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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 201029-0282]

RIN 0648-XG809

Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act--Notification of Rejection of Petition and Issuance of Comparability Findings

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

ACTION: Denial of petition and issuance of comparability findings.

SUMMARY: Under the authority of the Marine Mammal Protection Act (MMPA), the NMFS Assistant Administrator for Fisheries (Assistant Administrator) has denied a petition for emergency rulemaking from Sea Shepherd Legal. Additionally, the Assistant Administrator has issued comparability findings for the Government of New Zealand's (GNZ) following fisheries: West Coast North Island multi-species set net fishery, and West Coast North Island multi-species trawl fishery. NMFS bases the comparability findings on documentary evidence submitted by the GNZ and other relevant, readily-available information including the scientific literature.

DATES: These comparability findings are valid for the period of **[INSERT DATE OF FILING FOR PUBLIC INSPECTION WITH THE OFFICE OF THE FEDERAL**

REGISTER], through January 1, 2023, unless revoked by the Assistant Administrator in a subsequent action.

FOR FURTHER INFORMATION CONTACT: Nina Young, NMFS F/IASI (Office of International Affairs and Seafood Inspection) at *Nina.Young@noaa.gov* or 301–427–8383.

SUPPLEMENTARY INFORMATION:

Background

The MMPA, 16 U.S.C. 1371 *et seq.*, states that the “Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.” For purposes of applying this import restriction, the Secretary of Commerce “shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States.”

In August 2016, NMFS published a final rule (81 FR 54390; August 15, 2016) implementing the fish and fish product import provisions in section 101(a)(2) of the MMPA. This rule established conditions for evaluating a harvesting nation’s regulatory programs to address incidental and intentional mortality and serious injury of marine mammals in fisheries operated by nations that export fish and fish products to the United States.

Under the final rule, fish or fish products may not 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 U.S. standards (16 U.S.C. 1371(a)(2)). NMFS published a List of Foreign Fisheries (LOFF) on October 8, 2020 (85 FR 63527), to classify fisheries subject to

the import requirements. Effective January 1, 2023, fish and fish products from fisheries identified by the Assistant Administrator in the LOFF may only be imported into the United States if the harvesting nation has applied for and received a comparability finding from NMFS for those fisheries on the LOFF. The rule established the procedures that a harvesting nation must follow, and the conditions it must meet, to receive a comparability finding for a fishery on the LOFF. The final rule established an exemption period, ending January 1, 2023, before imports would be subject to any trade restrictions (see 50 CFR 216.24(h)(2)(ii)).

In that rule's preamble, NMFS stated that it may consider emergency rulemaking to ban imports of fish and fish products from an export or exempt fishery having or likely to have an immediate and significant adverse impact on a marine mammal stock. In addition, pursuant to the MMPA Import Provisions rule, nothing prevents a nation from implementing a bycatch reduction regulatory program and seeking a comparability finding during the five-year exemption period. As discussed below, the Government of New Zealand (GNZ) has requested an early Comparability Finding for several of its fisheries.

The Petition and Request for a Comparability Finding

In February 2019, Sea Shepherd Legal, Sea Shepherd New Zealand Ltd., and Sea Shepherd Conservation Society petitioned NMFS “for an emergency rulemaking under the [MMPA], asking [the Government] to ban the import of fish caught in gillnet and trawl fisheries in the Māui dolphin's range” because the Government of New Zealand's (GNZ) 2012 regulations were insufficient to protect the Māui dolphin. On July 10, 2019, NMFS rejected the petition on the basis that the GNZ: 1) had in place an existing regulatory program to reduce Māui dolphin bycatch; and 2) was proposing to implement in 2019 a regulatory program comparable in effectiveness to the United States which, when fully implemented,

would likely further reduce risk and Māui dolphin bycatch below Potential Biological Removal level¹.

On May 21, 2020, Sea Shepherd New Zealand and Sea Shepherd Conservation Society (collectively, “Plaintiffs”) initiated a lawsuit in the Court of International Trade (CIT) alleging (1) NMFS’ failure to ban imports as required by the MMPA violated the Administrative Procedure Act (5 U.S.C. 706(1)), which prohibits an agency unlawfully withholding or unreasonably delaying action; and (2) that NMFS’ denial of its petition was arbitrary and capricious and also violated the Administrative Procedure Act (5 U.S.C. 706(2)(A)). On June 24, 2020, the GNZ announced its final fisheries measures for reducing bycatch of Māui dolphins (effective October 1, 2020) and its final Threat Management Plan (TMP). On July 1, 2020, Plaintiffs moved for a preliminary injunction to ban imports of seafood into the United States from New Zealand’s set-net and trawl fisheries.

Before responding to Plaintiffs’ motion for a preliminary injunction, NMFS moved for a voluntary remand in order to reconsider the Plaintiffs’ petition for emergency rulemaking under the MMPA and requested that the court stay filing deadlines in the case pending decision of the voluntary remand.

On July 15, 2020, the GNZ, acting through the Ministry for Primary Industries, requested that NOAA and NMFS perform a comparability assessment of the TMP and its regulatory program as it relates to Māui’s dolphins. The court held oral argument on August 6, 2020. On August 13, 2020, the CIT granted the voluntary remand. The CIT also provided the Plaintiffs the opportunity to supplement their petition within 14 days of the court order. The

¹ 16 U.S.C. 1362 The term “potential biological removal level” means the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.

CIT ordered that NMFS file the remand determination, including a determination on GNZ's application for a comparability finding, with the court by October 30, 2020.

On August 27, 2020, NMFS received the supplemental petition, which both maintains the grounds for action outlined in the original petition and includes information that arose after submission of the original petition. The supplemental petition directs attention to the following new information: (1) The receipt of data from the New Zealand government suggesting sightings of Māui dolphins on the East Coast of the North Island; (2) the issuance of the 2019 Draft TMP; (3) the final TMP announced on June 24, 2020; and (4) the 2020 draft LOFF. On September 29, 2020, NMFS published notification of receipt of a supplemental petition to ban imports of all fish and fish products from New Zealand that do not satisfy the MMPA (85 FR 60946).

NMFS is undertaking this action in response to the court-ordered voluntary remand of NMFS' July 10, 2019 decision on the 2019 emergency petition, the 2020 supplemental petition, and the request by the GNZ for a comparability finding during the exemption period.

Māui Dolphin

Māui dolphins (*Cephalorhynchus hectori Māui*) are the northernmost distinct subpopulation of Hector's dolphin species (*Cephalorhynchus hectori*). The scientific community recognized Māui and South Island Hector's dolphins as distinct subspecies in 2002. The Māui dolphin is endemic to the west coast of the North Island of New Zealand and is listed by IUCN as Critically Endangered and as an endangered species under the U.S. Endangered Species Act (16 U.S.C. 1531 *et seq.*). In 1970, scientists estimated that the Māui dolphin population numbered approximately 200 animals. The Māui dolphin population is currently estimated at 63 individuals (95% CI 57–75); with the population declining at the rate

of 3–4 percent per year over the period 2001–16. Māui dolphin demographic models now estimate that the population may have stabilized or begun to increase in recent years following a decline in the past 20 to 30 years. Bycatch in gillnets (or set nets) and trawl nets are one of the threats to Māui dolphin.

NMFS Determination on the Petition and the GNZ's Comparability Application

NMFS is rejecting the petition to ban the importation of commercial fish or products from fish harvested in a manner that results in the incidental kill or incidental serious injury of Māui dolphins in excess of U.S. standards, and is issuing a Comparability Finding for the West Coast North Island multi-species set-net and trawl fisheries because the GNZ has implemented a regulatory program governing the bycatch of Māui dolphin that is comparable in effectiveness to U.S. standards.

As a part of the comparability finding process set forth at 50 CFR 216.24(h)(6) and review of the petition, NMFS considered documentary evidence submitted by the GNZ and other relevant, readily-available information including scientific literature and government reports. Specifically, NMFS reviewed the 2019 petition and supplemental petition, supporting documents to those petitions, previous GNZ risk assessments and threat management plans, the 2019 and 2020 TMP and supplemental documents, the 2020 regulatory regime, and the GNZ's comparability finding application.

NMFS is rejecting the petition and has determined that the West Coast North Island multi-species set-net fishery² and West Coast North Island multi-species trawl fishery³ have

² The target species of this multi-species fishery are: Australian salmon (*Arripis trutta*), Bluefin gurnard (*Chelidonichthys kumu*), Common warehou (*Seriola brama*), Flatfishes nei (*Pleuronectiformes*), Flathead grey mullet (*Mugil cephalus*), Silver seabream (*Pagrus auratus*), Spotted estuary smooth-hound (*Mustelus lenticulatus*), Tope shark (*Galeorhinus galeus*), White trevally (*Pseudocaranx dentex*).

³ The target species of this multi-species fishery are: Australian salmon (*Arripis trutta*), Blue grenadier (*Macruronus novaezelandiae*), Bluefin gurnard (*Chelidonichthys kumu*), Common warehou (*Seriola brama*),

met the MMPA's requirements to receive comparability findings. In accordance with 50 CFR 216.24(h)(8)(vii), a comparability finding will be terminated or revoked if NMFS determines that the requirements of 50 CFR 216.24(h)(6) are no longer being met. The rationale for the determination announced in this notice is articulated in an analysis of the GNZ application for a comparability finding. The analysis is available from NMFS (see FOR FURTHER INFORMATION CONTACT).

The comparability findings for the GNZ's affected fisheries included in this Federal Register notice will remain valid through January 1, 2023. All other exempt and export fisheries operating under the control of the GNZ are subject to the exemption period under 50 CFR 216.24(h)(2)(ii). The GNZ is still required to provide all reports and updates to its fisheries on NMFS' LOFF in accordance with 50 CFR 216.24(h) for these fisheries and all other GNZ fisheries on NMFS' LOFF.

Responses to Comments on the Notification of the Petition

NMFS received nine sets of comments on the amended petition from fishing industry groups, environmental non-governmental organizations (NGOs), private citizens, the Marine Mammal Commission (MMC), and Te Ohu Kaimoana.

General Comments

Comment 1: Comments submitted by members of the general public, NGOs, and the MMC supported initiating rulemaking to ban imports of fish and fish products from New

Jack and horse mackerels nei (*Trachurus spp*), John dory (*Zeus faber*), Silver gemfish (*Rexea solandri*), Silver seabream (*Pagrus auratus*), Snoek (*Thyrsites atun*), Spiny dogfish (*Squalus acanthias*), Spotted estuary smooth-hound (*Mustelus lenticulatus*), Tarakihi/jackass morwong (*Nemadactylus macropterus*), Tarakihi/jackass morwong (*Nemadactylus macropterus*), Tope shark (*Galeorhinus galeus*), Warehou nei (*Seriolella spp*), White trevally (*Pseudocaranx dentex*), Yellowtail amberjack (*Seriola lalandi*).

Zealand set-net and trawl fisheries operating in Māui dolphin habitat, alleging that the GNZ's regulatory program does not go far enough in protecting Maui dolphins.

Response: NMFS disagrees. The GNZ regulatory program that came into effect on October 1, 2020, is comparable in effectiveness to the U.S. regulatory program. The GNZ prohibits intentional killing and injury of marine mammals and has vessel registration, bycatch reporting, and a monitoring program comparable to the U.S. regulatory program. The GNZ's regulatory program includes calculated bycatch estimates, bycatch limits (potential biological removal level (PBR)) and a population sustainability threshold (PST), and a bycatch mitigation program to reduce and maintain Māui dolphin bycatch below PBR. The program also includes a management review trigger, which is designed to prevent bycatch from exceeding PBR and allows for the immediate imposition of additional bycatch reduction measures in the event that a fishing-related incident does occur. The regulatory program, similar to the U.S. Take Reduction process, includes public participation and periodic review and modification to the regulatory program to ensure that it is meeting its targets and objectives. The regulatory program also includes research projects to improve understanding of Māui dolphins and the threats they face.

Emergency Action:

Comment 2: Both NGOs and the MMC assert that emergency rulemaking to ban imports is required because of the small population of Māui dolphins. The MMC states that given the small numbers of Māui dolphins remaining, the population's trend over recent decades, the low capacity of the species to withstand further losses, and the ongoing number of deaths of Hector's and Maui dolphins attributed to fisheries bycatch, it is evident that

commercial fisheries have and may be continuing to have an impact on the Māui dolphin population.

Response: NMFS disagrees. Māui dolphin demographic models now estimate that the population may have stabilized or begun to increase in recent years following a decline in the past 20 to 30 years. The MMC did note that population estimates of Māui dolphins covering the period since the GNZ established its previous fishery-specific restrictions have varied between 55 and 69 individuals. The MMC also acknowledges that these and earlier estimates suggest that the protection provided by the GNZ's previous (prior to October 1, 2020) regulatory program has slowed the population's decline. Moreover, contrary to claims by the petitioners and the MMC that there are an estimated 14-17 reproductive-aged females remaining, scientists currently place these estimates at 20-35 adult females. According to the GNZ's onboard observer program, there have been no observed bycatch events of Māui or Hector's dolphins in set-net or trawl fisheries operating off the west coast of the North Island. Since 2012, fisheries observers sighted only two free-swimming *Cephalorhynchus* spp. (Māui/Hector's dolphin). Both sightings occurred from trawl vessels, in areas closed to set-nets. There has been one self-reported capture of a *Cephalorhynchus* spp. (Māui/Hector's dolphin) off the west coast of the North Island in January 2012 on a commercial set-net vessel fishing off Cape Egmont, Taranaki. Between 1921 and present there have been five beachcast recovered carcasses of *Cephalorhynchus* spp. dolphins (Māui/Hector's dolphin) off the West Coast North Island where fishing was implicated via necropsy in the cause of death, the last in 2012. In the absence of a declining population or ongoing incidental mortality or serious injury, the petitioners and MMC have failed to demonstrate that the incidental mortality and serious injury of Māui/Hector's dolphin from commercial fisheries is having, or is likely to

have, an immediate and significant adverse impact on the subspecies. Emergency rulemaking is not warranted.

Extent of the West Coast Distribution and the East Coast

Comment 3: NGOs claim that sightings in the northern and southern extent of the Māui dolphin distribution along the West Coast of the North Island are evidence of a resident population and necessitate fisheries restrictions in these areas.

Response: The GNZ's regulatory program includes fishery-specific restrictions in the northern and southern ranges and the transitory zone to reduce the bycatch risk in these areas. This action was taken notwithstanding that these areas represent a transient and small proportion of the Māui dolphin distribution. These measures concentrate the fishery-specific restrictions in the areas with the greatest overlap between fishing activities and the Māui dolphin population (core area), virtually eliminating the bycatch risk from set-nets and significantly reducing the trawl bycatch risk for Māui dolphins in this area. The GNZ's regulatory measures, in all likelihood, will reduce bycatch below PBR, making them comparable in effectiveness to U.S. standards.

Comment 4: NGOs claim that a resident population of Māui dolphins exists off the East Coast of the North Island, based on sightings. The NGOs assert that the GNZ must extend protection to this area including restrictions on set-nets and trawl gear.

Response: The GNZ, the New Zealand fishing industry, and Te Ohu Kaimoana (a New Zealand charitable trust for Maori fishing rights) assert that the petitioners have misrepresented the GNZ sighting data (e.g., claiming all sightings as Māui dolphins) and that no genetically-tested *Cephalorhynchus hectori* sp. dolphin found on the East Coast of the North Island has been identified as a Māui dolphin. The map provided by the petitioners in the

supplemental petition is a distortion of the sighting information available through the GNZ's Department of Conservation. The sighting information does not denote any dolphins on the East Coast as being Māui dolphins – to the contrary, all are denoted as being Hector's dolphins. To date, there is no evidence of a resident dolphin population of either subspecies in any North Island location outside of the recognized core range of Māui dolphins (*i.e.*, there have been no verified sightings of breeding aggregations or newborn calves, and the sightings do not conform to any predictable seasonal pattern). The literature, the absence of far-ranging migratory movements by Māui dolphins, and the sighting data clearly show the absence of confirmed sightings of Māui dolphin on the east coast of the North Island and do not support the existence of either a resident or “transient” population of Māui dolphins.

Risk Assessment and Habitat Models

Comment 5: NGOs claim that the GNZ risk assessment model underestimates fisheries mortality. Likewise, they claim that the habitat model is flawed by restricting the overlap of the Māui dolphin distribution and overestimating the benefits of the protective measures. The MMC states that the model uses biased and high abundance estimates, a high reproductive rate, and an assumed figure for calf survival. The MMC suggests that NMFS use a precautionary approach when considering the GNZ's comparability finding application and the data used to support its request.

Response: As alleged by the commenters, the GNZ's risk assessment methodology does not use the low overall observer coverage and the likely under-reporting of captures by fishers. Rather, the model pooled all available observer data for set-netting including that for the South Island coastal fleet where observer coverage is higher and the likelihood of a dolphin encountering a net was higher and estimated the likelihood of a Māui dolphin being

captured in a set-net. As the model estimates probability of capture or death per dolphin, per fishing event, it is insensitive to actual population size and can be used to evaluate risk in locations where population size is unknown or hypothetical.

NMFS notes that while some scientists may disagree about the assumptions that serve as the basis for the risk assessment models that underpin the GNZ bycatch estimates, NMFS finds that the approach taken in the risk assessment is reasonable. The MMPA Import Provisions do not mandate that the United States (specifically NMFS) arbitrate such scientific debates or disagreements. The MMPA Import Provisions do not require that a nation's approach be identical to the U.S. regulatory program or standards, just comparable in effectiveness to those standards. The MMPA Import Provisions also do not require an evaluation of the implementation of historic bycatch reduction or regulatory programs when making a comparability finding. The standard of the MMPA Import Provisions is that a nation currently has a regulatory program comparable in effectiveness to the U.S. regulatory program. Based on NMFS' analysis of all readily available data, the petition, and the reasonable proof supplied by the GNZ, the GNZ regulatory program that came into effect on October 1, 2020, is comparable in effectiveness to the U.S. regulatory program.

Bycatch Limits

Comment 6: The NGOs claim that the GNZ's use of the PST instead of PBR increases the level of acceptable bycatch. They also assert that PBR should be calculated using a net productivity rate of 0.018, resulting in a PBR of one dolphin every 20.6 years.

Response: The NGOs and petitioners are in error on two points. First, the GNZ PST as calculated in the final TMP (PST = 0.14) is a comparable scientific metric to PBR (PBR = 0.11). Regardless of the differences in the PBR/PST calculations, the GNZ, for the purpose of

its comparability finding application, is using and has calculated a PBR for Māui dolphins of 0.11 as its biological threshold or bycatch limit. Therefore, the standard used by the GNZ is PBR and is comparable to U.S. standards, and NMFS finds the underlying data inputs appropriate. Second, the NGOs and petitioners' calculation does not conform to the U.S. "Guidelines for Preparing Stock Assessment Reports Pursuant to the 1994 Amendments to the MMPA," which states: Substitution of other values of the maximum net productivity rate (R_{max}) should be made with caution, and only when reliable stock-specific information is available on R_{max} (e.g., estimates published in peer-reviewed articles or accepted by review groups such as the MMPA Scientific Review Groups or the Scientific Committee of the International Whaling Commission). The NGOs' and the petitioners' calculation relies on dated estimates for R_{max} , is inconsistent with the known age at first reproduction of Māui dolphins, underestimates maximum age for this species, and is contrary to more recent estimates of R_{max} in the literature. Moreover, the Māui dolphin demographic models now estimate that the population may have stabilized or begun to increase in recent years following a decline in the past 20 to 30 years. Therefore, NMFS finds the NGO's and petitioners' PBR estimate is not comparable to U.S. standards.

Monitoring

Comment 7: The NGOs claim that the GNZ's requirement for electronic monitoring of set-net and trawl fisheries is an inadequate measure. They base this claim on supposition that too few fishing vessels have been outfitted with camera systems and that such systems will not be fully operational until 2023. The MMC claims that the GNZ, under its new regulatory program, does not increase observer coverage in the set-net fishery and that camera monitoring is only on the South Island.

Response: Both the NGOs and the MMC are incorrect. Since November 1, 2019, on-board cameras are required on any set-net or trawl vessel (≥ 8 m and ≤ 29 m in registered length). The area where onboard cameras are required covers the coastal area of the Māui dolphin habitat zone, except for a small portion in the far north estimated to have a low density of dolphins, and extends into the northern portion of the southern transition zone. According to the GNZ, the requirement applies to 28 vessels, of which 20 have opted into the on-board camera requirement; the other eight vessels subject to the regulatory requirement are currently not operating in the defined area. Any authorized vessel without on-board cameras must carry an observer. Thus, fishing vessels currently operating in the core Māui dolphin habitat zone have 100 percent coverage of electronic monitoring. The GNZ bycatch monitoring program is comparable in effectiveness to U.S. standards. Finally, according to the GNZ, the 2023 date refers to broader implementation of on-board cameras including on the South Island and not the implementation of this program to the West Coast of the North Island.

Traceability

Comment 8: NGOs claim New Zealand's fishery traceability system is not structured to trace fishery catches and/or marine mammal bycatch incidents back to specific fisheries management areas. They assert that NMFS should not use this deficiency as an excuse to not impose the required fishery product import bans under the MMPA. The NGOs also claim that New Zealand's marine mammal bycatch traceability system is not consistent with the standards imposed on fisheries in the United States.

Response: As discussed in the response to comment 7, the GNZ's monitoring program, including its observer programs and on-board cameras, is comparable in

effectiveness to U.S. standards requiring monitoring. The GNZ's monitoring program is sufficient to detect and estimate bycatch. The MMPA Import Provisions do not require, as a condition for a comparability finding, a seafood traceability system.

Dated: October 26, 2020.

Paul N. Doremus,

Deputy Assistant Administrator for Operations,

National Marine Fisheries Service.

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