



By Email

May 21, 2021

Michael Tosatto, Regional Administrator
Pacific Islands Regional Office
National Marine Fisheries Service
1845 Wasp Boulevard
Building 176
Honolulu, HI 96818

RE: Completion of Endangered Species Act Consultation for Deep-set Longline, American Samoa Longline, and Purse Seine Fisheries

Dear Administrator Tosatto:

On behalf of Conservation Council for Hawai'i and Kona-based Moana Ohana, we write to express our deep concern that the National Marine Fisheries Service ("NMFS") has not yet completed consultation on the effects of multiple federal fisheries on the oceanic whitetip shark and giant manta ray. On February 2, 2019, we sent NMFS a 60-day notice of intent to sue with respect to NMFS's failure to complete these biological opinions. We appreciate the agency's willingness to provide regular updates on the status of those consultations since then. We have refrained from litigating the matter based on NMFS's representations that it was completing important scientific analyses and expeditiously working towards completing the opinions. However, more than two years have passed, expected timelines for completing the biological opinions have continued to lengthen, and the Hawai'i deep-set longline ("DSLL"), purse seine, and American Samoa fisheries continue to injure and kill oceanic whitetip sharks and giant manta rays without an assessment of their effects on the survival and recovery of the species and without take authorization or the accompanying measures to minimize take.

We are particularly concerned that NMFS has pushed its expected completion date for the DSLL biological opinion to October 2021. We learned of this latest delay during the March 2021 Western Pacific Fishery Management Council meeting. This is more than two years past the original date of July 2019 NMFS originally reported to us, and 3-4 months past the date NMFS reported to us in February 2021. Fishery managers estimate the DSLL fishery takes between 664 and 2,578 oceanic whitetips per year.¹ That figure is in addition to take by the Hawai'i shallow-set, purse seine, and American Samoa fisheries, bringing maximum estimated take from the four fisheries to well over 3,500 oceanic whitetips per year. The best available

¹ Western Pacific Regional Fishery Management Council, *2018 Annual Stock Assessment and Fishery Evaluation Report Pacific Island Pelagic Fishery Ecosystem Plan 284* (2019).

science shows that oceanic whitetips in the Central and Western Pacific cannot survive, much less recover, under existing fishing pressure.² NMFS must implement stringent take and catch limits, as well as other measures—and must do so swiftly—to finally satisfy its ESA obligations.

NMFS has repeatedly suggested that it has delayed completing the DSLL biological opinion in order to complete necessary modeling and analysis. While we support fully incorporating the best available science, as the Endangered Species Act (“ESA”) requires, the law does not direct—or even allow—NMFS to continue to delay establishing incidental take limits and other essential protective measures while it pursues more modeling. Nonetheless, given that NMFS intends to take 3-4 more months to finalize the biological opinion in order to incorporate scientific analysis, it must use that time to ensure the biological opinion meets ESA mandates by analyzing and incorporating all measures that would reduce catch and mortality of these species while safeguarding other protected species such as sea turtles, seabirds, and marine mammals.

We presented an overview of these measures in our March 19, 2021 comments to the Western Pacific Fishery Management Council (attached). The monofilament leader requirement that NMFS and the Council have discussed is a beneficial step, and we are glad the Council is moving forward with it. However, that measure alone is unlikely to be sufficient to protect this highly vulnerable population. Furthermore, there is no need for NMFS to wait for the Council to formally adopt that measure (or any other protective measure) in order to include it in the biological opinion. NMFS bears the responsibility under the ESA to determine what measures are necessary to avoid jeopardy, minimize take, and promote recovery; it may not rely on the Council to make those determinations for it.

The best available science and applicable law support also requiring hard caps on oceanic whitetip bycatch, corrodible non-stainless-steel hooks, and gear configurations that eliminate shallow hooks. The analysis NMFS presented at the March 2021 Council meeting showed that a combination of removing the shallower hooks, switching to monofilament line, and cutting trailing gear resulted in a 60% reduction in mortality—nearly double the mortality reduction NMFS estimated to occur with monofilament leaders alone. Adding corrodible non-stainless-steel hooks would likely further decrease long-term injuries due to hooks in the shark’s jaw. Hard caps are necessary to ensure that take would be strictly constrained to levels that allow the population to recover. We request that NMFS incorporate a thorough analysis of these measures in the DSLL biological opinion and require all measures it finds to be effective in reducing oceanic whitetip take and mortality while not negatively effecting other species as reasonable

² Young, C.N. and Carlson, J.K., The biology and conservation status of the oceanic whitetip shark (*Carcharhinus longimanus*) and future directions for recovery, *Rev. Fish Biol. Fisheries* (2020) 30:293–312, [https://doi.org/10.1007/s11160-020-09601-3\(0123456789\(\).,-volIV\)](https://doi.org/10.1007/s11160-020-09601-3(0123456789().,-volIV)

and prudent alternatives or reasonable and prudent measures, as appropriate.³ We expect that the agency will use the additional time between now and October to complete this work.

While we hope to continue a constructive dialogue with NMFS, the agency must recognize that further delays in completing biological opinions and establishing crucial protections for oceanic whitetip sharks are not acceptable. Please do not hesitate to contact us with any questions or updates.

Sincerely,



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Attachment: March 19, 2021 Letter from Earthjustice to Western Pacific Fishery Management Council

³ We also request that NMFS require the use of circle hooks in the American Samoa fishery, as outlined in the attached letter.