



April 12, 2016

Mr. Mark Wildman
Office for International Affairs and Seafood Inspection
NOAA Fisheries
1315 East-West Highway
Silver Spring, MD 20910

**RE: Proposed Implementation of the Seafood Import Monitoring Program,
NOAA-NMFS-2015-0122**

Dear Mr. Wildman,

Please accept the following comments on behalf of the Natural Resources Defense Council (“NRDC”), regarding the proposed rule to implement the Seafood Import Monitoring Program, 81 Fed. Reg. 6210 (Feb. 5, 2016), (“Proposed Rule”).

We applaud NOAA for issuing the proposed rule to implement a seafood traceability program in order to provide another line of defense against Illegal, Unregulated, and Unreported (“IUU”) fishing. The proposed rule establishes filing and recordkeeping procedures related to the importation of certain fish and fish products. NOAA bases the proposed rule on Section 307(1)(Q) of the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”) which, among other things, makes it unlawful for a person to import, sell, or purchase in interstate or foreign commerce fish taken, transported or sold in violation of any foreign law or regulation.¹

The Proposed Rule establishes a necessary system of reporting and a centralized database for collection of critical information in the fight against IUU fishing. The reported information under this regulation will help document that a covered shipment was indeed caught in a legal fishery and was properly identified at the point of import.²

¹ Under § 307 Prohibited Acts of the MSA, “It is unlawful -- (1) for any person -- (Q) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish taken, possessed, transported, or sold in violation of any foreign law or regulation.” Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857 (2015).

² The Proposed Rule outlines traceability requirements for “at risk” seafood from the catch location or farm to the first point of entry into U.S. commerce. These “at risk” species were selected using a variety of risk-based principles. The key data inputs proposed by the rule includes where the seafood was caught, what gear was used, the scientific name of the species, the name of the farm or aquaculture facility (if applicable), and unique vessel identifiers (if available).

However, as detailed below, the Proposed Rule should be strengthened in certain regards to provide a more comprehensive program that would enable a thorough deterrence of IUU fishing and more faithfully follow the recommendations of the Presidential Task Force Action Plan of March 15, 2015.

IUU fishing has ballooned into a major international issue causing massive global economic losses and threatening the viability of many oceanic species. It is estimated that around 20% of wild landings each year are either illegal or unreported.³ “Preventing illegal activities is squarely in the self-interest of most fishing nations.”⁴ Indeed, President Obama declared it in the interests of the United States to promote a framework “that supports sustainable fishing practices and combats seafood fraud and the sale of IUU fishing products.”⁵

IUU fishing constitutes a large international threat not only to the natural environment, but also to the economic viability of the fishing industry worldwide. It is estimated that IUU fishing comprises an economic loss in the range of \$10-24 billion annually.⁶ Undetected and illegal fishing “leads to poor and ineffective management decisions” and “hinders efforts to protect” vulnerable species.⁷ Prevalence of IUU fishing can lead to decision-makers acting on inaccurate data regarding catch locations and population viability of certain heavily-harvested species, among other things. Inevitably, these decision-makers then implement faulty fisheries policies based on that information. Reducing IUU fishing will result in more effective and sustainable fisheries management plans, ensuring that wild species recover and thrive in the world’s oceans.⁸ Furthermore, introduction of IUU fishing products into the markets can distort prices and undermine fair competition among legal fishermen, leading to a system incentivizing cheating.⁹ IUU fishing has also been linked to drug smuggling and human trafficking, a natural by-product of evading regulatory policies.¹⁰ Curtailment of IUU fishing would have a positive effect on the entire maritime economic landscape. It is imperative that NOAA establish an efficient method of ensuring entry of only legally caught products into the United States markets in order to reduce both the environmental and economic impacts of this pervasive IUU problem.

On June 17, 2014 President Obama released a memorandum entitled “Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud” and commissioned a task force to examine the ballooning IUU fishing program.¹¹ The task force

³ Bernd Cordes, et al., *ILLEGAL, UNREPORTED AND UNREGULATED (IUU) FISHING: A WHITEPAPER 3* (Packard Foundation) (2015); *see also* World Wildlife Fund, *ILLEGAL FISHING: WHICH FISH SPECIES ARE AT HIGHEST RISK FROM ILLEGAL AND UNREPORTED FISHING*, (October 2015) [hereinafter “*ILLEGAL FISHING*”] (stating that the range for these numbers are 13-31% and \$10-23 billion respectively).

⁴ *Id.* at 4.

⁵ THE WHITE HOUSE, *PRESIDENTIAL MEMORANDUM -- COMPREHENSIVE FRAMEWORK TO COMBAT ILLEGAL, UNREPORTED, AND UNREGULATED FISHING AND SEAFOOD FRAUD* (Jun. 17, 2014) [hereinafter “*PRESIDENTIAL MEMORANDUM*”]

⁶ Cordes at 3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 4; *ILLEGAL FISHING* at 4.

¹⁰ *ILLEGAL FISHING* at 4.

¹¹ *PRESIDENTIAL MEMORANDUM*

issued its recommendations on December 18, 2014,¹² followed by a publication of the Task Force Action Plan on March 15, 2015.¹³ The Action Plan consisted of fifteen recommendations, each assigned to certain agencies for their timely implementation. Recommendations 14 and 15 address implementation of a seafood traceability program and constitute the impetus for the current rulemaking.¹⁴

Despite the progress made by NOAA and NMFS in proposing this rule, NRDC has identified several areas for improvement that should be addressed and included in the final rule. On behalf of our members and supporters, we encourage you to finalize a strengthened version of the Proposed Rule to prevent illegally caught and fraudulent seafood from entering the U.S. market.

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I. Concerns and Recommendations

A. Comprehensiveness of Species List

The proposed rule suffers from a serious flaw in that it only applies to a limited list of “at risk” species of fish. The rule applies to only sixteen distinct species upon their import to U.S. markets. In order to fully stop seafood fraud and IUU fishing, the reporting and recordkeeping requirements should apply to all seafood types. The final rule should include a firm commitment and specific timeline to expand the program implemented under Phase 1 to all seafood species.

The sixteen covered species are not the only “at risk” species, and even a short-term exemption of other species may lead to large loopholes enabling regulatory evasion. Recent analysis suggests that 86% of the number of global fish stocks is at risk for IUU fishing.¹⁵ Furthermore, 57% of the volume of global catch is at high risk for IUU fishing and 30% of the volume of the

¹² *Presidential Initiative on Combating Illegal, Unreported, and Unregulated Fishing (IUU) Fishing and Seafood Fraud*, NOAA FISHERIES (last visited Apr. 1, 2016), <http://www.nmfs.noaa.gov/ia/iuu/taskforce.html>, [hereinafter “Presidential Initiative”].

¹² *Id.*

Id.

¹³ PRESIDENTIAL TASK FORCE ON COMBATING IUU FISHING AND SEAFOOD FRAUD, ACTION PLAN FOR IMPLEMENTING THE TASK FORCE RECOMMENDATIONS (2015) available at http://www.nmfs.noaa.gov/ia/iuu/noaa_taskforce_report_final.pdf.

¹⁴ *Id.* at 36-9. Recommendation 14 reads, “[d]irect the Task Force, with input from U.S. industry and other stakeholders, to identify and develop within six months a list of the types of information and operational standards needed for an effective seafood traceability program to combat seafood fraud and IUU seafood in U.S. commerce.”¹⁴ Recommendation 15 reads, “[d]irect the Task Force to establish within 18 months, the first phase of a risk-based traceability program to track seafood from point of harvest to entry into U.S. commerce.”¹⁴ NOAA has begun to carry out these recommendations through notice and comment rulemaking, as a list of risk-based species was compiled which will provide the basis for the first phase of the traceability program contemplated in this Proposed Rule.

¹⁵ ILLEGAL FISHING at 4.

global catch is at moderate risk of IUU fishing.¹⁶ The absence of coverage by the Proposed Rule of many additional “at risk” species will allow for the pervasive problem of species substitution to continue. By not requiring reporting for all species, the program may intensify the problem of mislabeling and misidentifying the identity of certain species of fish.

Squid is an example of an “at risk” species that should have been included. A key principle used to determine whether a species is “at risk” is “History of Violations,” particularly, “the history of violations of fisheries laws and regulations in the United States and abroad for a species, particularly those related to IUU fishing.”¹⁷

A 2014 study examined data from the top ten seafood exporting countries to the U.S.¹⁸ First, a determination of each country’s top three species of wild-caught US exports was sought. Of the top ten countries, four of them had squid as a top three species export. India’s largest seafood export to the United States was squid at 5,506 tons. Squid is the second largest seafood export to the US from Thailand and Chile. And finally, squid is China’s third largest seafood export to U.S with an annual export of 38,786 tons. From just these four countries combined, squid exports represent over \$200 million in market value. The proportion of the sizeable volume of squid imports to the U.S. that is likely the result of IUU fishing is distressing. In the same study, it was estimated that squid from India has a 20-35% chance of originating from an IUU catch. Chile and Thailand also have significant risks of IUU origin associated with their squid exports, with percentage ranges of 10-20% and 15-30%, respectively. It was estimated that from China, 10-15% of squid exports come from IUU catches. An additional study from 2009, found squid and similar species to be the eighth most likely species group to come from an IUU catch.¹⁹ Interestingly enough, according to this study, squid have an overall higher likelihood of being IUU than crabs and billfish, both of which have representation on the “at-risk” species list. Without reporting requirements for squid, very little is being done to curtail the massive amounts of IUU squid imports inevitably entering the U.S. every year.²⁰

Additionally, mislabeling is a principle used to determine “at risk” species. Implicating the prevalence of seafood fraud and misleading labeling, this principle focuses on, among other things, “misrepresentation related to the country of origin.”²¹ According to one 2014 study, each year, 90% of the 230 million pounds of California squid is exported to China for processing and re-imported to the United States, often under “Product of China” labels.²² This not only creates a misperception among American consumers, but can add to confusion and complications in the supply chain.²³ The NRDC urges NOAA to add squid, or specific species of squid, to the “at

¹⁶ ILLEGAL FISHING at 4.

¹⁷ 80 Fed. Reg. 66,867.

¹⁸ Ganapathiraju Pramod, et al., *Estimates of illegal and unreported fish in seafood imports to the USA*, 48 Marine Policy 105-6 (2014).

¹⁹ David Agnew, et al., *Estimating the Worldwide Extent of Illegal Fishing*, 4 PLOS ONE e4570 (2009).

²⁰ Furthermore, many of the other seafood species listed in the countries’ top exports are included in the list of at-risk species to be required to report information under Phase 1 of this Proposed Rule.

²¹ 80 Fed. Reg. 66,867.

²² Paul Greenberg, *The Long Journey of ‘local’ seafood to your plate*, Los Angeles Times (Jul. 11, 2014) (available at <http://www.latimes.com/nation/la-oe-greenberg-squid-seafood-20140713-story.html>).

²³ This sort of supply chain complication also implicates another key principle used to determine “at risk” species: “Complexity of Chain of Custody and Processing.” 80 Fed. Reg. 66,867.

risk” list that will be subject to the reporting requirements under Phase 1 of the Seafood Import Monitoring Program.

Misidentifying and mislabeling seafood is a persistent problem in the industry. In a recent *Boston Globe* review of seafood fraud, it was found that 87 of the 183 fish sold in restaurants were mislabeled or misidentified, representing almost 50% of all the fish surveyed.²⁴ According to *Consumer Reports*, it is difficult to determine where the misidentification originates. Once a fish is filleted, it is often difficult to determine with any certainty the actual species. Often fish are processed or mixed with other species to a certain degree prior to import, allowing for potential misidentification, either accidentally or as an attempt to evade regulatory measures covering a certain species.²⁵ Without a program covering all species of seafood, it is likely that some actors will continue to evade the regulations in place on “at risk” species through mislabeling or misidentification. To fully address IUU fishing and seafood fraud, the final rule should commit to a timely expansion of the program to cover all species of fish.

B. Exemption of Highly-Processed Products

In order to provide a comprehensive program to battle IUU fishing and seafood fraud, NOAA should require informational reporting for *all* seafood products and not categorically exclude “highly processed fish products.” The Proposed Rule states that “[d]ata required to be reported and retained under this program is not required for HTS codes applicable to fish oil, slurry, sauces, sticks, balls, cakes, pudding and other similar highly processed products for which the species of fish comprising the product or the harvesting event(s) or aquaculture operation(s) of the shipment of the product cannot currently be feasibly identified.”²⁶ Under the Proposed Rule, products categorized as highly processed seafood, including such popular products such as fish sticks, are exempted from the reporting requirements. What is the justification for categorizing such products as “highly processed”?

NRDC takes issue with this exemption and requests further explanation. First, what is NOAA’s definition of “highly-processed?” For example, why are fish sticks considered highly processed? What is the defining feature, and how was this feature determined to exempt the product from reporting obligations? Further, what efforts were made to refine this definition of “highly-processed” so as to not exempt a wide-ranging variety of popular seafood products? Highly-processed fish products represent a continued threat of seafood fraud in the U.S.,²⁷ and the final rule should require reporting obligations for these products as well.

NRDC recognizes some of the issues associated with requiring reporting of highly processed fish products, but believes that a comprehensive traceability program is the only way to fully combat ongoing IUU fishing and seafood fraud. Even industry has stated, “tools are needed to allow a

²⁴ Jen Abelsen and Beth Daley, *On the menu, but not on your plate*, BOSTON GLOBE (Oct. 23, 2011) http://archive.boston.com/business/articles/2011/10/23/on_the_menu_but_not_on_your_plate/.

²⁵ *Mystery Fish*, CONSUMER REPORTS MAGAZINE (Dec. 2011) available at <http://www.consumerreports.org/cro/magazine-archive/2011/december/food/fake-fish/overview/index.htm>.

²⁶ 81 Fed. Reg. 6210, 6222.

²⁷ See Shadi Shokralla, et al., *A DNA Mini-Barcoding System for Authentication of Processed Fish Products*, 5 SCIENTIFIC REPORTS 15894 (Oct. 30, 2015), <http://www.nature.com/articles/srep15894>.

quick, reliable and economic identification of highly processed fishery products at markets.”²⁸ Exempting highly-processed products allows IUU seafood to enter into U.S. markets free of any reporting requirements, perpetuating the global problem.

C. Vagueness of Location Reporting

The proposed rule should be amended to clarify exactly what information is required regarding the location of seafood catches. The proposed rule simply states that it will require “[i]nformation on where and when the fish were harvested and located.” This vague requirement should be refined and require a specific global location for where the seafood was first caught. It is conceivable that the proposed reporting requirement would be satisfied by simply listing a Food and Agriculture Organization (“FAO”) Area. FAO areas are simply too large to provide meaningful and useful information for the fight against IUU fishing. Some FAO areas comprise entire quadrants of oceans. For example, FAO Area 31 comprises almost the entire Southeast North Atlantic Ocean, from North Carolina to Brazil and from Mexico to Bermuda.²⁹ FAO Area 51 comprises the entire Western Indian Ocean.³⁰ The final rule should put forth a more stringent requirement for locational reporting. EU policies regarding the reporting of catch locations require a longitude/latitude coordinate: a one by one degree area.³¹ This area, though still rather large, is much smaller and defined than FAO areas and should be considered as a requirement in the final rule.

D. Reporting of Transshipments

The final rule should address the issue of transshipments more thoroughly and require that all transshipments along the supply chain to U.S. market entry be actively reported. The Proposed Rule would only require that “additional information on each point in the chain of custody regarding the shipment of fish or fish product to point of entry into U.S. commerce” (otherwise known as transshipments) be maintained by the importer of record and be made available to NMFS upon request.³² The information should be “sufficient for NMFS to conduct a trace back to verify the veracity of the information reported on entry.”³³ The Proposed Rule states that due to technological limitations, the importer of record must maintain this information for five years, but NOAA will not at this time impose an obligation to report this information upon entry.³⁴

Transshipments present yet another opportunity for illicit and unreported fishing to go undetected. According to one report, transshipments are “in many instances carried out illegally or without any permission.”³⁵ Whether authorized or not, transshipments often “facilitate the

²⁸ FAO, FISH IDENTIFICATION TOOLS FOR BIODIVERSITY AND FISHERIES ASSESSMENTS 9 (Joanne Fischer, ed.) (2013) available at <http://www.fao.org/3/a-i3354e.pdf>.

²⁹ ILLEGAL FISHING.

³⁰ ILLEGAL FISHING.

³¹ Commission Implementing Regulation (EU) 2015/1962 (Oct. 28, 2015) (amending Implementing Regulation (EU) No. 404/2011).

³² 81 Fed. Reg. 6210, 6216.

³³ *Id.*

³⁴ *Id.*

³⁵ ENVIRONMENTAL JUSTICE FOUNDATION, TRANSSHIPMENT AT SEA, THE NEED FOR A BAN IN WEST AFRICA (2013) available at http://ejfoundation.org/sites/default/files/public/ejf_transshipments_at_sea_web_0.pdf.

laundering of IUU fish due to the inability of coastal and flag state authorities to monitor how, by whom and where transferred fish was caught.”³⁶ Organizations have called for banning transshipments in certain high-risk IUU areas.³⁷

NOAA recognizes the conservation value of reporting this information; stating that it will within one year of the final rule, identify key chain-of-custody information to be included in the real-time reporting requirements. NRDC urges NOAA to include an obligatory reporting requirement of all chain-of-custody transfers and shipments in the final rule. At minimum, NRDC urges the agencies to include in the final rule a specific and firm commitment to a timeline for requiring real-time transshipment reporting within one year from the anticipated publication of this rule. NRDC requests that the agencies provide the specific steps that will be taken within that year to overcome the technological limitations involved in requiring real-time transshipment reporting.

E. Full Chain Traceability/Consumer Information

In order to implement a comprehensive traceability program, NOAA should extend the Seafood Import Monitoring Program beyond the point of first entry into U.S. markets. Seafood fraud is pervasive throughout all levels of the global supply chain. Domestically, seafood fraud continues to be a pressing issue. In Newport News, Virginia, Atlantic blue crab was mixed with inexpensive imported crustaceans and yet marketed as a U.S. product.³⁸ Also, in Brownsville, TX, 35,000 lbs. of Mexican shrimp was confiscated for removing “Product of Mexico” labels and attaching U.S.-caught labels.³⁹ These types of fraud could still occur despite the finalization of this proposed rule since they are happening in later stages in the supply chain after initial import.

NOAA states that the MSA is not the ideal statute to address seafood fraud in the supply chain after initial import, but NOAA should explore using provisions of the Lacey Act to implement a more expansive traceability program. Lacey Act §3372(b) states:

[i]t is unlawful for any person to import, export, or transport in interstate commerce any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labeled, or tagged in accordance with the regulations issued pursuant to paragraph (2) of section 3376(a) of this title.⁴⁰

Paragraph (2) of §3376 gives administration of the Lacey Act to the Secretary of Interior or Commerce, thus allowing NOAA to promulgate regulations addressing the pervasive mislabeling and traceability issues further down the supply chain.⁴¹ The final rule should include a plan to

³⁶ *Id.*

³⁷ *Id.* at 3.

³⁸ *Feds investigating Casey’s Seafood on mixing blue crab with imports*, DAILY PRESS (Mar. 23, 2016) <http://www.dailypress.com/news/crime/dp-nws-federal-charges-peninsula-20150627-story.html>.

³⁹ Press Release: Texas Company Sentenced for Mislabeling Mexican Shrimp as Caught in United States Waters, U.S. DEP’T OF JUSTICE (Sept. 24, 2015) *available at* <https://www.justice.gov/usao-edla/pr/texas-company-sentenced-mislabeling-mexican-shrimp-caught-united-states-waters>.

⁴⁰ Lacey Act, 16 U.S.C. § 3372.

⁴¹ *See* Lacey Act, 16 U.S.C. § 3376.

expand traceability throughout all levels of the supply chain, for we need a fully transparent, traceable system to ensure that we are eating legal and ethically-caught seafood.

Finally, the final rule should include a requirement that ensures comprehensive and detailed information is provided to consumers at the point of purchase. Seafood fraud is not limited to imported seafood. The U.S. should have enhanced seafood transparency all the way from boat to plate. Consumers have the right to know that the seafood they are buying is legal, ethically caught, and honestly labeled. Similarly, the Lacey Act provides authorization for rules regulating this supply chain issue.⁴²

* * *

In conclusion, we strongly urge NOAA to strengthen the Seafood Import Monitoring Program. Though certainly a step in the right direction in fighting IUU fishing, the Program could be much stronger in some respects—specifically by expanding the program to cover all seafood species, subjecting highly-processed fish products to the reporting requirements, defining in more specific and useful terms the location reporting requirements, requiring the reporting of transshipments along the entire chain of custody, and expanding the traceability program to the entire supply chain. A traceability program, when coupled with other actions under the Task Force Action Plan, will provide a defense against global IUU fishing and seafood fraud and can help to create models for other nations that wish to address these pervasive problems at both the domestic and global level. NOAA and NMFS should strengthen the Seafood Import Monitoring Program so as to make this defense as formidable as possible.

Thank you for considering our comments, and please do not hesitate to contact us if you have any questions.

Sincerely,



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⁴² See Lacey Act, 16 U.S.C. § 3371-8.