



October 12, 2023

Chief, Marine Mammal and Sea Turtle Conservation Division  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

**RE: RFI on List of Fisheries for 2024; Document Number 2023-19721**

**Don't Cage Our Oceans** is a nationwide coalition of over fifty organizations and businesses working to stop industrial-scale offshore finfish farming while uplifting values-based seafood systems led by local communities.<sup>1</sup> We represent nearly 4.5 million people nationwide. Responsible forms of aquaculture are community-driven, thoughtfully-sited, and appropriately scaled, using low impact methods. We appreciate the opportunity to provide comments on the List of Fisheries for 2024 (Docket No. 230907-0213; Document No. 2023-19721).

<sup>1</sup> For examples of values-based seafood systems led by local communities, see Farr, E., Webb, S., Holdeman, S. & Tolley, B. Aquaculture Values Report: A Visioning Project of the North American Marine Alliance. (Aug 2023.) Available at: <https://namanet.org/wp-content/uploads/NAMA-Aquaculture-Visioning-Report.pdf>

Our members are very concerned about the many ways that aquaculture facilities impact marine mammals. Our coalition can provide numerous examples of such harmful interactions between net pens in the ocean and marine mammals, along with resources for the agency to study. This is a valuable opportunity for NOAA to reassess its stance on industrial-scale net pens, as harms to marine mammals are an ongoing problem both domestically and worldwide. However, our coalition opposes the mechanism in which NOAA seeks to evaluate this, by engaging in the already litigated incorrect definition that deems an aquaculture operation a “fishery,” contrary to a court order and in the absence of legislative authority.

### ***MMPA Background***

Congress passed the Marine Mammal Protection Act in 1972, establishing a national framework for the conservation and protection of marine mammal species in the United States. The law included a moratorium on “takes” of marine mammals, with authorized exceptions if the takes would have a negligible impact on the species or stock, and with requirements and conditions for monitoring, reporting, and mitigation. Marine mammal interactions with commercial fisheries were a key driver of Congressional action to draft and pass the MMPA. Since enactment of the MMPA, many declining marine mammal populations in the United States have stabilized or recovered to healthy population levels.

Section 118 of the MMPA directs NMFS to categorize all U.S. commercial fisheries according to their impact on marine mammal stocks. Category I fisheries are those that have been determined by NMFS to have frequent incidental mortality and serious injury of marine mammals, while Category II fisheries cause occasional incidental mortality and serious injury of marine mammals. Category III fisheries have no, or a remote, likelihood of mortality or injury. The agency maintains and annually updates its “List of Fisheries” (LOF) to reflect current information on fishery interactions and each fishery’s categorization. A fishery’s categorization determines what regulatory measures may be applied to the fishery participants for monitoring, reporting, and efforts to reduce interactions with the affected stocks (take reduction).<sup>2</sup>

### ***NOAA Request for Public Input on List of Fisheries 2024***

On September 13th, 2023, as part of its annual update of the List of Fisheries required by the MMPA, the National Marine Fisheries Service issued a request for public input on “Aquaculture Fishery Descriptions” to inform how the agency will evaluate the potential risk to marine mammals from aquaculture operations for future LOFs. In addition to requesting information on

---

<sup>2</sup> Marine Mammal Protection Act of 1972, as amended through 2018, 16 U.S.C. 1387. Available at: [https://www.mmc.gov/wp-content/uploads/MMPA\\_March2019.pdf](https://www.mmc.gov/wp-content/uploads/MMPA_March2019.pdf)

incidences of marine mammal interactions with aquaculture gear, the agency is seeking “practical ways of grouping different aquaculture gears into a single fishery, such as grouping according to regional differences and/or operational and/or gear characteristics.”<sup>3</sup>

Before weighing in on the legal issues with NOAA deeming aquaculture a “fishery,” we first address the core *intent* behind this RFI, which is the otherwise laudable effort to fully assess the significant harms that offshore fish farm facilities operations have on marine mammals.

### ***Offshore Fish Farming Harms Marine Mammals***

**Offshore fish farming has already harmed the lives of marine mammals** across North America. Entanglement from ropes, lines, and net pens may harm endangered species and other wildlife in the proposed areas, especially as the facilities often act as fish aggregating devices (FADs) further exacerbating risks of entanglements and vessel strikes as species are drawn to the facilities. Recently, NOAA has admitted that industrial aquaculture may attract predators as a result of fish escapes, food drifting outside the pens, and other animals aggregating around the pens.<sup>4</sup> The FAD effect may result in more frequent encounters with protected species, which could increase the likelihood of injury from structures or equipment associated with the facility.<sup>5</sup>

As there is little monitoring, other than self-monitoring of facilities, confidence in the accuracy of interaction reports is low. The August 2023 escape of over 50,000 juvenile salmon from two of Cooke Aquaculture’s cages off Cross Island in Maine raised serious concerns about seal interactions and risks to wild fish.<sup>6</sup> But as this story unfolds, it is worth remembering that in 2017, this same company had lied and notoriously undercounted its massive fish escape in Washington state.<sup>7</sup>

---

<sup>3</sup> National Oceanic and Atmospheric Administration. Proposed Rule, Request for Comment. Available at: <https://www.federalregister.gov/documents/2023/09/13/2023-19721/list-of-fisheries-for-2024>

<sup>4</sup> Luke T. Barrett, et al., *Impacts of marine and freshwater aquaculture on wildlife: a global meta-analysis*, Reviews in Aquaculture (2018). <https://doi.org/10.1111/raq.12277>.

<sup>5</sup> *Id.*

<sup>6</sup> French, Edward. *Salmon escape raises concerns about seals, risk to wild fish*. Maine Monitor, August 26, 2023. Available at: <https://themainemonitor.org/salmon-escape-raises-concerns-about-seals-risk-to-wild-fish/>

<sup>7</sup> Mapes, Lynda V. *Fish farm caused Atlantic salmon spill near San Juans, then tried to hide how bad it was, state says*. Seattle Times, February 2, 2018. Available at: <https://www.seattletimes.com/seattle-news/fish-farm-caused-atlantic-salmon-spill-state-says-then-tried-to-hide-how-bad-it-was/>

Earlier this year, Bottlenose Dolphins were found to increase their aggression toward Spinner Dolphins around an offshore fish farm in Hawai'i.<sup>8</sup> These highly social animals have also been found to be more solitary as they grow accustomed to interacting with and feeding directly from the farms. They also have been known to change their feeding patterns in favor of preying on the wild fish that often congregate around finfish farms. Since 1990, at least 24 dolphins have died from entanglement at these farms.<sup>9</sup>

A ten-year-old Hawaiian Monk Seal died after being trapped in the nets of the NOAA-funded Blue Ocean Mariculture fish farm off the coast of Hawaii.<sup>10</sup> These rare seals are endangered, with only about 630 mature adults left in the wild.<sup>11</sup> There have also been at least 33 documented California Sea Lion deaths due to entanglement in offshore fish farms in Washington State.<sup>12</sup>

Whales have died because of entanglement with offshore fish farm infrastructure as well. In 2016, two Humpback Whales died after being caught in an offshore fish farm in British Columbia.<sup>13</sup> A Humpback Whale was trapped in a tuna farm for two days before being successfully released.<sup>14</sup> A juvenile North Atlantic Right Whale, of which there are only 336 remaining individuals, died after being entangled in aquaculture gear in the Western North Atlantic Ocean.<sup>15</sup>

The critically-endangered Rice's Whales, of which only 30-50 individuals remain,<sup>16</sup> are under increasing risk of entanglement hazards due to NOAA's interest in creating a series of "Aquaculture Opportunity Areas" (AOAs) in the Gulf of Mexico. Industrializing these areas with fish farms and diesel-powered feed barges would also create more ocean noise, which has terrible consequences for marine mammals like the Rice's whale. These AOAs seek to fast-track the permitting process for prospective applicants. The AOA designation process is also an effort

---

<sup>8</sup> Harnish, A. E., Baird, R. W., Corsi, E., Gorgone, A. M., Perrine, D., Franco, A., Hankins, C., & Sepeta, E. (2023). Long-term associations of common bottlenose dolphins with a fish farm in Hawai'i and impacts on other protected species. *Marine Mammal Science*, 1–17. <https://doi.org/10.1111/mms.13010>

<sup>9</sup> Bath, G. E., Price, C. A., Riley, K. L., & Morris, J. A. (2023). A global review of Protected Species Interactions with marine aquaculture. *Reviews in Aquaculture*. <https://doi.org/10.1111/raq.12811>

<sup>10</sup> *Rare monk seal dies in fish farm off Hawaii*. (2017, March 17). USA Today. Retrieved September 11, 2023, from <https://www.usatoday.com/story/news/nation/2017/03/17/rare-monk-seal-dies-fish-farm-off-hawaii/99295396/>

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

<sup>12</sup> Bath, *supra* note 8.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Price CS, Morris JA Jr, Keane E, Morin D, Vaccaro C, Bean D. *Protected Species and Marine Aquaculture Interactions: NOAA Technical Memorandum NOS NCCOS 211*. US National Oceanic and Atmospheric Administration; 2017.

<sup>16</sup> *Rice's Whale | NOAA Fisheries*. (n.d.). NOAA Fisheries. Retrieved September 11, 2023, from <https://www.fisheries.noaa.gov/species/rices-whale>

to bypass Congress and implement the first major provision of a piece of controversial and stalled legislation known as the AQUAA Act.

### ***Legality of Forcing Aquaculture into the MMPA***

Our coalition objects to the concept of classifying industrial finfish farming as a “fishery.” The Courts have also disagreed with that classification. Semantics matter, especially when there has been substantial litigation on the matter, and the courts have held that aquaculture is not a fishery. Unfortunately, NOAA has already demonstrated its inherent bias toward promoting harmful offshore fish farming in the face of overwhelming public opposition. It further erodes public trust when NOAA attempts to inappropriately force aquaculture into existing authorities for fisheries.

Both the MMPA and the Magnuson-Stevens Fishery Conservation and Management Act (MSA) define the term ‘fishery’ as:

- (A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and
- (B) any fishing for such stocks.<sup>17</sup>

Nothing in this definition, nor any other section of the MMPA, implies that Congress intended to categorize the farming of marine species, especially finfish, alongside traditional commercial fisheries for the purpose of managing fishery interactions with marine mammal species.

Nonetheless, the agency appears to have taken additional liberties not granted by Congress. Specifically, in promulgating the regulations implementing Section 118 of the MMPA, the agency defines a commercial fishing operation as “the catching, taking, or harvesting of fish from the marine environment (or other areas where marine mammals occur) that results in the sale or barter of all or part of the fish harvested. The term includes licensed commercial passenger fishing vessel (as defined in § 216.3 of this chapter) activities and aquaculture activities.”<sup>18</sup>

It appears that NOAA is deriving its authority to include aquaculture activities within the MMPA’s “List of Fisheries” mandate **based on its own regulations** as opposed to authority granted by Congress.

---

<sup>17</sup> The Marine Mammal Protection Act, *supra* note 1, at 16 U.S.C. 1362 (16); Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1802 (13); available at:

<https://media.fisheries.noaa.gov/dam-migration/msa-amended-2007.pdf>

<sup>18</sup> 50 CFR § 229.2 (2023).

## ***NOAA Lacks the Authority to Regulate Aquaculture in Federal Waters***

**In 2020, the Fifth Circuit Court of Appeals held that NOAA does not have the authority to permit aquaculture in the Gulf of Mexico's federal waters**, as there is no Congressional authorization to do so under the MSA.<sup>19</sup> For years, NOAA had claimed that the MSA had provided authority under the contorted view that aquaculture falls under the statutory definition of “fishing” for purposes of the MSA, as fish are ultimately extracted from net pens, and that NOAA could thus create a fishery management plan (FMP) to regulate aquaculture. The Fifth Circuit Court noted this did not make sense under the law, and ruled against it.

The same summer of the Fifth Circuit Court ruling, the Trump Administration issued an executive order to grant NOAA authority where Congress had not. While EO 13921 does nothing to bolster NOAA's authority, the agency appears to behave otherwise. Executive orders cannot confer authority on agencies because the president's powers are executive, not legislative, in nature.<sup>20</sup> Rather, the President's authority to act “must stem either from an act of Congress or from the Constitution itself.”<sup>21</sup> As a result, EO 13921 cannot allow NOAA to establish a new offshore aquaculture industry in the absence of any statutory authority granted by Congress.

More recently, NOAA has claimed authority to regulate aquaculture via its role in the interagency Subcommittee on Aquaculture,<sup>22</sup> established by the National Aquaculture Act of 1980.<sup>23</sup> This legislation identifies the U.S. Department of Agriculture as the lead agency on aquaculture, and barely assigns any responsibilities to the Department of Commerce (NOAA) at all, let alone authority to designate AOAs. The Act requires only consultation with NOAA for a biennial report on the status of aquaculture,<sup>24</sup> and several studies due 35 years ago.<sup>25</sup> None of these submissions required NOAA to determine locations suitable for industrial aquaculture in federal waters.

---

<sup>19</sup> *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F. 3d 454 (5th Cir. 2020).

<sup>20</sup> *Doe #1 v. Trump*, 957 F.3d 1050, 1062 (9th Cir. 2020) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”)).

<sup>21</sup> *Id.* at 585.

<sup>22</sup> NSTC Subcommittee on Aquaculture, A Strategic Plan to Enhance Regulatory Efficiency in Aquaculture. (Feb. 2022)

[https://www.ars.usda.gov/sca/Documents/2022%20NSTC%20Subcommittee%20on%20Aquaculture%20Regulatory%20Efficiency%20Plan\\_Final%20508%20compliant.pdf](https://www.ars.usda.gov/sca/Documents/2022%20NSTC%20Subcommittee%20on%20Aquaculture%20Regulatory%20Efficiency%20Plan_Final%20508%20compliant.pdf).

<sup>23</sup> 16 U.S.C. §§ 2801-2810.

<sup>24</sup> *Id.* § 2804(d).

<sup>25</sup> *Id.* § 2804(c)(1)(C), (D) (requiring the Department of Commerce to submit studies by December 31, 1987).

In June 2022, the U.S. Supreme Court made plain that an agency must “point to ‘clear congressional authorization’ for the authority it claims.”<sup>26</sup> NOAA’s attempts to promote and lead a highly controversial industry in U.S. federal waters and shoehorn it into existing laws such as the MMPA – without pointing to statutory text – provides just such an “extraordinary case” in which the “history and the breadth of the authority that [the agency] has asserted,” provides a “reason to hesitate before concluding that Congress” meant to confer such authority.<sup>27</sup> Here, there is no ambiguity at all. **Congress has never granted NOAA the authority to regulate aquaculture in federal waters.**

Our coalition understands that the broader *intent* of this request for public input is to evaluate impacts that aquaculture may have on marine mammals, and our members wholeheartedly support this endeavor. Yet the statutory authority and mechanisms by which this is being undertaken also matter. Terminology matters, especially when it has been the subject of litigation. Regardless of the nobility of the intent, to witness the agency try to – yet again – fit aquaculture under the rubric of a type of “fishery” has always been and remains entirely inappropriate.

---

<sup>26</sup> *W. Virginia v. EPA*, No. 20-1530, 2022 WL 2347278, at \*3 (U.S. June 30, 2022) (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

<sup>27</sup> *W. Virginia*, 2022 WL 2347278, at \*3; see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 666, 211 L. Ed. 2d 448 (2022).