

***Testimony of
Derb S. Carter, Jr.
Southern Environmental Law Center
on behalf of The National Audubon Society,
Defenders of Wildlife, and The Wilderness Society
before the***

***National Park Subcommittee
of the
Senate Committee on Energy and Natural Resources
on***

***Senate Bill 3113
to reinstate the Interim Management Strategy governing off-road vehicle use in the
Cape Hatteras National Seashore, North Carolina
July 30, 2008***

My name is Derb S. Carter, Jr. I am an attorney with the Southern Environmental Law Center in Chapel Hill, North Carolina. We represented the National Audubon Society and Defenders of Wildlife in the litigation that resulted in the consent decree that is the subject of Senate Bill 3113. This testimony is submitted on behalf of the National Audubon Society, Defenders of Wildlife, The Wilderness Society, and the Southern Environmental Law Center. Because the consent decree provides overdue protection of the natural resources of Cape Hatteras National Seashore and allows for appropriately managed off-road vehicle (“ORV”) use, we oppose Senate Bill 3113, legislation that would mandate a return to management practices that were resulting in declines and disappearance of wildlife from the Seashore.

Summary

On April 30, 2008, Dare County, Hyde County, an alliance of off-road vehicle advocacy groups, the National Park Service, the National Audubon Society, and Defenders of Wildlife entered a consent decree in federal court requiring the National Park Service to implement certain wildlife protection measures on Cape Hatteras National Seashore (“Seashore”) until it fulfills a more than thirty-year old obligation under federal law to adopt a final ORV management regulation. Senate Bill 3113, if enacted, would nullify this consent decree, which was agreed to by all parties and approved by the court, and would instead reinstate previous management guidelines that resulted in declines and disappearance of wildlife on the Seashore. We urge this committee and the Senate to oppose any effort to enact this legislation.

The consent decree implements the recommendations of Department of the Interior scientists to protect wildlife species on Cape Hatteras National Seashore until a final ORV plan and regulation is adopted. The species management measures include temporary closures to prevent disturbance of birds during the critical nesting season and restrictions on night driving to protect nesting sea turtles. These measures are necessary

to halt the precipitous declines of species on the Seashore. Preliminary monitoring results from the National Park Service are encouraging, and all species appear to be benefiting from the management measures required by the consent decree. In addition, the Department of the Interior and National Park Service are required to protect and preserve the Seashore and its wildlife. This consent decree is intended to bring the agency into compliance with its legal mandate regarding wildlife while it completes its work to comply with mandates to manage ORV use.

The species management requirements of the consent decree have not unreasonably restricted use of the Seashore. Residents and visitors are familiar with seasonal ORV prohibitions for resource protection and in front of the seven villages where ORV use is prohibited during the summer for families to enjoy sunbathing, swimming, and other non-vehicular activities.

Cape Hatteras National Seashore has approximately 67 miles of beaches. As of July 24, of the 67 miles of beaches on the Seashore, the area temporarily closed to ORV and pedestrian use for natural resource protection was 9.1 miles. In contrast, over 53 miles of beach are open and available for families to enjoy on foot at the Seashore. Similarly, 26.8 miles of the Seashore are available for ORV use. ORV users have taken advantage of these areas; on July 4, 2008, 2,557 vehicles used Seashore beaches.

The consent decree will remain in effect until the National Park Service adopts a final management plan and rule through a negotiated rulemaking process. It requires that the National Park Service publish the final ORV management regulation by April 2011. The consent decree makes clear that the final plan will replace the management requirements in the consent decree and the requirements in the consent decree are not binding on the negotiated rulemaking or the negotiated rulemaking committee.

Background

In 1972, President Nixon issued Executive Order 11644 requiring federal land management agencies to publish regulations for all federal lands designating ORV areas and trails and ensuring ORV use does not harm natural resources.¹ National Park Service regulations prohibit ORV use in national parks and seashores unless and until park-specific ORV regulations are published.² While other national seashores have complied with the requirement to issue plans and regulations for ORV use,³ Cape Hatteras has not.

¹ Exec. Order No. 11644, 37 Fed. Reg. 2,877 (Feb. 8, 1972).

² 36 C.F.R. § 4.10(a).

³ Cape Cod National Seashore, Assateague Island National Seashore, Gulf Islands National Seashore, Fire Island National Seashore, and Padre Island National Seashore have regulations managing ORV use. See 36 C.F.R. §§ 7.65, 7.67, 7.20, 7.12, and 7.75. Cumberland Island National Seashore, Canaveral National Seashore, and Point Reyes National Seashore all prohibit off-road vehicles entirely. See <http://www.nps.gov/cuis/planyourvisit/hours.htm>; <http://www.nps.gov/cana/faqs.htm>; http://www.nps.gov/pore/parkmgmt/upload/lawsandpolicies_compendium2005.pdf. Of the ten national seashores, only Cape Hatteras National Seashore and Cape Lookout National Seashore have failed to enact regulations managing ORV use.

In 2007, the National Park Service issued an “interim plan” for species management on the Seashore which in most respects simply reduced previous management of species to writing. In the decade prior to the “interim plan,” protected colonially nesting waterbirds on Seashore beaches declined 86% and threatened piping plovers declined from 14 pairs in 1996 to 6 pairs in 2007.⁴ The first year of the “interim plan,” 2007, was one of the worst bird breeding seasons on record and two colonial waterbird species failed to successfully nest on the Seashore beaches at all.⁵ Unsuccessful nesting attempts by threatened and endangered sea turtles exceeded successful nesting.⁶ As a result, the Park Service exceeded the amount of incidental taking authorized under the Endangered Species Act for threatened piping plovers and threatened or endangered sea turtles on the Seashore.⁷

In October 2007, the National Audubon Society and Defenders of Wildlife filed a lawsuit against the National Park Service, challenging the “interim plan” for species management on the Seashore.⁸ The organizations were concerned about the continuing decline of species on the Seashore and the fact the “interim plan” failed to implement the science-based management recommendations from Department of the Interior scientists. Dare and Hyde Counties and an alliance of ORV advocacy groups intervened in the lawsuit on the basis that they represented “local governments, ORV enthusiasts, recreational anglers, and ORV service providers . . . the parties that will be most immediately and directly affected by the outcome of this case.”⁹ On April 30, 2008, the U.S. District Court for the Eastern District of North Carolina approved a consent decree, agreed to and recommended to the court by all parties including the intervenors; it addressed driving on the beaches of Cape Hatteras National Seashore and the protection of wildlife there until a final ORV management plan is adopted.

Cape Hatteras National Seashore Consent Decree

The consent decree requires the National Park Service to publish a plan and regulations designating areas or trails for ORV driving on the Seashore, as required by federal law. The regulations must be published no later than April 1, 2011. In addition, to address declining wildlife populations, the consent decree requires that the National Park Service

⁴ Declaration of Walker Golder ¶ 5, filed in Defenders of Wildlife, et al. v. National Park Service, et al., Feb. 20, 2008 (summarizing North Carolina Wildlife Resources Commission data on Cape Hatteras National Seashore bird populations).

⁵ Id.

⁶ NATIONAL PARK SERVICE, CAPE HATTERAS NATIONAL SEASHORE: 2007 ANNUAL TURTLE REPORT 5 (2007) (reporting 82 nests and 115 false crawls during the 2007 season).

⁷ See Letter from Pete Benjamin, U.S. Fish & Wildlife Service, to Mike Murray, National Park Service (April 24, 2007) (amending the U.S. Fish & Wildlife Service’s biological opinion evaluating the interim plan and prescribing performance measures, including that the sea turtle nest to false crawl ratio be less than 1:1).

⁸ Together, Defenders of Wildlife, The National Audubon Society, and SELC have over two million members and supporters total, with more than 60,000 members and supporters in North Carolina.

⁹ Mem. of P. & A. in Supp. of Dare County, et al. Motion to Intervene in Defenders of Wildlife, et al. v. National Park Service, et al. 1, Nov. 28, 2007.

implement measures to protect breeding birds and sea turtles from disturbance until a final ORV management plan is adopted.

The parties to the consent decree are Dare County, Hyde County, Cape Hatteras Access Preservation Alliance, the National Park Service, the Department of the Interior, the National Audubon Society, and Defenders of Wildlife. The Cape Hatteras Access Preservation Alliance is an umbrella organization that includes the Outer Banks Preservation Association, the Cape Hatteras Anglers Club, and the North Carolina Beach Buggy Association.¹⁰ All parties in the lawsuit supported the consent decree and recommended that the court approve it.

That unanimous support for the consent decree was the result of extensive negotiations among all parties and detailed consideration of all affected interests. When asked by the court whether the counties and ORV coalition supported the consent decree, their attorney responded, “There have been intense negotiations between the parties here. Our clients have participated in those negotiations in good faith. A settlement has been worked out that is, I think, in nobody’s mind a perfect solution. We believe that we participated in the process in good faith and we join in asking the court to enter the consent decree.”¹¹ The commissioners of both counties held public meetings and voted to approve the settlement, and the ORV coalition similarly met and authorized their attorney to sign the consent decree. Similarly, the Park Service stated, “The agreement reached between the NPS and the other parties to the lawsuit is a creative solution that addressed a tough issue. This well thought out plan will serve as an example of how we fulfill our responsibilities and meet the needs of all parties involved.”¹² National Audubon Society and Defenders of Wildlife also recommended approval of the consent decree.

What does the Consent Decree require?

The consent decree requires that the National Park Service provide places for federally and state protected birds and sea turtles to nest on the Seashore during the breeding seasons—generally April to July or August for birds and May to November for sea turtles. ORV use is restricted at historic bird breeding sites in the spring to provide disturbance-free areas that allow the birds to set up territories or colonies and to nest. The pre-nesting areas still allow ORV use of the inlets and Cape Hatteras Point. During the months of the year before the establishment of pre-nesting closures on March 15 and

¹⁰ Cape Hatteras Access Preservation Association website, <http://capehatterasapa.org/>.

¹¹ Consent Decree Hr’g Tr. 45:9-14, April 30, 2008. Despite this representation in federal court that they negotiated and supported the consent decree, CHAPA and its member organizations have sought to override the agreement they crafted and joined through this proposed legislation. CHAPA has listed instructions and posted a sample letter to encourage its members to support this legislation. The Outer Banks Preservation Association, the North Carolina Beach Buggy Association, and the Cape Hatteras Anglers Club have similarly advocated for their members to support this legislation overturning the agreement they entered into.

¹² Press Release, National Park Service, Agreement Reached to Preserve Wildlife and Recreation Opportunities on Cape Hatteras National Seashore (May 1, 2008).

after the completion of the bird and sea turtle breeding, resource management closures do not limit ORV use of the ocean beaches of the Seashore.

If birds do begin to nest in the pre-nesting closures or other areas outside these pre-nesting closures, buffers are established around the nesting areas to prevent disturbance. The species-specific disturbance buffers are based on the “moderate protection recommendations” from peer-reviewed reports prepared by scientists in the United States Geological Survey (a part of the Department of the Interior) at the request of the National Park Service and on the recovery plan for the Atlantic Coast population of the threatened piping plover developed and issued by the U.S. Fish and Wildlife Service.¹³ Those reports were based on a thorough review of the best-available science. Depending on where the nesting occurs, ORV corridors and/or pedestrian access may or may not be affected by the buffers. The scientifically determined disturbance buffers may limit ORV and/or pedestrian use of an area until breeding is completed.

Sea turtles, which primarily nest and hatch during the night, are protected under the consent decree by closure of the beaches to ORV use from 10 p.m. to 6 a.m. May 1 through September 15 and a requirement for permits, driver education, and light restrictions from September 16 through November 15. These restrictions are also based on the best-available science, including the United States Geological Survey recommendations.¹⁴

Effects of the Consent Decree on visitors to the Seashore

Under the consent decree, only those areas used by breeding birds and areas immediately surrounding sea turtle nests are closed to ORV use during daylight hours. Breeding closures are removed when birds complete nesting and chicks fledge. Turtle nest closures are removed after the nest has hatched. As the breeding seasons for birds and turtles progresses and then winds down, the total area opened or closed to ORV use changes in response to breeding and nesting activity. This approach ensures that scientifically supported protections are put in place when needed to protect wildlife. In addition, this approach requires extensive monitoring and management of resources in order to make beaches available to vehicles quickly after turtles hatch or chicks fledge. An alternative approach, also recommended by Department of Interior scientists, is to close to ORV access key nesting areas around the inlets and Cape Point year-round.

To date, resource closures under the consent decree have only affected small stretches of the Seashore’s beaches. Cape Hatteras National Seashore has approximately 67 miles of beaches. On July 24, 2008, 9.1 miles were temporarily closed for natural resource

¹³ See e.g., UNITED STATES GEOLOGICAL SURVEY, MANAGEMENT, MONITORING, AND PROTECTION PROTOCOLS FOR COLONIALY NESTING WATERBIRDS AT CAPE HATTERAS NATIONAL SEASHORE, NORTH CAROLINA 13 (2005)(recommending 100m to 200m buffers for different colonial waterbirds); UNITED STATES FISH AND WILDLIFE SERVICE, PIPING PLOVER (*CHARADRIUS MELODUS*) ATLANTIC COAST POPULATION REVISED RECOVERY PLAN 192-194 (1996)(recommending buffer distances for pedestrians and ORVs).

¹⁴ UNITED STATES GEOLOGICAL SURVEY, MANAGEMENT AND PROTECTION PROTOCOLS FOR NESTING SEA TURTLES AT CAPE HATTERAS NATIONAL SEASHORE, NORTH CAROLINA (2005).

protection; 53.3 miles of Seashore were open to pedestrians; and 26.8 miles were open to ORV traffic. Cape Point, though temporarily closed during to protect piping plovers, was opened to pedestrian access on July 22, 2008.¹⁵

The size of some closures is, in part, a result of vandalism of buffer fencing. The National Park Service has documented four separate incidents of vandalism of resource closures. Two of those acts of vandalism occurred on Hatteras Island¹⁶ and two occurred on Bodie Island.¹⁷ In each instance, the first act of vandalism triggered a 50 meter buffer expansion and the second act of vandalism resulted in expansion a 100 meter buffer expansion.

Moreover, the two holiday weekends that have taken place under the consent decree appear to have been successful for tourism in the area. According to the local online newspaper, the Island Free Press, the usually busy Memorial Day weekend “was, well, like any other holiday weekend on Hatteras and Ocracoke” despite the “unprecedented beach closures.”¹⁸ This trend continued through the Fourth of July weekend; the Park Service reported 2,557 vehicles were on Seashore beaches on July 4th.¹⁹ The Island Free Press stated, “There are beaches open to off-road vehicles on Hatteras and Ocracoke islands – despite the impression that some folks have that all beaches are closed down. Even through the July 4 holiday weekend, there was room on those open beaches for anyone who wanted to drive to the ocean’s edge.”²⁰

Effects of the Consent Decree on wildlife on the Seashore

It is too early in the first breeding season under the consent decree to have a complete data set, but preliminary results from the National Park Service’s weekly Resource Management Reports are encouraging. By the last week in July, piping plovers had increased from 6 breeding pairs in 2007 to 11 pairs in 2008, an 83% increase for this

¹⁵ OUTER BANKS GROUP, NATIONAL PARK SERVICE BEACH ACCESS REPORT FOR JULY 24 2008 (2008) (“July 24 Beach Access Report”).

¹⁶ Press Release, Outer Banks Group, Second Act of Vandalism of Shorebird Closure Fencing (May 19, 2008), at <http://www.nps.gov/caha/parknews/second-act-of-vandalism-of-shorebird-closure-fencing.htm>.

¹⁷ Press Release, Outer Banks Group, A Deliberate Violation of Resource Protection Area for Least Tern Colony with Chicks and Nests (July 28, 2008), <http://www.nps.gov/caha/parknews/a-deliberate-violation-of-resource-protection-area-for-least-tern-colony-with-chicks-and-nests.htm>.

¹⁸ Irene Nolan, *Dodging the bullet on Memorial Day Weekend*, ISLAND FREE PRESS, May 19, 2008, <http://www.islandfreepress.org/2008Archives/05.19.2008-DispatchesFromTheBeachfront.html>.

¹⁹ Irene Nolan, *New dispatches from the beachfront: Access update, getting smart about beach driving, manners and laws, and July 4 report*, ISLAND FREE PRESS, <http://www.islandfreepress.org/2008Archives/07.11.2008-ShootingTheBreezeNewDispatchesFromTheBeachfront.html>. This level of ORV activity indicates that there has been little to no effect on overall ORV use of the beach, with the busiest holiday weekends in previous years reportedly approaching only 2,200 vehicles. Notice of Intent (NOI) To Prepare a Draft Environmental Impact Statement (DEIS) for an Off-Road Vehicle Management Plan (ORV Management Plan) for Cape Hatteras National Seashore, NC, 71 Fed. Reg. 71552 (Dec. 11, 2006).

²⁰ Irene Nolan, *New dispatches from the beachfront: Access update, getting smart about beach driving, manners and laws, and July 4 report*, ISLAND FREE PRESS, <http://www.islandfreepress.org/2008Archives/07.11.2008-ShootingTheBreezeNewDispatchesFromTheBeachfront.html>.

threatened species.²¹ Fledged piping plover chicks nearly doubled from 4 to 7 during the same period, the highest number of fledged piping plover chicks on the Seashore since 1998.²² American oystercatchers, which declined 42% between 1999 and 2007, were down one pair this year to 21 breeding pairs on Seashore beaches, but at least 20 additional oystercatchers were present, some of which appeared to be paired.²³ Oystercatchers have equaled last year's total of 10 fledged chicks, with up to 7 more possible, which raises the hope that the oystercatcher breeding population will continue to recover in coming years.²⁴ The overall number of nesting colonial waterbirds has increased, and black skimmers are nesting again on Seashore beaches, after failing to nest at all last year.

Additionally, the number of successful sea turtle nesting attempts has increased to 92 so far in 2008, up from 82 all of last year. As of July 24, there have been 92 successfully laid sea turtle nests and only 82 unsuccessful nesting attempts,²⁵ reversing last season's ratio under the "interim plan" when the number of unsuccessful nests, 115, far exceeded the number of successful nests, 82.²⁶ Based on these preliminary indicators, all species appear to be benefiting from the management measures required by the consent decree. However, due to the steep population declines over the last decade, it will take more than one or two years of proper management for beach nesting birds to recover fully at the Seashore.

Economic effects of the Consent Decree

As with environmental effects, it is too early to assess the economic effects, if any, of the restrictions on beach driving. Approximately 2.5 million visitors come to the Seashore each year. A 2008 government-contracted study concluded that 2.7 to 4% of these visitors are ORV users.²⁷ That study also estimated that 9% of the visitors to the Seashore would return more often if driving were restricted on the beaches.²⁸

The Dare County Visitors Bureau reports that visitation during May 2008 (the first month of the consent decree) as measured by occupancy of motels, cottages, and other accommodations, was 6.31% *higher* than May 2007, a greater increase in visitation than

²¹ OUTER BANKS GROUP, NATIONAL PARK SERVICE RESOURCE MANAGEMENT WEEKLY FIELD SUMMARY REPORT FOR JULY 24, 2008 1 (2008) ("July 24 Resource Report").

²² Declaration of Walker Golder Attachment 7, filed in Defenders of Wildlife, et al. v. National Park Service, et al., Feb. 20, 2008.

²³ OUTER BANKS GROUP, NATIONAL PARK SERVICE RESOURCE MANAGEMENT WEEKLY FIELD SUMMARY REPORT FOR JUNE 18, 2008 2 (2008).

²⁴ See Id.

²⁵ Id. at 3.

²⁶ NATIONAL PARK SERVICE, CAPE HATTERAS NATIONAL SEASHORE: 2007 ANNUAL TURTLE REPORT 5 (2007).

²⁷ INDUSTRIAL ECONOMICS, INC., ECONOMIC ANALYSIS FOR CRITICAL HABITAT DESIGNATION OF THE WINTERING PIPING PLOVER 2-14 (2008).

²⁸ Id. 2-17.

the average increases for May over the past five years.²⁹ This increase in visitation occurred despite a sagging economy and record high gas prices.

The National Park Service reports a drop in visitation this year to Cape Hatteras National Seashore of 14.5% through June 2008 as compared to the same period last year.³⁰ This reflects an overall drop in visitation to the entire national park system this year. However, the drop in visitation to Cape Hatteras National Seashore this year prior to implementation of the consent decree (January-April) was 20.2% compared to a 10% drop after implementation of the consent decree. Visitation at nearby Cape Lookout National Seashore, unaffected by the consent decree, has dropped 35% through June 2008 compared to the same period last year.³¹ Accordingly, the consent decree appears to have had little to no negative effects on tourism.

Park Service negotiated rulemaking to adopt a final ORV management plan

In January 2008, the Department of the Interior established an advisory committee representing diverse interests and charged with recommending a proposed final ORV management plan to the National Park Service. The consent decree does not restrict or undermine this process. The lawsuit that led to the consent decree challenged the ongoing management of wildlife on the Seashore under the interim plan and sought to halt the decline and disappearance of birds on the Seashore during the time it will take for a final ORV plan – the focus of the negotiated rulemaking – to be adopted. According to the Park Service, it will take three years to go through rulemaking to adopt a final ORV plan. At that time, as the consent decree states, the final plan will replace the management requirements in the consent decree. By its terms, the consent decree is not, nor could it be, binding on the negotiated ruling.

Cape Hatteras is a National Park System unit.

Cape Hatteras was established as the nation's first national seashore to be managed by the National Park Service in 1937. The enabling legislation creating the Seashore states

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 a 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 the area.³²

²⁹ OUTER BANKS VISITORS BUREAU, GROSS OCCUPANCY SUMMARY 1994-2007, www.outerbanks.org/pdf/Gross_Occupancy_Summary_receipts.pdf.

³⁰ <http://www.nature.nps.gov/stats/>

³¹ Id.

³² 16 U.S.C § 459a-2.

Neither “off-road vehicles” nor driving on the Seashore beaches are mentioned in any legislation creating the Seashore. In 1940, Congress passed a bill that authorized hunting on the Seashore and added the words “Recreational Area” to the name of the Seashore, but did not change the basic mandates for the park and did not address the use of ORVs.

The obligation of the Park Service to protect the natural resources of the Seashore is unaffected by its designation as a “National Seashore” instead of a “National Park,” because under the General Authorities Act, Congress mandated all units of Park System be managed under a unified system.³³ The Seashore is managed by the National Park Service under the congressional mandates of the National Park Service Organic Act. In that Act, Congress declared that the primary purpose of the Seashore is “to conserve the scenery and the natural and historic objects and wildlife therein and to provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations.”³⁴ Moreover, National Park Service management policies governing the Seashore recognize that “when there is a conflict between conserving resources and values and providing enjoyment of them, conservation is predominant.”³⁵

Protection of the natural resources on national parks and seashores to leave them unimpaired for future generations is, and should be, paramount. The consent decree strikes the appropriate balance in addressing conservation and recreation interests and provides much needed protection to wildlife on The Seashore until a final ORV management plan is adopted.

Conclusion

In sum, all parties and interests agreed in open court to the terms of the consent decree augmenting the terms of the “interim plan” until such time as the National Park Service adopts a final ORV management plan, and a federal court approved it. As the statistics above show, the slight increase in the portions of the beach that have been closed to ORV use under the consent decree has had only a negligible impact, if any, on tourism and on the numbers of ORVs using the Seashore. At the same time, however, the closures have had a strikingly positive effect on the success of the endangered and threatened species that live and breed at Cape Hatteras. We ask, therefore, that this Committee oppose Senate Bill 3113 and leave the consent decree in place.

³³ 16 U.S.C. §§ 1, 2-4.

³⁴ 16 U.S.C. § 1.

³⁵ National Park Service Management Policies 1.4.3 (2006).