

July 19, 2011

Sent via certified mail and electronic mail

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RE: Notice of Intent to Sue for Violations of the Endangered Species Act Related to the Management of the Gulf of Mexico Shrimp Trawl Fishery

This letter serves as notice of Oceana's intent to sue the Secretary of Commerce, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service (collectively, "the Fisheries Service") for violating Sections 7 and 9 of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, through actions and inactions related to the management of the shrimp trawl fishery that have resulted in, and continue to result in, illegal take of, and other harm to, protected sea turtle species. The magnitude of this illegal take is staggering. In 2010, for example, it appears that the Fisheries Service allowed shrimp fishing to kill approximately 4,874 loggerhead sea turtles, significantly more than the 3,948 authorized mortalities.¹

This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the Act, 16 U.S.C. § 1540(g). On May 31, 2011, the Center for Biological Diversity, Defenders of Wildlife, Turtle Island Restoration Network, and Sea Turtle Conservancy submitted a Notice of Intent to sue for violations of Sections 7 and 9 of the

¹ OCEANA, UNACCEPTABLE VIOLATIONS OF SEA TURTLE PROTECTIONS IN THE U.S. SHRIMP FISHERY 13 (July 19, 2011), attached as Appendix A; NMFS, BIOLOGICAL OPINION 56 (Dec. 2, 2002), *available at* <http://sero.nmfs.noaa.gov/pr/esa/Fishery%20Biops/00992.pdf>.

Endangered Species Act.² Their Notice Letter also served as a formal petition to the Fisheries Service to institute an emergency closure of the shrimp trawl fisheries in federal and state waters. Oceana hereby incorporates by reference the May 31, 2011 Notice Letter, and joins in the claims against the Fisheries Service related to sea turtles, as well as the petition for emergency closure.

For the sake of clarity and because intervening events have taken place since the May 31, 2011 Notice Letter, we briefly set forth some additional information below.

I. BACKGROUND

A. Record sea turtle strandings occurred in 2010 and 2011

There has been an unprecedented increase in the past year in sea turtle strandings³ attributable to the shrimp fisheries in the Gulf of Mexico. Five species of sea turtles inhabit waters in the Gulf of Mexico: loggerhead (*Caretta caretta*), green (*Chelonia mydas*), Kemp's ridley (*Lepidochelys kempii*), hawksbill (*Eretmochelys imbricata*), and leatherback (*Dermochelys coriacea*). They are all protected under the Endangered Species Act.

The May 31, 2011 Notice Letter demonstrated that the Fisheries Service's mismanagement of the Gulf of Mexico shrimp trawl fishery results in staggering numbers of sea turtle strandings and deaths.⁴ Sea turtle strandings in the northern Gulf of Mexico surged in 2010 and 2011 as hundreds of dead sea turtles washed ashore. The Fisheries Service's own data indicate that many of these sea turtles may have died from forced submergence in fishing gear.⁵ A Fisheries Service official noted in 2010 that there was "every indication that the vast majority" of juvenile Kemp's ridley mortalities in Louisiana and Mississippi Sound were related to shrimp fishing."⁶

In 2011 alone there have been at least 1107 documented sea turtle strandings in Texas, Alabama, Louisiana, Mississippi, and the Gulf Coast of Florida.⁷ Because strandings represent only a small fraction of sea turtle deaths, likely only 5-6 percent, the total mortality of sea turtles is much higher.⁸

² Notice of Intent to Sue (May 31, 2011), attached as Appendix B.

³ See Appendix C.

⁴ Notice of Intent to Sue, *supra* note 2, at 2-5.

⁵ Jane Lubchenco, Oil Spill Clarifies Road Map for Sea Turtle Recovery, *available at* http://www.nmfs.noaa.gov/mediacenter/docs/2011/mar/oil_spill_clarifies_road_map_for_sea_turtle_recovery.pdf.

⁶ Email from Barbara Schroeder, Fisheries Service National Sea Turtle Coordinator 129 (July 7, 2010, 09:40:37), *available at* <http://www.scribd.com/doc/53915146/NOAA-Endangered-species-Oil-Spill-Response>.

⁷ See Appendix D. The 1107 total does not include the approximately 1220 green sea turtle strandings in Texas from January 30 – February 12 that are likely attributable to cold stunning.

⁸ NMFS, BIOLOGICAL OPINION, *supra* note 1, at 43 (stating that, using conservative estimates, "strandings only account for between 5% and 6% of the total at-sea mortality").

B. Shrimp trawl vessels are required to use turtle excluder devices or comply with tow-time restrictions to reduce the number of sea turtles that they kill

The National Research Council concluded that shrimp trawling was the primary source of anthropogenic mortality for sea turtles in U.S. waters, estimating that, during the 1980s, shrimp trawling in the Atlantic and the Gulf may have killed up to 55,000 loggerhead and Kemp's ridley sea turtles annually,⁹ at a time when recorded strandings were lower than at present.¹⁰ To reduce this mortality, bottom otter trawls fishing for shrimp in the Atlantic and Gulf of Mexico are required to use turtle excluder devices ("TEDs").¹¹ The May 31, 2011 Notice Letter shows that exemptions and poor enforcement diminish the effectiveness of the TED requirement.¹²

One reason for the lack of effectiveness is that skimmer trawls are still not required to use TEDs. Instead, the Fisheries Service imposes tow-time restrictions to reduce sea turtle mortality from skimmer trawls.¹³ These tow-time restrictions, however, are difficult to enforce.¹⁴ Compounding this threat, the number of skimmer trawls in the Gulf of Mexico shrimp fishery has been increasing over the past ten years.¹⁵ In August 2010, during a time of high sea turtle strandings, the Fisheries Service acknowledged that TEDs may be necessary in skimmer trawls.¹⁶

Additionally, enforcement of the TED requirement remains limited. Enforcement presents a particular problem in state waters, where much of the shrimp trawl fishery operates. Such enforcement is non-existent in Louisiana, which prohibits the use of state funds to enforce this requirement.¹⁷

⁹ NATIONAL RESEARCH COUNCIL, *DECLINE OF THE SEA TURTLES 7* (National Academy Press 1990).

¹⁰ See Appendix C.

¹¹ 50 C.F.R. § 223.206(d)(2).

¹² Notice of Intent to Sue, *supra* note 2, at 4-5.

¹³ 50 C.F.R. §223.206(d)(2). Fishing vessels using pusher-head and wing net (butterfly) trawls, two other types of trawl gear, are also exempt from the TED requirement if they follow tow-time restrictions.

¹⁴ Threatened Fish and Wildlife; Threatened Marine Reptiles; Revisions to Enhance and Facilitate Compliance With Sea Turtle Conservation Requirements Applicable to Shrimp Trawlers; Restrictions Applicable to Shrimp Trawlers and Other Fisheries, 57 Fed. Reg. 57348, 57350 (Dec. 4, 1992).

¹⁵ E. Scott-Denton, P. Cryer, J. Gocke, M. Harrelson, K. Jones, J. Nance, J. Pulver, R. Smith, and J.A. Williams, *Skimmer trawl fishery catch evaluations in coastal Louisiana, 2004 and 2005*, 68(1-4) MARINE FISHERIES REVIEW 30, 30 (2006).

¹⁶ *DMR Offers Mississippi shrimpers free TED gear for skimmer trawls*, GULF COAST FISHERMAN NEWSLETTER, Aug. 1, 2010, available at <http://msucare.com/newsletters/gulf/201008.html> (stating that "The National Marine Fisheries Service (NMFS) has indicated that TED gear for Gulf of Mexico shrimpers using skimmer trawls may be required in the near future.").

¹⁷ LA. REV. STAT. ANN. §56:57.2 (2010).

C. New information shows that the shrimp trawl fishery has a low rate of compliance with sea turtle protection regulations

Oceana has received documents concerning the shrimp fishery in the Gulf of Mexico through a Freedom of Information Act request. These documents show poor enforcement of, as well as poor compliance with, TED and tow-time requirements.¹⁸

The disclosed documents show poor enforcement. Enforcement actions may be performed by both federal enforcement officers (NOAA and Coast Guard) and deputized state fish and wildlife officers. NOAA and the Gulf states have established Cooperative and Joint Enforcement Agreements under which federal agents may enforce federal law in state waters and state agents are deputized to enforce federal law in state waters.¹⁹ However, the Freedom of Information Act documents reveal that the NOAA Office of Law Enforcement did not affirmatively enforce TED rules. Rather, it only responded to specific complaints or strandings.²⁰ The documents also provide further evidence that state enforcement of TED requirements remains weak. For example, a Mississippi Marine Patrol Officer admitted to not even boarding vessels while supposedly carrying out TED inspections.²¹

Fisheries Service inspections carried out in Louisiana, Mississippi, Florida, and Texas indicate a low rate of compliance with the TED requirement. In Louisiana, only 3 out of 29 vessels boarded and inspected in 2010 fully complied with the TED regulations.²² Fisheries Service inspectors found a compliance rate of 0% in their inspection of 14 vessels in Biloxi, Mississippi.²³ 24 inspections carried out in Texas revealed 13% compliance.²⁴ In Florida, when Fisheries Service staff inspected shrimp trawlers in Mayport, immediately adjacent to a U.S. Coast Guard Station, and in Ft. Myers, they found significant violations of TED rules.²⁵

Additionally, information from NOAA and the Mississippi Department of Marine Resources, stemming from the monitoring of Mississippi Sound skimmer trawl vessels in 2010, indicates that the skimmer trawl fleet does not comply with its alternative tow-time requirements.²⁶

¹⁸ OCEANA, GOVERNMENT STANDS IDLE WHILE SHRIMP VESSELS PUSH TURTLES TOWARD EXTINCTION [hereinafter *GOVERNMENT STANDS IDLE*] (May 24, 2011), available at http://na.oceana.org/sites/default/files/TED_Comp_FOIA_Summary_FINAL.pdf.

¹⁹ See S.J. VanderKooy, GULF OF MEXICO COOPERATIVE LAW ENFORCEMENT STRATEGIC PLAN 2005-2010 AND OPERATIONS PLAN 2009-2012 2008 (Gulf States Marine Fisheries Commission), available at <http://www.gsmfc.org/publications/GSMFC%20Number%20160.pdf>.

²⁰ OCEANA, GOVERNMENT STANDS IDLE, *supra* note 18 (citing FOIA email 2-32124, on file with Oceana).

²¹ *Id.* (citing FOIA email 2-50621 (on file with Oceana)).

²² *Id.* (citing FOIA email 2-32149 (on file with Oceana)).

²³ *Id.* (citing FOIA email 2-50704 (on file with Oceana)).

²⁴ *Id.* (citing FOIA email 2-50658 (on file with Oceana)); FOIA email 2-50358 (on file with Oceana).

²⁵ *Id.* (citing FOIA email 2-50658 (on file with Oceana)).

²⁶ NMFS, SCOPING DOCUMENT FOR PREPARATION OF A DRAFT ENVIRONMENTAL IMPACT STATEMENT TO REDUCE INCIDENTAL BYCATCH AND MORTALITY OF SEA TURTLES IN THE SOUTHEASTERN U.S. SHRIMP FISHERY [hereinafter *SCOPING DOCUMENT*] 2 (June 20, 2011), available at

Reacting to the 2010 spike in sea turtle strandings, the Fisheries Service reinitiated consultation on the effect of shrimp trawling on sea turtles on August 17, 2010.²⁷ However, the Fisheries Service has not concluded its consultation. On June 24, 2011, the Fisheries Service published a Scoping Notice to consider requiring all skimmer trawls to use TEDs.²⁸ The Scoping Notice shows that the Fisheries Service recognizes the need to address the inadequate regulation of skimmer and certain other trawls.

D. The number of turtles killed by the shrimp fishery far exceeds the number authorized in the 2002 Biological Opinion

The Fisheries Service's 2002 Biological Opinion on the operation of the state and federal Gulf of Mexico and South Atlantic shrimp trawl fisheries considered "the effect of shrimp trawling, as conducted under the TED regulations and the FMPs, on all listed species within Federal waters and on listed sea turtles within state waters."²⁹ It found that, assuming TEDs release 97 percent of the turtles caught in shrimp trawls,³⁰ shrimp trawling activities would not jeopardize protected sea turtles.³¹ However, documents released under the Freedom of Information Act reveal that the overall effectiveness rate may be closer to 60 percent due to noncompliance.³² This rate significantly increases the number of lethal takes of sea turtles.

In the attached report, Oceana estimates the likely actual number of sea turtle mortalities occurring taking into account compliance issues.³³ We determined that based on inspection reports, approximately 17% of the fleet was fishing with either no TED installed or had the escape hatch intentionally blocked.³⁴ This 17% of the fleet is fishing without a TED or in a way that renders the TED totally ineffective. Therefore, the Oceana estimate uses the mortality rate for a trawl without a TED for the estimated 17% of the shrimp trawlers fishing with these significant TED violations. The results show a staggering increase in the number of turtles killed:

<http://sero.nmfs.noaa.gov/pr/endangered%20species/Shrimp%20Fishery/SCOPING%20DOCUMENT.pdf>.
See also FOIA email 2-50518 (on file with Oceana) (in the wake of the *Deepwater Horizon* oil spill, skimmer trawls frequently ignored tow-time restrictions.).

²⁷ Letter from David Bernhart to Roy Crabtree, Reinitiation of ESA Section 7 Consultation on Shrimp Trawling in the Southeastern United States [hereinafter *Reinitiation letter*] (Aug. 17, 2010).

²⁸ Intent to Prepare an Environmental Impact Statement for Sea Turtle Conservation and Recovery Actions and to Conduct Public Scoping Meetings, 76 Fed. Reg. 37050 (June 24, 2011).

²⁹ NMFS, BIOLOGICAL OPINION, *supra* note 1.

³⁰ *Id.* at 84 (citing 52 Fed. Reg. 24244 (June 29, 1987)).

³¹ *Id.* at 56.

³² OCEANA, GOVERNMENT STANDS IDLE, *supra* note 18 (citing FOIA email 2-32123 (on file with Oceana)).

³³ OCEANA, UNACCEPTABLE VIOLATIONS OF SEA TURTLE PROTECTIONS IN THE U.S. SHRIMP FISHERY, *supra* note 1, at 13.

³⁴ *Id.* at 12.

Species	Maximum Mortalities Authorized for Entire Shrimp Fishery ³⁵	NMFS Estimate of Mortality in Gulf of Mexico ³⁶	Estimate of Mortality in Gulf of Mexico Considering Compliance Issues ³⁷
Loggerhead	3,948	778	4,874
Leatherback	80	18	108

II. VIOLATIONS OF LAW

We incorporate by reference the discussion of the relevant sections of the Endangered Species Act included in the May 31, 2011 Notice Letter.³⁸

Based on information and belief, the Fisheries Service is violating the Endangered Species Act in the following ways:

- The Fisheries Service is in violation of Section 9 of the Endangered Species Act for unlawful take of endangered and threatened species;
- The Fisheries Service is in violation of Section 7(a)(2) of the Endangered Species Act for failing to insure that its actions are not likely to jeopardize the continued existence and recovery of endangered and threatened species; and
- The Fisheries Service has failed to complete consultation on the shrimp trawl fishery within the prescribed timeframe as required by Section 7(b) of the Endangered Species Act.³⁹

These violations are detailed below.

A. Violations of Section 9 of the Endangered Species Act

The Endangered Species Act “not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking....a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the [Endangered Species Act].”⁴⁰ Based on information and belief, the Fisheries Service’s continued operation of the southeastern shrimp trawl fishery results in unauthorized take of endangered and threatened species in violation of Section 9 of the Endangered Species Act. Accordingly, the Fisheries Service is violating Section 9.

³⁵ NMFS, BIOLOGICAL OPINION, *supra* note 1, at 56.

³⁶ Memo from Bonnie Ponwith, Ph.D., to Roy E. Crabtree, Ph.D, Southeast Fisheries Science Center of the National Marine Fisheries Service (Jan. 5, 2011).

³⁷ OCEANA, UNACCEPTABLE VIOLATIONS OF SEA TURTLE PROTECTIONS IN THE U.S. SHRIMP FISHERY, *supra* note 1, at 13.

³⁸ Notice of Intent to Sue, *supra* note 2, at 5-8.

³⁹ Oceana additionally incorporates by reference the May 31, 2011 Notice Letter’s petition for emergency closure. Notice of Intent to Sue, *supra* note 2, at 10-12.

⁴⁰ *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997).

The Fisheries Service's regulations exempt certain shrimp trawls from the Section 9 take prohibition as long as they comply with TED requirements, tow-time restrictions, and other measures to prevent sea turtle take. However, the Fisheries Service is not protected by this exemption since it is authorizing fishing activity in violation of the sea turtle conservation regulations. The regulations require shrimp trawlers to install an approved TED device.⁴¹ The recent Fisheries Service inspections detailed above show high levels of noncompliance with this requirement in Louisiana, Mississippi, Florida, and Texas.⁴² Freedom of Information Act disclosures also point to poor enforcement.⁴³ While the regulations exempt skimmer trawls in the Gulf from TED requirements, they mandate alternative measures instead. These measures include restricting tow times to 55 minutes from April 1 through October 31 and 75 minutes from November 1 through March 31.⁴⁴ As documentation gained through Oceana's Freedom of Information Act request shows, there has been a marked lack of compliance with these tow-time restrictions since the *Deepwater Horizon* spill, as well as poor enforcement.⁴⁵ These facts show that the sea turtle regulations are not being followed. The Fisheries Service's continued authorization of shrimp fisheries even though it is aware that the fishery is not complying with its regulations is in violation of Section 9.

Additionally, the Fisheries Service is in violation because it has failed to comply with the terms and conditions set forth in the Biological Opinion. Compliance with the Biological Opinion protects federal agencies, as well as others acting under the Biological Opinion, from enforcement action under Section 9's prohibition against take.⁴⁶ However, incidental takings are not authorized during fishing activities if the takings "[w]ould violate the restrictions, terms, or conditions of an incidental take statement."⁴⁷ The incidental take statement includes requirements to use observer information to monitor sea turtle mortality from trawls, take appropriate action if stranding trends significantly increase, and monitor activities exempt from the requirement for TEDs to determine effects on sea turtles.⁴⁸ The May 31, 2011 Notice Letter set forth the ways that the Fisheries Service has not complied with the Biological Opinion, and we incorporate this discussion by reference.⁴⁹ Because the Fisheries Service is not complying with the terms and conditions specified in the incidental take statement, it is violating Section 9 of the Endangered Species Act.

Moreover, the Fisheries Service has repeatedly acknowledged that the reasonable and prudent measures and terms and conditions specified in the Biological Opinion, such as

⁴¹ 50 C.F.R. §223.206(d)(2).

⁴² GOVERNMENT STANDS IDLE, *supra* note 18 (citing FOIA emails 2-32149, 2-50704, 2-50658, and 2-50658 (on file with Oceana)).

⁴³ *Id.* (citing FOIA emails 2-32124 and 2-50621 (on file with Oceana)).

⁴⁴ 50 C.F.R. §223.206(d)(2).

⁴⁵ OCEANA, GOVERNMENT STANDS IDLE, *supra* note 18 (citing FOIA emails 2-32124 and 2-50621 (on file with Oceana)); *see also* NMFS, SCOPING DOCUMENT, *supra* note 26, at 2.

⁴⁶ *See* 16 U.S.C. § 1536(o)(2); 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31 (a).

⁴⁷ 50 C.F.R. § 223.206(d)(4).

⁴⁸ NMFS, BIOLOGICAL OPINION, *supra* note 1, at 57-58.

⁴⁹ Notice of Intent to Sue, *supra* note 2, at 8-9.

tow-time restrictions, proper use of TEDs, use of observers, and enforcement measures, are insufficient to protect sea turtles.⁵⁰ Therefore, the Fisheries Service's continued reliance on the Biological Opinion as an action agency is arbitrary and capricious, and shrimp trawl activities that result in take of sea turtles are in violation of Section 9 of the Endangered Species Act.

B. Violations of Section 7(a)(2) of the Endangered Species Act

The failure to complete consultation has made it impossible for the Fisheries Service to comply with the substantive mandate of Section 7(a)(2) of the Endangered Species Act, which requires each federal agency to "insure" that any action it funds, authorizes, or carries out is "not likely to jeopardize the continued existence of any endangered species or threatened species."⁵¹ The unprecedented turtle strandings are occurring at a level that has not been shown to avoid jeopardy; therefore, the agency's failure to conclude consultation constitutes a failure to insure against jeopardy. As the action agency authorizing the continued operation of the southeastern U.S. shrimp trawl fishery, the Fisheries Service maintains an ongoing and affirmative duty to comply with Section 7's substantive mandate regardless of the status of consultation.⁵²

C. Unreasonable delay

The Fisheries Service has unreasonably and unlawfully delayed completing Endangered Species Act Section 7 consultation on the continued operation of the southeastern United States shrimp trawl fishery. The Fisheries Service has been consulting since August 17, 2010, on effects on sea turtles (336 days as of July 19, 2011). By delaying completion of consultation far beyond the normal 90-day statutory time period, the Fisheries Service has delayed action mandated by law, in violation of Section 7(b) of the Endangered Species Act.⁵³ This failure to complete consultation constitutes unreasonable delay under the Administrative Procedure Act.⁵⁴

III. CONCLUSION

If the Fisheries Service does not act within 60 days to correct its violations of the Endangered Species Act, Oceana will pursue litigation in federal court. Oceana will seek injunctive and declaratory relief, as well as legal fees and costs regarding these

⁵⁰ See, e.g., NMFS, SCOPING DOCUMENT, *supra* note 26, at 2; Reinitiation letter, *supra* note 28, at 2; Lubchenko, *supra* note 5.

⁵¹ 16 U.S.C. § 1536(a)(2).

⁵² Section 7(d) of the Endangered Species Act, 16 U.S.C. § 1536(b), does not empower the Fisheries Service's continued authorization of the shrimp fisheries during reinitiation of consultation, since Section 7(d) refers to an irreversible and irretrievable commitment of economic resources and is an additional protection to species, over and above the take prohibition. To the extent that the Fisheries Service incorrectly asserts that Section 7(d) does provide such authorization, we incorporate the relevant claim from the May 31, 2011 Notice Letter. Notice of Intent to Sue, *supra* note 2, at 10.

⁵³ 16 U.S.C. § 1536(b)(1)(A).

⁵⁴ 5 U.S.C. § 706(1).

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violations. An appropriate remedy that would prevent litigation would be for the Fisheries Service to suspend the shrimp trawl fishery in the Gulf of Mexico until the completion of consultation and to provide a schedule for a permanent binding resolution of these issues.

If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact Eric Bilsky, Oceana's Assistant General Counsel, at (202) 833-3900 or ebilsky@oceana.org. Thank you for your concern.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Hirshfield", with a long horizontal flourish extending to the right.

Michael F. Hirshfield
Senior Vice President, North America & Chief Scientist
Oceana, Inc.

Appendix A:

Oceana, Unacceptable Violations of Sea Turtle Protections in the U.S. Shrimp Fishery
(July 19, 2011)



Unacceptable Violations of Sea Turtle Protections in the U.S. Shrimp Fishery

July 19, 2011

The U.S. shrimp fishery catches more sea turtles than any other U.S. fishery. The use of Turtle Excluder Devices (TEDs) or limited tow times, depending on the type of fishing gear being used, were thought to be mitigating the problem by allowing most caught sea turtles to be released alive. However, recent information obtained by Oceana in a Freedom of Information Act (FOIA) request has uncovered the harsh reality of the fishery. Fishermen are violating the sea turtle protection regulations, which leads directly to turtle deaths. The vast majority of these violations are not minor errors or technicalities. In fact, in some cases fishermen are not using TEDs at all or fastening the TEDs shut, thus rendering them useless.

Sea Turtles and the Shrimp Fishery

The waters off the southeast U.S. and Gulf of Mexico are important habitat for loggerhead, Kemp's ridley, leatherback, hawksbill, and green sea turtles. All of these species are listed as endangered in the Gulf of Mexico under the Endangered Species Act (ESA), with the exception of the loggerhead, which is listed as threatened but the government has recently proposed to change its status to endangered.¹ These sea turtles face a range of threats including fishing gear, vessel strikes, degraded nesting beaches and recently the *Deepwater Horizon* oil spill.

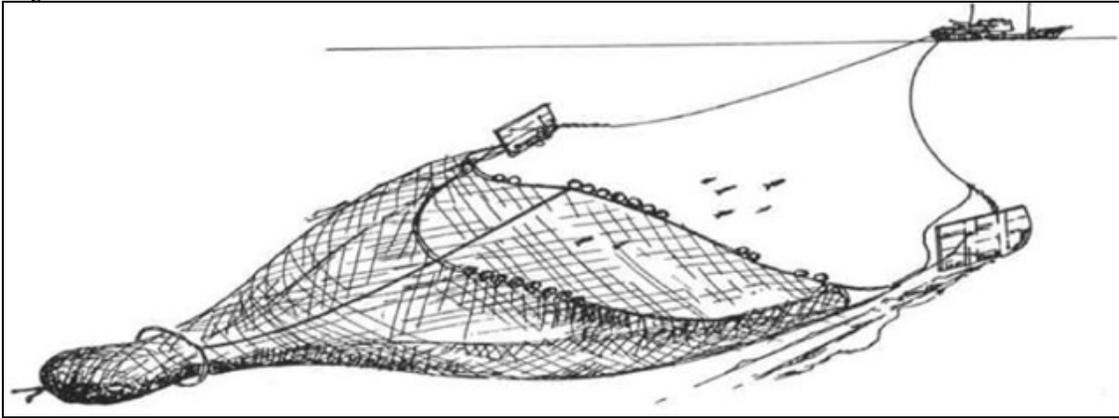
Possibly the gravest threat to sea turtles in this region is the large commercial shrimp trawl fishery. The otter trawl (Figure 1), a cone-shaped net held open in the front by large, heavy panels, is commonly used to catch shrimp.² Interactions between sea turtles and the Gulf shrimp trawl fishery have been high for decades, due to the unselective nature of trawls as they sweep both coastal and offshore waters. The severity of these interactions came to light in the 1980s, when the National Research Council estimated that shrimp trawls were to blame for 5,000-50,000 loggerhead and 500-5,000 Kemp's ridley sea turtle deaths annually.³ This meant that the shrimp fishery was responsible for more loggerhead and Kemp's ridley sea turtle deaths than any other human activity.

¹ NOAA Fisheries Office of Protected Resources. Marine Turtle Species Under the Endangered Species Act (ESA). Accessed July 11, 2011. <http://www.nmfs.noaa.gov/pr/species/esa/turtles.htm>.

² Food and Agriculture Organization of the United Nations, Fisheries and Aquaculture Department. 2011. Fishing Techniques: Shrimp Otter Trawling. Accessed July 11, 2011. <http://www.fao.org/fishery/fishtech/1021/en>.

³ National Research Council. *Decline of the Sea Turtles: Causes and Prevention*, National Academy Press, 1990. pp. 147.

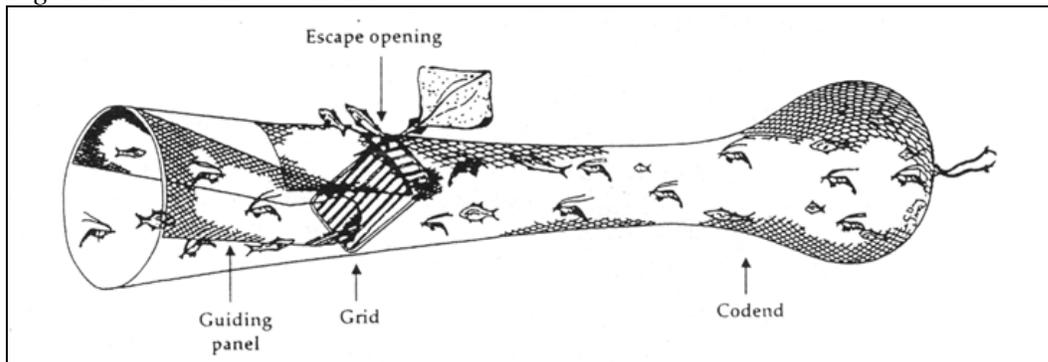
Figure 1: Otter Trawl.⁴



The Turtle Excluder Device

The National Marine Fisheries Service (NMFS) devoted years of research and development resources to finding a solution to this problem, which resulted in the Turtle Excluder Device (TED), now required in commercial shrimp otter trawl nets (Figure 2). A "Turtle Excluder Device" is a grid of bars with an opening either at the top or the bottom of the trawl net. The grid is fitted into the neck of a shrimp trawl, allowing small animals such as shrimp to pass through the bars and be caught in the bag end of the trawl.⁵ When larger animals such as sea turtles are caught, they strike the grid bars and are ejected through the opening.⁶

Figure 2: Turtle Excluder Device.⁷



⁴ Office of Marine Fisheries, Mississippi Department of Marine Resources. Mississippi Trawl Gear Characterization. Accessed July 11, 2011. http://www.nmfs.noaa.gov/pr/pdfs/strategy/ms_trawl_gear.pdf.

⁵ NOAA Fisheries Office of Protected Resources, Turtle Excluder Devices (TEDs). Accessed July 11, 2011. <http://www.nmfs.noaa.gov/pr/species/turtles/teds.htm>.

⁶ Ibid.

⁷ Food and Agriculture Organization of the United Nations. Fisheries and Aquaculture Department. 2011. Fishing Technology Equipments: Turtle Excluder Device (TED). Accessed July 11, 2011. <http://www.fao.org/fishery/equipment/ted>.

To be approved by NMFS, a TED design must be shown to be 97% effective in excluding sea turtles during testing based upon specific protocols.⁸ However, a TED must be installed and used correctly to achieve this 97% reduction in trapped turtles.

The Problem Is Not Solved

Despite the TED requirement in place, it is likely that incidental capture in the shrimp fishery remains the single greatest human caused source of sea turtle mortality in the southeastern United States. Most U.S. shrimp trawlers operating in the Atlantic Ocean and Gulf of Mexico have been required to use TEDs year-round since 1992.⁹ However, skimmer trawls, pusher-head trawls and wing nets (butterfly trawls) are not required to use TEDs if they limit tow times, the time the net is in the water fishing, to specified lengths.¹⁰ For both trawls that are required to use TEDs and those using limited tow times, much evidence exists of violations of the regulations intended to protect sea turtles.

In addition to the evidence of fishermen breaking the law, sea turtles began stranding in unprecedented numbers shortly after the *Deepwater Horizon* oil spill in April 2010.¹¹ Stranding is the term used to describe any time when sea turtles wash up dead or injured on the beach. NMFS has identified three possible causes of mortality for these sea turtles: the oil spill, harmful algal blooms and fisheries bycatch.¹² NMFS is exploring all of these possibilities and has been conducting numerous necropsies (autopsies on animals) in order to gain a better understanding of this unusual mortality event.¹³

While nearly all the sea turtles rescued after the oil spill were visibly oiled, most of the dead stranded sea turtles had no observable oil on their bodies and were in good health prior to their death.¹⁴ Necropsies on more than half of 600 recovered carcasses point to the possibility that the majority may have drowned in fishing gear.¹⁵ The necropsies of many of those turtles showed sediment and shrimp in their stomachs, indicating forced submergence in shrimp trawls.¹⁶ Shrimp, due to their speed, are not a normal part of a sea turtle's diet.¹⁷ According to a National Oceanic and Atmospheric Administration

⁸ 50 CFR 223.207(e)(1)

⁹ 50 CFR 217.12, 227.72(e)(2).

¹⁰ 50 CFR 223.206(d)(2)(ii)(A).

¹¹ NOAA Southeast Fisheries Science Center. 2011. Sea Turtle Stranding and Salvage Network. Accessed June 28, 2011. <http://www.sefsc.noaa.gov/species/turtles/strandings.htm>.

¹² NOAA Fisheries. Office of Protected Resources. 2011. Sea Turtle Strandings in the Gulf of Mexico. Accessed June 28, 2011. <http://www.nmfs.noaa.gov/pr/species/turtles/gulfofmexico.htm>.

¹³ Ibid.

¹⁴ Jane Lubchenco. 2011. Oil Spill Clarifies Road Map for Sea Turtle Recovery. Accessed July 12, 2011. http://www.nmfs.noaa.gov/mediacenter/docs/2011/mar/oil_spill_clarifies_road_map_for_sea_turtle_recovery.pdf.

¹⁵ Ibid.

¹⁶ Shaila Dewan, Turtle Deaths Called Result of Shrimping, Not Oil Spill, New York Times (June 25, 2010) (available at <http://www.nytimes.com/2010/06/26/science/earth/26turtle.html>).

¹⁷ NOAA Fisheries. Office of Protected Resources. 2011. Sea Turtle Strandings in the Gulf of Mexico. Accessed July 11, 2011. <http://www.nmfs.noaa.gov/pr/species/turtles/gulfofmexico.htm>.

(NOAA) veterinarian, “The most plausible scenario where an animal would be able to ingest shrimp is in a fisheries net.”¹⁸

Recently, NOAA scientists necropsied 26 turtles recovered in Mississippi in March of 2011.¹⁹ Of these 26 turtles, “19 turtles had no external traumatic injuries, were in good nutritional condition, had evidence of sediment aspiration/drowning, and had fish in the digestive tracts.”²⁰ As with shrimp, sea turtles typically do not prey on live fish, but will scavenge dead fish, most often available as discarded dead bycatch or as a result of fish kills.²¹ Necropsy results indicate a significant number of stranded turtles from both the 2010 and 2011 events likely perished due to forced submergence, which is commonly associated with fishery interactions.²²

The Evidence

Oceana filed a Freedom of Information Act (FOIA) request to NMFS for documents and emails related to compliance with sea turtle protections in the shrimp fishery. The documents obtained by Oceana make it clear that a real problem exists in the shrimp fishery. Of particular interest were memos that summarized the results of NMFS “courtesy checks” of shrimp-trawling vessels in various Gulf of Mexico ports, as well as a state-run investigation in Georgia, for their compliance with TED regulations. These checks are conducted periodically to ensure that fishermen understand TED regulations and are properly using TEDs, and to provide assistance with correcting TED installation, should it be needed.²³ Government TED experts conducting the checks are not law enforcement officers and do not issue citations to non-compliant vessel owners, but record the vessel’s name when possible and the types of violations encountered. Along with full courtesy inspections, the memos also document other vessels that were viewed during inspection trips but where a full inspection could not be completed. The following analysis includes all information from the memos, but since some, less obvious violations cannot be seen dockside, compliance issues may be even higher than documented.

In the FOIA documents received to date, Oceana has obtained six such TED compliance memos. The reports summarized NMFS courtesy checks that occurred between May, 2009 and April, 2011, and included ports in Florida, Louisiana, Mississippi, and Texas. Additionally, one report came from the Georgia Department of Natural Resources, which contained information on TED compliance gathered during vessel inspections at various state ports. Table 1 shows the locations and dates of these checks, as well as the number

¹⁸ Brent McDonald, *The Sea Turtles’ Plight* (Apr. 19, 2011), available at <http://video.nytimes.com/video/2011/04/19/us/100000000782274/the-sea-turtles-plight.html>.

¹⁹ NOAA Fisheries. Office of Protected Resources. 2011. Sea Turtle Strandings in the Gulf of Mexico. Accessed July 11, 2011. <http://www.nmfs.noaa.gov/pr/species/turtles/gulfofmexico.htm>.

²⁰ Ibid.

²¹ Ibid..

²² NMFS, Southeast Regional Office. Scoping Document for Preparation of a Draft Environmental Impact Statement to Reduce Incidental Bycatch and Mortality of Sea Turtles in the Southeastern U.S. Shrimp Fishery. June 20, 2011.

²³ Barnette, Michael. Memo to David Bernhart, Assistant Regional Administrator for Protected Resources, Southeast Regional Office of the National Marine Fisheries Service. 28 Jul. 2010.

of vessels viewed. A total of 112 vessels were checked for compliance with TED regulations.

Although the information contained in these six compliance memos gives us meaningful insight into the general non-compliance problem in the Gulf of Mexico, a larger number of vessel inspections would give us an even better idea of the extent of these violations. Additionally, TEDs are required on shrimp trawlers in the Atlantic as well, but Oceana did not receive information on courtesy checks done in this region. Information is available for only one Atlantic state, Georgia. Due to lack of information from the other Atlantic states, compliance rates in the Atlantic remain largely unknown and therefore the risk to sea turtles swimming in these waters cannot adequately be determined.

Table 1: Information on each of the six TED compliance courtesy check memos released to Oceana by NMFS.

Dates of Inspection	Locations of Inspection	Number of Vessels Viewed
May 5-7, 2009 ²⁴	Freeport, TX and Crystal Beach, TX	14
	Cameron, LA	6
May 1 – August 31, 2010 ²⁵	Georgia	30
July 19-21, 2010 ²⁶	Freeport, TX	7
	Galveston, TX	3
August 11, 2010 ²⁷	Cameron, LA	9
	Delcambre, LA	2
	Intracoastal City, LA	17
	Port Fourchon, LA	2
December 6-8, 2010 ²⁸	Mayport, FL	6
	Fort Meyers, FL	2
April 27-28, 2011 ²⁹	Biloxi, MS	14

²⁴ Stevens, Dale. Memo to John Mitchell, Southeast Fisheries Science Center of the National Marine Fisheries Service. 11 May 2009.

²⁵ Georgia Department of Natural Resources. Semi-Annual Progress Report: Recovery of Threatened and Endangered Species in Georgia, March 1, 2010 – August 31, 2010.

²⁶ Barnette, Michael. Memo to David Bernhart, Assistant Regional Administrator for Protected Resources, Southeast Regional Office of the National Marine Fisheries Service. 28 Jul. 2010.

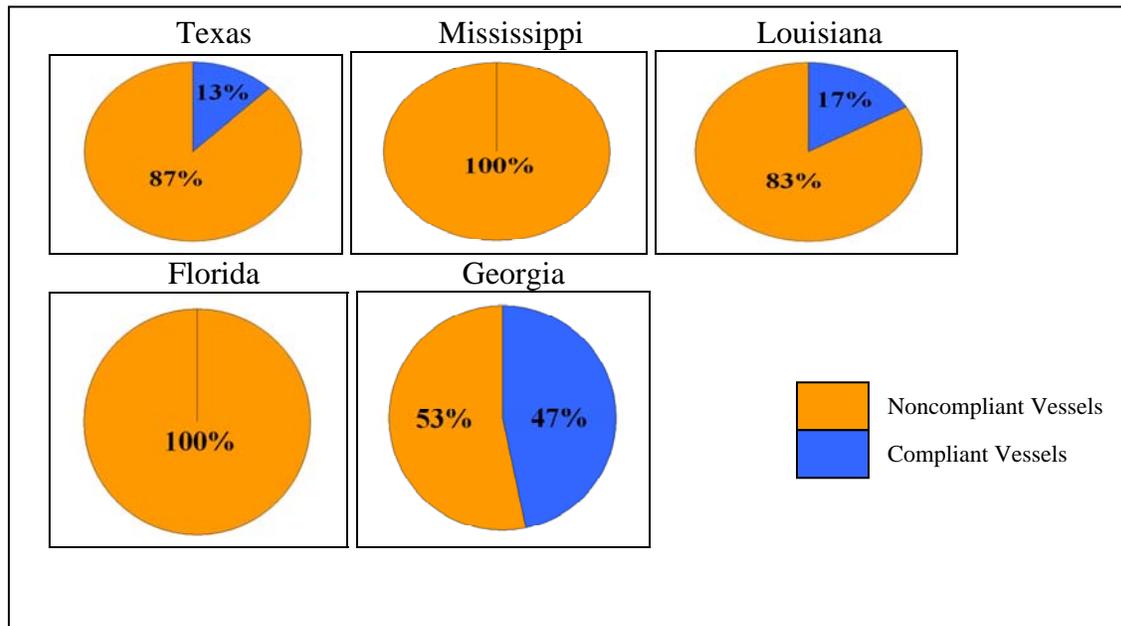
²⁷ Stevens, Dale & Forrester, Jack. Memo to John Mitchell, Southeast Fisheries Science Center of the National Marine Fisheries Service. 16 Aug. 2010.

²⁸ Barnette, Michael. Memo to David Bernhart, Assistant Regional Administrator for Protected Resources, Southeast Regional Office of the National Marine Fisheries Service. 10 Dec. 2010.

²⁹ Ibid.

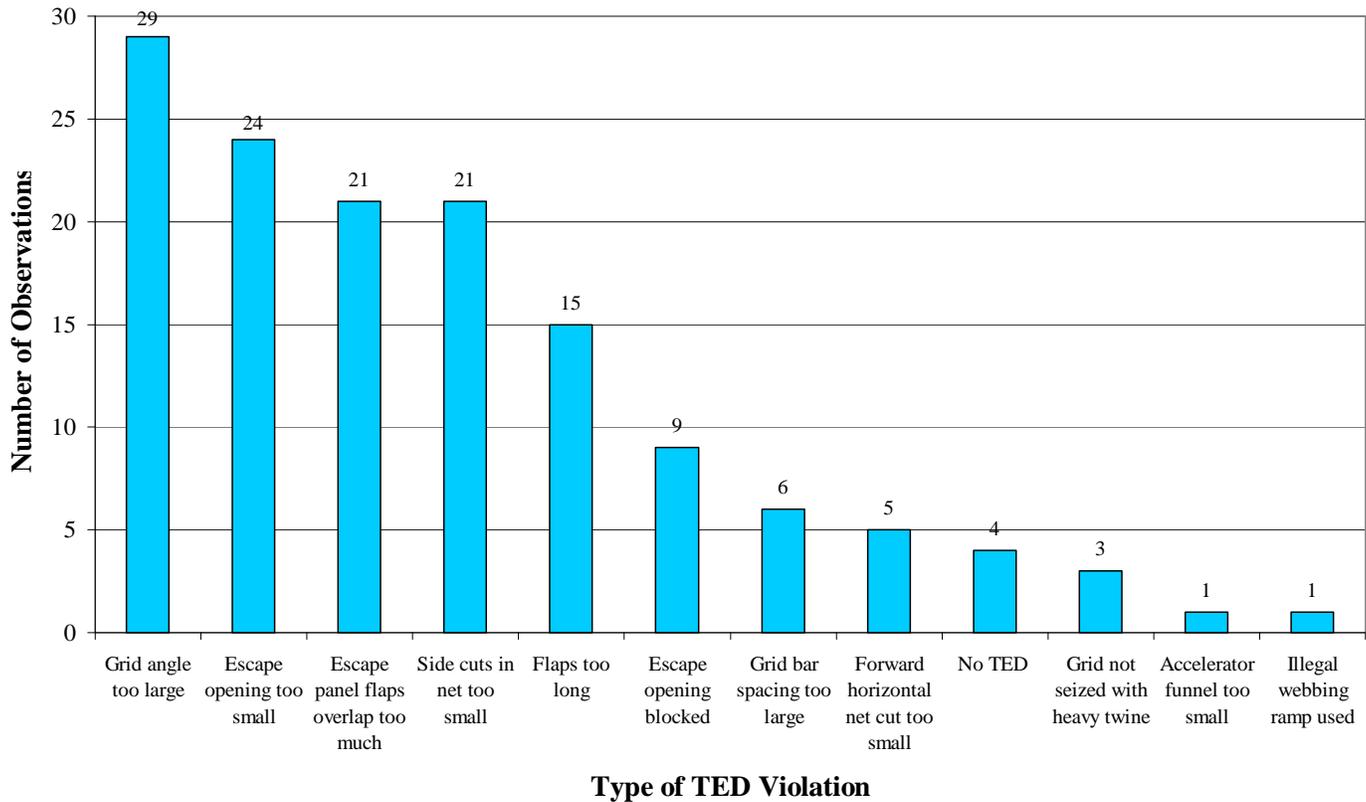
The results in these memos were shocking: the authors reported widespread non-compliance with TED regulations. Overall, out of 112 inspected vessels, only 23 (21%) were found to be compliant. In Mississippi and Florida, not a single inspected vessel was found to be in compliance, whereas the highest compliance rate was found in Georgia, at about 47% (Figure 3).

Figure 3: Vessel Compliance with TED Regulations by State.



Fisheries experts conducting these checks recorded the types of violations they observed (Figure 4). It is important to note that the total number of violations does not sum to the total number of non-compliant vessels, because several vessels had more than one TED violation and some vessels fish multiple trawl nets.

Figure 4: Frequency of Various Types of Observed TED Violations, All Vessels.



The most frequently observed violation was too high of an angle for the TED grid; 55 degrees is the maximum allowed. Steep TED-grid angles are of particular concern to small, juvenile sea turtles, as TED testing by NMFS has documented even small variances above the 55-degree maximum angle will prevent sea turtles from escaping the net.³⁰ According to the NMFS memo on May 2009 checks in Texas and Louisiana, “The Harvesting [Systems] Unit has fully evaluated the effects of high TED angles on turtle exclusion and has determined that this infraction has the potential for causing turtle mortality superseded only by the TED being sewn completely closed...I am confident that the angle problems which we observed could have resulted in the deaths of the stranded turtles the week before.”³¹ The memo also indicated that this type of infraction is not due to a lack of awareness about the regulations, but that fishermen and net installers are instead blatantly ignoring the law.³²

³⁰ National Marine Fisheries Service, Southeast Regional Office. *Scoping Document for Preparation of a Draft Environmental Impact Statement to Reduce Incidental Bycatch and Mortality of Sea Turtles in the Southeastern U.S. Shrimp Fishery*. June 20, 2011. Accessed July 11, 2011.

<http://sero.nmfs.noaa.gov/pr/endangered%20species/Shrimp%20Fishery/SCOPING%20DOCUMENT.pdf>

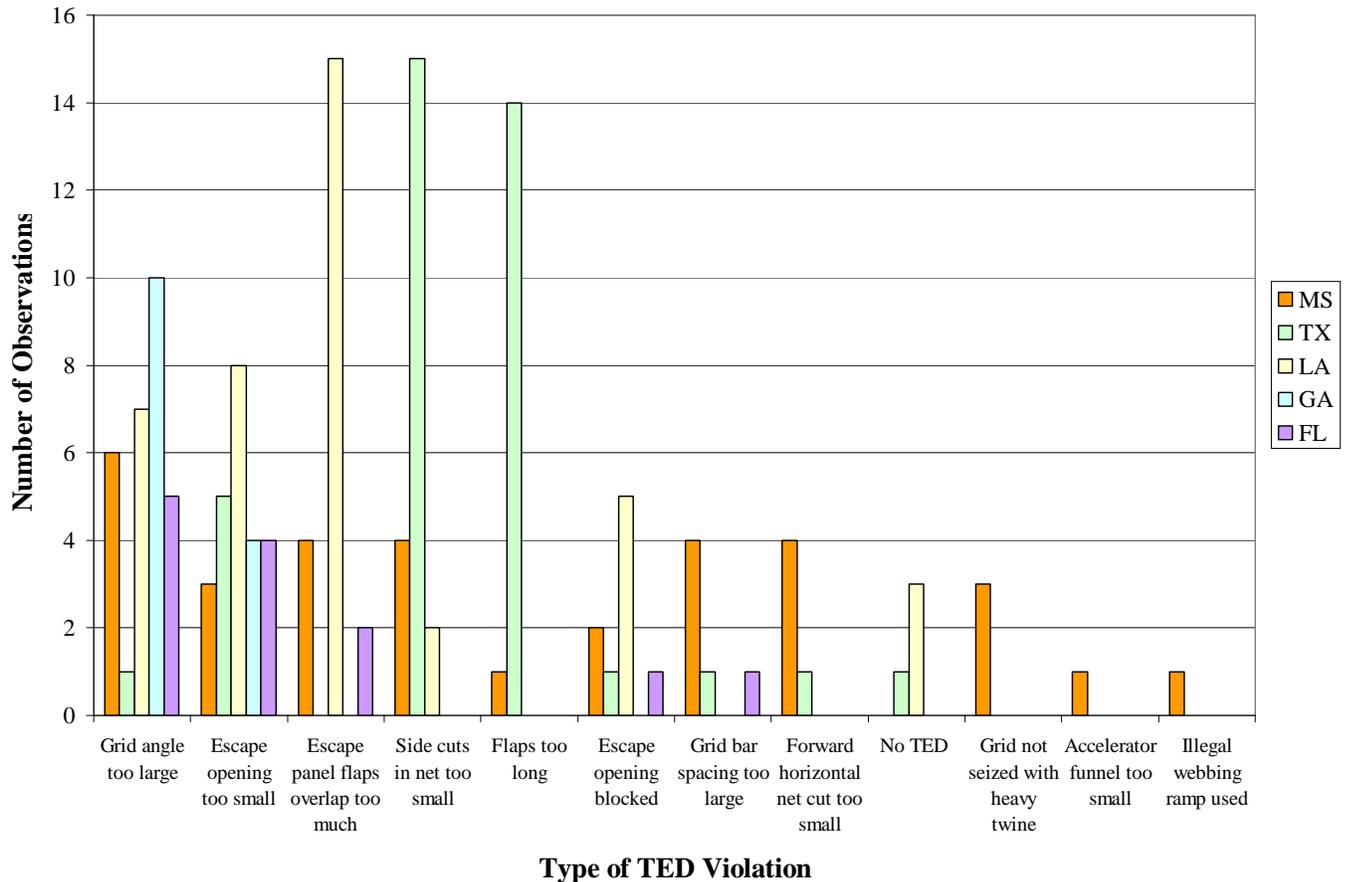
³¹ Stevens, Dale. Memo to John Mitchell, Southeast Fisheries Science Center of the National Marine Fisheries Service. 11 May 2009.

³² Ibid.

Other commonly occurring violations included the escape opening being too small (71” is the minimum diameter), the escape panel flaps overlapping too much (15” is the maximum overlap), and the side cuts of the net not being long enough (24” is the minimum diameter). If the opening doesn’t meet size requirements, larger turtles will not be able to escape.³³ Too much overlap in escape flaps and short side cuts also limit the ability of sea turtles to escape. The 71” escape opening rule has been in force since 2003,³⁴ and so it is unlikely that these cases of noncompliance are the result of a lack of awareness.

Most outrageously, on 4 inspected vessels, there were no TEDs even installed. Furthermore, in the case of an additional 9 vessels, the escape opening to the TED was blocked, either with a buoy or some other device meant to close off the net. While there are problems across the fishery, Louisiana leads the group of states with the highest level of these most egregious violations (Figure 5).

Figure 5: Frequency of Observed TED Violations by State.



³³NMFS, Southeast Regional Office. Scoping Document for Preparation of a Draft Environmental Impact Statement to Reduce Incidental Bycatch and Mortality of Sea Turtles in the Southeastern U.S. Shrimp Fishery. June 20, 2011.

³⁴ NOAA. “Endangered and Threatened Wildlife; Sea Turtle Conservation Requirements.” Fed. Reg. 72:31. Feb 15, 2007. p. 7383.

Unfortunately, violations of laws to protect turtles in the shrimp fishery are not limited to those vessels required to use TEDs. Skimmer trawls are commonly used in the northern Gulf of Mexico and in North Carolina. Information from NOAA and Mississippi Department of Marine Resources enforcement, stemming from the monitoring of Mississippi Sound skimmer trawl vessels in 2010, “indicate the alternative tow time requirements are exceeded by the skimmer trawl fleet.”³⁵ At this time, the extent that tow time requirements are exceeded by the skimmer trawl fleet in the other areas they operate is unknown.³⁶

Despite a great deal of publicity about the issue, the problem has not been solved, as this statement from a recent NOAA press release indicates: “On July 11, NOAA issued NOVAs [Notices of Violation and Assessment] for violations involving TEDs to three vessels that allegedly had their device’s escape flaps tied shut, one vessel that allegedly had no TEDs installed on the two nets that were being used at the time the vessel was boarded, and five that allegedly had TEDs with escape openings that were too small and/or positioned at too steep an angle to allow turtles to escape.”

Too Many Dead Turtles

Violations of the sea turtle protection regulations result in dead turtles. While some violations such as grid angles and escape opening size harm particular sizes of turtles, others, such as a lack of TED use or sewing the TED shut, cause the deaths of turtles of all sizes.

A TED must be 97% effective at allowing sea turtles to escape to be certified by NMFS for use in the shrimp fishery. However, a TED will not be 97% effective under real world conditions if it is not in compliance with the regulations.

Of the 76 vessels in the Gulf of Mexico documented in the memos, 17% had either no TED installed or had the escape hatch intentionally blocked by sewing the hatch shut or blocking it with a buoy, among other methods. Therefore, assuming that the vessels documented in the inspection memos are representative of the fleet, approximately 17% of the fleet is fishing without a TED or in a way that renders the TED totally ineffective. This means that current NMFS estimates of sea turtle mortality in the shrimp fishery are grossly underestimated.

In particular, it is completely inappropriate to use the 97% sea turtle escape estimate for the portion of the fishery that is fishing either without TEDs or with TEDs that have a blocked escape hatch. Rather, it should be assumed that all of the turtles caught in these

³⁵ NMFS, Southeast Regional Office. Scoping Document for Preparation of a Draft Environmental Impact Statement to Reduce Incidental Bycatch and Mortality of Sea Turtles in the Southeastern U.S. Shrimp Fishery. June 20, 2011.

³⁶ Ibid.

trawls cannot escape. Therefore, the mortality rate applied to turtles that cannot escape should be applied to the total number of turtles caught, rather than only 3% of them.

Using this information, Oceana developed a revised mortality estimate for loggerhead and leatherback sea turtles in shrimp bottom otter trawls in the Gulf of Mexico (see Appendix 1 for details).

Table 2: Current ESA authorized mortalities, NMFS estimate of mortalities and mortalities updated based on compliance data.

Species	Maximum Mortalities Authorized for entire shrimp fishery ³⁷	NMFS Estimate of Mortality in Gulf of Mexico ³⁸	Estimate of Mortality in Gulf of Mexico Considering Compliance Issues
Loggerhead	3,948	778	4874
Leatherback	80	18	108

Under the ESA, the shrimp fishery is authorized an annual take for all Gulf of Mexico and South Atlantic shrimp trawls of up to 3,948 loggerheads and 80 leatherbacks, numbers that are determined by NMFS in a Biological Opinion.³⁹ The revised estimate shows that bottom otter trawls in the Gulf of Mexico alone are killing enough sea turtles to violate the Biological Opinion for the entire fishery.

Furthermore, the number of sea turtles killed by the entire fleet is likely to be even greater than our revised estimate, for the following reasons.

- 1) Additional sea turtles are being killed by TEDs installed at an improper angle. As described above, improper installation “has the potential for causing turtle mortality superseded only by the TED being sewn completely closed.” Other violations also lead to increased sea turtle deaths.
- 2) Skimmer trawls, which are not required to use TEDs, have been documented exceeding their allowed tow times, and are therefore certainly killing sea turtles.
- 3) There are documented violations from the Atlantic, which means that additional sea turtles are being killed by this region of the fishery
- 4) In estimating bycatch in the shrimp fishery, NMFS uses different mortality estimates depending on season and area. For the Gulf of Mexico, the mortality estimates range from 89% to 100%. Because we used the minimum estimate (89%) for all bottom otter trawl fishing in the Gulf, our estimate is an underestimate of loggerhead and leatherback mortality.

³⁷ National Marine Fisheries Service, Endangered Species Act: Section 7 Consultation Biological Opinion, Shrimp Trawling in the Southeastern United States, under the Sea Turtle Conservation Regulations and as Managed by the Fishery Management Plans for Shrimp in the South Atlantic and Gulf of Mexico 16 (Dec. 2 2002).

³⁸ Ponwith, Bonnie, Ph.D. Memo to Roy E. Crabtree, Ph.D, Southeast Fisheries Science Center of the National Marine Fisheries Service. 5 Jan. 2011.

³⁹ National Marine Fisheries Service, Endangered Species Act: Section 7 Consultation Biological Opinion, Shrimp Trawling in the Southeastern United States, under the Sea Turtle Conservation Regulations and as Managed by the Fishery Management Plans for Shrimp in the South Atlantic and Gulf of Mexico 16 (Dec. 2 2002).

Finally, in January 2011, NMFS calculated updated estimates of loggerhead and leatherback take and mortality in shrimp otter trawls based on 2009 levels of effort. We used these revised estimates in the table above. These take levels are substantially lower than previous estimates due to sizeable reductions in the shrimp fleet in recent years. Due to data limitations, NMFS did not calculate new bycatch estimates for Kemp's ridley and green sea turtles. Without this information, we were unable to calculate an estimate of mortality from shrimp bottom otter trawls for these two species in the Gulf of Mexico that takes into account non-compliance with TED regulations. However, since the estimated mortalities of loggerheads and leatherbacks in Gulf bottom otter trawls are 123% and 135% of the authorized levels, respectively (when both recent effort reduction and non-compliance are accounted for), it is highly likely that mortality levels of Kemp's ridley and green sea turtles from bottom otter trawls in the Gulf of Mexico are also approximately 130% of the authorized levels for the entire fishery.

Conclusion

The disregard for turtle protection regulations in the shrimp fishery, either through improper required gear or violation of tow time restrictions, is causing unnecessary deaths of threatened and endangered sea turtles in the southeastern U.S. In several of the compliance memos we reviewed, the authors stated that enforcement is not sufficient and needs to be improved: "These findings indicate that significant TED compliance issues are not confined to the western Gulf of Mexico....but likely plagues the entire southeastern shrimp fishery."⁴⁰ As another memo concludes, "Past and current enforcement efforts on both a state and federal level have not been effective in compelling the shrimp fleet to comply with TED requirements."⁴¹ There is clearly a serious lack of compliance with sea turtle protection regulations in the shrimp fishery, and NMFS must act immediately to take short term actions and develop a long-term plan to ensure that the shrimp fishery does not drive sea turtles toward extinction.

What Needs to be Done

Urgent action is necessary to protect sea turtles from the U.S. shrimp fishery. The government must take immediate action to:

- Ensure compliance with existing regulations to protect threatened and endangered sea turtles
- Require TEDs in all trawl fisheries operating in times and areas with sea turtles
- Establish fishing closures for areas during times when large aggregations of sea turtles are present.
- Because compliance problems in the Gulf are particularly egregious, close Gulf shrimp fisheries until the issues above are addressed.

⁴⁰ Barnette, Michael. Memo to David Bernhart, Assistant Regional Administrator for Protected Resources, Southeast Regional Office of the National Marine Fisheries Service. 10 Dec. 2010.

⁴¹ Barnette, Michael. Memo to David Bernhart, Assistant Regional Administrator for Protected Resources, Southeast Regional Office of the National Marine Fisheries Service. 28 Jul. 2010.

Appendix 1: Calculation of Mortality Estimates Considering Compliance

In January 2011, NMFS calculated updated estimates of loggerhead and leatherback take and mortality in shrimp otter trawls based on 2009 levels of effort. For the Gulf of Mexico, NMFS estimated that 28,095 loggerhead sea turtles are caught each year and that 778 of them will be killed.⁴² For leatherbacks in the Gulf of Mexico, NMFS estimated that 623 turtles would be caught, 18 of which would be killed.⁴³

Table 1A:

Species	Estimated Interactions	Estimated Mortalities
Leatherback	623	18
Loggerhead	28,095	778

Of the 76 vessels in the Gulf of Mexico documented in the memos, 17% had either no TED installed or had the escape hatch intentionally blocked by sewing the hatch shut or blocking it with a buoy, among other methods. Assuming that the vessels documented in the inspection memos are representative of the fleet, approximately 17% of the fleet is fishing without a TED or in a way that renders the TED totally ineffective.

In particular, it is completely inappropriate to use the 97% sea turtle escape estimate for the portion of the fishery that is fishing either without TEDs or with TEDs that have a blocked escape hatch. Rather, it should be assumed that all of the turtles caught in these trawls cannot escape. Therefore, the mortality rate applied to turtles that cannot escape should be applied to the total number of turtles caught, rather than only 3% of them.

According to the 2011 NMFS bycatch estimate for the shrimp fishery, mortality rates vary by area and season, but the lowest mortality estimate for turtles that become trapped in shrimp trawls in the Gulf of Mexico is 89%.⁴⁴ Because fishing with a blocked escape hatch or fishing without a TED would prevent a turtle from escaping a trawl, the 89% mortality rate or higher should be applied to all of the turtles caught by shrimp trawlers fishing with these significant TED violations.

Therefore, the actual bycatch estimate for loggerhead and leatherback sea turtles in the Gulf of Mexico shrimp bottom otter trawls can be calculated as follows.

LOGGERHEADS

For No TED/TED blocked portion of fishery:

(17% of fishing) (28,095 loggerhead turtle interactions) (100% stuck in trawl) (89% mortality) = 4251 dead turtles.

⁴² Ponwith, Bonnie, Ph.D. Memo to Roy E. Crabtree, Ph.D, Southeast Fisheries Science Center of the National Marine Fisheries Service. 5 Jan. 2011.

⁴³ Ibid.

⁴⁴ Ibid.

For remainder of fishery:

(83% of fishing) (28,095 loggerhead turtle interactions) (3% stuck in trawl) (89% mortality) = 623 dead turtles

Total dead loggerheads in the Gulf shrimp bottom otter trawls 4251 + 623 = 4874

LEATHERBACKS

For No TED/TED blocked portion of fishery:

(17% of fishing) (623 leatherback interactions) (100% stuck in trawl) (89% mortality) = 94 dead turtles

For remainder of fishery:

(83% of fishing) (623 leatherback turtles estimated caught) (3% stuck in trawl) (89% mortality) = 14 dead turtles

Total dead leatherbacks in the Gulf shrimp bottom otter trawls 94 + 14 = 108

The Biological Opinion's incidental take statement for the shrimp fishery authorized an annual take for all Gulf of Mexico and South Atlantic shrimp trawling of up to 3,948 loggerheads and 80 leatherbacks per year.⁴⁵ Bottom otter trawls in the Gulf of Mexico alone are killing enough sea turtles to violate the Biological Opinion for the entire shrimp fishery.

Species	Maximum Mortalities Authorized for Entire Shrimp Fishery ⁴⁶	NMFS Estimate of Mortality in Gulf of Mexico ⁴⁷	Estimate of Mortality in Gulf of Mexico Considering Compliance Issues
Loggerhead	3,948	778	4,874
Leatherback	80	18	108

⁴⁵ National Marine Fisheries Service, Endangered Species Act: Section 7 Consultation Biological Opinion, Shrimp Trawling in the Southeastern United States, under the Sea Turtle Conservation Regulations and as Managed by the Fishery Management Plans for Shrimp in the South Atlantic and Gulf of Mexico 16 (Dec. 2 2002).

⁴⁶ Ibid.

⁴⁷ Ponwith, Bonnie, Ph.D. Memo to Roy E. Crabtree, Ph.D, Southeast Fisheries Science Center of the National Marine Fisheries Service. 5 Jan. 2011.

Appendix B:

Notice of Intent to Sue (May 31, 2011)



Sent via certified mail and electronic mail

May 31, 2011

Honorable Gary Locke
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RE: Notice of Intent to Sue for Violations of the Endangered Species Act Related to the Management of the Gulf of Mexico Shrimp Trawl Fishery and Petition for Emergency Closure

On behalf of the Center for Biological Diversity, Defenders of Wildlife, Turtle Island Restoration Network, and Sea Turtle Conservancy, this letter serves as a notice of our intent to sue the National Marine Fisheries Service (“Fisheries Service”) and the officials of State agencies of Louisiana, Mississippi, and Alabama (collectively, “States”) responsible for issuing commercial shrimp fishing licenses or permits in state waters, for violations of Sections 7 and 9 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, for actions and inactions related to the management and regulation of the shrimp trawl fishery that have resulted in and continue to result in illegal take of and other harm to protected species. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the Act, 16 U.S.C. §

1540(g).¹ Additionally, this letter serves as a formal petition for the Fisheries Service to close the shrimp trawl fisheries in federal and state waters and take other actions to conserve protected species.

As discussed below, the Fisheries Service and the States have violated and continue to violate their duties under the ESA to protect and conserve threatened and endangered species. The Fisheries Service's and States' mismanagement of the Gulf of Mexico shrimp trawl fishery is resulting in staggering numbers of sea turtle strandings and deaths. In 2010 and 2011, sea turtle strandings in the northern Gulf of Mexico surged as hundreds of dead sea turtles washed ashore. The Fisheries Service's own data show that many of these sea turtles died from forced submergence from fishing gear, primarily attributable to the shrimp trawl fishery. Based on the information currently available and belief, the shrimp fishery's take of sea turtles has exceeded and continues to exceed the level of take authorized in the 2002 Biological Opinion. For the reasons set forth below, the Fisheries Service's and States' current management of the shrimp trawl fishery violates Sections 7 and 9 of the ESA.

Additionally, we officially petition the Fisheries Service to take actions to necessary to conserve sea turtles, as discussed in detail below.

I. BACKGROUND

A. Record sea turtle strandings in 2010 and 2011 continue

There has been an unprecedented increase in the past year in sea turtle strandings² attributable to the shrimp fisheries in the Gulf of Mexico. Five species of sea turtles inhabit waters in the Gulf of Mexico, loggerhead (*Caretta caretta*), green (*Chelonia mydas*), Kemp's ridley (*Lepidochelys kempii*), hawksbill turtle (*Eretmochelys imbricata*), and leatherback (*Dermochelys coriacea*). They are all protected under the Endangered Species Act. In 2011 alone there have been at least 603 documented sea turtle strandings in Texas, Alabama, Louisiana, and Mississippi.³ Because strandings represent only a small fraction of sea turtle deaths, likely only 5-6 percent, the total

¹ Claims under the Administrative Procedure Act and the National Environmental Policy Act ("NEPA") are justiciable without a notice letter. The failure of the Fisheries Service to prepare a supplemental environmental impact statement to address new information brought to light by the Deepwater Horizon oil spill and recent sea turtle stranding data is a violation of NEPA. See 40 C.F.R. § 1502.9(c) (requiring agency to supplement NEPA document when "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) ("if there remains major Federal action to occur, and the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared") (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989)). The shrimp trawl fishery is also presently operating under an invalid Biological Opinion, and the Fisheries Service has accordingly reinitiated consultation. Because a challenge to a Biological Opinion and NEPA are brought under the judicial review provisions of the Administrative Procedure Act, judicial review of these claims is immediately available.

² See Figures 1 and 2.

³ See Table 1. The total of 496 strandings does not include the 647 green sea turtle strandings from January 30 – February 12 that are likely attributable to cold stunning.

mortality of sea turtles is much higher.⁴

The Fisheries Service itself believes that many of the dead turtles are casualties of the shrimp fishery, which may have captured an increased amount of sea turtles as an indirect result of the oil spill.⁵ Jane Lubchenco, National Oceanic and Atmospheric Administration (“NOAA”) Administrator, stated that last year’s necropsies “on more than half of 600 carcasses point to the possibility that a majority may have drowned in fishing gear.”⁶ Fisheries Service officials working on sea turtle response have noted that there was “every indication that the vast majority of these mortalities are shrimp fishing related.”⁷ Necropsies of many of those turtles found sediment and shrimp in their stomachs, pointing to forced submergence in shrimp trawls.⁸ In fact, during a necropsy of a sea turtle stranded in 2010 Dr. Brian Stacey, a veterinarian with the Fisheries Service, found a piece of shrimp lodged in its esophagus and remarked “you don’t see shrimp consumed as a part of the normal diet...shrimp are very fast...the most plausible scenario where an animal would be able to ingest shrimp is in a fisheries net.”⁹ According to the Fisheries Service, “[t]he only known plausible cause of forced submergence that could explain this event is incidental capture in fishing gear.”¹⁰

Turtles may also be more vulnerable due to the *Deepwater Horizon* oil spill and response efforts. The health and fitness of some sea turtles in the Gulf of Mexico may have been compromised by oil exposure, making them more vulnerable to capture and drowning in fishing gear. In 2010, the *Deepwater Horizon* oil spill released at least 200 million gallons of oil. Response efforts included dumping 1.84 million gallons of dispersants into the Gulf of Mexico and in-situ burns on over 500 square miles of water. As a last resort to keep sea turtle hatchlings from swimming into the oil, nearly 28,000 eggs yielding 15,000 turtle hatchlings, including loggerhead, Kemp’s ridley, and green turtles were relocated from the Gulf of Mexico in an effort to avoid the oil spill.¹¹ The success rate of these turtles reaching maturity and returning to nest will be unknown for decades. It is undisputed that since the *Deepwater Horizon* oil spill “extraordinarily high numbers of threatened and endangered sea turtle strandings” have been documented.¹² Oiled turtles have been collected from Port Arthur, Texas, to Apalachicola Bay, Florida. Seaside

⁴ The 2002 Biological Opinion (“BiOp”) states that “strandings only account for between 5% and 6% of the total at-sea mortality.” BiOp at 43 (using conservative estimates).

⁵ Letter from David Bernhart to Roy Crabtree, Reinitiation of ESA Section 7 Consultation on Shrimp Trawling in the Southeastern United States (Aug. 17, 2010) (hereinafter “Reinitiation letter”) (“It appears that these 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”).

⁶ Jane Lubchenco, Oil Spill Clarifies Road Map for Sea Turtle Recovery, available at http://www.nmfs.noaa.gov/mediacenter/docs/2011/mar/oil_spill_clarifies_road_map_for_sea_turtle_recovery.pdf.

⁷ Email from Barbara Schroeder, Fisheries Service National Sea Turtle Coordinator (July 7, 2010, 09:40:37) available at <http://www.scribd.com/doc/53915146/NOAA-Endangered-species-Oil-Spill-Response>.

⁸ Shailla Dewan, Turtle Deaths Called Result of Shrimping, Not Oil Spill, New York Times (June 25, 2010) (available at <http://www.nytimes.com/2010/06/26/science/earth/26turtle.html>). Also, necropsies of 26 of the turtles suggested that 19 of them had died from forced submergence.

⁹ Brent McDonald, *The Sea Turtles’ Plight* (Apr. 19, 2011), available at <http://video.nytimes.com/video/2011/04/19/us/100000000782274/the-sea-turtles-plight.html>.

¹⁰ <http://www.nmfs.noaa.gov/pr/species/turtles/gulfofmexico.htm>.

¹¹ Marcia Dunn, *Turtle egg rescue at space center billed success*, Sept. 8, 2010, www.msnbc.com; NMFS, Sea Turtles and the Gulf of Mexico Oil Spill, <http://www.nmfs.noaa.gov/pr/health/oilspill/turtles.htm>.

¹² Reinitiation letter at 2.

residents report that dead turtles continue to wash up on a daily basis. As of November 2, 2010, the official number of turtles collected dead during response activities to the spill was 609.¹³ However, this tally of corpses underestimates total mortality because it does not include turtles that perished undetected or that were collected alive but could not be rehabilitated. The impact on stressed sea turtles may have been exacerbated by increased shrimp trawling effort and non-compliance with turtle excluder device (“TED”) and tow-time regulations in a rush to harvest shrimp before the Gulf fisheries closed over concerns of contamination.

B. Shrimp trawl fishery

The National Research Council concluded that shrimp trawling was the primary source of anthropogenic mortality for sea turtles in U.S. waters, estimating that shrimp trawling killed 44,000 Kemp’s ridley and loggerhead sea turtles annually during the 1980s,¹⁴ a time when recorded strandings were lower than at present.¹⁵ To reduce this mortality, most shrimp trawlers in the Atlantic and Gulf of Mexico must now use a TED, except for narrow circumstances when they may instead comply with tow-time restrictions.¹⁶

There are exceptions, however, to the requirement to use TEDs and enforcement is limited. Skimmer trawls are still not required to use TEDs. Instead, the Fisheries Service and some states have tow-time restrictions to reduce sea turtle mortality.¹⁷ These tow-time restrictions, however, are difficult to enforce.¹⁸ Compounding this threat, the proportion of skimmer trawls to otter trawls in the Gulf of Mexico shrimp fishery has been increasing over the past ten years.¹⁹ The Fisheries Service recently acknowledged that TEDs may be necessary in skimmer shrimp trawls due to high numbers of turtle strandings, but they are still not required.²⁰

In addition, much of the shrimp trawl fishery operates in state waters. State enforcement of TED requirements is not strong, and is non-existent in Louisiana which prohibits enforcement of the requirement with the use of state funds.²¹ Enforcement actions may be performed by both federal enforcement officers (NOAA and Coast Guard) and deputized state fish and wildlife officers. NOAA and the Gulf states have established Cooperative and Joint Enforcement Agreements

¹³ *Deepwater Horizon* Response Consolidated Fish and Wildlife Collection Report, Nov. 2, 2010, available at <http://www.restorethegulf.gov/news/transcripts-docs>.

¹⁴ National Research Council. 1990. *Decline of the Sea Turtles*. National Academy Press. Washington, D.C. 259 p.

¹⁵ See Figures 1 and 2.

¹⁶ 50 C.F.R. § 223.206(d)(2).

¹⁷ 57 Fed. Reg. 57348, *Threatened Fish and Wildlife; Threatened Marine Reptiles; Revisions to Enhance and Facilitate Compliance With Sea Turtle Conservation Requirements Applicable to Shrimp Trawlers; Restrictions Applicable to Shrimp Trawlers and Other Fisheries* (Dec. 4, 1992).

¹⁸ *Id.*

¹⁹ Scott-Denton, E., P. Cryer, J. Gocke, M. Harrelson, K. Jones, J. Nance, J. Pulver, R. Smith, and J.A. Williams. 2006. *Skimmer trawl fishery catch evaluations in coastal Louisiana, 2004 and 2005*. *Marine Fisheries review* 68(1-4): 30-35.

²⁰ See Gulf Coast Fisherman Newsletter, *DMR Offers Mississippi shrimpers free TED gear for skimmer trawls* (Aug. 1, 2010) (“The National Marine Fisheries Service (NMFS) has indicated that TED gear for Gulf of Mexico shrimpers using skimmer trawls may be required in the near future.”), available at <http://msucares.com/newsletters/gulf/201008.html>.

²¹ Louisiana Revised Statutes 56 section 57.2. Turtle excluder devised; findings; enforcement of federal requirements; rules and regulations.

under which federal agents may enforce federal law in state waters and state agents are deputized to enforce federal law in state waters.²²

The Fisheries Service’s 2002 Biological Opinion (“BiOp”) on the operation of the state and federal Gulf of Mexico and South Atlantic shrimp trawl fisheries considered the “the effect of shrimp trawling, as conducted under the TED regulations and the FMPs, on all listed species within Federal waters and on listed sea turtles within state waters.”²³ It found that because TEDs release 97 percent of the turtles caught in shrimp trawls,²⁴ shrimp trawling activities would not jeopardize protected sea turtles.²⁵ The BiOp’s incidental take statement authorized an annual take for all Gulf of Mexico and South Atlantic state and federal shrimp trawling of up to:²⁶

Sea turtle	Mortalities	Interactions
Loggerhead	3,948	163,160
Kemp’s ridley	4,208	155,503
Green	514	18,757
Leatherback	80	3,090
Hawksbill	640	N/A

Due to the spike in sea turtles strandings in 2010, on August 17, 2010, the Fisheries Service reinitiated consultation on shrimp trawling’s effects on sea turtles.²⁷ The Fisheries Service has acknowledged that take of other ESA-listed species has exceeded or is also likely to have exceeded annual authorized take levels.²⁸ On May 1, 2009, and February 18, 2010, the Fisheries Service also reinitiated consultation on the shrimp trawl fishery’s effects on Gulf sturgeon and smalltooth sawfish, respectively, because take exceeded authorized levels for those species.²⁹ However, the Fisheries Service has not concluded the reinitiation of consultation with respect to any of the protected species.

II. VIOLATIONS OF LAW

A. The Endangered Species Act

The ESA was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...[and] a program for the conservation of such endangered species and threatened species.”³⁰ Section 2(c) of the ESA

²² VanderKooy, S.J. 2008. *Gulf of Mexico Cooperative Law Enforcement Strategic Plan 2005-2010 and Operations Plan 2009-2012*. Gulf States Marine Fisheries Commission. Ocean Springs, MS.

²³ National Marine Fisheries Service, Endangered Species Act: Section 7 Consultation Biological Opinion, Shrimp Trawling in the Southeastern United States, under the Sea Turtle Conservation Regulations and as Managed by the Fishery Management Plans for Shrimp in the South Atlantic and Gulf of Mexico (Dec. 2 2002) (hereinafter “BiOp”) at 16.

²⁴ BiOp at 84 (citing 52 Fed. Reg. 24244, June 29, 1987).

²⁵ BiOp at 56.

²⁶ BiOp, Table 5 at 56.

²⁷ Reinitiation letter.

²⁸ *See id.*

²⁹ *See id.*

³⁰ 16 U.S.C. § 1531(b).

establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”³¹ The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”³² Similarly, Section 7(a)(1) of the ESA directs that the Fisheries Service and other federal agencies shall use their programs and authorities to conserve endangered and threatened species.³³

In order to fulfill the substantive purposes of the ESA, federal agencies are required to engage in consultation with the Fisheries Service to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species...determined...to be critical.”³⁴ This provision is both procedural and substantive. The action agency must assess the effects of its actions on endangered species where the species may be present. When an agency determines that its proposed action “may affect listed species or critical habitat” it must engage in formal consultation with the federal resource agency responsible for the species at issue, known as the expert agency. 50 C.F.R. § 402.14(a). Where, as here, the Fisheries Service is both the action agency and the expert agency for purposes of the listed species in question, the agency must undertake internal consultation with itself.

Consultation shall be concluded within the 90-day period beginning on the date on which it is initiated or, under certain circumstances, another period.³⁵ If consultation will last longer than 150 days after initiation, the Fisheries Service must obtain consent to such a period from the agency requesting initiation.³⁶

Meanwhile, the action agency has an additional independent duty to comply with Section 7(a)(2)’s substantive requirement to insure that its actions are not likely to jeopardize the continued existence of species. This duty exists at all times and is not waived during consultation. If the biological opinion resulting from a consultation finds jeopardy, the opinion may specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action.³⁷ The Fisheries Service may also “suggest modifications” to the action during the course of consultation to “avoid the likelihood of adverse effects” to the listed species even if the modifications are not necessary to avoid jeopardy.³⁸

Because an agency’s duty to avoid jeopardy is continuing, “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:³⁹

³¹ 16 U.S.C. § 1531(c)(1).

³² 16 U.S.C. § 1532(3).

³³ 16 U.S.C. § 1536(a)(1).

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

³⁵ 16 U.S.C. § 1536(b).

³⁶ 16 U.S.C. § 1536(b).

³⁷ 16 U.S.C. § 1536(b).

³⁸ 50 C.F.R. § 402.13.

³⁹ 50 C.F.R. § 402.16.

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If 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;
- (c) If 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
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

During reinitiation of consultation, an agency also must comply with Section 7(d)'s mandate that the agency, as well as any applicant for a federal permit, "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." Congress enacted Section 7(d) "to ensure that the status quo would be maintained during the consultation process, to prevent agencies from sinking resources into a project in order to ensure its completion regardless of its impacts to endangered species" *Washington Toxics v. EPA*, 413 F.3d 1024, 1034-35 (9th Cir. 2005). It was not initially part of the ESA, but added to prevent agencies from steamrolling activities in order to secure completion of projects. *National Wilderness Institute v. Corps*, 2005 U.S. Dist. LEXIS 5159 (D.D.C. Mar. 23, 2005).

Compliance with the biological opinion protects federal agencies, and others acting under the biological opinion from enforcement action under Section 9's prohibition against take.⁴⁰ "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."⁴¹ The Service has extended these protections to threatened species by protective regulations deemed necessary and advisable for the conservation of the threatened species, including sea turtles and Gulf sturgeon.⁴² Section 7(o)(2) provides that "any taking that is in compliance with the terms and conditions specified in a written statement under subsection (b)(4)[sic](iv) of this section shall not be considered to be a prohibited taking of the species concerned." However, take not in compliance with the biological opinion is in violation of Section 9 of the ESA.

Based on information available and our belief, the Fisheries Service and States are violating the ESA in the following ways:

1. The Fisheries Service and States are in violation of Section 9 of the ESA for unlawful take of endangered and threatened species because:
 - a. The shrimp trawl fishery has exceeded the take of smalltooth sawfish, Gulf sturgeon, and sea turtles allowed in the BiOp;
 - b. The Fisheries Service is violating the terms and conditions of the BiOp;

⁴⁰ See 16 U.S.C. § 1536(o)(2); 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31 (a).

⁴¹ 16 U.S.C. § 1532(19).

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

- c. The Fisheries Service is violating the Reinitiation of Consultation provision of the BiOp, requiring that in “instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation”;⁴³ and
 - d. The Fisheries Service’s continued reliance on the BiOp is arbitrary and capricious given that it has acknowledged the measures prescribed in it are inadequate to protect imperiled sea turtles.
2. The Fisheries Service is in violation of Section 7 of the ESA for failing to:
- a. Insure its actions are not likely to jeopardize the continued existence of endangered and threatened species as required by Section 7(a)(2);
 - b. Complete consultation on the shrimp trawl fishery within the prescribed timeframe as required by Section 7(b);
 - c. Refrain from making any irreversible or irretrievable commitment of resources that may have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures; and
 - d. Request information regarding the presence of largemouth sawfish in shrimping areas or conduct a biological assessment if present, as required by Section 7(c).

B. Violations of ESA Section 9

Based on information and belief, the Fisheries Service and the States’ continued operation of the southeastern shrimp trawl fishery is directly resulting in unauthorized take of endangered and threatened species in violation of Sections 9 of the ESA.

The ESA “not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking....a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.”⁴⁴ Accordingly, the Fisheries Service, States, and all vessels and fishers in the Gulf of Mexico shrimp trawl fishery that engage in activities that result in the unauthorized take of sea turtles are acting in violation of Section 9 of the ESA.⁴⁵

The Fisheries Service has acknowledged that the southeastern United States shrimp trawl fishery has likely exceeded authorized take limits authorized in the BiOp for sea turtles, smalltooth sawfish and Gulf sturgeon. Therefore, take in excess in the amounts established in the BiOp is in violation of Section 9 of the ESA.

The Fisheries Service has also failed to comply with the terms and conditions contained in the BiOp. Incidental takings are not authorized during fishing activities if the takings “[w]ould

⁴³ BiOp at 59 (“pending” means “during,” thus the activities must cease until consultation is complete).

⁴⁴ *Strahan v. Coxe, et al.*, 127 F.3d 155 (1st Cir. 1997).

⁴⁵ The BiOp sets take authorization for both the Gulf of Mexico and South Atlantic Shrimp Trawl Fishery Management Plans as well as the TED regulations. Therefore the estimated take for the entire action has been exceeded, meaning that the South Atlantic fishery is also now operating without take authorization in violation of Section 9 of the ESA.

violate the restrictions, terms, or conditions of an incidental take statement.”⁴⁶ The incidental take statement includes requirements to use observer information to monitor sea turtle mortality from trawls, take appropriate action if stranding trends significantly increase, and monitor activities exempt from the requirement for TEDs to determine effects on sea turtles.⁴⁷ The Fisheries Service has not complied with these terms and conditions because:

- On information and belief, the Fisheries Service is violating terms 1(b)&(d) by not coordinating with the state of Louisiana to monitor fishing efforts or enforce sea turtle conservation regulations as Louisiana has prohibited the enforcement of TEDs use in state waters;⁴⁸
- Observer coverage is inadequate to monitor sea turtle mortality from trawls as required by term 1(c);
- The Fisheries Service is required to take appropriate action by term 1(d) but has taken no action, other than to reinitiate consultation, despite the spike in sea turtle strandings;⁴⁹
- The Fisheries Service is not sufficiently monitoring activities exempt from TEDs—a requirement of term 1(f);⁵⁰
- The Fisheries Service has not researched and implemented measures to reduce effort in the shrimp fishery thus reducing stress on sea turtles from multiple interactions in violation of term 4; and
- The Fisheries Service has not provided adequate training to the State agencies on the sea turtle conservation regulations nor adequately enforced sea turtle conservation regulations in violation of terms 3 & 5.⁵¹

Therefore, because the Fisheries Service is not complying with the terms and conditions specified in the incidental take statement, any take that results from shrimp trawl activities is in violation of Section 9 of the ESA.

Additionally, the Fisheries Service and states are in violation of the sea turtle conservation regulations, which require compliance with TEDS, tow time restrictions, and other measures to prevent sea turtle take. Accordingly, the Fisheries Service and states are in violation of Section 9 of the ESA and not protected by the incidental take statement for continuing approval of fishing activities that violate the sea turtle conservation regulations.

⁴⁶ 50 C.F.R. § 223.206(d)(4).

⁴⁷ BiOp at 57-58.

⁴⁸ Louisiana Revised Statutes 56 section 57.2. Turtle excluder devised; findings; enforcement of federal requirements; rules and regulations.

⁴⁹ The August 2010 letter requesting reinitiation of consultation found that “recent evidence of the lack of compliance with TED regulations, including the tow time provisions, now casts doubts onto the actual effectiveness of the regulations in protecting and conserving sea turtles populations.”

⁵⁰ The August 2010 letter requesting reinitiation of consultation acknowledges “vessels using skimmer trawls regularly exceeds these alternative tow time requirements, and monitoring tow times to ensure high compliance is time and man power prohibitive.”

⁵¹ The August 2010 letter requesting reinitiation of consultation stated “recent NOAA inspections of the east Texas shrimp fleet found problems in compliance with TEDs, despite the fact that a TED workshop had been conducted earlier that month which was attended by approximately 90 local fishermen.

Finally, the Fisheries Service has repeatedly acknowledged that the reasonable and prudent measures and terms and conditions specified in the BiOp, such as tow time restrictions, proper use of TEDs, use of observers, and enforcement measures, are insufficient to protect sea turtles. Therefore, the Fisheries Service's continued reliance on the BiOp as an action agency is arbitrary and capricious and shrimp trawl activities that result in take of sea turtles is in violation of Section 9 of the ESA.

C. Violations of ESA Section 7

The Fisheries Service's continued authorization of the shrimp fishery during consultation violates Sections 7(a)(1), 7(a)(2), 7(b), and the Government's interpretation of Section 7(d) of the ESA. The shrimp fishery is currently operating on a BiOp that the Fisheries Service has admitted is inadequate. The Fisheries Service has reinitiated consultation due to the excessive take of protected species.

The failure to complete consultation has made it impossible for the Fisheries Service to comply with the substantive mandate of Section 7(a)(2) of the ESA, which requires each federal agency to "insure" that any action it funds, authorizes, or carries out is "not likely to jeopardize the continued existence of any endangered species or threatened species."⁵² The unprecedented turtle strandings are occurring at a level that has not been shown to avoid jeopardy, therefore the agency's failure to conclude consultation constitutes a failure to ensure against jeopardy. As the action agency authorizing the continued operation of the southeastern U.S. shrimp trawl fishery, the Fisheries Service maintains an ongoing and affirmative duty to comply with Section 7's substantive mandate regardless of the status of consultation.

The Fisheries Service has unreasonably and unlawfully delayed completing ESA Section 7 consultation within the required timelines on the continued operation of the southeastern United States shrimp trawl fishery. The Fisheries Service has been consulting since August 17, 2010, on effects on sea turtles (over 260 days). By delaying completion of consultation for two to eight times the recommended statutory time period, the Fisheries Service has delayed action mandated by law, in violation of the ESA and the Administrative Procedure Act.⁵³

The Fisheries Service's continued authorization of the shrimp fisheries during reinitiation of consultation also constitutes a violation of Section 7(d)'s prohibition on the irreversible and irretrievable commitments of resources that could result in foreclosing the formulation of implementation of reasonable and prudent alternative measures.

III. PETITION FOR EMERGENCY CLOSURE AND PROTECTIVE REGULATIONS

Given that hundreds of threatened and endangered sea turtles are washing up dead in the northern Gulf of Mexico, immediate action to close the shrimp trawl fishery that contributes to the take of protected sea turtles is warranted. Under the Administrative Procedure Act ("APA")

⁵² 16 U.S.C. § 1536(a)(2).

⁵³ 5 U.S.C. § 706(1).

right to petition for the “issuance, amendment, or repeal” of an agency rule, 5 USC § 553(e), we respectfully request that the Fisheries Service:

- Impose an emergency closure of the federal and state shrimp trawl fishery in the Gulf of Mexico for the protection of threatened and endangered sea turtles until the Fisheries Service promulgates rules requiring TEDs on all commercial shrimp trawls and nets and requiring 100 percent observer coverage, or a level of observer coverage adequate to enforce those regulations;
- Issue a determination as to the primary cause of the strandings and whether the strandings are wholly or in part due to the sea turtles’ contact with oil and dispersants;
- Prepare a supplemental environmental impact statement to address new information brought to light by the Deepwater Horizon oil spill and recent sea turtle stranding data and assess the impacts to sea turtles;
- Take other actions necessary to conserve sea turtles, including but not limited to effort reduction, area closures, and gear conversion.

The APA provides for emergency regulations to protect the human environment.⁵⁴ The Fisheries Service must promptly respond to this petition.⁵⁵

The ESA provides ample authority for the Fisheries Service to close the shrimp trawl fishery. The Fisheries Service may “promulgate regulations as may be appropriate to enforce the [ESA].”⁵⁶ Further, the Fisheries Service “may restrict fishing activities in order to conserve a species listed under the Act.”⁵⁷ Indeed, the regulations command that the Assistant Administrator “will take such action” if the Assistant Administrator “determines that restrictions are necessary to avoid unauthorized takings that may be likely to jeopardize the continued existence of a listed species.”⁵⁸

Applicable regulations recognize the potential need for and expressly authorize emergency measures to protect sea turtles. Those regulations provide authority to condition or restrict fishing activities and permits as “necessary or appropriate to protect sea turtles and ensure compliance.”⁵⁹ The Fisheries Service may implement emergency restrictions for a period of up to 30 days, with the possibility of a 30-day renewal.⁶⁰ This emergency authority is intended for

⁵⁴ 5 U.S.C. § 553(b)(B) (waiving notice and comment requirements for good cause). *Oregon Trollers Ass’n v. Gutierrez*, 452 F.3d 1104, 1123-24 (9th Cir. 2006) (upholding application of good cause exception by NMFS to actions necessary before start of fishing season); *NRDC, Inc. v. Evans*, 316 F.3d 904, 910 (9th Cir.2003) (same); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987) (upholding Department of Interior’s interim hunting regulations under good cause exception); *Ocean Conservancy v. Evans*, 260 F. Supp. 2d 1162 (M.D. Fla. 2003) (upholding NMFS’s invocation of good cause exception for emergency adoption of fishery management quotas); *A.M.L. Intern., Inc. v. Daley*, 107 F. Supp. 2d (D. Mass. 2000) (same).

⁵⁵ 5 U.S.C. § 555(e).

⁵⁶ 16 U.S.C. § 1540(f).

⁵⁷ 50 C.F.R. § 223.206(d)(4)(ii).

⁵⁸ *Id.* (emphasis added).

⁵⁹ 50 C.F.R. § 223.206(d)(4)(iii).

⁶⁰ *Id.* § 223.206(d)(4)(iv).

circumstances such as these “to respond to unforeseen circumstances, or changes in the operation of the fishery, to prevent unauthorized takes of listed species.”⁶¹

Since the Fisheries Service first enacted the 1992 emergency sea turtle protection regulations, it has explicitly relied upon those regulations as well as the APA exception from notice and comment requirements on multiple occasions to implement emergency fishing restrictions. For example, on May 1, 2009, the Fisheries Service promulgated an emergency rule to close the bottom longline component of the reef fish fishery in the Gulf of Mexico because sea turtle bycatch.⁶² In doing so, the Fisheries Service relied on its authorities under the ESA, Magnuson-Stevens Act, and APA.⁶³ In 2001, after a spate of strandings in the fishery at issue here, the Fisheries Service issued emergency regulations requiring larger TED openings for shrimp trawlers operating in the Gulf of Mexico, which prior to these regulations had smaller openings than shrimp trawls used in the Atlantic.⁶⁴ The regulation, which took effect immediately, was deemed necessary to protect leatherback sea turtles, which were too large to escape from smaller TED openings, from drowning in shrimp trawls. As these past actions demonstrate, the Fisheries Service has both a continuing duty to prevent jeopardy to species such as ESA-listed sea turtles and ready regulatory mechanisms to carry out that duty by acting quickly to limit or eliminate fishing that is causing excessive take of sea turtles.

Conclusion

If the Fisheries Service does not act within 60 days to correct this violation of the ESA, the Center for Biological Diversity, Defenders of Wildlife, Turtle Island Restoration Network, and Sea Turtle Conservancy will pursue litigation in Federal Court. These parties will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. An appropriate remedy that would prevent litigation would be for the Fisheries Service to suspend the shrimp trawl fishery in the Gulf of Mexico until the completion of consultation. Additionally, the Fisheries Service should grant the petitioned-for actions for the conservation of sea turtles.

If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me at (415) 632-5308 or miyoko@biologicaldiversity.org. Thank you for your concern.

Sincerely,



Miyoko Sakashita
Oceans Program Director
Center for Biological Diversity
351 California Street, Suite 600
San Francisco, CA 94104

⁶¹ BiOp at 6.

⁶² 74 Fed. Reg. 20229, 20230 (May 1, 2009).

⁶³ *Id.*

⁶⁴ 66 Fed. Reg. 65658 (Dec. 20, 2001).

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Table 1. Documented sea turtle strandings in 2011. Source:
<https://grunt.sefsc.noaa.gov/stssnrep/SeaTurtleReportI.do?action=reportquery>.

Alabama Strandings	January (01/01-01/29)	February (01/30-03/05)	March (03/06-04/02)	April (04/03-04/30)	May (05/01-05/28)	2011 Total
Loggerhead	0	1	1	1	0	3
Green	2	0	1	0	0	3
Kemp's ridley	0	0	6	20	10	36
Unidentified	0	0	1	4	3	8
Total	2	1	9	25	13	50

Louisiana Strandings	January (01/01-01/29)	February (01/30-03/05)	March (03/06-04/02)	April (04/03-04/30)	May (05/01-05/28)	2011 Total
Loggerhead	1	0	3	1	2	7
Green	0	2	1	2	0	5
Kemp's ridley	0	2	17	18	3	40
Unidentified	1	0	3	2	1	7
Total	2	4	24	23	6	59

Mississippi Strandings	January (01/01-01/29)	February (01/30-03/05)	March (03/06-04/02)	April (04/03-04/30)	May (05-01-05/28)	2011 Total
Loggerhead	0	0	0	1	2	3
Green	1	0	2	1	0	4
Kemp's ridley	2	1	52	122	24	201
Unidentified	0	0	0	3	0	3
Total	3	1	54	127	26	211

Texas Strandings	January (01/01-01/29)	February (02/13-03/05)	March (03/06-04/02)	April (04/03-04/30)	May (05/01-05/28)	2011 Total
Loggerhead	10	0	9	22	18	59
Green	37	0	30	27	9	103
Kemp's ridley	6	59	11	30	10	116
Unidentified	2	0	0	3	0	5
Total	55	59	50	82	37	283

Total Strandings from January 1, 2011 – Present

Loggerhead: 72
Green: 115
Kemp's ridley: 393
Unidentified: 23
Total: 603

Figure 1. Annual sea turtle strandings in Louisiana, Mississippi and Alabama from 1986 through the present.

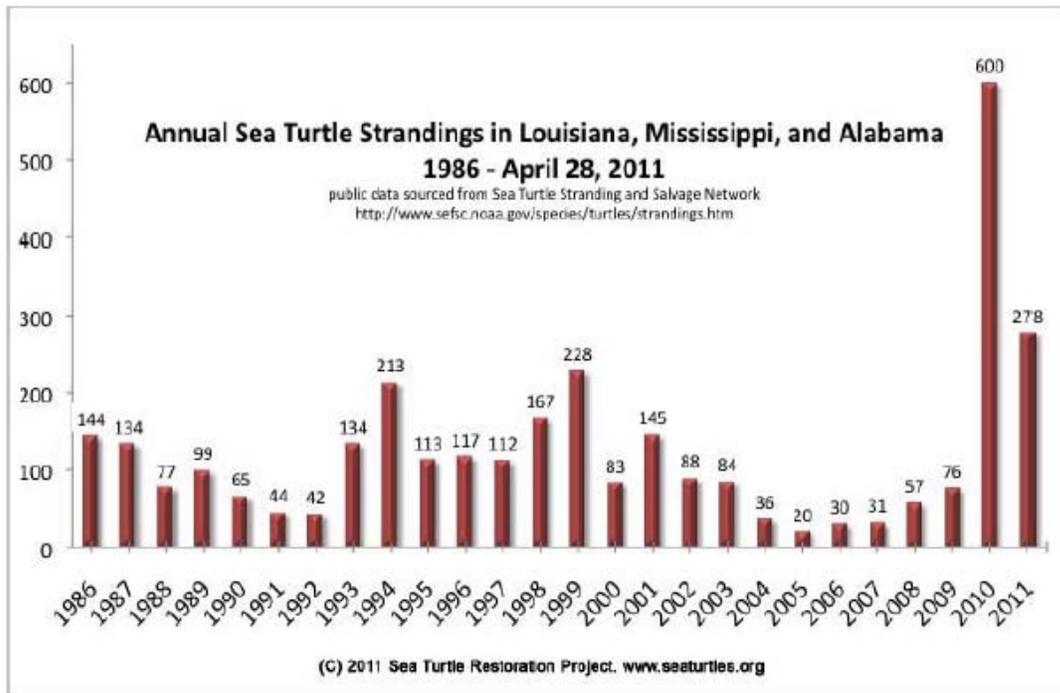
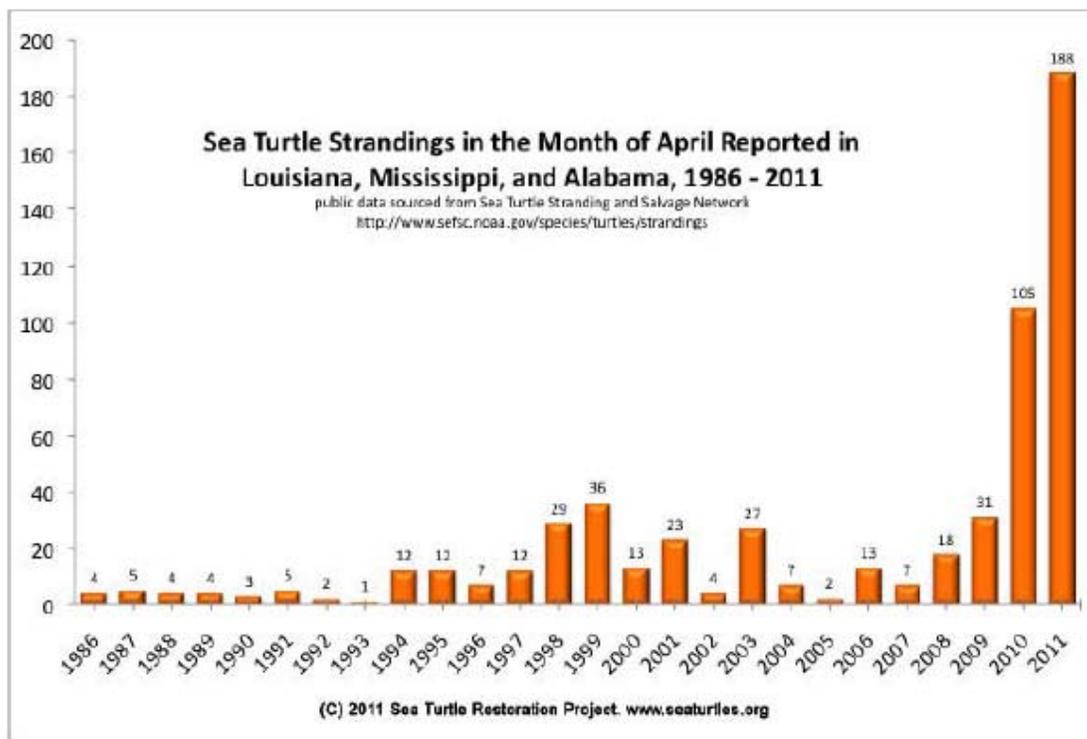


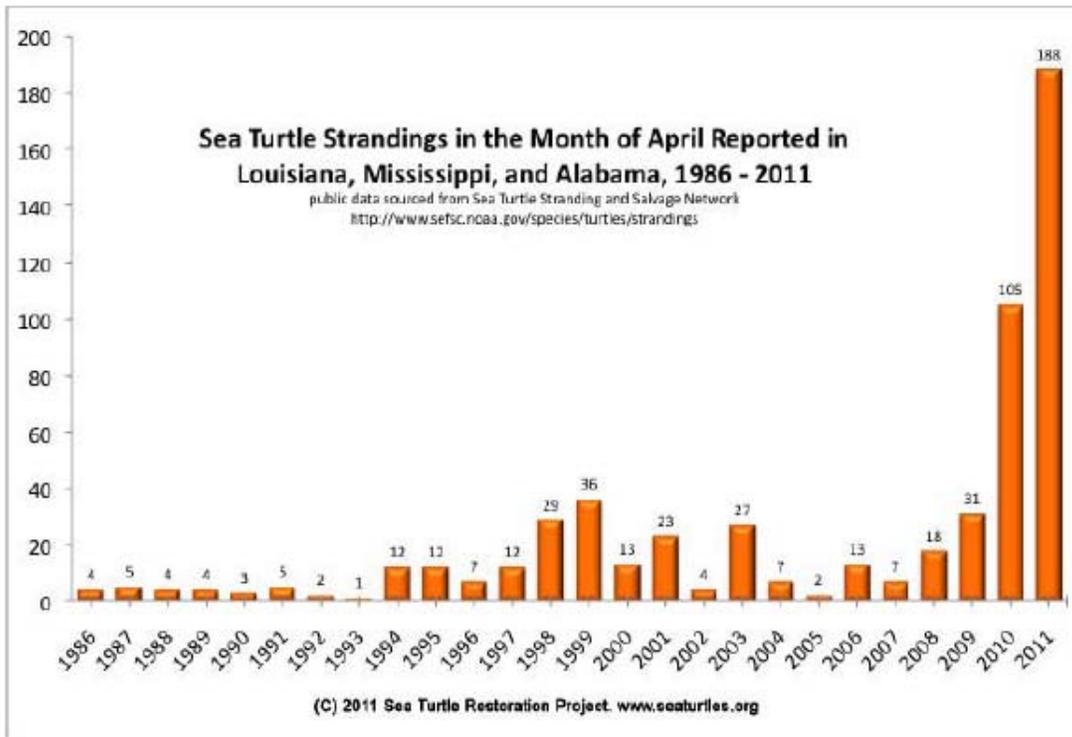
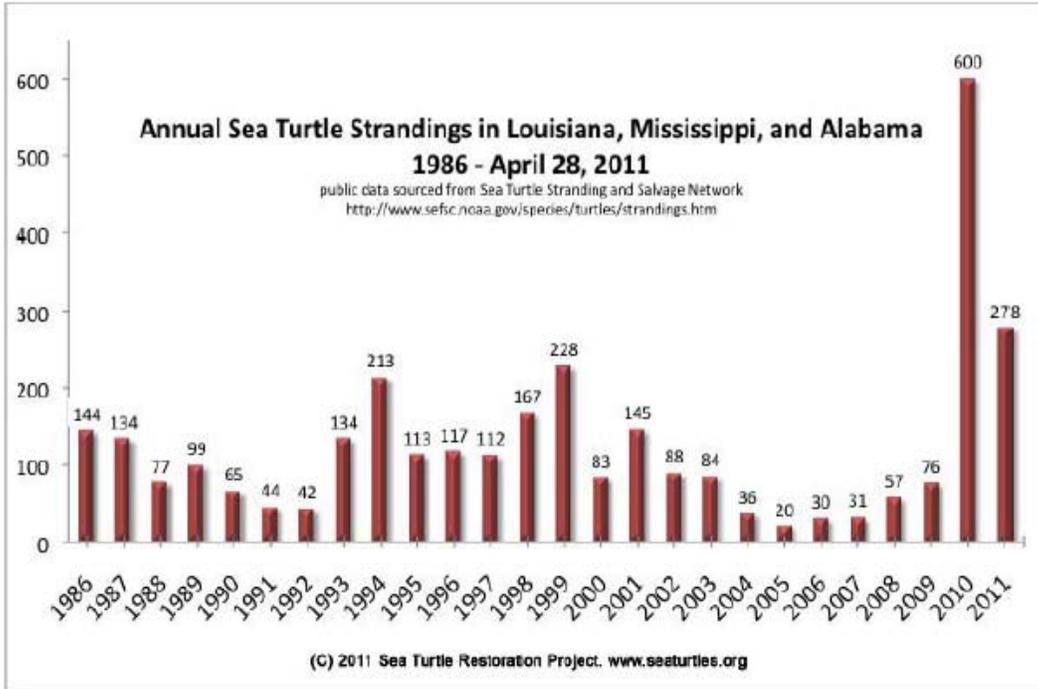
Figure 2. April sea turtle strandings in Louisiana, Mississippi, and Alabama.



Appendix C:

Sea Turtle Strandings in Louisiana, Mississippi, and Alabama

APPENDIX C



Appendix D:

Documented Sea Turtle Strandings in 2011, as of July 14

APPENDIX D

Documented Sea Turtle strandings in 2011, as of July 14.¹

State	Number of Stranded Turtles
Texas	406 ²
Louisiana	102
Mississippi	258
Alabama	74
Florida (Gulf)	267
Total	1107

¹ Sea Turtle Stranding and Salvage Network, Sea Turtle Stranding, <https://grunt.sefsc.noaa.gov/stssnrep/SeaTurtleReportI.do?action=reportquery>.

² Total does not include the 1220 green sea turtle strandings in Texas from January 30 – February 12 that are likely attributable to cold stunning. This approximate number of cold stunnings is based on news stories from NOAA and other sources, as well as strandings data for that period. *See, e.g.,* Katrina Phillips, *Over 1000 Sea Turtles Rescued by Volunteers in Southern Texas*, NOAA OFFICE OF OCEANIC AND ATMOSPHERIC RESEARCH NEWS, March 1, 2011, <http://researchmatters.noaa.gov/news/Pages/Over1000SeaTurtlesRescuedbyTexasVolunteers.aspx>; *860 Sea Turtles Rescued with More Strandings Expected*, TEXAS A&M NEWS AND INFORMATION SERVICES BLOG, Feb. 9 2011, <http://tamunews.tamu.edu/2011/02/09/860-sea-turtles-rescued-with-more-strandings-expected/>; Sea Turtle Stranding and Salvage Network, Sea Turtle Stranding.