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June 19, 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 160th COUNCIL MEETING

The Pacific Islands Section's Report to the 160th 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, Plaintiffs have appealed a district court's August 23, 2013 decision and order affirming all of the Agencies' decisions under the Endangered Species Act, National Environmental Policy Act, and Migratory Bird Treaty Act (MBTA), to authorize the continued operation of the Hawaii-based shallow-set longline fishery. On January 29, 2014, Plaintiffs filed their opening brief with the Ninth Circuit Court of Appeals, 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. On March 31, 2014, NMFS and USFWS filed an answering briefing, arguing in relevant part that USFWS' issuance of the MBTA special purpose permit was reasonable and based on a proper application of its regulations, and that NMFS' biological opinion considered the best available scientific information in rationally concluding that the



fishery would not jeopardize leatherbacks and North Pacific loggerhead sea turtles. Also on March 31, 2014, intervener-defendant Hawaii Longline Association filed its answering brief, contending that the agencies' decision-making was reasonable and complied with all relevant statutes. On May 14, 2014, Plaintiffs filed a reply brief. No hearing date has been scheduled.

- *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. However, the Ninth Circuit set aside the district court's decision that plaintiffs' NEPA claim was moot, and remanded that claim. On May 15, 2014, Food & Water Watch filed its renewed motion for summary judgment on the NEPA claim. On June 16, 2014, NOAA filed its opposition and cross motion for summary judgment, arguing that the decision to prepare an environmental assessment over an environmental impact statement was reasonable and based on a consideration of all relevant factors, and that NMFS was not required to evaluate the speculative impacts of future fish culture operations that may or may not occur in the action area.