



Animal Welfare Institute

900 Pennsylvania Avenue, SE, Washington, DC 20003 • www.awionline.org
telephone: (202) 337-2332 • facsimile: (202) 446-2131

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BY ELECTRONIC MAIL

Submitted via <http://www.regulations.gov>

Michael Barnette
Attn: 0648-BC10
Southeast Regional Office
National Marine Fisheries Service
263 13th Ave South
St. Petersburg, FL 33701

Dear Mr. Barnette:

RE: Comments on proposed rule to withdraw the alternative tow time restriction and require all skimmer trawls, pusher-head trawls, and wing nets rigged for fishing to use turtle excluder devices (TEDs) (77 Fed. Reg. 27411–27415)

On behalf of the Animal Welfare Institute (AWI), please accept the following comments on the above-referenced National Marine Fisheries Service (NMFS or the Service) proposed rule.

The stated purpose of the proposed rule is to provide more substantial protection for sea turtle species, all of which are listed as endangered or threatened under the Endangered Species Act (ESA) in the United States, by withdrawing the alternative tow time restrictions for skimmer trawls, pusher-head trawls, and vessels using wing nets, which had previously been available in lieu of TEDs.¹ AWI strongly supports the proposed rule and asserts that the present rate of take for sea turtles demonstrates that the rule is warranted. Ultimately, requiring the above-mentioned trawls, along with other shrimp trawlers operating in the southeastern United States, to have a NMFS-approved TED installed in each net that is rigged for fishing will provide for stronger sea turtle conservation in accordance with listing requirements under the ESA. Allowing for the continued take of sea turtles under the alternative tow time restrictions is inconsistent with the purpose of the ESA and has undermined state and federal efforts to protect the species.

Mandating TEDs for these additional trawls would provide many benefits to the species, including a substantial decline in strandings, forced submergence, injury, other capture-induced trauma, and death. The chance of sea turtle survival is greatly enhanced by the use of TEDs on shrimp trawlers, as is the survival of a number of other non-target aquatic species. This is significant at the species and population scales, but also at the individual scale; these devices serve to substantially reduce the pain and suffering that is inevitable for turtles who become trapped in conventional trawl nets. The species and population scale benefits of withdrawing the alternative tow time restriction (i.e. the substantial reduction in sea turtle mortality and injuries)

¹ 50 C.F.R. § 223.206(d)(2)(ii)(A).

have been addressed at length in both the Draft Environmental Impact Statement (DEIS) and in other comments submitted in response to this notice. Accordingly, the following comments emphasize the animal welfare considerations relevant to the agency's adoption and implementation of the proposed rule.

Population Status and Threats

The five species of sea turtles that inhabit the waters of the Gulf of Mexico and South Atlantic, including Kemp's ridley (*Lepidochelys kempii*), loggerhead (*Caretta caretta*), leatherback (*Dermochelys coriacea*), hawksbill (*Eretmochelys imbricata*), and green (*Chelonia mydas*) are each listed as "threatened" or "endangered" under the ESA.

Sea turtles are subject to targeted fisheries and illegal fishing throughout the world, but perhaps the greatest threat to these animals is their incidental take as bycatch in shrimp nets. The National Academy of Sciences, in a widely cited study, concluded that drowning in shrimp trawls "kills more sea turtles than all other human activities combined."²

As many as 28,000 sea turtles per year are captured by 2,500 skimmer trawls that operate in shallow waters and estuaries to catch shrimp. During the spring of 2011, 3,585 sea turtles washed up dead in the Gulf of Mexico and Southeastern coast during the shrimp season. This unprecedented number of sea turtle strandings was particularly intense along the coasts of Louisiana, Mississippi, and Alabama, and is attributable to fishing activities, biotoxins and possible impacts from the Deepwater Horizon Oil spill.³ The 2011 stranding data revealed that sea turtle mortality in the Gulf of Mexico alone has likely exceeded annual take allowances for the Gulf and South Atlantic shrimp fisheries combined. In addition, NMFS inspection reports document significant non-compliance with existing regulations.⁴

Existing Regulatory Mechanisms are Inadequate

The ESA prohibits the intentional or incidental "take" of a protected species. Take, as defined in the ESA, includes mortality but also extends to any harm or harassment of a protected species.⁵ NMFS has administratively exempted vessels that comply with 50 CFR § 223.206(d)(2)(ii)(A) from liability under the ESA, establishing a rule premised on the assumption that the majority of vessels in the Southeast and Gulf shrimp trawl fisheries are subject to TEDs requirements, that they are all properly using TEDs in their nets, and that TEDs are 97 percent effective at reducing sea turtle mortality. The liability exemptions contained in the sea turtle conservation regulations for shrimp fishing activities in the Gulf of Mexico and South Atlantic do not authorize incidental

² NATIONAL ACADEMY OF SCIENCES, DECLINE OF THE SEA TURTLES: CAUSES AND PREVENTION (1990).

³ NOAA Fisheries Office of Protected Resources, *Increase in Sea Turtle Strandings*, <http://www.nmfs.noaa.gov/pr/species/turtles/gulfofmexico.htm> (last visited July 2, 2012).

⁴ See NOAA Fisheries, *NOAA assesses civil penalties to shrimpers for alleged Turtle Excluder Device violations*, http://www.noaanews.noaa.gov/stories2011/2011110311_ole_teds.html (last visited July 2, 2012).

⁵ The statute defines "take" as to "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 ESA prohibits the direct taking of a listed species, as well as the acts of third parties, such as governmental agencies, whose acts cause such taking to occur. *Id.* § 1538(g). NMFS has extended these protections to threatened species by regulation. *Id.* § 1533(d); 50 C.F.R. § 17.42(b).

take of sea turtles if the taking would violate the restrictions, terms, or conditions of an incidental take statement or biological opinion, or would jeopardize the continued existence of the species.⁶

The regulations require most shrimp trawlers operating in the southeastern United States to have NMFS-approved TED installed in each net that is rigged for fishing, to allow sea turtles to escape. TEDs currently approved by NMFS include single-grid hard TEDs and hooped hard TEDs conforming to a generic description and one type of soft TED—the Parker soft TED (see 50 CFR 223.207). However, skimmer trawls, pusher-head trawls, and vessels using wing nets currently may employ alternative tow time restrictions in lieu of TEDs, pursuant to 50 CFR § 223.206(d)(2)(ii)(A). The alternative tow time restrictions currently limit tow times to 55 minutes from April 1 through October 31 and 75 minutes from November 1 through March 31.⁷

However, these assumptions and the TED regulations authorizing the use of tow-time restrictions in lieu of the TED requirement are not adequate to protect sea turtle populations from imminent harm and ensure that the Southeast shrimp trawl fisheries are operating in compliance with the ESA. This is because: the federal regulations exempt certain shrimp fishing activities from the TED requirements, including activities that have increased dramatically since the regulations were adopted; non-compliance with existing federal TEDs regulations by shrimp fishing vessels in the Gulf of Mexico is widespread and well-documented; and implementation and enforcement of federal TEDs regulations by federal and state agencies is inadequate.

The ESA's Best Available Science Mandate

The ESA, which provides the statutory basis for the proposed rule,⁸ requires that NMFS rely on the “best scientific and commercial data available” in determining whether an action taken or authorized by the agency is “likely to jeopardize the continued existence of any endangered species or threatened species.”⁹ The language of the ESA makes clear the importance of prioritizing the protection of endangered species above relevant financial interests. Accordingly, NMFS should base its conclusions upon the proposed rule’s scientific underpinnings, rather than the cost associated with its implementation. The proposed rule reflects extensive evidence that the alternative tow time restriction is ineffective as a tool for protecting sea turtles because tow times are difficult to enforce and are, consequently, frequently violated.¹⁰

Although requiring that skimmer trawls, pusher-head trawls, and wing nets be equipped with TEDs is consistent with evidence that the devices substantially reduce turtle mortality and trauma, additional protections are warranted to more effectively protect the Gulf’s imperiled sea turtles and to comply with the spirit of the ESA. Among the most important supplemental measures that NMFS should implement are time and area closures for the Gulf shrimp fishery. Satellite tagging technology and in-the-water aerial surveys have made advanced monitoring possible and have revealed information about the distribution and migration patterns of sea turtles in the Gulf. The Service should make use of this monitoring technology and resulting data

⁶ 50 C.F.R. § 223.206(d)(4)(i).

⁷ 77 Fed. Reg. 27411 (May 10, 2012).

⁸ Sea Turtle Conservation; Shrimp Trawling Requirements, 77 Fed. Reg. 27411, 27412 (May 10, 2012).

⁹ 16 U.S.C. § 1536(a)(2).

¹⁰ NMFS, DRAFT ENVIRONMENTAL IMPACT STATEMENT TO REDUCE INCIDENTAL BYCATCH AND MORTALITY OF SEA TURTLES IN THE SOUTHEASTERN U.S. SHRIMP FISHERIES 4 (2012) [hereinafter DEIS].

to evaluate and implement time and area closures. Such closures would likely cause a significant decline in strandings. When time and area closures were implemented in Texas waters, for instance, strandings in the area declined by 46% in the first year following the closure, and by 38% in the second year, relative to the years preceding the closure.¹¹ While requiring that skimmer trawls, pusher-head trawls, and wing nets be equipped with TEDs will have a substantial, positive impact on sea turtle populations, supplementing this technology with time and area closures would more effectively reduce turtle mortality in shrimp fisheries.¹²

Accordingly, NMFS should utilize these tools to determine when and where temporary closures are necessary to protect sea turtles from exposure to shrimping equipment. In evaluating closure options, the Service should consider populations' foraging, nesting and migration habits and patterns, and should give particular attention to areas where joint enforcement agreements for TED enforcement have not been established. Although certain Gulf States, either independently or in cooperation with NMFS, have mandated closures in their respective waters, time and area restrictions must be implemented at the federal level to provide the region's sea turtles with the comprehensive, effective protections that will enable their populations to recover.¹³

Enforcement of TED Requirements and Other Protective Measures is Critical

The efficacy of TED requirements, as well as any time and area closures that NMFS may implement, in protecting sea turtles will turn on enforcement. NMFS requires that TEDs be shown to be 97% effective in excluding sea turtles during testing in order to qualify for use on shrimp boats.¹⁴ However, the Service assumes 100% compliance—which would require vigilant enforcement. The Service must develop effective evaluation and enforcement tools, and must be consistent and firm in assuring compliance throughout the shrimp fishery. Implementing the proposed rule but failing to enforce it will do little to protect sea turtles and support their recovery in the Gulf of Mexico. Inadequate enforcement of TED rules has hindered the efficacy of TED requirements for vessels already required to be equipped with TEDs.¹⁵ The Service has recently strengthened its enforcement efforts, with positive results,¹⁶ but an enormous expansion in enforcement operations will be necessary to ensure full compliance with the proposed TED requirements.

It is particularly important that the proposed rule be enforced in Louisiana's state waters. The state, which hosts over 2,000 skimmer and butterfly trawlers¹⁷—the vast majority of the skimmer boats in the Gulf—has long attempted to circumvent the ESA's mandate by way of a state law that forbids the use of state funds for enforcement of federal TED standards in state waters.¹⁸ Louisiana's jurisdiction currently extends three miles into the Gulf of Mexico, but the Louisiana

¹¹ Rebecca L. Lewison et al., *The Impact of Turtle Excluder Devices and Fisheries Closures on Loggerhead and Kemp's Ridley Strandings in the Western Gulf of Mexico*, 17 CONSERVATION BIOL. 1089, 1096 (2003).

¹² *See id.*

¹³ The importance of time and area closures is discussed in greater detail in comments submitted to NOAA and NMFS by the Center for Biological Diversity, Turtle Island Restoration Network, Sea Turtle Conservancy, Defenders of Wildlife, and Oceana on August 8, 2011.

¹⁴ 50 C.F.R. § 223.207(e)(1).

¹⁵ DEIS, *supra* n.10, at 7.

¹⁶ *See, e.g., Shrimpers Face Fines After Sea Turtle Operation*, ASSOCIATED PRESS, Nov. 3, 2011.

¹⁷ DEIS, *supra* n.10, at 3.

¹⁸ *See* LA. REV. STAT. ANN. § 56:57.2.

Wildlife and Fisheries Commission is considering expanding state waters to ten miles beyond the shore. If Louisiana is permitted to continue evading the requirements of the ESA, this expansion would represent a substantial new threat to the Gulf's sea turtle populations. NMFS should not allow Louisiana to continue to violate the ESA. By prohibiting the enforcement of TED rules, the state is out of compliance with the ESA and should not be shielded from liability by NMFS's biological opinion concerning shrimp trawling in the southeastern United States and its impact on sea turtle populations. NMFS must not allow Louisiana to continue to contravene the letter and the spirit of the ESA.

Economic and Non-economic Considerations Favor the Proposed Rule

Economic considerations not addressed in the DEIS further support NMFS's decision to withdraw the alternative tow time restriction. The DEIS estimates the economic impact of implementing the proposed rule, accounting for the anticipated costs associated with purchasing and maintaining TEDs, as well as administrative and enforcement expenses.¹⁹ This analysis emphasizes costs to the shrimping industry while overlooking economic interests that will be advanced by withdrawing the alternative tow time restriction, such as tourism revenue associated with marine wildlife watching, including observation of sea turtles, in the Gulf of Mexico. Tourists join both walking tours and boat excursions to observe sea turtles in the Gulf, and marine life attracts travelers interested in scuba diving and similar activities. Tourism revenue is important to many coastal cities' economies, and the popularity of ecotourism continues to grow. Accordingly, the DEIS's economic analysis overstates the financial costs of expanding TED requirements. The economic benefits of sea turtle conservation provide additional support for the adoption and enforcement of the proposed rule, and NMFS should account for those benefits as it finalizes the rule.

The costs of implementing the proposed rule are thus not arbitrary, but reasonably related to Congress's purpose of protecting species under the ESA. As noted, NMFS must ultimately base its determination of whether an activity is likely to jeopardize the continued existence of a species based solely on "the best scientific and commercial data available."²⁰ The ESA does not permit the agency to base its jeopardy determination on other factors, such as the cost of protecting the species.

The Proposed Rule will Promote Animal Welfare

Beyond the aforementioned legal obligation of NMFS to protect endangered sea turtle species under the ESA, AWI emphasizes the significance of this proposed rule for its potential to improve not only the conservation status of the Gulf's endangered sea turtle species, and the mortality rates of relevant populations, but the welfare and lives of individual animals. TEDs enhance the likelihood of survival of not only sea turtles, but also other non-target aquatic species.²¹

Combined with the direct mortality data noted in the DEIS, this evidence provides a strong case for the potential of this proposed rule to prevent thousands of sea turtle mortalities in the

¹⁹ DEIS, *supra* n.10, at 164.

²⁰ 16 U.S.C. § 1536(a)(2).

²¹ Jeff Gearhart, *Evaluation of a Turtle Excluder Device (TED) Designed for use in the U.S. Mid-Atlantic Croaker Fishery*, NOAA Technical Memorandum NMFS-SEFSC-606 (2010).

combined skimmer trawl fisheries, as well as to preemptively address mortalities caused by capture stress and non-fatal injuries. This will serve not only to promote the conservation and recovery of sea turtle populations, consistent with the spirit of the ESA, but also to prevent non-fatal harm and suffering of individual sea turtles and other marine life caught in shrimp nets as bycatch.

It is clear that the chance of sea turtle survival is greatly enhanced by the use of TEDs on shrimp trawlers; however, the Service should not overlook the numerous other non-target marine life, including other endangered species, which would be protected from suffering and death by requiring that TEDs be used on all skimmer trawls, pusher-head trawls, and wing nets.²²

Bycatch is a significant problem in the shrimp trawl fisheries of the Gulf of Mexico. This is the most valuable fishery in the southeastern United States; almost 136,000 metric tons of shrimp worth over \$700 million USD were landed in 2000. In the Gulf of Mexico alone, NOAA Fisheries reports that over 50,000 metric tons of shrimp were landed in 2011, which is roughly in line with the average annual Gulf shrimp harvests from 2005 to 2010.²³ The concern, of course, is that an estimated 60–80% of the catch by weight in these fisheries is bycatch; over 150 species have been reported in shrimp trawl bycatch, including juveniles of species such as weakfish and red snapper that are highly valued as adults in other fisheries.²⁴

While animals that are caught in the wild are considered “natural resources,” “dead discards,” or “by-catch,” and are measured in metric tons, it is essential to remember that those metric tons are not simply expendable “resources.”

Conclusion

In sum, AWI supports the determination that the measures described in the proposed rule are necessary to protect sea turtle populations in the Gulf of Mexico. We emphasize that the withdrawal of the alternative tow time restriction will not only promote conservation values consistent with the ESA, but will serve to reduce the pain and suffering experienced by sea turtles and members of other marine species that are adversely impacted by shrimping vessels and nets. In addition to adopting the proposed rule, we encourage NMFS to implement this proposal and any other measures that are deemed necessary to promote the survival and recovery of endangered species and to protect the region’s marine life from unnecessary pain and suffering.

Thank you for providing this opportunity to comment on this proposed rule and for considering these comments. Please send any correspondence or information about this proposed rule to:

²² See *id.*

²³ See NOAA Fisheries, Fishery Market News, http://www.st.nmfs.noaa.gov/st1/market_news/index.html (last visited July 9, 2012).

²⁴ See Sandra L. Diamond, *Estimation of bycatch in shrimp trawl fisheries; a comparison of estimation methods using field data and simulated data*, NMFS FISHERY BULLETIN (2003). Shrimp trawl bycatch of juvenile red snapper (*Lutjanus campechanus*) is the most significant source of mortality for red snapper in U.S. waters of the Gulf of Mexico. An estimated 25–30 million individuals are caught annually in shrimp trawls, which may account for as much as 90% of juvenile red snapper mortality.

Mariko Terasaki, Wildlife/Marine Research Assistant, Animal Welfare Institute, 900
Pennsylvania Ave., SE, Washington, DC 20003.

Sincerely,

A handwritten signature in black ink that reads "Susan Millward". The signature is written in a cursive style with a large, sweeping initial "S".

Susan Millward
Executive Director