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National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 216

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

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****15 CFR Part 902****50 CFR Part 216**

[Docket No. 0907301201–6406–03]

RIN 0648–AY15

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

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

**ACTION:** Final rule.

**SUMMARY:** This final action implements the import provisions of the Marine Mammal Protection Act (MMPA). This rule establishes conditions for evaluating a harvesting nation's regulatory program to address incidental and measures to address intentional mortality and serious injury of marine mammals in fisheries that export fish and fish products to the United States. Under this rule, fish and fish products from fisheries identified by the Assistant Administrator in the List of Foreign Fisheries can only be imported into the United States if the harvesting nation has applied for and received a comparability finding from NMFS. The rule establishes procedures that a harvesting nation must follow and conditions to meet, to receive a comparability finding for a fishery. The rule also establishes provisions for intermediary nations to ensure that intermediary nations do not import, and re-export to the United States, fish or fish products subject to an import prohibition. Agency actions and recommendations under this rule will be in accordance with U.S. obligations under applicable international law, including, among others, the World Trade Organization (WTO) Agreement.

**DATES:** This final rule is effective on January 1, 2017.

**FOR FURTHER INFORMATION CONTACT:** Nina Young, Office of International Affairs and Seafood Inspection, NMFS at [Nina.Young@noaa.gov](mailto:Nina.Young@noaa.gov) or 301–427–8383. More information on this final action can be found on the NMFS Web site at <http://www.nmfs.noaa.gov/ia/>.

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

The MMPA contains provisions to address the incidental mortality and serious injury of marine mammals in

both domestic and foreign commercial fisheries. With respect to foreign fisheries, section 101(a)(2) of the MMPA states that the Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary of Commerce shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States. (16 U.S.C. 1371(a)(2))

Section 102 (c)(3) of the MMPA states that it is unlawful to import into the United States any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary of Commerce (Secretary) has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident to the catching of the fish. (16 U.S.C. 1372(c)(3)).

**Petition To Ban Imports**

On March 5, 2008, the U.S. Department of Commerce and other relevant Departments were petitioned under the MMPA to ban the imports of swordfish and swordfish products from nations that have failed to provide reasonable proof of the effects on ocean mammals of the commercial fishing technology in use to catch swordfish. The petition was submitted by two nongovernmental organizations, the Center for Biological Diversity and Turtle Island Restoration Network. The petition is available at the following Web site: <http://www.nmfs.noaa.gov/ia/>. Copies of this petition may also be obtained by contacting NMFS (see **FOR FURTHER INFORMATION CONTACT**).

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

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

NMFS extended the comment period for an additional 60 days (75 FR 38070).

Additionally, on October 5, 2011, and on March 13, 2012, NMFS received correspondence from 21 animal rights and animal welfare organizations and Save Our Seals Fund, respectively, urging it to take action to ban the importation of Canadian and Scottish aquaculture farmed salmon into the United States due to the intentional killing of seals asserting such lethal deterrence is subject to the importation ban under the MMPA sections 101(a)(2) and 102(c)(3) for international fisheries. NMFS decided that the proposed rule would be broader in scope than the 2008 petition. In particular, NMFS decided that it would be not limited in application to swordfish fisheries and would cover intentional, as well as incidental, killing and serious injury of marine mammals.

NMFS published a proposed rule on August 11, 2015 (80 FR 48172) that included a 90-day comment period. A summary of the comments received on the proposed rule and how these comments were addressed in the final rule can be found below. Further background is provided in the above referenced **Federal Register** documents and is not repeated here.

**National Environmental Policy Act (NEPA)**

NMFS prepared a final Environmental Assessment (EA) to accompany this final rule. The EA was developed as an integrated document that includes a Regulatory Impact Review (RIR) and a Final Regulatory Flexibility Analysis (FRFA). Copies of the EA/RIR/FRFA analysis are available at the following address: Office of International Affairs and Seafood Inspection, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. Copies are also available via the Internet at the NMFS Web site at <http://www.nmfs.noaa.gov/ia/>.

**Overall Framework To Implement Sections 101(a)(2) and 102(c)(3) of the MMPA****Overview of the MMPA Import Rule Process**

NMFS is amending 50 CFR 216.24 to add a new paragraph to establish procedures and conditions for evaluating a harvesting nation's regulatory program addressing marine mammal incidental mortality and serious injury in its export fisheries, to determine whether it is comparable in effectiveness to the U.S. regulatory program. The new paragraph also addresses intentional mortality and

serious injury in fisheries that export to the United States. The following is a brief summary of the process for implementing MMPA sections 101(a)(2)(A) and 102(c)(3). Each step was discussed in detail in the proposed rule and is not repeated here.

#### *List of Foreign Fisheries*

NMFS will identify harvesting nations with commercial fishing operations that export fish and fish products to the United States and classify those fisheries based on their frequency of marine mammal interactions as either "exempt" or "export" fisheries (See regulatory text in this rule for definitions of exempt and export fisheries).

NMFS will publish in the **Federal Register** a List of Foreign Fisheries by harvesting nation, their fisheries, and their classifications. After the effective date of the rule, NMFS will publish a proposed List of Foreign Fisheries for comment and a subsequent final List. To develop this list, NMFS will notify each harvesting nation having fisheries that export to the United States and request that within 90 days of notification the harvesting nation submit reliable information about the commercial fishing operations identified, including the number of participants, number of vessels, gear type, target species, area of operation, fishing season, and any information regarding the frequency of marine mammal incidental mortality and serious injury, including programs to assess marine mammal populations. Harvesting nations will also be requested to submit copies of any laws, decrees, regulations, or measures to reduce incidental mortality and serious injury of marine mammals in those fisheries or prohibit the intentional killing or injury of marine mammals. NMFS will evaluate each harvesting nation's submission, any readily available information, request additional information from the harvesting nations, as necessary, and use this information to classify the fisheries. Where no information or analogous fishery or fishery information exists, NMFS will classify the commercial fishing operation as an export fishery until such time as the harvesting nation provides reliable information to properly classify the fishery or such information is readily available to the Assistant Administrator in the course of preparing the List of Foreign Fisheries.

The year prior to the expiration of the exemption period and every four years thereafter, NMFS will re-evaluate foreign commercial fishing operations and publish a notice of the proposed

list, for public comment, and the final revised List of Foreign Fisheries in the **Federal Register**. In revising the list, NMFS may reclassify a fishery if new substantive information indicates the need to re-examine and possibly reclassify a fishery. The List of Foreign Fisheries will be organized by harvesting nation and other defining factors including geographic location of harvest, gear-type, target species or a combination thereof. Based upon the List of Foreign Fisheries, the Assistant Administrator will consult with harvesting nations, informing them of the regulatory requirements for exempt and export fisheries to import fish and fish products into the United States.

#### *Exemption Period and New Entrants*

NMFS will allow a one-time only, initial five-year exemption period, similar to the Interim Exemption for domestic fisheries that occurred in 1988 prior to implementation of the framework for addressing marine mammal bycatch in U.S. commercial fisheries, commencing from January 10, 2017. During the exemption period, the prohibitions of this rule will not apply to imports from the harvesting nation; however, harvesting nations are expected to develop regulatory programs to comply with the requirements to obtain a comparability finding during this time period.

After the conclusion of the one-time exemption period, any harvesting nation or fishery that has not previously exported to the United States wishing to commence exports will be granted a provisional comparability finding for a period not to exceed twelve months. Such fishery will be classified as an export fishery until the next List of Foreign Fisheries is published. If a harvesting nation provides 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. Prior to the expiration of a provisional comparability finding, a harvesting nation must provide information to classify the fishery and apply for and receive a comparability finding for its fishery to continue exporting fish and fish products from that fishery to the United States after the expiration of the provisional comparability finding.

#### *Consultations With Harvesting Nations*

The rule includes three broad consultation areas: (1) Notification of the List of Foreign Fisheries; (2)

notification of a denial of a comparability finding; and (3) discretionary consultations for transmittal or exchange of information.

#### *Comparability Finding*

By the end of the exemption period and every four years thereafter, a harvesting nation must have applied for and received a comparability finding for its fisheries to export fish and fish products to the United States. Fish and fish products from fisheries that fail to receive a comparability finding may not be imported into the United States.

To receive a comparability finding for an exempt or export fishery operating within the harvesting nation's exclusive economic zone (EEZ) and territorial sea, the high seas, or in the waters of another state, the harvesting nation must demonstrate it has prohibited the intentional mortality or serious injury of marine mammals in the course of commercial fishing operations in the fishery unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger; or that it has procedures to reliably certify that exports of fish and fish products to the United States are not the product of an intentional killing or serious injury of a marine mammal unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger.

The harvesting nation must also demonstrate that it has adopted and implemented, with respect to an export fishery, a regulatory program governing the incidental mortality and serious injury of marine mammals in the course of commercial fishing operations in its export fishery that is comparable in effectiveness to the U.S. regulatory program. The U.S. regulatory program governing the incidental mortality and serious injury of marine mammals in the course of commercial fishing operations is specified in the MMPA (*e.g.*, 16 U.S.C. 1386 and 1387) and its implementing regulations. To determine whether a harvesting nation maintains a regulatory program that is comparable in effectiveness to the U.S. regulatory program for a fishery, NMFS will examine whether the harvesting nation maintains a regulatory program that includes, or effectively achieves comparable results, as certain conditions specified in paragraph (h)(6)(iii) of the rule, subject to additional considerations specified in paragraph (h)(7) of the rule. The conditions specified in paragraph

(h)(6)(iii) are features of the U.S. regulatory program.

Paragraph (h)(6)(iii) specifies different conditions that a harvesting nation must meet for the Assistant Administrator to issue a comparability finding for: Export fisheries operating within the EEZ or territorial waters of the harvesting nation, export fisheries operating within the jurisdiction of another state, and export fisheries operating on the high seas. The conditions specified in paragraph (h)(6)(iii) and additional considerations specified paragraph (h)(7) are summarized below.

For export fisheries operating within the EEZ or territorial waters of the harvesting nation, the conditions include:

1. Marine mammal stock assessments that estimate population abundance for marine mammal stocks in waters under its jurisdiction that are incidentally killed or seriously injured in the export fishery;

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

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

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

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

- (c) for transboundary stocks or any other marine mammal stocks interacting with the export fishery, any measures to reduce the incidental mortality and serious injury of that stock that are the same or are comparable in effectiveness to measures the United States requires its domestic fisheries to take with respect to that transboundary stock or marine mammal stock in the United States.

4. Implementation of monitoring procedures in export fisheries designed

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

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

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

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

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

For export fisheries operating within the jurisdiction of another state the conditions include:

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

2. With respect to any other marine mammal stocks interacting with the export fishery while operating within the jurisdiction of the state, any measures to reduce incidental mortality and serious injury that the United States requires its domestic fisheries to take with respect to that marine mammal stock; and

3. For an export fishery not subject to management by a regional fishery management organization:

- (a) An assessment of marine mammal abundance of stocks interacting with the export fishery, the calculation of a bycatch limit for each such stock, an

estimation of incidental mortality and serious injury for each stock and reduction in or maintenance of the incidental mortality and serious injury of each stock below the bycatch limit. This data included in the application may be provided by the state or another source; and

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

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

For an export fishery operating on the high seas under the jurisdiction of the harvesting nation or of another state:

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

2. Implementation in the export fishery of:

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

- (b) With respect to any other marine mammal stocks interacting with the export fishery while operating on the high seas, any measures to reduce

incidental mortality and serious injury that the United States requires its domestic fisheries to take with respect to that marine mammal stock when they are operating on the high seas.

#### *Additional Considerations*

When determining whether to issue any comparability finding for a harvesting nation's export fishery the Assistant Administrator will also consider:

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

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

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

- Other relevant facts and circumstances, which may include the history and nature of interactions with marine mammals in this export fishery, whether the level of incidental mortality and serious injury resulting from the fishery or fisheries exceeds the bycatch limit for a marine mammal stock, the population size and trend of the marine mammal stock, the population level impacts of the incidental mortality or serious injury of marine mammals in a harvesting nation's export fisheries, and the conservation status of those marine mammal stocks where available;

- The record of consultations with the harvesting nation, results of these consultations, and actions taken by the harvesting nation, including under any applicable intergovernmental agreement or regional fishery management organization, to reduce the incidental mortality and serious injury of marine mammals in its export fisheries; and

- Information gathered during any onsite inspection by U.S. government officials of a fishery's operations.

- For export fisheries operating on the high seas under an applicable intergovernmental agreement or regional fishery management organization to which the United States is a party, the

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

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

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

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

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

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

comparability finding and the effective date of such import prohibitions.

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

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

For those fisheries receiving a comparability finding, such finding will remain valid for 4 years or for such other period as the Assistant Administrator may specify. To seek renewal of a comparability finding, every 4 years, the harvesting nation must submit to the Assistant Administrator an application by March 1 of the year when the comparability finding is due to expire, requesting a comparability finding for the fishery and providing the same documentary evidence required for the initial comparability finding, including documentary evidence of any measures they have implemented to reduce the incidental mortality and serious injury of marine mammals in its export fishery that are comparable in effectiveness to the U.S. regulatory program, in particular by maintaining a regulatory program that includes, or effectively achieves comparable results as the

features of the U.S. regulatory program described in paragraph (h)(6)(iii) of the rule. The Assistant Administrator may request the submission of additional supporting documentation or verification of statements made to support a comparability finding. If a harvesting nation's fishery does not receive a comparability finding during the renewal process, import restrictions will be applied.

#### *Import Restrictions*

If the Assistant Administrator denies or terminates a comparability finding for a fishery, the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, will identify and prohibit the importation of fish and fish products into the United States from the harvesting nation caught or harvested in that fishery. Any such import prohibition will become effective 30 days after publication of the **Federal Register** notice announcing the comparability finding and shall only apply to fish and fish products caught or harvested in that fishery. Any import prohibition imposed under this rule will remain in effect until the harvesting nation reapplies and receives a comparability finding for that fishery.

#### *Duration of Import Restrictions and Removal of Import Restrictions*

NMFS, in consultation with the Department of State and the Office of the United States Trade Representative, will consult with harvesting nations that failed to receive a comparability finding for a fishery, provide the reasons for the denial, and encourage the harvesting nation to take corrective action and reapply for a comparability finding. A harvesting nation may, at any time, reapply for or request the reconsideration of a denied comparability finding for a fishery, and submit documentary evidence to the Assistant Administrator in support of such application or request. Upon issuance of a comparability finding and notification to the harvesting nation, the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, will publish notification of the removal of the import prohibitions for that fishery, effective on the date of publication in the **Federal Register**.

#### *Certification of Admissibility*

If fish or fish products are subject to import prohibitions from a harvesting nation's fishery, the Assistant Administrator, to avoid circumvention of or to facilitate enforcement of import prohibitions, may require and publish

in the **Federal Register** the requirement that the same or similar fish or fish products from the harvesting nation's exempt or export fisheries that are not subject to any import prohibitions (*i.e.*, those that have received a comparability finding) be accompanied by certification of admissibility or electronic equivalent filed through the National Marine Fisheries message set required in the International Trade Data System.

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

#### *Discretionary Review of Comparability Findings*

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

#### *Intermediary Nations*

To prevent any fish or fish products subject to import prohibitions authorized by this rule from being

imported into the United States from any intermediary nation, including a processing nation, NMFS includes provisions for intermediary nations. Under these provisions, NMFS will identify intermediary nations that may import, and re-export to the United States, fish and fish products from a fishery subject to an import prohibition applied under this rule and notify such nations of the fish and fish products for which NMFS has identified them. Such intermediary nations must in turn certify that it does not import such fish and fish products from a harvesting nation's fisheries that are subject to import prohibitions applied under this rule or that it has procedures to reliably certify that its exports of fish and fish products to the United States do not contain such fish or fish products caught or harvested in a fishery subject to an import prohibition. Those procedures can be implemented globally or on a shipment-by-shipment basis and could include, for example, prohibiting the import of the prohibited fish and fish products, prohibiting the export of such product to the United States, or maintaining a tracking and verification scheme and including certification of such scheme on a shipment-by-shipment basis. The steps that the Assistant Administrator and the intermediary nation must follow are detailed in the preamble to the proposed rule and the regulatory text below and are not repeated in this summary.

For an intermediary nation that NMFS has identified as a nation that may import, and re-export to the United States, fish or fish products caught or harvested in a fishery subject to an import prohibition and that cannot certify that it does not import such fish or fish products caught or harvested in the fishery, such fish and fish products from that intermediary nation will not be imported into the United States, if the Assistant Administrator determines that the intermediary nation does not have procedures to reliably certify that exports of such fish and fish products from the intermediary nation to the United States do not contain fish or fish products caught or harvested in the fishery subject to the import prohibition. No fish or fish products caught or harvested in a fishery subject to an import prohibition under the rule may be imported into the United States from any intermediary nation. The Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, will publish a notice in the **Federal Register** announcing the prohibited fish and fish products exported from the

intermediary nation to the United States that are of the same species as, or similar to, fish or fish products subject to an import prohibition.

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

#### *Progress Report*

To review the harvesting nation's ongoing progress in developing and implementing its regulatory program for its export fisheries, NMFS will require progress reports every four years. The first report will be submitted two years prior to the end of the exemption period and then every four years thereafter, on or before July 31. In this report, the harvesting nation will present an update on actions taken over the previous two years to develop, adopt, and implement its regulatory program, as well as information on the performance of its export fisheries in reducing incidental mortality and serious injury of marine mammals. This progress report should detail the methods used to obtain the information contained in the progress report and should include a certification by the harvesting nation of its accuracy and authenticity. The report allows NMFS to monitor the harvesting nation's efforts in its export fisheries and to work closely with a harvesting nation to ensure they meet and continue to meet the conditions for a comparability finding.

#### *International Cooperation and Assistance*

Throughout implementation of this rule, NMFS will engage in consultations with harvesting nations. Consistent with existing authority under the MMPA (16 U.S.C. 1378), and contingent on annual appropriations, NMFS may provide assistance to harvesting nations to aid in compliance with this rule. Assistance activities may include cooperative research on marine mammal assessments (e.g., designing vessel

surveys and fishery observer programs) and development of techniques or technology to reduce incidental mortality and serious injury (e.g., fishing gear modifications), as well as efforts to improve governance structures or enforcement capacity (e.g., training). NMFS would also facilitate, as appropriate, the voluntary transfer of appropriate technology on mutually-agreed terms to assist a harvesting nation in qualifying its export fishery for a comparability finding and in designing and implementing appropriate fish harvesting methods that minimize the incidental mortality and serious injury of marine mammals.

#### *Emergency Rulemaking*

During the five-year interim exemption, NMFS 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. Under this rule, "U.S. regulatory program" is defined as the regulatory program governing the incidental mortality and serious injury of marine mammals in the course of commercial fishing operations as specified in the MMPA and its implementing regulations. The U.S. regulatory program at section 118(g) of the MMPA (16 U.S.C. 1387(g)) contains provisions for emergency rulemaking for U.S. domestic fisheries that are having or likely to have an immediate and significant adverse impact on a marine mammal stock. NMFS would likewise consider an emergency rulemaking for an export or exempt fishery having or likely to have an immediate and significant adverse impact on a marine mammal stock interacting with that fishery. Before NMFS initiates an emergency rulemaking, NMFS would consult with the nation with the relevant fishery and urge it to take measures to reduce the incidental mortality and serious injury and effectively mitigate such immediate and significant adverse impact on the marine mammal stock(s). If the harvesting nation fails to take measures to reduce the incidental mortality and serious injury and mitigate such immediate and significant adverse impact, NMFS would consider prohibiting the imports of fish and fish products from the relevant export or exempt fishery through notice and comment rulemaking.

The emergency regulations or measures allow for timely treatment of cases where the usual process and timeframe could result in unacceptable risks to the affected marine mammal

stock or species. Logically, such risks would result either from very small populations where any incidental mortality could result in increased risk of extinction or larger populations with substantial mortality that could become very small populations within the timeframe taken by the standard management process; in either situation these cases represent an unacceptable ecological risk.

#### *Responses to Comments on the Proposed Rule*

NMFS received comments on the proposed rule from fishing industry groups, including fish importers, processors, and trade organizations, environmental non-governmental organizations (NGOs), private citizens, the Marine Mammal Commission, and foreign governments.

#### *General Comments*

NMFS received more than 92,000 comment letters and petitions from private citizens through environmental NGOs supporting procedures to implement the MMPA import provisions. Specifically, the majority of commenters expressed their support for the comparability finding process and the application of trade measures. NMFS received numerous comments asking the agency to adopt the strongest measures possible to reduce marine mammal bycatch to conserve these resources and level the playing field for U.S. fishermen. Several commenters supported NMFS holding other nations to the same rigorous and strict standards to which U.S. fishermen are subject.

Several comments received were not germane to this rulemaking and are not addressed in this section. These comments include actions outside the scope of the statutory mandate or actions covered under other rulemakings. Comments received are available on the Internet at <http://www.regulations.gov> under Docket ID NOAA-NMFS-2010-0098. In the following section, NMFS responds to the comments applicable to this rulemaking.

#### *Definitions*

*Comment 1:* Numerous commenters recommended expanding the definition of "Fish and Fish Products" to encompass all fish products including highly processed products and expressed concern that the proposed exclusion of highly processed product has the potential to exempt from this rule a significant portion of U.S. imports from, or worse encourage exporters to increase export of process product to evade compliance with the MMPA.



*Response:* NMFS disagrees that the proposed exemption would incentivize businesses to increase production of highly processed products over traditional product forms in order to circumvent the requirements of the rule. However, NMFS is modifying the rule to remove language excluding highly processed products from the definition of fish and fish products. The rationale for doing so is provided below in “Changes From Proposed Action”. If a fishery of a harvesting nation fails to receive a comparability finding for a fishery, fish and fish products caught or harvested in that fishery will be subject to an import prohibition, including highly processed fish products containing fish caught or harvested in the fishery. This revision of the definition of fish and fish products to remove the exclusion for highly processed products also has implications for the provision of this rule that allows the Assistant Administrator to require that the same or similar fish and fish products caught or harvested in another fishery of the harvesting nation and not subject to the prohibition be accompanied by a certification of admissibility and therefore has clarified that provision as described “Changes to the Proposed Action” below.

*Comment 2:* Several commenters disagree that the MMPA authorizes NMFS to exempt certain fish products from this regulation. Further, exempting this subcategory of fish products runs contrary to the MMPA’s accompanying regulations under 50 CFR 216.24 for “tuna product” which explicitly include processed items such as “fish pastes,” and “fish balls, cakes, and puddings.”

*Response:* For the reasons explained in the “Changes from Proposed Action” section, NMFS is modifying the rule to remove language that would exclude highly processed products from the definition of fish and fish products.

*Comment 3:* One commenter suggested that the term “remote” be clarified within the definition of an exempt fishery.

*Response:* NMFS believes no further clarification of the term “remote” is needed. The definition clearly indicates that a commercial fishing operation with a remote likelihood of causing incidental mortality and serious injury of marine mammals is one that collectively with other foreign fisheries exporting fish and fish products to the United States causes the annual removal of:

- (1) Ten percent or less of any marine mammal stock’s bycatch limit; or
- (2) More than 10 percent of any marine mammal stock’s bycatch limit,

yet that fishery by itself removes 1 percent or less of that stock’s bycatch limit annually.

*Comment 4:* One commenter questioned why NMFS chose only two categories of fisheries, exempt and export, as opposed to the 3 categories of fisheries applicable to U.S. fisheries, stating that three categories of fisheries would allow the fisheries with the highest marine mammal bycatch to be excluded from comparability findings by the harvesting nations until those fisheries could be brought into compliance with the comparability finding requirements.

*Response:* Having only two categories simplifies and streamlines the development of the List of Foreign Fisheries. The regulatory program governing U.S. fisheries requires management action for Category 1 and 2 fisheries; this simplified approach is more practical for a harvesting nation developing regulatory programs to reduce marine mammal bycatch in its export fisheries. Nonetheless, nothing prevents the harvesting nation from prioritizing the export fisheries to which it will devote resources in developing regulatory programs for reducing marine mammal bycatch. Export fisheries not included in the application for a comparability finding and not governed by the harvesting nation’s regulatory program will not receive a comparability finding and fish and fish products from those fisheries will be subject to import prohibitions.

*Comment 5:* One commenter questioned whether the rule would address the bycatch of marine mammals that migrate from waters under the jurisdiction of one nation into U.S. waters?

*Response:* Yes, and NMFS has specifically defined “transboundary stock” as a marine mammal stock occurring in the: (1) Exclusive economic zones or territorial sea of the United States and one or more other States; or (2) Exclusive economic zone or territorial sea of the United States and on the high seas. A harvesting nation with bycatch of a transboundary stock in an export fishery must develop a regulatory program comparable in effectiveness to the U.S. regulatory program for that transboundary stock.

*Comment 6:* One commenter stated it is unclear why NMFS distinguishes between U.S. transboundary and non-transboundary stocks; and there is no reason NMFS should limit the application of this rule to U.S. stocks.

*Response:* NMFS is not limiting the application of this rule to U.S. stocks. Because NMFS has developed regulatory measures for its domestic

commercial fisheries with incidental mortality and serious injury of some transboundary stocks and shares management authority for such stocks with other harvesting nations, NMFS emphasizes the consideration of transboundary stocks in the comparability finding conditions in the rule. Because NMFS shares conservation and management for these stocks with other nations, there is a greater need for a harvesting nation to demonstrate that it has implemented a regulatory program for its export fisheries (whether operating in its EEZ, territorial sea, or on the high seas) that is comparable in effectiveness to the U.S. regulatory program for such transboundary stocks, especially for transboundary stocks governed by specific requirements of the U.S. regulatory program, including marine mammal take reduction plans.

*Comment 7:* The Marine Mammal Commission recommended that NMFS include a definition of the term “ocean mammals” and that it be defined as equivalent to the statutory definition of the term “marine mammal.”

*Response:* For this rule, NMFS considers the terms “marine mammal” and “ocean mammal” to be equivalent.

*Comment 8:* A commenter noted that NMFS defines a commercial fishing operation to include aquaculture activities that interact with or occur in marine mammal habitat (50 CFR 216.24(h)(3)(i)(A)). The commenter recommended that NMFS clearly state the commercial aquaculture operations that would not be: Impacted by the final rule, included in the List of Foreign Fisheries and required to have a comparability finding to export to the U.S.

*Response:* This rule applies to aquaculture facilities sited in marine mammal habitat that have or may incidentally or intentionally kill and seriously injure marine mammals. NMFS does not intend to include aquaculture facilities that are freshwater-based or are not located in marine mammal habitat.

#### *Application of This Rule*

*Comment 9:* One commenter asserts the purpose of this rule is to punish nations that continue to hunt whales while another urged NMFS to prohibit importation of fish products from Japan until they ceased their drive fisheries for dolphins.

*Response:* NMFS disagrees. This rule does not apply to commercial and subsistence whaling or drive fisheries for marine mammals. Subsistence and commercial whaling are governed under the other provisions of the MMPA, other U.S. laws, and the International



Convention for the Regulation of Whaling.

*Comment 10:* One nation asserted the U.S. does not have the authority to regulate marine mammals within another nation's coastal waters, except for those species included under an international management framework such as the Convention on International Trade in Endangered Species (CITES).

*Response:* NMFS is not attempting to regulate marine mammals within a nation's coastal waters. NMFS is prohibiting the importation of fish and fish products into the United States from a fishery that has not been issued comparability findings and establishing criteria for such comparability finding. The rule does require an export fishery operating under the jurisdiction of a harvesting nation within its EEZ (or the equivalent) or territorial sea, to develop and maintain a regulatory program comparable in effectiveness to the U.S. regulatory program in order to obtain a comparability finding. The harvesting nation must develop and implement such a regulatory program only if it wishes to export fish and fish products to the United States.

*Comment 11:* One nation commented that the rule should not be applied to all marine mammals, stating the proposed rule does not take into account that many marine mammal species are abundant and that incidental injury or mortality of some species will have little or no effect on their respective populations and recommended that NMFS list the specific species of concern, rather than all marine mammals generally.

*Response:* NMFS disagrees. The MMPA requires that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. This goal includes all marine mammals and does not differentiate based on level of abundance. The MMPA does prioritize action for those stocks defined as "strategic," and the agency hopes that nations would also prioritize action for threatened and endangered species and those for which bycatch is unsustainable.

#### *Aquaculture*

*Comment 12:* Numerous commenters supported inclusion of aquaculture operations under the rule. The Marine Mammal Commission recommended that foreign aquaculture operations should be subject to the import provisions under the MMPA recognizing that aquaculture operations

interact with marine mammals in ways that can result in intentional or incidental mortality or serious injury. Additionally, several commenters called for an immediate investigation into lethal practices (e.g. intentional shooting of depredating seals) by the global salmon aquaculture industry, while others recommended an immediate import prohibition of salmon harvested by aquaculture operations that engage in such practices, stating it was a violation of the MMPA to import the product.

*Response:* The regulatory definition of a commercial fishing operation includes aquaculture, and NMFS will classify foreign aquaculture operations considering both intentional and incidental mortality and serious injury according to the requirements of this rule. When making comparability finding determinations for farmed salmon imports, NMFS will evaluate measures to reduce interactions, prohibit intentional, and reduce incidental mortality and serious injury of marine mammals in foreign aquaculture operations as compared to the U.S. standards for aquaculture facilities (e.g., use of predator nets and the prohibition on intentional killing).

*Comment 13:* One nation asked what standard or measures the United States has implemented in its aquaculture facilities to avoid marine mammal bycatch, and what marine mammal mortality and serious injury rates are associated with U.S. aquaculture operations.

*Response:* U.S. marine aquaculture fisheries are currently Category III fisheries under the MMPA and are regulated under the regulations implementing the MMPA section 118 provisions governing the incidental take of marine mammals in all U.S. commercial fishing operations. These regulations also include provisions that prohibit the intentional killing and serious injury of marine mammals in commercial fishing operations. No U.S. marine aquaculture fishery is currently included under any marine mammal take reduction plan which would specify additional regulations specific to that particular aquaculture fishery (e.g., California white seabass enhancement net pens). Annual estimates of marine mammal incidental mortality and serious injury resulting from aquaculture operations, when they are reported, are published in the annual marine mammal stock assessment reports.

#### *Five-Year Interim Exemption Period*

*Comment 14:* The majority of commenters, including private citizens

and environmental NGOs, opposed the five-year exemption period, stating several species may become extinct within that timeframe, that nations have had a 43-year de facto exemption, that some nations and fisheries can comply in a shorter timeframe, and that an exemption period of that length weakens the incentive for a nation to develop the necessary infrastructure, much less the political and economic will to satisfy the rule's requirements. Further, some commenters assert that the MMPA does not authorize such an exemption. These commenters recommended exemption periods of 1 to 3 years, immediate implementation of a prohibition on intentional killing and serious injury, or adoption of emergency regulations for species of particular conservation concern. Numerous commenters stated that if the five-year exemption period is retained, provisions should be put in place requiring harvesting nations to demonstrate in the interim that they are making a good faith effort to comply with the rule.

*Response:* NMFS will retain the five-year interim exemption because we believe that this exemption is needed to provide nations with adequate time to assess marine mammal stocks, estimate bycatch, and develop regulatory programs to mitigate that bycatch. The progress report is NMFS' means to determine if nations are making a good faith effort to comply with the rule. Moreover, nothing in the rule prevents a nation from implementing a bycatch reduction regulatory program and seeking a comparability finding during the five-year exemption period.

*Comment 15:* The Marine Mammal Commission asserts the MMPA import provision is an ongoing, long-standing statutory requirement, and it does not see a legal basis for deferring implementation. To the extent that any delay can be countenanced, it should be kept to the absolute minimum necessary to secure the required information from exporting countries. The Marine Mammal Commission recommends that NMFS provide additional justification, including a legal analysis explaining why imports of fish and fish products need not be banned until the exporting countries provide the "reasonable proof" required under section 101(a)(2)(A), if it decides to defer implementation as proposed. NMFS also should explain why a shorter phase-in is not possible.

*Response:* NMFS has concluded that a five-year exemption period is permissible and has provided the rationale for such in the above response to comment 14 and the preamble to the

proposed rule (See August 11, 2015 80 FR 48172).

*Comment 16:* The Marine Mammal Commission recommended that NMFS establish a shorter exemption period for fisheries that (1) have bycatch of marine mammals that are critically endangered; (2) involve marine mammal stocks for which ample information already exists on their status and bycatch levels and for which monitoring and bycatch mitigation measures are already well developed or could be quickly established; or (3) are already subject to RFMO measures for monitoring and mitigating marine mammal bycatch. If NMFS proceeds to allow a five-year exemption period, the Marine Mammal Commission recommended that harvesting nations be required to take immediate steps once the final List of Foreign Fisheries is published to institute programs that require all fishermen engaged in fisheries that might take marine mammals to register with the appropriate national agency to identify their target catch and gear type, to report all marine mammals taken, and to carry observers when asked to do so.

*Response:* The intent of the exemption period is to provide nations with the time needed to assess marine mammal stocks and estimate and mitigate bycatch in their export fisheries. To meet these objectives nations will have to implement registries, and monitoring programs of the type recommended by the Marine Mammal Commission. NMFS believes the progress report will provide critical information on a nation's actions toward developing its regulatory program so it might receive a comparability finding for its fisheries.

*Comment 17:* Several commenters including the Marine Mammal Commission recommended that in lieu of decreasing the timeframe for the five-year exemption period, NMFS consider implementing an emergency import ban to protect species facing "significant adverse" impacts during the delay period. The Marine Mammal Commission noted the domestic interim exemption included an emergency rulemaking provision that directed NMFS to issue regulations "to prevent to the maximum extent practicable any further taking" of marine mammals in a fishery if information being collected under the interim program indicated that incidental taking was having "an immediate and significant adverse impact" on any marine mammal stock.

*Response:* NMFS acknowledges that the domestic interim exemption included emergency provisions, and believes the adoption of such measures would add a layer of precaution. The

emergency provisions are included within the U.S. standards to ensure that the United States can move quickly to engender protections for highly at-risk species. See the preamble for the discussion of emergency rulemaking during the interim exemption period and comparability finding period.

*Comment 18:* Processors and nations supported the exemption period stating that the majority of the harvesting nations exporting fish and fish products to the United States are not as advanced as the U.S. in developing, implementing, and enforcing fishery or protected species conservation and management rules; and in cases where data deficiencies exist, five years will likely be too short of a period to develop and apply rules for flag nation fleets and/or for fishing operations within an EEZ. These commenters recommended a ten-year exemption period, with one-year renewable extensions to the initial exemption period or flexibility in the timeline to avoid a disruption in trade that could arise if foreign fisheries fail to receive a comparability finding simply because they or even NMFS could not fulfill all the provisions of the rule within a non-extendable timeline.

*Response:* NMFS disagrees that the exemption period should be increased or have one-year renewable extensions. NMFS considers the five-year exemption period to be sufficient time for nations to develop regulatory programs for their fisheries subject to this rule.

#### *United States Regulatory Program*

*Comment 19:* Two nations requested information on incidental bycatch of marine mammals taken in U.S. fisheries and stock abundance estimates. One nation stated that it is important that NMFS provide all harvesting nations with sufficient information and suggested that NMFS first provide the contents of existing regulations and rules for conservation and management of marine mammals that the U.S. has already implemented as well as existing bycatch data.

*Response:* This information is readily available. Information on marine mammal bycatch and the U.S. regulatory program and stock assessments can be found at [http://www.nmfs.noaa.gov/pr/interactions/trt/marine\\_mammal\\_take\\_reduction\\_program.html](http://www.nmfs.noaa.gov/pr/interactions/trt/marine_mammal_take_reduction_program.html) and <http://www.nmfs.noaa.gov/pr/sars/species.htm>, respectively. In addition, when NMFS provides the List of Foreign Fisheries and the harvesting nation's export and exempt fisheries, NMFS will also provide harvesting nations with general information on the

regulatory program governing the incidental mortality and serious injury of marine mammals in the course of commercial fisheries and specific regulations applicable to their fisheries.

*Comment 20:* Several commenters recommended that NMFS adopt a bycatch standard that fully mirrors the U.S. standard in the MMPA including incorporating the MMPA's goal of reducing incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and injury rate (ZMRG).

*Response:* The rule defines U.S. regulatory program as the regulatory program governing the incidental mortality and serious injury of marine mammals in the course of commercial fishing operations as specified in the MMPA and its implementing regulations. NMFS is not ignoring the ZMRG standard in the rule; it has prioritized reducing bycatch to sustainable levels (e.g. below the bycatch limit) and will consider the application of the ZMRG, or metrics/ measures comparable in effectiveness to ZMRG, to foreign fisheries providing the same flexibility to foreign fisheries as it has applied to analogous U.S. fisheries that have not met ZMRG.

*Comment 21:* One commenter stated that, for marine mammal species that are listed as threatened or endangered under the ESA, NMFS may only authorize incidental mortality and serious injury from all commercial fisheries that have a "negligible impact" on the listed stocks. NMFS has not addressed section 101(a)(5)(E) or the negligible impact standard in its proposed rule.

*Response:* Section 101(a)(5)(E) is one of the links to the ESA to ensure threatened and endangered species are adequately addressed in fisheries. One of the requirements in section 101(a)(5)(E) is to comply with monitoring and take reduction plans, which are the same elements included in the comparability finding process for this rule.

#### *List of Foreign Fisheries*

*Comment 22:* Several commenters asked whether foreign fishery classifications would apply to a nation's entire fishery based on species, or whether there would be sub-classifications based on specific geographic areas and frequency of marine mammal interactions.

*Response:* NMFS intends to work with harvesting nations to adopt classifications of fisheries that, to the extent practicable, reflect gear type, geographic or management areas, and

frequency of interaction when warranted.

*Comment 23:* One commenter stated the regulatory language must be clear that imports of fish and fish products from a commercial fishing operation not on the List of Foreign Fisheries and not covered under this regulatory process must be banned.

*Response:* NMFS disagrees. A fishery must be classified as export or exempt. The nation must then apply for and receive a comparability finding for those fisheries otherwise the fish and fish products from that fishery cannot be imported into the United States.

*Comment 24:* Several commenters raised concern and sought clarification on the discretionary reasoning and factors that the Assistant Administrator may use to classify “exempt” or “export” fisheries absent adequate scientific information provided by the harvesting nation about the frequency and/or magnitude of incidental mortalities. Another commenter opposes the approach of classification by analogy, asserting the diverse range of gear types and configurations and differences in marine mammal distribution and behavior in various geographic locations. The Marine Mammal Commission recommended that, if NMFS finds that available information is not adequate to determine with sufficient reliability the frequency with which a foreign fishery takes marine mammals and from what stocks, the List of Foreign Fisheries identify that fishery as an export fishery until such information becomes available.

*Response:* To classify fisheries as exempt or export fisheries in the absence of information from the harvesting nation, NMFS will evaluate information concerning factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, the species and distribution of marine mammals in the area, and will classify fisheries by analogy with similar U.S. or foreign fisheries and gear types interacting with similar marine mammal stocks. Where no analogous fishery or other reliable information exists demonstrating that the likelihood of incidental mortality and serious injury is remote, NMFS will classify the commercial fishing operation as an export fishery until such time as the harvesting nation provides the reliable information to properly classify the fishery or, in the course of preparing the List of Foreign Fisheries, such information becomes readily available to the Assistant Administrator.

*Comment 25:* One commenter raised a concern about using readily available information stating NMFS should not reward a harvesting nation with a finding of exemption if that nation has not made a good-faith effort to support such a finding. The Marine Mammal Commission was troubled that the rule could be interpreted as placing the onus on NMFS to gather the necessary information.

*Response:* Consistent with section 101(a)(2)(A) of the MMPA, this rule places the burden of proof on the harvesting nation to supply the information to classify its fisheries. However, through the implementation of other regulations and participation in RFMOs, NMFS may have readily available information that it can use to supplement its evaluation and classification.

*Comment 26:* One commenter sought guidance on whether depredation by marine mammals on fish such as albacore captured on longlines can be regarded as interactions under the proposed rule.

*Response:* This rule addresses mortality and injury of marine mammals in the course of commercial fishing operations. Depredation in and of itself will not be considered for the purposes of this rule unless the outcome of that depredation is mortality or serious injury.

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

*Comment 27:* Several commenters opposed having the comparability finding being valid for four years noting that, in the interim, changes in fishing operations, regulations, and enforcement can all affect compliance with the conditions of a comparability finding. Some commenters suggested that comparability findings be renewed annually, others suggested that NMFS shorten the time that comparability findings are valid, to more closely align with the process to issue permits for the incidental take of threatened and endangered species by domestic commercial fisheries (e.g. three years). While no commenters supported issuing comparability findings lasting longer than 4 years, some stated the regulation should explicitly state that the Administrator’s discretion on timing may not extend beyond 4 years.

*Response:* NMFS maintains that four years is an appropriate duration for a valid comparability finding. The rule provides adequate oversight during the time when a comparability finding is in effect by requiring harvesting nations to submit a progress report half way through the four-year period that

comparability findings are in effect, and by providing the Assistant Administrator with the discretion to reconsider, at any time throughout the four year effective period, a comparability finding based on new information.

#### *Intentional Killing and Serious Injury*

*Comment 28:* The majority of commenters supported the prohibition on intentional mortality or serious injury of marine mammals in foreign commercial fishing operations as a condition for receiving a comparability finding. Several commenters noted that because the MMPA prohibits “the intentional lethal take of any marine mammal” by domestic commercial fishing operations, this is the clearest standard applicable to domestic commercial fisheries and as such must be applied to foreign commercial fisheries exporting fish and fish products to the United States.

*Response:* NMFS agrees that the rule should cover intentional mortality and serious injury and has retained, from the proposed rule, the provisions concerning intentional mortality and serious injury of marine mammals in the final rule.

*Comment 29:* Several commenters noted that when Congress granted U.S. fisheries an interim exemption from MMPA’s take ban in 1988, Congress *maintained* a strict prohibition on the “intentional lethal taking” of (a) any Steller sea lion, (b) any cetacean, and (c) any marine mammals from a depleted stock (i.e., ESA-listed species or stocks below Optimum Sustainable Population). 16 U.S.C. 1383a(b)(2)(C). Therefore, these commenters were of the view that, if NMFS adopts an exemption period, the agency should institute an analogous ban on intentional take comparable to that in the interim exemption during the exemption period.

*Response:* NMFS acknowledges that the interim exemption under the MMPA included a ban on the intentional lethal taking and that ban did not include all species or stocks of marine mammals due to species-specific conservation concerns relative to U.S. commercial fisheries at the time. The species-specific intentional lethal taking prohibition of the interim exemption does not include all marine mammals. Requiring harvesting nations to implement immediately a prohibition on the intentional mortality and serious injury on all or only some marine mammals, creates two problems. First, the application of such a piece-meal prohibition on intentional lethal take may not realize the same conservation benefit internationally that it did in the

United States. For example, data indicate that much of the intentional mortality and serious injury of pinnipeds involves species other than Steller sea lions, which were included in the interim exemption prohibition. Second, it is not feasible to require such a prohibition immediately as nations need sufficient time to institute decrees, laws, or regulations to prohibit the intentional mortality and serious injury of marine mammals.

*Comment 30:* The Marine Mammal Commission and other commenters expressed concern with the option that would allow imports of fish and fish products to the United States from fisheries in which it is permissible to kill marine mammals intentionally, as long as no marine mammals were killed or seriously injured in catching or raising the particular fish being exported to the United States. The Marine Mammal Commission stated that this is inconsistent with U.S. domestic standards for aquaculture and other fisheries, and provides a significant loophole for aquaculture operations around the world to circumvent the rule's requirements. It also presents significant enforcement problems, both in terms of monitoring whether any marine mammals were intentionally killed or injured in raising or harvesting the fish products and in differentiating seafood that can be imported from that which is banned. One commenter stated the statute does not explicitly authorize NMFS to create such a bifurcated regime, and there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits. The Marine Mammal Commission and others recommended that NMFS require an outright prohibition on intentional mortality and serious injury of marine mammals in the course of commercial fishing as a condition to be met before any fishery, including an exempt fishery, could receive a comparability finding, and that the alternative provided by the second option be dropped.

*Response:* For implementation and enforcement purposes, NMFS' preference is that a nation demonstrate it has prohibited the intentional mortality or serious injury of marine mammals in the course of commercial fishing operations in exempt and export fisheries unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger. Harvesting nations may implement this provision by either instituting a law, regulation, or licensure or permit condition applicable

to its export and exempt fisheries that prohibits the intentional killing or serious injury of marine mammals in the course of commercial fishing operations. Section 102(c)(3) only applies to imports of fish caught in a manner proscribed by the Secretary of Commerce. The alternative to the outright prohibition requires a harvesting nation to submit documentary evidence demonstrating that it has procedures to reliably certify that its exports of fish and fish products to the United States are not the product of the intentional killing or serious injury of marine mammals. NMFS expects that such procedures would include certification programs and tracking and verification schemes. For NMFS to consider that such a scheme can "reliably" certify their claims, the documentary evidence submitted by a harvesting nation must include tracking, verification, and chain of custody procedures ensuring, throughout the entire chain of commerce from the farms, to the packers, to the distributors, and finally to the ultimate importer — the ability to consistently segregate fish caught without intentional mortality and serious injury of marine mammals. This mirrors traceability requirements for seafood imports as described in the proposed seafood traceability implementing regulations (81 FR 6210, February 5, 2016).

#### *Stock Assessments*

*Comment 31:* Several nations raised concerns that for some species of marine mammals (such as rare species or species with wide distribution ranges), abundance estimates may be inadequate or lacking and that requiring governments to undertake such assessments is burdensome. One nation recommended that NMFS provide a specific treatment when data for marine mammals is not available and where the generation of such data would entail high and disproportionate costs.

*Response:* NMFS will consider all data, including abundance estimates, provided in a harvesting nation's application for a comparability finding for an export fish in light of the U.S. implementation of its stock assessment program for the same or similar marine mammal stocks and its bycatch mitigation measures for similar fisheries.

#### *Bycatch Limits*

*Comment 32:* Several nations requested clarification on the calculation of bycatch limits. One nation asked how the bycatch limit compares to thresholds based on the scientific advice provided by the

International Council for the Exploration of the Seas (ICES) and the Institute of Marine Research. Other commenters asked for examples of what constitutes a comparable equation. Another commenter recommended that NMFS rigorously define the standards applicable to determining whether an equation or bycatch estimation method is "comparable" including by stipulating appropriate and precautionary, recovery factors in the PBR equation.

*Response:* In addition to the U.S. Potential Biological Removal (PBR) level, there are several bycatch limit calculations that could be considered comparable formulae; these include the Catch Limit Algorithm and the conservation objective of the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS). For example, the conservation objective for harbor porpoise set under ASCOBANS calls for all anthropogenic mortality to be reduced to less than 1.7% of the best available estimate of abundance. ASCOBANS has subsequently reduced that further to less than 1% of the best available estimate of abundance.

PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. The PBR level is the product of the following factor: (a) The minimum population estimate of the stock; (b) one-half the maximum theoretical or estimated net productivity rate of the stock at a small population size; and (c) a recovery factor of between 0.1 and 1.0. The following guidelines apply to PBR elements:

- Minimum population estimate or  $N_{min}$  is defined as the lower 20th percentile of a log-normal distribution according to  $N_{min} = N / \exp(0.842 * (\ln(1 + CV(N)^2))^{1/2})$ , where  $CV(N)$  is the coefficient of variation of the stock's abundance.
- Default values of the maximum theoretical or estimated net productivity or  $R_{max}$  are used when stock-specific values are not available: 0.12 (pinnipeds and sea otters) and 0.04 (cetaceans and manatees).
- Recovery Factor or  $F_r$  is set at 0.1 for endangered species and 0.5 when stocks are depleted, threatened, or of unknown status. When stocks are within OSP or are increasing and incidental mortality has not been increasing, other values may be used up to 1.

NMFS does not need to go further by stipulating specific recovery factors as

there is ample guidance and the definition of bycatch limit, as we have stated in the proposed rule, notes a comparable equation for a bycatch limit is one that incorporates scientific uncertainty about the population estimate and trend and results in sustainable levels of incidental mortality and serious injury while still allowing the marine mammal stock to grow or recover.

*Comment 33:* One nation stated it is not clear how NMFS determines bycatch limits for incidental catches of marine mammals in individual fisheries given the fact that they have different stock development characteristics, feeding patterns, reproductive abilities, etc. The nation also asked from where the figure of 10 percent and below incidental catch level, as an objective, was taken.

*Response:* NMFS has conducted a series of workshops starting in 1994 to develop guidelines that may be consistently applied nationally to assess marine mammal stocks. These workshops resulted in Guidelines for Assessing Marine Mammal Stocks (GAMMS) and address the elements of PBR, abundance estimates, stock identification, etc. These guidelines and workshop reports can be found at <http://www.nmfs.noaa.gov/pr/sars/guidelines.htm>.

The MMPA includes a goal for U.S. domestic fisheries to reduce the mortality and serious injury levels incidental to commercial fishing to “insignificant levels approaching a zero mortality and serious injury rate.” NMFS has defined this insignificant threshold as 10% of the PBR level for a given stock. Ten percent of PBR is a level of mortality and serious injury incidental to commercial fisheries that, by itself, would allow a population to equilibrate to a level within 90 percent of its carrying capacity and would be considered insignificant to the population.

*Comment 34:* One commenter was concerned that NMFS only requires export fisheries to reduce their mortality and serious injury below the bycatch limit, while allowing non-export fisheries causing bycatch of the same stock to exceed the bycatch limit. They recommended that NMFS require harvesting nations to demonstrate that, for any stock that interacts with an export fishery, all bycatch of that stock (both from export and non-export fisheries) is cumulatively below the bycatch limit.

*Response:* Section 101(a)(2) of the MMPA only provides the U.S. authority to require fish imported into the United States to meet U.S. standards;

consequently NMFS has no authority to address non-export fisheries. Even so, NMFS will encourage harvesting nations to reduce cumulative bycatch by export, exempt, and non-export fisheries to levels below the bycatch limits for marine mammal stocks killed or seriously injured in such fisheries. We hope that through the development of effective bycatch mitigation measures and capacity building efforts, there will be the collateral benefit of bycatch reduction in non-export fisheries.

*Comment 35:* Several commenters opposed the “cumulative exceedance exemption” which allows a harvesting nation’s export fisheries to export fish to the U.S. when the cumulative incidental mortality or serious injury of exporting fisheries exceeds the bycatch limit for a marine mammal stock or stocks provided the harvesting nation demonstrates that the portion of incidental marine mammal mortality or serious injury for which the exporting fishery is responsible is at a level that, if the other export fisheries of that nation interacting with the same marine mammal stock or stocks were at the same level, would not result in a cumulative mortality or serious injury in excess of the bycatch limit for that stock or stocks. Commenters in opposition noted this exception is not part of the U.S. regulatory program, does not ensure that a harvesting nation’s mortality and serious injury level is below a marine mammal stock’s bycatch limit or approaching ZMRG, and would not meet the goal of the MMPA to ensure that marine mammal stocks meet their optimum sustainable population. They further maintained that the exemption is complicated and will likely confuse nations trying to comply with this rule.

*Response:* NMFS disagrees. NMFS adopted this approach to encourage compliance with the rule and avoid impacting export fisheries with low bycatch, while allowing nations to focus resources on fisheries with the highest bycatch. This is similar to the U.S. marine mammal take reduction program that prioritizes increased regulation of fisheries with high bycatch rather than fisheries that contribute little to the cumulative estimated bycatch.

#### *Comparable in Effectiveness*

*Comment 36:* Nations, industry, and environmental NGOs suggested that NMFS must either define what will be deemed comparable to U.S. standards or provide more detail and specificity on the criteria that will be used to determine “comparable in effectiveness”. Some commenters asserted that because “comparable in

effectiveness” is vague, without establishing minimum standards that all nations must meet, it will be difficult for the agency to make consistent and objective comparability determinations. By adopting such a vague standard, the agency greatly reduces transparency and accountability to the public, making it difficult to ascertain how and why the agency made a particular comparability determination. Commenters urge NMFS to provide specific examples within the rule of alternative programs that it would find “comparable.”

*Response:* In using the terms “comparable in effectiveness” NMFS 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 program that is completely different but achieves the same results. For example, if a particular fishery with high bycatch switches to non-entangling gear and can demonstrate that it has virtually eliminated its bycatch, those results can be considered comparable in effectiveness. Likewise, if a nation chooses to eliminate its bycatch by implementing time/area closures and can demonstrate the effectiveness of such closures, that regulatory program may be considered comparable in effectiveness. When making this determination, NMFS is evaluating, in lieu of implementing all conditions (e.g., stock assessments and bycatch limits), a harvesting nation’s implementation of bycatch mitigation measures that will result in clear and significant reductions.

*Comment 37:* One commenter stated that to properly ensure that a harvesting nation’s regulatory scheme is comparable to the U.S. regulatory program, a comparability finding should include a review of all sources of human-caused mortality and serious injury under a harvesting nation’s jurisdiction including all of its fisheries, not only those fisheries planning to export to the U.S.

*Response:* NMFS disagrees. Section 101 (a)(2) neither gives NMFS the legal authority to require nations to submit data on all human-caused mortality as a condition for a comparability finding nor does it authorize NMFS to regulate such mortality; see response to Comment 34.

*Comment 38:* One commenter supported the approach outlined in Alternative 3 of the Environmental Assessment requiring countries to implement specific regulatory measures required of U.S. commercial fishing operations as the result of a Take

Reduction Plan's implementing regulations, stating such an approach better meets the requirements of the MMPA.

*Response:* NMFS disagrees. Focusing only on those export fisheries for which NMFS has implemented specific regulatory requirements under a Take Reduction Plan would exclude many foreign fisheries from this regulation, permitting bycatch to continue, and providing no means to compel these fisheries to assess and reduce their bycatch.

*Comment 39:* The Marine Mammal Commission recommends that NMFS provide additional details on how it would make determinations as to whether U.S. and foreign fisheries are analogous, and that similarities in the taxa, behavior, and status of the marine mammals subject to taking be one of the considerations.

*Response:* Due to the highly variable nature of commercial fisheries and the marine mammals species with which they interact, NMFS cannot be rigid or overly prescriptive in its methodology for identifying analogous fisheries. To consider a fishery analogous, NMFS will use the best available information when considering the gear type, target species, and taxa of the marine mammal stocks incidentally killed and seriously injured.

#### High Seas Fisheries

*Comment 40:* For fisheries operating on the high seas, one of the conditions for a comparability finding is that a harvesting nation must demonstrate how its export fisheries implement both conservation and management and data requirements of any international agreement "to which the United States is a party." One commenter stated it is unclear why NMFS only requires compliance with agreements to which the United States is a party, as opposed to broadly requiring nations to comply with any international agreement that is applicable to that fishery.

*Response:* When fishing on the high seas, U.S. fishermen are required to comply with international measures to conserve and manage species of living marine resources recognized by the United States, pursuant to the High Seas Fishing Compliance Act (HSFCA) (16 U.S.C. 5505(1)). The United States participates in the negotiation and adoption of such measures. For export fisheries subject to measures adopted by RFMOs of which the United States is not a member, or under international agreements to which the United States is not a party, NMFS will still evaluate the harvesting nation's implementation of any conservation and management

measures adopted under that intergovernmental agreement or by that RFMO as well as any other measures adopted by a harvesting nation that constitute its regulatory program governing its high seas export fisheries interacting with marine mammals. NMFS will then determine whether this regulatory program is comparable in effectiveness to the U.S. regulatory program for similar fisheries interacting with similar stocks.

*Comment 41:* Another commenter noted that the standards for transboundary and non-transboundary stocks appear to be identical, and thus without further detail, it is unclear to the reader why NMFS is separating them. A second condition that an export fishery operating on the high seas must meet is implementation in the export fishery of: (a) With respect to any transboundary stock interacting with the export fishery, any measures to reduce the incidental mortality and serious injury of that stock that the United States requires its domestic fisheries to take with respect to that transboundary stock; and (b) With respect to any other marine mammal stocks interacting with the export fishery while operating on the high seas, any measures to reduce incidental mortality and serious injury that the United States requires its domestic fisheries to take with respect to that marine mammal stock when they are operating on the high seas.

*Response:* These requirements target situations where the United States has adopted regulatory measures through a marine mammal take reduction plan governing U.S. vessels participating in high seas fisheries to reduce incidental mortality and serious injury of a transboundary stock. While the United States would generally attempt to advance such measures for adoption by the intergovernmental agreement or RFMO, there may be situations where the U.S. has implemented regulatory measures for transboundary stocks that are more restrictive than existing RFMO measures or where measures have not been adopted by the relevant international body or RFMO, for high seas fisheries that interact with transboundary stocks. A harvesting nation would be expected to implement a regulatory program for such stocks that is comparable in effectiveness to the U.S. regulatory program for its vessels operating on the high seas or the U.S. EEZ or territorial sea, including any relevant RFMO measures that the U.S. is applying to its fisheries. If the U.S. regulatory program includes measures prescribed for the high seas and the U.S. EEZ or territorial sea to reduce the incidental mortality or serious injury of

transboundary stocks, and such stocks frequent both the high seas and the harvesting nation's EEZ or territorial sea, the harvesting nation must have a regulatory program applicable to both areas that is comparable in effectiveness to the U.S. regulatory program including any marine mammal take reduction plan measures.

*Comment 42:* A commenter noted the Western and Central Pacific Fisheries Commission, of which the United States is a member, has developed draft guidelines for the safe release of encircled animals in the purse seine fishery, and similar international guidelines are available for longline captured marine mammals. Given the role of the United States in developing and negotiating such arrangements, they recommended that the application of these guidelines should be considered sufficient under the proposed rule.

*Response:* NMFS acknowledges these guidelines but notes that RFMO conservation and management measures reflect multilateral agreements which may or may not meet U.S. standards for its domestic fisheries. The U.S. standard applicable to domestic fisheries under the MMPA prohibits the intentional encirclement of dolphins in the course of purse seine fishing; and there are additional regulatory requirements on longline fisheries to reduce the bycatch of false killer whales including longline gear requirements and longline prohibited areas (see <https://www.federalregister.gov/articles/2012/11/29/2012-28750/taking-of-marine-mammals-incident-to-commercial-fishing-operations-false-killer-whale-take>).

#### Progress Reports

*Comment 43:* The majority of commenters supported the submission of a progress report. One commenter suggested that the progress reports should be made available to the public to aid outside groups in evaluating the veracity of the report and the extent of compliance with the MMPA rule. An industry organization supported the initial progress report but questioned the value of continued progress reports for harvesting nations that have been determined to have a comparable regulatory system, especially with the requirement to reapply and be reassessed every four years. The Marine Mammal Commission recommended progress reports be required for all fisheries to ensure that the conditions that led to a comparability finding being issued remain in place and that each fishery continues to be comparable to U.S. standards, particularly in cases where complete information was not

provided by the harvesting nation. The Marine Mammal Commission further recommended that failure to meet research and monitoring standards by the time that the initial progress report is due should be a sufficient basis for implementing a trade ban immediately rather than allowing the full five-year exemption.

*Response:* NMFS maintains that progress reports provide the agency with an important means to track both the development and continued application of a regulatory program. While NMFS is not proposing to use the initial or subsequent progress report as the basis for imposing import restrictions, NMFS can use the information or lack thereof as grounds to initiate consultations to guide harvesting nations in the development of their regulatory program or urge improved compliance with the conditions of a comparability finding. For example, if NMFS provides a comparability finding to an export fishery that has just implemented or newly revised its regulations to meet reduce marine mammal incidental mortality or serious injury to levels below the bycatch limit, the progress report enables NMFS to track whether such regulations are meeting their target. This could prompt NMFS to work with nations to identify and correct problem to proactively avoid denying or revoking the comparability finding. Progress reports can also signal major shifts in the fishery which either reduce or increase incidental mortality or serious injury, enabling NMFS to work with the nations to make necessary adjustments. NMFS can also use the progress report as the basis to initiate reconsideration of a comparability finding.

#### Consultations

*Comment 44:* A commenter noted that information regarding regulatory requirements must be shared with nations, prior to the commencement of the five-year exemption period so every nation has equal opportunity to comply. Each nation needs an equal opportunity to share, discuss, and validate information.

*Response:* NMFS agrees and will continue to provide information on the rule to nations and use every avenue possible to consult with nations and provide information on an equal basis to facilitate compliance with this rule.

#### Additional Consideration/Flexibility

*Comment 45:* Several commenters noted that there can be multiple solutions to address a bycatch issue; therefore, harvesting nations should be

afforded flexibility to set up regulatory programs to protect marine mammals and reduce bycatch. Different measures should not be discarded as long as they contribute to the required objective. Generally, programs that allow solutions to develop that meet the needs of the individual nation and communities have a higher likelihood of success than prescribing one standard approach.

*Response:* NMFS agrees. By taking into account different approaches in a harvesting nation's export fishery, including alternative measures 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. It is the essence of "comparable in effectiveness."

*Comment 46:* A commenter was concerned that NMFS proposes to examine several "considerations" in determining whether a program is comparably effective, including "[w]hether the measures adopted by the harvesting nation . . . have reduced or will likely reduce" mortality and serious injury to below the bycatch limit; "the progress" of the foreign program in achieving its objectives; and "[t]he extent to which the harvesting nation has successfully implemented" bycatch measures. The commenter claims that this is contrary to "United States standards," which clearly require NMFS to only permit nations to import if they meet or go beyond the strict standards of section 101(a)(2).

*Response:* NMFS recognizes that there will be situations, similar to those encountered in our domestic fisheries, where comparability findings 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, 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).

*Comment 47:* The Marine Mammal Commission raised a similar concern to

the one described in Comment 46, noting it would be unfortunate if comparability findings were granted to export fisheries at a time when U.S. fisheries' bycatch or marine mammal stock assessments are not meeting the performance standards but corrective actions are being implemented or developed. The Marine Mammal Commission recommends that NMFS base an export fishery's comparability finding on its comparability to the overall performance and effectiveness of the U.S. marine mammal science and regulatory framework over a longer time period.

*Response:* NMFS has included in the rule the consideration of "U.S. implementation of its regulatory program for similar marine mammal stocks and similar fisheries." NMFS will consider the implementation history of marine mammal take reduction measures and stock assessments.

#### Comparability Finding Requirements for New Entrants

*Comment 48:* The majority of commenters opposed granting a 1-year provisional comparability finding to a harvesting nation or fishery that has not previously exported to the U.S. With a provisional comparability finding, NMFS will allow imports from harvesting nations that have not submitted "reasonable proof" that the new foreign commercial fishing operation is meeting U.S. standards for marine mammal bycatch. Commenters urged NMFS, once the proposed regulations come into force, to only allow imports from new foreign commercial fishing operations after they have received a comparability finding supported by reasonable proof. One industry commenter recommended new entrants be afforded the same five-year exemption period proposed for nations and fisheries currently exporting fish or fish products to the United States, and noted that there is no justification for two different approaches.

*Response:* NMFS retains the provisional comparability finding in the rule. While a new entrant may or may not be a new fishery or merely an existing fishery that is a new exporter, is inconsequential. All nations will receive an initial five-year exemption period and will be familiar with the requirements of this rule. NMFS does not want to incentivize non-compliance by providing each new entrant with another five-year exemption period. The shorter timetable for new entrants provides both NMFS and harvesting nations with the minimum amount of time to gather information to classify the



fishery, apply for, and make a comparability finding determination.

#### *Intermediary Nations*

*Comment 49:* Several commenters associated with the Maine lobster industry and the Maine Department of Marine Resources expressed concern with the intermediary nations provisions. A significant portion of Maine's lobster is sent to Canada for processing and comes back to the United States as a product of Canada. Commenters claim that seafood traceability is inadequate and existing traceability technologies are not operationally feasible for many fish product supply chains, including live lobster, to address any trade restrictions imposed by the proposed rule due to comingling of product and scale of operations. Application of an import prohibition on Canadian lobster could prevent millions of pounds of Maine-caught lobster from being sold in the U.S.

*Response:* There is no basis now to speculate that any import prohibition would ensue on Canadian lobster. Also in terms of re-imports to the U.S. of U.S. lobster, processed in Canada, the commenter has wrongly characterized Canada as an intermediary nation. For the Canadian caught lobster, Canada is the harvesting nation, and for the U.S. caught lobster Canada doesn't meet the definition of an intermediary nation because the U.S. lobster fishery is not on the List of Foreign Fisheries. If the Canadian lobster fishery fails to receive a comparability finding, the fish and fish products harvested in the Canadian lobster fishery would be subject to an import prohibition and NMFS may require a certificate of admissibility accompany processed lobster from Canada that is not harvested in the Canadian lobster fishery. According to Maine Department of Marine Resources (DMR), in 2014, Maine imported \$238 million of seafood from Canada. However, DMR did not stipulate what percentage of these imports are Maine-caught lobsters being re-imported to the U.S. Two actions appear to mitigate any potential impact from requiring a certificate of admissibility under this rule. First, Maine is increasing its lobster meat processing capabilities. In 2010, there were five companies processing lobster, in 2013 that number increased to 15 firms processing approximately 20 million pounds of meat. As Maine continues to increase its processing capacity, any potential economic impact from requiring a certificate of admissibility would be lessened.

Second, Canada is implementing traceability measures, not in response to this rule, but to global forces demanding seafood traceability throughout supply chains. In 2011 the Canadian Council of Fisheries and Aquaculture Ministers undertook the "Lobster Traceability Pilot Project" the objective of which was to "test the implementation of a seafood traceability system with practical experience, with real-life situations and challenges, and with a small number of participants at each step of the lobster value chain (a small number of fishermen, a few processors, one or two distributors, etc.)." The report of the pilot project lays out traceability requirements and models based on existing government regulations and existing traceability programs that Canada should use as it moves forward with its traceability program. The pilot project identified that the primary requirement of any traceability program must be that it can fully trace lobster, at any point in the supply chain, back to the source within 24 hours. Globally recognized basic models for traceability, and one implemented in the U.S. Bioterrorism Act, include a "one up, one down" approach. This mandates that each organization in the supply chain must be able to identify from whom, where, and when the product was received and to whom, where, and when the product was sent. Since this pilot project report several harvesters and processors have adopted traceability programs including the lobster fishery on the Gaspé Peninsula in Quebec and the Fisheries, Science Stewardship and Sustainability Board implemented a Newfoundland, Labrador lobster traceability program. As Canadian importers and processors continue to develop and roll-out additional tracking, verification, and traceability procedures that will allow for the differentiation of U.S.-harvested product from Canadian product, Canada should be able to meet any certification of admissibility requirements the AA may impose on processed lobster from Canada.

*Comment 50:* The proposed regulations call for any nation that NMFS identifies as a possible intermediary nation to either prohibit the importation of fish or fish products from fisheries subject to import prohibitions under this rule or to have procedures to reliably certify that exports of fish and fish products exported to the United States do not contain fish or fish products caught or harvested in a fishery subject to an import restriction. Several commenters expressed concern that this approach

introduces additional challenges to traceability and allows for the mixing of legally and illegally sourced fish; subsequently allowing illegally sourced fish to enter international trade as a "legal" product of the exporting nation. Another commenter stated that the rule lacks any real details as to what constitutes a reliable certification and does not specify what type of port state measures will be expected to monitor transshipments, loading, unloading, segregation of catch, processing of raw product from mixed sources; what type of effective monitoring, control and surveillance systems NMFS will require to be in place, or what type of legislative and administrative measures will be required to support a reliable catch documentation system.

*Response:* NMFS is neither prescribing the details for traceability or segregation of fish and fish products caught or harvested in a fishery subject to an import restriction nor defining what constitutes a reliable certification. The burden to develop these certification procedures rest on the possible intermediary nation, and NMFS wants to provide such nations with the flexibility to determine how best to comply with the intermediary nation requirements. If the nation's procedures can reliably certify that exports of fish and fish products from the nation to the United States do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition, NMFS will continue to allow trade in those fish and fish products from that nation.

#### *Certificate of Admissibility*

*Comment 51:* Several commenters including the Marine Mammal Commission were extremely concerned that the rule would allow a harvesting nation denied a comparability finding for one fishery to export that same seafood product from another fishery in another region or using a different gear type, which presents considerable risk that the trade ban could be bypassed. One commenter believes the possibility of fraud or even accidental mislabeling is too great, and the documentation required from the exporting nation is too complex to expect compliance or detection of violations by the United States. Therefore, the Marine Mammal Commission recommended that, if a harvesting nation fails to receive a comparability finding for a certain seafood product produced by a given fishery, then all exports of that seafood product from all fisheries should be prohibited until the harvesting nation is able to meet U.S. standards, unless the harvesting nation and intermediary

nation or the United States are able to design and implement a tracking program that provides reasonable assurance that no prohibited fish or fish products are being exported to the United States.

*Response:* NMFS disagrees and believes the rule addresses the concern through provisions providing for the Assistant Administrator to require a Certification of Admissibility on the same or similar fish and fish products caught or harvested in another fishery of the harvesting nation and not subject to the prohibition. Requiring a Certification of Admissibility properly places the burden on the harvesting nation to substantiate the attestation on the Certification of Admissibility form that the fish or fish products are not caught or harvested from the fishery subject to an import prohibition. The Certification of Admissibility avoids penalizing export fisheries that receive a comparability finding by allowing the same or similar fish and fish products from those fisheries to enter the United States.

*Comment 52:* A nation asked what constitutes other readily available sources and how NMFS will determine the veracity of that information. Another commenter expressed concern that NMFS could potentially rely on information provided by nongovernmental organizations and the public and asked how NMFS would ensure that information provided by nongovernment organizations and public sources is substantiated and credible if utilized in comparability finding determinations.

*Response:* NMFS will analyze and assess readily available information from a variety of sources, including scientific literature and reports from RFMOs and intergovernmental organizations. NMFS will evaluate which information and evidence is most appropriate for use in classifying fisheries and making comparability findings. This information could include data actively gathered by the U.S. Government as well as data offered by other nations, or international organizations (such as RFMOs), institutions, or arrangements that provides a reasonable basis to evaluate comparability findings or classify fisheries. NMFS decisions under this rule must comply with the Administrative Procedure Act, which prohibits arbitrary and capricious decision making.

#### *Burden of Proof and Non-Comparability Findings*

*Comment 53:* Several commenters note that the proposed rule rightly

places the burden of proof on the harvesting nation to provide the information necessary to show that fish and fish products exported to the United States were not caught in ways that exceed U.S. marine mammal protection standards. Unless sufficient evidence is presented by the exporting nation, imports of such fish and fish products are to be banned. Additionally, several commenters recommended that NMFS reject the options of issuing non-comparability findings or issuing comparability findings unless it was determined that such a finding was unwarranted. Other commenters noted that neither of these are viable options, as neither allows a process for the U.S. to ensure compliance with the MMPA before allowing access to the U.S. market, and both would place the burden of proof on NMFS. The MMPA requires the harvesting nation to provide evidence of compliance to maintain or gain access to the U.S. market; this process provides greater incentive for compliance and also allows for bilateral dialogue and U.S. technical and funding support to support compliance. The regulations, as proposed, will go much further in ensuring the goal of marine mammal protection across the globe. Likewise, the Marine Mammal Commission recommended that NMFS either issue or deny a comparability finding, rather than issuing a "Finding of Non-Comparability for nations that do not meet comparability finding requirements" as it would violate the MMPA by switching the burden of proof onto the U.S. government by allowing imports to continue until NMFS has collected sufficient information to show that the measures in place for a given fishery are not comparable. The Marine Mammal Commission further recommended that the final rule clearly specify that harvesting nations be issued a comparability finding only if they meet the U.S. standards, rather than be issued a comparability finding unless it is shown that they do not meet the applicable requirements.

*Response:* The MMPA bans imports of fish and fish products that result in the incidental mortality or serious injury of marine mammals in excess of U.S. standards for administering the ban to "insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effect on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States." 16 U.S.C. 1371(a)(2)(A). Thus, this rule requires

any harvesting nation submitting an application for a comparability finding for a fishery to provide documentary evidence demonstrating that it has met the applicable conditions for a comparability finding for that fishery, including reasonable proof as to the effects on marine mammals of commercial fishing technology in use in the fishery for fish or fish products exported from such nation to the United States.

*Comment 54:* One commenter suggested that NMFS could presume that a harvesting nation's standards are comparable in effectiveness to those of the United States upon presentation of reasonable proof of a valid marine mammal protection program. Such a country could export fish to the United States unless NMFS issued a non-comparability finding upon closer examination of the nation's application, or a comparability finding would automatically issue if NMFS did not act on the application within a specified time period, perhaps six months, subject to a later determination of non-comparability. The commenter also suggested that NMFS consider third party certifications of foreign fisheries, as sufficient to establish comparability findings and certifications of admissibility in order to reduce redundant efforts. Likewise one nation recommended NMFS consider Marine Stewardship Council (MSC) certifications in support of program efficiencies, towards establishing exempt fisheries classifications under the proposed rule, since amongst other criteria, the MSC certification considers marine mammal bycatch.

*Response:* NMFS disagrees, see response to *Comment 53*. Nothing in the MMPA authorizes NMFS to abrogate its responsibility to determine whether a fishery has bycatch in excess of U.S. standards to a third-party issuing certifications for other market or ecological purposes. NMFS cannot outright use third-party certifications as a proxy that an export fishery is meeting the conditions of a comparability finding. NMFS can consider such information as part of the documentary evidence that a harvesting nation submits to receive a comparability finding. Currently, NMFS does not recognize MSC certification in its management of protected species because the criteria for obtaining MSC certification do not comport with all the specific requirements of the MMPA or the ESA. Therefore, NMFS cannot base determinations to issue comparability findings solely on MSC certification.

*Comment 55:* Several nations asserted that NMFS should issue a comparability

finding in situations where the agency cannot evaluate an application within the stipulated timeframe or cannot judge whether the harvesting nation's regulatory program is comparable in effectiveness, due to scientific uncertainty, the lack of data, absence of consensus among scientists, or technical reasons such as there is no similar fishery. While other commenters stressed that, in the absence of reasonable, direct proof from a harvesting nation, NMFS should not render a comparability finding.

*Response:* NMFS will only make its comparability finding determinations based on the information provided by the nation, and any other readily available information, taking into consideration scientific uncertainty.

#### *Reasonable Proof*

*Comment 56:* Several commenters recommended that NMFS define "reasonable proof." Some commenters stated that requiring harvesting nations to provide documentary evidence of sufficient detail and an attestation that the evidence is accurate does not define the specific requirements which represent "reasonable proof." Other commenters stated, given the MMPA's reliance on the best available scientific information, NMFS should incorporate this standard into the meaning of "reasonable proof" for the submission of scientific information and should make determinations on Lists of Foreign Fisheries and comparability using the best scientific information available for science-based factors. The Marine Mammal Commission interprets the "reasonable proof" requirement of section 101(a)(2)(A) as placing the onus on the exporting country to provide information of sufficient quality and reliability to make the required showings. The Marine Mammal Commission asserts that the proposed rule does not include clear mechanisms for NMFS to ensure the reliability of the information that is submitted and recommended that NMFS require the harvesting nation to provide information in sufficient detail to demonstrate its reliability.

*Response:* NMFS will, as a matter of practice, use the best scientific information available. This rule does not define "reasonable proof"; but, in our guidance to harvesting nations, NMFS will make clear that the information provided by a harvesting nation in its application for a comparability finding must include documentary evidence of sufficient detail, quality, and reliability for NMFS to fully evaluate the regulatory program for a given export fishery.

#### *Capacity Building*

*Comment 57:* The Marine Mammal Commission urges NMFS to pursue one-on-one consultations, as well as capacity building, whenever possible. The Marine Mammal Commission and other commenters stated it would be important for NMFS to have sufficient funding in order to provide "carrots" and not just "sticks" to build capacity and encourage compliance. One commenter recommended that NMFS, in conjunction with cooperating nations, establish a permanent fund for research and implementation, and work in conjunction with foreign nations to make new bycatch reduction technologies available to all. Other commenters submitted that budgetary constraints and realities make direct capacity building assistance to other nations for MMPA implementation unlikely, especially given the number of competing priorities.

*Response:* NMFS, compliant with requirements regarding Congressionally-appropriated funding, will work cooperatively with harvesting nations to assist those nations in reducing their marine mammal bycatch and provide appropriate assistance to help such nations obtain a comparability finding. While NMFS cannot commit to establishing a fund (given this would require Congressional appropriations), we note that capacity building can take many forms, including technical collaboration between staff at NMFS and harvesting nations.

*Comment 58:* The Marine Mammal Commission recommended that any harvesting nation seeking a comparability finding should be subject to a shorter exemption period if the harvesting nation has benefited from capacity building from the United States in designing the bycatch reduction program.

*Response:* NMFS disagrees; the capacity building program is designed to help those nations, species, and fisheries most in need to comply with the comparability finding requirements. The Marine Mammal Commission recommendation would be a disincentive for nations to seek and participate in capacity building efforts.

*Comment 59:* Numerous commenters expressed concern that this rule would create a complex and cumbersome regulatory program for NMFS to administer and the process of evaluating comparability finding applications will be very time and resource consuming given the number of harvesting nations, especially with the added layer of complexity of having to potentially translate existing rules and applications

into English. Commenters were troubled that implementation of this rule, including its capacity building, has the potential to divert already limited resources necessary to implement MMPA provisions for domestic fisheries and result in other unintended consequences to U.S. fisheries. Still others were concerned that the proposed regulations put a sizable administrative burden on an agency that is resource-constrained and, without additional resources, these tasks may not be accomplished within the prescribed timeframes. A commenter recommended that NMFS request and ensure that the agency has the appropriate budget to fully implement the final regulatory regime. The Marine Mammal Commission recommended that the preamble to the final rule estimate the resource requirements (staff, funding) needed to implement the rule and identify the steps that will be taken to secure those resources (e.g., new budget initiatives, reallocation).

*Response:* NMFS acknowledges these concerns and will work, within its appropriated budget, to allocate sufficient resources toward the implementation of this program while continuing to meet its domestic conservation, science, and management obligations. The tasks and the actions to administer the rule are set out in Table 17 of the RIR. NMFS estimates that implementation of this rule will cost approximately \$0.9 million per year, which is based on the cost of NMFS and contract staff to carry out these activities. NMFS estimates that a total of 3.5 full time employees (FTEs) and two contract employees with subject matter expertise will be required. The 3.5 FTEs are already part of the plan for hiring for the Office of International Affairs and Seafood Inspection (3 FTEs) and the Office of Sustainable Fisheries (0.5 FTEs) and therefore this activity will not require additional personnel or funds. NMFS has provided an estimate in the Final Regulatory Impact Review of the cost for NMFS to administer the rule and the task associated with the rule.

*Comment 60:* The Marine Mammal Commission recommended that NMFS explore some form of cost recovery to supplement funding needed to implement the import provisions of the MMPA. A commenter specifically suggested a "sustainability fee" levied on foreign fisheries commensurate with their level of bycatch. Recognizing the multi-billion dollar value of seafood products imported annually into the United States, shifting the burden of funding research and information collection onto those nations that benefit from selling fish and fish

products to the U.S. market is a way to reduce the costs to NMFS.

*Response:* The MMPA does not authorize NMFS to collect such fees, making implementation of a cost recovery system impossible.

#### *Monitoring, Verification, and Enforcement*

*Comment 61:* A commenter noted that given the sources of imported seafood subject to the MMPA import rule are nations that likely lack the capacity and perhaps the will to effectively monitor and control both their fishing activities and their seafood supply chain, there is substantial opportunity for fraudulent declarations intended to circumvent the intent of this rule and any sanctions imposed pursuant to that authority. The commenter recommended that NMFS make extra efforts to ensure the veracity of declarations and take swift action to prohibit imports if verification is not clearly documented or observed. Several other commenters noted that NMFS should consider the link between illegal, unregulated and unreported (IUU) fishing rates and incidental bycatch and should modify the proposed rule to require examination of IUU data when making a comparability finding.

*Response:* NMFS acknowledges that the Presidential Task Force on Combating Illegal, Unregulated, and Unreported (IUU) Fishing and Seafood Fraud will provide a helpful tool for use in assessing comparability. The proposed regulations will establish traceability for some marine species from the point of catch or the location of the aquaculture facility to the first point of sale in the United States. This documentation requirement will aid NMFS in determining whether seafood came from a legal fishery, add more transparency to the supply chain to address IUU fishing and seafood fraud, and help enforce compliance with this final rule.

*Comment 62:* Several commenters criticized NMFS for failing to provide details as to how it intends to prevent fraud and to ensure the authenticity and accuracy of information submitted for comparability findings and certifications of admissibility. They questioned how NMFS would ensure that comparability findings are based on a truly effective program rather than one that only looks good on paper. Similarly, the Marine Mammal Commission recommended that NMFS require exporting countries to submit more than just a basic written description of its incidental take program to obtain a comparability finding. The Marine Mammal

Commission noted that NMFS must take into account not only the statutory or regulatory requirements imposed on foreign fishermen but also the corresponding level of compliance. Therefore, the Marine Mammal Commission recommended that NMFS require nations to provide information on the methods and effectiveness of fishery monitoring and enforcement activities in addition to the overall marine mammal bycatch reduction program.

*Response:* NMFS agrees that implementation and enforcement of a regulatory program is critical to its effectiveness and will take these factors into account in making comparability determinations. NMFS believes that it has included data and information verification safeguards through the rule's provisions including allowing other entities to challenge a comparability finding through the submission of information demonstrating that the conditions for a finding are not being met.

#### *International Agreements*

*Comment 63:* The Marine Mammal Commission suggested that, in addition to working bilaterally on capacity building, NMFS should continue a multilateral effort to develop guidelines for reducing marine mammal bycatch through the United Nations Food and Agriculture Organization, much as was done for sea turtles. In addition to providing marine mammal bycatch guidance for nations to apply in their small-scale domestic fisheries, these guidelines could be a powerful tool in multilateral negotiations within RFMOs on measures to address marine mammal bycatch. One nation recommended that the appropriate approach should be international action rather than unilateral measures; and strongly urged the U.S. to seek an international agreement on a common standard for by-catches of marine mammals that are in conformity with international trade law.

*Response:* NMFS agrees and will continue its multilateral efforts to develop guidelines for reducing marine mammal bycatch under the United Nations Food and Agriculture Organization. Consistent with the legislative intent of the MMPA, NMFS will work with the U.S. Department of State to protect marine mammals through the adoption of measures in relevant international fora that require reporting of bycatch data and use of bycatch mitigation gear. NMFS will also continue its efforts to work cooperatively with nations that lack sufficient capacity for fisheries

monitoring, control, surveillance, and bycatch mitigation and assist these nations to achieve sustainable fisheries.

#### *Economic Burden*

*Comment 64:* One commenter stated that most foreign nations exporting fish and fish products to the U.S. are unlikely to have comparable marine mammal protection legislation in place and thus unlikely to have information needed to meet the comparability finding requirements. As a result, countries that export a small number of products may choose to stop exporting to the U.S. if the costs associated with meeting the MMPA import provision requirements outweigh the benefits, and those that wish to obtain comparability findings could require compliance with marine mammal measures only for sectors that export fish to the U.S., which may represent a small portion of their fisheries.

*Response:* NMFS cannot control which export fisheries will seek comparability findings and choose to continue to export to the U.S. market. NMFS has crafted a rule that implements the relevant provisions of the MMPA, establishes clear standards, allows flexibility to comply with those standards and, when possible, offers assistance to achieve those standards.

*Comment 65:* A commenter questioned NMFS' statement that "[n]o U.S. industrial sector is likely to be directly affected by [this] rulemaking." While it is true that the burden of complying with the proposed regulation will be borne by NMFS and the foreign harvesting nations, the U.S. seafood supply chain relies heavily on having access to imported seafood. Any uncertainties to the availability of supply will impact pricing and could jeopardize jobs. The burden to the U.S. industry is difficult to estimate without having a sense of which, if any, of the over 120 nations would be successful in achieving a comparability finding and thus be allowed to continue to export fish and fish products to the U.S. Another commenter objected to the lack of economic impact analysis included in the Environmental Assessment for the proposed rule, especially for the U.S. lobster industry, claiming NMFS' inability to identify with certainty the nations that will fail to obtain a comparability finding should not absolve the agency of its obligation to make a good faith attempt to identify and analyze the significant adverse impacts to state and local economies that may result from trade restrictions imposed by the proposed rule. Another commenter challenged NMFS' assertion that one country's seafood can easily be

substituted for another's. As stated, "it is possible that a substitute product will be more expensive or otherwise less preferable to a prohibited foreign fish or fish product." If the substitute is more expensive, consumers will not buy it. To the extent that they purchase another seafood product, the impact generally may be lessened, albeit not to the importer who suddenly finds himself with no products and no customers. In that situation import prohibitions will be devastating to those U.S. businesses built around that particular supply.

*Response:* There are several factors that would have to occur for the regulations to directly increase costs to U.S. suppliers. The fishery subject to a ban would need to provide a significant proportion of the product to the U.S. Among the most heavily imported seafood products into the U.S., there are relatively few countries that presently provide a disproportionately large amount. The RIR provides data on the top exporting nations for the most widely imported categories of seafood. For example, Thailand is a major supplier of shrimp and tuna; however, for much of that product they are the processing (intermediary) nation and not the harvesting nation. Chile and Canada are major suppliers of salmon. Most fisheries supply a relatively small amount of product such that importers should be able to source an equivalent amount of product from another fishery. NOAA recognizes that substitute product may be less desirable and/or more expensive, but it would be speculative to quantify these costs. Additionally, there are important intermediary nations in the processing of certain fish and fish products and the cost of a trade prohibition to the U.S. suppliers and consumers would be contingent upon the role and behavior of intermediary nations.

If a foreign nation's ability to import certain fish or fish products into the United States is limited upon the failure of a particular export fishery to receive a comparability finding and the subsequent application of import prohibitions, this may impact the ability of U.S. suppliers to access fish or fish products from that nation. NMFS assumes that for the majority of the fish and fish products imported and consumed alternative sources of fish and fish products could mitigate the impacts of restrictions on U.S. suppliers' access to fish and fish products. NMFS will continue to work with partner resource agencies in the Federal and state governments to obtain the data necessary to fully understand and analyze potential trade implications of any import prohibition.

#### *Level Playing Field*

*Comment 66:* Numerous commenters supported efforts to level the playing field for U.S. fisheries, noting that American fishermen comply with the requirements of the MMPA in conducting their fishing activities, and those efforts come at an increased cost, so it is only fair to U.S. fisheries that a level playing field exists such that importing fisheries abide by similar standards when introducing fish into the U.S. market.

*Response:* NMFS agrees that the intent of sections 101(a)(2) and 102(c)(3) of the MMPA is to ensure that all fish and fish products entering the U.S. market was caught or harvested in fisheries meeting the U.S. standards for marine mammal bycatch.

#### *Trade Considerations*

*Comment 67:* One nation contended that not all marine mammals, including dolphins and whales, are threatened to extinction; therefore, it is not acceptable for an importing country to unilaterally impose trade restriction on exporting countries based solely on its unilateral sense of value. Another nation noted that the rule may create unnecessary obstacles to trade, because it requires considerable and unknown use of administrative and human resources relating to biological research, record keeping and statistics for the exporting countries, in particular developing countries, and seeks to influence the specific policy decisions of trading partners. Several questioned whether the rule is consistent with the WTO obligations of the U.S.

*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 this final rule will be in accordance with U.S. obligations under applicable international law, including the WTO Agreement. 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.

*Comment 68:* One commenter suggested that NMFS did not consider potential retaliatory responses of foreign markets on exports from the United States and the impact of such retaliation on U.S. exports. If the U.S. violates WTO standards by insisting that a sovereign nation with different laws and social mores comply with a complex marine mammal regulatory scheme such as is in place for U.S. fisheries, what makes NMFS think that said sovereign nation will not exercise its rights under the WTO to retaliate against U.S. exports?

*Response:* As noted in the response to *Comment 67*, the rule is designed to enable NMFS to apply this entire regulation, including any import prohibitions on certain fish or fish products, consistent with U.S. international obligations, including the WTO Agreement. Included in NMFS' approach is its intention to regulate in a fair, transparent, and non-discriminatory manner and to make determinations based on the best available science.

*Comment 69:* A commenter noted that the public will be challenged in assisting NMFS with comparability findings as it will not be informed about what information a nation has submitted and what information the agency already has and what it needs. They recommended NMFS review the proposed compliance process and identify additional opportunities for public notice and comment; and urged NMFS to provide for notice and comment on its proposed comparability findings.

*Response:* NMFS believes that the rule contains ample opportunity for input from the public, including at the point of publishing the List of Foreign Fisheries, the call for information on bycatch under the Moratorium Protection Act that NMFS intends to use to gather additional information on marine mammal bycatch, and the ability to challenge comparability finding determinations published in the **Federal Register**.

#### **Changes From Proposed Action**

In addition to streamlining the final rule to reduce duplication and improve readability, NMFS has made several changes in the final rule to respond to public comments, and provide clarification. The key changes are outlined below.

### 1. *Changes to the Definition of Fish and Fish Products*

In the proposed rule, “fish and fish products” was defined as any marine finfish, mollusk, crustacean, or other form of marine life other than marine mammals, reptiles, and birds, whether fresh, frozen, canned, pouched, or otherwise prepared in a manner that allows species identification, but did not include fish oil, slurry, sauces, sticks, balls, cakes, pudding and other similar highly processed fish products. Commenters strongly opposed this exemption arguing it would exclude from the regulatory requirements a significant proportion of fish and fish product imports so this definition has been revised in response to public comments. NMFS is removing from the definition of fish and fish products the exemption pertaining to fish oil, slurry, sauces, sticks, balls, cakes, pudding and other similar highly processed fish products. NMFS had originally excluded these products because due to the high degree of comingling or processing through the supply chain that may be associated with these products and the potential difficulty identifying the source of fish contained in such products.

NMFS recognizes the List of Foreign Fisheries is linked to fish that are caught or harvested in a specific fishery, not the level of processing that occurs downstream of the harvest event. As suggested in public comment, NMFS considers the product form to be less determinative of an importer's ability to trace back to the source fishery than is the specificity and number of fishery or fisheries which generated the raw material for that product. For example, NOAA considers it no less feasible to identify surimi or fish sticks as a product originating from the pollock fishery as it would be for pollock fillets. That said, NMFS did not anticipate that a fishery would appear on the List of Foreign Fisheries, and therefore need to apply for a comparability finding, solely because of its exports of highly processed products to the United States. However, as that is a possibility and because it will not increase the burden on harvesting nations whose fisheries are already on the List of Foreign Fisheries for fish and fish products other than highly processed products, NMFS considers it appropriate to revise the definition of fish and fish products as described.

NMFS does not consider the level of processing to be applicable to the definition of fish and fish products; rather the level of processing is applicable to the implementation of

import prohibitions for fish and fish products from a specific fishery denied a comparability finding. If a fishery of a harvesting nation fails to receive a comparability finding, fish and fish products caught or harvested in that fishery will be subject to an import prohibition. When import prohibitions are put into place for such a fishery, NMFS will designate HTS codes of species and product originating from that fishery that will be prohibited from importation. NMFS ability to determine product type and origin for all species is limited. In designating those HTS codes NMFS acknowledges that, depending on data reporting requirements associated with that product and the traceability of product, NMFS may not in all cases include highly processed fish products (fish oil, slurry, sauces, sticks, balls, cakes, puddings, and other similar highly processed fish products) for which the species of fish comprising the product or the harvesting event(s) or aquaculture operation(s) of the shipment of the product cannot be feasibly identified, either through inspection or documentation back to the fishery subject to the import prohibition. Also, for the same or similar fish or fish products caught or harvested in another fishery of the harvesting nation, NMFS is clarifying in the final rule that no certification of admissibility shall apply with respect to fish or fish products for which it is infeasible to substantiate the attestation contained in the certification of admissibility that the fish or fish products do not contain fish caught or harvested in a fishery subject to an import prohibition. NMFS will determine whether to apply a certification of admissibility to any fish or fish product on a case by case basis.

### 2. *Clarification of Conditions for a Comparability Requirement*

NMFS further clarified that a condition for a comparability finding, applicable to all export fisheries regardless of where they operate, that must be included in a regulatory program is the condition that the regulatory program must provide for or effectively achieves comparable results to measures that reduce the incidental mortality and serious injury of a marine mammal stock that the United States requires its domestic fisheries to take with respect to a transboundary or marine mammal stock.

### 3. *Clarification of Use of Alternative Documentation to the Certification of Admissibility*

In the preamble to the proposed rule, NMFS discussed its intent that when

the Automatic Commercial Environment/International Trade Data System (ACE/ITDS) rulemaking and subsequent rulemakings to implement the recommendations of the Presidential Task Force on Combating Illegal, Unreported and Unregulated Fishing and Seafood Fraud (Task Force) (*see* 79 FR 75536; December 18, 2014) are issued, NMFS may be able to identify fish prohibited from entry under MMPA authority based on the documentation specifying fishery of capture/harvest to be submitted by the importer to ACE/ITDS as part of the seafood traceability program. To eliminate duplicative requirements for MMPA import restrictions, NMFS will utilize import documentation procedures that have been developed as part of the ACE/ITDS and Task Force rulemakings so long as the information is sufficient to identify the fish or fish product was not caught or harvested in a fishery subject to an import prohibition under the MMPA. NMFS has added language in the regulations for the Certification of Admissibility to allow alternative data collection systems that require the same information found on the Certification of Admissibility.

### Classification

This rule is published under the authority of the Marine Mammal Protection Act, 16 U.S.C. 1371, 16 U.S.C. 1372, and 16 U.S.C. 1382.

Under NOAA Administrative Order (NAO 216–6), the promulgation of regulations that are procedural and administrative in nature are categorically excluded from the requirement to prepare an EA. Nevertheless, NMFS prepared an EA for this action to facilitate public involvement in the development of the national standard and procedures and to evaluate the impacts on the environment. This EA describes the impacts on marine mammals associated with fishing, the methods the United States has used to reduce those impacts, and a comparison of how approaches under the MMPA and the High Seas Driftnet Fishing Moratorium Protection Act provisions of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 would affect harvesting nations.

The alternatives described in section 2.1 of the EA (*see* NEPA) provide five alternatives for defining “U.S. standards” that would reduce mortality and serious injury of marine mammals in fishing operations (Sections 2.1.1 through 2.1.5). In addition to defining standards, the alternatives identify implementation and compliance steps as part of an overall regulatory program

for harvesting nations wishing to export fish and fish products into the United States.

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

Alternative 2 (Preferred Alternative) would require harvesting nations wishing to export fish and fish products to the United States to demonstrate comparability with U.S. standards as set out for domestic fisheries under sections 117 and 118 of the MMPA.

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

Alternative 3 would define U.S. standards as those specific regulatory measures required of U.S. commercial fishing operations as the result of a take reduction plan's implementing regulations. Such regulatory measures could be applied to fisheries conducted on the high seas where a take reduction plan is in place (and thus the requirements would already apply to vessels under the jurisdiction of the United States), and to foreign fisheries, regardless of their area of operation, that are comparable to U.S. fisheries.

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

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

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

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

Pursuant to E.O. 12866, NMFS conducted a Regulatory Impact Review (RIR). When conducting the RIR and the EA's socioeconomic analysis of the preferred alternative, NMFS considered the number of harvesting nations and the types of fish products exported to the United States. In 2012, 122 nations exported fish and fish products into the United States (see EA Section 3.4.3 Table 3). Fifty-five percent (66 nations) of those nations export five or fewer fish products, and 74% of the nations export 10 or fewer fish products. Only nine economies export 25 or more fish products; they are: Canada, Chile, China, Japan, Mexico, Taiwan, Thailand, South Korea, and Vietnam. With the exception of Japan, all of these economies are included within the U.S. list of top ten seafood trading partners by volume and weight (see EA Section 3.4.3 Table 4).

The United States imports more than 67 marine species, with tuna, shrimp, salmon (both farmed and wild salmon), mollusks, mackerel, and sardines representing the six largest imports. Tuna fisheries are conducted primarily on the high seas, whereas shrimp and salmon fisheries are a combination of live capture and aquaculture operations. For example, for high seas export fisheries to receive a comparability finding, harvesting nations may demonstrate, among other things, that they are implementing the requirements

of an RFMO or intergovernmental agreement to which the U.S. is a party. Tuna is caught in numerous gear types including purse seine nets, longline, hook and line, trolling, trap, harpoon and gillnets. Marine mammals interact with several gear types used in fisheries managed by tuna regional fishery management organizations (RFMOs). They most commonly interact with or are caught in purse seine, longline, and gillnet gear. With the exception of the eastern tropical Pacific Ocean, accurate abundance and bycatch estimates for marine mammals are lacking in areas where marine mammal distribution overlaps tuna fisheries, making quantitative analysis of bycatch extremely difficult. Nevertheless, there has been progress in quantifying tuna RFMO fishery impacts on or bycatch of marine mammals and several RFMOs have either passed or introduced measures to mitigate or reduce marine mammal mortality. For example, both the Western Central Pacific Fisheries Commission and the Indian Ocean Tuna Commission have adopted measures that prohibit the intentional encirclement of marine mammals in purse seine sets and also require safe handling and release in the event that a marine mammal is encircled. Similar measures have been introduced for purse seine fisheries operating under the International Convention for the Conservation of Atlantic Tunas. Therefore, these conservation and management measures would govern the purse seine fisheries of Thailand, Vietnam, Philippines, Indonesia and China. The largest exporter is Thailand, who exported more than 93 million kilos of tuna to the United States. Thailand is both a harvesting nation, landing roughly 26 million kilos, and intermediary nation, by way of its canning operations. Currently, Thailand processes almost one-quarter of the world's canned tuna (736,000 mt in 2008). Other nations exporting more than 20 million kilos include Vietnam, the Philippines, Indonesia, Ecuador, and China. Several of these nations are also processors, including Ecuador, which is the second largest processing site accounting for almost 12% of global annual production (362,400 mt in 2008). Ecuador, which has an affirmative finding for its yellowfin tuna purse seine fisheries, exports are governed predominantly by the Agreement on the Dolphin Conservation Program Act and section 101(a)(2)(B) of the MMPA. Because these regulatory programs are in place for purse seine fisheries, import prohibitions are unlikely for such fisheries.



U.S. aquaculture facilities are Category III fisheries, having a remote likelihood of marine mammal mortality and serious injury. By analogy, NMFS anticipates that most aquaculture facilities will be designated exempt in the List of Foreign Fisheries. Therefore, for aquaculture facilities classified as exempt fisheries and sited in marine mammal habitat or interacting with marine mammals, the harvesting nation must demonstrate it is prohibiting the intentional killing or serious injury of marine mammals in the course of aquaculture operations or has procedures to reliably certify that exports of fish and fish products to the United States are not the product of an intentional killing or serious injury of a marine mammal.

Therefore, NMFS anticipates that out of 122 harvesting nations, the greatest economic burden will be on the 21 nations that export more than 10 fish products, assuming that their regulatory program will include more export fisheries. This rule offers harvesting nations time to develop their regulatory program. Additionally, the consultative process and potential for financial and technological assistance will aid harvesting nations in meeting the requirements of these regulations. No U.S. industry sector would be directly affected by the rulemaking, although indirect effects may cause disruptions in the flow of seafood imports, potentially impacting U.S. businesses. Without knowing the fish products subject to a trade restriction, it is impossible to estimate how these indirect impacts will be distributed across U.S. businesses. There are several factors that suggest impacts in many instances will be small and short-lived or non-existent, though there may be potential scenarios that could result in the rule having more than negligible impacts. Additionally, if fisheries of other nations become subject to regulatory requirements that are comparable in effectiveness to requirements imposed on U.S. fishermen for conservation of marine mammals, there could be benefits to U.S. fishermen. Whether or not regulatory costs induced in foreign fisheries increase import prices enough to affect the price differential between domestic products and imported products remains to be seen. If the import prices rise enough to cause switching in the U.S. market from imports to domestically harvested fish, U.S. commercial fishermen may benefit. However, the high rate of exporting for U.S. harvested seafood is indicative that foreign markets already offer greater price incentives. Thus, it is more likely

that seafood dealers will locate alternative foreign sources for any product subject to an embargo. Additionally, there are important intermediary nations in the processing of certain fish and fish products and the cost of a trade prohibition to the U.S. consumer would be contingent upon the role and behavior of intermediary nations. Therefore, based on these analyses, NMFS does not anticipate that national net benefits and costs would change significantly in the long term as a result of the implementation of the proposed action.

A final regulatory flexibility analysis (FRFA) was prepared, as required by section 604 of the Regulatory Flexibility Act (RFA). The FRFA describes the economic impact this final rule would have on small entities. A statement of the need for and objectives of this rule are contained in this **SUPPLEMENTARY INFORMATION** section of the preamble. A summary of the analysis follows. A copy of the complete FRFA is available from NMFS (see NEPA).

NMFS did not receive comments from the Chief Counsel of Advocacy for the Small Business Administration on the initial regulatory flexibility analysis (IRFA) that was published with the proposed rule. As discussed in Comment 49 above, several commenters associated with the Maine lobster industry and the Maine Department of Natural Resources expressed concern that the rule could negatively impact the Maine lobster industry and lobstermen because application of an import prohibition on Canadian lobster could prevent millions of pounds of Maine-caught lobster, processed in Canada, from being sold in the U.S. As stated in the response to Comment 49 above, NMFS believes that the efforts Maine and Canada are already undertaking to implement tracking, verification, and traceability procedures will mitigate the potential for this negative indirect impact.

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

Under the final rule, NMFS would classify foreign fisheries based on the extent that the fishing gear and methods used interact with marine mammals. After notification from NMFS, harvesting nations desiring to export fish and fish products to the United States must apply for and receive a comparability finding for their exempt and export fisheries as identified in the List of Foreign Fisheries. Such a finding would indicate that marine mammal protection measures have been implemented in the fisheries that are comparable in effectiveness to the U.S.

regulatory program. In the event of import prohibitions being imposed for specific fish products, certain other fish products eligible for entry from the affected nation may be required to be accompanied by a certification of admissibility in order to be admitted into the United States.

This final rule does not directly regulate small entities; the rule requires harvesting nations that export fish and fish products to the United States to apply for and receive a comparability finding for its exempt and export fisheries. The universe of potentially indirectly affected industries includes: U.S. seafood processors, importers, retailers, and wholesalers. The exact volume and value of product, and the number of jobs supported primarily by imports within the processing, wholesale, and retail sectors cannot be ascertained based on available information. In general, however, the dominant position of imported seafood in the U.S. supply chain is indicative of the number of U.S. businesses that rely on seafood harvested by foreign entities.

#### *Recordkeeping and Reporting Requirements*

This final action contains new collection-of-information, involving limited reporting and record keeping, or other compliance requirements. To facilitate enforcement of the import prohibitions for prohibited fish products, harvesting nations with fisheries that do receive a comparability finding, that offer similar fish and fish products to those that have been prohibited from entry, may be required to submit certification of admissibility along with the fish or fish products offered for entry into the United States that are not subject to the specific import restrictions.

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

No U.S. industrial sector is directly regulated by this rulemaking. However, the indirect effects of import prohibitions may cause short-term disruptions in the flow of seafood imports potentially impacting U.S. businesses. NMFS does not anticipate that national benefits and costs would change significantly in the long-term as a result of the implementation of the rule. Therefore, NMFS anticipates that the impacts on U.S. businesses engaged in trading, processing, or retailing seafood will likely be minimal.

As described above and in Section 2.1 of the Final Environmental Assessment (see NEPA), NMFS analyzed several alternatives that achieve the objective of

reducing mortality of marine mammals in fishing operations. The final rule is based on the preferred alternative and is the one that offers the most flexibility while also complying with the relevant provisions of the MMPA and U.S. obligations under applicable international law, including the WTO Agreement. The flexibility offered under the rule allows harvesting nations to adopt a variety of alternatives to assess and reduce marine mammal incidental mortality and serious injury, provided the alternatives are comparable in effectiveness to the U.S. regulatory program. Because this flexibility facilitates the ability of the harvesting nations to comply, the potential for indirect adverse impacts on small entities is minimized.

The no action alternative, where NMFS would not promulgate regulations to implement the international provisions of the MMPA, may have reduced the potential indirect burden or economic impact to small entities; however, because the international provisions of the MMPA are statutory requirements, the no action alternative would be inconsistent with the MMPA. The final rule also demonstrates the U.S. commitment to achieving the conservation and sustainable management of marine mammals consistent with the statutory requirement of section 101(a)(2) of the MMPA. Additionally, the increased data collection that may result from the regulations could assist in global stock assessments of marine mammals and improve our scientific understanding of these species. Finally, the rule should help ensure that the United States is not importing fish and fish products harvested by nations that engage in the unsustainable bycatch of marine mammals in waters within and beyond any national jurisdiction.

Paperwork Reduction Act

This final rule contains a collection-of-information requirement subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval. The information collection in this final rule modifies an existing information collection that was approved under OMB Control Number 0648–0651 (Certification of Admissibility).

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 216

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

Dated: August 8, 2016.

Paul Doremus,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

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

Title 15: Commerce and Foreign Trade

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

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

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

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

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

| * * * * *                                                                   |                       |                                                           |   |   |
|-----------------------------------------------------------------------------|-----------------------|-----------------------------------------------------------|---|---|
| (b) * * *                                                                   |                       |                                                           |   |   |
| CFR part or section where the information collection requirement is located |                       | Current OMB control number (all numbers begin with 0648–) |   |   |
| 50 CFR                                                                      | *                     | *                                                         | * | * |
|                                                                             | *                     | *                                                         | * | * |
|                                                                             | 216.24(f)(2) .....    | –0387                                                     |   |   |
|                                                                             | 216.24(h)(9)(iii) ... | –0651                                                     |   |   |
|                                                                             | *                     | *                                                         | * | * |

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Title 50: Wildlife and Fisheries

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

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

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

■ 4. In § 216.3:

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

■ b. Add definitions for “Bycatch limit”, “Comparability finding”, “Exempt fishery”, “Exemption period”, “Export fishery”, “Fish and fish

product”, “Intermediary nation”, “List of Foreign Fisheries”, “Transboundary stock”, and “U.S. regulatory program” in alphabetical order.

The additions and revisions read as follows:

§ 216.3 Definitions.

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

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

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

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

(3) Where reliable information has not been provided by the harvesting nation on the frequency of incidental mortality and serious injury of marine mammals caused by the commercial fishing operation, the Assistant Administrator may determine whether the likelihood of incidental mortality and serious injury is “remote” by evaluating information concerning factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, the species and

distribution of marine mammals in the area, or other factors at the discretion of the Assistant Administrator. A foreign fishery will not be classified as an exempt fishery unless the Assistant Administrator has reliable information from the harvesting nation, or other information to support such a finding.

*Exemption period* means the one-time, five-year period that commences January 1, 2017, during which commercial fishing operations that are the source of exports of commercial fish and fish products to the United States will be exempt from the prohibitions of § 216.24(h)(1).

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

the foreign commercial fishing operation.

\* \* \* \* \*

*Fish and fish product* means any marine finfish, mollusk, crustacean, or other form of marine life other than marine mammals, reptiles, and birds, whether fresh, frozen, canned, pouched, or otherwise prepared.

\* \* \* \* \*

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

\* \* \* \* \*

*Intermediary nation* means a nation that imports fish or fish products from a fishery on the List of Foreign Fisheries and re-exports such fish or fish products to the United States.

\* \* \* \* \*

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

\* \* \* \* \*

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

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

\* \* \* \* \*

(h) *Taking and related acts of marine mammals in foreign commercial fishing operations not governed by the provisions related to tuna purse seine vessels in the eastern tropical Pacific Ocean*—(1) *Prohibitions.* (i) As provided in section 101(a)(2) and 102(c)(3) of the MMPA, the importation of commercial fish or fish products which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards or caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States are prohibited. For purposes of paragraph (h) of this section, a fish or fish product caught with commercial fishing technology which results in the incidental mortality or incidental serious injury of marine mammals in excess of U.S. standards is any fish or fish product harvested in an exempt or export fishery for which a valid comparability finding is not in effect.

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

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

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

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

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

(A) For the purposes of paragraph (h) of this section, *harvesting nation* means the country under whose flag or

jurisdiction one or more fishing vessels or other entity engaged in commercial fishing operations are documented, or which has by formal declaration or agreement asserted jurisdiction over one or more authorized or certified charter vessels, and from such vessel(s) or entity(ies) fish are caught or harvested that are a part of any cargo or shipment of fish or fish products to be imported into the United States, regardless of any intervening transshipments, exports or re-exports.

(B) [Reserved]

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

(iii) Paragraph (h) of this section shall not apply to a commercial fishing operation subject to section 101(a)(2)(B) of the MMPA and its implementing regulations set out in the relevant provisions of paragraph (f) of this section which govern the incidental take of delphinids in course of commercial purse seine fishing operations for yellowfin tuna in the eastern tropical Pacific Ocean and restrictions on importation and sale of fish and fish products caught or harvested in that commercial fishing operation. Paragraph (h) of this section shall not apply with respect to large-scale driftnet fishing, which is governed by paragraph (f)(7) of this section and the restrictions it sets out on importation and sale of fish and fish products harvested by using a large-scale driftnet.

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

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

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

(B) [Reserved]

(ii) Shall notify, in consultation with the Secretary of State, each harvesting nation that has commercial fishing operations identified pursuant to paragraph (h)(3)(i) of this section and request that within 90 days of notification the harvesting nation submit reliable information about the commercial fishing operations identified, including as relevant the number of participants, number of vessels, gear type, target species, area of operation, fishing season, any information regarding the frequency of marine mammal incidental mortality and serious injury and any programs (including any relevant laws, decrees, regulations or measures) to assess marine mammal populations and to reduce incidental mortality and serious injury of marine mammals in those fisheries or prohibit the intentional killing or injury of marine mammals.

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

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

(4) *List of Foreign Fisheries.* (i) Within one year of January 1, 2017, and the year prior to the expiration of the exemption period and every four years thereafter, the Assistant Administrator, based on the information obtained in paragraph (h)(3) of this section, will publish in the **Federal Register**:

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

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

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

(A) Classify each commercial fishing operation that is the source of exports of fish and fish products to the United States based on the definitions for export fishery and exempt fishery set forth in § 216.3 and identified in the List of Foreign Fisheries by harvesting nation and other defining factors including geographic location of harvest, gear-type, target species or a combination thereof;

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

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

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

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

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

(ii) The Assistant Administrator, in consultation with the Secretary of State, may consult with harvesting nations for the purposes of providing notifications of deadlines under this section, ascertaining or reviewing the progress of the harvesting nation's development, adoption, implementation, or enforcement of its regulatory program governing the incidental mortality and serious injury of marine mammals in the

course of commercial fishing operations for an export fishery, supplementing or clarifying information needed in conjunction with the List of Foreign Fisheries in paragraphs (h)(3) and (4) of this section, the progress report in paragraph (h)(10) of this section or an application for or reconsideration of a comparability finding in paragraphs (h)(6) and (8) of this section.

(iii) The Assistant Administrator shall, in consultation with the Secretary of State and the United States Trade Representative, consult with any harvesting nations that failed to receive a comparability finding for one or more of commercial fishing operations or for which a comparability finding is terminated and encourage the harvesting nation to take corrective action and reapply for a comparability finding in accordance with paragraph (h)(9)(iii) of this section.

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

(ii) *Procedures to issue a comparability finding.* No later than November 30th of the year when the exemption period or comparability finding is to expire, the Assistant Administrator, in response to an application from a harvesting nation for an export or exempt fishery, shall determine whether to issue to the harvesting nation, in accordance with the procedures set forth in paragraph (h)(8) of this section, a comparability finding for the fishery. In making this determination, the Assistant Administrator shall consider documentary evidence provided by the harvesting nation and relevant information readily available from other sources. If a harvesting nation provides insufficient documentary evidence in support of its application, the Assistant Administrator shall draw reasonable

conclusions regarding the fishery based on readily available and relevant information from other sources, including where appropriate information concerning analogous fisheries that use the same or similar gear-type under similar conditions as the fishery, in determining whether to issue the harvesting nation a comparability finding for the fishery.

(iii) *Conditions for a comparability finding.* The following are conditions for the Assistant Administrator to issue a comparability finding for the fishery, subject to the additional considerations set out in paragraph (h)(7) of this section:

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

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

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

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

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

(1) Marine mammal assessments that estimate population abundance for marine mammal stocks in waters under the harvesting nation's jurisdiction that

are incidentally killed or seriously injured in the export fishery.

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

(3) Regulatory requirements that include:

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

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

(iii) with respect to any transboundary stock or any other marine mammal stocks interacting with the export fishery, measures to reduce the incidental mortality and serious injury of that stock that the United States requires its domestic fisheries to take with respect to that transboundary stock or marine mammal stock.

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

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

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

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

(ii) Exceed the bycatch limit for that stock or stocks, but the portion of incidental marine mammal mortality or serious injury for which the export fishery is responsible is at a level that, if the other export fisheries interacting

with the same marine mammal stock or stocks were at the same level, would not result in cumulative incidental mortality and serious injury in excess of the bycatch limit for that stock or stocks.

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

(1) Implementation in the export fishery of:

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

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

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

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

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

export fisheries interacting with the same marine mammal stock or stocks were at the same level, would not result in cumulative incidental mortality and serious injury in excess of the bycatch limit for that stock or stocks; or

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

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

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

(2) Implementation in the export fishery of:

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

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

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

(i) U.S. implementation of its regulatory program for similar marine mammal stocks and similar fisheries (e.g., considering gear or target species), including transboundary stocks

governed by regulations implementing a take reduction plan (§ 229.2 of this chapter), and any other relevant information received during consultations;

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

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

(iv) Other relevant facts and circumstances, which may include the history and nature of interactions with marine mammals in this export fishery, whether the level of incidental mortality and serious injury resulting from the fishery or fisheries exceeds the bycatch limit for a marine mammal stock, the population size and trend of the marine mammal stock, and the population level impacts of the incidental mortality or serious injury of marine mammals in a harvesting nation's export fisheries and the conservation status of those marine mammal stocks where available;

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

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

(vii) For export fisheries operating on the high seas under an applicable intergovernmental agreement or regional fishery management organization to which the United States is a party, the harvesting nation's record of implementation of or compliance with measures adopted by that regional fishery management organization or intergovernmental agreement for data collection, incidental mortality and serious injury mitigation or the conservation and management of marine mammals; whether the harvesting nation is a party or cooperating non-party to such intergovernmental agreement or regional fishery management organization; the record of United States implementation of such measures; and whether the United

States has imposed additional measures on its fleet not required by an intergovernmental agreement or regional fishery management organization; or

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

(8) *Comparability finding determinations*—(i) *Publication*. No later than November 30th of the year when the exemption period or comparability finding is to expire, the Assistant Administrator shall publish in the **Federal Register**, by harvesting nation, a notice of the harvesting nations and fisheries for which it has issued or denied a comparability finding and the specific fish and fish products that as a result are subject to import prohibitions under paragraphs (h)(1) and (9) of this section.

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

(A) Issuing a comparability finding;

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

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

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

(1) Notify the harvesting nation that it is preliminarily denying or terminating its comparability finding and explain

the reasons for that preliminary denial or termination;

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

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

(C) A preliminary denial or termination of a comparability finding shall not result in import prohibitions pursuant to paragraphs (h)(1) and (9) of this section.

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

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

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

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

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

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

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

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

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

(C) The Assistant Administrator shall notify in writing the harvesting nation



and publish in the **Federal Register** a notice of the termination and the specific fish and fish products that as a result are subject to import prohibitions under paragraphs (h)(1) and (9) of this section.

(9) *Imposition of import prohibitions.*

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

(ii) *Duration of import restrictions and removal of import restrictions.* (A) Any import prohibition imposed pursuant to paragraphs (h)(1) and (9) of this section with respect to a fishery shall remain in effect until the Assistant Administrator issues a comparability finding for the fishery.

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

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

(D) Upon issuance of a comparability finding to the harvesting nation with respect to the fishery and notification in writing to the harvesting nation, the

Assistant Administrator, in cooperation with the Secretaries of Treasury and Homeland Security, shall publish in the **Federal Register** a notice of the comparability finding and the removal of the corresponding import prohibition effective on the date of publication in the **Federal Register**.

(iii) *Certification of admissibility.* (A) If fish or fish products are subject to an import prohibition under paragraphs (h)(1) and (9) of this section, the Assistant Administrator, to avoid circumvention of the import prohibition, may require that the same or similar fish and fish products caught or harvested in another fishery of the harvesting nation and not subject to the prohibition be accompanied by a certification of admissibility by paper or electronic equivalent filed through the National Marine Fisheries Service message set required in the International Trade Data System. No certification of admissibility shall be required for a fish product for which it is infeasible to substantiate the attestation that the fish or fish products do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition. The certification of admissibility may be in addition to any other applicable import documentation requirements.

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

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

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

(iv) *Intermediary nation.* (A) For purposes of this paragraph (h)(9), and in applying the definition of an "intermediary nation," an import into

the intermediary nation occurs when the fish or fish product is released from a harvesting nation's customs jurisdiction and enters the customs jurisdiction of the intermediary nation or when the fish and fish products are entered into a foreign trade zone of the intermediary nation for processing or transshipment. For other purposes, "import" is defined in § 216.3.

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

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

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

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

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

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

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

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

a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section and for which it was notified under paragraph (h)(9)(iv)(C) of this section.

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

(G) If the Assistant Administrator determines that the intermediary nation does not have procedures to reliably certify that exports of fish and fish products from the intermediary nation to the United States do not contain fish or fish products caught or harvested in a fishery subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section, the Assistant Administrator, in cooperation with the Secretaries of the Treasury and Homeland Security, will file with the Office of the Federal Register a notice announcing the fish and fish products exported from the intermediary nation to the United States that are of the same species as, or similar to, fish or fish products subject to an import prohibition under paragraphs (h)(1) and (h)(9)(i) of this section that may not be imported into the United States as a result of the determination. A prohibition under this paragraph shall not apply to any fish or fish product for which the intermediary nation was not

identified under paragraph (h)(9)(iv)(C) of this section.

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

*(10) Progress report for harvesting nations with export fisheries.*

(i) A harvesting nation shall submit, with respect to an exempt or export fishery, a progress report to the Assistant Administrator documenting actions taken to:

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

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

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

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

(iv) The Assistant Administrator may review the progress report to monitor progress made by a harvesting nation in developing its regulatory program or to

reconsider a comparability finding in accordance with paragraph (h)(8)(vi) of this section.

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

(i) Provide appropriate assistance to harvesting nations identified by the Assistant Administrator under paragraph (h)(5) of this section with respect to the financial or technical means to develop and implement the requirements of this section;

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

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

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

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

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