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Dear Dr. Hirshfield,

Thank you for your August 4, 2005, petition for rulemaking pursuant to the Administrative Procedure Act, 5 U.S.C. 553(e). NOAA's National Marine Fisheries Service (NMFS) has carefully considered your petition for rulemaking to protect sea turtles.

The petition requests that NMFS promulgate regulations that require the agency to (1) conduct in-water population level assessments; (2) increase observer coverage to obtain accurate information on the number of sea turtles caught in all fisheries; and (3) establish a quantitative method for determining take limits for biological opinions. NMFS is already working to address aspects of the petition and has determined that additional regulations dictating the choice of method used to achieve the agency's goals are unwarranted at this time. Moreover, Oceana fails to request specific and discrete agency actions that are properly within the scope of a rulemaking petition pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 553(e); instead the petitioner is challenging the agency's general pattern, practice, or policy. We reject Oceana's petition for rulemaking for this reason and for additional reasons as explained fully below.

*(1) Conduct in-water population level assessments.* The petition requests that NMFS use in-water survey techniques, such as trawl or aerial surveys to obtain supplemental population assessment information for those species for which nesting beach survey data are available. Among other things, Oceana cites Turtle Expert Working Group (TEWG) recommendations<sup>1</sup> to improve datasets and data-gathering methods in order to support its petition.

The petition fails to provide any new information that justifies the need for regulations that would change the agency's general pattern or practice regarding data collection and analytical methodologies. NMFS is aware of the TEWG's assessments of the current datasets and is already working to improve the empirical data that define where, how many, and at what life stage and condition sea turtles may be encountered. NMFS is also conducting and supporting in-water research in Florida, Georgia, South Carolina, North Carolina, Maryland, Virginia, and New York, and conducting aerial surveys in the mid-Atlantic to better assess sea turtle

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<sup>1</sup> Turtle Expert Working Group. 2000. Assessment Update for the Kemp's Ridley and Loggerhead Sea Turtle Populations in the Western North Atlantic. NOAA Tech. Mem. NMFS-SEFSC-444. 115pp.

distribution and abundance. In fact, NMFS has built upon the TEWG recommendations by developing a requirements plan to add to our understanding of the status of U.S. sea turtle populations.<sup>2</sup> The requirements plan reviews the current sea turtle (and other protected species) population assessment program in terms of present research capability and capacity, and delineates the resources necessary to acquire reliable assessment information to fully address identified data requirements. NMFS has addressed, and will continue to address, both the substance of this petitioned action and the TEWG recommendations through existing research planning documents and programs. Improvement of NMFS' research program is a matter left to the agency's discretion; the direction research should take is not a specific and discrete action that is properly within the scope of a petition for rulemaking pursuant to 5 U.S.C. 553(e). Accordingly, NMFS denies this component of the petition.

*(2) Increase observer coverage to obtain accurate information on the number of sea turtles caught in all fisheries.* The petition requests that NMFS promulgate regulations that increase observer coverage. The petition cites the TEWG statement that observer coverage over a statistically valid portion of the fishing effort throughout the range of sea turtles is necessary to accurately estimate catch and mortality. The petition cites an Oceana report as the best available science on the level of observer coverage that is needed to adequately estimate protected species bycatch.

Oceana has previously petitioned NMFS for a similar action that would require the agency to develop and implement a workplan for placing observers on enough fishing trips to provide statistically reliable bycatch estimates in all fisheries. *See* 67 FR 19154 (April 18, 2002). In its response to that petition, NMFS explained that even though observers are effective in many fisheries, they may not be appropriate for all fisheries. *See* 68 FR 11501, 11503 (March 11, 2003). NMFS is continuing in its efforts to expand and modernize observer programs for federal commercial fisheries. NMFS recognizes that improving monitoring programs should increase our understanding of sea turtle interactions; but constraints on agency resources and logistical difficulties (*e.g.* small boats) make it difficult to place observers in all fisheries that may have sea turtle interactions, especially state-managed and recreational fisheries. NMFS is exploring various observer options that could allow for more comprehensive, longer term monitoring of sea turtle-fishery interactions across fishing sectors and jurisdictional boundaries, but this ongoing effort is still in its early stages. Options may include placing observers in fisheries of concern pursuant to authority under the Endangered Species Act (ESA). In light of NMFS' previous denial of a substantially similar petitioned action and the agency's ongoing efforts to improve observer coverage, granting this petitioned action is unwarranted at this time.

*(3) Establish a new, uniform quantitative method for determining take limits for biological opinions.* The petition states that jeopardy analyses are inconsistent within NMFS, given the delegation of authority to conduct section 7 consultations to regional offices. The petition claims that NMFS fails to provide a quantitative rationale for incidental take specified in its biological opinions. The petition mentions several NMFS' evaluations of quantitative models for sea

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<sup>2</sup>NOAA Fisheries National Task Force for Improving Marine Mammal and Turtles Stock Assessment. September 2004. "A Requirements Plan for Improving Understanding of the Status of U.S. Protected Species."

turtles, including the Potential Biological Removal (PBR) model used for marine mammals. Finally, the petition refers to the August 2004 workshop convened by NMFS to develop an analytical framework for conducting jeopardy analyses under the ESA and identify options for assessing species' risk when data are limited. The petition requests that NMFS adopt regulations immediately to insure that biological opinions use a standardized method to make decisions.

NMFS understands Oceana's concerns and is keenly interested in maintaining consistency between the jeopardy analyses, while taking into account the wide variability in listed species' biology, as well as the wide variability in available information concerning species, population dynamics, and the types and severity of impacts to species. This objective led NMFS to task the Office of Protected Resources to develop the analytical framework that Oceana referred to in its letter. The August 2004 workshop convened by NMFS was a first step in vetting the consultation assessment framework. NMFS is still in the process of adding additional features such as identifying a suite of quantitative and qualitative methods for use in both data-sparse and data-rich situations, as well as testing and refining the applicability of the methods using information typical to section 7 consultations.

Any decision structure adopted by NMFS must also weigh such qualitative factors as severity of injury, significance of behavioral responses, and extent and severity of habitat disturbances, in the overall jeopardy evaluation. Any structured decision approach adopted by NMFS for evaluating take levels for biological opinions should contain options suitable to the varied species, available data sets, and actions under consideration. Use of any particular quantitative model such as PBR for every evaluation is inappropriate. Moreover, section 7 of the ESA and its implementing regulations do not require NMFS to estimate incidental take quantitatively. When promulgating the section 7 regulations in 1986, NMFS and the U.S. Fish and Wildlife Service (USFWS) explicitly declined to endorse the use of numerical estimates of incidental take in all cases. In many instances the NMFS and USFWS use descriptions of the extent of take because, for some species, loss of habitat resulting in death or injury of individuals may have more significant adverse consequences than the direct loss of a certain number of individuals (51 FR 19953, June 3, 1986). Where federal actions "take" threatened or endangered species by altering the species' habitat, it is often impossible to translate the habitat lost into numerical estimates of the number of individuals taken. Consequently, numerical estimates are not appropriate to every consultation, and requiring them through rulemaking could reduce the protections threatened and endangered species currently receive.

Together, the efforts described above are important for assessing status and trends, identifying management actions, and evaluating incidental take in future section 7 consultations. Since the analytical framework for evaluating take levels in biological opinions is not yet complete and has not been fully tested, it is premature to consider rulemaking to adopt it, or any other uniform structured decision approach. Thus, NMFS denies this component of the petition.

In closing I would like to clarify one ancillary point. Your letter asserts that permitted takes of loggerheads have exceeded the level that would still allow for recovery to occur. While NMFS disagrees with that position, it is concerned about the recovery of sea turtles. With the USFWS, we are currently revising the Atlantic recovery plans for the loggerhead and Kemp's ridley, and we intend to convene recovery teams to revise the Atlantic recovery plans for the hawksbill,

leatherback, and green turtles over the next several years. NMFS and USFWS have initiated status reviews (70 FR 20734, April 21, 2005) on all sea turtle species pursuant to ESA section 4. We encourage you to participate in these efforts by submitting comments during any public comment periods on documents reflecting the results of those projects. I appreciate your interest in sea turtle conservation.

Sincerely,

James H. Lecky  
Director  
Office of Protected Resources

Bcc: PR2, PR2-Therese Conant, Barbara Schroeder, PR3-A. Garrett, NER, SER  
File name and path: G:\PR2\TurtleTeam Documents\Regulations/Oceana Petition  
PR2-Therese Conant, Barbara Schroeder, 301-713-2322