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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 130221153-3572-02]

RIN 0648-BC78

Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to revise regulations under the Dolphin Protection Consumer Information Act (DPCIA) to enhance the requirements for documentation to support labels on tuna products that represent the product as dolphin-safe. This rule modifies the requirements for the certifications that must accompany the Fisheries Certificate of Origin (FCO); changes storage requirements related to dolphin-safe and non-dolphin-safe tuna on board fishing vessels; modifies the reporting requirements associated with tracking domestic tuna canning and processing operations; and creates other new requirements for processors, other than tuna canners, of tuna product labeled dolphin-safe. This rule is intended to better ensure dolphin-safe labels comply with the requirements of the DPCIA and to ensure that the United States satisfies its obligations as a member of the World Trade Organization (WTO).

DATES: This rule becomes effective on July 13, 2013.

ADDRESSES: Copies of the proposed and final rules for this action are available via the Federal e-Rulemaking portal, at <http://www.regulations.gov>, and are also available from the Acting Director, NMFS Office of International Affairs, Rodney R. McInnis, 501 W. Ocean Boulevard, Suite 4200, Long Beach, CA 90802. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to the NMFS Southwest Region (SWR) and by e-mail to [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov), or fax to (202) 395-7285.

FOR FURTHER INFORMATION CONTACT: William Jacobson, NMFS SWR, 562-980-4035.

SUPPLEMENTARY INFORMATION: On April 5, 2013, NMFS published a proposed rule in the Federal Register (78 FR 20604) to revise regulations at 50 CFR part 216, subpart H, in order to enhance the requirements for documentation to support labels on tuna products that represent the product as dolphin-safe. The proposed rule was open to public comment through May 6, 2013.

## Background

Enacted in 1990, the DPCIA (16 U.S.C. 1385) established a dolphin-safe labeling standard for tuna products. The law addressed a Congressional finding that “consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.” The DPCIA sets out minimum criteria for when tuna product producers, importers, exporters, distributors, or sellers may label their product dolphin-safe or with any other similar term or symbol suggesting that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins. Specifically, the DPCIA prohibits producers, importers, exporters, distributors, or sellers from labeling as dolphin-safe any tuna product that was harvested: (i) “on the high seas by a vessel engaged in driftnet fishing;” (ii) in

the eastern tropical Pacific Ocean (ETP) by purse seine vessels with a carrying capacity of 400 short tons or greater unless accompanied by a captain's statement and observer's statement that no dolphins were intentionally encircled during the trip and no dolphins were killed or seriously injured during the set; or (iii) outside the ETP by purse seine vessels, unless the captain certifies that no dolphins were intentionally encircled during the trip (16 U.S.C. 1385(d)(1)). The ETP is defined as the waters of the Pacific Ocean bounded by 40° N. latitude, 40° S. latitude, 160° W. longitude and the coastlines of North, Central and South America (50 CFR 216.3).

In addition, if the Secretary of Commerce (Secretary) identifies a purse seine fishery that has a regular and significant association between dolphins and tuna similar to the ETP, then tuna products containing tuna harvested in such a fishery may not be labeled dolphin-safe, unless a captain and observer certify that no dolphins were killed or seriously injured in the sets in which the tuna were harvested (16 U.S.C. 1385(d)(1)(B)(i)). Furthermore, if the Secretary identifies any other fishery that has a regular and significant mortality or serious injury of dolphins, then tuna products containing tuna harvested in that fishery may not be labeled dolphin-safe, unless a captain and observer (if NOAA Fisheries determines that an observer statement would be "necessary") certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were harvested (16 U.S.C. 1385(d)(1)(D)).

The minimum standards described above apply to any tuna product labeled dolphin-safe. The DPCIA further directs the Secretary to develop an "official mark" that may be used by tuna processors to label tuna products as dolphin-safe under 16 U.S.C. 1385(d)(3)(A), and requires that tuna product labeled dolphin-safe using an alternative mark may be used only if the tuna were harvested during a set or other gear deployment in which no dolphin was killed or seriously injured, regardless of the area of harvest or the type of gear used (16 U.S.C. 1385(d)(3)(C)(i)).

Finally, NOAA Fisheries has broad authority to issue regulations to implement the DPCIA, including specifically the authority to establish a domestic tracking and verification program to track tuna labeled dolphin-safe (whether using the official mark or any other mark), and to adjust such regulations as appropriate to implement an international tracking and verification program (16 U.S.C. 1385(f)).

Under the rules being revised here, tuna importers had to include, an FCO with every imported tuna product, and submit that FCO to NOAA Fisheries. The exporter declared the dolphin-safe status of an import on the FCO, which was endorsed by the importer. As a condition of labeling dolphin-safe tuna caught by ETP large purse seine vessels, the importer had to attach a certification from the captain and an observer on board the vessel that no dolphins were killed or seriously injured in the sets in which the tuna were caught, and that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught. For vessels using purse seine gear outside the ETP, to label tuna dolphin-safe the importer had to attach a certification from the captain that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught. Also, domestic tuna canners were required to submit to NOAA Fisheries monthly reports containing the pertinent information found on an FCO, as well as additional vessel and transshipment information not found on an FCO, for all tuna received at the plant.

In 2008, Mexico initiated WTO dispute settlement proceedings challenging the U.S. dolphin-safe labeling scheme as a violation of provisions of the WTO's General Agreement on Tariffs and Trade 1994 and Agreement on Technical Barriers to Trade (TBT Agreement). Mexico specifically challenged three U.S. measures: the DPCIA, Department of Commerce DPCIA regulations (50 CFR 216.91 and 216.92), and a Federal Court decision (Earth Island

Institute v. Hogarth, 494 F.3d 757 (9<sup>th</sup> Cir. 2007)). The challenged measures established conditions (described above) under which tuna products may voluntarily be labeled dolphin-safe. On June 13, 2012, the WTO Dispute Settlement Body (DSB) adopted the WTO Appellate Body report, and the WTO panel report as modified by the Appellate Body report, finding that the U.S. dolphin-safe labeling scheme (including the regulations amended by this final rule) accords less favorable treatment to Mexican tuna products and therefore is inconsistent with Article 2.1 of the TBT Agreement. The Appellate Body based this conclusion on a finding that the U.S. measures did not set conditions for using the label in a way that reflects the risks faced by dolphins in different oceans. The DSB adopted the Appellate Body's recommendation that the United States bring its measures into conformity with the TBT Agreement.

In response to this finding, NMFS proposed (78 FR 20604; April 5, 2013) to modify the requirements for the certifications that must accompany the FCO; change storage requirements related to dolphin-safe and non-dolphin-safe tuna on board fishing vessels; modify the reporting requirements associated with tracking domestic tuna canning and processing operations; and create new requirements for processors, other than tuna canners, of tuna product labeled dolphin-safe. This final rule is largely unchanged from the proposed rule. It is intended to better ensure that dolphin-safe labels comply with the requirements of the DPCIA, and that the United States satisfies its obligations as a member of the WTO. For more information on this subject, please see the preamble to the proposed rule. In this final rule, NMFS identifies a period of education and outreach, responds to public and government comments, and makes technical modifications.

#### Effective Date and Period of Education and Outreach

The effective date of this regulation is July 13, 2013, and the rule is mandatory as of that date. The requirements of this rule do not apply to tuna harvested on fishing trips that began

before July 13, 2013. However, NMFS understands that it may not be feasible for all of the affected entities to achieve 100% compliance immediately, and that some entities will need time to make the necessary changes to achieve full compliance with the new provisions for all tuna product labeled dolphin-safe. Therefore, through January 1, 2014, NMFS will conduct an industry education and outreach program on the provisions and requirements of this rule. NMFS has determined that this allocation of resources will ensure that the industry effectively and rationally implements this final rule.

#### Response to Public Comments

NMFS received seventy-one comments during the 30-day comment period, of which 64 supported the action, four opposed the action, two supported the action in a limited fashion, and one did not indicate a position to the action. Comments came from tuna industry organizations, environmental organizations, members of the public, and the Government of Mexico.

Many comments were broad statements or outside the scope of the rule, and do not require a response, such as: (1) strong support for the proposed rule to include observer statements, where applicable; (2) the proposed rule will improve verification efforts; (3) the proposed rule is likely to cause confusion among consumers; (4) the proposed rule does not go far enough to protect dolphins; (5) the purpose and objective of U.S. dolphin-safe rules are not a guarantee of zero dolphin mortality, but as a measure to eliminate the intentional chase and encirclement of dolphin and discourage forms of fishing that have an adverse effect on dolphin populations; (6) the proposed rule is a good example of governmental overreach and overregulation; (7) the DPCIA gives the Secretary of Commerce broad authority to implement the proposed actions; (8) the dolphin-safe labeling scheme can be brought in line with consumer expectations only through legislation; (9) the proposed rule should impose new requirements

only if commensurate with the incidence of interactions with dolphins; (10) the proposed rule puts the cost of keeping dolphin-safe tuna separate from non-dolphin-safe tuna on distributors and merchants rather than on fishermen; (11) fines imposed under Section 5 of the Federal Trade Commission Act may not be enough to deter fraud; (12) Congress and not NOAA must address discrimination against tuna labeled dolphin-safe pursuant to the Agreement on the International Dolphin Conservation Program; (13) the proposed rule will not create a sustainable, ecosystem-safe approach to fishing for tuna; (14) additional regulations will help provide greater protections for dolphins in all fisheries during the catching of tuna and safeguard the integrity of the dolphin-safe label for the benefit of consumers; and (15) the United States Government might be tempted, especially when subjected to lobbying, to pressure foreign observer programs to seek NOAA's determination that the program is "qualified and authorized." Specific pertinent comments are summarized and responded to below.

#### Comments on Captain and Observer Certifications

Comment 1: The facts do not warrant requiring captains of vessels outside the ETP to certify the absence of mortality or serious injury because dolphin interactions in fisheries outside the ETP are negligible and incidental.

Response: NMFS disagrees. Regulations at 50 CFR 216.91(a)(2)(ii) already require a written statement executed by the captain of a purse seine vessel fishing outside the ETP to certify that no purse seine was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna was harvested. This rule also requires a captain's statement certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught using any fishing gear type in all fishing locations (a broader application than the current regulations that apply this standard only to large purse seine vessels

fishing in the ETP). The broader application is authorized under DPCIA sections 1385(d)(3)(C)(i) and 1385(f). Section 1385(d)(3)(C)(i) prohibits labeling a tuna product with any label or mark that refers to dolphins, porpoises, or marine mammals (other than the official mark) unless no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. Notably, almost all tuna in the United States is labeled using alternative marks. Exercising its broad regulatory authority under Section 1385 paragraph (f) of the DPCIA, NMFS has long applied the standard applicable to any alternative mark to the use of the official mark. Therefore, these regulations require that all captains certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, regardless of the gear type or fishing location, regardless of the mark used.

Comment 2: Several commenters asserted that a captain's self-certification is unreliable and unverifiable.

Response: The DPCIA itself expressly mandates the use of written statements by captains to attest that either no purse seine net was intentionally deployed on or used to encircle dolphins during the trip in which the tuna were caught, and (in some cases) to also attest that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. The tracking and verification system does not rely solely on certifications by fishing captains. As described elsewhere in this rule, certifications by an onboard observer or by an authorized representative of the nation participating in a qualified and authorized observer program are also used to help verify the dolphin-safe status of the harvested tuna for some fishing trips. The tracking and verification system also includes recordkeeping and inspections at processing facilities and certifications by importers and exporters.

Comment 3: The rule should be clarified so that the regulated public understands that if an observer is not qualified and authorized in a fishery, no observer certification would be required to use a dolphin-safe label.

Response: The rule is already clear that observer certifications are required only in some fisheries, and not all, as described in the preamble of the proposed rule.

Comment 4: Several commenters asserted that fishery observers other than those working on large purse seine vessels in the ETP are not trained to identify dolphins and are not trained to determine whether a set was intentionally set on dolphins or not. Therefore, they are not qualified to make the required certifications. NMFS needs to make certain that any international observer program meets the same standards as U.S. observer programs by providing clear guidance during pertinent training.

Response: This rule expands the observer requirements, to certain fisheries outside the ETP, but only if NOAA determines that the participating observers are qualified, and are authorized by the applicable observer authority to make the certifications. NMFS anticipates that qualified observers will undergo training programs that include such topics as recognizing an intentional set, dolphin species identification, and criteria for determining a serious injury. NMFS acknowledges that these skills are complex, and that many existing observer programs give little attention to marine mammal interactions. NMFS will determine an observer program is qualified and authorized only after rigorous scrutiny of the program's training programs, and a finding that the observers are able to make the requisite determinations. When such a determination is made, the rationale for the determination will be explained in a public notice published in the Federal Register.

Comment 5: The rule would extend the requirement for an observer certification (if determined to be qualified and authorized), even though NMFS has never determined that scientific evidence exists of a regular and significant association between dolphins and tuna in the western Pacific Ocean purse seine fishery. The DPCIA requires this determination as the basis for expanding the observer requirement. Without such a determination, the DPCIA requires that the captain certify only that no purse seine net was intentionally deployed on or used to encircle dolphins (16 U.S.C. 1385 (d)(1)(B)(ii)). NMFS' regulatory authority in the DPCIA at 16 U.S.C. 1385(f) is not broad authority, but is limited to regulations "for tracking purposes." Claiming the need to ensure "consistency" or to seek conformity with WTO obligations does not provide additional regulatory authority.

Response: NMFS agrees with the commenter that, to date, there has not been adequate information to make a determination of such a "regular and significant" association in the Western Pacific purse seine fishery. However, NMFS disagrees with the commenter that NMFS' authority in the DPCIA is limited to "tracking purposes." Under 16 U.S.C. 1385(f), NOAA has broad authority to establish an effective tracking and verification program, as well as authority to make adjustments, as may be appropriate, that meets or exceeds the minimum requirements referenced in the statute. NMFS believes requiring a certification from a captain and a qualified and authorized observer on board the vessel (if any), or from an authorized representative of the nation participating in a qualified and authorized observer program (if any), that no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and that no dolphins were killed or seriously injured in the sets in which the tuna were caught, is within the authority of the Secretary to meet or exceed the minimum requirements for the effective tracking of tuna labeled under 16 U.S.C. 1385(d). This potential expansion of the requirements of

certifications from an observer, or from an authorized government representative associated with an observer, which will be implemented only if the “qualified and authorized” criteria are met, is intended to help verify the required captain’s certificates. In addition, 16 U.S.C. 1385(f) gives NMFS broad authority to issue regulations to implement the DPCIA generally: “The Secretary, in consultation with the Secretary of the Treasury, shall issue regulations to implement the Act, including regulations to establish a domestic tracking and verification program . . . .” (emphasis added). The agency’s regulatory authority under the DCPIA is not limited to matters of domestic tracking and verification, but “includes” those matters as a subset of broader authority. The final paragraph of 16 U.S.C. 1385(f) specifically authorizes NMFS to adjust the regulations to implement an international tracking and verification program. The new observer requirements, if imposed after the requisite determinations of “qualified and authorized,” would be part of the U.S. domestic tracking program and could be part of an international program. Regulations governing both are authorized under section 1385(f). This regulatory authority exists, regardless of whether the motivation for asserting this authority was the need to harmonize the tracking and verification program with United States obligations to the WTO. Finally, aside from meeting international WTO obligations, this rule also ensures that consumers are better informed about whether the “tuna they purchase is falsely labeled as to the effect of the harvesting on dolphins,” one of the primary objectives of the DPCIA (Congressional Finding for the DPCIA, 16 U.S.C. 1385(b)(3)).

#### Comments on Tuna Separation

Comment 6: The new requirements to keep dolphin-safe and non-dolphin-safe tuna separate would require double the space and double the containers.

Response: NMFS disagrees. The new requirements will only affect operations in which dolphin-safe and non-dolphin-safe tuna are harvested on the same trip or otherwise stored together, which is probably unusual. Furthermore, the rules being revised required separation (see 50 CFR 216.93(d)(4)). Where separation is required under this rule, fishing vessels or transportation and storage entities are allowed to use netting, other material, or separate storage areas to achieve separation. This change is not expected to require double the space or double the containers.

Comment 7: The rule falls short of ensuring consumers that non-dolphin-safe tuna will be verifiably segregated from dolphin-safe tuna and not be mixed through storage and processing, and therefore will affect the ability of the United States Government to audit and verify a captain's statement of no dolphin mortality or serious injury.

Response: NMFS disagrees. Regulations at 50 CFR 216.93(c)(4) and (d)(4) already require vessels to segregate non-dolphin-tuna and dolphin-safe tuna. Additionally, 50 CFR 216.93(f)(3) gives the Administrator, Southwest Region, timely access to all pertinent records and facilities to allow for audits and spot-checks on caught, landed, stored, and processed tuna. NMFS believes the current system is already working well and the increased authorities and requirements of this rule will fortify the verification program. In addition, the new observer requirements will afford NMFS an additional tool in verifying the dolphin-safe status of the harvested tuna.

Comment 8: The use of an entire well for separating one set of non-dolphin-safe tuna on U.S. purse seine vessels is inefficient. Webbing or other material should be considered as an acceptable method to separate non-dolphin-safe tuna from dolphin-safe tuna because it would be an effective, creative compromise without requiring drastic changes to a fishing vessel.

Response: The majority of tuna labeled dolphin-safe that is harvested by U.S. purse seine vessels comes from vessels that have more than 10 storage wells. NMFS believes using a separate well to store non-dolphin-safe tuna would not be inefficient, and would not require changes on most fishing vessels. By designating a particular well on a fishing trip as containing non-dolphin-safe tuna, a captain would aid fishery inspectors in verifying the location of non-dolphin-safe tuna on board a vessel, and would also facilitate tuna canneries and the NMFS Tuna Tracking and Verification Program to track, verify, and audit performance. The monitoring and tracking of tuna that is not dolphin-safe in separate wells is supported by the language of the DPCIA that requires the DPCIA implementing regulations to include, among other things, “[t]he designation of well location, procedures for sealing holds, procedures for monitoring and certifying both above and below deck . . . .” (16 U.S.C. 1385(f)(3)).

#### Comments on Collections of Information Under the Paperwork Reduction Act

Comment 9: The expansion of the certification requirements to non-purse seine captains and the new requirements for statements by observers, will result in a significant increase in paperwork and associated tracking, reporting and auditing for the seafood supply chain and for the United States Government. Measures to reduce paperwork, such as consolidating required NMFS forms and allowing cell phone photos of captain and observer statements, should be considered.

Response: While current regulations require the submission of a captain’s statement for purse seine vessels outside of the ETP, a significant number of FCOs for tuna product importations already include statements submitted by captains of non-purse seine vessels on a voluntary basis. Thus, while this rule would increase paperwork submission requirements for some segments of industry, and increase paperwork handling for the U.S. Government, the actual

increase in the number of documents received by the U.S. Government will be significantly less when taking into consideration the number of documents currently being voluntarily submitted. Additionally, NMFS is a Participating Governmental Agency working with U.S. Customs and Border Protection (CBP) in the International Trade Data System (ITDS) project. See: <http://www.itds.gov/>. The Document Imaging System, a part of ITDS expected to be tested in the near future through a pilot project, would allow customs brokers to send a version of the FCO and associated certifications in portable document format (PDF) to CBP. The NMFS copy would then be retrieved by or forwarded to NMFS, therefore eliminating the need for brokers to submit multiple copies to different U.S. agencies. If implemented, NMFS expects that the Document Imaging System will result in a significant reduction of paperwork for both the seafood supply chain and the U.S. Government, as well as allowing for more efficient tracking and auditing.

Comment 10: The rule will require the industry to make outreach efforts to educate thousands of longliners of U.S. dolphin-safe rules in multiple languages. Adequate time will need to be allotted to the industry to reach back into its supply chain and implement a new system to collect captain statements.

Response: The effective date of this regulation is July 13, 2013, and the rule is mandatory as of that date. As explained below, the United States has an international obligation to make this rule effective by July 13, 2013. The rule will require certification by the captain and, if applicable, by a qualified and authorized observer or an authorized representative of a nation participating in the observer program for all tuna labeled dolphin-safe that is harvested on fishing trips that begin on or after July 13, 2013. NMFS has determined that a period for education and outreach by NMFS and industry is appropriate. NMFS believes that mid-July 2013 through January 1, 2014 is a sufficient timeframe for the industry to become familiar with, and fully

transition to, the new requirements under the rule. During this period, NMFS will continue to educate the industry on NMFS' compliance and enforcement procedures so that fishermen, processors, importers, brokers, and others responsible for the paperwork required by this rule have clear expectations as to the requirements of this rule.

#### Comments on Additional Topics

Comment 11: Is there a defined process for determining "regular and significant," and has the Department of Commerce defined it?

Response: The "regular and significant" standard has been part of the DPCIA and its implementing regulations for many years. This rule is not intended to address or revise that standard. The DPCIA directs the Secretary to make a determination or identification of a fishery if there is a regular and significant association between dolphins and tuna (similar to the association between dolphins and tuna in the ETP), or if a fishery has regular and significant mortality or serious injury to dolphins. NMFS has no credible reports of any fishery in the world, other than the tuna purse seine fishery in the ETP, where dolphins are systematically and routinely chased and encircled each year in significant numbers by tuna fishing vessels, or any tuna fishery that has regular and significant mortality or serious injury of dolphins. Therefore, the Secretary has not made a determination that another fishery has either a regular and significant association between dolphins and tuna or regular and significant mortality or serious injury of dolphins.

Comment 12: The rule does not fully implement the letter and spirit of the 1997 International Dolphin Conservation Program Act, which requires that tuna bearing the dolphin-safe label must be independently certified as being caught without harm to dolphins.

Response: NMFS disagrees. This final rule fully implements the letter and spirit of the DPCIA in several ways. It modifies the requirements for the certifications that must accompany the FCO (i.e. the certification must include that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught); changes storage requirements related to dolphin-safe and non-dolphin-safe tuna on board fishing vessels; modifies the reporting requirements associated with tracking domestic tuna canning and processing operations; and creates other new requirements for processors, other than tuna canners, of tuna product labeled dolphin-safe. NMFS welcomes specific suggestions about how to better implement the letter and spirit of the statute. NMFS is not certain what the commenter means by “independent certification.” The DPCIA requires a rather complex series of measures to certify the dolphin-safe status of labeled tuna product, but the statute does not specifically require that the certification be made by an independent party.

Comment 13: The rule would cause economic harm to the U.S. tuna purse seine fleet due to reduced value (or zero value) of non-dolphin-safe tuna.

Response: Tuna not eligible to be labeled dolphin-safe has value and is currently sold in stores throughout the United States. Almost all tuna sold in the United States is labeled dolphin-safe, and is subject to the standard under 16 U.S.C. 1385(d)(3)(C)(i) (i.e. no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught). This rule merely requires new paperwork and separation procedures to support the assertion that tuna complies with the standard. Furthermore, NMFS received comments from representatives of the U.S tuna purse seine fleet acknowledging that dolphin mortalities or serious injuries to dolphins were rare events.

Comment 14: NMFS should ensure observers are able to talk with and provide information to outside non-governmental groups.

Response: The issue is beyond the scope of this rule.

Comment 15: NOAA should create a separate "international dolphin-safe label" that would allow customers to be aware that the tuna comes from international sources that are ideally subjected to the same standards as U.S. fishermen, but due to oversight issues these standards cannot be guaranteed.

Response: The issue is beyond the scope of this rule.

Comment 16: The rule would perpetuate current deceptive practices in the U.S. market by allowing tuna products to be labeled as dolphin-safe even if dolphins and other marine mammals were killed or seriously injured while the tuna was being harvested.

Response: NMFS disagrees. This rule explicitly requires documentation that any tuna product labeled dolphin-safe contains no tuna harvested during a set or other gear deployment in which dolphins were killed or seriously injured.

Comment 17: The terms "dolphin," "longline set," and "troll (jig) set" need to be defined.

Response: While the subject matter is relevant to the general topic of the rule, defining "dolphin," "longline set," and "troll (jig) set" is beyond the scope of this rule. However, NMFS will consider a future rulemaking to define these terms.

Comment 18: Several commenters gave views as to whether the rule would satisfy U.S. obligations to the WTO. Some commenters believed the rule would satisfy U.S. obligations and others either stated that it would not satisfy U.S. obligations or expressed skepticism about whether it would.

Response: NMFS, in consultation with the Office of the United States Trade Representative, has determined that this rule will bring the dolphin-safe labeling requirements into compliance with the WTO DSB's recommendations and rulings.

#### Changes from the Proposed Rule

In response to public comments, there will be a period of education and outreach, beginning on the effective date through January 1, 2014, during which the industry will be educated on how NMFS will enforce the rule. The effective date of the rule is July 13, 2013, and the rule will apply to fishing trips that begins on or after this date. The effective date has been added to § 216.91(a)(2)(ii), (a)(2)(iii), (a)(4), (a)(5) and to § 216.93(c)(2) and (3). Regulatory text at § 216.91(a)(2)(ii) and (iii) has been added and paragraphs have been redesignated in order to keep existing requirements for tuna harvested on fishing trips that began before July 13, 2013 (i.e. the effective date of this final rule). In this final rule, NMFS is publishing 50 CFR 216.93 in its entirety (including provisions that were not changed from the proposed rule) for the convenience of readers and to improve clarity.

#### Classification

The NMFS Assistant Administrator has determined that this final rule is consistent with the DPCIA and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not

repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule contains two collection-of-information requirements subject to the Paperwork Reduction Act (PRA) and which have been approved by the Office of Management and Budget (OMB) under control numbers 0648-0335 and 0648-0387. Public reporting burden for OMB control number 0648-0335, titled “Fisheries Certificate of Origin,” is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Public reporting burden for OMB control number 0648-0387, titled “International Dolphin Conservation Program,” is estimated to average 65 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspects of these data collections, including suggestions for reducing the burden, to NMFS Southwest Region (see ADDRESSES) and by e-mail to [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov), or fax to 202-395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

The effective date of July 13, 2013, is a product of an agreement between the United States and Mexico that the United States will bring the U.S. measures into conformity with the WTO DSB’s recommendations and ruling within 13 months of the DSB’s adoption of the WTO Appellate Body report, and the WTO panel report as modified by the Appellate Body report.

Accordingly, this rule is a military or foreign affair function of the United States, and the 30-day delay-in-effectiveness date requirement of the Administrative Procedure Act is inapplicable under 5 U.S.C. 553(a)(1).

List of Subjects in 50 CFR Part 216

Commercial fisheries, Food labeling, Imports, Marine mammals, Reporting and recordkeeping requirements, Seafood.

Dated: July 3, 2013.

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Alan D. Risenhoover, Director, Office of Sustainable Fisheries,  
performing the functions and duties of the Deputy Assistant Administrator  
for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216 is amended as follows:

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

1. The authority citation for 50 CFR part 216, subpart H, continues to read as follows:

Authority: 16 U.S.C. 1385

2. In § 216.91, revise paragraphs (a)(2)(ii) and (a)(4), and add paragraphs (a)(2)(iii) and (a)(5) to read as follows:

§ 216.91 Dolphin-safe labeling standards.

(a) \* \* \*

(2) \* \* \*

(ii) In any other fishery on a fishing trip that began before July 13, 2013 unless the products are accompanied as described in § 216.93(d), (e), or (f), as appropriate, by a written statement executed by the Captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna was harvested;

(iii) In any other fishery on a fishing trip that began on or after July 13, 2013 unless the products are accompanied as described in § 216.93(d), (e), or (f), as appropriate, by:

(A) A written statement executed by the Captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught, and that no dolphins were killed or seriously injured in the sets in which the tuna were caught; and

(B) Where the Assistant Administrator has determined that observers participating in a national or international observer program are qualified and authorized to certify that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught, and that no dolphins were killed or seriously injured in the sets in which the tuna were caught, and where such an observer is on board the vessel, a written statement executed by the observer, or by an authorized representative of a nation participating in the observer program based on information from the observer, certifying that no purse seine

net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught and that no dolphins were killed or seriously injured in the sets in which the tuna were caught. Any determination by the Assistant Administrator shall be announced in a notice published in the Federal Register. Determinations under this subparagraph will also be publicized on the website of the NMFS Southwest Region (<http://swr.nmfs.noaa.gov/>).

\* \* \* \* \*

(4) Other fisheries. By a vessel on a fishing trip that began on or after July 13, 2013 in a fishery other than one described in paragraphs (a)(1) through (3) of this section unless such product is accompanied as described in section 216.93(d), (e), or (f), as appropriate, by:

(i) A written statement executed by the Captain of the vessel certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught;

(ii) Where the Assistant Administrator has determined that observers participating in a national or international observer program are qualified and authorized to certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, and where such an observer is on board the vessel, a written statement executed by the observer, or by an authorized representative of a nation participating in the observer program based on information from the observer, certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. Any determination by the Assistant Administrator shall be announced in a notice published in the Federal Register. Determinations under this subparagraph will also be publicized on the website of the NMFS Southwest Region (<http://swr.nmfs.noaa.gov/>); and

(iii) In any other fishery that is identified by the Assistant Administrator as having a regular and significant mortality or serious injury of dolphins, a written statement executed by an observer participating in a national or international program acceptable to the Assistant Administrator, that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Assistant Administrator determines that such an observer statement is necessary.

(5) All Fisheries. On a fishing trip that began on or after July 13, 2013 during which any dolphin was killed or seriously injured, unless the tuna labeled dolphin-safe was caught in a set or other gear deployment was stored separately from tuna caught in non-dolphin-safe sets or other gear deployments by the use of netting, other material, or separate storage areas from the time of capture through unloading. If a purse seine vessel has more than one well used to store tuna, all tuna inside a well shall be considered non-dolphin-safe, if at any time non-dolphin-safe tuna is loaded into the well, regardless of the use of netting or other material inside the well.

\* \* \* \* \*

3. Section 216.93 is revised to read as follows:

§ 216.93 Tracking and verification program.

The Administrator, Southwest Region, has established a national tracking and verification program to accurately document the dolphin-safe condition of tuna, under the standards set forth in §§ 216.91 and 216.92. The tracking program includes procedures and reports for use when importing tuna into the United States and during U.S. fishing, processing, and marketing in the United States and abroad. Verification of tracking system operations is attained through the establishment of audit and document review requirements. The tracking program is consistent

with the international tuna tracking and verification program adopted by the Parties to the Agreement on the IDCP.

(a) Tuna tracking forms. Whenever a U.S. flag tuna purse seine vessel of greater than 400 st (362.8 mt) carrying capacity fishes in the ETP, IDCP approved Tuna Tracking Forms (TTFs), bearing a unique number assigned to that trip, are used by the observer to record every set made during that trip. One TTF is used to record dolphin-safe sets and a second TTF is used to record non-dolphin-safe sets. The information entered on the TTFs following each set includes the date, well number, weights by species composition, estimated tons loaded, and additional notes, if any. The observer and the vessel engineer initial the entry as soon as possible following each set, and the vessel captain and observer review and sign both TTFs at the end of the fishing trip certifying that the information on the forms is accurate. TTFs are confidential official documents of the IDCP, consistent with Article XVIII of the Agreement on the IDCP, and the Agreement on the IDCP Rules of Confidentiality.

(b) Dolphin-Safe Certification. Upon request, the Office of the Administrator, Southwest Region, will provide written certification that tuna harvested by U.S. purse seine vessels greater than 400 st (362.8 mt) carrying capacity is dolphin-safe, but only if NMFS' review of the TTFs for the subject trip shows that the tuna for which the certification is requested is dolphin-safe under the requirements of the Agreement on the IDCP and U.S. law.

(c) Tracking fishing operations. (1) ETP large purse seine vessel. In the ETP by a purse seine vessel of greater than 400 st (362.8 mt) carrying capacity:

(i) During fishing trips, any part of which included fishing in the ETP, by purse seine vessels greater than 400 st (362.8 mt) carrying capacity, tuna caught in sets designated as dolphin-safe by the vessel observer must be stored separately from tuna caught in non-dolphin-

safe sets from the time of capture through unloading. Vessel personnel will decide into which wells tuna will be loaded. The observer will initially designate whether each set is dolphin-safe or not, based on his/her observation of the set. The observer will initially identify a vessel fish well as dolphin-safe if the first tuna loaded into the well during a trip was captured in a set in which no dolphin died or was seriously injured. The observer will initially identify a vessel fish well as non-dolphin-safe if the first tuna loaded into the well during a trip was captured in a set in which a dolphin died or was seriously injured. Any tuna loaded into a well previously designated non-dolphin-safe is considered non-dolphin-safe tuna. The observer will change the designation of a dolphin-safe well to non-dolphin-safe if any tuna are loaded into the well that were captured in a set in which a dolphin died or was seriously injured.

(ii) The captain, managing owner, or vessel agent of a U.S. purse seine vessel greater than 400 st (362.8 mt) returning to port from a trip, any part of which included fishing in the ETP, must provide at least 48 hours' notice of the vessel's intended place of landing, arrival time, and schedule of unloading to the Administrator, Southwest Region.

(iii) If the trip terminates when the vessel enters port to unload part or all of its catch, new TTFs will be assigned to the new trip, and any information concerning tuna retained on the vessel will be recorded as the first entry on the TTFs for the new trip. If the trip is not terminated following a partial unloading, the vessel will retain the original TTFs and submit a copy of those TTFs to the Administrator, Southwest Region, within 5 working days. In either case, the species and amount unloaded will be noted on the respective originals.

(iv) Tuna offloaded to trucks, storage facilities, or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe designation of the tuna as it left the fishing vessel.

(v) The handling of TTFs and the tracking and verification of tuna caught in the Convention Area by a U.S. purse seine vessel greater than 400 st (362.8 mt) carrying capacity shall be conducted consistent with the international tuna tracking and verification program adopted by the Parties to the Agreement on the IDCP.

(2) Purse seine vessel other than ETP large purse seine vessel. This paragraph (c)(2) applies to tuna product labeled dolphin-safe that includes tuna harvested on a fishing trip that began on or after July 13, 2013, in the ETP by a purse seine vessel of 400 st (362.8 mt) or less carrying capacity or by a purse seine vessel outside the ETP of any carrying capacity.

(i) Tuna caught in sets designated as dolphin-safe must be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading. Tuna caught in sets where a dolphin died or was seriously injured must be stored in a well designated as non-dolphin-safe by the captain or, where applicable, by a qualified and authorized observer under § 216.91. Any tuna loaded into a well previously designated non-dolphin-safe is considered non-dolphin-safe tuna. The captain or, where applicable, a qualified and authorized observer under § 216.91, will change the designation of a dolphin-safe well to non-dolphin-safe if any tuna are loaded into the well that were captured in a set in which a dolphin died or was seriously injured. If a purse seine vessel has only one well used to store tuna, dolphin-safe tuna must be kept physically separate from non-dolphin-safe tuna by using netting or other material. If a purse seine vessel has more than one well used to store tuna, all tuna inside a well shall be considered non-dolphin-safe, if at any time non-dolphin-safe tuna is loaded into the well, regardless of the use of netting or other material inside the well.

(ii) Tuna offloaded to trucks, storage facilities, or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe designation of the tuna as it left the fishing vessel.

(3) Other vessels. This paragraph (c)(3) applies to tuna product labeled dolphin-safe that includes tuna harvested by a vessel on a fishing trip that began on or after July 13, 2013 other than ones described in paragraphs (c)(1) or (2) of this section:

(i) Tuna caught in sets or other gear deployments designated as dolphin-safe must be stored separately from tuna caught in non-dolphin-safe sets or other gear deployments from the time of capture through unloading. Dolphin-safe tuna must be kept physically separate from non-dolphin-safe tuna by using netting, other material, or separate storage areas. The captain or, where applicable, a qualified and authorized observer under § 216.91, must designate the storage areas for dolphin-safe and non-dolphin-safe tuna.

(ii) Tuna offloaded to trucks, storage facilities, or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe designation of the tuna as it left the fishing vessel.

(d) Tracking cannery operations. (1) Whenever a U.S. tuna canning company in the 50 states, Puerto Rico, or American Samoa receives a domestic or imported shipment of tuna for processing, a NMFS representative may be present to monitor delivery and verify that dolphin-safe and non-dolphin-safe tuna are clearly identified and remain segregated. Such inspections may be scheduled or unscheduled, and canners must allow the NMFS representative access to all areas and records.

(2) Tuna processors must submit a report to the Administrator, Southwest Region, of all tuna received at their processing facilities in each calendar month whether or not the tuna is

actually canned or stored during that month. Monthly cannery receipt reports must be submitted electronically or by mail before the last day of the month following the month being reported.

Monthly reports must contain the following information:

(i) Domestic receipts: whether the tuna is eligible to be labeled dolphin-safe under § 216.91, species, condition (round, loin, dressed, gilled and gutted, other), weight in short tons to the fourth decimal, ocean area of capture (ETP, western Pacific, Indian, eastern and western Atlantic, other), catcher vessel, gear type, trip dates, carrier name, unloading dates, and location of unloading. Where the processor indicates the tuna is eligible to be labeled dolphin-safe under § 216.91, it must enclose the certifications required by that section.

(ii) Import receipts: In addition to the information required in paragraph (d)(2)(i) of this section, a copy of the FCO for each imported receipt must be provided.

(3) Tuna processors must report on a monthly basis the amounts of ETP-caught tuna that were immediately utilized upon receipt or removed from cold storage. This report may be submitted in conjunction with the monthly report required in paragraph (d)(2) of this section.

This report must contain:

(i) The date of removal from cold storage or disposition;

(ii) Storage container or lot identifier number(s) and dolphin-safe or non-dolphin-safe designation of each container or lot; and

(iii) Details of the disposition of fish (for example, canning, sale, rejection, etc.).

(4) During canning activities, non-dolphin-safe tuna may not be mixed in any manner or at any time during processing with any dolphin-safe tuna or tuna products and may not share the same storage containers, cookers, conveyers, tables, or other canning and labeling machinery.

(e) Tracking processor operations other than cannery operations. U.S. tuna processors other than cannery operations engaged in processing tuna products, including frozen, dried, or smoked tuna products, must submit a report to the Administrator, Southwest Region that includes the information set out in § 216.93(d)(2) and (3) on a monthly basis for all tuna received at their processing facilities that will be included in any tuna product labeled dolphin-safe.

(f) Tracking imports. All tuna products, except fresh tuna, that are imported into the United States must be accompanied as described in § 216.24(f)(3) by a properly certified FCO as required by § 216.24(f)(2). For tuna tracking purposes, copies of FCOs and associated certifications must be submitted by the importer of record to the Administrator, Southwest Region, within 10 calendar days of the shipment's entry into the commerce of the United States as required by § 216.24(f)(3)(ii).

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

(2) Record submission. Within 10 calendar days of receiving a shipment of tuna or tuna products, any exporter, transshipper, importer, processor, or wholesaler/distributor of tuna or tuna products must submit to the Administrator, Southwest Region, all corresponding FCOs and required certifications for those tuna or tuna products.

(3) Audits and spot checks. Upon request of the Administrator, Southwest Region, any exporter, transshipper, importer, processor, or wholesaler/distributor of tuna or tuna products

must provide the Administrator, Southwest Region, timely access to all pertinent records and facilities to allow for audits and spot-checks on caught, landed, stored, and processed tuna.

(h) Confidentiality of proprietary information. Information submitted to the Assistant Administrator under this section will be treated as confidential in accordance with NOAA Administrative Order 216-100 "Protection of Confidential Fisheries Statistics."

[FR Doc. 2013-16508 Filed 07/08/2013 at 8:45 am; Publication Date: 07/09/2013]