

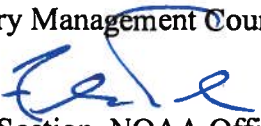


U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
OFFICE OF GENERAL COUNSEL
Pacific Islands Section
1601 Kapiolani Blvd., Suite 1110
Honolulu, Hawaii 96814-4700
(808) 944-2165 • Fax: (808) 973-2935

February 20, 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 159th COUNCIL MEETING

The Pacific Islands Section's Report to the 159th Meeting of the Western Pacific Fishery Management Council is as follows:

1. Litigation Matters

- *Turtle Island Restoration Network, Center for Biological Diversity v. Sec. Blank, NMFS/Sec. Salazar, FSW, CV-12-00594 (D. Haw.)* As previously reported, on November 2, 2012, Turtle Island Restoration Network and the Center for Biological Diversity filed a Complaint against the Secretaries of Commerce and Interior for declaratory and injunctive relief in the District Court of Hawaii, challenging the final rule implementing sea turtle incidental take levels for the Hawaii-based shallow set fishery (ESA and NEPA claims), as well as a USFWS permit authorizing the fishery to interact with migratory birds under the Migratory Bird Treaty Act (MBTA). Summary judgment motions were filed by both parties in July 2013. On August 23, 2013, the Court issued a 65-page opinion, affirming all of the Agencies' decisions under the ESA, NEPA and MBTA, and granting judgment on behalf of the Federal Defendants. Plaintiffs appealed to the Ninth Circuit Court of Appeals. On January 29, 2014, Plaintiffs filed their opening brief, arguing in relevant part, that the USFWS was arbitrary and capricious in issuing the MBTA permit because it failed to consider alternatives to reduce impacts on migratory birds, and also that NMFS' biological opinion ignored its own studies and experts in authorizing the fishery to



increase its impacts on endangered sea turtles. An extension to submit NMFS' answering brief was obtained. The answering brief is due on March 31.

- *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 district court granted 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. The district court has directed Food & Water Watch to file its motion to file a supplemental brief on the NEPA claim by February 28.
- *Dettling, Cabos v. NMFS*, Civil No. CV11-00374 KSC (D. Haw.): As reported at the 157th Council meeting, this action was filed in 2012 by two fishermen against the Department of Commerce/NOAA, alleging violations of the Administrative Procedure Act (APA) and the Federal Tort Claims Act (FTCA) for the loss of "traditional fishing grounds" when the President established the Papahānaumokuākea and Pacific Remote Islands Monuments and prohibited commercial fishing in each. After issuing an order in favor of the Federal Defendants, the Court allowed Plaintiffs 30 days to amend and refile an amended complaint on certain claims. On June 30, 2013, Plaintiffs' filed a Second Amended Complaint, again alleging violations of the APA, the FTCA, and the Tucker Act. Federal Defendants filed a motion to dismiss the Second Amended Complaint on August 12, 2013, on grounds that Plaintiffs failed to state a claim for which relief can be granted, and that the Court lacked subject matter jurisdiction over the claims. On November 15, 2013, the Court dismissed with prejudice Plaintiffs' claims for intentional infliction of emotional distress, and also dismissed without prejudice other claims under the FTCA and APA. The Court gave Plaintiffs 30 days to file a third amended complaint or judgment would be entered in favor of Defendants. After Plaintiffs failed to file a third amended complaint within the 30-day period prescribed, on January 6, 2014, the Court entered judgment in favor of Defendants.