



**SOUTH CAROLINA
ENVIRONMENTAL
LAW PROJECT**

Lawyers for the Wild Side

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Gina M. Raimondo, Secretary of Commerce
U.S. Department of Commerce
Herbert C. Hoover Bldg.
1401 Constitution Avenue, NW
Washington, DC 20230

Edward Simmer, Director
S.C. Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201

Deb Haalan, Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

Coastal Carolina University
Paul Gayes, Professor
P.O. Box 261954
Conway, South Carolina
29528

Price and Carolyn Sloan
1016 Coddington Place
Charlotte NC 28211

Mr. & Mrs. Michael J. Schulte
2526 Red Fox Trail
Charlotte, NC 28211

Anne and Mark Tiberio
512 Hermitage Court
Charlotte, NC 28207

Northwest Prop of Hickory LLC
1118 8th Street Circle
New Hickory, NC 28601

Re: 60 Day Notice of Intent to Sue Under the Endangered Species Act

Dear Secretary Raimondo, Secretary Haalan et al:

On behalf of the Coastal Conservation League, and in accordance with the 60-day notice requirement of the Endangered Species Act, 16 U.S.C. § 1540(g) ("Act"), you are hereby notified that the South Carolina Department of Health and Environmental Control (DHEC) and Edward Simmer in his official capacity as Director of DHEC, Price and Carolyn Sloan, Mark and Anne Tiberio, Michael and Laura Schulte, Northwest Properties of Hickory, LLC ("Individual Property Owners"), Coastal Carolina University and Paul Gayes, Professor, are violating the Incidental Take Permit ("ITP") requirement under 16 U.S.C. § 1539(a). The DHEC Board recently granted after-the-fact authorization of sandbags on Debidue beach, allowing them to remain permanently in place and be covered with sand under two permit exemptions in the Coastal Zone Management Act ("CZMA")¹, sought by Dr. Gayes in his capacity as professor at Coastal Carolina University.

¹ The DHEC Board's Final Agency Decision approves the activity under S.C. Code Ann. § 48-39-130(D)

The sandbags in place were installed by the Individual Property Owners. The DHEC authorization, the presence of the sandbag wall and the sandbag wall, once it is covered with sand, require an ITP and are in violation of the Act unless and until the named parties seek ITPs. If action is not taken to remedy these violations, the League will file suit no sooner than 60 days from the date of this letter.

Section 9 of the Act makes it unlawful to “take” any endangered or threatened species of fish or wildlife within the United States. 16 U.S.C. § 1538(a)(1)(B). “Take” is defined to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The National Marine Fisheries Service (“NMFS”) defines “harm” as:

An act which actually kills or injures fish and wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns including breeding, spawning, rearing, migrating, feeding or sheltering.

50 C.F.R. § 222.102.

Where a proposed activity will result in “any take of an endangered or threatened species incidental to, and not the purpose of, an otherwise lawful activity,” the project proponent is required to obtain an ITP. 16 U.S.C. § 1539(a)(1)(B).

South Carolina is home to the following marine turtles listed as either endangered or threatened under the Act: Loggerhead sea turtle (*Caretta caretta*), Kemp Ridley’s sea turtle (*Lepidochelys kempis*); Green sea turtle (*Chelonia mydas*); and Leatherback sea turtle (*Dermochelys coricea*). 50 CFR § 17.11. According to a retired South Carolina Department of Natural Resources sea turtle biologist with almost four decades of experience, loggerhead sea turtles typically lay eggs on South Carolina beaches from May through late August. During nesting season, female sea turtles emerge from the ocean and crawl onto the beach in order to find a suitable nesting location, dig a chamber and lay eggs. When those eggs hatch, the baby sea turtles crawl over the beach and back into the sea. Interference with any of these nesting activities constitutes a “take” under the Act. 16 U.S.C. § 1538(a)(1)(B). See Sierra Club v. Von Kolnitz, 2017 WL 3480777 (D.S.C. 2017).

In 2020, the Individual Property Owners installed sandbag walls seaward of their homes, but landward of an existing wooden seawall, without the required state authorization.² For over a year, DHEC’s Office of Ocean and Coastal Resource Management (“OCRM”) staff pursued

(“conservation, repletion and research activities of state agencies and educational institutions”) and § 48-39-320(C) (“a pilot project of any technology, methodology, or structure ... if it is reasonably anticipated that the use will be successful in addressing an erosional issue in a beach or dune area.”)

² Sandbags are only authorized on a temporary basis and only in emergency situations. S.C. Code Ann. § 48-39-130(D)(1)(a); S.C. Code Ann. Regs. 30-5(B).

enforcement against the owners for the illegal sandbag installation. During that time and at the behest of the Individual Property Owners, Dr. Paul Gayes of Coastal Carolina University submitted a request for a research exemption under § 48-39-320(c) to leave the sandbags in place and cover them with sand. Though the DHEC Board's Final Agency Decision, issued on February 10, 2022, cited both the research and pilot project exemptions in the CZMA, the request was originally characterized as a research project.

The DHEC-OCRM staff reviewed the request and denied it on several grounds, including that 1) the regulations allow the use of sandbags only as a temporary measure; and 2) the regulations expressly prohibit covering sandbags with sand. [cite] The property owners asked the DHEC Board to conduct a final review conference to review and reverse staff's denial. The DHEC Board granted the request and voted 3-2 to reverse the staff decision and authorize the project despite the staff's objections.

DHEC's approval allowing the sandbags to remain in place and to be covered violates the letter and spirit of South Carolina law. Yet regardless of the state law issues raised by the Board's approval, DHEC has violated the Act by failing to obtain an Incidental Take Permit prior to its approval of the Project.

The sandbag wall as it currently exists functions as a hard erosion control structure because it is shore-parallel and designed to be permanent. The sandbag wall is located behind the existing wooden seawall and currently turtles could not attempt to lay their eggs there because the existing seawall is an obstacle. However, the DeBordieu Colony Community Association is in the process of conducting a beach renourishment project, which would place sand on the beach and would cover the wooden seawall. Under the terms of the state and federal permits, the renourishment project must be completed before the start of turtle nesting season. With the renourishment sand covering the wall, sea turtles will be able to reach the sandbag wall.

We are in possession of evidence of recent turtle nesting activities on Debidue Beach. We are also in possession of evidence showing that the existing seawall on Debidue Beach has acted as a barrier to female turtles by inhibiting them from reaching nesting areas and causing "false crawls." These false crawls occur when a sea turtle crawls up to the wall then, deterred by the seawall, return to the ocean without laying her eggs. Because crawling onto the beach and searching for a nesting location is an arduous process, some sea turtles may make additional attempts to locate a nesting area, while others will simply discharge their eggs into the ocean. These false crawls have occurred for years and are continuing to occur, as evidenced by the photographs attached as Exhibit A. Once the renourishment occurs, the sandbag wall will act in the exact same manner as the existing seawall in that it will cause false crawls and thus result in takes. Unless DHEC, the Individual Property Owners, Coastal Carolina University, and Paul Gayes obtain an ITP for the presence of the sandbags and obtain an ITP before the bags are covered with sand, DHEC, the Individual Property Owners, Coastal Carolina and Paul Gayes will be subject to the civil and criminal penalties under Section 11(a) and (b) and for the violation of Section 9 of the ESA. 16 U.S.C. § 1540(a)(1).

If the above-identified violations are not remedied, the League is providing notice of its intent to bring an action seeking both an injunction against DHEC authorizations for similar installations on the beachfront and an order requiring the issuance of an ITP for the sandbag wall, or in the alternative that the structure be removed. A summons and complaint will be filed no fewer than 60 days after your receipt of this letter. Please contact me with any questions or if you wish to discuss this further.

Respectfully,



Leslie S. Lenhardt
Staff Attorney

cc: Elizabeth Von Kolnitz
Stephen Goldfinch, Esq.
Brad Churdar, Esq.

EXHIBIT A















