



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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DATE: November 21, 2022

MEMORANDUM

TO: Archie Soliai, Chair
Western Pacific Fishery Management Council

FROM: Frederick W. Tucher K.W.1030316289
Chief, Pacific Islands Section, NOAA Office of General Counsel

SUBJECT: NOAA OFFICE OF GENERAL COUNSEL, PACIFIC ISLANDS SECTION
REPORT TO THE 193rd COUNCIL MEETING

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NOAA Office of General Counsel Pacific Islands Section's Report to the 193rd Meeting of the Western Pacific Fishery Management Council is as follows:

Litigation Matters:

- 1. *Conservation Council of Hawaii (CCH) et al. vs. NMFS, et al., No. 1:22-cv-00224 (D. Haw.)*:** On May 17, 2022, CCH and Michael Nakachi filed a complaint against the National Marine Fisheries Service (NMFS) demanding declaratory and injunctive relief for alleged substantive and procedural violations of the Endangered Species Act (ESA). Plaintiffs alleged that the NMFS has failed to insure, through completion of a biological opinion under Section 7 of the ESA, that the authorization of the Hawaii deep-set longline and American Samoa longline fisheries will not jeopardize the oceanic whitetip shark, a species listed as threatened in January 2018. On July 7, the Court granted Hawaii Longline Association's motion to intervene as an Intervenor-Defendant. After NMFS completed supplemental biological opinions in September and October on the effects of the DSLL and ASLL fisheries on the recently listed oceanic whitetip shark and



giant manta ray, the parties filed a joint stipulation of dismissal. On November 7, the court granted this motion and dismissed the case without prejudice.

2. ***Wille v. Raimondo et al., No. 822-cv-689 (D. Md.)***: On March 21, 2022, three Hawaii residents filed suit against NMFS, Secretary of Commerce Raimondo, NOAA Administrator Spinrad, and Assistant Administrator Coit alleging that NMFS's September 2021 rule prohibiting approach of Hawaiian spinner dolphins within 50 yards violated the Appointments Clause of the U.S. Constitution. Plaintiffs argue that an official possessing rulemaking authority did not issue the rule, and also challenge the delegations of authority from the NOAA Administrator to inferior officers. Plaintiffs seek a judgment declaring that the rule and delegations of authority violate the Appointments Clause, and an injunction setting aside the rule and delegations of authority. On July 22, Defendants filed a motion to dismiss Plaintiffs' complaint on the grounds that Dr. Spinrad's July 8, 2022 ratification of the challenged rule, 87 Fed. Reg. 42104, cured any potential Appointments Clause deficiencies raised by Plaintiffs. Briefing on this motion concluded on September 16, 2022.
3. **Center for Biological Diversity's 60-day notice of intent to sue for alleged violations of the ESA**: On September 20, the Center for Biological Diversity (CBD) sent NMFS a notice of intent to sue (NOI) on NMFS's denial of CBD's 2020 petition to promulgate ESA Section 4(d) regulations for 20 species of threatened coral (5 Caribbean, and 15 Pacific). NMFS denied CBD's petition on May 5, 2021 because it determined that protective regulations were not necessary and advisable for the listed species. On November 16, NMFS responded to the NOI, explaining that the NOI did not include any additional information that would change NMFS' original decision.
4. **Conservation Council for Hawaii's sixty-day notice of intent to sue for alleged violations of the ESA**: On September 29, Earthjustice, on behalf of Conservation Council for Hawaii and Mike Nakachi, sent NMFS a notice of intent to sue, alleging that NMFS unlawfully failed to complete ESA Section 7 consultations on the effects of the Hawaii deep-set longline and American Samoa longline fisheries on all ESA-listed species, including sea turtles and insular false killer whale critical habitat.
5. **Territory of American Samoa's notice of intent to sue for alleged violations of federal law**: On November 18, 2022, the Territory of American Samoa sent NOAA a letter notifying the agency of its intent to file a lawsuit if NMFS finalizes the portions of its proposed rule at 87 Fed. Reg. 55,768 (Sept. 12, 2022) that would repeal the Effort Limit Area for Purse Seine (ELAPS). The notice letter alleges that repealing the ELAPS violates the Western and Central Pacific Fisheries Convention Implementation Act, the Administrative Procedure Act, the American Samoa Deeds of Cession, and President Biden's directives requiring the advancement of environmental and economic justice in U.S. Territories.