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Shrimping also threatening fish population, scientists say

By NANETTE HOLLAND
Tribune Staff Writer

TAMPA — Sea turtles aren't the only accidental victims of shrimp nets. For every pound of shrimp hauled aboard, five to 10 pounds of fish come with it, and most of it is thrown back into the water, dead, marine fisheries officials say.

Scientists say 1.6 billion pounds of fish — millions of them juveniles barely an inch long — are left to die on shrimp boat decks in the Gulf of Mexico each year, an ecological disaster they say is as heinous as the drownings of sea turtles in shrimp nets.

The issue of "bycatch" — as the incidental capture of fish in shrimp nets is dubbed — is going to catch up with shrimpers, very soon, scientists say. And when it does, it could be the end of an industry already troubled by regulations, falling profits and recent bad publicity.

"Within 20 years, I don't think there'll be any shrimping in the United States," said Terry Henwood, a scientist with the National Marine Fisheries Service's endangered species protection branch in St. Petersburg. "I don't like to see a shrimper go out of

business, but they are practicing one of the most destructive fisheries in the world and it's going to catch up with them."

Shrimpers have seen a preview of the future this year, with the ongoing fracas over rules requiring them to use devices to keep sea turtles from drowning in their nets. The shrimpers have fought tooth and nail to keep from having to use the devices. They, too, are beginning to think their days are numbered.

"Shrimping is going to be a thing of the past if it keeps on going the way it's going," said Richard Perez, president of the In-

shore Shrimpers Association of Tampa Bay. Scientists say bycatch is a serious threat to the survival of at least 13 species of fish. They say the problem is most acute in the Gulf of Mexico — where shrimping pressures are greatest — and especially in the bays and brackish rivers of the northern Gulf states.

Bays are nursery areas for fish. Sheltered from the predators of the open water, they grow in the estuaries until they are big enough to move offshore. But biologists say millions of inch-long juvenile fish, including commercially and recreationally valuable

species like red snapper and Spanish mackerel, will be scooped up in shrimp nets. Each year, fewer and fewer are left behind to reproduce.

"They're wiping out whole year-classes of fish," Henwood said. "You can go to an area that's been worked heavily by shrimpers and pull a net and not catch a thing. They've cleaned it out and shoveled 95 percent of it back over the side dead."

On average, shrimpers catch four times as many red snapper each year as recre-

See SHRIMPERS, Page 3B

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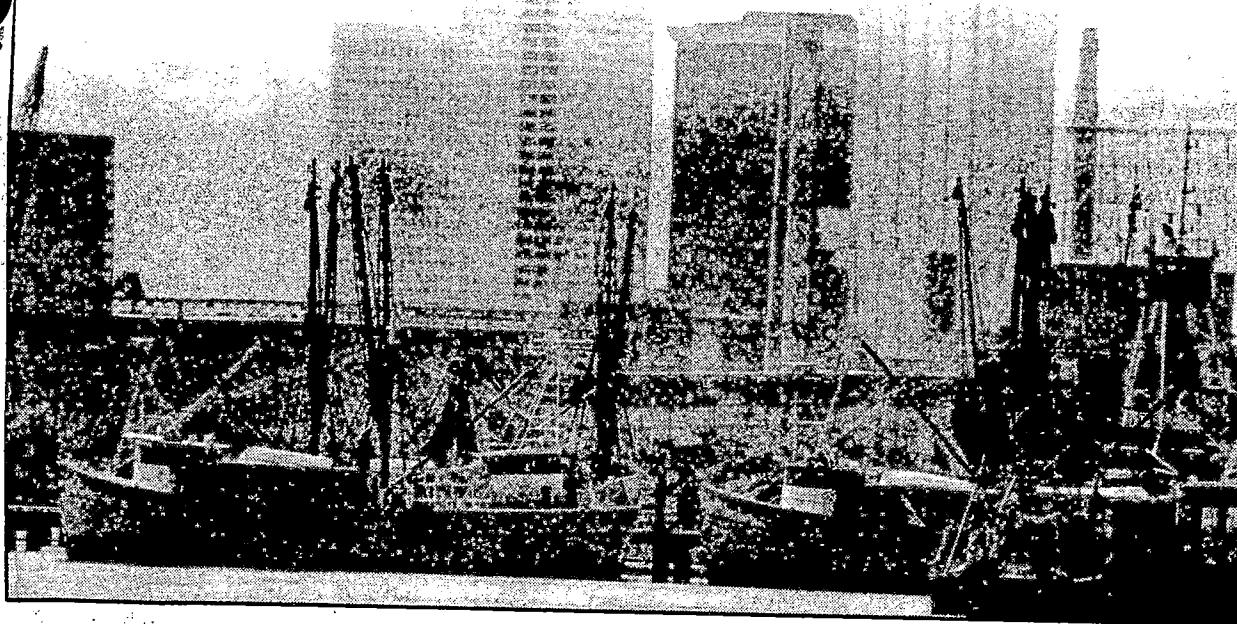
Front Page
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AUG 14 1989

TAMPA, FLA.
TRIBUNE

M - 237,205
S - 321,794

88



This calm and picturesque view of shrimp boats docked in Tampa belies the storm of controversy swirling around shrimpers and their turtle and fish catch.

Tribune photograph by JAY CONNER

Shrimpers maintain council scales dangerously stacked against them

■ From Page 1B

ational fishermen, a 1987 federal study shows. More than 15 million pounds of croaker are netted annually by shrimpers, while recreational anglers account for only about 11 million pounds.

Little fuss has been made so far by environmentalists and recreational fishermen, the two groups most likely to press for regulations to reduce bycatch.

They have directed their energies instead to supporting enforcement of the turtle excluder device rule, a measure they view as the first step toward clamping down on shrimpers. But bycatch is not far behind, they warn.

Emerging issue

"It's coming up fast and the shrimpers know it," said Ted Forsgren, executive director of the Florida Conservation Association. "They don't do what they've done with the turtle issue and argue about everything that's suggested or they can help themselves. We think the way to go about it is for them to get involved in solving the problem."

Forsgren said the bycatch issue offers shrimpers a chance to improve their tarnished image by demonstrating they are concerned about conservation. If they don't join the search for a solution, he said, the rules will go forward without them.

The shrimpers say they know they can't stand idly by. Earlier this

niques that will reduce their bycatch. If they succeed, they will ask the fisheries commission to reopen Upper Tampa Bay to shrimping.

"What option do they have?" said Mark Taylor, director of the Cortez chapter of the Organized Fishermen of Florida. "If they don't use some sort of device, they'll be out of business."

But, as with the turtle excluder device, most shrimpers maintain the scientists are exaggerating the bycatch problem. They say they are being made scapegoats, when the real cause of fish declines is habitat loss associated with development and industrial pollution.

"We're the smallest and the poorest group, so that makes us the easiest target," Perez said.

A question of attitude

He said most shrimpers are willing to modify their trawling methods or use a special bycatch-reducing device anyway if they can share in the equipment's design. But environmentalists say they doubt that many shrimpers share that view. They fear the hundreds of shrimpers who expressed their displeasure with turtle excluder devices by blockading two Texas ports two weeks ago and threatening to ram Coast Guard boats aren't likely to greet fish excluder devices with any more enthusiasm.

Some turtle excluder devices also are effective at deflecting fish, scientists say. The turtle excluder device designed by the National Marine Fisheries Service, for example,

just a matter of refining it for various conditions and putting the regulations in place," Oravetz said.

Scientists such as Henwood and Oravetz say those regulations are inevitable as more and more conservation-minded recreational fishermen step forward to spar with their commercial counterparts. The shift in the balance of power is particularly evident on the 13-year-old Gulf of Mexico Fisheries Management Council, a Congressionally created committee of 17 appointed members who recommend regulations to protect and conserve the resources of the Gulf.

In its early years, the council was weighted heavily with commercial fishing representatives, said Bob Lindall, assistant regional director of fisheries for the National Marine Fisheries Service. These days, however, the scales are tipping toward the recreational interests. Only two shrimpers currently serve on the council, although one is the chairman.

"It's definitely getting to be more of an even playing field," said Casey Fitzgerald, regional director of the Florida Conservation Association. The shrimpers maintain the scales are dangerously stacked against them.

But if the shrimpers choose to lock horns with the recreational and environmental groups over the bycatch issue, they most likely will wind up on the losing end, Henwood said.

"The recreational groups have a lot of money and shrimpers can't match them," Henwood said.

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Front Page Edit Page Other Page

HOUSTON, TEX.

POST AUG 5 1989

M - 301,100

S - 347,052

88

BRING BACK THE TEDS

Mosbacher should enforce rules as they're written

IT'S A PARADOX: A federal court ruled on Thursday that U.S. Commerce Secretary Robert Mosbacher has no authority to suspend regulations which require shrimpers to use turtle excluder devices. But at the same time, the judge gave Mosbacher the option of coming up with an alternative. Basic logic suggests you can't have it both ways.

U.S. District Judge Thomas Hogan was right in saying that "Congress has spoken" in the matter of turtle protection. This makes it all the more difficult to understand why he allowed Mosbacher any option except to enforce the existing rule.

Maybe Hogan simply does not understand the situation. The only alternative that Mosbacher is likely to come up with is a regulation requiring shrimpers to raise their nets every 105 minutes to free the trapped turtles, which otherwise would drown.

That's regulation by nudge-and-a-wink. Simply put, it wouldn't be adhered to, and would be all but impossible to enforce. There is no way anyone can prove how long a net has been in the water — and even if the nets are hauled up containing live turtles, many times the fishermen simply kill them on the spot and hope they won't get caught. Shrimpers view

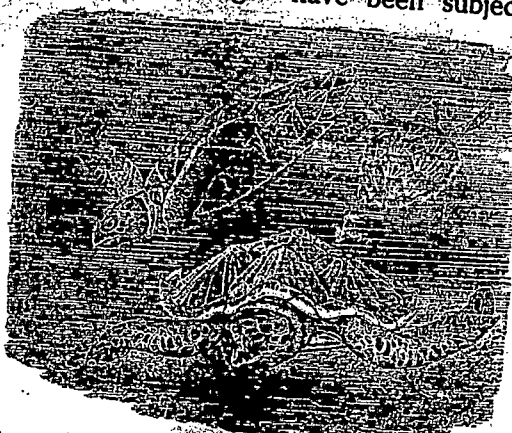
turtles as farmers view weeds.

But you can't fake having a TED. They require many minutes, even hours, to sew into a net, and you either have one or you don't. Under the now-suspended regulations, shrimpers caught not using the devices would have been subject to a fine of \$8,000 to \$25,000 and a jail term of up to six months.

It is difficult to fathom why Louisiana and Texas shrimpers are so dead set against TEDs. Reliable reports from Atlantic shrimpers say the loss of catch through using them runs about 5 percent, and the quality of the catch is improved enough to make up for the reduction. Raising

nets every 105 minutes guarantees missing out on far more shrimp than that.

As these words are written, shrimp fishermen are contemplating another blockade of Gulf ports, including the Houston Ship Channel, if the TEDs regulations are reinstituted. The Post urges Secretary Mosbacher, when he announces his decision on Monday, not to be cowed by such talk. He should hang tough and put the TEDs rules back in place. And the Coast Guard and all other enforcement authorities should stand ready to put a quick halt to any resumption of lawlessness.



MIAMI, FLORIDA

HERALD

M - 417.923

S - 52

AUG 13 1989

Turtles vs. shrimpers

ONCE AGAIN, Commerce Secretary Robert Mosbacher delayed the day when shrimp fishermen must use turtle-excluder devices (TEDs) on nets. On July 24, Mr. Mosbacher suspended Federal TED rules for the second time. That action makes today's decision by the Florida Marine Fisheries Commission crucial.

His actions should be deplored by environmentalists and law-and-order advocates everywhere, because the Secretary, himself a Texan, yielded after Gulf-coast shrimpers blockaded sea lanes to protest the regulations.

The shrimpers' do-or-die stand is without merit. Efforts to prevent some 12,000 turtles a year from drowning in shrimp nets began a decade ago. In 1981, the devices that allow turtles and other marine life to escape the huge shrimp nets were introduced. Extensive National Marine Fisheries testing shows that properly used TEDs account for only a 5-percent shrimp loss. They save shrimpers' fuel by freeing turtles and fish that load down nets during trawling. Four types of TEDs now are on the market, ranging in price from \$25 to \$400.

When it became apparent that shrimpers wouldn't use TEDs voluntarily, laws were introduced in Congress to require them.

FISHERIES PANEL HOLDS FATE

Some coastal states, including Florida, began writing TEDs rules for state waters. Even though Congress acted last year, the Commerce Department took shrimpers off the hook when the law took effect this spring. It decided to give violators only warnings instead of fines. The result? No one felt pressured to install TEDs.

Mr. Mosbacher's latest 45-day reprieve for shrimpers has been challenged in court by environmental groups. A ruling is imminent. Meantime, the National Audubon Society has called for a boycott on shrimp.

Last winter the Florida Cabinet approved an emergency TEDs rule to protect endangered Kemp's Ridley turtles during the last third of the Atlantic shrimping season. That rule has expired. Today, the Florida Marine Fisheries Commission considers a year-round TEDs rule in Florida waters. If approved, the rule goes to the Cabinet.

Florida waters support several types of commercial shrimping on the Atlantic and Gulf coasts. While the Federal rule also covers state waters, it simply isn't being enforced. The state needs its own TEDs regulation, and it needs one now.

JUL 28 1989

NEW ORLEANS, LA.

TIMES-PICAYUNE

M - 277,734

S - 340,171

38

'Greenwars' net disapproval

Two environmental disputes involving Louisianians turned ugly in recent days as reason and peaceful protest became casualties of inflamed emotions and intimidation.

Unfortunately, government officials have done little to uphold the rule of law.

The most flagrant abuse of the nation's honorable tradition of peaceful protest occurred when shrimpers used their trawlers to interfere with non-involved shipping in Louisiana and Texas.

The shrimpers were angry over the federal government's insistence that they insert light aluminum excluder devices (TEDs) in their trawling nets to help save from extinction sea turtles protected by the federal Endangered Species Act.

The shrimpers insist that using the TEDs would reduce their shrimp catches dramatically. But they can point to very little research data to support their claims since they have refused to take part in federal research programs and, indeed, have reacted with hostility, in many cases, to the programs.

For all their clamor, the shrimpers hardly deserve public applause for the tactics they have used, including outright thuggery and the firing of guns in at least one case.

Rather than siding with the firebrands, shrimpers should agree to try the TEDs over a specified period and permit agents of the National Marine Fisheries Service on board as observers.

The hasty capitulation to the rowdy demonstrators by Robert Mosbacher, the U.S. secretary of commerce, is regrettable. It is in direct contravention of the Endangered Species Act, renewed by Congress only last year, which makes it illegal to kill any member of an endangered species for whatever reason.

Urged on, lamentably, by Louisiana's U.S. Rep. Billy Tauzin, Mr. Mosbacher suspended the TEDs requirement until the National Academy of Sciences can complete a study of the need for them next February.

Yet considerable research already conducted by the National Marine Fisheries Service tends to belie the shrimpers' claims that TEDs substantially reduce their shrimp catches. Service officials say more data exists for Louisiana than for any other state. They report that 1,555 hours of trawling in Louisiana waters produced 12,185 pounds of shrimp with TEDs and 12,391 pounds without TEDs.

Not addressed in the TEDs controversy is the serious depletion of finfish populations as a result of "byproduct" fish taken along with shrimp in trawl nets.

To its credit, the National Wildlife Federation has chosen the peaceful and proper route by challenging Secretary Mosbacher's ill advised ruling in the courts.

A second regrettable episode occurred at Amelia, La., where Greenpeace, the international environmental activist organization, threatened to shut down the Marine Shale Processors hazardous waste-burning facility. Regardless of the merits in this case and the legal obligations of the state Department of Environmental Quality and the U.S. Environmental Protection Agency, Greenpeace's threat should not be condoned.

We supported Greenpeace's peaceful, if unconventional demonstrations last spring calling attention to the hazards of toxic pollution along the Mississippi River. But its threat to risk violence and take it upon itself to shut down a legally operating facility is the kind of insupportable arrogance that can only diminish the environmental movement itself in Louisiana.

ST. PETERSBURG, FL
TIMES
M - 312,708
S - 400,804 88

COLUMNS



■ Jon East

Commerce official's retreat on turtle protection is a disgrace

In U.S. District Court today, Commerce Secretary Robert Mosbacher is on trial. He's being sued by the National Wildlife Federation, which is trying to force him to protect endangered sea turtles, but he could just as easily have filed the suit himself.

Mosbacher, in his inexplicable and indefensible retreat on the Endangered Species Act, has played both sides of this fight about turtles. And he has done so in only four days.

Mosbacher on July 20: "There is no basis in current law for modifications of the existing regulations. This legal opinion, under existing law, is in turn compelled by the best scientific advice ... that any significant modification of the (turtle protection) regulations would jeopardize the continued existence of the Kemp's ridley turtles as a species."

Mosbacher on July 24: "We have worked out what I think is a good compromise that indicates sympathy to the shrimpers and their families as well as caring about the endangered species in general and the Kemp's ridley turtles in particular."

The case between the Wildlife Federation and Mosbacher is the case between a nation that wants to save animal species from extinction and an unruly industry that wants to save its profit margin. That Mosbacher is caught on the side of the industry in this fight is, as one Florida marine biologist said last week, a national disgrace.

The Endangered Species Act, first adopted in 1973, is a remarkable statement of national policy. It says that wildlife, fish and plants "are of esthetic, ecological, educational, historical, recreational, and scientific value to the nation and its people." Though the act suffered under the Reagan years, it has been responsible for a few successes. In

Florida, both the eastern brown pelican and the American alligator are strong in number today because of federal protection.

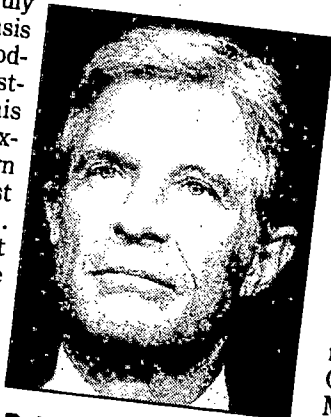
When Congress readopted the act last year, it not only strengthened the broader program but also dealt specifically with the plight of the lumbering sea turtle. An estimated 11,000 turtles drown each year in shrimping nets, and the National Marine Fisheries Service has spent 10 years and \$3.5-million finding a way to prevent that slaughter. The result of that research is a simple, inexpensive trap-door mechanism for shrimp nets, called the turtle excluder device (TED). After substantial compromise with the shrimping industry, Congress ordered that all offshore shrimpers use TEDs by May 1 of this year.

When their time came, though, the shrimpers squawked. Even after Mosbacher delayed enforcement for 60 days to give them time to adjust, the shrimpers rebelled. They threatened to block ports in Texas and Louisiana, and to shoot at Coast Guard cutters that would dare to challenge them. Mosbacher, in an affirmation that mob rule works so long as the mob has money and political influence, backed off. He set aside the regulation Congress ordered him to adopt.

Remember, the shrimpers who are fighting the law are the same ones who have even questioned the need for it. Tee John Mialjevich, president of the "Concerned Shrimpers of America," has tried to suggest that turtles are thriving. "Only buffoons are convinced TEDs are necessary," he has said. The tuna industry screamed in much the same way when it was forced to change fishing practices to save porpoises. But the tuna industry thrives today, and porpoise deaths have been drastically reduced.

Mosbacher, the appointee of a president who professed to be "an environmentalist," has indeed put himself in a peculiar position. Maybe he welcomes the fight in court today. Maybe he just wants to let a judge take the heat for enforcing the law. If that's the case, the judge, Thomas F. Hogan, has a right to be offended. The rest of the nation already is.

■ Jon East is an editorial writer for the St. Petersburg Times. ■



Robert Mosbacher is being sued over his retreat on turtle excluder devices.

12A

Houston Chronicle

Tuesday, July 25, 1989

Houston Chronicle

Editorials

Federal ineptness

The federal agencies have been singularly inept in this business of the shrimpers and the turtle-protection devices which led to the disruptions along the Texas and Louisiana coasts over the weekend.

If it was not clearly necessary to force the unwilling shrimpers to use these so-called turtle-excluders in their operations, then the rules should not have been made and enforced.

If it is necessary that shrimpers use these devices in order to protect endangered species, then the government should not have backed down and suspended the rules in face of blockaded shipping lanes and public services and the threat of violence. That sends a highly damaging message that illegal disruption of public order pays off.

Now, which is it? The government cannot have it both ways.

This is not a new issue. It has been in dispute for years, has been in and out of the courts and the subject of much political negotiating among various interests.

It seems the worst of all possible outcomes to have allowed this to come to a point where shrimpers effectively take the law into their own hands and the government backs down.

The Houston Post

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THE TEDS COMPROMISE

Turtle-saving devices haven't gotten a fair chance

COMMERCE SECRETARY Robert Mosbacher should have stood behind last week's decision on turtle excluder devices. To begin with, he was right. Moreover, the fishermen who blocked the Houston Ship Channel and other ports over the weekend weren't winning many friends.

Their protest caused massive delays in shipping traffic and left ferry passengers stranded in Louisiana and Texas. The action was estimated to cost about \$2,000 an hour for each commercial ship unable to use the ports, to say nothing of curtailed dockside operations. Shrimpers have to eat, but so do the folks who work at those jobs.

The fishermen say the TEDs are bulky, dangerous to deckhands, and cause the loss of as much as half their shrimp haul. Federal officials put the figure at 6 to 7 percent. But at the heart of the issue is whether we get to choose which laws we obey and which ones we don't. It has been The Post's long-standing position that no such choice exists. This is no exception.

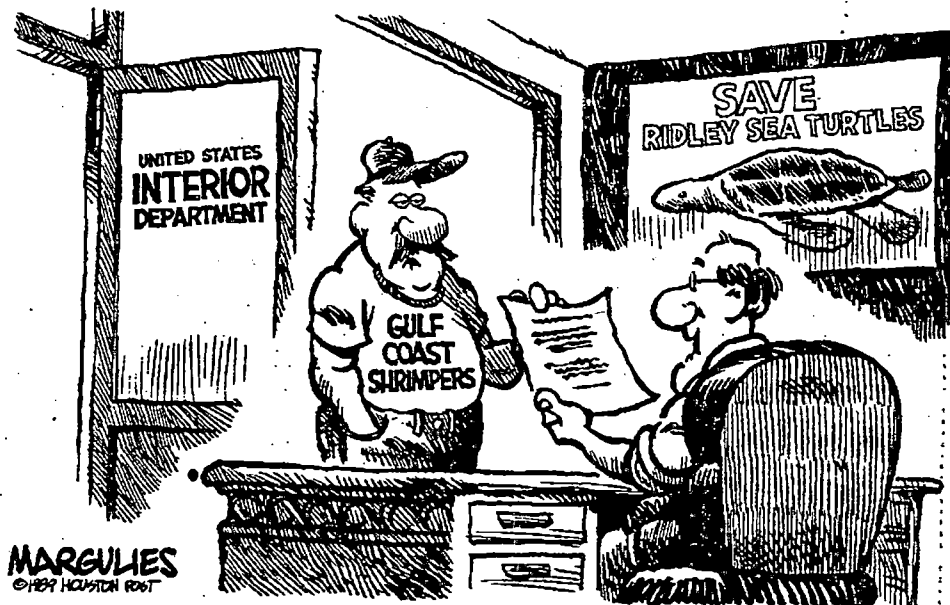
The shrimpers did have a point about the suddenness of last week's enforcement decision. Boats that were at sea without TEDs when Mosbacher issued the edict should have been allowed to complete their normal haul without returning to port for the devices. It's

no joke to go home with half a catch or less in a business that is not only physically grueling but economically marginal.

Inexcusably, many of the fishermen who have complained the longest and loudest about TEDs have never used them anyway. Atlantic shrimpers who have used TEDs report little if any detrimental effect, and some of them say the devices actually improve their catch: The shrimp they get to the dock are in better shape and command higher prices because they aren't crushed by the weight of turtles and finfish. Moreover, if the shrimp catch drops, the per-pound price goes up in the face of demand. Hasn't anyone thought of that?

And then there's the question of whose seas they are anyway. Shrimpers are entitled to a living, but federal fishery officials say nine pounds of finfish are caught and destroyed for every pound of shrimp brought ashore. Most of those fish, along with turtles, would be saved.

The Post sees the TEDs regulations as basically good ones. Mosbacher was right, if a bit precipitous, in enforcing them, and wrong to back down. They help protect species that have become endangered largely because of human activity. It therefore seems a small concession to try to save the ones that are left. We wish the shrimpers would pipe down for a while and try the TEDs. They might like them.



MARGULIES
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"You can apply if you like... but I doubt you'll be placed on the Endangered Species List."

JUL 26 1989

TAMPA, FLA. 33601
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M - 237,205

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88

EDITORIALS

In Turtle-Saving Effort Mosbacher Is a Jellyfish

Surrendering to shrimpers' pirate-like tactics, U.S. Commerce Secretary Robert Mosbacher suspended the requirement that shrimpers use devices to end the slaughter of turtles.

By yielding to lawbreakers, Mosbacher makes a farce of federal law. He also insults responsible commercial fishing groups, which urged their members to obey the regulation.

Last weekend, rogue shrimpers flew skull-and-crossbones flags as they staged a blockade at ports in Texas and Louisiana. A shrimp in Cameron, La., rammed a boat that tried to run the blockade. In Cameron, too, shots were fired at an oil company's crew boat. In Galveston, Texas, a tanker collided with a shrimp. And in Port Arkansas, Texas, a pipe wrench shattered the window of a Coast Guard cutter.

The intimidation worked. Mosbacher and a few congressmen listened to shrimpers who listened to lies. Rabble-rousers such as Tee John Mialjevich, founder of the Concerned Shrimpers of America, are interested in headlines, not facts. They incite shrimpers by railing against the turtle-excluder devices, or TEDs. Consider:

■ Shrimpers say the device, which allows turtles to escape the net, causes a loss of up to half the catch. The facts: the National Marine Fisheries Service compared the catches of standard nets and those with excluders. It determined nets with TEDs caught 2 percent fewer shrimp. This slight reduction was registered during the period when shrimpers were learning to use the TEDs.

Fisheries biologist Dr. Terry Henwood acknowledges, "TEDs do pull a lot differently. Shrimpers have to adjust their nets. If they don't, it can cause the net to collapse or all sorts of other weird things. That's where I think these reports of 50 percent losses come from."

Even so, trained shrimpers don't

experience notable catch reductions. Though federal employees will instruct shrimpers in proper TED use, few Gulf shrimpers ask for help. In contrast, shrimpers in South Carolina use TEDs without complaint.

■ Shrimpers say sargasso grass in the Gulf of Mexico clogs TEDs. A National Marine Fisheries boat scouting the Gulf found no major grass patches. Grass can clog a TED, but it also fills standard nets. Shrimpers avoid it in any event.

■ Shrimpers say they don't kill many turtles. Studies show nets kill at least 11,000 turtles a year. This year, from Pinellas County to Collier County, a record 175 dead sea turtles were reported. The deaths occurred during heavy shrimping.

In northeast Florida, where most shrimpers complied with the TED rule, only eight dead turtles were reported. In previous years as many as 100 dead turtles washed ashore there.

■ Shrimpers say they don't threaten the existence of turtles, which are endangered. True, poaching and habitat destruction contribute to losses. But shrimping may finish off the species. Scientists say only 500 to 600 nesting Kemp's ridley females remain. Shrimpers kill about 800 Kemp's ridleys a year — most juveniles. Mexico, at the United States' urging, is taking steps to protect Kemp's ridley nesting grounds. But the step is meaningless if U.S. shrimpers kill turtle young.

Mosbacher is allowing threats of bullies to overthrow prudent and essential actions of resource managers. His "compromise" would require shrimpers to pull up their nets every 90 minutes, to prevent turtles from drowning. Who will time the shrimpers? The same shrimpers who have demonstrated disdain for marine life.

Congress, responsible for endangered species, should take steps to rescind Mosbacher's craven decision, which lets pirates dictate federal law.

JUL -21-89

Shrimpers get welcomed reprieve from use of excluder devices

LOUISIANA SHRIMPERS fortunately have received another reprieve from the federal government in the required use of turtle excluder devices (TEDs) that went into effect July 1.

This reprieve will extend for 45 days during which the Coast Guard will conduct no boat inspections. It will be followed by a period in which shrimpers who do not use TEDs are limited to 90-minute trawl runs and shrimpers who do use TEDs may trawl as long as they like. Reports indicate that a turtle can survive for 90 minutes in a trawl net. The latter requirement will remain in effect until a study of the controversial contraptions and the shrimpers' role in decreasing sea turtle populations is expected to be completed, probably in February.

The shrimpers do not want to use the devices, saying that the cage-like apparatus developed to detour turtles out of the net, do not work in debris-filled Louisiana waters. Abnormal amounts of sargassum weed drifting off of the Louisiana coast have intensified the problem, increasing the number of shrimpers who refused to pull the turtle excluder device in their nets.

Amidst threats of violence from angry shrimpers, and the urging of Representative Billy Tauzin, the Coast Guard had temporarily suspended the regulations which outlined penalties of up to \$20,000 for shrimpers who refused to pull TEDs.

The first reprieve originally only applied to Louisiana shrimpers, but was then expanded to include Texas, Mississippi, Alabama and Florida shrimpers. Federal officials, explained that the abnormal amounts of seaweed in the Gulf was making pulling TEDs impossible.

Pete Juneau, marine biologist with Louisiana state wildlife and fisheries, said that seaweed or not, turtle excluder devices don't work off of the Louisiana coast.

"In Southwest Louisiana, shrimpers use them to deflect cannonballs (large jellyfish)," he said, "But along the rest of our coast, branches and debris that get into the Gulf from the rivers clog up the device and open the trap which allows everything to get out."

Juneau went on to explain that one branch or

plastic bag is all it takes to foul up the system. "I've gone out and tested these things myself, all it takes is one branch to lock the trap door open," Juneau asserted. "You get a garbage bag out of the river which closes up the grill and all the shrimp can only go one way -- out," he maintained.

The LDWF marine biologist added that shrimpers off the Louisiana coast don't often catch turtles in their nets anyway, saying that Florida has a much higher population of turtles.

Congressman Billy Tauzin had a meeting with Commerce Secretary Robert A. Mosbacher, who issued the reprieve, urging Mosbacher to take a closer look at the Turtle Excluder Device regulations. He advised Mosbacher that even after the seaweed condition had cleared, the ocean bottoms in the Mississippi River Delta should be approached differently than the sandy and clean bottoms of the East Coast and Florida Panhandle.

During the meeting, Tauzin and other members of five state congressional delegations reported to Mosbacher how many complaints they had received and asked that he move rapidly in making a determination about the use of TEDs in the Gulf.

"I think we impressed upon the Secretary that TEDs are creating a lot of tension and that they simply do not work in the Gulf. He assured us that he would receive a report from a NOAA (National Oceanic and Atmospheric Administration) vessel that was testing the TEDs devices in the Gulf of Mexico to determine how they worked there," said Tauzin. Earlier tests had only been conducted on the sandy bottoms of the Atlantic coast and in sandy bottom Florida waters.

Tauzin's efforts apparently are paying off. It is making the federal officials take another look at the need to force the use of a device that unnecessarily burdens our local seafood industry.

The fact that there are more environmentalists than shrimpers in the country does not mean that the logic of requiring use of such a device in Louisiana waters should be ignored. Hopefully the reprieve will become permanent for Louisiana shrimpers.

AUG-1 -89

Shrimp boycott a bad idea

The National Audubon Society has not contributed constructively to the turtle excluder device (TED) controversy by calling for a nationwide boycott of shrimp. Indeed, whoever hatched this idea has simply roiled the waters and probably increased antagonism between shrimpers and some environmentalists.

If the boycott became effective, it could hurt people connected to the food industry other than shrimpers, including some generally sympathetic to the environmentalist position.

Like the shrimpers who blockaded non-involved shipping in Louisiana and Texas harbors to protest the TEDs requirement, National Audubon has resorted to intimidation. The shrimpers fell for a bad idea; Secretary Mosbacher did, too. Now National Audubon has done likewise.

In notable contrast, the National Wildlife Federation has adopted the appropriate strategy by promptly challenging Secretary Mosbacher's ill-advised action in court.

Responding to intimidation and threats of violence by Gulf Coast shrimpers, Mr. Mosbacher completely disregarded the provisions and intent of the Endangered Species Act when he exempted Gulf Coast shrimpers from the use of TEDs for 45 days.

Almost as an afterthought, he threw in a provision that shrimpers pull in their nets every 90 minutes to check for sea turtles. Ninety minutes is the approximate time it takes turtles trapped in the nets to drown.

National Audubon calls the 90-minute requirement "ridiculous," and on that it is

probably right. Shrimpers who have forced a cave-in on TEDs probably will not pay much attention to the 90-minute sop, which might be completely unenforceable anyway.

Mr. Mosbacher took it upon himself to declare the no-TEDs moratorium and called on the National Science Academy to study the effects of TEDs on shrimp catches.

Based on research by the National Marine Fisheries Service, National Audubon appears to be right in its assertion that the TEDs matter already has been studied enough. In its July 28 news release from New York, National Audubon notes that shrimpers in Florida, Georgia and South Carolina have abided by regulations designed to protect sea turtles.

Research by the Fisheries Service in Louisiana waters found little difference in shrimp catches in which the light aluminum TEDs were used and those in which they were not.

In its news letter, National Audubon notes — correctly, based on our information — that some shrimpers support the use of TEDs but fear violence from other shrimpers. Yet a nationwide shrimp boycott would hurt the pro-TEDs shrimpers as well as those who remain opposed.

Research and reason will probably resolve the TEDs issue if both are allowed to work. Environmental groups such as National Audubon would do well to stay with science, reason and peaceful persuasion.

The environmental movement has finally gained strong and wide public support. It might be time to beware the shoals of its own hubris.

Hasty action on TED rules reimposition

Federal authorities have once again moved with undue haste in reimposing enforcement of turtle-excluder device regulations.

The immediate resumption of TED rules enforcement was announced Thursday by the Coast Guard.

There had been a temporary suspension of enforcement of the regulations after Commerce Secretary Robert Mosbacher met July 12 with Gulf Coast congressmen. The congressmen stressed that unusual conditions had created large amounts of seagrass along the coast and the seagrass was clogging the turtle devices.

The official announcement Thursday offered only a brief explanation of the new decision: "After reviewing the issue, the Commerce Department said that circumstances were such that there was no reason to not enforce the law."

Brian Gorman, a department spokesman, said scientists from the National Marine Fisheries Service, which implemented the regulations, are continuing to monitor the seagrass situation, particularly in areas close to shore.

Gorman said the NMFS officials had pulled about 250 tows with shrimp nets containing TEDs and that only four of the tows came up with seagrass.

However, he said, all of the initial tows were made 5 miles or farther from shore. More recently, they began moving closer to shore.

Shrimpers are required to carry TEDs in their nets in offshore water beyond the barrier islands, but not in bays and estuaries. Gorman conceded that seagrass may be a problem in near-shore areas where TEDs are required. He said the department would continue to monitor those areas.

Gorman also conceded that shrimpers, who usually go to sea for weeks at a time, may not learn of Thursday's decision immediately and may need time to go to shore and install TEDs in their nets.

Gulf Coast lawmakers were unhappy with the decision, with justification.

U.S. Rep. Larkin Smith, R-Miss., said, "I'm disappointed that Secretary Mosbacher has not been truthful with us. He told us all he would come back and meet with us before he makes a decision."

Shrimpers too were upset. They view the TED regulations as overkill and threatening both the consumer (with higher prices) or, at worst, threatening the industry itself.

We share that concern. If we're stuck with the regulations, then at least we must consider putting curbs on imports from nations which can shrimp at will without TEDs.

We do not believe in protectionism, but this is indeed an unusual situation.

Fish and Wildlife backs TEDs

U.S. agency hits Mosbacher for dropping turtle device rule

By BILL DAWSON
Houston Chronicle

The U.S. Fish and Wildlife Service has blasted Commerce Secretary Robert Mosbacher's decision to drop a requirement that shrimpers use turtle excluder devices, saying it "will further threaten the survival of the endangered Kemp's ridley sea turtle."

The Interior Department's Fish and Wildlife Service manages fed-

eral protection for sea turtles on land. The Commerce Department's National Marine Fisheries Service has that responsibility when the turtles are in water.

With its strongly worded protest of Mosbacher's action, the Fish and Wildlife Service joins a chorus of prominent sea turtle biologists who have spoken in favor of requiring the devices, called TEDs.

In a recommendation overruled by Mosbacher, Commerce Department biologists called TEDs "the only

reasonable and prudent alternative" to allow shrimping without jeopardizing endangered turtle species.

After Mosbacher rescinded the TED requirement, an advisory panel of American and Mexican scientists said his substitute plan — letting shrimpers limit trawling times — is not "a viable option" to save the Kemp's ridley from extinction.

Both the Interior and Commerce departments had agreed on the need for the TED regulations after years spent trying to persuade shrimpers

to use the devices voluntarily. But Mosbacher scrapped the rules after angry shrimpers blockaded Houston-area ship channels last month. Many shrimpers contend the devices reduce their catch.

Instead of requiring TEDs, which are trapdoor devices that let turtles escape from drowning in shrimp nets, Mosbacher issued interim regulations giving shrimpers the option of limiting trawling times to 105

minutes. See TURTLES on Page 12A.

Turtles

Continued from Page 1A

minutes, with nets out of the water for 30 minutes so trapped turtles can be freed. A federal judge has ordered that final regulations be issued by Sept. 8.

In an Aug. 22 letter to the Commerce Department on the interim rules, Interior Department official Richard Smith contested Mosbacher's assertion that limited trawl times will protect turtles better than requiring TEDs, because there will be better compliance.

The Commerce Department's own data indicate that even in the unlikely event of total compliance with limited trawling periods, 8,000 to more than 11,000 sea turtles would drown annually in American shrimpers' nets, wrote Smith, a deputy director of the Fish and Wildlife Service who was acting director when he sent the letter.

This calculation was based on Commerce scientists' estimate that about 40,000 sea turtles are netted yearly and on their finding that about 22 percent of netted turtles die after a 90-minute trawl, said Jack Woody, national sea turtle coordinator for the Fish and Wildlife Service.

The 105-minute rules provide for

90 minutes when nets are fully in the water and 15 minutes when they are being deployed or retracted.

With TEDs in use, fewer than 350 turtles would drown yearly, Smith wrote. Compliance with TED rules in the southeast Atlantic "was good and getting better every day," he noted, "and was promising in Alabama waters."

He took issue with Mosbacher's pledge to Congress to "increase a captive breeding program" for turtles — an idea that shrimpers and their legislative backers have promoted in lieu of TEDs.

Smith wrote that "there is no recognized or federally permitted breeding program for sea turtles in the United States."

In the view of the Fish and Wildlife Service, "which has jurisdiction over such programs, such a project has no practical management value to solving the question at hand," he said.

TEDs, he wrote, "do work; they are not dangerous aboard vessels, the cost is reasonable, and the reduction in shrimp harvested is minimal when properly installed and fished."

Commerce spokesman Brian Gorman said his agency will not comment on the Fish and Wildlife Service letter until the final turtle-protection regulations are issued.

Chronicle staffer Judy Wiessler contributed to this report.

Commerce 'squelches' advice from biologists

By BILL DAWSON
Houston Chronicle

The Commerce Department has "squashed" biologists' advice on whether shrimp-net devices or restricted tow times will protect sea turtles better, an environmental group charged Thursday.

In making the accusation, the Center for Marine Conservation released a Commerce Department memorandum that warned agency officials they might be fired if they are discovered to have divulged to reporters an earlier biologists' recommendation.

That recommendation by agency biologists said requiring shrimpers to use turtle excluder devices (TEDs) on their nets was "the only reasonable and prudent alternative" to allow shrimping to continue without jeopardizing the continued existence of endangered sea turtle species.

After shrimpers protested the TED requirement by blockading Houston-area ship channels, Commerce Secretary Robert Mosbacher decided in its place to require maximum 105-minute trawl times, separated by periods in which turtles

could be freed from shrimp nets.

In the July 27 memo released Thursday by the pro-TED Center for Marine Conservation, Commerce official James W. Brennan said the leaking of the recommendation that TEDs should be mandated "has been an embarrassment to the secretary and me."

"This incident demonstrates a degree of untrustworthiness and unreliability that, according to departmental regulations, could warrant removal from the federal service," wrote Brennan, the assistant administrator for fisheries of the National Oceanic and Atmospheric Administration.

The center said the memo indicated a "concerted effort" was under way "to limit public access to critical professional opinions within the department on TEDs and restricted tow times."

Michael Weber, center vice president, said the organization is filing a Freedom of Information request because it was denied copies of two recent reports by agency scientists that deal with the question of whether the trawl times will adequately protect turtles.

TED law to return Friday

No new blockade by shrimpers seen

By BILL DAWSON
and JOHN TOTH
Houston Chronicle

Houston Chronicle

Wednesday, Sept. 8, 1983

Turtles

Continued from Page 1A.

Turtle excluder devices again will be required on shrimp nets starting Friday, the Commerce Department announced Tuesday, reversing Secretary Robert Mosbacher's earlier decision to drop the mandate after shrimpers blockaded Houston-area ship channels.

John A. Knauss, administrator of the department's National Oceanic and Atmospheric Administration, said a thorough review of the scientific evidence indicated there was "no other choice under the Endangered Species Act" but to reinstate the original regulations mandating the devices, known as TEDs.

A leading TED opponent called the decision the work of "the anti-Christ," and pro-TED environmentalists greeted the announcement with mixed feelings.

"We're fighting the anti-Christ," said Tee John Mialjevich, referring to those who favor enforcement of TED rules. "We have these scientists who don't believe in Christ."

Mialjevich is president of Concerned Shrimpers of America, based in Belle Chase, La., and played a key role in negotiating an end to the blockade in July.

Mialjevich said he sees no point in a second blockade and denied organizing the first one. He said his group now plans to focus on Congress in trying to change the Endangered Species Act.

Michael Weber, vice president of the Washington-based Center for Marine Conservation that has led the campaign for TEDs, said that while he found the TED decision gratifying, "I can't be very pleased with the

course this issue has taken.

"We lost precious time, momentum and turtles while the secretary was flip-flopping over enforcing the law. This was probably policy-making at its worst."

TEDs are trap-door devices that let sea turtles, including the severely endangered Kemp's ridley species, escape drowning in shrimp nets. Shrimpers contend TEDs reduce their catch.

After years of efforts to get shrimpers to use the devices voluntarily, the Commerce Department issued regulations to require use of TEDs beginning May 1.

The agency announced in April, however, that only "warning tickets" would be given until July 1. Then the Coast Guard suspended enforcement from July 18-20 to investigate shrimpers' complaints that seaweed was clogging TEDs. Following the blockade the weekend of July 22-23, Mosbacher decided to allow shrimpers to limit their trawl times instead of using TEDs.

That temporary substitute regulation mandated 104-minute trawling periods, separated by half-hour intervals in which turtles caught in nets could be freed.

Scientists from NOAA, the Interior Department's Fish and Wildlife Service and an advisory panel of American and Mexican experts said, however, that TEDs are needed to save the severely endangered Kemp's ridley from extinction. The announcement of the NOAA's Knauss reflected his agreement.

"Secretary Mosbacher wanted a dispassionate look at this whole matter to see if there wasn't a way to

protect the turtles while recognizing the legitimate economic concerns of shrimpers, and I have concluded that, to comply with the law, the only way to ensure protection of these vanishing species is through the use of TEDs," Knauss said.

NOAA spokesman Brian Gorman said several analyses of existing scientific evidence all indicated limiting trawl times would not protect turtles as well as TEDs, which federal scientists have found release all but 3 percent of turtles with little shrimp loss if they are used properly.

Without TEDs, 48,000 turtles would be caught in shrimp nets yearly, with 11,000 drowning, federal studies have estimated.

After Mosbacher dropped the TED requirement, a federal judge declined to order it back in place, as environmentalists had sought, but gave Commerce officials until this Friday to develop final turtle-protection rules.

The original TED regulations will resume at 12:01 a.m. Friday, the agency said. Shrimpers cited for failure to use TEDs before Sept. 23 can avoid fines by installing TEDs by Oct. 15. Violators from Sept. 22 to Oct. 15 may have fines reduced if they install TEDs within 15 days. The usual first-time fine for Endangered Species Act violators is \$8,000, Gorman said.

Carole Allen, founder and chairwoman of the Houston-based HEART, a pro-TED group, said she is glad TEDs will be required but was "very disappointed it will be almost six weeks with no penalty."

Mialjevich predicted there will be little compliance. "From what I hear, they (shrimpers) won't pull TEDs," he said.

He blamed pressure from environmentalists for Tuesday's decision and said he will not recommend that shrimpers use the devices.

"What we need to do is get rid of these behind the law because we know that what they're saying is a bunch of lies," he said.

"They think they're saving Exxon. They're using lockpicks that work with large corporations. But they are crippling people who have to pay the bills and get ready for the holidays and winter."

National Wildlife Federation attorney Bob Levin called Mosbacher's ruling a clear victory and said the federation may drop its suit against the commerce secretary once it reviews the new rules.

Hours before the Commerce Department announcement, the Center for Marine Conservation released a study in Washington that it said showed the Kemp's ridley is more seriously endangered than previously thought.

The difference, the center said, is that Kemp's ridley adults produce more nests per season than previous studies had shown. The result was to lower the estimates of the Kemp's ridley population of nesting females by 13 percent.

Weber said earlier work had estimated each female produces 1.3 nests a year. More recent research changes that to 1.5 nests per season, "and even this may be too conservative," he said. The number of nesting females is calculated by dividing the number of nests counted annually by the number of nests produced by each female.

James P. Russ, who conducted the study, said, "Only 42 years ago, more than 42,000 females emerged from the Gulf of Mexico to nest in one day" along the Mexican beach that is their favorite nesting ground. "Today, fewer than 700 females may nest in an entire season."

Reporter William E. Clayton Jr.
Contributed to this report.

lieve that the jury could properly have found that Anderson knowingly possessed the rear portion of a silencer, since it was found in the vault in his residence, and that Anderson knew that this item was at the very least a portion of a silencer, since in addition to the components of the silencer there was also recovered from that vault a document describing fabrication of that type of silencer. When these facts are considered together with the undisputed testimony at trial that the rear portion alone produced a reduction in sound from 157 to 148 decibels, the jury could properly have concluded that this device fit the definition of silencer contained in the court's charge, i.e., "any device for silencing, muffling or diminishing the report of a portable firearm, including any combination of parts designed or redesigned and intended for use in assembling or fabricating a firearm silencer or firearm muffler and any part intended only for use in such assembly or fabrication,"¹² and thus was a firearm within the meaning of section 5845(a)(7). Given that there is no dispute that this device was not registered to Anderson in the National Firearms Registration and Transfer Record, we hold that there was sufficient evidence to convict him under section 5861(d) for possession of an unregistered silencer.

Conclusion

For the reasons stated, we conclude that none of Anderson's complaints on appeal presents any reversible error. We therefore affirm the district court's judgment.

AFFIRMED.

E. GRADY JOLLY, Circuit Judge,
specially concurring:

I fully concur in everything that Judge Garwood has said. I specially concur in this opinion only to emphasize that I fully agree with Judge Garwood's conclusion that *United States v. Vasquez*, our decision which controls this case, was wrongly decided, and until it is overruled by en banc

consideration, it will continue to set the most unfortunate precedent. I therefore urge en banc consideration of this case so that *Vasquez* may be reconsidered.



STATE OF LOUISIANA, ex rel.
William J. GUSTE, Jr., et al.,
Plaintiffs-Appellants,
and

Concerned Shrimpers of Louisiana,
Intervenor-Appellant,

v.

C. William VERITY, Jr., Secretary, United
States Department of Commerce,
et al., Defendants-Appellees,

and

The Environmental Defense Fund,
Intervenor-Appellee.

No. 88-3185.

United States Court of Appeals,
Fifth Circuit.

Aug. 15, 1988.

Action was brought challenging regulations on shrimping industry designed to reduce sea turtle mortality. The United States District Court for the Eastern District of Louisiana, Patrick E. Carr, J., 681 F.Supp. 1178, upheld the regulations and appeal was taken. After vacating stay and affirming the lower court's decision, 850 F.2d 211, the Court of Appeals, Jerry E. Smith, J., held that: (1) regulations were not arbitrary and capricious, and (2) regulations did not violate equal protection guarantees.

Affirmed.

(as defined in section 921 of Title 18, United States Code);

¹² This definition was drawn from 18 U.S.C. § 921(a)(24). Section 5845(a) provides that "[t]he term 'firearm' means ...: (7) any silencer

ENC. 24 THIRDS

sideration, it will continue to serve as a precedent. I would not give an en banc consideration of the case that Vasquez may be reconsidered.



STATE OF LOUISIANA, ex rel.
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and

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Affirmed.

As defined in section 921 of Title 16, United States Code.

STATE OF LA. EX REL. GUSTE, JR., VERITY

Civ. No. 88-3185 F.2d 322 (5th Cir. 1988)

323

1. Federal Courts ¶766

When reviewing grant of summary judgment, Court of Appeals applies same legal standard as that which guided the district court.

2. Administrative Law and Procedure ¶797

Fish ¶12

Game ¶3½

Review in the first instance of challenge to regulations promulgated under the Endangered Species Act is governed by the standards set forth in the Administrative Procedure Act. 5 U.S.C.A. § 706; Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.

3. Administrative Law and Procedure ¶763

Under the Administrative Procedure Act, administrative record is reviewed to determine whether the challenged agency action was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, in excess of statutory jurisdiction, authority or limitation, or without procedure required by law. 5 U.S.C.A. § 706(2)(A-D).

4. Administrative Law and Procedure ¶797

Fish ¶12

Game ¶3½

Regulations promulgated under the Endangered Species Act through informal rule making are not reviewed for substantial evidence. 5 U.S.C.A. §§ 556, 706(2)(A); Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.

5. Administrative Law and Procedure ¶793

Under the arbitrary and capricious standard of review, court is not to weigh evidence in the record pro and con, and agency action is to be upheld, if at all, on the basis of the record before the agency at the time that it made its decision.

6. Administrative Law and Procedure ¶763

If agency considers factors and articulates rational relationship between facts

found and choice made, its decision is not arbitrary or capricious.

7. Administrative Law and Procedure ¶763

Agency's decision need not be ideal so long as it is not arbitrary or capricious and so long as the agency gave at least minimal consideration to relevant facts contained in the record.

8. Fish ¶12

Evidence supported findings of impact of shrimp trawling on sea turtle mortality so as to support regulations requiring Gulf shrimpers to either use turtle excluder devices in their trawling nets or limit their trawling to periods of 90 minutes or less.

9. Fish ¶12

Determination of the Secretary of the Interior to give shrimpers in shallow waters the option to use turtle excluder devices as an alternative to limiting their trawling to periods of 90 minutes or less in order to reduce sea turtle mortality was supported by the record.

10. Fish ¶12

Evidence that use of turtle excluder devices required by regulation to reduce sea turtle mortality would involve cost to the Gulf water shrimping industry of \$5.9 million and would reduce anticipated catch by up to five percent did not show that the regulations were arbitrary or capricious.

11. Fish ¶12

Decision of the Department of Interior to attack one of the major causes of sea turtle mortality through regulation of shrimping was within its discretion, even though it did not address other serious causes of sea turtle mortality.

12. Fish ¶12

Game ¶3½

Regulations aimed at preventing taking of protected species cannot be invalidated on the ground that the record fails to demonstrate that the regulatory effort will enhance the species' chance of survival; record need only show that such regulations do in fact prevent prohibited takings of protected species. Endangered Species

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Act of 1973; §§ 3(3), 4(d), 9(a)(1), 16 U.S.C. A. §§ 1532(3), 1532(d), 1532(a)(1).

12. Constitutional Law ⇐253.2(2)

Basic concepts of equal protection as set forth in Fourteenth Amendment apply to federal action through the due process clause of the Fifth Amendment. U.S.C.A. Const.Amends. 5, 14.

14. Constitutional Law ⇐213.1(2)

Where administrative classifications are made, absent a fundamental right or suspect classification such as race, equal protection requires only that the classification bear a rational relationship to the legislative purpose of the enabling statute. U.S.C.A. Const.Amends. 5, 14.

15. Constitutional Law ⇐236

Fish ⇐12

Even if some sea turtles are found north of North Carolina, in the absence of evidence that they are caught there by shrimpers, regulations which apply only to shrimping south of North Carolina do not deny equal protection. U.S.C.A. Const.Amends. 5, 14.

16. Constitutional Law ⇐236

Fish ⇐12

Regulations of shrimping industry aimed at reducing sea turtle mortality did not deny equal protection to Gulf shrimpers because they regulated Gulf and Atlantic shrimpers in the same way, despite contention that Atlantic shrimpers took more turtles per capita. U.S.C.A. Const.Amends. 5, 14.

17. Constitutional Law ⇐236

Fish ⇐12

Fact that regulations on shrimpers aimed at reducing sea turtle mortality made distinctions based on the size of the boat rather than the size of the net did not render the regulations a denial of equal protection where it was shown that use of net size as determinative would result in regulations which were difficult to enforce.

1. See *Louisiana ex rel. Guste v. Verity*, 850 F.2d 211 (5th Cir.1988). As stated in that order, the stay will remain in effect until 11:59 p.m., August 31, 1988. We also informed appellants that if they wish to apply to the Supreme Court for a

and which significantly intruded into shrimp operations. U.S.C.A. Const.Amends. 5, 14.

John B. Sheppard, Jr., Asst. Atty. Gen., William G. Guste, Jr., Atty. Gen., Baton Rouge, La., for State of La.

Von Hoene & Skrmetta, Eric F. Skrmetta, William L. Von Hoene, Jr., New Orleans, La., for Concerned Shrimpers.

John Volz, U.S. Atty., S. Mark Gallinger, Asst. U.S. Atty., New Orleans, La., for other defendants-appellees.

David J. Hayes, Vicki L. Plaut, Dept. of Justice, Peter R. Steenland, Jr., Washington, D.C., for C. William Verity.

Gerald E. Meunier, New Orleans, La., Barbara E. Pace, Washington, D.C., for Environmental Defense.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Appellants, the State of Louisiana and the Concerned Shrimpers of Louisiana ("Concerned Shrimpers"), appealed the district court's entry of summary judgment in favor of the Commerce Department, upholding in all respects the Secretary's regulations requiring shrimp trawlers to install and use "turtle excluder devices," also known as "TEDs," in their nets or to limit their trawling to 90 minutes or less at a time. On July 11, 1988, six days after oral argument, we affirmed the judgment of the district court but postponed issuance of an opinion detailing the reasons for our ruling in order that we could immediately notify the parties that we were vacating the district court's order staying execution of its judgment.¹ We now offer our reasons for affirming summary judgment below.

further stay of judgment or for other relief, such application should be made during the pendency of the stay ordered by the district court, as we will grant no further stay.

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significantly intruded into the

13. The U.S.A. Const. Amend.

Leppard, Jr., Asst. Atty. Gen.
Guste, Jr., Atty. Gen., Baton
for State of La.

& Skrimetta, Eric F. Skrimet
L. Von Hoene, Jr., New Or
or Concerned Shrimpers,

U.S. Atty., S. Mark Gallinger
U.S. Atty., New Orleans, La.
endants-appellees.

ayes, Vicki L. Plant, Dejt. of
R. Steenland, Jr., Washing-
C. William Verity.

Mennier, New Orleans, La.
Pace, Washington, D.C., for
Defense.

n the United States District
Eastern District of Louisiana.

E, DAVIS, and SMITH, *et al.*
s.

SMITH, Circuit Judge:

the State of Louisiana and
shrimpers of Louisiana
shrimpers"), appealed the dis-
try of summary judgment in
Commerce Department, up-
pects the Secretary's regu-
ng shrimp trawlers to install
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to 90 minutes or less at a
11, 1988, six days after oral
affirmed the judgment of the
out postponed issuance of an
ig the reasons for our ruling
we could immediately notify
it we were vacating the dis-
der staying execution of its
e now offer our reasons for
nary judgment below.

judgment or for other relief, which
ould be made during the penden-
ordered by the district court, as
no further stay.

Five species of sea turtles—the Kemp's

ridley, loggerhead, leatherback, green, and
hawksbill—frequent the Gulf of Mexico
and the Atlantic Ocean, off the southeast
coast of the United States. All of these
species are listed as either "endangered" or
"threatened" under the Endangered Spe-
cies Act of 1978 ("ESA"), 16 U.S.C. § 1531
*et seq.*² Upon inclusion of any species on
the list as endangered, section 9 of the
ESA prohibits any person from "taking"³
any such species within the United States,
the territorial waters of the United States,
or upon the high seas. 16 U.S.C.
§ 1538(a)(1)(B)-(C). In the case of sea tur-
tles, it is equally forbidden to take threat-
ened and endangered 50 C.F.R.
§§ 222.21, 227.71. In addition to these pro-
hibitions, the ESA permits the Secretaries
of Commerce and the Interior to promul-
gate protective regulations. 16 U.S.C.
§ 1533(d).

On June 29, 1987, the Commerce Depart-
ment, through its National Marine Fisher-
ies Service ("NMFS"), promulgated final
regulations requiring shrimp trawlers in
the Gulf and South Atlantic to reduce the
incidental catch and mortality of sea turtles
in shrimp trawls. The regulations attempt
to supplement ESA's prohibitions against
the "taking" of protected species, and were
to become effective for Louisiana on March
1, 1988. Specifically, the regulations re-
quire shrimpers operating in offshore wa-

2. An "endangered" species is one that is in dan-
ger of extinction throughout all or a significant
part of its range. 16 U.S.C. § 1532(6). A
"threatened" species is one likely to become
endangered within the foreseeable future
throughout all or a significant part of its range.
16 U.S.C. § 1532(20).

Although the Kemp's ridley is the most crit-
ically endangered sea turtle, the four other spe-
cies are in serious danger of extinction as well.
By 1978, the Secretary of Commerce had listed
the Kemp's ridley, leatherback, and hawksbill
turtles as endangered species, and the logger-
head and green turtles as threatened. 50 C.F.R.
§ 222.23 (1987) (list of endangered sea turtles,
effective 1974); 50 C.F.R. § 227.4 (1987) (list of
threatened sea turtles, effective 1978). Under
the Secretary's authority to list endangered or
threatened species by region, the green turtle
was also listed as endangered in Florida waters.
50 C.F.R. § 222.23 (1987). The Pacific, or Olive

ters, and, in vessels 25 feet or longer to
install and use certified "turtle excluder
devices," or "TEDs", in each of their
trawls. 50 C.F.R. § 227.72(e)(2), (6)(i)
(1987). If the vessel is less than 25 feet or
is trawling in inshore waters, the shrimper
may limit each towing period to 90 minutes
or less as an alternative to using a TED.
Id. at § 227.72(e)(3), (6)(ii) (1987).

The reason for the regulations is simple:
Researchers have found that during
shrimping operations sea turtles are
caught in the large nets, or trawls, pulled
behind commercial shrimping vessels. The
nets drag the turtles behind the boats and
thereby prevent them from surfacing for
air. According to one study, once a turtle
is within the mouth of a shrimp trawl, the
animal's initial reaction is to attempt to
outswim the device. Of course, this stren-
uous effort consumes oxygen but affords
the turtle no opportunity to replenish the
supply. Once trapped, if the exhausted
turtle is not released quickly, it will drown.
Research cited in the administrative record
indicates that trawl times in excess of 90
minutes are highly likely to result in the
death of a captured turtle.⁴

The TED requirement thus applies with-
out exception to large shrimping vessels
that operate offshore, as these vessels fre-
quently pull their nets for long hours prior
to bringing their catches aboard. All of
the presently certified TEDs⁵ are coated
mesh, rope, or rigid frame devices inserted

ridley, not at issue in this case, is listed as
threatened, except for the population off the
Pacific coast of Mexico, which is listed as en-
dangered. *Id.*

3. To "take" is to "harass, harm, pursue, hunt,
shoot, wound, kill, trap, capture, collect, or to
attempt to engage in any such conduct." 16
U.S.C. § 1532(19).

4. In tests involving trawls lasting from 30 to 270
minutes, researchers found that 1.3% of the
captured sea turtles died in the 30-minute
trawls, 4.4% died in 90-minute trawls, and
26.4% died in 270-minute trawls. A maximum
tow time of 90 minutes, therefore, results in a
95% reduction in sea turtle mortality.

5. TED designs currently certified by the NMFS
are diagrammatically described at 50 C.F.R.
§ 227.72(e)(4) (1987).

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into the cone-shaped shrimp nets at an angle, at the point where the trawl begins to narrow. When a captured turtle reaches the TED, the device deflects the turtle to an escape portal in the top or bottom of the net. The alternative measure of restricting tow-time to 90-minute intervals applies both to smaller vessels, which tend to pull fewer nets at a time and for shorter durations, and to inshore areas, where TED use by either large or small vessels may be impaired by often heavier concentrations of underwater debris.

In October 1987, the State of Louisiana filed a complaint in federal district court, contending that both the TED and tow limit requirements are invalid. The State's complaint alleged that the regulations are arbitrary and capricious, unsupported by the record, and were promulgated in violation of the Administrative Procedure Act's procedural requirements and Executive Order 12291's requirement of a regulatory impact analysis. The State further argued that the regulations violate the Louisiana shrimpers' due process and equal protection rights.

In December 1987 the Environmental Defense Fund and the Center for Environmental Education were permitted to intervene as defendants. The parties filed cross motions for summary judgment and orally argued their motions on February 10, 1988. Two days before oral argument, on February 8, Concerned Shrimpers of Louisiana was granted leave to intervene as plaintiff. Concerned Shrimpers neither filed, nor responded to, any summary judgment motion, nor participated in oral argument.

On February 29, 1988, the district court entered summary judgment for the defendants. *Louisiana ex rel. Guste v. Verity*,

6. The State ends its brief with an argument completely new to this litigation: that the TED regulations constitute a *de facto* designation of critical habitat subject to, but not in compliance with, certain procedural requirements of 16 U.S.C. § 1533(b)(2). The argument appears nowhere in the State's (or the Concerned Shrimpers') complaint, summary judgment motion or memorandum, its opposition to the Secretary's summary judgment motion, or any of the pleadings filed in support of the stay entered by the district court. Since we discern no manifest injustice in declining to consider this argument

681 F.Supp. 1178 (E.D.La.), *aff'd*, 850 F.2d 211, (5th Cir.1988). On April 12, 1988, a stay pending appeal was issued. In the present appeal, the appellants again argue that the regulations are arbitrary and capricious. In addition, the Concerned Shrimpers' appeal carries forward the equal protection challenge raised below.

II.

A.

[1-4] The district court entered judgment for the Secretary on cross-motions for summary judgment. When reviewing a grant of summary judgment, a court of appeals applies the same legal standard as that which guided the district court. *Barbetta v. S/S BERMUDA STAR*, 848 F.2d 1364, 1368 (5th Cir.1988); *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fertilizers Co.*, 832 F.2d 1358, 1364 (5th Cir. 1987).

Review in the first instance of a challenge made to regulations promulgated under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, is governed by standards set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and it is thus to these same standards that we will look in conducting our review on appeal. *Environmental Coalition of Broward County, Inc. v. Meyers*, 831 F.2d 984, 987 (11th Cir.1987). Under the APA, the administrative record is reviewed to determine whether the challenged action was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right; in excess of statutory jurisdiction, authority or limitation; or without procedure required by law. 5 U.S.C. § 706(2)(A)-(D).⁷

so raised, we offer no opinion as to its merits. See *Vaughner v. Pulito*, 804 F.2d 873, 877 (5th Cir.1986); *Frank C. Bailey Enterprises, Inc. v. Cargill, Inc.*, 582 F.2d 333, 334 (5th Cir.1978) (appellate court, in reviewing summary judgment order, can consider only those matters presented to the district court).

7. These regulations were promulgated as informal rulemaking under the Endangered Species Act, which does not prescribe compliance with the formal procedures required by 5 U.S.C. § 556. Consequently, substantial evidence is

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178 (E.D.La.), *aff'd*, 850 F.2d 989 (5th Cir. April 12, 1988). The court's decision was issued. Directly, the appellants again argue that the regulations are arbitrary and capricious. In addition, the Concerned Shrimpers' appeal carries forward the challenge raised below.

II.

A.

The district court entered judgment. Secretary on cross-motions for judgment. When reviewing an agency judgment, a court of appeals is to apply the same legal standard as the district court. *Bartlett v. Bermuda Star*, 848 F.2d 1181 (5th Cir.1988); *Brooks, Tarlton & Kressler v. United States*, 882 F.2d 1358, 1364 (5th Cir.1987).

Review in the first instance is made to regulations promulgated under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, is governed by the standards set forth in the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), to the same standards that the district court applied in its review of the regulations.

In *Environmental Coalition of Broward County v. Meyer*, 831 F.2d 984 (11th Cir.1987). Under the APA, the record is reviewed to determine whether the challenged action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A)-(D). The court, in reviewing summary judgment, can consider only those matters that were before the district court.

The court offers no opinion as to its merits. *Frank C. Bailey Enterprises, Inc. v. EPA*, 804 F.2d 873, 877 (5th Cir.1986). *Frank C. Bailey Enterprises, Inc. v. EPA*, 802 F.2d 333, 334 (5th Cir.1986). The court, in reviewing summary judgment, can consider only those matters that were before the district court.

The regulations were promulgated as an exercise of authority under the Endangered Species Act, which does not prescribe compliance with the procedures required by 5 U.S.C. § 706(2)(A)-(D). Consequently, substantial evidence

[5] Appellants primarily charge that the regulations should be invalidated as arbitrary and capricious. Our scope of review under this standard, however, is very narrow.⁸ The court is not to weigh the evidence in the record pro and con. *C.A. White Trucking Co. v. United States*, 555 F.2d 1260, 1264 (5th Cir.1977). Rather, our role is to review the agency action to determine whether the decision "was based on a consideration of the relevant factors and whether there was a clear error of judgment." *Motor Vehicle Mfrs. Ass'n*, 468 U.S. at 43, 103 S.Ct. at 2866-67; *Nueces County Nav. Dist. No. 1 v. ICC*, 674 F.2d 1055, 1062-63 (5th Cir.), *cert. denied*, 459 U.S. 1035, 103 S.Ct. 446, 74 L.Ed.2d 601 (1982).

[6, 7] Thus, if the agency considers the factors and articulates a rational relationship between the facts found and the choice made, its decision is not arbitrary or capricious. *Watkins Motor Lines, Inc. v. ICC*, 641 F.2d 1188, 1188 (5th Cir. Unit B Apr. 1981). Indeed, the agency's decision need not be ideal, so long as it is not arbitrary or capricious, and so long as the agency gave at least minimal consideration to relevant facts contained in the record.⁹ With these principles of review in mind, we turn now to the challenges posed by the appellants.

B.

The core of appellants' challenge on appeal concerns the sufficiency of the administrative record to support the TED and trawling-period regulations.

view under 5 U.S.C. § 706(2)(E) is not appropriate. *F.C.C. v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 803-04, 98 S.Ct. 2096, 2116-17, 56 L.Ed.2d 697 (1978).

8. Concerned Shrimpers urge this court to undertake *de novo* review of the agency decision, including in our review consideration of new, extra-record materials never submitted to the agency or, for that matter, to the district court. We note, however, that both the Concerned Shrimpers' proposed standard of review and their attempt to reopen the administrative record in this court are improper. Under well-established principles of administrative law, *de novo* review is not the standard. The courts are not empowered to substitute their judgment for that of the agency. *Motor Vehicles Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983). Nor are the courts permitted to consider evidence outside the administrative record. *Camp v. Pitts*, 411

administrative record to support the TED and trawling-period regulations. In particular, they assert that the record insufficiently demonstrates the impact of shrimp trawling on sea turtle mortality, the efficacy of the regulations as applied to inshore Louisiana waters, and the impact of the regulations on the Louisiana economy. Appellants also challenge the regulations insofar as the administrative record supporting them fails to address serious causes of sea turtle mortality other than shrimp trawling. Based upon the limited scope of our review, we find that the record amply supports the Secretary's decision to issue the regulations in question.

1. The Impact of Shrimp Trawling on Sea Turtle Mortality.

[8] The relationship of shrimp trawling to sea turtle mortality is strongly demonstrated by data contained in the administrative record. Since 1978, on-board observers have documented the capture and drowning of sea turtles by shrimp trawlers. Using extrapolations based upon more than 27,000 hours of shrimp trawl observation, experts have concluded that more than 47,000 endangered and threatened sea turtles are caught in shrimp trawls each year; 11,179 of these turtles drown in the shrimpers' nets.¹⁰ Tag returns on the Kemp's ridley

U.S. 138, 142-43, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904-05 (5th Cir.1983). Agency action is to be upheld, if at all, on the basis of the record before the agency at the time it made its decision. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 51, 103 S.Ct. at 2870-71.

9. *City of Houston v. FAA*, 679 F.2d 1184, 1190 (5th Cir.1982); *American Petroleum Institute v. EPA*, 661 F.2d 340, 349 (5th Cir. Unit A Nov. 1981). See *Hondros v. United States Civil Service Comm'n*, 720 F.2d 278, 295 (3d Cir.1983) (action will not be deemed arbitrary, capricious, or an abuse of discretion simply because one may happen to think it ill-considered or to represent a less appealing alternative).

10. The observer data further established that 90% of the captured turtles are loggerheads, 6% are the critically-endangered Kemp's ridley, 3% are green turtles, and 1% are leatherbacks and hawksbills.

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also provide a fertile source of information: 84% of the Kemp's ridley turtles tagged by scientists and later recovered were captured by shrimp trawlers.

The capture and mortality statistics for Louisiana waters were derived largely from the so-called Henwood-Stuntz study, a series of extrapolations based upon 16,785 hours of observer effort in the Gulf of Mexico. Of this total, 4,333 hours were spent on shrimp boats off the Louisiana shore. During the Louisiana observation period, 12 sea turtles were taken, 5 of which had died by the time the trawl was retrieved. This mortality rate of 42% is among the highest of any state, the Gulf-wide rate being 29%. More than one-third of the turtles that were observed to have died in Gulf shrimp trawls, died off Louisiana.

Although the observers spent substantial hours on the shrimp boats, their efforts recorded the results of only a small fraction of the annual shrimp effort. Each year, commercial shrimpers are estimated to spend 2,063,074 hours trawling off Louisiana. Using a simple ratio of $5/4,333 = X/2,063,074$ and solving for X, a total of 2,381 endangered and threatened turtles would be estimated to be killed annually off Louisiana alone.¹¹

"Stranding" data further supports the conclusion that shrimp is responsible for large numbers of sea turtle deaths. Beginning in 1980, volunteers established the Sea Turtle Stranding and Salvage Network ("Network") to monitor the number and types of sea turtle carcasses stranded on beaches and in marshes and bayous. More than 8,800 dead sea turtles, including nearly 600 Kemp's ridleys, were reported to NMFS by the Network. Although determining the precise cause of a stranded sea turtle's death is difficult, a causal link to shrimp appears reasonable in light of

the fact that strandings occur predominantly in areas adjacent to shrimp grounds, and that the number of sea turtle strandings increases dramatically with the advent of the shrimp season.

In addition, the administrative record established that, based upon tag returns between 1966 and 1984, 82% of the Kemp's ridley turtles incidentally captured are caught in Louisiana waters, by far the highest rate of any state or country. Twenty-two percent of the Kemp's ridley strandings in the Gulf occur in Louisiana. In a 1984 study, 12 out of 15 Louisiana shrimpers interviewed said they caught from 1 to 2 sea turtles each year.¹²

In challenging the administrative fact-finding that links shrimp trawling to sea turtle mortality, appellants assert that the Secretary failed to consider the best scientific data available before issuing the regulations. The Henwood-Stuntz extrapolations heavily relied upon by the agency are flawed, appellants contend, because one of the field samples on which they are based is unscientifically small. Specifically, appellants point out that researchers conducting the study recorded a mere two captures of the Kemp's ridley turtles during the entire time test trawls were pulled off Louisiana's shores. The insufficiency of this sample is borne out, they believe, by the discrepancy between the Henwood-Stuntz extrapolations and observations made by the Louisiana Department of Wildlife and Fisheries. From 1967 until 1986, the Louisiana Department conducted a total of 86,837 trawl samples, but in none of these was a single sea turtle ever reported to have been captured. At the very least, appellants conclude, the methodology of Henwood-Stuntz is prone to grossly overestimating the killing of sea turtles in shrimp trawls.

11. Actually, the Henwood-Stuntz study used a more sophisticated and conservative analysis than this. The study nevertheless concluded that 6,396 sea turtles would be caught off Louisiana and that 1,407 of these would be drowned.

12. This result is all the more striking because interview data tends to under-report sea turtle

captures, as a result of the shrimpers' understandable reluctance to admit catching protected species. One study reported that, according to interview data, the turtle mortality rate was 7.9%, while on-board observer data showed a 15% mortality rate.

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strandings occur predominantly adjacent to shrimp grounds. The number of sea turtle strandings fluctuates with the advent of shrimp season.

In the administrative record created, based upon tag returns between 1984 and 1986, 32% of the Kemp's ridleys incidentally captured are in Louisiana waters, by far the most of any state or country. Ninety percent of the Kemp's ridley strandings in the Gulf occur in Louisiana. In a study, 12 out of 15 Louisianians interviewed said they caught at least one sea turtle each year.¹³

In making the administrative fact-finding links shrimp trawling to sea turtle mortality, appellants assert that the agency failed to consider the best scientific data available before issuing the regulation. Henwood-Stuntz extrapolations relied upon by the agency are flawed, appellants contend, because one of the principles on which they are based is factually small. Specifically, appellants point out that researchers conducting the study captured a mere two Kemp's ridley turtles during the entire shrimp trawling season. The insufficiency of this sample, they believe, by the time the Henwood-Stuntz extrapolations and observations made by the Department of Wildlife and Fisheries from 1967 until 1986, the Louisiana Department conducted a total of 36 shrimp trawls, but in none of these was a sea turtle ever reported to have been caught. At the very least, appellants argue, the methodology of Henwood-Stuntz is prone to grossly overestimate the killing of sea turtles in shrimp grounds.

As a result of the shrimpers' reluctance to admit catching protected species, one study reported that, according to on-board observer data, the mortality rate of sea turtles in shrimp grounds is 100%.

Although we believe appellants' challenge is not totally without merit, we are mindful that under the arbitrary-and-capricious standard, our deference to the agency is greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology.¹³ In reviewing such technical choices, "[w]e must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 905 (5th Cir.1988) (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 86 (D.C.Cir.) (en banc), cert. denied, 426 U.S. 941, 96 S.Ct. 2662, 49 L.Ed.2d 394 (1976)). Accordingly, where, as here, the agency presents scientifically respectable conclusions which appellants are able to dispute with rival evidence of presumably equal dignity, we will not displace the administrative choice.¹⁴ Nor will we remand the matter to the agency in order that the discrepant conclusions be reconciled.

From our admittedly lay perspective, the Henwood-Stuntz method of extrapolating the magnitude of sea turtle takings in shrimp trawls does not necessarily appear unreasonable. There are more than 18,000 domestic shrimp vessels operating in the Gulf and South Atlantic. Each of these vessels simultaneously pulls from 1 to 4 trawls, generally for 2 to 6 hours at a time. Shrimping occurs in the Gulf year-round, with most activity concentrated between June and December. Therefore, while the 16,785 hours of observer effort invested in the Henwood-Stuntz study represents the equivalent of less than one hour of fishing by the entire shrimping fleet, we recognize that the size of the industry realistically precludes statistical findings based totally

upon actual observation rather than extrapolation.

We are also unpersuaded by appellants' mischaracterization of the data base from which Henwood-Stuntz extrapolations were made. Appellants' attack is accomplished by isolating a narrow range of data concerning the most endangered of the five protected species—the Kemp's ridley—and concluding that the data concerning this single species in waters off a single state was insufficient to justify the regulations. As already indicated, however, the regulations are intended to prevent the illegal taking of all of the five endangered and threatened sea turtle species, whose habitats are not confined by state boundaries but may encompass thousands of square miles of sea. Because each local area, indeed each shrimper, is responsible for catching only a few sea turtles each year, it is only by aggregating this information that the relevant statistics can be approximated.

2. The Efficacy of the Regulations as Applied to Louisiana's Inland Waters.

The administrative record amply demonstrates that sea turtles are found in inshore waters. Kemp's ridleys, for example, are known to frequent the inshore waters of the Gulf, which hosts their favorite food species, the blue crab. Kemp's ridleys are most abundant in Louisiana, particularly in the near-shore white shrimp grounds. At least one expert has observed that "Kemp's ridley could logically be labelled the Louisiana turtle, because its greatest abundance is found there.... It is beyond doubt the commonest marine turtle in the state, concentrated in the shallow water from Marsh Island to the Mississippi Delta." Of all tag returns of nesting Kemp's ridley females, 59% are from Louisiana near-shore waters. Other species, including loggerheads and

13. See *Baltimore Gas & Elec. Council, Inc. v. National Resources Defense Council, Inc.*, 462 U.S. 87, 103, 103 S.Ct. 2246, 2255, 76 L.Ed.2d 437 (1983); *National Ass'n of Metal Finishers v. EPA*, 719 F.2d 624, 657 (3d Cir.1983), rev'd on other grounds, 470 U.S. 116, 105 S.Ct. 1102, 84 L.Ed.2d 90 (1985).

14. See *Suntex Dairy v. Block*, 646 F.2d 158, 162 (5th Cir.), cert. denied, 459 U.S. 826, 103 S.Ct. 59, 74 L.Ed.2d 62 (1982); cf. *Chrysler Corp. v. EPA*, 631 F.2d 865, 890 (D.C.Cir.), cert. denied, 449 U.S. 1021, 101 S.Ct. 589, 66 L.Ed.2d 483 (1980) (applying substantial evidence test).

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green turtles, also frequent inshore Louisiana waters. The Kemp's ridley is also found in nearby Texas coastal waters, as are green turtles and loggerheads.

Sea turtles not only frequent inshore waters; the record is replete with evidence to show that they are captured there as well. Most recoveries of "headstarted" Kemp's ridleys have occurred in inshore waters.¹⁵ Fully 12% of these recoveries have been off Louisiana, even though most of the releases have been off Texas. Nearly all of the Louisiana shrimpers who reported catching sea turtles (80% of those interviewed) caught them in shallow near-shore waters. In testimony before the National Oceanic and Atmospheric Administration, a Georgia marine fisheries expert reported that seven of the shrimpers interviewed had captured between 20 and 100 sea turtles each, in a single shrimping season, mostly in inshore waters.

By 1976, as evidence mounted that shrimp trawling is a substantial cause of sea turtle mortality, NMFS began research into equipment modifications that would allow turtles to escape shrimp trawls without causing a significant loss of shrimp.¹⁶ To ensure that the new gear would accom-

plish the program's objectives, NMFS required its proposed TED design to be at least 97% effective at releasing sea turtles. After more than 15,000 hours of testing in the Atlantic and Gulf of Mexico, the agency concluded that the NMFS TED met this standard, without resulting in significant shrimp loss.¹⁷ 52 Fed. Reg. 24245 (1987). Tests also showed that the new gear created certain savings for shrimpers. For example, the TED not only deflected turtles out of the net, but also other "by-catch"—marine animals that shrimpers normally must sort through and discard after retrieving the trawl from the water. And the reduced "by-catch" appeared to result in fuel efficiency as well, by reducing the unproductive (i.e., non-shrimp) drag on the vessel's engine.

Data concerning TED effectiveness was based primarily upon tests done in offshore waters, so although the agency had sufficient data that turtles frequent inshore waters and that shrimpers catch them there, the agency was receptive to time limitations on trawling as an alternative measure for inshore areas. During hearings on the proposed regulations, commenters urged

15. The "headstarting" program involves nurturing turtles in a protected environment for one year after they are hatched. At one year of age, the young turtles are released into the sea.

16. NMFS explored several alternatives to accomplish effective sea turtle conservation and restoration, some of which have been implemented with varying degrees of success. An extensive turtle headstarting program for the Kemp's ridley has released more than 10,000 young turtles into the sea. The success of this program is highly uncertain, however, so long as the headstarted turtles fail to return to the nesting beach. Thus far, none have returned. In addition, NMFS regulations now require anyone who incidentally takes a protected turtle during fishing operations to attempt to resuscitate the turtle if it is comatose or inactive. See 50 C.F.R. § 227.72(c)(6)(iv), (e)(1)(i)(B) (1987). According to the regulations, attempted resuscitation is accomplished by "[p]lacing the turtle on its back (carapace) and pumping its breast-plate (plastron) with hand or foot, or ... [by] placing the turtle on its breast-plate (plastron) and elevating its hindquarter several inches for a period of one up to twenty-four hours." *Id.* at § 227.72(e)(1)(i)(B). Turtles that revive are to be released over the stern of the boat only when

trawls are not in use, when the engine gears are in neutral position, and in areas where they are unlikely to be recaptured or injured by vessels. Similarly, sea turtles that fail to move within several hours (up to twenty-four if possible) must be returned to the water in the same manner. *Id.*

17. NMFS conducted more than 15,000 hours of testing under a variety of conditions. The testing was done during the day and at night, on board chartered vessels operated by project personnel and on cooperative shrimp vessels conducting normal commercial fishing operations. The gear was tested extensively in the Cape Canaveral Channel, Florida, area, where there are dense concentrations of sea turtles. It was also tested on commercial shrimp grounds throughout the United States South Atlantic and the Gulf of Mexico. Testing in inshore waters, however, was limited.

NMFS TEDs were tested by paired tows, in which one side of the vessel used a TED and the other did not. After 15,000 hours of testing, the TED was found effective at releasing turtles without reducing shrimp catch. During the testing, NMFS was able to reduce the TED from a 97-pound rigid frame to a collapsible 37-pound frame.

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that TEDs will not be effective inshore because the TEDs will clog with debris that reportedly lines the bottom of these waters, particularly the inshore Gulf waters. Commenters also urged that TEDs were unnecessary in inshore waters, because the debris makes it impossible for shrimpers to trawl for more than 60 to 90 minutes at a time, less time than it generally takes to drown a captured turtle. As Louisiana's Senator Breaux put it, "in all probability, shrimp in [inshore] waters will not result in any significant sea turtle mortality because it is practically impossible to tow a net for a sufficient length of time to drown a turtle." Based upon these assurances, the agency determined that tow-time restrictions offer a reasonable alternative to TED use in inshore waters.

[9] Appellants nevertheless argue that, if the agency had insufficient data to apply the more intrusive TED requirement to inshore shrimp, it automatically had insufficient data to support any other type of regulation. We disagree. Since the data was more than adequate to support the tow-time restriction in inland waters, it follows that the Secretary's decision to give shrimpers the option to use TEDs as an alternative is no less supportable. Inshore shrimpers who find the TED onerous need not use it. On the other hand, should shrimpers who experiment with the TED in inshore waters find the device compatible with their needs, they will be free to use it instead of having to haul aboard their nets after every ninety minutes of fishing. The shrimpers can hardly complain that the agency has given them a choice.

18. Some certified TEDs cost less than \$75. In addition, many shrimpers have successfully constructed and installed qualified, homemade TEDs, at a much lower cost. For example, shrimpers report constructing the certified Morrison Soft TED for as little as \$25 per TED.

19. See *TVA v. Hill*, 437 U.S. 153, 179, 98 S.Ct. 2279, 2294, 57 L.Ed.2d 117 (1978) (quoting H.R. Rep. No. 93-412, 93d Cong., 1st Sess. 4-5 (1973), U.S. Code Cong. & Admin. News 1973, p. 2989). In *Hill*, suit was brought against the TVA to enjoin completion of the \$100 million Tellico dam, situated on the Little Tennessee River, because the anticipated inundation caused by impoundment of the reservoir would have jeopardized the continued existence of the snail darter, an endangered species under the ESA. Im-

3. The Impact of the Regulations on Louisiana's Economy.

[10] The proposed regulations, which were to be phased in over a two-year period, will require 17,200 shrimpers using certain size nets to install TEDs and use them when fishing in offshore waters during the shrimp seasons. Shrimpers will purchase and install certified TEDs at an expected cost of \$200-400 per TED.¹⁸ The average annual cost to the entire industry was estimated at \$6.9 million, which included the cost of expected shrimp loss during the start-up period, before gear adjustments and changes in trawling techniques overcome any initial inefficiencies. There is substantial evidence in the administrative record indicating that anticipated catch loss resulting from use of the TEDs will amount to no more than 5%.

Although we do not denigrate appellants' concern with the expense and inconvenience the regulations will visit on Louisiana's shrimp industry, Congress has decided that these losses cannot compare to the "incalculable" value of genetic heritage embodied in any protected living species.¹⁹ While we do not mean to imply that economic impact can never be considered in determining whether a particular regulation promulgated under the ESA is arbitrary or capricious, the protections afforded by the regulations before us have not been shown to be achievable through less costly means. Thus, the costs shouldered by the industry are not arbitrary, but reasonably related to Congress's purpose.²⁰

ter, an endangered species under the ESA. Impressed by the fact that none of the "hardship exemptions" provided in § 10 of the Act, 16 U.S.C. § 1539, would even remotely apply to the Tellico project, the Court concluded that it was not empowered to create additional exemptions by judicial fiat. 437 U.S. at 189, 98 S.Ct. at 2299.

20. In this regard, we must be ever cognizant that "[w]e are judges, not legislators." *Boyle v. United Technologies Corp.*, — U.S. —, —, 108 S.Ct. 2510, 2528, 101 L.Ed.2d 442 (1988) (Brennan, J., dissenting). Congress has made the policy determination that endangered species are to be protected, and an administrative agency has decided that sea turtles are to be

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n's objectives, NMFS redesigned to be an "inshore" sea turtles. 15,000 hours of testing in Gulf of Mexico, the agency NMFS TED met this resulting in significant Fed.Reg. 24245 (1987). d that the new gear crengs for shrimpers. For not only deflected turtle net, but also other "by-catch" animals that shrimpers sort through and discard the trawl from the water. "by-catch" appeared to efficiency as well, by reducing (i.e., non-shrimp) drag engine.

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were tested by paired tows, in f the vessel used a TED and the fter 15,000 hours of testing, the effective at releasing turtles, shrimp catch. During the test- able to reduce the TED from a frame to a collapsible 37-pound

4. *The Secretary's Failure To Regulate Other Major Causes of Sea Turtle Mortality.*

[11] Appellants argue that the TEI regulations are arbitrary and capricious because they do not address other serious causes of sea turtle mortality. As we understand this argument, however, appellants are in fact raising two separate points. First, they appear to be urging us to adopt a novel proposition that regulations failing to address all of the causes of a problem are, for that reason, arbitrary and capricious. In doing so, they ignore the well-established rule that regulations need not remedy all evils, or none. See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110, 69 S.Ct. 463, 465-66, 98 L.Ed. 533 (1949); *Central Lumber Co. v. South Dakota*, 226 U.S. 157, 160, 33 S.Ct. 66, 67, 57 L.Ed. 164 (1912). Nor must the government "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486-87, 90 S.Ct. 1153, 1162, 22 L.Ed.2d 491 (1970).²¹ Thus, the agency's decision to attack one of the major causes of sea turtle mortality through regulation is entirely within its discretion. That dredges, commercial fishermen from other nations, and pollution also contribute to sea turtle deaths does not undermine the validity of these restrictions.

Appellants' second contention is based upon the proposition enunciated in *Connor v. Andrus*, 458 F.Supp. 1037, 1041 (W.D.

Tex.1978), that regulations issued under the ESA must halt, or even reverse, the population depletion of an endangered species. In *Connor*, the administrative record was found not to support a finding that banning all duck hunting in designated portions of New Mexico, Texas, and Arizona would increase, or tend to increase, the population of the endangered Mexican duck. The record did demonstrate, however, that the Mexican duck was threatened by other causes not targeted by this regulation, namely, the destruction of its natural habitat and its hybridization with another species, the mallard.

Having thus found that the agency had failed to consider all of the statutorily relevant factors, the *Connor* court held the challenged regulation to be arbitrary and capricious. *Id.* Accordingly, appellants believe the administrative record in the instant case is similarly deficient: There is no finding that the regulations will ultimately save sea turtles from extinction, nor does the record show that sea turtles saved from drowning in shrimpers' nets will ultimately survive the other causes of sea turtle mortality for such time as to replenish or increase their numbers.

An essential part of appellants' argument assumes that the ESA authorizes the Secretary to issue protective regulations only if found actually to save an endangered species from extinction. We believe, however, that this assumption finds no support in the statutory grant of regulatory authority, 16 U.S.C. § 1533(d).²² To be

protected despite substantial economic consequences for an important industry. We express no opinion on those choices. If the trade-off between marine life and economic success has been skewed in the wrong direction, it is for the legislative and executive branches, not the courts, to correct that imbalance.

21. See also *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610, 55 S.Ct. 570; 571, 79 L.Ed. 1086 (1935) ("the [government is] ... not bound to deal alike with all ... classes, or to strike at all evils at the same time or in the same way.")

22. 16 U.S.C. § 1533(d) provides in relevant part as follows: "Whenever any species is listed as a threatened species pursuant to subsection (c) of this sec-

tion, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife. . . . 16 U.S.C. § 1538(a)(1) provides in relevant part as follows:

Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

- (A) . . .
- (B) take any such species within the United States or the territorial sea of the United States;

DEN. 22

STATE OF LA. EX. RUL. GUSTE V. VERITY

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Cite as 533 F.2d 212 (5th Cir. 1983)

regulations issued and even reversed, but the administrative record to support a finding that hunting in designated portions of Mexico, Texas, and Arizona or tend to increase, that the endangered Mexican duck did demonstrate, how Mexican duck was threatened by causes not targeted by the law, the destruction of its habitat and its hybridization with the mallard.

found that the agency had failed all of the statutorily required factors. The *Connor* court held the regulation to be arbitrary and capricious.

Accordingly, appellants' administrative record in the instant case is similarly deficient. There is no evidence in the regulations will ultimately protect sea turtles from extinction. The record shows that sea turtles are declining in shrimpers' nets, and the other causes of mortality for such time as to reduce their numbers.

Appellants' argument that the ESA authorizes the use of protective regulations to save an endangered species from extinction. We believe, the government's assumption finds no support in the statutory grant of regulatory authority. 16 U.S.C. § 1533(d).²² To be

any shall issue such regulations necessary and advisable to protect and conserve of such species.

may by regulation prohibit any threatened species any action under section 1533(a)(1) of this act of fish or wildlife.... (a)(1) provides in relevant part

provided in sections 1533(g)(2) and (h), with respect to any endangered fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person to subject to the jurisdiction of the United States—

such species within the United States or the territorial sea of the United States.

sure, that statute mandates the Secretary to "issue such regulations as he deems necessary and advisable to provide for the conservation of [threatened] species." *Id.* "Conservation" is elsewhere defined in the ESA as "all methods and procedures which are necessary to bring endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(8).

In addition to this mandatory duty, however, the ESA also provides the Secretary discretionary authority to prohibit by regulation the taking of any threatened species of fish and wildlife. 16 U.S.C. §§ 1533(d), 1538(a)(1). This regulatory authority supplements the statutory prohibition against the taking of endangered species, *see* 16 U.S.C. § 1538(a)(1), the enforcement of which is not conditioned upon any showing that the prohibition will itself operate to restore the species to a level considered unendangered. Rather, Congress simply presumes that prohibited takings will deplete the species. We must honor that legislative determination.

[12] In sum, therefore, regulations aimed at preventing the taking of a protected species cannot be invalidated on the ground that the record fails to demonstrate that the regulatory effort will enhance the species' chance of survival. Insofar as *Connor v. Andrus, supra*, requires such a showing, we disapprove its holding.²³ Rather, the record need only show that such regulations do in fact prevent prohibited takings of protected species. Here, the record developed by the Secretary amply satisfies this burden.

III.

[13, 14] The Concerned Shrimpers also challenge the regulations on equal protection grounds. The basic concepts of equal protection as set forth in the fourteenth amendment apply to federal action though the due process clause of the fifth amend-

(C) take any such species upon the high seas;

ment. *United States v. Hawes*, 529 F.2d 472, 477 (5th Cir.1975). Where administrative classifications are made, absent a fundamental right or suspect classification such as race, equal protection requires only that the classification bear a rational relationship to the legislative purpose of the enabling statute. *See Turner v. Weinberger*, 728 F.2d 751, 757-58 (5th Cir.1984).

[15] Concerned Shrimpers argue that the regulations cannot meet the "rational basis" test because (1) they do not constrain activity north of North Carolina, even though sea turtles are believed to frequent those waters; (2) they regulate Gulf shrimpers with the same intensity as they regulate Atlantic shrimpers, even though Atlantic shrimpers catch more sea turtles *per capita*; and (3) they regulate based upon boat size, rather than net size. With respect to the first of these challenges, the Shrimpers themselves provide the best answer: "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *See Railway Express, supra*. Nor, as we have already noted, must the agency "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge, supra*. Even assuming, as the Shrimpers assert, that Kemp's ridleys do turn up off Long Island, there is no evidence that they are caught there by shrimp trawlers. Moreover, the government's regulation of a known evil at one place does not become invalid by the discovery of a similar, as-yet-unregulated evil at another.

[16] The Concerned Shrimpers' next argument—that the regulations violate equal protection because they regulate Gulf and Atlantic shrimpers in the same way—is similarly without merit. The agency is under no obligation to treat Atlantic and Gulf shrimpers differently, so long as its rule is reasonably related to its purpose. Here, both Gulf and Atlantic shrimpers apparently cause large numbers of sea turtle deaths. It is the agency's purpose to pro-

23. We also note that in *Connor*, the court recognized the Secretary's duty under the Act to increase the population of any endangered species. *See* 453 F.Supp. at 1041.

Photo Copy Preservation

tect these turtles from harm; it has no interest in penalizing shrimpers for the number of turtles caught, only to prevent such captures, to the extent possible, in the future. The regulations create an even-handed regulatory scheme, rationally related to their legitimate purpose. This is all that equal protection requires.

[17] Finally, the Shrimpers challenge the use of boat size as the trigger for the TED requirement, because, they urge, it is the size of the net, not the boat, that is critical. As originally proposed, the regulations indeed used net size as the basis for the TED requirement, but public comments persuaded the agency that this criterion could not work: It was not only difficult to enforce, but would cause significant intrusions into shrimp operations.²⁴

The compromise reached by the agency—to use boat size as a proxy for net size—was entirely reasonable. Boats below 25 feet in length generally do not pull the larger nets. But even if some 24-foot vessels do pull larger nets, as the Shrimpers say, the government need not achieve the "mathematical nicety" the Shrimpers demand in order to meet constitutional requirements. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 73, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911). Rather, as the Supreme Court has long recognized, "[t]he problems of government are practical ones and may justify, if they do not require rough accommodations." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913).²⁵ The "rough accommodation" attained by these regulations plainly passes constitutional muster.

IV.

For the foregoing reasons, the judgment of the district court is AFFIRMED.



24. Patrols would have to inspect the nets themselves, by itself a cumbersome task, and would have to order trawlers to lift their nets out of the water for these inspections. Boat length, by contrast, is more readily discernable. 50 C.F.R. § 217.12 (1987).

Diane PILCHER, Roger Gary, George Weeks and the Libertarian Party of Texas, Plaintiffs-Appellees,

v.

Jack M. RAINS, Secretary of State of Texas, Defendant-Appellant.

No. 88-1245.

United States Court of Appeals,
Fifth Circuit.

Aug. 16, 1988.

Members of minority political party brought action challenging constitutionality of Texas elections statute. The United States District Court for the Western District of Texas, James R. Nowlin, J., enjoined enforcement of provision requiring voter registration numbers on minority-party ballot access petitions, 683 F.Supp. 1130, and Texas Secretary of State appealed. The Court of Appeals, Johnson, Circuit Judge, held that provision was impermissible burden on access to ballot under First and Fourteenth Amendments.

Affirmed.

1. Elections — 24

Constitution assigns to states initial responsibility for setting rules governing national elections; state has compelling interest in protecting integrity of this political process. U.S.C.A. Const. Art. 1, §§ 2, cl. 1, 4, cl. 1.

2. Constitutional Law — 82(8), 274.2(1)

First and Fourteenth Amendments forbid state from using its regulating power to unnecessarily burden access to ballot. U.S.C.A. Const. Amends. 1, 14.

25. See also *Mathews v. De Castro*, 429 U.S. 181, 185, 97 S.Ct. 431, 434, 50 L.Ed.2d 389 (1976) (imperfect classifications are constitutional unless "clearly wrong; a display of arbitrary power, not an exercise of judgment").

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
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LOR: HYTE

STATE OF LOUISIANA EX REL.
WILLIAM J. GUSTE, JR.

VERSUS

ROBERT A. MOSBACHER, ETC.

CIVIL ACTION

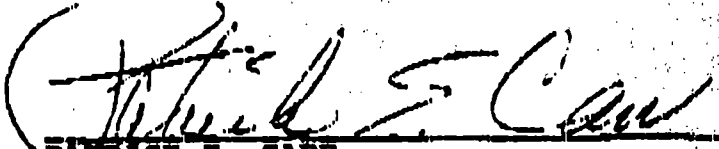
NO. 89-1899

SECTION "J"

J U D G M E N T

Pursuant to the Order and Reasons rendered this date,
IT IS ORDERED, ADJUDGED and DECREED that judgment be and is
hereby rendered in favor of the defendant, The Honorable
Robert A. Mosbacher, Secretary, United States Department of
Commerce and intervenors, Environmental Defense Fund, Center for
Marine Conservation and Green Peace-U.S.A., and against,
Plaintiff, State of Louisiana, Ex Rel, William J. Guste, Jr.,
dismissing plaintiff's claims with costs.

New Orleans, Louisiana, this 31st day of July, 1989.


PATRICK E. CARR
U. S. DISTRICT JUDGE

AUG 1 1989

(14)

DOCUMENT No. 212

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
AUG 1 8 40 AM '83
LORRY L. WHYTE
CLERK

STATE OF LOUISIANA, EX REL.
WILLIAM J. GUSTE, JR.

CIVIL ACTION

VERSUS

NO. 89-1899

THE HONORABLE ROBERT A. MOSBACHER,
SECRETARY, UNITED STATES DEPARTMENT
OF COMMERCE

SECTION "J"

ORDER AND REASONS

This matter is before the Court on plaintiff's, State of Louisiana, Motion for Preliminary Injunction. For the following reasons, the Court DENIES the motion.

The plaintiff, State of Louisiana, challenges the defendant's Robert A. Mosbacher, Secretary of Commerce (Secretary) authority to enforce regulations requiring certain shrimpers to use turtle excluder devices (TEDs). The United States Department of Commerce, through the National Marine Fisheries Service (NMFS) issued final regulations on June 29, 1987, which required that shrimpers in the Gulf of Mexico utilize TEDs to reduce accidental catch and mortality of sea turtles. These regulations were promulgated to protect certain sea turtles listed as threatened or endangered under the Endangered Species Act. 16 U.S.C. §§1531-1543; 50 C.F.R. §§17, 222, and 227.

In general the regulations require a shrimper who is operating in offshore waters and in vessels twenty-five feet or longer to install and use a certified TED. If the vessel is less than twenty-five feet or is trawling in inshore waters ~~three~~

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conservation, consists entirely of the amendment proposed by Senator Heflin of Alabama. On October 7, 1988, upon the President's signature, the bill became law. Public Law 100-478, Section 1008, reads as follows:

"(a) Delay of Regulations.--The Secretary of Commerce shall delay the effective date of regulations promulgated on June 29, 1987, relating to sea turtle conservation, until May 1, 1990, in inshore areas, and until May 1, 1989, in offshore areas, with the exception that regulations already in effect in the Canaveral area of Florida shall remain in effect. The regulations for the inshore area shall go into effect beginning May 1, 1990, unless the Secretary determines that other conservation measures are proving equally effective in reducing sea turtle mortality by shrimp trawling. If the Secretary makes such a determination, the Secretary shall modify the regulations accordingly.

(b) Study.--

(1) In general.-- The Secretary of Commerce shall contract for an independent review of scientific information pertaining to the conservation of each of the relevant species of sea turtles to be conducted by the National Academy of Sciences with such individuals not employed by Federal or State government other than employees of State universities and having scientific expertise and special knowledge of sea turtles and activities that may affect adversely sea turtles.

(2) Purposes of review.--The purposes of such independent review are--

(i) to further long-term conservation of each of the relevant species of sea turtles which occur in the waters of the United States;

[Subparagraphs (ii) through (v), which include no direct mention of TEDs, shrimpers, or the June, 1987 regulations, are omitted.]

(vi) in particular to assist in determining whether more or less stringent measures to reduce the drowning of sea turtles in shrimp nets are necessary and advisable for conservation of each of the relevant species of sea turtles and whether such measures should be

applicable to inshore and offshore areas as well as to various geographic locations; and

(vii) to furnish information and other forms of assistance to the Secretary for his use in reviewing the status of each of the relevant species of sea turtles and in carrying out other responsibilities contained under this Act and law.

(3) Scope of review.--The terms and outlines of such independent review shall be determined by a panel to be appointed by the President of the National Academy of Sciences, except that such review shall include, at a minimum, the following information:

[Subparagraphs (i) through (viii), which include no direct mention of TEDs, shrimpers, or the June, 1987 regulations, are omitted.]

(4) Completion and submission of review.--Such independent review shall be completed after an opportunity is provided for individuals with scientific and special knowledge of sea turtles and activities that may affect adversely sea turtles to present relevant information to the panel. It shall then be submitted by the Secretary, together with recommendations by the Secretary in connection therewith, to the Committee on Environment and Public Works of the United States Senate and the Committee on Merchant Marine and Fisheries of the United States House of Representatives on or before April 1, 1989. In the event that independent review cannot be completed by April 1, 1989, then the panel shall give priority to completing the independent review as it applies to the Kemp's ridley sea turtle as expeditiously as possible, and thereafter shall complete as expeditiously as possible the remaining work of the independent review.

(5) Review of status.--After receipt of any portion of the independent review from the panel, the Secretary shall review the status of each of the relevant species of sea turtles.

(6) Recommendations of Secretary.--The Secretary, after receipt of any portion of the independent review from the panel, shall consider, along with the requirements of existing law, the following before making recommendations:

[Subparagraphs (i) through (iii), which include no direct mention of TEDs, shrimpers, or the June, 1987 regulations, are omitted.]

(iv) the relationship of any more or less stringent measures to reduce the drowning of each of the relevant species of sea turtles in shrimp nets to the overall conservation plan for each such species;

(v) whether increased reproductive or other efforts on behalf of each of the relevant species of sea turtles would make no longer necessary and advisable present or proposed conservation regulations regarding shrimping nets;

[Subparagraphs (vi) through (viii), which include no direct mention of TEDs, shrimpers, or the June, 1987, regulations, are omitted.]

(7) Modification of regulations.--For good cause, the Secretary may modify the regulations promulgated on June 29, 1987, relating to sea turtle conservation, in whole or part, as the Secretary deems advisable.

[Paragraphs (8) and (9) omitted.]

(10) Purpose of this section.--Section 8 [sic] is intended to assist the Secretary in making recommendations and in carrying out his duties under law, including the Endangered Species Act (16 U.S.C. 1531 et seq.), and nothing herein alters the Secretary's powers or responsibilities to review, determine or redetermine, at any time, his obligations under law.

[Paragraph (b)(11) and subsection(c) omitted.]

102 Stat. at 2309-12.

The amendments first, provided that the Secretary would delay the effective date of the regulations until May 1, 1989 in offshore waters and until May 1, 1990, in inshore waters. Section 1008(a). Second, Congress ordered the Secretary to contract for an independent review of scientific information

pertaining to sea turtle conservation which is to be conducted by the National Academy of Sciences (NAS) to determine, inter alia, if there were less stringent measures to reduce sea turtle mortality in shrimp nets. Id. at Section 1008(b).

The State of Louisiana on April 28, 1989, filed a motion for temporary restraining order and preliminary injunction, seeking the Court to enjoin and/or restrain the Secretary, from implementing and enforcing the TEDs regulations with respect to offshore shrimping in the Gulf of Mexico set to take effect on May 1, 1989, until the National Academy of Science Study was completed. This court denied the State of Louisiana's Motion for Temporary Restraining Order on May 1, 1989. The issue before the court at this time is the State of Louisiana's Motion for a Preliminary Injunction.²

Standards Applicable for Injunctive Relief

The Fifth Circuit in Canal Authority of the State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974), sets forth four requirements for the issuance of a preliminary injunction. These are:

1. A substantial likelihood that plaintiff will prevail on the merits.

-
2. The parties filed a joint stipulation on May 25, 1989, agreeing that the issues presented in this case "will be tried on the pleadings and briefs previously filed, and those which may be subsequently filed, by the responsive parties."

2. A substantial threat that irreparable injury will result if the injunction is not granted.

3. That the threatened injury outweighs the threatened harm to defendant, and

4. That granting the preliminary injunction will not disserve the public interest.

Preliminary injunction is granted only when the movant has clearly met the four requirements set forth in Calloway.

Anderson v. Douglas and Lomason Co., 835 F.2d 128 (5th Cir. 1988).

Success on the Merits

A.

It is the State of Louisiana's contention that the National Academy of Science Study must be completed prior to the enforcement of the TED regulations. The State of Louisiana argues that it is clear from the plain meaning and structure of Section 1008 that Congress intended this study to be completed prior to the implementation of the June 29, 1987, regulations.

Nothing in Section 1008 provides that the enforcement of the regulations hinges on the completion of the NAS Study. In fact, the statute on its very face contemplates that the special study may not, in fact, be completed by the prescribed April 1, 1989, date. Indeed, the statute clearly specifies what is to happen in the event the study is not completed. Congress could easily have required the study to be completed prior to the enforcement of the regulations. The fact that Congress did not provide for this

was not an inadvertant oversight.³.

The State of Louisiana also argues that the legislative history demonstrates that the intent of Congress was for the Secretary to complete the study prior to the implementation of the regulations requiring TEDs. However, a review of the legislative history does not indicate this. The State of Louisiana quotes Senator Heflin of Alabama's statement that was made at the Senate floor debate concerning Section 1008. However, this quotation is incomplete and further reading demonstrates that Congress did not intend to delay the implementation of the regulations requiring TEDs in the event the study was not completed. Senator Heflin states:

. . . This legislation will postpone the mandatory implementation of TEDs until May 1, 1990, in the case of inshore waters and until May 1, 1989, in the case of offshore waters. If the study is not completed, the Secretary of Commerce has the authority to modify the regulations promulgated on June 29, 1987, in whole or in part as he deems advisable. Thus, he has the authority under the language of the bill to modify the regulations to the extent of further postponement. 134 Cong. Rec. H22560 (Sept. 15, 1988).

* * *

The provision requiring the Secretary to make recommendations to Congressional Committees is not intended to restrict or circumvent the Secretary's current authority and responsibility in matters of sea turtle protection and shrimp fishing. . .

3. Congress was aware that the NAS review would not be completed by the intended deadline. During the floor debate of the bill, Congressman Studts had presented a letter from the National Academy in which the Academy stated that it could not complete its report within the specified deadline. 134 Cong. Rec. H8250, 2 d. col. (Sept. 26, 1988).

Representative Studds from Massachusetts stated the following with regards to the Conference Committee Report concerning Section 1008:

The decision to delay the effective date of the offshore regulations until April, 1989, reflects our belief that the additional time will enhance the ability of the shrimping industry to make the transition to using the turtle excluder devices (TEDs) without undue disruption or difficulty. . . . The primary purpose of the study is to further the long term conservation of sea turtles. . . . several weeks ago I received a letter from the academy estimating that the study will take twelve months to complete . . . but the conference decided nonetheless to retain the ambitious date of April 1, 1989, for final report. . . . I nevertheless believe that the quality of the report should take precedence over its early conclusion.

Questions have also been raised about the relation of the report to the requirement that the offshore regulations take effect on May 1, 1989. It has been suggested that the conferees intend in fact that the report and its congressional review should necessarily occur prior to the taking effect of the offshore regulations, and that if the report is not received before May 1, the regulations should be delayed. The conference report, however, proposes no such tie between the two. To clarify this point, I specifically questioned the Senate conferees in the only meeting of the Conference Committee on this, and I was assured by our Senate counterparts that no such tie was intended. 134 Cong. Rec. H8249, H8250 (September 26, 1988). (Emphasis added)

Additional remarks further clarify that no such connection between the study and implementation of the regulations was intended by Congress. Representative Lowry stated that:

The secretary, however, need not - indeed, cannot, absent new information relevant to the conservation needs of turtles - await the completion of the study before implementing the regulations. The dates upon which the regulations are to be implemented in inshore and offshore areas are fixed and independent of when the special study may be completed or what its conclusions may be. 134 Cong. Rec. H8257 (September 26, 1988)

Representative Ravenel of South Carolina stated that:

"By enacting the legislation we are considering, Congress does two things, it ratifies the Secretary of Commerce's action in promulgating TED regulations. It also clarifies the Secretary's right to modify the regulations if he determines that it is necessary to require shrimpers to use TEDs in months when they are not now required to use them. The only thing he cannot do is to delay the implementation of regulations beyond the dates set forth in the legislation. 134 Cong. Rec. H8254 (September 28, 1988).

Neither the plain wording, nor the legislative history of the 1988 Endangered Species Act Amendments lends credence to the State of Louisiana's position. Accordingly, the Court finds this argument meritless.

B.

The State of Louisiana also advances the argument that the Secretary of Commerce has failed to comply with rule making requirements established by the Administrative Procedure Act, 5 U.S.C. 553 (APA). Specifically, the State of Louisiana contends that the Secretary must follow the notice and publication requirements in order to terminate the delay of the regulations by Public Law 100-478. In other words, the State argues that the Secretary is obligated to issue a new Federal Register notice lifting the delay and advising the public that the regulations will go back into effect on May 1, 1989. The Administrative Procedure Act, 5 U.S.C. 553(d) requires notice of proposed rule

making to be published in the Federal Register not less than thirty days before its effective date. The State of Louisiana claims that any action by the Secretary of Commerce to terminate the delay of the June 29, 1987, regulations must be published in the Federal Register in compliance with Section 553(d) and since this has not been done such regulations cannot be implemented nor enforced on May 1, 1989.

The APA does not compel such an action by the Secretary. The Congressionally imposed delay set forth in Section 1008 terminates of its own force. The APA applies only to Federal "agency" action, which does not include the actions of Congress. See 5 U.S.C. 551(1). Both the delay and the lifting of the delay were the result of Congressional action not requiring further agency action.

The purpose of Section 553 of the APA is to permit parties to be heard before any official action is taken in the promulgation of rules by allowing comments to be submitted and/or hearings conducted to amend, revise or change the proposed regulations. N.L.R.B. v. Wyman Gordon Co., 89 S.Ct. 1426 (1969). Here, the Secretary has already complied fully with the requirements of the APA in promulgating the sea turtle regulations. For the Secretary of Commerce to publish, as contended by the plaintiff is totally unnecessary in the context of setting forth that a delay has been in effect and that a lifting of such delay is imminent. No substantive change in the regulations has been made and thus opportunity for public comment is meaningless. Notice

was effectively given when the Public Law 100-478 was published. The Act does not require an agency to follow notice and comment procedures in connection with a temporary postponement of an effective date of a regulation. Such postponement is not rule making. Accordingly, plaintiff's argument that the Secretary must publish that the delay of the implementation of the TIEON regulation has been lifted is without merit.

C.

Lastly, the State of Louisiana argues that the authority given to the Secretary by Congress in Section 1008(b)(7) which provides that "For good cause, the Secretary may modify the regulations promulgated on June 29, 1987, relating to sea turtle conservation, in whole or in part, as the Secretary deems advisable." is an unconstitutional delegation of legislative authority because no standards are provided. First, this argument is wholly inapplicable to the facts of this case since the Secretary has not modified the regulations. Secondly, the Secretary's authority to promulgate regulations necessary to provide for the conservation of an endangered species has been upheld as constitutional. Christy v. Hodel, 857 F.2d 1324, 1336 (9th Cir. 1988).

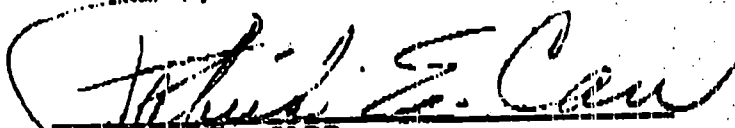
Section 1533(d) provides the Secretary with authority to issue protective regulations for the conservation of threatened and endangered species. The 1988 amendments to the Endangered Species Act specifically refer to the Secretary's "obligations under law" and in no way authorize him to exceed the authority

granted to him in Section 1533(d) of the Endangered Species Act. Under Section 1533(d) the Secretary is provided with sufficient standards to assist him in the promulgation of regulations having the force and effect of law. See, Christy, 857 F.2d 1336. Accordingly, the State of Louisiana's argument must fail.

Since a preliminary injunction may issue only if the four Calloway prerequisites are met and the plaintiff has failed to demonstrate a likelihood of success on the merits, the court hereby denies the State of Louisiana's Motion for a Preliminary Injunction.

Judgment shall be rendered accordingly.

New Orleans, Louisiana, this the 3rd day of July, 1989.


PATRICK E. CARR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION,
et al.,

Plaintiffs

v.

ROBERT A. MOSBACHER,
Secretary of Commerce,

Defendant

Civil Action No. 89-2089

FILED

AUG 14 1989

Clerk, U.S. District Court
District of Columbia

MEMORANDUM OF OPINION

At issue in this case is the legality of the Secretary of Commerce's decision to suspend for 45 days the implementation of certain regulations designed to protect threatened and endangered species of sea turtles during shrimp fishing operations. The regulations in question require shrimp trawlers in the Gulf of Mexico and southeastern Atlantic coastal areas to use so-called Turtle Excluder Devices ("TED")¹ on their nets, or to limit their tow times, in order to reduce the incidental capture and drowning of sea turtles. See 52 Fed. Reg. 24244 (1987), modified at 50 C.F.R. §§ 227.71 to .72 (1988).

On July 28, 1989, the Court denied plaintiff's motion for a temporary restraining order, and scheduled the case for an emergency consolidated hearing on plaintiffs' application for a

¹ TEDs are deflector grids or screen-like devices placed in the throat of a trawl net allowing large objects like turtles to escape while permitting shrimp to pass through. To date, there are six NMFS-approved TEDs: the NMFS' TED, the Cameron, La., TED, the Matagorda, Tx., TED, the Georgia TED, the Morrison TED, and the Parish TED. See 50 C.F.R. § 227.72(e)(4) (diagrams of qualified TEDs).

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preliminary injunction and the merits on August 3, 1989. At the conclusion of the hearing, the Court orally granted summary judgment for plaintiffs to the extent of declaring unlawful the Secretary's actions in suspending the regulations. The Court also ordered the Secretary to reinstitute the regulations or issue interim turtle conservation measures to become effective immediately, by August 7, 1989. The effect of the Court's Order was stayed, however, until August 7, 1989, to permit either party to pursue an emergency appeal.

In response to the Court's order, the Secretary on August 7, 1989, issued an interim final rule effective on August 8, and expiring September 8. This interim rule amends the existing regulations to allow shrimp fishermen to restrict trawling times to specified 105-minute intervals, as an alternative to using TEDs. Although the rule is immediately effective, it allows for comments to be submitted until August 21, 1989. This interim measure satisfies the Court's order that some conservation measures be put in place while permanent modification of the existing TED regulations are being considered. However, the Court makes no final ruling at this time on the merits of these or other measures being considered by the Secretary. And it remains to be seen how the Secretary will justify the sudden shift away from TEDs and the adoption of an 105-minute tow time restriction.

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I. BACKGROUND

Although the Secretary's recent actions would imply otherwise, the turtle conservation issue has an extensive history of legislative, administrative, and judicial consideration, spanning almost two decades. Protection of the five species of sea turtles involved in this case (the loggerhead, Kemp's ridley, green, leatherback, and hawksbill) began in the 1970's. These turtles are encountered in the Gulf and southeastern coastal waters of the United States. All are now protected as threatened or endangered under the Endangered Species Act of 1973. See 50 C.F.R. § 17.11 (1988).

In May 1975, the Secretaries of Interior and Commerce jointly proposed to list the loggerhead and green turtles as threatened and to adopt regulations restricting their taking. In their notices of proposed rulemaking the Secretaries identified the incidental capture and drowning of green and loggerhead turtles in commercial fishing nets, particularly shrimp trawls, as one of the factors contributing to their imperiled status. See 40 Fed. Reg. 21975, 21983.

By 1976, as evidence mounted that shrimp trawling was a substantial cause of sea turtle mortality, the National Marine Fisheries Service ("NMFS") began a research program to reduce the incidental capture and drowning of sea turtles by shrimp trawlers through the use of TEDs. NMFS determined, after thousands of hours of testing in the Gulf of Mexico and Atlantic, that the NMFS TED was 97% effective at releasing sea turtles, without

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resulting in significant shrimp loss. See Louisiana ex rel. Guste v. Verity, 853 F.2d 322, 330 (5th Cir. 1988); 52 Fed. Reg. 24245 (1987).

NMFS first attempted to encourage shrimp fishermen to use TEDs voluntarily through a formal program begun in 1983. When voluntary compliance failed, NMFS proposed regulations in March 1987 to require the use of TEDs. See 52 Fed. Reg. 6179-99 (1987). Public hearings were held in each of the affected states and in Washington, D.C. See 52 Fed. Reg. at 24245. Thousands of written comments were also submitted. Id.²

Final regulations were issued on June 29, 1987. The original effective dates and seasons during which TEDs are required varied according to the coastal area in question.³

² Ultimately, a twelve-volume administrative record was created, documenting the widespread participation in formulating the proposed rules:

In addition to compiling all the available scientific data and conducting its own studies and testing, the NMFS held meetings with a "working group" to review all the data and make recommendations for proposed regulations. Included in this working group was: The Center for Environmental Education, The Environmental Defense Fund, the Fund for Animals, Greenpeace, Monitor International, the Bryan County (Georgia) Fisheries Cooperative, the Concerned Shrimpers of Louisiana, the Louisiana Shrimp Association, the Southeastern Fisheries Association, the South Carolina Shrimpers Association and The Texas Shrimp Association. (Footnotes omitted.)

Louisiana ex rel. Guste v. Verity, 681 F. Supp. 1178, 1183-84

(E.D. La.), aff'd, 853 F.2d 322 (5th Cir. 1988).

³ The regulations contain the following table of effective dates:

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The regulation's TED requirements also vary according to the size of the vessel and whether the fishing is "offshore" or "inshore."⁴ Shrimpers operating vessels 25 feet or longer must install and use qualified TEDs when shrimping in offshore waters. *Id.* at § 227.72(e)(2), (6)(i). If the vessel is less than 25 feet or is trawling in inshore waters, the shrimper may limit each towing period to 90 minutes or less as an alternative to using a TED.⁵ *Id.* at § 227.72(e)(3), (6)(ii). Under the

Area	Start Date	Season
Atlantic Ocean:		
Canaveral Area--offshore.....	Oct. 1, 1987	All year.
Atlantic Area--offshore.....	May 1, 1988	May 1 through August 31, each year
Gulf of Mexico:		
Southwest Florida Area--offshore to 15 nautical miles..	Jan. 1, 1988	All year.
Gulf Area--offshore to 15 nautical miles..	Mar. 1, 1988	Mar. 1 through Nov. 30, each year
Southwest Florida Area--offshore.....	Jan. 1, 1989	All year.
Gulf Area--offshore.....	Mar. 1, 1989	Mar. 1 through Nov. 30, each year

Id. at § 227.72 (Table 1).

⁴ The terms "offshore" and "inshore" are respectively defined as the waters seaward and landward of the "baseline from which the territorial sea of the United States is measured." *Id.* at § 217.12.

⁵ The alternative tow time restriction applicable to smaller vessels and inland waters is designed to require the nets to be periodically pulled out of the water before captured turtles, otherwise unable to surface for air, drown. Research on

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regulations, "[s]hrimp fisherman in the southeastern United States and the Gulf of Mexico who comply with rules for threatened sea turtles . . . will not be subject to civil penalties under the [Endangered Species] Act for incidental captures of endangered sea turtles by shrimp trawl gear."

The final regulations were challenged by the State of Louisiana and the Concerned Shrimpers of Louisiana in an action filed in the United States District Court for the Eastern District of Louisiana. That court upheld the regulations in Louisiana ex rel. Guste v. Verity, 681 F. Supp. 1178 (E.D. La. 1988). The court stayed its ruling, however, pending an appeal to the Fifth Circuit. In contrast to the position now taken, the Secretary unsuccessfully moved to vacate the stay pending appeal, arguing that any delay in implementation of the TED regulations would irreparably harm threatened and endangered sea turtles and the TED regulation program. The Fifth Circuit thereafter affirmed the district court's decision and upheld the regulations. Louisiana ex rel. Guste v. Verity, 850 F.2d 311, opinion issued, 853 F.2d 322 (5th Cir. 1988). To facilitate an orderly transition to required TED use, the Court of Appeals continued the stay until September 30, 1988.

turtle mortality in trawl times ranging from 30 to 270 minutes indicates that 1.3% of the captured sea turtles drown in thirty minutes, 4.4% die in 90 minutes, 12.4% die in 120 minutes, and 26.4% die in 270-minutes. See Defendant's Exhibit 34; Verity, 853 F.2d at 325 n.4.

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Shortly after the Fifth Circuit's decision, however, as part of an amendment to the Endangered Species Act of 1973, Congress acted to postpone the effective dates of the regulations. See Pub. L. No. 100-478, § 1008, 102 Stat. 2309 (1988). Under that amendment, the effective dates of the regulations were delayed until May 1, 1989, in offshore areas, and May 1, 1990, in inshore areas, with the exception of the Canaveral area of Florida, where the regulations were allowed to remain in effect. *Id.* at § 1008(a). Congress also ordered the Secretary to commission a scientific study on sea turtle conservation by the National Academy of Sciences ("NAS"). *Id.* at § 1008(b).⁷ The NAS study is currently scheduled to be completed by February 1990.

On April 28, 1989, the Secretary announced that the regulations would be enforced in the offshore area beginning on May 1, 1989, the congressionally-imposed deadline, but that during a sixty-day grace period only warnings would be issued for violations. On July 10, 1989, the U.S. Coast Guard announced that it was suspending enforcement of the TED regulations at the request of Rep. W.J. Tauzin of Louisiana, based on claims that unusual concentrations of debris and sea grass in the Gulf precluded trawling with TEDs. The Coast Guard cancelled the suspension on July 20, 1989.

Also on July 20, after NMFS investigated and rejected the sea grass accumulation claims, the Secretary, through a letter to Rep. Robert Livingston of Louisiana, announced that the regulations would be enforced beginning immediately. The

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Secretary also represented in his letter to Congressman Livingston as follows:

Unfortunately, based on the results of that research [on unusual grass problems], as well as a thorough analysis of Section 1008(b)(7) of the Endangered Species Act, my legal counsel has advised there is no basis in current law for modifications of the existing regulations. This legal opinion, under existing law, is in turn compelled by the best scientific advice from NOAA that any significant modification in the TEDs regulations would jeopardize the continued existence of the Kemp Ridley turtles' [sic] as a species. Given the legal straightjacket this statute imposes, I have been constrained to advise the United States Coast Guard that I do not have the legal authority to support their continued suspension of enforcement of the TED regulations. Therefore, the Coast Guard will begin immediately to resume enforcement.

Letter from Robert Mosbacher to Robert Livingston (July 20, 1989) (Plaintiffs' Exhibit E) (emphasis in original). The Secretary further stated that he intended to increase a captive breeding program, and to establish an advisory committee of representatives of the shrimp industry and the environmental community which would explore alternative methods of protecting turtles.

Just four days later, however, on July 24, 1989, the Secretary announced a 45-day suspension of the TED regulations, following a weekend of violent protest by shrimp fishermen in Galveston, Texas and other Gulf ports. Commerce thereafter issued a "statement on turtle excluder devices" describing the Secretary's actions as follows:

Secretary Robert Mosbacher met . . . for lengthy discussions with a group of concerned congressmen and senators on the required use of turtle excluder devices (TEDs) by the shrimp fishing industry. He stated that

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there would be a 45-day moratorium on enforcement of the required use of TEDs. This "cooling off period" is needed to avoid the likelihood of civil disobedience.

During the "cooling off period," the Department will work to modify its regulations to require boats not using TEDs to limit their trawling time to 90 minutes. These regulations may also be revised following the completion of a National Academy of Sciences study expected to be issued in February, 1990. This study will address the effect of shrimp on the endangered turtle populations. Secretary Monbaker also noted that members of Congress assured him that the shrimp industry would commit to supporting "Project Head Start," a program to propagate turtles in the Gulf area.

Defendant's Exhibit 1.

Plaintiffs filed the present action the same day seeking declaratory and injunctive relief. However, the posture of the case has changed significantly with the filing of the Secretary's opposition and cross-motion for summary judgment. First, the Secretary has submitted a proposed "interim final rule" formalizing the previously-announced 45-day suspension, effective upon publication in the Federal Register. Second, the Secretary has submitted a notice of proposed rulemaking, proposing to modify existing TED regulations to allow shrimp trawlers to limit their tow times to 105 minutes as an alternative to using TEDs. The substance of the proposed rule has now been incorporated into the Secretary's interim final rule, issued in response to the Court's August 3, 1989, order.

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II. ANALYSIS

As noted initially, the sole issue properly before the Court is the legality of the Secretary's now-final 45-day suspension of the existing TED regulations. The substance of the Secretary's new proposed regulation is not properly before the Court, as there is obviously no "final" agency action for the Court to review. Moreover, as plaintiffs correctly argue "[r]egardless of any sea turtle conservation potential of the proposed rules, they do not in any way justify or legalize the Secretary's total 45 day suspension of all protections for threatened and endangered sea turtles." Plaintiffs' Reply at 18.

In the Court's analysis more is at issue in this case than the Secretary's enforcement policies. The Secretary's actions have moved considerably beyond a suspension of "enforcement" of the existing TED regulations: the Secretary has effectively rescinded the regulations in whole, albeit only for an initial period of 45 days. Although the interim final rule continues to speak in terms of "enforcement," it also, more candidly, characterizes the suspension as a substantive "modification" of the regulations.

Intervenor Concerned Shrimpers, therefore, misplaces its stubborn insistence that the Secretary has merely exercised his "prosecutorial discretion" on how to enforce the regulations, which is presumptively unreviewable under *Hickler v. Cheney*, 470 U.S. 521 (1985). Even where such a presumption is implicated, agency enforcement policy is subject to judicial review if the agency "has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty." *Adams*

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v. Richardson, 480 F.2d 1159, 1162-(D.C. Cir. 1973), cited in Haskler, 470 U.S. at 833 n.4. Moreover, the Court finds that there is "law to apply" in determining whether the Secretary has abused his discretion. As discussed below, that law is contained in the Endangered Species Act, as amended, and in the Administrative Procedure Act.

A. The Endangered Species Act

Because the turtles in question are threatened and endangered species, the Secretary has a statutory duty under the Endangered Species Act to "issue such regulations as he deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d). "Conservation" is defined as "all methods and procedures which are necessary to bring endangered species or threatened species to the point at which [protective] measures . . . are no longer necessary." *Id.* at § 1532(3). The existing TED regulations were designed to satisfy this statutory duty, and they have been upheld as "an evenhanded regulatory scheme, rationally related to their legitimate purpose." Verity, 832 F.2d at 334.

In contrast to the record supporting the existing regulations, the Secretary has utterly failed to show how the 45-day suspension of any protection for endangered and threatened turtles, during the height of the Gulf shrimp season, will foster conservation. It is well-settled that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Motor Vehicle Manufacturers Association of the United States, Inc. v. State

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Farm Mutual Automobile Insurance Co., 463 U.S. 29, 42 (1983). No such reasoned analysis was proffered by the Secretary in this case.

At a minimum, the Secretary had to show that interim turtle conservation measures were considered before the existing regulations could be revoked. *Id.* at 50 n.15 ("We think that it would have been permissible for the agency to temporarily suspend the passive restraint requirement or to delay its implementation date while an airbag mandate was studied. But . . . that option had to be considered before the passive restraint requirement could be revoked."). Although the Secretary has continuing discretion to propose modifications to the existing regulations, his discretion does not extend to a total failure to take turtle conservation measures in the interim. For this reason, the Court ordered the Secretary to put in place some protective measures, absent which the Secretary's actions would have to be deemed arbitrary.

In the 1988 Sea Turtle Conservation amendments to the Act, Congress provided that:

[f]or good cause, the Secretary may modify the regulations promulgated on June 29, 1987, relating to sea turtle conservation, in whole or in part, as the Secretary deems advisable.

Pub. L. No. 100-478, § 1008(b)(7), 102 Stat. at 2311. Contrary to plaintiffs' contentions, this discretion to modify the regulations is not limited by completion of the NAS study. When Congress intended to so limit the Secretary's discretion, it did so expressly. *See id.* at §§ 1008(b)(5), (b)(6) (specifying that Secretary's duties under those subsections arose "after receipt

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of any portion of the independent review"). Cf. Louisiana ex rel Guste v. Manbasher, No. 89-1899 (E.D. La., Aug. 1, 1989) (finding that completion of study not precondition to implementation of regulations).

The Secretary's discretion under this provision, however, is obviously not absolute. He must show "good cause" for any modification, which at a minimum means that the modification is designed to promote the "conservation" of threatened and endangered turtles. In this context, therefore, the Court's narrow holding is that, as a matter of law, the Secretary has not shown good cause for suspending existing TFD regulations in the absence of any interim conservation measures.

A separate inquiry is whether the Secretary has shown "good cause" for bypassing the procedural requirements under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 (1982), for ordering the 45-day suspension without prior notice and comment and in making it effective immediately. As previously held, the Court again holds that the Secretary has not.

B. The APA

The APA exempts a rule from the notice and comment procedures

when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(3). In addition, rules are generally not to be made effective less than 30 days after publication, absent a showing of "good cause found and published with the title." *Id.* at § 553(d)(3). The Secretary's 45-day suspension rule

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implicates both of these good cause exceptions -- as the Secretary has both bypassed notice and comment rulemaking procedures and made the suspension effective immediately.

In the interim final rule the Secretary makes the following "good cause" finding for bypassing regular procedures:

The Secretary is issuing this rule on an expedited basis in an attempt to defuse a very volatile situation in the Gulf of Mexico. The violent reaction of shrimp fishermen in the Gulf to implementation of the two regulations and the need to provide time to amend the current rules provides the Secretary with "good cause" to modify the regulations without seeking prior public comment and to make the modification effective immediately. . . .

Defendant's Exhibit 32, at 6. In the Court's analysis, this finding is inadequate to meet the stringent requirements for bypassing normal procedures.⁶

On the merits of the good cause exception, it is well-settled in our Circuit that "circumstances justifying reliance on this exception are 'indeed rare' and will be accepted only after the court has 'examine[d] closely proffered rationales justifying the elimination of public procedures.'" Council of Southern Mountains, Inc. v. Donovan, 653 F.2d 573, 580 (D.C. Cir. 1981)

⁶ Aside from the merits of the good cause finding, as a procedural matter the July 24 suspension announcement was clearly not in compliance with the APA, which expressly requires that the good cause finding be incorporated in the rule issued. The Court rejects as unfounded the Secretary's argument, relegated to a footnote that "[t]here is no provision in the APA or elsewhere requiring simultaneous publication in the Federal Register of a new or proposed rule with formal good cause findings when the rule is announced in some way other than through publication in the Federal Register as it was here" Defendant's Memorandum at 17 n.10. There is no such exception to the exception, as suggested by the Secretary. Plaintiffs, however, do not press this issue in their reply, probably because it is essentially moot given the Secretary's submission of a formal interim final rule.

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(Rek Surian) (quoting American Federation of Government Employees v. Block, 655 F.2d 1153, 1157 n.e (D.C. Cir. 1981)). The Secretary's proffered rationales of averting further violence cannot survive such strict scrutiny.

The case principally relied upon by the Secretary is Raeysa v. Simon, 507 F.2d 453 (Temp. Emer. Ct. App. 1974), cert. denied, 420 U.S. 991 (1975). That case reviewed the Federal Energy Office's emergency issuance of a regulation prohibiting gas station owners from setting aside gasoline for their regular customers due to the gas shortage arising out of the Arab oil embargo. The agency issued the regulation without submitting it for comment and made it effective immediately. The Temporary Emergency Court of Appeals upheld the action, reasoning that

[t]he gasoline shortage was a temporary, but highly disruptive, national emergency. The long lines and violence required immediate action. Some purchasers were being served, while others were being totally excluded. Under those circumstances, we find that the promulgation of [the regulation], with accompanying statement of good cause for dispensing with the 30-day notice requirement, was in conformance with the APA.

Id., 507 F.2d at 453.

However, Raeysa is distinguishable from the present case on several grounds: 1) in that case the agency was promulgating a rule where there had been none; 2) the violence at issue was the result of the absence of a rule, not in response to one; and 3) the case involved a true "national emergency" created by external forces, i.e., the Arab oil embargo. Moreover, except in the narrowest of circumstances not present here, recognition of civil disobedience as good cause to suspend laws or regulations would set a dangerous precedent. It cannot be gainsaid that "[v]iolent

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resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society." Cooper v. Aaron, 358 U.S. 1, 22 (1958). Anarchy simply cannot be used to justify abandonment of responsibility.

The lack of any interim conservation measures also bears on the good cause analysis under the APA. Under a recent decision out of our circuit on the good cause exception, for example, the court found it critical that the agency in question took the emergency measure in an effort to "strike a reasonable balance, fairly accommodating the interests of all affected parties, while [it] consider[ed] a permanent solution to the . . . question." Mid-Tex Electric Cooperative, Inc. v. FERC, 822 F.2d 1123, 1133 (D.C. Cir. 1987). The Secretary made no such effort here, as he proposed no interim protections whatsoever during the Secretary's consideration of a new permanent solution. The Court's remedial order was designed to cure this defect.

C. Remedy

The Court reiterates that its holding is a narrow one: that the Secretary has failed to show good cause for suspending existing TED regulations for 45 days without any interim conservation measures, and without following regular APA notice and comment procedures. Under this ruling, the Secretary retains his discretion to propose modifications to the existing TED regulations, and to adopt enforcement policies. The Court's remedial order was designed to reflect the Secretary's continuing discretion in these respects.

The Secretary's interim final rule instituting a 105-minute tow time restriction until September 8, 1989, is responsive to

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the Court's remedial order. Plaintiffs on August 8, 1989, filed objections to the interim final rule, and a motion for expedited production of documents. The court ordered the Secretary to respond to plaintiffs' motion by noon August 11. Although plaintiffs are entitled to discovery, the court is concerned about the adequacy of the administrative record in this case. The highly endangered Kemp's ridley turtle, the world's only leprechaun at this juncture to reach the shores of plaintiffs' objections. The Secretary has requested comments on the interim final rule and represents that "[a] final rule [concerning] comments will be published no later than September 2, 1989." The court should, therefore, defer ruling on plaintiffs' motions pending the Secretary's issuance of a final rule and the creation of an administrative record.⁷

Date: September 1989

Thomas P. Hogan
Thomas P. Hogan
United States District Judge

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⁷ The Court finds it safe to assume that the Secretary will make the documents responsive to plaintiffs' discovery request a part of the administrative record.

Withdrawal/Redaction Sheet

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From Will Eagle to Andy Card Re: Analysis of TEDs Issue (4 pp.)	9/22/89	P5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Turtle Excluder Devices (1990) [6]

Open on Expiration of PRA
 (Document Follows)
 By JP (NLGB) on 5/12/05

Date Closed:	12/13/2004	OA/ID Number:	29173-012
FOIA/SYS Case #:	1998-0004-F[1]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

(b)(1) National security classified information [(b)(1) of the FOIA]
 (b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
 (b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
 (b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
 (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE
WASHINGTON

September 22, 1989

MEMORANDUM FOR ANDY CARD

THROUGH: JIM PINKERTON 
FROM: WILL EAGLE 
SUBJECT: Analysis of TEDs issue.

While we do not claim any scientific expertise, we have reviewed the materials presented to us and made additional inquiries on the Turtle Excluder Devices. We have the following observations:

1. A federal court, presented with the identical data, ruled in favor of the use of TEDs.

The State of Louisiana challenged the National Oceanic and Atmospheric Administration (NOAA) requirements for the use of TEDs by shrimp fisherman under the regulations of the Endangered Species Act (ESA), and a federal court decided in NOAA's favor.

The Department of Interior has accused NOAA, and upon re-evaluating its own data NOAA has conceded that the numbers it presented before the court were flawed; in fact, they severely underestimated the number of turtles killed. Should the matter be dragged back into court, as it likely will be by environmentalists and advocates of the ESA, it is NOAA's opinion that these higher estimates of turtle deaths will come to light.

2. It is the opinion of NOAA, DOI and DOJ that the use of TEDs be enforced.

There is a consensus among both the legal and scientific communities within the administration that TEDs be used. The only resistance seems to be coming from the shrimpers and their few congressmen. The scientific data shows that shrimp fishermen have a significant impact on the turtle population, and the standing legal precedent seems to guarantee defeat in the courts. In fact, as noted above, our data on turtle death has gotten worse.

(more)

3. TEDs are already in wide use in the southern Atlantic states. Shrimpers in Florida and along the eastern seaboard already use TEDs without significant detriment or complication.
4. Other alternatives, such as limited tow times have their own drawbacks, including the fact that the shrimpers don't seem to like it because of its inhibition of efficiency and preferred lengthy tow times. In addition, the resulting lack of compliance and difficulty of enforcement only adds to the case against Commerce in complying with the ESA which is only concerned with the survival of the turtles.
5. Despite legal advice, Secretary Mosbacher, interested in protecting the economic livelihood of the shrimp industry of Louisiana and Texas, suspended TED regulations twice. The second suspension was overturned in a court challenge by the National Wildlife Fund. Mosbacher has been highly visible on this matter, and while NOAA wants to be supportive of the Secretary, they are convinced that TEDs are necessary according to the law.

On the other side of the issue, from the point of view of the fisherman, the situation is quite frustrating. While TEDs are relatively inexpensive, the profit margin in the shrimp business is narrow, and several other factors only serve to cloud and confuse the issue.

1. There have been suggestions about merely increasing the propagation of the endangered species in question.

The endangered turtle is the Kemp's Ridley, and so far as we know, it lays its eggs on one and only one nesting beach in Mexico. Discovered in 1947, this beach used to host upwards of 40,000 egg-laying females. The current number is now approximately 650 -- a reduction of 98%.

From nesting time until the eggs hatch, Mexican marines guard the beach from disturbance. In a joint cooperative effort, 10% of the hatchlings are taken to Galveston, Texas to be raised in a controlled environment in hopes of helping the baby turtles survive through the vulnerable first months of their lives. However, it would be scientifically unsound to attempt greater propagation efforts without evidence that it is truly beneficial.

(more)

2. Without TEDs, each shrimper will kill only two or three turtles of all species per year on the average. However, since the Louisiana fleet consists of approximately 5,000 boats, the multiplied effects are devastating.

One solution might involve subsidizing the cost of the TEDs. NOAA has concluded that some TEDs actually increase the efficiency of shrimping by holding the nets open wider allowing the shrimper to fish a greater area of the bottom. However, the shrimpers are understandably suspicious, and in unpracticed uses of TEDs, many were discouraged by poor results and were reluctant to continue use.

3. Shrimpers are not the only cause of turtle death -- why single them out?

This is true. There are other causes which can be prevented. As Congressman Tauzin points out, the dynamiting of abandoned oil platforms is an additional cause of turtle death which can be prevented. While the President is the biggest advocate of off-shore oil drilling, I'm sure there are compromises which can be sought toward their removal once the wells are tapped out.

Salt water intake, harbor dredging, and ocean dumping are all problems that the turtle population face, and there are measures which can be taken to reduce their effects. However, it has been determined that shrimp fishing is the biggest enemy of the turtle, and under the Endangered Species Act we seem to be obligated to implement the means we have available.

4. The United States is third on the list of suppliers of shrimp for its own consumption. Ecuador is the major supplier of shrimp to the U.S., followed by China.

With the benefits of low wage labor in these countries, shrimp are farmed in containment facilities. This allows production a larger and better quality shrimp, lowering the market price, and frustrating the struggling southern shrimper.

Congressman Tauzin and six other Louisiana officials have been leading the charge against TEDs. However, from all the evidence we see, TEDs will ultimately be imposed, and since the "rule" in Washington is to be for what happens, that suggests our best course of action.

In the interest of finding a long-term solution to the problem, it has been suggested that a joint effort be made. The habitat of not only the turtles, but also the shrimp, is being altered by the presence of human industry. Pollution and the disappearance of marshlands in the waters of the Mississippi Delta contribute to the problem. The President has stated his intention to clean up the oceans and to assure "no net loss of wetlands." In the opinion of concerned individuals, a give and take compromise could be struck between the shrimpers and the government. For example, in exchange for using TEDs now, in the course of following its intended policies, the government will ultimately improve the shrimp population, as well as that of the turtle.

We defer to those more expert in foreign policy, but it does occur to us that diplomatic options may be available to the President or appropriate agencies. Other large shrimp fishing countries, most notably Mexico, do not use TEDs, and pressure on these countries (similar to recent drift-net fishing agreements with Asian countries) may afford us new options.

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THE WHITE HOUSE
WASHINGTON

TO: GOVERNOR SUNUNU

FROM: DAVID Q. BATES



FYI



Action



Comment

Bates
4-026040S257 09/14/89

ICS IFMRNCZ CSF

4076472615 FRB TDRN MAITLAND FL 5000114 0343P EST

PMS MR. JOHN SINUNNU, CHIEF OF STAFF, DLR

WHITE HOUSE

WASHINGTON DC 20500

DEAR MR. SINUNNU:

OVER 10,000 SEA TURTLES WILL DROWN WITHOUT THE IMPLEMENTATION OF
TURTLE EXCLUDER DEVICES. THE 28,000 MEMBERS OF THE FLORIDA AUDUBON
SOCIETY STRONGLY SUPPORT THE USE OF TED'S. ANY MEASURE TO REVOKE
TED'S WOULD APPEAR TO COUNTERMAN THE ADMINISTRATION'S RECENT
ENVIRONMENTAL EFFORTS. FLORIDA AUDUBON URGES YOU TO SUPPORT THE
CONTINUING USE OF TED'S.

BERNARD J YOKELPRESIDENT

FLORIDA AUDUBON SOCIETY

32751

89 SEP 14 PM 4:45

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Memo	From Wendell Willkie, II to John Sununu Re: Scientific Reports Supporting Turtle Excluder Devices (TED) Regulations (2 pp.)	9/12/89	P -5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Turtle Excluder Devices (1990) [6]

Open on Expiration of PRA
 (Document Follows)
 By JF (NLGB) on 5/12/05

Date Closed:	12/13/2004	OA/ID Number:	29173-012
FOIA/SYS Case #:	1998-0004-F[1]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

(b)(1) National security classified information [(b)(1) of the FOIA]
 (b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
 (b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
 (b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
 (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

72300

NT OF COMMERCE

Linda,

Keep the turtle stuff
where DHS can have it

Ed

CHIEF of STAFF
een

MEMOR

FROM:

Gray Castle
Deputy Under Secretary, NOAA

SUBJECT: Scientific Reports Supporting Turtle Excluder
Device (TED) Regulations

Attached are five reports prepared by NOAA Fisheries. Four of these reports were cursorily summarized in the last two pages attached to NOAA's memorandum, which you were provided by our Congressional Affairs officer on Saturday. They are:

1. Henwood and Stuntz, 1987, which supports the data concerning turtle captures and mortalities in the absence of the TED regulations.

2. Kemmerer, Summary Report from Trawl Tow Time Versus Sea Turtle Mortality Workshop, 1989, supporting the data concerning turtle mortalities associated with various tow times.

3. and 4. Stuntz and Kemmerer, August 28, 1989, both of which evaluate the effectiveness of 105-minute tow times in the Gulf and in the Atlantic.

5. Stuntz and Kemmerer, September 11, 1989, comparing the current TED regulations to an alternative regime of year-round TEDs in the Atlantic and year-round 105-minute tow times in the Gulf.

You have asked us to consider an option involving 90-minute tow times in the Gulf, and we will provide an analysis of this as soon as possible. You noted that the difference to the shrimpers was only a 4% additional loss of shrimp (27% versus 31%). However, we believe that the shrimpers will not be satisfied with either a 90 or a 105-minute tow time. Our best information is that this option is more costly to the shrimpers than TEDs properly used, but, of course, we will all do what we can to identify any legally available option.

To receive the best explanation of the scientific NOAA Fisheries scientific data and reports, we recommend that you be briefed by Dr. William Fox, the new Assistant Administrator for Fisheries of NOAA. Dr. Fox is an eminently qualified scientist who is intimately familiar with both TED and turtle issues. He is a political appointee who has most recently served as Director, Cooperative Institute for Marine and Atmospheric Science, University of Miami, and as Chairman of the Florida Marine Fisheries Commission.

A paper outlining additional options has already been provided to your staff.

Attachments

cc: David Bates
Andrew H. Card, Jr.
Michael R. Deland
S. Jay Plager
George W. Van Cleve

THE WHITE HOUSE
WASHINGTON

TO: GOVERNOR SUNUNU

FROM: DAVID Q. BATES



FYI



Action



Comment



**GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE**
Washington, D.C. 20230

September 22, 1989

MEMORANDUM FOR David Q. Bates
Assistant to the President
and Secretary to the Cabinet

FROM: Wendell L. Willkie, II *WLV*
General Counsel

SUBJECT: TEDs

As we discussed this afternoon, I'm forwarding the attached advice from NOAA indicating that of 66 vessels boarded in the central and western Gulf since September 8 (when the TEDs requirement was reinstated) 53 of the vessels (or 80%) were using TEDs.

While this information is admittedly not comprehensive, it does indicate that there may well be substantial movement towards compliance with the TEDs requirement. I understand that this is the best information available from the Coast Guard at this time.

In my absence from the office until October 4, questions regarding this matter may be directed to John Knauss, Under Secretary, NOAA; Gray Castle, Deputy Under Secretary, NOAA; or Tom Campbell, General Counsel, NOAA.

cc: Andrew H. Card, Jr.
S. Jay Plager



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

September 22, 1989

MEMORANDUM FOR: Wendell W. Willkie, II
General Counsel, DOC

FROM: Thomas A. Campbell 

SUBJECT: TEDs Enforcement Situation

The following is the update on compliance with the TEDs regulations and Florida's new year-round TED requirements. These data were collected by NOAA enforcement from Coast Guard and Florida Marine Patrol sources. I have asked Coast Guard headquarters for an official report.

Of vessels boarded in Florida's waters, over 96% are using certified TEDs. Of vessels boarded in the central and western Gulf of Mexico, 80% are using certified TEDs.

The industry, even in the western Gulf, seems to be coming into compliance.





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Office of Enforcement
Atlantic Area Operations Division
Southeast Area
9450 Koger Boulevard
St. Petersburg, FL 33702

September 22, 1989

MEMORANDUM FOR: F/EN - Morris M. Pallozzi
FROM: F/EN22 - Suzanne M. Montero *for [Signature]*
SUBJECT: TED Compliance Update - 9/8/89 - 9/22/89

Gulf of Mexico Totals

Vessels Boarded:	177
Vessels With TEDS:	160
Violations Documented:	17

Southwest Florida (Source - Florida Marine Patrol and CCGD Seven)

Vessel Population:	50
Vessels Boarded:	30+
Vessels With TEDS:	29+
Violations Documented:	1

COMMENT: FMP does not always record total number of boardings, however, they have actively patrolled eight days out of the last 15 and have checked seven to ten vessels per night in southwest Florida. CCGD Seven had a 110 ft. cutter north of the Dry Tortugas for three days and conducted seven TED boardings. Only one of the vessels checked did not have TEDs installed. That vessel was later sighted trawling by the FMP and chopped his trawl cables prior to FMP's boarding to avoid being caught without TEDs.

Northwest Florida (Source - Florida Marine Patrol and CCGD Seven)

Vessel Population:	185
Vessels Boarded:	81
Vessels With TEDS:	78
Violations Documented:	3



Central and Western Gulf (Source - Coast Guard District Eight)

Vessel Population:	(Approx.)	500
Vessels Boarded:		66
Vessels With TEDS:		53
Violations Documented:		13

COMMENTS:

o One reliable estimate of compliance comes from the Sea Grant representative in Galveston, Texas who relayed that by his estimates 70 percent of the vessels in Freeport, Texas, had installed TEDs.

o There is a full moon right now and that alone cuts down significantly on the effort among the shrimp fleet. An air patrol off Port Isabel yesterday sighted only about 20 shrimp vessels engaged in the fishery.

o In Aransas Pass, Texas major fleet owners have equipped their entire fleets with TEDs. One example is Ron Herndon of Gulf King who has installed TEDs in all 53 of his vessels. Our agent in Corpus Christi reports that nearly every vessel in Port Aransas and Port Isabel has something installed in their nets. Not all of these installations, however, are certified TEDs.

cc: F/SER - Angelovic