



MARINE MAMMAL COMMISSION

9 November 2015

Mr. John J. Henderschedt, Director
Office of International Affairs and Seafood Inspection
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Dear Mr. Henderschedt:

The Marine Mammal Commission (the Commission) has reviewed the National Marine Fisheries Service's (NMFS) 11 August 2015 proposed rule (80 Fed. Reg. 48172) to implement provisions of Section 101(a)(2) of the Marine Mammal Protection Act (the MMPA) prohibiting imports of seafood products into the United States that are not taken under a program comparable to the one that manages marine mammal bycatch in U.S. fisheries. In consultation with its Committee of Scientific Advisors on Marine Mammals, the Commission offers the following comments and recommendations on the proposed rule with regard to the goals, policies, and requirements of the MMPA.

Background

The Commission previously commented on the petition requesting establishment of an import ban on certain swordfish products, which prompted NMFS to undertake this rulemaking (in its [29 January 2009 letter](#)) and on the Advance Notice of Proposed Rulemaking (ANPR) that led to this proposed rule (in its [30 August 2010 letter](#)).

Section 101(a)(2) of the MMPA provides that the Secretary of the Treasury shall ban the importation of commercial fish or products from fish that have been caught with commercial fishing technology that results in the incidental killing or serious injury of ocean mammals in excess of U.S. standards. The MMPA also directs the Secretary of Commerce to insist on reasonable proof from flag states documenting the effects of their fisheries on "ocean mammals" (section 101(a)(2)(A)). NMFS had never updated the implementation of these provisions following the 1988 or 1994 amendments to the MMPA, which significantly changed the U.S. standards. Rather, the agency had only focused on requirements concerning imports of yellowfin tuna from the fisheries in the Eastern Tropical Pacific and pertaining to fish products caught with high-seas driftnets, both of which are subject to additional requirements under the MMPA and which would remain unchanged under this proposed rule.

The proposed rule would revise and significantly expand the regulatory provisions applicable to the importation of fish and fish products under the MMPA by establishing conditions and procedures for evaluating a harvesting nation's regulatory program for managing marine mammal incidental mortality and serious injury in fisheries from which seafood products are exported to the United States. Following identification of such fisheries by NMFS in a List of Foreign Fisheries

(LOFF), harvesting nations would be required to apply to NMFS for a “comparability finding” (CF) for each identified fishery in order to export their seafood products to the United States.

In order to implement this requirement, it is necessary to provide a clear description of the “U.S. standards” on marine mammal bycatch in commercial fisheries to which foreign nation programs would need to be comparable. The two major sequential goals regarding bycatch set forth under the MMPA are reflected in section 118(f)(2) including to (1) reduce and maintain incidental mortality and serious injury below the Potential Biological Removal (PBR) of a stock and (2) reduce incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate goal (ZMRG), which NMFS has interpreted generally to be 10 percent of PBR. Sections 117 and 118 of the MMPA set forth the U.S. standards for meeting these goals, including (1) evaluating marine mammal stock status, (2) evaluating the levels of incidental mortality and serious injury with various monitoring requirements (observers, logbooks, other means), (3) developing take reduction plans and regulations to address marine mammal bycatch with the goal of reaching a total level of take below PBR within six months, and then below ZMRG within five years, and (4) implementing emergency regulations when incidental mortality and serious injury is having or likely to have “an immediate and significant adverse impact” on a marine mammal species or stock.

As noted in the preamble to the proposed rule, marine mammal bycatch in fisheries around the globe is the most serious direct threat to marine mammals worldwide. It has been estimated that over 650,000 marine mammals are killed annually due to bycatch in fishing operations (Read et al. 2006). Given that the United States imports 94 percent (by volume) of its seafood (NMFS 2013¹), U.S. import demand is clearly a driver in many fisheries around the globe. Total imports were valued at \$33.2 billion in 2013 (NMFS 2013), an increase of 6 percent over the previous year. The Commission therefore welcomes the long-overdue attention to this requirement, which was launched when NMFS was petitioned in 2008 to ban imports of swordfish from harvesting nations under the provisions of section 101(a)(2) of the MMPA. In addition, this rulemaking would help to “level the playing field” for U.S. fishermen who already abide by U.S. regulatory requirements that reportedly led to a reduction in marine mammal bycatch of some 40 percent overall from 1990 to 1999 (Read et al. 2006).

General comments and recommendations

While the Commission welcomes this rule, it has a number of concerns about the proposed process and measures. Our major concerns include (1) the long delay in implementing these statutory measures that have been in place since 1972 and that call for banning imports *until* evidence is provided by the exporting nation that its bycatch reduction programs are comparable to and achieve U.S. standards; (2) too much of the burden of proof is shifted to NMFS to gather information on marine mammal bycatch, the impacts of that bycatch on marine mammal stocks, and the effectiveness of mitigation measures being taken by harvesting nations for purposes of making CF determinations in cases where harvesting nations fail to provide adequate information, even though the statute clearly states that the harvesting nation is responsible for providing the “reasonable proof”; (3) the proposal to grant a CF in cases where the exporting country has not developed or provided reliable information that demonstrates its comparability to U.S. standards,

¹ NOAA Fisheries may revise this figure, which is likely an overestimate given conversion factors as well as U.S. imports of U.S.-caught products exported for processing (Fisheries of the U.S., page 115) although previous years’ figures have been estimated at over 80 percent.

both in terms of the structure of the program and its success in achieving comparably low levels of incidental marine mammal mortality and serious injury, particularly in cases where there is no marine mammal stock assessment, estimate of PBR, or reliable monitoring of the level of bycatch; and (4) a lack of information on NMFS's staffing and funding estimates needed to implement the rule. Of particular concern to the Commission is the proposed delay in implementing or even considering any import restrictions under the proposed timeline and procedures until at least early 2022, which would be nearly 14 years after the initial rulemaking petition and 50 years after the applicable statutory requirements were enacted. This delay is particularly disconcerting where bycatch by foreign fisheries exporting fish and fish products to the United States involves marine mammal species or populations that are highly endangered, or where bycatch is known to be a major threat to these species' or populations' conservation.

Definition of ocean mammals

It is unclear why Congress used the term "ocean mammals" in section 101(a)(2) rather than the term "marine mammals" as used elsewhere in the Act. The Commission has reviewed the legislative history of the Act and found no explanation for this different terminology. However, given the similar meanings of the terms "marine" and "oceanic" and the general purposes and policies of the MMPA to conserve all marine mammals, we do not think that Congress intended section 102(a)(2) to apply only to the killing or serious injury of marine mammals in oceanic waters. In fact, many marine mammals that inhabit fresh waters are listed as endangered or vulnerable (or data deficient) by IUCN and for most such species, fishery bycatch is identified as a significant threat (Reeves et. al. 2013). Assuming that Congress intended to provide similar protection from unsustainable fisheries bycatch to all marine mammals worldwide, the Commission believes that NMFS should interpret the fish import provision broadly. The Commission therefore recommends that NMFS include in the final rule a definition of the term "ocean mammal" and that it be defined to be equivalent to the statutory definition of the term "marine mammal."

List of Foreign Fisheries (LOFF)

The first step in the proposed regulatory process is to identify harvesting nations whose commercial fisheries export fish or fish products to the United States, and classify those fisheries based on the frequency of marine mammal bycatch as either "exempt" or "export" fisheries. Exempt fisheries are defined as those that have little likelihood of killing or injuring marine mammals (equivalent to Category III fisheries in the United States) but they must still obtain a CF. Export fisheries, which also must obtain a CF, are defined as foreign commercial fisheries with products exported to the United States that have more than a remote likelihood of incidentally killing or seriously injuring marine mammals (equivalent to Category I or II fisheries in the United States). Foreign fisheries that cannot be classified as either exempt or export fisheries (e.g., because of a lack of information on bycatch rates) are to be listed as export fisheries until adequate information is provided to or obtained by NMFS to determine their appropriate classification. Within one year of adopting a final rule, NMFS is to finalize the LOFF classifying all foreign fisheries that export fish or fish products to the United States, after publishing and considering public comments on a draft list. NMFS indicates that foreign fisheries will be classified based on "reliable information provided by the harvesting nation." The proposed rule goes on to indicate that "[w]here reliable information has not been provided by the harvesting nation, NMFS may determine whether the likelihood of mortality is 'remote' by evaluating other information, such as knowledge of the fishing techniques and gear, areas fished, etc."

The Commission understands that NMFS will consider information on marine mammal stocks and bycatch from a wide variety of sources. The Commission therefore assumes that any information received by NMFS that contradicts a harvesting nation's submission will also be considered in evaluating whether a fishery qualifies for a CF, or continues to qualify for a previously issued CF. What is less clear is how NMFS will determine the "effectiveness" of a foreign nation's bycatch management measures when information is incomplete or unavailable.

The proposed rule calls on foreign governments whose fleets export seafood to the United States to provide reliable information about their fisheries, marine mammal bycatch, marine mammal stocks, and marine mammal conservation programs related to bycatch reduction. In addition, harvesting nations are required to provide preliminary information within 90 days of the publication of the final rule. The Commission commends NMFS for the efforts it has already taken to contact nations currently exporting seafood to the United States to inform them of this rulemaking and to encourage their timely submission of information for classifying fisheries on the LOFF. This should help harvesting nations meet the deadline for properly classifying fisheries within the one-year deadline for publishing a final LOFF.

Nevertheless, the Commission believes it will be challenging for NMFS to identify and classify all fisheries and prepare this LOFF within one year. Whether all or even most foreign governments will be able to provide this information within the 90 days of rule adoption seems uncertain at best. The most troubling aspect in this regard is the apparent onus that the proposed rule places on NMFS for gathering the necessary information when nations do not provide adequate information themselves. As noted below, the legislative mandate clearly places the burden of proof on the exporting nations rather than NMFS. The Commission therefore recommends that, if NMFS finds that available information is not adequate to determine with sufficient reliability the frequency with which a foreign fishery takes marine mammals and from what stocks, the LOFF identify that fishery as an export fishery for which further consideration for issuance of a CF will be suspended until such information becomes available.

Application for a comparability finding

Following the date on which the first final LOFF is published, harvesting nations would be allowed a five-year exemption during which CF requirements of the rule would not be applied. The rationale for the five-year exemption period is that the U.S. bycatch reduction program implemented by NMFS under amendments to the MMPA in 1988 provided a five-year interim exemption to the commercial fisheries incidental take provision to allow U.S. fisheries to continue to operate in compliance with the Act ". . .yet minimize the harm it caused marine mammals." In addition to the initial five-year exemption from CF requirements, harvesting nations that wish to export a "new" product will automatically get a one-year provisional CF, again allowing marine mammal bycatch to continue unabated. It is not clear why new fisheries developed after the phase-in of the rule is complete would not have to meet the requirements for obtaining a CF before their fish and fish products can be imported into the United States

Although the Commission appreciates the situation created by NMFS's past failure to implement and enforce the fish import provision of section 101(a)(2), this nevertheless is an ongoing requirement under the MMPA that has been in place for more than 40 years. Thus, while it is unfortunate that fishing nations are being held accountable for their fishing practices as they relate to marine mammals all at once and generally for the first time, this is what the MMPA appears to

require. Inasmuch as this is an ongoing, long-standing statutory requirement, the Commission does not see a legal basis for deferring implementation. To the extent that any delay can be countenanced, it should be kept to the absolute minimum necessary to secure the required information from exporting countries. The Commission therefore recommends that NMFS provide additional justification, including a legal analysis explaining why imports of fish and fish products need not be banned until the exporting countries provide the “reasonable proof” required under section 101(a)(2)(A), if it decides to defer implementation as proposed. NMFS also should explain why a shorter phase-in is not possible. The Commission is concerned that the proposed delay would result in at least another six years during which seafood could continue to be imported into and sold in the United States, despite unacceptably high levels of marine mammal bycatch, unbeknownst to U.S. consumers, and during which U.S. fleets would face unfair competition from foreign fleets with little or no accountability to follow comparable marine mammal conservation measures.

The Commission also notes that—

- The five-year grace period under the 1988 interim exemption for U.S. fisheries was not a period without other requirements. During that period, in return for a certificate of exemption, all fishermen were required to register with NMFS to identify their fishing activity and gear type, to self-report any marine mammal bycatch, and to accept marine mammal observers aboard their vessel if asked by the agency to carry them. In addition, the agency was required to undertake research necessary to prepare stock assessments for affected marine mammals. Whereas the five-year interim exemption from CF requirements granted to foreign fisheries under the proposed rules is the same duration as that granted to U.S. fishermen while new U.S. standards were being developed, there are no similar requirements for interim measures to be imposed on harvesting nations during their proposed five-year exemption period and seafood exports from foreign fisheries can continue to flow freely into the U.S. market.
- The 1988 interim exemption also was not absolute. It included an emergency rulemaking provision that directed NMFS to issue regulations “to prevent to the maximum extent practicable any further taking” of marine mammals in a fishery if information being collected under the interim program indicated that incidental taking was having “an immediate and significant adverse impact” on any marine mammal stock. In addition, the interim exemption provided for remedial action to be taken by fishery management councils and state fisheries managers to mitigate adverse impacts on marine mammals in other situations. In contrast, the proposed five-year exemption for foreign fisheries is absolute. There would be no similar requirements that fishing nations expedite action to address acute problems.
- The need for the 1988 interim exemption under the MMPA was prompted by the February 1988 ruling in *Kokechik Fishermen’s Association v. Secretary of Commerce*, which, with little warning, threw into question the Secretary’s ability to issue incidental take authorizations to most U.S. fisheries. There was no time to anticipate that a new regime would be instituted. Also, a major reason that the interim exemption was established for five years was to provide time for the Commission and NMFS to develop a new incidental take regime based on sound principles of wildlife management and consistent with the purposes and policies of the MMPA (see section 114(l)). In contrast, nations that export fish and fish products to the United States have had advance notice that the United States was in the process of implementing these fish import provisions since at least 2010, with the publication of the ANPR and through outreach efforts by NMFS and other federal agencies. Also, unlike the

situation in 1988 when the United States was developing a new incidental take regime from scratch, exporting nations have the benefit of patterning their program on the U.S. program. These factors all argue in favor of fully implementing the import rule more quickly than under the 1988 interim exemption.

- Harvesting nations that are members of regional fisheries management organizations (RFMOs) may already be subject to marine mammal bycatch monitoring and mitigation measures. These RFMO measures may be based on assessment of marine mammal stocks and some attempt to define a bycatch limit or goal, and impose some type of gear restrictions, time/area closures, monitoring requirements, etc. to attain that goal. In such cases, the Commission believes it would be appropriate to implement provisions of these regulations within a shorter amount of time (e.g., within no more than 2.5 years). Indeed, the five-year exemption proposed in this rule could even facilitate non-compliance, or a delay in compliance, with some RFMO measures.
- In other cases, certain foreign fisheries operate literally side-by-side with comparable U.S. fisheries, such as the U.S. and Canadian Atlantic lobster and gillnet fisheries. The marine mammal stocks impacted by these fisheries are assessed and have established PBR estimates, so there is no need to start at “square one” for the foreign fishery, and no need for the full five-year phase-in as proposed.
- In still other cases, marine mammal bycatch has been the focus of years of bilateral meetings, technical and financial support, and other efforts to reduce bycatch—e.g., the bycatch of critically endangered vaquitas in gillnet fisheries in the Upper Gulf of California, Mexico. The vaquita population has been thoroughly assessed and closely monitored for more than a decade. There is no need or justification for delaying implementation with respect to fish and fish products from those fisheries that are known to kill or seriously injure vaquitas.

Thus, to the extent that any delay in implementing these requirements is consistent with the requirements of the MMPA, the Commission believes that, at least in some cases, a compelling rationale exists for providing a shorter period of exemption from CF requirements, particularly when bilateral and multilateral discussions concerning bycatch, and even about this rulemaking (underway in some form or another for nearly eight years), have a long history. Furthermore, it is usually the case that where marine mammal bycatch has received attention under bilateral and multilateral arrangements, the problem is acute. Indeed, a five- to six-year delay in imposing import restrictions on fisheries that kill or seriously injure vaquitas, and potentially on fisheries that affect other highly endangered marine mammal species or populations, could be the difference between survival and extinction. The Commission therefore recommends that NMFS establish a shorter exemption period for fisheries that (1) have bycatch of marine mammals that are critically endangered; (2) involve marine mammal stocks for which ample information already exists on their status and bycatch levels and for which monitoring and bycatch mitigation measures are already well developed or could be quickly established; or (3) are already subject to RFMO measures for monitoring and mitigating marine mammal bycatch. Examples meeting the first two of these requirements are the Mexican gillnet fishery for shrimp in the Upper Gulf of California and the Canadian Atlantic gillnet and lobster pot fisheries that threaten endangered North Atlantic right whales.

While the Commission maintains that a far shorter exemption period should be allowed for this process, one possible approach would be to require that harvesting nations whose fisheries fall under the above three categories provide information on their existing or proposed marine mammal

bycatch reduction programs at the time of the initial progress report (i.e., 2.5 years following the publication of the final rule) and to make CF determinations for those fisheries within a short time (e.g. 90 days) after those submissions. This would require defining a basis for identifying fisheries that would be subject to the shorter exemption period during the first year after adoption of the final rule—at a minimum, those fisheries that meet criterion 1 above—and notifying those nations with affected fisheries at the time the final LOFF is published.

As noted below, the five-year exemption period should be conditioned upon immediate implementation of measures to monitor bycatch and assess marine mammal stocks, as opposed to waiting for five years to see if these actions have been taken. If NMFS proceeds to allow a five-year exemption period, even for measures that were required for domestic fisheries under the U.S. interim exemption, the Commission recommends that harvesting nations be required to take immediate steps once the final LOFF is published to institute programs that require all fishermen engaged in fisheries that might take marine mammals to register with the appropriate national agency to identify their target catch and gear type, to report all marine mammals taken, and to carry observers when asked to do so. As noted above, NMFS is proposing that a progress report be provided within 2.5 years following the final LOFF's publication. This progress report would be an opportunity for NMFS to assess whether adequate action has been taken to institute these interim measures. Harvesting nations that fail to take any meaningful action in this regard within the first 2.5 years or that fail to provide a progress report that addresses these issues should have their five-year exemption period to CF requirements curtailed or revoked and their products subject to an immediate import ban.

Intentional killing and aquaculture

The proposed rule requires that both “exempt” and “export” fisheries receive a CF and that harvesting nations demonstrate that either—

- (1) there is a prohibition on the intentional killing or serious injury of marine mammals in the course of commercial fishing operations (including aquaculture) unless the mortality or injury is necessary for self-defense or safety issues; *or*
- (2) the harvesting nation has procedures to reliably certify that its exports of fish and fish products to the United States are not the product of an intentional killing or serious injury unless that is in self-defense or for safety reasons.

We interpret the second option as allowing imports of fish and fish products to the United States from fisheries in which it is permissible to kill marine mammals intentionally, as long as no marine mammals were killed or seriously injured in catching or raising the particular fish being exported to the United States. If we are correct in our understanding, this is not only inconsistent with U.S. domestic standards for aquaculture and other fisheries, but it also provides a significant loophole for aquaculture operations around the world. It also presents significant enforcement problems, both in terms of monitoring whether any marine mammals were intentionally killed or injured in raising or harvesting the fish products and in differentiating seafood that can be imported from that which is banned. The Commission therefore recommends that NMFS require the first condition to be met in order for any fishery, including an exempt fishery, to receive a comparability finding, and that the alternative provided by the second option be dropped.

Although generally listed as Category III fisheries, aquaculture operations in the United States are subject to the MMPA incidental take regime. Similarly, foreign aquaculture operations should be subject to the import provisions under the MMPA. A large share of U.S. seafood imports is farmed product (particularly shrimp and salmon). As noted in the correspondence received by NMFS in 2011 and 2012 (cited in the preamble to the proposed rule), aquaculture operations in foreign countries interact with marine mammals in ways that can result in intentional or incidental mortality or serious injury. Therefore, the Commission would have expected the rule to address interactions between foreign aquaculture facilities and marine mammals more explicitly. In addition, NMFS should consider whether “U.S. standards” for aquaculture facilities include requirements that enclosures be designed to reduce the likelihood of depredation and entanglement. If they do, the final rule should specify that such requirements must also be met by foreign aquaculture facilities in order to receive a CF. For example, in cases of salmon farming, where it is U.S. practice to use technology that effectively excludes marine mammals from preying on the farmed product and that significantly reduces the risk of serious injury and mortality, the Commission recommends that NMFS consider such measures to be part of the U.S. standards against which foreign programs are compared when making CF determinations for farmed salmon imports.

Burden of proof and quality of information

As noted above, the Commission believes that the proposed rule places far too much responsibility on NMFS to gather information on marine mammal bycatch and the monitoring and mitigation programs of harvesting nations needed to make CF determinations in cases where harvesting nations fail to provide adequate information. Section 101(a)(2)(A) of the MMPA directs the Secretary of Commerce to “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.” The statute clearly places the burden of proof on the harvesting nation to provide the information necessary to show that fish and fish products exported to the United States were not caught in ways that exceed U.S. marine mammal protection standards. Unless sufficient evidence is presented by the exporting nation, imports of such fish and fish products are to be banned. Shifting some or all of this burden of proof to NMFS is inconsistent with the statutory structure and will likely be less effective given the limited access the agency has to information on foreign fishery operations and its limited resources (staff and funding) to conduct such investigations.

The Commission interprets the “reasonable proof” requirement of section 101(a)(2)(A) as placing the onus on the exporting country to provide information of sufficient quality and reliability to make the required showings. As such, NMFS will need to require the exporting nation to demonstrate that the basic information being submitted is reliable. For instance, it would be insufficient for a country merely to report the numbers of marine mammals killed or seriously injured incidental to a particular fishery without also providing sufficient information for NMFS to judge the reliability of those numbers – e.g., are they based on self-reporting by fishermen or monitoring by observers, if observers are used, what is the level of coverage and how are the observers distributed, how is observer independence guaranteed, etc.? Similarly, it would be insufficient for the exporting country to report that the incidental take levels in a fishery are below PBR without also providing sufficiently detailed information on how the PBR was calculated to allow NMFS to assess the quality and precision of the population estimates and other data that went into that calculation. The proposed rule does not include clear mechanisms for NMFS to ensure the

reliability of the information that is submitted. The Commission recommends that NMFS require the exporting nation to provide information in sufficient detail to demonstrate its reliability.

Similarly, the Commission expects NMFS to require exporting countries to submit more than just a basic written description of its incidental take program to obtain a CF. How will NMFS ensure that the CF is based on a truly effective program rather than one that only looks good on paper? As noted in the Commission's August 2010 letter, NMFS must take into account not only the statutory or regulatory requirements imposed on foreign fishermen but also the corresponding level of compliance. This will require evaluation of the harvesting nation's monitoring and enforcement measures, in addition to information about the bycatch reduction program. Therefore, the Commission recommends that NMFS require nations to provide information on the methods and effectiveness of fishery monitoring and enforcement activities in addition to the overall marine mammal bycatch reduction program.

Comparability with U.S. fisheries

The proposed rule indicates that, where NMFS lacks data on analogous U.S. fisheries or the data needed to calculate PBR levels for the affected marine mammal stocks, comparable measures would not be required for a foreign nation to receive a CF. Similarly, if U.S. fisheries exceed bycatch limits established by a regulatory program, then analogous foreign fleets would not be subjected to meeting bycatch limits. However, it is unclear whether a small level of bycatch above PBR in a U.S. fishery could result in an analogous foreign fishery being allowed to export its seafood even if bycatch exceeds its PBR or other limit by a much greater amount.

The Commission has several questions and concerns about this proposal. What if the fisheries are analogous in terms of the type of gear used or the fish species targeted, but the marine mammal species subject to incidental take differ? For example, suppose the U.S. fishery occurs in waters inhabited by beaked whales, but the foreign fishery does not. Would the difficulty in obtaining the information necessary to calculate PBR for beaked whales, which are cryptic species and difficult to detect and count, excuse the foreign fishery from meeting the comparability requirements if it took only large whales, which are much easier to detect and for which a PBR calculation could be more easily produced? Would these be considered analogous fisheries for purposes of the import rule and, if so, what is the rationale for exempting the foreign fishery from providing the information necessary to make a CF if the impediment to NMFS having a reliable PBR estimate is not relevant to the foreign fishery? The Commission recommends that NMFS provide additional details on how it would make determinations as to whether U.S. and foreign fisheries are analogous, and that similarities in the taxa, behavior, and status of the marine mammals subject to taking be one of the considerations.

It also is not clear whether the lack of a PBR calculation for one stock taken in a U.S. fishery would form the basis for issuing a CF to an analogous foreign fishery for all stocks. For instance, if the U.S. fishery takes three or four marine mammal species, but a PBR calculation is lacking for only one, would that be a sufficient basis to grant a CF to the foreign fishery even it also takes multiple species, but does not have a comparable program for those species (or similar species) for which NMFS does have the information necessary to calculate PBR? While we agree that foreign fisheries should not be held accountable for meeting standards that the United States is not meeting, it appears that the exemption being considered by NMFS is overly broad. The Commission therefore recommends that any exemption that allows for the issuance of a CF based on the lack of a PBR

calculation for a marine mammal stock taken in an analogous U.S. fishery be tailored narrowly and applied only to the finding as it relates to the same or similar species or stocks.

There also is a temporal aspect that needs to be considered in deciding whether to issue a CF summarily to a foreign fishery based on certain deficiencies in meeting applicable standards in an analogous U.S. fishery. Fiscal challenges can result in shifts in allocation of funding in the United States for marine mammal research, observer coverage on fishing vessels, and other bycatch monitoring and mitigation programs, possibly resulting in out-dated or unavailable estimates of stock abundance and PBR calculations. In some cases these funding constraints last only for a few years before resources become available to correct the deficiency. Similarly, U.S. fisheries that exceed their bycatch cap (as based on a five-year bycatch average) are subject to the development of new measures by relevant Take Reduction Teams or new regulatory actions that are needed to correct the problem. Since NMFS is proposing that a CF be valid for a five-year period, it would be unfortunate if such exemptions were granted to foreign nations at a time when U.S. fisheries bycatch or marine mammal stock assessments are not meeting the performance standards but corrective actions are being implemented or developed. Therefore, the Commission recommends that NMFS base a foreign fishery's CF on its comparability to the overall performance and effectiveness of the U.S. marine mammal science and regulatory framework over a longer time period.

Implementing import bans

Implementing trade restrictions under the proposed regulations would be arduous given the large number of fisheries exporting seafood products to the U.S. market, the need to process all these applications on the same regulatory cycle, and the uncertainties that will inevitably surround the quality and reliability of available information. The Commission therefore commends NMFS for making best use of the ACE/ITDS² in its proposal as long as the information is sufficient to track seafood imports and ensure implementation of trade prohibitions associated with this rulemaking. The Commission notes, however, that the seafood tracking system being proposed by NMFS under the illegal, unreported and unregulated (IUU) program would not apply to products from fisheries associated with marine mammal bycatch, as the focus of that program is on the likelihood of IUU fishing on the target stocks. The Commission raised this issue in its [11 September 2015 letter](#) to NMFS regarding the species at risk of IUU fishing for which a traceability program should be implemented.

The Commission supports the proposed requirement for documenting products similar to ones that are denied a CF. However, the Commission is extremely concerned that the rule would allow a country denied a CF for one fishery to export that *same* seafood product from another fishery in another region or using a different gear type. For example, if shrimp caught with gillnets in Mexico is banned for importation to the United States, it would be a challenge to differentiate those shrimp from all other types of shrimp that may legally enter the U.S. market from Mexico. This presents considerable risk that the trade ban could be bypassed. The possibility of fraud or even accidental mislabeling is too great, and the documentation required from the exporting nation is too complex to expect compliance or detection of violations by the United States.

Other trade management programs address this problem through similarity of appearance provisions. For example, the Convention on International Trade in Endangered Species (CITES)

² Automated Commercial Environment/International Trade Data System.

allows for the regulation of trade in species that otherwise would not qualify for listing in order to control trade in products from species listed on Appendix I or Appendix II (CITES Article II. 2.(b), Resolution Conf. 9.24 (Rev. CoP12)). The Commission therefore recommends that, if a nation fails to receive a CF for a certain seafood product produced by a given fishery, then all exports of that seafood product should be prohibited until the nation is able to meet U.S. standards, unless the two countries are able to design and implement a tracking program that provides reasonable assurance that no prohibited fish or fish products are being exported to the United States. This would provide further incentives to harvesting nations to take appropriate action to address marine mammal bycatch.

The Commission also is concerned that sufficient funding to implement this program may not be available and could inhibit the ability of NMFS to meet its commitments. The Commission therefore recommends that the preamble to the final rule estimate the resource requirements (staff, funding) needed to implement the rule and identify the steps that will be taken to secure those resources (e.g., new budget initiatives, reallocation). Given the magnitude of seafood imports into the United States and the effect of foreign fishing on marine mammal stocks worldwide, the benefits for global marine mammal conservation resulting from this rule constitute a powerful argument for funding this program (along with capacity building for fisheries outside of international trade “reach”). No less compelling is the rationale that U.S. fishermen should be competing with foreign fisheries on a level playing field where costs for bycatch reduction are factored into all seafood products sold in U.S. markets. Of course, shifting the burden of funding research and information collection onto those nations who benefit from selling fish and fish products to the U.S. market is another way to reduce the costs to NMFS. Recognizing the multi-billion dollar value of seafood products imported annually into the United States and the burden that is expected to fall on NMFS to analyze, and perhaps gather, information to make CF determinations, the Commission recommends that NMFS explore some form of cost recovery to supplement funding needed to implement the import provisions of the MMPA.

International, bilateral, and multilateral outreach, capacity building, and negotiations

The Commission commends NMFS for the efforts it has already made to reach out to nations whose fisheries supply the U.S. seafood market. The Commission urges that one-on-one consultations, as well as capacity building, continue to be pursued whenever possible. Given the challenges that some harvesting nations will face in implementing marine mammal bycatch monitoring and mitigation programs that meet the MMPA’s standards, it will be important for NMFS to have sufficient funding in order to provide “carrots” and not just “sticks” to build capacity and encourage compliance. This will be even more important for fisheries noted in the following section that are not directly subject to/affected by this rulemaking or RFMO measures. In return, as noted in our comment above, any harvesting nation seeking a CF should be subject to a shorter exemption period if the harvesting nation has benefited from capacity building from the United States in designing the bycatch reduction program.

Global marine mammal bycatch beyond the “reach” of this rulemaking

Despite efforts made under this rulemaking, marine mammal bycatch around the world will continue to be a problem, for a number of reasons including—

- Some harvesting nations do not export fish or fish products to the United States or may decide to sell their products elsewhere if they believe the CF requirements to be too burdensome. In fact, exporters in some harvesting nations may use the proposed five-year grace period to find new markets, particularly if the fishing industry is concerned that their governments will be unable to complete the U.S. process of applying for and obtaining a CF.
- Harvesting nations that are unable to apply for a CF for all their fisheries on the LOFF may, at least initially, decide to develop marine mammal bycatch reduction programs for only some of their fisheries, leaving marine mammal bycatch to continue at excessive levels for other fisheries. This could lead to “easier” problems being addressed first, while leaving more egregious, challenging, and biologically significant cases of marine mammal bycatch for consideration at a later date – if at all. For most countries, if there is an alternative market, shifting their exports to those new markets may be an easier “solution” than meeting the U.S. standards required for a CF.

The Commission therefore believes that NMFS should increase its efforts to build capacity for implementing and carrying out the required programs in those countries, particularly those with small-scale coastal gillnet fisheries, where bycatch continues to be a major source of marine mammal mortality. Trade and other measures under the MMPA, High Seas Driftnet Fishery Moratorium Protection Act, or RFMOs often are not applicable to small-scale fisheries that supply local markets. In addition to working bilaterally on capacity building, NMFS should continue a multilateral effort to develop guidelines for reducing marine mammal bycatch under the United Nations Food and Agriculture Organization, much as was done for sea turtles. In addition to providing marine mammal bycatch guidance for small-scale domestic fisheries, these guidelines could be a powerful tool in multilateral negotiations within RFMOs on measures to address marine mammal bycatch.

Specific requests for comment

This rulemaking includes specific requests for comments on the following three points—

- (1) Page 48179—Comments on “these or any other alternative approaches...” for the CF. The Commission recommends that NMFS either issue or deny a CF, rather than issuing a “Finding of Non-Comparability for nations that do not meet CF requirements.” As discussed above, this approach is consistent with the burden of proof set forth in section 101(a)(2)(A). It is an affirmative duty of the exporting country to show that it meets the comparability requirements. As we read the description of the Finding of Non-Comparability alternative, it would switch the burden of proof onto the U.S. government by allowing imports to continue until NMFS has collected sufficient information to show that the measures in place for a given fishery are not comparable. The Commission further recommends that the final rule clearly specify that nations be issued a CF only *if* they meet the U.S. standards, rather than be issued a CF *unless* it is shown that they do not meet the applicable requirements.
- (2) Page 48182—Comments on the exempt fisheries process—should additional conditions apply to “exempt” fisheries. Fisheries are classified as exempt solely because they are expected to have a very low likelihood of killing or seriously injuring marine mammals. This means that it should be acceptable to subject them to less scrutiny as long as there is reliable information to indicate that they do in fact have only a remote likelihood of taking marine mammals and that the few they may take are not endangered. Nevertheless, the Commission recommends

that evidence for a CF for exempt fisheries be subject to the same scrutiny given to export fisheries. In particular, as noted in the section above on Intentional Killing and Aquaculture, the Commission recommends that there be a ban on intentional killing (other than for human safety concerns) and that any other standards that apply to U.S. aquaculture facilities be considered in evaluating comparability.

- (3) Page 48185—Comments on the utility of the progress report and an alternative that would require subsequent progress reports only for fisheries that were denied a CF or are reapplying after a CF has been terminated. The Commission recommends that progress reports be required for all fisheries to ensure that the conditions that led to a CF being issued remain in place and that each fishery continues to be comparable to U.S. standards, particularly in cases where complete information was not provided by the harvesting nation. Furthermore, as noted above, the Commission recommends that failure to meet certain research and monitoring standards by the time that the initial progress report is due should be a sufficient basis for implementing a trade ban immediately rather than allowing the full five-year exemption.

The Commission believes that this rulemaking has the potential to use the significant leverage of the U.S. seafood market to ensure improvements in addressing marine mammal bycatch in fisheries around the world. The Commission hopes that these comments and recommendations will be useful as NMFS prepares the final rule for the import measures under the MMPA.

Sincerely,



Rebecca J. Lent, Ph.D.
Executive Director

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