

BRIEF SUMMARY

Natural Resources Subcommittee
July 23, 2008 Conference Call

Participants: David Allen, Carla Boucher, Thayer Broili, Bob Eakes, Ona Ferguson, Robert Fisher, Walker Golder, Larry Hardham, Mike Murray, David Rabon, Mike Stevens, Judy Swartwood, Jason Waanders.

Next Steps: One-day in-person Subcommittee meeting (tentatively scheduled for August 5) or a series of calls to explore views on management measures in the consent decree and interim species management plan. The Park will develop recommendations for Subcommittee feedback. David Allen offered to discuss species counts and bird populations off-line with anyone who's interested. Additional discussion was requested about taking into consideration populations adjacent to the Park boundaries.

Relevant Statutes and Regulations: Mike Murray, Jason Waanders and Mike Stevens gave an overview of the relevant statutes and regulations that will shape NPS's consideration of natural resource management.

- Endangered Species Act for Piping Plover, Sea Turtles and Sea Amaranth. The DOI solicitor noted that the ESA prohibits take of listed endangered and threatened species. "Take" is expansively defined and includes "to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any of these actions. Habitat destruction and disruption of normal life activities (such as breeding and feeding) may constitute "take." ESA allows take of listed species incident to lawful activities if authorized through permit or incidental take statement, but prohibits take that will jeopardize continued existence of the listed species or destroy or adversely modify their critical habitat.
- Migratory Bird Treaty Act for other shorebird species. The DOI solicitor noted that the MBTA also prohibits "take" but the definition of take is narrower than under the ESA. Although there is no bright-line test, the killing, wounding, collection, destruction of birds, their eggs, and occupied nests is clearly prohibited. Habitat destruction and disruptive activities that do not directly result in death or harm of birds, eggs, and occupied nests probably are not prohibited. FWS policy provides that destruction of unoccupied nests is not per se a violation of the MBTA, but if it can be shown to lead to the death of a bird (for instance, destruction of a nest while a chick is foraging) it could also be considered a violation. Also, unlike the ESA "take" is illegal regardless of its effect on species or population as a whole. Finally, an action does not have to intend to take a bird, nest, or egg to be a violation of the MBTA.
- Organic Act: A strong driver of NPS resource management planning due to the requirement to conserve scenery, natural and historic objects, and wildlife, and to provide for the enjoyment of those resources in a manner that will leave them unimpaired for the enjoyment of future generations. The Act contains both non-impairment and conservation mandates. If proposed Park uses conflict with protection of resources and values, the protection of resources and values must take priority.

There is a lot of case law supporting deference to resource protection over uses. NPS has more discretion in carrying out the conservation mandate. Organic Act is focused on what happens within park boundaries and species are considered a park resource. Losing a species within the Park would constitute an impairment of Park resources. This is different than ESA and wildlife statutes that enable the Park to look at the species population as a whole. There also are regulations under the Organic Act, 36 C.F.R. 1.4, 36 C.F.R. 2.1, about non-impairment, conservation, and management.

- NPS Management Policies on Protected and Threatened Species and Executive Orders on ORVs on Public Land: NPS must maintain natural distribution and abundance of rare and declining species and consider federal and state listings. ORVs may be allowed only in locations where there are not impacts to natural, aesthetic and cultural values. NPS needs to manage ORVs in a way that allows the native species to prosper similar to the natural abundance and distribution of those species.

NPS Approach: Mike Murray reviewed the approach NPS is taking on natural resources in conjunction with the NEPA/reg neg process. As part of NEPA, NPS is developing a clear vision to guide decision-making of desired conditions to be created by the ORV management plan. The desired conditions will include the visitor experience in addition to natural resources. NPS staff are consulting with technical advisors and the Pautuxent Wildlife Resources Center on how to identify desired conditions on three dimensions: natural, human and institutional resources. NPS will then develop desired conditions based on that technical advice. These conditions or goals for the affected species could be quantitative (performance measures) or qualitative (e.g. the native species have stable, self-sustaining populations that are not in decline or danger). Setting these conditions is an NPS task and will not be negotiated with the Committee. However, NPS wants to be transparent with the Committee and get Committee input as they move through the process so the Committee will understand how the final results were developed. NPS wants an adaptive management plan built on these desired conditions. They envision that certain areas of the Park might have more restrictive protection until certain species thresholds are reached, then they might be able to be more flexible. The goal could be similar to allowing for stable, self-sustaining populations and NPS contributing to the recovery of the species. It is NPS policy to manage declining, sensitive rare species and their habitats in a way that will maintain their natural distribution in abundance. NPS is working hard to come up with desired conditions within the Committee's timeframe so the consensus agreement can become the preferred alternative.

Discussion included:

- What provides guidance for which species are protected in the Park and how do predators fit? NPS has statutory authority to provide for the removal of animals that are detrimental to the use of the Park under the Organic Act. Removing non-native predators that are causing ecosystem damage is fairly straightforward, whereas addressing predation by one native species of another is less simple. There is policy guidance allowing for controlling native species predating listed species in unnatural abundance. Management policies allow for restoration of native species. If there is a species at risk of being lost in the Park, NPS may take a more proactive role in managing to protect that species. Mike Murray noted the Park needs to complete its

predator management plan to use in making predator decisions. This also needs to be discussed with respect to the application to maintaining a sustainable turtle population.

- Why are particular species protected (e.g. Least Terns and Colonial Water Birds) and not others and what are the criteria of importance? The Organic Act protects species and their activity within the Park boundaries. NPS management policies place an emphasis on trying to restore depressed populations of native species, not only threatened and endangered species.
- Why isn't the geographic scope broadened beyond the physical boundaries of the Park (e.g. the dredge island off Ocracoke) to reflect where the birds go when counting a species? The Organic act requires the Park to protect their own resources rather than tracking the species as a whole. The same criteria apply to all Park units.