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VIA COURIER

Dockets Management Branch
Food and Drug Administration
Department of Health and Human Services
Room 1061
5630 Fishers Lane
Rockville, MD 20857

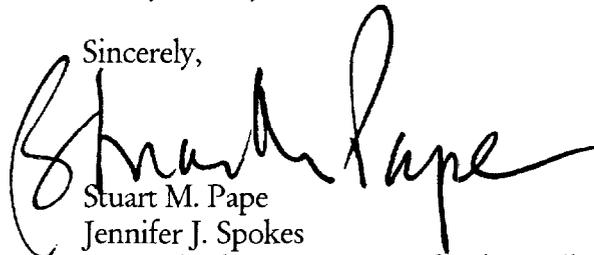
Re: Citizen's Petition Regarding the Crabmeat Common or Usual Name Rulemaking;
Docket #94P-0043

Dear Ladies and Gentlemen:

On behalf of the American Seafood Distributors Association, under 21 C.F.R. § 10.30, we hereby submit the enclosed Citizen's Petition. The Petition requests that FDA reopen the administrative docket for the rulemaking entitled "Crabmeat; Amendment of Common or Usual Name Regulation," Docket #94P-0043. Further, the Petition requests that the final rule designate the common or usual name "blue swimming crab" for the crab species *Portunus pelagicus*.

We look forward to working with you on this matter. If you have any questions, please feel free to contact me at the above number. Thank you for your consideration.

Sincerely,



Stuart M. Pape
Jennifer J. Spokes
Counsel, The American Seafood Distributors Association

SMP:Sro513982
Enclosure

00P-1326

CPI

Citizen's Petition

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Rockville, MD 20857

The undersigned submits this petition, on behalf of the American Seafood Distributors Association, a non-profit organization consisting of importers, distributors, and retailers of seafood products. The petition is submitted under Part 102 and section 10.30 of Title 21, Code of Federal Regulations. The petition addresses the ongoing rulemaking entitled "Crabmeat; Amendment of Common or Usual Name Regulation," Docket #94P--0043.¹

I. Action Requested

The undersigned requests that FDA reopen the administrative docket for this rulemaking to permit consideration of the evidence set forth in this petition. Further, the undersigned requests that, based on the evidence set forth in this petition, FDA establish in its final rule the common or usual name "blue swimming crab" for the crab species *Portunus pelagicus*.

II. Statement of Grounds

A. Introduction

In 1998, in response to a Citizen's Petition from the National Blue Crab Industry Association (the "Petitioner"), FDA proposed to amend the regulation for crabmeat by adding the species *Callinectes sapidus* ("*C. sapidus*") to the regulation and designating the common or usual name of crabmeat derived from this species as "blue crabmeat."² In addition, on its own initiative, FDA proposed to adopt common or usual names for crabmeat derived from eighteen additional crab species. According to the proposed rule, FDA intended to expand the list of common or usual names for crabmeat in order to allow crabmeat packers to properly identify their product so that consumers can make informed purchasing decisions.

According to the proposal, the common or usual names proposed for the additional crab species were based on FDA's "Seafood List" and information provided by the Petitioner. Under the proposed rule, *C. sapidus* is the only crab species for which the common or usual

¹ 63 Fed. Reg. 20148, 20149 (April 23, 1998).

² *Id.*

name contains the term “blue.” The proposal designates for crabmeat from the species *Portunus pelagicus* (“*P. pelagicus*”), which is frequently referred to as the “blue swimming crab,” as well as crabmeat from the species *Callinectes arcuatus*, *Callinectes toxotes*, and *Portunus puber*, the common or usual name “swimming crab.”

B. The Administrative Docket Should Be Reopened

The undersigned submits that the administrative docket for the crabmeat common and usual name rulemaking should be reopened to avoid finalization of an arbitrary and capricious rulemaking. The crabmeat common or usual name rule, as proposed, is defective in both premise and proof. The proposed rule is premised on the belief that common or usual names for crabmeat species should be established to better position *C. sapidus* crabmeat products in the marketplace. This premise is based on the false notion that *C. sapidus* is the crabmeat species most recognized and preferred by U.S. consumers, and that crabmeat products derived from other species are wrongfully usurping *C. sapidus*'s market position. If FDA were to finalize the proposed rule based on this premise, it would be an arbitrary and capricious action that would permit one segment of the seafood industry to manipulate FDA's common or usual name regulations for the sole purpose of improving that segment's economic position in the industry.

The first of the grounds cited by the Petitioner to justify the proposed rule states that *C. sapidus* is commonly known as “blue crab” and that it is the most commonly available type of crabmeat in many areas of the United States. Thus, the Petitioner asserts that *C. sapidus* is the only species that should have the common or usual name “blue crab.”³ FDA's apparent application of this premise in the proposed rule amounts to no other crab species having a common or usual name containing the term “blue.”

In fact, *P. pelagicus* accounts for 59% of the crabmeat market in the United States.⁴ *P. pelagicus*'s commonly recognized name is “blue swimming crab.” However, apparently on the premise that calling *P. pelagicus* “blue swimming crab” will result in consumers mistaking it for *C. sapidus*, FDA proposed “swimming crab” as the common or usual name for *P. pelagicus*. Because *P. pelagicus* is so common in the United States, changing its recognized name “blue swimming crab,” to “swimming crab” clearly would lead to consumer confusion. Furthermore, the only justification for creating this confusion is the premise that *C. sapidus* should be given a market advantage through common or usual name designations.

The first ground also states that it has become commonplace to import into the United States, repack, and essentially try to pass off lower value crabmeats as *C. sapidus* by calling them “crabmeat.” The undersigned agrees that by designating common or usual names for crabmeat species, the final rule will avoid confusion resulting from products that are solely labeled with the generic term “crabmeat.” However, the undersigned objects to the

³ *Id.*

⁴ Calculated using statistics from the USITC Trade Database for *P. pelagicus* and the U.S. crabmeat market including both imported and domestic crabmeat.

containing blue swimming crabs. Both *C. sapidus* and *P. pelagicus* have a blue coloration, swim, and have a similar flavor profile. However, the two species are derived from different geographical areas (*C. sapidus* is domestic, whereas *P. pelagicus* is of foreign origin), which can result in slight differences in taste. While the undersigned do not dispute designating different names for the two species, we assert that appropriate names describing the two species already exist and are known by consumers -- “blue crab” for *C. sapidus* and “blue swimming crab” for *P. pelagicus*.

Authoritative nomenclature and trade publication accept “blue swimming crab” as the common name for *P. pelagicus*. FDA’s own “Seafood List” recognizes “blue swimming crab” as the common name for *P. pelagicus*. The List advises that either the common name or market name that appears on the Seafood List should be used in identity labeling for marketing purposes or else the product can be deemed mislabeled. Therefore, FDA currently accepts, and recognizes as appropriate, the market use of the name “blue swimming crab” for *P. pelagicus*.

In determining the common names that appear on the FDA’s Seafood List, and in proposing the name “blue crab” for *C. sapidus*, FDA relied on the American Fisheries Society Publication, “Decapod Crustaceans.”¹¹ For species not listed in the publication, FDA looked first at the Food and Agriculture Organization species catalogues identification worksheets, and then, for species originating outside the United States, at the source country’s reference.¹² In the crabmeat common or usual name proposed rule, FDA also looked to the international nomenclature reference, “Fish: Five-Language Dictionary of Fish, Crustaceans, and Molluscs.”¹³ All of these sources support the use of “blue swimming crab” for the common or usual name of *P. pelagicus*.

Although the American Fisheries Publication does not specifically list *P. pelagicus*, it lists twenty species of the family Portunidae. The family is called “swimming crabs,” and each species name is a type of swimming crab, such as “speckled swimming crab,” “masked swimming crab,” etc. No other species listed is assigned the name “blue swimming crab,” indicating that it would be an appropriate name for the *P. pelagicus* member of the Portunidae family.

The Food and Agricultural Organization of the United Nations refers to *P. Pelagicus* as “blue swimming crab.”¹⁴ *P. pelagicus* is also commonly referred to as “blue swimming crab” or “blue swimmer crab” by the scientific community throughout the world.¹⁵ Finally, the Five-

¹¹ Williams, Austin B., Lawrence G. Abele, et. al., “Common and Scientific Names of Aquatic Invertebrates from the United States and Canada: Decapod Crustaceans,” American Fisheries Society Special Publication 17, pps. 41-42, 1989.

¹² 59 Fed. Reg. 47144 (September 14, 1994).

¹³ 63 Fed. Reg. at 20150.

¹⁴ See www.fao.org/docrep/t0726e/t0726e09.htm.

¹⁵ See Commercial Fishing, Fisheries Management Paper, Issues Affecting Western Australia’s Inshore Crab Fishery, 2.1 (citing Australian Fisheries Resources, published by the Bureau of Resources Sciences (Kaialola et al. 1993); Slattery, S.L. et al. 1989. “Mushiness in the blue swimmer crab,” *Portunus pelagicus*. Food Australian, 698-703; Jaruthomsophon, B.,

Language Dictionary lists five names for *P. pelagicus*, which include “blue swimmer” and “blue swimming crab,” but do not include “swimming crab.”¹⁶ Thus, there is no sufficient basis for designating *P. pelagicus* as “swimming crab” rather than “blue swimming crab,” and the evidence supports the common or usual name designation of “blue swimming crab.”

2. *P. pelagicus* is Recognizable by Consumers as “Blue Swimming Crab”

With common or usual names, FDA seeks to promote honesty and fair dealing in the interest of consumers and ensure that consumers are able to make fair value judgments about the foods they purchase. Currently, consumers purchase an abundance of crabmeat that is commonly called “blue swimming crab.” Phillips Foods, Inc. (“Phillips”) is the largest importer of crabmeat by more than four times,¹⁷ and sells over one hundred different crabmeat products of fifteen different product types (such as crabmeat, crab cakes, crab soup, etc.) that contain *P. pelagicus*.

Phillips has aggressively marketed *P. pelagicus* to the food service industry as “blue swimming crab.” Since August 1998, all Phillips Seafood cans and many plastic containers of *P. pelagicus* crabmeat refer to the species as “blue swimming crab.” Since September 1999, all Phillips Seafood sales materials regarding *P. pelagicus* refer to the species as “blue swimming crab.” Because the majority of Phillips crabmeat sales is to the food services industry, the name that Phillips uses with each of its food services customers is then used by the food services and passed on to numerous individual consumers. Thus, Phillips’s use of the name “blue swimming crab” is known by the food services industry and has ultimately been seen by many consumers.

Consumers likely recognize that “blue swimming crabmeat” derives from one crab species while “blue crabmeat” derives from another. Phillips has introduced blue swimming crab and blue swimming crab products into distribution across the country, including in regions that previously did not have access to this species of crabmeat. Therefore, in those regions, “blue swimming crabmeat” is clearly the only name known for the species *P. pelagicus*. In contrast, there is no prevalent market use of the name “swimming crab,” including for the species *P. pelagicus*.

The names “blue crab” and “blue swimming crab” are different enough that consumer can distinguish between them. Presently, when consumers observe crabmeat on market shelves, they might observe both “blue crab” and “blue swimming crab” -- two clearly different crabmeats with “blue” in the name. If FDA were to finalize the proposed rule, consumers

1986. “Experiments on a suitable sanctuary for rearing blue swimming crab (*Portunus pelagicus*).” Thai Fisheries Gazette 39(6):639-642.

¹⁶ Krane, W. “Five Language Dictionary of Fish, Crustaceans and Molluscs,” Van Nostran Reinhold, pp. 194, 1986.

¹⁷ According to Trade Intelligence, vol. 0, 0 through vol. 12, 1999, the ASDA Crab Imports: Summary of Importers, Phillips imported 4,822,261.0 kg crab while the next most imports was by Lamar Seafood Corporation at 952,082.7 kg. Phillips has 560 food service and other customer accounts and thus far in the year 2000, Phillips has sold crabmeat products to 240 food service accounts and 32 retail grocery accounts.

would observe “blue crab” on the shelves, along with the species currently known as “blue swimming crab” -- but called “swimming crab.” Because there would no longer be a “blue swimming crab” present to compare with the “blue crab,” consumers might mistakenly believe that the “blue crab” they see is what they formerly knew as “blue swimming crab.” Also, consumers might not know that “swimming crab” is the *P. pelagicus* that they currently purchase under the name “blue swimming crab,” especially given that FDA proposes to designate three other species as “swimming crab.” Thus, implementation of this provision would confuse consumers and inhibit their ability to make informed purchasing decisions. However, designating “blue swimming crab” as the common or usual name for *P. pelagicus* would be consistent with the FDA goal that common or usual names benefit consumers.

3. Other Crabmeat Names Contain Similar Terms in Their Proposed Names

Just as “blue swimming crabmeat” and “blue crabmeat” contain the term “blue,” other common or usual names proposed for two different species contain identical terms in their names. For example, “king crabmeat” is the proposed common or usual name for *Paralithodes camtschaticus* and *Paralithodes platypus*, while “brown king crabmeat” is the common or usual name proposed for *Lithodes aequispina*. In the proposed rule, FDA retained these names for these species and clearly did not foresee any difficulties in consumers recognizing that the two crabmeats are from different species.

Other species have two proposed common or usual names, such as “king crabmeat” or “Hanasaki crabmeat” for *Paralithodes platypus*, and “Korean variety crabmeat” or “Kegani crabmeat” for *Erimacrus isenbeckii*. For these species, FDA appears to have recognized in the proposed rule that the species have two names by which consumers recognize them. FDA clearly did not want to prohibit the use of one name, thereby potentially confusing consumers in certain regions where the species may be recognized by one particular name. Similarly, if FDA does not designate “blue swimming crab” as the only common or usual name for *P. pelagicus*, FDA should at least recognize it as one common or usual name for the species and should allow the industry the option to use this name so that consumers recognize the product.

D. Conclusion

FDA’s proposed rule establishes the common or usual name for *C. sapidus* as “blue crab” and attempts to establish common or usual names for eighteen other crab species. However, the premise and grounds for the proposed rule are clearly erroneous and would result in an arbitrary and capricious rulemaking if FDA were not to reopen the administrative record and consider the evidence presented above. The final rule should not seek to provide an exclusive market for *C. sapidus*, but instead should establish common or usual names that are currently recognized by consumers so that consumers know what crabmeat product they are purchasing.

Based on the Petitioner's defective grounds, FDA proposes "swimming crab" as the common or usual name for *P. pelagicus*, thus neglecting to recognize the accepted and appropriate common or usual name "blue swimming crab." Finalization of the name as "swimming crab" would confuse consumers and deprive them of the opportunity to make informed decisions when purchasing crabmeat. Thus, FDA, in the final rule, should designate "blue swimming crab" as the common or usual name for *P. pelagicus*.

III. Environmental Impact

Petitioners hereby claim a categorical exclusion from the environmental assessment requirement pursuant to 21 C.F.R. § 25.30(h).

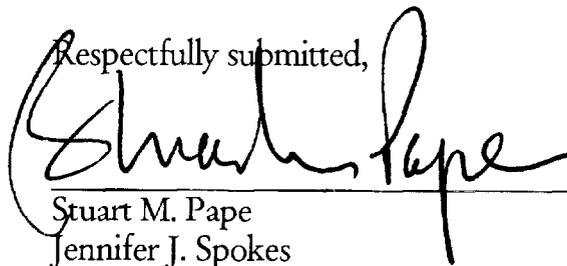
IV. Economic Impact

An economic impact analysis is not required at this time.

V. Certification

The undersigned certifies, that, to the best of the undersigned's knowledge and belief, this petition includes all information and views on which the petition relies, and that it includes favorable and unfavorable representative information relevant to the petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stuart M. Pape", written over a horizontal line.

Stuart M. Pape
Jennifer J. Spokes
Patton Boggs LLP
Counsel to
The American Seafood Distributors Association

assertion that *C. sapidus* should be given a market advantage on the grounds that it is a specialty seafood item. Some other crab species such as *P. pelagicus*, are not of lower value than *C. sapidus*. Phillips Foods *P. pelagicus* backfin crabmeat is currently priced at \$12.60/lb. while *C. sapidus* backfin crabmeat ranges from \$9.95/lb to \$10.95/lb.⁵ Jumbo, for four distributors is priced at \$16.95/lb., \$17.10/lb., \$17.10/lb., and \$17.95/lb. and these prices will decrease during peak season. Phillips jumbo crabmeat is priced at \$17.60/lb. and the price does not decrease seasonally.⁶ Therefore, there is no reason to attempt to pass off *P. pelagicus* as *C. sapidus*, and there is no need to deny *P. pelagicus* of its common name “blue swimming crab” in order to ensure that consumers are not misled by *C. sapidus* substitutes.

The second and third grounds focus on the illegal representation of various crabmeats as *C. sapidus*. The second ground states that in some cases imported crabmeat is blended with higher value domestic crabmeat and misrepresented as being entirely *C. sapidus*. The third ground asserts that the country of origin of imported crabmeat often does not appear on the label of crabmeat that has been repacked in the United States, contrary to U.S. Customs Service regulations. Passing an additional FDA regulation for crabmeat common or usual names does not address these illegal acts. Specifically, restricting the use of the term “blue” to the common or usual name of *C. sapidus* does not address this illegal activity either.

Current laws and regulations already prevent such illegal activity and allow for agency enforcement against the violators. FDA regulations against misbranding, and FTC regulations against false and misleading advertising, already enable enforcement against misrepresenting the species from which crabmeat derives. Similarly, U.S. Customs regulations require country of origin labeling and Customs has the means to enforce against violations of this rule. Thus, lack of enforcement against current violations of existing regulations cannot serve as adequate grounds for establishing new regulations, including common or usual name designations. Furthermore, these grounds certainly do not provide justification for designating *C. sapidus* as the only crabmeat containing “blue” in its name.

Finally, the fourth ground states that, absent a regulation, there is no binding rule to determine which crabmeat can be appropriately referred to as “blue crabmeat.” This petitioner does not dispute the benefits that can derive from common or usual names for different species of crabmeat. However, the common or usual names designated for the different crab species should reflect appropriate names that are currently used and accepted by the food industry and consumers. Therefore, *P. pelagicus* should be designated “blue swimming crab.” The designated names should not be changed to those that are less recognizable to consumers, such as “swimming crab” for *P. pelagicus*, in an attempt to create an exclusive market for *C. sapidus* crabmeat.

The proposed rule is a clear example of one portion of the industry, that portion marketing *C. sapidus*, manipulating the regulatory scheme for its own economic benefit. The Petitioner

⁵ United Shellfish price list, May 25, 2000.

⁶ Id.

attempts, and FDA in the proposed rule supports the attempt, to create a common or usual name framework for crabmeats that enhances the economic position of companies marketing *C. sapidus* crabmeat. The Petitioner attempts to improve the market position of, *C. sapidus* by designating it the only species that can use the popular name “blue crab.” FDA apparently attempts to further their efforts by deleting the term “blue” from the name of *P. pelagicus*. FDA’s apparent efforts to reserve any use of the term “blue” and its consumer recognition for *C. sapidus* indicates an attempt to give *C. sapidus* a market advantage at the expense of other crabmeat species -- a clearly arbitrary and capricious result.

C. The Final Rule Should Designate the Common or Usual Name of *Portunus pelagicus* as “Blue Swimming Crab,” Not “Swimming Crab”

The undersigned submits that the record does not contain sufficient evidence to designate the common or usual name for *P. pelagicus* as “swimming crab.”⁷ Thus, an FDA rulemaking establishing “swimming crab” as the common or usual name based on the record would be arbitrary and capricious. The undersigned submits that FDA must consider the information set forth below in order to avoid such an arbitrary and capricious finding. As demonstrated in this petition, the appropriate common or usual name for *P. pelagicus* is “blue swimming crab.”

The common or usual name of a food is the prevalent and meaningful name by which consumers ordinarily identify the food.⁸ The common or usual name permits the public to distinguish between similar foods that are available in the marketplace. It may be established by a history of common usage or by regulation. The common or usual name must accurately identify, in simple and direct terms, the basic nature of the food and its characterizing properties.⁹

For crabmeats, FDA has stated that the common or usual name needs to clearly identify the characterizing properties that consumers in the United States associate with the meat of a particular species or group of crab species.¹⁰ The name “blue swimming crab” correctly characterizes *P. pelagicus* and is the historical name of the species that both consumers and scientists associate with it. Therefore, in its final rule, FDA should designate “blue swimming crab” as the common or usual name for *P. pelagicus*.

1. There is a Scientific Basis for Naming *P. pelagicus* “Blue Swimming Crab”

The characteristics of *P. pelagicus* are correctly reflected by the name “blue swimming crab.” Both *C. sapidus* and *P. pelagicus* are members of the same genealogical family, *Portunidea*,

⁷ See 63 Fed. Reg. at 20148.

⁸ *Id.*

⁹ 21 C.F.R. § 102.5.

¹⁰ 63 Fed. Reg. at 20149.

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