



October 17, 2023

Via Electronic Mail

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Re: Fish Import Ban for Mexico's Sea Turtle Bycatch under the Moratorium Protection Act

Dear Honorable Secretaries and Mr. Jake Sullivan,

On behalf of the Center for Biological Diversity (“the Center”), we urge the Administration to promptly sanction Mexico for its failure to adopt “a regulatory program . . . that is comparable to that of the United States” in limiting bycatch of endangered loggerhead sea turtles, a shared population between our two nations.¹

In August 2023, the Secretary of Commerce through the National Marine Fisheries Service (“NMFS”) negatively certified Mexico under the Moratorium Protection Act (“MPA”).² NMFS certified Mexico for failing to maintain a comparable regulatory and monitoring program to control Mexico’s substantial bycatch of loggerhead sea turtles off the Baja Peninsula’s Pacific coast. This is the second time in eight years NMFS has certified Mexico for this bycatch. As a result of the certification, the MPA mandates automatic sanctions, including a ban on “importation . . . of fish and fish products” from Mexico.³

North Pacific Ocean loggerhead sea turtles face a serious risk of extinction, as Mexico continues to allow alarmingly high levels of deadly bycatch, despite the United States’ longstanding negotiations on the issue. While we are grateful for NMFS’s certification decision, without the strict penalties required by law, we believe Mexico may – once again – fail to protect this imperiled sea

¹ 16 U.S.C. § 1826k(c)(1).

² NOAA Fisheries, *2023 Report to Congress, Improving International Fisheries Management* (Aug. 2023). Available at: <https://www.fisheries.noaa.gov/s3/2023-08/2023RTC-ImprovingIFManagement.pdf>.

³ 16 U.S.C. §§ 1826k(c)(5); 1826a(a); 1826a(b); 50 C.F.R. § 300.205.

turtle population. **We therefore strongly urge the Administration to promptly issue full sanctions against Mexico, including a ban on fish imports, as required by law.**

A. Statutory Background

Congress enacted the Moratorium Protection Act in 2007 to encourage other nations to adopt and comply with U.S. domestic and international fishery measures.⁴ Among other goals, the MPA seeks to reduce bycatch of “protected living marine resources” (“PLMRs”), which include “sea turtles” and other marine species protected under U.S. law or international agreement.⁵ Congress substantially amended the MPA in 2022, broadening its scope.

Under the MPA’s PLMR provision, NMFS “shall identify and list” in its biennial report to Congress any “nation if . . . any fishing vessel of that nation . . . has been engaged during the [previous] 3 years . . . in fishing activities or practices . . . that have resulted in bycatch” of any PLMR, and “the vessel’s flag state has not adopted, implemented, and enforced a regulatory program . . . that is comparable in effectiveness to the regulatory program of the United States” to address bycatch, “taking into account differing conditions.”⁶ NMFS must subsequently consult with any identified nation and allow for an opportunity for public comment.⁷

NMFS then “shall certify” – either positively or negatively – whether the identified nation “has provided . . . documentary evidence” that it:

- (A) “has . . . adopt[ed] . . . a regulatory program governing the conservation of the protected living marine resource that is comparable to that of the United States, taking into account different conditions;” and
- (B) “has established a management plan containing requirements that will assist in gathering species-specific data to support international stock assessments and conservation enforcement efforts for protected living marine resources.”⁸

The MPA specifies two separate sanctions that “shall” apply.⁹ First, the Secretary of Homeland Security “shall” “withhold or revoke . . . clearance” required for vessels to enter U.S. ports for “fishing vessels of a nation that has been listed pursuant to” the MPA PLMR provision “in 2 or more consecutive [biannual] reports for the same type of fisheries activity . . . until a positive certification has been received.”¹⁰ Second, and critically, “[t]he President . . . upon receipt of . . . a negative certification” under the MPA PLMR provision, “shall direct the Secretary of the Treasury to prohibit the importation . . . of fish and fish products and sport fishing equipment . . . from that nation.”¹¹

⁴ Pub. L. 109-479, 121 Stat. 3575 (2007).

⁵ 16 U.S.C. § 1826k(e).

⁶ *Id.* § 1826k(a)(1)(A).

⁷ *Id.* § 1826k(b), (c)(1).

⁸ *Id.* § 1826k(c)(3), (1).

⁹ *Id.* § 1826k(c)(5).

¹⁰ *Id.* § 1826a(a)(2)(A).

¹¹ *Id.* § 1826a(b)(3).

Within six months of making the negative certification, NMFS “shall determine whether” the import prohibition issued by the President “[wa]s sufficient . . . to address” the PLMR bycatch issues.¹² If found insufficient, NMFS “shall certify” that finding to the President, and that certification also constitutes a certification under the U.S. Pelly Amendment, a statute that allows for even broader sanctions, including an import ban on “*any products* from the offending country.”¹³

B. Factual Background

For 15 years, scientists have documented extremely high levels of sea turtle bycatch around the Gulf of Ulloa located off Mexico’s Baja California Sur coast. These highly productive waters provide key juvenile foraging habitat for the turtles. The area is also intensively fished, and loggerhead sea turtles become entangled in both bottom-set gillnet gear and longlines used to target halibut, grouper, and sharks. NMFS has long recognized that “[i]ncidental capture in artisanal and commercial fisheries,” particularly in gear off of Baja California Sur, “is a significant threat to the persistence” of this loggerhead population.¹⁴

In 2012, scientists recorded 573 sea turtles stranded on the Gulf of Ulloa’s beaches,¹⁵ after becoming entangled in fishing gear, and 524 sea turtles stranded in 2013.¹⁶ Scientists estimate that, due to oceanographic factors, only 20% of turtles caught in fishing gear wash ashore,¹⁷ so the number of turtles killed is significantly greater than those found stranded.

In 2013, NMFS identified Mexico under the MPA for its sea turtle bycatch, and in 2015, NMFS negatively certified Mexico for failing to adopt a comparable program for addressing the bycatch.¹⁸ No penalties were issued for the negative certification, however, after extensive consultations, in 2016, Mexico adopted new regulations that established a fishing reserve in the Gulf of Ulloa, set a mortality cap of 90 turtles, adopted some gear restrictions, and required in-vessel video monitoring.¹⁹ The same year, NMFS issued a positive certification of Mexico.²⁰

¹² *Id.* § 1826a(b)(3).

¹³ *Id.* § 1826a(b)(4); 22 U.S.C. § 1978(c) (Pelly Amendment stating that, upon certification, the President may “prohibit . . . the importation . . . of *any products* from the offending country,” not just fish products) (emphasis added).

¹⁴ 76 Fed. Reg. 58,868 (Sept. 22, 2011).

¹⁵ SEMARNAT, Response to information request (Feb. 4, 2015) (available upon request); *see also* Esliman, A., et al. 2012. Mass Mortality of the Loggerhead Turtle in Baja California Sur, Mexico (unpublished) (documenting 483 stranded loggerheads in July alone).

¹⁶ Government of Baja California Sur. Letter: OFICIO No. SEPESCA/207/13. November 21, 2013.

¹⁷ Koch, V., H. Peckham, A. Mancini, T. Eguchi. 2013. Estimating At-Sea Mortality of Marine Turtles from Stranding Frequencies and Drifter Experiments. PLoS ONE 8(2): e56776. doi:10.1371/journal.pone.0056776.

¹⁸ *See* U.S. Department of Commerce, *Addendum to the Biennial Report to Congress Pursuant to Section 403(a) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006* (Aug. 14, 2015).

¹⁹ Diario Oficial de la Federación. 06/23/2016. ACUERDO por el que establece la zona de refugio pesquero y nuevas medidas para reducir la posible interacción de la pesca con tortugas marinas en la costa occidental de Baja California Sur.

²⁰ Addendum to the Biennial Report to Congress Pursuant to Section 403(a) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 Certification Determination for Mexico’s 2013 Identification for Bycatch of North Pacific Loggerhead Sea Turtles (Aug. 2015). As stated in our January 26, 2017 letter to NMFS, the Center opposed the positive certification of Mexico, as Mexico’s regulations were not “comparable” to U.S. regulations.

Despite these new regulations, Mexico’s Federal Environmental Protection Agency (“Profepa”), soon began to again document high levels of strandings in the area:²¹

2017	99
2018	459
2019	331
2020	1088
2021	682
2022	347**
2023	430**

***2022 and 2023 data are incomplete, as the Mexican Government has only provided us with stranding numbers from January through August of 2022 and from January through July of 2023*

Following several Center letters regarding these strandings, in 2021, NMFS “re-identif[ied]” Mexico for not having comparable management measures in its biannual congressional report.²² NMFS stated that it was “alarmed by the magnitude of these mortalities” and expressed concern that Mexico’s regulatory measures were “not . . . fully or effectively implemented.” NMFS then initiated the MPA-required consultations with Mexico.

In June 2023, Mexico revised its regulations, removing the 90-sea turtle cap that triggered fishing closures and removing its requirements for video monitoring.²³ In NMFS’s 2023 biannual report, the agency concluded that these new regulations “weaken the effectiveness” of Mexico’s regulatory program and expressed concerns that the program “is not being adequately enforced.” NMFS concluded that Mexico’s program is “not comparable in effectiveness” to the U.S. program and negatively certified the nation.²⁴

Indeed, in the United States, fishermen must comply with regulations limiting their loggerhead bycatch. Large swaths of U.S. loggerhead habitat are closed to both gillnets and longlines,²⁵ and NMFS requires gear modifications to limit turtle bycatch in some areas.²⁶ Critically, NMFS limits the number of loggerheads that may be caught by fishermen, allowing no more than 6 mortalities in the shallow-set pelagic longline fishery annually,²⁷ and no more than 1 mortality

²¹ Profepa, Response to information request No. 1613100008820 (02/18/2020); Conanp, Response to information request No. 330008323000576 (08/17/2023) and 330008322000591 (10/06/2022).

²² NOAA Fisheries, *Report to Congress: Improving International Fisheries Management* (Aug. 2021).

²³ SEMARNAT, ACUERDO por el que se establece la zona de refugio pesquero y nuevas medidas para reducir la posible interacción de la pesca con tortugas marinas en la Costa Occidental de Baja California Sur. Available at: https://www.dof.gob.mx/nota_detalle.php?codigo=5693203&fecha=23/06/2023&print=true.

²⁴ NOAA Fisheries, *2023 Report to Congress, Improving International Fisheries Management* (Aug. 2023).

²⁵ See CAL. FISH & GAME CODE §§ 8610.3; 8610.2; CAL. CODE REGS. tit. 14 § 104.1; 50 C.F.R. §§ 660.713(c), (d); 660.712(a); 223.206(d)(9).

²⁶ 50 C.F.R § 665.813(f), (g) (requiring the use of circle hooks and mackerel baiting on longlines).

²⁷ NMFS, Biological Opinion, Continued Authorization of the Hawaii Pelagic Shallow-Set Longline Fishery (July 2019).

annually in the U.S. drift gillnet fishery.²⁸ NMFS can also require observers to track and estimate bycatch.²⁹

C. Mandatory Penalties

As detailed above, the MPA mandates two separate penalties: denial of the nation’s fishing vessels’ access to U.S. ports and an import ban.³⁰ In its 2023 certification, NMFS stated that “the United States will implement appropriate restrictions on U.S. port access for Mexican-flagged vessels.”³¹ In addressing an import ban, NMFS simply stated it “may recommend appropriate trade restrictions to the President.”³²

However, the MPA requires the automatic, non-discretionary issuance of an import ban by the President. The law states:

The President . . . upon receipt of . . . a negative certification [under the MPA PLMR provision] *shall* direct the Secretary of the Treasury to prohibit the importation . . . of fish and fish products and sport fishing equipment . . . from that nation.³³

Accordingly, because Mexico received a negative certification, the President “shall” direct the Secretary of Treasury to ban import of fish, fish products, and sport fishing equipment from Mexico.

The ban on imports of fish, fish products, and sport fishing equipment from Mexico is mandatory; the President is not permitted any discretion in either directing the embargo to occur or in what products the embargo covers. The statute is plain and unambiguous, as “shall” means “shall.”³⁴

Moreover, the structure of the MPA makes clear that this automatic embargo must apply promptly after certification occurs. As noted above, “[n]ot later than six months after” NMFS “issues a negative certification” under the PLMR provision, NMFS “shall determine whether” the President’s “prohibition” on all fish and fishing equipment “[wa]s sufficient . . . to address” the PLMR bycatch issues.³⁵ If found insufficient, NMFS “shall certify” the nation under the U.S. Pelly Amendment, which allows for broader sanctions.³⁶ Accordingly, the MPA clearly contemplates and requires that the President direct sanctions immediately after certification, in order to give NMFS sufficient time to evaluate and report on Mexico’s response to these sanctions within six months.

²⁸ NMFS, Biological Opinion, Reinitiation of ESA Consultation on the Continued Operation of the Large Mesh Drift Gillnet Fishery under the U.S. West Coast Fishery Management Plan for Highly Migratory Species, NMFS Consultation Number: 2023-00435 (July 2023).

²⁹ 50 C.F.R. § 222.401.

³⁰ 16 U.S.C. § 1826a(a)(2)(A), (b)(3).

³¹ NOAA Fisheries, *2023 Report to Congress, Improving International Fisheries Management* (Aug. 2023).

³² *Id.*

³³ 16 U.S.C. § 1826a(b)(3). (emphasis added).

³⁴ See *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (in using “shall,” “Congress could not have chosen stronger words to express its intent”); *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (“The first sign that the statute imposed an obligation is its mandatory language: ‘shall.’”).

³⁵ 16 U.S.C. § 1826a(b)(3).

³⁶ *Id.* § 1826a(b)(4).

We further note that the President's obligation to direct the Secretary of Treasury to issue the import ban is enforceable in court.³⁷

Conclusion

We strongly urge the Administration to promptly issue sanctions against Mexico, including a ban on import of fish, fish products, and fishing equipment. Delay in sanctions violates the MPA and allows Mexico to continue its alarming level of bycatch of this highly imperiled, shared sea turtle population.

Please contact us anytime if you have questions.

Sincerely,



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³⁷ See *Franklin v. Mass.*, 505 U.S. 788, 802 (1992) (Court “left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely ‘ministerial’ duty”) (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498-499 (1867) (“a ministerial duty . . . is one in respect to which nothing is left to discretion”); *Nat’l Wildlife Fed’n v. United States*, 626 F.2d 917, 923 (D.C. Cir. 1980) (“Mandamus is not precluded because the federal official at issue is the President of the United States.”); *Saget v. Trump*, 375 F. Supp. 3d 280, 335 (E.D.N.Y. 2019) (enjoining President).

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