

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAWAII LONGLINE ASSOCIATION)

Plaintiff,)

V.)

NATIONAL MARINE FISHERIES)
SERVICE, et al.,)

Defendants.)

Civil Action No. 1:01cv00765:CKK

Judge: Colleen Kollar-Kotelly

DECLARATION OF WILLIAM T. HOGARTH, PH.D.

1. I am the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration (NOAA) and Director of NOAA Fisheries (NOAA Fisheries). The Secretary of Commerce's authority to perform functions relating to the Endangered Species Act (ESA) and the Magnuson-Stevens Fishery Conservation and Management Act (MSA) has been delegated to me in my official capacity. This declaration is based on my official and personal knowledge and information.

2. Before becoming Assistant Administrator for Fisheries, I was the Deputy Assistant Administrator for Fisheries. I have held various positions in NOAA Fisheries since 1994 that uniquely qualify me to evaluate management of longline fisheries for highly migratory species (swordfish, tunas and sharks) and sea turtle protection. I was Chief of the national office for Atlantic Highly Migratory Species, and then served at different times as the Southeast and Southwest Regional Administrator, regions for which sea turtle fishery interactions and swordfish and tuna fisheries are prominent management issues. In the latter position I supervised federal fishery management in the western Pacific region. Prior to my tenure at NOAA Fisheries, I was the Director of the

conservation and management regime is appropriate and, if so, what that regime should be. However, if the Court does not permit the June 2002 regulations and the November 2002 biological opinion to stay in place, pending development of a long-term regime NOAA Fisheries will be required to take some short-term action to address concerns about increased takes and the absence of a valid incidental take statement. NOAA Fisheries' options for emergency actions include, as a last resort, closure of all of the affected fisheries, or imposition of emergency regulations, as discussed in Paragraph 15. Such emergency regulations would be based on the existing analysis and the best science available to the agency, which means that, in the absence of an opportunity to develop and analyze new information, those regulations would be similar or identical to the June 2002 regulations. For these reasons, NOAA Fisheries has moved the Court to reinstate the June 2002 regulations and the November 2002 biological opinion, and to remand both the regulations and the biological opinion to the agency for the proper administrative process on remand.

5. If the Court modifies its Order, and chooses not to vacate the biological opinion and regulations, this will obviate the need for emergency action. NOAA Fisheries will then proceed according to the following schedule. NOAA Fisheries Pacific Islands Regional Office (PIRO) and the Council are considering alternative fishery management measures that will comply with ESA standards for sea turtle protection. During the week of October 20, 2003, the Council is expected to meet for the second time to consider proposals to conform this fishery with ESA standards for sea turtle protection through the regular Council process for considering and recommending to NOAA Fisheries fishery management measures. PIRO, after considering any Council

recommendations, will propose a long-term action that would be the subject of consultation to NOAA Fisheries Office of Protected Resources (OPR), the office that issues biological opinions. If the Council does not recommend a long-term action at the October 2003 meeting or soon thereafter, PIRO will propose a long-term regime that will be the subject of the consultation. The proposed long-term action will be implemented under the Administrative Procedure Act, beginning with publication of a proposed rule in the Federal Register according to the process at 50 CFR 660.31. NOAA Fisheries will initiate ESA Section 7 consultation on those measures at that time.

6. The ESA provides that a consultation involving an applicant be completed within 90 days, but may be extended for up to an additional 59 days without an applicant's consent. 16 U.S.C. § 1536(b)(1)(B). NOAA Fisheries and Fish and Wildlife Service joint ESA consultation regulations provide that NOAA Fisheries must produce a biological opinion within 45 days after formal consultation is concluded. 50 C.F.R. § 402.14(e). Assuming that a proposed action is available for consultation shortly after the Council meeting on October 20, 2003, the statutory and regulatory deadline, without the extension, would permit NOAA Fisheries until February 2004 to issue a biological opinion, and, with the statutory extension, until late April 2004.

7. During this section 7 consultation, NOAA Fisheries will treat HLA as an applicant, according to 50 C.F.R. Part 402. Specifically, PIRO will provide HLA an opportunity to submit information for consideration during the consultation; consistent with the Court's rulings, NOAA Fisheries will provide HLA an opportunity to review draft biological opinions obtained through PIRO; OPR will discuss the basis of their biological determination with PIRO and HLA and seek PIRO and HLA's expertise in

identifying reasonable and prudent alternatives to the action if likely jeopardy is determined; and the Pacific Islands Regional Office will provide HLA with a copy of the final biological opinion.

8. Consultations on the FMP are extremely complicated. NOAA Fisheries must consider the effects of various different fisheries that occur over a large ocean area off Hawaii as well as off American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands. Such analyses are complex scientifically and logistically. Thoroughly analyzing the effects of these fisheries on threatened and endangered species and critical habitat that has been designated for them takes more time and resources than normal formal consultations. To complete this consultation, NOAA Fisheries must first identify, gather, and analyze, for the purposes of Section 7 baseline and effects determinations, new biological, human interaction, and nesting beach data for Pacific sea turtles that have become available since the November 2002 biological opinion was issued.

9. Further, in response to concerns raised by conservation groups and the regulated community, NOAA Fisheries has committed to undertaking several steps to develop and analyze new information for use in future consultations. First, OPR has contracted to hold a series of workshops to consider risk assessment methodologies and post-hooking mortality estimates specific to longline fisheries that would provide HLA, environmental interests, and parties from the western Pacific islands who are not represented by HLA, with opportunities to participate in the development of the effects analyses that are central to ESA consultation. Second, NOAA Fisheries is seeking experts to conduct an analysis of whether the prohibition of swordfish fishing and the time area closures for tuna fishing, pursuant to the regulatory regime that has now been

vacated, has resulted in or will result in what has been labeled "transferred effects." Transferred effects would occur if longline fishing vessels of other countries increase their fishing effort as a result of restricting U.S. longline fisheries; these foreign vessels do not necessarily adhere to sea turtle conservation measures comparable to measures imposed on U.S. longline vessels and, as a result, may incidentally take and kill more sea turtles than the U.S. longline fleet. HLA has argued that transferred effects exist and that the net result of this phenomenon is that restrictions on U.S. fishermen increase the takes of sea turtles. NOAA Fisheries does not believe that presently available information is adequate to verify or invalidate the existence of transferred effects nor the extent of such effects. Because this issue has been raised by HLA and may have implications for a determination whether the fishery is likely to jeopardize the continued existence of sea turtles, NOAA Fisheries intends to support further investigations into this issue. NOAA Fisheries does not expect this analysis to be completed before January 2004 at the earliest (depending on the availability of experts). NOAA Fisheries intends to consider any information developed through these analyses in this and other future biological opinions.

10. NOAA Fisheries is also waiting for the completion, analysis and peer review of the gear experiments currently underway in the Atlantic Ocean pelagic longline fishery before relying on data from those experiments in any Pacific longline rule-making. We agree with HLA that basing decisions on sound science is imperative and that implementing these measures widely before the experiment is even complete, not to mention analyzed, is not appropriate. In addition, NOAA Fisheries must analyze these results with respect to previous concerns about implementing measures tested in the

Atlantic in the Pacific without further testing. These experiments are intended to develop techniques for longline fishing for swordfish that minimize or avoid by catch and mortality of sea turtles. Some methods do appear promising. This research will be concluded in November 2003, but the results will not be fully analyzed and peer-reviewed until February 2004 at the earliest. For future long-term management, NOAA Fisheries may consider the possibility of reopening the swordfish portion of the longline fishery in Hawaii using fishing techniques or fishing gear modified in ways proven to conserve sea turtles, but would only do so if the resulting turtle take estimates remain consistent with ESA standards. In order to consider this information in the biological opinion, NOAA Fisheries will need time to develop this new information and to analyze it for proper consideration in a biological opinion.

11. For all of the above reasons, I have determined that any consultation on a long-term fishery management regime that will be complete and responsive to the concerns raised by HLA and other interested parties requires until June 1, 2004. NOAA Fisheries intends to complete a biological opinion on a proposed long-term fishery management regime on that date. Because many people, beyond the NOAA, HLA and the intervenors, are very concerned about this fishery and its interactions with endangered and threatened sea turtles, and because these concerns could well result in continued litigation, I believe that taking the time required to do a thorough analysis of the factors affecting this fishery is the responsible action. I believe that the best scenario would be to obtain HLA's concurrence on this schedule.

12. Should HLA, as applicant, not accede to extending the timeline for Section 7 consultation on these measures, as provided at 50 C.F.R. § 402.14(e), to permit

consultation to conclude and a biological opinion to issue by June 1, 2004, then NOAA Fisheries will complete the consultations and the written opinion within the statutory and regulatory time frame. However, most of the newer information will not be available to the agency until February 2004 at the earliest. Those charged with writing the biological opinion will need an opportunity to review that information and seriously consider it as part of consultation and as part of writing a biological opinion. As a result, even if NOAA Fisheries were to rely on the statutory extension and complete a biological opinion by April 2004, such a biological opinion would be written without benefit of a thorough analysis of some or all of the new information described above.

13. As part of the regulatory component of this action, NOAA Fisheries will be required to ensure the proposed action adheres to the National Environmental Policy Act (NEPA). The 2001 Final Environmental Impact Statement (FEIS) on this fishery provides a broad range of coverage for this fishery, but it will need to be updated through a additional environmental analysis. If the original FEIS can be applied to this proposed action, the additional NEPA analysis is not expected to slow processing of this action. However, if the proposed action is not within the range of alternatives analyzed in the 2001 FEIS, then additional NEPA analysis will require significant additional time. At this stage, we anticipate that the existing FEIS, as updated by additional environmental analysis, will suffice.

14. Before the Court are competing motions to reconsider its order of August 31, 2003, and to stay the effect of the vacatur of the 2002 biological opinion and the 2002 regulations for either 45 days, 90 days, or until NOAA Fisheries completes a new biological opinion. For the reasons discussed above, forty-five or even ninety days

are not sufficient to complete a formal consultation and prepare a biological opinion on an action of the size and complexity of the Western Pacific pelagic fisheries, which encompass a variety of different fisheries over the entire Hawaiian archipelago and portions of the western Pacific Ocean. Any new consultation and biological opinion must examine the effects of troll, handline, and sport, and expense fisheries as well as the longline fisheries on threatened and endangered species across that entire area. Any new consultation would also have to update the status of the various listed species and critical habitat in the action area, re-set the environmental baseline to include the impact of new actions that have occurred over the past year, and conduct new effects analyses, including analyses of cumulative effects.

15. Further, should the Court issue a short-term stay, rather than remanding without vacatur pending a full and deliberate administrative process, some action would be required to provide conservation and management until the longer-term administrative proceeding is completed. The Council at a meeting held yesterday recommended emergency action under MSA section 305(c). Under the MSA, NOAA Fisheries must determine whether the Council's proposed emergency reaction is "necessary and appropriate," and complies with other applicable law, including the ESA. NOAA Fisheries will consider this proposal over the next few days in order to make such a determination; however, NOAA Fisheries' preliminary reaction to the Council's proposal is that it would authorize a far higher number of sea turtle takes than NOAA Fisheries believes the scientific record supports. Even if NOAA Fisheries does not accept the Council's recommendation, NOAA Fisheries could take unilateral emergency action under the same MSA authority, or under the ESA. As a last resort, NOAA Fisheries could close the affected fisheries, including those in the other affected

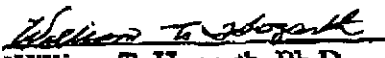
areas, pending completion of consultation.

16. In the absence of that drastic action, development and implementation of an interim emergency regime would distract both the Council and NOAA Fisheries from formulation of a long-term regime and would divert scarce resources to development of a temporary interim regime. Emergency regulations will require that NOAA Fisheries conduct consultation on those regulations. Certainly, the new information discussed in paragraphs 9 and 10 would not be available and could not be evaluated within such a short time period.

17. The Ocean Conservancy and the Turtle Island Restoration Network have been allowed to join this case, for limited purposes, as defendant-interveners. NOAA Fisheries is considering whether negotiations with all stakeholders would be an appropriate mechanism to develop a long-term fishery management regime. Negotiations with parties of such disparate views will take time, but in the long run will be the only process that keeps this issue out of the courts for the long term. We intend to encourage the Council to involve the fishing industry and conservation groups in seeking a long-term solution to this situation.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on September 24, 2003,


William T. Hogarth, Ph.D.
NOAA Fisheries
National Oceanic and Atmospheric Agency
1315 East West Highway
Silver Spring, Md. 20910