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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
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Washington, DC 20230

Dr. Roy Crabtree, Regional Administrator
National Oceanic and Atmospheric Administration Fisheries Service, Southeast
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Louis Daniel, Director
North Carolina Division of Marine Fisheries
P.O. Box 769
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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.[1]

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

[1] 16 U.S.C § 1540(g) (2006).

currently authorize the use of gill nets by fishermen who have obtained either a commercial license or a recreational commercial license.[2]

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..[3] 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.[4]

B) Endangered Species Act Requirements

All of the sea turtles found in North Carolina waters are listed as either endangered or threatened[5] pursuant to the ESA and all are protected by the take prohibitions set forth in section 9 of the Act.[6] 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.[7] Take means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[8]

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.[9] The

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[2] A commercial license allows a fisherman to use approved commercial gear and sell the catch commercially. A recreational commercial license, however, allows a fisherman to use certain types of commercial gear but *does not* allow commercial sale of the catch.
[3] N.C. GEN STAT § 113-182(a) (2008).
[4] N.C. GEN STAT § 113-168.1(f) (2008).
[5] The U.S. Fish and Wildlife Service maintains a state-by-state catalogue of endangered/threatened species, which can be found at http://ecos.fws.gov/tess_public/pub/stateListingAndOccurrenceIndividual.jsp?state=NC.
[6] Though the ESA states that take of endangered species is prohibited, 16 U.S.C § 1538(a)(1)(b) (2006), that prohibition is extended to threatened species by 50 CFR § 17.31(a) (2008).
[7] 16 U.S.C § 1538(a)(1)(B) (2006).
[8] 16 U.S.C § 1532(19) (2006).
[9] 16 U.S.C § 1538(g) (2006).

ESA specifically includes state governmental agencies within the definition of person.[10] 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.[11] 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,[12] 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.[13]

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.[14] Although gill nets are used outside the PSGNRA, NCDMF has

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[10] 16 U.S.C § 1532(13) (2006).
[11] E.g., Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997) ("The statute not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. . . . [A] governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.")
[12] A list of areas where gill nets are restricted can be found in 15A N.C. ADMIN. CODE. 03J.0402 (2008).
[13] BLAKE PRICE, ESTUARINE OBSERVER PROGRAM IN NORTH CAROLINA, REPORT TO USFS, GRANT NO. F-83-R 11 (2007). The map in Figure 1 shows that gill nets are used along the entire coast of North Carolina.
[14] NMFS, Permit to Incidentally Take Endangered/Threatened Species, Permit No. 1528 (2005).

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 PSGRNA, 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.[15] 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.[16] 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.[17] 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.[18]

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[15] *See* Catherine M. McClellan & Andrew J. Read, *Confronting the Gauntlet: Understanding Incidental Capture of Green Turtles Through Fine-Scale Movement Studies*, ENDANGERED SPECIES RES., June 2009.

[16] It is important to note that although large mesh gill nets are often cited as the central problem, small mesh gill nets can cause an equal amount of damage. Small mesh gill nets, however, are more likely to entangle smaller sea turtles, especially juvenile turtles.

[17] W.N. Witzell, *The Origin, Evolution, and Demise of the U.S. Sea Turtle Fisheries,* 56 MARINE FISHERIES REV. 8, 9 (2004).

[18] E.g., NOAA. 2009. Office of Protected Resources. Loggerhead Turtle (Caretta caretta) http://www.nmfs.noaa.gov /pr/species/turtles/loggerhead.htm.

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.[19] 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.[20] 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,[21] 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.[22] 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.[24]

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[19] Letter from Dr. Roy Crabtree, Regional Administrator of NMFS Southeast, to Dr. Louis Daniel, Director of NCDMF (July 7, 2009) (on file with author).
[20] *Id.*
[21] BLAKE PRICE, ESTUARINE OBSERVER PROGRAM IN NORTH CAROLINA, REPORT TO USFS, GRANT NO. F-83-R 22 (2007).
[22] *See* Kimberley T. Murray, *Characteristics and Magnitude of Sea Turtle Bycatch in U.S. Mid-Atlantic Gillnet Gear*, 8 ENDANGERED SPECIES RES. 211 (2009).
[23] NCWRC, GREEN TURTLE MASS STRANDING EVENT ON 07 JANUARY 2008, CAPE LOOKOUT BIGHT, NORTH CAROLINA, (2008) *available at* http://nomoregillnets.org/pdf/CALOJan08strandingevent-Update.pdf
[24] *See* Catherine M. McClellan et al., *Using Telemetry to Mitigate the Bycatch of Long-Lived Marine Vertebrates,* 19 ECOLOGICAL APPLICATIONS 1660 (2009).

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.[25] 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.[26] 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

[25] Conversation between Jean Beasley, Director, Beasley Center, and Patrick Duggan, Student Attorney, Duke Environmental Law & Policy Clinic (Sept. 18, 2009).

[26] Email from Wendy Cluse, Assistant Sea Turtle Biologist, North Carolina Wildlife Resources Commission, to NC-cturtle@lists.seaturtle.org (Oct. 12, 2009) (on file with Clinic) (stating that three sea turtles were brought to the Beasley Center after interactions with gill nets during the week of Oct. 4 – Oct 10, 2009).

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,[29] 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.[30] 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 was an observer onboard.[31] In 2007 alone, there were 20 observed sea turtle interactions in the

[27] NMFS, Permit to Incidentally Take Endangered/Threatened Species, Permit No. 1528 (2005).
[28] For instance, neither NCDMF's application nor ITP 1528 ever mention the federally mandated species recovery plan for any of the species, nor the methodology used to reach take limits. The permit allows the lethal take of up to 42 Kemp's Ridley turtles, the most endangered species of sea turtle in the world, over a three year period, without mentioned the recovery plan at all. NCDMF, Application for an Individual Incidental Take Permit under the Endangered Species Act of 1973 (2005); (on file with Clinic); NMFS, Permit to Incidentally Take Endangered/Threatened Species, Permit No. 1528 (2005).
[29] Examples of ambiguity include: What constitutes an observer is not defined; What an observed take consists of is not defined; Whether take is cumulative over the 6 years covered is never stipulated. NMFS, Permit to Incidentally Take Endangered/Threatened Species, Permit No. 1528 (2005).
[30] NMFS, Permit to Incidentally Take Endangered/Threatened Species, Permit No. 1528 11 (2005).
[31] Email from Dr. Roy Crabtree, Regional Administrator of NMFS Southeast, to the Coastal Fisheries Reform Group (Aug. 17, 2009) (on file with Clinic).

PSGNRA, which resulted in an estimate of 156 total interactions.[32] 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.[34]

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.[36] 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

[32] BLAKE PRICE, SEA TURTLE BYCATCH MONITORING OF THE 2007 FALL GILLNET FISHERIES IN SOUTHEASTERN PAMLICO SOUND, NORTH CAROLINA, COMPLETION REPORT FOR ACTIVITIES UNDER ENDANGERED SPECIES ACT SECTION 10 INCIDENTAL TAKE PERMIT # 1528 19-20 (2008)

[33] NMFS, Permit to Incidentally Take Endangered/Threatened Species, Permit No. 1528 6 (2005).

[34] *See id.*

[35] *Id.*

[36] BLAKE PRICE, SEA TURTLE BYCATCH MONITORING OF THE 2007 FALL GILLNET FISHERIES IN SOUTHEASTERN PAMLICO SOUND, NORTH CAROLINA, COMPLETION REPORT FOR ACTIVITIES UNDER ENDANGERED SPECIES ACT SECTION 10 INCIDENTAL TAKE PERMIT # 1528 19-20 (2008) (showing 7.46% coverage of total trips and 8.14% coverage of total effort from Sept. 15 - Oct. 31); BLAKE PRICE, SEA TURTLE BYCATCH MONITORING OF THE 2006 FALL GILLNET FISHERIES IN SOUTHEASTERN PAMLICO SOUND, NORTH CAROLINA, COMPLETION REPORT FOR ACTIVITIES UNDER ENDANGERED SPECIES ACT SECTION 10 INCIDENTAL TAKE PERMIT # 1528 19-20 (2007) (showing 8.36% coverage of total trips and 7.82% coverage of total effort from Sept. 15 - Oct. 31)

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
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Michelle B. Nowlin
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Attachments

cc: Amanda Little, General Counsel, North Carolina Division of Marine Fisheries

Frank Crawley, North Carolina Department of Justice

Alan Jernigan, Senior Deputy Attorney General, North Carolina Department of Justice

Mary Penny Thompson, General Counsel, North Carolina Department of Environment and Natural Resources

Michelle Duval, Executive Assistant to Councils, North Carolina Division of Marine Fisheries

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Chris Canfield, Director, Audubon North Carolina

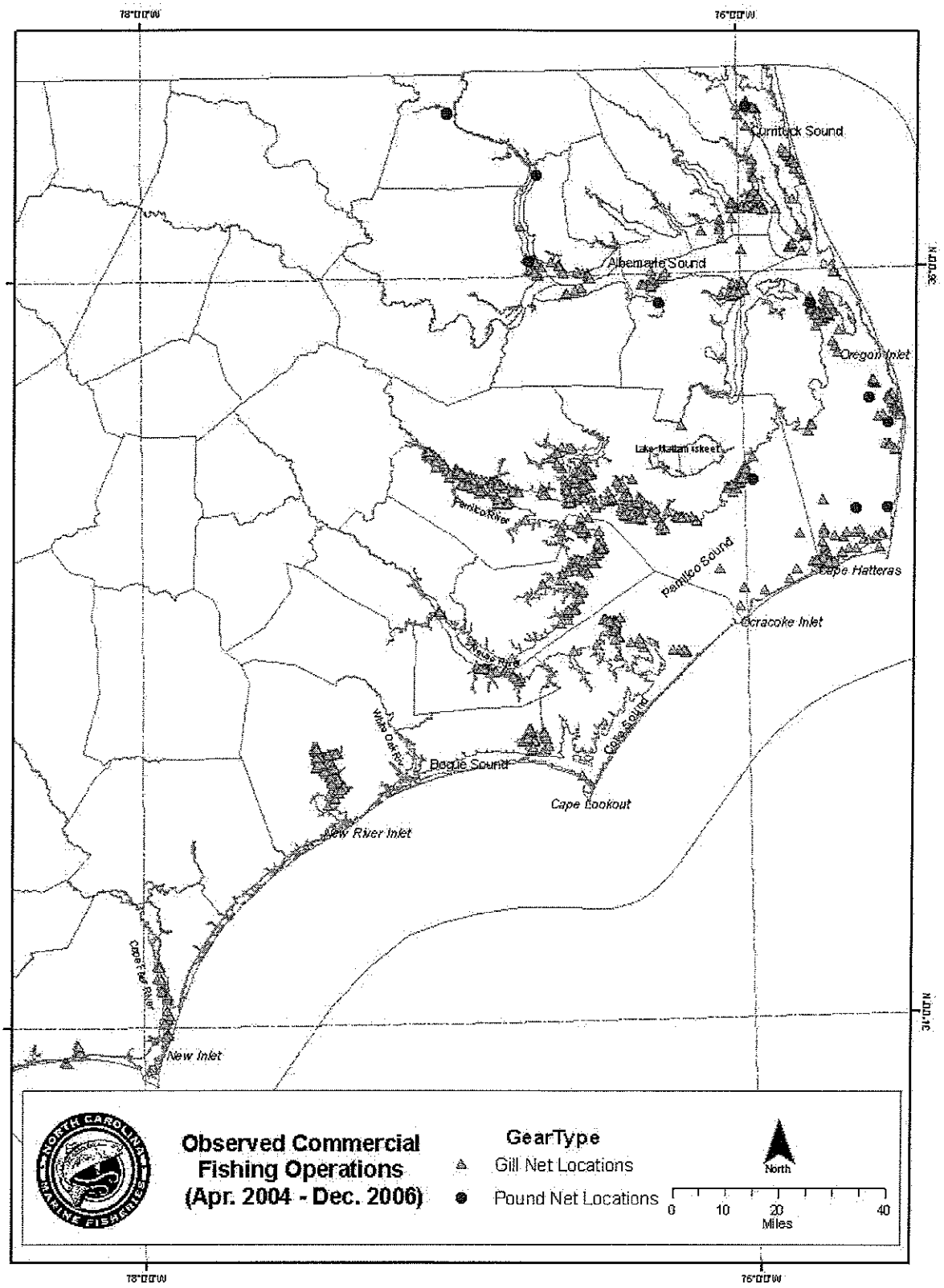
Sierra Weaver, Attorney, Defenders of Wildlife

Steve Roady, Attorney, EarthJustice

Julie Youngman, Attorney, Southern Environmental Law Center

Tim Guestwicki, North Carolina Wildlife Federation

Figure 1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Pamlico River
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Cape Hatteras
Ocracoke Inlet
Neuse River
White Oak River
Bogue Sound
Core Sound
Cape Lookout
New River Inlet
Cape Fear River
New Inlet
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Observed Commercial Fishing Operations (Apr. 2004 - Dec. 2006)
GearType
Gill Net Locations
Pound Net Locations
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