



Turtle Island Restoration Network

Via Certified and Electronic Mail

April 30, 2013

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Re: Petition for Pelly Certification and PLMR Action to Halt Loggerhead Sea Turtle Bycatch in Mexico

Dear Secretary Blank, Director Lent, and Administrator Rauch,

On behalf of the Center for Biological Diversity (“the Center”) and Turtle Island Restoration Network (“TIRN”), we formally petition the U.S. government to take immediate action to halt ongoing loggerhead sea turtle bycatch in Mexico’s Baja California Sur. Over the past decade, scientists estimate that Mexican gillnet and longline fisheries have killed over 2,000 endangered North Pacific Ocean loggerheads a year. Bycatch reached a record high last July, when a mass mortality event left 483 loggerheads stranded on just one stretch of beach – a 600 percent increase over previous years’ averages. This extraordinarily high level of bycatch cannot be sustained and may ultimately drive this endangered sea turtle population to extinction.

Both the United States and Mexico have long-been aware of this loggerhead mortality and, as parties to the Inter-American Convention for the Protection and Conservation of Sea Turtles (“IAC”), have committed to reduce sea turtle bycatch “to the greatest extent practicable.” Art. IV(2)(h), S. TREATY DOC. NO. 105-48, 2164 U.N.T.S. 29. Yet Mexico has continued to violate the IAC by allowing its fishermen to kill thousands of endangered loggerhead sea turtles a year in Baja California Sur. We therefore request that the Secretary of Commerce formally

“certify” that Mexico is “diminish[ing] the effectiveness” of the IAC pursuant to the U.S. Pelly Amendment and thereby initiate possible trade sanctions.¹ 22 U.S.C. § 1978(a)(2), (4).

We further express our support for the National Marine Fisheries Service’s (“NMFS”) formal “identification” of Mexico pursuant to the Protected Living Marine Resources (“PLMR”) statute.² See 16 U.S.C. § 1826k. NMFS will now enter into negotiations with Mexico, and over the next two years, Mexico must adopt fishery regulations “comparable” to the United States in order to avoid import sanctions. *Id.* § 1826k(c)(1). We formally request that NMFS insist Mexico adopt a fully comparable and equally “effective” bycatch program to that in the United States, including equivalent time/area closures, bycatch triggered-closures, gear specifications, observer-based monitoring, and enforcement. We also request that, if Mexico receives a negative PLMR certification, NMFS and its Executive branch partners fully implement all statutorily required sanctions, including import prohibitions and denial of port privileges. *Id.* §§ 1826k(c)(5); 1826a(a)(2), (b)(3), (b)(4).

BACKGROUND

A. Endangered Loggerhead Sea Turtles in Baja California Sur, Mexico

The loggerhead sea turtle (*Caretta caretta*) inhabits temperate and tropical oceans around the globe. Named for their large heads, loggerheads have reddish-brown, slightly heart-shaped top shells and powerful jaws used to open hard-shelled prey.

NMFS has recognized nine distinct population segments of loggerhead sea turtle, including the North Pacific Ocean population. This population’s only documented nesting area is in Japan, and after hatching, juvenile sea turtles swim over 7,500 miles across the Pacific to foraging grounds off of Mexico and occasionally California.³ The waters off of Baja California Sur are a key juvenile foraging area, likely due to abundant pelagic red crabs, squid, and sardines.⁴ After spending several years in the eastern North Pacific, mature turtles then migrate back to their natal beaches in Japan for reproduction.

The loggerhead sea turtle was originally listed as “threatened” under the U.S. Endangered Species Act (“ESA”) in 1978. 43 Fed. Reg. 32,800 (July 28, 1978). However, in response to a petition by the Center and TIRN, NMFS in 2011 uplisted four populations, including the North Pacific Ocean loggerhead population, to “endangered” status. 76 Fed. Reg. 58,868 (Sept. 22,

¹ This request is made pursuant to the Administrative Procedure Act (“APA”). 5 U.S.C. § 553(e).

² See U.S. Department of Commerce, Improving International Fisheries Management, Report to Congress Pursuant to Section 403(a) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (Jan. 2013), at 27 (“2013 PLMR Report”).

³ Conant, T.A., et al. 2009. Loggerhead sea turtle (*Caretta caretta*) 2009 status review under the U.S. Endangered Species Act. Report of the Loggerhead Biological Review Team to the National Marine Fisheries Service (Aug. 2009), at 8.

⁴ Conant (2009); Peckham, H., et al. 2008. High mortality of loggerhead turtles due to bycatch, human consumption and strandings at Baja California Sur, Mexico, 2003 to 2007. Endangered Species Research, published on-line Oct. 13, 2008 (open access).

2011). Based on historical records, nesting of this population has declined between 50 to 90 percent over the last half-century. *Id.* at 58,900. Fishery bycatch remains “a significant threat to the persistence” of this population. *Id.* at 58,910.

B. Loggerhead Sea Turtle Bycatch in Baja California Sur

Over the past decade, scientists have documented extremely high levels of sea turtle bycatch mortality off the coast of Baja California Sur.⁵ This high-use foraging habitat for juvenile loggerheads coincides with a high-use area for small-scale fisheries primarily targeting finfish and sharks.⁶

A 2007 study by Dr. Hoyt Peckham documented bycatch from two fleets – one bottom-set gillnet fleet and one longline fleet – operating out of Puerto López Mateos and Santa Rosa, as well as stranding data from the area’s beaches.⁷ The study estimated that, at a minimum, the bycatch *for these two fleets alone* was over 1,000 loggerhead sea turtles a year.⁸ In a follow-up study published in 2008, the authors increased the estimated mortality to between 1,500 and 2,950 loggerheads a year for these same two fleets.⁹ Actual bycatch is likely much higher, as these estimates include only “2 of 12 or more fleets” that fish the area.¹⁰ Strandings are typically highest in July and August, coinciding with peak fishing effort.¹¹

High levels of strandings have continued and reached a record-high last year. In July 2012, 483 loggerhead sea turtles stranded along a 26-mile stretch of the Baja California Sur coast – a 600% increase over the already “alarming” average number of strandings in July since 2003.¹² This mass stranding event corresponded with an “unusually high turtle bycatch observed at-sea” and “was likely caused by increases in fishing effort” in the area, as well as large, near-shore turtle densities.¹³ Similarly, the Mexican National Fisheries Institute (“INAPESCA”) reported on gillnet fishery trials conducted in July 2012 and documented the capture of 88

⁵ Conant (2009), at 112, citing Nichols, W.J. 2003. Biology and conservation of sea turtles of Baja California, Mexico. Unpublished Ph.D. Dissertation, University of Arizona, Tucson. 546 pp.

⁶ Koch, V., et al. 2013. Estimating At-Sea Mortality of Marine Turtles from Stranding Frequencies and Drifter Experiments. PLoS ONE 8(2): e56776. doi:10.1371/journal.pone.0056776.

⁷ Peckham, H., et al. 2007. Small-scale Fisheries Bycatch Jeopardizes Endangered Pacific Loggerhead Turtles. PLoS ONE 2(10): e1041. doi:10.1371/journal.pone.0001041.

⁸ *Id.*; see also Conant (2009), at 117.

⁹ Peckham (2008).

¹⁰ *Id.*

¹¹ Koch (2013).

¹² See Esliman, A., et al. 2012. Mass Mortality of the Loggerhead Turtle in Baja California Sur, Mexico (unpublished).

¹³ *Id.*

loggerheads in just eight days, providing additional, direct evidence of high turtle bycatch in this fishery.¹⁴

Baja California Sur may have “the highest known rates of turtle bycatch and strandings worldwide” and is now considered a global bycatch hotspot.¹⁵ NMFS has recognized that “[i]ncidental capture in artisanal and commercial fisheries,” particularly in gear off of Baja California Sur, “is a significant threat to the persistence” of North Pacific Ocean loggerheads.¹⁶ 76 Fed. Reg. 58,868. In fact, NMFS has determined that killing between just 37 to 92 Pacific Ocean loggerhead turtles “would be expected to increase the extinction risk” of the population and would ultimately “jeopardize the continued existence of loggerhead sea turtles.”¹⁷

C. Mexico’s Sea Turtle Protection Authority

In response to the documented loggerhead bycatch, cooperative work between scientists, NGOs, and fishermen has resulted in voluntary conservation measures in Baja California Sur.¹⁸ But despite these efforts, bycatch has continued. As described below, Mexico can and must adopt additional, mandatory sea turtle protection measures.

Mexico has designated the loggerhead as a species “in danger of extinction” pursuant to its General Wildlife Law, which is equivalent to an “endangered” listing under U.S. law.¹⁹ This

¹⁴ Instituto Nacional de Pesca. Evaluación Biotecnológica de Artes de Pesca Alternativas en la Pesquería Ribereña del Golfo de Ulloa B.C.S. Para Evitar la Captura Incidental de Especies No Objetivo (Octubre 2012). Dirección General Adjunta de Investigación Pesquera en el Pacífico. Subdirección de Tecnología en el Pacífico Norte. México. 29 pp.

¹⁵ Peckham (2008); See Wallace B., et al. 2013. Impacts of fisheries bycatch on marine turtle populations worldwide: toward conservation and research priorities. *Ecosphere* 2013 4:3, art40. Massive bycatch of endangered green sea turtles has also been documented in Baja California Sur. One study estimated that, between 2006 and 2008, 1,172 green sea turtles stranded in the area, likely due to gillnet entanglement. See Mancini, A., et al. 2011. Small-scale gill-net fisheries cause massive green turtle *Chelonia mydas* mortality in Baja California Sur, Mexico. *Oryx*, 46(1), 69-77. A March 2013 study of international sea turtle bycatch identified the Pacific coast of Baja California Sur as a hotspot for green sea turtle bycatch in gillnets. See Wallace (2013), at Fig. 5.

¹⁶ See also NMFS, Biological Opinion: Continued Operation of the Hawaii-based Shallow-set Longline Swordfish Fishery – Under Amendment 18 to the Fishery Management Plan for Pelagic Fisheries of the West Coast Region (Amended May 22, 2012), at 24 (“Interactions and mortality with coastal and artisanal fisheries in Mexico and the Asian region likely represent the most serious threats to North Pacific loggerheads.”).

¹⁷ NMFS, Highly Migratory Species Fisheries Management Plan Biological Opinion (Feb. 4, 2004), at 227, 230.

¹⁸ See Cronología de la gestión ante las autoridades con relación a la mitigación de la captura incidental de tortuga amarilla en el Golfo de Ulloa; Hawaii-based Shallow-set Longline Swordfish Fishery BiOp, at 29 (describing NGO efforts).

¹⁹ NOM-059-SEMARNAT-2010, D.O., 30 de diciembre de 2010.

listing generally prohibits extractive use of the species.²⁰ In 1990, Mexico also expressly prohibited the direct, intentional take of sea turtles.²¹

Mexican wildlife agencies clearly have the authority to regulate fisheries. Mexico controls most commercial fishing through concessions and permitting pursuant to its Fisheries Law and its Regulation to the Fisheries Law.²² Under the Fisheries Law, Mexican wildlife agencies, including the Ministry of the Environment and Natural Resources (“SEMARNAT”) and the National Commission of Aquaculture and Fisheries (“CONAPESCA”), may require conservation measures and closures to protect sea turtles, marine mammals, and other at-risk aquatic species from fishing gear entanglement.²³

Pursuant to these provisions, Mexico has instituted some sea turtle bycatch measures in the Pacific.²⁴ In 2006, Mexico issued new rules for its shark fishery, one of the primary fisheries in Baja California Sur, requiring circle hooks at certain times and depths, sea turtle handling and release requirements, an onboard observer program, and fishing closures near identified turtle nesting areas.²⁵ In 2012, Mexico closed the Pacific shark fishery from May through July to support shark reproduction.²⁶ Mexico has also adopted gillnet restrictions, including limiting mesh size and net length.

Yet despite these requirements, substantial bycatch and mortality has continued to occur in Baja California Sur, including the mass stranding event in July 2012.²⁷ As several scientists have noted, “[g]overnment action is urgently needed to mitigate turtle bycatch” in Baja California Sur, and “enforcement is required to curb illegal fishing” in the area.²⁸ NMFS has also

²⁰ See *Ley General de Vida Silvestre*, D.O., 3 de julio de 2000; see also Inter-American Convention for the Protection and Conservation of Sea Turtles [Mexico] 2012 Annual Report (April 30, 2012) (describing Mexico’s domestic wildlife protection laws relevant to sea turtles).

²¹ Acuerdo por el que se establece veda para las especies y subespecies de tortuga marina en aguas de jurisdicción Federal del Golfo de México y Mar Caribe, así como en las costas del Océano Pacífico, incluyendo el Golfo de California, D.O., 31 de mayo de 1990.

²² See *Ley de Pesca*, D.O., 9 de junio de 1992; Reglamento de la Ley de Pesca, D.O. 29 de septiembre de 1999.

²³ *Id.*; see Council on Environmental Cooperation, Summary of Environmental Law in Mexico (1995), available at: <http://www.cec.org/lawdatabase/mx17.cfm?varlan=english> (last visited Apr. 29, 2013).

²⁴ Since 1997, Mexico has also required the use of Turtle Excluder Devices (“TEDs”) in trawl nets used in the commercial shrimp fishery throughout Mexican waters. See NOM-002-PESC-1993, D.O., 31 de diciembre de 1993, as amended D.O., 30 de julio de 1997); Mexico 2012 Annual IAC Report, at 29.

²⁵ NOM-029-PESC- 2006, D.O., 14 de febrero 2007; Mexico 2012 Annual IAC Report, at 16.

²⁶ See Esliman (2012). It is believed that, as a result of the 2012 shark fishery closure, shark fishermen in Baja California Sur shifted to finfishing with bottom-set nets and deployed more gear than usual, which may have caused the July 2012 mass stranding. *Id.*

²⁷ *Id.*

²⁸ Esliman (2012); see also Peckham (2008) (noting that “conservation action to reduce bycatch” in Baja California Sur “is urgently needed”).

concluded that “reducing bycatch in small-scale fisheries” in Baja California is critical because bycatch is “one of the most significant sources of mortality” for North Pacific Ocean loggerheads.²⁹

D. U.S. Sea Turtle Protection Measures

In contrast to Mexico, the United States has taken substantial steps to limit bycatch of North Pacific Ocean loggerheads. Because this population is listed as endangered under the U.S. Endangered Species Act, the take – including the incidental harm, killing, or capture – of loggerheads is strictly regulated. 16 U.S.C. §§ 1538(a); 1532(19). NMFS may authorize the limited, incidental take of loggerheads in fishing gear, but only if the agency determines the take will not jeopardize the population’s continued existence. *Id.* § 1536(a).

U.S. fishermen must comply with a variety of closures and mandatory gear modifications that limit bycatch of North Pacific Ocean loggerheads.³⁰ For example, gillnet fishing is banned in some waters in the United States. Since 1994, gillnets have been entirely prohibited in most California state waters (within three nautical miles of the coast) from the Mexico border north to Point Arguello. CAL. FISH & GAME CODE §§ 8610.2; 8610.3. In 2002, the ban was extended north to Point Reyes in ocean waters 60 fathoms or less.³¹ CAL. CODE REGS. tit. 14 § 104.1; *see also* CAL. FISH & GAME CODE §§ 8680 (requiring other area closures and gillnet gear restrictions). NMFS has instituted area closures for drift gillnets extending 25 nautical miles offshore or throughout the U.S. Exclusive Economic Zone (“EEZ” or within 200 nautical miles of the coastline), depending on the season. 50 C.F.R. § 660.713(d).

NMFS has also implemented gillnet closures specifically to protect loggerhead sea turtles. Since 2004, NMFS has required the closure of the California/Oregon drift gillnet fishery off of southern California during El Niño events, when loggerheads are most likely to move north from Baja, following their pelagic red crab prey.³² 50 C.F.R. § 660.713(c)(2). The West Coast-based Highly Migratory Species (“HMS”) fishery, which includes the California/Oregon driftnet fishery, is permitted to cause no more than two loggerhead mortalities annually.³³

²⁹ Conant (2009), at 116.

³⁰ Petitioners note that, while the U.S. has taken action to limit loggerhead sea turtle bycatch, these actions may not be sufficient to avoid jeopardy of the critically imperiled North Pacific Ocean loggerhead.

³¹ In addition to closures, specific gear modifications have been required for bottom-set gillnet fisheries on the U.S. East Coast. For example, North Carolina requires gear modifications for inshore set gillnets, including limitations on soak time, net length, and gillnet heights. *See* North Carolina Division of Marine Fisheries Proclamation M-8-2010 (effective May 15, 2010). NMFS has proposed, but has not yet issued, an incidental take permit for this fishery, which would adopt these restrictions as ESA requirements. 77 Fed. Reg. 65,864 (Oct. 31, 2012); *see also* 50 C.F.R. § 223.206(d) (Atlantic gillnet closures).

³² NMFS has also implemented closures for the fishery throughout most of the U.S. EEZ during August through November to protect leatherback sea turtles. 50 C.F.R. § 660.713(c)(1).

³³ NMFS, Highly Migratory Species Fishery Management Plan Biological Opinion, at 238 (2004).

Longline fishing has also been heavily restricted. For example, for West Coast-based HMS vessels, pelagic longline fishing is generally prohibited within the U.S. EEZ. *Id.* § 660.712(a). NMFS has also prohibited the use of longline gear for West Coast-based swordfish fisheries on the high seas in the North Pacific Ocean east of 150° W specifically to protect loggerheads. *Id.* § 223.206(d)(9).

Additionally, in response to the Hawaii-based shallow-set pelagic longline fishery's substantial loggerhead bycatch in the early 2000s, NMFS required the fishery's use of circle hooks and mackerel baiting.³⁴ *See Id.* § 665.813(f), (g). NMFS has also set hard limits for bycatch – if the shallow-set pelagic longline fishery catches 34 loggerheads in one calendar year, NMFS requires the fishery's full closure. *Id.* § 665.813(b). NMFS now estimates that this fishery kills seven loggerheads per year.³⁵

NMFS is further authorized to require observers on any fishing vessel, whether recreational or commercial, operating in U.S. waters, allowing NMFS to track and estimate sea turtle interactions and evaluate existing bycatch measures. 50 C.F.R. § 222.401; 77 Fed. Reg. 75,999 (Dec. 26, 2012). In the Hawaii-based shallow-set longline fishery, NMFS requires 100% observer coverage.³⁶ The agency dictates handling and release methods for bycaught turtles and requires attempted resuscitation. 50 C.F.R. §§ 223.206(d); 660.711(d). While some loggerhead sea turtle bycatch continues in U.S. fisheries, the United States, in contrast with Mexico, has taken action to greatly reduce its bycatch.

PETITION PURSUANT TO PELLY

The ongoing, unsustainable loggerhead bycatch in Mexico not only threatens the North Pacific Ocean population's continued existence but violates international law. As described below, under the Inter-American Convention for the Protection and Conservation of Sea Turtles, both the U.S. and Mexico have committed to reduce “to the greatest extent practicable” sea turtle bycatch through fishery regulations and enforcement. Yet Mexico continues to allow its fishermen to kill thousands of endangered loggerheads each year off Baja Sur California, “diminish[ing] the effectiveness” of the treaty. Accordingly, we request that the Secretary of Commerce certify Mexico pursuant to the U.S. Pelly Amendment to stem the ongoing bycatch.

A. Inter-American Convention

The Inter-American Convention for the Protection and Conservation of Sea Turtles (“IAC” or “the Convention”) recognizes that sea turtles are threatened with extinction across the

³⁴ NMFS has also required gear modifications for bottom-set longline fisheries on the East Coast. For example, in order to protect North Atlantic Ocean DPS loggerheads, NMFS prohibits bottom longline gear in the Gulf of Mexico reef fish fishery in shallow waters off of Florida from June through August and limits the number of hooks that may be rigged. 50 C.F.R. § 622.5(q).

³⁵ NMFS, Hawaii-based Shallow-set Longline Swordfish Fishery BiOp, at 8, 70, 125. We note that the 34 sea turtle limit may not be sufficient to avoid jeopardy of this population and further reductions may be required.

³⁶ *Id.* at 73.

Americas, and because they migrate widely, their protection requires cooperation between all range states. *See* Inter-American Convention for the Protection and Conservation of Sea Turtles, Dec. 1, 1996, S. TREATY DOC. NO. 105-48, 2164 U.N.T.S. 29. Negotiated in 1996, the treaty entered into force in 2001 and has been ratified by fifteen nations, including the United States and Mexico.

The Convention requires that “[e]ach Party shall take appropriate and necessary measures, . . . on the basis of the best available scientific evidence, for the protection, conservation and recovery of sea turtle populations.” *Id.*, Art. IV. Specifically, “[s]uch measures *shall include*” both the “prohibition of the intentional . . . killing of” sea turtles and “[t]he reduction, to the greatest extent practicable, of the incidental capture, . . . harm or mortality of sea turtles in the course of fishing activities, through the appropriate regulation of such activities.” *Id.*, Art. IV(2)(a), (h) (emphasis added). Each party also “shall establish . . . a program to ensure monitoring” and “effective compliance with measures to protect and conserve sea turtles . . . set forth in this Convention or adopted pursuant thereto.” *Id.*, Art. IX, X. Finally, each Party must submit an annual report regarding its sea turtle protection programs. *Id.*, Art. XI.

B. Pelly Amendment

Enacted in 1971 and amended in 1978, the Pelly Amendment to the Fishermen’s Protective Act of 1967 (“Pelly Amendment”) provides the U.S. leverage to encourage other nations’ compliance with international agreements through trade restrictions. *See Am. Cetacean Soc’y v. Baldrige*, 768 F.2d 426 (D.C. Cir. 1985). The Pelly Amendment requires that, when the “Secretary of Commerce . . . finds that nationals of a foreign country, directly or indirectly, are engaging in . . . taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary . . . shall certify such fact to the President.” 22 U.S.C. § 1978(a)(2). Upon receiving a certification, the President may “prohibit . . . the importation into the United States of any products from the offending country.” *Id.* § 1978(a)(4). The Pelly Amendment then makes importation in violation of that prohibition unlawful. *Id.* § 1978(c).

The Pelly Amendment defines “taking” to include “harass[ing], harm[ing], . . . wound[ing], kill[ing], . . . [or] captur[ing]” protected animals. *Id.* § 1978(h)(5). The Pelly Amendment also defines an “international program for endangered or threatened species” as “any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to protect endangered or threatened species of animals.” *Id.* § 1978(h)(4). The IAC is clearly an “international program for endangered or threatened species” covered by Pelly, as it protects several ESA-listed sea turtles.

The Secretary is required to “promptly investigate any activity by foreign nationals that . . . may be cause for certification” and “promptly conclude” those investigations. 22 U.S.C. § 1978(a)(3). The Secretary’s decision to certify a country’s “departure” from a treaty requirement under Pelly may only be based on conservation concerns. *See Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221 (1986) (suggesting the Secretary may *not* refuse to certify a violation for a “reason not connected with the aims and conservation goals” of the treaty);

Greenpeace, U.S.A. v. Mosbacher, 719 F. Supp. 21, 24 (D.D.C. 1989) (noting that “a decision based on factors other than conservation constitutes an abuse of discretion”). Further, once a certification has been issued, the President may prohibit the import of *any* product from an offending country, not just importation of the particular wildlife species covered by the treaty. See *Florsheim Shoe Co. v. United States*, 19 C.I.T. 295, 297 (1995) (approving Pelly-based Presidential proclamation prohibiting importation of all wildlife products from Taiwan, including elk skin shoes, even though the treaty violation involved endangered tigers and rhinos).

C. Request for Pelly Certification of Mexico for its Loggerhead Bycatch

By allowing the continued bycatch of endangered loggerhead sea turtles, Mexican fishing vessels are “engaging in . . . taking which diminishes the effectiveness” of the Inter-American Convention for the Protection and Conservation of Sea Turtles. 22 U.S.C. § 1978(a)(2). Accordingly, we formally request the Secretary of Commerce certify Mexico pursuant to the Pelly Amendment and seek trade sanctions against Mexican imports.

As described above, for over a decade, scientists have documented extensive bycatch mortality in Baja California Sur fisheries. These gillnet and longline fisheries may be taking over 2,000 loggerheads a year and likely caused a mass stranding event in 2012.³⁷ Under the IAC, both the U.S. and Mexico have agreed to reduce fishery-related incidental mortality of sea turtles “to the greatest extent practicable” and to ensure enforcement of fishery regulations. 2164 U.N.T.S. 29, Art. IV(2)(h); Art. X. Yet Mexico has continued to allow its fishing vessels to kill thousands of endangered loggerhead sea turtles a year in Baja California Sur without sufficient regulation or enforcement, violating and “diminish[ing] the effectiveness” of the treaty. 22 U.S.C. § 1978(a)(2).

In its 2012 annual report required under the IAC, Mexico acknowledged that “gillnets and longlines interact with sea turtles” in its waters but claimed that “there are no specific studies on incidental capture that allows us to understand both spatially and temporally, the size of the problem.”³⁸ To the contrary, a decade of research has clearly demonstrated massive gillnet and longline bycatch in the Gulf of Ulloa in Baja California Sur, and gillnet trials conducted by Mexico last summer further substantiate this bycatch.³⁹

Accordingly, we request that the Secretary “certify” Mexico pursuant to the Pelly Amendment to encourage Mexico’s compliance with international law. 22 U.S.C. § 1978(a)(2). We further request the Secretary recommend to the President that he prohibit importation of Mexican products until Mexico substantially reduces loggerhead bycatch. *Id.* § 1978(a)(4). The Secretary must act to halt the ongoing loggerhead bycatch in Mexico to preserve this population’s chance for survival.

³⁷ See Peckham (2008); Esliman (2012).

³⁸ Mexico 2012 Annual IAC Report, at 29.

³⁹ Peckman (2007); Peckman (2008); INAPESCA (Oct. 2012).

REQUEST FOR PLMR ACTION

In January 2013, NMFS formally “identified” Mexico for its loggerhead bycatch pursuant to the “protected living marine resources” (“PLMR”) provision, also referred to as the Moratorium Protection Act.⁴⁰ The PLMR statute requires NMFS, in conjunction with several other agencies, to identify, certify, and sanction nations whose fisheries cause PLMR bycatch and who fail to adopt regulations “comparable” to U.S. bycatch measures. 16 U.S.C. § 1826k. We strongly support NMFS’s identification of Mexico.

NMFS will now initiate negotiations and decide whether to formally “certify” Mexico under the PLMR statute.⁴¹ As described below, in order for Mexico to avoid a negative certification, Mexico must adopt loggerhead bycatch regulations that are fully comparable to those applied in the United States, including similar area closures, gear specifications, observer-based monitoring, and adequate enforcement. We also remind NMFS and its Executive branch partners of their statutory mandate to levy sanctions, including the denial of port privileges and import prohibitions, if Mexico is negatively certified under PLMR. *Id.* §§ 1826k(c)(5); 1826a(a)(2), (b)(3), (b)(4).

A. Protected Living Marine Resources Provision

As part of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Congress enacted several new provisions to encourage other nations to adopt and comply with domestic and international fishery measures. Pub. L. 109-479, 121 Stat. 3575 (2007). One such provision seeks to reduce bycatch of “protected living marine resources” (“PLMRs”), defined as “non-target fish, sea turtles, or marine mammals that are protected under United States law or international agreement,” including both the ESA and the Marine Mammal Protection Act (“MMPA”). 16 U.S.C. § 1826k(e).

Under the PLMR provision, “every two years,” the Secretary of Commerce must issue a report to Congress in which the Secretary:

shall identify and list . . . a nation if:

- (A) fishing vessels of that nation . . . have been engaged during the preceding calendar year in fishing activities . . . beyond the [EEZ] of the United States that result in bycatch of a [PLMR] shared by the United States;
- (B) the relevant international organization for the conservation and protection of [a PLMR] . . . has failed to implement effective measures to end or reduce such bycatch . . . ; and
- (C) the nation has not adopted a regulatory program governing such fishing practices designed to end or reduce such bycatch that is comparable to that of the United States, taking in account different conditions.

Id. §§ 1826h; 1826k(a)(1).

⁴⁰ See 2013 PLMR Report, at 27.

⁴¹ *Id.* at 16.

Identification of a country triggers a series of negotiations and potential sanctions. Specifically, within 60 days of identification, the Secretary must notify and initiate discussions with the identified nation. *Id.* §§ 1826h; 1826k(b); 50 C.F.R. § 300.203(c)(1). Then, based on the nation’s response and in its next biennial report to Congress, the Secretary “shall certify” – either positively or negatively – whether the nation:

- (A) has . . . adopt[ed] . . . a regulatory program governing the conservation of the [PLMR] that is comparable to that of the United States, taking into account different conditions . . .; and
- (B) has established a management plan containing requirements that will assist in gathering species-specific data to support international stock assessments and conservation enforcement efforts for [PLMRs].

16 U.S.C. § 1826k(c)(1). The provision specifies that, “in the case of pelagic longline fishing,” the foreign regulatory program must “include[] mandatory use of circle hooks, careful handling and release equipment, and training and observer programs.” *Id.* Alternatively, the Secretary may issue a certification “on a shipment-by-shipment, shipper-by-shipper, or other basis” applying the same standards. *Id.* § 1826k(c)(4).

Then, for any nation “that has not been certified . . . or for which the Secretary has issued a negative certification” because the country has failed to adopt a “comparable” regulatory program, sanctions must issue. *Id.* § 1826k(c)(5). First, the Secretary of Treasury “shall . . . deny entry of [any relevant foreign fishing] vessel to any place in the United States,” including into any U.S. navigable waters. *Id.* § 1826a(a)(2)(B). Second, the Secretary “shall . . . withhold or revoke the clearance required by” law prior to exiting a U.S. port. *Id.* § 1826a(a)(2)(A). Third, the President “shall direct the Secretary of Treasury to prohibit the importation into the United States of fish and fish products” from the certified nation. *Id.* § 1826a(b)(3). And finally, if within six months, the Secretary of Commerce finds the Presidentially-imposed trade sanctions are “insufficient to . . . terminate” the PLMR bycatch, the Secretary “shall certify” the nation pursuant to the Pelly Amendment, as discussed above. *Id.* § 1826a(b)(4). If a nation is identified under Pelly, the President may then prohibit the import of *any* product from the country, not just fish-related products. *See* 22 U.S.C. § 1978; *Florsheim Shoe Co.*, 19 C.I.T. at 297.

B. 2013 PLMR Identifications

In January of 2013, the Secretary of Commerce, acting through NMFS, issued a biennial report to Congress, and for the first time, “identified” a nation for PLMR bycatch – Mexico. NMFS cited the “438 loggerhead sea turtles stranded, dead” along the coast of Baja California Sur during the summer of 2012 and also noted the 88 additional loggerheads captured in 2012 in gillnet fishery trials.⁴² The agency determined the strandings were likely caused by fishery bycatch and that documented strandings likely represent only a small portion of sea turtles actually killed. Based on this information, NMFS concluded that Mexican “vessels engaged in

⁴² *See id.* at 27-28; *see also* Esliman (2012); INAPESCA (Oct. 2012).

bycatch of a shared PLMR without a regulatory program that is comparable in effectiveness to that of the United States.”⁴³

We strongly applaud NMFS for identifying Mexico for its loggerhead sea turtle bycatch. The identification was clearly warranted under the statutory standards, as scientists documented hundreds of bycatch-related loggerhead strandings last year, even above the extraordinarily high levels seen in the past decade. 16 U.S.C. § 1826k(a).

C. Comparable Law

Now that NMFS has identified Mexico under the PLMR provision, over the next two years, NMFS must negotiate and then “certify” whether Mexico has adopted a bycatch regulatory program “that is comparable to that of the United States.” 16 U.S.C. § 1826k(c)(1). In making this determination, NMFS must first review regulations applied to U.S. fishermen to limit North Pacific Ocean loggerhead bycatch, including gear technology, data collection, monitoring, and enforcement. 76 Fed. Reg. 2011, 2018 (Jan. 12, 2011); *see also* 16 U.S.C. § 1826k(c)(1) (for “comparable” pelagic longline fisheries, requiring specific gear modifications, handling requirements, and observer programs). Further, the program must be at least “comparable in effectiveness” to U.S. regulatory measures.⁴⁴ 50 C.F.R. § 300.203(e). Accordingly and as detailed below, NMFS must insist that Mexico adopt a regulatory program that achieves the same levels of North Pacific loggerhead bycatch reduction as U.S. fisheries through equivalent triggered closures, time/area closures, and gear modifications.

First, Mexico must adopt a program that is “comparable in effectiveness” to U.S. bycatch standards. 50 C.F.R. § 300.203(e). As described above, the U.S. has substantially reduced North Pacific loggerhead bycatch in both its gillnet and longline fisheries.⁴⁵ Specifically, due to broad area closures and additional seasonal closures specifically intended to protect loggerheads, NMFS estimates that the West Coast-based Highly Migratory Species fishery causes only two North Pacific loggerhead mortalities each year.⁴⁶ *Id.* § 660.713(c), (d). Due to sea turtle conservation measures, the Hawaii-based pelagic longline fishery has reduced North Pacific

⁴³ 2013 PLMR Report at 27. NMFS also identified Mexico for engaging in “illegal, unreported, or unregulated” (“IUU”) fishing, pursuant to Section 1826j of the MSA. *Id.* NMFS found that five Mexican vessels “violated sea turtle bycatch mitigation measures” in Resolution C-04-05 of the Inter-American Tropical Tuna Commission “by failing to release turtles.” *Id.*; *see* IATTC Res. C-04-05 (June 2006) (mandating that parties “[r]equire fishermen . . . to promptly release unharmed, to the extent practicable, all sea turtles”). The IUU provision provides for an identification, certification, and sanctions process similar to PLMR. *See* 16 U.S.C. § 1826j(d).

⁴⁴ *See also* 2013 PLMR Report, at 28 (finding Mexican regulations “are not comparable in effectiveness to U.S. regulations for bycatch of North Pacific loggerheads”).

⁴⁵ We again note that, while U.S. loggerhead bycatch has been reduced over the past 20 years, U.S. regulation may not be sufficient to protect this endangered population or to avoid jeopardy. We cite these U.S. take rates and bycatch measures only to describe the minimum, existing U.S. standards with which the Mexican bycatch program must compare.

⁴⁶ NMFS, HMS BiOp, at 238.

Ocean loggerhead mortalities to an estimated seven turtles a year.⁴⁷ *Id.* §§ 223.206(d)(9); 665.813(f), (g). In order for Mexico’s fishery measures to be “comparable” to U.S. standards, Mexico must reduce bycatch to equivalent levels.

Second, seasonal and area closures have been widely imposed in both U.S. gillnet and longline fisheries. For nearly 20 years, gillnet fishing has been banned in shallow waters off of southern California, including in all areas within three nautical miles of the shoreline. CAL. FISH & GAME CODE §§ 8610.2; 8610.3; CAL. CODE REGS. tit. 14 § 104.1. NMFS also closes the California/Oregon drift gillnet fishery off of southern California during El Niño events to protect loggerheads. 50 C.F.R. § 660.713(c)(2). Pelagic longlines are prohibited in the West Coast-based HMS fishery. *Id.* § 660.712(a). And if the Hawaii shallow-set fishery exceeds established loggerhead catch levels in any calendar year, a fishery closure is triggered automatically. *Id.* § 665.813(b).

Mexico must implement equivalent closures, including triggered closures when take limits are exceeded and closures in areas and times with highest concentrations of loggerhead sea turtle habitat use in Baja California Sur. Specifically, the U.S. government should propose that Mexico implement a year-round marine protected area or seasonal time area closure encompassing waters in Bahia de Ulloa offshore of Santa Rosa and Puerto Lopez Mateos covering the 50% utilization distribution for observed loggerheads. *See* Att. A (Figure 1 from Peckham (2007)).⁴⁸ Researchers have identified this area, consisting of 4,115 square kilometers centered 32 kilometers from the Baja California Sur coast.⁴⁹ Fishers of Puerto Lopez Mateos declared this core high use area a voluntary “Fishers’ Turtle Reserve” in 2006, and a coalition of fishers, managers, scientists, and citizens have sought federal legislation to establish and co-manage the reserve.⁵⁰

Third, the U.S. has required specific gear modifications to reduce North Pacific Ocean loggerhead bycatch and mortality.⁵¹ For example, NMFS requires the Hawaii-based pelagic longline fishery to use circle hooks and mackerel baiting. 50 C.F.R. § 665.813(f), (g). While sea turtle bycatch in Mexico has been associated with bottom-set gillnets and bottom-set longlines, not pelagic longlines, Mexico must adopt equivalent gear modifications to reduce bycatch, including limiting gillnet mesh size, net heights, net lengths, and limiting soak times.⁵²

⁴⁷ NMFS, Hawaii-based Shallow-set Longline Swordfish Fishery BiOp, at 8, 125.

⁴⁸ *See* Peckham (2007), Figure 1.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Congress clearly intended that “comparable” fishery programs include equivalent gear measures. While Congress only specified what constitutes a “comparable” program for one fishery – pelagic longline, it required that comparable pelagic longline programs “include [] mandatory use of circle hooks.” 16 U.S.C. § 1826k(c)(1). Accordingly, comparable programs for other fisheries must also include gear modification.

⁵² *See, e.g.*, 77 Fed. Reg. 65,864 (Oct. 31, 2012) (proposing North Carolina’s set gillnet gear modifications, including limits on soak times, line lengths, and net heights); 50 C.F.R. § 622.35(q) (limiting number of hooks in bottom set longline gear in the Gulf of Mexico reef fish fishery).

Finally, Mexico must adopt and implement a plan to “gather . . . species-specific data to support international stock assessments and conservation enforcement efforts” for sea turtles, including an onboard observer program in all relevant fisheries. 16 U.S.C. § 1826k(c)(1);⁵³ 76 Fed. Reg. at 2015 (NMFS will consider whether comparable “[p]rograms for data collection and sharing, including . . . observer programs” have been implemented). NMFS requires that, upon request by the agency, all fishing vessels, whether recreational or commercial, operating in U.S. waters carry observers to track bycatch. 50 C.F.R. § 222.401. In the Hawaii-based shallow-set longline fishery, NMFS requires 100% observer coverage.⁵⁴ While Mexico has adopted an onboard observer program for its Pacific Ocean shark fishery,⁵⁵ to be “comparable,” Mexico must adopt an observer program in all fisheries taking North Pacific Ocean loggerheads and expand observer coverage to more fully and accurately track take levels.

In sum, in order for Mexico to avoid a negative PLMR certification and thus sanctions under that statute, Mexico must adopt a bycatch regulation program for its gillnet and longline fisheries that is fully comparable to U.S. bycatch measures. Mexico’s program must reduce bycatch to similar levels and include equivalent restrictions, including numeric take limits that trigger closures, time/area closures, gear restrictions, observer requirements, and full enforcement. 16 U.S.C. § 1826k(c)(1).

D. Penalties

Finally, if Mexico is negatively certified by NMFS in two years, or if NMFS is unable to make a certification decision, specific sanctions “shall” apply. 16 U.S.C. § 1826k(c)(5). The Secretary of Treasury “shall . . . deny entry of that vessel” into U.S. waters and “withhold or revoke” U.S. port privileges. *Id.* § 1826a(a)(2)(B), (a)(2)(A). Additionally, the President “shall direct the Secretary of Treasury to prohibit the importation into the United States of fish and fish products” from the certified nation.⁵⁶ *Id.* § 1826a(b)(3).

Despite these requirements, NMFS suggests in its 2013 PLMR Report that sanctions are discretionary, stating that if an identified country “receives a negative certification, sanctions

⁵³ See also 16 U.S.C. § 1826k(c)(1) (specifically requiring that, for a foreign pelagic longline fishery to be “comparable,” “observer program[s]” are required).

⁵⁴ NMFS, Hawaii-based Shallow-set Longline Swordfish Fishery BiOp, at 73.

⁵⁵ Mexico 2012 Annual IAC Report, at 16.

⁵⁶ Pursuant to the statute, the President must level import sanctions against a certified nation, although he maintains discretion regarding which fish or fish products to ban. Specifically, the PLMR provision does not contain its own penalty provisions, but instead references penalties set out in a separate section, under the High Seas Driftnet Fishery Enforcement Act (“HSDFEA”). See 16 U.S.C. § 1826k(c)(5). The HSDFEA states that the President “shall” levy import sanctions but only “if consultations” required *under the HSDFEA* are not “satisfactorily concluded.” *Id.* § 1826a(b)(3)(A)(i). While this language allows some discretion for determining whether *HSDFEA* consultations are “satisfactory” before sanctions must issue, in contrast, the PLMR provision sets out a specific, two-year identification, negotiation, and certification process. *Id.* § 1826k(c). If a country is certified after this PLMR process, consultations have clearly not concluded “satisfactorily,” and thus import prohibitions “shall” be implemented.

under that statute *may* be applied.”⁵⁷ The agency’s final PLMR regulation is equally non-committal, stating that negatively or non-certified nations “*could* face denial of port privileges, prohibitions on the import of fish . . . , and other appropriate measures.” 76 Fed. Reg. at 2015. However, the statute clearly mandates that sanctions “shall” apply, and NMFS, in coordination with its Executive branch partners, is obligated levy those sanctions. We request that NMFS ensure that all required, mandatory sanctions are implemented if Mexico is ultimately certified for its PLMR bycatch.

CONCLUSION

The Center and TIRN formally petition the Secretary of Commerce to certify Mexico pursuant to the Pelly Amendment for “diminish[ing] the effectiveness” of the Inter-American Convention for the Protection and Conservation of Sea Turtles. 22 U.S.C. § 1978(a)(2); 2164 U.N.T.S. 29. Further, in its upcoming PLMR negotiations, we request that NMFS insist Mexico adopt fishery regulations that are fully comparable to those applied in the United States, including equally “effective” bycatch measures and triggered-closures, time/area closures, and gear specifications. We also ask that the agency ensure all required sanctions are levied under the PLMR statute, including denial of port privileges and trade sanctions. *Id.* § 1826k(c)(5), (a)(2), (b)(3), (b)(4).

We welcome the opportunity to discuss this issue with NMFS. As the agency is aware, the IAC Conference of the Parties will be held this June in Ecuador. We encourage the United States to take this opportunity to discuss this troubling issue with Mexico and other Parties order to negotiate an immediate resolution, and we offer any possible assistance in this regard.

Sincerely,



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⁵⁷ 2013 PLMR Report, at 14 (emphasis added).

Attachment A:

Recommended Closure Area

From: Peckham, H., et al. 2007. Small-scale Fisheries Bycatch Jeopardizes Endangered Pacific Loggerhead Turtles. PLoS ONE 2(10): e1041. doi:10.1371/journal.pone.0001041.

Figure 1. Kernel Density of Loggerhead Turtle Habitat Use in the North Pacific. Inset: Positions of tracked loggerheads (yellow) spanned the North Pacific Basin. The 50% utilization distribution for observed loggerheads consisted of an area of 4,115 km² centered 32 km from the BCS coast, well within the 55 km range of small-scale fisheries (white line).
 doi:10.1371/journal.pone.0001041.g001

