

November 10, 2008

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTEDCondoleezza Rice
Secretary of State
U.S. Department of State
2201 C Street, NW
Washington, D.C. 20520James W. Balsiger
Acting Assistant Administrator
NOAA Fisheries Service
1315 East West Highway
Silver Spring, MD 20910Vice Admiral Conrad C. Lautenbacher
Administrator
National Oceanic and
Atmospheric Administration
1401 Constitution Avenue, NW
Washington, D.C. 20230Carlos M. Gutierrez
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230**Sixty Day Notice of Intent to Sue for Violations of the Endangered Species Act In Connection with the State Department's Certification of Shrimp Imports to the United States under Pub. L. 101-162 § 609**

Dear Secretaries Rice and Gutierrez and Administrators Lautenbacher and Balsiger:

Pursuant to the provisions of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), this letter provides notice of the intent of our client, Turtle Island Restoration Network ("TIRN"),¹ a California-based non-profit organization dedicated to the conservation of sea turtles and their habitat, to bring suit against the State Department for violating section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) in connection with the certification of imported shrimp pursuant to Public Law 101-162 § 609 ("Section 609"). In particular, the harvesting of shrimp for import to the United States may affect listed sea turtle species. Accordingly, the State Department is required to undertake section 7 consultation with the National Marine Fisheries Service ("NMFS") prior to certifying shrimp imports.

¹ TIRN's contact information is as follows: P.O. Box 370, Forest Knolls, CA 94933; phone (415) 663-8590; fax (415) 488-0372.

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A. Background

1. Shrimp Fisheries and the United States Market

Americans consume over 500,000 tons of shrimp annually.² Shrimp is the top fishery import of the United States, and shrimp imports were valued at over \$3.9 billion in 2007.³ This value amounts to 28% of the total value of edible imports into the United States.⁴ Five countries, Thailand, Ecuador, China, Mexico, and Indonesia, account for the majority of shrimp imports into the United States. Of these suppliers, Thailand alone accounts for over 30% of shrimp imports into the United States.⁵

2. Status of Sea Turtles

Six of the seven species of marine turtles are listed as endangered or threatened under the Endangered Species Act. 43 Fed. Reg. 32800 (July 28, 1978) (green, loggerhead, olive ridley); 35 Fed. Reg. 8491 (June 2, 1970) (hawksbill, leatherback); 35 Fed. Reg. 18319 (Dec. 2, 1970) (Kemp's ridley). All marine turtle species are also on the IUCN red list and face serious, ongoing threats from a number of fishery sources. Among the most serious human created threats to the survival of sea turtles are habitat destruction and fishery interactions.

Each year, tens of thousands of turtles are killed through interactions with fisheries. Because turtles breathe air, they frequently drown when they become entangled in fishing gear and are unable to surface. In trawl fisheries, large nets are dragged by a boat (or sometimes between two boats) to capture shrimp and other fishes. When turtles become caught in these nets, they will drown if they cannot escape and access the surface.

The necessary access to surface air can be readily provided through the installation of turtle excluder devices ("TEDs"). TEDs function by providing an escape hatch for sea turtles caught in trawl nets.⁶ The TED consists of a grate and an opening in the net.⁷ When the turtle swims into the grate, it is subsequently freed through the hole in

² Food & Agriculture Organization, Shrimp Market Report - April 2008 – US (2008), *available at* <http://www.globefish.org/index.php?id=4496>.

³ National Marine Fisheries Service, Fish Watch-U.S. Seafood Facts, http://www.nmfs.noaa.gov/fishwatch/trade_and_aquaculture.htm.

⁴ *Id.*

⁵ *Id.*

⁶ NOAA Fisheries Office of Protected Resources, Turtle Excluder Devices (TEDs), <http://www.nmfs.noaa.gov/pr/species/turtles/teds.htm>.

⁷ *Id.*

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the net.⁸ While the impact of TEDs on fishery yields has been debated, it is widely accepted that TEDs are a highly effective means of reducing sea turtle mortality in shrimp trawl nets that have minimal impacts on fishery yields.⁹

3. The Certification Requirement and its History

Section 609 requires that the State Department certify shrimp imports as being compliant with sea turtle protections employed in the United States. Current sea turtle protections in United States' shrimp fisheries include a number of measures meant to reduce the total number of sea turtle-fishery interactions and increase the probability that sea turtles will survive fishery interactions. Most significantly, federal regulations require that all shrimp trawlers operating in the United States equip their nets with TEDs. 50 C.F.R. § 223.206.

Pursuant to the requirement that foreign fisheries adopt the same protections employed in the domestic shrimp fishery, the State Department may issue certifications when the fishery operates with TEDs and other appropriate sea turtle protections or the fishery operates in an area where sea turtle interactions are unlikely. Initially, certifications were done only on a country level, but in response to a ruling by the Federal Circuit, they are now also available on a producer level for turtle-friendly catches from uncertified countries. *TIRN v. Evans*, 284 F.3d 1282 (Fed. Cir. 2002). Pursuant to section 609, the State Department issues annual certifications of shrimp imports. The most recent certification was issued in May, 2008 and certified 16 shrimp fisheries for adopting adequate sea turtle protections and an additional 24 for operation in areas where sea turtle interactions are unlikely. 73 Fed. Reg. 29549 (May 21, 2008).

B. The State Department's Ongoing Certification of Shrimp Imports Without a Section 7 Consultation Violates the Endangered Species Act.

Section 7 of the ESA requires that "[e]ach Federal agency *shall*, in consultation with and with the assistance of the Secretary, insure that any action *authorized*, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2) (emphasis added). The ESA's implementing regulations further specify that "[e]ach federal agency shall

⁸ *Id.* For video of TED operation see *id.*

⁹ Shrimp catch reduction varies depending on the type of TED used and a number of environmental factors, but can generally be kept to numbers as low as 1-3%. See NATIONAL MARINE FISHERIES SERVICE, STATUS OF BYCATCH REDUCTION DEVICE (BRD) PERFORMANCE AND RESEARCH IN NORTH-CENTRAL AND WESTERN GULF OF MEXICO 27 (2004).

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confer with the Service on any action that is likely to jeopardize the continued existence of any proposed species.” 50 C.F.R. § 420.10(a).

Actions that jeopardize the continued existence of a listed species are those that would be reasonably expected to directly or indirectly result in an appreciable reduction in the likelihood of survival and recovery of a listed species by reducing reproduction, distribution or numbers of the species. 50 C.F.R. § 402.02 (held invalid on other grounds *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004); *Cape Hatteras Access and Preservation Alliance v. U.S. Department of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004) (both invalidating the regulatory definition of adverse modification)). The operation of shrimp fishers primarily impacts juvenile and adult sea turtles, and the harm caused by this activity has been shown to have serious impacts on sea turtle populations.¹⁰ Therefore, the operation of shrimp trawlers may affect the survival and recovery of listed sea turtle populations.

The imposition of sea turtle protection requirements on the domestic shrimp fishery by the National Marine Fisheries Service to satisfy the ESA confirms that shrimp fishery operations may affect the survival and recovery of listed sea turtles. There is no reason to think that the threat to sea turtles would be lower in foreign or international fisheries. In fact, repeated litigation before the World Trade Organization regarding the United State’s attempts to force the use of sea turtle conservation measures elsewhere clearly demonstrates the government’s concern with the impacts of the global shrimp fishery on sea turtle populations. *See* Shrimp-Turtle, WT/DS58/AB/R (1998).

The Secretary’s certification of shrimp imports is, therefore, an action that may jeopardize sea turtle species and requires consultation under section 7. Without this certification, these shrimp would be unable to cross the U.S. border or legally enter the U.S. market. An “action” subject to ESA section 7 consultation includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02. The State Department’s role in affirmatively authorizing foreign shrimp products to come over the U.S. border and into the U.S.

¹⁰ Deborah T. Crouse, Larry B. Crowder, & Hal Caswell, *A Stage-Based Population Model for Loggerhead Sea Turtles and Implications for Conservation*, 68 *ECOLOGY* 1412 (1987); Rebecca L. Lewison, Larry B. Crowder, & Donna J. Shaver, *The Impact of Turtle Excluder Devices and Fisheries Closures on Loggerhead and Kemp’s Ridley Strandings in the Gulf of Mexico*, 17 *CONSERVATION BIOLOGY* 1089 (2003).

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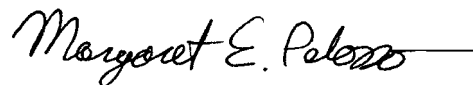
market constitutes an action under the ESA. The indirect effect of such authorization is harm to listed sea turtle species that may affect their survival and recovery. Accordingly, the State Department's Section 609 certification action triggers the requirement for ESA section 7 consultation, just as does the authorization by NMFS of domestic shrimp fishing operations.

TEDs can be extremely effective in reducing sea turtle bycatch mortality. Therefore, their widespread use in the global shrimp fishery can have a significant impact in preserving sea turtle populations. This means that it may be possible to conduct a global shrimp fishery in a manner that does not jeopardize the continued existence of sea turtle populations. However, in the nearly ten years that the State Department has been issuing certifications, it has not once initiated consultation with NMFS, and therefore it is impossible to say what the actual impact of certification is on sea turtle populations.

C. Conclusion

For the foregoing reasons, TIRN requests that the State Department initiate section 7 consultation for the section 609 import certifications for the upcoming fishing year. We would be happy to discuss these issues with you further. Should the State Department fail to initiate consultation within 60 days of this notice, however, TIRN intends to file suit against the State Department for violation of section 7 of the Endangered Species Act.

Very truly yours,



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