



**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**[Docket No. 201001-0262; RTID 0648-XA338]**

**Fish and Fish Product Import Provisions of the Marine Mammal Protection Act;**

**Final 2020 List of Foreign Fisheries**

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

**ACTION:** Notice of availability.

**SUMMARY:** NMFS is publishing its final 2020 List of Foreign Fisheries (LOFF), as required by the regulation implementing the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act (MMPA). The final 2020 LOFF reflects new information received during the comment period on interactions between commercial fisheries exporting fish and fish products to the United States and marine mammals and updates and revises the draft 2020 LOFF. NMFS classified commercial fisheries in this final 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 final 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. The final 2020 LOFF can be found at:

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

**FOR FURTHER INFORMATION, CONTACT:** Nina Young, NMFS IASI at *[Nina.Young@noaa.gov](mailto:Nina.Young@noaa.gov)*, *[mmpa.loff@noaa.gov](mailto: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 (hereafter referred to as the MMPA Import Provisions Rule). 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. The MMPA Import Provisions Rule established an initial five-year exemption period during which the import prohibitions do not apply. The exemption period allows time for harvesting nations to develop regulatory programs to mitigate marine mammal bycatch in their respective fisheries.

After the exemption period, fish and fish products identified by the Assistant Administrator as from export and exempt 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 final 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) and the draft 2020 LOFF, which was published on March 17, 2020 (85 FR 15116).

### **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 statutory requirements of the MMPA in August 2016 (81 FR 54390; August 15, 2016) (MMPA Import Provisions Rule). 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.<sup>1</sup>

---

<sup>1</sup> 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.

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 included on the LOFF by January 1, 2022. A harvesting 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 to the United States from those fisheries beginning January 1, 2022.

**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 to conditions related only 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. This does not include sport-fishing activities, whether or not carried out by charter boat or otherwise, and whether or not the fish caught are subsequently sold. At 50 CFR 229.2, “commercial fishing operation” is defined 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).

## **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 an 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 and that has 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 and that has 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. Each fishery is 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 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, the draft 2020 LOFF, and the 2019 Progress Report. NMFS also reviewed and considered the information provided by the public and other available sources of information, including, but not limited to: 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; Food and Agricultural Organization (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 the available information to classify each fishery as “export” or “exempt” 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, draft 2020 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 or previously issued Comparability Findings (e.g., this year and again in 2024) a notice of availability of the draft LOFF 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 exporting products 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 (lines that connect the traps). 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 (*e.g.*, system which protects bait and catch from marine mammal depredation), 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. Few nations provided evidence that the likelihood of marine mammal bycatch in these gillnet and set net fisheries was less than remote. Those that did, demonstrated that the gillnet fishing area of operation did not overlap with marine mammal habitat.

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 provided evidence 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 likelihood of 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 the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) in subareas 48.1-4 is classified as exempt due to the conservation and management measures requiring marine mammal excluding devices, observer coverage and reporting requirements, and because total estimated marine mammal mortalities are less than ten percent of the bycatch limit/PBR for these pinniped 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, or 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, small 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 is any 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 in cases where nations permit aquaculture facilities to intentionally kill or injure marine mammals.

### **Overview of the Final 2020 LOFF and the Response by Nations**

The 2020 final LOFF is composed of 953 exempt fisheries and 1852 export fisheries from 131 nations (or economies). Eighty-five nations submitted updates to their draft 2020 LOFF, which NMFS used to create the final 2020 LOFF. The following nations are predominantly intermediary nations: Aruba, Belarus, Monaco, and Switzerland.

The 2017 LOFF, the draft 2020 LOFF, the final 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 20 nations (or economies)<sup>2</sup> failed to submit updates to their 2017 LOFF entries, their 2019 Progress Report and the Draft 2020 LOFF. These nations include: Bahrain, British Virgin Islands, Cameroon, Cape Verde, Egypt, Haiti, Iran, Israel, Kiribati, Libya, Mauritania, Mozambique, Papua New Guinea, Romania, Solomon Islands, South Africa, Saint Kitts and Nevis, Saint Lucia, Tanzania, Tunisia, Turks and

---

<sup>2</sup> The terms “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.

Caicos Islands, and Venezuela. These nations are not on a positive trajectory toward receiving Comparability Findings for their commercial fisheries and face a risk of trade restrictions.

NMFS was able to confirm that approximately 65 nations are not exporting or do not intend to export fish or fish products to the United States in the coming years:

Afghanistan, Algeria, Andorra, Angola, Anguilla, Azerbaijan, Bermuda, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Burkina Faso, Central African Republic, Cayman Islands, Chad, Congo, Cuba, Czech Republic, Djibouti, Dominica, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gaza Strip, Georgia, Gibraltar, Guadeloupe, Guinea-Bissau, Iraq, Kosovo, Kuwait, Kyrgyzstan, Lebanon, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Martinique, Mongolia, Monserrat, Montenegro, Nauru, Nepal, Netherlands Antilles, Niger, Niue, North Macedonia, North Korea, Paraguay, Qatar, San Marino, Serbia, Sudan, Swaziland, Syria, Tajikistan, Tokelau, Tuvalu, Uzbekistan, West Bank, Western Sahara, Zambia, and Zimbabwe.

In the course of updating the draft2020 LOFF, NMFS added and/or re-confirmed that the following nations were exporting to the United States to identify if they should be included on the LOFF and, if so, how to list their fisheries: Albania, Aruba, Belarus, Jordan, Libya, Lithuania, Slovakia, Somalia, St. Lucia, Togo, and Yemen. NMFS continues to work with Burundi, British Virgin Islands, Cambodia, French Guiana, Kazakhstan, Laos, Moldova, and Rwanda..

NMFS urges nations to examine their exports to the United States over the last two decades and include all fisheries or processors and processed products 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. If any nation on these lists intends to export fish and fish products to the United States, they should contact NMFS to ensure their fisheries are on the LOFF and that they apply for and receive a Comparability Finding.

### **General Changes from the draft 2020 LOFF**

#### *Nations That Did Not Update Their draft 2020 LOFF*

Approximately 55 nations (or economies) did not update the information in their LOFF. These nations (or economies) include: Antigua and Barbuda, Armenia, Bahrain, Barbados, Benin, British Virgin Islands, Brunei, Cameroon, Cape Verde, Costa Rica, Dominican Republic, Egypt, Ghana, Grenada, Guatemala, Guinea, Haiti, Israel, Ivory Coast, Jamaica, Jordan, Kazakhstan, Kenya, Kiribati, Liberia, Libya, Madagascar, Malta, Mauritania, Mauritius, Mexico, Mozambique, Namibia, Papua New Guinea, Romania, Samoa, Senegal, Seychelles, Sierra Leone, Slovakia, Solomon Islands, Somalia, South Africa, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Tanzania, Togo, Tunisia, Turks and Caicos Islands, Uganda, United Arab Emirates, Vanuatu, and Yemen. As a result, the fishery classifications for these nations (or economies) for the most part remain unchanged from the draft2020 LOFF. It is uncertain what impact disruptions to government services or other extenuating circumstances played in a nation's ability or failure to submit updates to its LOFF.

#### *Updates to the Draft2020 LOFF*

Nations updated their draft 2020 LOFF through the NMFS International Affairs Information Capture and Reporting System (IAICRS). The IAICRS enables NMFS 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 information to reflect their fishery management regime. Throughout the exemption period, harvesting nations continued to update and refine their LOFF. These modifications continue to improve the quantity, quality, consistency, and accuracy of the final 2020 LOFF. A record of all modifications are retained within the IAICRS.

Harvesting nations undertook the following modifications:

- linked exported seafood products to specific fisheries and identified the target (and associated non-target) species of those fisheries;
- aggregated multi-species fisheries into one fishery, as appropriate;
- updated gear types based on the 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);
- updated the area of operation using the FAO major fishing areas and subareas, and the nation's management areas within their EEZ within those FAO fishing subareas;
- eliminated fisheries that were solely for domestic consumption and added fisheries that export fish and fish products or intend in the future to export such products to the United States;
- updated their marine mammal abundance estimates;
- updated their marine mammal bycatch limits;

- updated their marine mammal bycatch estimates for some of their fisheries on the LOFF, including adding additional years of data (*e.g.*, in accordance with NMFS' recommendation to include at least five years bycatch data); and
- updated bycatch estimates including information on the number of marine mammals killed, injured, and released alive in the fishery.

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 from or added to the LOFF and modifications to the list of marine mammals that interact with fisheries that were retained on the LOFF can be found at: <https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries>.

After harvesting nations revised the LOFF, 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 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>.

Finally, NMFS requested that nations update their list of marine mammals that co-occur with the fishery and specifically identify which marine mammals co-occur or overlap with commercial fishing operations from those that potentially or do interact with the fishery. This resulted in nations (such as Greenland, Turkey, and Cook Islands) revising their marine mammal lists to remove out-of-habitat marine mammals (*i.e.*,

marine mammal species incorrectly specified as being associated with a fishery when those species do not, in fact, inhabit that water body), specifying previously unspecified marine mammal species (*i.e.*, changing from a designation of “whale unspecified” to an indication of a specific species), and removing species that may be distributed in or migrate through a nation’s waters but those distributions do not overlap with the operation area of the fishery. Likewise, nations added to their lists of marine mammals that co-occur with their commercial fishing operations.

The final 2020 LOFF is 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.

#### *Nation-Specific Modifications Made to the Draft 2020 LOFF*

Several nations undertook significant revisions to their LOFF. These revisions include analysis of fishery bycatch compared to the bycatch limit to demonstrate a remote likelihood of bycatch, comparative analysis of fisheries with analogous U.S. domestic fisheries, and modification to their list of co-occurring marine mammals. Following is a summary of those changes. The changes to each fishery can be found at

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

#### *Canada*

Canadian net pen finfish aquaculture facilities without a history of marine mammal incidental or intentional mortality were reclassified as exempt fisheries. The reclassification was based on a comparison to U.S. salmon aquaculture operations. The U.S. salmon net pen aquaculture facilities are classified as Category III. Canadian net pen

aquaculture is known to have an equally low likelihood of marine mammal interactions, and intentional killing of marine mammals has recently been banned in Canada. The Minister of the Department of Fisheries and Oceans Canada (DFO) notified Canadian aquaculture operators on March 22, 2019, that the DFO would cease to authorize the lethal removal of nuisance seals effective immediately. At the same time, the DFO notified industry of its intention to prohibit this activity in regulation prior to 2022. Additionally, the Canadian Industry Alliance (CAIA) stated their members' commitment to "no intentional mammal kill practices in [our] seafood farming operations within Canada," as well as their commitment to "non-lethal and non-acoustic deterrence methods" for marine mammals. The DFO has initiated the regulatory process to amend the Marine Mammal Regulations (MMR) and the Pacific Aquaculture Regulations (PAR) to remove regulatory provisions allowing aquaculture operators to use lethal force on marine mammals, with the exception of cases where there is an imminent threat to human life or humane dispatch of a seriously injured animal.

Canada also has regulatory mechanisms in place that require the immediate notification of marine mammal mortality or serious injury by aquaculture operators. The MMR, which apply on the east coast, and the PAR Conditions of License in British Columbia both stipulate that the DFO must be immediately notified of marine mammal mortalities. Additionally, aquaculture operators are required under Marine Mammal Management Plans or Farm Management Plans to have marine mammal mitigation measures in place. These plans can describe non-lethal marine mammal deterrence methods, such as anti-predatory netting. Additionally, the DFO has undertaken a study of

marine mammal deterrence methods and identified humane and effective deterrence methods.

Additionally, NMFS reclassified as exempt Canadian purse seine, tuck seine and bar seine fisheries. As stated in the 2020 draft LOFF (85 FR 15116, March 17, 2020), if any nation demonstrated that it had implemented a 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. In 2019, Canada implemented a measure under conditions of licenses prohibiting the encirclement of marine mammals in Atlantic purse seine, tuck seine, and bar seine fisheries. These fisheries operate in the Atlantic Regions and have a remote likelihood of marine mammal bycatch, as determined based on fishery monitoring ( $\geq 5$  percent observer coverage and/or  $\geq 5$  percent electronic monitoring). These fisheries have either no documented marine mammal bycatch over at least five fishing seasons, or individual bycatch levels  $< 1$  percent of bycatch limit and cumulative fishery bycatch levels  $< 10$  percent of the bycatch limit; prohibit intentional killing of marine mammals; have mandatory reporting of marine mammal interactions; and are analogous with U.S. Category III fisheries.

NMFS also reclassified several other fisheries based on their having a remote likelihood of marine mammal bycatch and being analogous to U.S. Category III fisheries.

The fisheries that were reclassified can be found at:

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

*Chile*

Chile's LOFF had an exhaustive list of marine mammal populations identified as co-occurring with its fisheries. Chile's initial approach was to use the International Union for Conservation of Nature (IUCN) data on geographic distribution to identify all marine mammals in Chilean waters regardless of whether they co-occurred with the fishery listed on the LOFF. After NMFS's technical consultations with Chile, Chile revised the list to reflect only marine mammal populations that actually co-occur or interact with its fisheries on the LOFF. Chile held workshops with marine mammal experts and reviewed the scientific literature to identify, on a precautionary basis, marine mammal species or stocks whose distribution overlaps with areas where fishing operations occur or that have some type of direct interaction with fisheries on the LOFF.

#### *Description of the Columns on the LOFF*

The final 2020 LOFF is again organized by nation, and has listed the exempt and export fisheries for each nation. This list is organized by columns contains the following information. "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 fishery's 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 the 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.

“Area of Operation” is the FAO global fishing area and sub-regional statistical area or division where the fishery operates. Nations may have also included 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 of marine mammal species or stocks of known marine mammals whose distribution overlaps the area of operation of the fishery. This list includes the marine mammal species/stock that may be found in or migrate through a nation’s waters, specifically those marine mammals that have a regular and significant co-occurrence with this fishery, deplete 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.

“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.

“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 (RFMOs) or arrangements.

*List of Intermediary Nations and Products for Nations that are Processing Fish and Fish Products*

For the purposes of identifying intermediary nations, the list of intermediary nations and products include instances where a nation sources raw material from another nation for processing and re-export to the United States, or if the nation is both the harvester and processor of the raw material, or if the fish and fish product is harvested or processed elsewhere and transshipped through that nation's jurisdiction. In addition, the intermediary nation list also identifies 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 have indicated whether the product was harvested by another nation operating under an agreement, and have indicated which nations are actively fishing in its waters for the listed 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 indicated 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 indicated that it is solely transshipping the product. If a nation is performing some form of value-added processing of the product, then the nation did not indicate that it is solely transshipping. Finally, if a nation is also the harvester of this product, that nation indicated 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 current list of

intermediary products is at: <https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries>.

#### *The List of 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 aiming 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 or transshipped products); (3) Rule Does Not Apply (freshwater and inland fisheries/aquaculture). Fisheries that occur solely in fresh water outside any marine mammal habitat, and inland aquaculture operations, are exempt from this rule and are listed in the “Rule Does Not Apply” list.

#### **Response to Comments**

NMFS received ten comment letters on the draft 2020 LOFF (85 FR 15116; March 17, 2020). Several non-governmental organizations (NGOs) and an industry group submitted comments, which are summarized below. Nations provided either comments or substantive changes in the form of updates to their LOFF through the IAICRS, those updates are summarized above.

Several comments received were not germane to the draft LOFF and are not addressed in this section. These comments include references to actions outside the scope of the statutory mandate or actions covered under other rulemakings. Generally, comments from industry and the environmental community were supportive of NMFS’s ongoing implementation of the MMPA Import Provisions. Both sectors recognize that the MMPA Import Provisions provide a mechanism to level the playing field for U.S.

fishermen while improving fishing practices and the status of marine mammal populations worldwide. Animal Welfare Institute, Center for Biological Diversity, International Fund for Animal Welfare, Natural Resources Defense Council, and Whale and Dolphin Conservation (hereafter referred to as non-governmental organizations or NGOs) submitted extensive comments, which are summarized and responded to below. Comments received on the draft 2020 LOFF are available for review at <http://www.regulations.gov> under Docket ID NOAA-NMFS-2020-0001.

#### *General comments*

Legal Comments on the MMPA Import Provisions Rule and the Protocol for LOFF Treatment of Fish and Fish Products from Commercial Fishing Operations Not Identified in the LOFF

*Comment 1:* NGOs commented that NMFS should provide clarity to exporters, importers, and the public that imports from commercial fishing operations not identified in the final LOFF as either exempt or export fisheries will be classified as an export fishery 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 (50 CFR 216.3, defining “export fishery”). As such, fish and fish products entering the United States from such fisheries must have a valid Comparability Finding, be accompanied by a Certificate of Admissibility, or be accompanied by other documentation required by NMFS indicating that the fish or fish products were not caught or harvested in a fishery subject to an import prohibition (Id. § 216.24(h)(i)-(iii)). Otherwise, such fish and fish products will be banned from entry into the United States pursuant to Section 101(a)(2) of the MMPA. Without such a

Comparability Finding (or Certificate of Admissibility or other documentation), there is no reasonable proof that imports are meeting U.S. standards and such imports must be barred from entry.

*Response:* The MMPA Import Provisions Rule (50 CFR 216.24(h)) clearly provides that all fisheries that export to the United States must be on the LOFF. It is equally clear that a harvesting 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. 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. 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 that was caught or harvested in a fishery that does not have a valid Comparability Finding in effect at the time of import.

NMFS disagrees with these NGO commenters that a Certification of Admissibility must accompany each shipment from a nation. A Certification of Admissibility may only be required in situations where fish or fish products are subject to an import prohibition and the Assistant Administrator, to avoid circumvention of the import prohibition, requires 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 (50 CFR 216.24 (h)(9)(iii)).

Evaluating a Nation's Progress in Reducing Bycatch

*Comment 2:* NGOs commented that NMFS should strongly urge nations to demonstrate in their Comparability Finding applications that they meet all conditions established in Section (h)(6)(iii) of the regulations. For fisheries operating in their own EEZs, this includes prohibiting intentional mortality, conducting marine mammal stock assessments, maintaining a fisheries register, requiring bycatch reduction, conducting monitoring, and proving that bycatch does not exceed PBR (or a comparable scientific metric) (50 CFR 216.24(h)(6)(iii)).

*Response:* For any nation applying to receive a Comparability Finding for a fishery, NMFS must determine that the harvesting nation maintains a regulatory program with respect to the fishery that is comparable in effectiveness to the U.S. regulatory program regarding 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 paragraph (h)(6)(iii)(C), (D), or (E). The term “comparable in effectiveness” means that the regulatory 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 as the United States or a different program that achieves the same results. NMFS does not require that every nation implement every element outlined in 50 CFR 216.24 (h)(6)(iii). For example, if a particular fishery with high bycatch switches to non-entangling gear and can demonstrate that it has virtually eliminated its bycatch, that action can be considered comparable in effectiveness. Likewise, if a nation chooses to eliminate its bycatch by implementing time or area-based closures and can demonstrate the effectiveness of such closures, that regulatory program may be considered

comparable in effectiveness. When making this determination, NMFS evaluates a harvesting nation's implementation of bycatch mitigation measures that will result in clear and significant bycatch reductions.

*Comment 3:* NGOs reiterated their concern with 50 CFR 216.24 (h)(7) of the MMPA Import Provisions Rule, which allows NMFS to make several considerations in determining whether a nation's regulatory program is comparable. These considerations include the progress a foreign exporter has made in achieving its bycatch objectives, the likelihood a nation's regulations will reduce bycatch, and the extent to which the harvesting nation has successfully implemented bycatch measures (50 CFR 216.24(h)(7)(ii), (iii)). The commenters express concern that these considerations would give NMFS flexibility in determining whether nations' bycatch programs are comparable to the U.S. program, even if nations exceed PBR or a similar bycatch limit. They maintain that the MMPA Import Provisions require that NMFS shall ban fish imports if exporting fisheries' serious injury and mortality (SI/M) exceeds United States standards (16 U.S.C. 1371(a)(2)). The commenters claim the MMPA does not allow nations with fisheries with unknown or declining bycatch or bycatch in excess of PBR to enter the United States. They assert that NMFS has no statutory authority to deem nations comparable for half-measures taken or for mere improvement and that NMFS must require nations to meet U.S. bycatch standards.

*Response:* NMFS recognizes that there will be situations, similar to those encountered in our domestic fisheries, where Comparability Finding determinations will occur during a time when a harvesting nation may be implementing new regulations or

revising existing regulations to meet the conditions of a Comparability Finding. NMFS believes that such actions should be encouraged rather than penalized. In those situations, NMFS must determine whether such regulations are likely to reduce marine mammal bycatch or are making progress toward reducing marine mammal bycatch. The Secretary must make that same determination when promulgating regulations to implement domestic take reduction measures, as the MMPA mandates that a take reduction plan shall include measures the Secretary expects will reduce, within 6 months of the plan's implementation, such mortality and serious injury to a level below the potential biological removal level (16 U.S.C. 1387(f)(5)(A)). NMFS cannot establish a standard for other nations that is more rigorous than the U.S. regulatory standard under which we operate.

*Comment 4:* NGO commenters state that NMFS must treat nations equally to ensure fairness but also to ensure any import bans will withstand a potential challenge under the World Trade Organization ("WTO"). NMFS must apply the same protective and statutorily required standard for all nations.

*Response:* NMFS is mindful of U.S. obligations under the WTO Agreement when implementing the provisions of the MMPA and works with the Office of the U.S. Trade Representative to ensure that any actions taken under the MMPA are consistent with these obligations. Agency actions and recommendations under the MMPA Import Provisions Rule, including this final LOFF, will be in accordance with U.S. obligations under the WTO and other applicable international law. Consistent with the WTO Agreement and U.S. obligations under other free trade agreements, NMFS will consider a harvesting nation's existing mechanisms where they provide for comparable protection of

marine mammal species and are appropriate to the conditions in the harvesting nation. By taking into account different conditions in a nation's fishery, including conditions that could bear on the feasibility and effectiveness of certain bycatch mitigation measures, NMFS considers alternative measures implemented by the nation that are as effective or more effective than those applicable in U.S. fisheries.

#### Marine Mammal Mortality

*Comment 5:* NGOs requested that NMFS clarify how many years of mortality data may be used to calculate the "Annual Average Mortality Estimate" for each stock in a fishery. To ensure consistency for reporting, the commenters urged NMFS to recommend to nations that they use a five-year average unless a nation demonstrates that data quantity and quality for a particular fishery justifies a different average.

*Response:* NMFS uses the Guidelines for Preparing Stock Assessment Reports Pursuant to Section 117 of the Marine Mammal Protection Act (NMFS 2016) when advising nations on the development of their regulatory plans. The commenters should note that in the **Federal Register** notice (85 FR 15116 at 15119, March 17, 2020) under the section entitled "Instructions to Nations Reviewing the draft 2020 LOFF and Actions Needed by Nations," nations are requested to update their marine mammal bycatch estimates for each fishery on the LOFF, including adding additional years of data (*e.g.*, at least five years). IAICRS makes clear that we are requesting that the nation provide at least five years of data. The availability of bycatch data or estimates varies greatly over 129 nations and, just like within the United States, is a function of the bycatch monitoring or reporting program.

#### Basis for Exempt and Export Determinations

*Comment 6:* NGOs state that NMFS should disclose the basis for its determinations of whether a fishery is exempt or export. They stated that, unlike NMFS's draft and final 2017 LOFFs, the 2020 draft LOFF does not contain either references or detailed information and a few other critical categories (rationale, company name, etc.). The commenters state that this transparency is critical for the public to understand the decisions being made, whether the decisions are consistent, and whether they have sufficient support as is required under the Administrative Procedure Act (see *Ctr. for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1104 (9th Cir. 2006) "It is insufficient for requisite determinations to be lurking in the administrative record yet be unidentified in the decision itself.")).

*Response:* The draft 2017 LOFF and final 2017 LOFF contained a summary of the information used to support the designations or identification of fisheries (see <https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries>). The draft 2017 LOFF (82 FR 39762, August 22, 2017), the final 2017 LOFF (83 FR 11703, March 16, 2018), the draft 2020 LOFF (85 FR 15116 at 15119, March 17, 2020), and this document explain the basis for the classification of the exempt and export fisheries in a clear and transparent manner. Additionally, the draft 2017 and final 2017 LOFF contained a "Detailed Information" column which served as a catch-all for information that did not fit within the confines of the excel format, or contained references used in identifying fisheries from non-responsive nations. The move to IAICRS allowed for a level of consistency in data capture that was not available in the 2017 format to capture this information in the relevant columns published in the 2020 LOFF versions.

*Comment 7:* The NGOs cite NMFS' stock assessment guidance to assert that logbook data alone should not be used as a basis for exempting a fishery from regulatory requirements. The commenters seek to understand the quality and level of statistical rigor of the data that nations are reporting, and they further assert a nation's report of no or insignificant bycatch based on logbook data alone should not be a basis for classifying a fishery as exempt, particularly if there is any evidence of bycatch in similar gear types.

*Response:* The **Federal Register** notices previously published for each LOFF clearly state that if estimates of the total incidental mortality and serious injury were available and a bycatch limit was 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> (85 FR 15116 at 15119, March 17, 2020). However, NMFS has only been able to use that process for one fishery, the krill trawl fishery operating under CCAMLR in the Antarctic Peninsula region. Norway provided evidence that the bycatch limit for Antarctic fur seals in this region has been calculated at 88,200 individuals and the estimated incidental mortality and serious injury for these krill fisheries operating in the CCAMLR Convention Area is less than ten percent of the bycatch limit, making these fisheries exempt (83 FR 11703, March 16, 2018).

As NMFS has reiterated in previous notices and this **Federal Register** notice, the lack of information about marine mammal bycatch (including bycatch limits derived from logbooks), requires that NMFS use gear types to classify fisheries as either export

or exempt. The detailed rationales 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 above in this notice. 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 discussed above.

*Comments on Nations Listed as Not Exporting to the United States*

*Comment 8:* The NGOs note that the **Federal Register** notice for the draft 2020 LOFF lists 72 nations that have no record of exporting fish and fish products to the United States (85 FR 15118; March 17, 2020). However, they claim that their review of import data, from both NOAA's Foreign Fishery Trade Data database and the commercial subscription Panjiva database (<https://panjiva.com/>), demonstrates that several of the listed nations do export fish to the United States. They state that NMFS must include each of these exporting nations on the LOFF and should conduct a 20-year review of these databases to ensure the LOFF is correct.

*Response:* In preparing the LOFF and engaging in technical consultations, NMFS periodically conducts a 20-year review of its Foreign Fishery Trade Data and continues to monitor seafood supply chains. NMFS continues to work with other U.S. trade programs, offices, and partner agencies to confirm trade data is accurate and verify active seafood import streams. NMFS routinely verifies exports to the United States as part of its ongoing consultations with nations as well as with relevant RFMOs. In the course of import verification, if NMFS identifies a nation not previously on the LOFF as newly exporting seafood products, NMFS reviews and confirms that the trade data is accurate.

Then, NMFS consults with the nation on whether the product falls under the MMPA and adds that product to the LOFF as appropriate.

*Comment 9:* The NGOs highlight the MMPA Import Provisions Rule allowance of a one-year, provisional Comparability Finding for a fishery not listed on the LOFF if it is the source of new exports to the United States (50 CFR 216.24(h)(8)(vi)). They assert, however, any fish product that has in the past been exported to the United States cannot qualify as a “new export,” and NMFS cannot grant a one-year provisional Comparability Finding for the fishery. They further assert that NMFS must instead deny imports until the nation demonstrates comparability.

*Response:* NMFS disagrees because seafood supply chains are constantly changing. Moreover, vessels change flags, and fisheries are closed or halted for management purposes, while other fisheries commence on an experimental basis. The commenters’ interpretation of a “new export” is unduly restrictive. Products that have not been exported to the United States for several years due to fishery closures or changes in patterns in trade should be considered “new exports,” especially if they are under a new fishery management regime. As soon as NMFS becomes aware of new sources of fish product imports, NMFS will notify the exporting nations and begin consultations to characterize the production methods and supply chain. Absent information to make an informed decision, imposing a trade restriction from the outset could unduly constrain otherwise admissible products. In addition, it would be difficult to work with U.S. Customs and Border Protection (CBP) to impose embargoes and/or documentation requirements without knowing the details of the supply chain. Imprecise instructions to CBP could disrupt legitimate trade. It is anticipated that such “new export” situations

would not involve significant trade volumes and could be addressed in a short time frame through a consultative process.

*Comment 10:* The NGOs stated they reviewed NOAA's Foreign Fishery Trade Data for all 72 listed nations that are not on the LOFF due to lack of exports to find any imports of fish or fish products over the last 10 years (from 2010 to 2020). Their review identified 27 of these nations that exported fish or fish products during this period. They urged NMFS to contact the nations listed below that have exported and inform them that they must apply for a Comparability Finding for any fishery by March 2021, if they wish to export their product after January 1, 2022. The nations are: (1) Afghanistan; (2) Anguilla; (3) Aruba; (4) Bolivia; (5) Bosnia and Herzegovina; (6) Curaçao; (7) Burundi; (8) Cayman Islands; (9) Congo (Kinshasa); (10) Djibouti; (11) Gabon; (12) Georgia; (13) Gibraltar; (14) Guinea-Bissau; (15) French Guinea; (16) Kyrgyzstan; (17) Laos; (18) Lebanon; (19) Marshall Islands; (20) Martinique; (21) Niue; (22) Palau; (23) Serbia; (24) Sint Maarten (25) Tokelau; (26) Uzbekistan; (27) Zambia.

*Response:* As previously described, NMFS continues to verify trade data and consult with nations, including those with potentially newly identified imports. The LOFF reflects a nation's fisheries management authorities and its organization. In cases where an economy is a territory or otherwise grouped with another nation, we have seen misreporting due to issuing authorities that might be based in one jurisdictional area but are validating fish imports produced from another jurisdictional area. Following are NMFS's findings for the 27 nations identified by the NGO commenters. NMFS confirmed either data entry errors or country code error for: Bolivia, Bosnia and Herzegovina, Cayman Islands, Djibouti, Gabon, Georgia, Gibraltar, Guinea-Bissau,

Kyrgyzstan, Martinique, Lebanon, Niue, Serbia, Tokelau, Uzbekistan, and Zambia. These errors can result in fish and fish products being identified as originating in a particular nation that does not export that product. NMFS is in consultation with, and is awaiting a response from, Burundi, Laos, and French Guiana regarding their export status (*e.g.*, harvesting nation, processing nation or both). The commenters should note that Marshall Islands and Palau are on both the 2017 and the 2020 LOFF. Based on NMFS consultations, we added Aruba to the 2020 LOFF. Finally, NMFS confirmed that Afghanistan, Anguilla, Congo (Kinshasa), Curaçao, and Saint Maarten have no imports and do not intend to export seafood products to the United States.

*Comments Regarding Classification of Certain Gear Types*

Gillnet Fisheries

*Comment 11:* The NGOs assert that NMFS must presume all gillnet fisheries are export fisheries in the absence of specific information fully documenting that a particular fishery has had no bycatch for at least a five-year period, based on robust monitoring by observers or by tamper evident or tamper proof electronic monitoring (EM) systems that have been demonstrated to be effective at detecting bycatch. They also stated that as a general rule “it is reasonable to assume that where fisheries coincide with coastally-distributed cetaceans, bycatch, however poorly documented, will occur.” The commenters also asserted that even gillnet fisheries that are implementing mitigation techniques may not be addressing the problem sufficiently to be classified as exempt.

*Response:* NMFS agrees. It is precisely for this reason that NMFS uses co-occurrence information, analogous fisheries in the United States, and all available information, and has designated all gillnet fisheries as export fisheries as the default

classification. Only three Canadian gillnet fisheries are classified as exempt after extensive consultation with Canada about the nature of these fisheries. The exempt classification is due to their location (inshore or near-shore estuaries), and the documented lack of co-occurrence with marine mammal populations in the region. The **Federal Register** notices for the 2017 LOFF and the draft 2020 LOFF make clear that nations wishing to challenge this designation must provide sufficient observer or logbook data that refutes this determination and that clearly demonstrates that a gillnet fishery poses a remote likelihood of incidental mortality and serious injury to marine mammals.

#### Trap/Pot Fisheries

*Comment 12:* The NGOs stated that NMFS must presume that all trap/pot fisheries in habitats of large whales are export fisheries in the absence of specific information fully documenting that a particular fishery has had no bycatch for at least a five-year period, based on robust monitoring by observers or electronic monitoring. The commenters asserted that trap/pot fisheries that use vertical lines to mark gear are responsible for baleen whale bycatch, and that it is difficult to estimate bycatch of large whales in trap/pot gear, as larger whales can carry gear long distances and, as a result, serious injury and mortality in trap/pot gear goes undetected.

*Response:* NMFS agrees and has classified all pot/trap fisheries as export fisheries, with the exception of those analogous to U.S. Category III trap/pot fisheries such as the Caribbean mixed species trap/pot and the Caribbean spiny lobster trap/pot.

#### Longline Fisheries

*Comment 13:* The NGOs assert that marine mammals are often entangled or hooked in longline gear, and subject to suffering, serious injury, and mortality and serious

injury as a result of the interactions. Accordingly, NMFS must presume all longline fisheries are export fisheries in the absence of specific information fully documenting that a particular fishery has had no bycatch for at least a five-year period, based on robust monitoring by observers or electronic monitoring.

*Response:* NMFS agrees. The commenters should note that the **Federal Register** notice for the 2020 draft LOFF classifies longline gear and troll line fisheries as export fisheries because the likelihood of marine mammal bycatch is more than remote. However, NMFS classified as exempt longline and troll fisheries with a remote likelihood of bycatch or where 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. 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 longline fisheries using a cachalotera system as exempt, because the cachalotera system prevents, and in some cases eliminates, marine mammal hook depredation and entanglement.

#### Purse Seine Fisheries

*Comment 14:* NGOs state that NMFS must presume that all purse seine fisheries are export fisheries in the absence of specific information fully documenting that a particular fishery has had no bycatch for at least a five-year period, based on robust monitoring by observers or electronic monitoring.

*Response:* NMFS has classified purse seine fisheries as export fisheries, unless the fishery is operating under RFMO conservation and management measures or national regulations (comparable to those of the United States) 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. Exceptions include where a fishery is operating under a regulated non-encirclement provision and there is documentary evidence that such a provision is not being enforced. Fisheries of nations that are not enforcing non-encirclement provisions are classified as export fisheries.

#### Trawl Fisheries

*Comment 15:* NGOs assert that NMFS must presume that all trawl fisheries are export fisheries in the absence of specific information fully documenting that a particular fishery has had no bycatch for at least a five-year period based on robust monitoring by observers or electronic monitoring because, in the case of small cetaceans, mitigation is difficult as no reliably effective technical solutions to reduce small cetacean bycatch in trawl nets are available.

*Response:* NMFS classified as export all trawl fisheries, including beam 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. There are some exceptions to this, including some shellfish trawls and dredges classified as exempt due to the remote likelihood of interaction with marine mammals and analogous U.S. Category III fisheries, such as the: Atlantic shellfish bottom trawl, Gulf of Maine sea urchin dredge, Gulf of Maine mussel dredge, Gulf of Maine sea scallop dredge, U.S. Mid-Atlantic sea scallop dredge, Mid-Atlantic blue crab dredge, Mid-Atlantic soft-shell clam dredge, Mid-Atlantic whelk dredge, U.S. Mid-Atlantic/Gulf of Mexico oyster

dredge, and the New England and Mid-Atlantic offshore surf clam/quahog dredge. Additionally, the trawl fisheries operating under CCAMLR for toothfish, mackerel icefish, and krill are classified as exempt due to the conservation and management measures requiring marine mammal excluding devices and because levels of marine mammal mortalities are less than ten percent of the bycatch limit/PBR for marine mammal stocks that interact with these fisheries.

#### Other Gear

*Comment 16:* NGOs raised concern with NMFS classifying several gear types as exempt because the gear is highly selective or has a remote likelihood of bycatch, specifically handline gear and pole-and-line gear used in tuna fisheries, citing both gear types as having dolphin bycatch. The commenters also challenged the exempt classification for aquaculture and tuna fishing using fish aggregating devices (FADs), citing instances of entanglement.

*Response:* NMFS has reviewed the gear types cited by the commenters. However, individual instances of entanglement and mortality or entanglement and release are, by themselves, insufficient to justify reclassifying a fishery as an export fishery. Exempt fisheries are not required to have zero bycatch. An 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. The fisheries the commenters cite are analogous to Category III fisheries in the United States. Moreover, all exempt and export fisheries are required to report marine mammal incidental mortality and serious injury. In

the event that NMFS determines that an exempt fishery has more than a remote likelihood of incidental mortality and serious injury of marine mammals in the course of commercial fishing operations, that fishery will be reclassified as export fishery.

*Comments on Specific Nation Bycatch*

*Comment 17:* The NGOs provided charts for each nation within the Draft 2020 LOFF “Comments on Specific Nation Bycatch.” The charts list products from particular nation’s fisheries that the NGOs believe are imported into the United States..

*Response:* The fish and fish product information provided by the commenters lack a reference to specific trade documentation for either the exporting nation or the United States as the importing nation. NMFS assumes that the commenters used United States trade data and attempted (based on unspecified assumptions) to link such products to fisheries either on, or omitted from, the LOFF as the source of those fish and fish products. NMFS has taken a more rigorous approach to identify the source fisheries for fish and fish products. NMFS has worked with nations to identify the target and associated non-target species for each fishery listed on the LOFF. NMFS provided nations with a list of fish and fish product descriptions and requested that nations identify whether they were the harvester, processor, or both for that product. This action required nations to investigate their seafood supply chains to provide this information. For harvesting nations, NMFS requested that they identify the fishery or fisheries that were the source of that product.

Mexico

*Comment 18:* The NGOs provide information about the unauthorized use of other gear types within the hand lines fishery and the hand operated pole-and-line fishery for Pacific sierra and Gulf weakfish.

*Response:* 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 a commercial fishing operation as the lawful harvesting of fish from the marine environment for profit as part of an on-going business enterprise. This does not include sport-fishing activities, whether or not they are carried out by charter boat or otherwise, or whether or not the fish so caught are subsequently sold. Regulations at 50 CFR 229.2 also define a 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 activities (as defined in section 216.3 of 50 CFR 216) 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. Additionally, fish and fish products from nations that do not seek to include unauthorized fisheries under the LOFF or that do not seek a Comparability Finding for an unauthorized fishery and products from a fishery without a Comparability Finding, are inadmissible under the MMPA Import Provisions.

*Comment 19:* NGOs identified the following fisheries as being omitted from Mexico's LOFF: bigeye croaker/chano gillnet; sole gillnet; California halibut bottom set

gillnets; rooster hind bottom set gillnets; Pacific jack mackerel; yellowfin tuna purse seine; and herring purse seine.

*Response:* NMFS investigated and determined that the species listed above are included on the LOFF and harvested either with the gear types listed or other gear types. Fish can be harvested with an array of authorized gear types, but not all authorized gear types are used to harvest fish that are exported to the United States. Generally, larger industrial fleets using purse seine, longline, and trawl gear export fish and fish products, while artisanal or small-scale fleets use gillnets to harvest fish for domestic consumption. NMFS worked with nations to identify the commercially authorized fisheries and their associated gear types that are the source of fish and fish products exported to the United States. While NMFS will continue to update and revise the LOFF in consultation with nations, commenters should not assume that all commercial fishing operations operating within a nation export fish and fish products to the United States and should, therefore, be included on the LOFF. Fish and fish products harvested by fisheries and retained for domestic consumption are not included on the LOFF.

Peru

*Comment 20:* NGOs identified two shark longline fisheries with marine mammal interactions, and cited instances where small cetacean meat was used as bait. They also noted that a shark driftnet fishery had interactions with several marine mammal species. Additionally, the commenters listed three fisheries, which they acknowledge have no record of exports to the United States, as being omitted from the LOFF (porbeagle longlines, Peruvian weakfish purse seines, red mullet gillnets).

*Response:* The LOFF for Peru includes shark fisheries using driftnets, longlines, and gillnets. Each fishery is listed as interacting with marine mammals. Peru continues to investigate and quantify its marine mammal bycatch in its fisheries. With regard to the use of small cetaceans for bait, Peru's laws prohibit the intentional killing, sale, or consumption of marine mammals. When documentary evidence indicates that a nation is not effectively enforcing its regulatory measures related to the intentional or incidental mortality or serious injury of marine mammals in the course of commercial fishing operations, NMFS will use the MMPA Import Provisions to consult and possibly reconsider any Comparability Finding. Regarding the three fisheries claimed to be missing from the LOFF, we note that these fisheries are not on the LOFF because fisheries that do not export products to the United States are not included on the LOFF.

*Comment 21:* NGOs noted a fishery for rays, flounder, lobster, and smooth hound caught with bottom set nets was omitted from the LOFF for Peru.

*Response:* Currently, rays are on the LOFF for Peru as an export fishery, as rays are caught in the shark driftnet fishery. Lobster is on the intermediary product list. Flounder have not been exported to the United States since 2005, and, therefore, are not included on the LOFF. Nevertheless, NMFS will consult with Peru regarding this fishery.

Ecuador

*Comment 22:* NGOs stated that the issue of marine mammal-baited FADs has recently emerged as a threat to the conservation of marine mammals in Ecuador and should be addressed. Incidentally captured, killed, or otherwise retrieved cetaceans and pinnipeds have been used as bait for improvised FADs. Approximately a fifth of dead

marine mammals found stranded along Ecuador's beaches were associated with FADs over the period 2001 to 2017 (Castro et. al. 2020).

*Response:* Similar to Peru's laws, Ecuador's laws prohibit the intentional killing, sale, or consumption of marine mammals. When documentary evidence indicates that a nation is not effectively enforcing its regulatory measures related to the intentional or incidental mortality or serious injury of marine mammals in the course of commercial fishing operations, NMFS will use the MMPA Import Provisions to consult and possibly reconsider any Comparability Finding. Nevertheless, NMFS will consult with Ecuador regarding this fishery.

*Comment 23:* NGOs claim that shark, tuna, marlin, and bonito gillnet fisheries and a longline fishery for sharks were not included in the LOFF for Ecuador, and that, for some fisheries on the LOFF, interactions with certain marine mammal species are missing, such as sperm whale, bottlenose dolphin, common dolphin, pilot whales, and humpback whales.

*Response:* NMFS disagrees. On the LOFF for Ecuador there is a multi-species large pelagic gillnet fishery that includes tuna, marlin, bonito, swordfish, and sharks. There is also a longline fishery for these target species, including sharks. The species recorded as co-occurring or interacting with this fishery include all of the species the commenters assert as being omitted. The list includes: common bottlenose dolphin, common dolphin, saddleback dolphin, dusky dolphin, humpback whale, killer whale/orca, offshore pantropical spotted dolphin, pygmy sperm whale, sea lion unspecified, sperm whale, and pilot whale unspecified.

India

*Comment 24:* NGOs highlight the significant bycatch in gillnets for tuna and tuna-like species of spinner dolphin (*Stenella longirostris*), Indo-Pacific bottlenose dolphin (*Tursiops aduncus*), long-beaked common dolphin (*Delphinus capensis*), Indo-Pacific humpbacked dolphin (*Sousa chinensis*), Risso's dolphin (*Grampus griseus*), and dolphins unspecified.

*Response:* NMFS is aware of this bycatch and recent literature that further elaborates on the extent of gillnet bycatch in Indian Ocean tuna fisheries. India indicated that there is no interaction, mortality, or injury in its tuna gillnet fisheries with the cetaceans listed as co-occurring with that fishery. In this case, NMFS has documentary evidence to the contrary and will be consulting with India to modify the LOFF where necessary in advance of issuing a Comparability Finding. Additionally, commenters should note that in 2016, NMFS issued a determination, under the Dolphin Protection Consumer Information Act (DPCIA), of regular and significant mortality and serious injury of dolphins in gillnet fisheries harvesting tuna by vessels flagged under the Government of India (81 FR 66625, September 28, 2016). NMFS' determinations under the DPCIA are based on review of scientific information and, when available, documentary evidence submitted by the relevant government. The NMFS 2016 determination triggered additional documentation requirements for tuna product from those fisheries that is exported to or offered for sale in the United States. Such tuna must be accompanied by a written statement executed by an observer participating in a national or international program acceptable to NMFS, in addition to a statement by the captain of the vessel that certifies that no dolphins were killed or seriously injured in the

sets or other gear deployments in which the tuna were caught and that contains certain other required information regarding dolphin interactions and segregation of tuna.

*Comment 25:* NGOs identified sardine purse seine fisheries interacting with finless porpoise, and identified four shore seine fisheries for scad, sardine, snapper, mackerel, frigate tuna, and Indian prawn as also interacting with finless porpoise.

*Response:* On the LOFF for India, sardines are harvested by purse seines and gillnets, both of which are listed as interacting with finless porpoise. Regarding the shore seine fisheries, these fisheries are likely small-scale fisheries, and the products harvested by this gear-type are typically retained for domestic consumption. Fisheries only harvesting fish and fish products that are retained for domestic consumption are not on the LOFF. All species harvested by shore seines can be found on the LOFF as they are also harvested by other gear types in fisheries that do export products. Scad are found on the LOFF as “*Carangids nei*” and are listed as being caught by handlines, longlines, and gillnet gears, and listed as interacting with finless porpoise.

Spain

*Comment 26:* NGOs state that all aquaculture in Spain is based on stocking net pens with fish obtained from wild-capture harvest. The majority of captured tunas are fattened over time in the farming operation. These tuna are initially captured by purse seine, which represent more than 90 percent of the Mediterranean catches. Most of the catch is obtained through purse seine fishing on FADs, followed by capture with longlines. Farmed tuna is fed sardine (*Pilchardus* spp.), Sardinella or alacha (*Sardinella* spp), horse mackerel (*Trachurus trachurus*), mackerel (*Scomber scombrus*), starling

(*Scomber japonicus*), and cephalopods, and NMFS must consider whether these fisheries for the feed inputs to tuna farms have interactions with marine mammals.

*Response:* Purse seine and longline fisheries in the Mediterranean operating under ICCAT for tuna and tuna-like species, including bluefin tuna, are included as export fisheries. The MMPA Import Provisions clearly state that the Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been **caught** (emphasis added) with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. This provision of the MMPA does not give NMFS the authority to regulate feed used in aquaculture facilities by means of trade restrictions on the end products from those facilities.

United Kingdom

*Comment 27:* NGOs noted that the longline fisheries in the SW Atlantic fall under CCAMLR monitoring and stated that it is not clear why the Falklands longline fishery for toothfish is an exempt fishery, whereas the United Kingdom South Georgia longline fishery for toothfish is an export fishery. Marine mammal mortality in the United Kingdom South Georgia fishery is rare (four incidents reported since 2007), but there is no reason to think the Falklands fishery would necessarily have a lower risk.

*Response:* NMFS reviewed the toothfish fisheries operating under CCAMLR and moved those fisheries to the exempt category, because those fisheries have a remote likelihood of, or no known documented evidence of, interacting with marine mammals. The toothfish fisheries operating under CCAMLR that remain on the export list are those fisheries with a documented history of marine mammal interaction or an unknown level

of marine mammal interaction if the nation failed to provide such information. NMFS will revisit these fisheries, particularly the United Kingdom South Georgia Island toothfish longline fisheries, at the time of application for the Comparability Finding and review information provided by nations on the interaction levels between marine mammals and these fisheries and re-assess the status of these fisheries at that time.

Fisheries for toothfish not listed as operating within the CCAMLR Convention Area and being subject to the conservation measures of CCAMLR, are evaluated based on the nation's regulatory program in place for that fishery. Many nations have implemented observer requirements and adhere to CCAMLR conservation and management measures and catch documentation requirements for all toothfish catch, regardless of whether the catch is from the Convention Area or that nation's exclusive economic zone (EEZ). Regarding the United Kingdom South Georgia Island fishery, this fishery is not recorded as operating within the CCAMLR area and the area of operation provided for this fishery does not fully correspond to South Georgia Island. NMFS will follow up with the United Kingdom to make sure this fishery is recorded correctly for the purposes of a Comparability Finding.

*Comment 28:* In the Atlantic halibut gillnet fishery and turbot trammel net fishery, NGOs noted that estimates of bycatch are given but the number of vessels is not given. The commenters assert that, to estimate bycatch, the number of vessels must have been estimated. They also assert there are other fisheries affecting the same cetacean populations that need to be taken into account; therefore, it is important to correctly identify the vessels involved with this fishery. Similarly, the commenters note that, in the Atlantic cod fishery and the herring sardine gillnet fishery, the number of vessels is given

but bycatch is unknown; however, with the current data, it should be possible to provide some estimates based on the observed bycatch rates and days at sea.

*Response:* The commenters will note that, in the 2020 final LOFF, the United Kingdom updated or provided vessel numbers for the multispecies demersal gillnet fishery. Further, this comment provides conflicting information. The commenters state that, in order to estimate bycatch, vessel numbers must be known, but in the Atlantic cod gillnet fishery the commenters acknowledge that bycatch estimates could be derived from other units of effort, including days at sea. The latter is correct: the number of vessels is not required to estimate total bycatch so long as there is some unit of effort that reflects fishing effort in the fishery. The United Kingdom continues to update its bycatch estimates, including estimates of total bycatch from observed fisheries.

*Comment 29:* The NGOs note that, in the seabass bottom pair trawl fishery, stranding data identify a potential population level impact for common dolphin in this fishery, in combination with other fisheries in the region.

*Response:* NMFS agrees, and is in continuing discussions on this matter with nations.

Norway

*Comment 30:* NGOs note that the blue swimming crab, European lobster, and Norwegian lobster pot/trap fisheries pose an entanglement risk to large whales, and that humpback whales, specifically, should be listed as interacting with the Norwegian lobster pot/trap fishery. The commenters also state that the zero reported entanglement rates are not reliable, given recent studies which report large whale entanglement.

*Response:* Minke and humpback whales are included as having a co-occurrence risk in all three fisheries. Fin whales are included in all of these fisheries but the Norwegian lobster pot/trap fishery. NMFS recognizes the possible under-estimation of marine mammal bycatch in pot/trap gear and the challenges of attributing large whale entanglement to specific pot fisheries in instances where large whales become entangled and swim away with the gear, or in instances where gear that is retrieved from a whale does not allow identification to a specific fishery.

#### Chile

*Comment 31:* NGOs noted that, for the purse seine fishery for anchoveta on the northern coast of Chile (Arica, Iquique, Tocopilla, and Mejillones), short-beaked common dolphins and South American sea lions have been reported as entangled with mortalities since 2010. The NGO commenters noted that a 2019 news report indicated that some 20 dolphins were found dead in purse seine nets that were set for anchoveta. Additionally, for small pelagic purse seine nets for common sardines (*Strangomera bentincki*), anchovy (*Engraulis ringens*) and horse mackerel (*Trachurus murphyi*) (Valparaíso and Los Lagos Region and the area between Arica and Parinacota Region and the Antofagasta Region), observers reported captures of southern sea lions (*Otaria flavascens*), dusky dolphins (*Lagenorhynchus obscurus*), common dolphins (*Delphinus delphis*) and bottlenose dolphins (*Tursiops truncatus*).

*Response:* NMFS is aware of the 2019 purse seine mortality and has been in consultation with Chile to ensure that the bycatch is reflected in the LOFF. Additionally, Chile is working to implement both electronic monitoring and observer programs. Chile is also analyzing observer data to provide bycatch estimates for these fisheries.

## Iceland

*Comment 32:* NGOs note that most of the LOFF listings for Iceland list the number of vessels as “unknown.” However, all Icelandic vessels are registered and assigned quotas, and the Directorate of Fisheries maintains a publicly accessible list of allowed catch and catches by species by individual licensed vessels (as well as total allowed catch and catches). Therefore, the number of vessels should be easily provided.

*Response:* NMFS has conferred with Iceland regarding the licensing of Icelandic fishing vessels and the best way to accurately reflect Iceland’s fisheries in the LOFF, given the nature of the individual transferable quota system. As noted by the commenters, Icelandic fishing vessel information is publicly available from the Icelandic Directorate of Fisheries. However, a direct count of the vessels landing catch would lead to an over-representation of total Icelandic vessels, as Icelandic vessels are authorized to switch gear, transfer quota, and fish in multiple areas. NMFS, in consultation with Iceland, agreed that leaving the vessel number empty (with some fishery exceptions) was the best path forward to capture all of the relevant fisheries information, given the multi-species and multi-gear nature of many Icelandic fisheries.

*Comment 33:* NGOs note that in the blue mussel aquaculture operations only humpback whales are listed as co-occurring with the fishery. However, a 2015 paper by Madeline Young included interviews with mussel farmers around Iceland and noted that humpback whales, minke whales, and harbor porpoises were most frequently sighted. Long-finned pilot whales, orcas, and white beaked dolphins were also reported by separate respondents. Four respondents were aware of cetaceans swimming through,

or very close (within 50 m) to, their mussel operation, and there was a known harbor porpoise entanglement in 1998, indicating potential concern.

*Response:* NMFS notes this information and will consult with Iceland to determine whether any modification to the list of co-occurring marine mammals is necessary.

*Comment 34:* NGOs highlight that pelagic purse seine and trawl fisheries for herring have known co-occurrences and bycatch for a number of species despite the lack of information in the LOFF. Species include humpback whales, minke whales, bottlenose dolphins, Atlantic white-sided dolphins, and killer whales. In 2008, an Icelandic herring trawler hauled a minke whale on board.

*Response:* Co-occurrence information is important for nations who may not have information about marine mammal bycatch. However, this is not the situation in Iceland. NMFS has focused discussions with Iceland on those marine mammal species with documented interactions and mortality with fisheries.

#### Other Nations' Exempt Fisheries

*Comment 35:* NGOs asked why tuna purse seine fisheries authorized by Indonesia (operating under the Indian Ocean Tuna Commission (IOTC) and the Western and Central Pacific Fisheries Commission (WCPFC)), by Italy (operating under the IOTC), and by South Korea (operating under IOTC and WCPFC) are exempt fisheries.

*Response:* NMFS has classified these purse seine fisheries as exempt because they are operating in fisheries managed by RFMOs and in compliance with conservation and management measures prohibiting the intentional encirclement of marine mammals by a

purse seine. NMFS has determined that where purse seine vessels do not intentionally set on marine mammals, the likelihood of marine mammal bycatch is generally remote.

*Comment 36:* NGOs asked why some crab and lobster traps/pots are exempt. The commenters noted that some New South Wales lobster trap/pot fisheries are exempt, despite some past evidence of humpback whale entanglements.

*Response:* In 2018, NMFS, as part of its evaluation of the 2017 draft LOFF, changed the New South Wales eastern rock lobster trap from export to exempt; this fishery now uses an at-call acoustic release system (Galvanic Time Release (GTR)) that submerges the headgear of the trap and has been effective in eliminating large whale entanglements (83 FR 11703, March 16, 2018).

*Comment 37:* NGOs note that in New Zealand there are many Danish seine fisheries classified as exempt. The commenters highlight that in a recent ecological risk assessment the Australian fishery management authority identified one species, the Australian fur seal, as at risk from Danish seine fishing. The commenters further note that the populations of these species are in the proximity of Danish seine operations in the Commonwealth Trawl Sector, and, considering the susceptibility of seals to this method of fishing, Australia has adopted a code of practice to minimize interaction with seals in this fishery (<https://www.afma.gov.au/fisheriesmanagement/methods-andgear/danish-seine>). The commenters then assume that Danish seines in New Zealand pose a similar level of risk.

*Response:* 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. Danish seines are actively fished and can easily accommodate best

practices for marine mammal bycatch mitigation or release, reducing the likelihood of marine mammal bycatch. The exceptions are Danish seine fisheries with documentary evidence of marine mammal interactions, which NMFS classified as export. NMFS does not have data indicating that New Zealand Danish seines have more than a remote likelihood of marine mammal incidental mortality and serious injury and therefore require reclassification as an export fishery.

*Comment 38:* NGOs state that the Norwegian longline fishery for bluefin tuna may be a risk, even if no bycatch has been reported to date.

*Response:* In 2018, as part of its evaluation of the 2017 draft LOFF, NMFS changed the Norwegian longline and purse seine tuna fisheries to exempt. NMFS based this determination on information Norway submitted to ICCAT. From 2014 through 2017 there was no reported or observed bycatch of marine mammals in the tuna longline/purse seine fisheries (83 FR 11703, March 16, 2018).

*Comment 39:* NGOs state that in the Philippines it is not clear why some ring net fisheries are exempt fisheries and some are export fisheries.

*Response:* Ring net fisheries are predominantly classified as exempt. Those ring nets/purse seine nets operating under the conservation and management measures of the WCPFC and the non-encirclement provisions of that RFMO are listed as exempt. The ring net fishery for bonitos and mackerel potentially has marine mammal bycatch associated with it and is therefore classified as an export fishery.

*Comments on Other Nations' Export Fisheries*

*Comment 40:* NGOs state that the western rock lobster pot/trap fishery in Australia is listed as export, and humpback whales are noted in marine mammal interactions/mortality, but no numbers are given.

*Response:* NMFS cannot identify the fishery that the commenters are referring to; however, there is an Australian spiny lobster (*Panulirus cygnus*), Chaceon geryons nei (*Chaceon* spp), Champagne crab (*Hypothalassia armata*), Red rock lobster (*Jasus edwardsii*), Tasmanian giant crab (*Pseudocarcinus gigas*) pot/trap fishery that interacts with humpback whales. NMFS recognizes the possible under-estimation of marine mammal bycatch in pot/trap gear and the challenges of attributing large whale entanglement to specific pot fisheries in instances where large whales become entangled and swim away with the gear, or in instances where gear retrieved from a whale does not allow identification to a specific fishery.

*Comment 41:* NGOs state that all estimates of bycatch are zero for German fisheries operating in the Baltic, which does not seem correct. They assert that the 2018 reports from ICES indicate that there is harbour porpoise bycatch in the Baltic Sea fisheries.

*Response:* The only fisheries on the LOFF for Germany indicated as operating in the Baltic Sea and exporting to the United States are those for Atlantic herring (*Clupea harengus*) midwater pair trawls, and midwater trawls (not specified), and purse seines, in the German EEZ, (FAO:27 Atlantic Northeast), subareas 27.3.a, 27.3.b.23, 27.3.c.22, 27.3.d.24. We have no information indicating that harbor porpoise are captured in these trawl and seine fisheries.

*Comment 42:* NGOs indicate that, on the LOFF for Italy, pair trawling for anchovy is listed as export, but no information on marine mammal interactions/mortality is associated with this fishery. In other areas (*e.g.*, English Channel bass fishery) pair trawling has a high bycatch rate of common dolphins.

*Response:* First, these pair trawls are for a different target species and operate in a different area than the example that the commenters cite. Assumptions that bycatch is the same across oceans, gear types, and target species are not valid. NMFS continues to work with nations to ensure that the marine mammals that co-occur with that fishery and any bycatch of those marine mammals is recorded in the IAICRS.

*Comment 43:* NGOs indicate that for Netherland fisheries on the LOFF all bycatch estimates are zero. The commenters assert this is not correct for porpoises in the North Sea.

*Response:* The Netherlands undertook significant revisions to its information provided for the LOFF, including adding bycatch estimates. NMFS urges the commenters to review the LOFF for the Netherlands in the final 2020 LOFF.

*Comment 44:* Industry commenters noted the need for NMFS to examine the Canadian pelagic longline fishery. Commenters note that this fishery most certainly interacts with some of the same transboundary marine mammal stocks (*e.g.*, longfin pilot whales) as the U.S. fleet, and the commenters have serious doubts that the Canadian government has implemented a marine mammal conservation regulatory program that is comparable in effectiveness to that of the United States. The commenters strongly urge NMFS to carefully examine the comparability of the Canadian marine mammal regulatory program through the implementation of the MMPA Import Provisions.

*Response:* NMFS agrees and will evaluate these fisheries which interact with transboundary stocks of marine mammals currently included under the Pelagic Longline Take Reduction Plan in accordance with the MMPA Import Provisions.

#### MMPA and the Seafood Import Monitoring Program

*Comment 45:* Industry expressed concern that it will be difficult for NMFS to fully and accurately identify all intermediary nations in the LOFF, and to fully and accurately identify the fisheries from which intermediary nations' exports originate in order to determine if those fisheries meet the U.S. comparability standards. Failure to do so would very seriously undermine the effectiveness of the MMPA Import Provisions by providing a major loophole for those high seas fisheries to escape application of the U.S. comparability standards. To prevent this, the commenter urged NMFS to use its traceability data collection capabilities under the Seafood Import Monitoring Program (SIMP) to enforce the MMPA Import Provisions. The commenter urged NMFS to fully integrate the MMPA Import Provisions with SIMP to prevent this and other forms of circumvention that will surely develop once the MMPA Import Provisions take effect.

*Response:* NMFS continues to work with other U.S. trade programs, offices, and partner agencies to confirm the accuracy of trade data and verify active seafood import streams for harvesting nations and intermediary products. Data available for the thirteen species and species groups subject to SIMP has been used to assist in identifying intermediary nations. Trade data collected under SIMP is protected, and its usage to help verify intermediary products under the MMPA Import Provisions is conducted according to the Trade Secrets Act (18 U.S.C. 1905) and the confidentiality of information requirements under Magnuson-Stevens Act 16 U.S.C. 1881a(b).

*Comment 46* : One environmental group notes that the MMPA Import Provisions complement and strengthen the current SIMP requirements to ensure that species with high risk of being from illegal, unreported, and unregulated (IUU) fisheries or seafood products that are mislabeled are not sold in the United States. The commenter states that the documentation requirements of SIMP will complement the MMPA Import Provisions in preventing non-compliant seafood from entering the U.S. market. NMFS should discuss the overlap between SIMP and the MMPA Import Provisions, how the two programs enhance one another, and the effect of expansion of SIMP requirements on MMPA enforcement. The commenter encouraged NMFS to consider expanding the requirements of SIMP to include all seafood as a means to enforce the MMPA Import Provisions.

*Response*: NMFS routinely verifies exports to the United States as part of its ongoing consultations with nations as well as consultations with relevant trade programs to identify supply chains subject to the MMPA Import Provisions. At this time, NMFS is focused on effective implementation of SIMP in its current form. Expansion of SIMP to include additional species would require a full rulemaking process, which allows for public input from U.S. and foreign stakeholders. Enhancing the enforcement of the MMPA Import Provisions would be considered in determining whether, how and when to expand the species scope of SIMP through a full rulemaking process.

#### *Other Comments*

*Comment 47*: One environmental organization notes that if a fishery or fishery sector is not captured in the LOFF, it is the responsibility of that fishery or country to ensure that it is included in the next iteration of the LOFF rather than to ask for

flexibility. Any ad hoc flexibility creates incentive to reclassify or recategorize fisheries and segments of fisheries to avoid regulation. This flexibility will create a scenario in which NMFS is behind the issue rather than leading with the firm requirements of the law. Future LOFF reviews will provide regular opportunity for corrections and additions, but the agency should not allow for any variance once the LOFF is finalized.

*Response:* NMFS will work with nations to ensure the accuracy of the LOFF, and to ensure that the LOFF reflects a nation's fishery management regime and its authorized fisheries.

*Comment 48:* One environmental organization states that countries that do not participate in the LOFF process despite ample opportunity to do so should not be given special consideration or expedited consideration outside of the regular LOFF process. The commenter further states that harvesting nations should not receive waivers, exemptions or exceptions to the requirements of the Marine Mammal Import Provisions and should be denied the ability to import fish and fish products into the United States until those countries demonstrate compliance through the LOFF process.

*Response:* After January 1, 2022, all nations and fisheries exporting to the United States must be on the LOFF and must have received a Comparability Finding for those fisheries. There are no exemptions or waivers. There are procedures for obtaining a Comparability Finding for new foreign commercial fishing operations wishing to export to the United States (50 CFR 216.24 (h)(8)(vi)).

## **References**

- Castro, C., Van Waerebeek, K., Cárdenas, D., & Alava, J. J. (2020). Marine mammals used as bait for improvised fish aggregating devices in marine waters of Ecuador, eastern tropical Pacific. *Endangered Species Research*, 41, 289-302.
- 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.)

Dated: October 2, 2020.

**Christopher Wayne Oliver,**

*Assistant Administrator,*

*National Marine Fisheries Service.*

[FR Doc. 2020-22290 Filed: 10/7/2020 8:45 am; Publication Date: 10/8/2020]