



December 18, 2006

***By Certified Mail/Return Receipt Requested***

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**RE: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act in Connection with the Biological Opinion and Draft Interim Protected Species Management Plan for Cape Hatteras National Seashore.**

Dear Secretary Norton; Directors Bomar, Hamilton, and Hooks; and Acting Superintendent Francis:

On behalf of Defenders of Wildlife and in accordance with the 60-day notice requirement of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, I hereby provide notice that the National Park Service (“NPS”) and the U.S. Fish & Wildlife Service (“FWS”) remain in violation of the ESA and its implementing regulations, 50 C.F.R. § 402 *et seq.*

The FWS has prepared a biological opinion for Cape Hatteras National Seashore’s (“CAHA”) Draft Interim Protected Species Management Plan (“IPSMP” or “Plan”) that does not meet the requirements of the ESA. NPS is currently implementing that plan despite its lack of final publication in the Federal Register. Continued

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reliance upon that biological opinion in implementation of the Plan is thus illegal and must be remedied immediately.

Plaintiff's claims relate to the NPS's continued authorization of off-road vehicle "ORV" use in areas of CAHA that "may affect" numerous threatened and endangered species, including the threatened piping plover, various species of endangered sea turtles, and the seabeach amaranth. For many years, the NPS has allowed ORV use in these areas despite failing to consult with the FWS over the impacts to listed species. In response to our previous notice of intent to sue, dated May 17, 2005, the NPS initiated a process for developing an interim protected species management plan. As part of that process, NPS also commissioned from the United States Geological Survey a set of Management, Monitoring, and Protection Protocols for Cape Hatteras National Seashore ("Protocols"). Those Protocols, released in October 2005, reflected the best available scientific information on the piping plover, sea turtles, seabeach amaranth, colonial waterbirds, and the American oystercatcher at CAHA and presented a scientific view of options in managing protected species at the Seashore. See <http://parkplanning.nps.gov>.

NPS then sought public comment on draft options for interim protected species management and consulted with FWS on its preferred alternative. Incredibly, none of the options presented to the public for review or considered by NPS and FWS were consonant with the Protocols. Despite assertions that the biological opinion would be prepared in time to guide the 2006 breeding season at CAHA, the FWS did not ultimately release the document until August 2006. The resulting biological opinion, as detailed further below, contravenes the plain language and intent of the ESA and allows for unquantified and apparently unlimited take of all listed species at CAHA in order to preserve "access" for ORVs.

If the IPSMP biological opinion cannot be squared with the ESA, then NPS has not satisfied its obligations under Section 7 of the ESA and its authorization of ORV use at CAHA violates the agency's obligations under the ESA and may result in the take of those species in violation of Section 9.

We have previously given notice that the NPS is in violation of other federal laws, including the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703 *et seq.*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, as well as laws and regulations specifically governing the national park system. To date, those violations have not been remedied. Indeed, NPS has further violated NEPA in developing its IPSMP because it failed to evaluate the long-term or cumulative impacts of the Plan on listed species, failed to adequately evaluate practicable methods to minimize the effect of ORV use on listed species, and failed to consider an adequate range of alternatives—like those outlined in the Protocols.

Lastly, the NPS continues to act contrary to two executive orders, agency regulations, and the organic acts of both CAHA and the NPS by authorizing ORV use without first developing an ORV management plan in a national seashore area intended to be “permanently reserved as a primitive wilderness.” 50 Stat. 669 (1937).<sup>1</sup> The interim plan does not comport with the law, and the proposed negotiated rulemaking process—which has yet to begin—is not expected to conclude until at least 2009. Even assuming that consensus process occurs, there is no guarantee that it will conclude with a rule agreed to by all participants and which satisfies federal law. The NPS cannot continue to violate the law on the speculative promise that it will somehow remedy these violations in the future through a proposed negotiated rulemaking process.

NPS’s actions are presently causing and will foreseeably continue to cause substantial harm and adverse impacts to federally protected species. If these violations are not substantially rectified within 60 days, Defenders of Wildlife intends to bring a civil action to compel compliance with these and other provisions of federal law.

## **BACKGROUND**

Cape Hatteras National Seashore was established in 1953 as the nation’s first national seashore. With more than 70 miles of shoreline, CAHA is one of the longest protected barrier island systems on the East Coast. Millions of visitors each year come to CAHA 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, boating, and beach driving.

The islands of CAHA also provide habitat and nesting grounds for various species of fauna and serve as an important wintering area for migratory waterfowl. Most notably, CAHA is home to several animal and plant species that are listed as threatened or endangered under the ESA, including the endangered leatherback turtle (*Dermochelys coriacea*), and the threatened loggerhead turtle (*Caretta caretta*), green sea turtle (*Chelonia mydas*), piping plover (*Charadrius melodus*), and seabeach amaranth (*Ameranthus pumilus*). Other rare or declining shorebirds inhabit CAHA, including the

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<sup>1</sup> The Organic Act for Cape Hatteras National Seashore reads in pertinent part:

Except for certain portions of the area, deemed to be especially adaptable for recreational uses, particularly swimming, boating, sailing, fishing, and other recreational activities of similar nature, which shall be developed for such uses as needed, the said area shall be permanently reserved as a primitive wilderness and no development of the project or plan for the convenience of visitors shall be undertaken which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing in this area.

H.R. 7022, Sec. 4, 50 Stat. 669 (1937).

American oystercatcher, black skimmer, common tern, gill-billed tern, least tern, and Wilson's plover.<sup>2</sup>

The beaches of CAHA bear a tremendous amount of ORV traffic each day.<sup>3</sup> This can dramatically affect coastal ecosystem habitat and can significantly reduce the ability of species to nest and forage. ORV use on beaches harms the geomorphic structure of the coastal ecosystem and increases human and domesticated pet traffic, which in turn can frighten animals away from prime nesting and feeding habitats. More directly, ORV traffic can crush or kill animals and their nests and can significantly conflict with foraging or resting shorebirds and marine life. Researchers have demonstrated that “[e]ven low-level impacts can result in severe environmental degradation,” and concluded that ORV use “should be restricted or eliminated entirely in the dunes and coastal habitats.”<sup>4</sup> Prime shorebird habitat should be closed to all vehicles during the breeding season because of the hypersensitivity of these ecological systems.<sup>5</sup>

The potential harm to listed species as a result of ORV use and associated recreational uses is well-documented. The Atlantic Piping Plover Recovery Plan, the U.S. Geological Survey Protocols, and the recent IPSMP Biological Opinion all include a detailed review of research related to ORV impacts on wildlife.<sup>6</sup> As the FWS noted in the recovery plan for the piping plover:

Typical behaviors of piping plover chicks increase their vulnerability to vehicles. Chicks frequently move between the upper berm or foredune and feeding habitats in the wrack line and intertidal zone. These movements place chicks in the path of vehicles driving along the berm or through the intertidal zone. Chicks stand in, walk, and run along tire ruts, and sometimes have difficulty crossing deep ruts or climbing out of them. Chicks sometimes stand motionless or crouch as vehicles pass by or do not move quickly enough to get out of the way.<sup>7</sup>

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<sup>2</sup> The American oystercatcher, common tern, and the least tern are protected under the Migratory Bird Treaty Act. 16 U.S.C. § 703 *et seq.* The black skimmer and the least tern are also listed by the State of North Carolina as a species of special concern.

[http://www.ncwildlife.org/pg07\\_WildlifeSpeciesCon/protected\\_species.pdf](http://www.ncwildlife.org/pg07_WildlifeSpeciesCon/protected_species.pdf)

<sup>3</sup> A recent study estimated that an average of 252 ORVs could be found on CAHA beaches at any one time in 2003, with the maximum number of ORVs that year at any one time closer to 1300. Hans Vogelsong, Cape Hatteras National Seashore Visitor Use Study (Aug. 2003) at 9.

<sup>4</sup> Stephen P. Leatherman & Paul J. Godfrey, *The Impact of Off-Road Vehicles on Coastal Ecosystems in Cape Cod National Seashore: an Overview* (1979) at xi and xiv.

<sup>5</sup> *Id.*

<sup>6</sup> Information on ORV impacts is discussed at length in the Petition for Rulemaking filed by the National Parks Conservation Association, The Wilderness Society, and the Natural Resources Defense Council in June 2004.

<sup>7</sup> Piping Plover Revised Recovery Plan, at 40-41 (citing Tull 1984, Eddings et. al. 1990; Strauss 1990; Rimmer and Deblinger 1990; Melvin et. al 1993; Golden 1993); *see also* Petition for Rulemaking filed by the National Parks Conservation Association, The Wilderness Society, and the Natural Resources Defense Council (June 2004). (Attachment A).

In addition to the significant risk of physical harm to piping plovers and their chicks, ORV use degrades habitat and disrupts normal behavior patterns.<sup>8</sup> ORVs can harm or harass piping plovers by crushing wrack into the sand and making it unavailable as cover or foraging substrate and by preventing plovers from using habitat that is otherwise suitable.<sup>9</sup> In fact, beaches that are used by vehicles during nesting and brood-rearing periods generally have fewer breeding plovers than the habitat would otherwise support, while in contrast, “plover abundance and productivity has increased on beaches where vehicle restrictions during chick-rearing periods have been combined with protections of nests from predators.”<sup>10</sup>

ORV use also can lead to take by pedestrians and pets, namely dogs, which can flush incubating plovers from nests, exposing their eggs to predators and temperature changes that can kill embryos or retard their development. Pedestrians can inadvertently crush hard-to-spot nests, and dogs can chase plovers, destroy nests, and kill chicks.<sup>11</sup> The same is also true for colonial waterbirds and sea turtles that rely on CAHA for nesting.

In 1972, President Richard Nixon issued an Executive Order directing the National Park Service “to establish policies and provide for procedures that will ensure that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands, to promote the safety of all users of those land, and to minimize conflicts among the various uses of those lands.”<sup>12</sup> The order required that the Secretary of the Interior develop and issue regulations that designate specific areas and trail on which ORV use may be permitted within six months of the order.<sup>13</sup> As the courts have held, this order “sets forth in unambiguous and mandatory language the criteria that are to be employed in the designation of areas and trails for use or non-use of ORVs.” *National Wildlife Fed’n v. Morton*, 393 F. Supp. 1286, 1295 (D.D.C. 1975).

President Carter issued a second Executive Order requiring the Secretary of the Interior to immediately close areas or trails open to ORVs if such use is determined to be

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<sup>8</sup> Piping Plover Revised Recovery Plan, at 40.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* The recovery plan cites numerous scientific studies documenting the impact of ORV and associated recreation on piping plovers. A sampling of studies reaching similar conclusions includes: Anne Hecht, *Relationships Between Human Recreation and Piping Plover Foraging Ecology and Chick Survival* (1992); Fred J. Anders & Stephen P. Leatherman, *The Effects of Off-Road Vehicles on Beach and Dune Systems: Fire Island National Seashore* (1981); Stephen P. Leatherman and Paul J. Godfrey, *The Impact of Off-Road Vehicles on Coastal Ecosystems in Cape Cod National Seashore: An Overview* (1979); Cynthia G. Meekins & Paul E. Hosier, *The Effects of Off-Road Vehicles on the Vegetation of Core Banks, Cape Lookout National Seashore, North Carolina* (1983).

<sup>12</sup> Exec. Order No. 11,644 (Feb. 8, 1972), 3 C.F.R. 666 (1971-1975), *reprinted as amended* in 42 U.S.C. § 4321.

<sup>13</sup> *Id.* The order further mandates that with regard to NPS resources like CAHA, ORV trails and areas may be established “only if the respective agency head determines that [ORV] use ... will not adversely affect their natural, aesthetic or scenic values.” *Id.* In addition, the agency head must “establish procedures for the enforcement of [the ORV] regulations” and must “monitor the effect” of ORV use and amend the ORV route and area designations “as necessary to further the policy of [the] order. *Id.*

causing or likely to cause considerable adverse effects on the soil, vegetation, wildlife habitat or cultural historic resources of public lands.<sup>14</sup> Taken together, these executive orders “generally prohibit ORV use on public lands except in those areas or trails that are determined to be suitable for such use.” *Wildlife Conservation Fund of America v. Norton*, 2:01cv25-FtM29-DNF (M.D. Fla. Aug. 15, 2003) (order rejecting challenge to ORV management plan at Big Cypress National Preserve). Additionally, NPS regulations require that routes and areas for off-road vehicle use be designated by special regulation in compliance with these executive orders. 36 C.F.R. § 4.10.

In violation of these executive orders and NPS’s own regulations, CAHA officials have not engaged in formal rulemaking to designate specific trails or areas for ORV use, nor has there been a determination that areas currently open to ORVs are located in a way that minimizes damage to natural resources, harassment of wildlife, and disruption of wildlife habitat. 36 C.F.R. § 4.10. To the contrary, there is ample evidence that NPS-authorized ORV use at CAHA harasses and kills wildlife and vegetation and likely damages coastal dunes.

Further, NPS officials have not adequately closed or symbolically fenced important habitats within CAHA, nor have they instituted adequate regulations regarding ORV use and associated indirect impacts. Although CAHA has seasonally or permanently closed some areas to ORVs, it has permitted high levels of ORV use on ecologically significant habitat areas such as the Bodie Island spit, “the Point,” the Hatteras Inlet spit, and Ocracoke Inlet. Lack of enforcement of closures remains a significant problem at CAHA as violations are routinely noted by field staff. The ORV corridors that have been instituted in these areas do not adequately protect shorebird nesting habitat or provide sufficient protection for ocean side feeding habitats in these critical areas. This lack of timely, adequate symbolic fencing and buffer zones will likely result in take of species and/or a reduction of species productivity. Not surprisingly, CAHA experienced an extremely poor breeding season for piping plovers and other shorebirds in 2006, with fledging rates well below what one might expect from protected beaches with suitable nesting habitat.

NPS’s continued ad hoc authorization of these uses within such critical areas jeopardizes potential nesting sites and violates the Endangered Species Act, the Migratory Bird Treaty Act, Executive Orders, and other regulations pertaining to the management of national parks and cannot be allowed to continue.<sup>15</sup> CAHA’s policies also stand in marked contrast to that of other national seashores, including Cape Cod, Fire Island, and Assateague Island, which have final rules or other management plans in place to address ORV use.

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<sup>14</sup> Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977).

<sup>15</sup> Our intent in filing this notice is not to seek a complete ban on ORV use in CAHA. There are places within CAHA where ORV use can occur with appropriate time, place, and manner restrictions to alleviate adverse impacts on listed species. As this notice makes clear, however, NPS’s current authorization of ORV use violates numerous federal laws and regulations.



## **A. VIOLATIONS OF THE ENDANGERED SPECIES ACT**

The ESA mandates that all federal agencies must ensure that their actions are not likely to jeopardize the continued existence of any species listed as threatened or endangered under the statute. 16 U.S.C. § 1536(a)(2). If an action is likely to adversely affect a listed non-marine species, an agency must formally consult with FWS, which then issues a biological opinion to determine whether the action is likely to jeopardize the species. 50 C.F.R. § 402.14(a). A biological opinion must evaluate the effects of the action and all cumulative effects on the species. *Id.* § 402.14(g)(3).

Additionally, FWS must specify whether the action will cause any incidental “take” of the species, and if so will include within the biological opinion an incidental take statement. 16 U.S.C. § 1536(b)(4). This statement must specify the impact of such incidental taking on the species, outline measures to minimize such impact, and set forth terms and conditions “that must be complied with by the Federal agency” to implement the measures. *Id.* The ESA also requires that each agency “shall use the best scientific and commercial data available” when fulfilling the consultation duties. *Id.* § 1536(a)(2).

### **1. THE FWS’S BIOLOGICAL OPINION VIOLATES THE ENDANGERED SPECIES ACT.**

#### **a. FWS’s Unlawful “No Jeopardy” Conclusion**

The IPSMP Biological Opinion acknowledges in great detail the adverse effects of off-road vehicles and associated recreational activities on the piping plover, sea beach amaranth, and sea turtles, the significant extent of that activity within the habitat of these species, and the potential of the IPSMP to adversely affect these species. But then the Biological Opinion simply pronounces the conclusion that implementation of the IPSMS is not likely to jeopardize these species. This is an arbitrary and capricious conclusion that violates the ESA and APA. *See Pacific Coast Fed’n of Fishermen’s Assoc’ns, Inc. v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001).

Indeed, the Biological Opinion recognizes a “steep decline in the CAHA population” of piping plovers from “15 pairs to two to three pairs annually since 1989.” IPSMS Biological Opinion. Furthermore, the opinion concedes that “evidence suggests that the actions proposed to be authorized have the potential to result in mortality/injury to nesting turtles and nests, eggs, hatchlings, post-hatchling washbacks, and stranded live turtles.” *Id.* Likewise, the Biological Opinion concludes that “there is evidence that restricted access may protect [seabeach amaranth] and result in a larger population.” *Id.* The opinion cites numerous scientific studies reporting harmful effects of ORVs on these species. And the agency recognizes that ORV activity at CAHA and in nesting areas in particular has increased and continues to expand. *Id.*

The opinion notes that pressure from recreational activities has increased over the years. Visitation to CAHA has soared from 264,500 visitors in 1955 to more than 2.25

million visitors in 2006. Furthermore, “ORV use at CAHA is a year-round activity” and that, with limited exceptions, “during winter months all CAHA beaches are open to ORV use.” *Id.* Tellingly, the FWS states that “for the past couple of years, 150-foot ORV corridors have been used in certain areas of CAHA to provide for recreation use and access while providing *some* protection of natural resources.” *Id.* (emphasis added). The ESA does not require that some protection of threatened and endangered species occur; it flatly *prohibits* take of these species.

The Biological Opinion recommends additional monitoring as well as development of more specific standards and strategies to alleviate the significant threat to listed species at CAHA. Yet, after recognizing that the Plan’s lack of direction and standards—for example, no permitting system is called for under the IPSMP and no limitations are proposed for night driving—to limit recreational activity that could affect the nesting and foraging of piping plovers and sea turtles, FWS concludes that implementation of the Plan is not likely to jeopardize the species. This conclusion has no rational connection to the facts laid out in the Biological Opinion, is arbitrary and capricious under the APA, and violates the ESA’s requirements including that FWS must ensure against jeopardy to the species and use the best available scientific information in reaching its conclusions. Moreover, the no jeopardy opinion does not distinguish between take of the more numerous Atlantic Coast population of piping plovers and the critically endangered Great Lakes population, numbers of which use Cape Hatteras beaches for migration and wintering.

Furthermore, under the ESA regulations, the agency must also consider cumulative effects of other State and private activities that are reasonably certain to occur within the area. 50 C.F.R. §§ 402.14(g)(3), 402.02. The Biological Opinion contains only one short paragraph discussing cumulative effects of activities in and around the seashore on listed species at CAHA. These paragraphs fail to adequately identify and discuss activities on State and private land and explain why effects from those activities combined with the proposed action will not jeopardize the species.

Finally, the Biological Opinion acknowledges that the continued implementation of the IPSMP may result in “take” of listed species at CAHA, but FWS states that it cannot quantify the level of take. Despite not knowing how much take will occur, and acknowledging the importance of CAHA to the piping plover and sea turtles, FWS concludes that the action is not likely to jeopardize the species. Considering that *any* take of a listed species could impact its chances of survival and recovery, the Service’s no-jeopardy conclusion and authorization of “incidental” take is unreasonable.

In sum, in issuing the Biological Opinion, FWS ignored the best available scientific and commercial information, failed to conduct adequate cumulative effects analyses, failed to ensure against jeopardy to the species, and failed to articulate a rational connection between the facts and its conclusions when conducting its jeopardy analyses, all in violation of the ESA and APA.



**b. FWS' Unlawful "Incidental Take" Authorization.**

The Ninth Circuit has established that an incidental take statement must specify the amount or extent of authorized take, which, if exceeded, results in an unacceptable level of take that triggers re-initiation of consultation. *Arizona Cattle Growers' Assoc. v U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1249 (9th Cir. 2001). This limit need not be a numerical limit but could be a surrogate limit that describes ecological conditions which would define the amount or extent of take. However, if a surrogate is used, FWS must establish why no numerical limit could be obtained and demonstrate that the surrogate conditions are linked to take of the species. *Id.* at 1250-51. *See also Natural Res. Def. Council v. Evans*, 232 F. Supp. 2d 1003, 1049-51 (N.D. Cal. 2002); *National Wildlife Fed'n v. NMFS*, 235 F. Supp. 2d 1143, 1160 (W.D. Wash. 2002). An incidental take statement cannot be effective if no trigger exists to require the agency to reconsider its approval of the incidental take. *National Wildlife Fed'n*, 235 F. Supp. 2d at 1160.

The Biological Opinion at issue here violates these requirements because it does not identify the amount or extent of "incidental" take authorized. It establishes neither numerical limits of take, nor any ecological surrogate conditions that define the limit of authorized take. Instead, it simply states that the level of take is "undeterminable" or "difficult to detect." *IPSMP Biological Opinion*. Thus, the opinion does not identify any trigger to determine when the authorized level of take has been exceeded and re-initiation of consultation is required. The Ninth Circuit has held that such deficiencies render an incidental take statement unlawful. *Arizona Cattle Growers*, 273 F.3d at 1251.

**2. THE NPS IS IN VIOLATION OF SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT FOR FAILING TO ENSURE THAT ITS ACTIONS WILL NOT JEOPARDIZE LISTED SPECIES.**

The core mandate of § 7(a)(2) of the ESA is clear: "Each Federal agency *shall*, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], 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 . . ." 16 U.S.C. § 1536(a)(2) (emphasis added). An agency's duty to consult under this provision is triggered whenever it is determined that an action "may affect" a threatened or endangered species. 16 U.S.C. § 1536(a)(3); 50 C.F.R. § 402.12 - 402.14.<sup>16</sup>

Where a "may affect" determination has been made, formal consultation is required unless the FWS concurs, in writing, that the proposed action is "not likely to adversely affect" listed species. An agency may satisfy its duty to avoid jeopardy or

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<sup>16</sup> This trigger for consultation was "set sufficiently low to allow Federal agencies to satisfy their duty to 'insure' under Section 7(a)(2)." *Florida Key Deer v. Stickney*, 864 F. Supp. 1222, 1229 (S.D. Fla. 1994) (quoting 51 Fed. Reg. 19,949-950 (June 3, 1986)) ("Therefore, 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.").

adverse modification by conforming its action to a biological opinion issued by the FWS following formal consultation, and by fully complying with any reasonable and prudent alternatives and measures set forth in such biological opinion. Only after the federal agency complies with Section 7(a)(2) can that agency action go forward. *National Wildlife Fed'n v. Brownlee*, 2005 U.S. Dist. LEXIS 5688 (D.D.C. April 6, 2005) (“[An Agency] must consult with FWS ‘at the earliest time possible’ if any ‘action’ that it takes ‘may affect’ an endangered species.”); *Florida Key Deer v. Brown*, 2005 U.S. Dist. LEXIS 5981, at \*6 (citing *Pacific Coast Federation of Fisherman’s Assoc. v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1242 (N.D. Cal. 2001)).

Beyond its procedural requirements, Section 7(a)(2) of the ESA imposes an independent substantive duty on all Federal agencies to “insure” that their actions are not likely to “jeopardize the continued existence” of listed species. 16 U.S.C. § 1536(a)(2). Indeed, the ESA “imposes an absolute prohibition on any federal action that is likely to jeopardize the continued existence of a listed species.” *Center for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1156 (D. Ariz. 2002). An agency action jeopardizes the continued existence of a species if it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

While consultation with the FWS is the procedural manifestation of an agency’s obligations under Section 7, that “alone does not satisfy an agency’s duty under the [ESA]” to avoid jeopardy. *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994), citing *Pyramid Lake Paiute Tribe v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). Therefore, an agency cannot “abrogate its responsibility to ensure that its actions will not jeopardize a listed species” simply because it has consulted and received a biological opinion; “its decision to rely on a FWS biological opinion must not [be] arbitrary or capricious.” *Pyramid Lake*, 898 F.2d at 1415. In this instance, by relying on the patently defective IPSMP Biological Opinion, the Park Service has taken actions that are jeopardizing the continued existence of the piping plover, sea turtles and other listed species. The significant negative effects of activities authorized under the IPSMP identified in the biological opinion, including habitat degradation, loss of forage, restriction of essential movement and increased stress from human intrusion, underscore the stark disconnect between the facts and the FWS’s conclusions.

Specifically, within the biological opinion, the FWS paints an unfavorable picture for the continued existence of the piping plover at CAHA. The FWS concedes that the “unrestricted use of motorized vehicles on beaches is a serious threat to piping plovers and their habitats.” IPSMP Biological Opinion at \*24. The FWS concludes that “[b]eaches used by vehicles during nesting and brood-rearing periods generally have fewer breeding plovers than available nesting and feeding habitat can support. In contrast, plover abundance and productivity has increased on beaches where vehicle restrictions during chick-rearing periods have been combined with protection of nests from predators. *Id.* In addition to a serious and documented risk of chicks being killed

by vehicles, *id.* at \*25, FWS further notes that “[v]ehicles also significantly degrade piping plover habitat or disrupt normal behavior patterns.” *Id.* The FWS further concedes that “[d]emographic models for piping plovers indicate that even small declines in adult and juvenile survival rates will cause very substantial increased in extinction risk” and “insufficient protection of non-breeding piping plovers has the potential to quickly undermine the progress toward recovery achieved at other sites.” *Id.* at \*27.

The FWS is even more forthcoming in its discussion of the impacts of ORV and associated recreational activities on sea turtles:

“[T]he use of ORVs on sea turtle nesting beaches can adversely affect the egg, hatchling, and nesting life stages [of] sea turtles. Vehicles can directly impact sea turtles by running over nesting females and hatchlings making their way to the ocean; crushing nests; deterring females from nesting and approaching nesting beaches; and, changing the beach profile and nesting habitat (e.g., compacting sand, making nest excavation difficult, producing ruts in the sand that trap hatchlings, and creating escarpments that prevent females from accessing the beach.).

Nesting females and hatchling sea turtles can be killed or nests can be crushed when run over by ORVs. Vehicles on beaches, especially during night hours, run the risk of striking adult females emerging on the beach to nest or hatchlings making their way towards the surf after emerging from the nest (national Research Council, 1990). Both marked and unmarked nests run the risk of being crushed by vehicle use within the nesting areas (typically above the high tide line).

Similarly, the FWS concedes that “most serious threats to the continued existence of seabeach amaranth” include off-road vehicles.

The IPSMP Biological Opinion is replete with similar statements documenting the potential serious, longterm risk posed to these species as a result of continued unfettered ORV use at CAHA. Given the available information on the harm to these species and their habitat caused by off-road vehicles and associated recreational activities, the FWS’s determination that the implementation of the IPSM Plan will not jeopardize the continued existence of these species is arbitrary and capricious and inconsistent with the intent and language of the ESA. Thus, the Park Service is not justified in relying upon the conclusions within the biological opinion when fulfilling its independent obligation to determine if the implementation of the IPSMP is likely to jeopardize the continued existence of the listed species at CAHA. Therefore, the Park Service, by allowing and enabling increased ORV intrusion into protected species’ habitat, is in violation of Section 7(a)(2) of the ESA.

**3. THE NPS IS IN VIOLATION OF SECTION 7(a)(1) OF THE ENDANGERED SPECIES ACT FOR FAILING TO TAKE ACTION TO CONSERVE LISTED SPECIES AT CAHA.**

The NPS is also violating Section 7(a)(1) of the ESA by failing to “utilize [its] authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species.” 16 U.S.C. § 1536(a)(1). The term “conservation” is defined under the ESA as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary.” *Id.* § 1532(3). Thus, the duty to conserve goes beyond the mere avoidance of “jeopardy”; it requires the NPS to develop and implement, in consultation with the FWS, an affirmative conservation program to protect and recover listed species like the piping plover and sea turtles. The NPS, however, has failed to implement appropriate programs for the protection of these species and has failed to adequately carry out those policies that are in place. This failure has led to the dwindling number of species at CAHA.

For the piping plover, the Recovery Plan specifically addresses the need to effectively manage ORVs and associated recreational activities use within plover habitat, calling for land managers to “[r]educe disturbance of breeding plovers from humans and pets.” Recovery Plan, sec. 1.3 and App. G. The Recovery Plan clearly states that “[u]nrestricted use of motorized vehicles on beaches is a serious threat to piping plovers and their habitats.” *Id.* Further, the Recovery Plan and its associated guidelines for managing recreational activities (Appendix G) sets out minimum protections. As the FWS noted “some Federal land managers have endangered species protection obligations under Section 7 of the Endangered Species Act or under Executive Orders 11644 and 11989 that go beyond adherence to these guidelines.” *Id.*

Inexplicably, the NPS’s IPSMP completely abandons the goal of recovering species. For piping plovers, FWS concludes that “[u]nder the proposed management strategy, the piping plover population at CAHA is likely to remain low. Continued declines in the CAHA population or even maintaining current population levels could prevent achieving the stated recovery goals for the Southern recovery unit.” *Id.* at 72. At the same time, FWS acknowledges that “[d]ecreasing disturbance throughout CAHA to promote nesting opportunities and protect established nests and chicks could easily reverse a population that appears to be approaching functional extirpation. Non-breeding protections are also warranted and attainable to reverse the declines seen in juvenile return rates and overwinter survival to promote population increase in other parts of the species’ range.” IPSMP Biological Opinion (emphasis added).

One can only conclude from reviewing the IPSMP and the biological opinion that the NPS has provided no strategy to reduce the impacts of motorized recreation and associated activities that will facilitate conservation of the listed species at CAHA. Indeed, rather than implement the recommendations of the U.S. Geological Survey Protocols, which represent the best available science on protection of CAHA’s listed

species, the NPS developed an IPSMP that did not even include the protocol recommendations. The NPS, therefore, has committed to land management practices directly opposed to what was deemed necessary for piping plovers to “reverse a population that appears to be approaching functional extirpation.” IPSMP Biological Opinion.

**4. THE NPS IS IN VIOLATION OF SECTION 9 OF THE ESA FOR ALLOWING THE UNAUTHORIZED TAKE OF LISTED SPECIES.**

Under Section 9 of the ESA, it is unlawful for any person to “take” a listed species. 16 U.S.C. § 1538(a)(1)(B). The term take is defined by statute to include engaging or attempting to engage in conduct that will “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” members of a listed species. 16 U.S.C. § 1532(19). The term “harass” is further defined by the FWS as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. The NPS is liable for the take of listed species that results from ORV use, if the NPS allows the use of ORVs in a manner that raises a reasonably certain threat that a take is imminent.

An exception to the take prohibition exists when, in the course of consultation under Section 7, the FWS determines that an otherwise lawful action will result in “an incidental taking” of the listed species and issues an Incidental Take Statement (“ITS”). The ITS authorizes the “incidental take” of a specific number of individuals of a listed species where the take “result(s) from, but [is] not the purpose of, carrying out an otherwise lawful activity.” 50 C.F.R. § 402.02; *see also* 16 U.S.C. § 1536(b)(4). An ITS must state the impact that the take will have on the species, identify the “reasonable and prudent measures” (“RPMs”) necessary to minimize the expected impact and establish “terms and conditions” for implementation of the RPMs. 16 U.S.C. § 1536(b)(4); *see also* 50 C.F.R. § 402.14(i). A take that results from an action conducted in compliance with an ITS is exempt from the ESA’s prohibitions and penalties. 16 U.S.C. § 1536(o)(2). If, however, the agency fails either to implement the RPMs or to comply with the terms and conditions of the ITS, any take that results from the actions is unlawful. 50 C.F.R. § 402.14(i)(5).

Here, it is not clear that the FWS can even issue an incidental take statement for ORV use at CAHA, because the NPS’s authorization of that use is presently illegal under the executive orders and regulations governing the national park system. The purpose of an incidental take allowance is to permit *otherwise lawful activities* to occur despite the possibility of limited impacts to listed species. That is not the case here. Moreover, the IPSMP Biological Opinion contains no numerical limits on take of listed species at CAHA and proffers no reasonable and prudent measures, save for increased monitoring, that could reduce take. Even if this monitoring occurs and is adequately performed, the incidental take statement’s apparent authorization of unlimited take includes no trigger for reinitiating consultation if take levels are exceeded or determining when the NPS has

failed to comply with its terms and conditions. Indeed, it is not clear whether it is even possible to exceed take limits as the vaguely worded take statement does not actually limit take. This turns the entire concept of incidental take on its head and cannot be squared with the ESA.

In light of the myriad and well-documented adverse impacts on wildlife associated with ORVs and related activities, as described above, the NPS's authorization, facilitation, and implementation of activities that support and increase ORV trails and use is resulting in "take" of CAHA's listed species in violation of Section 9 of the ESA.

## **B. VIOLATIONS OF THE MIGRATORY BIRD TREATY ACT**

Section 2 of the MBTA prohibits the taking of migratory birds, providing in broad terms that: "it shall be unlawful at any time, by any means or in any manner . . . to take . . . [or] kill . . . any migratory bird, [or] any part, nest, or egg of any such bird." 16 U.S.C. § 703. The D.C. Circuit has ruled that the MBTA clearly applies to federal agencies, such as NPS. *Humane Society of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000). The NPS's authorization of ORV use has caused the death of migratory birds such as the American oystercatcher and the least tern. By authorizing actions that fail to prevent potential take of migratory birds and nests due to ORV use, NPS is violating the MBTA.

The NPS's authorization of ORV use in shorebird habitat has caused the death of protected shorebird species and even led to criminal investigation of Park Service staff by FWS's Division of Law Enforcement. See FWS, Report of Investigation, No. 2004403940 (2004) (obtained through FOIA) (Attachment B). Specifically, two least tern chicks were found crushed by ORVs at Hatteras Spit on July 23, 2004.<sup>17</sup> Likewise, on June 29, 2003, one adult least tern and one American oystercatcher chick were found dead in ORV tracks; a second oystercatcher chick which had been run over was found alive but died later the same day.<sup>18</sup> In reporting these fatalities, the National Park Service acknowledged that "[e]xisting closures did not allow adequate protection from human activities."<sup>19</sup> One month later, on July 27, 2003, despite temporary expansion of bird closures, two additional least tern chicks were found dead in ORV tracks.<sup>20</sup> In addition, seven black skimmer chicks were found dead or dying in vehicle tracks during the 2003 breeding season.<sup>21</sup> The IPSMP Biological Opinion further details known deaths of migratory birds at CAHA and other seashores due to ORV use.

<sup>17</sup> See FWS, Report of Investigation, No. 2004403940 (2004); Press Release, Cape Hatteras National Seashore, Temporary Bird Closure to be Established on Hatteras Spit (July 30, 2004).

<sup>18</sup> Press Release, Cape Hatteras National Seashore, NPS Expands Temporary Bird Closure (July 1, 2003), formerly available at [www.nps.gov/caha/pphtml/newsandeventsdetail7565.html](http://www.nps.gov/caha/pphtml/newsandeventsdetail7565.html).

<sup>19</sup> *Id.*

<sup>20</sup> Press Release, Cape Hatteras National Seashore, NPS Asks Beach Drivers to Slow Down, (July 29, 2003), formerly available at [www.nps.gov/caha/pphtml/newsandeventsdetail7744.html](http://www.nps.gov/caha/pphtml/newsandeventsdetail7744.html).

<sup>21</sup> Karen Sales and Marcia Lyons, 2003 American Oystercatcher Breeding Activity, Cape Hatteras National Seashore (2004).



Last June, at Hatteras Inlet, two oystercatcher chicks were lost to predators in large part due to inadequate closures and nighttime ORV disturbance. Because the closures were inadequate, chicks wandered into ORV corridors. The efforts of park staff and volunteers to delay ORV passage until the adult parents could rescue the chicks were largely rebuffed by their operators, according to NPS reports obtained via FOIA. With the adults flushed due to disturbance, one chick died of hypothermia and the other was taken by a ghost crab. In all likelihood, neither death would have occurred had proper buffers and nighttime closures been established.

The IPSMP Biological Opinion improperly contains a blanket waiver from the requirements of the MBTA. It states: “The USFWS will not refer the incidental take of any migratory bird for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 USC § 703-712), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.” IPSMP Biological Opinion. But the FWS does not have the authority to waive the MBTA in a biological opinion, especially not here, where the biological opinion and the IPSMP are legally deficient. Although, the FWS retains discretion over prosecutions under the MBTA, it may not issue a blanket exemption from future liability.

NPS authorization of ORV use on CAHA clearly harms migratory birds and may well lead to take of threatened and endangered species. Various species of birds have been found dead in ORV tracks in the past. This harm is neither potential nor speculative, and it will reoccur if NPS continues to authorize ORV use in close proximity to unfledged chicks during nesting seasons.

### ***C. VIOLATIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT***

NEPA requires that federal agencies prepare a detailed statement of environmental impact for every “recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332. If an action is likely to have significant environmental effects, the agency must prepare an Environmental Impact Statement (EIS).

The President’s Council on Environmental Quality has issued regulations listing ten factors that may demonstrate the “significance” of an action’s impact on the environment. The NPS’s continued authorization of ORV use in CAHA implicates the majority, if not all, of these factors. 40 C.F.R. § 1508.27. ORV use at CAHA impacts a unique ecologically-critical area; is highly controversial; may establish a precedent for future use at CAHA and other national seashore areas; has significant cumulative impacts on the area’s land, flora and fauna; may affect historic, scientific, and cultural sites within CAHA; adversely affects endangered and threatened species; and as demonstrated above is currently being authorized in violation of numerous federal laws.

Specifically, the NPS has violated NEPA in its preparation of an EIS for the IPSMP by failing to include an appropriate range of alternatives for public review. NEPA's regulations require that a full "range of alternatives" be considered. 40 C.F.R. § 1505.1. According to the Council on Environmental Quality, which administers that statute, "[t]he phrase 'range of alternatives' ... includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. 40 C.F.R. § 1502.14.

As discussed previously, the NPS commissioned the U.S. Geological Survey to develop a set of protocols and recommendations for the management of protected species at CAHA in 2005. Those documents contain detailed management recommendations intended to help NPS and the public consider the proposed IPSMP alternatives. But in preparing the IPSMP alternatives for the environmental assessment, NPS failed to include the USGS recommendations among the options. In fact, even the most restrictive option presented to the public fell well short of the recommendations of the USGS Protocols, which still represent the latest and most authoritative scientific recommendations for managing these species. NPS's failure to consider an appropriate range of alternatives in its environmental assessment is a clear violation of NEPA.

#### **D. VIOLATIONS OF EXECUTIVE ORDERS AND NPS REGULATIONS**

As noted above, Executive Order 11,644 directs the National Park Service "to establish policies and provide for procedures that will ensure that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands, to promote the safety of all users of those land, and to minimize conflicts among the various uses of those lands."<sup>22</sup> The order required that the Secretary of the Interior develop and issue regulations that designate specific areas and trails on which ORV use may be permitted within six months of the order.<sup>23</sup> Furthermore, Executive Order 11,989 requires the Secretary of the Interior to immediately close areas or trails open to ORVs if such use is determined to be causing or likely to cause considerable adverse effects on the soil, vegetation, wildlife habitat or cultural historic resources of public lands.<sup>24</sup> NPS regulations require that routes and areas for off-road vehicle use be designated by special regulation in compliance with these executive orders. 36 C.F.R. § 4.10. The NPS has yet to develop and issue these special regulations.

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<sup>22</sup> Exec. Order No. 11,644 (February 8, 1972), 3 C.F.R. 666 (1971-1975), *reprinted as amended in* 42 U.S.C. § 4321.

<sup>23</sup> *Id.* The order further mandates that with regard to NPS resources like CAHA, ORV trails and areas may be established "only if the respective agency head determines that [ORV] use ... will not adversely affect their natural, aesthetic or scenic values." *Id.* In addition, the agency head must "establish procedures for the enforcement of [the ORV] regulations" and must "monitor the effect" of ORV use and amend the ORV route and area designations "as necessary to further the policy of [the] order. *Id.*

<sup>24</sup> Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977).

Indeed, NPS itself has 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.” NPS, CAHA, Talking Points: ORV Use and the Beach-Driving Fee Permit Issue, *available at* <http://www.nps.gov/caha/beachpermit.htm>. In the words of the NPS: “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.” *Id.*

Numerous courts have held that the President’s proclamations and orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress. *National Wildlife Fed’n v. Babbitt*, 1993 U.S. Dist. LEXIS 10689 (D.D.C. July 30, 1993) (citations omitted). Congressional authorization for executive orders can be either “express or implied.” *United States v. New Orleans Public Serv., Inc.*, 553 F.2d 459, 465 (5th Cir. 1977). Executive orders are enforceable through the Administrative Procedure Act. *Id.* at \*33 (“It is now fairly well established that administrative action taken pursuant to an executive order is ‘agency action’ within the meaning of APA § 706(2), so long as the executive order has the force of law and places substantive limits on agency discretion.”). The orders at issue here are plainly enforceable as they limit agency discretion and are consistent with the organic acts for the National Park Service and Cape Hatteras and various environmental laws.

## **CONCLUSION**

By authorizing, funding, and implementing activities and projects which allow ORV use within protected species habitat, the NPS is violating Section 7(a)(1) and 7(a)(2) of the ESA. The NPS is relying upon a faulty biological opinion to support a legally flawed interim protected species management plan that does not meet the agency’s obligation to recover species. The NPS is therefore liable for any take of listed species that results from activities carried out under that plan.

NPS’s continued failure to comply with the requirements of the ESA and other environmental laws—including laws that specifically govern management of CAHA—in authorizing ORV use at CAHA is unacceptable and must be remedied. If, however, these violations are not remedied within 60 days, we intend to file suit.

Plaintiffs urge the NPS and the FWS to remedy these violations of the ESA, and to take all necessary and legally required steps to ensure the survival and recovery of listed species at CAHA. Plaintiffs remain more than willing to discuss these issues further with you, as Plaintiffs genuinely desire to avoid litigation through a mutually acceptable solution. We are looking forward to participating with you in the proposed negotiated rulemaking process, but NPS must strictly adhere to the law during that process. But NPS and the FWS cannot avoid their responsibility to take affirmative steps to recover species simply because a potential process exists to address these concerns in

the future. CAHA has been out of compliance with federal law, its own regulations, and two presidential executive orders for too long.

Thank you in advance for your consideration of these matters. Please contact us within sixty days if you wish to avoid suit or believe any of the above statements to be in error.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason C. Rylander". The signature is fluid and cursive, with a large initial "J" and "R".

Jason C. Rylander  
Staff Attorney  
Defenders of Wildlife