

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**TURTLE ISLAND RESTORATION
NETWORK**

9255 Sir Francis Drake Blvd.
Olema, CA 94950;

**CENTER FOR BIOLOGICAL
DIVERSITY**

1333 N. Oracle Rd.
Tucson, AZ 85705;

DEFENDERS OF WILDLIFE

1130 17th Street, NW
Washington, DC 20036; and

SEA TURTLE CONSERVANCY

44 NW 13th Street, Suite B-11
Gainesville, FL 32609,

Plaintiffs,

v.

**NATIONAL MARINE FISHERIES
SERVICE**

1315 East-West Highway
Silver Spring, MD 20910,

Defendant.

Civil Case No.

**COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Endangered and threatened species in the Gulf of Mexico and South Atlantic, including sea turtles, smalltooth sawfish, and Gulf sturgeon, are vulnerable to entanglement, injury, and drowning in shrimp fishing nets. During 2010 and 2011, observed sea turtle mortality in these regions increased dramatically, reaching levels not seen in decades. Based on the federal government's own modeling assumptions and inspection reports, thousands of sea turtles have likely drowned over the last two years. Available data indicate that destructive shrimp fishing practices are largely responsible for this increased mortality.

2. The federal government began regulating shrimp fishing activities in the 1980s to address the imperiled status of sea turtle populations along the U.S. Atlantic coast and in the Gulf of Mexico (collectively, "Southeast shrimp trawl fisheries"). Federal regulations currently require that some shrimp trawl vessels operating in these regions employ turtle excluder devices ("TEDs") in their nets. Defendant National Marine Fisheries Service ("NMFS") has administratively exempted vessels that comply with these regulations from liability under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, for the incidental taking of listed sea turtles. This exemption is premised on Defendant's assumptions that the majority of vessels in the Southeast shrimp trawl fisheries are subject to TEDs requirements, that all such covered vessels are properly using TEDs in their nets, and that TEDs are 97 percent effective at reducing sea turtle mortality.

3. The foregoing assumptions, and thus the regulations based upon them, are not presently adequate to protect sea turtle populations from imminent harm and ensure that the Southeast shrimp trawl fisheries are operating in compliance with the ESA, for several reasons: (1) the federal regulations exempt certain shrimp fishing activities from the TEDs requirements,

including activities that have increased dramatically since the regulations were adopted (*e.g.*, skimmer trawl activities); (2) non-compliance with existing federal TEDs regulations by shrimp fishing vessels in the Gulf of Mexico is widespread and well-documented; and (3) implementation and enforcement of federal TEDs regulations by federal and state agencies is woefully inadequate.

4. NMFS acknowledged in August 2010 that recent sea turtle deaths and other evidence required a reassessment of sea turtle impacts from shrimp fishing to meet its legal obligation under Section 7 of the ESA, 16 U.S.C. § 1536(a), to insure that the Gulf of Mexico and South Atlantic shrimp trawl fisheries are not likely to jeopardize the continued existence of any listed species. NMFS similarly reinitiated consultation on the fisheries' impacts to Gulf sturgeon in February 2010 and on smalltooth sawfish in May 2009 and March 2010. Despite the timeframe provided by the ESA for completing consultation, the agency still has not completed its assessments on the effects of the fishery for any of these species, and thus has not met its ESA obligations.

5. While NMFS delays in completing consultation, threatened and endangered species continue to drown in shrimp nets. During the spring of 2011, the Gulf of Mexico experienced unprecedented sea turtle strandings – dead or injured turtles washed ashore – particularly along the coasts of Louisiana, Mississippi, and Alabama. The federal government's 2011 stranding data reveal that sea mortality in the Gulf of Mexico alone has likely exceeded the annual take allowances for the Gulf and South Atlantic shrimp fisheries combined. Moreover, recent NMFS inspection reports reveal significant non-compliance with existing regulations. Notwithstanding these facts, NMFS has continued to authorize shrimp fishing without imposing any new protective measures to mitigate the ongoing killing of sea turtles by shrimp trawlers.

This action seeks to compel NMFS to expeditiously complete the required ESA consultation and to implement appropriate interim measures to mitigate the ongoing injury and mortality to endangered and threatened species until such consultation is completed, including, without limitation, an order enjoining NMFS from authorizing the operation of shrimp trawl fishing vessels unless all fishing nets on the vessel are equipped and operated with approved TEDs.

JURISDICTION AND VENUE

6. This court has jurisdiction over this case under 28 U.S.C. § § 1331 (federal question), 2201 (declaratory judgment), and 2202 (injunctive relief), and under 16 U.S.C. § 1540 (action arising under citizen suit provision of Endangered Species Act). Plaintiffs have provided advance notice of their intent to file this lawsuit as required by 16 U.S.C. § 1540(g).

7. Venue is proper in this court pursuant to 28 U.S.C. § 1391 and 16 U.S.C. § 1540(g).

PARTIES

8. Plaintiff TURTLE ISLAND RESTORATION NETWORK (“TIRN”) is a nonprofit membership organization based in Marin, California, with affiliated offices in Texas and Costa Rica. TIRN is dedicated to the preservation of marine species and their habitats through public education, scientific and policy advocacy, and litigation. The Sea Turtle Restoration Project of TIRN advocates for the protection of endangered and threatened sea turtles in ways that make cultural and economic sense to the communities that share the beaches and waters with these gentle creatures. The Sea Turtle Restoration Project has for decades been leading efforts to protect sea turtle populations worldwide. Through its Sea Turtle Restoration Project, TIRN works with international grassroots organizations, biologists, and local communities in the United States and abroad to protect and restore sea turtle populations from

the impacts of fishing and other harmful activities. TIRN's staff and members regularly visit waters and nesting beaches in the United States, including in the Gulf of Mexico and the South Atlantic, where sea turtles are present, and they have observed and studied each of the sea turtle species affected by shrimp harvesting operations and intend to continue doing so in the future.

9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a nonprofit corporation that works through science, law and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center has over 42,000 members, including over 3,500 in the Gulf of Mexico region. These members include those who have viewed, photographed, and otherwise appreciated sea turtles, smalltooth sawfish, and Gulf sturgeon and their habitat, as well as other wildlife in the Gulf of Mexico and South Atlantic, who live near these species, habitats, and ecosystems, and who intend to visit and enjoy these species, habitats and ecosystems in the future. The Center's members use the Gulf of Mexico and South Atlantic for wildlife observation, research, nature photography, aesthetic enjoyment, recreational, educational, and other activities.

10. Plaintiff DEFENDERS OF WILDLIFE ("Defenders") is a national nonprofit organization dedicated to the protection and restoration of all native wild animals and plants in their natural communities. Based in Washington, D.C., and with offices from Florida to Alaska, Defenders has more than 400,000 members across the nation, including over 40,000 members in states bordering the Gulf of Mexico. Defenders, which brings this action on behalf of itself and its adversely affected members, has a long history of advocacy for the protection of imperiled marine species, and especially the protection of sea turtles from the impacts of capture in fishing gear. As one example, during the summer of 2011, over 42,000 Defenders members and supporters urged the Defendant NMFS to take prompt action to address the recent dramatic spike

in sea turtle strandings by improving sea turtle protections in the shrimp fishery. Defenders' members enjoy observing, photographing, and appreciating threatened and endangered sea turtles, smalltooth sawfish, and Gulf sturgeon in the wild, and studying the species in their natural habitats. The interests of Defenders' members in observing, studying, and otherwise enjoying these species in and around the Gulf of Mexico and Atlantic coast of the Southeast United States are harmed by NMFS's continued legal violations related to the operation of the Gulf of Mexico and South Atlantic shrimp fishery. If NMFS is required to ensure that the fishery is operating in compliance with the ESA, including through completion of a new biological opinion or through the implementation of additional protective measures, Defenders' members' interests in observing and studying the affected populations will be protected.

11. Plaintiff SEA TURTLE CONSERVANCY ("STC") is a nonprofit membership organization headquartered in Gainesville, Florida, which is dedicated to the protection of marine turtles and their coastal and pelagic habitats. STC is the world's oldest sea turtle research and conservation organization; it was established in 1959 by University of Florida professor and renowned sea turtle expert Dr. Archie Carr for the purpose of studying and protecting sea turtles in Florida and throughout the wider Caribbean. STC has approximately 6,500 members within the United States and abroad. Many of STC's individual members live near or directly on Southeastern U.S. beaches and are actively involved in sea turtle and coastal resource protection. STC and its members have conducted extensive work to protect sea turtles throughout Florida and the Gulf of Mexico through educational outreach, including guided sea turtle walks to allow the public to safely view nesting sea turtles, involvement in sea turtle research, and policy advocacy through the Florida Coastal and Oceans Coalition and STC's Fisheries Policy Program. During and after the Deepwater Horizon oil spill, STC worked to protect sea turtles and sea turtle

nests from oil pollution and is working to reduce the impact of beachfront lighting and predation on nesting females and their offspring. STC and its members have visited and observed sea turtles in the Gulf of Mexico, the Atlantic Ocean and elsewhere and derive scientific, recreational, conservation, and aesthetic benefits from these animals. STC and its members have been actively involved in urging NMFS to protect sea turtles from the impacts of the shrimp trawl fishery.

12. Plaintiffs' members and staff derive scientific, recreational, educational, health, conservation, spiritual, and aesthetic benefits from the existence, observation, and study of threatened and endangered sea turtles, smalltooth sawfish, and Gulf sturgeon. To preserve these interests, they rely on NMFS to comply fully with the ESA, including the statute's consultation requirements, to protect these species and promote their recovery. Plaintiffs are adversely affected by NMFS's failure to comply with the ESA and the Administrative Procedure Act ("APA") while it continues to authorize operation of the Gulf of Mexico and South Atlantic shrimp trawl fisheries. Until NMFS completes the consultation on impacts of the fishery that it reinitiated in 2010 and imposes any necessary additional protective measures, NMFS cannot insure that the operation of the fishery is not likely to jeopardize the continued existence of sea turtles or any other listed species. Plaintiffs' members and their interests in sea turtles have been, are being, and unless the relief requested is granted, will continue to be injured by NMFS's violations of the ESA and APA. Plaintiffs have no adequate remedy at law.

13. Defendant NATIONAL MARINE FISHERIES SERVICE ("NMFS") is an agency within the National Oceanic and Atmospheric Administration and a division of the Department of Commerce, which is authorized and required by law to manage and protect living marine resources within the U.S. Exclusive Economic Zone. NMFS is responsible for the

conservation and recovery of listed marine species under the ESA, including all five sea turtle species that inhabit the Gulf of Mexico and U.S. Atlantic coast waters, as well as the smalltooth sawfish and Gulf sturgeon. NMFS is also responsible for authorizing and regulating the Southeast shrimp trawl fishery.

STATUTORY BACKGROUND

14. Congress enacted the ESA to provide “a program for the conservation of [] endangered species and threatened species.” 16 U.S.C. § 1531(b).

15. The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Commerce and the Interior, who have delegated this responsibility to NMFS and the U.S. Fish and Wildlife Service (“FWS”), respectively. 50 C.F.R. § 402.01(b). NMFS has primary responsibility for the listed sea turtles and fish at issue in this action.

16. The five species of sea turtles that inhabit the waters of the Gulf of Mexico and South Atlantic, including Kemp’s ridley (*Lepidochelys kempii*), loggerhead (*Caretta caretta*), leatherback (*Dermochelys coriacea*), hawksbill (*Eretmochelys imbricata*), and green (*Chelonia mydas*), are each listed as “threatened” or “endangered” under the ESA. The endangered smalltooth sawfish (*Pristis pectinata*) also inhabits these waters, and the threatened Gulf sturgeon (*Acipenser oxyrinchus desotoi*) inhabits the Gulf of Mexico.

17. Section 9 of the ESA prohibits the “take” of listed endangered species. 16 U.S.C. § 1538(a). The statute defines “take” as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). The ESA prohibits the direct taking of members of a listed species, as well as the acts of third parties, such as governmental agencies, whose acts cause such a taking to occur. *Id.* § 1538(g). NMFS has

extended these protections to threatened species by regulation. *Id.* § 1533(d); 50 C.F.R. § 17.42(b).

18. The ESA requires that “[f]ederal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species.” 16 U.S.C. § 1536(a)(1). The statute 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 chapter are no longer necessary.” *Id.* § 1532(3).

19. In order to fulfill the substantive purposes of the ESA, Section 7(a)(2) of the statute requires each federal agency, in consultation with NMFS or FWS, 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.” 16 U.S.C. § 1536(a)(2).

20. If the agency proposing the action determines that it “may affect” a listed species, the agency must engage in “formal consultation” with NMFS or FWS to meet the ESA’s substantive “no jeopardy” mandate. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. Here, where NMFS has authorized shrimp fishing activity in the Gulf of Mexico and South Atlantic, the agency was required to conduct an internal consultation with its Office of Protected Species.

21. Unless the Secretary takes action to extend the period, consultation must be completed within 90 days from the date of initiation. 16 U.S.C. § 1536(b)(1)(A)-(B).

22. Formal consultation results in a “biological opinion” in which the consulting agency must make its determination as to “whether the action is likely to jeopardize the continued existence of a listed species.” *Id.* § 402.14(h); 16 U.S.C. § 1536(b)(3)-(4). NMFS

defines the term “jeopardize” as an action that “reasonably would be expected . . . to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

23. NMFS must base its determination of whether an activity is likely to jeopardize the continued existence of a species solely on “the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). The ESA does not permit the agency to base its jeopardy determination on other factors, such as the cost of protecting the species.

24. If NMFS determines that the action is likely to cause jeopardy to a species, the biological opinion must outline “reasonable and prudent alternatives” to the action, if any exist, “which [the agency] believes would not violate [Section 7(a)(2)].” 16 U.S.C. § 1536(b)(3)(A); 50 C.F. R. § 402.14(h)(3).

25. Conversely, pursuant to Section 7(b)(4) of the ESA, a biological opinion that concludes that the agency action is not likely to jeopardize the continued existence of a listed species must include an “incidental take statement,” which specifies the impact of any allowable takes of individual members of the species, provides reasonable and prudent measures necessary to minimize the impact of those takes, and sets forth terms and conditions that must be followed to implement such measures. 16 U.S.C. § 1536(b)(4); 50 C.F. R. § 402.14(i)(1), (3). Section 7(o)(2) exempts takings in compliance with these terms and conditions from the prohibition on takings in Section 9 of the ESA. 16 U.S.C. § 1536(o)(2).

26. After the issuance of a final biological opinion and “where discretionary Federal involvement or control over the action has been retained or is authorized by law,” the agency must reinitiate formal consultation if, *inter alia*:

- “the amount or extent of taking specified in the incidental take statement is exceeded”;

- “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”; or
- “the identified action is subsequently modified in a manner that causes an effect to the listed species . . . that was not considered in the biological opinion.”

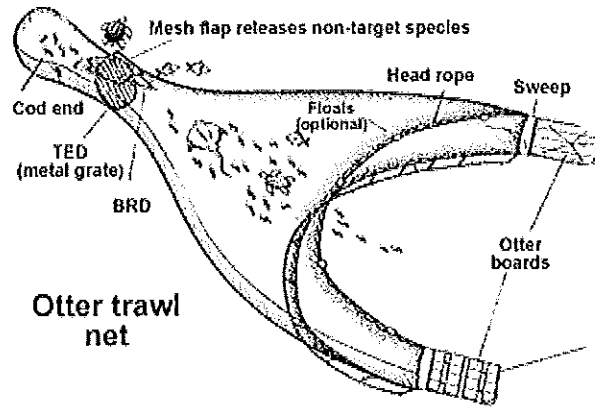
50 C.F.R. § 402.12.

REGULATORY HISTORY

27. Commercial fishing is one of the most significant human activities negatively affecting sea turtles, and the drowning of sea turtles in shrimp trawl nets is the most harmful of all commercial fishing practices affecting sea turtles in the Gulf of Mexico and South Atlantic.

28. Since at least 1977, NMFS has assumed primary federal regulatory responsibility for the conservation and recovery of sea turtles in the marine environment, including the management of sea turtle populations in the Gulf of Mexico and the South Atlantic.

29. In 1978, NMFS began experimenting with turtle excluder devices, or TEDs, in shrimp trawl nets to reduce impacts on listed sea turtle species. Although there are now several types of TEDs, the basic concept is similar for all types. TEDs consist of a set of bars fitted into the neck of a net, together with an escape opening at the top or bottom of the net. When a sea turtle is caught in a shrimp net with a properly operating TED, the turtle moves back through the net as the vessel moves forward, is stopped against the bars, and is ejected through the escape opening, while shrimp (and other small marine organisms) pass through the bars and are collected at the end of the net. Based on its research in the 1970s and 1980s, NMFS concluded that TEDs, when properly installed and operated, are very effective and do not result in a significant loss of shrimp catch. The “otter trawl net” depicted below provides a basic illustration of how TEDs operate.



30. In 1987, NMFS adopted a set of Sea Turtle Conservation Regulations that require the installation and use of TEDs in many shrimp vessels. NMFS adopted these regulations pursuant to its ESA obligations and authority in order “to prevent further declines in the populations of the five species of sea turtles and because of the lack of success of the voluntary TED program.” 54 Fed. Reg. 24,244 (June 29, 1987).

31. The Sea Turtle Conservation Regulations currently provide that it is unlawful to operate a vessel except in compliance with the requirements of 50 C.F.R. § 223.206(d). 50 C.F.R. § 223.205. Section 223.206(d) provides that shrimp trawl vessels operating in the Gulf of Mexico and South Atlantic must use a NMFS-approved TED in each net rigged for fishing, subject to certain exemptions. Under the Sea Turtle Conservation Regulations, vessels operating in compliance with the gear or other requirements are exempt from the take prohibition of ESA Section 9 that would otherwise apply.

32. Certain types of shrimp gear, such as skimmer trawls, pusher-head trawls, and butterfly trawls, are exempt from the requirement to use TEDs if the vessel employing such gear limits its in-water tow-times as specified in the Sea Turtle Conservation Regulations. 50 C.F.R. § 223.206(d)(ii). Other shrimp nets, such as try nets smaller than 12 foot headrope, are similarly excluded from the TEDs requirement. *Id.* Tow-time restrictions are generally regarded as

difficult to properly enforce, especially with nighttime fishing, and reports indicate that the maximum time limits are often exceeded.

33. The liability exemptions contained in the Sea Turtle Conservation Regulations for shrimp fishing activities in the Gulf of Mexico and South Atlantic do not authorize incidental take of sea turtles if the taking would violate the restrictions, terms, or conditions of an incidental take statement or biological opinion or would jeopardize the continued existence of a species. 50 C.F.R. § 223.206(d)(4)(i).

34. In adopting the Sea Turtle Conservation Regulations, NMFS conducted “consultation” on the regulations as required by ESA Section 7, 16 U.S.C. § 1536, to insure that the operation of the Gulf of Mexico and South Atlantic shrimp trawl fisheries in accordance with the regulatory protections are not likely to jeopardize the continued existence of any listed species. That consultation resulted in the issuance of a “no jeopardy” biological opinion which included an incidental take statement that established annual take allowances for ESA listed species.

35. In 1992, NMFS reinitiated consultation to address the impacts of two management plans subsequently developed under the Magnuson-Stevens Fishery Conservation and Management Act: (1) the Shrimp Fishery Management Plan for the South Atlantic, developed by the South Atlantic Fisheries Management Council, and (2) Amendment 6 to the Gulf of Mexico Shrimp Fishery Management Plan, developed by the Gulf of Mexico Fisheries Management Council. In response to subsequent developments, NMFS again reinitiated consultation on these fisheries in 1994, 1996, 1998, and 2002.

36. The most recent biological opinion addressing sea turtle takes in the Southeast shrimp trawl fisheries, issued in 2002 (“2002 BiOp”), anticipated annual combined sea turtle

mortality for all shrimp trawling in the Southeast, including the Gulf of Mexico and the South Atlantic, to be 514 green turtles, 3,948 loggerhead turtles, 5,208 Kemp's ridley turtles, 640 hawksbill turtles, and 80 leatherback turtles. It also anticipated that shrimp trawlers annually would cause 163,160 nonlethal interactions with loggerhead turtles, 155,503 nonlethal interactions with Kemp's ridley turtles, 18,757 nonlethal interactions with green turtles, and 3,090 nonlethal interactions with leatherback turtles. These estimates assumed that TEDs are properly installed and used in all shrimp vessels subject to TEDs requirements (*i.e.*, 100 percent compliance by the relevant fishing fleet), that TEDs reduce sea turtle mortality by 97 percent, and that shrimp vessels not required to use TEDs will comply with the applicable alternative tow-time limits.

37. The terms and conditions of the 2002 BiOp require, among other things, that NMFS:

- (1) monitor ongoing and new activity and reinitiate consultation in the event of a significant increase or decrease in catch per unit of fishing effort;
- (2) coordinate with states to monitor fishing effort and sea turtle trends;
- (3) continue to use observer information, strandings data, and other data as available to monitor mortality of turtles as a result of capture in trawls;
- (4) continue to coordinate with the sea turtle standing and salvage network ("STSSN") and the states to monitor strandings and, if stranding trends indicate a significant shift, to analyze this information and take appropriate action; and
- (5) monitor activities (e.g. bait shrimping) and gear (e.g. skimmer trawls) that are exempted from TED use and rely on tow time restrictions to determine their compliance with tow times and to determine if there are any effects on sea turtles from the use of these gears or the continuation of these activities that were not previously known.

38. The 2002 BiOp covers any vessel subject to the Sea Turtle Conservation Requirements, including those operating in both federal and state waters. The federal government, through NMFS and the U.S. Coast Guard, retains responsibility for enforcing the

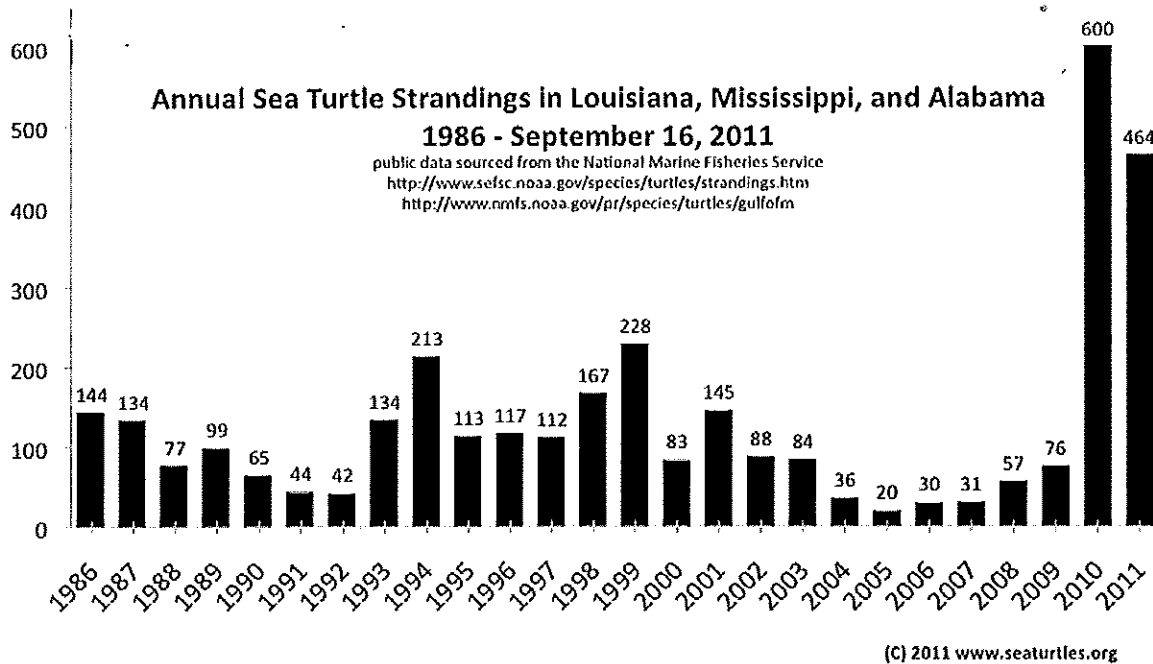
Sea Turtle Conservation Regulations in federal waters, while coastal states have primary responsibility for enforcing TEDs requirements in state waters. In addition, NMFS has entered into joint enforcement agreements with many coastal states. Such agreements provide payment to state law enforcement agencies to help enforce the federal regulations, but NMFS's own officials have concluded that these joint enforcement efforts result in little increased TEDs compliance.

RECENT DEVELOPMENTS

(Sea Turtles)

39. In the decades since sea turtles were listed under the ESA in the 1970s, hundreds of thousands of turtles likely have perished in shrimp fishing nets. Despite the adoption and implementation of the Sea Turtle Conservation Regulations, regional sea turtle populations in the Gulf of Mexico and South Atlantic have not recovered.

40. In 2010, sea turtle mortality, as measured by strandings, increased dramatically as compared to annual strandings during the preceding two decades. For example, strandings along just the coasts of Louisiana, Mississippi, and Alabama reached an unprecedented 600 in 2010, as illustrated by the bar graph of NMFS data plotted below. These stranding numbers do not include potential cold stun events or other strandings in Texas, Florida, Georgia, South Carolina, or North Carolina. Necropsies of dead turtle strandings along the Gulf coast strongly suggest that shrimp fishing activity was a significant contributor to many of these sea turtle deaths.



41. In 2011, sea turtle strandings in the Gulf of Mexico have continued to be extraordinarily high. As of September 20, 2011, the following sea turtle strandings had been reported in the Gulf of Mexico since the start of the calendar year: 567 Kemp’s ridley turtles, 478 green turtles, 292 loggerhead turtles, 18 hawksbill turtles, 4 leatherback turtles, and 63 unidentified turtles.

42. As of September 20, 2011, the following sea turtle strandings have been reported in the South Atlantic since the start of the calendar year: 719 loggerhead turtles, 575 green turtles, 206 Kemp’s ridley turtles, 16 hawksbill turtles, 16 leatherback turtles, and 15 unidentified turtles.

43. The 2002 BiOp for the Gulf of Mexico and South Atlantic shrimp fisheries relied on the best available data to conclude that observable strandings along the coast account for only 5 to 6 percent of total at-sea mortality.

44. Extrapolation from observed 2011 stranding data for the Gulf of Mexico and South Atlantic, based on the 5 percent formula contained in the 2002 BiOp, indicates that actual sea turtle mortality in these regions so far in 2011 is likely 20,220 loggerhead turtles, 21,060 green turtles, 15,460 Kemp's ridley turtles, 640 hawksbill turtles, 400 leatherback turtles, 1,560 unidentified turtles.

45. The mortality estimates set forth in paragraph 44 are greater than the annual lethal incidental take allowances established in the 2002 BiOp for all five listed sea turtle species.

46. NMFS has failed to monitor and collect the data that would be necessary for a more precise estimate of impacts from the Gulf of Mexico and South Atlantic shrimp fisheries on sea turtle populations. For instance, NMFS requires observers on only two percent of the roughly 5,000 shrimp fishing vessels operating in the Gulf of Mexico. This level of observer coverage is not adequate to derive more statistically robust estimates of sea turtle interactions with the shrimp fishing fleet.

47. Additionally, recent NMFS inspection records regarding vessel compliance with TEDs gear requirements, disclosed to the public in the summer of 2011, indicate that compliance rates are significantly lower than the full compliance required by the Sea Turtle Conservation Regulations and assumed in the 2002 BiOp. In some Gulf coast states, no inspected vessels were in full compliance with the TEDs gear requirements and in others, full compliance was observed in less than 50 percent of the vessels inspected.

48. Based upon these inspection data, a July 19, 2011 report by the non-profit organization Oceana concluded that 17 percent of the 76 vessels inspected in the Gulf of Mexico either had no TED installed or had blocked the escape hatch of the TED in some way. Applying this compliance percentage to the most recent NMFS estimates for sea turtle interactions with

shrimp fishing vessels in the Gulf of Mexico, Oceana estimated that 4,874 loggerhead turtles and 108 leatherback turtles were killed by shrimp fishing activities in the Gulf of Mexico in 2010, exceeding the take allowances of 3,948 and 80, respectively, for these species in the 2002 BiOp.

49. Accordingly, on information and belief, the shrimp trawl fishery has exceeded the authorized sea turtle take levels in the 2002 BiOp.

50. NMFS itself acknowledged in its August 17, 2010 memorandum that new information not previously considered in the 2002 BiOp, including recent stranding data and an increase in shrimp fishing vessels using nets not subject to the TEDs gear requirements, required reinitiation of consultation under the ESA. Notwithstanding this acknowledgement, NMFS has failed to take appropriate action to address the ongoing harm to sea turtle resulting from Southeast shrimp trawl fisheries, such as the imposition of time/area closures or the suspension of shrimp fishing authorization for vessels not using TEDs, as required by the 2002 BiOp.

51. There are several likely sources of the increase in sea turtle mortality in the Gulf of Mexico. First, in recent years, there has been an increase in the use of skimmer trawls, which generally do not employ TEDs, relative to traditional (otter) trawls for which TEDs are required. NMFS personnel have concluded that the increase in skimmer trawls is resulting in increased injury and death to sea turtles.

52. Second, state enforcement of TEDs requirements in state waters is often inadequate and sometimes non-existent. The State of Louisiana, for instance, does not enforce TEDs regulations in state waters due to a state law prohibiting such enforcement. In other Gulf coast states, NMFS has found cursory or ineffective state enforcement.

53. Third, federal implementation of the Sea Turtle Conservation Regulations and the terms and conditions of the 2002 BiOp is not adequate to ensure consistent and proper use of

TEDs gear. Although inspectors from the NOAA Office of Law Enforcement or NMFS conduct some dockside vessel compliance inspections, these inspections are not regular and historically have been undertaken largely or solely in response to complaints or increased strandings. While NMFS has stepped up inspections in response to Plaintiffs' recent advocacy efforts, NMFS has acknowledged that maintaining increased dockside inspections poses a long term challenge. NMFS also has recognized that, although the U.S. Coast Guard may board shrimp fishing vessels on the water, Coast Guard inspectors frequently do not conduct full TEDs inspections.

54. Based on the alarming numbers of strandings in 2010, Plaintiffs TIRN and the Center sent a sixty-day notice and administrative petition to NMFS on July 14, 2010, seeking immediate reinitiation of consultation under Section 7 of the ESA and an emergency closure of the Gulf shrimp fishery until consultation is completed. By a memorandum dated August 17, 2010, the Assistant Regional Administrator for the NMFS Southeast Regional Office requested reinitiation of consultation under Section 7 on the Sea Turtle Conservation Regulations. But the agency has not timely completed that consultation despite the expiration of the statutory timeframe for doing so. The agency took no action on the request for emergency closure.

55. On April 4, 2011, Plaintiff TIRN sent another petition to NMFS seeking emergency closure of the Gulf of Mexico shrimp fishery, an emergency rule to require that skimmer trawls use TEDs, increased TEDs enforcement, and increased observer coverage in the fishery.

56. On May 31, 2011, Plaintiffs TIRN, the Center, Defenders of Wildlife, and STC sent a second sixty-day notice and petition for emergency closure of the Gulf shrimp fishery to NMFS in response to the unprecedented number of strandings recorded in April 2011. This notice also alerted NMFS of Plaintiffs' intent to sue regarding NMFS' failure to complete

consultation for the smalltooth sawfish and Gulf sturgeon, and for take occurring as a result of the shrimp fishery. By letter dated July 25, 2011, NMFS notified Plaintiffs that it did not intend to implement any emergency closures.

(Smalltooth Sawfish and Gulf Sturgeon)

57. In addition to entangling sea turtles, the shrimp trawl fishery also catches endangered smalltooth sawfish and threatened Gulf sturgeon. The ESA generally prohibits the take of smalltooth sawfish and Gulf sturgeon, 16 U.S.C. § 1538(a)(1); 50 CFR § 17.44(v), unless in compliance with a valid incidental take statement. 16 U.S.C. § 1536 (o).

58. Smalltooth sawfish are slow growing and late maturing, as well as very large fish; they can reach up to 18 feet, though some individuals have reached 24 feet. The smalltooth sawfish has a distinctive serrated snout that looks like a saw, which makes it vulnerable to entanglement in fishing gear.

59. Shrimp trawl fisheries are associated with high adult sawfish mortality. The 2009 smalltooth sawfish recovery plan ranked the severity of threat of injury from trawl entanglement as high. NMFS consulted on the shrimp trawl fishery's impacts on smalltooth sawfish and completed biological opinions for the Gulf of Mexico and South Atlantic shrimp trawl fisheries in 2006 and 2005, respectively. Each opinion included an incidental take statement authorizing one lethal take of sawfish annually.

60. On May 4, 2009, the Assistant Regional Administrator requested reinitiation of Section 7 consultation on the South Atlantic shrimp fishery and its effects on smalltooth sawfish because observer data indicated that the amount of take authorized in the 2005 Biological Opinion had been exceeded. On March 9, 2010, the Assistant Regional Administrator requested reinitiation of Section 7 consultation on the Gulf shrimp fishery to address impacts to smalltooth

sawfish based on observer data indicating the amount of take authorized through the 2006 Biological Opinion for that fishery also had been exceeded. In 2009, smalltooth sawfish gained critical habitat protections which also triggered the need to reinitiate consultation. To date, NMFS has not completed consultation regarding the impacts of these fisheries on the smalltooth sawfish.

61. NMFS listed the Gulf sturgeon as threatened in 1991 and designated its critical habitat in 2003. Gulf sturgeon are bottom-feeding, primitive-looking fish that inhabit the coastal rivers from Louisiana to Florida in the warmer months and forage in the Gulf of Mexico waters in the cooler months. Although the sturgeon once supported a commercial fishery, habitat destruction and overfishing contributed to a population collapse.

62. In its 2002 BiOp on the shrimp trawl fishery, NMFS concluded that the Gulf sturgeon was not likely to be adversely affected and did not anticipate any incidental take. NMFS reached this conclusion because the Gulf sturgeon is only exposed to the shrimp trawl fishery during the winter, because the species occurs mostly in state waters, and because there had been no documented take. Accordingly, there is no authorized incidental take of Gulf sturgeon. On February 18, 2010, Assistant Regional Administrator for Sustainable Fisheries requested reinitiation of Section 7 consultation based on documented take that occurred in federal waters in 2009. In 2003, Gulf sturgeon also gained critical habitat protections that triggered the need to reinitiate consultation. To date, NMFS has not completed consultation regarding the impacts of the shrimp trawl fishery on the Gulf sturgeon.

CLAIMS FOR RELIEF

First Cause of Action

(Violations of Endangered Species Act Section 7, 16 U.S.C. § 1536)

63. Plaintiffs hereby reallege and incorporate by reference each and every allegation set forth in paragraphs 1 through 62 of this Complaint, as though fully set forth herein.

64. Data show that take authorizations in the operative biological opinions for sea turtles, smalltooth sawfish, and Gulf sturgeon in the Gulf of Mexico and South Atlantic shrimp trawl fisheries have been exceeded.

65. Defendant has documented widespread non-compliance by Gulf of Mexico shrimp fishing vessels with the TEDs gear and tow time requirements established in the Sea Turtle Conservation Regulations.

66. Defendant has documented the failure of implementation and enforcement efforts by state and local agencies to ensure compliance with the TEDs gear and tow time requirements established in the Sea Turtle Conservation Regulations.

67. Defendant purported to reinitiate consultation for the smalltooth sawfish in May 2009 and March 2010; for Gulf sturgeon in February 2010; and for Gulf sea turtles in August 2010. Defendant has exceeded, for each of these species, the 90-day period set forth in the ESA, 16 U.S.C. § 1536(b), for completion of consultation and has not justified extensions of the statutory period.

68. Defendant's continued reliance on the 2002 BiOp to authorize the operation of the Gulf of Mexico and South Atlantic shrimp fisheries when it is aware that fundamental assumptions regarding the effects of the fisheries on listed species have been proven false constitutes a failure to insure that these fisheries are not likely to jeopardize the continued existence of listed species, in violation of Section 7 of the ESA, 16 U.S.C. § 1536. Such action

is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2), and is subject to judicial review under 16 U.S.C. § 1540(g).

69. Defendant's continued reliance on the 2005 and 2006 biological opinions to authorize the operation of the South Atlantic and Gulf of Mexico shrimp fisheries when the annual incidental take authorization for smalltooth sawfish has been exceeded constitutes a failure to ensure that these fisheries are not likely to jeopardize the continued existence of listed species, in violation of Section 7 of the ESA, 16 U.S.C. § 1536. Such action is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2), and is subject to judicial review under 16 U.S.C. § 1540(g).

Second Cause of Action
(Violations of Section 9 of the Endangered Species Act, 16 U.S.C. § 1538)

70. Plaintiffs hereby reallege and incorporate by reference each and every allegation set forth in paragraphs 1 through 62 of this Complaint, as though fully set forth herein.

71. Defendant's ongoing authorization of the Gulf of Mexico and South Atlantic shrimp trawl fisheries pursuant to the Sea Turtle Conservation Regulations and the 2002 BiOp violates Section 9 of the ESA, 16 U.S.C. § 1538, in that:

a. Defendant's stranding data show that the allowable take levels for listed sea turtle species in the 2002 BiOp have been exceeded, as described more fully in paragraphs 40 through 49 above, but Defendant has failed to revoke its authorization to operate the Gulf of Mexico or South Atlantic shrimp trawl fisheries and continues to authorize their operation without a new biological opinion and incidental take statement; and

b. Defendant has failed to satisfy the terms and conditions of the 2002 BiOp concerning its own duty to, among other things, coordinate with the Gulf coast states to enforce regulations, provide adequate observer coverage to monitor sea turtle mortality, monitor trawling activities exempt from the TEDs, implement measures to reduce effort in shrimp fisheries, and provide adequate training to state agencies, thereby increasing the risk of injury to and death of listed sea turtles.

72. Because Defendant has authorized fishing in violation of the terms and conditions of the 2002 BiOp and in excess of the annual take allowances established in the BiOp, any ongoing take of listed sea turtles is not authorized under the exemption in Section 7(o)(2) of the ESA and is, therefore, prohibited under Section 9 of the ESA and 50 C.F.R. § 223.206(d)(4)(A).

73. Defendant's continued authorization of the Gulf of Mexico shrimp fishery in violation of the terms, conditions, and take allowances in the 2002 BiOp constitutes a violation of the take prohibition in Section 9 of the ESA, 16 U.S.C. § 1538, and is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2), subject to judicial review under 16 U.S.C. § 1540(g).

74. Defendant also is violating Section 9 of the ESA, 16 U.S.C. § 1538, by continuing to authorize the shrimp fishery, which has taken endangered smalltooth sawfish that are not authorized by a valid incidental take statement, and is violating ESA protective regulations that prohibit the take of Gulf sturgeon, 50 C.F.R. 17.44(v), by continuing to allow the unauthorized take of threatened Gulf sturgeon. These violations also are subject to judicial review under 16 U.S.C. § 1540(g).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment providing the following relief:

1. Declare that Defendant has failed to insure that the Gulf of Mexico and South Atlantic shrimp trawl fisheries are not likely to jeopardize listed species in violation of Section 7(a) of the ESA, 16 U.S.C. § 1536(a), by continuing to rely upon the 2002 Biological Opinion and Incidental Take Statement to authorize the operation of these fisheries when annual take allowances for listed sea turtles and Gulf sturgeon have been exceeded and when there is widespread non-compliance with the gear and tow time requirements in the Sea Turtle Conservation Regulations on which Defendant's authorization is based;

2. Declare that Defendant has failed to insure that the Gulf of Mexico and South Atlantic shrimp trawl fisheries will not jeopardize listed species in violation of Section 7(a) of the ESA, 16 U.S.C. § 1536(a), by continuing to rely on the 2005 and 2006 Biological Opinions and Incidental Take Statements to authorize the operation of these fisheries when annual take allowances for the listed smalltooth sawfish have been exceeded;

3. Declare that Defendant is violating Section 9 of the ESA, 16 U.S.C. § 1538, by continuing to authorize the operation of the Gulf of Mexico and South Atlantic shrimp trawl fisheries when the annual incidental take allowances in the 2002 Biological Opinion and Incidental Take Statement have been exceeded;

4. Declare that Defendant is violating Section 9 of the ESA, 16 U.S.C. § 1538, by continuing to authorize the operation of the Gulf of Mexico and South Atlantic shrimp trawl fisheries when the terms and conditions of the 2002 Biological Opinion and Incidental Take Statement have not been satisfied;

5. Declare that Defendant is violating Section 9 of the ESA, 16 U.S.C. § 1538, by continuing to authorize the Gulf of Mexico and South Atlantic shrimp trawl fisheries when the annual incidental take allowances in the 2005 and 2006 Biological Opinions and Incidental Take Statements have been exceeded;

6. Order Defendant to complete ESA Section 7 consultation on the impact of shrimp trawling in the Gulf of Mexico and South Atlantic on listed species by no later December 31, 2011;

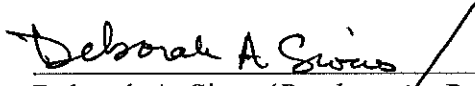
7. Order Defendant to suspend authorization of shrimp trawl fishing under the Sea Turtle Conservation Regulations for any vessel, including, without limitation, any skimmer trawl vessel, that is not operating with a properly installed and operating NMFS-approved turtle excluder device in each net rigged for fishing;

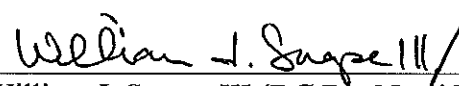
8. Order such other injunctive relief as may be appropriate, including, without limitation, closure of part or all of the U.S. shrimp trawl fisheries, until such time as the violations in this Complaint are remedied;

9. Award to Plaintiffs the costs of litigation, including reasonable attorneys' fees under the Endangered Species Act; and

10. Grant Plaintiffs such other relief as the Court deems just and proper.

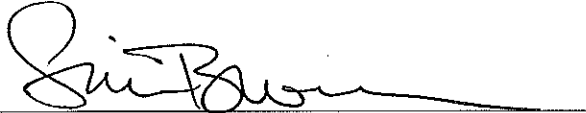
Dated: October 13, 2011

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