

**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. _____

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

Defendants.)

_____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. In this action for declaratory and injunctive relief pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, 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”). The National Marine Fisheries Service and Defendants (hereinafter “NMFS”) issued this final action on October 13,

2009 pursuant to section 7(a)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2).

2. This challenge follows years of NMFS’s non-compliance with the ESA in its authorization of the bottom longline component of the Reef Fish Fishery (“Bottom Longline Fishery” or “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 over 900 sea turtles, virtually all of which are thought to have been loggerheads, more than ten times the number authorized in the 2005 Biological Opinion for the Bottom Longline Fishery. Despite the documented capture and death of ESA-protected species, NMFS delayed any alteration of Fishery operations until May 2009.

3. In the 2009 Biological Opinion, NMFS determined that the implementation of new management measures in the Bottom Longline Fishery, some of which went into effect on October 16, 2009, and some of which are expected to be finalized by May 2010 but have not yet been approved, will allow the entire Reef Fish Fishery to operate in compliance with the ESA. Yet 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 violates the most

basic requirements of the ESA to conserve listed species, and is arbitrary and capricious, an abuse of discretion, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2).

II. JURISDICTION AND VENUE

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

5. 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.

6. 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

7. 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.

8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a nonprofit corporation dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands. The Center has 43,000 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 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.

9. 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 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. 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 the arbitrary and capricious 2009 Biological Opinion. 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.

10. Plaintiff GULF RESTORATION NETWORK, INC. ("GRN") is a nonprofit 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 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 and elsewhere in the Gulf of Mexico. GRN's members intend to continue to visit and observe, or attempt to visit and observe, these species. 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 members.

11. Plaintiff TURTLE ISLAND RESTORATION NETWORK ("TIRN") is a nonprofit 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, including the Sea Turtle Restoration Project, brings this action on behalf of itself and its adversely affected members.

12. 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. Plaintiffs' members and their interests in sea turtles have been, are being, and unless the relief requested is granted, will continue to be injured by NMFS's violations of the ESA and APA. Plaintiffs have no adequate remedy at law.

B. Defendants

13. 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.

14. 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.

15. 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.

16. Collectively, Defendants named in paragraphs 14-16 above shall be referred to as "Defendants" or "NMFS" in this Complaint.

IV. LEGAL BACKGROUND

A. The Magnuson-Stevens Fishery Conservation and Management Act

17. 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 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 the ESA.

B. The Endangered Species Act

18. 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).

19. 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.

20. 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).

21. 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).

22. 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.

23. 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 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.

24. 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 the effects of that action when added to all other activities and influences that affect the status of that species.

25. 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 of “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.

26. 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.

27. 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).

28. 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).

29. 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, reinitiate formal consultation. 50 C.F.R. § 402.16.

C. The Administrative Procedure Act

30. 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 is an agency action within the meaning of the APA.

31. In an APA suit, the reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be (A) 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

32. 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.

33. 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.

34. 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, 1978.¹ 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.

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 that segment 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. A final determination on the petition was due in November 2008, but NMFS has not issued a determination.

35. 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.

36. 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.

37. Turtles encounter this gauntlet of hooks as they forage for food at the bottom of the 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.

38. 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.

39. Sublethal effects also may include severe respiratory and metabolic stress caused by forced submergence, and may require as long as 20 hours for a turtle 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.

40. 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 has occurred over the past decade. Florida nesting data from 2009 indicate that this was the fourth lowest nesting year in recorded history.

41. 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.

42. 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 – 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.

43. 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.

B. Sea Turtle Impacts under the 2005 Biological Opinion

44. 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. 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. The ITS authorized a total of 203 loggerhead takes by the entire Gulf Reef Fish Fishery.

45. 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 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.

46. According to NMFS data, 967 sea turtles (virtually all of which are believed to have been loggerheads) were captured, injured, or killed by the Gulf of Mexico Bottom Longline Fishery between July 2006 and December 2008, more than ten 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 level specified in the Incidental Take Statement by the end of 2006.

47. 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.

48. 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

49. 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.

50. 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.

51. On May 1, 2009, NMFS promulgated an emergency rule temporarily closing the Bottom Longline Fishery. 74 Fed. Reg. 20,229 (May 1, 2009). The emergency rule indicated that it would become effective on May 18, 2009 and expire on October 28, 2009, unless extended by NMFS.

52. 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 is a proposed regulatory package, designed by the Council, that (if approved by NMFS) would modify the existing fishing requirements under the Reef Fish FMP. NMFS describes 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.

74 Fed. Reg. at 53,890.

53. 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.

54. If Amendment 31 is approved, NMFS will promulgate a new final rule implementing the Amendment. A final rule implementing Amendment 31 is not expected to be effective until May 2010.

55. In the meantime, in order to reopen the Fishery, NMFS promulgated a new rule governing the operation of the Bottom Longline Fishery pursuant to its authority under the Endangered Species Act. 74 Fed. Reg. 53,889 (Oct. 21, 2009) (“ESA Rule”).

In the preamble, NMFS summarizes the new ESA 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.

74 Fed. Reg. at 53,889-90. The ESA Rule took effect on October 16, 2009, and superseded the emergency closure and related rule that had been set to expire on October 28, 2009. The ESA Rule is expected to be superseded by Amendment 31, when it is finalized.

D. The 2009 Biological Opinion

56. 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.

57. 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 from 90 vessel strikes by boats operating in the Reef Fish Fishery. These take estimates represent a major increase 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.

58. NMFS explicitly acknowledges in the 2009 Biological Opinion that the Western North Atlantic loggerhead population is “in decline and likely to continue to decline,” is now “experiencing more mortality than it can withstand,” and “is likely to continue to decline until large mortality reductions in all fisheries and other sources of mortality (including impacts outside U.S. jurisdiction) are achieved.”

59. 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 current numbers. Moreover, NMFS capriciously based its static analysis on an inflated population estimate 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 current population level.

60. 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.

61. 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 this 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.

62. 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 likely remain resting on the surface" assuming that "it had the energy stores to do so."

63. 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 any 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.

VI. CLAIMS FOR RELIEF

First Claim for Relief

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

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

65. 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).

66. 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. 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.

67. 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.

68. 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 Western North Atlantic population of loggerheads.

69. 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 is agency action that is arbitrary, capricious, an abuse of discretion, or not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

70. 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 is agency action that is arbitrary, capricious, an abuse of discretion, or not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

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

Second Claim for Relief

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

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

73. 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).

74. 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).

75. 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.

76. 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, in violation of the APA, 5 U.S.C. § 706(2)(A).

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

Third Claim for Relief

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

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

79. 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).

80. 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 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 forced submergence, and risk of multiple forced submergences, but did not address or incorporate these harms into the post-interaction mortality rate analysis or “no jeopardy” determination.

81. 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 is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2).

82. These actions and omissions 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) Set aside and vacate the 2009 Biological Opinion as in violation of the ESA and APA;
- (3) Order Defendants to reinitiate Section 7 consultation on the Fishery and complete a new legally valid biological opinion by a date certain;
- (4) Enjoin Defendants from allowing the ongoing operation of the Bottom Longline Fishery until the completion of consultation and the fulfillment of each ESA requirement and duty, including a new legally valid biological opinion;
- (5) Award Plaintiffs their fees, costs, expenses, and disbursements, including reasonable attorneys' fees, associated with this litigation; and
- (6) Grant such additional relief as the Court deems just and proper.

Respectfully submitted this 17th day of December, 2009,

...

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