



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

[REDACTED]
Head of Aquaculture & Recreational Fisheries
Directorate for Marine Scotland
Victoria Quay, Edinburgh EH6 6QQ

Dear [REDACTED]

Thank you for your letter in follow-up to our December 3, 2019 teleconference on trade between the United States and Scotland and the U.S. Marine Mammal Protection Act (MMPA) Import Provisions. I apologize for the delay in providing you a response to your letter. We greatly appreciate your engagement, frank consultations, and efforts to fully implement the MMPA Import Provisions.

In your letter, you ask for clarifications and advice on several issues regarding the Scottish Government's (SG) regulations and policies on the interaction of seals and fish farms/fisheries. I will respond to each below.

First, you ask for confirmation that in order to satisfy the MMPA, the SG should amend the Marine (Scotland) Act 2010 ("the 2010 Act") to remove the ability to issue seal licenses to fish farms for the intentional take of seals for the protection of the fish or to prevent serious damage to the farms. The SG has proposed an administrative approach, where the SG would no longer issue seal licenses to fish farms beginning in 2021.

During Scotland's Technical Consultation, we advised the SG to remove or amend the provisions in the 2010 Act that allow for the issuance of licenses to kill, injure, or take live seals to protect the health and welfare of farmed fish (Section 110(1)(f)) and to prevent serious damage to fisheries or fish farms (Section 110(g)). The U.S. regulations implementing the MMPA section 118 provisions governing the incidental take of marine mammals in all U.S. commercial fishing operations, including U.S. marine aquaculture fisheries, include provisions that prohibit the intentional killing and serious injury of marine mammals.¹ The MMPA does not provide for the issuance of permits or licenses to aquaculture operations to intentionally kill seals to protect the health and welfare of farmed

¹ 16 U.S.C. 1387 (a)(5) Except as provided in section 101(c), the intentional lethal take of any marine mammal in the course of commercial fishing operations is prohibited. 16 U.S.C (c) [TAKING IN DEFENSE OF SELF OR OTHERS.] — It shall not be a violation of this Act to take a marine mammal if such taking is imminently necessary in self-defense or to save the life of a person in immediate danger, and such taking is reported to the Secretary within 48 hours. The Secretary may seize and dispose of any carcass. (d) [GOOD SAMARITAN EXEMPTION.] — It shall not be a violation of this Act to take a marine mammal if— (1) such taking is imminently necessary to avoid serious injury, additional injury, or death to a marine mammal entangled in fishing gear or debris; (2) reasonable care is taken to ensure the safe release of the marine mammal, taking into consideration the equipment, expertise, and conditions at hand; (3) reasonable care is exercised to prevent any further injury to the marine mammal; and (4) such taking is reported to the Secretary within 48 hours.



fish or to prevent serious damage to fisheries or fish farms. When making comparability finding determinations for farmed salmon imports, we will evaluate the measures to reduce or deter interactions, prohibit intentional, and reduce incidental mortality and serious injury of marine mammals in foreign aquaculture operations as compared to the U.S. standards for aquaculture facilities. As long as the SG's regulations are available for implementation, subsequent administrations may avail themselves of those provisions at any time. Thus, we have concerns with the SG's proposal to suspend the issuance of seal licenses without removing the licensing provisions from the 2010 Act. Any such licensing provision is not comparable to the U.S. regulatory program.

Second, you request confirmation that river and coastal fisheries that do not qualify as fish farms, and do not export to the U.S. (or outside of the UK), are outside the scope of the relevant MMPA standards and seal licensing for these fisheries under the 2010 Act to prevent serious damage to fisheries can continue.

The U.S. is not attempting to directly regulate marine mammal bycatch in fisheries for domestic consumption occurring within a nation's coastal waters. The MMPA import rule established criteria that harvesting nations must meet for imports of fish and fish products into the United States (MMPA sections 101 (a) (2), 102 (c) (3) for global fisheries exporting to the United States, and 118 (a) (5) for domestic fisheries.) Fisheries on the List of Foreign Fisheries (LOFF) should reflect the commercial fisheries authorized by the harvesting nation, according to their fishery management system, to commercially fish and export fish and fish products to the United States.

While salmon/fish products from the river and coastal fisheries destined only for domestic/UK consumption (no export to the U.S.) for which a license has been issued under the 2010 Act would not be considered for a comparability finding and would not be included on the LOFF, this nonetheless raises some concerns. If the SG continues to allow for the issuance of licenses for the lethal take of seals for these fisheries, there must be a program in place to "reliably" certify that salmon/fish products from these fisheries are not exported to the United States either directly or through an intermediary. Specifically, this tracking and verification system must "reliably certify" that this product is not comingled with salmon/products from fisheries on the LOFF that received a comparability finding and qualify for export.

Such a certification program would need to include tracking, verification, and chain of custody procedures ensuring, throughout the entire chain of commerce from the farms, to the packers, to the distributors, and finally to the ultimate importer – the ability to consistently segregate fish caught without intentional mortality and serious injury of marine mammals. Thus, continuing to issue these licenses is accompanied by a level of risk and uncertainty. The SG as part of their comparability finding must provide their tracking and certification process for our evaluation. If it is not acceptable, this could have larger implications for the export of your salmon/fish products to the United States. Therefore, we continue to recommend that the SG remove the measures allowing for the licensing of fishermen to intentionally kill seals to protect the health and welfare of farmed fish or prevent serious damage to fisheries or fish farms. Such action would take a

significant step toward the SG's regulations mirroring U.S. regulations governing our domestic fisheries.

Lastly, you ask for clarification on the U.S.'s guidance on use of non-lethal deterrence measures (including Acoustic Deterrent Devices (ADDs) and whether the regulation of ADDs will be required for foreign fisheries exporting to the U.S. and whether the steps the SG is taking is in accordance with the MMPA.

Per MMPA section 101(a)(4), NMFS is currently developing guidelines for safely deterring marine mammals.² These guidelines will address both acoustic (e.g., ADDs) and non-acoustic deterrents, and the NMFS Office of Protected Resources is currently analyzing the expected impacts to individual animals of such devices and techniques. This analysis includes identifying the source level, frequency, duty cycle, etc. and evaluating whether these characteristics may result in onset of permanent threshold shift for each of the five marine mammal functional hearing groups (<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance>). We expect some ADDs currently on the market may result in significant adverse effects to one or more functional hearing groups when used as directed. Until the NMFS has completed its analyses and finalized the guidelines for safely deterring marine mammals as well as any prohibited deterrents, we cannot advise which ADDs would be appropriate. We will be sure to alert you when the proposed rule publishes and is available for public comment. In the meantime, we suggest that you review the report of the Expert Workshop on Marine Mammal Non-lethal Deterrents and the proceedings of the Acoustic Deterrence of Harmful Marine Mammal-Fishery Interactions Workshop.

<https://www.fisheries.noaa.gov/resource/document/summary-technical-expert-workshop-marine-mammal-non-lethal-deterrents-10-12>

<https://www.fisheries.noaa.gov/resource/document/acoustic-deterrence-harmful-marine-mammal-fishery-interactions-proceedings>

² 16 USC 1371(a)(4)(A) Except as provided in subparagraphs (B) and (C), the provisions of this Act shall not apply to the use of measures— (i) by the owner of fishing gear or catch, or an employee or agent of such owner, to deter a marine mammal from damaging the gear or catch; (ii) by the owner of other private property, or an agent, bailee, or employee of such owner, to deter a marine mammal from damaging private property; (iii) by any person, to deter a marine mammal from endangering personal safety; or (iv) by a government employee, to deter a marine mammal from damaging public property, so long as such measures do not result in the death or serious injury of a marine mammal. (B) The Secretary shall, through consultation with appropriate experts, and after notice and opportunity for public comment, publish in the Federal Register a list of guidelines for use in safely deterring marine mammals. In the case of marine mammals listed as endangered species or threatened species under the Endangered Species Act of 1973 [16 U.S.C. 1531 et seq.], the Secretary shall recommend specific measures which may be used to nonlethally deter marine mammals. Actions to deter marine mammals consistent with such guidelines or specific measures shall not be a violation of this Act. (C) If the Secretary determines, using the best scientific information available, that certain forms of deterrence have a significant adverse effect on marine mammals, the Secretary may prohibit such deterrent methods, after notice and opportunity for public comment, through regulation under this Act. (D) The authority to deter marine mammals pursuant to subparagraph (A) applies to all marine mammals, including all stocks designated as depleted under this Act.

Once NMFS has finalized our deterrence guidelines, we will be examining whether foreign nations have guidelines that are comparable to the U.S. If the use of a deterrent, including ADDs, is deemed not to be acceptable in the U.S., we will view the continued use of that deterrent method or ADD as contrary to our regulatory program. Nations will need to have some means of controlling the use of ADDs, through guidelines or the equivalent policy or regulation. We support the SG's development of mitigation strategies, informed by science-based guidance, which should increase the effectiveness and mitigate the potential adverse impacts of ADDs.

Thank you again for your thoughtful letter. I appreciate your engagement in the MMPA Import Provisions. If you have any further questions, please don't hesitate to contact me via email at [REDACTED] or [REDACTED] or by phone at [REDACTED]

Sincerely,

[REDACTED]