

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

Via U.S. Mail and Electronic Mail

December 16, 2009

Honorable Gary Locke
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue, N.W., Room 5516
Washington, D.C. 20230
glocke@doc.gov

Dr. James W. Balsiger
Acting Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration
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**RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act
Related to the Management of the Gulf of Mexico Reef Fish Fishery**

Dear Secretary Locke and Dr. Balsiger:

On behalf of the Caribbean Conservation Corporation (“CCC”), Center for Biological Diversity (“CBD”), Defenders of Wildlife (“Defenders”), Turtle Island Restoration Network (“TIRN”), and the Gulf Restoration Network (“GRN”), this letter serves as a 60-day notice of intent to sue the National Marine Fisheries Service/NOAA Fisheries (“NMFS”) for its violations of Sections 7 and 9 of the Endangered Species Act (“ESA”) (16 U.S.C. § 1531 *et seq.*) related to the management and regulation of the Gulf of Mexico Bottom Longline Fishery (“Fishery” or “Bottom Longline Fishery”).

As detailed below, NMFS is in violation of Section 7 of the ESA, 16 U.S.C. § 1536, because it is failing to ensure that the ongoing operation of the Gulf of Mexico Bottom Longline Fishery is not likely to jeopardize the continued existence of loggerhead sea turtles and other listed species. NMFS also is in violation of Section 9 of the ESA, 16 U.S.C. § 1538, for authorizing the unlawful take of sea turtles in the Bottom Longline Fishery. NMFS’s violations stem from its reliance on the Biological Opinion for “The Continued Authorization of Reef Fish Fishing under the Gulf of Mexico Reef Fish Fishery Management Plan, including Amendment 31, and a Rulemaking to Reduce Sea Turtle Bycatch in the Eastern Gulf Bottom Longline Component of the Fishery” (“2009

Biological Opinion”), finalized on October 13, 2009. The 2009 Biological Opinion is fundamentally flawed and cannot be relied upon to ensure that the Bottom Longline Fishery meets the requirements of the ESA. The 2009 Biological Opinion fails to use the best available science, omits key factors from consideration, and fails to establish a rational connection between the facts found and conclusions made. Consequently, the 2009 Biological Opinion represents a violation of the most basic requirements of the ESA to conserve listed species, and is arbitrary and capricious, an abuse of discretion, and not in accordance with law, in violation of the ESA and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2).

This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g). If NMFS does not take action within 60 days to remedy its violations of ESA Sections 7 and 9, our organizations will pursue litigation.

Background

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

The Bottom Longline Fishery operates primarily off Florida’s west coast in an area relied upon by several sea turtle species for vital foraging habitat. Loggerhead sea turtles, in particular, appear to rely on this area and frequently are caught, injured, and killed by the Fishery.

Prior Mismanagement of the Bottom Longline Fishery

On February 15, 2005, NMFS issued a biological opinion on the continued authorization of the Gulf of Mexico reef fish fishery as managed under the Reef Fish Fishery Management Plan. The 2005 Biological Opinion concluded that the Reef Fish Fishery – composed of the bottom longline, commercial vertical line, and recreational vertical line fisheries – was not likely to jeopardize the continued existence of the Atlantic population of loggerhead sea turtles.¹ The 2005 Biological Opinion’s incidental take

¹ NMFS, Biological Opinion on the Continued Authorization of Reef Fish Fishing under the Gulf of Mexico (GOM) Reef Fish Fishery Management Plan (RFFMP) and Proposed Amendment 23 (Feb. 15, 2005) (“2005 Biological Opinion”) at 93. Since the 2005 Biological Opinion was issued, NMFS has received a petition to list the Western North Atlantic subpopulations of loggerheads as a distinct population segment and reclassify

statement (“ITS”) authorized the Bottom Longline Fishery to take up to 85 loggerheads (including 42 lethal takes) over a 3-year period.² The total 3-year incidental take limit for all three combined fisheries was 203 loggerhead turtles (including 78 lethal takes).³

Though the 2005 Biological Opinion required that NMFS analyze and report bycatch levels in the Fishery on an annual basis, NMFS failed to do so until late summer 2008. NMFS’s belated analysis of its observer data showed that the Bottom Longline Fishery had far exceeded the take limits contained in the 2005 Biological Opinion for loggerhead sea turtles, capturing at least 782 loggerheads between June 2006 and December 2007. Despite the documented capture and death of these ESA-protected species, NMFS delayed any alteration of Fishery operations until May 2009 when it published an emergency rule prohibiting bottom longline fishing east of 85°30’ W longitude in waters 50 fathoms or shallower.⁴ This action came only after our organizations filed a notice of intent to sue the agency on January 14, 2009, and filed suit on April 15, 2009.

Loggerhead Sea Turtles’ Imperiled Status

The Western North Atlantic loggerhead sea turtle population – the population segment affected by the bottom longline fishery – is experiencing a dangerous decline. Nesting populations of loggerhead sea turtles throughout the Gulf of Mexico and southeast U.S. have declined significantly over the past decade.⁵ The annual loggerhead nests counted at index nesting beaches in Florida show a decline of more than 40 percent over the last decade.⁶ Data from the recent 2009 nesting season indicate that this was the fourth lowest nesting year on record for loggerhead sea turtles in Florida.

The decline in Florida loggerhead sea turtle nesting has implications for the global status of loggerheads. The South Florida loggerhead nesting assemblage, together with the important Oman assemblage in the Arabian Sea, accounts for 80-90 percent of the world’s loggerhead nesting activity.⁷

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.

² 2005 Biological Opinion at 94.

³ *Id.*

⁴ NMFS, Temporary Rule – Gulf Reef Fish Longline Restriction, 74 Fed. Reg. 20229 (May 1, 2009).

⁵ NMFS. 2008. Final Recovery Plan for the Northwest Atlantic Population of Loggerhead Sea Turtles (*Caretta caretta*), Second Revision.

⁶ 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.

⁷ Witherington et al. 2009 at 30; 2005 Biological Opinion at 41.

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.⁸ 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. Scientists have also found that loggerhead population numbers are profoundly affected by the removal of juvenile loggerheads, which have high reproductive potential.⁹

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.¹⁰ 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 as well as to other harms, such as vessel strikes or predation.¹¹ Unfortunately, not all turtles are able to recover from such extreme physical harm and physiological stress, and many die after being released.

The best available science demonstrates that loggerhead sea turtles are vulnerable to incidental capture year-round, as the area used by the Fishery is important year-round foraging habitat for this species.¹² In 2008 and in 2009, scientists from the Florida Wildlife Conservation Commission ("FWCC" or "the Commission") and Mote Marine Laboratory presented NMFS with a summary of satellite tracking data that shows the prevalence of loggerheads off the west coast of Florida.¹³ The Commission's 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 adults)."¹⁴

⁸ Witherington et al. 2009 at 50.

⁹ 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).

¹⁰ 2005 Biological Opinion at 57-59.

¹¹ *Id.* at 59-60.

¹² 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).

¹³ Letter from Gil McRae, Fish and Wildlife Research Institute, to Roy Crabtree, NOAA Fisheries Southeast Region (Dec. 9, 2008); Letter from Gil McRae, Fish and Wildlife Research Institute, Fla. Fish and Wildlife Conservation Comm'n, to Roy Crabtree, NOAA Fisheries Southeast Region (May 11, 2009); Letter from Tony Tucker, Sea Turtle Conserv. and Research Program, Mote Marine Lab, to Roy Crabtree, NOAA Fisheries Southeast Region (May 14, 2009) (letter misdated as May 2008).

¹⁴ *Id.* at 2.

Finally, the best available science shows that the loggerhead sea turtle, and particularly the Western North Atlantic loggerhead, cannot withstand continued high levels of bycatch if it is to survive and recover. An analysis of potential causes of the decline in nesting female loggerheads in Florida found that “the factor that best fits the nesting decline is fisheries bycatch. . . .”¹⁵ 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.¹⁶ Indeed, a team of sea turtle biologists, including NMFS biologists, has determined that the Western North Atlantic loggerhead population segment is “currently at risk of extinction.”¹⁷ The same team concluded that fisheries bycatch was the primary source of mortality for Western North Atlantic loggerheads.¹⁸

NMFS’s New Management Measures and the 2009 Biological Opinion

In order to lift the temporary fishery closure put in place in May 2009 for the protection of loggerhead sea turtles, NMFS and the Gulf of Mexico Fishery Management Council developed revised management measures for the Bottom Longline Fishery. These included an interim rule promulgated pursuant to the ESA and longer term measures to be implemented under proposed Amendment 31 to the Reef Fish Fishery Management Plan (“FMP”).

On August 13, 2009, the Gulf Council voted in favor of submitting Amendment 31 to the Reef Fish FMP to NMFS for review and approval under the Magnuson-Stevens Fishery Conservation and Management Act. If approved, Amendment 31 would (1) prohibit the use of bottom longline gear shoreward of a line approximating the 35–fathom contour during the months of June through August; (2) reduce the number of longline vessels operating in the fishery through an endorsement program that would grant vessel permits only to those ships with a demonstrated history of landings, on average, of at least 40,000 pounds of reef fish annually with fish traps or longline gear during 1999–2007; and (3) restrict the total number of hooks that may be possessed onboard each reef fish bottom longline vessel to 1,000, only 750 of which may be rigged for fishing.¹⁹ Due to the Council process and various rulemaking requirements, these measures are not expected to go into effect until May 2010.

On October 21, 2009, NMFS issued a rule pursuant to the ESA (“ESA Rule”) lifting the May 2009 temporary closure and providing interim authority and management

¹⁵ Letter from Gil McRae, Florida Fish and Wildlife Conservation Commission, to Roy Crabtree, NMFS SERO (Dec. 9, 2008); *see also* Witherington et al. 2009 at 48

¹⁶ Witherington et al. 2009 at 51.

¹⁷ Loggerhead Biological Review Team, Loggerhead Sea Turtle 2009 Status Review Under the US ESA (August 2009) at 164.

¹⁸ *Id.* at 73.

¹⁹ *See* 74 Fed. Reg. 53889, 53890 (Oct. 21, 2009) (“ESA Rule”) (describing Council action and need for interim management measures).

measures under which the Bottom Longline Fishery must operate until Amendment 31 is implemented.²⁰ The ESA Rule incorporates the hook restriction from Amendment 31 and prohibits bottom longline fishing in eastern Gulf of Mexico waters shallower than 35 fathoms.²¹ NMFS anticipates that this rule will remain in place until the long-term regulatory measures contained in the Reef Fish FMP Amendment 31 are implemented.

NMFS issued a new biological opinion (“2009 Biological Opinion”) on the effects of the Reef Fish Fishery’s operations under the ESA Rule and Amendment 31 on October 13, 2009, concluding that the operation of the Reef Fish Fishery under these management measures was not likely to jeopardize the continued existence of the loggerhead sea turtle or any other listed species. NMFS explains in the 2009 Biological Opinion that its jeopardy analysis is based on the number of adult female loggerheads killed by the Fishery from 2011 onward relative to the size of the entire adult female population of Western North Atlantic loggerheads and the relative contribution of the Reef Fish Fishery compared to other sources of loggerhead mortality.²²

The 2009 Biological Opinion states:

the proposed action is anticipated to result in the take of up to 1,152 loggerhead sea turtles, of which 631 are expected to be lethal, for the period 2009 through 2011. After that (i.e., from 2012 forward), the proposed action is anticipated to result in the take of up to 1,043 loggerhead sea turtles triennially, of which 566 are expected to be lethal.²³

These numbers include take by three sectors of the overall Reef Fish Fishery – commercial bottom longline, commercial vertical line, and recreational vertical line – as well as vessel strikes by vessels operating within the Reef Fish Fishery. Whereas the 2005 Biological Opinion allowed the entire Reef Fish Fishery to take 203 loggerheads every 3 years, including 85 takes by the Bottom Longline Fishery, the 2009 Biological Opinion authorizes the Reef Fish Fishery to take more than 1,000 loggerheads every 3 years, including 623 to 732 takes by the Bottom Longline Fishery.

The 2009 Biological Opinion acknowledges that the Western North Atlantic loggerhead population is “in decline and likely to continue to decline,” is “experiencing more mortality than it can withstand,” and that the predicted continued decline is “largely driven by mortality of juvenile and adult loggerheads from fishery bycatch that occurs throughout the North Atlantic Ocean.”²⁴ The Biological Opinion also notes that the population “*is likely to continue to decline until large mortality reductions in all fisheries*

²⁰ 74 Fed. Reg. at 53889.

²¹ *Id.*

²² *Id.* at 132-36.

²³ 2009 Biological Opinion at 129.

²⁴ *Id.* at 131, 135.

and other sources of mortality (including impacts outside U.S. jurisdiction) are achieved.²⁵

The 2009 Biological Opinion nonetheless finds that the Reef Fish Fishery is not likely to “appreciably reduce” the loggerhead’s chances at survival and recovery because the impact of the number of turtles that NMFS estimates will be captured and killed in the Reef Fish Fishery is small when compared to other sources of mortality.

Violations of the ESA

NMFS is in violation of Section 7 of the ESA by failing to ensure that the ongoing operation of the Gulf of Mexico Bottom Longline Fishery is not likely to jeopardize the continued existence of loggerhead sea turtles and other listed species and by failing to use its authority to conserve federally protected species. NMFS also is in violation of Section 9 of the ESA for authorizing the unlawful take of sea turtles in the Bottom Longline Fishery. Because NMFS’s conclusions in the 2009 Biological Opinion are arbitrary and capricious, and not in accordance with applicable law, that opinion cannot be relied upon as to meet these legal requirements. The following describes particular violations of the ESA that NMFS has committed by reopening the Fishery based on this flawed Biological Opinion.

ESA Sections 2(c) and 7(a)(1)

Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1). The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” *Id.* § 1532(3). Similarly, Section 7(a)(1) of the ESA directs that the Secretary review “programs administered by him and utilize such programs in furtherance of the purposes of the Act.” *Id.* § 1536(a)(1).

NMFS’s continued authorization of the Fishery is violating Sections 2(c) and 7(a)(1) of the ESA because NMFS has not used its authorities to further the purpose of listed species conservation. Specifically, as noted above, the 2009 Biological Opinion acknowledges that the Western North Atlantic loggerhead population is “in decline and likely to continue to decline,” is “experiencing more mortality than it can withstand,” and that the predicted continued decline is “largely driven by mortality of juvenile and adult loggerheads from fishery bycatch that occurs throughout the North Atlantic Ocean.”²⁶ And indeed, this decline is expected to continue “***until large mortality reductions in all***

²⁵ *Id.* at 136 (emphasis added).

²⁶ *Id.* at 131, 135.

fisheries and other sources of mortality (including impacts outside U.S. jurisdiction) are achieved.”²⁷

Rather than require the necessary reductions in mortality from this fishery (as well as others), NMFS has authorized the Fishery to continue to operate in a way that is expected to capture over 1,000 loggerhead sea turtles every three years. At the same time, it is continuing to authorize numerous other federal fisheries that also are expected to result in the take of thousands of loggerhead sea turtles. By taking this action even while acknowledging that it may forestall the recovery of an already declining population, NMFS is clearly failing to use all the resources necessary to bring the loggerhead back to the point where ESA protection would no longer be necessary.

ESA Section 7(a)(2)

Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To accomplish this goal, agencies must consult with the delegated agency of the Secretary of Commerce or Interior whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Where, as here, NMFS is both the action agency and the consulting agency, different branches of NMFS must undertake internal consultation with each other. At the completion of consultation, NMFS as the consulting agency issues a biological opinion that determines whether the action is likely to jeopardize the continued existence of the species or destroy or adversely modify critical habitat. If so, the opinion must specify reasonable and prudent alternatives that will avoid the likelihood of jeopardy and allow the action to proceed. 16 U.S.C. § 1536(b).

Even after the procedural requirements of a consultation are complete, however, the ultimate duty to ensure that an activity does not jeopardize a listed species lies with the action agency. An action agency’s reliance on an inadequate, incomplete, or flawed biological opinion cannot satisfy its duty to avoid the likelihood of jeopardy to listed species. *See, e.g., Florida Key Deer v. Paulison*, 522 F.3d 1133, 1145 (11th Cir. 2008); *Pyramid Lake Tribe of Indians v. U.S. Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990); *Stop H-3 Ass’n. v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984) (action agency must independently ensure that its actions are not likely to cause jeopardy). Thus, the substantive duty to insure against jeopardy to listed species remains in effect regardless of the status of the consultation. While the action agency may most readily fulfill this substantive duty by implementing a federal action that the consulting agency properly has determined not to cause jeopardy, or by implementing a valid reasonable and prudent alternative that results from a properly completed consultation, an action agency is “technically free” to choose an

²⁷ *Id.* at 136 (emphasis added).

alternative course of action if it can independently ensure that the alternative will avoid jeopardy. *See Bennett v. Spear*, 520 U.S. 154, 170 (1997).

The 2009 Biological Opinion is a deeply flawed document on which NMFS may not reasonably rely. For example, the opinion fails to properly analyze the “effects of the action” when added to a comprehensive environmental baseline. 50 C.F.R. § 402.02. First, the 2009 Biological Opinion fails to comprehensively and accurately describe the environmental baseline. As noted above, the 2009 Biological Opinion clearly states that the Western North Atlantic loggerhead population is “in decline and likely to continue to decline,” is now “experiencing more mortality than it can withstand,” and “is likely to continue to decline until large mortality reductions in all fisheries and other sources of mortality (including impacts outside U.S. jurisdiction) are achieved.”²⁸ Indeed, this decline has been precipitous, with nesting in Florida falling over 40% during the last decade and scientists projecting a possible 80% decline from 1998 levels by 2017. Yet the Biological Opinion assumes a static baseline in its jeopardy analysis, comparing the number of adult female loggerheads expected to be killed by the Reef Fish Fishery to the size the Western North Atlantic loggerhead population today. In light of the ongoing nature of the Fishery, NMFS was required to project its impacts going forward, not simply in a snapshot manner.

Moreover, the 2009 Biological Opinion incorporates that flawed baseline into a patently unlawful jeopardy analysis, comparing the discrete risk posed by the Reef Fish Fishery with the overall, grim state of affairs presented by all risks to loggerhead sea turtles, rather than adding the effects of the Reef Fish Fishery to this baseline as required by the ESA and its implementing regulations. The Ninth Circuit examined NMFS’s approach in a prior case and soundly rejected it as contrary to ESA purposes and requirements: “Under this approach, a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent.” *Nat’l Wildlife Fed’n v. NMFS*, 481 F.3d 1224, 1235 (9th Cir. 2005).

In addition, the 2009 Biological Opinion is not based on the best available science and fails to make a rational connection between the facts found in the analysis and its ultimate “no jeopardy” conclusion. As one especially egregious example, NMFS fails to address or meaningfully consider satellite tracking data indicating that loggerheads are present in the action area year-round, and frequently occur at depths greater than 35 fathoms.²⁹ In addition, although NMFS acknowledges that capture in the Bottom Longline Fishery may have significant sublethal effects on loggerhead and other sea turtles as a

²⁸ 2009 Biological Opinion at 131, 135-36.

²⁹ Letter from Tony Tucker, Mote Marine Laboratory, to Roy Crabtree, NMFS (May 14, 2009) at 2; Letter from Gil McRae, Florida Fish and Wildlife Conservation Commission, to Roy Crabtree, NMFS (May 11, 2009) at 1-2; Girard, C., A.D. Tucker, B. Calmettes (2009), Post-nesting migrations of loggerhead sea turtles in the Gulf of Mexico: dispersal in highly dynamic conditions, *Marine Biology*; 2008 McRae letter, *supra* note 15.

result of the forced submergence these animals suffer, it does not incorporate such considerations into its jeopardy analysis.

For these reasons, among others, the 2009 Biological Opinion incorrectly concludes that the continued operation of the Reef Fish Fishery is not likely to jeopardize the continued existence of the loggerhead sea turtle. In its capacity as the expert consulting agency, NMFS has acted in violation of the ESA and APA in producing an invalid biological opinion. In its duty as the action agency authorizing the operation of the Fishery, NMFS also has an independent duty to ensure that its actions avoid the likelihood of jeopardy. By authorizing the continued operation of the Bottom Longline Fishery based on the 2009 Biological Opinion, NMFS does not meet this legal standard. *See, e.g., Pyramid Lake Tribe of Indians*, 898 F.2d at 1415; *Stop H-3 Ass'n.*, 740 F.2d at 1460. NMFS has therefore violated and remains in violation of Section 7(a)(2) of the ESA.

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,” *id.* § 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 prohibition applies to NMFS here because “[t]he statute not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. . . . [A] governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.” *Strahan v. Coxe, et al*, 127 F.3d 155, 163 (1st Cir. 1997). NMFS provides the authorization for the operation of all sectors of the Gulf of Mexico Reef Fish Fishery, as well as all other federal fisheries. The agency’s continued authorization of the Bottom Longline Fishery, which is known to regularly result in the capture and mortality of sea turtles throughout the year, absent a valid incidental take authorization, violates ESA Section 9. Because such take is ongoing, NMFS is in violation of ESA Section 9.³⁰

A federal agency, and private entities such as fishermen acting under federal authorization, may take listed species only in accordance with an Incidental Take

³⁰ To the extent NMFS relies upon the ESA Rule, as codified at 50 C.F.R. § 223.206(d), as authorization to allow incidental take of loggerhead sea turtles in the Bottom Longline Fishery, such authorization is inapplicable. The ESA Rule wholly relies upon the unlawful 2009 Biological Opinion to establish an exception to the Section 9 take prohibition. As discussed above, reliance on this invalid document cannot satisfy NMFS’s duties under the ESA. Regardless, the uplisting of the loggerhead sea turtle to endangered status appears both appropriate and imminent based on the pending petition for uplisting and NMFS’s own recent statements—and indeed should have occurred already. NMFS has acknowledged that the Western North Atlantic loggerhead is “at risk of extinction” in its Loggerhead Sea Turtle 2009 Status Review. Under the ESA, a species must be listed as Endangered if it is “in danger of extinction throughout all or a significant portion of its range.” Should NMFS follow through on its scientific finding and change the status of the Western North Atlantic loggerhead as Endangered, any take authorization provided for this fishery by 50 C.F.R. § 223.206(d) would no longer be applicable. NMFS’s own delay in addressing the uplisting issue can provide no shield for its unlawful action here.

Statement (“ITS”) in a valid biological opinion. Pursuant to Section 7(b)(4) of the ESA, a biological opinion which concludes that the agency action will not jeopardize a listed species must include an ITS which specifies the impact of any incidental takes, provides reasonable and prudent measures necessary to minimize the impact of those takes, and sets forth terms and conditions that must be followed in order to ensure the action is not likely to cause jeopardy. 16 U.S.C. § 1536(b)(4). If the terms and conditions of the ITS are satisfied, the federal agency and any permittee are exempted from Section 9’s take prohibitions. *Id.* § 1536(o)(2). If any term or condition for the biological opinion is not fulfilled, however, all subsequent take is in violation of Section 9.

Because of the deficiencies in the 2009 Biological Opinion, any takes of sea turtles in the Fishery are without the protection of a valid ITS and therefore are in violation of Section 9. In addition, to the best of our knowledge, it appears likely that NMFS has violated the mandatory terms and conditions of the 2009 Biological Opinion through its failure to ensure that “observer coverage is sufficient to produce a statistically reliable sample of the bottom longline component of the Gulf reef fish fishery,”³¹ a requirement that NMFS estimates will translate to observer coverage of at least 2.9 to 6.5 percent of bottom longline trips.³² Although we have been unable to obtain any information regarding current observer coverage levels from NMFS, these levels have not historically been met, reaching only about 1.3 percent coverage in the Bottom Longline Fishery in prior years. Moreover, NMFS has consistently failed to provide evidence of how or when these required levels will be achieved.

Because there is no legal take authorization for the Bottom Longline Fishery due both to the flaws in the 2009 Biological Opinion and to NMFS’s apparent non-compliance with even this flawed Biological Opinion’s mandatory terms and conditions, NMFS is acting in violation of Section 9 of the ESA.

Conclusion

As this letter makes clear, we believe that the continued operation of the Gulf of Mexico Bottom Longline Fishery violates the ESA. If NMFS does not act within 60 days to correct the violations described in this letter, our organizations will pursue litigation in Federal Court against NMFS. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. An appropriate remedy that would forestall litigation would be for NMFS to immediately reinstate formal consultation pursuant to ESA Section 7(a)(2) and ensure federally protected species receive sufficient protection while consultation occurs. During reinstatement of consultation, NMFS should, at a minimum, maintain the ESA Rule; implement and maintain a level of observer coverage that is at least adequate to satisfy the terms and conditions of the 2009 Biological Opinion; and make publicly available real-time information regarding the level of observer coverage for

³¹ See 2009 Biological Opinion at 149, Term and Condition No. 5.

³² Carlson, J., NMFS Southeast Fisheries Science Center, Revised Estimation of Observer Coverage Required in the Reef Fish Bottom Longline Fishery based on Interactions with Sea Turtles (Sept. 2009).

the Bottom Longline Fishery and any takes that occur within the Bottom Longline Fishery as well as other components of the Reef Fish Fishery.

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

Sincerely,



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Attachments

cc:

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Robert Shipp, Chair, Gulf of Mexico Fishery Management Council