



U.S. DEPARTMENT OF COMMERCE
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September 30, 2014

MEMORANDUM

TO: Arnold Palacios, Chair
Western Pacific Fishery Management Council

FROM: Frederick W. Tucher
Chief, Pacific Islands Section, NOAA Office of General Counsel

SUBJECT: NOAA OFFICE OF GENERAL COUNSEL, PACIFIC ISLANDS SECTION
REPORT TO THE 161st COUNCIL MEETING

The Pacific Islands Section's Report to the 161st Meeting of the Western Pacific Fishery Management Council is as follows:

1. Litigation Matters

- *Kahea and Food & Water Watch v. NMFS*, CV-11-00474 (D. Haw.) and 12-16445 (9th Cir.) As previously reported, in August 2011 plaintiffs Kahea and Food & Water Watch, Inc. filed a complaint in federal district court in Hawaii challenging NOAA's approval of a one-year special permit authorizing Kona Blue Water Farms Inc. to culture and harvest almaco jack, a coral reef management unit species, in the U.S. EEZ using an unapproved gear type. Plaintiffs argued that NOAA lacked authority under MSA to authorize the commercial harvest of cultivated fish in the U.S. EEZ, and further, that the relevant Fishery Ecosystem Plan did not authorize the permitting of aquaculture operations. On April 27, 2012, the court issued a final decision and order granting NOAA's motion for summary judgment on all claims. Food & Water Watch appealed. On October 29, 2013, the Ninth Circuit Court of Appeals upheld NMFS' authority under MSA to issue the special permit, and also found that NMFS had not engaged in improper rulemaking. The Ninth Circuit reversed the district court's finding that the NEPA claim was moot, and remanded that claim for further proceedings on the merits. On July 24, 2014, the district court again ruled in favor of NOAA and held that the agency took the requisite "hard look" at the



environmental impacts of the project and that preparation of an Environmental Impact Assessment (EIS) was not required. The district court agreed with NOAA that the EA considered potential precedent-setting and growth-inducing effects as well as cultural impacts, and found that Plaintiffs failed to show that the project was controversial or had uncertain impacts. Judgment has been entered in favor of Federal Defendants. A notice of appeal has not been filed within the mandatory 60-day time period.