

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****15 CFR Part 902****50 CFR Part 216****[Docket No. 0907301201-4923-02]****RIN 0648-AY15****Fish and Fish Product Import Provisions of the Marine Mammal Protection Act**

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS is proposing to revise its regulations to implement the import provisions of the Marine Mammal Protection Act (MMPA). These proposed regulations would establish conditions for evaluating a harvesting nation's regulatory program for reducing marine mammal incidental mortality and serious injury in fisheries that export fish and fish products to the United States. Under this proposed rule, harvesting nations must apply for and receive a comparability finding for each fishery identified by the Assistant Administrator in the List of Foreign Fisheries in order to import fish and fish products into the United States. The proposed rule establishes procedures that a harvesting nation must follow, and conditions to meet, to receive a comparability finding for a fishery. The proposed rule also establishes procedures for intermediary nations to certify that exports from those nations to the United States do not contain fish or fish products subject to an import prohibition. Agency actions and recommendations under this rule will be in accordance with U.S. obligations under applicable international trade law, including the World Trade Organization (WTO) Agreement.

**DATES:** Written comments must be received by 5 p.m. Eastern Time on November 9, 2015. Information and comments concerning this proposed rule may be submitted by any one of several methods (see **ADDRESSES**). NMFS will consider all comments and information received during the comment period in preparing a final rule. NMFS will also seek input from other nations on the proposed rule at bilateral and multilateral meetings, as appropriate.

**ADDRESSES:** You may submit comments on this document, identified by NOAA-NMFS-2010-0098, by any of the following methods:

1. *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to [www.regulations.gov/](http://www.regulations.gov/) #!docketDetail;D=NOAA-NMFS-2010-0098, click the "Comment Now!" icon, complete the required fields and enter or attach your comments.

2. *Mail:* Submit written comments to: Director, Office of International Affairs, Attn: MMPA Fish Import Provisions, NMFS, F/IA, 1315 East-West Highway, Silver Spring, MD 20910.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on <http://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe portable document file (PDF) formats only.

**National Environmental Policy Act (NEPA)**

NMFS prepared a draft Environmental Assessment (EA) to accompany this proposed rule and will consider comments on the EA submitted in response to this notice. The EA was developed as an integrated document that includes a Regulatory Impact Review (RIR) and Initial Regulatory Flexibility Analysis (IRFA). Copies of the proposed rule and draft EA/RIR/IRFA analysis are available by writing to the mailing address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the NMFS Web site at <http://www.nmfs.noaa.gov/ia/>. This proposed rule is also accessible on the Government Printing Office Web site at <http://www.gpo.gov/fdsys/>. Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Nina Young, NMFS F/IA at [Nina.Young@noaa.gov](mailto:Nina.Young@noaa.gov) or 301-427-8383.

**SUPPLEMENTARY INFORMATION:****MMPA Requirements**

The U.S. Ocean Commission stated in its 2005 report that the "biggest threat to marine mammals worldwide is their accidental capture or entanglement in fishing gear (bycatch), which kills hundreds of thousands of them each year." Scientists estimate the global annual bycatch of marine mammals at more than 600,000 animals. The MMPA contains provisions to address the incidental mortality and serious injury of marine mammals in both domestic and foreign commercial fisheries. With respect to foreign fisheries, section 101(a)(2) of the MMPA states that 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. 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. (see 16 U.S.C. 1371(a)(2)) Throughout the 1970s and 1980s, section 101(a)(2) was implemented by regulations under 50 CFR 216.24(e) and was tied to standards governing U.S. fisheries under general permits. In 1994, Congress reauthorized the MMPA and created a regime for governing the incidental take of marine mammals in U.S. commercial fisheries (16 U.S.C. 1387). This regime replaced the general permit thereby rendering those regulations obsolete and narrowing their focus to fish and fish products caught with driftnets (50 CFR 216.24(e)) (See EA for details on the regulatory history).

Section 102(c)(3) of the MMPA states that it is unlawful to import into the United States any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary of Commerce (Secretary) has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident to the catching of the fish. (see 16 U.S.C. 1372(c)(3)). Section 102(c)(3) is implemented by regulations under 50 CFR 216.12(d). This section among other provisions implements the MMPA's prohibition on the intentional killing or serious injury of marine mammals in the course of commercial fishing, under 16 U.S.C. 1378.

*U.S. Standards Governing Incidental Marine Mammal Mortality and Serious Injury in Commercial Fisheries Under the Jurisdiction of the United States*

Since the MMPA was first passed in 1972, one of its goals has been that the incidental kill or incidental serious injury of marine mammals permitted in the course of [U.S.] commercial fishing operations be reduced to insignificant levels approaching a zero mortality and injury rate. (see 16 U.S.C. 1371(a)(2)).

The MMPA establishes a moratorium on taking marine mammals (with limited exceptions) within U.S. waters or by persons or vessels subject to U.S. jurisdiction on the high seas or in waters of another nation seaward of its territorial sea (16 U.S.C. 1371(a)), where “take” means to “harass, hunt, capture, or kill or attempt to harass, hunt, capture, or kill any marine mammal” (16 U.S.C. 1362(13)). The MMPA originally prohibited the incidental take of marine mammals in U.S. commercial fisheries unless authorized by a general permit. In U.S. commercial fisheries, optimum sustainable population (OSP) had been the standard used to issue a general permit authorizing such incidental take. General permits could not be issued for the take of marine mammals from a population that was determined to be below its OSP level. Internationally, nations could not export fish to the United States if caught in a manner that would not be allowed by a general permit (45 FR 72194, October 31, 1980).

In January 1988, NMFS announced its intention to prepare an Environmental Impact Statement (EIS) on the proposed reissuance of domestic general permits authorizing commercial fishers to take marine mammals incidental to commercial fisheries (53 FR 2069, January 26, 1988). In preparing the draft EIS, NMFS determined that it had insufficient information to determine OSP levels for the majority of marine mammal stocks taken in U.S. commercial fisheries. Subsequently, a legal challenge to an MMPA general permit resulted in a court order that NMFS could not issue a general permit to incidentally take any population that is below its OSP level or for which NMFS could not calculate OSP. See *Kokechik Fishermen's Ass'n. v. Secretary of Commerce*, 839 F.2d 795 (D.C. 1988). Without OSP determinations, NMFS could not make the findings required to waive the MMPA moratorium on incidental take and therefore could not promulgate regulations to issue a general permit for the incidental take of marine mammals in commercial fishing operations.

Without the authority to issue a general permit, regulations governing importations from foreign fisheries were no longer coherent since they were linked to the U.S. general permit requirements.

In November 1988, Congress provided a five-year interim exemption to the commercial fisheries incidental take provision to allow fishing to continue yet minimize the harm it caused marine mammals. This exemption allowed NMFS time to develop a comprehensive regime governing commercial fisheries interactions with marine mammals and alternative standards to OSP (16 U.S.C. 1383a). The MMPA Interim Exemption Program (Interim Exemption) required fishers to participate in a data-gathering program by carrying mandatory observers, compiling log books, and reporting marine mammal interactions in return for a temporary exemption from the moratorium on incidental take (16 U.S.C. 1383a). Under the Interim Exemption, Congress also required the Secretary of Commerce to place commercial fishing operations into one of three categories based on the frequency of incidental mortality and serious injury of marine mammals and to publish an annual list of fisheries by category (16 U.S.C. 1383a(b)).

In 1994, the MMPA was amended to add sections 117 and 118 (16 U.S.C. 1386 and 1387, respectively), which established the current U.S. standards governing the incidental take of marine mammals in commercial fisheries. These amendments established a new metric: Potential Biological Removal (PBR). PBR is defined as “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population” (16 U.S.C. 1362(20)).

With this change in the MMPA, incidental take authorizations and regulations to reduce incidental take in commercial fisheries became linked to PBR, which could be readily calculated for marine mammal stocks. The 1994 amendments reaffirmed the original goal of the MMPA to reduce the incidental mortality or serious injury of marine mammals in the course of commercial fishing operations to insignificant levels approaching zero. To more clearly delineate this goal, NMFS later issued regulations (50 CFR 229.2) to define this “insignificance threshold” as 10% of a stock’s PBR level. Therefore, with these amendments, MMPA section 118(f)(2) sets two goals. The short-term goal is to reduce and maintain incidental mortality and serious injury below the PBR of a stock. The long-term goal is to

reduce incidental mortality and serious injury “to insignificant levels approaching a zero mortality and serious injury rate” (i.e., 10% of a stock’s PBR level).

The 1994 amendments to the MMPA maintained the requirement for categorizing commercial fisheries into three groups based on frequency of interactions with marine mammals (16 U.S.C. 1387(c)(1)). Category I includes fisheries that have frequent incidental mortality and serious injury of marine mammals. Category II includes fisheries that have occasional incidental mortality and serious injury of marine mammals. Category III includes fisheries that have a remote likelihood of, or no known, incidental mortality and serious injury of marine mammals. Numerical criteria for placing fisheries into these categories were eventually developed using the PBR standard (50 CFR 229.2).

Today, sections 117 and 118 of the MMPA comprise the U.S. standards for regulating incidental mortality and serious injury in domestic commercial fisheries, including (1) evaluating marine mammal stock status; (2) evaluating the levels of incidental mortality and serious injury in commercial fisheries by placing observers on vessels, reporting requirements, and other means; (3) developing take reduction plans and regulations to reduce incidental mortality and serious injury of marine mammals below each stock’s PBR level and, ultimately, to insignificant levels approaching zero mortality and serious injury rate, following consultation with stakeholder-based take reduction teams; and (4) implementing emergency regulations when necessary. However, regulations implementing the MMPA’s import provisions at section 101(a)(2) were never modified to codify these new U.S. standards. Instead the regulatory focus was narrowed to govern imports of yellowfin tuna and fish products caught with driftnets.

*Petition*

On March 5, 2008, the U.S. Department of Commerce and other relevant Departments were petitioned under the MMPA to ban the imports of swordfish and swordfish products from nations that have failed to provide reasonable proof of the effects on ocean mammals of the commercial fishing technology in use to catch swordfish. The petition was submitted by two nongovernmental organizations, the Center for Biological Diversity and Turtle Island Restoration Network. The petition is available at the following Web site: [http://www.nmfs.noaa.gov/ia/docs/swordfish\\_petition\\_1-4.pdf](http://www.nmfs.noaa.gov/ia/docs/swordfish_petition_1-4.pdf). Copies

of this petition may also be obtained by contacting NMFS [see **ADDRESSES**].

On December 15, 2008, NMFS published a notice of receipt of the petition in the **Federal Register** and a request for public comments through January 29, 2009 (73 FR 75988). NMFS subsequently reopened the comment period for an additional 45 days from February 4 to March 23, 2009 (74 FR 6010, February 4, 2009).

On April 30, 2010, NMFS published an advance notice of proposed rulemaking (ANPR) describing options to develop procedures to implement the import provisions of MMPA section 101(a)(2) (75 FR 22731). On July 1, 2010, NMFS extended the comment period for an additional 60 days (75 FR 38070).

Although the petition requested specific action regarding imports of swordfish and swordfish products, the import provisions of the MMPA apply more broadly to imports from other foreign fisheries that use “commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards.” Additionally, on October 5, 2011, and on March 13, 2012, NOAA received correspondence from 21 animal rights and animal welfare organizations and Save Our Seals Fund, respectively, urging it to take action to ban the importation of Canadian and Scottish aquaculture farmed salmon into the United States due to the intentional killing of seals which is prohibited under the MMPA sections 101(a)(2), 102(c)(3) for international fisheries, and 118(a)(5) for domestic fisheries. NOAA decided that the proposed rule would be broader in scope than the 2008 petition and is not limited in application to swordfish fisheries.

#### *Overall Framework To Implement Sections 101(a)(2) and 102(c)(3) of the MMPA*

NMFS is proposing to amend 50 CFR 216.24 to add a new section to establish procedures and conditions for evaluating a harvesting nation’s regulatory program for reducing marine mammal incidental mortality and serious injury in its export fisheries, to determine whether it is comparable in effectiveness to the U.S. regulatory program. However, it is not proposing to amend any other section within 50 CFR 216.24, including the regulations on importing fish products taken in high seas driftnet fisheries or in eastern tropical Pacific yellowfin tuna purse seine fisheries. Dolphin (family Delphinidae) incidental mortality and serious injury in eastern tropical Pacific yellowfin tuna purse seine fisheries are covered by section 101(a)(2)(B) and Title

III of the MMPA (16 U.S.C. 1371(a)(2)(B) and 16 U.S.C. 1411–1417), implemented in 50 CFR 216.24(a)–(g), and are not addressed in this proposed rule. Likewise, section 101(a)(2)(F) (16 U.S.C. 1371(a)(2)(F)) of the MMPA and its implementing regulations cover marine mammal incidental mortality and serious injury from high seas driftnet fisheries and are not addressed in this proposed rule.

To implement section 101(a)(2) and 102(c)(3) of the MMPA, NMFS is proposing a procedural approach similar to the regulations implementing the affirmative finding process for importing yellowfin tuna caught with purse seine vessels in the eastern tropical Pacific Ocean (51 FR 28963, August 13, 1986). Section 101(a)(2) of the MMPA only pertains to incidental serious injury and mortality to marine mammals from commercial fishing operations that export the fish product to the United States and does not apply to a foreign nation’s non-exporting fisheries or other sources of non-fishery human-caused incidental mortality and serious injury of marine mammals.

Consistent with this approach, NMFS is proposing to define “Fish and Fish Products” for the purposes of this proposed rule as any marine finfish, mollusk, crustacean, or other form of marine life other than marine mammals, reptiles, and birds, whether fresh, frozen, canned, pouched, or otherwise prepared in a manner that allows species identification, but does not include fish oil, slurry, sauces, sticks, balls, cakes, and pudding and other similar highly processed fish products. NMFS is proposing to exclude fish oil, slurry, sauces, sticks, balls, cakes, pudding and other similar highly processed fish products from the requirements of the proposed rule as these represent processed product which cannot be tracked back to one species of fish or a specific commercial fishing operation. Instead NMFS will track Harmonized Tariff Schedule (HTS) codes ([http://www.usitc.gov/publications/docs/tata/hts/bychapter/1401c16\\_0.pdf](http://www.usitc.gov/publications/docs/tata/hts/bychapter/1401c16_0.pdf)) which correspond to whole fish or processed fish which can be identified to a species. Examples included under this definition: Crabmeat in airtight containers, lobster products, bonito, yellowtail, pollock, mackerel, tunas, among others.

NMFS is also proposing to define “harvesting nation” as the country under whose flag or jurisdiction one or more fishing vessels or other entity engaged in commercial fishing operations are documented, or which has by formal declaration or agreement asserted jurisdiction over one or more

authorized or certified charter vessels, and from such vessel(s) or entity(ies) fish are caught or harvested that are a part of any cargo or shipment of fish to be imported into the United States, regardless of any intervening transshipments, exports or re-exports. By this definition NMFS clarifies that the government or “harvesting nation” is the sovereign nation responsible for regulating its exempt and export fisheries, providing all necessary documentation proposed to be required by this rule and consulting with the Assistant Administrator on the subject fisheries. A harvesting nation’s exempt and export fisheries include commercial fishing operations from a nation’s flag vessels conducted on the high seas and in another coastal state’s exclusive economic zone (EEZ), and all vessels, persons, and operations within a nation’s EEZ and territorial sea.

#### **Overview of the Proposed Process**

This section provides an overview of the proposed process for implementing MMPA sections 101(a)(2)(A) and 102(c)(3). Each step is discussed in more detail in subsequent sections of this rule. NMFS will identify harvesting nations with commercial fishing operations that export fish and fish products to the United States and classify those fisheries based on their frequency of marine mammal interactions as either “exempt” or “export” fisheries (See section entitled “List of Foreign Fisheries” for definitions of exempt and export fisheries).

NMFS will publish in the **Federal Register** a list of harvesting nations, their fisheries, and their classifications as a List of Foreign Fisheries. Based upon the List of Foreign Fisheries, the Assistant Administrator will consult with harvesting nations, informing them of the regulatory requirements for exempt and export fisheries to import fish and fish products into the United States.

NMFS will allow a one-time only, initial five-year exemption period, similar to the Interim Exemption for domestic fisheries, commencing from the effective date of the final rule implementing these regulations. During the exemption period, the prohibitions of this rule will not apply with respect to imports from the harvesting nation. This exemption period is necessary to allow harvesting nations sufficient time to develop regulatory programs to comply with the requirements to obtain a comparability finding, which are described below. By the end of the exemption period and every four years thereafter, a harvesting nation must

have applied for and received a comparability finding for its fisheries in order for fish and fish products from those fisheries to be imported into the United States. Fish and fish products from fisheries that fail to receive a comparability finding may not be imported into the United States. After the conclusion of the one-time exemption period, any harvesting nation or fishery that has not previously exported to the United States would be granted a provisional comparability finding not to exceed 12 months. Prior to the expiration of that provisional comparability finding a harvesting nation must provide information to classify the fishery and apply for and receive a comparability finding for its fishery to continue to export to the United States after the expiration of the provisional comparability finding.

To receive a comparability finding for a fishery operating within the harvesting nation's exclusive economic zone (EEZ) and territorial sea, the harvesting nation must demonstrate it has prohibited the intentional mortality or serious injury of marine mammals in the course of commercial fishing operations in an exempt and export fishery unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger; or that it has procedures to reliably certify that exports of fish and fish products to the United States are not the product of an intentional killing or serious injury of a marine mammal unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger. The harvesting nation must also demonstrate that it has adopted and implemented, with respect to an export fishery, a regulatory program governing the incidental mortality and serious injury of marine mammals in the course of fishing operations in its export fishery that is comparable in effectiveness to the U.S. regulatory program. The U.S. regulatory program governing the incidental mortality and serious injury of marine mammals in the course of commercial fishing operations is specified at 16 U.S.C. 1386 and 1387, and also includes other regulatory requirements under the MMPA that regulate interactions of commercial fishing with marine mammals. The regulations implementing these provisions constitute the U.S. regulatory program. The conditions that constitute a harvesting nation's regulatory program for the Assistant Administrator to find it comparable in effectiveness to the

U.S. regulatory program are discussed below in more detail, including the conditions for harvesting nations with fisheries operating on the high seas and in another coastal state.

NMFS is not proposing to require that a harvesting nation match every aspect of the U.S. regulatory program to obtain a comparability finding for an export fishery. Instead, the conditions allow for flexibility in granting a comparability finding to programs that effectively achieve comparable results to the U.S. regulatory program even where they use different mechanisms to do so.

In the event that an exempt or export fishery fails to receive a comparability finding from the Assistant Administrator, importation of fish and fish products from that fishery into the United States will be prohibited under sections 101(a)(2) or 102(c)(3) of the MMPA until the harvesting nation reapplies and receives a comparability finding for that fishery.

Throughout this process, NMFS will engage in consultations with harvesting nations. Contingent on annual appropriations, NMFS may work with harvesting nations to assist with the design of marine mammal assessments and incidental mortality and serious injury mitigation programs.

To review the ongoing progress in the development and implementation of the harvesting nation's regulatory program for its export fisheries, NMFS will require progress reports every four years. The proposed rule also contains provisions regarding intermediary nations. For an intermediary nation to export fish and fish products to the United States, the proposed rule calls for any intermediary nation to demonstrate that it does not import, or does not offer for import into the United States, fish or fish products subject to an import prohibition; or it has procedures to reliably certify that exports of fish and fish products from the intermediary to the United States do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition. In the event that fish and fish products from a fishery are prohibited, NMFS has included provisions for an individual shipment certification of admissibility that will allow the importation of similar fish and fish products from a harvesting nation's fisheries that received comparability findings.

#### **List of Foreign Fisheries—Initial Identification and Classification**

NMFS proposes to classify foreign commercial fishing operations exporting fish and fish products to the United States as either an "exempt fishery" or

"export fishery" based on the reliable information provided by the harvesting nation.

NMFS defines "exempt fishery" as a foreign commercial fishing operation determined by the Assistant Administrator to be the source of exports of commercial fish and fish products to the United States and to have a remote likelihood of, or no known, incidental mortality and serious injury of marine mammals in the course of commercial fishing operations. A commercial fishing operation that has a remote likelihood of causing incidental mortality and serious injury of marine mammals is one that collectively with other foreign fisheries exporting fish and fish products to the United States causes the annual removal of:

(1) Ten percent or less of any marine mammal stock's bycatch limit, or

(2) More than 10 percent of any marine mammal stock's bycatch limit, yet that fishery by itself removes 1 percent or less of that stock's bycatch limit annually, or

(3) Where reliable information has not been provided by the harvesting nation on the frequency of incidental mortality and serious injury of marine mammals caused by the commercial fishing operation, the Assistant Administrator may determine whether the likelihood of incidental mortality and serious injury is "remote" by evaluating information concerning factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, the species and distribution of marine mammals in the area, or other factors at the discretion of the Assistant Administrator. A foreign fishery will not be classified as an exempt fishery unless the Assistant Administrator has reliable information from the harvesting nation, or other information to support such a finding.

Exempt fisheries are considered to be equivalent to Category III fisheries because the impact of these fisheries on marine mammals is remote. Commercial fishing operations that NMFS determines meet the definition of an exempt fishery would still be required to obtain a comparability finding by having the harvesting nation demonstrate that it has either prohibited the intentional mortality or serious injury of marine mammals in the course of commercial fishing operations in these exempt fisheries, unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger; or that it has procedures to reliably certify

that exports of fish and fish products to the United States are not the product of an intentional killing or serious injury of a marine mammal unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger. Exempt fisheries would not have to meet the comparability finding requirement to have a regulatory program for incidental mortality and serious injury comparable in effectiveness to the U.S. regulatory program.

NMFS defines “export fishery” as a foreign commercial fishing operation determined by the Assistant Administrator to be the source of exports of commercial fish and fish products to the United States and to have more than a remote likelihood of incidental mortality and serious injury of marine mammals (as defined in the definition of an “exempt fishery”) in the course of its commercial fishing operations. Where reliable information has not been provided by the harvesting nation on the frequency of incidental mortality and serious injury of marine mammals caused by the commercial fishing operation, the Assistant Administrator may determine whether the likelihood of incidental mortality and serious injury is more than “remote” by evaluating information concerning factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area, or other factors at the discretion of the Assistant Administrator that may inform whether the likelihood of incidental mortality and serious injury of marine mammals caused by the commercial fishing operation is more than “remote.” Commercial fishing operations not specifically identified in the current List of Foreign Fisheries as either exempt or export fisheries are deemed to be export fisheries until the next List of Foreign Fisheries is published unless the Assistant Administrator has reliable information from the harvesting nation to properly classify the foreign commercial fishing operation. Additionally, the Assistant Administrator, may request additional information from the harvesting nation and may consider other relevant information as set forth in paragraph (h)(3) of this section about such commercial fishing operations and the frequency of incidental mortality and serious injury of marine mammals, to

properly classify the foreign commercial fishing operation.

Export fisheries would be considered to be the functional equivalent to Category I or II fisheries under the U.S. regulatory program (see definitions at 50 CFR 229.2). Fisheries that NMFS determines have more than a remote likelihood of incidental mortality and serious injury of marine mammals, or for which there is a lack of reliable information that they have no or a remote likelihood of incidental mortality and serious injury to marine mammals, will be classified as export fisheries. Because the United States focuses its incidental mortality and serious injury assessment efforts on Category I and II fisheries (which are domestic fisheries where the likelihood of incidental mortality and serious injury is more than remote) NMFS proposes that the regulatory requirements of this proposed rule apply to export fisheries.

Within the first year of the effective date of the final rule implementing sections 101(a)(2) and 102(c)(3) of the MMPA, NMFS would produce a proposed and final List of Foreign Fisheries. To develop this list, NMFS would analyze imports of fish and fish products and identify harvesting nations with fisheries exporting such fish and fish products to the United States that are likely harvested with gear (e.g., gillnets, longlines, trawls, traps/pots, purse seines) or methods that have or may have incidental mortality or serious injury of marine mammals in the course of their commercial fishing operations. NMFS would notify each harvesting nation that has such fisheries and request that within 90 days of notification the harvesting nation submit reliable information about the commercial fishing operations identified, including the number of participants, number of vessels, gear type, target species, area of operation, fishing season, and any information regarding the frequency of marine mammal incidental mortality and serious injury, including programs to assess marine mammal populations and laws, decrees, regulations, or measures to reduce incidental mortality and serious injury of marine mammals in those fisheries or prohibit the intentional killing or injury of marine mammals. NMFS would evaluate each harvesting nation’s submission and request additional information from the harvesting nations, as necessary.

If estimates of the total incidental mortality and serious injury are available and a bycatch limit has been calculated, NMFS will use the quantitative and tiered analysis to

classify foreign commercial fishing operations as export or exempt fisheries under the category definition within 50 CFR 229.2 and the procedures used to categorize U.S. fisheries as Category I, II, or III, reflected at <http://www.nmfs.noaa.gov/pr/interactions/lof/>.

Initially, NMFS expects information on the frequency of interactions in most foreign fisheries to be lacking or incomplete. In the absence of quantifiable information or reliable information from the harvesting nation, NMFS would classify fisheries by analogy with similar U.S. fisheries and gear types interacting with similar marine mammal stocks using readily available information or available observer or logbook information per the procedures outlined in 50 CFR 229.2. Where no analogous fishery or fishery information exists, NMFS would classify the commercial fishing operation as an export fishery until such time as the harvesting nation provides the reliable information to properly classify the fishery or in the course of preparing the List of Foreign Fisheries such information is readily available to the Assistant Administrator.

NMFS is proposing this approach since it follows the U.S. domestic program’s implementation. In situations where no information exists for a domestic fishery, MMPA regulations direct NMFS to place the fishery into Category II, because the MMPA provides the authority to place observers on vessels participating in Category II fisheries to collect information, evaluate risk to the marine mammal stock, and to properly categorize the fishery (50 CFR 229.2 and 229.7(d)). The MMPA requires that a harvesting nation provide the reasonable proof necessary for the United States to determine the “effects on ocean mammals of the commercial fishing technology.” Because harvesting nations are not required for exempt fisheries to implement a regulatory program governing the incidental mortality and serious injury of marine mammals in the course of commercial fishing operations that is comparable in effectiveness to the U.S. regulatory program or, by extension, to report or estimate incidental mortality and serious injury for the fishery, fisheries lacking reliable information of their level of incidental mortality and serious injury must be classified as an export fishery until such time as the nation can provide the reliable information required by the MMPA to classify the fishery or in the course of preparing the List of Foreign Fisheries such information is readily available to the Assistant Administrator. If NMFS does

not follow this procedure, it cannot reasonably determine the “effects on ocean mammals of the commercial fishing technology” from a particular fishery. By including such data-poor commercial fishing operations as export fisheries, harvesting nations have an incentive to gather and provide to NMFS the reliable information necessary for NMFS to consider classifying the fishery as exempt. In comments on this proposed rule, NMFS encourages nations to include reliable information about their commercial fishing operations exporting fish and fish products to the United States, their frequency of marine mammal incidental mortality and serious injury, and any regulatory programs to reduce such mortality and serious injury. It is important that nations work closely with NMFS as soon as possible to provide the information necessary to classify their commercial fishing operations.

The year prior to the expiration of the exemption period and every four years thereafter, NMFS proposes to re-evaluate foreign commercial fishing operations and publish a notice of the draft, for public comment, and the final revised List of Foreign Fisheries in the **Federal Register**. In revising the list, NMFS may reclassify a fishery if new substantive information indicates the need to re-examine and possibly reclassify a fishery. Fisheries wishing to commence exports of fish and fish products to the United States after publication of the Foreign List of Fisheries will be classified as export fisheries until the next List of Foreign Fisheries is published and will be provided a provisional comparability finding for a period not to exceed twelve months. If a harvesting nation can provide the reliable information necessary to classify the commercial fishing operation at the time of the request for a provisional comparability finding or prior to the expiration of the provisional comparability finding, NMFS will classify the fishery in accordance with the definitions. The provisions for new entrants are discussed in more detail below.

To classify fisheries, gather information to assist in making a comparability finding, or determine if a harvesting nation's fishery is still in compliance with the terms of a previously-issued comparability finding, NMFS may solicit information as part of the High Seas Drift Net Fishing Moratorium Protection Act (HSDMPA) information solicitation and use information obtained from U.S. government agencies; harvesting nations; other foreign, regional, and

local governments; regional fishery management organizations; nongovernmental organizations; industry organizations; academic institutions; and citizens and citizen groups to identify commercial fishing operations with intentional or incidental mortality and serious injury of marine mammals. Such information may include fishing vessel records; reports of on-board fishery observers; information from off-loading facilities, port-side government officials, enforcement agents, transshipment vessel workers and fish importers; government vessel registries; RFMO or intergovernmental agreement documents, reports, and statistical document programs; appropriate catch certification programs; and published literature and reports on commercial fishing operations with intentional or incidental mortality and serious injury of marine mammals.

NMFS would publish the final List of Foreign Fisheries in the **Federal Register**. The List of Foreign Fisheries would be separate and different from the domestic List of Fisheries published annually in the **Federal Register**, pursuant to Section 118 of the MMPA (16 U.S.C. 1387(c)(1)).

The List of Foreign Fisheries would be organized by harvesting nation and other defining factors including geographic location of harvest, gear-type, target species or a combination thereof. For example, tuna fisheries in the western central Pacific could be designated as the western central Pacific yellowfin tuna purse seine fishery. The List of Foreign Fisheries would also include a list of the marine mammals that interact with each commercial fishing operation and indicate the level of incidental mortality and serious injury of marine mammals in each commercial fishing operation. If available, the list would also provide a description of the harvesting nation's programs to assess marine mammal stocks and estimate and reduce marine mammal incidental mortality and serious injury in its export fisheries; and actions it has taken to prohibit, in the course of commercial fishing operations that are the source of exports to the United States, the intentional mortality or serious injury of marine mammals.

#### Consultations With Harvesting Nations

The proposed rule includes several consultations that are specific to the comparability finding and those are outlined below. Three broad consultation areas are (1) notification of the List of Foreign Fisheries; (2) notification of a denial of a comparability finding; and (3)

discretionary consultations for transmittal or exchange of information. Within ninety days of the date of publication of the final List of Foreign Fisheries in the **Federal Register**, NMFS, in consultation with the Department of State, would consult with the harvesting nations that export fish or fish products to the United States and provide them with the final List of Foreign Fisheries, relevant U.S. regulations, and applicable take reduction plan measures that relate to its exempt and export fisheries.

NMFS would consult with harvesting nations throughout the exemption period and implementation of the program outlined in this rule. Given the number of nations, fisheries, and the range of exports, NMFS does not envision that all nations will need the same level of consultations. The exact nature and extent of these consultations are discretionary for NMFS and is a mechanism through which the United States could potentially assist a harvesting nation's needs for information and technical expertise. NMFS, in consultation with the Department of State, would, when necessary or upon request by a harvesting nation, initiate bilateral discussions with the harvesting nation to, among other things:

- Communicate the provisions of the MMPA;
- Provide notifications of deadlines for reports or comparability finding applications;
- Discuss the development, adoption, implementation, or enforcement of the harvesting nation's regulatory program;
- Offer an opportunity to provide or supplement information on the implementation and enforcement of the harvesting nation's regulatory program in conjunction with an application, preliminary comparability finding, or reconsideration of a comparability finding; and
- Provide an opportunity for the harvesting nation to clarify, support, or refute information from other sources in conjunction with the List of Foreign Fisheries, the progress report or an application for a comparability finding.

NMFS, in consultation with the Department of State and the Office of the United States Trade Representative, would notify harvesting nations with fisheries that are likely to fail to receive a comparability finding for a fishery and provide the harvesting nation with an opportunity to refute preliminary comparability findings, and communicate any corrective actions taken to comply with the conditions of a comparability finding. If a harvesting nation cannot refute preliminary

comparability findings, or communicate any corrective actions taken to comply with the comparability finding conditions, by the expiration of either the exemption period or an existing comparability determination, the fishery will not receive a comparability finding and will have to reapply. The Assistant Administrator would, in consultation with the Department of State and the Office of the United States Trade Representative, consult with harvesting nations that failed to receive a comparability finding for a fishery, provide the reasons for the denial of such comparability finding, and encourage the harvesting nation to take corrective action and reapply for a comparability finding.

#### **Comparability Finding for Harvesting Nations' Fisheries**

Section 101(a)(2)(A) requires that the Assistant Administrator "insist on reasonable proof" from harvesting nations as to the effect of its commercial fishing technology on marine mammals. As a condition to import fish and fish products into the United States, NMFS proposes to require that a harvesting nation apply for and receive a comparability finding for its fisheries. The first application for a comparability finding must be submitted by March 1st of the last year of the exemption period, and on March 1st every four years thereafter. To receive a comparability finding, a harvesting nation must submit an application, along with documentary evidence demonstrating that the harvesting nation's export or exempt fishery meets the requirements of a comparability finding including, where applicable, reasonable proof as to the effects on marine mammals of the commercial fishing technology in use in the fishery for fish or fish products exported from such nation to the United States. For the purposes of this proposed rule, documentary evidence means the submission to the Assistant Administrator by a responsible government official from a harvesting nation of information of sufficient detail, including an attestation that the information is accurate, to allow the Assistant Administrator to evaluate 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 for making a comparability finding. When making a comparability finding NMFS will rely largely on the documentary evidence provided by the harvesting nation; however, NOAA will also consider information from other readily available sources. Where information from the harvesting nation

is insufficient, NOAA will draw reasonable conclusions based on information from other sources, including analogous fisheries. For example, where a harvesting nation does not provide sufficient relevant information for a fishery and information from other sources of direct evidence regarding the fishery is not readily available to NOAA, the Assistant Administrator shall draw reasonable conclusions based on other information, such as indirect evidence of bycatch in the fishery or information from analogous fisheries (*e.g.* fisheries that use similar gear type or operate under similar conditions as the fishery at issue). In addition, all agency decisions under this rule must comply with the Administrative Procedure Act (5 U.S.C. 500 *et seq.*), including the relevant requirements prohibiting arbitrary and capricious decisionmaking.

The comparability finding has two parts. The first part requires the harvesting nation to demonstrate that it has either prohibited the intentional mortality or serious injury of marine mammals in the course of commercial fishing operations in an exempt and export fishery unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger; or that it has procedures to reliably certify that exports of fish and fish products to the United States are not the product of an intentional killing or serious injury of a marine mammal unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger. No later than November 30th of the year when the exemption period or comparability finding is to expire, NMFS would grant or renew the comparability finding for exempt fisheries should they meet this condition, export fisheries must meet this and other conditions, discussed below.

The prohibition of intentional killing or seriously injuring a marine mammal is one of the U.S. standards within the MMPA (16 U.S.C. 1387(a)(5) and 16 U.S.C. 1372(c)(3)). The United States prohibits the intentional killing or injury of marine mammals in the course of all commercial fishing operations unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger. Therefore, NMFS proposes that to receive a comparability finding, a harvesting nation must demonstrate for all exempt and export fisheries, whether such operations are within its EEZ, its

territorial sea, the EEZ of another coastal state (excluding its territorial sea) or on the high seas, that it either prohibits the intentional killing or serious injury of marine mammals in the course of commercial fishing operations unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger; or that it has procedures to reliably certify that exports of fish and fish products to the United States are not the product of an intentional killing or serious injury of a marine mammal unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger. This prohibition includes aquaculture operations that interact with or occur in marine mammal habitat and the intentional killing of marine mammals for bait in commercial fishing operations. The application of the intentional lethal removal provisions of Section 120 of the MMPA (16 U.S.C. 1389) do not fall under this proposed rule as they are not undertaken in the course of commercial fishing.

Harvesting nations may implement this provision by either instituting a law, regulation, or licensure or permit condition applicable to its export and exempt fisheries that prohibits the intentional killing or serious injury of marine mammals in the course of commercial fishing operations. In the absence of this approach, a harvesting nation must submit documentary evidence that it has procedures, such as certification programs and tracking and verification schemes, to reliably certify that its exports of fish and fish products to the United States are not the product of the intentional killing or serious injury of marine mammals.

To receive a comparability finding for export fisheries, a harvesting nation must not only demonstrate that it meets the conditions related to intentional killing and serious injury of marine mammals in the course of commercial fisheries, it must also meet a second condition. The Assistant Administrator will grant or renew a comparability finding for an export fishery under the jurisdiction of a harvesting nation provided the harvesting nation has and, in the case of a renewal, maintains a regulatory program that is comparable in effectiveness to the U.S. regulatory program in reducing marine mammal incidental mortality and serious injury in commercial fishing operations, including for transboundary stocks, subject to the additional considerations for a comparability finding set out in the



section on “Considerations for Comparability Finding Determinations”.

Different conditions exist for the following areas of a harvesting nation’s export fisheries: Export fisheries operating within the EEZ or territorial waters of the harvesting nation, export fisheries operating within the jurisdiction of another coastal state and export fisheries operating on the high seas. Each is discussed below. The proposed rule’s consideration of these three different areas is comparable to the U.S. regulatory program governing U.S. domestic fisheries operating in these areas.

In using the terms “comparable in effectiveness” NMFS means that the program includes the same conditions listed below or the program effectively achieves comparable results to the U.S. regulatory program. This approach gives harvesting nations flexibility to implement the same type of regulatory program or a program that is completely different but achieves the same results.

Since NMFS has developed regulatory measures for its domestic commercial fisheries with incidental mortality and serious injury of transboundary stocks and shares management authority for such stocks with other harvesting nations, NMFS emphasizes the consideration of transboundary stocks in the comparability finding conditions in the proposed rule. In the proposed rule, NMFS defines a transboundary stock as a marine mammal stock occurring in the EEZ or territorial sea of the United States and one or more other coastal States, or in the EEZ or territorial sea of the United States and on the high seas. Because NMFS shares conservation and management for these stocks with other nations, a harvesting nation must demonstrate that it has implemented a regulatory program for its export fisheries (whether operating in its EEZ, territorial sea, or on the high seas) that is comparable in effectiveness to the U.S. regulatory program for transboundary stocks, especially for transboundary stocks governed by specific requirements of the U.S. regulatory program, including take reduction plans.

NMFS recognizes that harvesting nations face resource limitations. A harvesting nation can submit an application for a comparability finding for all or a subset of its export fisheries. In the proposed rule, the harvesting nation has the flexibility to prioritize the export fisheries to which it will devote resources towards developing its regulatory program. Export fisheries not included in the application and not governed by the harvesting nation’s regulatory program will not receive a

comparability finding and will be ineligible to export fish and fish products to the United States.

NOAA seeks comment on alternative approaches for meeting the requirements of section 101(a)(2) of the MMPA. For example, the rule could operate on the basis of non-comparability findings. Under this alternative, the Assistant Administrator would issue non-comparability findings where it determines (considering documentary evidence and information from other sources that a harvesting nation’s regulatory program is not comparable in effectiveness to the U.S. regulatory program and that the commercial fishing technology used in the fishery results in marine mammal bycatch in excess of U.S. standards. Under this alternative, continued entry of seafood into the U.S. would be predicated on the absence of a “non-comparability finding,” though the criteria could be similar to what is described in below, as applicable.

A modification of this alternative would be for the Assistant Administrator to issue comparability findings unless it determines (considering documentary evidence and information from other sources) that a harvesting nation’s regulatory program is not comparable in effectiveness to the U.S. regulatory program and that the commercial fishing technology used in the fishery results in marine mammal bycatch in excess of U.S. standards. The regulatory text would read as follows:

“Conditions for a Comparability Finding. In response to an application, the Assistant Administrator shall issue a harvesting nation a comparability finding for the fishery unless the Assistant Administrator finds that the harvesting nation has not met the applicable conditions set out in . . . .”

Comments should discuss the relative costs and benefits of these or any other alternative approaches, including aspects related to paperwork burden.

*Conditions for a Comparability Finding for an Export Fishery Operating Within a Harvesting Nation’s EEZ or Territorial Sea*

A comparability finding would be granted or renewed for an export fishery where the Assistant Administrator finds that the harvesting nation implements a regulatory program comparable in effectiveness to the U.S. regulatory program with respect to the export fishery that includes, or effectively achieves comparable results as, the following conditions:

1. Marine mammal stock assessments that estimate population abundance for marine mammal stocks in waters under its jurisdiction that are incidentally

killed or seriously injured in the export fishery;

2. An export fishery register containing a list of all vessels participating in an export fishery under the jurisdiction of the harvesting nation, including the number of vessels participating, information on gear type, target species, fishing season, and fishing area for each export fishery;

3. Regulatory requirements (e.g., including copies of relevant laws, decrees, and implementing regulations or measures) that include:

(a) A requirement for the owner or operator of vessels participating in the fishery to report all intentional and incidental mortality and injury of marine mammals in the course of commercial fishing operations; and

(b) A requirement to implement measures in export fisheries designed to reduce the total incidental mortality and serious injury of a marine mammal stock below the bycatch limit. Such measures may include: Bycatch reduction devices; incidental mortality and serious injury limits; careful release and safe-handling of marine mammals and gear removal; gear marking; bycatch avoidance gear (e.g., pingers); gear modifications or restrictions; or time-area closures.

4. Implementation of monitoring procedures in export fisheries designed to estimate incidental mortality and serious injury of marine mammals in each export fishery under its jurisdiction, as well as estimates of cumulative incidental mortality and serious injury for marine mammal stocks in waters under its jurisdiction that are incidentally killed or seriously injured in the export fishery and other export fisheries with the same marine mammal stock, including an indication of the statistical reliability of those estimates;

5. Calculation of bycatch limits for marine mammal stocks in waters under its jurisdiction that are incidentally killed or seriously injured in an export fishery;

6. Comparison of the incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery in relation to the bycatch limit for each stock; and comparison of the cumulative incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery and any other export fisheries of the harvesting nation showing that these export fisheries:

(a) Does not exceed the bycatch limit for that stock or stocks; or

(b) Exceeds the bycatch limit for that stock or stocks, but the portion of



incidental marine mammal mortality or serious injury for which the exporting fishery is responsible is at a level that, if the other export fisheries interacting with the same marine mammal stock or stocks were at the same level, would not result in cumulative incidental mortality and serious injury in excess of the bycatch limit for that stock or stocks.

NMFS is proposing that a harvesting nation calculate bycatch limits using either the PBR equation (50 CFR 229.2), or a comparable equation that incorporates scientific uncertainty about the population estimate and trend and results in sustainable levels of incidental mortality and serious injury while still allowing the marine mammal stock to grow or recover. The scientific literature demonstrates other nations have adopted variations on PBR that are comparable and achieve this goal.

For marine mammal stocks that have bycatch limits and the export fisheries that interact with those stocks, a harvesting nation that is seeking a comparability finding for an export fishery must demonstrate that the cumulative incidental mortality and serious injury of each marine mammal stock or stocks resulting from fishing technology used by the export fishery and any other export fisheries of the harvesting nation that interact with the same marine mammal stock or stocks does not exceed the bycatch limit for that stock or stocks. In instances where the cumulative incidental mortality and serious injury exceeds the bycatch limit for that stock or stocks, the harvesting nation must demonstrate that the portion of incidental marine mammal mortality or serious injury for which the exporting fishery is responsible is at a level that, if the other export fisheries of that harvesting nation interacting with the same marine mammal stock or stocks were at the same level, would not result in cumulative incidental mortality and serious injury in excess of the bycatch limit for that stock or stocks.

For example, in the latter scenario, three export fisheries (A, B, and C) cumulatively exceed the bycatch limit of 30 animals for a particular marine mammal stock. If export fishery C's incidental mortality and serious injury is 5 animals, it would meet this condition to qualify for a comparability finding, if all three export fisheries each had the same level of incidental mortality and serious injury (*i.e.*, 5 animals for a cumulative total of 15), bycatch would be below the bycatch limit of 30.

In this situation, NMFS expects a harvesting nation will take measures to reduce the incidental mortality and serious injury by all of its export

fisheries, but that it would prioritize and implement more stringent measures on export fisheries with the highest bycatch levels.

To implement its regulatory program, generally, regardless of location, the harvesting nation may enter into arrangements with academic institutions, non-governmental bodies, or any other entity to conduct assessments, estimate incidental mortality and serious injury, test and implement mitigation measures, or carry out any other components of the regulatory program, so long as the harvesting nation maintains responsibility for the oversight, verification and reporting on the implementation of its regulatory program to the United States.

A nation could receive a comparability finding for its export fishery without conducting a marine mammal stock assessment, estimating bycatch, or calculating a bycatch limit provided it can demonstrate that its program achieves comparable results to the U.S. regulatory program. NMFS will consider whether a regulatory program effectively achieves the outcomes of the U.S. regulatory program for similar marine mammal stocks and fisheries (considering gear type and target species), providing flexibility to allow a nation to develop comparably effective alternative measures to reduce incidental mortality and serious injury. Therefore, the Assistant Administrator may make a comparability finding based on alternative measures or approaches provided the harvesting nation's regulatory program effectively achieves comparable results to the U.S. regulatory program.

*Conditions for a Comparability Finding for an Export Fishery Operating Within the Jurisdiction of Another Coastal State*

International law provides that coastal States have sovereign rights to manage fisheries in waters under their jurisdiction. More than ninety percent of the global fish catch is estimated to be taken within waters under the jurisdiction of coastal States. The large majority of fishing activity taking place in waters under the jurisdiction of most coastal States is undertaken by vessels registered in the coastal States themselves. In such situations, the coastal State is also the flag State and the harvesting nation. This scenario covers fishing vessels registered to a harvesting nation that operate with permission of another coastal State or fish under terms of access granted to them by the coastal State.

The Assistant Administrator will grant or renew a comparability finding

for an export fishery operating within the jurisdiction of another coastal state where the Assistant Administrator finds that the harvesting nation maintains a regulatory program that includes, or effectively achieves comparable results as, the following conditions:

1. Implementation in the export fishery:

(a) With respect to any transboundary stock interacting with the export fishery, any measures to reduce the incidental mortality and serious injury of that stock that the United States requires its domestic fisheries to take with respect to that transboundary stock; and

(b) With respect to any other marine mammal stocks interacting with the export fishery while operating within the jurisdiction of the coastal state or on the high seas, any measures to reduce incidental mortality and serious injury that the United States requires its domestic fisheries to take with respect to that marine mammal stock.

2. For an export fishery not subject to management by a regional fishery management organization the harvesting nation:

(a) An assessment of marine mammal abundance of stocks interacting with the export fishery, the calculation of a bycatch limit for each such stock, an estimation of incidental mortality and serious injury for each stock and reduction in or maintenance of the incidental mortality and serious injury of each stock below the bycatch limit. This data included in the application may be provided by the coastal state; and

(b) Comparison of the incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery in relation to the bycatch limit for each stock; and comparison of the cumulative incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery and any other export fisheries of the harvesting nation showing that these export fisheries do not exceed the bycatch limit for that stock or stocks; or exceed the bycatch limit for that stock or stocks, but the portion of incidental marine mammal mortality or serious injury for which the export fishery is responsible is at a level that, if the other export fisheries interacting with the same marine mammal stock or stocks were at the same level, would not result in cumulative incidental mortality and serious injury in excess of the bycatch limit for that stock or stocks.

3. For an export fishery subject to management by a regional fishery management organization, the harvesting nation demonstrates it

applies a regulatory program comparable in effectiveness to the United States regulatory program, which includes implementing marine mammal data collection and conservation and management measures applicable to that fishery required under an applicable intergovernmental agreement or regional fisheries management organization to which the United States is a party.

*Conditions for a Comparability Finding for an Export Fishery Operating on the High Seas*

For export fisheries operating on the high seas, the Assistant Administrator would grant or renew a comparability finding where the Assistant Administrator finds that the harvesting nation maintains a regulatory program with respect to the harvesting nation's export fisheries operating on the high seas that includes, or effectively achieves comparable results as, the following conditions:

1. Implementation in the fishery of marine mammal data collection and conservation and management measures applicable to that fishery required under any applicable intergovernmental agreement or regional fisheries management organization to which the United States is a party; and

2. Implementation in the export fishery of:

- (a) With respect to any transboundary stock interacting with the export fishery, any measures to reduce the incidental mortality and serious injury of that stock that the United States requires its domestic fisheries to take with respect that transboundary stock; and

- (b) With respect to any other marine mammal stocks interacting with the export fishery while operating on the high seas, any measures to reduce incidental mortality and serious injury that the United States requires its domestic fisheries to take with respect to that marine mammal stock when they are operating on the high seas.

An export fishery must satisfy the appropriate condition to receive a comparability finding. For example, for high seas export fisheries or export fisheries operating within another coastal state's EEZ and governed by an RFMO, the proposed rule includes as a condition for a comparability finding that the harvesting nation has adopted and implemented data collection and conservation and management measures required under an applicable intergovernmental agreement or RFMO to which the United States is a party. By taking this approach NMFS recognizes, where the United States is a party to a multilateral agreement, the measures adopted under that agreement should be

used among other factors to assess those export fisheries.

These provisions also provide an alternative route to receiving a comparability finding, including in circumstances when the export fishery is governed by an intergovernmental agreement or RFMO to which the United States is not a party. In this situation, NMFS will evaluate any conservation and management measures adopted by the intergovernmental agreement or RFMO and any other measures adopted by a harvesting nation that constitute its regulatory program governing its high seas export fisheries interacting with marine mammals. NMFS will then determine whether this regulatory program is comparable in effectiveness to the U.S. regulatory program for similar fisheries interacting with similar stocks.

This provision also addresses situations where the United States has adopted measures through a take reduction plan governing U.S. vessels participating in high seas fisheries to reduce incidental mortality and serious injury of a transboundary stock. While the United States would attempt to advance such measures for adoption by the intergovernmental agreement or RFMO, there may be situations where the measures are not adopted by the RFMO. In that case, for high seas fisheries that interact with transboundary stocks, a harvesting nation would be expected to implement a regulatory program for such stocks that is comparable in effectiveness to the U.S. regulatory program for its vessels operating on the high seas or the U.S. EEZ or territorial sea, including any relevant RFMO measures that the U.S. is applying on its fisheries. If the U.S. regulatory program includes measures prescribed for the high seas and the U.S. EEZ or territorial sea to reduce the incidental mortality or serious injury of transboundary stocks, and such stocks frequent both the high seas and the harvesting nation's EEZ or territorial sea, the harvesting nation must have a regulatory program applicable to both areas that is comparable in effectiveness to the U.S. regulatory program.

**Considerations for Comparability Finding Determinations**

When determining whether to grant or renew any comparability finding for a fishery, the Assistant Administrator would review and evaluate information submitted by the harvesting nation in making its application for each fishery, and consider readily available information from other sources, on the extent of the harvesting nation's implementation of its regulatory

program in the export fishery and progress toward reducing the total incidental mortality and serious injury of marine mammals in the export fishery to levels below the bycatch limit. This information could include data readily available to the U.S. Government as well as information made available by other nations, international organizations (such as RFMOs), institutions, bilateral or other arrangements, or non-governmental organizations.

When determining whether a harvesting nation's regulatory program is comparable in effectiveness to the U.S. regulatory program, NMFS will consider:

- U.S. implementation of its regulatory program for similar marine mammal stocks and similar fisheries (considering gear, target species, or other factors), including transboundary stocks governed by regulations implementing a take reduction plan, and any other relevant information received during consultations;
- The extent to which the harvesting nation has implemented measures in the export fishery to reduce the total incidental mortality and serious injury of a marine mammal stock below the bycatch limit;
- The effectiveness of such measures, based on evidence that such measures implemented in an export fishery have reduced or are progressing and likely to reduce the cumulative incidental mortality and serious injury of a marine mammal stock below the bycatch limit, especially for the marine mammal stocks interacting with an export fishery with the greatest contribution to the incidental mortality and serious injury;
- Relevant facts and circumstances, which may include, the history and nature of interactions with marine mammals in this export fishery, whether the level of incidental mortality and serious injury exceeds the bycatch limit for a marine mammal stock, the population size and trend (particularly for declining stocks), and the estimated population level impacts of the incidental mortality and serious injury of marine mammals in a harvesting nation's export fisheries and the conservation status of the marine mammal stocks where available;
- The record of consultations with the harvesting nation, the results of these consultations and actions taken by the harvesting nation and any applicable intergovernmental agreement or RFMO to reduce the incidental mortality and serious injury of marine mammals in its export fisheries; and
- Information gathered during onsite inspection by any government official of

an export fishery's operations and any relevant information received during consultations.

For export fisheries operating on the high seas covered by an intergovernmental agreement or RFMO to which the United States is a party, NMFS will consider among other things:

- The harvesting nation's record of implementation of or compliance with measures adopted by that RFMO or intergovernmental agreement for data collection, incidental mortality and serious injury mitigation, or the conservation and management of marine mammals;

- Whether the harvesting nation is a party or cooperating non-party to the organization; and

- The record of the United States in implementing or complying with such measures and whether it has imposed additional measures on its fleet not required by the RFMO or intergovernmental agreement.

With regard to export fisheries operating on the high seas, under an intergovernmental agreement or RFMO to which the United States is not a party NMFS will consider, among other things:

- The harvesting nation's record of implementation of, or compliance with, measures adopted by that RFMO or intergovernmental agreement for data collection, incidental mortality and serious injury mitigation, or for the conservation and management of marine mammals, and whether such measures are comparable in effectiveness to the U.S. regulatory program for similar fisheries;

- Whether the harvesting nation is a party or cooperating non-party to the organization; and

- The effectiveness of any additional measures implemented by the harvesting nation to reduce or mitigate the incidental mortality and serious injury of marine mammals in these export fisheries, and whether such measures are comparable in effectiveness to the U.S. regulatory program for similar fisheries.

For transboundary stocks incidentally killed or seriously injured in a high seas export fishery, NMFS will also consider the extent to which the harvesting nation has adopted and implemented a regulatory program, including measures to reduce the incidental mortality or serious injury of transboundary stocks in export fisheries operating on the high seas and within its EEZ or territorial sea, that is comparable in effectiveness to the U.S. regulatory program governing similar U.S. fisheries.

NMFS would make comparability findings pursuant to the MMPA, and

also considering U.S. regulations implementing our obligations under RFMOs, intergovernmental agreements, trade agreements. NMFS will make determinations and any resulting imposition of import restrictions consistent with the international obligations of the United States, including under the WTO Agreement pertaining to non-discrimination.

In this regard, where NMFS lacks data and PBR calculations for analogous U.S. fisheries, NMFS would not require foreign nations to have such data or calculations as a condition for a comparability finding. In addition, where analogous U.S. fisheries have not reduced bycatch below an established bycatch limit, NMFS will evaluate the measures harvesting nations have adopted and determine whether those measures are at least as comparable in effectiveness to the U.S. regulatory program in reducing marine mammal bycatch.

Finally NMFS is interested in receiving comments on the extent to which these additional considerations should also apply to exempt fisheries.

#### **Issuance or Denial of a Comparability Finding**

No later than November 30th of the year when the exemption period or comparability finding is to expire, the Assistant Administrator shall publish in the **Federal Register**, by harvesting nation, a notice of the harvesting nations and fisheries for which it has issued and denied a comparability finding and the specific fish and fish products that as a result are subject to import prohibitions.

Prior to publication in the **Federal Register**, the Assistant Administrator, in consultation with the Secretary of State and, in the event of a denial of a comparability finding, with the Office of the U.S. Trade Representative, shall notify each harvesting nation in writing of the fisheries of the harvesting nation for which the Assistant Administrator is:

- Issuing a comparability finding;
- Denying a comparability finding with an explanation for the reasons for the denial of such comparability finding; and
- Specify the fish and fish products that will be subject to import prohibitions on account of a denial of a comparability finding and the effective date of such import prohibitions.

Notification is the action whereby the decision is made. For a fishery that applied for and is unlikely to receive a comparability finding, NMFS will implement a preliminary comparability finding consultation. Specifically, for a

fishery that applied for and is unlikely to receive a comparability finding NMFS, in consultation with the Secretary of State and the United States Trade Representative, would notify the harvesting nation prior to the notification and publication of the decision whether to issue or deny a comparability finding in the **Federal Register** that it is preliminarily denying the harvesting nation a comparability finding, or terminating an existing comparability finding, and provide the harvesting nation with an opportunity to submit reliable information to refute the preliminary denial or termination of the comparability findings, and communicate any corrective actions taken since submission of its application to comply with the comparability finding conditions. If a harvesting nation does not take corrective action by the time the Assistant Administrator has made all comparability findings and will issue such findings in writing to the harvesting nation and publish them in the **Federal Register**, the fishery will not receive a comparability finding and will have to reapply for a comparability finding. NMFS would take the information received and the results of such consultations into consideration in finalizing its comparability findings or when making subsequent comparability findings for that harvesting nation's fishery. A preliminary denial or termination of a comparability finding shall not result in import prohibitions.

#### **Duration and Renewal of a Comparability Finding**

For those fisheries that receive a comparability finding, such finding will remain valid for 4 years or for such other period as the Assistant Administrator may specify to keep it on the same renewal cycle, particularly if the comparability finding was issued as part of a reapplication following a denied or terminated comparability finding or was an application for a new export fishery proposed after a round of comparability findings. NMFS prefers to keep all nations on the same cycle. Thus if a harvesting nation is denied a comparability finding for an export fishery and reapplies mid-cycle and receives a comparability finding for that fishery, the duration may be less to bring it into a cycle with all other comparability findings. Likewise this language also allows NMFS to issue a comparability finding for less than four years to a fishery that was on the cusp of denial but would benefit from additional time to demonstrate that its regulatory program is comparable in effectiveness.

To seek renewal of a comparability finding, every 4 years, the harvesting nation must submit to the Assistant Administrator an application by March 1 of the year when the comparability finding is due to expire, requesting a comparability finding for the fishery and providing the same documentary evidence required for the initial comparability finding, including by providing documentary evidence of any alternative measures they implemented to reduce the incidental mortality and serious injury of marine mammals in their export fishery are comparable in effectiveness and achieve comparable results to the U.S. regulatory program. The Assistant Administrator may require the submission of additional supporting documentation or verification of statements made to support a comparability finding. If a harvesting nation's fishery does not receive a comparability finding during this renewal process, the procedures detailed below to implement import restrictions would be followed.

*Procedures for a Comparability Finding for New Foreign Commercial Fishing Operations Wishing To Export to the United States*

For foreign commercial fishing operations not on the List of Foreign Fisheries that are new exports to the United States, the harvesting nation must notify the Assistant Administrator that the commercial fishing operation wishes to export fish and fish products to the United States. Upon notification the Assistant Administrator shall issue a provisional comparability finding allowing such imports for a period not to exceed 12 months. At least 120 days prior to the expiration of the provisional comparability finding the harvesting nation must submit to the Assistant Administrator the reliable information specified in the section to categorize foreign fisheries and the application and the documentary evidence required to receive a comparability finding, including reasonable proof as to the effects on marine mammals of the commercial fishing technology in use in the fishery for fish or fish products exported to the United States.

Prior to expiration of the provisional comparability finding, the Assistant Administrator shall review the application and information provided and classify the commercial fishing operation as either an exempt or export fishery and determine whether to issue the harvesting nation a comparability finding for the fishery.

If the harvesting nation submits the reliable information specified to classify the fishery at least 180 days prior to

expiration of the provisional comparability finding, the Assistant Administrator will review that information and classify the fishery as either an exempt or export fishery.

*Discretionary Review of Comparability Findings*

In addition, the Assistant Administrator may reconsider a comparability finding and may terminate a comparability finding if he or she determines that the requirements of these regulations are no longer being met. Given that comparability findings are made every four years, this provision allows the Assistant Administrator to consider the progress report submitted by a harvesting nation, information collected by the NMFS, or information provided by entities including RFMOs, nongovernmental organizations, and the public, to determine whether the exempt or export fishery is continuing to meet the requirements of these regulations. After such review or reconsideration, and after consultation with the harvesting nation (preliminary comparability finding), a comparability finding can be terminated if the Assistant Administrator determines that the basis for the comparability finding no longer applies. The Assistant Administrator shall notify in writing the harvesting nation and publish in the **Federal Register** a notice of the termination and the specific fish and fish products that as a result are subject to import prohibitions.

*Duration of Import Restrictions and Removal of Import Restrictions*

With respect to a harvesting nation for which the Assistant Administrator has denied or terminated a comparability finding for a fishery, the Assistant Administrator in cooperation with the Secretaries of the Treasury and Homeland Security would identify and prohibit importation of fish and fish products from that fishery into the United States until the harvesting nation's fishery applies or reapplies for, and receives, a comparability finding. The Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, will publish a notice of such import restrictions in the **Federal Register** announcing the comparability finding determinations (referenced above). The import restrictions would become effective thirty days after the date of publication in the **Federal Register** allowing sufficient time for implementation of such restrictions and disposition of any product currently in warehouses or in transit.

NMFS, in consultation with the Department of State and the Office of the United States Trade Representative, would consult with harvesting nations that failed to receive a comparability finding for a fishery, provide the reasons for the denial of such comparability finding, and encourage the harvesting nation to take corrective action and reapply for a comparability finding.

Any harvesting nation's fishery that fails to attain a comparability finding would remain subject to import prohibitions until it has satisfactorily met the conditions for and received a comparability finding. A harvesting nation may, at any time, re-apply for or request the reconsideration of a denied comparability finding for a fishery, and submit documentary evidence to the Assistant Administrator in support of such application or request. Upon issuance of a comparability finding and notification to the harvesting nation, the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, would publish notification of the removal of the import prohibitions for that fishery, effective on the date of publication in the **Federal Register**.

*Certification of Admissibility*

If fish or fish products are subject to import prohibitions from a harvesting nation's fishery, the Assistant Administrator, to avoid circumvention of or to facilitate enforcement of import prohibitions, may publish in the **Federal Register** the requirement that the same or similar fish or fish products from the harvesting nation's exempt or export fisheries that are not subject to any import prohibitions (*i.e.*, those that have received a comparability finding) be accompanied by certification of admissibility.

The Assistant Administrator shall notify the harvesting nation of the fisheries and the fish and fish products to be accompanied by a certification of admissibility and provide the necessary documents and instruction. The Assistant Administrator in cooperation with the Secretaries of Treasury and Homeland Security, shall as part of the **Federal Register** notice referenced above publish by harvesting nation the fish and fish products to be accompanied by a certification of admissibility. Any requirement for a certification of admissibility shall be effective 30 days after the publication of such notice in the **Federal Register**.

For each shipment, the certification of admissibility must be completed and signed by a duly authorized official or agent of the harvesting nation and validated by a responsible official(s)

designated by the Assistant Administrator. The certification must also be signed by the importer of record and submitted in a format (electronic mail, facsimile [fax], the Internet, etc.) specified by the Assistant Administrator. NMFS proposes to modify the certification of admissibility developed under the HSDFMPA and the Shark Conservation Act of 2010 to add a designation on the certification of admissibility stating that the fish or fish products are from a fishery or nation that are *not* subject to an import restriction of the United States under the MMPA.

Should import prohibitions be imposed due to denial or revocation of a comparability finding, NMFS will identify to Customs and Border Protection the specific HTS codes for fish and fish products subject to embargo from the relevant harvesting nation. If the fish and fish products subject to an import prohibition also originate from a different fishery of the same harvesting nation, and that different fishery is exempt or has been issued a comparability finding, these products may be subject to requirement for a certification of admissibility whereby such products would be admissible to the U.S. if accompanied by a certification of admissibility that they were not harvested in the fishery subject to the embargo. The certification of admissibility must be properly completed and signed by a duly authorized official or agent of the harvesting nation. At the time of implementing an import prohibition, NMFS will communicate the scope of the prohibition to the harvesting nation and, should it be the case that the identified fish and fish products may also originate from a fishery of the harvesting nation other than the fishery subject to embargo, NMFS would work with the harvesting nation to define an acceptable protocol for certification of the identified fish and fish products from the harvesting nation's non-embargoed fisheries and obtain a list of duly authorized officials designated by the harvesting nation as well as details of the methods to be implemented by the harvesting nation to ensure that certifications are not issued for products of prohibited fisheries. The certification would be required for all inbound shipments of the identified products (designated by HTS codes) from the harvesting nation. While the certification must be properly completed and signed as a condition of entry, NMFS will also validate the certifications to ensure that prohibited products are not admitted. NMFS will

designate validating authorities (*e.g.*, NMFS or other agency employees, contractors, accredited third party certifiers) and a protocol for validating the information provided by, or requested from, harvesting nations in support of certifications accompanying admitted shipments. Pre- and/or post-entry validations would be conducted using a risk-based approach and may involve random samples or specific screening and targeting criteria. Admitted products, later determined to be inadmissible by the validation process, could be subject to re-delivery orders and/or administrative sanctions against the importer.

The certification of admissibility would be a requirement for lawful import for the fish and fish products identified by harmonized tariff codes communicated by NMFS to Customs and Border Protection (CBP). The certification would be collected as part of electronic entry filing through the Automated Commercial Environment/ International Trade Data System (ACE/ITDS). It is envisioned that a limited number of data elements would be collected through the partner government agency message set as part of the entry/entry summary submission in ACE/ITDS. In addition, an image file of the certification document would be submitted at entry summary through the document imaging system maintained by CBP as part of ACE/ITDS.

The NMFS approach to integrating its existing trade monitoring programs into ACE/ITDS is to be addressed in a separate rulemaking that is currently under development (RIN 0648-AX63). When the ACE/ITDS rulemaking and subsequent rulemakings to implement the recommendations of the Presidential Task Force on Combating Illegal, Unreported and Unregulated Fishing and Seafood Fraud (Task Force) (79 FR 75536; December 18, 2014) are issued, NMFS may be able to identify fish prohibited from entry under MMPA authority based on the documentation specifying fishery of capture/harvest to be submitted by the importer to ACE/ITDS as part of the Task Force traceability program. To eliminate duplicative requirements for MMPA import restrictions, NMFS will utilize import documentation procedures that have been developed as part of the ACE/ITDS and Task Force rulemakings so long as the information is sufficient to identify the fish or fish product was not caught or harvested in a fishery subject to an import prohibition under the MMPA.

### *Intermediary Nations*

To prevent any fish or fish products subject to import prohibitions authorized by this rulemaking from being imported into the United States from any intermediary nation, including a processing nation, NMFS proposes provisions for intermediary nations. A fishery without a comparability finding may still export its fish and fish products to an intermediary nation. That intermediary nation from which fish and fish products would be imported into the United States must in turn certify that it exports do not include fish and fish products from a harvesting nation's fisheries that are subject to U.S. import prohibitions applied under this rule. To implement this provision, NMFS would not require an intermediary nation to enact laws or regulations to meet this condition. NMFS recognizes that an intermediary nation needs flexibility to determine how it will certify to the United States that any fish or fish product that it exports is not subject to import prohibitions applied under this rule. The proposed rule creates flexibility with respect to how a nation can show that it does not export prohibited fish and fish products to the United States, including by providing any certification, traceability, or tracking scheme that may be readily available or that it chooses to create. The nation must demonstrate that it has procedures to reliably certify that exports of fish and fish products from the intermediary to the United States do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition. Those procedures can be implemented globally or on a shipment-by-shipment basis. They could include prohibiting the import of the prohibited fish and fish products, prohibiting the export of such product to the United States, or maintaining a tracking and verification scheme and including certification of such scheme on a shipment-by-shipment basis.

For purposes of this proposed rule, and in applying the definition of an "intermediary nation," an import into the intermediary nation occurs when the fish or fish product is released from a harvesting nation's custom jurisdiction and enters the custom jurisdiction of the intermediary nation or when the fish and fish products are entered into a foreign trade zone of the intermediary nation for processing or transshipment. No fish or fish products caught or harvested in a fishery subject to an import prohibition may be imported into the United States from any intermediary nation.

Within 30 days of publication of the **Federal Register** specifying fish and fish products subject to import prohibitions, the Assistant Administrator shall, based on readily-available information, identify nations that may import, and re-export to the United States, fish and fish products from a fishery subject to an import prohibition and notify such nations in writing that they are subject to action with respect to the fish and fish products for which the Assistant Administrator identified them.

Within 60 days from the date of notification, a nation must certify to the Assistant Administrator that it:

(1) Does not import, or does not offer for import into the United States, fish or fish products subject to an import prohibition; or

(2) Has procedures to reliably certify that exports of fish and fish products from the intermediary to the United States do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition.

The intermediary nation must provide documentary evidence to support its certification including information demonstrating that:

(1) It has not imported in the preceding 6 months the fish and fish products for which it was notified; or

(2) It maintains a tracking, verification, or other scheme to reliably certify on either a global, individual shipment or other appropriate basis that fish and fish products from the intermediary nation offered for import to the United States do not contain of fish or fish products caught or harvested in a fishery subject to an import prohibition and for which it was notified.

No later than 120 days after a notification, the Assistant Administrator will review the certification and documentary evidence provided by the intermediary nation and determine based on that information or other readily available information whether the intermediary nation imports fish and fish products subject import prohibitions and, if so, whether the intermediary nation has procedures to reliably certify that exports of fish and fish products from the intermediary to the United States do not contain fish or fish products subject to import prohibitions, and notify the intermediary nation of its determination.

If the Assistant Administrator determines that the intermediary nation does not have procedures to reliably certify that exports of fish and fish products from the intermediary to the United States do not contain fish or fish products caught or harvested in a

fishery subject to an import prohibition, the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, will file with the Office of the **Federal Register** a notice announcing that fish and fish products exported from the intermediary nation to the United States that are of the same species as, or similar to, fish or fish products subject to an import prohibition and for which it was notified may not be imported into the United States.

The Assistant Administrator will review determinations under this paragraph upon the request of an intermediary nation. Such requests must be accompanied by specific and detailed supporting information or documentation indicating that a review or reconsideration is warranted. Based upon such information and other relevant information, the Assistant Administrator may determine that the intermediary nation should no longer be subject to an import prohibition. Based on that determination the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, may lift an import prohibition under this paragraph and publish notification of such action in the **Federal Register**.

In response to the recommendations of the Presidential Task Force on Combatting Illegal, Unreported and Unregulated Fishing and Seafood Fraud (79 FR 75536; December 18, 2014), relevant U.S. government agencies are considering the scope of a seafood traceability scheme to prevent unlawfully acquired or fraudulently represented fish products from infiltrating the legitimate supply chain. It is envisioned that such a scheme would collect information on the origin of seafood products and the fishery in which such seafood is caught or harvested when such products are offered for entry into U.S. commerce. The National Ocean Council Committee on IUU Fishing and Seafood Fraud (NOC Committee) is seeking public input on the minimum types of information necessary for an effective seafood traceability program to combat IUU fishing and seafood fraud, as well as the operational standards related to collecting, verifying and securing that data. The **Federal Register** notice (80 FR 37601; July 1, 2015), seeks comments on the basic information that may be collected as part of the electronic entry filing through ACE/ITDS including:

- Who harvested or produced the fish, including name of harvesting vessel; flag state of harvesting vessel; name of farm or aquaculture facility;

name of processor; and type of fishing gear.

- What fish was harvested and processed, including species of fish; product description; name of product; form of the product; and quantity and/or weight of the product.

- Where and when was the fish harvested and landed, including area of wild-capture or aquaculture harvest; harvest date(s); name and location of aquaculture facility; point of first landing; date of first landing.

Such information would be required for products exported directly from the harvesting nation, and also when exported from intermediary nations. NMFS is participating in the implementation of the Presidential Task Force's recommendations and will work to ensure that the Task Force's recommendations and this rule are implemented in a manner so as to avoid duplicative requirements. NMFS will also work with harvesting and intermediary nations to specify the data elements that must be collected and reported, and the interoperability standards for data management systems to ensure that the required data are available to entry filers at the point of import into U.S. commerce. Such a traceability scheme would also facilitate the certification options for intermediary nations, in addition to certificates of admissibility for harvesting nations, as envisioned by this proposed rule.

### Progress Report

The Assistant Administrator would require each harvesting nation to submit a progress report. The first report would be submitted two years prior to the end of the exemption period and then every four years thereafter on or before July 31. In this report, the harvesting nation would present an update on actions taken over the previous two years to develop, adopt, and implement its regulatory program, as well as information on the performance of its export fisheries in reducing incidental mortality and serious injury of marine mammals. The report allows NMFS to monitor the harvesting nation's efforts in its export fisheries and to work closely with a harvesting nation to ensure they meet and continue to meet the conditions for a comparability finding. NMFS is seeking comment on the utility of the progress report and an alternative that, after the first progress report, would only require subsequent progress reports for those fisheries denied a comparability finding or for which a comparability finding has been terminated and wish to reapply.

This progress report should describe in detail the methods used to obtain the information contained in the progress report and should include a certification by the harvesting nation of its accuracy and authenticity.

### International Cooperation and Assistance

Consistent with existing authority under the MMPA (16 U.S.C 1378), and subject to the availability of funds, NMFS may provide assistance to harvesting nations whose export fisheries NMFS has identified for assistance based on information in the List of Foreign Fisheries, comparability finding applications, progress reports, and to harvesting nations whose financial capacity to establish a comparable regulatory program is limited. To prioritize its capacity building efforts, NMFS may consider the needs of harvesting nations and the potential impacts of those nations' fisheries, based on: (1) Frequent incidental mortality and serious injury of marine mammals, (2) incidental mortality and serious injury in excess of a bycatch limit, if known; and (3) incidental mortality and serious injury of a threatened or endangered species listed under the Endangered Species Act (ESA). NMFS may also consider the extent to which a harvesting nation has programs or the capacity to assess marine mammal stocks and estimate or mitigate marine mammal incidental mortality and serious injury. Assistance activities may include cooperative research on marine mammal assessments (e.g., designing vessel surveys and fishery observer programs) and development of techniques or technology to reduce incidental mortality and serious injury (e.g., fishing gear modifications), as well as efforts to improve governance structures, or enforcement capacity (e.g., training). NMFS would also facilitate, as appropriate, the voluntary transfer of appropriate technology on mutually agreed terms to assist a harvesting nation in qualifying its export fishery for a comparability finding and in designing and implementing appropriate fish harvesting methods that minimize the incidental mortality and serious injury of marine mammals.

Participating in the U.S. cooperation and assistance program is voluntary and would not determine whether a harvesting nation is issued a comparability finding. Likewise, NMFS' funds are limited and likely will be insufficient to meet all requests for assistance. NMFS' inability to provide requested assistance does not relieve a harvesting nation from the requirement

to meet the conditions set forth in this proposed rule in order to obtain a comparability finding for an export fishery.

### Coordination With Other Consultation Processes

NMFS would utilize, as appropriate, existing programs and processes to conduct outreach to potentially affected nations, including the consultation process of the HSDFMFA (50 CFR 300.200 *et seq.*), for addressing the bycatch of protected living marine resources incidental to commercial fisheries. While the applicability of sections 101(a)(2) and 102(c)(3) of the MMPA is broader than the HSDFMFA, NMFS would use HSDFMFA consultative process to augment the efforts outlined elsewhere in this rule to seek information and conduct outreach to harvesting nations potentially affected by this proposed rule. NMFS would also discuss and address these issues through bilateral fisheries consultations, and other relevant bilateral dialogues with harvesting nations and through appropriate fora associated with intergovernmental agreements and RFMOs.

### Advance Notice of Proposed Rulemaking

NMFS published an ANPR on April 30, 2010 (75 FR 22731) describing options to develop procedures for implementing MMPA provisions for imports of fish and fish products and defining U.S. standards. The ANPR identified nine potential options to implement section 101(a)(2) of the MMPA in response to the petition for rulemaking. NMFS sought public comment on the following options:

*Option 1:* Marine mammal incidental mortality and serious injury (bycatch) in export fisheries is maintained at a level below PBR for impacted marine mammal stocks.

*Option 2:* Marine mammal incidental mortality and serious injury in export fisheries have been reduced to insignificant levels approaching a zero mortality and serious injury rate to the extent feasible, taking into account different conditions.

*Option 3:* Marine mammal incidental mortality and serious injury in export fisheries are maintained at levels below PBR or at levels comparable to those actually achieved in comparable U.S. fisheries, whichever is higher.

*Option 4:* Marine mammal incidental mortality and serious injury in export fisheries either cause the depletion of a marine mammal stock below its optimum sustainable population or impede the ability of a depleted stock to

recover to its optimum sustainable population.

*Option 5:* Incidental mortality and serious injury in export fisheries have, or are likely to have, an immediate and significant adverse impact on a marine mammal stock (the trigger for issuing emergency regulations in U.S. commercial fisheries pursuant to section 118 of the MMPA).

*Option 6:* Incidental mortality and serious injury in export fisheries are likely to jeopardize the continued existence of any endangered or threatened marine mammal species or stock (the prohibitive standard of the ESA).

*Option 7:* Incidental mortality and serious injury by export fisheries are likely to jeopardize the continued existence of any marine mammal species or stock regardless of whether it is ESA-listed as threatened or endangered.

*Option 8:* Marine mammal incidental mortality and serious injury in a foreign nation's export fisheries are managed effectively by a relevant international fisheries or conservation organization or by the fishing nation itself.

*Option 9:* Foreign nations that supply fish and fish product imports to the United States have implemented regulations to address marine mammal incidental mortality and serious injury in the nations' export fisheries that are comparable to regulations implemented by the United States, taking into account different conditions.

NMFS received 42 comments from governmental entities, including the Marine Mammal Commission, individuals, and organizations. Comments received were compiled and are available on the Internet at <http://www.regulations.gov> under Docket ID NOAA–NMFS–2010–0098. Comments addressed both the proposed options and other topics.

### Comments on the Proposed Options in the ANPR

#### Options 1 and 2

*Comment 1:* Many of the comments supported options 1 or 2 or a combination of the two. One commenter stated that some U.S. fisheries have not met the requirements of options 1 and 2; and, thus, NMFS could not impose those standards on other countries.

*Response:* NMFS has determined that because of a lack of data and PBR calculations for some marine mammal stocks in U.S. waters, NMFS would adopt an approach that assesses whether a fishery has incidental marine mammal mortality and serious injury in excess of U.S. standards based on an evaluation of



whether foreign nations have adopted a regulatory program that is comparable in effectiveness to the U.S. regulatory program with respect to reducing incidental marine mammal bycatch mortality and serious injury, in particular by adopting a regulatory program with the same elements as the U.S. regulatory program or by adopting alternative measures that achieve comparable results. Therefore, where NMFS lacks data and PBR calculations for analogous U.S. fisheries, NMFS would not require foreign nations to have such data or calculations as a condition for a comparability finding. Rather, NMFS will be looking to see what measures harvesting nations have adopted and whether those measures are at least as comparable in effectiveness to the U.S. regulatory program in reducing marine mammal bycatch. The U.S. regulatory program begins with assessments and observations of marine mammals and their interactions with commercial fisheries and then calculates PBR and implements measures to reduce incidental mortality and serious injury of marine mammals in commercial fishing operations. NMFS finds that the proposed rule is sufficiently flexible to permit harvesting nations to develop and implement a range of approaches/ measures and receive a comparability finding provided the nation has a regulatory program that is comparable in effectiveness to U.S. standards. If a nation does not estimate stock abundance, mortality, and calculate a bycatch limit but can nonetheless demonstrate that its regulatory programs effectively achieves comparable results to the U.S. regulatory program, NMFS would grant a comparability finding.

Although a nation may adopt a bycatch standard not currently in use by the United States, NMFS is not proposing to require nations to adopt and implement bycatch standards that we ourselves have not adopted and implemented. While the United States has not reduced incidental mortality and serious injury to insignificant levels (*i.e.*, 10% of PBR) for all marine mammal stocks in all of its commercial fisheries, many of the fisheries with incidental mortality and serious injury at levels above PBR are subject to a take reduction team and take reduction plan. This proposed rule follows U.S. implementation of domestic requirements by focusing on export fisheries, the equivalent of those fisheries that have frequent or occasional interactions with marine mammals (Category I and Category II fisheries).

#### *Options 6 and 7*

*Comment 2:* Most of the comments opposed options 6 or 7 because those are ESA standards, not MMPA standards and therefore should not be applied to the MMPA. Some respondents believe the ESA “jeopardy standard” is not as protective as OSP and PBR standards in the MMPA.

*Response:* NMFS believes it is more appropriate to develop a proposed rule based on the requirements for U.S. domestic fisheries contained in Sections 117 and 118 of the MMPA, rather than relying on standards in another statute. In addition, the “jeopardy standard” of the ESA only applies to threatened or endangered species, subspecies, or distinct population segments (DPS). It does not apply to all species of marine mammals regardless of their status, nor does it apply at the stock level unless that stock is also designated as a DPS. The jeopardy standard also only applies to Federal activities. As a result, NMFS determined that attempting to apply ESA standards to a MMPA provision limits action to a subset of marine mammals and would create unnecessary confusion.

#### *Other Comments*

##### *Support for the Rulemaking*

The majority of comments from organizations and individuals supported implementing the MMPA import provisions through a prohibition on imports of fish and fish products, as well as NMFS broadening the scope of its response to the petition to encompass all fish imports.

*Comment 3:* One commenter noted that rulemaking was unnecessary to prohibit imports of fish and fish products and that a ban on swordfish products should be put in place immediately.

*Response:* NMFS developed this proposed rule to implement Section 101(a)(2) of the MMPA that would apply to all fisheries, not just swordfish imports, except high seas driftnet fisheries and eastern tropical Pacific yellowfin tuna purse seine fisheries, since other MMPA provisions govern these fisheries. NMFS believes this proposed rule would advance the U.S. conservation objective to reduce marine mammal incidental mortality and serious injury in commercial fisheries by applying a flexible regulatory approach that would be comparable in effectiveness to the U.S. regulatory program and allowing adequate time for harvesting nations to develop the necessary information and implement such programs. NMFS believes it is necessary to promulgate regulations in

order to implement this section of the MMPA.

#### *Suggested Alternative Approaches To Addressing International Marine Mammal Incidental Mortality and Serious Injury*

*Comment 4:* Several comments, particularly those from foreign governments, suggested that working cooperatively with trading partners would be more effective than banning imports. Some of those comments suggested that the United States work to address international marine mammal incidental mortality and serious injury through international organizations, such as RFMOs.

*Response:* The United States will work through its participation in RFMOs to address incidental mortality and serious injury in commercial fisheries and will also promote this objective in other multilateral fora. The United States will look to all types of fora as a means to work with harvesting nations to reduce marine mammal mortality and serious injury in these global fisheries. Nevertheless, bilateral and multilateral fora alone are not sufficient to achieve the MMPA goals as they do not encompass all of the foreign fisheries subject to this proposed rule. Section 101(a)(2) directs the Secretary of the Treasury to ban the importation of commercial fish or fish products which have been caught with commercial fishing technology that results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards. This rulemaking would establish the U.S. program to implement that provision.

#### *Trade and Economic Issues*

*Comment 5:* Several comments stated that any action the United States takes should be consistent with international law, particularly the WTO and not be a disguised method to unilaterally restrict the export of fisheries products to the United States.

*Response:* As noted above, NMFS intends to apply this entire regulation, including the enforcement of any import prohibitions on certain fish or fish products, consistent with U.S. international obligations, including the WTO Agreement. Included in NMFS’ approach is its intention to regulate in a fair, transparent, and non-discriminatory manner, and to regulate based on the best available science. NMFS would implement the provisions of this rule taking into account a harvesting nation’s existing regulatory program or progress in developing one and reducing bycatch, and the U.S. implementation of its regulatory

program for similar fisheries interacting with similar stocks.

#### *U.S. Standards*

*Comment 6:* Several comments noted that the U.S. standards need to be clear but flexible.

*Response:* NMFS believes the U.S. standards proposed through this rulemaking are clear and flexible. These are based on the U.S. program that requires assessment of marine mammal stocks and incidental mortality and serious injury as a first step, followed by measures to reduce marine mammal incidental mortality and serious injury in commercial fisheries to sustainable levels. NMFS intends to work with affected nations to develop regulatory programs to fit different conditions and situations.

*Comment 7:* Several comments noted that NMFS must allow for different methods to achieve the common objective and focus on attaining outcomes of effective management and protection rather than specific management inputs.

*Response:* NMFS believes the proposed rule contains sufficient flexibility to allow for different methods to achieve the objective of reducing marine mammal incidental mortality and serious injury. The proposed rule is modeled after the U.S. program to govern incidental take in commercial fisheries but does not require that affected nations adopt identical methods or regulations as the United States to meet the requirements of the proposed rule. NMFS will evaluate the results of each affected nation's regulatory program to determine if it is comparable in effectiveness to the U.S. program.

#### *Reasonable Proof*

*Comment 8:* Several commenters noted that what constitutes "reasonable proof" needs to be clearly defined.

*Response:* NMFS is not proposing a definition of reasonable proof, but instead requires nations provide documentary evidence of sufficient detail and an attestation that the evidence is accurate to allow NMFS to evaluate the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such harvesting nation to the United States for the purposes of rendering a comparability finding.

*Comment 9:* Several comments noted that reasonable proof should be received as a precondition to allowing fish and fish products to be imported into the United States.

*Response:* NMFS is requiring an application for a comparability finding

to contain documentary evidence. NMFS believes nations must be given adequate time to develop comparable regulatory programs before any fish or fish products are prohibited from importation into the United States. The United States developed its current domestic program over the course of five years to provide sufficient time to collect information necessary to develop and implement its domestic bycatch reduction program. For that reason, NMFS is proposing an exemption period of five years to allow harvesting nations time to develop and implement their regulatory programs for their export fisheries.

*Comment 10:* Several comments stated that reasonable proof should be provided on a continual basis.

*Response:* The proposed program requires the harvesting nations to provide progress reports detailing the development and maintenance of a comparable regulatory program. NMFS is proposing that documentary evidence be the standard for any information submitted, including for the progress report, comparability finding, or reconsideration of a comparability finding.

#### *Consultation Process*

*Comment 11:* Several comments noted the need for a consultation process and sufficient time allowed to meet requirements once measures are implemented, to assess effectiveness before any import determinations are made. Other comments stated that the consultation process should have specific deadlines.

*Response:* The consultation process in this proposed rule would allow affected fisheries and nations five years to meet the requirements of the program. NMFS also intends to conduct outreach to potentially affected nations, including using the consultation process contained in HSDFMPA. NMFS' proposed consultation process has clear deadlines for comparability findings and the renewal of those findings.

#### **Classification**

This proposed rule is published under the authority of the Marine Mammal Protection Act, 16 U.S.C. 1371.

Under NOAA Administrative Order (NAO 216-6), the promulgation of regulations that are procedural and administrative in nature are categorically excluded from the requirement to prepare an EA. Nevertheless, NMFS prepared an EA for this action to facilitate public involvement in the development of the proposed national standard and procedures and to evaluate the impacts

on the environment. This EA provides context for reviewing the proposed action by describing the impacts on marine mammals associated with fishing, the methods the United States has used to reduce those impacts, and a comparison of how approaches under the MMPA and the HSDFMPA provisions of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 would affect harvesting nations.

The alternatives described in section 2.1 of the EA provide five alternatives for ways to define "U.S. standards" for reducing mortality of marine mammals in fishing operations (Sections 2.1.1 through 2.1.5). In addition to defining standards, the alternatives set out implementation and compliance steps as part of an overall regulatory program for harvesting nations wishing to import fish and fish products into the United States. To meet the purpose and need, NMFS will select one alternative.

The alternatives to implement the import provisions of the MMPA are as follows: Under Alternative 1, Quantitative Standard, NMFS would require harvesting nations wishing to export fish and fish products to the United States to, as required by NMFS for U.S. domestic fisheries, reduce incidental mortality and serious injury of marine mammals to levels below PBR and subsequently to the same "insignificant" threshold, or 10 percent of potential biological removal in order to export fish and fish products to the United States.

Alternative 2 would require harvesting nations wishing to export fish and fish products to the United States to demonstrate comparability with U.S. standards as set out for domestic fisheries under sections 117 and 118 of the MMPA. Comparability is defined as "comparable in effectiveness to that of the United States [regulatory program]," not necessarily identical or as detailed. A finding of comparability would be made based on the documentary evidence provided by the harvesting nation to allow the Assistant Administrator to determine whether the harvesting nation has developed and implemented a regulatory program comparable in effectiveness to the U.S. program prescribed for U.S. commercial fisheries in sections 117 and 118 of the MMPA." This is NMFS' preferred alternative. Like the prior alternative, the preferred alternative also requires calculation of PBR or a bycatch limit and reducing incidental mortality and serious injury of marine mammals to levels below the bycatch limit.

Alternative 3 would define U.S. standards as those specific regulatory

measures required of U.S. commercial fishing operations as the result of a take reduction plan's implementing regulations. Such regulatory measures could be applied to fisheries conducted on the high seas where a take reduction plan is in place (and thus the requirements would already apply to vessels under the jurisdiction of the United States), and to foreign fisheries, regardless of their area of operation, that are comparable to U.S. fisheries.

Alternative 4 uses a procedure of identification, documentation and certification devised under the HSDFMPA and promulgated as a final rule in January 2011 (76 FR 2011, January 12, 2011).

Alternative 5, the no action alternative, proposes an approach for taking no action to implement section 101(a)(2) of the MMPA.

Overall, the preferred alternative in the EA sets the U.S. import standards for harvesting nations as the same standard used for U.S. commercial fishing operations to reduce incidental mortality and serious injury of marine mammals with flexibility for comparability in effectiveness. It takes an approach that evaluates whether fish/fish products exported to the United States are subject to a regulatory program of the harvesting nation that is comparable in effectiveness to the U.S. regulatory program in terms of reducing incidental mortality and serious injury and considers fish and fish products not subject to such a regulatory program as caught with technology that results in marine mammal incidental mortality and serious injury in excess of U.S. standards. This approach provides harvesting nations with flexibility to implement the same measures as under the U.S. program or other measures that achieve comparable results.

This proposed rulemaking has been determined to be significant for the purposes of Executive Order (EO) 12866 because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Pursuant to EO 12866, NMFS conducted a Regulatory Impact Review (RIR). When conducting the RIR and the EA's socioeconomic analysis of the preferred alternative, NMFS considered the number of harvesting nations and the types of fish products exported to the United States. NMFS is proposing to define "*Fish and Fish Products*" for the purposes of this proposed rule as any marine finfish, mollusk, crustacean, or other form of marine life other than marine mammals, reptiles, and birds, whether fresh, frozen, canned, pouched, or otherwise prepared in a manner that

allows species identification, but does not include fish oil, slurry, sauces, sticks, balls, cakes, pudding and other similar highly processed fish products. NMFS is proposing to exclude fish oil, slurry, sauces, sticks, balls, cakes, pudding and other similar highly processed fish products from the requirements of the proposed rule and thus the analysis in the RIR. In 2012, 122 nations exported fish and fish products into the United States (see EA Section 3.4.3 Table 3). Fifty-five percent (66 nations) of those nations export five or fewer fish products, and 74% of the nations export 10 or fewer fish products. Only nine nations export 25 or more fish products; they are: Canada, Chile, China, Japan, Mexico, Taiwan, Thailand, South Korea, and Vietnam. With the exception of Japan, all of these nations are included within the U.S. list of top ten seafood trading partners by volume and weight (see EA Section 3.4.3 Table 4).

The United States imports more than 67 marine species, with tuna, shrimp, salmon (both farmed and wild salmon)) molluscs, mackerel, and sardines representing the six largest imports. Tuna fisheries are conducted primarily on the high seas, whereas shrimp and salmon fisheries are a combination of live capture and aquaculture operations. For example, for high seas export fisheries to get a comparability finding, harvesting nations may demonstrate including among other things that they are implementing the requirements of an RFMO or intergovernmental agreement to which the U.S. is a party; likewise for aquaculture facilities classified as exempt fisheries and sited in marine mammal habitat or interacting with marine mammals, the harvesting nation must demonstrate it is prohibiting the intentional killing of marine mammals in the course of aquaculture operations or has procedures to reliably certify that exports of fish and fish products to the United States are not the product of an intentional killing or serious injury of a marine mammal. Therefore, NMFS anticipates that out of 122 harvesting nations, the greatest economic burden will be on the 21 nations that export more than 10 fish products, assuming that their regulatory program will include more export fisheries.

This proposed rule offers harvesting nations time to develop their regulatory program. Additionally, the consultative process and potential for financial and technological assistance, will aid harvesting nations in meeting the requirements of these regulations. An initial regulatory flexibility analysis (IRFA) was prepared, as required by

section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the **SUPPLEMENTARY INFORMATION** section of the preamble. A summary of the Analysis follows. A copy of the complete IRFA is available from NMFS (see **ADDRESSES**). NMFS is specifically seeking comments on whether it may be appropriate at the final rule stage to certify to the Small Business Administration that the rule will not have a significant economic impact on a substantial number of small entities.

Under the proposed rule, NMFS would classify foreign fisheries based on the extent that the fishing gear and methods used interact with marine mammals. After notification from NMFS, harvesting nations desiring to export fish and fish products to the United States must apply for and receive a comparability finding for its exempt and export fisheries as identified in the List of Foreign Fisheries. Such a finding would indicate that marine mammal protection measures have been implemented in the fisheries that are comparable in effectiveness to the U.S. regulatory program. In the event of trade restrictive measures being imposed for specific fish products, certain other fish products eligible for entry from the affected nation may be required to have a certification of admissibility in order to be admitted into the United States.

#### *Number and Description of Small Entities Regulated by the Proposed Action*

This proposed rule does not apply directly to any U.S. small business as the rulemaking applies with regard to imports of fish and fish products. The universe of potentially indirectly affected industries includes the following: U.S. seafood processors, importers, retailers, and wholesalers. The exact volume and value of product, and the number of jobs supported primarily by imports within the processing, wholesale and retail sectors cannot be ascertained based on available information. In general, however, the dominant position of imported seafood in the U.S. supply chain is indicative of the number U.S. businesses that rely on seafood harvested by foreign entities.

#### *Recordkeeping and Reporting Requirements*

This proposed action contains new collection-of-information, involving limited reporting and record keeping, or

other compliance requirements. To facilitate enforcement of the import prohibitions for prohibited fish products, fisheries that do receive a comparability finding, that offer similar fish and fish products to those that have been prohibited from entry, may be required to submit certification of admissibility along with fish or fish products offered for entry into the United States that are not subject to the specific import restrictions.

*Description of Significant Alternatives That Minimize Adverse Impacts on Small Entities*

NMFS analyzed several alternatives under the EA for reducing mortality of marine mammals in fishing operations. Of those alternatives, the proposed rule (which is based on the EA preferred alternative) is the one that offers the most flexibility while being compliant with the provisions of the MMPA and U.S. obligations under the World Trade Organization, and thus was the one that could be considered in the analysis to minimize adverse impacts on small entities. The flexibility offered under the proposed rule allows harvesting nations to adopt a variety of alternatives to assess and reduce marine mammal incidental mortality and serious injury, provided the alternatives are comparable in effectiveness to the U.S. regulatory program. The flexibility should reduce burdens on small entities that import fish and fish products. One alternative to the proposed rule is the no action alternative, where NMFS would not promulgate regulations to implement the international provisions of the MMPA. This alternative to the proposed rule may demonstrate the least burden or economic impact to small entities. However, since the international provisions of the MMPA are statutory requirements, NOAA Fisheries does not have discretion to implement the no action alternative.

The proposed rule also demonstrates the U.S. commitment to achieving the conservation and sustainable management of marine mammals consistent with the statutory requirement of section 101(a)(2) of the MMPA. Additionally, the increased data collection that may result from the proposed regulations could assist in global stock assessments of marine mammals and improve our scientific understanding of these species. Finally, the proposed regulations should help ensure that the United States is not importing fisheries products harvested by nations that engage in the unsustainable bycatch of marine mammals in waters within and beyond any national jurisdiction.

No U.S. industrial sector is likely to be directly affected by the rulemaking. However, indirect effects may result in temporary and long-term responses that may be both positive and negative for various sectors of the U.S. seafood supply chain. Although over 90 percent of the edible seafood consumed annually in the United States is imported, the United States imports from over 120 nations. Given the number of nations exporting fish and fish products to the U.S. market and the volume of products supplied, domestic importers, retailers, wholesalers, and processors should be able to locate substitute or alternative sources of fish and fish products for those fisheries that fail to receive a comparability finding. However, it is possible that a substitute product will be more expensive or otherwise less preferable to a prohibited foreign fish or fish product. NMFS seeks comment on the costs, if any, incurred by U.S. entities that must find alternative sources for prohibited foreign fish and fish products.

Although U.S. entities are not directly impacted by this rule, they may experience some indirect effects from this rule. The indirect effects of import prohibitions may cause short term disruptions in the flow of seafood imports potentially impacting U.S. businesses. NMFS does not anticipate that national benefits and costs would change significantly in the long-term as a result of the implementation of the proposed alternatives. Therefore, NMFS anticipates that the impacts on U.S. businesses engaged in trading, processing, or retailing seafood will likely be minimal.

*Duplicate, Overlapping, or Conflicting Federal Rules*

This proposed action does not duplicate, overlap or conflict with any other Federal rules.

**Public Participation**

It is the policy of the Department of Commerce, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding this proposed rule by one of the methods listed in the Instructions section. All comments must be received by midnight on the day of the close of the comment period.

We are particularly interested in comments concerning the following questions:

1. Are there fisheries that are likely to be subject to prohibitions under this rule and, if so, what are the potential

economic impacts on small businesses and consumers?

2. Is the five year exemption period an appropriate amount of time to allow harvesting nations to comply with the requirements of this rule?

3. Is four years an appropriate amount of time for the duration of a comparability finding?

4. Is the rule and corresponding notice of an information collection clear in regards to the type of documentation that would be required for harvesting nations to demonstrate the requirement that they have prohibited the intentional and incidental mortality or serious injury of marine mammals?

5. Is there a definition of "reasonable proof" that is used by another Federal government agency that would be appropriate to incorporate into this rule?

**Paperwork Reduction Act**

This proposed rule contains a collection-of-information requirement subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval. The information collection in this proposed rule would revise a collection-of-information requirement previously approved under OMB Control Number 0648-0651 (Certification of Admissibility). The revision would add a new category to the certification requirements for exports of fishery products to the United States from a nation's export fishery that have received a comparability finding under the procedures for evaluating export fisheries set forth in this proposed rule but are exporting fish and fish products similar to export fisheries that have failed to obtain a comparability finding. The Assistant Administrator may require that fish and fish products from such nation's other export fisheries could be admitted into the United States if the exporting nation certifies that the products were not harvested in the fishery for which a comparability finding was not issued.

The public reporting burden for the proposed requirement has been estimated, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information per response. NMFS estimates that the time to complete the Certification of Admissibility Form would be 10 minutes. In the event that import restrictions are imposed under these new procedures, additional responses by foreign exporters and U.S.

importers may increase the burden by 50% from the initial estimates under the existing approved collection. Based on an examination of trade statistics and the number of traders, the total number of respondents (*e.g.* seafood exporters/government officials) is estimated to be 90, increased from 60; the total number of responses is estimated to be 900, increased from 600; and the total annual burden is estimated at 150 hours, increased from 100 hours.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology.

The burden associated with the application for a comparability finding and the progress reports are not presently analyzed under the Paperwork Reduction Act. Nonetheless, we recognize that these collections of information pose regulatory burdens for harvesting nations and possibly affected fisheries and seek comment on the potential cost of these provisions, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information.

Send comments on these or any other aspects of the collection of information to the Director, Office of International Affairs (see **ADDRESSES**), and to OMB by email to [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov) or by fax to (202) 395-5806.

If this revision to the collection-of-information requirement under Control Number 0648-0651 is approved by OMB, the table of approved NOAA information collections that appears at 15 CFR part 902 would be amended accordingly.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

#### List of Subjects

##### 15 CFR Part 902

Reporting and recordkeeping requirements.

##### 50 CFR Part 216

Administrative practice and procedure, Exports, Marine Mammals, Reporting and recordkeeping requirements.

Dated: July 31, 2015.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, 15 CFR part 902 and 50 CFR part 216 are proposed to be amended as follows:

#### PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

**Authority:** 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, in the table in paragraph (b), remove the entry for 216.24 and add in its place an entry for 216.24(h)(9)(iii) in numerical order under the heading 50 CFR to read as follows:

##### § 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

| CFR part or section where the information collection requirement is located | Current OMB control number (all numbers begin with 0648-) |
|---|---|
| 50 CFR.   |   |
| 216.24(h)(9)(iii) .....   | —0387 and —0651   |

#### PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 3. The authority citation for part 216 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*

■ 4. In § 216.3:

■ a. Add definitions for “Bycatch limit,” “Comparability finding,” “Exempt fishery,” “Exemption period,” “Export fishery,” and “Fish and fish product” in alphabetical order;

■ b. Revise the definition for “Import”; and

■ c. Add definitions for “Intermediary nation,” “List of foreign fisheries,” “Transboundary stock,” and “U.S. regulatory program” in alphabetical order.

The additions and revisions read as follows:

##### § 216.3 Definitions.

**Bycatch limit** means the calculation of a potential biological removal level for a particular marine mammal stock, as defined in § 229.2, or comparable scientific metric established by the harvesting nation or applicable regional fishery management organization or intergovernmental agreement.

**Comparability finding** means a finding by the Assistant Administrator that the harvesting nation for an export fishery has met the applicable conditions specified in § 216.24(h)(6)(iii) subject to the additional considerations for comparability determinations set out in § 216.24(h)(7).

**Exempt fishery** means a foreign commercial fishing operation determined by the Assistant Administrator to be the source of exports of commercial fish and fish products to the United States and to have a remote likelihood of, or no known, incidental mortality and serious injury of marine mammals in the course of commercial fishing operations. A commercial fishing operation that has a remote likelihood of causing incidental mortality and serious injury of marine mammals is one that collectively with other foreign fisheries exporting fish and fish products to the United States causes the annual removal of:

(1) Ten percent or less of any marine mammal stock’s bycatch limit; or

(2) More than 10 percent of any marine mammal stock’s bycatch limit, yet that fishery by itself removes 1 percent or less of that stock’s bycatch limit annually; or

(3) Where reliable information has not been provided by the harvesting nation on the frequency of incidental mortality and serious injury of marine mammals caused by the commercial fishing operation, the Assistant Administrator may determine whether the likelihood of incidental mortality and serious injury is “remote” by evaluating information concerning factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, the species and distribution of marine mammals in the area, or other factors at the discretion of the Assistant Administrator. A foreign fishery will not be classified as an exempt fishery unless the Assistant

Administrator has reliable information from the harvesting nation, or other information to support such a finding.

*Exemption period* means the one-time, five-year period that commences with the effective date of the final rule implementing this section during which commercial fishing operations that are the source of exports of commercial fish and fish products to the United States will be exempt from the prohibitions of § 216.24(h)(1).

*Export fishery* means a foreign commercial fishing operation determined by the Assistant Administrator to be the source of exports of commercial fish and fish products to the United States and to have more than a remote likelihood of incidental mortality and serious injury of marine mammals (as defined in the definition of an “exempt fishery”) in the course of its commercial fishing operations. Where reliable information has not been provided by the harvesting nation on the frequency of incidental mortality and serious injury of marine mammals caused by the commercial fishing operation, the Assistant Administrator may determine whether the likelihood of incidental mortality and serious injury is more than “remote” by evaluating information concerning factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area, or other factors at the discretion of the Assistant Administrator that may inform whether the likelihood of incidental mortality and serious injury of marine mammals caused by the commercial fishing operation is more than “remote.” Commercial fishing operations not specifically identified in the current List of Foreign Fisheries as either exempt or export fisheries are deemed to be export fisheries until the next List of Foreign Fisheries is published unless the Assistant Administrator has reliable information from the harvesting nation to properly classify the foreign commercial fishing operation. Additionally, the Assistant Administrator may request additional information from the harvesting nation and may consider other relevant information as set forth in § 216.24(h)(3) of this section about such commercial fishing operations and the frequency of incidental mortality and serious injury of marine mammals, to properly classify the foreign commercial fishing operation.

\* \* \* \* \*

*Fish and fish product* means any marine finfish, mollusk, crustacean, or other form of marine life other than marine mammals, reptiles, and birds, whether fresh, frozen, canned, pouched, or otherwise prepared in a manner that allows species identification, but does not include fish oil, slurry, sauces, sticks, balls, cakes, pudding and other similar highly processed fish products.

\* \* \* \* \*

*Import* means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the Customs laws of the United States; except that, for the purpose of any ban issued under 16 U.S.C. 1371(a)(2)(B) on the importation of fish or fish products, the definition of “import” in § 216.24(f)(1)(ii) shall apply.

\* \* \* \* \*

*Intermediary nation* means a nation that imports fish or fish products from a fishery that is subject to an import restriction pursuant to § 216.24(h)(9) and re-exports such fish or fish products to the United States.

\* \* \* \* \*

*List of Foreign Fisheries* means the most recent list of foreign commercial fishing operations exporting fish or fish products to the United States, that is published in the **Federal Register** by the Assistant Administrator and that classifies commercial fishing operations according to the frequency and likelihood of incidental mortality and serious injury of marine mammals during commercial fishing operations as either an exempt fishery or export fishery. This list will be organized by harvesting nation.

\* \* \* \* \*

*Transboundary stock* means a marine mammal stock occurring in the:

- (1) Exclusive economic zones or territorial sea of the United States and one or more other coastal States; or
- (2) Exclusive economic zone or territorial sea of the United States and on the high seas.

\* \* \* \* \*

*U.S. regulatory program* means the regulatory program governing the incidental mortality and serious injury of marine mammals in the course of commercial fishing operations as specified in the Marine Mammal Protection Act and its implementing regulations.

\* \* \* \* \*

■ 4. In § 216.24, the section heading is revised and paragraph (h) is added to read as follows:

**§ 216.24 Taking and related acts incidental to commercial fishing operations including tuna purse seine vessels in the eastern tropical Pacific Ocean.**

\* \* \* \* \*

(h) *Taking and related acts of marine mammals incidental to foreign commercial fishing operations not governed by the provisions related to tuna purse seine vessels in the eastern tropical Pacific Ocean.* (1) *Prohibitions.*

(i) As provided in section 101(a)(2) of the MMPA, the importation of commercial fish or fish products which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards is prohibited. For purposes of this section, a fish or fish product caught with commercial fishing technology which results in the incidental mortality or incidental serious injury of marine mammals in excess of U.S. standards is any fish or fish product harvested in an exempt or export fishery for which a valid comparability finding is not in effect.

(ii) Accordingly, it is unlawful for any person to import, or attempt to import, into the United States for commercial purposes any fish or fish product if such fish or fish product:

(A) Was caught or harvested in a fishery that does not have a valid comparability finding in effect at the time of import; or

(B) Is not accompanied by a Certification of Admissibility where such Certification is required pursuant to paragraph (h)(9)(iv) of this section or by such other documentation as the Assistant Administrator may identify and announce in the **Federal Register** that indicates the fish or fish product was not caught or harvested in a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section.

(iii) It is unlawful for any person, including exporters, transshippers, importers, processors, or wholesalers/distributors to possess, sell, purchase, offer for sale, re-export, transport, or ship in the United States, any fish or fish product imported in violation of this section.

(2) *Exemptions.* (i) Exempt fisheries are exempt from requirements of paragraph (h)(6)(iii)(B) through (E) of this section.

(A) For the purposes of paragraph (h) of this section, *harvesting nation* means the country under whose flag or jurisdiction one or more fishing vessels or other entity engaged in commercial fishing operations are documented, or which has by formal declaration or agreement asserted jurisdiction over one

or more authorized or certified charter vessels, and from such vessel(s) or entity(ies) fish are caught or harvested that are a part of any cargo or shipment of fish or fish products to be imported into the United States, regardless of any intervening transshipments, exports or re-exports.

(B) [Reserved]

(ii) The prohibitions of paragraph (h)(1) of this section shall not apply during the exemption period.

(iii) Section 216.24(h) shall not apply with respect to incidental take of delphinids in purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean or large-scale driftnet fishing. Section 216.24(f) shall govern restrictions on importation and sale of fish and fish products caught or harvested, and the taking of delphinids, in the course of commercial purse seine fishing operations for yellowfin tuna in the eastern tropical Pacific Ocean and fish and the importation of fish products harvested by using a large-scale driftnet.

(3) *Procedures to identify foreign commercial fishing operations with incidental mortality and serious injury of marine mammals.* In developing the List of Foreign Fisheries in paragraph (h)(4) of this section, the Assistant Administrator:

(i) Shall periodically analyze imports of fish and fish products and identify commercial fishing operations that are the source of exports of such fish and fish products to the United States that have or may have incidental mortality or serious injury of marine mammals in the course of their commercial fishing operations.

(A) For the purposes of paragraph (h) of this section, a *commercial fishing operation* means vessels or entities that catch, take, or harvest fish (as defined in Section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)) from the marine environment (or other areas where marine mammals occur) that results in the sale or barter of all or part of the fish caught, taken or harvested. The term includes aquaculture activities that interact with or occur in marine mammal habitat.

(B) [Reserved]

(ii) Shall notify, in consultation with the Secretary of State, each harvesting nation that has commercial fishing operations identified pursuant to paragraph (h)(3)(i) of this section and request that within 90 days of notification the harvesting nation submit reliable information about the commercial fishing operations identified, including as relevant the number of participants, number of vessels, gear type, target species, area of

operation, fishing season, any information regarding the frequency of marine mammal incidental mortality and serious injury and any programs (including any relevant laws, decrees, regulations or measures) to assess marine mammal populations and to reduce incidental mortality and serious injury of marine mammals in those fisheries or prohibit the intentional killing or injury of marine mammals;

(iii) Shall review each harvesting nation's submission, evaluate any information it contains (including descriptions of its regulatory programs) and, if necessary, request additional information; and

(iv) May consider other readily available and relevant information about such commercial fishing operations and the frequency of incidental mortality and serious injury of marine mammals, including: Fishing vessel records; reports of on-board fishery observers; information from off-loading facilities, port-side officials, enforcement agents, transshipment vessel workers and fish importers; government vessel registries; regional fisheries management organizations documents and statistical document programs; and appropriate certification programs. Other sources may include published literature and reports on fishing vessels with incidental mortality and serious injury of marine mammals from government agencies; foreign, state, and local governments; regional fishery management organizations; nongovernmental organizations; industry organizations; academic institutions; and citizens and citizen groups.

(4) *List of Foreign Fisheries.* (i) Within one year of the effective date of the final rule implementing this section and the year prior to the expiration of the exemption period and every four years thereafter, the Assistant Administrator, based on the information obtained in paragraph (h)(3) of this section, will publish in the **Federal Register**:

(A) A proposed List of Foreign Fisheries by harvesting nation for notice and comment; and

(B) A final List of Foreign Fisheries, effective upon publication in the **Federal Register**.

(ii) To the extent that information is available, the List of Foreign Fisheries shall:

(A) Classify each commercial fishing operation that is the source of exports of fish and fish products to the United States based on the definitions for export fishery and exempt fishery set forth in § 216.3 of this part and identified in the List of Foreign Fisheries by harvesting nation and other

defining factors including geographic location of harvest, gear-type, target species or a combination thereof;

(B) Include fishing gear type, target species, and number of vessels or other entities engaged in each commercial fishing operation;

(C) List the marine mammals that interact with each commercial fishing operation and indicate the level of incidental mortality and serious injury of marine mammals in each commercial fishing operation;

(D) Provide a description of the harvesting nation's programs to assess marine mammal stocks and estimate and reduce marine mammal incidental mortality and serious injury in its export fisheries; and

(E) List the harvesting nations that prohibit, in the course of commercial fishing operations that are the source of exports to the United States, the intentional mortality or serious injury of marine mammals unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger.

(5) *Consultations with Harvesting Nations with Commercial Fishing Operations on the List of Foreign Fisheries.* (i) Within 90 days of publication of the final List of Foreign Fisheries in the **Federal Register**, the Assistant Administrator, in consultation with the Secretary of State, shall consult with harvesting nations with commercial fishing operations identified as export or exempt fisheries as defined in § 216.3 for purposes of notifying the harvesting nation of the requirements of the Marine Mammal Protection Act and this subpart.

(ii) The Assistant Administrator, in consultation with the Secretary of State, may consult with harvesting nations for the purposes of providing notifications of deadlines under this section, ascertaining or reviewing the progress of the harvesting nation's development, adoption, implementation, or enforcement of its regulatory program governing the incidental mortality and serious injury of marine mammals in the course of commercial fishing operations for an export fishery, supplementing or clarifying information needed in conjunction with the List of Foreign Fisheries in paragraphs (h)(3) and (4) of this section, the progress report in paragraph (h)(10) of this section or an application for or reconsideration of a comparability finding in paragraph (h)(6) and (h)(8) of this section.

(iii) The Assistant Administrator shall, in consultation with the Secretary of State and the United States Trade Representative, consult with any



harvesting nations that failed to receive a comparability finding for one or more of commercial fishing operations or for which a comparability finding is terminated and encourage the harvesting nation to take corrective action and reapply for a comparability finding in accordance with paragraph (h)(9)(iii) of this section.

(6) *Procedure and conditions for a comparability finding.* (i) *Procedures to apply for a comparability finding.* On March 1st of the year when the exemption period or comparability finding is to expire, a harvesting nation, shall submit to the Assistant Administrator an application for each of its export and exempt fisheries, along with documentary evidence demonstrating that the harvesting nation has met the conditions specified in paragraph (h)(6)(iii) of this section for each of such fishery, including reasonable proof as to the effects on marine mammals of the commercial fishing technology in use in the fishery for fish or fish products exported from such nation to the United States. The Assistant Administrator may require the submission of additional supporting documentation or other verification of statements made in an application for a comparability finding.

(ii) *Procedures to issue a comparability finding.* No later than November 30th of the year when the exemption period or comparability finding is to expire, the Assistant Administrator, in response to an application from a harvesting nation for an export or exempt fishery, shall determine whether to issue to the harvesting nation, in accordance with the procedures set forth in paragraph (h)(8) of this section, a comparability finding for the fishery. In making this determination, the Assistant Administrator shall consider documentary evidence provided by the harvesting nation and relevant information readily available from other sources. If a harvesting nation provides insufficient documentary evidence in support of its application, the Assistant Administrator shall draw reasonable conclusions regarding the fishery based on readily available and relevant information from other sources, including where appropriate information concerning analogous fisheries that use the same or similar gear-type under similar conditions as the fishery, in determining whether to issue the harvesting nation a comparability finding for the fishery.

(iii) *Conditions for a comparability finding.* The following are conditions for the Assistant Administrator to issue a comparability finding for the fishery,

subject to the additional considerations set out in paragraph (h)(7) of this section:

(A) For an exempt or export fishery, the harvesting nation:

(1) Prohibits the intentional mortality or serious injury of marine mammals in the course of commercial fishing operations in the fishery unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger; or

(2) Demonstrates that it has procedures to reliably certify that exports of fish and fish products to the United States are not the product of an intentional killing or serious injury of a marine mammal unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger; and

(B) For an export fishery, the harvesting nation maintains a regulatory program with respect to the fishery that is comparable in effectiveness to the U.S. regulatory program with respect to incidental mortality and serious injury of marine mammals in the course of commercial fishing operations, in particular by maintaining a regulatory program that includes, or effectively achieves comparable results as, the conditions in paragraphs (h)(6)(iii)(C), (D) or (E) of this section as applicable (including for transboundary stocks).

(C) *Conditions for an export fishery operating under the jurisdiction of a harvesting nation within its EEZ (or the equivalent) or territorial sea.* In making the finding in paragraph (h)(6)(ii) of this section, with respect to an export fishery operating under the jurisdiction of a harvesting nation within its EEZ (or the equivalent) or territorial sea, the Assistant Administrator shall determine whether the harvesting nation maintains a regulatory program that provides for, or effectively achieves comparable results as, the following:

(1) Marine mammal assessments that estimate population abundance for marine mammal stocks in waters under the harvesting nation's jurisdiction that are incidentally killed or seriously injured in the export fishery.

(2) An export fishery register containing a list of all fishing vessels participating in the export fishery, including information on the number of vessels participating, the time or season and area of operation, gear type and target species.

(3) Regulatory requirements that include:

(i) A requirement for the owner or operator of a vessel participating in the export fishery to report all intentional

and incidental mortality and injury of marine mammals in the course of commercial fishing operations; and

(ii) A requirement to implement measures in the export fishery designed to reduce the total incidental mortality and serious injury of a marine mammal stock below the bycatch limit.

(4) Implementation of monitoring procedures in the export fishery designed to estimate incidental mortality or serious injury in the export fishery, and to estimate the cumulative incidental mortality and serious injury of marine mammal stocks in waters under its jurisdiction resulting from the export fishery and other export fisheries interacting with the same marine mammal stocks, including an indication of the statistical reliability of those estimates.

(5) Calculation of bycatch limits for marine mammal stocks in waters under its jurisdiction that are incidentally killed or seriously injured in the export fishery.

(6) Comparison of the incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery in relation to the bycatch limit for each stock; and comparison of the cumulative incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery and any other export fisheries of the harvesting nation showing that these export fisheries:

(i) Do not exceed the bycatch limit for that stock or stocks; or

(ii) Exceed the bycatch limit for that stock or stocks, but the portion of incidental marine mammal mortality or serious injury for which the export fishery is responsible is at a level that, if the other export fisheries interacting with the same marine mammal stock or stocks were at the same level, would not result in cumulative incidental mortality and serious injury in excess of the bycatch limit for that stock or stocks.

(D) *Conditions for a harvesting nation's export fishery operating within the jurisdiction of another coastal state.* In making the finding in paragraph (h)(6)(ii) of this section, with respect to a harvesting nation's export fishery operating within the jurisdiction of another coastal state, the Assistant Administrator shall determine whether the harvesting nation maintains a regulatory program that provides for, or effectively achieves comparable results as, the following:

(1) Implementation in the export fishery of:

(i) With respect to any transboundary stock interacting with the export fishery, any measures to reduce the incidental

mortality and serious injury of that stock that the United States requires its domestic fisheries to take with respect to that transboundary stock; and

(ii) with respect to any other marine mammal stocks interacting with the export fishery while operating within the jurisdiction of the coastal state or on the high seas, any measures to reduce incidental mortality and serious injury that the United States requires its domestic fisheries to take with respect to that marine mammal stock; and

(2) For an export fishery not subject to management by a regional fishery management organization:

(i) An assessment of marine mammal abundance of stocks interacting with the export fishery, the calculation of a bycatch limit for each such stock, an estimation of incidental mortality and serious injury for each stock and reduction in or maintenance of the incidental mortality and serious injury of each stock below the bycatch limit. This data included in the application may be provided by the coastal state or other source; and

(ii) Comparison of the incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery in relation to the bycatch limit for each stock; and comparison of the cumulative incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery and any other export fisheries of the harvesting nation showing that these export fisheries do not exceed the bycatch limit for that stock or stocks; or exceed the bycatch limit for that stock or stocks, but the portion of incidental marine mammal mortality or serious injury for which the export fishery is responsible is at a level that, if the other export fisheries interacting with the same marine mammal stock or stocks were at the same level, would not result in cumulative incidental mortality and serious injury in excess of the bycatch limit for that stock or stocks; or

(3) For an export fishery that is subject to management by a regional fishery management organization, implementation of marine mammal data collection and conservation and management measures applicable to that fishery required under an applicable intergovernmental agreement or regional fisheries management organization to which the United States is a party.

(E) *Conditions for a harvesting nation's export fishery operating on the high seas.* In making the finding in paragraph (h)(6)(ii) of this section, with respect to a harvesting nation's export fishery operating on the high seas, the Assistant Administrator shall determine

whether the harvesting nation maintains a regulatory program that provides for, or effectively achieves comparable results as, the U.S. regulatory program with respect to the following:

(1) Implementation in the fishery of marine mammal data collection and conservation and management measures applicable to that fishery required under any applicable intergovernmental agreement or regional fisheries management organization to which the United States is a party; and

(2) Implementation in the export fishery of:

(i) With respect to any transboundary stock interacting with the export fishery, any measures to reduce the incidental mortality and serious injury of that stock that the United States requires its domestic fisheries to take with respect to that transboundary stock; and

(ii) With respect to any other marine mammal stocks interacting with the export fishery while operating on the high seas, any measures to reduce incidental mortality and serious injury that the United States requires its domestic fisheries to take with respect to that marine mammal stock when they are operating on the high seas.

(7) *Additional considerations for comparability finding determinations.* When determining whether to issue any comparability finding for a harvesting nation's export fishery the Assistant Administrator shall also consider:

(i) U.S. implementation of its regulatory program for similar marine mammal stocks and similar fisheries (e.g., considering gear or target species), including transboundary stocks governed by regulations implementing a take reduction plan (§ 229.2 of this chapter), and any other relevant information received during consultations;

(ii) The extent to which the harvesting nation has successfully implemented measures in the export fishery to reduce the incidental mortality and serious injury of marine mammals caused by the harvesting nation's export fisheries to levels below the bycatch limit;

(iii) Whether the measures adopted by the harvesting nation for its export fishery have reduced or will likely reduce the cumulative incidental mortality and serious injury of each marine mammal stock below the bycatch limit, and the progress of the regulatory program toward achieving its objectives;

(iv) Other relevant facts and circumstances, which may include the history and nature of interactions with marine mammals in this export fishery, whether the level of incidental mortality and serious injury resulting from the

fishery or fisheries exceeds the bycatch limit for a marine mammal stock, the population size and trend of the marine mammal stock, and the population level impacts of the incidental mortality or serious injury of marine mammals in a harvesting nation's export fisheries and the conservation status of those marine mammal stocks where available;

(v) The record of consultations under paragraph (h)(5) of this section with the harvesting nation, results of these consultations, and actions taken by the harvesting nation and under any applicable intergovernmental agreement or regional fishery management organization to reduce the incidental mortality and serious injury of marine mammals in its export fisheries;

(vi) Information gathered during onsite inspection by U.S. government officials of a fishery's operations;

(vii) For export fisheries operating on the high seas under an applicable intergovernmental agreement or regional fishery management organization to which the United States is a party, the harvesting nation's record of implementation of or compliance with measures adopted by that regional fishery management organization or intergovernmental agreement for data collection, incidental mortality and serious injury mitigation or the conservation and management of marine mammals; whether the harvesting nation is a party or cooperating non-party to such intergovernmental agreement or regional fishery management organization; the record of United States implementation of such measures; and whether the United States has imposed additional measures on its fleet not required by an intergovernmental agreement or regional fishery management organization; or

(viii) For export fisheries operating on the high seas under an applicable intergovernmental agreement or regional fisheries management organization to which the United States is not a party, the harvesting nation's implementation of and compliance with measures, adopted by that regional fisheries management organization or intergovernmental agreement, and any additional measures implemented by the harvesting nation for data collection, incidental mortality and serious injury mitigation or the conservation and management of marine mammals and the extent to which such measures are comparable in effectiveness to the U.S. regulatory program for similar fisheries.

(8) *Comparability finding determinations.* (i) *Publication.* No later than November 30th of the year when the exemption period or comparability finding is to expire, the Assistant

Administrator shall publish in the **Federal Register**, by harvesting nation, a notice of the harvesting nations and fisheries for which it has issued and denied a comparability finding and the specific fish and fish products that as a result are subject to import prohibitions under paragraphs (h)(1) and (9) of this section.

(ii) *Notification.* Prior to publication in the **Federal Register**, the Assistant Administrator, in consultation with the Secretary of State and, in the event of a denial of a comparability finding, with the Office of the U.S. Trade Representative, shall notify each harvesting nation in writing of the fisheries of the harvesting nation for which the Assistant Administrator is:

(A) Issuing a comparability finding;  
(B) Denying a comparability finding with an explanation for the reasons for the denial of such comparability finding; and

(C) Specify the fish and fish products that will be subject to import prohibitions under paragraphs (h)(1) and (9) of this section on account of a denial of a comparability finding and the effective date of such import prohibitions.

(iii) *Preliminary comparability finding consultations.* (A) Prior to denying a comparability finding under paragraph (h)(8)(ii) of this section or terminating a comparability finding under paragraph (h)(8)(vii) of this section, the Assistant Administrator shall:

(1) Notify the harvesting nation that it is preliminarily denying or terminating its comparability finding and explain the reasons for that preliminary denial or termination;

(2) Provide the harvesting nation a reasonable opportunity to submit reliable information to refute the preliminary denial or termination of the comparability finding and communicate any corrective actions it is taking to meet the applicable conditions for a comparability finding set out in paragraph (h)(6)(iii) of this section subject to the additional considerations set out in paragraph (h)(7) of this section.

(B) The Assistant Administrator shall take into account any information it receives from the harvesting nation and issue a final comparability finding determination, notifying the harvesting nation pursuant to paragraph (h)(8)(ii) of this section of its determination and, if a denial or termination, an explanation of the reasons for the denial or termination of the comparability finding.

(C) A preliminary denial or termination of a comparability finding shall not result in import prohibitions

pursuant to paragraphs (h)(1) and (9) of this section.

(iv) *Duration of a comparability finding.* Unless terminated in accordance with paragraph (h)(8)(vii) of this section or issued for a specific period pursuant to a re-application under paragraph (h)(9)(iii) of this section, a comparability finding shall remain valid for 4 years from publication or for such other period as the Assistant Administrator may specify.

(v) *Renewal of comparability finding.* To seek renewal of a comparability finding, every 4 years or prior to the expiration of a comparability finding, the harvesting nation must submit to the Assistant Administrator the application and the documentary evidence required pursuant to paragraph (h)(6)(i) of this section, including, where applicable, reasonable proof as to the effects on marine mammals of the commercial fishing technology in use in the fishery for fish or fish products exported to the United States, by March 1 of the year when its current comparability finding is due to expire.

(vi) *Procedures for a comparability finding for new foreign commercial fishing operations wishing to export to the United States.* (A) For foreign commercial fishing operations not on the List of Foreign Fisheries that are the source of new exports to the United States, the harvesting nation must notify the Assistant Administrator that the commercial fishing operation wishes to export fish and fish products to the United States.

(B) Upon notification the Assistant Administrator shall issue a provisional comparability finding allowing such imports for a period not to exceed 12 months.

(C) At least 120 days prior to the expiration of the provisional comparability finding the harvesting nation must submit to the Assistant Administrator the reliable information specified in paragraph (h)(3)(ii) of this section and the application and the applicable documentary evidence required pursuant to paragraph (h)(6)(i) of this section.

(D) Prior to expiration of the provisional comparability finding, the Assistant Administrator shall review the application and information provided and classify the commercial fishing operation as either an exempt or export fishery in accordance with paragraphs (h)(3)(iii) through (iv) and (h)(4)(ii) of this section and determine whether to issue the harvesting nation a comparability finding for the fishery in accordance with paragraph (h)(6)(ii) through (iii) of this section.

(E) If the harvesting nation submits the reliable information specified in paragraph (h)(3)(ii) of this section at least 180 days prior to expiration of the provisional comparability finding, the Assistant Administrator will review that information and classify the fishery as either an exempt or export fishery.

(vii) *Discretionary review of comparability findings.* (A) The Assistant Administrator may reconsider a comparability finding that it has issued at any time based upon information obtained by the Assistant Administrator including any progress report received from a harvesting nation; or upon request with the submission of information from the harvesting nation, any nation, regional fishery management organizations, nongovernmental organizations, industry organizations, academic institutions, citizens or citizen groups that the harvesting nation's exempt or export fishery no longer meets the applicable conditions in paragraph (h)(6)(iii) of this section. Upon receiving a request, the Assistant Administrator has the discretion to determine whether to proceed with a review or reconsideration.

(B) After such review or reconsideration and consultation with the harvesting nation, the Assistant Administrator shall, if the Assistant Administrator determines that the basis for the comparability finding no longer applies, terminate a comparability finding.

(C) The Assistant Administrator shall notify in writing the harvesting nation and publish in the **Federal Register** a notice of the termination and the specific fish and fish products that as a result are subject to import prohibitions under paragraphs (h)(1) and (9) of this section.

(9) *Imposition of import prohibitions.*

(i) With respect to a harvesting nation for which the Assistant Administrator has denied or terminated a comparability finding for a fishery, the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, shall identify and prohibit the importation of fish and fish products into the United States from the harvesting nation caught or harvested in that fishery. Any such import prohibition shall become effective 30 days after the of publication of the **Federal Register** notice referenced in paragraph (h)(8)(i) of this section and shall only apply to fish and fish products caught or harvested in that fishery.

(ii) *Duration of import restrictions and removal of import restrictions.* (A) Any import prohibition imposed

pursuant to paragraphs (h)(1) and (9) of this section with respect to a fishery shall remain in effect until the Assistant Administrator issues a comparability finding for the fishery.

(B) A harvesting nation denied a comparability finding for a fishery may re-apply for a comparability finding at any time submitting an application to the Assistant Administrator, along with documentary evidence demonstrating that the harvesting nation has met the conditions specified in paragraph (h)(6)(iii) of this section, including, as applicable, reasonable proof as to the effects on marine mammals of the commercial fishing technology in use in the fishery for the fish or fish products exported from such nation to the United States.

(C) The Assistant Administrator shall make a determination whether to issue the harvesting nation that has re-applied for a comparability finding for the fishery within 90 days from the submission of complete information to the Assistant Administrator. The Assistant Administrator shall issue a comparability finding for the fishery for a specified period where the Assistant Administrator finds that the harvesting nation meets the applicable conditions in paragraph (h)(6)(iii) of this section, subject to the additional consideration for a comparability finding in paragraph (h)(7) of this section.

(D) Upon issuance of a comparability finding to the harvesting nation with respect to the fishery and notification in writing to the harvesting nation, the Assistant Administrator, in cooperation with the Secretaries of Treasury and Homeland Security, shall publish in the **Federal Register** a notice of the comparability finding and the removal of the corresponding import prohibition effective on the date of publication in the **Federal Register**.

(iii) *Certification of admissibility.* (A) If fish or fish products are subject to an import prohibition under paragraphs (h)(1) and (9) of this section, the Assistant Administrator, to avoid circumvention of the import prohibition, may require that the same or similar fish and fish products caught or harvested in another fishery of the harvesting nation and not subject to the prohibition be accompanied by a certification of admissibility. The certification of admissibility may be in addition to any other applicable import documentation requirements.

(B) The Assistant Administrator shall notify the harvesting nation of the fisheries and the fish and fish products to be accompanied by a certification of admissibility and provide the necessary documents and instruction.

(C) The Assistant Administrator in cooperation with the Secretaries of Treasury and Homeland Security, shall as part of the **Federal Register** notice referenced in paragraph (h)(8)(i) of this section publish by harvesting nation the fish and fish products to be accompanied by a certification of admissibility. Any requirement for a certification of admissibility shall be effective 30 days after the publication of such notice in the **Federal Register**.

(D) For each shipment, the certification of admissibility must be properly completed and signed by a duly authorized official or agent of the harvesting nation and subject to validation by a responsible official(s) designated by the Assistant Administrator. The certification must also be signed by the importer of record and submitted in a format (electronic facsimile [fax], the Internet, etc.) specified by the Assistant Administrator.

(iv) *Intermediary nation.* (A) For purposes of this paragraph, and in applying the definition of an “intermediary nation,” an import into the intermediary nation occurs when the fish or fish product is released from a harvesting nation’s customs jurisdiction and enters the customs jurisdiction of the intermediary nation or when the fish and fish products are entered into a foreign trade zone of the intermediary nation for processing or transshipment. For other purposes, “import” is defined in § 216.3.

(B) No fish or fish products caught or harvested in a fishery subject to an import prohibition under paragraphs (h)(1) and (9) of this section, may be imported into the United States from any intermediary nation.

(C) Within 30 days of publication of the **Federal Register** described in paragraph (h)(8)(i) of this section specifying fish and fish products subject to import prohibitions under paragraphs (h)(1) and (h)(9) of this section, the Assistant Administrator shall, based on readily available information, identify nations that may import, and re-export to the United States, fish and fish products from a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section and notify such nations in writing that they are subject to action under paragraph (h)(9)(iv)(D) of this section with respect to the fish and fish products for which the Assistant Administrator identified them.

(D) Within 60 days from the date of notification, a nation notified pursuant to paragraph (h)(9)(iv)(C) of this section must certify to the Assistant Administrator that it:

(1) Does not import, or does not offer for import into the United States, fish or fish products subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section; or

(2) Has procedures to reliably certify that exports of fish and fish products from the intermediary to the United States do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section.

(E) The intermediary nation must provide documentary evidence to support its certification including information demonstrating that:

(1) It has not imported in the preceding 6 months the fish and fish products for which it was notified under paragraph (h)(9)(iv)(C) of this section; or

(2) It maintains a tracking, verification, or other scheme to reliably certify on either a global, individual shipment or other appropriate basis that fish and fish products from the intermediary nation offered for import to the United States do not contain of fish or fish products caught or harvested in a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section and for which it was notified under paragraph (h)(9)(iv)(C) of this section.

(F) No later than 120 days after a notification pursuant to paragraph (h)(9)(iv)(C) of this section, the Assistant Administrator will review the documentary evidence provided by the intermediary nation under paragraphs (h)(9)(iv)(D) and (E) of this section and determine based on that information or other readily available information whether the intermediary nation imports, or offers to import into the United States, fish and fish products subject import prohibitions and, if so, whether the intermediary nation has procedures to reliably certify that exports of fish and fish products from the intermediary to the United States do not contain fish or fish products subject to import prohibitions under paragraphs (h)(1) and (9) of this section, and notify the intermediary nation of its determination.

(G) If the Assistant Administrator determines that the intermediary nation does not have procedures to reliably certify that exports of fish and fish products from the intermediary to the United States do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section, the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, will file with the

Office of the Federal Register a notice announcing that fish and fish products exported from the intermediary nation to the United States that are of the same species as, or similar to, fish or fish products subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section and for which it was notified under paragraph (h)(9)(iv)(C) of this section may not be imported into the United States.

(H) The Assistant Administrator will review determinations under this paragraph upon the request of an intermediary nation. Such requests must be accompanied by specific and detailed supporting information or documentation indicating that a review or reconsideration is warranted. Based upon such information and other relevant information, the Assistant Administrator may determine that the intermediary nation should no longer be subject to an import prohibition under paragraph (h)(9)(iv)(G) of this section. Based on that determination the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, may lift an import prohibition under this paragraph and publish notification of such action in the **Federal Register**.

(10) *Progress report for harvesting nations with export fisheries* (i) A harvesting nation shall submit, with respect to an exempt or export fishery, a progress report to the Assistant

Administrator documenting actions taken to:

(A) Develop, adopt and implement its regulatory program; and

(B) Meet the conditions in paragraph (h)(6)(iii) of this section, including with respect to reducing or maintaining incidental mortality and serious injury of marine mammals below the bycatch limit for its fisheries.

(ii) The progress report should include the methods the harvesting nation is using to obtain information in support of a comparability finding and a certification by the harvesting nation of the accuracy and authenticity of the information contained in the progress report.

(iii) The first progress report would be due two years prior to the end of exemption period and every four years thereafter on or before July 31.

(iv) The Assistant Administrator may review the progress report to monitor progress made by a harvesting nation in developing its regulatory program or to reconsider a comparability finding in accordance with paragraph (h)(8)(vi) of this section.

(11) *International cooperation and assistance.* Consistent with the authority granted under Marine Mammal Protection Act at 16 U.S.C. 1378 and the availability of funds, the Assistant Administrator may:

(i) Provide appropriate assistance to harvesting nations identified by the Assistant Administrator under paragraph (h)(5) of this section with

respect to the financial or technical means to develop and implement the requirements of this section;

(ii) Undertake, where appropriate, cooperative research on marine mammal assessments for abundance, methods to estimate incidental mortality and serious injury and technologies and techniques to reduce marine mammal incidental mortality and serious injury in export fisheries;

(iii) Encourage and facilitate, as appropriate, the voluntary transfer of appropriate technology on mutually agreed terms to assist harvesting nations in qualifying for a comparability finding under paragraph (h)(6) of this section; and

(iv) Initiate, through the Secretary of State, negotiations for the development of bilateral or multinational agreements with harvesting nations to conserve marine mammals and reduce the incidental mortality and serious injury of marine mammals in the course of commercial fishing operations.

(12) The Assistant Administrator shall ensure, in consultation with the Office of the United States Trade Representative, that any action taken under this section, including any action to deny a comparability finding or to prohibit imports, is consistent with the international obligations of the United States, including under the World Trade Organization Agreement.

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