



April 2, 2019

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Wilbur Ross, Secretary
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

**RE: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act
in Connection with Authorizing Atlantic Highly Migratory Species Fisheries**

Dear Mr. Oliver, Ms. Hogan, Mr. Risenhoover, and Mr. Ross:

On behalf of Defenders of Wildlife and the Center for Biological Diversity, we write to notify you of violations of section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536, in connection with the National Marine Fisheries Service’s (“NMFS”) failure to reinstate and complete consultations regarding the effects of its continued authorization of fisheries managed under the Atlantic Highly Migratory Species Fishery Management Plan (“HMS FMP”) on the oceanic whitetip shark and the giant manta ray. By failing to complete consultation, NMFS is failing to ensure that its activities do not jeopardize the continued existence of these species. Complying with the section 7 duty is particularly critical for these two species because NMFS has not extended substantive protections to the shark or manta ray under section 4(d) of the ESA.

NMFS issued its final rules listing the oceanic whitetip shark (*Carcharhinus longimanus*) and the giant manta ray (*Mobula birostris*, formerly known as *Manta birostris*) as threatened species in January 2018. 83 Fed. Reg. 4153 (Jan. 30, 2018) (oceanic whitetip

shark); 83 Fed. Reg. 2916 (Jan. 22, 2018) (giant manta ray). NMFS’s listing decisions recognize that continued fishing pressure is a major factor in both species’ decline. 83 Fed. Reg. at 4162; 83 Fed. Reg. at 2918–19, 2924. However, NMFS continues to allow fisheries managed under the HMS FMP (the “HMS Fisheries”) to catch both of these species as bycatch, as well as catch oceanic whitetips as targeted catch, without having completed consultation on the effects of such fishing or issuing an incidental take statement concerning the fisheries’ take of either species.

NMFS has recognized the need to reinitiate consultation on the HMS fisheries following the listing of the oceanic whitetip shark and giant manta ray. However, so far as we are aware, NMFS has not begun consultation on all HMS Fisheries that affect the oceanic whitetip and giant manta ray, in violation of ESA section 7 and its implementing regulations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16. Moreover, NMFS has not *completed* consultation on any of the HMS Fisheries that affect these species, and thus has failed to ensure that its ongoing authorization of these fisheries is not likely to jeopardize the continued existence of the oceanic whitetip shark or giant manta ray, in violation of ESA section 7(a)(2). 16 U.S.C. § 1536(a)(2). This letter constitutes notice required by section 11(g)(2)(a)(i) of the ESA prior to commencement of legal action. *Id.* § 1540(g)(2)(a)(i).

I. THE ENDANGERED SPECIES ACT

Section 7 of the ESA imposes a continuing and affirmative duty on federal agencies 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” its critical habitat. 16 U.S.C. § 1536(a)(2). “Action” is defined to include the promulgation of regulations; actions that may directly or indirectly cause modifications to the land, water, or air; and granting of licenses and permits. 50 C.F.R. § 402.02. In this case, where NMFS is both the action agency authorizing the fishery and the consulting agency tasked with conserving the oceanic whitetip and giant manta ray, NMFS’s Office of Sustainable Fisheries must consult with its Office of Protected Resources.

The duty to consult is triggered whenever an action “may affect” a listed species or critical habitat, or when a new species is listed that may be affected by the action or new information reveals that the action may affect an endangered or threatened species in a manner or to an extent not previously considered. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.12, .16. The duty to consult is ongoing. ESA regulations reflect that obligation by requiring reinitiation of consultation in four circumstances:

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;

- (b) 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;
- (c) 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
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16. This requirement applies to FMPs and NMFS's implementation of FMPs. *Greenpeace Found. v. Daley*, 122 F. Supp. 2d 1110, 1121 (D. Haw. 2000); *see also 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").

Both the action agency and the consulting agency must "use the best scientific and commercial data available" in evaluating the action's effects. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d), (g)(8). The consultation concludes in the issuance of a biological opinion that determines 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). Jeopardy exists if an action reasonably would be expected, directly or indirectly, to appreciably reduce the likelihood of the survival or recovery of a listed species in the wild. 50 C.F.R. § 402.02; *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 931–33 (9th Cir. 2008). If NMFS concludes that the proposed action is likely to jeopardize the species, it must specify reasonable and prudent alternatives that would avoid the likelihood of jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

Another key aspect of the biological opinion is the incidental take statement. The ESA requires NMFS to provide an incidental take statement when the agency anticipates that incidental taking of a threatened or endangered species will occur. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). This requirement applies even if take of the species is not prohibited by statute or regulation. *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 910–11 (9th Cir. 2012). The statement must specify the permissible level of taking. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(i); *see Salazar*, 695 F.3d at 911 (explaining purpose of this requirement is to "serve[] as a check on the agency's original decision that the incidental take of listed species resulting from the proposed action will not [jeopardize the continued existence of the species]" (second alteration in original) (citation omitted)). In addition, the incidental take statement must specify reasonable and prudent measures that NMFS considers necessary or appropriate to minimize the effects of take, as well as reporting requirements and other terms and conditions with which the action agency must comply in order to implement the reasonable and prudent measures. 16 U.S.C. § 1536(b)(4)(B); 50 C.F.R. § 402.14(i)(1).

Congress established the section 7 consultation process explicitly "to ensure compliance with the [ESA's] substantive provisions." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed

without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result.”); *see also 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.”); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056–57 (9th Cir. 1994) (“Only after the [agency] complies with § 7(a)(2) can any activity that may affect the protected [species] go forward.”). Therefore, until NMFS completes any necessary consultation, it is out of compliance with both its procedural and substantive section 7(a)(2) obligations.

Separately, ESA section 7(d) prohibits federal agencies, after the initiation of consultation, from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d). This prohibition is not an exception to the requirements of section 7(a)(2); it is *in addition to* the requirements of section 7(a)(2) and ensures that section 7(a)(2)’s substantive mandate is met. *See, e.g., Pac. Rivers Council*, 30 F.3d at 1056–57 & n.14; *Defenders of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 113 (D.D.C. 2011).

II. NMFS’S VIOLATIONS OF ESA SECTION 7(a)(2) DUTIES TO REINITIATE AND COMPLETE CONSULTATION WITH RESPECT TO THE OCEANIC WHITETIP SHARK AND GIANT MANTA RAY

A. NMFS Recently Listed the Oceanic Whitetip Shark and Giant Manta Ray as Threatened.

NMFS issued a final rule listing the oceanic whitetip shark as a threatened species on January 30, 2018. 83 Fed. Reg. 4153 (codified at 50 C.F.R. § 223.102(e)). NMFS explained that the species has “experienced significant historical and ongoing abundance declines in all three ocean basins [Atlantic, Pacific, and Indian] (*i.e.*, globally) due to overutilization from fishing pressure and inadequate regulatory mechanisms to protect the species.” *Id.* at 4162. The Atlantic Ocean populations have declined between 50 and 88% from their historical levels. *Id.* NMFS also noted that the species “is extremely susceptible to incidental capture in both longline and purse seine fisheries throughout its range, and thus experiences substantial levels of bycatch-related fishing mortality from these fisheries.” *Id.* (citations omitted). The oceanic whitetip’s life history characteristics and low genetic diversity exacerbate the effects of fishing-related mortality on the species. *Id.*

NMFS issued a final rule listing the giant manta ray as threatened on January 22, 2018. 83 Fed. Reg. 2916 (codified at 50 C.F.R. § 223.102(e)). NMFS noted that the giant manta ray has declined significantly—by as much as 95 percent in some regions—and identified fishing as a factor in the species’ decline. *Id.* at 2918–19, 2924. While NMFS posited that fishing threats are more intense in the Pacific Ocean, even minimal targeted fishing or bycatch-induced mortality of giant manta rays in the Atlantic could significantly contribute to the species’ extinction risk, particularly if it were extirpated within the significant portion of its range. *Id.* at 2920–21, 2924.

B. NMFS's Ongoing Implementation of the Atlantic HMS FMP May Affect the Oceanic Whitetip Shark and Giant Manta Ray.

NMFS administers and implements the HMS FMP under authority of the Magnuson-Stevens Fishery Conservation and Management Act and the Atlantic Tunas Convention Act. NMFS authorizes the HMS Fisheries pursuant to the HMS FMP. The HMS Fisheries include the pelagic longline fishery, shark bottom longline fishery, shark drift gillnet fishery, shark recreational fishery, swordfish handgear fishery, tuna purse seine fishery, tuna recreational fishery, and tuna handgear fishery. NMFS implements the HMS FMP and authorizes the HMS Fisheries on an ongoing basis. *See* 16 U.S.C. § 1854(g)(1)(E); 50 C.F.R. pt. 635; *see also* 16 U.S.C. § 1855(d) (giving Secretary “general responsibility to carry out any fishery management plan”). NMFS accordingly has recognized that its continued authorization of the HMS Fisheries managed under the HMS FMP are agency actions subject to Section 7’s consultation requirements.¹

NMFS’s continued authorization of the HMS Fisheries results in bycatch of both oceanic whitetip sharks and giant manta rays, as well as direct catch of oceanic whitetip sharks, both of which adversely affect the species. Indeed, NMFS recognized in listing rules that fisheries management practices are “[f]ederal actions that may affect” the oceanic whitetip shark and giant manta ray. 83 Fed. Reg. at 4163; 83 Fed. Reg. at 2929. Despite its acknowledgement that authorizing and regulating fishing that harasses, injures, and kills oceanic whitetips and giant manta rays “may affect” the species, NMFS has yet to consult or complete consultation on those effects.

The U.S. Atlantic pelagic longline fishery — which targets primarily tuna and swordfish managed under the HMS FMP — catches both oceanic whitetip sharks and giant manta rays. This fishery catches substantial numbers of oceanic whitetip sharks as bycatch. Although NMFS has prohibited landing or retaining oceanic whitetip sharks by the pelagic longline fishery, 76 Fed. Reg. 53,652 (Aug. 29, 2011) (codified at 50 C.F.R. § 635.21(c)(1)), the fishery’s bycatch results in considerable harm and mortality to the sharks. According to NMFS data released under the Freedom of Information Act, observers have reported between 22 and 90 oceanic whitetips caught each year in this fishery since 2002 (with a median of 37). These figures represent the sharks observed

¹ *See, e.g.,* Nat’l Marine Fisheries Serv., *Endangered Species Act – Section 7 Consultation Biological Opinion: Continued Authorization of the Atlantic Shark Fisheries via the Consolidated HMS Fishery Management Plan as Amended by Amendments 3 and 4 and the Federal Authorization of a Smoothhound Fishery (F/SER/2011/06520)* 3 (2012); Nat’l Marine Fisheries Serv., *Endangered Species Act – Section 7 Consultation Biological Opinion: The Continued Authorization of Shark Fisheries (Commercial Shark Bottom Longline, Commercial Shark Gillnet and Recreational Shark Handgear Fisheries) as Managed under the Consolidated Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (Consolidated HMS FMP), including Amendment 2 to the Consolidated HMS FMP (F/SERJ2007/05044)* 2 (2008); Nat’l Marine Fisheries Serv., *Endangered Species Act – Section 7 Consultation Biological Opinion: Reinitiation of Consultation on the Atlantic Pelagic Longline Fishery for Highly Migratory Species*, at ii (2004).

caught in only 8% of sets; the actual bycatch numbers necessarily are substantially higher. Several studies have found that a significant proportion of oceanic whitetips that get hooked on longlines die by the time they are hauled back to the vessel: 25–77% of those bycaught die before reaching the vessel.² The rate of post-release mortality is presently unknown, but likely contributes to additional whitetip deaths. Bycatch in this fishery therefore has substantial adverse effects on the oceanic whitetip.³ The fishery also catches giant manta rays, causing take that may adversely affect that species.⁴

The other HMS Fisheries also take giant manta rays and oceanic whitetip sharks. The shark bottom longline fishery, directed shark drift gillnet fishery, shark drift net fishery, and other Southeast gillnet fisheries take giant manta rays as bycatch.⁵

The shark bottom longline fishery, shark drift gillnet fishery, shark recreational fishery, swordfish handgear fishery, tuna purse seine fishery, tuna recreational fishery, and tuna handgear fishery also take oceanic whitetips. Although catch of oceanic whitetips in these fisheries occurs primarily as bycatch, NMFS specifically authorizes targeted fishing for oceanic whitetip sharks under the HMS FMP. NMFS currently authorizes fishing for oceanic whitetips using bottom longline, gillnet, rod and reel, handline, and bandit gear. 81 Fed. Reg. 96,304, 96,319 (Dec. 29, 2016). NMFS authorizes both commercial fishers and recreational fishers to target, catch, and retain large pelagic sharks, which include oceanic whitetips. *See* 50 C.F.R. §§ 635.4(b), (c), (e)(3), 635.22(c), 635.24(a)(4). By expressly authorizing the targeting and retention of oceanic whitetip sharks under the HMS FMP, NMFS is taking action that clearly “may affect” the species.⁶

² Defenders of Wildlife, *A Petition to List the Oceanic Whitetip Shark (Carcharhinus longimanus) as an Endangered, or Alternatively as a Threatened, Species Pursuant to the Endangered Species Act and for the Concurrent Designation of Critical Habitat* 52–53 (submitted to NMFS Sept. 21, 2015) (citing studies) [hereinafter *Whitetip Petition*].

Observer data from the fishery show an average post-capture mortality rate of around 20%.
³ *See also* C.N. Young et al., *Status Review Report: Oceanic Whitetip Shark (Carcharhinus longimanus)* 71 (2017) (“[T]he species’ susceptibility to capture in longline fisheries is likely the main reason for its increased vulnerability overall.”) [hereinafter *Whitetip Status Review*]; *id.* at 76 (cautioning “that the efficacy of these prohibitions [on retention] is still largely unclear and overutilization may still be a threat to the species”).

⁴ Defenders of Wildlife, *A Petition to List the Giant Manta Ray (Manta birostris) as an Endangered, or Alternatively as a Threatened, Species Pursuant to the Endangered Species Act and for the Concurrent Designation of Critical Habitat* 84 (Nov. 10, 2015) [hereinafter *Manta Petition*]; 83 Fed. Reg. at 2929.

⁵ M.H. Miller & C. Klimovich, *Endangered Species Act Status Review Report: Giant Manta Ray (Manta birostris) and Reef Manta Ray (Manta alfredi)* 59 (2016); *Manta Petition* at 84.

⁶ Recreational HMS fishers in Puerto Rico took 132 oceanic whitetips in 2015, for example. NOAA Fisheries, *2017 Stock Assessment and Fishery Evaluation (SAFE) Report for Atlantic Highly Migratory Species* 99 (2018).

NMFS also authorizes numerous fisheries under the HMS FMP that catch and harm substantial numbers of oceanic whitetips as bycatch. According to the Oceanic Whitetip Status Review Report, oceanic whitetips are caught as bycatch in the Atlantic by purse seines, gillnets, trawls, and handlines, in addition to longlines as described above, in fisheries for tuna and tuna-like species.⁷ And NMFS has estimated (based on 2006–2010 data) that the Southeast snapper-grouper vertical line fishery takes as many as 400 oceanic whitetip sharks in a given year.⁸ The rates of post-capture and post-release mortality for oceanic whitetip sharks in these other fisheries are unknown, but bycatch likely results in considerable harm to the sharks.⁹

The best available scientific information shows that direct catch and bycatch of oceanic whitetip sharks and bycatch of giant manta rays in HMS Fisheries have substantial adverse effects on — and, at the very least, “may affect” — these species. For this reason, NMFS is required by ESA Section 7(a)(2) to reinitiate and complete consultation on the effects the HMS FMP and the fisheries it authorizes have on the oceanic whitetip shark and giant manta ray.

C. Continued Implementation of the HMS FMP Violates ESA Section 7.

The ESA requires NMFS to insure, through the consultation process, that its actions are not likely to jeopardize the continued existence of any threatened species. 16 U.S.C. § 1536(a)(2). NMFS is not in compliance with this duty until the required consultation has been completed. *See id.* § 1536(b); *Pac. Rivers Council*, 30 F.3d at 1056–57. The ESA’s implementing regulations further specify that NMFS must reinitiate consultation if a “new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. § 402.16.

On January 22, 2018, and January 30, 2018, respectively, NMFS promulgated the final rules listing the giant manta ray and oceanic whitetip shark as threatened species. NMFS retains authority over and continues to implement the HMS FMP and to authorize the HMS Fisheries — agency actions under the ESA. *Cf. Greenpeace Found.*, 122 F. Supp. 2d at 1121 (reinitiation duty applies to FMP administration); *Greenpeace*, 80 F. Supp. 2d at 1145 (FMP administration is ongoing agency action). The HMS Fisheries catch, kill, and otherwise take oceanic whitetip sharks and giant manta rays as bycatch and, in some cases, catch, kill, and otherwise take oceanic whitetips as directed take.

NMFS therefore is required by ESA section 7(a)(2) to reinitiate and complete consultation to insure that its continued authorization of the HMS Fisheries will not jeopardize the continued existence of the oceanic whitetip shark and giant manta ray. NMFS has failed to timely reinitiate and complete consultation on the HMS Fisheries, in violation of the ESA

⁷ Whitetip Status Review, at 72.

⁸ Nat’l Marine Fisheries Serv., *U.S. National Bycatch Report First Edition Update 1*, at Table 4.1, p.15 (2013).

⁹ *See* Whitetip Petition, at 52–53. In addition, holders of shark incidental Limited Access Permits are permitted to retain bycaught oceanic whitetips. 50 C.F.R. § 635.24(a)(4)(iii).

and its implementing regulations. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16. NMFS therefore has violated and remains in ongoing violation of the ESA and its implementing regulations. In addition, NMFS's authorization of the HMS Fisheries prior to the completion of reinitiated consultation may violate ESA Section 7(d)'s prohibition on the irreversible or irretrievable commitment of resources. 16 U.S.C. § 1536(d). If NMFS fails to cure these violations within 60 days of receiving this letter, Defenders of Wildlife and the Center for Biological Diversity intend to file suit for declaratory and injunctive relief. *See* 16 U.S.C. § 1540(g)(1).

If you believe any of the foregoing is in error, have any questions, or would like to discuss this matter, please do not hesitate to contact me.

Sincerely,



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