

# Sea Turtles and Turtle Excluder Devices: A Review of Recent Events

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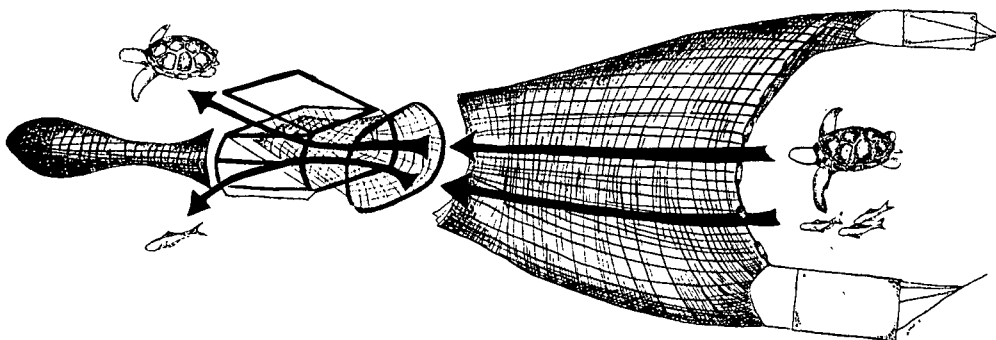
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**Sea Turtles and Turtle Excluder Devices:  
A Review of Recent Events**

by Sean Skaggs



**Introduction**

In the Fall of 1989, after more than a year of political and legal battles, the National Marine Fisheries Service (NMFS) reinstated the sea turtle regulations governing shrimp trawling in offshore waters. The regulations had been in effect for a short period in 1987 before being suspended by a court ordered stay pending appeal, a Congressional amendment to the Endangered Species Act (ESA), and actions taken by the Coast Guard and the Secretary of Commerce. This article reviews the events surrounding the initial proposal of sea turtle regulations and the legal challenges which ensued.

## I. Background

Five species of sea turtle occur along the coasts of the United States.<sup>1</sup> All five species are on the threatened and endangered species list.<sup>2</sup> The decline in sea turtle populations has been attributed to a number of factors. As early as 1975, the National Marine Fisheries Service<sup>3</sup> identified shrimp trawling as a threat to sea turtle survival; the nets used by shrimp fishermen frequently caused sea turtle drownings.<sup>4</sup> Since 1975, NMFS has gathered data from a number of sources which indicate shrimp trawling is a significant cause of sea turtle mortality.<sup>5</sup> Based on these data, NMFS began researching methods to avert the incidental taking of sea turtles by shrimpers.<sup>6</sup> In 1978, NMFS

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<sup>1</sup> The five species are the loggerhead (Caretta caretta), the leatherback (Dermochelys coriacea), the green (Chelonia mydas), the kemp's ridley (Lepidochelys kempii), and the hawksbill (Eretmochelys imbricata). 52 Fed. Reg. 24244 (1987), codified at 50 C.F.R. § 227.72 (1989).

<sup>2</sup> 50 C.F.R. § 17.11 (1989). The green and loggerhead are listed as threatened, the leatherback, hawksbill, and kemp's ridley are listed as endangered. Id.

<sup>3</sup> The ESA delegates authority to the Secretary of Commerce and the Secretary of Interior. The Secretary of Commerce delegated his authority to the National Marine Fisheries Service.

<sup>4</sup> 40 Fed. Reg. 21975, 21983 (1975).

<sup>5</sup> NMFS placed observers on shrimp trawling boats and accumulated over 27,000 hours of observations. NMFS used data obtained from observations to estimate that greater than 11,000 sea turtles drown in shrimp trawls each year. NMFS also interviewed shrimpers, asking how many turtles they incidentally captured in their nets. Beginning in 1980, a sea turtle stranding network formed to document the number of dead turtles that wash up in coastal areas each year; stranding data is compared to the location and intensity of shrimping activities in order to demonstrate a correlation between strandings and shrimping. From 1980 to 1986, over 8,300 strandings were documented, 600 of which were the endangered kemp's ridley. 52 Fed. Reg. 24244 (1987).

<sup>6</sup> 52 Fed. Reg. 24244 (1987), codified at 50 C.F.R. § 227.72 (1989).

began to study the feasibility of modifying shrimp nets to provide an escape route for sea turtles that would not reduce shrimp catch.<sup>7</sup> The device NMFS developed became known as the turtle excluder device (TED);<sup>8</sup> after extensive testing, NMFS determined that TEDs are 97% effective at keeping sea turtles out of the nets while causing only a marginal loss of shrimp.<sup>9</sup> NMFS sought to develop a voluntary program of TED use, but after experiencing a low level of voluntary compliance, NMFS decided on a mandatory program under the authority of the ESA.<sup>10</sup>

## II. The Sea Turtle Regulations Issued In 1987.

On June 29, 1987, after receiving extensive public comment and compiling a twelve volume administrative record, NMFS issued final regulations to control shrimp trawling and the incidental taking of sea turtles.<sup>11</sup> The final regulations governed shrimping activity on the East coast from North Carolina southward, and in the Gulf of Mexico;<sup>12</sup> the regulations were to become effective on October 1, 1987.<sup>13</sup> The regulations required all shrimp boats greater than twenty five feet in length to use TEDs when trawling in offshore waters; smaller boats were required to restrict trawling time to ninety minute intervals- a time limit determined to be short enough to prevent entangled sea

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<sup>7</sup> Id.

<sup>8</sup> The turtle excluder device was renamed the trawling efficiency device in order to emphasize the beneficial aspect of TEDs for shrimpers. The term turtle excluder device is still commonly used.

<sup>9</sup> 52 Fed. Reg. 24244 (1987). NMFS predicts a five percent loss; the shrimping organizations claim 40% losses will result from the use of TEDs.

<sup>10</sup> 52 Fed. Reg. 24244, 24245 (1987).

<sup>11</sup> 52 Fed. Reg. 24244 (1987).

<sup>12</sup> Id.

<sup>13</sup> Id.

turtles from drowning in shrimp nets.<sup>14</sup> For boats trawling in inshore waters, the regulations required that shrimp trawls be equipped with TEDs or that trawls be hauled out of the water at ninety minute intervals.<sup>15</sup>

A legal challenge brought by the state of Louisiana and Shrimpers' organizations, however, delayed implementation of the final regulations. In Louisiana ex rel Guste v. Verity,<sup>16</sup> Louisiana claimed that the regulations violate the arbitrary and capricious standard of the Administrative Procedure Act (APA) and are therefore invalid. Specifically, Louisiana contended that the regulations are based on insufficient data concerning the cause of sea turtle mortality and the presence of sea turtles off the coast of Louisiana,<sup>17</sup> and that the regulations unfairly place the burden of sea turtle conservation on a single group (shrimpers). The District Court for the Eastern District of Louisiana reviewed the NMFS regulations and found the twelve volume record amply supported the regulations, that NMFS had provided a rational basis for issuing the regulations, and therefore the regulations did not violate the APA.<sup>18</sup> The court did note that NMFS had little data concerning the efficiency of TEDs in inshore waters, but that NMFS's willingness to allow restricted trawling time duration in lieu of TEDs in inshore waters adequately addressed this lack of data.<sup>19</sup> The State of

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<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Louisiana ex rel Guste v. Verity, 681 F. Supp. 1178 (E.D. La. 1988), aff'd, Louisiana ex rel Guste v. Verity, 853 F.2d 322 (5th Cir. 1988).

<sup>17</sup> Id. at 1181.

<sup>18</sup> Id. at 1183-84.

<sup>19</sup> Id. at 1183 n.5.

Louisiana appealed the ruling of the district court.<sup>20</sup> The Fifth Circuit affirmed the district court, finding that the regulations are not arbitrary and capricious and do not violate equal protection guarantees of shrimpers.<sup>21</sup> In response to the state's claim that NMFS had not shown the sea turtle regulations would be effective, the Fifth Circuit stated that the agency need not demonstrate that the measures taken will save a species from extinction, only that the regulations do, in fact, stop the incidental takings of sea turtles.<sup>22</sup> The court held that NMFS had demonstrated that the regulations adequately address the incidental taking of sea turtles.<sup>23</sup> In emphasizing its limited role in this matter, the Fifth Circuit stated, "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."<sup>24</sup> Indeed, the legislature took action shortly after the Fifth Circuit's decision. In September, 1988, Congress passed an amendment to the ESA which provided for a delay in the implementation of the sea turtle regulations until May 1, 1989 for offshore waters, and May 1, 1990 for inshore waters.<sup>25</sup> The amendment also provided for the independent review of sea turtle conservation data by the National Academy of Science.<sup>26</sup> The National Academy of Science, as part of its review, was to consider whether less stringent regulations could effectively

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<sup>20</sup> Louisiana ex rel Guste v. Verity, 853 F.2d 322 (5th Cir. 1988).

<sup>21</sup> Id.

<sup>22</sup> Id. at 333.

<sup>23</sup> Id.

<sup>24</sup> Id. at 333, n.20.

<sup>25</sup> Pub. L. 100-478.

<sup>26</sup> Id.

reduce sea turtle mortality.<sup>27</sup>

Before either of the congressionally imposed delays expired, the NMFS was forced to respond to an unusually high number of turtle strandings off the coast of southern Georgia and northern Florida. On February 23, 1989, NMFS issued an emergency rule<sup>28</sup> which required the use of TEDs for all shrimp trawling in the offshore waters of southern Georgia and northern Florida.<sup>29</sup> The emergency rule became effective on March 9, 1989 and expired on November 6, 1989.<sup>30</sup> NMFS acknowledged that the 1988 amendments to the ESA delayed the implementation of the 1987 sea turtle regulations, but noted that the amendments did not otherwise modify the authority and responsibility established by the ESA.<sup>31</sup> NMFS indicated that the emergency rule was different from the 1987 regulations and was in response to an emergency not foreseen at the time of the passing of the ESA amendments.<sup>32</sup>

### III. Continued Opposition to TEDs

As the end of the Congressionally imposed delay approached, the state of Louisiana sought a preliminary injunction to restrain the scheduled implementation of the sea turtle

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<sup>27</sup> Id.

<sup>28</sup> 54 Fed. Reg. 7773 (1989).

<sup>29</sup> 54 Fed. Reg. 7773-4 (1989). NMFS did not except boats smaller than twenty five feet in length from the TED requirements because two new "soft" TEDs had been developed and NMFS determined TEDs were no longer dangerous to use on smaller boats. 54 Fed. Reg. 7773, 7776 (1989).

<sup>30</sup> 54 Fed. Reg. 7773 (1989).

<sup>31</sup> 54 Fed. Reg. 7773, 7774 (1989).

<sup>32</sup> Id. NMFS indicated that strandings occurring between October and December 1988 had increased by 57% from the previous three month period in 1987. The number of kemp's ridley strandings increased by 337%, from 16 in 1987 to 70 in 1988. NMFS also noted an increase in shrimping activity in the same area as the strandings. Id.

regulations on May 1, 1989.<sup>33</sup> Louisiana argued that the APA requires NMFS publish a notice to announce the end of the delay.<sup>34</sup> Louisiana also argued NMFS had to wait until the completion of the National Academy of Science report before enforcing the use of TEDs.<sup>35</sup> The court found the delay did not cause the regulations to change in any substantive way, and additional notice of the regulations would serve no purpose.<sup>36</sup> The court noted this type of postponement is not rulemaking governed by the notice requirements of the APA.<sup>37</sup> The court also noted that completion of the National Academy of Science report is not a prerequisite to enforcing the sea turtle regulations.<sup>38</sup> Thus, the preliminary injunction was denied and the regulations went into effect on May 1, 1989.<sup>39</sup>

The National Marine Fisheries Service provided for a sixty day grace period for shrimpers to come into compliance with the TED requirements.<sup>40</sup> Eleven days after the grace period ended, on July 10, the Coast Guard notified NMFS that it was suspending enforcement of the sea turtle regulations.<sup>41</sup> The Coast Guard

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<sup>33</sup> Louisiana ex rel Guste v. Mosbacher, No. 89-1899 (E.D. La. 1989) (LEXIS, Genfed library, Dist file).

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id. The court quoted from the legislative record: "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." Id. (quoting 134 Cong. Rec. H8254 (September 26, 1988)).

<sup>39</sup> Id.

<sup>40</sup> National Wildlife Federation v. Mosbacher, No. 89-2089 (D.D.C. 1989) (LEXIS, Genfed library, Dist file).

<sup>41</sup> Id.



justified its action by citing complaints by shrimpers in the Gulf, who claimed that sea grass made trawling with TEDs impossible.<sup>42</sup> NMFS's investigation found these claims to be without merit; NMFS urged immediate enforcement of the regulations.<sup>43</sup> On July 20, 1989 the Coast Guard resumed enforcement of the regulations.<sup>44</sup> The following day, shrimpers in the Gulf region violently protested the regulations, blockading a number of ports in the Gulf.<sup>45</sup> The Secretary of Commerce responded to the situation on July 24, by announcing a 45 day suspension of the sea turtle regulations.<sup>46</sup> The Secretary bypassed the procedural requirements of the APA to make the suspension immediate. During this 45 day period, the Secretary proposed modifying the sea turtle regulations to provide an alternative to the use of TEDs.<sup>47</sup> On August 10, 1989, NMFS published an interim final rule which allowed shrimpers to limit trawling time to 105 minutes in lieu of using a TED.<sup>48</sup> The interim final rule was to last until September 8, 1989.<sup>49</sup>

The National Wildlife Federation challenged the Secretary's suspension of the regulations.<sup>50</sup> The District Court for the District of Columbia found the Secretary had violated the ESA by

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<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> 54 Fed. Reg. 32815 (1989).

<sup>49</sup> Id.

<sup>50</sup> National Wildlife Federation v. Mosbacher, No. 89-2089 (D.D.C. 1989) (LEXIS, Genfed library, Dist file).

failing to implement the TED regulations.<sup>51</sup> Although noting initially that the issue before it was the legality of the Secretary's 45 day suspension, the court went on to state that the issue was broader than the Secretary's enforcement policies because the suspension and the publication of an interim rule substantially modified the sea turtle regulations.<sup>52</sup> The court noted the Secretary had the duty under the ESA to issue regulations deemed necessary to provide for the conservation of the species.<sup>53</sup> Existing sea turtle regulations were designed to fulfill the duty imposed by the ESA, and had already been upheld by the Fifth Circuit.<sup>54</sup> Moreover, the court found the Secretary had failed to show how the 45 day suspension aids in the conservation of sea turtles.<sup>55</sup> The court recognized the Secretary's broad discretion to modify the regulations, and emphasized that had the interim final rule been considered before the suspension, there would have been no violation of the ESA.<sup>56</sup> The suspension of the regulations in the absence of any protective measures did violate the ESA, however.<sup>57</sup>

Although reiterating the Secretary retains his discretion to propose modifications to the existing TED regulations, the court made it clear that the interim final rule had not been tested

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<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Verity, 853 F.2d at 322.

<sup>55</sup> Mosbacher, No. 89-2089 (D.D.C. 1989).

<sup>56</sup> Id.

<sup>57</sup> Id. The court also found that the Secretary had failed to show good cause for bypassing the procedural requirements of the APA. In so finding, the court noted, "violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society." Id. (quoting Cooper v. Aaron, 358 U.S. 1, 22 (1958)).

yet, stating, "it remains to be seen how the Secretary will justify the sudden shift away from TEDs and the adoption of the 105 minute tow time restriction."<sup>58</sup> The National Wildlife Federation filed objections to the interim final rule, but the court deferred ruling on the objections until the Secretary could receive comments on the interim final rule, and publish a final rule.<sup>59</sup> On September 13, 1989, NMFS moved away from the interim final rule and published a reinstatement of the original sea turtle regulations, initially promulgated in 1987.<sup>60</sup>

### Conclusion

Fifteen years after the connection was made between shrimp trawling and sea turtle mortality, and one and one-half years after final regulations protecting sea turtles were issued, the regulations for offshore waters went into effect. Based on NMFS estimates of shrimping-induced sea turtle mortality, the delay resulted in the death of over 15,000 turtles.<sup>61</sup> The delay may have proven particularly harmful to the kemp's ridley, deemed by NMFS to be "critically endangered."<sup>62</sup>

The continuing battle over sea turtle regulations illustrates the problem of endangered species conservation under the

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<sup>58</sup> Id. The court pointed out that in the recent past the Secretary had opposed any delay to implementing the TED regulations, noting the Secretary's objection to the stay granted in Verity, and the objection to the Coast Guard's suspension of enforcement. Id.

<sup>59</sup> Id. This was to be accomplished by September 8, 1989. Id.

<sup>60</sup> 54 Fed. Reg. 37812 (1989).

<sup>61</sup> See the discussion of estimates of sea turtle mortality supra note 5.

<sup>62</sup> 54 Fed. Reg. 7773, 7775 (1989). The population size of kemp's ridleys has dropped dramatically in the past forty years; in 1947 the number of mature females was estimated at 40,000. In 1988 the estimate had dropped to 655 mature females. Id. The continued high mortality of kemp's ridleys has frustrated attempts to prevent the extinction of the species.

framework of the ESA. The provisions for emergency regulations under the ESA proved an effective means of protecting sea turtles during a short term crisis, but the permanent rule-making process proved too time-consuming and burdened by political pressure to effectively protect these threatened and endangered species.

On May 1, 1990, the Congressionally mandated delay of TED regulations for inshore waters will be lifted. Barring an additional legal challenge,<sup>63</sup> this date will mark the end of a three-year struggle to implement the sea turtle regulations.

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<sup>63</sup> Although the lack of data on the use of TEDs in inshore waters presents grounds for a possible legal challenge, this issue was already litigated, *Louisiana ex rel Guste v. Verity*, 681 F. Supp. 1178 (E.D. La 1988) aff'd *Louisiana ex rel Guste v. Verity*, 853 F.2d 322 (5th Cir. 1988), and as long as NMFS provides a choice between TEDs and restricted towing times in inshore waters, it is unlikely the court will allow the regulation to be challenged on these grounds.