



**U.S. DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
OFFICE OF GENERAL COUNSEL  
Pacific Islands Section  
Daniel K. Inouye Regional Center  
1845 Wasp Blvd., Bldg. 176  
Honolulu, Hawaii 96818  
(808) 725-5205 • Fax: (808) 725-5216

DATE: September 16, 2022

**MEMORANDUM**

**TO:** Archie Soliai, Chair  
Western Pacific Fishery Management Council

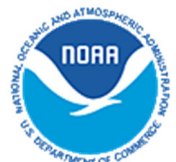
**FROM:** Frederick W. Tucher  
Chief, Pacific Islands Section, NOAA Office of General Counsel

**SUBJECT:** NOAA OFFICE OF GENERAL COUNSEL, PACIFIC ISLANDS SECTION  
REPORT TO THE 192<sup>nd</sup> COUNCIL MEETING

NOAA Office of General Counsel Pacific Islands Section's Report to the 192<sup>nd</sup> 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 allege 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. Plaintiffs seek declaratory relief and a court order requiring NMFS to complete the consultations within 90 days. Plaintiffs submitted a Notice of Intent to Sue on February 7, 2019. On July 7, the Court granted Hawaii Longline Association's motion to intervene as an Intervenor-Defendant. On September 1, 2022, Defendant NOAA Fisheries lodged its administrative



record pursuant to the Court's scheduling order. The order further provides the following: October 31 - concurrent cross-motions for summary judgment due by; December 1 - concurrent oppositions to cross-motions for summary judgment due by; 4) December 15 - concurrent reply briefs due; and January 13, 2023 - oral argument before Court.

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 the rule was not issued by an official who possesses rulemaking authority, and also challenge the delegations of authority from the NOAA Administrator to the Assistant Administrator and from the Assistant Administrator to the Deputy Assistant Administrator. 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.