IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

SEA SHEPHERD NEW ZEALAND, *a New Zealand registered charity*

and

SEA SHEPHERD CONSERVATION SOCIETY, *a United States nonprofit organization,*

Plaintiffs,

v.

WILBUR ROSS, *in his official capacity as Secretary of Commerce,*

UNITED STATES DEPARTMENT OF COMMERCE, *a United States government agency*,

CHRIS OLIVER, *in his official capacity as Assistant Administrator of the National Marine Fisheries Service*,

NATIONAL MARINE FISHERIES SERVICE, *a United States government agency*,

STEVEN MNUCHIN, *in his official capacity as Secretary of the Treasury*,

UNITED STATES DEPARTMENT OF THE TREASURY, *a United States government agency*,

CHAD WOLF, *in his official capacity as Acting Secretary of Homeland Security*,

and

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *a United States government agency,*

Defendants.

Civil Action No. 20-cv-00112

COMPLAINT

INTRODUCTION

1. The Māui dolphin, endemic to New Zealand, is the most endangered marine dolphin in the world. As of 2016, only an estimated 57 individuals remained. These dire numbers are in stark contrast with the estimated 2,000 individuals that ranged along the entire coastline of the North Island of New Zealand in 1970. In light of these numbers, the Scientific Committee of the International Whaling Commission ("IWC") has repeatedly stated that "[t]he human-caused death of even one individual would increase the extinction risk." The primary cause of the drastic decline of the Māui dolphins, and the leading threat to the survival of this subspecies, is their incidental capture, or bycatch, in gillnet and trawl fisheries within their range.

2. In 1972, in recognition of the significant aesthetic, recreational, and economic value of marine mammals such as the Māui dolphin, and the threat to such species posed by human activities, Congress enacted the Marine Mammal Protection Act ("MMPA"). *See* 16 U.S.C. § 1361 *et seq*. The dangers of bycatch were central to Congress' analysis when it enacted the MMPA. In accord with this Congressional intent, the MMPA bans not only the intentional killing of marine mammals but also strictly limits the degree to which the United States fishing industry may incidentally harm or kill marine mammals. 16 U.S.C. § 1371(a)(2). Key to the MMPA's scheme is the "Zero Mortality Rate Goal" ("ZMRG"), which is to reduce the incidental mortality or serious injury of marine mammals in the course of commercial fishing operations to insignificant levels approaching zero. *Id.*

3. Recognizing that the United States could shape policy in foreign nations as a result of its substantial import market for fisheries products, Congress chose to prohibit imports from foreign fisheries that fail to reduce the bycatch of marine mammals to insignificant levels approaching the ZMRG. Accordingly, the MMPA requires that the United States "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." 16 U.S.C. § 1371(a)(2). The Secretary of Commerce, the United States Department of Commerce, the Secretary of the Treasury, the United States Department of the Treasury, the Administrator of the National Marine Fisheries Service, the National Marine Fisheries Service, the Secretary of Homeland Security, and the United States Department of Homeland Security (collectively, "Defendants") are responsible for administering and/or implementing the MMPA's requirements.

4. Māui dolphins are being caught with commercial fishing technology that results in their incidental death or serious injury at a rate that exceeds United States standards, and New Zealand has not provided reasonable proof of the effects of its fisheries on the Māui dolphin. As such, Sea Shepherd New Zealand and Sea Shepherd Conservation Society (collectively, "Plaintiffs") urge this Court to declare that Defendants are violating federal law and to enter an injunction requiring Defendants to ban the import of fish and fish products that are caught in, or derived from, New Zealand commercial fisheries that use gillnets or trawls that result in the incidental death or serious injury of Māui dolphins.

5. Pursuant to the MMPA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*, on February 6, 2019, Plaintiffs submitted a Petition to Defendants urging them to enact an emergency rule banning the import of fish and fish products from New Zealand that result in the incidental kill or serious injury of Māui dolphins in excess of United States standards. The MMPA provides that Defendants must engage in emergency rulemaking if they determine that "the incidental mortality and serious injury of marine mammals from commercial fisheries is

having, or is likely to have, an immediate and significant adverse impact on a stock or species." 16 U.S.C. § 1387(g)(1); 81 Fed. Reg. 54390, 54395 (Aug. 15, 2016).

6. Defendants denied Plaintiffs' Petition on June 18, 2019. Defendants' denial of Plaintiffs' Petition, which was based largely on potential actions that the New Zealand government may take in the future, was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A).

7. Defendants' actions violate the MMPA and threaten the existence of the critically endangered Māui dolphin. If the Court does not require Defendants to take immediate action, the world may lose the Māui dolphin forever.

JURISDICTION

8. This Court has exclusive jurisdiction over Plaintiffs' first claim for relief because Plaintiffs are seeking an embargo "on the importation of merchandise for reasons other than the protection of the public health or safety." 28 U.S.C. § 1581(i)(3). Plaintiffs' claim is against United States agencies and officers under MMPA section 101(a)(2), which provides for an embargo of certain fish and fish products. *See* 16 U.S.C. § 1371(a)(2) ("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."). This Court has supplemental jurisdiction over Plaintiffs' second request for relief. *See* 28 U.S.C. § 1367(a) (providing that district courts "have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy"); 28 U.S.C. § 1585 (providing that the Court of International Trade possesses "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States").

9. This Court may grant the relief requested pursuant to MMPA section 101(a)(2), 16 U.S.C. § 1371(a)(2), the Administrative Procedure Act (APA), 5 U.S.C. §§ 706(1)–(2), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

PARTIES

10. Sea Shepherd New Zealand Ltd ("SSNZ") is a registered New Zealand charity whose object and purpose is to educate the New Zealand public about marine conservation, protect and preserve New Zealand's ocean environment including its ecosystems, flora, and fauna, and support organizations and initiatives that are consistent with and will further these charitable purposes. SSNZ implements its marine conservation and ecosystem protection goals through advocacy, research, education, grass-roots activities, and direct action. Protecting the Māui dolphin is an integral part of SSNZ's mission and purpose, and as such SSNZ has a long history of actively advocating for protection of the Māui dolphin.

11. Sea Shepherd Conservation Society ("SSCS") is a 501(c)(3) nonprofit corporation incorporated in Oregon. SSCS operates as an international nonprofit, marine wildlife conservation organization, with thousands of supporters and volunteers throughout the world, including in New Zealand. Established in 1977, SSCS's mission is to end the destruction of habitat and slaughter of wildlife in the world's oceans in order to conserve and protect ecosystems and species. SSCS uses innovative direct-action tactics, as well as scientific and legal tools, to investigate, document, and take action when necessary to expose and confront illegal activities in the world's oceans. By safeguarding the biodiversity of the planet's delicately balanced ocean ecosystems, SSCS works to ensure the Māui dolphin's and other species' survival for their own sake and for that of future generations. SSCS is an integral part of the global Sea Shepherd network. Collectively, Sea Shepherd has offices in over forty countries, including SSNZ.

12. SSNZ and SSCS have supporters and volunteers who travel to or reside in New Zealand, and who derive ongoing and lasting recreational, aesthetic, professional, moral, spiritual, and cultural benefits from observing Māui dolphins in the wild and knowing that Māui dolphins continue to exist in the world.

13. SSNZ's and SSCS's supporters' and volunteers' interests have been harmed and will continue to be harmed by Defendants' failure to ban the import of fish and fish products that are caught in, or derived from, New Zealand commercial fisheries that use gillnets or trawls that result in the incidental death or injury of Maui dolphins in excess of United States standards, and by Defendants' arbitrary and capricious denial of Plaintiffs' Petition. These supporters and volunteers are concerned that, absent a ban, the Māui dolphin population will continue to decline and likely become extinct. If action is not taken now to protect Māui dolphins, the future opportunities of these supporters and volunteers to fulfill their plans to observe or continue to observe Māui dolphins will be greatly diminished, and the joy and benefits they receive from seeing Māui dolphins in the wild, and knowing that they might be able to see them in the future, will be lessened.

14. The above-described interests of SSNZ's and SSCS's supporters and volunteers have been, are being, and unless the relief prayed for herein is granted, will continue to be adversely affected by Defendants' disregard of their statutory duties under the MMPA and APA and by the devastating, ongoing harm caused to the small Māui dolphin population resulting from such disregard. The relief requested in this lawsuit will redress these injuries.

15. Defendant United States Department of Commerce oversees the National Marine Fisheries Service's compliance with the MMPA and is responsible for implementing the MMPA,

including portions of section 101(a)(2). Therefore, the Department of Commerce is responsible for the violations alleged in this complaint.

16. Defendant Wilbur Ross is the Secretary of Commerce and directs all business of the United States Department of Commerce. Therefore, Secretary Ross in his official capacity is responsible for the violations alleged in this complaint.

17. The Department of Commerce has delegated responsibility for implementing the MMPA to the National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NMFS"), including implementation of section 101(a)(2). Therefore, NMFS is responsible for the violations alleged in this complaint.

18. Defendant Chris Oliver is the Assistant Administrator of NMFS and directs all business of NMFS. Therefore, Assistant Administrator Oliver in his official capacity is responsible for the violations alleged in this complaint.

19. Section 101(a)(2) of the Act directs the United States Department of the Treasury to ban the importation of commercial fish and fish products that do not meet United States standards for the protection of marine mammals. Therefore, the Department of the Treasury is responsible for the violations alleged in this complaint.

20. Defendant Steven Mnuchin is the Secretary of the Treasury and directs all business of the United States Department of the Treasury. Therefore, Secretary Mnuchin in his official capacity is responsible for the violations alleged in this complaint.

21. Pursuant to the Homeland Security Act, the Department of the Treasury has partially delegated its authority related to trade bans to the United States Department of Homeland Security. *See* 6 U.S.C. §§ 203(1), 212(a)(1); 68 Fed. Reg. 28,322 (May 23, 2003). Therefore, the Department of Homeland Security is responsible for the violations alleged in this Complaint.

22. Defendant Chad Wolf is the Acting Secretary of Homeland Security and directs all business of the United States Department of Homeland Security. Therefore, Acting Secretary Wolf is responsible in his official capacity for the violations alleged in this Complaint.

LEGAL BACKGROUND

Marine Mammal Protection Act

23. The MMPA was enacted in 1972 to protect and restore marine mammal species that "are, or may be, in danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361(1). In adopting the MMPA, Congress recognized that marine mammal species and populations "should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population." *Id.* § 1361(2). Further, Congress recognized that "marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic," and found "that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management[.]" *Id*. § 1361(6). NMFS and the United States Fish and Wildlife Service are jointly responsible for administering the MMPA. *Id.* §§ 1362(12)(A), (B).

24. Bycatch resulting from commercial fishing has led to the severe depletion of marine mammals throughout the world. In response to this issue, Congress included the ZMRG in the MMPA, which has the overarching "immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." *Id*. § 1371(a)(2). In order to achieve the ZMRG, section 101(a)(2) of the MMPA (hereafter, the "Imports Provision") directs

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." *Id.* § 1371(a)(2). Accordingly, the Imports Provision calls for a mandatory ban when bycatch in the foreign fishery exceeds "United States standards."

25. To evaluate the necessity of a ban, the MMPA requires that the Secretary of Commerce "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[.]" *Id.* § 1371(a)(2)(A).

26. In order to achieve the ZMRG, the MMPA includes specific standards for tracking, assessing, and limiting marine mammal bycatch:

a. **Stock Assessments:** NMFS must prepare a "stock assessment" for each marine mammal population in United States waters. The assessment includes a report concerning the population's abundance, the current population trend, the fisheries that interact with the population, the level of "mortality and serious injury" caused by those fisheries each year, and whether the mortality from commercial fisheries is "insignificant and is approaching a zero mortality and serious injury rate." *Id.* § 1386(a).

b. **Potential Biological Removal:** A "potential biological removal" ("PBR") level must be derived for each marine mammal population. *Id.* PBR is 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." *Id.* § 1362(20). Calculated using a specific formula, the PBR method has the principal goal of ensuring that human-caused mortality is below a level that could lead to population depletion.

c. **Take Reduction Plan:** A "take reduction plan" must be developed when a commercial fishery is incidentally killing a marine mammal population at or above the PBR, or that species is listed (or likely to be listed) as threatened or endangered under the Endangered Species Act. The take reduction plan sets an immediate goal of reducing fishery-related mortality and serious injury below the PBR within six months and a long-term goal of reducing bycatch levels to "insignificant levels approaching a zero mortality and serious injury rate" within five years. *Id.* § 1387(f).

d. **Monitor and Estimate Bycatch Provision:** NMFS must establish "a program to monitor incidental mortality and serious injury of marine mammals during the course of commercial fishing operations" in order to "obtain statistically reliable estimates" of bycatch. *Id.* § 1387(d). This monitoring goal may be achieved by placing human observers onboard fishing vessels to record, among other things, marine mammal sightings and the number of marine mammals killed during the fishing operations. *Id.*

27. These MMPA standards, including the ZMRG, are "United States standards" under the Imports Provision and apply to domestic commercial fisheries and foreign fisheries that import fish and fish products into the United States. *Id.* § 1371(a)(2).

28. In 2016, NMFS promulgated regulations regarding importation of fish products from foreign fisheries. 81 Fed. Reg. 54,390 (Aug. 15, 2016) (the "Imports Rule"). The Imports 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." *Id*. Under this Rule, fish and fish products can only be imported into the United States if the foreign nation has received a comparability finding from NMFS. *Id.* The Imports Rule includes a five-year exemption period for foreign commercial fisheries. 50 C.F.R. §§ 216.3, 216.24(h)(2)(ii).

29. Section 118(g) of the MMPA provides that the Secretary of Commerce "shall" undertake emergency rulemaking actions if he or she "finds that the incidental mortality and serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species[.]" 16 U.S.C § 1387(g)(1).

30. Although section 118(g) applies to domestic fisheries, in its publication of the final Imports Rule, NMFS referenced this statutory section as support for extending a similar emergency rulemaking regime to the foreign fisheries context. 81 Fed. Reg. 54390, 54395 (col. 2 & 3) (Aug. 15, 2016). Specifically, NMFS stated that it "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." *Id*. at 54395 (col. 2). NMFS further observed that emergency rulemaking "allow[s] for timely treatment of cases where the usual process and timeframe could result in unacceptable risks to the affected marine mammal stock or species." *Id*. at 54395 (col. 2 & 3). Under this standard, NMFS recognized that emergency rulemaking would be appropriate in the case of a "very small population[] where any incidental mortality could result in increased risk of extinction[.]" *Id*. at 54395 (col. 3). Thus, this emergency rulemaking provision is an exception to the Import Rule's five-year moratorium.

31. Prior to initiating an emergency rulemaking, NMFS noted that it would consult with the exporting nation and urge it to take measures to reduce bycatch of the marine mammal, and

that NMFS would consider imposing a ban if the country failed to implement NMFS's requested measures. *Id*. at 54395 (col. 2).

32. The MMPA established the Marine Mammal Commission ("MMC") as an independent United States agency. 16 U.S.C. § 1401(a). Among other duties imposed by the MMPA, the MMC must "recommend to the Secretary [of Commerce] and to other Federal officials such steps as it deems necessary or desirable for the protection and conservation of marine mammals." *Id.* § 1402(a)(4). Federal officials must explain in detail any deviation from such recommendations. *Id.* § 1402(d).

Administrative Procedure Act

33. APA section 706(1) provides that a reviewing court "shall … compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1). This provision applies to all discrete actions an agency is required to make. *Natural Res. Def. Center v. Ross,* 332 F.Supp. 3d 1338, 1353 (Ct. Int'l Trade Aug. 14, 2018).

34. APA section 702 provides a cause of action to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

35. Courts must "hold unlawful and set aside" an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Arbitrary and capricious review under the APA requires a court to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Lady Kim T. Inc. v. U.S. Secretary of Agriculture.,* 491 F. Supp 2d. 1366, 1369 (Ct. Int'l Trade June 6, 2007) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

36. The APA further provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e).

37. The denial of a petition for rulemaking is a final agency action reviewable under the APA. *See* 5 U.S.C. § 704.

FACTUAL BACKGROUND

Māui Dolphin Biology, Habitat, and Range

38. Māui dolphins, found only in the inshore waters around New Zealand's North Island, are on the verge of extinction. Māui dolphins have suffered a dramatic decline in population over the past 50 years. From 1970 to 2016, the population decreased from approximately 2,000 to 57 dolphins. The estimate of 57 dolphins is based on analyses by members of the IWC Scientific Committee in 2018. The Māui dolphin is listed as critically endangered by the International Union for Conservation of Nature ("IUCN"), meaning that the subspecies is considered to be facing an extremely high risk of extinction in the wild.

Source: Sea Shepherd New Zealand

39. The Māui dolphin is one of two imperiled subspecies of Hector's dolphin, both subspecies being endemic to New Zealand's waters. The Māui dolphin is of special importance to the indigenous population of New Zealand, the Māori. The Māori consider the Māui dolphin to be *taonga* or a sacred cultural treasure.

40. Māui dolphins have a lifespan of approximately 25 years and have a low reproductive rate (calving every 2–4 years) and late onset of sexual maturity (7–9 years). These characteristics contribute to Māui dolphins' low maximum population growth rate, which means that even low levels of human-caused mortality threaten the survival of the species. Given their specific biological traits, including very small population size, low fecundity, and rapid decline in numbers, the Māui dolphin is at extremely high risk of extinction. Small populations, in particular, are more vulnerable simply due to their small size. For example, losing a single breeding female (due to natural causes or human impact) has a much larger impact on Māui dolphins because there are less than 20 (14 – 17) breeding females.

41. Māui dolphins inhabit New Zealand's coastal and inshore waters and are typically seen in small groups. The Māui dolphin's range extends around the North Island coastline, with the core range of the dwindling population primarily on the west coast of the North Island, from Maunganui Bluff in the north to Whanganui in the south, including harbors. Figure 1 below is a map of the North Island depicting the most recent sighting data for the Māui dolphin. This map confirms the wide distribution of Māui dolphins along the North Island coastline.

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Figure 1: Māui dolphin sightings off New Zealand's North Island (Source: New Zealand National Institute of Water and Atmospheric Research)

42. Given the nature of the offshore topography around the North Island, and the observed habitat-use patterns of the Māui dolphin, protection of its habitat should be based on depth contour (a line connecting points of equal depth) rather than lateral distance from shore. The 100-meter depth contour best matches the offshore extent of Māui dolphin habitat.

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The Significant Incidental Mortality of Māui Dolphins in New Zealand Fisheries

43. Māui dolphins are captured and killed or seriously injured in what is known as "bycatch," which NMFS defines as "discarded catch of marine species and unobserved mortality due to a direct encounter with fishing vessels and gear." In this case, Māui dolphins are entangled and killed or seriously injured in gillnets (also known as "set nets") and trawl nets. Gillnets are a type of non-selective fishing net that is hung vertically in the water for hours or up to days at a time to harvest marine fish and other species. Given that they are non-selective, gillnets capture and incidentally kill a vast array of sealife, and it is common for the target species to comprise only a small percentage of a gillnet's total catch. Trawl fishing is another type of indiscriminate fishing method whereby one or two boats drag a large net through the water column, catching almost everything in the net's path. The New Zealand government has acknowledged on numerous occasions that "[i]t is widely accepted that incidental mortality in coastal fisheries, notably set nets and to a lesser extent trawls, is the most significant threat to Hector's and Māui dolphins."

44. The general vulnerability of Māui dolphins to human-caused mortality can be best understood through the calculation of a PBR for this subspecies. In a 2017 report to the IWC Scientific Committee, experts calculated a PBR indicating that only one Māui dolphin roughly every 20 years could be removed from the population while still allowing Māui dolphins to reach or maintain their optimum sustainable population.

45. A 2019 study discussed by the IWC Scientific Committee estimated mean annual bycatch mortality for Māui dolphins. This study estimated that the annual mean bycatch in recent years was 1.8 to 2.4 Māui dolphins per year, which vastly exceeds their calculated PBR of "one individual roughly every 20 years." The study further demonstrated that Māui dolphins are 14 to

20 times more vulnerable to fisheries bycatch than had been estimated by the New Zealand government.

46. The IWC Scientific Committee also expressed concern regarding New Zealand's failure to account for the significant and tremendously detrimental impact of bycatch on Māui dolphins—stating in 2017, for example, that (1) it is "estimated that the reported bycatch of Hector's and Maui dolphins [i]s 4-5% of actual bycatch, due to low levels of observer coverage and voluntary reporting by fishermen" and (2) "bycatch [is] estimated to substantially exceed sustainable levels calculated using the PBR approach."

New Zealand's Failure To Protect Māui Dolphins Throughout Their Range

47. Since 2003, New Zealand has enacted some restrictions to protect Māui dolphins from the risk of bycatch due to commercial fisheries operating in their range. However, the existing protections are wholly inadequate to protect Māui dolphins from bycatch and the risk of extinction.

48. As Figure 2 below clearly shows, areas with fishing restrictions cover only a small fraction of the Māui dolphin's range. As acknowledged by NMFS, trawling has been banned in approximately 5% of the habitat of the Māui dolphin, while gillnets are banned in an additional 14% of that habitat." 84 Fed. Reg. 5977, 5977 (col. 3) (February 25, 2019). These limited protections are grossly inadequate and virtually guarantee the extinction of the Māui dolphin.

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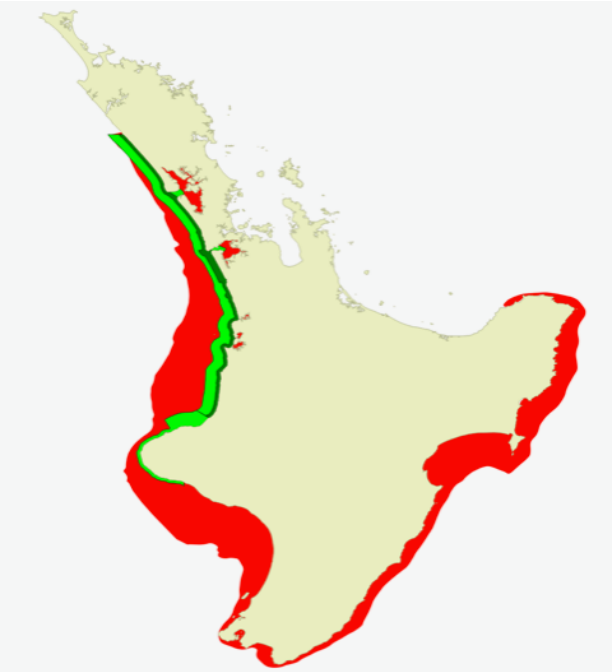

Figure 2: Māui dolphin range and extent of current protections. (Red: Range of Māui dolphin [100-meter depth contour]. Dark green: Areas where gillnets and trawling are banned. Light green: Areas where gillnets are banned but trawling is permitted.)

49. The IUCN has strongly urged New Zealand to "extend dolphin protection measures, with an emphasis on banning gill net and trawl net use from the shoreline to the 100 metre depth contour in all areas where Hector's and Maui's Dolphins are found, including harbours." Accordingly, the IUCN's recommended protection measures extend throughout the entire area depicted in red in Figure 3 above.

New Zealand's Efforts To Protect Māui Dolphins Fall Far Short of United States Standards

50. The MMPA imposes strict standards on United States domestic, commercial fisheries designed to protect marine mammals from incidental mortality in such fisheries. *See* 16 U.S.C. § 1387. New Zealand has failed to adopt similar statutorily mandated standards for marine mammals in general and for the Māui dolphin in particular.

New Zealand Law Does Not Include Anything Approximating the ZMRG

51. New Zealand law does not require, or set as a standard or goal, the reduction of the incidental mortality or serious injury of marine mammals in the course of commercial fishing operations to insignificant levels approaching zero, a fact admitted by the New Zealand government. In 2013, the Ministry of Primary Industries ("MPI") (an entity that includes the Ministry of Fisheries) observed that "the [Fisheries] Act does not oblige [the government] to reduce the risk of fishing-mortality rates to zero."

New Zealand Does Not Prepare Stock Assessment Reports for Marine Mammals

52. In the United States, the MMPA requires preparation and periodic updating of a stock assessment report to track the status of marine mammal populations based on the best available science. The stock assessment reporting process includes a framework for analyzing and managing the risk to marine mammals from bycatch in commercial fisheries. This framework incorporates, among other things, methods to judge the efficacy of observer coverage to ensure that regulators can reliably assess the impact of bycatch on a marine mammal population.

53. New Zealand does not require the preparation of anything approximating a stock assessment report for the marine mammals in its waters.

New Zealand Has Not Adopted a Standard Equivalent to the PBR

54. New Zealand does not include the PBR approach in assessing the management measures necessary to protect the Māui dolphin. Instead, New Zealand has adopted a considerably less protective variant of the United States' PBR standard: the Population Sustainability Threshold ("PST"). As summarized by MPI: "The PST is an index of the population productivity, adapted from the PBR. It is an estimate of the maximum number of human-caused mortalities that will

allow populations to remain above half their carrying capacity after 200 years, with a 95% probability . . .”

55. Material differences between the PST and the PBR formulas often result in the calculation of a considerably higher PST (*e.g.*, nearly three times higher for the Māui dolphin) than under the more precautionary PBR approach. By permitting a higher level of mortality, the PST results in the adoption of far less protective management measures. Additionally, the PST’s use of a long timescale (200 years) for population recovery is unacceptable for depleted populations like the Māui dolphin. In contrast, under the more precautionary PBR standard, the United States has recognized that, for depleted species like the Māui dolphin, PBR should be set to 0 – resulting in the closure of the fishery negatively impacting that species. Thus, the PST is not equivalent to the PBR standard.

56. The estimated annual bycatch of Māui dolphins is 1.5–2.4 animals per year. The species-specific PBR for Māui dolphins is 0.05 (or 1 dolphin mortality every 20 years). By comparison, the PST is 0.14 (or 1 dolphin mortality every 7 years). Thus, estimated bycatch mortality substantially exceeds both the PBR and PST. Furthermore, the more precautionary PBR standard yields a considerably smaller (about three times smaller) annual mortality threshold that counsels more protective measures, including the prohibition of all gillnet and trawl fishing in the entire Māui dolphin range—as urged by the IUCN.

57. When the incidental mortality of a marine mammal species exceeds PBR, under United States standards, a take reduction plan must be prepared. 16 U.S.C. § 1387(f). In New Zealand, exceeding the PST does not trigger any particular statutorily mandated management measures.

New Zealand Has Not Adopted Anything Similar to a "Take Reduction Plan" for the Māui Dolphin

58. In 1999, the New Zealand Minister of Conservation designated the Māui dolphin as a "threatened species." The Māui dolphin is also defined as a "protected species" under New Zealand's Marine Mammal Protection Act (1978) ("New Zealand MMPA") and Fisheries Act (1996). The New Zealand MMPA allows for the approval of a population management plan ("PMP") for any protected species. A PMP imposes a maximum allowable level of fishing-related mortality that will allow the species to achieve non-threatened status in less than 20 years. The PMP process also contains other statutory mandates designed to achieve this goal.

59. To date, a PMP has not been developed for the Māui dolphin.

60. Since 2007, New Zealand has had a threat management plan ("TMP") for the Māui dolphin. Unlike a PMP, the TMP is not a statutory document containing conservation-orientated legal mandates, but rather it is a discretionary management plan identifying human-induced threats to the Māui dolphin and outlining strategies to mitigate those threats. The Māui dolphin TMP is the first in a series of steps on the road to possible legal change but the actual implementation of any new protections into law will take additional time and be subject to legal challenge.

61. The TMP is not equivalent to the take reduction plan required under the MMPA when incidental mortality exceeds the PBR. In addition to being the product of a discretionary, non-statutory process, the TMP fails to incorporate the safeguards of a take reduction plan, including, for example, the requirement to identify and implement actions that will achieve PBR within six months and the ZMRG within five years of plan implementation. *Id.* Instead, although New Zealand introduced the first TMP in 2007, thirteen years later the Māui dolphin population remains seriously imperiled.

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New Zealand Fails To Adequately Monitor the Incidental Mortality and Serious Injury of Māui Dolphins During Commercial Fishing Operations

62. In order to set appropriate management actions, such as sufficiently protective area-based fishing restrictions, New Zealand must effectively monitor the fisheries impacting the Māui dolphin population. In the United States, the MMPA requires implementation of a monitoring program in commercial fisheries to, among other things "obtain statistically reliable estimates of incidental mortality and serious injury." 16 U.S.C. § 1387(d). New Zealand does not have a similar statutory mandate. While the Fisheries Law includes general observer requirements, there are not any specific observer standards related to incidental marine mammal mortality. Rather, the TMP sets forth discretionary monitoring objectives that have remained unfulfilled.

63. Observer coverage in Māui dolphin habitat off the west coast of the North Island is 14.6% for trawling vessels and 12.7% for gillnetting vessels greater than six meters in length, with no observer coverage for smaller craft. However, the risk to Maui dolphins is based not on the size of the vessel, but on the amount (length) of net set in the water. If observer rates are assessed based on total length set, then observer coverage adds up to only 2% because the coverage calculation then includes the smaller craft. If east coast of the North Island were included in these calculations, the aggregate number would be even lower—reflecting the lack of any observer coverage in that segment of Māui dolphin habitat.

64. In addition to observer data, New Zealand relies upon self-reporting of Māui dolphin mortality by the fishers themselves in assessing the impact of bycatch on the population. Nevertheless, New Zealand acknowledges that fishers do not report Māui dolphins killed during fishing operations—admitting that there is a "strong likelihood of underreporting."

65. Inadequate observer coverage, in conjunction with the failure of fishers to report Māui dolphin bycatch, contributes to New Zealand's material underestimate of the impact of fisheries on the Māui dolphin.

66. Given the absence of statutory mandates concerning the monitoring of incidental marine mammal mortality and serious injury coupled with low observer coverage and a lack of fisher reporting, New Zealand's monitoring standards are not equivalent to those in the United States.

A Decision on New Zealand's Current Draft TMP Will Not Result in Adequate Protections for Māui Dolphins

67. In 2018, New Zealand began the process of revising the Hector's and Māui Dolphin TMP. New Zealand estimated that public consultation on the draft TMP would conclude in April 2019 and that a final decision would be presented to the government Ministers in May 2019. New Zealand did not keep to this schedule.

68. In June 2019, the New Zealand government released a draft TMP containing four options that it is considering to manage threats to Hector's and Māui dolphins, including threats from fisheries' bycatch. The first option would keep current restrictions in place, thus maintaining the status quo. The second and third options include progressively greater protections compared with the status quo but still fail to go nearly far enough to save the Māui dolphin. The fourth option would ban fishing with set-nets and trawling gear in a larger percentage of the Māui dolphin's range but only out to the 100-meter depth contour for a portion of that range. The fourth option also falls far short of the IUCN's recommendation that protections be extended to the entire Māui dolphin range, including along the east coast of the North Island.

69. The draft TMP inappropriately minimizes the effect of fisheries bycatch on the Māui dolphin while substantially overemphasizing the relative impact of the disease

toxoplasmosis. This disease arises from exposure to the parasite *Toxoplasma gondii*, which is transmitted through cat feces found in runoff from terrestrial sources. A 2019 study presented to the IWC Scientific committee questioned the reliability of New Zealand's toxoplasmosis mortality projections. The study noted that the projections are based upon "limited necropsy data" and concluded that the most accurate model supported fisheries bycatch as the primary cause of Māui dolphin mortality.

70. In 2018, New Zealand convened an expert stakeholder panel to assess New Zealand's approach in formulating the TMP. With respect to toxoplasmosis, the expert panel criticized New Zealand's reliance on the limited necropsy data and strongly advised that New Zealand lacked the information needed to compare toxoplasmosis and fisheries bycatch mortality estimates.

71. By promoting toxoplasmosis as a more significant cause of Māui dolphin mortality in comparison with fisheries bycatch, the draft TMP's results are biased against the implementation of critically needed protections throughout the range of the Māui dolphin.

72. To date, New Zealand's has not released a final TMP selecting one of the four proposed management measures. Nevertheless, even in the unlikely event that New Zealand ultimately selects the most protective option (the fourth option), that selection does not go far enough to save the Māui dolphin from extinction.

The Improper Denial of Plaintiffs' Petition

73. Recognizing the dire threat to the survival of the Māui dolphin, on February 6, 2019, Plaintiffs filed a petition with Defendants asking them to perform their non-discretionary duties established under the MMPA by implementing an emergency rulemaking that would "ban the importation of commercial fish or products from fish" harvested using fishing activities that

"result[] in the incidental kill or incidental serious injury" of Māui dolphins "in excess of United States standards." 16 U.S.C. § 1371(a)(2). *See* Exhibit A (Plaintiffs' Petition). Specifically, the Petition requested that Defendants immediately ban, pursuant to the MMPA Imports Provision, all fish and fish products originating from fisheries in the Māui dolphin's range that employ either gill nets or trawls—the fishing gear responsible for the near extinction of the Māui dolphin.

74. On March 27, 2019, the MMC submitted comments on the Petition. In its letter, the MMC stated that "given the small numbers of Māui dolphins remaining, the population's trend, the low capacity of the species to withstand further losses, and the ongoing number of deaths attributed to fisheries bycatch, it is plainly evident that commercial fisheries are having such an [immediate and significant adverse] impact on the Māui dolphin." The MMC concluded that a complete ban on gillnet fishing and trawling within the range of Māui dolphins is the measure most likely to achieve a significant reduction in the death of Māui dolphins and to make New Zealand's efforts to conserve Māui dolphins comparable with U.S. standards. While the MMC noted that New Zealand is in the process of developing a revised TMP, it stated that it is likely the plan will take considerable time to implement and that "the Māui dolphins are at too great a risk of further decline and extinction to allow for customary, but potentially drawn-out procedures" that may not have a significant impact.

75. In its March 27, 2019 letter, the MMC recommended that NMFS accelerate its emergency rulemaking process by promptly publishing a proposed or final rule to ban imports of fish or fish products from fisheries that are likely to result in take of Māui dolphins in excess of United States standards unless it has received new information that indicates New Zealand is implementing additional mitigation measures that are highly likely to reduce the mortality and

serious injury of Māui dolphins incidental to gillnet and trawl fisheries to a level lower than the species' PBR level.

76. Upon information and belief, New Zealand did not submit information to NMFS establishing that New Zealand has implemented additional mitigation measures that are highly likely to reduce the mortality and serious injury of Māui dolphins incidental to gillnet and trawl fisheries to a level lower than the species' PBR level. Upon information and belief, New Zealand has not implemented any such mitigation measures.

77. On June 18, 2019, the day after New Zealand released the draft TMP, NMFS denied Plaintiffs' Petition. *See* 84 Fed. Reg. 32853, 83854–32855 (July 1, 2019). NMFS stated that it was rejecting the Petition because (1) "New Zealand is implementing a regulatory program comparable in effectiveness to the United States;" (2) "New Zealand has in place an existing regulatory program to reduce Māui dolphin bycatch;" and (3) New Zealand "was proposing additional regulatory measures" that would "further reduce the risk" to Māui dolphins. *Id.* at 32854 (col. 1-2).

78. NMFS's denial of the Petition relied significantly on the much delayed and scientifically flawed TMP process that is not equivalent to United States standards. NMFS has also admitted that New Zealand's current protections for Māui dolphins fall far short of United States standards. Specifically, in discussing Plaintiffs' Petition internally, NMFS stated: "Recognizing that there have been no changes to the regulatory regime governing fisheries in Maui dolphin habitat since 2013 and that the IWC has found the current regulations inadequate, the U.S. government cannot in good faith find the current regulatory regime comparable to the U.S. regulatory regime." Accordingly, NMFS's denial was based upon an incorrect finding that New

Zealand's standards for preventing the incidental mortality or serious injury of Māui dolphins in commercial fisheries were equivalent to United States standards.

Seafood Trade Between New Zealand and the United States

79. Bycatch of Māui dolphins in gillnet and trawl fisheries is the primary threat to the dolphins' survival. There are many commercial gillnet and trawl fishers that operate within the Māui dolphins' range, and fish and fish products caught in these gillnet and trawl fisheries are exported to the United States.

80. As one of the largest importers of seafood products in the world, the United Sates is in a powerful position to influence market forces. In 2019, New Zealand exported NZ $2.024 billion (USD $1.21 billion) in seafood globally. The United States is the recipient of much of these exports and is, in fact, New Zealand's second largest seafood export market behind China. This high trade volume with the United States makes New Zealand susceptible to United States economic pressure and, thus, highly likely to respond to a trade ban.

81. In assessing the potential economic effect of the trade ban requested by Plaintiffs, New Zealand has officially evaluated its exposure to be in the range of $2 to $200 million USD. New Zealand bases the $200 million USD figure on the fact that its fisheries suffer from a serious lack of traceability. In other words, New Zealand does not have an adequate system in place to track fish from the fishing vessel to the seafood exporter. As a consequence of this traceability problem, New Zealand has stated that it cannot segregate seafood exports from fisheries with incidental mortality of Māui dolphins from seafood exports originating in fisheries that do not impact Māui dolphins. The result is that that the trade ban may affect all seafood exports from New Zealand to the United States until New Zealand is able to establish a traceability and

certification program sufficient to prove that fish and fish products did not originate in fisheries using gillnets and trawls in the Māui dolphin's range.

82. New Zealand has further expressed concern about the damage to its international reputation from Plaintiffs' requested trade ban: "a US import ban would undermine the reputation of New Zealand's fisheries management regime, including the TMP [Threat Management Plan] process, and our wider environmental credentials." This is a significant concern for New Zealand, which deeply values its international reputation for high-quality, safe, and sustainably produced seafood, underpinned by an internationally recognized "clean and green" ethos. This reputation provides New Zealand with a distinct competitive edge in the global seafood market.

83. Given the substantial economic impact and international reputational damage that will flow from Plaintiffs' requested relief, New Zealand will likely respond by taking measures necessary to increase protections for the critically endangered Māui dolphin, including by bringing such protections in line with United States standards.

FIRST CLAIM FOR RELIEF

Violation of the APA, 5 U.S.C. § 706(1)
Failure to Ban Imports as Required by the Marine Mammal Protection Act

84. Plaintiffs reallege and incorporate by reference the allegations contained in all preceding paragraphs.

85. The MMPA provides that Defendants "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 U.S. standards." 16 U.S.C. § 1371(a)(2).

86. Despite the fact that New Zealand fisheries export to the United States fish caught with technology that results in the incidental killing or serious injury of Māui dolphins in excess

of U.S. standards, Defendants have not banned the importation of fish and fish products from those fisheries, in violation of MMPA section 1371(a)(2). *Id*.

87. An import ban is a final agency action that can be compelled under the APA, 5 U.S.C. § 706(1).

88. Defendants' failure to act constitutes "agency action unlawfully withheld or unreasonably delayed," for which this Court may order relief under the APA. 5 U.S.C. § 706(1).

SECOND CLAIM FOR RELIEF

Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)
Denial of Petition Was Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

89. Plaintiffs reallege and incorporate by reference the allegations contained in all preceding paragraphs.

90. On February 6, 2019, Plaintiffs filed a Petition asking Defendants to perform their nondiscretionary duties under the MMPA to engage in emergency rulemaking to ban the import of fish and fish products from New Zealand that result in the incidental killing or serious injury of Māui dolphins in excess of U.S. standards.

91. On July 10, 2019, Defendants denied Plaintiffs' Petition.

92. Defendants' denial of Plaintiffs' Petition is a "final agency action for which there is no other adequate remedy in a court" within the meaning of the APA, 5 U.S.C. § 704.

93. Defendants' denial of the Petition was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A), for at least the following reasons:

a. The science and evidence are clear that the use of gillnets and trawling in the Māui dolphin range is having an "immediate and significant adverse impact" on the

Māui dolphin population, which is a "very small population[] where any incidental mortality could result in increased risk of extinction.";

b. New Zealand has not provided reasonable proof of the effects on Māui dolphins of commercial fishing technology in use for fish or fish products exported to the United States;

c. New Zealand's regulatory program is insufficient to reduce Māui dolphin bycatch and does not meet U.S. standards;

d. Documents on which NMFS heavily relied, including New Zealand's 2019 draft TMP, are significantly flawed and do not adequately assess the risk to the survival of the Māui dolphin from commercial fisheries bycatch;

e. There is uncertainty as to what, if any, additional regulatory measures New Zealand might implement as a result of the ongoing, and delayed, TMP process, and whether those measures would be adopted and implemented in a timely manner;

f. Even the most protective potential measures included by New Zealand in the 2019 draft TMP do not meet U.S. standards, do not adequately reduce Māui dolphin bycatch, and would not stop the commercial fisheries in Māui dolphin habitat from having an immediate and significant adverse impact on Māui dolphins and resulting in the incidental kill and/or serious injury of Māui dolphins in excess of U.S. standards; and

g. Defendants' reasoning is based largely on the MMPA Imports Rule and ignores the mandatory statutory language of the MMPA.

94. For at least these reasons, the Court should hold unlawful and set aside Defendants' denial of the Petition pursuant to APA section 706(2), 5 U.S.C. § 706(2).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that Defendants unlawfully withheld or unreasonably delayed the banning of fish and fish-product imports from New Zealand commercial fisheries that use gillnets and/or trawl fishing within the Māui dolphin range;

2. Enter an injunction requiring Defendants to ban the import of fish or fish products that are caught in, or derived from, New Zealand commercial fisheries that use gillnets and/or trawls which result in the incidental kill or incidental serious injury of Māui dolphins;

3. Declare that Defendants' denial of Plaintiffs' Petition was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law under APA, 5 U.S.C. § 706(2)(A);

4. Hold unlawful and set aside Defendants' denial of Plaintiffs' Petition;

5. Award Plaintiffs the costs of this action, including reasonable attorneys' fees; and

6. Grant any other relief this Court finds just and proper.

Dated: May 21, 2020

Respectfully submitted,

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EXHIBIT A

February 6, 2019

PETITION TO BAN IMPORTS OF FISH AND FISH PRODUCTS FROM NEW ZEALAND THAT RESULT IN THE INCIDENTAL KILL OR SERIOUS INJURY OF MĀUI DOLPHINS IN EXCESS OF UNITED STATES STANDARDS PURSUANT TO MARINE MAMMAL PROTECTION ACT SECTION 101

BEFORE THE DEPARTMENT OF HOMELAND SECURITY, THE DEPARTMENT OF THE TREASURY, AND THE DEPARTMENT OF COMMERCE

Sea Shepherd Legal

Sea Shepherd New Zealand Ltd

Sea Shepherd Conservation Society

NOTICE OF PETITION

Kirstjen Nielsen, Secretary
Department of Homeland Security
Washington, DC 20528

Steven Mnuchin, Secretary
Department of the Treasury
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Wilbur Ross, Secretary
Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Kevin McAleenan, Commissioner
Customs and Border Protection
Department of Homeland Security
1300 Pennsylvania Ave., NW
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Chris Oliver
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About the Petitioners

Sea Shepherd Legal is a nonprofit environmental law firm committed to saving marine wildlife and habitats by enforcing, strengthening, and developing protective laws, treaties, policies, and practices worldwide. Sea Shepherd Legal is concerned with the conservation of marine mammals and the effective implementation of the Marine Mammal Protection Act ("MMPA"). www.seashepherdlegal.org

Sea Shepherd New Zealand Ltd is a nonprofit conservation organisation whose mission is to end the destruction of habitat and slaughter of wildlife in the world's oceans in order to conserve and protect ecosystems and species. Sea Shepherd New Zealand Ltd uses innovative direct-action tactics to investigate, document and take action when necessary to expose and confront illegal activities in the oceans. By safeguarding the biodiversity of our delicately balanced oceanic ecosystems, Sea Shepherd New Zealand Ltd works to ensure their survival for future generations. Sea Shepherd New Zealand Ltd is especially concerned with the Māui dolphin, as this iconic species, endemic to New Zealand, is on the brink of extinction. www.seashepherd.org.nz

Sea Shepherd Conservation Society is an international nonprofit, marine wildlife conservation organization. Established in 1977, Sea Shepherd Conservation Society's mission is to end the destruction of habitat and slaughter of wildlife in the world's oceans in order to conserve and protect ecosystems and species. Sea Shepherd Conservation Society uses innovative direct-action tactics to investigate, document, and take action when necessary to expose and confront illegal activities on the high seas. By safeguarding the biodiversity of our delicately balanced ocean ecosystems, Sea Shepherd Conservation Society works to ensure their survival for future generations. www.seashepherd.org

Action Requested

Sea Shepherd Legal, Sea Shepherd New Zealand Ltd, and Sea Shepherd Conservation Society (collectively, "Petitioners") request the Secretaries of Homeland Security, the Treasury, and Commerce (collectively, "Agencies") to perform their non-discretionary duties established by section 101(a)(2) of the MMPA, 16 U.S.C. § 1371(a)(2) ("Imports Provision"), to "ban the importation of commercial fish or products from fish" sourced using fishing activities that "result[] in the incidental kill or incidental serious injury" of Māui dolphins (*Cephalorhynchus hectori maui*) "in excess of United States standards." Contrary to the MMPA, the United States, through the actions and omissions of the Agencies, currently allows the importation of fish and fish products from New Zealand fisheries that kill and injure critically endangered Māui dolphins in excess of United States standards.

Therefore, the Petitioners request that the Agencies immediately ban imports of all fish and fish products from New Zealand that do not satisfy the requirements of the Imports Provision as applied to the incidental killing or serious injury of Māui dolphins. As explained below, this ban must cover all export fisheries that operate within Māui dolphin habitat using set nets or trawls. Emergency rulemaking banning such imports is warranted to avoid immediate, ongoing, and unacceptable risks to Māui dolphins. **This letter is a formal petition under 5 U.S.C. § 553(e). Given the emergency nature of the situation, we request that you provide a substantive response within 60 days.**

Dated: February 6, 2019

/s/Brett Sommermeyer
Brett Sommermeyer
Legal Director
Sea Shepherd Legal
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INTRODUCTION

Sea Shepherd Legal, Sea Shepherd New Zealand Ltd, and Sea Shepherd Conservation Society (collectively, "Petitioners") request that the Department of Homeland Security, the Department of the Treasury, and the Department of Commerce (collectively, "Agencies") carry out their non-discretionary duties under section 101(a)(2) ("Imports Provision") of the Marine Mammal Protection Act ("MMPA") to "ban the importation of commercial fish or products from fish" harvested in a manner that "results in the incidental kill or incidental serious injury" of Māui dolphins (*Cephalorhynchus hectori maui*) "in excess of United States standards."[1] Specifically, we request that, pursuant to the Imports Provision, the Agencies immediately ban all fish and fish products originating from fisheries in the Māui dolphin's range, along the west coast of New Zealand's North Island, that employ either gillnets or trawls — the fishing gear responsible for the near extinction of the Māui dolphin. As detailed more fully below, the situation for the Māui dolphin is **dire**, and the Agencies must take **immediate action** to prevent the extinction of the species.

Incidental capture (a.k.a. bycatch) is the leading cause of injury and death of marine mammals around the world.[2] Annual global bycatch of marine mammals is estimated to be in the hundreds of thousands.[3] In the case of the Māui dolphin, a species listed as endangered under the Endangered Species Act ("ESA")[4] and depleted under the MMPA,[5] bycatch has reduced population numbers to the point that it is the most endangered marine dolphin in the world.[6] Māui dolphins have declined from approximately 2,000 individuals in 1971, to 111 in 2004,[7] to 55 in 2011.[8] The 2018 report of the Scientific Committee of the International Whaling Commission ("IWC") contained an abundance estimate of 57 individuals, but the same report noted that there could be as few as 44 individuals remaining.[9] In a 2012 study published by the New Zealand Ministry for Primary Industries and Department of Conservation, Currey *et al.* estimated that

[1] 16 U.S.C. § 1371(a)(2).
[2] Marine Mammal Commission, *Marine Mammal Bycatch*, *available at* https://www.mmc.gov/priority-topics/fisheries-interactions-with-marine-mammals/marine-mammal-bycatch/ ("Bycatch is the greatest direct cause of marine mammal injury and death in the United States and around the world.").
[3] Andrew J. Read, et al., *Bycatch of Marine Mammals in U.S. and Global Fisheries*, 20 CONSERVATION BIOLOGY 163 (2006).
[4] *Endangered and Threatened Wildlife and Plants: Final Rule To List the Maui Dolphin as Endangered and the South Island Hector's Dolphin as Threatened Under the Endangered Species Act*, 82 Fed. Reg. 43701 (Sept. 7, 2017).
[5] Milena Palka & Aimee Leslee, *Addressing Gaps in Management Approach and Protection of the World's Rarest Marine Dolphin, Cephalorhynchus hectori maui* (WWF-New Zealand 2014), *available at* https://www.researchgate.net/publication/316155117_Addressing_gaps_in_management_approach_and_protection_of_the_world%27s_rarest_marine_dolphin_Cephalorhynchus_hectori_maui.
[6] Christopher Pala, *Endangering the World's Rarest Dolphins*, THE INVESTIGATIVE FUND (Feb. 27, 2017), *available at* https://www.theinvestigativefund.org/investigation/2017/02/27/endangering-worlds-rarest-dolphins/.
[7] Elisabeth Slooten, et al., *A New Abundance Estimate for Maui's Dolphin: What Does It Mean for Managing This Critically Endangered Species?*, 128 BIOLOGICAL CONSERVATION 576 (2006).
[8] Rebecca M. Hamner, et al., *Genetic Differentiation and Limited Gene Flow Among Fragmented Populations of New Zealand Endemic Hector's and Māui's Dolphins*, 13 CONSERVATION GENETICS 987 (2012).
[9] International Whaling Commission, Report of the Scientific Committee, IWC/67/Rep01, at Table 16 (2018) [hereinafter "2018 Report of the IWC Scientific Committee"]("Abundance estimates, CVs and 95% confidence intervals for estimates agreed at the 2018 meeting.").

fishing-related threats, particularly the indiscriminate use of set gillnets and commercial trawling, are responsible for killing 4.97 Māui dolphins annually — which equates to 95.5% of the total human-associated deaths.[10] These numbers stand in stark contrast with estimates that the Māui population can sustain only *one* human-caused death every 10 to 23 years based on the U.S. potential biological removal ("PBR") method.[11] With this grim reality in mind, the IWC's Scientific Committee has repeatedly stated that "[t]he human-caused death of even one individual would increase the extinction risk."[12]

The dangers of bycatch were central to Congress' analysis when it enacted the MMPA. The MMPA not only bans the intentional killing of marine mammals, but also strictly limits the degree to which U.S. fishermen may incidentally harm or kill marine mammals in association with legal (and illegal) fisheries.[13] Yet, far from erecting rules that focus only on U.S. waters or U.S. vessels fishing abroad, Congress embraced a global vision. Recognizing that the U.S. could shape policy in foreign nations as a result of its import market for fisheries products — the U.S. was the world's largest importer of seafood by value in 2016[14] — Congress chose to prohibit imports from foreign fisheries that fail to prevent bycatch of marine mammals to an adequate degree.[15] Accordingly, the Imports Provision requires administrative authorities to "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."[16]

Unfortunately, for want of implementing regulations, Congress' command in the Imports Provision collected dust for over 40 years. In 2016, following litigation, the National Marine Fisheries Service ("NMFS") finally issued a rule implementing the Imports Provision ("Imports Rule").[17] Although the Imports Rule contains a default five-year exemption period that finds no support in the statute, NMFS nevertheless stated that it would entertain "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."[18] Like the vaquita, the

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[10] Rohan J.C. Currey, et al., *A Risk Assessment of Threats to Maui's Dolphins*, at Table 3 (2012), *available at* https://www.doc.govt.nz/Documents/conservation/native-animals/marine-mammals/maui-tmp/mauis-dolphin-risk-assessment.pdf.

[11] P.R. Wade, et al., *The Potential Biological Removal (PBR) and Probability of Decline for Maui's Dolphin* (2012), reproduced as Appendix 1 in Rohan J.C. Currey, et al., *A Risk Assessment of Threats to Maui's Dolphins*.

[12] 2018 Report of the IWC Scientific Committee, *supra* note 9, at p. 69.

[13] *See* 16 U.S.C. § 1371(a)(2) ("In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate."); *see also Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 215-216 (D.D.C. 2016) ("The MMPA proceeds from the premise that takes of marine mammals (broadly defined) are taboo, which corresponds with the principle that, when in conflict, the wellbeing of marine mammals takes precedence over fishing interests.") (internal citations omitted). *See also, NRDC, Inc. v. Ross,* 331 F. Supp. 3d 1381, 1386 (Ct. Int'l Trade, July 26, 2018) ("Altogether, the Imports Provision ban applies to legal and illegal fisheries whose 'fish or fish products [] have been caught with commercial fishing technology which results in the incidental kill . . . of ocean mammals in excess of United States standards.'").

[14] FAO, *USA Fisheries Statistics: Production, Consumption and Trade*, *available at* http://www.fao.org/in-action/globefish/market-assets/countries/usa/usa-trade/en/?page=7&ipp=5&tx_dynalist_pi1%5Bpar%5D=YToxOntzOjE6IkwiO3M6MToiNyI7fQ%3D%3D.

[15] 16 U.S.C. § 1371(a)(2).

[16] *Id.*

[17] *See* 81 Fed. Reg. 54390 (Aug. 15, 2016).

[18] *Id.* at 54395 (col. 2); *see also* 16 U.S.C. § 1387(g).

plight of the Māui dolphin plainly authorizes emergency rulemaking to ban imports from fisheries contributing to its rapid decline.

While there may be some reluctance to impose an import ban, we remind the Agencies that the federal courts are on guard. As the Agencies know, in *NRDC, Inc. v. Ross*, the U.S. Court of International Trade ("CIT") recently granted a preliminary injunction requiring the Agencies to ban the importation of all fish and fish products from Mexican commercial fisheries that use gillnets within the vaquita's range.[19] The similarities between the plight of the vaquita and the plight of the Māui dolphin are striking — and they compel the same result. If the Agencies decline to immediately act and litigation is required, we are confident that the courts will have little difficulty reaching the same result — one that favors protecting the Māui dolphin from otherwise inevitable extinction.

DISCUSSION

I. Governing Law

A. The MMPA Prohibits Imports from Foreign Fisheries that Deficiently Regulate Marine Mammal Bycatch

When enacting the MMPA, Congress mandated that conservation, including maintaining healthy populations of marine mammals, is of highest priority. The legislative history of the MMPA makes it clear that the precautionary principle must be applied and that any bias must favor marine mammals.[20] The courts have agreed. In *Comm. For Humane Legislation v. Richardson*, the court observed that any action subject to the MMPA must "proceed knowledgeably and cautiously"[21] and that the MMPA must be interpreted and applied for the benefit of marine mammals "and not for the benefit of commercial exploitation."[22]

One of the key manifestations of the precautionary principle in the MMPA is the so-called Zero Mortality Rate Goal ("ZMRG"), which is to reduce the incidental mortality or serious injury of marine mammals in the course of commercial fishing operations to insignificant levels approaching zero.[23] The MMPA achieves this goal through implementation of specific standards governing and restricting the incidental catch (or "bycatch") of marine mammals.[24]

The MMPA standards apply both to domestic commercial fisheries and to foreign fisheries that export their products to the United States. With respect to the latter, the Imports Provision in section 101(a)(2) calls for a ban of imports associated with foreign fisheries that have failed to institute sufficient regulations preventing marine-mammal bycatch. This provision, which expressly incorporates the ZMRG, states as follows:

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[19] *NRDC, Inc. v. Ross*, 331 F. Supp. 3d 1338 (Ct. Int'l Trade July 26, 2018); *see also NRDC, Inc. v. Ross*, 331 F. Supp. 3d 1381, *supra* note 13 (clarifying the terms of the injunction).
[20] H.R. REP. NO. 92-707, at 24 (1971); 118 CONG. REC. S15680 (daily Ed. Oct. 4, 1971) (statement of Sen. Packwood).
[21] 414 F. Supp. 297, 310 n.29 (D.D.C. 1976), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976).
[22] *Id.* at 24.
[23] 16 U.S.C. § 1371(a)(2).
[24] *See id*. §§ 1386–87.

> In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. The Secretary of the Treasury[25] **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.[26]

The Imports Provision further requires the Secretary to "insist on reasonable proof" from the exporting nation's government "of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products" exported to the United States.[27] As noted by the court in *NRDC, Inc. v. Ross*, this statutory provision "only requires that the Government request information from foreign governments when determining whether to *exempt* fishery operations" from a trade ban under the Imports Provision.[28]

B. A Mandatory Trade Ban Is Triggered When Marine Mammal Bycatch Exceeds United States Standards

As made clear by the above-emphasized language, the Imports Provision calls for a **mandatory ban** when bycatch in the foreign fishery exceeds "United States standards." Although not defining this phrase, the applicable "United States standards" are found within the MMPA. For example, the MMPA directs NMFS to issue marine mammal stock assessments documenting the population's abundance, trend, and net productivity; describing the fisheries that interact with the stock; and estimating the level of mortality by fishery.[29] As part of this stock assessment process, NMFS must also assess the PBR level for each stock to effectuate the ZMRG.[30]

Notably, PBR is the primary metric through which NMFS determines the bycatch limit for any given marine mammal stock.[31] More specifically, PBR is the "maximum number of animals . . . that may be removed . . . while allowing that stock to reach or maintain its optimum sustainable population."[32] Additionally, for any commercial fishery that causes mortality of a marine mammal population in excess of PBR, NMFS **must** develop a "take[ ] reduction plan" to reduce fishery-related mortality to "less than the potential biological removal level" within six months.[33]

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[25] Although the statutory text directs the Secretary of Treasury to impose the import ban, Congress subsequently transferred a portion of Treasury's authority to the Department of Homeland Security and its sub-agency, Customs and Border Patrol. *See* 6 U.S.C. §§ 203; 212(a)(1), (2); *see also* 19 C.F.R. § 0.1, Appx. 1; 68 Fed. Reg. 28,322 (May 23, 2003). Separately, NMFS has confirmed that it is the Secretary of Commerce that bears the duty to "insist on reasonable proof" from foreign nations. 75 Fed. Reg. 22,731 (Apr. 30, 2010).
[26] 16 U.S.C. § 1371(a)(2).
[27] *Id.*
[28] *NRDC, Inc.*, 331 F. Supp. 3d, *supra* note 19, at 1356 (emphasis added).
[29] 16 U.S.C. § 1386(a).
[30] *Id.* § 1386(a)(6).
[31] *See* 50 C.F.R. § 216.3 (as revised) ("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.").
[32] 16 U.S.C. § 1362(20).
[33] *Id.* §§1387(f)(1)-(2),(5); 1362(19).

It is these standards — the calculation of PBR and the institution of a take reduction plan when fisheries-related mortality exceeds the PBR — that constitute "United States standards" under the Imports Provision. Thus, New Zealand **must** employ such standards (among others detailed in the MMPA) in its regulatory scheme to satisfy the Imports Provision. Significantly in this regard, as the Agencies are aware, in *NRDC v. Ross*, the CIT confirmed the validity of this interpretation of "United States standards" — holding that the "PBR level is . . . a marker of 'United States standards' for the purposes of the Imports Provision" and that the "immediate goal" of a take reduction plan is to reduce mortality below the PBR.[34] The court further held that "the long-term goal shall be to reduce bycatch levels 'to insignificant levels approaching a zero mortality and serious injury rate' within five years."[35] There is no evidence demonstrating New Zealand's compliance with these standards despite the perilous status of the Māui dolphin.

C. A Trade Ban Is Not Precluded by the Five-Year Moratorium Imposed by the Imports Rule

Section 118(g) of the MMPA provides that the Secretary of Commerce "shall" undertake emergency rulemaking actions if he or she "finds that the incidental mortality and serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species."[36] Although section 118(g) applies to domestic fisheries, in its publication of the final Imports Rule, NMFS referenced this statutory section as support for extending a similar emergency rulemaking regime to the foreign fisheries context.[37] As discussed below, where required (as here), this emergency rulemaking provision is an exception to the five-year moratorium inappropriately imposed by the Imports Rule.

Inconsistent with its express recognition of the urgency of the bycatch problem in its notice of proposed rulemaking for the Imports Rule,[38] NMFS unjustifiably gave nations half a decade to achieve compliance. Significantly in this regard, NMFS opened its discussion of MMPA requirements with the acknowledgment that the "'biggest threat to marine mammals worldwide is their accidental capture or entanglement in fishing gear (bycatch), which kills hundreds of thousands of them each year.'"[39] Yet, how did NMFS respond to this "biggest" of threats? By giving importing nations — nations that supply the vast majority of seafood consumed in the United States — *five years* to achieve bycatch rates comparable to the U.S. before imposing any trade restrictions.[40]

NMFS' decision to include this generous allowance is not only arbitrary and capricious but also finds no support in the underlying statute. The Imports Provision speaks in unequivocal terms: the government "**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

[34] *NRDC, Inc.*, *supra* note 19, at 1363.
[35] *Id.* at 1364.
[36] *Id.* § 1387(g)(1) (emphasis added).
[37] *See* 81 Fed. Reg. 54390, 54395 (col. 2 & 3) (Aug. 15, 2016).
[38] 80 Fed. Reg. 48172 (Aug. 11, 2015).
[39] *Id.* at 48172 (col. 3).
[40] 81 Fed. Reg. at 54414 (col. 1) (setting forth new provision codified at 50 C.F.R. § 216.24(h)(2)(ii)).

injury of ocean mammals in excess of United States standards."[41] The statute does *not* contemplate a phase-in period, much less one so generous as five years (on top of the 43 years that passed with no implementing regulation in place). While Congress may have chosen to include such a time period on the policy grounds offered by NMFS (*i.e.*, that nations need additional "time to assess marine mammal stocks, estimate bycatch, and develop regulatory programs to mitigate that bycatch"[42]), that is for *Congress* to decide, not NMFS.

Of note, it is not just environmental groups that have drawn attention to the legal problems with the five-year exemption period. In its recent decision granting a temporary injunction in the vaquita case, the CIT found the exemption period to be in violation of the MMPA, holding:

> The Government cannot give itself a five year exemption from compliance with the MMPA, which dictates that the Secretary of the Treasury 'shall ban' offending imports in order to meet the 'immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.[43]

Thus, in accord with the plain language of the Imports Provision (providing that the government "shall ban" non-complying imports), **the MMPA demands immediate action** in situations like the matter at hand.

In the Imports Rule, NMFS has itself acknowledged an exception for emergency situations.[44] Referencing section 118(g), NMFS stated that it "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."[45] As the name implies, emergency rulemaking "allow[s] for timely treatment of cases where the usual process and timeframe could result in unacceptable risks to the affected marine mammal stock or species."[46] More to the point, **NMFS recognized that emergency rulemaking would be appropriate in the case of a "very small population[] where any incidental mortality could result in increased risk of extinction."[47] The instant petition presents precisely this scenario.**

In short, under the Imports Provision, the Agencies have a statutory obligation to immediately prohibit imports of fish and fish products from foreign commercial fisheries associated with marine mammal bycatch in excess of U.S. standards. Notably, the MMPA does not require the United States to prove that foreign fisheries are substandard prior to blocking imports. Rather, the burden of proof rests with foreign nations wishing to access the U.S. market.[48] Such nations must furnish

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[41] 16 U.S.C. § 1371(a)(2) (emphasis added).
[42] 81 Fed. Reg. at 54397 (col. 3).
[43] *NRDC, Inc.*, *supra* note 19, at 1354 (citing 16 U.S.C. § 1371(a)(2)).
[44] *See* 81 Fed. Reg. at 54395 (col. 2).
[45] *Id.*
[46] *Id.* at 54395 (col. 2-3).
[47] *Id.* at 54395 (col. 3).
[48] *NRDC, Inc.*, *supra* note 19, at 1356 ("[T]he Government's position again gets the requirements of the statute backwards: the statute only requires that the Government *request* information from foreign governments when determining whether to *exempt* fishery operations from a potential ban arising from bycatch in excess of United States standards. In this case, it is undisputed that because of bycatch in the gillnet fishing technology, the vaquita is

"reasonable proof" that their fisheries meet U.S. bycatch standards as a condition precedent to lawful exports to the U.S. Thus, the default rule is *not* that imports are allowed absent proof (by the U.S.) of non-compliance. To the contrary, the default rule is that imports are *prohibited absent proof (by the importing nation) of compliance*.[49]

In the case of the Māui dolphin, the Agencies have violated this rule. Far from a "technical" breach, the Agencies' failure to prohibit imports of fisheries products is contributing to the disappearance of the Māui dolphin. Contrary to congressional intent, U.S. consumers are facilitating the Māui dolphin's rapid slide toward extinction by purchasing products from harmful New Zealand fisheries.

II. The Māui Dolphin

A. The Dire Conservation Status of the Māui Dolphin

The Māui dolphin's precarious status at the hands of New Zealand fisheries clearly qualifies as a case warranting immediate action under the Imports Provision and emergency rulemaking under the Imports Rule. The scientific literature establishes that there is but a "very small population" of Māui dolphins remaining, such that "any incidental mortality could result in increased risk of extinction."[50]

Of direct relevance here, NMFS has itself recognized this exigent situation. On September 19, 2017, NMFS listed the Māui dolphin as endangered under the ESA.[51] In its analysis of the statutory listing criteria, NMFS made a candid assessment of the risks facing the Māui dolphin, writing as follows:

> The present estimated abundance of Maui dolphins is critically low, and the subspecies faces additional demographic risks due to greatly reduced genetic diversity and a low intrinsic population growth rate. **Past declines, estimated to be on the order of about 90 percent** (Martien et al., 1999, Slooten 2007a), **are considered to have been driven largely by bycatch in gillnets** (Currey et al., 2012). **Maui dolphins continue to face threats of bycatch**, disease, and mining and seismic disturbances; and, it is considered unlikely that this subspecies will recover unless sources of anthropogenic mortality are eliminated (Slooten et al.,

being killed and is on the verge of extinction—a result which perforce contravenes United States standards. Countenancing a regulations-imposed delay until 2022 for consultations with the Mexican government (a posture endorsed by the Government), while the vaquita goes extinct, would be inconsistent with the MMPA's general moratorium on marine mammal takings and the Imports Provision's direction that the Secretary of the Treasury 'shall ban' offending imports in order to meet the 'immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.'") (internal citations omitted) (emphasis in original).

[49] *See id.*

[50] *Id.*

[51] 82 Fed. Reg. 43701 (Sept. 19, 2017).

> 2006; MFish and DOC 2007b, Baker et al., 2010). Based on the best available scientific and commercial information . . . and after consideration of protective efforts, we find that the Maui dolphin (*Cephalorhynchus hectori maui*) is in danger of extinction throughout its range.[52]

Commenting on NMFS' proposal to list the Māui dolphin as endangered, the Marine Mammal Commission ("MMC") wholeheartedly agreed.[53] After citing a 2010–2011 population estimate of 55 individuals over one year of age, the MMC noted that the primary threat to the Māui dolphin, fisheries bycatch, persisted despite New Zealand's regulatory measures.[54]

Like the vaquita, the total population of Māui dolphins has declined rapidly in recent years. The estimated population has declined from approximately 2,000 individuals in 1971, to 111 in 2004,[55] to 55 in 2011.[56] In its most recent report (2018), the IWC Scientific Committee reported an abundance estimate of 57 individuals, with a 95% confidence interval ("CI") of 44 to 75 individuals.[57] The following figure shows the steady decline of an already depleted population, from 1985 to 2016.

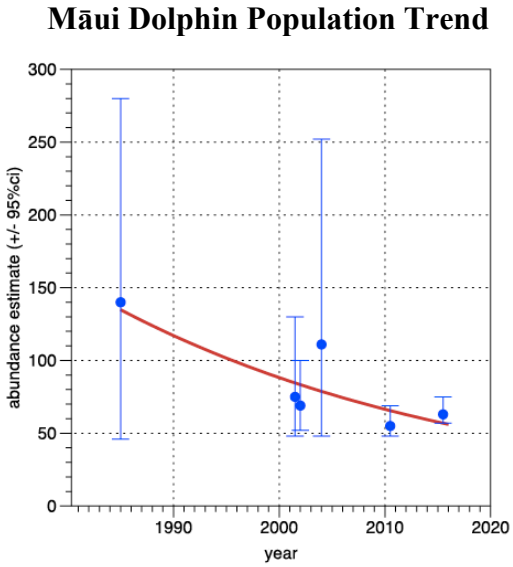

Figure 1: Linear regression of log-transformed population estimates for Māui dolphins, back-transformed to original scale.). Figure published in Elisabeth Slooten & Stephen Dawson, *Updated Population Viability Analysis, Population Trends and PBRs for Hector's and Maui Dolphin* (2016).

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[52] *Id.* at 43708 (col. 2-3) (emphasis added).
[53] Marine Mammal Commission, *Comments on Proposal to List Hector's Dolphin and Maui Dolphin Under ESA* (Nov. 18, 2016) (on file with Petitioners).
[54] *Id.* at 1.
[55] Elisabeth Slooten, et al., *A New Abundance Estimate for Maui's Dolphin*, *supra* note 7.
[56] Rebecca M. Hamner, et al., *supra* note 8.
[57] 2018 Report of the IWC Scientific Committee, *supra* note 9, at Table 16.

The above figure shows a decline from about 138 Māui dolphins in 1985 to 56 individuals in 2016. This equates to an average decline of 2% every year and a total decline of 59% over the 31-year period from 1985 to 2016.[58] This alarming trend, coupled with the incredibly low number of estimated remaining dolphins, led the IWC Scientific Committee to conclude that "[t]he human-caused death of even one individual would increase the extinction risk."[59]

The decline of the Māui dolphin is overwhelmingly the result of bycatch in set gillnets and trawls. For this reason, the IWC Scientific Committee has recommended "closures of any fisheries within the range of Māui dolphins that are known to pose a risk of bycatch to dolphins (*i.e.*, set net and trawl fisheries)."[60] To date, New Zealand has ignored this critical recommendation.

B. Gillnet and Trawl Fisheries on the West Coast of New Zealand's North Island Do Not Meet U.S. Standards, and Emergency Rulemaking Is Required To Ban Imports

1. New Zealand export fisheries using gillnets and trawls exceed the Māui dolphin bycatch limit by many orders of magnitude

Given the Māui dolphin's precarious status, any fishery using gillnets or trawls in the Māui dolphin's range necessarily runs afoul of U.S. standards for marine mammal protection. Among other possible shortcomings, New Zealand is clearly out of step with respect to bycatch limits, as calculated using PBR, and monitoring procedures.

In the case of the Māui dolphin, it is clear that New Zealand export fisheries using gillnets and trawls are exceeding the bycatch limit. In a 2017 study prepared for the IWC Scientific Committee, Slooten and Dawson estimated PBR of Māui dolphins at 0.12 (when using an Rmax of 4%, the default value of 4% for cetaceans) and 0.05 (when using a 1.8% Rmax, the tailored estimate for Hector's and Māui dolphins).[61] In contrast, the authors estimated "current bycatch of Maui dolphins at 2.4–3.8 individuals per year."[62] The New Zealand government does not dispute this phenomenon. In fact, the most recent New Zealand government risk assessment estimates that fishing activities are responsible for 4.97 Māui dolphin deaths per year.[63] "In comparison, non-fishing-related threats . . . were estimated to contribute 0.27 (95% CI: 0.05–0.90) Maui's dolphin mortalities per annum, or 4.5% of total threat-associated mortalities."[64]

While the precise numbers may be unknown (as is the nature of estimates for such small populations), there is no dispute that bycatch exceeds PBR several times over. As the New Zealand

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[58] Elisabeth Slooten & Stephen Dawson, *Updated Population Viability Analysis, Population Trends and PBRs for Hector's and Maui Dolphin*, at p. 13 (2016) (on file with Petitioners).
[59] 2018 Report of the IWC Scientific Committee, *supra* note 9, at p. 69.
[60] *Id.*
[61] Elizabeth Slooten & Stephen Dawson, *Bycatch and PBRs for Maui and Hectors Dolphin*, SC/67A/HIM/07, at Table 3 (2017).
[62] *Id.* at 12.
[63] Rohan J.C. Currey, et al., *A Risk Assessment of Threats to Maui's Dolphins*, *supra* note 10, at Table 3.
[64] *Id.* at 14.

government candidly observed, fisheries present a "100% likelihood of exceeding PBR."[65] Thus, two facts are clear: (1) bycatch is the leading threat to Māui dolphins; and (2) "[c]urrent estimates of . . . Maui dolphin bycatch far exceed PBRs."[66]

It is undisputed that bycatch is occurring in both set gillnet and trawling fisheries. According to an expert panel convened by the New Zealand government, "[c]ommercial set net, commercial trawl and recreational/customary set net fisheries were the threats estimated to have the greatest impact on Maui's dolphins."[67] As shown in the figure below, the panel estimated 2.33 Māui dolphin mortalities per year from commercial set gillnets, 1.13 mortalities per year from commercial trawls, and 0.88 mortalities per year from recreational/customary set gillnet fisheries.

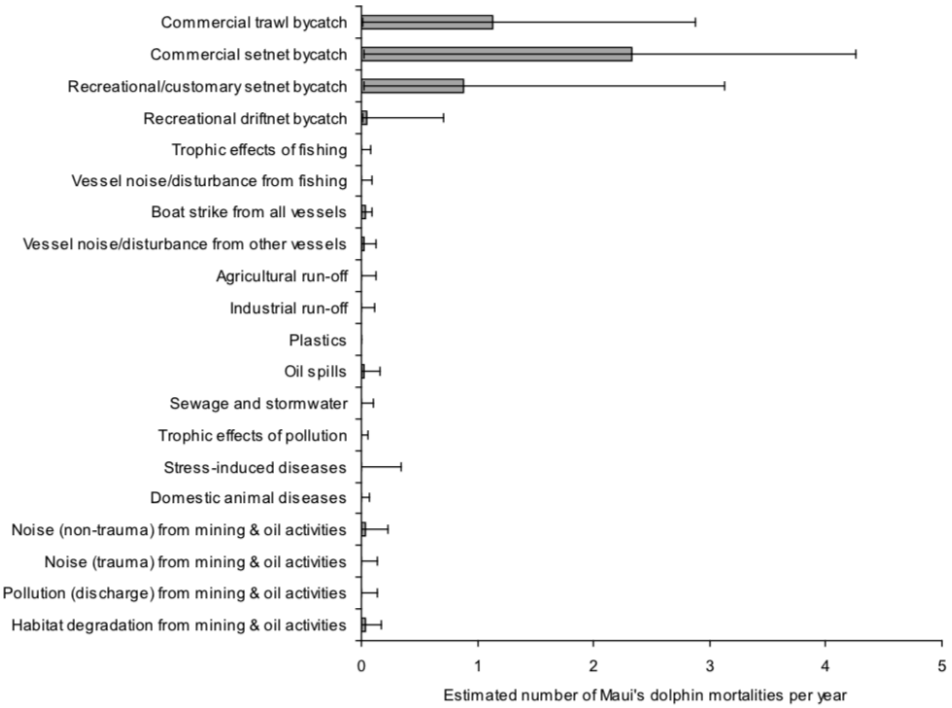

Figure 2: Estimated Māui dolphin mortalities per year for each threat, as scored by an expert panel of domestic and international specialists in marine mammal science and ecological risk assessment, convened by New Zealand. Image published in Rohan J.C. Currey, et al., *A Risk Assessment of Threats to Maui's Dolphins* (2012).

Comparing these mortality numbers to PBR (0.05 or, at most, 0.12), it becomes clear that bycatch from commercial set gillnets (2.33 fatalities per year) and commercial trawls (1.13 mortalities per year) far exceeds the PBR. To the extent that these fisheries export fish and fish products to the

[65] Ministry of Primary Industries, *Aquatic Environment and Biodiversity Annual Review 2016: A Summary of Environmental Interactions Between the Seafood Sector and the Aquatic Environment*, at Table 6.3 (2016), *available at* www.openseas.org.nz/wp-content/uploads/2017/06/MPI_AEBAR_2016.pdf.
[66] Elizabeth Slooten & Stephen Dawson, *Bycatch and PBRs for Maui and Hectors Dolphin*, *supra* note 61, at 12.
[67] Rohan J.C. Currey, et al., *A Risk Assessment of Threats to Maui's Dolphins*, *supra* note 10, at 15.

U.S. (which is demonstrated below), New Zealand has clearly failed to satisfy the requirement that they "not exceed the bycatch limit for that stock or stocks."[68]

2. New Zealand's gear and method restrictions and observer coverage are grossly inadequate to the task of reducing Māui dolphin bycatch

While New Zealand has taken some steps to reduce bycatch of Māui dolphins, it has not done nearly enough. In essence, New Zealand has attempted to address the bycatch problem by (1) restricting set gillnets and trawls in certain areas, and (2) increasing observer coverage and other monitoring mechanisms. However, both efforts are half-measures at best.

In the case of gear and method restrictions, trawling has been banned in approximately 5% of the habitat of Māui dolphin, while gillnets are banned in an additional 14% of that habitat.[69] According to one study, extensions to protected areas in 2012 and 2013 appeared to reduce the number of deaths from 4.97 to between 3.25 and 4.16 in 2014.[70] However, this number of mortalities in fishing nets still eclipses PBR by between 27-fold (if we use the conservative PBR estimate of .12 and the lower figure of 3.25 fatalities per year) and 83-fold (if we use the alternative PBR estimate of .05 and the higher figure of 4.16 fatalities per year). Hence, it should come as no surprise that the IWC Scientific Committee has repeatedly urged New Zealand to take "immediate management actions to eliminate bycatch of Maui dolphins, including closures of any fisheries within the range of Maui dolphins that are known to pose a risk of bycatch to dolphins (*i.e.* set net and trawl fisheries)."[71] So far, this has not happened. Set gillnets and trawl fisheries continue to operate in the majority of the Māui dolphin's habitat. New Zealand continues to allow such operations despite its acknowledgement that "creation of spatial closures where harmful activities are restricted or regulated[] is the *only* management approach for which there has been an apparent associated improvement in a vital rate for Hector's and Māui dolphins."[72]

As for observer coverage and other monitoring efforts, New Zealand has failed to ensure that fisheries operating in Māui dolphin habitat are adequately monitored. In recognition of the key role that monitoring plays in determining bycatch, the Imports Rule provides that robust monitoring is, by itself, an indispensable element to a positive comparability finding. Although the Imports Rule does not go into effect until 2022, adequate monitoring of marine mammal bycatch should be considered a "United States standard" for purposes of the Imports Provision, as domestic fisheries are required to monitor marine mammal bycatch under section 118 of the MMPA.[73]

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[68] 50 C.F.R. § 216.24(h)(6)(iii)(C)(6)(i).
[69] Elisabeth Slooten & Stephen Dawson, *Updated Population Viability Analysis*, *supra* note 58, at 4.
[70] Elisabeth Slooten, *Effectiveness of Extensions to Protected Area for Maui's Dolphin in 2012 and 2013*, Paper SC-65b-SM08 (2014) (presented at the 2014 IWC Scientific Committee meeting in Bled, Slovenia).
[71] 2018 Report of the IWC Scientific Committee, *supra* note 9, at 69.
[72] Ministry of Primary Industries, *Aquatic Environment and Biodiversity Annual Review 2016*, *supra* note 65, at 148 (emphasis added).
[73] *See, e.g.,* 16 U.S.C. §§ 1387(d), 1387(f)(9)(D).

It is true that New Zealand has instituted some monitoring procedures. However, for the reasons discussed below, these procedures are woefully inadequate to the critical task of "estimate[ing] . . . incidental mortality and serious injury"[74] of Māui dolphins by associated fisheries.

First, New Zealand does not maintain adequate observer coverage of fisheries in Māui dolphin habitat. "Observer coverage in Maui dolphin habitat off the west coast of the North Island is 14.6% for trawling vessels[.]"[75] Meanwhile, observer coverage for gillnetting vessels in Māui dolphin habitat is 12.7% for vessels greater than six meters in length.[76] Smaller craft (*i.e.*, less than six meters in length) have no observer coverage at all.[77] Yet, commercial gillnetters commonly use these craft in the large harbors of the North Island's west coast.[78] Māui dolphins inhabit these harbors.[79] If these low observer numbers are aggregated into a single dataset for all gillnet vessels fishing in Māui dolphin habitat, overall observer coverage adds up to only 2% for all such vessels.[80]

Second, New Zealand's extremely limited observer coverage fails to adequately estimate incidental mortality or serious injury of Māui dolphins via bycatch. While overall bycatch can be extrapolated from a smaller sample, uncertainty increases as sample size decreases. In the case of the Māui dolphin, "low and sporadic observer coverage in New Zealand's inshore fisheries results in a high level of uncertainty of the level of fisheries mortality in gillnet and in particular trawl fisheries."[81] Moreover, "low levels of observer coverage . . . can also cause a negative bias in the catch rate estimate."[82] Slooten and Dawson demonstrated this phenomenon in the context of the Hector's dolphin, where 1,000 observer days were needed to produce a distribution curve centered around the expected value — and where fewer days produced progressively skewed results implying unrealistically low levels of bycatch.[83]

Third, while New Zealand has proposed introducing video camera monitoring for all inshore gillnet and trawling vessels,[84] this proposal is hardly the panacea that it purports to be. The effectiveness of video monitoring depends on several factors, including image quality, the "view" furnished by the camera, reliability of the system, and, perhaps most importantly, the extent to which authorities actually review the recordings.[85] Moreover, even if all these factors are addressed, there is still a need for physical observers to detect drop-out (*i.e.*, capture of dolphins

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[74] *Id.* § 1386(a)(4)(B).
[75] Elizabeth Slooten & Stephen Dawson, *Bycatch and PBRs for Maui and Hectors Dolphin*, *supra* note 61, at 10.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*; *see also* New Zealand Dep't of Conservation, *Facts About Māui Dolphin*, *available at* https://www.doc.govt.nz/nature/native-animals/marine-mammals/dolphins/maui-dolphin/facts/ ("Māui dolphins' use of harbours and their close inshore distribution means that the same waters we use for fishing and recreation are also their home.").
[80] Elisabeth Slooten & Stephen Dawson, *Bycatch and PBRs for Maui and Hectors Dolphin*, *supra* note 61, at 10.
[81] *Id.* at 12.
[82] *Id.* at 6.
[83] *Id.* at 6-7.
[84] *Id.* at 13.
[85] *Id.*

that, despite being caught in a net, drop out of the net prior to, or during, retrieval).[86] Regardless, video monitoring has not yet been instituted for gillnet and trawling vessels operating in Māui habitat. It remains but a proposal.[87]

Finally, even if New Zealand had the best observer program imaginable, this fact alone would not save the Māui dolphin from extinction. Without more substantive protections, monitoring would, in this case, simply serve as a witness to an extinction event. As Slooten and Dawson recently concluded, "the very low statistical power for detecting Māui dolphin population trends makes it impractical to monitor the population in the hope of determining whether the current, partial protection is effective."[88] Instead, "improved protection has a better chance of avoiding extinction of this population[.]"[89]

In sum, the Agencies must immediately ban imports of fish and fish products from New Zealand's gillnet and trawl fisheries inside the Māui dolphin's range, as those fisheries do not comport with U.S. standards for marine mammal protection. New Zealand's failure to protect the Māui dolphin is well-known at the international level. For example, the IWC Scientific Committee has repeatedly highlighted New Zealand's neglect in this regard. In its most recent statement on the matter, the Scientific Committee offered the following assessment, which bears quoting in full:

> The Committee notes that no new management action regarding the Māui dolphin has been enacted since 2013. It therefore concludes, as it has repeatedly in the past, that existing management measures in relation to bycatch mitigation fall short of what has been recommended previously and expresses continued grave concern over the status of this small, severely depleted subspecies. The human-caused death of even one individual would increase the extinction risk. In addition, the Committee:
>
> (1) re-emphasizes that the critically endangered status of this subspecies and the inherent and irresolvable uncertainty surrounding information on most small populations point to the need for precautionary management;
>
> (2) reiterates its previous recommendation that highest priority should be assigned to immediate management actions to eliminate bycatch of Māui dolphins including closures of any fisheries within the range of Māui dolphins that are known to pose a risk of bycatch to dolphins (*i.e.* set net and trawl fisheries);

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[86] *Id.*

[87] We note that at least two major fishing firms ostensibly support this policy, although it is unclear whether the firms have made the shift. *See* Moana New Zealand & Sanford Limited, Maui Dolphin Protection Plan, at 5 (2016), *available at* https://www.sanford.co.nz/assets/Sanford-and-Moana-Maui-Protection-Plan-2016.pdf ("We support full transparency during the transition process and will work towards delivering video monitoring of coastal fishing (trawl and coastal set netting) within the Māui dolphin habitat on Sanford and Moana New Zealand linked vessels and on trawl fishers' landing into our markets as soon as possible, aiming for April 2017.").

[88] Elizabeth Slooten & Stephen Dawson, *Bycatch and PBRs for Maui and Hectors Dolphin*, *supra* note 61, at 2.

[89] *Id.*

> (3) notes that the confirmed current range extends from Maunganui Bluff in the north to Whanganui in the south, offshore to 20 n. miles, and it includes harbours — within this defined area, fishing methods other than set nets and trawling should be used;
>
> (4) welcomes the update on Māui dolphins provided and looks forward to receiving the species-specific, spatially explicit, multi-threat risk assessment in 2019;
>
> (5) respectfully encourages the New Zealand Government to commit to specific population increase targets and timelines for Māui dolphin conservation;
>
> (6) respectfully requests that reports be provided on progress towards the conservation and recovery goals as updates become available.[90]

Unfortunately, the IWC Scientific Committee has issued similar statements on multiple occasions, to little avail. The Agencies have an opportunity — and a legal obligation — to affirmatively use the Imports Provision to incentivize New Zealand to finally take the steps required to save the Māui dolphin from otherwise inevitable extinction. Additionally, New Zealand's strong economic profile and social stability eliminate any excuse for non-compliance. Where Mexico's fight to save the vaquita is arguably complicated by the presence of armed poachers linked to drug cartels[91] (not to mention difficult economic conditions), New Zealand's failure to protect a similarly-situated marine mammal seems to be the result of little more than a lack of resolve. An import ban would provide the needed economic pressure to encourage New Zealand to alter its approach.

3. A trade ban would strongly encourage proactive efforts by New Zealand to finally adequately address Māui dolphin bycatch

Under the facts at issue, there is no question that an import ban would have the desired effect of strongly encouraging New Zealand to take the critical steps needed to align its management of the fisheries driving the Māui dolphin to extinction with U.S. standards. On this point, it is indisputable that, as one of the largest importers of seafood products, the United States is in a powerful position to influence market forces. In fact, as concluded in a recent study, the United States market "is one of the world's biggest seafood markets, whose purchasing power has a significant impact on patterns of fishing and trade."[92] On the flip-side, as one of the twenty largest seafood exporters to the United States market,[93] New Zealand is susceptible to United States economic pressure and, thus, highly likely to respond to a trade ban. These circumstances give

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[90] 2018 Report of the IWC Scientific Committee, *supra* note 9, at 69.
[91] *See, e.g.,* Kate Morrisey, *Totoaba Trafficker's Arrest Offers Faint Hope for Vaquita*, San Diego Union Tribune (Sept. 19, 2018), *available at* https://www.sandiegouniontribune.com/news/border-baja-california/sd-me-oscar-parra-20180919-story.html.
[92] Ganapathiraju Pramod et al., *Estimates of Illegal and Unreported Fish in Seafood Imports to the USA*, MARINE POL'Y 102, 112 (2014).
[93] *Notice of Availability: Fish and Fish Product Import Provisions of the Marine Mammal Protection Act List of Foreign Fisheries*, 83 Fed. Reg. 11703, 11710 (Table 1) (March 16, 2018).

rise to a strong presumption that New Zealand would comply with a demand that its export fishery be brought in line with United States law protective of marine mammals.[94]

4. A trade ban must not await New Zealand's development of a new threat management plan for the Māui dolphin

Despite the foregoing, the Agencies might claim that an import ban would be imprudent pending the release of New Zealand's a new Threat Management Plan ("TMP"). New Zealand claims that the new TMP will be designed to improve protections for the Māui dolphin.[95] Any such argument should be disregarded for three primary reasons.

First, and to repeat, the Import Provision does not, by its express language, authorize this delay. It prohibits imports of fish and fish products associated with bycatch in violation of U.S. standards. The statute is unambiguous; it requires immediate action when triggered.

Second, New Zealand's poor track record in developing past TMPs for the Māui dolphin undermines any confidence that it will implement reforms sufficient to satisfy the MMPA now. As the above-quoted IWC assessment demonstrates, New Zealand has for years assured the international community that it is working on the issue. Yet evidence of genuine progress has been wanting, as "existing management measures in relation to bycatch mitigation fall short of what has been recommended previously."[96] In fact, New Zealand has touted its work on a TMP — and characterized the same as the species' savior – *since 2007*.[97] There is simply no reason to believe that New Zealand will finalize an adequate TMP in short order (absent the incentive provided by an import ban).

Third, there is already strong evidence that New Zealand's current efforts are far from sufficient to address the significant bycatch threats facing the Māui dolphin. More to the point, during a July 2018 workshop to review and discuss the draft TMP and underlying risk assessment, an invited international expert panel was highly critical of the direction taken by the New Zealand government.[98] Among other points, the expert panel noted the following issues that undercut the TMP's effectiveness:

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[94] *See Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 570 (1995), *appeal dismissed*, 86 F.3d 1178 (Fed. Cir. 1996) (holding in a case concerning inaction regarding imports of shrimp harvested in a manner that harmed sea turtles that it was "safe to presume that the exporting countries do (and would) attempt to comply with U.S. law" due to the size of the United States seafood export market).

[95] *See* New Zealand Department of Conservation, Draft Hector's and Māui Dolphin Threat Management Plan, *available at* https://www.doc.govt.nz/about-us/science-publications/conservation-publications/native-animals/marine-mammals/draft-hectors-and-mauis-dolphin-threat-management-plan/.

[96] 2018 Report of the IWC Scientific Committee, *supra* note 9, at 69.

[97] New Zealand Department of Conservation, Timeline of Research and Protection Events for Māui Dolphin, *available at* https://www.doc.govt.nz/nature/native-animals/marine-mammals/dolphins/maui-dolphin/timeline-of-research-and-protection-events/.

[98] Hector's and Māui Dolphin Threat Management Plan Review, Risk Assessment Workshop, 9-13 July 2018: Panel Recommendations (Aug. 2, 2018), *available at* https://www.doc.govt.nz/our-work/our-work-with-maui-dolphin/hectors-and-maui-dolphin-threat-management-plan/review/workshops-and-stakeholder-forums/.

- problems in modeling (*e.g.*, the untenable assumption "that beach-cast carcasses are representative (or even a rough approximation) of the actual proportions of causes of death");[99]

- a failure to account for recreational and illegal fishing as additional sources of bycatch;[100]

- a failure to incorporate or otherwise utilize all relevant "previously collected data";[101]

- a failure to provide population status "relative to historical numbers," which would in turn facilitate managerial efforts to focus on populations with a "very low abundance and therefore . . . greater risk of being extirpated";[102]

- an under-emphasis of the fact "that many areas have little to no observer coverage and even in those that do, observer coverage is low and often from some time ago."[103]

Significantly, Dr. Barbara Taylor, a NMFS scientist and leader of NMFS' Marine Mammal Genetic Program, was a member of this panel.

On balance, New Zealand's track record and progress to date do not inspire confidence. Regardless, the MMPA does not authorize a "wait-and-see" approach. To the contrary, the statute commands immediate action, based on the very premise that a trade ban will prompt serious efforts to reduce bycatch below PBR.

5. There is a critical need for emergency rulemaking

As explained above, the CIT recently held that "[t]he Government cannot give itself a five-year exemption from compliance with the MMPA[.]"[104] It is a fundamental principle of administrative law that a regulation cannot contradict the hierarchically superior terms of a governing statute. An agency "has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute."[105] Thus, notwithstanding the regulation's attempt to create a five-year exemption period, the Agencies have a statutory duty to immediately ban imports from offending fisheries as required by the Imports Provision.

Yet, even if the five-year exemption period were valid — and it is not — this petition qualifies for emergency rulemaking under the MMPA. As NMFS explained in its rulemaking, the MMPA authorizes emergency rulemaking when the status of a marine mammal stock demands immediate

[99] *Id.* at 2; *see also id.* at 12 (elaborating on the point).
[100] *Id.* at 2; *see also id.* at 10-11 (elaborating on the point).
[101] *Id.* at 4.
[102] *Id.* at 5.
[103] *Id.* at 9.
[104] *NRDC, Inc.*, *supra* note 19, at 1354.
[105] *Board of Governors of Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986).

action.[106] More specifically, NMFS stated that it would entertain "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."[107] New Zealand export fisheries are having precisely this sort of impact on the Māui dolphin. As with the vaquita, the Māui dolphin demands emergency action under NMFS' own standard. Like the vaquita, the Māui dolphin is now limited to a "very small population[] where any incidental mortality could result in increased risk of extinction."[108]

In addition, emergency rulemaking that dispenses with notice and comment is authorized under the Administrative Procedure Act ("APA"). Although the APA normally requires notice and comment prior to issuance of a final rule of the type requested, notice and comment in this case is neither appropriate nor required. In emergency situations, the APA contemplates that agencies may bypass notice and comment for "good cause."[109] Specifically, the APA exempts legislative rules from notice and comment if "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[110] In such scenarios, agencies will frequently issue an "interim final" rule — a rule that is effective on an interim basis, to be replaced with a permanent rule following notice and comment in due course.[111]

Here, an interim final rule issued without notice and comment is warranted because notice and comment would be both "impracticable" and "contrary to the public interest." It is impracticable because the Agencies "cannot both follow section 553 and execute [their] statutory duties" under the MMPA.[112] As explained above, the MMPA requires an *immediate* ban to prevent offending imports. Further, the courts have recognized that notice and comment may be excused as impracticable when "necessary to stave off any imminent threat to the environment[.]"[113] Similarly, notice and comment is contrary to the public interest because this time-intensive process would "impede[] timely implementation of a statute"[114] and exacerbate an existential risk to an endangered species. Finally, given the urgency of the situation and Congress' clear statutory command in the MMPA, the Agencies should invoke their power under section 553(d)(3) of the APA to dispense with the normal 30-day waiting period for a published rule to take effect.[115] In

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[106] 81 Fed. Reg. at 54395 (col. 2).
[107] *Id.*; *see also* 16 U.S.C. § 1387(g).
[108] 81 Fed. Reg. at 54395 (col. 3).
[109] 5 U.S.C. § 553(b)(B).
[110] *Id.*
[111] *See, e.g., American Federation of Government Employees v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981) ("Therefore, once an emergency situation has been eased by the promulgation of interim rules, it is crucial that the comprehensive permanent regulations which follow emerge as a result of the congressionally-mandated policy of affording public participation that is embodied in section 553.").
[112] *Riverbend Farms, Inc. v. Maddigan*, 958 F.2d 1484-85 & n.2 (9th Cir. 1992); *see also North Carolina Growers' Ass'n*, 702 F.3d 755, 766 (4th Cir. 2012) (stating that the normal process "may be found to be impracticable when the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings") (quoting *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (internal quotation marks omitted).
[113] *North Carolina Growers' Ass'n*, 702 F.3d at 766.
[114] *United States v. Johnson*, 652 F. Supp. 2d 720, 729 (S.D. Miss. 2009).
[115] 5 U.S.C. § 553(d)(3).

short, the Agencies should publish the rule as soon as possible, and the rule should take effect immediately upon publication.

In light of the above and other evidence regarding the plight of the Māui dolphin, any fishery using gillnets or trawls that interacts with Māui dolphins in its habitat along the west coast of New Zealand's North Island does not meet U.S. standards under the MMPA. According to the best available data, including NMFS' List of Foreign Fisheries[116] — a document developed by NMFS under the new regulation to identify export fisheries that interact with marine mammals — the following fisheries meet the above criteria and currently export fish or fish products to the United States:

- Snapper (*Pagrus auratus*) — trawl

  New Zealand's commercial snapper fisheries are managed under six fishery management areas.[117] As the following government image and table illustrate, the Māui dolphin's habitat is contained within SNA8, the second largest snapper management area.

Figure 3: Snapper fishery management areas. Image published by Ministry for Primary Industries.

[116] NOAA Fisheries, Final List of Foreign Fisheries (2018), *available at* https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries.
[117] Ministry for Primary Industries, Snapper, *available at* https://www.mpi.govt.nz/travel-and-recreation/fishing/fish-species/snapper/.

Area	Total allowable catch	Commercial allowance	Customary allowance	Recreational allowance	Other mortality[2]
SNA 1	8050	4500	50	3050	450
SNA 2	450	315	14	90	31
SNA 3	–[1]	32.3	–	–	–
SNA 7	306	200	16	90	–
SNA 8	1785	1300	43	312	130
SNA 10	–	10	–	–	–

[1] Areas marked '–' have no allowance set (not enough information is available to set catch allowances)
[2] Fishing-related mortality from all sectors such as discarding and poaching.

Figure 4: New Zealand's 2016 catch allowances for the snapper fishery. Image published by Ministry for Primary Industries.

The List of Foreign Fisheries correctly notes that the snapper trawl fleet, containing approximately 59 vessels, operates in the waters of both the North and South Islands.[118] The Ministry for Primary Industries classifies this as an "inshore" fishery.[119] In contrast to "deepwater" fisheries, "[i]nshore fisheries are found from the waterways within New Zealand through to about 12 nautical miles offshore."[120] Like the other inshore fisheries discussed below, this places the snapper trawl fishery squarely within the Māui dolphin's habitat.

Incredibly, however, the List of Foreign Fisheries does not acknowledge interactions with Māui dolphins as a characteristic of this fishery (the document identifies only interactions with the bottlenose dolphin, the common dolphin, and the New Zealand fur seal). This oversight is shocking, as even the fishing industry acknowledges that the trawl fishery for snapper is associated with bycatch of Māui dolphins.[121] In fact, fishing behemoths Moana New Zealand (Moana) and Sanford Limited (Sanford) have acknowledged that "gillnetting/set-netting is considered the main fishing threat to Māui dolphins, followed by trawling."[122] As a result of this "conservation emergency," the two companies committed in 2016 to "transition away from conventional trawl fishing methods" within Maui dolphin habitat.[123] The companies identified the snapper fishery as one of the "[k]ey fish stocks affected by this commitment[.]"[124]

- Snapper (*Pagrus auratus*) — set gillnet

[118] Final List of Foreign Fisheries, *supra* note 116, at 136.
[119] Ministry for Primary Industries, Inshore Fisheries, *available at* https://www.mpi.govt.nz/growing-and-harvesting/fisheries/fisheries-management/inshore-fisheries/.
[120] *Id.*
[121] *See* Christopher Pala, *Endangering the World's Rarest Dolphins*, *supra* note 6 ("Sanford [Limited] has pledged to find a dolphin-safe trawl net by 2022 and to continue trawling with its vessels in the Maui habitat until then.").
[122] Moana New Zealand & Sanford Limited, Maui Dolphin Protection Plan, *supra* note 87, at 1.
[123] *Id.* at 4.
[124] *Id.* at 6.

Although the List of Foreign Fisheries does not identify the set gillnet snapper fishery (perhaps on the assumption that this fishery does not export to the U.S.), this fishery uses gear that is known to pose a major threat to Māui dolphins. As New Zealand's Ministry for Primary Industries recently stated, "[i]t is widely accepted that incidental mortality in coastal fisheries, notably set nets and to a lesser extent trawls, is the most significant threat to Hector's and Māui dolphins."[125] Snapper caught using set gillnets has no place in the U.S. market under the MMPA.

- Tarakihi (also spelled "Terakihi") (*Nemadactylus macropterus*) — set gillnet and trawl

  The Tarakihi fishery is an inshore fishery[126] that includes 147 vessels using trawls and seven vessels using set nets.[127] These vessels operate in both the North and South Islands. Although the List of Foreign Fisheries does not identify interactions with Māui dolphins as a concern, Moana and Sanford identify the Tarakihi fishery as one of the "[k]ey fish stocks affected" by their 2016 commitment to take steps to limit bycatch of Māui dolphins.[128] To the extent that this fishery uses problematic gear (trawls and set gillnets) within Māui dolphin habitat, it remains incompatible with U.S. standards.

- Spotted dogfish (a.k.a. rig) (*Mustelus lenticulatus*) — set gillnet and trawl

  According to the List of Foreign Fisheries, there are 133 vessels engaged in the set gillnet fishery for spotted dogfish and another 25 vessels that target this species using trawls.[129] NMFS recognizes that the set gillnet fishery is associated with bycatch of Māui dolphins.[130] Although NMFS does not identify Māui dolphin bycatch as a known issue with respect to the trawl fishery, the fishery operates in Māui dolphin habitat using gear that is known to take Māui dolphins.[131] As with snapper and terakihi, Sanford and Moana have identified the fishery for spotted dogfish as one of the key stocks affected by its commitment to make changes to reduce bycatch of Māui dolphins.[132] Thus, imports of spotted dogfish from both fisheries should be banned under the MMPA.

- Trevally (*Pseudocaranx dentex*) — set gillnet and trawl

  The New Zealand trevally fishery is an inshore fishery[133] that consists of 46 trawl vessels

[125] Ministry of Primary Industries, *Aquatic Environment and Biodiversity Annual Review* 2016, *supra* note 65, at 142.
[126] Ministry for Primary Industries, Inshore Fisheries, *supra* note 119.
[127] Final List of Foreign Fisheries, *supra* note 116, at 138.
[128] Moana New Zealand & Sanford Limited, Maui Dolphin Protection Plan, *supra* note 87, at 6.
[129] Final List of Foreign Fisheries, *supra* note 116, at 137.
[130] *Id.*
[131] Moana New Zealand & Sanford Limited, Maui Dolphin Protection Plan, *supra* note 87, at 6.
[132] *Id.*
[133] Ministry for Primary Industries, Inshore Fisheries, *supra* note 119.

and 36 vessels using set gillnets.[134] However, while the List of Foreign Fisheries seems to acknowledge that this fishery is active in Māui dolphin habitat, it does not identify bycatch of Māui dolphins as a concern.[135] This is belied by the fact that the trevally fishery is one of the fisheries that Sanford and Moana have identified as in need of change.[136]

- Warehou (*Seriolella brama*) — trawl

  This fishery consists of 13 vessels.[137] In the List of Foreign Fisheries, NMFS acknowledges that this fishery is associated with bycatch of Māui dolphins.[138] Likewise, Sanford and Moana Fisheries recognize that this fishery is in need of reform to reduce interactions with Māui dolphins.[139]

- Hoki (*Macruronus novaezelandiae*) — trawl

  Although the List of Foreign Fisheries does not identify interactions with Māui dolphins associated with this fishery, the List of Foreign Fisheries recognizes that the hoki trawl fishery operates within the Cook Strait.[140] Māui dolphins have historically used these waters.[141]

- Barracouta (also spelled "barracoota") (*Thyrsites atun*) — trawl

  Curiously, the List of Foreign Fisheries describes the barracouta trawl fishery as limited to the South Island (and, therefore, outside of Māui dolphin habitat).[142] However, both the New Zealand government and the fishing industry readily concede that this species is caught in waters coinciding with Māui dolphin habitat. As the Ministry for Primary Industries states, "[c]ommercial fishing is an important industry for the North Island West Coast region — from set netting inside the harbours and close to shore for rig, school shark, flounder and grey mullet, to trawling further off the coast for snapper, trevally and barracoota[.]"[143] The fact that this fishery threatens Māui dolphins is confirmed by Sanford and Moana's inclusion of this fishery as one of the key stocks with respect to which change is required "to reduce the risk to Māui dolphins from commercial fishing vessels[.]"[144]

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[134] Final List of Foreign Fisheries, *supra* note 116, at 138-39.
[135] *See id.*
[136] Moana New Zealand & Sanford Limited, Maui Dolphin Protection Plan, *supra* note 87, at 6.
[137] Final List of Foreign Fisheries, *supra* note 116, at 139.
[138] *Id.*
[139] Moana New Zealand & Sanford Limited, Maui Dolphin Protection Plan, *supra* note 87, at 6.
[140] Final List of Foreign Fisheries, *supra* note 116, at 134.
[141] New Zealand Department of Conservation, *Facts About Māui Dolphin*, *available at* https://www.doc.govt.nz/nature/native-animals/marine-mammals/dolphins/maui-dolphin/facts/.
[142] *Id.* at 132.
[143] Ministry for Primary Industries: Fisheries New Zealand, *Fishery — West Coast North Island Finfish*, *available at* https://fs.fish.govt.nz/Page.aspx?pk=5&fpid=14.
[144] Moana New Zealand & Sanford Limited, Maui Dolphin Protection Plan, *supra* note 87, at 2.

- Flounder (*Rhombosolea* spp.) — trawl and set gillnet

  The trawl and set gillnet fisheries for flounder species are inshore fisheries,[145] operating within the waters of both the North and South Islands.[146] In the List of Foreign Fisheries, NMFS states that these fisheries are not associated with documented bycatch of marine mammals.[147] However, Sanford and Moana have recognized that the flounder fisheries pose threats to the Māui dolphin and must be reformed to ward off extinction.[148]

- Mullet (*Mugilidae* spp.) — set net and inshore drift net

  According to the List of Foreign Fisheries, the mullet fishery in New Zealand includes five vessels using inshore drift nets and 136 vessels deploying set nets.[149] These vessels ply the waters of the North Island's west coast, squarely within Māui dolphin habitat.[150] Although the List of Foreign Fisheries reports no "documented" interactions with marine mammals,[151] this is yet another fishery that Sanford and Moana identified as in need of change for the sake of the Māui dolphin.[152]

- Gurnard (*Chelidonichthys kumu*) — set net and trawl

  The gurnard fishery is an inshore fishery,[153] with 128 vessels engaged in trawling and five vessels using set nets.[154] While trawl vessels in this fishery operate in both the South and North Islands,[155] vessels using set nets operate only in the North Island.[156] The List of Foreign Fisheries indicates that the trawl fleet is associated with bycatch of bottlenose dolphins, common dolphins, and New Zealand fur seals. However, this, too, is a "[k]ey fish stock[] affected by" Sanford and Moana's public commitment to alter fishing practices on behalf of the Māui dolphin.[157]

Additional information regarding imports from these fisheries is provided immediately below and in the accompanying Appendix.[158]

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[145] Ministry for Primary Industries, Inshore Fisheries, *supra* note 119.
[146] Final List of Foreign Fisheries, *supra* note 116, at 133.
[147] *Id.*
[148] Moana New Zealand & Sanford Limited, Maui Dolphin Protection Plan, *supra* note 87, at 6 (identifying flounder as one of the "[k]ey fish stocks affected by this commitment").
[149] Final List of Foreign Fisheries, *supra* note 116, at 135.
[150] New Zealand Fisheries, Grey Mullet, *available at* https://fs.fish.govt.nz/Doc/21731/34_GMU_09.pdf.ashx.
[151] Final List of Foreign Fisheries, *supra* note 116, at 135.
[152] Moana New Zealand & Sanford Limited, Maui Dolphin Protection Plan, *supra* note 87, at 6 (identifying the grey mullet as one of the "[k]ey fish stocks affected by this commitment").
[153] Ministry for Primary Industries, Inshore Fisheries, *supra* note 119.
[154] Final List of Foreign Fisheries, *supra* note 116, at 133-34.
[155] *Id.* at 133.
[156] *Id.* at 134.
[157] Moana New Zealand & Sanford Limited, Maui Dolphin Protection Plan, *supra* note 87 at 6.
[158] *See* Appendix I: Import Data from NMFS' Statistics and Economics Division (detailing imports from various fisheries that violate the strictures of the MMPA).

A special note is required on the topic of "highly processed fish products" derived from the above-identified fisheries. In the draft rule, NMFS defined ''fish and fish products'' in a generally broad manner while carving out a specific exclusion for "fish oil, slurry, sauces, sticks, balls, cakes, pudding and other similar highly processed fish products."[159] Following comments observing the lack of statutory authority for this exclusion, NMFS reversed course. In the final Imports Rules, NMFS decided "to remove language excluding highly processed products from the definition of fish and fish products."[160] Thus, in the case of an offending 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."[161]

Official NMFS trade data shows that the U.S. imports significant amounts of highly processed fish products from New Zealand — primarily fish sticks and fish meal unfit for human consumption, but also oil and fishmeal fit for human consumption, as well as other items.[162] Absent clear and convincing evidence to the contrary, it is dangerous to assume that these products do not originate from fisheries operating in Maui dolphin habitat. Unless U.S. authorities, with the assistance of New Zealand, are able to definitively determine that a given shipment of highly processed fish products is *not* sourced from the above-identified fisheries, such products should likewise be subject to the requested import ban. With this in mind, we have annotated the attached Appendix to indicate the highly processed fish products that are presumptively subject to the ban.

Finally, it bears noting that NMFS' trade data may significantly underestimate the quantity of imports from New Zealand fisheries. Seafood New Zealand, a major industry association, compiles monthly reports using New Zealand government data.[163] These reports break down export flows by species and destination country. In many cases, the Seafood New Zealand reports indicate quantities of trade in excess of the NMFS reports. For instance, with respect to snapper exports to the United States in January 2018, Seafood New Zealand indicates exports of 41,994 kilograms worth $485,231 New Zealand Dollars (approx. $328,081 USD).[164] In contrast, the NMFS trade data indicates that imports of snapper that month amounted to a mere 534 kilograms, worth only $4,495 USD.[165] Further, whereas Seafood New Zealand reports exports of flounder in January 2018,[166] the NMFS data does not report *any* flounder imports during the same time period.[167] While these and other divergences may be the result of different categorization methods

[159] 80 Fed. Reg. at 41892 (col. 2).
[160] 81 Fed. Reg. at 54396 (col. 1).
[161] *Id.*
[162] *See, e.g.,* Appendix I: Import Data from NMFS' Statistics and Economics Division at p. 18 (showing that, in November 2014, the U.S. imported 56,673 kilos of "STICKS, TYPE PRODUCTS, COATED, NOT COOKED, NOT IN OIL, NOT MINCED").
[163] Seafood New Zealand, Export Information: Export Statistics, *available at* https://www.seafoodnewzealand.org.nz/publications/export-information/.
[164] Appendix II: Sample Export Data from Seafood New Zealand at p. 3 (also available online at https://www.seafoodnewzealand.org.nz/publications/export-information/export-statistics/?tx_ttnews%5Btt_news%5D=1237&cHash=3ddab1c58653753bfc58f834b1f8944a).
[165] Appendix I: Import Data from NMFS' Statistics and Economics Division at p. 81.
[166] Appendix II: Sample Export Data from Seafood New Zealand at p. 1.
[167] *See* Appendix I: Import Data from NMFS' Statistics and Economics Division at p. 80 (containing no data re flounder imports during January 2018).

(*e.g.*, NMFS employs the category of "SNAPPER (LUTJANIDAE SPP.) FRESH," while Seafood New Zealand uses "Snapper, Finfish, Chilled Whole"), a more likely explanation may be that, in whole or in part, the NMFS data contains significant inaccuracies that depict far lower trade volumes than actually prevail in the market.

C. Imports from Fisheries Harming the Māui Dolphin Must Be Banned

Any fish or fish product from the above-identified fisheries, or any fish or fish product from any other trawl or gillnet fishery in the Māui dolphin's habitat along the west coast of New Zealand's North Island, does not meet U.S. standards for protection of marine mammals. Over the past five years, the United States has imported vast quantities of fish and fish products produced by these fisheries.[168] Pursuant to the MMPA, imports of fish and fish products from these fisheries must be banned.

Notably, as the attached Appendix demonstrates, banning products from the relevant fisheries hardly amounts to a ban of *all* fish and fish products from New Zealand. The Petitioners are not requesting an overly broad remedy. Rather, we are simply asking the Agencies to prohibit those products — and only those products — that violate the strictures of the Imports Provision. **More specifically, we request that the Agencies impose an immediate ban on the importation from New Zealand of all fish and their products caught in gillnets or trawls inside the Māui dolphin's range. We further request that this ban include all fish and their products sourced from either the west coast of New Zealand's North Island or the Cook Strait, unless affirmatively identified as having been caught with a gear type other than gillnets or trawls or affirmatively identified as caught outside the Māui dolphin's range.** Invoking the authority of APA sections 553(b)(B)[169] and 553(d)(3),[170] the Agencies should issue an interim rule imposing this ban immediately, without notice and comment.

CONCLUSION

By an overwhelming margin, the weight of the evidence proves that New Zealand's failure to manage bycatch from gillnet and trawl fisheries is driving the Māui dolphin to extinction. In fact, without serious changes to fisheries management, the Māui dolphin will likely become the next vaquita — a cetacean whose hopes for survival are in serious question.

As it stands, U.S. consumers are contributing to the Māui dolphin's decline by purchasing imported products from fisheries associated with high levels of bycatch. Under the MMPA, the Agencies are required to impose an import ban to incentivize New Zealand to finally take the management steps needed to come into compliance with U.S. marine mammal bycatch standards. Action is required — and it is required now.

[168] *See generally* Appendix I: Import Data from NMFS' Statistics and Economics Division.
[169] 5 U.S.C. § 553(b)(B).
[170] 5 U.S.C. § 553(d)(3).