



**environmentaldefender's office ltd
new south wales**

**TURNING THE TIDE EXHIBITION LAUNCH
21 November 2005
THE IMPACTS OF SHARK MESHING ON
THREATENED SPECIES**

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To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- ◆ *the importance of indigenous involvement in protection of the environment.*

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THE IMPACTS OF SHARK MESHING ON
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21 November 2005

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The purpose of this paper is to give a very brief introduction to some of the legal issues surrounding the operation of the NSW beach meshing program, in particular, the impacts of the program on marine species which are protected under Australian law.

1. AUSTRALIA AS WORLD-LEADER

Australia is recognised internationally as a world-leader in relation to the protection of marine species. At an international level, Australia is a party to a number of important conventions which aim to conserve and protect the marine environment. On national and State levels, Australia has strong laws recognising, protecting and assisting the recovery of threatened marine species. However, those laws and international obligations are potentially breached by the continued operation of the shark control programs on the beaches of NSW and Queensland.

2. IMPACTS ON THREATENED SPECIES

Since the protective beach nets were first installed on NSW beaches in 1937 and in 1961 in Queensland, thousands of sharks and other species have been caught in the nets. One of the main problems with the NSW and Queensland beach meshing programs is the significant impact the nets have on non-target species or by-catch, several of which are listed threatened species and protected under State and federal laws. For every dangerous shark which is caught, potentially hundreds of harmless species are also killed.

By-catch in the beach nets includes sharks which are harmless to humans, such as the Grey Nurse shark and the Port Jackson shark, as well as other species including whales, dolphins, dugongs, rays, turtles and fin fish. When non-target sharks and marine mammals are found caught in the nets they will be released if they are alive, otherwise they will die in the nets and be dumped at sea.

In July last year, the death of a baby humpback whale which drowned in a Gold Coast shark net was well publicised.¹ Another baby humpback died in the Gold Coast nets in August this year.²

¹ See Australian Marine Conservation Society Media Release 17 July 2005, Juvenile whale sacrificed for peace of mind”; *Daily Telegraph* 20 July 2004, “Remove the nets expert call for change as baby whale dies; Australian Marine Conservation Society Media Release 7 September 2004 “When will the slaughter end?”.

² *The Age* 2 August 2005 “Whale mum mourns calf”.

“Death or injury to marine species following capture in shark control programs on NSW ocean beaches” has been listed under the *Fisheries Management Act 1994 (NSW)* and the *Threatened Species Conservation Act 1995 (NSW)* as a Key Threatening Process.³ This means that the NSW Fisheries Scientific Committee has found that the NSW shark control program:

- (a) adversely affects 2 or more threatened species, populations or ecological communities, or
- (b) could cause species, populations or ecological communities that are not threatened to become threatened.⁴

The listed threatened species identified by the Scientific Committee as being adversely affected by the shark nets are the Grey Nurse Shark and the Great White Shark. Both of which are protected species. The Scientific Committee has also found that the shark nets could cause species which are not threatened to become threatened.

The Grey Nurse shark is NSW’s most endangered shark. It became the world’s first protected shark in 1984 under NSW legislation.⁵ In NSW it is listed as endangered and at the Commonwealth level, the east-coast population of the species, which is found in southern Queensland and along the NSW coast, is listed as critically endangered, facing extinction.⁶ Estimates of the numbers of Grey Nurse shark vary, but there are thought to be between 200-500 left.⁷ There are a number of critical habitat sites for Grey Nurse sharks in NSW, including one at Magic Point near Maroubra.⁸ The NSW Fisheries Scientific Committee has noted that the shark nets are at times placed close to this designated critical habitat.⁹

The Scientific Committee acknowledges that with such a small population, the loss of any individual of this species has a serious effect on the recovery of the population.¹⁰ While an average of only one Grey Nurse shark is caught in the nets every year, with such few numbers left, this alone has a significant impact on the species. In September last year two adult female Grey Nurse sharks were killed in the shark nets.¹¹

³ “The current shark meshing program in New South Wales waters” has been listed in Schedule 6 of the *Fisheries Management Act 1994 (NSW)*; “Death or injury to marine species following capture in shark control programs on ocean beaches (as described in the final determination of the Scientific Committee to list the key threatening process)” has been listed in Schedule 3 of the *Threatened Species Conservation Act 1995*.

⁴ Section 13 *Threatened Species Conservation Act 1995*.

⁵ First listed as vulnerable in October 1999 pursuant to the specification in Division 1 of Schedule 4 to the *Fisheries Management Act 1994 (NSW)*, the status was upgraded to endangered in April 2000. The GNS was first listed as a protected fish in NSW in 1984 under the *Fisheries and Oyster Farms Act 1935 (NSW)*. This was the first time that a shark species had been protected anywhere in the world.

⁶ Pursuant to s 178 *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*.

⁷ Environment Australia., *Recovery Plan for the Grey Nurse Shark (Carcharias taurus) in Australia*, June 2002, p. 6.

⁸ See the register of critical habitat and buffer zones for the Grey Nurse Shark at

http://www.fisheries.nsw.gov.au/threatened_species/general/species/gns_critical_habitat_and_buffer_zones

⁹ Fisheries Scientific Committee, *Final recommendation – current shark meshing program in New South Wales waters*. Viewed at http://www.fisheries.nsw.gov.au/_data/assets/pdf_file/5262/FR-24-Shark-Meshing.pdf

¹⁰ *Ibid*.

¹¹ Humane Society International Inc, News Release, 29 September 2004: *Shark death toll continues to rise: Shark nets claim two critically endangered Grey Nurse Sharks*. Viewed at <http://www.hsi.org.au/>.

Other threatened species which are caught in the nets include dugongs and loggerhead turtles, which are listed as endangered species, green turtles, leatherback turtles, humpback whales and Australian fur seals, which are listed as vulnerable under NSW law.¹² Loggerhead and green turtles are also protected under federal legislation.¹³

As for the Great White Shark, whilst the species is recognised as being dangerous to humans, the species is protected both internationally and nationally.¹⁴ It is listed as vulnerable under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and the NSW *Fisheries Management Act*.¹⁵ The Great White shark is also listed as endangered on the *Convention on Migratory Species* to which Australia is a party. This listing obliges parties to the Convention:

- a) to conserve and restore those habitats of the species in order to remove the species from the danger of extinction; and
- b) to prevent or reduce factors that are endangering the species. One such factor is shark nets.

A Conference of the Parties to the *Convention on the Conservation of Migratory Species of Wild Animals* is being held in Nairobi this week and Australia has called for the development of a Global Agreement for the protection and recovery of the Basking, Great White and Whale Sharks.¹⁶ Australia is also calling for the development of a memorandum of understanding in the Pacific Ocean for the protection of marine turtles, which are regularly caught in the shark nets.

Given that a number of marine species which are regularly caught in the shark nets are protected under federal law, the Humane Society International Inc nominated death or injury to marine species due to the NSW and Queensland shark meshing programs as a key threatening process under federal legislation.¹⁷

The Commonwealth Threatened Species Scientific Committee found that although any death or injury to a Grey Nurse Shark would be likely to have a significant impact on the population, the death of Grey Nurse Sharks in shark nets and drumlines is not likely to cause the species to be eligible to move up to the next category of threatened species listing, which is extinct in the

¹² See the threatened species schedules of the *Fisheries Management Act 1994* (NSW). Viewed at http://www.fisheries.nsw.gov.au/_data/assets/pdf_file/11799/ts_schedules_1-05.pdf

¹³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) List of Threatened Fauna. Viewed at <http://www.deh.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=fauna>

¹⁴ Listed as vulnerable under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth); listed on Appendix 1 of the *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn Convention) as endangered.

¹⁵ See *Environment Protection and Biodiversity Conservation Act 1999* listing viewed at http://www.deh.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id=64470; *Fisheries Management Act 1994* listing viewed at http://www.fisheries.nsw.gov.au/threatened_species/general/species/Grey_Nurse_Shark

¹⁶ Humane Society International Inc News Release, 21 November 2005 “HSI to help Australia broker deals for strengthened shark, turtle, dugong and whale protection”.

¹⁷ See list of unsuccessful nominations viewed at <http://www.deh.gov.au/biodiversity/threatened/nominations/shark-control-programs.html>

wild.¹⁸ Accordingly, the threshold which the Scientific Committee applies when considering nominations for threatening process listing is that a process such as shark netting, which has an adverse impact on a species listed as critically endangered, will not be listed as a Key Threatening Process unless it causes the species to become extinct. This threshold is dangerously high and has no regard for the precautionary principle.¹⁹

The Commonwealth Recovery Plan for the Grey Nurse Shark,²⁰ which was prepared in 2002, states that shark netting has a significant impact on the Grey Nurse Shark and recommends that alternative methods of shark control be trialed.²¹ This has not yet occurred.

3. LEGAL ISSUES ARISING FROM THE REMOVAL OF SHARK NETS

I have also been asked to comment on whether the NSW Government, which is responsible for the beach meshing program in NSW, would be liable in the event that it ceases the beach meshing program and provides no alternative form of protection to swimmers and a person is injured by a shark.

It is the opinion of the Environmental Defender's Office Ltd that it is unlikely that the NSW Government could be held liable for injury to a swimmer by a shark following removal of the shark nets. This is primarily due to the operation of provisions of the *Civil Liability Act 2002* (NSW) which relate to "inherent risks" of activities²², recreational activities²³ and public authorities²⁴.

In our view, the NSW Government does not owe a duty of care to swimmers to protect them from shark attack. If any duty of care arises, it would be due to the reliance by a swimmer on the presence of shark nets at the beach. Such a duty could be fulfilled by erecting warning signs on beaches which are currently netted stating that the nets are no longer in place.

4. CONCLUSION

Although Australia has strong laws in place for the protection of threatened marine species, the beach meshing programs in NSW and Queensland have had an adverse impact on many marine species, a large number of which are threatened and protected under State and federal laws. Beach meshing has contributed to some of these species being listed as threatened.

The continuation of beach meshing both breaches laws protecting threatened species and could contribute to those species already listed being moved to higher levels of endangerment.

¹⁸ *Ibid.*

¹⁹ As defined in Principle 15 of the Rio Declaration on Environment and Development (adopted in 1992 by the United Nations Conference on Environment and Development [UNCED] in Rio De Janeiro as "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

²⁰ Environment Australia, *Recovery Plan for the Grey Nurse Shark (Carcharias taurus) in Australia*, June 2002.

Viewed at <http://www.deh.gov.au/coasts/publications/grey-nurse-plan/index.html> .

²¹ *Ibid.*, p. 14.

²² Section 5L.

²³ Section 5M.

²⁴ Section 43A.

The NSW Government should act now to stop the continued killing of threatened species in the shark nets. The excuse of public liability can no longer be used to justify the continued operation of the beach meshing program.