



March 12, 2009

***Via Electronic and Certified Mail***

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U.S. Department of Commerce  
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**RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act; Failure to Make 12-Month Findings on Petitions Regarding the Designation and Classification of Distinct Population Segments of the Loggerhead Sea Turtle (*Caretta caretta*)**

Dear Acting Secretary Wolff, Secretary Salazar, Dr. Balsiger, and Dr. Gould:

This letter serves as a sixty-day notice of intent to sue the National Marine Fisheries Service over violations of Section 4(b)(3)(B) of the Endangered Species Act, 16 U.S.C. § 1533(b)(3)(B), on behalf of the Center for Biological Diversity (“the Center”), Oceana, Inc., and Turtle Island Restoration Network (“TIRN”). Specifically, the agency failed to make a 12-month finding on either of two petitions regarding the status of distinct population segments of the loggerhead sea turtle (*Caretta caretta*). The petitions request that the Fisheries Service designate the North Pacific and Western North Atlantic subpopulations of the loggerhead sea turtle as distinct population segments (“DPS”) and reclassify the DPSs as Endangered under the Endangered Species Act. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the Act. *Id.* at § 1540(g).

On July 12, 2007, the Center and TIRN submitted, via email and U.S. mail, a formal, detailed petition to designate the North Pacific subpopulation of the loggerhead sea turtle as a DPS, to reclassify the North Pacific DPS of the loggerhead sea turtle from a Threatened to an Endangered species, and to designate critical habitat for the DPS under the Act (“North Pacific DPS Petition”). The North Pacific DPS Petition was received on July 16, 2007. On November 16, 2007, the Fisheries Service made a positive 90-day finding on this petition and initiated a 60-

day public comment period and status review. 72 Fed. Reg. 64585 (Listing Endangered and Threatened Wildlife and Designating Critical Habitat; 90-day Finding for a Petition to Reclassify the Loggerhead Turtle in the North Pacific Ocean as a Distinct Population Segment with Endangered Status and to Designate Critical Habitat). Oceana submitted comments supporting the petition on January 15, 2008. The 90-day finding triggered a legal obligation for the Fisheries Service to make a 12-month finding on the petition no later than July 16, 2008. The Fisheries Service has not yet made such a finding and is therefore in violation of the Act.

On November 15, 2007, the Center and Oceana submitted, via email and UPS overnight delivery, a formal, detailed petition to designate the Western North Atlantic subpopulations of the loggerhead sea turtle as a DPS and reclassify the Western North Atlantic subpopulations as Endangered under the Act (“Western North Atlantic DPS Petition”). The Western North Atlantic DPS Petition was received on November 16, 2007. On March 5, 2008, the Fisheries Service made a positive 90-day finding on the Western North Atlantic DPS petition and initiated a 60-day public comment period and status review. 73 Fed. Reg. 11849 (Listing Endangered and Threatened Wildlife and Designating Critical Habitat; 90-day Finding for a Petition to Reclassify the Loggerhead Turtle in the Western North Atlantic Ocean). This finding triggered a legal obligation for the Fisheries Service to make a 12-month finding on the petition no later than November 16, 2008. As with the North Pacific DPS Petition, the Fisheries Service has not yet made such a finding on the Western North Atlantic DPS Petition and is therefore in violation of the Act.

Congress aptly described Section 4 of the Act, 16 U.S.C. §1533, the section that sets out the process for listing a species, as “[t]he cornerstone of effective implementation of the Endangered Species Act ....” S. Rep. No. 418, 97th Cong., 2d Sess. at 10; *see also* H. Rep. No. 567, 97th Cong., 2d Sess. at 10. Section 4 sets forth a detailed process by which the Secretary of Commerce through his designee, the Fisheries Service, adds to the lists of Threatened and Endangered species. 16 U.S.C. §1533. The listing process can begin either by citizen petition or by internal agency processes. In either case, strict timelines apply once the process is initiated.

Upon receipt of a petition to list a species under the Act, the Fisheries Service must determine whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). The Fisheries Service must make this initial, “90-Day Finding,” “[t]o the maximum extent practicable, within 90 days after receiving the petition.” *Id.* If the agency determines that the petition presents substantial information that a listing may be warranted, it must “promptly commence a review of the status of the species” to determine whether listing is (1) warranted, (2) not warranted, or (3) warranted but precluded by other pending proposals that require immediate attention. *Id.* at § 1533(b)(3)(B). This finding, known as the 12-Month Finding, is due “within 12 months after receiving a petition.” *Id.* The agency has no discretion to extend the time allotted for the 12-Month Finding.

If the 12-Month Finding concludes that listing is warranted, the Fisheries Service must simultaneously publish a proposed rule to list the species in the Federal Register. 16 U.S.C.

§ 1533(b)(3)(B)(ii). Within 12 months of publishing the proposed rule, the agency must make a final listing determination for the species. At this point, the Fisheries Service must publish a final rule listing the species, publish a withdrawal of the proposal, or, in the rare instance where there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. *Id.* §§ 1533(b)(6)(A)(i); 1533(b)(6)(B)(i).

The North Pacific DPS Petition was received by the Fisheries Service on July 16, 2007. The Western North Atlantic DPS Petition was received by the Fisheries Service on November 16, 2007. The 12-month findings on the North Pacific DPS Petition and Western North Atlantic DPS Petition were therefore due no later than July 16, 2008, and November 16, 2008, respectively. The agency is therefore now in violation of the Act for failing to make the required findings.

Since submitting the petitions, our organizations have communicated with the Fisheries Service staff on several occasions regarding expected and actual delays in the agency's responses to the petitions. Early in the summer of 2008, agency staff informed us that they would not meet the statutory deadlines for issuing 12-month findings on both petitions, but expected to issue those findings by the end of the year. On February 13, 2009, the staff informed us that the agency would not make a 12-month finding on either petition until the end of 2009. We appreciate the agency staff's candor and efforts to update us on the status of the agency's deliberations. However, a further delay of nearly a year before these imperiled populations receive desperately needed additional protection contravenes the purposes of the Act and poses a serious risk to the species. The Fisheries Service's failure to comply with the Act's deadlines for processing the North Pacific DPS Petition and Western North Atlantic DPS Petition deprives the loggerhead sea turtle of statutorily mandated protection vitally necessary for its survival. Any further delay by the agency in response to the petitions frustrates the intent of the Act, because the likelihood of survival and recovery of the species, and particularly of these population segments, is reduced due to continued harm to the species from commercial fishing, global warming, and other threats detailed in the petitions. Put simply, the conservation needs of loggerhead sea turtles in the North Pacific and Western North Atlantic require immediate action.

As detailed in the petitions, human activities endanger loggerheads in multiple ways. Chief among the threats right now is the threat from commercial fishing vessels catching and killing loggerheads. In the future, loggerheads face threats to their nesting habitat and reproductive capability from global warming caused by society's emissions of carbon dioxide and other greenhouse gases. These threats have continued and, indeed, increased since the filing of the petitions.

The catching and killing of loggerheads by commercial fishing fleets has continued largely unabated, and levels of known takes will likely increase in the near future. For example, while this petition has been pending, the agency has evaluated new observer information concerning the impact of gill net fisheries off the Atlantic coast. It is expected that this evaluation will reveal significant number of caught and killed loggerheads that had not previously been known. Furthermore, over 770 loggerheads have been and continue to be killed

in Mid-Atlantic trawl fisheries because of insufficient government oversight and the Atlantic pelagic longline fishery continues to kill loggerheads at a higher rate than is authorized by its Biological Opinion. In October 2008, the Fisheries Service announced that the Gulf of Mexico bottom longline sector of the reef fish fishery had substantially exceeded the take levels authorized by the fishery's biological opinion by taking nearly 1000 sea turtles, most of which were loggerheads, in just 18 months. NMFS Southeast Fisheries Science Center, Estimated Takes of Sea Turtles in the Bottom Longline Portion of the Gulf of Mexico Reef Fish Fishery July 2006 through 2007 Based on Observer Data, NMFS SFSC Contribution PRD-07/08-15 (September 2008). While the Gulf of Mexico Fishery Management Council, to its credit, voted in late January to close the areas of this fishery where sea turtles are believed to be caught on an emergency basis, we fear that substantial numbers of sea turtles may be killed before the closure is put in place.

In the Pacific, fishery managers have proposed to expand pelagic longline fishing outside the West Coast Exclusive Economic Zone as well as in the waters surrounding the Hawaiian Islands. *See, e.g.*, NMFS, Environmental Assessment for West Coast Deep-Set Longline Fishery Operating Outside of the U.S. Exclusive Economic Zone (September 2008) (contemplating expansion of West Coast deep-set longline fishery); 73 Fed. Reg. 45965 (Aug. 7, 2008) (NMFS notice of intent to prepare SEIS on Amendment 2 to West Coast Highly Migratory Species Fishery Management Plan allowing re-establishment of high seas shallow-set longline fishery); Western Pacific Regional Fishery Management Council, Draft SEIS for Amendment 18 to the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region – Management Modifications for the Hawaii-based Shallow-set Longline Swordfish Fishery that Would Remove Effort Limits, Eliminate the Set Certificate Program, and Implement New Sea Turtle Interaction Caps (Sept. 2008) (proposing to raise allowable annual take of loggerheads from 17 to 46). Each of these fishery expansions presents an imminent threat of increased harm to the North Pacific loggerhead.

Meanwhile, the United States has yet to adopt any meaningful plan for reducing greenhouse gases. As a result, the United States is responsible for over 20% of the world's total greenhouse gas emissions and United States emissions continue to grow. Atmospheric carbon dioxide concentrations now stand at approximately 385 parts per million (“ppm”), up from a preindustrial revolution concentration of 280 ppm, and are rising at more than 2 ppm per year. Thus, the threat to the loggerhead from global warming has increased since the filing of the petition, and will continue to do so.

The Center, Oceana, TIRN, and their members and staff are vitally concerned about and actively involved in the protection of the loggerhead sea turtle and its habitat. Our organizations' members and staff engage in professional, recreational, aesthetic and scientific activities involving this species and its habitat, including observing and attempting to observe the species. On their behalf, we urge you to take prompt action to protect the species under the Act. Accordingly, an acceptable remedy would be prompt issuance of 12-month findings on the North Pacific DPS Petition and Western North Atlantic DPS Petition and the concurrent publication of a proposed listing rule for each.

Hon. Otto J. Wolff, Hon. Ken Salazar, Dr. James W. Balsiger, and Dr. Rowan W. Gould  
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If the Fisheries Service does not act within 60 days to correct these violations of the Endangered Species Act, our organizations will pursue litigation in federal court. We will seek injunctive and declaratory relief regarding these violations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me. Thank you for your concern.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Treece', with a long horizontal flourish extending to the right.

Andrea A. Treece  
Senior Attorney, Oceans Program  
Center for Biological Diversity