

**Defenders of Wildlife • National Audubon Society
Southern Environmental Law Center**

By Certified Mail/Return Receipt Requested

October 18, 2007

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

Dear Secretary Kempthorne, Directors Bomar and Hall, and Superintendent Murray:

Defenders of Wildlife, the National Audubon Society, and the Southern Environmental Law Center hereby provide notice of intent to sue in accordance with the 60-day notice requirement of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, 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.* with respect to the management of off-road vehicles (“ORV”) at Cape Hatteras National Seashore (“CAHA”).

Defenders of Wildlife and Audubon North Carolina have previously submitted detailed comments on the Interim Protected Species Management Strategy (IPSMS) and our concerns remain largely unaddressed. Defenders specifically gave notice of legal flaws in the draft Interim Protected Species Management Strategy on December 18, 2006, and the NPS has not sufficiently responded to those concerns. The “performance measures” developed as an amendment to the original Biological Opinion on April 24, 2007, and included in the July 2007 Finding of No Significant Impact, do not address these concerns. Although we appreciate that these performance measures were developed in response to our concerns about the incidental take provisions of the original Biological Opinion, the inclusion of productivity goals is not sufficient. First, we do not believe that performance standards that are based on productivity goals adequately substitute for actual limitations on take, which a proper incidental take statement should set forth. Second, CAHA did not come close to meeting those goals this past season; thus, already CAHA has violated its newly-minted

incidental take standard. After it was clear the standard could not be met, CAHA failed to mitigate the losses by making any changes to ORV management and continued to allow highly risky off-road vehicle use on ocean beaches in front of locations where there were unfledged piping plover chicks.

The NPS has now amended and finalized its interim strategy. The Finding of No Significant Impact and accompanying documents was released to the public on July 13, 2007. See <http://parkplanning.nps.gov>. The undersigned organizations believe that the park's adopted alternative (a modified version of Alternative D) still fails to comply with the ESA and other federal laws. NPS's adoption and implementation of the IPSMS is presently causing and will foreseeably continue to cause substantial harm and adverse impacts to federally-protected species. Indeed the Park Service's continued lax administration of ORV use at CAHA, without a legally-sufficient management plan, has resulted in a dismal nesting season for piping plovers, sea turtles, and colonial waterbirds in 2007.

We recognize that NPS intends to develop an ORV management plan and environmental impact statement through negotiated rulemaking, but although discussions of this process have been underway for more than two years, NPS did not publish its formal notice of its intent to establish a negotiated rulemaking committee until June 28, 2007. *Notice of Intent (NOI) to Establish a Negotiated Rulemaking Committee, Cape Hatteras National Seashore*, 72 Fed. Reg. 35373 (June 28, 2007). Furthermore, the Department of the Interior has yet to approve the rulemaking committee, and it is unclear whether the committee will formally meet prior to 2008. Once the committee is established, NPS estimates that the process will take at least 18-24 months to complete. Even if a consensus rulemaking process begins this year or next, there is still no guarantee that it will conclude in a timely fashion with a rule that is agreed to by all participants and which satisfies federal law. This interim species plan will accordingly govern ORV management and species protection at CAHA for *at least* the 2008 and 2009 breeding seasons and must comply with federal law for as long as it is implemented.

To put the matter as plainly as possible, our organizations have waited long enough for the management of CAHA to address the impacts of ORV use on protected species. The NPS cannot continue to violate federal law by allowing unregulated ORV use on the speculative promise that it will somehow remedy its numerous legal violations in the future through a proposed negotiated rulemaking process that has not yet begun and at best will take years to reach fruition. Although we are committed to participating in the potential negotiated rulemaking process, we cannot abide an interim management plan that maintains the status quo in certain aspects, reduces protection in other critical ways, and fails to comply with applicable federal laws and regulations.

A. VIOLATIONS OF THE ENDANGERED SPECIES ACT

1. THE NPS AND FWS ARE IN VIOLATION OF SECTION 9 OF THE ESA FOR IMPROPERLY ALLOWING THE 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 creates a likelihood of imminent take.

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).

In the course of the past nesting season, NPS allowed ORV use in close proximity to piping plover nests and unfledged chicks. NPS and the FWS have not followed FWS’s own recreational activity guidance for managing ORV use in piping plover nesting areas which states clearly that “[s]ections of beaches where unfledged piping plover chicks are present should be temporarily closed to all vehicles not deemed essential.” *FWS, Guidelines for Managing Recreational Activities in Piping Plover Breeding Habitat on the U.S. Atlantic Coast to Avoid Take Under Section 9 of the Endangered Species Act*, April 15, 1994, at 7. “Protected areas should extend from the oceanside low water line to the bay-side low water line or to the farthest extent of dune habitat if no bayside intertidal habitat exists.” *Atlantic Coast Piping Plover Recovery Plan*, Appendix G at 195.

NPS has also continued to allow day and night driving in close proximity to nesting areas and has not provided adequate buffers, which significantly increases the likelihood of abandonment of potential nesting areas and loss of nests or chicks due to abandonment or direct take. These actions are contrary both to the Recovery Plan guidelines for managing ORVs in plover habitat and the U.S. Geological Survey Protocols for plovers and nesting sea turtles, which the NPS commissioned to guide its management of protected species at CAHA and which represents the best available science on protection of CAHA’s listed species. Accordingly, we believe the Park Service’s management has and will likely lead to take of listed species at CAHA.

a. FWS’s “Incidental Take” Authorization Is Unlawful

As an initial matter, it does not appear 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. As Judge Terrence Boyle recently noted in *United States v. Mattei*, under federal law, executive orders, and NPS regulations ORV use at CAHA is not currently authorized and thus is presently illegal. *United States v. Mattei*, Civ. No. 2:07-mj-01065-BO (D.N.C. July 17, 2007) (“It is a violation to operate a motor vehicle on Cape Hatteras National Seashore without prior authority and is punishable by up to \$5,000.00, six months in prison, or both. 18 U.S.C. § 3571.”). As ORV use at CAHA is not now lawful, FWS cannot issue an incidental take permit for an unlawful activity.

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 and incidental take statement at issue here violate these requirements because it does not identify the amount or extent of “incidental” take authorized. It establishes neither numerical limits on 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.” *IPSMS Biological Opinion* at *78. To the extent this is true, however, it is so only because the NPS has allowed unfettered ORV use in protected species habitat and thus lacks a baseline from which to measure the direct and indirect impacts of that use and the potential capacity of available habitat. The Ninth Circuit has held that such deficiencies render an incidental take statement unlawful. *Arizona Cattle Growers*, 273 F.3d at 1251.

The April 24, 2007, amendments to the Biological Opinion do not cure these defects. The performance measures for the piping plover require that CAHA produce: 1) four or more breeding pair per year; 2) three or more nests of 75% of the number of breeding pairs (whichever is greater); 3) at least one fledged chick, on average, per nest; and for wintering plovers, a monitoring protocol “to help establish where the wintering enclosures should be placed.” In addition, the amendment includes a performance measure requiring that sea turtle false crawl-to-nest ratios for all species be less than or equal to 1:1 annually and that the number of sea turtle nests at the seashore annually be greater than or equal to 10% of the state-wide average for the previous 5 years. Although these performance measures provide a modicum of guidance they do not specify in any way how much take will be permitted. So long as CAHA meets these modest productivity standards an unlimited number of piping plovers and sea turtles could apparently be taken in order to provide for unfettered ORV use. That, of course, potentially impacts the survival and recovery of these species across their range. See Letter from Pete Benjamin, FWS, to

Michael B. Murray, Amendment to the Biological Opinion for Cape Hatteras National Seashore's Interim Protected Species Management Strategy, April 24, 2007 at 3, 4 (“[T]he level of incidental take is expected to be those breeding pairs, nests, eggs and chicks that are identified by plover monitoring at the Seashore that exceed the Seashore’s minimum performance target levels.”). Similar provisions are in effect for nesting sea turtles. *Id.* (“[I]ncidental take is expected to be all sea turtle nests (all species) that exceed 10% of the States total annual nesting numbers (based on the previous five years’ nesting average) and all false crawls that exceed a false crawl to nest ration of 1:1 (annually).”).

We are particularly concerned about the inadequate protection for migrating and wintering piping plovers. The Seashore clearly is one of the most critical stopover areas on the Atlantic Coast for migrating piping plovers and it also is an important wintering location. The Biological Opinion states that for wintering plovers a monitoring protocol is necessary to “provide data that will allow the NPS to adjust the protective measures to enhance conservation of the plover the following year.” Biological Opinion at *79 It is not clear under the Interim Strategy or Biological Opinion whether the Seashore is required to protect migrating piping plovers at all or what protections will apply for migrating or wintering piping plovers. After several years of work on the Interim Plan, the Seashore clearly should have done more than state that *at some time in the future*, it will develop a protocol. Such speculative, future action neither provides protection now, nor indicates what level of incidental take is allowable.

As discussed further below, the IPSMS Biological Opinion contains no meaningful 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 authorizes unlimited take of piping plovers once certain performance measures are met. This unlimited, unquantified take authorization 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, the NPS’s authorization, facilitation, and implementation of activities that support and increase ORV use at CAHA is resulting in “take” of listed species in violation of Section 9 of the ESA.

b. NPS Is in Violation of the Incidental Take Statement

Even if one accepts, *arguendo*, that these performance measures are a defensible substitute for a proper take limitation, the fact remains that CAHA failed utterly to meet even these modest goals this season. Indeed, while CAHA did manage at least 6 breeding pair this year and 11 nest attempts, it fledged only 4 chicks. We also understand that CAHA’s false crawl-to-nest ratio for sea turtles was exceeded.

Although CAHA management was well aware by mid-summer 2007 that it would exceed its authorized incidental take for Piping Plovers, the NPS did not cease ORV use or even restrict it further to improve chances of fledging chicks late in the breeding season. To date, the NPS has taken no action to halt or modify ORV use or reinitiate consultation. The Seashore has no way of knowing if some of the chick loss was directly due to ORV use during nighttime driving, at which time it is impossible to monitor the chicks, or at other times and places when NPS personnel were not present or not able to observe the chicks, or

if the loss is indirectly due to ORV use, such as increased predator numbers near breeding areas caused by ORV users leaving food, bait scraps, and fish on the beach while fishing or feeding gulls. Further, we understand that to date NPS has not even requested reinitiation and does not intend to do so until the NPS completes its annual report in January. That, of course, means that further amendment of the IPSMS and Biological Opinion will be rushed or more likely will not be completed prior to the start of the 2008 breeding season. Indeed, FWS and NPS utterly failed to complete the current IPSMS prior to the 2007 breeding season despite promises to do so.

Under the circumstances, it is clear that the NPS is in clear violation of the revised Biological Opinion and incidental take statement, that the NPS has failed to enforce even the inadequate Interim Strategy and that management pursuant to these documents is not adequate to protect threatened and endangered species at CAHA. These violations have led to takings of the various listed species that reside and breed at CAHA that are actionable under Section 9 of the ESA.

2. THE NPS IS IN VIOLATION OF SECTION 7 OF THE ENDANGERED SPECIES ACT

a. NPS HAS FAILED 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.

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.”).

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 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. Both the Biological Opinion and the NPS’s reliance on it are arbitrary and capricious in light of the plethora of contradictory information available to the NPS, and give rise to a claim under Section 7(a)(2).

In this instance, by relying on a patently defective IPSMS Biological Opinion and FONSI, the NPS has taken actions that are jeopardizing the continued existence of the piping plover and sea turtles. The significant negative effects of activities authorized under the IPSMS 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 conclusion that unlimited ORV use under the IPSMS will have “no significant effect” on listed species.

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.” IPSMS 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 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. Risk of jeopardy is particularly acute for migrating or wintering members of the highly-endangered Great Lakes population, which have been found at CAHA in low numbers, *id.* at

29, despite a monitoring program that, due to its lack of spotting scope use, is not conducive to locating birds from this very rare population.

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).

Id. at *31. Similarly, the FWS concedes that “most serious threats to the continued existence of seabeach amaranth” include off-road vehicles. *Id.* at *27.

The IPSMS Biological Opinion is replete with similar statements documenting the potential serious, long-term risk posed to these species as a result of continued unfettered ORV use at CAHA. In addition, the management protocols developed by USGS scientists at the request of the NPS confirm that much more protective measures than those described by either the Biological Opinion or the Interim Plan are necessary to protect the various listed species from extirpation.

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 IPSMS will not jeopardize the continued existence of these species is arbitrary and capricious and inconsistent with the intent and language of the ESA. The NPS is not justified in relying upon the conclusions within the Biological Opinion when fulfilling its independent obligation to determine if the implementation of the IPSMS is likely to jeopardize the continued existence of the listed species at CAHA. By allowing and enabling unlimited ORV intrusion into protected species’ habitat, the NPS is in violation of Section 7(a)(2) of the ESA.

b. NPS HAS FAILED TO REINITIATE CONSULTATION

By the very terms of the amended IPSMS Biological Opinion, the Park Services’ failure to comply with its incidental take statement demands *immediate* reinitiation of formal consultation and revised reasonable and prudent measures. “If during the course of the

action, the level of incidental take is exceeded, such incidental take represents new information requiring reinitiation of consultation and review of the reasonable and prudent measures provided. The Seashore must immediately provide an explanation of the causes of the taking and review with the USFWS the need for possible modification of the reasonable and prudent measures.” Letter from Pete Benjamin, FWS, to Michael P. Murray, NPS, April 24, 2007, Amendment to the Biological Opinion for Cape Hatteras National Seashore’s Interim Protected Species Management Strategy. Furthermore, the Biological Opinion states clearly: “In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.” IPSMS Biological Opinion at *85.

Under the plain language of the Biological Opinion, because the NPS has violated its incidental take statement ORV use at CAHA pursuant to the Interim Strategy should cease until reinitiation of consultation is completed. NPS has neither reinitiated consultation nor ceased activities permitted under its incidental take statement.

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

The NPS is 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 dwindling populations 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.* The Recovery Plan and its associated guidelines for managing recreational activities (Appendix G) sets out minimum protections, but as the FWS noted in that document, “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.*

NPS apparently views its IPSMS as a temporary measure pending completion of the proposed negotiated rulemaking process but this does not absolve the NPS of the requirement to recover species. The IPSMS completely abandons that goal. In its Biological Opinion, 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.” IPSMS Biological Opinion 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.” *Id.* (emphasis added).

The Seashore should not take any solace in the fact that it had the highest productivity for piping plovers in North Carolina this year. Other areas that repeatedly have higher productivity than CAHA, but which are particularly vulnerable to storms because of their low elevation, suffered very poor weather conditions this summer. More importantly, with .67 chicks fledged per pair at CAHA, this productivity level is far below what is necessary to maintain even a stable population. See Piping Plover Revised Recovery Plan at 179 (“[A] mean annual fecundity of 1.245 chicks fledge per pair is needed to maintain a stationary population....”). In allowing ORV use in front of unfledged chicks this year, CAHA disregarded the Recovery Plan and the collective expertise of biologists who have decades of experience successfully managing nesting Piping Plovers.

One can only conclude from reviewing the IPSMS, the Biological Opinion, and the most recent amendments, that the NPS has not seriously attempted to reduce the impacts of motorized recreation and associated activities (such as repeated instances of dogs off leash) that will facilitate conservation of the listed species at CAHA. Indeed, rather than implement the recommendations of the U.S. Geological Survey Protocols, the best available science on protection of CAHA’s listed species, the NPS developed an IPSMS process that did not even include the protocol recommendations among the alternatives for consideration. The NPS, therefore, has committed itself to land management practices that fall short of what was deemed necessary under the piping plover recovery plan and the U.S.G.S. protocols to “reverse a population that appears to be approaching functional extirpation.” IPSMS Biological Opinion at *72.

4. THE FWS’S BIOLOGICAL OPINION IS INADEQUATE AND ITS “NO JEOPARDY” CONCLUSION IS ARBITRARY AND CAPRICIOUS

The IPSMS 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 IPSMS to adversely affect these species. But then the Biological Opinion simply asserts 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 at *76. The opinion also 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 Biological 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. *Id.* at *5. 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 requires more than *some* protection of threatened and endangered species; it requires a level of protection sufficient to promote the recovery of the 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 permit system is called for under the IPSMS 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.

The Biological Opinion acknowledges that the continued implementation of the IPSMS 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. Under these circumstances, the Service’s no jeopardy conclusion and authorization of “incidental” take is arbitrary and capricious. Because the Service does not know how many members of these species will be taken it cannot properly assess its impact of the IPSMS on the species’ survival and recovery.

Finally, 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. No mention or discussion, for example, is included regarding the proposed replacement of the Bonner Bridge. The Biological Opinion fails to adequately identify and discuss activities on federal, state, and private land and does not explain why effects from those activities combined with the proposed action will not jeopardize the species.

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.

5. The IPSMS Does Not Adequately Protect Listed Species

Underlying these claims is our strong belief, based on the Piping Plover Revised Recovery Plan and the USGS protocols for species at CAHA, that the Park Service's adopted IPSMS alternative simply does not adequately protect listed species. In adopting a modified version of Alternative D, which we believe is actually less protective of natural resources than the original Alternative D, the NPS has ignored these concerns.

Specifically, we believe the plan's failure to address nighttime beach driving places nesting sea turtles at risk. Vehicle headlights deter turtles from attempting to nest, cause them to abandon nesting attempts, and disorient them. Generally, vehicles can crush nesting turtles and hatchlings, and tire ruts can trap hatchlings on their path to the sea. Likewise night driving without adequate buffers should not be permitted during the nesting season for shorebirds. Shorebird chicks cannot be monitored effectively at night and may move out of protected areas to forage or rest. Indeed, vehicle lights may be an attractant for some shorebird species, such as the American oystercatcher, and are a known source of disorientation for sea turtles. Effective monitoring of shorebird and sea turtle nests is extremely difficult in daylight; it is impossible at night.

Second, none of the IPMS alternatives adequately address newly created habitat and instead require new areas to be posted only upon discovery of a nest or observation of breeding behavior on multiple occasions. Given the dynamic nature of CAHA beaches, this failure to protect all suitable habitat is very problematic and ignores the fact that the presence of vehicles can deter mating and nesting in the first place.

Third, the park's adopted alternative requires intensive monitoring and frequent moving of symbolic fencing to protect chicks, which is frankly beyond CAHA's ability, particularly if nighttime driving is allowed. This labor intensive plan will likely result in delays in protection and could lead to loss of chicks. Far more appropriate would be an approach that would provide ORV corridors during nesting and incubation but which would include closing relevant portions of the inlet spits to ORVs after chicks hatch to provide safe and adequate access to forage areas at the waters edge. That is, in fact, what the USGS and the FWS's own piping plover recovery plan maintain is required. *See FWS, Guidelines for Managing Recreational Activities in Piping Plover Breeding habitat on the U.S. Atlantic Coast to Avoid Take Under Section 9 of the Endangered Species Act*, April 15, 1994.

Fourth, we remain extremely concerned that the minimum 600 foot buffer around piping plover chicks is too small to provide protection from driving. Likewise, it is unclear why buffers for other shorebirds are not defined. Indeed, the original draft allowed only a 300 foot buffer but the FONSI promises only to rely on "best professional judgment." That malleable standard provides no assurances that piping plovers and other nesting shorebirds will enjoy adequate buffers from ORV use. This malleable standard is compounded by the

Seashore's decision to allow ORV use on ocean beaches in front of unfledged piping plover chicks. Monitoring even during the daylight hours does not provide adequate protection from take. Chicks are highly mobile, and have been observed at Hatteras and many other locations moving large distances in short periods. Moreover, chicks may not be visible during rain or wind. Even in good weather, they may disappear into vegetation. Even if, by chance, the chicks were seen moving toward the vehicle corridor, as demonstrated by the death of two American Oystercatcher chicks at Hatteras Inlet last year, NPS biotechs are powerless to stop ORV drivers, as the techs are not law enforcement personnel. Of course, at night, monitoring is impossible. The Seashore is gambling that chicks will remain in the same location. Such a gamble arrogantly disregards piping plover biology and is inconsistent with scientifically-based standards for protecting plover nesting areas.

Conclusion

Despite repeated warnings from the undersigned organizations and other stakeholders, the NPS has adopted an interim protected species management strategy that continues to violate the law by emphasizing ORV use over protection of listed and non-listed species. By authorizing, funding, and implementing ORV activities at CAHA at the expense of the seashore's native wildlife, the NPS is violating the ESA and numerous other federal laws and regulations.

NPS's continued failure to comply with the requirements of the ESA and other environmental laws—including those that specifically govern management of CAHA—in authorizing ORV use must be remedied immediately. If these violations are not addressed within 60 days, the undersigned organization will bring suit in federal district court.

Yours truly,

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