



**NATIONAL
FISHERIES
INSTITUTE**

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Deputy Assistant Administrator for Regulatory Programs
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
1315 East-West Highway
Silver Spring, MD 20910

SUBMITTED VIA REGULATIONS.GOV

RE: Docket No. NOAA-NMFS-2014-0090-0109; Presidential Task Force on Combating Illegal, Unreported and Unregulated Fishing and Seafood Fraud Action Plan Recommendations 14/15 Identifying Species “At Risk” of IUU Fishing and Seafood Fraud; 80 Federal Register 24247 (April 30, 2015).

Dear Dr. Rauch:

The National Fisheries Institute appreciates the opportunity to comment on the work of the Presidential Task Force on Combating Illegal, Unreported and Unregulated Fishing and Seafood Fraud, specifically on the Task Force’s above-captioned notice concerning “at risk” species.

NFI’s comments are organized into the two primary issues the Task Force has examined, IUU fishing and seafood mislabeling. Some comments, however, apply to both topics.

To begin, it must be emphasized once more: NFI member companies believe that IUU fishing and seafood fraud are practices that punish honest seafood businesses, diminish the effectiveness of existing regulation, and erode consumer confidence in the seafood available for purchase. There can be no substitute for clear regulation and effective management and enforcement of both priorities – responsibilities that are in nearly all circumstances best carried out at the federal level.

As explained in greater detail below, in working on Recommendations 14 and 15, the Task Force and all Federal agencies should be guided by data and the best science available. President Obama, in one of his first acts as the government’s chief executive, issued guidance to agencies that they must adhere to verifiable information, data and the science that results. To quote:

Science and the scientific process must inform and guide decisions of my Administration on a wide range of issues, including improvement of public health, protection of the environment, increased efficiency in the use of energy and other

resources, mitigation of the threat of climate change, and protection of national security.¹

Because the results of the Task Force’s identification of a species as “high risk” for IUU or fraud will likely cause those fish to be required to adhere to additional traceability requirements, the government should take specific care to ensure their decisions are based on facts not rumor, deeds not words. “High risk” species designation should be based on credible data that those species are indeed at high risk of unlawful harvest or mislabeling, not random anecdotes of bad actors intent on skirting the law or misunderstanding of existing labeling regulations and conventions. That is perhaps a particularly important point with respect to IUU fishing – and, according to recent statements – it is a perspective the Task Force supports. Further, any designation should be based on relatively current information, not based on issues that have long been resolved.

I. DEFINING HIGH RISK.

Because any designation of a species as “high risk” of IUU or fraud will carry with it additional regulatory burden, the government should ensure it uses this tool with great care. An entry discussion must be how is “high risk” defined?

In the academic study of risk, and its practical application in food safety, the definition of risk might be the combination of exposure to a problem and its severity.

The U.S. government uses this definition as a template in other areas of regulation. For instance, in food safety, the U.S. participates and adheres to the principles of CODEX Alimentarius which define risk as:

A function of the probability of an adverse health effect and the severity of that effect, consequential to a hazard(s) in food.²

Other U.S. government organizations have modeled risk on the combination of exposure and impact.

During this stage, each potential hazard is evaluated based on the severity of the potential hazard and its likely occurrence. Severity is the seriousness of the consequences of exposure to the hazard. Considerations of severity (e.g., impact of sequelae, and magnitude and duration of illness or injury) can be helpful in understanding the public

¹ Memorandum for the Heads of Executive Departments and Agencies. (2009, March 9). Retrieved from https://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/

² Joint FAO/WHO Food Standards Program, 2015. Codex Alimentarius Commission Procedural Manual, 23rd ed. World Health Organization/Food and Agriculture Organization of the United Nations, Rome, p. 116.

health impact of the hazard. Consideration of the likely occurrence is usually based upon a combination of experience, epidemiological data, and information in the technical literature. When conducting the hazard evaluation, it is helpful to consider the likelihood of exposure and severity of the potential consequences if the hazard is not properly controlled.³

So, a fish designated as “high risk” should be one that is common in the United States market (high exposure) and can cause significant damage (in IUU context to fisheries and in fraud context in health or economic disadvantage to legitimate supply chain participants).

II. ILLEGAL UNREGULATED UNREPORTED (IUU) FISHING.

IUU fishing erodes seafood resources, punishes legitimate seafood businesses, and undermines fishery management systems. The National Oceanic and Atmospheric Administration (NOAA) is an acknowledged international leader in fishery science, preventing overfishing, and rebuilding overfished stocks. We agree with President Obama, who in a message to Congress in May 2015 stated that the “current requirements of [the Magnuson Stevens Fishery Conservation and Management Act] are working – the percentage of stocks that are subject to overfishing and the percentage that are in an overfished state are at historic lows.”⁴ Dr. Kathryn Sullivan, Under Secretary of Commerce of Oceans and Atmosphere and Administrator of NOAA and Task Force Co-Chair, amplified the President’s point by noting that

[United States] domestic fisheries are more sustainably managed than ever before, and this is directly because of the world class science that informs our decision-making. Our recent report to congress on the Status of U.S. Fisheries outlines our progress showing that overfished stocks and overfishing are at all-time lows. It is vital that our science not regress, as this would inevitably lead to declines in our stocks and a loss in the economic and social values they provide. Our progress in making fisheries management more effective is based on the principle that management is based on sound science.⁵

We applaud Administration efforts to eliminate IUU fishing and the leadership to address this issue globally. Other countries have systems based on the same principles – strong and independent science, adherence to catch limits, awareness of fishing impacts on the ecosystem, and enforcement. In light of this, we urge the Task Force to carefully assess the true extent of IUU fish in the U.S. market before proposing new mandates to be put in place on top of the many tools available today to deter and punish IUU fishing. Our comments in this section

³ National Advisory Committee on Microbiological Criteria for Foods. Hazard Analysis and Critical Control Point Principles and Application Guidelines. 1998. J. Food Protect. 61:1246-1259.

⁴ President Barack Obama: "Statement of Administration Policy: H.R. 1335 – Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act," May 19, 2015

⁵ Improvement and Innovation in Fisheries Data Collection: Hearings before the Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard. Committee on Commerce, Science, and Transportation. (2015) (testimony of Dr. Kathryn D. Sullivan).

include: the effectiveness of existing laws to combat IUU, analysis of high risk IUU species, and principles to identify IUU species.

A. EFFECTIVENESS OF EXISTING LAWS

1. *Global Level*

The Task Force has been focused to a great degree on suspected IUU fishing in non-U.S. waters. For instance, “Our domestic management system is one of the best in the world, if not the best in the world, but despite all of that and all the successes we have had, there are still some IUU fishing issues going on, and that really is however you – and I’m sure yours – can be an economic disadvantage to the good players and our domestic fisheries.”⁶ In light of that, it is imperative to take stock of the existing tools available to U.S. policymakers when it comes to imported, wild-capture seafood.⁷

First, the United States has multiple tools available to combat IUU fishing through Regional Fisheries Management Organizations (RFMOs), the primary agents for managing fisheries in international waters. Starting in 2012, the United States began working closely with international partners to strengthen the ability of the Members of various RFMOs to identify IUU vessels and outlaw fishing by them via their flag countries. This has been carried out through the adoption and implementation of specific management measures. These measures included development and sharing of lists of IUU vessels, enhanced monitoring and control programs, adoption of port States inspection schemes, and better regulation of transshipment at sea.⁸

NOAA is also engaged with numerous coastal nations, on a bilateral basis, to highlight the need for effective IUU regulation and enforcement, and to strengthen the capacity of those nations to target likely IUU activity. Again beginning in 2012, NOAA collaborated with several developing coastal States to support their domestic fisheries management, including helping to establish scientific stock assessments and strong enforcement regimes. For example, over the past 2 years, NOAA has trained West African fisheries management and enforcement officials. In February 2012, U.S. trainers presented a 5-day course in Liberia to observers and inspectors on collecting data from tuna purse seine and longline vessels. NOAA is engaged in similar efforts in Latin and South America and in the Pacific Rim region.

NOAA has recently expanded on this work with both the Russian Federation and the European Union. NOAA is today negotiating a bilateral agreement with the Russian Federation designed to improve that country’s IUU enforcement and sustainability efforts across wild-capture

⁶ In the Matter of: Task Force on Combatting IUU Fishing and Seafood Fraud, August 20, 2014 (p. 7). Retrieved at http://www.nmfs.noaa.gov/ia/iuu/iuu_transcript_8_20_14.pdf

⁷ We renew our request for confirmation from the Task Force that, as a conceptual and legal matter, farmed seafood cannot be illegally fished.

⁸ National Oceanic and Atmospheric Administration, Level the Playing Field. Retrieved from <http://www.nmfs.noaa.gov/ia/iuu/ltpf.pdf>

species.⁹ The United States has signed a U.S.-EU joint statement on combatting IUU fishing, pledging bilateral cooperation to targeting and preventing IUU fishing in U.S. and EU waters and on the high seas – a first in the longstanding partnership between the U.S. and the EU on fisheries management.¹⁰

Recent changes in U.S. law enhance the Administration’s ability to address suspected overseas IUU fishing. Recent Magnuson-Stevens amendments modified the High Seas Driftnet Fishing Moratorium Protection Act (Moratorium Protection Act), directing the United States to strengthen international fisheries management organizations and to address illegal, unreported, and unregulated (IUU) fishing and bycatch of protected living marine resources. The Moratorium Protection Act was then amended in 2011 by the Shark Conservation Act to improve the conservation of sharks domestically and internationally.¹¹ And most recently, the Billfish Conservation Act of 2012 prohibited the commercial harvest of marlin and related species, barring that seafood from the U.S. market.¹²

These legal authorities, initiatives, and partnerships collectively represent a strong enforcement regime for imported, wild capture seafood. It also important for the government to ensure fish designed as “high risk” have significant “exposure” in the U.S. market. As noted in previous NFI comments to the Task Force, while the United States imports more than 80% of the seafood Americans enjoy, the amount of wild capture seafood is much smaller and concentrated on a few species (e.g., tuna)¹³

2. *Federal Level*

All of this is, of course, in addition to the existing NOAA processes specifically aimed at identifying and deterring IUU fishing. That process involves first the NOAA biennial report on Improving Fisheries Management to Congress.¹⁴ NOAA’s most recent report identified 10

⁹ Strengthening U.S.-Russian Cooperation on Fisheries. (2013, April 30). Retrieved from http://www.nmfs.noaa.gov/ia/slider_stories/2013/04/us_russia.html

¹⁰ Joint Statement Between the European Union and The United States Government on Efforts to Combat Illegal, Unreported and Unregulated (IUU) Fishing. (2011, September 7). Retrieved from http://www.nmfs.noaa.gov/stories/iuu/docs/statement_online_handout.pdf

¹¹ Shark and Fishery Conservation Act, 111-348 U.S.C.

¹² Billfish Conservation Act of 2012, 112-183 U.S.C.

¹³ NFI Comments, September 2, 2014, Docket No. NOAA-NMFS-2014-0090 and NFI Comments, January 20, 2105, Docket No. NOAA-NMFS-2014-0090-0058

¹⁴ The High Seas Driftnet Fishing Moratorium Protection Act, as amended by the Magnuson-Stevens Reauthorization Act, requires NOAA to identify countries that have fishing vessels engaged in IUU fishing activities. NOAA has completed three of these required reports (in 2011, 2013, and 2015).

nations whose fishing vessels recently engaged in IUU fishing.¹⁵ The United States is required to consult with each of the 10 nations to encourage them to take action to address IUU fishing. If a nation fails to take concrete actions to address the instances of illegal fishing activities described in the report, that nation's fishing vessels may be denied entry into U.S. ports, and its seafood exports to the United States may be prohibited. This straightforward but effective tool already gives NOAA the authority to force other countries to prioritize IUU identification and enforcement, lest they lose access to the lucrative U.S. market.

On the enforcement side, legislation pending in Congress would strengthen the nation's ability to punish IUU fishing up and down the supply chain. That legislation would empower NOAA, the United States Coast Guard, and others to identify and then intercede products generated from IUU fishing. The Agreement and its implementing legislation together would help to eliminate ports of convenience, making it far more difficult and costly for IUU vessels to operate and far more difficult for illegal product to enter the stream of commerce.

Finally, the Lacey Act also provides the United States with wide-ranging authority to impose significant sanctions against individuals and companies engaged in trafficking illegally taken fish and wildlife.¹⁶ That authority can be used against all manner of wild-capture seafood, domestic or imported.¹⁷

B. ANALYSIS OF "AT RISK" IUU SPECIES

In order to effectively and accurately assess the extent and nature of "at risk" IUU fishing, NFI urges the Task Force to keep in mind several points:

- The Task Force should analyze all allegations of IUU fishing and make an independent, U.S. Government determination of the veracity of any allegations.¹⁸

¹⁵ United States continues global leadership to address illegal, unreported, and unregulated fishing. (2015, February 9). Retrieved from <http://www.noanews.noaa.gov/stories2015/20150208- united-states- continues-global-leadership-to-address-illegal-unreported-and-unregulated-fishing.html>

¹⁶ 16 U.S.C. 3371-3378.

¹⁷ Consider the recent case of Robert Thompson. On April 17, 2015, a two-and-a-half-year investigation and judicial process came to a close when Mr. Thompson, 53, of Rockwood, Maine, was sentenced to eight months imprisonment for evading federal income tax and for sales of illegally harvested lobsters. He pled guilty to violating the Lacey Act. The Court, in addition to the prison sentence, ordered Mr. Thompson to pay the Internal Revenue Service restitution of \$65,172. Contrary to the implication in the Task Force final report ("For example, the Lacey Act, which prohibits the importation of fish and fish products taken or imported in violation of a foreign law or treaty, and the Antarctic Living Marine Resources Convention Act, both have very low civil penalty maximums." accessed at http://www.nmfs.noaa.gov/ia/iuu/noaa_taskforce_report_final.pdf), the Lacey Act is a powerful tool in the fight against IUU.

¹⁸ NFI has reviewed U.S. Government, RFMO, non-governmental organization, industry, and media reports alleging IUU, from 2002 to 2015. NFI noted 449 allegations. NGOs made 39% of the allegations, with Greenpeace alone making 135 claims. RFMOs logged 56% of the allegations, but it

- The Task Force should treat private sector or civil society data and media reports, especially such reports that are reliant on anonymous sources, as not credible without significant corroborating support from other sources.¹⁹
- While the majority of IUU fishing concentrate on tuna and toothfish, the Task Force must recognize the significant work of other nations and the private sector in addressing IUU in these fisheries. For instance, the International Seafood Sustainability Foundation (ISSF), representing the vast majority of the global tuna industry, has adopted a widely regarded series of measures designed to improve tuna fisheries management.²⁰ In the Toothfish fishery, the combined action of industry (Coalition of Legal Toothfish Operators)²¹ and governments' actions have helped dramatically reduce illegal fishing in the southern seas and nearly eliminated it from markets.²²
- The Task Force should also analyze data for trends. The military adage that “Admirals and Generals often fight the last war” (meaning the leaders think about past actions and do not reflect on change in enemy strategies, tactics, and weapons), is an apt advisory. The Task Force should understand if a problem with a particular fishery or species is growing or being eliminated by other means (e.g., toothfish) before designating it as “high risk” and thus forcing that fishery to be undergo increased regulatory burdens.

C. PRINCIPLES FOR DESIGNATING FISH AS HIGH RISK FOR IUU

The Task Force seeks input regarding what criteria to employ in designating seafood “at risk” for IUU fishing.²³ Consistent with the discussion above, and with the Administration’s commitment to relying on sound science, the Task Force should rely on the following factors:

should be noted that 116 of the 250 vessels were removed from the IUU lists. This could indicate the designation was in error or the vessel addressed its shortcomings. Of the total, tuna was noted in 73% of the allegations, but again it should be noted that 113 of these vessels were removed from IUU lists.

¹⁹ A widely-read 2014 report in Marine Policy makes splashy allegations about the amount and percentages of IUU fishing in a number of categories but does so based on anecdotal information culled from news reports and interviews with anonymous sources. The report concedes that the “total amount of illegal fishing for all major fishing countries has been estimated and these figures have been refined here by fish species and region using additional [unspecified] information” (p. 103), and in many cases “information gathered through confidential interviews with knowledgeable individuals was also used: these are cited here as anonymous when necessary” (p. 104).

²⁰ ISSF Annual Conservation Measures & Commitments Compliance Report, p. 4. (2014, June). Retrieved from <http://iss-foundation.org/wp-content/uploads/downloads/2014/06/ISSF-Public-Compliance-Report-Final-6-14.pdf>

²¹ Coalition of Legal Toothfish Operators: <http://www.colto.org/>

²² McCully, M. (2015, May 23). NZ welcomes interception of IUU fishing vessels. Retrieved from <https://beehive.govt.nz/release/nz-welcomes-interception-iuu-fishing-vessels>

²³ The Task Force’s April 30 Notice asserts that the Notice “is the first step in implementing Task Force Recommendations 14 and 15, ‘Identifying current at risk species threatened by IUU fishing and seafood fraud.’ Once ‘at-risk’ species have been determined, the NOC Committee will transmit the list to agencies for appropriate action. This list will form the basis for the species addressed in the first phase of the risk-

- The Task Force should identify IUU fishing based on latest evidence and not outdated data.
- The Task Force should rely on government resources to determine IUU fishing.
- The Task Force should independently verify media or other allegations of IUU. United States government action should not be based on innuendo or rumor.
- The Task Force should refer to RMFO IUU vessel lists, but must recognize that vessels are often eliminated from IUU lists (indicating that the original listing may have been in error or that the vessel addressed its shortcoming)
- The Task Force should differentiate between sport and commercial fishing when determining IUU fishing activities.
- The Task Force should recognize other countries' actions to address IUU allegations, if the exporting nations are legitimate, and not add species that those countries are already addressing.

III. SEAFOOD MISLABELING

NFI and its member companies have had a long record of positive engagement on both food safety and economic integrity. For many years, NFI has worked with FDA, the nation's leading food safety regulator, to meet the requirements of the FDA Hazard Analysis and Critical Control Points (HACCP) regulatory system for the safe production of seafood products from both domestic and international sources. As discussed in greater detail in previous comments²⁴, HACCP is a comprehensive, science-based system of hazard control designed to eliminate food

based seafood traceability program, as described in the Task Force Action Plan.... Both the draft list of principles and the draft list of 'at-risk' species will be published in the Federal Register for public comment in July 2015." 80 Fed. Reg. at 24247.

Though appreciative of this opportunity to comment here, NFI is compelled to point out that the Task Force's solicitation of public input in this manner does not and cannot substitute for formal notice-and-comment rulemaking by Executive Branch Department on any requirement – traceability-related or not – applicable to industry. Unless "appropriate action" by agencies such as NOAA and FDA means notice-and-comment rulemaking, interested parties will remain unable to understand and react to any number of crucial outstanding issues. Those issues include at the very least the precise statutory and regulatory basis for new traceability, economic integrity, or other requirements; the exact wording of changes to affected provisions in the Code of Federal Regulations; and, in final rulemaking, the relevant agency's considered replies to matters raised by commenters. That is to say nothing of the potentially mandated Office of Management and Budget review of any rulemaking deemed economically significant and a host of other requirements governing the Federal regulatory process. See 5 U.S.C. 501 et seq.; Executive Order No. 12866, Regulatory Planning and Review (Sept. 30, 1993). The Task Force is simply not engaged in rulemaking, and the right of NFI, its member companies, and others to review and react to changes sought by the Administration via rulemaking is undiminished by the Task Force's solicitation of public input here.

²⁴ NFI Comments, September 2, 2014, Docket No. NOAA-NMFS-2014-0090 and NFI Comments, January 20, 2105, Docket No. NOAA-NMFS-2014-0090-0058

safety risks at their source, instead of relying solely on inspection and testing of the finished products to verify food safety.

Due to rigorous FDA enforcement of seafood safety regulations, the safety of seafood imports and the effectiveness of FDA seafood regulations have been established over several decades of increasingly globalized fisheries trade and confirmed by U.S. government agencies. The Centers for Disease Control and Prevention analyzed 6 years of reported foodborne illnesses data from 2005-2010, from across the country.²⁵ CDC found that less than 2 percent of the more than 122,000 reported illnesses were attributed to imported food. An even smaller percentage of reported illnesses – 0.12 percent – were caused by imported seafood. The CDC found that only 141 of the 122,000 reported illnesses were connected to imported seafood.²⁶

In light of outcomes such as these, Congress expressly exempted companies in compliance with seafood HACCP from the preventive controls and foreign supplier verification activities that the FSMA imposed on the rest of the food industry,²⁷ signifying confidence in FDA to ensure the safety of seafood products consumed in the United States.

A. EXISTING ACTIONS ON SEAFOOD MISLABELING

Particularly to combat seafood fraud, FDA's guiding law, the Federal Food, Drug, and Cosmetic Act, already prohibits all aspects of seafood fraud. Products that bear labeling that is misleading in any way can be deemed misbranded. Therefore, seafood products with incorrect name, incorrect representation of net weight, and incorrect country of origin statement, as examples, are misbranded. Products can be deemed adulterated if found to be absent of, substituted with or addition of constituents that make the product less valuable. Seafood products that are substituted with species or have excess water added without declaring on the label can be deemed adulterated.

1. *Federal Level*

FDA and other federal law require seafood to be properly labeled for species identification. To aid firms in properly fulfilling this mandate, FDA has developed *The Seafood List*²⁸, the agency's Guide to Acceptable Market Names for Seafood. The List contains a fish species' Acceptable Market Name cross-referenced with its Common Name and Latin Scientific Name and is updated every six months, in coordination with NOAA and experts at the Smithsonian Institute. The List is available on the internet and easily searchable.

²⁵ <http://www.cdc.gov/foodborneoutbreaks>.

²⁶ *Ibid.*

²⁷ Food Safety Modernization Act, 111-353 U.S.C. § 103(j)(1)(A) and 301(e)(1).

²⁸ The Seafood List. (2015, February). Retrieved from <http://www.accessdata.fda.gov/scripts/fdcc/?set=seafoodlist>

FDA has also established a compliance program for testing seafood to determine identity. The multi-pronged Fish SCALE (Seafood Compliance and Labeling Enforcement) program²⁹ includes the development of validated DNA testing methods, a library of DNA sequence data for species which have been authenticated with taxonomically identified specimens, and sampling assignments to pull samples from imports, warehouses, distribution centers and retail. FDA has taken compliance actions such as Warning Letters, injunction orders, and Import Alerts,³⁰ against seafood firms for misbranding violations determined with DNA testing.

2. *Industry actions*

From an industry perspective, NFI members have come to a market solution – the establishment of the Better Seafood Board (BSB), an association of companies each of which pledges to abide by federal prohibitions against mislabeling, short-weighting, and other illegal practices that cheat NFI companies and the consumers they serve. The BSB was the result of NFI members’ desire to rid the industry of unscrupulous vendors willing to defraud customers and to highlight for buyers at the processor, distributor, retail and restaurant levels, those seafood providers that have systems in place to ensure that their products are properly labeled for weights and counts, country of origin and species. Each NFI member CEO has committed to only sell products properly labeled for weights, origin, and species. Each CEO also agreed to pay for and undergo a third party audit if the BSB received complaints about the company’s products. The BSB process includes a call center that accepts comments from buyers in the seafood value chain about challenges they have had with seafood suppliers providing them products which they believe are not in accord with industry and legal practices. NFI member companies found to be violating the commitment to economic integrity will be dismissed from the association, a “public shaming” that companies would seek to avoid.

B. PREVALENCE OF SEAFOOD MISLABELING

An aspect of FDA’s multi-pronged Fish SCALE program was a two-year survey of seafood labeling. The Agency sampled 174 wholesale product lots in 14 states with a focus on species that were allegedly “normally mislabeled.”³¹ (“Wholesale” is that point in the supply chain prior to retail or restaurants. This is key, as it demonstrates where, if a problem exists, it is along the

²⁹ Fish SCALE (Seafood Compliance and Labeling Enforcement). (n.d.). Retrieved from U.S. Food and Drug Administration website: <http://www.accessdata.fda.gov/FDATrack/track-proj?program=cfsan&id=CFSAN-ORS-Fish-Scale>

³⁰ FDA Import Alert 16-04, FDA Import Alert 16-47, and FDA Import Alert 16-128 all address seafood mislabeling

³¹ FY13-CFSAN Sampling for Seafood Species Labeling in Wholesale Seafood. (2012, April). Retrieved from <http://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Seafood/UCM419983.pdf>

chain ---- at the supplier or restaurant level.³²) FDA’s survey found that 85 percent of the seafood tested was properly labeled at the point of distribution to restaurants or retailers’ shelves with the majority of mislabeling found being with groupers and snappers.³³ It is important to emphasize that FDA tested products that were alleged to be regularly mislabeled. These results suggest that fraud may not be as extensive in the U.S. industry as some activists have argued. Therefore, we urge the Task Force to emphasize clarification and enforcement of existing laws to address seafood mislabeling where the greatest economic damage occurs rather than utilizing government and industry resources implementing a costly traceability “solution” that has not been proven to address seafood mislabeling. NFI supports practical solutions.

C. FOOD SAFETY IMPACT OF SEAFOOD MISLABLEING

NFI believes that all seafood products should be properly labeled as to identity, country of origin, added ingredients, and net weight because 1) that is what is required by U.S. laws and regulations, 2) correct labeling provides for fair business practices and 3) consumers deserve to receive the product they believe they are purchasing. In addition, because different seafood species may carry different food safety risks, the proper identification of seafood species is necessary to ensure adequate control of these food safety risks throughout the supply chain.

To understand the food safety implications of mislabeled seafood, NFI reviewed examples of seafood mislabeling from reports of FDA, non-governmental organizations and media published between 2011 and 2014. For each of the examples, the potential species-related hazards were identified for the actual species and for the species identified on the label following Guidance provided by FDA.³⁴ A public health implication would occur if there were unique hazards associated with the actual species that, because of the mislabeling, would not be apparent to the consumer or supply chain after the primary processors. An assessment was made as to the public health implications of the mislabeling with the results categorized as follows:

- No public health implications because there are no hazards associated with the actual species.

³² To assist restaurants with properly labeling, the BSB and National Restaurant Association in 2013 signed a Memorandum of Understanding in which NFI agrees to review NRA members’ menus for adherence to the FDA Seafood List

³³ FY13-CFSAN Sampling for Seafood Species Labeling in Wholesale Seafood. (2012, April). Retrieved from <http://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Seafood/UCM419983.pdf>

³⁴ U.S. Food and Drug Administration. 2011. Fish and Fishery Products Hazards and Controls Guidance, Fourth Edition.; Chapter 3. Retrieved from <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Seafood/ucm2018426.htm>. Note, Chapter 3 of the Fish and Fishery Products Hazards and Controls Guidance also addresses potential process- and packaging-related hazards. These were not considered in this assessment because these hazards apply to all seafood species and would not be impacted by mislabeling.

- No public health implications because the hazards associated with both species are the same.
- No public health implications because the hazards associated with the actual species are controlled by the primary processor (i.e., the processor who purchases the fish or shellfish from the harvest vessel or the aquaculture farm) and controls are not necessary beyond the primary processor.
- No public health implications because the product is typically cooked or if eaten raw, frozen prior to raw consumption as required by the Food Code.
- Potential for histamine formation if mishandled because the risk associated with certain species will not be apparent.
- Potential exposure to gempylotoxin because the risk associated with certain species will not be apparent.

Of the 98 examples assessed only three had unintended food safety implications because the consumer or establishments through the supply chain would be unaware of the actual hazards associated with the species.

D. PRINCIPLES FOR DESIGNATING FISH AS HIGH RISK FOR SEAFOOD FRAUD

The Task Force seeks input regarding the criteria to employ to designate seafood “at risk” for seafood fraud. Consistent with the discussion above, and with the Administration’s commitment to relying on sound science, the Task Force should rely on the following factors:

- The Task Force should identify species “at risk” for mislabeling based on latest evidence and not outdated reports which may not reflect current seafood purchasing patterns in the U.S.
- The Task Force should rely on Government resources, endorsing FDA as the authoritative agency for identifying and enforcing mislabeling and seafood fraud.
- The Task Force should rely on recent FDA analysis of the prevalence of potential seafood mislabeling along the supply chain, i.e., FDA’s two year study of mislabeling (October 2014)
- The Task Force should NOT deem a species as “high risk” based on evidence of mislabeling provided by non-governmental organizations or media reports without first independently verifying the reports.
- The Task Force should understand where in the supply chain any mislabeling occurs. Because of the regulatory burden any additional tracking of seafood will incur, it will be unfair to impose those costs on parts of the supply chain that are acting properly (e.g., if mislabeling occurs at the restaurant point, it is not appropriate to require the supply chain to have additional tracking requirements).

- The Task Force should consider “at risk” species to be only those that are consistently found to be mislabeled between point of harvest and point of first U.S. sale.³⁵ Random occurrences of mislabeling do not constitute “at risk” species.
- The Task Force should weigh the magnitude of labeling violations and impact on the U.S. consumer prior to deeming a species “at risk”. The following are examples of mislabeling that should represent lower concern and should NOT be the sole basis for an “at risk” determination:
 - Species that are mislabeled within the same genus or within the same acceptable market name grouping, e, g, shrimp, cod or grouper
 - Species that are of low volume for consumption, importation or production (low on the exposure aspect of risk).³⁶
 - Species that do not represent a food safety risk to the end-user.
- The Task Force should assess how the risk-based traceability program will prevent mislabeling of the potential “at risk” species throughout the supply chain.³⁷

IV. POTENTIAL IMPLICATIONS OF “HIGH RISK” DESIGNATIONS ON U.S. WORLD TRADE ORGANIZATION OBLIGATIONS

Trade is essential to the U.S. seafood sector. According to the Department of Commerce economic analysis, the seafood industry generates 1,270,141 jobs in the U.S. and has a sales impact of \$140,660,993,000.³⁸ U.S. harvested seafood creates 744,850 jobs, and imported seafood creates another 525,291 American jobs. Imported seafood also generates about 64% of the sales of the seafood industry and creates about 56% of the value addition to fish in the United States.³⁹ It is important that the Task Force understand the broad seafood industry and appreciate the economic impacts its decisions will have on American processing jobs.

³⁵ The scope of the Task Force recommended traceability program is to track at-risk seafood from harvest to entry into U.S. commerce (79 Fed. Reg. at 75540). Species found to be mislabeled at the later points in the supply chain (i.e., the restaurant or retail) would be beyond the scope of the Task Force’s recommendations.

³⁶ Ninety-seven percent of the 14.5 pounds of seafood that Americans ate in 2013 was provided by 10 species (shrimp, salmon, canned tuna, tilapia, pollock, pangasius, cod, catfish, crabs, clams). Many of the highly reported mislabeled species such as snapper, grouper, and escolar comprise a small portion of the remaining three percent of US consumption and could be considered a low volume species. (National Marine Fisheries Service 2014 Landings data).

³⁷ As an example, if red snapper is determined to be an “at risk” species, will requiring a traceability system for red snapper prevent any other species of fish to be labeled red snapper throughout the supply chain?

³⁸ National Overview U.S. Summary Management Context. NOAA Fisheries, 2012. Web. 29 Aug. 2014. http://www.st.nmfs.noaa.gov/Assets/economics/documents/feus/2012/FEUS2012_NationalOverview.pdf.

³⁹ Understanding the Commercial Fisheries and Recreational Fisheries Economic Impact Estimates. NOAA Fisheries, 2012. Web. 29 Aug. 2014. https://www.st.nmfs.noaa.gov/Assets/economics/documents/feus/2012/Understanding_fisheries_economic_impact_estimates.pdf

The “at risk” designation for either IUU or seafood mislabeling raises another issue: The possibility that the designation and the mandates it creates conflicts with basic obligations shared by all WTO Member States. Those obligations include the basic national treatment requirement that new regulatory measures be applied equally to all Member States, and that the requirements for non-U.S. persons be the same as those for U.S. persons. That means, of course, that U.S. rules for IUU and seafood mislabeling as they apply to domestic seafood must be the same as applied to imported seafood, absent a clear evidentiary basis that justifies different treatment. But WTO obligations go further, providing that even a facially non-discriminatory regulatory measure is unlawful if it effectively denies some or all non-U.S. firms an equal opportunity to compete in the U.S. market.

These obligations are especially important to bear in mind when it comes to U.S. regulation related to trade in commercial foods. Twice in recent years, the WTO Appellate Body has held that Federal regulatory measures violate WTO Agreements, first with respect to NOAA “dolphin-safe” regulations intended to eliminate dolphin bycatch in commercial fishing.⁴⁰ Second and most recently, country of origin labeling rules for beef and poultry that the WTO ruled could not be sustained in the face of objections from major trading partners Canada and Mexico.⁴¹

If the Task Force’s work translates into at-risk designations and differentiation without sufficient factual justification – either on an import versus import basis, or on a U.S. product versus import basis – then the at-risk analysis and the traceability requirements imposed as a consequence will be vulnerable to attack by fellow WTO Members. That legal vulnerability, as always, could then result in reaction – justified or not – against the nearly \$6 billion in annual U.S. seafood exports, in the form of copycat regulation or even retaliatory tariffs aimed specifically at U.S. harvesters and their exported product.

V. CONCLUSION

NFI appreciates the opportunity to provide principles to identify at risk species for mislabeling challenges from the perspective of over 300 NFI member companies engaged in harvesting, importing, processing, distributing and selling domestic and imported seafood at retailers and restaurants. We urge the Task Force, given the additional regulatory burden likely to result from a fish being designated as “high risk” of IUU or fraud to ensure its decisions are made based on government analysis and verification. NFI also asks that the Task Force ensure its decisions are consistent with applicable federal administrative law and Executive Orders (particularly Executive Order No. 12866, Regulatory Planning and Review (Sept. 30, 1993)). Finally, because so many American jobs depend on processing and distributing imported seafood, NFI urges

⁴⁰ World Trade Organization Dispute Settlement: Dispute DS384, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, January 22, 2014

⁴¹ World Trade Organization Dispute Settlement: Dispute DS384, United States — Certain Country of Origin Labelling (COOL) Requirements, May 29, 2015

caution that the Task Force decisions are made acknowledging the United States World Trade Organization obligations.

Sincerely,

A handwritten signature in black ink, appearing to read "John Connelly". The signature is written in a cursive style with a prominent loop at the end.

John Connelly
President
National Fisheries Institute