



Sent via certified mail and electronic mail

May 31, 2011

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RE: Notice of Intent to Sue for Violations of the Endangered Species Act Related to the Management of the Gulf of Mexico Shrimp Trawl Fishery and Petition for Emergency Closure

On behalf of the Center for Biological Diversity, Defenders of Wildlife, Turtle Island Restoration Network, and Sea Turtle Conservancy, this letter serves as a notice of our intent to sue the National Marine Fisheries Service (“Fisheries Service”) and the officials of State agencies of Louisiana, Mississippi, and Alabama (collectively, “States”) responsible for issuing commercial shrimp fishing licenses or permits in state waters, for violations of Sections 7 and 9 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, for actions and inactions related to the management and regulation of the shrimp trawl fishery that have resulted in and continue to result in illegal take of and other harm to protected species. This letter is provided

pursuant to the 60-day notice requirement of the citizen suit provision of the Act, 16 U.S.C. § 1540(g).¹ Additionally, this letter serves as a formal petition for the Fisheries Service to close the shrimp trawl fisheries in federal and state waters and take other actions to conserve protected species.

As discussed below, the Fisheries Service and the States have violated and continue to violate their duties under the ESA to protect and conserve threatened and endangered species. The Fisheries Service's and States' mismanagement of the Gulf of Mexico shrimp trawl fishery is resulting in staggering numbers of sea turtle strandings and deaths. In 2010 and 2011, sea turtle strandings in the northern Gulf of Mexico surged as hundreds of dead sea turtles washed ashore. The Fisheries Service's own data show that many of these sea turtles died from forced submergence from fishing gear, primarily attributable to the shrimp trawl fishery. Based on the information currently available and belief, the shrimp fishery's take of sea turtles has exceeded and continues to exceed the level of take authorized in the 2002 Biological Opinion. For the reasons set forth below, the Fisheries Service's and States' current management of the shrimp trawl fishery violates Sections 7 and 9 of the ESA.

Additionally, we officially petition the Fisheries Service to take actions to necessary to conserve sea turtles, as discussed in detail below.

I. BACKGROUND

A. Record sea turtle strandings in 2010 and 2011 continue

There has been an unprecedented increase in the past year in sea turtle strandings² attributable to the shrimp fisheries in the Gulf of Mexico. Five species of sea turtles inhabit waters in the Gulf of Mexico, loggerhead (*Caretta caretta*), green (*Chelonia mydas*), Kemp's ridley (*Lepidochelys kempii*), hawksbill turtle (*Eretmochelys imbricata*), and leatherback (*Dermochelys coriacea*). They are all protected under the Endangered Species Act. In 2011 alone there have been at least 603 documented sea turtle strandings in Texas, Alabama, Louisiana, and Mississippi.³ Because strandings represent only a small fraction of sea turtle deaths, likely only 5-6 percent, the total

¹ Claims under the Administrative Procedure Act and the National Environmental Policy Act (“NEPA”) are justiciable without a notice letter. The failure of the Fisheries Service to prepare a supplemental environmental impact statement to address new information brought to light by the Deepwater Horizon oil spill and recent sea turtle stranding data is a violation of NEPA. See 40 C.F.R. § 1502.9(c) (requiring agency to supplement NEPA document when “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (“if there remains major Federal action to occur, and the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared”) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989)). The shrimp trawl fishery is also presently operating under an invalid Biological Opinion, and the Fisheries Service has accordingly reinitiated consultation. Because a challenge to a Biological Opinion and NEPA are brought under the judicial review provisions of the Administrative Procedure Act, judicial review of these claims is immediately available.

² See Figures 1 and 2.

³ See Table 1. The total of 496 strandings does not include the 647 green sea turtle strandings from January 30 – February 12 that are likely attributable to cold stunning.

mortality of sea turtles is much higher.⁴

The Fisheries Service itself believes that many of the dead turtles are casualties of the shrimp fishery, which may have captured an increased amount of sea turtles as an indirect result of the oil spill.⁵ Jane Lubchenco, National Oceanic and Atmospheric Administration (“NOAA”) Administrator, stated that last year’s necropsies “on more than half of 600 carcasses point to the possibility that a majority may have drowned in fishing gear.”⁶ Fisheries Service officials working on sea turtle response have noted that there was “every indication that the vast majority of these mortalities are shrimp fishing related.”⁷ Necropsies of many of those turtles found sediment and shrimp in their stomachs, pointing to forced submergence in shrimp trawls.⁸ In fact, during a necropsy of a sea turtle stranded in 2010 Dr. Brian Stacey, a veterinarian with the Fisheries Service, found a piece of shrimp lodged in its esophagus and remarked “you don’t see shrimp consumed as a part of the normal diet...shrimp are very fast...the most plausible scenario where an animal would be able to ingest shrimp is in a fisheries net.”⁹ According to the Fisheries Service, “[t]he only known plausible cause of forced submergence that could explain this event is incidental capture in fishing gear.”¹⁰

Turtles may also be more vulnerable due to the *Deepwater Horizon* oil spill and response efforts. The health and fitness of some sea turtles in the Gulf of Mexico may have been compromised by oil exposure, making them more vulnerable to capture and drowning in fishing gear. In 2010, the *Deepwater Horizon* oil spill released at least 200 million gallons of oil. Response efforts included dumping 1.84 million gallons of dispersants into the Gulf of Mexico and in-situ burns on over 500 square miles of water. As a last resort to keep sea turtle hatchlings from swimming into the oil, nearly 28,000 eggs yielding 15,000 turtle hatchlings, including loggerhead, Kemp’s ridley, and green turtles were relocated from the Gulf of Mexico in an effort to avoid the oil spill.¹¹ The success rate of these turtles reaching maturity and returning to nest will be unknown for decades. It is undisputed that since the *Deepwater Horizon* oil spill “extraordinarily high numbers of threatened and endangered sea turtle strandings” have been documented.¹² Oiled turtles have been collected from Port Arthur, Texas, to Apalachicola Bay, Florida. Seaside

⁴ The 2002 Biological Opinion (“BiOp”) states that “strandings only account for between 5% and 6% of the total at-sea mortality.” BiOp at 43 (using conservative estimates).

⁵ Letter from David Bernhart to Roy Crabtree, Reinitiation of ESA Section 7 Consultation on Shrimp Trawling in the Southeastern United States (Aug. 17, 2010) (hereinafter “Reinitiation letter”) (“It appears that these sea turtles may have been more vulnerable to drowning in trawls, perhaps because of an as-yet unidentified effect of the BP Deepwater Horizon oil spill”).

⁶ Jane Lubchenco, Oil Spill Clarifies Road Map for Sea Turtle Recovery, available at http://www.nmfs.noaa.gov/mediacenter/docs/2011/mar/oil_spill_clarifies_road_map_for_sea_turtle_recovery.pdf.

⁷ Email from Barbara Schroeder, Fisheries Service National Sea Turtle Coordinator (July 7, 2010, 09:40:37) available at <http://www.scribd.com/doc/53915146/NOAA-Endangered-species-Oil-Spill-Response>.

⁸ Shaila Dewan, Turtle Deaths Called Result of Shrimping, Not Oil Spill, New York Times (June 25, 2010) (available at <http://www.nytimes.com/2010/06/26/science/earth/26turtle.html>). Also, necropsies of 26 of the turtles suggested that 19 of them had died from forced submergence.

⁹ Brent McDonald, *The Sea Turtles’ Plight* (Apr. 19, 2011), available at <http://video.nytimes.com/video/2011/04/19/us/10000000782274/the-sea-turtles-plight.html>.

¹⁰ <http://www.nmfs.noaa.gov/pr/species/turtles/gulfmexico.htm>.

¹¹ Marcia Dunn, *Turtle egg rescue at space center billed success*, Sept. 8, 2010, www.msnbc.com; NMFS, Sea Turtles and the Gulf of Mexico Oil Spill, <http://www.nmfs.noaa.gov/pr/health/oilspill/turtles.htm>.

¹² Reinitiation letter at 2.

residents report that dead turtles continue to wash up on a daily basis. As of November 2, 2010, the official number of turtles collected dead during response activities to the spill was 609.¹³ However, this tally of corpses underestimates total mortality because it does not include turtles that perished undetected or that were collected alive but could not be rehabilitated. The impact on stressed sea turtles may have been exacerbated by increased shrimp trawling effort and non-compliance with turtle excluder device (“TED”) and tow-time regulations in a rush to harvest shrimp before the Gulf fisheries closed over concerns of contamination.

B. Shrimp trawl fishery

The National Research Council concluded that shrimp trawling was the primary source of anthropogenic mortality for sea turtles in U.S. waters, estimating that shrimp trawling killed 44,000 Kemp’s ridley and loggerhead sea turtles annually during the 1980s,¹⁴ a time when recorded strandings were lower than at present.¹⁵ To reduce this mortality, most shrimp trawlers in the Atlantic and Gulf of Mexico must now use a TED, except for narrow circumstances when they may instead comply with tow-time restrictions.¹⁶

There are exceptions, however, to the requirement to use TEDs and enforcement is limited. Skimmer trawls are still not required to use TEDs. Instead, the Fisheries Service and some states have tow-time restrictions to reduce sea turtle mortality.¹⁷ These tow-time restrictions, however, are difficult to enforce.¹⁸ Compounding this threat, the proportion of skimmer trawls to otter trawls in the Gulf of Mexico shrimp fishery has been increasing over the past ten years.¹⁹ The Fisheries Service recently acknowledged that TEDs may be necessary in skimmer shrimp trawls due to high numbers of turtle strandings, but they are still not required.²⁰

In addition, much of the shrimp trawl fishery operates in state waters. State enforcement of TED requirements is not strong, and is non-existent in Louisiana which prohibits enforcement of the requirement with the use of state funds.²¹ Enforcement actions may be performed by both federal enforcement officers (NOAA and Coast Guard) and deputized state fish and wildlife officers. NOAA and the Gulf states have established Cooperative and Joint Enforcement Agreements

¹³ Deepwater Horizon Response Consolidated Fish and Wildlife Collection Report, Nov. 2, 2010, available at <http://www.restorethegulf.gov/news/transcripts-docs>.

¹⁴ National Research Council. 1990. *Decline of the Sea Turtles*. National Academy Press. Washington, D.C. 259 p.

¹⁵ See Figures 1 and 2.

¹⁶ 50 C.F.R. § 223.206(d)(2).

¹⁷ 57 Fed. Reg. 57348, *Threatened Fish and Wildlife; Threatened Marine Reptiles; Revisions to Enhance and Facilitate Compliance With Sea Turtle Conservation Requirements Applicable to Shrimp Trawlers; Restrictions Applicable to Shrimp Trawlers and Other Fisheries* (Dec. 4, 1992).

¹⁸ *Id.*

¹⁹ Scott-Denton, E., P. Cryer, J. Gocke, M. Harrelson, K. Jones, J. Nance, J. Pulver, R. Smith, and J.A. Williams. 2006. *Skimmer trawl fishery catch evaluations in coastal Louisiana, 2004 and 2005*. Marine Fisheries review 68(1-4): 30-35.

²⁰ See Gulf Coast Fisherman Newsletter, *DMR Offers Mississippi shrimpers free TED gear for skimmer trawls* (Aug. 1, 2010) (“The National Marine Fisheries Service (NMFS) has indicated that TED gear for Gulf of Mexico shrimpers using skimmer trawls may be required in the near future.”), available at <http://msucares.com/newsletters/gulf/201008.html>.

²¹ Louisiana Revised Statutes 56 section 57.2. Turtle excluder devised; findings; enforcement of federal requirements; rules and regulations.

under which federal agents may enforce federal law in state waters and state agents are deputized to enforce federal law in state waters.²²

The Fisheries Service's 2002 Biological Opinion ("BiOp") on the operation of the state and federal Gulf of Mexico and South Atlantic shrimp trawl fisheries considered the "the effect of shrimp trawling, as conducted under the TED regulations and the FMPs, on all listed species within Federal waters and on listed sea turtles within state waters."²³ It found that because TEDs release 97 percent of the turtles caught in shrimp trawls,²⁴ shrimp trawling activities would not jeopardize protected sea turtles.²⁵ The BiOp's incidental take statement authorized an annual take for all Gulf of Mexico and South Atlantic state and federal shrimp trawling of up to:²⁶

Sea turtle	Mortalities	Interactions
Loggerhead	3,948	163,160
Kemp's ridley	4,208	155,503
Green	514	18,757
Leatherback	80	3,090
Hawksbill	640	N/A

Due to the spike in sea turtles strandings in 2010, on August 17, 2010, the Fisheries Service reinitiated consultation on shrimp trawling's effects on sea turtles.²⁷ The Fisheries Service has acknowledged that take of other ESA-listed species has exceeded or is also likely to have exceeded annual authorized take levels.²⁸ On May 1, 2009, and February 18, 2010, the Fisheries Service also reinitiated consultation on the shrimp trawl fishery's effects on Gulf sturgeon and smalltooth sawfish, respectively, because take exceeded authorized levels for those species.²⁹ However, the Fisheries Service has not concluded the reinitiation of consultation with respect to any of the protected species.

II. VIOLATIONS OF LAW

A. The Endangered Species Act

The ESA was enacted, in part, to provide a "means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...[and] a program for the conservation of such endangered species and threatened species."³⁰ Section 2(c) of the ESA

²² VanderKooy, S.J. 2008. *Gulf of Mexico Cooperative Law Enforcement Strategic Plan 2005-2010 and Operations Plan 2009-2012*. Gulf States Marine Fisheries Commission. Ocean Springs, MS.

²³ National Marine Fisheries Service, Endangered Species Act: Section 7 Consultation Biological Opinion, Shrimp Trawling in the Southeastern United States, under the Sea Turtle Conservation Regulations and as Managed by the Fishery Management Plans for Shrimp in the South Atlantic and Gulf of Mexico (Dec. 2 2002) (hereinafter "BiOp") at 16.

²⁴ BiOp at 84 (citing 52 Fed. Reg. 24244, June 29, 1987).

²⁵ BiOp at 56.

²⁶ BiOp, Table 5 at 56.

²⁷ Reinitiation letter.

²⁸ See id.

²⁹ See id.

³⁰ 16 U.S.C. § 1531(b).

establishes that it is “the policy of Congress 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 this Act.”³¹ The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”³² Similarly, Section 7(a)(1) of the ESA directs that the Fisheries Service and other federal agencies shall use their programs and authorities to conserve endangered and threatened species.³³

In order to fulfill the substantive purposes of the ESA, federal agencies are required to engage in consultation with the Fisheries Service 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 adverse modification of habitat of such species...determined...to be critical.”³⁴ This provision is both procedural and substantive. The action agency must assess the effects of its actions on endangered species where the species may be present. When an agency determines that its proposed action “may affect listed species or critical habitat” it must engage in formal consultation with the federal resource agency responsible for the species at issue, known as the expert agency. 50 C.F.R. § 402.14(a). Where, as here, the Fisheries Service is both the action agency and the expert agency for purposes of the listed species in question, the agency must undertake internal consultation with itself.

Consultation shall be concluded within the 90-day period beginning on the date on which it is initiated or, under certain circumstances, another period.³⁵ If consultation will last longer than 150 days after initiation, the Fisheries Service must obtain consent to such a period from the agency requesting initiation.³⁶

Meanwhile, the action agency has an additional independent duty to comply with Section 7(a)(2)’s substantive requirement to insure that its actions are not likely to jeopardize the continued existence of species. This duty exists at all times and is not waived during consultation. If the biological opinion resulting from a consultation finds jeopardy, the opinion may specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action.³⁷ The Fisheries Service may also “suggest modifications” to the action during the course of consultation to “avoid the likelihood of adverse effects” to the listed species even if the modifications are not necessary to avoid jeopardy.³⁸

Because an agency’s duty to avoid jeopardy is continuing, “where discretionary Federal involvement or control over the action has been retained or is authorized by law,” the agency must in certain circumstances reinitiate formal consultation:³⁹

³¹ 16 U.S.C. § 1531(c)(1).

³² 16 U.S.C. § 1532(3).

³³ 16 U.S.C. § 1536(a)(1).

³⁴ 16 U.S.C. § 1536(a)(2) (Section 7 consultation).

³⁵ 16 U.S.C. § 1536(b).

³⁶ 16 U.S.C. § 1536(b).

³⁷ 16 U.S.C. § 1536(b).

³⁸ 50 C.F.R. § 402.13.

³⁹ 50 C.F.R. § 402.16.

- (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.

During reinitiation of consultation, an agency also must comply with Section 7(d)'s mandate that the agency, as well as any applicant for a federal permit, "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." Congress enacted Section 7(d) "to ensure that the status quo would be maintained during the consultation process, to prevent agencies from sinking resources into a project in order to ensure its completion regardless of its impacts to endangered species" *Washington Toxics v. EPA*, 413 F.3d 1024, 1034-35 (9th Cir. 2005). It was not initially part of the ESA, but added to prevent agencies from steamrolling activities in order to secure completion of projects. *National Wilderness Institute v. Corps*, 2005 U.S. Dist. LEXIS 5159 (D.D.C. Mar. 23, 2005).

Compliance with the biological opinion protects federal agencies, and others acting under the biological opinion from enforcement action under Section 9's prohibition against take.⁴⁰ "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."⁴¹ The Service has extended these protections to threatened species by protective regulations deemed necessary and advisable for the conservation of the threatened species, including sea turtles and Gulf sturgeon.⁴² Section 7(o)(2) provides that "any taking that is in compliance with the terms and conditions specified in a written statement under subsection (b)(4)[sic](iv) of this section shall not be considered to be a prohibited taking of the species concerned." However, take not in compliance with the biological opinion is in violation of Section 9 of the ESA.

Based on information available and our belief, the Fisheries Service and States are violating the ESA in the following ways:

1. The Fisheries Service and States are in violation of Section 9 of the ESA for unlawful take of endangered and threatened species because:
 - a. The shrimp trawl fishery has exceeded the take of smalltooth sawfish, Gulf sturgeon, and sea turtles allowed in the BiOp;
 - b. The Fisheries Service is violating the terms and conditions of the BiOp;

⁴⁰ See 16 U.S.C. § 1536(o)(2); 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31 (a).

⁴¹ 16 U.S.C. § 1532(19).

⁴² 16 U.S.C. § 1533(d); 50 C.F.R. § 17.42(b) (extending section 9 prohibitions to threatened sea turtles); 50 C.F.R. § 17.44(v) (extending section 9 to Gulf sturgeon).

- c. The Fisheries Service is violating the Reinitiation of Consultation provision of the BiOp, requiring that in “instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation”,⁴³ and
 - d. The Fisheries Service’s continued reliance on the BiOp is arbitrary and capricious given that it has acknowledged the measures prescribed in it are inadequate to protect imperiled sea turtles.
2. The Fisheries Service is in violation of Section 7 of the ESA for failing to:
- a. Insure its actions are not likely to jeopardize the continued existence of endangered and threatened species as required by Section 7(a)(2);
 - b. Complete consultation on the shrimp trawl fishery within the prescribed timeframe as required by Section 7(b);
 - c. Refrain from making any irreversible or irretrievable commitment of resources that may have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures; and
 - d. Request information regarding the presence of largetooth sawfish in shrimping areas or conduct a biological assessment if present, as required by Section 7(c).

B. Violations of ESA Section 9

Based on information and belief, the Fisheries Service and the States’ continued operation of the southeastern shrimp trawl fishery is directly resulting in unauthorized take of endangered and threatened species in violation of Sections 9 of the ESA.

The ESA “not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking....a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.”⁴⁴ Accordingly, the Fisheries Service, States, and all vessels and fishers in the Gulf of Mexico shrimp trawl fishery that engage in activities that result in the unauthorized take of sea turtles are acting in violation of Section 9 of the ESA.⁴⁵

The Fisheries Service has acknowledged that the southeastern United States shrimp trawl fishery has likely exceeded authorized take limits authorized in the BiOp for sea turtles, smalltooth sawfish and Gulf sturgeon. Therefore, take in excess in the amounts established in the BiOp is in violation of Section 9 of the ESA.

The Fisheries Service has also failed to comply with the terms and conditions contained in the BiOp. Incidental takings are not authorized during fishing activities if the takings “[w]ould

⁴³ BiOp at 59 (“pending” means “during,” thus the activities must cease until consultation is complete).

⁴⁴ *Strahan v. Coxe, et al.*, 127 F.3d 155 (1st Cir. 1997).

⁴⁵ The BiOp sets take authorization for both the Gulf of Mexico and South Atlantic Shrimp Trawl Fishery Management Plans as well as the TED regulations. Therefore the estimated take for the entire action has been exceeded, meaning that the South Atlantic fishery is also now operating without take authorization in violation of Section 9 of the ESA.

violate the restrictions, terms, or conditions of an incidental take statement.”⁴⁶ The incidental take statement includes requirements to use observer information to monitor sea turtle mortality from trawls, take appropriate action if stranding trends significantly increase, and monitor activities exempt from the requirement for TEDs to determine effects on sea turtles.⁴⁷ The Fisheries Service has not complied with these terms and conditions because:

- On information and belief, the Fisheries Service is violating terms 1(b)&(d) by not coordinating with the state of Louisiana to monitor fishing efforts or enforce sea turtle conservation regulations as Louisiana has prohibited the enforcement of TEDs use in state waters;⁴⁸
- Observer coverage is inadequate to monitor sea turtle mortality from trawls as required by term 1(c);
- The Fisheries Service is required to take appropriate action by term 1(d) but has taken no action, other than to reinitiate consultation, despite the spike in sea turtle strandings;⁴⁹
- The Fisheries Service is not sufficiently monitoring activities exempt from TEDs—a requirement of term 1(f);⁵⁰
- The Fisheries Service has not researched and implemented measures to reduce effort in the shrimp fishery thus reducing stress on sea turtles from multiple interactions in violation of term 4; and
- The Fisheries Service has not provided adequate training to the State agencies on the sea turtle conservation regulations nor adequately enforced sea turtle conservation regulations in violation of terms 3 & 5.⁵¹

Therefore, because the Fisheries Service is not complying with the terms and conditions specified in the incidental take statement, any take that results from shrimp trawl activities is in violation of Section 9 of the ESA.

Additionally, the Fisheries Service and states are in violation of the sea turtle conservation regulations, which require compliance with TEDS, tow time restrictions, and other measures to prevent sea turtle take. Accordingly, the Fisheries Service and states are in violation of Section 9 of the ESA and not protected by the incidental take statement for continuing approval of fishing activities that violate the sea turtle conservation regulations.

⁴⁶ 50 C.F.R. § 223.206(d)(4).

⁴⁷ BiOp at 57-58.

⁴⁸ Louisiana Revised Statutes 56 section 57.2. Turtle excluder devised; findings; enforcement of federal requirements; rules and regulations.

⁴⁹ The August 2010 letter requesting reinitiation of consultation found that “recent evidence of the lack of compliance with TED regulations, including the tow time provisions, now casts doubts onto the actual effectiveness of the regulations in protecting and conserving sea turtles populations.”

⁵⁰ The August 2010 letter requesting reinitiation of consultation acknowledges “vessels using skimmer trawls regularly exceeds these alternative tow time requirements, and monitoring tow times to ensure high compliance is time and man power prohibitive.”

⁵¹ The August 2010 letter requesting reinitiation of consultation stated “recent NOAA inspections of the east Texas shrimp fleet found problems in compliance with TEDs, despite the fact that a TED workshop had been conducted earlier that month which was attended by approximately 90 local fishermen.”

Finally, the Fisheries Service has repeatedly acknowledged that the reasonable and prudent measures and terms and conditions specified in the BiOp, such as tow time restrictions, proper use of TEDs, use of observers, and enforcement measures, are insufficient to protect sea turtles. Therefore, the Fisheries Service's continued reliance on the BiOp as an action agency is arbitrary and capricious and shrimp trawl activities that result in take of sea turtles is in violation of Section 9 of the ESA.

C. Violations of ESA Section 7

The Fisheries Service's continued authorization of the shrimp fishery during consultation violates Sections 7(a)(1), 7(a)(2), 7(b), and the Government's interpretation of Section 7(d) of the ESA. The shrimp fishery is currently operating on a BiOp that the Fisheries Service has admitted is inadequate. The Fisheries Service has reinitiated consultation due to the excessive take of protected species.

The failure to complete consultation has made it impossible for the Fisheries Service to comply with the substantive mandate of Section 7(a)(2) of the ESA, which requires each federal agency to "insure" that any action it funds, authorizes, or carries out is "not likely to jeopardize the continued existence of any endangered species or threatened species."⁵² The unprecedented turtle strandings are occurring at a level that has not been shown to avoid jeopardy, therefore the agency's failure to conclude consultation constitutes a failure to ensure against jeopardy. As the action agency authorizing the continued operation of the southeastern U.S. shrimp trawl fishery, the Fisheries Service maintains an ongoing and affirmative duty to comply with Section 7's substantive mandate regardless of the status of consultation.

The Fisheries Service has unreasonably and unlawfully delayed completing ESA Section 7 consultation within the required timelines on the continued operation of the southeastern United States shrimp trawl fishery. The Fisheries Service has been consulting since August 17, 2010, on effects on sea turtles (over 260 days). By delaying completion of consultation for two to eight times the recommended statutory time period, the Fisheries Service has delayed action mandated by law, in violation of the ESA and the Administrative Procedure Act.⁵³

The Fisheries Service's continued authorization of the shrimp fisheries during reinitiation of consultation also constitutes a violation of Section 7(d)'s prohibition on the irreversible and irretrievable commitments of resources that could result in foreclosing the formulation of implementation of reasonable and prudent alternative measures.

III. PETITION FOR EMERGENCY CLOSURE AND PROTECTIVE REGULATIONS

Given that hundreds of threatened and endangered sea turtles are washing up dead in the northern Gulf of Mexico, immediate action to close the shrimp trawl fishery that contributes to the take of protected sea turtles is warranted. Under the Administrative Procedure Act ("APA")

⁵² 16 U.S.C. § 1536(a)(2).

⁵³ 5 U.S.C. § 706(1).

right to petition for the “issuance, amendment, or repeal” of an agency rule, 5 USC § 553(e), we respectfully request that the Fisheries Service:

- Impose an emergency closure of the federal and state shrimp trawl fishery in the Gulf of Mexico for the protection of threatened and endangered sea turtles until the Fisheries Service promulgates rules requiring TEDs on all commercial shrimp trawls and nets and requiring 100 percent observer coverage, or a level of observer coverage adequate to enforce those regulations;
- Issue a determination as to the primary cause of the strandings and whether the strandings are wholly or in part due to the sea turtles’ contact with oil and dispersants;
- Prepare a supplemental environmental impact statement to address new information brought to light by the Deepwater Horizon oil spill and recent sea turtle stranding data and assess the impacts to sea turtles;
- Take other actions necessary to conserve sea turtles, including but not limited to effort reduction, area closures, and gear conversion.

The APA provides for emergency regulations to protect the human environment.⁵⁴ The Fisheries Service must promptly respond to this petition.⁵⁵

The ESA provides ample authority for the Fisheries Service to close the shrimp trawl fishery. The Fisheries Service may “promulgate regulations as may be appropriate to enforce the [ESA].”⁵⁶ Further, the Fisheries Service “may restrict fishing activities in order to conserve a species listed under the Act.”⁵⁷ Indeed, the regulations command that the Assistant Administrator “will take such action” if the Assistant Administrator “determines that restrictions are necessary to avoid unauthorized takings that may be likely to jeopardize the continued existence of a listed species.”⁵⁸

Applicable regulations recognize the potential need for and expressly authorize emergency measures to protect sea turtles. Those regulations provide authority to condition or restrict fishing activities and permits as “necessary or appropriate to protect sea turtles and ensure compliance.”⁵⁹ The Fisheries Service may implement emergency restrictions for a period of up to 30 days, with the possibility of a 30-day renewal.⁶⁰ This emergency authority is intended for

⁵⁴ 5 U.S.C. § 553(b)(B) (waiving notice and comment requirements for good cause). *Oregon Trollers Ass’n v. Gutierrez*, 452 F.3d 1104, 1123-24 (9th Cir. 2006) (upholding application of good cause exception by NMFS to actions necessary before start of fishing season); *NRDC, Inc. v. Evans*, 316 F.3d 904, 910 (9th Cir. 2003) (same); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987) (upholding Department of Interior’s interim hunting regulations under good cause exception); *Ocean Conservancy v. Evans*, 260 F. Supp. 2d 1162 (M.D. Fla. 2003) (upholding NMFS’s invocation of good cause exception for emergency adoption of fishery management quotas); *A.M.L. Intern., Inc. v. Daley*, 107 F. Supp. 2d (D. Mass. 2000) (same).

⁵⁵ 5 U.S.C. § 555(e).

⁵⁶ 16 U.S.C. § 1540(f).

⁵⁷ 50 C.F.R. § 233.206(d)(4)(ii).

⁵⁸ *Id.* (emphasis added).

⁵⁹ 50 C.F.R. § 223.206(d)(4)(iii).

⁶⁰ *Id.* § 223.206(d)(4)(iv).

circumstances such as these “to respond to unforeseen circumstances, or changes in the operation of the fishery, to prevent unauthorized takes of listed species.”⁶¹

Since the Fisheries Service first enacted the 1992 emergency sea turtle protection regulations, it has explicitly relied upon those regulations as well as the APA exception from notice and comment requirements on multiple occasions to implement emergency fishing restrictions. For example, on May 1, 2009, the Fisheries Service promulgated an emergency rule to close the bottom longline component of the reef fish fishery in the Gulf of Mexico because sea turtle bycatch.⁶² In doing so, the Fisheries Service relied on its authorities under the ESA, Magnuson-Stevens Act, and APA.⁶³ In 2001, after a spate of strandings in the fishery at issue here, the Fisheries Service issued emergency regulations requiring larger TED openings for shrimp trawlers operating in the Gulf of Mexico, which prior to these regulations had smaller openings than shrimp trawls used in the Atlantic.⁶⁴ The regulation, which took effect immediately, was deemed necessary to protect leatherback sea turtles, which were too large to escape from smaller TED openings, from drowning in shrimp trawls. As these past actions demonstrate, the Fisheries Service has both a continuing duty to prevent jeopardy to species such as ESA-listed sea turtles and ready regulatory mechanisms to carry out that duty by acting quickly to limit or eliminate fishing that is causing excessive take of sea turtles.

Conclusion

If the Fisheries Service does not act within 60 days to correct this violation of the ESA, the Center for Biological Diversity, Defenders of Wildlife, Turtle Island Restoration Network, and Sea Turtle Conservancy will pursue litigation in Federal Court. These parties will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. An appropriate remedy that would prevent litigation would be for the Fisheries Service to suspend the shrimp trawl fishery in the Gulf of Mexico until the completion of consultation. Additionally, the Fisheries Service should grant the petitioned-for actions for the conservation of sea turtles.

If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me at (415) 632-5308 or miyoko@biologicaldiversity.org. Thank you for your concern.

Sincerely,



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⁶¹ BiOp at 6.

⁶² 74 Fed. Reg. 20229, 20230 (May 1, 2009).

⁶³ *Id.*

⁶⁴ 66 Fed. Reg. 65658 (Dec. 20, 2001).

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Table 1. Documented sea turtle strandings in 2011. Source:
<https://grunt.sefsc.noaa.gov/stssnrep/SeaTurtleReportI.do?action=reportquery>.

Alabama Strandings	January (01/01-01/29)	February (01/30-03/05)	March (03/06-04/02)	April (04/03-04/30)	May (05/01-05/28)	2011 Total
Loggerhead	0	1	1	1	0	3
Green	2	0	1	0	0	3
Kemp's ridley	0	0	6	20	10	36
Unidentified	0	0	1	4	3	8
Total	2	1	9	25	13	50

Louisiana Strandings	January (01/01-01/29)	February (01/30-03/05)	March (03/06-04/02)	April (04/03-04/30)	May (05/01-05/28)	2011 Total
Loggerhead	1	0	3	1	2	7
Green	0	2	1	2	0	5
Kemp's ridley	0	2	17	18	3	40
Unidentified	1	0	3	2	1	7
Total	2	4	24	23	6	59

Mississippi Strandings	January (01/01-01/29)	February (01/30-03/05)	March (03/06-04/02)	April (04/03-04/30)	May (05-01-05/28)	2011 Total
Loggerhead	0	0	0	1	2	3
Green	1	0	2	1	0	4
Kemp's ridley	2	1	52	122	24	201
Unidentified	0	0	0	3	0	3
Total	3	1	54	127	26	211

Texas Strandings	Januar y (01/01-01/29)	February (02/13-03/05)	March (03/06-04/02)	April (04/03-04/30)	May (05/01-05/28)	2011 Total
Loggerhead	10	0	9	22	18	59
Green	37	0	30	27	9	103
Kemp's ridley	6	59	11	30	10	116
Unidentified	2	0	0	3	0	5
Total	55	59	50	82	37	283

Total Standings from January 1, 2011 – Present

Loggerhead: 72
Green: 115
Kemp's ridley: 393
Unidentified: 23
Total: 603

Figure 1. Annual sea turtle strandings in Louisiana, Mississippi and Alabama from 1986 through the present.

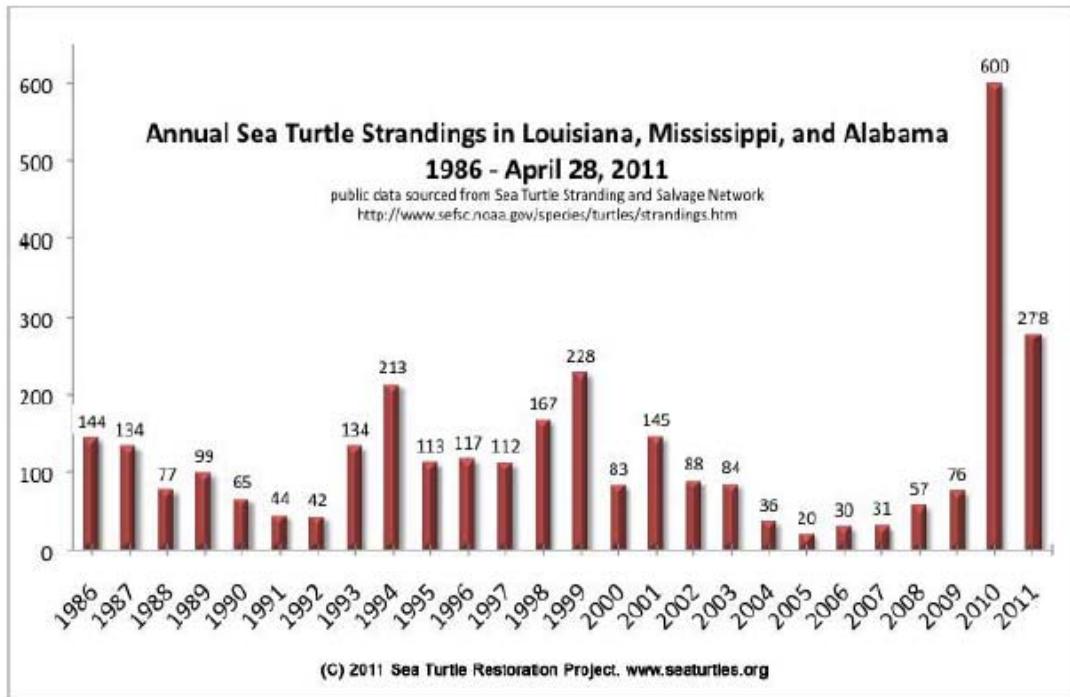


Figure 2. April sea turtle strandings in Louisiana, Mississippi, and Alabama.

