

**UNITED STATES COURT OF INTERNATIONAL TRADE**

BEFORE: THE HONORABLE GARY S. KATZMANN, JUDGE

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|                           |                      |
|---------------------------|----------------------|
| NATURAL RESOURCES DEFENSE | )                    |
| COUNCIL, INC., et al.,    | )                    |
|                           | )                    |
| Plaintiffs,               | )                    |
|                           | )                    |
| v.                        | ) Court No. 18-00055 |
|                           | )                    |
| WILBUR ROSS, et al.,      | )                    |
|                           | )                    |
| Defendants.               | )                    |

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**FURTHER SUPPLEMENTAL MEMORANDUM**

Pursuant to the Court’s order of April 30, 2019 (ECF No. 87), defendants respectfully submit this supplemental memorandum.

**I. Amendment Of The Complaint In Lieu Of Plaintiffs’ Bringing A New Action Would Risk Improper Supplementation Of The Administrative Record**

In their April 19, 2019 supplemental memorandum (ECF No. 83), plaintiffs requested, in the alternative, that, should this Court determine that their current claims under 5 U.S.C. §706(1) are moot, they be permitted to amend their complaint to assert a claim under 5 U.S.C. §706(2). Although we would not object to amendment given the lenient standard of USCIT R. 15, we would caution against amendment on two prudential grounds.

First, a dismissal of this action for mootness, while permitting plaintiffs to file a new action under section 706(2), would result in the automatic vacatur of the preliminary injunction issued in this action. *E.g., U.S. Ass’n of Importers of Textiles & Apparel v. U.S. Dep’t of Commerce (USA-ITA)*, 413 F.3d 1344, 1348 (Fed. Cir. 2005) (lack of jurisdiction precludes a likelihood of success on the merits). Further, any future form of preliminary injunctive relief would be addressed based on plaintiffs’ new allegations to be brought in an action asserting a claim under section 706(2). By contrast, were the Court to permit

amendment of the complaint in lieu of dismissal, then the Court would need to take the affirmative step of vacating the preliminary injunction issued in response to plaintiffs' now-mooted claim. The agency's November 27, 2018 final action is entitled to a presumption of correctness. *E.g., Ctr. for Biological Diversity v. Nat'l Marine Fisheries Serv.*, 977 F. Supp. 55, 76 (D.P.R. 2013). Plaintiffs cannot establish any basis for their assertion that the preliminary injunction issued in response to a now-moot claim brought under section 706(1) may be carried over to support their prospective, and entirely new and separate, claim under section 706(2). *E.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.").

Second, the Court would review a new claim brought under section 706(2) based on an entirely separate and distinct administrative record. *E.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. §706, to the agency decision based on the record the agency presents to the reviewing court."). The current, and voluminous, administrative record concerns something that is materially different—plaintiffs' allegations that the agency had unreasonably delayed or unlawfully withheld action. Although portions of the current record could be part of a new administrative record concerning the agency's November 27 final decision, the vast majority of the current record likely would be irrelevant and absent from a new administrative record.

Should the Court allow amendment of the complaint, the Court would need to quarantine the current administrative record and strictly prohibit the parties from any reliance on, or reference to, the current record in connection with a section 706(2) claim. Otherwise, any decision by this Court regarding a new section 706(2) claim that would rest explicitly or

impliedly on references to the current administrative record could be seen as improper supplementation of the new administrative record, which would be a clear abuse of discretion. The Court of Appeals for the Federal Circuit has held repeatedly that “supplementation of the administrative record should be limited to cases in which ‘the omission of extra-record evidence precludes effective judicial review.’” *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009); accord *AgustaWestland N. Am. v. United States*, 880 F.3d 1326, 1331 (Fed. Cir. 2018) (“Judicial review is ‘effective’ if it is consistent with the APA.”) (citing *Axiom*, 564 F.3d at 1381). In both cases, the Federal Circuit held that the trial court had abused its discretion by “supplementing the record, and relying on the supplemental evidence to reach its decision.” *AgustaWestland*, 880 F.3d at 1332; *Axiom*, 564 F.3d at 1381 (“By admitting *Axiom*’s extra-record evidence without [determining] whether supplementation of the record was necessary in order not ‘to frustrate effective judicial review’, the court abused its discretion.”) (quoting *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973)).

For this reason, allowing amendment in an action in which there is an extant administrative record, and receiving a new administrative record supporting the new final decision under challenge, could invite confusion regarding the boundaries of the proper administrative record on which the Court’s section 706(2) review may be based. Accordingly, amendment of the complaint would necessitate the imposition of strict safeguards to avoid such confusion.

## **II. If The Preliminary Injunction Were Dissolved, The Agency Would Implement Equivalent Measures To Protect The Vaquita**

As Nina M. Young explains in the attached declaration, the agency would implement equivalent measures to protect the vaquita if the Court’s injunction were dissolved.

### III. Other Materials Cited At Argument

For completeness, we note that we referred to the following materials at the April 30 oral argument:

*Road & Highway Builders, LLC v. United States*, 702 F.3d 1365, 1368-69 (Fed. Cir. 2012) (Government officials are presumed to discharge their duties in good faith; presumption may be overcome only with clear and convincing evidence);

*Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1338 (Fed. Cir. 2010) (28 U.S.C. § 1581(i) provides for an APA cause of action).

*Motions Systems Corp. v. Bush*, 437 F.3d 1356 (Fed. Cir. 2006) (en banc) (same).

Illegal, Unreported and Unregulated (IUU) Fishing. <http://www.fao.org/iuu-fishing/background/what-is-iuu-fishing/en/>

Massive Trade in Endangered Species Uncovered: U.S. Attorney Charges 7 with Smuggling Swim Bladders of Endangered Fish Worth Millions on Black Market; Officials See Trend (Apr. 24, 2013). <https://www.justice.gov/usao-sdca/pr/massive-trade-endangered-species-uncovered-us-attorney-charges-7-smuggling-swim>

Letter from Raul de Jesus Elenes Angulo, National Commissioner for Agriculture and Fisheries of Mexico, to Dr. Paul Doremus, Acting Director for International Affairs and Seafood Inspection, NOAA, dated April 29, 2019 (English translation). Attachment A.

Respectfully submitted,

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Director

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*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of May, 2019, I electronically filed a copy of the foregoing using the CM/ECF system, which sent a notification of such filing to counsel of record.

/s/Stephen C. Tosini  
Stephen C. Tosini

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE GARY S. KATZMANN, JUDGE

|                           |             |   |                    |
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|                           | Defendants. | ) |                    |
| <hr/>                     |             | ) |                    |

DECLARATION OF NINA YOUNG

I, NINA YOUNG, hereby declare and state as follows:

1. Since 2010, I have worked as a Foreign Affairs Specialist, Marine Mammal Lead, at the National Marine Fisheries Service (NMFS) Office of International Affairs and Seafood Inspection, drafting the regulations to implement Section 101(a)(2) of the Marine Mammal Protection Act (MMPA) at 50 C.F.R. § 216.24, known as the MMPA import regulations. NMFS is part of the National Oceanic and Atmospheric Administration (NOAA) of the U.S. Department of Commerce.

2. I previously submitted a declaration to the Court in this matter on April 19, 2019, where I described my background and duties at NMFS, including my work to protect the vaquita porpoise in the Gulf of California, Mexico.

3. I am submitting this declaration to describe the import measures that would go into effect under the MMPA and other provisions of law should the Court lift its order banning the importation of all shrimp, curvina, sierra, and chano and their products sourced from the Gulf of

California, Mexico, unless affirmatively identified as having been caught with a gear type other than gillnets or affirmatively identified as caught outside the vaquita's range.

4. In the NMFS final determination issued on November 27, 2018, the agency denied Mexico's request for a "comparability finding to the El Golfo de Santa Clara curvina rodeo-style gillnet fishery." AR103 at 002815.

5. Accordingly, in the final determination, NMFS concluded that curvina caught in the El Golfo de Santa Clara curvina rodeo-style gillnet fishery are not admissible to the United States pursuant to 50 C.F.R. §§ 216.24(h)(1) and (9); *see* AR103, AR104.

6. The regulation, at 50 C.F.R. §§ 216.24(h)(9)(iii), directs that "[i]f fish or fish products are subject to an import prohibition under paragraphs (h)(1) and (9) of this section, the Assistant Administrator, to avoid circumvention of the import prohibition, may require that the same or similar fish and fish products caught or harvested in another fishery of the harvesting nation and not subject to the prohibition be accompanied by a certification of admissibility . . ."

7. Should the Court lift its injunction, NMFS will require certificates of admissibility for all imports from Mexico of curvina, sierra, and chano pursuant to clause 216.24(h)(9)(iii), because, for the purpose of inspection and enforcement at the border, sierra and chano are "similar" to curvina.

8. Although shrimp are not similar to the finfish identified above, all shrimp imports from Mexico into the United States are subject to the U.S. Seafood Import Monitoring Program (SIMP; 50 C.F.R. § 300.324), which "establishes reporting and recordkeeping requirements for imports of certain seafood products, to combat illegal, unreported and unregulated (IUU)-caught and/or misrepresented seafood from entering U.S. commerce."

<<https://www.iuufishing.noaa.gov/RecommendationsandActions/RECOMMENDATION1415/FinalRuleTraceability.aspx>>; Attachment A at 1.

9. SIMP is a reporting and recordkeeping regulation implemented to facilitate enforcement of a prohibition under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) against the importation of fish products acquired in violation of a foreign law or regulation. 16 U.S.C. § 1857(1)(Q). Specifically, under the SIMP, “[o]n December 31, 2018, it became mandatory for foreign shrimp products to be accompanied by harvest and landing data and for importers to maintain chain of custody records for shrimp and abalone imports entering the U.S.” Attachment A at 1-2. Because shrimp caught using gillnets in the Gulf of California is IUU seafood, its importation would be banned under the MSA and this import restriction can be enforced through the SIMP reporting and recordkeeping requirements.

10. SIMP further includes comprehensive audit procedures requiring importers to substantiate their claims and documentation regarding chain of possession. *See* <https://www.iuufishing.noaa.gov/Portals/33/SIMP%20Audit%20Guidance%20Rev.pdf?ver=2019-02-07-221905-963>>; Attachment B.

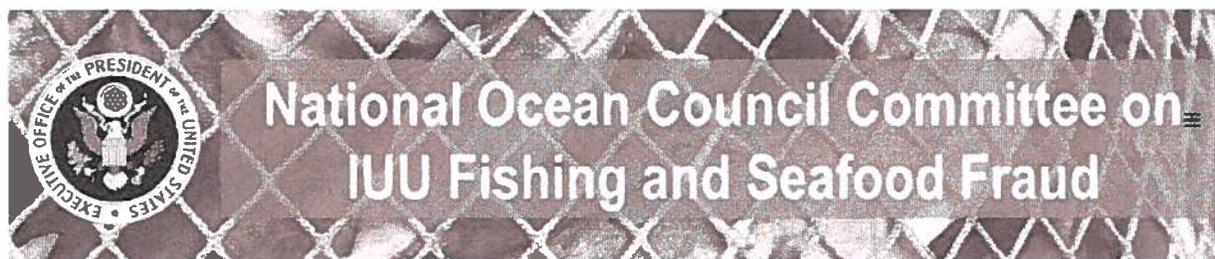
11. Accordingly, all imports of shrimp, curvina, sierra, and chano from Mexico will require certifications that those products were not caught in the were not caught in the Mexican curvina rodeo-style gillnet fishery, or through any IUU means, such as the use of gillnets to capture shrimp in the Gulf of California.

12. Attachment C is a list of domestic fisheries that have been removed from the list of MMPA regulated fisheries.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd of May, 2019 in Washington, DC.

  
\_\_\_\_\_  
NINA YOUNG

Attachment A



(<https://www.iuufishing.noaa.gov/Home.aspx>)

## U.S. SEAFOOD IMPORT MONITORING PROGRAM

The Seafood Import Monitoring Program - or SIMP- establishes reporting and recordkeeping requirements for imports of certain seafood products, to combat illegal, unreported and unregulated (IUU)-caught and/or misrepresented seafood from entering U.S. commerce. SIMP provides additional protections for our national economy, global food security and the sustainability of our shared ocean resources. This is a risk-based traceability program (</LinkClick.aspx?link=2391&tabid=2913&portalid=33&mid=14281>)—requiring the importer of record to provide and report key data—from the point of harvest to the point of entry into U.S. commerce—on thirteen imported fish and fish products identified as vulnerable to IUU fishing and/or seafood fraud. Mandatory compliance for eleven of the species covered under SIMP began on January 1, 2018. Shrimp and abalone compliance became effective on December 31, 2018 (</RecommendationsandActions/RECOMMENDATION1415/Implementation.aspx>).

### Included Species

**Abalone, Atlantic Cod, Blue Crab (Atlantic), Dolphinfish (Mahi Mahi), Grouper, King Crab (red), Pacific Cod, Red Snapper, Sea Cucumber, Sharks, Shrimp, Swordfish, Tunas (Albacore, Bigeye, Skipjack, Yellowfin, and Bluefin)**

### Overview

The Seafood Import Monitoring Program establishes permitting, data reporting and recordkeeping requirements for thirteen imported fish and fish products identified as vulnerable to IUU fishing and/or seafood fraud.

The data collected through the International Trade Data System (ITDS), allows these species to be traced from the point of entry into U.S. commerce back to the point of harvest or production to verify whether it was lawfully harvested or produced.

The Seafood Import Monitoring Program is not a labeling program, nor is it consumer facing. Under the Magnuson-Stevens Act authority (under which the regulatory program has been promulgated) and the strict information security of the ITDS--the information collected under this program is confidential.

The importer of record is required to keep records regarding the chain of custody of the fish or fish product from harvest to point of entry into U.S.

On April 23, 2018, NOAA lifted its stay on shrimp and abalone in SIMP (<https://www.federalregister.gov/documents/2018/04/24/2018-08553/magnuson-stevens-fishery-conservation-and-management-act-lifting-the-stay-on-inclusion-of-shrimp-and>). On December 31, 2018, it became mandatory for

foreign shrimp products to be accompanied by harvest and landing data and for importers to maintain chain of custody records for shrimp and abalone imports entering the U.S. Learn more.

(/RecommendationsandActions/RECOMMENDATION1415/Implementation.aspx)

### Additional Information

NOAA Fisheries has announced a proposed rule (<https://www.regulations.gov/document?D=NOAA-NMFS-2016-0165-0001>) to establish a voluntary Commerce Trusted Trader Program for U.S. importers—a valuable complement to the Seafood Import Monitoring Program (</LinkClick.aspx?link=2913&tabid=2780&portalid=33&mid=13460>) (SIMP).

To receive updates about the Seafood Import Monitoring Program, please send a request to: [IUU.FISHING@NOAA.GOV](mailto:IUU.FISHING@NOAA.GOV) (<mailto:iuu.fishing@noaa.gov>)

## RESOURCE MATERIALS

- Shrimp and Abalone Compliance Provisions for SIMP December 31 through April 1, 2019 (</LinkClick.aspx?link=3266&tabid=2913&portalid=33&mid=14280>)
- Guide to Audit Requirements for SIMP (</Portals/33/SIMP%20Audit%20Guidance%20Rev.pdf?ver=2019-02-07-221905-963>)
- Implementation Guide (PGA Message Set Implementation Guidelines) (</LinkClick.aspx?link=https%3a%2f%2fwww.cbp.gov%2fdocument%2fguidance%2fnmfs-simp-message-set&tabid=2913&portalid=33&mid=11437>)
- ([/LinkClick.aspx?fileticket=Atro4JMa\\_KI%3d&tabid=2913&portalid=33&mid=14280](/LinkClick.aspx?fileticket=Atro4JMa_KI%3d&tabid=2913&portalid=33&mid=14280)) Fact Sheet (</Portals/33/SIMP.FactSheet.Rev2018.pdf?ver=2019-02-07-204941-770>)
- SIMP Compliance Guide (FAQ's) (</Portals/33/SIMPComplianceGuide2018rev.pdf?ver=2018-12-11-172442-553>)
- Harmonized Tariff Schedule Code List (</Portals/33/SIMP.HTScodes.revMarch2019.pdf?ver=2019-03-19-163059-480>) (Excel download (</Portals/33/SIMP.HTS.codes.March2019.xls?ver=2019-03-19-163353-047>))
- Three Alpha Code List ([/Portals/33/SIMP/species\\_list\\_including\\_shrimp\\_and\\_abalone\\_rev15May2018.pdf?ver=2018-05-17-164004-123](/Portals/33/SIMP/species_list_including_shrimp_and_abalone_rev15May2018.pdf?ver=2018-05-17-164004-123)) (Excel download ([/Portals/33/SIMP/species\\_list\\_including\\_shrimp\\_and\\_abalone\\_asof5-2018.xls?ver=2018-05-16-174506-613](/Portals/33/SIMP/species_list_including_shrimp_and_abalone_asof5-2018.xls?ver=2018-05-16-174506-613)))
- Model Form: Aggregated Catch Certificate (</Portals/33/SIMP.ModelAggregatedCatchForm.7-17.pdf>), also in Spanish (</LinkClick.aspx?fileticket=ZVpnnW3BoC8%3d&tabid=2913&portalid=33&mid=14280>), French (</LinkClick.aspx?fileticket=hQQLkf5l5o%3d&tabid=2913&portalid=33&mid=14280>), Indonesian (</LinkClick.aspx?fileticket=qYHX4WUr3kw%3d&tabid=2913&portalid=33&mid=14280>), Japanese (</Portals/33/SIMP.ModelAggregatedCatchForm.Japanese.pdf?ver=2017-10-19-165147-187>), Mandarin Chinese (</LinkClick.aspx?fileticket=C9yKGs9hsyY%3d&tabid=2913&portalid=33&mid=14280>), Portuguese ([/LinkClick.aspx?fileticket=npN\\_2rkCu9M%3d&tabid=2913&portalid=33&mid=14280](/LinkClick.aspx?fileticket=npN_2rkCu9M%3d&tabid=2913&portalid=33&mid=14280)), Russian (</LinkClick.aspx?fileticket=9iqiYnTw-KE%3d&tabid=2913&portalid=33&mid=14280>), Tagalog ([/LinkClick.aspx?fileticket=\\_tfrkThYAgk%3d&tabid=2913&portalid=33&mid=14280](/LinkClick.aspx?fileticket=_tfrkThYAgk%3d&tabid=2913&portalid=33&mid=14280)), Vietnamese (</LinkClick.aspx?fileticket=Lfr83e5FfK0%3d&tabid=2913&portalid=33&mid=14280>)

- Model Form: Catch Certificate ([/Portals/33/NMFS\\_ModelCatchFormrev.pdf?ver=2017-12-07-174538-023](/Portals/33/NMFS_ModelCatchFormrev.pdf?ver=2017-12-07-174538-023)), also in Spanish (</LinkClick.aspx?fileticket=XlzuDDpPals%3d&tabid=2913&portalid=33&mid=14280>), French (</LinkClick.aspx?fileticket=EeccINKaMLU%3d&tabid=2913&portalid=33&mid=14280>), Indonesian (</LinkClick.aspx?fileticket=J9ez41FIBsA%3d&tabid=2913&portalid=33&mid=14280>), Japanese ([/Portals/33/SIMP\\_ModelCatchCertificate.Japanese.pdf?ver=2017-10-19-165216-640](/Portals/33/SIMP_ModelCatchCertificate.Japanese.pdf?ver=2017-10-19-165216-640)), Mandarin Chinese (</LinkClick.aspx?fileticket=PBnsXhSA0JE%3d&tabid=2913&portalid=33&mid=14280>), Portuguese (</LinkClick.aspx?fileticket=tvTUizaSjKU%3d&tabid=2913&portalid=33&mid=14280>), Russian (</LinkClick.aspx?fileticket=PcpzrJpNrWY%3d&tabid=2913&portalid=33&mid=14280>), Tagalog (</LinkClick.aspx?fileticket=Wd41-abEUwg%3d&tabid=2913&portalid=33&mid=14280>), Vietnamese (</LinkClick.aspx?fileticket=mKdytveCTUs%3d&tabid=2913&portalid=33&mid=14280>), Thai (</LinkClick.aspx?fileticket=7K8ck1SacyU%3d&tabid=2913&portalid=33&mid=14280>)
- Presentation on SIMP: (</LinkClick.aspx?fileticket=YKB0tH6dQ0E%3d&tabid=2913&portalid=33&mid=14280>) also in Spanish (</LinkClick.aspx?fileticket=Yz8EjK0QsKk%3d&tabid=2913&portalid=33&mid=14280>), French (</LinkClick.aspx?fileticket=-QeVHfITHvE%3d&tabid=2913&portalid=33&mid=14280>), Indonesian (</LinkClick.aspx?fileticket=Jp8Ew23XUiM%3d&tabid=2913&portalid=33&mid=14280>), Japanese (</Portals/33/SIMP.PowerPoint.Japanese.pdf?ver=2017-10-19-165703-333>), Mandarin Chinese (</LinkClick.aspx?fileticket=do3viKh79BM%3d&tabid=2913&portalid=33&mid=14280>), Portuguese ([/LinkClick.aspx?fileticket=w-0Ff\\_TnSeo%3d&tabid=2913&portalid=33&mid=14280](/LinkClick.aspx?fileticket=w-0Ff_TnSeo%3d&tabid=2913&portalid=33&mid=14280)), Russian (</LinkClick.aspx?fileticket=W6klbbzpxY%3d&tabid=2913&portalid=33&mid=14280>), Tagalog (</LinkClick.aspx?fileticket=onuH1djaHcM%3d&tabid=2913&portalid=33&mid=14280>), Vietnamese (</LinkClick.aspx?fileticket=9UEnPuQtx7w%3d&tabid=2913&portalid=33&mid=14280>)
- Regulation to Lift the Stay of Shrimp and Abalone in SIMP (<https://www.federalregister.gov/documents/2018/04/24/2018-08553/magnuson-stevens-fishery-conservation-and-management-act-lifting-the-stay-on-inclusion-of-shrimp-and>)
- Regulation to Implement a Seafood Import Monitoring Program (Federal Register Notice) (<https://www.regulations.gov/document?D=NOAA-NMFS-2015-0122-0111>)

NOTE: Translations of any materials into languages other than English are intended solely as a convenience to the non-English-reading public. We have attempted to provide an accurate translation of the original material in English, but due to the nuances in translating to a foreign language, slight differences may exist. Any discrepancies or differences created in the translation are not binding and have no legal effect. If any questions arise related to the accuracy of the information contained in these materials, please refer to the English version of the website.

## RELATED LINKS

- Commerce Trusted Trader Program (</LinkClick.aspx?link=2780&tabid=2397&portalid=33&mid=11437>)
- Seafood Import Monitoring Program (SIMP) (</RecommendationsandActions/RECOMMENDATION1415/FinalRuleTraceability.aspx>)
- SIMP: Final Regulatory Impact Review and Final Regulatory Flexibility Analysis (</LinkClick.aspx?fileticket=YgDbeCKwPKU%3d&tabid=2913&portalid=33&mid=11437>)
- SIMP: Implementation Guide for (PGA Message Set Implementation Guidelines) (</LinkClick.aspx?link=https%3a%2f%2fwww.cbp.gov%2fdocument%2fguidance%2fnmfs-simp-message-set&tabid=2913&portalid=33&mid=11437>)
- Apply for an International Fisheries Trade Permit (</LinkClick.aspx?link=https%3a%2f%2fwww.cbp.gov%2frade%2face%2fcatair&tabid=2913&portalid=33&mid=11437>)
- Technical requirements for transmitting automated data (</LinkClick.aspx?link=https%3a%2f%2fwww.cbp.gov%2frade%2face%2fcatair&tabid=2913&portalid=33&mid=11437>) to the Automated Commercial Environment

- [FAO 3-Alpha Species Codes \(\(Aquatic Sciences Fishery Information System - ASFIS\) List of Species \(/LinkClick.aspx?link=http%3a%2f%2fwww.fao.org%2ffishery%2fcollection%2fasfis%2fen&tabid=2913&portalid=33&mid=11437\)\)](#)
- [US Customs and Border Protection Import Guidance \(https://www.cbp.gov/trade/ace/catair\)](#) / [Export Guidance \(https://www.cbp.gov/trade/aes/aestir/introduction-and-guidelines\)](#)
- [Agency specific detailed reporting requirements \(https://www.cbp.gov/document/guidance/ace-aestir-appendix-q-pga-record-formats\)](#)



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**Attachment B**



**NOAA**  
FISHERIES

## GUIDE TO AUDIT REQUIREMENTS FOR THE SEAFOOD IMPORT MONITORING PROGRAM: FREQUENTLY ASKED QUESTIONS

The Seafood Import Monitoring Program (SIMP) established permitting, reporting and recordkeeping requirements for imports of certain seafood products in order to prevent illegal, unreported and unregulated (IUU)-caught and/or misrepresented seafood from entering U.S. commerce, thereby providing additional protections for our national economy, global food security and the sustainability of our shared ocean resources. Currently, SIMP requires the importer of record to report key data in entry filings for all import shipments of imported fish and fish products identified as particularly vulnerable to IUU fishing or seafood fraud. In addition, importers must retain records of the information provided at entry and additional chain of custody information sufficient to trace the fish from the point of entry into U.S. commerce back to the point of harvest. These records must be retained, in paper or electronic format, at the importer's place of business for a period of two years from the date of import and must be made available for inspection, including supporting an audit.

The National Marine Fisheries Service (NMFS) published a [final rule establishing the Seafood Import Monitoring Program \(SIMP\)](#) on December 9, 2016. January 1, 2018 was the mandatory compliance date for this rule. On April 24, 2018 NMFS published a [final rule to include shrimp and abalone species in SIMP](#) with a mandatory compliance of December 31, 2018.

This document was developed in response to questions from importers regarding SIMP audit processes and NOAA's intent is to support industry compliance with SIMP requirements and, in particular, with audits conducted under SIMP. This document does not offer any new interpretation of the SIMP final rule or speak to potential enforcement actions which may result from noncompliance with SIMP requirements, including noncompliance identified through the audit process. As NMFS refines its auditing processes and additional questions from industry are raised, this guidance will be updated.

### OVERVIEW

The purpose of a SIMP audit is to verify the harvest and landing information provided in an entry filing as well as the sufficiency of chain of custody records documenting the movement of fish and fish products from harvest to the point of entry into US commerce. Importers will be notified in writing by a NMFS auditor if an entry was selected for audit and asked to provide supporting records within 5-10 days, depending on the format of submission. As a general rule, within thirty days of providing chain of custody records to NMFS, auditees will be notified of audit results and, if necessary, any nonconformities identified for the entry audited as well as corrective actions to support compliance with respect to future shipments.

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**DEFINITION OF TERMS**

- ACE:** The Automated Commercial Environment, managed by U.S. Customs and Border Protection, is the primary system through which the trade community electronically reports import data required by Federal agencies.
- Auditee:** An Importer of Record holding a current International Fisheries Trade Permit with one or more entries selected for audit under SIMP.
- Chain of Custody:** A series of records sufficient to trace the fish or fish products in an imported shipment from the point of harvest to entry into US commerce, and at all points in between, including individual or Aggregated Harvest Reports, documentation of all movements of the fish, and identification of each custodian of the fish.
- Information:** Traceability data that describes documented or undocumented chain of custody events provided to NMFS auditors.
- Record:** Documentation, in electronic or paper format, related to the harvest, landing, transshipment, transfer or processing of fish and fish products subject to SIMP.
- SIMP Data Set:** The information, as specified at 50 CFR 300.324(b), that must be reported in ACE at the time of entry for each entry containing species or species groups subject to SIMP.

## CHAIN OF CUSTODY RECORDS AND INFORMATION

For SIMP, a complete chain of custody tracks product from its initial wild-caught or aquaculture harvest to the point of entry into U.S. commerce. Records to show this chain of custody should identify the product and each custodian of the fish or fish product (e.g., a transshipper, processor, storage facility, or distributor) at every step as that product moves through the supply chain.

NMFS may request additional information from the importer to assist in verifying the information contained in chain of custody records provided. Additionally, NMFS may consult with other U.S. agencies and foreign governments to verify the authenticity of documentation provided, subject to the strict data confidentiality provisions applicable to SIMP.

NMFS intends to work with industry to support and improve compliance with SIMP. For example, NMFS developed sample SIMP forms that were widely disseminated in multiple languages to demonstrate to industry how required data related to catch, processing and transshipment might be organized to facilitate entry filing. While these documents are records, the traceability information they contain must be supported with other source documentation (e.g., records from the harvester, country of origin, shipper, storage facility or processor) or information to establish a verifiable chain of custody.

### *HARVEST AND LANDING DATA PROVIDED THROUGH ACE*

The harvest and landing data elements reported at the time of entry filing through ACE will serve as records that NOAA will seek to verify if an entry is selected for audit. If third party verification is not possible, or if the information in the entry filing is insufficient or incongruous with other records, auditors may request supplemental chain of custody records documenting the harvest and landing of product, which the importer of record would need to make available.

### *CHAIN OF CUSTODY RECORDS*

Per section 300.324(e) of the SIMP final rule, "In addition to the entry recordkeeping requirements specified at 19 CFR part 163 and 300.323(b), the importer of record is required to maintain records containing information on the chain of custody of the fish or fish products sufficient to trace the fish or fish products from point of entry into U.S. commerce back to the point of harvest, including individual or Aggregated Harvest Reports, if any, and information that identifies each custodian of the fish or fish product (such as any transshipper, processor, storage facility or distributor). The latter may include widely used commercial records such as declarations by the harvesting/carrier vessels or bills of lading." SIMP does not require the retention of specific records, offering industry the flexibility to use any records sufficient to establish traceability through the supply chain from harvest to entry into U.S. commerce, such as declarations by harvesting and carrier vessels or bills of lading.

Some examples of records that may be used to establish chain of custody are listed in the table below:

| HARVEST AND LANDING RECORDS             | SHIPMENT RECORDS              | PROCESSING AND STORAGE RECORDS         |
|---|-------------------------------|--|
| Vessel Harvest Manifest Records         | Processor's Bill of Lading    | Daily Production Log                   |
| Raw Material Invoice                    | Processor Receiving Bill      | Finished Product Packaging Label       |
| Fish Tickets at Landing Port            | Cold Storage Receiving Ticket | Cold Storage Discharge Log             |
| Off Loading Reports with Vessel Name(s) | Vessel Transferred Ticket     | Cold Storage Receiving Log             |
| Country Catch Certificate               | Mate's Receipt                | Processor's Raw Material Receiving Log |
| Proforma Invoice                        | Transshipment Log             | Packing Log                            |
|   | Cold Storage Unloading Log    |  |

## AUDIT PROCESS OVERVIEW

1. NMFS auditors will send a request for records pertaining to the entry(ies) selected for audit by email to the designated International Fisheries Trade Permit (IFTP) holder, and may follow up with a call as necessary. The IFTP Holder is required to report any changes in the information provided in the IFTP permit application, including contact information, within 15 days of those changes going into effect; if the change is not reported within 30 days, the permit is void as of the 30<sup>th</sup> day. See 50 CFR 300.322(k). Importers can update this information through the [NOAA Fisheries Permits website](#).
2. NMFS auditors are currently conducting SIMP audits through remote record review. The time frame for auditees to provide requested chain of custody records to NMFS auditors is as follows:
  - a. **Five business days** from receipt of the Audit notification if the auditee, IFTP Holder or importer of record (IOR) choose to transmit the records via electronic means over e-mail or using a secure file sharing service such as Accellion.
  - b. **Ten business days** from receipt of the Audit notification if the auditee, IFTP Holder or IOR choose to transmit the records via secured shipping such as UPS, FedEx or U.S. Post Office.
3. NMFS auditors will review submitted records and information for completeness. If the chain of custody documentation is incomplete, NMFS will send a follow-up request for supplemental records to the auditee, specifying key points in the supply chain where records are missing.
4. NMFS auditors will verify the adequacy and accuracy of traceability records and information provided.
5. NMFS will attempt to conclude audits within 30 days of receipt of records. Following the completion of an audit, importers of record will receive a letter describing the outcome of the audit.

Failure to provide requested documents will result in a referral to the Office of Law Enforcement.

## FREQUENTLY ASKED QUESTIONS

### *SIMP AUDIT PROCESS*

***Q: Will auditing always be post shipment?***

A: No, per 50 CFR 300.324(d) , “[i]mport shipments of fish or fish products subject to this program may be selected for inspection and/or the information or records supporting entry may be selected for audit, on a pre- or post-release basis, in order to verify the information submitted at entry.” However, at this time, NMFS is focused on conducting audits after the shipment has entered U.S. commerce.

***Q: Why was my entry selected for audit?***

A: SIMP entries may be subject to both random and targeted audits.

***Q: Who will be contacted for an audit, and how are they notified?***

A: The holder of the International Fisheries Trade Permit (IFTP) will be contacted by a NMFS auditor via email from [SIMP.audits@noaa.gov](mailto:SIMP.audits@noaa.gov), using the contact information in the NOAA Fisheries Permits Database. It is important that the IFTP holder’s contact information be current, as this is used to contact importers for an audit. IFTP holders must report any changes in the contact information provided in their permit application within 15 days after such change; if a change in permit information is not reported within 30 days, the permit is void as of the 30th day after such change.(50 CFR §300.322(k)). Contact information can be updated through the [NOAA Fisheries Permits website](#). IFTP holders should add the [SIMP.audits@noaa.gov](mailto:SIMP.audits@noaa.gov) email address to their email contact lists to prevent accidental discard or diversion of audit notifications and correspondence.

***Q: Who is responsible for providing chain of custody records and information to NMFS auditors?***

A: Based on the SIMP Final Rule, the auditee is responsible for making chain of custody records available for inspection, including to support an audit.

***Q: What is the time frame for providing the chain of custody records to the auditors?***

A: Chain of custody records must be retained in electronic or paper format, and made available for inspection at the importer’s place of business for a period of two years from the date of import. For the purposes of conducting audits, NMFS currently requests to receive electronic records provided within 5 days of notification, and hard copy records within 10 days of notification.

***Q: Will the auditors be on-site? Or can the auditors conduct the audit remotely?***

A: Records must be made available for immediate inspection at the importer’s place of business upon request. In addition, NMFS conducts SIMP audits as remote records reviews for which the auditor does not need to be on-site at your facility. The instructions for providing digital records within five days and hard copy records within ten days applies to remote record review audits.

***Q: How and when will I know the result of an audit?***

A: In most cases, auditees will receive notification of the results of an audit within 30 days of submission of chain of custody records to NMFS.

#### HARMONIZED TARIFF CODES

**Q: If I am importing a species that is not subject to SIMP but filed under a Harmonized Tariff Schedule code that includes species that are subject to SIMP, could my entry be subject to an audit?**

A: If an entry of a product under an HTS code covered by SIMP includes a species code that is not subject to the full SIMP message set in ITDS, it is also not subject to the recordkeeping requirements of SIMP and would therefore not be selected for audit.

**Q: If I am importing a species that is subject to SIMP but filed under a Harmonized Tariff Schedule code that is not subject to SIMP, could my entry be subject to an audit?**

A: Importers are required to use the most specifically descriptive Harmonized Tariff Schedule code available for any given entry; importers cannot legally circumvent SIMP requirements by using a non-descript harmonized Tariff Schedule code. If an entry includes a species that is subject to SIMP, but the HTS code is not subject to the reporting and recordkeeping requirements of SIMP (such as for highly processed products), the entry is not subject to SIMP and would therefore not be selected for audit.

**Q: How do I choose a Harmonized Tariff Schedule code?**

A: Under the Tariff Act of 1930, importers must use "reasonable care" in filing entries under the most accurate Harmonized Tariff Schedule code that reflects the product (19 U.S.C. § 1484(a)). If you have a question regarding selection of Harmonized Tariff Schedule codes, including the criteria for establishing exercise of reasonable care, please contact your U.S. Customs and Border Protection client representative.

**Q: Do all species subject to SIMP that I am importing under a single Harmonized Tariff Schedule code need to be listed in entry filing?**

A: Yes, all species imported under a single Harmonized Tariff Schedule Code in an entry filing should be indicated in the PGA message set, and this information will be verified in the event of an audit.

#### CHAIN OF CUSTODY RECORDS

**Q: Which records are required for the chain of custody records?**

A: Chain of custody records must include documentation of all points in the supply chain of the seafood product, from point of harvest to entry into U.S. commerce (e.g., harvest, transshipment, landing, processing, storage, distribution, export/re-export, and changes in custody. NMFS does not prescribe what specific records are required because supply chains vary depending on a variety of factors including fishery, product type, country of origin and producer. NMFS requires records sufficient to trace each step from entry into U.S. commerce back to the harvest or production event. Chain of custody records could include vessel product declarations, transshipment records, bills of lading, records on processing, reprocessing, and co-mingling, changes in product ownership, and changes in product location including storage, export/re-export and re-packaging.

**Q: Are quality control records required as part of the SIMP chain of custody?**

A: Quality control records such as those for health, temperature storage, and heavy metals test results may be provided as a component of a complete supply chain record, but are usually not required to trace seafood from the point of harvest to entry into U.S. commerce.

**Q: Are electronic or scanned copies of chain of custody records acceptable, or are original hard copies required by NOAA for a SIMP audit?**

A: Under SIMP, required records may be in electronic or paper format. A SIMP audit does not require

original records as long as the paper or electronic (digital) copies of the chain of custody records are clear and legible.

***Q: For electronic traceability systems - for example, software that tracks lot shipments from farm to plant and from plant to importer - would NOAA accept the electronic transaction information as sufficient (provided of course that the SIMP information is present), or is NOAA requiring records such as a .pdf or invoice?***

A: Yes, electronic transaction information would be sufficient provided that the information required under SIMP is present and verifiable.

***Q: Some of my chain of custody hard copy records are required by a foreign government, so I do not have access to them. What can I provide that will meet the SIMP audit requirements?***

A: As stated above, records required under SIMP may be in paper or electronic format and original records are not required for an audit. You should make and retain a copy of all required records prior to submitting the originals to a foreign government. NOAA may work with foreign governments and international organizations to verify traceability information provided to NMFS.

***Q: Do suppliers need to be approved by the Food and Drug Administration (FDA)?***

A: NMFS does not require approved supplier lists, such as those provided by foreign government inspection authorities, of processors of fish and fishery products that, according to those authorities, are in good standing and are meeting the requirements of the FDA seafood Hazard Analysis Critical Control Point (HACCP) regulations as chain of custody records for SIMP. However, these documents may be provided as a component of a complete supply chain records.

***Q: What if the chain of custody records I can provide are not in English? Who is responsible for translating the records?***

A: NMFS will translate records into English if needed, however it is the responsibility of the auditee to explain how and to what extent the record describes a link in the chain of custody.

***Q: How should I submit sensitive business information for an audit?***

A: The data and records relating to the audit involving confidential and proprietary information will be transmitted, accessed, and stored by NMFS in accordance with applicable federal law, including the Magnuson-Stevens Fishery Conservation and Management Act and the Privacy Act, as well as current U.S. Department of Commerce policy on protection of Personally Identifiable Information (PII) and Business Identifiable Information (BII). The process of secured transmission of the requested records for SIMP's audit will be advised to the auditee at the time of the audit notification.

***Q: Are documents that have been modified or edited (e.g., through the use of white-out, or crossing out of data) acceptable chain of custody records for SIMP?***

A: NMFS will seek to verify the information provided in chain of custody records, whether visibly edited or not. Regardless of edits made, if the information in a document is accurate and verifiable the record is acceptable. Business information that is not relevant to SIMP (e.g. prices) may be redacted from records provided to NMFS.

***Q: What if I, as an auditee, am not privy to the sensitive business information from other companies in the supply chain?***

A: SIMP is intended to ensure that importers of record are able to verify the legal origin of the products they are importing. This would require some degree of access to information describing each step in the chain of custody by the importer.

**Q: What records are required of production during processing (e.g., soaking, peeling, cooking)?**

A: Processing records and information must be provided to explain changes in custody, product form, and differences between received and final product weight during processing.

*RECORDS ASSOCIATED WITH HARVEST AND LANDING*

**Q: What different chain of custody records will I need for small harvester vessels vs. large harvester vessels?**

A: The data elements reported at the time of entry filing through ACE will serve as records that NMFS will use to verify harvest and landing if an entry is selected for audit, regardless of vessel size. In all cases, chain of custody records beyond harvest and landing to the point of entry into U.S. commerce are required.

**Q: If the harvest vessel is registered under a Regional Fisheries Management Organization (RFMO) and we access information related to the vessel's authorization directly from the RFMO's website, will this information satisfy the SIMP requirement or do we have to keep the fishing license of each vessel we purchase fish from on file?**

A: Information obtained from the RFMO's website will suffice, as long as the verification information includes name of the vessel, fishing gear or method, type of fish, validity, flag state, and vessel registration number, but that information needs to be retained by the IFTP holder.

**Q: Some catch log books and observer reports are directly sent by the vessel owner and observer to a Regional Fisheries Management Organization (RFMO) and it is not current practice for the vessel owner to provide the auditee/importer/buyer with this information. Is it mandatory that the auditee have these specific records on file for a SIMP audit, or is there any other records sufficient to prove the catch is not IUU?**

A: SIMP does not required retention of any specific records, but does required retention of records sufficient to document the chain of custody. NOAA Fisheries would first attempt to verify harvest and lading information provided to NMFS through the entry filing message set. In verifying entry information, NMFS may engage external parties, including RFMOs, concerning the details and legality of the harvest events reported. In addition, records a vessel owner may have such as Captains' statements may include traceability information that could also be used to verify harvest events and could be requested of the auditee as needed.

**Q. Is cold storage considered a "custodian" or "owner" of the product and will they then have to supply SIMP related transactional data?**

A. Cold storage would be considered to be a custodian of the product so the auditee would need to retain and provide chain of custody records such as receiving, storage, and shipping records under the SIMP Rule.

**Q: For fish which is stored in a cold storage facility then transferred to a carrier vessel or refrigerated container to the final destination, will a receipt from the cold storage or declaration of transfer letter or self-certified letter of fish transfer from the cold storage to the shipper be sufficient to satisfy SIMP audit requirements?**

A: Receipts from cold storage that list the amount that is received and transferred are acceptable. However, the Bill of Lading issued by the shipping company or the carrier vessel would also be required as one of the chain of custody records.

**Q: For tuna, why can't the SIMP auditors look at and get all the information from the Tuna Tracking & Verification records that are uploaded into ITDS?**

A: Traceability information provided to NMFS through other trade monitoring programs may serve as records. The NOAA 370 Form may provide the following information about the harvest event: harvest weight, catch area, fishing gear, flag vessel, vessel names, and landing dates; as well as some chain of custody information such as the name of the exporter and importer.

***Q: Will auditors ask for documentation of small-scale harvest events?***

A: Given provisions for small-scale fisheries under SIMP, NMFS will not ask for a record verifying the details and legality of individual small-scale harvests, but auditors will ask for records beginning at the point of aggregation, which may include records of deliveries or sale from the aggregator to a processor or shipper listing the products harvested.

***Q: When reporting small scale vessel harvests, is an importer expected to demonstrate that all harvesting vessels were less than 20 meters in length?***

The regulations establishing SIMP exempt an importer from the requirement to individually identify harvesting vessels for a given import if the importer provides other required data elements based on an aggregated harvest report. An aggregated harvest report can be used for: (1) harvests at a single collection point in a single calendar day from small-scale vessels (i.e., twelve meters in length or less or 20 gross tons or less); (2) landing by a vessel to which catches of small-scale vessels were made at sea. The importer must provide records sufficient for NMFS to verify that all aggregated harvest events were conducted by small scale vessels.

*POST-AUDIT*

***Q: What enforcement actions could be taken if there are issues with the completeness or accuracy of the chain of custody records I provided to NMFS?***

A: Noncompliance with the permitting, reporting or recordkeeping requirements of SIMP constitutes a violation of the Magnuson-Stevens Fishery Conservation and Management Act and is subject to enforcement action. The Magnuson Act authorizes monetary penalties and permit sanctions for violations of the Act and its implementing regulations; the action that might be taken in any particular case will depend on a number of factors including the nature and gravity of the violation and the violator's degree of culpability and history of prior violations. More information about NOAA enforcement actions, including the NOAA Penalty Policy, is available on the NOAA Office of General Counsel Enforcement Section website: <http://www.gc.noaa.gov/enforce-office.html>.

***Q: If a SIMP audit results in a finding that my import shipment contained illegal seafood; will NMFS provide me with the finding so that I can address the issue?***

A: NMFS will provide the auditee with the finding. The information will also be referred to the NOAA Fisheries Office of Law Enforcement for further action, as appropriate.

**RESOURCES**

This guide as well as a wealth of additional information regarding the Seafood Import Monitoring Program is available online at [www.iuufishing.noaa.gov](http://www.iuufishing.noaa.gov).

The SIMP requirements are codified at 50 CFR 300.320-300.325. If there is a discrepancy between the information provided in the Guidance and the regulations, the regulations take precedence.

*CONTACT US*

Technical support and general questions regarding compliance can be directed to SIMP Support:

Email: [SIMPsupport@noaa.gov](mailto:SIMPsupport@noaa.gov)

Phone: TOLL: 301-427-8301 TOLL FREE (US and Canada): 833-440-6599

Other questions or feedback may be directed to Celeste Leroux, NOAA Fisheries Office of International Affairs and Seafood Inspection at [Celeste.Leroux@noaa.gov](mailto:Celeste.Leroux@noaa.gov)

Attachment C

## History of Fisheries Removed from the List of Fisheries (LOF)

### Pacific

#### **Oregon swordfish floating longline and Oregon blue shark floating longline**

- Removed in 2008 LOF.
- The Pacific Highly Migratory Species (HMS) Fisheries Management Plan and Endangered Species Act regulations prohibit the use of longline gear to target HMS species in the U.S. Pacific EEZ and prohibit the use of shallow-set longline gear outside the U.S. Pacific EEZ. As a result, the State of Oregon no longer issues development permits for these fisheries.

#### **WA, OR herring, smelt, shad, sturgeon, bottom fish, mullet, perch, rockfish gillnet**

- Removed in 2016 LOF.
- This fishery was removed because gillnets are not legal for any ocean fishing off of Washington and Oregon.

#### **WA herring brush weir**

- Removed in 2015 LOF.
- This fishery was removed because brush weirs have not been used in the herring fishery since 1994. The brush weir, a type of marine impoundment or fish trap, was defined as a gear type for herring harvest by the Washington Department of Fish and Wildlife in 1973, but was removed from the Department's list of lawful gear types for use in the herring fishery in 1994.

### **CA abalone**

- Removed in 2015 LOF.
- This fishery was listed as a Category III, however, this fishery is not a commercial fishery. Although there is a limited recreational fishery for abalone, it is illegal to harvest wild abalone for commercial sale anywhere in California.

### Atlantic, Gulf of Mexico

#### **U.S. Atlantic large pelagics pair trawl (a.k.a. Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics pair Trawl)**

- Removed in 1997 LOF.
- Removed in 1997 because this fishery has not been authorized under Atlantic Tunas Convention Act.

**Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics drift gillnet**

- Removed in 2001 LOF.
- NMFS regulations prohibit the use of this drift gillnets for the swordfish and tuna fishery.

**Southeastern U.S. Atlantic coastal gillnet**

- Removed in 1997 LOF.
- The Southeastern U.S. Atlantic coastal gillnet fisheries no longer occur south of North Carolina due to state gillnet bans.