

Before the U.S. Department of Commerce
National Oceanic and Atmospheric Administration
("NOAA")

WASHINGTON, D.C.

Sea Turtle Conservation)
Activities Related to) **FR Doc. 02-11636**
Fishing)

*To the Chief, Endangered Species Division; Office of Protected Resources
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Comments of Public Employees for Environmental Responsibility
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Pursuant to Title 15, Section 922.2(e) of the Code of Federal Regulations, Public Employees for Environmental Responsibility ("PEER"), by and through counsel, respectfully comment on the need to establish a sea turtle conservation plan to monitor and mitigate the incidental take of sea turtles resulting from commercial and recreational fishing activities in Hawaiian State waters.

PEER has reviewed the April 5, 2002, Department of Commerce Notice (I.D. 032602B) and May 19, 2002, Proposed Rule (I.D. 042402B) regarding an Application for an Incidental Take Permit (ITP) (1357) submitted by the State of Hawaii Department of Aquatic Resources (DAR). National Marine Fisheries Service (NMFS) will issue an ITP to the State of Hawaii if NMFS accepts the conservation plan. The following comments are respectfully submitted to encourage compliance with the requirements of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*)(ESA) and the National Environmental Policy Act, as amended, (Pub. L. 91-190, 42 U.S.C. 4321-4347,

January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4(b), Sept. 13, 1982)(NEPA).

I. Introduction

Section 9 of the ESA prohibits the taking of endangered and threatened species. 16 U.S.C. § 1538 (ESA § 9) (a)(1)(b). Taking is defined in part as “killing, harming, or harassment.” 16 U.S.C. § 1532 (ESA § 3) (19). Hawaiian fishermen incidentally “take” threatened and endangered loggerhead (*Caretta caretta*), green (*Chelonia mydas*), leatherback (*Deromochelys coriacea*), hawksbill (*Eretmochelys imbricata*), and olive ridley (*Lepidochelys olivacea*) sea turtles. The National Marine Fisheries Service is charged to enforce prohibitions against Incidental Take of threatened and endangered Species under Section 9. However, the NMFS has insufficient funds to thoroughly enforce environmental regulations.

The ESA was amended in 1982 to allow for the issuance of incidental take permits. 16 U.S.C. § 1539 (ESA § 10). One purpose of the incidental take permit (ITP) is to encourage protection of threatened and endangered species through the formation of creative partnerships. H.R. Rep. No. 97-835, at 29 (1982). The conservation plan proposed under the State of Hawaii incidental take permit application establishes a program to monitor and mitigate the incidental take of sea turtles from waters under the jurisdiction of the State of Hawaii through a partnership between DAR and NMFS. While such a partnership would allow for increased enforcement capability through sharing of state and federal resources, the program cannot be established as part of an ITP unless all relevant statutory requirements are satisfied.

II. Requirements Under ESA

Section 10 of the ESA allows for the issuance of incidental take permits when the following section 10(a)(2)(B) requirements have been met: (1) the taking will be incidental to otherwise lawful activity, (2) the taking will not appreciably reduce the likelihood of survival and recovery of a species, (3) the applicant provides a conservation plan that will minimize and mitigate impacts *to the maximum extent possible*, and (4) the applicant ensures adequate funding for the conservation plan. 16 U.S.C. § 1539 (ESA § 10) (emphasis added). In addition, the conservation plans in various regions for a species must be consistent, and if a recovery plan for a species has been prepared, the conservation plan should be consistent with the recovery plan. United States Fish and Wildlife Service (USFWS) and NMFS, Habitat Conservation Planning and Incidental Take Permit Processing Handbook, at 3-20, 23 (1996). In light of these requirements, PEER presents the following comments:

A. Each species should be considered separately during the development of the conservation plan, and the plan should be consistent with the recovery plan for each species.

The permit application lists five species of turtles that will most likely be effected, including two species that nest in Hawaii. The conservation plan, however, fails to give separate consideration to each species. Methods for mitigation of fishing impact on sea turtles may be similar for all five species, but differences such as preferred diet, habitat preferences, and seasonal migration patterns should not be overlooked during the development of the conservation plan. For example, if a species occupies a certain habitat seasonally, the conservation plan should include seasonal protection in those areas.

In addition, the conservation plan should consider each species separately in order to be consistent with the recovery plans that have been individually developed for each species. USFWS and NMFS, Habitat Conservation Planning and Incidental Take Permit Processing Handbook, at 3-23 (1996). According to the hawksbill recovery plan, the hawksbill is rapidly approaching extinction and is therefore of high concern. NMFS,

Recovery Plan for the U.S. Pacific Populations of the Hawksbill, at iv (1998). The hawksbill is a species that nests on Hawaiian Islands and forages in the nearby waters. The approximately 20-30 female hawksbills that nest annually in the Main Hawaiian Islands represent the only population of this species that is likely to recover. *Id.* at 23, 52. Because the hawksbill is given high concern in the recovery plan, it should be given special consideration during the development of the conservation plan.

B. In order for the permit to be granted, the taking must not appreciably reduce the likelihood of survival and recovery of any protected species.

In order for the ITP to be issued, the NMFS must determine that the taking will not appreciably reduce the likelihood of survival and recovery of any protected species. This determination is required under Section 10 of the ESA. In addition, ITP approval is a federal action subject to analysis under Section 7 of ESA. USFWS and NMFS, Habitat Conservation Planning and Incidental Take Permit Processing Handbook, at 1-6 (1996). Section 7 requires a finding that the issuance of the permit “is not likely to jeopardize the continued existence of any endangered species or threatened species.” Because the hawksbill is of high concern status, these determinations should give special consideration to this species. According to data provided in the application on page 44, 32 hawksbill strandings were reported between 1982-2000. Four of these strandings showed signs of fishing gear interactions, and several of the other reported strandings likely resulted from gear interactions. These numbers undoubtedly represent only a fraction of the number of hawksbills killed as a result of gear interactions, as an unknown number of fishing-related injuries go unreported.

Mitigation steps presented in the proposed conservation plan are (1) monitoring of commercial takings, (2) increased public education, (3) *possible* new gill net restrictions, and (4) *potential* designation of new protected areas. (See application pages 26-33). The two guaranteed steps are insufficient to ensure that the likelihood of survival and recovery of the hawksbill is not appreciably reduced. Measures (3) and (4) must be strengthened, and additional conservation strategies should be incorporated into the conservation plan. Mitigation strategies are further discussed in comment D, *infra*.

C. The cost of the conservation plan should be partially borne by the industries that will benefit from the taking of the protected species.

The incidental take permit was intended to encourage species protection through creative partnerships between public and private sectors. H.R. Rep. No. 97-835, at 29 (1982); see also USFWS and NMFS, Habitat Conservation Planning and Incidental Take Permit Processing Handbook, at 1-2 (1996). Congress modeled the permit process after the development of the San Bruno Mountain habitat conservation plan, and instructed that future conservation plans use San Bruno as a model. See Percival, Miller, Schroeder, and Laepe: Env. Reg., Law, Science and Policy at 1122-3 (1995). The San Bruno conservation plan was the result of lengthy negotiations and compromise between landowners, developers, conservationists, and local governments. Id. The San Bruno plan placed the cost of conservation on landowners and developers. Id. Under this model, state and federal agencies should not shelter private interests from contribution towards the cost of species preservation.

The private interests that will benefit from the incidental take of sea turtles should contribute toward the cost of the conservation plan. The destruction of biodiversity through the use of public waters is a serious cost of fishing activities. Environmental costs of commercial activities should be internalized to the greatest extent possible. The conservation plan presented in the application substantially places the cost of conservation on the shoulders of the federal government, in the form of NMFS contributions. The federal government has limited funding with which to support conservation of endangered and threatened species. Internalization of the cost of conservation through contribution from the private interests that will benefit from the takings would ease the burden on federal and state governments. In addition, internalization of the cost of mitigation of takings could provide the industry with an incentive to use and develop technologies that reduce taking. This would be accomplished by assessing contribution according to the number of takes that occur.

The ESA requires that the applicant ensure funding of the conservation plan. 16 U.S.C. § 1539 (ESA § 10). The sources of funding listed in the application on page 49 are all subject to availability through state and federal budgets. Requiring contribution from private interests would provide a source of funding that is not dependent upon uncertain state and federal budget appropriations. Private contribution will be further discussed in comment 4, infra.

D. The commitment of the applicant in mitigation must extend beyond monitoring of commercial activities and education of the public, and the conservation plan must be consistent with other U.S. incidental take permits.

ESA requires that the conservation plan minimize and mitigate impacts *to the maximum extent possible*. 16 U.S.C. § 1539 (ESA § 10) (emphasis added). In addition, mitigation strategies for a species must be as consistent as possible. See USFWS and NMFS, Habitat Conservation Planning and Incidental Take Permit Processing Handbook, at 3-23 (1996); see also Sierra Club v. Babbitt, 15 F. Supp. 2d. 1274, 1281 (S.D. Ala. 1998) (overturning the issuance of an incidental take permit in part because the FWS had inconsistently applied mitigation standards). In order to meet these requirements, the conservation plan mitigation commitments must be strengthened. Under the conservation plan presented in the application on pages 26-33, the only mitigation steps that are guaranteed are monitoring of commercial takings and increased education of the public. The conservation plan also includes recommendations for new gillnet restrictions and potential designation of new areas for protection. These commitments must be strengthened and additional mitigation strategies must be incorporated.

New gillnet restrictions must be guaranteed, and the management of gear and the designation of protected areas should be coordinated with the monitoring program. The Hawaiian taking permit application lists and rates different gear types on page 45. Slide bate on lines and gill nets are rated as “interaction likely, could cause fatalities.” An adaptive management program should coordinate restriction of use of these types of gear with the monitoring program, through satisfactory procedures to be established before the taking permit is issued. If the DAR is powerless to guarantee gear restrictions, the

authorizing body should be involved in the development of the conservation plan. These suggestions are consistent with the mitigation strategies for a recent North Carolina sea turtle ITP application, which included the mitigation strategy of closing gillnet operations once a requisite number of takings has occurred. Texas and Florida have banned gill nets state-wide. The bans were very controversial and PEER empathizes with displaced fishermen. Issuance of gill netting permits to only active, professional gill netters and canceling permits which lapse for more than one year would reduce resistance. As each permit expires, gill netting would slowly be phased out.

Mitigation of the impact of taking could also be accomplished through contributions from private interests toward that cost of existing conservation programs. For example, private interests that benefit from the actions that result in taking of sea turtles could contribute to the funding of efforts to improve egg survival through nest predation control and relocation of nest to safer areas. The conservation plan should come close to offsetting the fisheries by-catch. In Hawaii, the greatest threat to the green turtle is a lethal tumor disease. It is possible that lethal incidental take of the green turtle could also be mitigated through contribution to scientific research contributing towards the reduction of turtle deaths resulting from this disease. In order to determine that the conservation plan minimizes and mitigates the impact of the takings to the maximum extent possible, as required by the ESA, private funding of these mitigation strategies must be considered.

III. Requirements Under NEPA

NEPA requires preparation of an environmental impact statement (EIS) for any major federal action that significantly effects the environment. 40 C.F.R. 1508.11 § 102. The EIS must include a detailed statement of environmental impacts, environmental costs that might be avoided, and alternatives to the proposed action. Id.

A. The EIS should be conducted so as to support the development of a conservation plan that meets statutory requirements.

Under the ESA, the conservation plan for the ITP must mitigate and minimize impacts of the taking action to the maximum extent possible. 16 U.S.C. § 1539 (ESA § 10). The EIS should be conducted in such a way as to lead to the development of such a conservation plan. In addition, all of the suggestions given in Part I concerning the development of the conservation plan under the requirements of the ESA should be considered in the design of the EIS. Namely, each species should be considered separately, and each gear type should be considered separately. The Hawksbill should be given special consideration as a high concern species. The EIS should determine whether proposed actions will appreciably reduce the likelihood of survival of this species or any other affected species, and if so, what additional mitigation steps are required to alleviate such likelihood.

B. The EIS should consider the cumulative effect of the fishing activities in the Pacific Region covered by the recovery plan.

Determining the scope of the EIS is a critical step in the preparation process. In 1976, the Supreme Court held that the cumulative effects of related proposed actions must be considered in a comprehensive EIS. Kleppe v. Sierra Club, 427 U.S. 390 (1976). Subsequent CEQ regulations require that connected actions, cumulative actions, and similar actions be considered in establishing the scope of the EIS. 40 C.F.R. § 1508.25. Under Kleppe and the CEQ regulations, the NMFS must consider the cumulative effects of federally-approved actions affecting U.S. Pacific turtle populations. This includes other Hawaiian-based fishing activities, as well as federally-approved fisheries along the west coast of the United States.

Sea turtles migrate great distances. The transpacific migration of several species has been shown using DNA technologies and satellite tracking. According to mitochondrial DNA analysis of turtles taken by long-line fisheries of Hawaii, the turtles that forage near these islands originate from Japan, Australia, the Western Pacific, and

the Eastern Pacific. Balazs, Bixby, Dutton, and LeRoux: Genetic Stock Origin of Sea Turtles Caught in the Hawaii-Based Long-line fishing Industry, Proc. of the NMFS Symposia on Sea Turtle Conservation Biology, page 120 (1999). The impact of fishing activities on sea turtle populations therefore cannot be assessed without consideration of the cumulative effect of fishing not only from waters under the jurisdiction of the State of Hawaii, but also from other Pacific waters. According to the recovery report for the hawksbill, “mortality associated with entanglement in active and abandoned fishing gear has not yet been quantified, but is very likely to involve tens of thousands of Pacific sea turtles each year.” NMFS, Recovery Plan for the U.S. Pacific Populations of the Hawksbill, at iv (1998).

The NMFS has developed recovery plans for each of the species likely to be affected by the activities covered in the taking permit. For the purpose of the recovery plans, populations of the U.S. Pacific are considered separately from the population of the Atlantic. The regional division used in the development of the recovery plans would be a sensible division to employ in the development of the scope of the EIS. In addition, the ESA requires consistency between regions in the conservation plans for a particular species. The development of a comprehensive EIS that considers the impact of fishing from all U.S. Pacific waters would facilitate the establishment of consistent conservation plans for these areas.

IV. Conclusion

To wit, PEER requests that the EIS be expanded so that:

- Species-specific differences such as preferred diet, habitat preferences, and seasonal migration patterns should be reviewed, and not be overlooked, during the development of the conservation plan.

- The conservation plan considers each species separately in order to be consistent with the recovery plans that have been individually developed for each species.
- Greater study be made of mitigation options involving *possible* new gill net restrictions, and *potential* designation of new protected areas. (See application pages 26-33).
- The private interests that will benefit from the incidental take of sea turtles should significantly contribute toward the cost of the conservation plan.
- All of the suggestions given in Part I concerning the development of the conservation plan under the requirements of the ESA should be considered in the design of the EIS. Namely, each species should be considered separately, and each gear type should be considered separately. The Hawksbill should be given special consideration as a high concern species.

Very respectfully,

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