

October 29, 2009

Sally McGee  
Chair, Sea Scallop Oversight Committee  
New England Fishery Management Council  
50 Water Street, Mill 2  
Newburyport, MA 01950

**Re: Development of Measures in Framework 21 to Comply with the 2008  
Biological Opinion for the Sea Scallop Fishery**

Dear Ms. McGee and Ms. Kurkul:

Oceana writes to urge the New England Fishery Management Council to take strong action at its November 2009 meeting to anticipate and respond to the likelihood of reinitiation of Section 7 consultation under the Endangered Species Act for the Atlantic Sea Scallop Fishery.

Significant new information has been published since the March 2008 Biological Opinion for this fishery which should trigger a new section 7 consultation under the Endangered Species Act. The new information about the status of loggerhead turtles may dramatically change the management of this fishery and, in light of these developments; Oceana urges strong action by the Council in Framework 21 in anticipation of this process.

As you know, Oceana has a long record of advocacy and litigation to support, inter alia, the fundamental goals of reducing finfish and sea turtle bycatch in the scallop dredge and trawl fisheries. Oceana continues its work toward these goals and views our recommended action as a necessary step toward meaningful improvements to this fishery's continued operation.

**New Information- New Biological Opinion**

The guiding regulations for Section 7 consultation require the agency to reinitiate consultation when new information about the status of a species or the effect of a proposed action changes from the conditions on which the previous Biological Opinion was based. The regulations direct that:

*'Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:*

(b)If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.

-50 C.F.R. § 402.16. See *also* March 14, 2008, Biological Opinion at 106 (Reinitiation Statement).

The recent publication of the *Loggerhead Sea Turtle (Caretta caretta) 2009 Status Review*<sup>1</sup> by the Loggerhead Biological Review Team on behalf of the Agency satisfies this criterion on two fronts with the new definition of the Northwest Atlantic Distinct Population Segment (DPS) of loggerhead turtle and significant new conclusions about the status of this DPS.

In a significant finding, the Status Review concludes that the Northwest Atlantic DPS "is at risk of extinction" and that:

the Northwest Atlantic Ocean DPS is likely to decline in the foreseeable future, even under the scenario of the lowest anthropogenic mortality rates. These results are largely driven by mortality of juvenile and adult loggerheads from fishery bycatch that occurs throughout the North Atlantic Ocean..... Therefore, the BRT concluded that the Northwest Atlantic Ocean DPS is currently at risk of extinction.

-Status Review at 164.

This conclusion represents a dramatic shift in conclusion when compared to the discussion of the status of the species contained in the 2007 Status Review document which concluded "that threatened loggerhead sea turtles should not be delisted or reclassified as endangered."<sup>2</sup> This finding also appears to directly contradict and supersede the finding in the 2008 Biological Opinion, at 89, that "loggerhead sea turtles in the western Atlantic will not go extinct within the next 100 years."

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<sup>1</sup> Conant, T.A., P.H. Dutton, T. Eguchi, S.P. Epperly, C.C. Fahy, M.H. Godfrey, S.L. MacPherson, E.E. Possardt, B.A. Schroeder, J.A. Seminoff, M.L. Snover, C.M. Upite, and B.E. Witherington. 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, August 2009. 222 pages.

<sup>2</sup> NMFS and USFWS. 2007a. Loggerhead sea turtle (*Caretta caretta*) 5 year review: summary and evaluation. National Marine Fisheries Service, Silver Spring, Maryland. 65 pp. (cited in March 14, 2008, Biological Opinion at 24).

The shift from "not endangered" to "at risk of extinction" warrants a new review of the effects of this fishery on the newly defined Northwest Atlantic DPS through a new section 7 consultation that reflects this new information.

If the agency fails to take action to reinitiate consultation immediately, it will ignore the best available science and will be unlawful under the Endangered Species Act as well as the Magnuson-Stevens Act.

### **Framework 21- Setting the Stage for a New Biological Opinion-**

With a new Biological Opinion likely or foreseeable for the scallop fishery for the reasons described above, it is advisable that the Council take all action available at this time to reduce takes of loggerhead turtles in the scallop fishery in an effort to avoid a likely 'Jeopardy' finding for this fishery.

What would a Jeopardy finding mean for the scallop fishery? A Jeopardy finding will have significant effects on the management and prosecution of the scallop fishery well beyond the vague discussions of 'minor changes' to the fishery that are being discussed as part of FW21. Rather than providing the Council with Reasonable and Prudent *Measures* and giving the Council the latitude to develop management alternatives to meet those terms, a Jeopardy finding comes with the more severe Reasonable and Prudent *Alternatives* developed *by the agency*, which are very likely to make substantial changes to preclude the fishery from jeopardizing the new NW Atlantic DPS of loggerhead turtles.

If the measures adopted in FW21 are overly weak or ineffective in demonstrating their value in conserving sea turtles it increases the likelihood that a future Biological Opinion will contain a significant 'Jeopardy' finding and resultant potential for the Council ceding control of this fishery to the agency because of its inaction.

### **The Council should do everything it can in FW21 to minimize its effects on turtles in anticipation of the analysis of a likely new Biological Opinion.**

Oceana would like to highlight a recent instance of proactive management of a fishery in anticipation of a new Biological Opinion. In 2009 the Gulf of Mexico Fishery Management Council learned of an upcoming Biological Opinion for its bottom longline reef fish fishery and was advised by NMFS that under the current circumstances, the estimated 387 sea turtles/year the fishery was taking would likely result in a "Jeopardy" decision. When advised of the fact that the analysis of the effects of the fishery on turtles would be made against a baseline of the measures adopted before the new Biological Opinion is issued, the Gulf Council, working with all of the interested stakeholders, adopted new strict measures in a good faith effort to avoid a Jeopardy opinion.

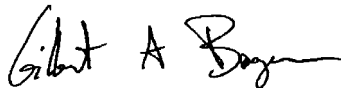
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Ultimately the Council was successful in its effort and avoided a jeopardy opinion for this fishery in October, 2009 by reducing turtle takes roughly 54%. It is important to note that the turtles taken in this fishery are from the same population as those taken by the scallop fishery and that NMFS was worried about Jeopardy at a take level lower than what is authorized to the scallop fishery.

With the continued operation of the very lucrative scallop fishery at risk, the Council should consider this information carefully and take decisive action in FW21 to demonstrate meaningful improvements to reduce takes sea turtles. Proactive management at this time may avoid even more significant changes to the fishery in the future. Anything less than measures to provide meaningful, demonstrable reductions in turtle takes in FW21 could be considered to be simply poor stewardship and poor management of the fisheries and the marine ecosystem.

We thank you for considering this important issue at this time,

Sincerely,



Gib Brogan  
Northeast Representative  
Oceana  
Wayland, MA

Cc: Patricia Kurkul National Marine Fisheries Service Regional Administrator  
Paul Howard, Executive Director, New England Fishery Management Council  
John Pappalardo, Chair, New England Fishery Management Council