

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

SIERRA CLUB AND SOUTH CAROLINA
WILDLIFE FEDERATION,

Plaintiffs,

v.

ELIZABETH VON KOLNITZ in her official
capacity as Chief of the Office of Coastal
Resource Management of South Carolina
Department of Health and Environmental Control,
CATHERINE HEIGEL in her official capacity as
the Director of South Carolina Department of
Health and Environmental Control, and SOUTH
CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL,

Defendants.

Civil Action No. 2:16-cv-3815-CWH

COMPLAINT

Plaintiffs, Sierra Club and South Carolina Wildlife Federation, by way of their
Complaint, would respectfully show unto this Honorable Court the following:

INTRODUCTION

1. This case is brought pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, in order to challenge actions of the South Carolina Department of Health and Environmental Control (“DHEC”) which are causing harm, injury and other unlawful “takes” of endangered sea turtles in violation of the ESA. Specifically, these unlawful takes involve interference with sea turtle nesting activities, which has occurred and will continue to occur as a result of the Defendant’s authorization of experimental sea walls

known as wave dissipation systems (“WDS”) for locations on Harbor Island and Isle of Palms, in Beaufort and Charleston counties, South Carolina.

2. By authorizing and facilitating these experimental sea walls without obtaining an Incidental Take Permit (“ITP”) pursuant to 16 U.S.C. § 1539(a)(1)(B), Defendants have taken and will continue to take federally endangered sea turtles that nest along this section of South Carolina’s beaches. See 16 U.S.C. § 1532(19).

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this case pursuant to 16 U.S.C. § 1540(g) and 28 U.S.C. § 1331, because this is an action brought under federal law to enforce provisions of the Endangered Species Act.
4. Defendants and the Secretary of the Interior were provided with at least sixty days notice of the ESA violations alleged herein, through notice letter sent via certified mail on June 15, 2016. Plaintiffs have complied with the 60 notice rule as set forth in 16 U.S.C.A. §1540(g).
5. The proper venue for citizen suits under the Endangered Species Act is the Federal District Court for the district where the controversy arises pursuant to 16 U.S.C.A. §1540(g). Venue is proper in this Court pursuant to 28 U.S.C. § 1391, because the WDS authorized by the Defendants are located in Charleston and Beaufort Counties and because Defendants are a state agency of South Carolina and officials of that agency.

PARTIES

6. Plaintiff Sierra Club is a 501(c)(3) public interest organization with tens of thousands of members nationwide. Sierra Club also maintains a chapter in South Carolina with members of the Club residing in and around the Isle of Palms and Harbor Island and

utilizing the beaches which are affected by these WDS. Sierra Club's mission is to explore, enjoy, and protect the planet; to practice and promote the responsible use of Earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

7. Plaintiff South Carolina Wildlife Federation ("SCWF") is a 501(c)(3) public interest organization particularly focused on issues concerning wildlife in the state of South Carolina. SCWF has thousands of members, some of whom also reside in and around Isle of Palms and Harbor Island and utilize the beaches at issue in this proceeding. SCWF's mission is to conserve and restore South Carolina's wildlife and wildlife habitat through education and advocacy.
8. Both of the Plaintiff organizations' missions include protecting and restoring the natural environment. In the instant matter, the Plaintiffs are specifically concerned about the continued protection for and recovery of endangered sea turtles.
9. Members of the Sierra Club and South Carolina Wildlife Federation regularly visit South Carolina beaches, including Harbor Island and Isle of Palms.
10. Members of the Sierra Club and South Carolina Wildlife Federation observe, assist, view and enjoy endangered sea turtle populations on Isle of Palms, Harbor Island, and throughout South Carolina for recreational, aesthetic and educational purposes.
11. Protection of all endangered species in South Carolina, and sea turtles specifically, is consistent with the missions of the Sierra Club and South Carolina Wildlife Federation.
12. The Sierra Club's and South Carolina Wildlife Federation's aesthetic, recreational, and organizational interest in the endangered marine turtle species listed below will be

irreparably damaged if the Defendants are allowed to continue harming and interfering with turtle habitat and nesting ability.

13. Plaintiffs have suffered a particular and concrete harm that is actual and imminent as laid out further in this complaint.

14. The harm suffered is directly attributable to the Defendants as laid out further in this complaint.

15. The harm is redressable by a favorable decision from this Court as laid out further in this complaint.

16. The Defendants are Elizabeth Von Kolnitz in her official capacity as Chief of the Office of Coastal Resource Management (hereinafter OCRM) of South Carolina Department of Health and Environmental Control (hereinafter DHEC), Catherine Heigel in her official capacity as the Director of DHEC, and DHEC, a state agency of South Carolina.

ALLEGATIONS OF FACT

17. Seawalls such as the WDS are generally banned under South Carolina's coastal law.

Section 48-39-290(B)(2)(a) of South Carolina's Coastal Zone Management Act ("CZMA") prohibits the construction of new erosion control structures or devices on the beach/dune system seaward of the state's designated jurisdictional setback line. As a result, no new erosion control structures have been constructed on South Carolina's beaches since Section 48-39-290(B)(2)(a) was passed in 1988.

18. The CZMA does allow, however, for "research activity" to be conducted on South Carolina's beaches pursuant to Section 48-39-130(D)(2).

19. In 2014, the South Carolina Legislature passed a Budget Proviso to the 2014-2015 Budget, which was renewed in identical form for the 2015-2016 Budget, opening the door for use of the WDS. 2014-2015 BP 34.51; 2015-2016 BP 34.48.
20. The Defendants subsequently authorized the installation of the WDS on Harbor Island and Isle of Palms in South Carolina, in front of several private oceanfront properties.
21. The WDS consists of vertical plastic pylons drilled into the sand and horizontal plastic bars stacked within the pylons. The WDS is basically a plastic wall running parallel with the shoreline.
22. The WDS is constructed on the active beach and prevents marine turtles from accessing the beach and dunes behind the WDS.
23. Both before the WDS was installed, and during its expansion to different sites and continued authorizations, Defendant DHEC was made aware of concerns from both state and federal resource agencies that the WDS could and did interfere with sea turtle nesting.
24. After the WDS was installed, Defendant DHEC received reports of “false crawls” caused by the WDS on both Harbor Island and Isle of Palms. “False crawls” occur when a sea turtle crawls out of the ocean and toward the dry sand beach in an attempt to nest, but is blocked and returns to the ocean without laying her eggs.
25. Defendants were provided with evidence of “false crawls” occurring as a result of the WDS, including photographs depicting sea turtle tracks leading up to WDS and then turning back and going into the ocean, without any nesting or laying of eggs.
26. Despite the evidence of harm to sea turtles, DHEC continued to authorize the use and expansion of the WDS at multiple locations on Harbor Island and Isle of Palms.

27. Defendant DHEC is the state agency charged with regulating the public trust beach where the WDS are located, and the agency has sole authority for authorizing construction in this zone. Defendant DHEC has discretion as to whether to allow installation of the WDS, including the location and duration of such devices on South Carolina's beaches.
28. The following marine turtle species are present in South Carolina: (a) The Loggerhead sea turtle (*Caretta caretta*); (b) The Kemp's Ridleys sea turtle (*Lepidochelys kempis*); (c) The Green sea turtle (*Chelonia mydas*); and (d) The Leatherback sea turtle (*Dermochelys coriacea*). All of these species are listed as either endangered or threatened under the Endangered Species Act.
29. The Loggerhead sea turtle nests along beaches in both Beaufort County and Charleston County, and Kemp's Ridleys, Green, and Leatherback turtles have also been found to nest along South Carolina beaches
30. Sea turtle nests were found on Harbor Island and Isle of Palms, where the WDS are located, during the 2016 nesting season.
31. The WDS have caused sea turtles to abort nesting attempts since their installation.
32. The WDS have caused takes under the ESA by interfering with the breeding activities and habitat of one or more of the endangered species listed in paragraph 19 of this complaint. This interference with breeding habitat is significant enough to stop or retard the recovery of the species.

FIRST CAUSE OF ACTION
(Unlawful Take—ESA Section 9)

33. Plaintiffs repeat and reallege Paragraphs 1-32 as if restated verbatim.
34. The Endangered Species Act applies to all private and public entities including individuals, state agencies, and federal agencies. 16 U.S.C.A §1538 (1988).

35. Under the Endangered Species Act, it is unlawful for any person under the jurisdiction of the United States to “take” an endangered species. 16 U.S.C.A. §1538(a)(1)(B). “Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C.A. § 1532(19). “Harm” is further defined to include significant habitat modification or degradation which “actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. §17.3.
36. Under the Endangered Species Act, 16 U.S.C.A. §1540(g), Plaintiffs may bring a civil action against Defendants for a take of an endangered or threatened species.
37. Defendants violated the Endangered Species Act by taking one or more of the endangered or threatened turtle species listed herein. The following actions caused a take of these species:
- a. Defendants authorized the installation of WDS on Harbor Island, South Carolina.
 - b. Defendants authorized the installation of WDS on Isle of Palms, South Carolina.
 - c. Defendants failed to notify the U.S. Fish and Wildlife Service of actions which they knew may result in the take of an endangered species.
 - d. Defendants neither sought nor obtained a permit from the U.S. Fish and Wildlife Service for an incidental take of an endangered species.
 - e. The WDS authorized by Defendants prevented endangered or threatened turtles from reaching nesting habitat.
 - f. The WDS authorized by Defendants blocked, redirected, and deterred endangered or threatened turtles during the attempted performance of a critical life function.
 - g. The WDS authorized by Defendants caused endangered turtles to abandon nesting

attempts, resulting in the loss of sea turtle eggs.

- h. The WDS authorized by Defendants discouraged and/or prevented endangered species from procreating.

38. Interference with nesting will retard or stop the recovery of the endangered and threatened species listed in this Complaint.

39. The Defendants caused a take of individuals of an endangered or threatened species by authorizing, facilitating, monitoring, and overseeing the WDS program, and such devices will continue to take endangered or threatened species until the Defendants require them to be removed.

40. Because of the violations of the Endangered Species Act listed in this Complaint, Plaintiffs have suffered an immediate harm in the loss of enjoyment of the turtle species mentioned herein.

41. Because of the violations of the Endangered Species Act listed in this Complaint, Plaintiffs are threatened with imminent harm from the loss of enjoyment of more individual turtles so long as the WDS remains in place.

42. Plaintiffs are entitled to injunctive relief enjoining Defendants from current and continuing violation of Section 9 of the Endangered Species Act.

43. Plaintiffs are entitled to declaratory relief stating that WDS are in violation of the prohibition on takes under Section 9 of Endangered Species Act and must be removed and prohibited.

44. Upon information and belief, Plaintiffs are entitled to an award of costs and fees against Defendants, including reasonable attorney fees in prosecuting this action.

45. The Plaintiffs have no other adequate remedy at law.

PRAYER FOR RELIEF

Wherefore, having fully set forth their allegations against Defendants, Plaintiffs respectfully request that the Court grant the following relief:

- A. An injunction requiring the immediate removal of existing wave dissipation systems from Isle of Palms and Harbor Island;
- B. An injunction prohibiting Defendants from authorizing further placement of the wave dissipation systems, or similar devices, on South Carolina beaches;
- C. Declaratory relief stating the wave dissipation systems are a violation of the Endangered Species Act;
- D. Declaratory relief stating that all devices that block turtle access to the dry sand beach must be built under an incidental take permit from the U.S. Fish and Wildlife Service;
- E. An award of Plaintiffs costs and expenses in this action, including attorneys fees; and
- F. Award such additional relief as the Court deems proper.

* * *

Respectfully submitted this 5th day of December, 2016.

s/Michael G. Corley

Michael G. Corley (Fed ID No. 10590)

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