

# A Shell of Their Former Selves:

## Environment Groups Seek Greater Protections for Sea Turtles

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**Nonprofit environmental protection groups sued the** National Marine Fisheries Service (NMFS), arguing that it failed to protect endangered sea turtles. The first lawsuit in the federal District Court for the Northern District of California succeeded. The court found that NMFS broke the law by allowing longline fishing that could harm sea turtles. The second suit is in progress, and the same nonprofits argue that NMFS failed to preserve sea turtles by neglecting to protect their habitat. They claim the government's failure violated the Endangered Species Act (ESA). Both of these cases could increase protections for endangered sea turtles in the Gulf of Mexico.

Sea turtles are marine reptiles that live in the ocean. They nest and lay eggs on beaches, and spend most of their lives at sea, often migrating hundreds or thousands of miles through the ocean to feed and reproduce.<sup>1</sup> Humans have long been a threat to them. People hunt turtles for their meat and shells, ensnare them in fishing equipment, or destroy the habitat turtles need to survive. Of the seven existing species of sea turtles, five are present in the Gulf of Mexico.<sup>2</sup> (These species are loggerhead, green, leatherback, Kemp's Ridley, and hawksbill.) All five of these species are listed as threatened or endangered under the ESA. This means they are at risk of dying out.

### California Longline Fishing Lawsuit

In the first lawsuit, the federal court in California ruled that NMFS violated environmental protection laws because it issued two permits that allowed longline fishing in the Pacific.<sup>3</sup> Longline fishing is a large-scale fishing technique in which a boat pulls thousands of yards of fishing line. These lines carry hundreds or thousands of baited hooks, which allows mass harvesting of fish. Unfortunately, the lines also hook sea creatures such as turtles, a phenomenon

known as "bycatch." Each year, longline fishing operations ensnare many endangered sea turtles. Turtles snagged by these lines often drown because they cannot reach the surface to breathe, or starve after swallowing hooks that obstruct their digestive tracts. Others survive but suffer painful injuries from the hooks. Longline fishing is therefore essentially banned off the coast of California due to the threat to endangered sea turtles.

The nonprofits Center for Biological Diversity (CBD) and Turtle Island Restoration Network (Turtle Island) filed a lawsuit arguing that NMFS had violated numerous environmental laws by allowing longline fishing to resume. The nonprofits quickly asked the court to rule in their favor because, they argued, the facts and law were clearly on their side, so there was no reason to continue the case. The court granted the nonprofits' request, holding that NMFS had violated the ESA, the National Environmental Policy Act (NEPA), and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The court decided that it was against the law for NMFS to risk harming turtles by issuing the longline fishing permits.

The ESA requires a federal agency to use the "best scientific and commercial data available" when it considers an action that may threaten an endangered species.<sup>4</sup> To achieve this goal, NMFS is required to research and write Biological Opinions, or BiOps. The scientific studies in this case analyzed sea turtle populations and the dangers of longline fishing. The court found (and the government admitted) that NMFS had ignored a BiOp from 2017 when it issued the longline fishing permits. This BiOp showed an alarming decline in the population of leatherback sea turtles. The judge decided that NMFS had broken the law by issuing longline fishing permits despite the warnings in the 2017 BiOp.

The court further explained that NMFS had also violated the Magnuson-Stevens Act. The Magnuson-Stevens Act requires federal agencies to follow federal law, including the relevant parts of the ESA. The court therefore found that violating the ESA resulted in a violation of the Magnuson-Stevens Act.

The court was not finished. The judge said that NMFS had violated another law: NEPA. This law required NMFS to evaluate whether its actions significantly harmed the environment. NMFS contradicted itself on this issue. At one point, it claimed that the death of a single turtle from longline fishing was a significant impact on the environment. It later said that it was not. This contradiction led the court to find that calling a single turtle's death insignificant violated NEPA, because NMFS had not thoroughly evaluated its actions.

### Gulf of Mexico Longline Fishing

There are similar problems with longline fishing in the Gulf of Mexico. NMFS has previously enacted restrictions on longlining in the Gulf to protect endangered turtles. In the summer of 2009, temporary rules decreased the areas of the Gulf where longline fishing was permitted.<sup>5</sup> NMFS issued this rule after determining that bycatch from longlining was hurting too many sea turtles. (For example, the National Bycatch Report estimated that the Gulf Bottom Longline Fishery caught approximately 10.37 sea turtles per year as of 2005).<sup>6</sup> The authorities later issued a permanent rule banning longline fishing in certain areas from June – August of each year. This rule also reduced the number of longline fishing vessels allowed in the area.<sup>7</sup> The government claims that these measures significantly reduced bycatch and that the fishery is no longer a threat to the turtle population. However, it has acknowledged that the general practice of longline fishing is still a threat to sea turtle recovery.

Recall the California court's no-tolerance treatment of hurting sea turtles. It was illegal for the government to ignore the possibility of a single turtle dying from longline fishing. Some could argue that if the government was wrong to risk a *single* sea turtle death, then it is much worse to risk ongoing deaths in the Gulf. Keep in mind that the California case only involved two permits for longline fishing—a very small operation contrasted with the Gulf

fishery. Permitting an entire longline fishery to continue creates a larger chance of bycatch. After all, the term bycatch “reduction” indicates that bycatch still occurs, just in smaller numbers than before. This is especially important since the government has acknowledged the ongoing dangers of longline bycatch to sea turtles. In light of this admission, advocacy groups could argue that an abundance of caution disfavors longline operations in the Gulf.

### Critical Habitat Lawsuit

Gulf longline fisheries are not the only area where NMFS arguably needs to protect sea turtles. CBD and Turtle Island (the same nonprofit organizations from the California case above) filed a lawsuit in January 2020 against both NMFS and the Fish and Wildlife Service (FWS) (together, the Services) for their failure to protect critical habitat for green sea turtles. The ESA requires the Services to designate protected habitat for a species once they list the species as threatened or endangered. If there is not enough information to determine the species' critical habitat at the time, the Service must designate it within a year.

According to the ESA and the regulations that accompany it, a species is endangered when it is at risk of extinction in the area it occupies. It is threatened when it is at risk of becoming endangered. In other words, if a species or part of a species is in danger of dying out, it is likely threatened or endangered. A species' “critical habitat” includes areas “essential to the conservation of the species.”<sup>9</sup> This means places that the creatures need in order to survive, such as beach areas where sea turtles nest and lay eggs. It is difficult for the turtles to reproduce when human activity damages these spots. The ESA does not protect these areas until the Services designate them as critical habitats. A failure to designate critical habitat puts sea turtles at risk of damage or destruction from pollution or new construction.

The nonprofits argue that in 2015 NMFS and FWS listed eleven distinct populations of green sea turtles in the Atlantic and Pacific as endangered or threatened. The North Atlantic distinct population segment of green sea turtles includes those of the Gulf of Mexico. Nearly five years later, the Services still have not designated critical habitats for these populations. The nonprofits claim that regulations gave the agencies a year maximum to designate the habitats. However, they allowed that deadline to pass without action. The nonprofits contend

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that this failure by NMFS and FWS is against the law. Therefore, CBD and Turtle Island argue that the court needs to intervene and compel the agencies to act.

Specifically, they are asking the court to declare that NMFS and FWS broke the law by missing the original deadline. The nonprofits also asked the court to set a deadline for the agencies to designate critical habitats for the green sea turtle.

### Critical Habitat in the Gulf of Mexico

Critical habitat is relevant to protecting sea turtles in the Gulf of Mexico. A court ordering NMFS and FWS to protect the critical turtle beach habitats for North Atlantic populations of the green turtle arguably will increase protection for all Gulf sea turtles. The government has only designated critical habitat in the Gulf for one of the five sea turtle species that live there. Specifically, NMFS and FWS designated areas of the Gulf as critical habitat for the loggerhead sea turtle in 2014.<sup>10</sup> Three of the other species—the green sea turtle, leatherback, and hawksbill—have critical habitat designated elsewhere, but none in the Gulf.<sup>11</sup> Perhaps worse, NMFS and FWS have not designated critical

habitat anywhere for Kemp's Ridley turtles.<sup>12</sup> Turtle Island requested that the administration designate Gulf beaches where Kemp's Ridley turtles nest as critical habitat in 2017, to no avail.<sup>13</sup> Environmental groups have repeatedly requested critical habitat protections for the Kemp's Ridley species since at least 2010.<sup>14</sup> The current lawsuit to identify green sea turtles' Atlantic and Pacific critical habitats is based on missed deadlines to designate critical habitat for them.

### Conclusion

The twin issues of longline fishing in California and failure to designate critical habitats for green sea turtles both show promise for protecting Gulf turtles. Although sea turtle bycatch from longline fisheries in the Gulf has decreased, it is still an issue. The recent court decision from California demonstrates that one turtle dying may be too many. This creates the possibility of an argument against allowing the risks of longlining to continue in the Gulf. Likewise, a lawsuit requiring habitat protections for green sea turtle populations in the Atlantic and Pacific could lead to enhanced protection for all sea turtles in the Gulf of Mexico. 🐢

*Andrew W. Rock was a Legal Intern with the Mississippi-Alabama Sea Grant Legal Program at the time of writing this article. He graduated from the University of Mississippi School of Law in May, 2020.*

**Endnotes**

1. National Geographic, *Sea Turtles, Facts and Information*, nationalgeographic.com (2020).
2. National Oceanic and Atmospheric Administration, *Frequent Questions: Northern Gulf of Mexico Sea Turtle Strandings*, noaa.gov (revised July 16, 2019).
3. Center for Biological Diversity v. Ross, 2019 WL 7020195 (N.D. Cal. 2019).
4. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).
5. World Fishing and Aquaculture, *Longlining Restrictions in the Gulf of Mexico*, worldfishing.net (June 1, 2009).
6. National Oceanic and Atmospheric Administration, *U.S. National Bycatch Report*, noaa.gov (Sep. 30, 2011).
7. National Marine Fisheries Service, *Endangered Species Act - Section 7 Consultation Biological Opinion*, fws.gov (Feb. 10, 2016).
8. Center for Biological Diversity v. Bernhardt, 2020 WL 95717 (filed Jan. 8, 2020).
9. 16 U.S.C. § 1532(5)(A).
10. National Marine Fisheries Service, *Endangered and Threatened Species: Critical Habitat for the Northwest Atlantic Ocean Loggerhead Sea Turtle Distinct Population Segment (DPS) and Determination Regarding Critical Habitat for the North Pacific Ocean Loggerhead DPS*, 79 Fed. Reg. 39855 (July 10, 2014); National Marine Fisheries Service, *Loggerhead Turtle - Northwest Atlantic Ocean DPS Critical Habitat Map*, fisheries.noaa.gov (June 26, 2019); Fish and Wildlife Service, *Index Map of Critical Habitat Units for the Northwest Atlantic Ocean Loggerhead Sea Turtle DPS*, fws.gov (2014).
11. Fish and Wildlife Service, *Leatherback Sea Turtle Fact Sheet*, fws.gov (April 2015); Fish and Wildlife Service, *Designated Critical Habitat; Green and Hawksbill Sea Turtles*, 63 Fed. Reg. 46693 (Sep. 2, 1998).
12. Fish and Wildlife Service, *Kemp's Ridley Sea Turtle Fact Sheet*, fws.gov (Apr. 5, 2015).
13. Turtle Island Restoration Network, *Consider the Kemp's Ridley Sea Turtle*, seaturtles.org (Dec. 18, 2017).
14. National Oceanic and Atmospheric Administration, *Kemp's Ridley Turtle (Lepidochelys kempii)*, nrc.gov (Nov. 15, 2013).



**IN SUM.**

A Summation of the Facts and Figures of Interest in this Edition

★ State fine (max.) in Alabama for harming a flattened musk turtle:	\$5,000
★ Federal fine (max.) for harming a flattened musk turtle:	\$100,000
★ Species of sea turtles found in the Gulf of Mexico:	5
★ Rank of red-eared slider among the world's most invasive species:	Top 100
★ Number of red-eared sliders named after Renaissance artists:	4 (at least)