

August 27, 2020

SUPPLEMENTAL 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

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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).**

Dated: August 27, 2020 (in supplement to original petition dated February 6, 2019)

/s/Brett Sommermeyer
Brett Sommermeyer
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I. INTRODUCTION

On February 6, 2019, Sea Shepherd Legal, Sea Shepherd New Zealand Ltd, and Sea Shepherd Conservation Society (collectively, “Petitioners”) formally petitioned the Department of Homeland Security, the Department of the Treasury, and the Department of Commerce (collectively, the “Agencies”) to 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 “in excess of United States standards.”¹ In particular, Petitioners requested 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.

A. Denial of Petition and Petitioners’ Lawsuit Against the Agencies

On June 18, 2019, the National Marine Fisheries Service (“NMFS”) denied Petitioners’ petition.² NMFS stated that it was denying 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.³ Of note, NMFS’s third basis for denial was in reference to a draft threat management plan (“2019 Draft TMP”) publicly announced by the New Zealand government the previous day.

On May 21, 2020, Petitioners filed a lawsuit against the Agencies in the United States Court of International Trade (hereinafter “CIT Lawsuit”) asserting two claims for relief: (1) the Agencies violated the Administrative Procedure Act (“APA”) by failing to ban the import of commercial fish and products from fish caught using gillnets and trawls in the range of the Māui dolphin as required by the MMPA and (2) the Agencies’ denial of the petition was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the MMPA within the meaning of the APA.⁴ In their complaint, Petitioners requested a trade ban covering a larger geographic area than the one at issue in the petition. Petitioners based this request upon sighting information received from the New Zealand government after submission of the petition. This information confirmed that the current Māui dolphin range extended beyond the west coast to the east coast of New Zealand’s North Island.

On June 24th, the New Zealand government announced its much delayed decision on the Māui dolphin TMP. In that announcement, the government indicated that new measures would be put

¹ 16 U.S.C. § 1371(a)(2).

² 84 Fed. Reg. 32853 (July 10, 2019).

³ *Id.* at 32854 (col. 1- 2).

⁴ *Sea Shepherd New Zealand v. Wilbur Ross*, Civil Action No. 1:20-cv-00112-GSK (Ct. Int’l Trade May 21, 2020) (“CIT Lawsuit”).

in place on October 1, 2020 along the west coast of the North Island.⁵ These measures included some additional set net and trawl restrictions, a ban on driftnets, and a grant of authority to the Minister of Fisheries to impose further restrictions if a single dolphin were reported to have been caught in the Māui dolphin habitat within a certain area on the west coast of the North Island.⁶

On July 1st, Petitioners filed a motion for a preliminary injunction on their first claim for relief in the CIT Lawsuit. In response, the Agencies moved to stay the filing of their response to Petitioners' pending motion and requested a voluntary remand so that NMFS could reconsider the petition under the MMPA in light of: (1) the fishery measures announced by the New Zealand government on June 24th; (2) a July 21st request by the New Zealand government for a comparability assessment of its Māui dolphin TMP with the newly announced measures; and (3) allegedly new factual information presented in connection with those measures.

While expressing its appreciation for the urgency of the issues presented in the case, the Court found that the Agencies had satisfied the grounds for a voluntary remand. However, in recognition of that urgency, the Court ordered NMFS to file its remand determination by October 30, 2020, and for the parties to thereafter pursue an expedited briefing schedule on Petitioners' motion for a preliminary injunction. The Court also permitted Petitioners to supplement their petition within 14 days of its order granting remand. The Court allowed supplementation "so that [NMFS] has before it all additional information in reconsidering Plaintiffs' petition."⁷

In accord with the Court's order, Petitioners submit this supplemental petition. In particular, Petitioners request that, pursuant to the Imports Provision, the Agencies immediately ban the import of all fish and fish products originating from fisheries in the entirety of the Māui dolphin's current and historical range, which includes the entire coastline of the North Island out to the 100m depth contour, that employ either set nets or trawls — the fishing gear responsible for the near extinction of the Māui dolphin.

B. Scope of Supplemental Petition and Supporting Evidence

Rather than repeat the legal and factual grounds for a trade ban asserted in their original petition, Petitioners reincorporate those grounds by reference herein and concentrate this supplemental petition on facts that arose after submission of the original petition. Specifically, Petitioners focus on the issues surrounding: (1) the receipt of data from the New Zealand government supporting a geographical expansion of protections for Māui dolphins beyond the west coast of the North Island; (2) the issuance of the 2019 Draft TMP; (3) the final TMP announced on June 24, 2020; and (4) the 2020 draft List of Foreign Fisheries ("2020 LOFF").

In the interest of efficiency, Petitioners also draw the Agencies' attention to the following submissions in the CIT Lawsuit:

⁵ See New Zealand Minister of Fisheries Decision Letter on Threat Management Plan for Hector's and Māui Dolphins (June 24, 2020), available at <https://www.fisheries.govt.nz/dmsdocument/40922-dolphintmp-ministers-decision-letter-reduced-pdf> (last visited on August 22, 2020) ("June 2020 TMP Decision Letter").

⁶ *Id.*

⁷ *Sea Shepherd N.Z. v. United States*, 2020 Ct. Intl. Trade LEXIS 120, *14 (August 13, 2020).

- First Amended Complaint (Docket No. 23)
- Plaintiffs’ Motion for Preliminary Injunction (“Plaintiffs’ Motion”) (Docket No. 11)
- Declaration of Professor Elisabeth Slooten in Support of Plaintiffs’ Motion (“Slooten Decl.”) (Docket No. 11-2)
- Declaration of Dr. Glenn Simmons in Support of Plaintiffs’ Motion (“Simmons Decl.”) (Docket No. 11-3)
- Declaration of Dr. Timothy Ragen in Support of Plaintiffs’ Motion (“Ragen Decl.”) (Docket No. 11-4)
- Declaration of Brett Sommermeyer (“Sommermeyer Decl.”) (Docket No. 11-1)

As parties to the CIT Lawsuit, the Agencies have direct access to (and constructive knowledge of) the above-listed filings. However, for the Agencies’ convenience, these filings may be directly accessed through the following link:

<https://www.dropbox.com/sh/j98zmwd8f2h pz3n/AA Bqm qo Mr-uNixRpELbBZlFda?dl=0>

In this supplemental submission, Petitioners will endeavor to refer to specific legal and factual assertions in the listed documents but otherwise incorporate them herein in their entirety as support for the requested trade ban.

II. DISCUSSION

A. The Confirmed Māui Dolphin Range Extends From the West Coast to the East Coast of the North Island

Historically, the New Zealand government has focused its limited efforts to protect the Māui dolphin on the west coast of the North Island. Even on the west coast, the government has been reluctant to acknowledge the full extent of their range. For example, in 2012, the Department of Conservation (“DOC”) and the Ministry for Primary Industries (“MPI”) conducted a review of the Māui dolphin portion of the 2007 Hector’s and Maui’s dolphin TMP.⁸ For this purpose, an expert panel was convened to conduct a risk assessment. With respect to Māui dolphin distribution, the New Zealand government presented the expert panel with the restricted range depicted in the left-hand map in Figure 1 below.⁹ However, the expert panel found that the data better supported the more extended west coast range shown in the right-hand map in Figure 1.¹⁰

⁸ R.J.C. Currey, *et al.*, *A risk assessment of threats to Maui’s Dolphins*, Ministry for Primary Industries and Department of Conservation (2012), available at <https://www.doc.govt.nz/Documents/conservation/native-animals/marine-mammals/maui-tmp/mauis-dolphin-risk-assessment.pdf> (last visited on August 22, 2020) (“Currey *et al.* 2012”).

⁹ *Id.*

¹⁰ *Id.*

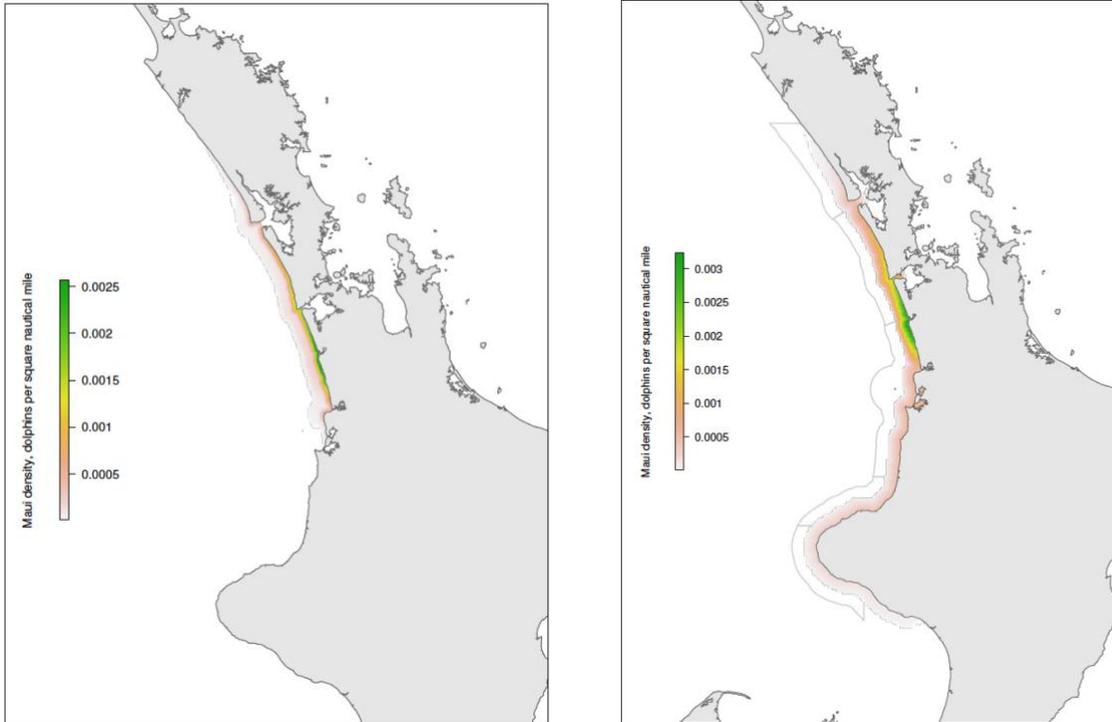


Figure 1. Māui dolphin distribution maps extracted from Currey et al. (2012). The left-hand map was presented to an expert panel by the New Zealand government. The right-hand map depicts the distribution accepted by the expert panel for the west coast of the North Island based upon the data available at that time.¹¹

This illustration is just one example of the New Zealand government’s consistent resistance to any attempts to present a more expanded Māui dolphin range on the west coast. The government has, in fact, only recently acknowledged that the range extended to Wellington in the south in its 2019 Draft TMP.¹² Yet, even after finally admitting that Māui dolphins are found in the southern portion of the west coast, New Zealand restricted its newly announced protections in that particular area to set net fisheries (not trawls) and limited those protections to 4 nautical miles from shore.¹³

While recently accepting that the Māui dolphin has a southward distribution to Wellington, the New Zealand government continues to deny that the Māui dolphin’s range extends to the east coast of the North Island. To be sure, recognizing this larger range would be consistent with the dolphin’s historical range, which extended around the entire North Island coastline. However, MPI disregarded this historical range and excluded the east coast from the scope of proposed

¹¹ Currey *et al.* 2012, at 35-36.

¹² Department of Conservation, *Protecting Hector’s and Māui dolphins, Consultation on proposals for an updated Threat Management Plan* (2019), Figure 1 (depicting spatial distribution of Māui dolphins along the west coast of the North Island), available at <https://www.fisheries.govt.nz/dmsdocument/34971-2019-hectors-maui-dolphin-consultation> (last visited on August 22, 2020) (“2019 Draft TMP”)

¹³ See June 2020 TMP Decision Letter, Appendix 1 (“Southern transition/potential habitat zone”).

future protections in the 2019 Draft TMP. Although the draft TMP omits the east coast from the scope of the proposed protections, the habitat model in the spatial risk assessment informing MPI’s work on the TMP uses an arbitrary population size of 10 dolphins for the east coast (“North Island Other” in Figure 2 below).¹⁴ The risk assessment assigns this number to account for a “few” public sightings of Māui dolphins on the east coast – to allegedly account for the possibility that the observed dolphins are “transient” to these areas or “dispersing” from other areas. *Id.*

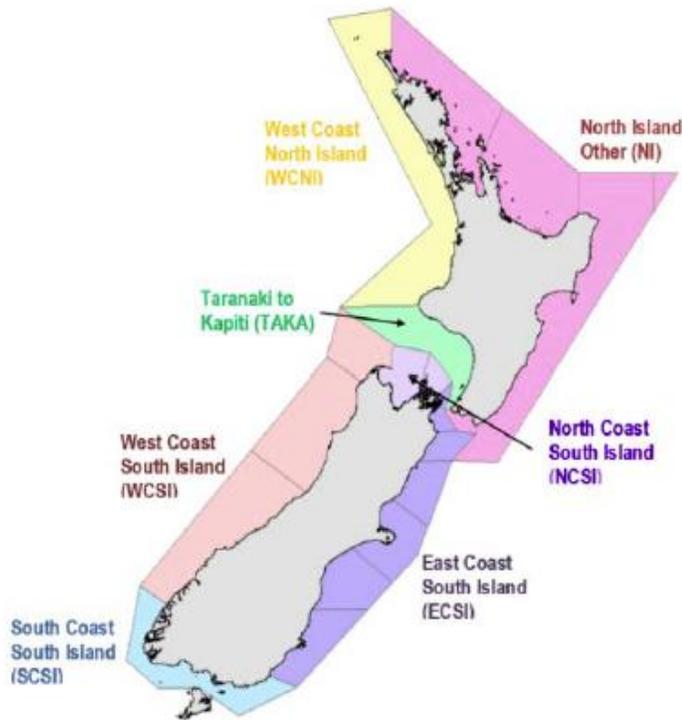


Figure 2. Population structure used in the Roberts et al. (2019) risk assessment, which allocated a population size of 10 dolphins to the area labeled as NI (North Island Other).¹⁵

This risk assessment, which was published in June 2019, was not yet available at the time of the submission of the original petition in February 2019. In any case, the assessment did not contain specific information about Māui dolphin sightings on the east coast. It was not until receipt of documents from the New Zealand government, in response to information requests submitted under New Zealand’s Official Information Act (“OIA”), that Petitioners first became aware of official government data firmly supporting the existence of an east coast Māui dolphin population. Far from illustrating only a “few” public sightings, data received from National Institute of Water & Atmospheric Research Ltd (NIWA) on October 22, 2019 showed numerous

¹⁴ J.O. Roberts, *et al.*, *Spatial risk assessment of threats to Hector’s and Māui dolphins (Cephalorhynchus hectori)*, New Zealand Aquat. Env. and Biodiv. Rep. No. 214 (2019) (“Roberts *et al.* 2019”).

¹⁵ *Id.* at 14.

Māui dolphin sightings (including a substantial number of recent ones) throughout the near shore waters of the east coast. The NIWA data is depicted in Figure 3 below.

To Petitioners' knowledge, the production of this dataset represents New Zealand's first public disclosure directly supporting the presence of a Māui dolphin population on the east coast. In light of this disclosure, it is evident that New Zealand has been deliberately minimizing the true extent of the Māui dolphin's range (as it has done with respect to the west coast population).



Figure 3. Māui dolphin sightings in the database provided the NIWA, as mapped by Dr. Slooten.¹⁶ The green star shows a sighting of a group of Māui dolphins at Hotwater Beach on Coromandel Peninsula in 2020.¹⁷ The red star shows a Māui dolphin caught in a recreational gillnet near Te Kaha on East Cape.¹⁸

¹⁶ Slooten Decl., at 6.

¹⁷ *Id.* Dr. Slooten updated the NIWA data with this particular datapoint.

¹⁸ *Id.*

The New Zealand government’s longstanding, apparent policy choice to completely ignore the presence of Māui dolphins on the east coast is not only contrary to decades of sighting evidence (Figure 3) but is also inconsistent with recent statements made by MPI in connection with the TMP announced in June 2020. Specifically, in his “rationales” for the selected measures, the Minister of Fisheries explained why the agency was expanding set net restrictions to include (within 4 nautical miles) the southern segment of the west coast:

Southern transition/potential habitat zone

In the southern habitat zone (south of Cape Egmont), *I note that there does not appear to be a resident population at this time. However, we know that Hector's and/or Māui dolphins are occasionally present and/or transit through this area, and when doing so are exposed to a high level of fisheries risk.* This risk is largely driven by the exposure to set-net activity, which will now be prohibited. In particular, the area between Hawera and Wellington represents one of the highest recreational set-net risk areas in the country (the other being within Tasman and Golden Bay in the South Island).^[19]

Significantly, it is not clear why MPI would not take a similar approach to the east coast. Even if MPI does not recognize a “resident population” in that area (which Petitioners strongly dispute), there is undeniable evidence of, at the very least, “transient” Māui dolphins on the east coast that are also exposed to a “high level of fisheries risk.” On this point, Figures 4 and 5 below depict the level of trawl and set net fishing on the east coast.

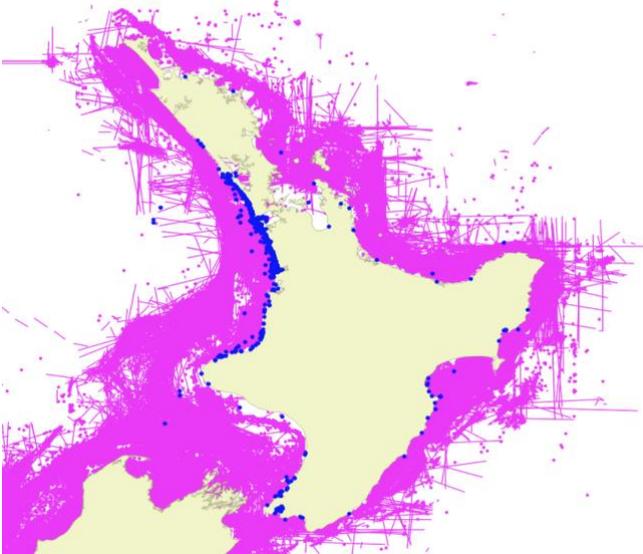


Figure 4: Māui dolphin sightings (blue dots) and trawl fishing effort (purple lines) during 2009-2017.²⁰

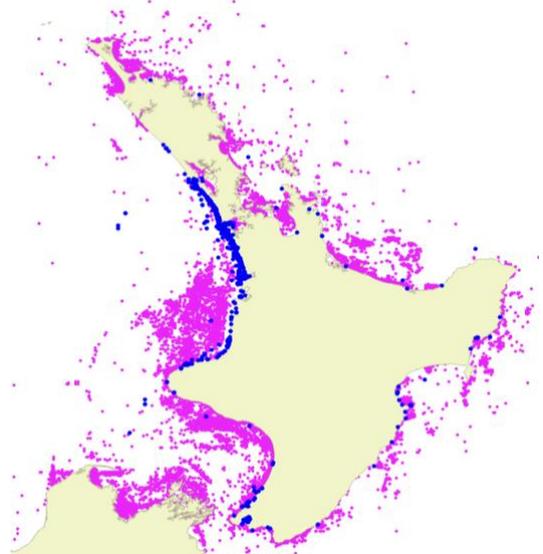


Figure 5: Māui dolphin sightings (blue dots) and set net fishing effort (purple dots) during 2009-2017.²¹

¹⁹ See June 2020 TMP Decision Letter, Appendix 1 (emphasis added).

²⁰ Slooten Decl., at 17; Simmons Decl. at 8.

²¹ Slooten Decl. at 16; Simmons Decl., at 10.

The fishing effort illustrated in these figures clearly depicts a high level of fisheries risk on the east coast – and certainly at a level warranting the approach taken by MPI in at least partially extending set net protections into the southern zone of the west coast. Yet, without explanation, the east coast is quite literally left off the map of areas subject to the announced 2020 TMP measures.

The large number of sightings recorded for the east coast, including many recent ones, draws into serious question the New Zealand government’s decision to not include the east coast in its TMPs and supporting spatial risk assessments. The inclusion of 10 Māui dolphins, although an “arbitrarily” selected number, in the Roberts et al. (2019) risk assessment is an admission by New Zealand that they are present in that area. That assessment also fails to provide any scientific basis for its conclusion that the observed dolphins are likely “transient” to the areas or “dispersing” from other areas. Moreover, the large number of recorded sightings should be assigned considerably more significance in light of the fact that (1) the east coast (south of the East Cape) is more difficult to access by road than the west coast and has a lower human population density and (2) the west coast (from Maunganui Bluff to New Plymouth) is the only area for which there have been systematic, scientific Māui dolphin surveys.²² The most likely explanation for the number and regularity of observations on the east coast, despite these observational challenges, is that there is a resident population fragment of Māui dolphins on the east coast.²³

Finally, in making gradual, incremental additions to the geographic extent of fishing gear restrictions in Māui dolphin habitat (and entirely disregarding the east coast), New Zealand has ignored the advice of international experts, including the Scientific Committee of the International Whaling Commission (“IWC”) and the International Union for the Conservation of Nature (“IUCN”). These institutions have repeatedly called for the implementation of complete bans on set nets and trawls throughout the range of the Māui dolphin. The IUCN, in particular, 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.”

B. The Existence of a Māui Dolphin Range from the West to the East Coast of the North Island Underscores the Critical, Immediate Need for Stronger, More Expansive Protections

The strong evidence of a far larger Māui dolphin range than historically represented by the New Zealand government further demonstrates (and highlights) the inadequacy of the limited protections imposed to date. Moreover, this more widespread distribution provides the Agencies with two primary additional grounds for imposing Petitioners’ requested trade ban.

²² Dr. Elizabeth Slooten, personal communication (August 22, 2020). There have also been a large number of sightings on the west coast (from Maunganui Bluff to New Plymouth) because the area is in close proximity to Auckland and popular with surfers. *Id.*

²³ *Id.*

First, it is apparent that, aside from the core population on the west coast, there are smaller, fragmented populations throughout the waters of the North Island.²⁴ The serious risk of extinction posed by population fragmentation has been well documented for Hector’s dolphin populations around the South Island.²⁵ Connectivity is limited between these fragmented populations, thus increasing the risk of local extinctions due to human impacts, including fisheries mortality.²⁶

Second, given the heightened risk of extirpation for fragmented populations of Māui dolphins, protections against mortality in commercial fisheries are critically needed. Yet, in the face of this risk, New Zealand has been slow to increase protections in even the core area on the west coast. As a result, large segments of the west coast remain unprotected (a fact not changed by implementation of the new protections – as discussed below) and there are not any protections on the east coast.²⁷

Significantly, scientists warned about a shrinking and fragmenting Māui dolphin population over 20 years ago.²⁸ With no protection from set net or trawl fisheries, the apparently very small number of resident dolphins off the east coast are at extremely high risk of extirpation.²⁹ Such lack of protections may be a primary contributing factor to the low number of Māui dolphins in that area (as compared with the west coast).³⁰ In this regard, mortality in fisheries bycatch may have resulted in an east coast population that is fragmented into several potentially isolated remnants.³¹

The fragmentation, isolation, and local extirpation of the small remaining Māui dolphin population in the waters around the North Island present a serious risk of extinction for the subspecies as a whole.³² A fragmented population that continues to be impacted will only become even more fragmented and isolated over time. The only solution to this crisis is to *institute protections for Māui dolphins throughout their entire range* (e.g., including the east coast out to the 100 m depth contour for all areas). Protecting the dolphins throughout their range will allow them to reclaim habitat that is necessary to their ultimate recovery.³³ In contrast, “spatially restricted management measures that do not allow a population to regain essential historical habitat may preclude its recovery.”³⁴ Nevertheless, this flawed approach is precisely the one being pursued by New Zealand in focusing its incrementally introduced (over

²⁴ Note that, as supported by the NIWA data depicted in Figure 3, Petitioners seek protections for the entire coast of the North Island, which constitutes the entirety of the current and historical range of the Māui dolphin.

²⁵ See Slooten Decl., ¶18 (noting that photographic-identification surveys and genetic data show a pattern of small, local populations).

²⁶ *Id.*

²⁷ *Id.*, ¶17.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* See also, ¶51 (“Considerable overlap between dolphins and fisheries . . . coupled with a lack of protection and extremely low observer coverage, may help explain the much smaller numbers of dolphins off the east coast of the North Island, where dolphin densities were much higher in the past (e.g. Cawthorn 1988, Russell 1999, Pichler 2002, McGrath 2020).”)

³¹ *Id.*

³² See Ragen Decl., ¶13.

³³ *Id.*, ¶14.

³⁴ *Id.*

the course of two decades) protections nearly exclusively on the core population area in the west coast of the North Island.³⁵ Even on the west coast, those protections fail to go far enough.

In addition to further supporting the critical need for a trade ban to foster increased protections, taking into account a larger Māui dolphin range also means that a greater number of fisheries will be potentially subject to a ban. This result is more likely (as discussed below) given the extreme lack of traceability in the New Zealand fisheries sector and the multi-species nature of many of the fisheries. These characteristics result in a situation where the same fish caught in Māui dolphin habitat are also caught outside that habitat but then, without any attempt to document their points of origin in New Zealand waters, are mixed together before export to the United States. Under such circumstances, it is not possible for an importer of New Zealand fish products into the United States to issue a valid certificate of admissibility – certifying that the imported fish product does not implicate a fish species caught in Māui dolphin habitat.

C. The “New” Protections Announced for the TMP Fail To Meet U.S. Standards

The Draft 2019 TMP presented four options under consideration by the New Zealand government for management of threats (including mortality in fisheries bycatch) to Hector’s and Māui dolphins. The first option maintained the status quo, while the second, third, and fourth options specified progressively greater protections from set nets and trawls in some areas along the west coast of the North Island.³⁶ However, none of the proposed options banned trawling or set netting *throughout* Māui dolphin habitat as recommended by the IWC and IUCN and as required to comport with U.S. standards.³⁷

The numerous flaws that plagued the Draft 2019 TMP, and the Roberts et al (2019) spatial risk assessment upon which the TMP was based, are extensively detailed in Petitioners filings in the CIT Lawsuit. For the Agencies’ convenience, we provide the following summary of some of the main points discussed in those filings – points that firmly demonstrate that New Zealand’s flawed TMP process falls short of “U.S. standards,” as that term is understood under the Imports Provision of the MMPA.

- **Flawed Māui dolphin bycatch estimates that understate fisheries risk:** “The options presented in the Draft 2019 TMP are largely informed by estimates of annual Māui dolphin bycatch mortality in inshore gillnet and trawl fisheries. But . . . observer coverage in these fisheries is far too low to produce scientifically robust estimates of such mortality.”³⁸ “Given that the Draft 2019 TMP relies upon biased estimates of Māui

³⁵ See Slooten Decl., ¶34.

³⁶ *Id.*, ¶38.

³⁷ *Id.*

³⁸ *Id.*, ¶47. Contrary to the outlandish (and undocumented) claims in the CIT Lawsuit by the New Zealand government concerning observer coverage, Petitioners’ expert evidence submitted in that proceeding clearly demonstrates extremely low observer coverage (coupled with very low fisher reporting) throughout Māui dolphin habitat, which circumstance renders New Zealand’s Māui dolphin bycatch estimates virtually meaningless. See Slooten Decl., ¶¶26-33; Ragen Decl., ¶¶66-71. The failure to address the significant, negative bias engendered by

dolphin bycatch mortality, it fails to fully and adequately account for such mortality in assessing management options. Instead, the TMP is based upon a flawed spatial risk assessment that inappropriately minimizes the significance of fisheries mortality in comparison with other potential sources of mortality, such as disease.”³⁹

- **Flawed habitat model underlying the TMP that understates fisheries risk:** “The protection options in the TMP . . . depend critically on a habitat model constructed by MPI, which suggests that Māui dolphins are found along a relatively narrow strip off the North Island’s west coast and are rare in harbours (Roberts et al. 2019). Thus, the habitat model reduces the overlap between dolphins and fishing, and therefore the estimate of how many dolphins are killed in fishing nets each year. Under-estimating the range of Māui dolphins also results in overly optimistic predictions about the effectiveness of the protection options in the TMP.”⁴⁰ Part of the reason for this underestimate is the choice of the incorrect Māui dolphin fish prey species.⁴¹ The selected species results in a significant statistical error in the habitat model. As a consequence of this inappropriate prey species selection, the final habitat model “suggests Māui dolphins are found only in a relatively thin strip of habitat along the coastline, and that dolphin densities in the harbours are very low.”⁴² Thus, this prey species selection results in a conveniently negatively biased portrayal of the commercial fisheries overlap with Māui dolphin habitat.⁴³
- **Failure to extend protections to small populations:** “The protection options in the Draft 2019 TMP (and in the protection measures announced on 24 June) ignore the risk of extinction for the smallest, most at-risk populations.”⁴⁴ As discussed above, New Zealand has failed to provide any protections for the resident east coast Māui dolphins and (even under the newly announced protections) has primarily focused on the core population on the west coast while insufficiently protecting the smaller Māui dolphin populations in the more northern and southern areas of the west coast and failing to recognize the offshore extent of Māui dolphin habitat (out to the 100m depth contour). The failure to protect the smaller, fragmented populations outside the core area significantly increases the risk of extinction for the species.⁴⁵
- **Significant, scientifically unjustified, emphasis on toxoplasmosis as the primary driver of Māui dolphin mortality:** “The MPI risk assessment (Roberts et al. 2019), on which the TMP options are based, significantly overstated the risk of toxoplasmosis (a disease transmitted through cat feces) to the Māui dolphin. The method used in the risk

low observer coverage for small, threatened marine mammal populations (like the Māui dolphin) is but one example of how New Zealand’s standards for preventing marine mammal bycatch are not equivalent to U.S. standards – in this example, monitoring standards.

³⁹ Slooten Decl., ¶49; Ragen Decl., ¶43.

⁴⁰ Slooten Decl., ¶50; Ragen Decl., ¶43.

⁴¹ Slooten Decl., ¶¶ 52-53.

⁴² *Id.*, ¶52.

⁴³ *Id.*

⁴⁴ *Id.*, ¶¶55-57.

⁴⁵ Slooten Decl., ¶¶18, 56-57; Ragen Decl., ¶¶13&46.

assessment to calculate the number of dolphin deaths from toxoplasmosis, and the comparison with bycatch mortality, is not scientifically robust (e.g. Taylor et al. 2018).”⁴⁶

- **Underestimated degree of fisheries bycatch risk through reliance on the “population sustainability threshold” (“PST”) rather than the “potential biological removal” (“PBR”) rate:** “Another significant flaw of the TMP, and more generally, the science that New Zealand is relying upon to determine what additional protections for Māui dolphins are needed, relates to the formula New Zealand is using to determine the sustainable level of bycatch for Māui dolphins.”⁴⁷ The PBR approach followed in the U.S. relies upon objective scientific criteria and establishes bycatch limits through a transparent process.⁴⁸ By comparison, New Zealand’s PST formula is subject to political manipulation to achieve particular management goals (e.g., greater levels of fishing) and suffers from a lack of transparency in application.⁴⁹ As applied to the Māui dolphin, the PST inflates the allowable bycatch limit (by 2 to 3 times the PBR rate) and fails to account for historical habitat – which is critical to the recovery of fragmented populations.⁵⁰ Relying on the PST approach, New Zealand would allow a mortality/serious injury rate of 1 individual every 9.7 years.⁵¹ In contrast, using the U.S. PBR approach, and incorporating the more appropriate maximum net productivity rate of 0.018, results in the allowable loss of 1 individual every 20.6 years.⁵² However, whether you choose the 9.7 or 20.6 year figure, it is clear that the number of Māui dolphins the population can withstand losing to fisheries bycatch is far too low not to impose immediate protections throughout their entire range – especially considering New Zealand’s failure to accurately model and portray the true risk from fisheries bycatch.

As a result of these (and other) significant flaws in the 2019 Draft TMP, the four management options proposed in the draft plan continued the long New Zealand tradition of only offering incremental protections for the Māui dolphin (in only a portion of their habitat) that fail to make meaningful progress in averting the extinction crisis facing the species.

The recently announced (much delayed) “new” measures do very little to change the *status quo*. Rather, they offer a hybrid compilation of restrictions for set net and trawl fishing that largely fall somewhere between the Options 2 and 3. Dr. Slooten, who has in-depth, expert knowledge of historical, current, and proposed TMP-based measures for the Māui dolphin, provides the following summary of the shortcomings of the “new” measures for set nets (gillnets) and trawls:

- Gillnetting ban:
 - No offshore extensions of coverage to the 100m depth contour (as required by Option 4 for a portion of the west coast);

⁴⁶ Slooten Decl., ¶58; *see also id.* ¶¶ 59-62; Ragen Decl., ¶¶44-45.

⁴⁷ Slooten Decl., ¶63.

⁴⁸ *Id.*, ¶¶64&66; Ragen Decl., ¶¶23-24&30.

⁴⁹ Slooten Decl., ¶¶67, 69-70; Ragen Decl., ¶30.

⁵⁰ Slooten Decl., ¶¶68&71; Ragen Decl., ¶29.

⁵¹ Regan Decl., ¶25.

⁵² *Id.*

- Small additional coverage for Manukau Harbour (in line with Option 2) but otherwise no harbour coverage; and
 - No coverage past Wellington in the south to the east coast of the North Island.
- Trawling ban:
 - No offshore extension of coverage to the 100m depth contour (as required by Option 4 for a portion of the west coast);
 - No northern extension to the northern tip of North Island;
 - No extension to Wellington in the south;
 - Trawl protection is closer to Option 2 than Option 4 in the TMP; [and]
 - No coverage for a large segment of the west coast or around the south end and along the east coast of the North Island to East Cape.^[53]

Although the set net ban was extended farther north and south, “the offshore extent of protection is highly inconsistent, extending to 12 nmi in some areas, 7 nmi in others and only 4 nmi in the northern and southern regions where the smallest, most vulnerable Māui dolphin populations live.”⁵⁴ The ban’s continued failure to cover harbors (except for a *de minimus* extension in one harbor) is problematic because of the high level of set net activity in harbours.⁵⁵ The new trawling measures are comparatively even worse. While the “previously inconsistent offshore range of protection, which was 2 nmi in some areas and 4 nmi in others, is now consistently 4 nmi offshore,” the trawl ban still only “covers about 8% of the habitat of Māui dolphins.”⁵⁶ Overall, the total extent of the fishing bans, once the new measures go into effect (currently scheduled for October 1, 2020), still covers only a portion of the Māui dolphin’s total range – contrary the IUCN’s recommendation that protections be extended throughout their range. Further, the decision to ignore the east coast and continue to fail to implement full protections in the northern and southern portions of the west coast signal New Zealand’s unwillingness to protect the smaller, fragmented populations and to protect historical habitat that is critical to the Māui dolphin’s recovery.

In an apparent attempt to draw attention away from the continued gaps in the set net and trawling bans, the New Zealand government touts additional “measures” that it deems to be further protective of Māui dolphins. These additional “measures” and Petitioners’ responses to them are summarized in the following table.

⁵³ Slooten Decl., ¶39.

⁵⁴ *Id.*

⁵⁵ Simmons Decl., ¶16 (“Virtually all parts of all the harbours are fished, from the intertidal upper reaches to the deeper channels towards the entrances. As such, any Māui dolphins coming into these waters are at risk of entanglement.”).

⁵⁶ Slooten Decl., ¶39.

New additional “measure”	Response
Full ban on driftnets.	<u>No material benefit</u> : The use of driftnets is negligible in New Zealand waters. As admitted by MPI, this method is “not particularly common” and such nets have a “very low level of use.” ⁵⁷
An increase in the size of marine mammal protected areas.	<u>No material benefit</u> : “[The] larger marine mammal protected areas do not protect Māui dolphins from fisheries bycatch. The marine mammal sanctuaries managed by DOC are about protecting dolphins from marine mining. These ‘sanctuaries’ do not protect dolphins from the most serious threat, which is fishing.” ⁵⁸
Regulations allowing the Minister of Fisheries “immediately to impose further restrictions if a single dolphin is caught in the Māui dolphin habitat within the west coast of the North Island.”	<u>No material benefit</u> : This ministerial “discretion to impose greater restrictions if a single dolphin is caught is meaningless given seriously deficient observer coverage and a lack of fisher reporting. The newly announced plan certainly fails to even address the absence of monitoring and enforcement of existing protections.” ⁵⁹ Even assuming that this plan could be effectively implemented, it would not alleviate the unacceptable risk posed by the small PBR (or even the less protective PST) calculated for the Māui dolphin. The best solution remains the implementation of complete set net and trawl bans throughout the Māui dolphin’s current and historical range.

As a final line of defense, the New Zealand government claims that it has instituted onboard camera monitoring requirements that will help to protect the Māui dolphin. However, as established by Petitioners’ experts, cameras (even if fully implemented and enforced throughout the commercial set net and trawler fleet on the west coast) are not the solution to the Māui

⁵⁷ *Id.*, ¶40.

⁵⁸ *Id.*

⁵⁹ *Id.* In addition, Dr. Ragen emphasizes that the new TMP does not disclose that monitoring and enforcement will increase. Dr. Timothy Ragen, personal communication (June 25, 2020). Dr. Regan further observes: “Recall that 90% of the dead Māui dolphins are not found. Recall also that the setnet [observer] coverage is on the order of 3%. So the allowance for quick action by the Minister is almost meaningless as the odds are strongly against detecting and reporting dolphin[s] killed by fishing.” *Id.*

dolphin’s dire predicament. First, cameras have only been added to a handful of vessels operating on the west coast, with further implementation delayed for over a year.⁶⁰ Second, camera requirements would only be imposed on the west coast.⁶¹ Third, for a host of reasons, onboard camera systems suffer from a number of issues (*e.g.* poor camera placement and tampering) that significantly undercut their effectiveness as a bycatch monitoring tool.⁶² More importantly, what the Māui dolphin needs is full protection now from set nets and trawls in its full range – not cameras that might help to better document its eventual extinction.

In sum, the “new” TMP offers only a marginal improvement over the *status quo* in terms of set net and trawling bans and provides meaningless additional “measures” that fail to result in any material benefit to the Māui dolphin. Accordingly, the Agencies do not have a legal or factual basis for finding them to be “comparable” to U.S. standards under the MMPA.

NMFS should certainly agree with Petitioners on the foregoing point. Based upon their review of documents received from NMFS through the Freedom of Information Act, Petitioners understand that the agency was reviewing the proposed options in the 2019 Draft TMP as early as February 2019. More particularly, in a document dated February 24, 2019 summarizing information received from MPI, NMFS included a table describing the first three options. In one row labeled “NMFS Preferred,” the agency described the measures that it apparently deemed to be the most acceptable – all which exceeded any of the measures imposed under Options 1-3.

- “Extend the commercial set net ban from the shoreline to [20 nmi] [10 nmi] offshore from Maunganui Bluff to Pariokariwa Point.”⁶³
- “Ban all recreational and commercial set nets within harbors.”⁶⁴
- “Extend the commercial trawl ban from the shoreline to [20 nmi] [10 nmi] offshore from Maunganui Bluff to Pariokariwa Point.”⁶⁵
- “100% observer coverage in all set net fisheries and trawl fisheries.”⁶⁶

Given NMFS’s apparent belief that the above described measures were the minimum required for New Zealand’s TMP to be “comparable” to what would be required under U.S. standards, it is not clear why NMFS needs to undertake that same analysis again now – as the recently selected measures clearly fall between Options 2 and 3. Nothing has changed, from a scientific or regulatory perspective, in the interim since NMFS’s original 2019 analysis to justify the agency’s acceptance of lesser protections. What has changed is the Petitioners’ provision of new information since submitting their original petition further supporting the IWC’s and IUCN’s call for considerably more protective measures throughout the Māui dolphin’s range.

⁶⁰ *Id.*, ¶72.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Sommermeyer Decl, at 32.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

D. The Lack of Traceability in New Zealand Fisheries Necessitates a Broad Trade Ban

As discussed above in Sections A and B, the geographically broader area for which Petitioners now seek protections will potentially implicate additional fisheries in New Zealand. The lack of traceability in New Zealand’s fisheries renders such an outcome even more likely.⁶⁷ On this point, Petitioners’ expert on international trade and the New Zealand seafood sector in the CIT Case observes that “New Zealand does not have a boat to plate traceability system.”⁶⁸ New Zealand does not deny this fact. In responses to Petitioners’ requests under New Zealand’s OIA, MPI admitted: “Export data is collected on a national level and cannot be traced back to the fisheries management areas [FMAs] from which products may have been obtained.”⁶⁹ After further analysis on the subject, Petitioners’ trade expert concludes that the “New Zealand fishery suffers from a severe lack of traceability that renders it extremely difficult, if not virtually impossible, to attribute marine mammal bycatch to specific [Fishery Management Areas], [Quota Management Areas], or fisheries statistical areas.”⁷⁰

This issue of traceability is extremely important to the scope of a trade ban issued against New Zealand under the Imports Provision of the MMPA. After extensive trade data analysis, Petitioners’ expert determined that “at least 33 fish species are caught in waters that Māui dolphin inhabit” and that, “of these 33 species, at least 23 are exported to the U.S.”⁷¹ Significantly, these species are caught throughout New Zealand’s waters, inside and outside of Māui dolphin habitat.⁷² Accordingly, under the requested trade ban, in the likely event that New Zealand importers cannot prove (*e.g.*, through a certificate of admissibility) that a fish product – including composite seafood products – arises from fish species caught outside Māui dolphin habitat, that product will be precluded from entry into the U.S.⁷³

NFMS’s recent issuance of the 2020 LOFF further highlights New Zealand’s traceability problem and its related inability to provide suitable evidence that its seafood imports into the U.S. are not potentially impacting the Māui dolphin. Petitioners’ experts have reviewed the 2020 LOFF and identified numerous inaccuracies, inconsistencies, and missing pieces of information.⁷⁴ On the basis of his analysis, Petitioners’ trade expert concludes: “New Zealand would need to implement comprehensive systems for both product tracing and bycatch

⁶⁷ This lack of traceability also raises the distinct possibility that the geographically expanded request by Petitioners will not have a material effect on the scope of implicated fisheries. The reason for this possible circumstance is that (as detailed herein and in the Simmons Decl.) the same fish species that are caught off the east coast of the North Island and elsewhere, including around the South Island, are commingled with those caught within the core Māui dolphin habitat on the west coast of the North Island before export to the U.S.

⁶⁸ Simmons Decl., ¶22.

⁶⁹ *Id.*

⁷⁰ *Id.*, ¶28.

⁷¹ *Id.*, ¶18.

⁷² *Id.*, ¶¶19-20.

⁷³ *Id.*, ¶¶64-68 (partially discussing the implications of NMFS’s decision to revoke comparability findings for certain fish species caught in the Gulf of California).

⁷⁴ *Id.*, ¶¶29-38 (“This lack of traceability has serious implications for New Zealand’s ability to accurately report marine mammal bycatch data to the U.S. in connection with the 2020 draft List of Foreign Fisheries (2020 LOFF) implemented pursuant to the Fish and Fish Product Import Provisions of the U.S. Marine Mammal Protection Act (MMPA).”).

monitoring to even potentially provide the U.S. with an accurate submission for the LOFF process. New Zealand's submission for the 2020 LOFF evidences the fact that its marine mammal bycatch is not monitored or managed in a way that is comparable to U.S. standards."⁷⁵ Following a similar analysis, Petitioners' Māui dolphin expert, Dr. Slooten, reaches the identical conclusion.⁷⁶

In short, since Petitioners issuance of their original petition, their analysis of New Zealand seafood trade data has identified a larger number of fish species and associated fish products that may originate in Māui dolphin habitat. This result partially follows from Petitioners' inclusion of the east coast of the North Island. However, it also flows from the severe lack of traceability found in New Zealand's seafood sector.

III. CONCLUSION

The additional information provided by Petitioners in this supplemental submission only serves to further support the need for the Agencies to finally fulfill their statutory duty under the MMPA Imports Provision by immediately issuing a trade ban against New Zealand seafood products from commercial fisheries that potentially result in the incidental mortality of Māui dolphins. Petitioners' inclusion of a larger geographic range around the North Island is fully supported by data received directly from the New Zealand government and Petitioners' expert analysis. Of note, the inclusion of the fragmented, smaller populations on the east coast of the North Island provides additional justification for imposing a trade ban as quickly as possible to motivate New Zealand authorities to take the necessary steps now to save the Māui dolphin from extinction.

⁷⁵ *Id.*, ¶38.

⁷⁶ Slooten Decl., ¶¶73-77.