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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.

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. 23-cv-100

**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 and endangered species from harm caused by fisheries in the Western Pacific Ocean. Specifically, NMFS has failed to complete required consultations under the Endangered Species Act (“ESA”) regarding the effects of NMFS’s continued authorization of the Hawai‘i deep-set longline and American Samoa longline fisheries on multiple threatened and endangered species: the green sea turtle, olive ridley sea turtle, loggerhead sea turtle, hawksbill sea turtle, leatherback sea turtle, scalloped hammerhead shark, sperm whale, and Main Hawaiian Island insular false killer whale (hereinafter, false killer whale). By failing to complete the consultations, NMFS is failing to ensure that these fisheries do not jeopardize the continued existence of these species or destroy or adversely modify their critical habitat, in violation of ESA Section 7 and its implementing regulations.

2. The Hawai‘i deep-set longline and American Samoa longline fisheries attempt to catch tuna and other far-ranging open ocean fish species by laying dozens of miles of baited hooks in the water. This indiscriminate fishing method catches, injures, and kills myriad species it is not meant to catch, including every

species of sea turtle that roams the Pacific Ocean and numerous marine mammal and shark species. In addition, the Hawai‘i deep-set longline fishery affects the availability of food for ocean predators, including false killer whales, which depend on the same fish species this fishery intentionally removes from the ecosystem.

3. ESA Section 7 requires NMFS’s Office of Sustainable Fisheries to ensure, through consultation with NMFS’s Office of Protected Resources, that these fisheries’ operations are not likely to jeopardize the species’ chances of survival and recovery. That consultation culminates in NMFS issuing a biological opinion that includes, among other things, an “incidental take limit” on the number of individuals from listed species that fishing operations may unintentionally harm or kill.

4. The duty to consult is ongoing. The ESA requires NMFS to reinitiate Section 7 consultation and complete a new biological opinion if new information indicates that the fisheries may affect listed species in a way or to a degree NMFS did not consider—for example, by catching or killing more animals than authorized by the fishery’s incidental take limits or by affecting newly designated critical habitat for listed species.

5. Because these fisheries have a history of injuring and killing threatened and endangered species, they have been the subject of a series of

biological opinions that establish incidental take limits for each of the many affected listed species. The Hawai‘i deep-set longline fishery currently operates pursuant to a biological opinion and a supplemental biological opinion completed in 2014 and 2017, respectively. The American Samoa longline fishery currently operates pursuant to a biological opinion completed in 2015.

6. NMFS reinitiated consultation on the effects of the Hawai‘i deep-set longline fishery and American Samoa longline fishery in 2018 and 2019, respectively, in response to various triggers, including the fisheries’ excessive take of sea turtles, the recent designation of critical habitat for false killer whale, and new information on the effects of the fisheries on leatherback sea turtles, scalloped hammerheads, and sperm whales.

7. In the meantime, both fisheries have consistently and significantly exceeded the incidental take limits that the most recent biological opinions established for multiple sea turtle species. Between 2017 and 2019, the Hawai‘i deep-set longline fishery injured and killed almost twice the number of green and olive ridley sea turtles allowed under its incidental take limits, and continuously exceeded the take limits for loggerhead sea turtles. During the same time, the American Samoa longline fishery injured and killed green, hawksbill, and olive ridley sea turtles well above its incidental take limits. These fisheries have exceeded incidental take limits for one or more sea turtle species every single year

since 2017.

8. Incidental take limits are supposed to act as a check on the agency's assumption that these fisheries are not impairing the species' ability to survive and recover in the long term. Yet, the agency has allowed the fisheries to injure and kill many more turtles—in some cases twice as many—than the limits it deemed acceptable in its existing biological opinions without checking the effects of that excessive take on the long-term prospects of these already imperiled, slow-growing species.

9. Since reinitiating consultation, NMFS's Office of Sustainable Fisheries has continued to allow the Hawai'i deep-set longline and American Samoa longline fisheries to operate despite the fact that both fisheries have continued to injure and kill far more sea turtles than their incidental take limits authorize. NMFS has allowed that excessive take to continue for four or more years without completing either consult to ensure that the fisheries will not impair the species' long-term chances of surviving and recovering. Similarly, it has allowed fishery impacts to continue on other species while it has delayed addressing new information on how those impacts affect leatherback sea turtles, scalloped hammerheads, sperm whales, and false killer whale critical habitat.

10. NMFS's continued authorization of the Hawai'i deep-set longline fishery and American Samoa longline fishery without first completing the required

consultations violates the agency's procedural duty to complete consultation and its substantive duty to avoid jeopardy to the continued existence of listed species and destruction or modification of their critical habitat under Section 7 of the ESA. 16 U.S.C. § 1536(a)(2).

11. 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 green sea turtle, olive ridley sea turtle, hawksbill sea turtle, loggerhead sea turtle, leatherback sea turtle, scalloped hammerhead shark, sperm whale, and false killer whale critical habitat within 90 days.

### **JURISDICTION AND VENUE**

12. 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).

13. Plaintiffs provided written notice of the legal violations alleged in this Complaint to the named Defendants on September 29, 2022, as required by the ESA. *See* 16 U.S.C. § 1540(g)(2)(C). Defendants have not corrected their violations of law.

14. 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.

15. 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**

16. 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 bills in the state legislature, including 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. In 2022, CCH and Mr. Nakachi challenged NMFS's failure to complete ESA consultations on the effects of the Hawai'i deep-set longline and American Samoa longline fisheries on the oceanic whitetip shark, which left the species without any protection from injury and death in these fisheries.

17. 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. The sea turtles, sharks, and marine mammals harmed by the longline fisheries, and the ecosystems of which those species are an integral part, are vitally important to CCH members and staff. CCH brings this action on behalf of itself and its adversely affected members and staff.

18. Plaintiff Michael Nakachi is a Native Hawaiian cultural practitioner and a small business owner. Mr. Nakachi's 'aumakua<sup>1</sup> is the manō (shark) and his

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<sup>1</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).

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.

19. Mr. Nakachi holds a close relationship with the scalloped hammerhead shark in Hawai'i and across the pae 'āina (group of islands). He has dived with them and studied them solo and in large congregations of sharks. Over time, he has also observed a substantial decline in their populations and changes in their natural behavior. Mr. Nakachi has also seen firsthand scalloped hammerhead sharks with fishing trailing lines, hooks, and other debris.

20. 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. As a practitioner, he is constantly engaged in Papakū

Makawalu,<sup>2</sup> observing the marine environment and how we interact with it.

21. Mr. Nakachi educates people about sea turtles and their ecological importance, as well as about almost every form of Kinolau (species) that inhabit the oceans. He has personally observed several sea turtle species in local waters, including the leatherback, the hawksbill, the green, and the olive ridley sea turtle. Over the years, he has witnessed their decline and encountered dead sea turtles killed by fishing line, smashed in boat ramps, or otherwise harmed by debris in the ocean.

22. The sperm whale is another species that guides Mr. Nakachi and many Native Hawaiian cultural practitioners. It is held to the highest reverence as it is said to be one of the first beings in Kumulipo (Hawaiian creation chant) as well as one of the forms of Kanaloa (Hawaiian god of the ocean). The sperm whale is also regarded as an ancestral spirit that guides and offers blessings to family members.

23. Over the last 35 years, Mr. Nakachi has encountered sperm whales

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<sup>2</sup> Papakū Makawalu is the ability of our kupuna (ancestors) to categorize and organize our natural world and all systems of existence within the universe. Papakū Makawalu is the foundation to understanding, knowing, acknowledging, becoming involved with, but most importantly, becoming the experts of the systems of this natural world. See <https://edithkanakaolefoundation.org/papakuMakawalu.php>.

and has visited most of the Wahi Pana<sup>3</sup> across Hawai‘i with stories and genealogical ties to the sperm whale and the scalloped hammerhead shark.

24. Often, he sees false killer whales, the black fish form of Kanaloa, offshore or during crossings from island to island. He has observed the behavior of false killer whales as apex predators and fierce hunters, using their tail to inflict wounds on their prey.

25. 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. 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 protected nearshore species such as sea turtles and sharks. 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

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<sup>3</sup> Wahi Pana are celebrated and storied places in the cultural traditions of Hawai‘i. Some examples include royal birthing sites, legendary sites, and places of significance for the people who live there. These sacred places have mana (spiritual power) and are treated with great respect, honor, and reverence. *See* <https://dlnr.hawaii.gov/dsp/files/2014/10/Wahi-Pana-brochure.pdf>.

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.

26. 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.

27. 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.

28. 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.

29. 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**

30. 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).

31. 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.

32. 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).

33. 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 or result in the destruction or adverse modification” of their critical habitat. *Id.* § 1536(a)(2). 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.

34. Critical habitat means “the specific areas within the geographical area occupied by the species, at the time it is listed” that contain “physical or biological features [] essential to the conservation of the species” and that “may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A).

Critical habitat may also include areas outside the area occupied by the species if the requisite agency determines that the area is “essential for the conservation of the species.” *Id.*

35. 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). Under the ESA, NMFS is the consulting agency responsible for protecting sea turtles in the ocean and most other marine species through the consultation process.

36. Initially, the consulting agency makes a determination on whether the agency action in question “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).

37. 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.

38. 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 or result in the

destruction or adverse modification of their critical habitat, 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h).

39. To “jeopardize the continued existence of” a species means “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.

40. “Destruction or adverse modification” of critical habitat means “a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” 50 CFR § 402.02.

41. 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).

42. The term “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

43. The requirement to provide an incidental take statement 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.

44. Under the ESA, the term “species” encompasses “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). NMFS defines a distinct population segment as “a vertebrate population or group of populations that is discrete from other populations of the species and significant in relation to the entire species.” *Glossary: Endangered Species Act*, NOAA, <https://www.fisheries.noaa.gov/laws-and-policies/glossary-endangered-species-act> (last updated Nov. 15, 2022). For example, NMFS has designated distinct population segments of green sea turtles and loggerhead sea turtles.

45. 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).

46. 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.

C.F.R. § 402.16(a).

47. 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**

48. 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.

49. 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).

50. 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 Fishery Ecosystem Plan for the Pacific Pelagic Fisheries of the Western Pacific Region. *See, e.g.*, 50 C.F.R. §§ 665.1, 665.798–665.819.

### III. Marine Mammal Protection Act

51. The overriding purpose of the Marine Mammal Protection Act (“MMPA”) is to protect all marine mammals, including those listed as endangered or threatened under the ESA. 16 U.S.C. § 1361(6).

52. The MMPA imposes a moratorium on takes of marine mammals, *id.* § 1371(a), and expressly prohibits the unauthorized take of a marine mammal by any person, *id.* § 1372(a). Prohibited takings include actions that kill or injure marine mammals or disrupt behavioral patterns, such as migration, breathing, breeding, or feeding. *Id.* § 1362(13), (18).

53. The MMPA requires NMFS to prepare and implement a conservation plan for any marine mammal population it identifies as “depleted” with “the purpose of conserving and restoring the species or stock to its optimum sustainable population.” *Id.* § 1383b(a)–(b). Additionally, NMFS must develop “take reduction plans” for species caught in commercial fisheries to “prevent the depletion” of marine mammal populations. *Id.* § 1387(f)(1).

54. Marine mammals listed as threatened or endangered under the ESA are automatically identified as depleted under the MMPA. *Id.* § 1362(1)(C).

55. The ESA allows incidental takings of threatened or endangered marine mammals only when authorized under the MMPA. 16 U.S.C. § 1361 *et seq.* The MMPA provides limited exceptions to the moratorium on the taking of marine

mammals. One of those exceptions allows commercial fishing vessels with valid permits pursuant to the Magnuson-Stevens Act to incidentally take threatened and endangered marine mammals when:

- (I) the incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stock;
- (II) a recovery plan has been developed or is being developed for such species or stock pursuant to the Endangered Species Act of 1973; and
- (III) where . . . a monitoring program is established . . . , vessels engaged in such fisheries are registered . . . , and a take reduction plan has been developed or is being developed for such species or stock.

16 U.S.C. § 1371(a)(5)(E).

56. The MMPA requires NMFS to publish a list of commercial fisheries each year that classifies each fishery based on how frequently the fishery kills or seriously injures marine mammals. *Id.* § 1387(c)(1). The classification determines whether participants in that fishery are subject to other protective provisions, such as requiring observer coverage and a take reduction plan for the species. *Id.*

57. Category I fisheries are defined as those that cause “frequent mortality and serious injury of marine mammals;” Category II fisheries cause “occasional incidental mortality and serious injury of marine mammals;” and Category III fisheries have “a remote likelihood of or no known incidental mortality or serious injury of marine mammals.” *Id.* The Hawai‘i deep-set longline fishery is a Category I fishery because it frequently kills or seriously injures false killer whales as well as at least other seven species of marine mammals. The American Samoa

longline fishery is a Category II fishery because it occasionally kills or seriously injures at least three different species of marine mammals. 87 Fed. Reg. 55348 (Sept. 9, 2022).

#### **IV. Administrative Procedure Act**

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

59. 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. The Hawai‘i Deep-Set Longline and American Samoa Longline Fisheries Incidentally Catch, Injure, and Kill Threatened and Endangered Species.**

60. As their names indicate, the Hawai‘i deep-set longline fishery and the American Samoa longline fishery use longline fishing gear. Longline fisheries employ a mainline, which floats horizontally in the water column, and numerous branchlines with baited hooks that hang vertically from the mainline. The mainline is often dozens of miles long with hundreds to thousands of baited hooks that are left in the water from morning to nighttime. While the Hawai‘i deep-set longline and the American Samoa longline fisheries primarily target tuna, they attract and catch many “non-target” species, including other fish species, sharks, sea turtles, sea birds, and marine mammals.

61. The Hawai‘i deep-set longline fishery uses mainlines that are typically 29 to 52 miles long, deployed from 40 to 400 meters deep. The fleet consists of 164 permitted vessels and operates inside and outside the U.S. exclusive economic zone, primarily around the main Hawaiian Islands and Northwestern Hawaiian Islands.

62. The Hawai‘i deep-set longline fishery incidentally catches, injures, and kills over 100 different species, including numerous threatened and endangered species, such as scalloped hammerhead sharks, oceanic whitetip sharks, sperm whales, and false killer whales. This fishery takes a particularly high toll on sea turtles, injuring and killing hundreds of green, olive ridley, leatherback, and loggerhead sea turtles every year.

63. The American Samoa longline fishery operates within the U.S. Exclusive Economic Zone around America Samoa. Like the deep-set fishery, the American Samoa longline fishery uses gear that consists of a mainline with hooks hanging down from it on branchlines; the hooks are generally set at a depth of around 100 meters. The size of the fishing fleet varies year to year. While NMFS permits around 60 vessels in this fishery, most recently about 13 primarily large vessels actively fished.

64. Even at a relatively small size, this fishery incidentally catches, injures, and kills numerous non-target species, including many of the same

threatened and endangered species as the Hawai‘i deep-set longline fishery. It similarly causes excessive harm to sea turtles, injuring and killing dozens of green, olive ridley, and hawksbill sea turtles every year.

65. NMFS’s Office of Sustainable Fisheries authorizes and manages the Hawai‘i deep-set longline and the American Samoa longline fisheries with advice from the Western Pacific Fishery Management Council pursuant to the Pelagic Species Fishery Ecosystem Plan.

## **II. NMFS’s Delay in Completing Consultations on the Hawai‘i Deep-Set and American Samoa Longline Fisheries Harms ESA-Listed Species.**

66. The Hawai‘i deep-set longline and American Samoa longline fisheries adversely affect numerous species protected under the ESA, including some that are at risk of extinction within the foreseeable future.

### **Sea Turtles**

67. Sea turtles are among the world’s largest reptiles, have inhabited the oceans for over 100 million years, and play a vital role in marine ecosystems. Green sea turtles and hawksbill sea turtles help maintain the health of seagrass beds and coral reefs—which are some of the most productive and biodiverse ecosystems in the world. Green sea turtles graze on seagrasses, which helps seagrass take in more nutrients. They also help make space for corals to grow by grazing on algae in coral reefs. Hawksbill sea turtles also support coral reef health by feeding on sponges, which naturally compete with corals for space, thereby

keeping sponge populations in check. Leatherback sea turtles, juvenile green sea turtles, olive ridley sea turtles, and hawksbill sea turtles are among some of the most important consumers of jellyfish, which can proliferate in the absence of predators and severely damage other marine species, including commercially important fish populations. Unsustainable fishing and other human causes of mortality suppress sea turtle populations and impair their ability to fill their key roles in marine ecosystems.

68. Sea turtles have a complex life cycle. After mating in the water, females come ashore to nest on beaches. The hatchling turtles that emerge from these nests immediately make their way to the ocean and often spend years at sea. Most sea turtle species exhibit high fidelity to the nesting beaches where they were born, as well as to particular coastal habitats where they feed and reproduce. The habitats they depend on can be located across entire oceans from one another, such that some species travel thousands of miles between where they are born, forage, and reproduce.

69. Despite the vital ecological roles they play, sea turtles are also among the most imperiled marine species, with six out of the seven sea turtle species in the world being either threatened or endangered.

70. Sea turtle populations have severely declined in the last century, leading to their listing as threatened or endangered under the ESA in the 1970s.

Since then, all sea turtle species found in the United States have remained threatened or endangered. Even as sea turtle numbers continue to decline, as reflected by nesting trends, fisheries continue to catch hundreds of thousands of sea turtles every year. Thanks in part to the widespread use of unsustainable fishing methods like longlining, commercial fisheries remain a major threat to the continued existence and recovery of sea turtles.

71. Longline fisheries, including the Hawai‘i deep-set and American Samoa longline fisheries, cause serious injury and death to individual turtles and overall harm to their populations. Typical injuries occur when turtles take baited hooks, resulting in hooking the turtle in the mouth or face or, worse yet, in the gut if the turtle swallows the hook. Turtles also become entangled in fishing line or hooked in their flippers. These animals breathe air and must be able to reach the surface to breathe. When held for long periods underwater, as is often the case for turtles caught with longline gear, the turtle may suffer lung injuries, become comatose, or drown. Turtles that are released alive often have hooks and fishing line still attached to them, which can cause additional and lasting injuries, and interfere with feeding, swimming, and breeding.

72. The species at issue in this case are all listed under the ESA as either threatened or endangered, in large part due to the impacts of unsustainable fishing. All are caught as bycatch, injured, and killed by the Hawai‘i deep-set and

American Samoa longline fisheries.

73. **Green sea turtles** are the largest hard-shelled sea turtle in the world. Adult green turtles are herbivores and feed mostly on algae and seagrass. As juveniles, they are omnivorous and feed on jellyfish, crab, shrimp, and snails. They are highly migratory and, depending on their life stage, can be found in the open ocean or coastal areas. Due in part to their omnivorous diet, juveniles are particularly likely to get caught on longline hooks while attempting to eat the bait. Green sea turtle populations continue to decline.

74. NMFS has designated eleven distinct population segments (“DPSs”) of green sea turtles, all of which are listed under the ESA. In the Pacific, NMFS has identified six DPSs: East Pacific (threatened), Central North Pacific (threatened), East-Indian West Pacific (threatened), Central West Pacific (endangered), Southwest Pacific (threatened), and Central South Pacific (endangered).

75. **Hawksbill sea turtles** are named after their unique beak-like mouth that resembles a hawk, which they use to consume sponges, soft coral, and algae. Due to their fondness for eating sponges, they play an important role in maintaining coral reefs. Like other sea turtle species, they are highly migratory and travel widely in the open ocean. Hawksbill sea turtle populations continue to decline globally and are listed as endangered under the ESA.

76. **Olive ridley sea turtles** are one of the smallest sea turtle species and are named after the olive color of their shell. They are found primarily in tropical regions in the Pacific, Indian, and Atlantic Oceans. Their diet consists of jellyfish, tunicates, and salps. The bycatch rate is particularly high for this species in the Hawai‘i deep-set longline fishery because olive ridleys hunt for food in deep water, at the same depths the Hawai‘i deep-set longline fishery’s gear hangs its baited hooks.

77. NMFS divides olive ridley sea turtles into two breeding populations (Mexico’s Pacific coast breeding population and all other breeding populations). The Mexico Pacific breeding population is listed as endangered and all other breeding populations are listed as threatened under the ESA. Olive ridley sea turtle populations continue to decline and incidental capture in commercial longline fisheries remains a significant threat.

78. **Loggerhead sea turtles** are named after their large head and powerful jaw, which allows them to feed on hard-shelled organisms like conch, whelks, and crabs. NMFS has identified two distinct population segments in the Pacific, both of which are listed as endangered: the North Pacific Ocean DPS and the South Pacific Ocean DPS. Both populations have dramatically decreased in the last few decades. The North Pacific DPS has declined by up to 90 percent in the last 60 years. The South Pacific DPS has experienced a similarly dramatic decline: estimates indicate

that only about 500 nesting females remain in the South Pacific DPS, down from the 3,500 females that nested in 1977.

79. **Leatherback sea turtles** are the largest of all living sea turtle species, weighing between 750 and 1,000 pounds and measuring up to 6 feet long. They are the only species of sea turtles that lacks a hard shell. Instead, their carapace is formed by a tough layer of rubbery skin, which allows them to grow faster than hard-shelled sea turtles. They have scissor-like jaws and feed almost exclusively on jellyfish. Leatherback sea turtles dive to great depths, with the deepest recorded dive reaching 4,000 feet; deeper than any other sea turtle species and most marine mammals are known to dive.

80. The leatherback sea turtle is listed as endangered under the ESA. Pacific leatherback populations have declined precipitously, putting the species at imminent risk of extinction. The largest remaining nesting population in the Western Pacific, which accounts for 75 percent of the Western Pacific population, has declined by over 80 percent, while nesting activity in the Eastern Pacific population has declined by over 90 percent.

### **Marine Mammals and Sharks**

81. The Hawai'i deep-set longline and American Samoa longline fisheries also adversely affect numerous marine mammal and shark species by hooking or entangling them as well as by competing with those animals for food.

82. **The Main Hawaiian Island insular false killer whale** lives in tropical and subtropical areas, particularly around the Hawaiian Islands, and is found in deep offshore waters. They are members of the dolphin family and share similarities to killer whales, including the shape of their skull and their ability to form strong and long-lasting social bonds. False killer whales feed on pelagic species such as tuna, mahi mahi, and wahoo. As cooperative predators, they share the prey among their group, which usually consists of 15 to 25 individuals. The Hawai‘i deep-set longline fishery and the American Samoa longline fishery target the same species the false killer whale relies on for food.

83. The Main Hawaiian Island insular false killer whale is listed as endangered under the ESA and depleted under the MMPA. In July 2018, NMFS designated critical habitat for the false killer whale. The critical habitat covers waters from the 45 to the 3,200 meter depth contour around the Main Hawaiian Islands from Niihau to Hawai‘i. While the Hawai‘i deep-set longline fishery does not operate in the same geographic area as the newly designated critical habitat, the fishery targets and catches fish species that false killer whales eat and NMFS considers the quantity, availability, and quality of prey species to be an essential feature of critical habitat.

84. **Sperm whales** are the largest of the toothed whales, weighing up to 45 tons and measuring up to 52 feet long. They are found across the world’s

oceans in deep waters, where they routinely dive to around 2,000 feet deep. During these dives, sperm whales hunt and feed on squid, sharks, and other fish that inhabit deeper waters. Historically, sperm whales were targeted by the whaling industry from 1800 to around 1990 for their spermaceti, which is the oil sac found in their heads and previously used to produce oil lamps and candles. The whaling industry nearly drove all sperm whale populations to extinction and the species is still recovering. Sperm whales are listed as endangered under the ESA and depleted under the MMPA.

85. **Scalloped hammerhead sharks** are known for their “hammer-shaped” heads, which they use to locate prey buried in the sea floor. Their diet includes squid, rays, sharks, and fish. They are found globally in both offshore and nearshore areas. Adult scalloped hammerheads live offshore and dive as deep as 900 feet but move to shallower areas to pup. Adult scalloped hammerhead sharks in Hawaiian waters reach an average length of about 7 feet. While scalloped hammerhead sharks are usually solitary, they also form large schools of hundreds of adults. This behavior has made them particularly vulnerable to commercial fishing, and they have been targeted around the world for their highly valuable fins. The Indo-West Pacific DPS of scalloped hammerhead shark is listed as threatened under the ESA.

**III. The Hawai‘i Deep-Set Longline Fishery and American Samoa Longline Fishery Continue to Exceed Incidental Take Limits for Multiple Threatened and Endangered Species, Causing Significant Harm While NMFS Delays Completing Consultation.**

86. NMFS’s delay in completing consultations for the Hawai‘i deep-set longline and American Samoa longline fisheries is all the more unreasonable and risky because these fisheries have continued to exceed incidental take limits for multiple sea turtle species.

87. Indeed, both fisheries have exceeded incidental take limits for one or more sea turtle species every year since those limits were last established in 2017 for the Hawai‘i deep-set longline fishery and 2015 for the American Samoa longline fishery.

88. Meanwhile, NMFS has allowed these fisheries to operate for approximately four years without completing the legally required consultations necessary to determine the long-term impacts of this ongoing, excessive take on those species’ ability to survive and recover.

89. The current biological opinions that apply to each fishery establish separate numerical limits for the number of a particular species the fishery incidentally takes—that is, catches, harms, harasses, or kills—and the number of those takes that result in death—that is, mortalities. NMFS applies these limits on an averaged three-year rolling basis. Specifically, NMFS records the number of incidental takes that occur on an annual basis. To determine whether the fishery

has exceeded incidental take limits for a given species, NMFS adds three years of take together and divides the total by three to calculate the three-year average—that is, the average number of incidental takes per year during that three-year period. If that average is above the incidental take limit, the fishery has exceeded the take limit for the species. The incidental take statement applies to every three-year period. For example, the average take for the 2016–2018 period must be at or below the take limit; the same goes for the 2017–2019 period, the 2018–2020 period, etc. Exceeding either the incidental take limit for total takes or for mortalities triggers reinitiation of consultation.

**A. The Hawai‘i Deep-Set Longline Fishery**

90. The Hawai‘i deep-set longline fishery operates subject to incidental take limits established in a 2014 biological opinion and a 2017 supplemental biological opinion. The 2017 Supplemental Biological Opinion established new incidental take limits for multiple sea turtle species after the fishery exceeded the limits established in the 2014 Biological Opinion. In particular, NMFS separated green sea turtles into 6 distinct population segments and established a separate incidental take limit for each one. Likewise, NMFS separated olive ridleys into two breeding populations and established a separate incidental take limit for each one. These changes significantly expanded the number of olive ridley and green sea turtles the fishery is authorized to take.

The incidental take limits that are currently in effect are shown below in Table 1:

Table 1 – Hawai‘i Deep-Set Longline Fishery’s Incidental Take Limits

Species	3-Year Limits	
	Takes	Mortalities
Loggerhead	18	13
Olive Ridley (Mexico and EP)	141	134
Olive Ridley (WP)	42	40
Green East Pacific	12	12
Green Central North Pacific	6	6
Green East Indian-West Pacific	6	6
Green Southwest Pacific	6	6
Green Central West Pacific	3	3
Green Central South Pacific	3	3
Leatherback	72	27
Scalloped Hammerhead Shark	6	3
Sperm Whale	9	6

91. Despite the expanded take limits in the 2017 Supplemental Biological opinion, the Hawai‘i deep-set longline fishery once again immediately exceeded the incidental take limits for olive ridley and green sea turtles. NMFS formally reinitiated consultation on October 4, 2018, to address the fishery’s incidental take exceedance.

92. The Hawai‘i deep-set longline fishery has continued to exceed the incidental take limits for the East Pacific DPS of green, olive ridley, and loggerhead sea turtles every single 3-year period since NMFS issued the 2017 Supplemental Biological Opinion and reinitiated consultation. Indeed, while NMFS has continued to delay completing consultation, the fishery has caught and/or killed nearly twice as many green sea turtles (East Pacific DPS) and olive

ridley sea turtles as the incidental take statement allows.

Table 2 – Hawai‘i Deep-Set Longline Fishery’s Incidental Take Numbers for Sea Turtles

Species	Take Limits		Recorded Takes					
	Total Take Allowed	Mortalities Allowed	2017-19		2018-20		2019-21	
			T	M	T	M	T	M
Loggerhead	18	(13)	16	(10.72)	23	(14.89)	24	(14.52)
Leatherback	72	(27)	26	(10.30)	57	(21.55)	53	(19.77)
Olive Ridley (Mx. & EP)	141	(134)	271.81	(259.04)	241.01	(228.80)	202.51	(190.43)
Olive Ridley (WP)	42	(40)	81.19	(77.37)	71.99	(68.34)	60.49	(56.88)
Green (EP)	12	(12)	32.9	(31.11)	22.4	(21.35)	29.4	(28.08)
Green (Central NP)	6	(6)	5.64	(5.33)	3.84	(3.66)	5.04	(4.81)
Green (East Indian-WP)	6	(6)	3.76	(3.56)	2.56	(2.44)	3.36	(3.21)
Green (SWP)	6	(6)	3.29	(3.11)	2.24	(2.14)	2.94	(2.81)
Green (Central WP)	3	(3)	0.47	(0.44)	0.32	(0.31)	0.42	(0.40)
Green (Central SP)	3	(3)	0.47	(0.44)	0.32	(0.31)	0.42	(0.40)

\*Numbers in red depict ITS exceedance and numbers in ( ) show mortalities within the total number of take.

## **B. The American Samoa Fishery**

93. NMFS last completed a biological opinion on the effects of the American Samoa longline fishery on ESA-listed species in 2015. The 2015 Biological Opinion established the following incidental take limits for green sea turtles, hawksbill sea turtles, and olive ridley sea turtles, among other species. The incidental take limits that are currently in effect are shown below in Table 3:

Table 3 – American Samoa Longline Fishery’s Incidental Take Limits

Species	3-Year Limits	
	Takes	Mortalities
Loggerhead (South Pacific)	6	3
Leatherback	69	49
Olive Ridley	33	10
Green (Central South Pacific)	30	27
Green (Southwest Pacific)	20	17.82
Green (East Pacific)	7	6.48
Green (Central West Pacific)	2	1.62
Green (East Indian-West)	1	1.08
Hawksbill	6	3
Scalloped Hammerhead Shark	36	12

94. NMFS reinitiated consultation in response to the fishery exceeding prior incidental take limits and issued a new biological opinion in 2015. That opinion, which remains in effect, significantly increased the incidental take numbers for hawksbill, olive ridley, loggerhead, and leatherback sea turtles. NMFS also increased the overall allowable incidental take of green sea turtles by assigning a separate incidental take limit for the newly designated green sea turtle DPSs.

95. Immediately after NMFS issued the 2015 Biological Opinion, the fishery exceeded its incidental take limits for four of the green sea turtle distinct population segments, as well as olive ridley and hawksbill sea turtles.

96. In response to that exceedance, NMFS reinitiated consultation on April 3, 2019.

97. Since NMFS reinitiated consultation in 2019, the American Samoa

longline fishery has continued to exceed incidental take limits for olive ridley and hawksbill sea turtles, as well as the five distinct population segments of green sea turtles.

Table 4 – The American Samoa Longline Fishery’s Incidental Take Numbers for Sea Turtles

Species	Take Limits		Recorded Takes							
	Total Take Allowed	Mortalities Allowed	2016-18		2017-19		2018-20		2019-21	
			T	M	T	M	T	M	T	M
Loggerhead (South Pacific)	6	(3)	0	0	0	0	0	0	0	0
Leatherback	69	(49)	10.6	(7.21)	15	(10.28)	12	(8.29)	14	(9.62)
Olive Ridley <sup>1</sup>	33	(10)	36.2	(23.53)	43	(32.92)	31	(23.72)	26	(19.56)
Green (Central South Pacific)	30	(27)	31.9	(29.35)	34	(32.32)	23	(21.86)	18.5	(17.66)
Green (Southwest Pacific)	20	(17.82)	21.1	(19.41)	22.44	(21.33)	15.18	(14.43)	12.21	(11.66)
Green (East Pacific)	7	(6.48)	7.1	(6.53)	8.16	(7.76)	5.52	(5.25)	4.44	(4.24)
Green (Central West Pacific)	2	(1.62)	1.7	(1.56)	2.04	(1.94)	1.38	(1.31)	1.11	(1.06)
Green (East Indian-West)	1	(1.08)	1.2	(1.1)	1.36	(1.29)	0.92	(0.87)	0.74	(0.71)
Hawksbill	6	(3)	20.4	(20.4)	8	(8)	5	(5)	2	(2)

\*Numbers in ( ) indicate the mortalities within the total number of takes.

<sup>1</sup>The 2015 BiOp does not divide olive ridley sea turtles into separate breeding populations.

#### **IV. NMFS Has Not Completed the ESA Required Consultations on the Effects of the Hawai‘i Deep-Set Longline and American Samoa Fisheries on Threatened and Endangered Species.**

98. 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 fisheries, and NMFS’s Office of Protected Resources is the consulting agency.

99. NMFS's delays in completing consultations to ensure that these fisheries do not jeopardize multiple listed species or adversely modify their critical habitat have stretched for more than four years. On February 7, 2019, Plaintiffs CCH and Michael Nakachi notified NMFS of their intent to sue under the ESA because NMFS had failed to complete—or, in the case of the American Samoa longline, even reinstate—formal consultation on the effects of multiple fisheries on oceanic whitetip sharks.

100. The agency responded to the notice on April 4, 2019, stating that NMFS had reinstated consultation on the Hawai'i deep-set longline fishery on October 4, 2018, and on the American Samoa longline fishery on April 3, 2019. At that time, NMFS stated that it planned to complete consultations with respect to the fisheries' effects on all affected ESA-listed species by July 5, 2019, and September 1, 2019, respectively.

101. Hoping to resolve the matter without litigation, Plaintiffs' counsel maintained regular communication with NMFS over the next three years and received repeated assurances that biological opinions addressing all affected species (not just oceanic whitetip sharks) would be completed in a matter of months. However, NMFS repeatedly failed to live up to those assurances.

102. For example, in June 2020, NMFS informed the Western Pacific Fishery Management Council that the American Samoa and Hawai'i deep-set

longline fisheries biological opinions were “in their final draft stages and being prepared for review,” with anticipated completion dates of September and October 2020, respectively. In December 2020, NMFS reiterated that the opinions were “in the final stages” and assured the Council that the American Samoa opinion was “on track” to be released in December 2020 (i.e., later that month) and the Hawai‘i deep-set would be released in February 2021. By June 2021, NMFS still had not finalized either biological opinion, but claimed the consultations were “in the last stages” and anticipated completing the American Samoa opinion in August 2021 and Hawai‘i deep-set opinion in January 2022. In December 2021, however, NMFS reported that it would instead complete the Hawai‘i deep-set opinion in March 2022 and the American Samoa opinion in April 2022. Those dates passed without NMFS completing either biological opinion.

103. On May 17, 2022, after NMFS changed its expected completion dates of the biological opinions at least nine times, Plaintiffs filed suit in the District Court of Hawai‘i challenging the agency’s failure to complete the consultations for the oceanic whitetip shark. *Conservation Council for Hawai‘i v. National Marine Fisheries Service*, No. 1:22-cv-00224 (D. Haw. filed May 17, 2022).

104. Faced with the prospect of having to litigate the matter, NMFS informed the Court and parties that it intended to issue supplemental biological opinions addressing the effects of the Hawai‘i deep-set and American Samoa

longline fisheries on oceanic whitetip sharks and giant manta rays only, while continuing to defer completing consultation on the remaining species. NMFS completed the supplemental biological opinions on September 28, 2022, and October 27, 2022, respectively.

105. NMFS has yet to complete a new biological opinion addressing the Hawai‘i deep-set or American Samoa longline fishery’s impacts on the numerous other sea turtle, whale, and shark species they adversely affect, despite their ongoing, unsustainable impacts to multiple species. Instead, repeating a familiar pattern, NMFS has stated that it intends to complete these consultations in May 2023 but has refused to commit to meeting any definite deadline.

106. Instead of completing the requisite biological opinions, NMFS has issued a series of interim determinations for the Hawai‘i deep-set longline fishery and the American Samoa fishery, which purport to find that the fisheries will not cause jeopardy to the adversely affected species during the extended consultation period.

107. However, the ESA requires NMFS to ensure through completed consultations culminating in new biological opinions that the fisheries’ impacts will not jeopardize the species or destroy or adversely modify their critical habitat. Looking at the impacts over short snapshots of time merely masks the long-term effects on survival and recovery that the ESA requires NMFS to analyze. In the

meantime, these fisheries continue to catch, injure, and kill listed species and compete with them for food, all without the safeguards the ESA requires. NMFS's continued delay in completing new biological opinions year after year, even as the fisheries continue to injure and kill far more individuals than NMFS has ever determined to be sustainable, is making it more likely those impacts will impair the species' chances of survival and recovery.

### 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)).**

108. Paragraphs 1–107 are incorporated herein by reference.

109. 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” or destroy or adversely modify critical habitat. 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 or its critical habitat. *Id.*; 50 C.F.R. § 402.14(a).

110. NMFS's continued authorization of the Hawai'i deep-set longline fishery and American Samoa longline fishery operating under the Pelagic Fishery Ecosystem Plan 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 fishery management plans and their implementation “constitute ongoing agency action under the ESA”).

111. The duty to consult is ongoing. Federal agencies are required to reinitiate consultation under Section 7 of the ESA when, among other things, the amount or extent of taking specified in the incidental take statement is exceeded or when critical habitat is designated that may be affected by the identified action. 50 C.F.R. § 402.16(a).

112. NMFS reinitiated consultation on the effects of Hawai‘i deep-set longline fishery on October 4, 2018, in response to multiple triggers, including the fishery exceeding its incidental take limit for on the East Pacific DPS of green sea turtles, the recent designation of critical habitat for false killer whale, and new information on the effects of the fisheries on leatherback sea turtles, scalloped hammerheads, and sperm whales.

113. NMFS reinitiated consultation on the effects of the American Samoa longline fishery on April 3, 2019, in response to multiple triggers, including the fishery exceeding its incidental take limits for four DPSs of green sea turtles, olive ridley sea turtles, and hawksbill sea turtles, and new information on the fishery’s effects on leatherback sea turtles and scalloped hammerheads.

114. In the approximately four years since NMFS reinitiated these

consultations, the fisheries have continued to exceed incidental take limits for green sea turtles, loggerhead sea turtles, hawksbill sea turtles, and olive ridley sea turtles—all without NMFS evaluating how these mounting injuries and deaths will affect the species' long-term prospects for survival and recovery.

115. NMFS has continued to authorize the Hawai'i deep-set longline fishery for more than four years since it reinitiated consultation without completing the required consultation process and issuing a biological opinion addressing impacts to green, olive ridley, loggerhead, and leatherback sea turtles, sperm whales, and scalloped hammerhead sharks, as well as the critical habitat for the false killer whale. Likewise, NMFS has continued to authorize the American Samoa longline fishery for nearly four years without completing the required consultation process and issuing a biological opinion addressing impacts to green, olive ridley, loggerhead, hawksbill, and leatherback sea turtles and the scalloped hammerhead shark.

116. NMFS is in violation of its duties under the ESA and its implementing regulations to complete the required consultations and ensure that its authorizations of the Hawai'i deep-set longline fishery and the American Samoa longline fishery are not likely to jeopardize the continued existence of threatened and endangered species or destroy or modify their critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

117. 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 Consultations Within Reasonable Time.**

118. Paragraphs 1–117 are incorporated herein by reference.

119. 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.

120. The initiation of formal consultation requires NMFS to complete consultation and to issue 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).

121. Over four years since reinitiating consultation, NMFS has not completed a new biological opinion evaluating the Hawai'i deep-set longline fishery's effects on the green sea turtle, olive ridley sea turtle, loggerhead sea turtle, leatherback sea turtle, sperm whale, scalloped hammerhead shark, and false killer whale critical habitat.

122. After almost four years, NMFS also has not completed a biological opinion evaluating the American Samoa longline fishery's effects on the green sea turtle, olive ridley sea turtle, hawksbill sea turtle, loggerhead sea turtle, leatherback sea turtle, or the scalloped hammerhead shark.

123. 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).

124. 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). The statute contemplates that consultations should generally be completed in 150 days, *id.*, reflecting the expectation that the agency complete new biological opinions in a matter of months, not years.

125. NMFS’s multiyear delay in completing the legally required, reinitiated consultations and issuing 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).

126. NMFS’s unlawful delay in completing these required consultations and publishing biological opinions is resulting in continued unsustainable injury and death of multiple sea turtle species, as well as harm to scalloped hammerhead sharks and sperm whales, and to food sources that form critical habitat for the endangered false killer whale. 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.

127. 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 continued authorization of the Hawai'i deep-set longline fishery absent completed Section 7 consultations regarding the green sea turtle, loggerhead sea turtle, olive ridley sea turtle, leatherback sea turtle, sperm whale, scalloped hammerhead shark, and the Main Hawaiian Island insular false killer whale critical habitat violates 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's continued authorization of the American Samoa longline fishery absent completed Section 7 consultations regarding the green sea turtle, hawksbill turtle, olive ridley sea turtle, loggerhead sea turtle, leatherback sea turtle, and scalloped hammerhead shark violates the procedural and substantive requirements of ESA and its implementing regulations, 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14;

3. 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;

4. 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);

5. 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

6. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 22nd day of February, 2023.

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