

From: [Sherri Fields](#)
To: [Mike Murray](#)
Cc: [Sandra Hamilton](#); [Timothy Pinion](#)
Subject: Re: Fw: Consent decree modifications
Date: 10/07/2008 04:45 PM

Mike,

Tim and I discussed the language relative to use of decoys and have the following thoughts.

Intervention in CWB nest site selection by placing decoys on the beach raises the following questions:

- (1) If we are to depart from the Management Policies directing "whenever possible, natural processes will be relied upon," what will this be based on?
- (2) What data can we point to that demonstrate CWB nest failure is high due to overwash events in this specific area?
- (3) How often have these overwash events occurred in the past? How predictable are they in the future?
- (4) What criteria would we use to determine where to place decoys to attract CWB? Are there data to support these criteria?
- (5) In what ways does the habitat differ between the overwash area and the proposed decoy area?
- (6) The last few questions all fit under the broader question, what gives us confidence that we can select more suitable habitat for CWB than the birds can select themselves?

Also, it might be worth clarifying that we are talking about using decoys to attract birds to an area rather than using decoys to frighten birds away from an area.

Finally, we looked at Sections 4.4.2, and 4.4.2.2 Restoration of Native Plant and Animal Species for potential applicability. Section 4.4.2.2 seems to be limited to actions for species that have been extirpated from a park. My recollection is that there may be a species or two of CWB that have not nested there in recent years but don't know if they are present otherwise. Even if use of decoys to attract CWB is interpreted to fall within the realm of this section of the management policies, all of the above questions would remain.

Sherri

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**Mike
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cc: Timothy Pinion/Atlanta/NPS@NPS

10/07/2008 11:41 AM

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Sherri and Sandy,

We are working on draft consent decree modifications to send to the AUSA. See Jason Waanders comment below about Paragraph 7. Would you please review the language in Paragraph 7 about the use of bird decoys (which has been proposed by CAHA RM staff and are commonly used by NCWRC to encourage CWB nesting at a particular site) and Jason's concerns. **Do you have any policy concerns about the proposed use of decoys as described? Are there any edits that we could make to the language that would alleviate those concerns?**

(Jason's comment) "Par. 7: I have concerns about whether the "decoy" experiment is consistent with NPS wildlife management principles--in particular, I question whether it is consistent with Management Policies 4.4.2. If we are doing it to restore listed species that already have low populations and there is no other way to bring them back except protecting them from nesting in overwash, then it may be OK. But if we are doing it to draw them out of ORV zones and could just as well solve the problem by keeping ORVs out of those areas (or keeping them out of other areas where the birds would rather be), then it probably isn't. **If NPS biologists and biological resource policy people are willing to say it's consistent with 4.4.2 (and the rest of 4.4) then I'm OK with it.**"

7. Cape Point Access Corridor: Plaintiffs, Federal Defendants, and Intervenor-Defendants recognize the importance of recreational access to Cape Point. Based on the current configuration of the area and recent bird nesting history, NPS may modify the 2008 prenesting area at Cape Point in 2009 to provide up to a 100 meter access corridor (approximately similar to the ORV corridor width for the 2008/09 winter season) along the eastern ocean shoreline to the Point to allow room for incremental buffer expansions, as needed, as the season progresses. For piping plover, implement the prescribed buffers as needed for all phases of PIPL breeding cycle. For observed least terns breeding behavior or nests adjacent to access corridor, provide a minimum 50 meter buffer and daily monitoring of observed pre-nesting and nesting behavior. Expand buffers if needed to minimize disturbance. During pre-nesting and incubation period, if due to buffer expansions the corridor width is reduced to 50 m or less, restrict access to Cape Point to only ORVs in a "pass through" corridor, with no stopping or disembarking of passengers and no pedestrians in the "pass through" corridor. Once the pass-through corridor goes into effect, ORV access is restricted to 7 a.m. to 7 p.m. subject to further restriction NPS determines it is necessary to protect park

resources. Reduce width of pass-through corridor as needed for buffer expansions. If/when width is reduced to less than 10 meter above the high tide line, close the pass-through corridor. Pets shall be prohibited within the Cape Point Access Corridor from March 15 until the later of July 15 or two weeks after the last chick has fledged, as determined by two consecutive monitoring events. **In an effort to facilitate early and successful nesting by CWBs, Park Natural Resource Management staff will experiment with the use of bird decoys to the west of the eastern shoreline to draw the CWBs away from areas that overwash annually and result in an increased number of nesting attempts.** Exact configuration of access corridor and location of CWB colony site to be determined by NPS Natural Resources Management staff and identified in the annually updated pre-nesting closure map for Cape Point by date(s) described in Paragraph 20. NPS will evaluate these measures and report the results as part of the annual reporting requirements identified in Paragraph 19. NPS retains discretion at all times to enforce more protective closures or take other measures, if considered necessary to protect park resources.

[attachment "CAHA CD.NPS Proposed mods in full doc.10.07.08.doc" deleted by Sherri Fields/Atlanta/NPS]

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----- Forwarded by Mike Murray/CAHA/NPS on 10/07/2008 10:21 AM -----

**JASON
WAANDERS/HQ/SOL/DOI@SOL**

To Mike Murray/CAHA/NPS@NPS
cc MIKE P STEVENS/ATL/SOL/DOI@SOL

10/07/2008 09:35 AM

Subject Consent decree modifications

Mike: Looks like NPS e-mails still aren't getting through to SOL e-mail-- seems like whenever we have an e-mail problem, the NPS e-mails are the last to get fixed.

A few thoughts on the proposed modifications:

Par. 7: I have concerns about whether the "decoy" experiment is consistent with NPS wildlife management principles--in particular, I question whether it is consistent with Management Policies 4.4.2. If we are doing it to restore listed species that already have low populations and there is no other way to bring them back except protecting them from nesting in overwash, then it may be OK. But if we are doing it to draw them out of ORV zones and could just as well solve the problem by keeping ORVs out of those areas (or keeping them out of other areas where the birds would rather be), then it probably isn't. If NPS biologists and biological resource policy people are willing to say it's consistent with 4.4.2 (and the rest of 4.4) then I'm OK with it.

Par. 24: In the third-to-last sentence, the statement "Deliberate acts...will not result in the expansion of a buffer" is too strong--there may be situations where NPS will find expansion to be necessary even if the particular violator has been caught (for example, if there's an organized group of violators). Plus this sentence appears to conflict with NPS's broader authority (stated elsewhere) to take more protective measures whenever necessary. Either change "will" to "may," or add "automatic" before "expansion."

Par. 26: I am uncomfortable with this entire paragraph, because it is a gratuitous giveaway to an interest that is not a party to the consent decree. I recognize that the intervenors may want to throw them a bone for political/PR reasons, but they don't actually represent them, right? That said, I recognize that you probably think this is a good idea, and there's no real way to do it except by modifying the decree. So I can live with the action. But I don't want to make a gratuitous legal concession, and therefore would like to strike the first sentence. I suppose I could live with the first part of that sentence if push came to shove, but I can't live with the part after the parentheses.

Par. 40: The attorney fees discussion seems a bit odd to me as currently written, because we say it's been resolved (in the past) but leave in the sentences about how we're going to resolve it (in the future). Plaintiffs will probably still want the first sentence in there, which makes sense to me, but I suspect they can live without the second and third. If you just have the first sentence and the (new) last sentence, it makes more sense to me.

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