

March 3, 2008

PETITION TO BAN IMPORTS OF SWORDFISH FROM COUNTRIES  
FAILING TO SUBMIT PROOF OF THE EFFECTS OF FISHING  
TECHNOLOGY ON MARINE MAMMALS PURSUANT TO MARINE  
MAMMAL PROTECTION ACT SECTION 101

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

Center for Biological Diversity  
Turtle Island Restoration Network

## NOTICE OF PETITION

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The Center for Biological Diversity is a non-profit, public interest environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has over 40,000 members throughout the United States. The Center and its members are concerned with the conservation of marine mammals and the effective implementation of the Marine Mammal Protection Act.

Turtle Island Restoration Network is a nonprofit, public interest environmental organization with approximately 10,000 members throughout the United States and the world, each of whom shares a commitment to the study, protection, enhancement, conservation, and preservation of the world's marine and terrestrial ecosystems, including protection of marine mammals.

### **Action Requested**

The Center for Biological Diversity and Turtle Island Restoration Network are writing to request that the Secretaries of Homeland Security, the Treasury, and Commerce carry out the non-discretionary duties imposed by section 101(a)(2) of the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1371(a)(2), to “ban the importation of commercial fish or fish products that have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of marine mammals in excess of United States standards.” Contrary to the MMPA requirement, the Secretaries have failed to obtain reasonable proof from countries exporting swordfish and swordfish products to the U.S. regarding the effects of their commercial swordfish fishing technology on marine mammals. Therefore, petitioners request that the Secretaries ban imports of swordfish from any and all countries that have not satisfied the MMPA section 101(a)(2) requirement.

To the extent any of the violations of law described in herein require affirmative action by agencies and officials within the Department of Treasury, Department of Homeland Security, or Department of Commerce, please consider this letter a formal petition for such action pursuant to 5 U.S.C. § 553(e).

Dated:

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## INTRODUCTION

The Center for Biological Diversity and Turtle Island Restoration Network request that the Department of Treasury, Department of Homeland Security, and/or Department of Commerce carry out their non-discretionary duties under section 101(a)(2) of the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1371(a)(2), to “ban the importation of commercial fish or fish products that have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of marine mammals in excess of United States standards.” Specifically, we request that the import of swordfish and swordfish products be banned from all countries that have failed to provide proof of the effects on marine mammals of the commercial fishing technology they use to catch swordfish.

Commercial fishing poses a significant threat to marine mammal species around the globe. Swordfish fisheries are especially dangerous to non-target species due to the massive level of fishing effort directed at swordfish, largely to feed U.S. demand, and to the harmful fishing methods employed to catch swordfish, particularly gillnetting and longlining. Thousands of dolphins, whales, sea lions, and other marine mammals are injured and killed each year in gillnets and longlines strewn throughout their feeding, breeding, and migratory habitat. Often these animals become entangled after unwittingly swimming into vast gillnets or a wall of longlines dozens of miles in length. Others are hooked after trying to grab a ready meal off the line. Still others are purposefully killed by fishers trying to protect their catch from depredation. In essence, gillnet and longline fishing place massive, deadly obstacles to basic life functions in the only habitat these air-breathing, ocean-dependent mammals have to sustain themselves.

Congress recognized that fishing posed a grave threat to marine mammal species when it passed the MMPA. The law imposes restrictions on fisheries-related mortalities of marine mammals and, together with regulations pursuant to the Endangered Species Act, has led to the establishment of significant protective measures aimed at restricting harmful fishing practices and protecting marine mammal populations from unsustainable fisheries bycatch. Congress also recognized that, if the United States’ efforts to protect marine mammals from fisheries bycatch were to be successful, it would have to exert pressure on fisheries of other nations to adopt similarly protective measures.

MMPA section 101 provides that vital mechanism for ensuring the safety of marine mammals outside U.S. waters. By requiring foreign nations to prove that their fishing methods do not result in harm to marine mammals in excess of U.S. standards before allowing those nations to export fish and fish products to the U.S., MMPA section 101 ensures that the U.S.’s considerable economic power provides an incentive to conserve, rather than obliterate, marine mammal populations. It also serves to protect U.S. fishers from unfair competition by foreign fishers operating without appropriate restraints on fishing practices.

However, the vital purposes of MMPA section 101 can only be achieved if the U.S. government carries out its non-discretionary duty to obtain the required proof from countries wishing to export swordfish to the United States. To date, the government has not done so, and

marine mammal populations around the globe suffer for it. The U.S. government must protect the public's interest in healthy global marine mammal populations and sustainable fisheries by enforcing this longstanding MMPA provision.

## **I. LEGAL FRAMEWORK.**

### **A. The MMPA's Restrictions on the Import of Commercial Fish or Fish Products.**

Section 101(a)(2) of the MMPA reads as follows:

The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary—

(A) shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States...<sup>1</sup>

Some of the duties the MMPA assigned to the Department of the Treasury were transferred to the newly created Department of Homeland Security ("DHS") in 2002 by the Homeland Security Act.<sup>2</sup> The Homeland Security Act transferred many border-related entities and functions formerly borne by other agencies to the DHS, including the U.S. Customs Service within the Department of Treasury and the related functions of the Secretary of Treasury.<sup>3</sup> Under the reorganization, U.S. Customs and Border Protection ("CBP") is vested with the authority to enforce the MMPA section 101, 16 U.S.C. § 1371.<sup>4</sup>

If, however, the Department of Homeland Security is not the agency currently charged with enforcing this provision of the MMPA, Petitioners request that the Secretary of Treasury or Secretary of Commerce take the action requested in this petition.

### **B. The MMPA Places the Burden on Exporting Countries to Provide Reasonable Proof of Compliance with U.S. Standards.**

The MMPA § 101(a)(2)(A) places the burden of proof on exporting countries to demonstrate the impact of their commercial fisheries on marine mammals, and requires that the Secretary of the Treasury (and now the Secretary of Homeland Security) "*shall insist on reasonable proof* from the government of any nation from which fish or fish products *will be* exported to the United States of the effects on ocean mammals of the commercial fishing

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<sup>1</sup> 16 U.S.C. § 1371(a)(2). *See also* 50 C.F.R. § 216.24(f)(1) (implementing regulations).

<sup>2</sup> 6 U.S.C. § 111.

<sup>3</sup> 6 U.S.C. § 203.

<sup>4</sup> Summary of Laws and Regulations Enforced by CBP, *available at* [http://www.cbp.gov/xp/cgov/toolbox/legal/summary\\_laws\\_enforced/](http://www.cbp.gov/xp/cgov/toolbox/legal/summary_laws_enforced/) (last visited Aug. 27, 2007).

technology in use for such fish or fish products exported from such nation to the United States.”<sup>5</sup> In other words, the Secretary must demand, obtain, and deem adequate a country’s demonstration of the effects of its fishing techniques on marine mammals *before* allowing that country’s fish products to enter the U.S. In drafting the MMPA, Congress explained this as an affirmative duty on the Secretary “to obtain reasonable proof from foreign governments in order to make a finding that foreign commercial fishing techniques were not resulting in kills or injuries in excess of U.S. standards.”<sup>6</sup>

The Center for Biodiversity has formally requested information from the Departments of the Treasury, Homeland Security, and Commerce detailing what evidence the Departments have of the fishing practices of countries that export swordfish to the United States. To our knowledge, none of these countries have provided this information and therefore have failed in to meet their burden of proof. As we show below, many of these countries’ swordfish fisheries fall far short of U.S. standards.

### **C. The Secretaries Have a Duty to Ban Imports of Fish and Fish Products in Absence of Information Demonstrating the Fish Was Caught in Accordance with U.S. Standards.**

Under MMPA section 101, the Secretary of the Treasury (and/or the Secretary of Homeland Security) “shall ban” the import of fish or fish products caught in a manner that exceeds U.S. standards for incidental injury or death to marine mammals. Furthermore, the MMPA § 102(c)(3) makes the import of such products a criminal violation: “It is unlawful to import into the United States . . . any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident to the catching of the fish.”<sup>7</sup>

The legislative history of the MMPA underscores Congress’ conviction that the purposes of the MMPA could not be met solely by regulating domestic fisheries. Congress recognized that the U.S. would have to use its market power to effectively protect marine mammals in international waters, as well as to prevent U.S. fishers from suffering a competitive disadvantage to unregulated foreign fishers. Therefore, Congress set out to “restrict or to prohibit the importation of marine mammals or animals taken by methods or in circumstances which would not be permitted to persons subject to U.S. jurisdiction.”<sup>8</sup> As described below, the situation that Congress sought to avoid – i.e., a situation in which U.S. dollars support the decimation of marine mammals by poorly regulated, destructive fisheries while U.S. fishers struggle to compete – is exactly the situation we are in today.

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<sup>5</sup> 16 U.S.C. § 1371(a)(2)(A) (emphasis added).

<sup>6</sup> Marine Mammal Protection Act Amendments of 1988, S. Rep. No. 592 (1988).

<sup>7</sup> 16 U.S.C. § 1372(c)(3).

<sup>8</sup> H.R. Rep. 92-707, at [redacted] (1972), as reprinted in 1972 U.S.C.C.A.N. 4144, [redacted].

## **II. GEAR AND TECHNIQUES USED BY SWORDFISH FISHERIES.**

Commercial fisheries targeting swordfish generally use either longline gear or gillnets. Both longline and gillnet fishing result in substantial catch of non-target species, such as sea turtles, marine mammals, and sea birds. Pelagic longline fishing involves the use of a monofilament line that stretches from 20 to upwards of 60 miles from a vessel and is set to a given depth depending on the target species. Boats targeting swordfish set their lines at a relatively shallow depth, which tends to attract a larger number of non-target species. Attached to the longline are additional lines to which are attached weights and baited hooks. A single longline fishing vessel may deploy several thousand hooks at one time, yet only catch one to three targeted fish per hundred hooks.<sup>9</sup> Marine mammals get caught on the baited hooks of longlines or are entangled in the lines. Unable to surface for air, these animals subsequently drown. Those that do not immediately drown often suffer serious injury, such as hook ingestion, condemning them to a slower death by starvation, internal bleeding, or infection.

Gillnets, which are often a mile or more in length and entangle virtually everything that comes into contact with them, are especially dangerous to cetaceans and pinnipeds.<sup>10</sup> As with longlines, animals that become entangled in gillnets are unable to surface for air and therefore drown. It has been estimated that over 300,000 marine mammals die every year in global fisheries, most of them in gillnets.<sup>11</sup>

## **III. U.S. LONGLINE AND DRIFT-GILLNET FISHERIES ARE REGULATED TO REDUCE MARINE MAMMAL TAKE.**

U.S. swordfish vessels operate under a relatively stringent set of federal and state laws that limit the gear they use and when and where they may fish, and require that special procedures be followed to reduce bycatch of protected species such as marine mammals. While provisions of the Magnuson-Stevens Fishery Conservation and Management Act, Endangered Species Act, and Marine Mammal Protection Act establish restrictions on all U.S. fisheries, regional fisheries are subject to additional restrictions from area-specific fishery management plans and state laws. U.S. swordfish fisheries, located off the Atlantic coast from Florida to New England, the Pacific Coast from Washington to California, and in the western Pacific waters surrounding Hawaii, are each governed by a separate fishery management plan and, to some extent, marine mammal take reduction plan. As described below, these measures provide substantial protection to marine mammals and other species.

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<sup>9</sup> National Coalition for Marine Conservation. 1998. *Ocean Roulette: Conserving Swordfish, Sharks and Other Threatened Pelagic Fish In Longline-Infested Waters*, at 19.

<sup>10</sup> Read, Andrew J., Phebe Drinker, Simon Northridge. 2006. *Bycatch of Marine Mammals in U.S. and Global Fisheries. Conservation Biology*. 20: 163-169, at 166.

<sup>11</sup> *Id.*

## **A. Laws Applicable to All U.S. Fisheries.**

### **1. Magnuson-Stevens Fishery Conservation & Management Act.**

The Magnuson-Stevens Fishery Conservation & Management Act (“MSA”) provides a national program for the conservation and management of marine and anadromous fishery resources both within and beyond the U.S. exclusive economic zone (“EEZ”).<sup>12</sup> The MSA establishes eight regional fishery management councils, which are tasked with developing a fishery management plan “for each fishery under its authority that requires conservation and management.”<sup>13</sup> Fishery management plans (“FMPs”) must specify, among other things, the type and quantity of gear that may be used for a given fishery, and information on time and location of fishing, effort, and catch levels that fishing vessels must report.<sup>14</sup> In an effort to track and reduce bycatch, the MSA requires each FMP to “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority . . . minimize bycatch [and] minimize the mortality of bycatch which cannot be avoided.”<sup>15</sup>

### **2. Endangered Species Act.**

A number of marine mammals that interact with swordfish gear are protected under the Endangered Species Act (“ESA”), including sperm, humpback, fin, and North Atlantic right whales.<sup>16</sup> This law, one of the strongest of its kind, provides multi-layered protection for listed species. Section 2(c) of the ESA establishes that it is “...the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”<sup>17</sup> The ESA defines “conservation” to mean “...the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”<sup>18</sup> Similarly, section 7(a)(1) of the ESA directs that the Secretary review “...other programs administered by him and utilize such programs in furtherance of the purposes of the Act.”<sup>19</sup>

Section 4 of the ESA calls for the preparation of a recovery plan for every species listed under the Act. Recovery plans establish recovery goals and objectives, describe site-specific management actions recommended to achieve those goals, and estimate the time and cost required for recovery.<sup>20</sup> Section 4(f) specifically requires that NMFS both “...develop and *implement* plans (hereinafter...referred to as ‘recovery plans’) for the conservation and survival

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<sup>12</sup> 16 U.S.C. § 1801(b).

<sup>13</sup> 16 U.S.C. §§ 1852(a), (h)(1).

<sup>14</sup> 16 U.S.C. §§ 1853(a)(2), (5).

<sup>15</sup> 16 U.S.C. § 1853(a)(11).

<sup>16</sup> NMFS, List of Marine Mammal Species under the Endangered Species Act, *available at* <http://www.nmfs.noaa.gov/pr/species/esa/mammals.htm> (last visited September 10, 2007).

<sup>17</sup> 16 U.S.C. § 1531(c)(1).

<sup>18</sup> 16 U.S.C. § 1532(3).

<sup>19</sup> 16 U.S.C. § 1536(a)(1).

<sup>20</sup> 16 U.S.C. § 1533(f).

of endangered species and threatened species....”<sup>21</sup> Consistent with the intent that recovery plans actually be implemented, Congress required that recovery plans “...incorporate... (i) a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species.”<sup>22</sup>

Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical . . . .”<sup>23</sup> To accomplish this goal, agencies must consult with the delegated agency of the Secretary of Commerce or Interior whenever their actions “may affect” a listed species.<sup>24</sup> Where NMFS is both the acting agency and the delegated wildlife agency for purposes of the listed species in question, different branches of NMFS must undertake internal consultation with each other. For species under the jurisdiction of the U.S. Fish and Wildlife Service (“FWS”), NMFS must also consult with that agency as well.

At the completion of consultation, NMFS or FWS issues a Biological Opinion that determines if the agency action is likely to jeopardize the species. If so, the opinion must specify a Reasonable and Prudent Alternative (“RPA”) that will avoid jeopardy and allow the agency to proceed with the action.<sup>25</sup>

The ESA also prohibits any “person” from “taking” threatened and endangered species without a valid permit.<sup>26</sup> In the case of ESA-listed marine mammals, any person wishing to engage in an activity that might result in the take of such a marine mammal must first obtain a permit under both the ESA and the MMPA.<sup>27</sup> The definition of “take,” found at 16 U.S.C. § 1532(19), states,

The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

In a case dealing with fisheries, a court found that “the statute not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. We believe that... a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.”<sup>28</sup> As such, the take prohibition applies to NMFS as the authorizing agency for fisheries actions, and the applicant as the person directly engaged in the activity likely to result in prohibited take. Violations of section 9 of the ESA are subject to civil penalties, forfeiture of fishing vessels, and criminal penalties of fines and imprisonment.<sup>29</sup>

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<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> 16 U.S.C. § 1533(f)(1)(B)(i).

<sup>23</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

<sup>24</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

<sup>25</sup> 16 U.S.C. § 1536(b).

<sup>26</sup> 16 U.S.C. § 1538.

<sup>27</sup> See 16 U.S.C. §§ 1371(a)(5)(E) and 1536(b)(4)(C).

<sup>28</sup> *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997).

<sup>29</sup> 16 U.S.C. § 1540(a), (b) and (e).

### 3. Marine Mammal Protection Act.

The MMPA demands that all fisheries “shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate” by April 30, 2001.<sup>30</sup> This goal, known as the Zero Mortality Rate Goal (“ZMRG”), is defined by regulation as ten percent of Potential Biological Removal (“PBR”).

Under the MMPA, NMFS must develop and implement take reduction plans (“TRPs”) for marine mammal stocks that interact with specified commercial fisheries known to cause frequent or occasional incidental mortality and serious injury to marine mammals.<sup>31</sup> The TRP must aim to reduce incidental mortality and serious injury of marine mammals in both the short- and long-term. The plan must contain measures to reduce incidental mortality and serious injury within six months of its implementation to levels less than the potential biological removal level established for the particular stock under MMPA section 117. The plan must also aim to reduce, within five years of implementation, incidental mortality and serious injury of the marine mammal stock to insignificant levels approaching zero.<sup>32</sup>

As with the ESA, engaging in a knowing violation of the MMPA carries substantial civil and criminal penalties.<sup>33</sup>

#### B. Regulation of Drift-Gillnet Fisheries in the U.S.

In addition to species-specific take limitations, U.S. standards for the protection of marine mammals require fishery-specific restrictions. Gillnet fisheries are carefully regulated in the United States because of their known impact on marine mammals and other species. According to many of the world’s leading marine mammal experts, the “single biggest threat facing cetaceans worldwide is death as bycatch in fishing gear.”<sup>34</sup> Researchers at Duke University and the University of St. Andrews in Scotland estimate that approximately 308,000 cetaceans are killed each year in fishing gear, and point to gillnet use as the most consistent offender:

Experts agree that wherever there are gillnets, there is cetacean bycatch. When caught in fishing gear, small whales, dolphins and porpoises often die because they aren't strong enough to break free and come to the surface to breathe.<sup>35</sup>

Recognizing this threat, the U.S. has banned the use of drift gillnets in two of the three U.S. swordfish fisheries. The Atlantic Highly Migratory Species (“HMS”) fishery management

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<sup>30</sup> 16 U.S.C. § 1387(b)(1).

<sup>31</sup> 16 U.S.C. § 1387(f)(1).

<sup>32</sup> 16 U.S.C. § 1387(f)(2).

<sup>33</sup> See 16 U.S.C. §§ 1375 (fines and imprisonment) and 1376 (forfeiture of vessels).

<sup>34</sup> Scientists included Dr. Andrew Read of Duke University Marine Laboratory, U.S., and Dr. Simon Northridge of the Sea Mammal Research Unit (SMRU), St Andrew's University, U.K. For list of task force participants and January 2002 Workshop participants, see <http://www.cetaceanbycatch.org/network.cfm>, <http://www.cetaceanbycatch.org/workshoplist.cfm>. See also Read et al. 2006, *supra* note 10.

<sup>35</sup> *Id.*

plan, which governs U.S. fishing for swordfish, tuna, and sharks off the U.S. East Coast, prohibits the use of gillnets to fish for swordfish and prohibits a vessel that has a gillnet on board from possessing swordfish.<sup>36</sup> Fishing with drift gillnets is similarly prohibited in the western Pacific fishery management area surrounding Hawaii, except when authorized under an experimental fishery permit.<sup>37</sup>

Drift gillnet fishing is not yet banned off the West Coast of the U.S. mainland, but is significantly limited by complex set of federal and state regulations. At the federal level, the Pacific Offshore Cetacean Take Reduction Team (“POCTRT”) requires that drift gillnet fishers follow several measures designed to protect marine mammals. The POCTRT requires that drift gillnet operators:

- (1) use acoustic deterrent devices (i.e. pingers) on drift gillnets to prevent entanglement of marine mammals;
- (2) deploy drift gillnets at a minimum depth of 6 fathoms (10.9 meters) in order to allow marine mammals to swim over the tops of the nets without entanglement;
- (3) accommodate observers onboard drift gillnet vessels when an observer is assigned to the vessel; and
- (4) attend any mandatory skipper workshops regarding marine mammal bycatch reduction.<sup>38</sup>

In addition, federal regulations prohibit drift gillnet fishing in certain areas of the U.S. EEZ off the West Coast. See Figure 1. While these closures are primarily intended to protect sea turtles, they also protect marine mammals from incidental encounters with drift gillnet gear. Under these regulations, drift gillnet fishing may not be conducted from August 15 to November 15 in the portion of the EEZ bounded by the coordinates 36°18.5' N latitude (Point Sur), to 34°27' latitude, 123° 35' W longitude to 129°W longitude (off California coast), north to 45°N latitude (off Oregon coast), and east to the point at which the 45°N latitude meets the Oregon coast.<sup>39</sup> Drift gillnet fishing is also prohibited in the portion of the EEZ south of Point Conception, California, located at 34°27' N latitude, and west to 120°W longitude from August 15 to August 31 and January 1 through January 31 when NMFS has forecasted or announced the occurrence of an El Niño event.<sup>40</sup>

State laws further restrict both the types of gear permissible for drift gillnet fishing and the areas in which it may be conducted. State laws prohibit the use of drift gillnet gear in the following areas:

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<sup>36</sup> 50 C.F.R. §§ 635.21(e)(4), 635.71(a)(17).

<sup>37</sup> 50 C.F.R. §665.30.

<sup>38</sup> Pacific Fishery Management Council, West Coast Highly Migratory Species Fishery Management Plan (June 2007) (“West Coast HMS FMP”) at 67.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 68.

- (1) In the EEZ off California from February 1 to April 30;
- (2) In the portion of the EEZ off California within 75 nautical miles (“nm”) of the coastline from May 1 to August 14;
- (3) In the portion of the EEZ off California within 25 nm of the coastline from Dec. 15 through Jan. 31;
- (4) In the portion of the EEZ bounded by a direct line connecting Dana Point; Church Rock on Catalina Island; and Point La Jolla, San Diego County; and the inner boundary of the EEZ from August 15 through September 30 each year;
- (5) In the portion of the EEZ within 12 nm from the nearest point on the mainland shore north to the Oregon border from a line extending due west from Point Arguello;
- (6) East of a line running from Point Reyes to Noonday Rock to the westernmost point of southeast Farallon Island to Pillar Point;
- (7) In the following areas around the Channel Islands, California:
  - (a) In the portion of the EEZ within six nm westerly, northerly, and easterly of the shoreline of San Miguel Island between a line extending six nm west magnetically from Point Bennett and a line extending six nm east magnetically from Cardwell Point and within six nm westerly, northerly, and easterly of the shoreline of Santa Rosa Island between a line extending six nm west magnetically from Sandy Point and a line extending six nm east magnetically from Skunk Point, from May 1 through July 31 each year;
  - (b) In the portion of the EEZ within 10 nm westerly, southerly, and easterly of the shoreline of San Miguel Island between a line extending 10 nm west magnetically from Point Bennett and a line extending 10 nm east magnetically from Cardwell Point and within 10 nm westerly, southerly, and easterly of the shoreline of Santa Rosa Island between a line extending 10 nm west magnetically from Sandy Point and a line extending 10 nm east magnetically from Skunk Point from May 1 through July 31 each year;
  - (c) In the portion of the EEZ within a radius of 10 nm of the west end of San Nicolas Island from May 1 through July 31 each year;
  - (d) In the portion of the EEZ within six nm of the coastline on the northerly and easterly side of San Clemente Island, lying between a line extending six nm west magnetically from the extreme northerly end of San Clemente Island to a line extending six nm east magnetically from Pyramid Head from August 15 through September 30 each year;
- (8) In the portion of the EEZ within 75 nm of the Oregon shoreline from May 1 through August 14, and within the 1,000 fathom (“fm”) curve during the remainder of the year; and

(9) In all EEZ waters off the Washington coast (Washington does not authorize use of any drift gillnet gear).<sup>41</sup>

Notably, the West Coast HMS FMP adopts Washington State's prohibition on drift gillnet fishing in the EEZ off the Washington coast and modifies current Oregon state regulations to delete the May-August prohibition on drift gillnetting within 75 nm and prohibit drift gillnet fishing year round in EEZ waters off the Oregon coast east of a line approximating the 1,000 fm curve.<sup>42</sup>

California also restricts the type of gear that drift gillnet operations may use. State law requires that drift gillnets have a minimum stretch mesh size of 14 inches and that the unattached portion of a net be marked by a pole equipped with a radar reflector.<sup>43</sup> A vessel may not have more than 6,250 ft. of gillnet on board. Of this total, no more than 6,000 ft. in cumulative float line length may be on the vessel's net reel, dock, and/or in the water at any time.<sup>44</sup> Finally, drift gillnet vessels may not use quick disconnect devices to attach net panels.<sup>45</sup>

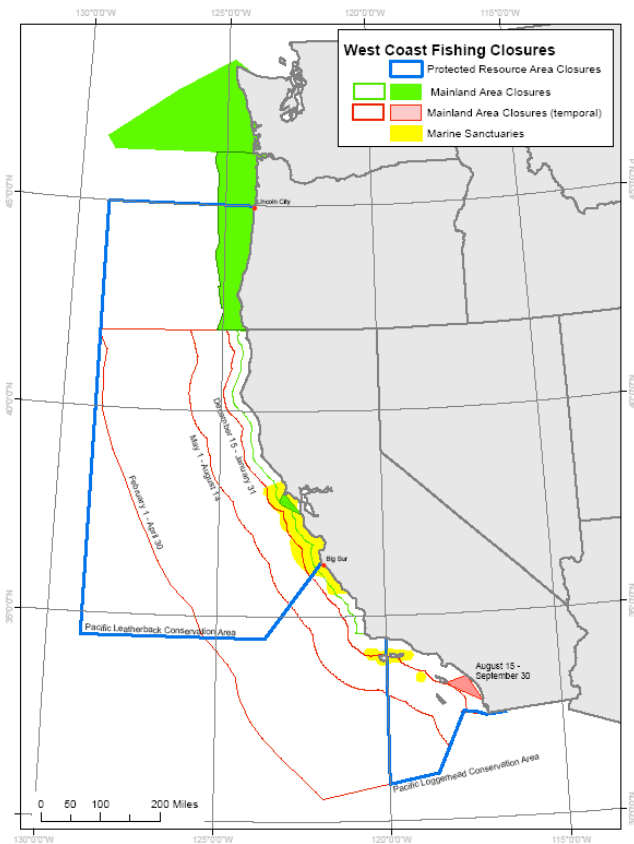


Figure 1. Areas closed to gillnet fishing off the U.S. West Coast.

<sup>41</sup> *Id.* at 68-69.

<sup>42</sup> *Id.* at 70.

<sup>43</sup> *Id.* at 68.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

### C. Regulation of Longline Fisheries in the U.S.

As with drift gillnet fishing, longline fishing kills thousands of marine mammals, sea turtles, and sea birds each year. These animals are often attracted to the baited hooks and either become hooked themselves or entangled in the line. Unable to surface for breath, they drown. A single longline set can trail for up to 40-50 miles, dangling thousands of lines and hooks in its wake and forming a nearly invisible, deadly obstacle for animals in the open water.

Responding to concern over the incidental capture and mortality of marine mammals, sea turtles, and sea birds, the U.S. has banned pelagic longline fishing in large areas of the Pacific Ocean. The West Coast HMS fishery management plan, which governs the swordfish fishery off the U.S. West Coast, prohibits the use of pelagic longline gear in the West Coast EEZ.<sup>46</sup> The use of longline gear to target swordfish (i.e. shallow-set longlining) is also prohibited outside the EEZ north of the equator.<sup>47, 48</sup> These prohibitions were largely driven by the need to protect the imperiled leatherback and loggerhead sea turtles. However, they also protect marine mammals that reside in or migrate through the no-longlining areas from becoming entangled in longline gear.

Where longline fishing for swordfish is permitted, U.S. regulations place strict limitations on the gear that may be used, fishing effort, and the time of year when fishing is permissible.

Western Pacific pelagic fisheries, including the Hawaii-based shallow-set longline fishery that targets swordfish as well as the deep-set longline fishery that targets tuna species, operate pursuant to a number of gear and other restrictions under the FMP for Pelagic Fisheries of the Western Pacific Region (“Pelagics FMP”). The Pelagics FMP Amendment 3 restricts the collective shallow-set longline fishing effort north of the equator to 2,120 sets per year and limits the number of shallow-sets any vessel may make north of the equator during a given trip.<sup>49</sup> When making shallow-sets north of the equator, Western Pacific fishery longline vessels must only use circle hooks sized 18/0 or larger with a 10-degree offset and mackerel-type bait.<sup>50</sup> When making shallow-sets north of 23°N latitude, vessels must start and complete deployment of longline gear during the time period from one hour after local sunset to local sunrise.<sup>51</sup> Within

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<sup>46</sup> *Id.* at 70.

<sup>47</sup> *Id.*

<sup>48</sup> Longline fishing targeting tuna species (i.e. deep-set longlining) is allowed under the West Coast HMS FMP between the western boundary of the U.S. West Coast EEZ and 150°W longitude. Even this fishery is severely restricted, however. West Coast deep-set longline vessels fishing on the high seas are subject to the same requirements as Hawaii-based longline vessels holding longline permits in 2003. These requirements include carrying line clippers, dip nets, and bolt cutters to aid in the release of sea turtles, deploying the main longline in a manner that allows the deepest point of the line between any two floats to be greater than 100m below the sea's surface, and specifications for thawing, dying, and discharging bait and offal so as to minimize its attraction to sea birds and turtles. *Id.* at 70-71. The FMP also prohibits the use of light sticks and restricts the number of branch lines that may be set between any two floats to no more than 15. *Id.* In addition, these vessels must implement measures for the proper release and handling of sea turtles and sea birds, specified in 50 C.F.R. Part 660, and have a vessel monitoring system (“VMS”). Vessel operators must attend annual protected species workshops to learn how to avoid interactions with these species and safely release any individuals that are incidentally caught. *Id.* at 71.

<sup>49</sup> 69 Fed. Reg. 17329, 17330 (April 2, 2004); 50 C.F.R. §660.33(a).

<sup>50</sup> 69 Fed. Reg. at 17330-31; 50 C.F.R. §§660.33(f), (g).

<sup>51</sup> 69 Fed. Reg. at 17331; 50 C.F.R. §660.35(a).

72 hours of landing a pelagic species under the Pelagics FMP, longline vessels are required to submit to NMFS logbooks and a valid shallow-set certificate for every shallow-set made north of the equator during the trip.<sup>52</sup> Furthermore, each vessel must carry and use NMFS-approved dehooking devices to safely release incidentally hooked protected species.<sup>53</sup> Both the owner and operator of a vessel registered for use under a Hawaii longline limited access permit must attend a NMFS workshop each year on how to safely handle and release protected species and must have a valid workshop certificate on board the vessel whenever it is engaged in longline fishing.<sup>54</sup> Finally, NMFS requires 100% observer coverage for longline vessels targeting swordfish in this fishery.<sup>55</sup>

Like the closures under the West Coast HMS fishery management plan, these measures are largely designed to protect sea turtles. However, restrictions on fishing effort, requirements to carry equipment to safely unhook or disentangle incidentally animals, and full observer coverage for these vessels undoubtedly help to reduce the frequency and lethality of marine mammal interactions with this fishery.<sup>56</sup>

The U.S. Atlantic longline fishery similarly operates under a combination of time area closures, gear restrictions, and effort limits. See Figure 2. The Atlantic HMS fishery management plan establishes several seasonal closures. Vessels with longline gear on board may not deploy any fishing gear within:

- (1) the Northeastern U.S. closed area from June 1 through June 30 each calendar year;
- (2) the Charleston Bump closed area from February 1 through April 30 each calendar year;
- (3) the East Florida Coast closed area at any time;
- (4) the DeSoto Canyon closed area at any time.<sup>57</sup>

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<sup>52</sup> 69 Fed. Reg. at 17330; 50 C.F.R. §660.33(c).

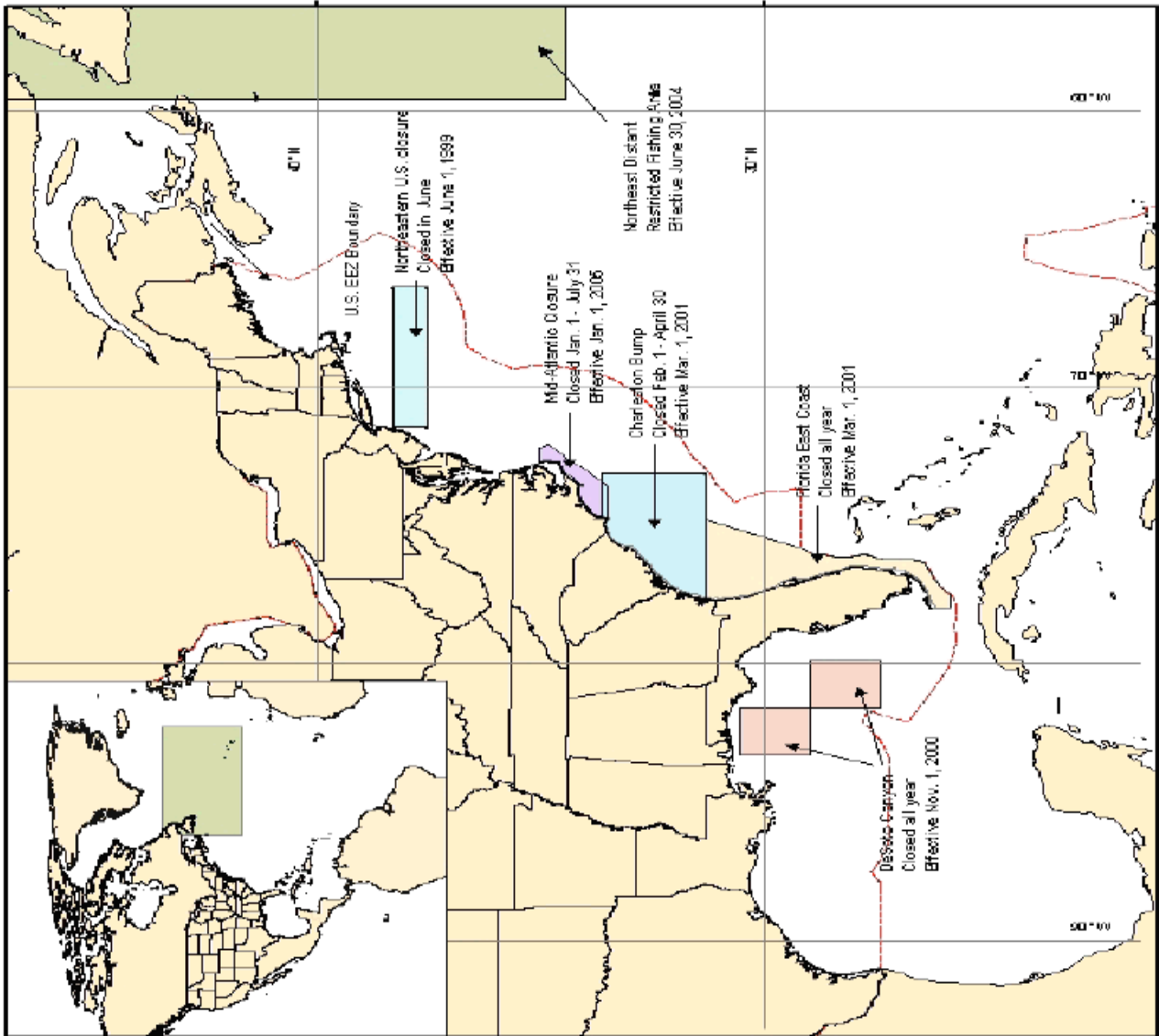
<sup>53</sup> 69 Fed. Reg. at 17331; 50 C.F.R. §660.32.

<sup>54</sup> 69 Fed. Reg. at 17354; 50 CFR §§660.34(a), (d).

<sup>55</sup> 69 Fed. Reg. at 17333.

<sup>56</sup> The MMPA requires that NMFS further reduce mortality and serious injury of marine mammals that are incidentally caught by this fishery by convening a marine mammal take reduction team to formulate a take reduction plan for the Western Pacific. NMFS has not yet taken this critical, required step.

<sup>57</sup> 50 C.F.R. §§ 665.21(c)(2)(i)-(iv).



**Figure 2. Existing time/area closures in HMS fisheries.** Inset shows extent of the Northeast Distant restricted fishing area. All closures except the Mid-Atlantic are applicable to pelagic longline gear only. The Mid-Atlantic Closure is applicable to bottom longline gear only. Note: the Northeast Distant (NED) was a closed area to all vessels as of 2001. It became the NED Restricted Fishing Area on June 30, 2004 when it was opened to those participating in the NED experiment. (Source: Atlantic HMS FMP at 2-19 (July 2006))

The Atlantic HMS FMP also prohibits fishing within the Northeast Distant closed area unless vessels use only 18/0 or larger circle hooks and comply with a number of measures designed to reduce bycatch and mortality of sea turtles.<sup>58</sup>

<sup>58</sup> 50 C.F.R. § 665.21(c)(2)(v).

In order facilitate enforcement of these time-area closures, the owner or operator of a commercial pelagic longlining vessel permitted to fish for HMS species must install a NMFS-approved vessel monitoring system (“VMS”) unit on board the vessel and operate the VMS whenever the vessel is away from port with pelagic longline gear on board.<sup>59</sup> The VMS requirement serves as an important supplement to onboard observer coverage. Approximately 2.5 to 5 percent of vessels in this fishery have an onboard observer.<sup>60</sup>

In the event that a marine mammal or sea turtle is hooked or entangled by pelagic longline gear, the operator of the vessel must immediately release the animal, retrieve the pelagic longline gear, and move at least 1 nm (2 km) from the location of the incident before resuming fishing. Vessels must report all marine mammal entanglements to NMFS consistent with regulations in 50 C.F.R. § 229.6.<sup>61</sup> In addition, pelagic longline vessels must carry approved equipment for safely removing gear from hooked or entangled animals.<sup>62</sup>

In addition to the restrictions imposed by the Atlantic HMS FMP, the Atlantic Pelagic Longline Take Reduction Team (“TRT”) has recommended a number of additional requirements, which await implementation by NMFS. As described above, the MMPA requires NMFS to develop and implement take reduction plans for marine mammal stocks that interact with specified commercial fisheries known to cause frequent or occasional incidental mortality and serious injury to marine mammals.<sup>63</sup>

The Center for Biological Diversity and Turtle Island Restoration Network filed suit against NMFS in 2002 for its failure to convene a TRT for the Atlantic pelagic longline fishery, which resulted in a 2003 settlement agreement requiring the agency to convene a TRT by June 30, 2005, to address bycatch of long-finned pilot whales, short-finned pilot whales, and common dolphins in the Atlantic pelagic longline fishery.<sup>64</sup> On June 22, 2005, NMFS announced the establishment of the TRT, directing it to address incidental mortality and serious injury of short and long-finned pilot whales in the mid-Atlantic region of the Atlantic pelagic longline fishery, and to prepare a draft TRP for these non-strategic stocks within 11 months of the Team’s establishment.<sup>65, 66</sup>

On June 6, 2006, the TRT recommended a number of protective measures to reduce mortality and serious injury of marine mammals in the Atlantic pelagic longline fishery. These include:

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<sup>59</sup> 50 C.F.R. § 635.69(a)(1).

<sup>60</sup> Dietrich, Kimberly et al. 2007. Best Practices for the Collection of Longline Data to Facilitate Research and Analysis to Reduce Bycatch of Protected Species: Report of a workshop held at the International Fisheries Observer Conference Sydney, Australia, November 8, 2004. NOAA Technical Memorandum NMFS-OPR-35, at 5.

<sup>61</sup> 50 C.F.R. § 635.21(c)(3).

<sup>62</sup> 50 C.F.R. § 635.21(c)(5).

<sup>63</sup> 16 U.S.C. § 1387(f)(1).

<sup>64</sup> Atlantic Pelagic Longline Take Reduction Team, Draft Atlantic Pelagic Longline Take Reduction Plan (June 8, 2006) (“Draft TRP”) at 3.

<sup>65</sup> 70 Fed. Reg. 36120 (June 22, 2005).

<sup>66</sup> The TRT was not directed to address incidental mortality or serious injury to common dolphins because no recent serious injuries or mortalities of common dolphins had been recently observed in the pelagic longline fishery by the time the TRT was convened. Draft TRP, *supra* note 64, at 2.

- (1) The designation of a special research area offshore of Cape Hatteras with specific observer and other requirements for fishers operating in that area;
- (2) A limitation on mainline length for all pelagic longline sets in the Mid-Atlantic Bight region;
- (3) An increase in observer coverage in all highly migratory species fisheries that interact with pilot whales and Risso's dolphins;
- (4) The development and use of equipment and methods for careful handling and release of entangled or hooked marine mammals;
- (5) The promotion of voluntary daily communications among captains regarding interactions with protected species and other bycatch throughout the Atlantic pelagic longline fishery;
- (6) The distribution of an updated informational placard that must be displayed in the wheelhouse and on the working deck of all active pelagic longline vessels;
- (7) The development of mandatory certification workshops for owners and operators of pelagic longline vessels on marine mammal bycatch; and
- (8) The distribution of quarterly reports of pilot whale and Risso's dolphin bycatch rates to the TRT for its review.<sup>67</sup>

Measures 1, 2, 6, and 7 are expected to be enacted in regulation in the near future.

#### **D. Take of Marine Mammals in U.S. Longline and Gillnet Fisheries.**

While the only certain way to eliminate bycatch in longline and drift gillnet fisheries is to prohibit the use of these types of gear, U.S. regulations have undoubtedly reduced the impact of fisheries bycatch on marine mammals. Between 2000 and 2002, observers in the Western Pacific longline fishery reported 24 instances of marine mammal bycatch, including two mortalities.<sup>68</sup> An estimate of total bycatch was not reported. The most common identified species in longline bycatch were false killer whale, short-finned pilot whale, Risso's dolphin, and humpback whale.<sup>69</sup>

Pilot whales and Risso's dolphins also figure prominently in the Atlantic HMS fishery's marine mammal bycatch. In 2005, this fishery recorded 24 marine mammal interactions, including 10 serious injuries.<sup>70</sup> Scientists estimate from the observed number of interactions that 208 pilot whales and 13 Risso's dolphins suffered serious injury in pelagic longline gear during

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<sup>67</sup> *Id.* at 50.

<sup>68</sup> NOAA Fisheries, Western Pacific Fisheries Bycatch Overview, available at <http://www.nmfs.noaa.gov/bycatch-chart.html> (last visited September 13, 2007).

<sup>69</sup> *Id.*

<sup>70</sup> Walsh, C. Fairfield and L. Garrison. 2006. Estimated Bycatch of Marine Mammals and Turtles in the U.S. Atlantic Pelagic Longline Fleet During 2005. NOAA Technical Memorandum NOAA NMFS-SEFSC-539, at 9.

2005.<sup>71</sup> These numbers will likely decrease once the measures set forth in the Atlantic TRP are implemented.

The California-Oregon drift gillnet fishery seriously injures or kills a number of cetacean and pinniped species. Between 2003 and 2005, the fishery documented the kill of 23 short-beaked common dolphins, 10 California sea lions, 4 Risso's dolphins, as well as a gray whale, a northern right whale dolphin, and a northern elephant seal.<sup>72</sup> Several other individuals, including a humpback whale, California sea lion, and an unidentified whale, were captured but released alive.<sup>73</sup> Estimated total bycatch numbers for this time period were not reported.

Overall, conservation measures have significantly decreased marine mammal bycatch in U.S. fisheries.<sup>74</sup> Between 1990 and 1999, bycatch of marine mammals in U.S. fisheries declined by 40 percent.<sup>75</sup> While some of this decline may be attributable to shifts in fishing effort, it nevertheless demonstrates the importance of strong bycatch reduction efforts and the necessity of requiring countries wishing to export fish to the U.S. to meet the same standards.

#### IV. SWORDFISH IMPORTS INTO THE U.S.

The U.S. imports over ten thousand metric tons of swordfish and swordfish products each year, making it one of the top swordfish consumers in the world.<sup>76</sup> In the past three years, most swordfish imports into the U.S. have come from Singapore, Panama, Canada, Mexico, and Chile.<sup>77</sup> See Figure 3, below. Singapore alone has exported over 2,500 metric tons of swordfish annually to the U.S. over the past three years.<sup>78</sup> Canada and Panama each export an average of over 1,000 metric tons of swordfish to the U.S. every year. Ecuador, Brazil, Uruguay, Indonesia, and Vietnam have also become significant swordfish exporters.<sup>79</sup> Overall, the U.S. has received swordfish imports from nearly four dozen countries in recent years (Figure 4), yet the U.S. government reports that it has no information from any of these countries regarding their fishing practices, take of marine mammals, or any other information to satisfy the requirements of MMPA section 101.<sup>80</sup>

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<sup>71</sup> *Id.* at 12.

<sup>72</sup> NMFS Southwest Regional Office, NMFS California/Oregon Drift Gillnet Observer Program: Observed Catch by Fishing Season (2003-2004) and (2004-2005), available at <http://swr.nmfs.noaa.gov/fmd/observer/catch0304.htm> and <http://swr.nmfs.noaa.gov/fmd/observer/catch0405.htm> (last visited September 13, 2007).

<sup>73</sup> *Id.*

<sup>74</sup> Read et al. 2006, *supra* note 10, at 167.

<sup>75</sup> *Id.*

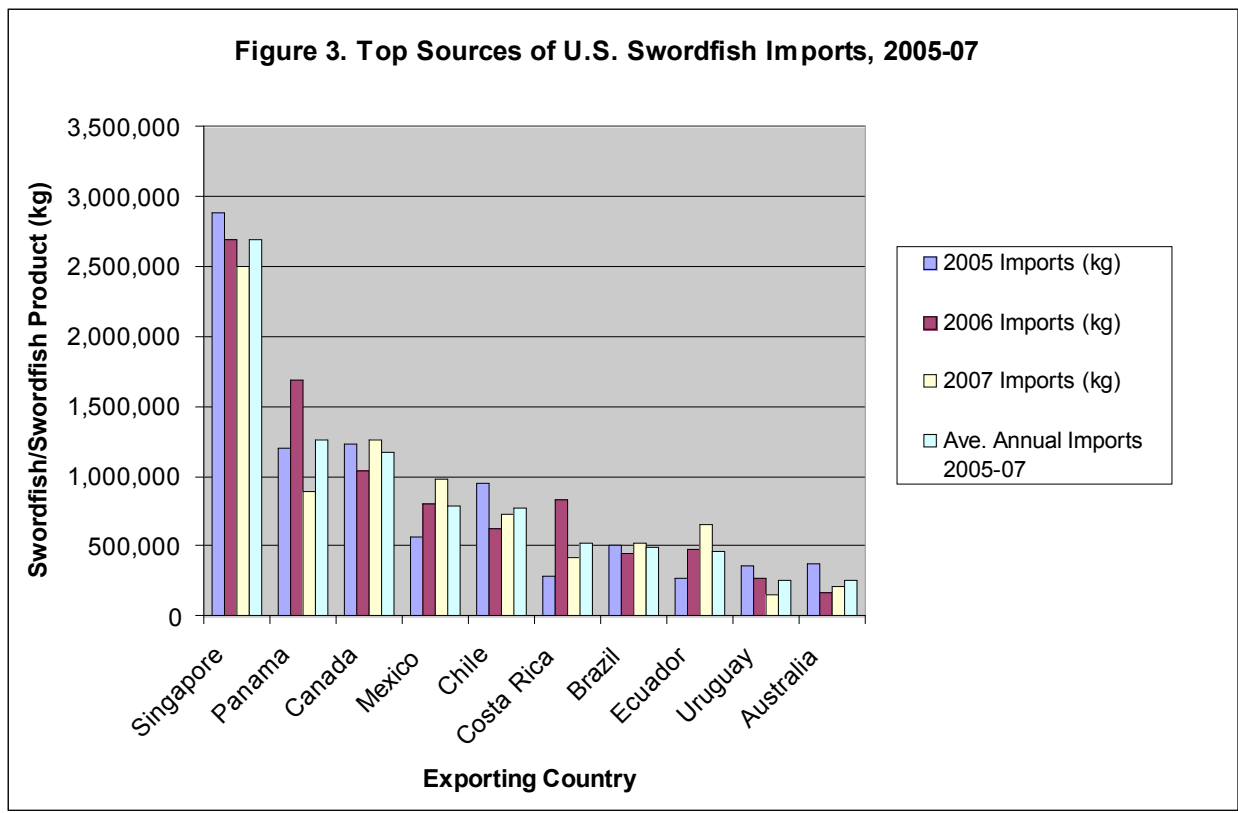
<sup>76</sup> U.S. Dept. of Commerce, Imports and Exports of Fishery Products Annual Summary 2006 at 3, 5, available at <http://www.st.nmfs.gov/st1/trade/index>.

<sup>77</sup> NMFS Fisheries Statistics and Economics Division, Trade Query – Swordfish (2005-07), available at [http://www.st.nmfs.gov/st1/trade/cumulative\\_data/TradeDataProduct.html](http://www.st.nmfs.gov/st1/trade/cumulative_data/TradeDataProduct.html).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Letter from L. Brown, Director of Field Programs, U.S. Customs & Border Protection, to M. Sakashita, Staff Attorney, Center for Biological Diversity (August 14, 2007); *see also* Letter from S.E. Sloca, FOIA Officer, Office of the Secretary of the Interior, to M. Dorgan, FOIA Officer/Public Liaison, Dept. of Homeland Security (July 16, 2007); Letter from M. Dorgan, FOIA Officer/Public Liaison, Dept. of Homeland Security, to M. Sakashita, Staff Attorney, Center for Biological Diversity (July 26, 2007); and Letter from W. Hogarth, Asst. Administrator for Fisheries, NMFS, to M. Sakashita, Center for Biological Diversity (December 12, 2007).



(Source: NMFS Fisheries Statistics and Economics Division, Trade Query – Swordfish (2005, 2006, and 2007), available at [http://www.st.nmfs.gov/st1/trade/cumulative\\_data/TradeDataProduct.html](http://www.st.nmfs.gov/st1/trade/cumulative_data/TradeDataProduct.html).)