

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA**

CARIBBEAN CONSERVATION
CORPORATION; CENTER FOR BIOLOGICAL
DIVERSITY; DEFENDERS OF WILDLIFE;
FLORIDA WILDLIFE FEDERATION, INC.;
GULF RESTORATION NETWORK, INC.; and
TURTLE ISLAND RESTORATION NETWORK,

Plaintiffs,

Case No. _____

v.

GARY LOCKE, United States Secretary of
Commerce; JAMES W. BALSIGER,
Assistant Administrator for Fisheries; and the
NATIONAL MARINE FISHERIES SERVICE,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. The Caribbean Conservation Corporation, Center for Biological Diversity, Defenders of Wildlife, Florida Wildlife Federation, Inc., Gulf Restoration Network, Inc., and Turtle Island Restoration Network (collectively "Plaintiffs") challenge the failures of the Secretary of Commerce, the Acting Assistant Administrator for Fisheries, and the National Marine Fisheries Service (collectively "NMFS" or "Defendants") to comply with mandatory obligations under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.*, to protect threatened and endangered sea turtles from capture, injury, and death in the Gulf of Mexico Bottom Longline Fishery ("Bottom Longline Fishery" or

“Fishery”). Although the Bottom Longline Fishery has been in violation of the ESA since 2006, NMFS has not taken action to stop the excessive and illegal hooking, entanglement, and drowning of sea turtles in the Fishery and has failed to insure that the Fishery is not likely to jeopardize the continued existence of federally listed sea turtle species.

2. Plaintiffs specifically challenge NMFS’s violation of the 2005 Biological Opinion for the Fishery, which was developed in order to meet the ESA’s requirement that federal agencies insure against jeopardy. To this end, the 2005 Biological Opinion analyzed the expected impact of the Fishery on sea turtles listed under the ESA and granted a limited authorization to capture sea turtles during the operation of the Fishery. This limited authorization included specific mandatory requirements that must be met in order to comply with the ESA and set a limit on the number of sea turtles that could be captured. NMFS has not stayed within the limits of the 2005 Biological Opinion and is in violation of the ESA: it has allowed the Fishery to exceed the numerical limit on sea turtle capture substantially, by capturing at least 782 loggerhead sea turtles, more than 9 times the number authorized, and by capturing at least 967 total sea turtles, more than 8 times the number authorized; and it has breached other significant mandatory terms and conditions terms related to monitoring and reporting of sea turtle capture.

3. By continuing to authorize the Bottom Longline Fishery in violation of the 2005 Biological Opinion, NMFS has caused and is continuing to cause the illegal capture of threatened and endangered sea turtles in violation of ESA Section 9, 16 U.S.C. § 1538(a), is violating ESA Section 7(a)(2)’s substantive requirement to insure that the

ongoing operation of the Bottom Longline Fishery is not likely to jeopardize the existence of sea turtle species, *id.* § 1536(a)(2), is violating ESA Section 7(d)'s prohibition on the irreversible and irretrievable commitment of resources during consultation, *id.* § 1536(d), and is violating its continuing duty to utilize its authorities in furtherance of species conservation under ESA Section 7(a)(1), 16 U.S.C. § 1536(a)(1). For these reasons, Plaintiffs seek declaratory and injunctive relief that will immediately halt the ongoing capture, injury, and death of ESA-listed sea turtles in the Bottom Longline Fishery until Defendants come into compliance with the ESA.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), 2202 (injunctive relief), and 16 U.S.C. §§ 1540(c) (action arising under the ESA), and 1540(g) (citizen suit provision).

5. Pursuant to 16 U.S.C. § 1540(g), 60 days' notice of the violations alleged in this Complaint was provided to the Secretary of Commerce ("Secretary") and NMFS's Acting Assistant Administrator for Fisheries prior to this action being filed.

6. Venue is proper in this judicial district and in this Court under 28 U.S.C. § 1391(e) because no real property is involved in this action and first-named Plaintiff Caribbean Conservation Corporation resides or maintains its headquarters or principal place of business in Gainesville, Florida, which is located in this Division of the Northern District of Florida.

7. Pursuant to Civil Local Rule 3.1(A), the appropriate intradistrict assignment of this case is to the Gainesville Division, where Plaintiff Caribbean

Conservation Corporation resides or is headquartered, or in the alternative, to the Tallahassee Division, where Plaintiff Florida Wildlife Federation resides or is headquartered.

III. PARTIES

8. Plaintiff CARIBBEAN CONSERVATION CORPORATION (“CCC”) is a private nonprofit organization headquartered in Gainesville, Florida, which is dedicated primarily to the protection of marine turtles and their coastal nesting habitats. CCC 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. CCC has approximately 8,000 members, with 922 members currently residing in Florida. Many of CCC’s individual members live near or directly on the beach and are actively involved in sea turtle and coastal resource protection. Five of CCC’s Board of Directors, including the President of the Board, are Florida residents. CCC and its members have conducted extensive work to protect sea turtles throughout Florida and elsewhere 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 CCC’s Fisheries Policy Program. CCC and its members have been actively involved in urging NMFS to take immediate action to protect sea turtles from the impacts of the Fishery. The interests of CCC and its members in protecting and recovering imperiled sea turtle populations are and will continue to be adversely affected by NMFS’s

continued authorization of the Fishery, which directly causes excessive, unsustainable levels of injury and death to loggerhead and other sea turtle species.

9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-profit corporation dedicated to the preservation, protection and restoration of biodiversity, native species, ecosystems, and public lands. The Center has 44,000 members, over 2,000 of whom reside in Florida. The Center maintains offices in California, Arizona, New Mexico, Oregon, Vermont, and Washington, D.C. The Center’s members and staff regularly use waters of the Gulf of Mexico off the coast of Florida for observation, research, aesthetic enjoyment, and other recreational, scientific and educational activities. The Center’s members and staff have researched, studied, observed, and sought protection for many federally-listed threatened and endangered species that inhabit the Gulf of Mexico, including the loggerhead sea turtle. The Center’s members and staff have visited and observed each of the species at issue in this suit in the waters off Florida or elsewhere in the Gulf of Mexico and Atlantic Ocean. The Center’s members and staff intend to continue to visit and observe, or attempt to visit and observe, these species in the near future. The Center’s members and staff derive scientific, recreational, conservation, and aesthetic benefits from these rare species’ existence in the wild. NMFS’s unlawful actions and inactions regarding the Fishery directly harm these interests. The Center brings this action on behalf of itself and its adversely affected members.

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 25,000 in Florida. Defenders, which brings this action on behalf of itself and its adversely affected members, has a long history of advocacy for the protection of sea turtles, and especially the protection of sea turtles from the impacts of capture in fishing gear. In a recent electronic action alert focused on Defendant NMFS, Defenders' members and supporters submitted nearly 50,000 comments urging the agency to protect sea turtles from death and injury by suspending the operation of the Bottom Longline Fishery. Defenders' members enjoy observing, photographing, and appreciating threatened and endangered sea turtles in the wild, and studying the species in their natural habitats. The interests of Defenders' members in observing, studying, and otherwise enjoying sea turtles in and around the Gulf of Mexico and Atlantic coast of the Southeast United States are harmed by NMFS's continued authorization of the Bottom Longline Fishery, which is substantially contributing to the depletion and possible extinction of various sea turtle species, including loggerhead sea turtles. A temporary closure of the Fishery while NMFS comes into compliance with the ESA will help to protect and assist in the recovery of the threatened and endangered sea turtle populations that Defenders' members enjoy observing and studying.

11. Plaintiff FLORIDA WILDLIFE FEDERATION, INC. ("FWF") is a Florida statewide non-profit conservation and education organization which is headquartered in Tallahassee, Florida. The Federation's mission includes the preservation, management, and improvement of Florida's water resources and its fish and

wildlife habitat. The Federation advocates to preserve and protect Florida's rivers, lakes, and estuaries, as well as the ocean waters of the Gulf of Mexico. The Federation is a membership-based organization with approximately 13,000 members throughout Florida. A substantial number of these members use and enjoy Florida's waters – both fresh waters and ocean waters – for recreational and economic activities, and to observe and enjoy wildlife that rely upon these waters as habitat. Additionally, a significant number of FWF members reside near these waters. Many Federation members enjoy fishing, hunting, kayaking, canoeing, boating, and observing wildlife in and around Florida's waters, including but not limited to the Gulf of Mexico. FWF's members have researched, studied, observed and sought protection for many threatened and endangered species that inhabit the Gulf of Mexico, including the loggerhead sea turtle. FWF's members have observed the species at issue in this suit in the waters off Florida or elsewhere in the Gulf of Mexico and Atlantic Ocean. FWF's members intend to continue to visit and observe, or attempt to visit and observe, these species during the current nesting season. FWF's members derive scientific, recreational, conservation, and aesthetic benefits from these rare species' existence in the wild. Defendants' unlawful action and inaction regarding the Fishery directly harms these interests. FWF brings this action on behalf of itself and its adversely affected members.

12. Plaintiff GULF RESTORATION NETWORK, INC. ("GRN") is a non-profit Louisiana corporation with its principal place of business in New Orleans, Louisiana. GRN is a network of environmental, social justice, and citizen's groups and individuals committed to uniting and empowering people to protect and restore the

natural resources of the Gulf Region for future generations. GRN currently has 43 local, regional, and state-based group members, including seven based in Florida. GRN also has 396 individual members who hail from each of the Gulf States, including Florida. GRN, its member groups, and individual members are closely involved in protecting endangered and threatened species in the Gulf Region, including several species of sea turtles. GRN members depend upon the Gulf's resources for commercial fishing, food, recreation, and aesthetic enjoyment. The interests of GRN members in protecting Gulf resources, including sea turtle populations, are directly harmed by unsustainable fishing practices in general and Defendants' continued authorization of the Gulf of Mexico Bottom Longline Fishery in particular. GRN's members have studied, observed and sought protection for many threatened and endangered species that inhabit the Gulf of Mexico, including the loggerhead sea turtle. GRN's members have observed the species at issue in this suit in the waters off Florida or elsewhere in the Gulf of Mexico. GRN's members intend to continue to visit and observe, or attempt to visit and observe, these species during the current nesting season. GRN's members derive scientific, recreational, conservation, and aesthetic benefits from these rare species' existence in the wild. Defendants' unlawful action and inaction regarding the Fishery directly harms these interests. GRN brings this action on behalf of itself and its adversely affected members.

13. Plaintiff TURTLE ISLAND RESTORATION NETWORK ("TIRN") is a non-profit corporation with its principal place of business in Marin County, California. The Sea Turtle Restoration Project, established in 1989, operates under the fiscal sponsorship of TIRN and is dedicated to the protection and restoration of endangered and

threatened species of sea turtles. TIRN and the Sea Turtle Restoration Project have over 2,100 members in Florida, other Gulf states, and elsewhere, each of whom shares a commitment to the study, protection, enhancement, conservation, and preservation of the world's marine ecosystems and the wildlife that inhabit the oceans. In addition to these members who reside in Florida, hundreds more have vacationed there and plan to do so again in the future. Members and staff spend time in the Gulf of Mexico in a number of wildlife-viewing activities such as swimming, snorkeling, scuba, wildlife watching, and sport-fishing. The staff and members of TIRN and the Sea Turtle Restoration Project also include wildlife biologists who are engaged in the study, protection, enhancement, conservation and preservation of endangered and threatened marine species, as well as professional wildlife photographers whose livelihoods depend in part on their continued ability to photograph sea turtles, whales, dolphins and other marine species. TIRN, including the Sea Turtle Restoration Project, brings this action on behalf of itself and its adversely affected members.

14. Plaintiffs' members derive scientific, recreational, health, conservation, spiritual, and aesthetic benefits from threatened and endangered sea turtles. To preserve these interests, Plaintiffs' members rely on NMFS to comply fully with the provisions of the ESA that protect sea turtles and promote their recovery. Plaintiffs' members are adversely affected by NMFS's failure to comply with the 2005 Biological Opinion for the Fishery (including the Incidental Take Statement) and by the resulting injury and death of the animals they enjoy. 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 continued authorization of the Fishery in violation of the ESA. Plaintiffs have no adequate remedy at law.

15. Defendant NATIONAL MARINE FISHERIES SERVICE ("NMFS") is the agency within the U.S. Department of Commerce's National Oceanic and Atmospheric Administration which has been delegated authority and stewardship duties of fisheries management, including the conservation of endangered and threatened marine species pursuant to the ESA.

16. Defendant JAMES W. BALSIGER is the Acting Assistant Administrator for Fisheries at NMFS, and has responsibility for implementing and fulfilling all the agency's duties under the ESA. Acting Assistant Administrator Balsiger is sued in his official capacity.

17. Defendant GARY LOCKE is the Secretary of the United States Department of Commerce, and has ultimate responsibility for the programs of the National Marine Fisheries Service. Secretary Locke is sued in his official capacity.

18. Collectively, Defendants named in paragraphs 15-17 above shall be referred to as "Defendants" or "NMFS" in this Complaint.

IV. LEGAL BACKGROUND

A. The Magnuson-Stevens Fishery Conservation and Management Act

19. The Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801 *et seq.*, governs fishing by U.S. vessels, as well as fishing by foreign vessels within the U.S. Exclusive Economic Zone ("EEZ"), including the Gulf of Mexico. The Magnuson Act accomplishes this, in part, through Regional

Fishery Management Councils, which create Fishery Management Plans (“FMPs”). Each FMP or FMP amendment must be approved by NMFS before it becomes operational. *Id.* § 1852(h)(1). In the absence of an approved FMP, the management of a fishery remains the responsibility of the state. As explained below, NMFS may only approve an FMP, FMP amendment, or allow any other fishing activity to occur or continue if it does not violate the ESA.

B. The Endangered Species Act

20. Recognizing that certain species of plants and animals “have been so depleted in numbers that they are in danger of or threatened with extinction,” 16 U.S.C. § 1531(a)(2), Congress enacted the ESA to provide both “a means whereby the ecosystems upon which endangered and threatened species depend may be conserved,” and “a program for the conservation of such endangered species and threatened species,” *id.* § 1531(b). The ESA affords first priority to the preservation of endangered and threatened species. The ESA therefore 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 chapter.” *Id.* § 1531(c)(1). The principal duties that the ESA assigns to the Secretary of Commerce for protecting marine species have been delegated to NMFS. 50 C.F.R. § 222.101(a).

21. Under the ESA, a species is listed as “endangered” where it is “in danger of extinction throughout all or a significant portion of its range,” 16 U.S.C. § 1532(6), and listed as “threatened” where it is “likely to become an endangered species within the

foreseeable future throughout all or a significant portion of its range,” *id.* § 1532(20).

Once listed, a species is entitled to a number of protections.

22. Section 7(a)(1) of the ESA directs that “[t]he Secretary shall review programs administered by him and utilize such programs in furtherance of the purposes of this chapter.” *Id.* § 1536(a)(1). It further requires that “Federal 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.” *Id.* 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 chapter are no longer necessary.” *Id.* § 1532(3).

23. Section 7(a)(2) of the ESA requires each federal agency, in consultation with NMFS (or, depending on the species involved, the U.S. Fish and Wildlife Service (“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.” *Id.* § 1536(a)(2). Agency “action” is defined in the ESA’s implementing regulations to include “(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

24. If the agency proposing the action determines its action “may affect” a listed species, the agency must engage in “formal consultation” with NMFS or FWS. *Id.* § 402.14(a). Where the action agency and the consulting agency are the same, as in this

case, the agency must engage in consultation with itself. Here, this means that the NMFS Sustainable Fisheries Division, which is taking the action, must consult with the NMFS Protected Resources Division. The result of this consultation is the agency's preparation of a "biological opinion." 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. The biological opinion must explain how the proposed action will affect the listed species or habitat and determine "whether the action is likely to jeopardize the continued existence of a listed species." 50 C.F.R. § 402.14(h); 16 U.S.C. § 1536(b)(3)-(4). The term "jeopardize" is defined 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. If NMFS determines in the biological opinion that the action is likely to jeopardize a species, the biological opinion must outline "reasonable and prudent alternatives" to the proposal, if any exist, that will avoid jeopardy. *Id.* § 402.14(h)(3); 16 U.S.C. § 1536(b)(3)(A).

25. NMFS must base its determination 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.

26. The agency has a continuing duty to insure against jeopardy under section 7(a)(2). 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 in certain circumstances reinstate formal consultation. 50 C.F.R. § 402.16.

27. In addition, and consistent with the action agency's continuing duty to avoid jeopardy, Section 7(d) of the ESA provides that once a federal agency initiates or reinitiates consultation on an action under the ESA, the agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would" insure against the likelihood of jeopardy to the species. 16 U.S.C. § 1536(d). Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) to insure that the action is not likely to jeopardize the continued existence of the species or destroy or adversely modify critical habitat. 50 C.F.R. § 402.09.

28. Section 9 of the ESA prohibits any person from "taking" an endangered species. 16 U.S.C. § 1538(a)(1). NMFS regulations apply the Section 9 prohibition to threatened sea turtle species. 50 C.F.R. § 223.205(a); *see also id.* §§ 17.31, 223.206. A "person" includes private parties as well as local, state, and federal agencies. 16 U.S.C. § 1532(13). "Take" is defined broadly under the ESA to include harming, harassing, trapping, capturing, wounding, or killing a protected species either directly or by degrading its habitat sufficiently to impair essential behavior patterns. *Id.* § 1532(19). The ESA prohibits the acts of parties directly causing a take as well as the acts of third parties such as governmental agencies whose acts authorize or otherwise bring about the taking. *Id.* § 1538(g).

29. Take of listed species may occur only in limited circumstances. Take of listed species incidental to, and not the purpose of, an otherwise lawful activity may only permissibly occur if, in the case of a private entity, it occurs consistent with the terms of an incidental take permit issued to that entity under Section 10 of the ESA, 16 U.S.C. § 1539, or, in the case of a federal agency, the take is in accordance with an incidental take statement included in a biological opinion. Pursuant to Section 7(b)(4) of the ESA, a biological opinion which concludes that the agency action is not likely to jeopardize a listed species must include an incidental take statement, which specifies the impact of any incidental taking, provides reasonable and prudent measures necessary to minimize impacts, and sets forth terms and conditions that must be followed. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1), (3). Incidental take that is subject to a valid incidental take statement and occurs in compliance with all the terms and conditions of the incidental take statement, including any limit on the amount of incidental take, is not prohibited. *Id.* § 1536(o)(2); 50 C.F.R. § 402.14(i)(1)(5). Conversely, if such terms and conditions are not followed, for example, if the incidental take number is exceeded, then the take authorization granted under Section 7(o)(2) no longer applies. The exceedance of the take limit specified in the incidental take statement or the emergence of new information are example circumstances that require the action agency to reinstate section 7 consultation. 50 C.F.R. § 402.16.

30. In keeping with NMFS's continuing obligation under Section 7 of the ESA to insure that commercial fishing activities that it authorizes pursuant to the Magnuson Act are not likely to jeopardize the continued existence of a listed species,

NMFS established in 1992 regulatory mechanisms to provide immediate protection for sea turtles threatened by such activities. NMFS regulations authorize the agency to implement immediate protective measures, including fishery closures, when incidental takings of sea turtles “[w]ould violate the restrictions, terms, or conditions of an incidental take statement or biological opinion,” or “[m]ay be likely to jeopardize the continued existence” of a listed species. NMFS, Final Rule, *Revisions to Enhance and Facilitate Compliance With Sea Turtle Conservation Requirements Applicable to Shrimp Trawlers; Restrictions Applicable to Shrimp Trawlers and Other Fisheries*, 57 Fed. Reg. 57,348, 57,357 (Dec. 4, 1992), codified at 50 C.F.R. § 223.206(d). These emergency sea turtle conservation regulations state that NMFS “may issue a determination that incidental takings during fishing activities are unauthorized” if the above conditions are met, and implement an immediate 30-day fishery closure, which may be renewed for additional periods of 30 days each. 50 C.F.R. § 223.206(d)(4)(ii). The regulations provide that the Assistant Administrator for Fisheries “will take such action” if the Assistant Administrator for Fisheries “determines that restrictions are necessary to avoid unauthorized takings that may be likely to jeopardize the continued existence of a listed species.” *Id.*

31. NMFS has applied these regulations on numerous occasions to implement emergency measures in order to fulfill its ESA duties. *See, e.g.*, NMFS, Temporary Rule, *Sea Turtle Conservation; Restrictions to Fishing Activities*, 66 Fed. Reg. 33,489 (June 22, 2001) (implementing emergency measures in the Virginia pound net fishery to protect sea turtles); NMFS, Temporary Rule, *Sea Turtle Conservation; Restrictions to Fishing*

Activities, 65 Fed. Reg. 31,500, 31,502 (May 18, 2000) (implementing emergency closure of fishery “to reduce the likelihood that interactions with fishing gear will result in additional mortalities” of loggerhead sea turtles).

V. FACTUAL BACKGROUND AND ALLEGATIONS

A. Death and Injury of Sea Turtles in the Bottom Longline Fishery

32. The Bottom Longline Fishery, consisting of approximately 100 active vessels, is governed by the Gulf of Mexico Reef Fish Fishery Management Plan, which was developed by the Gulf of Mexico Fishery Management Council pursuant to the Magnuson Act. The Bottom Longline Fishery operates primarily in the relatively shallow continental shelf waters off Florida’s west coast and targets a variety of reef fish species, such as grouper and tilefish, as well as shark species. In addition to the target catch, i.e., reef fish and sharks, the Bottom Longline Fishery also is known to capture and kill a number of non-target species, including endangered and threatened sea turtles and smalltooth sawfish. In addition, bottom longline gear is known to cause physical damage to coral reef and other hard bottom habitat.

33. All marine sea turtles found in United States waters are listed as either threatened or endangered under the ESA. Capture in commercial fisheries constitutes a leading threat to the survival and recovery of sea turtle species throughout the world. The Bottom Longline Fishery is known to adversely affect the following species of sea turtles: green (Florida population listed as endangered under the ESA on July 28, 1978), hawksbill (listed as endangered under the precursor to the ESA on June 2, 1970), Kemp’s ridley (listed as endangered under the precursor to the ESA on December 2, 1970), and

loggerhead (listed as threatened under the ESA on July 28, 1978¹). Due to the bony carapace, or shell, that is characteristic of all of these species, they are collectively referred to as “hardshell” sea turtles.²

34. The west Florida shelf, including where the Fishery operates, provides important year-round benthic foraging habitat for significant numbers of loggerhead, Kemp’s ridley, and green sea turtles. The turtles that frequent this area include juvenile, subadult and adult turtles, all of which have high reproductive value to the population. A loss of individual turtles with high reproductive value creates exponential harm to the species and sets back species recovery. Loggerhead turtles, for example, take 25-30 years to reach reproductive age.

35. Encounters with bottom longline gear can be especially dangerous for sea turtles. Bottom longline vessels use gear consisting 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 branch lines, called gangions, that extend out from the 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.

¹ On November 15, 2007, Plaintiff Center for Biological Diversity and Oceana (which is not a party to this action) submitted a petition to designate the Western North Atlantic subpopulations of loggerheads as a distinct population segment and classify it as endangered. On March 5, 2008, NMFS issued a determination that uplisting may be warranted under the ESA. *90-day Finding for a Petition to Reclassify the Loggerhead Turtle in the Western North Atlantic Ocean*, 73 Fed. Reg. 11,849.

² The only non-hardshell sea turtle involved in this case is the leatherback sea turtle, which has a leathery carapace. Although this species occurs in the waters in which the Bottom Longline Fishery operates and has been known to be adversely affected by the Bottom Longline Fishery in the past, there have been no confirmed leatherback takes documented in recent years.

36. Turtles encounter this sea of hooks as they forage for food at the bottom of ocean. The turtles sometimes attempt to bite the baited hooks. As a result, these turtles become hooked in the jaw, throat, or gut if the hook is swallowed. Sea turtles can also become entangled in the miles of line as they swim through the gear. A turtle hooked or entangled in bottom longline gear will generally not be able to surface for breath. Like all air-breathing animals, if a hooked or entangled sea turtle is not brought to the surface in time, it will drown. For this reason, there is a high level of mortality for sea turtles captured in bottom longline gear.

37. In addition, sublethal effects on captured sea turtles often have longer term implications for the individual turtles and the fitness of the population. Entanglement in longlines, gear left trailing from an animal, and injuries from hooking can affect a turtle's ability to feed, swim, avoid predators, and reproduce. 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 long as 20 hours to recover. During this recovery period, the turtle will generally stay near the surface, where it may be vulnerable to recapture in fishing gear near the surface. Not all turtles are able to recover from such extreme physiological stress, and many not drowned upon capture die from their injuries after being released. The physiological stress of incidental capture also has the potential to alter the reproductive behavior of sea turtles, particularly of small males with relatively poor body condition. The hormonal shifts caused by stress can cause these males to abandon their breeding behavior altogether.

38. The impact of incidental capture in fisheries is thought to be one of the leading causes of an over 40% decline in loggerhead sea turtles nesting on Florida beaches between 1998 and 2008. Researchers have concluded that the impact of losing immature turtles with high reproductive potential to incidental capture has been a major contributing factor to the Florida nesting decline.

39. 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 Critically Endangered status under International Union for Conservation of Nature criteria, meaning that the species would face an extremely high risk of extinction in the wild.

40. This decline on Florida nesting beaches has troubling implications for the Western North Atlantic loggerhead population specifically and global loggerhead sea turtle numbers in general. Loggerheads in the Western North Atlantic originate from five nesting assemblages, four of which are located in the southeastern United States and one of which is located within the Greater Caribbean. Florida beaches comprise some of the most valuable nesting habitat for loggerheads in the world. The South Florida loggerhead nesting assemblage is thought to be the second largest in the world and, together with the nesting assemblage in Oman, accounts for 80 to 90 percent of global loggerhead nesting activity. For this reason, the health of Florida loggerhead nesting populations is vital to the health of the species as a whole.

41. Interactions with fisheries have also been particularly problematic for Kemp's ridleys, the most endangered sea turtle species in the world. This species occurs primarily in the coastal areas of the Gulf of Mexico and the northwestern Atlantic Ocean, with adults of the species usually confined to the Gulf of Mexico. Incidental capture by Gulf of Mexico fisheries was a leading cause in the species' previous precipitous decline and remains a significant threat to the future of the species.

B. The 2005 Biological Opinion's Requirements to Insure Against Jeopardy

42. Because of the overall Reef Fish Fishery's interactions with threatened and endangered species, on February 15, 2005, NMFS issued a Biological Opinion for the Gulf of Mexico Reef Fish Fishery, including the Bottom Longline Fishery, pursuant to Section 7 of the ESA. The Biological Opinion concluded that the continued operation of the entire Reef Fish Fishery, including the Bottom Longline Fishery, was not likely to jeopardize the continued existence of any hardshell sea turtle species. NMFS's "no jeopardy" determination was based on an expected level of take specified in the Incidental Take Statement. For the Bottom Longline Fishery, the Incidental Take Statement predicted and authorized the take of up to 85 loggerheads (including 42 lethal takes), 26 green turtles (including 13 lethal takes), 2 Kemp's ridleys (including one lethal take), and no hawksbills over a 3-year period. Thus, the total take limit allowed for all hardshell sea turtles over a 3-year period was 113.

43. As part of the Incidental Take Statement, the 2005 Biological Opinion also set forth reasonable and prudent measures ("RPMs") necessary to minimize impacts to the species and specified a number of non-discretionary terms and conditions to

implement those measures. The Biological Opinion specified that “[o]nly incidental taking by the federal agency or applicant that complies with the specified terms and conditions is authorized.” 2005 BiOp at 94.

44. One of the RPMs set forth in the Biological Opinion required that NMFS ensure that the monitoring and reporting of any sea turtles or smalltooth sawfish encountered: “(1) detects any adverse effects resulting from the GOM reef fish fishery; (2) assesses the actual level of incidental take in comparison with the anticipated incidental take documented in that opinion; (3) detects when the level of anticipated take is exceeded; and (4) collects improved data from individual encounters.” *Id.* at 95. The Biological Opinion included several mandatory terms and conditions to implement this RPM, including one that specifically obligated NMFS to implement or secure funding for a fishery observer program to be operative throughout the Reef Fish Fishery no later than August 2005. The terms and conditions also required that NMFS ensure that key information on fishing effort, fishery observer coverage, and sea turtle take be reported on an annual basis, including total take estimates for each species.

45. Despite the non-discretionary requirements established by the 2005 Incidental Take Statement and Biological Opinion, NMFS did not release any annual report regarding the take of sea turtles until September 2008, a gap of over three years from when an observer program was required to be established under the Biological Opinion. The 2008 report provided no information about the observer program nor any take estimates between the August 2005 start date reflected in the mandatory terms and

conditions of the 2005 Biological Opinion and the July 2006 start date reflected in the NMFS take analysis.

C. NMFS's Violation of the 2005 Biological Opinion

46. In September 2008, NMFS finally revealed to the public data indicating that the Bottom Longline Fishery has captured and killed or injured hundreds more sea turtles than authorized by the 2005 Biological Opinion and thus significantly more than the incidental take limit on which the Opinion's "no jeopardy" finding was based. The data present a particularly dramatic take exceedance for loggerhead turtles, in addition to other unidentified species of hardshell sea turtles.³

47. According to NMFS data, 967 hardshell sea turtles were captured, injured, or killed by the Gulf of Mexico Bottom Longline Fishery between July 2006 and December 2008, including 782 loggerheads. At the end of 3 years, the Fishery had captured, injured, or killed nine times the number of loggerheads specified in the Incidental Take Statement, and more than eight times as many turtles of all hardshell species. In fact, NMFS's belated data analyses show that the Bottom Longline Fishery had exceeded the authorized take levels specified in the Incidental Take Statement by the end of 2006.

48. The sea turtle takes observed in the Bottom Longline Fishery primarily occurred in the waters off the west coast of Florida in the same general area where

³ NMFS released an updated take report in early March 2009 that revised its overall take estimates and incorporated data on observed takes from 2008. All references to the number of turtles taken in the Fishery are from the updated take report. Both reports reflect significant exceedances of authorized take levels.

loggerheads have been satellite-tracked by Florida scientists. All of the individual turtles that were observed taken were juveniles and adults. Due to sea turtles' long life span and late sexual maturity, the removal of older juveniles and adults from the breeding population has serious implications for the species' population numbers. Scientists have found that loggerhead population numbers are profoundly affected by the removal of older juvenile loggerheads, which have high reproductive potential.

49. On September 3, 2008, NMFS reinitiated consultation on the Reef Fish Fishery pursuant to ESA Section 7 because of its exceedance of the 2005 Biological Opinion's Incidental Take Statement. It did not at that time, or at any time since then, however, take action necessary to protect sea turtles from ongoing capture pursuant to the ESA.

50. Upon learning that the Bottom Longline Fishery had far exceeded its authorized take of loggerhead and other sea turtle species, Plaintiffs and other concerned conservation organizations urged NMFS and the Gulf of Mexico Fishery Management Council ("Council") to take immediate action to protect the species as required by the ESA. These efforts began with conversations and outreach to the agency and the Council in the belief that the agency's own data regarding the unsustainable death and injury of sea turtles would compel NMFS to act quickly to come into compliance with the ESA. With no action forthcoming, Counsel for Plaintiffs sent on January 14, 2009, a letter to

Defendants providing 60 days' notice of intent to sue regarding the violations of the ESA in the Bottom Longline Fishery.⁴

51. During its January 28-29, 2009 meeting, the Gulf of Mexico Fishery Management Council also took action to protect the sea turtles affected by the Bottom Longline Fishery by voting to request that NMFS enact an emergency rule that would prohibit bottom longline gear in waters less than 50 fathoms for the entire eastern Gulf of Mexico. The Council shortly thereafter forwarded this action to NMFS for approval and implementation, but NMFS has not yet acted on this request.

52. On February 25, 2009, NMFS published in the Federal Register a notice asking for comments on a petition for emergency rulemaking filed by Oceana, and on Plaintiffs' 60-day notice letter, which NMFS characterized as a petition for rulemaking. 74 Fed. Reg. 8494. Plaintiffs submitted detailed comments in response to this notice, including supporting scientific information, on March 27, 2009. In addition, Plaintiffs and other groups continued to press NMFS to take action to protect the sea turtles before risk to the turtle species was increased even further by additional fishing. In March 2009, Defenders of Wildlife delivered a petition with over 50,000 signatures urging the agency to close the Bottom Longline Fishery for the protection of sea turtles. Similarly, on March 27, 2009, the Center delivered over 2,800 comment letters from its members asking the agency to immediately suspend the Bottom Longline Fishery to protect sea

⁴ Counsel sent a second letter on March 4, 2009, providing notice to Defendants of the intention of Florida Wildlife Federation to join this lawsuit.

turtles. Plaintiffs also engaged in multiple discussions with NMFS in an attempt to resolve the matter without litigation.

D. NMFS's Ongoing Operation of the Fishery and Violations of the ESA

53. On March 16, 2009, despite the exceedance of the 2005 Biological Opinion's Incidental Take Statement and the reinitiation of consultation on the operation of the Bottom Longline Fishery, NMFS allowed the shallow water component of the Bottom Longline Fishery to reopen for the season. Although the Fishery operates year-round, the shallow water portion of the Fishery closes from February 15 to March 15 each year. This closure, meant to protect spawning grouper species, is followed by a spike in fishing effort during the period immediately after the Fishery is reopened.

54. This spike in effort following the March closure has also resulted in a spike in turtle capture in recent years. NMFS's data show that a significant number of observed takes have occurred from April to July in past years. NMFS has estimated that the Bottom Longline Fishery took dozens of sea turtles in April 2008 alone. Takes remained high throughout June and July in 2006 and 2007. If takes proceed at the rate and timing of recent years in the current operation of the Bottom Longline Fishery, it is likely that the Fishery will again take hundreds of sea turtles in the coming months.

55. To Plaintiffs' knowledge, NMFS did not analyze the impact of past or ongoing sea turtle takes upon first learning in September 2008 of the high take rates occurring in the Bottom Longline Fishery. To Plaintiffs' knowledge, the agency has not at any time since then analyzed or released an analysis of the impact of the recent past

and ongoing takes, as required to insure that the Fishery is not likely to jeopardize the continued existence of the species.

56. While NMFS reinitiated consultation regarding the effects of the Fishery, it has not completed a new biological opinion analyzing any of these impacts. NMFS has nevertheless allowed the Bottom Longline Fishery to proceed in the absence of this information and analysis.

57. NMFS also has not analyzed or released an analysis of the impact of the past and ongoing takes in the Bottom Longline Fishery in light of new information regarding the current status of the various sea turtle species. For example, NMFS has not analyzed the effect of the Fishery removing so many loggerheads from the population in the context of the over 40% decline in Florida loggerhead nesting between 1998 and 2008. The steady and dramatic decline in loggerhead nesting in Florida indicates that ongoing and future takes in the Bottom Longline Fishery are likely to have an even greater impact on the loggerhead population than determined in the 2005 Biological Opinion. NMFS also has not considered or released an analysis of the impacts of the ongoing operation of the Bottom Longline Fishery in the context of the current status of any other species of sea turtle. Nor has it considered the cumulative impact of the take exceedances in the Bottom Longline Fishery from 2006-2008 on the affected sea turtle populations.

58. NMFS has not yet made any data regarding the 2009 operation of the Fishery available to the public, including fishing effort statistics, turtle take statistics, or

fishery observer coverage statistics since the reopening of the shallow water portion of the Bottom Longline Fishery on March 16, 2009.

59. NMFS has not taken any action that would satisfy the requirements of the ESA and protect sea turtles from capture, death, or injury as a result of the ongoing operation of the Bottom Longline Fishery.

VI. CLAIMS FOR RELIEF

First Claim for Relief

(Violation of ESA Duty to Utilize Authorities for the Conservation of Species)

60. Plaintiffs reallege and incorporate by reference each and every allegation set forth above in this Complaint.

61. Section 7(a)(1) of the ESA directs that “Federal agencies shall . . . 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).

62. Defendants’ failures to take necessary action to provide for the conservation of threatened and endangered sea turtle species affected by the Bottom Longline Fishery constitute violations of Section 7(a)(1), *id.*, and are subject to this action pursuant to 16 U.S.C. § 1540(g).

Second Claim for Relief

(Violation of ESA Duty to Insure that Action Is Not Likely to Jeopardize Species)

63. Plaintiffs reallege and incorporate by reference each and every allegation set forth above in this Complaint.

64. Section 7(a)(2) of the ESA requires each federal agency, in consultation with NMFS, 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).

65. Defendants’ continued authorization of the Bottom Longline Fishery in exceedance of the 2005 Biological Opinion’s Incidental Take Statement, absent the completion of a new biological opinion analyzing the impact of the actual take levels and other new information regarding the status of various sea turtle species, is a violation of their duties under Section 7(a)(2) of the ESA and its implementing regulations as set forth at 50 C.F.R. § 402.16 and is subject to this action pursuant to 16 U.S.C. § 1540(g).

Third Claim for Relief

(Violation of ESA Prohibition Against Commitment of Resources During Consultation)

66. Plaintiffs reallege and incorporate by reference each and every allegation set forth above in this Complaint.

67. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates or reinitiates consultation on an action under the ESA, the agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would” insure against the likelihood of jeopardy to the species.

68. Given the dramatically high take levels exhibited in the Bottom Longline Fishery in recent years, as well as new information indicating an increased likelihood of significant harm to loggerhead sea turtles as a result of dramatic population declines, Defendants' continued authorization of the Bottom Longline Fishery after reinitiating consultation in September 2008 constitutes an irreversible and irretrievable commitment of resources in violation of Section 7(d) of the ESA, 16 U.S.C. § 1536(d), and its implementing regulations, 50 C.F.R. § 402.09. This violation is subject to this action pursuant to 16 U.S.C. § 1540(g).

Fourth Claim for Relief

(Violation of ESA Take Prohibition)

69. Plaintiffs reallege and incorporate by reference each and every allegation set forth above in this Complaint.

70. Section 9 of the ESA prohibits the "take" of endangered species. 16 U.S.C. § 1538(a)(1). It also prohibits the causing of take to occur. *Id.* § 1538(g). NMFS regulations apply the Section 9 take prohibition to threatened sea turtle species. 50 C.F.R. § 223.205(a). Incidental take may be authorized through a valid biological opinion and incidental take statement, but such authorization is only applicable to takes within the authorized take level and in compliance with the mandatory terms and conditions of the biological opinion. 16 U.S.C. § 1536(b)(4); *id.* § 1536(o)(2); 50 C.F.R. § 223.206(d).

71. Defendants have violated and continue to violate Section 9 of the ESA and its accompanying regulations by authorizing the ongoing operation of the Fishery in a

manner that is resulting in the unlawful take of threatened and endangered species, including the loggerhead, and other hardshell sea turtles such as the green, Kemp's ridley, and hawksbill. This take is in violation of Section 9 because it is in excess of levels authorized in the Incidental Take Statement and in violation of the mandatory terms and conditions of the Incidental Take Statement. 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 223.205. These violations are subject to this action pursuant to 16 U.S.C. § 1540(g), including action to compel Defendants' application of the take prohibition set forth in Section 9, *id.* § 1538(a)(1)(B), *see id.* § 1540(g)(1)(B).

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(1) Adjudge and declare that Defendants are violating Section 7(a)(1) of the ESA by failing to utilize their authorities for the conservation of the loggerhead sea turtle and other sea turtle species;

(2) Adjudge and declare that Defendants are violating Section 7(a)(2) of the ESA and implementing regulations, 50 C.F.R. § 402.16, by failing to ensure that the ongoing authorization of the Bottom Longline Fishery does not jeopardize the loggerhead sea turtle or any other sea turtle species;

(3) Adjudge and declare that Defendants are violating Section 7(d) of the ESA and implementing regulations, 50 C.F.R. § 402.09, by continuing to authorize the operation of the Bottom Longline Fishery during consultation and thereby making an irreversible and irretrievable commitment of resources;

(4) Adjudge and declare that Defendants are violating Section 9 of the ESA and implementing regulations by allowing the Fishery to continue to operate in a manner that has caused and is continuing to cause the unauthorized take of loggerhead and other sea turtle species;

(5) Order Defendants to complete the required Section 7 consultation on the Fishery by a date certain;

(6) Order Defendants to apply the take prohibitions of section 9, 16 U.S.C. § 1538(a)(1)(B) and implementing regulations, 50 C.F.R. § 223.205(a), with respect to the unauthorized take of sea turtles by the Bottom Longline Fishery unless and until the Fishery has received a valid take authorization in a new biological opinion;

(7) Enjoin Defendants from allowing the ongoing operation of the Fishery until the completion of consultation and the fulfillment of each ESA requirement and duty;

(8) Award Plaintiffs their fees, costs, expenses, and disbursements, including reasonable attorneys' fees, associated with this litigation; and

(9) Grant such additional relief as the Court deems just and proper.

Respectfully submitted this 15th day of April, 2009,

/s/ Colin H. Adams
Colin H. Adams
Fla. Bar No. 0058110
P.O. Box 1329
EARTHJUSTICE
Tallahassee, FL 32302-1329
Telephone: (850) 681-0031
Facsimile: (850) 681-0020
cadams@earthjustice.org

Stephen E. Roady
D.C. Bar No. 926477
(N.D. Fla. admission application pending)
Emma C. Cheuse
N.Y. Bar (Reg. No. 4507463)
(Admitted to N.D. Fla. 4/13/09)
EARTHJUSTICE
1625 Massachusetts Ave., N.W., Suite 702
Washington, D.C. 20036-2212
Telephone: (202) 667-4500
Facsimile: (202) 667-2356
sroady@earthjustice.org
echeuse@earthjustice.org

Andrea A. Treece
Calif. Bar No. 237639
(Admitted to N.D. Fla. 4/13/09)
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA 94104-2404
Telephone: (415) 436-9682
Facsimile: (415) 436-9683
atreece@biologicaldiversity.org

Sierra B. Weaver
D.C. Bar No. 488560
(N.D. Fla. admission application pending)
DEFENDERS OF WILDLIFE
1130 17th Street, N.W.
Washington, D.C. 20036-4604
Telephone: (202) 772-3274
Facsimile: (202) 682-1331
sweaver@defenders.org

COUNSEL FOR PLAINTIFFS

