



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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DATE: June 20, 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 195th COUNCIL MEETING

NOAA Office of General Counsel Pacific Islands Section's Report to the 195th 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 alleging that its 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 Administrator Spinrad's July 8, 2022 ratification of the challenged rule, 87 Fed. Reg. 42104, cured any potential Appointments Clause



deficiencies raised by Plaintiffs. 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 filed a motion for summary judgment on May 5, 2023. Briefing on this motion is scheduled to conclude on June 23rd.

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 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 failed to ensure against the likelihood of jeopardy to these species. NMFS completed the subject consultations in May 2023, and the parties subsequently filed a stipulation of voluntary dismissal with each party bearing its own fees and costs, which the court granted on June 2, 2023. The case is now closed.
3. ***Center for Biological Diversity v. Raimondo et al.*, No. 1:23-cv-00809 (D.D.C.):** On March 27, 2023, the Center for Biological Diversity (CBD) filed suit in the U. S. District Court for the District of Columbia, challenging NMFS's failure to finalize two separate designations of critical habitat under the Endangered Species Act (ESA). Prior litigation over coral critical habitat in 2019 resulted in NMFS publishing two proposed rules on November 27, 2020, one for the 5 corals in U.S. Caribbean waters, 85 Fed. Reg. 76302, and another for the 7 corals in the Indo-Pacific, 85 Fed. Reg. 76262. CBD's 2023 complaint seeks a declaration from the Court that the agency violated the ESA and Administrative Procedure Act, an order requiring final designations by a date certain, and attorneys' fees and costs. Federal Defendants' deadline to respond to the complaint is July 5, 2023.
4. **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.

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. NOAA Fisheries sent a letter in response to the NOI in January 2023.