



March 12, 2009

Via Electronic and Certified Mail

Honorable Otto J. Wolff
Acting Secretary of Commerce
U.S. Department of Commerce
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RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act; Failure to Make 12-Month Finding on Petition to Revise Critical Habitat Designation for the Leatherback Sea Turtle (*Dermochelys coriacea*)

Dear Acting Secretary Wolff and Dr. Balsiger:

The Center for Biological Diversity (“the Center”), Oceana, Inc., and Turtle Island Restoration Network (“TIRN”) hereby provide notice of their intent to sue the National Marine Fisheries Service (“Fisheries Service”) for violating Section 4 of the Endangered Species Act (“the Act”) (16 U.S.C. § 1531 *et seq.*) by failing to make a 12-month finding regarding our Petition to Revise the Critical Habitat Designation for the Leatherback Sea Turtle (*Dermochelys coriacea*) under the Endangered Species Act (“Leatherback Petition”). See 16 U.S.C. § 1533(b)(3)(D)(ii). This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the Act. See 16 U.S.C. § 1540(g).

On September 26, 2007, the Center, Oceana, and TIRN submitted via certified U.S. mail a formal, detailed petition to revise the critical habitat designation for the leatherback sea turtle under the Endangered Species Act to include waters in the Pacific Ocean off the U.S. West Coast. The Leatherback Petition was received on October 2, 2007. On December 28, 2007, the Fisheries Service made a positive 90-day finding on the petition and initiated a 60-day public comment period and status review. 72 Fed. Reg. 73746 (Listing Endangered and Threatened Wildlife and Designating Critical Habitat; 90-day Finding for a Petition to Revise the Critical Habitat Designation for the Leatherback Turtle). This finding triggered the agency’s legal obligation to make a 12-month finding no later than October 2, 2008, regarding how the agency would proceed with the requested revision. The Fisheries Service has not yet made such a finding and is therefore in violation of the Act.

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The designation and protection of critical habitat is one of the primary ways in which the fundamental purpose of the Endangered Species Act, “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” is achieved. 16 U.S.C. §1531(b). The legislative history of the Act shows Congress clearly recognized the importance of critical habitat designation in conserving listed species:

classifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species’ continued existence... If the protection of endangered and threatened species depends in large measure on the preservation of the species’ habitat, then *the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.*

H.R. Rep. No. 94-887 at 3 (1976) (emphasis added).

Section 4 sets forth a detailed process by which the Secretary of Commerce, through the Fisheries Service, revises critical habitat designations. 16 U.S.C. § 1533. The critical habitat designation and revision process can begin either by citizen petition or by internal agency processes. In either case, strict timelines apply once the process is initiated. 16 U.S.C. § 1533(b)(3)(D).

Upon receipt of a petition to revise a critical habitat designation under the Endangered Species Act, the Fisheries Service must determine whether the petition “presents substantial scientific information indicating that the revision may be warranted.” 16 U.S.C. § 1533(b)(3)(D)(i). The Fisheries Service must make this initial, “90-day finding” “[t]o the maximum extent practicable, within 90 days after receiving the petition.” *Id.* If the agency determines that the petition presents substantial information that a critical habitat revision may be warranted, it must “determine how [the Fisheries Service] plans to proceed with the requested revision.” *Id.* § 1533(b)(3)(D)(ii). This finding is due within 12 months after receiving a petition. *Id.* The agency has no discretion to extend the time allotted for this finding.

The petition to revise the critical habitat designation for the leatherback sea turtle was received by the Fisheries Service on October 2, 2007. The 12-month finding on the Leatherback Petition was therefore due no later than October 2, 2008. The Fisheries Service is now in violation of the Endangered Species Act for failing to make this required finding.

Since submitting the Leatherback Petition, our organizations have communicated with the Fisheries Service staff on several occasions regarding expected and actual delays in the Fisheries Service’s response. Early in the summer of 2008, the Fisheries Service staff informed us that they would not meet the statutory deadline for issuing a 12-month finding on the Leatherback Petition, but expected to issue the finding by the end of the year. On February 13,

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2009, the Fisheries Service staff informed us that the agency would not make a 12-month finding on this petition until the end of 2009. We appreciate the agency staff's openness and efforts to update us on the status of the agency's deliberations. However, a delay of nearly another year before the Pacific leatherback's crucial foraging grounds receive protection frustrates the purposes of the Endangered Species Act and poses a serious risk to the species. Indeed, any further delay by the Fisheries Service in response to the petition impairs the likelihood of survival and recovery of the species, as the degradation of its habitat continues due to increasing pressures, including commercial fishing, global warming, and other threats detailed in the petition. These threats and the vulnerable state of the western Pacific leatherback population require immediate action.

As detailed in the petition, human activities endanger the Pacific leatherback and its habitat in multiple ways. Chief among those threats is the incidental capture and killing of leatherbacks by commercial fishing fleets, which has continued unabated, and threatens to increase in the near future. Outside the proposed critical habitat area, fishery managers have proposed significant expansions of pelagic longline fishing – a method known to entangle and kill leatherback sea turtles. *See, e.g.*, Fisheries Service, Environmental Assessment for West Coast Deep-Set Longline Fishery Operating Outside of the U.S. Exclusive Economic Zone (September 2008) (contemplating expansion of West Coast deep-set longline fishery); 73 Fed. Reg. 45965 (Aug. 7, 2008) (Fisheries Service notice of intent to prepare SEIS on Amendment 2 to West Coast Highly Migratory Species Fishery Management Plan allowing re-establishment of high seas shallow-set longline fishery); Western Pacific Regional Fishery Management Council, Draft SEIS for Amendment 18 to the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region – Management Modifications for the Hawaii-based Shallow-set Longline Swordfish Fishery that Would Remove Effort Limits, Eliminate the Set Certificate Program, and Implement New Sea Turtle Interaction Caps (Sept. 2008).

The Fisheries Service has also proposed to allow pelagic longline fishing *within* the proposed critical habitat area, notwithstanding the agency's own finding that this area is crucial to the species' survival and recovery. *See* 73 Fed. Reg. 22340 (April 25, 2008); Letter from the Center & TIRN to Rodney R. McInnis, Fisheries Service, Re Proposed Exempted Fishing Permit to allow Pelagic Longline Fishing in the EEZ off California and Oregon (May 27, 2008); Letter from Oceana to Rodney R. McInnis, Fisheries Service, Re: Exempted Fishing Permit for Longline Fishing in the West Coast EEZ (May 27, 2008). This proposal is intended to test the "economic viability and environmental effects, including the potential impacts to protected species and non-target finfish interactions, of fishing swordfish in the West Coast EEZ [Exclusive Economic Zone]." *See* 73 Fed. Reg. 22340 (April 25, 2008). Therefore, this proposal, if approved, would then be used to provide a foot in the door for a full-fledged longline fishery in the very waters proposed by petitioners as critical habitat and circumvent existing seasonal protections specifically put in place for leatherbacks. These fishery expansions present an imminent threat of increased harm to the western Pacific leatherback and makes strong protection of its foraging grounds all the more necessary.

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Meanwhile, the United States has yet to adopt any meaningful plan for reducing greenhouse gases. As a result, the United States is responsible for over 20% of the world's total greenhouse gas emissions and United States emissions continue to grow. Atmospheric carbon dioxide concentrations now stand at approximately 385 parts per million ("ppm"), up from a preindustrial revolution concentration of 280 ppm, and are rising at more than 2 ppm per year. Thus, the threat to leatherbacks from global warming has increased since the filing of the petition, and will continue to do so.

The Center, Oceana, TIRN, and their members and staff are vitally concerned about and actively involved in the protection of the leatherback sea turtle and its habitat. Our organizations' members and staff engage in professional, recreational, aesthetic, and scientific activities involving this species and its habitat, including observing and attempting to observe the species. On their behalf, we urge you to take prompt action to protect the species under the Endangered Species Act. Accordingly, an acceptable remedy would be prompt issuance of the 12-month finding on the Leatherback Petition and the concurrent publication of a proposed critical habitat designation.

The Endangered Species Act plainly requires that the Fisheries Service take timely and precautionary action to allow this species to survive and recover, including designating much-needed critical habitat to protect the western Pacific leatherback population. If the Fisheries Service does not act within 60 days to correct these violations of the Endangered Species Act, our organizations will pursue litigation in federal court. We will seek injunctive and declaratory relief regarding these violations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me. Thank you for your concern.

Sincerely,



Andrea A. Treece
Senior Attorney, Oceans Program
Center for Biological Diversity