Floats attached inside the net must be behind the rear surface at the top of the TED.

(B) *Accelerator funnel.* An accelerator funnel may be installed in the trawl, if it is made of net webbing material with a stretched mesh size not greater than 1 5/8 inches (4.1 cm), if it has an insidehorizontal opening of at least 39 inches (99.1 cm) when measured in a taut position, if it is inserted in the net immediately forward of the TED, and if its rear edge does not extend past the bars of the TED. The trailing edge of the accelerator funnel may be attached to the TED on the side opposite the escape opening if not more than 1/3 of the circumference of the funnel is attached, and if the inside horizontal opening of at least 39 inches (99.1 cm) is maintained. In a downward shooting TED, only the top 1/3 of the circumference of the funnel may be attached to the TED. In an upward shooting TED, only the bottom 1/3 of the circumference of the funnel may be attached to the TED.

(C) *Webbing flap.* A webbing flap may be used to cover the escape opening if: No device holds it closed or otherwise

restricts the opening; it is constructed of webbing with a stretched mesh size no larger than 1 5/8 inches (4.1 cm); it lies on the outside of the trawl; it is attached along its entire forward edge forward of the escape opening; it is not attached on the sides beyond the row of meshes that lies 6 inches (15.2 cm) behind the posterior edge of the grid; and it does not extend more than 24 inches (61.0 cm) beyond the posterior edge of the grid, except for trawlers fishing in the Gulf SFSTCA or Atlantic SFSTCA with a hard TED with the position of the escape opening at the bottom of the net when the net is in its deployed position, in which case the webbing flap must not extend beyond the posterior edge of the grid.

(D) *Chafing webbing.* A single piece of nylon webbing, with a twine size no smaller than size 36 (2.46 mm in diameter), may be attached outside of the escape opening webbing flap to prevent chafing on bottom opening TEDs. This webbing may be attached along its leading edge only. This webbing may not extend beyond the trailing edge or sides of the existing escape opening webbing flap, and it must not interfere or otherwise restrict the turtle escape opening.

(E) *Roller gear.* Roller gear may be attached to the bottom of a TED to prevent chafing on the bottom of the TED and the trawl net. When a webbing flap is used in conjunction with roller gear, the webbing flap must be of a length such that no part of the webbing flap can touch or come in contact with any part of the roller gear assembly or the means of attachment of the roller gear assembly to the TED, when the trawl net is in its normal, horizontal position. Roller gear must be constructed according to one of the following design criteria:

(*1*) A single roller consisting of hard plastic shall be mounted on an axle rod, so that the roller can roll freely about the axle. The maximum diameter of the roller shall be 6 inches (15.24 cm), and the maximum width of the axle rod shall be 12 inches (30.4 cm). The axle rod must be attached to the TED by two support rods. The maximum clearance between the roller and the TED shall not exceed 1 inch (2.5 cm) at the center of the roller. The support rods and axle rod must be made from solid steel or solid aluminum rod no larger than 1/2 inch (1.28 cm) in diameter. The attachment of the support rods to the TED shall be such that there are no protrusions (lips, sharp edges, burrs, etc.) on the front face of the grid. The axle rod and support rods must lie entirely behind the plane of the face of the TED grid.

(*2*) A single roller consisting of hard plastic tubing shall be tightly tied to the back face of the TED grid with rope or heavy twine passed through the center of the roller tubing. The roller shall lie flush against the TED. The maximum outside diameter of the roller shall be 3 1/2 inches (8.0 cm), the minimum outside diameter of the roller shall be 2 inches (5.1 cm), and the maximum length of the roller shall be 12 inches (30.4 cm). The roller must lie entirely behind the plane of the face of the grid.

(5)(i) *Revision of generic design criteria, and approval of TEDs, of allowable modifications of hard TEDs, and of special hard TEDs.* The Assistant Administrator may revise the generic design criteria for hard TEDs set forth in paragraph (e)(4)(i) of this section, may approve special hard TEDs in addition to those listed in paragraph (e)(4)(ii) of this section, may approve allowable modifications to hard TEDs in addition to those authorized in paragraph (e)(4)(iv) of this section, or may approve other TEDs, by regulatory amendment, if, according to a NMFS-approved scientific protocol, the TED demonstrates a sea turtle exclusion rate of 97 percent or greater (or an equivalent exclusion rate). Two such protocols have been published by NMFS (52 FR 24262, June 29, 1987; and 55 FR 41092, October 9, 1990) and will be used only for testing relating to hard TED designs. Testing under any protocol must be conducted under the supervision of the Assistant Administrator, and shall be subject to all such conditions and restrictions as the Assistant Administrator deems appropriate. Any person wishing to participate in such testing should contact the Director, Southeast Fisheries Science Center, NMFS.

(ii) Upon application, the Assistant Administrator may issue permits, subject to such conditions and restrictions as the Assistant Administrator deems appropriate, authorizing public or private experimentation aimed at improving shrimp retention efficiency of existing approved TEDs and at developing additional TEDs, or conducting fishery research, that would otherwise be subject to paragraph (e)(2) of this section. Applications should be addressed to the Director, Southeast Region, NMFS, 9450 Koger Blvd., St. Petersburg, FL 33702.

(6) *Limitations on incidental takings during fishing activities*—(i) *Limitations.* The exemption for incidental takings of sea turtles in paragraph (e)(1) of this section does not authorize incidental takings during fishing activities if the takings:

(A) Would violate the restrictions, terms, or conditions of an incidental take statement or biological opinion;

(B) Would violate the restrictions, terms, or conditions of an incidental take permit; or

(C) May be likely to jeopardize the continued existence of a species listed under the Act.

(ii) *Determination; restrictions on fishing activities.* The Assistant Administrator may issue a determination that incidental takings during fishing activities are unauthorized. Pursuant thereto, the Assistant Administrator may restrict fishing activities in order to conserve a species listed under the Act, including, but not limited to, restrictions on the fishing activities of vessels subject to paragraph (e)(2)(i) of this section. The Assistant Administrator will take such action if he/she determines that restrictions are necessary to avoid unauthorized takings that may be likely to jeopardize the continued existence of a listed species. The Assistant Administrator may withdraw or modify a determination concerning unauthorized takings or any restriction on fishing activities if the Assistant Administrator determines that such action is warranted.

(iii) *Notice; applicability; conditions.* The Assistant Administrator will publish a notification of a determination concerning unauthorized takings or a notification concerning the restriction of fishing activities in the FEDERAL REGISTER. The Assistant Administrator will provide as much advance notice as possible, consistent with the requirements of the Act, and will announce the notification in summary form on channel 16 of the marine VHF radio. Notification of a determination concerning unauthorized takings will include findings in support of that determination; specify the fishery, including the target species and gear used by the fishery, the area, and the times, for which incidental takings are not authorized; and include such other conditions and restrictions as the Assistant Administrator determines are necessary or appropriate to protect sea turtles and ensure compliance. Notification of restriction of fishing activities will include findings in support of the restriction, will specify the time and area where the restriction is applicable, and will specify any applicable conditions or restrictions that the Assistant Administrator determines are necessary or appropriate to protect sea turtles and ensure compliance. Such conditions and restrictions may include, but are not limited to, limitations on the types of fishing gear that may be used, tow-time restrictions, alteration or extension of the periods of time during which particular tow-time requirements apply, requirements to use TEDs, and requirements to provide observers. Notification of withdrawal or modification will include findings in support of that action.

(iv) *Registration.* If the Assistant Administrator imposes restrictions under paragraph (e)(6)(ii) of this section, he/she may require the owner and operator of a vessel to register before entering an area where, and during the time when, the restrictions apply. If registration is required, the vessel's owner and operator must submit the following information to the NMFS Regional Office:

(A) The name and official number (or registration number) of the vessel;

(B) The names, mailing and street addresses, and telephone numbers of the vessel owner and operator;

(C) The permit number or other identification of relevant state or Federal fishing permit(s);

(D) Where and when the vessel intends to fish; and

(E) Where and when the vessel will depart on any fishing trip, with sufficient specificity to allow for an observer to embark on the trip.

(F) Any changes in the information submitted under paragraphs (e)(6)(iv)(A) through (E) of this section. Failure to do so immediately will void the registration, which will render unlawful any subsequent entry of the fishing vessel into the area where and during the time when the restrictions apply.

(v) *Procedures.* The Assistant Administrator will consult with the appropriate fisheries officials (state or Federal) where the fishing activities are located in issuing notification of a determination concerning unauthorized takings or notification concerning the restriction of fishing activities. An emergency notification will be effective for a period of up to 30 days and may be renewed for additional periods of up to 30 days each. The Assistant Administrator may invite comments on such action, and may withdraw or modify the action by following procedures similar to those for implementation. The Assistant Administrator will implement any permanent determination or restriction through rulemaking.

(7) *Incidental-take permits.* The Assistant Administrator may issue permits authorizing activities that would otherwise be prohibited in §227.71(a) of this chapter in accordance with section 10(a)(1)(B) of the Act (16 U.S.C. 1539(a)(1)(B)), and in accordance with, and subject to, the provisions of parts 220 and 222 of this chapter. Such permits may be issued for the incidental taking of both endangered and threatened species of sea turtles. This section supersedes restrictions on the scope of parts 220 and 222, including, but not limited to, the restrictions specified in §§220.3, 222.1, 222.2(a) and 222.22(a).

(f) *Subsistence.* The prohibition in §227.71(b) shall not apply with respect to the taking of any member of the species of green sea turtle (*Chelonia mydas*) in waters seaward of mean low tide for personal consumption by residents of the Trust Territory of the Pacific Islands if such taking is customary, traditional and necessary for the sustenance of such resident and his immediate family. Sea turtles so taken cannot be transferred to non-residents or sold.

[43 FR 32809, July 28, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §227.72, see the List of CFR Sections Affected in the Finding Aids section of this volume.

EFFECTIVE DATE NOTE: At 60 FR 15516, Mar. 24, 1995 in §227.72, paragraph (e)(4)(i)(I) was revised. Paragraph (e)(4)(i)(I)(*2*)(*ii*) contains information collection requirements and will not become effective until approval has been given by the Office of Management and Budget.

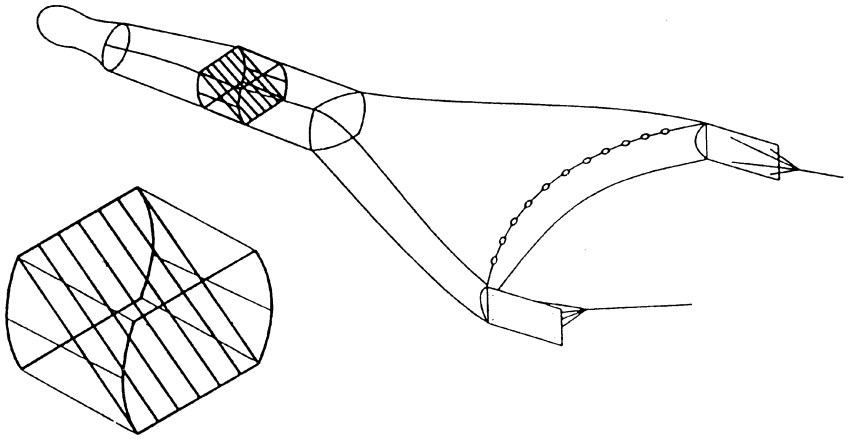


FIGURE 1 to part 227--NMFS TED

[60 FR 15519, Mar. 24, 1995]

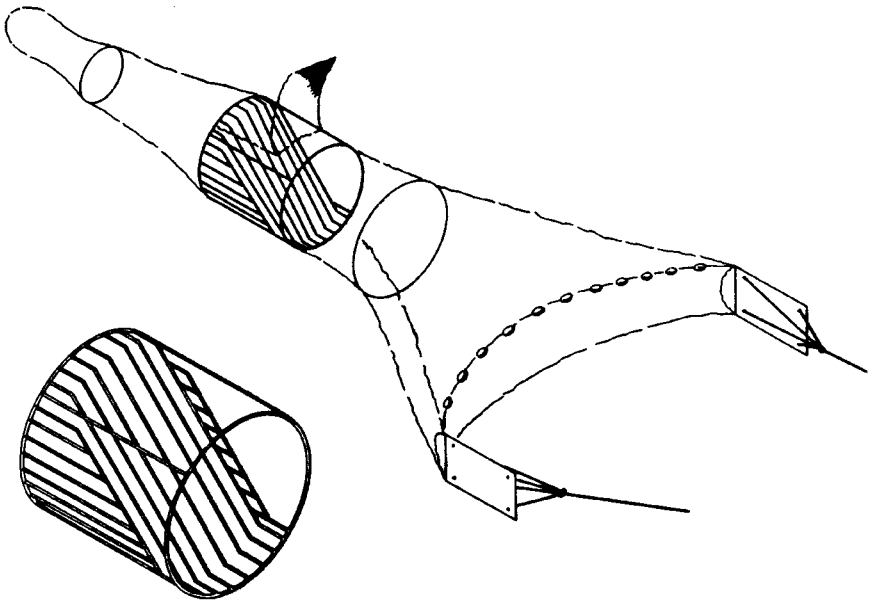


FIGURE 2 (CAMERON TED)

[52 FR 24259, June 29, 1987. Redesignated at 57 FR 40868, Sept. 8, 1992]

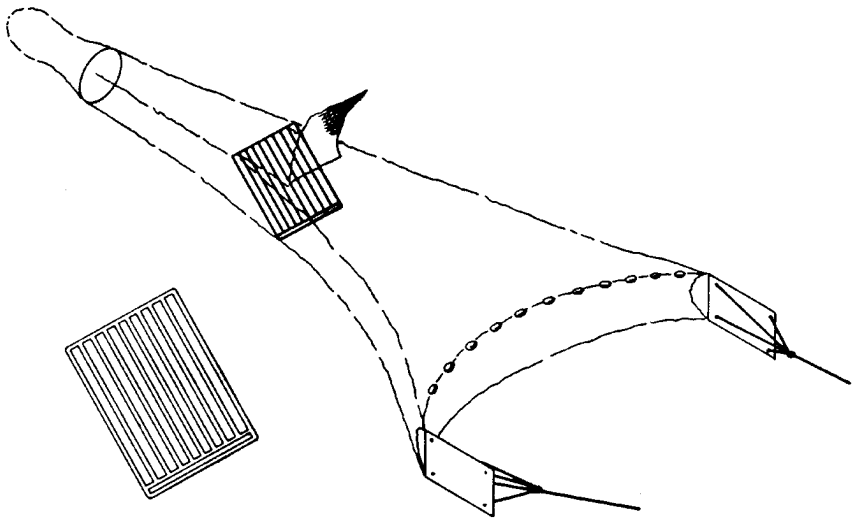


FIGURE 3 MATAGORDA TED

[52 FR 24260, June 29, 1987. Redesignated at 57 FR 40868, Sept. 8, 1992]

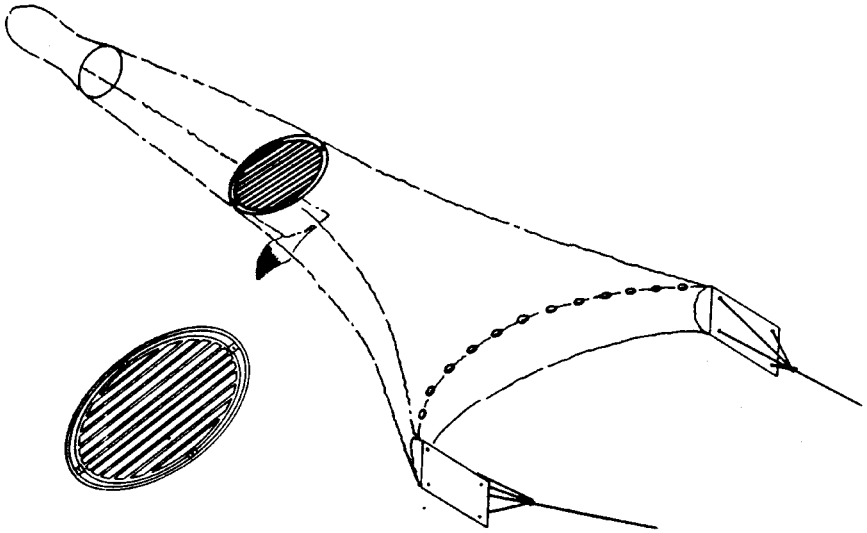
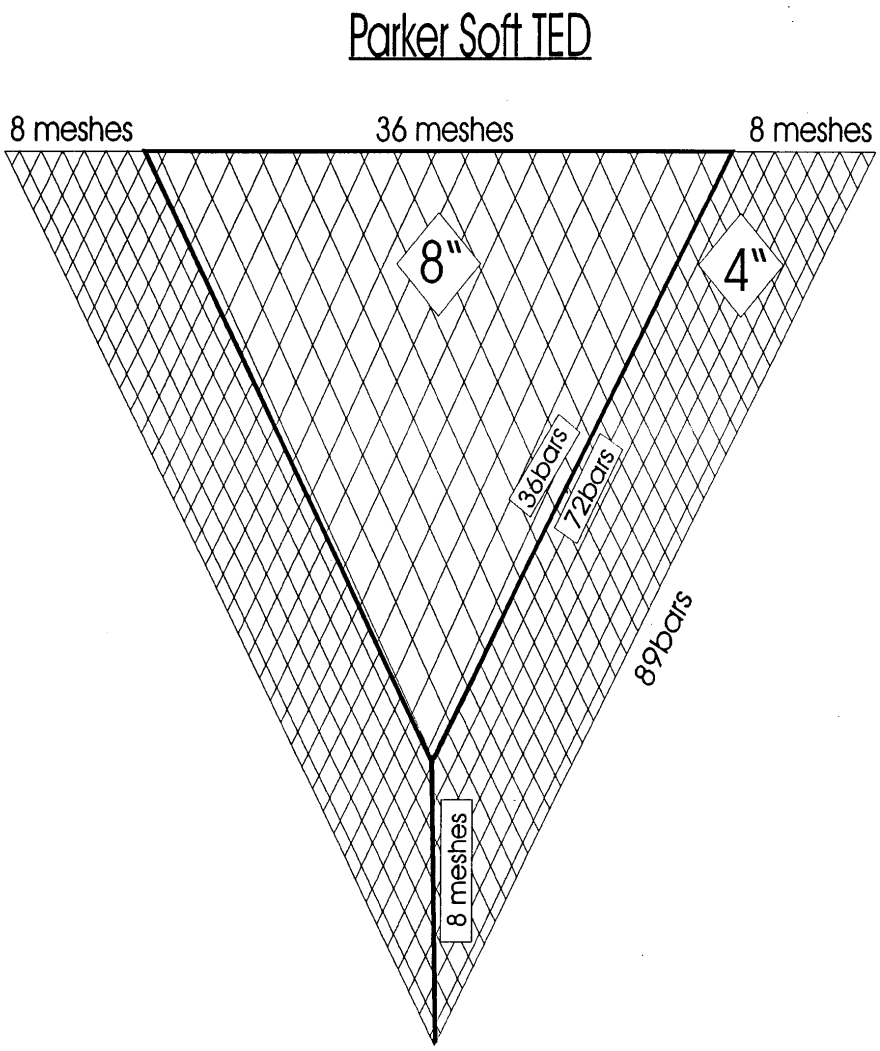


FIGURE 4 (GEORGIA TED)

[52 FR 24261, June 29, 1987. Redesignated at 57 FR 40868, Sept. 8, 1992]



The side panels are composed from 4-inch stretched mesh polyethylene or polypropylene webbing with No.48 twine size (3mm).

The main panel is composed of 8-inch stretced mesh polyethylene or polypropylene webbing with No.48 twine size (3mm).

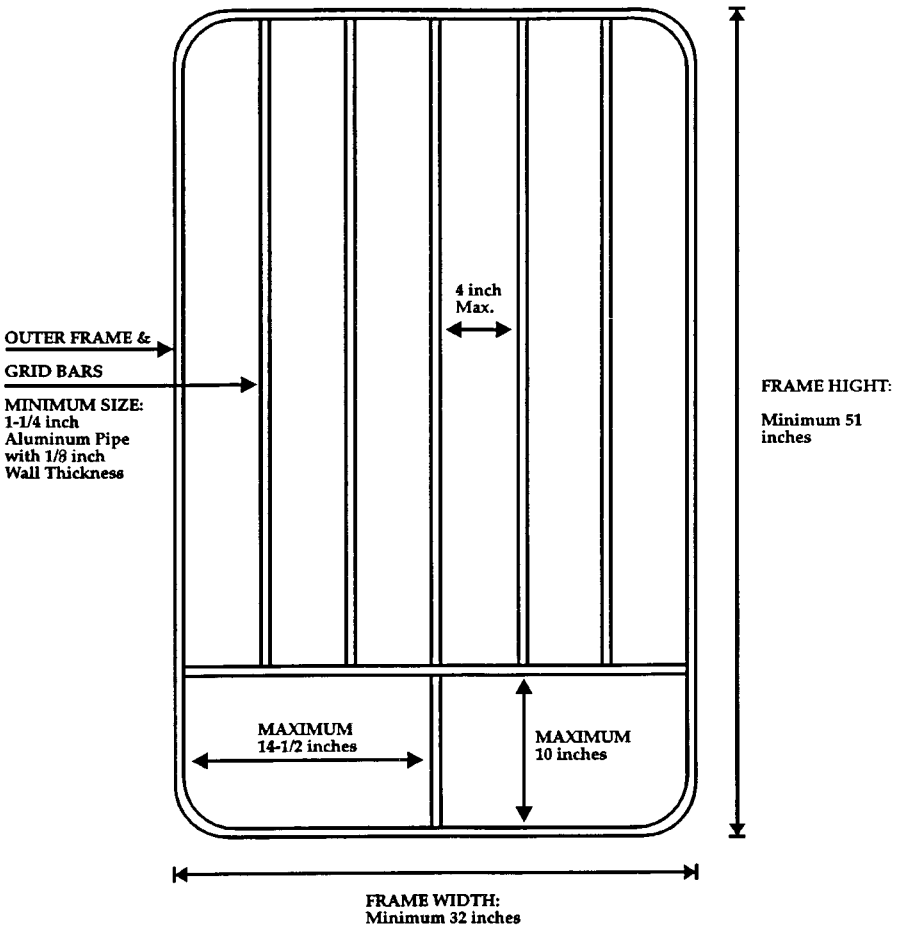
FIGURE 5 NET DIAGRAM FOR THE EXCLUDER PANEL OF THE PARKER SOFT TED

[63 FR 17958, Apr. 13, 1998]

FIGURES 6–9b TO PART 227 [RESERVED]

FLOUNDER TED

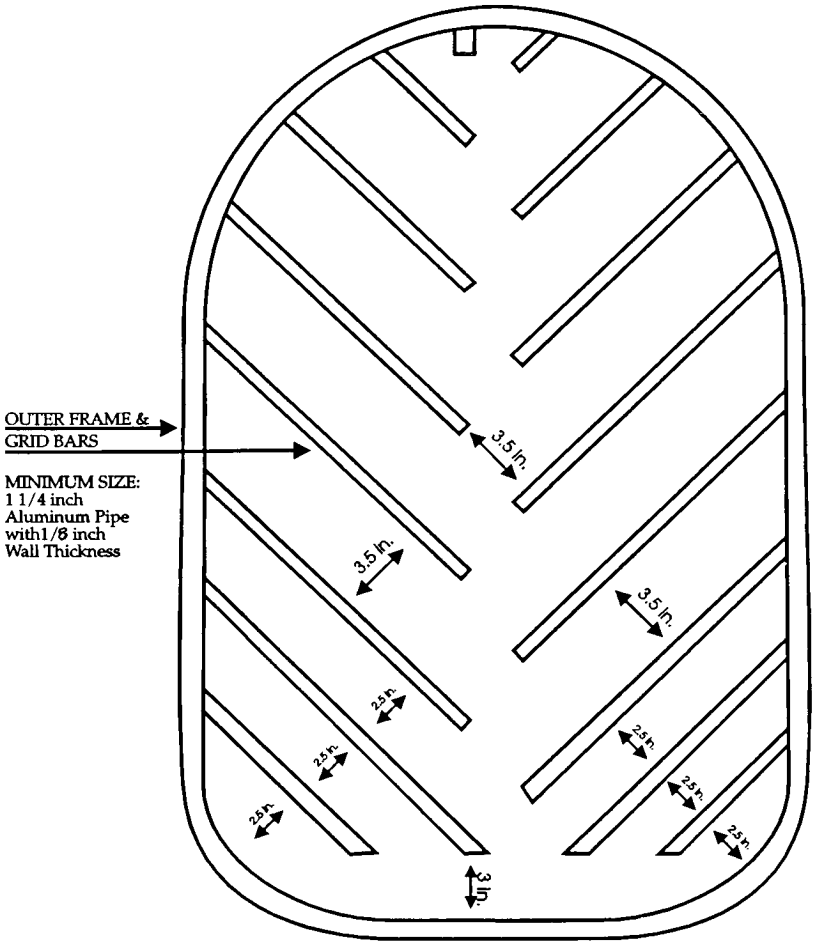
FIGURE 10



[58 FR 54069, Oct. 20, 1993]

JONES TED

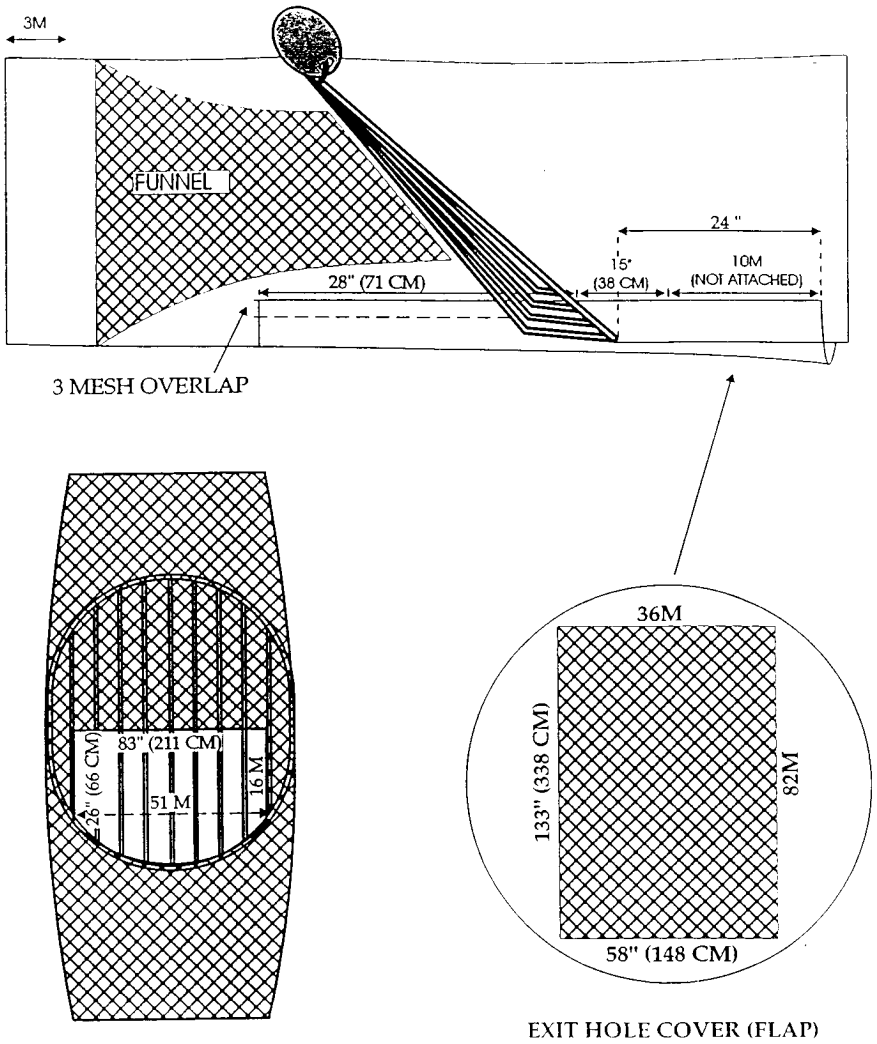
FIGURE 11



[58 FR 54070, Oct. 20, 1993]

FIGURE 12a to part 227

ATTACHMENT OF THE EXIT HOLE COVER



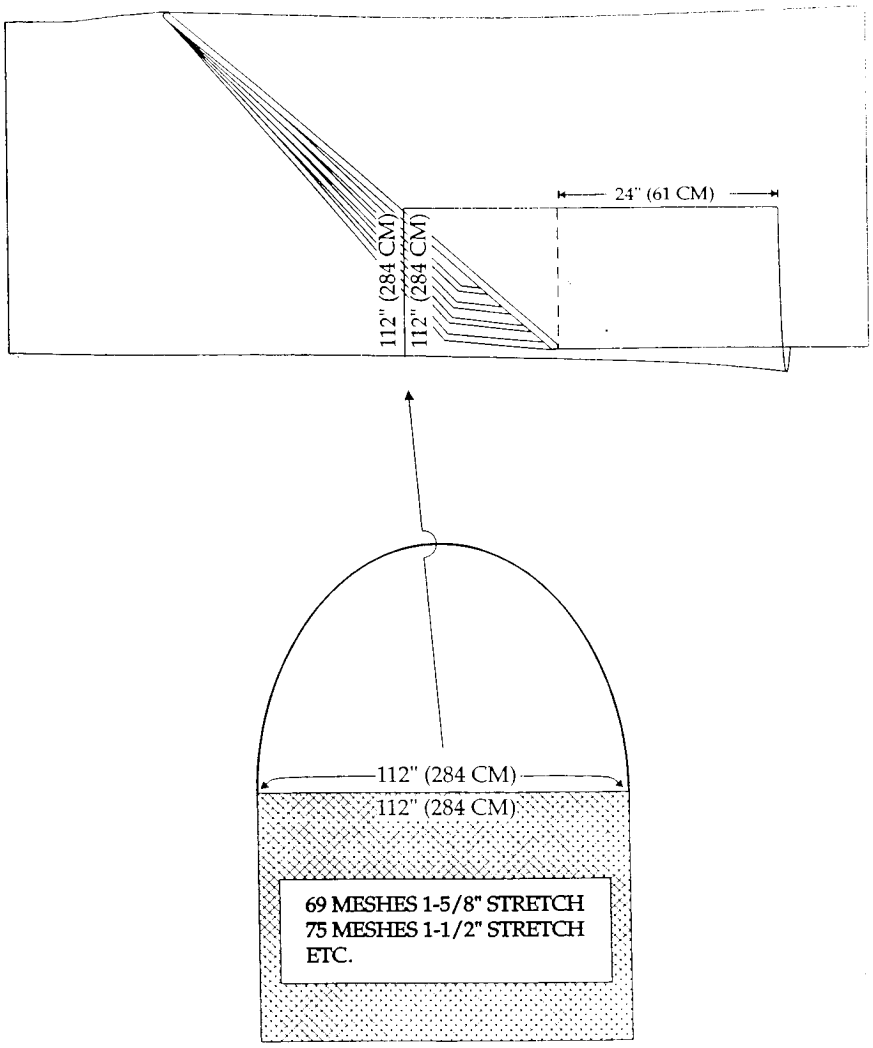
CUTTING THE EXIT HOLE

EXIT HOLE COVER (FLAP)

[59 FR 25830, May 18, 1994]

FIGURE 12b to part 227

GRID TED LEATHERBACK MODIFICATION



[59 FR 25831, May 18, 1994]

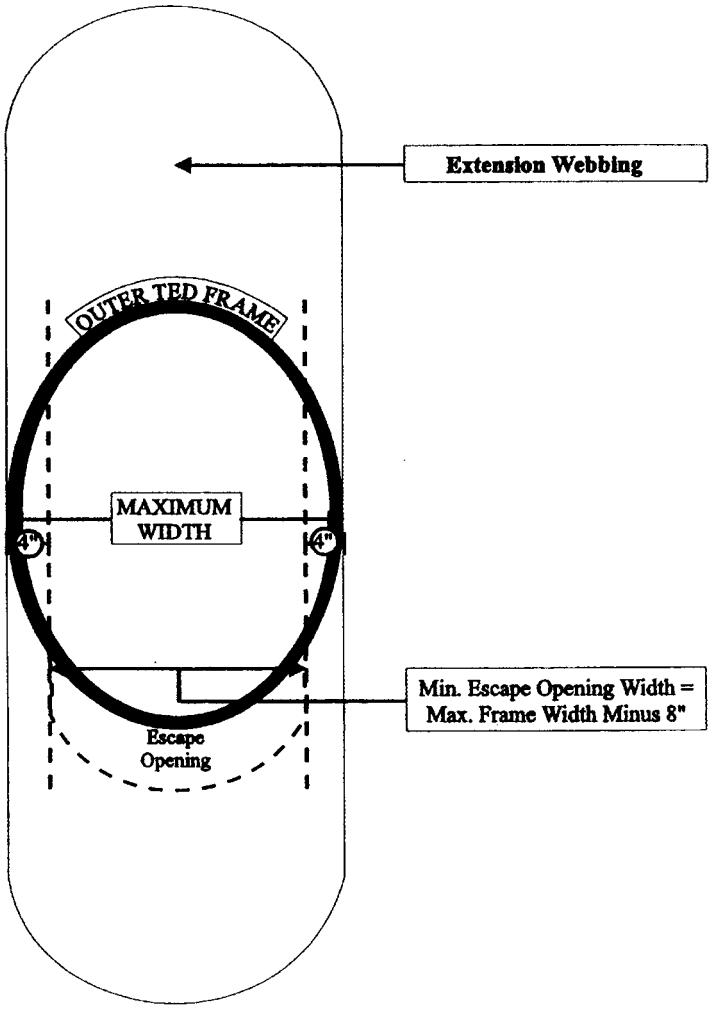


FIGURE 13 to part 227--SINGLE GRID HARD TED ESCAPE OPENING

[60 FR 15520, Mar. 24, 1995]

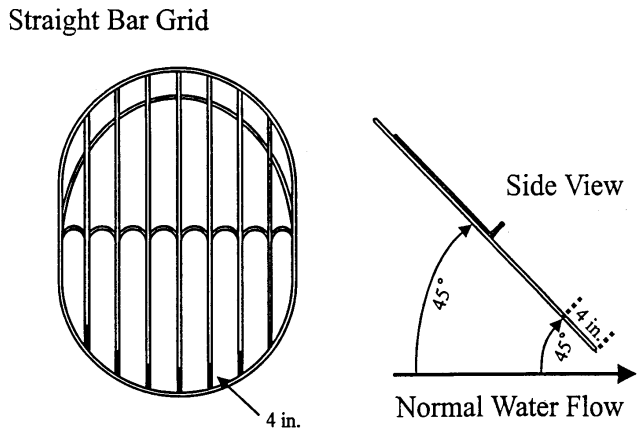


Figure 14a to part 227
Maximum Angle of Deflector Bars with Straight Bars
Attached to the Bottom of the Frame

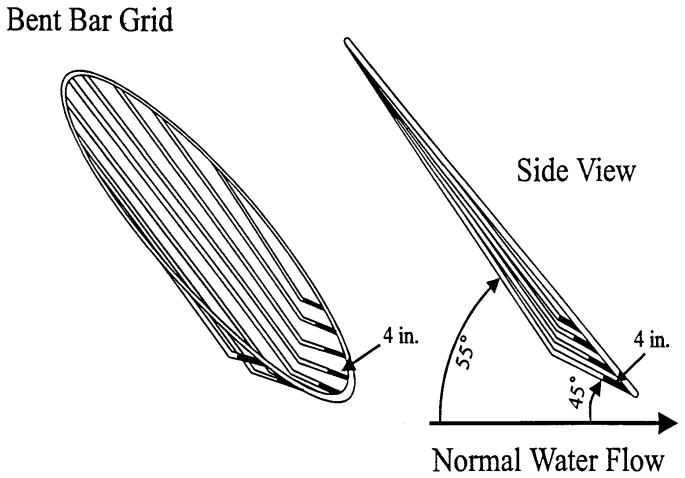


Figure 14b to part 227
Maximum Angle of Deflector Bars with Bent Bars
Attached to the Bottom of the Frame

[61 FR 66946, Dec. 19, 1996]

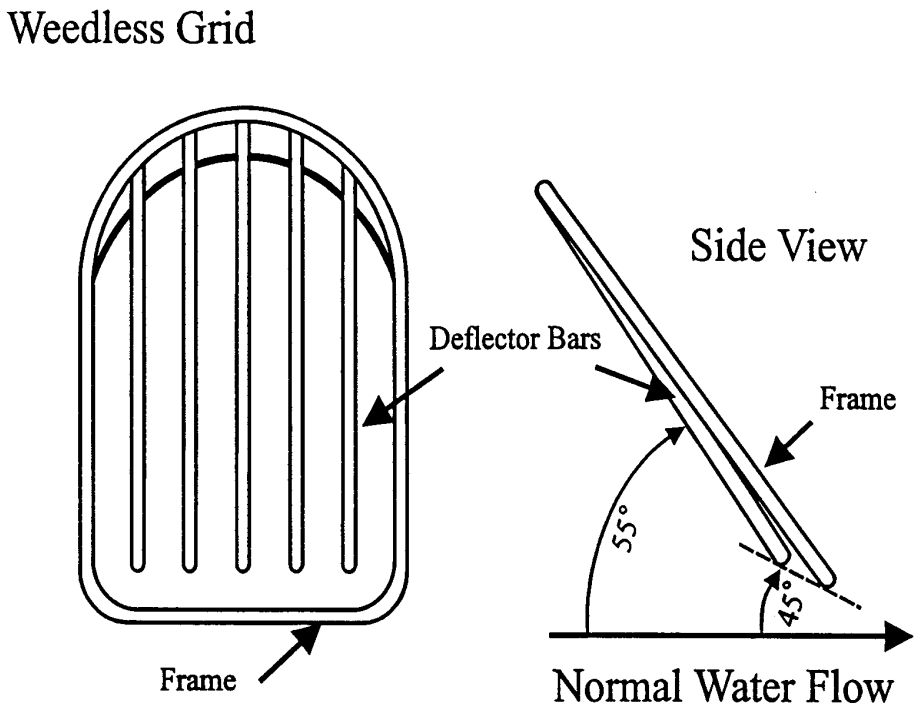


Figure 15 to part 227
Maximum Angle of Deflector Bars with Bars Unattached to the Bottom of the Frame

[61 FR 66947, Dec. 19, 1996]

PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972

Subpart A—General Provisions

Sec.
229.1 Purpose and scope.
229.2 Definitions.
229.3 Prohibitions.
229.4 Requirements for Category I and II fisheries.
229.5 Requirements for Category III fisheries.
229.6 Reporting requirements.
229.7 Monitoring of incidental mortalities and serious injuries.
229.8 Publication of List of Fisheries.
229.9 Emergency regulations.
229.10 Penalties.
229.11 Confidential fisheries data.
229.12 Consultation with the Secretary of the Interior.

Subpart B—Takes of Endangered and Threatened Marine Mammals

229.20 Issuance of permits.

Subpart C—Take Reduction Plan Regulations and Emergency Regulations

229.31 Pacific Offshore Cetacean Take Reduction Plan.
229.32 Atlantic large whale take reduction plan regulations.
FIGURE 1 TO PART 229—DRIFT GILLNET PINGER CONFIGURATION AND EXTENDER REQUIREMENTS

AUTHORITY: 16 U.S.C. 1361 *et seq.*

SOURCE: 60 FR 45100, Aug. 30, 1995, unless otherwise noted.

Subpart A—General Provisions

§ 229.1 Purpose and scope.

(a) The regulations in this part implement sections 101(a)(5)(E) and 118 of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1371(a)(5)(E) and 1387) that provide for exceptions for the taking of marine mammals incidental to certain commercial fishing operations from the Act's general moratorium on the taking of marine mammals.

(b) Section 118 of the Act, rather than sections 103 and 104, governs the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States, other than vessels fishing for yellowfin tuna in the eastern tropical Pacific Ocean purse seine fishery, and vessels that have valid fishing permits issued in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)).

(c) The regulations of Subpart B also govern the incidental taking by commercial fishers of marine mammals from species or stocks designated under the Act as depleted on the basis of their listing as threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(d) The regulations of this part do not apply to the incidental taking of California sea otters or to Northwest treaty Indian tribal members exercising treaty fishing rights.

(e) Authorizations under subpart A of this part are exemptions only from the taking prohibitions under the Act and not those under the Endangered Species Act of 1973. To be exempt from the taking prohibitions under the Endangered Species Act, specific authorization under subpart B of this part is required.

(f) Authorizations under this part do not apply to the intentional lethal taking of marine mammals in the course of commercial fishing operations.

(g) The purposes of the regulations in this part are to:

(1) Reduce the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations below the potential biological removal level for a particular stock, and

(2) Reduce the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate by the statutory deadline of April 30, 2001.

§ 229.2 Definitions.

In addition to the definitions contained in the Act and § 216.3 of this chapter, and unless the context otherwise requires, in this part 229:

Act or *MMPA* means the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*).

American lobster or lobster means *Homarus americanus.*

Anchored gillnet means any gillnet gear, including sink gillnets, that is set anywhere in the water column and which is anchored, secured or weighted to the bottom.

Assistant Administrator means the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration.

Authorization Certificate means a document issued by the Assistant Administrator, or designee, under the authority of section 118 of the Act that authorizes the incidental, but not intentional, taking of marine mammals in Category I or II fisheries.

Breaking strength means the highest tensile force which an object can withstand before breaking.

Bridle means the lines connecting a gillnet to an anchor or buoy line.

Buoy line means a line connecting fishing gear in the water to a buoy at the surface of the water.

Category I fishery means a commercial fishery determined by the Assistant Administrator to have frequent incidental mortality and serious injury of marine mammals. A commercial fishery that frequently causes mortality or serious injury of marine mammals is one that is by itself responsible for the annual removal of 50 percent or more of any stock's potential biological removal level.

Category II fishery means a commercial fishery determined by the Assistant Administrator to have occasional incidental mortality and serious injury of marine mammals. A commercial fishery that occasionally causes mortality or serious injury of marine mammals is one that, collectively with other fisheries, is responsible for the annual removal of more than 10 percent of any marine mammal stock's potential biological removal level and that is by itself responsible for the annual removal of between 1 and 50 percent, exclusive, of any stock's potential biological removal level. In the absence of reliable information indicating the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery, the Assistant Administrator will determine whether the taking is ''occasional'' by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area, or at the discretion of the Assistant Administrator. Eligible commercial fisheries not specifically identified in the list of fisheries are deemed to be Category II fisheries until the next list of fisheries is published.

Category III fishery means a commercial fishery determined by the Assistant Administrator to have a remote likelihood of, or no known incidental mortality and serious injury of marine mammals. A commercial fishery that has a remote likelihood of causing incidental mortality and serious injury of marine mammals is one that collectively with other fisheries is responsible for the annual removal of:

(1) Ten percent or less of any marine mammal stock's potential biological removal level, or

(2) More than 10 percent of any marine mammal stock's potential biological removal level, yet that fishery by itself is responsible for the annual removal of 1 percent or less of that stock's potential biological removal level. In the absence of reliable information indicating the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery, the Assistant Administrator will determine whether the taking is ''remote'' by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area or at the discretion of the Administrator.

Commercial fishing operation means the catching, taking, or harvesting of fish from the marine environment (or other areas where marine mammals occur) that results in the sale or barter of all or part of the fish harvested. The term includes licensed commercial passenger fishing vessel (as defined in §216.3 of this chapter) activities and aquaculture activities.

Depleted species means any species or population that has been designated as depleted under the Act and is listed in § 216.15 of this chapter or part 18, subpart E of this title, or any endangered or threatened species of marine mammal.

Driftnet, drift gillnet, or drift entanglement gear means gillnet gear that is not anchored, secured or weighted to the bottom.

Fish with or fishing with means to use, set, or haul back gear or allow gear that is set to remain in the water.

Fisher means the vessel owner or operator or owner or operator of gear in a nonvessel fishery.

Fishery has the same meaning as in section 3 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802).

Fishing trip means any time spent away from port actively engaged in commercial fishing operations. The end of a fishing trip will be the time of a fishing vessel's return to port or the return of a fisher from tending gear in a nonvessel fishery.

Fishing vessel or *vessel* means any vessel, boat, ship, or other craft that is used for, equipped to be used for, or of a type normally used for, fishing.

Float-line means the rope at the top of a gillnet from which the mesh portion of the net is hung.

Gillnet means fishing gear consisting of a wall of webbing or nets, designed or configured so that the webbing or nets are held approximately vertically in the water column designed to capture fish by entanglement, gilling, or wedging. Gillnets include gillnets of all types such as sink gillnets, other anchored gillnets, and drift gillnets.

Groundline, with reference to lobster pot gear, means a line connecting lobster pots in a lobster pot trawl, and, with reference to gillnet gear, means a line connecting a gillnet or gillnet bridle to an anchor or buoy line.

Incidental, but not intentional, take means the non-intentional or accidental taking of a marine mammal that results from, but is not the purpose of, carrying out an otherwise lawful action.

Incidental mortality means the non-intentional or accidental death of a marine mammal that results from, but is not the purpose of, carrying out an otherwise lawful action.

Injury means a wound or other physical harm. Signs of injury to a marine mammal include, but are not limited to, visible blood flow, loss of or damage to an appendage or jaw, inability to use one or more appendages, asymmetry in the shape of the body or body position, noticeable swelling or hemorrhage, laceration, puncture or rupture of eyeball, listless appearance or inability to defend itself, inability to swim or dive upon release from fishing gear, or signs of equilibrium imbalance. Any animal that ingests fishing gear, or any animal that is released with fishing gear entangling, trailing or perforating any part of the body will be considered injured regardless of the absence of any wound or other evidence of an injury.

Inshore Lobster waters means all state and Federal waters between 36°33′00.8″N lat. (the Virginia/North Carolina border) and the U.S./Canada border that is shoreward of the area designated below as ''offshore lobster waters.''

Interaction means coming in contact with fishing gear or catch. An interaction may be characterized by a marine mammal entangled, hooked, or otherwise trapped in fishing gear, regardless of whether injury or mortality occurs, or situations where marine mammals are preying on catch. Catch means fish or shellfish that has been hooked, entangled, snagged, trapped or otherwise captured by commercial fishing gear.

Lead-line means the rope, weighted or otherwise, to which the bottom edge of a gillnet is attached.

List of Fisheries means the most recent final list of commercial fisheries published in the FEDERAL REGISTER by the Assistant Administrator, categorized according to the likelihood of incidental mortality and serious injury of marine mammals during commercial fishing operations.

Lobster pot means any trap, structure or other device that is placed on the ocean bottom and is designed to or is capable of catching lobsters.

Lobster pot trawl means two or more lobster pots attached to a single groundline.

Mid-Atlantic coastal waters means waters bounded by the line defined by the

following points: The southern shoreline of Long Island, New York at 72°30′W, then due south to 33°51′N lat., thence west to the North Carolina/South Carolina border.

Minimum population estimate means an estimate of the number of animals in a stock that:

(1) Is based on the best available scientific information on abundance, incorporating the precision and variability associated with such information; and

(2) Provides reasonable assurance that the stock size is equal to or greater than the estimate.

Negligible impact has the same meaning as in § 228.3 of this chapter.

Net productivity rate means the annual per capita rate of increase in a stock resulting from additions due to reproduction, less losses due to mortality.

NMFS means the National Marine Fisheries Service.

Nonvessel fishery means a commercial fishing operation that uses fixed or other gear without a vessel, such as gear used in set gillnet, trap, beach seine, weir, ranch, and pen fisheries.

Northeast waters means those U.S. waters east of 72°30′W and north of 36°33′00.8″N lat. (the Virginia-North Carolina border).

Observer means an individual authorized by NMFS, or a designated contractor, to record information on marine mammal interactions, fishing operations, marine mammal life history information, and other scientific data, and collect biological specimens during commercial fishing activities.

Offshore lobster waters includes all U.S. waters seaward of the following lines except for waters in the Great South Channel critical right whale habitat: Beginning at the international boundary between the U.S. and Canada; thence southerly along the boundary to the LORAN C 9960–Y–44400 line; thence southwesterly along the 44400 line to 70°W long.; thence south along the 70° meridian to the LORAN C 9960–W–13700 line; thence southeasterly to the intersection with the LORAN C 9960–Y–43700 line; thence westerly to the intersection with the LORAN C 9960–W–14610 line; thence southerly along the 14610 line to the intersection with the LORAN C 9960–Y–43700 line; thence southwesterly to the intersection of the LORAN C lines 9960–Y–43500 and 9960–X–26400; thence southerly to the intersection of the LORAN C lines 9960–Y–42600 and 9960–X–26550; thence southerly to the intersection of the LORAN C lines 9960–Y–42300 and 9960–X–26700; thence southerly to the intersection of the LORAN C lines 9960–Y–41600 and 9960–X–26875; thence southerly in a line toward the intersection of LORAN C lines 9960–Y–40600 and 9960–X–26800 but stopping at 36°33′00.8″N lat. (the North Carolina/Virginia border); thence due west to the shore.

Operator, with respect to any vessel, means the master, captain, or other individual in charge of that vessel.

Potential biological removal level means the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. The potential biological removal level is the product of the following factors:

(1) The minimum population estimate of the stock;

(2) One-half the maximum theoretical or estimated net productivity rate of the stock at a small population size; and

(3) A recovery factor of between 0.1 and 1.0.

Regional Fishery Management Council means a regional fishery management council established under section 302 of the Magnuson Fishery Conservation and Management Act.

Serious injury means any injury that will likely result in mortality.

Sink gillnet has the meaning specified in 50 CFR 648.2.

Sinking line means rope that sinks and does not float at any point in the water column. Polypropylene rope is not sinking line unless it contains a lead core.

Southeast waters means waters south of a line extending due eastward from 33°51′N lat. (the North Carolina/South Carolina border).

Spotter plane means a plane that is deployed for the purpose of locating schools of target fish for a fishing vessel that intends to set fishing gear on them.

Stellwagen Bank/Jeffreys Ledge area means all Federal waters in the Gulf of Maine, except those designated as right whale critical habitat, that lie south of the 43°15′N lat. line and west of the 70° W long. line.

Strategic stock means a marine mammal stock:

(1) For which the level of direct human-caused mortality exceeds the potential biological removal level;

(2) Which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act of 1973 within the foreseeable future;

(3) Which is listed as a threatened species or endangered species under the Endangered Species Act of 1973; or

(4) Which is designated as depleted under the Marine Mammal Protection Act of 1972, as amended.

Strikenet or to fish with strikenet gear means a gillnet, or a net similar in construction to a gillnet, that is designed so that when it is deployed, it encircles or encloses an area of water either with the net, or by utilizing the shoreline to complete encirclement, or to fish with such a net and method.

Take Reduction Plan means a plan developed to reduce the incidental mortality and serious injury of marine mammals during commercial fishing operations in accordance with section 118 of the Marine Mammal Protection Act of 1972, as amended.

Take Reduction Team means a team established to recommend methods of reducing the incidental mortality and serious injury of marine mammals due to commercial fishing operations, in accordance with section 118 of the Marine Mammal Protection Act of 1972, as amended.

Tended gear or tend means active fishing gear that is physically attached to a vessel or to fish so that active gear is attached to the vessel.

U.S. waters means both state and Federal waters to the outer boundaries of the U.S. exclusive economic zone along the east coast of the United States from the Canadian/U.S. border southward to a line extending eastward from the southernmost tip of Florida on the Florida shore.

Vessel owner or operator means the owner or operator of:

(1) A fishing vessel that engages in a commercial fishing operation; or

(2) Fixed or other commercial fishing gear that is used in a nonvessel fishery.

Vessel of the United States has the same meaning as in section 3 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802).

Weak link means a breakable device that will part when subject to a certain tension load.

[60 FR 45100, Aug. 30, 1995, as amended at 62 FR 39183, July 22, 1997]

§ 229.3 Prohibitions.

(a) It is prohibited to take any marine mammal incidental to commercial fishing operations except as otherwise provided in part 216 of this chapter or in this part 229.

(b) It is prohibited to assault, harm, harass (including sexually harass), oppose, impede, intimidate, impair, or in any way influence or interfere with an observer, or attempt the same. This prohibition includes, but is not limited to, any action that interferes with an observer's responsibilities, or that creates an intimidating, hostile, or offensive environment.

(c) It is prohibited to provide false information when registering for an Authorization Certificate, applying for renewal of the Authorization Certificate, reporting the taking of any marine mammal, or providing information to any observer.

(d) It is prohibited to tamper with or destroy observer equipment in any way.

(e) It is prohibited to intentionally lethally take any marine mammal in the course of commercial fishing operations unless imminently necessary in self-defense or to save the life of a person in immediate danger, and such taking is reported in accordance with the requirements of § 229.6.

(f) It is prohibited to violate any regulation in this part or any provision of section 118 of the Act.

(g) It is prohibited to fish with lobster pot gear in the areas and for the times specified in § 229.32 (c)(4) through (c)(10) unless the lobster pot gear meets the marking requirements specified in

§229.32(c)(1) and complies with the closures, modifications, and restrictions specified in §229.32 (c)(2) through (c)(10).

(h) It is prohibited to fish with anchored gillnet gear in the areas and for the times specified in §229.32 (d)(3) through (d)(8) unless that gillnet gear meets the marking requirements specified in §229.32(d)(1) and complies with the closures, modifications, and restrictions specified in §229.32 (d)(2) through (d)(8).

(i) It is prohibited to fish with drift gillnets in the areas and for the times specified in §229.32(e)(2) unless the drift gillnet gear meets the marking requirements specified in §229.32(e)(1) and complies with the restrictions specified in §229.32(e)(2).

(j) It is prohibited to fish with shark driftnet gear in the areas and for the times specified in §229.32(f) (2) and (3) unless the gear meets the marking requirements specified in §229.32(f)(1) and complies with the restrictions and requirements specified in §§229.32 (f)(2) and (f)(3).

[60 FR 45100, Aug. 30, 1995, as amended at 62 FR 39184, July 22, 1997]

§229.4 Requirements for Category I and II fisheries.

(a) *General.* (1) For a vessel owner or crew members to lawfully incidentally take marine mammals in the course of a commercial fishing operation in a Category I or II fishery, the owner or authorized representative of a fishing vessel or nonvessel fishing gear must have in possession a valid Certificate of Authorization. The owner of a fishing vessel or nonvessel fishing gear is responsible for obtaining a Certificate of Authorization.

(2) The granting and administration of Authorization Certificates under this part will be integrated and coordinated with existing fishery license, registration, or permit systems and related programs wherever possible. These programs may include, but are not limited to, state or interjurisdictional fisheries programs. If the administration of Authorization Certificates is integrated into a program, NMFS will publish a notice in the FEDERAL REGISTER announcing the integrated program and summarizing how an owner or authorized representative of a fishing vessel or non-fishing gear may register under that program or how registration will be achieved if no action is required on the part of the affected fisher. NMFS will make additional efforts to contact participants in the affected fishery via other appropriate means of notification.

(b) *Registration.* (1) The owner of a vessel, or for nonvessel gear fisheries, the owner of gear, who participates in a Category I or II fishery is required to be registered for a Certificate of Authorization.

(2) Unless a notice is published in the FEDERAL REGISTER announcing an integrated registration program, the owner of a vessel, or for nonvessel fishery, the owner of the gear must register for and receive an Authorization Certificate. To register, owners must submit the following information using the format specified by NMFS:

(i) Name, address, and phone number of owner.

(ii) Name, address, and phone number of operator, if different from owner, unless the name of the operator is not known or has not been established at the time the registration is submitted.

(iii) For a vessel fishery, vessel name, length, home port; U.S. Coast Guard documentation number or state registration number, and if applicable; state commercial vessel license number and for a nonvessel fishery, a description of the gear and state commercial license number, if applicable.

(iv) A list of all Category I and II fisheries in which the fisher may actively engage during the calendar year.

(v) The approximate time, duration, and location of each such fishery operation, and the general type and nature of use of the fishing gear and techniques used.

(vi) A certification signed and dated by the owner of an authorized representative of the owner as follows: ''I hereby certify that I am the owner of the vessel, that I have reviewed all information contained on this document, and that it is true and complete to the best of my knowledge.''

(3) If a notice is published in the FEDERAL REGISTER announcing an integrated registration program, the owner of a vessel, or for nonvessel fishery, the

owner of the gear may register by following the directions provided in that notice. If a person receives a registration to which he or she is not entitled or if the registration contains incorrect, inaccurate or incomplete information, the person shall notify NMFS within 10 days following receipt. If a fisher participating in a Category I or II fishery who expects to receive automatic registration does not receive that registration within the time specified in the notice announcing the integrated registration program, the person shall notify NMFS as directed in the notice or may apply for registration by submitting the information required under paragraph (b)(1)(i) through (b)(1)(vi) of this section.

(c) *Fee.* A check or money order made payable to NMFS in the amount specified in the notice of the final List of Fisheries must accompany each registration submitted to NMFS. The amount of this fee will be based on recovering the administrative costs incurred in granting an authorization. The Assistant Administrator may waive the fee requirement for good cause upon the recommendation of the Regional Director.

(d) *Address.* Unless the granting and administration of authorizations under part 229 is integrated and coordinated with existing fishery licenses, registrations, or related programs pursuant to paragraph (a) of this section, requests for registration forms and completed registration forms should be sent to the NMFS Regional Offices are given:

(1) Alaska Region, NMFS, P.O. Box 21668, 709 West 9th Street, Juneau, AK 99802; telephone: 907–586-7235;

(2) Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115-0070; telephone: 206–526-4353;

(3) Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213; telephone: 310–980–4001;

(4) Northeast Region, NMFS, 1 Blackburn Drive, Gloucester, MA 01930; telephone: 508–281–9254; or

(5) Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702; telephone: 813–570–5301.

(e) *Issuance.* (1) Unless an integrated registration program is in place, NMFS will issue an Authorization Certificate and, if necessary, a decal to an owner or authorized representative who:

(i) Submits a completed registration form and the required fee.

(ii) Has complied with the requirements of this section and §§229.6 and 229.7.

(iii) Has submitted updated registration or renewal registration which includes a statement (yes/no) whether any marine mammals were killed or injuried during the current or previous calendar year.

(2) If an integrated registration program has been established, an Authorization Certificate or other proof of registration will be issued annually to each fisher registered for that fishery.

(3) If a person receives a renewed Authorization Certificate or a decal to which he or she is not entitled, the person shall notify NMFS within 10 days following receipt. In order for a Authorization Certificate to be valid, the certification must be signed and dated by the owner or an authorized representative of the owner.

(f) *Authorization Certificate and decal requirements.* (1) The annual decal must be attached to the vessel on the port side of the cabin or, in the absence of a cabin, on the forward port side of the hull, and must be free of obstruction and in good condition. The decal must be attached to the Authorization Certificate for nonvessel fisheries.

(2) The Authorization Certificate, or a copy, must be on board the vessel while it is operating in a Category I or II fishery, or, in the case of nonvessel fisheries, the Authorization Certificate with decal attached, or copy must be in the possession of the person in charge of the fishing operation. The Authorization Certificate, or copy, must be made available upon request to any state or Federal enforcement agent authorized to enforce the Act, any designated agent of NMFS, or any contractor providing observer services to NMFS.

(3) Authorization Certificates and annual decals are not transferable. In the event of the sale or change in ownership of the vessel, the Authorization Certificate is void and the new owner must register for an Authorization Certificate and decal.

(4) An Authorization Certificate holder must notify the issuing office in writing:

(i) If the vessel or nonvessel fishing gear will engage in any Category I or II fishery not listed on the initial registration form at least 30 days prior to engaging in that fishery; and,

(ii) If there are any changes in the mailing address or vessel ownership within 30 days of such change.

(g) *Reporting.* Any Authorization Certificate holders must comply with the reporting requirements specified under §229.6.

(h) *Disposition of marine mammals.* Any marine mammal incidentally taken must be immediately returned to the sea with a minimum of further injury, unless directed otherwise by NMFS personnel, a designated contractor or an official onboard observer, or authorized otherwise by a scientific research permit that is in the possession of the operator.

(i) *Monitoring.* Authorization Certificate holders must comply with the observer or other monitoring requirements specified under §229.7.

(j) *Deterrence.* When necessary to deter a marine mammal from damaging fishing gear, catch, or other private property, or from endangering personal safety, vessel owners and crew members engaged in a Category I or II fishery must comply with all deterrence provisions set forth in the Act and all guidelines and prohibitions published thereunder.

(k) *Self defense.* When imminently necessary in self-defense or to save the life of a person in immediate danger, a marine mammal may be lethally taken if such taking is reported to NMFS in accordance with the requirements of §229.6.

(l) *Take reduction plans and emergency regulations.* Authorization Certificate holders must comply with any applicable take reduction plans and emergency regulations.

(m) *Expiration.* Authorization Certificates and annual decals expire at the end of each calendar year.

[60 FR 45100, Aug. 30, 1995, as amended at 62 FR 46, Jan. 2, 1997]

§229.5 Requirements for Category III fisheries.

(a) *General.* Vessel owners and crew members of such vessels engaged only in Category III fisheries may incidentally take marine mammals without registering for or receiving an Authorization Certificate.

(b) *Reporting.* Vessel owners engaged in a Category III fishery must comply with the reporting requirements specified in §229.6.

(c) *Disposition of marine mammals.* Any marine mammal incidentally taken must be immediately returned to the sea with a minimum of further injury unless directed otherwise by NMFS personnel, a designated contractor, or an official onboard observer, or authorized otherwise by a scientific research permit in the possession of the operator.

(d) *Monitoring.* Vessel owners engaged in a Category III fishery must comply with the observer requirements specified under §229.7(f).

(e) *Deterrence.* When necessary to deter a marine mammal from damaging fishing gear, catch, or other private property, or from endangering personal safety, vessel owners and crew members engaged in a Category I or II fishery must comply with all deterrence provisions set forth in the Act and all guidelines and prohibitions published thereunder.

(f) *Self-defense.* When imminently necessary in self-defense or to save the life of a person in immediate danger, a marine mammal may be lethally taken if such taking is reported to NMFS in accordance with the requirements of §229.6.

(g) *Emergency regulations.* Vessel owners engaged in a Category III fishery must comply with any applicable emergency regulations.

§229.6 Reporting requirements.

(a) Vessel owners or operators engaged in any Category I, II, or III fishery must report all incidental mortality and injury of marine mammals in the course of commercial fishing operations to the Assistant Administrator, or appropriate Regional Office, by mail or other means, such as fax or overnight mail specified by the Assistant Administrator. Reports must be sent

within 48 hours after the end of each fishing trip during which the incidental mortality or injury occurred, or, for nonvessel fisheries, within 48 hours of an occurrence of an incidental mortality or injury. Reports must be submitted on a standard postage-paid form as provided by the Assistant Administrator. The vessel owner or operator must provide the following information on this form:

(1) The vessel name, and Federal, state, or tribal registration numbers of the registered vessel;

(2) The name and address of the vessel owner or operator;

(3) The name and description of the fishery, including gear type and target species; and

(4) The species and number of each marine mammal incidentally killed or injured, and the date, time, and approximate geographic location of such occurrence. A description of the animal(s) killed or injured must be provided if the species is unknown.

(b) Participants in nonvessel fisheries must provide all of the information in paragraphs (a)(1) through (4) of this section with the exception of the vessel name and registration number.

§ 229.7 Monitoring of incidental mortalities and serious injuries.

(a) *Purpose.* The Assistant Administrator will establish a program to monitor incidental mortality and serious injury of marine mammals during the course of commercial fishing operations in order to:

(1) Obtain statistically reliable estimates of incidental mortality and serious injury;

(2) Determine the reliability of reports of incidental mortality and injury under § 229.6; and

(3) Identify changes in fishing methods or technology that may increase or decrease incidental mortality and serious injury.

(b) *Observer program.* Pursuant to paragraph (a) of this section, the Assistant Administrator may place observers aboard Category I and II vessels as necessary. Observers may, among other tasks:

(1) Record incidental mortality and injury, and bycatch of other nontarget species;

(2) Record numbers of marine mammals sighted; and

(3) Perform other scientific investigations, which may include, but are not limited to, sampling and photographing incidental mortalities and serious injuries.

(c) *Observer requirements for Authorization Certificate holders.* (1) If requested by NMFS or a designated contractor providing observer services to NMFS, an Authorization Certificate holder engaged in a Category I or II fishery must take aboard an observer to accompany the vessel on fishing trips.

(2) After being notified by NMFS, or by a designated contractor providing observer services to NMFS, that the vessel is required to carry an observer, the Authorization Certificate holder must comply with the notification by providing information requested within the specified time on scheduled or anticipated fishing trips.

(3) NMFS, or a designated contractor providing observer services to NMFS, may waive the observer requirement based on a finding that the facilities for housing the observer or for carrying out observer functions are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized.

(4) The Authorization Certificate holder and crew must cooperate with the observer in the performance of the observer's duties including:

(i) Providing adequate accommodations;

(ii) Allowing for the embarking and debarking of the observer as specified by NMFS personnel or designated contractors. The operator of a vessel must ensure that transfers of observers at sea are accomplished in a safe manner, via small boat or raft, during daylight hours if feasible, as weather and sea conditions allow, and with the agreement of the observer involved;

(iii) Allowing the observer access to all areas of the vessel necessary to conduct observer duties;

(iv) Allowing the observer access to communications equipment and navigation equipment, when available on the vessel, as necessary to perform observer duties;

(v) Providing true vessel locations by latitude and longitude, accurate to the minute, or by loran coordinates, upon request by the observer;

(vi) Sampling marine mammal or other protected species specimens, upon request by NMFS personnel;

(vii) Sampling, retaining and storing mammal or other protected species specimens, upon request by NMFS personnel, designated contractors, or the observer aboard, if adequate facilities are available and if feasible;

(viii) Notifying the observer in a timely fashion of when all commercial fishing operations are to begin and end;

(ix) Not impairing or in any way interfering with the research or observations being carried out; and

(x) Complying with other guidelines or regulations that NMFS may develop to ensure the effective deployment and use of observers.

(5) Marine mammals incidentally killed during fishing operations and which are readily accessible to crew members, must be brought onboard the vessel as biological specimens and retained for the purposes of scientific research if feasible and requested by NMFS personnel, designated contractors, or the aboard observer. Marine mammals so collected and retained as biological specimens must, upon request by NMFS personnel, designated contractors, or the observer aboard, be retained in cold storage on board the vessel, if feasible, until removed at the request of NMFS personnel, designated contractors, or the observer aboard, retrieved by authorized personnel of NMFS, or released by the observer for return to the ocean. Such biological specimens may be transported on board the vessel during the fishing trip and back to port under this authorization.

(6) Any marine mammal incidentally taken may be retained only if authorized by NMFS personnel, designated contractors or an official observer aboard, or by a scientific research permit that is in the possession of the operator.

(d) *Observer requirements for Category III fisheries.* (1) The Assistant Administrator may place observers on Category III vessels if the Assistant Administrator:

(i) Believes that the incidental mortality and serious injury of marine mammals from such fishery may be contributing to the immediate and significant adverse impact on a species or stock listed as a threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*); and

(ii) Has complied with §229.9(a)(3)(i) and (ii); or

(iii) Has the consent of the vessel owner.

(2) If an observer is placed on a Category III vessel, the vessel owner and/or operator must comply with the requirements of §229.7(c).

(e) *Alternative observer program.* The Assistant Administrator may establish an alternative observer program to provide statistically reliable information on the species and number of marine mammals incidentally taken in the course of commercial fishing operations. The alternative observer program may include direct observation of fishing activities from vessels, airplanes, or points on shore.

§229.8 Publication of List of Fisheries.

(a) The Assistant Administrator will publish in the FEDERAL REGISTER a proposed revised List of Fisheries on or about July 1 of each year for the purpose of receiving public comment. Each year, on or about October 1, the Assistant Administrator will publish a final revised List of Fisheries, which will become effective January 1 of the next calendar year.

(b) The proposed and final revised List of Fisheries will:

(1) Categorize each commercial fishery based on the definitions of Category I, II, and III fisheries set forth in §229.2; and

(2) List the marine mammals that interact with commercial fishing operations and the estimated number of vessels or persons involved in each commercial fishery.

(c) The Assistant Administrator may publish a revised List of Fisheries at other times, after notification and opportunity for public comment. The revised final List of Fisheries will become effective no sooner than 30 days after publication in the FEDERAL REGISTER.

§ 229.9 Emergency regulations.

(a) If the Assistant Administrator finds that the incidental mortality or serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species, the Assistant Administrator will:

(1) In the case of a stock or species for which a take reduction plan is in effect—

(i) Prescribe emergency regulations that, consistent with such plan to the maximum extent practicable, reduce incidental mortality and serious injury in that fishery; and

(ii) Approve and implement on an expedited basis, any amendments to such plan that are recommended by the Take Reduction Team to address such adverse impact;

(2) In the case of a stock or species for which a take reduction plan is being developed—

(i) Prescribe emergency regulations to reduce such incidental mortality and serious injury in that fishery; and

(ii) Approve and implement, on an expedited basis, such plan, which will provide methods to address such adverse impact if still necessary;

(3) In the case of a stock or species for which a take reduction plan does not exist and is not being developed, or in the case of a Category III fishery that the Assistant Administrator believes may be contributing to such adverse impact,

(i) Prescribe emergency regulations to reduce such incidental mortality and serious injury in that fishery, to the extent necessary to mitigate such adverse impact;

(ii) Immediately review the stock assessment for such stock or species and the classification of such commercial fishery under this section to determine if a take reduction team should be established; and

(iii) Where necessary to address such adverse impact on a species or stock listed as a threatened species or endangered species under the Endangered Species Act (16 U.S.C. 1531 *et seq.*), place observers on vessels in a Category III fishery if the Assistant Administrator has reason to believe such vessels may be causing the incidental mortality and serious injury to marine mammals from such stock.

(b) Prior to taking any action under § 229.9(a)(1) through (3), the Assistant Administrator will consult with the Marine Mammal Commission, all appropriate Regional Fishery Management Councils, state fishery managers, and the appropriate take reduction team, if established.

(c) Any emergency regulations issued under this section:

(1) Shall be published in the FEDERAL REGISTER and will remain in effect for no more than 180 days or until the end of the applicable commercial fishing season, whichever is earlier, except as provided in paragraph (d) of this section; and

(2) May be terminated by notification in the FEDERAL REGISTER at an earlier date if the Assistant Administrator determines that the reasons for the emergency regulations no longer exist.

(d) If the Assistant Administrator finds that incidental mortality and serious injury of marine mammals in a commercial fishery is continuing to have an immediate and significant adverse impact on a stock or species, the Assistant Administrator may extend the emergency regulations for an additional period of not more than 90 days or until reasons for the emergency regulations no longer exist, whichever is earlier.

§ 229.10 Penalties.

(a) Except as provided for in paragraphs (b) and (c) of this section, any person who violates any regulation under this part or any provision of section 118 of the MMPA shall be subject to all penalties set forth in the Act.

(b) The owner or master of a vessel that fails to comply with a take reduction plan shall be subject to the penalties of sections 105 and 107 of the Act, and may be subject to the penalties of section 106 of the Act.

(c) The owner of a vessel engaged in a Category I or II fishery who fails to ensure that a decal, or other physical evidence of such authorization issued by NMFS, is displayed on the vessel or is in possession of the operator of the vessel shall be subject to a penalty of not more than $100.

(d) Failure to comply with take reduction plans or emergency regulations issued under this part may result in suspension or revocation of an Authorization Certificate, and failure to comply with a take reduction plan is also subject to the penalties of sections 105 and 107 of the Act, and may be subject to the penalties of section 106 of the Act.

(e) For fishers operating in Category I or II fisheries, failure to report all incidental injuries and mortalities within 48 hours of the end of each fishing trip, or failure to comply with requirements to carry an observer, will subject such persons to the penalties of sections 105 and 107 and may subject them to the penalties of section 106 of the Act, which will result in suspension, revocation, or denial of an Authorization Certificate until such requirements have been fulfilled.

(f) For fishers operating in Category III fisheries, failure to report all incidental injuries and mortalities within 48 hours of the end of each fishing trip will subject such persons to the penalties of sections 105 and 107, and may subject them to section 106, of the Act.

(g) *Suspension, revocation or denial of Authorization Certificates.* (1) Until the Authorization Certificate holder complies with the regulations under this part, the Assistant Administrator shall suspend or revoke an Authorization Certificate or deny an annual renewal of an Authorization Certificate in accordance with the provisions in 15 CFR part 904 if the Authorization Certificate holder fails to report all incidental mortality and serious injury of marine mammals as required under §229.6; or fails to take aboard an observer if requested by NMFS or its designated contractors.

(2) The Assistant Administrator may suspend or revoke an Authorization Certificate or deny an annual renewal of an Authorization Certificate in accordance with the provisions in 15 CFR part 904 if the Authorization Certificate holder fails to comply with any applicable take reduction plan, take reduction regulations, or emergency regulations developed under this subpart or subparts B and C of this part or if the Authorization Certificate holder fails to comply with other requirements of these regulations;

(3) A suspended Authorization Certificate may be reinstated at any time at the discretion of the Assistant Administrator provided the Assistant Administrator has determined that the reasons for the suspension no longer apply or corrective actions have been taken.

§229.11 Confidential fisheries data.

(a) Proprietary information collected under this part is confidential and includes information, the unauthorized disclosure of which could be prejudicial or harmful, such as information or data that are identifiable with an individual fisher. Proprietary information obtained under part 229 will not be disclosed, in accordance with NOAA Administrative Order 216–100, except:

(1) To Federal employees whose duties require access to such information;

(2) To state employees under an agreement with NMFS that prevents public disclosure of the identity or business of any person;

(3) When required by court order; or

(4) In the case of scientific information involving fisheries, to employees of Regional Fishery Management Councils who are responsible for fishery management plan development and monitoring.

(5) To other individuals or organizations authorized by the Assistant Administrator to analyze this information, so long as the confidentiality of individual fishers is not revealed.

(b) Information will be made available to the public in aggregate, summary, or other such form that does not disclose the identity or business of any person in accordance with NOAA Administrative Order 216–100 (see ADDRESSES). Aggregate or summary form means data structured so that the identity of the submitter cannot be determined either from the present release of the data or in combination with other releases.

§229.12 Consultation with the Secretary of the Interior.

The Assistant Administrator will consult with the Secretary of the Interior prior to taking actions or making

determinations under this part that affect or relate to species or population stocks of marine mammals for which the Secretary of the Interior is responsible under the Act.

Subpart B—Takes of Endangered and Threatened Marine Mammals

§ 229.20 Issuance of permits.

(a) *Determinations.* During a period of up to 3 consecutive years, NMFS will allow the incidental, but not the intentional, taking by persons using vessels of the United States or foreign vessels that have valid fishing permits issued by the Assistant Administrator in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)), while engaging in commercial fishing operations, of marine mammals from a species or stock designated as depleted because of its listing as an endangered species or threatened species under the Endangered Species Act of 1973 if the Assistant Administrator determines that:

(1) The incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stock;

(2) A recovery plan has been developed or is being developed for such species or stock pursuant to the Endangered Species Act of 1973; and

(3) Where required under regulations in subpart A of this part:

(i) A monitoring program has been established under § 229.7;

(ii) Vessels engaged in such fisheries are registered in accordance with § 229.4; and

(iii) A take reduction plan has been developed or is being developed for such species or stock in accordance with regulations at subpart C of this part.

(b) *Procedures for making determinations.* In making any of the determinations listed in paragraph (a) of this section, the Assistant Administrator will publish an announcement in the FEDERAL REGISTER of fisheries having takes of marine mammals listed under the Endangered Species Act, including a summary of available information regarding the fisheries interactions with listed species. Any interested party may, within 45 days of such publication, submit to the Assistant Administrator written data or views with respect to the listed fisheries. As soon as practicable after the end of the 45 days following publication, NMFS will publish in the FEDERAL REGISTER a list of the fisheries for which the determinations listed in paragraph (a) of this section have been made. This publication will set forth a summary of the information used to make the determinations.

(c) *Issuance of authorization.* The Assistant Administrator will issue appropriate permits for vessels in fisheries that are required to register under § 229.4 and for which determinations under the procedures of paragraph (b) of this section can be made.

(d) *Category III fisheries.* Vessel owners engaged only in Category III fisheries for which determinations are made under the procedures of paragraph (b) of this section will not be subject to the penalties of this Act for the incidental taking of marine mammals to which this subpart applies, as long as the vessel owner or operator of such vessel reports any incidental mortality or injury of such marine mammals in accordance with the requirements of § 229.6.

(e) *Emergency authority.* During the course of the commercial fishing season, if the Assistant Administrator determines that the level of incidental mortality or serious injury from commercial fisheries for which such a determination was made under this section has resulted or is likely to result in an impact that is more than negligible on the endangered or threatened species or stock, the Assistant Administrator will use the emergency authority of § 229.9 to protect such species or stock, and may modify any permit granted under this paragraph as necessary.

(f) *Suspension, revocation, modification and amendment.* The Assistant Administrator may, pursuant to the provisions of 15 CFR part 904, suspend or revoke a permit granted under this section if the Assistant Administrator determines that the conditions or limitations set forth in such permit are not being complied with. The Assistant Administrator may amend or modify,

after notification and opportunity for public comment, the list of fisheries published in accordance with §229.21(b) whenever the Assistant Administrator determines there has been a significant change in the information or conditions used to determine such a list.

(g) *Southern sea otters.* This subpart does not apply to the taking of Southern (California) sea otters.

Subpart C—Take Reduction Plan Regulations and Emergency Regulations

§229.31 Pacific Offshore Cetacean Take Reduction Plan.

(a) *Purpose and scope.* The purpose of this section is to implement the Pacific Offshore Cetacean Take Reduction Plan. Paragraphs (b) through (d) of this section apply to all U.S. drift gillnet fishing vessels operating in waters seaward of the coast of California or Oregon, including adjacent high seas waters. For purposes of this section, the fishing season is defined as beginning May 1 and ending on January 31 of the following year.

(b) Extenders. An *extender* is a line that attaches a buoy (float) to a drift gillnet's floatline. The floatline is attached to the top of the drift gillnet. All extenders (buoy lines) must be at least 6 fathoms (36 ft; 10.9 m) in length during all sets. Accordingly, all floatlines must be fished at a minimum of 36 feet (10.9 m) below the surface of the water.

(c) *Pingers.* (1) For the purposes of this paragraph (c), a pinger is an acoustic deterrent device which, when immersed in water, broadcasts a 10 kHz (± 2 kHz) sound at 132 dB (± 4 dB) re 1 micropascal at 1 m, lasting 300 milliseconds (+ 15 milliseconds), and repeating every 4 seconds (+ .2 seconds); and remains operational to a water depth of at least 100 fathoms (600 ft or 182.88 m).

(2) While at sea, drift gillnet vessels with gillnets onboard must carry enough pingers to meet the configuration requirements set forth under paragraph (c)(3) of this section.

(3) Pingers must be attached on or near the floatline and on or near the leadline and spaced no more than 300 ft (90.9 m) apart. Pingers attached on extenders, or attached to the floatline with lanyards, must be within 3 ft (0.91 m) of the floatline. Pingers attached with lanyards to the leadline must be within 6 ft (1.82 m) of the leadline. Pingers on or near the floatline and on or near the leadline must be staggered, such that the horizontal distance between a pinger on or near the floatline and a pinger on the leadline is no more than 150 ft (45.5 m). Any materials used to weight pingers must not change its specifications set forth under paragraph (c)(1) of this section.

(4) The pingers must be operational and functioning at all times during deployment.

(5) If requested, NMFS may authorize the use of pingers with specifications or pinger configurations differing from those set forth in paragraphs (c)(1) and (c)(3) of this section for limited, experimental purposes within a single fishing season.

(d) *Skipper education workshops.* After notification from NMFS, vessel operators must attend a skipper education workshop before commencing fishing each fishing season. For the 1997/1998 fishing season, all vessel operators must have attended one skipper education workshop by October 30, 1997. NMFS may waive the requirement to attend these workshops by notice to all vessel operators.

[62 FR 51813, Oct. 3, 1997, as amended at 63 FR 27861, May 21, 1998]

§229.32 Atlantic large whale take reduction plan regulations.

(a)(1) *Regulated waters.* The regulations in this section apply to all U.S. waters except for the areas exempted in paragraph (a)(2) of this section.

(2) *Exempted waters.* The regulations in this section do not apply to waters landward of the following lines:

Maine and New Hampshire

44° 49.52′ N 66° 56.10′ W TO 44° 48.90′ N 66° 57.00′ W

44° 38.60′ N 67° 11.50′ W TO 44° 36.26′ N 67° 15.70′ W

44° 36.26′ N 67° 15.70′ W TO 44° 27.80′ N 67° 32.85′ W

44° 27.80′ N 67° 32.85′ W TO 44° 26.48′ N 67° 36.00′ W

44° 26.48′ N 67° 36.00′ W TO 44° 21.75′ N 67° 51.85′ W

44° 21.75′ N 67° 51.85′ W TO 44° 19.60′ N 68° 03.00′ W
44° 19.45′ N 68° 02.00′ W TO 44° 14.40′ N 68° 11.55′ W
44° 14.15′ N 68° 11.90′ W TO 44° 13.25′ N 68° 20.20′ W
44° 13.25′ N 68° 20.20′ W TO 44° 13.71′ N 68° 28.31′ W
44° 13.21′ N 68° 28.92′ W TO 44° 10.48′ N 68° 35.80′ W
44° 10.48′ N 68° 35.80′ W TO 44° 08.80′ N 68° 40.80′ W
44° 08.80′ N 68° 40.80′ W TO 44° 02.25′ N 68° 48.25′ W
44° 02.10′ N 68° 48.40′ W TO 43° 51.75′ N 69° 17.10′ W
43° 51.75′ N 69° 17.10′ W TO 43° 48.15′ N 69° 35.90′ W
43° 48.15′ N 69° 35.90′ W TO 43° 42.00′ N 69° 51.10′ W
43° 42.00′ N 69° 50.10′ W TO 43° 33.47′ N 70° 12.35′ W
43° 33.47′ N 70° 12.35′ W TO 43° 21.90′ N 70° 24.90′ W

Rhode Island

41° 22.41′ N 71° 30.80′ W TO 41° 22.41′ N 71° 30.85′ W (Pt. Judith Pond Inlet)
41° 21.31′ N 71° 38.30′ W TO 41° 21.30′ N 71° 38.33′ W (Ninigret Pond Inlet)
41° 19.90′ N 71° 43.08′ W TO 41° 19.90′ N 71° 43.10′ W (Quonochontaug Pond Inlet)

New York

West of the line from the Northern fork of the eastern end of Long Island, NY (Orient Pt.) to Plum Island to Fisher's Island to Watch Hill, RI. (Long Island Sound)

41° 11.40′ N 72° 09.70′ W TO 41° 04.50′ N 71° 51.60′ W (Gardiners Bay)
40° 50.30′ N 72° 28.50′ W TO 40° 50.36′ N 72° 28.67′ W (Shinnecock Bay Inlet)
40° 45.70′ N 72° 45.15′ W TO 40° 45.72′ N 72° 45.30′ W (Moriches Bay Inlet)
40° 37.73′ N 73° 18.40′ W TO 40° 38.00′ N 73° 18.56′ W (Fire Island Inlet)
40° 34.40′ N 73° 34.55′ W TO 40° 35.08′ N 73° 35.22′ W (Jones Inlet)

New Jersey

39° 45.90′ N 74° 05.90′ W TO 39° 45.15′ N 74° 06.20′ W (Barnegat Inlet)
39° 30.70′ N 74° 16.70′ W TO 39° 26.30′ N 74° 19.75′ W (Beach Haven to Brigantine Inlet)
38° 56.20′ N 74° 51.70′ W TO 38° 56.20′ N 74° 51.90′ W (Cape May Inlet)
39° 16.70′ N 75° 14.60′ W TO 39° 11.25′ N 75° 23.90′ W (Delaware Bay)

Maryland/Virginia

38° 19.48′ N 75° 05.10′ W TO 38° 19.35′ N 75° 05.25′ W (Ocean City Inlet)
37° 52.50′ N 75° 24.30′ W TO 37° 11.90′ N 75° 48.30′ W (Chincoteague to Ship Shoal Inlet)
37° 11.10′ N 75° 49.30′ W TO 37° 10.65′ N 75° 49.60′ W (Little Inlet)
37° 07.00′ N 75° 53.75′ W TO 37° 05.30′ N 75° 56.50′ W (Smith Island Inlet)

North Carolina to Florida

All marine and tidal waters landward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts 1:80,000 scale), and as described in 33 CFR part 80.

(b) *Gear marking provisions*—(1) *Gear marking required for specified gear*—(i) *Specified gear.* Specified fishing gear consists of lobster pot gear in inshore and offshore lobster waters, anchored gillnet gear in northeast waters and in mid-Atlantic coastal waters; drift gillnet gear in mid-Atlantic coastal waters; and shark driftnet gear in southeast waters.

(ii) *Requirement.* From January 1, 1998, and as otherwise required in paragraphs (c)(1), (d)(1), (e)(1), and (f)(1) of this section, any person who owns or fishes with specified fishing gear must mark that gear as specified in paragraphs (b)(2) and (b)(3) of this section, unless otherwise required by the Assistant Administrator under paragraph (g) of this section.

(2) *Color code.* Gear must be marked as specified with the appropriate colors to designate gear-types as follows:

Lobster pot gear in inshore lobster waters—red and green
Lobster pot gear in offshore lobster waters—red and blue
Anchored gillnet gear in northeast waters—green and yellow
Anchored gillnet gear in mid-Atlantic waters—green and black
Mid-Atlantic driftnet gear—blue and yellow
Shark driftnet gear—blue and black

(3) *Markings.* Each color of the color codes must be permanently marked on or along the line or lines specified under paragraphs (c)(1), (d)(1), (e)(1), and (f)(1) of this section. Each color mark of the color codes must be clearly visible when the gear is hauled or removed from the water. Each mark must be at least 4 inches (10.2 cm) long. The two color marks must be placed

within 6 inches (15.2 cm) of each other. (For example, buoy lines of inshore lobster pot gear must have a red mark and a green mark, each at least 4 inches long, with the red and green marks placed within 6 inches of each other.) If the color of the rope is the same or similar to a color code, a white mark may be substituted for that color code. In marking or affixing the color code or associated neutral band, the line may be dyed, painted, or marked with thin colored whipping line, thin colored plastic or heat shrink tubing, or other material, or thin line may be woven into or through the line, or the line may be marked as approved in writing by the Assistant Administrator. If the Assistant Administrator revises the gear marking requirements under paragraph (g) of this section, the gear must be marked in compliance with those requirements.

(c) *Restrictions applicable to lobster pot gear in regulated waters*—(1) *Gear marking requirements.* No person may fish with lobster pot gear in regulated waters unless that gear is marked by gear type and region according to the gear marking code specified under paragraph (b) of this section. From January 1, 1998, all buoy lines used in connection with lobster pot gear must be marked within 2 ft (0.6 m) of the top of the buoy line (or 2 ft below a weak link) and midway along the length of the buoy line.

(2) *No line floating at the surface.* No person may fish with lobster pot gear that has any portion of the buoy line floating at the surface at any time, except that, if there are more than one buoy attached to a single buoy line or if there are a high flyer and a buoy used together on a single buoy line, floating line may be used between these objects.

(3) *No wet storage of gear.* No person may leave lobster pot gear in the water without hauling it out of the water at least once in 30 days.

(4) *Cape Cod Bay Restricted area*—(i) *Area.* The Cape Cod Bay restricted area consists of the Cape Cod Bay Critical Habitat area specified under 50 CFR 216.13(b), unless the Assistant Administrator extends that area in accordance with paragraph (g) of this section.

(ii) *Winter restricted period.* The winter restricted period for this area is from January 1 through May 15 of each year, unless the Assistant Administrator revises the restricted period in accordance with paragraph (g) of this section. The Assistant Administrator may waive the restrictions of these paragraphs through a document in the FEDERAL REGISTER if it is determined that right whales have left the critical habitat and are unlikely to return for the remainder of the winter restricted period. During the winter restricted period, no person may fish with lobster pot gear in the Cape Cod Bay Restricted Area unless that person's gear complies with the following requirements:

(A) *Weak links.* All buoy lines are attached to the buoy with a weak link. The breaking strength of this weak link must be no more than 1100 lb;

(B) *Multiple pot trawls.* All pots are set in trawls of four or more pots. Single pots and two or three pot trawls are not allowed.

(C) *Sinking buoy lines.* All buoy lines are sinking line except the bottom portion of the line, which may be a section of floating line not to exceed 1/3 the overall length of the buoy line.

(D) *Sinking ground line.* All ground lines are made entirely of sinking line.

(iii) *Other restricted period.* From May 16 through December 31 of each year, no person may fish with lobster pot gear in the Cape Cod Bay Restricted Area unless that person's gear complies with at least two of the characteristics of the Lobster Take Reduction Technology List in paragraph (c)(11) of this section. The Assistant Administrator may revise this restricted period in accordance with paragraph (g) of this section.

(5) *Great South Channel Restricted Lobster Area*—(i) *Area.* The Great South Channel restricted area consists of the Great South Channel Critical Habitat area specified under 50 CFR 216.13(a) unless the Assistant Administrator changes that area in accordance with paragraph (g) of this section.

(ii) *Spring closed period.* The spring closed period for this area is from April 1 through June 30 of each year unless the Assistant Administrator revises the closed period in accordance with

paragraph (g) of this section. During the spring closed period, no person may fish with or set lobster pot gear in the Great South Channel restricted lobster area unless the Assistant Administrator specifies gear modifications or alternative fishing practices in accordance with paragraph (g) of this section and the gear or practices comply with those specifications.

(iii) *Other restricted period.* From July 1 through March 31 no person may fish with lobster pot gear in the Great South Channel Restricted Lobster Area unless that person's gear complies with at least two of the characteristics of the Lobster Take Reduction Technology List in paragraph (c)(11) of this section. The Assistant Administrator may revise this restricted period in accordance with paragraph (g) of this section.

(6) *Stellwagen Bank/Jeffreys Ledge Restricted Area*—(i) *Area.* The Stellwagen Bank/Jeffreys Ledge restricted area consists of all Federal waters of the Gulf of Maine that lie to the south of the 43°15′ N lat. line and west of the 70° W long. line, except for right whale critical habitat, unless the Assistant Administrator changes that area in accordance with paragraph (g) of this section.

(ii) *Gear Requirements.* No person may fish with lobster pot gear in the Stellwagen Bank/Jeffreys Ledge Restricted Area unless that person's gear complies with at least two of the characteristics of the Lobster Take Reduction Technology List in paragraph (c)(11) of this section. The Assistant Administrator may revise this requirement in accordance with paragraph (g) of this section.

(7) *Northern offshore lobster waters*—(i) *Area.* The northern offshore waters area includes all offshore lobster waters north of 41°30′ N lat., except for areas included in the Great South Channel Critical Habitat.

(ii) *Gear requirements.* No person may fish with lobster pot gear in the northern offshore lobster waters area unless that person's gear complies with at least one of the characteristics of the Lobster Take Reduction Technology List in paragraph (c)(11) of this section. The Assistant Administrator may revise this requirement in accordance with paragraph (g) of this section.

(8) *Southern offshore lobster waters*—(i) *Area.* The southern offshore waters area includes all offshore lobster waters south of 41°30′ N lat., except for areas included in the Great South Channel Critical Habitat.

(ii) *Gear requirements.* From December 1 through March 31, no person may fish with lobster pot gear in the southern offshore lobster waters area unless that person's gear complies with at least one of the characteristics of the Lobster Take Reduction Technology List in paragraph (c)(11) of this section. The Assistant Administrator may revise this requirement in accordance with paragraph (g) of this section.

(9) *Northern inshore lobster waters*—(i) *Area.* Northern inshore lobster waters consist of all inshore lobster waters north of 41°30′ N lat., except the Cape Cod Bay restricted area, Great South Channel restricted area and the Stellwagen Bank/Jeffreys Ledge restricted area.

(ii) *Gear requirements.* No person may fish with lobster pot gear in the northern inshore lobster waters area unless that person's gear complies with at least one of the characteristics of the Lobster Take Reduction Technology List in paragraph (c)(11) of this section. The Assistant Administrator may revise this requirement in accordance with paragraph (g) of this section.

(10) *Southern inshore lobster waters*—(i) *Area.* The southern inshore lobster waters consist of all inshore lobster waters south of 41°30′ N lat., except the Great South Channel restricted area.

(ii) *Gear requirements.* From December 1 through March 31, no person may fish with lobster pot gear in the southern inshore lobster waters area unless that person's gear complies with at least one of the characteristics of the Lobster Take Reduction Technology List in paragraph (c)(11) of this section. The Assistant Administrator may revise this requirement in accordance with paragraph (g) of this section.

(11) *Lobster Take Reduction Technology List.* The following gear characteristics comprise the Lobster Take Reduction Technology List:

(i) All buoy lines are 7/16 inches in diameter or less.

(ii) All buoys are attached to the buoy line with a weak link having a maximum breaking strength of up to 1100 lb. Weak links may include swivels, plastic weak links, rope of appropriate diameter, hog rings, rope stapled to a buoy stick, or other materials or devices approved in writing by the Assistant Administrator.

(iii) For gear set in offshore lobster areas only, all buoys are attached to the buoy line with a weak link having a maximum breaking strength of up to 3780 lb.

(iv) For gear set in offshore lobster areas only, all buoys are attached to the buoy line by a section of rope no more than ¾ the diameter of the buoy line.

(v) All buoy lines are composed entirely of sinking line.

(vi) All ground lines are made of sinking line.

(d) *Restrictions applicable to anchored gillnet gear in regulated waters*—(1) *Marking requirements.* No person may fish with anchored gillnet gear in northeast or mid-Atlantic waters unless that gear is marked according to the gear marking code specified under paragraph (b) of this section. From January 1, 1998, all buoy lines used in connection with anchored gillnets must be marked within 2 ft (0.6 m) of the top of the buoy line (or two ft below a weak link) and midway along the length of the buoy line.

(2) *No line floating at the surface.* No person may fish with anchored gillnet gear that has any portion of the buoy line floating at the surface at any time, except that, if there are more than one buoy attached to a single buoy line or if there are a high flyer and a buoy used together on a single buoy line, floating line may be used between these objects.

(3) *Cape Cod Bay restricted area*—(i) *Area.* The Cape Cod Bay restricted area consists of the Cape Cod Bay Critical Habitat area specified under 50 CFR 216.13(b), unless the Assistant Administrator extends that area under paragraph (g) of this section.

(ii) *Winter restricted period.* The winter restricted period for this area is from January 1 through May 15 of each year, unless the Assistant Administrator revises the restricted period under paragraph (g) of this section. During the winter restricted period, no person may fish with anchored gillnet gear in the Cape Cod Bay restricted area unless the Assistant Administrator specifies gear modifications or alternative fishing practices under paragraph (g) of this section and the gear or practices comply with those specifications. The Assistant Administrator may waive this closure for the remaining portion of any year through a notification in the FEDERAL REGISTER if NMFS determines that right whales have left the critical habitat and are unlikely to return for the remainder of the season.

(iii) *Other restricted period.* From May 16 through December 31 of each year, no person may fish with anchored gillnet gear in the Cape Cod Bay Restricted Area unless that person's gear complies with at least two of the characteristics of the Gillnet Take Reduction Technology List in paragraph (d)(9) of this section. The Assistant Administrator may revise this restricted period in accordance with paragraph (g) of this section.

(4) *Great South Channel restricted gillnet area*—(i) *Area.* The Great South Channel restricted gillnet area consists of the area bounded by lines connecting the following four points: 41°02.2′ N/69°02′ W., 41°43.5′ N/69°36.3′ W., 42°10′ N/68°31′ W., and 41°38′ N/68°13′ W., unless the Assistant Administrator changes that area in accordance with paragraph (g) of this section. This area includes the Great South Channel critical habitat area specified under 50 CFR 216.13(a), except for the ''sliver area'' identified below.

(ii) *Spring closed period.* The spring closed period for this area is from April 1 through June 30 of each year unless the Assistant Administrator revises the closed period in accordance with paragraph (g) of this section. During the spring closed period, no person may set or fish with anchored gillnet gear in the Great South Channel restricted gillnet area unless the Assistant Administrator specifies gear modifications or alternative fishing practices in accordance with paragraph (g) of this section and the gear or practices comply with those specifications.

(iii) *Other restricted period.* From July 1 through March 31 no person may fish with lobster pot gear in the Great South Channel restricted gillnet area unless that person's gear complies with at least two of the characteristics of the Gillnet Take Reduction Technology List in paragraph (d)(9) of this section. The Assistant Administrator may revise this restricted period in accordance with paragraph (g) of this section.

(5) *Great South Channel sliver restricted area*—(i) *Area.* The Great South Channel sliver restricted area consists of the area bounded by lines connecting the following points: 41°02.2′ N/69°02′ W., 41°43.5′ N/69°36.3′ W., 41°40′ N/69°45′ W., and 41°00′ N/69°05′ W., unless the Assistant Administrator changes that area in accordance with paragraph (g) of this section.

(ii) *Gear requirements.* No person may fish with anchored gillnet gear in the Great South Channel sliver restricted area unless that person's gear complies with at least two of the characteristics of the Gillnet Take Reduction Technology List in paragraph (d)(9) of this section. The Assistant Administrator may revise these requirements in accordance with paragraph (g) of this section.

(6) *Stellwagen Bank/Jeffreys Ledge restricted area*—(i) *Area.* The Stellwagen Bank/Jeffreys Ledge restricted area consists of all Federal waters of the Gulf of Maine that lie to the south of the 43°15# N. lat. line and west of the 70° W long. line, except right whale critical habitat, unless the Assistant Administrator changes that area in accordance with paragraph (g) of this section.

(ii) *Gear requirements.* No person may fish with anchored gillnet gear in the Stellwagen Bank/Jeffreys Ledge restricted area unless that person's gear complies with at least two of the characteristics of the Gillnet Take Reduction Technology List in paragraph (d)(9) of this section. The Assistant Administrator may revise these requirements in accordance with paragraph (g) of this section.

(7) *Other northeast waters area*—(i) *Area.* The other northeast waters area consists of all northeast waters except for the Cape Cod Bay restricted area, the Great South Channel restricted gillnet area and Great South Channel sliver restricted areas and the Stellwagen Bank/Jeffreys Ledge restricted area.

(ii) *Gear requirements.* No person may fish with anchored gillnet gear in the other northeast waters area unless that person's gear complies with at least one of the characteristics of the Gillnet Take Reduction Technology List in paragraph (d)(9) of this section. The Assistant Administrator may revise these requirements in accordance with paragraph (g) of this section.

(8) *Mid-Atlantic coastal waters area*—(i) *Area.* The mid-Atlantic coastal waters area is defined in § 229.2.

(ii) *Gear requirements.* From December 1 through March 31, no person may fish with anchored gillnets in mid-Atlantic coastal waters area unless that person's gear complies with at least one of the characteristics of the Gillnet Take Reduction Technology List in paragraph (d)(9) of this section. The Assistant Administrator may revise these requirements in accordance with paragraph (g) of this section.

(9) *Gillnet Take Reduction Technology List.* The following gear characteristics comprise the Gillnet Take Reduction Technology List:

(i) All buoy lines are 7/16 inches in diameter or less.

(ii) All buoys are attached to the buoy line with a weak link having a maximum breaking strength of up to 1100 lb. Weak links may include swivels, plastic weak links, rope of appropriate diameter, hog rings, rope stapled to a buoy stick, or other materials or devices approved in writing by the Assistant Administrator.

(iii) Gear is anchored with the holding power of a 22 lb. danforth-style anchor at each end.

(iv) Gear is anchored with a 50 lb dead weight at each end.

(v) Nets are attached to a lead line weighing 100 lb or more per 300 feet.

(vi) Weak links with a breaking strength of up to 1100 lb are installed in the float rope between net panels.

(vii) All buoy lines are composed entirely of sinking line.

(e) *Restrictions applicable to mid-Atlantic driftnet gear*—(1) *Gear marking requirements.* No person may fish in mid-

Atlantic coastal waters with drift gillnet gear unless that gear is marked by gear type and region according to the gear marking code specified under paragraph (b) of this section. From January 1, 1998, all buoy lines used in connection with driftnet gear in the mid-Atlantic must be marked within 2 ft (0.6 m) of the top of the buoy line and midway along the length of the buoy line according to gear type and region.

(2) *Restrictions.* From January 1, 1998, during the winter/spring restricted period, no person may fish at night with driftnet gear in the mid-Atlantic coastal waters area unless that gear is tended. Before a vessel returns to port, all driftnet gear set by that vessel in the mid-Atlantic coastal waters area must be removed from the water and stowed on board the vessel. The winter/spring restricted period for this area is from December 1 through March 31 unless the Assistant Administrator revises that restricted period in accordance with paragraph (g) of this section.

(f) *Restrictions applicable to shark driftnet gear*—(1) *Gear marking requirements.* No person may fish with drift gillnet gear in southeast waters unless that gear is marked according to the gear marking code specified under paragraph (b) of this section. From November 1, 1998, all buoy lines must be marked within 2 ft (0.6 m) of the top of the buoy line and midway along the length of the buoy line. From November 1, 1999, each net panel must be marked along both the float line and the lead line at least once every 100 feet (30.8 m).

(2) *Management areas*—(i) *SEUS restricted area.* The southeast U.S. restricted area consists of the area from 32°00′ N lat. (near Savannah, GA) south to 27°51′ N lat. (near Sebastian Inlet, FL), extending from the shore eastward to 80°00′ W long., unless the Assistant Administrator changes that area in accordance with paragraph (g) of this section.

(ii) *SEUS observer area.* The SEUS observer area consists of the SEUS restricted area and an additional area along the coast south to 26°46.5′ N lat. (near West Palm Beach, FL) and extending from the shore eastward out to 80°00′ W long., unless the Assistant Administrator changes that area in accordance with paragraph (g) of this section.

(3) *Restrictions*—(i) *Closure.* Except as provided under paragraph (f)(3)(iii) of this section, no person may fish with driftnet gear in the SEUS restricted area during the closed period. The closed period for this area is from November 1 through March 31 of the following year, unless the Assistant Administrator changes that closed period in accordance with paragraph (g) of this section.

(ii) *Observer requirement.* No person may fish with driftnet gear in the SEUS observer area from November 1 through March 31 of the following year unless the operator of the vessel calls the SE Regional Office in St. Petersburg, FL, not less than 48 hours prior to departing on any fishing trip in order to arrange for observer coverage. If the Regional Office requests that an observer be taken on board a vessel during a fishing trip at any time from November 1 through March 31 of the following year, no person may fish with driftnet gear aboard that vessel in the SEUS observer area unless an observer is on board that vessel during the trip.

(iii) *Special provision for strikenets.* Fishing with strikenet gear is exempt from the restriction under paragraph (e)(3)(i) of this section if:

(A) No nets are set at night or when visibility is less than 500 yards (460 m).

(B) Each set is made under the observation of a spotter plane.

(C) No net is set within 3 nautical miles of a right, humpback, or fin whale.

(D) If a right, humpback or fin whale moves within 3 nautical miles of the set gear, the gear is removed immediately from the water.

(g) *Other provisions.* In addition to any other emergency authority under the Marine Mammal Protection Act, the Endangered Species Act, the Magnuson-Stevens Fishery Conservation and Management Act, or other appropriate authority, the Assistant administrator may take action under this section in the following situations:

(1) *Entanglements in critical habitat.* If a serious injury or mortality of a right whale occurs in the Cape Cod Bay critical habitat from January 1 through

May 15, in the Great South Channel restricted areas from April 1 through June 30, or in the SEUS restricted area from November 1 through March 31 as a result of an entanglement by gear types allowed to be used in those areas and times, the Assistant Administrator shall close that area to that gear type for the rest of that time period and for that same time period in each subsequent year, unless the Assistant Administrator revises the restricted period in accordance with paragraph (g)(2) of this section or unless other measures are implemented under paragraph (g)(2) of this section.

(2) *Other special measures.* The Assistant Administrator may revise the requirements of this section through publication of a rule in the FEDERAL REGISTER if:

(i) NMFS verifies that certain gear characteristics are both operationally effective and reduce serious injuries and mortalities of endangered whales;

(ii) New gear technology is developed and determined to be appropriate;

(iii) Revised breaking strengths are determined to be appropriate;

(iv) New marking systems are developed and determined to be appropriate;

(v) NMFS determines that right whales are remaining longer than expected in a closed area or have left earlier than expected;

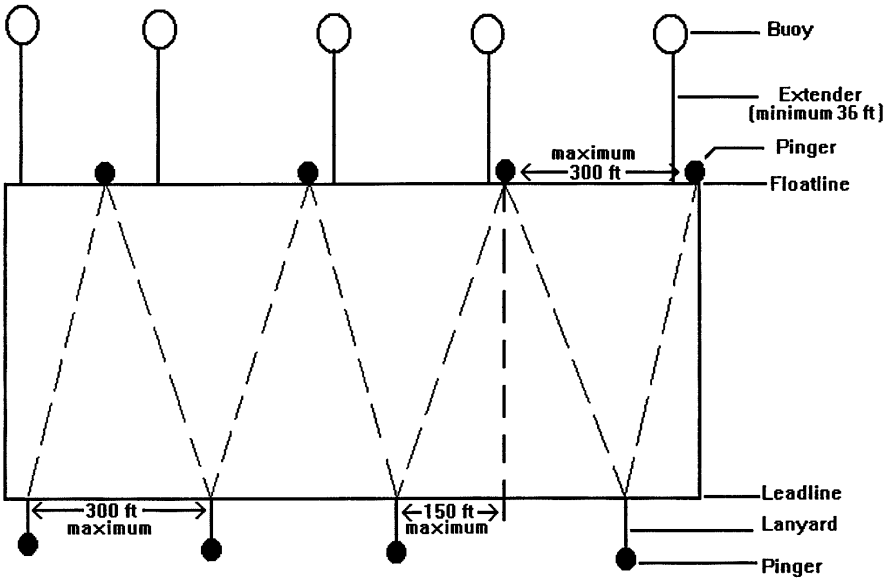
(vi) NMFS determines that the boundaries of a closed area are not appropriate;

(vii) Gear testing operations are considered appropriate; or

(viii) Similar situations occur.

[62 FR 39184, July 22, 1997]

Figure 1 -- Drift Gillnet Pinger Configuration and Extender Requirements



[63 FR 27861, May 21, 1998]

SUBCHAPTER D—WHALING

PART 230—WHALING PROVISIONS

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230.1 Purpose and scope.
230.2 Definitions.
230.3 General prohibitions.
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230.6 Quotas and other restrictions.
230.7 Salvage of stinkers.
230.8 Reporting by whaling captains.

AUTHORITY: 16 U.S.C. 916 *et seq.*

SOURCE: 61 FR 29631, June 11, 1996, unless otherwise noted.

§ 230.1 Purpose and scope.

The purpose of the regulations in this part is to implement the Whaling Convention Act (16 U.S.C. 916 *et seq.*) by prohibiting whaling except for aboriginal subsistence whaling allowed by the International Whaling Commission. Provisions of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.*) and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) also pertain to human interactions with whales. Rules elsewhere in this chapter govern such topics as scientific research permits, and incidental take and harassment of marine mammals.

§ 230.2 Definitions.

Aboriginal subsistence whaling means whaling authorized by paragraph 13 of the Schedule annexed to and constituting a part of the Convention.

Assistant Administrator means the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration.

Authorized officer means:

(1) Any commissioned, warrant, or petty officer of the U.S. Coast Guard;

(2) Any special agent or enforcement officer of the National Marine Fisheries Service;

(3) Any officer designated by the head of a Federal or state agency that has entered into an agreement with the Secretary of Commerce or the Commandant of the Coast Guard to enforce the provisions of the Whaling Convention Act; or

(4) Any Coast Guard personnel accompanying and acting under the direction of any person described in paragraph (1) of this definition.

Calf means any whale less than 1 year old or having milk in its stomach.

Commission means the International Whaling Commission established by article III of the Convention.

Convention means the International Convention for the Regulation of Whaling signed at Washington on December 2, 1946.

Cooperative agreement means a written agreement between the National Oceanic and Atmospheric Administration and a Native American whaling organization for the cooperative management of aboriginal subsistence whaling operations.

Landing means bringing a whale or any parts thereof onto the ice or land in the course of whaling operations.

Native American whaling organization means an entity recognized by the National Oceanic and Atmospheric Administration as representing and governing Native American whalers for the purposes of cooperative management of aboriginal subsistence whaling.

Regulations of the Commission means the regulations in the Schedule annexed to and constituting a part of the Convention, as modified, revised, or amended by the Commission from time to time.

Stinker means a dead, unclaimed whale found upon a beach, stranded in shallow water, or floating at sea.

Strike means hitting a whale with a harpoon, lance, or explosive device.

Wasteful manner means a method of whaling that is not likely to result in the landing of a struck whale or that does not include all reasonable efforts to retrieve the whale.

Whale products means any unprocessed part of a whale and blubber, meat, bones, whale oil, sperm oil, spermaceti, meal, and baleen.

Whaling means the scouting for, hunting, striking, killing, flensing, or landing of a whale, and the processing of whales or whale products.

Whaling captain or *captain* means any Native American who is authorized by a Native American whaling organization to be in charge of a vessel and whaling crew.

Whaling crew means those Native Americans under the control of a captain.

Whaling village means any U.S. village recognized by the Commission as having a cultural and/or subsistence need for whaling.

§ 230.3 General prohibitions.

(a) No person shall engage in whaling in a manner that violates the Convention, any regulation of the Commission, or this part.

(b) No person shall engage in whaling without first having obtained a license or scientific research permit issued by the Assistant Administrator.

(c) No person shall ship, transport, purchase, sell, offer for sale, import, export, or possess any whale or whale products taken or processed in violation of the Convention, any regulation of the Commission, or this part, except as specified in § 230.4(f).

(d) No person shall fail to make, keep, submit, or furnish any record or report required of him/her by the Convention, any regulation of the Commission, or this part.

(e) No person shall refuse to permit any authorized officer to enforce the Convention, any regulation of the Commission, or this part.

§ 230.4 Aboriginal subsistence whaling.

(a) No person shall engage in aboriginal subsistence whaling, except a whaling captain licensed pursuant to § 230.5 or a member of a whaling crew under the control of a licensed captain.

(b) No whaling captain shall engage in whaling that is not in accordance with the regulations of the Commission, this part, and the relevant cooperative agreement.

(c) No whaling captain shall engage in whaling for any calf or any whale accompanied by a calf.

(d) No whaling captain shall engage in whaling without an adequate crew or without adequate supplies and equipment.

(e) No person may receive money for participation in aboriginal subsistence whaling.

(f) No person may sell or offer for sale whale products from whales taken in an aboriginal subsistence hunt, except that authentic articles of Native handicrafts may be sold or offered for sale.

(g) No whaling captain shall continue to whale after:

(1) The quota set for his/her village by the relevant Native American whaling organization is reached;

(2) The license under which he/she is whaling is suspended as provided in § 230.5(b); or

(3) The whaling season for that species has been closed pursuant to § 230.6.

(h) No whaling captain shall claim domicile in more than one whaling village.

(i) No person may salvage a stinker without complying with the provisions of § 230.7.

(j) No whaling captain shall engage in whaling with a harpoon, lance, or explosive dart that does not bear a permanent distinctive mark identifying the captain as the owner thereof.

(k) No whaling captain shall engage in whaling in a wasteful manner.

§ 230.5 Licenses for aboriginal subsistence whaling.

(a) A license is hereby issued to whaling captains identified by the relevant Native American whaling organization.

(b) The Assistant Administrator may suspend the license of any whaling captain who fails to comply with the regulations in this part.

§ 230.6 Quotas and other restrictions.

(a) Quotas for aboriginal subsistence whaling shall be set in accordance with the regulations of the Commission. Quotas shall be allocated to each whaling village or captain by the appropriate Native American whaling organization. The Assistant Administrator shall publish in the FEDERAL REGISTER, at least annually, aboriginal subsistence whaling quotas and any other limitations on aboriginal subsistence whaling deriving from regulations of the Commission. These quotas and restrictions shall also be incorporated in the relevant cooperative agreements.

(b) The relevant Native American whaling organization shall monitor the whale hunt and keep tally of the number of whales landed and struck. When a quota is reached, the organization shall declare the whaling season closed, and there shall be no further whaling under that quota during the calendar year. If the organization fails to close the whaling season after the quota has been reached, the Assistant Administrator may close it by filing notification in the FEDERAL REGISTER.

§230.7 Salvage of stinkers.

(a) Any person salvaging a stinker shall submit to the Assistant Administrator or his/her representative an oral or written report describing the circumstances of the salvage within 12 hours of such salvage. He/she shall provide promptly to the Assistant Administrator or his/her representative each harpoon, lance, or explosive dart found in or attached to the stinker. The device shall be returned to the owner thereof promptly, unless it is retained as evidence of a possible violation.

(b) There shall be a rebuttable presumption that a stinker has been struck by the captain whose mark appears on the harpoon, lance, or explosive dart found in or attached thereto, and, if no strike has been reported by such captain, such strike shall be deemed to have occurred at the time of recovery of the device.

§230.8 Reporting by whaling captains.

(a) The relevant Native American whaling organization shall require each whaling captain licensed pursuant to §230.5 to provide a written statement of his/her name and village of domicile and a description of the distinctive marking to be placed on each harpoon, lance, and explosive dart.

(b) Each whaling captain shall provide to the relevant Native American whaling organization an oral or written report of whaling activities including but not limited to the striking, attempted striking, or landing of a whale and, where possible, specimens from landed whales. The Assistant Administrator is authorized to provide technological assistance to facilitate prompt reporting and collection of specimens from landed whales, including but not limited to ovaries, ear plugs, and baleen plates. The report shall include at least the following information:

(1) The number, dates, and locations of each strike, attempted strike, or landing.

(2) The length (taken as the straight-line measurement from the tip of the upper jaw to the notch between the tail flukes) and the sex of the whales landed.

(3) The length and sex of a fetus, if present in a landed whale.

(4) An explanation of circumstances associated with the striking or attempted striking of any whale not landed.

(c) If the relevant Native American whaling organization fails to provide the National Marine Fisheries Service the required reports, the Assistant Administrator may require the reports to be submitted by the whaling captains directly to the National Marine Fisheries Service.

SUBCHAPTER E—TRANSPORTATION AND LABELING OF FISH OR WILDLIFE [RESERVED]
SUBCHAPTER F—AID TO FISHERIES

PART 253—FISHERIES ASSISTANCE PROGRAMS

Subpart A—General

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AUTHORITY: 46 U.S.C. 1271–1279 and 16 U.S.C. 4101 *et seq.*

SOURCE: 61 FR 19172, May 1, 1996, unless otherwise noted.

Subpart A—General

§ 253.1 Purpose.

(a) The regulations in this part pertain to fisheries assistance programs. Subpart B of these rules governs the Fisheries Obligation Guarantee Program, which guarantees the repayment of certain long-term fisheries and aquacultural debts. This allows those debts to be placed in the same private investment market that buys U.S. Treasury securities, where interest rates are lower and maturities are longer. The Program does all credit work and holds and services all credit collateral. The Program's guarantee fee makes it self-supporting.

(b) Subpart C implements Title III of Public Law 99–659 (16 U.S.C. 4100 *et seq.*), which has two objectives:

(1) To promote and encourage State activities in support of the management of interjurisdictional fishery resources identified in interstate or Federal fishery management plans; and

(2) To promote and encourage management of interjurisdictional fishery resources throughout their range.

(3) The scope of this part includes guidance on making financial assistance awards to States or Interstate Commissions to undertake projects in support of management of interjurisdictional fishery resources in both the exclusive economic zone (EEZ) and State waters, and to encourage States to enter into enforcement agreements with either the Department of Commerce or the Department of the Interior.

Subpart B—Fisheries Obligation Guarantee Program

§ 253.10 Definitions.

The terms used in this subpart have the following meanings:

Act means Title XI of the Merchant Marine Act, 1936, as amended.

Actual cost means project cost (less a 10-percent salvage value), depreciated (excluding land) on a straightline basis at 1-year intervals over the project property's useful life including architectural, engineering, inspection, delivery, outfitting, and interest costs, as well as the cost of any consulting contract the Division requires.

Applicant means the one applying for a guarantee (the prospective notemaker).

Application means an application for a guarantee.

Application fee means 0.5 percent of the dollar amount of an application.

Aquacultural facility means land, land structures, water structures, water craft built in the U.S., and equipment for hatching, caring for, or growing fish under controlled circumstances

and for its unloading, receiving, holding, processing, or distribution for commercial purposes.

CCF means Capital Construction Fund.

Citizen means a citizen or national of the U.S. who is otherwise also a citizen for the purpose of documenting a vessel in the coastwise trade under section 2 of the Shipping Act, 1916, as amended.

Contributory project means any project that contributes to developing the U.S. fishing industry by: Causing any vessel to catch less overutilized species than before; applying new technology; improving safety or fuel efficiency; making project property more efficient, productive, or competitive; potentially increasing fisheries exports; helping develop an underutilized fishery; or enhancing financial stability, financial performance, growth, productivity, or any other business attribute.

Demand means a noteholder's request that the guarantor pay a guaranteed note's full principal and interest balance.

Division means the Financial Services Division, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

Dual Use CCF means a CCF agreement whose qualified vessel is project property and whose deposits are pledged to repayment of the U.S. note.

Facility means a fisheries facility or aquacultural facility.

Financing means the first permanent debt placed on project property for financing its project cost.

Fish means all forms of aquatic animal and plant life, except marine mammals and birds.

Fishery facility means land, land structures, water craft that do not fish, and equipment used for transporting, unloading, receiving, holding, processing, or distributing fish for commercial purposes (including any fishery facility for passenger fishing).

Fishing means catching wild fish for commercial purposes (including passenger fishing).

Guarantee means the guarantor's contractual promise, backed by the full faith and credit of the United States, to repay a guaranteed note if a notemaker fails to repay it as agreed.

Guarantee fee means 1 percent of a guaranteed note's average annual unpaid principal balance.

Guaranteed note means a promissory note from a notemaker to a noteholder whose repayment the guarantor guarantees.

Guarantor means the U.S., acting, under the Act, by and through the Secretary of Commerce.

Industry means the fisheries and/or aquacultural industry.

Noteholder means a guaranteed note payee.

Notemaker means a guaranteed note payor.

Passenger fishing means carrying in vessels for commercial purposes passengers who catch fish.

Program means the Fisheries Obligation Guarantee Program.

Project means the construction of new project property or the refurbishing or purchase of used project property including architectural, engineering, inspection, delivery, outfitting, and interest costs, as well as the cost of any consulting contract the Division requires.

Project property means the vessel or facility involved in a project whose actual cost is eligible under the Act for guarantee and controls the dollar amount of a guaranteed note.

Property means the project property and all other property pledged as security for a U.S. note.

Qualified means acceptable, in the Division's credit risk judgment, and otherwise meeting the Division's requirements for guarantee.

Refinancing means newer debt that either replaces older debt or reimburses applicants for previous expenditures.

Refinancing/assumption fee means 0.25 percent of the principal amount of a guaranteed note to be refinanced or assumed.

Refurbishing means any reconstruction, reconditioning, or other improvement of used project property involving more than routine repair or maintenance.

Security documents mean all collateral securing the U.S. note's repayment and all other assurances, undertakings, and

contractual arrangements associated with the U.S. note.

Underutilized fishery means:

(1) For a vessel, any fish species harvested below its sustainable yield.

(2) For a fisheries facility, any facility using that species or any for which aggregate facilities are inadequate to best use harvests of that or any other species.

U.S. means the United States of America and, for citizenship purposes, includes the Commonwealth of Puerto Rico; American Samoa; the U.S. Virgin Islands; Guam; the Republic of the Marshal Islands; the Federated States of Micronesia; the Commonwealth of the Northern Mariana Islands; any other commonwealth, territory, or possession of the United States; or any political subdivision of any of them.

U.S. note means a promissory note payable by the notemaker to the guarantor.

Useful life means the period during which project property will, as determined by the Division, remain economically productive.

Vessel means any vessel documented under U.S. law and used for fishing.

Wise use means the wise use of fisheries resources and their development, advancement, management, conservation, and protection.

§ 253.11 Guarantee policy.

(a) A guarantee financing or refinancing up to 80 percent of a project's actual cost shall be available to any qualified citizen otherwise eligible under the Act and these rules, except:

(1) *Vessel construction.* The Program will not finance this project cost. The Program will only refinance this project cost for an existing vessel whose previous construction cost has already been financed (or otherwise paid). Refinancing this project cost for a vessel that already exists is not inconsistent with wise use, but financing it may be.

(2) *Vessel refurbishing that materially increases an existing vessel's harvesting capacity.* The Program will not finance this project cost. The Program will only refinance this project cost for a vessel whose previous refurbishing cost has already been financed (or otherwise paid). Refinancing this project cost is not inconsistent with wise use, but financing it may be.

(3) *Purchasing a used vessel or used fishery facility.* The Program will neither finance nor refinance this project cost (except for a used vessel or fishery facility that the Program purchased and is reselling), unless the used vessel or fishery facility will be refurbished in the United States and will be a contributory project or it will be used in an underutilized fishery.

(b) Every project, other than those specified in paragraphs (a) (1) and (2) of this section, is consistent with wise use and every project, other than those specifically precluded in paragraphs (a) (1) and (2) of this section, may be financed, as well as refinanced.

§ 253.12 Guaranteed note, U.S. note, and security documents.

(a) *Guaranteed note*—(1) *Principal.* This may not exceed 80 percent of actual cost, but may, in the Division's credit judgment, be less.

(2) *Maturity.* This may not exceed 25 years, but shall not exceed the project property's useful life and may, in the Division's credit judgment, be less.

(3) *Interest rate.* This may not exceed the amount the Division deems reasonable.

(4) *Prepayment penalty.* The Division will allow a reasonable prepayment penalty, but the guarantor will not guarantee a notemaker's payment of it.

(5) *Form.* This will be the simple promissory note (with the guarantee attached) the Division prescribes, promising only to pay principal, interest, and prepayment penalty.

(6) *Sole security.* The guaranteed note and the guarantee will be the noteholder's sole security.

(b) *U.S. note and security documents*—(1) *Form.* The U.S. note and security documents will be in the form the Division prescribes.

(2) *U.S. note.* This exists to evidence the notemaker's actual and contingent liability to the guarantor (contingent if the guarantor does not pay the guaranteed note (including any portion of it), on the notemaker's behalf or if the guarantor does not advance any other amounts or incur any other expenses on the notemaker's behalf to protect

the U.S. or accommodate the notemaker; actual if, and to the same monetary extent that, the guarantor does). Payment of the guaranteed note by anyone but the guarantor will amortize the original principal balance (and interest accruing on it) of the U.S. note to the same extent that it amortizes the guaranteed note. The U.S note will, among other things, contain provisions for adding to its principal balance all amounts the Program advances, or expenses it incurs, to protect the U.S. or accommodate the notemaker.

(3) *Security documents.* The Division will, at a minimum, require a pledge of all project property (or adequate substitute collateral). The Division will require such other security as it deems the circumstances of each notemaker and project require to protect the U.S. All security documents will secure the U.S. note. The security documents will, among other things, contain provisions for adding to the U.S. note all Program advances, expenditures, and expenses required to protect the U.S. or accommodate the notemaker.

(4) *Recourse.* Significant Program reliance, as a secondary means of repayment, on the net worths of parties other than the notemaker will ordinarily require secured recourse against those net worths. Recourse may be by a repayment guarantee or irrevocable letter of credit. Ordinarily, the Division will require recourse against: All major shareholders of a closely-held corporate notemaker, the parent corporation of a subsidiary corporate notemaker without substantial pledged assets other than the project property, and all major limited partners. The Division may also require recourse against others it deems necessary to protect the U.S. The principal parties in interest, who ultimately stand most to benefit from the project, should ordinarily be held financially accountable for the project's performance. Where otherwise appropriate recourse is unavailable, the conservatively projected net liquidating value of the notemaker's assets pledged to the Program must, in the Division's credit judgment, substantially exceed all projected Program exposure.

(c) *Dual-use CCF.* For a vessel, the Division may require annually depositing some portion of the project property's net income into a dual-use CCF. A dual-use CCF provides the normal CCF tax-deferral benefits, but also both gives the Program control of CCF withdrawals and recourse against CCF deposits and ensures an emergency refurbishing reserve (tax-deferred) for project property.

§253.13 Ability and experience requirements.

A notemaker and the majority of its principals must generally have the ability, experience, resources, character, reputation, and other qualifications the Division deems necessary for successfully operating the project property and protecting the U.S. The Program will ordinarily not provide guarantees: For venture capital purposes; to a notemaker whose principals are all from outside the industry; or for a notemaker the majority of whose principals cannot document successful industry ability and experience of a duration, degree, and nature consistent with protecting the U.S.

§253.14 Economic and financial requirements.

(a) *Income and expense projections.* The Division's conservative income and expense projections for the project property's operation must prospectively indicate net earnings that can service all debt, properly maintain the project property, and protect the U.S. against the industry's cyclical economics and other risks of loss.

(b) *Working capital.* The Division's conservative assessment of an applicant's financial condition must indicate initial working capital prospectively sufficient to provide for the project property to achieve net earnings projections, fund all foreseeable contingencies, and protect the U.S. At the Division's discretion, some portion of projected working capital needs may be met by something other than current assets minus current liabilities (i.e., by a line or letter of credit, noncurrent assets readily capable of generating working capital, a guarantor with sufficient financial resources, etc.).

(c) *Audited financial statements.* These will ordinarily be required for any notemaker with large or financially extensive operations whose financial condition the Division believes it cannot otherwise assess with reasonable certainty.

(d) *Consultant services.* Infrequently, expert consulting services may be necessary to help the Division assess a project's economic, technical, or financial feasibility. The Division will select and employ the necessary consultant, but require the applicant to reimburse the Division. A subsequently approved application will not be closed until the applicant reimburses the Division. This cost may, at the Division's discretion, be included in a guaranteed note's amount. For a declined application, the Division may reimburse itself from the remaining 25 percent of the application fee.

§ 253.15 Miscellaneous.

(a) *Applicant.* Only the legal title holder of project property (or the lessee of an appropriate long-term financing lease) may apply for a guarantee. Applicants must submit an ''Application for Fisheries Obligation Program Guarantee'' to the appropriate NMFS Regional Financial Services Branch to be considered for a guaranteed loan.

(b) *Investigation and approval.* The Division shall do a due diligence investigation of every application it accepts and determine if, in the Division's sole judgment, the application is eligible and qualified. Applications the Division deems ineligible or unqualified will be declined. The Division will approve eligible and qualified applications based on the applicability of the information obtained during the application and investigation process to the programmatic goals and financial requirements of the program and under terms and conditions that, in the Division's sole discretion, protect the U.S. The Division will state these terms and conditions in its approval in principal letter.

(c) *Insurance.* All property and other risks shall be continuously insured during the term of the U.S. note. Insurers must be acceptable to the Division. Insurance must be in such forms and amounts and against such risks as the Division deems necessary to protect the U.S. Insurance must be endorsed to include the requirements the U.S., as respects its interest only, deems necessary to protect the U.S. (e.g., the Program will ordinarily be an additional insured as well as the sole loss payee for the amount of its interest; cancellation will require 20 days' advance written notice; vessel seaworthiness will be admitted, and the Program will be adequately protected against other insureds' breaches of policy warranties, negligence, omission, etc.)

(d) *Property inspections.* The Division will require adequate condition and valuation inspection of all property as the basis for assessing the property's worth and suitability for guarantee. The Division may also require these at specified periods during guarantee life. These must be conducted by competent and impartial inspectors acceptable to the Division. Inspection cost will be at an applicant's expense. Those occurring before application approval may be included in actual cost.

(e) *Guarantee terms and conditions.* The Division's approval in principle letter shall specify the terms and conditions of the guarantor's willingness to guarantee. These shall be incorporated in closing documents that the Division prepares. Terms and conditions are at the Division's sole discretion. An applicant's nonacceptance will result in disqualification for guarantee.

(f) *Noteholder.* The Division will, as a gratuitous service, request parties interested in investing in guaranteed notes to submit offers to fund each prospective guaranteed note. The Division and the applicant will, by mutual consent, choose the responsive bidder, which ordinarily will be the prospective noteholder whose bid represents the lowest net effective annual cost of capital. Until the Division has closed the guarantee, arrangements between an applicant and a prospective noteholder are a matter of private contract between them, and the Program is not responsible to either for nonperformance by the other.

(g) *Closing*—(1) *Approval in principle letters.* Every closing will be in strict accordance with a final approval in principle letter.

(2) *Contracts.* The guaranteed note, U.S. note, and security documents will ordinarily be on standard Program forms that may not be altered without Divisional approval. The Division will ordinarily prepare all contracts, except certain pledges involving real property, which will be prepared by each notemaker's attorney at the direction and approval of the Division's attorney.

(3) *Closing schedules.* The Division will ordinarily close guarantee transactions with minimal services from applicants' attorneys, except where real property pledges or other matters appropriate for private counsel are involved. Real property services required from an applicant's attorney may include: Title search, mortgage and other document preparation, execution and recording, escrow and disbursement, and a legal opinion and other assurances. An applicant's attorney's expense, and that of any other private contractor required, is for applicant's account. Attorneys and other contractors must be satisfactory to the Division. The Division will attempt to meet reasonable closing schedules, but will not be liable for adverse interest-rate fluctuations, loss of commitments, or other consequences of being unable to meet an applicant's and a prospective noteholder's closing schedule. These parties should work closely with the Division to ensure a closing schedule the Division can meet.

§253.16 Fees.

(a) *Application fee.* The Division will not accept an application without the application fee. Fifty percent of the application fee is fully earned at application acceptance, and is not refundable. The rest is fully earned when the Division issues an approval in principal letter, and it is refundable only if the Division declines an application or an applicant requests refund before the Division issues an approval in principal letter.

(b) *Guarantee fee.* Each guarantee fee will be due in advance and will be based on the guaranteed note's repayment provisions for the prospective year. The first annual guarantee fee is due at guarantee closing. Each subsequent one is due and payable on the guarantee closing's anniversary date. Each is fully earned when due, and shall not subsequently be refunded for any reason.

(c) *Refinancing or assumption fee.* This fee applies only to refinancing or assuming existing guaranteed notes. It is due upon application for refinancing or assuming a guaranteed note. It is fully earned when due and shall be nonrefundable. The Division may waive a refinancing or assumption fee's payment when the refinancing or assumption's primary purpose is to protect the U.S.

(d) *Where payable.* Fees are payable by check made payable to ''NMFS/FSFF.'' Other than those collected at application or closing, fees are payable by mailing checks to: U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, P.O. Box 73004, Chicago, Ill. 60673. To ensure proper crediting, each check must include the official case number the Division assigns to each guarantee.

§253.17 Demand and payment.

Every demand must be delivered in writing to the Division. Each must include the noteholder's certified record of the date and amount of each payment made on the guaranteed note and the manner of its application. Should the Division not acknowledge receipt of a timely demand, the noteholder must possess evidence of the demand's timely delivery.

§253.18 Program operating guidelines.

The Division may issue Program operating guidelines, as the need arises, governing national Program policy and administrative issues not addressed by these rules.

§253.19 Default and liquidation.

Upon default of the security documents, the Division shall take such remedial action (including, where appropriate, liquidation) as it deems best able to protect the U.S.' interest.

Subpart C—Interjurisdictional Fisheries

§ 253.20 Definitions.

The terms used in this subpart have the following meanings:

Act means the Interjurisdictional Fisheries Act of 1986, Public Law 99–659 (Title III).

Adopt means to implement an interstate fishery management plan by State action or regulation.

Commercial fishery failure means a serious disruption of a fishery resource affecting present or future productivity due to natural or undetermined causes. It does not include either:

(1) The inability to harvest or sell raw fish or manufactured and processed fishery merchandise; or

(2) Compensation for economic loss suffered by any segment of the fishing industry as the result of a resource disaster.

Enforcement agreement means a written agreement, signed and dated, between a state agency and either the Secretary of the Interior or Secretary of Commerce, or both, to enforce Federal and state laws pertaining to the protection of interjurisdictional fishery resources.

Federal fishery management plan means a plan developed and approved under the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

Fisheries management means all activities concerned with conservation, restoration, enhancement, or utilization of fisheries resources, including research, data collection and analysis, monitoring, assessment, information dissemination, regulation, and enforcement.

Fishery resource means finfish, mollusks, and crustaceans, and any form of marine or Great Lakes animal or plant life, including habitat, other than marine mammals and birds.

Interjurisdictional fishery resource means:

(1) A fishery resource for which a fishery occurs in waters under the jurisdiction of one or more states and the U.S. Exclusive Economic Zone; or

(2) A fishery resource for which an interstate or a Federal fishery management plan exists; or

(3) A fishery resource which migrates between the waters under the jurisdiction of two or more States bordering on the Great Lakes.

Interstate Commission means a commission or other administrative body established by an interstate compact.

Interstate compact means a compact that has been entered into by two or more states, established for purposes of conserving and managing fishery resources throughout their range, and consented to and approved by Congress.

Interstate Fisheries Research Program means research conducted by two or more state agencies under a formal interstate agreement.

Interstate fishery management plan means a plan for managing a fishery resource developed and adopted by the member states of an Interstate Marine Fisheries Commission, and contains information regarding the status of the fishery resource and fisheries, and recommends actions to be taken by the States to conserve and manage the fishery resource.

Landed means the first point of offloading fishery resources.

NMFS Regional Director means the Director of any one of the five National Marine Fisheries Service regions.

Project means an undertaking or a proposal for research in support of management of an interjurisdictional fishery resource or an interstate fishery management plan.

Research means work or investigative study, designed to acquire knowledge of fisheries resources and their habitat.

Secretary means the Secretary of Commerce or his/her designee.

State means each of the several states, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, or the Commonwealth of the Northern Mariana Islands.

State Agency means any department, agency, commission, or official of a state authorized under the laws of the State to regulate commercial fisheries or enforce laws relating to commercial fisheries.

Value means the monetary worth of fishery resources used in developing the apportionment formula, which is equal to the price paid at the first point of landing.

Volume means the weight of the fishery resource as landed, at the first point of landing.

§253.21 Apportionment.

(a) Apportionment formula. The amount of funds apportioned to each state is to be determined by the Secretary as the ratio which the equally weighted average of the volume and value of fishery resources harvested by domestic commercial fishermen and landed within such state during the 3 most recent calendar years for which data satisfactory to the Secretary are available bears to the total equally weighted average of the volume and value of all fishery resources harvested by domestic commercial fishermen and landed within all of the states during those calendar years.

(1) The equally weighted average value is determined by the following formula:

$$\frac{\text{Volume of X State}}{\text{Volume of all States}} = \text{A percent}$$

$$\frac{\text{Value of X State}}{\text{Value of all States}} = \text{B percent}$$

$$\frac{[\text{A\%} + \text{B\%}]}{2} = \begin{array}{c}\text{State percentage used to}\\ \text{determine state's share of}\\ \text{the total available funds}\end{array}$$

(2) Upon appropriation of funds by Congress, the Secretary will take the following actions:

(i) Determine each state's share according to the apportionment formula.

(ii) Certify the funds to the respective NMFS Regional Director.

(iii) Instruct NMFS Regional Directors to promptly notify states of funds' availability.

(b) No state, under the apportionment formula in paragraph (a) of this section, that has a ratio of one-third of 1 percent or higher may receive an apportionment for any fiscal year that is less than 1 percent of the total amount of funds available for that fiscal year.

(c) If a State's ratio under the apportionment formula in paragraph (b) of this section is less than one-third of 1 percent, that state may receive funding if the state:

(1) Is signatory to an interstate fishery compact;

(2) Has entered into an enforcement agreement with the Secretary and/or the Secretary of the Interior for a fishery that is managed under an interstate fishery management plan;

(3) Borders one or more of the Great Lakes;

(4) Has entered into an interstate cooperative fishery management agreement and has in effect an interstate fisheries management plan or an interstate fisheries research program; or

(5) Has adopted a Federal fishery management plan for an interjurisdictional fishery resource.

(d) Any state that has a ratio of less than one-third of 1 percent and meets any of the requirements set forth in paragraphs (c) (1) through (5) of this section may receive an apportionment for any fiscal year that is not less than 0.5 percent of the total amount of funds available for apportionment for such fiscal year.

(e) No state may receive an apportionment under this section for any fiscal year that is more than 6 percent of the total amount of funds available for apportionment for such fiscal year.

(f) Unused apportionments. Any part of an apportionment for any fiscal year to any state:

(1) That is not obligated during that year;

(2) With respect to which the state notifies the Secretary that it does not wish to receive that part; or

(3) That is returned to the Secretary by the state, may not be considered to be appropriated to that state and must be added to such funds as are appropriated for the next fiscal year. Any notification or return of funds by a state referred to in this section is irrevocable.

§253.22 State projects.

(a) *General*—(1) *Designation of state agency*. The Governor of each state shall notify the Secretary of which agency of the state government is authorized under its laws to regulate commercial fisheries and is, therefore, designated receive financial assistance awards. An official of such agency shall certify which official(s) is authorized

in accordance with state law to commit the state to participation under the Act, to sign project documents, and to receive payments.

(2) States that choose to submit proposals in any fiscal year must so notify the NMFS Regional Director before the end of the third quarter of that fiscal year.

(3) Any state may, through its state agency, submit to the NMFS Regional Director a completed NOAA Grants and Cooperative Agreement Application Package with its proposal for a project, which may be multiyear. Proposals must describe the full scope of work, specifications, and cost estimates for such project.

(4) States may submit a proposal for a project through, and request payment to be made to, an Interstate Fisheries Commission. Any payment so made shall be charged against the apportionment of the appropriate state(s). Submitting a project through one of the Commissions does not remove the matching funds requirement for any state, as provided in paragraph (c) of this section.

(b) *Evaluation of projects.* The Secretary, before approving any proposal for a project, will evaluate the proposal as to its applicability, in accordance with 16 U.S.C. 4104(a)(2).

(c) *State matching requirements.* The Federal share of the costs of any project conducted under this subpart, including a project submitted through an Interstate Commission, cannot exceed 75 percent of the total estimated cost of the project, unless:

(1) The state has adopted an interstate fishery management plan for the fishery resource to which the project applies; or

(2) The state has adopted fishery regulations that the Secretary has determined are consistent with any Federal fishery management plan for the species to which the project applies, in which case the Federal share cannot exceed 90 percent of the total estimated cost of the project.

(d) *Financial assistance award.* If the Secretary approves or disapproves a proposal for a project, he or she will promptly give written notification, including, if disapproved, a detailed explanation of the reason(s) for the disapproval.

(e) *Restrictions.* (1) The total cost of all items included for engineering, planning, inspection, and unforeseen contingencies in connection with any works to be constructed as part of such a proposed project shall not exceed 10 percent of the total cost of such works, and shall be paid by the state as a part of its contribution to the total cost of the project.

(2) The expenditure of funds under this subpart may be applied only to projects for which a proposal has been evaluated under paragraph (b) of this section and approved by the Secretary, except that up to $25,000 each fiscal year may be awarded to a state out of the state's regular apportionment to carry out an ''enforcement agreement.'' An enforcement agreement does not require state matching funds.

(f) *Prosecution of work.* All work must be performed in accordance with applicable state laws or regulations, except when such laws or regulations are in conflict with Federal laws or regulations such that the Federal law or regulation prevails.

§ 253.23 Other funds.

(a) *Funds for disaster assistance.* (1) The Secretary shall retain sole authority in distributing any disaster assistance funds made available under section 308(b) of the Act. The Secretary may distribute these funds after he or she has made a thorough evaluation of the scientific information submitted, and has determined that a commercial fishery failure of a fishery resource arising from natural or undetermined causes has occurred. Funds may only be used to restore the resource affected by the disaster, and only by existing methods and technology. Any fishery resource used in computing the states' amount under the apportionment formula in § 253.21(a) will qualify for funding under this section. The Federal share of the cost of any activity conducted under the disaster provision of the Act shall be limited to 75 percent of the total cost.

(2) In addition, pursuant to section 308(d) of the Act, the Secretary is authorized to award grants to persons engaged in commercial fisheries, for uninsured losses determined by the Secretary to have been suffered as a direct result of a fishery resource disaster. Funds may be distributed by the Secretary only after notice and opportunity for public comment of the appropriate limitations, terms, and conditions for awarding assistance under this section. Assistance provided under this section is limited to 75 percent of an uninsured loss to the extent that such losses have not been compensated by other Federal or State programs.

(b) *Funds for interstate commissions.* Funds authorized to support the efforts of the three chartered Interstate Marine Fisheries Commissions to develop and maintain interstate fishery management plans for interjurisdictional fisheries will be divided equally among the Commissions.

§253.24 Administrative requirements.

Federal assistance awards made as a result of this Act are subject to all Federal laws, Executive Orders, Office of Management and Budget Circulars as incorporated by the award; Department of Commerce and NOAA regulations; policies and procedures applicable to Federal financial assistance awards; and terms and conditions of the awards.

PART 259—CAPITAL CONSTRUCTION FUND

JOINT TAX REGULATIONS

Sec.
259.1 Execution of agreements and deposits made in a Capital Construction Fund.

CAPITAL CONSTRUCTION FUND AGREEMENT

259.30 Application for Interim Capital Construction Fund Agreement (''Interim CCF Agreement'').
259.31 Acquisition, construction, or reconstruction.
259.32 Conditional fisheries.
259.33 Constructive deposits and withdrawals; ratification of withdrawals (as qualified) made without first having obtained Secretary's consent; first tax year for which Interim CCF Agreement is effective.
259.34 Minimum and maximum deposits; maximum time to deposit.
259.35 Annual deposit and withdrawal reports required.
259.36 CCF accounts.
259.37 Conditional consents to withdrawal qualification.
259.38 Miscellaneous.

AUTHORITY: 46 U.S.C. 1177.

JOINT TAX REGULATIONS

§259.1 Execution of agreements and deposits made in a Capital Construction Fund.

In the case of a taxable year of a taxpayer beginning after December 31, 1969, and before January 1, 1972, the rules governing the execution of agreements and deposits under such agreements shall be as follows:

(a) A capital construction fund agreement executed and entered into by the taxpayer on or prior to the due date, with extensions, for the filing of his Federal income tax return for such taxable year or years will be deemed to be effective on the date of the execution of such agreement or as of the close of business of the last regular business day of each such taxable year or years to which such deposit relates, whichever day is earlier.

(b) Notwithstanding the provisions of paragraph (a) of this section, where:

(1) For taxable years beginning after December 31, 1969, and prior to January 1, 1971, an application for a capital construction fund agreement is filed by a taxpayer prior to January 1, 1972, and a capital construction fund agreement is executed and entered into by the taxpayer prior to March 1, 1972, and

(2) For taxable years beginning after December 31, 1970, and prior to January 1, 1972, an application for a capital construction fund agreement is filed by a taxpayer prior to January 1, 1973, and a capital construction fund agreement is executed and entered into by the taxpayer prior to March 1, 1973 (or, if earlier, 60 days after the publication of final joint regulations under section 607 of the Merchant Marine Act, 1936, as amended); then such a capital construction fund agreement will be deemed to be effective as of the close of business of the last regular business day of each such taxable year or years to which such deposit related.

(c)(1) Deposits made in a capital construction fund pursuant to such an agreement within 60 days after the date of execution of the agreement, or on or prior to the due date, with extensions, for the filing of his Federal income tax return for such taxable year or years, whichever date shall be later, shall be deemed to have been made on the date of the actual deposit or as of the close of business of the last regular business day of each such taxable year or years to which such deposit relates, whichever day is earlier.

(2) Notwithstanding paragraph (c)(1) of this section, for taxable years beginning after December 31, 1970, and ending prior to January 1, 1972, deposits made later than the last date permitted under paragraph (c)(1) of this section but on or before January 9, 1973, in a capital construction fund pursuant to an agreement with the Secretary of Commerce, acting by and through the Administrator of the National Oceanic and Atmospheric Administration, shall be deemed to have been made on the date of the actual deposit or as of the close of business of the last regular business day of such taxable year, whichever is earlier.

(d) Nothing in this section shall alter the rules and regulations governing the timing of deposits with respect to existing capital and special reserve funds or with respect to the treatment of deposits for any taxable year or years other than a taxable year or years beginning after December 31, 1969, and before January 1, 1972.[1]

[37 FR 25025, Nov. 25, 1972, as amended at 38 FR 8163, Mar. 29, 1973]

CAPITAL CONSTRUCTION FUND AGREEMENT

SOURCE: Sections 259.30 to 259.38 appear at 39 FR 33675, Sept. 19, 1974, unless otherwise noted.

[1] The phrase ''existing capital and special reserve funds'' does not refer to the Capital Construction Fund program but rather to funds established with the Maritime Administration prior to the amendment of the Merchant Marine Act, 1936, which authorized the Capital Construction Fund program.

§ 259.30 Application for Interim Capital Construction Fund Agreement (''Interim CCF Agreement'').

(a) *General qualifications.* To be eligible to enter into an Interim CCF Agreement an applicant must:

(1) Be a citizen of the United States (citizenship requirements are those for documenting vessels in the coastwise trade within the meaning of section 2 of the Shipping Act, 1916, as amended);

(2) Own or lease one or more eligible vessels (as defined in section 607(k)(1) of the Act) operating in the foreign or domestic commerce of the United States.

(3) Have an acceptable program for the acquisition, construction, or reconstruction of one or more qualified vessels (as defined in section 607(k)(2) of the Act). Qualified vessels must be for commercial operation in the fisheries of the United States. If the qualified vessel is 5 net tons or over, it must be documented in the fisheries of the United States. Dual documentation in both the fisheries and the coastwise trade of the United States is permissible. Any vessel which will carry fishing parties for hire must be inspected and certified (under 46 CFR part 176) by the U.S. Coast Guard as qualified to carry more than six passengers or demonstrate to the Secretary's satisfaction that the carrying of fishing parties for hire will constitute its primary activity. The program must be a firm representation of the applicant's actual intentions. Vague or contingent objectives will not be acceptable.

(b) *Content of application.* Applicants seeking an Interim CCF Agreement may make application by letter providing the following information:

(1) Proof of U.S. citizenship;

(2) The first taxable year for which the Interim CCF Agreement is to apply (see § 259.33 for the latest time at which applications for an Interim CCF Agreement relating to a previous taxable year may be received);

(3) The following information regarding each ''eligible vessel'' which is to be incorporated in Schedule A of the Interim CCF Agreement for purposes of making deposits into a CCF pursuant to section 607 of the Act:

(i) Name of vessel,

(ii) Official number, or, in the case of vessels under 5 net tons, the State registration number where required,

(iii) Type of vessel (i.e., catching vessel, processing vessel, transporting vessel, charter vessel, barge, passenger carrying fishing vessel, etc.),

(iv) General characteristic (i.e., net tonnage, fish-carrying capacity, age, length, type of fishing gear, number of passengers carried or in the case of vessels operating in the foreign or domestic commerce the various uses of the vessel, etc.),

(v) Whether owned or leased and, if leased, the name of the owner, and a copy of the lease,

(vi) Date and place of construction,

(vii) If reconstructed, date of redelivery and place of reconstruction,

(viii) Trade (or trades) in which vessel is documented and date last documented,

(ix) If a fishing vessel, the fishery of operation (which in this section means each species or group of species—each species must be specifically identified by acceptable common names—of fish, shellfish, or other living marine resources which each vessel catches, processes, or transports or will catch, process, or transport for commercial purposes such as marketing or processing the catch),

(x) If a fishing vessel, the area of operation (which for fishing vessels means the general geographic areas in which each vessel will catch, process, or transport, or charter for each species or group of species of fish, shellfish, or other living marine resources).

(4) The specific objectives to be achieved by the accumulation of assets in a Capital Construction Fund (to be incorporated in Schedule B of the Interim CCF Agreement) including:

(i) Number of vessels,

(ii) Type of vessel (i.e., catching, processing, transporting, or passenger carrying fishing vessel),

(iii) General characteristics (i.e., net tonnage, fish-carrying capacity, age, length, type of fishing gear, number of passengers carried),

(iv) Cost of projects,

(v) Amount of indebtedness to be paid for vessels to be constructed, acquired, or reconstructed (all notes, mortgages, or other evidences of the indebtedness must be submitted as soon as available, together with sufficient additional evidence to establish that full proceeds of the indebtedness to be paid from a CCF under an Interim CCF Agreement, were used solely for the purpose of the construction, acquisition, or reconstruction of Schedule B vessels),

(vi) Date of construction, acquisition, or reconstruction,

(vii) Fishery of operation (which in this section means each species or group of species—each species must be specifically identified by acceptable common name—of fish, shellfish, or other living marine resources),

(viii) Area of operation (which in this section means the general geographic areas in which each vessel will will operate for each species or group of species of fish, shellfish, or other living marine resources).

(c) *Filing.* The application must be signed and submitted in duplicate to the Regional Office of the National Marine Fisheries Service's Financial Assistance Division corresponding to the region in which the party conducts its business. As a general rule, the Interim CCF Agreement must be executed and entered into by the taxpayer on or prior to the due date, with extensions, for the filing of the Federal tax return in order to be effective for the tax year to which that return relates. It is manifestly in the Applicant's best interest to file at least 45 days in advance of such date.

[39 FR 33675, Sept. 19, 1974, as amended at 42 FR 65185, Dec. 30, 1978]

§259.31 Acquisition, construction, or reconstruction.

(a) *Acquisition.* No vessel having previously been operated in a fishery of the United States prior to its acquisition by the party seeking CCF withdrawal therefor shall be a qualified vessel for the purpose of acquisition, except in the cases specified in paragraphs (a)(1) and (2) of this section:

(1) A vessel not more than 5 years old, at the time of its acquisition by the party seeking CCF withdrawal therefor may be a qualified vessel for the purpose of acquisition, but only if each acquisition in this category becomes a Schedule A vessel and there

exists for each acquisition in this category (on a one-for-one basis) an additional Schedule B construction or reconstruction. The sole consideration for permitting an acquisition in this category is that it will enable the party (but the Secretary will not attempt to predetermine such an ability) to accelerate accomplishment of the additional Schedule B construction or reconstruction. Should this consideration materially fail, the Secretary shall, at his discretion, disqualify previously qualified withdrawals in this category, seek liquidated damages as provided for in paragraph (a)(4) of this section and/or terminate the Interim CCF Agreement.

(2) A vessel more than 5 years old, but not more than 25 years old (special showing required if more than 25 years old, see paragraph (b) of this section), at the time of acquisition by the party seeking CCF withdrawal therefor may be a qualified vessel for the purpose of acquisition, but only if that same vessel becomes a Schedule A vessel and (in addition to being a Schedule B vessel for the purpose of its acquisition) becomes a Schedule B vessel for the purpose of that same vessel's reconstruction to be accomplished ordinarily within 7 years from the date of acquisition. The sole consideration for permitting an acquisition in this category is that it will enable a party (but the Secretary will not attempt to predetermine such an ability) to accelerate accomplishment of the Schedule B reconstruction of the vessel so acquired. Should this consideration materially fail, the same penalty prescribed in paragraph (a)(1) of this section applies.

(3) Reserved for minimum deposits under this section.

(4) Reserved for liquidated damages.

(b) *Reconstruction.* No reconstruction project costing less than $100,000 shall qualify a vessel for reconstruction, unless the reconstruction project costs, or will cost, 20 percent or more of the reconstructed vessel's acquisition cost (in its unreconstructed state) to the party seeking CCF withdrawal therefor. If the reconstruction project meets the $100,000 test, then the 20 percent test does not apply. Conversely, if the reconstruction project does not meet the $100,000 test, then the 20 percent test applies.

(1) Reconstruction may include rebuilding, replacing, reconditioning, converting and/or improving any portion of a vessel. A reconstruction project must, however, substantially prolong the useful life of the reconstructed vessel, increase its value, or adapt it to a different commercial use in the fishing trade or industry.

(2) All, or the major portion (ordinarily, not less than 80 percent), of a reconstruction project's actual cost must (for the purpose of meeting the above dollar or percentage tests) be classifiable as a capital expenditure for Internal Revenue Service (IRS) purposes. That otherwise allowable (i.e., for the purpose of meeting the above dollar or percentage tests) portion of a reconstruction project's actual cost which is not classifiable as a capital expenditure shall, however, be excluded from the amount qualified for withdrawal as a result of the reconstruction project.

(3) No vessel more than 25 years old at the time of withdrawal or request for withdrawal shall be a qualified vessel for the purpose of reconstruction unless a special showing is made, to the Secretary's discretionary satisfaction, that the type and degree of reconstruction intended will result in an efficient and productive vessel with an economically useful life at least 10 years beyond the date reconstruction is completed.

(c) *Time permitted for construction or reconstruction.* Construction or reconstruction must be completed within 18 months from the date construction or reconstruction first commences, unless otherwise consented to by the Secretary.

(d) *Energy saving improvements.* An improvement made to a vessel to conserve energy shall, regardless of cost, be treated as a reconstruction for the purpose of qualifying a CCF withdrawal for such expenditure and shall be exempted from having to meet conditional fishery requirements for reconstruction as set forth in § 259.32 and from all qualifying tests for reconstruction set forth in paragraph (b) of this section with the following exceptions:

(1) An energy saving improvement shall be required to meet both conditional fishery requirements and the qualifying tests for reconstruction if it serves the dual purpose of saving energy and meeting the reconstruction requirement of paragraph (a) of this section for qualifying a withdrawal for the acquisition of a used vessel.

(2) That portion of the actual cost of an energy saving improvement which is to be paid for from the CCF must be classifiable and treated as a capital expenditure for Internal Revenue Service purposes.

(e) *Safety projects*. The acquisition and installation of safety equipment for a qualified vessel and vessel modifications whose central purpose is materially increasing the safety of a qualified vessel or the acquisition and installation of equipment required by law or regulation that materially increases the safety of a qualified vessel shall, regardless of cost, be treated as reconstruction for the purpose of qualifying a CCF withdrawal for such expenditure, shall be exempt from having to meet conditional fishery requirements for reconstruction as set forth in §259.32, and shall be exempt from all qualifying tests for reconstruction set forth in paragraph (b) of this section, with the following exceptions:

(1) A safety improvement shall be required to meet both conditional fishery requirements and all qualifying tests for reconstruction if it serves the dual purpose of safety and meeting the reconstruction requirement of paragraph (a) of this section for qualifying a withdrawal for the acquisition of a used vessel;

(2) That portion of the actual cost of a safety improvement that is to be paid for from the CCF must be classifiable and treated as a capital expenditure for Internal Revenue Service purposes;

(3) Safety improvement projects whose clear and central purpose is restricted to complying with the requirements of the Commercial Fishing Industry Vessel Safety Act of 1988 (Public Law 100–424 Sec. 1, 102 stat. 1585 (1988) (codified in scattered sections of 46 U.S.C.)) shall, without further documentation, be considered to fall within this paragraph (e). Satisfactory documentation will be required for all other projects proposed to be considered as falling within this paragraph (e). Projects not required by law or regulation whose central purpose clearly involves something other than an improvement that materially increases the safety of a vessel will not be considered to fall within this paragraph (e).

[39 FR 33675, Sept. 19, 1974, as amended at 46 FR 54563, Nov. 3, 1981; 62 FR 331, Jan. 3, 1997]

§259.32 Conditional fisheries.

(a) The Secretary may from time-to-time establish certain fisheries in which CCF benefits will be restricted. The regulatory mechanism for so doing is part 251 of this chapter. Each fishery so restricted is termed a ''conditional fishery''. Subpart A of part 251 of this chapter establishes the procedure to be used by the Secretary in proposing and adopting a fishery as a conditional fishery. Subpart B of part 251 of this chapter enumerates each fishery actually adopted as a conditional fishery (part 251 of this chapter should be referred to for details). The purpose of this §259.32 is to establish the effect of conditional fishery adoption upon Interim CCF Agreements.

(b) If a written request for an otherwise permissible action under an Interim CCF Agreement is submitted prior to the date upon which conditional fishery adoption occurs, then the Secretary will act, in an otherwise normal manner, upon so much of the action then applied for as is then permissible without regard to the subsequent adoption of a conditional fishery (even, if that adoption occurs before the Secretary gives his consent or issues an Interim CCF Agreement or amendment thereto, all as the case may be). Nevertheless, the conditions as set forth in paragraph (d) of this section shall apply.

(c) If a written request for an otherwise permissible action under an Interim CCF Agreement, or an application for an Interim CCF Agreement, is submitted after the date upon which conditional fishery adoption occurs, then the Secretary will act, in an otherwise normal manner, upon so much of the action then applied for as is then permissible without regard to the previous adoption of a conditional fishery

provided, however, that this paragraph shall apply only to construction or reconstruction for which a binding contract has been reduced to writing prior to the date upon which conditional fishery adoption occurred. Nevertheless, the conditions as set forth in paragraph (d) of this section shall apply.

(d) Conditional fishery adoption shall have no effect whatsoever upon a Schedule B objective whose qualification for withdrawal (which may be in an amount equal to the total cost over time of a Schedule B objective, i.e., a series of withdrawals) has been, prior to the date of conditional fishery adoption, either consented to by the Secretary or requested in accordance with paragraph (b) or (c) of this section. This extends to past, present, and future withdrawals in an amount representing up to 100 percent of the cost of a Schedule B objective. Commencement of any project in these categories shall, however, be started not later than 6 months from the date of conditional fishery adoption and shall be completed within 24 months from the date of conditional fishery adoption, unless for good and sufficient cause shown the Secretary, at his discretion, consents to a longer period for either project commencement or completion. Consent to the qualification of withdrawal for any project in these categories not commenced or completed within the periods allowed shall be revoked at the end of the periods allowed.

(e) Conditional fishery adoption shall have no effect whatsoever upon Schedule B objectives which will not result in significantly increasing harvesting capacity in a fishery adopted as a conditional fishery.

(1) Construction of a new vessel (vessel ''Y'') for operation in an adopted conditional fishery shall be deemed to significantly increase harvesting capacity in that fishery unless the party causing the ''Y'' vessel to be constructed causes (within 1 year after the delivery of vessel ''Y'') to be permanently removed from all fishing, or placed permanently in a fishery not then adopted as a conditional fishery, under such conditions as the Secretary may deem necessary or desirable, a vessel (vessel ''Z'') which has during the previous 18 months operated substantially in the same fishery as the ''Y'' vessel and which has a fishing capacity substantially equivalent to the ''Y'' vessel. Failure to remove a vessel could subject all withdrawals to be treated as nonqualified and may be cause for termination of the CCF. What constitutes substantially equivalent fishing capacity shall be a matter for the Secretary's discretion. Ordinarily, in exercising his discretion about what does or does not constitute substantially equivalent fishing capacity, the Secretary will take into consideration (i) the average size of vessels constructed for the adopted conditional fishery in question at the time vessel ''Z'' was constructed (or, if constructed for a different fishery, the average size of vessels in the adopted conditional fishery at the time vessel ''Z'' entered it), (ii) the average size of vessels constructed for the adopted conditional fishery at the time vessel ''Y'' was or will be constructed, and (iii) such other factors as the Secretary may deem material and equitable, including the length of time the party had owned or leased vessel ''Z'' and the length of time the vessel has operated in the conditional fishery. The Secretary will consider these factors, and exercise his discretion, in such a way as to encourage use of this program by established fishermen who have owned or leased for substantial periods vessels which need to be replaced, even though a ''Z'' vessel may have been constructed at a time which dictated a lesser fishing capacity than dictated for a ''Y'' vessel at the time of its construction.

(2) Acquisition and/or reconstruction of a used vessel for operation in an adopted conditional fishery shall be deemed to significantly increase harvesting capacity in that fishery unless the vessel to be acquired and/or reconstructed had during the previous 3 years operated substantially in the same fishery as the adopted conditional fishery in which it will operate after acquisition and/or reconstruction. If less than 3 years, then acquisition and/or reconstruction of a used vessel for operation in an adopted conditional fishery shall be deemed to significantly increase harvesting capacity in that

fishery unless there occurs vessel removal or permanent placement elsewhere under the same conditions specified for construction in paragraph (e)(1) of this section.

(3) Construction of a new vessel or the acquisition and/or reconstruction of a used vessel for operation in an adopted conditional fishery shall not be deemed to significantly increase the harvesting capacity where the vessel constructed, acquired and/or reconstructed replaces another vessel which was lost or destroyed and which had, immediately prior to the loss or destruction, operated in the same fishery as the adopted conditional fishery, provided, however, that the fishing capacity of the replacement vessel has a fishing capacity substantially equivalent to the vessel lost or destroyed and that the construction, acquisition and/or reconstruction is completed within 2 years after the close of the taxable year in which the loss or destruction occurred. The Secretary may, at his discretion, and for good and sufficient cause shown, extend the replacement period, provided that the request for extension of time to replace is timely filed with the Secretary

(f) Conditional fishery adoption shall have the following effect on all Schedule B objectives (whether for acquisition, construction, or reconstruction) which the Secretary deems to significantly increase harvesting capacity in that fishery, excluding those circumstances specifically exempted by paragraphs (b) through (e) of this section (which shall be governed by the provisions of paragraphs (b) through (e) of this section).

(1) The Secretary may nevertheless consent to the qualification of withdrawal, but only up to an amount not exceeding the total of eligible ceilings actually deposited during tax years other than the taxable year in which conditional fishery adoption occurs plus a pro-rata portion of eligible ceilings generated in the tax year in which conditional fishery adoption occurs. Pro-ration shall be according to the number of months or any part thereof in a party's tax year which elapse before the adoption of the conditional fishery occurs. For example, if a party's tax year runs from January 1, 1974, to December 31, 1974, and conditional fishery adoption occurs on August 15, 1974, (i.e., during the 8th month of the party's tax year), then the pro-rata portion for that year is eight-twelfths of the total eligible ceilings generated during that year.

(2) Qualified withdrawals in excess of the amount specified in paragraph (f)(1) of this section shall not, during the continuance of the adopted conditional fishery, be consented to. Parties at this point shall have the following option:

(i) Make, with the Secretary's consent, a nonqualified withdrawal of the excess and discontinue the future deposit of eligible ceilings (which may effect termination of the Interim CCF Agreement).

(ii) Reserve the excess, as well as the future deposit of eligible ceilings, for a Schedule B objective not then involving an adopted conditional fishery. If amendment of an Interim CCF Agreement is necessary in order to include a Schedule B objective not then involving an adopted conditional fishery, the party may, with the Secretary's consent, make the necessary amendment.

(iii) Reserve the excess, as well as the future deposit of eligible ceilings, for a Schedule B objective involving a then adopted conditional fishery in anticipation that the then adopted conditional fishery will eventually be disadopted, in which case all deposits of eligible ceilings will once again be eligible for the Secretary's consent as qualified withdrawals. If the adoption of a conditional fishery continues for a substantial length of time and there is no forseeable prospect of disadoption, then the Secretary, in his discretion, may require paragraph (f)(2)(i) or (ii) of this section to be effected.

(g) The Secretary shall neither enter into a new Interim CCF Agreement, nor permit amendment of an existing one, which involves a Schedule B objective in a then adopted conditional fishery unless paragraph (b), (c) or (d) of this §259.32 applies or unless the Schedule B objective is expressly conditioned upon acquisition construction, or reconstruction of the type permitted under paragraph (e) of this §259.32. Such an express condition would not survive beyond the time at which conditional fishery status is removed.

§ 259.33 Constructive deposits and withdrawals; ratification of withdrawals (as qualified) made without first having obtained Secretary's consent; first tax year for which Interim CCF Agreement is effective.

(a) *Periods controlling permissibility.* For the purpose of this § 259.33, the period between the beginning and the end of a party's tax year is designated ''Period (aa)''; the period between the end of a party's tax year and the party's tax due date for that tax year is designated ''Period (bb)''; the period between the party's tax due date and the date on which ends the party's last extension (if any) of that tax due date is designated ''Period (cc)''.

(b) *Constructive deposits and withdrawals* (*before Interim CCF Agreement effectiveness date*). Constructive deposits and withdrawals shall be permissible only during the Period (aa) during which a written application for an interim CCF Agreement is submitted to the Secretary and so much of the next succeeding Period (aa), if any, which occurs before the Secretary executes the Interim CCF Agreement previously applied for. All otherwise qualified expenditures of eligible ceilings during Period (aa) may be consented to by the Secretary as constructive deposits and withdrawals: *Provided,* The applicant's application for an Interim CCF Agreement and for consent to constructive deposit and withdrawal qualification (together with sufficient supporting data to enable the Secretary's execution or issuance of consent) is submitted to the Secretary either before the end of Period (bb) or, if extension was requested and received, before the end of Period (cc). If, however, the Secretary receives the completed application in proper form so close to the latest permissible period that the Interim CCF Agreement cannot be executed and/or the consent given before the end of Period (bb) or Period (cc), whichever applies, then the burden is entirely upon the applicant to negotiate with the Internal Revenue Service (IRS) for such relief as may be available (e.g., filing an amended tax return, if appropriate). The Secretary willl nevertheless execute the Interim CCF Agreement and issue his consent however long past the applicant's Period (bb) or Period (cc), whichever applies, the Secretary's administrative workload requires. Should IRS relief be, for any reason, unavailable, the Secretary shall regard the same as merely due to the applicant's having failed to apply in a more timely fashion.

(c) *Constructive deposits* (*after Interim CCF Agreement effectiveness date*). The Secretary shall not permit constructive deposits or withdrawals after the effective date of an Interim CCF Agreement. Eligible ceilings must, after the effective date of an interim CCF Agreement, be physically deposited in money or kind in scheduled depositories before the last date eligible ceilings for any Period (aa) of any party become ineligible for deposit (the last date being Period (bb) or Period (cc), whichever applies).

(d) *Ratification of withdrawals* (*as qualified*) *made without first having obtained Secretary's consent.* The Secretary may ratify as qualified any withdrawal made without first having obtained the Secretary's consent therefor, provided the withdrawal was such as would have resulted in the Secretary's consent had it been requested before withdrawal, and provided further that the party's request for consent (together with sufficient supporting data to enable issuance of the Secretary's consent) is submitted to the Secretary either before the end of Period (bb) or, if extension was requested and received, before the end of Period (cc).

(1) If, however, the Secretary receives the request in proper form so close to the latest permissible period that the consent cannot be given before expiration of Period (bb) or Period (cc), whichever applies, then the burden is entirely upon the party to negotiate with IRS for such relief as may be available (e.g., filing an amended tax return, if appropriate). The Secretary will nevertheless issue his consent however long past the party's Period (bb) or Period (cc), whichever applies, the Secretary's administrative workload requires. Should IRS relief be, for any reason, unavailable, the Secretary shall regard the same as merely due to the party's having failed to apply in a more timely fashion.

(2) All parties shall be counseled that it is manifestly in their best interest to request the Secretary's consent 45 days in advance of the expected date of withdrawal. Withdrawals made without the Secretary's consent, in reliance on obtaining the Secretary's consent, are made purely at a party's own risk. Should any withdrawal made without the Secretary's consent prove, for any reason, to be one to which the Secretary will not or cannot consent by ratification, then the result will be either, or both, at the Secretary's discretion, an unqualified withdrawal or an involuntary termination of the Interim CCF Agreement.

(3) Should the withdrawal made without having first obtained the Secretary's consent be made in pursuance of a project not then an eligible Schedule B objective, then the Secretary may entertain an application to amend the Interim CCF Agreement's Schedule B objectives as the prerequisite to consenting by ratification to the withdrawal, all under the same time constraints and conditions as otherwise specified herein.

(4) Any withdrawals made, after the effective date of an Interim CCF Agreement, without the Secretary's consent are automatically non-qualified withdrawals unless the Secretary subsequently consents to them by ratification as otherwise specified herein.

(5) Redeposit of that portion of the ceiling withdrawn without the Secretary's consent, and for which such consent is not subsequently given (either by ratification or otherwise), shall not be permitted. If such a non-qualified withdrawal adversely affects the Interim CCF Agreement's general status in any wise deemed by the Secretary, at his discretion, to be significant and material, the Secretary may involuntarily terminate the Interim CCF Agreement.

(e) *First tax year for which Interim CCF Agreement is effective.* An Agreement, to be effective for any party's Period (aa), must be executed and entered into by the party, and submitted to the Secretary, before the end of Period (bb) or Period (cc), whichever applies, for such Period (aa). If executed and entered into by the party, and/or received by the Secretary, after the end of Period (bb) or Period (cc), whichever applies, then the Agreement will be first effective for the next succeeding Period (aa).

(1) If, however, the Secretary receives an Agreement executed and entered into by the party in proper form so close to the latest permissible period that the Secretary cannot execute the Agreement before expiration of Period (bb) or Period (cc), whichever applies, then the burden is entirely upon the party to negotiate with IRS for such relief as may be available (e.g., filing an amended tax return, if appropriate). The Secretary will nevertheless execute the Agreement however long past the party's Period (bb) or Period (cc), whichever applies, the Secretary's administrative workload requires. Should IRS relief be, for any reason, unavailable, the Secretary shall regard the same as merely due to the party's having failed to apply in a more timely manner.

(2) All parties shall be counseled that it is manifestly in their best interest to enter into and execute an Agreement, and submit the same to the Secretary, at least 45 days in advance of the Period (bb) or Period (cc), whichever applies, for the Period (aa) for which the Agreement is first intended to be effective.

§259.34 Minimum and maximum deposits; maximum time to deposit.

(a) *Minimum annual deposit.* The minimum annual (based on each party's taxable year) deposit required by the Secretary in order to maintain an Interim CCF Agreement shall be an amount equal to 2 percent of the total anticipated cost of all Schedule B objectives unless such 2 percent exceeds during any tax year 50 percent of a party's Schedule A taxable income, in which case the minimum deposit for that year shall be 50 percent of the party's Schedule A taxable income.

(1) Minimum annual deposit compliance shall be audited at the end of each party's taxable year unless any one or more of the Schedule B objectives is scheduled for commencement more than 3 taxable years in advance of the taxable year in which the agreement is

effected, in which case minimum annual deposit compliance shall be audited at the end of each 3 year taxable period. In any taxable year, a Party may apply any eligible amount in excess of the 2 percent minimum annual deposit toward meeting the party's minimum annual deposit requirement in past or future years: *Provided, however,* At the end of each 3 year period, the aggregate amount in the fund must be in compliance with 2 percent minimum annual deposit rule (unless the 50 percent of taxable income situation applies).

(2) The Secretary may, at his discretion and for good and sufficient cause shown, consent to minimum annual deposits in any given tax year or combination of tax years in an amount lower than prescribed herein: *Provided,* The party demonstrates to the Secretary's satisfaction the availability of sufficient funds from any combination of sources to accomplish Schedule B objectives at the time they are scheduled for accomplishment.

(b) *Maximum deposits.* Other than the maximum annual ceilings established by the Act, the Secretary shall not establish a maximum annual ceiling: *Provided, however,* That deposits can no longer be made once a party has deposited 100 percent of the anticipated cost of all Schedule B objectives, unless the Interim CCF Agreement is then amended to establish additional Schedule B objectives.

(c) *Maximum time to deposit.* Ten years shall ordinarily be the maximum time the Secretary shall permit in which to accumulate deposits prior to commencement of any given Schedule B objective. A time longer than 10 years, either by original scheduling or by subsequent extension through amendment, may, however, be permitted at the Secretary's discretion and for good and sufficient cause shown.

§ 259.35 Annual deposit and withdrawal reports required.

(a) The Secretary will require from each Interim CCF Agreement holder (Party) the following annual deposit and withdrawal reports. Failure to submit such reports may be cause for involuntary termination of CCF Agreements.

(1) A preliminary deposit and withdrawal report at the end of each calendar year, which must be submitted not later than 45 days after the close of the calendar year. The report must give the amounts withdrawn from and deposited into the party's CCF during the subject year, and be in letter form showing the agreement holder's name, FVCCF identification number, and taxpayer identification number. Each report must bear certification that the deposit and withdrawal information given includes all deposit and withdrawal activity for the year and the account reported. Negative reports must be submitted in those cases where there is no deposit and/or withdrawal activity. If the party's tax year is the same as the calendar year, and if the final deposit and withdrawal report required under paragraph (a)(2) of this section is submitted before the due date for this preliminary report, then this report is not required.

(2) A final deposit and withdrawal report at the end of the tax year, which shall be submitted not later than 30 days after expiration of the due date, with extensions (if any), for filing the party's Federal income tax return. The report must be made on a form prescribed by the Secretary using a separate form for each FVCCF depository. Each report must bear certification that the deposit and withdrawal information given includes all deposit and withdrawal activity for the year and account reported. Negative reports must be submitted in those cases where there is no deposit and/or withdrawal activity.

(b) Failure to submit the required annual deposit and withdrawal reports shall be cause after due notice for either, or both, disqualification of withdrawals or involuntary termination of the Interim CCF Agreement, at the Secretary's discretion.

(c) Additionally, the Secretary shall require from each Interim CCF Agreement holder, not later than 30 days after expiration of the party's tax due date, with extensions (if any), a copy of the party's Federal Income Tax Return filed with IRS for the preceding tax year. Failure to submit shall after due notice be cause for the same adverse

action specified in the paragraph above.

[39 FR 33675, Sept. 19, 1974, as amended at 48 FR 57302, Dec. 29, 1983; 53 FR 35203, Sept. 12, 1988]

§259.36 CCF accounts.

(a) *General:* Each CCF account in each scheduled depository shall have an account number, which must be reflected on the reports required by §259.35. All CCF accounts shall be reserved only for CCF transactions. There shall be no intermingling of CCF and non-CCF transactions and there shall be no pooling of 2 or more CCF accounts without prior consent of the Secretary. Safe deposit boxes, safes, or the like shall not be eligible CCF depositories without the Secretary's consent and then only under such conditions as the Secretary, in his discretion, prescribes.

(b) *Assignment:* The use of Fund assets for transactions in the nature of a countervailing balance, compensating balance, pledge, assignment, or similar security arrangement shall constitute a material breach of the Agreement unless prior written consent of the Secretary is obtained.

(c) *Depositories:* (1) Section 607(c) of the Act provides that amounts in a CCF must be kept in the depository or depositories specified in the Agreements and be subject to such trustee or other fiduciary requirements as the Secretary may specify.

(2) Unless otherwise specified in the Agreement, the party may select the type or types of accounts in which the assets of the Fund may be deposited.

(3) Non-cash deposits or investments of the Fund should be placed in control of a trustee under the following conditions:

(i) The trustee should be specified in the Agreement;

(ii) The trust instrument should provide that all investment restrictions stated in section 607(c) of the Act will be observed;

(iii) The trust instrument should provide that the trustee will give consideration to the party's withdrawal requirements under the Agreement when investing the Fund;

(iv) The trustee must agree to be bound by all rules and regulations which have been or will be promulgated governing the investment or management of the Fund.

§259.37 Conditional consents to withdrawal qualification.

The Secretary may conditionally consent to the qualification of withdrawal, such consent being conditional upon the timely submission to the Secretary of such further proofs, assurances, and advices as the Secretary, in his discretion, may require. Failure of a party to comply with the conditions of such a consent within a reasonable time and after due notice shall, at the Secretary's discretion, be cause for either, or both, nonqualification of withdrawal or involuntary Interim CCF Agreement termination.

§259.38 Miscellaneous.

(a) Wherever the Secretary prescribes time constraints herein for the submission of any CCF transactions, the postmark date shall control if mailed or, if personally delivered, the actual date of submission. All required materials may be submitted to any Financial Assistance Division office of the National Marine Fisheries Service.

(b) All CCF information received by the Secretary shall be held strictly confidential, except that it may be published or disclosed in statistical form provided such publication does not disclose, directly or indirectly, the identity of any fundholder.

(c) While recognizing that precise regulations are necessary in order to treat similarly situated parties similarly, the Secretary also realizes that precision in regulations can often cause inequitable effects to result from unavoidable, unintended, or minor discrepancies between the regulations and the circumstances they attempt to govern. The Secretary will, consequently, at his discretion, as a matter of privilege and not as a matter of right, attempt to afford relief to parties where literal application of the purely procedural, as opposed to substantive, aspects of these regulations would otherwise work an inequitable hardship. This privilege will be sparingly granted and no party should before the fact attempt to act in reliance on its being granted after the fact.

(d) These §§ 259.30 through 259.38 are applicable absolutely to all Interim CCF Agreements first entered into (or the amendment of all then existing Interim CCF Agreements, which amendment is first entered into) on or after the date these §§ 259.30 through 259.38 are adopted. These §§ 259.30 through 259.38 are applicable to all Interim CCF Agreements entered into before the date these §§ 259.30 through 259.38 are adopted, with the following exceptions only:

(1) The vessel age limitations imposed by § 259.31 shall not apply to already scheduled Schedule B objectives.

(2) The minimum deposits imposed by § 259.34 shall not apply to any party's tax year before that party's tax year next following the one in which these §§ 259.30 through 259.38 are adopted.

(e) These §§ 259.30 through 259.38 are specifically incorporated in all past, present, and future Interim CCF Agreements by reference thereto made in Whereas Clause number 2 of all such Interim CCF Agreements.

SUBCHAPTER G—PROCESSED FISHERY PRODUCTS, PROCESSED PRODUCTS THEREOF, AND CERTAIN OTHER PROCESSED FOOD PRODUCTS

PART 260—INSPECTION AND CERTIFICATION

Subpart A—Inspection and Certification of Establishments and Fishery Products for Human Consumption

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AUTHORITY: Sec. 6, 70 Stat. 1122, 16 U.S.C. 742e; secs. 203, 205, 60 Stat. 1087, 1090 as amended; 7 U.S.C. 1622, 1624; Reorganization Plan No. 4 of 1970 (84 Stat. 2090).

SOURCE: 31 FR 16052, Dec. 15, 1966, unless otherwise noted.

Subpart A—Inspection and Certification of Establishments and Fishery Products for Human Consumption

§ 260.1 Administration of regulations.

The Secretary of Commerce is charged with the administration of the regulations in this part except that he may delegate any or all of such functions to any officer or employee of the National Marine Fisheries Service of the Department in his discretion.[1]

[36 FR 21037, Nov. 3, 1971]

DEFINITIONS

§ 260.6 Terms defined.

Words in the regulations in this part in the singular form shall be deemed to import the plural and vice versa, as the case may demand. For the purposes of the regulations in this part, unless the context otherwise requires, the following terms shall have the following meanings:

Acceptance number. ''Acceptance number'' means the number in a sampling plan that indicates the maximum number of deviants permitted in a sample of a lot that meets a specific requirement.

Act. ''Act'' means the applicable provisions of the Agricultural Marketing Act of 1946 (60 Stat. 1087 et seq., as amended; 7 U.S.C. 1621 et seq.).

Applicant. ''Applicant'' means any interested party who requests inspection service under the regulations in this part.

Case. ''Case'' means the number of containers (cased or uncased) which, by the particular industry are ordinarily packed in a shipping container.

Certificate of loading. ''Certificate of loading'' means a statement, either written or printed, issued pursuant to the regulations in this part, relative to check-loading of a processed product subsequent to inspection thereof.

Certificate of sampling. ''Certificate of sampling'' means a statement, either written or printed issued pursuant to the regulations in this part, identifying officially drawn samples and may include a description of condition of containers and the condition under which the processed product is stored.

Class. ''Class'' means a grade or rank of quality.

Condition. ''Condition'' means the degree of soundness of the product which may affect its merchantability and includes, but is not limited to those factors which are subject to change as a result of age, improper preparation and processing, improper packaging, improper storage, or improper handling.

Department. ''Department'' means the U.S. Department of Commerce.

Deviant. ''Deviant'' means a sample unit affected by one or more deviations or a sample unit that varies in a specifically defined manner from the requirements of a standard, specification, or other inspection document.

Deviation. ''Deviation'' means any specifically defined variation from a particular requirement.

Director. ''Director'' means the Director of the National Marine Fisheries Service.

[1] All functions of the Department of Agriculture which pertain to fish, shellfish, and any products thereof, now performed under the authority of title II of the Act of August 14, 1946, popularly known as the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621–1627) including but not limited to the development and promulgation of grade standards, the inspection and certification, and improvement of transportation facilities and rates for fish and shellfish and any products thereof, were transferred to the Department of the Interior by the Director of the Budget (23 FR 2304) pursuant to section 6(a) of the Act of Aug. 8, 1956, popularly known as the Fish and Wildlife Act of 1956 (16 U.S.C. 742e). Reorganization Plan No. 4 of 1970 (84 Stat. 2090) transferred, among other things, such functions from the U.S. Department of the Interior to the U.S. Department of Commerce.

Establishment. ''Establishment'' means any premises, buildings, structures, facilities, and equipment (including vehicles) used in the processing, handling, transporting, and storage of fish and fishery products.

Inspection certificate. ''Inspection certificate'' means a statement, either written or printed, issued pursuant to the regulations in this part, setting forth in addition to appropriate descriptive information relative to a processed product, and the container thereof, the quality and condition, or any part thereof, of the product and may include a description of the conditions under which the product is stored.

Inspection service. ''Inspection service'' means:

(1) The sampling pursuant to the regulations in this part;

(2) The determination pursuant to the regulations in this part of:

(i) Essential characteristics such as style, type, size, or identity of any processed product which differentiates between major groups of the same kind;

(ii) The class, quality, and condition of any processed product, including the condition of the container thereof by the examination of appropriate samples;

(3) The issuance of any certificate of sampling, inspection certificates, or certificates of loading of a processed product, or any report relative to any of the foregoing; or

(4) Performance by an inspector of any related services such as to observe the preparation of the product from its raw state through each step in the entire process; or observe conditions under which the product is being harvested, prepared, handled, stored, processed, packed, preserved, transported, or held; or observe sanitation as a prerequisite to the inspection of the processed product, either on a contract basis or periodic basis; or checkload the inspected processed product in connection with the marketing of the product, or any other type of service of a consultative or advisory nature related herewith.

Inspector. ''Inspector'' means any employee of the Department authorized by the Secretary or any other person licensed by the Secretary to investigate, sample, inspect, and certify in accordance with the regulations in this part to any interested party the class, quality and condition of processed products covered in this part and to perform related duties in connection with the inspection service.

Interested party. ''Interested party'' means any person who has a financial interest in the commodity involved.

Licensed sampler. ''Licensed sampler'' means any person who is authorized by the Secretary to draw samples of processed products for inspection service, to inspect for identification and condition of containers in a lot, and may, when authorized by the Secretary, perform related services under the act and the regulations in this part.

Lot. ''Lot'' has the following meanings:

(1) For the purpose of charging fees and issuing certificates, ''Lot'' means any number of containers of the same size and type which contain a processed product of the same type and style located in the same or adjacent warehouses and which are available for inspection at any one time: *Provided,* That:

(i) Processed products in separate piles which differ from each other as to grade or other factors may be deemed to be separate lots;

(ii) Containers in a pile bearing an identification mark different from other containers of such processed product in that pile, if determined to be of lower grade or deficient in other factors, may be deemed to be a separate lot; and

(iii) If the applicant requests more than one inspection certificate covering different portions of such processed product, the quantity of the product covered by each certificate shall be deemed to be a separate lot.

(2) For the purpose of sampling and determining the grade or compliance with a specification, ''Lot'' means each pile of containers of the same size and type containing a processed product of the same type and style which is separated from other piles in the same warehouse, but containers in the same pile bearing an identification mark different from other containers in that

pile may be deemed to be a separate lot.

Official establishment. ''Official establishment'' means any establishment which has been approved by National Marine Fisheries Service, and utilizes inspection service on a contract basis.

Officially drawn sample. ''Officiallydrawn sample'' means any sample that has been selected from a particular lot by an inspector, licensed sampler, or by any other person authorized by the Secretary pursuant to the regulations in this part.

Person. ''Person'' means any individual, partnership, association, business trust, corporation, any organized group of persons (whether incorporated or not), the United States (including, but not limited to, any corporate agencies thereof), any State, county, or municipal government, any common carrier, and any authorized agent of any of the foregoing.

Plant. ''Plant'' means the premises, buildings, structures, and equipment (including, but not being limited to, machines, utensils, and fixtures) employed or used with respect to the manufacture or production of processed products.

Processed product. ''Processed product'' means any fishery product or other food product covered under the regulations in this part which has been preserved by any recognized commercial process, including, but not limited to, canning, freezing, dehydrating, drying, the addition of chemical substances, or by fermentation.

Quality. ''Quality'' means the inherent properties of any processed product which determine the relative degree of excellence of such product, and includes the effects of preparation and processing, and may or may not include the effects of packing media, or added ingredients.

Rejection number. ''Rejection number'' means the number in a sampling plan that indicates the minimum number of deviants in a sample that will cause a lot to fail a specific requirement.

Sample. ''Sample'' means any number of sample units to be used for inspection.

Sample unit. ''Sample unit'' means a container and/or its entire contents, a portion of the contents of a container or other unit of commodity, or a composite mixture of a product to be used for inspection.

Sampling. ''Sampling'' means the act of selecting samples of processed products for the purpose of inspection under the regulations in this part.

Secretary. ''Secretary'' means the Secretary of the Department or any other officer or employee of the Department authorized to exercise the powers and to perform the duties of the Secretary in respect to the matters covered by the regulations in this part.

Shipping container. ''Shipping container'' means an individual container designed for shipping a number of packages or cans ordinarily packed in a container for shipping or designed for packing unpackaged processed products for shipping.

Unofficially drawn sample. ''Unofficially drawn sample'' means any sample that has been selected by any person other than an inspector or licensed sampler, or by any other person not authorized by the Director pursuant to the regulations in this part.

Wholesome. ''Wholesome'' means the minimum basis of acceptability for human food purposes, of any fish or fishery product as defined in section 402 of the Federal Food, Drug, and Cosmetic Act, as amended.

[31 FR 16052, Dec. 15, 1966, as amended at 36 FR 21037, Nov. 3, 1971]

§ 260.7 Designation of official certificates, memoranda, marks, other identifications, and devices for purposes of the Agricultural Marketing Act.

Subsection 203(h) of the Agricultural Marketing Act of 1946 provides criminal penalties for various specified offenses relating to official certificates, memoranda, marks or other identifications and devices for making such marks or identifications, issued or authorized under section 203 of said act, and certain misrepresentations concerning the inspection or grading of agricultural products under said section. For the purposes of said subsection and the provisions in this part, the terms listed below shall have the respective meanings specified:

Official certificate. ''Official certificate'' means any form of certification, either written or printed, including those defined in §260.6, used under this part to certify with respect to the inspection, class, grade, quality, size, quantity, or condition of products (including the compliance of products with applicable specifications).

Official device. ''Official device'' means a stamping appliance, branding device, stencil, printed label, or any other mechanically or manually operated tool that is approved by the Director for the purpose of applying any official mark or other identification to any product or the packaging material thereof.

Official identification. ''Official identification'' means any United States (U.S.) standard designation of class, grade, quality, size, quantity, or condition specified in this part or any symbol, stamp, label, or seal indicating that the product has been graded or inspected and/or indicating the class, grade, quality, size, quantity, or condition of the product approved by the Director and authorized to be affixed to any product, or affixed to or printed on the packaging material of any product.

Official mark. ''Official mark'' means the grade mark, inspection mark, combined form of inspection and grade mark, and any other mark, or any variations in such marks, including those prescribed in §260.86, approved by the Secretary and authorized to be affixed to any product, or affixed to or printed on the packaging material of any product, stating that the product was graded or inspected or both, or indicating the appropriate U.S. Grade or condition of the product, or for the purpose of maintaining the identity of products graded or inspected or both under this part.

Official memorandum. ''Official memorandum'' means any initial record of findings made by an authorized person in the process of grading, inspecting, or sampling pursuant to this part, any processing or plant-operation report made by an authorized person in connection with grading, inspecting, or sampling under this part, and any report made by an authorized person of services performed pursuant to this part.

INSPECTION SERVICE

§260.12 Where inspection service is offered.

Inspection service may be furnished wherever an inspector or licensed sampler is available and the facilities and conditions are satisfactory for the conduct of such service.

§260.13 Who may obtain inspection service.

An application for inspection service may be made by any interested party, including, but not limited to, the United States and any instrumentality or agency thereof, any State, county, municipality, or common carrier, and any authorized agent in behalf of the foregoing.

§260.14 How to make application.

An application for inspection service may be made to the officer of inspection or to any inspector, at or nearest the place where the service is desired. An up-to-date list of the Inspection Field Offices of the Department may be obtained upon request to the Director. Satisfactory proof that the applicant is an interested party shall be furnished.

§260.15 Information required in connection with application.

Application for inspection service shall be made in the English language and may be made orally (in person or by telephone), in writing, or by telegraph. If an application for inspection service is made orally, such application shall be confirmed promptly in writing. In connection with each application for inspection service, there shall be furnished such information as may be necessary to perform an inspection on the processed product for which application for inspection is made, including but not limited to, the name of the product, name and address of the packer or plant where such product was packed, the location of the product, its lot or car number, codes or other identification marks, the number of containers, the type and size of the containers, the interest of the applicant in the product, whether the lot has been inspected previously to the application by any Federal agency and the purpose for which inspection is desired.

§ 260.16 Filing of application.

An application for inspection service shall be regarded as filed only when made in accordance with the regulations in this part.

§ 260.17 Record of filing time.

A record showing the date and hour when each application for inspection or for an appeal inspection is received shall be maintained.

§ 260.18 When application may be rejected.

An application for inspection service may be rejected by the Secretary (a) for noncompliance by the applicant with the regulations in this part, (b) for nonpayment for previous inspection services rendered, (c) when the product is not properly identifiable by code or other marks, or (d) when it appears that to perform the inspection service would not be to the best interests of the Government. Such applicant shall be promptly notified of the reason for such rejection.

§ 260.19 When application may be withdrawn.

An application for inspection service may be withdrawn by the applicant at any time before the inspection is performed: *Provided,* That, the applicant shall pay at the hourly rate prescribed in § 260.70 for the time incurred by the inspector in connection with such application, any travel expenses, telephone, telegraph or other expenses which have been incurred by the inspection service in connection with such application.

[31 FR 16052, Dec. 15, 1966, as amended at 36 FR 18738, Sept. 21, 1971]

§ 260.20 Disposition of inspected sample.

Any sample of a processed product that has been used for inspection may be returned to the applicant, at his request and expense; otherwise it shall be destroyed, or disposed of to a charitable institution.

§ 260.21 Basis of inspection and grade or compliance determination.

(a) Inspection service shall be performed on the basis of the appropriate U.S. standards for grades of processed products, Federal, Military, Veterans Administration or other government agency specifications, written contract specification, or any written specification or instruction which is approved by the Secretary.

(b) Unless otherwise approved by the Director compliance with such grade standards, specifications, or instructions shall be determined by evaluating the product, or sample, in accordance with the requirements of such standards, specifications, or instructions: *Provided,* That when inspection for quality is based on any U.S. grade standard which contains a scoring system the grade to be assigned to a lot is the grade indicated by the average of the total scores of the sample units: *Provided further,* That:

(1) Such sample complies with the applicable standards of quality promulgated under the Federal Food, Drug, and Cosmetic Act;

(2) Such sample complies with the product description;

(3) Such sample meets the indicated grade with respect to factors of quality which are not rated by score points; and

(4) With respect to those factors of quality which are rated by score points, each of the following requirements is met:

(i) None of the sample units falls more than one grade below the indicated grade because of any quality factor to which a limiting rule applies;

(ii) None of the sample units falls more than 4 score points below the minimum total score for the indicated grade; and

(iii) The number of sample units classed as deviants does not exceed the applicable acceptance number indicated in the sampling plans contained in § 260.61. A ''deviant,'' as used in this paragraph, means a sample unit that falls into the next grade below the indicated grade but does not score more than 4 points below the minimum total score for the indicated grade.

(5) If any of the provisions contained in paragraphs (b)(3) and (4) of this section are not met the grade is determined by considering such provisions in connection with succeedingly lower

grades until the grade of the lot, if assignable, is established.

§260.22 Order of inspection service.

Inspection service shall be performed, insofar as practicable, in the order in which applications therefor are made except that precedence may be given to any such applications which are made by the United States (including, but not being limited to, any instrumentality or agency thereof) and to any application for an appeal inspection.

§260.23 Postponing inspection service.

If the inspector determines that it is not possible to accurately ascertain the quality or condition of a processed product immediately after processing because the product has not reached equilibrium in color, or drained weight, or for any other substantial reason, he may postpone inspection service for such period as may be necessary.

§260.24 Financial interest of inspector.

No inspector shall inspect any processed product in which he is directly or indirectly financially interested.

§260.25 Forms of certificates.

Inspection certificates, certificates of sampling or loading, and other memoranda concerning inspection service shall be issued on forms approved by the Secretary.

§260.26 Issuance of certificates.

(a) An inspection certificate may be issued only by an inspector: *Provided,* That, another employee of the inspection service may sign any such certificate covering any processed product inspected by an inspector when given power of attorney by such inspector and authorized by the Secretary, to affix the inspector's signature to an inspection certificate which has been prepared in accordance with the facts set forth in the notes, made by the inspector, in connection with the inspection.

(b) A certificate of loading shall be issued and signed by the inspector or licensed sampler authorized to check the loading of a specific lot of processed products: *Provided,* That, another employee of the inspection service may sign such certificate of loading covering any processed product checkloaded by an inspector or licensed sampler when given power of attorney by such inspector or licensed sampler and authorized by the Secretary to affix the inspector's or licensed sampler's signature to a certificate of loading which has been prepared in accordance with the facts set forth in the notes made by the inspector or licensed sampler in connection with the checkloading of a specific lot of processed products.

§260.27 Issuance of corrected certificates.

A corrected inspection certificate may be issued by the inspector who issued the original certificate after distribution of a certificate if errors, such as incorrect dates, code marks, grade statements, lot or car numbers, container sizes, net or drained weights, quantities, or errors in any other pertinent information require the issuance of a corrected certificate. Whenever a corrected certificate is issued, such certificate shall supersede the inspection certificate which was issued in error and the superseded certificate shall become null and void after the issuance of the corrected certificate.

§260.28 Issuance of an inspection report in lieu of an inspection certificate.

A letter report in lieu of an inspection certificate may be issued by an inspector when such action appears to be more suitable than an inspection certificate: *Provided,* That, the issuance of such report is approved by the Secretary.

§260.29 Disposition of inspection certificates.

The original of any inspection certificate, issued under the regulations in this part, and not to exceed four copies thereof, if requested prior to issuance, shall be delivered or mailed promptly to the applicant, or person designated by the applicant. All other copies shall be filed in such manner as the Secretary may designate. Additional copies of any such certificates may be supplied to any interested party as provided in §260.78.

§ 260.30 Report of inspection results prior to issuance of formal report.

Upon request of any interested party, the results of an inspection may be telegraphed or telephoned to him, or to any other person designated by him, at his expense.

APPEAL INSPECTION

§ 260.36 When appeal inspection may be requested.

An application for an appeal inspection may be made by any interested party who is dissatisfied with the results of an inspection as stated in an inspection certificate, if the lot of processed products can be positively identified by the inspection service as the lot from which officially drawn samples were previously inspected. Such application shall be made within thirty (30) days following the day on which the previous inspection was performed, except upon approval by the Secretary the time within which an application for appeal inspection may be made, may be extended.

§ 260.37 Where to file for an appeal inspection and information required.

(a) Application for an appeal inspection may be filed with:

(1) The inspector who issued the inspection certificate on which the appeal covering the processed product is requested; or

(2) The inspector in charge of the office of inspection at or nearest the place where the processed product is located.

(b) The application for appeal inspection shall state the location of the lot of processed products and the reasons for the appeal; and date and serial number of the certificate covering inspection of the processed product on which the appeal is requested, and such application may be accompanied by a copy of the previous inspection certificate and any other information that may facilitate inspection. Such application may be made orally (in person or by telephone), in writing, or by telegraph. If made orally, written confirmation shall be made promptly.

§ 260.38 When an application for an appeal inspection may be withdrawn.

An application for appeal inspection may be withdrawn by the applicant at any time before the appeal inspection is performed: *Provided*, That the applicant shall pay at the hourly rate prescribed in § 260.70, for the time incurred by the inspector in connection with such application, any travel expenses, telephone, telegraph, or other expenses which have been incurred by the inspection service in connection with such application.

[31 FR 16052, Dec. 15, 1966, as amended at 36 FR 18738, Sept. 21, 1971]

§ 260.39 When appeal inspection may be refused.

An application for an appeal inspection may be refused if:

(a) The reasons for the appeal inspection are frivolous or not substantial;

(b) The quality or condition of the processed product has undergone a material change since the inspection covering the processed product on which the appeal inspection is requested;

(c) The lot in question is not, or cannot be made accessible for the selection of officially drawn samples;

(d) The lot relative to which appeal inspection is requested cannot be positively identified by the inspector as the lot from which officially drawn samples were previously inspected; or

(e) There is noncompliance with the regulations in this part. Such applicant shall be notified promptly of the reason for such refusal.

§ 260.40 Who shall perform appeal inspection.

An appeal inspection shall be performed by an inspector or inspectors (other than the one from whose inspection the appeal is requested) authorized for this purpose by the Secretary and, whenever practical, such appeal inspection shall be conducted jointly by two such inspectors: *Provided*, That the inspector who made the inspection on which the appeal is requested may be authorized to draw the samples when another inspector or licensed sampler is not available in the area where the product is located.

§260.41 Appeal inspection certificate.

After an appeal inspection has been completed, an appeal inspection certificate shall be issued showing the results of such appeal inspection; and such certificate shall supersede the inspection certificate previously issued for the processed product involved. Each appeal inspection certificate shall clearly identify the number and date of the inspection certificate which it supersedes. The superseded certificate shall become null and void upon the issuance of the appeal inspection certificate and shall no longer represent the quality or condition of the processed product described therein. The inspector or inspectors issuing an appeal inspection certificate shall forward notice of such issuance to such persons as he considers necessary to prevent misuse of the superseded certificate if the original and all copies of such superseded certificate have not previously been delivered to the inspector or inspectors issuing the appeal inspection certificate. The provisions in the regulations in this part concerning forms of certificates, issuance of certificates, and disposition of certificates shall apply to appeal inspection certificates, except that copies of such appeal inspection certificates shall be furnished all interested parties who received copies of the superseded certificate.

LICENSING OF SAMPLERS AND INSPECTORS

§260.47 Who may become licensed sampler.

Any person deemed to have the necessary qualifications may be licensed as a licensed sampler to draw samples for the purpose of inspection under the regulations in this part. Such a license shall bear the printed signature of the Secretary, and shall be countersigned by an authorized employee of the Department. Licensed samplers shall have no authority to inspect processed products under the regulations in this part except as to identification and condition of the containers in a lot. A licensed sampler shall perform his duties pursuant to the regulations in this part as directed by the Director.

§260.48 Application to become a licensed sampler.

Application to become a licensed sampler shall be made to the Secretary on forms furnished for that purpose. Each such application shall be signed by the applicant in his own handwriting, and the information contained therein shall be certified by him to be true, complete, and correct to the best of his knowledge and belief, and the application shall contain or be accompanied by:

(a) A statement showing his present and previous occupations, together with names of all employers for whom he has worked, with periods of service, during the 10 years previous to the date of his application;

(b) A statement that, in his capacity as a licensed sampler, he will not draw samples from any lot of processed products with respect to which he or his employer is an interested party;

(c) A statement that he agrees to comply with all terms and conditions of the regulations in this part relating to duties of licensed samplers; and

(d) Such other information as may be requested.

§260.49 Inspectors.

Inspections will ordinarily be performed by employees under the Secretary who are employed as Federal Government employees for that purpose. However, any person employed under any joint Federal-State inspection service arrangement may be licensed, if otherwise qualified, by the Secretary to make inspections in accordance with this part on such processed products as may be specified in his license. Such license shall be issued only in a case where the Secretary is satisfied that the particular person is qualified to perform adequately the inspection service for which such person is to be licensed. Each such license shall bear the printed signature of the Secretary and shall be countersigned by an authorized employee of the Department. An inspector shall perform his duties pursuant to the regulations in this part as directed by the Director.

§ 260.50 Suspension or revocation of license of licensed sampler or licensed inspector.

Pending final action by the Secretary, the Director may, whenever he deems such action necessary, suspend the license of any licensed sampler, or licensed inspector, issued pursuant to the regulations in this part, by giving notice of such suspension to the respective licensee, accompanied by a statement of the reasons therefor. Within 7 days after the receipt of the aforesaid notice and statement of reasons by such licensee, he may file an appeal, in writing, with the Secretary supported by any argument or evidence that he may wish to offer as to why his license should not be suspended or revoked. After the expiration of the aforesaid 7 day period and consideration of such argument and evidence, the Secretary shall take such action as he deems appropriate with respect to such suspension or revocation.

§ 260.51 Surrender of license.

Upon termination of his services as a licensed sampler or licensed inspector, or suspension or revocation of his license, such licensee shall surrender his license immediately to the office of inspection serving the area in which he is located. These same provisions shall apply in a case of an expired license.

SAMPLING

§ 260.57 How samples are drawn by inspectors or licensed samplers.

An inspector or a licensed sampler shall select samples, upon request, from designated lots of processed products which are so placed as to permit thorough and proper sampling in accordance with the regulations in this part. Such person shall, unless otherwise directed by the Secretary, select sample units of such products at random, and from various locations in each lot in such manner and number, not inconsistent with the regulations in this part, as to secure a representative sample of the lot. Samples drawn for inspection shall be furnished by the applicant at no cost to the Department.

§ 260.58 Accessibility for sampling.

Each applicant shall cause the processed products for which inspection is requested to be made accessible for proper sampling. Failure to make any lot accessible for proper sampling shall be sufficient cause for postponing inspection service until such time as such lot is made accessible for proper sampling.

§ 260.59 How officially drawn samples are to be identified.

Officially drawn samples shall be marked by the inspector or licensed sampler so such samples can be properly identified for inspection.

§ 260.60 How samples are to be shipped.

Unless otherwise directed by the Secretary, samples which are to be shipped to any office of inspection shall be forwarded to the office of inspection serving the area in which the processed prodcuts from which the samples were drawn is located. Such samples shall be shipped in a manner to avoid, if possible, any material change in the quality or condition of the sample of the processed product. All transportation charges in connection with such shipments of samples shall be at the expense of the applicant and wherever practicable, such charges shall be prepaid by him.

§ 260.61 Sampling plans and procedures for determining lot compliance.

(a) Except as otherwise provided for in this section in connection with inplant inspection and unless otherwise approved by the Secretary, samples shall be selected from each lot in the exact number of sample units indicated for the lot size in the applicable single sampling plan or, at the discretion of the inspection service, any comparable multiple sampling plan: *Provided,* That at the discretion of the inspection service the number of sample units selected may be increased to the exact number of sample units indicated for any one of the larger sample sizes provided for in the appropriate plans.

(b) Under the single sampling plans with respect to any specified requirement:

(1) If the number of deviants (as defined in connection with the specific requirements) in the sample does not exceed the acceptance number prescribed for the sample size the lot meets the requirement;

(2) If the number of deviants (as defined in connection with the specific requirement) in the sample exceeds the acceptance number prescribed for the sample size the lot fails the requirement.

(c) Under the multiple sampling plans inspection commences with the smallest sample size indicated under the appropriate plan and with respect to any specified requirement:

(1) If the number of deviants (as defined in connection with the specific requirement) in the sample being considered does not exceed the acceptance number prescribed for that sample size the lot meets the requirement;

(2) If the number of deviants (as defined in connection with the specific requirement) in the sample being considered equals or exceeds the rejection number prescribed for that sample size the lot fails the requirement; or

(3) If the number of deviants (as defined in connection with the specific requirement) in the sample being considered falls between the acceptance and rejection numbers of the plan, additional sample units are added to the sample so that the sample thus cumulated equals the next larger cumulative sample size in the plan. It may then be determined that the lot meets or fails the specific requirement by considering the cumulative sample and applying the procedures outlined in paragraphs (c)(1) and (2) of this section or by considering successively larger samples cumulated in the same manner until the lot meets or fails the specific requirement.

(d) If in the conduct of any type of inplant inspection the sample is examined before the lot size is known and the number of sample units exceeds the prescribed sample size for such lot but does not equal any of the prescribed larger sample sizes the lot may be deemed to meet or fail a specific requirement in accordance with the following procedure:

(1) If the number of deviants (as defined in connection with the specific requirement) in the nonprescribed sample does not exceed the acceptance number of the next smaller sample size the lot meets the requirements;

(2) If the number of deviants (as defined in connection with the specific requirement) in the nonprescribed sample equals the acceptance number prescribed for the next larger sample size additional sample units shall be selected to increase the sample to the next larger prescribed sample size;

(3) If the number of deviants (as defined in connection with the specific requirement) in the nonprescribed sample exceeds the acceptance number prescribed for the next larger sample size the lot fails the requirement.

(e) In the event that the lot compliance determination provisions of a standard or specification are based on the number of specified deviations instead of deviants the procedures set forth in this section may be applied by substituting the word ‘‘deviation’’ for the word ‘‘deviant’’ wherever it appears.

(f) Sampling plans referred to in this section are those contained in Tables I, II, III, IV, V, and VI which follow or any other plans which are applicable. For processed products not included in these tables, the minimum sample size shall be the exact number of sample units prescribed in the table, container group, and lot size that, as determined by the inspector, most closely resembles the product, type, container size and amount of product to be samples.

SINGLE SAMPLING PLANS AND ACCEPTANCE LEVELS

TABLE I—CANNED OR SIMILARLY PROCESSED FISHERY PRODUCTS, AND PRODUCTS THEREOF CONTAINING UNITS OF SUCH SIZE AND CHARACTER AS TO BE READILY SEPARABLE

Container size group	Lot size (number of containers)								
GROUP 1									
Any type of container of less volume than that of a No. 300 size can (300×407)	3,600 or less	3,601–14,400	14,401–48,000	48,001–96,000	96,001–156,000	156,001–228,000	228,001–300,000	300,001–420,000	Over 420,000
GROUP 2									
Any type of container of a volume equal to or exceeding that of a No. 300 size can, but not exceeding that of a No. 3 cylinder size can (404×700)	2,400 or less	2,401–12,000	12,001–24,000	24,001–48,000	48,001–72,000	72,001–108,000	108,001–168,000	168,001–240,000	Over 240,000
GROUP 3									
Any type of container of a volume exceeding that of a No. 3 cylinder size can, but not exceeding that of a No. 12 size can (603×812)	1,200 or less	1,201–7,200	7,201–15,000	15,001–24,000	24,001–36,000	36,001–60,000	60,001–84,000	84,001–120,000	Over 120,000
GROUP 4									
Any type of container of a volume exceeding that of a No. 12 size can, but not exceeding that of a 5-gallon container	200 or less	201–800	801–1,600	1,601–2,400	2,401–3,600	3,601–8,000	8,001–16,000	16,001–28,000	Over 28,000
GROUP 5									
Any type of container of a volume exceeding that of a 5-gallon container	25 or less	26–80	81–200	201–400	401–800	801–1,200	1,201–2,000	2,001–3,200	Over 3,200

SINGLE SAMPLING PLANS [1]

Sample size (number of sample units)[2]	3	6	13	21	29	38	48	60	72
Acceptance number	0	1	2	3	4	5	6	7	.....

[1] For extension of the single sample sizes beyond 72 sample units, refer to table V of this section; for multiple sampling plans comparable to the various single sampling plans refer to table VI of this section.

[2] The sample units for the various container size groups are as follows: Groups 1, 2, and 3—1 container and its entire contents. Groups 4 and 5—approximately 2 pounds of product. When determined by the inspector that a 2-pound sample unit is inadequate, a larger sample unit may be substituted.

TABLE II—FROZEN OR SIMILARLY PROCESSED FISHERY PRODUCTS, AND PRODUCTS THEREOF CONTAINING UNITS OF SUCH SIZE AND CHARACTER AS TO BE READILY SEPARABLE

Container size group	Lot size (number of containers)								
GROUP 1									
Any type of container of 1 pound or less net weight	2,400 or less	2,401–12,000	12,001–24,000	24,001–48,000	48,001–72,000	72,001–108,000	108,001–168,000	168,001–240,000	Over 240,000
GROUP 2									
Any type of container over 1 pound but not over 4 pounds net weight	1,800 or less	1,801–8,400	8,401–18,000	18,001–36,000	36,001–60,000	60,001–96,000	96,001–132,000	132,001–168,000	Over 168,000
GROUP 3									
Any type of container over 4 pounds but not over 10 pounds net weight	900 or less	901–3,600	3,601–10,800	10,801–18,000	18,001–36,000	36,001–60,000	60,001–84,000	84,001–120,000	Over 120,000
GROUP 4									
Any type of container over 10 pounds but not over 100 pounds net weight	200 or less	201–800	801–1,600	1,601–2,400	2,401–3,600	3,601–8,000	8,001–16,000	16,001–28,000	Over 28,000
GROUP 5									
Any type of container over 100 pounds net weight	25 or less	26–80	81–200	201–400	401–800	801–1,200	1,201–2,000	2,001–3,200	Over 3,200
Single sampling plans[1]									
Sample size (number of sample units)[2]	3	6	13	21	29	38	48	60	72
Acceptance number	0	1	2	3	4	5	6	7	8

[1] For extension of the single sample sizes beyond 72 sample units, refer to table V of this section; for multiple sampling plans comparable to the various single sampling plans refer to table VI of this section.

[2] The sample units for the various container size groups are as follows: Groups 1, 2, and 3—1 container and its entire contents. Groups 4 and 5—approximately 3 pounds of product. When determined by the inspector that a 3-pound sample unit is inadequate, a larger sample unit or 1 or more containers and their entire contents may be substituted for 1 or more sample units of 3 pounds.

TABLE III—CANNED, FROZEN, OR OTHERWISE PROCESSED FISHERY AND RELATED PRODUCTS, AND PRODUCTS THEREOF OF A COMMINUTED, FLUID, OR HOMOGENEOUS STATE

Container size group[1]	Lot size (number of containers)								
GROUP 1									
Any type of container of 12 ounces or less	5,400 or less	5,401–21,600	21,601–62,400	62,401–112,000	112,001–174,000	174,001–240,000	240,001–360,000	360,001–480,000	Over 480,000
GROUP 2									
Any type of container over 12 ounces but not over 60 ounces	3,600 or less	3,601–14,400	14,401–48,000	48,001–96,000	96,001–156,000	156,001–228,000	228,001–300,000	300,001–420,000	Over 420,000
GROUP 3									
Any type of container over 60 ounces but not over 160 ounces	1,800 or less	1,801–8,400	8,401–18,000	18,001–60,000	36,001–60,000	60,001–96,000	96,001–132,000	132,001–168,000	Over 168,000
GROUP 4									
Any type of container over 160 ounces but not over 10 gallons or 100 pounds whichever is applicable	200 or less	201–800	801–1,600	1,601–3,200	3,201–8,000	8,001–16,000	16,001–24,000	24,001–32,000	Over 32,000
GROUP 5									
Any type of container over 10 gallons or 100 pounds whichever is applicable	25 or less	26–80	81–200	201–400	401–800	801–1,200	1,201–2,000	2,001–3,200	Over 3,200
Single sampling plans[2]									
Sample size (number of sample units)[3]	3	6	13	21	29	38	48	60	72
Acceptance number	0	1	2	3	4	5	6	7	8

[1] Ounces pertain to either fluid ounces of volume or avoirdupois ounces of net weight whichever is applicable for the product involved.

[2] For extension of the single sample sizes beyond 72 sample units, refer to table V of this section; for multiple sampling plans comparable to the various single sampling plans refer to table VI of this section.

[3] The sample units for the various container size groups are as follows: Groups 1, 2, and 3—1 container and its entire contents. A smaller sample unit may be substituted in group 3 at the inspector's discretion. Groups 4, 5, and 6—approximately 16 ounces of product. When determined by the inspector that a 16-ounce sample unit is inadequate, a larger sample unit may be substituted.

TABLE IV—DEHYDRATED FISHERY AND RELATED PRODUCTS

Container size group	Lot size (number of containers)								
GROUP 1									
Any type of container of 1 pound or less net weight	1,800 or less	1,801–8,400	8,401–18,000	18,001–36,000	36,001–60,000	60,001–96,000	96,001–132,000	132,001–168,000	Over 168,000
GROUP 2									
Any type of container over 1 pound but not over 6 pounds net weight	900 or less	901–3,600	3,601–10,800	10,801–18,000	18,001–36,000	36,001–60,000	60,001–84,000	84,001–120,000	Over 120,000
GROUP 3									
Any type of container over 6 pounds but not over 20 pounds net weight	200 or less	201–800	801–1,600	1,601–3,200	3,201–8,000	8,001–16,000	16,001–24,000	24,001–32,000	Over 32,000
GROUP 4									
Any type of container over 20 pounds but not over 100 pounds net weight	48 or less	49–400	401–1,200	1,201–2,000	2,001–2,800	2,801–6,000	6,001–9,600	9,601–15,000	Over 15,000
GROUP 5									
Any type of container over 100 pounds net weight	16 or less	17–80	81–200	201–400	401–800	801–1,200	1,201–2,000	2,001–3,200	Over 3,200
Single sampling plans[1]									
Sample size (number of sample units)[2]	3	6	13	21	29	38	48	60	72
Acceptance number	0	1	2	3	4	5	6	7	8

[1] For extension of the single sample sizes beyond 72 sample units, refer to table V of this section; for multiple sampling plans comparable to the various single sampling plans refer to table VI of this section.

[2] The sample units for the various container size groups are as follows: Group 1—1 container and its entire contents. Groups 2, 3, 4, and 5—1 container and its entire contents or a smaller sample unit when determined by the inspector to be adequate.

TABLE V—SINGLE SAMPLING PLANS FOR USE IN INCREASING SAMPLE SIZE BEYOND 72 SAMPLE UNITS

Sample size, *n*	84	96	108	120	132	144	156	168	180	192	204	216	230	244	258	272	286	300	314	328	342	356	370	384	400
Acceptance numbers, *c*	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33

MULTIPLE SAMPLING PLANS [1]

TABLE VI—MULTIPLE SAMPLING PLANS COMPARABLE TO THE INDICATED SINGLE SAMPLING PLANS

Indicated single sampling plan:																								
Single sample size, *n*	6			13			21			29			38			48			60			72		
Acceptance numbers, *c*	1			2			3			4			5			6			7			8		
Cumulative sample sizes, n_c, and acceptance numbers, *c*, and rejection numbers, *r*, for multiple sampling.	n_c	*c*	*r*	n_c	*c*	*r*	n_c	*c*	*r*	n_c	*c*	*r*	n_c	*c*	*r*	n_c	*c*	*r*	n_c	*c*	*r*	n_c	*c*	*r*
	4	0	2	8	0	3	10	0	3	12	0	4	14	0	4	16	0	4	18	0	5	22	0	5
	6	0	2	10	0	3	14	1	4	16	0	4	20	0	5	24	1	5	28	1	6	32	1	7
	8	1	2	12	1	3	18	1	4	20	1	5	26	1	6	32	2	6	38	2	7	42	2	8
				14	2	3	22	2	5	24	2	5	32	2	6	40	3	8	48	3	8	52	3	9
							26	4	5	28	3	6	38	3	7	48	4	8	58	4	8	62	5	10
										32	3	6	44	6	7	56	7	8	68	8	9	72	6	10
										36	5	6										82	9	10

[1] These multiple sampling plans may be used in lieu of the single sampling plans listed at the heading of each column.

§260.62 Issuance of certificate of sampling.

Each inspector and each licensed sampler shall prepare and sign a certificate of sampling to cover the samples drawn by the respective person, except that an inspector who inspects the samples which he has drawn need not prepare a certificate of sampling. One copy of each certificate of sampling prepared shall be retained by the inspector or licensed sampler (as the case may be) and the original and all other copies thereof shall be disposed of in accordance with the instructions of the Secretary.

§260.63 Identification of lots sampled.

Each lot from which officially drawn samples are selected shall be marked in such manner as may be prescribed by the Secretary, if such lots do not otherwise possess suitable identification.

FEES AND CHARGES

§260.69 Payment fees and charges.

Fees and charges for any inspection service shall be paid by the interested party making the application for such service, in accordance with the applicable provisions of the regulations in this part, and, if so required by the person in charge of the office of inspection serving the area where the services are to be performed, an advance of funds prior to rendering inspection service in an amount suitable to the Secretary, or a surety bond suitable to the Secretary, may be required as a guarantee of payment for the services rendered. All fees and charges for any inspection service, performed pursuant to the regulations in this part shall be paid by check, draft, or money order made payable to the National Marine Fisheries Service. Such check, draft, or money order shall be remitted to the appropriate regional or area office serving the geographical area in which the services are performed, within ten (10) days from the date of billing, unless otherwise specified in a contract between the applicant and the Secretary, in which latter event the contract provisions shall apply.

[36 FR 21038, Nov. 3, 1971]

§260.70 Schedule of fees.

(a) Unless otherwise provided in a written agreement between the applicant and the Secretary, the fees to be charged and collected for any inspection service performed under the regulations in this part at the request of the United States, or any other agency or instrumentality thereof, will be published as a notice in the FEDERAL REGISTER and will be in accordance with §260.81.

(b) Fees are reviewed annually to ascertain that the hourly fees charged are adequate to recover the costs of the services rendered.

(1) The TYPE I (Contract Inspection) hourly fee is determined by dividing the estimated annual costs by the estimated annual billable hours.

(2) The TYPE II (Lot Inspection) hourly fee is determined by adding a factor of 50 percent to the TYPE I fee, to cover additional costs (down-time, etc.) associated with conducting lot inspection services.

(3) The TYPE III (Miscellaneous and Consulting) hourly fee is determined by adding a factor of 25 percent to the TYPE I fee, to cover the additional costs (down-time, etc.) associated with conducting miscellaneous inspection services.

[48 FR 24901, June 3, 1983]

§260.71 [Reserved]

§260.72 Fees for inspection service performed under cooperative agreement.

The fees to be charged and collected for any inspection or similar service performed under cooperative agreement shall be those provided for by such agreement.

§260.73 Disposition of fees for inspections made under cooperative agreement.

Fees for inspection under a cooperative agreement with any State or person shall be disposed of in accordance with the terms of such agreement. Such portion of the fees collected under a cooperative agreement as may be due the United States shall be remitted in accordance with §260.69.

§ 260.74 Fee for appeal inspection.

The fee to be charged for an appeal inspection shall be at the rates prescribed in this part for other inspection services: *Provided,* That, if the result of any appeal inspection made for any applicant, other than the United States or any agency or instrumentality thereof, discloses that a material error was made in the inspection on which the appeal is made, no inspection fee shall be assessed.

§ 260.76 [Reserved]

§ 260.77 Fees for score sheets.

If the applicant for inspection service requests score sheets showing in detail the inspection of each container or sample inspected and listed thereon, such score sheets may be furnished by the inspector in charge of the office of inspection serving the area where the inspection was performed; and such applicant shall be changed at the rate of $2.75 for each 12 sampled units, or fraction thereof, inspected and listed on such score sheets.

§ 260.78 Fees for additional copies of inspection certificates.

Additional copies of any inspection certificate other than those provided for in § 260.29, may be supplied to any interested party upon payment of a fee of $2.75 for each set of five (5) or fewer copies.

§ 260.79 Travel and other expenses.

Charges may be made to cover the cost of travel and other expenses incurred in connection with the performance of any inspection service, including appeal inspections: *Provided,* That, if charges for sampling or inspection are based on an hourly rate, an additional hourly charge may be made for travel time including time spent waiting for transportation as well as time spent traveling, but not to exceed 8 hours of travel time for any one person for any one day: *And provided further,* That, if travel is by common carrier, no hourly charge may be made for travel time outside the employee's official work hours.

§ 260.80 Charges for inspection service on a contract basis.

Irrespective of fees and charges prescribed in the foregoing sections, the Secretary may enter into a written memorandum of understanding or contract, whichever may be appropriate, with any administrative agency charged with the administration of a marketing order effective pursuant to the Agricultural Marketing Agreement Act of 1937, as revised (16 U.S.C. 661 et seq.) for the making of inspections pursuant to said agreement or order on such basis as will reimburse the National Marine Fisheries Service of the Department for the full cost of rendering such inspection service as may be determined by the Secretary. Likewise, the Secretary may enter into a written memorandum of understanding or contract, whichever may be appropriate, with an administrative agency charged with the administration of a similar program operated pursuant to the laws of any State.

[36 FR 21038, Nov. 3, 1971]

§ 260.81 Readjustment and increase in hourly rates of fees.

(a) When Federal Pay Act increases occur, the hourly rates for inspection fees will automatically be increased on the effective date of the pay act by an amount equal to the increase received by the average GS grade level of fishery product inspectors receiving such pay increases.

(b) The hourly rates of fees to be charged for inspection services will be subject to review and reevaluation for possible readjustment not less than every 3 years: *Provided,* That, the hourly rates of fees to be charged for inspection services will be immediately reevaluated as to need for readjustment with each Federal Pay Act increase.

[35 FR 15925, Oct. 9, 1970]

MISCELLANEOUS

§ 260.84 Policies and procedures.

The policies and procedures pertaining to any of the inspection services are contained within the NMFS Fishery Products Inspection Manual. The policies and procedures are available

from the Secretary to any interested party by writing to Document Approval and Supply Services Branch, Inspection Services Division, P.O. Drawer 1207, 3207 Frederic St., Pascagoula, MS 39568–1207.

[61 FR 9369, Mar. 8, 1996]

§260.86 Approved identification.

(a) *Grade marks:* The approved grade mark or identification may be used on containers, labels, or otherwise indicated for any processed product that:

(1) Has been packed under inspection as provided in this part to assure compliance with the requirements for wholesomeness established for the raw product and of sanitation established for the preparation and processing operations, and (2) has been certified by an inspector as meeting the requirements of such grade, quality or classification.

The grade marks approved for use shall be similar in form and design to the examples of Figures 1 to 5 of this section.

Shield using red, white, and blue background or other colors appropriate for label.

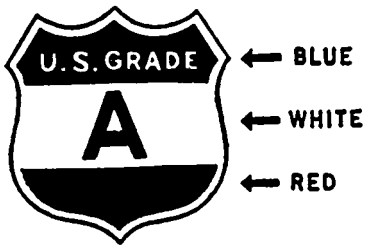

FIGURE 1.

Shield with plain background.

FIGURE 2.

U.S. GRADE A

FIGURE 3.

U.S.
GRADE
B

FIGURE 4.

U.S.
GRADE
C

FIGURE 5.

(b) *Inspection marks:* The approved inspection marks may be used on containers, labels, or otherwise indicated for any processed product that:

(1) Has been packed under inspection as provided in this part to assure compliance with the requirements for wholesomeness established for the raw product and of sanitation established for the preparation and processing operations, and (2) has been certified by

an inspector as meeting the requirements of such quality or grade classification as may be approved by the Secretary.

The inspection marks approved for use shall be similar in form and design to the examples in Figures 6, 7, and 8 of this section.

Statement enclosed within a circle.

FIGURE 6.

Statement without the use of the circle.

PACKED UNDER
FEDERAL
INSPECTION

U.S. DEPARTMENT
OF COMMERCE

FIGURE 7.

Statement without the use of the circle.

PACKED BY

UNDER FEDERAL INSPECTION
U.S. DEPT. OF COMMERCE

FIGURE 8.

(c) *Combined grade and inspection marks:* The grade marks set forth in paragraph (a) of this section, and the inspection marks, Figures 7 and 8, set forth in paragraph (b) of this section, may be combined into a consolidated grade and inspection mark for use on processed products that have been packed under inspection as provided in this part.

(d) *Products not eligible for approved identification:* Processed products which have not been packed under inspection as provided in this part shall not be identified by approved grade or inspection marks, but such products may be inspected on a lot inspection basis as provided in this part and identified by an authorized representative of the Department by stamping the shipping cases and inspection certificate(s) covering such lot(s) as appropriate, with marks similar in form and design to the examples in Figures 9 and 10 of this section.

FIGURE 9.

FIGURE 10.

(e) *Removal of labels bearing inspection marks:* At the time a lot of fishery products is found to be mislabeled and the labels on the packages are not removed within ten (10) consecutive calendar days, the following procedure shall be applicable:

(1) The processor, under the supervision of the inspector, shall clearly and conspicuously mark all master cases in the lot by means of a ''rejected by USDC Inspector'' stamp provided by the Department.

(2) The processor shall be held accountable to the Department for all mislabeled products until the products are properly labeled.

(3) Clearance for the release of the relabeled products shall be obtained by the processor from the inspector.

(f) Users of inspection services having an inventory of labels which bear official approved identification marks stating ''U.S. Department of the Interior'' or otherwise referencing the Interior Department, will be permitted to use such marks until December 31, 1971, except that upon written request the Director, National Marine Fisheries Service, may extend such period for the use of specific labels.

[36 FR 4609, Mar. 10, 1971]

§ 260.88 Political activity.

All inspectors and licensed samplers are forbidden, during the period of their respective appointments or licenses, to take an active part in political management or in political campaigns. Political activities in city, county, State, or national elections, whether primary or regular, or in behalf of any party or candidate, or any measure to be voted upon, are prohibited. This applies to all appointees or licensees, including, but not limited to, temporary and cooperative employees and employees on leave of absence with or without pay. Willful violation of this section will constitute grounds for dismissal in the case of appointees and revocation of licenses in the case of licensees.

§ 260.90 Compliance with other laws.

None of the requirements in the regulations in this part shall excuse failure to comply with any Federal, State, county, or municipal laws applicable to the operation of food processing establishments and to processed food products.

§ 260.91 Identification.

Each inspector and licensed sampler shall have in his possession at all times and present upon request, while on duty, the means of identification furnished by the Department to such person.

§ 260.93 Debarment and suspension.

(a) *Debarment.* Any person may be debarred from using or benefiting from the inspection service provided under the regulations of this subchapter or under the terms of any inspection contract, and such debarment may apply to one or more plants under his control, if such person engages in one or more of the following acts or activities:

(1) Misrepresenting, misstating, or withholding any material or relevant facts or information in conjunction with any application or request for an inspection contract, inspection service, inspection appeal, lot inspection, or other service provided for under the regulations of this subchapter.

(2) Using on a processed product any label which displays any official identification, official device, or official mark, when the label is not currently approved for use by the Director or his delegate.

(3) Using on a processed product any label which displays the words ''Packed Under Federal Inspection, U.S. Department of Commerce'', or which displays any official mark, official device, or official identification, or which displays a facsimile of the foregoing, when such product has not been inspected under the regulations of this subchapter.

(4) Making any statement or reference to the U.S. Grade of any processed product or any inspection service provided under the regulations of this subchapter on the label or in the advertising of any processed product, when such product has not been inspected under the regulations of this subchapter.

(5) Making, using, issuing or attempting to issue or use in conjunction with the sale, shipment, transfer or advertisement of a processed product any

certificate of loading, certificate of sampling, inspection certificate, official device, official identification, official mark, official document, or score sheet which has not been issued, approved, or authorized for use with such product by an inspector.

(6) Using any of the terms ''United States'', ''Officially graded'', ''Officially inspected'', ''Government inspected'', ''Federally inspected'', ''Officially sampled'', or words of similar import or meanings, or using any official device, official identification, or official mark on the label, on the shipping container, or in the advertising of any processed product, when such product has not been inspected under the regulations of this subchapter.

(7) Using, attempting to use, altering or reproducing any certificate, certificate form, design, insignia, mark, shield, device, or figure which simulates in whole or in part any official mark, official device, official identification, certificate of loading, certificate of sampling, inspection certificate or other official certificate issued pursuant to the regulations of this subchapter.

(8) Assaulting, harassing, interfering, obstructing or attempting to interfere or obstruct any inspector or sampler in the performance of his duties under the regulations of this subchapter.

(9) Violating any one or more of the terms of any inspection contract or the provisions of the regulations of this subchapter.

(10) Engaging in acts or activities which destroy or interfere with the purposes of the inspection program or which have the effect of undermining the integrity of the inspection program.

(b) *Temporary suspension.* (1) Whenever the Director has reasonable cause to believe that any person has engaged in any act or activity described in paragraph (a) of this section, and in such act or activity, in the judgment of the Director, would cause serious and irreparable injury to the inspection program and services provided under the regulations of this subchapter, the Director may, without a hearing, temporarily suspend, either before or after the institution of a debarment hearing, the inspection service provided under the regulations of this subchapter or under any inspection contract for one or more plants under the control of such person. Notice of suspension shall be served by registered or certified mail, return receipt requested, and the notice shall specifically state those acts or activities of such person which are the bases for the suspension. The suspension shall become effective five (5) days after receipt of the notice.

(2) Once a person has received a notice of a temporary suspension, a debarment hearing will be set for 30 days after the effective date of the suspension. Within 60 days after the completion of the debarment hearing, the Hearing Examiner shall determine, based upon evidence of record, whether the temporary suspension shall be continued or terminated. A temporary suspension shall be terminated by the Hearing Examiner if he determines that the acts or activities, which were the bases for the suspension, did not occur or will not cause serious and irreparable injury to the inspection program and services provided under the regulations of this subchapter. This determination of the Hearing Examiner on the continuation or termination of the temporary suspension shall be final and there shall be no appeal of this determination. The initial decision by the Hearing Examiner on the debarment shall be made in accordance with paragraph (b)(1), *Decisions,* of this section.

(3) After a debarment hearing has been instituted against any person by a suspension, such suspension will remain in effect until a final decision is rendered on the debarment in accordance with the regulations of this section or the temporary suspension is terminated by the Hearing Examiner.

(4) When a debarment hearing has been instituted against any person not under suspension, the Director may, in accordance with the regulations of this paragraph (b) temporarily suspend such person, and the suspension will remain in effect until a final decision on the debarment is rendered in accordance with the regulations of this section or the temporary suspension is terminated by the Hearing Examiner.

(c) *Hearing Examiner.* All hearing shall be held before a Hearing Examiner appointed by the Secretary or the Director.

(d) *Hearing.* If one or more of the acts or activities described in paragraph (a) of this section have occurred, the Director may institute a hearing to determine the length of time during which the person shall be debarred and those plants to which the debarment shall apply. No person may be debarred unless there is a hearing, as prescribed in this section, and it has been determined by the Hearing Examiner, based on evidence of record, that the one or more of the activities described in paragraph (a) of this section have occurred. Any debarment or suspension must be instituted within two (2) years of the time when such acts or activities described in paragraph (a) of this section have occurred.

(e) *Notice of hearing.* The Director shall notify such person of the debarment hearing by registered or certified mail, return receipt requested. The notice shall set forth the time and place of the hearing, the specific acts or activities which are the basis for the debarment hearing, the time period of debarment being sought, and those plants to which the debarment shall apply. Except for the debarment hearing provided for in paragraph (b) of this section the hearing will be set for a time not longer than 120 days after receipt of the notice of hearing.

(f) *Time and place of hearing.* The hearing shall be held at a time and place fixed by the Director: *Provided, however,* The Hearing Examiner may, upon a proper showing of inconvenience, change the time and place of the hearing. Motions for change of time or place of the hearing must be mailed to or served upon the Hearing Examiner no later than 10 days before the hearing.

(g) *Right to counsel.* In all proceedings under this section, all persons and the Department of Commerce shall have the right to be represented by counsel, in accordance with the rules and regulations set forth in title 43, Code of Federal Regulations, part 1.

(h) *Form, execution, and service of documents.* (1) All papers to be filed under the regulations in this section shall be clear and legible; and shall be dated, signed in ink, contain the docket description and title of the proceeding, if any, and the address of the signatory. Five copies of all papers are required to be filed. Documents filed shall be executed by:

(i) The person or persons filing same,

(ii) by an authorized officer thereof if it be a corporation or,

(iii) by an attorney or other person having authority with respect thereto.

(2) All documents, when filed, shall show that service has been made upon all parties to the proceeding. Such service shall be made by delivering one copy to each party in person or by mailing by first-class mail, properly addressed with postage prepaid. When a party has appeared by attorney or other representative, service on such attorney or other representative will be deemed service upon the party. The date of service of document shall be the day when the matter served is deposited in the U.S. mail, shown by the postmark thereon, or is delivered in person, as the case may be.

(3) A person is deemed to have appeared in a hearing by the filing with the Director a written notice of his appearance or his authority in writing to appear on behalf of one of the persons to the hearing.

(4) The original of every document filed under this section and required to be served upon all parties to a proceeding shall be accompanied by a certificate of service signed by the party making service, stating that such service has been made upon each party to the proceeding. Certificates of service may be in substantially the following form:

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by: (1) Mailing postage prepaid, (2) delivering in person, a copy to each party.

Dated at _____ this _____ day of _____, 19__

Signature _____

(i) *Procedures and evidence.* (1) All parties to a hearing shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the Hearing Examiner at the outset of or during the hearing.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this section, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary.

(j) *Duties of Hearing Examiner.* The Hearing Examiner shall have the authority and duty to:

(1) Take or cause depositions to be taken.

(2) Regulate the course of the hearings.

(3) Prescribe the order in which evidence shall be presented.

(4) Dispose of procedural requests or similar matters.

(5) Hear and initially rule upon all motions and petitions before him.

(6) Administer oaths and affirmations.

(7) Rule upon offers of proof and receive competent, relevant, material, reliable, and probative evidence.

(8) Control the admission of irrelevant, immaterial, incompetent, unreliable, repetitious, or cumulative evidence.

(9) Hear oral arguments if the Hearing Examiner determined such requirement is necessary.

(10) Fix the time for filing briefs, motions, and other documents to be filed in connection with hearings.

(11) Issue the initial decision and dispose of any other pertinent matters that normally and properly arise in the course of proceedings.

(12) Do all other things necessary for an orderly and impartial hearing.

(k) *The record.* (1) The Director will designate an official reporter for all hearings. The official transcript of testimony taken, together with any exhibits and briefs filed therewith, shall be filed with the Director. Transcripts of testimony will be available in any proceeding under the regulations of this section, at rates fixed by the contract between the United States of America and the reporter. If the reporter is an employee of the Department of Commerce, the rate will be fixed by the Director.

(2) The transcript of testimony and exhibits, together with all briefs, papers, and all rulings by the Hearing Examiner shall constitute the record. The initial decision will be predicated on the same record, as will be final decision.

(l) *Decisions.* (1) The Hearing Examiner shall render the initial decision in all debarment proceedings before him. The same Hearing Examiner who presides at the hearing shall render the initial decision except when such Examiner becomes unavailable to the Department of Commerce. In such case, another Hearing Examiner will be designated by the Secretary or Director to render the initial decision. Briefs, or other documents, to be submitted after the hearing must be received not later than twenty (20) days after the hearing, unless otherwise extended by the Hearing Examiner upon motion by a party. The initial decision shall be made within sixty (60) days after the receipt of all briefs. If no appeals from the initial decision is served upon the Director within ten (10) days of the date of the initial decision, it will become the final decision on the 20th day following the date of the initial decision. If an appeal is received, the appeal will be transmitted to the Secretary who will render the final decision after considering the record and the appeal.

(2) All initial and final decisions shall include a statement of findings and conclusions, as well as the reasons or bases therefore, upon the material issues presented. A copy of each decision shall be served on the parties to the proceeding, and furnished to interested persons upon request.

(3) It shall be the duty of the Hearing Examiner, and the Secretary where there is an appeal, to determine whether the person has engaged in one or more of the acts or activities described in paragraph (a) of this section, and, if there is a finding that the person has engaged in such acts or activities, the length of time the person shall be debarred, and the plants to which the debarment shall apply.

[31 FR 16052, Dec. 15, 1966, as amended at 36 FR 18738, Sept. 21, 1971]

REQUIREMENTS FOR PLANTS OPERATING UNDER CONTINUOUS INSPECTION ON A CONTRACT BASIS [1]

§ 260.96 Application for fishery products inspection service on a contract basis at official establishments.

Any person desiring to process and pack products in an establishment under fishery products inspection service on a contract basis, must receive approval of such buildings and facilities as an official establishment prior to the inauguration of such service. An application for inspection service to be rendered in an establishment shall be approved according to the following procedure:

(a) Initial survey: When application has been filed for inspection service as aforesaid, NMFS inspector(s) shall examine the buildings, premises, and facilities according to the requirements of the fishery products inspection service and shall specify any additional facilities required for the service.

(b) Final survey and establishment approval: Prior to the inauguration of the fishery products inspection service, a final survey of the buildings, premises, and facilities shall be made to verify that the buildings are constructed and facilities are in accordance with the approved drawings and the regulations in this part.

(c) Drawings and specifications of new construction or proposed alterations of existing official establishments shall be furnished to the Director in advance of actual construction for prior approval with regard to compliance with requirements for facilities.

[36 FR 21039, Nov. 3, 1971]

§ 260.97 Conditions for providing fishery products inspection service at official establishments.

(a) The determination as to the inspection effort required to adequately provide inspection service at any establishment will be made by NMFS. The man-hours required may vary at different official establishments due to factors such as, but not limited to, size and complexity of operations, volume and variety of products produced, and adequacy of control systems and cooperation. The inspection effort requirement may be reevaluated when the contracting party or NMFS deems there is sufficient change in production, equipment and change of quality control input to warrant reevaluation. Inspectors will not be available to perform any of employee or management duties, however, they will be available for consultation purposes. NMFS reserves the right to reassign inspectors as it deems necessary.

(b) NMFS shall not be held responsible:

(1) For damages occurring through any act of commission or omission on the part of its inspectors when engaged in performing services; or

(2) For production errors, such as processing temperatures, length of process, or misbranding of products; or

(3) For failure to supply enough inspection effort during any period of service.

(c) The contracting party will:

(1) Use only wholesome raw material which has been handled or stored under sanitary conditions and is suitable for processings; maintain the official establishment(s), designated on the contract in such sanitary condition and to employ such methods of handling raw materials for processing as may be necessary to conform to the sanitary requirements precribed or approved by NMFS;

(2) Adequately code each primary container and master case of products sold or otherwise distributed from a manufacturing, processing, packing, or repackaging activity to enable positive lot identification to facilitate, where necessary, the segregation of specific food lots that may have become contaminated or otherwise unfit for their intended use;

(3) Not permit any labels on which reference is made to Federal inspection, to be used on any product which is not packed under fishery products inspection service nor permit any labels on which reference is made to any U.S. Grade to be used on any product

[1] Compliance with the above requirements does not excuse failure to comply with all applicable sanitary rules and regulations of city, county, State, Federal, or other agencies having jursidiction over such establishments and operations.

which has not been officially certified as meeting the requirements of such grade; nor supply labels bearing reference to Federal inspection to another establishment unless the products to which such labels are to be applied have been packed under Federal inspection at an official establishment;

(4) Not affix any label on which reference is made to Federal inspection to any container of processed foods, produced in any designated official establishment, with respect to which the grade of such product is not certified because of adulteration due to the presence of contaminants in excess of limits established in accordance with the regulations or guidelines issued pursuant to the Food, Drug, and Cosmetic Act, as amended;

(5) Not, with respect to any product for which U.S. Grade Standards are in effect, affix any label on which reference is made to Federal inspection to any container of processed food which is substandard: *Provided*, That such label may be affixed to any container of such substandard quality product if such label bears a statement to indicate the substandard quality;

(6) Not, with respect to any product for which U.S. Grade Standard are not in effect, affix any label on which reference is made to the Federal inspection to containers of processed foods, except with the approval of NMFS;

(7) Furnish such reports of processing, packaging, grading, laboratory analyses, and output of products inspected, processed, and packaged at the designated official establish-ment(s) as may be requested by NMFS, subject to the approval of the Bureau of the Budget in accordance with the Federal Reports Act of 1942;

(8) Make available for use by inspectors, adequate office space in the designated official establishment(s) and furnish suitable desks, office equipment, and files for the proper care and storage of inspection records;

(9) Make laboratory facilities and necessary equipment available for the use of inspectors to inspect samples of processed foods and/or components thereof;

(10) Furnish and provide laundry service, as required by NMFS, for coats, trousers, smocks, and towels used by inspectors during performance of duty in official establishment(s);

(11) Furnish stenographic and clerical assistance as may be necessary in the typing of certificates and reports and the handling of official correspondence, as well as furnish the labor incident to the drawing and grading of samples and other work required to facilitate adequate inspection procedures whenever necessary;

(12) Submit to NMFS, three (3) copies of new product specifications in a manner prescribed by NMFS, and three (3) end-product samples for evaluation and/or laboratory analysis on all products for approval, for which U.S. Grade Standards are not available, when inspection is to be applied to such products. If requested of NMFS, such new specifications and end-product samples shall be considered confidential;

(13) Submit, as required by NMFS, for approval, proofs prior to printing and thereafter four (4) copies of any finished label which may or may not bear official identification marks, when such products are packed under Federal inspection on a contract basis;

(14) Not make deceptive, fraudulent, or unauthorized use in advertising, or otherwise, of the fishery products inspection service, the inspection certificates or reports issued, or the containers on which official identification marks are embossed or otherwise identified, in connection with the sale of any processed products;

(15) Submit to NMFS, four (4) copies of each label which may or may not bear official identification marks, when such labels are to be withdrawn from inspection or when approved labels are disapproved for further use under inspection;

(16) Notify NMFS in advance of the proposed use of any labels which require obliteration of any official identification marks, and all reference to the inspection service on approved labels which have been withdrawn or disapproved for use;

(17) Accord representatives of NMFS at all reasonable times free and immediate access to establishment(s) and official establishment(s) under applicant's control for the purpose of checking codes, coded products, coding devices, coding procedures, official identification marks obliteration, and use of withdrawn or disapproved labels.

(d) Termination of inspection services:

(1) The fishery products inspection service, including the issuance of inspection reports, shall be rendered from the date of the commencement specified in the contract and continue until suspended or terminated:

(i) By mutual consent;

(ii) by either party giving the other party sixty (60) days' written notice specifying the date of suspension or termination;

(iii) by one (1) day's written notice by NMFS in the event the applicant fails to honor any invoice within ten (10) days after date of receipt of such invoice covering the full costs of the inspection service provided, or in the event the applicant fails to maintain its designated plants in a sanitary condition or to use wholesome raw materials for processing as required by NMFS, or in the event the applicant fails to comply with any provisions of the regulations contained in this part;

(iv) by automatic termination in case of bankruptcy, closing out of business, or change in controlling ownership.

(2) In case the contracting party wishes to terminate the fishery products inspection service under the terms of paragraph (d)(1)(i) or (ii) of this section, either the service must be continued until all unused containers, labels, and advertising material on hand or in possession of his supplier bearing official identification marks, or reference to fishery products inspection service have been used, or said containers, labels, and advertising material must be destroyed, or official identification marks, and all other reference to the fishery products inspection service on said containers, labels, advertising material must be obliterated, or assurance satisfactory to NMFS must be furnished that such containers, labels, and advertising material will not be used in violation of any of the provisions of the regulations in the part.

(3) In case the fishery products inspection service is terminated for cause by NMFS under the terms of paragraph (d)(1)(iii) of this section, or in case of automatic termination under terms of paragraph (d)(1)(iv) of this section, the contracting party must destroy all unused containers, labels, and advertising material on hand bearing official identification marks, or reference to fishery products inspection service, or must obliterate official identification marks, and all reference to the fishery products inspection service on said containers, labels and advertising material.

After termination of the fishery products inspection service, NMFS may, at such time or times as it may determine to be necessary, during regular business hours, enter the establishment(s) or other facilities in order to ascertain that the containers, labels, and advertising material have been altered or disposed of in the manner provided herein, to the satisfaction of NMFS.

[36 FR 21039, Nov. 3, 1971]

§ 260.98 Premises.

The premises about an official establishment shall be free from conditions which may result in the contamination of food including, but not limited to, the following:

(a) Strong offensive odors;

(b) Improperly stored equipment, litter, waste, refuse, and uncut weeds or grass within the immediate vicinity of the buildings or structures that may constitute an attractant, breeding place, or harborage for rodents, insects, and other pests;

(c) Excessively dusty roads, yards, or parking lots that may constitute a source of contamination in areas where food is exposed;

(d) Inadequately drained areas that may contribute contamination to food products through seepage or foot-borne filth and by providing a breeding place for insects or micro-organisms;

If the grounds of an official establishment are bordered by grounds not under the official establishment operator's control of the kind described in

paragraphs (b) through (d) of this section, care must be exercised in the official establishment by inspection, extermination, or other means to effect exclusion of pests, dirt, and other filth that may be a source of food contamination.

[36 FR 21040, Nov. 3, 1971]

§260.99 Buildings and structures.

The buildings and structures shall be properly constructed and maintained in a sanitary condition, including, but not limited to the following requirements:

(a) *Lighting.* There shall be sufficient light (1) consistent with the use to which the particular portion of the building is devoted, and (2) to provide for efficient cleaning. Belts and tables on which picking, sorting, or trimming operations are carried on shall be provided with sufficient nonglaring light to insure adequacy of the respective operation. Light bulbs, fixtures, skylights, or other glass suspended over exposed food in any step of preparation shall be of the safety type or otherwise protected to prevent food contamination in case of breakage.

(b) *Ventilation.* There shall be sufficient ventilation in each room and compartment thereof to prevent excessive condensation of moisture and to insure sanitary and suitable processing and operating conditions. If such ventilation does not prevent excessive condensation, the Director may require that suitable facilities be provided to prevent the condensate from coming in contact with equipment used in processing operations and with any ingredient used in the manufacture or production of a processed product.

(c) *Drains and gutters.* All drains and gutters shall be properly installed with approved traps and vents. The drainage and plumbing system must permit the quick runoff of all water from official establishment buildings, and surface water around buildings and on the premises; and all such water shall be disposed of in such a manner as to prevent a nuisance or health hazard. Tanks or other equipment whose drains are connected to the waste system must have such screens and vacuum breaking devices affixed so as to prevent the entrance of waste water, material, and the entrance of vermin to the processing tanks or equipment.

(d) *Water supply.* There shall be ample supply of both hot and cold water; and the water shall be of safe and sanitary quality with adequate facilities for its (1) distribution throughout buildings, and (2) protection against contamination and pollution.

Sea water of safe suitable and sanitary quality may be used in the processing of various fishery products when approved by NMFS prior to use.

(e) *Construction.* Roofs shall be weathertight. The walls, ceilings, partitions, posts, doors, and other parts of all buildings and structures shall be of such materials, construction, and finish as to permit their efficient and thorough cleaning. The floors shall be constructed of tile, cement, or other equally impervious material, shall have good surface drainage, and shall be free from openings or rough surfaces which would interfere with maintaining the floors in a clean condition.

(f) *Processing rooms.* Each room and each compartment in which any processed products are handled, processed, or stored (1) shall be so designed and constructed as to insure processing and operating conditions of a clean and orderly character; (2) shall be free from objectional odors and vapors; and (3) shall be maintained in a clean and sanitary condition.

(g) *Prevention of animals and insects in official establishment(s).* Dogs, cats, birds, and other animals (including, but not being limited to rodents and insects) shall be excluded from the rooms from which processed products are being prepared, handled, or stored and from any rooms from which ingredients (including, but not being limited to salt, sugar, spices, flour, batter, breading, and fishery products) are handled and stored. Screens, or other devices, adequate to prevent the passage of insects shall, where practical, be provided for all outside doors and openings. The use of chemical compounds such as cleaning agents, insecticides, bactericides, or rodent poisons shall not be permitted except under such precautions and restrictions as will prevent any possibility of their contamination of the processed product. The use of such compounds shall

be limited to those circumstances and conditions as approved by NMFS.

(h) *Inspector's office.* Furnished suitable and adequate office space, including, but not being limited to, light, heat, and janitor service shall be provided rent free in official establishments for use for official purposes by the inspector and NMFS representatives. The room or rooms designated for this purpose shall meet with the approval of NMFS and shall be conveniently located, properly ventilated, and provided with lockers or cabinets suitable for the protection and storage of inspection equipment and supplies and with facilities suitable for inspectors to change clothing.

(i) Adequate parking space, conveniently located, for private or official vehicles used in connection with providing inspection services shall be provided.

[36 FR 21040, Nov. 3, 1971]

§ 260.100 Facilities.

Each official establishment shall be equipped with adequate sanitary facilities and accommodations, including, but not being limited to, the following:

(a) Containers approved for use as containers for processed products shall not be used for any other purpose.

(b) No product or material not intended for human food or which creates an objectionable condition shall be processed, handled, or stored in any room, compartment, or place where any fishery product is manufactured, processed, handled, or stored.

(c) Suitable facilities for cleaning and sanitizing equipment (e.g., brooms, brushes, mops, clean cloths, hose, nozzles, soaps, detergent, sprayers) shall be provided at convenient locations throughout the plant.

[36 FR 21040, Nov. 3, 1971]

§ 260.101 Lavatory accommodations.

Modern lavatory accommodations, and properly located facilities for cleaning and sanitizing utensils and hands, shall be provided.

(a) Adequate lavatory and toilet accommodations, including, but not being limited to, running hot water (135° F. or more) and cold water, soap, and single service towels, shall be provided. Such accommodations shall be in or near toilet and locker rooms and also at such other places as may be essential to the cleanliness of all personnel handling products.

(b) Sufficient containers with covers shall be provided for used towels and other wastes.

(c) An adequate number of hand washing facilities serving areas where edible products are prepared shall be operated by other than hand-operated controls, or shall be of a continuous flow type which provides an adequate flow of water for washing hands.

(d) Durable signs shall be posted conspicuously in each toilet room and locker room directing employees to wash hands before returning to work.

(e) Toilet facilities shall be provided according to the following formula:

Number of persons	Toilet bowls required
1 to 15, inclusive	1
16 to 35, inclusive	2
36 to 55, inclusive	[1] 3
56 to 80, inclusive	[1] 4
For each additional 30 persons in excess of 80	[1] 1

[1] Urinals may be substituted for toilet bowls but only to the extent of one-third of the total number of bowls required.

All toilet equipment shall be kept operative, in good repair, and in a sanitary condition.

[36 FR 21041, Nov. 3, 1971]

§ 260.102 Equipment.

All equipment used for receiving, washing, segregating, picking, processing, packaging, or storing any processed products or any ingredients used in the manufacture or production thereof, shall be of such design, material, and construction as will:

(a) Enable the examination, segregation, preparation, packaging, and other processing operations applicable to processed products, in an efficient, clean, and sanitary manner, and

(b) Permit easy access to all parts to insure thorough cleaning and effective bactericidal treatment. Insofar as is practicable, all such equipment shall be made of smooth impermeable corrosion-resistant material that will not adversely affect the processed product by chemical action or physical contact. Such equipment shall be kept in good repair and sanitary condition. Such

equipment shall be cleaned and sanitized at a frequency as is necessary or required in accordance with Good Manufacturing Practice Regulations, 21 CFR part 128.

[36 FR 21041, Nov. 3, 1971]

§260.103 Operations and operating procedures shall be in accordance with an effective sanitation program.

(a) All operators in the receiving transporting, holdings, segregating, preparing, processing, packaging, and storing of processed products and ingredients, used as aforesaid, shall be strictly in accord with clean and sanitary methods and shall be conducted as rapidly as possible and at temperatures that will inhibit and retard the growth of bacterial and other micro-organisms and prevent any deterioration or contamination of such processed products or ingredients thereof. Mechanical adjustments or practices which may cause contamination of foods by oil, dust, paint, scale, fumes, grinding materials, decomposed food, filth, chemicals, or other foreign materials shall not be conducted during any manufacturing or processing operation.

(b) All processed products, raw materials, ingredients, and components thereof shall be subject to inspection during each manufacturing or processing operation. To assure a safe, wholesome finished product, changes in processing methods and procedures as may be required by the Director shall be effectuated as soon as practicable. All processed products which are not manufactured or prepared in accordance with the requirements contained in §260.96 to §260.104 or are unwholesome or otherwise not fit for human food shall be removed and segregated prior to any further processing operation.

(c) Official establishments operating under Federal inspection should have an effective quality control program as appropriate for the nature of the products and processing operations.

(d) All ingredients used in the manufacture or processing of any processed product shall be wholesome and fit for human food.

(e) The methods and procedures employed in the receiving, segregating, handling, transporting, and processing of ingredients in official estab lishment(s) shall be adequate to result in a satisfactory processed product. Such methods and procedures include, but are not limited to, the following requirements:

(1) Containers, utensils, pans, and buckets used for the storage or transporting of partially processed food ingredients shall not be nested unless rewashed and sanitized before each use;

(2) Containers which are used for holding partially processed food ingredients shall not be stacked in such manner as to permit contamination of the partially processed food ingredients;

(3) Packages or containers for processed products shall be clean when being filled with such products; and all reasonable precautions shall be taken to avoid soiling or contaminating the surface of any package or container liner which is, or will be, in direct contact with such products.

(f) Retention tags: (1) Any equipment such as, but not limited to, conveyors, tillers, sorters, choppers, and containers which fail to meet appropriate and adequate sanitation requirements will be identified by the inspector in an appropriate and conspicuous manner with the word ''RETAINED.'' Following such identification, the equipment shall not be used until the discrepancy has been resolved, the equipment reinspected and approved by the inspector and the ''RETAINED'' identification removed by the inspector.

(2) Lot(s) of processed products that may be considered to be mislabeled and/or unwholesome by reason of contaminants or which may otherwise be in such condition as to require further evaluation or testing to determine that the product properly labeled and/or wholesome will be identified by the inspector in an appropriate and conspicuous manner with the word ''RETAINED.'' Such lot(s) of product shall be held for reinspection or testing. Final disposition of the lot(s) shall be determined by NMFS and the removal of the ''RETAINED'' identification shall be performed by the inspector.

[36 FR 21041, Nov. 3, 1971]

§ 260.104 Personnel.

The establishment management shall be responsible for taking all precautions to assure the following:

(a) *Disease control.* No person affected by disease in a communicable form, or while a carrier of such disease, or while affected with boils, sores, infected wounds, or other abnormal sources of microbiological contamination, shall work in a food plant in any capacity in which there is a reasonable possibility of food ingredients becoming contaminated by such person, or of disease being transmitted by such person to other individuals.

(b) *Cleanliness.* All persons, while working in direct contact with food preparation, food ingredients, or surfaces coming into contact therewith shall:

(1) Wear clean outer garments, maintain a high degree of personal cleanliness, and conform to hygenic practices while on duty, to the extent necessary to prevent contamination of food products.

(2) Wash and sanitize their hands thoroughly to prevent contamination by undesirable microorganisms before starting work, after each absence from the work station, and at any other time when the hands may have become soiled or contaminated.

(3) Remove all insecure jewelry and, when food is being manipulated by hand, remove from hands any jewelry that cannot be adequately sanitized.

(4) If gloves are used in food handling, maintain them in an intact, clean, and sanitary condition. Such gloves shall be of an impermeable material except where their usage would be inappropriate or incompatible with the work involved.

(5) Wear hair nets, caps, masks, or other effective hair restraints. Other persons that may incidentally enter the processing areas shall comply with this requirement.

(6) Not store clothing or other personal belongings, eat food, drink beverages, chew gum, or use tobacco in any form in areas where food or food ingredients are exposed or in areas used for washing equipment or utensils.

(7) Take any other necessary precautions to prevent contamination of foods with microorganisms or foreign substances including, but not limited to perspiration, hair, cosmetics, tobacco, chemicals, and medicants.

(c) *Education and training.* Personnel responsible for identifying sanitation failures or food contamination should have a background of education or experience, or a combination thereof, to provide a level of competency necessary for production of clean wholesome food. Food handlers and supervisors should receive appropriate training in proper food-handling techniques and food-protection principles and should be cognizant of the danger of poor personal hygiene and unsanitary practices, and other vectors of contamination.

[36 FR 21041, Nov. 3, 1971]

LABELING REQUIREMENTS

§§ 260.200–260.201 [Reserved]

PART 261—UNITED STATES STANDARDS FOR GRADES

Sec.
261.101 Standard description.
261.102 Publication and removal of U.S. Grade Standards.
261.103 Basis for determination of a U.S. Standard for Grades.

AUTHORITY: 7 U.S.C. 1621–1630.

SOURCE: 61 FR 9369, Mar. 8, 1996, unless otherwise noted.

§ 261.101 Standard description.

A U.S. Standard for Grades authorized under this part is a standard for a fish or fishery product that has been developed and adopted by the voluntary seafood inspection program pursuant to the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*) and other authorities delegated to the U.S. Department of Commerce.

§ 261.102 Publication and removal of U.S. Grade Standards.

(a) The voluntary U.S. Standards for Grades adopted pursuant to this part shall be issued as Program policies and contained within the NMFS Fishery Products Inspection Manual. Compliance with voluntary standards issued as Program policies within the manual shall satisfy the requirements of this

part. Compliance with a voluntary standard issued as a Program policy does not relieve any party from the responsibility to comply with the provisions of the Federal Food, Drug, and Cosmetic Act; or other Federal laws and regulations.

(b) Notification of an application for a new grade standard shall be published in the FEDERAL REGISTER. If adopted, the grade standard shall be issued as a Program policy and contained in the NMFS Fishery Products Inspection Manual.

(c) Recision and revision of a U.S. Standard for Grades will be made a Program policy amendment and contained in the NMFS Fishery Products Inspection Manual.

(d) The NMFS Fishery Products Inspection Manual is available to interested parties.

§ 261.103 Basis for determination of a U.S. Standard for Grades.

(a) To address the inherently distinct and dissimilar attributes found in the fishery product groups, each standard for grades should have a different scope and product description, product forms, sample sizes, definition of defects, etc. The Secretary will make the final determination regarding the content of a U.S. Standard for Grades.

(b) A proposal for a new or revised U.S. grade standard may include the following:

(1) *Scope and product description*, which describes the products that are eligible for grading using the standard (e.g., fish portion, fish fillet).

(2) *Product forms*, which describe the types, styles and market forms covered by the standard (e.g., skin-off, tail-on, headless).

(3) *Grade and inspection marks*, which describe the grades and inspection mark criteria for each grade category (e.g., Grade A ≤ 15 points).

(4) *Grade determination*, which describes the means by which the grade is determined (i.e., the factors rated by score points and those that are not). Standards may contain defect grouping limiting rules that contain additional provisions that must be met.

(5) *Sampling*, which describes the method of sampling and sample unit sizes (e.g., 10 portions, 8 ounces, etc.).

(6) *Procedures* that describe the process used to determine the product grade (e.g., label declarations, sensory evaluation).

(7) *Definitions of defects*, which outline the defects associated with the products covered by the standard, defines them, and describes the method of counting or measuring the defects. This section may provide associated defect points or reference a defect table (e.g., bruises, blood spots, bones, black spots, coating defects, 1–inch squares, percent by weight, ratios).

(8) *Defect point assessment*, which describes how to assess points and provides any special guidance that may be necessary to the particular standard (e.g., defect points for certain categories are added together and divided by the weight of the sample unit; the number of instances are counted to determine if it is slight, moderate, or excessive defect).

(9) *Tolerances for lot certification*, which provide the sections from Title 50 CFR that regulate lot certification.

(10) *Hygiene*, which specifies the sections of applicable Federal regulations regulating the safe, wholesome production of food for human consumption.

(11) *Methods of analysis*, which describe the methods of analysis that will be used in the evaluation of the products covered by the standard for grades (e.g., net weight, deglazing, debreading).

(12) *Defect table*, which is the table of defects and associated points to be assessed for each defect.

SUBCHAPTER H [RESERVED]

SUBCHAPTER I—TUNA FISHERIES

PART 285—ATLANTIC TUNA FISHERIES

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FIGURE 1 TO PART 285

AUTHORITY: 16 U.S.C. 971 *et seq.*

SOURCE: 50 FR 43398, Oct. 25, 1985, unless otherwise noted.

Subpart A—General

§ 285.1 Purpose and scope.

(a) The Atlantic Tunas Convention Act of 1975 (16 U.S.C. 971–971h) authorizes the Secretary to implement the recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT). The Secretary's authority under the Act has been delegated to the Assistant Administrator.

(b) This part implements the ICCAT recommendations for persons and vessels subject to the jurisdiction of the United States.

(c) This part does not apply to any person or vessel authorized by the Commission, or in writing by the Director, or any state upon written authorization by the Director, to engage in fishing for research purposes.

(d) Under section 9(d) of the Act, determinations made by the Assistant Administrator that the provisions of this part apply within the territorial sea of the United States adjacent to, and within the boundaries of, the States of Texas, Louisiana, Alabama, Florida, Georgia, South Carolina, North Carolina, Virginia, Maryland, Delaware, New Jersey, New York, Rhode Island, Massachusetts, New

Hampshire, and the Commonwealths of Puerto Rico and the Virgin Islands, and, with the exceptions of §§285.22 (c) and (d), 285.23 (a) and (b) and 285.25 within the territorial sea of the United States adjacent to, and within the boundaries of, the State of Maine, continue in effect.

[50 FR 43398, Oct. 25, 1985, as amended at 60 FR 38511, July 27, 1995]

§285.2 Definitions.

The terms used in this part have the following meanings (definitions in the Act are repeated here to aid understanding of the rules):

Act means the Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971–971h.

Aircraft means any contrivance used for flight in air.

Albacore means the fish species *Thunnus alalunga.*

Angling means fishing for or catching of, or the attempted fishing for or catching of, fish by any person (angler) with a hook attached to a line which is hand held or by rod and reel made for this purpose.

Archival tag means an electronic recording device that is implanted or affixed to a fish that is released alive back into the ocean to allow collection of scientific information about the migratory behavior of that fish.

Assistant Administrator means the Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, Department of Commerce, or an individual to whom appropriate authority has been delegated.

Atlantic bluefin tuna means the subspecies of bluefin tuna *Thunnus thynnus thynnus* that is found in the Atlantic Ocean. Size classes for Atlantic bluefin tuna are defined in §285.26.

Atlantic bonito means the fish species *Sarda chiliensis* or *Sarda sarda.*

Authorized officer means:

(1) Any commissioned, warrant, or petty officer of the U.S. Coast Guard; or any U.S. Coast Guard personnel accompanying and acting under the direction of a commissioned, warrant, or petty officer of the U.S. Coast Guard;

(2) Any special agent or fisheries enforcement officer of NMFS; or

(3) Any person designated by the head of any Federal or state agency that has entered into an agreement with the Secretary or the Commandant of the U.S. Coast Guard to enforce the provisions of the Magnuson Act.

Bandit gear means vertical hook-and-line gear with rods attached to a vessel, with no more than two hooks per line and with line retrieved by manual, electric, or hydraulic reels.

Bigeye tuna means the fish species *Thunnus obesus.*

Bluefin tuna means the fish species *Thunnus thynnus* that is found in any ocean area.

Buy-boat means any vessel or other means of conveyance used by a dealer in purchasing or receiving Atlantic bluefin tuna from any person or fishing vessel engaged in fishing for any tuna.

Cargo vessel means any fishing vessel used for transporting fish or fish products.

Charter boat means a vessel less than 100 gross tons (90.8 metric tons) that meets the requirements of the Coast Guard to carry six or fewer passengers for hire and that carries a passenger for hire at any time during the calendar year.

Commercial activity means any activity, other than fishing, of industry, trade, or commerce, including but not limited to the buying or selling of a regulated species and activities conducted for the purpose of facilitating such buying and selling.

Commercial fishing means fishing for purposes including sale or barter of any or all of the fish harvested.

Commission means the International Commission for the Conservation of Atlantic Tunas established under Article III of the Convention.

Convention means the International Convention for the Conservation of Atlantic Tunas, signed at Rio de Janeiro, Brazil, on May 14, 1966, 20 U.S.T. 2887, TIAS 6767, including any amendments or protocols thereto, which are binding upon the United States.

Curved fork length means a measurement of the length of Atlantic tuna taken in a line tracing the contour of the body from the tip of the upper jaw to the fork of the tail, which abuts the ventral side of the pectoral fin and the ventral side of the caudal keel.

Dealer means any person who engages in a commercial activity with respect to a regulated species or parts thereof.

Director means the Director of the Office of Fisheries Conservation and Management, 1335 East-West Highway, Silver Spring, MD 20910.

Downrigger means a rod attached to a vessel and with a weight on a cable that is in turn attached to hook-and-line gear to maintain lures or bait at depth while trolling, and that has a release system to retrieve the weight by rod and reel or by manual, electric, or hydraulic winch after a fish strike on the hook-and-line.

Dressed weight means the weight of a fish after it has been gilled, gutted, beheaded, and definned.

Drift gillnet, sometimes called a drift entanglement net or drift net, means a flat net, unattached to the ocean bottom, whether or not attached to a vessel, designed to be suspended vertically in the water to entangle the head or other body parts of fish that attempt to pass through the meshes.

Eviscerated means removal of the alimentary organs only.

Fish or *fishing* means the catching or fishing for, or the attempted catching or fishing for, any species of fish covered by the Convention, or any activities in support of fishing.

Fisheries Science Center Director means:

(1) For areas south of Virginia, the Science and Research Director, Southeast Fisheries Science Center, NMFS, 75 Virginia Beach Drive, Miami, FL 33149, telephone 305–361–5761, or a designee; or

(2) For Virginia and areas to the north, the Science and Research Director, Northeast Fisheries Science Center, NMFS, 166 Water Street, Woods Hole, MA 02543–1097, telephone 508–548–5123.

Fishing record means all records of navigation and operations, as well as all records of catching, harvesting, transporting, landing, purchase or sale.

Fishing trip means the time period between when a fishing vessel departs from port to carry out fishing operations and the time such vessel returns to port or offloads any of its catch.

Fishing vessel means any vessel engaged in fishing, processing, or transporting fish loaded on the high seas, or any vessel outfitted for such activities.

Fishing week means a period of time beginning at 0001 hours local time on Sunday, and ending at 2400 hours local time on the following Saturday.

Fixed gear means stationary, anchored non-trawl gear.

Handgear means handline, harpoon, or rod and reel.

Handline or *handline gear* means fishing gear which is released by hand and consists of one main line of variable length to which is attached one or two leaders and hooks. Handlines are retrieved only by hand, and not by mechanical means.

Harpoon or *harpoon gear* means fishing gear consisting of a pointed dart or iron attached to the end of a line several hundred feet in length, the other end of which is attached to a floatation device. Harpoon gear is attached to a pole or stick which is propelled only by hand, and not by mechanical means.

Headboat (partyboat) means a vessel that holds a valid Certificate of Inspection issued by the U.S. Coast Guard to carry passengers for hire.

Intermediate country means a country from which bluefin tuna or bluefin tuna products that were previously imported by that nation are exported to the United States. Shipments of bluefin tuna or bluefin tuna products through a country on a through bill of lading or in another manner that does not enter the shipments into that country as an importation do not make that country an intermediate country under this definition.

Land means to begin offloading fish, to offload fish, or to arrive in port with the intention of offloading fish.

Length overall means the length listed on the vessel's U.S. Coast Guard Certificate of Documentation or Certificate of Number, or if not documented, on the vessel's state registration certificate.

Longline or *longline gear* means fishing gear which is set horizontally, either anchored, floating, or attached to a vessel, which consists of a main or groundline with three or more gangions and hooks. A longline may be retrieved by hand or mechanical means.

Metric ton (mt) means 2204.6 pounds (1000 kilograms).

NMFS means the National Marine Fisheries Services, National Oceanic and Atmospheric Administration, Department of Commerce.

Operator, with respect to any vessel, means the master or other individual on board and in charge of that vessel.

Owner means, with respect to any vessel

(1) Any person who owns that vessel in whole or part;

(2) Any charterer of the vessel, whether bareboat, time, or voyage; or

(3) Any person who acts in the capacity of a charterer, including but not limited to parties to a management agreement, operating agreement, or any similar agreement that bestows control over the destination, function, or operation of the vessel.

Pacific bluefin tuna means the subspecies of bluefin tuna *Thunnus thynnus orientalis* that is found in the Pacific Ocean.

Person means any individual, partnership, corporation, or association subject to the jurisdiction of the United States.

Plastic tag means the plastic or combination plastic and metal marker issued for the tag and release program under § 285.27

Postmark means independently verifiable evidence of date of mailing, such as U.S. Postal Service postmark, United Parcel Service (U.P.S.) or other private carrier postmark, certified mail receipt, overnight mail receipt or a receipt issued upon hand delivery to an authorized representative of NMFS.

Private boat means any vessel fishing in the Angling category other than charter or party boats.

Purse seining means fishing for or catching a regulated species by means of an encircling net and associated gear.

Recreational fishing means fishing for purposes not including sale or barter of any or all of the fish harvested.

Regional Director means

(1) For the purposes of Atlantic tuna vessel and dealer permits and Atlantic bluefin tuna dealer reports, the Director, Northeast Region, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930–3799; and for purposes of reporting for Atlantic tunas other than bluefin, the Regional Director, Southeast Region, National Marine Fisheries Service, 9721 Executive Center Drive, St. Petersburg, FL 33702–2432.

(2) For the purposes of Pacific bluefin dealer permits and reporting, the Director, Southwest Region, National Marine Fisheries Service, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213.

Regulated species means albacore, Atlantic bluefin tuna, bigeye tuna, skipjack tuna, or yellowfin tuna.

Regulatory area means all waters of the Atlantic Ocean including adjacent seas, except the waters over which the individual States exercise fishery management jurisdiction unless the Assistant Administrator has determined otherwise in accordance with this part, as noted in § 285.1(d).

Reporting week means a period of time beginning at 0001 hours local time on Sunday, and ending at 2400 hours local time the following Saturday.

Restricted-fishing day means a date, beginning at 0001 hours and ending at 2400 hours, after the commencement date of the General category fishing season and before the effective date of fishery closure on attaining the annual or subperiod quota, designated by the Director under § 285.24(a) upon which no fishing for, possession or retention of Atlantic bluefin tuna may be conducted by persons aboard vessels permitted in the Atlantic tunas General category.

Rod and reel means vertical hook-and-line gear with a hand-held (includes rod holder) fishing rod and with a manually operated reel attached.

Round or *round weight* means a fish or the weight of a fish before gilling, gutting, beheading, and definning.

Secretary means the Secretary of Commerce, or a designee.

Short ton (st) means 2,000 pounds (907 kilograms).

Skipjack tuna means the fish species *Katsuwonus (Euthynnus) pelamis.*

State means any State of the United States, the District of Columbia, the Commonwealths of Puerto Rico and the Virgin Islands, and territories and possessions of the United States.

Straight fork length means a measurement of the length of Atlantic tuna

taken in a straight line along the middle of the lateral surface from a line perpendicular to the tip of the upper jaw to a line perpendicular to the fork of the tail.

Tag means the flexible, self-locking ribbon issued by NMFS for the identification of Atlantic bluefin tuna under § 285.30.

Trap means a pound net, weir or staked gill net that is maintained and operated at a fixed location.

Tuna means albacore, Atlantic bluefin tuna, Atlantic bonito, bigeye tuna, skipjack tuna or yellowfin tuna.

Yellowfin tuna means the fish species *Thunnus albacares.*

[50 FR 43398, Oct. 25, 1985, as amended at 51 FR 26899, July 28, 1986; 52 FR 25011, July 2, 1987; 53 FR 24645, June 29, 1988; 57 FR 372, Jan. 6, 1992; 57 FR 32920, July 24, 1992; 58 FR 45289, Aug. 27, 1993; 59 FR 17725, Apr. 14, 1994; 60 FR 14386, Mar. 17, 1995; 60 FR 38511, July 27, 1995; 61 FR 30186, June 14, 1996; 62 FR 30744, June 5, 1997; 62 FR 38487, July 18, 1997; 63 FR 669, Jan. 7, 1998]

§ 285.3 Prohibitions.

It is unlawful:

(a) For any person or for any fishing vessel subject to the jurisdiction of the United States to engage in fishing or to land any Atlantic tuna in violation of these rules, except that fish implanted or affixed with archival tags may be possessed, retained and landed under the provisions of § 285.9.

(b) For any person to land, transship, ship, transport, purchase, sell, offer for sale, import, export, or have in custody, possession, or control any fish that the person knows, or should have known, was taken, retained, possessed, or landed contrary to this part, without regard to the citizenship of the person or registry of the fishing vessel that harvested the fish.

(c) For a dealer or any person in charge of any fishing vessel subject to the jurisdiction of the United States to fail to make, keep, or furnish reports required by this part.

(d) For a dealer or any person in charge of any fishing vessel subject to the jurisdiction of the United States to obstruct or to refuse to allow any authorized officer to enter the dealer's premises or to board the fishing vessel to search or inspect its catch, equipment, books, documents, records, or other articles, or to question the persons in the dealer's premises or aboard the fishing vessel under the provisions of this part.

(e) For any person to import from any country any regulated species in any form subject to regulation under a recommendation of the Commission, or any fish in any form not under regulation but under investigation by the Commission, during the period such fish have been denied entry under this part.

(f) For any person or vessel subject to the jurisdiction of the United States to land:

(1) Any tuna, except bluefin, in forms other than round (fins intact), or other than eviscerated with the head, tail, and fins removed, except that one pectoral fin must remain attached; and

(2) Bluefin tuna in forms other than round (fins intact), or other than eviscerated with the head and fins removed, except that one pectoral fin and tail must remain attached.

(g) For any person subject to the jurisdiction of the United States to land, transship, ship, transport, purchase, sell, offer for sale, import, export, or have in custody, possession, or control any regulated species that was harvested, retained, or possessed in a manner contrary to the regulations of another country.

(h) For any person to refuse to provide information requested by NMFS personnel or anyone collecting information for NMFS, under an agreement or contract, relating to the scientific monitoring or management of tuna.

(i) For any person to assault, impede, oppose, intimidate, or interfere with, by any means, NMFS personnel or anyone collecting information for NMFS, under an agreement or contract, relating to the scientific monitoring or management of tuna.

(j) For any person on board a vessel subject to the jurisdiction of the United States to fish for or catch any Atlantic tuna with gear that is not authorized under § 285.21(b) or § 285.51, or to retain or land Atlantic tunas taken with unauthorized gear.

(k) For any person to possess any Atlantic tuna on board a vessel subject to the jurisdiction of the United States

that has gear on board that is not authorized under §285.21(b) or §285.51, unless authorized under §285.7.

(l) For any person to violate any conditions specified by the Director in any exemption issued under §285.7.

(m) For any person to assault, resist, oppose, impede, intimidate, interfere with, obstruct, delay, or prevent, by any means, any authorized officer in the conduct of any search, inspection, seizure or lawful investigation made in connection with enforcement of this part.

(n) For any person to assault, resist, oppose, impede, harass, intimidate, or interfere with a NMFS-approved observer aboard a vessel.

(o) Interfere with or bar by command, impediment, threat, coercion, or refusal of reasonable assistance, an at-sea observer conducting his or her duties aboard a vessel.

(p) Fail to provide an observer with the required food, accommodations, access, and assistance, as specified in §285.8(c).

(q) Purchase, receive, or transfer for commercial purposes any Atlantic tunas landed by owners or operators of vessels not permitted to do so under this part, or purchase, receive, or transfer for commercial purposes any Atlantic tunas without a valid dealer permit issued under this part.

(r) Sell, offer for sale, or transfer for commercial purposes any Atlantic tunas landed by owners or operators of a vessel not permitted to do so under this part or to any person or vessel without a valid dealer permit issued under this part.

(s) Dispose of fish or parts thereof or other matter in any manner, after any communication or signal from an authorized officer, or after the approach of an authorized officer.

[50 FR 43398, Oct. 25, 1985, as amended at 57 FR 372, Jan. 6, 1992; 58 FR 45289, Aug. 27, 1993; 60 FR 38511, July 27, 1995; 63 FR 669, Jan. 7, 1998]

§285.4 Facilitation of enforcement.

(a) The Secretary, the Secretary of the Department in which the U.S. Coast Guard is operating, and the U.S. Customs Service will enforce jointly this part and the provisions of the Act.

(b) Enforcement agents of NMFS will enforce provisions of this part and the Act on behalf of the Secretary and may take any actions authorized with respect to enforcement. By agreement, the Secretary may utilize the personnel, services, and facilities of any other Federal Agency to enforce these rules and the Act. By agreement, the Secretary also may designate personnel of a State to enforce these rules and the Act.

(c) The operator of, or any other person aboard, any fishing vessel subject to this part must immediately comply with instructions and signals issued by an authorized officer to stop the vessel and with instructions to facilitate safe boarding and inspection of the vessel, its gear, equipment, fishing record (where applicable), and catch for purposes of enforcing the Act and this part.

(d) *Communications.* (1) Upon being approached by a U.S. Coast Guard vessel or aircraft, or other vessel or aircraft with an authorized officer aboard, the operator of a fishing vessel must be alert for communications conveying enforcement instructions.

(2) VHF–FM radiotelephone is the preferred method of communicating between vessels. If the size of the vessel and the wind, sea, and visibility conditions allow, a loudhailer may be used instead of the radio. Hand signals, placards, high frequency radiotelephone, or voice may be employed by an authorized officer, and message blocks may be dropped from an aircraft.

(3) If other communications are not practicable, visual signals may be transmitted by flashing light directed at the vessel signaled. Coast Guard units will normally use the flashing light signal ''L'' as the signal to stop. In the International Code of Signals, ''L'' (.—..)[1] means ''you should stop your vessel instantly.''

(4) Failure of a vessel's operator promptly to stop the vessel when directed to do so by an authorized officer

[1] Period (.) means a short flash of light; dash (—) means a long flash of light.

using loudhailer, radiotelephone, flashing light signal, or other means constitutes *Prima facie* evidence of the offense of refusal to allow an authorized officer to board.

(5) The operator of a vessel who does not understand a signal from an enforcement unit and who is unable to obtain clarification by loudhailer or radiotelephone must consider the signal to be a command to stop the vessel instantly.

(e) *Boarding.* The operator of a vessel directed to stop must

(1) Guard Channel 16, VHF–FM if so equipped;

(2) Stop immediately and lay to or maneuver in such a way as to allow the authorized officer and his party to come aboard;

(3) Except for those vessels with a freeboard of four feet or less, provide a safe ladder, if needed, for the authorized officer and his party to come aboard;

(4) When necessary to facilitate the boarding or when requested by an authorized officer, provide a manrope or safety line, and illumination for the ladder; and

(5) Take such other actions as necessary to facilitate boarding and to ensure the safety of the authorized officer and the boarding party.

(f) *Signals.* The following signals, extracted from the International Code of Signals, may be sent by flashing light by an enforcement unit when conditions do not allow communications by loudhailer or radiotelephone. Knowledge of these signals by vessel operators is not required. However, knowledge of these signals and appropriate action by a vessel operator may preclude the necessity of sending the signal ''L'' and the necessity for the vessel to stop instantly.

(1) ''AA'' repeated (.- .-) is the call to an unknown station. The operator of the signaled vessel should respond by identifying the vessel by radiotelephone or by illuminating the vessel's identification.

(2) ''RY–CY'' (.-. -.— -.-. -.—) means ''you should proceed at slow speed, a boat is coming to you.'' This signal is normally employed when conditions allow an enforcement boarding without the necessity of the vessel being boarded coming to a complete stop, or, in some cases, without retrieval of fishing gear which may be in the water.

(3) ''SQ3'' (... —.- ...—) means ''you should stop or heave to; I am going to board you.''

[50 FR 43498, Oct. 25, 1985; 50 FR 45828, Nov. 4, 1985, as amended at 53 FR 24645, June 29, 1988]

§ 285.5 Civil procedures.

(a) The method for assessment of civil penalties for violation of these rules or the Act must be in accordance with the procedures set forth in 15 CFR part 904.

(b) In view of the perishable nature of tuna when not processed otherwise than by chilling or freezing, authorized officers may cause to be sold, for not less than its reasonable market value, unchilled or unfrozen tunas that may be seized and forfeited under the Act and this part.

(c) The purchaser must remit the proceeds of any sale made under paragraph (b) of this section to the Director. The Director will deposit and retain the proceeds in the Suspense Account of NMFS (Account No. DO 6875—Phase 19) after deducting the reasonable cost of the sale, if any, pending judgement of the court or other disposition of the case.

[50 FR 43398, Oct. 25, 1985, as amended at 53 FR 24645, June 29, 1988; 57 FR 32923, July 24, 1992]

§ 285.6 Civil penalities.

Any person who:

(a) Violates any provisions of § 285.3 (a), (b), or (f) of this part will be assessed a civil penalty of not more than $25,000 for a first violation and a civil penalty of not more than $50,000 for any subsequent violation;

(b) Violates any provision of § 285.3 (c) or (d) of this part will be assessed a civil penalty of not more than $1,000 for a first violation and a civil penalty of not more than $5,000 for any subsequent violation; or

(c) Violates any provision of § 285.3(e) will be assessed a civil penalty of not more than $100,000.

[50 FR 43398, Oct. 25, 1985, as amended at 52 FR 25012, July 2, 1987]

§285.7 Experimental fishing exemption.

(a) Upon a written request received at least 30 days before the desired effective date, the Director, in order to provide for the conduct of experimental fishing to gather data needed to make management decisions for the Atlantic tuna resources or fisheries, may exempt any person or vessel from specific requirements of this part.

(b) A request for an exemption must be in writing and received by the Director at least thirty (30) days before the desired effective date. The request must specify any vessel(s) involved, describe the gear to be used, the manner in which the gear will be fished, the duration of the activity, the area where the activity will be conducted, the species of tuna that will be caught, the anticipated bycatch, the port(s) involved and the disposition of the catch, both domestic and foreign. The request must include any fee specified by the Director pursuant to §285.7(e).

(c) The Director may not grant such exemption unless it is determined that the purpose, design, and administration of the experimental fishing is consistent with the objectives of the management program, ICCAT recommendations, the provisions of the Atlantic Tunas Convention Act, and other applicable law, and that granting the exemption will not:

(1) Have a detrimental effect on the Atlantic tunas resources and fisheries; or

(2) Create significant enforcement problems.

(d) Each vessel participating in any experimental fishing activity is subject to all provisions of this part except those specified in the exemption granted that activity by the Director. The conditions, duration of the experimental fishing, and the provisions of this part to which the exemption applies, will be specified in a letter issued by the Director to each vessel or person participating in the exempted activity. This letter must be carried aboard the vessel conducting the exempted activity. Any exemption authorization that has been altered, erased, or mutilated is invalid. A letter of exemption issued under this part is not transferable or assignable. Any violation of any condition in a letter of exemption shall render it null and void upon receipt of written notification from the Director.

(e) The Director may charge a fee to recover the administrative expenses of issuing a letter of exemption. The amount of the fee will be calculated, at least annually, in accordance with the procedures of the NOAA Finance Handbook for determining administrative costs of each special product or service. The fee may not exceed such costs. Persons seeking an exemption may contact the Director at (301) 713–2334 to find out the applicable fee. Failure to pay the fee will preclude issuance of the exemption. Payment by a commercial instrument later determined to be insufficiently funded shall invalidate any letter of exemption.

[58 FR 45290, Aug. 27, 1993]

§285.8 At-sea observer coverage.

(a) Notwithstanding the selection for placement or the placement of onboard fishery observers under the authority of any other Federal statute or fisheries regulation, NMFS may require observers for any vessel engaged in directed fishing for, or incidentally taking, Atlantic tunas at any time.

(b) Owners of vessels selected for observer coverage are required to notify the appropriate Fisheries Science Center Director before commencing any fishing trip that may result in the harvest of any Atlantic tuna. Notification procedures will be specified in selection letters to vessel owners.

(c) An owner or operator of a vessel on which a NMFS-approved observer is embarked must:

(1) Provide accommodations and food that are equivalent to those provided to the crew;

(2) Allow the observer access to and use of the vessel's communications equipment and personnel upon request for the transmission and receipt of messages related to the observer's duties;

(3) Allow the observer access to and use of the vessel's navigation equipment and personnel upon request to determine the vessel's position;

(4) Allow the observer free and unobstructed access to the vessel's bridge, working decks, holding bins, weight

scales, holds, and any other space used to hold, process, weigh, or store fish; and

(5) Allow the observer to inspect and copy the vessel's log, communications logs, and any records associated with the catch and distribution of fish for that trip.

[58 FR 45290, Aug. 27, 1993]

§ 285.9 Archival tags.

(a) *Reserved.*

(b) *Landing.* Notwithstanding other provisions of this part, any person may catch, possess, retain, and land any regulated species in which an archival tag has been affixed or implanted, provided that person complies with all requirements of paragraph (c) of this section.

(c) *Landing report.* The person possessing, retaining, or landing, under the authority of paragraph (b) of this section, a regulated species in which an archival tag has been affixed or implanted must contact the NMFS, Southeast Science Center (1–800–437–3936) or any NMFS enforcement office (a list of local NMFS enforcement offices can be obtained from the Director) prior to, or at the time of landing, furnish all requested information regarding the location and method of capture, and, as instructed, remove the tag and return it to NMFS or make the fish available so that a NMFS scientist, enforcement agent, or other person designated in writing by the Director may inspect the fish and recover the tag.

(d) *Quota monitoring.* If a regulated species landed under the authority of paragraph (b) of this section is subject to a quota, the fish shall be counted against the applicable quota category consistent with the fishing gear and activity which resulted in the catch. In the event such fishing gear or activity is otherwise prohibited under applicable provisions of this part, the fish shall be counted against the scientific reserve quota established for that species.

[63 FR 669, Jan. 7, 1998]

Subpart B—Atlantic Bluefin Tuna (Thunnus thynnus thynnus)

SOURCE: 50 FR 43400, Oct. 25, 1985, unless otherwise noted.

§ 285.20 Fishing seasons.

(a) *Commencement.* Fishing in the regulatory area for Atlantic bluefin tuna will begin

(1) On January 1 of each year:

(i) For anglers fishing for Atlantic bluefin tuna under the quota specified in § 285.22(d);

(ii) For vessels permitted in the Incidental Catch category fishing under the quota specified in § 285.22(e); and

(iii) For anglers participating in the tag and release program under § 285.27.

(2) On June 1 of each year:

(i) For vessels permitted in the General category fishing under the quota specified in § 285.22(a), and

(ii) For vessels permitted in the Harpoon Boat category fishing under the quota specified in § 285.22(b).

(3) On August 15 of each year:

(i) For vessels permitted in the Purse Seine category fishing under the quota specified in § 285.22(c).

(ii) [Reserved]

(4) Consistent with the Convention, the Act and this part, the Assistant Administrator may change the commencement date under this section for any vessel permit category or person (angler) if the Assistant Administrator determines that the changed date will enable scientific research on the status of the stock to be conducted more effectively and will not prevent the quotas for the affected fishery from being caught, based upon historical catch data or other relevant information. The Assistant Administrator will publish a notice in the FEDERAL REGISTER of any change in the commencement date(s) for fishing under this section at least 60 days before commencement of the affected fishery.

(b) *Closure.* (1)(i) NMFS will monitor catch and landing statistics, including catch and landing statistics from previous years and projections based on those statistics, of Atlantic bluefin tuna by vessels other than those permitted in the Purse Seine category. On

the basis of these statistics, NMFS will project a date when the catch of Atlantic bluefin tuna will equal any quota established under this section, and will file notification with the Office of the Federal Register stating that fishing for or retaining Atlantic bluefin tuna under the quota must cease on that date at a specified hour.

(ii) Upon determining that variations in seasonal distribution, abundance, or migration patterns of ABT, or the catch rate in one area may preclude anglers in an another area from a reasonable opportunity to harvest a portion of the quota, NMFS may close all or part of the Angling category, and may reopen it at a later date if NMFS determines that ABT have migrated into an identified area. In determining the need for any such temporary or area closure, NMFS will consider the following factors:

(A) The usefulness of information obtained from catches of a particular geographic area of the fishery for biological sampling and monitoring the status of the stock;

(B) The current year catches from the particular geographic area relative to the catches recorded for that area during the preceding four years;

(C) The catches from the particular geographic area to date relative to the entire category and the likelihood of closure of that entire category of the fishery if no allocation is made;

(D) The projected ability of the entire category to harvest the remaining amount of Atlantic bluefin tuna before the anticipated end of the fishing season.

(2) Angling for Atlantic bluefin tuna under a tag and release program under §285.27 may continue even after fishing for a quota has ceased.

(3) A vessel permitted in the Purse Seine category may fish under the bluefin tuna quota specified in §285.22(c), or in fisheries for Atlantic yellowfin or skipjack tuna or other fisheries where bluefin tuna might be taken as bycatch, only until the allocation of bluefin tuna assigned or transferred under §285.25(d) to that vessel is reached. Upon reaching its individual vessel allocation of Atlantic bluefin tuna, directed purse seine fisheries for Atlantic tunas are closed to such vessel and the vessel will be deemed to have been given notice to that effect.

(c) *State actions.* Nothing in this section may be construed to invalidate any more restrictive commencement or closure date established by any State in waters under its jurisdiction.

[50 FR 43400, Oct. 25, 1985, as amended at 53 FR 24645, June 29, 1988; 57 FR 32920, July 24, 1992; 60 FR 38512, July 27, 1995; 62 FR 8635, Feb. 26, 1997]

§285.21 Vessel permits.

(a) *Permit requirements.* A vessel that fishes for, takes, retains or possesses Atlantic bluefin tuna must have on board a valid permit issued to the vessel owner under this section.

(b) *Categories of permits.* (1) Upon submission of a complete and valid application pursuant to paragraph (c) of this section, the owner of each qualifying vessel may be issued a permit by NMFS for one of the following permit categories: General, Charter/Headboat, Angling, Harpoon Boat, Purse Seine, or Incidental Catch. A permit will not be issued for more than one category.

(2) Persons may fish for, retain or possess Atlantic bluefin tuna only under the quota, catch limits, and size classes applicable to the permit category of the carrying vessel, except that anglers on board General and Charter/Headboat category vessels may fish for and retain school, large school and small medium bluefin tuna, subject to the limits applicable to the Angling category only until such time that a large medium or giant bluefin tuna is caught, retained or possessed on board the vessel.

(3) School, large school and small medium bluefin tuna landed by anglers on board General and Charter/Headboat category vessels are counted against the Angling category quota. When the General category fishery is open, large medium and giant bluefin tuna landed by anglers on board General and Charter/Headboat category vessels are counted against the General category quota. When the General category fishery is closed, or at any time in the Gulf of Mexico, large medium and giant bluefin tuna landed by anglers on board Angling and Charter/Headboat category vessels pursuant to §285.24(d)(2)

may not be sold and are counted against the Angling category quota.

(4) Persons fishing for Atlantic bluefin tuna must not possess on board or use any gear inappropriate to the category for which the carrying vessel is permitted:

(i) General—rod and reel (including downriggers), handline, harpoon, bandit gear;

(ii) Charter/Headboat—rod and reel (including downriggers), handline;

(iii) Angling—rod and reel (including downriggers), handline;

(iv) Harpoon Boat—harpoon;

(v) Purse Seine—purse seine nets;

(vi) Incidental Catch—purse seine nets, fixed gear, traps, longlines.

(5) When fishing for, or possessing, Atlantic bluefin tuna, operators of vessels permitted for the Charter/Headboat category must have on board a current copy of the operator's merchant marine license or the operator's uninspected passenger vessel license.

(6) Vessels permitted for any category other than the Angling category are eligible to conduct commercial fishing for Atlantic bluefin tuna.

(7) Except for purse seine vessels for which a permit has been issued under this section, an owner may change the category of the vessels's Atlantic tunas permit to another category by application on the appropriate form to NMFS or by dialing 1–888–USA-TUNA before the specified deadline. After the deadline, the vessel's permit category may not be changed to another category for the remainder of the calendar year, regardless of any change in the vessel's ownership. For 1997, the deadline is July 28, 1997. In years after 1997, the deadline for category changes is May 15.

(c) *Application procedure.* A vessel owner applying for a permit under this section must submit a completed permit application as indicated in the application instructions at least 30 days before the date on which the applicant desires to have the permit made effective.

(1) Applicants must provide all information concerning vessel, gear used, fishing areas, and fisheries participation, including sworn statements relative to income requirements and permit conditions, as indicated in the instructions on the application form.

(2) Applicants must also submit a copy of the official state registration or United States Coast Guard documentation, charter/headboat license, and, if a boat is owned by a corporation or partnership, the corporate or partnership documents (copy of Certificate of Incorporation and Articles of Association or Incorporation), along with the names of all shareholders owning 5 percent or more of the corporation's stock.

(3) NMFS may require the applicant to provide documentation supporting any sworn statements required under this section before a permit is issued or to substantiate why such permit should not be revoked or otherwise sanctioned under paragraph (j) of this section.

(4) Applicants must also submit any other information that may be necessary for the issuance or administration of the permit, as requested by NMFS.

(d) *Issuance.* (1) Except as provided in subpart D of 15 CFR part 904, a permit shall be issued within 30 days of receipt of a completed application. An application is complete when all requested forms, reports, information, sworn statements and supporting documentation have been received.

(2) The applicant will be notified of any deficiency in the application. If the applicant fails to correct the deficiency within 15 days following the date of notification, the application will be considered abandoned.

(e) *Duration.* A permit issued under this section remains valid until it expires or is suspended, revoked, or modified pursuant to subpart D of 15 CFR part 904. Permits expire on the date indicated on the permit or when any of the information previously submitted on the application changes. Permits must be renewed upon expiration. Renewal of permits must be initiated at least 30 days before the expiration date to avoid a lapse in validity.

(f) *Alteration.* A permit issued under this section which is substantially altered, erased, or mutilated is invalid.

(g) *Replacement.* Replacement permits will be issued when requested by the owner or authorized representative. A

request for a replacement permit will not be considered a new application. An appropriate fee, consistent with paragraph (k) of this section, may be charged for issuance of the replacement permit.

(h) *Transfer.* A permit issued under this section, except in the case of a purse seine permit as allowed under paragraph (m) of this section, is not transferable or assignable to another vessel or owner; it is valid only for the vessel and owner to which it is issued.

(i) *Display.* A permit issued under this section must be carried on board the vessel at all times. The permit must be displayed for inspection upon request of any authorized officer or any employee of NMFS designated by the Regional Director for such purpose. Upon sale of any large medium or giant Atlantic bluefin tuna, the vessel permit must be presented for inspection to the permitted dealer completing the landing card.

(j) *Sanctions.* The Administrator may suspend, revoke, modify, or deny a permit issued or sought under this section. Procedures governing permit sanctions and denials are found at subpart D of 15 CFR part 904.

(k) *Fees.* NMFS may charge a fee to recover the administrative expenses of permit issuance. The amount of the fee shall be determined, at least biannually, in accordance with the procedures of the NOAA Finance Handbook, available from the Director, for determining administrative costs of each special product or service. The fee may not exceed such costs and is specified with application or renewal instructions. The required fee must accompany each application or renewal. Failure to pay the fee will preclude issuance of the permit.

(l) *Change in application information.* Within 15 days after any change in the information contained in an application submitted under this section, the vessel owner must report the change by phone (1–888–USA–TUNA) or internet (http://www.usatuna.com). In such case, a new permit will be issued to incorporate the new information. For certain informational changes, NMFS may require supporting documentation before a new permit will be issued or may require payment of an additional fee. Permittees will be notified of such requirements, if applicable, when reporting changes. In case of failure to report changes, the permit shall be void as of the sixteenth day after a change in the permit information should have been reported as found in an action under 15 CFR part 904.

(m) *Closed categories.* The Regional Director will issue permits to catch and retain Atlantic bluefin tuna under §285.22(c) only to current owners of those purse seine vessels, or their replacements, that were granted allocations under this subpart and landed Atlantic bluefin tuna in the fishery for Atlantic bluefin tuna during the period 1980 through 1982. The Regional Director will not issue a permit to take Atlantic bluefin tuna under this subpart to the owner of any vessel that was replaced or consolidated with another vessel and retired from the purse seine fishery during the period 1980 through 1982, unless that vessel is replacing another vessel being retired from the fishery.

[50 FR 43400, Oct. 25, 1985, as amended at 58 FR 45290, Aug. 27, 1993; 60 FR 38512, July 27, 1995; 62 FR 332, Jan. 3, 1997; 62 FR 27519, May 20, 1997; 62 FR 30744, June 5, 1997; 62 FR 38487, July 18, 1997]

§285.22 Quotas.

The total annual (January 1–December 31) amount of Atlantic bluefin tuna that may be caught, retained, possessed or landed by persons and vessels subject to U.S. jurisdiction in the regulatory area is subdivided as follows:

(a) *General.* (1) The total annual amount of large medium and giant Atlantic bluefin tuna that may be caught, retained, possessed or landed in the regulatory area by vessels permitted in the General category under §285.21(b) is 633 mt, of which 374 mt are available in the period beginning June 1 and ending August 31; 187 mt are available in the period beginning September 1 and ending September 30; and 72 mt are available in the period beginning October 1.

(2) On the basis of the statistics referenced at §285.20(b)(1), the Assistant Administrator will project a date when the catch of Atlantic bluefin tuna will equal the available quota in any period, and will publish a notification in the FEDERAL REGISTER stating that

fishing for, retaining, possessing, or landing Atlantic bluefin tuna under the quota for that period is prohibited from a specified time on that date until the opening of the subsequent quota period, whereupon a quota equal to the initial quota for that period as adjusted for estimated overharvest or underharvest prior to that period will become available.

(3) When the coastwide General category fishery has been closed in any quota period under paragraph (a)(2) of this section, the Director may publish a notification in the FEDERAL REGISTER to make available up to 10 mt of the quota set aside for an area comprising the waters south and west of a straight line originating at a point on the southern shore of Long Island at 72°27' W. long. (Shinnecock Inlet) and running SSE 150° true, and north of 38°47' N. lat. The daily catch limit for the set-aside area will be one large medium or giant ABT per vessel per day. Upon the effective date of the set-aside fishery, fishing for, retaining, or landing large medium or giant ABT is authorized only within the set-aside area. Any portion of the set-aside amount not harvested prior to the reopening of the coastwide General category fishery in the subsequent quota period established under paragraph (a)(1) of this section may be carried over for the purpose of renewing the set-aside fishery at a later date.

(b) *Harpoon Boat.* The total annual amount of large medium and giant Atlantic bluefin tuna that may be caught, retained, possessed, or landed in the regulatory area by vessels permitted in the Harpoon Boat category under § 285.21(b) is 53 mt.

(c) *Purse Seine.* The total amount of large medium and giant Atlantic bluefin tuna that may be caught, retained, possessed, or landed in the regulatory area by vessels permitted in the Purse Seine category under § 285.21(b) is 250 mt.

(d) *Angling.* The total annual amount of Atlantic bluefin tuna that may be caught, retained, possessed, or landed in the regulatory area by anglers is 265 mt. No more than 6 mt of this quota may be large medium or giant bluefin tuna quota and no more than 108 mt of this quota may be school Atlantic bluefin tuna. The size class subquotas for Atlantic bluefin tuna are further subdivided as follows:

(1) 51 mt of school, 71 mt of large school or small medium, and 4 mt of large medium or giant Atlantic bluefin tuna may be caught, retained, possessed, or landed south of 38°47' N. lat.

(2) 57 mt of school, 80 mt of large school or small medium, and 2 mt of large medium or giant Atlantic bluefin tuna may be caught, retained, possessed, or landed north of 38°47' N. lat.

(e) *Incidental.* The total annual amount of large medium and giant Atlantic bluefin tuna that may be caught, retained, possessed, or landed in the regulatory area by vessels permitted in the Incidental Catch category under § 285.21(b) is 110 mt. This quota is further subdivided as follows:

(1) 109 mt for longline vessels. No more than 86 mt may be caught, retained, possessed, or landed in the area south of 34°00′ N. lat.

(2) For vessels fishing under § 285.23 (a) and (b), 1 mt may be caught, retained, possessed, or landed in the regulatory area.

(f) *Reserve.* The total amount of Atlantic bluefin tuna that will be held in reserve for inseason adjustments and fishery independent research is 33 mt. The Assistant Administrator may allocate any portion (from zero to 100 percent) of this amount to any category or categories of the fishery, including research activities authorized under § 285.1(c). The Assistant Administrator will publish a notice of allocation of any inseason adjustment amount in the FEDERAL REGISTER before such allocation is to become effective. Before making any such allocation, the Assistant Administrator will consider the following factors:

(1) The usefulness of information obtained from catches of the particular category of the fishery for biological sampling and monitoring the status of the stock;

(2) The catches of the particular gear segment to date and the likelihood of closure of that segment of the fishery if no allocation is made;

(3) The projected ability of the particular gear segment to harvest the additional amount of Atlantic bluefin

tuna before the anticipated end of the fishing season; and

(4) The estimated amounts by which quotas established for other gear segments of the fishery might be exceeded.

(g) The catching or retention of school, large school or small medium Atlantic bluefin tuna is prohibited except as allowed by paragraph (d) of this section.

(h) If the Assistant Administrator determines, based on landing statistics and other available information, that an annual quota in any category, or as appropriate, subcategory, has been exceeded or has not been reached, the Assistant Administrator will subtract the overharvest from, or add the underharvest to, that quota category for the following year; provided that the total of the adjusted quotas and the reserve is consistent with a recommendation of the Commission regarding country quotas. The Assistant Administrator will publish any amounts to be subtracted or added and the basis for the quota reductions or increases in the FEDERAL REGISTER.

(i) *Transfers between categories.* The Assistant Administrator is authorized to make adjustments to quotas involving transfers between vessel categories or, as appropriate, subcategories if, during a single year quota period or the second year of a biannual quota period as defined by ICCAT, the Assistant Administrator determines, based on landing statistics, present year catch rates, effort, and other available information, that any category, or as appropriate, subcategory, is not likely to take its entire quota as previously allocated for that year. Given that determination, the Assistant Administrator may transfer inseason any portion of the quota of any fishing category to any other fishing category or to the reserve after considering the four factors indicated at paragraphs (f) (1) through (4) of this section, and the probability that any transfers between categories will not result in the total single-year quota or the total 2-year quota being exceeded. The Assistant Administrator shall file a notification of transfer of any inseason adjustment amount with the Office of the Federal Register before such transfer is to become effective.

[57 FR 32920, July 24, 1992, as amended at 58 FR 45291, Aug. 27, 1993; 59 FR 17725, Apr. 14, 1994; 60 FR 38512, July 27, 1995; 61 FR 30186, June 14, 1996; 62 FR 35109, June 30, 1997; 62 FR 38941, July 21, 1997; 63 FR 27865, May 21, 1998]

§285.23 Incidental catch.

(a) *Herring, mackerel, and menhaden purse seine gear and fixed gear other than longlines or traps.* Subject to the quotas in §285.22, large medium and giant Atlantic bluefin tuna may be retained during any fishing trip, on board a vessel for which an Incidental Catch permit has been issued under §285.21 that is fishing with herring, mackerel, and menhaden purse seine gear or fixed gear other than longlines or traps principally for species of fish other than tuna, provided that the total amount of Atlantic bluefin tuna taken does not exceed 2 percent, by weight, of all other fish on board the vessel at the end of each fishing trip.

(b) *Traps.* Subject to the quotas in §285.22, large medium and giant Atlantic bluefin tuna may be retained during any fishing trip on board a vessel for which an Incidental Catch permit under §285.21 has been issued that catches Atlantic bluefin tuna incidentally while fishing with traps, provided that the total amount of Atlantic bluefin tuna taken does not exceed 2 percent, by weight, of all other fish landed by the owner of the vessel within the preceding 30-day period.

(c) *Longlines.* Subject to the quotas in §285.22, any person operating a vessel using longline gear possessing an Incidental Catch permit issued under §285.21 may retain or land large medium and giant Atlantic bluefin tuna as an incidental catch. The amount of Atlantic bluefin tuna retained or landed may not exceed:

(1) One fish per vessel per fishing trip landed south of 34°00′ N. latitude, provided that for the months of January through April at least 1,500 pounds (680 kg), and for the months of May through December at least 3,500 pounds (1,588 kg), either dressed or round weight, of species other than Atlantic bluefin tuna are legally caught, retained, and offloaded from the same

trip and are recorded on the dealer weighout as sold; and

(2) Two percent by weight, either dressed or round weight, of all other fish legally landed, offloaded and documented on the dealer weighout as sold at the end of each fishing trip, north of 34°00′ N. latitude.

(d) *Purse Seine.* When fishing for Atlantic yellowfin or skipjack tuna, vessels for which an Atlantic bluefin tuna Purse Seine category permit has been issued are allowed a 1 percent per trip (by weight) incidental take of bluefin less than the large medium size class. Any landings of these incidental catches may not be sold and will be counted against the Purse Seine category quota allocation for bluefin tuna.

[57 FR 32921, July 24, 1992, as amended at 58 FR 45292, Aug. 27, 1993; 59 FR 17726, Apr. 14, 1994; 60 FR 38513, July 27, 1995]

§ 285.24 Catch limits.

(a) *General category*. (1) From the start of each fishing year, except on designated restricted-fishing days, only one large medium or giant Atlantic bluefin tuna may be caught and landed per day from a vessel for which a General category permit has been issued under this part. On designated restricted-fishing days, persons aboard such vessels may not fish for, possess or retain Atlantic bluefin tuna. For calendar year 1997, designated restricted-fishing days are: July 16, 17, 23, and 30; August 6, 10, 11, 12, 17, 20, 24, and 27; and September 1, 3, 6, 7, 10, 11, 14, 17, 19, 21, 24, and 28.

(2) The Assistant Administrator may increase or reduce the catch limit over a range from zero (restricted fishing days) to a maximum of three large medium or giant Atlantic bluefin tuna per day per vessel based on a review of dealer reports, daily landing trends, availability of the species on the fishing grounds, and any other relevant factors, to provide for maximum utilization of the quota. The Assistant Administrator will publish a document in the FEDERAL REGISTER of any adjustment in the allowable daily catch limit made under this paragraph. Other than fishery closures pursuant to attainment of quotas in any period, such notice of catch limit adjustment shall be filed at the Office of the Federal Register at least 3 calendar days prior to the change becoming effective.

(3) Large medium and giant Atlantic bluefin tuna may be possessed or retained on board a vessel for which a General category permit has been issued if the amount does not exceed a single day's catch, regardless of the length of the trip, as allowed by the daily catch limit in effect on that day.

(4) For calendar year 1997, anglers on board vessels permitted in the General category may possess school, large school, and small medium Atlantic bluefin tuna in an amount not to exceed a single day's catch, regardless of the length of the trip, as allowed by the daily catch limit for the Angling category in effect on that day. However, on allowable fishing days, once the applicable catch limit for large medium or giant bluefin tuna is possessed or retained, fishing by persons on board the vessel must cease and the vessel must proceed to port.

(b) *Harpoon Boat category*. Vessels permitted in the Harpoon Boat category may catch multiple giant bluefin tuna but only one large medium bluefin tuna per day per vessel may be caught.

(c) *Purse Seine category*. Large medium bluefin tuna may be caught from a vessel for which a Purse Seine category permit has been issued provided that the total amount of large medium bluefin landed per trip does not exceed 15 percent by weight of the total amount of giant Atlantic bluefin tuna landed on that trip, and the total annual amount of large medium bluefin landed does not exceed 10 percent by weight of the total amount of giant Atlantic bluefin tuna allocated to that vessel for that fishing season.

(d) *Angling category*. (1) Each angler on board a vessel permitted in the Angling category may catch and retain each day no more than two Atlantic bluefin tuna which may be from the school or large school size class. In addition to the per angler limits, one small medium size class bluefin tuna may be retained each day, per angling category vessel. Anglers may not retain young school Atlantic bluefin tuna.

(2) In addition to the daily catch limit for school, large school and small

medium bluefin tuna, a vessel for which an Angling category permit has been issued may catch and retain annually one large medium or giant Atlantic bluefin tuna, to be counted against the Angling category quota specified in §285.22. The owner or operator of the vessel must report to the nearest NMFS enforcement office within 24 hours of landing any large medium or giant bluefin, and must make the tuna available for inspection and attachment of a tag. No such large medium or giant Atlantic bluefin tuna may be sold or transferred to any person for a commercial purpose except for taxidermic purposes. A list of local NMFS enforcement offices may be obtained from the Regional Director.

(3) The Assistant Administrator may increase or reduce the per angler catch limit for any size class bluefin tuna or may change the per angler limit to a per boat limit or a per boat limit to a per angler limit based on a review of daily landing trends, availability of the species on the fishing grounds, and any other relevant factors, to provide for maximum utilization of the quota spread over the longest possible period of time. The Assistant Administrator will publish a document in the FEDERAL REGISTER of any adjustment in the allowable daily catch limit made under this paragraph. Other than fishery closures pursuant to attainment of quotas in any period, such notice of catch limit adjustment shall be filed at the Office of the Federal Register at least 3 calendar days prior to the change becoming effective.

(4) Anglers on board vessels for which an Angling category permit has been issued may possess school, large school, and small medium Atlantic bluefin tuna in an amount not to exceed a single day's catch, regardless of the length of the trip, as allowed by the daily catch limit for the Angling category in effect on that day.

(e) *Charter/Headboat category*. (1) Persons aboard vessels for which a Charter/Headboat category permit has been issued under this part are subject to the daily catch limit in effect on that day for school, large school, and small medium ABT applicable to the Angling category or the daily catch limit in effect on that day for large medium and giant ABT applicable to the General category. The size category of the first ABT retained or possessed shall determine the fishing category applicable to the vessel that day. Persons aboard the vessel may possess ABT in an amount not to exceed a single day's catch, regardless of the length of the trip, as allowed by the daily catch limit in effect on that day for the Angling or General category, as applicable. School, large school, and small medium ABT landed by persons aboard Charter/Headboat category vessels are counted against the Angling category quota. Large medium and giant ABT landed by persons aboard Charter/Headboat category vessels are counted against the General category quota if landed under paragraph (a)(1) of this section, or the Angling category quota, if landed under paragraph (d)(2) of this section.

(2) When commercial fishing by vessels for which General category permits have been issued under this part is authorized, except when fishing in the Gulf of Mexico, operators of vessels for which a Charter/Headboat category permit has been issued under this part are subject to the daily catch limit in effect for the General category for large medium or giant Atlantic bluefin tuna as specified in paragraph (a)(1) of this section. Once the applicable catch limit for large medium or giant bluefin tuna is possessed or retained on authorized commercial fishing days, persons aboard vessels for which Charter/Headboat category permits have been issued under this part must cease fishing and the vessel must proceed to port. Large medium or giant ABT landed under this paragraph (e)(2) may be sold.

(3) When the General category fishery is closed, except when fishing in the Gulf of Mexico, operators of vessels for which a Charter/Headboat category permit has been issued under this part are subject to the annual vessel limit and reporting requirement for noncommercial take of large medium or giant Atlantic bluefin tuna as specified in paragraph (d)(2) of this section. Once the applicable catch limit for large medium or giant bluefin tuna is possessed or retained under the Angling category quota, fishing by persons aboard Charter/Headboat category vessels must

cease and the vessel must proceed to port.

(4) At any time when fishing in the Gulf of Mexico, operators of vessels for which Charter/Headboat category permits have been issued under this part may not fish for, catch, retain or possess bluefin tuna except that large medium and giant Atlantic bluefin tuna taken incidental to fishing for other species may be retained subject to the annual vessel limit and reporting requirement for non-commercial take of large medium or giant Atlantic bluefin tuna as specified in paragraph (d)(2) of this section. Once the applicable catch limit for large medium or giant bluefin tuna is possessed or retained under the Angling category quota, fishing by persons aboard Charter/Headboat category vessels must cease and the vessel must proceed to port.

[57 FR 32921, July 24, 1992, as amended at 59 FR 17726, Apr. 14, 1994; 60 FR 38513, July 27, 1995; 61 FR 30187, June 14, 1996; 62 FR 30745, June 5, 1997; 62 FR 38941, July 21, 1997]

§ 285.25 Purse seine vessel requirements.

(a) *Mesh size.* Any owner or operator of a vessel with a permit issued under § 285.21(b) conducting a directed fishery for Atlantic bluefin tuna with nets, other than a trap net, must use a purse seine net with a mesh size equal to or smaller than 4.5 inches in the main body (stretched when wet) and which has at least 24-count thread throughout the net.

(b) *Exemption.* The Director may exempt any person from the mesh restrictions in paragraph (a) of this section if it is determined that the net sought to be exempted will not result in significant injury or mortality to Atlantic bluefin tuna which are encircled by the net but manage to escape.

(c) *Inspection.* Any owner of a purse seine vessel with a permit issued under § 285.21(b) must request an inspection of the vessel and fishing gear by an enforcement agent of NMFS before commencing any fishing trip that may result in the harvest of any regulated species and before offloading any Atlantic bluefin tuna. The vessel owner must request such inspection at least 24 hours before commencement of a fishing trip and offloading by calling 508–563–5721 or 508–281–9261. Purse seine vessel owners must have each large medium and giant bluefin tuna in their catch weighed, measured, and the information recorded on the landing card required under § 285.28(a) at the time of offloading and prior to transporting said tuna from the area of offloading.

(d) *Vessel allocations.* (1) Owners or operators of vessels for which a Purse seine permit has been issued under § 285.21(b) must apply for an allocation of Atlantic bluefin tuna from the quotas specified in § 285.22. The owner or operator must apply for this allocation in writing to the Regional Director by April 15 and must specify the particular size class or classes of Atlantic bluefin tuna for which the vessel will fish. The owner or operator must supply documentation of the vessel's stockholders, owners, partners, or association structure.

(2) The Regional Director will review applications for allocations of Atlantic bluefin tuna on or about May 1, and will make equal allocations of the available size classes of Atlantic bluefin tuna among vessel owners so requesting. Such allocations are freely transferable, in whole or in part, among purse seine vessel permit holders. Any purse seine vessel permit holder intending to land bluefin tuna under an allocation transferred from another purse seine vessel permit holder must provide written notice of such intent to the Regional Director 3 days before landing any such bluefin tuna. Such notification must include the transfer date, amount (mt) transferred, and the permit numbers of vessels involved in the transfer. Trip or seasonal catch limits otherwise applicable under § 285.24(c) are not altered by transfers of bluefin tuna allocation. Purse seine vessel permit holders who, through landing and/or transfer, have no remaining bluefin tuna allocation may not use their permitted vessels in any fishery in which Atlantic bluefin tuna might be caught.

(3) Purse seine vessel owners may apply to the Regional Director to permanently consolidate vessel permits issued under § 285.21(b). Upon approval of consolidation by the Regional Director, the Atlantic tuna permit(s) of the transferring vessel(s) will be cancelled,

and the holder of the consolidated permit is authorized to apply for allocations of Atlantic bluefin tuna commensurate with the number of consolidated permits. Purse seine vessel owners who cancel their permit by means of consolidation must not fish their vessel in any fishery in which Atlantic bluefin tuna might be caught.

(e) *Transfer at sea.* Purse seine vessel owners or operators may transfer large medium and giant Atlantic bluefin tuna at sea from the net of the catching vessel to another permitted purse seine vessel provided the amount transferred does not cause the receiving vessel to exceed its annual vessel allocation as modified by authorized transfers. Such at-sea transfers are authorized only between purse seine vessels permitted under §285.21 and not to buy boats permitted under §285.28.

[50 FR 43400, Oct. 25, 1985, as amended at 57 FR 32923, July 24, 1992; 58 FR 45292, Aug. 27, 1993; 60 FR 38514, July 27, 1995; 61 FR 30187, June 14, 1996]

§285.26 Size classes.

Total curved fork length will be the sole criterion for determining the size class of whole (head on) Atlantic bluefin tuna. For this purpose, all measurements must be taken in a line tracing the contour of the body from the tip of the upper jaw to the fork of the tail, which abuts the ventral side of the pectoral fin and the ventral side of the caudal keel. For any Atlantic bluefin tuna found with the head removed, it is deemed, for purposes of this subpart, that the tuna, when caught, fell into a size class in accordance with the following formula: Total curved fork length equals pectoral fin curved fork length multiplied by a factor of 1.35. The pectoral fin curved fork length will be the sole criterion for determining the size class of a beheaded Atlantic bluefin tuna. For this purpose, all measurements must be taken in a line tracing the contour of the body from the ventral side of the pectoral fin to the fork of the tail, which abuts the ventral side of the caudal keel.

Size category	Total curved fork length	Pectoral fin curved fork length	Approx. round weight
Young School	Less than 27 inches Less than 69 cm	Less than 20 inches Less than 51 cm	Less than 14 lb. less than 6.4 kg.
School	27 to <47 inches 69 to <119 cm	20 to <35 inches 51 to <89 cm	14 to <66 lb. 6.4 to <30 kg.
Large School	47 to <59 inches 119 to <150 cm	35 to <44 inches 89 to <112 cm	66 to <135 lb. 30 to <61 kg.
Small Medium	59 to <73 inches 150 to <185 cm	44 to <54 inches 112 to <137 cm	135 to <235 lb. 61 to <107 kg.
Large Medium	73 to <81 inches 185 to <206 cm	54 to <60 inches 137 to <152 cm	235 to <310 lb. 107 to <141 kg.
Giant	81 inches or greater 206 cm or greater	60 inches or greater 152 cm or greater	310 lb or greater. 141 kg or greater.

[60 FR 14387, Mar. 17, 1995, as amended at 60 FR 38514, July 27, 1995; 61 FR 30187, June 14, 1996]

§285.27 Tag and release program.

(a) Notwithstanding other provisions of this part, a person aboard a vessel permitted under this part, other than a person aboard a vessel permitted in the General category on a designated restricted-fishing day, may fish for Atlantic bluefin tuna under a tag and release program, provided the person tags all Atlantic bluefin tuna so caught with tags issued or approved by NMFS under this section, and releases and returns such fish to the sea immediately after tagging and with a minimum of injury. To participate in this program, an angler must obtain tags, reporting cards, and detailed instructions for their use from the Cooperative Tagging Center, Southeast Fisheries Center, NMFS, 75 Virginia Beach Drive, Miami, FL 33149–1099 or by calling (800)437–3936.

(b) Tags obtained from sources other than NMFS may be used to fish for Atlantic bluefin tuna provided the angler has registered each year with the Cooperative Tagging Center and the NMFS program manager has approved the use of tags from that source. Anglers using an alternative source of tags wishing to tag bluefin tuna can call (800) 437–3936 or write NMFS at the address given above.

(c) Anglers registering for the Atlantic bluefin tagging program are required to provide their name, address, phone number, and, if applicable, identify the alternate source of tags.

(d) If NMFS-issued or NMFS-approved tags are not on board a vessel, all anglers on board that vessel are deemed to be ineligible to fish under this section.

[60 FR 38514, July 27, 1995, as amended at 62 FR 30745, June 5, 1997]

§285.28 Dealer permits.

(a) *General.* A dealer purchasing, receiving, possessing, importing or exporting Atlantic bluefin tuna must have a valid permit required under this section. If such purchase or receipt is made from a buy-boat, the buy-boat must have a valid permit under paragraph (l) of this section.

(b) *Application.* Applications for a dealer permit must be in writing on an appropriate form obtained from the Regional Director. The application must be signed by the applicant, and be submitted to the Regional Director at least 30 days before the date upon which the applicant desires the permit to be effective. The application must contain the following information: Company name; principal place of business; owner or owners' names; applicant's name (if different from owner or owners) and mailing address and telephone number; and any other information required by the Regional Director.

(c) *Issuance.* (1) Except as provided in subpart D of 15 CFR part 904, the Regional Director will issue a permit within 30 days of receipt of a completed application.

(2) The Regional Director will notify the applicant of any deficiency in the application. If the applicant fails to correct the deficiency within 15 days following the date of notification, the application will be considered abandoned.

(d) *Duration.* Any permit issued under this section remains valid until December 31 of the year for which it is issued, unless suspended or revoked.

(e) *Alteration.* Any permit which is substantially altered, erased, or mutilated is invalid.

(f) *Replacement.* The Regional Director may issue replacement permits. An application for a replacement permit is not considered a new application.

(g) *Transfer.* A permit issued under this section is not transferable or assignable; it is valid only for the dealer to whom it is issued.

(h) *Inspection.* The dealer must keep the permit issued under this section at his/her principal place of business. The permit must be displayed for inspection upon request of any authorized officer, or any employee of NMFS designated by the Regional Director for such purpose.

(i) *Sanctions.* The Administrator may suspend, revoke, modify, or deny a permit issued or sought under this section. Procedures governing permit sanctions and denials are found at subpart D of 15 CFR part 904.

(j) *Fees.* The Regional Director may charge a fee to recover the administrative expenses of permit issuance. The amount of the fee is calculated, at least annually, in accordance with the procedures of the NOAA Finance Handbook for determining administrative costs of each special product or service. The fee may not exceed such costs and is specified on each application form. The appropriate fee must accompany each application. Failure to pay the fee will preclude issuance of the permit. Payment by a commercial instrument later determined to be insufficiently funded shall invalidate any permit.

(k) *Change in application information.* Within 15 days after any change in the information contained in an application submitted under this section, the dealer issued a permit will report the change in writing to the Regional Director.

(l) *Buy-boats.* Each buy-boat must have a dealer permit issued under this section. The Regional Director will not issue a dealer permit under this section for a buy-boat operation to any vessel which has a valid fishing permit issued under § 285.21. The Regional Director will not issue a dealer permit to a buy-boat unless the owner or operator of the buy-boat agrees in writing to allow an individual authorized by the Regional Director to accompany the buy-boat on any trip to observe operations. The Regional Director will provide reasonable notice to the owner or operator of any buy-boat that an individual will be placed aboard. Failure to allow an authorized individual to be placed aboard following reasonable notice voids the permit. The Regional Director will reimburse the owner of any buy-boat for any expenses which the Regional Director determines to be reasonable and which are related directly to the placement of an individual aboard that buy-boat.

[50 FR 43400, Oct. 25, 1985, as amended at 53 FR 24645, June 29, 1988; 57 FR 373, Jan. 6, 1992; 58 FR 45293, Aug. 27, 1993]

§ 285.29 Recordkeeping and reporting.

(a) Any person issued a dealer permit under § 285.28 must report via electronic facsimile (fax) or an Interactive Voice Response System (IVRS) as instructed by the Regional Director within 24 hours of the purchase or receipt of each Atlantic bluefin tuna from the person or vessel that harvested the fish. Said report via fax or the IVRS must include the tag number affixed to the fish by the dealer, the date landed, the round and/or dressed weight (indicating which weight(s) measured), the total or pectoral fin curved fork length (indicating which length(s) measured), and the permit category of the landing vessel. In addition, dealers must submit to the Regional Director a daily report on a reporting card provided by NMFS. Said card must be postmarked and mailed at the dealer's expense within 24 hours of the purchase or receipt of each Atlantic bluefin tuna. Each vessel permit holder or vessel operator must sign each reporting card immediately upon transfer of the fish to verify the name of the vessel that landed the fish and the vessel permit number, and each card must indicate the tag number affixed to the fish by the dealer or assigned by an authorized officer, the date landed, the port where landed, the round and/or dressed weight (indicating which weight(s) measured), the total and/or pectoral fin curved fork length (indicating which length(s) measured), gear used, and area where the fish was caught. The dealer purchasing or receiving the Atlantic bluefin tuna must inspect the vessel permit and verify that the required vessel name and vessel permit information is correctly recorded on the reporting card.

(b) Any person issued a dealer permit under § 285.28 must submit to the Regional Director a bi-weekly report on forms supplied by NMFS.

(1) Said report must be postmarked and mailed, at the dealer's expense, within 10 days after the end of each 2-week reporting period in which Atlantic bluefin tuna were purchased, received, or imported. The biweekly reporting periods are defined as the first day through the 14th day of each month and the 15th day through the last day of the month. Each report must specify accurately and completely for each tuna purchased or received: Date of landing or import, vessel Atlantic Bluefin Tuna permit number (if applicable), tail tag number, weight in pounds or kilograms (specify

if round or dressed), nature of the sale (dockside or consignment), price per pound or kilogram (round or dressed weight), and destination of the fish (domestic or export). In addition, dealers may indicate the quality rating of their bluefin tuna: (A, B, or C) for four attributes (freshness, fat, color, and shape).

(2) At the top of each form, the dealer must indicate the company name, license number, and the name of the person filling out the report. In addition, the beginning and ending dates of the 2-week reporting week period must be specified by the dealer and noted at the top of the form.

(c) Any person issued a dealer permit under §285.28 must allow an authorized officer, or any employee of NMFS designated by the Regional Director for this purpose, to inspect and copy any records of transfers, purchases, or receipts of Atlantic bluefin tuna;

(d) Any person issued a dealer permit under §285.28 must retain at his/her place of business a copy of each landing card (including proof of fax or IVRS transmission) and a copy of each biweekly report for a period of 2 years from the date on which each was required to be submitted to the Regional Director.

(e) Each operator of a buy-boat, in addition to the above, must notify the Regional Director of any intended offloading, and must request a vessel inspection at least 6 hours before such offloading, by calling 508–281–9261 between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, local time, or at all other times during the day and weekends, by calling 508–992–7711. In making the request for inspection, the owner or operator of the buy-boat or a designated representative must provide his/her name, the buy-boat's name and permit number, the number of tuna received, and the location and anticipated time of landing in port.

(f) Beginning July 1, 1997 anglers are required to report directly to NMFS all ABT landed under the Angling category quota. Permittees will be notified by the Director of the applicable reporting requirements and procedures. Alternative reporting procedures may be established by the Director in cooperation with the states and may include telephone, dockside or mail surveys, mail-in or phone-in reports, tagging programs, or mandatory ABT check-in stations. A statistically-based sample of the Angling category permittees may be selected for these alternative reporting programs.

(Approved by the Office of Management and Budget under OMB control number 0648–0239)

[50 FR 43400, Oct. 25, 1985, as amended at 53 FR 24645, June 29, 1988; 57 FR 373, Jan. 6, 1992; 58 FR 45293, Aug. 27, 1993; 60 FR 14387, Mar. 17, 1995; 60 FR 38515, July 27, 1995; 62 FR 30745, June 5, 1997]

§285.30 Tags.

(a) *Issuance of tags.* The Regional Director will issue numbered tail tags to each person receiving a dealer's permit under §285.28.

(b) *Transfer of tags.* Tail tags issued under this section are not transferable and are usable only by the permitted dealer to whom they are issued.

(c) *Affixing tags.* (1) A dealer or agent must affix a tail tag to each Atlantic bluefin tuna purchased or received, immediately upon its offloading from a vessel. The tail tag must be affixed to the tuna between the fifth dorsal finlet and the keel.

(2) Any person who catches a large medium or giant Atlantic bluefin tuna and does not transfer it to a permitted dealer must contact the nearest NMFS enforcement office at the time of landing said Atlantic bluefin tuna and make the tuna available so that a NMFS enforcement agent may inspect the fish and attach a tail tag to it. A list of local NMFS enforcement offices can be obtained by contacting regional offices in Gloucester, MA (508–281–9261) and St. Petersburg, FL (813–570–5344). The Regional Director may designate a person other than a NMFS agent to inspect and tag the fish. Such designation will be made in writing.

(d) *Removal of tags.* A tag affixed to any Atlantic bluefin tuna under paragraph (c)(1) of this section or under §285.202(a)(6)(v) must remain on the tuna until the tuna is cut into portions. If the tuna or tuna parts subsequently are packaged for transport for domestic commercial use or for export, the tag number must be written legibly and indelibly on the outside of any

package or container. Tag numbers must be recorded on any document accompanying shipment of bluefin tuna for commercial use or export.

(e) *Reuse of tags.* Tags issued under this section are separately numbered and may be used only once, one tail tag per fish, to distinguish the purchase of one Atlantic bluefin tuna. Once affixed to a tuna or recorded on any package, container or report, a tail tag and associated number may not be reused.

[60 FR 14387, Mar. 17, 1995]

§ 285.31 Prohibitions.

(a) It is unlawful for any person or vessel subject to the jurisdiction of the United States to do any of the following:

(1) Fish for, catch, possess, or land Atlantic bluefin tuna without a valid permit required under § 285.21 and carried onboard the vessel;

(2) Fish for, catch, possess, or land Atlantic bluefin tuna after fishing has been closed or before fishing has commenced under § 285.20, except under the provisions of § 285.27;

(3) Fish for, catch, possess or retain Atlantic bluefin tuna in excess of the quotas specified in § 285.22 except that fish may be caught and released under the provisions of § 285.27.

(4) Fish for, catch, or possess or retain Atlantic bluefin tuna in excess of the catch limits specified in § 285.24, except that fish may be caught and released under the provisions of § 285.27.

(5) Fish for, catch, possess, or land Atlantic bluefin tuna in excess of any allocation made under § 285.25(d);

(6) Fish for or catch Atlantic bluefin tuna in a directed fishery with purse seine nets without an allocation made under § 285.25(d);

(7) Fish for or catch Atlantic bluefin tuna in a directed fishery with nets other than those specified in § 285.25;

(8) For any vessel other than a vessel holding a purse seine permit issued under § 285.21(b), to approach to within 100 yd (91.5 meters) of the cork line of any purse seine net used by any vessel fishing for Atlantic bluefin tuna, or for any such purse seine vessel to approach to within 100 yd (91.5 meters) of any vessel, other than a purse seine vessel, actively fishing for Atlantic bluefin tuna;

(9) Retain or land Atlantic bluefin tuna in excess of the incidental catch provisions under § 285.23;

(10) Land any Atlantic bluefin tuna in forms other than round (fins intact), or other than eviscerated with the head and fins removed, except that one pectoral fin and the tail must remain attached;

(11) Retain any Atlantic bluefin tuna caught under the tag and release program allowed under § 285.27;

(12) Purchase, receive, or transfer Atlantic bluefin tuna from any person or vessel without a valid dealer permit issued under § 285.28(a);

(13) Purchase, receive, or transfer any Atlantic bluefin tuna at sea from a person or vessel engaged in fishing for such tuna without a valid dealer permit for buy-boat operations issued under § 285.28 unless between permitted purse seine vessels as authorized under § 285.25(e);

(14) Sell, offer for sale, or transfer any Atlantic bluefin tuna to any person or vessel other than to a person or vessel with a permit issued under § 285.28;

(15) Sell, offer for sale, or transfer to any person for a commercial purpose any large medium or giant Atlantic bluefin tuna caught with rod and reel gear under § 285.24(d)(2) or § 285.24(e)(2);

(16) Engage in fishing with a vessel issued a permit under § 285.21 unless the vessel travels to and from the area where it will be fishing under its own power and the person operating that vessel brings any Atlantic bluefin tuna under control (secured to the catching vessel or aboard) with no assistance from other vessels, except in circumstances where the safety of the vessel or its crew is jeopardized or due to other circumstances beyond the control of the operator;

(17) Fail to release immediately with a minimum of injury any Atlantic bluefin tuna that will not be retained;

(18) Fail to inspect any vessel's permit or fail to affix immediately to any large medium or giant Atlantic bluefin tuna, between the fifth dorsal finlet and the keel, an individually numbered tail tag when the tuna has been received for a commercial purpose or purchased by that dealer from any person or vessel having caught such tuna;

(19) Remove any tag affixed to an Atlantic bluefin tuna under §285.30(c)(1) or under §285.202(a)(6)(v), before removal is allowed under §285.30(d), or fail to write the tag number on the shipping package or container as prescribed by that section;

(20) Purchase or transport with a buy-boat any Atlantic bluefin tuna captured incidentally by longlines;

(21) Begin fishing or offloading from any purse seine vessel to which a permit has been issued under §285.21 any Atlantic bluefin tuna without first requesting an inspection of the vessel in accordance with §285.25;

(22) Fail to report the catching of any Atlantic bluefin tuna to which a plastic tag has been affixed under a tag and release program conducted by NMFS or any other scientific organization or in which an archival tag has been affixed or implanted;

(23) Falsify or fail to make, keep, maintain, or submit any reports, or other record required by this subpart;

(24) Refuse to allow an authorized officer to make inspections for the purpose of checking any records relating to the catching, harvesting, landing, purchase, or sale of any Atlantic bluefin tuna required by this subpart;

(25) Make any false statement, oral or writtten, to an authorized officer concerning the catching, harvesting, landing, purchase, sale, or transfer of any Atlantic bluefin tuna;

(26) Fish for, catch, retain, possess or land Atlantic bluefin tuna with longline gear except as provided in §285.23(c);

(27) Fish for or catch Atlantic bluefin tuna with longline gear, or while having longline gear on board, if the vessel is permitted in the General or Harpoon Boat category under §285.21;

(28) Fish for or catch school, large school or small medium Atlantic bluefin tuna with gear other than hook and line, which is held by hand or rod and reel made for this purpose, or to possess such fish taken with unauthorized gear;

(29) Use or possess handline or harpoon flotation gear which is not marked in accordance with §285.33, or is marked with the Atlantic bluefin tuna permit number of another vessel;

(30) Fish for, catch, possess, or retain Atlantic bluefin tuna from the Gulf of Mexico except as specified under §285.23(c) or §285.24(e)(2), or if taken incidental to recreational fishing for other species and retained in accordance with §285.24(d)(2);

(31) Fish for, catch, possess or retain Atlantic bluefin tuna with a gear type or in a manner other than specified in §§285.21, 285.22, 285.23, 285.24 and 285.25, or other than authorized under an experimental fishing exemption issued pursuant to the requirements of §285.7;

(32) Interfere with, delay, or prevent by any means, the apprehension of another person, knowing that such person has committed any act prohibited by this part;

(33) Retain young school Atlantic bluefin tuna for any purpose;

(34) Sell, offer for sale, purchase, receive for a commercial purpose, trade, or barter, or if a seafood dealer or processor, retain or possess, any Atlantic bluefin tuna other than a large medium or giant, except with documentation as specified in §285.34;

(35) Refuse to permit access of NMFS personnel to inspect any records relating to, or area of custody of, Atlantic bluefin tuna;

(36) Reuse any tail tag previously affixed to an Atlantic bluefin tuna under §285.30 or reuse any tail tag number previously written on a shipping package or container as prescribed by that section; or

(37) Fish for, catch, possess, or retain any Atlantic bluefin tuna less than the large medium size class from a vessel other than one issued a permit for the Angling or Charter/Headboat categories under §285.21, or a permit for the Purse Seine category under §285.21 as authorized under §285.23(d), or, for calendar year 1997, a permit for the General category under §285.21.

(38) Fail to cease fishing and return to port once the catch limit for large medium and giant bluefin is retained or possessed on board vessels permitted in the General and Charter/Headboat categories.

(39) For owners or operators of General category permitted vessels, and persons aboard vessels permitted in the General category under §285.21, to fish

for, catch, possess, or retain, or to attempt to fish for, catch, possess, or retain Atlantic bluefin tuna on designated restricted-fishing days.

(b) It is unlawful for any person subject to the jurisdiction of the United States to violate any other provision of this subpart, the Act, or any other rules promulgated under the Act.

[50 FR 43400, Oct. 25, 1985, as amended at 52 FR 25012, July 2, 1987; 53 FR 24645, June 29, 1988; 57 FR 374, Jan. 6, 1992; 57 FR 32922, July 24, 1992; 58 FR 45293, Aug. 27, 1993; 59 FR 17726, Apr. 14, 1994; 60 FR 14388, Mar. 17, 1995; 60 FR 38515, July 27, 1995; 62 FR 30745, June 5, 1997; 62 FR 38487, July 18, 1997; 62 FR 38487, July 18, 1997; 63 FR 669, Jan. 7, 1998; 63 FR 36612, July 7, 1998]

§ 285.32 Civil penalties.

(a) Any person who violates § 285.31(a)(1) through (a)(21) inclusive, or (a)(25) through (a)(31) inclusive, or (a)(33) and (a)(34) or (a)(36) through (a)(38) inclusive, will be assessed a civil penalty of not more than $25,000 for a first violation and a civil penalty of not more than $50,000 for a subsequent violation.

(b) Any person who violates § 285.31(a)(22) through (24) inclusive, or (a)(32), or (a)(35) will be assessed a civil penalty of not more than $1,000, and a civil penalty of not more than $5,000 for a subsequent violation.

(c) Any person who violates § 285.31(b) will be assessed a civil penalty in accordance with the criteria set forth in 16 U.S.C. 971e.

[50 FR 43400, Oct. 25, 1985, as amended at 60 FR 38515, July 27, 1995]

§ 285.33 Gear restrictions.

(a) Any flotation device attached to handline or harpoon gear must be marked with the Atlantic bluefin tuna permit number of the vessel from which it is used. The required markings must be permanently affixed and at least one inch in height in block Arabic numerals of a color that contrasts with the background color of the flotation device.

(b) [Reserved]

[50 FR 43400, Oct. 25, 1985, as amended at 62 FR 38487, July 18, 1997; 63 FR 36612, July 7, 1998]

§ 285.34 Restrictions on sale.

(a) Any Atlantic bluefin tuna less than the large medium size class may not be, or attempted to be, purchased, bartered, traded, sold, or offered for sale, or retained or possessed by a dealer or seafood processor in any state unless it is lawfully imported and is accompanied by the Commission's Bluefin Tuna Statistical Document.

(b) Except for a bluefin tuna landed in a Pacific state and remaining in the state of landing, a bluefin tuna that is possessed by a dealer or seafood processor is deemed to be a bluefin tuna harvested from the Atlantic Ocean by a United States vessel unless it is accompanied by the Commission's Bluefin Tuna Statistical Document.

[60 FR 38515, July 27, 1995]

Subpart C—Atlantic Tunas Other Than Bluefin Tuna

SOURCE: 60 FR 38516, July 27, 1995, unless otherwise noted.

§ 285.50 Species subject to regulation.

Regulations contained in this subpart pertain to yellowfin tuna, bigeye tuna, albacore tuna, skipjack tuna and Atlantic bonito.

§ 285.51 Authorized fishing gear.

Fishing for, catching, retention or possession of Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito in the regulatory area by persons on board fishing vessels subject to the jurisdiction of the United States is authorized only for handline, rod and reel (including downriggers), harpoon, purse seine, longline, drift gillnet and bandit gear unless the gear is authorized under an experimental fishing exemption issued pursuant to the requirements of § 285.7.

§ 285.52 Size limits.

(a) Fishing for, catching, retaining, or possessing of Atlantic yellowfin and bigeye tunas in the regulatory area by persons aboard fishing vessels subject to the jurisdiction of the United States is authorized only for yellowfin or bigeye tuna measuring 27 inches (69 cm) or more in total curved fork length.

(b) Total curved fork length is the sole criterion for determining the size class of whole (head on) Atlantic yellowfin and bigeye tuna. For this purpose, all measurements must be taken in a line tracing the contour of the body from the tip of the upper jaw to the fork of the tail, which abuts the ventral side of the pectoral fin and the ventral side of the caudal keel.

[61 FR 30187, June 14, 1996]

§285.53 Vessel permits.

(a) *Permit requirements.* The operator of each vessel that fishes for, or takes, Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito must have on board a valid permit issued under this section.

(b) *Commercial vessel permits.* As a prerequisite to selling Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito and to be eligible for exemption from applicable bag limits, if any, specified in this subpart, an owner or operator of a vessel that fishes for or takes Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito must be issued a vessel permit in the commercial category appropriate for the gear type or method of fishing.

(c) *Charter/Headboat vessel permits.* Owners or operators of charter vessels and headboats must be issued a charter/headboat vessel permit to lawfully fish for, catch, retain or land Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito. Anglers on board charter vessels and headboats must adhere to applicable catch limits for the recreational fisheries.

(d) *Recreational vessel permits.* Owners or operators of private recreational vessels must be issued vessel permits in order to fish for, catch, retain, or land Atlantic yellowfin, bigeye, albacore, and skipjack tunas. Anglers aboard private recreational vessels must adhere to applicable daily catch limits. Atlantic tunas taken on board private recreational vessels may not be sold.

(e) *Purse seine.* Directed purse seine fishing for Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito is restricted to owners of those purse seine vessels that have current Atlantic bluefin tuna purse seine permits under §285.21(b) and that have reported, or replaced vessels that have reported, Atlantic yellowfin, skipjack, albacore or bigeye tuna landings to NMFS over the period 1989 through 1993. The owner or operator of such purse seine vessel must apply for authorization to fish for Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito in writing to the Regional Director by April 15. The owner must supply documentation of the vessel's stockholders, owners, partners, or association structure and records of landings to verify that the vessel meets the qualifying criteria. The Regional Director will review these applications for authorization on or about May 1 and issue authorizations as appropriate.

(f) *Exemptions.* In lieu of a permit issued under this section, persons on board a vessel for which a valid permit for the Atlantic bluefin tuna fishery has been issued under §285.21 of this part are eligible to fish for and take Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito using the authorized gear and subject to the commercial fishing restrictions applicable to the category of permit issued for the vessel. In lieu of a permit issued under this section, owners or operators of vessels for which valid permits for the Atlantic shark fishery (50 CFR part 678) or the Atlantic swordfish fishery (50 CFR part 630) have been issued are eligible to fish for and take Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito using the authorized gear and subject to fishing restrictions applicable to the permit issued to the vessel. Owners or operators of vessels fishing for Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito shoreward of the outer boundary of the EEZ around Puerto Rico and the Virgin Islands with only handgear on board are exempt from the permit requirements of this section.

[60 FR 38516, July 27, 1995, as amended at 60 FR 57685, Nov. 17, 1995; 62 FR 332, Jan. 3, 1997]

§285.54 Vessel recordkeeping and reporting.

(a)(1) *Logbooks.* If selected and so notified in writing by the Director, the owner and/or operator of a vessel for

which a permit has been issued under § 285.21 or § 285.53, must ensure that a daily logbook form is maintained of the vessel's fishing effort, catch, and disposition on forms available from the Science and Research Director. Such forms must be submitted to the Science and Research Director postmarked not later than the seventh day after sale of the fish offloaded from a trip. If no fishing occurred during a month, a report so stating must be submitted in accordance with instructions provided with the forms.

(2) *Tally sheets.* The owner and/or operator of a vessel for which a permit has been issued under § 285.21 or § 285.53, and who is required to submit a logbook under paragraph (a)(1) of this section, must ensure that copies of tally sheets are submitted for all fish offloaded and sold after a fishing trip. Each tally sheet must show the dealer to whom the fish were transferred, the date they were transferred, and the carcass weight of each fish for which individual carcass weights are normally recorded. For species not individually weighed, tally sheets must record total weights by market category. Copies of tally sheets must be submitted with the logbook forms required under paragraph (a)(1) of this section.

(b) The master or other person in charge of a fishing vessel, subject to the jurisdiction of the United States, except vessels proceeding directly to Puerto Rico or to any other U.S. port for unloading, must report to the Regional Director not less than 48 hours prior to entering the regulatory area via the Panama Canal. In addition, the master or other person in charge of a vessel, subject to the jurisdiction of the United States except a vessel without fish on board, must notify the Regional Director not less than 48 hours prior to leaving the regulatory area via the Panama Canal. Each report must include the name of the reporting vessel, the tonnage by species on board, and whether the fish were caught in Pacific or Atlantic waters.

(c) All such fishing vessels entering or leaving the regulatory area via the Panama Canal are subject to inspection. Official seals will be affixed to wells containing fish taken within or outside the regulatory area, as appropriate and the same will be noted on the vessel log. The official seals may be removed only by a designated agent of NMFS upon arrival at point of sale or delivery.

(d) The master or other person in charge of a fishing vessel subject to the jurisdiction of the United States, must notify the Regional Director not less than 48 hours prior to any transfer of Atlantic tuna taken in the regulatory area to another vessel for the purpose of transshipment. Such reports must include the date and place of unloading, name and destination of the oncarrying vessel, and the tonnage by species of tuna transferred.

(e) The failure to file the reports or to follow the procedures required by this section, the tampering with or the removal of an official seal, or the alteration of a fishing vessel's log by any person or fishing vessel subject to the jurisdiction of the United States is a prohibited act within the meaning of § 285.3.

(f) Any person authorized to carry out enforcement activities under the Act or these regulations has power, without warrant or other process, to inspect, at any reasonable time, catch on board the vessel, log books, catch reports, statistical records, or other reports as required by the regulations in this part to be made, kept or furnished.

(g) Owners and operators of vessels fishing for Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito shoreward of the outer boundary of the EEZ around Puerto Rico and the Virgin Islands with only handgear on board are exempt from the reporting requirements of this section.

[60 FR 38516, July 27, 1995, as amended at 62 FR 30746, June 5, 1997]

§ 285.55 Dealer permits.

(a) *General.* Effective November 15, 1995, a dealer purchasing or attempting to purchase, receiving, possessing, importing or exporting Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito must have a valid permit required under this section.

(b) *Application.* Applications for a dealer permit must be in writing on an

appropriate form obtained from the Regional Director. The application must be signed by the applicant, and be submitted to the Regional Director at least 30 days before the date upon which the applicant desires the permit to be effective. The application must contain the following information: Company name; principal place of business; owner or owners' names; applicant's name (if different from owner or owners) and mailing address and telephone number; and any other information required by the Regional Director.

(c) *Issuance.* (1) Except as provided in subpart D of 15 CFR part 904, the Regional Director will issue a permit within 30 days of receipt of a completed application.

(2) The Regional Director will notify the applicant of any deficiency in the application. If the applicant fails to correct the deficiency within 15 days following the date of notification, the application will be considered abandoned.

(d) *Duration.* Any permit issued under this section remains valid until December 31 of the year for which it is issued, unless suspended or revoked.

(e) *Alteration.* Any permit which is substantially altered, erased, or mutilated is invalid.

(f) *Replacement.* The Regional Director may issue replacement permits. An application for a replacement permit is not considered a new application.

(g) *Transfer.* A permit issued under this section is not transferable or assignable; it is valid only for the dealer to whom it is issued.

(h) *Inspection.* The dealer must keep the permit issued under this section at his/her principal place of business. The permit must be displayed for inspection upon request of any authorized officer, or any employee of NMFS designated by the Regional Director for such purpose.

(i) *Sanctions.* The Administrator may suspend, revoke, modify, or deny a permit issued or sought under this section. Procedures governing permit sanctions and denials are found at subpart D of 15 CFR part 904.

(j) *Fees.* The Regional Director may charge a fee to recover the administrative expenses of permit issuance. The amount of the fee is calculated, at least annually, in accordance with the procedures of the NOAA Finance Handbook for determining administrative costs of each special product or service. The fee may not exceed such costs and is specified on each application form. The appropriate fee must accompany each application. Failure to pay the fee will preclude issuance of the permit. Payment by a commercial instrument later determined to be insufficiently funded shall invalidate any permit.

(k) *Change in application information.* Within 15 days after any change in the information contained in an application submitted under this section, the dealer issued a permit will report the change in writing to the Regional Director.

(l) *Exemptions.* Dealers issued valid permits for the Atlantic bluefin tuna fishery under §285.28 of this part, dealers issued valid permits for the Atlantic shark fishery (50 CFR part 678) or the Atlantic swordfish fishery (50 CFR part 630), and dealers located in Puerto Rico and the Virgin Islands who purchase, sell, or re-sell only Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito taken shoreward of the outer boundary of the EEZ around Puerto Rico and the Virgin Islands by handgear are exempt from the permit requirements of this section.

§285.56 Dealer recordkeeping and reporting.

(a) A dealer who has been issued a dealer permit pursuant to §285.55 must submit reports to the Fisheries Science Center Director as specified in paragraph (b) of this section. A report form is available from the Science and Research Director. The following information must be included in each report:

(1) Name, address, and permit number of the dealer.

(2) Names and official numbers of fishing vessels from which Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito were received.

(3) Dates of receipt of Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito.

(4) Listed by each port and county where Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic

bonito were offloaded from fishing vessels:

(i) Total weight (pounds) for Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito by market category, if applicable, and for other species received with the tuna, including, but not limited to, shark, swordfish, dolphin, and wahoo; and

(ii) Price per pound or total value paid by market category for tuna and other species, to the extent that such price information is known at the time of reporting.

(b) A report of tuna and other applicable species received by a dealer on the first through the 15th days of each month must be submitted to the Science and Research Director postmarked not later than the 20th day of that month. A report of tuna and other applicable species received by the dealer on the 16th through the last day of each month must be submitted to the Science and Research Director postmarked not later than the 5th day of the following month. If no tuna was received during the reporting period, a report so stating must be submitted postmarked as specified for that respective reporting period.

(c) The reporting requirement of paragraph (a) of this section may be satisfied by providing a copy of each appropriate weigh-out sheet and/or sales record, provided such weigh-out sheet and/or sales record, by itself or combined with the form available from the Science and Research Director, includes all of the required information.

(d) In lieu of providing a required report to the Science and Research Director by mail, as specified in paragraph (a) of this section, a dealer may provide a report to a state or Federal fishery port agent designated by the Science and Research Director. Reports so provided must be delivered to such port agent not later than the prescribed postmark date for submitting each such report.

(e) *Additional data and inspection.* Additional data may be collected by authorized statistical reporting agents, as designees of the Science and Research Director, and by authorized officers. Dealers are required to make tuna available for inspection by the Science and Research Director or an authorized officer and must allow an authorized officer, or any employee of NMFS designated by the Regional Director for this purpose, to inspect and copy any records of transfers, purchases, or receipts of Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito;

(f) *Recordkeeping.* Dealers must retain at their place of business a copy of each bi-weekly report for a period of 2 years from the date on which each was required to be submitted to the Regional Director.

(g) *Exemptions.* Dealers located in Puerto Rico and the Virgin Islands who purchase, sell, or re-sell only Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito taken shoreward of the outer boundary of the EEZ around Puerto Rico and the Virgin Islands by handgear are exempt from the reporting and recordkeeping requirements of this section.

§ 285.57 Purse seine vessel requirements.

(a) *Mesh size.* Any owner or operator of a purse seine vessel conducting a directed fishery for Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito must use a purse seine net with a mesh size as specified under § 285.25(a).

(b) *Inspection.* The owner or operator of a purse seine vessel conducting a directed fishery for Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito must request an inspection of the vessel and fishing gear by an enforcement agent of NMFS prior to commencing fishing for the season in any fishery that may result in the harvest of any regulated species. The owner or operator must request such inspection at least 48 hours before commencement of the first fishing trip of the season. In addition, at least 48 hours before commencement of offloading any Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito after a fishing trip, the owner or operator must request an inspection of vessel and catch by calling 508–563–5721 or 508–281–9261. The inability to provide for an inspection within 48 hours of notification shall constitute a waiver of this requirement. The

owner or operator of a purse seine vessel must have the vessel's catch information recorded on the appropriate forms at the time of offloading and prior to transporting said tuna from the area of offloading.

§285.58 Incidental catch.

Persons or fishing vessels subject to the jurisdiction of the United States must release, in a manner to promote survival, any yellowfin tuna or bigeye tuna less than the minimum size specified in §285.52 taken incidental to authorized fishing in the regulatory area.

§285.59 Prohibitions.

(a) It is unlawful for any person or vessel subject to the jurisdiction of the United States to do any of the following:

(1) Fish for, catch, possess, retain or land Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito without a valid permit required under §285.53 and carried on board the vessel;

(2) Fish for, catch, land, retain or possess, Atlantic yellowfin or bigeye tuna below the minimum size specified in §285.52;

(3) Fail to release immediately with a minimum of injury any Atlantic yellowfin or bigeye tuna that will not be retained;

(4) Fish for or catch Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito in a directed fishery with purse seine nets if without any remaining bluefin tuna allocation made under §285.25(d);

(5) For any vessel other than a vessel holding a purse seine permit issued under §285.53(d), to approach to within 100 yds (91.5 meters) of the cork line of any purse seine net used by any vessel fishing for Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito, or for any such purse seine vessel to approach to within 100 yds (91.5 meters) of any vessel, other than a purse seine vessel, actively fishing for Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito;

(6) Begin fishing or offloading from any purse seine vessel to which a permit has been issued under §285.21 any Atlantic tuna without first requesting an inspection of the vessel in accordance with §285.57(b);

(7) Fail to report the catching of any Atlantic tuna to which a plastic tag has been affixed under a tag and release program conducted by NMFS or any other scientific organization;

(8) Falsify or fail to make, keep, maintain, or submit any reports, or other record required by this subpart;

(9) Refuse to allow an authorized officer to make inspections for the purpose of checking any records relating to the catching, harvesting, landing, purchase, or sale of any Atlantic tuna required by this subpart;

(10) Make any false statement, oral or written, to an authorized officer concerning the catching, harvesting, landing, purchase, sale, or transfer of any Atlantic tuna;

(11) Interfere with, delay, or prevent by any means, the apprehension of another person, knowing that such person has committed any act prohibited by this part;

(12) Refuse to permit access of NMFS personnel to inspect any records relating to, or area of custody of, Atlantic yellowfin, bigeye, albacore, and skipjack tunas and Atlantic bonito;

(b) It is unlawful for any person subject to the jurisdiction of the United States to violate any other provision of this subpart, the Act, or any other rules implemented under the Act.

Subpart D—Restrictions on Tuna Imports

§285.80 Basis and purpose.

(a) The stocks of Atlantic tunas under investigation and regulation by the Commission represent the concern of a number of countries interested in the conservation of such stocks. In order to assure that the achievement of the conservation objectives of the Commission are fulfilled the Act provides for certain restrictions on the importation of Atlantic tunas. Pursuant to section 6(c) of the Act, the Secretary, with the concurrence of the Secretary of State, is directed to promulgate regulations to prohibit:

(1) The entry into the United States of fish in any form of those species

which are subject to regulation pursuant to a recommendation of the Commission and which were taken from the regulatory area in such manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations of the Commission; and

(2) The entry into the United States, from any country when vessels of such country are being used in the conduct of fishing operations in the regulatory area in such manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations of the Commission, of fish in any form of those species which are subject to regulation pursuant to a recommendation of the Commission and which were taken from the regulatory area;

(3) The entry into the United States, from any country when vessels of such country engage in repeated and flagrant fishery operations in the regulatory area which seriously threaten the achievement of the objectives of the Commission's recommendations, of fish in any form of these species which are under investigation by the Commission and which were taken from the regulatory area.

(b) By letter of February 18, 1976, the Secretary of State concurred in the promulgation of the regulations in this part. Such regulations are designed to implement the provisions of section 6(c) of the Act with respect to import controls and to proscribe procedures for the establishment of restrictions on imports of tuna and tuna-like fish whenever such action shall be deemed warranted.

[41 FR 8352, Feb. 26, 1976. Redesignated at 43 FR 8554, Mar. 2, 1978]

§ 285.81 Species subject to regulation.

The species of tuna currently subject to regulation by recommendation of the Commission within the meaning of section 6(c) are yellowfin tuna, bigeye tuna, and Atlantic bluefin tuna.

[46 FR 3026, Jan. 13, 1981]

§ 285.82 Species under investigation by the Commission.

Those species of tuna currently under investigation by the Commission within the meaning of section 6(c) of the Act are yellowfin, Atlantic bluefin, skipjack, albacore, bigeye and Atlantic bonito, and billfishes.

[41 FR 8352, Feb. 26, 1976. Redesignated at 43 FR 8554, Mar. 2, 1978]

§ 285.83 Investigations authorized.

(a) The Assistant Administrator will make, from time to time, such inquiries and investigations as may be necessary to keep himself and other interested persons currently informed regarding the nature and effectiveness of the measures for the implementation of the Commission's recommendations concerning those activities which are being carried out by foreign countries whose vessels engage in fishing within the regulatory area. In making a finding, as to:

(1) Whether or not fish in any form of those species which are subject to regulation by the Commission are being taken from the regulatory area in a manner or under such circumstances as would tend to diminish effectiveness of the conservation recommendations of the Commission; or

(2) Whether or not a country is condoning the use of vessels in the conduct of fishing operations in the regulatory area in such a manner or under such circumstances that would tend to diminish the effectiveness of the conservation recommendations of the Commission; or

(3) Whether or not a country is condoning the use of vessels in repeated and flagrant fishing operations which seriously threaten the achievement of the objectives of the commissions recommendations, the Assistant Administrator will take into account, among such other considerations as may appear to be pertinent in a particular case, the following factors:

(i) Whether or not the country provides or causes to be provided to the Commission pertinent statistics on a timely basis;

(ii) Whether or not the country has in force conservation measures applicable to its own fishermen adequate for the implementation of the Commission's recommendations;

(iii) Whether or not the country has in force measures for the control of landings in its ports of species subject

to regulations which are taken in the regulatory area by fishermen of other countries contrary to the Commission's conservation recommendations;

(iv) Whether or not the country, having put conservation measures into effect, takes reasonable action to enforce such measures;

(v) The number of vessels of the country which conduct fishing operations in the regulatory area;

(vi) The quantity of species subject to regulation taken from the regulatory area by the Country's vessels contrary to the Commission's conservation recommendations and its relationship to (A) the total quantity permitted to be taken by the vessels of all countries participating in the fishery and (B) the quantity of such species sought to be restored to the stocks of fish pursuant to the Commission's conservation recommendations.

(b) Any person who has reason to believe that the vessels of any country are being used in the conduct of fishing operations in the regulatory area in such manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations of the Commission or that other acts within the purview of the import control provisions of section 6(c) of the Act, are occurring or are likely to occur, may communicate his belief to the Assistant Administrator. Every such communication must contain or be accompanied by a full statement of the reasons for the belief, including a detailed description of such specific acts or events as may indicate a need for instituting an investigation as authorized in this part.

(c) Upon receipt by the Assistant Administrator of any communication submitted pursuant to paragraph (b) of this section and upon a finding that the communication complies with the requirements of that paragraph, the Assistant Administrator will promptly conduct an investigation to be made as appears to be warranted by the circumstances of the case. In conducting such investigations the Assistant Administrator or his designated representative will consider any representations offered by foreign interests, importers, brokers, domestic producers, or other interested persons. Unless good cause to the contrary exists every such investigation will be completed within 60 days following receipt of the communication.

[41 FR 8352, Feb. 26, 1976. Redesignated at 43 FR 8554, Mar. 2, 1978, and amended at 44 FR 36045, June 20, 1979; 53 FR 24645, June 29, 1988]

§285.84 Publication of findings.

If it is determined on the basis of §285.83 that species of fish subject to regulation or under investigation by the Commission, as the case may be, are ineligible for entry into the United States under section 6(c) of the Act, the Assistant Administrator with the approval of the Secretary of the Commerce and with the concurrence of the Secretary of State, will publish a finding to that effect in the FEDERAL REGISTER. Effective upon the date of publication of such finding in the FEDERAL REGISTER every shipment of fish in any form of the species found to be ineligible will be denied entry unless it is established by satisfactory proof pursuant to §285.85 that a particular shipment of such fish is not ineligible for entry: *Provided*, That entry will not be denied and no such proof will be required for any such shipment which, on the date of such publication, was in transit to the United States on board a vessel operating as a common carrier.

[41 FR 8352, Feb. 26, 1976. Redesignated at 43 FR 8554, Mar. 2, 1978, and amended at 44 FR 36045, June 20, 1979; 53 FR 24645, June 29, 1988; 53 FR 27798, July 22, 1988]

§285.85 Proof of admissibility.

(a) For the purposes of §285.83 of this part and section 6(c) of the Act a shipment of fish in any form of the species under regulation or under investigation by the Commission offered for entry, directly or indirectly, from a country named in a finding published under §285.84 is eligible for entry if the shipment is accompanied by a certificate of eligibility certifying as may be appropriate, that the fish in the shipment:

(1) Are not of the species specified in the published finding;

(2) Are of the species named in the published finding but were not taken in the regulatory area; or

(3) Are of the species named in the published finding but are products of

an American fishery lawfully taken in conformity with applicable conservation laws and regulations and landed in the country named in the published finding solely for transshipment. The certificate shall be attached to the invoice and be in the following form:

CERTIFICATE OF ELIGIBILITY

I, _____, an authorized officer of the Government of _____, certify that the shipment of tuna accompanied by this certificate, consisting of _____ (quantity) of _____ (Species) in _____ (Number and kind of packages or containers bearing the following marks and numbers.)

☐ (a) Contains no tuna of the species prohibited entry into the United States by virtue of a finding of ineligibility published under regulations issued pursuant to section 6(c) of the Atlantic Tunas Convention Act of 1975. (A certificate of authentication executed by a consular officer or a consular agent of the United States must be attached.)

☐ (b) Contains tuna of the species prohibited entry into the United States by virtue of a finding of ineligibility published under regulations issued pursuant to section 6(c) of the Atlantic Tunas Convention Act of 1975, but that such tuna were caught in the waters of_____(Identify area or areas in which tuna were taken) by vessels subject to the jurisdiction of _____ and that none of the tuna were taken in the Atlantic Ocean or its adjacent seas. (A certificate of authentication executed by a consular officer or consular agent of the United States must be attached.) _____

☐ (c) Contains tuna of the species prohibited entry into the United States by virtue of a finding of ineligibility published under regulations issued pursuant to section 6(c) of the Atlantic Tunas Convention Act of 1975, but that such tuna, as shown in the attached declaration, were taken in strict conformity with applicable conservation laws and regulations in a fishing enterprise conducted under the American flag by vessels of the United States, are products of an American fishery within the meaning of Schedule 1, Part 15A, Tariff Schedules of the United States, were landed in a foreign country solely for transshipment without change in condition and are eligible for free entry under such Schedule and 19 CFR 10.78–10.79. (Where an entry is to be made pursuant to this paragraph, this certificate must be executed by a consular officer or consular agent of the United States and the declaration(s) required by 19 CFR 10.79 and must be attached.)

_____
Signature

_____
Title

_____
Address

(b) If the tuna are offered for entry under paragraph (a) or (b) of the Certificate of Eligibility, the certificate must be executed by a duly authorized official of the country named in the published finding and the certificate must be authenticated with respect to the signature and official position of the person executing the same by a consular officer or consular agent of the United States. Such certificate of authentication shall be attached to the Certificate of Eligibility and be substantially in the following form:

_____
_____
_____
_____

I, _____ (Name of the consular officer or consular agent) _____ (Title) of the United States of America at _____ (Place), duly commissioned and qualified, do hereby certify that _____ (Name of foreign official), whose true signature and official seal are, respectively subscribed and affixed to the annexed certificate, was, on the _____ day of _____, 19__, the date thereof, _____ (Title of foreign official), duly commissioned and qualified, to whose official acts faith and credit are due.

In witness whereof I have hereunto set my hand and affixed the seal of the _____ this day of _____19__,

_____
Signature

_____
(Name and full title of officer)

(c) If the tuna are offered for entry under paragraph (c) of the Certificate of Eligibility, the certificate must be executed by a consular officer or consular agent of the United States and be accompanied by the declaration(s) required by 19 CFR 10.79. The ''Declaration of Master and Two Members of Crew on Entry of Products of American Fisheries'', required by 19 CFR 10.79 must contain a further statement as follows: ''We further declare that the said tuna were caught by us in full compliance with part 285, title 50, Code of Federal Regulations, and such other conservation laws and regulations as

were applicable at the time the fishing operation was in progress.''

[41 FR 8352, Feb. 26, 1976. Redesignated at 43 FR 8554, Mar. 2, 1978; and amended at 53 FR 24645, June 29, 1988]

§ 285.86 Removal of import restrictions.

Upon a determination by the Assistant Administrator that the conditions no longer exist which warranted the imposition of import restrictions in the finding published pursuant to § 285.84 the Assistant Administrator, with the approval of the Secretary and the concurrence of the Secretary of State, will publish a finding to such effect in the FEDERAL REGISTER. Effective upon the date of publication of such finding, the prior existing import restrictions against the country designated therein will terminate: *Provided,* That for a period of 1 year from such date of publication every shipment of fish in any form that was subject to the finding published pursuant to § 285.84 will continue to be denied entry unless the shipment is accompanied by a certification executed by an authorized official of the country of export and authenticated by a consular officer or consular agent of the United States, certifying that no portion of the shipment is comprised of fish taken prior to or during the import restriction.

[41 FR 8352, Feb. 26, 1976. Redesignated at 43 FR 8554, Mar. 2, 1978, and amended at 44 FR 36045, June 20, 1979; 53 FR 24645, June 29, 1988]

§ 285.87 Import restrictions for Belize, Honduras, and Panama.

(a) Effective August 20, 1997 all shipments of Atlantic bluefin tuna or Atlantic bluefin tuna products in any form harvested by a vessel of Honduras or Belize will be denied entry into the United States, unless a validated Bluefin Statistical Document required under subpart F of this part, §§ 285.200 through 285.205, shows that a particular shipment of such bluefin tuna was exported prior to August 20, 1997.

(b) Effective January 1, 1998, all shipments of Atlantic bluefin tuna or Atlantic bluefin tuna products in any form harvested by a vessel of Panama will be denied entry into the United States, unless a validated Bluefin Statistical Document required under subpart F of this part, §§ 285.200 through 285.205, shows that a particular shipment of such bluefin tuna was exported prior to January 1, 1998.

[62 FR 44423, Aug. 21, 1997]

Subpart E—International Port Inspection

SOURCE: 48 FR 53564, Nov. 28, 1983, unless otherwise noted.

§ 285.100 Basis and purpose.

At its sixth regular meeting, the International Commission for the Conservation of Atlantic Tunas (Commission) adopted an international port inspection scheme to assist in the enforcement of the Commission's recommendations. The following regulations have been adopted by the United States to implement the port inspection scheme.

§ 285.101 Authorized officer.

For the purposes of this subpart, an authorized officer is a person appointed by a contracting party (the United States and the countries listed in § 285.102(a)) as an authorized inspector for the Commission, who possesses an identification card so stating.

§ 285.102 Vessels subject to inspection.

(a) All United States tuna vessels or vessels carrying tuna and their catch, gear, and records are subject to inspection under this subpart by an authorized officer when landing or transshipping tuna or when making a port call at a port of the following countries, which are defined as the contracting parties. The names of any subsequent additional contracting parties may be added to the list by FEDERAL REGISTER notice. United States tuna vessels or vessels carrying tuna are also subject to the requirements of subparts A through C as appropriate.

(1) Brazil
(2) Cuba
(3) France
(4) Gabon
(5) Ivory Coast
(6) Portugal
(7) Senegal
(8) South Africa
(9) Spain

(b) All tuna vessels or vessels carrying tuna, and registered by any of the above countries, and their catch, gear and records are subject to inspection under this subpart when landing or transshipping tuna or when making a port call in the United States.

(c) A vessel entering a port of the above countries because of *force majeure* shall be exempt from inspection by an authorized officer.

§ 285.103 Reports.

(a) Inspections must be reported on a standardized Commission form and signed by the authorized officer. The master is entitled to add or have added to the report, any observation which the master thinks suitable. If the master adds information to the report, he also must sign the report. The authorized officer will note in the vessel's log that the inspection has been made. A copy of the report will be given to the vessel master and a copy sent to the authorized officer's national authority.

(b) The master must allow the authorized officer to examine any portion of the catch and gear and provide any relevant documents as the authorized officer deems necessary to verify compliance with these regulations.

[48 FR 53564, Nov. 28, 1983, as amended at 53 FR 24645, June 29, 1988]

Subpart F—Bluefin Tuna Statistical Documentation

SOURCE: 60 FR 14388, Mar. 17, 1995, unless otherwise noted.

§ 285.200 Species subject to documentation requirements.

Imports into the United States and exports or re-exports from the United States of all bluefin tuna or bluefin tuna products regardless of ocean area of catch are subject to the documentation requirements of this subpart.

(a) Documentation is required for bluefin tuna identified by the following item numbers from the Harmonized Tariff Schedule:

(1) Fresh or chilled bluefin tuna, excluding fillets and other fish meat, No. 0302.39.00.20.

(2) Frozen bluefin tuna, excluding fillets, No. 0303.49.00.20.

(b) In addition, bluefin tuna products in other forms (e.g., chunks, fillets, canned) listed under any other item numbers from the Harmonized Tariff Schedule are subject to the documentation requirements of this subpart, except that fish parts other than meat (i.e., heads, eyes, roe, guts, tails) may be allowed entry without said statistical documentation.

§ 285.201 Documentation requirements.

(a) *Bluefin imports.* (1) Imports of all bluefin tuna products into the United States must be accompanied at the time of entry by an original completed approved Bluefin Tuna Statistical Document with the information and exporter's certification specified in § 285.202(a)(1) through (7). Such information must be validated as specified in § 285.202(a)(8) by a responsible government official of the country whose flag vessel caught the tuna (regardless of where the fish are first landed), unless the Assistant Administrator has waived validation requirements for the country pursuant to § 285.203.

(2) Bluefin tuna imported into the United States from a country requiring a tag on all such tuna available for sale must be accompanied by the appropriate tag issued by that country, and said tag must remain on any tuna until it reaches its final import destination. If the final import destination is the United States, the tag must remain on the tuna until it is cut into portions. If the tuna portions are subsequently packaged for domestic commercial use or export, the tag number and the issuing country must be written legibly and indelibly on the outside of the package.

(3) Dealers selling bluefin tuna that was previously imported into the United States for domestic commercial use must provide on the original Bluefin Tuna Statistical Document that accompanied the import shipment the correct information and importer's certification specified in § 285.202(a)(9). The original of the completed Bluefin Tuna Statistical Document must be postmarked and mailed by said dealer to the Regional Director within 24 hours of the time the tuna was imported into the United States.

(b) *Bluefin exports.* (1) Dealers exporting bluefin tuna that was harvested by U.S. vessels and first landed in the United States must complete an original numbered Bluefin Tuna Statistical Document issued to that dealer by the Regional Director. Such an individually numbered document is not transferable or reusable and may be used only once by the dealer to which it was issued to report on a specific export shipment. Dealers must provide on the Bluefin Tuna Statistical Document the correct information and exporter certification specified in § 285.202(a)(1) through (7). As required under § 285.203, the Bluefin Tuna Statistical Document must be validated as specified in § 285.202(a)(8) by an official of the U.S. Government or, if authorized by NMFS, an official of an accredited institution. A list of such officials may be obtained by contacting the Office of Fisheries Conservation and Management, NMFS, Silver Spring, MD (301–713–2347), or the nearest NMFS Enforcement Office. A list of local NMFS enforcement offices can be obtained by contacting regional offices in Gloucester, MA (508–281–9261), St. Petersburg, FL (813–570–5344) and Long Beach, CA (310–980–4050). Dealers requesting government validation for exports should notify NMFS as soon as possible after arrival of the vessel to avoid delays in inspection and validation of the export shipment.

(2) Dealers re-exporting bluefin tuna that was previously imported into the United States must provide on the original Bluefin Tuna Statistical Document that accompanied the import shipment the correct information and intermediate importer's certification specified in § 285.202(a)(9).

(3) Dealers must submit the original of the completed Bluefin Tuna Statistical Document to accompany the shipment of bluefin tuna to its export or re-export destination. A copy of the Bluefin Tuna Statistical Document completed as specified under paragraph (b)(1) or (2) of this section must be postmarked and mailed by said dealer to the Regional Director within 24 hours of the time the tuna was exported or re-exported from the United States.

(c) *Recordkeeping.* Dealers must retain at their principal place of business a copy of each Bluefin Tuna Statistical Document required to be submitted to the Regional Director pursuant to this section for a period of 2 years from the date on which it was submitted to the Regional Director.

§ 285.202 Contents of documentation.

(a) A Bluefin Tuna Statistical Document, to be deemed complete, must:

(1) Have a document number assigned as prescribed by the country issuing the document;

(2) State the name of the country issuing the document, which is the country whose flag vessel harvested the bluefin tuna, regardless of where the tuna is first landed;

(3) State the name of the vessel that caught the fish and the vessel's registration number, if applicable;

(4) State the name of the owner of the trap that caught the fish, if applicable;

(5) State the point of export, which is the city, state or province, and country from which the bluefin tuna is first exported;

(6) State the following specified information about the shipment:

(i) The product type (fresh or frozen) and product form (round, gilled and gutted, dressed, fillet or other);

(ii) The method of fishing used to harvest the fish (purse seine, trap, rod and reel, etc.);

(iii) The ocean area from which the fish was harvested (western Atlantic, eastern Atlantic, Mediterranean, or Pacific);

(iv) The weight of each fish (in kilograms for the same product form previously specified);

(v) The identifying tag number, if landed by vessels from countries with tagging programs;

(7) State the name and license number of, and be signed and dated in the exporter's certification block by, the exporter;

(8) If applicable, state the name and title of, and be signed and dated in the validation block by, a responsible government official of the country whose flag vessel caught the tuna (regardless of where the tuna are first landed) or

by an official of an institution accredited by said government, with official government or accredited institution seal affixed, thus validating the information on the Bluefin Tuna Statistical Document; and

(9) As applicable, state the name(s) and address(es), including the name of the city and state or province of import, and the name(s) of the intermediate country(ies) or the name of the country of final destination, and license number(s) of, and be signed and dated in the importer's certification block by, each intermediate and the final importer.

(b) An approved Bluefin Tuna Statistical Document may be obtained from the Regional Director to accompany exports of bluefin tuna from the United States. Bluefin tuna dealers in countries that do not provide an approved Bluefin Tuna Statistical Document to exporters may obtain an approved Bluefin Tuna Statistical Document from the Regional Director to accompany exports to the United States.

(c) Dealers from a country exporting bluefin tuna to the United States may use the approved Bluefin Tuna Statistical Document obtainable from the Regional Director or documents developed by the dealer's country, if that country submits a copy, through the ICCAT Executive Secretariat, to the Assistant Administrator, and the Assistant Administrator concurs with the ICCAT Secretariat's determination that the document meets the information requirements of the ICCAT recommendation. In such case, the Assistant Administrator shall provide a list of countries for which Bluefin Tuna Statistical Documents are approved, together with examples of such documents to the appropriate official of the U.S. Customs Service. Effective upon the date indicated in such notice to the U.S. Customs Service, shipments of bluefin tuna or bluefin tuna products offered for importation from said country(ies) may be accompanied by either that country's approved Bluefin Tuna Statistical Document or by the Bluefin Tuna Statistical Document provided to the foreign country exporter by the Regional Director.

§ 285.203 Validation requirements.

(a) *Imports.* The approved Bluefin Tuna Statistical Document accompanying any import of bluefin tuna, whether or not the issuing country is a member of ICCAT, must be validated by a government official from the issuing country, unless the Assistant Administrator waives the government validation requirement for that country following a recommendation to do so by the Executive Secretary of ICCAT. The Assistant Administrator shall furnish a list of countries for which government validation requirements are waived to the appropriate official of the U.S. Customs Service. Said list shall indicate the circumstances of exemption for each issuing country and the non-government institutions, if any, accredited to validate Bluefin Statistical Documents for that country.

(b) *Exports.* The approved Bluefin Tuna Statistical Document accompanying any export of bluefin tuna from the United States must be validated by a U.S. government official, except under circumstances of waiver, if any, specified on the form and accompanying instructions, or in a letter to permitted dealers from the Regional Director. Such circumstances of waiver of government validation shall be consistent with ICCAT recommendations concerning validation of Bluefin Tuna Statistical Documents. If authorized, such waiver of government validation may include:

(1) Exemptions from government validation for fish with individual tags affixed pursuant to § 280.52 or § 285.30 of this chapter, or;

(2) Validation by non-government officials authorized to do so by the Regional Director under paragraph (c) of this section.

(c) *Authorization for non-government validation.* Institutions, or associations seeking authorization to validate Bluefin Tuna Statistical Documents accompanying exports from the United States, must apply in writing to the Regional Director. A letter of application must indicate the procedures to be used for verification of information to be validated, must list the names, addresses, and telephone/fax numbers of individuals to perform validation, and must provide an example of the stamp

or seal to be applied to the Bluefin Tuna Statistical Document. Upon finding the institution or association capable of verifying the information required on the Bluefin Tuna Statistical Document, the Regional Director will issue, within 30 days, a letter specifying the duration of effectiveness and conditions of authority to validate Bluefin Tuna Statistical Documents accompanying exports from the United States. The effectiveness of such authorization will be delayed as necessary for the Assistant Administrator to notify the ICCAT Secretariat of non-government institutions and associations authorized to validate Bluefin Tuna Statistical Documents.

§ 285.204 Ports of entry.

The Assistant Administrator shall monitor the importation of bluefin tuna into the United States. If the Assistant Administrator determines that the diversity of handling practices at certain ports at which bluefin tuna is being imported into the United States allow for circumvention of the Bluefin Tuna Statistical Document requirement, he/she may designate, after consultation with the U.S. Customs Service, those ports at which Pacific or Atlantic bluefin tuna may be imported into the United States. The Assistant Administrator shall announce in the FEDERAL REGISTER the names of ports so designated and the effective dates of entry restrictions.

§ 285.205 Prohibitions.

It is unlawful for any person to do any of the following:

(a) Import or attempt to import any bluefin tuna into the United States without an accompanying original form of an approved Bluefin Tuna Statistical Document correctly completed with the appropriate certification and government validation.

(b) Import any bluefin tuna into the United States from a country that requires all such tuna to be tagged, without said tag accompanying the bluefin tuna.

(c) Remove a tag from any bluefin tuna imported into the United States accompanied by a tag, prior to its being cut into portions for a destination in the United States or for export.

(d) Fail to write legibly and indelibly the tag number and the issuing country on the outside of any package containing a part or parts of a bluefin tuna that was imported into the United States accompanied by said tag.

(e) Export or re-export from the United States any bluefin tuna without an accompanying original approved Bluefin Tuna Statistical Document correctly completed with the appropriate certification and, if applicable, validated by a designated official of the United States government or an official of an institution authorized by the Regional Director pursuant to § 285.203(c) to validate such documents.

(f) Fail to provide in a timely manner any originals or copies of Bluefin Tuna Statistical Documents required to be submitted to the Regional Director pursuant to § 285.201.

(g) Write false information on or modify any information previously written on any Bluefin Tuna Statistical Document required by this subpart or to validate such document if not authorized to do so by the Regional Director.

(h) Fail to maintain copies of completed Bluefin Tuna Statistical Documents as required under § 285.201.

(i) Import any bluefin tuna in a manner inconsistent with any ports of entry designated by the Assistant Administrator pursuant to § 285.204.

(j) Reuse, or transfer to another dealer, any numbered Bluefin Tuna Statistical Document issued to a dealer under this subpart.

(k) Import any Atlantic bluefin tuna or Atlantic bluefin tuna products into the United States from Belize or Honduras after August 20, 1997 unless a validated Bluefin Statistical Document required under this subpart F, §§ 285.200 through 285.205, shows that a particular shipment of such bluefin tuna was exported prior to August 20, 1997.

(l) Import any Atlantic bluefin tuna or Atlantic bluefin tuna products into the United States from Panama after January 1, 1998, unless a validated Bluefin Statistical Document required under this subpart F, §§ 285.200 through

285.205, shows that a particular shipment of such bluefin tuna was exported prior to January 1, 1998.

[60 FR 14388, Mar. 17, 1995, as amended at 62 FR 44423, Aug. 21, 1997]

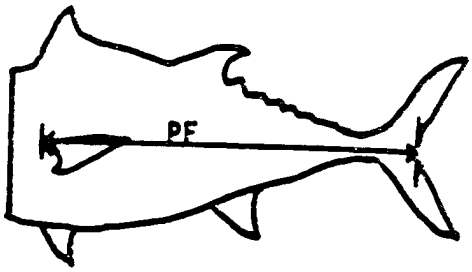

Figure 1. Pectoral fin to fork of tail measurement (PF).

[57 FR 374, Jan. 6, 1992]

SUBCHAPTER J [RESERVED]

SUBCHAPTER K—CONTINENTAL SHELF

PART 296—FISHERMEN'S CONTINGENCY FUND

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AUTHORITY: Pub. L. 97–212 (43 U.S.C. 1841 et seq.).

SOURCE: 47 FR 49600, Nov. 1, 1982, unless otherwise noted.

§ 296.1 Purpose.

These regulations implement title IV of the Outer Continental Shelf Lands Act Amendments of 1978, as amended (title IV). Title IV establishes a Fishermen's Contingency Fund to compensate commercial fishermen for damage or loss caused by obstructions associated with oil and gas activities on the Outer Continental Shelf.

§ 296.2 Definitions.

Area affected by Outer Continental Shelf activities means the area within a 3-mile radius of any casualty site which:

(1) Includes any portion of a leased block, pipeline, easement, right of way, or other OCS oil and gas exploration, development, or production activity; or

(2) Is otherwise associated (as determined by the Chief, Financial Services Division) with OCS oil and gas activities, such as, for example, expired lease areas, relinquished rights-of-way or easements, and areas used extensively by surface vessels supporting OCS oil and gas activities (areas landward of the OCS are included when such areas meet this criterion).

Chief, FSD means Chief, Financial Services Division, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910; telephone: (301) 713–2396.

Citizen of the United States means any person who is a United States citizen, any State, or any corporation, partnership, or association organized under the laws of any state which meets the requirements for documenting vessels in the U.S. coastwise trade.

Commercial fisherman means any citizen of the United States who owns, operates, or is employed on a commercial fishing vessel.

Commercial fishing vessel means any marine craft which is documented under the laws of the United States or, if under five net tons, registered under the laws of any State, and used for commercial fishing or activities directly related to commercial fishing.

Easement means a right of use or easement granted under 30 CFR 250.18.

Fish means all forms of marine animal and plant life other than marine mammals, birds, and highly migratory species.

Fishing gear means any commercial fishing vessel, and any equipment of such vessel.

Fund means the Fishermen's Contingency Fund established by title IV of the Outer Continental Shelf Lands Act Amendments of 1978.

Holder means the owner of record of each lease, prelease exploratory drilling permit, easement, or right-of-way or any agent or assignee of an owner.

Lease means any authority under section 8 or section 6 of the OCS Lands Act to develop and produce or explore for oil or gas.

Negligence or fault includes, but is not limited to, failure to:

(1) Remain outside of any navigation safety zone established around oil and gas rigs and platforms by any responsible Federal agency;

(2) Avoid obstructions recorded on nautical charts or in the Notice to Mariners or marked by a buoy or other surface marker (casualties occurring

within a one-quarter mile radius of obstructions so recorded or marked are presumed to involve negligence or fault of the claimant);

(3) Abide by established rules of the road;

(4) Use proper care; or

(5) Use due care and diligence to mitigate the damage or loss.

Outer Continental Shelf means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in 43 U.S.C. section 1301, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control. Generally, but not in all cases, this includes all submerged lands lying seaward of the territorial sea (3 miles from a State's coastline, or 9 miles from the coast of Texas or Florida).

Person means an individual, partnership, corporation, association, public or private organization, government, or other entity.

Resulting Economic Loss means the gross income, as estimated by the Chief, FSD, that a claimant will lose because of not being able to fish, or having to reduce fishing effort, during the period before the damaged or lost fishing gear concerned is repaired or replaced and available for use. This period must be reasonable. This period begins on the date of the casualty and stops on the date the damage could reasonably have been remedied by repair or replacement.

Right-of-way means any right-of-way granted under section 5(e) of the OCS Lands Act or under 43 CFR 3340.0–5.

Secretary means the Secretary of Commerce or his designee.

[47 FR 49600, Nov. 1, 1982, as amended at 61 FR 6322, Feb. 20, 1996]

§ 296.3 Fishermen's contingency fund.

(a) *General.* There is established in the Treasury of the United States the Fishermen's Contingency Fund. The Fund is available without fiscal year limitation as a revolving fund to carry out the purposes of title IV of the Outer Continental Shelf Lands Act Amendments of 1978, as amended.

(b) *Payments into the fund.* Each Holder of an exploration permit, lease, easement, or rights-of-way for the construction of a pipeline, or a prelease exploration drilling permit issued or maintained under the Outer Continental Shelf Lands Act, in effect on or after June 30, 1982, shall pay assessments to the Fund. All pipeline right-of-way and easements are to be included for assessment except those constructed and operated lines within the confines of a single lease or group of contiguous leases under unitized operation or single operator. Payments will not be required for geological or geophysical permits, other than prelease exploratory drilling permits issued under section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. 1340).

(1) *Assessments to maintain the fund.* When the total amount in the Fund is less than the Chief, FSD, determines is needed to pay Fund claims and expenses, the Chief, FSD, will notify the Secretary of the Interior that additional assessments are needed.

(2) *Billing and collections.* The Secretary of the Interior will calculate the amounts to be paid by each Holder and shall notify each Holder of the dollar amount and the time and place for all payments. Each assessment shall be paid to the Secretary of the Interior no later than 45 days after the Secretary of the Interior sends notice of the assessment.

(3) *Annual assessment limits.* No Holder shall be required to pay in excess of $5,000 for any lease, permit, easement or right-of-way in any calendar year.

(c) *Moneys recovered through subrogation.* Any moneys recovered by the Secretary through the subrogation of a claimant's rights shall be deposited into the Fund.

(d) *Investments of the fund.* Excess sums in the Fund will be invested in obligations of, or guaranteed by, the United States. Revenue from such investments shall be deposited in the Fund.

(e) *Litigation.* The Fund may sue and be sued in its own name.

§ 296.4 Claims eligible for compensation.

(a) *Claimants.* Damage or loss eligible for Fund compensation must be suffered by a commercial fisherman.

(b) *Damage or loss of fishing gear.* Damage or loss is eligible for Fund

compensation if it was caused by materials, equipment, tools, containers, or other items associated with OCS oil and gas exploration, development, or production activities. Damage or loss may be eligible for compensation even though it did not occur in OCS waters if the item causing the damage or loss was associated with oil and gas exploration, development, or production activities in OCS waters.

(c) *Exceptions.* Damage or loss is not eligible for Fund compensation:

(1) If the damage or loss was caused by the negligence or fault of the claimant;

(2) If the damage or loss occurred prior to September 18, 1978;

(3) To the extent that damage or loss exceeds the replacement value of the fishing gear involved;

(4) For any portion of the damage or loss which can be compensated by insurance;

(5) If the claim is not filed within 90 calendar days of the date the claimant or the claimant's agent first became aware of the damage or loss (or such longer period as the Secretary may allow under unusual and extenuating circumstances); or

(6) If the damage or loss was caused by an obstruction unrelated to OCS oil and gas exploration, development, or production activities.

[47 FR 49600, Nov. 1, 1982, as amended at 50 FR 13796, Apr. 8, 1985; 61 FR 6322, Feb. 20, 1996]

§296.5 Instructions for filing claims.

(a) *Fifteen-day report required to gain presumption of causation*—(1) *General.* Damages or losses are presumed to be qualified for compensation if certain requirements are satisfied. One requirement is that a report must be made to NMFS within fifteen (15) days after the date on which the vessel first returns to a port after discovering the damage or loss. Filing of a fifteen-day report must be followed up by filing a detailed claim.

(2) *When and how to file a fifteen-day report.* To qualify for the presumption of causation, a fifteen-day report must be made to NMFS within fifteen days after the date on which the vessel first returns to a port after discovering the damage or loss. Satisfaction of the fifteen-day requirement is determined by the postmark, if the report is mailed; by the date of a call, if the report is telephoned or radiotelephoned; or, by the date of appearance, if the report is made in person. The fifteen-day report must be made to the Chief, Financial Services Division, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910; telephone: (301) 713–2396.

(3) *Contents of fifteen-day report.* Each fifteen-day report must include the following information:

(i) The claimant's name and address;

(ii) The name of the commercial fishing vessel involved;

(iii) The location of the obstruction which caused the damage or loss;

(iv) A description of the nature of the damage or loss;

(v) The date such damage or loss was discovered;

(vi) If the fifteen-day report is made after the vessel returns to port, the date on which the vessel first returned to port after discovering the damage.

(b) *Form of claim.* Claims must be in writing. Claims may be submitted on NOAA form 88–164. This form may be obtained from any NMFS regional office or from the Chief, FSD. Although claimants are not required to use this claim form, it will probably be to their benefit to do so.

(c) *Who must file and when and where to file claims.* All claimants (including those who filed 15-day reports to gain the presumption of causation) must submit a claim application to the Chief, Financial Services Division, within 90 calendar days of the date the claimant or the claimant's agent first became aware of the damage or loss. The Chief, FSD, may allow a longer period for filing claims if, in his discretion, unusual and extenuating circumstances justify a longer period. The term ''filed'' means delivered in person, or mailed (as determined by the date of the postmark) to the Chief, Financial Services Division, National Marine Fisheries Service, 1825 Connecticut Avenue, NW., Washington, DC 20235. The Chief, FSD, suggests that mailed claims be sent by registered or certified mail, return receipt requested, so the claimant will have a record that

the claim was received by the Chief, FSD.

(d) *Aggregating claims.* If more than one commercial fisherman suffers loss or damage from the same incident (for example, when several members of the crew lost income due to loss of fishing time), all claims should be submitted on their behalf by the owner or operator of the commercial fishing vessel involved.

(e) *Contents of claim.* Each claim must be signed by the claimant and must accurately and completely provide the following information:

(1) The name, mailing address, telephone number, citizenship, and occupational status (for example, vessel owner, operator, or crew member) of each claimant;

(2) The name and Coast Guard documentation number or State registration number of the commercial fishing vessel involved in the damage or loss;

(3) The home port, type, and size of the vessel involved in the casualty;

(4) A full statement of the circumstances of the damage or loss including:

(i) The date when the casualty was first discovered by the claimant,

(ii) The water depth (if known) and visibility at the time and location where the casualty occurred,

(iii) The direction, speed, and activities of the claimant's vessel immediately before, during, and after the casualty (including a full description of both the deployment of any fishing gear which is the subject of the claim and all attempts at retrieval of the gear),

(iv) The names and addresses of all witnesses to the casualty,

(v) The location where the casualty occurred in Loran C coordinates or the next most accurate method of position fixing available to the claimant,

(vi) A description of the item or obstruction (if sighted or recovered) which caused the casualty, and whether or not any surface markers were attached to or near the obstruction. Submit any available photographs of the item or obstruction. State reasons for believing the obstruction is associated with OCS oil and gas activities.

(5) The amount claimed for property damage or loss and a full statement of the type and extent of damage or loss including:

(i) An inventory of all components of fishing gear damaged or lost,

(ii) The date, place, and cost of acquisition of all fishing gear damaged or lost and proof of its purchase (sales receipts, affidavits, or other evidence),

(iii) One estimate from a commercial fishing gear repair or supply company of the present replacement or repair (whichever applies) cost of the damaged or lost fishing gear. If the gear will be repaired by the claimant himself, a detailed estimate by the claimant identifying the repair cost.

(6) The amount claimed for economic loss and the basis for that amount with supporting documentation, as follows:

(i) Trip tickets for the three vessel trips immediately before the trip during which the casualty was discovered and for the vessel trip immediately following the trip during which the casualty occurred.

(ii) A statement of the amount of time involved on each of the vessel trips above (or if the casualty involves fixed gear, a statement of the number of gear units deployed on each of these trips).

(iii) A statement of the amount of time lost from fishing because of the damage or loss and a full explanation of why this time period is reasonable.

(iv) Documentation of the date replacement gear was ordered and received or the date gear repair began and ended. This documentation may consist of purchase orders, bills of lading, or statements from sellers or repairers.

(7) The amount claimed for other consequential loss or costs (including fees for claim preparation, etc.) with suitable documentation of the amounts claimed (such as invoices, receipts, etc.).

[47 FR 49600, Nov. 1, 1982, as amended at 50 FR 13796, Apr. 8, 1985; 53 FR 24645, June 29, 1988; 61 FR 6322, Feb. 20, 1996]

§ 296.6 NMFS processing of claims.

(a) *Action by NMFS.* Upon receipt of a claim, the Chief, FSD, will:

(1) Send an abstract of the claim to the Secretary of the Interior;

(2) Send the reported location of any obstruction which was not recovered

and retained to the National Ocean Survey, which will inform the Defense Mapping Agency Hydrographic/Topographic Center.

(b) *Actions by the Interior Department.* Upon receipt of an abstract of a claim, the Interior Department will immediately:

(1) Plot the casualty site, and advise NMFS whether the site is in an area affected by OCS activities;

(2) make reasonable efforts to notify all persons known to have engaged in activities associated with OCS energy activity in the vicinity where the damage or loss occurred.

(c) *Responses to notice of claim.* (1) Each person notified by the Interior Department will, within thirty days after receipt of the notice, advise the Chief, FSD, and the Interior Department whether he admits or denies responsibility for the damages claimed.

(2) Each person notified by the Interior Department who fails to give timely and proper advice of admission or denial of responsibility shall be presumed to deny responsibility for the damages claimed.

(3) If any person admits responsibility, the Chief, FSD, will initiate action to recover from that party any sums paid or to be paid for the claimed damages.

(4) Any person referred to in this section, including lessees or permittees or their contractors or subcontractors, may submit evidence about any claim to the Chief, FSD.

(d) *Failure to meet filing requirements.* The Chief, FSD, may reject any claim that does not meet the filing requirements. The Chief, FSD, will give a claimant whose claim is rejected written notice of the reasons for rejection within 30 days after the date on which the claim was filed. If the claimant does not refile an acceptable claim within 30 days after the date of this written notice, the claimant is not eligible for Fund compensation unless there are extenuating circumstances.

(e) *Proceedings*—(1) *Location.* Any required proceeding will be conducted within such United States judicial district as may be mutually agreeable to the claimant and the Assistant Administrator, NMFS, or his designee, or if no agreement can be reached, within the United States judicial district in which the claimant's home port is located.

(2) *Powers.* For purposes of any proceeding, the Assistant Administrator, NMFS, or his designee, shall have the power to administer oaths and subpoena witnesses and the production of books, records, and other evidence relative to the issues involved.

(3) *Amendments to claims.* A claimant may amend the claim at any time before the Chief, FSD, issues an initial determination.

(4) *Criminal penalty for fraudulent claims.* Any person who files a fraudulent claim is subject to prosecution under 18 U.S.C. sections 287 and 1001, each of which, upon conviction, imposes a penalty of not more than a $10,000 fine and 5 years' imprisonment, or both.

[47 FR 49600, Nov. 1, 1982, as amended at 61 FR 6322, Feb. 20, 1996]

§296.7 Burden of proof and presumption of causation.

(a) *Burden of proof.* The claimant has the burden to establish, by a preponderance of the evidence, all facts necessary to qualify his claim, including:

(1) The identity or nature of the item which caused the damage or loss; and

(2) That the item is associated with oil and gas exploration, development, or production activities on the Outer Continental Shelf.

(b) *Presumption of causation.* Notwithstanding the above, damages or losses are presumed to be caused by items associated with oil and gas exploration, development, or production activities on the OCS if the claimant establishes that:

(1) The claimant's commercial fishing vessel was being used for commercial fishing and was located in an area affected by OCS oil and gas exploration, development, or production activities;

(2) A report on the location of the obstruction which caused such damage or loss, and the nature of such damage or loss, was made within fifteen days after the date on which the vessel first returned to a port after discovering such damage;

(3) There was no record on the most recent nautical charts issued by the

National Ocean Survey, NOAA, or in any weekly Notice to Mariners issued by the Defense Mapping Agency Hydrographic/Topographic Center, in effect at least 15 days before the date the damage or loss occurred, then an obstruction existed in the immediate vicinity where the damage or loss occurred. In the case of damages caused by a pipeline, the presumption will be available regardless of whether the pipeline was recorded on charts or in the Notice to Mariners; and

(4) There was no proper surface marker or lighted buoy attached, or closely anchored, to such obstruction.

(c) *Geographic exclusion from presumption of causation.* Damage or loss occurring within a one-quarter mile radius of obstructions recorded on charts or in a Notice to Mariners, or properly marked, is presumed to involve the recorded or marked obstruction.

§ 296.8 Amount of award.

(a) *Actual damages.* The award for damaged fishing gear will be the lesser of the gear's repair cost or replacement cost. The award for lost fishing gear will be the gear's replacement cost.

(b) *Consequential damages.* An award may also include compensation for any damage or loss (except personal injury) that is incurred as a consequence of the fishing gear damage or loss.

(c) *Resulting economic loss.* An award may also include 50 percent of the resulting economic loss from damage to or loss of fishing vessels and gear.

(d) *Attorney, CPA, consultant fees.* An award may also include compensation for reasonable fees paid by the claimant to an attorney, CPA, or other consultant for the preparation or prosecution of a claim.

(e) *Negligence of claimant.* (1) An award will be reduced to the extent that the loss or damage was caused by the negligence or fault of the claimant. (For example, a claimant who sustained $10,000 in damages and whose negligence or fault was found to be responsible for 40% of the damage would receive $6,000 in compensation. If the same claimant were responsible for 99% of the negligence or fault that caused the damage, the claimant would receive $100 in compensation).

(2) Negligence of the owner or operator of the fishing vessel or gear will reduce crewmember awards to the same extent that it reduces an award to the vessel's owner or operator.

(f) *Insurance proceeds.* An award will be reduced by the amount the claimant has, or reasonably would have, received under a commercial policy of full hull and machinery and protection and indemnity insurance, whether or not such insurance was in effect at the time the casualty occurred.

[47 FR 49600, Nov. 1, 1982, as amended at 50 FR 13796, Apr. 8, 1985]

§ 296.9 Initial determination.

The Chief, FSD will make an initial determination on a claim within 60 days after the day on which the claim is accepted for filing. The initial determination will state:

(a) If the claim is disapproved, the reason for disapproval, or

(b) If the claim is approved, the amount of compensation and the basis on which the amount was determined.

§ 296.10 Agency review.

(a) Within 30 days after the Chief, FDS, issues an initial determination, the claimant, or any other interested person who submitted evidence relating to the initial determination, may ask the Assistant Administrator, NMFS, or his designee, for a review of the initial determination.

(b) The petitioner may submit written or oral evidence within 30 days of filing the petition for review.

§ 296.11 Final determination.

(a) If a petition for review of an initial determination is filed within 30 days after the date the Chief, FSD, issues an initial determination, the Assistant Administrator, NMFS, or his designee will conduct a review of the initial determination, and will issue a final determination no later than 60 days after receipt of the request for review of the initial determination.

(b) If a petition for review of an initial determination is not filed within 30 days after the day on which the Chief, FSD, issues an initial determination, the initial determination will become a final determination.

§296.12 Payment of costs.

(a) *By person denying responsibility for damage.* Any person who is notified by the Interior Department and fails to respond or denies responsibility for the damages claimed will pay the costs of the proceedings if such person is subsequently found to be responsible for the damage claimed.

(b) *By the claimant.* Any claimant who files a claim will pay the cost of the proceedings if such person is subsequently found to be responsible for the damage claimed.

(c) *By person denying responsibility for damage and the claimant.* If more than one party is found to have responsibility for the damage claimed, then the cost of the proceedings will be apportioned between them.

§296.13 Payment of award for claim.

(a) Upon an initial determination, the Chief, Financial Services Division, shall immediately disburse the claim awarded if the claimant signed as part of his/her application a statement agreeing to repay all or any part of the award if the award should for any reason be subsequently reduced.

(b) [Reserved]

[61 FR 6322, Feb. 20, 1996]

§296.14 Subrogation.

(a) The claim application will contain a subrogation statement signed by the claimant as a condition of payment of the claim which:

(1) Assigns to the Fund the claimant's rights against third parties; and

(2) Provides that the claimant will assist the Fund in any reasonable way to pursue those rights.

(b) Collection of subrogated rights. If a reasonable chance of successful collection exists, NMFS will refer any subrogated rights to the Justice Department for collection.

(c) Any moneys recovered through subrogation shall be deposited into the Fund.

[47 FR 49600, Nov. 1, 1982, as amended at 61 FR 6323, Feb. 20, 1996]

§296.15 Judicial review.

Any claimant or other person who is aggrieved by a final determination may, no later than 30 days after the determination, seek judicial review of the determination in the United States District Court for such judicial district as may be mutually agreeable to the parties concerned or, if no agreement can be reached, in the United States District Court for the judicial district in which the claimant's home port is located.