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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 200309-0071]

RTID 0648-XQ007

Fish and Fish Product Import Provisions of the Marine Mammal Protection Act 2020

List of Foreign Fisheries

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

ACTION: Notice of availability; request for comments.

SUMMARY: NMFS is publishing its draft 2020 List of Foreign Fisheries (LOFF), as required by the regulations implementing the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act (MMPA). The draft 2020 LOFF reflects new information received from nations submitting their 2019 Progress Reports on interactions between commercial fisheries exporting fish and fish products to the United States and marine mammals, and updates the 2017 LOFF. NMFS classified each commercial fishery in this draft 2020 LOFF into one of two categories, either “export” or “exempt,” based upon frequency and likelihood of incidental mortality and serious injury of marine mammals likely to occur incidental to each fishery. The classification of a fishery on the draft 2020 LOFF determines which regulatory requirements will be applicable to that fishery for it to receive a comparability finding necessary to export fish and fish products to the United States from that fishery.

DATES: Written comments must be received by 5 p.m. Eastern Time on May 1, 2020.

ADDRESSES: The draft 2020 LOFF can be found at:

<https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries>

You may submit comments on this document, identified by NOAA–NMFS–2020–0001, by either of the following methods:

1. *Electronic Submissions:* Submit all electronic comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0001*, 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 and Seafood Inspection, Attn: MMPA List of Foreign Fisheries, NMFS, F/IASI, 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 *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). NMFS will consider all comments and information received during the comment period in preparing a final LOFF. NMFS will also seek input from nations on the draft LOFF at bilateral and multilateral meetings, as appropriate.

FOR FURTHER INFORMATION, CONTACT: Nina Young, NMFS F/IASI at

Nina.Young@noaa.gov, mmpa.loff@noaa.gov, or 301–427–8383.

SUPPLEMENTARY INFORMATION: In August 2016, NMFS published a final rule (81 FR 54390; August 15, 2016) implementing the fish and fish product import provisions (section 101(a)(2)) of the MMPA. This rule established conditions for evaluating a harvesting nation’s regulatory programs to address incidental and intentional mortality and serious injury of marine mammals in its fisheries producing fish and fish products exported to the United States. Specifically, fish or fish products cannot be imported into the United States from commercial fishing operations that result in the incidental mortality or serious injury of marine mammals in excess of United States standards. Fish and fish products from export and exempt fisheries identified by the Assistant Administrator for Fisheries in the LOFF can only be imported into the United States if the harvesting nation has applied for and received a comparability finding from NMFS. The 2016 final rule established procedures that a harvesting nation must follow and conditions it must meet to receive a comparability finding for a fishery. The rule also established provisions for intermediary nations to ensure that such nations do not import and re-export to the United States fish or fish products that are subject to an import prohibition.

This draft 2020 LOFF (see <https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries>) makes updates to the final 2017 LOFF, which was published on March 16, 2018 (83 FR 11703).

What is the List of Foreign Fisheries?

Based on information provided by nations, industry, the public, and other readily available sources, NMFS identified nations with commercial fishing operations that export fish and fish products to the United States and classified each of those fisheries based on their frequency of marine mammal interactions as either “exempt” or “export” fisheries (see **Definitions** below). The entire list of these export and exempt fisheries, organized by nation (or economy), constitutes the LOFF.

Why is the LOFF important?

Under the MMPA, the United States prohibits imports of commercial fish or fish products caught in commercial fishing operations resulting in the incidental killing or serious injury (bycatch) of marine mammals in excess of United States standards (16 U.S.C. 1371(a)(2)). NMFS published regulations implementing these MMPA import provisions in August 2016 (81 FR 54390; August 15, 2016). The regulations apply to any foreign nation with fisheries exporting fish and fish products to the United States, either directly or through an intermediary nation.¹

The LOFF lists foreign commercial fisheries that export fish and fish products to the United States and that have been classified as either “export” or “exempt” based on the frequency and likelihood of interactions or incidental mortality and serious injury of a marine mammal. All fisheries that export to the United States must be on the LOFF. A harvesting

¹ With respect to all references to “nation” or “nations” in the rule, it should be noted that the Taiwan Relations Act of 1979, Pub. L. No. 96-8, Section 4(b)(1), provides that [w]henver the laws of the United States refer or relate to foreign countries, nations, states, governments, territories or similar entities, such terms shall include and such laws shall apply with respect to Taiwan. 22 U.S.C. § 3303(b)(1). This is consistent with the United States’ one-China policy, under which the United States has maintained unofficial relations with Taiwan since 1979.

nation must apply for and receive a comparability finding for each of its export and exempt fisheries on the LOFF to continue to export fish and fish products from those fisheries to the United States.

What do the classifications of “exempt fishery” and “export fishery” mean?

The classifications of “exempt fishery” or “export fishery” determine the criteria that a nation’s fishery must meet to receive a comparability finding for that fishery. A comparability finding is required for both exempt and export fisheries, but the criteria for exempt and export fisheries differ.

For an exempt fishery, the criteria to receive a comparability finding are limited only to conditions related to the prohibition of intentional killing or injury of marine mammals (see 50 CFR 216.24(h)(6)(iii)(A)). For an export fishery, the criteria to receive a comparability finding include the conditions related to the prohibition of intentional killing or injury of marine mammals (see 50 CFR 216.24(h)(6)(iii)(A)) and the requirement to develop and maintain regulatory programs comparable in effectiveness to the U.S. regulatory program for reducing incidental marine mammal bycatch (see 50 CFR 216.24(h)(6)). The definitions of “exempt fishery” and “export fishery” are stated in the **Definitions** below.

What type of fisheries are included in the List of Foreign Fisheries?

The LOFF contains only those commercial fishing operations authorized by the harvesting nation to fish and export fish and fish products to the United States. 50 CFR 18.3 defines “commercial fishing operation” as the lawful harvesting of fish from the marine environment for profit as part of an on-going business enterprise. Such term shall not include sport fishing activities whether or not carried out by charter boat or otherwise, and whether or

not the fish so caught are subsequently sold. 50 CFR 229.2 also defines “commercial fishing operation” as the catching, taking, or harvesting of fish 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 harvested. The term includes licensed commercial passenger fishing vessel (as defined in section 216.3 of 50 CFR 216) activities and aquaculture activities. Per the application of these two definitions, the LOFF contains export and exempt fisheries that are engaged in the lawful and authorized commercial harvest of fish from the marine environment. The term “commercial fishing operation” is used in the definitions of exempt fishery and export fishery (see Definitions below).

How did NMFS classify a fishery if a harvesting nation did not provide information?

Information on the frequency or likelihood of interactions or bycatch in most foreign fisheries was lacking or incomplete. Absent such information, NMFS used readily available information, noted below, to classify fisheries, which included drawing analogies to similar U.S. fisheries and gear types interacting with similar marine mammal stocks. Where no analogous fishery or fishery information existed, NMFS classified the commercial fishing operation as an export fishery until information becomes available to properly classify the fishery. Henceforth, in the year prior to the year in which a determination is required on a comparability finding application (*e.g.*, 2020 and 2024), NMFS will revise the LOFF. When revising the LOFF, NMFS may reclassify a fishery if a harvesting nation provides reliable information to reclassify the fishery or such information is readily available to NMFS (*e.g.*, during the comment periods, consultations, or in Progress Reports).

Overview of the 2020 Draft LOFF

The 2020 draft LOFF is composed of 906 exempt fisheries and 1990 export fisheries from 129 nations (or economies). Ninety-six nations submitted their 2019 Progress Reports, and NMFS used information from those reports to revise the 2017 LOFF and create the updated draft 2020 LOFF. The 2017 LOFF and the draft 2020 LOFF, as well as a list of Intermediary nations (or economies) and their associated products and sources of those products, and a list of fisheries and nations where the rule does not apply, can be found at: <https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries>.

Nations Failing to Respond

More than 37 nations (or economies)² failed to submit a 2019 Progress Report. These nations include: Azerbaijan, Bahrain, British Virgin Islands, Cameroon, Cape Verde, Colombia, Dominican Republic, Egypt, Fiji, French Polynesia, France, Ghana, Haiti, Iran, Israel, Kiribati, Libya, Lithuania, Malaysia, Mauritania, Mozambique, New Caledonia, Nicaragua, Papua New Guinea, Romania, Russian Federation, Saudi Arabia, Senegal, Solomon Islands, South Africa, Saint Kitts Nevis, Saint Pierre Miquelon, Tanzania, Tunisia, Turks and Caicos Islands, and Venezuela. Some nations, such as Colombia, France, French Polynesia, Ghana, Senegal, Tunisia, and the Russian Federation, were in various stages of completing their 2019 Progress Reports at the time of the deadline.

The following nations are solely intermediary nations and were not technically required to submit a 2019 Progress Report: Belarus, Monaco, Reunion, and Switzerland. Switzerland submitted a 2019 Progress Report requesting the deletion of all of its

² The term “nation or harvesting nation” includes foreign countries, nations, states, governments, territories, economies, or similar entities that have laws governing the fisheries operating under their control.

intermediary products, which NMFS denied because U.S. trade records clearly indicate that these products are exports from Switzerland.

Of the 37 nations listed above, approximately 26 failed to submit to NMFS either their 2019 Progress Reports or information for development of the LOFF. These nations are: Azerbaijan, Bahrain, British Virgin Islands, Cameroon, Cape Verde, Dominican Republic, Egypt, Fiji, Haiti, Israel, Kiribati, Lithuania, Luxembourg, Mauritania, Nicaragua, Papua New Guinea, Romania, Russian Federation, Saudi Arabia, Solomon Islands, Saint Helena, Saint Kitts Nevis, Saint Lucia, Saint Pierre Miquelon, Tanzania, and Tunisia. If any of these nations fail to submit information or comments on this 2020 draft LOFF, these nations will not be on a positive trajectory toward receiving a comparability finding for their commercial fisheries.

Approximately 17 nations have a limited or sporadic history of exporting fish and fish products to the United States over the last 20 years. In the 2017 Draft LOFF, NMFS proposed several of these nations for removal from the LOFF and provided its rationale (82 FR 39762, August 22, 2017). These nations are: Albania, Bermuda, Cambodia, French Guiana, Jordan, Kazakhstan, Libya, Macedonia, Malta, Moldova, Mongolia, Montserrat, Rwanda, Slovakia, Somalia, Togo, and Yemen. NMFS urge these nations to contact NMFS or the Department of State to clarify whether they intend to continue to export fish and fish products to the United States.

Approximately 72 nation have no record of exporting fish and fish products to the United States. These nations are: Afghanistan, Algeria, Andorra, Angola, Anguilla, Aruba, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Burkina Faso, Burundi, Cayman

Islands, Chad, Congo, Cuba, Djibouti, Dominica, East Timor, Equatorial Guinea, Eritrea, Ethiopia, French Indian Ocean Area, French Pacific Islands, French Southern Territories, French West Indies, Gabon, Gaza Strip, Georgia, Gibraltar, Guadeloupe, Guinea-Bissau, Heard and McDonald Islands, Iraq, Kosovo, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Martinique, Mayotte, Montenegro, Nauru, Nepal, Netherlands Antilles, Niger, Niue, North Korea, Paraguay, Qatar, San Marino, Serbia, Sudan, Svalbard Jan Mayen, Swaziland, Syria, Tajikistan, Tokelau, Trust Territories of Pacific Islands, Tuvalu, Uzbekistan, Vatican City, Wallis and Futuna, West Bank, Western Sahara, Zambia, and Zimbabwe.

In these latter two cases (of having limited or sporadic history of exporting to the United States over the last 20 years, or of having no records of exporting to the United States), NMFS urges nations to examine their exports to the United States over the last two decades and include all fisheries or processors and processed product, which have, are, or in the future may be the source of fish and fish products exported to the United States. To ensure that no fisheries or processed products are overlooked in this process, nations should be as inclusive as possible. Nations or other entities should provide all the documentation and applicable references necessary to support any proposed modifications to the fisheries on the LOFF. Nations on these lists should send a letter to NMFS to confirm that they do not intend to export fish and fish products to the United States between January 1, 2022, and January 1, 2026. If any nation on these lists intends to export fish and fish products to the United States, they should contact and work with NMFS to ensure their fisheries are on the LOFF and that they apply for and receive a comparability finding.

General Changes from the 2017 LOFF

Nations submitted their 2019 Progress Reports through the NMFS International Affairs Information Capture and Reporting System (IAICRS). IAICRS was developed, in part, to achieve greater consistency and standardization in the reporting of target species, gear types, area of operation, and marine mammal interactions. Nations were instructed to revise their fisheries to reflect the fishery management regime within that harvesting nation. Consequently, nearly every harvesting nation that submitted a 2019 Progress Report updated the information on the LOFF. These modifications significantly improved the quantity, quality, consistency, and accuracy of the draft 2020 LOFF. Although the modifications are too numerous and fine-scale to enumerate in detail within this **Federal Register** notice, a record of all modifications are retained within IAICRS. The modifications are summarized below.

The target species listed on the 2017 Draft LOFF were initially identified based on the fish and fish products exported to the United States from that harvesting nation. Nations were requested to link those exported seafood products to specific fisheries and the target species of those fisheries. In some instances, the exported product was a non-target species harvested in a fishery. Therefore, in the 2019 Progress Report, harvesting nations were requested to identify target and non-target species for each fishery. If a particular fishery was a multi-species fishery, harvesting nations were instructed to include all species harvested or authorized to be harvested in that fishery. NMFS still encourages nations to aggregate multi-species fisheries into one fishery, as appropriate.

The 2017 LOFF included fisheries with unknown gear types or that used parochial names for certain gear types. In contrast, IAICRS uses the Food and Agriculture (FAO) definitions of fishing gear, grouped by categories, in accordance with the FAO-recommended classification system, the International Standard Statistical Classification of Fishing Gear (ISSCFG). These FAO definitions and FAO-recommended classifications are valid on a worldwide basis for fisheries in both inland waters and oceans, as well as for small-, medium- and large-scale fisheries. Therefore, using IAICRS, harvesting nations updated their gear types using these FAO definitions for gear types.

NMFS discourages harvesting nations from combining gear types with dissimilar bycatch risk profiles. For example, exempt gear types should not be listed with export gear types with high bycatch risk profiles (*e.g.*, gillnets), because this could result in fisheries using these exempt gear types being classified as export fisheries. Therefore, harvesting nations are urged to review their gear types and separate exempt gear types from export gear types.

IAICRS denotes area of operation using the FAO major fishing areas and subareas, and allows nations to designate management areas within their EEZ within those FAO fishing subareas. Harvesting nations were requested to use this construct to designate their area of operation. Nearly every harvesting nation submitting a 2019 Progress Report updated its area of operation for the LOFF.

Harvesting nations were requested to review the 2017 LOFF and identify fisheries that could be consolidated by area or target species, especially multi-species fisheries (*e.g.*, fisheries with permits issued to one gear type to fish multiple target species) or fisheries that

should be eliminated because the fisheries are solely for domestic consumption. NMFS also requested that harvesting nations add fisheries that export fish and fish products or intend in the future to export such products to the United States.

NMFS maintains that the fisheries on the LOFF should reflect the commercial fisheries authorized by the harvesting nation, according to their fishery management system, to commercially fish and export fish and fish products to the United States. A list of commercial fisheries that were deleted or added can be found at:

<https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries>.

After harvesting nations revised the LOFF as part of the 2019 Progress Reports, NMFS reviewed fisheries and identified gear types indicated in a fishery that should be classified as an export fishery rather than as an exempt fishery, or vice-a-versa. NMFS reclassified such fisheries from export to exempt or from exempt to export as appropriate. A list of commercial fisheries with revised classifications can be found at:

<https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries>.

Instructions to Nations Reviewing the Draft 2020 LOFF and Actions Needed by Nations

In the draft 2020 LOFF, the vast majority of fisheries (1990 fisheries) are classified as export fisheries, in accordance with 50 CFR 216.24(h)(3) and 216.3. To ensure that all of the information for their fisheries is complete and can be appropriately classified, harvesting nations should review carefully the draft 2020 LOFF within IAICRS (<https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries>), together with this **Federal Register** notice, and make any revisions in IAICRS. Harvesting nations

may also submit detailed comments on their commercial fishing and processing operations in writing (see **ADDRESSES** above) or in IAICRS.

The final 2020 LOFF will be the last LOFF prior to the deadline for submission of comparability finding applications by nations. The 2020 LOFF will be the foundation for all responses that nations must provide as part of their comparability finding application.

Therefore, NMFS urges nations to update the draft 2020 LOFF and provide the information that is lacking for their nation. NMFS further urges nations to provide as much detail as possible about the fishery, its operational characteristics, and, in particular, its interactions with and bycatch of marine mammals, including applicable references. It is in the interest of nations to provide the requested information, because the information allows NMFS to determine whether the MMPA import rule applies to all of the fish and fish products exported to the United States or only to a particular fishery or fisheries, what fishery classification is appropriate, whether the nation is only a processor of that fish or fish product, or if the nation is a harvester and processor of that fish or fish product. Specifically, we request that harvesting nations:

- Update their marine mammal abundance estimates using the new tool in IAICRS containing a look-up feature that provides the “best available” marine mammal abundance estimates for marine mammal populations/stock in their waters;
- Update their bycatch limit, using the guidance (provided in IAICRS) to calculate a bycatch limit and the new look-up feature that will automatically calculate the bycatch limit for the selected marine mammal stock;

- Update their marine mammal bycatch estimates for each fishery on the LOFF, including adding additional years of data (*e.g.*, at least five years);
- Provide and update bycatch estimates including information on the number of marine mammals killed, injured, and released alive in the fishery (note that any fishery for which a nation indicated that an observer program exists should be accompanied by bycatch estimates);
- Provide information in any category where the data set is labelled “none provided” or “unknown”;
- Provide gear types for any gear listed as Unknown/Gear not known/Not provided; and
- Update and include information on distant water fisheries that are operating under a licensing or access agreement (even if nations are uncertain whether this product is exported to the United States).

We know that nations may have submitted deletion requests for fisheries and intermediary products (see below), and that NMFS declined requests due to inadequate information to support the deletion request or due to the existence of contrary trade data demonstrating that the fish and fish products were exported to the United States. For example, Hong Kong, while submitting its 2019 Progress Report, did so by requesting the deletion of all of its fisheries. NMFS denied these deletion requests because the U.S. trade data (<https://www.fisheries.noaa.gov/national/sustainable-fisheries/foreign-fishery-trade-data>) indicate that Hong Kong exports these products to the United States. If appropriate, nations are encouraged to use the deletion request system to request a fishery deletion or an intermediary product deletion. In addition, as stated above, nations are encouraged to review

and revise their marine mammal lists under the “Manage Marine Mammals” tab in IAICRS. Many nations failed to submit marine mammal population abundance estimates and bycatch limit estimates, even when the estimate could be found in the scientific literature. NMFS has developed a new tool in IACRS where nations can look up the marine mammal stock, click on the appropriate stock, and populate the data fields with the abundance estimate, maximum net reproductive rate, recovery factor, and bycatch limit for that marine mammal stock.

Description of the Columns on the LOFF and Additional Instructions

The draft 2020 LOFF, like the 2017 LOFF, is again organized by nation, and has listed for each nation its exempt and export fisheries. This list contains the following seven columns.

“Target Species or Product” is a list of the target species and the non-target species associated with that exempt or export fishery. For standardization purposes, this list includes common and scientific names for the fisheries’ target and non-target species.

“Gear Type” is the list of fishing gears used to harvest the target species. As previously discussed, the gears are designated according to the FAO definitions of fishing gear, and are grouped by categories in accordance with the FAO-recommended ISSCFG classification system.

“Number of Vessels/Licenses/Participants, Aquaculture Facilities” is an estimate of the number of vessels authorized to fish in this fishery, the number of fishing permits or licenses issued by the nation for vessels or number of participants authorized to legally fish or operate in this fishery. In the case of aquaculture, it is the number of facilities authorized

by the nation to operate aquaculture operations. Nations are requested to provide at least one of these data points.

“Area of Operation” is the FAO global fishing area and sub-regional statistical area or division where the fishery operates. Nations may also include fishery management areas specific to their laws and management structure with the FAO area, division or subarea.

“Marine Mammal Interactions or Co-occurrence by Group, Species or Stock” is a listing by marine mammal species or stock of known marine mammals whose distribution overlaps the area of operation of the fishery during the time when the fishery is in operation. This list does not need to be an exhaustive list of all of the marine mammal species/stock that may be found in or migrate through a nation’s waters, but it should reflect the marine mammals that have a regular and significant co-occurrence with this fishery, depredate on bait or catch, are captured and released alive, or are killed or injured in the fishery. Co-occurrence data is useful to develop risk assessment models in the absence of bycatch estimates. Nations are requested to review and update this list.

“Marine Mammal Bycatch Estimates” are the marine mammal species/stocks and the average annual bycatch estimate for that species as provided by the harvesting nation. This list is likely to be a subset of the marine mammal species/stocks listed in the “Marine Mammal Interactions or Co-occurrence by Group, Species or Stock” column. In IAICRS, nations are requested to carefully review their existing submission and edit this data to provide marine mammal mortality and injury data for no less than five years. Nations are also requested to calculate an average annual mortality estimate or average annual mortality and injury estimate for all of the years where data is provided in the IAICRS. NMFS expects

that, for any fishery for which there is an observer program, nations will provide bycatch estimates using that observer data, and will extrapolate the observed bycatch data/rate to estimate bycatch in the entire fleet.

“RFMO” indicates that the fishery is operating under the jurisdiction of, or adhering to the management measures of, one or several regional fishery management organizations (RFMO). If the fishery is operating under an RFMO, nations should indicate each RFMO associated with that fishery.

Instruction for Intermediary Nations and Products for Nations that are Processing Fish and Fish Products

For the purposes of identifying intermediary nations, if a nation exports a fish or fish product (for which it is the processor) to the United States, or if the nation is the harvester and processor, or if the fish in that product is harvested elsewhere and transshipped through that nation, NMFS strongly encourages that nation to identify those products and the source fisheries and nations for those products. Providing this information may allow NMFS to reclassify a nation as an intermediary nation for that specific fish or fish product. In addition, the intermediary nation list and the product feature in IAICRS also identify whether the specific fish or fish product was harvested in the nation’s waters under an “Access/License/Charter Agreement or Bilateral/Permitting Agreement.” Nations should indicate whether the product was harvested by another nation operating under an agreement, and should indicate which nations are actively fishing in its waters for this product. If the product was not harvested in a nation’s waters, but rather was imported into a nation from another nation for the purposes of processing, that nation should indicate which nations

provided the product or raw material. If the product was transshipped through a nation's border (*i.e.* transport only, with no value added), thus changing the product's origin so that it becomes a product of the nation through which it is transshipped, that nation should indicate that it is solely a transshipper of the product. If a nation is performing some form of value-added processing of the product, that nation should not indicate that it is a transshipper. Finally, if a nation is also the harvester of this product, that nation should indicate that it is sourcing this product from other nations and possibly co-mingling the product with product from its own active-harvest fisheries already on the LOFF. The intermediary nation and the product feature came online in IAICRS mid-way through the 2019 Progress Report reporting period. NMFS strongly encourages nations to use IAICRS to complete or update their list of intermediary products. The current list of intermediary products is at:

<https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries>.

Instructions for Fisheries Listed in "Rule Does Not Apply"

The MMPA import provisions do not apply to any land-based or freshwater aquaculture operations, as these commercial fishing operations do not occur in marine mammal habitat. Nevertheless, NMFS is attempting to account for all fish and fish products exported by a nation to the United States in one of three categories: (1) LOFF (exempt and export fisheries); (2) Intermediary (processed products); (3) Rule Does Not Apply (freshwater and inland fisheries).

Fisheries that occur solely in fresh water outside any marine mammal habitat, and inland aquaculture operations, are exempt from this rule. If any such fisheries operations have been included in the LOFF, nations should indicate such fisheries and operations and

provide the necessary documentary evidence so NMFS can include them on the LOFF under “Rule Does Not Apply”. However, nations wishing to designate a fishery under “Rule Does Not Apply” cannot use as a rationale that it occurs in an estuary, has no documented marine mammal bycatch, or exports small quantities of fish and fish products.

Instructions for Non-Nation Entities

NMFS welcomes the input of the public, non-governmental organizations, and scientists. These entities can provide critical information about marine mammal bycatch in global fisheries and efforts to mitigate such bycatch. NMFS requests that when such entities comment on the draft 2020 LOFF, they provide as much detail and supporting documentary evidence as possible. While literature contains references to marine mammal bycatch in certain foreign fisheries, it may be that fish and fish products originating from those fisheries are not exported to the United States (*e.g.*, artisanal or coastal fisheries for domestic consumption). NMFS would like to receive information on which fish and fish products are exported to the United States and the frequency of marine mammal interactions or bycatch in those fisheries.

Frequently Asked Questions About the LOFF and the MMPA Import Provisions

Definitions within the MMPA Import Provisions

What is a “comparability finding?”

A comparability finding is a finding by NMFS that the harvesting nation has implemented a regulatory program for an export or exempt fishery that has met the applicable conditions specified in the regulations (see 50 CFR 216.24(h)) subject to the additional considerations for comparability findings set out in the regulations. A

comparability finding is required for a nation to export fish and fish products to the United States. To receive a comparability finding for an export fishery, the harvesting nation must maintain a regulatory program with respect to that fishery that is comparable in effectiveness to the U.S. regulatory program for reducing incidental marine mammal bycatch. This requirement may be met by developing, implementing and maintaining a regulatory program that includes measures that are comparable, or that effectively achieve comparable results to the regulatory program under which the analogous U.S. fishery operates.

What is the definition of an “export fishery?”

The definition of export fishery can be found in the implementing regulations for section 101(a)(2) of the MMPA (see 50 CFR 216.3). NMFS considers “export” fisheries to be functionally equivalent to Category I and II fisheries under the U.S. regulatory program (see definitions at 50 CFR 229.2).

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 that have more than a remote likelihood of incidental mortality and serious injury of marine mammals in the course of its commercial fishing operations.

Where reliable information on the frequency of incidental mortality and serious injury of marine mammals caused by the commercial fishing operation is not provided by the harvesting nation, the Assistant Administrator may determine the likelihood of incidental mortality and serious injury as more than remote by evaluating information concerning factors such as fishing techniques, gear used, methods used to deter marine mammals, target

fish 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.

Commercial fishing operations not specifically identified in the current LOFF as either exempt or export fisheries are deemed to be export fisheries until a revised LOFF is posted, unless the harvesting nation provides the Assistant Administrator with information to properly classify a foreign commercial fishing operation not on the LOFF. To properly classify the foreign commercial fishing operation, the Assistant Administrator may also request additional information from the harvesting nation, as well as consider other relevant information about such commercial fishing operations and the frequency of incidental mortality and serious injury of marine mammals.

What is the definition of an “exempt fishery?”

The definition of exempt fishery can be found in the implementing regulations for section 101(a)(2) of the MMPA (see 50 CFR 216.3). NMFS considers “exempt” fisheries to be functionally equivalent to Category III fisheries under the U.S. regulatory program (see definitions at 50 CFR 229.2).

NMFS defines an 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 that 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 ten percent of any marine mammal stock's bycatch limit; yet that fishery by itself removes one 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 such as fishing techniques, gear used, methods to deter marine mammals, target fish 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.

Developing the 2020 List of Foreign Fisheries

How is the List of Foreign Fisheries organized?

NMFS organized the LOFF by harvesting nation (or economy). The LOFF may include "exempt fisheries" and "export fisheries" for each harvesting nation. The fisheries are defined by target species, geographic location of harvest, gear-type or a combination thereof. Where known, the LOFF also includes a list of the marine mammals that co-occur with the fishery, a list of marine mammals that interact (*e.g.*, depredate the fishing gear, are killed or injured in, or are released from the fishery) with each commercial fishing operation,

and, when available, numerical estimates of the incidental mortality and serious injury of marine mammals in each commercial fishing operation.

What sources of information did NMFS use to classify the commercial fisheries included in the LOFF?

NMFS reviewed and considered documentation provided by nations during the development of the 2017 LOFF and the 2019 Progress Report. NMFS also reviewed and considered the information provided by the public and other sources of information, where available, including fishing vessel records; reports of on-board fishery observers; information from off-loading facilities, port-side government officials, enforcement entities and documents, transshipment vessel workers and fish importers; government vessel registries; RFMO or intergovernmental agreement documents, reports, national reports, and statistical document programs; appropriate catch certification programs; FAO documents and profiles; and published literature and reports on commercial fishing operations with intentional or incidental mortality and serious injury of marine mammals. NMFS has used these sources of information and any other readily available information to classify the fisheries as “export” or “exempt” fisheries to develop the LOFF.

How did NMFS determine which species or stocks are included as incidentally or intentionally killed or seriously injured in a fishery?

The LOFF includes a column consisting of a list of marine mammals that co-occur with the commercial fisheries, that is, the distribution of marine mammals that overlaps with the distribution of commercial fishing activity. The marine mammals that co-occur with a fishery may or may not interact with, or be incidentally or intentionally killed or injured in,

the fishery. The LOFF also includes a list of marine mammal species and/or stocks incidentally or intentionally killed or injured in a commercial fishing operation. The list of species and/or stocks incidentally or intentionally killed or injured includes “serious” and “non-serious” documented injuries and interactions with fishing gear, including interactions such as depredation.

NMFS reviewed information submitted by nations (for inclusion in the 2017 LOFF and in their 2019 Progress Report) and readily available scientific information including co-occurrence models demonstrating distributional overlap of commercial fishing operations and marine mammals to determine which species or stocks to include as incidentally or intentionally killed or injured in or interacting with a fishery. NMFS also reviewed, when available, injury determination reports, bycatch estimation reports, observer data, logbook data, disentanglement network data, fisher self-reports, and the information referenced in the definition of exempt and export fishery (see **Definitions** above or 50 CFR 216.3).

How often will NMFS revise the List of Foreign Fisheries?

NMFS will re-evaluate foreign commercial fishing operations and publish in the **Federal Register** the year prior to the expiration of the exemption period (*e.g.*, this year and again in 2024) a notice of availability of the draft for public comment and a notice of availability of the final revised LOFF. NMFS will revise the final LOFF, as appropriate, and publish a notice of availability in the **Federal Register** every four years thereafter. In revising the list, NMFS may reclassify a fishery if new, substantive information indicates the need to re-examine and possibly reclassify a fishery. After January 1, 2022, all fisheries

wishing to export to the United States must be on the LOFF and have a comparability finding. (see 50 CFR 216.24(h)(1)).

After publication of the LOFF, if a nation wishes to commence exporting fish and fish products to the United States from a fishery not currently included in the LOFF, that fishery will be classified as an export fishery until the next LOFF 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 the regulations implementing section 101(a)(2) of the MMPA (see 50 CFR 216.24(h)(8)(vi)).

How can a classification be changed?

To change a fishery's classification, nations or other interested stakeholders must provide observer data, logbook summaries (preferably over a five-year period), or reports that specifically indicate the presence or absence of marine mammal interactions, quantify such interactions wherever possible, provide additional information on the location and operation of the fishery, details about the gear type and how it is used, maps showing the distribution of marine mammals and the operational area of the fishery, information regarding marine mammal populations and the biological impact of that fishery on those populations, and/or any other documentation that clearly demonstrates that a fishery is either an export or exempt fishery. Data from independent onboard observer programs documenting marine mammal interaction and bycatch is preferable and is given higher consideration than

self-reports, logbooks, fishermen interviews, or sales tickets or dockside interviews. Such data can be summarized and averaged over at least a five-year period and include information on the observer program including the percent coverage, number of vessels and sets or hauls observed. Nations should also indicate whether bycatch estimates from observer data are observed minimum counts or extrapolated estimates for the entire fishery. Nations submitting logbook information should include details about the reporting system, including examples of forms and requirements for reporting. Nations may make formal requests to NMFS to reconsider a fishy classification.

Classification Criteria, Rationale, and Process used to Classify Fisheries

Process when Incidental Mortality and Serious Injury Estimates and Bycatch Limits Are Available

If estimates of the total incidental mortality and serious injury were available and a bycatch limit calculated for a marine mammal stock, NMFS used 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, at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-list-fisheries>.

Process When Only Incidental Mortality and Serious Injury Estimates Were Available

For most commercial fisheries, NMFS is still lacking detail regarding marine mammal interactions, and/or lacking quantitative information on the frequency of interactions. Where nations provided estimates of bycatch or NMFS found estimates of bycatch in published literature, national reports, or through other readily available sources,

NMFS classified the fishery as an export fishery if the information indicated that there was a likelihood that the mortality and serious injury was more than remote. *Alternative Approaches When Estimates of Marine Mammal Bycatch Are Unavailable*

As bycatch estimates are lacking for most fisheries, NMFS relied on three considerations to assess the likelihood of bycatch or interaction with marine mammals, including: (1) co-occurrence, the spatial and seasonal distribution and overlap of marine mammals and fishing operations as a measure of risk (Komoroske & Lewison 2015; FAO 2010; Watson *et al.*, 2006; Read *et al.*, 2006; Reeves *et al.*, 2004); (2) analogous gear, evaluation of records of bycatch and assessment of risk, where such information exists, in analogous U.S. fisheries (MMPA List of Fisheries found at: <https://www.fisheries.noaa.gov/action/list-fisheries-2019>) and international fisheries or gear types; and (3) overarching classifications, evaluation of gears and fishing operations and their risk of marine mammal bycatch (see section below for further discussion). NMFS also evaluated other relevant information including, but not limited to information on fishing techniques, gear used, methods used to deter marine mammals, target fish species, and seasons and areas fished; qualitative data from logbooks or fisher reports; stranding data; and information on the species and distribution of marine mammals in the area, or other factors. Published scientific literature provides numerous risk assessments of marine mammal bycatch in fisheries, routinely using these approaches to estimate marine mammal mortality rates, identify information gaps, set priorities for conservation, and transfer technology for deterring marine mammals from gear and catch. Findings from the most recent publications

cited in this **Federal Register** notice often demonstrate levels of risk by location, season, fishery, and gear.

Classification in the Absence of Information

When no analogous gear, fishery, or fishery information existed, or insufficient information was provided by the nation and information was not readily available, NMFS classified the commercial fishing operation as an export fishery per the definition of “export fishery” at 50 CFR 216.3. These fishing operations will remain classified as export fisheries until the harvesting nation provides the reliable information necessary to classify properly the fishery or, in the course of revising the LOFF, such information becomes readily available to NMFS.

Global Classifications for Some Fishing Gear Types

Due to a lack of information about marine mammal bycatch, NMFS used gear types to classify fisheries as either export or exempt. The detailed rationale for these classifications by gear type were provided in the **Federal Register** notice for the draft 2017 LOFF (82 FR 39762; August 22, 2017) and are summarized here. In the absence of specific information showing a remote likelihood of marine mammal bycatch in a particular fishery, NMFS classified fisheries using these gear types as export. Exceptions to those classifications are included in the discussion below.

NMFS classified as export all trap and pot fisheries because the risk of entanglement in float/buoy lines and groundlines is more than remote, especially in areas of co-occurrence with large whales. While many nations assert that marine mammals cannot enter the trap and become entangled, the risk is not from the trap but from the surface buoy line and the

groundlines (line that connects the trap). These lines represent an entanglement risk to large whales and some small cetaceans. However, NMFS classified as exempt trap and pot fisheries operating in the Gulf of Mexico and Caribbean due to the low co-occurrence with large whales in this region and an analogous U.S. Category III mixed species and lobster trap/pot fishery operating in the Gulf of Mexico and Caribbean. NMFS classifies as exempt small-scale fish, crab, and lobster pot fisheries using mitigation strategies to prevent large whale entanglements, including seasonal closures during migration periods, ropeless fishing, and vertical line acoustic release technology.

NMFS classified as export longline gear and troll line fisheries because the likelihood of marine mammal bycatch is more than remote. However, NMFS classified as exempt longline and troll fisheries with demonstrated bycatch rates that are less than remote or the fishery is analogous (by area, gear type, and target species) to U.S. Category III fishery operating in the area where the fishery occurs. The entanglement rates from marine mammals depredating longline gear is largely unknown. NMFS classifies as exempt snapper/grouper bottom-set longline fisheries operating in the Gulf of Mexico and the Caribbean because they are analogous to U.S. Category III bottom-set longline gear operating in these areas. NMFS also classifies as exempt longline fisheries using a cachalotera system, which prevents and, in some cases, eliminates marine mammal hook depredation and entanglement.

NMFS uniformly classified as export all gillnet, driftnet, set net, fyke net, trammel net, and pound net fisheries because the likelihood of marine mammal bycatch in this gear type is more than remote. No nation provided evidence that the likelihood of marine mammal bycatch in these gillnet and set net fisheries was less than remote.

NMFS classified purse seine fisheries as export, unless the fishery is operating under an RFMO that has implemented conservation and management measures prohibiting the intentional encirclement of marine mammals by a purse seine. In those instances, NMFS classifies the purse seine fisheries as exempt because the evidence suggests that, where purse seine vessels do not intentionally set on marine mammals, the likelihood of marine mammal bycatch is generally remote. However, if there is documentary evidence that a nation's purse seine fishery continues to incidentally kill or injure marine mammals despite such a prohibition, NMFS classified the fishery as an export fishery. Similarly, if any nation demonstrated that it had adopted and implemented a regulatory measure prohibiting the intentional encirclement of marine mammals by a purse seine vessel, that fishery would be designated as exempt, absent evidence that it continued to incidentally kill or injure marine mammals.

NMFS classified as export all trawl fisheries, including bream trawls, pair trawls, and otter trawls, because the marine mammal bycatch in this gear type is more than remote, and this gear type often co-occurs with marine mammal stocks. However, the krill trawl fishery operating under changes to Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) in subareas 48.1-4 of CCAMLR is classified as exempt due to the conservation and management measure requiring marine mammal excluding devices and levels of marine mammal mortalities that are less than ten percent of the bycatch limit/PBR for marine mammal stocks that interact with that fishery.

There are several gear types that NMFS classified as exempt because they are highly selective, have a remote likelihood of marine mammal bycatch, and have analogous U.S.

Category III fisheries. These gear types are: hand collection, diving, manual extraction, hand lines, hook and line, jigs, dredges, clam rakes, beach-operated hauling nets, ring nets, beach seines, small lift nets, cast nets, bamboo weir, and floating mats for roe collection.

NMFS classified Danish seine fisheries as exempt based on the remote likelihood of marine mammal bycatch because of a lack of documented interactions with marine mammals. The exception are Danish seine fisheries with documentary evidence of marine mammal interactions, which NMFS classified as export.

Finally, NMFS classified as exempt most forms of aquaculture, including lines and floating cages, unless documentary evidence indicates marine mammal interactions or entanglement, particularly of large whale entanglement in aquaculture seaweed or shellfish lines, or nations permit aquaculture facilities to intentionally kill or injure marine mammals.

General Trends and Observations related to the LOFF and the 2019 Progress Report

Gillnets represent the vast majority of the export fisheries with documented marine mammal bycatch. Mitigation measures for gillnets are few. Active sound emitters such as “pingers” are used in gillnet fisheries to reduce small cetacean bycatch. However, pingers are not effective for all small cetacean species and may be less effective in operational fisheries than research programs (Dawson *et al.*, 2013). Given the limited mitigation options, nations should consider substituting gillnets with other non-entangling fishing gear, where there is overlap between operational area of the fishery and the distribution of marine mammal populations.

The LOFF highlights the clear need for bycatch monitoring programs to better estimate marine mammal bycatch and to identify where mitigation efforts are most needed.

For example, several nations recommended that longline and purse seine fisheries be classified as exempt fisheries because there are few interactions with marine mammals. However, the logbook and observer data and reports from various RFMOs that NMFS received did not fully substantiate that the likelihood of bycatch in these fisheries is remote.

NMFS believes accurate classification of longline fisheries, especially for tuna, and purse seine fisheries for pelagic species would benefit from monitoring programs (*e.g.*, observer programs) or analyses of observer and logbook programs to assess the bycatch rates associated with these gear types. RFMOs are well-situated to evaluate marine mammal bycatch rates in tuna and swordfish longline fisheries. Information from these sources could be used to determine whether the likelihood of marine mammal bycatch is remote. Nations should strongly consider bycatch monitoring programs, especially observer and electronic video monitoring, as a core element in any regulatory program and a key to the appropriate classification of their fisheries.

There is a growing volume of information available on marine mammal bycatch mitigation. The most comprehensive report is that of the Expert Workshop on the Means and Methods for Reducing Marine Mammal Mortality in Fishing and Aquaculture Operations (FAO 2018), which reviewed the current state of knowledge on the issue of marine mammal bycatch, and evaluated the efficacy and implementation of different strategies and measures for mitigating bycatch. The workshop produced some key technical outputs, including an extensive review of techniques across different gear types and species, together with a summary table and a draft decision-making tool (decision tree) which could be used to support management decision-making processes. The workshop recommended that FAO

develop technical guidelines on means and methods for prevention and reduction of marine mammal bycatch and mortality in fishing and aquaculture operations in support of FAO's Code of Conduct for Responsible Fisheries, which are currently under development.

References

CCAMLR. 2015a. Krill fishery report 2015.

D'agrosa, Caterina, C.E. Lennert-Cody, and O. Vidal. 2000 Vaquita Bycatch in Mexico's Artisanal Gillnet Fisheries: Driving a Small Population to Extinction. *Conservation Biology* Vol 14 1110-1119

Dawson, S.M., S. Northridge, D. Waples, and A.J. Read. (2013) To ping or not to ping: the use of active acoustic devices in mitigating interactions between small cetaceans and gillnet fisheries. *Endangered Species Research* Vol. 19 201-221.

FAO. 2018. Report of the Expert Workshop on Means and Methods for Reducing Marine Mammal Mortality in Fishing and Aquaculture Operations Rome, 20-23 March 2018

IUCN. 2008. *Arctocephalus gazella*: Hofmeyr, G.: The IUCN Red List of Threatened Species 2014: e.T2058A45223888.

Koschinski, S. & Stempel, R. (2012): Strategies for the Prevention of Bycatch of Seabirds and Marine Mammals in Baltic Sea Fisheries. ASCOBANS AC19/Doc.4–17 (S). 19th ASCOBANS Advisory Committee Meeting, Galway, Ireland, 20–22 March. 69 pp.;

Herr, H., Siebert, U. & Benke, H. (2009b): Stranding numbers and bycatch implications of harbor porpoises along the German Baltic Sea coast. Document AC16/Doc.62 (P). 16th ASCOBANS Advisory Committee Meeting, Brugge, Belgium, 20-24 April 2009. ASCOBANS, Bonn. 3 pp.).

SCAR EGS. 2004. Scientific Committee on Antarctic Research Expert Group on Seals

(SCAR EGS): Scientific Committee for Antarctic Research- Expert Group on Seals
Report.

Skora, K.E., Kuklik, I. (2003) Bycatch as a potential threat to harbor porpoises (*Phocoena phocoena*) in Polish Baltic waters. NAMMCO Scientific Publications 5: 303-315.

Vanhatalo, J., Vetemaa, M., Herrero, A., Aho, T., Tiilikainen, R. 2014.) By-catch of grey seals (*Halichoerus grypus*) in Baltic fisheries – a Bayesian analysis of interview survey. Plos One.

Vinther (1999, Bycatches of harbor porpoises (*Phocoena phocoena* L.) in Danish set-net fisheries. J. Cetacean Res. Manage. 1: 123-135.)

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