

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

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

Plaintiffs,)

v.)

Case No. 1:09-cv-00259-SPM-GRJ

GARY LOCKE, United States Secretary of)
Commerce; ERIC SCHWAAB, Assistant)
Administrator for Fisheries; and the NATIONAL)
MARINE FISHERIES SERVICE,)

Defendants.)

**SECOND AMENDED COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

I. INTRODUCTION

1. In this action for declaratory and injunctive relief, Plaintiffs challenge the failure of the National Marine Fisheries Service and other Defendants (hereinafter “NMFS” or “Defendants”) to comply with duties or requirements of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4331 *et seq.*, and the Magnuson-Stevens Fishery Conservation and Management Act (“MSA” or “Magnuson Act”), 16 U.S.C. §§ 1801 *et seq.*, in

managing the bottom longline component of the Gulf of Mexico Reef Fish Fishery (“Bottom Longline Fishery” or “Fishery”).

2. Specifically, pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, Plaintiffs seek judicial review of 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”). Plaintiffs further seek judicial review of NMFS’s final Environmental Impact Statement (“EIS”) which fails to comply with NEPA requirements in analyzing the environmental impacts of Amendment 31 and its implementing regulations. Finally, pursuant to the APA, 5 U.S.C. § 706, the ESA, 16 U.S.C. § 1540(g), and the MSA, 16 U.S.C. § 1855(f)(1), Plaintiffs seek review of Amendment 31 and its accompanying regulations, and challenge NMFS’s failure to ensure that these actions and the agency’s ongoing actions in furtherance of them are not likely to jeopardize the continued existence of endangered or threatened sea turtles.

3. This challenge follows years of NMFS’s non-compliance with the ESA in its authorization of the Bottom Longline Fishery, resulting in the illegal capture of hundreds of threatened and endangered sea turtles. Between July 2006 and December 2008, the Bottom Longline Fishery captured at least 782 loggerhead sea turtles, more than 9 times the number authorized in the 2005 Biological Opinion for the Bottom Longline Fishery. Despite the documented capture and death of members of an ESA-protected species, NMFS delayed any alteration of Fishery operations until May 2009.

4. In the 2009 Biological Opinion, NMFS opined that the implementation of new management measures in the Bottom Longline Fishery, some of which went into effect on October 16, 2009 pursuant to an emergency rulemaking, and some of which were promulgated on April 26, 2010, pursuant to a fishery management plan amendment, would allow the entire Reef Fish Fishery to operate in compliance with the ESA. However, the 2009 Biological Opinion is fundamentally flawed and cannot be relied upon to ensure that the Reef Fish Fishery is not likely to jeopardize the continued existence of loggerhead sea turtles and other threatened and endangered species, as required by the ESA. In formulating the 2009 Biological Opinion, NMFS failed to use the best available science, omitted key factors from consideration, and failed to establish a rational connection between the facts found and conclusions made. Consequently, the 2009 Biological Opinion is arbitrary and capricious, an abuse of discretion, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2). In addition, NMFS cannot legally rely on the 2009 Biological Opinion to meet its ESA statutory duties related to the authorization of the Bottom Longline Fishery pursuant to Amendment 31 and its implementing regulations. Consequently, NMFS is in violation of Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), for failing to ensure that the operation of the Fishery is not likely to jeopardize the continued existence of any listed species, and of Section 9 of the ESA, *id.* § 1538(1).

5. Even if NMFS's "no jeopardy" conclusion in the 2009 Biological Opinion had been lawful at the time it was made, that conclusion cannot stand in light of new circumstances and information presented by the Deepwater Horizon oil spill. All told,

the spill poured an estimated 206 million gallons of oil into the Gulf of Mexico, affecting thousands of square miles of open ocean and coastal habitat, including sea turtle nesting and foraging grounds. The Deepwater Horizon incident fundamentally changed the assumptions underlying the 2009 Biological Opinion's conclusions regarding the environmental baseline for Gulf sea turtles and their habitat, triggering NMFS's duty to reinitiate consultation per 16 U.S.C. § 1536(a)(2). NMFS's failure to do so violates its duties under the ESA.

6. Furthermore, Defendants' failure to analyze the environmental effects of an adequate range of alternatives as required by NEPA, including a true "no action" alternative and all practicable action alternatives, undercuts both the letter and spirit of NEPA and is arbitrary and capricious, an abuse of discretion, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2). Defendants also failed to analyze and continue to fail to address the significant new circumstances and information regarding how and to what extent the April 2010 Deepwater Horizon explosion and catastrophic oil spill are likely to affect the environment of the Gulf of Mexico, and the survival and recovery of endangered and threatened sea turtle species, including the loggerhead sea turtle.

II. JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question), 2201-02 (declaratory judgment and further relief), 16 U.S.C. § 1540(g) (ESA), 5 U.S.C. §§ 701-02, 706 (APA), and 16 U.S.C. § 1855(f) (MSA), as alleged in this complaint.

8. Plaintiffs provided NMFS with notice of their intent to sue the agency for violations of the ESA related to NMFS's authorization of the Reef Fish Fishery, pursuant to 16 U.S.C. § 1540(g), on December 16, 2009.

9. Plaintiffs provided NMFS with notice of their intent to sue the agency for violations of the ESA related to NMFS's authorization of the Reef Fish Fishery and failure to reinitiate consultation after the Deepwater Horizon oil spill, pursuant to 16 U.S.C. § 1540(g), on July 22, 2010.

10. 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.

11. 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.

III. PARTIES

A. Plaintiffs

12. 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 the Gulf of Mexico through educational outreach, including guided sea turtle walks to allow the public to safely view nesting sea turtles, involvement in sea turtle research, and policy advocacy through the Florida Coastal and Oceans Coalition and CCC's Fisheries Policy Program. CCC and its members have been actively involved in urging NMFS 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 arbitrary and capricious 2009 Biological Opinion, its unlawful reliance on that Biological Opinion, and NMFS's failure to conduct the open and thorough environmental review required by NEPA.

13. 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 over 42,000 members, more than 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 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 animals' existence and survival 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.

14. 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, 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 2009 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, and intend to continue to visit and observe, or attempt to visit and observe, these species in the near future. 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 legal violations related to the Bottom Longline Fishery, including the release of and reliance upon the arbitrary and capricious 2009 Biological Opinion and Defendants' inadequate environmental analysis under NEPA. If the 2009 Biological Opinion is vacated and set aside, pursuant to the APA, the completion of a new legally valid biological opinion will help to protect and assist in the recovery of the threatened and endangered sea turtle populations that Defenders' members enjoy observing and studying. Similarly, if the challenged EIS and Record of Decision ("ROD") for Amendment 31 are vacated and set aside, pursuant to the APA, the completion of a new legally valid NEPA analysis and fishery regulations will help ensure that sea turtles are protected from unsustainable capture, death, and injury in the Bottom Longline Fishery.

15. 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 citizens' groups and individuals committed to uniting and empowering people to protect and restore the natural resources of the Gulf Region for current and future generations. GRN has 40 local, regional, and state-based group members, including seven based in Florida. GRN also has 6,000 individual members who hail from each of the Gulf States, including 1,000

who reside in Florida. GRN, its member groups, and its 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 Defendants' reliance on the invalid 2009 Biological Opinion for the Bottom Longline Fishery. 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 in the near future. GRN's members derive scientific, recreational, conservation, and aesthetic benefits from these rare animals' existence and survival in the wild. Defendants' unlawful action regarding the Fishery directly harms these interests. GRN brings this action on behalf of itself and its adversely affected member groups and individual members.

16. 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 the members who reside in Florida, hundreds more have vacationed there and plan to do so again in the future. Members and staff spend time engaging in a number of wildlife-viewing activities in the Gulf of Mexico region 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's members intend to continue to visit and observe, or attempt to visit and observe, these species in the near future. TIRN, including the Sea Turtle Restoration Project, brings this action on behalf of itself and its adversely affected members.

17. 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 ESA and APA in its promulgation of the 2009 Biological Opinion. Because this Biological Opinion fails to comply with the law, it cannot be relied upon to ensure that the operation of the Bottom Longline Fishery is not likely to jeopardize the continued existence of loggerhead sea

turtles or any other listed species. In addition, Plaintiffs' members rely upon full and adequate review under NEPA to inform and ensure sound agency decision-making. NMFS's failures to analyze an appropriate range of alternatives for Amendment 31 and to address the new circumstances created by the Deepwater Horizon explosion, oil spill, and clean-up operation have resulted in an inadequate assessment of Amendment 31's environmental effects as well as illegally truncated decision-making on what measures should be included in Amendment 31. Plaintiffs' members and their interests in sea turtles have been, are being, and unless the relief requested is granted, will continue to be injured by NMFS's violations of the ESA, NEPA, the MSA, and APA. Plaintiffs have no adequate remedy at law.

B. Defendants

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

19. Defendant ERIC SCHWAAB is the Assistant Administrator for Fisheries at NMFS, and has responsibility for implementing and fulfilling all of the agency's duties under the ESA. Assistant Administrator Schwaab is sued in his official capacity.

20. 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.

21. Collectively, Defendants named in paragraphs 18-20 above shall be referred to as “Defendants” or “NMFS” in this Complaint.

IV. LEGAL BACKGROUND

A. The Magnuson-Stevens Fishery Conservation and Management Act

22. The Magnuson-Stevens Fishery Conservation and Management 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 propose Fishery Management Plans (“FMPs”) to regulate fishing within their region. Each FMP or FMP “amendment” must be approved by NMFS before it becomes operational. *Id.* § 1852(h)(1). As explained below, NMFS may only approve an FMP, FMP amendment, or allow any other fishing activity to occur or continue if such an FMP, amendment, or other activity does not violate applicable laws, including the ESA and NEPA. *Id.* § 1854(a)(1).

23. The MSA provides for judicial review of regulations promulgated by NMFS under the MSA and actions taken under regulations which implement a fishery management plan. *Id.* § 1855(f). The court shall set aside any such regulation or action if arbitrary, capricious, not in accordance with law, or an abuse of discretion under the APA standard of review, 5 U.S.C. § 706(2).

B. The Endangered Species Act

24. 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).

25. 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, including both prohibitions on harm and affirmative duties to promote the species’ conservation and recovery.

26. Section 9 of the ESA prohibits any person from “taking” an endangered species with only limited exceptions. *Id.* § 1538(a)(1)-(2). NMFS regulations apply the Section 9 prohibition to threatened sea turtle species. 50 C.F.R. § 223.205(a). 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). For federal agency actions, incidental take may only occur in accordance with an incidental take statement contained in a valid biological opinion and subject to all accompanying terms and conditions. *Id.* § 1536(o)(2); 50 C.F.R. § 402.14(i)(1)(5).

27. 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.” 16 U.S.C. § 1536(a)(1); *see also id.* § 1531(c)(1) (defining conservation as a policy of the ESA). 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.* § 1536(a)(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 chapter are no longer necessary.” *Id.* § 1532(3).

28. 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.

29. If the agency proposing the action determines that 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 internal or intra-agency consultation. Here, this means that the NMFS Sustainable Fisheries Division, which is taking the action of authorizing the operation of the Gulf of Mexico Reef Fish Fishery, must consult with the NMFS Protected Resources Division. The result of this consultation is the Protected Resources Division’s preparation of a “biological opinion” that describes the expected impact of the Reef Fish Fishery on listed species. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

30. The biological opinion must include a summary of the information on which the opinion is based, an evaluation of “the current status of the listed species or critical habitat,” the “effects of the action,” and “cumulative effects.” 50 C.F.R. § 402.14(g)(2)-(3). “Effects of the action” include both direct and indirect effects of an action “that will be added to the environmental baseline.” *Id.* § 402.02. The environmental baseline includes “the past and present impacts of all Federal, State or private actions and other human activities in the action area” and “the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation.” *Id.* NMFS must therefore consider not just the proportional share of responsibility for impacts to the species traceable to the activity that

is the subject of the biological opinion, but also the effects of that action when added to all other activities and influences that affect the status of that species.

31. After the consulting agency has added the direct and indirect effects of the action to the environmental baseline, the consulting agency must make its determination as to “whether the action is likely to jeopardize the continued existence of a listed species,” *Id.* § 402.14(h); 16 U.S.C. § 1536(b)(3)-(4). 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.

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

33. Pursuant to Section 7(b)(4) of the ESA, a biological opinion that concludes that the agency action is not likely to jeopardize a listed species also must include an incidental take statement, which specifies the impact of any allowable takes of individual members of the species, provides reasonable and prudent measures necessary to minimize the impact of those takes, and sets forth terms and conditions that must be followed to insure against jeopardy. *Id.* § 1536(b)(4); 50 C.F.R. § 402.14(i)(1), (3).

34. Conversely, if NMFS determines that the action is likely to jeopardize a species, the biological opinion must outline “reasonable and prudent alternatives” to the

action, if any exist, that will avoid jeopardy and “which [the Secretary] believes would not violate [Section 7(a)(2)].” 16 U.S.C. 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

35. The action agency has a continuing duty to ensure 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, reinitiate formal consultation. 50 C.F.R. § 402.16. These circumstances include, *inter alia*, if “the amount or extent of taking specified in the incidental take statement is exceeded”; “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered”; “the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion”; or “a new species is listed or critical habitat designated that may be affected by the identified action.” *Id.*

36. The ESA grants the right to any person to bring suit “to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA] or regulation issued under the authority thereof.” 16 U.S.C. § 1540(g)(1)(A). Under this citizen suit provision, the district courts have jurisdiction “to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.”

C. The National Environmental Policy Act

37. The purpose of the National Environmental Policy Act (“NEPA”) is to “promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C.

§ 4321. NEPA's fundamental purposes are to guarantee that: (1) agencies take a "hard look" at the environmental consequences of their actions before these actions occur by ensuring that the agency carefully considers detailed information concerning significant environmental impacts; and (2) agencies make the relevant information available to the public so that it may also play a role in both the decisionmaking process and the implementation of that decision. *See, e.g.*, 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1500.1.

38. NEPA and the regulations promulgated thereunder by the Council on Environmental Quality ("CEQ") require that all federal agencies, including NMFS, must prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4.

39. An EIS must provide a detailed statement of: (1) the environmental impact of the proposed action; (2) any adverse environmental effects that cannot be avoided should the proposed action be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C).

40. NEPA is intended to ensure that agencies make informed choices when federal decisions are likely to have environmental consequences. To that end, an EIS must "inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."

40 C.F.R. § 1502.1. NEPA also requires federal agencies to analyze the direct, indirect, and cumulative impacts of the proposed action. *Id.* §§ 1508.7, 1508.8. One of the most important aspects of NEPA is that the agency is required to consider the cumulative effects of its actions, which the CEQ regulations describe as:

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Id. § 1508.7. In the context of fishery management plan amendments, NEPA requires that NMFS consider and disclose to the public the cumulative impacts of the fishery management measures on threatened and endangered species, targeted fish stocks, and marine habitat.

41. When preparing an EIS, an agency must ensure that high quality information is available to the agency and the public before any decision is made or action is taken. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. *Id.* § 1500.1(b). The agency is required to identify clearly all of its assumptions, to explain any inconsistencies, to disclose all methodologies used, to rebut all contradictory evidence, to eliminate guesswork, to make explicit reference to sources relied upon for conclusions, and to record in an understandable manner the basis for those conclusions. *Id.* § 1502.24. Gaps in relevant information and scientific uncertainty must be disclosed and agencies must obtain missing or incomplete information relevant to adverse impacts if the cost of obtaining such information is not exorbitant. *Id.* § 1502.22.

42. NEPA requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). The analysis of alternatives is the “heart” of the environmental review process; the EIS must “rigorously explore and objectively evaluate all reasonable alternatives,” in order to “provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14(a). Alternatives that must be considered include the following: (1) no action alternative, (2) other reasonable courses of action, and (3) mitigation measures (not in the proposed alternative). A “reasonable range” of alternatives must be considered, and this must include consideration of full protection of all the resources involved. The exclusion of reasonable alternatives from review under an EIS renders the analysis invalid.

43. In addition to alternatives and impacts, NEPA requires agencies to consider mitigation measures to minimize the environmental impacts of the proposed action. *Id.* § 1502.14 (alternatives and mitigation measures); *id.* § 1502.16 (environmental consequences and mitigation measures).

44. When “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,” NEPA requires agencies to prepare a supplemental EIS. *Id.* § 1502.9(c)(1)(ii). Where this is necessary, the agency “[s]hall prepare, circulate, and file a supplement to a statement in the same fashion . . . as a draft and final [environmental impact] statement.” *Id.* § 1502.9(c)(4).

D. The Administrative Procedure Act

45. The Administrative Procedure Act (“APA”) provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. The 2009 Biological Opinion, the Final Environmental Impact Statement and Record of Decision for Amendment 31, and the final rule promulgating regulations to implement Amendment 31 are agency actions within the meaning of the APA.

46. In an APA suit, the reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

V. FACTUAL BACKGROUND AND ALLEGATIONS

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

47. The Bottom Longline Fishery is governed, in part, by the Gulf of Mexico Reef Fish Fishery Management Plan (“FMP”), which was developed by the Gulf of Mexico Fishery Management Council pursuant to the Magnuson Act. This FMP requires a federal fishing permit for any vessel engaged in commercial or for-hire fishing for Gulf reef fish in the U.S. EEZ, which extends from 9 nautical miles (“nm”) seaward into the Gulf from the state coasts of Florida and Texas, and 3 nm seaward from the state coasts of Alabama, Mississippi, and Louisiana, to 200 nm from the baseline from which the territorial sea of the United States is measured.

48. The Bottom Longline Fishery operates primarily in the 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 this target catch, the Bottom Longline Fishery also captures and kills non-target species, including endangered and threatened sea turtles and the endangered smalltooth sawfish.

49. The Bottom Longline Fishery is known to capture and kill large numbers of loggerhead sea turtles, which were listed as threatened under the ESA on July 28, 1978. The west Florida shelf, including where the Fishery operates, provides important year-round benthic foraging habitat for significant numbers of loggerhead sea turtles. Satellite tracking data of loggerhead sea turtles from the Florida Fish and Wildlife Conservation Commission and Mote Marine Laboratory show that loggerheads are present year-round in the area used by the Fishery, particularly at depths of 50 fathoms and shallower.

50. Loggerhead sea 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 sea turtles take 25-30 years to reach reproductive age.

51. 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 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.

52. Turtles encounter this gauntlet 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 immediate mortality for sea turtles captured in bottom longline gear.

53. Even if the turtle is brought to the surface before it drowns and then is released alive, sublethal effects on captured sea turtles often have other immediate and 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.

54. Sublethal effects also may include severe respiratory and metabolic stress caused by forced submergence, and a sea turtle may require as long as 20 hours to recover, if it is able to survive that long. During this recovery period, the turtle will generally stay near the surface, if it has sufficient energy to do so. There, it is vulnerable to re-capture in fishing gear, vessel strikes, predation, and other harm that may cause injury or death that would not have occurred if the turtle had not been captured. Multiple forced submergences within a short period of time increase the susceptibility of sea

turtles to lethal metabolic acidosis. Thus, even if sea turtles survive the initial capture in bottom longline or other fishing gear, many may die subsequently, or may not fully recover.

55. Capture in commercial fisheries is thought to be one of the leading causes of the over 40 percent decline in loggerhead sea turtle nesting on Florida beaches that occurred over the past decade. Florida nesting data from 2009 indicate that this was the fourth lowest nesting year in recorded history.

56. 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 in only 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, indicating that the species faces an extremely high risk of extinction in the wild.

57. This decline on Florida nesting beaches has troubling implications for the Northwest Atlantic loggerhead population specifically and global loggerhead sea turtle numbers in general. Loggerheads in the Northwest 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 – the same nesting assemblage most affected by the Fishery –together with the important Oman assemblage in the Arabian Sea, 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.

58. The NMFS Loggerhead Biological Review Team determined in August 2009 that the Northwest Atlantic Ocean distinct population segment is presently at risk of extinction, due in substantial part to fisheries bycatch. On March 16, 2010, NMFS and the U.S. Fish and Wildlife Service proposed to change the status of the Northwest Atlantic distinct population segment from threatened to endangered. Endangered and Threatened Species; Proposed Listing of Nine Distinct Population Segments of Loggerhead Sea Turtles as Endangered or Threatened; Proposed Rule, 75 Fed. Reg. 12,598 (Mar. 16, 2010). After the Deepwater Horizon oil spill, NMFS extended comment on this proposed listing through September 13, 2010. *See* Notice of Extension of Comment Period, 75 Fed. Reg. 30,769 (June 2, 2010).

B. Sea Turtle Impacts under the 2005 Biological Opinion

59. 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 sea turtle species. NMFS's "no jeopardy" determination was based on an expected level of take specified in the Incidental Take Statement contained in the Biological Opinion. 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.

60. In September 2008, NMFS publicly revealed data indicating that the Bottom Longline Fishery had captured and killed or injured hundreds more sea turtles than authorized by the then-applicable 2005 Biological Opinion, and thus significantly more than the incidental take limit on which the 2005 Biological Opinion's "no jeopardy" finding was based. The data presented a particularly dramatic take exceedance for loggerhead sea turtles.

61. According to NMFS data, 782 loggerhead sea turtles were captured, injured, or killed by the Gulf of Mexico Bottom Longline Fishery between July 2006 and December 2008, i.e., nine times the number of loggerheads specified in the 2005 Biological Opinion's Incidental Take Statement. 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.

62. NMFS observers documented sea turtles captured by the Fishery throughout the area in which it operated during both seasons of the Fishery, January through June, and July through December. In April 2009, a bottom longline vessel was observed capturing five loggerheads in a single trip. To Plaintiffs' knowledge, NMFS has not made publicly available the total observed sea turtle take for 2009, any data from 2010, or any analyses that it may have performed on these data.

63. The sea turtle takes observed in the Bottom Longline Fishery primarily occurred in the waters off the west coast of Florida. 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.

C. Development of Management Measures to Reduce the Death and Injury of Sea Turtles in the Fishery

64. On September 3, 2008, NMFS reinitiated consultation on the Reef Fish Fishery pursuant to ESA Section 7 because of the Fishery's exceedance of the 2005 Biological Opinion's Incidental Take Statement. Nevertheless, NMFS continued to allow the Bottom Longline Fishery to operate while consultation was ongoing.

65. On April 15, 2009, Plaintiffs in this suit brought legal action to stop the ongoing operation of the Bottom Longline Fishery until Defendants completed consultation and promulgated a new biological opinion that would ensure the entire Reef Fish Fishery could operate without a likelihood of jeopardy to sea turtles.

66. On May 1, 2009, NMFS promulgated an emergency rule temporarily closing the Bottom Longline Fishery. Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Gulf Reef Fish Longline Restriction, 74 Fed. Reg. 20,229 (May 1, 2009) ("Emergency Rule"). The Emergency Rule indicated that it would become effective on May 18, 2009 and expire on October 28, 2009, unless extended by NMFS.

67. On August 13, 2009, the Council voted in favor of submitting Amendment 31 to the Reef Fish FMP to NMFS for review and approval under the Magnuson Act. Amendment 31 was designed and proposed by the Council as a set of rules that (if

approved by NMFS) would modify the existing fishing requirements under the Reef Fish FMP. NMFS described Amendment 31 as follows:

Amendment 31 . . . proposes the following actions to reduce sea turtle take by the bottom longline component of the reef fish fishery east of Cape San Blas, Florida: (1) A prohibition on the use of bottom longline gear shoreward of a line approximating the 35–fathom contour from June through August; (2) a reduction in the number of longline vessels operating in the fishery through an endorsement provided only to vessel permits 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) restricting 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.

Sea Turtle Conservation; Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic, 74 Fed. Reg. 53,889, 53,890 (Oct. 21, 2009) (“ESA Rule”).

68. During public comment periods at the Council and NMFS on Amendment 31, sea turtle biologists submitted scientific data regarding loggerhead distribution in the area used by the Fishery, which showed that loggerheads were present off the west coast of Florida at the same depths used by the Bottom Longline Fishery during all months of the year. Based on this information, biologists suggested that the proposed 3-month closure extending only to waters of less than 35 fathoms would not adequately reduce bycatch of loggerheads.

69. During the earlier comment periods and in comments submitted to NMFS on March 1, 2010, Plaintiffs urged Defendants not to finalize Amendment 31 and its accompanying regulations due to the scientific and legal problems under the ESA, NEPA, and MSA alleged herein.

70. In order to reopen the Fishery in part during the time Amendment 31 was being formulated, NMFS promulgated a new rule governing the operation of the Bottom Longline Fishery pursuant to its authority under the Endangered Species Act. *Id.* The ESA Rule took effect on October 16, 2009, and superseded the temporary closure then in place under the Emergency Rule that was set to expire on October 28, 2009. In the preamble to the ESA Rule, NMFS summarized the new rule as follows:

This rule implements an area closure and associated gear restrictions applicable to the bottom longline component of the reef fish fishery in the exclusive economic zone (EEZ) of the Gulf of Mexico to reduce incidental take and mortality of sea turtles. Specifically, this rule prohibits the use of bottom longline gear for the harvest of reef fish shoreward of a line approximating the 35-fathom depth contour in the eastern Gulf of Mexico and limits bottom longline vessels operating in the reef fish fishery east of longitude 85°30'W to 1,000 hooks onboard, of which only 750 may be actively fished or rigged for fishing.

Id. at 53,889-90.

71. On April 26, 2010, NMFS published a final rule promulgating regulations to implement Amendment 31 and replace the extant ESA Rule, and simultaneously released its Record of Decision on Amendment 31, final EIS, and accompanying regulations. Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fishery of the Gulf of Mexico; Amendment 31, 75 Fed. Reg. 21,512 (Apr. 26, 2010) (amending ESA regulations at 50 C.F.R. Part 223 and MSA regulations at 50 C.F.R. Part 622). Amendment 31 and these new implementing regulations became effective on May 26, 2010.

D. The 2009 Biological Opinion

72. On October 13, 2009, NMFS completed a new biological opinion (“2009 Biological Opinion”) regarding the effects of the Gulf of Mexico Reef Fish Fishery on ESA-listed species. The 2009 Biological Opinion assesses the operation of the Reef Fish Fishery as a whole pursuant to the October 2009 ESA Rule until May 2010, and then pursuant to the proposed Amendment 31 to the Reef Fish FMP.

73. The 2009 Biological Opinion includes a finding that the continued operation of the Bottom Longline Fishery under the revised management regime would result in the capture of 732 loggerheads between 2009 and 2011, and 623 loggerheads every 3 years thereafter. NMFS expects that more than 60 percent of these takes will be lethal. The 2009 Biological Opinion also includes a finding that the overall Reef Fish Fishery would take 1,152 loggerheads from 2009 to 2011, and 1,043 loggerheads every 3 years thereafter, including 90 vessel strikes by boats operating in the Reef Fish Fishery. These take estimates represent an increase of more than 500% from the take levels authorized for the overall Reef Fish Fishery in the 2005 Biological Opinion, yet NMFS, in the 2009 Biological Opinion, has determined that the operation of the Reef Fish Fishery is not likely to jeopardize the continued existence of loggerhead sea turtles.

74. NMFS explicitly acknowledges in the 2009 Biological Opinion that the Northwest 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.” 2009 Biological Opinion at 131, 135-36.

75. Notwithstanding its prior acknowledgement that the population is declining, NMFS failed to assess the effect on the already declining loggerhead population of removing hundreds of reproductive turtles from the population every year for an indefinite number of years into the future. Instead of assessing the impact of future take levels on future population levels (likely to be lower and still declining), NMFS assessed the impact of future take against a static estimate of the loggerhead population based on 2009 numbers. Moreover, NMFS capriciously based its static analysis on an inflated population estimate for 2009 that does not comport with the numbers the agency itself recently used in its Loggerhead Sea Turtle 2009 Status Review, and arbitrarily assumed that the loggerhead population would remain at its 2009 population level.

76. NMFS also based its “no jeopardy” conclusion on the premise that the reduction in sea turtle numbers and reproduction directly attributable to the proposed Fishery operations was not “appreciable” when *compared to* overall loggerhead population numbers and mortality. NMFS did not add the effects of the action to the environmental baseline – including its own authorization of federal fisheries taking thousands of loggerhead sea turtles each year – as required by the ESA and its regulations. Rather, the agency looked at total mortality from this Fishery in isolation, arbitrarily ignored requisite factors that must be included in the baseline, and reached a conclusion not rationally based on the record and contrary to the requirements of the ESA.

77. NMFS also based its “no jeopardy” conclusion on its analysis of the overlap between fishing effort and the distribution of loggerheads in the area where the Fishery operates. However, this analysis omitted key data showing that loggerheads are present in the area used by the Fishery year-round, often at depths greater than 35 fathoms. NMFS was presented with these data during the Gulf Council’s development of Amendment 31. Florida researchers also urged that measures beyond the proposed depth and temporal restrictions of the Fishery may be necessary to conserve the loggerhead population and alleviate or minimize harmful sea turtle takes.

78. In addition to direct takes, the 2009 Biological Opinion recognized that capture in bottom longline gear also often results in severe physiological stress stemming from the turtle’s forced submergence and inability to breathe during that time. The Biological Opinion recognized that a turtle may take up to 20 hours to recover from a single submergence (to say nothing of multiple, successive submergences, which are also known to occur), during which time the turtle “would most likely remain resting on the surface” assuming that “it had the energy stores to do so.” 2009 Biological Opinion at 80.

79. Despite these acknowledgments, the 2009 Biological Opinion did not address the likelihood that initially sublethal effects of forced submergence could expose sea turtles to further injury and death. For example, although NMFS considered the effects of potential vessel strikes, it did not assess the likelihood that sea turtles captured and released by the Fishery are more vulnerable to death or injury from such strikes. Nor did this analysis consider other potential harm that may occur to an injured or weakened

sea turtle at the surface during its extended post-release period, such as predation or capture by another vessel or fishery. Nor did the post-release mortality analysis consider the possibility that a turtle may not have the energy needed to remain near the surface while it tries to recover from a take.

80. One of the terms and conditions underlying the 2009 Biological Opinion's incidental take authorization is that NMFS must provide observer coverage in the Fishery that is sufficient to provide a statistically reliable sample.

E. The Final Environmental Impact Statement and Record of Decision for Amendment 31

81. Defendants defined the "no action" alternative for analysis under NEPA as the operation of the Bottom Longline Fishery as it occurred before NMFS took any of the emergency protective actions described in paragraphs 66 and 70, above, including the temporary Emergency Rule (May 2009) and the ESA Rule (October 2009).

82. However, the true status quo at the time NMFS was conducting its analysis was the Fishery's operation pursuant to the October 2009 ESA Rule. The ESA Rule included no expiration date. Given its role in permanently changing the regulatory landscape prior to finalization of Amendment 31 and its implementing regulations, the ESA Rule established the new baseline for review under NEPA, including the properly analyzed "no action" alternative. Yet, the Final EIS ignored the newly defined environmental baseline under the ESA Rule in considering both available alternatives and their conservation benefits.

83. In addition to failing to appropriately analyze the "no action" alternative, NMFS further failed to consider a reasonable range of alternatives that would meet the

requirements of the ESA to ensure against the likelihood that the Fishery would jeopardize the continued existence of loggerhead sea turtles. Specifically, NMFS failed to consider alternatives that would have required mandatory levels of observer coverage (such as a level that would comply with the 2009 Biological Opinion's terms and conditions regarding observer requirements) or triggers for reinitiation of ESA consultation if more turtles are captured and killed by the Fishery than expected.

84. Without a full evaluation of available alternatives, the Final EIS and ROD could not and did not satisfy other applicable NEPA requirements, including the requirement to take a hard look at the environmental consequences of NMFS's actions (including all direct, indirect, and cumulative impacts of the proposed action), and to consider mitigation measures to minimize the environmental impacts of the proposed action.

F. Significant Recent Events and Information Further Undermine NMFS's Determination Regarding the Status of Loggerhead Sea Turtle Populations and the Agency's Basis for Approving Amendment 31

85. On April 20, 2010, the Deepwater Horizon oil rig exploded and sank nearly a mile to the floor of the Gulf of Mexico. The resulting oil and gas leak continued for more than three months, releasing an estimated 4.9 million barrels (206 million gallons) of oil into the Gulf environment. Satellite images indicated that the visible sheen of oil from the spill covered thousands of square miles. Heavy crude, tar, and sheen reached hundreds of miles of Gulf coastline, where it affected dozens of miles of nesting beaches relied upon by loggerheads and other sea turtle species. Substantial

concentrations of oil were also detected beneath the surface of the ocean in the form of subsea “plumes,” one of which measured more than 22 miles in length.

86. In an effort to minimize the amount of oil that reached the ocean surface and coastline, spill responders applied more than 1.07 million gallons of chemical dispersants to the surface and over 771,000 gallons below the surface. These dispersants have never been applied in such volumes or at such depths as they have been and are being applied in response to the Deepwater Horizon spill, and the short- and long-term biological effects of doing so are largely unknown. The principal type of dispersant being deployed, Corexit, has been banned in the United Kingdom due to concerns over its environmental impacts. Toxicity testing conducted by the U.S. Environmental Protection Agency on a shrimp species and an estuarine fish species showed that dispersant mixed with oil was generally at least as toxic as oil alone. These mixtures were considered “moderately” to “highly” toxic.

87. Sea turtles feeding, breeding, and migrating through the Gulf and off the Florida coast may be exposed to oil, tar and other oil byproducts, and chemical dispersants resulting from the Deepwater Horizon oil spill and recovery efforts. Loggerheads inhabit shelf waters throughout the Gulf of Mexico. Juvenile loggerheads are believed to reside in particular developmental foraging areas for many years. Adult loggerheads nest on beaches fringing the Gulf of Mexico, feed in shallow waters, and migrate throughout the Gulf. Hatchlings that emerge from these beaches commonly are transported in the Loop Current, where they remain near the surface, feeding and sheltering in mats of *Sargassum* seaweed.

88. Oil, oil byproducts, and chemical dispersants from the Deepwater Horizon disaster are likely to reach habitats used by loggerheads at every life stage. Moreover, sea turtles at all life stages – eggs, hatchlings, juveniles, and adults – are known to be vulnerable to the effects of oil and other chemical insults. Sea turtles are particularly vulnerable to oil spills because they generally do not avoid contaminated areas, tend to migrate and feed in the same convergence zones or currents that carry oil, and inhale deeply at the surface before diving. In addition, loggerheads feeding in nearshore areas affected by the spill are likely to be exposed to oil coating or consumed by their bottom-dwelling prey. Potential effects of oil on sea turtles include direct mortality due to oiling of hatchlings, juveniles, and adults; increased mortality of eggs; developmental defects; damage to respiratory, digestive, and immune systems; skin damage; and blood disorders. While the effects of chemical dispersants pose greater uncertainty, scientists believe that the combined effect of oil and dispersant contamination of sea turtles and their habitats could significantly reduce the species' overall fitness and reproductive success. Exposure to the remnants of oil and dispersants from an incident like Deepwater Horizon and the effects they have on the ecosystem over time can cause potential long-term and cumulative effects on sea turtles.

89. Over 1,100 sea turtles have been found injured or dead in the area affected by the spill since the disaster began. The turtles that rescuers were able to identify included nearly 800 Kemp's ridley sea turtles, 198 green sea turtles, 85 loggerheads and 16 hawksbills. The majority of Kemp's ridleys and loggerheads were dead at the time they were collected. Because surveys for stranded turtles were limited and focused on

beaches and nearshore areas, it is likely that many more turtles were harmed by the spill and spill response activities.

90. The spill affected thousands more sea turtle eggs and hatchlings. Fearing that successfully hatched sea turtles might leave the nesting beach only to swim into a morass of oil and toxins, the federal government and rescue groups undertook a significant and risky sea turtle nest relocation effort. During this effort, nests were removed from Gulf coasts beaches, particularly from the Florida panhandle, and moved to the east coast of Florida. Over 270 loggerhead nests were relocated. Scientists have not yet predicted how this relocation might affect the turtles' survival or their ability to return to their original natal beach to nest once they are mature.

91. Per 40 C.F.R. § 1502.9(c)(1)(ii), each of these impacts represented “significant new circumstances or information relevant to environmental concerns and bearing on” Amendment 31 and its regulations.

92. Per 50 C.F.R. § 402.16, these impacts also represent new information revealing that the effect of the Gulf Reef Fish Fishery “may affect listed species or critical habitat in a manner or to an extent not previously considered.”

93. On July 30, 2010, the Bureau of Offshore Energy Management, Regulation, and Enforcement (“BOEM”), the federal agency responsible for managing offshore oil and gas drilling, requested that NMFS reinitiate consultation on the effects of the Five-Year Outer Continental Shelf Oil and Gas Leasing Program (2007-2012) in the Central and Western Planning Areas of the Gulf of Mexico, a program that covers the lease and exploration activities that led to the Deepwater Horizon oil spill. In its request

for reinitiation, the agency stated that “the spill volumes and scenarios used in the analysis for the existing NMFS BO [Biological Opinion] need to be readdressed given the ‘rare event’ of a spill exceeding 420,000 gallons as referenced in the current NMFS BO has occurred and that affects to and the status of some listed species or designated critical habitats may have been altered as a result of the [Deepwater Horizon] incident and therefore require further consideration.”

94. The 2007 Biological Opinion for the Five-Year Program on which BOEM requested reinitiation is relied on in the 2009 Biological Opinion for the Reef Fish Fishery. Among the findings in the 2007 Biological Opinion relevant to the Reef Fish Fishery’s impacts on sea turtles, the 2007 Biological Opinion contemplates a single spill of approximately 630,000 gallons of oil, covering an area of approximately 3,108 square kilometers. NMFS estimated that, during the 40-year lifetime of that plan, any large oil spill would cause approximately 42 lethal takes of loggerhead sea turtles, and 111 non-lethal takes of loggerheads, as well as an additional 24 lethal takes of all other sea turtle species, and 60 non-lethal takes of all other sea turtle species; smaller oil spills and other oil and gas activities were assumed to result in no take of sea turtles. From this, NMFS estimated that the annual lethal take of loggerheads from oil and gas activities in the Gulf of Mexico would be four individuals, an amount “not detectable” with respect to any risk to the species. Further, NMFS did not take into account the effects of an oil spill reaching shore, including reaching sea turtle nesting beaches.

95. On August 17, 2010, NMFS reinitiated consultation for listed sea turtles on the shrimp trawl fishery in the Gulf in part due to NMFS’s concern that “sea turtles

may have been more vulnerable to drowning in trawls, perhaps because of an as-yet unidentified effect of the BP Deepwater Horizon oil spill.”

96. Despite fundamental changes to the baseline assumptions and analyses regarding the status of Gulf sea turtles underlying NMFS’s 2009 Biological Opinion for the Reef Fish Fishery, NMFS has decided not to reinitiate consultation on the Reef Fish Fishery.

97. Defendants have failed to consider or address any of the significant new circumstances caused by the oil spill and its likely effects as required by the ESA, NEPA, and MSA, before finalizing and implementing Amendment 31 and its accompanying regulations. Defendants’ failure to address the impact of these significant new circumstances and information on sea turtles remains ongoing.

VI. CLAIMS FOR RELIEF

First Claim for Relief

VIOLATION OF ESA AND APA: THE BIOLOGICAL OPINION IS UNLAWFUL BECAUSE OF FLAWED JEOPARDY ANALYSIS

98. Plaintiffs re-allege, as if fully set forth herein, each and every allegation set forth in this Complaint.

99. The APA prohibits an agency from taking action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

100. Section 7(a)(2) of the ESA requires each federal agency, “in consultation with and with the assistance of the Secretary,” to “insure that any action . . . is not likely

to jeopardize the continued existence of any threatened or endangered species.” 16 U.S.C. § 1536(a)(2). In making its jeopardy determination to satisfy this requirement in completing a biological opinion, the consulting agency must evaluate “the current status of the listed species or critical habitat,” the “effects of the action,” and “cumulative effects.” 50 C.F.R. § 402.14(g)(2)-(3). “Effects of the action” include both direct and indirect effects of an action “that will be added to the environmental baseline.” *Id.* § 402.02.

101. The environmental baseline includes “the past and present impacts of all Federal, State or private actions and other human activities in the action area” and “the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation.” *Id.* § 402.02.

102. Despite admitting that the loggerhead sea turtle population is likely to continue to decline in the future, NMFS failed to take this continued decline into account when it analyzed the effects of continued incidental take by the Fishery. NMFS also failed to account for the continued effects of allowing the Fishery, for an indefinite period of time, to remove hundreds of reproductive turtles every year from an already declining population.

103. Rather than add the effects of the ongoing operation of the Reef Fish Fishery to the environmental baseline as required by ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02, the 2009 Biological Opinion compared the effects of the Reef Fish Fishery to the high cumulative impacts of fisheries bycatch on the Northwest Atlantic population of loggerheads.

104. Because NMFS has failed to properly identify or analyze the environmental baseline to which effects of the action must be added, the 2009 Biological Opinion violates the ESA and is agency action that is “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A).

105. Because NMFS has failed to analyze the likelihood that the action would jeopardize the continued existence of loggerhead sea turtles in accordance with the requirements of ESA § 7(a)(2), the 2009 Biological Opinion violates the ESA and is agency action that is “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A).

106. These actions have harmed Plaintiffs and Plaintiffs have no adequate remedy at law.

Second Claim for Relief

VIOLATION OF ESA AND APA:
THE BIOLOGICAL OPINION IS UNLAWFUL BECAUSE IT IS NOT
BASED ON THE BEST AVAILABLE SCIENCE

107. Plaintiffs re-allege, as if fully set forth herein, each and every allegation set forth in this Complaint.

108. The APA prohibits an agency from taking action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

109. Section 7(a)(2) of the ESA requires consultations to be based upon “the best scientific . . . data available.” 16 U.S.C. § 1536(a)(2).

110. Defendants did not adhere to this statutory mandate in reaching the no jeopardy conclusion in the 2009 Biological Opinion. Among other deficiencies, Defendants disregarded the best available science documenting the year-round occurrence of significant numbers of loggerhead turtles in the area in which the Reef Fish Fishery operates.

111. Defendants' failure to base the Biological Opinion's conclusions upon the best available scientific data violates ESA section 7(a)(2) and is arbitrary, capricious, an abuse of discretion, or not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2)(A).

112. These actions have harmed Plaintiffs and Plaintiffs have no adequate remedy at law.

Third Claim for Relief

VIOLATION OF ESA AND APA:
THE BIOLOGICAL OPINION'S CONCLUSIONS ARE ARBITRARY AND
CAPRICIOUS BECAUSE THEY ARE UNSUPPORTED BY THE RECORD

113. Plaintiffs re-allege, as if fully set forth herein, each and every allegation set forth in this Complaint.

114. The APA prohibits an agency from taking action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

115. The 2009 Biological Opinion contains no rational connection between the record and NMFS's conclusion of "no jeopardy." For example, the Biological Opinion offers no reasonable explanation for the conclusion that the proposed action analyzed in

the 2009 Biological Opinion and the increased incidental take limit authorized (more than 1,000 loggerhead sea turtles for each upcoming triennial period) are not likely to jeopardize the continued existence of loggerhead sea turtles in light of the recent dramatic decline in the species nesting numbers and other existing and likely threats to the species. In addition, NMFS failed to offer a rational explanation of and basis for the estimate of post-interaction mortality that it applied to help calculate the expected lethal take of the Fishery. For example, it acknowledged additional harms likely to occur to loggerhead sea turtles released alive due to the 20-hour potential recovery period from capture, and due to the increased risk caused by multiple forced submergences, but did not address or incorporate either of these risks of harm into the post-interaction mortality rate analysis or no-jeopardy determination.

116. Because NMFS's determination in the Biological Opinion that the operation of the Bottom Longline Fishery is not likely to jeopardize the continued existence of loggerhead sea turtles has no rational basis in the record, this determination violates the ESA and is arbitrary and capricious, an abuse of discretion, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2).

117. These actions have harmed Plaintiffs and Plaintiffs have no adequate remedy at law.

Fourth Claim for Relief

VIOLATIONS OF ESA AND APA:
NMFS HAS FAILED AND CONTINUES TO FAIL TO ENSURE THAT ITS
ACTIONS ARE NOT LIKELY TO JEOPARDIZE THE CONTINUED EXISTENCE
OF LOGGERHEAD SEA TURTLES

118. Plaintiffs re-allege, as if fully set forth herein, each and every allegation set forth in this Complaint.

119. In addition to its duty as an expert consulting agency, NMFS has an independent duty as the agency authorizing fishing activities to ensure that its actions avoid the likelihood of jeopardy to ESA-listed species. Finalization of Amendment 31 and its accompanying regulations and implementation of Amendment 31, including allowing fishing to continue in loggerhead habitat for much of the year and the permitting of thousands of reproductively important turtles to be removed from a declining population, will have both short-term and long-term adverse impacts on the Northwest Atlantic loggerhead sea turtle. Because NMFS may not rely on the legally invalid 2009 Biological Opinion to meet its duty to ensure against jeopardy to loggerhead sea turtles, NMFS's authorization of the Bottom Longline Fishery pursuant to Amendment 31 and its accompanying regulations violate section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2).

120. Defendants' decision to finalize Amendment 31 and its accompanying regulations and Defendants' failure to insure that their actions will not jeopardize the continued existence of the loggerhead sea turtle violate section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and are arbitrary, capricious, an abuse of discretion, and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2).

121. These actions have harmed Plaintiffs and Plaintiffs have no adequate remedy at law.

Fifth Claim for Relief

VIOLATIONS OF ESA AND APA:
NMFS CONTINUES TO AUTHORIZE THE FISHERY'S OPERATION AND HAS
FAILED TO REINITIATE CONSULTATION TO CONSIDER THE IMPACTS OF
THE FISHERY IN LIGHT OF CHANGED CONDITIONS
FROM THE DEEPWATER HORIZON OIL SPILL

122. Plaintiffs re-allege, as if fully set forth herein, each and every allegation set forth in this Complaint.

123. NMFS has violated its duty under ESA Section 7 to ensure against the likelihood of jeopardy to loggerhead and other sea turtle species by failing to reinitiate consultation on the effects of the Gulf of Mexico Reef Fish Fishery, particularly the Bottom Longline Fishery, in light of the evidence of new sea turtle strandings and dangers, and of the drastic changes to the species' habitat, baseline condition, population trajectory, and chances of survival or recovery wrought by the Deepwater Horizon oil spill and response activities.

124. Defendants' decision to authorize the ongoing operation of the Fishery, Defendants' reliance on the 2009 Biological Opinion's erroneous assumptions regarding the effects of oil and gas exploration, and Defendants' decision not to reinitiate formal consultation that takes this new catastrophe and these previously unconsidered effects on sea turtles into account violate the ESA and are arbitrary, capricious, an abuse of discretion, and not in accordance with law, contrary to the ESA, 16 U.S.C. § 1536(a)(2),

and are actionable under 16 U.S.C. § 1540(g), or alternatively, under the APA, 5 U.S.C. § 706(2).

125. These actions and failures to act have harmed Plaintiffs and Plaintiffs have no adequate remedy at law.

Sixth Claim for Relief

VIOLATIONS OF ESA AND APA:
NMFS IS UNLAWFULLY PERMITTING TAKES OF LOGGERHEAD SEA
TURTLES WITHOUT A VALID INCIDENTAL TAKE AUTHORIZATION

126. Plaintiffs re-allege, as if fully set forth herein, each and every allegation set forth in this Complaint.

127. Section 9 of the ESA prohibits NMFS from authorizing activities that cause the unauthorized take of threatened and endangered species. As alleged above, NMFS's 2009 Biological Opinion is fundamentally flawed, rendering the incidental take authorization purportedly provided under that opinion invalid. NMFS is therefore in violation of ESA Section 9.

128. Further, in order for the protection provided by a legally valid incidental take permit to apply, all terms and conditions of the incidental take permit must be fulfilled. One of the terms and conditions underlying the 2009 Biological Opinion's incidental take authorization is that NMFS must provide observer coverage in the Fishery that is sufficient to provide a statistically reliable sample. Yet NMFS has failed to publicly release information demonstrating that the observer coverage requirement has been met. Plaintiffs allege, upon information and belief, that the 2009 Biological Opinion's observer coverage terms and conditions have not been and are not being met.

Therefore, even if NMFS incidental take authorization were valid, NMFS has violated the terms and conditions of that authorization and its protections no longer apply.

129. Defendants' authorization of the incidental take of thousands of loggerhead sea turtles in the absence of a valid biological opinion and incidental take statement, as well as Defendants' failure to meet the mandatory terms and conditions of even the flawed Biological Opinion and incidental take statement violate the ESA and are arbitrary, capricious, an abuse of discretion, and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2).

130. These actions have harmed Plaintiffs and Plaintiffs have no adequate remedy at law.

Seventh Claim for Relief

VIOLATIONS OF NEPA AND APA: NMFS FAILED TO ADEQUATELY ANALYZE ENVIRONMENTAL IMPACTS OF IMPLEMENTING AMENDMENT 31

131. Plaintiffs re-allege, as if fully set forth herein, each and every allegation set forth in this Complaint.

132. NMFS has violated NEPA and its implementing regulations by issuing a ROD adopting Amendment 31, and by approving the Final EIS for Amendment without meeting the requirements of NEPA, 42 U.S.C. §§ 4331 *et seq.*; 40 C.F.R. §§ 1500.1 *et seq.*, and in violation of 5 U.S.C. § 706(2).

133. In particular, by issuing the ROD, finalizing Amendment 31 and its accompanying regulations, and Final EIS without considering operation of the Fishery pursuant to the ESA Rule as the true no action alternative, NMFS failed to assess the

proper or actual “no action” alternative as required by 40 C.F.R. § 1502.14(a) (requiring an assessment based on a true no action alternative). NMFS also has failed to take a hard look at the impacts of the new action, Amendment 31.

134. Without satisfying these requirements, NMFS could not fulfill NEPA’s fundamental requirements to take a hard look at all environmental impacts under 40 C.F.R. §§ 1500.1, 1508.7, 1508.8, to fully involve the public in consideration of these impacts, under 40 C.F.R. § 1506.6, and to fully consider and address any potential mitigation measures under 40 C.F.R. §§ 1502.14, 1502.16.

135. Because NMFS did not address and analyze the significant new circumstances and information regarding potential environmental impacts of the April 2010 Deepwater Horizon oil spill and related clean-up and mitigation measures as part of the environmental baseline or as part of the cumulative impacts on the environment, including impacts on the loggerhead sea turtle, before finalizing and implementing Amendment 31 and its regulations, and also did not prepare a supplemental environmental impact statement, NMFS has failed to take a hard look at the environmental baseline and has failed to satisfy 40 C.F.R. § 1502.9(c)(1)(ii).

136. For each of the above reasons, and others, NMFS’s adoption of the ROD and Final EIS for Amendment 31 and its decision to promulgate Amendment 31 and implementing regulations violate NEPA and are arbitrary, capricious, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2).

137. These actions have harmed Plaintiffs and Plaintiffs have no adequate remedy at law.

Eighth Claim for Relief

VIOLATIONS OF MSA:
NMFS VIOLATED THE MSA BY APPROVING A FISHERY MANAGEMENT PLAN
AMENDMENT AND IMPLEMENTING REGULATIONS THAT ARE NOT
CONSISTENT WITH APPLICABLE LAW

138. Plaintiffs re-allege, as if fully set forth herein, each and every allegation set forth in this Complaint.

139. For each of the reasons set forth above, and in each of the above outlined six claims, Amendment 31 and its implementing regulations are not consistent with applicable law, particularly the ESA and NEPA. Defendants' decision to finalize and promulgate Amendment 31 and its accompanying regulations in spite of the measures' inconsistencies with applicable law is arbitrary, capricious, an abuse of discretion, and not in accordance with law, contrary to the MSA, 16 U.S.C. § 1855(f), and violates Section 304(a)(1) of the MSA, 16 U.S.C. § 1854(a)(1).

140. These actions have harmed Plaintiffs and Plaintiffs have no adequate remedy at law.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- (1) Adjudge and declare that Defendants' 2009 Biological Opinion (including its "no jeopardy" finding) is arbitrary and capricious in violation of the ESA and APA;
- (2) Adjudge and declare that Defendants' decision to finalize and promulgate Amendment 31 and its accompanying regulations violates Section 7(a)(2) of the ESA

because NMFS has failed to insure that its actions do not jeopardize the continued existence of the endangered or threatened sea turtle species;

(3) Adjudge and declare that Defendants are in violation of Section 9 of the ESA for authorizing fishing that is likely to cause the take of endangered or threatened sea turtles without a valid incidental take statement or a valid biological opinion;

(4) Adjudge and declare that Defendants are in violation of Section 9 of the ESA because they have failed to comply with the mandatory terms and conditions of the incidental take statement contained in the 2009 Biological Opinion;

(5) Adjudge and declare that Defendants' Final Environmental Impact Statement, Record of Decision, and final regulations implementing Amendment 31 violate NEPA and its implementing regulations;

(6) Adjudge and declare that Defendants' failure to reinitiate (or decision not to reinitiate) consultation on the Fishery violates Section 7(a)(2) of the ESA and the APA, 5 U.S.C. § 706(2);

(7) Adjudge and declare that because Defendants have violated the ESA and NEPA by finalizing Amendment 31 and its accompanying regulations they also have violated Section 304(a)(1) of the MSA;

(8) Set aside and vacate the 2009 Biological Opinion as in violation of the ESA and APA;

(9) Order Defendants to reinitiate ESA Section 7 consultation on the Fishery and complete a new legally valid biological opinion by a date certain;

- (10) Set aside and vacate the Final Environmental Impact Statement and Record of Decision, as in violation of NEPA;
- (11) Set aside and vacate Amendment 31, and its accompanying regulations, as in violation of the ESA, NEPA, MSA, and APA;
- (12) Enjoin Defendants from allowing the ongoing operation of the Bottom Longline Fishery pursuant to Amendment 31 until the completion of new consultation and the fulfillment of each ESA requirement and duty, including a new legally valid biological opinion and the implementation of any new mitigation measures required by the ESA;
- (13) Enjoin Defendants from allowing the ongoing operation of the Bottom Longline Fishery pursuant to Amendment 31 until the completion of a supplemental EIS and Record of Decision pursuant to NEPA and its implementing regulations;
- (14) Order Defendants to comply with the ESA, NEPA, and the MSA in connection with any further action taken regarding the Fishery;
- (15) Award Plaintiffs their fees, costs, expenses, and disbursements, including reasonable attorneys' fees, associated with this litigation; and
- (16) Grant such additional relief as the Court deems just and proper.

Respectfully submitted this 1st day of October, 2010,

/s/ Stephen E. Roady
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief was filed with the Clerk of Court using the CM/ECF system on this 1st day of October, 2010, which will automatically notify and provide service to all counsel of record of the filing via e-mail.

/s/ Stephen E. Roady
Attorney