



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

MEMORANDUM FOR: Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget

FROM: Eileen Sobeck
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National Oceanic and Atmospheric Administration
U.S. Department of Commerce

SUBJECT: Request for Emergency Review and Approval of a Revision to
OMB Control No. 0648-0387 - International Dolphin Conservation
Program [**Final Rule RIN: 0648-BF73**]

We are seeking an emergency Paperwork Reduction Act (PRA) clearance of revisions to OMB Control No. 0648-0387 that implements *chain of custody* recordkeeping requirements. These recordkeeping requirements enhance other document requirements to support the use of the dolphin-safe label on tuna products in the United States. This action is intended to ensure that the United States (U.S.) comes into compliance with its obligations as a Member of the World Trade Organization (WTO). Failure to approve the chain of custody recordkeeping requirements on this emergency basis could result in the interim final rule (IFR) not being published by March 22, 2016 or call into question that the IFR published on that date constitutes compliance with U.S. WTO obligations. If such scenario came to pass, the Administration's efforts to block (or significantly delay) Mexico's efforts to seek WTO authorization to retaliate against U.S. exports would be greatly undermined. Retaliation against U.S. exports would have a detrimental effect not only on the companies that produce those goods that are targeted by the retaliation, but could undermine this important environmental measure as well as the Administration's trade policy agenda.

BACKGROUND

The National Marine Fisheries Service (NMFS) is issuing an interim final rule to amend regulations governing the use of dolphin-safe labels on tuna products under the Dolphin Protection Consumer Information Act (DPCIA). This action is intended to ensure that the United States comes into compliance with its obligations as a Member of the WTO. Although the action is of high interest, it is not expected to be controversial.

In 2008, Mexico initiated WTO dispute settlement proceedings to challenge three components of the U.S. dolphin-safe labeling measure, claiming these components were a violation of provisions of the WTO agreements: the DPCIA, Department of Commerce DPCIA regulations (50 CFR 216.91-216.92), and a federal court decision (*Earth Island Institute v. Hogarth*, 494



F.3d 757 (9th Cir. 2007)). Among other requirements, the U.S. dolphin-safe labeling measure does not allow tuna products to be labeled dolphin-safe if they contain tuna caught by intentionally encircling and deploying purse seine nets on dolphins. On June 13, 2012, the WTO Dispute Settlement Body adopted WTO panel and Appellate Body reports ruling that the U.S. dolphin-safe labeling measure accords less favorable treatment to Mexican tuna products and, therefore, is inconsistent with U.S. WTO obligations. This conclusion was based on a finding that the U.S. measures did not set conditions for use of the label in a way that reflects the risks faced by dolphins in different oceans.

In response to this finding, NMFS published a final rule on July 9, 2013, amending regulations under the DPCIA to enhance documentary evidence that supports the U.S. dolphin-safe label (78 FR 40997). Subsequently, the WTO compliance panel found that the U.S. measure was inconsistent with U.S. WTO obligations based, in part, on the certification and tracking and verification requirements of the regulation. On November 20, 2015, the WTO Appellate Body upheld the compliance panel's finding that the United States had not brought its measure into compliance with its WTO obligations.

On February 5, 2016, NMFS published a proposed rule (81 FR 6210) as the first phase of a U.S. seafood traceability program (referred to hereafter as the "Traceability Rule"). This proposed rule would establish filing and recordkeeping procedures relating to the importation of certain fish and fish products in order to implement the Magnuson-Stevens Fishery Conservation and Management Act's prohibition on the import and trade, in interstate or foreign commerce, of fish taken, possessed, transported, or sold in violation of any foreign law or regulation. The concept of chain of custody documentation requirements for importers and U.S. processors of tuna and tuna product in the proposed Traceability Rule will be incorporated into this interim final rule to address the concerns regarding the tuna tracking and verification raised by the WTO compliance panel and Appellate Body.