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# United States Senate

COMMITTEE ON COMMERCE, SCIENCE,  
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

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November 5, 2013

The Honorable Kathryn D. Sullivan  
Acting Administrator  
National Oceanic and Atmospheric Administration  
U.S. Department of Commerce  
1401 Constitution Avenue, Northwest  
Washington, DC 20230

Dear Dr. Sullivan,

I write to express my concern regarding the National Marine Fisheries Service (NMFS) proposed rule for the implementation of the Shark Conservation Act of 2010, Pub. L. No. 111-348, title I, 124 Stat. 3668 (2010). I am concerned NMFS is interpreting the Shark Conservation Act in a way that is contrary to the intent of Congress, and I urge you to give all due attention to this matter.

The Shark Conservation Act amended the Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1884 (2012), to enhance federal fisheries enforcement capabilities to better detect and deter the already unlawful practice of cutting the fins off sharks and discarding the carcasses at sea. Specifically, the Magnuson-Stevens Act, as amended, now prohibits the removal of any of the fins of a shark at sea and requires that sharks be landed with their fins naturally attached. Separately, Hawaii, California, and several other states have enacted laws which prohibit one or more of the possession, transportation, sale, or distribution of shark fins in their respective states. These states have enacted such laws in response to concerns over the demand for shark fins, which is driving shark finning and the depletion of shark populations, as well as posing public health concerns surrounding the high mercury levels found in shark fins. NMFS's proposed rule, Magnuson-Stevens Act Provisions; Implementation of the Shark Conservation Act of 2010, 78 Fed. Reg. 25685 (proposed May 2, 2013) (to be codified at 50 C.F.R. pt. 600), threatens to preempt these laws.

As a cosponsor of the Shark Conservation Act and as the Chairman of the Committee of jurisdiction responsible for moving it through the Senate legislative process, I can attest that such a federal imposition on the States' prerogative to adopt legitimate laws regulating intrastate commerce for the protection of public health and living marine resources within their boundaries was neither contemplated nor intended by Congress. Indeed, these state laws are consistent with the fundamental purpose of the Shark Conservation Act—to promote the conservation of the over 400 species of sharks in U.S. waters and around the world whose abundance in recent decades has steadily declined. NMFS's interpretation appears to be based upon an overly narrow

reading of the Magnuson-Stevens Act which, for the reasons outlined below, I strongly urge that NMFS reconsider before issuing a final rule.

In its proposed rule, NMFS indicates state statutes combating shark finning by prohibiting possession, sale, and distribution of shark fins are preempted by the Magnuson-Stevens Act if they are inconsistent with that Act, as amended by the Shark Conservation Act. NMFS offers a brief analysis of how these types of state statutes might be inconsistent with Magnuson-Stevens, in which it rightly observes that a key purpose of Magnuson-Stevens is to promote domestic commercial and recreational fishing under sound conservation and management principles. 16 U.S.C. § 1801(b)(3). It looks to the definition of the term “conservation and management” in Magnuson-Stevens in order to properly construe this statement of purpose and other relevant provisions of the Act, and notes that the term includes measures “which are designed to assure that . . . a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis.” 16 U.S.C. § 1802(5). NMFS then turns to the ten national standards under Magnuson-Stevens, with which all federal fishery management plans must be consistent, noting National Standard 1 requires that conservation and management measures prevent overfishing while providing optimum yield from a fishery on a continuing basis. 16 U.S.C. § 1851(a)(1). Applying these provisions to the state statutes at issue, NMFS concludes that, to the extent a state law prohibits the possession, transportation, or sale of sharks or shark fins in that state which have been lawfully harvested in federal waters, the law interferes with the accomplishment of the purposes and objectives of the Magnuson-Stevens Act and would therefore be preempted by the Act.

NMFS fails, however, to consider in its analysis that “conservation and management” measures under the Magnuson-Stevens Act are not limited only to those measures designed to assure a supply of food and other products and recreational benefits on a continuing basis. The term also encompasses measures that preserve, and avoid long-term adverse effects on, fishery resources and the marine environment. The complete definition of “conservation and management” under the Act is as follows:

- (5) The term “conservation and management” refers to all of the rules, regulations, conditions, methods, and other measures
  - (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and
  - (B) which are designed to assure that—
    - (i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;
    - (ii) irreversible or long-term effects on fishery resources and the marine environment are avoided; and
    - (iii) there will be a multiplicity of options available with respect to future uses of these resources.

16 U.S.C. § 1802(5). It seems clear that the state laws at issue meet this definition when read in its totality. By prohibiting the possession, transportation, or sale of sharks or shark fins, these



state laws have the direct and immediate effect of reducing the demand for shark fins that is driving the global depletion of shark populations—an alarming trend that must be reversed as soon as possible in order to assure the long term health of sharks, other marine species, and ocean ecosystems. As such, these laws are consistent with subparagraph (A) of the definition above, in that they are both required and useful in rebuilding, restoring, and maintaining shark populations and the marine environment in which they play a key role as apex and meso predators. Likewise, by promptly and substantially reducing shark fin demand, these state laws assure that irreversible and long-term effects on fishery resources and the marine environment are avoided, consistent with subparagraph (B)(ii) above, and that an inestimable number of options will be available with respect to future uses of sharks as a resource and other fishery resources in whose ecosystem sharks play a vital role, consistent with subparagraph (B)(iii). Finally, by reducing demand for shark fins today, these laws do, in fact, assure a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis from our federally managed fisheries in the future.

Because these state laws clearly fall within the ambit of “conservation and management” measures as defined in the Magnuson-Stevens Act, it follows that they can and ought to be viewed as consistent with the stated goals and standards under the Act. They promote domestic commercial and recreational fishing under sound conservation and management principles, consistent with the stated purposes of the Magnuson-Stevens Act, because they promote the return of sharks as a keystone species in ocean ecosystems, which is beneficial to numerous other fish species with commercial and recreational value in those ecosystems. For the same reason, these state laws may be seen as consistent with the national standards set forth in the Act, including the requirement that conservation and management measures prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry under national standard 1.

In its proposed rule, NMFS also notes that neither the Shark Finning Prohibition Act, Pub. L. No. 106-557, 114 Stat. 2772 (2000), nor the Shark Conservation Act, suggests that Congress intended to prohibit the possession or sale of shark fins, and that Congress chose instead to prohibit discarding shark carcasses at sea and to require that fins remain naturally attached to their corresponding carcass. It is important to note as well that nothing in either of those Acts or their legislative histories evinces any intent by Congress to prevent the States from enacting laws dealing with shark finning in their respective jurisdictions, and both Acts amended the Magnuson-Stevens Act without any diminution of the broad authority reserved to the States under Magnuson-Stevens. The Magnuson-Stevens Act provides generally that “nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.” 16 U.S.C. § 1856(a). While an exception to this broad reservation of state power exists in the case of a state action or omission that will substantially and adversely affect the carrying out of a federal fishery management plan, nothing in the state laws at issue appear to have substantial adverse effects. Nothing in the State of Hawaii’s prohibition on possession, sale, trade, or distribution of shark fins, for example, prevents a permit holder under the Western Pacific Region’s Pelagic Fishery Ecosystem Plan from harvesting sharks in federal waters in accordance with the rules and requirements of that plan, or from possessing, selling,

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trading in, or distributing the fins from those sharks in other states and foreign jurisdictions where such acts are not prohibited.

In light of the foregoing, I ask that you give all due attention to NMFS's development of implementing regulations for the Shark Conservation Act of 2010, to ensure that the final rule does not inappropriately and unnecessarily preempt or supersede state laws. These laws will have a substantial, positive impact in replenishing depleted shark species and improving the health of ocean ecosystems, as well as positive human health impacts resulting from reduced mercury consumption.

Sincerely,



John D. Rockefeller IV  
Chairman

cc: Hon. Penny Pritzker, Secretary, Department of Commerce  
Hon. Nancy Sutley, Chair, Council on Environmental Quality  
Hon. John Thune, Ranking Member, U.S. Senate Committee on Commerce, Science, and Transportation