

LCAMA# 2057

FILED

APR 30 2008

DENNIS P. IAVARONE, CLERK
US DISTRICT COURT, EDNC
BY B. Beasley DEP CLK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

No. 2:07-CV-45-BO

DEFENDERS OF WILDLIFE, <u>et al.</u> ,)	CONSENT DECREE
)	
Plaintiffs,)	
)	
v.)	
)	
NATIONAL PARK SERVICE, <u>et al.</u> ,)	
)	
Defendants,)	
)	
and)	
)	
DARE COUNTY, <u>et al.</u> ,)	
)	
Intervenor-Defendants.)	

WHEREAS, Defenders of Wildlife and the National Audubon Society (collectively, "Plaintiffs"), commenced this action on October 18, 2007, against the National Park Service ("NPS"); the United States Department of the Interior ("DOI"); Dirk Kempthorne, Secretary of the Interior; Mary A. Bomar, Director of NPS; and Michael B. Murray, Superintendent of Cape Hatteras National Seashore ("Seashore") (collectively, "Federal Defendants");

WHEREAS, by Order dated December 18, 2007, this Court granted the motion of Dare County, North Carolina; Hyde County, North Carolina; and the Cape Hatteras Access Preservation Alliance (collectively, "Intervenor-Defendants"), to intervene as defendants in this action;

WHEREAS, on December 19, 2007, Plaintiffs filed an Amended Complaint adding the United States Fish and Wildlife Service ("FWS") and H. Dale Hall, Director of FWS, as defendants and additional claims under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544;

WHEREAS, Plaintiffs' Amended Complaint alleges that Federal Defendants' Interim Protected Species Management Strategy, approved on July 13, 2007, and Federal Defendants' failure to issue a long-term plan and special regulation governing off-road vehicle ("ORV") use at the Seashore, violate the National Park Service Organic Act ("Organic Act"), 16 U.S.C. § 1, et seq.; the Seashore enabling legislation, 16 U.S.C. §§ 459-459a-10; Executive Order 11644, as amended by Executive Order 11989 and implemented by 36 C.F.R. § 4.10; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712, and Executive Order 13186; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq.; and the ESA;

WHEREAS, the Court has stated in previous cases that ORV use is unauthorized at the Seashore in the absence of a Special Regulation issued pursuant to 36 C.F.R. § 4.10 designating ORV routes and areas, United States v. Matei, 2:07-M-1075 (E.D.N.C. July 17, 2007); United States v. Worthington, 2008 WL 194386 (E.D.N.C. January 2, 2008);

WHEREAS, Federal Defendants concede that a Special Regulation designating ORV routes and areas at the Seashore has

not yet been issued pursuant to 36 C.F.R. § 4.10;

WHEREAS, Plaintiffs, Federal Defendants, and Intervenor-Defendants, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to Plaintiffs' claims (except as set forth in the preceding paragraph), have reached an agreement that they consider to be a just, fair, adequate, and equitable resolution of the claims contained in Plaintiffs' Amended Complaint;

WHEREAS, Plaintiffs, Federal Defendants, and Intervenor-Defendants agree that it is in the interest of the public, the Parties, and judicial economy to resolve the claims in this lawsuit without protracted litigation;

NOW, THEREFORE, Plaintiffs, Federal Defendants, and Intervenor-Defendants agree, and the Court hereby ORDERS, ADJUDGES, and DECREES, as follows:

1. Final ORV Management Plan and Special Regulation:

Federal Defendants shall complete an ORV Management Plan for the Seashore by December 31, 2010, and will complete and promulgate the final Special Regulation by April 1, 2011.

2. Modified Interim Management Plan: Pending the implementation of the final Special Regulation referenced in paragraph 1 above, the Selected Alternative of the Interim Strategy ("Interim Strategy"), as described in the Finding of No Significant Impact ("FONSI") approved July 13, 2007, shall remain

in full force and effect, except as modified by the following provisions of this Consent Decree. If there is a conflict between the Interim Strategy and the measures described in this Consent Decree, the Consent Decree shall control.

3. **Pre-nesting areas:** NPS shall by March 15 of each year establish pre-nesting areas on Bodie Island Spit, Cape Point, South Beach, Hatteras Spit, North Ocracoke, and Ocracoke South Point. The pre-nesting areas shall be marked with symbolic fencing consisting of wooden posts, bird usage signs, strings, and flagging tape.

4. For the 2008 breeding season, the pre-nesting areas shall be as delineated on the maps attached hereto as Exhibits 1 through 7 and incorporated by reference. These areas shall not be reduced to accommodate an ORV corridor, including in the event of naturally occurring erosion or accretion of the area, except in emergency situations. The pre-nesting areas shall remain in place until the later of July 15 or two weeks after the last tern, black skimmer, American oystercatcher, piping plover, or Wilson's plover chick within the area has fledged, as determined by two consecutive monitoring events.

5. In the years following the 2008 breeding season, NPS shall establish pre-nesting closure areas at Bodie Island Spit, Cape Point, South Beach, Hatteras Spit, North Ocracoke, and Ocracoke South Point that incorporate to the maximum extent

possible the areas delineated in the 2008 prenesting closure maps attached as Exhibits 1 through 7.

6. Plaintiffs, Federal Defendants, and Intervenor-Defendants recognize that Bodie Island Spit, Cape Point, South Beach, Hatteras Spit, North Ocracoke, and Ocracoke South Point are dynamic areas that may change from year to year. If substantial changes occur to these areas, NPS shall establish pre-nesting closure areas consistent to the maximum extent possible with the 2008 breeding season prenesting areas. These pre-nesting areas shall include to the maximum extent possible the soundside intertidal zone, areas of moist soil habitat, ocean backshore, dunes, dry sand flats, overwashes, and blowouts. The pre-nesting areas shall also include areas of the ocean tidal zone consistent to the maximum extent possible with the 2008 breeding season pre-nesting closures.

7. **Buffers:** NPS also shall establish buffers for observed breeding behavior, including but not limited to territorial behavior, courtship, mating, confirmed scrapes, or other nest-building activities; for breeding adult piping plover foraging outside of an established closure; and for nests and chicks. The buffers, which are consistent with the recommendations of the Piping Plover, Atlantic Coast Population, Recovery Plan, as developed by FWS with assistance from the U.S. Atlantic Coast Piping Plover Recovery Team, and the recommendations of the U.S. Geological Survey, Moderate Protection Protocols, and which take

into account other relevant factors, shall apply to ORVs and pedestrians as explained below:

TABLE OF RELEVANT ORV AND PEDESTRIAN BUFFERS

Species	Breeding Behavior/Nest Buffer (m)	Unfledged Chick Buffer (m)
Piping Plover	50	1000 (ORV only) 300 (Pedestrian only)
Least Tern	100	200
Other Colonial Waterbirds	200	200
American Oystercatcher	150	200

8. When multiple species are present, the greatest applicable buffer distance shall be used. The buffer areas shall be marked with symbolic fencing consisting of wooden posts, bird usage signs, string and flagging tape, to the extent possible in light of physical characteristics of the closure and the high tide line.

9. If disturbance from ORVs and/or pedestrians, as observed by NPS natural resource management staff, occurs within the given buffer distance, the buffer zone shall be expanded in 50 m increments until no disturbance occurs. Behaviors indicating disturbance include defensive displays, alarm calls, flushing or leaving a nest or feeding area, and diving or mobbing pedestrians, dogs, or vehicles. Plaintiffs, Federal Defendants, and Intervenor-Defendants recognize NPS natural resource management staff may cause a disturbance amongst the species during the course of their monitoring activities; any disturbance

caused by NPS monitoring shall not be cause for an expansion of the buffer zone.

10. Nonessential¹ ORVs are prohibited within the buffer areas. Pedestrians are prohibited within the buffer areas, except for when the 1000 m unfledged piping plover chick buffer is in effect. When this 1000 m buffer is in effect, pedestrians may be allowed limited access to the protected area, during daylight hours only, as follows: pedestrians may be permitted within a narrow walking and sunbathing corridor that extends 10 m landward from the mean high tide line, provided a buffer of 300 m from piping plover chicks, and the respective buffers for breeding/nest/unfledged chick buffers of the other species, is maintained. NPS shall prohibit pets, kite flying, frisbee throwing and similar activities at all times within the 1000 m unfledged piping plover chick buffer.

11. The ORV closure area shall extend for 1000 m on each side of a line drawn through the nest site and perpendicular to the long axis of the beach. The resulting closure area shall extend from the ocean side low water line to the bayshore low water line or the dune line if no bayshore habitat exists. Vehicles may be allowed to pass through portions of the protected area, where the protected area is considered by NPS natural resource management staff to be inaccessible to piping plover

¹ The term "essential vehicle" is defined in the FONSI at Table 3, page 40.

chicks because of steep topography, dense vegetation, or other naturally occurring obstacles. All of the ocean beach at Cape Point, South Beach, and North Ocracoke and all of the bayshore and ocean beach at Bodie Island Spit and Ocracoke South Point will be considered accessible to piping plover chicks in these areas. Within the 1000 m piping plover unfledged chick buffer at Hatteras Spit, all of the ocean beach and that part of the bayshore beach at the overwash fans and from the inlet east to a point 200 m east of the point where the Spur Road from the Pole Road meets the bayshore will be considered accessible to piping plover chicks in these areas.

12. As set forth below, NPS retains the discretion to modify the 1000 m unfledged piping plover chick buffer, if NPS natural resources staff determines a modification is acceptable:

During daylight hours only, NPS may allow ORV access within the 1000 m unfledged piping plover chick buffer two weeks after the chicks have hatched; when ORV access is permitted, a buffer distance of 300 m between piping plover chicks and ORVs shall be maintained at all times. The chicks will be monitored from dawn to dusk by NPS staff with at least one full season experience monitoring piping plovers or snowy plovers. The modified access area will not be open to ORVs, each morning, until the location of the brood has been determined by an NPS monitor and an adequate buffer has been assured. If a piping plover adult or chick moves within 200 m of ORVs or an ORV access corridor, the

NPS staff on site shall immediately take protective measures to close and re-establish the 1000 m buffer, including contacting law enforcement to begin evacuation of the area; no additional nonessential ORVs shall be allowed within the 1000 m unfledged piping plover chick buffer. Monitors shall not disturb chicks.² NPS recognizes that this provision, if exercised, increases the risk to piping plover chicks; therefore, this provision is void if a piping plover chick at any location is injured or killed by an ORV within the 1000 m buffer.

NPS retains the discretion to use this modification provision selectively and to re-establish the 1000 m buffer at any time, if it deems the full closure to be necessary.

13. Locations of the buffers described in paragraphs 7-12 above shall be adjusted to accommodate chick movement. NPS retains the discretion to enforce greater restrictions as necessary to protect the species.

14. Plaintiffs, Federal Defendants, and Intervenor-Defendants recognize that prompt establishment of buffers at the initiation of prenesting and/or breeding behavior is vital to the successful nesting of colonial waterbirds, piping plovers, and American oystercatchers. NPS shall assign trained biologists or

²Because monitors must be present from dawn to dusk, even "normal" monitor disturbance has the potential to disrupt chick development; therefore, this provision is an exception to paragraph 9. Notwithstanding this provision, the parties acknowledge that monitors may cause disturbance during nest surveys or in locating chicks each morning; this shall not be considered a disturbance for the purposes of this section.

field technicians to monitor Cape Point, South Beach, Hatteras Spit, North Ocracoke, and Ocracoke South Point at least once every two days from March 15 to April 15, and daily from April 16 to July 15, to determine if any birds are exhibiting prenesting and/or breeding behavior. NPS shall monitor Bodie Island Spit at least daily from March 15 to July 15.

15. For breeding piping plover, the provisions in the FONSI related to adult foraging, Table 2, page 36, remain applicable. If no piping plover are observed utilizing such a foraging closure over a two-week period of time, the closure will be removed.

16. If NPS observes prenesting and/or breeding behavior of colonial waterbirds, piping plovers, or American oystercatchers, NPS shall establish the appropriate buffer as quickly as possible, but always within 8 daylight hours. Upon discovery of an active nest or chicks that are outside an existing closure, protective measures shall be taken immediately to close and establish the buffers described above. Symbolic fencing with the applicable buffer distances stated above shall be installed as soon as NPS staff can reasonably be mobilized to erect the fencing, but always within 6 daylight hours.

17. The foregoing pre-nesting and/or breeding behavior closures and buffer requirements and other consistent provisions of the Interim Strategy are minimum measures, and nothing set forth herein prevents NPS from exercising its discretion to

provide additional protections as needed. Additionally, when nesting occurs in the immediate vicinity of paved roads, parking lots, campgrounds, buildings, and other facilities, NPS retains the discretion to provide resource protections to the maximum extent possible while still allowing those sites to remain operational.

18. **Ocean Backshore Closures:** For the benefit of all bird species, sea turtles, and seabeach amaranth, from March 15 to November 30, in all locations not in front of the villages, outside of the pre-nesting areas described above, and open to ORV use, NPS shall provide an ORV-free zone in the ocean backshore at least 10 m wide and running the length of the site, wherever backshore habitat exists, provided there is sufficient beach width to allow an ORV corridor of at least 20 m above the mean high tide line. This zone shall be adjacent to the toe of the primary dune whenever a primary dune exists (i.e., ORVs should be restricted to a corridor between the mean high tide line and the edge of the zone of the protected backshore). For the 2008 breeding season only, ocean backshore closures shall be established no later than June 1.

19. **Reports:** By January 31 of each year until the final Special Regulation is promulgated, NPS shall provide Plaintiffs and Intervenor-Defendants a copy of the written reports provided to the Fish and Wildlife Service ("FWS") as part of the

Biological Opinion reconsultation process for the piping plover, sea turtles, and seabeach amaranth; these reports include information regarding buffer violations. For colonial waterbirds and American oystercatchers, in lieu of providing an annual report, NPS shall provide Plaintiffs and Intervenor-Defendants the data collected on colonial waterbirds' and American oystercatchers' breeding activity, along with copies of the previous year's closure request documentation and the written closure request forms for these species. Also by January 31 of each year until the final Special Regulation is promulgated, NPS shall provide the Court with a copy of these reports along with a written summary of the progress of the Negotiated Rulemaking Advisory Committee for ORV Management at the Seashore ("Reg. Neg.").

20. By February 20 of each year until the final Special Regulation is promulgated, NPS shall provide public notice of the proposed pre-nesting areas for Bodie Island Spit, Cape Point, South Beach, North Ocracoke, and Ocracoke South Point for that year's breeding season. The pre-nesting area maps shall include locations for all known piping plover and American oystercatcher nests within the area during the preceding breeding season. Plaintiffs and Intervenor-Defendants may submit comments on the proposed pre-nesting areas to NPS by March 1. NPS, to the extent it determines a response is required and/or is appropriate, will

respond to Plaintiffs' and Intervenor-Defendants' comments by March 15.

21. Subject to 16 U.S.C. § 5937, within the reports and data provided to Plaintiffs and Intervenor-Defendants pursuant to paragraph 19 above, NPS shall include GPS coordinates, to the extent available, for sea turtle nests and false crawls, shorebird nests, symbolic fencing locations, and colony perimeters for colonial waterbirds.

22. **Retained NPS Authority for Park Management:** NPS retains discretion at all times to enforce more protective closures or take other measures, if considered necessary, consistent with its obligations under law and this Consent Decree.

23. **Violations of Pre-nesting Areas and Buffers:** At all established pre-nesting areas and buffers, if, in the opinion of NPS, a confirmed deliberate act that disturbs or harasses wildlife or vandalizes fencing, nests, or plants, is documented by NPS personnel, the pre-nesting area or buffer shall be expanded automatically by 50 m. If a second such act occurs at the same area, the buffer shall be expanded automatically by an additional 100 m. If a third such act occurs, the buffer shall be expanded automatically by an additional 500 m or more, if NPS determines it is necessary to minimize the extent of further disturbance. To the extent possible, NPS shall provide public

notice of violations and the relevant applicable buffer expansions.

24. **Night Driving:** To increase the chances of successful turtle nesting, NPS shall close all potential sea turtle nesting habitat (ocean intertidal zone, ocean backshore, and dunes) to nonessential ORV use from 10 p.m. until 6 a.m. from May 1 to November 15, except as set forth in paragraph 25 below.

25. Between September 16 and November 15, NPS may issue night driving permits for authorized nonessential driving between the hours of 10 p.m. and 6 a.m. The permit application process shall have an educational component, and the permit shall contain restrictions on light use. During the September 16 to November 15 time period, NPS retains the discretion to limit night driving to certain areas or routes, based on resource protection considerations.

26. After September 15 all remaining unhatched turtle nests, once they reach their hatch window, shall be protected by full beach closures, in addition to the fencing methodology described in the Interim Strategy.

27. NPS recognizes some risk to turtles exists if beaches are open to ORVs prior to completion of turtle patrols; NPS shall complete turtle patrols as expeditiously as possible each morning.

28. **Education:** Prior to the 2009 breeding season, NPS shall have the following provisions in place to enhance the public's understanding of the protected species and responsible use of the Seashore: NPS shall provide educational information about protected species at all ORV access points. NPS shall redesign the Seashore beach driving brochure to concisely communicate the regulations and potential penalties for violations. NPS shall establish and post a 24-hour phone line that citizens can use to report illegal activities and unsafe conditions on the beach.

29. For the 2008 breeding season, NPS will make a good faith effort to begin the initiation of the educational programs set forth above. In furtherance of this effort, by May 15, 2008, NPS will order new signage aimed at more clearly communicating applicable regulations and will post applicable requirements on its website, including its obligations under this settlement.

30. **Duration:** This Consent Decree shall expire automatically upon the effective date of the final Special Regulation described in paragraph 1 above.

31. **Voluntary Dismissal:** Based upon the representations and commitments herein, Plaintiffs' claims are hereby DISMISSED WITH PREJUDICE pursuant to Fed. R. Civ. P. 41(a)(2).

32. **Modifications:** The Court may modify any requirements of this Consent Decree, including the deadlines for any actions

specified in Paragraph 1 above, for good cause shown by the Plaintiffs, Federal Defendants, and/or Intervenor-Defendants. Before seeking modifications to this Consent Decree, Plaintiffs, Federal Defendants, and/or Intervenor-Defendants shall use the dispute resolution procedures specified in Paragraph 33 below.

33. Dispute Resolution: Plaintiffs, Federal Defendants, and Intervenor-Defendants agree to provide opposing counsel written notice, if practicable, of any disputes or requests for judicial relief related to compliance with this Consent Decree. Plaintiffs, Federal Defendants, and Intervenor-Defendants agree to attempt to resolve any disputes for a minimum of thirty days after providing written notice and prior to seeking relief from the Court. Plaintiffs, Federal Defendants, and Intervenor-Defendants agree that the sole remedy for breach of this Consent Decree shall be enforcement of the terms of the Consent Decree. Plaintiffs, Federal Defendants, and Intervenor-Defendants agree that contempt will not be sought for an alleged breach of the Consent Decree but also agree that this prohibition on seeking contempt does not apply to subsequent orders of the Court issued to enforce this Consent Decree. Plaintiffs agree not to seek to reinstate the Complaint or to bring or prosecute any claims contained therein in this or any other legal proceeding. Nothing in this paragraph is intended to preclude the parties, or their

representatives, from engaging in informal communications to attempt to resolve any potential disputes.

34. **No Precedence:** Plaintiffs, Federal Defendants, and Intervenor-Defendants stipulate and agree that this Consent Decree is entered into solely for the purpose of settling this case, and for no other purpose, and this Consent Decree shall not be cited or otherwise referred to in any other legal proceeding, in which the parties or counsel for the parties have or may acquire an interest, except as necessary to effectuate the terms of this Consent Decree. This Consent Decree shall not be binding on the Reg. Neg. as they develop the final Special Regulation; nothing in this provision precludes any party from discussing the terms of the Consent Decree at the Reg. Neg.

35. **Anti-Deficiency Act:** Nothing in this Consent Decree shall be interpreted as or constitute a commitment or requirement that Federal Defendants obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

36. **Statutory Obligations:** No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that Federal Defendants take action in contravention of NEPA, the ESA, the Administrative Procedure Act ("APA"), or any other law or regulation, either substantive or procedural. Nothing in this Consent Decree shall be construed to limit or modify the discretion accorded to Federal Defendants by NEPA, the

ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in making any determination required herein, or as to the substance of any final determinations.

37. **No Waiver of Rights:** Plaintiffs do not waive any right they may have to bring suit against Federal Defendants for any violations of law which may arise relating to the ORV Management Plan and Special Regulation described in Paragraph 1 above, including, but not limited to, violations of NEPA, the ESA, the MBTA, the APA, or Federal Defendants' responsibilities under 36 C.F.R. § 4.10. Further, by entering into this Consent Decree, Federal Defendants and Intervenor-Defendants do not waive any claim or defenses they may have in any action brought by the Plaintiffs challenging the ORV Management Plan, Final Environmental Impact Statement, and Special Regulation described in Paragraph 1 above. Plaintiffs, Federal Defendants, and Intervenor-Defendants agree that any challenge to the ORV Management Plan, the Special Regulation, or other agency action set forth in Paragraph 1 above shall be brought in a separate action and not pursuant to this Consent Decree.

38. **Attorneys' Fees:** Federal Defendants agree that Plaintiffs are prevailing parties and entitled to reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, up to and including the date of execution

of this Consent Decree. Plaintiffs and Federal Defendants agree to attempt to resolve Plaintiffs' claim for fees and costs expeditiously and without the need for Court intervention. By entering into this Consent Decree, Federal Defendants do not waive any right to contest fees claimed by Plaintiffs or Plaintiffs' counsel, including the hourly rate, in any future litigation or continuation of the present action.

39. **Severability; Court Acceptance:** Wherever possible, each provision of this Consent Decree shall be interpreted in such a manner as to be effective and valid. If any provision of this Consent Decree is prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions hereof. However, in the event the Court does not accept any part of this Consent Decree, each party to the Consent Decree reserves the right to withdraw from the Consent Decree and proceed with the existing litigation.

40. None of the provisions or obligations of this Consent Decree shall become effective and binding unless and until the Court accepts this Consent Decree and enters an Order approving its terms.

41. **Entire Agreement:** This Consent Decree constitutes the entire agreement of Plaintiffs, Federal Defendants, and

Intervenor-Defendants, and no statement, agreement or understanding, oral or written, which is not contained herein shall be recognized or enforced.

42. **Authorization:** Each undersigned representative of the Plaintiffs, Federal Defendants, and Intervenor-Defendants certifies that he or she is fully authorized to enter into and execute the terms and conditions of this Consent Decree, and to legally bind such party to this Consent Decree. The terms of this Consent Decree apply to, are binding upon, and inure to the benefit of Plaintiffs (and their successors, assigns, and designees), Federal Defendants, and Intervenor-Defendants.

43. **Continuing Jurisdiction:** Notwithstanding the dismissal of this action, the Court retains jurisdiction to resolve any disputes arising under the Consent Decree and for issuing such further orders or directions as may be necessary or appropriate to construe, implement, modify, or enforce the terms of this Consent Decree, and to resolve any motions relating to attorneys' fees. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

Respectfully submitted, this 16th day of April, 2008.

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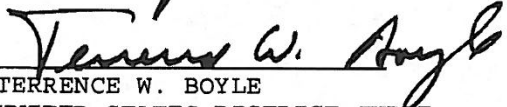
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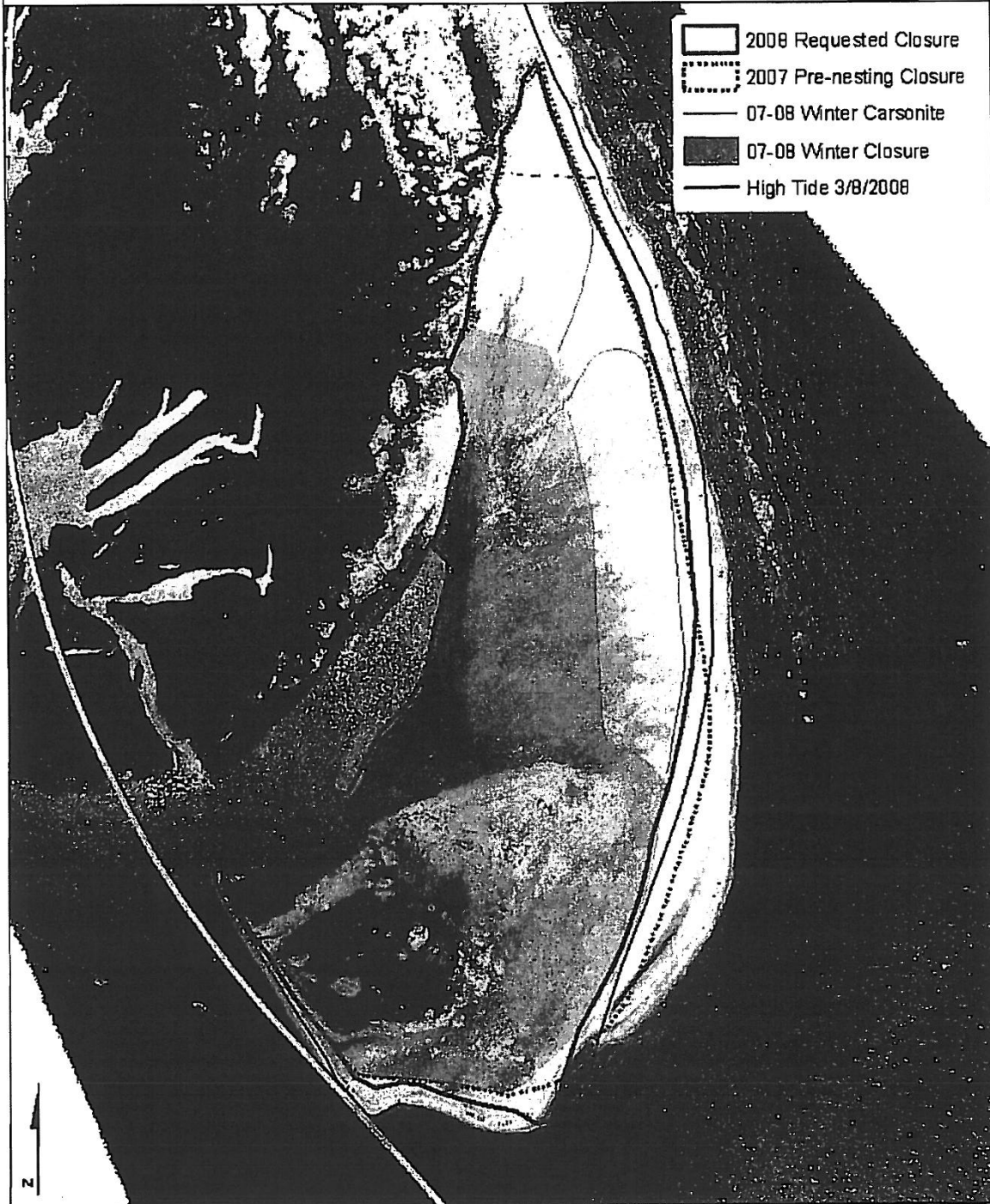
IT IS SO ORDERED this 30 day of April, 2008


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

Cape Hatteras National Seashore
North Carolina

National Park Service
U.S. Department of the Interior

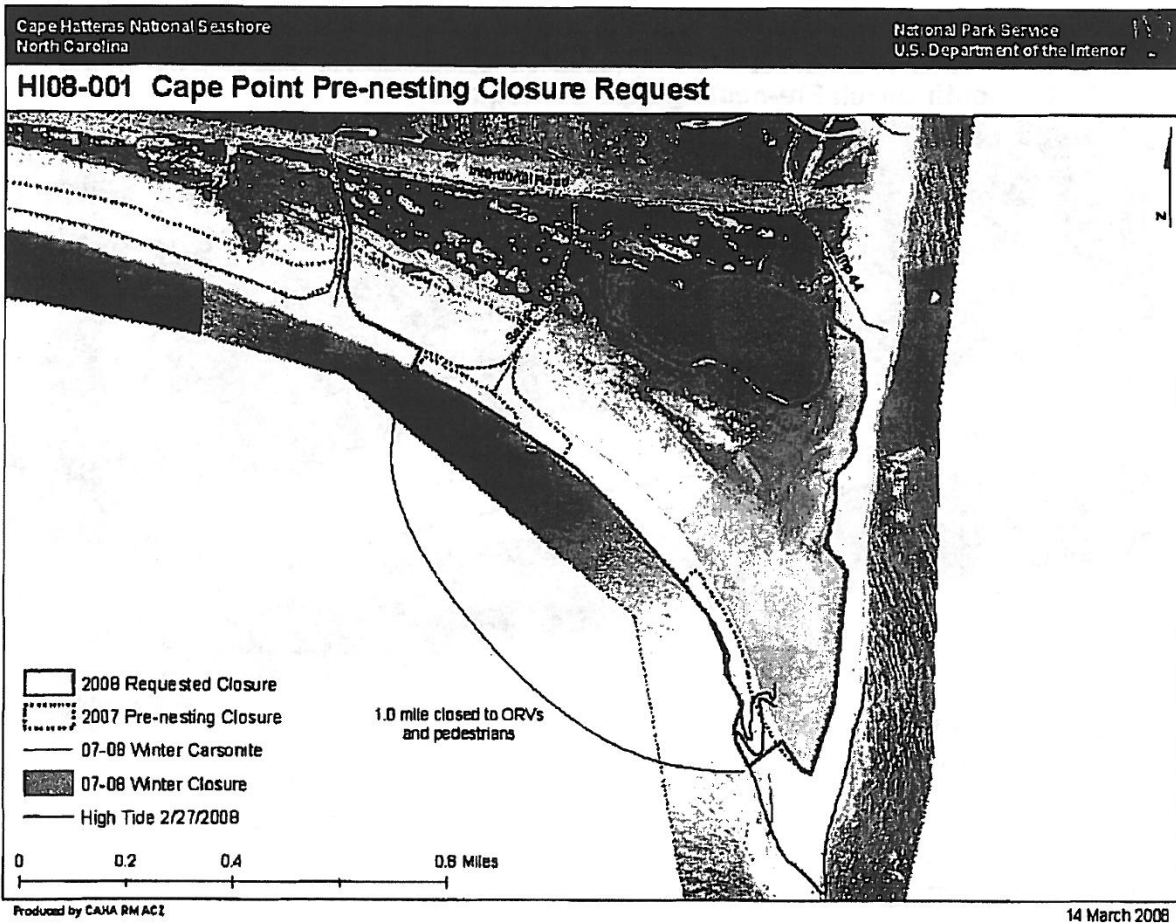
BI08-001 Bodie Island Pre-nesting Closure Request

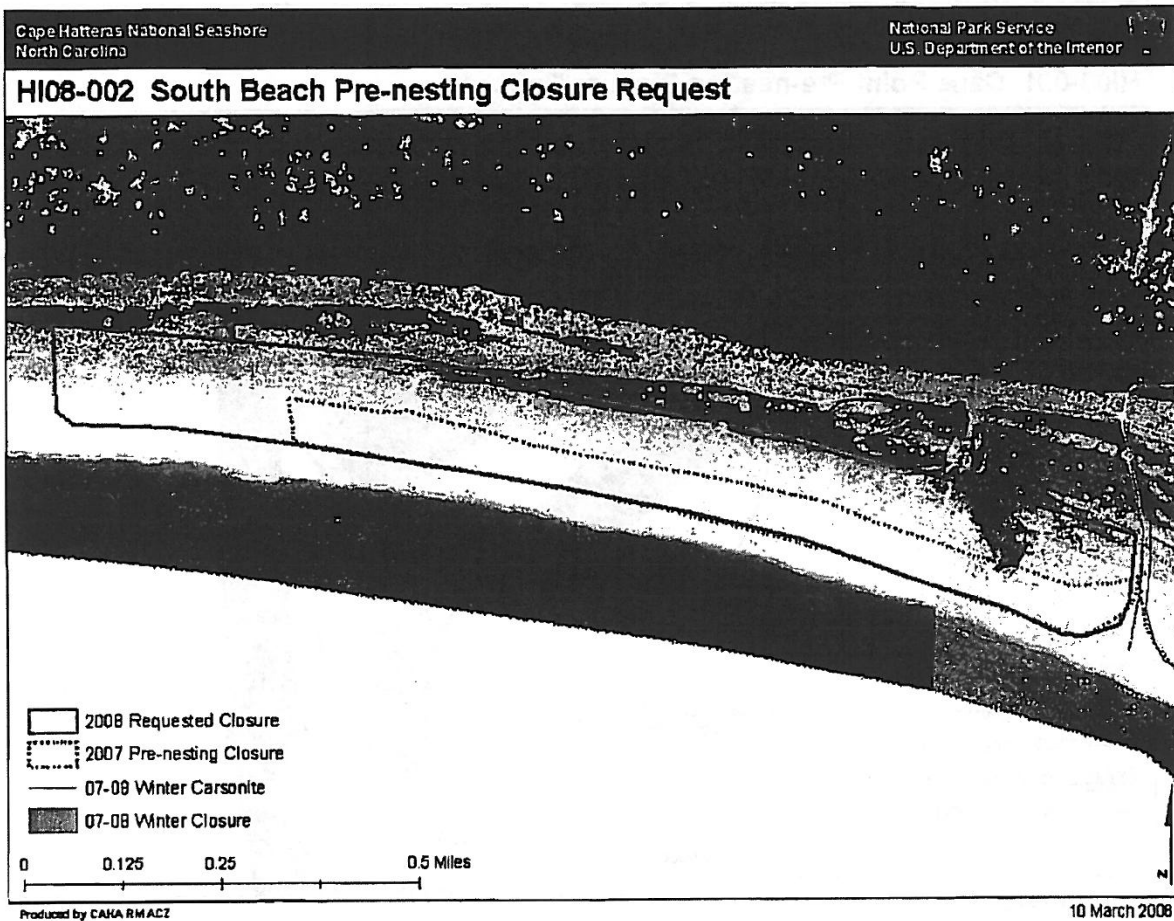


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10 March 2008

Ex. 1





Ex. 3

