

# SOUTHERN ENVIRONMENTAL LAW CENTER

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June 30, 2010

VIA FACSIMILE (252-473-2595) AND U.S. MAIL

Michael B. Murray  
Superintendent, Cape Hatteras National Seashore  
National Park Service, Outer Banks Group  
1401 National Park Drive  
Manteo, NC 27954

**Re: Taking of Loggerhead Sea Turtle at Cape Hatteras National Seashore**

Dear Superintendent Murray:

We write on behalf of Southern Environmental Law Center, Defenders of Wildlife, and National Audubon Society, to follow up on our public request for improved enforcement of protections for sea turtles at Cape Hatteras National Seashore. In light of last week's terrible but avoidable crushing of a nesting loggerhead sea turtle by an off-road vehicle driving on the beaches of Ocracoke Island, immediate measures are necessary to prevent additional takings of federally listed endangered and threatened sea turtles.

As you know, the Consent Decree currently prohibits night driving on Seashore beaches from May 1 to September 15 between the hours of 10:00 pm. and 6:00 a.m., to "increase the chances of successful turtle nesting." (Consent Decree ¶ 24.) It also provides, however, that the National Park Service may "enforce more protective closures or take other measures," as necessary, to protect natural resources. (Consent Decree ¶ 22.)

In light of these provisions and the imminent danger of additional turtle deaths, we ask that the National Park Service immediately implement the following measures in order to prevent future harm to protected turtle species:

- 1) Expand the timing of the night driving ban to the hours between sunset and the time at which the beach is cleared by the Park Service turtle patrol each morning.
- 2) Erect barriers to physically close all ORV ramps during those hours by, for instance, the use of chains between the posts installed at each ramp.
- 3) Increase nighttime monitoring of beaches (using turtle-safe lighting) to detect and deter driving in violation of the night driving rules.

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Going forward, we ask the National Park Service to consider additional appropriate turtle protections measures, including for instance installing fixed gates and cameras at the Seashore's ORV ramps and strengthening the night driving restrictions in the final ORV management plan for the Seashore as described in our May 11, 2010 comments on the Draft Environmental Impact Statement for that plan.

The unlawful killing of the loggerhead on Ocracoke Island last week amounts to an unlawful taking in violation of the Endangered Species Act. The Biological Opinion for Cape Hatteras National Seashore (dated August 14, 2006, and amended on April 24, 2007) does not provide for an incidental take of even one adult sea turtle. The Biological Opinion also states that if the National Park Service "fails to require adherence to the term and conditions of the incidental take statement through enforceable terms, the protective coverage of section 7(o)(2)," which exempts any taking that complies with an incidental take statement from being considered a prohibited taking, "may lapse."

The National Park Service is responsible and liable for actions that authorize acts that result in a taking of endangered or threatened species. Under Section 9 of the ESA, it is "unlawful for any person" to "take any [endangered or threatened] species within the United States...." 16 U.S.C. § 1538(a)(1)(B). It is also "unlawful for any person" to "attempt to commit, solicit another to commit, or *cause to be committed*" a taking of any endangered species within the United States. 16 U.S.C. § 1538(g) (emphasis added). The term "person" is defined to include "any officer, employee, agent, department, or instrumentality of the Federal Government, [or] of any State..." and thus includes the National Park Service. 16 U.S.C. § 1532(13). "Take" under the Act includes "kill" and any "harm" to an endangered or threatened species. 16 U.S.C. 1532(19). Section 9 prohibits not only the actions of those who "directly exact the taking" of a threatened or endangered species, "but also bans those acts of a third party that bring about the acts exacting a taking." *Strahan v. Coxe*, 127 F.3d 155, 163 (1<sup>st</sup> Cir. 1997). In the *Strahan* case, the State of Massachusetts was found to have exacted a taking of endangered Northern Right Whales through its licensing and permitting of certain fishing practices that exacted a taking of the species. In another case directly on point, *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180-1181 (M.D. Fla. 1995), the court held Volusia County caused take of endangered sea turtles through its authorization of vehicular beach access during turtle nesting season.<sup>1</sup>

In light of this prevailing law, it is therefore essential that the National Park Service both enhance and better enforce existing prohibitions on night driving at the Seashore as described above and also ensure that future night driving restrictions, including those included in the final

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<sup>1</sup> See also *Sierra Club v. Yuetter*, 926 F.2d 429, 438-39 (5<sup>th</sup> Cir. 1991) (finding Forest Service caused take of endangered red-cockaded woodpecker by permitting logging practices near nesting colonies); *Defenders of Wildlife v. Adm'r, Env'tl. Protection Agency*, 882 F.2d 1294, 1300-01 (8<sup>th</sup> Cir. 1989) (finding EPA caused take of endangered species through its registration of pesticides for use by others).

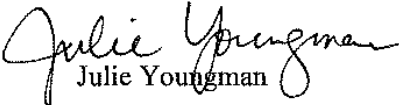
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ORV Management Plan for the Seashore, are adequate to prevent future takings of protected sea turtles.

Please consider this letter as a supplement to our original comments on the Draft Environmental Impact Statement for the Cape Hatteras National Seashore ORV Management Plan, based on new information that was not previously available. We believe that the recent taking of a nesting loggerhead offers additional support for the portions of our comments submitted on May 11, 2010, that argue in favor of enhanced night driving restrictions. (See pages 31, 33, 39-40, 50-52 of our comments.)

Thank you for your consideration of this request.

Yours truly,

  
Julie Youngman

  
Derb Carter

cc: Jonathan Jarvis, Director, NPS  
Dan Wenk, Deputy Director, NPS  
David Vela, Southeast Regional Director, NPS  
Pete Benjamin, Fish & Wildlife Service  
Walker Golder, National Audubon Society  
Jason Rylander, Defenders of Wildlife