

MAHESH CLEVELAND (#11023)

Earthjustice

850 Richards Street, Suite 400

Honolulu, Hawai‘i 96813

T: (808) 599-2436

Email: mcleveland@earthjustice.org

ANDREA A. TREECE (*pro hac vice forthcoming*)

Earthjustice

50 California St., Suite 500

San Francisco, CA 94111

T: (415) 217-2089

Email: atreece@earthjustice.org

GRACE P. BAUER (*pro hac vice forthcoming*)

Earthjustice

810 Third Ave., Suite 610

Seattle, WA 98104

T: (206) 343-7340

Email: gbauer@earthjustice.org

Attorneys for Plaintiffs

**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.

NATIONAL MARINE FISHERIES
SERVICE, Department of Commerce;
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION,
Department of Commerce; and GINA
RAIMONDO, in her official capacity as
Secretary of the United States Department
of Commerce,

Defendants.

Civil No. 22-cv-00224

**PLAINTIFFS’ COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs Conservation Council of Hawai‘i and Michael Nakachi bring this action for declaratory and injunctive relief to remedy Federal Defendants’ (collectively, the National Marine Fisheries Service (“NMFS”)) failure to protect threatened oceanic whitetip sharks from harm caused by fisheries in the Western Pacific Ocean. Specifically, NMFS has failed to complete required consultation under the Endangered Species Act (“ESA”) regarding the effects of NMFS’s continued authorization of two fisheries managed under the Fishery Ecosystem Plan for Pacific Pelagic Fisheries of the Western Pacific Region (“Pelagic FEP”) on the oceanic whitetip shark. By failing to complete consultation, NMFS is failing to ensure that these activities do not jeopardize the continued existence of the species, in violation of Section 7 of the ESA and its implementing regulations.

2. The oceanic whitetip shark has suffered a precipitous population decline of up to 88 percent in recent decades. The decline is due primarily to significant fishing pressure in the form of incidental capture and death in fisheries targeting other species (“bycatch”) and targeted catch. Ongoing fishing-related mortality and harm continue to threaten the shark’s existence.

3. In recognition of its population decline and ongoing threats, NMFS issued a final rule in January 2018 listing the oceanic whitetip shark as a threatened

species under the ESA.

4. Section 7 of the ESA requires every federal agency to ensure, through consultation with the relevant federal wildlife agency (here, NMFS's Office of Protected Resources), that any agency action that may affect a threatened or endangered species will not jeopardize the species' continued existence.

5. In the time since it listed the oceanic whitetip shark, NMFS's Office of Sustainable Fisheries has continued to authorize fisheries managed under the Pelagic FEP that affect the oceanic whitetip shark through bycatch. Capture in these fisheries can kill or seriously harm individual oceanic whitetip sharks, contributing to population reductions and diminishing the likelihoods of its survival and recovery.

6. NMFS has not completed the required ESA consultation on the effects of two of these fisheries—the Hawai'i deep-set longline fishery and the American Samoa longline fishery—on numerous ESA-listed species, including the oceanic whitetip shark.

7. NMFS's continued authorization of the Hawai'i deep-set longline fishery and American Samoa longline fishery without first completing this required consultation violates the agency's procedural duty to complete consultation and its substantive duty to avoid jeopardy to the continued existence of listed species under Section 7 of the ESA. 16 U.S.C. § 1536(a)(2).

8. Plaintiffs therefore ask this Court to declare that NMFS is in violation of the ESA and its implementing regulations and to order NMFS to complete the required consultations and issue final biological opinions on the effects of the Hawai‘i deep-set longline fishery and the American Samoa longline fishery on the oceanic whitetip shark within 90 days.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 16 U.S.C. § 1540(c), (g) (ESA citizen suits).

10. Plaintiffs provided written notice of the legal violations alleged in this Complaint to the named Defendants on February 7, 2019, as required by the ESA. *See id.* § 1540(g)(2)(C). Defendants have not corrected their violations of law.

11. This Court has authority to grant Plaintiffs’ requested relief pursuant to the ESA, *id.* § 1540(g), the Administrative Procedure Act (APA), 5 U.S.C. § 706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202. Defendants’ sovereign immunity has been waived under the ESA’s citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), and the APA, 5 U.S.C. § 702.

12. Venue is properly vested in this District pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e)(i) because a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred in this District and Plaintiffs reside in this District.

PARTIES

13. 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 NMFS’s decision to permit the U.S. Navy’s use of high-powered sonar and explosives off the coast of Hawai‘i and Southern California, which harm marine life. In the local community, CCH has produced a series of wildlife viewing interpretive signs to help protect marine species and held beach clean-ups.

14. 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.

15. Plaintiff Michael Nakachi is a Native Hawaiian cultural practitioner and a small business owner. Mr. Nakachi's 'aumakua¹ 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.

16. 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

¹ '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).

has personally observed a decline in the number of oceanic whitetip sharks in the 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).

17. 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 on House Bill 553, which passed into law in 2021 after seven years of advocacy. The law, known as Act 51, became effective January 1, 2022, and makes it illegal to knowingly capture, entangle, or kill any shark in Hawai‘i state waters. For the past nineteen 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.

18. 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 ESA. Unless the requested relief is granted, Plaintiffs’ interests will continue to be injured by the Defendants’ failure to comply with the Act. The relief sought herein would redress Plaintiffs’ injuries. Plaintiffs have no other adequate remedy at law.

19. Defendant Gina Raimondo is Secretary of the United States Department of Commerce (“Secretary”). She is sued in her 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 Fishery Conservation and Management Act (“Magnuson-Stevens Act”), which governs federal fishery management. The Secretary is also responsible for administering and implementing the ESA with respect to certain marine species. The Secretary is responsible for complying with the ESA when taking any action that may affect threatened or endangered species.

20. Defendant National Oceanic and Atmospheric Administration (“NOAA”) is an agency of the United States Department of Commerce with

supervisory responsibility for NMFS. The Secretary has delegated responsibility to implement and enforce compliance with the Magnuson-Stevens Act and ESA to NOAA, which in turn has sub-delegated that responsibility to NMFS.

21. Defendant National Marine Fisheries Service is the agency to which the Secretary of Commerce has delegated the authority to manage federal fisheries, including the Hawai‘i deep-set longline fishery and American Samoa longline fishery, pursuant to the Magnuson-Stevens Act. NMFS also is the agency with responsibility for administering and implementing the ESA with respect to certain marine species. NMFS is responsible for complying with the ESA when taking any action that may affect threatened or endangered species.

STATUTORY BACKGROUND

I. The Endangered Species Act

22. Congress enacted the ESA to protect endangered and threatened species and the habitats upon which they depend. 16 U.S.C. § 1531(b). Through the ESA, Congress declared its policy “that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the Act].” *Id.* § 1531(c)(1).

23. The ESA’s “language, history, and structure . . . indicate[] beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). “The plain intent

of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.

24. The ESA provides protections to those species the U.S. Fish and Wildlife Service or NMFS designates as either “endangered” or “threatened.” *See* 16 U.S.C. § 1533. A species is endangered when it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is threatened if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

25. Section 7 of the ESA imposes a continuing and affirmative duty on each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species.” *Id.* § 1536(a)(2).

26. In the context of Section 7, an “action” includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” that are within the agencies’ discretionary control. 50 C.F.R. §§ 402.02, 402.03.

27. The ESA and its implementing regulations establish an interagency consultation process to assist federal agencies in complying with their substantive duty to avoid jeopardy under the ESA. The consultation process requires an action agency, whenever it takes an action that “may affect” a threatened or endangered

species or critical habitat, to consult with the appropriate wildlife agency—the consulting agency—to determine whether the action may cause jeopardy.

16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). NMFS has responsibility under the ESA for protecting the oceanic whitetip shark and most other marine species through, among other things, the consultation process.

28. To “jeopardize the continued existence of” a species denotes “engag[ing] in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

29. Agencies are required to “use the best scientific and commercial data available” throughout the consultation process. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14(d), (g)(8).

30. The Section 7 consultation process begins with a determination whether an agency action “may affect” a listed species or its critical habitat. “The minimum threshold for an agency action to trigger consultation . . . is low” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011). “*Any possible effect . . . triggers the formal consultation requirement*” Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (emphasis added); *see also* U.S. Fish & Wildlife Serv. &

Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook* at xvi (1998) (“May affect [is] the appropriate conclusion when a proposed action may pose *any* effects on listed species or designated critical habitat.”). An agency is excused from consulting only if the action agency determines with the written concurrence of the consulting agency that the proposed action is not likely to adversely affect any listed species or critical habitat. *See* 50 C.F.R. § 402.14(b)(1).

31. At the conclusion of consultation, an action agency will obtain either a written concurrence from the consulting agency that the proposed action is “not likely to adversely affect” listed species, 50 C.F.R. §§ 402.12(j), (k), 402.13(c), 402.14(b)(1), or, if the action is likely to adversely affect listed species, a biological opinion evaluating those effects and determining whether the action is likely to jeopardize the continued existence of the listed species, 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h).

32. If the consulting agency concludes in the biological opinion that the proposed action is likely to jeopardize the species, it must specify reasonable and prudent alternatives, if any, that would avoid the likelihood of jeopardy, or specify that no such alternatives exist. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2).

33. If the consulting agency concludes that the action is not likely to jeopardize the continued existence of the species, but that incidental take of the

threatened species will occur, the consulting agency must produce a written “incidental take statement” that “[s]pecifies the impact, *i.e.*, the amount or extent, of such incidental taking on the species.” 16 U.S.C. § 1536(b)(4); *see also* 50 C.F.R. § 402.14(i)(1)(i). This requirement applies even when take of the species is not prohibited by statute or regulation. *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 911 (9th Cir. 2012). An incidental take statement must also specify “reasonable and prudent measures” that are “necessary or appropriate to minimize [the] impact” of such incidental take and the “terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency” to implement the measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(ii)–(iv). The incidental take statement serves as a check on the agency’s determination that the proposed action’s effects on the species will not jeopardize the species’ continued existence. *Salazar*, 695 F.3d at 911.

34. The duty to consult is ongoing. Federal agencies are required to “reinitiate” consultation under Section 7 of the ESA in four circumstances:

- (1) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or
- (4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(a).

35. Compliance with the ESA’s Section 7 consultation requirement is integral to fulfilling the ESA’s substantive objective because the consultation process ensures that federal agencies will not cause serious, undue harm to threatened or endangered species. *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005) (“The purpose of the consultation process . . . is to prevent later substantive violations of the ESA.”); *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (stating consultation process serves as a procedural requirement “to ensure compliance with the [ESA’s] substantive provisions”).

II. Magnuson-Stevens Fishery Conservation and Management Act

36. The Magnuson-Stevens Act governs the conservation and management of fisheries in the United States territorial waters and in the exclusive economic zone, which extends from the boundaries of state waters (typically 3 miles from shore) to 200 miles offshore or to an international boundary with neighboring countries. 16 U.S.C. §§ 1801(b)(1), 1802(11); 33 C.F.R. § 2.30.

37. The Magnuson-Stevens Act creates eight Regional Fishery Management Councils and requires them to prepare fishery management plans for all fisheries under their authority that require conservation and management. 16 U.S.C. § 1852(h)(1). The Western Pacific Fishery Management Council has authority over federally managed fisheries operating off the coasts of Hawai‘i,

American Samoa, Guam, and the Northern Mariana Islands. 16 U.S.C. § 1852(a)(1)(H).

38. The Magnuson-Stevens Act requires NMFS to review all fishery management plans, plan amendments, and implementing regulations to ensure they comply with all applicable law, including the ESA. 16 U.S.C. § 1854(a), (b). The Magnuson-Stevens Act assigns to NMFS “general responsibility to carry out any fishery management plan.” 16 U.S.C. § 1855(d). NMFS authorizes and manages the Hawai‘i deep-set longline fishery and American Samoa longline fishery pursuant to the Pelagic FEP. *See, e.g.*, 50 C.F.R. §§ 665.1, 665.798–665.819.

III. Administrative Procedure Act

39. The APA directs an agency “to conclude a matter presented to it” “within a reasonable time.” 5 U.S.C. § 555(b).

40. A reviewing court may compel action if the agency has a duty to act and it has “unreasonably delayed” in discharging that duty. *Id.* § 706(1).

FACTUAL BACKGROUND

I. NMFS Listed the Oceanic Whitetip Shark as a Threatened Species Under the ESA Due Primarily to Declines Caused by Commercial Fishing.

41. Oceanic whitetip sharks are top predators of the open ocean and play an important role in maintaining a healthy ecosystem. They are long-lived, living up to 36 years. Roaming far and wide, these highly migratory, solitary sharks are

found in tropical and subtropical waters across the world, including waters surrounding Hawai‘i and American Samoa. Unfortunately, oceanic whitetip shark populations have plummeted due to fishing in all regions the shark is found—by as much as 88 percent from historical numbers in some regions.

42. Commercial fishing by U.S. and foreign national fleets has been the main driver of this species’ significant population declines. Oceanic whitetip sharks are targeted for their high-value fins. Both targeted and incidental capture of oceanic whitetip sharks continue to threaten the species’ long-term survival.

43. Bycatch from the Hawai‘i deep-set longline fishery and American Samoa longline fishery poses a major threat to the oceanic whitetip shark in the Western and Central Pacific Ocean.

44. The oceanic whitetip shark is particularly vulnerable to fishing pressure because of its biology and life history. Oceanic whitetip sharks grow slowly, take a long time to reach reproductive maturity, and produce relatively few offspring. Females generally do not reach maturity until they are 9 years of age and only give birth every other year. The species also suffers from low genetic diversity and declining size of individuals—factors that make it less resilient and less productive.

45. On January 30, 2018, NMFS listed the oceanic whitetip shark as threatened, largely due to excessive pressure from direct and unintentional catch in

fisheries. 83 Fed. Reg. 4153, 4153, 4162 (codified at 50 C.F.R. § 223.102(e)) (citing “overutilization from fishing pressure and inadequate regulatory mechanisms” as primary reasons for listing the oceanic whitetip shark).

II. NMFS Continues to Authorize Fisheries that Catch and Kill Oceanic Whitetip Sharks.

46. NMFS continues to authorize multiple fisheries that catch and kill oceanic whitetip sharks, including the Hawai‘i deep-set longline fishery and American Samoa longline fishery.

47. These fisheries primarily target tuna and swordfish, but also catch large numbers of oceanic whitetip sharks as bycatch. A 2020 report by the Western Pacific Fishery Management Council estimates that in 2019 alone, the Hawai‘i deep-set longline fishery incidentally caught an estimated 2,125 oceanic whitetip sharks; the American Samoa longline fishery took an estimated 870 oceanic whitetips in the same year. These two fisheries are estimated to have caught more than 6,500 oceanic whitetips between 2018 (when NMFS listed the species) and 2020 (the most recent year for which estimates are available).

48. Significant numbers of oceanic whitetip sharks caught as bycatch in longline gear die due to the physical trauma of being hooked and hauled to the vessel 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). Scientists have estimated

that approximately one-third or more of oceanic whitetip sharks die after being caught as bycatch on longline gear.

49. The best available scientific information shows that bycatch of oceanic whitetip sharks in the Hawai'i deep-set longline fishery and American Samoa longline fishery has substantial adverse effects on—or, at the very least, “may affect”—the species. NMFS is required to complete consultation before continuing to authorize any fishery that may affect the oceanic whitetip shark.

III. NMFS Has Not Completed ESA Consultation Regarding the Effects of the Hawai'i Deep-Set Longline and American Samoa Fisheries on the Oceanic Whitetip Shark.

50. NMFS listed the oceanic whitetip shark under the ESA more than four years ago. In part due to the new listing, and recognizing that both fisheries may affect this threatened species, NMFS reinitiated consultation on the Hawai'i deep-set longline fishery and American Samoa longline fishery on October 4, 2018, and April 3, 2019, respectively. NMFS has not completed consultation for either fishery, but has continued to authorize both fisheries.

51. NMFS is both the action agency and the consulting agency in these consultations. Specifically, NMFS's Office of Sustainable Fisheries is the action agency that authorizes and manages the Hawai'i deep-set longline and American Samoa longline fisheries, and NMFS's Office of Protected Resources is the consulting agency.

52. On April 4, 2019, NMFS informed Plaintiffs that it expected to complete the reinitiated formal consultations on the effects of the Hawai'i deep-set longline and American Samoa longline fisheries on all listed species by July 2019, and September 2019, respectively.

53. Plaintiffs' counsel continued to communicate with NMFS representatives for nearly three years with the aims of spurring the agency to complete the consultations and providing recommendations for measures to include in the resulting biological opinions, while avoiding litigation. The agency has repeatedly pushed back the anticipated completion dates for both consultations. Most recently, in March 2022, it informed the Western Pacific Fishery Management Council that the consultations would not be completed by its most recent deadline and did not provide any new anticipated date of completion.

54. Four years after oceanic whitetip sharks were listed under the ESA and three years after NMFS stated it would complete these consultations within a matter of several months, the agency has not done so and has not provided any assurance that it will complete them in any time frame. In the meantime, the agency continues to allow unauthorized, unlimited take of oceanic whitetip sharks in the Hawai'i deep-set and American Samoa longline fisheries.

CLAIMS FOR RELIEF

Count I – Violation of ESA Section 7(a)(2) Duties to Complete Consultation and Ensure Against Jeopardy (16 U.S.C. § 1536(a)(2))

55. Paragraphs 1–54 are incorporated herein by reference.

56. Section 7(a)(2) of the ESA imposes a substantive duty on each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). To comply with this duty, the ESA and its implementing regulations require NMFS’s Office of Sustainable Fisheries to complete consultation with NMFS’s Office of Protected Resources before taking any action that “may affect” a listed species. *Id.*; 50 C.F.R. § 402.14(a).

57. NMFS’s authorization of each individual fishery operating under the Pelagic FEP, including the Hawai’i deep-set longline fishery and American Samoa longline fishery, constitutes a federal agency “action” under the ESA. 50 C.F.R. §§ 402.02, 402.03; *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1145 (W.D. Wash. 2000) (stating FMPs and their implementation “constitute on-going agency action under the ESA”).

58. NMFS’s authorizations of the Hawai’i deep-set longline fishery and American Samoa longline fishery result in bycatch of oceanic whitetip sharks. Therefore, the authorization of each fishery “may affect” the threatened oceanic whitetip shark. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

59. Accordingly, NMFS is required to complete Section 7 consultation on the effects of the Hawai‘i deep-set longline fishery and American Samoa longline fishery on the oceanic whitetip shark *prior* to authorizing the operation of the fisheries. NMFS also has a substantive duty as the action agency authorizing the Hawai‘i deep-set longline fishery and American Samoa longline fishery to ensure that its actions are not likely to jeopardize the continued existence of the oceanic whitetip shark. 16 U.S.C. § 1536(a)(2).

60. NMFS has continued authorizing the Hawai‘i deep-set longline fishery and American Samoa longline fishery in the period since it listed the oceanic whitetip shark as threatened under the ESA. However, NMFS has not completed consultation or obtained a biological opinion on these fisheries’ effects on the species.

61. NMFS therefore is in violation of its duties under the ESA and its implementing regulations to complete the required consultation and ensure its authorizations of the Hawai‘i deep-set longline fishery and American Samoa longline fishery do not jeopardize the continued existence of the threatened oceanic whitetip shark. *Id.*; 50 C.F.R. § 402.14.

62. NMFS’s actions and failures to act are causing irreparable injury to Plaintiffs for which they have no adequate remedy at law.

Count II – Violation of ESA Section 7(a)(2) and APA Section 706(1) Duties to Complete Consultation.

63. Paragraphs 1–62 are incorporated herein by reference.

64. Formal consultation “commences with the Federal agency’s written request for consultation under section 7(a)(2) of the Act and concludes with [NMFS’s] issuance of a biological opinion under section 7(b)(3) of the Act.” 50 C.F.R. § 402.02; *see also id.* §§ 402.14.

65. NMFS’s Office of Sustainable Fisheries reinitiated formal consultation on the Hawai‘i deep-set longline fishery and American Samoa longline fishery on October 4, 2018, and April 3, 2019, respectively.

66. The initiation of formal consultation requires NMFS to complete consultation and to deliver a biological opinion upon each consultation’s conclusion. 16 U.S.C. § 1536(b)(1)(A), (b)(3)(A); 50 C.F.R. § 402.14(e), (g).

67. NMFS has not issued biological opinions on the reinitiated consultations for the Hawai‘i deep-set longline fishery and American Samoa longline fishery.

68. In addition, on information and belief, NMFS’s Office of Sustainable Fisheries has not determined, with the written concurrence of its Office of Protected Resources, that its proposed actions are not likely to adversely affect any listed species or critical habitat. The formal consultations therefore have not concluded. *See* 50 C.F.R. § 402.14(b).

69. Under the APA, each federal agency must “conclude a matter presented to it” “within a reasonable time.” 5 U.S.C. § 555(b). The APA authorizes reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

70. The schedule that Congress prescribed in the ESA for completing consultations informs the timeline for defining the APA duty to act within a reasonable time. *See* 16 U.S.C. § 1536(b)(1)(A).

71. NMFS’s multiple-year delay in completing the legally required, reinitiated consultations and publishing the legally required biological opinions on the Hawai‘i deep-set longline fishery and American Samoa longline fishery constitutes unreasonable delay under APA section 706(1) and a failure to conclude matters presented to it within a reasonable amount of time under APA section 555(b). 5 U.S.C. §§ 555(b), 706(1).

72. NMFS’s unlawful delay in completing these required consultations and publishing biological opinions is resulting in and will continue to result in unmitigated, harmful bycatch of threatened oceanic whitetip sharks. In light of the importance Congress has assigned to the protection of threatened and endangered species, the delay at issue in this case is manifestly unreasonable.

73. NMFS’s actions and failures to act are causing irreparable injury to the Plaintiffs for which they have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that NMFS's continuing authorizations of the Hawai'i deep-set longline fishery and American Samoa longline fishery absent completed Section 7 consultations regarding the oceanic whitetip shark violate the procedural and substantive requirements of ESA and its implementing regulations, 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14;
2. Declare that NMFS is in violation of sections 555(b) and 706(1) of the APA, 5 U.S.C. §§ 555(b), 706(1), by unreasonably delaying the legally required completion of consultations and legally required issuance of biological opinions for the Hawai'i deep-set longline fishery and American Samoa longline fishery;
3. Order NMFS to complete the required consultations on the Hawai'i deep-set longline fishery and American Samoa longline fishery and publish final biological opinions within 90 days, in accordance with 50 C.F.R. § 402.14(e);
4. Award Plaintiffs their attorney fees and costs in this action pursuant to 16 U.S.C. § 1540(g)(4) and 28 U.S.C. § 2412; and
5. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 17th day of May, 2022.

/s/ Mahesh Cleveland
Mahesh Cleveland (#11023)

Earthjustice
850 Richards St., Suite 400
Honolulu, HI 96813
T: (808) 599-2436
Email: mcleveland@earthjustice.org

/s/ Andrea A. Treece
Andrea A. Treece (*pro hac vice forthcoming*)
Earthjustice
50 California St., Suite 500
San Francisco, CA 94111
T: (415) 217-2089
Email: atreece@earthjustice.org

/s/ Grace P. Bauer
Grace P. Bauer (*pro hac vice forthcoming*)
Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104
T: (206) 343-7340
Email: gbauer@earthjustice.org

*Attorneys for Plaintiffs Conservation
Council for Hawai'i and Michael Nakachi*