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Via U.S. Mail

October 20, 2009

Gary Locke, Secretary
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Ken Salazar, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Dr. Jane Lubchenco, Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Avenue, NW
Room 5128
Washington, DC 20230

Dr. Roy Crabtree, Regional Administrator
National Oceanic and Atmospheric Administration Fisheries Service, Southeast
263 13th Avenue South
Saint Petersburg, FL 33701

Louis Daniel, Director
North Carolina Division of Marine Fisheries
P.O. Box 769
Morehead City, NC 28557

Robert Bizzell, Chairman
North Carolina Marine Fisheries Commission
300-C N. Queen St
Kinston, NC 28501

RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act Related to the North Carolina Inshore Gillnet Fishery

Dear Secretary Locke;

This letter serves as a 60 day notice on behalf of the Karen Beasley Sea Turtle Rescue and Rehabilitation Center ("Beasley Center") of its intent to sue both the North Carolina Division of Marine Fisheries ("NCDMF") and the North Carolina Marine Fisheries Commission ("NCMFC") over violations of section 9 of the Endangered Species Act ("ESA") (16 U.S.C. §1531 et seq.). This letter is intended to fulfill the 60 day notice requirement of the citizen suit

provision of the ESA.

Specifically, the NCDMF and the NCMFC have violated section 9 of the ESA by: 1) authorizing and issuing licenses allowing the use of gill nets, which have resulted in significant take of multiple species of endangered and threatened sea turtles, and 2) violating Incidental Take Permit Number 1528 (“ITP 1528”) issued to NCDMF.

If the National Marine Fisheries Service (“NMFS”) does not act within 60 days to remedy the aforementioned violations, the Beasley Center will pursue all remedies available to it under state and federal law, including initiating a citizen’s suit against NCDMF and NCMFC pursuant to the ESA.

1. Violations of the ESA: Unlawful Take

A) Licensing of Fishing Gear by the State of North Carolina

Before a fisherman may fish in any manner, he must receive the appropriate license from the NCDMF in accordance with rules established by the NCMFC. NCMFC and NCDMF

currently authorize the use of gill nets by fishermen who have obtained either a commercial license or a recreational commercial license.

The NCMFC is the rule making body for North Carolina fisheries, and the North Carolina General Assembly has vested it with the responsibility to “authorize, license, regulate, prohibit, prescribe, or restrict” all activities relating to the “marine and estuarine resources in coastal fishing waters” of North Carolina..

The NCMFC is therefore the governmental body that determines the substantive content of a fishing license. The NCDMF serves as the implementing staff to NCMFC and is the governmental body that actually reviews and issues licenses in accordance with rules set forth by the NCMFC.

B) Endangered Species Act Requirements

All of the sea turtles found in North Carolina waters are listed as either endangered or threatened pursuant to the ESA and all are protected by the take prohibitions set forth in section 9 of the Act. Section 9 states that it is unlawful for any person to “take” a protected species within the United States or the territorial seas of the United States.

Take means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

The prohibition on take extends beyond the individual who physically commits a take to include any person who solicits another, or otherwise causes another, to commit a take.

The ESA specifically includes state governmental agencies within the definition of person.

Those two facts, taken together, have led to a long line of case law that places liability for unlawful take on government agencies, if those agencies permit or authorize actions that directly cause the take.

NCMFC’s and NCDMF’s actions, authorizing and licensing gill net fisheries that produce such a devastating amount of take that the continued existence of threatened and endangered sea turtles may be jeopardized, place them squarely within the limits of liability envisioned by the

framers of the ESA.

C) Gill Net Usage in North Carolina

Gill nets are used widely in coastal North Carolina with few restrictions. There are various areas where gill nets are restricted, but the restricted areas are generally small relative to the areas where gill netting is allowed. As Figure 1 shows, gill nets have been observed by NCDMF along the entire coast of North Carolina.

The most significant restricted area is the Pamlico Sound Gill Net Restricted Area (“PSGNRA”), which has historically been a Southern Flounder gill net fishery. Within the PSGNRA, large mesh gill nets (greater than 5.5 inch mesh size) are allowed only in specific shallow water areas from September to December, though small mesh gill nets are still allowed throughout the PSGNRA.

Pursuant to Section 10 of the ESA, NCDMF has obtained an Incidental Take Permit (“ITP”), ITP 1528, from NMFS for the September – December PSGNRA large mesh gill net fishery.

Although gill nets are used outside the PSGNRA, NCDMF has neither applied for nor received an ITP for any other areas where gill netting occurs. Therefore, each time a sea turtle becomes entangled in a gill net on the North Carolina coast outside of the PSGNRA, it is an unlawful take pursuant to the ESA.

D) Taking of Sea Turtles by Gill Net Fisheries

A gill net consists of a monofilament mesh net that is stretched perpendicular to the sea floor. The net is weighted at the bottom and buoyed at the top so that it stays stationary in the water. The individual mesh openings are sized so that the target fish may swim into the opening but cannot pass all the way through. If the fish tries to back out, the net will catch on its gills, hence the name gill net.

Gill nets are typically placed in shallow waters, which sea turtles also use as foraging grounds, virtually guaranteeing interactions. When a sea turtle comes in contact with a gill net, the turtle’s head or flipper can be caught in the mesh. As the turtle moves to free itself, it becomes further entangled. If the mesh of a gill net does not amputate the turtle’s entangled extremity, the turtle will remain entangled.

Because sea turtles are air-breathing reptiles, they will drown if they remain entangled. In fact, when capturing sea turtles was legal, gill nets were the preferred gear.

Gill nets have repeatedly been cited as one of the greatest threats to sea turtle populations in a variety of scientific literature, and North Carolina is often mentioned as an area of high concern.

There is ample evidence of sea turtle take via gill net along the North Carolina coast (as well as take via pound nets and trawlers). In fact, NMFS recently warned the NCDMF that there was excessive and unacceptable take of endangered sea turtles by gill nets in North Carolina waters.

In the summer of 2009, NMFS began a six-month observer program of the Core Sound inshore gill net fishery. On four of the first five trips, a total of eleven unlawful endangered sea turtle takes were observed. There have been numerous other studies which have found such takes.

A study completed in 2007 by the NCDMF for the U.S. Fish and Wildlife Service recorded 6 sea turtle interactions on 519 observed large mesh gill net trips, documenting a sea turtle interaction in approximately one out of every 87 individual gill net trips in North Carolina waters outside of the PSGNRA.

A study by the National Oceanic and Atmospheric Administration (“NOAA”) recorded significantly higher rates of sea turtle bycatch in the Mid-Atlantic region. While the data from federal sources indicates a much higher level of take than state sources, either amount is unacceptable under the ESA.

Unlawful take of sea turtles by gill net in North Carolina waters has been recorded in other forums as well. In January 2008, there was a mass sea turtle stranding at the Cape Lookout Bight.

After necropsies, sea turtle biologists at the North Carolina Wildlife Resources Commission (“NCWRC”) and NOAA determined the strandings were at least partially caused by nearby gill nets.²³ Independent scientific research has also shown unlawful take.

In addition, there is no shortage of local residents who can attest to the take of sea turtles in gill nets. Evidence shows that residents often attempt to free entangled turtles or report such take to authorities.

Lastly, the Beasley Center is in a unique position to witness first hand not only the quantity, but the severity, of the injury and mortality that gill nets inflict upon sea turtles.

Today, like most other days, there are sea turtles being treated at the Beasley Center that have been harmed by gill nets in North Carolina waters.

Despite the overwhelming evidence that the NCDMF and NCMFC have allowed massive amounts of sea turtle take, even a single take is unlawful under the ESA.

E) Violations of ESA by NCMFC and NCDMF

The evidence above demonstrates not only that gill nets cause the unlawful take of endangered sea turtles, but also that the NCMFC and NCDMF license the widespread use of gill nets in North Carolina. The only conclusion that can be drawn from those facts is that the NCMFC and NCDMF have inadequately protected sea turtles, and in doing so have egregiously violated the ESA.

Gear and licensing rules passed by the NCMFC and carried out by the NCDMF have failed to protect turtles and other endangered species from take. The NCMFC is liable not only due to its own actions and inactions, but also as the body charged with overseeing the administration of the NCDMF’s programs.

NCFMC has supervisory liability for any acts or omissions by the NCDMF.

2. Violations of the ESA: Non-compliance with Incidental Take Permit 1528

A) NCDMF’s Incidental Take Permit 1528

Pursuant to section 10 of the ESA, the NCDMF has obtained from NMFS an Incidental Take Permit for the gill nets used in the Southern Flounder Fishery of the PSGRNA.²⁷ ITP 1528 allows the use of gill nets with certain restrictions and assurances of enforcement effort by NCDMF to prevent and restrict sea turtle take incident to their use. By accepting ITP 1528,

NCDMF is bound by all of its requirements.

B) Violations of ITP 1528 by NCDMF

Though NCDMF has obtained an ITP from NMFS, it has openly violated many of the requirements of the ITP. While the biological foundations of the take limits already seem arbitrary,²⁸ and the stipulations are extremely ambiguous, even the clear-cut requirements have not been followed.

The most blatant violations involve reporting of takes. The ITP requires that all incidental takes must be reported. Yet in a recent email, Dr. Roy Crabtree, Regional Administrator of NMFS for the Southeast, admits that not a single fisherman has reported an incidental take of an injured or dead sea turtle since the permit was issued in 2005 unless there as an observer onboard.

In 2007 alone, there were 20 observed sea turtle interactions in the PSGNRA, which resulted in an estimate of 156 total interactions. Therefore, out of an estimated 136 unobserved interactions, zero were reported. This situation highlights not only a violation of the ITP, but a crucial flaw in the ITP itself: It is unrealistic to expect fishermen, who are economically motivated to keep the PSGNRA open, to report take that could close the fishery.

In fact, there is evidence to show that not only are fisherman failing to report incidentally captured turtles, they are actively hiding them by killing the turtles and sinking them, or by hiding them in marshes.

The ITP also requires NCDMF to enforce all conditions of the ITP.³³ The lack of unobserved take reports shows that NCDMF has not enforced the reporting provision, thereby violating the conditions of the ITP.

ITP 1528 also requires 2% observer coverage of the large mesh fishery from September 1-15 and November 1-December 1, and 10% observer coverage from September 15-October 31.³⁵ Observer coverage is especially important for ITP 1528 because of its heavy reliance on extrapolation. The NCDMF has not maintained the 10% level of observer coverage, and has therefore violated the permit.

NCDMF has been unable to comply with the requirements of the permit and is therefore violating not just the permit, but the ESA itself.

Conclusion

The Beasley Center believes that the NCMFC and NCDMF are continually violating the ESA by licensing the use of gill nets as currently permitted. If NMFS fails to take action to halt the violations, then the Beasley Center will pursue litigation in federal court to enjoin the continuing violations and recover associated legal fees and costs. Because of ambiguities in the current ITP and NCDMF's failure or inability to comply with and enforce the ITP, the issuance of additional ITPs for other areas of the North Carolina coast would not resolve these violations. Please contact us if you have any questions. We look forward to your reply.

Sincerely,

Patrick Duggan
Student Attorney
Duke Environmental Law & Policy Clinic