



North Carolina Department of Environment and Natural Resources

Pat McCrory
Governor

John E. Skvarla, III
Secretary

October 18, 2013

Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dr. Kathryn Sullivan
Acting Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Avenue, NW, Room 5128
Washington, D.C. 20230

RE: Proposals to Designate Critical Habitat for Loggerhead Sea Turtles

Dear Secretary Jewell and Dr. Sullivan,

I am writing to express concern over recent proposals by the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Fish and Wildlife Service (USFWS) to designate Critical Habitat for the threatened Northwest Atlantic Ocean population of loggerhead sea turtles (*Caretta caretta*). While we strongly support the protection and recovery of loggerhead sea turtles, we have significant concerns related to the process used for these designations, the lack of clarity regarding regulatory impacts, the potentially significant economic implications, and the precedent that could be set with respect to future Critical Habitat designations under the federal Endangered Species Act (ESA).

The USFWS published a proposed rule designating Critical Habitat for the loggerhead sea turtle in the Federal Register on March 25, 2013 (78 FR 42921 at 42921-42927) and provided a comment period ending on May 24, 2013.¹ On July 18 2013, the National Marine Fisheries Service (NMFS) published their proposed rule for Critical Habitat designation in the Federal Register (78 FR 43005 at 43005-43054) for review and announced the availability of the draft economic analysis. The proposals by both agencies are intended to be adopted through a Joint Rule in 2014.

¹ On July 18, 2013, the USFWS published a second notice in the Federal Register along with a draft economic analysis seeking public comment with a closing date of September 16, 2013.

As with any proposal to designate new federal jurisdictional areas on state and private lands and waters, your proposals have generated significant controversy, concerns, and questions among our state and local leaders and our citizens. With this case in particular, we have been entirely unsatisfied with responses to date from NOAA and the USFWS. The shared message from both of your agencies regarding the proposed designation of these expansive federal areas has been that no additional conservation or management measures are anticipated, but that the designation of Critical Habitat is nonetheless required under the ESA. We disagree, and present the following in support of our position.

Critical Habitat designations have significant regulatory implications.

With the proposed Critical Habitat designations, we are concerned with the potential for significant regulatory impacts to our coastal communities and stakeholders. The most apparent effects of designation of Critical Habitat stem from additional consultation requirements for federal agency actions under Section 7 of the ESA. In the absence of a Critical Habitat designation, Section 7 consultation requirements for federal actions focus solely on avoiding jeopardy to the continued existence of a listed species. However, if Critical Habitat has been designated, the ESA imposes an additional consultation requirement where an action will result in the “destruction or adverse modification” of Critical Habitat (16 U.S.C. § 1536(a)(2)).

Both the USFWS and the NMFS have indicated that no additional conservation measures are likely to be required for activities within the Critical Habitat Areas. For example, the Draft Economic Analysis prepared for the USFWS states that “[a]ccording to the USFWS, it is unlikely that future Section 7 consultations would identify a difference between measures needed to avoid the destruction or adverse modification of critical habitat from measures needed to avoid jeopardizing the continued existence of the species.” The USFWS proposed rule includes the following statement: “The designation of Critical Habitat in areas currently occupied by the loggerhead sea turtle may impose nominal additional regulatory restrictions to those currently in place and, therefore, may have little incremental impact on State and local governments and their activities.” Similarly, the NMFS Draft Economic Analysis states that “[a]ccording to NMFS, it is unlikely that critical habitat will generate new or different recommendations for conservation efforts.” The proposed rule itself states “We do not expect critical habitat designation to generate additional requests for project modification in any of the proposed critical habitat units.”

While the two agencies have consistently represented that existing management measures will typically satisfy any protections needed in designated Critical Habitat areas, several federal courts have held that avoiding jeopardy to the continued existence of a species is not the “functional equivalent” of avoiding the destruction or adverse modification of Critical Habitat.² These courts have noted that the ESA requires protections for Critical Habitat that go above and beyond those protections put in place to prevent jeopardy to the continued existence of a listed species.³

² See *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441-43 (5th Cir. 2001); *Gilford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) ; *Cape Hatteras Access Pres. Alliance v. United States DOI*, 344 F.Supp 2d 108, 130 (D.D.C. 2004)

³ See e.g. *Sierra Club*, 245 F.3d at 441-42 (finding that the requirement to preserve critical habitat is designed to promote conservation of the species in addition to its survival and that “‘conservation’ is a much broader concept than mere survival”).

Furthermore, your agencies acknowledge in their proposed rules that “special management considerations” within Critical Habitat areas are needed to address threats to essential features of loggerhead sea turtle terrestrial habitat. These identified “threats” include a wide range of coastal activities, including recreational beach use, beach driving, beach sand placement activities, in-water and shoreline alterations, coastal development, and artificial lighting (78 Fed. Reg. 18009; March 25, 2013).

If Critical Habitat is designated, we anticipate that your proposed joint rule will impact a wide variety of coastal projects involving federal actions and we can readily foresee increased planning, permitting, construction, and monitoring costs – in both time and monetary terms – for projects that are already subject to significant regulatory reviews and permit conditions. For example, additional Section 7 consultation requirements will likely result in costly delays and additional conditions placed on coastal and inlet management activities that are permitted, funded or implemented by the United States Army Corps of Engineers (Corps) or Federal Emergency Management Agency (FEMA). Coastal Storm Damage Reduction projects and coastal navigation project costs could increase on the order of tens of millions of dollars on an annual basis – primarily for the processing of paperwork that is of no on-the-ground benefit to the loggerhead sea turtles. Other federal grants, such as those used to provide public access and infrastructure projects, may also be delayed, restricted, or require additional conservation measures. Federal Fishery Management Plans will require renewed and/or expanded Biological Assessments. Non-federal development activities requiring federal permit approvals, such as development projects requiring permits from the Corps, could also be subject to further conditions. In fact, any action with a federal nexus that occurs within the designated Critical Habitat could potentially require a formal consultation supported by Biological Assessments with associated National Environmental Policy Act (NEPA) documentation. These impacts are just some of the reasonably foreseeable effects to coastal uses and resources in North Carolina.⁴ While the potential economic effects were downplayed in the proposed rule, no detailed analysis was provided. A comprehensive economic analysis of these impacts is needed and should be prepared before further action is taken on the proposed rules.

Even if we were to accept your agencies’ claims that no additional management measures will be needed for activities within these expansive Critical Habitat Areas along our coast (and we do not), we would then question the need for these designations in the first place. The ESA states that Critical Habitat should be designated “on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact;” and further, that areas may be excluded from critical habitat designations when “the benefits of such exclusion outweigh the benefits of specifying such area” (16 USC §1533(b)(2)). We urge you to fully consider the potential for significant regulatory implications, as well as the benefits of excluding coastal lands and waters of our State, given your stated lack of need for additional management measures for the protection of this species and its habitat.

⁴ This letter is not intended to provide an exhaustive list of all foreseeable effects of the proposed habitat designation. The CZMA consistency process would provide for a more extensive analysis of foreseeable effects.

Critical Habitat designations require State reviews under the federal CZMA.

The proposed rules are subject to review under the federal Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464, as amended (CZMA) and its implementing regulations (15 C.F.R. 930, Subpart C), which require that “Federal agencies shall provide State agencies with consistency determinations for all federal agency activities affecting any coastal use or resource” (15 C.F.R. § 930.34(a)(1)). The legal definition of federal agency activity means “any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities” and “includes a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., ...a proposed rulemaking that alters uses of the coastal zone” (15 C.F.R. §930.31(a)). The USFWS has indicated that it believes critical habitat designation is not a “federal agency activity” and is therefore not subject to the CZMA. We hope that this letter makes it clear that the designation of critical habitat does result in coastal effects that are reasonably foreseeable and alter the uses of the coastal zone, and that the USFWS position is not supported by either the CZMA or ESA.

As part of its federal consistency determination, federal agencies are required to make a determination of effects and an analysis of relevant state program policies (15 C.F.R. § 930.33(a)(1)). The term “effect on any coastal use or resource” is defined as “any reasonably foreseeable effect on any coastal use or resource resulting from a Federal agency activity” (§930.11(g)). “Effects” include both direct effects and indirect (cumulative and secondary) effects. An action which has minimal or no environmental effects may still have effects on a coastal use (e.g., effects on public access and recreational opportunities, protection of historic property) or a coastal resource (§930.33(a)(1)).

If it is determined that “there will not be coastal effects, then the Federal agency shall provide the State agencies with a negative determination for a Federal agency activity” (15 C.F.R. § 930.35). However, “Federal agencies shall broadly construe the effects test to provide state agencies with a consistency determination...and not a negative determination...or other determination of no effects” (§ 930.33(d)). These rules apply to a wide range of federal activities, including an agency’s “plan that is used to direct future agency actions, (or) a proposed rulemaking that alters uses of the coastal zone” (15 C.F.R. § 930.31).

For the reasons outlined above, it is not only “reasonably foreseeable” but clearly evident that the proposed Critical Habitat designations will affect coastal uses and resources. Therefore, the USFWS and NMFS are required to submit a CZMA consistency determination to the states in which Critical Habitat has been designated. Following the initial public notice of the USFWS proposed rule, representatives of several state coastal zone management programs contacted their local points of contact with USFWS and NMFS regarding the lack of coordination with the coastal programs as required by the CZMA. Some of these conversations resulted in correspondence between state and federal agencies regarding concerns about the overall process and impact of the proposed rule. In some instances, state coastal managers were told that consistency determinations would be submitted, only to be told later that this would not be the case. For example, South Carolina’s Governor Niki Haley was told in a letter dated July 10, 2013 that the USFWS would ‘...formally submit our determination to the South Carolina Department of Health and Environmental Control, as requested...;’ however, it is my understanding that to date this correspondence has not been received.

In letters dated on or around April 26, 2013, the USFWS notified several state coastal program managers that no consistency determination would be forthcoming. Based on additional feedback, USFWS representatives scheduled conference calls with each state to review their decision and discuss next steps. During these conference calls in early and mid-July 2013, the USFWS reaffirmed their position.

In contrast, on or around August 5, 2013, the NMFS sent letters to several state coastal program managers outlining their proposed rule and stating that the NMFS found this direct federal activity to be consistent with each state's coastal program. In submitting this letter, NMFS appears to acknowledge the need for a federal consistency review in accordance with the CZMA. However, there was no supporting documentation or evaluation of the state's coastal programs' enforceable policies for the purpose of determining consistency in accordance with federal consistency regulations (15 C.F.R. § 930.33(a)(1)). This lack of information led us to notify the National Marine Fisheries Service that their submittal was incomplete, thereby stopping the process until this matter is addressed and the appropriate information is presented for review and response. Many of the coastal states also sent letters to the federal agencies in advance of the public comment deadlines in May and September 2013 in order to formally submit their positions for the record.

Therefore, in addition to our significant concerns over the lack of clarity regarding regulatory implications and the limited detail provided in the economic impact analyses, we are disappointed in the inconsistent and conflicting information we have received with respect to our longstanding federal consistency review process. Your agencies have not coordinated with the coastal states as envisioned and required by the federal CZMA. Had these proposals been explored in close collaboration with the affected coastal states, a far more coordinated, clear, and justifiable result may have been achieved, especially in comparison with what will now be an attempt to address the tens of thousands of public comments your agencies have received to date.

Summary

North Carolina's beaches and inlets make a substantial contribution to the national, state, and local economies. Our State also cares deeply about, and is heavily invested in, the recovery of threatened and endangered species along our coast. I respectfully request that you seek a resolution that continues to ensure the protection and recovery of the loggerhead sea turtle while balancing impacts to public recreation, the environment, and our coastal and ocean economies.

In summary, I request that the USFWS and NMFS:

- 1) Re-evaluate Critical Habitat Designations for the Northwest Atlantic Ocean subpopulation of loggerhead sea turtles in light of significant regulatory and economic implications and your stated lack of need for additional management measures;

or, if you proceed with rulemaking:

- 2) Submit complete federal consistency determinations regarding the proposed Critical Habitat designations to our NOAA-approved State Coastal Management Program; wherein you:
- a. Clarify the potential range of additional management efforts, regulatory reviews, and operational conditions that may be placed upon those activities listed as “threats” to designated Critical Habitats;
 - b. Expand the economic analyses of the potential impacts to coastal communities and stakeholders with respect to the additional management efforts under (a); and
 - c. Provide additional information on the data utilized for the proposed designations.

I appreciate your willingness to consider these comments and requests, and look forward to your response. North Carolina is prepared to pursue mediation or other legal actions if necessary; however, we would prefer to seek an alternative solution if possible.



John E. Skvarla, III
Secretary, North Carolina Department of Environment and Natural Resources

cc: Mr. Daniel M. Ashe, Director
U.S. Fish and Wildlife Service

Samuel D. Rauch, III, Acting Director
NOAA Fisheries Service

Pat McCrory
Governor of North Carolina

North Carolina Congressional Delegation