UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUISIANA SHRIMP ASSOCIATION; JOHN BROWN; LARRY J. HELMER JR.; PENNY ZAR Plaintiffs, v. JOSEPH R. BIDEN, JR. in his official capacity as President of the United States; GINA RAIMONDO, in her official capacity as United States Secretary of Commerce; NATIONAL MARINE FISHERIES SERVICE; Defendants.	No. 24-cv-00156 JUDGE: Judge Jane Triche Milazzo MAGISTRATE JUDGE: Judge Eva J. Dossier

Federal Defendants' Cross-Motion for Summary Judgment

Federal Defendants submit this cross-motion for summary judgment on all counts of Plaintiffs' Complaint, ECF No. 1, pursuant to the Federal Rules of Civil Procedure 56 and Local Civil Rule 56. In support of this motion, Federal Defendants state as follows:

Federal Defendants are entitled to summary judgment because the National Marine Fisheries Service's decision to require the use of turtle excluder devices by the skimmer trawl fishery to prevent takes of Endangered Species Act listed sea turtles comports with the law, is rational, and is supported by the administrative record.

An accompanying memorandum in support of this motion, a statement of material facts, and a response to Plaintiffs' statement of material facts are filed herewith.

Respectfully submitted this 5th day of September 2024.

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INTRODUCTION

The rule at issue in this case requires certain skimmer trawl vessels in the southeastern U.S. shrimp fisheries to install turtle excluder devices ("TEDs") in their nets to protect sea turtles listed under the Endangered Species Act ("ESA"). Shrimp Trawling Requirements, 84 Fed. Reg. 70048-01 (Dec. 20, 2019) ("Final Rule"). The Final Rule reflects the reasoned determination of the National Marine Fisheries Service ("NMFS") that TEDs are "necessary and advisable," 16 U.S.C. § 1533(d), to reduce incidental bycatch and mortality of sea turtles and to aid in the protection and recovery of these populations in the southeastern U.S. shrimp fisheries, and is lawful under NMFS's broad authority to promulgate "such regulations as may be appropriate to enforce" the ESA, *id.* § 1540(f). The Court should decline Plaintiffs' invitation to overturn the Final Rule on unpersuasive statutory and constitutional grounds and uphold it as a reasonable exercise of congressionally-delegated authority that is supported by the administrative record.

These same claims were originally presented by the State of Louisiana. *La. State v. Dep't of Com.*, Civ. No. 21-1523, 2022 WL 17251152 (E.D. La. Nov. 28, 2022). The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of these claims on standing grounds, *see id.*, and held that the State "made no attempt to show any injury to its marine resources resulting from the Final Rule." *La. State v. Nat'l Oceanic & Atmospheric Admin.*, 70 F.4th 872, 880 (5th Cir. 2023). In addition, the D.C. Circuit Court of Appeals upheld the Final Rule on its merits, holding that "the 2019 final rule was not arbitrary and capricious." *Ctr. for Biological Diversity v. NMFS*, No. 22-5295, 2024 WL 3083338, at *3 (D.C. Cir. June 21, 2024) (per curiam). The court concluded that NMFS's "final rule reflects a policy choice, which was adequately explained by its consideration of the rule's costs and benefits," including impacts to sea turtle species and the shrimping industry. *Id.* Based on the previous decisions and the reasons

set forth below, the Court should find that NMFS lawfully promulgated the Final Rule to protect federally-listed endangered and threatened sea turtles.

STATUTORY AND REGULATORY FRAMEWORK

The ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . ." 16 U.S.C. § 1531(b). To accomplish this goal, Congress directed the Secretary of the Interior and the Secretary of Commerce to list endangered and threatened species and designate their critical habitat.[1] *See id.* § 1533. An endangered species is one that is in danger of extinction throughout all or a significant portion of its range, *id.* § 1532(6), and a threatened species is one that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. *Id.* § 1532(20). Once a species is listed as endangered or threatened, a number of provisions of the statute help ensure the survival and recovery of the species. *See, e.g.*, *id.* § 1533(f) (requirement to develop and implement recovery plans for listed species); *id.* § 1536 (federal agencies' duty to avoid jeopardizing listed species and destroying or adversely modifying listed species' designated critical habitat).

The ESA contains certain prohibitions, including "take,"[2] that apply to endangered species. *Id.* § 1538(a)(1). NMFS has the discretion to extend those prohibitions to threatened species or to issue other regulations to protect threatened species. Section 4(d) provides that:

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[1] Responsibility for the ESA is divided between the Secretary of the Interior and the Secretary of Commerce. The Secretary of the Interior, who is generally responsible for all terrestrial and freshwater species, has delegated her responsibility to the United States Fish and Wildlife Service. The Secretary of Commerce, who is responsible for most marine species, including sea turtles in the ocean, has delegated her responsibility to NMFS.

[2] Under the ESA, "[t]he term 'take' means 'to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'" 16 U.S.C. § 1532(19).

> whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as [s]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 9(a)(1), in the case of fish or wildlife . . .

Id. § 1533(d). Thus, under the second sentence of Section 4(d), NMFS "may" extend the Section 9(a)(1) prohibitions to threatened species. The Secretary of Commerce has extended the Section 9(a)(1) prohibitions to threatened sea turtles through 50 C.F.R. § 223.205. Pursuant to ESA Section 11(f), NMFS also has broad authority to promulgate "such regulations as may be appropriate to enforce this [Act]." 16 U.S.C. § 1540(f).

FACTUAL BACKGROUND

Five species of sea turtles occur in U.S. waters (Kemp's ridley, loggerhead, leatherback, green, and hawksbill sea turtles), each of which have been listed by NMFS as either endangered or threatened under the ESA. 50 C.F.R. § 223.102(e) (enumeration of threatened sea turtles); *id.* § 224.101(h) (enumeration of endangered sea turtles). In June 1987, NMFS issued regulations pursuant to its authority under ESA Sections 4(d) and 11(f) to protect sea turtles. Shrimp Trawling Requirements, 52 Fed. Reg. 24244 (June 29, 1987) ("1987 Rule"). The 1987 Rule requires that shrimp trawlers[3] trawling in offshore waters from North Carolina through Texas to use a NMFS-approved TED[4] in their nets during certain times of the year in specific areas. *Id.*; 50 C.F.R. § 223.206(d)(2). The Fifth Circuit upheld these regulations in *Louisiana, ex rel. Guste v. Verity*, 853 F.2d 322 (5th Cir. 1988).

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[3] A shrimp trawler is a type of fishing vessel equipped with trawl nets that fishes for shrimp, or whose on-board or landed catch is greater than one percent by weight of all the fish on board. 50 C.F.R. § 222.102.

[4] A TED is "a device designed to be installed in a trawl net forward of the cod end for the purpose of excluding sea turtles from the net, as described in 50 C.F.R. [§] 223.207." 50 C.F.R. § 222.102.

On May 10, 2012, NMFS published a proposed rule to require the use of TEDs in certain additional trawl types than were included in the 1987 Rule, including skimmer trawls. Shrimp Trawling Requirements, 77 Fed. Reg. 27411 (May 10, 2012) ("2012 Proposed Rule") (AR000265). During the development of the 2012 Proposed Rule, NMFS placed federal observers on skimmer trawl vessels to collect additional data on sea turtle interactions. Observers documented the capture of sea turtles on observed trips during 2012-2014 using skimmer trawl gear, including captures that occurred while fishing in inshore waters off Louisiana. AR010893, 010924, & 010955. Although observer data both confirmed the presence of sea turtles and documented their capture by skimmer trawl vessels, observations about the size of captured turtles in 2012 led NMFS to withdraw the final rule on February 7, 2013. Shrimp Trawling Requirements, 78 Fed. Reg. 9024 (Feb. 7, 2013) ("Withdrawal Rule") (AR000288). Specifically, most of the sea turtles observed were small enough to pass between the required maximum four-inch bar spacing of the approved TEDs, negating much of the sea turtle conservation benefit expected from the 2012 Proposed Rule. *Id.* at 9025 (AR000289). *See also* AR010947-48 ("The majority (58%) of the sea turtles captured during the 2012 observer coverage were small enough to pass through the maximum four-inch TED bar spacing currently allowed.").

On December 16, 2016, NMFS published a proposed rule to require TEDs on almost all vessels in the southeastern U.S. shrimp fisheries. 81 Fed. Reg. 91097, 91097-98 (Dec. 16, 2016), ("2016 Proposed Rule") (AR002167). NMFS explained that, after publication of the 2013 Withdrawal Rule, NMFS had completed additional testing and developed new TED configurations to allow small turtles to effectively escape the trawl nets. 81 Fed. Reg. at 91098 (AR002168). In addition, NMFS cited information calling into question previous determinations about the effectiveness of the alternative tow time requirements. *Id.*

On December 20, 2019, NMFS issued the Final Rule. 84 Fed. Reg. 70048 (AR009464). The Final Rule requires skimmer trawl vessels 40 feet and greater in length to use TEDs, as "tow time limits may not be as effective in reducing sea turtle bycatch and mortality as previously thought" and thus "the most effective protective measure for threatened and endangered sea turtle populations is to reduce the total time sea turtles are entrained in a skimmer trawl by using TEDs." *Id.* at 70050 (AR009466). The Final Rule will "result in a conservation benefit of 801-1,168 sea turtles annually in the Southeastern U.S. shrimp fisheries." *Id.* at 70049 (AR009465). NMFS set the effective date of the Final Rule as April 1, 2021. *Id.* at 70055 (AR009471). On March 31, 2021, NMFS published a notice delaying the effective date from April 1, 2021, to August 1, 2021, due to safety and travel restrictions stemming from the COVID-19 pandemic. Shrimp Trawling Requirements, 86 Fed. Reg. 16676-01 (Mar. 31, 2021) (AR012339). On September 9, 2021, this Court enjoined the Final Rule in Louisiana inshore waters until February 1, 2022, reasoning that "a brief delay in implementation of the Final Rule to allow appropriate time for all shrimpers to come into compliance will not result in an unreasonable risk to sea turtles." *La. State v. Dep't of Com.*, 559 F. Supp. 3d 543, 549 (E.D. La. 2021). The Final Rule has now been in effect for more than two years.

On April 20, 2021, NMFS published an advance notice of proposed rulemaking ("ANPR") to solicit comments on further modification of the TED requirements for skimmer trawl vessels shorter than 40 feet operating in the southeast U.S. shrimp fisheries. Potential New Turtle Exclusion Device Requirements for Skimmer Trawl Vessels Less Than 40 Feet (12.2 Meters) in Length, 86 Fed. Reg. 20475-01 (Apr. 20, 2021) (AR012638). NMFS has not yet published a proposed rule or taken further regulatory action regarding the ANPR.

STANDARD OF REVIEW

Federal Defendants bring this Cross-Motion for Summary Judgment under Rule 56(c) of the Federal Rules of Civil Procedure. Summary judgment is appropriate where no genuine issue of material fact exists, and a party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). As this case involves review of a final agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, however, the standard in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record. *See, e.g., Atchafalaya Basinkeeper v. Bostick*, No. 14-649, 2015 WL 3824318, at *6 (E.D. La. June 19, 2015) (In the context of judicial review of an administrative agency's decision, a "motion for summary judgment stands in a somewhat unusual light, in that the administrative record proves the complete factual predicate for the court's review." (citation omitted)). "[T]he district court must 'determine whether as a matter of law, evidence in the administrative record permitted the agency to make the decision it did, and summary judgment is an appropriate mechanism for deciding the legal question of whether an agency could reasonably have found the facts as it did.'" *Id.* (citation omitted). The Final Rule is subject to judicial review under the APA, 5 U.S.C. § 706(2)(A)-(D), and a reviewing court is to affirm final agency action unless that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A); *Coastal Conservation Ass'n v. U.S. Dep't of Com.*, No. 15-1300, 2016 WL 54911, at *3 (E.D. La. Jan. 5, 2016), *aff'd*, 846 F.3d 99 (5th Cir. 2017). This standard is "highly deferential" and the agency's decision is entitled to a presumption of validity. *Hayward v. U.S. Dep't of Lab.*, 536 F.3d 376, 379 (5th Cir. 2008) (per curiam) (citation omitted).

ARGUMENT

The Final Rule is lawful and supported by the record. NMFS complied with the procedural requirements of the APA in issuing the Final Rule and the Final Rule passes Constitutional muster.

I. The Final Rule Fully Complies with the APA.

NMFS reasonably concluded in the Final Rule that TEDs were an appropriate measure to reduce sea turtle bycatch and mortality in the skimmer trawl fisheries. In promulgating the Final Rule, NMFS relied upon scientifically rigorous studies and data, including data collected during a federal observer program, to support the TED requirement as necessary to further conservation efforts and assist in the recovery of threatened and endangered sea turtle species. The Final Rule easily passes muster under the APA's highly deferential standard. *BCCA Appeal Grp. v. U.S. EPA*, 355 F.3d 817, 824 (5th Cir. 2003), *as amended on denial of reh'g and reh'g en banc* (Jan. 8, 2004).

Plaintiffs may disagree with NMFS's decision to implement a TED requirement for certain skimmer trawl vessels instead of the previously applicable tow time restrictions. But this "difference in opinion" does not render the Final Rule arbitrary and capricious. *Id.* at 824. NMFS fulfilled its obligation to make a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). When, as here, "the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. v. U.S. EPA*, 714 F.3d 841, 857 (5th Cir. 2013) (citation omitted).

A. The Final Rule adequately explains why a TED requirement for skimmer trawl vessels is appropriate.

In the Final Rule, NMFS fully explained the factual basis of its decision to require skimmer trawl vessels 40 feet and greater in length to use TEDs, notwithstanding its prior decision in the 1987 Rule not to require TEDs "at this time." 52 Fed. Reg. at 24246 (citing a lack of observer data and limited scientific information about incidental mortality of sea turtles and TED effectiveness, to "agree[] that it is not appropriate *at this time* to require TEDs to be used in both inshore and offshore waters by all shrimp trawlers.") (emphasis added). NMFS published the 1987 Rule over 30 years ago and has since gathered additional data about the effectiveness of TEDs in reducing sea turtle bycatch and mortality. NMFS's determination in 1987 that it was "not appropriate at this time" to require TEDs—in part due to the lack of data—does not preclude NMFS from gathering data and determining in 2019 in the Final Rule that a TED requirement is now appropriate. It is hardly surprising that an agency would change its position on a proposed regulation in response to comments received through the rulemaking process. *E.g., PSWF Corp. v. F.C.C.*, 108 F.3d 354, 357 (D.C. Cir. 1997) ("[A]gencies may change their minds in the course of a rulemaking, even though those affected may be disappointed."). Indeed, it is Defendants' prerogative to determine what currently constitutes the best scientific information available and make informed policy judgments based on that information. *E.g., Organized Fishermen of Fla. v. Franklin*, 846 F. Supp. 1569, 1577 (S.D. Fla. 1994). Here, the record provides ample support for NMFS's determination that tow time restrictions were insufficient to protect ESA-listed sea turtles and that a TED requirement for certain skimmer trawl vessels was necessary to reduce sea turtle mortality and to further conserve ESA-listed sea turtle species.

NMFS first promulgated regulations on the use of TEDs in certain shrimp trawling vessels on a spatio-temporal basis in 1987. Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24244. At that time, NMFS acknowledged that it had "no observer

data," and because of the "limited scientific data on the incidental mortality of sea turtle and TED effectiveness in certain areas" it "agree[d] that it is not appropriate *at this time* to require TEDs to be used in both inshore and offshore waters by all shrimp trawlers." *Id.* at 24246. In support of their motion for summary judgment, Plaintiffs largely ignore NMFS's discussion of the latest scientific information and instead quote outdated information that supported the 1987 Rule. ECF No. 30-1 at 20-27. In the more than 30 years since the 1987 Rule, NMFS has gathered additional data—including observer data—and provided compelling justification to support its determination in the Final Rule to expand the use of TEDs in relation to the 1987 Rule for certain skimmer trawlers as an appropriate measure to reduce sea turtle bycatch and mortality.

Although NMFS and the fishing community have made significant progress in reducing incidental bycatch and mortality of threatened and endangered sea turtles, a large number of sea turtles continue to be injured or killed as a result of shrimp trawling operations every year. In its November 4, 2019, Final Environmental Impact Statement ("FEIS"), NMFS estimated that 7,794 sea turtles are captured annually by the Gulf of Mexico skimmer trawls, pusher-head trawl, and wing net fisheries, resulting in 2,118 to 2,868 total sea turtle mortalities per year. AR001796-97. When tow time restrictions were applicable to all skimmer trawls, NMFS documented "elevated sea turtle strandings in the northern Gulf of Mexico," and necropsy results indicated that "a significant number of stranded turtles" likely died due to drowning "commonly associated with fishery interactions." AR000266. NMFS also had significant evidence of noncompliance with the tow time restrictions. *Id.* (federal and state law enforcement monitoring of the Mississippi Sound skimmer trawl vessels in 2010 indicated that vessels in the skimmer trawl fleet exceeded tow time requirements); AR009491 (noting that "[l]aw enforcement data and public comments" demonstrated that "although[] the extent of non-compliance is unclear," "some skimmer trawl

vessels do not comply with tow time restrictions."); AR010087 (observations aboard commercial skimmer trawls in 2004 and 2005 indicated that tow times were often exceeded). Information from state law enforcement indicated that some participants in the skimmer trawl fishery were not even aware of the tow time restrictions. AR000267. Tow time restrictions were also inherently difficult to enforce due to factors such as "the time required to monitor a given vessel, as well as the limited ability to observe unbiased fishing operations," AR009491; AR000267 (explaining that enforcement personnel needed to remain undetected "for at least 55 minutes—practically impossible at sea—or else their presence may bias a vessel captain's operational procedure"), as well as the possibility of sea turtles not being visible during net inspection because many vessels fish at night. AR000300.

Equipped with this new data indicating that tow time limits may not be as effective in reducing sea turtle bycatch and mortality as previously thought, and based on new information regarding sea turtle mortality in inshore shrimp trawls, NMFS issued a proposed rule on May 10, 2012 to require TED use in "all skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) rigged for fishing." AR000265.[5] In the 2012 proposed rule, NMFS explicitly acknowledged its previous decisions that established TED exemptions for skimmer trawls,

[5] Contrary to Plaintiffs' characterization, *see* ECF No. 30-1 at 9, it is of no moment that the Proposed Rule was published after the parties entered a settlement agreement in *Turtle Island Restoration Network v. NMFS*, No. 1:11-cv-01813 (D.D.C. Apr. 26, 2012). The settlement agreement addressed, *inter alia*, the schedule for NMFS to publish a proposed rule pursuant to Sections 4(d) and 11(f) of the ESA, 16 U.S.C. §§ 1533(d), 1540(f), to address sea turtle interactions with skimmer trawls harvesting shrimp in state waters in the Southeast United States. The settlement agreement did not address the required substance of the proposed rule. Moreover, prior to entering the settlement agreement, NMFS published a notice of intent to prepare an Environmental Impact Statement ("EIS") and to conduct public scoping meetings to comply with the National Environmental Policy Act by assessing potential impacts resulting from the proposed implementation of new sea turtle regulations pursuant to the ESA in the Atlantic and Gulf of Mexico shrimp trawl fisheries. 76 Fed. Reg. 37050 (June 24, 2011).

stating that skimmer trawls were "initially allowed to use alternative tow time restrictions in lieu of TEDs under the assumption that the trawl bags were typically retrieved at intervals that would not be fatal to most sea turtles that were captured in the net." AR000267. NMFS went on to explain that information about noncompliance with tow time restrictions and difficulty with enforcement had led it to consider a TED requirement.

Concurrent with issuing the 2012 Proposed Rule, NMFS implemented a federal observer program on commercial skimmer trawl vessels to gather data on the effectiveness of tow time restrictions on minimizing sea turtle bycatch and mortality. AR010087. The results of the federal observer program were published in the 2012, 2013, and 2014 National Oceanic and Atmospheric Administration Technical Reports. AR010882-909; AR010910-39; AR010940-73. The federal observer data revealed widespread noncompliance with tow time limits. AR010924 (approximately 35% of observed tow were under the limit in 2012); AR010893 (approximately 38% of observed tow were under the limit in 2013); AR0010955 (approximately 28% of observed tows were under the limit in 2014). NMFS notes that even the tow time compliance data collected were likely skewed due to the "biased operational procedures" of skimmer trawlers in the presence of NMFS observers and so "it [wa]s likely that most tow time violations go undetected." AR000016. The federal observer data also documented sea turtle mortality resulting from tows that exceeded tow time limits, AR009466, as well as incidental capture in skimmer trawls during tows that were compliant with tow time limits. *Id.*; AR000016. As NMFS explained in the 2016 Proposed Rule,

> [a] total of 39 sea turtles were captured during observed trips consisting of 2,699.23 tow hours from 2012 through 2015. Additionally, in 2015 the North Carolina Division of Marine Fisheries observed 238 tows over 62 days, which is 6.21 percent of the total annual skimmer trawl fishing effort. They observed four sea turtle captures (Brown 2016).

AR002169. NMFS then "calculated sea turtle catch per unit effort rates based on observed effort in the skimmer trawl fisheries," resulting in "a total anticipated take of 7,928 captured sea turtles in the combined skimmer trawl, pusher-head trawl, and wing net fisheries." *Id.* NMFS then went on to estimate sea turtle mortality, "based on observed mortality rates and taking into consideration the effects of post-interaction mortality on captured and released sea turtles." *Id.*

Plaintiffs largely ignore the data about sea turtle interactions collected during the federal observer program, arguing an "absence of data," ECF No. 1 ("Compl.") ¶ 4, and that "[t]here is nearly no evidence of [sea turtle] interaction, and no evidence whatsoever of harm, that the NMFS can point to in requiring their rule change." *Id.* at ¶ 86. *See also* ECF No. 30-1 at 20 ("The limited data available to NMFS indicated little necessity for TEDs inshore. . . ."). Contrary to Plaintiffs' assertions, NMFS had more than sufficient data gathered during the observer program to determine that a TED requirement would decrease sea turtle mortalities compared to a regulatory regime consisting solely of tow time restrictions. NMFS considered that while many of the incidentally-captured sea turtles during the observer program were "often released alive," scientific studies indicated that the "persistent or delayed effects" of the time that sea turtles spent submerged could lead to "deaths of some turtles that appear to be in good health at the time of release." AR009466. NMFS also assessed the data collected during the observer program in conjunction with scientific studies that post-interaction mortality for the trawl fisheries could be "more than triple the number estimated based on dead and comatose turtles alone." *Id. See also* AR002052 (EIS response to comments) (citing Stacy, *et al.*, 2015 and Procedural Directive 02-110-21). Given the data before it, NMFS acted well within its authority to make these scientific assessments "based upon its evaluation of complex scientific data within its technical expertise." *BCCA Appeal Grp.*, 355 F.3d at 824.

Although the 2013 Withdrawal Rule referenced concerns about ecological benefits of implementing a TED requirement for skimmer trawl vessels, *see* AR00288-89, the Withdrawal Rule makes clear that NMFS was withdrawing the 2012 Proposed Rule due in large part to the recently collected data from the 2012 federal observer program, during which observers noticed a "prevalence of very small Kemp's ridley sea turtles," and "approximately 58 percent of these turtles had a body depth that could allow them to pass between the required maximum four-inch bar spacing of a TED" thereby negating much of the sea turtle conservation benefit expected from the 2012 Proposed Rule. AR000289-90. The Withdrawal Rule went on to explain that NMFS "expect[ed] to explore technological solutions" including "conducting TED feasibility and catch loss studies on TEDs with bar spacing less than 4 inches." AR000290. It ends by making clear that NMFS would "pursu[e]" both additional observer data and analysis of the size of turtles interacting with the inshore skimmer trawl fisheries to "determine TED bar spacing that would maximize benefits to sea turtle conservation." *Id.*

NMFS has repeatedly explained the process by which it has made revisions to and reconsidered the TED requirement in multiple Federal Register notices. For example, NMFS explained in the Withdrawal Rule that it would be "explor[ing] technological solutions to address the small turtle issue" and that its "objective [was] to have sufficient information to evaluate a potential proposed rule that would be effective in reducing sea turtle bycatch in the inshore skimmer trawl fisheries in the near future." *Id.* NMFS did indeed "pursu[e]" the planned data collection and additional testing of TEDs: in the 2016 Proposed Rule NMFS explained that after the Withdrawal Rule it initiated additional TED testing that produced "several" TED configurations with bar spacing less than four-inches, and that these TEDs allowed for "small turtles to effectively escape the trawl net." AR002168. NMFS acknowledged the rationale for the

Withdrawal Rule and explained that in the intervening time period it had initiated additional TED testing to evaluate TEDs with three-inch bar spacing and "escape-opening flap specifications that would allow small turtles to effectively escape the trawl net" to be used by trawlers in areas with small sea turtles. *Id.* The fact that this data collection and additional testing of TEDs occurred during the interval *after* publication of the Withdrawal Rule and *before* publication of the 2016 Proposed Rule refutes Plaintiffs' argument that NMFS reversed course without sufficient explanation in the 2016 Proposed Rule based on the same information about tow times (*i.e.,* citing Stacy, *et al.*, 2015 and Procedural Directive 02-110-21) that was available at the time of the Withdrawal Rule. *See* ECF No. 30-1 at 22.

Plaintiffs incorrectly suggest that the *Guste* decision itself is dispositive as to factual questions about the respective advantages of using tow time restrictions versus TEDs among trawler vessels shrimping in inshore waters. *Id.* at 19. Contrary to the Plaintiffs' characterization, the quoted material was provided by the *Guste* court in ruling against the State of Louisiana, which was claiming that the lack of sufficient data in 1987 to require TEDs inshore prevented the agency from requiring TEDs anywhere. *See Guste*, 853 F.2d at 331 ("Appellants nevertheless argue that, if the agency had insufficient data to apply the more intrusive TED requirement to inshore shrimping, it automatically had insufficient data to support any other type of regulation."). The *Guste* court did not uphold the 1987 TED rule only because it allowed tow times for inshore shrimping vessels instead of TEDs, nor did it foreclose NMFS from modifying the TED regulations in the future. Moreover, the Court's ruling was based on the administrative record before the agency at the time. The record before the agency for this rulemaking (more than 30 years later) was markedly different.

Plaintiffs' argument that the 2014 Biological Opinion ("2014 BiOp") renders the Final Rule arbitrary and capricious also fails. ECF No. 30-1 at 24. The 2014 BiOp was issued under ESA section 7(a)(2), which directs each federal agency to, in consultation with either the United States Fish and Wildlife Service or NMFS, insure that "any action authorized, funded, or carried out by such agency" is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the designated "critical [habitat]" of the species. 16 U.S.C. § 1536(a)(2). The 2014 BiOp assessed the effects of the continued implementation of sea turtle conservation regulations, AR011145, and concluded that the authorization of shrimp trawling in the Southeast shrimp fisheries was "not likely to *jeopardize the continued existence*" of ESA-listed sea turtle species or result in destruction or adverse modification of critical habitat. AR011369-70.

The Final Rule, on the other hand, was promulgated under ESA sections 4(d) and 11(f), which direct NMFS to issue such regulations as "deem[ed] necessary and advisable to provide for the *conservation* of such species" and "as may be appropriate to enforce this [Act]." 16 U.S.C. § 1533(d) (emphasis added); *id.* § 1540(f). Thus, the Final Rule concludes that "the most effective *protective* measure for threatened and endangered sea turtle populations is to reduce the total time sea turtles are entrained in a skimmer trawl by using TEDs." 84 Fed. Reg. at 70050 (emphasis added).

In short, NMFS issued the 2014 BiOp under a separate statutory provision of the ESA than the ones on which the agency based the Final Rule, and thus the 2014 BiOp necessarily contains a different analysis and fulfills a different purpose than the Final Rule. Thus, unlike the facts in *American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 928 (D.C. Cir. 2017), on which Plaintiffs attempt to rely (ECF No. 30-1 at 21), NMFS neither "glosses over or

swerves from prior precedents." To the contrary, NMFS acted well within its authority under ESA Sections 4(d) and 11(f) to determine that TEDs for certain skimmer trawl vessels were required to provide for the conservation of ESA-listed sea turtles.

Finally, there is no merit to the Plaintiffs' contention that NMFS did not adequately respond to public comments that opposed the use of TEDs and claimed that tow time restrictions were sufficiently protective of ESA-listed sea turtles. *Id.* at 19. An agency must consider and respond to the material comments and concerns that are voiced. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."). *See also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (asking whether the agency's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment" (citation omitted)); *Chamber of Com. of U.S. v. U.S. Sec. and Exch. Co.,* 85 F.4th 760, 774 (5th Cir. 2023) (The agency is required "to consider all relevant factors raised by the public comments and provide a response to significant points within."). Here, the record before the Court confirms that NMFS weighed comments from Plaintiffs and other stakeholders. *See, e.g.*, AR003167-3170; AR009470 (in response to public comment that NMFS did not have "sufficient evidence of tow time violations," explaining that it had "cited violations of tow time limits by skimmer trawl fishers" and documented sea turtle bycatch and mortality, including post-interaction mortality). As informed by comments received, NMFS adopted a new preferred alternative requiring skimmer trawl vessels 40 feet and greater in length to use TEDs designed to exclude small turtles instead of virtually all skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) rigged for fishing as originally proposed. AR001654 (FEIS Abstract);

AR001679 (Description of Alternative 8); AR001811 (Effects of Alternative 8); AR002069 (Comment 64); AR002071 (Record of Decision); AR009441 (Decision Memorandum).

B. NMFS observer data confirms that there are incidental takings occurring in Louisiana inshore waters.

Observer data from skimmer trawl trips unquestionably documented the capture of sea turtles while fishing in inshore waters off Louisiana, contrary to Plaintiffs' assertion that "[t]he agency's data failed to demonstrate that incidental takings were even occurring in Louisiana inshore waters," ECF No. 30-1 at 23. AR010893 ("Locations for the 8 sea turtles captured on observed trips using skimmer trawl gear are given in figure 4."); AR010907 ("Figure 4.—Sea turtle capture locations based on mandatory observer coverage of the U.S. Gulf of Mexico skimmer trawl fishery from April through July 2013."); AR010924 ("Twenty-four sea turtles were captured on observed trips using skimmer trawl gear (Figure 5)."); AR010938 ("Figure 5. —Sea turtle capture locations based on mandatory observer coverage of the U.S. Gulf of Mexico skimmer trawl fishery from May through August 2012."); AR010955 ("Locations for the ten sea turtles captured on observed trips using skimmer trawl gear are given (Figure 4)."); AR010970 ("Figure 4.—Sea turtle capture locations based on mandatory observer coverage of the U.S. Gulf of Mexico skimmer trawl fishery from May through July 2014."). Plaintiffs' assertion that inland waters of Louisiana do not have sea turtles, *see* ECF No. 30-1 at 23, and that the agency's data failed to demonstrate that incidental takings were occurring in Louisiana inshore waters, *see id.*, are plainly incorrect. Indeed, NMFS specifically addressed the comment that "TED use should be based on inside/outside waters as defined by the Louisiana Statutes 45:495, and only required in outside waters" in Response to Comment 57 in the 2019 Final Rule. AR009473. NMFS responded that "[f]isheries observer data from skimmer trawl vessels demonstrate that sea turtles occur within areas defined as inside waters by the Louisiana Statutes." *Id.* Plaintiffs' assertions

that inland waters of Louisiana do not have sea turtles and that incidental takings of sea turtles do not occur in Louisiana inshore waters are also contrary to the findings of the *Guste* decision that Plaintiffs frequently cite. *See Guste*, 853 F.2d at 329 ("The administrative record amply demonstrates that sea turtles are found in inshore waters.'); *id.* at 330 ("Sea turtles not only frequent inshore waters; the record is replete with evidence to show that they are captured there as well."). Unlike the agency determination in *Music Choice v. Copyright Royalty Board*, 970 F.3d 418, 429 (D.C. Cir. 2020) on which Plaintiffs rely (ECF No. 30-1 at 24), NMFS's observations that sea turtles occur in Louisiana inland waters and become entangled in skimmer trawl equipment are more than amply supported by the record and not mere "ipse dixit" conclusions.

The Court should also reject Plaintiffs' attempt to rely on a May 2021 comment letter from the Louisiana Department of Wildlife & Fisheries ("LDWF") referencing state-conducted bycatch studies and an extra-record declaration submitted in the previous lawsuit prove that NMFS "refused to consider" contrary data that shrimp trawlers do not interact with sea turtles. ECF No. 30-1 at 27 (citing declaration of Peyton Cagle ("Ex. A"), ECF No. 30-2). These documents are not in the administrative record because they post-date the Final Rule and thus NMFS could not and did not consider them during the rulemaking process. Consequently, they are outside the Court's scope of review. *Indep. Turtle Farmers of La., Inc. v. United States*, 703 F. Supp. 2d 604, 610 (W.D. La. 2010) (A court reviewing agency action under the APA ordinarily "[can]not review evidence outside of the administrative record." (citing *Guste*, 853 F.2d at 327 n.8)). Plaintiffs have waived their right to argue for addition of these documents to the administrative record, as the agreed June 14, 2024, deadline for Plaintiffs to file any motion to complete and/or supplement the administrative record has passed. ECF No. 18. In any event,

Plaintiffs offer no applicable exception to the prohibition against review of extra-record materials, nor could they. "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Plaintiffs make no argument that they or any party submitted the LDWF comment or any other "contrary data" to NMFS during the rulemaking process. And where the cited comment letter and declaration both post-date the Final Rule, it follows that NMFS did not have them at the time of the agency's decision. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) (The "focal point for judicial review [of an agency decision] should be the administrative record already in existence, not some new record made initially in the reviewing court."). Clearly, NMFS could not refuse to consider data during a rulemaking that it did not have until *after* the Final Rule was issued. *See*, *e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) ("[T]he agency must examine the *relevant* data. . . .") (emphasis added); *Guste*, 853 F.2d at 327 n.8 ("[Plaintiffs] 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 . . . . [B]oth the [plaintiffs'] proposed standard of review and their attempt to reopen the administrative record in this court are improper."). Plaintiffs cannot credibly assert that NMFS ignored "new and better data," *see* ECF No. 30-1 at 27 (quoting *Dist. Hosp. Partners v. Burwell*, 786 F.3d 46, 56 (D.C. Cir. 2015), when the purportedly better data was never submitted to NMFS in the first instance.

Even if Plaintiffs could identify some exception to the general prohibition against considering extra-record information in APA cases, the statement in the comment letter that bycatch data suggest "little to no turtle interactions" (ECF No. 30-2 at 8) should be afforded no

weight. The letter does not express any relevant opinion about the relative likelihood of harmful interactions between skimmer trawl vessels and ESA-listed sea turtles. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (Under the Federal Rules of Evidence, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."). Indeed, the proffered LDWF information is directly contradictory to the scientific information NMFS gathered as part of its review. AR010893, 010924, & 010955. Plaintiffs' attempt to transform this APA case into an after-the-fact "battle of experts" should be denied. *See Guste*, 853 F.2d at 327 n.8.

Although the LDWF comment letter is not part of the administrative record, Plaintiffs are entirely incorrect in suggesting that NMFS failed to consider the costs and benefits of TEDs in promulgating the Final Rule. *See* ECF No. 30-1 at 28 (citing *Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 60 F.4th 956, 973 (5th Cir. 2023)). The record here confirms that NMFS considered public comments on the anticipated costs and benefits of the TED requirement and modified the minimum vessel length requirement from 26 feet to 40 feet in response to these comments. AR009472. As noted above, the U.S. Court of Appeals for the D.C. Circuit reviewed and upheld the Final Rule, concluding that the "final rule reflects a policy choice, which was adequately explained by its consideration of the rule's costs and benefits. . . ." *Ctr. for Biological Diversity*, 2024 WL 3083338, at *3.

In sum, the record demonstrates that over time, NMFS gathered data documenting sea turtle mortality resulting from interaction with skimmer trawl vessels and extrapolated that data to assess TED effectiveness at reducing mortality. NMFS's decision to change its mind after previous decisions not to require the use of TEDs for skimmer trawl vessels was supported by: 1) observer data that documented the capture of sea turtles by skimmer trawl vessels, *see*

AR002169; information about the difficulty of enforcing tow time restrictions, *see* AR002168; new information about the lack of effectiveness of tow times in avoiding sea turtle mortality, *see* AR002169; and new information about TEDs with three-inch bar spacing and escape-opening flaps that allow smaller turtles to effectively escape the trawl net, AR002168. The record before the Court confirms that, during the rulemaking process, NMFS "engaged with all of the purportedly inconsistent statements that Plaintiffs now identify." *Estes v. U.S. Dep't of the Treasury,* 219 F. Supp. 3d 17, 33 (D.D.C. 2016). Where applicable, NMFS provided a reasoned explanations for its changed positions with respect to the anticipated benefits of requiring skimmer trawl vessels 40 feet and greater in length to use TEDs. *Texas v. U.S. EPA,* 91 F.4th 280, 299 (5th Cir. 2024). NMFS used its scientific expertise and significant discretion to make the decision to implement TED requirements for certain skimmer trawl vessels instead of the difficult-to-enforce and frequently violated tow time restrictions. Plaintiffs now ask this Court to second-guess NMFS's expertise in determining which methods and studies to rely upon in determining that tow time restrictions were ineffective in reducing sea turtle bycatch and mortality and that TEDs will be more effective. The Court should defer to NMFS's expertise in weighing the available scientific information for purposes of ESA compliance. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) ("Because analysis of the relevant documents 'requires a high level of technical expertise,' [the Court] must defer to 'the informed discretion of the responsible federal agencies.'" (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976))); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) ("[T]he [agency] is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").

III. NMFS Considered Any Reliance Interests as Appropriate.

Equally unavailing are Plaintiffs' arguments that they had reliance interests in the previously applicable tow time regime and that NMFS, in promulgating the Final Rule, acted arbitrarily and capriciously in allegedly ignoring these reliance interests. ECF No. 30-1 at 25-28. As a threshold matter, Plaintiffs fail to establish the existence of any justifiable, detrimental reliance. Even in the 1987 Rule NMFS stated that it "believes that if a TED effectively excludes turtles in offshore waters, it will function as effectively in inshore waters," but, "acknowledge[ing] that TEDs have not been tested for turtle exclusion in inshore waters," clarified that "[t]he final regulations do not require shrimpers to use TEDs in inshore waters *at this time*." 52 Fed. Reg. at 24246 (emphasis added). Indeed, NMFS has been developing and testing TEDs since the late 1970s. AR002005. And given the history of litigation and regulatory uncertainty regarding the implementation of a TED requirement, any claimed reliance interest is unreasonable. *Mozilla Corp. v. FCC*, 940 F.3d 1, 64 (D.C. Cir. 2019) (per curiam) (holding that a purported reliance interest was not reasonable, in part because the prior regulation had been subject to persistent legal challenges). Plaintiffs have cited no authority to support their assertion that some other reliance interests exist with respect to the status quo regulatory regime.

Even if Plaintiffs' reliance interests were valid—which they are not—third-party "reliance" does not preclude NMFS from promulgating a rule that deviates from a prior regulatory regime. Where a "prior policy has engendered serious reliance interests," an agency must only provide a reasoned explanation for its change in policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). Here, NMFS gathered scientific data on the incidental mortality of sea turtles associated with the skimmer trawl fisheries, thoroughly explained why tow time restrictions were not sufficiently effective in reducing sea turtle bycatch

and mortality, and provided the required reasoned explanation for a TED requirement for certain skimmer trawl vessels.[6]

In sum, Plaintiffs' alleged reliance interests did not legally preclude NMFS from promulgating the Final Rule. The record shows that NMFS explained how NMFS addressed those interests. This is all the law required to address any "reliance" concerns.

IV. NMFS Has the Constitutional Authority to Promulgate the Final Rule.

Plaintiffs' Commerce Clause argument fares no better than their record-based ones. The entirety of Plaintiffs' Commerce Clause argument rests on the reach of the Final Rule to regulate the hypothetical "non-commercial skimmer trawl vessels [that] harvest shrimp recreationally for their own and their families' consumption," which according to Plaintiffs demonstrates that the Final Rule will unlawfully regulate "skimmers who are not engaged in interstate commerce or commerce at all." ECF No. 30-1 at 28. As a threshold matter, "skimmer trawls are not an authorized gear for recreational fishers" and "[a]ny fishers using skimmer trawl gear would, therefore, be considered a commercial fisherman, even if using the gear only to harvest for personal consumption." AR009437. But even assuming such a non-commercial shrimper exists, the Final Rule is a regulation of activity that affects ESA-listed species and so is well within Congress' Commerce Clause authority.

A. Plaintiffs fail to demonstrate standing in support of their Second Cause of Action.

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[6] As the record here demonstrates, this case thus bears no resemblance to *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016), cited by Plaintiffs at ECF No. 30-1 at 24. In *Encino Motorcars*, the Department of Labor had since 1978 interpreted the Fair Labor Standards Act not to require car dealerships to pay overtime to a category of employees known as "service advisors" but reversed course in 2011 and "gave almost no reasons at all" for the shift. *Id.* at 215-19, 223-24. It is also distinguishable from *Department of Homeland Security*, where the agency argued that it "did not need to" consider reliance interests with respect to its policy decision, and the Supreme Court faulted the agency for wholly failing to address that factor. 140 S. Ct. at 1913.

The Court need not reach the merits of Plaintiffs' Commerce Clause claim because Plaintiffs have failed to demonstrate standing for the claim and thus the Court lacks jurisdiction. To satisfy the standing requirements of Article III of the Constitution, a plaintiff must establish an injury that is (i) "concrete, particularized, and actual or imminent"; (ii) "fairly traceable to the challenged action"; and (iii) "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks and citation omitted). Moreover, "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). A plaintiff "bears the burden of showing that he has standing for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). At the summary judgment stage, satisfying that burden requires proving specific facts via affidavits or other means. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

In support of their assertion that some shrimp trawlers harvest shrimp on an entirely non-commercial basis, Plaintiffs cite only catch composition data from 1990-1996, AR001815, and the extra-record comment letter from LDWF filed in the previous case, ECF No. 30-2. *See* ECF No. 30-1 at 28. Plaintiffs failed to provide any declarations from a non-commercial shrimper. Even assuming *arguendo* that Plaintiffs Louisiana Shrimp Association and/or John Brown could establish Article III standing to challenge the merits of the Final Rule based on their alleged participation in the skimmer trawl fishery, neither the catch composition data nor the extra-record comment letter shows that the individually-named Plaintiff or any specific member of the Louisiana Shrimp Association will be injured by the alleged unconstitutional reach of the Final Rule to the activities of non-commercial shrimpers. *Sierra Club,* 405 U.S. at 734-35. The Court

should grant summary judgment in favor of Federal Defendants as to Plaintiffs' Second Cause of Action on standing grounds.

B. The Final Rule is a regulation of activity that affects ESA-listed species and is within Congress' Commerce Clause authority.

Assuming, arguendo, that Plaintiffs could demonstrate standing in support of their claims concerning the alleged reach of the Final Rule on noncommercial fishing activities, it is well-settled that Congress can regulate activity that is noncommercial altogether. *See Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."). To demonstrate that a regulation is authorized under the Commerce Clause, the government need set forth only a "rational basis" for the conclusion "that a regulated activity sufficiently affected interstate commerce." *United States v. Lopez*, 514 U.S. 549, 557 (1995). A "rational basis" for that conclusion exists here. The Fifth Circuit has already concluded that the ESA is a comprehensive scheme that has a substantial relation to interstate commerce. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 639-642 (5th Cir. 2003); *see also Am. Stewards of Liberty v. Dep't of Interior*, 370 F. Supp. 3d 711 (W.D. Tex. 2019). And the Final Rule was properly promulgated pursuant to NMFS's authority under two separate provisions of the ESA: 16 U.S.C. § 1533(d), which requires NMFS to issue regulations necessary and advisable to provide for the conservation of threatened species, and *id.* § 1540(f), which gives NMFS broad authority to promulgate "such regulations as may be appropriate to enforce" the ESA. These provisions are integral components of the ESA and the Final Rule as an application of these provisions is a constitutional exercise of Congress' authority—and, therefore, NMFS's authority—under the Commerce Clause.

None of Plaintiffs' arguments to the contrary are persuasive. *United States v. Morrison*, 529 U.S. 598, 608 (2000) and *National Federation of Independent Business v. Sebelius,* 567 U.S. 519, 552-57 (2012) are inapposite. ECF No. 30-1 at 29. These cases involved facial challenges to statutes or particular statutory provisions. In contrast, here, Plaintiffs seek to isolate a single application of ESA Sections 4(d) and 11(f): the Final Rule. The Supreme Court has admonished that such an argument attacking the isolated application of a concededly constitutional statute[7] is inappropriate. *See Raich*, 545 U.S. at 23 ("[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class") (citation omitted). None of the cases cited by Plaintiffs calls into question the numerous decisions that previously upheld the constitutionality of the ESA.

The "take" of sea turtles as a result of inshore shrimping activities cannot evade the reach of the Commerce Clause or the ESA simply because such "take" is incidental to an activity that is purportedly subject to State regulation. Every court that has reviewed the constitutionality of ESA-based regulations has confirmed that the Commerce Clause affords NMFS (or the U.S. Fish and Wildlife Service, which co-implements the ESA) the authority to regulate activities (including noncommercial activities) that affect threatened and endangered species. *See GDF Realty Invs., Ltd.,* 326 F.3d at 639-642 ; *Am. Stewards of Liberty*, 370 F. Supp. 3d at 735.[8]

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[7] The Plaintiffs make no argument that the ESA itself is unconstitutional under the Commerce Clause.

[8] In addition to the Fifth Circuit, multiple circuit courts of appeals have evaluated and rejected post-*Lopez* Commerce Clause challenges to specific statutory provisions or applications of the ESA. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1272-73 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006) (per curiam) (affirming district court's analysis); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).

Plaintiffs cite no contrary authority, and we are unaware of any. The Final Rule is a reasonable exercise of NMFS's authority pursuant to the ESA and consistent with the Commerce Clause.

To the extent Plaintiffs also argue that the "major questions doctrine" applies, such an argument also fails. Under that doctrine, Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021) (quoting and citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). In *BST Holdings,* the court opined that the Occupational Safety and Health Administration's COVID-19 mandates governing the conduct of private employers likely exceeded Commerce Clause authority to regulate noneconomic activities that case fell within the states' police power. 17 F.4th at 617. Here, by contrast, Congress has "sp[oken] clearly" in giving NMFS the authority to promulgate the Final Rule pursuant to ESA Sections 4(d) and 11(f). This case also is nothing like *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984), where the court found that Congress had a given clear statement of its intent in the Magnuson-Moss Warranty Act by incorporating language prohibiting the imposition of liability for personal injury claims. Here, Plaintiffs cite no corresponding provision in the ESA that would limit the Defendants' regulation of shrimp trawling.

NMFS (via the Secretary of Commerce, as delegated) is expressly charged by Congress with the authority to administer the ESA as it relates to sea turtles in the ocean. 16 U.S.C. § 1531; 50 C.F.R. § 223.205(a) ("The prohibitions of Section 9 of the [ESA] relating to endangered species apply to threatened species of sea turtle"). Based on Congress's grant of authority to administer the ESA, NMFS's exercise of this authority to require TEDs on certain skimmer trawl vessels to prevent sea turtles from entanglement in shrimp nets and drowning is a routine administrative action that falls squarely within the statutory delegation, *see Center for*

Biological Diversity, 2024 WL 3083338, at *1, and so does not implicate the major questions doctrine. Indeed, the Fifth Circuit previously upheld TED requirements, noting that "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 protected despite substantial economic consequences for an important industry" and cautioning that courts "must be ever cognizant that '[w]e are judges, not legislators.'" *Guste*, 853 F.2d at 331, n.20 (alteration in original) (citation omitted).

In sum, the "major questions" doctrine suggested by Plaintiffs is not implicated here because Congress has already made its intent certain with respect to NMFS's authority to protect threatened and endangered species. *Id.* Because the Final Rule does not constitute an "enormous and transformative expansion in [NMFS's] regulatory authority without clear congressional authorization," *Util. Air Regul. Grp.*, 573 U.S. at 324, the "major questions" doctrine does not disturb the conclusion that the Final Rule passes Constitutional muster.

V. No Remedy is necessary, but if the Court disagrees it should allow supplemental remedy briefs.

For all the reasons provided above, no remedy is appropriate here because the record supports NMFS's decision to issue the Final Rule and to the extent the Court has jurisdiction over Plaintiffs' second claim the Final Rule is consistent with the Commerce Clause. Nevertheless, should the Court disagree, supplemental remedy briefing is appropriate.

Courts need not vacate agency regulations as a matter of course. *See Cent. & Sw. Servs., Inc. v. U.S. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). To the contrary, where the administrative record of an agency action does not support that action, a proper course is to remand to the agency. *Camp*, 411 U.S. at 142. The determination whether to vacate an invalid rule or remand to the agency "is made by evaluating whether '(1) the agency's decision is so deficient as to raise

serious doubts whether the agency can adequately justify its decision at all; and (2) vacatur would be seriously disruptive or costly.'" *Texas v. United States*, 787 F.3d 733, 768 n.128 (5th Cir. 2015) (quoting *N. Air Cargo v. USPS,* 674 F.3d 852, 860–61 (D.C. Cir. 2012)).

As to the first criterion articulated in *Texas v. United States*, in light of the new scientific information developed since publication of the 2013 Withdrawal Rule, there is a strong possibility can adequately justify its decision in the Final Rule on remand even if the Court finds some legal violation with respect to Plaintiffs' APA-based First Cause of Action. *See* Compl.at ¶¶ 65-86. As to the second criterion, Plaintiffs ask the Court to set aside and vacate the Final Rule without grappling with the disruptive ramifications of their request. *Id.* at ¶ 6; ECF No. 30-1 at 21, 29. This is an especially relevant concern where, as here, the Final Rule extends to portions of multiple states and "it would be disruptive to vacate a rule that applies to other members of the regulated community." *Cent. & Sw. Servs.*, 220 F.3d at 692. Moreover, given the conservation imperative of the Final Rule (i.e., NMFS has estimated that Final Rule will result in 801 to 1,158 fewer annual sea turtle mortalities than predecessor tow time restrictions for all skimmer trawls), the Court should retain the Final Rule in effect pending remand if the Court finds any legal deficiency with respect to the Final Rule. *E.g., Endangered Species Comm. of the Bldg. Indus. Ass'n of S. Cal., et al., v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1994) (retaining final rule listing the coastal California gnatcatcher as threatened species pending remand); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1406 (9th Cir. 1995) ("The equitable concerns weigh toward leaving the listing rule in place while [the U.S. Fish and Wildlife Service] remedies its procedural error and considers anew whether to list the Springs Snail.").

In sum, issuing a blanket vacatur against the Final Rule like Plaintiffs request would be improper. Because remedy issues are complex—and the implications of setting aside the Final

Rule, which has now been in effect for over two years, are significant—NMFS requests further detailed briefing to the Court on any issues of remedy that may arise.

VI. CONCLUSION

The Final Rule is expected to result "in a conservation benefit of 801–1,168 sea turtles annually in the Southeastern U.S. shrimp fisheries." 84 Fed. Reg. at 70049. It is rational and amply supported by the administrative record, and thus should be upheld under the applicable deferential standard of review. The Court lacks jurisdiction over the second claim, but even if it had jurisdiction the Final Rule is also firmly within the reach of the Commerce Clause and does not implicate the "major questions doctrine." The Court should deny the Plaintiffs' motion for summary judgment and grant Federal Defendants' cross-motion.

Respectfully submitted this 5th day of September 2024.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUISIANA SHRIMP ASSOCIATION; JOHN BROWN; LARRY J. HELMER JR.; PENNY ZAR Plaintiffs, v. JOSEPH R. BIDEN, JR. in his official capacity as President of the United States; GINA RAIMONDO, in her official capacity as United States Secretary of Commerce; NATIONAL MARINE FISHERIES SERVICE; Defendants.	No. 24-cv-00156 JUDGE: Judge Jane Triche Milazzo MAGISTRATE JUDGE: Judge Eva J. Dossier

Federal Defendants' Statement of Material Facts in Support of Cross-Motion for Summary Judgment

Pursuant to Local Civil Rule 56.1, Federal Defendants respectfully submit this Statement of Material Facts in support of Federal Defendants' Cross-Motion for Summary Judgment.

1. Five species of sea turtles occur in U.S. waters (Kemp's ridley, loggerhead, leatherback, green, and hawksbill sea turtles), each of which have been listed by NMFS as either endangered or threatened under the ESA. 50 C.F.R. § 223.102(e) (enumeration of threatened sea turtles); *id.* § 224.101(h) (enumeration of endangered sea turtles).

2. In June 1987, NMFS issued regulations pursuant to its authority under ESA Sections 4(d) and 11(f) to protect sea turtles. Shrimp Trawling Requirements, 52 Fed. Reg. 24244 (June 29, 1987) ("1987 Rule").

3. The 1987 Rule requires that shrimp trawlers[1] trawling in offshore waters from North Carolina through Texas use a NMFS-approved TED[2] in their nets during certain times of the year in specific areas. *Id.*; 50 C.F.R. § 223.206(d)(2).

4. The Fifth Circuit upheld these regulations in *Louisiana, ex rel. Guste v. Verity*, 853 F.2d 322 (5th Cir. 1988) (per curiam).

5. On May 10, 2012, NMFS published a proposed rule to require the use of TEDs in certain additional trawl types than were included in the 1987 Rule, including skimmer trawls. Shrimp Trawling Requirements, 77 Fed. Reg. 27411 (May 10, 2012) ("2012 Proposed Rule") (AR 000265).

6. During the development of the 2012 Proposed Rule, NMFS placed federal observers on skimmer trawl vessels to collect additional data on sea turtle interactions. Observers documented the capture of sea turtles on observed trips during 2012-2014 using skimmer trawl gear, including captures that occurred while fishing in inshore waters off Louisiana. AR 010893, 010924, & 010955.

7. Although observer data both confirmed the presence of sea turtles and documented their capture by skimmer trawl vessels, observations about the size of captured turtles in 2012 led NMFS to withdraw the final rule on February 7, 2013. Shrimp Trawling Requirements, 78 Fed. Reg. 9024 (Feb. 7, 2013) ("Withdrawal Rule") (AR 000288).

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[1] A shrimp trawler is a type of fishing vessel equipped with trawl nets that fishes for shrimp, or whose on-board or landed catch is greater than one percent by weight of all the fish on board. 50 C.F.R. § 222.102.

[2] A TED is "a device designed to be installed in a trawl net forward of the cod end for the purpose of excluding turtles from the net, as described in 50 C.F.R. 223.207." 50 C.F.R. § 222.102.

8. Specifically, most of the sea turtles observed were small enough to pass between the required maximum 4-inch bar spacing of the approved TEDs, negating much of the sea turtle conservation benefit expected from the 2012 Proposed Rule. *Id.* at 9025 (AR 000289). *See also* AR 010947 ("The majority (58%) of the sea turtles captured during the 2012 observer coverage were small enough to pass through the maximum 4-inch TED bar spacing currently allowed.").

9. On December 16, 2016, NMFS published a proposed rule require TEDs on almost all vessels in the southeastern U.S. shrimp fisheries. 81 Fed. Reg. 91097, 91097-98 (Dec. 16, 2016), AR002167 ("2016 Proposed Rule").

10. NMFS explained that, after publication of the 2013 Withdrawal Rule, NMFS had completed additional testing and developed new TED configurations to allow small turtles to effectively escape the trawl nets. 81 Fed. Reg. at 91098 (AR 002168). In addition, NMFS cited information calling into question previous determinations about the effectiveness of the alternative tow time requirements. *Id.*

11. On December 20, 2019, NMFS issued the Final Rule. 84 Fed. Reg. 70048 (Dec. 20, 2019) (AR 009464).

12. The Final Rule requires skimmer trawl vessels 40 feet and greater in length to use TEDs, as "tow time limits may not be as effective in reducing sea turtle bycatch and mortality as previously thought" and thus "the most effective protective measure for threatened and endangered sea turtle populations is to reduce the total time sea turtles are entrained in a skimmer trawl by using TEDs." *Id.* at 70050 (AR 009466).

13. The Final Rule was expected to "result in a conservation benefit of 801-1,168 sea turtles annually in the Southeastern U.S. shrimp fisheries." *Id.* at 70049 (AR 009465).

14. NMFS set the effective date of the Final Rule as April 1, 2021. *Id.* at 70055 (AR 009471).

15. On March 31, 2021, NMFS published a notice delaying the effective date from April 1, 2021, to August 1, 2021, due to safety and travel restrictions stemming from the COVID-19 pandemic. Shrimp Trawling Requirements, 86 Fed. Reg. 16,676-01 (Mar. 31, 2021) (AR 012339).

16. On September 9, 2021, this Court enjoined the Final Rule in Louisiana inshore waters until February 1, 2022, reasoning that "a brief delay in implementation of the Final Rule to allow appropriate time for all shrimpers to come into compliance will not result in an unreasonable risk to sea turtles." *La. State v. DOC*, 559 F.Supp.3d 543, 549 (E.D. La. 2021).

17. The Final Rule has now been in effect for more than two years.

Respectfully submitted this 5th day of September 2024.

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