

Government property includes both Government-furnished property and Contractor-acquired property. Government property consists of material, equipment, special tooling, special test equipment, and real property.

(b) *Policy for Contractor Reporting of Government Property Lost, Stolen, Damaged, or Destroyed.*

(1) The Contractor shall use the Defense Contract Management Agency (DCMA) "e-Tools" software application for reporting of loss, theft, damage, or destruction of Government property. Reporting value shall be at acquisition cost. The "e-Tools" system can be accessed from the DCMA home page External Web Access Management application at <http://www.dcmamil>.

(2) Unless otherwise provided for in this contract, the requirements of paragraph (b) (1) of this clause do not apply to normal and reasonable inventory adjustments, *i.e.*, losses of "low risk" consumable material such as common hardware, as agreed to by the Contractor and the Government Property Administrator. Such losses are typically a product of normal process variation. The Contractor shall ensure that its property management system provides adequate management control measures, *e.g.*, statistical process controls, as a means of managing such variation.

(3) Reporting requirements apply to losses outside such variation. For example, due to theft of; or when losses occur due to a failure to provide adequate storage or security, *e.g.*, failure to repair a leaky roof; or due to "acts of God," *e.g.*, tornado damages warehouse or stockroom.

(4) The aforementioned reporting requirements in no way change the liability provisions or reporting requirements under the clauses at FAR 52.245-1, Government Property, or FAR 52.245-2, Government Property Installation Operation Services.

(End of clause)

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

Docket No. 0907301201-91203-01

RIN 0648-AY15

#### Implementation of 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:** Advance notice of proposed rulemaking; request for comments.

**SUMMARY:** NMFS issues this advance notice of proposed rulemaking to

announce that it is developing procedures to implement provisions of the Marine Mammal Protection Act for imports of fish and fish products. NMFS is seeking advance public comment on the development of these procedures and on the types of information to be considered in the process.

**DATES:** Written comments must be received by 5 p.m. on June 29, 2010.

**ADDRESSES:** You may submit comments by any of the following methods:

(1) **Electronic Submissions:** Submit all electronic public comments via the Federal eRulemaking Portal at <http://www.regulations.gov>.

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

(3) **Fax:** (301) 713-2313

All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

**FOR FURTHER INFORMATION CONTACT:** Michael Simpkins at [Michael.Simpkins@noaa.gov](mailto:Michael.Simpkins@noaa.gov) or 301-713-9090.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361-1423h, contains provisions addressing bycatch, or the incidental mortality and serious injury, of marine mammals in both domestic and foreign fisheries. With respect to foreign fisheries, section 101(a)(2) of the MMPA (16 U.S.C. 1371(a)(2)) states that "[t]he 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]- (A) 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."

This rulemaking would define the "United States standards" referred to in MMPA section 101(a)(2), along with any associated criteria by which the United States would assess foreign fisheries that supply fish and fish product imports to the United States (hereafter "import-supplying fisheries") with respect to marine mammal bycatch. The rule also would describe procedures for ensuring the established standards and their associated criteria are met, as well as procedures for developing recommendations regarding import prohibitions if those standards and associated criteria are not met. In defining the standards and associated criteria by which marine mammal bycatch in import-supplying fisheries would be evaluated, this rulemaking would consider U.S. statutory provisions and regulations applied to the management of incidental mortality and serious injury of marine mammals, including provisions of the MMPA, the Endangered Species Act (ESA), and the High Seas Driftnet Fishing Moratorium Protection Act (HSDFMFA).

This rulemaking also would recognize existing bilateral or multilateral arrangements to address marine mammal bycatch in foreign fisheries as well as the potential for such arrangements in the future. In the case of eastern tropical Pacific yellowfin tuna purse seine fisheries, marine mammal bycatch is covered by section 101(a)(2)(B) and Title III of the MMPA (16 U.S.C. 1371(a)(2)(B) & 1411-1417, respectively), which incorporate requirements adopted under the auspices of the Agreement on the International Dolphin Conservation Program (AIDCP).

#### U.S. Incidental Marine Mammal Mortality and Serious Injury Statutory Provisions

Section 2 of the MMPA describes several broad goals, including (1) maintaining the health and stability of the marine ecosystem; (2) retaining marine mammals as a significant functioning element in the ecosystem of which they are a part; and (3) ensuring that marine mammals can remain at or recover to their optimum sustainable population. The term "optimum sustainable population" is defined in section 3(9) (16 U.S.C. 1362(9), 50 CFR 216.3) of the MMPA as "the number of animals which will result in the maximum productivity of the

population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.”

Sections 117 and 118 (16 U.S.C. 1386 and 1387) of the MMPA describe the current U.S. program for regulating bycatch in domestic commercial fisheries. The program includes (1) evaluating marine mammal stock status; (2) evaluating bycatch in commercial fisheries; (3) developing bycatch reduction measures and regulations following consultation with stakeholder-based take reduction teams; and (4) implementing emergency regulations when necessary.

MMPA section 118(f)(2) defines both short- and long-term goals for take reduction plans created by take reduction teams. The short-term goal is to reduce and maintain marine mammal bycatch below the potential biological removal level for a given stock. MMPA section 3(20) defines “potential biological removal” (PBR) 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 long-term goal is to reduce bycatch “to insignificant levels approaching a zero mortality and serious injury rate,” often referred to as the zero-mortality rate goal. MMPA section 118(f)(3) provides NMFS with discretion to prioritize and develop take reduction plans based on available funding. MMPA section 118(f)(2) provides additional discretion with respect to the long-term goal by requiring NMFS to take into account “the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans.”

Section 118(g) of the MMPA empowers NMFS to prescribe emergency regulations to reduce marine mammal bycatch in a fishery if the Secretary of Commerce finds that such bycatch is having, or is likely to have, an immediate and significant adverse impact on a stock or species.

The ESA contains provisions that apply more broadly to any direct or incidental serious injury or mortality of species listed as endangered or threatened under the ESA. Specifically, section 7 of the ESA (16 U.S.C. 1536) requires Federal agencies to ensure that any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of any species listed as endangered or threatened under the ESA, or any species proposed for such listing. If an action is determined to

likely result in jeopardy to a species that has been listed or proposed to be listed under the ESA, the responsible Secretary (of Interior or Commerce) is required to develop reasonable and prudent alternatives, as necessary or appropriate, to mitigate such impact. If there is no reasonable and prudent alternative available, then section 7 of the ESA also provides that the Endangered Species Committee may decide whether to grant an exemption from the jeopardy prohibition.

Under section 610 of the HSDFMFA (16 U.S.C. 1826k), the Secretary of Commerce is required to identify nations whose fishing vessels engage in fishing activities or practices that result in bycatch of protected living marine resources (PLMRs), including marine mammals. In determining whether a nation’s vessels have engaged in bycatch of a PLMR, the Secretary must determine whether the fishing activities in question result in bycatch of PLMRs in waters beyond any national jurisdiction or whether the bycatch involves stocks that are shared by the United States and occur beyond the exclusive economic zone of the United States. Such nations are identified if (1) the fishing activity in question occurred during the preceding calendar year; (2) the relevant international organizations for managing the fisheries or protecting the bycaught species have failed to implement effective measures to end or reduce such bycatch, or the nation is not a party or cooperating member of such organization; and (3) the nation has not adopted a regulatory program to reduce bycatch that is comparable to that of the United States, taking into account different conditions.

After a nation has been identified, the HSDFMFA requires that the Secretary, acting through the Secretary of State, notify and consult with the identified nation for the purpose of entering into treaties to protect the PLMRs in question. The HSDFMFA also authorizes the Secretary of Commerce to provide appropriate assistance to identified nations to assist those nations in qualifying for positive HSDFMFA certification, described below. Such assistance may include cooperative research, technology transfer, and assistance in designing and implementing fish harvesting plans.

Following consultation, an identified nation is certified positively only if it provides documentary evidence that the nation has adopted a regulatory program to conserve PLMRs that is comparable to that of the United States, taking into account different conditions, and also has established a management plan that will assist in gathering species-specific

data to support international stock assessments and conservation efforts for PLMRs.

Failure by a nation to receive a positive certification under the HSDFMFA may result in denial of port privileges and prohibition of imports of some fish or fish products.

#### **Possible Standards for Evaluating Marine Mammal Bycatch Associated with Fish and Fish Product Imports**

NMFS is considering whether the statutory provisions described above rise to the level of “United States standards,” and, if so, NMFS is considering several possible standards that could be used when evaluating marine mammal bycatch in import-supplying fisheries for the purposes of implementing MMPA section 101(a)(2). NMFS also is considering whether to use only one of these standards or a combination of two or more standards when evaluating marine mammal bycatch in import-supplying fisheries. The options under consideration as possible standards are described below.

Several possible standards that NMFS is considering are derived from the short- and long-term goals of take reduction plans developed under section 118(f)(2) of the MMPA. Specifically, NMFS is considering evaluating whether marine mammal bycatch in import-supplying fisheries is maintained at a level below PBR for impacted marine mammal stocks (option 1). Alternatively, NMFS is considering evaluating whether such bycatch has been reduced to insignificant levels approaching a zero mortality and serious injury rate to the extent feasible, taking into account different conditions (option 2). NMFS recognizes that these two goals have been met for many, but not all, U.S. domestic fisheries. Another alternative possible standard NMFS is considering is to evaluate whether marine mammal bycatch in import-supplying fisheries is maintained at levels below PBR or at levels comparable to those actually achieved in comparable U.S. fisheries, whichever is higher (option 3). With respect to all three of these possible standards, NMFS recognizes that section 118(f)(3) of the MMPA provides NMFS with discretion to prioritize and develop take reduction plans for domestic U.S. fisheries to achieve these goals subject to available funding.

NMFS also is considering possible standards derived from the population status goal described in MMPA section 2. Specifically, NMFS is considering evaluating whether marine mammal bycatch in import-supplying fisheries either causes the depletion of a marine

mammal stock below its optimum sustainable population or impedes the ability of a depleted stock to recover to its optimum sustainable population (option 4). Domestically, the United States manages marine mammal bycatch based on PBR levels to achieve the goal of allowing marine mammal stocks to reach or maintain their optimum sustainable populations. However, NMFS recognizes that foreign nations may have other approaches to achieving the same goal, and that some of these might be commensurate with the U.S. marine mammal bycatch management program.

NMFS also is considering possible standards derived from the trigger for emergency regulations in MMPA section 118(g). Specifically, NMFS is considering evaluating whether bycatch in import-supplying fisheries has, or is likely to have, an immediate and significant adverse impact on a marine mammal stock (option 5).

NMFS also is considering possible standards derived from the jeopardy criteria described in ESA section 7. Specifically, NMFS is considering evaluating whether bycatch in import-supplying fisheries is likely to jeopardize the continued existence of any endangered or threatened marine mammal species (option 6). For this option, NMFS is considering whether and how to apply such possible standards uniformly to bycatch of foreign or international marine mammal species that are endangered or threatened, but have not been evaluated or listed under the ESA. Alternatively, NMFS is considering evaluating more broadly whether bycatch by import-supplying fisheries is likely to jeopardize the continued existence of a marine mammal species (option 7).

NMFS also is considering possible standards derived from HSDFMMPA section 610. Specifically, NMFS is considering evaluating whether marine mammal bycatch in a foreign nation's import-supplying fisheries is managed effectively by a relevant international fisheries management or conservation organization, or by the fishing nation itself (option 8). For this possible standard, NMFS would evaluate whether effective measures have been implemented by a relevant international fisheries management or conservation organization to which the nation is a party or cooperating member. If the relevant organization has not implemented effective measures, or the fishing nation is not a party or cooperating member of the organization, then NMFS would also evaluate whether the nation has adopted a regulatory program to reduce marine

mammal bycatch that is comparable to that of the United States, taking into account different conditions.

Finally, NMFS is considering possible standards derived from regulations implemented to manage marine mammal bycatch in U.S. domestic fisheries. Specifically, NMFS is considering evaluating whether foreign nations that supply fish and fish product imports to the United States have implemented regulations to address marine mammal bycatch in the nations' import-supplying fisheries that are comparable to regulations implemented by the United States, taking into account different conditions (option 9). These U.S. domestic regulations are developed and applied on a regional and fishery-by-fishery basis, recognizing that different regional and fishery conditions bear on the effectiveness of the measures.

To the extent that the options described above are determined to rise to the level of "United States standards," NMFS anticipates selecting one or more of the possible standards described above to apply when evaluating marine mammal bycatch in a foreign nation's import-supplying fisheries and, in turn, to define those standards as "United States standards" for the purposes of section 101(a)(2)(A). NMFS intends to select clear standards and associated criteria that could be applied uniformly to all foreign fisheries that supply fish and fish product imports to the United States. NMFS also intends to select only standards and associated criteria that have been met by U.S. domestic fisheries.

NMFS requests comments on the standards to be used when evaluating foreign import-supplying fisheries, including any suggestions of other standards or associated criteria NMFS should consider or modifications of the standards suggested above; and whether to apply one or more standards.

#### **Potential Procedures for Ensuring that U.S. Marine Mammal Bycatch Standards Are Met for Foreign Imports**

NMFS is considering developing a process for evaluating bycatch in foreign import-supplying fisheries that would be consistent with both the U.S. process for managing domestic marine mammal bycatch, outlined in MMPA sections 117 and 118, and the process for assessing and certifying nations for bycatch of protected living marine resources, outlined in HSDFMMPA section 610. In particular, NMFS is considering a process that would include (1) requesting that nations whose fisheries supply imports to the United States provide reasonable proof

of the impact of those fisheries on marine mammals; (2) initiating consultation with nations who fail to provide such reasonable proof or whose import-supplying fisheries are known or likely to not meet U.S. marine mammal bycatch standards; (3) allowing some time for nations undergoing consultation to meet U.S. marine mammal bycatch standards by providing acceptable "reasonable proof" of the impacts of their import-supplying fisheries on marine mammals, by improving their assessment capabilities in order to provide such proof, or by implementing effective bycatch mitigation measures; and (4) recommending that the import of certain fish and fish products from a nation or fishery into the United States be prohibited if that nation or fishery fails to meet U.S. marine mammal bycatch standards after consultation.

With regard to (1) above, NMFS is considering defining "reasonable proof" as information that indicates that a nation's import-supplying fisheries meet U.S. marine mammal bycatch standards.

With respect to (2) above, NMFS is considering initiating consultation with nations to encourage each nation to take the necessary corrective action to meet the U.S. marine mammal bycatch standards. Such consultation would likely consider the efficacy of marine mammal bycatch measures adopted under multilateral agreements to which the nation is a party, as well as the nation's implementation of those measures. Such consultation also would likely identify different conditions that NMFS may consider when making decisions regarding foreign fisheries imports, including existing scientific capacity within the nation, differences in fishing practices, logistical and technical challenges to assessing status or bycatch of specific marine mammal stocks, and logistical and technical challenges to mitigating bycatch for some stocks or fisheries. As necessary, appropriate, and feasible, NMFS may provide capacity building, training, or technology transfer to address issues identified during consultation. Such consultation and capacity building would be consistent with the approach described in HSDFMMPA section 610 for identifying and certifying nations for bycatch of protected living marine resources. Further, U.S. domestic consultations with take reduction teams also consider similar conditions, such as the quality of data available, logistical or technological challenges, and the feasibility of mitigation measures. NMFS also provides scientific support during domestic take reduction team consultations.

The time allotted in (3) above recognizes the need for some nations to improve their capacity to conduct suitable assessments, implement effective mitigation measures, or address unique challenges. NMFS is considering whether to include time to address these issues within the consultation period or to allow some time after consultation to assess the effectiveness of newly implemented measures before making import determinations. Both MMPA section 118(f) and HSDFMPA section 610 allow time for consultation before action is taken.

Finally, (4) refers to the implementation of import prohibitions themselves. NMFS would coordinate with other Federal agencies to make decisions regarding possible import prohibitions. NMFS also is considering whether and what kind of alternative procedures to establish for implementing import prohibitions on a shipment-by-shipment, shipper-by-shipper, or other basis if such imports were harvested by practices that do not result in marine mammal bycatch or were harvested by practices that are comparable to those of the United States. The HSDFMPA allows for the development of such alternative procedures.

NMFS is considering if and how intermediary nations should be addressed by the procedures under consideration. Intermediary nations are those that serve as intermediaries in re-exporting fish or fish products to the United States from the nation whose fisheries originally harvested the fish. With respect to yellowfin tuna harvested in the eastern tropical Pacific purse seine fisheries, section 101(a)(2)(D) of the MMPA requires that any intermediary nation certify and provide reasonable proof that "it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States." NMFS is considering using a similar approach to ensure that imports from intermediary nations meet U.S. marine mammal bycatch standards.

NMFS is requesting comments on the procedures under consideration for ensuring that foreign fisheries imports meet U.S. marine mammal bycatch standards, including whether to apply one or more of the possible standards when evaluating import-supplying fisheries to make decisions regarding initiating consultation or banning imports, which standards to apply, and whether to apply different standards for making the decision to initiate consultation than are used to make the

decision to ban imports. Further, NMFS is requesting comments on what issues and conditions should be considered during consultation and whether and what kind of alternative procedures should be established for implementing import prohibitions on a shipment-by-shipment or shipper-by-shipper basis. Finally, NMFS is requesting comments regarding if and how intermediary nations should be addressed by the procedures under consideration.

#### Petition for Rulemaking

On March 5, 2008, the U.S. Department of Commerce and other relevant Departments were petitioned to initiate rulemaking to ban importation of swordfish and swordfish products from countries that have not satisfied the MMPA section 101(a)(2) requirement. The petition for rulemaking under the Administrative Procedure Act was submitted by two nongovernmental organizations, the Center for Biological Diversity and the Turtle Island Restoration Network. The complete text of the petition is available via the internet at the following web address: <http://www.nmfs.noaa.gov/ia/>. Copies of this petition may also be obtained by contacting NMFS [see ADDRESSES].

On December 15, 2008, NMFS published a notification of receipt of the petition, with a January 29, 2009, deadline for comments (73 FR 75988). NMFS subsequently reopened the comment period from February 4 to March 23, 2009 (74 FR 6010, February 4, 2009).

Although the petition only requested action regarding imports of swordfish and swordfish products, the import provisions of MMPA section 101(a)(2) apply more broadly to imports from other foreign fisheries that use "commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards". Therefore, this rulemaking would be broader in scope than the petition. Comments received on the petition were considered during the development of this advance notice of proposed rulemaking. Many of the comments were limited to the scope of the petition, but others are more broadly applicable. We have summarized all comments on the petition below.

#### Summary of Comments Received on Petition

NMFS received almost 45,000 comments on the petition during the two public comment periods, including comments from individual members of the public, environmental and industry

groups, members of Congress, and swordfish exporting nations. The vast majority of public comments were submitted in association with mass comment campaigns by the Center for Biological Diversity and the Natural Resources Defense Council. NMFS developed this advance notice of proposed rulemaking in response to the comments received on the petition.

(1) *Support for the petition*—The vast majority of public comments supported the petition and recommended that NMFS implement the MMPA import provisions. Most of those comments recommended banning swordfish imports immediately, although a few comments recommended that NMFS request and evaluate information from nations before banning imports.

Some comments in support of the petition indicated that implementing the MMPA import provisions would (1) provide an incentive for foreign fisheries to implement bycatch reduction measures and data requirements similar to those of the United States; (2) provide added protection for marine mammals outside of U.S. waters; (3) level the "playing field" and protect U.S. fishers from unfair competition; and (4) ensure that U.S. consumers do not unwittingly contribute to the depletion of marine mammal populations as a result of poorly regulated fisheries. Several comments claimed that NMFS had failed to implement the MMPA import provisions and, thereby, had promoted the destruction of marine mammal populations and placed U.S. fishers at a significant competitive disadvantage. One comment suggested that NMFS did not need to develop regulations to implement a ban on swordfish imports because NMFS could "readily compare" foreign fishing operations to U.S. marine mammal bycatch standards.

(2) *Suggested alternative approaches to addressing international marine mammal bycatch*—Several comments suggested that working cooperatively with trading partners would be more effective than banning imports. Some of those comments suggested that the United States work to address international marine mammal bycatch through international organizations, such as regional fishery management organizations.

One comment suggested a capacity-building effort to bring about change in the fishing practices of trading partners. Another comment suggested developing a coalition of fish-importing companies in the United States to encourage suppliers in other countries to buy fish caught with "mammal safe" gear, which it suggested could be provided,

installed, and demonstrated by the U.S. government, industry, or non-governmental organization partners.

(3) *Possible standards*—A few comments pointed out the need to clearly define the “United States standards” regarding marine mammal bycatch in the context of section 101(a)(2) of the MMPA. Two comments recommended that NMFS consider the fisheries and fishing conditions of individual nations when evaluating those fisheries against U.S. marine mammal bycatch standards.

The majority of comments suggested that “United States Standards” should include consideration of the bycatch mitigation measures implemented by exporting nations. Comments suggested that foreign measures should be comparable to those used in U.S. fisheries, which include pingers (acoustic deterrents), net extenders, limits on longline length, time-area closures, safe handling and release training and equipment, and observer coverage.

Many comments suggested applying either the short- or long-term bycatch reduction goal of MMPA section 118 as a standard. The short-term goal specifies that bycatch should be reduced below a marine mammal stock’s PBR level, while the long-term goal specifies that bycatch should be reduced to insignificant levels approaching a zero mortality and serious injury rate (sometimes referred to as the “zero mortality rate goal”). In contrast, one comment suggested that it would be inappropriate to hold exporting nations to the long-term goal until U.S. fisheries have achieved it. One comment recommended applying additional MMPA standards, including (1) maintaining the health and stability of the marine ecosystem; (2) recovering populations to, and maintaining them at, optimum sustainable populations; (3) ensuring that authorized take levels do not disadvantage affected stocks; and (4) requiring development of take reduction plans for fisheries that exceed a stock’s PBR level. Several comments also pointed out that MMPA section 101(a)(2)(B) establishes standards for the eastern tropical Pacific purse seine fishery for tuna. Another comment suggested using the standards described in section 610 of the HSDFMFA.

(4) *Trade and economic issues*—Several comments discussed the relevance of the MMPA import provisions to intermediary nations. One comment recommended that NMFS apply the provisions to intermediary

nations by requiring those nations to provide documentation as to how swordfish or swordfish products they export to the United States were harvested and what impact those fisheries had on marine mammals. Another comment suggested that harvesting nations should be responsible for issuing “mammal-free certifications” to vessels and that importers in intermediary nations should be required to obtain such “certifications” prior to landing fish at the nations’ ports.

Numerous comments stated that a ban on swordfish imports would cause economic hardship for exporting nations. Another comment claimed that banning imports would financially harm importing companies in the United States because foreign harvesters would sell their fish to alternative markets.

Some comments voiced concern that implementing the MMPA import provisions could result in “unlawful barriers to international trade.” Some comments suggested that any measures taken should not hamper trade in swordfish or any other fish caught by “proper fishing devices.” A comment from one nation suggested that banning imports of swordfish would contradict the existing spirit of partnership and good relations with the United States. In contrast, one comment suggested that a ban on swordfish imports could be implemented in a manner consistent with the General Agreement on Tariffs and Trade and the World Trade Organization. That comment further suggested that NMFS is obligated to implement the MMPA import provisions, even if a ban on swordfish imports were found to be in conflict with international trade agreements.

(5) *Inaccuracies in petition and counter claims*—During its review of the petition, NMFS noted that the petition contained some factual errors. For example, some of the swordfish import amounts reported for Taiwan (referred to as China-Taipei in the petition), Mauritius, Mexico, New Zealand, and South Africa were incorrect. Corrections are available at <http://www.st.nmfs.noaa.gov/st1/trade/>.

NMFS also noted some discrepancies in the petition’s description of the scope and timing of some U.S. fishery closures described in the petition. In particular, the description on page eleven of the petition underestimated the extent of longline closures in the Pacific, ignoring areas closed to longline fishing in Guam and the Northwestern and Main Hawaiian Islands. The description on

page eight of the petition failed to recognize that the gillnet prohibition in the western Pacific fishery management area includes all U.S. EEZ waters around Hawaii, Guam, American Samoa, Commonwealth of the Northern Mariana Islands, and U.S. Pacific remote island areas. Further, the description on the same page of the timing of drift gillnet fishery closures on the U.S. west coast during El Niño events was incorrect; those closures are implemented from June 1 through August 31 when NMFS has forecasted or announced the occurrence of an El Niño event.

Several exporting nations offered counterclaims to those listed in the petition. Brazil noted that the petition claimed that Brazil expanded its longline fleet by leasing vessels from flag of convenience countries. In its comments, Brazil cited a law prohibiting vessels operating for Brazilian fishing companies from registering in other countries under flags of convenience. Taiwan provided comments questioning the validity of bycatch estimates for Taiwan fisheries in the petition. Taiwan argued that the estimates were derived using incorrect methods and data. Two nations commented that they believed there was no valid justification for the measures proposed by the petitioners.

A number of nations commented that their marine mammal protection programs were comparable to those of the United States. Those nations provided a variety of supporting information regarding their laws, regulations, and/or bycatch management measures.

One nation suggested that the provision of reasonable proof regarding the effects of fisheries on marine mammals is not a prior obligation of exporting nations, although the United States is entitled to request such information.

### Classification

This advance notice of proposed rulemaking has been determined to be not significant for purposes of Executive Order 12866.

Dated: April 26, 2010.

**Samuel D. Rauch III,**  
Deputy Assistant Administrator for  
Regulatory Programs, National Marine  
Fisheries Service.

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