



EARTHJUSTICE



Via U.S. Mail

January 13, 2009

Honorable Carlos M. Gutierrez
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue, N.W., Room 5516
Washington, D.C. 20230

Dr. James W. Balsiger
Acting Assistant Administrator for Fisheries
National Oceanographic and Atmospheric Administration
1315 East-West Highway
Silver Spring, MD 20910

RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act Related to the Management of the Gulf of Mexico Bottom-Set Longline Fishery

Dear Secretary Gutierrez and Dr. Balsiger;

This letter serves as a sixty day notice on behalf of the Caribbean Conservation Corporation (“CCC”), Center for Biological Diversity (“CBD”), Defenders of Wildlife (“Defenders”), Turtle Island Restoration Network (“TIRN”), and the Gulf Restoration Network (“GRN”) of their intent to sue the National Marine Fisheries Service/NOAA Fisheries (“NMFS”) over violations of Sections 7 and 9 of the Endangered Species Act (“ESA”) (16 U.S.C. § 1531 *et seq.*) for actions and inactions related to the management and regulation of the Gulf of Mexico bottom-set longline fishery (“Fishery”). In particular, NMFS has violated the ESA through its continued operation of the Fishery in the face of loggerhead sea turtle take dramatically in excess of the Fishery’s incidental take authorization. This letter is provided pursuant to the 60-day

notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).¹ If NMFS does not take action within 60 days to remedy the ongoing illegal take of threatened loggerhead sea turtles in the Fishery and ensure that the continued operation of the Fishery is not likely to jeopardize the continued existence of loggerhead sea turtles and other threatened and endangered species, our organizations will pursue litigation seeking to close the bottom-set longline fishery until NMFS has fully complied with its duties under the ESA and legally adequate protection measures are in place.

Background

The operation of the Fishery is authorized and managed by NMFS pursuant to the federal fishery management plan for the Gulf of Mexico reef fish fishery. The Fishery employs longline gear set along the ocean bottom to target a variety of reef fish species. While the overall Gulf of Mexico commercial reef fish fishery uses several types of gear, bottom longline gear accounts for most grouper and tilefish landings as well as most take of threatened and endangered sea turtles species.² This gear consists of a mainline made of steel cable or monofilament ranging anywhere from 4 to 9 nautical miles (“nm”) with up to 2,100 hooks attached to gangions along the mainline (generally 100-200 hooks per nm of mainline). Once deployed, the hooks are left to “soak” for 3 hours or more before being hauled out of the water to collect any catch.

The Fishery operates primarily off Florida’s west coast in an area relied upon by several sea turtle species for vital foraging habitat. Studies indicate that the west Florida shelf provides benthic foraging habitat for loggerhead, Kemp’s ridley, and green sea turtles.³ All of these species are protected under the ESA. Loggerheads in particular appear to rely on this area and frequently are caught, injured, and killed by the Fishery.⁴ The Fishery is also known to catch endangered smalltooth sawfish and may affect threatened staghorn and elkhorn corals and their critical habitat.

On February 15, 2005, NMFS issued a Biological Opinion on the continued authorization of the Gulf of Mexico reef fish fishery as managed under the Reef Fish Fishery Management Plan. The 2005 Biological Opinion concluded that the reef fish fishery – composed of the bottom longline, commercial vertical line, and recreational vertical line fisheries – would not jeopardize the continued existence of the Atlantic populations of loggerhead, Kemp’s ridley, green, hawksbill, and leatherback sea turtles.⁵ The Biological Opinion’s incidental take

¹ To the extent any of the violations of law described in this letter require affirmative action by NMFS, please consider this letter a formal petition for such action pursuant to 5 U.S.C. § 553(e).

² NMFS, Scoping Document for Amendment 31 to Address Bycatch of Sea Turtles in the Gulf of Mexico Reef Fish Bottom Longline Fishery (November 2008) (“NMFS Scoping Document”) at 4, 7; NMFS Southeast Fisheries Science Center. September 2008. Estimated Takes of Sea Turtles in the Bottom Longline Portion of the Gulf of Mexico Reef Fish Fishery July 2006 through 2007 Based on Observer Data, NMFS SFSC Contribution PRD-07/08-15 (“NMFS Take Estimates”) at 4.

³ NMFS Scoping Document at 4.

⁴ *Id.*

⁵ NMFS, Biological Opinion on the Continued Authorization of Reef Fish Fishing under the Gulf of Mexico (GOM) Reef Fish Fishery Management Plan (RFFMP) and Proposed Amendment 23 (Feb. 15, 2005) (“2005 Biological Opinion”) at 93. Since the 2005 Biological Opinion was issued, NMFS has received a petition to list the Western

statement (“ITS”) set a 3-year take limit and specified reasonable and prudent measures (“RPMs”) necessary to minimize the impact of the takes.⁶ Under the ITS, the bottom longline fishery was authorized to take up to 85 loggerheads (including 42 lethal takes), 26 green turtles, 2 Kemp’s ridley, no hawksbills, and 1 leatherback over a 3-year period.⁷ The total 3-year incidental take limit for all three combined fisheries was 203 loggerhead turtles (including 78 lethal takes), 51 green turtles, 44 hawksbill turtles, 3 Kemp’s ridley turtles, and 20 leatherback turtles.⁸

An analysis of NMFS observer data made available recently makes clear that the Gulf of Mexico reef fish fishery as a whole, and the bottom longline fishery in particular, has far exceeded the take limits contained in the 2005 Biological Opinion for loggerheads and possibly other hardshell sea turtles.⁹ In particular, this information, which includes data collected from June 2006 through 2007, indicates that 974¹⁰ hardshell sea turtles – including 799¹¹ loggerheads – were taken by the bottom longline sector of the fishery in this 18 month period, with 83% of observed takes resulting in injury or death. Of the estimated takes, 325 were projected to be lethal, 216 were unknown, and 433 were projected to be released alive (but may have died later). In other words, according to NMFS’s own analysis, the bottom longline fishery alone, which comprises but one component of the entire fishery authorized under the 2005 Biological Opinion, has taken *more than triple* the number of hardshell sea turtles allowed for the entire Gulf of Mexico reef fish fishery *in just half the time* allotted for that 3-year take limit. For loggerheads, we know the situation to be even worse, with the bottom longline sector alone taking nearly ten times the number of loggerhead turtles anticipated and authorized for that sector during the entire 3-year period. This situation is illegal and unacceptable.

This violation of the ESA is particularly troubling in light of the precarious condition of threatened and endangered sea turtle populations in the Gulf of Mexico. Nesting populations of loggerhead sea turtles throughout the Gulf of Mexico and southeast U.S. are declining

North Atlantic subpopulations of loggerheads as a distinct population segment and reclassify them as endangered under the ESA. Oceana and Center for Biological Diversity, Petition Pursuant to the Endangered Species Act to Designate the Western North Atlantic Subpopulations of the Loggerhead Sea Turtle (*Caretta caretta*) as a Distinct Population Segment and to Reclassify the Western North Atlantic Subpopulations as Endangered (Nov. 15, 2007). On March 5, 2008, NMFS and the U.S. Fish and Wildlife Service issued a positive 90-day finding on the petition. 73 Fed. Reg. 11849. A final determination on the petition was due in November 2008.

⁶ The RPMs include safe handling and release requirements to increase the odds of survival for turtles and sawfish that are caught, as well better data collection on takes in the Gulf of Mexico Reef Fish fishery. 2005 Biological Opinion at 94-96. Despite the requirement for better data collection, only 0.42 to 2.15% of the bottom longline fishery has received observer coverage. NMFS Take Estimates at 4.

⁷ 2005 Biological Opinion at 94.

⁸ *Id.*

⁹ The NMFS Take Estimates notes that captured sea turtles included two “unidentified hardshell turtles” for which the observers were unable to verify the species. Thus, these turtles may have been additional loggerheads, green turtles, hawksbill turtles, or Kemp’s ridley turtles. NMFS Take Estimate at 5.

¹⁰ Based on a 95% confidence interval, this number could range from 444, which is still significantly higher than the 3-year take limit, to a staggering 2,137 – or seven times the 3-year take limit for all hardshell turtle species.

¹¹ As with the take of all hardshell turtles, this number also represents an estimate. Based on a 95% confidence interval, this number could range from 339 to 1883, also dramatically higher than the loggerhead takes allowed in the ITS regardless of which number is used.

markedly¹², with annual rates of decline ranging from 1.6 – 6.3% over 10 or more years. The annual loggerhead nests counted at index nesting beaches in Florida during the period 1989 – 2008 show an increase in nests between 1989 and 1998, followed by a steep decline; with overall loggerhead nesting at Florida index nesting beaches over the last decade declining by more than 40 percent.¹³ Moreover, the majority of loggerheads observed taken were juvenile or sexually mature, both age classes that are particularly important for maintaining population numbers.¹⁴ Under these circumstances, it is very likely that the excessive number of takes in the commercial bottom longline reef fish fishery is not only impeding the recovery of loggerhead sea turtles but jeopardizing the existence of this species. In fact, a recent analysis of potential causes of the decline in nesting female loggerheads in Florida found that “the factor that best fits the nesting decline is fisheries bycatch. . . .”¹⁵ NMFS itself has acknowledged that a new biological opinion on the bottom longline fishery is likely to reach a “jeopardy” conclusion if action is not taken to drastically reduce take from this fishery.¹⁶

Yet, in spite of the obvious threat posed to loggerheads and other sea turtle species, NMFS has continued to allow the bottom longline fishery to operate without a valid take authorization or assurance against jeopardy. On September 3, 2008, NMFS’s Office of Protected Resources requested reinitiation of consultation under ESA section 7. The agency also initiated a scoping process for a new rulemaking to establish mitigation measures to reduce sea turtle take. By the agency’s own reckoning, however, it is quite possible that none of the mitigation measures to be examined in this lengthy rulemaking process would reduce sea turtle take to a “no jeopardy” level.¹⁷ And it is all but certain that allowing the Fishery to continue to operate during this rulemaking process, as it has during the past 18 months, will result in further unsustainable and illegal take of imperiled sea turtles.

Violations of the ESA

Section 2(c) of the ESA 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.” 16 U.S.C. § 1531(c)(1). 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.” 16 U.S.C. § 1532(3). Similarly, Section 7(a)(1) of the ESA directs that the Secretary review “...other programs

¹² NMFS. 2008. Draft Recovery Plan for the Northwest Atlantic Population of Loggerhead Sea Turtles (*Caretta caretta*), Second Revision.

¹³ Florida Fish and Wildlife Research Institute. 2008. Long-Term Monitoring Program Reveals a Continuing Loggerhead Decline, Increases in Green Turtle and Leatherback Nesting. (http://research.myfwc.com/features/view_article.asp?id=27537).

¹⁴ See, e.g., Crowder, L., et al. 1994. Predicting the Impact of Turtle Excluder Devices on Loggerhead Sea Turtle Populations. *Ecological Applications*. 4(3):437-445 (finding population growth is most sensitive to survival of large juveniles).

¹⁵ Letter from Gil McRae, Florida Fish and Wildlife Conservation Commission, to Roy Crabtree, NMFS SERO (Dec. 9, 2008).

¹⁶ NMFS Scoping Document at 1.

¹⁷ NMFS, Bottom Longline Gear Study Power Analysis (Nov. 18, 2008).

administered by him and utilize such programs in furtherance of the purposes of the Act.” 16 U.S.C. § 1536(a)(1).

NMFS’s continued authorization of the Fishery is violating Sections 2(c) and 7(a)(1) of the ESA because the agency refuses to use its authorities to further the purpose of listed species conservation. Specifically, by not closing the Fishery immediately or taking other measures to avoid unlawful take of loggerheads and other sea turtles by the Fishery, NMFS is violating these provisions. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1511, n. 15 (9th Cir. 1995) (“If Seneca violates section 9, or any other environmental standard, the BLM need not consult with the FWS before exercising its right under the environmental stipulation to terminate the offending project. Indeed, section 7(a)(1) would appear to *require* the BLM to utilize its authority under the stipulation to suspend an activity that would result in a taking.”) (emphasis in original).

Section 7(a)(2) of the ESA requires 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 adverse modification of habitat of such species . . . determined . . . to be critical” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To accomplish this goal, agencies must consult with the delegated agency of the Secretary of Commerce or Interior whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Where, as here, NMFS is both the action agency and the delegated wildlife agency for purposes of the listed species in question, different branches of NMFS must undertake internal consultation with each other. At the completion of consultation NMFS issues a biological opinion that determines if the agency action is likely to jeopardize the continued existence of the species or destroy or adversely modify critical habitat. If so, the opinion must specify a Reasonable and Prudent Alternative (“RPA”) that will avoid the likelihood of jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b).

Because NMFS’s “no jeopardy” determination in its 2005 Biological Opinion was premised upon the estimates of incidental take reflected in the ITS,¹⁸ and actual levels of take have far exceeded the levels analyzed for the Biological Opinion, the Biological Opinion no longer provides a valid basis for continuing the Fishery. The levels of take above the ITS threshold demonstrate that NMFS has failed to insure that the bottom longline fishery authorized as part of the Gulf of Mexico Reef Fish Fishery Management Plan do not jeopardize loggerhead and other hardshell sea turtles. Indeed, NMFS cannot insure against jeopardy by continuing to authorize fishing without having assessed the impacts of excessive take by the Fishery. Therefore, NMFS is currently in violation of its substantive mandate under Section 7(a)(2) of the ESA, and it will remain in violation of the ESA until and unless NMFS receives a new Biological Opinion for the Fishery Management Plan that concludes that the continued operation of the bottom longline sector does not jeopardize any listed species or destroy or adversely modify its critical habitat.

Moreover, an agency’s duty to avoid jeopardy does not end with the issuance of a biological opinion. Rather, an agency’s duty to avoid jeopardy is continuing, and “where

¹⁸ 2005 Biological Opinion at 94.

discretionary Federal involvement or control over the action has been retained or is authorized by law,” the agency must reinitiate formal consultation when, *inter alia*, new information emerges or authorized take is exceeded. 50 C.F.R. § 402.16.

Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates (or reinitiates) consultation on an action under the ESA, 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” ensure against the likelihood of jeopardy to the species. The purpose of Section 7(d) is to maintain the environmental *status quo* pending the completion of interagency consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action is not likely to jeopardize the continued existence of the species or destroy or adversely modify critical habitat. *Lane County Audubon Soc. v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992). As explained above, available evidence shows that continued fishing will almost certainly result in the injury or death of significant numbers of sea turtles, particularly loggerheads. Given the species’ precarious status and declining population trend, the loss of even a small number of additional turtles constitutes an irreversible and irretrievable commitment of resources and a detrimental change to the biological *status quo*. NMFS’s continued authorization of the bottom longline fishery without a lawful and operative Biological Opinion therefore constitutes a violation of Section 7(d)’s prohibition on irreversible and irretrievable commitments of resources.

Finally, Section 9 of the ESA prohibits any “person” from “taking” threatened and endangered species. 16 U.S.C. § 1538. The definition of “take”, found at 16 U.S.C. § 1532(19), states that “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” “The statute 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.” *Strahan v. Cox, et al*, 127 F.3d 155, 163 (1st Cir. 1997). NMFS provides the authorization for all sectors of the Gulf of Mexico Reef Fish Fishery, as well as all other federal fisheries. The agency’s continued authorization of bottom longline fishing even after the Fishery has vastly exceeded its authorized take limit fits the statute’s definition of take. Because such take is ongoing, NMFS is in violation of ESA Section 9.

A federal agency, and private entities such as fishermen acting under federal authorization, may take listed species only in accordance with an ITS in a valid biological opinion. Pursuant to Section 7(b)(4) of the ESA, a biological opinion which concludes that the agency action will not jeopardize a listed species must include an ITS which specifies the impact of any incidental taking, provides reasonable and prudent measures necessary to minimize impacts, and sets forth terms and conditions that must be followed. 16 U.S.C. § 1536(b)(4). If the terms and conditions of the ITS are followed, the federal agency and any permittee are exempted from Section 9’s take prohibitions. 16 U.S.C. § 1536(o)(2). If the amount of take authorized in the ITS is exceeded, however, all subsequent take is in violation of Section 9.

As described above, the level of incidental take to loggerhead sea turtles, and perhaps other hardshell sea turtles, that was authorized by the ITS of the 2005 Biological Opinion has been exceeded. Therefore, NMFS and all vessels and fishers engaging in the bottom longline sector of the Gulf of Mexico Reef Fish Fishery are acting in violation of Section 9 of the ESA.

Conclusion


As the above makes clear, we believe that the continued operation of the Gulf of Mexico bottom-set longline fishery violates the ESA. If NMFS does not act within 60 days to correct the violations described in this letter, our organizations will pursue litigation in Federal Court against NMFS. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. An appropriate remedy that would forestall litigation would be for NMFS to immediately institute a closure of the Fishery until such time as formal consultation is completed pursuant to ESA section 7(a)(2) and the Fishery is determined not to jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify critical habitat.

If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact us at the numbers provided below. Thank you for your concern.

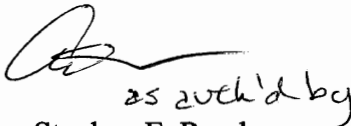
Sincerely,



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Attachments

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