



September 22, 2005

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U.S. Department of the Interior
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RE: Cape Hatteras Closures

Dear Mike:

I am writing to address the proposal of the Cape Hatteras Access Preservation Alliance ("CHAPA") to open certain areas of the Cape Hatteras National Seashore ("CHNS") to public use. We understand the National Park Service is seriously considering this request to reduce protections for these sensitive habitat areas in the near future.

Defenders of Wildlife continues to be amazed by the Park Service's willingness to entertain such requests during a period of continued non-compliance with the Endangered Species Act ("ESA"), two presidential executive orders, and numerous federal laws and regulations concerning off-road vehicle use at the seashore. Much of CHNS is already open—albeit illegally—to off-road vehicles. As long as threatened piping plovers continue to rest and feed in these remaining protected areas, it defies logic that the Park Service would consider opening them to recreational use.

As we have previously noted, given NPS's failure to promulgate a management plan for ORV use or designate specific ORV trails and areas as required by executive orders and regulation, the issue is not whether NPS has the authority to close beaches to protect wildlife; to the contrary, the issue is whether NPS has the authority to permit ORV use *at all*. The NPS has itself recognized the likelihood of litigation "for failure to comply with Executive Orders 11,644 and 11,989 and with 36 C.F.R. 4.10. The privilege of beach driving is very vulnerable to a suit of this kind. It is not hard to imagine a federal judge ordering the suspension of beach driving until Cape Hatteras NS has complied with these orders and regulations."¹

CHNS cannot continue to violate the law by making decisions on beach access on an ad hoc basis without benefit of formal consultation or a biological opinion to guide these determinations. The Recovery Plan for the piping plover specifically calls for protection of "essential wintering

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¹ NPS, CHNS, Talking Points: ORV Use and the Beach-Driving Fee Permit Issue, available at <http://www.nps.gov/caha/beachpermit.htm>.

habitat by preventing habitat degradation and disturbance” including protecting such habitat “from disturbance by recreationists and their pets.”² In the words of the plan, “[w]here a site-specific evaluation determines that recreation poses a threat to plovers, appropriate protection measures should be implemented.”³ Existing plover habitat has been degraded through ORV use and further reductions of protected areas without consultation would raise serious legal issues.⁴

Section 7(a)(2) of the ESA requires that all federal agencies consult with the FWS to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.”⁵ An agency’s duty to consult under this Section 7(a)(2) is triggered whenever it is determined that an action “may affect” a threatened or endangered species.⁶ As courts have held: “The burden is on the Federal agency to show the absence of likely, adverse effects to listed species or critical habitat as a result of its proposed action in order to be excepted from the formal consultation obligation.”⁷

It should be readily apparent that opening occupied habitat to off-road vehicles “may affect” the piping plover. Whether these effects rise to the level of “take” is admittedly unclear, and thus warrants formal consultation with the FWS. Moreover, permitting such impacts to species habitat is inconsistent with the Park Service’s overarching obligation under Section 7(a)(1) to “utilize [its] authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species.”⁸ Under Section 7(a)(1), courts have held that an agency “has a specific, rather than a generalized duty to conserve species.”⁹ Opening areas to recreational use in a “may affect” situation without consultation with FWS violates the ESA.

The *Volusia County* case cited by CHAPA is not to the contrary.¹⁰ Evidence of harm to listed species is a fact-specific inquiry. Volusia County is a highly-developed area with erosion-prone beaches and numerous artificial seawalls. That the plaintiffs in the *Volusia* case failed to present sufficient evidence of direct or indirect harm to plovers does not foreclose the possibility that different conditions at CHNS could yield a different result

² Recovery Plan at 84-85.

³ *Id.* at 85.

⁴ Use of CHNS by Great Lakes piping plovers also implicates the Great Lakes Recovery Plan, which calls for reductions of disturbance to piping plovers at wintering sites. That plan states as follows: “As on the breeding grounds, public land managers should use recreation management techniques such as vehicle and pet restrictions and psychological fencing to reduce disturbance and risk of take of piping plovers during winter.” U.S. F&WS, Recovery Plan for the Great Lakes Piping Plover (2003), at 68.

⁵ 16 U.S.C. § 1536(a)(2).

⁶ 16 U.S.C. § 1536(a)(3); 50 C.F.R. § 402.12 - 402.14.

⁷ *Florida Key Deer v. Stickney*, 864 F. Supp. 1222, 1229 (S.D. Fla. 1994) (quoting 51 Fed. Reg. 19,949-950 (June 3, 1986)).

⁸ 16 U.S.C. § 1536(a)(1).

⁹ *Florida Key Deer v. Brown*, No. 90-10037, 2005 U.S. Dist. LEXIS 5981, at *25 (S.D. Fla. March 29, 2005).

¹⁰ *Atlantic Green Sea Turtle v. County of Volusia*, No. 6:04-cv-1576-Orl-31KRS (Dec. 21, 2004).

in court. Indeed, significant differences in both habitat and management exist between CHNS and the Smyrna Dunes of Volusia County.

Beach driving is highly regulated in Volusia County. Unlike CHNS, Volusia County complied with the ESA by preparing a habitat conservation plan (“HCP”) for sea turtles and obtained an incidental take permit for beach driving and night lighting in 1996. The county is currently working to amend that plan to provide for the conservation of wintering piping plovers.¹¹

Also unlike CHNS, prime habitat areas for turtles and shorebirds in Volusia County are permanently closed to off-road vehicle traffic.¹² Volusia County prohibits night driving, which protects turtles and minimizes disturbance to shorebirds. Vehicle access is permitted only from sunrise to sunset, Nov. 1 through April 30 and from 8 a.m.-7 p.m., May 1 through Oct. 31.¹³ Additionally, Volusia County imposes a \$5 per day per vehicle user fee to drive on the beach from February 1 through November 30 and charges \$20 for season beach passes for Volusia County residents and \$40 for non-residents.¹⁴ Driving and parking are permitted only along designated lanes and spaces.

Furthermore, Volusia County is not subject to the National Park Service’s explicit mandate to protect its wildlife resources for future generations. As my previous letters have discussed in greater detail, the NPS Organic Act grants the agency broad authority to

regulate the use of the Federal areas known as national parks, monuments, and reservation ... by such means and measures as conform to the fundamental purposes of said parks ... which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1 (emphasis added). Under the General Authorities Act of 1970, “[t]he authorization of activities shall be conducted in the light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.” 16 U.S.C. § 1a-1. And the CHNS Organic Act states that “except for certain portions,” the park “shall be permanently reserved as a primitive wilderness” and prohibits activities “which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions now

¹¹ USFWS, News Release, Revised Habitat Conservation Plan and Environmental Assessment for Incidental Take Permit Renewal Application for Volusia County, Florida, available at <http://www.fws.gov/northflorida/Releases-05/001-05-NOA-Volusia-Renewal-022505.htm>. (EXHIBIT 1).

¹² Volusia County, Beach Driving and Parking, available at <http://volusia.org/beach/beach2.htm#bd> (dividing the beach into natural, transitional and urban zones and noting that “the Natural zones generally correspond to the areas where off-beach development is less intense. The dune habitats within this area largely are intact. These areas also have the highest concentration of turtle nests on Volusia beaches. Public driving and parking is not allowed in the Natural beach areas.” (EXHIBIT 2)).

¹³ Id.

¹⁴ Id.

prevailing in this area.” 50 Stat. 669 (1937). Volusia County must comply with the ESA, but it is not subject to the higher standards applicable to the National Park System.

To be blunt, Volusia County more closely resembles Nags Head or Ocean City than it does CHNS. A more apt comparison might be to Canaveral National Seashore which is adjacent to the Volusia’s Smyrna Dunes, harbors both sea turtles and wintering plovers, and bans beach driving entirely. The *Volusia County* case clearly does not compel CHNS to open additional habitat areas to off-road vehicle use.

Additionally, CHAPA’s alarmist claims of economic harm due to maintenance of these protected areas cannot be taken seriously.¹⁵ For example, in their April 20 letter, attorneys Lawrence Liebesman and Rafe Petersen argued that limited closures to protect piping plovers during the breeding season would “devastate” the local economy “through loss of tourist dollars, reduction in real estate values, and the need to raise taxes to replace lost revenue.” Letter from Messrs. Liebesman and Petersen to Mark Hardgrove and Peter Benjamin, April 20, 2005, regarding Proposed Beach Closures at Cape Hatteras National Seashore. In reality, the closures that were ultimately implemented had virtually no impact on the local economy.

According to Carolyn McCormick, managing director of the Outer Banks Visitors Bureau, Dare County had a very successful summer season. “We’ve had the best year ever in the history of the Outer Banks,” she told *The Coastland Times*. Jessica Hamrick, *Numbers Show Good Summer Season*, *The Coastland Times*, September 20, 2005 (Exhibit 3). The paper reported that income from meals surged 8 percent in June and July over last year and occupancy rates increased 10 percent from \$77 million in 2004 to \$88 million this year. All this occurred despite seasonal closures of popular CHNS beaches and a 20 percent increase in average fuel costs, which increases the cost of travel. CHAPA’s claims of economic impact are belied by the facts.

Likewise, no weight can be given to CHAPA’s purported survey of residents and visitors of the lower Outer Banks. *See* Letter from Lawrence Liebesman to Mike Stevens, Sept. 9, 2005 (Exhibit 5). The survey’s author, SDR Consulting, thus far has refused to publicly release the complete report, data or methodology.¹⁶ But without access to the survey methodology, it is impossible to address the claims of the survey, which on their face appear fanciful in light of actual economic data from this past summer. One cannot determine from the executive summary alone whether the survey is based on a representative sample of respondents or whether these respondents may have been motivated to overstate the impacts of ORV restrictions for political reasons.

¹⁵ As we have previously noted, ORV users comprise a small percentage of the millions of visitors who flock to CHNS each year to enjoy the seashore’s spectacular beaches and scenic lighthouses, and to engage in recreational activities such as bird and wildlife viewing, fishing and hunting, hiking, camping, surfing, and boating. According to a recent visitor survey, ORV users make up between 7.3% and 11% of all CHNS visitors. Hans Vogel song, *Cape Hatteras National Seashore Visitor Use Study* (Aug. 2003) at 12.

¹⁶ A call to SDR Consulting requesting this information was rebuffed by consultant William Neal with a gruff admonition to contact their lawyers. Telephone conversation between Jason Rylander, DoW, and William Neal, SDR Consulting, Sept. 21, 2005.

Moreover, the executive summary characterizes the study results as describing the impact of a “single event—denying beach access to licensed off-road vehicles” and repeatedly refers to this event as a “ban” on beach driving. That was not the case this summer when Dare County enjoyed record tourism revenues, and it is most certainly not the case now with significant ORV access allowed at Bodie Island, Hatteras Spit, and Cape Point, among other areas of the seashore. Even if one assumes *arguendo* that the study accurately reflects public attitudes and intentions with respect to a complete ban on off-road vehicle use at CHNS, it is not clearly applicable to the present debate. No one is currently advocating such a ban.

Conclusion

In short, there is no compelling reason to reduce the remaining limited protected areas at CHNS to mollify a vocal minority of park users. Doing so risks potential take of a threatened species, violates the ESA’s consultation and conservation requirements, and is unfaithful to the Park Service’s core mandate to protect America’s natural resources for future generations at the same time that it provides for public recreation. The Seashore’s continued willingness to bow to political pressure from ORV groups is frankly dispiriting. It raises serious concerns about CHNS’s intended approach for interim management and casts doubt on the likelihood of success for the upcoming negotiated rulemaking process. As we have stated previously, the long term success of any negotiated rulemaking depends on the Service’s ability to address interim management issues in a manner that complies with the ESA and other federal laws. Further reduction of protected areas only increases the chances of litigation to compel compliance with these statutes.

Defenders of Wildlife strongly urges the Park Service to reject this latest request to reduce protections for the wildlife of CHNS. The Service should focus its attention instead on complying fully with the ESA and other federal laws.

Sincerely yours,



Jason Rylander
Staff Attorney

cc: Patrick Reed (CHNS)
David Smith (DOI)
Peter Benjamin (FWS)
Mark Hardgrove (CHNS)
Mary Doll (CHNS)

Exhibits