

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

No. 02:07-CV-0045-BO

DEFENDERS OF WILDLIFE and)	
THE NATIONAL AUDUBON)	
SOCIETY,)	
)	
Plaintiffs,)	
)	
v.)	PLAINTIFFS' STATUS REPORT
)	AND RESPONSE TO NOTICE
NATIONAL PARK SERVICE, et al.)	OF COMPLIANCE WITH
)	CONSENT DECREE
Defendants,)	
)	[E.D.N.C. Local Rule 5.1, 7.1]
and)	
)	
DARE COUNTY, et al.)	
)	
Defendant- Intervenors.)	
_____)	

Plaintiffs Defenders of Wildlife and National Audubon Society submit this status report in response to the Notice of Compliance with the Consent Decree filed by Defendants. The Consent Decree requires the National Park Service (“NPS”) to provide the parties and the Court with reports including data on various bird and sea turtle species from the previous breeding season with information on closures, nesting sites and management. Consent Decree ¶¶ 19, 21. In addition, the NPS is required to provide the Court a written summary of the progress of the

Negotiated Rulemaking Advisory Committee for ORV Management at Cape Hatteras National Seashore. Id. ¶ 20. Plaintiffs submit the following additional information regarding the status of the implementation of the Consent Decree:

1. Plaintiffs have reviewed the reports filed by the NPS and find that the NPS has complied with both the letter and spirit of the Consent Decree. We recognize that some of the intensive management measures required by the Consent Decree have placed additional burdens on NPS staff. We appreciate the efforts by NPS management and staff to comply with the management requirements imposed by the Consent Decree. Our overall assessment is the Consent Decree is achieving its objective of stabilizing and increasing nesting bird and sea turtle populations on Cape Hatteras National Seashore until a final ORV management plan and rule are adopted. All species appear to be responding favorably to the enhanced protections afforded by the required management measures. For instance, the number of nests laid by colonial waterbirds (least terns, common terns, and black skimmers) more than tripled in 2009 as compared to 2007 (the last pre-Consent Decree year), increasing from 212 nests to 642, and the number of chicks fledged doubled (86 in 2007 to 174 in 2009). The number of turtle nests reached 104, more than all previously recorded seasons except for last year's record-setting 112. Piping plover numbers also increased: in 2009, there were nine nesting pairs and six chicks fledged, as compared to six nesting pairs and

four chicks fledged in 2007. Attached as Exhibit 1 are charts showing these trends, using NPS data from its reports.

2. Since recommending to the Court that it approve the Consent Decree in April 2008, Defendant-Intervenors Dare County and the Cape Hatteras Access Preservation Alliance (“CHAPA”) have worked doggedly to enact legislation to invalidate the Consent Decree. In 2008, Dare County and CHAPA supported companion bills in the U.S. House and Senate (H.R. 6233 and S. 3113) to overturn the Consent Decree. Their efforts violated the spirit of the Consent Decree (see page 3 and paragraphs 32-33, 42) and the constitutional principle of separation of powers. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) (“separation of powers prohibition . . . is violated when an individual final judgment is legislatively rescinded”); *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (“Congress may not exercise the judicial power to revise final judgments.”).

3. After testimony before congressional subcommittees in favor of the bills by Dare County Commissioner Warren Judge and against the bills by National Park Service Deputy Director Daniel Wenk and by Southern Environmental Law Center attorney Derb Carter, neither bill received favorable committee action. (Mr. Judge’s testimony before the Senate committee is attached as Exhibit 2.) The House Bill never came up for a committee vote and the Senate

Bill was defeated by a vote of the Senate Committee on Energy and Natural Resources on September 11, 2008.

4. In 2009, Dare County and CHAPA renewed their efforts to enact legislation to invalidate the Consent Decree with the introduction of bills in both the House and Senate (H.R. 718 and S. 1557). Upon information and belief, despite ongoing lobbying efforts in favor of these bills by Dare County and CHAPA, the bills remain pending, and the Consent Decree is still in force. A copy of these two bills is attached hereto as Exhibits 3 and 4. Information regarding the ongoing lobbying effort to enact the bills is available at the Dare County-sponsored website. <http://www.preservebeachaccess.org>. Excerpts from that website are attached as Exhibit 5.

5. While seeking to overturn the Consent Decree by legislation, Dare and Hyde Counties and CHAPA have lauded the Consent Decree's management measures as providing "important biological benefits and protections" for threatened piping plovers in an ongoing lawsuit in the United States District Court for the District of Columbia, in which they are challenging designation of portions of Cape Hatteras National Seashore as critical habitat for wintering piping plovers under the Endangered Species Act. Cape Hatteras Access Preservation Alliance, Dare County, and Hyde County, North Carolina v. U.S. Department of Interior, et al., 09-0236-RCL (D.D.C.).

6. In a memorandum in support of a motion for summary judgment in that case, CHAPA and Dare and Hyde Counties argue the designation of critical habitat was arbitrary and capricious because the species was already protected by an existing management plan, highlighting at least three management measures in the Consent Decree, and concluding these measures in the Consent Decree provide “important biological benefits and protections” and provide “assurances that the conservation management strategies will be implemented to accomplish the objectives” of protection of piping plover habitat on the Seashore and critical habitat designation is not necessary. *Id.* (Mem. in Supp. of Pls.’ Mot. for Summ. J., Feb. 4, 2010, at 22, 23, 43).

7. Finally, on March 5, 2010, the NPS released a draft environmental impact statement (“DEIS”) and off-road vehicle management plan. It is available at: <http://parkplanning.nps.gov/documentsList.cfm?parkId=358&projectId=10641>. On March 12, 2010, EPA published a notice of availability in the Federal Register, which began a 60-day public comment period on the DEIS and proposed plan. 75 Fed. Reg. 11881, 11882 (Mar. 12, 2010). The DEIS includes an NPS-preferred alternative that would designate 52 of the 68 miles (76%) of Seashore beaches as year-round or seasonal ORV routes subject to natural resource closures. The comment period ends May 11, 2010.

Respectfully submitted this 17th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of March, 2010, served a copy of the foregoing pleading upon the parties listed below by electronically filing the foregoing with the Court on this date using the CM/ECF system:

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