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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAI‘I**

CONSERVATION COUNCIL FOR  
HAWAI‘I, a non-profit corporation, and  
MICHAEL NAKACHI, an individual,

*Plaintiffs*

v.

WILBUR L. ROSS, in his official capacity  
as Secretary of the Department of  
Commerce; NATIONAL OCEANIC AND  
ATMOSPHERIC ADMINISTRATION,  
United States Department of Commerce;  
NATIONAL MARINE FISHERIES  
SERVICE, Department of Commerce,

*Defendants.*

Civil Action No.

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiffs Conservation Council for Hawai‘i and Michael Nakachi (collectively, “Plaintiffs”) hereby challenge the failure of the Secretary of Commerce, the National Oceanic and Atmospheric Administration (“NOAA”), and the National Marine Fisheries Service (collectively, “Defendants” or “Fisheries Service”) to properly designate oceanic whitetip sharks (*Carcharhinus longimanus*) in the Western and Central Pacific Ocean as overfished and subject to overfishing. Specifically, Plaintiffs challenge Defendants’: (1) unlawful failure to immediately notify the Western Pacific Regional Fishery Management Council (“WesPac”) of the species’ overfished status, 16 U.S.C. § 1854(e)(2); 5 U.S.C § 706(1); and (2) decision to arbitrarily and capriciously conclude in its annual status of fisheries report to Congress that it is “unknown” whether the oceanic whitetip shark in the Western and Central Pacific is overfished or experiencing overfishing, 16 U.S.C. § 1854(e)(1); 5 U.S.C § 706(2). If the Fisheries Service had properly notified WesPac about the overfished status of the shark or properly identified the whitetip population as overfished or experiencing overfishing in its report to Congress, WesPac would be required to take immediate management action to prepare and implement a plan to end overfishing of the oceanic whitetip and implement conservation and management measures to rebuild its population. 16 U.S.C. § 1854(e)(3), (4). Accordingly, Plaintiffs request this Court declare that Defendants have violated both the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”) and the Administrative Procedure Act (“APA”) by failing to adequately protect the oceanic whitetip population and enjoin the Fisheries Service to make proper notifications that would trigger necessary protections as expeditiously as possible and no later than 30 days after this Court’s order.

2. The oceanic whitetip shark was once one of the most abundant shark species in the world, but high demand for its fins and frequent catch of oceanic whitetips have drastically reduced its population. Much was unknown about the health and resiliency of its population levels in the Western and Central Pacific Ocean until 2012, when the international Western and Central Pacific Fisheries Commission (“Commission”) conducted a stock assessment and concluded that the stock was overfished and overfishing was occurring (*i.e.*, the population had reached an unsustainable size and the rate of removal of oceanic whitetip sharks from the ocean was too high).

3. Either status of overfished or overfishing demonstrates that fishing is occurring at unsustainable levels. A population that is overfished is too low to sustain fishing pressure. Left uncorrected, the population could dwindle to such low numbers that survival is at risk.

4. The Commission passed measures prohibiting fishermen in the Pacific from fishing for and keeping oceanic whitetips in an attempt to reverse its steep downward trend toward extinction. In 2014, the oceanic whitetip shark was also added to Appendix II of the Convention on International Trade in Endangered Species (CITES), placing restrictions on global trade of the species.

5. These international efforts, however, have proven insufficient. In 2015, the Commission found that even if the whitetip population in the Western and Central Pacific Ocean doubled, it would still be overfished. In 2018, the Fisheries Service listed the oceanic whitetip shark throughout its range as threatened with extinction under the Endangered Species Act. And a second stock assessment for the oceanic whitetip shark in the Western and Central Pacific Ocean published in August 2019 by the Commission continued the grim narrative, concluding that the stock remains overfished and overfishing is occurring. The Commission concluded that if current levels of fishing mortality continue, the population will go extinct.

6. One of the primary drivers contributing to the species' continued decline is bycatch-related mortality (*i.e.*, mortality that results when the sharks are accidentally caught in nets or gear that are meant to catch other species). No protections exist to prevent fisheries from incidentally capturing oceanic whitetip sharks as bycatch.

7. Fisheries in the U.S. annually cause the bycatch-related mortality of thousands of oceanic whitetip sharks in the Western and Central Pacific Ocean.

8. Defendants are responsible for managing and protecting the nation's marine resources, including the oceanic whitetip shark. Part of those responsibilities include notifying Congress and the regional fishery management councils of a species in decline. These notifications trigger the councils to implement protective measures that will reverse the species' downward trend and rebuild its population. Despite listing the oceanic whitetip shark as threatened throughout its range under the Endangered Species Act, acknowledging in multiple public documents that the species is overfished and subject to overfishing, and knowing its imperiled status globally, the Fisheries Service has violated its mandates to protect the oceanic whitetip shark in the Western and Pacific Ocean and require WesPac to take action.

9. Specifically, the Fisheries Service has failed to "immediately" notify WesPac that the Western and Central Pacific population of oceanic whitetip shark are overfished and request that WesPac take action to end overfishing and implement conservation and management measures, as required by the Magnuson-Stevens Act. 16 U.S.C. § 1854(e)(2); 5 U.S.C § 706(1).

10. Further, the Fisheries Service has arbitrarily and capriciously concluded in its 2018 annual Report to Congress on the Status of U.S. Fisheries ("Annual Stock Status Report") that it is "unknown" whether the oceanic whitetip shark in the Western and Central Pacific is overfished or experiencing overfishing,

in violation of the Magnuson-Stevens Act and the APA.<sup>1</sup> 16 U.S.C. § 1854(e)(1); 5 U.S.C § 706(2). The Fisheries Service has no rational basis for this conclusion and it directly conflicts with the conclusions the Fisheries Service has made in other documents that the species is at risk of extinction due to its overfished status and continued overfishing.

11. Defendants' violations of the Magnuson-Stevens Act and the APA harm Plaintiffs' interests in protecting and restoring the oceanic whitetip population in the Western and Central Pacific. This harm will continue in the absence of action by this Court.

### **PARTIES**

12. Plaintiff Conservation Council for Hawai'i ("CCH") is a non-profit citizens' organization based in Hawai'i with approximately 5,000 members in Hawai'i, the United States mainland, and foreign countries. CCH is the Hawai'i affiliate of the National Wildlife Federation, a non-profit membership organization with over 5.8 million members and supporters nationwide. CCH's mission is to protect native Hawaiian species, including threatened and endangered species, and to restore native Hawaiian ecosystems for future generations. CCH and its members have advocated for increased protection for marine life by supporting shark protection bills in the state legislature, a statewide ban on lay gillnets, and the establishment of marine protected areas. In 2015, CCH, along with others, successfully challenged the Fisheries Service's decision to permit the U.S. Navy's use of high-powered sonar and explosives off the coast of Hawaii and Southern California, which harm marine life. In the local community, CCH has produced a

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<sup>1</sup> To Plaintiffs' knowledge, the Fisheries Service has not released its 2019 annual Report to Congress on the Status of U.S. Fisheries.

series of wildlife viewing interpretive signs to help protect marine species and held beach clean-ups.

13. CCH members include wildlife biologists, Native Hawaiian practitioners, farmers, fishermen, hunters, educators, artists, community leaders, and others who study and enjoy native Hawaiian wildlife. CCH members who live in other states visit the islands to observe and enjoy Hawai‘i’s native wildlife. CCH brings this action on behalf of itself and its adversely affected members and staff.

14. Plaintiff Michael Nakachi is a Native Hawaiian cultural practitioner and a small business owner. Mr. Nakachi’s ‘aumakua<sup>2</sup> is the manō (shark) and his family’s lineage traces back to a direct line of kahu manō (shark guardians or shark keepers) from the island of Maui. Traditionally, the kahu manō was an important spiritual leader and residents of the ahupua‘a (district) had to ask permission from the kahu manō before taking a shark. As the family ‘aumakua, the manō has been an integral presence during significant life events and has protected Mr. Nakachi’s family in times of peril while at sea. From a very young age, Mr. Nakachi has felt his connectivity with the land, the ocean, and the manō, and has spent his life working to understand and preserve his family heritage and sharks.

15. In his professional life, over the past thirty years, Mr. Nakachi has led thousands of scuba diving trips throughout the Hawaiian Islands as the owner of a scuba diving company. He spends his days educating people about the sharks’ cultural and ecological importance and guides visitors and locals alike in how to engage and respect sharks in their underwater world. Over the years, Mr. Nakachi has personally observed a decline in the number of oceanic whitetip sharks in the

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<sup>2</sup> ‘Aumākua are “[f]amily or personal gods, deified ancestors who might assume the shape of sharks” or other natural elements. Further, “[a] symbiotic relationship existed; mortals did not harm or eat ‘aumākua (they fed sharks), and ‘aumākua warned and reprimanded mortals in dreams, visions, and calls.” Mary Kawena Pukui & Samuel H. Elbert, *Hawaiian Dictionary* 32 (Univ. of Haw. Press 1986).

local waters and noticed that the vast majority of sharks he observes now have been marred as a result of fishing activities (*e.g.*, scars caused by fishing line, hooks, nets; a broken jaw from a vessel collision).

16. Mr. Nakachi is a member of the West Hawai‘i Fisheries Council, and has been actively involved in efforts to preserve Hawai‘i’s natural resources, including the shark. With the West Hawai‘i Fisheries Council, for instance, Mr. Nakachi advocated for the passage of Act 306, a state law that was passed in 1998 and established the West Hawai‘i Regional Fishery Management Area, which prohibited the take, killing, possession, and sale of all sharks in the nearshore waters of the western shores of Hawai‘i island. He has provided oral testimony in front of the Hawai‘i state legislature multiple times, most recently relating to a bill addressing the taking of sharks. For the past seventeen years, he has also been involved with the Ka‘ūpūlehu Marine Life Advisory Committee, working with the Hawai‘i Department of Land and Natural Resources on the implementation of a no-take marine reserve and the development of a management plan based on science and cultural integration to guide sustainable harvest in the future. That work has included Mr. Nakachi diving every other day in the Ka‘ūpūlehu Marine Reserve on the North Kona Coast of Hawai‘i Island to assess and monitor the abundance of nearshore species, including sharks.

17. The legal violations alleged in this complaint cause direct injury to the cultural, scientific, aesthetic, recreational, conservation, educational, spiritual, and other interests of Plaintiffs and their members and staff. These are actual, concrete injuries to Plaintiffs, caused by Defendants’ failure to comply with the Magnuson-Stevens Act, its implementing regulations and policies, and the APA. Unless the requested relief is granted, Plaintiffs’ interests will continue to be injured by the Defendants’ failure to comply with the Magnuson-Stevens Act and APA. The relief

sought herein would redress Plaintiffs' injuries. Plaintiffs have no other adequate remedy at law.

18. Defendant Wilbur L. Ross is Secretary of the United States Department of Commerce ("Secretary"). He is sued in his official capacity as the chief officer of the Department of Commerce, which is charged with overseeing the proper administration and implementation of the Magnuson-Stevens Act, including provisions of that Act that require the Secretary to report annually to Congress and identify overfished fisheries and other actions necessary to end overfishing and rebuild overfished populations of fish.

19. Defendant National Oceanic and Atmospheric Administration ("NOAA") is an agency of the United States Department of Commerce with supervisory responsibility for the Fisheries Service. The Secretary has delegated responsibility to implement and enforce compliance with the Magnuson-Stevens Act to NOAA, which in turn has sub-delegated that responsibility to the Fisheries Service.

20. Defendant National Marine Fisheries Service ("Fisheries Service") is an agency of the United States Department of Commerce that has been delegated the responsibility to implement and enforce fishery management plans and amendments to those plans, and to issue implementing regulations. The Fisheries Service is the United States government agency with primary responsibility to ensure that the requirements of the Magnuson-Stevens Act are followed and enforced, including actions necessary to end overfishing and rebuild overfished populations of fish.

### **JURISDICTION AND VENUE**

21. This action arises under the Magnuson-Stevens Act, 16 U.S.C. §§ 1801–1891d and the APA, 5 U.S.C. §§ 701–706.

22. This Court has jurisdiction over this action pursuant to the Magnuson-Stevens Act, which provides that “[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under” the Magnuson-Stevens Act. 16 U.S.C. § 1861(d).

23. This Court further has jurisdiction over this action pursuant to the APA, 5 U.S.C. §§ 701–706, which provides that final agency action for which there is no other remedy in a court is subject to judicial review; 28 U.S.C. § 1331 (federal question jurisdiction), which grants the district courts “original jurisdiction of all civil actions arising under the . . . laws . . . of the United States;” and 28 U.S.C. § 1361, which grants the district courts “original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

24. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and may grant relief pursuant to the Magnuson-Stevens Act, 16 U.S.C. § 1861(d), as well as the APA, 5 U.S.C. § 706. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

25. Venue is properly vested in this judicial district under 28 U.S.C. § 1391(b), (e), where a substantial part of the events and omissions which gave rise to this action occurred in this district and where the plaintiffs reside.

## **LEGAL BACKGROUND**

### **I. Magnuson-Stevens Act**

26. The Magnuson-Stevens Act is designed to conserve and manage fish populations in the United States territorial waters and in the exclusive economic zone, which extends from the boundaries of state waters to 200 miles offshore or to an international boundary with neighboring countries. 16 U.S.C. § 1801(b)(1).

27. The purpose of the Magnuson-Stevens Act is to “take immediate action to conserve and manage the fishery resources found off the coasts of the United States.” 16 U.S.C. § 1801(b)(1).

28. Congress enacted the Magnuson-Stevens Act to “prevent overfishing and rebuild overfished stocks [of fish].” *Id.* § 1801(a)(6); *see also id.* §§ 1851(a)(1), 1853(a)(1)(A).

29. The Magnuson-Stevens Act defines the terms “overfishing” and “overfished” to mean “a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.” 16 U.S.C. § 1802(34). Its implementing regulations define “maximum sustainable yield” as the largest long-term average catch that can be taken from a stock under prevailing environmental and fishery conditions. 50 C.F.R. § 600.310(e)(1)(i).

30. “Overfishing” occurs when fishermen remove too many fish, too quickly relative to the fish’s population size and ability to reproduce. A stock that is experiencing “overfishing” has a harvest rate higher than the rate that produces its maximum sustainable yield. *Id.* § 600.310(e)(2)(i)(B).

31. When a population of fish reaches an “overfished” state, the population has declined to unsustainable levels. *Id.* § 600.310(e)(2)(i)(E). An “overfished” stock has a very low population size, jeopardizing its ability to produce the maximum sustainable yield. *Id.* § 600.310(e)(2)(i)(E), (F).

32. The Magnuson-Stevens Act aims to ensure the sustainable management of fish populations before overfishing causes irreversible effects. 16 U.S.C. § 1801(a)(5) (“Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained . . .”).

33. To assist the Fisheries Service in achieving its mandate to conserve and manage fish resources, the Act established eight regional fishery management councils. *Id.* § 1852(a)(1). Each council is charged with developing and preparing a fishery management plan for each fishery under its authority that requires conservation and management. *Id.* § 1852(h)(1).

34. Each fishery management plan must assess and specify the present and probable future condition of the fishery, and include a summary of the information used to make that specification. *Id.* § 1853(a)(3). The plan must “contain the conservation and management measures . . . necessary . . . to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.” *Id.* § 1853(a)(1)(A).

35. The term “fishery” means “one or more stocks of fish . . . and any fishing for such stocks.” *Id.* § 1802(13). “Fishing” includes both the intentional “catching, taking, or harvesting of fish” as well as the unintentional capture of fish through bycatch, *i.e.*, the unwanted catch when fishermen are targeting other fish. *Id.* § 1802(16) (fishing includes “any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish”).

36. The Magnuson-Stevens Act requires the Fisheries Service to report annually to Congress on the status of fisheries and identify the fish stocks that are overfished as well as fish stocks that are subject to overfishing. 16 U.S.C. § 1854(e)(1); 50 C.F.R. § 600.310(j)(1).

37. If the Fisheries Service determines at any time that a fishery is overfished or that overfishing is occurring, the Fisheries Service must immediately notify in writing the appropriate council. 16 U.S.C. § 1854(e)(2); 50 C.F.R. § 600.310(j)(1). The Fisheries Service must request that action be taken by the appropriate council “to end overfishing in the fishery and to implement conservation and management measures to rebuild” the affected fish stock.

16 U.S.C. § 1854(e)(2). In addition, the Fisheries Service must publish a notice to this effect in the Federal Register. *Id.*

38. Within two years of notification that a stock is overfished or approaching a condition of being overfished, the appropriate council must implement a fishery management plan, fishery management plan amendment, or proposed regulations “to end overfishing immediately in the fishery and to rebuild affected stocks of fish.” 16 U.S.C. § 1854(e)(3)(A); 50 C.F.R. § 600.310(j)(2)(ii). This plan, amendment, or regulation (often called a “rebuilding plan”) must specify a time for rebuilding the population that must be “as short as possible,” taking into account, among other things, the status and biology of the overfished species. *Id.* § 1854(e)(4)(A)(i). The Act requires that the rebuilding period may not exceed 10 years, unless the biology of the stock, other environmental conditions, or management measures under an international agreement dictate otherwise. 16 U.S.C. § 1854(e)(4)(A)(ii).

## **II. Administrative Procedure Act**

39. The APA grants a right of judicial review to “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.” 5 U.S.C. § 702.

40. Under the APA, a court must “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). An agency action is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of

agency expertise.” *Motor Vehicle Mfrs. Ass’n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

41. The APA also allows the Court to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

42. The annual report on the status of fisheries that the Fisheries Service is required to submit to Congress and the appropriate council pursuant to 16 U.S.C. § 1854(e)(1) is an “agency action” subject to judicial review under the APA.

### **FACTUAL BACKGROUND**

#### **I. Oceanic Whitetip Sharks Are Particularly Vulnerable to Commercial Fishing.**

43. The oceanic whitetip shark (*Carcharhinus longimanus*) is an ancient, formidable apex predator species, one that has inhabited the ocean for millions of years.

44. Roaming far and wide, these highly mobile, solitary sharks live in warm, tropical, and sub-tropical waters around the world, including waters surrounding Hawai‘i and American Samoa.

45. In Hawaiian culture, sharks are revered and highly respected as guardians of the ocean. The relationship with sharks runs deep, especially with members of Hawaiian coastal communities. Grandparents and parents take their children out on boats and into the water to show them how to swim and have a relationship with the sharks. Stories, passed through generations, share how sharks have helped people catch fish, protected them in the ocean, and saved them when lost at sea. Native Hawaiians greatly value all creatures and understand that each has a rightful place in the ecosystem. If a shark is taken from the ocean, every part of the shark is used—nothing is wasted.

### Oceanic whitetip shark



46. Unfortunately, the oceanic whitetip shark is particularly vulnerable to fishing pressure due its life history characteristics, including relatively slow growth, late age of maturity, low fecundity, and low genetic diversity. At the top of the marine food chain, the oceanic whitetip shark is both long-lived and slow-growing. Its growth is considered slow even compared to other pelagic sharks such as the blue shark, mako shark, and silky shark. A female oceanic whitetip takes as long as nine years to reach sexual maturity. Females give birth to live young, with an average litter of six pups. A female's reproductive cycle is slow, typically only giving birth every other year after a lengthy gestation period of 10–12 months.

47. Fishing pressure has drastically affected the health and resiliency of this species. Oceanic whitetip sharks were historically one of the most abundant sharks in the Pacific Ocean, but due to both U.S. and international fishing pressure, its population has declined an average of 70–80 percent since the 1990s. In some areas of the Pacific, oceanic whitetip populations have declined over 90 percent.

48. Oceanic whitetips are also decreasing in size; early surveys measured the maximum length of oceanic whitetips at between 350 and 395 cm (between 11.5 and 13 feet), but fishing pressure since the 1940s has reduced their size. Since the 1940s, the estimated maximum size has reduced to only between 300 and 325 cm

(about 10 feet). This is particularly concerning as researchers have documented that larger female oceanic whitetips produce more offspring.

49. The oceanic whitetip shark now ranks as the fourth lowest shark in global genetic diversity due to its decreasing population.

50. Reports reveal that the majority of oceanic whitetip sharks now observed are immature, and that since 2000, 100 percent of oceanic whitetips sampled in the Pacific purse seine fishery have been immature.

51. When listing the oceanic whitetip shark as threatened under the Endangered Species Act, the Fisheries Service determined that the oceanic whitetip shark's life history characteristics and current population levels reduces its fitness and limits its evolutionary adaptability. As such, the species is extremely vulnerable to external threats and at risk of extinction.

## **II. Bycatch in U.S. Commercial Fisheries Is Causing a Significant Decline in the Oceanic Whitetip Shark Population.**

52. Oceanic whitetip sharks are no longer the target of most commercial fisheries worldwide. Despite this, fishermen targeting other fish still unintentionally capture oceanic whitetips in their nets or gear as "bycatch." Once caught as bycatch, a shark often dies due to the physical trauma of fishing or from physiological stress associated with the capture and handling process. This mortality can occur at the time of capture (at-vessel mortality) or after the shark is returned to sea (post-release mortality).

53. Due to its preferred habitat in the warmer tropical and sub-tropical waters, the oceanic whitetip shark is extremely susceptible to incidental capture in both longline and purse seine fisheries and experiences substantial levels of bycatch-related fishing mortality from these fisheries.

54. In the U.S., the two major fisheries operating in the Pacific that catch oceanic whitetip sharks as bycatch are the Hawai'i-based pelagic longline fishery,

which includes both a deep-set and shallow-set longline fishery, and the American Samoa longline fishery. These fisheries primarily target tuna and swordfish, but also catch large numbers of oceanic whitetip sharks as bycatch. Calculations by WesPac estimate that in 2018 alone, the Hawai‘i-based pelagic longline fishery unintentionally caught 1,099 oceanic whitetip sharks and the American Samoa longline fishery caught 617 sharks. Over the past decade, these U.S. fisheries have captured approximately 20,000 oceanic whitetip sharks as bycatch.

55. Many oceanic whitetip sharks caught as bycatch suffer at-vessel mortality. Capture on a longline is a stressful experience that can last hours because fishermen leave longline gear to soak in the water unattended for extended periods of time. For instance, in the Hawai‘i shallow-set longline fishery, fishermen leave gear in the water for an average of 8–10 hours. Most sharks caught as bycatch tend to be hooked by longline gear, while others may become entangled in the lines as they attempt to escape, resulting in death if they are unable to circulate water through their gills. Even when these sharks manage to survive the initial capture and are released alive, they often sustain lasting damage from the physical trauma and extreme stress of being captured and many die after being released. Scientists have estimated that approximately 44 percent or more of oceanic whitetip sharks die after being captured and released as bycatch in the longline fleets.

### **Oceanic whitetip shark bycatch**



**III. The International Community Recognizes the Overfished and Overfishing Stock Statuses of the Oceanic Whitetip Shark in the Western and Central Pacific Ocean.**

56. Fish stock health is generally assessed by determining whether a stock has been overfished or is experiencing overfishing, either of which demonstrates that the level of fishing is not sustainable. If left uncorrected, the stock can dwindle to low numbers, hindering its chance of survival.

57. A stock assessment can evaluate the health and resiliency of a particular fish stock by estimating the current population size, comparing it to annual fishing mortality, and concluding whether the stock is likely to be overfished or experiencing overfishing.

58. Scientists from the Western & Central Pacific Fisheries Commission<sup>3</sup> (“Commission”) completed a stock assessment of the Western and Central Pacific oceanic whitetip population in 2012. The assessment concluded the Western and Central Pacific population of oceanic whitetip sharks is “overfished” and that “overfishing is occurring.” It found that the number of mature sharks had declined by 86 percent from 1995 levels, and that current fishing mortality from bycatch was six and a half times greater than what was sustainable for the population.

59. The assessment concluded that the greatest impact on the oceanic whitetip stock is “attributed to bycatch from the longline fishery.” It also determined there is “considerable concern over the future of this stock.”

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<sup>3</sup> The Commission is an international body established by the Convention for the Conservation and Management of Highly Migratory Fish Stocks. It is charged with ensuring the conservation and sustainability of stocks in the Western and Central Pacific, including the waters surrounding Hawai‘i, American Samoa, Guam, the Northern Mariana Islands, U.S. Pacific Remote Islands Areas, other Pacific island nations, and the high seas.

60. In 2013, in response to the stock assessment, the Commission enacted a conservation and management measure, prohibiting fishermen fishing in the high seas of the Pacific Ocean from retaining oceanic whitetip sharks that they catch and requiring them to release all captured sharks.

61. In 2014, the oceanic whitetip shark was added to Appendix II of the Convention on International Trade in Endangered Species (CITES), adding restrictions on global trade of the species. The proposal to list was brought by the U.S., Brazil, and Colombia and noted that the species qualified for inclusion in Appendix II because of high exploitation rates from both the international fin trade and bycatch.

62. The Commission completed an additional update on the oceanic whitetip stock in the Western and Central Pacific in 2015. It noted in its analysis that the population was continuing to decline throughout the tropical waters of the Western and Central Pacific Ocean and that even if the population doubled, it would still be overfished.

63. In 2019, scientists from the Commission completed a second stock assessment of the oceanic whitetip population in the Western and Central Pacific. Although the 2019 stock assessment concluded that fishing mortality had decreased as a result of measures prohibiting retention, it found that the population was still subject to overfishing. It also concluded that the population remained overfished. Overall, the assessment found that under the current levels of fishing mortality from bycatch, the population would eventually go extinct.

**IV. The Western Pacific Regional Fishery Management Council Has Determined That the Oceanic Whitetip Shark in the Western and Central Pacific Is Overfished and Subject to Overfishing.**

64. In the U.S., the Magnuson-Stevens Act governs the management of fish populations. The Act establishes regional fishery management councils and

requires those councils to manage fish populations in order to prevent overfishing, minimize bycatch, and protect fish stocks and habitat. The Pacific population of oceanic whitetip sharks falls under the management authority of WesPac.

65. WesPac manages these sharks under the U.S. Pacific Island Pelagic Fisheries Ecosystem Plan (“FEP”), published in 2009.

66. In the 2009 FEP, WesPac noted that, where possible, stock status is reported annually in Stock Assessments and Fishery Evaluations (“SAFE reports”). These SAFE reports make findings as to whether stocks are overfished or experiencing overfishing.

67. WesPac has concluded in every SAFE report since 2015 that oceanic whitetip sharks in the Western and Central Pacific Ocean are overfished and experiencing overfishing.

**V. The Fisheries Service Has Determined That the Oceanic Whitetip Shark in the Western and Central Pacific Is Overfished and Subject to Overfishing.**

68. The Fisheries Service has repeatedly determined that the population of oceanic whitetip shark in the Western and Central Pacific is overfished and experiencing overfishing. Most prominently, it has listed the oceanic whitetip shark as threatened throughout its range under the Endangered Species Act, recognizing the species’ overfished status and the threats to its continued survival. In its Biological Opinion related to the operation of the Hawai‘i pelagic shallow-set longline fishery, the Fisheries Service determined the oceanic whitetip shark stock in the Western and Central Pacific was overfished and experiencing overfishing and took its imperiled status into consideration. And, in its Shark Finning Report to Congress, the Fisheries Service concluded that the oceanic whitetip shark in the Tropical Pacific was both overfished and experiencing overfishing. Despite its own findings and acknowledgements, the Fisheries Service has arbitrarily refused to

adequately alert Congress or WesPac as required by the Magnuson-Stevens Act that the population in the Western and Central Pacific is overfished, and to trigger the steps designed to save this overfished population.

*Endangered Species Act Listing*

69. The Fisheries Service listed the oceanic whitetip shark as threatened throughout its range under the Endangered Species Act (“ESA”) in 2018.

70. To determine whether to list a species under the ESA, the Fisheries Service must summarize the best available data and information on the species and present an evaluation of its status and extinction risk in an ESA Status Review Report.

71. In its 2018 ESA Status Review Report for the oceanic whitetip shark, the Fisheries Service concluded that “the population is overfished and overfishing is still occurring.” The Report also found that the “oceanic whitetip [will] not only continue to decline . . . but even if the population doubled . . . it would still be considered overfished.”

72. The Fisheries Service admitted in its ESA Status Review Report that the international measures prohibiting retention of oceanic whitetip sharks may be only partially effective because they fail to prevent the sharks from being caught as bycatch. The report determined that “based on the best available scientific and commercial information, it appears that the oceanic whitetip shark has experienced significant population declines throughout a large portion of its range due to pressures associated with bycatch-related retention and mortality in commercial fisheries.”

73. In making the determination to list the oceanic whitetip shark as threatened, the Fisheries Service concluded that “due to significant and ongoing threats of overutilization and largely inadequate regulatory mechanisms, current

trends in the species' abundance, productivity and genetic diversity place the species on a trajectory towards a high risk of extinction in the foreseeable future.”

*Biological Opinion for the Hawai‘i Pelagic Shallow-set Longline Fishery*

74. The Fisheries Service released a Biological Opinion in June 2019 to inform its decision whether to reauthorize the Hawai‘i pelagic shallow-set longline fishery. In its analysis, the Fisheries Service concluded that “the oceanic whitetip shark is not only experiencing overfishing in the Western and Central Pacific, but the stock is currently in an overfished state.”

75. Throughout the Biological Opinion, the Fisheries Service repeatedly characterized the oceanic whitetip as experiencing overfishing and as overfished, identifying bycatch-related mortality as the primary driver for its decline. The Fisheries Service found that “the oceanic whitetip shark population appears to be decreasing at significant rates” and faces “a high probability of becoming endangered . . . unless they are protected from the combined threats of incidental take and commercial utilization.”

76. The Biological Opinion also noted that the relative abundance of oceanic whitetip declined within a few years of the expansion of the longline fishery, suggesting that this fishery has contributed to the overfishing of the oceanic whitetip in the Western and Central Pacific. The Fisheries Service concluded that the “fishing activities of the [Hawai‘i shallow-set longline] fishery are likely to adversely affect the population dynamics, behavioral ecology, or social dynamics of oceanic whitetip sharks through the loss of individuals.” It estimated that approximately 18–31 percent of oceanic whitetip sharks incidentally captured from the fishery will suffer at-vessel or post-release mortality.

*Shark Finning Prohibition Act Report to Congress*

77. The Shark Finning Prohibition Act requires the Fisheries Service to provide reports to Congress describing its efforts to end shark finning. Public Law 106–557. This report also includes data regarding shark stock status.

78. In its most recent 2017 Shark Finning Report, the Fisheries Service noted that oceanic whitetip sharks are a large component of the shark bycatch in tuna purse seine and longline fisheries worldwide, and that locally, whitetip sharks have shown significant declines in relative abundance in the Hawai‘i longline fishery since 1995. In examining the international efforts to ban retention of the species, the Fisheries Service admitted that the “[n]o-retention policies can reduce targeted fishing effort but may have little effect on reducing total mortality in [oceanic whitetip shark] bycatch.”

79. In the Shark Finning Report, the Fisheries Service determined that the oceanic whitetip shark in the Tropical Pacific was “overfished” and currently experiencing “overfishing.”

**VI. The Fisheries Service Has Failed to Protect These Sharks from Overfishing and Ensure Rebuilding of the Overfished Population as Mandated by the Magnuson-Stevens Act.**

80. Although the Fisheries Service has repeatedly determined that the population of oceanic whitetip shark in the Western and Central Pacific is overfished and experiencing overfishing, the Fisheries Service’s Annual Stock Status Reports to Congress in 2018, 2017, and 2016 list the stock status of Western and Central Pacific oceanic whitetip as “unknown.” This conclusion directly conflicts with the findings of the Commission’s stock assessments, the CITES listing decision, the WesPac’s SAFE reports since 2015, and the Fisheries Service’s

own ESA Status Review Report, Shallow-Set Longline Biological Opinion, and Shark Finning Report to Congress.

81. The Fisheries Service has violated the Magnuson-Stevens Act and APA by arbitrarily reporting to Congress that the status of the oceanic whitetip stock in the Western and Central Pacific is “unknown.” The Service has also violated its Magnuson-Stevens Act mandate to immediately notify WesPac that the shark population is overfished and experiencing overfishing. By failing to identify the population as overfished to Congress and failing to notify WesPac, the Fisheries Service has unlawfully delayed the preparation and implementation of a plan to end overfishing and implement conservation and management measures to rebuild the oceanic whitetip shark population.

82. The Fisheries Service has failed to meet its statutory obligations and prevented the oceanic whitetip shark from receiving any of the protections afforded to overfished stocks and stocks subject to overfishing under the Magnuson-Stevens Act and its implementing regulations.

### **CAUSES OF ACTION**

#### **COUNT I: THE FISHERIES SERVICE FAILED TO IMMEDIATELY NOTIFY WESPAC IN VIOLATION OF THE MAGNUSON-STEVENSONS ACT AND ITS IMPLEMENTING REGULATIONS**

83. Plaintiffs reallege and incorporate by reference paragraphs 1 through 82 of the Complaint in this First Cause of Action.

84. The Magnuson-Stevens Act states that “[i]f the [Fisheries Service] determines at any time that a fishery is overfished, the [agency] shall *immediately* notify the appropriate Council and request that action be taken to end overfishing in the fishery and to implement conservation and management measures to rebuild affected stocks of fish.” 16 U.S.C. § 1854(e)(2) (emphasis added). The statute further requires the Fisheries Service to publish each such notice in the Federal

Register. *Id.* The Fisheries Service’s implementing regulations similarly specify that the Fisheries Service “will *immediately* notify in writing a Regional Fishery Management Council whenever [the Fisheries Service] determines that: (i) Overfishing is occurring; (ii) A stock or stock complex is overfished; [or] (iii) A stock or stock complex is approaching an overfishing condition.” 50 C.F.R. § 600.310(j)(1) (emphasis added).

85. “Within 2 years after an identification [of an overfished stock] . . . the appropriate Council shall prepare and implement a fishery management plan, plan amendment, or proposed regulations . . . to end overfishing immediately in the fishery and to rebuild affected stocks.” 16 U.S.C. § 1854(e)(3)(A); *see also* 50 C.F.R. § 600.310(j)(2)(ii). Upon notification of a stock undergoing overfishing, WesPac should immediately begin work with its scientific committee to end overfishing. 50 C.F.R. § 600.310(j)(2)(i).

86. Under the APA, “[t]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C § 706(1).

87. The Commission’s 2012 and 2019 oceanic whitetip shark stock assessments, its 2015 stock status update, and WesPac’s SAFE reports since 2015 have all concluded that the oceanic whitetip shark population in the Western and Central Pacific is overfished and experiencing overfishing.

88. By at least 2017, the Fisheries Service itself determined that the Pacific stock of oceanic whitetip shark is overfished and undergoing overfishing. The agency stated the shark population is overfished and experiencing overfishing in its 2017 Shark Finning Report to Congress, 2018 ESA Status Review Report, and 2019 Biological Opinion for the Hawai‘i shallow-set longline fishery reauthorization.

89. Despite these multiple findings and conclusions, the Fisheries Service has failed for at least three years to publish its determination about the status of the

Pacific oceanic whitetip shark population in the Federal Register and notify WesPac that the population is overfished or experiencing overfishing. The Fisheries Service has known for years that the oceanic whitetip shark population in the Western and Central Pacific Ocean is overfished and in significant continuing decline. The agency, however, arbitrarily refuses to make the finding necessary to trigger the WesPac to act to save these sharks.

90. The Fisheries Service's failure to immediately notify WesPac that oceanic whitetip sharks are overfished and still subject to overfishing has denied this population the protections necessary to end overfishing and rebuild its stock, as mandated in the Magnuson-Stevens Act and its implementing regulations.

91. The Fisheries Service is therefore in violation of the Magnuson-Stevens Act and the APA. 16 U.S.C. § 1854(e)(2); 50 C.F.R. § 600.310(j)(1); 5 U.S.C § 706(1).

92. These actions have harmed Plaintiffs, and Plaintiffs have no adequate remedy at law.

**COUNT II: THE FISHERIES SERVICE'S ANNUAL STOCK STATUS REPORT TO CONGRESS ARBITRARILY ASSIGNED OCEANIC WHITETIP SHARKS AN "UNKNOWN" STATUS, CONTRARY TO ITS OWN FINDINGS, IN VIOLATION OF THE MAGNUSON-STEVENSONS ACT AND THE APA**

93. Plaintiffs reallege and incorporate by reference paragraphs 1 through 92 of the Complaint in this Second Cause of Action.

94. The Magnuson-Stevens Act requires that the Fisheries Service "shall report annually to the Congress and the Councils on the status of fisheries within each Council's geographical area of authority and identify those fisheries that are overfished or are approaching a condition of being overfished." 16 U.S.C. § 1854(e)(1).

95. Under the APA, “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(a).

96. The Annual Stock Status Reports to Congress are final agency actions under the APA. *See* 5 U.S.C. § 704.

97. The Fisheries Service listed the oceanic whitetip shark as threatened throughout its range under the ESA, noting that its significant decline was primarily caused by overfishing.

98. The Fisheries Service determined that the oceanic whitetip shark in the Tropical Pacific is overfished and undergoing overfishing in its 2017 Shark Finning Report to Congress.

99. It determined that the Pacific population of oceanic whitetip shark is overfished and undergoing overfishing in its 2018 ESA Status Review Report.

100. It also determined in its 2019 Biological Opinion for the Hawai‘i shallow-set longline fishery reauthorization that the Pacific population of oceanic whitetip shark is overfished and undergoing overfishing.

101. WesPac concluded in all its SAFE Reports since 2015 that the oceanic whitetip shark in the Western and Central Pacific Ocean is overfished and experiencing overfishing.

102. The 2012 and 2019 international oceanic whitetip shark stock assessments and 2015 stock status report have all found the oceanic whitetip shark in the Western and Central Pacific is overfished and experiencing overfishing. In 2014, at the request of the U.S. and other countries, the oceanic whitetip shark was added to Appendix II of the Convention on International Trade in Endangered Species (CITES) to restrict trade and in recognition of the overexploitation of the species.

103. Despite this extensive evidence and the agency's numerous findings to the contrary, in its 2018 Annual Stock Status Report to Congress, the Fisheries Service claimed it was "unknown" whether the oceanic whitetip shark population in the Western and Central Pacific was overfished or undergoing overfishing.

104. This "unknown" conclusion is not based on any stock assessment, scientific report, or other evidence.

105. Contrary to all the evidence before the agency, the Fisheries Service's conclusion in its 2018 Annual Stock Status Report to Congress is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the Magnuson-Stevens Act and the APA. 16 U.S.C. § 1854(e)(1); 5 U.S.C § 706(2)(A).

106. These actions have harmed Plaintiffs, and Plaintiffs have no adequate remedy at law.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request this Court to enter the following relief:

1. Declare that the Fisheries Service has violated both the Magnuson-Stevens Act and the APA, as described above, by failing to make the appropriate notifications after determining the Western and Central Pacific population of oceanic whitetip shark is overfished and experiencing overfishing;

2. Declare that the Fisheries Service has violated both the Magnuson-Stevens Act and the APA, as described above, by assigning the Western and Central Pacific population of oceanic whitetip sharks a stock status of "unknown" in its Annual Stock Status Reports to Congress instead of overfished and experiencing overfishing, despite numerous findings to the contrary;

3. Order and enjoin the Fisheries Service to do the following within 30 days after this Court's order: (a) notify WesPac that the oceanic whitetip shark population in the Western and Central Pacific is overfished and request that action be taken to end overfishing in the fishery and implement conservation and management measures to rebuild the population of oceanic whitetip sharks, as mandated by the Magnuson-Stevens Act; and (b) publish notice of the same in the Federal Register, as mandated by the Magnuson-Stevens Act;

4. Remand the 2018 Annual Stock Status Report to the Fisheries Service and order the Fisheries Service to prepare a new Annual Stock Status Report for Congress within three months that is in compliance with the mandates of the Magnuson-Stevens Act and the APA;

5. Maintain jurisdiction over this action until the Fisheries Service is in compliance with the Magnuson-Stevens Act, the APA, and every order of this Court;

6. Enter any other appropriate injunctive relief to ensure that the Fisheries Service complies with the Magnuson-Stevens Act and the APA, and to prevent irreparable harm to Plaintiffs and to the environment until such compliance occurs;

7. Award Plaintiffs their reasonable attorney fees and costs pursuant to 28 U.S.C. § 2412; and

8. Provide such additional and further relief as may be appropriate.

Respectfully submitted this 2nd day of April, 2020.

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