

July 17, 2024

Transcript of Comments Shared during E.O. 12866 Meeting for Proposed Rule 0648-BG11

Good afternoon.

My name is Sabrina Devereaux, and I am an Associate Attorney with Earthjustice's International Oceans Program. I am here today with my colleagues Natalie Barefoot, who is a Senior Attorney in the International Oceans Program, and Kristin Butler, who is an Associate Legislative Representative with Earthjustice's Policy and Legislation Team. Earthjustice is one of the oldest and largest nonprofit environmental law organizations in the U.S. Over the past five years, our international oceans team has worked to address illegal and unsustainable fishing practices globally and engaged with US efforts to combat unsustainable fishing practices, including by submitting comments to proposed rules and evidence to inform the National Marine Fisheries Service's biennial listing processes under the High Seas Driftnet Fishing Moratorium Protection Act.

Thank you for this opportunity to provide comments to inform the development of the National Marine Fisheries Service's proposed rule to make conforming amendments to the regulations implementing the High Seas Driftnet Fishing Moratorium Protection Act and related statutes. The Moratorium Protection Act is one of the strongest legal tools for combatting illegal, unregulated, and unreported ("IUU") fishing and improving conservation of sharks and protected living marine resources abroad. Congress further strengthened the Act and emphasized its conservation purpose through the National Defense Authorization Act of 2023 ("NDAA"). The proposed rule is an important opportunity to align the implementing regulations with the statute, achieve Congress's intent, and ensure that all nations engaged in unsustainable fishing practices are listed.

Earthjustice is especially interested in the proposed rule's implications for global shark catch. In the last fifty years, oceanic sharks and rays have declined in abundance by more than 70%. Overfishing is the largest driver of shark decline. The high seas were once a de facto refuge for these species because it was beyond the reach of most fishing vessels. But today, distant water fishing fleets fish extensively on the high seas, and pelagic sharks account for more than 50% of shark catch worldwide. The Moratorium Protection Act is one of the few legal tools available to address unsustainable shark catch, by allowing the United States to leverage its position as a major seafood market to improve foreign fishing policies through consultation, cooperation, assistance, and import restrictions.

The proposed rule presents an opportunity to correct the current regulations' misalignment with the statute, implement recent statutory amendments, and provide increased precision to the process, which will improve transparency and efficiency. We join other organizations in supporting the inclusion of a revised definition of IUU fishing that incorporates forced labor. Additionally, we encourage NMFS to adopt a proposed rule that effectively achieves the

purposes of the Moratorium Protection Act's shark provisions by: 1) preventing delay through a clearly articulated timing provision; 2) including clear and transparent metrics for determining comparability; 3) broadening NMFS's consideration of shark catch to all of the world's oceans; and 4) making the consequences of negative certification decisions consistent with the text of the statute.

I. IUU Definition

We appreciated NMFS's expansion of the definition of IUU fishing in the 2022 proposed regulations for the Act which included 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 unprofitable 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 human rights violations. In addition to these revisions, we also encourage NMFS to expand the definition even further to address these unacceptable practices by removing the jurisdictional limitation to the high seas, acknowledging that the use of forced labor in fishing activities constitutes IUU fishing no matter where the fishing takes place.

II. Timing Provision

The NDAA amended the Moratorium Protection Act to allow the Secretary of Commerce to identify nations for IUU fishing, PLMR bycatch, or shark catch "at any time that the Secretary has sufficient information to make such identification." This language is intended to strengthen the ability of NMFS to identify nations outside of and in addition to the biennial report process. The proposed rule should retain the current regulatory language which makes clear that NMFS will identify and list nations engaged in IUU fishing, PLMR bycatch, and shark catch in the biennial report. To implement the timing provision added by the NDAA, it should also include an addition that the biennial report may be supplemented with identifications where there is sufficient information gathered outside of this mainstay process.

This addition is consistent with the statute. The Moratorium Protection Act states that nations engaging in IUU fishing, PLMR bycatch, and shark catch shall be identified and listed in the biennial reports. The timing language added by the NDAA is in addition to, and not instead of, this mandate to list nations in each biennial report.

This approach is most in line with the framework for listing determinations laid out in the Moratorium Protection Act. The amended timing provision only applies to identifications, and not for negative certifications. Identifications trigger a consultation process with the government of the listed nation, facilitating an exchange of data and evidence. The intent of the additional timing provision in the statute is therefore to begin engagement with a harvesting nation as soon as possible, so that corrective action can be taken.

Additionally, this approach is needed to embody Congress's intent to protect the marine environment and ensure that imported seafood abides by U.S. standards. The text of the Moratorium Protection Act makes it clear that *any* single incidence of illegal fishing is enough to list a nation. Delay in listing decisions would allow illegal and unsustainable practices to be left unaddressed, potentially for years. This would harm not only the marine environment, but the

interests of U.S. domestic fishers who have to compete with foreign-caught seafood and U.S. seafood consumers who expect that their fish is both legal and sustainable. It is within the best interests of U.S. citizens for NMFS to promptly list harvesting nations suspected of illegal and unsustainable fishing practices, even based on imperfect information.

III. Clear and Transparent Metrics

The Moratorium Protection Act directs NMFS to identify nations engaged in distant-water fishing activities which catch sharks and who have not adopted, implemented, and enforced a regulatory program for the conservation of sharks that is comparable in effectiveness to that of the United States. The Act does not further define the term “comparable in effectiveness,” except to emphasize that a comparable regulatory program should include “measures to prohibit removal of any of the fins of a shark” before landing the shark in port. Notably, the NDAA amendments removed the consideration of “differing conditions” in the listing of a nation for shark catch. In order to achieve the statutory intent behind this provision, the proposed rule needs to remove the current discretion written into the regulations and provide clear and transparent metrics for NMFS to use to perform its comparative regulatory program analysis.

The current implementing regulations provide little detail on how NMFS determines whether a harvesting nation possesses a comparable regulatory program for shark catch. The current regulations essentially restate the previous language of the Act, and add additional discretion not provided for in the current Act allowing NMFS to take into account “all relevant matters” including the history, nature, circumstances, duration, and gravity of the fishing activity. Nor do the biennial reports provide much additional detail. The 2023 Report (the first and only to identify nations for shark catch), broadly listed the types of actions NMFS considered to assess comparability, but did not specify the standards that NMFS used to determine whether these policies were “comparable.” Further, NMFS did not specify the 31 nations that it deemed to have a “comparable” regulatory program, which would provide stakeholders and nations an indication of which regulatory programs NMFS feels are in fact comparable.

Without further information on NMFS’s standards for determining comparability or what nations are considered “comparable,” it is difficult for members of the public to understand the significance of NMFS’s listing decisions for shark catch. The lack of transparency also prevents nations from clearly understanding the metrics against which their regulatory programs may be compared, leading to uncertainty regarding whether they are being treated fairly and equitably under this law. Additionally, since NMFS is required to consider information submitted by members of the public in developing its biennial reports, greater transparency and identifiable metrics would ensure that public input is tailored to the information that NMFS will actually consider. The current status quo is inefficient for both stakeholders and the government, is wasteful of agency resources, and could be easily remedied through the implementing regulations.

NMFS must align its regulations with the current statutory language and remove the discretion that previously allowed it to take “into account differing conditions” in its listing decisions. We urge NMFS to add transparency and predictability to the listing process by defining the metrics by which NMFS determines whether a nation’s shark regulatory program is comparable, beyond the statutory requirement of fins naturally attached, and adding a requirement to specify which

nations were deemed “comparable” in each biennial report. This increased transparency is consistent with the edict that NMFS should “adopt a presumption in favor of disclosure,” including taking “affirmative steps to make information public.” NMFS therefore should take this rulemaking opportunity to: 1) specify the factors that NMFS considers in determining whether a nation’s regulatory program is comparable, including what NMFS considers the minimum necessary to achieve comparability; 2) incorporate the fins naturally attached requirement for a comparable program; 3) remove the discretion to consider differing conditions in listing decisions, and 4) add a requirement that the biennial report name the nations that were considered and determined to have a comparable shark regulatory program.

IV. Inclusion of All Oceans

The Moratorium Protection Act provisions addressing equivalent conservation measures are meant to apply globally and equally to all nations. However, in every biennial report, NMFS has constrained its analysis of shark catch to the areas governed by regional fishery management organizations (RFMOs) to which the United States is a party. This contradicts the language of the statute, which requires NMFS to identify nations engaging in “fishing activities on the high seas or within the exclusive economic zone of another nation.”

As a result of this limited analysis, nations catching sharks in, for example, the Indian Ocean, are completely ignored. This means that some nations which export fish to US markets, are being held to a higher standard than other nations only because of where they catch their fish. This is an erroneous application of the statute and one that is prejudicial to certain nations and the trade thereunder. There is nothing in the text of the Moratorium Protection Act or the current implementing regulations to suggest that NMFS should limit its shark catch analysis to RFMOs to which the United States is a party. Yet NMFS has consistently excluded entire oceans from its shark catch analysis. The proposed rule should include language clarifying that nations should be identified for unsustainable shark catch regardless of the RFMO jurisdiction where that catch occurred.

V. Effective Consequences for Negative Certifications

This proposed rule also offers an opportunity for the government to correct language regarding the consequences for negative certification decisions, which in the current implementing regulations, is at odds with the statute.

The plain text of the Moratorium Protection Act indicates that, once a country is negatively certified for IUU fishing, PLMR bycatch, or shark catch, import prohibitions should automatically follow. Specifically, the Act states that, “upon receipt of notification of the identification of a nation” for IUU fishing, PLMR bycatch, or shark catch, the President “shall direct the Secretary of the Treasury” to prohibit imports. In contrast, the current implementing regulations have interpreted trade sanctions under the Act to be discretionary, stating that the President “is authorized” to direct the Secretary of the Treasury to prohibit imports upon notification “and recommendations” by the Secretary of Commerce. As a result, there have been no import prohibitions enacted in the history of the Moratorium Protection Act, despite numerous negative certification decisions for IUU fishing and PLMR bycatch. Since import prohibitions are the primary consequence provided for by the Act, the failure to ban imports from

negatively certified nations undermines the strength and efficacy of the biennial listing and consultation processes.

For these reasons, we urge NMFS to correct the language in the current regulations to require import prohibitions to automatically and immediately follow from negative certification decisions. Any alternative not only conflicts with the plain language of the statute, but undermines the effectiveness of the listing process.

VI. Conclusion

In conclusion, we agree with NMFS's decision to draft a proposed rule to modify its implementing regulations to better conform with the relevant law. Our comments today outline several key changes that are needed to effectively implement the Moratorium Protection Act's shark catch provisions. We will upload this script to the meeting platform shortly. We thank you for the opportunity to share our thoughts, and encourage you to please reach out to us if you have any further questions.