September 16, 2013

Via Regulations.gov Portal

National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, Maryland 20910

Re: Comments of the American Petroleum Institute, the International Association of Geophysical Contractors, and the National Ocean Industries Association on the National Marine Fisheries Service's Proposed Designation of Critical Habitat under the Endangered Species Act for the Northwest Atlantic Ocean Loggerhead Sea Turtle Distinct Population Segment, RIN 0648–BD27 (NOAA-NMFS-2013-0079).

Dear Sir/Madam:

This letter provides the public comments of the American Petroleum Institute ("API"), and the National Ocean Industries Association ("NOIA") (collectively, "the Associations") in response to the National Marine Fisheries Service's ("NMFS" or the "Service") proposed designation of critical habitat ("CH") for the northwest Atlantic Ocean loggerhead sea turtle ("loggerhead") distinct population segment ("DPS") under the Endangered Species Act ("ESA").[1] As explained in more detail below, the Associations believe NMFS should not designate CH because it is not necessary for the conservation of loggerheads, is impermissible under the ESA and its implementing regulations, because CH is not prudent or determinable, and because there is no evidence that the additional protective measures would benefit the species. If NMFS persists in finalizing a CH designation, it should narrowly delineate CH and entirely exclude all areas that it is considering designating based on the potential presence of sargassum.

The Associations appreciate the opportunity to provide this information and analysis. We hope and expect that the Service will give close consideration of the comments set forth below.

[1] 78 Fed. Reg. 43006 (July 18, 2013).

I. INTRODUCTION

The Associations

API is a national trade association representing over 540 member companies involved in all aspects of the oil and natural gas industry. API's members include explorers, producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry and provide most of the nation's energy. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources to meet consumer demands. API members may be impacted by the proposed loggerhead CH designation because a number of them maintain significant offshore and shore-side operations in the Gulf of Mexico ("GoM") and are interested in exploration and development opportunities in the Mid- and South Atlantic Planning Areas.

NOIA is the only national trade association representing all segments of the offshore energy industry with an interest in the exploration and production of both traditional and renewable energy resources on the nation's outer continental shelf. The NOIA membership comprises more than 275 companies engaged in business activities ranging from producing to drilling, engineering to marine and air transport, offshore construction to equipment manufacture and supply, telecommunications to finance and insurance, and renewable energy. NOIA members may be impacted by the proposed loggerhead CH designation because they maintain significant offshore and shore-side operations in the GoM.

Together, the companies represented by these Associations provide a tremendous economic benefit to the nation. In 2011, oil and gas development in the GoM alone resulted in nearly a quarter million jobs.[2] Those employment numbers are projected to have increased significantly in the ensuing years.[3] From an investment perspective, the Bureau of Ocean Energy Management ("BOEM") has determined that over a 40-year period, the existing 5-year leasing plan (which does not include the Atlantic planning areas) will result in "[b]etween $1,050 million and $2,180 million in income."[4]

Importantly, the 5-year leasing plan not only provides industry the ability to create this tremendous economic benefit, but it also contains significant restrictions and requirements that, when woven into the multitude of conservation measures already required of the oil and gas industry and other industries that operate in the GoM and Atlantic Ocean, provide real and meaningful protections to loggerheads and their habitat. Accordingly, separate and aside from the economic benefits provided by the oil and gas industry, the Associations encourage NMFS to base its ultimate determination on due consideration of the level of regulatory protection already afforded loggerheads and the lack of an identifiable need for further regulation.

---

[2] Quest Offshore Resources, Inc., The State of the Offshore U.S. Oil and Gas Industry An in-depth study of the outlook of the industry investment flows offshore, (Table 26) (Dec. 2011), available at http://www.api.org/~/media/Files/Policy/Exploration/Quest_2011_December_29_Final.pdf.

[3] *Id*.

[4] Outer Continental Shelf Oil and Gas Leasing Program: 2012-1017 Final Programmatic Environmental Impact Statement (July, 2012).

B. Summary of Comments

The Associations appreciate and share the Service's interest in loggerhead conservation; however, we dispute the necessity and legality of designating critical habitat to protect loggerheads. As discussed at length below, loggerheads in the DPS are meaningfully protected through a wide variety of overlapping multi-jurisdictional, multi-industry restrictions, prohibitions, and conservation measures that have led to historic levels of loggerhead nesting and abundance. Indeed, the measures in place to protect loggerheads are so extensive that neither NMFS nor its consultants can conceive of additional conservation protections that would accrue pursuant to the proposed critical habitat designation. Not only is promulgating regulations in the face of such facts illogical from a conservation perspective, it is impermissible under the ESA and its implementing regulations.

The ESA only allows critical habitat designations when special management considerations may be necessary, when designation is prudent, and where critical habitat is determinable. NMFS has not met any of these requirements, nor has NMFS shown how a designation that imposes administrative costs and no conservation benefits survives the ESA's required economic benefits analysis.

These fundamental flaws carry through, and are magnified in, the proposed sargassum habitat. Not only would designation of the sargassum habitat cause the proposed critical habitat designation to be the largest in the history of the ESA, it would be based on physical and biological features that are poorly understood, ephemeral, and largely disconnected from the post-hatchling populations it is intended to protect.

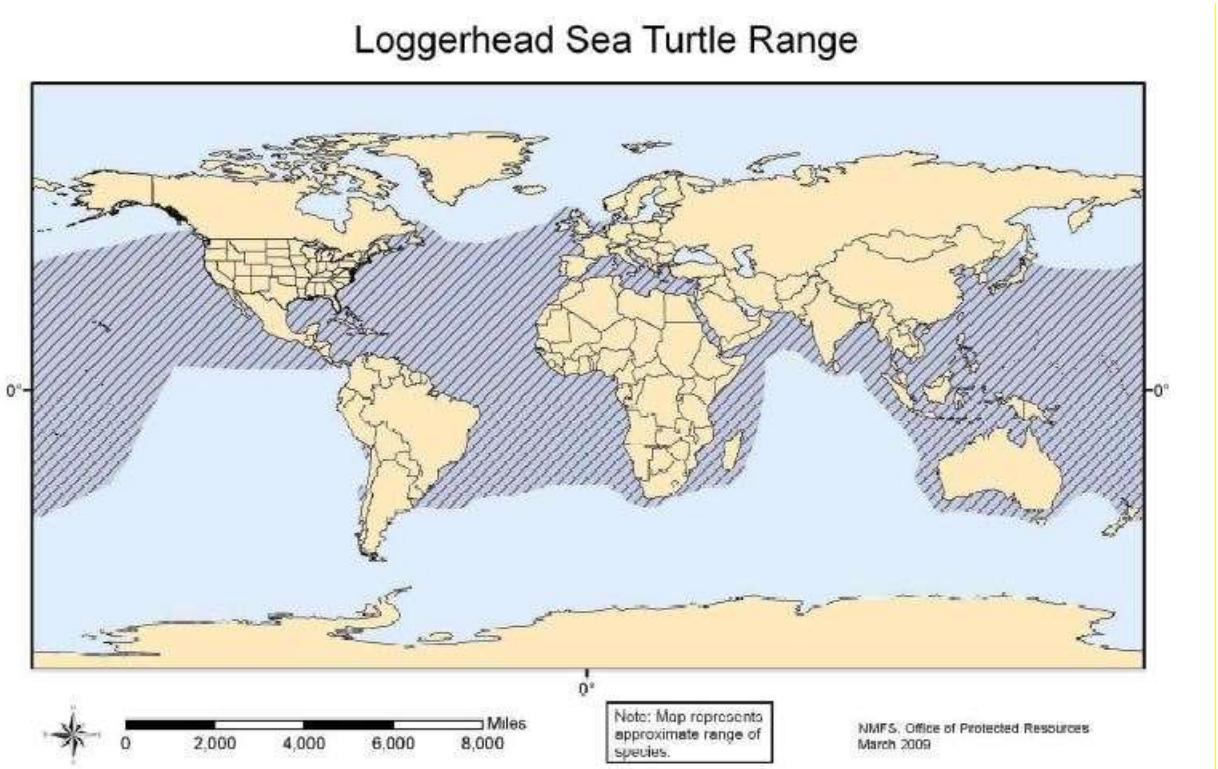
As such, the Associations request that the entire proposed critical habitat designation be withdrawn as unnecessary and impermissible under the ESA and its implementing regulations. If NMFS declines to withdraw this proposal, at a minimum, the Service should exclude from the designation all existing and proposed oil and gas development areas, as well as the areas containing industry's support infrastructure. Doing so is appropriate given the substantial measures already required of the oil and gas industry to protect marine ecosystems and loggerheads in particular.

II. DETAILED COMMENTS

A. Loggerhead Populations are Abundant and Increasing

In order to properly analyze the need for, and prudence of, a CH designation, it is important to fully understand the status of the species and the protections already in place to protect the species and its habitat. This need to understand the current status of the species is particularly pronounced in the case of loggerheads. Loggerheads have a long history of protection under the ESA and have benefitted greatly from significant conservation measures – both mandated and voluntary. Before NMFS looks forward and considers what new restrictions and constraints may be necessary to protect loggerheads, the Service should first look back at how the species is already protected and consider the status improvements those protections have created.

"Loggerheads are circumglobal, occurring throughout the temperate and tropical regions of the Atlantic, Pacific, and Indian Oceans. Loggerheads are the most abundant species of sea turtle found in U.S. coastal waters."[5]



Source: http://www.nmfs.noaa.gov/pr/pdfs/rangemaps/loggerhead_turtle.pdf

"In the Atlantic, the loggerhead turtle's range extends from Newfoundland to as far south as Argentina. . . [T]he major nesting concentrations in the U.S. are found from North Carolina through southwest Florida . . ."[6] "In the southeastern U.S., about 80% of loggerhead nesting occurs in six Atlantic coastal counties in Florida (Brevard, Indian River, St. Lucie, Martin, Palm Beach, and Broward Counties)."[7] Certainly, the Southeastern coast of the U.S. provides a habitat that is important to both the DPS and the worldwide population.[8]

Because the East Coast of the United States and adjacent waters are so important to the loggerhead, in 2010, NMFS first proposed to change the listing status of the loggerhead in the northwest Atlantic DPS (which includes the GoM) from threatened to endangered.[9] Ultimately,

[5] NMFS Loggerhead Species Page. http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm (accessed 8/19/13)

[6] *Id.*

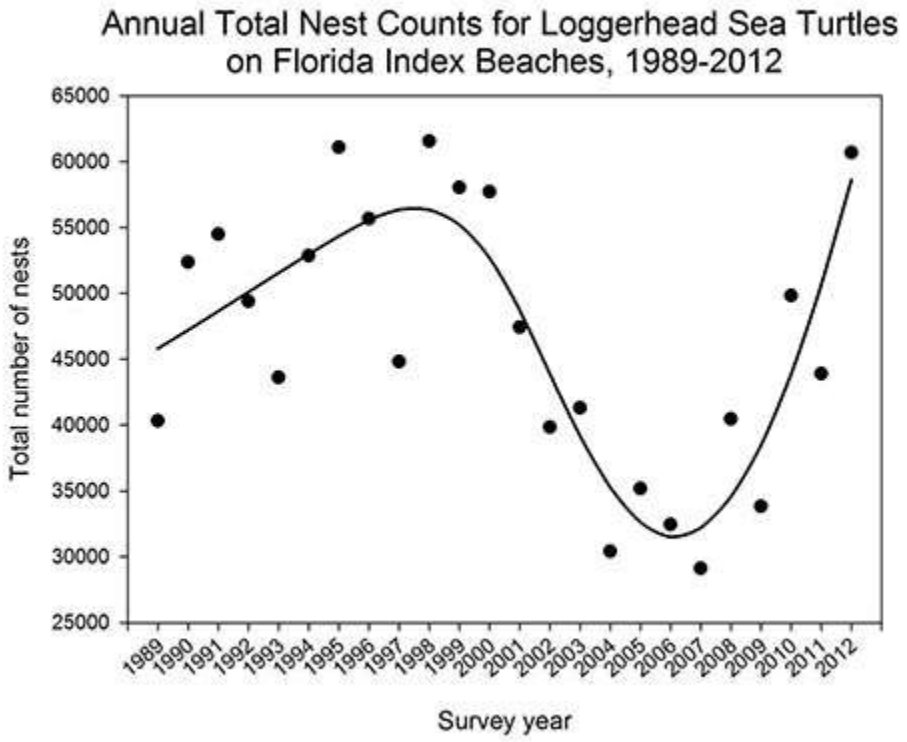
[7] *Id.*

[8] The portions of the DPS in the GoM, however, have significantly less loggerhead activity. NMFS has found that there is "minimal nesting" on the GoM from the western coast of Florida through Texas. NMFS Loggerhead Species Page. http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm (accessed 8/19/13)

[9] *See* 75 Fed. Reg. 12598 (Mar. 16, 2010).

however, this proposal was rejected based on a significant rebound of nesting females in the key peninsular Florida nesting population, as well as record levels of nesting across key beaches in North Carolina, South Carolina, and Georgia.[10] As of the time of the 2011 decision, not only had formerly deeply negative abundance trends stabilized, but numerous indices were also showing a growing and abundant stock.[11]

Since 2010, the positive trends in loggerhead turtle abundance have only continued. In 2012, index beaches in the principal breeding unit – the Peninsular Florida Recovery Unit – saw the second highest nest abundance on record.[12] Record numbers of nests were identified on the Florida Panhandle index beaches in 2012 – almost 2.5 times the number of nests in 2011.[13]



Trends in the Northern Recovery Unit, which extends from the Florida/Georgia border through southern Virginia, are likewise stable or improving. So far in 2013, record numbers of nests have been recorded on numerous nesting beaches. In North Carolina, for example, the

[10] *See* 76 Fed. Reg. 58868, 58885 (Sept. 22, 2011).

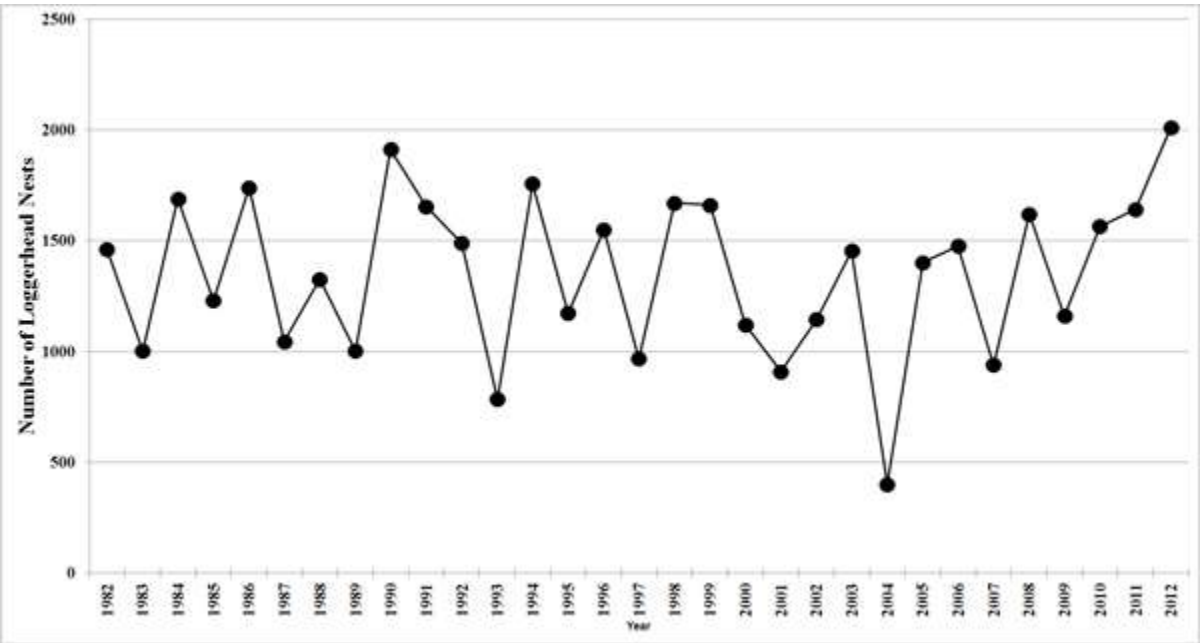
[11] *Id.*

[12] Available at http://myfwc.com/research/wildlife/sea-turtles/nesting/loggerhead-trends/.

[13] See FFWC. Index Nesting Beach Survey Totals (1989-2012), *available at* http://myfwc.com/research/wildlife/sea-turtles/nesting/beach-survey-totals/.

Cape Hatteras National Seashore beaches have already recorded a record number of nests (220) - over five times the series low (40) in 2004.[14]

In Georgia, nests increased from 1005 nests in 2009 to 1778 nests in 2010, and set all-time records in 2012 (2,141 nests) and (to date) 2013 (2,142 nests) – that is four record loggerhead nest counts in the last five years.[15] South Carolina, which typically has the most nests of any state in the Northern Recovery Unit, has likewise shown a significant increase in nests over the past three years.[16] Indeed, as evidenced by the graph below, more nests were observed in 2012 than in the past 30 years.



Even in areas north of the Northern Recovery Unit, excluded because southern Virginia is considered "the northern extent of the nesting range,"[17] there are encouraging signs. For example, 2011 and 2012 saw the first recorded loggerhead turtle nesting activity on Maryland and Delaware beaches.[18]

---

[14] See *http://www.seaturtle.org/nestdb/?view=1* (year to date counts for N.C. beaches) *see also* USFWS, Biological Opinion on the Off-Road Vehicle Management Plan, Cape Hatteras National Seashore, North Carolina, at 79 (Nov. 2010), *available at* http://parkplanning.nps.gov/document.cfm?parkID=358&projectID=10641&documentID=37519 ("Between 2000 and 2009 there was an average of 79 loggerhead nests per year at the Seashore, with the lowest number of nests (40) occurring in 2004 and the highest number (108) of nests occurring in 2008 (NPS 2010a, Figure 13, p. 214; Baker pers. comm. 2009b). However, as of October 14, 2010, a record-breaking 146 loggerhead nests were laid at the Seashore (M. Murray, NPS, pers. comm. 2010).").

[15] See http://www.seaturtle.org/nestdb/; *see also* The Fishing Wire, "Georgia Loggerheads Top Nest Record Again," available at *http://www.thefishingwire.com/story/295984*.

[16] See South Carolina Dept. of Natural Resources Marine Turtle Conservation Program, Current Nest Count, available at http://www.dnr.sc.gov/seaturtle/nest.htm. The chart below was reproduced from this website.

[17] 2009 Recover Plan at II-5.

[18] See http://www.wtop.com/41/3111440/First-sea-turtle-hatched-in-Maryland.

The increase in loggerhead nests (and therefore adult females) in the DPS is bolstered by numerous in-water surveys that show meaningful increases in populations of both adult and juvenile loggerhead. Most recently, the Service's Northeast and Southeast Fisheries Science Centers estimated the 2010 abundance of juvenile and adult loggerhead in the portion of the northwestern Atlantic continental shelf between Cape Canaveral and the mouth of the Gulf of St. Lawrence, Canada based on data collected from an aerial line-transect sighting survey and satellite tagged loggerheads.[19] The preliminary regional abundance estimate, accounting for perception and availability bias, was about 588,000 individuals (approximate inter-quartile range of 382,000 – 817,000) based on only the positively identified loggerhead sightings, and about 801,000 individuals (approximate inter-quartile range of 521,000–1,111,000) when based on the positively identified loggerheads and a portion of the unidentified turtle sightings.[20] Importantly, these encouraging in-water abundance estimates are only for a piece of the Atlantic Ocean portion of the DPS. They do not even count other known populations in the DPS (south of Cape Canaveral and in the GoM), nor do they account for significant populations in the eight other worldwide DPSs.

This tremendous growth and recovery is a result of the combination of increasingly strict turtle protection measures, many of which have come into effect just over the past ten years, and decreases in fishing effort occurring over a slightly longer period. In its 2011 decision to reject environmental groups' proposal to uplist the northwest Atlantic loggerhead DPS from "threatened" to "endangered," NMFS recognized the correlation between the imposition of protective measures and the potential for latent increases in the mature sea turtle population:

> A variety of conservation measures for fisheries and non-fishery activities have been enacted in many areas, including in the Northwest Atlantic, and many within the past generation of loggerhead sea turtles. Additionally, many fisheries, especially the shrimp trawl fisheries in the Northwest Atlantic Ocean and Gulf of Mexico, have experienced substantial declines, thus potentially reducing impacts to sea turtles. The benefits of those fishery reductions, if permanent, combined with conservation actions, if sufficiently effective, may only now, or may soon, begin to become evident on the nesting beaches. The agencies are committed to reducing fisheries bycatch further regardless of the listing status.[21]

[19] Northeast Fisheries Science Center and Southeast Fisheries Science Center. 2011. Preliminary summer 2010 regional abundance estimate of loggerhead turtles (Caretta caretta) in northwestern Atlantic Ocean continental shelf waters. ("Loggerhead Abundance Estimate") US Dept Commerce, Northeast Fish Sci Cent Ref Doc. 11-03; 33 p.

[20] Loggerhead Abundance Estimate at 2.

[21] 76 Fed. Reg. at 58896.

Indeed, NMFS has long considered fishing related mortality to be, by far, the gravest threat to loggerheads.[22] The changes in fisheries that NMFS considered the greatest threats to loggerheads have been transformative and highly significant. Details on these fisheries and measures implemented are discussed below.

Pelagic Longline Fishery for Highly Migratory Species - The number of vessels in the pelagic longline fishery for highly migratory species, which NMFS considers to be among the gravest threats to loggerhead due to observed interactions with fishing gear, has declined 73 percent from peak levels in 1989.[23] Total hooks fished are down 33 percent from 1996. [24] Mortality from pelagic longline fishing that continues to occur is limited spatially and temporally to further reduce loggerhead interactions and is further mitigated through changes in technology and practices.

The first time/area closures to protect turtles were implemented for the pelagic longline fishery in 2000.[25] The use of circle hooks that significantly reduce loggerhead mortality and use of bait species that reduce loggerhead bycatch were first required in 2004. Restrictions for the bottom longline fishery in the GoM started in 2006.[26] Through 2009, these measures largely focused on safe handling and release techniques, equipment to reduce post-release mortality, and temporary prohibitions in certain areas. In 2010, permanent rules institutionalized some of these closures and reduced the number of permitted vessels. [27]

Scallop Fishery - Use of scallop dredges, which NMFS considered a major threat to loggerhead, is down 57 percent.[28] As with the pelagic longline fishery, many scallop controls are now mandated and proving effective. NMFS adopted an industry-developed turtle excluding device ("TED"), the chain mat over the mouth of the scallop dredge, in 2006.[29] In 2011, NMFS implemented a seasonal closure to protect sea turtles and Framework 22 to the Scallop Fishery Management Plan that contains further measures to reduce scallop fishing effort during times and in areas where loggerheads and the fishery overlap.[30] The industry has also developed a specialized dredge frame that prevents the possibility of turtles passing under the dredge and suffering severe injury and death. NMFS currently mandates use of this new dredge in the

---

[22] "The greatest cause of decline and the continuing primary threat to loggerhead turtle populations worldwide is incidental capture in fishing gear, primarily in longlines and gillnets, but also in trawls, traps and pots, and dredges." NMFS Loggerhead Species Page.

[23] *Id.*, Table 6B(2)a. All figures reported here are from peak years compared to values for 2009 (the last year of complete data) and can be found in Attachment 1 to NMFS reply.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*, Table 6B(3). This table includes both open area days-at-sea and time fished in access areas. It also appears to include both the limited access and general category fleet, the latter of which has been recently been subject to limited access and significantly constrained. *See* 73 Fed. Reg. 20090 (Apr. 14, 2008).

[29] *Id.*

[30] *See* 76 Fed. Reg. 19929 (Apr. 11, 2011) (Framework 22 proposed rule).

Scallop FMP Framework Adjustment 23.[31] Today, the scallop dredge fishery is estimated to lethally take only the equivalent of three mature females annually, down from estimates in the hundreds early this century.[32]

Gillnet Fisheries - Gillnet gear use, which NMFS also considered a major threat to loggerhead, is also down. 2009 saw a fairly significant spike in use of this gear in federal waters of the Southeast region, but trips were still down 18 and 10 percent in the GoM and South Atlantic, respectively, from their peaks.[33] In key North Carolina forage grounds, the number of gillnet vessels is down 41 percent and gillnet trips are down 32 percent compared to 1996-97.[34] In Alabama, the number of gillnet vessels is down 80 percent since 1995 and 20 percent from 2003 levels.[35] Like all others, those significantly fewer fishermen using gillnets now comply with time/area and soak time restrictions designed to prevent loggerhead injuries and deaths. For the Virginia gillnet and pound net fisheries, NMFS has mandated a series of time/area closures, mesh size requirements, and gear restricted areas. These measures have been complemented by state-level protections.[36]

Shrimp Fisheries – Perhaps the most extensive changes are those that have occurred in the GoM and South Atlantic shrimp fisheries, which account for, by far, most incidental loggerhead takes. The number of active vessels in the shrimp fishery is down 56 percent in the GoM and 58 percent in the South Atlantic.[37] Critically, in each region, trips are down 80 percent.[38] Further, as with each other fishery that NMFS alleges to threaten loggerheads, the significantly fewer participants in the shrimp fishery are required to use technology to reduce loggerhead mortality, in this case, TEDs. The first legal requirements to use TEDs (by shrimpers) came into effect in 1987, but compliance was both voluntary and spotty.[39] 1992 saw an effort to "strengthen the effectiveness and enforceability . . . of TEDs" among all Southeast shrimp fishermen.[40] These requirements, however, were phased in through 1994.[41] NMFS spent the rest of the 1990s, up until 2003, strengthening TED requirements and mandating use of ever larger and more effective TEDs for this fishery.[42]

---

[31] *See* 77 Fed. Reg. 20728 (Apr. 6, 2012).

[32] Kimberly T. Murray, *Interactions between sea turtles and dredge gear in the U.S. sea scallop (Placopecten magellanicus) fishery, 2001–2008*, FISHERIES RESEARCH (in press).

[33] Schwaab Letter, Att. 2, Table 6B(5)a.

[34] *Id.* Table 6B(5)b.

[35] *Id.*

[36] Schwaab Letter, Att. 2, Table 6B(6-9).

[37] *Id.*, Table 6B(1)a.

[38] *Id.*, Table 6B(1)b.

[39] *Id.*, 6B(6-9).

[40] *Id.*

[41] *Id.*

[42] *Id.*

The protections afforded by these changes in the fisheries that NMFS considers the gravest threats to loggerheads are complemented by efforts across numerous jurisdictions. The U.S. Fish and Wildlife Service ("FWS") conducts major nest protection efforts and beach habitat protection in the significant nesting areas in the DPS.[43] Many coastal counties and communities in Florida, Georgia, and South Carolina have developed lighting ordinances to reduce hatchling disorientations.[44] Important U.S. nesting beaches have been and continue to be acquired for long-term protection.[45] Indeed, as the Service's Incremental Effects Memorandum for the Economic Analysis of the Proposed Rule to Designate Critical Habitat for Loggerhead Sea Turtle ("Incremental Effects Memo") explains, each state within the DPS has instituted significant conservations measures to protect loggerheads.[46]

Because loggerheads are highly migratory, international protections are important as well. Loggerheads are listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Flora and Fauna ("CITES"), which prohibits international trade of the species.[47] Loggerheads are listed in Appendices I and II of the Convention on Migratory Species ("CMS") and are protected under the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia ("IOSEA") and the Memorandum of Understanding Concerning Conservation Measures for Marine Turtles of the Atlantic Coast of Africa.[48] "Loggerheads are also protected under Annex II of the Specially Protected Areas and Wildlife ("SPAW") Protocol of the Cartagena Convention."[49] "Additionally, the U.S. is a party to the Inter-American Convention for the Protection and Conservation of Sea Turtles ("IAC"), which is the only binding international treaty dedicated exclusively to marine turtles."[50]

In summary, declines in loggerhead populations have been addressed effectively by federal, state, local, and international efforts. Far from being evidence of the need for further restrictions in a CH designation, if anything, the evidence before NMFS presents a strong case for delisting.[51] NMFS' engagement with various jurisdictions and industries in furtherance of loggerhead conservation is a success story. As discussed further below, and as NMFS has largely acknowledged, these efforts have negated the need to designate CH and, indeed, have made designation imprudent, and therefore impermissible under the ESA and its implementing regulations.

---

[43] FWS Loggerhead Species Page. http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm (accessed 8/19/13).

[44] FWS Loggerhead Species Page. http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm (accessed 8/19/13).

[45] FWS Loggerhead Species Page. http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm (accessed 8/19/13).

[46] October 23, 2012 memorandum from Angela Somma to Heather Coll "Incremental Effects Memorandum for the Economic Analysis of the Proposed Rule to Designate Critical Habitat for Loggerhead Sea Turtle"

[47] NMFS Loggerhead Species Page. http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm (accessed 8/19/13).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] To be clear, the Associations are not presently petitioning NMFS to delist the loggerhead from the ESA, though we believe the evidence exists to support such a delisting petition and we reserve the right to file one in the future.

B. Designating CH for Loggerheads is Not Permitted by the ESA or its Implementing Regulations

As with listing decisions, the ESA requires the designation of CH to be based on the best scientific data available.[52] Unlike listing decisions, however, CH determinations must also be based on a demonstration of necessity and meaningful consideration of the economic impacts of the designation. As discussed further below, NMFS has not shown this action to be necessary and, in fact, provided in the docket compelling evidence that it is not; nor did NMFS adequately consider the potential economic consequences of its action. Accordingly, if the Service were to finalize this designation as proposed, a court would likely find it to be arbitrary, capricious, and impermissible under the ESA.

1. Loggerhead Habitat Features Do Not Require Special Management Protections

The ESA defines "critical habitat" as areas with physical or biological features that are essential to the conservation of the species and that may require special management measures.[53] Explicit within this definition and courts' interpretations thereof, designation of CH cannot be based solely on the presence of physical or biological features – the listing service must demonstrate that those physical or biological features *may require* special management measures.[54]

NMFS, however, merely states that many of the physical or biological features ("PBF") important to loggerheads, such as reproduction, breeding, feeding, and forage areas, "may require special management considerations as described below."[55] What follows is merely a list of activities that could conceivably adversely impact PBF.[56] NMFS never explains why special management measures may be required to address these activities. Such conclusory statements do not satisfy the special management requirements of ESA § 4(b)(2).[57]

The Service's failure to provide support in its proposal for this key requirement for designating critical habitat is not the result of imprecise drafting of the preamble – it is because

[52] 16 U.S.C. § 1533(b)(2).

[53] 16 U.S.C. § 1532(5)(A)(1).

[54] *See Cape Hatteras Access Preservation Alliance v. U.S.F.W.S.*, 344 F. Supp. 2d 108, 124 (D.D.C. 2004) (Service cannot designate critical habitat without making "mandatory" finding that special management may be required).

[55] 78 Fed. Reg. at 43023.

[56] *Id*. at 43023-43024.

[57] See *Cape Hatteras*, 344 F. Supp. 2d at 124 (special management finding cannot be satisfied by "conclusory statement.")

there is no support for the premise that the PBF "may require" special management measures. By all measures, loggerhead populations are increasing throughout the DPS and nesting and reproducing at levels greater than have ever been surveyed. These tremendous increases are the direct result of the significant protections afforded by multiple layers of regulation across multiple jurisdictions, and to some extent, changing levels of effort in fisheries across several management units. Indeed, in the Service's Incremental Effects Memo, there are over forty pages of descriptions of the measures already in place to protect loggerheads.[58]

Because there are so many meaningful measures already in place to protect loggerheads, the Draft Economic Analysis of Critical Habitat Designation of Marine Habitat for the Northwest Atlantic Ocean Distinct Population Segment of the Loggerhead Sea Turtle ("DEA"), concluded, in numerous places and in numerous contexts, that designation of CH "is not expected to change the level or types of conservation efforts undertaken."[59] The DEA further explained,

> This analysis finds that the impacts of critical habitat designation will most likely be limited to incremental administrative effort to consider potential adverse modification as part of future section 7 consultations. According to NMFS, it is unlikely that critical habitat will generate new or different recommendations for conservation efforts. This is because the conservation efforts that would be recommended to avoid jeopardy would most likely also avoid adverse modification of critical habitat.[60]

Because the DEA could identify no conservation benefit from designating CH, it assigned no economic value to the designation.[61] As explained in the DEA,

> The extent to which critical habitat designation for the loggerhead sea turtle may improve the DPS' population or recovery potential is unknown. That is, information is not available on the potential percent increase in loggerhead populations, or the incremental change in the probability of recovery, generated by the critical habitat rule. . . . Benefits of critical habitat would stem from changes in the level or type of conservation efforts being implemented for the species. As described in the previous chapters, for the most part, critical habitat designation is not expected to change the level or types of conservation efforts undertaken. . . . Absent information on the incremental change in loggerhead population or recovery potential associated, we are

[58] October 23, 2012 memorandum from Angela Somma to Heather Coll "Incremental Effects Memorandum for the Economic Analysis of the Proposed Rule to Designate Critical Habitat for Loggerhead Sea Turtle"

[59] Economic Analysis of Critical Habitat Designation of Marine Habitat for the Northwest Atlantic Ocean Distinct Population Segment of the Loggerhead Sea Turtle; Draft Report (July 11, 2013), at 7-1

[60] DEA at ES-2.

[61] *Id.* Chapter 7.

> unable to monetize associated incremental use and non-use benefits.[62]

Similarly, in assessing the financial impact on operators in the proposed CH, the DEA assumed there would be no costs associated with conservation measures.[63] Indeed, the only costs the DEA associated with the proposed CH designation were modest administrative costs.[64] While the Associations dispute below the DEA's calculation of these administrative costs, we concur with the conclusion that the Service's proposed CH designation would provide no conservation benefit to loggerheads.[65]

In light of the conclusion in the DEA that the proposed CH designation will provide no conservation benefit, NMFS cannot reasonably justify any finding that loggerhead habitat, or physical or biological features therein, may require special management considerations or protections. "Special management considerations or protection[s]" means "any methods or procedures useful in protecting physical or biological features of the environment for the conservation of the listed species."[66] The obvious intent of this regulation is to provide for habitat designation only where doing so will trigger some "methods or procedures" that will be "useful" in conserving the species. As the DEA explains, however, loggerheads are already adequately protected under a multitude of conservation measures, and the designation of CH will result in no "new or different recommendations or conservation measures."[67] Under these circumstances, where designation will not trigger any material conservation measures – in fact, designation will not trigger any conservation measures – NMFS cannot conclude that special management considerations or protections may be required.

The legislative history surrounding Congress' decision to amend the ESA in 1978 to limit CH designation to areas that "may require special management considerations or protections" is instructive in this regard. Prior to 1978, the ESA had no express definition of CH, which led the listing services to designate broadly all areas occupied by the species as CH. Congress was concerned that this practice resulted in designations "as far as the eye can see and the mind can

---

[62] *Id.* at 7-1.

[63] *Id.* at ES-2.

[64] *Id.*

[65] NMFS, in the preamble, attempted to remediate the DEA conclusions finding no economic or conservation benefit by stating, without support, that CH designation results in improved "education and outreach" and "additional protections under state and local authorities." 78 Fed. Reg. at 43029. Not only are such statements unsupported and somewhat questionable, they are undermined by, and in direct conflict with, the DEA. If NMFS proceeds with a final designation based on this unsupported and conclusory statement, its action will likely be found arbitrary and capricious by a court. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (U.S. 1983) (agency action is arbitrary and capricious where "explanation for its decision [] . . . runs counter to the evidence before the agency"); *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife*, 273 F.3d 1229 (9th Cir. Ariz. 2001) (holding listing service decision arbitrary and capricious where based on "no evidence" in record).

[66] 50 C.F.R. § 424.02.

[67] DEA at ES-2.

conceive."[68] To address these concerns, Congress created the current definition of CH that limits CH designations to "specific areas" that contain "the physical or biological features . . . essential to the conservation of the species" *and* that "may require special management considerations or protections."[69] This narrower definition was designed to significantly constrain overbroad designations that were simply not useful for the conservation of threatened or endangered species. In the absence of any identifiable conservation benefit to designation, not only would the Service's proposed CH designation conflict with the ESA and case law thereon, it directly contravenes congressional intent. A final designation to protect habitat that NMFS acknowledges does not require special management considerations or protections, therefore, would not be in accordance with the ESA.

2. Loggerhead CH is Not Prudent or Determinable

In addition to defining CH as those areas with features essential to the conservation of the species and that require special management considerations or protections, the ESA requires listing agencies to limit their CH designations to those that are "prudent and determinable."[70] Under listing agency regulations, CH designations are not "prudent" when the designation will not benefit the species.[71] Such designations are not "determinable" when, *inter alia*, there is not sufficient information available to analyze the designation in accordance with the statute.[72]

The Service's proposed CH designation unambiguously fails the "prudence" test for the same reason NMFS failed to show that features of loggerhead habitat "may require special management considerations and protections." As explained above, the DEA found that the proposed CH designation would result in no new conservation measures or protections and therefore attributed no conservation benefits or costs to the proposed action (other than costs to prepare and file paperwork).[73] Simply put, the CH designation is not prudent because the Service's own analysis unambiguously says it does not benefit the loggerhead. On this point alone, NMFS should withdraw its proposal.

CH, however, is also not determinable because the proposed CH designation fails to provide information sufficient to analyze the designation in accordance with the statute. As discussed further below, as opposed to listing determinations, which can only be made on the best scientific and commercial data available, §4 of the ESA requires CH determinations to be made on the basis of the "best scientific data available . . . after taking into consideration the economic impact . . . on specifying any particular area as critical habitat."[74] This analysis,

[68] See Legislative History of the Endangered Species Act at 823 (reprinting House Consideration and Passage of H.R. 14104, with amendments, Oct. 14, 1978).

[69] 16 U.S.C. § 1532(5)(A).

[70] 16 U.S.C. § 1533(a)(3).

[71] 50 C.F.R. § 424.12(a)(1).

[72] 50 C.F.R. § 424.12(a)(2).

[73] DEA at ES-2.

[74] 16 U.S.C. § 1533(b)(2).

however, cannot be made because of the profound uncertainties as to the benefits of the rule. As the DEA notes, the conservation benefits of CH designation could not be quantified because there are no known or identifiable improvements to loggerhead populations or increased recovery potential.[75]

Without information sufficient to make this statutorily-required economic analysis, CH is not determinable, and therefore unlawful, as per 50 C.F.R. § 424.12(a)(2). On the other hand, if the Service's inability to quantify the benefit of the proposed CH designation is because there is no benefit, its fails the cost-benefit analysis under ESA §4. Either way, the proposed CH designation is not in accordance with the ESA.

3. Draft Economic Analysis is Flawed

As explained above, §4 of the ESA requires CH determinations to be made on the basis of the "best scientific data available . . . after taking into consideration the economic impact . . . on specifying any particular area as critical habitat."[76] While the Associations recognize that NMFS may exercise judgment in deciding whether or not to designate CH pursuant to the ESA §4(b)(2) analysis, in this instance, where the Service can identify no conservation benefit to loggerheads, the only reasonable disposition is to decline to designate CH. The reasonability of such a conclusion does not change simply because the costs of the designation are apparently fairly modest.

Even apparently modest costs, when weighed against no identifiable benefit, tip the analytical scales against CH designation.[77] Nonetheless, the costs the DEA attributes to the proposed CH designation likely significantly underestimate the actual costs of the designation. For instance, for all offshore oil and gas operations, the DEA predicts costs of $17,000 over the next 10 years.[78] This value is unrealistic for a number of reasons:

(1) It accounts only for consultation costs in areas where there are existing offshore oil and gas operations, and not the South- and Mid-Atlantic planning areas where additional

[75] DEA at 7-1. Further, when NMFS finalized the nine loggerhead DPSs on September 22, 2011, it stated that it lacked "comprehensive data and information to identify and describe physical and biological features of the marine and terrestrial habitats of the loggerhead sea turtle" and therefore found "designation of critical habitat to be "not determinable" at this time." 76 Fed. Reg. at 58948. Nearly all the references cited in the Biological Review, however, predate the September 22, 2011 rule. As such, NMFS should explain with specificity what information became available in the ensuing 21 months that now makes CH determinable.

[76] 16 U.S.C. § 1533(b)(2).

[77] The Service's proposed CH designation is also plainly at odds with EO 13563, in which President Obama directed his agency heads to tailor their regulatory approaches to provide benefits with "the least burden on society." There is simply no conceivable justification for a regulation – even one with modest costs – that provides no benefit at all.

[78] DEA at 5-19.

oil and gas leasing is being considered and renewable energy projects are already occurring.[79]

(2) For the entire Western and Central GoM Planning areas, the DEA estimates that there will only be three programmatic consultations in the next ten years.[80] There have been six consultations in this same area in the last five years.[81]

(3) Because the DEA assumes that Section 7 consultation is already required based on the presence of loggerhead, it assigned a value of $4,200 as the incremental administrative cost the government would incur in each of the consultations to address adverse modification.[82] It assumes no costs for industry. While the Associations agree that consultations pursuant to the programmatic Environmental Impact Statement ("EIS") result in greater costs to the consulting agency, such consultations still result in costs to the industries that operate under the programmatic EIS.

Many of the unrealistic assumptions and values in the oil and gas analysis carry through to the other industries examined in the DEA. Across all industries, the DEA estimates the proposed CH designation would result in a total cost of $750,000 over the next ten years ($86,000 annualized)[83] – for a designation that (including the sargassum habitat) would be about the size of Texas, California, and North Dakota combined.

Not only are these values undermined by profound underestimates in the number and cost of consultations, they fail to consider the near-certain indirect costs of the designation such as project delay and litigation. While the DEA recognizes the potential for these impacts, it found them to be too speculative to quantify.[84] Litigation, and litigation-caused project delays, however, are not speculative. This CH designation was proposed in response to litigation from three separate environmental groups.[85] There have been at least eight other lawsuits filed related to the loggerhead alone.[86] Additionally, the oil and gas industry, and particularly those operations that occur offshore and in the GoM, have always been major targets for litigation. That environmental groups will attempt to use a final CH designation as a basis for further litigation and as a means of constraining and delaying offshore development is not speculative –

[79] *Id.* at 5-2.

[80] *Id.*at 5-19.

[81] *Id.*at 5-17

[82] *Id.*at 5-17.

[83] *Id.*at ES-2.

[84] *Id.*at ES-7, 8.

[85] Center for Biological Diversity, Oceana, and the Turtle Island Restoration Network (78 Fed. Reg. at 43007).

[86] *Oceana, Inc. v. Blank*, Civil Action No. 08-1881 (PLF) (D.D.C.) (pending); *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt. and Enforcement*, 791 F. Supp. 2d 1158 (S.D. Ala. 2011); *Oceana v. Gutierrez*, D.D.C. Civ. No. 07-142 (RBW) (2007); *The Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147 (D.D.C. 2005); *Oceana v. Evans*, Civ. No. 03-10570-GAO, 2004 U.S. Dist. LEXIS 14895 (D. Mass. July 30, 2004); *Oceana v. Evans*, 384 F. Supp. 2d 203 (D.D.C. 2005); *Loggerhead Turtle v. Council of Volusia Cty., Fla*., 120 F. Supp. 2d 1005 (11th Cir. 2000); *Center for Marine Conservation v. Brown*, 917 F. Supp. 1128 (S.D. Texas 1996).

it is a near certainty that a CH designation that provides no additional conservation benefits to loggerheads.

Even assuming that litigation may be filed on only the three programmatic consultations that the DEA anticipates for the oil and gas industry, there will be an incremental cost to respond to additional claims relative to allegations of adverse modifications. In comments on the proposed polar bear critical habitat designation, the oil and gas industry estimated the incremental cost of defending an additional claim related to adverse modification to be around $50,000.[87] That value may be higher or lower now three years later and in the lower 48 states, but it most certainly is not zero. If similar incremental litigation costs were carried over across all the industries and industry activities in the DEA, the costs of this proposed CH designation would increase exponentially – and likely accompanying those litigation costs would be the substantial costs related to project delays and production slippage.

Even though NMFS does not anticipate that the proposed CH designation would add any new restrictions or conservation requirements on industry, that does not mean that the procedural obligations triggered by the CH designation are somehow eliminated. In every Section 7 consultation, the Service must provide an analysis that the proposed action will not adversely destroy or modify critical habitat. To support that conclusion, in every instance, NMFS will have to identify which Primary Constituent Elements ("PCEs") are present at each site and demonstrate that the proposed action will not significantly impair those elements. Development of that record – imminently supportable as it may be – takes time and relies on increasingly overburdened agency resources. Far from being speculative, delay is a likely outcome of such additional analysis.

Further, while the Associations certainly do not believe it to be a necessary or appropriate outcome of a final CH designation, we are aware of instances where areas have been eliminated from oil and gas lease sales exclusively based on the existence of critical habitat. For example, Ledyard Bay was eliminated from Lease Sale 193 in the Chukchi Sea because it contained CH for the spectacled eider. If important development areas were eliminated from future oil and gas lease sales based on loggerhead CH, the cost of this designation would be astronomical.

In sum, based on the Associations' experience in Section 7 consultations and in offshore operations, we believe that the DEA took an overly optimistic view of the administrative costs that are driven by the presence of CH, and failed to consider entirely predictable litigation and delay costs. As such, the total cost of this proposed CH designation, and the costs relative to oil and gas operations, are likely tremendously underestimated. Even if the DEA's estimate of $750,000 across all industries were correct, however, when balanced against zero identifiable benefit, the only supportable outcome is to decline to designate CH.

C. "Sargassum Habitat" Should Not be Designated as CH

[87] See July 6, 2010 Comments from Alaska Oil and Gas Association and American Petroleum Institute in FWS-R7-ES-2009-0042.

NMFS is not presently proposing to include, but is taking comment on inclusion of, sargassum habitat in the CH designation.[88] The Service delineates the sargassum habitat as the entire GoM and the Atlantic Ocean up to 40 degrees north latitude ("ºN"), from the 10-meter depth contour to the outer boundary of the Exclusive Economic Zone ("EEZ").[89] NMFS does not quantify this area, but we calculate it to be well over 500,000 square miles ("sq. mi."),[90] which would make it the largest CH designation in the history of the ESA, and roughly three times the size of the second-largest CH designation.[91] If additional context is required, consider that the identified potential sargassum habitat is larger than the states of Texas, California, and North Dakota, combined.

1. Sargassum's Benefit to Loggerheads is More Limited Than NMFS Suggests

While sargassum has value to loggerheads, particularly at the post-hatchling stage, it is not uniformly valuable (or likely present) throughout the entire 500,000 sq. mi. habitat that NMFS is considering designating. Sargassum is of greatest value to vulnerable post-hatchlings and is only useful to them when its spatial and temporal accumulations coincide with post-hatchlings' presence in neritic habitats associated near nesting beaches – habitats which NMFS is proposing to designate as CH independent of sargassum. The limited spatial and temporal value of sargassum does not extend to the limits of the EEZ, is almost entirely non-existent in the GoM, and provides no justification for adding another habitat - the largest one in the history of the ESA – to an already unnecessary proposed CH designation.

Indeed, NMFS should decline to designate sargassum habitat for the same reasons discussed above to designate all loggerhead habitat – loggerhead populations are expanding, CH designation creates only costs with no conservation benefit, and the proposed designations do not meet ESA requirements. In the subsections below, we explain why designating the sargassum habitat as CH is particularly problematic under the ESA.

More specifically, as the name suggests, this massive potential addition to the proposed CH designation is based entirely on the potential presence of sargassum on the surface of the ocean.[92] Sargassum is a floating genus of macroalgae that, as a result of wind, currents, convergence zones along fronts, internal waves, Langmuir circulations, and other factors

[88] 78 Fed. Reg. at 43006.

[89] 78 Fed. Reg. at 43021.

[90] The U.S. EEZ in the GoM is 273,295 sq. mi. The EEZ of the U.S. East Coast is 353,578 sq. mi., of which approximately 75% of which (265,183 sq. mi.) is south of 40º N.

[91] The 2nd largest designation was for the polar bear (187,157 sq. mi) (75 Fed. Reg. 76086 (Dec. 7, 2010). Notably, the polar bear CH designation was vacated and remanded by the U.S. District Court for the District of Alaska for being overly broad. *Alaska Oil & Gas Ass'n v. Salazar*, (No. 3:11-cv-0025-RRB) (Jan 1, 2013).

[92] 78 Fed. Reg. at 43013.

scientists do not yet understand, can accumulate into large mats or "windrows," that loggerheads may utilize for shelter and foraging opportunities.[93] These mats can generally be found in western portions of the GoM and broad areas of the Atlantic Ocean known as the Sargasso Sea.[94]

While sargassum has a widespread range, its "geographical and temporal distributions are variable and not well understood."[95] Generally, sargassum initially emerges around March of each year in propagation areas in the northwest GoM.[96] It then circulates through portions of the GoM along the Loop current, until around June or July, when it exits the GoM and begins circulating between 20º N and 40º N and out to 30º W.[97] Multiple variables impact sargassum drift patterns, making this habitat feature "dynamic and transitory."[98] Areas of ocean that may provide loggerheads important forage and shelter opportunities at any given time, may not be utilized by loggerheads at other periods, depending on a multitude of factors - some currently understood and many not.[99]

Not only is sargassum a transitory and ephemeral feature of any part of the identified potential sargassum habitat, its importance to loggerheads is also ephemeral. There is evidence, for instance, that the importance of sargassum as forage and shelter habitat is tied to its density.[100] While sargassum density is dependent on many factors, the greatest biomass and aggregation into mats and windrows generally occurs off the southeastern coast of the U.S. around July.[101] This peak density roughly coincides with peak hatchling production on the southeastern coast.[102] Thus, to the extent sargassum forms mats within the near-shore and neritic habitat, those mats would likely be utilized by, and important to, post-hatchlings.[103] Indeed, NMFS is considering inclusion of sargassum habitat in the proposed CH designation specifically because of the vulnerability of post-hatchlings at this life stage.[104]

---

[93] Biological Report on the Designation of Marine Critical Habitat for the Loggerhead Sea Turtle, *Caretta caretta* ("Biological Report") (NMFS 2013) at 62.

[94] *Id.*at 62.

[95] *Id.*at 63.

[96] *Id.*

[97] *Id.*at 62-64.

[98] 78 Fed. Reg. at 43008.

[99] Indeed, both NOAA and BOEM have important studies underway to better understand sargassum distribution and movement and those factors that impact distribution and movement. See NOAA's Addendum to Assessment Plan for Sargassum Communities and Associated Fauna in the Northern Gulf to Support Sargassum Mapping; See also BOEM 2010 "Comprehensive Ecosystem Characterization of the U.S. Outer Continental Shelf: Pelagic Sargassum Algae Distribution and Movement in the Gulf of Mexico and Atlantic. Environmental Studies Program; Studies Development Plan for FY 2011-2013.

[100] *Id.* at 65-66.

[101] *Id.* at 65.

[102] *Id.*

[103] 78 Fed. Reg. at 43022.

[104] *Id*. at 43022.

The temporal and geographic coincidence of sargassum's forage and shelter opportunities with post-hatchlings' need for forage and shelter opportunities is fairly unique and localized. Sargassum that is further offshore, not oriented off nesting beaches, or that is not sufficiently aggregated into mats, is likely less important to loggerheads, particularly post-hatchlings.

The coincidences that make sargassum potentially important to post-hatchlings off the southeastern coast are not present in the GoM. The GoM has far fewer nesting beaches and far less productive nesting beaches than the U.S. southeastern coast.[105] The GoM also contains less sargassum biomass than the southeastern coast.[106] More importantly, the sargassum that is present in the GoM does not generally intersect spatially or temporally with the post-hatchling loggerheads that rely most on sargassum's forage and shelter opportunities.

In the GoM, the highest densities of sargassum are found in the western GoM close to the Texas coast.[107] There are, however, almost no loggerhead nesting beaches in the GoM along the Texas coast or anywhere west of the outfall of the Mississippi River. FWS specifically declined to propose CH anywhere in Texas or Louisiana "because of the very low number of nests (less than 10 annually in each state from 2002 to 2011) known to be laid in these states."[108] Similarly, NMFS's proposed designation of the neritic habitats that are associated with nesting beaches do not extend west of the State of Mississippi.[109] As such, the only areas of the GoM where sargassum has the potential to be present in sufficient density to provide forage and shelter opportunities to post-hatchling loggerheads, has almost no nesting beaches to contribute post-hatchings into the neritic habitat.

In the GoM, loggerheads nest on beaches along Florida's west coast and westward to Mississippi.[110] Both FWS and NMFS acknowledge this narrow range and accordingly limited their CH proposals to nesting beaches and associated neritic habitats within this range.[111] Sargassum, however, is rarely present at all along these areas.[112] Where sargassum is present in the eastern GoM, it is mostly low-density accumulations that are farther offshore and which do not associate with the known nesting beaches and post-hatchling neritic habitats.[113] Based on such, NMFS concluded that, "the persistence of *Sargassum* habitat and young loggerheads in the eastern Gulf of Mexico can only be speculated upon at this time . . ."[114]

---

[105] *Id.* at 43007.

[106] Biological Report at 65.

[107] *Id.*

[108] 78 Fed. Reg. 18001 (Mar. 25, 2013).

[109] *Id*. at 43025-43-28.

[110] *Id.* at 43025-43-28.

[111] *Id.* at 43025-43-28; 78 Fed. Reg. 18001.

[112] Biological Report at 64-65.

[113] *Id.*

[114] *Id.*

The only identifiable point where meaningful accumulations of sargassum are proximate to nesting beaches and neritic habitats is where it moves past the Florida Keys on its way to the Atlantic Ocean.[115] Even so, as it is being rapidly conveyed in the powerful Gulf Stream through the narrow Straits of Florida, NMFS considers sargassum's presence near the Florida Keys to be "extremely transient."[116] As such, throughout the entire 273,295 sq. mi. EEZ of the GoM that NMFS is considering designating as CH (exclusively due to the potential presence of sargassum), sargassum is only known to be briefly present in necessary accumulations in near-shore waters off a few miles of nesting beaches in the Florida Keys – that are already protected as a National Marine Sanctuary[117] and which NMFS is already proposing to designate as CH for reproductive and migratory reasons.[118]

Importantly, not only is sargassum in the GoM spatially disconnected from areas of the GoM where post-hatchlings are present, it is in the GoM only briefly and well before post-hatchlings could use it for forage or shelter opportunities. Sargassum is present in the GoM in significant concentrations (again, the northwest GoM, where there are no loggerhead nesting beaches or neritic habitat) from approximately March to June each year.[119] Loggerheads in the DPS, however, generally make three to six nests at 12-15 day intervals from late April to early September.[120] The eggs laid in those nest then incubate for between 42 and 75 days,[121] meaning that, even if sargassum were present near nesting beaches and neritic habitat, by the time most post-hatchlings enter the water, there are no concentrations of sargassum in the GoM.[122]

2. "Sargassum Habitat" Does Not Require Special Management Protections

As discussed above, the ESA limits CH designations to areas with PBF that are essential to the conservation of the species and that may require special management measures.[123] NMFS identifies the PBF of sargassum habitat as "foraging habitat for young loggerheads where surface waters form accumulations of floating material, especially *Sargassum*."[124]

The more than 500,000 sq. mi. of sargassum habitat, however, does not all contain accumulations of sargassum or other floating material. As NMFS notes, sargassum is "dynamic and transitory,"[125] and that its "geographical and temporal distributions are variable and not well

[115] *Id.*

[116] *Id.* at 65.

[117] *See http://www.dep.state.fl.us/coastal/sites/keys/* (accessed 8/28/13).

[118] 78 Fed. Reg. at 42027- 43028.

[119] Biological Report at 65.

[120] 78 fed. Reg. at 43007- 43008.

[121] *Id*. at 43008.

[122] Biological Report at 63.

[123] 16 U.S.C. § 1532(5)(A)(1).

[124] 78 Fed. Reg. at 43020.

[125] *Id.* at 43008.

understood."[126] This variability, in fact, lead to the massive delineation of the sargassum habitat as NMFS was unable to "identify specific areas where these weedlines are likely to form consistently. . ."[127] Indeed, large sections of the sargassum habitat may never contain accumulations of sargassum. Those areas that may more consistently contain accumulations of sargassum may not also spatially or temporally coincide with the post-hatchlings and young loggerheads that NMFS considers to benefit from sargassum accumulations. As discussed above, areas within the GoM with likely sargassum accumulations are not generally associated with neritic habitats off nesting beaches. As such, NMFS cannot credibly find that the 500,000+ sq. mi. sargassum habitat is a specific area "within the geographical areas occupied by the species, at the time it is listed...on which are found those physical or biological features [that are] essential to the conservation of the species..."[128] It is, in fact, the precise type of designation "as far as the eye can see and the mind can conceive,"[129] that Congress amended the ESA to prohibit.

Nor can NMFS credibly conclude that these ephemeral PBF *may require* special management measures, as required by the ESA and case law thereunder.[130] Sargassum is abundant. Gross estimates of the standing stock for sargassum in the North Atlantic range between 4 and 11 million metric tons.[131] According to the best scientific information available, sargassum abundance has remained steady with no observed declines in biomass or range for as long as it has been studied.[132]

Additionally, not only are loggerhead fully and effectively protected in the absence of a CH designation, but so is sargassum. Sargassum has been protected under a fishery management plan ("FMP") since 2002,[133] and is protected as essential fish habitat.[134] The FMP for sargassum is incredibly stringent, even though there is only one known commercial harvester of sargassum.[135] The sargassum FMP: (1) limits the total allowable catch of sargassum to 5,000 pounds per year; (2) limits harvesting to November to June to protect turtles; (3) requires

---

[126] Biological Report at 63.

[127] 78 Fed. Reg. at 43021.

[128] 16 U.S.C. § 1532(5)(A)(1).

[129] See Legislative History of the Endangered Species Act at 823 (reprinting House Consideration and Passage of H.R. 14104, with amendments, Oct. 14, 1978).

[130] *See Cape Hatteras, 344 F. Supp. 2d* (Service cannot designate critical habitat without making "mandatory" finding that special management may be required).

[131] Fishery Management Plan for Pelagic Sargassum Habitat of the South Atlantic Region, South Atlantic Fishery Management Council (Nov. 2002) at 28.

[132] Fishery Management Plan for Pelagic Sargassum Habitat of the South Atlantic Region, South Atlantic Fishery Management Council (Nov. 2002) at 16; *See also* Butler, J.N. and A.W. Stoner. 1984. Pelagic Sargassum: has its biomass changed in the last 50 years? Deep-Sea Res. 31:1259-1264; Nierman, U., H.G. Andres, and H.C. John. 1986; Distribution and abundance of pelagic Sargassum in spring 1979. Senckenb. Marit. 17:293-302.

[133] Fishery Management Plan for Pelagic Sargassum Habitat of the South Atlantic Region, South Atlantic Fishery Management Council (Nov. 2002).

[134] NMFS, Southeast Regional Office, "Essential Fish Habitat: A Marine Fish Habitat Conservation Mandatefor Federal Agencies South Atlantic Region," at 11-12 (Sept. 2010).

[135] http://www.safmc.net/Library/Sargassum/tabid/414/Default.aspx (accessed 8/30/13).

observers on any vessel harvesting sargassum; (4) prohibits harvest within 100 miles of shore; and, (5) imposes gear specifications.[136]

Importantly, in the context of loggerhead recovery, which is the only context relevant to this proposed designation, each of these protections for sargassum is supported by the numerous overlapping loggerhead protections discussed earlier and the meaningful and comprehensive industry regulations discussed below.

As it did with each of the habitats proposed to be designated, NMFS failed to identify any potential need for special management considerations. NMFS merely states, in conclusory fashion, that commercial harvesting, oil and gas activities, vessel operations, disposal activities, and climate change "may require special management."[137] NMFS never explains why special management measures may be required to address these activities/issues. Such conclusory statements do not satisfy the special management requirements of ESA § 4(b)(2).[138] Such conclusory statements are also completely belied by the DEA, which found that no new conservation measures or restrictions would be imposed by the proposed CH designation – in sargassum habitat or elsewhere.[139] Further, the Service's unsupported statements that CH designation may lead to increased state and local protections are particularly unpersuasive in the context of the sargassum habitat because the vast majority of the habitat extends beyond state jurisdiction and all of it is beyond local jurisdiction.

Most of the sargassum habitat does not contain PBF. Those areas that may, from time to time, contain the accumulations necessary to be considered a PBF are generally spatially and temporally distant from the post-hatchlings that NMFS considers most in need of sargassum. Even if support existed for the notion that these PBF (necessary accumulations of sargassum) were found everywhere in the sargassum habitat, NMFS failed to demonstrate, or meaningfully discuss, the need for special management considerations to protect those PBF. Indeed, the DEA specifically found that special management measures are not expected anywhere in the proposed CH designation, including the sargassum habitat. If NMFS were to finalize the proposed CH designation to include the sargassum habitat while at the same time acknowledging that the presence of PBF was uncertain and that no special management considerations are necessary or even contemplated to protect them, such a decision would be arbitrary, capricious, and not in accordance with the ESA.

3. Designating "Sargassum" Habitat is Not Prudent or Determinable

[136] Fishery Management Plan for Pelagic Sargassum Habitat of the South Atlantic Region, South Atlantic Fishery Management Council (Nov. 2002).

[137] 78 Fed. Reg. at 43024. Specifically, for the oil and gas industry, NMFS suggests that special management considerations may be needed because of normal activities as well as oil spills and response actions. NMFS, however, provides absolutely no information anywhere in the record to suggest that oil spills or dispersant use adversely impact sargassum.

[138] See Cape Hatteras, 344 F. Supp. 2d at 124 (special management finding cannot be satisfied by "conclusory statement.")

[139] Economic Analysis of Critical Habitat Designation of Marine Habitat for the Northwest Atlantic Ocean Distinct Population Segment of the Loggerhead Sea Turtle; Draft Report (July 11, 2013), at 7-1.

As discussed above, under listing agency regulations, CH designations are not "prudent" when the designation will not benefit the species.[140] NMFS and the DEA have recognized the proposed CH designation's lack of conservation benefit across all habitats, including the sargassum habitat. As discussed in Section C.1., nowhere among the analyzed habitats is the lack of a conservation benefit more pronounced than in the sargassum habitat. Not only are loggerheads protected to such an extent that NMFS cannot conceive of any new necessary conservation measures under the CH designation, but so is sargassum – separately and independently.

Even if sargassum required special management considerations (which it does not), promulgating a CH designation to protect sargassum habitat would still not be prudent. As discussed above, while sargassum has value to loggerheads, its value is significantly limited spatially and temporally. In the narrow circumstances where/when sargassum accumulations have particular value to loggerheads, those accumulations are in highly protected areas and areas that NMFS is proposing to designate as CH for reasons independent of the potential presence of sargassum. Designating the sargassum habitat as CH, therefore, provides no benefit to loggerheads. As the Service's regulations under the ESA direct, CH designations that do not benefit species are not prudent and should not be promulgated.

Not only is designating sargassum habitat as CH imprudent, it is also not determinable. Designations are not "determinable" when, *inter alia*, there is not sufficient information available to analyze the designation in accordance with the statute.[141]

While sargassum habitat is indeterminable for the same reason all the other proposed habitats were indeterminable (lack of sufficient information to conduct the required economic analysis), the dearth of data relative to the sargassum habitat make it particularly indeterminable. The PBF on which all sargassum CH designation must be based are ephemeral, transitory, and not well understood. Inexplicably, NMFS acknowledged its inability to determine where PBF may be found in the sargassum habitat, stated that it was "unsuccessful in identifying specific sites as *Sargassum* critical habitat for loggerheads," and then proposed to designate the entire sargassum habitat as CH anyhow.[142] To be clear, the ESA does not allow NMFS to forgo its analysis of the presence of PBF, or its analysis of the need to protect them. If there is insufficient information on the existence of PBF, then CH is not determinable, and designation is not permissible under the ESA or listing agency regulations thereunder.

4. Draft Economic Analysis of Sargassum Habitat is Particularly Flawed

Section 4 of the ESA requires CH determinations to be made on the basis of the "best scientific data available…after taking into consideration the economic impact…on specifying any particular area as critical habitat."[143] Section B.3. above discusses at length the profound

[140] 50 C.F.R. § 424.12(a)(1).

[141] 50 C.F.R. § 424.12(a)(2).

[142] 78 Fed. Reg. at 43021-43022.

[143] 16 U.S.C. § 1533(b)(2).

flaws in the Service's economic analysis across all habitats. Not only did the DEA underestimate the costs of the proposed CH designation, but even the modest costs estimated in the DEA, when compared to no conservation benefit, warrant withdrawal of the proposed CH designation.

This imbalance of costs and benefits is most pronounced in the sargassum habitat. Like all habitats, the DEA found no conservation benefit to designating sargassum habitat as CH.[144] Yet, 38 percent of the costs the DEA attributes to this rule are from consultation efforts in sargassum habitat.[145] This percentage, which equates to $285,000, is by far the highest among all the proposed habitats.[146] Still, $285,000 is likely a profound underestimate of the real costs of the proposed CH designation. As discussed above, consideration of CH in Section 7 consultations can be costly. Litigation and delay are near-certain outcomes of designation. When factors such as these are more fully considered, the costs specifically attributable to the potential designation of expansive and ephemeral sargassum habitat will increase significantly. Balanced against no identifiable conservation benefit and considering the Service's incomplete understanding of the presence and importance of PBR in the habitat, sargassum habitat is particularly unsuited for designation as CH under the ESA.

D. If NMFS Designates CH, Then it Must Also Reasonably Exclude Important Development Areas

If NMFS persists in finalizing the proposed CH designation – particularly if such designation includes the sargassum habitat, then, pursuant to ESA §4(b)(2), it should exclude those areas within the CH where "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . ."[147] As discussed in detail above, the lack of conservation benefits stemming from the proposed designation justify withdrawing the proposed CH designation entirely, and, in fact, make designation arbitrary, capricious, and impermissible under the ESA. The Associations do not herein concede any justification exists for such a step. Instead, the Associations here argue that, if NMFS persists with a final designation, it should, at a minimum, exclude all areas presently open to oil and gas development or being considered for oil and gas development, as well as the existing and proposed areas where pipeline and infrastructure support such development.

Indeed, all areas utilized by the industries discussed in the DEA warrant exclusion for a number of reasons, most of which have been discussed above: (1) loggerhead populations are healthy and abundant in these areas; (2) loggerheads are already protected by a wide array of regulations and conservation measures that are proving quite effective; (3) the most important areas of sargassum habitat are much more narrowly delineated than NMFS defines; (4) NMFS acknowledges that CH designation will not lead to any additional conservation measures or

[144] DEA at ES-7.

[145] *Id*.

[146] *Id.at* ES-2.

[147] 16 USC § 1533 (b)(2).

protections to loggerheads; and, (5) the DEA explicitly estimated that the costs of designating CH exceed the benefits to loggerheads.

Exclusion from the proposed CH designation of all existing and proposed oil and gas development areas makes particular sense for the oil and gas industry, however, because the potential threats from the industry are already managed by BOEM requirements and regulations regarding:

(1) decommissioning activities;[148]
(2) seismic mitigation measures for marine mammals and sea turtles;[149]
(3) avoidance measures for biologically-sensitive underwater features and areas;[150]
(4) avoidance of sensitive turtle habitats;[151]
(5) seasonal/temporal/proximity limits for exploration/development/use of lights in sensitive habitats.[152]
(6) use of surveyors for sea turtles and sargassum during exploration and operations;[153]
(7) use of lookouts and buffer zones when navigating in known turtle habitat;[154]

The offshore oil and gas industry is also subject to a number of laws with relevant protections for loggerheads and the marine environment:

(1) 30 C.F.R. Part 250 – "Oil and Gas and Sulphur Operations in the Outer Continental Shelf" – requires protections for marine environment and marine species, prevents unauthorized discharges, and regulates the use and disposal of numerous materials.
(2) The Outer Continental Shelf Lands Act ("OCSLA") – protects all submerged land seaward of state coastal waters.[155] OCSLA requires numerous measures to evaluate and protect sea life and marine ecosystems, including those important to loggerheads.
(3) Coastal Zone Management Act – requires that federal actions that affect the natural resources of a state's coastal zone be consistent with the enforceable

[148] 67 Fed. Reg. 66046 (Oct. 30, 2002).

[149] BOEM NTL 2012-G02.

[150] BOEM NTL 2009-G39.

[151] DEA at 5-12.

[152] *Id.*

[153] *Id*.

[154] 2012-JOINT-G01.

[155] Further, each state with oil and gas operations in their coastal waters also maintain strict oil and gas regulations. (*See* DEA at 5-14, 5-15). Even Atlantic coastal states that do not yet have operations in their coastal waters are developing regulations (DEA at 5-14).

policies of a federally approved state coastal zone management plan. Many such plans specifically protect loggerheads.[156]

These measures apply everywhere the oil and gas industry is currently operating, will apply wherever industry operations occur in the future, and are in no way impacted or improved through CH designation. Given these measures, if NMFS finalizes the proposed CH designation, at a minimum, it should exclude all areas open to oil and gas development or proposed to be opened to oil and gas development.

E. NMFS has an Obligation to Make Available the Studies that Form the Basis of its Proposed CH Designation

Despite the fact that the proposed CH designation would encompass a broad multi-state region (and the entire EEZ through the GoM and the East Coast north of 40º N), other than the biological report and the DEA, the Service failed to provide any docket materials for the proposed actions in the regulations.gov docket or on its website. It is inconceivable that, for a rulemaking of this potential magnitude, the Service would not make critical docket materials, including key studies on which it relied, available electronically. This failure is especially harmful here because the Service's proposed designation could potentially impact small businesses, many of which are unable to travel to the Service's only docket repository in Washington, D.C.

Adequate opportunity for public participation not only improves agency rulemaking, it is required by the Administrative Procedure Act.[157] Further, in signing Executive Order 13463, President Obama recognized that effective public participation in an increasingly web-enabled society requires that important rulemaking information be electronically available. More precisely, Executive Order 13463 directs each agency to provide "for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded."[158] Not only did the Executive Order give the public the right to electronic access for purposes of commenting on the proposals, it also required "an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings."[159]

This proposal fails each of these requirements and stands in contrast to this Administration's commitment to open government and transparent processes.[160] The majority of stakeholders in this rulemaking have thus far been denied a meaningful opportunity to understand and comment on the Service's proposal. They are forced to rely on the Service's own characterization of the supporting data.

---

[156] *Id.*

[157] 5 U.S.C. §§ 552(a), 553(c).

[158] E.O. 13,463 Sec. 2(b).

[159] *Id.*

[160] See Memorandum For the Head of Executive Departments and Agencies: Open Government Directive; Peter Orszag, Director, Office of Management and Budget (Dec. 8, 2012).

Before NMFS proceeds in designating CH for loggerheads, it must, at a minimum, make electronically available each study and report on which it relied in proposing the listing and then reopen a substantial comment period so that stakeholders can review the rule and effectively participate in the rulemaking process.

III. CONCLUSION

Designation of critical habitat for loggerheads creates costs without any conservation benefits, is unnecessary, and is impermissible under the ESA and its implementing regulations – particularly so if NMFS were to include the sargassum habitat in the final designation. The Associations therefore request that NMFS withdraw the proposal and decline to designate critical habitat. If NMFS persists in designating critical habitat, at a minimum, it should exclude all existing and proposed oil and gas development areas.

The Associations appreciate the opportunity to provide comments on these petitions. Should you have any questions on these comments, please feel free to contact Andy Radford, API, at radforda@api.org or by phone as 202.682.8584.

Sincerely,

Andy Radford. API

Jeffery Vorberger, NOIA