

TABLE 7—SSLS FOR PROJECT ACTIVITIES

Sound source	SSL	
	SEL	SPL _{RMS}
3 tugs at 50 percent power	185 dB at 1 m.
4 tugs at 50 percent power	186.2 dB at 1 m.
Conductor pipe pile (20 in, impact)	184 dB at 10 m	193 dB at 10 m.

On page 51120, table 10 is corrected to read as follows:

TABLE 10—LEVEL A HARASSMENT AND LEVEL B HARASSMENT ISOPLETHS FROM TUGGING AND IMPACT PILE DRIVING

Sound source	Level A Harassment Isopleths (m)					Level B Harassment Isopleths (m)
	LF	MF	HF	PW	OW	
Conductor pipe pile, 70 percent installation	3,064	109	3,650	1,640	119	1,585
Conductor pipe pile, 30 percent installation	1,742	62	2,075	932	68
Tugging/Positioning, 3 Tugs ¹	95	78	679	69	0	3,850
Tugging/Positioning, 4 Tugs ²	108	89	773	79	1	4,483

¹ These zones are results from Hilcorp's modeling.

² For otariids, Hilcorp's model estimated a Level A harassment zone of 0 during tugging/positioning with three tugs. Therefore, for four tugs, NMFS applied the Level A harassment zone calculating with the User Spreadsheet.

Dated: June 25, 2024.

Kimberly Damon-Randall,
 Director, Office of Protected Resources
 National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XE053]

Taking and Importing of Marine Mammals

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

ACTION: Notice; new 5-year affirmative finding for El Salvador from 2023.

SUMMARY: This provides notice that on June 5, 2023, the NMFS Assistant Administrator (Assistant Administrator) issued a new 5-year affirmative finding for the Government of El Salvador under the portions of the Marine Mammal Protection Act (MMPA) related to the eastern tropical Pacific Ocean (ETP) tuna purse seine fishery and the importation of yellowfin tuna from nations participating in this fishery. This affirmative finding allows for the importation into the United States of yellowfin tuna and yellowfin tuna products harvested in the ETP, in compliance with the Agreement on the

International Dolphin Conservation Program (AIDCP), by purse seine vessels operating under El Salvador's jurisdiction or exported from El Salvador. NMFS based the affirmative finding determination on reviews of documentary evidence submitted by the Government of El Salvador and of information obtained from the Inter-American Tropical Tuna Commission (IATTC). NMFS typically publishes notice of new affirmative findings shortly after the Assistant Administrator makes those findings; however, due to an oversight, this notice was not published in 2023, and is therefore being published now to provide the public with notice of the finding.

DATES: This new affirmative finding is effective for the 5-year period of April 1, 2023, through March 31, 2028.

FOR FURTHER INFORMATION CONTACT: Justin Greenman, West Coast Region, NMFS, by mail: 501 W Ocean Blvd., Suite 4200, Long Beach, CA 90802, email: justin.greenman@noaa.gov, or phone: (562) 980-3264.

SUPPLEMENTARY INFORMATION: The MMPA, 16 U.S.C. 1361 *et seq.*, allows for importation into the United States of yellowfin tuna harvested by purse seine vessels in the ETP from a nation with jurisdiction over purse seine vessels with carrying capacity greater than 400 short tons that harvest tuna in the ETP only if the nation has an "affirmative finding" issued by the NMFS Assistant Administrator. See section 101(a)(2)(B) of the MMPA, 16 U.S.C. 1371(a)(2)(B);

see also 50 CFR 216.24(f)(6)(i). If requested by the Government of such a nation, the Assistant Administrator will determine whether to make an affirmative finding based upon documentary evidence provided by the Government, the IATTC, or the Department of State.

The affirmative finding process requires that the harvesting nation is meeting its obligations under the AIDCP and its obligations of membership in the IATTC. Every 5 years, the Government of the harvesting nation must request a new affirmative finding and submit the required documentary evidence directly to the Assistant Administrator. On an annual basis, NMFS must determine whether the harvesting nation continues to meet the requirements of their 5-year affirmative finding. NMFS does this by annually reviewing the documentary evidence from the previous year. A nation may provide information related to compliance with AIDCP and IATTC measures directly to NMFS on an annual basis or may authorize the IATTC to release the information to NMFS to annually renew an affirmative finding determination without an application from the harvesting nation.

An affirmative finding will be terminated, in consultation with the Secretary of State, if the Assistant Administrator determines that the requirements of 50 CFR 216.24(f) are no longer being met or that a nation is consistently failing to take enforcement actions on violations, thereby

diminishing the effectiveness of the AIDCP.

As a part of the affirmative finding process set forth in 50 CFR 216.24(f)(8), the Assistant Administrator considered documentary evidence submitted by the Government of El Salvador and obtained from the IATTC and determined that El Salvador met the MMPA's requirements to receive a new 5-year affirmative finding.

After consultation with the Department of State, the Assistant Administrator issued a new 5-year affirmative finding to El Salvador, allowing the importation into the United States of yellowfin tuna and products derived from yellowfin tuna harvested in the ETP by purse seine vessels operating under El Salvador's jurisdiction or exported from El Salvador. Issuance of a new 5-year affirmative finding for El Salvador does not affect implementation of an intermediary nation embargo under 50 CFR 216.24(f)(9), which applies to exports from a nation that exports to the United States yellowfin tuna or yellowfin tuna products that was subject to a ban on importation into the United States under section 101(a)(2)(B) of the MMPA, 16 U.S.C. 1371(a)(2)(B).

This new affirmative finding for El Salvador is for the 5-year period of April 1, 2023, through March 31, 2028, subject to subsequent annual reviews by NMFS.

Dated: June 14, 2024.

Janet Coit,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

[FR Doc. 2024-14330 Filed 6-27-24; 8:45 am]

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO-C-2024-0023]

Experimental Use Exception Request for Comments

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice and request for comments.

SUMMARY: The United States Patent and Trademark Office (USPTO), Department of Commerce, is interested in collecting the public's views on the current state of the common law experimental use exception and whether legislative action should be considered to enact a statutory experimental use exception.

DATES: Written comments must be received on or before September 26, 2024.

ADDRESSES: For reasons of Government efficiency, comments should be submitted through the Federal eRulemaking Portal at <https://www.regulations.gov>. To submit comments via the portal, enter docket number PTO-C-2024-0023 on the homepage and click "Search." The site will provide a search results page listing all documents associated with this docket. Find a reference to this request for information and click on the "Comment" icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted in Adobe® portable document format or Microsoft Word® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included.

Visit the Federal eRulemaking Portal (<www.regulations.gov>) for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please submit comments by First-Class Mail or Priority Mail to: Christian Hannon, Senior Patent Attorney, Mail Stop OPIA, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450.

FOR FURTHER INFORMATION CONTACT: Christian Hannon, Senior Patent Attorney, USPTO, Office of Policy and International Affairs (OPIA), at 571-272-7385.

SUPPLEMENTARY INFORMATION: The USPTO is interested in collecting the public's views on the current state of the common law experimental use exception and whether legislative action should be considered to enact a statutory experimental use exception.

Historical Development of the Experimental Use Doctrine

The experimental use defense to a claim of patent infringement was first introduced in the landmark case *Whittemore v. Cutter*.¹ The *Whittemore* court approved the instruction to the jury that "the making of a machine fit for use, and with a design to use it for profit, was an infringement" of a patent right.² In assessing this instruction, the

¹ *Whittemore v. Cutter*, 29 F. Cas. 1120 (C.C.D. Mass. 1813) (Case No. 17,600).

² Prior to the enactment of the Patent Act of 1952, rights conferred by a patent grant gave a patentee the "sole and exclusive right and liberty of making, constructing, using, and vending" his or her invention. Without the written consent of the patent holder, the accused infringing party was required to forfeit and pay damages to the patentee. See Patent Act of 1790, Ch. 7, sec. 1, 1 Stat. 109-112 (April 10, 1970).

court reasoned that "it could never have been the intention of the legislature to punish a man, who constructed such a machine merely for philosophical experiments, or for the purpose of ascertaining the sufficiency of the machine to produce its described effects."³ Thus, the court looked to the prospect of profit-making to determine infringement.⁴

Subsequent courts affirmed *Whittemore's* rationale, finding that experimentation is not a defense to infringement if it creates a benefit for the accused infringer.⁵ Thus, in *Bonsack Machine v. Underwood*, the court found that experimentation on a patented cigarette machine was not experimental use when the purpose of the experiment was to show superior properties of the defendant's competing product.⁶ In *Roche Prod. v. Bolar Pharm. Co.*, the court found that "Bolar's intended 'experimental' use is solely for business reasons and not for amusement, to satisfy idle curiosity, or for strictly philosophical inquiry."⁷ Notably, the *Roche* court stated that it "cannot construe the experimental use rule so broadly as to allow a violation of the patent laws in the guise of 'scientific inquiry,'" when that inquiry has definite, cognizable, and not insubstantial commercial purposes."⁸ Subsequently, in *Embrex v. Service Engineering Corp.*, the court denied an experimental use defense because of the district court's determination that the defendant performed tests "expressly for commercial purposes."⁹

The U.S. Court of Appeals for the Federal Circuit revisited the experimental use exception in *Madey v. Duke University*, finding that the district court "erred in applying the experimental use defense."¹⁰ The court explained that its precedent does not immunize "use that is in any way

³ *Id.*; see also *Sawin v. Guild*, 21 F. Cas. 554, 554 (C.C.D. Mass. 1813 (No. 12,319)) (stating that *Whittemore* held that making must be coupled with intent to use for profit).

⁴ *Id.*

⁵ *Bonsack Mach. Co. v. Underwood*, 73 F. 206 (C.C.E.D.N.C. 1896) (holding that "the making of an infringing machine merely as an experiment is not an actionable infringement, but if it is to be used for the purpose of selling the patent under which it is made, it is then to be regarded as use for profit, and a suit will lie for the infringement").

⁶ *Id.*

⁷ See *Roche Prod. v. Bolar Pharm. Co.*, 733 F.2d 858, 862 (Fed. Cir. 1984) at 863.

⁸ *Id.* This holding was effectively superseded by the Drug Price Competition and Patent Term Restoration Act of 1984 (commonly referred to as the Hatch-Waxman Act and codified at 35 U.S.C. 271(e)(1)).

⁹ *Embrex, Inc. v. Service Engineering Corp.*, 216 F.3d 1343 (Fed. Cir. 2000) at 1349.

¹⁰ *Madey v. Duke University*, 307 F.3d 1361 (Fed. Cir. 2002) at 1352.