

To: Subcommittee on National Parks, Forests, and Public Lands of the House Committee on Natural Resources  
From: Virginia L. Luizer, P.O. Box 1092, Buxton, NC, 27920—(252) 995-4968  
Date: September 9, 2008  
Re: Testimony In Support Of House Bill 6233 And Senate Bill 3113 To Reinstate The Interim Protected Species Management Strategy At Cape Hatteras National Seashore Recreational Area (CHNSRA)

Please enter the following as testimony in support of House Bill 6233 and Senate Bill 3113 to reinstate the Interim Protected Species Management Strategy at CHNSRA. As I will demonstrate below:

1. there is a precedent for the requested legislation,
2. despite the continued pressure from SELC, DOW and Audubon (hereafter referred to as SELC), NPS has made significant progress in the new rulemaking process,
3. the modifications to the Interim Protected Species Management Strategy that resulted from the consent decree violate the Federal Code of Regulations and NEPA, and
4. the USGS Protocols are not binding.

### **PRECEDENT**

Executive Orders 11644 and 11989 issued in 1972 and 1977 respectively required all agency heads to develop rules to manage the use of ORVs on federal lands. Executive Orders 11644 and 11989 have been the subject of continued litigation. For example, in 1999 Bluewater Network filed a petition asking the courts to require the NPS to develop a special rule for ORV use. It was in direct response to this petition that on July 20, 2000, Denis P. Galvin, Deputy Director, NPS, DOI spoke to this committee regarding the DOI's intent to follow the existing rules on snowmobile use in the national parks until such time that new rulemaking was completed."<sup>1</sup> In 2005 Bluewater Network filed a request to enjoin ORV use at all National Parks not in compliance with Executive Orders 11644 and 11989. It was in response to this request for injunction that Congress passed legislation to authorize snowmobile use at Yellowstone National Park. Based upon the intention of CHNSRA to enter into a negotiated rulemaking process, Bluewater Network exempted CHNSRA from the request for injunction allowing CHNSRA to continue to manage ORVs under existing rules.<sup>2</sup> As of this date, Bluewater Network has settled its lawsuit. In this regard, Bluewater has not objected to Glen Canyon National Recreation Area in Utah or Cape Lookout National Seashore in North Carolina continuing to apply existing rules so long as they continue to work toward completion of the rulemaking processes that are underway.<sup>3</sup> Quite simply, there is ample precedent for allowing park units to follow existing rules while completing the new rulemaking process.

### **RULEMAKING PROGRESS AT CHNSRA**

CHNSRA had made several attempts to comply with Executive Orders 11644 and 11989 between 1978 and 1999. The newest attempt began in 2001 when NPS contracted four studies<sup>4</sup> designed to provide a scientific basis for managing recreation and ORV use at CHNSRA. These studies were presented to the public in 2003. In February 2005, NPS announced its plan to run a traditional rulemaking process and a negotiated rulemaking process simultaneously. In that same year, in response to increasing pressure from DOW and Audubon to do more to protect sensitive species and from visitors objecting to the ever-increasing and unpredictable resource closures, NPS proposed an interim plan designed to "protect sensitive species and provide for recreational use ... until a long-term ORV management plan/EIS is developed."<sup>5</sup> Despite the temporary nature of the proposed interim

plan, NPS adhered to all NEPA requirements including conducting multiple public meetings, providing multiple opportunities for public comment, and providing hard copies of the 300 plus page Environmental Assessment to all interested parties. The Interim Protected Species Management Strategy was finalized in July 2007 when USFWS issued a “no jeopardy” opinion and the Atlanta office of the NPS issued a “finding of no significant impact”. Should you still have doubts as to whether the Interim Plan provides the type of ORV management required by NPS mandates, consider the background in support of Warren Judge’s testimony to the Subcommittee On National Parks Of The Senate Committee On Energy, the Interim Protected Species Strategy submitted on July 30, 2008. In this document Attorney Liebesman makes a compelling argument that the Interim Protected Species Strategy, when combined with other park management policies, serves the intended purpose of providing the type of ORV management policies required by Executive Orders 11644 and 11989.<sup>6</sup>

On October 18, 2007 SELC filed a lawsuit challenging the adequacy of the Interim Protected Species Management Strategy. At the January 2008 Negotiated Rulemaking Committee meetings the public and committee members responded by challenging SELC’s commitment to the negotiated rulemaking process and accusing SELC of attempting to compromise the negotiation process. SELC responded by noting that the decision to file the lawsuit was made prior to the establishment of the negotiated rulemaking committee. SELC went so far as to state that there was no reason to expect that the negotiated rulemaking committee would be approved. While the establishment of the negotiated rulemaking committee was not published in the federal register until December 2007, the following facts demonstrate that there was every reason for SELC to expect that the negotiated rulemaking committee would be approved and for SELC to act accordingly.

1. SELC, DOW, and Audubon were all included in proposed negotiated rulemaking stakeholder list published on April 4, 2006.
2. The Negotiated Rulemaking Feasibility Analysis dated April 4, 2006 clearly stated that legal action on the part of stakeholders had the potential to compromise good faith negotiations among the committee members.<sup>7</sup>
3. Recognizing the potential impact of their involvement in the Bluewater lawsuit discussed above, another applicant to the committee, the National Parks Conservation Association, exempted CHNSRA from the Bluewater lawsuit. Despite the fact that the National Parks Conservation Association was never appointed to the committee, they did not rescind the exemption.<sup>8</sup>

On February 20, 2008 SELC filed a request to enjoin ORV use at the most popular areas of CHNSRA. This action was taken despite the facts:

1. that SELC accepted membership in the negotiated rulemaking committee,
2. that SELC participated in the development of a draft of ground rules, including one that called for members to refrain from using the courts to settle disputes, and
3. that the above-referenced ground rule was developed because of the potential for legal actions to compromise good faith negotiations.<sup>9</sup>

SELC defended their actions by asserting 1) that the ground rules had not been formally approved, and 2) that the lawsuit and the request for injunction were based solely on alleged deficiencies in the Interim Protected Species Management Strategy as opposed to the long-term ORV management plan/EIS. While the first assertion is clearly splitting hairs, the second assertion is not consistent with the facts. Stated more specifically, the request for injunction repeatedly states that one of the reasons ORV use should be enjoined is because CHNSRA does not have a long-term ORV management

plan/EIS. As such, SELC alleges that CHNSRA is not in compliance with Executive Orders 11644 and 11989.<sup>10</sup> As further evidence that the request for injunction is not based solely upon the alleged deficiencies Interim Protected Species Management Strategy, consider the fact that the absence of a long-term ORV management plan/EIS was the single factor Judge Boyle cited when he stated that he was inclined to issue the requested injunction on April 4.<sup>11</sup>

As predicted in the negotiated rulemaking feasibility analysis of 2006, the set of events described above have had a significant negative impact on the process of negotiating a long term ORV management plan/EIS. The final act of sabotage, however, involved not just SELC but the governmental agencies that we are expected to trust with the final say over a long-term ORV management plan/EIS that balances resource protection with recreational uses of the Seashore—that is, NPS, USFWS, and DOI. The act of sabotage to which I refer consists of six weeks of negotiations regarding modifications to the duly authorized Interim Protected Species Management Strategy that were conducted without the knowledge of either the Interveners in the case or the negotiated rulemaking committee.<sup>12</sup> The exclusion of the negotiated rulemaking committee not only served to compromise the rulemaking negotiations but, ultimately led several negotiated rulemaking committee members to call for the removal of SELC, DOW, and Audubon from the committee.

On April 4, 2008, Judge Boyle did instruct SELC to permit the Interveners to come to the table regarding the negotiated modifications to the Interim Protected Species Management Strategy.<sup>13</sup> The Interveners, however, came to the table knowing full well that the Judge was ready to issue the injunction and thus, were at a distinct disadvantage. Even more appalling is the fact that the Interveners were not permitted to take the agreement to their respective constituencies prior to the final filing of the agreement (consent decree) on April 16, 2008.<sup>14</sup> Given the potential impact of the injunction and without input from their constituencies, the Interveners took the only reasonable course of action—that is, they signed the decree and put the best face on it lest the judge refuse to accept the decree. Based upon the two court orders that followed on April 19 and April 22, Judge Boyle's acceptance of the decree was far from certain.

The bottom line is this, during the past 7 years NPS has finalized a rule that will allow NPS to fulfill its mandate to balance resource management with appropriate public access—that is, the Interim Protected Species Management Strategy. At the same time, NPS has made considerable progress in the development of the long-term ORV management plan/EIS. This progress is nothing short of amazing considering the time spent in court and the added demands placed upon management by consent decree requirements. Finally, despite the distrust bred by SELC's demands and the lack of openness regarding the settlement of the SELC lawsuit, the committee has agreed to continue their deliberations and to try to reach consensus on as many of the issues as is possible.<sup>15</sup> While it would be preferable to have a rule that was based upon consensus among the negotiated rulemaking committee members, this consensus is not a prerequisite to the successful completion of the long-term ORV management plan/EIS. In fact, based upon the progress made to date and the obvious commitment to this project, there is every reason to expect that the current effort to complete the long-term ORV management plan/EIS will be successful.

## **VIOLATIONS OF THE FEDERAL CODE OF REGULATIONS AND NEPA**

As per the consent decree, NPS conceded one point only, “that a special regulation designating ORV routes and areas at the Seashore has not yet been issued.”<sup>16</sup> Stated more specifically, NPS was quite clear that their decision to enter into the consent decree was not to be taken as any admission or final adjudication of the issues of fact or law with respect to the Plaintiffs' claims regarding the Interim

Protected Species Management Strategy.<sup>17</sup> In fact, the rationale for brokering the agreement was that Judge Boyle had already stated that in the absence of a special regulation designating ORV routes and areas, ORV use at CHNSRA is not legal.<sup>18</sup> Based upon this understanding of NPS's position, I was shocked and dismayed when Mr. Wenk, Deputy Director, NPS, DOI told the Subcommittee On National Parks Of The Senate Committee On Energy And Natural Resources that the DOI could not support the Senate Bill (3113) to reinstate the duly authorized, NEPA compliant Interim Protected Species Management Strategy.<sup>19</sup> Quite simply, I expected Mr. Wenk to respond in the same fashion as Mr. Galvin did in 2000 and support the rule that resulted from the NEPA process designed to produce rules that strike the balance between resource protection and other uses of the park. I found it even more offensive that two other agencies (Office of Management and Budget and the President's Council on Environmental Quality) that were not a party to the consent decree and that are responsible for implementing NEPA supported Mr. Wenk's position.<sup>20</sup>

### **Public Use of the Park**

Title 36 of the Code of Federal Regulations states that when closures are of a "magnitude and duration that will result in a significant alteration in the public use pattern of the park area" or "are of a highly controversial nature", such closures are to be "published as rulemaking in the Federal Register."<sup>21</sup> The changes in public use patterns resulting from the consent decree have been significant. For example, during the period of May 5 through August 14, the implementation of the consent decree resulted:

1. in the effective closure of anywhere from 35 to 48% of the beaches normally available to ORV users (see Appendix A),
2. in the effective closure of anywhere from 20 to 30% of the beaches normally open to pedestrians, and
3. in the effective closure of the most popular areas (the point and the four inlet spits).

With respect to the nature of the closures resulting from the consent decree, obviously, the closures have proven to be extremely controversial. As such, the modifications resulting from the Consent decree should have been subjected to the rulemaking process.

### **Section 9 Exception Does Not Apply**

Executive Orders 11644 and 11989, do not alter the above noted rulemaking requirements but rather are intended to further the purposes of NEPA.<sup>22</sup> The only exception to rulemaking is provided in Section 9. Section 9 provides that agency heads can unilaterally close Off Road Vehicle Use areas but only if it is determined that Off Road Vehicle use is causing or will cause "considerable adverse effects" on the resource. SELC alleged that, based upon a comparison of bird populations in 1999 and 2007, Off Road Vehicle use has caused the type of "considerable adverse effects" noted in Section 9.<sup>23</sup> As demonstrated below, the facts do not support the alleged "considerable adverse effects" of Off Road Vehicle use.

NPS began implementing the portions of the Interim Protected Species Management Strategy as early as 2005. These management policies differed considerably from past practice. The being the case, analysis of current management policies should be limited to 2005 through 2007. In this regard consider the following facts:

1. The false crawl ratio for 2007 included 24 false crawls that occurred in an area closed to recreational use.<sup>24</sup> USFWS suggested that any efforts to ascertain the impact of recreational use should not include the observations from this area.<sup>25</sup> Following USFWS's recommendation, the recalculated false crawl ratio is 1.09:1.
2. The recalculated 2007 false crawl ratio of 1.09:1 is comparable to the 7 year average false crawl ratio of 1.04:1.<sup>26</sup>
3. The recalculated 2007 false crawl ratio of 1.09:1 is not only well below the reinitiation trigger, it is very close to the Interim Plan goal of 1:1.
4. The number of breeding pairs of Piping Plover has been trending upward since 2003.<sup>27</sup>
5. USFWS anticipates that this trend will continue and attributes the increases to the implementation of the Interim Protected Species Management Strategy.<sup>28</sup>
6. The Piping Plover fledge rate for 2007 (.67) exceeded the 10 year average for the period of 1994 to 2003 (.607).<sup>29</sup>
7. The Oystercatcher population has been steady for the last 3 years (22, 21, 24 in 2007, 2006, and 2005, respectively).<sup>30</sup>
8. The Oystercatcher fledge rate for the last 3 years (.43) has exceeded the average for the past 10 years (.37).<sup>31</sup>
9. Colonial Waterbird numbers continue to be highly variable with a significant number exhibiting a preference for newly created dredge islands.<sup>32</sup>

Based upon the above data, there is no justification for supplanting the NEPA compliant Interim Protected Species Management Strategy with a modified version that has not been subjected to the rulemaking process.

### **Consent Decree Fails to Provide a Balance Between Benefits and Costs**

The rulemaking process is designed to produce rules that balance the benefits derived from resource protection with the costs associated with the proposed protective measures. As I will demonstrate below, the failure to attempt to project the probable benefits to the resource and the cost associated with the new policies has not resulted in the balance sought by the rulemaking process.

As Mr. Wenk acknowledged during his testimony to the Subcommittee On National Parks Of The Senate Committee On Energy And Natural Resources, three months is clearly not enough time to evaluate the impact any policy change will have on bird or turtle populations.<sup>33</sup> That said, it is possible to make some preliminary evaluations with respect to the impact the consent decree has had on bird and turtle productivity. As you will recall, the major change resulting from the consent decree involved significant increases in the recreational free buffers provided in nesting areas. Based upon the fact that there were fewer storms during the 2008 nesting season<sup>34</sup> and assuming that the new policies will halt the alleged declines of birds and turtles,<sup>35</sup> 2008 productivity measures would be expected to show significant improvement. Upon reviewing the productivity measures presented below, it should be clear that there was little, if any, improvement in bird and turtle productivity.

1. The false crawl ratio for 2008 of .92:1 (101/92) is NOT significantly different than the recalculated 1.09:1 ratio for 2007.<sup>36</sup>
2. The fledge rate for Piping Plover observed in 2008 (.64) is NOT significantly different from the fledge rate observed in 2007 (.67).
3. The .74 fledge rate for Oystercatchers is NOT significantly different from the .5 fledge rate observed in 2007.

With respect to the costs associated with the consent decree, SELC, based upon occupancy taxes for May and NPS visitation statistics as of June, concludes that the consent decree policies have had “little to no effects on tourism.”<sup>37</sup> It is patently ridiculous to draw any conclusions from such a limited data set. Furthermore, NEPA requires a much broader investigation into the costs associated with resource management plans. The list presented below provides a sampling of the type of costs to be considered. Upon reviewing the list, it should be clear that the observed costs associated with the consent decree are far from minimal. Furthermore, it should be equally clear that the potential for economic harm should the consent decree remain in effect is substantial.

1. Additional management costs under the consent decree are expected to top \$353,000.<sup>38</sup>
2. The comments attached to the 11,600 plus signatures on the petition in support of the House Bill 6233 and Senate Bill 3113 clearly demonstrate a significant negative impact on visitor use and experience.<sup>39</sup>
3. Some businesses have reported losses of up to 30%.
4. The comments attached to the 11,600 plus signatures on the petition clearly demonstrate a large potential for lost revenues should the extensive closures continue.
5. The closure of the most popular areas to ORV use has the potential to displace the majority of approximately 750,000 visitors that come to CHNSRA for the express purpose accessing the park’s beaches via ORV.<sup>40</sup> In the event that the displaced visitors react by going elsewhere, there is the potential for significant loss of revenues in all sectors.
6. The time frame of the most extensive closures, May through August, accounts for nearly 70% of the total number of visits to CHNSRA.<sup>41</sup> If even one quarter of these visitors decide to go elsewhere, many of the small businesses that make up the Island economy will find it difficult to survive.

In view of the facts 1) that the consent decree is based **SOLELY** upon the USGS Protocols contracted for the Interim Protected Species Management Strategy, and 2) that the Protocols “do not attempt to balance the need for protection of these species with other activities that occur at CAHA”,<sup>42</sup> the above-described failure to balance benefits and costs is not unexpected. In point of fact, as evidenced by the following quote, USGS never anticipated that the Interim Protected Species Management Strategy would be based **SOLELY** upon the USGS Protocols.

“...be considered by the National Park Service (NPS), along with federal laws and mandates, NPS policies, other scientific information, and public input, in developing management plans and conservation strategies implemented at the Seashore.”<sup>43</sup>

In fact, NPS did exactly as USGS suggested. They considered the Protocols in conjunction with the wealth of data collected since monitoring of species began in 1999. Furthermore, as per NEPA requirements:

1. NPS included a no action alternative and a less restrictive alternative which included procedures for applying discretion when conditions change—a recommendation made by USGS,<sup>44</sup>
2. NPS evaluated the impacts of each of the alternatives as they related to visitor use and experience and the local economy, and
3. NPS evaluated the management costs of implementing each of the alternatives.

A thorough review of the 300 plus page Interim Protected Species Management Strategy Environmental Assessment clearly demonstrates that NPS considered a wide array of information before selecting the preferred alternative that became the Interim Protected Species Management Strategy. Given the significant alterations of public use patterns, the failure to present a fact-based compelling need for immediate action, and the potential for excessive costs, the modifications placed into effect by the consent decree should have been subjected to above-described rulemaking process.

### **USGS PROTOCOLS ARE NOT BINDING**

The above description of the analysis that culminated in the Interim Protected Species Management Strategy begs the question, why does the Consent decree rely **SOLELY** upon the USGS Protocols? Because SELC insists that the USGS Protocols were the only peer-reviewed science considered in the development of the Interim Protected Species Management Strategy. This being the case, SELC asserts that NPS is required to use the USGS Protocols as the basis for resource management. Furthermore, according to SELC, NPS is not permitted any discretion with respect the specific protective measures outlined in the USGS Protocols—that is, the USGS Protocols have become the bible.

Actually, the Protocols are not peer-reviewed science. The Protocols are a summary of published scientific data. Furthermore, with respect to the published scientific data reviewed, USGS made the following observation:

"published scientific data on which management is based is often incomplete and less specific to the particular location of species under management than is desirable."<sup>45</sup>

The lack of complete and specific data is one reason that the USGS stated that the protocols were preliminary suggestions to **be considered in conjunction with other appropriate data**. That is, NPS was right to consider the vast amount of data collected as a result of monitoring efforts and should NOT be limited to using the USGS Protocols as written.

Finally, the peer reviews that SELC references are nothing more than a review by the published authors conducted for the purpose of verifying that their work was accurately summarized. That is, they are NOT the type of peer review normally associated with science that is used as the basis of resource management plans.

### **SUMMARY**

Mr. Wenk summed up the Department's position in the following manner.

"The Department supports allowing public use and access at Cape Hatteras National Seashore to the greatest extent possible while ensuring protection for the Seashore's wildlife, including the federally protected species that are the focus of present concern, for this and future generations of park visitors. Because we believe that the April 30, 2008, consent decree will accomplish this objective better than the original 2007 Interim Management Strategy for the period until a final ORV plan and rule are adopted, the Department cannot support S. 3113."<sup>46</sup>

As I have demonstrated above, the Department does not appear to have exercised due diligence in verifying SELC claims with regard to the alleged "considerable adverse effects" of ORV use at

CHNSRA. Similarly, the Department does not appear to have done anything to verify that the claim that consent decree will allow for continued access to the seashore's beaches. The Department has not even bothered to consider the costs associated with the consent decree. In fact, Mr. Wenk sounds like he is regurgitating SELC and DOW press releases. The only possible support I can see for Mr. Wenk's position is that in the absence of a special rule, Judge Boyle was prepared to grant the injunction. If the only options are no ORV use or the Consent decree, then certainly the Decree accomplishes the Department's objectives better than original 2007 Interim Management Strategy which would result if Judge Boyle closing the seashore to ORVs. There is one problem, however, with the Department's position. By accepting the decree and giving up discretion with respect to the protective measures employed at CHNSRA, the Department has relinquished NPS's authority to manage the park.

As noted earlier, congress enacted legislation that authorized snowmobile use in Yellowstone. The difference between the Yellowstone legislation and the proposed legislation for CHNSRA is that the Department representative, Mr. Galvin supported the legislation proposed for Yellowstone. Please do not allow the lack of support from the Department to keep you from passing this legislation. In this regard, I ask that you do what the Department did not. Give the data a good hard look and based upon a real review of the facts decide if the Interim Protected Species Management Strategy was developed in accordance with NEPA. Furthermore, give the arguments presented by Attorney Liebesman a good hard look and decide if the current management policies, in conjunction with the Interim Protected Species Management Strategy satisfy the intent of Executive Orders 11644 and 11989. If you decide that the Interim Protected Species Management Strategy is NEPA compliant and that the combination of the Interim Protected Species Management Strategy and current management policies do satisfy the intent of Executive Orders 11644 and 11989, please do everything in your power to make sure this legislation is passed. Send a message to environmental extremists that SELC represents. Make it clear that they cannot use endangered species or species of concern as a tool to overturn valid rules promulgated by our government land managers. Put the authority to manage CHNSRA back into the hands of NPS where it belongs.

cc: Subcommittee On National Parks Of The Senate Committee On Energy And Natural Resources  
The Honorable Richard Burr -- 202-228-2981  
The Honorable Elizabeth Dole -- 202-224-1100  
The Honorable Walter B. Jones, Jr. -- 202-225-3286  
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## APPENDIX A

Based upon 66.85 Total Miles---as per Update from Larry Hardham, Negotiated Rulemaking Stakeholder, and verified by tracing NPS Google Map, including sound side access points at the inlets

Other Assumptions	Permanently closed miles	16.70
As per NPS closure maps dated 3/8/08.	Seasonal miles	11.10
	Seasonal Peds Only Total	27.80
	ORV seasonal miles	39.05

Closed is defined as closed or access that requires wading, kayaking, boating, etc.  
Figures were derived from the mapping of the NPS text description of beach access.

Date	ORV Miles			ORV miles open	ORV closed miles	Percent Closed to ORVs	Peds. Only Open	Peds. Only Added or (Reduced)	Peds. Only Closed	Total Open	Total Closed	Percent Closed to All	Average Closed to All
	Oregon Inlet	Hatteras	Ocracoke										
5/15/2008	16.20	5.80	24.40	16.20	14.65	37.5%	24.80	-1.20	1.80	49.20	17.65	26.4%	
5/23/2008	12.90	5.80	21.10	12.90	17.95	46.0%	24.80	-1.20	1.80	45.90	20.95	31.3%	May
5/30/2008	12.10	5.80	20.30	12.10	18.75	48.0%	24.80	-1.20	1.80	45.10	21.75	32.5%	20.12
6/5/2008	13.00	5.40	20.80	13.00	18.25	46.7%	25.05	-1.20	1.55	45.85	21.00	31.4%	30.1%
6/12/2008	12.80	5.30	20.50	12.80	18.55	47.5%	25.95	-0.80	1.05	46.45	20.40	30.5%	
6/19/2008	13.80	6.00	22.20	13.80	16.85	43.1%	25.95	-0.80	1.05	48.15	18.70	28.0%	June
6/26/2008	13.70	6.00	22.10	13.70	16.95	43.4%	25.95	-0.80	1.05	48.05	18.80	28.1%	19.73
7/3/2008	15.40	6.00	23.80	15.40	15.25	39.1%	25.95	-0.80	1.05	49.75	17.10	25.6%	29.5%
7/10/2008	15.40	6.50	24.30	15.40	14.75	37.8%	25.95	-0.80	1.05	50.25	16.60	24.8%	
7/17/2008	13.80	7.60	23.80	13.80	15.25	39.1%	27.55	0.80	1.05	51.35	15.50	23.2%	July
7/24/2008	15.30	7.30	25.00	15.30	14.05	36.0%	28.30	1.15	0.65	53.30	13.55	20.3%	15.48
7/31/2008	12.55	7.20	22.15	12.55	16.90	43.3%	30.05	4.10	1.85	52.20	14.65	21.9%	23.2%
8/7/2008	13.55	7.90	24.35	13.55	14.70	37.6%	30.30	4.10	1.60	54.65	12.20	18.2%	
8/14/2008	17.25	6.75	26.50	17.25	12.55	32.1%	23.60	-0.30	3.90	50.10	16.75	25.1%	August
8/21/2008	20.40	6.75	29.65	20.40	9.40	24.1%	24.80	0.90	3.90	54.45	12.40	18.5%	12.49
8/28/2008	22.80	7.65	34.35	22.80	4.70	12.0%	23.90	0.10	4.00	58.25	8.60	12.9%	18.7%
9/4/2008	23.00	7.25	34.15	23.00	4.90	12.5%	22.20	0.10	5.70	56.35	10.50	15.7%	

## END NOTES

<sup>1</sup>“Until a new rulemaking is completed, the existing rules on snowmobile use in the national parks will remain in effect.” Statement Of Denis P. Galvin, Deputy Director, National Park Service, Department Of The Interior, Before The Subcommittee On National Parks And Public Lands, House Committee On Resources, Concerning General Issues Involving Access To National Parks, July 20, 2000, <http://www.doi.gov/oc1/2000/access.htm>

<sup>2</sup> The exemption was contingent upon National Parks Conservation Association taking part in the negotiated rulemaking process. Letter to Fran Mainellia, Director NPS from Robert D. Rosenbaum, November 29,2005 and CBI Feasibility Assessment dated, April 4, 2006.

<sup>3</sup> [http://www.npca.org/media\\_center/press\\_releases/2008/orv\\_052208.html](http://www.npca.org/media_center/press_releases/2008/orv_052208.html)

<sup>4</sup> “To develop a comprehensive literature search which will assist the park service in the development and implementation of a comprehensive off-road vehicle use plan.” Determination of Status of Existing Natural Resource Impacts from Recreational Use of Cape Hatteras National Seashore: Literature Review and Ecological Assessment, Dr James Perry, cost \$110,000; Visitor Use Survey; Cape Hatteras National Seashore Visitor Use Study, August 2003, Protocol and Survey Instrument Approval OMB # 1024-0224 (NPS01-015) Hans Vogelsong, cost \$95,000; Habitat Assessment and Restoration of Seabeach Amaranth (*Amaranthus pumilus*, Amaranthaceae), a Federally Threatened Plant of Coastal Shorelines, Using Remote Sensing Data, Claudia L. Jolls, cost \$51,400; USGS Protocols, cost unknown.

<sup>5</sup> Interim Protected Species Management Strategy/Environmental Assessment, Jan. 2006, p. i.

<sup>6</sup> Background Paper In Support Of Testimony By Warren Judge On S. 3113 National Parks Subcommittee Energy And Natural Resources Committee United States Senate Lawrence R. Liebesman, Holland And Knight Llp, July 30, 2008

<sup>7</sup> CBI Feasibility Assessment dated, April 4, 2006.

<sup>8</sup> Letter to Fran Mainellia, Director NPS from Robert D. Rosenbaum, November 29,2005 and CBI Feasibility Assessment dated, April 4, 2006.

<sup>9</sup> See draft of ground rules on NPS Park Planning website.

<sup>10</sup> Plaintiffs’ Motion For Preliminary Injunction [Fed. R. Civ. P. 65, E.D.N.C. Local Rule 7.1], No. 2:07-CV-00045-BO, 2/20/08.

<sup>11</sup> Motion Hearing, NO.: 2:07-CV-45-BO, 4/4/08, p. 4.

<sup>12</sup> *ibid*, p. 17.

<sup>13</sup> *ibid*, p. 35.

<sup>14</sup> The regularly scheduled General Membership meeting of the Anglers Club was held on April 12, 2008. At this meeting Mr. John Couch, President of Cape Hatteras Access Preservation Alliance reported that the Interveners had been given permission to take a tentative agreement to their respective board of directors but that they had been advised that they could not share the details with their general membership.

<sup>15</sup> Assessment Survey Of Cape Hatteras National Seashore Off Road Vehicle Negotiated Rulemaking Committee Prepared by Shayla Simmons and David Emmerson August 8, 2008

<sup>16</sup> Consent Decree, NO.: 2:07-CV-45-BO, 4/16/08, pp. 2 & 3.

<sup>17</sup> *ibid*, p. 3.

<sup>18</sup> *ibid*, p. 2.

<sup>19</sup> Statement Of Daniel N. Wenk, Deputy Director, National Park Service, U.S. Department Of The Interior, Before The Subcommittee On National Parks Of The Senate Committee On Energy And Natural Resources, Concerning S. 3113, A Bill To Reinstate The Interim Management Strategy Governing Off-Road Vehicle Use In The Cape Hatteras National Seashore, North Carolina, Pending The Issuance Of A Final Rule For Off-Road Vehicle Use By The National Park Service, July 30, 2008, p. 26.

<sup>20</sup> “Number of Fledglings up in CHNS”, Mary Hellen Goodloe-Murphy, The Coastland Times, August 12, 2008, p. 11A.

<sup>21</sup> Code of Federal Regulations, Title 36, volume 1, pp 9, section 1.5(b).

<sup>22</sup> “by virtue of the authority vested in me as President of the United States by the Constitution of the United States and in furtherance of the purpose and policy of the National Environmental Policy Act of 1969 (42 U.S.C. 4321)...”, Executive Order 11644, Introduction.

<sup>23</sup> “These measures are necessary to halt the precipitous declines of species on the Seashore.”, Testimony of Derb S. Carter, Jr., Southern Environmental Law Center on behalf of The National Audubon Society, Defenders of Wildlife, and The Wilderness Society before the National Park Subcommittee of the Senate Committee on Energy and

Natural Resources on Senate Bill 3113 to reinstate the Interim Management Strategy governing off-road vehicle use in the Cape Hatteras National Seashore, North Carolina July 30, 2008, pp. 1-2.

<sup>24</sup> “Number of fledglings up in CHNS”, The Coastland Times, Tuesday, August 12, 2008, p. 11A.

<sup>25</sup> USFWS suggested that false crawls and the nests from the area in question be excluded from the analysis. Second Amendment to the Biological Opinion for Cape Hatteras National Seashore’s Interim Protected Species Management Strategy, USFWS, Raleigh Field Office, March 28,2008, p.2.

<sup>26</sup> *ibid*, p.2.

<sup>27</sup> *ibid*, p.3.

<sup>28</sup> *ibid*, p.4.

<sup>29</sup> <http://www.fws.gov/northeast/pipingplover/recplan/status.html#productivity> and CHNSRA resource reports.

<sup>30</sup> [http://www.ncsu.edu/project/grsmgis/AMOY/References/2007\\_NC\\_AMOY\\_Report.pdf](http://www.ncsu.edu/project/grsmgis/AMOY/References/2007_NC_AMOY_Report.pdf)

<sup>31</sup> [http://www.ncsu.edu/project/grsmgis/AMOY/References/2007\\_NC\\_AMOY\\_Report.pdf](http://www.ncsu.edu/project/grsmgis/AMOY/References/2007_NC_AMOY_Report.pdf)

<sup>32</sup> 1999 -- 1,155 pairs, 2000 -- 465 pairs, 2004 -- 964 pairs, and 2007 -- 217 pairs. While there were fewer Colonial Water Birds at CHNSRA, newly constructed Cora June Island was home to one of the largest mixed tern/black skimmer colonies in the state with good numbers of nesting adults that successfully fledged hundreds of chicks—see Feb. news at <http://www.ncwildlife.org/>.

<sup>33</sup> See Webcast, 1:05 to 1:08, [http://energy.senate.gov/public/\\_files/energy073008.ram](http://energy.senate.gov/public/_files/energy073008.ram)

<sup>34</sup> Only one minor storm was observed in 2008. 2007, on the other hand had two significant weather events—a northeaster on 5/7 and Tropical Storm Barry on 6/5.

<sup>35</sup> “These measures are necessary to halt the precipitous declines of species on the Seashore.”, Testimony of Derb S. Carter, Jr., Southern Environmental Law Center on behalf of The National Audubon Society, Defenders of Wildlife, and The Wilderness Society before the National Park Subcommittee of the Senate Committee on Energy and Natural Resources on Senate Bill 3113 to reinstate the Interim Management Strategy governing off-road vehicle use in the Cape Hatteras National Seashore, North Carolina July 30, 2008, pp. 1-2.

<sup>36</sup> USFWS suggested that false crawls and the nests from the area in question be excluded from the analysis. Second Amendment to the Biological Opinion for Cape Hatteras National Seashore’s Interim Protected Species Management Strategy, USFWS, Raleigh Field Office, March 28,2008, p.2.

<sup>37</sup> Testimony of Derb S. Carter, Jr., Southern Environmental Law Center on behalf of The National Audubon Society, Defenders of Wildlife, and The Wilderness Society before the National Park Subcommittee of the Senate Committee on Energy and Natural Resources on Senate Bill 3113 to reinstate the Interim Management Strategy governing off-road vehicle use in the Cape Hatteras National Seashore, North Carolina July 30, 2008, pp. 7 & 8.

<sup>38</sup> “Number of Fledglings up in CHNS”, Mary Hellen Goodloe-Murphy, The Coastland Times, August 12, 2008, p. 11A.

<sup>39</sup> <http://www.gopetition.com/online/18790.html>

<sup>40</sup> 50% of the roughly 1.5 million visitors that were reported by the NPS for the period of May through Sept. 2007. 50% is the estimate of the portion of the visiting public that utilized ORVs, see p. 14 of the Peer Review Summary dated 5/5/08. The visitation figures were obtained from the NPS Public Use Statistics Office.

<sup>41</sup> NPS Public Use Statistics Office.

<sup>42</sup> USGS Protocols, SYNTHESIS OF MANAGEMENT, MONITORING, AND PROTECTION PROTOCOLS FOR THREATENED AND ENDANGERED SPECIES AND SPECIES OF SPECIAL CONCERN AT CAPE HATTERAS NATIONAL SEASHORE, NORTH CAROLINA, 10/28/05, P.5.

<sup>43</sup> *ibid*, P.1.

<sup>44</sup> *ibid*, P.6 , “In recent years, the scientific community has formally recognized and responded to what resource managers have known for a long time, that (i) management actions are not static but must change with changing conditions, often year to year...”,.

<sup>45</sup> *ibid*, P.6.

<sup>46</sup> Statement Of Daniel N. Wenk, Deputy Director, National Park Service, U.S. Department Of The Interior, Before The Subcommittee On National Parks Of The Senate Committee On Energy And Natural Resources, Concerning S. 3113, A Bill To Reinstate The Interim Management Strategy Governing Off-Road Vehicle Use In The Cape Hatteras National Seashore, North Carolina, Pending The Issuance Of A Final Rule For Off-Road Vehicle Use By The National Park Service, July 30, 2008, p. 26.