



National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, MD 20910

THE DIRECTOR

MAR 7 2001

MEMORANDUM FOR: Chairs, Regional Fishery Management Councils

FROM: *William T. Hogarth*
William T. Hogarth, Ph.D.
Acting Assistant Administrator for Fisheries

SUBJECT: Regional Fishery Management Council Role in the
Endangered Species Act Consultation Process

Section 7 consultation provisions of the Endangered Species Act (ESA) require Federal agencies to consult with the National Marine Fisheries Service (NMFS) and/or the U.S. Fish and Wildlife Service (FWS) on activities they permit, fund, or carry out, that may affect listed species. The Federal agency proposing the action is called the action agency and NMFS and/or FWS would be the consulting agency. Roles, rules, and procedures are clearly described in guidance documents (e.g., Final ESA Consultation Handbook of March 1998) and regulations (50 CFR Part 402 published June 3, 1986). Issuance of the biological opinion is expressly delegated by Congress to the Secretaries of Commerce and Interior.

When NMFS conducts a consultation on fishery management actions under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the process becomes more complicated. The Federal agency that is proposing an action (action agency) is also conducting the consultation (consulting agency). In addition, the fishery management process usually also involves States and Commissions (e.g., Atlantic, Gulf and Pacific States Marine Fisheries Commissions, and the International Commission for the Conservation of Atlantic Tunas); regional fishery management councils (Councils); and resource users and other interested stakeholders.

THE ASSISTANT ADMINISTRATOR
FOR FISHERIES



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Council standing and involvement in the ESA process have been a subject of debate. The Councils do not fit the definition of a Federal action agency or applicant within the ESA context (see attached agency legal memorandum). Therefore, it has been longstanding agency policy not to release draft biological opinions other than to the action agency and to share that information with the applicant. Very compressed schedules for rendering biological opinions, oftentimes mandated by court decision, also make it problematic to allow for public review of draft opinions and for agency response to comments. However, it is clear that there is great interest by the affected Councils and public in draft biological opinions and reasonable and prudent alternatives that impact current fishery management regimes.

Therefore, to provide a more open process, I will ensure that the Councils have the opportunity for comprehensive examination of protective measures for listed species during the NEPA process. In response to requests that the affected Councils and public be more involved in the biological opinion process, I have agreed to have the Office of Sustainable Fisheries (as the action agency) release three official draft biological opinions prior to their final signature. These releases will occur by posting the draft opinion to the NMFS internet site (at nmfs.gov), and as an announcement of availability in the *FEDERAL REGISTER*. This exception to agency policy is limited to the official agency drafts of these three opinions only. Official means review and concurrence by the Regional Administrator, the Office of Protected Resources, the General Counsel for Fisheries, and the Assistant Administrator for Fisheries. These biological opinions will be the 2001 Atlantic Pelagic Fishery, 2001 Pacific Pelagic Fishery, and the next biological opinion analyzing changes to the 2001 or 2002 Alaska Groundfish Fishery. Release of these biological opinions does not imply that a period of time has been established for public comment, and although we will consider comments, it does not imply that public comment will be considered as it is during notice-and-comment rulemaking under the Administrative Procedures Act (APA) or during environmental review under NEPA. In addition to the fact that the preparation of a biological opinion under the ESA is an inherently different process than the one conducted under the APA and NEPA, the agency has statutory and sometimes court-imposed deadlines for completing these opinions.

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After releasing these three draft biological opinions, NMFS will analyze the effects of those releases on the public, the agency, the resources under the agency's administration, and any enhancement of Council involvement in the ESA process, while giving the necessary protections to ESA-listed species.

Moreover, we have two additional studies underway--one that will review how we conduct NEPA reviews and one by the National Academy of Public Administration that we will utilize to improve this policy as necessary.

cc: Regional Administrators
Science Center Directors
Office Directors
NOAA General Counsel
General Counsel for Fisheries



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
OFFICE OF THE GENERAL COUNSEL
 Washington, D.C. 20230

February 23, 2001

MEMORANDUM TO: Clarence Pautzke
 Acting Deputy Assistant Administrator

THROUGH: *Margaret F. Hayes*
 Margaret F. Hayes
 Assistant General Counsel for Fisheries

FROM: Roger B. Eckert *Roger Eckert*
 Attorney-Adviser, GCF

SUBJECT: Regional Fishery Management Councils as Federal Agencies or Applicants under the Endangered Species Act (ESA)

QUESTION PRESENTED: Whether Regional Fishery Management Councils are federal agencies or federal permit applicants for consultation purposes under section 7(a)(2) of the ESA.

ANSWER: While Regional Fishery Management Councils have an important role in the management of federal fisheries, they are neither federal agencies nor federal permit applicants for purposes of section 7 consultations under the ESA. Rather, NMFS has encouraged the Councils to consider impacts of fishery management actions on protected resources in the preparation of necessary documents under the National Environmental Policy Act (NEPA). An adequate NEPA analysis of environmental effects, including effects on ESA-listed species, should be consistent with any conclusions reached in a Biological Opinion (BO) on the same action.

DISCUSSION: Under the Magnuson-Stevens Fishery Conservation and Management Act (M-S Act), Councils prepare fishery management plans (FMPs) for fisheries under their jurisdictions that require conservation and management (section 302(h)(1)). The FMPs, or amendments thereto, must be consistent with the M-S Act's ten national standards (301(a)), the rest of the M-S Act, and other applicable law. After developing an FMP or amendment, a Council submits it to NMFS, and NMFS may approve, disapprove, or partially disapprove the submission on behalf of the Secretary. Disapproval must be based on a finding that the submission is inconsistent with applicable law (e.g., the M-S Act, the ESA, NEPA).

The ESA requires NMFS to conserve listed species. In addition, under ESA section 7(a)(2), federal agencies consult with NMFS on their actions affecting listed species under NMFS' jurisdiction. For fisheries management actions, NMFS consults with itself in order to ensure that its actions under the M-S Act (approving and implementing FMPs and amendments) do not jeopardize the continued existence of a listed species, or result in destruction or adverse



modification of critical habitat. Specifically, the Office of Sustainable Fisheries (F/SF) consults with the Office of Protected Resources (F/PR) on the effects of NMFS' M-S Act actions on listed species.

The consultation regulations provide in part that, if requested, NMFS will make available to the federal action agency the draft BO for the purpose of analyzing the reasonable and prudent alternatives (RPAs). 50 CFR 402.14(g)(5). With respect to M-S Act actions, if requested, F/PR makes available to F/SF the draft BO for the purpose of analyzing any RPAs. F/SF plays a constructive role in developing appropriate RPAs for fishery management actions.

The ESA defines the term "federal agency" as any department, agency, or instrumentality of the United States. Councils are not federal action agencies under the ESA because they do not take the action that is subject to section 7(a) requirements. For purposes of ESA consultations and M-S Act actions, NMFS is the federal agency required to satisfy the consultation (and other ESA) requirements, because NMFS approves FMPs and promulgates regulations to implement them.

In addition, a federal permit applicant "may request a copy of the draft opinion from the federal [action] agency." 50 CFR 402.14(g)(5). The regulations do not require the release of a draft BO to an applicant. The term "applicant," for ESA consultation purposes, is defined as any person who requires formal approval or authorization from a federal agency as a prerequisite to conducting an action. Councils are not "applicants" for ESA consultation purposes because their actions are not the subject of consultation; they are not conducting the fishery management actions under the M-S Act. Rather, it is NMFS' responsibility to take the necessary fishery management actions through approval of FMPs and issuance of regulations.

While Councils have a critical role in the management of federal fisheries, they are neither federal agencies nor federal permit applicants for purposes of section 7 consultations under the ESA. Councils must be aware of the effects of proposed fishery management actions on listed species. To this end, NMFS has encouraged Councils to consider impacts of fishery management actions on listed species early in the development of management alternatives and in the preparation of necessary documents under NEPA. An adequate NEPA analysis of environmental effects, including effects on listed species, should be consistent with any conclusions reached in a BO that would be prepared for the same action.

NOAA/NMFS Litigation Docket - 05/2/02

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
Ace Lobster v. Daley	1/4/01	D. Rhode Island	00-004	APA, ACFCMA (implicating MSA), RFA	Lobster businesses challenge reduced trap limits and requirement that vessels fishing in more than one management area abide by the most restrictive measures in effect for any one area. Plaintiffs allege requirements are not compatible with ASMFC lobster plan and violate national standards 4,5,6,8, and 10. Plaintiffs claim defendant lacked authority to withdraw American Lobster FMP and failed to identify alternatives to minimize economic impacts. Won, Appealed to 1st Circuit, and argued April 5, 2002. Awaiting decision.	GCF-Williams/DOJ-Gustafson	commercial fishing	NMFS	Alan Eagles; Violet Fish and Trap Company; Red Devil Fish and Lobster Company; Palombe Fishing Corporation; Palombo-Nippert Fishing, Ltd.; Garry Mataronas; C. E. H., Inc.; Narragansett Seahawk, Inc.	
Alsea Valley Alliance v. Daley	10/28/99	D. Oregon	99-6265-HO	ESA, APA, NEPA	Challenge to the listing of Oregon Coast coho salmon population, for failure to include hatchery-bred coho in the listing decision; 9/12/01, Order struck down the Oregon Coast coho listing, thereby immediately delisting the population. 11/14/01, Court allowed seven environmental groups to intervene, for the sole purpose of appealing the 9/12 order. 12/14/01, on the intervenors' motion, the 9th Circuit stayed the District Court's decision, thus restoring Oregon Coast coho to threatened status, and protection under the ESA. The appeal is pending, with the intervenors' first brief due on March 1, 2002.	GCNW - Bancroft/DOJ-Hettenbach	environmental	NMFS	Mark Sehl (private citizen/fishing guide)	Director of Oregon Department of Fish and Wildlife
American Pelagic Fishing Company v. United States	3/9/99	U. S. Court of Federal Claims	99-119C	Constitution	Plaintiff filed a takings claim for compensation for NMFS' cancellation of its vessel's permits and letters of authorization to fish for certain species of fish, as a result of language in riders to two successive appropriations bills.	GCNE-MacDonald/D OJ-Holl	commercial fishing	NMFS		

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
Anderson v. Evans	1/10/02	W.D. Washington	02-0081C	ESA, APA, MMPA	Challenge to NMFS' Environmental Assessment and its issuance of an aboriginal subsistence whaling quota to the Makah Indian Tribe.	GCF-Eckert/DOJ-Page/Rauch	environmental	NMFS	Fund for Animals, Humane Society, Australlians for Animals, Cetacean Society, West Coast Anti-Whaling Society, Abels, Hansen, Ness, Lamb, Owens, Peninsula Citizens for the Protection of Whales, Spomer, Miller, Dutton	Lautenbacher, Hogarth
Arclic King Fisheries, Inc. v. U.S.	2/1/99	U.S. Court of Claims	99-49C	AFA, Constitution	Challenge to American Fisheries Act claiming that exclusion of plaintiff's vessel from the Bering Sea pollock fishery constitutes a taking; "an amount to be determined at trial in excess of \$1,250,000 plus pre-judgment and post-judgment interest, together with any and all further damages".	GCAK - Auer/DOJ-Sullivan	commercial fishing	NMFS	United Seafoods Limited Partnership	
Association of California Water Agencies v. Mineta	8/3/00	E.D. California	F-00-6148 REC DLB	ESA, NEPA, APA	Complaint alleges NMFS violated the ESA, NEPA and APA by not conducting any meaningful analysis of the economic impact upon plaintiffs when it designated critical habitat for the steelhead and chinook salmon. Plaintiffs seek an order setting aside the critical habitat designation and injunctive relief prohibiting NMFS from adopting a final rule designating critical habitat until NMFS prepares an EIS and an economic analysis. DOJ has filed a motion to dismiss the NEPA and "pattern and practices" causes of action as well as claims against any ESUs other than the Central Valley spring run chinook and the Central Valley steelhead. Summary Judgment hearing 4/1/02.	GCSW - Harwood/DOJ-Hettenbach	Municipal organizations, water districts	NMFS	State Water Contractors, Kern County Water Agency and Stockton East Water District.	Donald Knowles, NMFS; William Stelle, Jr., NMFS
Atlantic Fish Spotters Association v. Evans	6/7/01	D. MA	01-10968-JLT	APA, RFA	Plaintiff alleges defendants failed to provide notice through the Federal Register, and solicit comments from the public regarding their development and implementation of the General Permit condition. Plaintiff further alleges defendants failed to conduct a regulatory flexibility analysis in connection with NMFS' failed 1997 efforts to implement a spotter plane ban for the Atlantic bluefin tuna (ABT) General and Harpoon Category fisheries.	GCF-Park/DOJ-	Commercial	NMFS	Jonathan E. Mayhew, Robert Sampson, William C. Chaprales, Ralph E. Pratt	

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
Blue Water Fishermen's Ass'n v. Daley	7/7/99	D. District of Columbia	2:99CV2846 (RWR)	MSA, APA, RFA	Challenges the Fishery Management Plan for the Atlantic Tuna, Swordfish and Sharks and its implementing regulations. Court ruled in favor of agency except with respect to the vessel monitoring system requirement, which was remanded with instructions to reconsider. On September 21, the court issued an order reinstating case.	GCF-Joseph/Wildlife section of ENR- Brown	commercial fishing	NMFS	A Fishermen's Best, Inc., Viking Village, Inc., Willie R. Etheridge Seafood Company, Inc., Tuna Fresh, Burcaw, Dunn, Johnson, Rucky	
Blue Water Fishermen's Association v. NMFS	11/20/00	D. Mass.	00-12313 (NG)	ESA, MSA, APA	Challenge to the emergency rule that established time/area closures in the Grand Banks to reduce harm to turtles from pelagic longline gear, and challenge to the biological opinion for Atlantic highly migratory species.	GCF/Lawrence - DOJ-Giedt	commercial fishing	NMFS	Johnson, Maclean, Maclean, Horton, Nagle, Panacek, Rockwell, Weiss	
Bluewater Fisheries, Inc. v. Daley	4/27/00	E.D. N. Y.	CV-00-2418	MSA, APA, NEPA	General challenge to Amendment 12 to the N. E. Multispecies FMP (whiting regulations).	GCNE-Martin/DOJ - Alpert	commercial fishing	NMFS	Bluewater Fisheries, Inc.	
Brower v. Evans	8/18/99	N.D. California	C99-3892-SC	MMPA, DPCIA, IDCPA	Complaint challenges April 29, 1999, finding on the effects of chase and encirclement on depleted dolphin stocks; Notice of Appeal filed in the Ninth Circuit Court of Appeals, 5/18/00, No. 00-15968. Agency lost 9th Circuit appeal, case pending attorney fees. Ninth Circuit affirmed the District court's grant of summary judgment 7/23/01. Parties entered into tentative settlement agreement of \$676,000 in plaintiffs' attorneys' fees and costs under EAJA.	GCSW-Feder/DOJ-Lowry	environmental	NMFS	Samuel F. LaBudde; Earth Island Institute; The Human Society of the United States; The American Society for the Prevention of Cruelty to Animals; Defenders of Wildlife; The Oceanic Society; International Wildlife Coalition; Environmental Solutions Interna	
California State Grange v. Evans	2/5/02	D. Oregon	02-6044-HO	ESA, APA	Alleges that by failing to consider hatchery coho salmon in its listing of Southern Oregon/Northern California coho, NMFS failed to evaluate under the proper standard whether coho salmon should or should not be listed, and if listed, the appropriate recovery role for hatchery coho.	GCNW - Bancroft/DOJ - Lowery	Farmer organizations	NMFS	Oregon State Grange, Greenhorn Grange, Jackson County Pomona Grange, Alsea Valley Alliance, Tim O'Connor, Ryan Kiewer, and Leonard Zylstra	

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Center for Biological Diversity v. National Marine Fisheries Service	6/22/99	N. D. California	C 99-3041 (SBA)	ESA, APA	Complaint alleges that NMFS violated its duty under Section 4(d) of the ESA and the APA by not adopting protective regulations for the Central California Coast, south-Central California coast, and Central Valley Evolutionary Significant Units of steelhead trout. Case settled, currently negotiating payment of attorneys' fees.	GCSW - McIntosh/DOJ -Love	environmental	NMFS	Alameda Creek Alliance; Coastside Habitat Coalition; South Yuba River Citizens League; Turtle Island Restoration Network; California Sportfishing Protection Alliance; Northern California Council of the Federation of Fly Fishers; Pacific Coast Federation o	
Center for Biological Diversity v. NMFS	5/2/01	N.D. CA	01-1706 VRW	ESA, APA	Complaint alleges that NMFS is allowing the California-based longline fishery to operate without an environmental review. Plaintiffs allege that the fishery is harming protected species and NMFS has never reviewed the fishery's impacts on federally threatened and endangered species as required. Summary judgment for defendants 11/28/01. Plaintiff's appealed to the 9th Circuit on 12/24/01 (No. 02-15027)	GCSW - Feder/DOJ - Issenberg	Environmental Groups	NMFS	Turtle Island Restoration Network	
Center for Marine Conservation v. National Marine Fisheries Service	2/24/99	District Court - Hawaii	99-00152 DAE	NEPA, ESA, APA	Complaint for declaratory and injunctive relief alleging NMFS violated NEPA, failed to properly manage the Hawaii Central North Pacific Longline Fishery to conserve and avoid jeopardizing endangered leatherback, olive ridley and loggerhead sea turtles. In order of injunction dated 03/30/01, NMFS was ordered to immediately implement measures protecting sea turtles as described in the FEIS on the pelagic fisheries of the Western Pacific Region. Attorneys' fees paid in the amount \$192,860.00.	GCSW - Feder/DOJ - Issenberg	Environmental Groups	NMFS	Turtle Island Restoration Network	NOAA, DOC, William Daley, Secretary of Commerce
Churchman v. Evans	3/11/02	N.D. CA	02-1182-JCS	MSA, APA	Plaintiffs allege that NMFS violated MSA by allocating more groundfish to trawl vessels than to fixed gear vessels between Cape Mendocino and Pt. Conception.	GCNW - Mitchell/DOJ - Coda	commercial fishing	NMFS	Edward Paasch, Todd Beeson	
City of Sausalito v. O'Neill	2/15/02	N. D. California	01-01819EDL	NEFA, ESA, MBTA, MMPA, CZMA, APA	Complaint challenges NMFS' decision that the National Park Service's commercial development of Fort Baker will not adversely affect listed species or critical habitat protected by the ESA. Plaintiff is requesting injunctive relief to declare NMFS' approval of the Fort Baker Plan unlawful.	GCSW- Andrews McIntosh/DOJ -Not Assigned	Municipality	NMFS		National Park Service, NMFS, USFWS

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
Clipper Endeavor, LLC v. NMFS	1/3/02	WD Wa.	C02-0016 Z	MSA	Challenge of Length Overall (LOA) regulations; Plaintiffs will incur substantial economic harm from civil fines and are precluded from participating in fisheries without incurring significant costs for observer coverage because of NMFS' decision to disregard previous regulation language and enforce new regulation. Won on the Motion to Dismiss.	GCAK - Tom Meyer/DOJ - Kipnis	Commercial Fishing	NMFS	Clipper Endeavor, LLP, Clipper Surprise, LLP, Clipper Seafoods, LTD	NMFS, Balsiger and Evans
Columbia River Alliance v. NMFS	2/14/00	W.D. Washington	00-231R-235R	ESA, APA, NEPA	Challenge to the biological opinion concerning the Corps of Engineers project to deepen the shipping channel in the Columbia River downstream of Portland, Oregon. Consolidated with Northwest Environmental Advocates v. NMFS; 00-235 R. (consolidated); case stayed pending issuance of a new BO.	GCNW - Vanatto/DOJ - Disheroon	environmental	NMFS	CRANE	
Common Sense Salmon Recovery v. Daley	5/4/99	D. District of Columbia	1:99CV01093	ESA, APA, MMPA, MSA	Request for declaratory and injunctive relief to force NMFS to conserve salmon of the Pacific Northwest.	GCF- Eckert/DOJ- Rauch	Other industry	NMFS	Building Industry Association of Washington, Washington Association of Realtors, Washington Farm Bureau, Washington Cattlemen's Association	
Common Sense Salmon Recovery v. Daley	8/20/99	D. District of Columbia	1:99CV02249	FOIA, ESA	Request for declaratory and injunctive relief to force NMFS to provide documents regarding management of Pacific salmon.	GCF- Eckert/DOJ- Ludwig	other industry	NMFS		
Commonwealth of the Northern Mariana Islands v. United States	7/31/97	D. Northern Mariana Islands	97-0036	Covenant between U.S. and CNMI, United Nations Charter and Trusteeship Agreement, Constitution	Request to quiet title and for declaratory and injunctive relief establishing CNMI's jurisdiction over submerged lands seaward to 12 miles from the baseline, as well as drawing the baseline along the archipelago rather than around each island.	GCSW- Feder DOJ- Gelderman	commonwealth/Juridical Entity	NMFS		

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Commonwealth of the Northern Mariana Islands v. United States	4/30/99	D. Northern Mariana Islands	99-0028	Quiet Title Act, Covenant Establishing CNMI in Political Union with U.S.	CNMI is requesting quiet title and declaratory and injunctive relief for its claim of jurisdiction over submerged lands seaward to 12 miles from the baseline, as well as drawing the baseline along the archipelago rather than around each island. Complaint is substantially the same as 97-0036 but was refiled because original case was not properly served. Plaintiffs requested consolidation with 1997 case but motion was denied and complaint was dismissed. Case appealed to the 9th Circuit, 99-17501. 9th Circuit overturned the District Court ruling and found that for the purposes of the Quiet Title Act, the CNMI should be treated as a "state." This suit will now be able to continue.	GCSW-Feder/DOJ-Dobbins	Government/Judicial Entity	NMFS	Sportfishing Protection Alliance; Klamath Forest Alliance; Native Fish Society; Northern California Council of the Federation of Fly Fishers, Northcoast Environmental Center, Oregon Natural Resources council fund, Oregon Wildlife Fed., Siskiyou Reg. Ed. Pj	Rolland A. Schmiten, NMFS
Connecticut v. Vineta	7/24/00	D. Connecticut	300CV1386DJS	Constitution	Plaintiff challenges the constitutional underpinnings of the MSA and the ACFCMA.	GCNE-JMacDonald/DOJ-Smith	state government	NMFS		Atlantic States Marine Fisheries Commission
Conservation Law Foundation v. Daley	5/19/00	D. D. C.	00-1134	APA, MSA	Challenge to framework 33 of Multispecies FMP on grounds that it fails to meet Sustainable Fisheries Act requirements. - On December 28, 2001, plaintiffs' motion for summary judgment was granted due to defendants not complying with the SFA. Summary judgment.	GCNE-Martin/DOJ-Jacobs	Environmental	NMFS	Conservation Law Foundation, Center for Marine Conservation, National Audubon Society, Natural Resources Defense Council	
Conservation Law Foundation v. Evans	5/31/01	D. MA	01CV10927	APA, MSA, NEPA	Challenge to Scallop Framework 14	GCNE-Martin	Environmental	NMFS	American Oceans Campaign	
Cont'l v. United States	12/10/99	Court of Federal Claims	99-987C	Constitution	Plaintiff challenges the taking of his property without compensation, through regulations banning drift gillnet gear on the swordfish fishery in the North Atlantic. Court granted agency's motion to dismiss; plaintiff has entered a notice of appeal, docketed 3/14/01, Federal Circuit, #01-5058.	GCF/Ben-David - DOJ/Sullivan	commercial fishing	NMFS		
Cook Inlet Beluga Whale v. Evans	5/8/00	D. C. Circuit	01-5387 (Appeal)	ESA, APA, MMPA	Challenge of defendants' decision not to list Cook Inlet beluga whales under the ESA. Decision in favor of defendants filed on 8/20/01. Appeal filed on 10/17/01; Originally - D. D. C. - Center for Marine conservation v. Daley; 1:00CV01017	GCF-Babson/DOJ-Thurston	Environmental	NMFS	Cook Inlet Beluga Whale, Alaska Center for the Environment, Alaska Community Action on Toxins, Alaska Wildlife Alliance, Center for Biological Diversity, National Audubon Society	

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Jaddona v. City of Stamford	12/28/99	D. Connecticut	399CV02540-AHN	Organized Crime Control Act 01 1970, as amended, 14th Amendment	Plaintiff alleges defendants engaged in a pattern of racketeering violating his rights under Organized Crime Control Act, and alleges unconstitutional taking of his property. Claims stem from City of Stamford's rezoning offshore islands to create a wildlife refuge that plaintiff claims to have had property rights in. No specific allegations against NMFS, but alleges that NMFS and Corps of Engineers "continue to resist development of any kind.	GCNE-Williams/U.S. Attorney, New Haven, Connecticut - Brenda Green	Private Citizen	NMFS		City of Stamford; State of Connecticut; National Marine Fisheries Service; U.S. Army Corps of Engineers
Defenders of the Wildlife v. Hogarth	2/8/00	U.S. Court of International Trade	00-02-00060	MMPA, IDCPA, NEPA, APA, DPCIA	Complaint alleges that NMFS violated the Marine Mammal Protection Act (MMPA) by failing to implement the International Dolphin Conservation Program Act (IDCPA) and the Dolphin Protection Consumer Information Act (DPCIA). It also alleges NMFS violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA) by not preparing a lawful Environmental Assessment and not preparing an Environmental Impact Statement (EIS). Plaintiffs' motion for a TRO or preliminary injunction denied April 14, 2000. Case was appealed to the 9th Circuit on February 4, 2002. Plaintiffs filed notice of appeal.	GCSW-Feder/DOJ-Lau	Environmental	NMFS	Earth Island Institute; Humane Society of the U.S.; Environmental Solutions Int'l; Animal Welfare Institute; International Wildlife Coalition; American Humane Association; Earthtrust; Greenpeace Foundation; Animal Fund; American Society for the Prevention	Secretary of State; Secretary of the Treasury; Commissioner of the U.S. Customs Service
Defenders of Wildlife v. Babbitt	6/28/00	D. District of Columbia	1:00CV01544	ESA, APA	Complaint alleges that NMFS failed to consider the Bureau of Reclamation's actions on the Colorado River on the endangered vaquita (porpoise) and totoaba (fish), species that occur only in Mexico.	GCSW-Harwood/DOJ - Rauch	environmental	NMFS	Center for Biological Diversity; Asociacion Ecologica de Usuarios del Rio Hardy-Colorado; Sierra Club; Centro Regional de Estudios Ambientales y Socioeconomicos, A.C.; Centro de Derecho Ambiental e Integracion Ecnomica del Sur, A.C.; Consejo Coordinador E	U.S. Bureau of Reclamation
Eagle v. Department of Commerce	6/26/01	N.D. CA	01-20591	FOIA	NOAA denied fee waiver request.	DOC-Coe	Individual	NMFS	Josh Eagle, Stanford University	
East Coast Fisheries Federation v. Daley	6/26/00	E.D. New York	CA00309L	APA, MSA	Plaintiffs challenges the gear restricted areas for scup in which the use of mesh smaller than the prescribed size is prohibited.	GCNE - JMacDonald/AUSA - Matthews	commercial fishing	NMFS	Nautilus, Inc.	

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Environmental Defense Center, Inc. v. Evans	12/11/00	C. D. CA	00-1212 AHS	ESA, APA	Alleges that NMFS violated Section 4 of the ESA by listing only a portion of the Southern California Steelhead evolutionary significant unit (ESU) and NMFS failure to designate critical habitat for the Southern California ESU located upstream of man-made impassable barriers and south of Malibu Creek was arbitrary and capricious and an abuse of discretion. Complaint also alleges NMFS violated APA when it "unlawfully" withheld agency action by excluding steelhead south of Malibu Creek from the listed Southern California ESU. Court Costs and Attorneys' Fees	GCSW - McIntosh/DOJ - Rosenthal	Environmental Groups, Industry Group	NMFS	Troul, Inc.; Center for Biological Diversity; Heal the Bay; Friends of the Santa Clara River; Institute for Fisheries Resources; Pacific Coast Federation of Fisherman's Associations.	Penelope Dalton, NMFS; Jim Lecky, NMFS; Bruce Babbitt, DOI; Jamie Rappaport-Clard, FWS.
Federation of Fly Fishers v. DALEY	3/3/99	N.D. California	C 99-0981 SI	ESA, APA	Complaint for declaratory and injunctive relief to compel Commerce and NMFS to add the Klamath Mountains Province and Northern California steelhead ESUs to the list of threatened and endangered species and to designate critical habitat for those ESUs. Lost. Both parties filed summary judgment motions and a hearing was held on 10/13/00. Judge Iliston granted plaintiffs motion and denied defendants' motion on 10/21/00. NMFS must make a final listing decision for KMP steelhead by March 31, 2001. Attorneys' fees of \$310,973.81 granted to plaintiff 01/10/02.	GCSW - McIntosh; Harwood DOJ- Coda	Environmental Groups	NMFS	Sportfishing Protection Alliance; Klamath Forest Alliance; Native Fish Society; Northern California Council of the Federation of Fly Fishers, Northcoast Environmental Center, Oregon Natural Resources council fund, Oregon Wildlife Federation (continued)	Rolland A. Schmitlen, NMFS.
Ferrara v. Mineta	6/27/00	D. Massachusett	00CV10962RE K	APA, MSA	Challenge to the denial of a confirmation of permit history.	GCNE- JMacDonald/ AUSA- Giedt	commercial fishing	NMFS		
Fishing Company of Alaska, Inc. v. United States	1/27/97	W.D. Washington	C97-0126Z	MSA, APA	Challenge to civil penalties assessed by ALJ and collateral attack on underlying regulatory vessel incentive program; dismissal of civil penalties totaling \$300,000 and set aside of regulatory program as arbitrary and capricious. Won on 3/5/02, pending expiration of appeal.	GCAK- Auer/DOJ- Shockey	commercial fishing	NMFS		

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Florida Wildlife Federation v. Evans	11/13/00	D. District of Columbia, Court of Appeals	00-54181	MSA, APA, NEPA	Challenge to various EFH amendments. In a decision issued September 14, 2000, the court upheld the agency's actions under the Magnuson-Stevens Act, but found that the environmental assessments were deficient. Appeal dismissed on Jan. 7, 2002, as part of Joint Stipulation and Order outlining process for preparation of new NEPA documents. (Formerly American Oceans Campaign v. Evans; No. 1:99CV00982(GK); D. District of Columbia; April 19, 1999)	GCF-O'Brien/DOJ-Smeltzer	environmental, commercial	NMFS	Cape Code Commercial Hook Fishermen's Association; Center for Marine Conservation; Florida Wildlife Federation; Institute for Fisheries Resources; National Audubon Society; National Resources Defense Council (continued)	Texas Shrimp Association (Defendant-Intervenor)
Greenpeace v. NMFS	2/22/02	W.D. Washington	C98-0492Z	ESA	Plaintiffs allege that the biological opinions do not "adequately discuss or address" key factors relevant to the Endangered Species Act's jeopardy and adverse modification of critical habitat standards, and that the biological opinions' determinations that the fisheries are sufficiently protective of Steller sea lions and their critical habitat are arbitrary and capricious, unlawful, and an abuse of discretion.	GCAK-Pollard/DOJ-Rauch	Environmental	NMFS	Greenpeace, American Oceans Campaign, Sierra Club	NMFS
Gulf of Maine Fishermen's Alliance v. Daley	5/16/99	D. Massachusetts	99-11195 (GAO)	MSA, RFA, APA	Challenge to Framework 27 of the Northeast multispecies FMP which imposes closure, reduced trip limits for cod, and other measures in Gulf of Maine.	GCNE - Martin/DOJ - Jacobs	Industry	NMFS		
Gulf of Maine Fishermen's Alliance, Inc. v. Daley	6/19/98	D. Massachusetts	98CV10744GA O	MSA, RFA, NEPA, APA	Challenge to Framework 25 of the Northeast Multispecies Fishery Management Plan, which imposes further restrictions on cod fishing. Defendant's motion to dismiss for mootness granted; Appeal to 1st Circuit by Plaintiff.	GCNE-Martin/DOJ-Jacobs	Industry	NMFS		
Hadaja Inc., v. Evans	10/25/01	D. RI	C. A. 01-517 ML	MSA, APA	Plaintiff challenge the regulations implementing the Fishery Management Plan for the Tilefish Fishery. In particular, the plaintiff alleges that the qualifying criteria for the various limited entry category permits are arbitrary and capricious and that the lack of any catch limits underlying the various permit category quotas will not prevent overfishing as required by national standard 1.	GCNE-MacDonald/D OJ - Govindan	commercial fisherman	NMFS	Hadaja Inc.	Donald Evans

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
Hawaii Longline Association v. NMFS	4/10/01	D.C.	1-01CV00765 CK-K	ESA, MSA, APA	Complaint alleges inter alia that NMFS' March 29, 2001, biological opinion on the effects of the Hawaii-based longline fishery on sea turtles was developed by an unfair and illegal process, failed to use the best available science, was contradicted by the administrative record, and requires management measures that jeopardize sea turtles. (Turtle Island Restoration Network v. NMFS, CV 01-00332 DAE LEK, HI transferred and consolidated with this case)	GCSW - Feder / DOJ - Issenberg	Fishing Industry, Environmental Groups	NMFS	Center for Marine Conservation, Turtle Island Restoration Network	Secretary of Commerce; Center for Marine Conservation (Defendant-Intervenor); Turtle Island Restoration Network (Defendant-Intervenor)
Hulse V. Evans	1/9/01	D. Alaska	J01-002CV	MSA, APA, Constitution	Complaint for declaratory and injunctive relief-two scallop fishermen are challenging the Secretary's approval of a license limitation program for the Alaska scallop industry. Appealed to 9th Cir. 3/20/02	GCAK-Meyer/DOJ-Russell	Commercial Fishing	NMFS	Clipper Endeavor, LLC	NMFS, Balsiger and Evans
Idaho County v. Evans	2/19/02	D.Idaho	02-0080-C-EH	MSA, NEPA, RFA, APA	Challenge to Final Rule regarding essential fish habitat (EFH) amendments, alleging violations of MSA and various procedural statutes.	GCF-O'Brien/DOJ-Raurch	other industry	NMFS	Idaho County (ID); Valley County (ID); Okanogan County (WA); Alaska Forest Association; Intermountain Forest Association; National Association of Home Builders	
In re Kemp	11/26/96	U. S. Bankruptcy Court	LA96-4961	Merchant Marine Act	Agency seeks to protect a \$2.5 million judgment against a vessel owner who is seeking bankruptcy protection.	GCNW - Cody/DOJ - Underhill		NMFS		
In re Trans-Coastal Fisheries Partnership	4/24/96	W.D. Washington	96-04660	Merchant Marine Act	Agency sought relief from stay to proceed with vessel arrest proceedings; on December 8, 1999, a stipulated order for relief from the automatic stay was signed by the Court.	GCNW - Cody/DOJ - Underhill		NMFS		
Kittitas County v. Evans	1/30/01	D. District of Columbia	1:01CV00234	ESA, APA, RFA	Challenges agency's underlying standard, applied in the challenged salmon 4(d) rules, that counties, municipalities, and other local government entities are vicariously liable under ESA for violations by private parties whose activities require a permit, or are subject to other local governmental land-use ordinances. Transferred to W.D. Washington, 10/17/01	GCNW - Bancroft/DOJ - Hettenbach	county government	NMFS	National Association of Home Builders (national trade association)	

<i>Case Name</i>	<i>Date Open</i>	<i>Court</i>	<i>Number</i>	<i>Nature of Suit</i>	<i>Complaint</i>	<i>NOAA Att.</i>	<i>Plaintiff Type</i>	<i>NOAA Def.</i>	<i>Plaintiffs</i>	<i>Defendants</i>
Klamath Irrigation District v. United States of America	10/11/01	U.S. Court of Federal Claims	01-591 L	U.S. Constitution, Amendment V	Plaintiffs allege that the constraints of NMFS' biological opinions will not allow them to receive any irrigation water from the Upper Klamath Lake and related irrigation facilities in 2001 nor in the next six to seven years out of ten. Plaintiffs allege the United States' denial of their water rights constitutes a taking of their property and demand just compensation for this property.	GCSW-Keifer/DOJ-Shuey	Irrigation Districts and private parties	NMFS	Tulelake Irrigation District, Klamath Drainage District, Poe Valley Improvement District, Sunnyside Irrigation District, Klamath Basin Improvement District, Klamath Hills District Improvement Co. (continued - see form)	
Kristine L, Inc. v. Daley	5/17/00	D. New Jersey	00-2390 (MLC)	MSA, RFA, APA	Plaintiffs challenge NMFS' final rule implementing limited access for the swordfish fishery as violating the MSA, the RFA, and the APA (facial challenge). They also challenge the rule as applied, arguing that they substantially met the limited access requirement. Court granted agency's motion for partial dismissal; leaving only "as applied" challenge.	GCF-Park/DOJ-Rauch	commercial fishing	NMFS		
Kvilhaug v. Daley	4/28/99	D. Massachusetts	99-CV-10899(DPW)	MSA, APA, RFA	Challenge to regulations implementing Amendment 7 to the Atlantic sea scallop fishery management plan, particularly days-at-sea restrictions and rebuilding goals.	GCNE - Martin/DOJ - Davenport	commercial fishing	NMFS	M. Kvilhaug, H. Bruce, R. Bruno, H. Davidson, L. Yacubian	
Lake Pend Oreille Idaho Club, Inc. v. NMFS	9/5/00	D. Idaho	00-498-N-EJL	ESA, APA, NEPA	Plaintiffs' oppose a lowering of Lake Pend Oreille and rely upon a potential conflict between the needs of two ESA listed fish, because the higher lake level benefits bull trout while drafting the lake to a lower level provides water needed by listed salmon.	GCNW - Eames/DOJ - Rauch	other industry	NMFS		Army Corps of Engineers, U. S. Fish and Wildlife Service, Department of Interior

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
.aub v. Babbitt	9/27/00	E.D. California	00-6601 OWW/SMS	NEPA, APA, California Environmental Quality Act	Complaint alleges NMFS violated the National Environmental Policy, the Administrative Procedure Act and the California Environmental Quality Act by failing to fully consider the environmental impact and failing to perform a legally adequate mitigation plan in its participation in the CALFED program's proposed acquisition and conversion of approximately one million acres of farmland and several hundred thousand acre-feet of agricultural water resources. Plaintiffs seek a preliminary injunction to restrain defendants from taking any action to carry out the CALFED program, issue a writ of mandate and a mandatory injunction to vacate and set aside the certification of the Final EIR/EIS, and to prepare a new and legally adequate EIR/EIS. Appeal filed 01/14/02. Ninth Circuit Court of Appeals No. 02-15104. Dismissed with leave to amend. Decision has been appealed	GCSW - McIntosh/DOJ - lizuka	Individuals, Industry Group	NMFS	Debbie Jacobson; Ted Sheely; California Farm Bureau Federation	EPA; Dept. of the Army (Civil Works); DOC; USDA; U.S. Army Corps of Engineers; Natural Resources Conservation Service; U.S. FWS; U.S. Bureau of Reclamation; State of California; California Resources Agency; California Environmental Protection Agency.
Little Bay Lobster Co. v. Daley	1/4/00	D. New Hampshire	00-0007-M	APA, ACFCMA (implicating MSA), RFA	Lobster dealer and offshore vessel owners challenge placement of boundary line between two management areas. They allege agency's boundary line lacks necessary justification and violates national standards 2, 4, and 8. Plaintiffs claim defendant lacked authority to withdraw American Lobster FMP and failed to identify alternatives to minimize economic impacts.	GCF- Lynch/DOJ- Gustafson	commercial fishing	NMFS	Amy Philbrick, Carol Coles, Eulah McGrath, Jennifer Anne, Jacqueline Robin, Michele Jeanne, Amy Michele	
Lund's Fisheries, Inc. v. Daley	11/5/99	D. New Jersey	99cv5199(JEI)	APA, MSA, RFA	Claim for declaratory and injunctive relief. General challenge to Monkfish FMP.	GCNE- Martin/DOJ- Stermitz	Industry	NMFS	Lund's Fisheries, Inc., A. Kranozinsky, Export, Inc., M. Johnson, P. Morse, A & A Seafood, Inc., Aggar Fish Corp., Trio Algarvio, Inc.	
Maine v. Babbitt	12/7/00	D. Maine	00-250-B-C	APA, ESA	Seeks declaratory judgment setting aside the regulation listing Atlantic salmon as endangered and the determination that the Gulf of Maine population is a distinct population segment, and permanent injunction against listing Atlantic salmon. (Maine-State Chamber of Commerce v. Norton, 00-254-B-C, is consolidated with this case effective March 22, 2001).	GCF- Lawrence/DO J - Issenberg	State government, Industry Assoc., Individual bus	NMFS	Maine State Chamber of Commerce, Atlantic Salmon of Maine, Stott Sea Farm, Inc.; Maine Aquaculture Association, Maine Pulp of Paper Association, Wild Blueberry Commission of Maine, Jasper Wyman & Sons, Cherry Field Foods, Inc.	Department of Interior (Norton), U. S. Fish and Wildlife Service (Jones)

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
Maine v. Interior	6/8/00	D. Maine	00-122-B-C (01-1234)	FOIA	Challenge to Agency's refusal to release certain data relating to the proposed rule to list Atlantic salmon. (Case appealed to the 1st circuit on January 12, 2001, case no. 01-1234). Appealed issued 4/5/02.	GCF- Lawrence;DO J- Frank/Collette	State Government	NMFS		U. S. Geological Survey, U. S. Fish & Wildlife Service, Department of Commerce
Midwater Trawlers v. Daley	11/14/96	W.D. Wash.	96-1808 (consolidated)	MSA, RFA, ESA, NEPA	Challenge to allocation of whiting to treaty Indian tribes; Civ. Action #97-36008; 9th Circuit; January 29, 1998; affirmed in part, reversed in part and remanded, April 2, 1999; summary judgment granted for defendants, denied for plaintiffs, July 27, 2000; consolidated with Washington v. Daley; 96-5671 ;and West Coast Seafood Processors v. Daley; 96-5671; Oregon v. Daley; 99-1415. Ninth Circuit Remanded to NMFS to either (1) promulgate a new allocation consistent with the law and basec on best available science, or (2) provide further justification for the current allocation that conforms to the Magnuson Act, March 5, 2002	GCNW - Cooney/DOJ- Thurston	commercial fishing	NMFS	Fishermen's Marketing Association	
Montauk Inlet Seafood, Inc. v. Daley	6/23/00	E. D. New York	CV003731	APA, MSA, NEPA	Challenge to the scup gear restricted areas	GCNE - JMacDonald/A USA - Matthews	Commercial fishing	NMFS	Mark Lofstad, J&R, Inc., Lund's Fisheries, Seafreeze, Ltd., Fred Mattered, Manasquan Inlet Realty, Inc.	
Municipal Water District of Orange County v. California Resources Agency	9/28/00	Superior Court of the State of California for the County of Los Angeles	B C237574	CEQA	Plaintiffs are challenging Respondents' adoption and certification of the Environmental Impact Report for the CALFED Programmatic Record of Decision (ROD) and seek a writ of mandate to suspend all actions pursuant to the ROD until and unless all of the components of the Program are studied in a supplement to the EIR and approved in full compliance with the California Environmental Quality Act.	GCSW - McIntosh/ DOJ - lizuka	Local Water District	NMFS		California Environmental Protection Agency; California Department of Fish and Game; California Department of Water Resources; California State Water Resources Control Board; California Department of Food and Agriculture; Delta Protection Commission; Calif

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National Association of Home Builders v. Mineta	11/20/00	D. District of Columbia	1:00CV02799	ESA, MSA, RFA, APA, NEPA	Alleges Essential Fish Habitat under the Salmon Plan is excessive, unduly vague and not justified; alleges Critical Habitat for 19 Salmon ESU's is excessive, unduly vague, not justified, and not based upon a required economic analysis.	GCNW - Erickson/DOJ - Hellenbach	other industry	NMFS	Oregon Building Industry Association, Home Builders Association of Kitsap County, Tice Ranch, L.P., American Forest Resource Council, Building Industry Association of Washington, California Building Industry Association, Coos County, Grant County, Home Bu	Pacific Fishery Management Council
National Audubon Society v. Daley	6/25/99	D. D. C.	1-99CV01717 (RWR)	MSA, APA	Challenges the defendants' failure to protect the Western Atlantic bluefin tuna from overfishing and failure to establish an adequate plan to rebuild the overfished ABT population to a sustainable level.	GCF-McCall/DOJ - Brown	Environmental	NMFS		
National Coalition for Marine Conservation v. Daley	6/24/99	D. D. C.	1:99CV01692	APA, MSA, RFA	Challenges the agency's regulations to reduce bycatch in the Atlantic pelagic longline fishery as inadequate vis-à-vis billfish; alleges agency failure to establish adequate bycatch reporting methodology. (Cases now consolidated with the above caption are: The Billfish Foundation v. Mineta, 1:00CV02086; and A Fishermen's Best, Inc. v. Mineta, 00-CV-3096).	GCF - McCall/DOJ - Lewers	Environmental	NMFS	National Audubon Society	Mineta, NOAA
National Wilderness Institute v. U. S. Army Corps of Engineers	2/6/01	D. D. C.	1:01CV00273	ESA, APA	Seeks declaratory judgment against defendants for acting arbitrarily and capriciously, and an injunction against defendants prohibiting further actions on the Wilson Bridge Project and the Washington Aqueduct.	GCF-Ben-David/DOJ - Stermitz	Environmental	NMFS	National Wilderness Institute	DOC, DOI, EPA, FHA
National Wildlife Federation v. NMFS	5/3/01	D. Oregon	01-00640-KI	ESA, APA	Challenges the biological opinion concerning the Federal Columbia River Power System. Alleges violations due to the biological opinion not being in accordance with law.	GCNW-Earnes/DOJ - Disheroon	environmental	NMFS	Idaho Wildlife Fed., Washington Wildlife Fed., Sierra Club, Trout Unlimited, Pacific Coast Fed. Of Fishermen's Asso., Inst. for Fisheries Resources, Idaho Rivers United, Idaho Steelhead and Salmon United, Norwest Sportfishing Industry Assoc., etc.	

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
Native Village of Alek v. Daley	11/2/98	D. Alaska	A98-365	Federal Common Law	Suit by five federally recognized Indian tribes seeking to establish their non-exclusive aboriginal hunting and fishing rights in the EEZ in the Gulf of Alaska.	GCAN - Babson DOJ-Landon	Indian Tribe	NMFS	Native Villages of 1) Tatitlek, 2) Chenega, 3) Nanwalek and 4) Port Graham	
Natural Resources Defense Council v. Daley	6/23/00	D. D. C.	1:00CV01481	MSA, APA, NEPA	Challenge to the 2000 summer flounder quota. Attorneys' fees not resolved.	GCNE - JMacDonald/DOJ - Mark Brown	Environmental	NMFS	National Audubon Society, Environmental Defense, Center for Marine Conservation	Donald Evans, National Oceanic and Atmospheric Administration, National Marine Fisheries Service
Natural Resources Defense Council v. Evans	10/26/01	S.D. NY	01 civ. 9453 (RMB)	MSA, APA, NEPA	Plaintiffs challenge the regulations implementing the Fishery Management Plan for the Tilefish Fishery. In particular, the plaintiffs cite the lack of any measures protecting the tilefish essential fish habitat from the damage caused by trawling as being violative of the Magnuson-Stevens Fishery Conservation and Management Act, the National Environmental Policy Act and the Administrative Procedure Act.	GCNE - MacDonald-AUSA Goldman	environmental	NMFS	Natural Resources Defense Council	
Natural Resources Defense Council v. Evans	4/5/02	N.D. California	02-1650-BZ	MSA, APA, NEPA	Challenges the 2002 fishery management measures. Plaintiffs allege NMFS is not being sufficiently protective of overfished species by allowing rebuilding periods that are too long, failing to adequately account for and reduce bycatch, and failing to comply with NEPA.	GCNW - Mitchell/DOJ - Baca	Environmental	NMFS	Oceana, Inc.,	DOC
Natural Resources Defense Council, Inc. (NRDC II) v. Evans	2/9/01	N.D. California	01-0637-JL	MSA, APA	Challenges NMFS' approval of the 2001 fishery specifications and management measures (specifications) for Pacific Coast Groundfish Fishery. They challenge 1) the assumption of no discard for two species, 2) the EA, and 3) the waiver of notice and public comment on the specs (that is, they argue we need to have proposed and final specifications filed with the Federal Register). District Court ruled against NMFS. NMFS has appealed.	GCNW - Mitchell/DOJ - Baca	environmental	NMFS	Pacific Marine Conservation Council, Inc.	
Natural Resources Defense Council, Inc. (NRDCI) v. Evans	1/25/01	N.D. California	01-0421JL	MSA, APA	Challenges Amendment 12 to the Pacific Coast Groundfish Plan, which establishes a framework for rebuilding plans; plaintiffs want rebuilding plans to be plan amendments or regulations, they want Am. 12 to specify additional contents for rebuilding plans, and they object to the inclusion of the mixed-stock exception in the rebuilding plan; District Court ruled against NMFS. NMFS has appealed.	GCNW - Mitchell/DOJ - Baca	environmental	NMFS	Pacific Marine Conservation Council, Inc.	

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New York v. Evans	3/30/01	E.D. New York	01-2027	MSA, APA	Plaintiff challenges the 2001 scup specifications as being arbitrary and capricious due to a lack of a state by state distribution system for the Summer Period quota.	GCNE-MacDonald/A USA-Lipari	state	NMFS		Scott B. Gudes
Northwest Environmental Advocates v. EPA	4/12/01	D. Oregon	01-510 HA	CWA, ESA, APA	Challenges NMFS' issuance of a biological opinion on EPA approval of Oregon's Water Quality Standards that concludes the water standards will not jeopardize the continued existence of salmon, steelhead and bull trout populations is arbitrary and capricious.	GCNW - Rowland/DOJ-Gulley	environmental	NMFS		National Marine Fisheries Service
Ocean Conservancy v. Evans	7/25/01	M.D. Florida	8:01-CIV-1399-T-24EAJ	MSA, NEPA, APA	Challenge to the opening of the second semi-annual 2001 fishing season for large coastal sharks with a fishing quota set based on 1997 quota levels. Specific violations relate to failure to prevent overfishing and to rebuild overfished stocks and to make decisions based on best scientific information; and, failure to complete an adequate EA.	GCF-Park/DOJ-Brown	Environmental	NMFS	National Audubon Society	
Ocean Conservancy v. Evans	1/24/02	Dist. Florida (Tampa Division)	not yet assigned	MSFCMZ, NEPA, APA, FOIA	Claims that the emergency rule to establish the commercial quotas for Atlantic large coastal sharks for the 2002 fishing season at 1997 levels, and the suspension of regulations on management measures for Atlantic large, small and pelagic sharks violates the above referenced Acts, by failing to provide notice-and-comment and by improperly invoking emergency rulemaking; preparing an inadequate EA and FONSI, and by failing to respond to request for documents.	GCF-Park/DOJ-Moncrief	Environmental	NMFS	National Audubon Society	
Okanogan County v. NMFS	6/19/01	E.D. Washington	01-0192-RHW	ESA, APA	Challenges restrictions on special use permits for irrigation diversions across federal land and the biological opinions that resulted in the restrictions. Claims defendant Forest Service lacks authority to impose flow conditions to comply with ESA; that NMFS violated APA in the standard it applied in the biological opinions. Defendant's motions for summary judgment granted in full and plaintiffs' motion denied 3/14/02.	GCNW-Rowland/DOJ-Gulley	county government	NMFS	Early Winters Ditch Company, Lundgren Limited Family Partnership, Ron Vanderyacht, David C. Jones, Frances A. Kaul	U. S. Fish and Wildlife Service, U.S. Forest Service

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
Oregon v. Daley	6/28/00	D. Oregon	00-880-KI	ESA, APA	Petition for review of Incidental Take Permit issued for takes of certain ESA protected fish and motion for a preliminary injunction to prevent NMFS from allocating incidental take under ESA for fall chinook in the mainstem of the Columbia River.	GCNW-Mitchell/DOJ - Disheroon	state government	NMFS	Washington State Department of Fish and Wildlife	
Pacific Coast Federation of Fishermen's Associations PCFFA II) v. NMFS	1/19/99	W.D. Washington	99-0067R	ESA, APA	Challenge to NMFS's biological opinions concerning the effect of timber harvest on listed species; 99-36027 and 99-36195. 9th Circuit; filed 11/23/99; 9th Circuit ruled against NMFS; pending resolution of attorneys' fees claim.	GCNW - Van Alta/DOJ - Barton	commercial fishing	NMFS	Institute for Fisheries Resources; Oregon Resources Council; Umpqua Watersheds; Coast Range Association; Headwaters	Douglas Timber Operators; Northwest Forestry Association (Intervenors)
Pacific Coast Federation of Fishermen's Associations (PCFFA III) v. NMFS	10/13/00	W.D. Washington	00-1757R	ESA, APA	Challenge to 20 biological opinions issued under Section 7 of the ESA concerning the effect of timber sales in listed species of salmon and steelhead; Bureau of Indian Affairs added as defendant in January 2002.	GCNW-Van Alta/DOJ-Williams	commercial fishing	NMFS		
Pancratz v. Restricted Access Management Division, NMFS	4/12/02	USDC, D. AK.	J02-0006-CV (HRH)	16 USC 773 et seq. North Pacific Halibut Act	Alleges NMFS illegally approved transfer of halibut quota share he owned to another party.	GCAK-Babson/DOJ-	Private Individual	NMFS	Mathew Pancratz	NMFS
Pilchuck Audubon Society v. NMFS	7/18/01	W. D. Washington	01-1107L	ESA, APA	Challenges the scope of the biological opinion. Alleges that it is unduly narrow; misses key impacts on threatened Puget Sound salmon; runs counter to the evidence before the agency and prior determinations made by the agency; fails to independently assess the project's impact on designated critical habitat, and authorizes FHWA, WSDOT, and City of Everett to proceed with actions likely to jeopardize threatened Puget Sound chinook salmon. NMFS motion for stay granted, 2/28/02	GCNW-Roland/DOJ-Boyles	Environmental	NMFS	Public Employees for Environmental Responsibility	

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
Regional Council of Rural Counties v. California	9/27/00	Superior Court of the State of California	00CS01337	CEQA	Plaintiffs are challenging the Respondents' adoption and certification of the Final Environmental Impact Report for Implementation of the CALFED Programmatic Record of Decision (ROD) and seek a writ of mandate commanding respondents State of California and various state agencies to vacate their Order Adopting and Certifying the Final EIR and to prepare a legally sufficient environmental impact report. NMFS is named as an interested party/real party in interest that would be affected if Petitioners receive the relief sought in the writ.	GCSW - McIntosh/DOJ - Iizuka	State agencies, individuals and corporations	NMFS	Central Delta Water Agency; R. C. Farms, Inc.; Zuckerman-Mandevilla, Inc.; Rudy Musli, and South Delta Water Agency.	State of California, Does 1 through 1000, exclusive.
Rogue v. Evans	4/26/01	D. Mass.	01-10709-RGS	MSA	Challenge to civil administrative decision.	GCEL/NE-Juliland	commercial fisherman	NMFS	Marianne Rogue	
San Francisco Baykeeper v. U. S. Army Corps of Engineers	2/7/01	N. D. California	C01 0602 CW	ESA, NEPA, APA	Alleges that NMFS violated the ESA by not preparing a legally adequate biological opinion for proposed improvements at the Port of Oakland and by issuing a concurrence letter to the Corps of Engineers instead of preparing a full biological opinion. Plaintiffs allege that neither the biological opinion nor the concurrence letter considers the adverse impacts of the improvement projects on listed endangered and threatened species. Attorney's fees and court costs.	GCSW-Harwood/DOJ-Govindan	Environmental	NMFS	Center for Marine Conservation	U.S. Fish and Wildlife Service; National Marine Fisheries Service; Intervenor; City of Oakland/Port of Oakland
San Luis & Delta-Mendota Water Authority v. DOI	2/25/02	E.D. California	02-5209 REC DLB	ESA	Challenge to the amendment to the CVP BO. Plaintiffs claim that NMFS is causing incidental take, by illegally causing major changes in the CVP operation, resulting in harm to farms, cities and industries reliant on CVP water. This occurs when the number of fish incidentally taken at project pumps exceeds the estimates of likely take included in the BO issued by the services.	GCSW-McIntosh/DOJ	Joint powers water authority	NMFS	Westlands Water District	DOI, BOR, FWS
Schnitzer Investment Corp. v. Evans	6/29/01	D.D.C.	1:01CV01454	ESA, NEPA, APA, RFA	Challenge to NMFS' 4(d) regulations for several species of salmon and steelhead, issued on July 10, 2000. Transferred to W.D. Washington, 02/28/02.	GCF-Eckert/DOJ-Rauch	Other Industry	NMFS		

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
Sierra Club v. J.S. Fish & Wildlife Service	6/11/99	E.D. Louisiana	00-30117	ESA, APA	Plaintiff challenge the Services' "not prudent" finding with regard to a determination whether to designate critical habitat for Gulf sturgeon, a species listed as "threatened" under the ESA. On January 31, 2000, Plaintiff appealed to 5th Cir. 00-30117 magistrate's order upholding government's decision not to designate critical habitat for Gulf Sturgeon. March 15, 2001, Appeal Court issued decision (remand to agency), overturning our regulations as inconsistent with ESA. On August 3, 2001, District Court issued order giving the Services six months to issue a proposed critical habitat designation for Gulf Sturgeon, and six months to issue a final CH designation. Originally 98-3788-S-2.	GCSE-Smit-Brunello/DOJ-Shilton	Environmental	NMFS		NMFS
Spalt v. United States	6/26/01	D. MA	01-11102-DPW	U.S. Constitution, Amendments V and XIV	(1) Allege violation of Due Process rights by NOAA's refusal to grant a hearing on a denial of plaintiffs' permit application. (2) Allege NOAA breached contract with plaintiffs by refusing to consent to plaintiffs' permit application. (3) Seek declaratory judgment that NOAA must grant plaintiffs a permit or voiding settlement agreement.	GCEL-MacDonald/OJ-Giedt	former fisherman	NMFS	Spalt	
Spirit of the Sage Council v. Babbitt	7/29/98	D. District of Columbia	1:98CV01873-EGS	ESA, APA	Alleges that the "No Surprises" final rule greatly expands the circumstances under which third parties may "take" endangered or threatened species through destruction of habitat, by guaranteeing to all holders of ITPs that permittees will never be obligated to make substantial changes to their HCPs to avoid extinction of species (even when existing plans prove inadequate).	GCF-Lawrence/DOJ - Shockey	Environmental	NMFS	Biodiversity Legal Foundation, The National Endangered Species Network, Shoshone Gabrielino Nation, The Humane Society of the United States, Klamath Forest Alliance, Klipstein, Rocha, Welty	Department of Commerce
Tulare Lake Basin Water Storage District v. United States	2/11/98	Court of Federal Claims	98-101C	Constitution	Plaintiffs claim a 5th Amendment taking of their property interests in water occurred through implementation of two biological opinions (NMFS' and FWS') that required water to be left in the San Francisco Bay Delta for winter run salmon and delta smelt. Order issued 4/30/01 found a 5th Amendment taking had occurred. Damages phase now proceeding. \$25,720,320.00 plus compound interest; attorneys' fees; expert witness fees; expenses; costs of litigation.	GCSW-McIntosh, Keifer/DOJ-Disheroon, Goger	Individuals, Water District, Industry Groups	NMFS	Hansen Ranches; Kern County Water Agency; Lost Hills Water District; H. P. Anderson and Sons; Wheeler Ridge-Maricopa Water Storage District; James Josephson and Linda Josephson; Lee E. Brown and Anita Brown; MJ-B Farming Co.	Amos S. Eno, U.S. FWS, DOI; William M. Daley, DOC; Rolland A. Schmitzen, NMFS.

<i>Case Name</i>	<i>Date Open</i>	<i>Court</i>	<i>Number</i>	<i>Nature of Suit</i>	<i>Complaint</i>	<i>NOAA Att.</i>	<i>Plaintiff Type</i>	<i>NOAA Def.</i>	<i>Plaintiffs</i>	<i>Defendants</i>
Turtle Island Restoration Network v. Mineta	9/15/98	U.S. Court of International Trade	98-09-02818	Pub. L. No. 101-162, sec. 609 (relating to the protection of sea turtles)	Statutory challenge of State Department Shrimp import guidelines. Closed on July 19, 2000, finding for the plaintiffs on declaratory relief but denying injunctive relief. Overturned by the Federal Circuit on March 21, 2002 (Nos. 00-1569, -1581, -1582).	GCF-Lawrence/DOJ - Lau	Environmental	NMFS	Steiner, The American Society for the Prevention of Cruelty to Animals, The Humane Society of the United States, The Sierra Club	Department of State; Department of Treasury
U. S. v. F/V Grand Duchess	5/11/00	D. Oregon	00-CV650-ST	Merchant Marine Act	Mortgage foreclosure and guarantee actions.	GCNW - Cody/DOJ - Underhill		NMFS		
U. S. v. Z. Tinian Freezer, Inc.	7/1/99	D. Northern Mariana Islands	99-0043	Merchant Marine Act	Real estate mortgage foreclosure and guarantee actions; \$3.5 million	GCNW-Cody/DOJ - Lord	federal government	NMFS		
U.S. v. Zuanich	5/1/00	S.D. California	00-CV01099	Merchant Marine Act	Title XI guarantee actions.	GCNW - Cody/DOJ - Berns		NMFS		
United States v. F/V BERING TRADER	10/17/89	W.D. Washington	89-1537	Merchant Marine Act	Admiralty mortgage foreclosure action and guarantor action seeking \$12 million on four defaulted loan guarantees.	GCNW - Cody/DOJ - Underhill		NMFS		
United States v. F/V LARRY Z	9/1/96	S.D. California	96-1663	Merchant Marine Act	Judicial foreclosure action on loan guarantee collateral.	GCNW - Cody/DOJ - Berns	federal government	NMFS		
United States v. F/V MILAGROS Z	9/1/96	S.D. California	96-1633	Merchant Marine Act	Mortgage foreclosure and collection action related to a defaulted vessel loan guarantee.	GCNW - Cody/Torts Branch-Berns	federal government	NMFS		
United States v. F/V SOLEIL Z	9/1/96	S.D. California	96-1634	Merchant Marine Act	Vessel foreclosure and collection actions related to defaulted tuna vessel.	GCNW - Cody/DOJ - Berns	federal Government	NMFS		
United States v. F/V YOLANDA Z	9/1/96	S.D. California	96-1934	Merchant Marine Act	Vessel arrest and mortgage foreclosure and collection actions related to defaulted loan guarantee; \$3.4 million	GCNW - Cody/DOJ - Berns	federal government	NMFS		
United States v. Oregon	5/1/88	D. Oregon	68-513M	Indian Treaty	Expired CRFMP was adopted by the Court on 10/7/88; Indian treaty fishing case settled by consent decree expiring end of 1998. Efforts ongoing to reach new settlement.	GCNW - Mitchell/DOJ - Disheroon	Government	NMFS		

Case Name	Date Open	Court	Number	Nature of Suit	Complaint	NOAA Att.	Plaintiff Type	NOAA Def.	Plaintiffs	Defendants
United States v. Washington	4/19/70	W.D. Washington	9213	MSA	Quantification of Pacific whiting fishing rights for coastal tribes; Sub-proceeding 01-01; January 12, 2001; Action by twenty Northwest Indian tribes, supported by the United States, to have the court declare that the State of Washington's failure to repair state-owned culverts that prevent fish passage violates Treaty Indian fishing rights.	GCNW - Mitchell/DOJ - Monson	federal government	NMFS		
Wards Cove Packing v. NMFS	9/14/00	W.D. Wash.	C00-1570	MSA	IFQ permit denial appeal. 3/1/01 District Court entered judgment for Agency. Appealed: 9th Circuit 01-35309, 3/23/01.	GCAK- Babson/DOJ- Brown	tribe fishing	NMFS		
Washington Trout v. Lohn	11/26/01	W.D. Washington	01-8163P	ESA, NEPA, APA	Washington Trout has sued NMFS over approval of a plan for harvest of threatened Puget Sound chinook salmon under the rules to protect listed salmon issued by NMFS under section 4(d) of the ESA. The challenged plan was prepared by the State of Washington and the Puget Sound Indian tribes with treaty fishing rights. Plaintiffs allege NMFS did not perform adequate analyses under NEPA and ESA. Plaintiffs also assert there are substantive problems with the plan.	GCNW - Bancroft/DOJ - Hettenbach	Environmental	NMFS		Commerce
Westlands Water District v. U.S. Department of Interior	12/13/00	E.D. CA	F-00-7124OWW DLB	ESA, APA, NEPA	Complaint alleges NMFS violated the ESA, the APA, and NEPA when it issued its Biological Opinion for the Trinity River Mainstem Fishery Restoration project. Plaintiffs maintain that because NMFS' Biological Opinion did not conclude that there would be any incidental take of coho salmon, it could not impose reasonable and prudent measures to minimize take of the salmon. Plaintiffs further allege that there was no review of the Biological Opinion pursuant to NEPA. Court ruled that the government did not fully comply with NEPA so DOI is doing a supplemental EIS. Court Costs and Attorneys' Fees requested.	GCSW - McIntosh/DOJ - Shockey	Local Water District	NMFS		U.S. Bureau of Reclamation, Eluid Martinez as Commissioner; L. Snow (Regional Director); U.S. FWS,DOI; J. Rappaport Clark, FWS; DOI; M. Spear, FWS,DOI; Mineta (DOC), Dalton, NMFS/DOC; R.Lent, NMFS/DOC

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAWAII LONGLINE ASSOCIATION,

Plaintiff,

22.

**NATIONAL MARINE FISHERIES SERVICE
and DONALD L. EVANS, In his capacity as
Secretary, United States Department of
Commerce,**

Defendants.

Civil Action No. 01-765 (CKK/JMF)

REPORT AND RECOMMENDATION

The parties' cross-motions for partial summary judgment are before me for a Report and Recommendation pursuant to LCvR 72.3. A separate motion for summary judgment is also ripe, but it has not been referred to me at this time and I shall not discuss it.

BACKGROUND

Plaintiff Hawaii Longline Association ("HLA") has moved for partial summary judgment to set aside defendant National Marine Fisheries Service's ("NMFS" or "the agency") Biological Opinion regarding the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region. HLA is a trade association that represents the owners, crews, suppliers, dealers, and vessels that make up the Hawaii-based longline tuna and swordfish fishery ("Fishery").

The Endangered Species Act ("ESA"), 16 U.S.C.A. § 1531 *et seq.* (2000), establishes a comprehensive structure for saving plant and animal species from extinction. Individual species that are determined to be at risk of extinction across all or a substantial portion of their range are

listed as endangered or threatened by the United States Fish and Wildlife Service ("FWS"), and in the case of marine species, by NMFS. § 1533; 50 C.F.R. § 402.01(b)(2002).¹ The listing of a species triggers a set of protections ranging from designating critical habitat to developing a recovery plan. §§ 1533(b), (f). Furthermore, under section 7(a)(2) of the statute, federal agencies must consult with NMFS if an agency action "may affect" an endangered or threatened species. § 1536(a)(2); 50 C.F.R. § 402.14(a).²

As part of this consultation process, NMFS must issue a Biological Opinion ("BiOp") detailing how the agency action affects the species or its critical habitat. More specifically, if NMFS concludes that the action is likely to jeopardize the continued existence of a listed species, it must offer "reasonable and prudent alternatives" ("RPA") that would not jeopardize the species. § 1536(b)(3)(a); 50 C.F.R. § 402. On the other hand, if there is a "no jeopardy" finding, NMFS must issue an Incidental Take Statement that sets levels for a taking of the species that will not jeopardize its existence.³ § 1536(b)(4); 50 C.F.R. § 402.14(i). If the Incidental Take Statement levels are later exceeded, NMFS must reinitiate consultations. 50 C.F.R. § 402.16.

¹ Because this case involves marine species, NMFS is the relevant agency. Therefore, although the ESA refers to both FWS and NMFS, I shall hereinafter refer only to NMFS.

² All references to 50 C.F.R. are to the 2002 edition as it appears in Westlaw.

³ In ESA parlance, any action that results in mortality or injury to a species is called a "take."

Fisheries under the United States' jurisdiction are regulated by NMFS under the Magnuson-Stevens Act ("MSA"), 16 U.S.C.A. § 1801 *et seq.* (1994). The MSA established eight regional councils comprised of a cross-section of interested parties to issue rules and regulations most appropriate to fisheries in particular regions. § 1842(a), (h)(1). The fisheries based in Hawaii, Samoa, Guam, and the Northern Mariana Islands fall under the Western Pacific Fishery Management Council ("Council"). § 1852(a)(1)(H). The Council is responsible for preparing various fisheries management plans ("FMP"), including the Pelagics FMP, which is at issue here. In addition to meeting the parameters set by the MSA, every FMP also must conform to other applicable law, including the ESA. § 1853(a)(1).

The substantive issue at the heart of his case is whether the Fishery has contributed to the decline in populations of four species of threatened or endangered sea turtles: loggerhead, leatherback, green, and olive ridley. All four species migrate through the Pacific Ocean and come into contact with the Fishery. The longline gear used by the Fishery consists of a mainline up to 60 nautical miles long to which are attached from 400 to 2,000 separate branch lines, each with a baited hook. It is undisputed that turtles of each species are killed or injured when they become entangled in fishing lines or pierced by hooks. A.R. at 09194-09202. The question for ESA purposes is whether those mortalities and injuries jeopardize the turtles' existence over all or a part of their ranges.

The Pelagics FMP was first issued in 1985 and has been frequently revised since then. Every time an FMP is revised, NMFS must engage in ESA consultations with itself,⁴ pursuant to

⁴ One fundamental aspect of this case bears pointing out. Because NMFS is the agency that oversees FMP's, it is the "action agency" under § 1536(a)(2). However, NMFS is also the

the ESA. § 1536(f); 50 C.F.R. §§ 402.01, *et seq.* In a 1998 BiOp, NMFS concluded that the Fishery was not likely to jeopardize the continued existence of any listed sea turtle species. A.R. at 03164-03228. NMFS used a population modeling analysis called TURTSIM, which predicted that neither a significant decrease nor increase in the Fishery would substantially affect the sea turtle populations. A.R. at 03198.

Environmental advocacy groups disputed the 1998 BiOp in a 1999 lawsuit, Center for Marine Conservation v. NMFS, Civ. No. 99-00152 (D. Haw. 2000), charging violations of the ESA and of the National Environmental Policy Act, 42 U.S.C.A. § 4331 *et seq.* (1996). In particular, plaintiffs challenged the "no jeopardy" finding and alleged that the Incidental Take Statement was arbitrary and capricious. In October 1999, Chief Judge Ezra of the Hawaii District Court dismissed all of the ESA claims. Center for Marine Conservation, No. 99-00152, slip op. at 16-31 (October 18, 1999). In turn, NMFS initiated an Environmental Impact Statement ("EIS") subsequent to the filing of the suit, thus mooted plaintiffs' request for one. The court did, however, grant a limited injunction pending completion of the EIS. Id. at 41-42. Subsequent orders set an April 1, 2001 deadline for completion of a final EIS. Center for Marine Conservation, No. 99-00152 (D. Haw. June 26, 2000).

Meanwhile, in May 2000, NMFS determined that the Fishery had likely exceeded the predicted take levels for olive ridley turtles specified in the 1998 BiOp's Incidental Take Statement. NMFS was therefore required to reinitiate consultations. 16 U.S.C.A. § 1539; 50

consulting agency, i.e., the agency that must be consulted by the action agency. Thus, NMFS must consult with itself. The Southwest Region Sustainable Fisheries Division of NMFS, the action agency, consulted with the Southwest Region Endangered Species Division of NMFS.

C.F.R. § 402.16. Pursuant to the reinitiated consultations, NMFS began preparing the BiOp that was eventually published in March 2001 and that lies at the center of this litigation.

Thus, as of December 2000, NMFS was engaged in two processes related to the Pelagics FMP. On December 22, 2000, NMFS published the Draft Environmental Impact Statement ("DEIS") that had been ordered by the Center for Marine Conservation litigation. 65 Fed. Reg. 80828. Comments on the DEIS were accepted until January 29, 2001. At the same time, NMFS was preparing a BiOp as a result of the consultations reinitiated in May 2000.

On December 19, 2000, HLA counsel Jeffrey W. Leppo ("Leppo") orally requested a copy of the draft BiOp from Judson Feder ("Feder"), a NMFS attorney. Leppo followed up with a written request one week later, and also indicated HLA's desire to "engage in a discussion" regarding reasonable and prudent alternatives for NMFS to consider. Administrative Record ("A.R.") at 05628-05630. Feder rejected the request for a copy of the draft BiOp in a response letter dated January 3, 2001. Id. at 06262. At the same time, Feder stated that NMFS planned to base the BiOp on the DEIS that had just been released on December 22, 2000. Thus, he indicated that HLA's comments on the DEIS regarding "the effects of the fishery on sea turtles, or the biology of sea turtles" would be incorporated into NMFS' draft BiOp. Id. Feder went on to note that the comments on the DEIS were due on January 29, 2001, but that NMFS was "preparing the biological opinion on a very tight schedule," aiming to finish the draft by January 21, 2001. Id.⁵ On January 16, 2001, the Council, also seeking applicant status, likewise sent a letter requesting a copy of the draft BiOp. Rebecca Lent ("Lent"), NMFS' Regional

⁵ It appears that NMFS did not meet this target date, for the record indicates that the draft was released internally on February 16, 2001. A.R. 07381, 07573.

Administrator, responded with a letter dated February 1, 2001, rejecting this request. Leppo Declaration, Exhibit C.

Meanwhile, the Council held a public meeting on February 16, 2001, concerning, *inter alia*, the Hawaii-based longline fishery. Much of the discussion centered around written questions submitted by HLA. Several NMFS scientists were present at this meeting and engaged in extensive dialogue with an HLA representative over the same issues addressed in NMFS' forthcoming BiOp.

On March 9, 2001, NMFS posted the draft BiOp on its website, and after a couple days of technical difficulties with the NMFS website, HLA was able to fully access the draft on March 12, 2001. HLA contends that NMFS informally invited HLA to submit comments by March 15, three days hence. HLA rushed to submit some comments by the deadline, but was unable to compile what it considered to be a comprehensive submission in this short time period. A.R. at 08998-09017. The Council, meanwhile, hurriedly submitted comments just under the wire. A.R. at 08887-08891. HLA contends that NMFS did not invite or receive the comments in good faith, and that it never intended to give them serious consideration, given that the final BiOp was released hours after HLA's comments were received.

A contentious Council meeting was held in Honolulu on March 13, 2001, one day after HLA was able to view the draft BiOp and just days before the final BiOp was issued. NMFS' Acting Assistant Administrator for Fisheries, Dr. William Hogarth, was present and specifically invited comments on the draft BiOp, noting that there were still "a few days" before the BiOp would be finalized. A.R. at 08624. Lent also invited comments on the draft BiOp. A.R. at 08626. The record indicates that four HLA representatives participated in this meeting by directing

comments to the NMFS' representatives. A.R. at 08659-65, 08674-79, 08702-05, 08688-90, 08690-97.

The final BiOp was formally published on March 29, 2001. Reversing the 1998 BiOp, it concluded that Fishery activity under the Pelagics FMP is likely to jeopardize three of the four turtle species. A.R. at 09099. In reaching this new finding, NMFS ceased relying on the TURTSIM population model analysis, and instead scrutinized new scientific studies and revised incidental take estimates based on data gathered from NMFS observers deployed on fishing vessels since 1994. A.R. at 09175-09210. This new data suggested that the highest incidence of turtle mortalities and injuries resulted from swordfishing gear, while takes from tuna gear were limited to particular geographic regions. A.R. at 09202-09206. Accordingly, NMFS issued strict regulations, effectively closing the swordfish fishery and significantly curtailing the tuna fishery. A.R. at 09229-09235. These restrictions took effect on March 15, 2001, and have remained in place ever since.

Subsequent to the filing of this suit, NMFS announced that it was once more going to prepare a new BiOp. Thus, the remand of the March 2001 BiOp is no longer a remedy sought by plaintiffs. Rather, HLA now seeks to enjoin NMFS from excluding it from the forthcoming consultations and to compel the release of the draft BiOp, which is scheduled to be published in May 2002.

DISCUSSION

HLA's main argument is that NMFS violated the ESA's implementing regulations by shutting HLA out of the consultation and BiOp process. The consultation regulations require that NMFS review all relevant information submitted by the applicant and discuss its analysis

and grounds for the BiOp with the applicant. 50 C.F.R. § 402.14(d), (g). Biological opinions have been held to be "final agency actions" and thus are reviewable under the Administrative Procedure Act ("APA"). 5 U.S.C.A. § 701-706 (1994). Bennett v. Spear, 520 U.S. 154, 176-78 (1997). Plaintiffs argue that NMFS' interpretation of the ESA and its implementing regulations is contrary to law under § 706(1)-(2) of the APA.

The parties' cross-motions present three separate questions of law: (1) whether HLA and its members are "applicants" under the ESA, (2) whether an applicant is entitled to a copy of a draft BiOp, and (3) whether NMFS' release of the draft BiOp on its web site and discussions with HLA representatives at the public Council meetings satisfied its Section 7 consultation obligations towards HLA.⁶ Since the cross-motions were filed, however, NMFS has reinitiated consultations and plans to issue a new BiOp in May 2002. Thus, the third issue is now moot, for the March 2001 BiOp will be superseded by the forthcoming BiOp. At the same time, the questions of HLA's procedural rights remain ripe, for HLA seeks to participate as an applicant in the reinitiated consultations.

⁶ Taking another tack, HLA argues that NMFS' obligation to use the "best scientific and commercial data available" is yet another reason the action agency should be required to share the draft BiOp. See 16 U.S.C.A. § 1536(a)(2). Although this obligation may provide another reason why NMFS should provide a copy of the draft BiOp to applicants, it does not constitute an independent basis for the latter obligation. Given my above analysis that NMFS is required to provide HLA with a draft BiOp, I shall not delve into further discussion of the significance of this provision.

Standard of Review

Under Fed. R. Civ. P. 56(c), a court must enter summary judgment if there is "no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The only material facts in dispute pertain to the events surrounding the release of the draft BiOp. However, because this factual issue is not dispositive to the remaining issues of law, I shall recommend summary judgment on the issues that the parties agree are questions of law.

HLA and Its Members' Status as "Applicants"

The ESA itself is silent on the definition of an "applicant." Thus, we must turn to the regulations issued jointly by NMFS and FWS found at 50 C.F.R. §402. NMFS' consultation regulations define an "applicant" as "any person . . . who requires formal approval or authorization from a Federal agency as a prerequisite for conducting the action." 50 C.F.R. § 402.02. "Action," in turn, is defined as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to . . . (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid . . ."

" Id.

NMFS contends that neither the Council, HLA, nor its members is an "applicant" under the ESA's definition because they do not directly conduct the consulted-upon action, i.e., the approval of the FMP. By defining the consulted-on action as "fishery management," and not

fishing itself, NMFS seeks to deny HLA applicant status. Under this interpretation of the statute, there is no applicant involved in NMFS' internal consultations regarding the FMP. HLA, in turn, claims that because its members need NMFS' approval to fish for pelagic species, HLA and its members should be considered "applicants." According to this approach, even though the FMP grants no official permit or license to fish, the FMP establishes a *de facto* licensing scheme by prohibiting any fishing activity not allowed under the plan.

Before turning to the merits, I will engage in a two-step process to determine the appropriate standard of review to apply to NMFS' interpretation of its regulations. First, because I conclude that the agency's interpretation is a post-hoc rationalization, I will not apply the highly deferential standards found in Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and Auer v. Robbins, 519 U.S. 452 (1997). Second, in place of Auer, I will adopt an alternative persuasiveness standard. Finally, I will turn to the merits, and will conclude that HLA's interpretation is more persuasive.

The general standard used by courts in reviewing an agency's interpretation of a statute under its administration is that of substantial deference. Chevron, 467 U.S. at 842-44. But we must look beyond Chevron in this case, for the question is not the level of deference owed to an agency's interpretation of a *statute*, but rather an agency's interpretation of a *regulation that it has authored*. In this context, the Supreme Court has held that such interpretations are entitled to an even stronger standard of deference than in Chevron, and should be considered controlling "unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); Wyoming Outdoor Council v. U.S.

Forst Service, 165 F.3d 43, 52 (D.C. Cir. 1999).⁷

But there are exceptions to this high standard of deference. Plaintiffs, citing Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212-13 (1988), contend that NMFS' interpretation is not entitled to the usual deference because it has not been asserted prior to the litigation and is therefore a "post-hoc rationalization." See also National Coalition Against the Misuse of Pesticides v. Thomas, 809 F.2d 875, 883-84 (D.C. Cir. 1987); Church of Scientology v. IRS, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986). A post-hoc rationalization may be found when agency counsel, usually a Department of Justice attorney, asserts a litigation position that had never been articulated by the agency itself prior to the litigation. But not all "post-hoc" explanations are "rationalizations" and unworthy of deference. As explained in Auer, 519 U.S. at 452, a position articulated for the first time in litigation may still be accorded deference if it reflects the agency's "fair and considered judgment." Id. at 462.

My review of the record here convinces me that the agency's argument with respect to the definition of "applicant" is indeed a post-hoc rationalization. At no time prior to this litigation has NMFS ever explicitly addressed the issue of HLA's status as an applicant. In his January 3, 2001 reply letter to HLA's written request for a copy of the draft BiOp, Fcder began by noting that the regulations do not require NMFS to share the draft BiOp with applicants. A.R. at 06262.

⁷ As with Chevron, the threshold question is whether the regulation is ambiguous on its face. See Wyoming Outdoor Council, 165 F.3d at 52 (proceeding to the appropriate level of review only after determining that the regulation was ambiguous). This question need not delay us long, however, for after reviewing the provision, I am convinced of its ambiguity.

Far from stating the NMFS did not consider HLA or the Council to be applicants, this statement implies that Feder was assuming that they were applicants. Likewise, Lent, the NMFS Regional Administrator, wrote a similar letter to the Council on February 1, 2001, in response to the Council's request for a copy of the draft BiOp. Leppo Decl., Exh. C. As with Feder, Lent did not offer any indication that NMFS did not consider the Council to be an applicant. If ever there was an appropriate opportunity, if not a responsibility, to declare that NMFS did not consider IILA or the Council to be applicants, it was in response to explicit requests from those entities to be accorded the rights of applicants. If NMFS had truly formulated an interpretation of the regulations at this point, why would it remain silent in its reply letters?

In its defense, NMFS points to a statement by Hogarth that fishery management councils do not fit the definition of "applicant." A.R. at 08182. Hogarth also refers to an attached legal memorandum, which presumably is the document found on pages 08076-08077 in the administrative record. NMFS fails to acknowledge, however, that these documents interpreted a different legal question, i.e., the applicant status of the fishery management councils, not that of an industry group such as HLA. As I point out below, the Council and IILA have very different functions, structures and goals, and cannot be conflated for the purposes of assessing applicant status.

While I do not go so far as plaintiffs urge and read these letters as a waiver of NMFS' contrary litigation position, they certainly carry implications for the appropriate level of judicial deference. Indeed, it appears that I must reject the "plainly erroneous" deferential standard of Auer, for it does not reflect the agency's "fair and considered judgment." Id. at 552. As I point out below, NMFS' litigation position is sharply inconsistent with NMFS' earlier interpretations of

the very same regulations.

But rejecting the Auer standard does not mean that HLA automatically prevails on this issue. Rather, I must identify an alternative standard to apply here. The main post-hoc rationalization cases such as Bowen, National Coalition Against the Misuse of Pesticides, and Church of Scientology do not explicitly identify an alternative to Chevron. Perhaps this is because these cases preceded the Supreme Court's more recent emphasis on what standard should apply where Chevron is not applicable. A review of these cases indicates that I must replace Auer with Skidmore deference. In Christensen v. Harris County, 529 U.S. 576 (2000), the Supreme Court held that Chevron deference is only due where an agency's statutory construction is announced through formal adjudication or rulemaking. Instead, citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), the Court held that such interpretations are "entitled to respect" to the extent that they have the "power to persuade." Christensen, 529 U.S. at 587. A year after Christensen, the Supreme Court refined its decision in United States v. Mead Corporation, 533 U.S. 218 (2001), holding that the deference analysis is more complicated than a simple examination of whether the agency's interpretation was subject to a formal rulemaking, as Christensen had intimated. Mead also affirms Christensen's embrace of Skidmore deference as an alternative standard whenever Chevron does not apply. Although Christensen and Mead were issued as alternatives to the Chevron standard, I see no reason why the same logic should not also supplant the Auer standard where a post-hoc rationalization is found. Employing Skidmore, I would be more than happy to accept NMFS' position if it is a sound and convincing interpretation of its regulations.

Unfortunately for NMFS, its argument is not very persuasive at all. Far more convincing are NMFS' earlier interpretations of the regulations found in the preamble that accompanied publication of the regulations and in a Final ESA Section 7 Consultation Handbook ("Handbook") that was jointly published by NMFS and FWS in 1998. The preamble to the regulations explicitly states that applicant status is to be "broadly" conferred and reiterates the statutory command that any person seeking "any other form of authorization or approval issued by a Federal agency as a prerequisite for carrying out the action" be deemed an applicant. 51 Fed. Reg. 19926 (June 3, 1986).

Reference to the Handbook is even more telling, for it provides an instructive example to distinguish between an applicant and one who simply has a general interest in an agency's operations. The Handbook, in relevant part, states:

Users of public resources (e.g. timber companies harvesting on National Forests) are not parties to programmatic section 7 consultations dealing with an agency's overall management operations, including land management planning and other program level consultations. However, users who are party to a discrete action (i.e., where they are already the successful bidder on a timber sale that becomes the subject of later consultation or reinitiation when a new species is listed or new critical habitat is designated) may participate as applicants in the section 7 process.

Handbook at 2-12. NMFS cites to this example in purportedly "analogizing"⁸ the longline fishermen to general users of public resources. In fact, the fishermen's position here is parallel to that of the successful bidder on a timber sale, insofar as the fishermen already have obtained

⁸ There was some skirmishing in the briefs over whether NMFS was asserting that the reinitiated consultations were "programmatic" in nature. In its reply, NMFS disclaims any attempt to label the 2001 BiOp the result of a programmatic consultation. Rather, NMFS claims to have merely "analogized" to that section. In any event, I shall take NMFS at its word but because I find it to be an unconvincing analogy, the question is ultimately irrelevant.

licenses from NMFS to fish under another provision. 50 C.F.R. § 660.21. In addition, licensees are required to adhere to all regulations under an FMP. That those licenses are not the immediate subject of the FMP is not dispositive, for the licensees' interests are directly affected by the FMP, as repeatedly acknowledged by NMFS itself. See Plaintiffs' Reply at 8-9. NMFS' attempt to limit applicant status to consultations over a specific permit or license contradicts the unambiguous and broad language of its regulations.

The Handbook also sheds light on the proper scope of the consulted-on "agency action." In this litigation, NMFS narrowly defines the agency action as "fishery management," and focuses on the fact that, under the Magnuson-Stevenson Act, NMFS is solely responsible for approving the FMP. 16 U.S.C.A. §§ 1852(h)(1), 1854(c)(1)(A)(2000). NMFS further attempts to distinguish the approval of the FMP from all of the effects of the FMP. Thus, by drawing a rigid fence around the defined "action," NMFS insists that neither the Council nor HLA could possibly participate.

As a preliminary matter, NMFS' depiction of its role in approving the FMP as far superior to the Council's is contradicted by the actual practice of how an FMP is developed. As Feder, NMFS' own attorney, wrote in an e-mail to a fellow NMFS' representative, "Generally, fishery management councils take the lead in developing FMPs and fishery management policy under the Magnuson Act." A.R. at 06855. The Council works closely with the regulated community, including HLA, in crafting the FMP. Although it is true that NMFS has the ultimate authority to implement the FMP, having the final word is not especially significant for the purpose of defining the agency action.

Even more important, this narrow articulation of the action directly contradicts the Handbook's declaration that "the Federal action involves the approval of a permit or license sought by the applicant, *together with the activities resulting from such permission.*" Handbook at 2-12 (emphasis added). Equally telling is the fact that NMFS did not previously try to cabin its description of the proposed action in either this case or other consultations. In the 1998 BiOp, for example, it defined the proposed action as "the continued operation of the Hawaii Central North Pacific Longline Fishery under Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region." A.R. at 03171; see also May 1991 Biological Opinion, A.R. at 00777 (same); October 2000 Biological Opinion on the California/Oregon Drift Gillnet Fishery, A.R. at 09297 (describing future consultation required for "the FMP *and its implementing regulations*") (emphasis added). This language clarifies that NMFS ordinarily views its consultations as focusing equally on both the management and *operation* of the fishery, rather than only on the former. NMFS' proposed narrowing of the scope of the action is inconsistent with its ordinary interpretation.

Greenpeace v. National Marine Fisheries Service, 80 F.Supp.2d 1137 (W.D.Wash. 2000), presented the very same issue and the court held that the agency action for a consultation regarding an FMP included all of the accompanying regulations and measures affecting the fishery. Id. at 1145.⁹ A broader definition of the agency action makes perfect sense, as this term,

⁹ By definition, the rules, regulations and other measures that comprise the Fishery Management Plans constitute "agency action." See 50 C.F.R. 402.02. The plans as a whole authorize and regulate all the activities involved in fishing. Thus, these plans not only set forth criteria for harvesting resources within sea lion habitat, but guide and constrain all aspects of the groundfish fisheries in the BSAI and

like that of applicant, is to be construed broadly. 50 C.F.R. § 402.02; Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1055 (9th Cir.1994). The clear intent of the Section 7 regulations is to allow input from those who are directly affected by ESA consultations. It would undermine this intent to deny a party such a voice based on a technical distinction over the scope of the agency action.

GOA. See Pacific Rivers Council, 30 F.3d at 1056; Silver v. Babbitt, 924 F.Supp. at 984.

Id. at 1145.

Under this court's authority to determine the scope of the agency action,¹⁰ I recommend that the action include both the management and operation of the fishery and that HLA be deemed an applicant for the purposes of Section 7 consultation.

I also note that my recommendation extends only to HLA's status, and not that of the Council. Even though the Council, like HLA, requested a copy of the draft BiOp in early 2001, the Council is not a party to this action and has not formally pursued its rights herein. The Council is a very different entity from HLA, as it was created under the Magnuson-Stevens Act and has been treated as a federal agency for certain purposes. A.R. at 08550. Unlike HLA, which represents the interests of fishery participants, the Council has a defined role in charting fishery management policies. The Council may very well qualify as an applicant, but it is beyond my authority to issue a recommendation on this question. Alternatively, the Council may also or instead qualify as a federal agency, as it argued in a letter to NMFS. A.R. at 08550. In any event, I do not decide these questions here.¹¹

Obligation to Provide Applicant with Draft BiOp

¹⁰ See Greenpeace, 80 F.Supp. at 1144 (citing Pacific Rivers Council, 30 F.3d at 1053-54).

¹¹ Of course, if this Report and Recommendation is ultimately adopted by the Court, NMFS may choose to cut its losses and treat the Council as an applicant or as a federal agency.

Whether NMFS is obligated to share a draft BiOp with an applicant turns in large part on the interpretation of another key provision of the regulations. A subsection entitled "Service Responsibilities" enumerates five duties of NMFS in conducting its consultations. 50 C.F.R. § 402.14(g). The last of these duties reads:

Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1)-(3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives . . . The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service . . .

50 C.F.R. § 402.14(g)(5).

NMFS adopts a literal interpretation of this provision, arguing that there is no express requirement that the consulting agency provide a copy of the draft BiOp to the applicant. It emphasizes the distinction between the use of permissive language in describing the applicant's role ("may request") and mandatory language in describing the action agency's rights. HLA, in turn, asserts that the regulations and previous agency interpretations thereof make clear that applicants are entitled to a copy of the draft BiOp.

As with § 402.02, I begin by determining the appropriate level of judicial deference. Once again, I find NMFS' claims to substantial deference under Auer without merit, although for somewhat different reasons. I cannot in all fairness characterize NMFS' position with respect to § 402.14(g)(5) as a post-hoc rationalization. Throughout these and other recent consultations,

NMFS has consistently determined that applicants do not have a right to obtain a copy of the draft BiOp. This position was explicitly stated in both Feder's and Lent's letters to HIA and the Council, respectively. A.R. at 06262, Leppo Decl., Exh. C.

Nevertheless, NMFS' current interpretation of § 402.14(g)(5) cannot be accorded substantial deference because, as I will soon establish, it is clearly inconsistent with its earlier interpretations of the very same provision. See Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)(quoting Gardebring v. Jenkins, 485 U.S. 415, 430 (1988)(deferring to an agency's interpretation of its regulations unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation"))(emphasis added). Furthermore, as the Supreme Court explained in Good Samaritan Hosp. v. Shalala, 508 U.S. 402 (1993):

... an administrative agency is not disqualified from changing its mind ... [but] the consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated: "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."

Id. at 417 (internal citations omitted); see also National Federation of Federal Employees, Local 1309 v. Department of Interior, 526 U.S. 86 (1999); Watt v. Alaska, 451 U.S. 259, 272-73 (1981)(holding that agency's interpretation of amendment that was contemporaneous with amendment's passage was entitled to considerably more deference than agency's current, inconsistent interpretation).

The agency's present position is that an applicant is not entitled to the draft BiOp. Hogarth's internal memorandum of March 7, 2001, refers to a legal memorandum by NMFS counsel. A.R. at 08182. This legal memorandum concludes that applicants are not entitled to

draft BiOps. A.R. at 08076-77. However, in its comments that accompanied the publication of the final regulations, NMFS indicated that applicants would be entitled to the draft BiOp:

Four commenters requested that the final rule clarify whether an applicant was entitled to receive a copy of the draft biological opinion. The Service believes that the applicant should participate in the review and should receive a copy of the draft opinion from the Federal agency. The final rule includes this provision.

The release of draft opinions to Federal agencies and any applicants (through the Federal agency) facilitates a more meaningful exchange of information. Review of draft opinions may result in the development and submission of additional data, and the preparation of more thorough biological opinions.

51 Fed. Reg. at 19952. Even more explicit language is found in the Handbook, which confirms that "[t]he applicant is entitled to review draft biological opinions obtained through the action agency, and to provide comments through the action agency." Handbook at 2-13. In spite of its present position, NMFS cannot wish these earlier interpretations away.

NMFS representatives frequently referred to the agency's "longstanding policy" not to release draft BiOps, but there is no information regarding when or how this policy was established. A.R. at 00092, 00094, 08182. Even Hogarth expressed some confusion as to the background of this policy. A.R. at 08623. One consistent theme of the Supreme Court's decisions in Chevron, Christensen, and Good Samaritan is that the appropriate level of deference accorded agency interpretation is, at least in part, a function of the manner in which the agency formulated that interpretation. Absent a showing of the context in which this alleged policy was developed, it is difficult to accord it much deference, especially in light of the existence of a

written policy to the contrary, i.e., the Handbook.¹² Given the patent inconsistencies between NMFS' more recent interpretation and those found in the preamble and the Handbook, as well as the agency's failure to explain how or when its longstanding "policy" was formulated, Aucr deference is not in order and I now examine NMFS' position for persuasiveness.

As a matter of statutory interpretation, NMFS' literal parsing of the regulation fails to explain why the § 402.14(g)(5) includes the statement that an applicant "may request a copy of the draft opinion" unless this language was intended to convey something more than an affirmation of the obvious. Anyone, applicant or non-applicant, may request a copy of the draft BiOp. It would not make sense for NMFS to include this phrase in the regulations unless it conferred some right upon the applicant. As HLA puts it, "granting someone the right to ask the government a question is completely meaningless." Plaintiffs Motion at 10; see Beck v. Prupis, 529 U.S. 494, 506 (2000)(a statute should not be construed so as to render any provision meaningless or superfluous).

Although the language in the regulations is ambiguous, my reading suggests that release of the draft BiOp to applicants was intended to be automatic. For example, the first sentence of the section requires the consulting agency to discuss with the action agency and the applicant its analysis and conclusions and the availability of RPA's "if a jeopardy opinion *is to be issued*." 50

¹² Was this policy developed before the Handbook was published in 1998? If so, why was the policy not included in the Handbook? If the policy was developed after the Handbook was published, was there any attempt to amend the Handbook? Does FWS follow the same policy, or do NMFS and FWS disagree on this practice?

C.F.R. § 401.14(g)(5)(emphasis added). As plaintiff points out, the use of the future tense here suggested the intent to disclose this information prior to the completion of the final BiOp.

As a policy matter, NMFS offers no legitimate reason why the draft BiOp should not be released to applicants. Indeed, its main reluctance to do so was because of the time pressure, not because it chooses to ignore public input. A.R. at 06962. In general, formal consultations must be concluded within 90 days after initiation, and a final BiOp is due within 45 days after conclusion of consultations. 50 C.F.R. § 402.14(e). But a complicating factor is that consultations are often conducted simultaneously with a NEPA review. In this case, NMFS was subject to an April 1, 2001 deadline set by Judge Ezra for completion of the NEPA process. NMFS suggested on more than one occasion that a release of the draft BiOp would prevent it from meeting this deadline. A.R. at 00094, 06254, 06262, 06855. Because NMFS sought to fold the BiOp into the EIS, it hoped to complete both documents by this date. Similarly, NMFS reasoned that because complete drafts of the BiOp are not available until late in the consultation process, comments on the DEIS would have to suffice instead. A.R. at 00094.

There was honest and thoughtful discussion among NMFS employees about how best to coordinate the BiOp and the DEIS and FEIS. A.R. at 06961-06963. But I must suggest that statutory or court-ordered time pressures do not excuse NMFS from fulfilling its obligations to applicants in the consultation process. Nor do they justify the more general exclusion of applicants from the consultation process, even when a looming NEPA deadline does not exist. It seems that NMFS anticipated that 90 days might be an ambitious time frame in which to complete consultations. Thus, there are provisions in the regulations that govern the procedural deadlines and allows for extensions. 50 C.F.R. § 402.14(e), (g)(5). NMFS cannot maintain the

position that applicant input would be a wonderful thing, but that it simply does not have the time. One way or another, NMFS must make the time and tailor the process accordingly.

Another concern expressed by NMFS representatives was that disclosure of the draft BiOp would compromise the agency's ability to conduct fruitful internal discussions before subjecting its findings to applicant scrutiny. A.R. at 06254. Protecting this internal dialogue is especially important where the subject of the consultations is highly controversial, as often is the case with fishery management issues. But disclosure of the draft BiOp would not jeopardize the agency's private deliberations, for NMFS staff could still communicate behind closed doors prior to the release of the draft BiOp. We see a perfect example of this in the NEPA process, for instance, where an agency must publicly release the DEIS. All of the agency's work product up until that point is private and need not be disclosed. Thus, as long as the agency knows that its draft BiOp will be available to applicants, there is no resulting disclosure of private communications.

In reviewing the administrative record, I was impressed with the considerable amount of effort and analysis that goes into preparing a BiOp. I also appreciate that NMFS is often in a no-win situation in its ESA consultations, as its conclusions will be assailed by either environmental advocates or industry representatives, or both. In this vein, I understand that this Report and Recommendation, if adopted, will render NMFS' task significantly more complicated and time-pressured.¹³ In particular, NMFS likely will have to advance the time in which the draft BiOp is

¹³ NMFS does not indicate in its pleadings when the 2001 draft BiOp was finished, but I am assuming that it was before March 9, 2001, when it published the draft on its web site. There is one mention in the administrative record that the draft BiOp was scheduled for completion on February 16, 2001, and it appears that this target date was met. A.R. at 07381, 07573. Thus,

completed, so as to allow enough time accept and account for comments from applicants. It will also mean that the draft BiOp will need to meet a higher level of scrutiny, as it will be subject to comments of applicants and not just other NMFS staff. In this regard, the draft BiOp will probably come to resemble a DEIS in the NEPA process, which is released to the general public by an agency. Whatever changes NMFS decides to implement, I am confident that allowing applicants a more defined role will result in more informed final BiOps.

I turn now to a few remaining points addressed by the parties. First, NMFS touts the "unprecedented level of public input" in this consultation, pointing to the two Council meetings and the opportunity to comment on the related DEIS. To borrow one of NMFS' lines, that discussion may be interesting, but it is irrelevant. A.R. 06262. It is all very well and good that NMFS discussed the issues covered by the BiOp, but that does not excuse its failure to provide HLA with a draft BiOp. It is not difficult to imagine how the March 13, 2001 public meeting might have been even more constructive if HLA had been provided with a draft BiOp. Furthermore, HLA's opportunity to comment on the DEIS does not justify curtailing its procedural rights in the ESA consultations. Although the DEIS and the BiOp contained overlapping information, they derive from different statutes and serve different purposes. In particular, the DEIS contains no "jeopardy" finding, no Incidental Take Statement, and no RPA's.

In addition, there was discussion between the parties as to whether NMFS' dual role as the action agency and the consulting agency influenced its decision not to share the draft BiOp. HLA argues that NMFS' litigation position is colored by the fact that it could not blame the

NMFS had over one month to allow HLA to review the draft and submit comments back to NMFS, given that NMFS eventually set a date of March 16, 2001, to receive such comments.

decision not to release the draft BiOp on the action agency, because it was the action agency. NMFS responds that because two separate divisions act as the action agency and the consulting agency, respectively, there is no conflict of interest and that the Sustainable Fisheries Division had every right, in its role as the action agency, to decline to share the draft BiOp.

I suspect that the truth, as usual, lies somewhere in between. That is to say, NMFS' dual role does create the potential to influence the decision of whether to share the draft BiOp. In the typical Section 7 consultation, a separate action agency such as the Department of Transportation is consulting with NMFS or FWS. It is thus fairly easy to determine who represents which agency. Here, the record is not entirely clear as to which NMFS officials were under which of the two divisions. It appears that this blurring of the lines between the two divisions manifested itself in a very visible way in the Pegalics Fishery consultation. From what I could gather, it appears that certain NMFS officials oversee all matters that arise in a particular geographic region. Feder, for example, is identified as "Southwest Regional Counsel." A.R. at 06262. Lent, in turn, is the "Regional Administrator." Leppo Decl., Exh. C. They presumably handle matters that arise in all of the divisions in the Southwest Region, whether those matters arise from the Sustainable Fisheries or the Endangered Species Division. Thus, when Lent and Feder made the decision not to share the draft BiOp with HLA, it is not at all clear whether they were speaking for the action agency or the consulting agency. While I do not begin to suggest that NMFS should be prevented from consulting with itself, this somewhat unusual situation does complicate NMFS' argument that the action agency should have the unfettered discretion to release a draft BiOp to an applicant. The merits of a mandatory release of the draft BiOp are all the more compelling in light of NMFS' inherently split role as the action and the consulting agency.

Recommended Injunction

HLA initially requested a remand of the 2001 BiOp in light of the alleged procedural flaws. Because NMFS has announced that it will be releasing a new BiOp, that requested remedy is now moot. In a conference call with the HLA and NMFS counsel earlier this month, it became apparent that both parties were looking to the court for guidance with respect to the forthcoming BiOp. Thus, I offer some recommendations on a proposed injunction requiring NMFS to observe a certain schedule in connection with the pending BiOp.

As a general matter, the action agency has much discretion in deciding how to include an applicant in the consultation process, but it must still honor the procedural rights of applicants. Handbook at 2-12 ("The action agency [] determines how the applicants are to be involved in the consultation, consistent with provisions of section 7(a)(3), (b) and (c) of the Act and the section 7 regulations."). In addition to requiring that NMFS share the draft BiOp with applicants, the regulations strongly imply that NMFS must receive comments on this draft. § 402.14(g)(5). The regulations also require NMFS to discuss various subjects with an applicant, including: (1) NMFS' review and evaluation conducted under paragraphs 402.14(g)(1)-(3), (2) the basis for any finding in the BiOp, and (3) the availability of reasonable and prudent alternatives. § 402.14(g)(5). Therefore, NMFS should give the applicants a reasonable amount of time to review the draft, to submit comments thereto, and to discuss the above-noted matters. Although I decline to define what length of time minimally meets this reasonableness standard, I do recommend that Judge Kollar-Kotelly set forth a clear minimum for the forthcoming BiOp, in order to avoid further litigation of this issue. In my view, two weeks (14 days) should suffice. In

addition, NMFS would be wise to allow enough time between the deadline for submitting comments to the draft BiOp and its release of the final BiOp. Although NMFS has no obligation to adopt any of an applicant's suggestions, it must in good faith honor an applicant's procedural rights. Thus, this court will likely view with suspicion a final BiOp that is published hours after comments on the draft BiOp are received and that does not substantially address those comments.

CONCLUSION

In accordance with the above discussion, I recommend that Hawaii Longline Association's Motion for Partial Summary Judgment and Memorandum in Support Thereof [#14] be **GRANTED IN PART AND DENIED IN PART**. I further recommend that Defendant's Motion for Partial Summary Judgment [# 38] be **DENIED**. Finally, I recommend that plaintiff HLA be entitled to a copy of the draft BiOp of the forthcoming consultation and be allowed 14 days to submit comments thereto.

Failure to file timely objections to the findings and recommendations set forth in this report may waive your right of appeal from an order of the District Court adopting such findings and recommendations. See Thomas v. Arn, 474 U.S. 140 (1985).

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated:

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Contract for Independent Legal Review (Contract SSL-06)

Legal Standing and Role of the Councils relative to ESA/MSA/NEPA

Background

Biological opinions on proposed fishery management actions are drafted by NMFS Office of Protected Resources (OPR) analysts in the regions with guidance from NMFS HQ. Until recently, NMFS has not included the regional fishery management Councils in development of biological opinions. This approach has resulted in very controversial opinions being developed behind closed doors and then imposed on the Councils and affected public as fait accompli, with little meaningful opportunity for scientific review or public comment. This appears to run counter to the very transparent process used by NMFS and the regional Councils related to MSA, NEPA, the Regulatory Flexibility Act, and other laws and executive orders that govern the development of regulatory proposals, and even to NMFS' own practices in working with ESA applicants on actions that are not related to fisheries management.

The practice is partially due to the internal arrangement wherein NMFS consults with itself regarding the impacts of fishery management actions on listed species: the Office of Sustainable Fisheries serves as the "action" agency and the Office of Protected Resources serves as the "consulting" agency. It also is due to the heavy workloads placed on the agency to complete many biological opinions annually and the very tight schedules required to complete biological opinions. NMFS has taken steps to ameliorate this problem of lack of transparency. On March 7, 2001, the Acting Assistant Administrator for Fisheries announced a more open process that would ensure that the "...Councils have the opportunity for comprehensive examination of protective measures for listed species during the NEPA process." NMFS also agreed to release three official draft biological opinions for review and comment prior to their final signature, including opinions for the 2001 Atlantic pelagic fishery, 2001 Pacific pelagic fishery, and for the 2002 Alaska groundfish fisheries. The North Pacific Fishery Management Council and its RPA Committee have worked closely with NMFS over the past year in developing proposed management measures for the 2002 groundfish fisheries that will avoid jeopardy and adverse modification of critical habitat for listed species (SSL). This experimental procedure to be more inclusive is a significant step in the right direction.

Nonetheless, there are several legal issues that should be analyzed vis-a-vis the Council role in the ESA process. Further, given the re-development of the programmatic groundfish SEIS, as well as a new EIS for identification and protection of Essential Fish Habitat (EFH) and other actions, the intersection of the leading Acts under which we operate (ESA, MSA, and NEPA), need to be clarified, as well as the Council's standing and role in identification and approval of alternative

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FMPs and/or amendments to those FMPs. **This latter issue will be a primary focus of the review; i.e., Issue 4 described below should be given equal treatment to Issues 1, 2, and 3 combined.** Specific questions to be examined, with notations, are identified below. Existing NOAA GC opinions on these issues will be provided for reference.

Issue 1: Is there a legal mandate for NMFS to share draft biological opinions with the Council or industry?

- NOAA GC contends that 402 CFR requires NMFS to share draft biological opinions with the action agency, which for NMFS would be the Office of Sustainable Fisheries, and thus this is an internal exercise.
- NOAA GC contends that 402 CFR does not require NMFS to share draft opinions with any applicants or outside stakeholders.
- This legal opinion appears to run counter to the plain language of 402 CFR and clarifying comments in the preamble, and counter to practices articulated in the Agency's ESA Handbook and to USFWS practices.
- There are three ways that the Council could be involved: It could be considered part of the action agency, or an applicant, or be informally, but explicitly, involved as was done for the 2002 RPAs and Biop. Pros and cons of each designation should be addressed. NOAA GC on February 23, 2001, opined that an applicant, for ESA consultation purposes, is any person who requires formal approval or authorization from a federal agency as a prerequisite to conducting an action, and that Councils are not applicants because their actions are not the subject of consultation; they are not conducting the fishery management actions under the MSA. Rather it is NMFS' responsibility to take the necessary fishery management actions.

Issue 2: Can the Councils be considered a federal agency for purposes of ESA and thus request consultation under section 7(a)(2) of the ESA?

- NOAA GC concluded in a February 23, 2001 opinion that the ESA defines the term "federal agency" as any department, agency, or instrumentality of the U.S.
- Councils are not federal action agencies under the ESA because they do not take action that is subject to section 7(a) requirements.
- The Western Pacific Council noted in a letter of March 13, 2001 to the Assistant Administrator for Fisheries, that before the 1990s, their Council drafted biological opinions, but then NMFS implemented a policy change removing the Councils from the biological opinion process.
- Several legal opinions have been issued in the past that Councils were considered federal agencies for other statutes such as APA, FACA, and FOIA, and were also considered to be 'executive agencies of the Department of Commerce'. What are the implications, if any, to the Councils' standing?
- Pros and cons of such designation need to be examined, including the Councils' culpability.

Issue 3: Is NMFS required to provide draft biops to “applicants”?

- NOAA GC concludes in their February 23, 2001 opinion, that even if the council or fishing industry member were to be identified as an applicant, there is no regulation compelling the agency to share the draft biop. NOAA GC’s advice appears to run counter even to NMFS own guidance in its ESA handbook.
- Section 402.14(g) Service Responsibilities and its paragraph (5) make it clear that an applicant may request a copy of the draft opinion. It implies that the consulting agency must respond to that request via the action agency by providing the draft.
- The explanation in the preamble on page 19952 supports this interpretation, stating that “paragraph (g) provides for Federal agency and applicant review of the basis for any finding contained in draft biological opinions, including the availability of reasonable and prudent alternatives.
- The Hawaii Longline Association filed a lawsuit on April 10, 2001, and among other things, has requested the court to require NMFS to prepare a new biop pursuant to a court-approved schedule, and with the input of applicants, the HLA and the WPFMC. This could shed legal light on the position and role of industry and the Councils. (Decision pending)

Issue 4: What is the legal standing of the Councils in the context of the intersection of MSA/ESA/NEPA?

- NOAA GC has informed the Council that NOAA GC’s primary client is NMFS, thus there seems to be a secondary attorney-client privilege relationship with the Council, especially in situations where the Council is at odds with NMFS.
- Under MSA, and given the required NEPA process, can NMFS promulgate regulations developed in settlement talks without seeking Council review and comment?
- Given Section 304(a) - (c) in the MSA, can the Secretary take an independent action on changing fishery management plans or regulations without first consulting with the Council? Can the Secretary substitute his preferred alternative for that recommended by the Council in the context of a programmatic SEIS, or must it be remanded to the Council?
- Can/should the Councils be involved in settlement talks that involve or would potentially change Council proposed regulations or fishery management plans?
- Where MSA, ESA, and NEPA appear to be at odds, which Act prevails?
- In compiling an EIS for the groundfish fisheries FMP, as amended over time, is the ‘proposed action’ properly defined as the FMPs in their current, amended form?
- In an amendment/EIS process, does ‘ownership’ of the document rest with the Council, or NMFS, prior to a Council forwarding a recommendation for Secretarial review? Is this ‘ownership’ altered if development of an EIS is the result of a court order imposed on the agency?