

SEC. 609. (a) The Secretary of State, in consultation with the Secretary of Commerce, shall, with respect to those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987--

- (1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles;
- (2) initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles;
- (3) encourage such other agreements to promote the purposes of this section with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;
- (4) initiate the amendment of any existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section; and
- (5) provide to the Congress by not later than one year after the date of enactment of this section--

(A) a list of each nation which conducts commercial shrimp fishing operations within the geographic range of distribution of such sea turtles;

(B) a list of each nation which conducts commercial shrimp fishing operations which may affect adversely such species of sea turtles; and

(C) a full report on--

(i) the results of his efforts under this section; and

(ii) the status of measures taken by each nation listed pursuant to paragraph (A) or (B) to protect and conserve such sea turtles.

(b)(1) IN GENERAL- The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

(2) CERTIFICATION PROCEDURE- The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that--

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or  
(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

[Federal Register: July 8, 1999 (Volume 64, Number 130)]  
[Notices]  
[Page 36946-36952]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr08jy99-125]

[[Page 36946]]

-----  
DEPARTMENT OF STATE

[Public Notice 3086]

Revised Guidelines for the Implementation of Section 609 of  
Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp  
Trawl Fishing Operations

SUMMARY: Section 609 of Public Law 101-162 ('`Section 609'') provides that shrimp harvested with technology that may adversely affect certain species of sea turtles may not be imported into the United States. This import prohibition does not apply if the Department of State certifies to Congress that the harvesting nation has a regulatory program and an incidental take rate comparable to that of the United States, or, alternatively, that the fishing environment in the harvesting nation does not pose a threat of the incidental taking of sea turtles. On March 25, 1999, in response to recommendations of the Dispute Settlement Body of the World Trade Organization, the Department of State published a notice in the Federal Register (Public Notice 3013, 64 FR 14481) proposing several revisions to the guidelines issued by the Department on August 28, 1998 for use in making such certifications. In that Federal Register Notice, the Department also requested public comment on certain aspects of those proposals, in accordance with provisions of the Uruguay Round Trade Agreements Act, 16 U.S.C. 3533. This notice reviews and responds to the comments received and provides the current version of the guidelines, which include a number of modifications made pursuant to those comments.

EFFECTIVE DATE: July 8, 1999.

FOR FURTHER INFORMATION CONTACT: Mr. David Hogan, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, Washington D.C., telephone number (202) 647-2335.

I. SUPPLEMENTARY INFORMATION:

A. Section 609

Section 609 provides that shrimp or products from shrimp harvested with commercial fishing technology that may adversely affect certain species of sea turtles protected under U.S. law and regulations may not be imported into the United States. This import prohibition does not apply if the President certifies to Congress by May 1, 1991, and

annually thereafter, that:

a. The government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

b. The average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

c. The particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

The President has delegated to the Secretary of State the authority to make certifications pursuant to Section 609 (Memorandum of December 19, 1990; 56 FR 357; January 4, 1991).

The relevant species of sea turtles are: Loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempfi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Eretmochelys imbricata*).

## B. Summary of Comments Received and Responses to Those Comments

The Department of State received 11 sets of comments on the Federal Register notice issued March 25, 1999. The Department received 5 sets of comments from governments (or government agencies): Agriculture, Fisheries and Forestry Australia; India; Malaysia; Thailand; and the U.S. Fish and Wildlife Service. The Department also received 6 sets of comments from non-governmental organizations and individuals: A coalition of environmental organizations, including the Caribbean Conservation Corporation, Center for Marine Conservation, Consumers Choice Council, Defenders of Wildlife, Earthjustice Legal Defense Fund, Humane Society of the United States, National Wildlife Federation, Natural Resources Defense Council, Sea Turtle Restoration Project, Sierra Club, World Wildlife Fund; Australian Prawn Promotion Association; Center for Marine Conservation; National Fisheries Institute; Sea Turtle Restoration Project; and J. Frazier, D. PhIL.

The Federal Register notice issued March 25, 1999 presented a review of the WTO decision and the steps being proposed and/or taken by the United States to implement that decision. However, the notice sought public comments on those aspects of the WTO decision that were intended to be addressed through the proposed changes to the guidelines, as set forth in Sections II and III of that notice.

Section II of the notice proposed an amendment to the list of exemptions for methods of harvesting shrimp that do not pose a threat to sea turtles and are thus outside the scope of any embargo under the Section 609. Section II also described in more specific terms the types of information that foreign governments may provide and the manner in which the Department will review such information in making determinations under Section 609.

Section III of the notice proposed certain changes to the criteria that the Department will use in making certification decisions, with the intent of introducing greater flexibility in considering the comparability of foreign programs and the U.S. program. Section III also laid out an elaborated ``timetable and procedures'' for certification decisions, including an expedited timetable to apply in 1999 only. The intent of these proposed changes is to increase the transparency and predictability of the certification process and to

afford foreign governments seeking certification a greater degree of due process.

The governments and organizations that submitted comments did not limit those comments to Sections II and III of the Federal Register notice. Instead, many of those comments responded to other parts of the notice, particularly to the current policy of permitting importation of shrimp harvested by vessels equipped with turtle excluder devices ('`TEDs'') in uncertified nations, for which the Department proposed no change.

The following material summarizes, and responds to, all comments received.

(1) General Comments: A number of comments received were general in nature and did not relate to any particular proposal for revision of the guidelines. Several comments simply praised the effort of the Department of State to comply with the WTO ruling. Three comments, however, took the position that, in order to comply with the WTO decision, the United States must lift the import prohibition required by Section 609 immediately and that mere revisions in the implementation of Section 609 are insufficient.

Response. The WTO decision did not require a change to Section 609 itself or require that the import prohibitions set forth in Section 609 be otherwise lifted across-the-board. Rather, the WTO decision found that several aspects of the implementation of Section 609, in their cumulative effect, amounted to a violation of the obligations of the United States under the WTO Agreement. The modifications to the guidelines set forth in this notice, together with the other measures described in the Federal Register notice issued March 25, 1999, are intended to address the rulings and

[[Page 36947]]

recommendations set forth in the WTO decision.

(2) Comments on Section II: With respect to the proposed amendment to the list of exemptions for harvesting methods that do not harm sea turtles, one comment simply supported the new wording. Another comment suggested that the conditions and criteria upon which determinations will be made under the proposed amendment should be clearly identified and that there should be a definite time-frame regarding publication and notification of the results of such determinations.

Response. The proposed amendment is designed to cover situations not presently known to the Department of State in which shrimp may be harvested in ways that do not adversely affect sea turtle species. As such, it is difficult to specify the conditions and criteria upon which such determinations will be made. Instead, in keeping with the spirit of the WTO decision, the intent is to provide for the flexibility necessary to assess each situation on its own merits, taking into account differences that may exist in the shrimp harvesting conditions in different nations. For similar reasons, it is hard to specify a single time-frame that would be appropriate for all such determinations. Nevertheless, the section of the proposed guidelines entitled ``Review of Information'' provides that the Department of State will make such determinations within 120 days from the date on which a foreign government submits the necessary information.

A final comment suggested that the term ``incidental mortality'' should be used instead of ``incidental capture.''

Response. The proposed guidelines actually use the term ``incidental taking,'' which covers both incidental mortality and

incidental capture. In the view of the Department of State, the term ``incidental taking'' is the most appropriate term since, in addition to being the term used in Section 609 itself, it is well-established in U.S. law and practice regarding the protection of endangered and threatened sea turtles.

Several comments supported the proposed changes regarding review of information, particularly the new language requiring ``empirical data supported by objective scientific studies'' and the proposed timeline for response. One comment suggested the deletion of the phrase ``available biological and commercial data,'' on grounds that such data are not relevant to the determination of whether the fishing environment of a harvesting nation is likely to pose a threat to sea turtles.

Response. The term ``available biological and commercial data'' refers to two separate sets of information. ``Biological data'' refers, e.g., to data and information on the resources in question, both the shrimp that is being targeted by the fisheries and the sea turtles that might be caught incidental to those fisheries. ``Commercial data'' refers, in this case, to information relating to the operation of the fleet in a particular fishery (areas of operation, fishing depth, length of trawls, etc.). Both sets of information are relevant to determining of whether the fishing environment in a particular country or fishery is likely to pose a threat to sea turtles. To be clearer on this point, the final version of the guidelines replaces the term ``biological and commercial data'' with ``biological data regarding the resources in question and operational information relating to activities of the fishing fleet''.

(3) Comments on Section III: With respect to the proposed changes intended to introduce greater flexibility in the making of certification decisions, several comments supported the changes on grounds that they would encourage nations to adopt innovative methods for protecting sea turtles. Another comment emphasized that, because properly installed TEDs release 97 percent of sea turtles captured in shrimp trawl nets, other approaches to protecting sea turtles in the course of shrimp trawl fishing cannot be considered comparable unless they are 97 percent effective.

Response: As recognized in the WTO decision, Section 609 requires, as a condition for certification, that a foreign program for protecting sea turtles in the course of shrimp trawl fishing be comparable to the U.S. program. If a foreign nation adopts a program that seeks to protect sea turtles by modifications to the gear used for shrimp trawling, it may be appropriate to compare, in a numerical sense, the success of such gear modifications in protecting sea turtles to the success achieved through the mandatory use of TEDs. If, by contrast, a foreign nation seeks to protect sea turtles from the effects of shrimp trawl harvesting through other means, e.g., through time and area closures or other non-gear related measures, it may not be appropriate to make the comparison to the U.S. program on a strictly numerical basis.

A further comment argued that the criteria on which certifications are made should be more clearly identified. Certain elements should be more clearly defined, including ``comparably effective regulatory program'', ``sufficient duration'' and ``information from other sources''.

Response: The term ``comparably effective regulatory program'' derives its meaning from Section 609 itself; i.e., ``a regulatory program governing the incidental taking of sea turtles in the course of

commercial shrimp trawl harvesting that is comparable to that of the United States.' By contrast, the term 'sufficient duration' is difficult to specify precisely, due to the fact that the duration of a scientific study necessary to make a reliable determination may vary considerably, depending on the nature of the inquiry. As provided in the section of the guidelines entitled 'Review of Information,' the United States will, upon request 'review and provide comments on a planned or existing study with respect to sample size, scientific methodology and other factors that affect whether such a study provides a sufficient basis for making a reliable determination.' It is the intention of the Department of State to work cooperatively with foreign nations seeking certification in considering the scientific bases on which such determinations are to be made.

Finally, the section of the guidelines entitled 'Review of Information' also makes clear that the term 'information from other sources' includes, but is not limited to 'academic and scientific organizations, intergovernmental organizations and non-governmental organizations with recognized expertise in the subject matter.'

The same comment added that the proposed revisions have not sufficiently taken into account the issue of predictability.

Response: The Department of State is not certain what is meant by this comment. To the extent that the comment suggests the need for a foreign government seeking certification to anticipate the result of a determination before it is made, the section of the guidelines entitled 'Timetable and Procedures for Certification Decisions' provides, inter alia, for the considerable information exchange that is intended to allow the foreign government to predict the likely result. In particular, the guidelines stipulate that, 'By March 15, the Department of State will notify in writing through diplomatic channels the government of each nation that, on the basis of available information \* \* \* does not appear to qualify for certification. Such notification will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification and invite the government of the harvesting nation to provide, by April

[[Page 36948]]

15, any further information. If the government of the harvesting nation so requests, the Department of State will schedule face-to-face meetings between relevant U.S. officials and officials of the harvesting nation to discuss the situation.' Through these procedures, the Department of State intends that the certification determinations will be both more predictable and transparent.

With one exception, all other comments that addressed the proposals for new timetables and procedures supported the proposals, on grounds that they would ensure transparency and equitableness and will improve predictability, due process and procedural fairness. However, one comment stated that the proposed date of September 1, 1999, by which foreign governments seeking certifications under the revised guidelines must submit information, is not acceptable due to such factors as the availability of resources, capacity, skills, technologies, etc.

Response: The Department of State recognizes that a government seeking certification on the basis of the revised guidelines may not, by September 1, 1999, be able to gather sufficient information necessary to support such a request. To meet this concern, and in accordance with its existing practice, the Department will accept

requests for certification at any time in the year and will undertake to process them as expeditiously as possible. However, the Department can only commit to making a certification determination by December 6, 1999 if it has received the necessary information by September 1, 1999. Language to this effect has been added to the guidelines.

(3) Comments on Other Issues. Despite the fact that the Federal Register notice issued March 25, 1999 only sought comments on the issues discussed above, by far the most comments pertained to the policy of the Department of State relating to the importation of shrimp harvested by vessels equipped with TEDs in uncertified nations. The current policy was set forth in the guidelines issued by the Department of State on August 28, 1998, Public Notice 2876, 63 F.R. 167 ("the current policy").

In general, some comments actively supported the current policy, while other comments strongly opposed it. Those comments in support of the current policy argued that imports of shrimp caught by vessels equipped with TEDs should not be excluded from the U.S. market, regardless of the certification status of the nation involved. Allowing such shrimp into the United States encourages foreign shrimpers to join sea turtle conservation efforts. Another comment in support of the current policy emphasized that, if shrimp is harvested by a vessel using a TED, it should be allowed to enter the U.S. market whether or not all vessels in the same nation are using TEDs.

Comments in opposition to the current policy argued that the policy was inconsistent with Section 609, insofar as Section 609 provides for certification of foreign nations, and does not allow for the authorization of individual shipments of shrimp entering the United States. Other comments also took the view that the current policy undermines the goal of sea turtle conservation by creating a disincentive for foreign nations that are maintaining, or may be considering, a nation-wide program to require TEDs use. Still other comments stated that the use of TEDs by only some vessels in a foreign nation does not protect sea turtles overall, in that sea turtles that escape from nets equipped with TEDs are subject to capture and drowning in nets of other vessels that are not using TEDs.

Response. The Department of State recognizes the strongly held views on all sides of this issue, and notes that the issue is also the subject of on-going litigation before the U.S. Court of International Trade. In light of these circumstances, the Department has determined that it will make no change to the current policy at this time.

Several comments supported U.S. efforts, described in the Federal Register notice issued March 25, 1999, to pursue negotiations toward a comprehensive sea turtle agreement for the Indian Ocean region. One comment, however, noted such an agreement "should not include a WTO escape clause, because this will negate the chance of any pro-environment aspect of the treaty to survive if ever challenged."

Response. The Department of State is not certain what is meant by the term "WTO escape clause." The Department would simply note that the agreement we envision would deal with the protection of sea turtles and would not deal with international trade issues except to reinforce existing restrictions on international trade in sea turtles and sea turtle parts.

Several comments addressed issues concerning the provision of assistance by the United States Government to other governments to promote TEDs use. One comment urged the United States Government to offer assistance to other governments in developing effective monitoring and enforcement programs. Another comment suggested that the



United States Government should give TEDs away for free or on a subsidized basis, and that U.S. shrimp fishermen could take part in training shrimp fishermen in other nations.

Response. The United States Government, primarily through the NMFS, has offered assistance to other governments in the area of monitoring and enforcing fishing rules, and shrimp fishing rules in particular. We envision that, under the auspices of the Inter-American Sea Turtle Convention and a comparable agreement that would cover the Indian Ocean region, such assistance could also be made available from a variety of sources.

Experience has shown that foreign governments can easily acquire TEDs on the open market or by constructing TEDs themselves from materials that are readily available. The costs of purchasing or constructing a TED is modest when compared with other costs associated with the operation of a commercial shrimp trawl vessel, such as fuel, gear, etc. In our judgment, the resources of the United States Government are better devoted to training foreign government officials and shrimp fishermen in the proper design, construction, installation and use of TEDs.

The Department of State would support initiatives by U.S. fishermen familiar with TEDs to assist their foreign counterparts in acquiring and using this technology.

Several comments addressed other exemptions pertaining to shrimp harvested in ways not harmful to sea turtles. One comment noted that the ecological effects of shrimp farming or aquaculture ultimately harm sea turtles as they do other marine life. Another comment characterized as "meaningless and arbitrary" the 30-day minimum that shrimp must spend in an aquaculture pond before being harvested in order to qualify for the aquaculture exemption. A final comment suggested a more precise definition for the term "mechanical devices" with respect to the exemption relating to artisanal means of shrimp harvesting.

Response. While the Department of State is aware of significant ecological concerns with respect to the harvesting of shrimp by aquaculture, those concerns do not relate to sea turtles specifically. As such, the Department is of the view that Congress did not intend to include the harvesting of shrimp by aquaculture within the meaning of the term "commercial fishing technology that may adversely affect" sea turtle species. Regarding the 30-day minimum period, the Department instituted this requirement to ensure that shrimp categorized as qualifying for the

[[Page 36949]]

aquaculture exemption were not actually harvested in the wild and merely placed in an aquaculture facility for a brief moment before being processed for export. With respect to the term "mechanical devices," the Department has modified the language of the guidelines to add specificity.

Another comment suggested that the DSP-121 forms be made available for public inspection.

Response. The Department of State does not believe that this suggestion is feasible, or that its adoption is necessary to achieve an adequate system for monitoring imports of shrimp.

The guidelines contain numerous safeguards to ensure the proper completion of the DSP-121 and to protect against fraud.

A final comment suggested that, to achieve effective sea turtle conservation, the guidelines should cover all species of sea turtles,

despite the fact that Section 609 applies only to ``those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on June 29, 1987.''

Response. The purpose of the guidelines is to assist in the implementation of Section 609, which, as a technical matter, pertains only to those species of sea turtles covered by the June 29, 1987 regulations promulgated by the Secretary of Commerce. However, the Department of State notes that, as a practical matter, the requirements relating to shrimp imports set in place by Section 609 and the guidelines have the effect of extending protection to all endangered and threatened species of sea turtles. There are few, if any, places in the world where endangered or threatened sea turtle species falling outside the technical scope of Section occur and that sea turtle species covered by Section 609 do not.

## Revised Guidelines

For the sake of clarity, the August 28, 1998 guidelines are restated below as modified to reflect the changes proposed in the Federal Register notice issued March 25, 1999, and the comments received on those proposed changes.

### I. Introductory Material

#### A. The U.S. Program

Since certification decisions under Section 609(b)(2)(A) and (B) are based on comparability with the U.S. program governing the incidental taking of sea turtles in the course of shrimp harvesting, an explanation of the components of that program follows. The U.S. program requires that commercial shrimp trawl vessels use TEDs approved in accordance with standards established by the U.S. National Marine Fisheries Service (NMFS), in areas and at times when there is a likelihood of intercepting sea turtles. The goal of this program is to protect sea turtle populations from further decline by reducing the incidental mortality of sea turtles in commercial shrimp trawl operations.

The commercial shrimp trawl fisheries in the United States in which there is a likelihood of intercepting sea turtles occur in the temperate waters of the Gulf of Mexico and the Atlantic Ocean from North Carolina to Texas. With very limited exceptions, all U.S. commercial shrimp trawl vessels operating in these waters must use approved TEDs at all times and in all areas. The only exceptions to this requirement are as follows:

a. Vessels equipped exclusively with wing nets, skimmer trawls, and pusher-head trawls when used in conjunction with certain restricted tow times are not required to use TEDs because their operations do not pose a threat to sea turtles. Vessels equipped with barred beam trawls and/or barred roller trawls are not required to use TEDs. Single try nets (with less than a twelve foot headrope and fifteen foot rope) are not required to use TEDs.

b. Vessels whose nets are retrieved exclusively by manual rather than mechanical means are not required to use TEDs because the lack of a mechanical retrieval system necessarily limits tow times to a short duration so as not to pose a threat of the incidental drowning of sea turtles. This exemption applies only to vessels that have no power or mechanical-advantage trawl retrieval system.

c. In exceptional circumstances, where NMFS determines that the use of TEDs would be impracticable because of special environmental conditions such as the presence of algae, seaweed, or debris, or that TEDs would be ineffective in protecting sea turtles in particular areas, vessels are permitted to restrict tow times instead of using TEDs. Such exceptions are generally limited to two periods of 30 days each. In practice, NMFS has permitted such exceptions only rarely.

With these limited exceptions, all other commercial shrimp trawl vessels operating in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles must use TEDs at all times. For more information on the U.S. program governing the incidental taking of sea turtles in the course of commercial shrimp trawl harvesting, see 50 CFR 227.17 and 50 CFR 227.72(e).

#### B. Shrimp Harvested in a Manner Not Harmful to Sea Turtles

The Department of State has determined that the import prohibitions imposed pursuant to Section 609 do not apply to shrimp or products of shrimp harvested under the following conditions, since such harvesting does not adversely affect sea turtle species:

a. Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in pond prior to being harvested.

b. Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States.

c. Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices, such as winches, pulleys, power blocks or other devices providing mechanical advantage, or by vessels using gear that, in accordance with the U.S. program described above, would not require TEDs.

d. Shrimp harvested in any other manner or under any other circumstances that the Department of State may determine, following consultation with the NMFS, does not pose a threat of the incidental taking of sea turtles. The Department of State shall publish any such determinations in the Federal Register and shall notify affected foreign governments and other interested parties directly.

#### C. Shrimp Exporter's/Importer's Declaration

The requirement that all shipments of shrimp and products of shrimp imported into the United States must be accompanied by a declaration (DSP-121, revised) became effective as of May 1, 1996 and remains effective. The DSP-121 attests that the shrimp accompanying the declaration was harvested either under conditions that do not adversely affect sea turtles (as defined above) or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609. All declarations must be signed by the exporter. The declaration must accompany the shipment through all stages of the export process, including any transformation of the original product and any shipment through any intermediary nation. As before, the Department of State will make copies of the declaration readily available. Local reproduction of the declarations is fully acceptable.

The requirement that a government official of the harvesting nation not

[[Page 36950]]

currently certified pursuant to Section 609 must also sign the DSP-121

asserting that the accompanying shrimp was harvested under conditions that do not adversely affect sea turtles species remains effective. In order to protect against fraud, the Department will continue to conduct periodic reviews of the systems that such foreign governments have put in place to verify the statements made on the DSP-121 form.

Date of Export. Import prohibitions shall not apply to shipments of shrimp and products of shrimp with a date of export falling at a time in which the harvesting nation is currently certified pursuant to Section 609.

Country of Origin. For purposes of implementing Section 609, the country of origin shall be deemed to be the nation in whose waters the shrimp is harvested, whether or not the harvesting vessel is flying the flag of another nation.

#### E. Review of Information

The government of any harvesting nation may request that the Department of State review any information regarding the particular shrimp fishing environment and conditions in that nation, or within a distinct geographic region of that nation, in making decisions pursuant to Section 609. Such information may be presented to demonstrate, inter alia:

(1) That some portion of the shrimp intended to be exported from that nation to the United States is harvested under one of the conditions identified above as not adversely affecting species of sea turtles;

(2) That the government of that nation has adopted a regulatory program governing the incidental taking of sea turtles in the course of commercial shrimp trawl fishing that is comparable to the U.S. program and, therefore, that the nation is eligible for certification under Section 609(b)(2)(A) and (B); or

(3) That the fishing environment in that nation does not pose a threat of the incidental taking of sea turtles and, therefore, that the nation is eligible for certification under Section 609(b)(2)(C).

Such information should be based on empirical data supported by objective scientific studies of sufficient duration and scope to provide the information necessary for a reliable determination. In addition, information submitted to support a request for any such determination should include available biological data regarding the resources in question and operational information relating to the activities of the fishing fleet that are relevant to determining whether or not the fishing environment of the harvesting nation is likely to pose a threat to sea turtles. Studies intended to show the rate of incidental taking of sea turtles in a given shrimp fishery should, at a minimum, contain data for an entire fishing season. Upon request, the United States will review and provide comments on a planned or existing study with respect to sample size, scientific methodology and other factors that affect whether such a study provides a sufficient basis for making a reliable determination.

The Department will fully review and take into consideration all such information and, in consultation with the NMFS, respond in writing to the government of the harvesting nation within 120 days from the date on which the information is received.

The Department, in consultation with the NMFS, will also take into consideration information on the same subjects that may be available from other sources, including but not limited to academic and scientific organizations, intergovernmental organizations and non-

governmental organizations with recognized expertise in the subject matter.

## II. Guidelines for Making Certification Decisions

### A. Certification Pursuant to Section 609(b)(2)(C)

Section 609(b)(2)(C) authorizes the Department of State to certify a harvesting nation if the particular fishing environment of the harvesting nation does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. Accordingly, the Department shall certify any harvesting nation meeting the following criteria without the need for action on the part of the government of the harvesting nation:

- a. Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction;
- b. Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, e.g., any nation that harvests shrimp exclusively by artisanal means;
- c. Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur.

### B. Certification Pursuant to Section 609(b)(2)(A) and (B)

Under Section 609(b)(2), the Department of State shall certify any other harvesting nation by May 1st of each year if ``the government of (that) nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States'' and if ``the average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting.''

a. Regulatory Program. The Department of State shall assess regulatory programs, as described in any documentary evidence provided by the governments of harvesting nations, for comparability with the U.S. program.

Where standard otter trawl nets are used in shrimp fisheries in waters where sea turtles are present, sea turtles will inevitably be captured and drowned. The Department of State is presently aware of no measure or series of measures that can minimize the capture and drowning of sea turtles in such nets that is comparable in effectiveness to the required use of TEDs.

1. If the government of the harvesting nation seeks certification on the basis of having adopted a TEDs program, certification shall be made if a program includes the following:

(i) Required Use of TEDs--a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use TEDs at all times. TEDs must be comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the U.S. program described above; and

(ii) Enforcement--a credible enforcement effort that includes monitoring for compliance and appropriate sanctions.

2. If the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory

program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs, that nation will also be eligible for certification. As described above, such a demonstration would need to be based on empirical data supported by objective scientific studies of sufficient duration and scope to provide the information necessary for a reliable determination. In reviewing any such information, the Department of State will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations, as well as information available from other sources.

[[Page 36951]]

b. Incidental Take. Average incidental take rates will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the U.S. program or, as described above, otherwise demonstrates that it has implemented a comparably effective program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs.

c. Additional Considerations. 1. Form--A regulatory program may be in the form of regulations promulgated by the government of the harvesting nation and having the force of law. If the legal system and industry structure of the harvesting nation permit voluntary arrangements between government and the fishing industry, such an arrangement may be acceptable so long as there is a governmental mechanism to monitor compliance with the arrangement and to impose penalties for non-compliance, and reliable confirmation that the fishing industry is complying with the arrangement.

2. Documentary Evidence--Documentary evidence may be in the form of copies of the relevant laws, regulations or decrees. If the regulatory program is in the form of a government-industry arrangement, then a copy of the arrangement is required. Harvesting nations are encouraged to provide, to the extent practicable, information relating to the extent of shrimp harvested by means of aquaculture.

3. Additional Sea Turtle Protection Measures--The Department of State recognizes that sea turtles require protection throughout their life cycle, not only when they are threatened during the course of commercial shrimp trawl harvesting. In making certification determinations, the Department shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles, including national programs to protect nesting beaches and other habitat, prohibitions on the directed take of sea turtles, national enforcement and compliance programs, and participation in any international agreement for the protection and conservation of sea turtles. In assessing any information provided by the governments of harvesting nations in this respect, the Department of State will rely on the technical expertise of NMFS and, where appropriate, the US Fish and Wildlife Service to evaluate threats to sea turtles and the effectiveness of sea turtle protection programs.

4. Consultations--The Department of State will engage in ongoing consultations with the governments of harvesting nations. The Department recognizes that, as sea turtle protection programs develop, additional information will be gained about the interaction between sea turtle populations and shrimp fisheries.

These Guidelines may be revised in the future to take into consideration that and other information, as well as to take into account changes in the U.S. program. These Guidelines may also be

revised as a result of pending domestic litigation. In addition, the Department will continue to welcome public input on the best ways to implement both these Guidelines and Section 609 as a whole and may revise these guidelines in the future accordingly.

### C. Timetable and Procedures for Certification Decisions

Each year the Department will consider for certification: (a) any nation that is currently certified, and (b) any other shrimp harvesting nation whose government requests such certification in a written communication to the Department of State through diplomatic channels prior to September 1 of the preceding year. Any such communication should include any information not previously provided that would support the request for certification, including the information specified above under Review of Information.

Between September 1 and March 1, U.S. officials will seek to visit those nations requesting certifications pursuant to Section 609(b)(2)(A) and (B). Each visit will conclude with a meeting between the U.S. officials and government officials of the harvesting nation to discuss the results of the visit and to review any identified deficiencies regarding the harvesting nation's program to protect sea turtles in the course of shrimp trawl fishing.

By March 15, the Department of State will notify in writing through diplomatic channels the government of each nation that, on the basis of available information, including information gathered during such visits, does not appear to qualify for certification. Such notification will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification and invite the government of the harvesting nation to provide, by April 15, any further information. If the government of the harvesting nation so requests, the Department of State will schedule face-to-face meetings between relevant U.S. officials and officials of the harvesting nation to discuss the situation.

Between March 15 and May 1, the Department of State will actively consider any additional information that the government of the harvesting nation believes should be considered by the Department in making its determination concerning certification.

By May 1 of each year the Department of State will make formal decisions on certification. The governments of all nations that have requested certification will be notified in writing of the decision promptly through diplomatic channels. In the case of those nations for which certification is denied, such notification will again state the reasons for such denial and the steps necessary to receive a certification in the future.

The government of any nation that is denied a certification by May 1 may, at any time thereafter, request reconsideration of that decision. When the United States receives information from that government demonstrating that the circumstances that led to the denial of the certification have been corrected, U.S. officials will visit the exporting nation as early as a visit can be arranged. If the visit demonstrates that the circumstances that led to the denial of the certification have indeed been corrected, the United States will certify that nation immediately thereafter.

### D. Special Timetable for 1999

The United States and the four nations that brought the WTO complaint have agreed that the United States would implement the recommendations and rulings of the DSB within 13 months of the adoption of the WTO Appellate Body report by the DSB, i.e., by December 6, 1999.

Accordingly, the Department of State hereby establishes the following timetable to apply in 1999 only:

After the date of publication of the revised guidelines, the government of any harvesting nation that was denied certification by May 1, 1999, may request to be certified in accordance with these guidelines in a written communication to the Department of State through diplomatic channels prior to September 1, 1999.

Not later than October 15, 1999, U.S. officials will seek to visit to those nations requesting such certifications. Each visit will conclude with a meeting between the U.S. officials and government officials of the harvesting nation to discuss the results of the visit and to review any identified deficiencies regarding the harvesting nation's program to protect sea turtles in the course of shrimp trawl fishing.

By November 1, 1999, the Department of State will notify in writing through diplomatic channels the government of any nation that, on the basis of available

[[Page 36952]]

information, including information gathered during such visits, does not appear to qualify for certification. Such notification will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification and invite the government of the harvesting nation to provide, by November 15, 1999, any further information.

Between November 15 and December 6, 1999, the Department of State will actively consider any additional information that the government of the harvesting nation believes should be considered by the Department in making its determination concerning certification.

By December 6, 1999, the Department of State will make formal decisions on certification. The governments of all nations that have requested certification under the special 1999 timetable will be notified in writing of the decision promptly through diplomatic channels. In the case of those nations for which certification is denied, such notification will again state the reasons for such denial and the steps necessary to receive a certification in the future.

The government of any nation that is denied a certification by December 6, 1999, may, at any time thereafter, request reconsideration of that decision. When the United States receives information from that government demonstrating that the circumstances that led to the denial of the certification have been corrected, U.S. officials will visit the exporting nation as early as a visit can be arranged. If the visit demonstrates that the circumstances that led to the denial of the certification have indeed been corrected, the United States will certify that nation immediately thereafter.

The Department of State recognizes that a government seeking certification on the basis of the revised guidelines may not, by September 1, 1999, be able to gather sufficient information necessary to support such a request. To meet this concern, and in accordance with its existing practice, the Department will accept requests for certification at any time in 1999 and will process them as expeditiously as possible. However, the Department can only commit to



making a certification determination by December 6, 1999 if it has received the necessary information by September 1, 1999.

#### E. Related Determinations

As noted above, any harvesting nation that is not certified on May 1 of any year may be certified prior to the following May 1 at such time as the harvesting nation meets the criteria necessary for certification. Conversely, any harvesting nation that is certified on May 1 of any year may have its certification revoked prior to the following May 1 at such time as the harvesting nation no longer meets those criteria.

As a matter relating to the foreign affairs function, these guidelines are exempt from the notice, comment, and delayed effectiveness provisions of the Administrative Procedures Act. This action is exempt from Executive Order 12866, and is not subject to the requirements of the Regulatory Flexibility Act.

Dated: June 29, 1999.  
Stuart E. Eizenstat,  
Under Secretary of State for Economic, Business and Agriculture  
Affairs.  
[FR Doc. 99-17330 Filed 7-7-99; 8:45 am]  
BILLING CODE 4710-09-U