

Erin Wilkinson
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

July 31, 2013

Re: Proposed rule to implement the provisions of the Shark Conservation Act of 2010 (SCA),
NOAA-NMFS-2012-0092

Dear Ms. Wilkinson,

The undersigned organizations hereby submit the following comments on the National Marine Fisheries Service's (NMFS) proposed rule to implement the provisions of the Shark Conservation Act of 2010.¹ While we support the Service's actions to implement the Shark Conservation Act, we strongly disagree with the interpretation, contained within the proposed rule, that state and territorial statutes prohibiting the possession, sale and distribution of detached shark fins and shark fin products may be preempted.

Ecological Impacts of Shark Finning

Shark finning is a cruel and wasteful practice, which decimates shark populations, and can have a negative effect on ocean ecosystems. Experts estimate that between 26 and 73 million sharks are killed every year to supply the global demand for shark fins,² and that such unsustainable numbers are contributing to massive declines in shark populations worldwide. For instance, populations of some species are considered to be reduced by as much as 99%, including, for example, hammerhead sharks in the Gulf of Mexico.³ Furthermore, according to the International Union for Conservation of Nature's Red List of Threatened Species, all seven species of sawfish are classified as Critically Endangered, scalloped hammerhead and great hammerhead sharks are classified as Globally Endangered, blue and silky sharks are classified as Near Threatened, and shortfin and longfin mako and oceanic whitetip sharks as Vulnerable. These are just some of the shark species that are declining, at least in part due to the demand for their fins. The fins of fourteen shark species listed as being at risk of extinction by the IUCN are found commonly traded in the market in Hong Kong.⁴

¹ See 78 Fed. Reg. 25,684 (May 2, 2013).

² See Clarke, et al., "Global estimates of shark catches using trade records from commercial markets," *Ecology Letters*, 9:10(2006) pp. 1115-1126, www.iccs.org.uk/papers/Clarke2006EcologyLetters.pdf. See also Worm, et al., "Global catches, exploitation rates, and rebuilding options for sharks," *Marine Policy* 40(2013)pp. 194-204 (estimating mortality of approximately 100 million sharks in 2000, 97 million in 2010 and estimating range of possible mortalities at 63-273 million sharks per year.)

³Baum, et al., "Shifting baselines and the decline of pelagic sharks in the Gulf of Mexico," *Ecology Letters*, 7:2(2013) pp. 135-145.

⁴ Clarke, et al., "Identification of shark species composition and proportion in the Hong Kong shark fin market based on molecular genetics and trade records," *Conservation Biology*, 20:1(2006) pp. 201-211.

While the population declines alone are staggering, they must be considered in the context of their impacts on our ocean ecosystems. As predators at or near the top of marine food webs, sharks are key to a well-functioning marine ecosystem. The massive depletion of sharks has cascading effects throughout the oceans' ecosystems.⁵ Complicating matters, sharks are particularly vulnerable to overfishing because they are slow to reach reproductive maturity and produce very few offspring. Their low reproductive rates mean that once severely depleted, populations can take years or even decades to recover – if they recover at all.

Federal Action Against Shark Finning

The U.S. has long recognized that shark finning is an important conservation issue. Acting on this, Congress passed the Shark Finning Prohibition Act of 2000, with the purpose of prohibiting shark finning. However, the Act contained a rebuttable presumption that shark fins onboard or landed by a U.S. fishing vessel were taken by finning if they exceeded 5% of the total weight of shark carcasses onboard or landed (hereafter “5% ratio ban”). The 5% ratio ban was found to be difficult to enforce, and transshipment loopholes undermined the prohibition on finning. Accordingly, the Shark Conservation Act of 2010 (SCA), which amended the Magnuson-Stevens Act (MSA), was enacted to close loopholes in the ratio ban by mandating that sharks must be landed with their fins naturally attached to their bodies (hereafter “fins-attached”) and to ensure that the law applied to all vessels on the water, not just fishing vessels.

As experts have concluded that a fins-attached policy is the only guaranteed method for preventing shark finning,⁶ we generally support NMFS' efforts to implement the SCA. This rule could potentially be a large step forward for conservation. However, we are concerned that the agency's commentary in the preamble and the associated regulatory language, which indicate that state and territorial shark fin statutes could be preempted, will be a conservation disaster for shark species worldwide.

Within the preamble to the currently proposed rule, the agency suggests that there can be no regulation of any sale of fish products if such fish are lawfully taken, remarking that state and territorial shark fin statutes “have the potential to undermine significantly conservation and management of federal shark fisheries.”⁷ This is apparently due to a perceived conflict with the federal fishery management regulatory scheme's goal of optimizing sustainable yield of federal fisheries. As such, the agency has deemed these state and territorial statutes to be inconsistent with the MSA, stating that “if sharks are lawfully caught in federal waters, state laws that prohibit the possession and landing of those sharks with fins naturally attached or that prohibit the sale, transfer or possession of fins from those sharks unduly interfere with achievement of [MSA] purposes and objectives.”⁸

⁵ Myers et al., “Cascading effects of the loss of apex predatory sharks from a coastal ocean,” *Science* 315(2007) pp. 1846-1850.

⁶ “Expert advice on shark fin-to-carcass ratios and finning ban enforcement”, Shark Alliance, http://www.sharkalliance.org/do_download.asp?did=38106.

⁷ 78 Fed. Reg. at 25,686.

⁸ *Id.* at 25,687.

The conservation community disagrees with this interpretation. The MSA's shark finning provisions only seek to address the practice of finning sharks in U.S. waters, and *only apply up to the point that sharks are brought to land*. These statutory provisions were not constructed to address the trade in detached and processed shark fins within the borders of U.S. states and territories. Implementation of the state and territorial laws, by contrast, begins after the reach of the federal law ends, and they directly target the market for and sale of shark fins and fin products within a specific state or territorial jurisdiction. By regulating the trade of products within state borders, these laws fall within the states' traditional powers of regulation. Where such laws are based on traditional state police power interests – e.g. combatting animal cruelty, conservation of natural resources, and protection of public health – regulation by states, as opposed to the federal government is the norm. Shark fin bans fall squarely within this traditional area of state authority.

Furthermore, NMFS' newly articulated preemption position does not come from any specific statutory language,⁹ and is *entirely dependent* on the agency's interpretation of only one of the goals of the federal fishery management regulatory scheme – to optimize sustainable yield of federal fisheries. The agency has never before cited this generic goal as prohibiting states from regulating in-state consumer markets for fish parts or fish products. Moreover, the agency's myopic focus on the goal of maximizing yield from federal fisheries, though convenient to its preemption position, wholly ignores the important, conservation-oriented, goals of the MSA that are *supported* by these state and territorial statutes, as well as the fact that the MSA specifically states that “. . . nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.”¹⁰

Global Trade in Shark Fins

Unfortunately, while the U.S. has recognized the ecological benefits of a fins-attached statutory and regulatory system, only a handful of the more than 80 countries that catch sharks and engage in the shark fin trade have a fins-attached policy,¹¹ and there is effectively no enforced fins-attached policy on the high seas. This highlights the fact that the global shark fin market is largely unmonitored and unregulated. Given that fins coming from U.S. fisheries are undistinguishable from fins coming from other countries, the lack of regulation in foreign jurisdictions is highly problematic. As the IUCN Shark Specialist Group's has noted, “Trade and landings data indicate that finning activity is widespread, largely unmanaged and unmonitored. Because of the biological characteristics of sharks, it also leads to unsustainable levels of mortality.” The same statement also notes that, “observer data from high seas fisheries and

⁹ Further, NMFS' proposed changes to the regulations related to preemption *were not required by Congress* when it enacted the SCA. See Final Rule on Identification and Certification Procedures to Address Shark Conservation, 14 Fed. Reg. 3338, 3341 (Jan. 16, 2013) (stating that “NMFS *cannot* address state finning bans” with respect to a prior rulemaking the primary purpose of which was “to implement provisions of the Shark Conservation Act”) (emphasis added).

¹⁰ 16 U.S.C. § 1856(a)(1).

¹¹ “Shark Finning Regulations”, Humane Society International, http://www.hsi.org/assets/pdfs/shark_finning_regs_2013.pdf.

reports of fin fisheries in some developing countries indicate that many millions of sharks are being finned and discarded at sea.”¹²

Furthermore, there is no current global mechanism in place that requires detailed record keeping on species, origin, or chain of custody for shark fins. Nor are there detailed record keeping requirements in the domestic market. U.S. exports of shark fins do not require species-specific records, nor do U.S. imports of shark fins. As such, there is simply no way to track the origin of detached shark fins and shark fin products to ensure that they are coming from sharks that have been landed with fins naturally attached.

The problem is compounded by the sheer volume of shark fin imports and exports coming to and from the U.S. According to the Department of Commerce’s 2011 Shark Finning Report to Congress, from 2006 to 2010, the U.S. exported an average of 48 metric tons of shark fins each year with 82% of the exports destined for Hong Kong. During the same period, the U.S. imported an average of 28 metric tons of shark fins each year with 87% of imports from Hong Kong. Hong Kong processes an estimated 50% to 80% of the world’s shark fins, with over 80 countries, including the U.S., sending shark fins to Hong Kong.¹³ Most fins undergo a drying and bleaching process in Hong Kong or southern China, after which they are re-exported from Hong Kong or mainland China to markets around the world, including the U.S.

Given this complicated chain of commerce there is simply no way to track the origin of shark fins, or shark fin products, to ensure that they are coming from sharks that have been landed with fins naturally attached. Once imported into the U.S., it is usually impossible to tell by looking at a processed, treated shark fin what species it is from or whether it is from a federally managed shark fishery, or an illegal or overfished shark population.

State and Territorial Action Against Trade in Shark Fins

A growing number of states and territories have adopted or are considering legislation prohibiting the sale, possession, and trade of shark fins, underscoring a major concern in these jurisdictions regarding the lack of a mechanism to address the import and trade of shark fins from finned, overfished and illegally-caught sharks entering the U.S. market. The statutes signify these jurisdictions’ desire to take immediate and feasible action to address these concerns. Thus far eight states and three territories have adopted legislation prohibiting the sale of shark fins: Hawaii, California, Washington, Oregon, Illinois, Maryland, Delaware, New York, Guam, American Samoa and the Northern Mariana Islands. Each of these bills underwent vigorous scrutiny through a transparent and democratic process. They represent the genuine concern by the citizens of these states and territories for the plight of sharks worldwide.

States and territories should not be forced to permit the operation of in-state markets for detached fins and fin products that conflict with the values of their citizenry and their legitimate state

¹² IUCN Species Survival Commission, “Shark Specialist Group Position Statement on Finning”, http://www.iucnssg.org/tl_files/SSG%20finning%20and%20attacks%20statements/SSG%20Finning%20Statement_160811.pdf

¹³ Trade data from the Census and Statistics Department of Hong Kong.

interests, and disregard the results of lengthy, democratic and transparent legislative processes. Furthermore, the regulation of products deemed to be produced by inhumane means and contrary to species conservation is a traditional exercise of state police powers. The state statutes at issue aim to close the in-state trade in detached and processed shark fins in order to remove any market incentive for shark finning and for perpetuating the unsustainable global trade in shark fins. These statutes do not interfere with the management and conservation of federal shark fisheries, but instead complement existing state and federal fisheries regulations. They constitute an important measure to strengthen shark conservation by addressing demand for shark fin products in their individual states and territories. Therefore, we consider NMFS' interpretation that these statutes should be preempted to be imprudent and inconsistent with the MSA. Further, and as stated above, the MSA itself clearly states “. . . nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.”¹⁴

The state and territorial shark fin statutes not only complement federal regulations but strengthen U.S. leadership in global shark conservation. In the absence of strong shark finning prohibitions and enforcement in many parts of the world, diminishing market incentives for finning are necessary in order to curb finning and overfishing of sharks worldwide. Reducing the market for shark fins is a necessary counterpart to efforts to strengthen prohibitions on shark finning, and together these strategies further global shark conservation.

Conclusion

In order to address the problem of shark-finning head on, states and territories must be allowed to complement the federal ban on finning in U.S. waters. As such, we urge NMFS to withdraw the preemption provision in the proposed rule. Thank you for your consideration, and we look forward to your reply.

Sincerely,

Gillian Lyons
Regulatory Specialist
The Humane Society of the United States

Beth Lowell
Campaign Director
Oceana

Seth Atkinson
Staff Attorney
Natural Resources Defense Council

Marie Levine
Executive Director
Shark Research Institute

Elizabeth Hogan
Campaign Manager for Oceans and Wildlife
World Society for the Protection of Animals

Peter Knights
Executive Director
WildAid

¹⁴ 16 U.S.C. 1856(a)(1).

Jupp Kerckerinck
President
Sharkprotect

Sarah Uhlemann
Senior Attorney
Center for Biological Diversity

Alejandra Goyenechea
International Counsel
Defenders of Wildlife

Jennifer Walling
Executive Director
Illinois Environmental Council

Judy Ki
Chair
Asian Pacific American Ocean Harmony Alliance

Jamie Pollack
Director of Operations
Shark Angels

John Kostyack
Vice President, Wildlife Conservation
National Wildlife Federation

Will Travers
President
Species Survival Network

Jill Hepp
Director, Global Shark Conservation
The Pew Charitable Trusts

John Hocevar
Oceans Campaign Director
Greenpeace USA

Beth Allgood
Campaigns Manager
International Fund for Animal Welfare

Dave Raney
Chair, Marine Action Team
Sierra Club

Kitty Block
Vice President
Humane Society International

Rene Umberger
Director
For the Fishes

Robert Harris
Chapter Director
Sierra Club of Hawaii

Patricia Haddock
President
Delaware Votes for Animals

Ignacio V. "Ike" Cabrera
Chairman
Friends of the Marianas Trench MNM

Marjorie Ziegler
Executive Director
Conservation Council for Hawaii

Deborah Bassett
Hawaii Director
The Sea Shepherd Conservation Society

Patrick Wardell
President
Monk Seal Foundation

Robert Wintner
Executive Director
Snorkel Bob Foundation

Stefanie Brendl
President
Shark Allies

Juanita Blaz
Administrator
Island Girl Power

Carlotta Leon Guerrero
Executive Director
Ayuda Foundation

Nancy Perry
Senior Vice President, Government Relations
American Society for the Prevention of Cruelty to Animals

Linda Huebner
Deputy Director, Advocacy
Massachusetts Society for the Prevention of Cruelty to Animals

Christopher Chin
Executive Director
The Center for Oceanic Awareness, Research, and Education (COARE)