




U.S. DEPARTMENT OF COMMERCE
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DATE: October 8, 2019

MEMORANDUM

TO: Archie Soliai, 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 180th COUNCIL MEETING

NOAA Office of General Counsel Pacific Islands Section's Report to the 180th Meeting of the Western Pacific Fishery Management Council is as follows:

Litigation Matters:

1. *Territory of American Samoa v. National Marine Fisheries Service, et al.*, No. 17-7081 (U.S. Court of Appeals for the Ninth Circuit): As previously reported, the National Marine Fisheries Service (NMFS) has appealed the U.S. District Court of Hawaii's March 2017 decision granting summary judgment to American Samoa and invalidating a rule which established an exemption from the American Samoa Large Vessel Prohibited Area (LVPA) to eligible longline vessels. The rule, which reduced the size of the prohibited area for eligible longline vessels, was intended to help improve the efficiency and economic viability of the American Samoa longline fleet after a lengthy period of economic decline. The U.S. District Court found that NMFS had failed to adequately consider whether this rule preserved and protected American Samoa cultural fishing under the Instruments of Cession, which the Court found were "other applicable law" for purposes of the Magnuson Stevens Fishery Conservation and Management Act. The appeal has been fully briefed and the Ninth Circuit Court of Appeals has indicated the case is being considered for oral arguments in Honolulu the week of February 3-7, 2020.



2. *American Tunaboat Association v. Ross et al.*, No. 1:19-cv-01011 (U.S. District Court for the District of Columbia): As previously reported, American Tunaboat Association (ATA), an association representing the U.S. purse seine fishery operating in the Western and Central Pacific Ocean (WCPO), sued to compel NMFS to designate it as an Applicant in an ongoing formal Endangered Species Act (ESA) consultation on the continued operation of the WCPO purse seine fishery. NMFS denied the request because, among other reasons, under its interpretation of the relevant regulations and policy guidance, Applicant status is only available for consultations on a discrete action such as a permit, not for broad programmatic consultations on the operation and management of a fishery. On July 31, 2019, the District Court for the District of Columbia granted summary judgment to NMFS, finding that its decision to deny Applicant status to ATA was reasonable and entitled to deference. ATA filed a notice of appeal of this order on September 27, 2019.

3. *Center for Biological Diversity v. Ross et al.*, No. 1:19-cv-2526 (U.S. District Court for the District of Columbia): On August 21, 2019, Center for Biological Diversity (CBD) filed a complaint for declaratory and injunctive relief under the ESA and Administrative Procedure Act seeking to compel NMFS to designate critical habitat for five species of Florida and Caribbean coral and seven species of Pacific coral. NMFS listed these corals as threatened on September 30, 2014 and was required to designate critical habitat by September 30, 2015 under Section 4 of the ESA. NMFS's answer to the complaint is due November 15, 2019.

4. *Conservation Council of Hawaii Sixty-Day Notice of Intent to Sue for Alleged Violations of the ESA*: As previously reported, Conservation Council for Hawaii (CCH), an environmental advocacy organization, and Mike Nakachi, a Hawaiian cultural practitioner, provided notice of their intent to sue (NOI) NMFS under the ESA concerning the continued authorization of the Hawaii deep-set and shallow-set longline fisheries, the American Samoa longline fishery, and the WCPO purse seine fishery. The NOI alleges that these pelagic fisheries interact with the oceanic whitetip shark, a species listed as threatened under the ESA in January 2018, and that because NMFS has not yet completed formal consultation under Section 7 of the ESA, the continued operation of the fisheries violates NMFS's Section 7 duty to insure that federally-managed fisheries do not jeopardize the species. NMFS has reinitiated consultation on each fishery and has completed consultation for the Hawaii shallow-set fishery regarding the effects of these fisheries on the oceanic whitetip shark. The sixty-day notice period has expired but CCH has not yet filed suit. NMFS has agreed to provide CCH with monthly telephonic briefings on the progress of each consultation.

5. *Hawaii Longline Association Sixty-Day Notice of Intent to Sue for Alleged Violations of the ESA*: As previously reported, Hawaii Longline Association (HLA) provided notice of its intent to sue NMFS under the ESA concerning the failure to timely complete consultation for the Hawaii deep-set longline fishery. NMFS reinitiated consultation for the deep-set fishery on October 4, 2018. The NOI alleges that NMFS has missed the statutory deadline to complete the

consultation, and may only extend the deadline with the express consent of the Applicant (HLA) – which it has not received. The sixty-day notice period has lapsed but HLA has not yet filed suit.

6. Center for Biological Diversity Sixty-Day Notice of Intent to Sue for Alleged Violations of the ESA: As previously reported, CBD provided notice of its intent to sue NMFS for violations of Section 4 of the ESA for failing to issue a 12-month finding regarding CBD’s petition to list cauliflower coral in Hawaii as “threatened” or “endangered” under the ESA. CBD submitted its petition on March 14, 2018. On September 18, 2018, NMFS published a “positive” 90-day finding that listing the coral as either threatened or endangered may be warranted. The NOI alleges that NMFS has missed the 12-month statutory deadline to issue a finding whether listing is warranted. The sixty-day notice period has lapsed but CBD has not yet filed suit.

