

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

OCEANA, INC.,)
1350 Connecticut Ave., NW, 5th Floor)
Washington, DC 20036,)
)
Plaintiff,)
)
v.)
)
PENNY PRITZKER, in her official capacity)
as Secretary of the United States Department)
of Commerce)
Office of the Secretary)
Room 5858)
14th Street and Constitution Ave, NW)
Washington, DC 20230;)
)
NATIONAL OCEANIC AND)
ATMOSPHERIC ADMINISTRATION)
Department of Commerce)
Room 5128)
14th Street and Constitution Ave., NW)
Washington, DC 20230; and)
)
NATIONAL MARINE FISHERIES)
SERVICE)
Department of Commerce)
Room 14636)
1315 East-West Highway)
Silver Spring, MD 20910,)
)
Defendants.)

No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Loggerhead, green, leatherback, hawksbill, and Kemp’s ridley sea turtles are supposed to be protected as threatened or endangered species under the Endangered Species

Act.¹ Yet the Southeast Atlantic shrimp fisheries at issue in this case take over *half a million* “protected” sea turtles each year and kill over *fifty thousand*. These fisheries kill substantially more sea turtles than all other U.S. Atlantic fisheries combined.

2. The federal agencies charged with protecting these threatened and endangered species continue to approve, albeit arbitrarily, actions that further imperil their chances of survival and recovery. These agencies have violated their statutory mandate to protect these species by not adequately monitoring or analyzing human impacts, such as the deaths inflicted by shrimp fishing, and are also failing to carry out reasonable measures to reduce impacts on sea turtle populations.

3. Shrimp trawls, including otter, skimmer, pusher head, and butterfly trawls, regularly catch sea turtles, or otherwise entangle, hit, harm, or injure sea turtles with their fishing gear. These “incidental takes” are legal, in pertinent part, only if the designated federal agency formally consults under Section 7 of the Act, obtains a biological opinion that the prosecution of the fishery will not jeopardize either the survival or the recovery of the sea turtles species, and obtains an incidental take statement authorizing incidental take up to a certain specified level.

4. This case arises from a biological opinion assessing whether the continued operation of Southeast U.S. shrimp trawl fisheries in federal waters would jeopardize the continued existence of loggerhead, green, leatherback, hawksbill, and Kemp’s ridley sea turtles. *See* Endangered Species Act Section 7 Consultation on the Continued Implementation of the Sea Turtle Conservation Regulations under the Endangered Species Act and the Continued Authorization of the Southeast U.S. Shrimp Fisheries in Federal Waters under the Magnuson-Stevens Fishery Management and Conservation Act (Consultation No. SER-2013-12255) (Apr.

¹ This Complaint refers to the Endangered Species Act, codified at 16 U.S.C. §§ 1531–1544, as the “ESA,” “Endangered Species Act,” or “the Act.”

18, 2014) (hereinafter “Shrimp Biological Opinion”). In that Opinion, the government authorized the U.S. shrimp fisheries to kill over 50,000 sea turtles each year.

5. The Shrimp Biological Opinion suffers from several grave deficiencies. Notably:
- The biological opinion does not require actual monitoring of takes, as required by the Act, even though the agency can readily monitor lethal takes with at-sea observers on fishing vessels.
 - The biological opinion failed to follow the quantitative modeling methodology used in prior biological opinions for all other Atlantic fisheries, apparently because there was good reason to believe that use of this methodology would force the agency to find that the shrimp fisheries placed sea turtles in jeopardy of extinction. For example, under the quantitative modeling methodology, the agency found that killing 619 loggerhead sea turtles a year resulted in a detectable effect that was not material or considerable enough to cause jeopardy. In comparison, the Southeast U.S. Shrimp Fisheries are anticipated to kill **7,778** loggerhead sea turtles a year.
 - The biological opinion does not consider adequately the impact of the shrimp fisheries on the likelihood of sea turtles’ recovery.

6. In this civil action for declaratory and injunctive relief, Plaintiff Oceana, Inc., (“Oceana”) challenges the failure of Defendants Penny Pritzker, in her official capacity as Secretary of Commerce, the National Oceanic and Atmospheric Administration (“NOAA”), and the National Marine Fisheries Service (collectively, the “Fisheries Service”) to follow the Administrative Procedure Act, 5 U.S.C. §§ 701–706 (“APA”), the Endangered Species Act, and the National Marine Fisheries Service’s regulations and internal guidance by issuing and relying

on a substantively and procedurally flawed biological opinion that fails adequately to protect threatened and endangered sea turtles.

7. As a result of these flaws, Oceana seeks a declaration that the Fisheries Service issued the Shrimp Biological Opinion in violation of the APA and the Endangered Species Act and an injunction requiring the Fisheries Service to correct its mistakes by reinitiating the consultation process that generated the Shrimp Biological Opinion.

JURISDICTION

8. Oceana brings this action pursuant to the APA, 5 U.S.C. §§ 701–706.

9. The District Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, which grants the district courts “original jurisdiction of all civil actions arising under the . . . laws . . . of the United States.”

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

11. The District Court may hold unlawful and set aside agency action pursuant to 5 U.S.C. § 706 and issue a declaratory judgment and any further necessary or proper relief pursuant to 28 U.S.C. §§ 2201–2202.

PARTIES

12. Plaintiff Oceana is a non-profit international advocacy organization dedicated to protecting and restoring the world’s oceans through policy, advocacy, science, law, and education. Oceana has over 200,000 members around the world, including over 34,000 members in the coastal states from North Carolina to Texas. Oceana is organized under the laws of the District of Columbia, and maintains its headquarters in Washington, D.C. It has offices, staff, or affiliates in eleven states (Alaska, California, Florida, Louisiana, Maine, Massachusetts, New York, North Carolina, Oregon, South Carolina, and Virginia) and twelve foreign countries

(Belgium, Belize, Brazil, Canada, Chile, Denmark, Finland, Peru, the Philippines, Spain, Switzerland, and the United Kingdom). Oceana advocates for the protection of threatened and endangered marine species, such as ESA-listed sea turtles, and promotes environmentally and economically sustainable fisheries through its policy, scientific, litigation, communications, and grass-roots activities. Oceana is a leading advocate for the use of Turtle Excluder Devices (“TEDs”) in fisheries and was instrumental in designating critical habitat in U.S. waters for the protection of sea turtles. Oceana has participated in administrative proceedings before government agencies, litigated before courts, and issued reports to the public, all in the service of protecting marine resources and wildlife.

13. Oceana’s members use and enjoy the oceans for a variety of activities, including fishing, scuba diving, snorkeling, boating, swimming, beach walking, and study. Oceana’s members value a healthy marine environment. They are concerned about and directly affected by environmental injury caused by harmful fishing practices, including practices that catch and kill endangered and threatened sea turtles.

14. Oceana and its members suffer direct and immediate injury as a result of the Fisheries Service’s failure to protect ESA-listed sea turtles. Oceana’s members study, observe, and attempt to observe sea turtles that migrate and forage in the areas where the shrimp fisheries operate. Oceana’s members intend and have plans to study, observe, and attempt to observe sea turtles in the future in these areas. They derive scientific, recreational, conservation, spiritual, and aesthetic benefits from the existence of sea turtles in the wild. These interests have been impaired by the agency’s conduct and, unless the Court grants the relief requested herein, will continue to be impaired, as the existence of sea turtles continues to be placed in jeopardy by these fisheries.

15. Defendant Penny Pritzker is Secretary of the United States Department of Commerce. Oceana sues her in her official capacity as the chief officer of the federal agency charged by the United States Congress with protecting threatened and endangered species in the marine environment, including ESA-listed sea turtles.

16. Defendant NOAA is an agency of the United States Department of Commerce with supervisory responsibility for the National Marine Fisheries Service. The Secretary of Commerce has delegated responsibility for protecting threatened and endangered species in the marine environment to NOAA, which in turn has sub-delegated that responsibility to the National Marine Fisheries Service.

17. Defendant National Marine Fisheries Service is an office of NOAA within the United States Department of Commerce that has been delegated the primary responsibility to protect threatened and endangered species in the marine environment. NOAA sometimes refers to the National Marine Fisheries Service as “NOAA Fisheries,” although that is not its official name.

18. The Sustainable Fisheries Division in the National Marine Fisheries Service Southeast Regional Office (“Sustainable Fisheries Division”) is responsible for conserving and managing marine fishery resources in federal waters from North Carolina to Texas, including Puerto Rico and the U.S. Virgin Islands, including the fisheries at issue in this lawsuit. In this capacity, the Sustainable Fisheries Division is known as the “action agency” for purposes of ESA Section 7.

19. The Protected Resources Division of the National Marine Fisheries Service Southeast Regional Office (“Protected Resources Division”) is responsible for managing, conserving, and rebuilding populations of threatened and endangered species, in the Southeast

region, among other tasks. As part of this responsibility, the Protected Resources Division fulfills the Secretary of Commerce's duty under ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), to consult with other federal agencies to help those agencies ensure that their actions are not likely to jeopardize endangered or threatened species. In this capacity, the Protected Resources Division is known as the "expert agency" for purposes of ESA Section 7.

20. When the National Marine Fisheries Service, through its Sustainable Fisheries Division, proposes to take an action that may affect threatened or endangered marine species, such as adopting a fishery management plan, ESA Section 7(a)(2) requires it to ensure that the action is not likely to jeopardize the continued existence of any threatened or endangered species. 16 U.S.C. § 1536(a)(2). Under ESA Section 7(a)(2), the Sustainable Fisheries Division consults with the Protected Resources Division to assess the risks that such action may present to the survival and recovery of threatened and endangered species, and to ensure that the proposed action is not likely to jeopardize those species.

21. The National Marine Fisheries Services' regulation of fisheries, including the shrimp fisheries, sets up a troubling situation where the U.S. Department of Commerce, through its delegate NOAA, simultaneously acts as the action agency and the expert agency under the Endangered Species Act. Under these circumstances, the National Marine Fisheries Service has a paramount obligation to ensure that its inherent conflicts of interest do not lead to arbitrary and capricious decisions to authorize fishery operations that affect threatened and endangered species.

STATUTORY AND REGULATORY BACKGROUND

Administrative Procedure Act

22. The APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” *Id.* § 704.

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

Endangered Species Act

24. Congress enacted the Endangered Species Act to give the protection of threatened and endangered species the highest of priorities. When it was passed, “the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

Congress intended the Act “to provide a means whereby the ecosystems upon which the endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

25. Accordingly, Section 7(a)(2) of the Endangered Species Act requires that each federal agency, in consultation with the Secretaries of the Interior or Commerce, ensure that any activity which it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify any listed species’ critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. With respect to marine

species in the Southeast region, the Secretary of Commerce has delegated her consultation duties under the Endangered Species Act to the Protected Resources Division. 50 C.F.R. § 402.01(b).

26. An action jeopardizes a species if it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” *Id.* § 402.02.

27. As part of the agency’s consultation, the Protected Resources Division must issue a “biological opinion” determining whether the action is likely to jeopardize a listed species or adversely affect its critical habitat, and providing a summary of the reasons for that conclusion. 16 U.S.C. § 1536(b)(3)(A).

28. In formulating the biological opinion, the Protected Resources Division must use the best scientific and commercial data available. *Id.* § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

29. The Protected Resources Division must also “[e]valuate the current status of the listed species,” and “[e]valuate the effects of the action and cumulative effects on the listed species.” 50 C.F.R. § 402.14(g)(2)–(3).

30. The “effects of the action” include “the direct and indirect effects of an action on the species . . . that will be added to the environmental baseline.” 50 C.F.R. § 402.02.

31. “Cumulative effects” are “effects of future State or private activities, not involving Federal activities.” *Id.*

32. The “environmental baseline” includes “the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or

early [S]ection 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.” *Id.*

33. The Protected Resources Division also must assess “whether the aggregate effects of the factors analyzed under ‘environmental baseline,’ ‘effects of the action,’ and ‘cumulative effects’ in the action area—when viewed against the status of the species . . . —are likely to jeopardize the continued existence of the species.” FWS & NMFS, *Endangered Species Consultation Handbook* at 4-33 (1998) (emphasis omitted).

34. If, following consultation with the action agency, the Protected Resources Division concludes that a proposed action will not jeopardize any listed species, it may authorize the take of listed species incidental to the proposed action. In such a case, the Protected Resources Division must provide in the biological opinion an Incidental Take Statement (“ITS”) that specifies, among other things, the amount or extent of take that will incidentally occur as a result of the action, and “those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact.” 50 C.F.R. § 402.14(i)(1)(i), (ii); *see also* 16 U.S.C. § 1536(b)(4).²

35. The Endangered Species Act broadly defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The Act and its implementing regulations generally prohibit the “take” of an endangered or threatened species. *Id.* § 1538(a)(1)(B)–(C); 50 C.F.R. §§ 17.21,

² If the Protected Resource Division determines that a proposed action will jeopardize a listed species, it must issue a biological opinion that identifies reasonable and prudent alternatives (“RPAs”) to the proposed action, if any, that it believes will avoid jeopardizing the listed species. 50 C.F.R. § 402.14(h)(3); 16 U.S.C. § 1536(b)(3)(A). If the Protected Resource Division is “unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.” 50 C.F.R. § 402.14(h)(3)

17.31. A take may lawfully occur under a valid ITS as a limited exception to the Act's prohibition on taking endangered and threatened species. *See* 16 U.S.C. § 1536(o)(2).

36. The ITS terms and conditions must include requirements to report on the actual impact of the action on the species. 16 U.S.C. § 1536(b)(4)(C)(iv); 50 C.F.R. § 402.14(i)(1)(iv), (i)(3). The ITS must also include enforceable take limits that trigger reinitiation of the consultation process if they are exceeded. *See* 50 C.F.R. §§ 402.14(i)(4), 402.16(a). These take limits must be measurable, must allow the action agency to assess whether it is in compliance, and must not be coextensive with the scope of the entire action.

FACTUAL AND PROCEDURAL HISTORY

Loggerhead Sea Turtles

37. Loggerhead sea turtles (*Caretta caretta*) are reddish brown to yellow in color with a large head. As adults, they weigh about 250 pounds and are about three feet long. They reach reproductive maturity when they are thirty-two to thirty-five years old. Loggerhead sea turtles were first listed as threatened under the Endangered Species Act in 1978. Despite their listing, many loggerhead sea turtle populations continue to decline.

38. Loggerhead sea turtles play important roles in the ocean ecosystem. They travel long distances at sea, serving as “swimming reefs” for barnacles, clams, algae, and other species that attach to their shells. Loggerheads also transport nutrients from off-shore feeding areas to near-shore coastal habitats. As predators, loggerheads help to moderate jellyfish and fish populations, and break up shells of their invertebrate prey, making calcium available to other animals. Loggerheads are a “keystone species”—a plant or animal that plays a unique and crucial role in certain ecosystem functions. Declines in the number of loggerheads

can have detrimental ripple effects throughout the oceanic ecosystem, potentially disrupting the population dynamics of other species through changes in predation and nutrient transport.

39. In September 2011, the National Marine Fisheries Service revised the classification for loggerhead sea turtles by designating nine distinct population segments (“DPSs”), each of which forms a discrete population, and by classifying four of the DPSs as threatened and five as endangered. 76 Fed. Reg. 58,868 (Sept. 22, 2011). Loggerheads in the Northwest Atlantic Ocean DPS, which is at issue in this lawsuit, range north from the equator and west of 40 degrees West longitude.³ The Northwest Atlantic Ocean DPS continues to be classified as threatened. *Id.* at 58,945–46. In making that assessment, the National Marine Fisheries Service stated that the “primary threat to the Northwest Atlantic Ocean DPS was determined to be fisheries bycatch and mortality.” *Id.* at 58,946.

40. The Shrimp Biological Opinion acknowledges that fishery interactions continue to present threats to the Northwest Atlantic Ocean DPS. Shrimp Biological Opinion at 52. The opinion states that “[t]he Loggerhead Biological Review Team determined that the greatest threats to the Northwest Atlantic Ocean DPS of loggerheads result from cumulative fishery bycatch in neritic and oceanic habitats.”⁴ *Id.*

41. Loggerhead hatchlings in the Northwest Atlantic Ocean DPS head to the Sargasso Sea in the Atlantic until they mature into juveniles. They then migrate to the eastern Atlantic helped by the current systems, and turtles from the American coast have been recaptured in the eastern Atlantic and the Mediterranean Sea. When they mature into older juveniles, they follow

³ The term “loggerheads” as used in this Complaint generally refers to the loggerhead sea turtles in the Northwest Atlantic DPS, unless stated otherwise. *See* 50 C.F.R. §§ 17.11, 223.102(b).

⁴ The neritic zone is the relatively shallow part of the ocean above the drop-off of the continental shelf, approximately 200 meters in depth. The oceanic zone is the deep part of the open ocean that lies off of the continental shelf, measuring deeper than 200 meters.

ocean currents back to the East Coast of the United States where they migrate up and down the coast and/or the Gulf of Mexico, nesting on southern beaches. Overseas fisheries impact turtles during their early life stages in a manner similar to the more mature turtles impacted by U.S. fisheries.

42. In 2008, the National Marine Fisheries Service revised a recovery plan for loggerhead sea turtles in the Northwest Atlantic Ocean (“2008 Recovery Plan”) that designated five geographic recovery units for the Northwest Atlantic loggerhead sea turtle population based on nesting data: (1) the Northern Recovery Unit (NRU: Florida/Georgia border through southern Virginia), (2) the Peninsular Florida Recovery Unit (PFRU: Florida/Georgia border through Pinellas County, Florida), (3) the Dry Tortugas Recovery Unit (DTRU: islands located west of Key West, Florida), (4) the Northern Gulf of Mexico Recovery Unit (NGMRU: Franklin County, Florida through Texas); and (5) the Greater Caribbean Recovery Unit (GCRU: Mexico through French Guiana, Bahamas, Lesser Antilles, and Greater Antilles). *See id.* at 47.

43. The 2008 Recovery Plan set forth a variety of objective and measureable criteria for each recovery unit. The rate of increase provided for each recovery unit is distinct and dependent on its level of vulnerability. The recovery units have different levels of vulnerability. The “recovery plan concluded that all recovery units are essential to the recovery of the species,” *id.* at 47, and that “[r]ecoverly criteria must be met for all recovery units identified in the Recovery Plan before the Northwest Atlantic DPS can be considered for delisting.” *Id.* at 111.

Green Sea Turtles

44. Green sea turtles (*Chelonia mydas*) are the largest species in the family of hard-shelled sea turtles. As adults, they weigh about 300–350 pounds and are about three feet long. They do not reach reproductive maturity until they are twenty to fifty years old. Green sea

turtles in the southeastern U.S. and Gulf of Mexico waters are threatened. For purposes of the Shrimp Biological Opinion, the agency deemed green sea turtles in the Florida nesting population as endangered.⁵

45. Green sea turtles range from Texas to Massachusetts in the Atlantic Ocean and Gulf of Mexico. Their nesting range in the southeastern United States includes beaches from Texas to North Carolina, as well as the U.S. Virgin Islands and Puerto Rico. The vast majority of green sea turtle nesting in the United States occurs in Florida. *Id.* at 54.

46. Green sea turtles migrate long distances between feeding sites and nesting sites, some swimming more than one thousand miles to reach their mating grounds. Green sea turtles demonstrate fidelity to specific foraging and nesting grounds, often returning to the same beach where they hatched.

47. Green sea turtles face many of the same threats as other sea turtle species, including destruction of nesting habitat from storm events, oceanic events such as cold-stunning,⁶ pollution, ecosystem alterations, poaching, global climate change, fisheries interactions, natural predation, and disease. *Id.* at 57.

⁵ In March 2015, the Fisheries Service proposed a new rule identifying a North Atlantic DPS of green sea turtles with a range from the boundary of South and Central America north to include Central America and the United States, then east across the Atlantic Ocean at 48 degrees North latitude, then south to 19 degrees North latitude, and then west at 19 degrees North latitude to the Caribbean basin, where it makes a southwestern turn to meet the boundary of South and Central America. The North Atlantic DPS would include green sea turtles on Florida nesting beaches that are currently listed as endangered, and would classify these turtles as threatened. *See* 80 Fed. Reg. 15272 at 15287 (Mar. 23, 2015).

⁶ “Cold-stunning” refers to an hypothermic reaction that occurs when sea turtles are exposed to prolonged cold water temperatures. Initial symptoms include a decreased heart rate, decreased circulation, and lethargy, followed by shock, pneumonia and possibly death.

48. The Fisheries Service acknowledges that incidental capture in fishing gear, primarily in gillnets, but also in trawls, traps and pots, longlines, and dredges is a serious ongoing source of mortality that adversely affects the green sea turtles' recovery.

Leatherback Sea Turtles

49. Leatherback sea turtles (*Dermochelys coriacea*) are the largest living turtles in the world. As adults, they weigh up to 2,000 pounds and reach lengths of about six and a half feet. Scientists have not discovered at what age leatherback sea turtles reach reproductive maturity. Unlike other sea turtles, leatherbacks do not have a hard shell. A leatherback's shell consists of soft, leathery, oil-saturated connective tissue. In 1970, Leatherback sea turtles were listed as endangered throughout their range under the Endangered Species Conservation Act of 1969 ("ESCA"), a precursor to the Endangered Species Act.

50. Leatherback sea turtles are relatives of the first true sea turtles that evolved over 110 million years ago during the Cretaceous period. Leatherbacks have evolved unique traits that allow them to maintain high body temperatures, even in cold water. Those traits include the ability to generate heat through high levels of metabolic activity, and physical characteristics that minimize their heat loss. Leatherbacks' adaptations allow them to travel thousands of miles through a wide range of ocean temperatures, some swimming more than 6,000 miles. In the Atlantic Ocean, Leatherbacks range as far north as Newfoundland, Canada, and Norway, and as far south as Uruguay, Argentina, and South Africa. *Id.* at 59.

51. Leatherbacks face many of the same threats as other sea turtle species, including destruction of nesting habitat from storm events, oceanic events such as cold-stunning, pollution, ecosystem alterations, poaching, global climate change, fisheries interactions, natural predation,

and disease. *Id.* at 64. Of all sea turtle species, leatherbacks appear to be the most vulnerable to entanglement in fishing gear, especially gillnet and pot/trap lines. *Id.*

52. The Fisheries Service acknowledges that leatherback sea turtles face threats on both nesting beaches and in the marine environment. Illegal poaching and incidental capture in fishing gear remain the primary threats to leatherbacks worldwide. In developing nations, poachers scavenge eggs and adults from nesting beaches, and catch juveniles and adults on feeding grounds. Incidental capture primarily occurs in gillnets, but also in trawls, traps and pots, longlines, and dredges.

Hawksbill Sea Turtles

53. Hawksbill sea turtles (*Eretmochelys imbricata*) are small to medium-sized compared to other sea turtles. As adults, they weigh about 100–150 pounds and grow to about twenty-five to thirty-five inches long. They reach reproductive maturity when they are twenty to forty years old. The Fisheries Service listed the hawksbill sea turtle as endangered throughout its entire range under the ESCA in 1970.

54. In the western Atlantic, hawksbill sea turtles are distributed throughout the Caribbean Sea, off the coasts of Florida and Texas, in the Greater and Lesser Antilles, and along the mainland of Central America south to Brazil. They are highly migratory and capable of traveling long distances between their nesting beaches and foraging grounds.

55. Hawksbill sea turtles rely on coral reefs for food resources and habitat. Global climate change negatively impacts coral reefs by causing higher incidences of coral diseases, which can ultimately kill entire coral reef communities. Continued loss of coral reef communities is expected to impact foraging and represents a major threat to the recovery of hawksbill sea turtles. *Id.*

56. Hawksbill sea turtles also face the same suite of threats on both nesting beaches and in the marine environment as other sea turtles, including interaction with federal and state fisheries, coastal construction, oil spills, climate change affecting sand temperatures (thereby affecting the sex ratio of hatchlings) and sea levels, and other threats. *Id.* at 68. Incidental capture in fishing gear, primarily gillnets, and vessel strikes also adversely affect hawksbill sea turtles' recovery.

Kemp's Ridley Sea Turtles

57. Kemp's ridley sea turtles (*Lepidochelys kempii*) are the smallest species of all sea turtles. As adults, they weigh less than 100 pounds and grow to about twenty-four to twenty-eight inches long. They reach reproductive maturity when they are five to sixteen years old. The Fisheries Service listed the Kemp's ridley sea turtle as endangered under the ESCA in 1970. Internationally, the Kemp's ridley sea turtle is considered the most endangered sea turtle. *Id.* at 69.

58. Kemp's ridley sea turtles' primary range lies within the Gulf of Mexico basin. They also live in coastal and offshore waters of the U.S. Atlantic Ocean. Kemp's ridley sea turtles primarily live in sandy and muddy areas of shallow, nearshore waters where they prey on swimming crabs, fish, jellyfish, and mollusks.

59. Kemp's ridley sea turtles face many of the same threats as other sea turtle species, including destruction of nesting habitat from storm events, oceanic events such as cold-stunning, pollution, ecosystem alterations, poaching, global climate change, fisheries interactions, natural predation, and disease. *Id.* at 71.

The Fisheries

60. The shrimp fisheries covered by the Shrimp Biological Opinion use various types of gear. “The otter trawl, with various modifications, is the dominant gear used in offshore waters and essentially the sole gear used in the federal fisheries.” *Id.* at 19. The fisheries also use wing nets (a.k.a., butterfly trawls), skimmer trawls, pusher-head trawls (a.k.a., chopstick rigs), beam trawls, roller-frame trawls, cast nets, channel nets, haul seines, traps, and dip nets. *Id.*

61. Otter trawls consist of a heavy net with “doors” on each side designed to funnel the shrimp into the “tail bag.” *Id.*

62. The gear used by the shrimp fisheries injure half a million and kill tens of thousands of threatened and endangered sea turtles throughout the action area. *Id.* at 97.

63. Sea turtles encountering a trawl often try to outswim it. When the trawl net overtakes the sea turtle, the sea turtle falls into the “cod end” or “tail bag” of the net, becoming trapped underwater. Once captured, sea turtles can drown from being forcibly submerged, *id.* at 141, become unconscious, or survive, depending on how long they are trapped underwater and other environmental conditions.

64. Trawl nets can be outfitted with TEDs, large, cage-like devices with a metal-framed trap door that releases 97% of the turtles caught in shrimp trawls with no loss of shrimp. *Id.* at 293. Fisheries Service regulations require that many shrimp trawlers operating in the southeastern United States use approved TEDs.

65. Exceptions exist for some shrimp fishing activities and equipment, including for pusher-head trawls, skimmer trawls, and butterfly trawls, if trawlers follow restrictions limiting tow times to 55 minutes from April 1 through October 31, and 75 minutes from November 1

through March 31. 50 C.F.R. § 223.206(d)(ii). The idea of the tow time restriction is that the net will be pulled from the water before the sea turtle is submerged long enough to drown.

66. The effectiveness of TEDs and other conservation regulations depends on fleet compliance. TEDs have no utility if fishing boats do not install or use them correctly. Incorrect installation or maintenance of TEDs reduces their effectiveness and in some cases completely compromises them. *Id.* at 15. Lack of compliance, even by a relatively small portion of a fishery fleet, can potentially have dramatic results on overall sea turtle mortality levels. *Id.*

67. The Fisheries Service presently “ha[s] no way of testing [its] assumption that boarding data on TED compliance are representative of the fleet.” Shrimp Biological Opinion at 17. “Not having [a] random sample of boardings makes it difficult to determine which areas should be closed for compliance problems.” *Id.*

68. Oceana released a report in 2011 demonstrating that from 2009 to 2011, only 21% of inspected shrimp trawls fully complied with the agency’s TED regulations. After a surge in inspecting and enforcing TED regulations, compliance increased to 66% in 2012. *See* Reinitiation of Endangered Species Act Section 7 Consultation on the Continued Implementation of the Sea Turtle Conservation Regulations, as Proposed to Be Amended, and the Continued Authorization of the Southeast U.S. Shrimp Fisheries in Federal Waters under the Magnuson-Stevens Act at 131 (May 8, 2012) (“2012 Shrimp Biological Opinion”). Even so, overall compliance with tow times remained low, reaching only 35% in 2012. Shrimp Biological Opinion at 175. Observers found that one in five tows exceeded 70 minutes, and some extended for more than two hours. *Id.*

Oceana's Prior Challenges to the Fisheries Service's Biological Opinions

69. Oceana currently has two pending challenges to biological opinions issued by the Fisheries Service. First, Oceana challenged the legality of the jeopardy analysis and ITS contained in the Fisheries Service's Endangered Species Act Section 7 Consultation on the Atlantic Sea Scallop Fishery Management Plan (Consultation No. F/NER/2012/01461) (July 12, 2012) ("2012 Sea Scallop Biological Opinion"). See *Oceana, Inc. v. Pritzker*, No. 08-CV-1881-PLF (D.D.C. Am. Compl. filed Nov. 5, 2012) ("*Oceana I*"). That case began with Oceana's challenge to the jeopardy analysis first adopted by the Fisheries Service in its 2008 biological opinion on the sea scallop fishery. See *id.* (initial complaint challenging the Fisheries Service's Endangered Species Act Section 7 Consultation on the Atlantic Sea Scallop Fishery Management Plan (Consultation No. F/NER/2008/00973) (Oct. 31, 2008) ("2008 Sea Scallop Biological Opinion")). On December 17, 2014, the Court granted in part Oceana's motion for summary judgment, holding that the agency's ITS irrationally adopted a surrogate for monitoring actual takes in the dredge component of the fishery. The Court further held that the agency failed to rationally explain its decision not to monitor *annual* takes in the trawl component of the fishery, instead adopting a five-year monitoring timetable. The case is currently on remand to the agency to correct these deficiencies.

70. Second, Oceana challenges the legality of the jeopardy analysis and ITS contained in the Fisheries Service's Endangered Species Act Section 7 Consultation on the Continued Implementation of Management Measures for the Northeast Multispecies, Monkfish, Spiny Dogfish, Atlantic Bluefish, Northeast Skate Complex, Mackerel/Squid/Butterfish, and Summer Flounder/Scup/Black Sea Bass Fisheries (Consultation No. F/NER/2012/01956) (Dec. 16, 2013) ("Batched Biological Opinion"). See *Oceana, Inc. v. Pritzker*, No. 12-0041-PLF (D.D.C. Am.

Compl. filed March 14, 2014) (“*Oceana II*”). The Batched Biological Opinion adopted the same flawed jeopardy analysis the Fisheries Service first applied in the 2008 Sea Scallop Biological Opinion. Oceana’s challenge to this biological opinion remains pending.

The Shrimp Biological Opinion

71. The April 20, 2010, explosion of the Deepwater Horizon drilling platform and subsequent release of millions of barrels of oil into the Gulf of Mexico adversely affected thousands of sea turtles. *Id.* at 108. The total effects of that spill remain unknown.

72. In the wake of that spill, sea turtle strandings in the Gulf of Mexico spiked. Of those that stranded, necropsy results indicated death from drowning, consistent with prolonged submergence in shrimp trawl nets. Kemp’s ridley sea turtles may have suffered the most severe impacts, accounting for 71% of all recovered turtles (alive or dead) and 79% of the turtles recovered dead. *Id.* at 109.

73. A total of 644 sea turtle strandings were reported in 2010 from Louisiana, Mississippi, and Alabama waters. Kemp’s ridleys accounted for 561 (87%) of those strandings. *Id.* at 72. A total of 525 sea turtle strandings were reported in 2011 from Louisiana, Mississippi, and Alabama waters. Kemp’s ridleys accounted for 390 (86%) of those strandings. *Id.* During 2012, a total of 428 sea turtle strandings were reported from Louisiana, Mississippi, and Alabama waters. Kemp’s ridleys accounted for 301 (70%) of those strandings. *Id.*

74. Strandings typically represent only five to six percent of total mortality due to shrimp trawls, meaning that the stranding may reflect only one twentieth of the actual number of deaths. *See* An assessment of the Kemp’s Ridley (*Lepidochelys kempi*) and Loggerhead (*Caretta caretta*) Sea Turtle populations in the western North Atlantic, Turtle Expert Working Group, NOAA Technical Memorandum, NMFS-SEFSC-409 (1998).

75. The agency initiated consultation on the shrimp fisheries and proposed a new rule to require TEDs in skimmer and other trawls to address the spike in strandings and the widespread noncompliance issues in the fishery. The Protected Resources Division released a new biological opinion on the shrimp fisheries in 2012 in conjunction with the new proposed rule. *See* 2012 Shrimp Biological Opinion.

76. The agency later withdrew its proposed new TED rule, dramatically changing the proposed action analyzed in the 2012 Shrimp Biological Opinion, nullifying that opinion, and undermining its jeopardy analysis. The agency then reinitiated consultation on the shrimp fisheries.

77. The agency released the Shrimp Biological Opinion in 2014. This new biological opinion, the subject of this Complaint, carries forward the same errors found in the prior biological opinions challenged by Oceana and contains additional serious errors as well, and still contains no measures adequate to mitigate the high number of estimated takes or address noncompliance. The agency did not expand the use of TEDs to skimmer and other kinds of exempted trawls despite evidence of noncompliance with tow time regulations.

78. The Fisheries Service estimated that all southeast U.S. shrimp fisheries combine to take up to 527,482 loggerhead, green, leatherback, and Kemp's ridley sea turtles each year, killing up to 53,622 each year. *Id.* at 185. The Fisheries Service also estimated that the shrimp fisheries kill an average of 78 hawksbill sea turtles each year. *Id.* at 192. The agency's estimated takes and deaths assume that TEDs are 88% effective at excluding sea turtles, based on the agency's estimate of the shrimp fisheries' compliance with TED regulations.

79. The Shrimp Biological Opinion violates the Endangered Species Act and APA by abjectly failing to explain its adoption of a surrogate for the actual number of takes when it can

readily estimate lethal takes with adequate observer coverage, and by adopting a totally irrational and unsupported jeopardy analysis. The Shrimp Biological Opinion also contains a host of other defects, including many of the same defects found in the prior biological opinions Oceana challenges.

80. ***Irrational Take Limit and Monitoring.*** The Fisheries Service failed to adopt an enforceable take limit or require actual monitoring of takes in the shrimp fisheries. Instead, the Fisheries Service perpetuated its prior irrational decisions by rejecting an actual take limit in favor of a deficient surrogate based on outdated and irrelevant effort levels, and wholly speculative compliance levels for TEDs.

81. The agency did not set enforceable take limits that trigger reinitiation of consultation within a reasonable timeframe. The agency instead adopted a surrogate for measuring actual sea turtle takes based on outdated effort levels of the shrimp fisheries and assumed compliance levels. *Id.* at 232. Specifically, the Fisheries Service used effort levels from 2009 as the baseline for its surrogate, assuming that effort levels would not increase in the future. *Id.* And the Fisheries Service assumed an 88% effectiveness level for TEDs based on its speculation as to future compliance levels, even though the available evidence indicates much lower compliance levels for TEDs.

82. The agency's decision to adopt a surrogate suffers from deficiencies similar to those identified by the Court in the 2012 Sea Scallop Biological Opinion. But the agency's decision here is even more irrational because lethal takes in the shrimp fisheries are observable. Most lethal takes happen when the TED fails or when the trawler does not use a TED and the sea turtle drowns in the net—both of which can be detected with adequate observer coverage. And the agency can use this observer data to develop an actual take estimate. The agency nowhere

explained why it adopted a surrogate for measuring actual sea turtle takes when it can estimate mortalities with adequate observer coverage.

83. The Fisheries Service also failed to require adequate monitoring to enforce the ITS. Rather than actually monitoring takes in any of the fishing gear on an annual basis, the agency instead decided to rely on estimates based on the number of days fished in the Gulf of Mexico, the number of fishing trips in the South Atlantic, and assumptions about sea turtle capture rates derived from hypothetical TED compliance levels. The agency's refusal to require adequate monitoring resembles, but is more egregious than, the deficiencies identified by the Court in the 2012 Sea Scallop Biological Opinion. Here, the agency nowhere explained its decision not to monitor using at-sea observers, even though the agency can sufficiently monitor takes that result in mortalities with the ordinary use of such observers.

84. *Irrational Jeopardy Analysis.* The agency found that killing over 53,000 loggerhead, green, leatherback, Kemp's ridley, and hawksbill sea turtles each year does not jeopardize the likelihood of survival or recovery of any of the five species of sea turtles. In doing so, the agency conducted a jeopardy analysis that was cursory at best, refusing even to commit to an actual number of sea turtle takes or deaths caused by the shrimp fisheries, and consequently failing to consider adequately how those deaths affect sea turtle populations.

85. The agency also departed sharply, and without explanation, from its prior methodology for assessing the impact of Atlantic fisheries on these same sea turtle populations. In recent biological opinions assessing the impact of eight Atlantic fisheries on sea turtles, the agency used a quantitative Population Viability Analysis ("PVA") model to determine that comparatively fewer numbers of sea turtles killed by the subject fisheries detectably increased the turtles' probability of extinction and shortened their time to quasi-extinction. It nonetheless

reached no-jeopardy conclusions on the basis that those effects were not “material” or “considerable.”

86. Specifically, in the 2008 Sea Scallop Biological Opinion, the agency used a quantitative PVA model to assess the impact on loggerhead sea turtle populations of scallop fishing operations estimated to kill 102 adult female loggerheads per year (representing a subset of the 619 loggerhead sea turtles the agency estimated scallop fisheries kill annually). Based on the PVA results, the agency concluded that killing 102 adult female loggerheads detectably reduced the likelihood of loggerhead sea turtles’ survival and recovery. The Fisheries Service nonetheless reached a no-jeopardy conclusion after deciding that these detectable effects were not “material” or “considerable.” *See generally* 2008 Sea Scallop Biological Opinion; 2012 Sea Scallop Biological Opinion.

87. In the Batched Biological Opinion, the agency again relied on the 2008 PVA results to determine that seven other Atlantic fisheries did not materially or considerably reduce loggerhead sea turtles’ likelihood of survival or recovery. The agency reached this conclusion based on its estimate that each of those fisheries killed fewer adult female loggerheads than the sea scallop fishery. *See generally* Batched Biological Opinion.

88. While the Fisheries Service has relied on the PVA to assess the impact of Atlantic fisheries on loggerhead sea turtles, the underlying quantitative approach applies equally to other sea turtle species. The agency has all of the data it needs to consider the effects of the shrimp fisheries on sea turtles using the same or similar quantitative approach.

89. Here, faced with evidence that the shrimp fisheries kill tens of thousands of sea turtles – tens of thousands more than the agency previously modeled in its PVA analysis – the agency made no effort to model the effects of those deaths, consider them in light of the results

of its prior PVA analysis, determine whether they were material or considerable, or even mention its prior PVA model. Despite relying on the PVA to assess the effects of eight other Atlantic fisheries that kill *hundreds* of loggerhead sea turtles, the agency totally and irrationally ignored the PVA results here, even though it estimated that the shrimp fisheries will kill nearly *eight thousand* loggerhead sea turtles.

90. The Shrimp Biological Opinion also irrationally and arbitrarily restricted its jeopardy analysis—and its consideration of the impacts of the shrimp fisheries—to “the next several decades.” Shrimp Biological Opinion at 213.

91. The best available science concerning the timeframe for assessing jeopardy instructs the National Marine Fisheries Service to consider the projected population reduction over ten years or three generations, *whichever is the longer* (up to a maximum of 100 years). *IUCN Red List Categories and Criteria*, Version 3.1, 2d ed., IUCN Species Survival Commission at 16 (Feb. 9, 2000) (“*IUCN Red List*”).

92. Because all five species of sea turtles grow relatively slowly, with several decades or more between each generation, the internationally accepted scientific guidance would call for an assessment of the population status and likelihood of extinction over 100 years for most of the sea turtles at issue. *See IUCN Red List*.

93. The Shrimp Biological Opinion also failed to analyze adequately the aggregate effects of takes of ESA-listed sea turtles in the shrimp fisheries, together with all other federally authorized fisheries, international fisheries, and the impact of all other activities. The agency also failed to assess adequately whether the continued operation of the shrimp fisheries, taken together with cumulative effects and evaluated in light of the environmental baseline, will jeopardize the continued existence of ESA-listed sea turtles.

94. Finally, the agency continued to rely on the deficient jeopardy analysis and reasoning contained in the 2008 Sea Scallop Biological Opinion, including applying an arbitrary and capricious interpretation of the Endangered Species Act’s phrase “jeopardize the continued existence of.”⁷

95. ***Irrational Analysis of Recovery.*** The Fisheries Service failed to consider adequately the species’ recovery in the jeopardy analysis. While the agency identified relevant recovery objectives, it did not address adequately the impacts of the shrimp fisheries on those objectives. Instead, the agency simply described overall trends and population numbers.

96. For example, for loggerhead sea turtles, the agency did not address how the expected takes will affect recovery units with varying levels of vulnerability, or the overall impact on recovery due to takes from more or less vulnerable recovery units. The jeopardy analysis discusses only the encouraging signs regarding nesting assemblage of the Peninsular Florida Recovery Unit and the Northern Florida Recovery Unit. It neither mentions the three remaining recovery units nor analyzes the effects of the proposed action on them. The agency also observed that the impact of the Deepwater Horizon oil spill “to the Northern Gulf of Mexico Recovery Unit of the NWA loggerhead DPS would be proportionally much greater than the impacts occurring to other recovery units.” *Id.* at 112. Yet the jeopardy analysis nowhere mentions the Northern Gulf of Mexico Recovery Unit or the effect of the shrimp fisheries on loggerhead recovery in light of the profound effects of the Deepwater Horizon spill on this recovery unit.

⁷ Oceana acknowledges the Court’s ruling on cross-motions for summary judgment in *Oceana I*, Oceana’s challenge to the 2012 Sea Scallop Biological Opinion, but notes that the Court’s decision is not final and is not binding in this case.

97. The Shrimp Biological Opinion further fails to apply the appropriate standard to determine whether the shrimp fisheries jeopardize recovery. The jeopardy analysis concludes that the agency expects sea turtle populations to “retain the potential for recovery.” *Id.* at 213. But the appropriate standard asks whether the action will affect the likelihood of recovery, not whether some potential for recovery remains in spite of the action.

98. ***Irrational Analysis of the Environmental Baseline.*** The Fisheries Service failed to analyze adequately the environmental baseline, including by failing to describe the nature of the habitats that sea turtles use in the action area, including the impacts that fishing gear and the Deepwater Horizon oil spill have on those habitats.

99. The Fisheries Service failed to discuss adequately the impacts of the Atlantic pelagic longline fishery to the environmental baseline. The agency recognized that the “Atlantic pelagic fisheries targeting swordfish and tuna are known to incidentally capture and kill large numbers of loggerhead and leatherback sea turtles.” *Id.* at 99. It further acknowledged that in March 2014, the National Marine Fisheries Service requested the reinitiation of a “formal Section 7 consultation for the Atlantic pelagic longline (PLL) fishery” based on information indicating that takes from the pelagic fishery exceeded the net mortality rate and total mortality estimates for leatherback sea turtles specified in the reasonable and prudent alternative, changes in information about leatherback and loggerhead sea turtle populations, and new information about sea turtle mortality associated with Atlantic pelagic longline gear. *Id.* at 100. Yet the Shrimp Biological Opinion fails to discuss or analyze the effect of this new information on the environmental baseline

100. The Fisheries Service further irrationally concluded that “there is no information at this time that [the Deepwater Horizon oil spill] has, or should be expected to have,

substantially altered the long-term survival rates in a manner that would significantly change the population dynamics compared to the conservative estimates used in this opinion.” *Id.* at 213.

This conclusion directly contradicts earlier findings in the opinion that “[t]he recent [Deepwater Horizon] oil spill is expected to have had an adverse impact on the base line for sea turtles,” *id.* at 120, and “[t]he available data on sea turtle strandings and response collections during the time of the spill are expected to represent a fraction (currently unknown) of the actual losses to the species, as most individuals likely were not recovered.” *Id.* at 108.

101. The Fisheries Service also failed to consider adequately the substantial impacts of climate change. The agency acknowledged that there is a large and growing body of literature on past, present, and future impacts of global climate change on sea turtles. *Id.* at 45. The agency acknowledged that increased global temperatures are expected to lead to a loss of sea turtle habitat, as sands become warmer, sea levels rise, storms intensify, and beaches increasingly erode. *Id.* Warmer temperatures also are expected to adversely impact the primary prey species of sea turtles. *Id.* The agency recognized that many of these effects are likely to have negative effects on sea turtles including changes in hatchling sex ratios, loss of nesting habitat, and loss of primary foraging areas. *Id.* Yet the agency did not consider any of these climate change effects in its environmental baseline or its jeopardy analysis.

102. The Fisheries Service also irrationally and arbitrarily failed to consider adequately the substantial impacts of high seas and foreign activities on sea turtles, whether in its assessment of the action area, the status of the ESA-listed species, or as part of the environmental baseline.

COUNT I

Violation Of The APA: Failure to Set Enforceable Take Limits

103. Oceana realleges, as if fully set forth herein, the allegations set forth in paragraphs 1 through 102 of this Complaint.

104. Fisheries Service regulations require that the ITS in a biological opinion set enforceable take limits that can trigger reinitiation of the formal consultation process if they are exceeded. 40 C.F.R. §§ 402.14(i)(4), 402.16(a).

105. Cases interpreting the requirements for these take limits further specify that they must be measurable, must allow the action agency to assess whether it is in compliance, and must not be coextensive with the scope of the entire action.

106. The Shrimp Biological Opinion fails to set measurable and enforceable take limits.

107. Instead of setting take limits, the Shrimp Biological Opinion proposes to monitor and limit takes by observing effort and compliance levels. *Id.*

108. The Fisheries Service did not adequately explain its rationale for using the effort level from 2009 and a hypothetical 88% TED effectiveness level as surrogates for actual take estimates.

109. Nor did the Fisheries Service explain how its surrogates serve as an actual measure of sea turtles takes, or function as enforceable take limits.

110. The Fisheries Service's surrogates are not amenable to measurement within reasonable time periods. These surrogates do not allow the Fisheries Service to timely assess whether the shrimp fisheries comply with the ITS.

111. The agency's decision to adopt a surrogate in the Shrimp Biological Opinion suffers from the same defects that the Court found in the agency's decision to use a surrogate in the 2012 Sea Scallop Biological Opinion.

112. Even worse, the agency actually can estimate lethal take using the standard methodology of requiring adequate observers during shrimp fishery operations.

113. The Fisheries Service's failure to specify enforceable take limitations that can trigger reinitiation of consultation pursuant to 40 C.F.R. §§ 402.14(i)(4), 402.16(a) is arbitrary, capricious, an abuse of discretion, or not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

114. These actions have harmed Oceana and its members and Oceana has no adequate remedy at law.

COUNT II

Violation Of The APA: Failure to Require Adequate Monitoring

115. Oceana realleges, as if fully set forth herein, the allegations set forth in paragraphs 1 through 114 of this Complaint.

116. Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(b)(4)(C)(iv), requires that the terms and conditions of a biological opinion contain reporting requirements.

117. Fisheries Service regulations require that the National Marine Fisheries Service, as the action agency, monitor the impacts of the authorized incidental takes by reporting on the progress of the action and its impact on the species. 50 C.F.R. § 402.14(i)(3).

118. If, during the course of the action, the monitoring shows that the number of incidental takes exceeds the number authorized by the ITS, then the Sustainable Fisheries

Division must immediately reinitiate consultation, requesting the Protected Resources Division to develop a new biological opinion. *Id.* §§ 402.14(i)(4), 402.16(a).

119. The Shrimp Biological Opinion does not require sufficient monitoring necessary to enforce the ITS limit and to follow the Fisheries Service's regulations.

120. The Shrimp Biological Opinion does not require any actual monitoring of takes in any of the fishing equipment.

121. The Shrimp Biological Opinion also does not require sufficient monitoring of TED compliance level to allow annual assessments of whether the fishery is in compliance with the ITS.

122. Although the biological opinion requires the use of enforcement agents to monitor TED compliance, the level of agent coverage is so low that the overall fleet compliance cannot be directly measured or even estimated.

123. In the absence of sufficient monitoring, the agency will be unable to accurately determine the level of takes in the fishery and use that information to determine whether the fishery complies with the ITS and whether it must reinitiate consultation and/or take additional conservation measures.

124. The Fisheries Service's failure to require adequate monitoring in violation of its own regulations is arbitrary, capricious, an abuse of discretion, or not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

125. These actions have harmed Oceana and its members and Oceana has no adequate remedy at law.

COUNT III

Violation of the APA and the Endangered Species Act: Irrational Jeopardy Analysis

126. Oceana realleges, as if fully set forth herein, the allegations set forth in paragraphs 1 through 125 of this Complaint.

127. The Fisheries Service irrationally and arbitrarily failed to explain the basis for its no-jeopardy conclusion. In its jeopardy analysis, the Shrimp Biological Opinion lists numerous studies related to sea turtle population sizes and trends and nesting data, *id.* at 211–24, without explaining how the takes from the shrimp fisheries will or will not cause jeopardy based on these studies.

128. The Fisheries Service also irrationally and arbitrarily departed, without explanation, from its prior methodology for assessing the impact of Atlantic fisheries on these same sea turtle populations.

129. Faced with evidence that the shrimp fisheries kill over 50,000 sea turtles, the Fisheries Service made no effort to model the effects of those deaths on sea turtle populations as it has done in prior biological opinions on Atlantic fisheries affecting the same sea turtles. Nor did it even consider those deaths in light of the results of its 2008 PVA, as in the Batched Biological Opinion.

130. The results of the 2008 PVA underscore the infirmity of the agency's jeopardy analysis here. The 2008 PVA found that the annual loss of 102 adult females had detectable (albeit "non-material") impacts on the likelihood of loggerhead sea turtles' survival and recovery. The agency relied on the 2008 PVA results to reach no-jeopardy findings in its 2008 Sea Scallop Biological Opinion, 2012 Sea Scallop Biological Opinion, and Batched Biological

Opinion, where loggerhead mortalities were expected to be fewer than predicted in the scallop fishery in 2008.

131. Here, the Shrimp Biological Opinion estimates that the shrimp fisheries will kill nearly **8,000** loggerhead sea turtles every year—nearly **13 times** the number of loggerhead sea turtles killed by the scallop fishery. The 2008 PVA results thus leave no doubt that the shrimp fisheries have, at a minimum, detectable effects on the likelihood of sea turtles' survival and recovery. From there, using the agency's own methodology, it must consider whether those effects are "considerable" or "material." Yet the agency nowhere mentions its 2008 PVA model, analyzes whether the detectable effects of the shrimp fishery are considerable or material, or attempts to update its prior findings with a new model of the effects on loggerhead sea turtle populations of a fishery that kills thousands more turtles than the scallop fishery.

132. The agency's abject failure to consider these detectable effects and its decision to depart, without explanation, from its prior findings and analysis is the height of arbitrary and capricious decision making. The agency cannot comply with the APA or the Endangered Species Act by cherry picking the findings it uses and the approaches it takes in its jeopardy analysis to avoid finding jeopardy.

133. Additionally, without analysis, consideration of the best scientific information available, or further discussion, the Shrimp Biological Opinion irrationally and arbitrarily restricts its analysis of the impact of the fisheries to "the next several decades," Shrimp Biological Opinion at 213, rather than over the next 100 years, as called for by internationally accepted scientific guidance.

134. Finally, the Fisheries Service's jeopardy analysis irrationally fails to consider adequately takes from recreational and international fisheries, fails to estimate adequately the

impact of the Deepwater Horizon spill, fails to consider the effects of climate change, and fails to analyze the extent and impact of takes on different age classes and recovery units.

135. The Fisheries Service's failure to explain the basis for its no-jeopardy conclusion, irrational departure from its prior analysis, artificially restricted timeframe for consideration of the effects of the shrimp fisheries, and its failure to consider the actual takes of sea turtles, are arbitrary, capricious, an abuse of discretion, or not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A) and the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

136. These actions have harmed Oceana and its members and Oceana has no adequate remedy at law.

COUNT IV

Violation of the APA and the Endangered Species Act: Jeopardy Analysis Fails to Consider Adequately Aggregate and Cumulative Effects

137. Oceana realleges, as if fully set forth herein, the allegations set forth in paragraphs 1 through 136 of this Complaint.

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

139. The Endangered Species Act requires the Fisheries Service to use its authority to further the purposes of the Act, 16 U.S.C. § 1536(a)(1), and to ensure that "any action" that it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species. *Id.* § 1536(a)(2).

140. The law requires the Protected Resources Division to consult with and assist the National Marine Fisheries Service in ensuring that any action authorized, funded, or carried out by the National Marine Fisheries Service is not likely to jeopardize the continued existence of any endangered or threatened marine species. *Id.*; 50 C.F.R. §§ 402.01(b), 402.14.

141. During the formal consultation process, the Protected Resources Division must (1) “[e]valuate the current status of the listed species,” (2) “[e]valuate the effects of the action and cumulative effects on the listed species,” and (3) “[f]ormulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of [the] listed species.” 50 C.F.R. §§ 402.14(g)(2)–(4).

142. The Consultation Handbook jointly issued by the National Marine Fisheries Service and the Fish and Wildlife Service “provides internal guidance to all employees of the two agencies relative to conducting consultations and conferences under Section 7 of the Endangered Species Act.” 64 Fed. Reg. 31,285, 31,285 (June 10, 1999). The agencies publicly announced the issuance of the Handbook and took public comments before finalizing the Handbook. *Id.*

143. With respect to jeopardy conclusions, the Consultation Handbook directs the National Marine Fisheries Service to assess “whether the aggregate effects of the factors analyzed under ‘environmental baseline,’ ‘effects of the action,’ and ‘cumulative effects’ in the action area—when viewed against the status of the species . . . —are likely to jeopardize the continued existence of the species.” Consultation Handbook at 4-33 (emphasis omitted). After “the biologist sums up the previous analyses” of these factors, “[t]he final [jeopardy] analysis then looks at whether, given the aggregate effects, the species can be expected to both survive and recover.” *Id.* at 4-37.

144. The Shrimp Biological Opinion is arbitrary, capricious, and contrary to law because its jeopardy analysis fails to analyze adequately the aggregate effects of takes of ESA-listed sea turtles in the shrimp fisheries, together with all other federally authorized fisheries, international fisheries, and the impact of all other activities, in violation of the APA, 5 U.S.C.

§ 706(2)(A), and the Endangered Species Act, 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.02 (definition of “jeopardize the continued existence of”), and 50 C.F.R. § 402.14(g)(2)–(4).

145. The Shrimp Biological Opinion is arbitrary, capricious, and contrary to law because its jeopardy analysis does not assess adequately whether the continued operation of the shrimp fisheries, taken together with cumulative effects and evaluated in light of the environmental baseline, will jeopardize the continued existence of ESA-listed sea turtles, in violation of the APA, 5 U.S.C. § 706(2)(A), and the Endangered Species Act, 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.02, and 50 C.F.R. § 402.14(g)(2)–(4).

146. These actions have harmed Oceana and its members and Oceana has no adequate remedy at law.

COUNT V

Violation of the APA and the Endangered Species Act: Reliance On an Unlawful Interpretation of or Failure to Define “Jeopardize the Continued Existence of”

147. Oceana realleges, as if fully set forth herein, the allegations set forth in paragraphs 1 through 146 of this Complaint.

148. In determining that the operation of the shrimp fisheries would not result in jeopardy to sea turtles, the Fisheries Service either relies on an arbitrary and capricious interpretation of or fails to define “jeopardize the continued existence of.”

149. In the jeopardy analysis of the Shrimp Biological Opinion, the Fisheries Service considered whether the proposed action “would appreciably reduce the likelihood of survival for loggerheads,” but failed to expressly define “appreciably.”

150. In past biological opinions, the Fisheries Service relied on an arbitrary and capricious definition of “jeopardize the continued existence of.” As Oceana previously explained in its challenges to the 2012 Sea Scallop Biological Opinion and the Batched

Biological Opinion, the agency's prior jeopardy analysis violated the APA and the Endangered Species Act by relying on an unlawful interpretation of the Fisheries Service's regulations.

151. The Fishery Service's regulations define "[j]eopardize the continued existence of" to mean "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

152. In the 2008 Sea Scallop Biological Opinion, the Fisheries Service acknowledged the "lack of a regulatory definition of, or agency statement on, the meaning of 'appreciably reduce' within the definition of 'jeopardize the continued existence.'" 2008 Sea Scallop Biological Opinion at 84. Ignoring the common dictionary definition of "appreciable" as "capable of being perceived or measured," the Fishery Service instead interpreted the term "appreciably" to mean "considerably" or "materially," in contradiction of its plain meaning. This misinterpretation created a standard for jeopardy far narrower than the standard set forth in the agency's regulations.

153. Reliance by the Fisheries Service on the same arbitrary and capricious narrow jeopardy standard used in the 2008 Sea Scallop Biological Opinion renders the Shrimp Biological Opinion arbitrary, capricious, an abuse of discretion, or not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A), and the Endangered Species Act, 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.02, and 50 C.F.R. § 402.14(g)(2)–(4).

154. Alternatively, reliance by the Fisheries Service on an undefined and unstated jeopardy standard in the Shrimp Biological Opinion also renders that Opinion arbitrary, capricious, an abuse of discretion, or not in accordance with law, in violation of the APA,

5 U.S.C. § 706(2)(A), and the Endangered Species Act, 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.02, and 50 C.F.R. § 402.14(g)(2)–(4).

155. These actions have harmed Oceana and its members and Oceana has no adequate remedy at law.

COUNT VI

Violation of the APA and the Endangered Species Act: Jeopardy Analysis Fails to Adequately Consider Whether the Action Would Reduce Sea Turtle Recovery

156. Oceana realleges, as if fully set forth herein, the allegations set forth in paragraphs 1 through 155 of this Complaint.

157. Under Section 7(a)(2) of the Endangered Species Act, the Fisheries Service has a duty to determine whether the shrimp fisheries under consideration in the Shrimp Biological Opinion are likely to jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify any listed species' critical habitat. 16 U.S.C. § 1536(a)(2).

158. An action jeopardizes a species if it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

159. The Shrimp Biological Opinion fails to address adequately the threat to sea turtle recovery posed by the shrimp fisheries in its jeopardy analysis.

160. The Shrimp Biological Opinion does not address the impact of the shrimp fisheries on individual recovery objectives for each species of sea turtle.

161. The Shrimp Biological Opinion further fails to apply the appropriate standard to determine whether the shrimp fisheries jeopardize recovery. The jeopardy analysis concludes

that the agency expects sea turtle populations to “retain the potential for recovery.” *Id.* at 213. But the appropriate standard asks whether the action will affect the likelihood of recovery, not whether some potential for recovery remains in spite of the action.

162. The Fisheries Service’s failure to address adequately whether the expected takes would reduce the likelihood of sea turtle recovery is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A) and the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

163. These actions have harmed Oceana and its members and Oceana has no adequate remedy at law.

COUNT VII

Violation of the APA and the Endangered Species Act: Irrational Analysis of Environmental Baseline

164. Oceana realleges, as if fully set forth herein, the allegations set forth in paragraphs 1 through 163 of this Complaint.

165. The Fisheries Service must “[e]valuate the current status of the listed species,” and “[e]valuate the effects of the action and cumulative effects on the listed species.” 50 C.F.R. § 402.14(g)(2)–(3).

166. The “effects of the action” include “the direct and indirect effects of an action on the species . . . that will be added to the environmental baseline.” 50 C.F.R. § 402.02.

167. The “environmental baseline” includes “the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early [S]ection 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.” *Id.*

168. The Fisheries Service did not properly analyze the environmental baseline. The agency irrationally failed to describe the impacts that fishing gear and the Deepwater Horizon oil spill have on habitats used by sea turtles.

169. The Fisheries Service irrationally failed to discuss adequately new information about the impacts of the Atlantic pelagic longline fishery to the environmental baseline.

170. The Fisheries Service irrationally concluded that there is no information that the Deepwater Horizon oil spill has altered sea turtles' long-term survival rates, despite its findings that the Deepwater Horizon oil spill "is expected to have had an adverse impact on the base line for sea turtles." Shrimp Biological Opinion at 120.

171. The Fisheries Service further irrationally and arbitrarily failed to consider adequately the substantial impacts of climate change, high seas, and foreign activities on the ESA-listed sea turtles, whether in its assessment of the action area, the status of the ESA-listed species, or as part of the environmental baseline.

172. The National Marine Fisheries Service's failure to evaluate adequately the environmental baseline is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A), and the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

173. These actions have harmed Oceana and its members and Oceana has no adequate remedy at law.

COUNT VIII

Violation of the APA and the Endangered Species Act: Failure to Consider the Best Available Science

174. Oceana realleges, as if fully set forth herein, the allegations set forth in paragraphs 1 through 173 of this Complaint.

175. Section 7(a)(2) of the Endangered Species Act requires consultations be based upon “the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

176. The Fisheries Service acknowledged that “[t]here is a large and growing body of literature on past, present, and future impacts of global climate change, exacerbated and accelerated by human activities.” Shrimp Biological Opinion at 45.

177. Yet the Fisheries Service failed to consider adequately the potential effects of climate change in its jeopardy analysis. The Fisheries Service failed to adhere to this statutory mandate when issuing the Shrimp Biological Opinion because, *inter alia*, it failed to consider all of the relevant factors and disregarded the best available science documenting the threat that climate change, including resulting nesting habitat loss, poses to sea turtles.

178. The Fisheries Service also failed to consider the best available scientific information on the substantial adverse effects of the Deepwater Horizon oil spill on local sea turtle populations, including particularly Kemp’s ridley sea turtles.

179. The Fisheries Service’s failure to consider the best available science is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A) and the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

180. These actions have harmed Oceana and its members and Oceana has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Oceana respectfully requests that the Court:

(1) Adjudge and declare that the Shrimp Biological Opinion issued by the Fisheries Service is arbitrary and capricious and not in accordance with law in violation of the APA and Endangered Species Act;

(2) Enter an Order vacating the Shrimp Biological Opinion and directing the Fisheries Service to reinitiate consultation under Section 7 of the Endangered Species Act for the shrimp fisheries;

(3) Issue such injunctive relief as is appropriate to allow the continued prosecution of the shrimp fisheries during the remand period while preventing irreparable harm to sea turtles;

(4) Award Oceana its fees, costs, expenses, and disbursements, including reasonable attorney's fees, associated with this litigation; and

(5) Grant such additional relief as the Court deems necessary, just, and proper.

Respectfully Submitted,

/s/ Gardner F. Gillespie

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