EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

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VIA E-MAIL and REGULATIONS.GOV

National Marine Fisheries Service
Office of International Affairs, Trade, and Commerce
Attn: Christopher Rogers
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Silver Spring, MD 20910
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RE: Response to Request for Comments, NOAA-NMFS-2016-0164, Implementation of Provisions of the Illegal, Unreported, and Unregulated Fishing Enforcement Act of 2015 and the Ensuring Access to Pacific Fisheries Act

Dear Mr. Rogers,

Earthjustice submits these comments in response to the National Marine Fisheries Service's ("NMFS") request for public input on amendments to implement certain provisions of the Illegal, Unreported, and Unregulated Fishing Enforcement Act of 2015 and the Ensuring Access to Pacific Fisheries Act, and to amend the definition of illegal, unreported, or unregulated ("IUU") fishing in the regulations that implement the High Seas Driftnet Fishing Moratorium Protection Act ("Moratorium Protection Act" or "Act") ("Proposed Rule"). Earthjustice believes the Act is an important tool for combatting IUU fishing and increasing conservation of sharks and protected living marine resources. This proposed rule provides a sound basis to better achieve the Act's purposes.

In the comments below, we: 1) support the expanded definition of IUU fishing but encourage NMFS to make some important tweaks to strengthen the definition and ensure consistency with the FAO definition; 2) encourage NMFS to align the regulations with the statutory text and the discretion the statute provides during different stages of the listing and certification process; 3) urge NMFS to ensure that the regulations on penalties are in accordance with the statutory text; and 4) encourage NMFS to use this rulemaking opportunity to clarify that a fins naturally attached requirement is an essential component of the U.S. shark regulatory program under the Act.

I. NMFS's expansion of the definition of IUU fishing for purposes of the Moratorium Protection Act is appropriate and will better promote the Act's purposes

We support NMFS's proposal to expand the definition of IUU fishing to include two additional types of fishing activity: 1) fishing activities by one nation's vessels within the exclusive

economic zone ("EEZ") of a second nation that violates the second nation's laws; and 2) fishing activities in areas beyond national jurisdiction that involve the use of forced labor.

A. Defining IUU to Include Fishing in the EEZs of other Nations

We are pleased that NMFS now considers illegal fishing activities within the EEZs of nations as IUU fishing for the purposes of the Moratorium Protection Act. Many nations do not have full capacity to enforce their own fisheries regulations, and this provision allows the United States to support nations whose resources are being plundered by the distant water fleets of other nations.

However, we urge NMFS to remove the phrase "persistent and pervasive" from § 300.201(6) for the following reasons: 1) the phrase is inconsistent with the statutory language as well as the FAO definition of IUU fishing; and 2) the phrase imposes an unnecessary burden at the listing stage that could nullify the inclusion of the definition.

First, the Moratorium Protection Act requires the listing of a nation for a single instance of IUU fishing. According to 16 USC §1826j(a)(1), "[t]]he Secretary **shall** . . . identify and list. . . a nation if **any** fishing vessel of that nation is engaged, or has been engaged at **any** point during the preceding 3 years, in illegal, unreported, or unregulated fishing."[1] The Proposed Rule's requirement that IUU fishing be "persistent and pervasive" suggests that the illegal activity must occur more than once, which conflicts with the statute's clear directive that a single instance of IUU fishing give rise to a listing.

Second, the phrase "persistent and pervasive" does not appear in the FAO definition of IUU fishing.[2] The inclusion of this extra phrase creates an unnecessary inconsistency between the definition in the Moratorium Protection Act, the FAO's definition, and other provisions of U.S. law that have adopted the FAO definition of IUU fishing.[3]

Finally, the phrase "persistent and pervasive" unnecessarily and unlawfully raises the threshold for listing, requiring NMFS to establish a pattern and practice of violations before listing a nation, a much higher burden that is inconsistent with the structure of the Act and the practical reality of collecting fisheries data. The Moratorium Protection Act already constrains the listing of nations to fishing activities that occur within a three-year timeframe, limiting the number of offenses that can give rise to a listing. In practical terms, because of delays in receiving, compiling, and accessing fisheries data and the timing of the biennial report, much less than three years of data is even able for consideration in each listing determination, depending on the fishery. Moreover, fishing violations are difficult to detect, as observer coverage is low in certain fisheries, and fisheries enforcement is often lacking due to resource constraints and the large areas of ocean that require monitoring, even within EEZs. Because of this, governments and fisheries managers are not alerted to every, or even most, fishing violations. Accordingly, an extra requirement to establish a pattern and practice could effectively nullify the inclusion of this

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[1] 16 USC §1826j(a)(1) (emphasis added).
[2] FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unregulated and Unreported Fishing* 2 para. 3.1.1 (2001), https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/2001_ipoa_iuu.pdf.
[3] *See id*.; 16 U.S.C. § 7402(2).

provision, defeating the purpose of amending the regulation. In this context, even one instance of IUU fishing—including only one instance of a nation fishing illegally in a second nation's waters—should give rise to a listing under the Act.

B. Defining IUU fishing to include forced labor

We appreciate NMFS's expansion of the definition of IUU fishing in regulations for the Act which now includes fishing activities in areas beyond national jurisdiction that involve the use of forced labor. IUU fishing is often closely linked with forced labor, as unsustainable fishing practices are usually uneconomical without it. This expansion of the IUU definition acknowledges the crucial link between IUU and forced labor and allows NMFS to identify and certify nations for this pernicious practice. Accordingly, we also encourage NMFS to expand the definition even further to address these unacceptable practices by removing the jurisdictional limitation to the high seas and acknowledging that the use of forced labor in fishing activities constitutes IUU fishing no matter where the fishing takes place.

II. NMFS must ensure that its implementing regulations for the Moratorium Protection Act are consistent with the statutory text

We urge NMFS to take this rulemaking opportunity to align the agency's regulations with the statutory text of the Moratorium Protection Act. The Act sets out a multistage process to identify nations, consult with nations, and certify nations for three types of fishing activity: IUU fishing, the bycatch of protected living marine resources, and shark catch on the high seas.[4] NMFS must publish the results of this process in a biennial report to Congress.[5]

Under the IUU pathway to listing, the statute requires NMFS to list a nation for a *single* vessel's violation of an RFMO management measure if the violation undermines the effectiveness of that measure.[6] Under the shark fishing and protected living marine resources pathways to listing, once catch is established, NMFS need only consider whether the nation has a comparable regulatory program to the United States.[7] The Act's use of the word "shall" at the listing stage, along with the clear requirements for what should give rise to the listing, do not give the agency discretion about when and whether to list a nation.[8]

In contrast, and contrary to the statutory text, NMFS's regulations give the agency wide discretion at the listing stage, stating that when determining whether to list a nation, "NMFS will take into account all relevant matters, including but not limited to the history, nature, circumstances, extent, duration, and gravity of the IUU fishing activity in question…."[9] But these considerations are not relevant. Whether the instance of IUU fishing is long or short, the first violation or part of pattern, particularly egregious or relatively minor is not relevant to the statutory requirement, which very clearly directs NMFS to list nations for a single instance of

[4] 16 U.S.C. §§ 1826j; 1826k.
[5] *Id.*
[6] 16 U.S.C. § 1826j(a)(2)(A).
[7] *Id.* at § 1826k(a).
[8] *Id*. at §§ 1826j; 1826k.
[9] 50 C.F.R. §§ 300.202(a)(2), 300.203(a)(2), 300.204(a)(2).

IUU fishing.[10] By introducing this wide discretion at the listing stage, the regulations unlawfully raise the threshold for identifying and listing nations in the biennial report, which undermines one of the key purposes of the report: to inform Congress about the scope of IUU fishing on our oceans.

The biennial report and the list of nations it contains is not punitive; neither does it carry legal sanctions. Congress and U.S. governmental agencies rely on the report and the list of nations to inform key decisions, including where to effectively distribute international aid to nations struggling to monitor their fisheries, what research programs and technology development or transfer would assist in solving persistent issues, how to craft legislation to fix a particularly egregious problem, or where to engage in discussions relating to initiating and amending or providing resolutions to international agreements, treaties, and bodies. In short, the list of nations is not merely the first step to possible penalties, but rather an informative tool in its own right. The regulations, by introducing a whole host of considerations not found in the Act, improperly raise the threshold for listing and vitiate key purposes of the listing process. The result is an artificially constrained listing process and an inaccurate report that cannot capture the true pervasiveness of IUU on our oceans, which impedes the U.S. government from effectively addressing the issues. [11]

Moreover, the Act explicitly gives NMFS discretion at a later stage in the process, when the agency must positively or negatively certify a nation.[12] At this point—when legal repercussions *do* attach to the agency's determination—the Act provides NMFS with substantial discretion.[13] But NMFS's regulations improperly transpose this discretion from the certification stage to the listing stage.

NMFS should therefore make the following changes to § 300.202(a)(3) of the proposed rule:

> (3) Considerations when making identifications. ~~When determining whether to identify a nation as having fishing vessels engaged in IUU fishing, NMFS will take into account all relevant matters, including but not limited to the history, nature, circumstances, extent, duration, and gravity of the IUU fishing activity in question, and any measures that the nation has implemented to address the IUU fishing activity.~~ NMFS will also take into account whether an international fishery management organization exists with a mandate to regulate the fishery in which the IUU activity in question takes place. If such an organization exists, NMFS will consider whether the relevant international fishery management organization has adopted measures that are effective at addressing the IUU fishing activity in question and, if the nation whose fishing vessels are engaged, or have been engaged, in IUU fishing is a party to, or maintains cooperating status with, the organization. NMFS will also take into account any actions taken or on-going

[10] 16 U.S.C. § 1826j(a)(2)(A).
[11] National Intelligence Council, *Global Implications of Illegal, Unreported, and Unregulated (IUU) Fishing* 3 (Sept. 19, 2016), https://fas.org/irp/nic/fishing.pdf.
[12] *See* Section 1826j(d) allowing NMFS to "establish a procedure" and "determine, on the basis of the procedure" to positively or negatively certify a nation. *See also* Section 1826k(c).
[13] *Id*.

proceedings by the United States and/or flag State to address the IUU fishing activity of concern as well as the effectiveness of such actions. With regard to making identifications under § 300.201(7), NMFS may additionally consider any pertinent documentation provided by other relevant Departments and agencies, including, but not limited to, information provided under § 131 of the Trafficking Victims Protection Reauthorization Act (TVPRA); Withhold Release Orders and Findings issued pursuant to section 307 of the Tariff Act of 1930; ~~and other information on the history, nature, circumstances, extent, duration, and gravity of the activity in question, and any measures that the nation has implemented to address that activity.~~

NMFS should likewise remove § 300.203(b) of the Proposed Rule, as well as § 300.204(a)(2) of the existing regulations.

III. NMFS should align the penalties provisions with the statutory text of the Moratorium Protection Act

The proposed regulatory text improperly limits imposition of import restrictions on fish or fish products to individual vessels, for violations of the protected living marine resources ("PLMR") and shark catch prongs. This conflicts with the statutory text, which allows the Secretary to impose import restrictions on nations as well as individual vessels. The regulations should be amended to conform to the statute.

When a nation is identified and negatively certified under the PLMR or shark catch provisions, the proposed regulations limit the authorization of the President to direct the Secretary to "impose import prohibitions with respect to fish and fish products from those nations; such prohibitions would only apply to fish and fish products caught by the vessels engaged in the relevant activity for which the nation was identified and negatively certified."[14] This directly conflicts with the statutory text which provides that the President "shall direct the Secretary of the Treasury to prohibit the importation into the United States of fish and fish products . . . from that nation."[15]

In addition to conflicting with the statutory text, the limitation that NMFS adds to the proposed regulation is not logical. To negatively certify a nation for PLMR or shark catch, NMFS must first analyze whether that nation's regulatory program is comparable to that of the United States. A listing is thus based on an examination of the systemic fisheries management issues in the nation. It therefore does not make sense to limit the penalties to a singular vessel or vessels, when part of the reason for negatively certifying that nation is the regulatory frameworks that the vessels are operating under and with which they may be in compliance. Thus, under NMFS's unlawful regulations, penalties may be misdirected and may fail to solve the underlying problem. As the language of the proposed regulation is not what Congress intended and does not make practical sense, NMFS should amend the proposed rule to allow for import restrictions on nations which are negatively certified for PLMR bycatch or shark catch.

[14] Proposed Rule, 87 Fed. Reg. 40763, 40775 (Jul. 8, 2022).
[15] 16 U.S.C. § 1826a(b)(3).

IV. NMFS should amend the Moratorium Protection Act regulations to clarify the components of the U.S. shark regulatory program

The proposed rule amends the shark catch provisions expands the lookback period for identifying nations catching sharks on the high seas from one year to three, consistent with statutory language and current agency practice. Indeed, for both the 2019 and 2021 Reports, NMFS used a three-year timeframe for identifying nations for shark catch. Despite this expanded lookback period, NMFS has never listed a nation for catching sharks on the high seas.[16] As a would-be leader in shark conservation and in order to effectively tackle shark finning on the high seas, NMFS should further amend 50 C.F.R. § 300.204(a) to: 1) specifically require fins naturally attached as an essential component of comparable shark regulatory program; and 2) provide increased transparency.

A. Fins Naturally Attached

The language in 50 C.F.R. § 300.204(a)(1)(ii) incorporates the requirement that a comparable regulatory program includes "measures to prohibit removal of any of the fins of a shark (including the tail) and discard the carcass of the shark at sea, that is comparable in effectiveness to that of the United States, taking into account different conditions, including conditions that could bear on the feasibility and effectiveness of measures." This provision should be amended to clarify that a comparable regulatory program would require, as the United States does of all of its fisheries on the high seas, that sharks be landed with their fins naturally attached.

Fins naturally attached is a keystone provision of the U.S. shark regulatory program and an essential component to its effectiveness. In fact, the United States amended its own laws to require fins naturally attached after finding that the finning ban previously in place was not as effective in preventing shark finning. [17] The United States, as well as many other nations, have explicitly acknowledged that the fins naturally attached rule is the most effective form of anti-finning regulation—and that other methods, including the 5% fin to carcass ratio adopted by

[16] Although NMFS has not listed nations for shark catch under 16 USC § 1826k, NMFS has listed nations for IUU violations involving sharks under 16 USC § 1826j. However, the shark catch provisions of 16 USC § 1826k differ in purpose and form from the IUU provisions contained in 16 USC § 1826j. Rather than examining individual violations, the shark catch provisions also look to whether a nation directly or indirectly catches sharks on the high seas, and then analyzes whether it has a regulatory program comparable to that of the United States. Then, the provisions call for consultation and negotiation and cooperation and assistance to resolve the issues and systemically improve shark conservation. This produces different structural results and benefits than a listing under the IUU provisions of 16 USC § 1826j targeting a violation.

[17] Shark and Fishery Conservation Act, Pub. L. No. 111-348, 124 Stat 3668 (2011); NOAA, *How Our Shark Finning Ban Helps Us Sustainably Manage Shark Fisheries*, https://www.fisheries.noaa.gov/feature-story/how-our-shark-finning-ban-helps-us-sustainably-manage-shark-fisheries (last visited December 9, 2021)

some RFMOs—is not equivalent.[18] In moving forward the adoption of a fins naturally attached requirement for certification, the Marine Stewardship Council found that: "Consultations with stakeholders, as well as independent research commissioned by the MSC, pointed to the Fins Naturally Attached policy being the most viable option to ensure shark finning is not taking place."[19] In brief, fins naturally attached is more effective than other regulatory mechanisms addressing shark finning and should be explicitly incorporated into the regulations governing comparable shark regulatory programs under the Act.

B. Increased Transparency

In the 2021 biennial report, NMFS indicated that it had identified 50 countries as catching shark on the high seas. Of these, NMFS determined 41 had had comparable shark regulatory programs, and 9 were required to submit additional information on their shark programs before making an assessment. To date, this was the most information NMFS had ever provided in a report about its process to determine whether a nation has a comparable shark regulatory program to the United States.

We urge NMFS to continue to add transparency and predictability to this process by defining what constitutes a comparable shark regulatory program and identifying which specific nations have one. This increased transparency ensures that the public and other nations clearly understand this process. Shedding light on the analysis and process provides a better basis for addressing the identified problems, negotiating resolutions, and staving off accusations that any listing or sanction is arbitrary. In addition, such action supports the edict that NMFS should "adopt a presumption in favor of disclosure," including taking "affirmative steps to make information public"[20] NMFS therefore should take this rulemaking opportunity to specify 1) the factors that NMFS considers in determining of whether a nation's regulatory program is comparable, including what NMFS considers the minimum necessary to achieve comparability; and 2) a requirement that the biennial report name the nations that were considered and that received a "passing grade," i.e. a determination that the nation does indeed have a comparable shark regulatory program.

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Thank you for the opportunity to comment on this proposed rule.

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[18] ICCAT, *Draft Recommendation by ICCAT Concerning the Conservation of Sharks in Association with Fisheries Managed by ICCAT*, Doc. No. PA4-806 / 2018, https://www.iccat.int/com2018/ENG/PA4_806_ENG.pdf (submitted by the United States and others); *See also* IATTC, *Resolution on the Conservation of Sharks Caught in Association with Fisheries in The IATTC Convention Area Submitted by the European Union*, Proposal IATTC-90-C-1 (July 2016), https://www.iattc.org/Meetings/Meetings2016/IATTC-90/PDFs/Proposals/_English/IATTC-90-PROP-C-1_EUR-Conservation-of-sharks.pdf.

[19] *Strengthening the MSC's policy against shark finning*, Marine Stewardship Council, https://www.msc.org/standards-and-certification/developing-our-standards/the-fisheries-standard-review/projects/shark-finning-solutions/q-and-a (last visited Aug. 18, 2022).

[20] Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 26, 2009).

Sincerely,

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