



MARINE MAMMAL COMMISSION

28 September 2026

Eugenio Piñeiro Soler
Assistant Administrator for Fisheries
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Dear Mr. Soler:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the advance notice of proposed rulemaking published by the National Marine Fisheries Service (NMFS) on 29 July 2026 (91 Fed. Reg. 47798) seeking input on potential revisions to the regulations implementing the provisions of the Marine Mammal Protection Act (MMPA) governing the import of fish and fish products into the United States. The Commission offers the following comments.

Statutory Requirements

The text of the applicable statutory provision being implemented, section 101(a)(2) of the MMPA (16 U.S.C. § 1371(a)(2)), is relatively simple, with the text concerning fish imports being only two sentences long. They read as follows:

The Secretary of the Treasury *shall ban* the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. (Emphasis added.)

For purposes of applying the preceding sentence, the Secretary [of Commerce] *shall insist on reasonable proof* from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States. (Emphasis added.)

As characterized by NMFS in the Federal Register notice, these two sentences, when read together, require “the United States to ban the importation of fish or fish products caught with commercial fishing technology that results in the incidental kill or serious injury of marine mammals in excess of U.S. standards.”

In general, the Commission concurs with this characterization. Clearly, the use of the word “shall” in both sentences makes these non-discretionary duties of the implementing agencies. Unless the statutory requirements are met, an import ban is to be imposed. Also, the Commission agrees that the metric of comparability is the level of incidental mortality and serious injury. That is, it is not sufficient for the exporting country to establish a comparable take reduction program on paper

— that program must achieve incidental mortality and serious injury levels that are comparable to the standards applicable to U.S. fisheries.

However, the Commission disagrees with NMFS’s characterization of the statutory requirements with respect to the burden of proof placed on exporting countries. A more accurate portrayal of the statutory requirements is that the MMPA requires “the United States to ban the importation of fish or fish products unless the exporting country provides reasonable proof that those fish or fish products were caught with commercial fishing technology that does not result in the incidental kill or serious injury of marine mammals in excess of U.S. standards.” As the statute is written, an import ban should be imposed and remain in place for any country that fails to demonstrate that its incidental mortality and serious injury rate is comparable to U.S. standards.

U.S. Standards

The standards applicable to the take of marine mammals incidental to U.S. fisheries are largely set out in sections 117 and 118 of the MMPA (16 U.S.C. §§ 1386-1387). A particularly clear standard is the prohibition on the intentional lethal take of any marine mammal in the course of commercial fishing operations (section 118(a)(5)).¹ Beyond that, the MMPA sets out two standards that domestic fisheries must meet. The immediate goal of the MMPA’s fisheries take provisions is to reduce the incidental mortality and serious injury of marine mammals to below each stock’s potential biological removal level (PBR). The longer-term goal is to reduce incidental mortality and serious injury of marine mammals incidental to commercial fisheries to insignificant levels approaching a zero mortality and serious injury rate — the so-called “zero mortality rate goal” (section 118(b))². Further, the MMPA includes additional requirements applicable to marine mammal species and stocks listed as endangered or threatened under the Endangered Species Act. Under MMPA section 101(a)(5)(E), taking of listed marine mammals is subject to other requirements, including that such taking have only a negligible impact on the species or stock.

Section 117 requires the publication and periodic updating of stock assessment reports for each stock of marine mammal that occurs in waters subject to the jurisdiction of the United States. These reports contain information used to calculate each stock’s PBR and to determine whether mortality and serious injury of marine mammals from fisheries and other human activities exceeds PBR. PBR is the product of three factors, the stock’s minimum population estimate, one-half of the maximum theoretical or estimated net productivity rate of the stock at a small population size, and a recovery factor between 0.1 and 1.0. The recovery factor is designed to take into account the conservation status and vulnerability of the stock (e.g., endangered, threatened, or depleted status, etc.) and inaccuracies in population and take estimates and helps to ensure that fisheries bycatch does not cause a stock to become depleted or prevent a depleted stock from reaching its optimum sustainable population level.

Section 118 established a registration and authorization program to ensure that all U.S. commercial fishing vessels are accounted for, information is collected on gear type(s) and the fisheries in which each vessel participates, and incidental deaths and injuries of marine mammals are reported. This section also established a monitoring program to “obtain statistically reliable estimates

¹ Except when “imminently necessary” to protect human life.

² This goal was to have been achieved for U.S. fisheries by 2001.

of marine mammal incidental mortality and serious injury,” determine the reliability of fishermen’s reports, and identify changes in fishing methods and technology. Other parts of section 118 pertain to take reduction plan development and implementation and, while similar efforts by other countries should be encouraged, they are not particularly relevant to determining whether the country has achieved an incidental mortality and serious injury rate that meets U.S. standards.

Needed Clarifications

The Commission has identified three ways in which it is unclear whether and how U.S. standards are applicable to foreign fisheries and are factored into comparability findings for exporting nations. The Commission recommends that, if NMFS proceeds with publication of a proposed rule, the rule clarify the applicability of these standards to fish imports.

As discussed above, one of the key standards applicable to U.S. fisheries is the zero mortality rate goal. The proposed rule should clarify whether that standard is considered when making comparability findings for export fisheries and, if so, how it is factored into NMFS’s decisions. If the zero mortality rate goal is not considered, the rule should explain the agency’s rationale for excluding it when making comparability findings.

Another central element of the U.S. standards is the inclusion of heightened protections for species of conservation concern (e.g, vulnerable and declining stocks), particularly those listed under the Endangered Species Act. More conservative mortality and serious injury limits are established through the inclusion of a lower recovery factor when calculating PBR and through the applicability of section 101(a)(5)(E), which overlays a negligible impact requirement for listed species on top of the generally applicable take reduction requirements of section 118. NMFS should explain whether comparable foreign programs must also include heightened protections for such vulnerable species and, presuming so, how the programs will be evaluated. Many foreign countries may be more familiar with the IUCN³ Red List, so NMFS should consider allowing them to use those assessments in lieu of listings under the U.S. Endangered Species Act when identifying which marine mammals merit special conservation consideration.

Finally, stock assessment reports for U.S. marine mammals include information not only on incidental take in fisheries but on all sources of human-caused mortality and serious injury. In turn, the totality of human-caused serious injury and mortality is expected to be taken into account when deciding which fisheries are subject to the take-reduction provisions of the MMPA.⁴ The proposed rule should provide clear guidance on whether and how non-fisheries mortality and serious injury are factored into determining whether export nation programs are comparable to U.S. standards. NMFS should also discuss how determinations will be made for individual export fisheries when it is apparent that the nation’s fisheries collectively kill or seriously injure marine mammals in excess of U.S. standards or when fisheries from several exporting nations collectively exceed those standards. It would be contrary to the goals of the MMPA to allow imports from fisheries that may be having adverse impacts on marine mammal stocks simply by carving them up into smaller pieces when making comparability findings.

³ International Union for Conservation of Nature.

⁴ See, for example, the first sentences of section 118(f)(7) and section 118(f)(8).

Comparability Findings

As noted above, the MMPA requires each exporting country to provide reasonable proof that it has achieved an incidental mortality and serious injury rate that meets U.S. standards. It does not require that those countries have fisheries and take reduction programs identical to those established by the United States, only that their programs are sufficiently robust to meet and document to that they meet the U.S. standards pertaining to incidental mortality and serious injury of marine mammals. To do this, the programs should have several core elements. NMFS should require that exporting countries demonstrate that their programs have these elements and explain how each contributes to achieving comparability with U.S. standards. These elements include:

1. A ban on the intentional lethal taking of marine mammals by participants in the export fishery and adequate enforcement of that ban.

This is one area where latitude should not be afforded to foreign programs. The prohibition on intentional lethal taking is a clear “line in the sand” for all U.S. fisheries and should be incorporated into the program for any comparable export fishery.

2. Mechanisms to account for and regulate the activities of all vessels participating in the export fishery.

The U.S. program gathers information on which vessels are engaged in each fishery, the gear that they use, and when and where they operate through its registration and authorization program. Comparable foreign programs should have similar mechanisms to account for and track the activities of all vessels participating in the export fishery or some other means of determining how many vessels participate in each fishery and what gear type they employ.

3. Methods and procedures for setting allowable mortality and serious injury limits.

Each exporting nation must provide a clear explanation of how it establishes limits on allowable levels of incidental marine mammal mortality and serious injury in the export fishery. To be comparable to the U.S. program, those limits should reflect information on the abundance, population dynamics, and conservation status of each marine mammal stock taken in the fishery. Each submission should explain how it determined which marine mammal stocks are taken by the fishery and how it estimated abundance (or the minimum population size) for each of those stocks, make those estimates available, indicate when the information on which the estimates are based was collected and analyzed, and provide the statistical variation around those estimates. Each country should also indicate whether it sets limits using a PBR approach and, if not, it should describe its methodology and explain why it believes that system is comparable to U.S. standards. The narrative from each country should also indicate whether any of the affected stocks are endangered or threatened or otherwise of particular conservation concern and, if so, how it took the stock’s status into account when setting take limits. In addition, the country should explain whether total human-caused mortality and serious injury or total fisheries incidental take is considered in its determinations of allowable take levels for the fishery.

As noted previously, although the zero mortality rate goal is an important standard applicable to U.S. fisheries, it remains unclear whether NMFS factors it into comparability findings for fish exporting countries. If NMFS determines that it is applicable, it should also explain how the standard will be implemented and what information the export nation needs to submit to demonstrate comparability.

The MMPA's provisions governing U.S. fisheries vary depending on the frequency with which marine mammals are taken, and vessels in fisheries determined to have a remote likelihood or no known incidents of killing or seriously injuring mammals are excluded from all but the basic registration and reporting requirements. The import rule adopts a similar approach through its exclusion of "exempt fisheries⁵." The Commission recommends that the current exemption definition and procedures be carried forward into any regulatory revisions, provided that adequate information collection measures and other mechanisms are in place to confirm periodically that the fishery continues to qualify as exempt.

4. Monitoring programs sufficient to provide reliable estimates of incidental mortality and serious injury in the export fishery.

The final element in determining whether a foreign program meets U.S. standards is whether monitoring is adequate to provide reliable estimates of incidental mortality and serious injury that can be compared with the established take limits. There are many ways that such monitoring can be conducted, but the crucial question is whether estimates of marine mammal mortality and serious injury are reliable. And, if those estimates are based on partial sampling that is extrapolated to estimate total take levels, the samples are representative of the fishery as a whole (temporally, by location, etc.) and that reliable effort data are also collected. NMFS should not mandate specific monitoring measures, but should insist on reasonable proof that whatever methodology is used produces reliable results. In general, reports provided by fishermen without additional verification would not meet this standard.

Overarching Questions

The *Federal Register* notice concludes by posing 16 questions on which it is seeking input. The Commission has already addressed some of these issues and will not repeat its comments here. Responses to other selected questions follow.

As discussed above, section 101(a)(2) of the MMPA places the burden on exporting countries to provide reasonable proof that the fish and fish products being imported to the United States were not caught with commercial fishing technology that results in the incidental kill or serious injury of marine mammals in excess of U.S. standards. If that burden has not been met, importation of those fish and fish products are to be banned. Several of the questions posed by NMFS seem to suggest possible ways to avoid having countries meet this burden of proof and, therefore, would be contrary to the statutory language. For example, question 5 asks about prioritizing comparability findings for fisheries based on the risk of bycatch or on the conservation status of the marine mammals they catch. The Commission agrees that heightened scrutiny is warranted when considering comparability findings for fisheries with the largest bycatch or that interact with vulnerable marine species and stocks. However, that does not mean that findings for

⁵ Defined in 50 C.F.R. § 216.3.

such fisheries should be given priority to the exclusion of other fisheries, which may be what NMFS is contemplating. The requirements of section 101(a)(2) would continue to apply to all export fisheries, and fish and fish products from exporting countries would be subject to an import ban unless and until an affirmative comparability finding is made (unless they were from an exempt fishery).

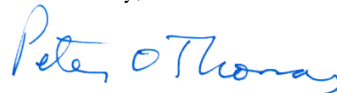
Similarly, question 7 suggests the use of “conditional” comparability findings based on a country’s commitment to meet U.S. standards in the future thereby allowing the country to import fish and fish products while giving it the opportunity to address problems that caused it to exceed U.S. standards. Such schemes are clearly inconsistent with the MMPA’s requirements, which place the burden on the exporting country to demonstrate current comparability with U.S. standards as a condition of importation. Likewise, the answer to question 13, which asks how to account for uncertainty and incomplete information, hinges on the MMPA’s burden of proof. If such uncertainty or data gaps undermine the exporting country’s ability to provide reasonable proof that it is meeting U.S. standards, then it does not meet the requirements of the MMPA and its fish and fish products would be subject to an import ban.

Question 11 asks whether potential economic impacts should be factored into NMFS’s comparability findings. Here again, the statute is clear; potential economic impacts are not one of the decision-making criteria. It is Congress’s purview, not NMFS’s, to decide whether to temper the existing fish import provisions to consider economic impacts.

Questions 10 and 15 focus on trade and tracking aspects of the import rule. The Commission’s area of expertise is marine mammals and implementation of the provisions of the MMPA, not trade. Nevertheless, we suggest that NMFS look to the system now in place for illegal, unreported, and unregulated (IUU) fishing (the Seafood Import Monitoring Program) and consider that as a possible model for tracking fish imports under the MMPA.

Thank you for considering the Commission’s comments. We look forward to working with NMFS as it considers possible revisions to the existing regulations.

Sincerely,



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Executive Director