

**Caribbean Conservation Corporation • Center for Biological Diversity  
Defenders of Wildlife • Earthjustice • Florida Wildlife Federation  
Gulf Restoration Network • Turtle Island Restoration Network**

*Via U.S. Mail and Federal eRulemaking Portal*

March 26, 2009

Mr. Peter Hood  
National Marine Fisheries Service, Southeast Regional Office  
263 13th Avenue South  
St. Petersburg, FL 33701-5511

**Re: RIN 0648-XN22; Need for Emergency Rulemaking to Address Take of  
Sea Turtles in Gulf of Mexico Bottom Longline Fishery, 74 Fed. Reg. 8494  
(Feb. 25, 2009)**

Dear Mr. Hood:

Please accept these comments on behalf of the Caribbean Conservation Corporation, Center for Biological Diversity, Defenders of Wildlife, Florida Wildlife Federation, Gulf Restoration Network, and Turtle Island Restoration Network.

The excessive take of sea turtles in the Gulf of Mexico bottom longline fishery violates the law and requires immediate action by the National Marine Fisheries Service (“NMFS”). NMFS has allowed this fishery to operate without any meaningful oversight or valid take authority under the Endangered Species Act (“ESA”) for over two and a half years. As a result, the fishery has captured, killed, or injured nearly 10 times the number of loggerhead sea turtles that it was allowed to take by NMFS’s 2005 Biological Opinion. NMFS’s inexplicable hesitation to carry out its non-discretionary legal obligations with respect to this species is all the more egregious in light of the dramatic decline in Florida loggerhead sea turtle nesting over the past decade and the agency’s own admission that incidental capture in commercial fisheries is a primary threat to the species. As detailed below, NMFS must immediately suspend the Gulf of Mexico bottom longline fishery in order to come into compliance with the ESA.

Our organizations and others concerned about the plight of loggerhead sea turtles have urged the agency to address the problems in the longline fishery since we first learned of them in October 2008. These efforts began with conversations and outreach to the agency and the Gulf of Mexico Fishery Management Council on the belief that NMFS’s own data regarding the unsustainable death and injury of sea turtles would leave the agency with no choice but to act quickly to come into compliance with the ESA.

With no action forthcoming, however, our organizations sent on January 14, 2009, a letter providing 60-day notice of intent to sue regarding the violations of the ESA in the bottom longline fishery. In its February 25, 2009, Federal Register notice, NMFS characterized this letter as a petition for rulemaking and sought comments through March 27, 2009.

Despite our organizations' ongoing efforts, and those of the Gulf of Mexico Fishery Management Council, *see* 74 Fed. Reg. at 8495, to end the injury and death of threatened and endangered sea turtles in the bottom longline fishery, NMFS still has not acted. Rather, the agency has allowed the risk to sea turtles to increase to an unacceptable level in its decision to allow the shallow water grouper fishery to reopen on March 15, 2009. Participants in this fishery have been quite vocal of their intention to fish quickly and with as much effort as possible in anticipation of a fishery closure later this year, yet our understanding is that they are still subject to very low observer coverage. The risk of a largely unobserved derby fishery is significant, and compounded by NMFS's take data from 2007 and 2008 showing a substantial risk of turtle capture during April and extending through the summer months.

We have held back on legal action up to this point due to the agency's repeated assertions that it is working quickly to address the situation, but the sea turtles caught and injured in the ongoing fishery receive no protection from unsupported promises. The agency can no longer delay action to protect the threatened and endangered sea turtles for which they are responsible under the ESA.<sup>1</sup>

## **I. Background: Dramatic Exceedance of the Fishery's Allotted Sea Turtle Take**

The history of NMFS's behavior with respect to the bottom longline fishery in the Gulf of Mexico over the past three years reveals a startling and illegal inattention to the fate of sea turtles that the agency is legally bound to protect under the ESA. 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 Biological Opinion concluded that the fishery, including the bottom longline component of the fishery, would not jeopardize the continued existence of the Atlantic populations of loggerhead, Kemp's ridley, green, hawksbill, and leatherback sea turtles.<sup>2</sup>

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<sup>1</sup> Nearly 50,000 members of Defenders of Wildlife have already weighed in personally to urge the agency to move quickly to protect these imperiled species. These comments were submitted to the agency on March 12, 2009, and submitted again today under separate cover.

<sup>2</sup> Since the 2005 Biological Opinion was issued, NMFS has received a petition to list the Western North Atlantic subpopulations of loggerhead 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.

The Biological Opinion's incidental take statement ("ITS") set a 3-year take limit and specified reasonable and prudent measures ("RPMs") necessary to minimize the impact of the takes. 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 – no more. The total 3-year incidental take limit for the combined reef fish fisheries was 203 loggerhead turtles (including 78 lethal takes), 51 green turtles, 44 hawksbill turtles, 3 Kemp's ridley turtles, and 20 leatherback turtles.

These incidental take numbers formed the basis of NMFS's conclusion that the fishery was not likely to jeopardize the continued existence of loggerheads and other sea turtles.<sup>3</sup> NMFS based its "no jeopardy" finding on its opinion that the removal of specific numbers of individuals would not harm the species' chances of survival and recovery.<sup>4</sup> To our knowledge, NMFS did not at that time, and still has not, analyzed the effect of injuring or killing *hundreds* of loggerheads per year. As explained below, NMFS must undertake such an analysis *before* allowing fishing to continue in order to meet its duty to insure against the likelihood of jeopardy under the ESA. While any exceedance of a take limit is cause for concern and reinitiation of consultation pursuant to ESA Section 7, the numbers at issue in the Gulf of Mexico bottom longline fishery far surpass any reasonable notion of acceptable error and clearly require immediate action.

NMFS's analysis of observer data from the bottom longline fishery shows that this fishery has taken *nearly 10 times* the number of loggerheads and *nearly 5 times* the total number of hardshell turtles specified in the applicable 2005 ITS. NMFS's updated analysis<sup>5</sup> of observer data from July 2006 through 2008 shows that the fishery took an estimated 967 hardshell sea turtles,<sup>6</sup> including 782 loggerheads.<sup>7</sup> The majority of turtles

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<sup>3</sup> 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 92, 94.

<sup>4</sup> *Id.* at 65 ("Given our limited data and the broad assumptions applied, the take estimates are uncertain but not unreasonable. Based on the best available information, we believe basing our jeopardy analysis on these numbers is appropriate."); 92.

<sup>5</sup> The updated analysis builds upon the report NMFS originally released in September 2008. NMFS Southeast Fisheries Science Center. 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 Take Estimates"). NMFS's initial analysis, which included data collected from July 2006 through 2007, indicated that approximately 974 hardshell sea turtles were taken by the bottom longline sector of the fishery in this 18 month period. Of these takes, an estimated 325 turtles died prior to release and the status of 216 was unknown. An additional estimated 433 turtles were released alive (albeit injured).

<sup>6</sup> While much of this discussion has focuses on loggerhead sea turtles, the number of unidentified hardshell turtles taken indicates that this fishery may be causing significant harm to other species as well. Kemp's ridley, hawksbill, and the Florida nesting population of green sea turtles are all listed as Endangered under the ESA. The 2005 Biological Opinion allows the take of only 26 green sea turtles, 2 Kemp's ridleys, and *no* hawksbills over a 3-year period. 2005 Biological Opinion at 94. The fishery may well have exceeded the take limit for any or all of these species.

<sup>7</sup> Memo from Bonnie Ponwith, NMFS, to Roy E. Crabtree, NMFS, Re Data Analysis Request: Update of "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" to now include 2008 observer and effort data, and revised

observed taken were juvenile and sexually mature loggerheads. Approximately 28.6 percent of the turtles observed taken died prior to release, while the condition of 23.8 percent of the observed turtles was “unknown” upon release and 47.6 percent were released alive and injured.<sup>8</sup> NMFS has estimated that 30 percent of loggerheads incidentally captured and released alive by the bottom longline fishery die after being released.<sup>9</sup>

## **II. Excessive Take of Loggerhead Sea Turtles Poses a Serious Threat to the Species**

The segment of the Atlantic loggerhead sea turtle population affected by the bottom longline fishery, the Western North Atlantic loggerhead, is experiencing a serious and dangerous decline. Nesting populations of loggerhead sea turtles throughout the Gulf of Mexico and southeast U.S. have declined significantly over the past decade.<sup>10</sup> 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 declining by more than 40 percent over the last decade.<sup>11</sup> The decline in Florida nesting has implications for the global status of loggerheads. The South Florida loggerhead nesting assemblage is thought to be second in size only to the assemblage in Oman in the Arabian Sea and, together with the Oman assemblage, accounts for 80-90 percent of the world’s loggerhead nesting activity.<sup>12</sup> Researchers have concluded that bycatch of loggerheads by various fisheries, particularly the removal of immature turtles, is a major contributing factor to the decline in Florida loggerhead nesting.<sup>13</sup>

The incidental take of reproductively valuable subadults and adults in the Gulf of Mexico bottom longline fishery is particularly worrisome given the loggerhead’s downward population trend.<sup>14</sup> It is estimated that one out of every thousand sea turtle hatchlings survive to reach adulthood, a process that takes 25 to 35 years. The removal of adults from the breeding population therefore has serious implications for the species’

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2006-2007 effort and observer data (“NMFS Updated Take Estimates”) at 6-7. Given the nearly non-existent level of observer coverage during the second half of 2008, these numbers may represent an underestimate. *See id.* at 3 (number of reported trips, sets and hooks) and 5 (percent observer coverage).

<sup>8</sup> *Id.* at 10-11.

<sup>9</sup> 2005 Biological Opinion at 75.

<sup>10</sup> NMFS. 2008. Final Recovery Plan for the Northwest Atlantic Population of Loggerhead Sea Turtles (*Caretta caretta*), Second Revision.

<sup>11</sup> Witherington, B. et al. 2009, Decreasing annual nest counts in a globally important loggerhead sea turtle population, *Ecological Applications* 19(1): 30-54. *See also id.* 48 (“The incidental capture of sea turtles in commercial and artisanal fisheries is considered to be the most significant factor affecting the conservation and recovery of the loggerhead sea turtle.”), citing NMFS and USFWS (2007), Loggerhead sea turtle (*Caretta caretta*) 5-year review: Summary and evaluation.

<sup>12</sup> Witherington et al. 2009 at 30; 2005 Biological Opinion at 41.

<sup>13</sup> Witherington et al. 2009 at 50.

<sup>14</sup> NMFS Scoping Document at 1 (“Individuals incidentally caught by the fishery are sexually immature juveniles and mature adult loggerheads that have high reproductive potential.”).

population numbers. Scientists have also found that loggerhead population numbers are profoundly affected by the removal of juvenile loggerheads, which have high reproductive potential.<sup>15</sup>

Sublethal effects on captured loggerheads may also carry implications for the fitness of the population. Entanglement in longlines, trailing gear, and injuries from hooking can affect a turtle's ability to feed, swim, avoid predators, and reproduce.<sup>16</sup> A turtle hooked or entangled in bottom longline gear will generally not be able to surface for breath. Even if the turtle is brought to the surface before it drowns, the severe respiratory and metabolic stress it experiences from the forced submergence weakens the turtle, which may require as much as 20 hours to recover. During this recovery period, the turtle will generally stay near the surface, where it may be vulnerable to recapture in fishing gear near the surface.<sup>17</sup> Unfortunately, not all turtles are able to recover from such extreme physiological stress, and many die after being released. The physiological stress of incidental capture also has the potential to alter the reproductive behavior of male sea turtles, particularly of small males with relatively poor body condition. The hormonal shifts caused by stress can cause these males to abandon their breeding behavior altogether.<sup>18</sup>

The best available science demonstrates that the excessive number of loggerheads already taken in the commercial bottom longline reef fish fishery is not only impeding the loggerhead's recovery and causing significant harm to the population's reproductive capacity, but also raises a significant likelihood of jeopardy to the species.<sup>19</sup> The best available science also demonstrates that unsustainable take will continue for as long as this fishery is allowed to operate under the current management scheme, as the area used by the fishery is important year-round foraging habitat for loggerhead sea turtles.<sup>20</sup> Scientists from the Florida Wildlife Conservation Commission have already presented NMFS with a summary of satellite tracking data that shows the prevalence of loggerheads off the west coast of Florida.<sup>21</sup> "The data show that the shelf waters of the eastern Gulf of Mexico off Florida provide habitat for important numbers of loggerhead sea turtles, including individuals with the highest reproductive value (subadults and

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<sup>15</sup> See, e.g., Crouse, D. et al. 1987, A Stage-Based Population Model for Loggerhead Sea Turtles and Implications for Conservation, *Ecology*, 68(5): 1412-23; 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).

<sup>16</sup> 2005 Biological Opinion at 57-59.

<sup>17</sup> *Id.* at 59-60.

<sup>18</sup> *Id.* at 60-61.

<sup>19</sup> See, e.g., Witherington et al. 2009; Letter from Gil McRae, Fish and Wildlife Research Institute, to Roy Crabtree, NOAA Fisheries Southeast Region (Dec. 9, 2008); NMFS Scoping Document at 1.

<sup>20</sup> *Id.*

<sup>21</sup> Letter from Gil McRae, Fish and Wildlife Research Institute, to Roy Crabtree, NOAA Fisheries Southeast Region (Dec. 9, 2008).

adults).”<sup>22</sup> Not surprisingly, the takes observed in the bottom longline fishery occurred in the same general area as the loggerheads that were satellite-tracked.<sup>23</sup>

Finally, the best available science demonstrates that the coming months, including April, may be especially dangerous for loggerheads in the vicinity of the fishery. April takes of loggerheads were observed in 2007 and 2008, and in 2008, NMFS estimates that nearly 100 loggerheads were captured in April alone.<sup>24</sup> In other words, it is all but inevitable that significant numbers of loggerheads will be captured, injured, and killed in the bottom longline fishery if it is not suspended immediately. The effect of allowing yet more unauthorized take must not be underestimated. If the Florida loggerhead nesting decline continues at its current rate, scientists estimate that by 2017 loggerhead nest counts will have decreased by 80 percent from 1998 levels. Such a drastic decline over a period of just 19 years – less than half the loggerhead’s 45-year generation time – would warrant IUCN Critically Endangered status.<sup>25</sup> Indeed, scientific evidence shows that this segment of the loggerhead population should be listed as Endangered under the Endangered Species Act.<sup>26</sup> In light of all of this evidence, NMFS’s duty to suspend bottom longline fishing in the Gulf of Mexico immediately to protect loggerhead sea turtles could not be clearer.

### **III. NMFS Has Authority and Obligation under the ESA to Prevent Further Take**

The Endangered Species Act, 16 U.S.C. §§ 1531-1544, 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.” 16 U.S.C. § 1531(b). The ESA “is the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The Supreme Court’s review of the ESA’s “language, history, and structure” convinced the Court “beyond a doubt” that “Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174. As the Court found, “the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184. *See also, Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) (discussing the ESA duty to insure against jeopardy and the importance of avoiding the “slow slide into oblivion” as “one of the very ills the ESA seeks to prevent”).

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<sup>22</sup> *Id.* at 2.

<sup>23</sup> *See* McRae letter at 2-4; NMFS Scoping Document at 14; NMFS Updated Take Estimates at Figure 2.

<sup>24</sup> NMFS Updated Take Estimates at 6. While the SBLOP did not report takes during this time, observed takes in the RFOP produced an estimate of 94.7 (95% C.I. 27.2-329.3) loggerheads taken in April 2008.

<sup>25</sup> Witherington et al. 2009 at 51.

<sup>26</sup> *See supra*, note 2.

**A. NMFS’s Failure to Suspend the Gulf of Mexico Bottom Longline Fishery Immediately Violates NMFS’s On-Going Duty to Insure Against the Likelihood of Jeopardy Under ESA Section 7**

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). 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 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. Reinitiation of consultation alone, however, does not suffice to meet NMFS’s duty to prevent jeopardy. The ESA clearly requires that NMFS use its authority to actively “insure” against jeopardy *before* allowing any agency action to continue that might adversely affect a listed species.

Indeed, 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) to insure 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).

Because NMFS’s “no jeopardy” determination in its 2005 Biological Opinion was premised upon the estimates of incidental take reflected in the 2005 ITS,<sup>27</sup> 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 Gulf of Mexico bottom longline 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 is not likely to jeopardize the continued existence of loggerhead and other hardshell sea turtles. As noted above, the agency did not analyze the impact of the actual take numbers on the species in 2005, and it has not completed that assessment in its 2008 reinitiation of consultation either. Without such an

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<sup>27</sup> 2005 Biological Opinion at 94.

analysis, NMFS cannot insure against jeopardy in its continued authorization of the fishery.

Furthermore, 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. This provision of the ESA directly implements Section 7's prohibition on jeopardy ensures vital protection while consultation is pending and further demonstrates the agency's non-compliance with Section 7's substantive mandate.

**B. NMFS's Continued Authorization of Fishing in Excess of the 2005 Biological Opinion's ITS and in Violation of its Terms and Conditions is in Violation of ESA Section 9**

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 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." *Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997). This prohibition applies to NMFS as its continued authorization of bottom longline fishing in the Gulf of Mexico even after the fishery has far exceeded its authorized incidental take fits squarely within the statute's definition of take.

Moreover, because NMFS has failed to comply with the terms and conditions of its 2005 Biological Opinion, any protective coverage of ESA section 7(o)(2) no longer applies *independent* of the fishery's dramatic take exceedance. The 2005 Biological Opinion contains a number of non-discretionary terms and conditions, non-compliance with which renders the take authorization ineffective. These terms and conditions include the completion of annual take analyses and reports, and timely assessments to determine whether the ITS levels have been exceeded.<sup>28</sup> Significantly, the 2005 Biological Opinion explicitly requires NMFS to analyze observer data on an annual basis in order to detect take exceedances in a timely manner – so that NMFS can take appropriate and immediate action in circumstances such as exist here. Yet, as detailed below, observer data went unanalyzed for years, the excessive numbers of turtles taken

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<sup>28</sup> 2005 Biological Opinion at 94-96.



went unaddressed, and the fishery was allowed to keep operating without any valid take authority or any further effort to manage it for the conservation of federally protected sea turtles.

NMFS's unconscionable delay in analyzing the observed take numbers from 2006-08 – a mandatory term and condition intended to insure that the fishery is not likely to jeopardize the continued existence of threatened and endangered sea turtles – has directly resulted in excessive take of loggerhead sea turtles. By NMFS's own estimate, the bottom longline fishery exceeded the level of incidental take of loggerheads authorized in the 2005 Biological Opinion by the end of 2006 based on the number of observed takes between July and December 2006 alone.<sup>29</sup> *This means that the fishery captured in six months more than the number of turtles the agency expected to be captured over the course of three years.* Even the incomplete raw observer data before the agency at that time – evidence of 9 turtle takes with only 1-2% observer coverage – should have signaled the existence of a serious problem requiring NMFS action.

Regardless of the number of takes observed, NMFS was legally obligated to analyze the 2006 data immediately after the end of 2006, not the latter half of 2008. Had it analyzed the 2006 data in a timely manner and complied with its obligations under the ESA, NMFS would have reinitiated consultation by the beginning of 2007 and taken the necessary steps to ensure that the fishery was not likely to jeopardize the continued existence of these species. Unfortunately, the agency entrusted with the protection of threatened and endangered species chose to ignore both the data and its legal duties.

As a result, the bottom longline fishery captured hundreds more turtles in 2007.<sup>30</sup> By the end of 2007, again by NMFS's own estimate, this fishery had taken nearly *10 times* as many loggerheads as it was authorized to take in the 2005 Biological Opinion.<sup>31</sup> However, NMFS neither reinitiated consultation nor took any action to stop further take by the fishery at this time, presumably because the agency had yet again neglected to analyze the annual observed take data. The fishery therefore operated for another full year in 2008 without additional mitigation measures to prevent further sea turtle take,

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<sup>29</sup> NMFS Updated Take Estimates at 6. These estimates are based on observer data from two programs. The Reef Fish Observer Program ("RFOP") attempts to randomly sample vessels with reef fish permits. NMFS Take Estimates at 4. This program observed between 0.77 and 2.20 percent of trips and between 0.71 and 1.54 percent of hooks on these boats between July 2006 and June 2008. NMFS Updated Take Estimates at 5. The Shark Bottom Longline Observer Program ("SBLOP") attempts to randomly sample vessels with directed shark permits. NMFS Take Estimates at 4. The program observed between 0.75 and 2.10 percent of trips and between 0.79 and 1.77 percent of hooks on these boats between July 2006 and December 2007. *Id.* During July-December 2008, fewer than 3 vessels were observed in either program, resulting in observer coverage characterized only as ">0." *Id.* Even if one were only to look at the lower loggerhead take estimate in 2006 from the RFOP (94.9 loggerheads), it is clear that the fishery had already exceeded the 85 loggerheads authorized by the 2005 Biological Opinion. The weighted mean using both sets of data, including the 836.6 loggerhead takes estimated from the SBLOP data, would naturally be higher. *Id.* at 6.

<sup>30</sup> NMFS Updated Take Estimates at 6-7.

<sup>31</sup> NMFS Take Estimates at 12; NMFS Updated Take Estimates at 6.

resulting in the incidental capture of an estimated 148 more sea turtles during the first half of that year, including approximately 94 loggerheads.<sup>32</sup> While NMFS reports no sea turtle takes for the latter half of 2008, this is most likely because observer coverage was nearly non-existent during this time. Even after NMFS finally acknowledged in early September 2008 that sea turtle take in the bottom longline fishery was far past authorized levels and posed a significant danger to the species, the agency failed to take any action to prevent further take by the fishery.

Plainly, the need for urgent action to protect loggerheads and other sea turtles in the Gulf of Mexico has existed for over two years. Had the agency been meeting the mandatory terms and conditions required for the operation of the fishery in the 2005 Biological Opinion, the current “emergency” would likely not exist – hundreds of loggerheads would have remained alive to contribute to the population, the fishery would have received some certainty regarding how and when it could operate, and NMFS would not be facing the threat of litigation. NMFS may not use the unfortunate situation created by its own failure to act in accordance with the law during the past three years as an excuse to yet again evade its legal responsibilities. As explained below, NMFS not only has the authority to act for the protection of sea turtles immediately; it has the legal duty to do so immediately.

**C. NMFS’s Failure to Take Immediate Action to Ensure Against Jeopardy is Arbitrary, Capricious, and Not in Accordance With the Law**

In keeping with NMFS’s continuing obligation under Section 7 of the ESA to ensure that commercial fishing is not likely to jeopardize the continued existence of a listed species, NMFS established in 1992 regulatory mechanisms to provide immediate protection for loggerhead sea turtles threatened by such activities. Although NMFS may use a variety of mechanisms to comply with its Section 7 duties, these regulations provide an especially expeditious way of dealing with situations such as the one in which the agency currently finds itself regarding the bottom longline fishery. The agency’s failure to take action under this mechanism when it has done so multiple times in nearly identical circumstances provides further evidence of NMFS’s arbitrary and capricious actions in this instance. *Burlington Northern and Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776-77 (D.C. Cir. 2005) (“An agency must provide an adequate explanation to justify treating similarly situated parties differently. . . . Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.”); 5 U.S.C. § 706(2).

NMFS’s regulations authorize the agency to implement immediate protective measures, including fishery closures, when incidental takings of sea turtles would

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<sup>32</sup> NMFS Updated Take Estimates at 6-7.

“violate the restrictions, terms, or conditions of an incidental take statement or biological opinion,” or “may be likely to jeopardize the continued existence” of a listed species. 57 Fed. Reg. 57348 (Dec. 4, 1992). NMFS gave notice and opportunity to comment on these procedures through a proposed rule. See 57 Fed. Reg. 18446 (April 30, 1992) (proposed rule). The agency also completed an environmental assessment for the rule. The final regulations were originally codified at 50 C.F.R. § 227.72(e)(6); they are now part of 50 C.F.R. § 223.206(d) (excerpt attached).

These regulations state that NMFS “may issue a determination that incidental takings are unauthorized” if the above conditions are met, and implement an immediate 30-day fishery closure, which may be renewed for additional periods of 30 days each. 50 C.F.R. § 223.206(d)(4)(ii). 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.” *Id.* (emphasis added).

This regulatory authority and requirement to act expeditiously to enact fishing restrictions for the protection of threatened and endangered sea turtles directly implements the requirements of ESA Section 7 and is augmented by the provisions of the Administrative Procedure Act (“APA”) that allow for the waiver of notice and comment for “good cause.” 5 U.S.C. § 553(b)(B). The APA generally requires agencies to give notice of and opportunity to comment on proposed regulations. However, the APA permits the agency to waive notice and comment on a proposed rulemaking “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” *Id.*

Since NMFS 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, in May 2000, NMFS instituted an emergency closure of an area along eastern North Carolina and Virginia for fishing with large-mesh gillnets after large numbers of loggerhead sea turtles were observed stranded in the area. 65 Fed. Reg. 31500 (May 18, 2000). NMFS determined that the strandings were mostly likely the result of drowning in large-mesh gillnet gear. Citing concerns that the “extreme increase in loggerhead mortality may pose a serious threat to the species’ recovery,” NMFS concluded that “it is critical that action be implemented to reduce the likelihood that interactions with fishing gear will result in additional mortalities of sea turtles.” *Id.* at 31502. “Continued mortality caused by incidental capture in large-mesh gillnets during loggerhead migrations along the mid-Atlantic coast could significantly affect this population and its ability to recover and may be likely to jeopardize the species.” *Id.* NMFS put the restriction into effect immediately, finding that, pursuant to 5 U.S.C. § 553(b)(B), “[i]t would be contrary to the public interest to provide prior notice and opportunity for comment because providing notice and comment would prevent the

agency from implementing this action in a timely manner to protect the listed sea turtles.” *Id.* at 31503.

Recognizing that the unprecedented levels of large-mesh gillnet-related loggerhead mortality observed in the spring of 2000 could recur in the next year, NMFS issued a rule in May 2001 establishing that the fishery would be closed immediately if the numbers specified in the applicable biological opinion’s incidental take statement were exceeded.<sup>33</sup> 66 Fed. Reg. 28842 (May 25, 2001). NMFS issued this rule in order to avoid even a relatively minor delay in shutting down fishing once incidental take levels had been surpassed.<sup>34</sup> *Id.* at 28845. As with other rules discussed in this memo, NMFS found that it had good cause to waive notice and comment requirements under the APA. 66 Fed. Reg. at 28846.

In the same year, NMFS issued an emergency rule requiring all Virginia permitted fishermen deploying pound nets with leaders measuring 8 inches or greater stretched mesh and leaders with stringers to tie up those leaders in Virginia waters of the mainstem Chesapeake Bay and tributaries for a 30-day period. 66 Fed. Reg. 33489 (June 22, 2001). NMFS issued the rule in response to a large number of sea turtle strandings in and near Chesapeake Bay. Though a number of fisheries operated in the area, NMFS determined that the stranded turtles, mostly loggerheads, were likely drowned by pound net gear. NMFS noted that the loggerhead population affected by the fishery was declining and determined that the elevated take of loggerheads, particularly those migrating to nesting grounds, was likely to impair the population’s recovery. NMFS determined that the action was “necessary to respond to an emergency situation to provide adequate protection for endangered and threatened sea turtles, pursuant to the ESA and other applicable law.” *Id.* at 33492. Therefore, NMFS put the restriction into effect immediately, finding once again that, pursuant to 5 U.S.C. § 553(b)(B), “[i]t would be contrary to the public interest to provide prior notice and opportunity to comment because providing notice and comment would prevent the agency from implementing this action in a timely manner to protect the ESA-listed sea turtles.” *Id.*

Finally, in December 2001, NMFS issued emergency regulations requiring most shrimp trawlers operating in the Gulf of Mexico and Atlantic to have an enlarged, NMFS-approved TED installed in each net rigged for fishing, year-round. 66 Fed. Reg. 65658 (Dec. 20, 2001). 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. In all of these instances, NMFS notified

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<sup>33</sup> Notably, the fishery had 100% observer coverage at the time, making it possible to quickly determine when authorized take numbers were reached or exceeded.

<sup>34</sup> The agency noted that “[f]rom time to time, the AA has invoked these procedures [under 50 C.F.R. § 223.203(d)(4)] in response to exceeding incidental take statements or other unauthorized sea turtle mortalities. The process to implement those restrictions generally requires about 7 days before additional restrictions become effective.” 66 Fed. Reg. at 28845.

fishermen of the emergency restrictions using the NOAA weather channel, newspapers, and other media.

As these past actions demonstrate, NMFS has both a continuing duty to prevent jeopardy to species such as the loggerhead sea turtle 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 – before there is a likelihood of jeopardy to the species. NMFS has no rational basis not to take immediate action to protect and ensure against jeopardy to loggerheads in this instance. Nothing in these regulations limits the scope of the emergency regulations to any particular type of fishing gear. *See* 50 C.F.R. § 223.206(d)(4) (authorizing restrictions on fishing activities to address incidental takings during “fishing activities” and authorizing restrictions based on gear type); NMFS, Proposed Rule, Restrictions Applicable to Shrimp Trawlers and Other Fisheries, 57 Fed. Reg. 18446, 18,452-53 (Apr. 30, 1992) (discussing proposed rule as applicable to other fisheries and gear because “[f]isheries other than the shrimp fishery may cause sea turtle mortality” and explaining partial basis for these rules is: “there is a need for a mechanism to prevent sea turtle mortalities in other fisheries or when existing restrictions on the shrimp fishery are found to be ineffective”); 57 Fed. Reg. at 57349 (NMFS final rule, referring to “other types of fishing activities”). Furthermore, nothing in the regulations limits emergency actions to any geographic scope, size of closure, or degree of economic or environmental impact. To the contrary, the ESA itself *prohibits* consideration of economic cost from delaying or preventing actions necessary to protect threatened and endangered species. *See, e.g., Tenn. Valley Auth.*, 437 U.S. at 184. Rather, decisions regarding the management of listed species must be based exclusively on the best available science.

The current situation could hardly present a more compelling case for taking emergency action “necessary to avoid unauthorized takings that may be likely to jeopardize the continued existence of a listed species.” Sea turtle takes in the Gulf of Mexico bottom longline fishery are many times the number authorized by NMFS and the fishery has been operating in excess of its authorized take limit for two and a half years.<sup>35</sup> Any turtles taken this spring will be taken illegally, given that NMFS has nullified any take authority granted via the 2005 Biological Opinion when it violated the Opinion’s terms and conditions. The best available data show that loggerheads depend on this area as important foraging habitat, are present here year-round, and have been captured here during the spring, when NMFS contemplates allowing the fishery to operate. This species can ill-afford to lose more reproductively valuable individuals. The Western North Atlantic loggerhead is declining and further take may well jeopardize its continued existence. NMFS could have no valid reason for failing to act now – before any further unlawful takes occur.

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<sup>35</sup> Any take in excess of the numbers specified in the 2005 Biological Opinion’s ITS violates ESA Section 9, 16 U.S.C. § 1538. Likewise, NMFS’s continued authorization of fishing that results in take above ITS levels violates Section 9. Under the law, NMFS may not allow the bottom longline fishery’s unauthorized take of sea turtles to continue while the rulemaking process proceeds.

Finally, we note that although fishery closures are often difficult for the industry, members of the Gulf of Mexico bottom longline fishery have received ample notice of the likelihood of a fishery closure and multiple opportunities to comment. The need for an immediate closure has been discussed publicly since at least October 2008 through the Gulf of Mexico Regional Fishery Management Council as well as NMFS. There is no need, nor any valid legal basis, for NMFS to delay taking action to prevent further take. To the contrary, this situation presents similar triggering circumstances as those that provoked emergency closures in the past and must be addressed in a similar manner.

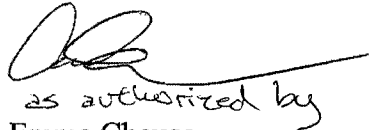
NMFS's current course of action – allowing the bottom longline fishery to proceed with no additional safeguards, very low observer coverage, and no real time reporting of observed takes while the agency slowly assesses the damage already clearly done by NMFS's poor management since 2005 – is patently illegal and unacceptable. NMFS can and, indeed, must use its existing authority immediately to suspend bottom longline fishing in the Gulf of Mexico until such time as it can provide appropriate protection for the imperiled sea turtles under its stewardship and ensure that the continued operation of the fishery will not be likely to jeopardize the continued existence of loggerheads and other sea turtle species.

Thank you for your consideration. If you have any questions, please do not hesitate to contact Andrea Treece at 415-436-9682 x306.

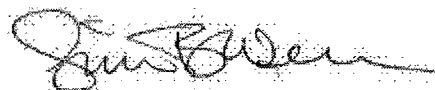
Sincerely,



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