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RE: Notice of Intent to Sue for Violations of the Endangered Species Act Related to the Management of the Gulf of Mexico and South Atlantic Shrimp Trawl Fisheries

On behalf of the Center for Biological Diversity, Turtle Island Restoration Network, Oceana, and Sea Turtle Conservancy, this letter serves as a notice of our intent to sue the National Marine Fisheries Service (“Fisheries Service”) for its continued implementation of sea turtle conservation regulations and continued authorization of the Southeast U.S. shrimp trawl fisheries in federal waters for violations of Sections 7 and 9 of the Endangered Species Act (“ESA” or “Act”), 16 U.S.C. §§ 1531-1544. The violations include actions and inactions related to the management and regulation of the southeast shrimp trawl fishery that have resulted in and continue to result in illegal take of and other harm to protected species, including loggerhead, green, leatherback, hawksbill, and Kemp’s ridley sea turtles. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the Act, 16 U.S.C. § 1540(g).

As detailed below, the Fisheries Service has violated and continues to violate the ESA with respect to its duties to protect and conserve threatened and endangered species. The Fisheries

Service's ongoing management of the shrimp trawl fishery is resulting in sea turtle strandings and deaths. Based on available information and our belief, the Fisheries Service is violating the ESA in the following ways:

1. The Fisheries Service is in violation of Section 7 of the ESA for failing to:
 - a. Complete consultation on the shrimp trawl fisheries within the prescribed timeframe as required by Section 7(b);
 - b. Insure its actions are not likely to jeopardize the continued existence of endangered and threatened species as required by Section 7(a)(2); and
 - c. Insure take is in compliance with the 2002 and/or 2012 biological opinion(s).
2. The Fisheries Service is in violation of Section 9 of the ESA for unlawful take of endangered and threatened species because:
 - a. The Fisheries Service authorizes the southeast shrimp trawl fisheries to operate and their operations result in take which has not been adequately evaluated or authorized by a legally valid biological opinion, incidental take statement, or incidental take permit; and
 - b. To the extent the Fisheries Service continues to rely on the 2002 or 2012 biological opinions:
 - a. that determination is arbitrary and capricious given that the Fisheries Service has acknowledged the measures prescribed in it are inadequate to protect imperiled sea turtles; and
 - b. take is not in compliance with the terms and conditions of either biological opinion.

For the reasons set forth below, we notify the Fisheries Service of our intent to sue over its management of the southeast shrimp trawl fisheries for violations of Sections 7 and 9 of the ESA.

I. BACKGROUND

In 2002, the Fisheries Service analyzed the effects of shrimp trawl fishing on all listed species within federal waters and listed sea turtles within state waters. In 2005 and 2006, the Fisheries Service consulted on the effects of shrimp trawl fishing on smalltooth sawfish. In 2009 and 2010, consultation on the sawfish was reinitiated because new observer data indicated that the incidental take statement was exceeded. In 2010, consultation on Gulf sturgeon was reinitiated based on new information indicating the fishery had unanticipated adverse effects.

On August 17, 2010, the Fisheries Service reinitiated consultation on the continued authorization of southeast shrimp trawl fisheries and their effects on all listed species that occur in the southeast region due to new information: the *Deepwater Horizon* oil spill and clean up. On May 31, 2011, the Center for Biological Diversity, Turtle Island Restoration Network, Sea Turtle Conservancy and Defenders of Wildlife notified the Fisheries Service of their intent to file suit within 60 days due to the Fisheries Service missing its deadline to conclude consultation and issue a biological opinion. On October 13, 2011, the conservation groups filed suit under Section 7(a)(2) of the Act.

That suit was settled when the Fisheries Service agreed to issue a new biological opinion and a new proposed rule that would require the use of TEDs on skimmer trawl operations. On May 10, 2012, the Service published a biological opinion and proposed rule that would require all skimmer trawls, pusher-head trawls, and wing nets to use TEDs in their nets.¹ The biological opinion was for the Fisheries Service's continued implementation of the sea turtle conservation regulations and the continued authorization of the southeast U.S. shrimp fisheries in federal waters under the Magnuson-Stevens Act. It analyzed the implementation of the proposed skimmer rule and included terms and conditions requiring the Fisheries Service to coordinate with the states to monitor fishing efforts, and monitor compliance with sea turtle conservation regulations. However, after issuing the 2012 biological opinion and proposed TEDs skimmer trawl rule, the Fisheries Service shifted observer effort to the inshore skimmer trawl fishery and alleged that even with high compliance with proposed TED requirements protection for sea turtles would be significantly less than previously estimated. Finding that the TEDs requirement would have potentially significant economic ramifications for fisheries and that the ecological benefits to sea turtle populations were highly uncertain, the Fisheries Service withdrew the proposed TEDs skimmer trawl rule. On November 26, 2012, the Fisheries Service reinitiated consultation with itself and stated it anticipated having a new biological opinion completed by the end of March 2013. The Center has inquired about the completion of a new biological opinion several times since November 2012.²

II. VIOLATIONS OF THE ENDANGERED SPECIES ACT

The ESA was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...[and] a program for the conservation of such endangered species and threatened species.”³ Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”⁴ The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”⁵ Similarly, Section 7(a)(1) of the ESA directs that the Fisheries Service and other federal agencies shall use their programs and authorities to conserve endangered and threatened species.⁶

In order to fulfill the substantive purposes of the ESA, federal agencies are required to engage in consultation with the Fisheries Service to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species...determined...to be critical.”⁷ The action agency must assess the effects of its actions on endangered species where the species may be present. When an agency determines that its

¹ 77 Fed. Ref. 27411.

² See Attachment 1 “2013_04_15 ltr to NMFS,” Attachment 2 “2013_06_14 ltr to NMFS.”

³ 16 U.S.C. § 1531(b).

⁴ 16 U.S.C. § 1531(c)(1).

⁵ 16 U.S.C. § 1532(3).

⁶ 16 U.S.C. § 1536(a)(1).

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

proposed action “may affect listed species or critical habitat” it must engage in formal consultation with the federal resource agency responsible for the species at issue, known as the expert agency.⁸ Where, as here, the Fisheries Service is both the action agency and the expert agency for purposes of the listed species in question, the agency must undertake internal consultation with itself.

A. Section 7(b) Violations

The Endangered Species Act specifies that consultation shall be concluded within the 90-day period beginning on the date on which it is initiated or, under certain circumstances, another period.⁹ Formal consultation is initiated on the date the request is received, if the action agency provides all the relevant data required by 50 CFR § 402.14(c). The U.S. Fish and Wildlife Service and National Marine Fisheries Service, Consultation Handbook (1998), has specified instances in which an extension is justified:

The consultation timeframe cannot be “suspended.” If the Services need more time to analyze the data or prepare the final opinion, or the action agency needs time to provide data or review a draft opinion, an extension may be requested by either party. Both the Services and the action agency must agree to the extension. Extensions should not be indefinite, and should specify a schedule for completing the consultation.

The Consultation Handbook also states that during intra-service consultations, “[t]he Service must be held to the same rigorous consultation standards that other Federal agencies are required to meet under section 7.” Even in the case of intra-agency consultation, as is the case here, consultation must be concluded within 90 days.¹⁰ A biological opinion must be delivered within an additional 45 days.¹¹ If consultation will last longer than 150 days after initiation, the Fisheries Service must obtain consent to such a period from the agency requesting initiation.¹²

One year, 2 months, and 25 days (or 451 days) have passed since the Fisheries Service reinitiated consultation and it has still not issued a biological opinion. The Fisheries Service meanwhile continues to authorize shrimp trawl fisheries that operate absent a biological opinion, or pursuant to biological opinion(s) that the Fisheries Service knows to be inadequate and flawed (referring to both the 2002 and 2012 biological opinions).

B. Section 7(a)(2) Violations

In addition to its duty to timely complete consultation, the Fisheries Service must comply with Section 7(a)(2)’s substantive requirement to insure that its actions are not likely to jeopardize the continued existence of listed species. This duty exists at all times and is not waived during consultation. The Fisheries Service has admitted that poor compliance with TEDs and tow time

⁸ 50 C.F.R. § 402.14(a).

⁹ 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

¹⁰ Final ESA Intra-Service Consultation Handbook, March 1998, E-22.

¹¹ *Id.*

¹² 16 U.S.C. § 1536(b).

requirements has likely resulted in a significantly higher number of sea turtle mortalities than previously estimated, that skimmer trawl efforts have increased in recent years, and that there are no measures in place to mitigate this higher level of impact.

The failure to complete consultation has made it impossible for the Fisheries Service to comply with the substantive mandate of Section 7(a)(2), which requires that the agency ensures it is “not likely to jeopardize the continued existence of any endangered species or threatened species.”¹³

In addition, it would be arbitrary and capricious for the Fisheries Service to rely on the 2012 biological opinion because it was based the implementation of a proposed skimmer rule that was later withdrawn. Similarly, it would be arbitrary and capricious for the Fisheries Service to rely on the 2002 biological opinion because since it was drafted, there has been a shift in fishing effort (an increase in skimmer trawl use), multiple instances of actual take exceeding the amount estimated in the biological opinion and the *Deepwater Horizon* oil spill. Moreover, the Fisheries Service has reinitiated consultation on both the 2002 and 2012 biological opinions, rendering them both invalid.

C. Section 9 Violations

Compliance with a biological opinion protects federal agencies and others acting under the biological opinion from enforcement action under Section 9’s prohibition against take.¹⁴ “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁵ The Fisheries Service has extended these protections to threatened species by protective regulations deemed necessary and advisable for the conservation of the threatened species, including sea turtles and Gulf sturgeon.¹⁶ Section 7(o)(2) provides that “any taking that is in compliance with the terms and conditions specified in a written statement under subsection (b)(4)[sic](iv) of this section shall not be considered to be a prohibited taking of the species concerned.” However, take not in compliance with a biological opinion or absent a biological opinion is in violation of Section 9 of the ESA.

The ESA “not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking....a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.”¹⁷ Accordingly, the Fisheries Service which authorizes activities that engage in activities that result in the unauthorized take of sea turtles is acting in violation of Section 9 of the ESA.¹⁸

¹³ 16 U.S.C. § 1536(a)(2).

¹⁴ See 16 U.S.C. § 1536(o)(2); 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31 (a).

¹⁵ 16 U.S.C. § 1532(19).

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

¹⁷ *Strahan v. Cox, et al.*, 127 F.3d 155 (1st Cir. 1997); 16 U.S.C. 1538(g).

¹⁸ The BiOp sets take authorization for both the Gulf of Mexico and South Atlantic Shrimp Trawl Fishery Management Plans as well as the TED regulations. Therefore the estimated take for the entire action has been exceeded, meaning that the South Atlantic fishery is also now operating without take authorization in violation of Section 9 of the ESA.

Based on information and belief, the Fisheries Service's continued operation of the southeastern shrimp trawl fishery is directly resulting in unauthorized take of endangered and threatened species in violation of Sections 9 of the ESA because there is no legally valid biological opinion;¹⁹ and to the extent the Fisheries Service is relying on the 2012 or 2002 biological opinions, it is not complying with the terms and conditions of those biological opinions.

Incidental takings are not authorized during fishing activities if the takings "[w]ould violate the restrictions, terms, or conditions of an incidental take statement."²⁰ The incidental take statement includes requirements to use observer information to monitor sea turtle mortality from trawls, take appropriate action if stranding trends significantly increase, and monitor activities exempt from the requirement for TEDs to determine effects on sea turtles.²¹ The Fisheries Service acknowledges in that "[i]n order to be exempt from the prohibitions of section 9 of the ESA, [it] must comply with the [] terms and conditions" which are nondiscretionary:²²

On information and belief, the Fisheries Service has not complied with the terms and conditions of the 2012 biological opinion because:

- The Fisheries Service is violating terms 7(b)&(c) by not enforcing the TED regulations specified in the 2012 biological opinion and by not working with the state of Louisiana to improve and standardize enforcement of TED regulations as Louisiana has prohibited the enforcement of TEDs use in state waters;
- The Fisheries Service is not coordinating with Louisiana to monitor fishing efforts, in violation of term 1; and
- The Fisheries Service is not coordinating with Louisiana or any other entity to gather information on compliance with TED regulations analyzed in the 2012 biological opinion, in violation of term 8.

On information and belief, the Fisheries Service has not complied with the terms and conditions of the 2002 biological opinion because:

- The Fisheries Service is violating terms 1(b)&(d) by not coordinating with the state of Louisiana to monitor fishing efforts or enforce sea turtle conservation regulations as Louisiana has prohibited the enforcement of TEDs use in state waters;²³
- Observer coverage is inadequate to monitor sea turtle mortality from trawls as required by term 1(c);
- The Fisheries Service is required to take appropriate action by term 1(d) but has taken no action, other than to reinitiate consultation, despite the spike in sea turtle strandings;²⁴
- The Fisheries Service is not sufficiently monitoring activities in violation of term 1(f);²⁵

¹⁹ Please see subsection A. Section 7(b) Violations and B. Section 7(a)(2) Violations of this notice letter.

²⁰ 50 C.F.R. § 223.206(d)(4).

²¹ 2002 BiOp at 57-58, 2012 BiOp at 200.

²² 2012 BiOp at 200-201.

²³ Louisiana Revised Statutes 56 section 57.2. Turtle excluder devised; findings; enforcement of federal requirements; rules and regulations.

²⁴ The August 2010 letter requesting reinitiation of consultation found that "recent evidence of the lack of compliance with TED regulations, including the tow time provisions, now casts doubts onto the actual effectiveness of the regulations in protecting and conserving sea turtles populations."

- The Fisheries Service has not adequately researched and implemented measures to reduce effort in the shrimp fishery thus reducing stress on sea turtles from multiple interactions in violation of term 4; and
- The Fisheries Service has not provided adequate training to the State agencies on the sea turtle conservation regulations nor adequately enforced sea turtle conservation regulations in violation of terms 3 & 5.²⁶

The Fisheries Service acknowledges that the shrimp trawl fishery takes listed species.²⁷ It takes listed species with or without the implementation of sea turtle conservation measures. The Fisheries Service also acknowledges that compliance with sea turtle conservation regulations is low. In authorizing shrimp fishing in federal waters and sea turtle conservation measures in state and federal waters, the Fisheries Service has authorized activities “in specifically the manner that is likely to result in a violation” of the ESA.²⁸

For example, in the 2012 biological opinion the Fisheries Service estimated total annual mortality for the southeast shrimp trawl fishery as 7,701 loggerhead, 1,382 green, and 43,307 Kemp’s ridley sea turtles. Those amounts estimated total mortality with the proposed skimmer regulation implemented. After the Fisheries Service withdrew the proposed rule in a November 2012 letter, it calculated new estimated total annual mortality of 7,786 loggerhead, 1,489, and 44,320 Kemp’s ridley sea turtles.

Indeed in 2013 over 4,385 sea turtles were discovered stranded due to causes not attributable to cold stranding.

	Loggerhead	Green	Kemp’s ridley	Leatherback	Olive ridley	Unknown	Hawksbill	Total
TX	85	421	153	2		12	4	677
LA	12	10	184	1		35		242
AL	15	6	72	4		5		102
MS	12	1	464	1				478
FL	207	263	185	5		10	7	677
FLA	595	566	50	5	1	7	24	1,248
GA	111	66	50	2		1		230
SC	84	15	18	3		2		122
NC	193	264	128	4		20		609
	1,314	1,612	1,304	27	1	92	35	4,385

²⁵ The August 2010 letter requesting reinitiation of consultation acknowledges “vessels using skimmer trawls regularly exceeds these alternative tow time requirements, and monitoring tow times to ensure high compliance is time and man power prohibitive.”

²⁶ The August 2010 letter requesting reinitiation of consultation stated “recent NOAA inspections of the east Texas shrimp fleet found problems in compliance with TEDs, despite the fact that a TED workshop had been conducted earlier that month which was attended by approximately 90 local fishermen.

²⁷ 2002 BiOp; 2012 BiOp.

²⁸ *Strahan v. Coxe*, 127 F.3d 155, 164 (1st Cir. 1997).

However, these totals only reflect discovered, stranded sea turtles. “Considering that strandings make up 5-6% of the total at sea mortality”²⁹ and that stranding “usually does not exceed 10-20% of total mortality even in near shore waters,” actual sea turtle mortality and rates of interactions with shrimp trawl gear are likely much higher.³⁰ Each sea turtle interaction with shrimp trawl gear is an unauthorized take and in violation of Section 9 of the Endangered Species Act.

Conclusion

If the Fisheries Service does not act within 60 days to correct these violations of the ESA, the Center for Biological Diversity, Turtle Island Restoration Network, Oceana, and Sea Turtle Conservancy will pursue litigation in Federal Court. These parties will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. An appropriate remedy that would prevent litigation would be for the Fisheries Service to suspend the shrimp trawl fishery in the Gulf of Mexico until the completion of consultation and for the State of Louisiana to enforce any measures deemed necessary by the Fisheries Service to protect endangered species from state-authorized shrimp fishing activities.

If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me at (727) 490-9190 or jlopez@biologicaldiversity.org. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'J Lopez', with a long horizontal stroke extending to the right.

Jaclyn Lopez
Staff Attorney

²⁹ 2002 BiOp at 44.

³⁰ Koch, V. 2013. Estimating At-Sea Mortality of Marine Turtles from Stranding Frequencies and Drifeter Experiements. PloS One. 2013; 8(2): e56776, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3577704/>.