



# MARINE MAMMAL COMMISSION

14 June 2013

Rodney R. McInnis  
Regional Administrator, Southwest Region  
National Marine Fisheries Service  
501 West Ocean Blvd., Suite 4200  
Long Beach, CA 90802

Dear Mr. McInnis:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's proposed rule to amend the documentation requirements for tuna products labeled as being dolphin safe (78 FR 20604). The Dolphin Protection Consumer Information Act (16 U.S.C. § 1385) establishes criteria for labeling tuna exported from or offered for sale in the United States as "dolphin safe" and forms the basis for these regulations.

## **RECOMMENDATION**

The Marine Mammal Commission recommends that the National Marine Fisheries Service adopt the proposed amendments to its regulations at 50 C.F.R. § 216.91 and § 216.93. The Marine Mammal Commission further recommends that the National Marine Fisheries Service revisit the question of what sizes and types of vessels operating in the eastern tropical Pacific are capable of setting on dolphins to verify that only those vessels incapable of making dolphin sets are exempted from the observer requirement.

## **RATIONALE**

In enacting the Dolphin Protection Consumer Information Act, Congress found 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." Toward this end, the Act specifies labeling standards and directs the Secretary of Commerce, in consultation with the Secretary of the Treasury, to issue regulations to establish a tracking and verification program that provides for the effective tracking of tuna labeled as dolphin safe.

Congress was particularly concerned about the killing of dolphins and other marine mammals in the eastern tropical Pacific purse seine tuna fishery and in high seas driftnet fishing. As such, it directed that tuna cannot be labeled as being dolphin safe if it is harvested on the high seas by a vessel engaged in driftnet fishing. Those fishing for tuna in the eastern tropical Pacific Ocean using a large purse seine vessel must submit documentation that no tuna were harvested by deploying a purse seine net intentionally to encircle dolphins, and that no dolphins were killed or

seriously injured during the entire fishing trip for their tuna to qualify as dolphin safe.<sup>1</sup> Similar requirements apply to purse seine vessels operating in other areas if the Service has determined that the fishery has a regular and significant mortality or serious injury of dolphins.

The Dolphin Protection Consumer Information Act also covers tuna harvested in other areas or in other ways. However, because those fisheries are less likely to kill or seriously injure dolphins and other marine mammals, the documentation requirements are not as strict. In any case, however, tuna can only be labeled as being dolphin safe if no dolphins were killed or seriously injured in the sets or other gear deployments in which the fish were caught. However, as noted by the Service, “current regulations do not require a captain’s or observer’s statement to document that no such mortality or injury has occurred.”<sup>2</sup> The proposed rule seeks to strengthen the reporting and documentation requirements for these other fisheries.

For purse seine vessels operating outside the eastern tropical Pacific, the proposed rule would require a written statement executed by the captain certifying that no sets were made on dolphins for the entirety of the trip on which the tuna were harvested and that no dolphins were killed or seriously injured in the sets in which the tuna were caught. Certification from qualified observers also would be required where such programs are in place, but there would be no requirement to establish an observer program if one does not already exist.

Other fisheries, including smaller vessels (i.e., those < 400 st carrying capacity) fishing in the eastern tropical Pacific, and those using methods other than purse seining to catch tuna, also would be required to submit a written statement from 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. Again, documentation from observers would be required in those instances when observer programs have been established and an observer is on board the vessel. However, the establishment of an acceptable observer program and documentation from observers would be required only if the Service determines that the fishery is having a regular and significant mortality or serious injury of dolphins.

For the most part, the Marine Mammal Commission agrees with these proposals and recommends that the National Marine Fisheries Service adopt the proposed changes to 50 C.F.R. § 216.91. Requiring certification from vessel captains in all instances that no dolphins were killed or seriously injured in the fishing operations and, as applicable, that no dolphin sets were made on a particular fishing trip should strengthen compliance with and accountability under the Dolphin Protection Consumer Information Act. The Commission concurs that verification from observers should be required when such programs have been established and observers are in place. Although it would be ideal if documentation from observers were available in most instances, the Commission appreciates that the costs associated with establishing such programs may not be warranted for fisheries with a very low probability of killing or injuring dolphins or no history of taking significant numbers of dolphins. The Commission agrees with the Service that it should be sufficient to require

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<sup>1</sup> This is the applicable standard under 16 U.S.C. § 1385(h), which was contingent on research into the effects of chase and encirclement on depleted dolphin stocks.

<sup>2</sup> Existing regulations at 50 C.F.R. § 216.91(a)(4) require such statements for other fisheries identified as having a regular or significant mortality or serious injury of dolphins, but currently no fisheries have been so identified.

the placement of observers only in those instances when the Service has determined that the fishery has a regular and significant mortality or serious injury of dolphins, provided that the Service exercises due diligence to identify those fisheries and gear types where the taking of dolphins may be a problem.<sup>3</sup>

The Dolphin Protection Consumer Information Act differentiates between large purse seine vessels operating in the eastern tropical Pacific and those of a type and size not capable of deploying its nets to encircle dolphins. This distinction makes sense, and the Commission concurs with the Service's proposal not to require an observer statement from all vessels operating in the eastern tropical Pacific for the tuna to be considered dolphin safe. Nevertheless, the Commission is concerned that some vessels currently exempted from the observer requirement may be capable of setting on dolphins. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service revisit the question to verify that only those vessels incapable of making dolphin sets are exempted. These regulations should be amended, as necessary, to reflect those findings. Further in this regard, the Commission calls your attention to the conference agreement reflected in the Consolidated Appropriations Act, 2005 (Pub Law 108-447) that directed the Service "to dedicate funding and efforts on revising downward its definition of a vessel that is not capable of setting on or encircling dolphins to reflect the fact that vessels smaller than 400 short tons are known to engage in this practice." Although the Service directed substantial attention to addressing this question, including examining whether the species and size composition of a vessel's catch might be a reliable indicator of the type of fishing it engaged in, the Commission is not aware that the Service ever completed its investigation.

The Service also is proposing amendments to its regulations at 50 C.F.R. § 216.93 that govern its tuna tracking and verification program. These proposed amendments would strengthen the applicable requirements to help ensure that dolphin safe and other tuna are properly identified and segregated. The Marine Mammal Commission recommends that these amendments be adopted as proposed.

Thank you for the opportunity to provide the views of the Marine Mammal Commission. Kindly contact me if you have questions or would like to discuss these recommendations and comments.

Sincerely,



Rebecca Lent, Ph.D.  
Executive Director

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<sup>3</sup> Adequate documentation presumably also would be needed to meet the requirements of section 101(a)(2) of the Marine Mammal Protection Act, which requires that the government of the nation from which fish or fish products are exported to the United States to provide reasonable proof of the effects of such fishing on marine mammals.