



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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DATE: March 17, 2023

MEMORANDUM

TO: John Gourley, 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 194th COUNCIL MEETING

NOAA Office of General Counsel Pacific Islands Section's Report to the 194th Meeting of the Western Pacific Fishery Management Council is as follows:

Litigation Matters:

1. ***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, and a hearing was held on March 8, 2023. The court declined to decide the



question of whether the ratification cured any alleged Appointments Clause defects with the rule at the motion to dismiss stage, and ordered the parties to address this question (and only this question) in summary judgment briefs. Defendants have until March 22 to file an answer and proposed schedule for summary judgment briefing.

2. ***Conservation Council of Hawaii and Michael Nakachi v. NMFS et al., No. 1-23-00100-DKW-WRP (D. Haw.)***: On February 22 2023, Conservation Council of Hawaii and Michael Nakachi filed a complaint in the federal district court in Hawaii demanding declaratory and injunctive relief for substantive and procedural violations of the ESA. Specifically, plaintiffs allege that NMFS has failed to complete required ESA section 7 consultations on the effects of the Hawaii deep-set longline and American Samoa longline fisheries on multiple listed species (green turtle, olive ridley turtle, loggerhead turtle, leatherback turtle, hawksbill turtle, scalloped hammerhead shark, sperm whale, and Main Hawaiian Islands insular false killer whale). Plaintiffs also allege that NMFS has failed to ensure against the likelihood of jeopardy to these species. Plaintiffs seek declaratory relief and an order compelling NMFS to complete the consultations within 90 days. Plaintiffs sent NMFS a Notice of Intent to Sue for these alleged violations on September 29, 2022, and NMFS responded by letter on November 30 and stated that it anticipated completing the consultations in the spring of 2023. Defendants' deadline to respond to Plaintiffs' complaint is April 28.
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. **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. NOAA Fisheries sent a letter in response to the Territory of American Samoa in January 2023.