

COPY

COPY

NORTHWESTERN HAWAIIAN ISLANDS  
CORAL REEF ECOSYSTEM RESERVE ADVISORY COUNCIL

September 25, 2013

Mr. David Swatland  
Acting NOAA Superintendent  
Papahānaumokuākea Marine National Monument  
6600 Kalanianaʻole Highway, Suite 300  
Honolulu, Hawaiʻi 96825

Dear Mr. Swatland:

Thank you for scheduling National Marine Fisheries Service (NMFS) Pacific Islands Regional Office Director Michael Tosatto's July 26, 2013, presentation to the Reserve Advisory Council (RAC) about the proposed rule implementing the Shark Conservation Act of 2010 (SCA), Public Law 111-348. We have serious concerns whether proposed rule 50 CFR Section 600.1201(d) is authorized by the SCA.

To date, eight US states, including Hawaiʻi and three US Territories have exercised their police powers under the Tenth Amendment of the US Constitution and enacted legislation that bans the possession, transport or sale of shark fins. The California and Hawaiʻi laws, for example, clearly are not fisheries management measures. In fact the California law specifically notes that shark fins often contains high amounts of mercury which has been proven dangerous to human health. Federal courts have consistently upheld state laws banning the possession, transport or sale of certain products if they have been proven dangerous to the health of their citizens.

Footnote: While federal courts have sometimes applied the Supremacy Clause, federal preemption principles, and dormant commerce clause principles to strike down state laws that are held to conflict with federal law or place an undue burden on interstate commerce, federal agencies should not imply congressional intent to preempt state environmental laws absent a clear statement of preemptory language or a very clear and fundamental conflict between federal and state laws. See Learner, Howard A. 2008. Restraining federal preemption when there is an "emerging consensus" of state environmental laws and policies. *Northwestern University Law Review*, Vol. 102, No. 2.

The SCA clearly did not authorize the promulgation of a rule that provides "State and territorial statutes that address shark fins are preempted if they are inconsistent with the Magnuson-Stevens Act as amended by the Shark Conservation Act of 2010 . . ."

We recommend that NMFS remove section 600.1201(d) in the proposed rule.

As the Acting Superintendent, you are aware that the Northwestern Hawaiian Islands (NWHI) is one of the last intact predator-dominated coral reef ecosystems in the world. The top predators in this system are sharks and jacks. These predators are essential to the health and stability of the ecosystem. Recent research has demonstrated that sharks are highly migratory and move in and out of the Reserve and between the NWHI and the main Hawaiian Islands<sup>1</sup>.

The global appetite for shark fins is threatening shark species around the globe, including in the North Pacific and Papahānaumokuākea Marine National Monument. Therefore, the consumption of fins is a direct threat to Monument and Reserve resources. As the official advisory body for the Northwestern Coral Reef Ecosystem Reserve, we are obligated to make this recommendation which is consistent with the protection of Monument resources and the applicable Executive Orders.

Again we recommend that NMFS remove section 600.1201(d) in the proposed rule. We recognize that this letter is being submitted after the formal public comment period for the proposed rule closed; however, we request you forward this letter to the NMFS Assistant Administrator for consideration and response.

Sincerely,



Timothy E. Johns  
Advisory Council Chair  
Northwestern Hawaiian Islands  
Coral Reef Ecosystem Reserve

---

<sup>1</sup> Dale JJ, Meyer CG, Clark CE. (2011) The Ecology of Coral Reef Top Predators in the Papahānaumokuākea Marine National Monument. *Journal of Marine Biology*. 2011:1-14. doi:10.1155/2011/725602.