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VIA USPS & EMAIL

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RE: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act in Connection with the Sea Turtle Conservation; Shrimp Trawling Requirements Final Rule, 84 Fed. Reg. 70,048 (Dec. 20, 2019)

Dear Mr. Oliver, Dr. Jacobs, and Mr. Ross:

On behalf of the Center for Biological Diversity, Defenders of Wildlife, and Turtle Island Restoration Network, we write to notify you that the promulgation of the Shrimp Trawling Requirements final rule (“TED Rule”), 84 Fed. Reg. 70,048 (Dec. 20, 2019), violates the Endangered Species Act (“ESA”). As set forth below, the National Marine Fisheries Service (“NMFS”) is violating section 7 of the ESA, 16 U.S.C. § 1536, and its implementing regulations, 50 C.F.R. Part 402, by failing to complete consultation on the TED Rule and to insure the TED

¹ Dr. Jacobs is being given notice in his capacity as the official “performing the duties of Under Secretary of Commerce for Oceans and Atmosphere.” <https://www.noaa.gov/our-people/leadership/dr-neil-jacobs>.

Rule does not jeopardize listed species. This letter constitutes notice required by the ESA, 16 U.S.C. § 1540(g)(2)(A)(i), prior to commencement of legal action on this violation.

I. The Endangered Species Act

Congress enacted the ESA in 1973 to provide for the conservation of endangered and threatened fish, wildlife, plants, and their natural habitats. 16 U.S.C. § 1531.² The ESA imposes substantive and procedural obligations on all federal agencies with regard to species that are listed or proposed for listing under the Act, as well as their critical habitats. *See id.* §§ 1536(a)(1), (a)(2), (a)(4), 1538(a); 50 C.F.R. § 402.01.

Section 7 of the ESA and its implementing regulations require each federal agency, in consultation with the appropriate wildlife agency—here, NMFS—to insure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). “Action” is broadly defined to include “actions intended to conserve listed species,” “the promulgation of regulations,” or any other action that may directly or indirectly cause modifications to the land, water, or air. 50 C.F.R. § 402.02. Where, as here, NMFS is both the action agency issuing a regulation and the consulting agency tasked with conserving the ESA-listed species, NMFS is responsible for completing all aspects of consultation.

Section 7 requires an action agency to engage in formal or informal consultation when it determines that its proposed action “may affect” listed species or critical habitat. *Id.* §§ 402.13, 402.14. An action agency is not obligated to consult with the wildlife agencies only if the action agency properly determines that its proposed action will have *no* effect on listed species or critical habitats. *Id.* § 402.14. But “[t]he minimum threshold for an agency action to trigger consultation with [the wildlife agencies] is low.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011). “*Any possible* effect, whether *beneficial*, benign, adverse, or of an undetermined character, triggers the formal consultation requirement . . .” 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (emphases added); *see also* U.S. Fish & Wildlife Serv. & Nat’l Marine Fisheries Serv., *Endangered Species Consultation Handbook*, at xvi (1998) (“May affect [is] the appropriate conclusion when a proposed action may pose *any* effects on listed species or designated critical habitat.”). Effects determinations must be based on the sum of all effects caused by the action. 50 C.F.R. § 402.02 (defining “effects of the action.”). Both the action agency and the consulting agency must “use the best scientific and commercial data available” in evaluating the action’s effects and completing the consultation process. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d), (g)(8).

² Congress defined “conservation” as “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 [the Act] are no longer necessary.” *Id.* § 1532(3) (emphasis added).

If an action may affect a listed species or critical habitat, the action agency must either engage in formal consultation or obtain the wildlife agency's written concurrence that the action is not likely to adversely affect listed species or critical habitat. 50 C.F.R. §§ 402.13(a), 402.14. Formal 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 and recovery of a listed species in the wild. 50 C.F.R. § 402.02. If the wildlife agency 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)(2).

The ESA requires the wildlife agency to provide an incidental take statement with the biological opinion when it anticipates that incidental take of a threatened or endangered species will occur. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The statement must specify the permissible level of take. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(i). In addition, the incidental take statement must specify reasonable and prudent measures that the wildlife agency 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).

Once the action agency has initiated consultation, section 7(d) prohibits it from making "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" that would avoid violating ESA section 7(a)(2). 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

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.

II. Notice of Violation of ESA Section 7, 16 U.S.C. § 1536

NMFS's issuance of the TED Rule violates the agency's procedural and substantive obligations under ESA section 7(a)(2) and its implementing regulations. 16 U.S.C. § 1536(a)(2). The TED

Rule revises tow time restrictions that had been in place to mitigate bycatch-related mortality of sea turtles in skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls). 84 Fed. Reg. at 70,048–49. The TED Rule also requires the use of TEDs in all skimmer trawl vessels 40 feet and greater in length. *Id.* NMFS states that the purpose of these changes is to “reduce incidental bycatch and mortality of sea turtles in the southeastern U.S. shrimp fisheries, and to aid in the protection and recovery of listed sea turtle populations,” *id.* at 70,048.

The Final Environmental Impact Statement (“FEIS”) for the Rule describes how the TED Rule will have direct and indirect effects on five ESA-listed sea turtle species: the endangered leatherback (*Dermochelys coriacea*), hawksbill (*Eretmochelys imbricata*), and Kemp’s ridley (*Lepidochelys kempii*) sea turtles, and the threatened Northwest Atlantic Distinct Population Segment (“DPS”) of loggerhead (*Caretta caretta*) sea turtles and the North and South Atlantic DPSs of green sea turtles (*Chelonia mydas*). Nat’l Marine Fisheries Serv., *Environmental Impact Statement to Reduce the Incidental Bycatch and Mortality of Sea Turtles in the Southeastern U.S. Shrimp Fisheries* 43, 140–57 (Nov. 4, 2019). Effects include changes to sea turtle bycatch frequency and location in the shrimp fisheries, which may affect sea turtle populations. *Id.* at 140–57.

The undersigned and other members of the public submitted comments on the proposed TED Rule identifying NMFS’s ESA section 7 consultation duties.

NMFS’s issuance of the TED Rule on December 20, 2019, is an agency action under ESA section 7. *See* 50 C.F.R. § 402.02 (including actions intended to conserve listed species and the promulgation of regulations in definition of “action”). ESA section 7 requires NMFS to complete consultation if its action “may affect” listed species or critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02, 402.13, 402.14. Consultation is required even if the effects are beneficial to the species. 51 Fed. Reg. 19,926, 19,949 (June 3, 1986). NMFS is not in compliance with this duty until the required consultation has been completed. *See* 16 U.S.C. § 1536(b); *Pac. Rivers Council*, 30 F.3d at 1056–57.

As described above, NMFS’s own analyses and conclusions establish that the TED Rule “may affect” ESA-listed sea turtles in the Gulf of Mexico and southeastern United States. NMFS therefore is required by ESA section 7(a)(2) to initiate and complete consultation to insure the action will not jeopardize the continued existence of ESA-listed Kemp’s ridley sea turtles, loggerhead sea turtles (Northwest Atlantic DPS), green sea turtles (North and South Atlantic DPSs), leatherback sea turtles, and hawksbill sea turtles.

NMFS indicated that it “will reinitiate Section 7 consultation on the effects of the shrimp fisheries in both the South Atlantic and Gulf of Mexico areas” upon publication of the final TED Rule and that the consultation will also address the effects of TED regulations. FEIS at 305. However, the ESA requires NMFS to ensure its action is not likely to jeopardize the continued existence of listed species by completing consultation before taking that action. NMFS failed to complete consultation before promulgating the TED Rule. And NMFS has recently indicated that the aforementioned consultation on the effects of the shrimp fisheries still has not been

completed. Defendants' Status Report, *Oceana, Inc. v. Ross*, No. 1:15-cv-00555-PLF (D.D.C. Jan. 5, 2021). Unless and until NMFS completes the required consultation on the final TED Rule, it has violated and remains in ongoing violation of the ESA and its implementing regulations. 16 U.S.C. § 1536(a)(2).

* * *

If NMFS fails to cure its violations within 60 days of receiving this letter, the Center for Biological Diversity, Defenders of Wildlife, and Turtle Island Restoration Network intend to file suit for declaratory and injunctive relief. *See* 5 U.S.C. § 706(2); 16 U.S.C. § 1540(g)(1)(A).

If you believe any of the foregoing is in error, have any questions, or would like to discuss this matter, please feel free to contact us.

Sincerely,



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