



September 11, 2015

Ms. Danielle Rioux
Office of Sustainable Fisheries
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
1315 East-West Highway
Silver Spring, Maryland 20910

SUBMITTED VIA REGULATIONS.GOV.

RE: Docket No. NOAA-NMFS-2014-0090; Presidential Task Force on Combating Illegal Unreported and Unregulated (IUU) Fishing and Seafood Fraud Action Plan; 80 *Federal Register* 45955 (August 3, 2015).

Dear Ms. Rioux:

The National Fisheries Institute (“NFI”) hereby submits comments on the proposal contained in the August 3 Federal Register Notice captioned above. NFI appreciates the opportunity to provide the views of the harvesters, processors, importers, distributors, restaurants, and retailers responsible for much of the fish Americans consume every day.

Executive Summary

NFI again submits comments to the Presidential Task Force on IUU Fishing and Seafood Fraud/National Ocean Council, this time in response to the Task Force’s August 3, 2015, *Federal Register* Notice applying seven principles to designate 12 seafood categories as “at risk” for both IUU fishing and seafood fraud and one as “at risk” for seafood fraud. These categories, according to the Task Force’s Action Plan, will be subjected to the traceability system outlined in a similar, July 1, 2015, *Federal Register* Notice, which requires affected seafood businesses to continuously collect and submit for unrestricted, perpetual Federal review a minimum of 17 pieces of data for every package containing any of those items imported into the United States.

NFI must again express disappointment with the Task Force’s proposal. In the August 3 Notice, the Task Force:

- Adopts as principles for designating seafood at risk for IUU fishing and seafood fraud the concept of “complexity of the chain of custody and processing” – a

widely applicable (and entirely unobjectionable) characteristic of the global seafood industry.

- Concludes with no evidence beyond the opinions of unidentified “experts” that the 13 chosen seafood categories – among them four of the top ten domestic categories – are at risk for IUU fishing and mislabeling, in effect alleging that multiple U.S. trading partners are complicit in widespread illegality intended to defraud tens of millions of American consumers and subvert fishery management systems that those partners established in the first place.
- Ignores the simple fact that seafood fraud related to imported and domestic product occurs overwhelmingly in the United States and cannot possibly be addressed by targeting overseas producers who have no connection to the violations in question.
- Denies, apparently, the obvious beneficial impact of enforcing existing Food and Drug Administration requirements related to economic adulteration of seafood in reducing seafood fraud.
- Continues on a path that will trigger retaliation, in seafood and perhaps elsewhere, in the form of traceability requirements designed to hobble market access for U.S. exporters.

I. By Using “Complexity Of The Chain Of Custody And Processing” As A Principle For Identifying At-Risk Categories, The Task Force Attempts To Convert An Essential Characteristic Of The 21st-Century Seafood Industry Into Evidence Of Criminality.

The Task Force identifies seven principles to be used in selecting the at risk species for either IUU fishing or seafood fraud:

1. Enforcement capability.
2. Catch documentation scheme.
3. Species substitution.
4. Mislabeling.
5. History of violations.
6. Human health risks.
7. Complexity of the chain of custody and processing.¹

To begin with, a nation’s enforcement capability bears directly on its ability to ensure that fishery management rules are observed and, similarly, to root out and punish economic integrity violations. Evidence of mislabeling and species substitutions, and a history of such violations in a particular category are of course relevant to assessing that category’s status.

¹ 80 Fed. Reg. at 45956.

That point applies to the United States Government as much as to any other: As NFI argues in greater detail below, the key to reducing seafood fraud in the United States is for U.S. authorities to more aggressively enforce existing laws against violators. The potential health risks arising from consumption of a fish that is not what the consumer purchased is also a legitimate consideration with respect to assessing seafood fraud, and that is yet another reason the nation's food safety regulator for seafood, FDA, should take the lead in identifying and punishing mislabeling and other economically motivated adulteration. The simplest solution to any issue of fraud is for the Administration to require FDA to enforce its regulations.

The Task Force also proposes using the complexity of the chain of custody and processing as a final factor in making at risk designations, and points to the extent of lawful transshipment, processing, and commingling present for a given product as indicative of an "at risk" category. This principle does not so much identify a vulnerability to IUU fishing or fraud as it does describe the modern seafood industry. As explained in prior NFI comments to the Task Force, categories such as tuna, shrimp, crab, cod, snapper, mahi-mahi, and swordfish are all characterized by multi-continent harvesting and processing, value-added processing and commingling, and large-scale multi-modal shipping across national boundaries. That such characteristics are present in one seafood item does not demonstrate a tendency towards violations in that category any more than an investment bank's regular cross-border funds transfers indicate financial chicanery. Those transfers are what make it a global investment bank, not an international scofflaw.

To that point, the Task Force has conceded that it is impractical to require vessel-specific information in fisheries, such as the Bristol Bay salmon fishery in Alaska, that depend on thousands of tender vessels transferring catch to larger ships at sea.² The August 3 Notice nevertheless emphasizes that "the transfer of fish from one vessel to another, either at sea or in port" makes for a lack of supply chain transparency, and thus tends towards IUU fishing. NFI agrees that vessel-specific information in certain fisheries will be extremely difficult to collect and report, but that begs the question of why the presence of such a complex supply chain should be weighted heavily in determining which seafood is genuinely susceptible to either of the problems the Task Force has set out to address.

The fundamental problem with the principles the Task Force has identified is not the principles themselves but what the Task Force would have Federal agencies *do* in response to those seven concepts. Having identified a lack of enforcement capability, or insufficient catch documentation, or a history of violations in a particular fishery, the Federal Government – one would think – would react by building outreach to nations to help strengthen enforcement, improve basic catch documentation, emphasize capacity to improve enforcement capabilities, or

² In a fishery "with tender vessels taking deliveries from many smaller harvesting boats, collection of this information could become burdensome. In this instance, the Committee currently anticipates requiring only the name of the tender vessels making traceable deliveries to a buyer or processor." 80 Fed. Reg. 37602.

immediately target likely violators. The Task Force, in its “at risk” approach, takes a different tack.

II. Even Were The Task Force’s At-Risk Principles Well-Chosen, Its Application Of Those Principles To The 13 Designated Seafood Categories Is Highly Flawed.

A. The August 3 *Federal Register* Notice Contains Virtually No Objective Evidence Justifying The Task Force’s At-Risk List, And Relies Instead On Unsubstantiated Conclusions Gleaned From Unspecified Government Data And Unidentified “Subject Matter Experts.”

Though the above concerns as to the “at risk” principles are real, the application of those principles to the 46 categories considered by the Task Force raises far more serious questions. That process yielded 13 at-risk categories, 12 of them at risk for IUU fishing and fraud, and blue crab, which is deemed at risk for fraud alone. The Task Force arrived at these conclusions based on information from CBP, FDA, NOAA, RFMOs, and “the knowledge of subject matter experts, including members of the Working Group and other personnel from represented agencies.”³

This methodology as described in the August 3 Notice is sorely wanting. The Task Force apparently utilized some relevant government data, but did not consider information from other reliable sources, such as the United Nations Food and Agriculture Organization. It is not clear which agency data was considered and which was ignored.

The Task Force’s consultation of unidentified subject matter experts – including, apparently, non-government “experts” – is of concern. These experts may (or may not) have an understanding of the commercial seafood industry inside and outside the United States. They may (or may not) have experience in the enforcement of international fisheries requirements and economic integrity requirements. They may be interested parties or even commenters in this process. Moreover, even if these experts are Task Force participants with decades of relevant experience, *reliance on their views cannot and does not substitute for particularized evidence that supports the at risk determinations.*

But there is no such evidence in the August 3 Notice, which makes The Task Force’s summaries of each of these 13 determinations less than compelling. The August 3 Notice includes dozens of conclusory allegations of “a lack of enforcement capability,” “a history of violations,” and “a history of species substitutions.” These summaries contain not a single substantiated fact in support of the at risk determinations.⁴ The glaring absence of substantiated facts calls into question the entire “at risk” exercise, especially as to large categories such as tuna, shrimp, and

³ 80 Fed. Reg. at 45956.

⁴ The only substantiated fact in these 13 summaries NFI can locate – a reference to the U.S. Government’s maintenance of a data program relating to swordfish, on behalf of ICCAT – cuts *against* the Task Force’s finding that swordfish is at risk for IUU fishing. 80 Fed. Reg. at 45958.

crab, in which fishery management requirements – and the effectiveness of enforcement of such requirements – differ and where, as a result, broad-brush conclusions about violations and enforcement do not apply.

This makes it challenging for NFI and other commenters to meaningfully respond to the August 3 Notice. For instance, which “value-added [tuna] products,” from what “certain regions” are at risk?⁵ Without inside knowledge of the Task Force working groups and their subject matter experts’ views, there is no way to know for certain and therefore no way to comment in any detail. But more importantly, this is an obstacle to effective implementation of Task Force Recommendations. The August 3 Notice restricts the scope of the traceability program to certain seafood imports into the United States, at least in the “first phase” of this effort, and is thus critically important.⁶ Surely the significance of this step in the Task Force’s work calls for a more substantial, data-driven approach conducted in a fully transparent manner. That would be to the benefit of the United States and to the many nations that supply seafood to American consumers.

B. The August 3 Notice In Effect Alleges That Numerous Major U.S. Trading Partners Support Widespread Criminality In Their Seafood Exports, Without The Slightest Effort To Document A Record Of Law-Breaking To Justify The Allegations.

Seafood fraud and illegal, unreported, and unregistered fishing are already crimes under numerous Federal laws. Through the Lacey Act, the Federal Food, Drug, and Cosmetic Act, country of origin provisions, the Nicholson Act, and other statutes, numerous Federal agencies (including Task Force participants the Departments of Justice, Commerce, Health and Human Services, Agriculture, Interior, and Homeland Security) have wide-ranging authority to investigate and punish those who, for instance, illegally fish in U.S. waters; inaccurately label or short-weight their seafood in interstate commerce; import into interstate commerce seafood that was harvested in violation of the harvest nation’s laws; attempt to land any fish caught on the high seas, or any product made from that fish, in a port of the United States, under a foreign flag, unless authorized by treaty; or transport across state lines fish that has been illegally harvested or impermissibly labeled. Punishments for violations of these provisions of U.S. law range from modest civil penalties to \$500,000 per violation and five years in prison, plus forfeiture of tainted seafood.⁷

⁵ 80 Fed. Reg. at 45958.

⁶ 80 Fed. Reg. at 45962.

⁷ See, e.g., 16 U.S.C. Section 3373 (Lacey Act); 7 U.S.C. Section 1638a (USDA COOL); 21 U.S.C. Section 343 (FFDCA); 19 U.S.C. Section 1304 (CBP COOL); and 46 U.S.C. Section 55114 (the Nicholson Act).

NFI has identified 35 countries that substantially harvest/farm, process, or harvest/farm and process one or more of the 13 designated categories. Each of the 35 nations on the attached chart is responsible for a substantial percentage of the total landed catch of the category noted. Only one such major producer – the United States – is excluded, as the proposed traceability program does not apply to the large majority of U.S. harvested or farmed seafood. The chart also identifies which countries have been listed by the NMFS as IUU violators in any of the four biennial IUU reports since 2009, for any of the 13 designated at risk categories in which the country is a major producer.⁸

	Atlantic Cod		Pacific Cod		Blue Crab (Alligator or Blue Swimming Crab)		Mahi Mahi		Grouper		King Crab		Red Snapper		Sea Cucumber		Sharks		Shrimp		Swordfish		Tuna		TOTAL USG Designated Countries	
	Major Harvester or Processor	USG Designated IUU Countries	Major Harvester or Processor	USG Designated IUU Countries	Major Harvester or Processor	USG Designated IUU Countries	Major Harvester or Processor	USG Designated IUU Countries	Major Harvester or Processor	USG Designated IUU Countries	Major Harvester or Processor	USG Designated IUU Countries	Major Harvester or Processor	USG Designated IUU Countries	Major Harvester or Processor	USG Designated IUU Countries	Major Harvester or Processor	USG Designated IUU Countries	Major Harvester or Processor	USG Designated IUU Countries	Major Harvester or Processor	USG Designated IUU Countries	Major Harvester or Processor	USG Designated IUU Countries		
Argentina												H													0	
Australia	H																									0
Brazil														H												0
Burma							HSP																			0
Canada			H									HSP			HSP		H					HSP				0
Chile	H																									0
China	HSP											P									HSP			HSP		0
Costa Rica									H														H			0
EU			H																							0
Ecuador									HSP												HSP		HSP	HSP	2011, 2013, 2015	1
Faroese			H																							0
Guatemala									H																	0
Hong Kong	HSP																	P								0
Honduras																H										0
Iceland			H																							0
India							HSP			HSP											HSP					0
Indonesia							HSP					P									HSP			HSP		0
Japan					H																			H		0
Korea					H		HSP																	H	2013	1
Malaysia							HSP														HSP					0
Mexico	H								HSP	H		P		H		H		H	2013	HSP		H		HSP	2013, 2015	2
New Zealand										H								H								0
Nicaragua														H												0
Norway			H																							0
Panama								HSP		H				H									H			0
Philippines							HSP														HSP			HSP		0
Russia			H		H							H														0
Sri Lanka							HSP																			0
Singapore																							H			0
Spain																								H	2013	1
Taiwan									H		HSP													H		0
Thailand							HSP					P									HSP			HSP		0
Trinidad											HSP															0
USA			H		H																			H		0
Viet Nam									HSP				P											HSP		0
TOTAL	5	0	7	0	4	0	9	0	6	0	6	0	8	0	4	0	3	0	4	1	10	0	6	0	12	4

⁸ See NOAA's Biennial Reports to Congress on IUU Fishing from 2009, 2011, 2013, and 2015.

The chart shows that of the 35 producing nations whose seafood products are alleged to be at risk for IUU fishing and seafood fraud, only four – Ecuador, Korea, Spain, and Mexico – have *ever* been previously found by the United States to be responsible for IUU fishing of an at risk item in a category where they are a major producer. Again excluding the United States, this means producers of the other 30 nations in effect now stand accused, for the first time, of serial IUU and seafood fraud violations.⁹ Though the Task Force does not name countries, no other conclusion is possible: For each of the 13 at risk categories, the major producers must be complicit in ongoing Federal felonies in order for the designation to make any sense.

What is more, Task Force leadership has stated that the at risk designation applies to all imports from any harvesting or processing nation and has specifically stated that the Administration will not take into account differences in fishery management systems or the effectiveness of enforcement from nation to nation:

To the extent that a species is on the list, those data requirements will be applied to all fisheries both domestic and import. With respect to any particular species where one might think that there are different management schemes or different levels of risks for seafood fraud on a national or regional basis, the working group is not able to average risk. In other words, good management of a species in one area does not mitigate IUU risk or seafood fraud risk somewhere else. ***For that reason, the working group really needed to assign risk according to sort of the worst case across the range of a species.*** So, and that is addressed specifically in the *Federal Register* Notice, the fact that identifying a species is at risk of IUU fishing or seafood fraud is not an indication that it shares that same risk across the geographic distribution of the species in fisheries, or that it points to any particular conservation concern, but, simply, somewhere across the distribution the working group identified significant risk.¹⁰

With all due respect, this is the regulatory equivalent of “kill ‘em all, and let God sort ‘em out.” Though the Task Force acknowledges that different countries have different systems and different enforcement outcomes, those differences have been ignored in the at risk determinations. But if each major harvester has a different risk profile for a given species, then imposing the proposed traceability system on that species across the board and without regard to those risk profiles is the very opposite of the risk-based approach the Task Force claims to want. And doing so by reference to the worst performing country for that fish – “the worst case across

⁹ The only fish alleged by NMFS to be an IUU product but not included as an at risk category in the August 3 Notice is toothfish.

¹⁰ Statement of John Henderschedt, Director, NMFS International Affairs & Seafood Inspection Program, August 25, 2015 Task Force webinar at 36’34’’ to 38’ 05’’ (http://www.nmfs.noaa.gov/ia/iuu/082615_at-risk_webinar_audio.wav.) (emphasis supplied).

the species” – punishes the high-performing nations in the chart above, for the alleged shortcomings of a few.

The Task Force compounds this error with what appears to be a lack of consultation with affected trading partners. From a review of comments already filed, it appears that the Task Force has not communicated its designations of IUU and fraud and their implications to the 34 countries listed above.¹¹ The Presidential Memorandum establishing the Task Force calls for “working with industry and foreign partners to develop and implement new and existing measures, such as voluntary, or other, traceability programs, that can combat IUU fishing and seafood fraud” and “strengthening coordination between Federal, State, local, and foreign agencies, and industry approaches that contribute to efforts to combat IUU fishing and seafood fraud, including with respect to seafood traceability and ways to minimize any costs and reporting burdens on small businesses.”¹² Certainly, other major initiatives to assess and punish countries with unsatisfactory IUU enforcement include consultation with affected countries.¹³

This lack of consultation augurs poorly for both the effectiveness of the proposed system and the receptiveness of major seafood producers not just to the traceability requirements they will have

¹¹ See Comments of the Ministry of Primary Industries and Ministry of Foreign Affairs and Trade of New Zealand, August 31, 2015 (NOAA-NMFS-2014-0090-0307). New Zealand states:

“The Working Group recommendation of the 13 species includes little detail about why the species were considered to be of high risk other than broad generalizations, such as lack of enforcement capability. Many of the countries which export the listed species of seafood have never been accused by the US government of IUU fishing (as would be required under existing US law and NOAA’s biannual report to Congress on IUU)” (at 6).

“New Zealand would appreciate clarification as to whether the proposed grouper measure applies to species of Serraninae or more extensively to include related species such as those in Polyprionidae” (at 7).

See Comments of Fisheries and Oceans Canada, September 10, 2015 (NOAA-NMFS-2014-0090-0314). Canada states:

“We are interested to know whether there will be bilateral discussions with implicated trading nations before traceability requirements are finalized” (at 2).

¹² Memorandum for the Heads of Executive Departments and Agencies, at 1 and 3 (June 17, 2014). (<https://www.whitehouse.gov/the-press-office/2014/06/17/presidential-memorandum-comprehensive-framework-combat-illegal-unreported>).

¹³ For instance, the European Union’s process for identifying IUU violators involves regular consultations. Under Council Regulation (EC) No 1005/2008, when flag States are unable to certify the legality of products in line with international rules, the Commission starts a process of cooperation and assistance with them to help improve their legal framework and practices. The issuance of a yellow card to Thailand is a “result of a thorough analysis and a series of discussions with Thai authorities since 2011.” (http://europa.eu/rapid/press-release_IP-15-4806_en.htm).

to meet but also to the Task Force Recommendations involving government-to-government collaboration and capacity building.

C. It Is Particularly Egregious To Point Fingers At Overseas Seafood Producers For Seafood Fraud That Is Occurring *Inside U.S. Borders* And That Is The Legal Responsibility Of The Businesses Mislabeling Fish.

IUU fishing that is in fact taking place in the waters of other nations or on the high seas is of course the responsibility of the nation controlling the relevant waters and/or the flag nation of the harvest vessel. In contrast, economic integrity violations and especially species substitution are the responsibility of the country in which the violations takes place, even if the product in question is an at risk category that country heavily imports. Seafood fraud, in particular misrepresenting species or country of origin in a way that affects U.S. consumers, overwhelmingly takes place in the U.S., not overseas. This raises the question of why seafood deemed at risk by the Task Force should have to meet proposed traceability requirements starting at the vessel or farm, when the misrepresentation occurs far downstream in the supply chain.¹⁴

In its decision to sample at the wholesale/distributor level and at point of importation, FDA certainly has signaled its intent to identify the likely point of suspected substitution in the United States. As noted in prior comments to the Task Force, FDA seafood species labeling tests primarily focus on wholesale rather than retail samples. For instance, FDA's multi-pronged Fish SCALE program included a two year survey of seafood labeling. The agency sampled 174 lots sourced at wholesale or importation in 14 states with a focus on species that were allegedly "normally mislabeled."¹⁵ FDA found that 85 percent of the seafood tested was properly labeled at the U.S. point of distribution to restaurants or retailers' shelves. Of the remaining 15 percent, virtually all of it was fish mislabeled as grouper or an incorrectly labeled variety of snapper. When teasing out the results of the grouper and snapper samples taken at point of importation 88% of the grouper (15 out of 17) and 81% of the snapper (12 out of 15) were correctly identified with the violations being misidentifications as to the specific type of grouper or snapper.

Private sector sources of information back up this conclusion. In a widely-read series on seafood fraud, the *Boston Globe* investigated seafood mislabeling at over 130 restaurants, grocery stores, and seafood markets in the Boston area, finding that 48 percent of the samples tested were mislabeled. The series documents many examples of restaurant owners or chefs admitting to substituting one species for another. State regulators often report similar observations from

¹⁴ This is not to suggest that some types of mislabeling such as short weights or added water do not happen overseas. However, the Task Force has failed to demonstrate how a complicated traceability system will prevent that form of misbranding and/or adulteration from occurring.

¹⁵ It is interesting to note that although cookie-cuttered skate wings are, according to urban legend, passed off as scallops, FDA did not include scallops in the list of tested species.

routine inspections. One example cited by the Florida Department of Business and Professional Regulation, Division of Hotels and Restaurants is the now-familiar escolar being sold as white tuna: “Observed establishment advertised white tuna on the menu/menu board but served escolar, per chef.”¹⁶

This only stands to reason: Both the economic incentive for misrepresenting species (the restaurateur, not the farmer, stands to reap a windfall by labeling tilapia as “grouper”) and the practicalities of seafood importing (a package of “wild-caught grouper” arriving at a U.S. port from a Pacific Rim farmed fish producer will raise suspicions) strongly suggests that such mislabeling happens in the U.S. by businesses at or near the end of the supply chain.

Recognizing, of course, that the United States should first address shortcomings in the U.S. market, it is worth noting that over the past 5 ½ years, seafood exported from the U. S. into Canada is second only to China for the number of refused shipments due to mislabeling (i.e., net weight or excessive moisture) violations.¹⁷ This suggests that if the Government of Canada were to address seafood fraud in a similar manner as this Task Force, the United States would be considered an at risk source of mislabeled seafood. Based on the principles proposed in the August 3 *Federal Register* Notice, Canada then would be justified in requiring traceability for seafood products from the U.S. because of a history of mislabeling.

The solution to this problem – to the seafood fraud that is happening in the United States *right now* – is not to impose in coming years a multi-billion dollar traceability mandate on a large swath of the seafood-producing world (and, even later, on all imports from every category). Rather, the solution is *vigorous and immediate Administration enforcement against the U.S. businesses that insist on flouting existing law*. The Lacey Act is a powerful enforcement tool, and the Administration should use it. As one influential environmental organization puts it: “In theory, regular prosecutions and strong penalties should deter potential violators. And because the [Lacey] Act can be applied to distributors and retailers in the U.S., and not merely to importers, it can also serve as an incentive to U.S. seafood merchants to avoid products of dubious origin.”¹⁸ But such prosecutions are not theoretical at all – they are concrete tools available to the Administration *right now* to ensure that domestic and imported seafood products are properly labeled, weighted, and safe to eat.¹⁹ That is nowhere more evident than with respect to the largest U.S. seafood category, shrimp.

¹⁶ Division of Hotels and Restaurants Food Misrepresentation Cases available at <http://www.myfloridalicense.com/dbpr/hr/food-lodging/foodmisrep.html>

¹⁷ Sourced from the Canadian Food Inspection Agency Mandatory Inspection List available at (<http://www.inspection.gc.ca/active/scripts/fispoi/ial/ialfront.asp?lang=e>).

¹⁸ Comments of the World Wildlife Foundation, NOAA-NMFS-2014-0090-0056 (Sept. 2, 2014), at 7.

¹⁹ The mislabeling violations of seafood shipments into Canada noted in the previous paragraph were the results of a sampling effort by the Canadian government as a means to deter seafood fraud – regulatory oversight of existing laws and regulations.

D. These Points Are Borne Out By Examination Of The Specific Categories Designated As At Risk.

1. Shrimp.

The Task Force identifies shrimp as at risk because of “a significant amount of mislabeling and/or misrepresentation of shrimp,” “the level of processing often associated with shrimp products,” and the alleged use of Sodium Tripolyphosphate to add water weight.²⁰

First, there are no specifics here to demonstrate the conclusions the Task Force draws. Second, the degree of processing associated with shrimp in general varies according the specific product in question, as any retail customer comparing the freezer aisle with the seafood counter can attest. Third, the Task Force would have producing nations comply with the traceability proposal described in the July 1 *Federal Register* Notice, thus requiring affected companies to report to the Federal Government both the market name (“shrimp”) and one of 48 scientific names for shrimp as recognized by FDA. But the Task Force itself, when confronted with this complexity, combined all 48 of these species into one name “because the supporting data utilized nomenclature which made further analytical breakouts (*e.g.*, by scientific name) unworkable.”²¹ There is more than a little chutzpah in demanding that major producing and processing countries meet a reporting requirement that the Task Force, after consultation with subject matter experts, does not.

Major Wild and Farm Shrimp Exporters to U.S.

Countries	Harvester or Processor	Volume (MT)	Percent	Value (\$)	Low Enforcement Capability	Low Law Enforcement	Fisheries Violation	Ineffective Catch Documents	Transshipment	Significant Processing	Short Weight	Species Substitute	Mislabeling
India		108,664	19%	1,380,181,289			X			X	X	X	X
Indonesia		103,329	18%	1,318,682,502			X			X	X	X	X
Ecuador		92,405	16%	901,153,656			X			X	X	X	X
Viet Nam		73,483	13%	1,001,178,791			X			X	X	X	X
Thailand		64,816	11%	816,677,345			X			X	X	X	X
China		32,561	6%	271,480,645			X			X	X	X	X
Mexico		20,262	4%	301,325,957			X			X	X	X	X
Malaysia		17,704	3%	178,473,032			X			X	X	X	X
Total		568,644		6,696,846,217									

Source: Umer Barry and Department of Commerce (Data from 2014).

These allegations amount to a determination that the eight nations in the chart above – responsible for 90 percent of U.S. shrimp imports – are shipping illegally harvested or misbranded shrimp to the U.S., not once in a while, but on a regular basis, and that the numerous other countries that are major producers (but do not ship directly to the U.S. in large amounts) are in league with those eight. Before making such allegations about the nation’s largest seafood category, the Task Force should have adduced specific evidence to support its case.

The IUU designation of imported shrimp in particular is at odds with the trade flows and the realities of commercial shrimp production. That is because about 90 of U.S. consumption of

²⁰ 80 Fed. Reg. at 45958.

²¹ 80 Fed. Reg. at 45956.

shrimp is imported, and the vast majority of that is farmed product. Of remaining U.S. consumption, most is of domestic, wild-capture shrimp – which is exempt from the Task Force’s proposal. Thus, in designating “shrimp” as at risk for IUU fishing, the Task Force condemns a large industry segment of imports for alleged violations committed, if at all, by a far smaller segment comprising a very small slice of U.S. consumption. This effectively turns the process on its head, making shrimp farmers and the U.S.-based processors they supply responsible for illegally fishing a product that cannot be fished.

Finally, it must be noted that NFI supports vigorous enforcement of FDA rules against mislabeling and improper use of Sodium Tripolyphosphate. But, again, it must be emphasized that the Administration has readily-available tools for combatting economically motivated adulteration of food and mislabeling.

Consider the recent prosecution of a North Carolina seafood processor and distributor for mislabeling 25,000 pounds of farm-raised imported shrimp as wild-caught product of the United States and then selling it to customers in Louisiana. The Government made no allegation that the non-U.S. exporter or producer had anything to do with this malfeasance. The company, Alphin Brothers Inc., was sentenced to a \$100,000 criminal fine, forfeiture of 21,450 pounds of shrimp, and three years of probation. The prosecution involved NMFS and the Louisiana Department of Wildlife and Fisheries.²² If the Task Force believes that relying on this type of prosecution is too laborious or takes too long, then a senior level telephone call between the Task Force and the Department of Justice would appear to be in order.

2. Tuna.

The Task Force’s case for designating tuna at risk is a content-free wonder:

Tunas are a high volume and high visibility species group.... There has been a history of fisheries violations in certain tuna fisheries and in certain regions. Further, harvesting, transshipment, and trade patterns for tunas can be complex, in particular for certain value-added products. While there are multilateral management and reporting measures in place for many stocks within the tuna species group, these management and reporting mechanisms vary in terms of information standards and requirements and do not all provide a complete catch documentation scheme. Tunas are also subject to complicated processing that includes comingling of species and transshipments. Further, there has been a history of some species substitutions, with most instances involving substitution of one tuna species for another. However, there have also been instances of escolar, which can be a toxin, being substituted for albacore tuna.²³

²² “North Carolina Seafood Processor and Distributor Sentenced for Mislabeling Shrimp,” United States Department of Justice press release, August 11, 2015. (<http://www.justice.gov/opa/pr/north-carolina-seafood-processor-and-distributor-sentenced-mislabeling-shrimp>).

²³ 80 Fed. Reg. at 45958

To begin, the “high volume” and “high visibility” nature of tuna does not mean the category is more or less apt to be illegally fished; it merely means consumers are familiar with the product and like it. In the same vein, tuna production indeed “can be complex,” but that is not evidence of wrongdoing; it is evidence of a complex supply chain. But the real problem with this description is its lack of specifics: What “history of violations”? Which “value-added products”? Which “fisheries” “stocks” and “regions”? There is no way to know, and therefore no way to meaningfully respond. It is true that substituting escolar for tuna poses a food safety problem for unsuspecting consumers, but that again underscores the need for the nation’s food safety regulator for seafood, the FDA, to take a lead role in investigating and punishing mislabeling.

Lastly, by designating tuna an at risk category, the Task Force in effect alleges that major harvesting and processing nations are engaged in significant law-breaking that is defrauding the American consumer. The two charts below identify the 14 nations responsible for at least three percent of global harvest and/or at least three percent of all processed tuna exported to the U.S. That means the Task Force has concluded that these countries, *sans* the U.S., are catching tuna illegally, processing that tuna for U.S. customers, and/or violating FDA economic integrity requirements. Of these 13 countries, only Ecuador, Spain, and Mexico have ever been accused by NMFS of IUU fishing for tuna. Unlike the biennial NMFS IUU fishing report, this allegation is leveled without any specific evidence, and for a category that is subject to highly-developed catch documentation and other requirements already in place.²⁴

As for substitutions of escolar for white tuna, outreach to local and state regulators with an expectation of enforcement would be a much more effective tool to eliminate this blatant misrepresentation than requiring traceability of an innocent party.

Tuna Harvesters by Countries

Countries	Harvester or Processor	Volume (MT)	Percent	Low Enforcement Capability	Low Law Enforcement	Fisheries Violation	Ineffective Catch Document	Transship	Significant Processing	Short Weight	Species Substitution	Mislabeling
Indonesia	H	951,028	17%			X	X	X	X		X	
Philippines	H	491,010	9%			X	X	X	X		X	
Japan	H	372,391	7%			X	X	X	X		X	
Spain	H	341,299	6%			X	X	X	X		X	
Ecuador	H	296,726	5%			X	X	X	X		X	
Korea, Republic of	H	267,970	5%			X	X	X	X		X	
Papua New Guinea	H	194,040	4%			X	X	X	X		X	
USA	H	147,641	3%			X	X	X	X		X	
Mexico	H	142,598	3%			X	X	X	X		X	
Total		5,457,856										

Source: Data from FAO in 2013.

²⁴ Comments of the International Seafood Sustainability Foundation, NOAA-NMFS-2014-0090-0240 (May 29, 2015) (describing the ProActive Vessel Register, which gives the tuna supply chain assurance that fishing vessels are meeting ISSF sustainability requirements).

Major Exporters of Tuna to U.S.

Countries	Harvester or Processor	Volume (MT)	Percent	Value (\$)	Low Enforcement Capability	Low Law Enforcement	Fisheries Violation	Ineffective Catch Documents	Transshipment	Significant Processing	Short Weight	Species Substitution	Mislabeling
Thailand	H and P	107,794	38%	475,312,852			X	X	X	X		X	
China	H a little and P	29,048	10%	119,768,436			X	X	X	X		X	
Philippines	H and P	25,739	9%	133,825,442			X	X	X	X		X	
Viet Nam	H and P	23,654	8%	131,823,180			X	X	X	X		X	
Indonesia	H and P	19,676	7%	146,373,281			X	X	X	X		X	
Ecuador	H and P	18,576	7%	126,246,934			X	X	X	X		X	
Fiji	H and P	12,180	4%	64,640,634			X	X	X	X		X	
Mauritius	H and P	8,129	3%	43,150,581			X	X	X	X		X	
Mexico	H and P	7,275	3%	36,581,955			X	X	X	X		X	
Total		282,599		1,536,145,345									

Source: Umer Barry and Department of Commerce (2014).

Similar problems arise concerning the Task Force’s conclusions as to other major at risk categories.

3. Blue Crab.

Blue swimming crab – the *correct* name for the product produced by the countries in the chart below²⁵ – is almost always shipped to the United States in pasteurized form, either for retail sale in that form or for further processing into value-added items such as crab cakes. Mislabeling this product so as to trick consumers into believing that it is a U.S. product involves either: (i) changing the label on the cans, thus violating existing country of origin marking requirements; or (ii) removing the crab from each can and then mixing the meat with domestic blue crab, as a kind of filler. These methods, which should be punished when they take place, unquestionably occur in the United States without any involvement from overseas producers or processors.²⁶

The Task Force’s designation of blue crab as at risk for seafood fraud can only mean that producers in Indonesia, the Philippines, Vietnam, Thailand, and India reporting 14 data elements to the Federal Government will somehow address such mislabeling, even though those producers have no hand in, and do not profit from, the misconduct taking place thousands of miles from their pots. These two ideas simply cannot be squared, and the Task Force cannot possibly argue that the proposed traceability proposal will result in fewer American restaurant menus illegally touting U.S.-harvested “blue crab.”

²⁵ This raises the question of which crab specie(s) will be impacted by a required traceability regime – only *Callinectes sapidus* (Blue Crab as identified as being at risk), or also imported *Portunus pelagicus* (blue swimming crab), which is accused of masquerading as domestic product?

²⁶ Those concerned over seafood fraud involving blue swimming crab do not point to examples of crab entering the United States mislabeled. *See, e.g.*, “Seafood fraud cases plummet as NOAA cuts investigators,” *Baltimore Sun* (December 6, 2014) (quoting a letter from, among others, Senator Barbara Mikulski, stating: “Some processors are importing foreign crabmeat, repacking it at a domestic facility, and then labeling it as a product of the United States.”)

Major Exporters of Blue Swimming Crab to U.S.

Countries	Harvester or Processor	Volume (MT)	Percent	Low Enforcement Capability	Low Law Enforcement	Fisheries Violation	Ineffective Catch Documents	Transshipment	Significant Processing	Short Weight	Species Substitution	Mislabeling
Indonesia	H&P	9,907,758	46%						X	X	X	X
Philippines	H&P	3,012,357	14%						X	X	X	X
Vietnam	H&P	2,785,472	13%						X	X	X	X
Thailand	H&P	2,695,294	13%						X	X	X	X
India	H&P	1,244,600	6%						X	X	X	X
Sri Lanka	H&P	626,498	3%						X	X	X	X
Total		21,516,384							X	X	X	X

Source: Umer Barry and Department of Commerce (Data from 2013).

4. King Crab.

Here, too, the Task Force fails to present evidence for King Crab as an at risk species for IUU fishing and fraud beyond conclusory allegations of a “significant history of violation, lack of effective catch documentation scheme,” and frequent transshipment.

To repeat, Federal agencies are able to punish IUU violators under existing law. In a 2011 prosecution, the Department of Justice with the support of NMFS seized \$2.5 million worth of illegal king crab because a U.S. importer had purchased products

harvested from Russian waters in violation of Russian quotas, was not marked in accordance with regulations implemented by the National Oceanic and Atmospheric Administration (NOAA) pursuant to the Lacey Act, and was not accompanied with information required by the reporting regulations implemented by the Food and Drug Administration pursuant to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002.²⁷

Further, NMFS is on September 11, 2015 signing a bilateral agreement with Russia that commits both countries to work collaboratively to address IUU fishing. The Administration is to be applauded for bringing this agreement to a successful conclusion, but designating a major Russia seafood export as presumptively the product of pirate fishing is a curious way to carry it out.

Major Exporters of King Crab to U.S.

Countries	Harvester or Processor	Volume (MT)	Percent	Value (\$)	Low Enforcement Capability	Low Law Enforcement	Fisheries Violation	Ineffective Catch Documents	Transshipment	Significant Processing	Short Weight	Species Substitution	Mislabeling
Russia	H	10,689	34%	222,681,247	X		X	X	X				X
China	P	6,121	20%	47,755,741	X		X	X	X				X
Canada	H&P	4,580	15%	52,869,687	X		X	X	X				X
Indonesia	P	3,434	11%	86,737,381	X		X	X	X				X
Argentina	P	2,014	6%	24,794,873	X		X	X	X				X
Viet Nam	P	1,599	5%	33,514,531	X		X	X	X				X
Mexico	H a little and P	1,585	5%	9,039,340	X		X	X	X				X
Thailand	P	1,284	4%	18,544,881	X		X	X	X				X
Total		31,306		495,937,681									

Source: Umer Barry and Department of Commerce (2014).

²⁷ "DOJ And Seafood Importer Reach Settlement Over 112 Tons Of Illegally Imported Russian King Crab – Crab Seized Last Year at Port of Seattle Following Federal Investigation," U.S. Attorney’s Office for the Western District of Washington, press release, April 20, 2002.

5. Atlantic & Pacific Cod.

The history of cod and in particular U.S. and Canada cod fisheries is a cautionary tale about the need for effective fishery management. But today’s major overseas Atlantic cod fisheries are managed by some of the world’s most advanced fisheries regulators and are among the world’s healthiest. Four nations account for virtually the entire world harvest. The Task Force’s conclusion that Iceland, Norway, the EU, and Russia are all responsible for significant IUU fishing of cod – and that is, again, what this designation must mean to make any sense – ignores the highly-developed management systems that have been in place in most of the countries and in the North Pacific for decades.

As for the species substitution the Task Force alleges is taking place, that substitution almost certainly involves lower-value whitefish being labeled *as cod* so as to fetch a premium from retail and restaurant buyers or their customers, something that producers from these four nations have no incentive to do and have no power to stop. To repeat: *Imposing on, for instance, Iceland cod harvesters the obligation to report 17 different data elements to the Federal Government will do nothing to stop mislabeling in the United States of fish that is of lower value than the cod landed in Reykjavik.*

Atlantic Cod By Harvest Countries

Countries	Harvester or Processor	Volume (MT)	Percent	Low Enforcement Capability	Low Law Enforcement	Fisheries Violation	Ineffective Catch Documents	Transshipment	Significant Processing	Short Weight	Species Substitution	Mislabeling
Norway	H	471,000	35%	X			X				X	X
Russia	H	436,000	32%	X			X				X	X
Iceland	H	236,000	18%	X			X				X	X
EU	H	158,000	12%	X			X				X	X
Faroes	H	32,000	2%	X			X				X	X
U.S./Canada	H	12,000	1%	X			X				X	X
Total		1,345,000										

Source: GFF and FAO Database (2013).

The story with respect to Pacific cod is different. Despite the “clear history of [IUU] violations,” the Task Force exempts the massive U.S. catch that accounts for almost 70 percent of the harvest but simultaneously insists on full compliance by Russia and Japan.²⁸ In doing so, the Task Force takes most of the world harvest off the table, and in the process invites allegations from both countries that the U.S. is violating basic World Trade Organization obligations. But that will not exempt U.S. harvesters from a *de facto* need to meet the traceability requirements, because at least some of the U.S. harvest is processed in China and then shipped to U.S. customers (as the two charts below together demonstrate). Which means that this specific cod will have to comply

²⁸ 80 Fed. Reg. at 45957.

with the July 1 Task Force traceability mandate. This for a fish that, when the FDA tested it in 2013, came back as properly labeled in all 15 samples.²⁹

Pacific Cod By Harvest Countries

Countries	Harvester or Processor	Volume (MT)	Percent	Low Enforcement Capability	Low Law Enforcement	Fisheries Violation	Ineffective Catch Documents	Transshipment	Significant Processing	Short Weight	Species Substitution	Mislabeling
USA	H	320,000	68%			X	X	X		X	X	X
Russia	H	78,000	17%			X	X	X		X	X	X
Japan	H	60,000	13%			X	X	X		X	X	X
Korea	H	12,000	3%			X	X	X		X	X	X
Total		470,000										

Source: GFF and FAO Database (2013).

Major Exporters of Cod to U.S.

Countries	Harvester or Processor	Volume (MT)	Percent	Value
China	P	45,781	66.9%	239,109,231
Iceland	H&P	7,352	10.7%	64,424,740
Canada	H	4,935	7.2%	33,048,255
Russia	H	4,387	6.4%	29,791,330
Norway	H	3,573	5.2%	24,842,324
Total		68,458		407,911,580

Source: Urner Barry and Department of Commerce (2014).

6. Red Snapper.

Management of red snapper is the subject of heated debate on Capitol Hill and among fisheries regulators, but that does not support an at risk designation here. And it certainly does not make the case that Mexico, Nicaragua, Brazil, and Panama are serial IUU violators, based – again – on unsubstantiated allegations of wrongdoing category-wide. In addition, the Task Force correctly notes the human health concerns that could arise from species substitution. Once more (and with feeling): The fact that mislabeling of this category could have an impact on human health – because of “parasites and natural toxins” present in some of the substituted species – is an argument for aggressive FDA enforcement of the agency’s existing food safety and economic integrity requirements, not for imposition of an elaborate traceability system that does not capture the part of the supply chain where mislabeling occurs.³⁰

²⁹ See FY13-CFSAN Sampling for Seafood Species Labeling in Wholesale Seafood. Retrieved from <http://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Seafood/UCM419983.pdf>.

³⁰ 80 Fed. Reg. at 45957.

FDA’s targeted testing of snapper sampled at point of importation found that of the 15 samples tested, only three were misidentified as to the specific type of snapper.³¹ None of the red snappers was misidentified, which suggests that FDA’s long-standing import alerts are sufficient deterrents for preventing foreign processors passing off other snapper species as red.³²

Major Exporters of Red Snapper to U.S.

Countries	Harvester or Processor	Volume (MT)	Percent	Value (\$)	Low Enforcement Capability	Low Law Enforcement	Fisheries Violation	Ineffective Catch Documents	Transshipment	Significant Processing	Short Weight	Species Substitution	Mislabeling
Mexico	H and P	3,273	22%	21,327,445	X		X	X				X	
Nicaragua	H and P	2,666	18%	16,857,842	X		X	X				X	
Brazil	H and P	2,494	17%	14,818,537	X		X	X				X	
Panama	H and P	1,335	9%	9,837,331	X		X	X				X	
Total		14,933		96,576,113									

Source: Umer Barry and Department of Commerce (2014).

7. Grouper.

The Task Force finds grouper at risk for a “history of fisheries violations,” “lack of a catch documentation scheme throughout the geographic range of fishing activity,” transshipping and global processing, and lastly, “a strong history of species substitution, including substitution using seafood that is of human health concern”³³ This last point is not surprising since grouper is the poster child for mislabeling, leading one State regulatory agency to provide guidance to consumers on how to protect themselves from being duped.³⁴

Similar to testing described above, FDA’s targeted testing of grouper sampled at point of importation found that of the 17 samples tested, only two were misidentified as to the specific type of grouper and these two were actually groupers, just not the specific species identified on the label. This is in contrast to the results from testing of grouper sampled at the wholesale/distributor level (presumably at least one distribution step away from point of importation). Of the 45 samples, five were mislabeled, 2 as other types of grouper, but 3 as

³¹ See FY13-CFSAN Sampling for Seafood Species Labeling in Imported Seafood. Retrieved from <http://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Seafood/UCM419984.pdf>.

³² Import Alert 16-47, Detention Without Physical Examination of Red Snapper from Thailand and Import Alert 16-04, Misbranded Seafood both accessed at http://www.accessdata.fda.gov/cms_ia/industry_16.html.

³³ 80 Fed. Reg. at 45957.

³⁴ See <http://www.freshfromflorida.com/Divisions-Offices/Marketing-and-Development/Food-and-Nutrition/Food-Safety/Mislabeling-Seafood-Products-Is-Illegal>.

species other than grouper.³⁵ To repeat once more: Such mislabeling is wrong, and the Federal Government has ample authority to target the illegal labeling of grouper right now.

Major Exporters of Grouper to U.S.

Countries	Harvester or Processor	Volume (MT)	Percent	Value (\$)	Low Enforcement capability	Low Law Enforcement	Fisheries Violation	Ineffective Catch Documents	Transshipment	Significant Processing	Short Weight	Species Substitution	Mislabeling
Mexico	H	3,294	70%	28,969,813			X	X	X			X	
Panama	H	539	11%	4,608,991			X	X	X			X	
Taiwan	H&P	173	4%	396,443			X	X	X			X	
Trinidad	H	156	3%	1,457,265			X	X	X			X	
India	H&P	129	3%	544,746			X	X	X			X	
New Zealand	H	63	1%	673,816			X	X	X			X	
Total		4,711		39,071,155									

Source: Umer Barry and Department of Commerce (2014).

8. Mahi-mahi & Swordfish.

The same problems that plague the Task Force’s other at risk designations are also present with respect to mahi-mahi and swordfish. Ecuador, Canada, Singapore, Panama and Costa Rica supply over 73 percent of U.S. swordfish consumption. None of these nations has ever been named for illegal swordfish catch in the biennial NMFS IUU report. Similarly, for mahi-mahi, major harvesting nations such as Ecuador, Taiwan and Peru have never been accused of illegal fishing. Similar to Atlantic cod, it may be that some mislabeling of other species as “swordfish” or “mahi-mahi” occurs in the U.S., but mislabeling of actual swordfish or mahi-mahi as something else makes no sense, as these are premium categories. Thus, there is no possibility that collecting 17 pieces of traceability data from harvesters of *these* fish will help stamp out mislabeling which those fishermen have nothing to do with and indeed are economically incentivized to *oppose*.

Major Exporters of Swordfish to U.S.

Countries	Harvester or Processor	Volume (MT)	Percent	Value (\$)	Low Enforcement Capability	Low Law Enforcement	Fisheries Violation	Ineffective Catch Documents	Transshipment	Significant Processing	Short Weight	Species Substitution	Mislabeling
Ecuador	H & P	2,505	27%	19,162,612	X		X		X			X	
Canada	H & P	1,248	13%	14,904,589	X		X		X			X	
Singapore	H & P	846	9%	7,646,393	X		X		X			X	
Panama	H & P	844	9%	5,872,053	X		X		X			X	
Costa Rica	H & P	803	9%	6,799,001	X		X		X			X	
Mexico	H & P	542	6%	3,694,940	X		X		X			X	
Total		9,442		81,994,767									

Source: Umer Barry and Department of Commerce (2014).

³⁵ See FY12—CFSAN Sampling for Seafood Species Labeling in Wholesale Seafood and FY13-CFSAN Sampling for Seafood Species Labeling in Imported Seafood. Retrieved from <http://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Seafood/UCM419984.pdf>.

Major Exporters of Mahi Mahi to U.S.

Countries	Harvester or Processor	Volume (MT)	Percent	Value (\$)	Low Enforcement Capability	Low Law Enforcement	Fisheries Violation	Ineffective Catch Documents	Transshipment	Significant Processing	Short Weight	Species Substitution	Mislabeling
Ecuador	H&P	7,028	27%	57,971,339	X			X	X			X	X
Taiwan	H	5,813	22%	44,865,066	X			X	X			X	X
Peru	H	5,582	21%	46,039,971	X			X	X			X	X
Costa Rica	H	1,944	7%	14,464,943	X			X	X			X	X
Panama	H	1,596	6%	11,313,319	X			X	X			X	X
Guatemala	H	1,272	5%	5,473,501	X			X	X			X	X
Total		26,479		200,837,933									

Source: Umer Barry and Department of Commerce (2014).

Conclusion

The Task Force in its at risk approach unfortunately compounds the errors made in the underlying traceability proposal issued earlier this year, consigning large and important segments of the international trade in seafood to a perpetual and burdensome reporting requirement that will come at a significant cost in money and in operational difficulties. That burden might be one worth bearing, if it had the chance of materially reducing illegal and unreported fishing or seafood fraud in the “at risk” categories selected via the wisdom of the Task Force’s unnamed subject matter experts. But, far from offering the prospect of genuine improvements in outcomes, the Task Force’s approach is unlikely to effectively address either challenge. NFI urges the Task Force to reconsider its traceability proposal, as applied to the at risk categories.

Sincerely,



John P. Connelly
 President