

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NORTH CAROLINA

3 DEFENDERS OF WILDLIFE, )

)

4 PLAINTIFF, )

5 VS ) CASE NO. 2:07-CV-45

6 )  
7 NATIONAL PARK SERVICE, )

8 ET AL, )

9 DEFENDANTS. )

10  
11 MOTION HEARING

12 APRIL 30, 2008

13 HONORABLE TERRENCE W. BOYLE, PRESIDING

14  
15  
16 APPEARANCES:

17 MR. DERB CARTER  
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1 APPEARANCES: (CONT.)

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6 (FOR THE DEFENDANT)

7 MR. MICHAEL B. MURRAY  
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9 MR. L.P. HORNTAL, JR.  
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25 SHARON K. KROEGER, COURT REPORTER  
MACHINE SHORTHAND REPORTER, COMPUTER AIDED TRANSCRIPTION

1 THE COURT: ALL RIGHT. THE COURT IS HERE IN  
2 THE CASE OF DEFENDERS OF WILDLIFE VERSUS THE PARK  
3 SERVICE. WE WERE LAST HERE ON APRIL 4 FOR AN INJUNCTION  
4 HEARING WHICH WAS CONTINUED AT THAT TIME AT THE REQUEST  
5 OF THE PARTIES SO THAT THEY COULD PURSUE WHAT THEY  
6 REPRESENTED TO BE ONGOING SETTLEMENT NEGOTIATIONS.

7 THE CASE WAS CONTINUED UNTIL THE 11TH AND THEN  
8 CONTINUED UNTIL THE 16TH. AND THEN THE PARTIES FILED A  
9 JOINT MOTION WITH WHAT THEY CALLED A PROPOSED CONSENT  
10 DECREE, BUT WHICH I CONSTRUE TO BE A MOTION TO DISMISS  
11 THE CASE AS A RESULT OF THEIR MUTUAL AGREEMENT.

12 THEY HAVE ASKED THE COURT TO JOIN IN THAT.  
13 WHETHER THE COURT SHOULD OR WILL JOIN IN THAT IS  
14 UNDETERMINED.

15 AFTER THE FILING OF THIS MOTION BY THE  
16 PARTIES, THE COURT TRIED WITH ITS LIMITED RESOURCES TO  
17 READ AND UNDERSTAND THE MAPS WHICH PROVED TO BE  
18 UNSUCCESSFUL. AND SO AT SOME POINT WE MAY HAVE THE MAPS  
19 DESCRIBED FOR THE PUBLIC.

20 THE ACTIVITIES THAT TOOK PLACE BETWEEN THE

21 PARTIES, AS FAR AS I KNOW, WERE ALL CLOSED AND NOT OPEN  
22 TO THE PUBLIC EXAMINATION OR SCRUTINY, AND THIS DOCUMENT  
23 HAS COME FORWARD.

24 THIS CASE IS, IN MY OPINION, MATERIALLY  
25 DIFFERENT AND NOT CONTROLLED BY THE FOURTH CIRCUIT RULE

1 IN THE CASE OF UNITED STATES VERSUS NORTH CAROLINA. THAT  
2 CASE HAD STARK AND MATERIAL DIFFERENCES. THAT CASE  
3 RESULTED IN A CONSENT DECREE WHICH WAS A MANDATORY  
4 INJUNCTION AND REQUIRED THE COURT AS A PART OF THE  
5 INJUNCTION TO REMAIN ACTIVELY ENGAGED AND TO RATIFY THE  
6 FINDINGS AND PROCEEDINGS THAT WERE GOING TO LEAD FROM  
7 THAT.

8 THIS CASE HAS NO SUCH THING. THIS CASE WILL,  
9 ACCORDING TO THE PARTIES, BE OVER WHEN THE DISMISSAL IS  
10 ENTERED. WHY YOU DON'T TAKE A VOLUNTARY DISMISSAL  
11 REMAINS TO BE SEEN. WHY YOU WANT THE COURT INVOLVED  
12 REMAINS TO BE SEEN. IF YOU THINK THE COURT'S  
13 RATIFICATION WILL SOMEHOW SUGGEST THAT IT SATISFIES THE  
14 PUBLIC INTEREST AND JUSTICE, THEN THAT IS ONE THING.

15 THE ANSWERS TO MY QUESTIONS ARE ANSWERS, BUT  
16 THEY DON'T RESOLVE THE QUESTIONS AND THE MEANING OF THE  
17 QUESTIONS. I READ THE DECLARATION THAT WAS FILED  
18 YESTERDAY PROBABLY. AND IN PARAGRAPH 34, THE WITNESS  
19 SAYS AND EXPRESSES THE OPINION THAT "IN MY PROFESSIONAL  
20 OPINION, THE PROPOSED CONSENT DECREE WILL INSURE

21 EFFECTIVE RESOURCE PROTECTION AND A REDUCED, BUT  
22 REASONABLE LEVEL OF ORV ACCESS."

23 AND I MAY BE COMPLETELY OFF BASE, BUT MY  
24 CONSTRUCTION OF WHAT IS GOING ON HERE IS CENTERED RIGHT  
25 THERE. ACCESS WILL BE REDUCED, BUT ORV DENSITY IS NOT



1 AFFECTED WHATSOEVER. THERE ISN'T A SINGLE THING IN THIS  
2 PLAN OR PROPOSAL THAT EITHER MEASURES THE NUMBER OF  
3 VEHICLES, OR IN ANY WAY PROHIBITS OR LIMITS THE NUMBER OF  
4 VEHICLES.

5 AND REASON AND COMMON SENSE WOULD CAUSE ONE TO  
6 EXPECT THAT NO FEWER VEHICLES THAN HAVE APPEARED IN THE  
7 LAST YEAR OR LAST YEARS WILL ARRIVE AND THAT ALL THEY  
8 WILL HAVE IS LESS ACCESS, THEREBY PRODUCING HIGHER AND  
9 HIGHER CONCENTRATIONS OF VEHICLES IN THE LOCATIONS THAT  
10 THEY CONTINUE TO BE OPEN, HAVE OPEN TO THEM.

11 AND MOST OF MY QUESTIONS WERE ADDRESSED TO  
12 THAT. NONE OF THE ANSWERS RESPONDED TO IT.

13 THE FIRST QUESTION WAS IS IT NOT A FACT THAT  
14 ACCESS TO THE BEACH FROM A ROAD, FROM A STATE ROAD, FROM  
15 A PUBLIC SOURCE, HAS TO OCCUR THROUGH A RAMP? YOU CAN'T  
16 FLY A CAR OFF HIGHWAY 12 ONTO THE BEACH. YOU HAVE TO GO  
17 THROUGH A RAMP. THE QUESTION WAS WILL THE RAMPS PROVIDE  
18 ANY CONTROL? AND THE ANSWER IS JUST "NO". "NO" WOULD  
19 HAVE BEEN SUFFICIENT INSTEAD OF THAT SEVERAL PARAGRAPHS.

20 DO THE RAMPS PROVIDE ANY CONTROL NOW? "NO."

21 IS MEASURE AND CONTROL THE ONLY WAY YOU CAN

22 REGULATE BEACH ACCESS? YES.

23 I HAVE GOT A NUMBER OF OTHER QUESTIONS, BUT DO

24 YOU WANT TO PROCEED WITH THIS HEARING? IS IT YOUR INTENT

25 TO HAVE THE COURT ACTUALLY SIGN A DOCUMENT?

1 MS. TAYLOR: YES, YOUR HONOR. WE WOULD LIKE  
2 TO PROCEED, AND IT IS OUR INTENT THAT AT THE END OF THIS  
3 HEARING, WE WOULD HAVE SATISFIED YOUR CONCERNS.

4 THE COURT: WHAT GOOD WOULD SATISFYING MY  
5 CONCERNS BE? WHY DO YOU WANT THAT OR NEED THAT?

6 MS. TAYLOR: THE UTILITY OF THE CONSENT DECREE  
7 IS TO ALLOW FOR THE COURT OVERSIGHT IN A WAY SO THAT THE  
8 COURT --

9 THE COURT: WHAT OVERSIGHT? THE CASE WILL BE  
10 OVER. IT WILL BE CLOSED. THE COURT WILL HAVE NO  
11 CONTINUING JURISDICTION TO MAKE CHANGES OR OTHERWISE  
12 EFFECT IT OTHER THAN WHAT THE PARTIES REQUEST.

13 MS. TAYLOR: THAT'S CORRECT, YOUR HONOR. THAT  
14 IS THE EXTENT OF YOUR CONTINUING JURISDICTION. AND  
15 BECAUSE WE BELIEVE THAT THIS CONSENT DECREE RESOLVES ALL  
16 OF THE ISSUES IN DISPUTE IN THIS CASE WHICH RELATE TO THE  
17 INTERIM STRATEGY, THIS CASE IS NOT ABOUT THE FINAL ORV  
18 REGULATION. THIS IS ABOUT THE INTERIM PROTECTIVE  
19 MEASURES THAT ARE IN PLACE UNDER THE INTERIM PROTECTIVE  
20 SPECIES MANAGEMENT STRATEGY, AND WE HAVE RESOLVED THOSE

21 DISPUTES.

22 WITH THE CONSENT DECREE, WE WOULD LIKE TO HAVE

23 THE ABILITY TO COME BACK TO THE COURT TO REQUEST

24 MODIFICATIONS AS NEED BE, FOR THE COURT TO BE INVOLVED

25 IN DISPUTES --

1 THE COURT: THIS AGREEMENT DOESN'T EVEN COUNT  
2 THE FIRST VEHICLE THAT GOES ACROSS A RAMP AND ONTO THE  
3 BEACH. IT DOESN'T COUNT THE 2,000 OR THE 5,000 OR ANY  
4 NUMBER. WE WON'T KNOW A DAY, A WEEK, A MONTH, A YEAR  
5 FROM NOW WHETHER BEACH TRAFFIC HAS INCREASED, STAYED THE  
6 SAME, DECREASED. WE HAVE NO DATA AND NO INFORMATION  
7 WHATSOEVER AS A RESULT OF THIS.

8 MS. TAYLOR: NOT AS A RESULT OF THIS CONSENT  
9 DECREE, BUT WE DO TRACK THAT DATA INDEPENDENTLY AT THE  
10 PARK.

11 THE COURT: I DON'T THINK SO. I HAVE NEVER  
12 SEEN ANY RELIABLE REPORTING OF DAILY ACCESS, NUMBER OF  
13 VEHICLES THAT CROSS -- LET ME SEE, RAMP 4, I THINK IT IS.  
14 ISN'T THAT THE NUMBER OF THE BODIE ISLAND RAMP? THE  
15 FIRST TWO ARE CLOSE EFFECTIVELY FOR THE SUMMER. ONE  
16 PERMANENTLY AND ONE SEASONALLY. AND THEN RAMP 4 WOULD BE  
17 THE ONLY OTHER RAMP ON BODIE ISLAND; WOULDN'T IT?

18 MS. TAYLOR: I BELIEVE THAT IS CORRECT, YOUR  
19 HONOR.

20 THE COURT: OKAY. I HAVE NEVER SEEN ANY

21 ACTUAL VALID COUNT BY THE DAY OR THE WEEK DURING A MONTH  
22 OR A SEASON OF HOW MANY VEHICLES ACCESS RAMP 4.

23 MS. TAYLOR: IT'S MY UNDERSTANDING --

24 THE COURT: THAT IS AN EASY THING TO DO.

25 MS. TAYLOR: AND WE HAVE INSTALLED TRAFFIC

1 PATTERN COUNTERS LAST FALL AND WE ARE JUST BEGINNING TO  
2 COMPILE THAT.

3 THE COURT: SO WE HAVE NO SUMMER DATA EVER ON  
4 THAT.

5 MS. TAYLOR: OTHER THAN THE ESTIMATES BASED  
6 UPON PRIOR. THAT'S CORRECT.

7 THE COURT: SO NO ONE CAN TELL ME IF ON  
8 MEMORIAL DAY AND FOURTH OF JULY AND LABOR DAY OF LAST  
9 YEAR THERE WERE 1,000 VEHICLES THAT CROSSED THAT RAMP;  
10 2,000; 3,000; BECAUSE YOU CAN COME AND GO. IF THERE WERE  
11 2,000 IN THE BODIE ISLAND BEACH, THEN THERE MAY HAVE BEEN  
12 4,000; 2,000 OF WHICH CAME AND LEFT. I DON'T KNOW.

13 AND THE GOVERNMENT DOESN'T KNOW EITHER. AND  
14 HOW CAN YOU BEGIN TO ESTABLISH SOME BENCHMARK AND SOME  
15 REASONABLE APPLICATION OF SCIENCE AND SOUND MANAGEMENT TO  
16 THIS WITHOUT KNOWING WHAT THE PROBLEM IS.

17 I WOULD HAVE THOUGHT -- AND I CAN'T DO  
18 ANYTHING BUT KEEP DROPPING CONSPICUOUS HINTS OR  
19 SUGGESTIONS AND THEY JUST FALL ON DEAF EARS.

20 MS. TAYLOR: I THINK WHERE OUR DISCONNECTION

21 IS COMING FROM IS THAT THERE IS THIS ONGOING NEGOTIATED  
22 RULE MAKING PROCESS THAT ADDRESSES THE COURT'S -- THE  
23 ISSUES.

24 THE COURT: THAT IS IN TIME FUTURE. I MEAN,  
25 YOUR BEST FORECAST IS THAT THAT WILL HAPPEN THREE YEARS



1 FROM NOW, BUT THIS IS THE GOVERNMENT. IT MIGHT HAPPEN 30  
2 YEARS FROM NOW. IN 1972, WE MIGHT HAVE HAD THIS SAME  
3 CONVERSATION AND IT'S 36 YEARS HENCE. THERE HAS BEEN  
4 NOTHING, EVEN THOUGH THE LAW IS IN PLACE, FOR 36 YEARS.

5 WHY WOULD A REASONABLE PERSON THINK THAT IT  
6 WILL ALL OF A SUDDEN COMPRESS INTO THREE YEARS. I DON'T  
7 HAVE ANY CONFIDENCE IN THAT AT ALL.

8 MS. TAYLOR: ONE IS WE HAVE AGREED TO DO SO  
9 EXPRESSLY. WE HAVE ALL OF THE APPROPRIATE PEOPLE WITHIN  
10 THE DEPARTMENT OF INTERIOR AND PARK SERVICE AND FISH AND  
11 WILDLIFE COMMITTED TO THIS PROCESS.

12 THE COURT: THE EASIEST THING TO DO WOULD BE  
13 TO CLOSE THE RAMP AND PUT A CHAIN ACROSS IT, AND THAT  
14 WOULD ACCELERATE THE RULE MAKING PROCESS.

15 MS. TAYLOR: I WOULD AGREE WITH YOUR HONOR,  
16 BUT BECAUSE OF THE COMPLEXITY OF THIS ISSUE, THE NUMBER  
17 AND VARIETY OF STAKEHOLDERS, THE NUMBER AND VARIETY OF  
18 THE USERS, WE DECIDED TO HAVE THE PUBLIC PROCESS OF  
19 NEGOTIATED RULE MAKING, THAT PROCESS FOR THE FINAL REG.

20 THIS LAWSUIT IS ABOUT THE ENVIRONMENTAL

21 PROTECTIONS THAT ARE IN PLACE RIGHT NOW UNDER THE INTERIM  
22 STRATEGY. IT'S QUESTIONABLE WHETHER IF THE PARK HAD NOT  
23 GONE AHEAD --

24 THE COURT: WHY COULDN'T THE PARK SERVICE HAVE  
25 DONE THIS WITHOUT THE LAWSUIT AND WITHOUT A PROPOSED

1 CONSENT DECREE? IF THEY ARE ESSENTIAL AND IF THEY ARE  
2 NECESSARY, WHY NOT, AS AN EXERCISE OF GOOD MANAGEMENT,  
3 JUST GO AHEAD AND DO THESE?

4 MS. TAYLOR: THAT IS WHAT THE NEGOTIATED RULE  
5 MAKING PROCESS WAS INTENDED TO BE UNDER THE INTERIM  
6 STRATEGY WHICH WE BEGAN FORMULATING IN '04 WHICH WAS  
7 FINALLY APPROVED THROUGH THE NEPA PROCESS LAST JULY OF  
8 '07 WITH THE FINDING OF NO SIGNIFICANT IMPACT. THAT WAS  
9 THE PARK'S ATTEMPT TO ADDRESS THESE ISSUES UNTIL WE HAVE  
10 A FINAL REGULATION IN PLACE.

11 BEGINNING IN '99 AND THEN AGAIN IN '04, WE HAD  
12 NOTICE OF INTENT TO SUE BECAUSE OF OUR LACK OF A REG. IT  
13 WAS WHERE A PERFECT STORM WAS ON THE HORIZON, AND WE  
14 WANTED TO DEAL WITH IT. AND THAT IS WHERE THE INTERIM  
15 STRATEGY CAME ABOUT. HOW DO THEY PROTECT THE DELICATE  
16 AND ENDANGERED SPECIES UNTIL WE HAVE A FINAL REG TO  
17 ADDRESS NUMBER OF VEHICLES, PEAK USE LIMITS, PERMITS,  
18 DRIVER QUALIFICATIONS, SPECIFIC VEHICLE REQUIREMENTS.

19 ALL OF THOSE ISSUES ARE ONES, AS YOU CAN SEE  
20 FROM THE NEGOTIATED RULE MAKING CHARTER, ARE GOING TO BE

21 ADDRESSED. SO IT WAS ABOUT WHAT DO WE DO IN THE  
22 MEANTIME. AND THAT IS WHAT THIS LAWSUIT IS ABOUT.  
23 THE PLAINTIFFS HAVE CONTENDED THAT WE DIDN'T  
24 DO ENOUGH TO PROTECT THE ENVIRONMENT UNDER THAT INTERIM  
25 STRATEGY. SO WE GOT TOGETHER, THROUGH EXTENSIVE

1 NEGOTIATIONS, WITH ALL PARTIES. WE SAT DOWN AND FIGURED  
2 OUT. IT'S NOT A PERFECT SYSTEM, BUT IT'S HOW WE CAN  
3 PROVIDE ENHANCED PROTECTIONS WHILE STILL ALLOWING FOR  
4 REASONABLE RV ACCESS.

5 THE COURT: WELL, I THINK THE PUBLIC HAS A  
6 RIGHT TO SEE WHAT YOU HAVE DONE, AND SO I AM GOING TO ASK  
7 YOU TODAY TO EXPLAIN THESE MAPS AND EXPLAIN THESE  
8 CLOSURES. AND, YOU KNOW, I READILY ADMIT I AM NOT TRYING  
9 TO DO ANYTHING BUT BE HONEST THAT I CAN'T FIGURE OUT WHAT  
10 YOU HAVE DONE FROM THESE SUBMISSIONS.

11 I LOOK AT THE MAPS AND THEY HAVE CIRCLES ON  
12 THEM AND THEY DON'T RELATE TO THE GROUND TO ME. I KNOW  
13 WHERE THE OCEAN IS. I KNOW THE BEACH. I KNOW THE  
14 LANDMARKS. AND SO DO MOST OF THE PEOPLE HERE OR ALL OF  
15 THE PEOPLE HERE. BUT I CAN'T READ THE CLOSURE  
16 DESCRIPTIONS AND THE MAP AND SEE THE MAPS AND FIGURE OUT  
17 DOES THAT MEAN THAT YOU COME ON RAMP 4, BUT YOU CAN'T GET  
18 DOWN TO THE SPIT AND GET UNDER THE BRIDGE.

19 WELL, IF IT MEANS THAT, THEN WHY ARE YOU  
20 LETTING ANYBODY ON RAMP 4 BECAUSE THAT IS WHERE THEY ALL

21 WANT TO GO. THEY ALL WANT TO GO RIGHT DOWN THERE TO THE  
22 CHANNEL AND LOOK AT IT AND PACK AS MANY CARS AS THEY CAN  
23 RIGHT THERE ON WATER'S EDGE IN FRONT OF THE CHANNEL.

24 SO IF YOU ARE NOT GOING TO LET THEM DO THAT

25 BECAUSE YOU HAVE A CLOSURE THAT GOES ALL THE WAY TO THE

1 OCEAN FOR PIPING PLOVER ON THE SPIT AT BODIE ISLAND, THEN  
2 WHY LET THEM ON THE RAMP AT ALL? ALL YOU ARE DOING IS  
3 INVITING THEM TO GET ON THE RAMP, CHURN IT UP, AND TURN  
4 AROUND AND COME BACK OFF BECAUSE THEY ARE GOING TO HIT A  
5 DEAD END. THESE ARE THINGS THAT MAKE NO SENSE TO ME  
6 AT ALL.

7 AND I CAN'T TELL IF YOU ARE LETTING PEOPLE ON  
8 AND LETTING THEM GO EXTENSIVE DISTANCES AS THEY COULD  
9 HISTORICALLY. I KNOW THAT THERE ARE CLOSURES IN FRONT OF  
10 THE VILLAGE ON HATTERAS ISLAND. SO WHEN YOU GET ON A  
11 RAMP ON HATTERAS ISLAND, YOU KNOW YOU ARE NOT GOING TO BE  
12 ABLE TO GO THROUGH ALL THE WAY AND YOU ARE GOING TO HAVE  
13 TO GET OFF ON ANOTHER RAMP.

14 ARE THERE GOING TO BE CLOSURES IN BETWEEN SO  
15 THAT IF YOU HIT DEAD END, YOU HAVE TO BACK UP AND TURN  
16 AROUND AND COME BACK? OR ARE YOU GOING TO LET THEM GO  
17 THROUGH SO THAT THEY PASS ON WATER'S EDGE? BECAUSE IF  
18 THEY PASS ON WATER'S EDGE, THAT IS A WHOLE OTHER SET OF  
19 ISSUES.

20 ANYWAY, DO YOU WANT TO OFFER A WITNESS AND PUT

21 EVIDENCE. I WILL BE QUIET AND LET YOU PUT ON A

22 PRESENTATION, IF THAT IS WHAT YOU WANT.

23 MS. TAYLOR: I THINK WHAT WOULD BE HELPFUL. I

24 WOULD LIKE TO PUT ON A PRESENTATION. I THINK WHAT MIGHT

25 BE THE EASIEST WAY TO PROCEED, IS RATHER THAN HAVE ME, WE



1 HAVE SUPERINTENDENT MIKE MURRAY WITH ME TODAY ALONG WITH  
2 LAW ENFORCEMENT SPECIALIST PAUL STEVENS AND FIELD  
3 SUPERVISOR PETE BENJAMIN FROM FISH AND WILDLIFE WHO ARE  
4 ALSO CAPABLE OF PROVIDING ASSISTANCE TODAY.

5 BUT RATHER THAN HAVE SUPERINTENDENT MURRAY  
6 TAKE THE STAND, I THINK IT WOULD BE MORE EFFECTIVE TO  
7 ALLOW HIM TO JUST -- WE HAVE THE ABILITY TO DRAW UP THE  
8 MAPS.

9 THE COURT: THE PUBLIC WANTS TO SEE IT AND  
10 UNDERSTAND WHAT IS PROPOSED, BECAUSE MAYBE -- THEY MAY  
11 ALL KNOW, BUT I CERTAINLY DON'T KNOW.

12 MS. TAYLOR: LET ME PROVIDE A LITTLE BIT OF  
13 BACKGROUND BECAUSE THE COURT'S QUESTIONS ARE GOOD ONES,  
14 AND IT ALL -- THE DIFFERENT PARTS OF THE CONSENT DECREE  
15 OVERLAY TO CREATE THIS ADOPTIVE MANAGEMENT RESPONSE TO  
16 WHAT IS HAPPENING ON THE GROUND.

17 PART OF THE LIKELY CONFUSION IS BECAUSE WE  
18 DON'T KNOW WHAT IS GOING TO HAPPEN THIS YEAR. A LOT OF  
19 THE ASPECTS --

20 THE COURT: YOU DON'T KNOW WHERE THE CLOSURES

21 ARE GOING TO BE BECAUSE THE BIRDS HAVEN'T GOTTEN THERE  
22 YET AND THE PRECURSORS FOR THEIR ARRIVAL HAVEN'T -- WHICH  
23 IS -- PLAYS RIGHT INTO THE QUESTION OF WHY NOT CLOSE THE  
24 BEACH.

25 MS. TAYLOR: WE CONSIDERED THAT, YOUR HONOR.

1 AND WE STARTED WITH THE PRE-NESTING CLOSURES AND THOSE  
2 WERE THE MAPS THAT WERE ATTACHED TO THE CONSENT DECREE,  
3 WHICH ARE BEING DRAWN UP RIGHT NOW. WE CAN START WITH,  
4 FOR EXAMPLE, THE BODIE ISLAND MAP.

5 THE COURT: OKAY.

6 MS. TAYLOR: AND MIKE MURRAY WILL PROVIDE MORE  
7 SPECIFICS, BUT ESSENTIALLY WE START OFF IN MARCH WITH  
8 PRE-NESTING CLOSURES. SO THAT IS A SPOT WHERE BASED UPON  
9 THE NESTING DATA FROM THE PREVIOUS SEASON, SO THIS YEAR  
10 WE LOOKED AT THE 2007 NESTING AND WE CHARTED WHAT IS --  
11 WHAT SEEMS TO BE THE MOST VIABLE HABITAT FOR THOSE  
12 SPECIES, WHERE THEY LIKE TO BREED, WHERE THEY LIKE TO  
13 NEST. AND WE CLOSED THEM OUTRIGHT TO PEDESTRIANS  
14 BEGINNING THIS YEAR IN APRIL 1. UNDER THE CONSENT  
15 DECREE, IT WILL BE MARCH 15.

16 AND YOUR HONOR, I WOULD LIKE TO PASS UP THE  
17 MAPS SO YOU HAVE A COPY AS WELL.

18 THE COURT: I HAVE ALL THE MAPS, BUT THE MAPS  
19 DON'T MEAN ANYTHING TO ME. SAY THAT AGAIN. THE MARCH 15  
20 IS A TARGET OR A BEGINNING DATE, AND WHAT IS THE EFFECT

21 OF THAT ON BODIE ISLAND?

22 MS. TAYLOR: THE AREA OUTLINED IN THE DOTTED

23 RED HASHES IS CLOSED TO ORV.

24 THE COURT: WHY DON'T YOU HAVE THE

25 SUPERINTENDENT COME UP THERE AND POINT TO IT SO THAT WE

1 CAN FIGURE OUT WHAT THE MAP MEANS.

2 AND TURN IT AROUND SO THAT THE PUBLIC CAN SEE.

3 MR. MURRAY: IF I COULD, I WOULD LIKE TO

4 DISTINGUISH BETWEEN WHAT HAPPENS UNDER THE INTERIM

5 STRATEGY WHICH IS -- WE HAVE BEEN FOLLOWING SINCE 2006.

6 UNDER INTERIM STRATEGY, BY APRIL 1 OF EACH YEAR, WE GO TO

7 THE PRIMARY PIPING PLOVER NESTING SITES ON BODIE ISLAND

8 SPIT, CAPE POINT, SOUTH BEACH, HATTERAS INLET, NORTH

9 OCRACOKE AND SOUTH OCRACOKE.

10 THE COURT: THOSE ARE HISTORICAL SITES?

11 MR. MURRAY: YES.

12 THE COURT: SITES THAT WERE NESTING THE

13 PREVIOUS YEAR? THE BIRDS ARE GONE?

14 MR. MURRAY: OR OVER A LONGER PERIOD OF TIME.

15 THE COURT: RIGHT.

16 MR. MURRAY: UNDER THE INTERIM STRATEGY, WE

17 LOOK AT THE AREAS THAT HAD NESTING IN THE LAST THREE

18 YEARS.

19 THE COURT: CORRECT.

20 MR. MURRAY: AND SO BEFORE APRIL 1 WE PUT UP

21 WHAT ARE CALLED PRE-NESTING AREAS. WE IDENTIFIED HABITAT  
22 WHERE THEY ARE LIKELY TO COME IN AND NEST AGAIN. AND  
23 WHAT THAT DOES, FOR EXAMPLE, AT BODIE ISLAND SPIT, IS IT  
24 CLOSES THE AREA IN RED, SURROUNDED BY RED.  
25 THE COURT: BUT NOT THE BEACH?

1 MR. MURRAY: CORRECT.

2 THE COURT: YOU CAN DRIVE A VEHICLE ON THE  
3 HARD PACK ALL THE WAY AROUND?

4 MR. MURRAY: UNDER THE INTERIM STRATEGY, THE  
5 CORRIDOR IS ABOUT 100 FEET WIDE, SO FROM HIGH TIDE LINE  
6 FOR ABOUT 100 FEET --

7 THE COURT: SO THAT IS THE HARD PACK BETWEEN  
8 WHERE THE OCEAN IS THAT DAY AND THE LINE.

9 MR. MURRAY: CORRECT. SO WHAT IS A LITTLE  
10 DIFFICULT TO SEE IS THE UNDERLYING PHOTOGRAPHIC IMAGE  
11 WHICH IS HARD TO KEEP UP TO DATE BECAUSE THE SHORE LINE  
12 CHANGES. ON THIS PARTICULAR MAP THERE IS A BLUE LINE  
13 THAT LOOKS BLACK ON THE SCREEN. BETWEEN THE BLUE LINE,  
14 WHICH IS A RECENT SHORE LINE TAKEN BY G.P.S. COORDINATES,  
15 AND THE RED LINE, THAT IS THE ORV AND PEDESTRIAN ACCESS  
16 CORRIDOR WHICH ENABLES PEOPLE TO GET DOWN TO --

17 THE COURT: IS THIS GOING TO BE -- IS THIS  
18 WHAT THE PLAN CONTEMPLATES, THAT THAT WILL REMAIN ON THE  
19 FOURTH OF JULY. YOU WILL BE ABLE TO DO THAT?

20 MR. MURRAY: NO, SIR. IT'S THE STARTING POINT

21 AT THE BEGINNING OF THE BREEDING SEASON. SO IT'S THE  
22 INITIAL BASE LINE PRE-NESTING AREA BEFORE THE BIRDS  
23 ARRIVE.  
24 ONCE THE BIRDS ARRIVE UNDER THE INTERIM  
25 STRATEGY --



1 THE COURT: OKAY.

2 MR. MURRAY: AND IT WILL BE MODIFIED ALSO

3 UNDER THE CONSENT DECREE. UNDER THE INTERIM STRATEGY, AS

4 THE BIRD ACTIVITY OCCURS TO COURTSHIP AND MATING,

5 NESTING, UNFLEDGED CHICKS, WE IMPLEMENT ADDITIONAL BUFFER

6 AREAS AROUND THAT PARTICULAR ACTIVITY.

7 THE COURT: WHAT DOES IT DO TO DRIVING IN THE

8 CORRIDOR?

9 MR. MURRAY: WELL, IT DEPENDS. IF THERE IS A

10 NEST OR CHICKS NEAR THE CORRIDOR AND THE BUFFER WOULD

11 CLOSE THE CORRIDOR, THAT COULD OCCUR. FOR EXAMPLE, LAST

12 YEAR ABOUT MID-JULY, WE HAD PIPING PLOVER CHICK IN THE

13 SOUTHERN POINT OF BODIE ISLAND AND WE ENDED UP HAVING TO

14 CLOSE IT FOR ABOUT A MONTH, AND IT WAS PROBABLY

15 EVERYTHING SOUTH FROM WHERE I AM POINTING. SO PEOPLE

16 COULD COME DOWN TO THIS POINT, AND BEYOND THAT WAS CLOSED

17 FOR ABOUT A MONTH UNTIL THE CHICK HAD FLEDGED. SO THAT

18 IS WHAT HAS BEEN OCCURRING.

19 WHAT THE CONSENT DECREE WOULD --

20 THE COURT: NOW, THE SPIT -- WHERE IS THE

21 BRIDGE? IS THAT THAT WHITE LINE?

22 MR. MURRAY: YES, SIR. SO THE SPIT IS

23 ACTUALLY ALL THE WAY UNDER THE BRIDGE. IT HAS GONE ON TO

24 THE WEST SIDE NOW ACTUALLY. YOU CAN WALK ONTO THE WEST

25 SIDE OF THE BRIDGE, AND IT GOES BACK NORTH OR NORTHWEST

1 ALONG THE PATH OF THE BRIDGE.

2 AS OF TODAY, THE SPIT; CORRECT?

3 MR. MURRAY: CORRECT. AT THE VERY SOUTHERN  
4 END OF THE SPIT IS NEAR THE BRIDGE.

5 THE COURT: YES. THE THING THAT KEEPS THE  
6 SPIT FROM EXTENDING ITSELF SOUTH AND WEST IS THE CHANNEL?

7 MR. MURRAY: YES.

8 THE COURT: IF THERE WAS NO CHANNEL, THE SPIT  
9 WOULD BE ON THE OTHER SIDE?

10 MR. MURRAY: THAT'S CORRECT.

11 THE COURT: SO THE CHANNEL CONTINUES TO DEFINE  
12 IT, BUT IT MOVES AROUND THROUGH UNDER THE BRIDGE AND UP  
13 ON THE OTHER SIDE RIGHT NOW.

14 MR. MURRAY: THE -- CURRENTLY, THE  
15 SOUTHWESTERN TERMINUS OF THE SPIT DOES NOT GO UNDER THE  
16 BRIDGE. IT'S VERY CLOSE TO IT.

17 THE COURT: IT DID A MONTH AGO OR TWO MONTHS  
18 AGO?

19 MR. MURRAY: WELL, IT CURRENTLY DOES NOT DO  
20 THAT NOW. IF YOU DROVE DOWN HERE, YOU WOULD BE RIGHT

21 UNDERNEATH THE BRIDGE.

22 THE COURT: OKAY.

23 MR. MURRAY: BUT IT DOES NOT EXTEND TO THE

24 OTHER SIDE. SO AS THE SEASON PROGRESSES AND EACH SPECIES

25 HAS A DIFFERENT BUFFER DISTANCE, WHETHER IT'S PIPING

1 PLOVER, AMERICAN OYSTERCATCHERS OR COLONIAL WATERBIRDS,  
2 WHEN WE SEE ACTIVITIES IN THE AREAS STILL OPEN TO THE RV  
3 USE, WE IMPLEMENT ADDITIONAL CLOSURES USING THE BUFFER  
4 ZONES.

5 THE COURT: WELL, WHAT ARE YOU GOING TO DO ON  
6 THE FOURTH OF JULY WHEN YOU PROSPECTIVELY HAVE A CLOSURE  
7 AND 3,000 ORV'S SHOW UP GOING UP RAMP 4 TO GET ON THE  
8 BEACH? ARE YOU JUST GOING TO LET THEM UP THERE?

9 MR. MURRAY: NO, WE ARE NOT.

10 THE COURT: WHAT ARE YOU GOING TO DO?

11 MR. MURRAY: IT IS GOING TO REQUIRE GOOD  
12 INFORMATION AND PUBLIC INFORMATION.

13 THE COURT: HOW ARE YOU GOING TO STOP THEM?  
14 ARE YOU GOING TO TELL THEM THERE ARE 400 PEOPLE  
15 WITH ORV'S UP THERE; YOU CAN'T GO BECAUSE WE ARE LIMITING  
16 IT TO 400 TODAY.

17 MR. MURRAY: MOST OF THE CLOSURES HAPPEN  
18 INCREMENTALLY, SO IN MY OPINION, BY THE FOURTH OF JULY,  
19 BASED ON PAST YEARS' NESTING, BODIE ISLAND SPIT MAY WELL  
20 BE CLOSED OR HAVE SEVERELY RESTRICTED ACCESS. SO WE

21 WOULD HAVE ADVANCE INFORMATION OUT TO THE PUBLIC. WE DO  
22 A WEEKLY BEACH ACCESS REPORT.

23 THE COURT: BUT YOU ARE NOT GOING -- YOU MAY  
24 COUNT, BUT YOU ARE NOT GOING TO TOLL AT A CERTAIN NUMBER  
25 AND SAY NO MORE CARS ON THE BEACH?

1 MR. MURRAY: WELL, ON THE SHORT TERM, WE  
2 WOULD. YOU GET INTO SPATIAL LIMITATIONS.

3 THE COURT: FOR PUBLIC SAFETY REASONS, OF  
4 COURSE.

5 MR. MURRAY: YES, SIR.

6 THE COURT: AND SINCE MEMORIAL DAY IS ROUGHLY  
7 34 DAYS EARLIER THAN THE FOURTH OF JULY, THERE MIGHT BE  
8 DRIVING ALL THE WAY DOWN AND AROUND ON MEMORIAL DAY  
9 BECAUSE YOU MIGHT NOT HAVE ANY CHICK NESTS THERE?

10 MR. MURRAY: IT'S POSSIBLE, YES, SIR.

11 THE COURT: WHICH IS PROBABLY WHAT HAPPENED  
12 LAST YEAR?

13 MR. MURRAY: CORRECT.

14 THE COURT: AND COULD HAPPEN AGAIN THIS YEAR?

15 MR. MURRAY: IT COULD. UNDER THE PROPOSED  
16 CONSENT DECREE, THE PRESCRIBED BUFFERS ARE LARGER FOR  
17 EACH SPECIES. AND SO THE LIKELIHOOD IS THAT EARLIER IN  
18 THE SEASON, THE BUFFERS, AS THEY ARE IMPLEMENTED AROUND  
19 ACTIVITY SUCH AS NESTS --

20 THE COURT: DON'T YOU FEEL LIKE YOU ARE JUST

21 GOING TO CREATE MORE OF A MANAGEMENT CRISIS BY HAVING  
22 NARROWER AND NARROWER AREAS IN WHICH THE SAME NUMBER OF  
23 VEHICLES CAN COMPACT?

24 MR. MURRAY: I BELIEVE IT WILL BE CHALLENGING,  
25 FOR SURE. THERE IS NO DISMISSING THAT SITUATION. WHAT I



1 ANTICIPATE IS WITH THESE BUFFERS, THAT IT WILL LEAD TO  
2 FULL CLOSURES OF SOME AREAS EARLIER.

3 THE COURT: BUT NOT THE RAMPS. YOU ARE NOT  
4 GOING TO CLOSE THE RAMPS?

5 MR. MURRAY: WHAT WE WOULD DO IS IF THERE IS  
6 ANY ACCESSIBLE BEACH GOING AT A RAMP, WE WOULD LEAVE THAT  
7 OPEN SO THAT PEOPLE CAN ACCESS WHAT IS AVAILABLE.

8 THE COURT: IT SEEMS LIKE JUST PLAIN COMMON  
9 SENSE IF THE ACCESSIBLE BEACH IS A NARROW LITTLE AREA,  
10 YOU WOULD SAY THE FIRST 300 PEOPLE THAT GET HERE -- IF  
11 YOU WANT TO GO TO A BASKETBALL GAME, YOU NEED TO COME  
12 EARLY TO PARK. WHY CAN'T YOU SAY IF YOU WANT TO GO TO  
13 THE BEACH, COME EARLY AND YOU WILL GET ON. IF YOU DON'T  
14 COME EARLY, YOU WON'T GET ON. WE'LL LET 300 PEOPLE ON.  
15 WHAT IS SO HORRIBLE ABOUT THAT?

16 MR. MURRAY: IF I COULD USE THE TERM CARE AND  
17 CAPACITY OR USE LIMITS ON THE NUMBER OF VEHICLES IS  
18 I THINK AN IMPORTANT MANAGEMENT TOOL AND VERY VALID IN  
19 THE LONG RUN TO BE CONSIDERED. IN THE SHORT TERM, IT'S A  
20 COMPLICATED ISSUE AND VERY DIFFICULT TO PICK A NUMBER.

21 THE COURT: SOME NUMBER IS BETTER THAN NO  
22 NUMBER. CLEARLY. I MEAN, EVEN A HIGH NUMBER WOULD BE  
23 BETTER THAN NO NUMBER AT ALL. AT LEAST IT SUGGESTS  
24 RESPONSIBLE APPROACH. BUT SAYING, YOU KNOW, IF YOU COME,  
25 WE'LL LET YOU ON, THAT INVITES IRRESPONSIBILITY IT SEEMS.

1 MR. MURRAY WE WOULD NOT SAY -- WE ARE NOT  
2 SAYING IF YOU COME, WE'LL LET YOU ON BECAUSE THERE IS  
3 OBVIOUSLY SPATIAL LIMITATIONS.

4 THE COURT: HAVE YOU EVER TURNED ANYONE AWAY?

5 MR. MURRAY: NOT TO MY KNOWLEDGE, OTHER THAN  
6 WHEN WE HAVE HAD THE COMPLETE CLOSURES. IT'S SPATIALLY  
7 LIMITED BY THE WIDTH OF THE CORRIDOR. AND WE CERTAINLY  
8 HAVE HAD INSTANCES WHERE IT'S OVERCROWDED OUT THERE.

9 THE COURT: GROSSLY OVERCROWDED.

10 MR. MURRAY: UM-HUM.

11 THE COURT: AND CORRECT ME IF I AM WRONG, BUT  
12 I THINK WE BOTH KNOW THAT IN ORDER TO TRAVEL DOWN THE  
13 SPIT ON THE HARD PACK AT OCEAN'S EDGE, IT'S NOT LIKE A  
14 TREMENDOUS FIELD OF HUNDREDS OF YARDS. IT'S A NARROW  
15 CORRIDOR THAT THE CARS DRIVE THROUGH. THEY DRIVE THROUGH  
16 THE RUTS BECAUSE IT'S SOFT SAND OR CLOSED WHERE THE DUNE  
17 IS FURTHER IN.

18 SO ALL OF THE VEHICLES ARE HAVING TO TRAVEL  
19 THROUGH WHAT BECOMES THE TRAIL OR THE PASSAGEWAY OR A  
20 NECK OR A PORTAL OR WHATEVER YOU WANT TO CALL IT. AND SO

21 YOU GET EVERY SINGLE VEHICLE HAVING TO NEGOTIATE THAT AND  
22 THAT CREATES -- PRESENTS ITS OWN COMPLICATIONS; DOESN'T  
23 IT?

24 MR. MURRAY: THE TRAVEL IS RESTRICTED TO WHAT  
25 WE CALL THE CORRIDOR --

1 THE COURT: YES.

2 MR. MURRAY: -- AT THESE AREAS AFTER THE  
3 PRE-NESTING AREAS ARE INSTALLED BY APRIL 1. THE CORRIDOR  
4 IS ABOUT A HUNDRED FEET WIDE ABOVE MAIN HIGH TIDE LINE,  
5 SO DEPENDING ON TIDE, IT MAY BE.

6 THE COURT: YOU HAVE NO IDEA OF THE  
7 QUALIFICATIONS OF THE PERSON DRIVING THE VEHICLE, WHETHER  
8 THEY ARE A SEASONED BEACH OFF-ROAD DRIVER, WHETHER THEY  
9 HAVE NEVER BEEN OFF-ROAD BEFORE. YOU HAVE NO IDEA  
10 WHETHER THEY HAVE LET THE AIR OUT OF THEIR TIRES, WHETHER  
11 THEIR VEHICLE IS GOING TO MAKE IT, WHETHER THEY ARE  
12 HANDLING THEIR VEHICLE PROPERLY.

13 AND SO THE POSSIBILITY OF SOMEBODY CREATING A  
14 BOTTLENECK OR A CRISIS WITH THESE CORRIDORS IS ALWAYS  
15 THERE AND SOMETIMES HAPPENS; ISN'T THAT TRUE?

16 MR. MURRAY: THAT'S CORRECT. IT CAN HAPPEN.  
17 SOME OF THAT WE CAN APPROACH THROUGH EDUCATION. WE ARE  
18 GOING TO REPLACE SIGNS.

19 THE COURT: BUT EDUCATION ISN'T GOING TO  
20 CHANGE WHO SHOWS UP AND DRIVES ONTO THE BEACH. YOU CAN

21 PUT ALL THE SIGNS UP YOU WANT, BUT IF YOU DON'T KNOW WHO  
22 THE PERSON IS OR THEY ARE NOT QUALIFIED, THEY SHOULDN'T  
23 BE LET ON THE BEACH. AND YOU ONLY DO THAT THROUGH A  
24 PERMITTING PROCESS.

25 MR. MURRAY: I THINK PERMITS ARE A VALUABLE

1 TOOL. I WAS THE DEPUTY SUPERINTENDENT AT CAPE COD FOR  
2 EIGHT YEARS AND HAVE SEEN THE VALUE OF THAT. IN THE  
3 SHORT TERM, A PERMIT SYSTEM CAN BE FAIRLY CUMBERSOME AND  
4 COMPLICATED.

5 THE COURT: NOT IF YOU MAKE THEM PAY FOR THE  
6 PERMITS?

7 MR. MURRAY: CORRECT. BUT IN ORDER TO HAVE AN  
8 EFFECTIVE DISTRIBUTION PROCESS, IT WOULD PROBABLY TAKE US  
9 AT LEAST A YEAR TO SET IT UP.

10 THE COURT: THEY PERMIT THINGS LIKE SHOOTING A  
11 SWAN AND PEOPLE FIGURED OUT HOW TO GET ONE AND GO THROUGH  
12 WITH IT.

13 MR. MURRAY: YES. UM-HUM.

14 THE COURT: I AM SORRY. I DON'T WANT TO  
15 INTERRUPT YOU ANY FURTHER. GO AHEAD.

16 MR. MURRAY: SO ANYWAY, AS THE SEASON  
17 PROGRESSES, THESE PRE-NESTING AREAS EVOLVE BY THE  
18 ADDITION OF DIFFERENT CLOSURES BASED AROUND THE BIRD  
19 ACTIVITY. THE LARGEST BUFFERS BOTH IN THE INTERIM  
20 STRATEGY AND ALSO IN THE PROPOSED CONSENT DECREE OCCUR

21 WHEN CHICKS OCCUR.

22 PIPING PLOVER CHICKS, FOR EXAMPLE, ARE HIGHLY

23 MOBILE. THEY CAN TRAVEL A GREAT DISTANCE, SO A LARGER

24 BUFFER WOULD BE --

25 THE COURT: DO THEY EVER GO TO THE WATER?



1 MR. MURRAY: PIPING PLOVER CHICKS RANGE A  
2 GREAT DISTANCE. THEY FEED IN WET SANDS WHICH INCLUDES  
3 THE INTERTIDAL ZONE NEXT TO THE WATER

4 THE COURT: SO WHERE THE HIGH TIDE, LOW TIDE  
5 LINE IS, THEY WILL FEED IN THAT?

6 MR. MURRAY: YES.

7 THE COURT: HOW CAN YOU LET PEOPLE DRIVE  
8 ACROSS THAT IF THEY ARE FEEDING IN THAT?

9 MR. MURRAY: THOSE AREAS ARE CLOSED WHEN  
10 PIPING PLOVER CHICKS ARE AROUND.

11 THE COURT: SO THEY DO TAKE ADVANTAGE OF THE  
12 EDGE OF THE WATER PHENOMENON?

13 MR. MURRAY: YES, THEY DO.

14 THE COURT: IT'S NOT JUST TURTLES; IT'S BIRDS,  
15 TOO?

16 MR. MURRAY: THAT'S CORRECT. AMERICAN  
17 OYSTERCATCHER CHICKS ALSO FEED AT THE WATER'S EDGE.

18 THE COURT: THAT WAS AN ISSUE THAT CAME UP  
19 EARLIER, AND IT DIDN'T APPEAR TO ME THAT ANYBODY PAID ANY  
20 ATTENTION TO IT, THAT THE WATER'S EDGE IS A CRITICAL

21 DYNAMIC IN THIS WHOLE ECOLOGY SYSTEM HERE AND BIRDS AND  
22 THE TURTLES ALL -- YOU CAN'T LOOK AT THEM IN ISOLATION.  
23 YOU HAVE TO LOOK AT THEM IN COOPERATION OR ASSIMILATION  
24 INTO THE BEACH ENVIRONMENT; THE WATER, AND THE DUNE.  
25 MR. MURRAY: THAT'S CORRECT. IF I COULD TELL

1 THE COURT ABOUT WHAT HAPPENS AS THE SEASON PROGRESSES.  
2 THERE IS AN ACCUMULATION OF THESE CLOSURES, AND BY  
3 GENERALLY MID-JULY TO MID-AUGUST WE HAVE THE MAXIMUM  
4 AMOUNT OF BEACH RESTRICTIONS IN PLACE.

5 LAST YEAR IN MID-AUGUST, 2007, FOR EXAMPLE, WE  
6 HAD 9.8 MILES OF BEACH ENTIRELY CLOSED AND QUITE A BIT OF  
7 THAT WAS AT SOME OF THESE KEY SITES. WE LEFT ACCESS OPEN  
8 WHERE WE COULD, WHERE IT WAS NOT IN CONFLICT,  
9 PARTICULARLY WITH THE BIRD CHICKS. AND WHAT WE WOULD  
10 ANTICIPATE UNDER THE CONSENT DECREE WOULD BE A SIMILAR  
11 ACCUMULATION OR INCREASE IN THE NUMBER OF PROTECTIVE  
12 MEASURES IN PLACE PEAKING IN MID-JULY TO MID-AUGUST. AND  
13 THEN AS THE BIRDS FLEDGE, WE BEGIN TO RE-OPEN AREAS THAT  
14 ARE CLOSED, AND GENERALLY BY EARLY SEPTEMBER, MUCH OF THE  
15 AREA HAS BEEN RE-OPENED.

16 THE COURT: IT JUST SEEMS TO ME THAT FROM A  
17 POLICY STANDPOINT YOU WOULD CLOSE RAMP 4. IT WOULD SAVE  
18 YOU AN ENORMOUS EXPENDITURE OF PERSONNEL AND RESOURCE.  
19 IT'S A VERY MARGINAL USE FOR SPORTSMEN, LITTLE OR NO USE  
20 FOR SPORTSMEN, AND IT HAS THE MOST READY ACCESS TO

21 TRANSIENT BEACH DRIVING.

22 DOES ALL THAT MAKE SENSE?

23 YOU DON'T HAVE TO AGREE WITH IT, BUT --

24 MR. MURRAY: WELL, YOUR BACKGROUND, I THINK,

25 IS ACCURATE. FROM OUR POINT OF VIEW, BOTH THE ENABLING

1 LEGISLATION, THE ORGANIC ACT GAVE US A DUAL MISSION TO  
2 PROVIDE FOR RESOURCE PROTECTION AS WELL AS TO PROVIDE FOR  
3 VISITOR ENJOYMENT.

4 WE HAVE A LONG TRADITION OF BEACH DRIVING AT  
5 THE SEASHORE, AND THE INTERIM STRATEGY AND THE NEW RV  
6 MANAGEMENT PLAN --

7 THE COURT: WELL, THAT'S ANOTHER -- I DON'T  
8 MEAN TO KEEP INTERRUPTING, BUT YOU SAID A LONG TRADITION  
9 OF BEACH DRIVING AT THE SEASHORE. BUT YOU AND I KNOW  
10 THAT IN 1972 YOU WERE UNDER AN OBLIGATION -- NOT YOU, BUT  
11 THE SERVICE -- WAS UNDER AN OBLIGATION TO COME UP WITH A  
12 PLAN. AND WE ARE NOT TAKING A SNAPSHOT FROM 1972 WHEN IN  
13 TRUTH AND FACT IT SHOULD HAVE BEEN THE BENCHMARK AGAINST  
14 WHICH EVOLUTIONARY BEACH DRIVING WAS MEASURED.

15 WE ARE TAKING A SNAPSHOT IN 2008. AND THOSE  
16 ARE ENORMOUSLY DIFFERENT CONDITIONS; ENORMOUSLY  
17 DIFFERENT. VIRTUALLY NO BEACH ACCESS IN 1972. LIMITED.  
18 VERY FEW PEOPLE DRIVING ON THE BEACH.

19 MR. MURRAY: MY UNDERSTANDING IS A RELATIVELY  
20 SMALLER NUMBER. I WISH THEY HAD TAKEN CARE OF THIS WAY

21 BACK THEN.

22 THE COURT: I UNDERSTAND. GO AHEAD.

23 MR. MURRAY: WHAT WE ARE TRYING TO DO WITH THE  
24 INTERIM STRATEGY IS TO PROTECT RESOURCES UNTIL WE CAN  
25 COMPLETE THE LONG TERM PLAN. IT'S NOT A PERFECT

1 SITUATION, NOR IS IT PERFECT WITH THE CONSENT DECREE, BUT  
2 IT ALLOWS US THE TIME TO THOUGHTFULLY DEVELOP THE PLAN  
3 AND REGULATION WITH THE NEGOTIATED RULEMAKING COMMITTEE  
4 AND IT ALSO GIVES US A TRANSITION OF INCREASED PROTECTION  
5 WHICH WILL ALSO HAVE INCREASED RESTRICTIONS DURING THE  
6 PEAK SEASON SO THAT WE CAN DEVELOP A THOUGHTFUL PLAN THAT  
7 WILL TAKE CARE OF THIS ONCE AND FOR ALL.

8 THE COURT: I READ YOUR DECLARATION AND I  
9 THOUGHT IT WAS AN OUTSTANDING STATEMENT BY A DEDICATED  
10 PUBLIC SERVANT, AND I WANT YOU TO KNOW THAT, SO I THOUGHT  
11 YOU COVERED EVERYTHING VERY CAPABLY IN YOUR DECLARATION.  
12 AND I KNOW THAT YOU ARE IN A VERY DIFFICULT AND HARD  
13 PLACE WHERE YOU ARE TRYING TO BE LIKE SOLOMON AND SATISFY  
14 MANY COMPETING INTERESTS AND LEGITIMATE CONCERNS. SO  
15 THIS IS IN NO WAY OPPOSED TO THAT.

16 DO YOU HAVE ANY MORE QUESTIONS? DO YOU WANT  
17 TO LOOK AT OTHER THINGS?

18 WE NEED TO LOOK AT HATTERAS ISLAND AND  
19 OCRACOKE ISLAND, TOO, BUT I THINK HE HAS PROBABLY COVERED  
20 THE BODIE ISLAND SITUATION.

21 MR. MURRAY: CAN WE SEE CAPE POINT?

22 MS. TAYLOR: WHEREVER YOUR HONOR WOULD LIKE US

23 TO GO.

24 THE COURT: BUT IT'S SELF EVIDENT HERE THAT

25 THE AREAS OF RICHEST ENVIRONMENTAL TREASURE ARE THE ONES



1 THAT ARE THE MOST IN JEOPARDY AND MOST USED BECAUSE THAT  
2 IS -- YOU KNOW, THE ONES THAT STICK OUT INTO THE OCEAN  
3 ARE THE ONES THAT NATURE WANTS TO USE AND PEOPLE WANT TO  
4 USE; RIGHT?

5 MR. MURRAY: CORRECT.

6 THE COURT: GO AHEAD.

7 MR. MURRAY: ALL RIGHT. CAPE POINT -- THIS IS  
8 THE PRE-NESTING AREA THAT WAS INSTALLED IN 2008, THE LAST  
9 WEEK OF MARCH.

10 AGAIN, THE RED OUTLINE SHOWS WHAT IS  
11 PROTECTED. RIGHT NOW YOU CAN ACCESS CAPE POINT DOWN THE  
12 EASTERN SHORELINE TO THE POINT ABOUT A QUARTER MILE WEST  
13 OF THE TERMINUS OF THE POINT. THE PRE-NESTING AREA COMES  
14 TO THE WATER. SO IT'S A FULL SHORELINE CLOSURE FOR ABOUT  
15 A MILE FROM THIS POINT UP TO THERE.

16 THE INTERDUNAL ROAD -- THERE IS A ROAD BACK IN  
17 THE DUNES. WE CALL IT AN INTERDUNAL,  
18 I-N-T-E-R-D-U-N-A-L, ROAD ALLOWS PEOPLE TO COME DOWN THIS  
19 AREA OUT ONTO THE BEACH AT A DIFFERENT LOCATION.

20 AND SO WE HAVE A FULL SHORELINE CLOSURE FOR

21 ABOUT A MILE HERE. AND WE HAVE ONE PIPING PLOVER NEST IN  
22 THE MIDDLE OF THE AREA AND TWO OTHER PAIR OF PIPING  
23 PLOVER SCRAPING AND GETTING READY TO NEST. LAST YEAR WE  
24 HAD THREE PAIR OF NESTS IN THAT SAME AREA. SO THIS IS  
25 OCCURRING UNDER THE INTERIM STRATEGY. IT HAPPENED LAST

1 YEAR.

2 UNDER THE PROPOSED CONSENT DECREE, BECAUSE  
3 THERE IS A LARGER BUFFER, ONCE PIPING PLOVER CHICKS ARE  
4 ON THE GROUND, THERE IS A FAIR CHANCE THAT THERE WILL BE  
5 CLOSURE FOR SOME PERIOD OF TIME OF THE AREA TO ORV AND  
6 THERE IS SOME MODIFICATIONS TO THAT IN THE PROPOSED  
7 CONSENT DECREE THAT AFTER TWO WEEKS WE COULD RE-OPEN A  
8 PORTION PROVIDING WE HAD A MINIMUM BUFFER OF 300 METERS.

9 SOMETHING I WOULD LIKE TO POINT OUT WHICH I  
10 DIDN'T AT BODIE ISLAND, BUT DURING THE WINTER WE ALSO  
11 HAVE WINTER CLOSURES TO PROVIDE MIGRATING IN WINTERING  
12 BIRD AREAS TO ROOST AND REST AND ALSO AREAS TO FORAGE.  
13 THE WINTERING CLOSURES HAVE BEEN OCCURRING AND THEY TEND  
14 TO BE SMALLER AND LESS RESTRICTIVE TO ACCESS. THE WINTER  
15 CLOSURES ARE REFLECTED BY THE PURPLE OR PINKISH COLOR ON  
16 THE MAP, SO DURING THE WINTER, THE PINK AREA IS CLOSED.  
17 BY APRIL 1 THE AREA IN RED IS CLOSED AND THEN AS BIRD  
18 ACTIVITY OCCURS, WE DO THESE BUFFER DISTANCES AROUND  
19 WHATEVER THE ACTIVITY IS.

20 THE COURT: YOU GET A SIGNIFICANT LEVEL OF USE

21 BY THE FISHING POPULATION IN THE LATE FALL AND THE EARLY  
22 SPRING ON CAPE POINT; DON'T YOU?  
23 MR. MURRAY: CORRECT. IT'S ALSO, I WOULD SAY,  
24 IT'S POPULAR YEAR ROUND, BUT SPRING AND FALL FISHING IS  
25 VERY IMPORTANT.

1 ARE THERE ANY OTHER QUESTIONS ABOUT THAT?

2 THE COURT: NO.

3 MR. MURRAY: HOW ABOUT OUT AT OCRACOCKE?

4 THE COURT: AND JUST TO SET THE RECORD

5 STRAIGHT, THE VOLUME OF USE AND THE TRAFFIC THAT GETS TO

6 CAPE POINT IS DRAMATICALLY BELOW THAT WHICH WOULD BE AT

7 BODIE ISLAND IN PERIODS OF PEAK USE. NOW, IT MAY HAVE

8 MORE CONSTANT USE, BUT IT NEVER HAS THE AGGRAVATED USE

9 THAT THE BODIE ISLAND SPIT HAS.

10 MR. MURRAY: FROM MY RECOLLECTION, I CAN'T

11 TELL YOU WHICH HAS THE MOST NUMBERS, BUT YOUR

12 CHARACTERIZATION, I WOULD AGREE WITH.

13 WHAT IS ALSO A LITTLE BIT DIFFERENT IS BODIE

14 ISLANDS TYPICALLY HAS THE NARROW CORRIDOR.

15 THE COURT: RIGHT.

16 MR. MURRAY: WHEREAS AT CAPE POINT, THERE IS

17 AN OPEN AREA WHERE VEHICLES CAN CONGREGATE SEVERAL ROWS

18 DEEP, BUT IT SEEMS TO BE SELF-REGULATING. THEY ARE THERE

19 TO FISH, AND WE HAVEN'T HAD ANY DIFFICULTIES WITH THAT.

20 THE COURT: RIGHT.

21 MR. MURRAY: SOUTH OCRACOKE. ANOTHER  
22 IMPORTANT FISHING AREA AND ALSO AN IMPORTANT BIRD HABITAT  
23 IS SOUTH POINT OF OCRACOKE ISLAND. AND THE PRE-NESTING  
24 AREA WHICH WAS PUT IN THE LAST WEEK OF MARCH ALLOWS  
25 ACCESS DOWN THE OCEAN CORRIDOR ALL THE WAY DOWN ABOUT

1 HALFWAY THROUGH THE INLET SHORELINE, AND THEN BEYOND THAT  
2 POINT IS CLOSED BY THE PRE-NESTING CLOSURE.

3 SO THIS IS SORT OF THE BASE LINE GOING INTO  
4 THE BREEDING SEASON. AS ACTIVITY OCCURS, WE'LL IMPLEMENT  
5 THE ADDITIONAL BUFFERS. IT'S HARD TO PREDICT WHERE THOSE  
6 WILL BE.

7 THE COURT: BUT THE NUMBER OF ORV THAT ARE  
8 ACCESSING SOUTH POINT AND OCRACOKE IS SIGNIFICANTLY BELOW  
9 THOSE ON HATTERAS ISLAND AND EVEN FURTHER BELOW THOSE ON  
10 BODIE ISLAND?

11 MR. MURRAY: THAT IS GENERALLY TRUE. I THINK  
12 IT'S A FUNCTION OF BEING AN ISLAND ACCESSIBLE ONLY BY  
13 FERRY.

14 AND THEN, AGAIN, TYPICALLY THESE BUFFER  
15 DISTANCE CLOSURES WILL ACCUMULATE. THEY WILL -- THE --  
16 MOST OF -- THE HIGHEST NUMBER OF THOSE AND THE MOST TOTAL  
17 AREA WILL BE CLOSED APPROXIMATELY MID-JULY TO MID-AUGUST.  
18 AND THEN THERE IS A SHIFT IN THE PATTERN THAT WE START  
19 REMOVING CLOSURES AS BIRDS FLEDGE. GENERALLY BY THE END  
20 OF AUGUST OR EARLY SEPTEMBER, MOST OF THE BEACHES HAVE

21 BEEN RESTORED. OR SAY BY MID-SEPTEMBER, SEPTEMBER 15, WE  
22 REVERT BACK TO THE WINTER CLOSURES.

23 WE STILL WILL HAVE TURTLE NESTS IN PLACE

24 BECAUSE SOME OF THOSE DON'T HATCH UNTIL OCTOBER OR EVEN  
25 NOVEMBER, BUT THE CLOSURES AROUND TURTLE NESTS ARE



1 RELATIVELY SMALL.

2 THE COURT: AND THOSE CLOSURES GO ALL THE WAY  
3 TO THE OCEAN?

4 MR. MURRAY: UNDER THE INTERIM STRATEGY, IT  
5 DEPENDS ON THE CIRCUMSTANCES. IF THEY ARE HIGH ON THE  
6 BEACH, ONCE THE NEST IS ABOUT 50 TO 55 DAYS OLD, THAT IS  
7 WHAT WE CALL THE HATCH WINDOW.

8 THE COURT: YES.

9 MR. MURRAY: THE EGGS ARE THERE LONG ENOUGH,  
10 THEY MAY BE READY TO HATCH. WE'LL DO A COMPLETE CLOSURE  
11 DOWN TO THE SHORELINE. IF THERE IS ENOUGH ROOM BETWEEN  
12 THE NEST AND THE TOE OF THE DUNE, THEN WE CAN ALLOW  
13 TRAVEL BEHIND IT BASED ON A BUFFER DISTANCE.

14 THE COURT: TELL ME ABOUT THE NIGHT DRIVING  
15 REGULATION IN THIS PLAN.

16 MR. MURRAY: CURRENTLY IN THE INTERIM  
17 STRATEGY, THERE IS NO RESTRICTION ON NIGHT DRIVING IN THE  
18 PROPOSED CONSENT DECREE FROM MAY 1 UNTIL NOVEMBER 15.

19 THERE WOULD BE PROHIBITION ON NON-ESSENTIAL  
20 VEHICLES DRIVING ON THE BEACH FROM 10:00 P.M. TO 6:00

21 A.M. BY NON-ESSENTIAL VEHICLES, IT'S LANGUAGE THAT COMES  
22 OUT OF THE PIPING PLOVER RECOVERY PLAN. ESSENTIAL  
23 VEHICLES WOULD INCLUDE PARK SERVICE RESOURCE STAFF, LAW  
24 ENFORCEMENT, LOCAL EMERGENCY SERVICES, SORT OF LEGITIMATE  
25 GOVERNMENT ADMINISTRATIVE OR EMERGENCY NEEDS TO DRIVE IN

1 A CLOSED AREA.

2 THE COURT: YOU ARE TALKING ABOUT FOR THE  
3 ENTIRE SEASHORE?

4 MR. MURRAY: CORRECT.

5 THE COURT: SO ALL OF THE -- FROM WHALEBONE  
6 DOWN, ONCE YOU GET ON THE BEACH AT COQUINA, ALL THE WAY  
7 DOWN TO THE END OF OCRACOCKE, THERE WILL BE NO BEACH  
8 DRIVING AT NIGHT?

9 MR. MURRAY: CORRECT. BETWEEN 10:00 P.M. AND  
10 6:00 A.M. FROM MAY 1 UNTIL NOVEMBER 15. THE DATES  
11 CORRESPOND IN THE SPRING WITH TURTLE NESTING AND IN THE  
12 FALL THEY CORRESPOND WITH THE EGGS HATCHING.

13 THERE IS A PROVISION OR MODIFICATION IN THE  
14 PROPOSED SETTLEMENT THAT SEPTEMBER 16 AND THEREAFTER WE  
15 COULD ISSUE A NIGHT DRIVING PERMIT.

16 THE COURT: WELL, THAT IS ONE OF THE MORE  
17 POSITIVE CONSEQUENCES OF THIS COLLECTIVE AGREEMENT;  
18 WOULDN'T YOU SAY?

19 MR. MURRAY: I THINK IT WILL BE PRODUCTIVE FOR  
20 THE RESOURCES AND CERTAINLY PROBABLY HELP WITH OUR

21 WORKLOAD IN TERMS OF LATE NIGHT ACTIVITIES. IT WILL BE A  
22 CHANGE FOR VISITORS. A LOT OF PEOPLE LIKE TO FISH AT  
23 NIGHT AND SO THAT WILL EFFECT THEIR ACCESS WHEN IT'S IN  
24 EFFECT.  
25 THE COURT: HOW ARE YOU GOING TO REGULATE THAT

1 WITHOUT ANY CONTROL OF THE RAMPS? THERE IS ONLY ONE RAMP  
2 ON BODIE ISLAND THAT WOULD BE -- MOST OF THE TIME THAT  
3 WOULD BE IN PLAY, BUT THEN THERE ARE SIX OR SEVEN RAMPS  
4 ON HATTERAS ISLAND THAT WOULD BE INVOLVED HERE.

5 MR. MURRAY: IT WILL BE A POSTED REGULATIONS.  
6 IT WILL BE POSTED AT ALL THE RAMPS. WE'LL DO PRESS  
7 RELEASES AND PUBLIC INFORMATION. WE WILL DO PERIODIC  
8 ENFORCEMENT. WE ACTUALLY HAVE SOME EXTRA LAW ENFORCEMENT  
9 STAFF COME WHEN THIS INITIALLY GOES INTO EFFECT SO THAT  
10 WE CAN DO A PROACTIVE CONTACTING VISITORS ON THE BEACH TO  
11 LET THEM KNOW OF IT.

12 AND IT WILL REQUIRE CONSISTENT ENFORCEMENT IN  
13 ORDER TO MAKE IT EFFECTIVE. WE DO NOT HAVE THE RESOURCES  
14 NOR PLANS TO TRY TO SWEEP THE BEACH, YOU KNOW, RUN PEOPLE  
15 OFF THE BEACH EVERY NIGHT, SO IT WILL BE A POSTED,  
16 ENFORCED REGULATION.

17 THE COURT: SO JUST TO GO OVER RAMP 23, 27,  
18 30, 34, 38, 43, 44, 49 AND 55, ALL OF THOSE RAMPS  
19 WOULD -- IT WOULD BE ILLEGAL TO GO UP THOSE RAMPS AT  
20 NIGHT AND GO ON BEACH.

21 MR. MURRAY: AFTER 10:00 P.M. AT NIGHT. AND

22 ALSO THE RAMPS ON OCRACOKE.

23 MR. MURRAY: RIGHT.

24 THE COURT: BUT ON HATTERAS ISLAND.

25 MR. MURRAY: YES.

1 THE COURT: OKAY.

2 MR. MURRAY: THAT SUMMARIZES WHAT I WOULD LIKE  
3 TO TELL YOU ABOUT THE INTERIM STRATEGY.

4 THE COURT: WELL, IT'S INTERESTING THAT YOU  
5 ARE CAPABLE OF CLOSING THE RAMP. SO IT IS A  
6 DISCRETIONARY ISSUE. SAY IF YOU WANTED TO CLOSE RAMP 4  
7 ON MEMORIAL DAY, FOURTH OF JULY, AND LABOR DAY, YOU COULD  
8 DO IT. YOU COULD POST A NOTICE, THE RAMP IS CLOSED?

9 MR. MURRAY: YES.

10 THE COURT: AND IF YOU WANTED TO STRADDLE  
11 THOSE DAYS ON THE DAY BEFORE AND THE DAY AFTER OR TWO  
12 DAYS BEFORE OR TWO DAYS AFTER WITH ONE, TWO OR THREE OF  
13 THEM OR ANY COMBINATION, YOU COULD DO THAT?

14 MR. MURRAY: YES.

15 THE COURT: OKAY. I DON'T HAVE ANY OTHER  
16 QUESTIONS ABOUT THAT. MS. TAYLOR.

17 MS. TAYLOR: I DON'T HAVE ANY MORE QUESTIONS  
18 FOR SUPERINTENDENT MURRAY.

19 THE COURT: I AM ADDRESSING THE GOVERNMENT  
20 BECAUSE YOU ARE THE MANAGER OF THE SEASHORE AND I AM

21 ASSUMING THAT YOU ARE THE ONE THAT NEEDS TO RESPOND --  
22 YOU THE PARK SERVICE, AND ASKING THE OTHER PARTIES IS NOT  
23 APPROPRIATE BECAUSE THEY ARE NOT GOING TO MANAGE IT.

24 MS. TAYLOR: YES, YOUR HONOR. WE UNDERSTAND  
25 THAT.



1 THE COURT: WHAT ELSE DO YOU WANT TO SHOW?

2 OTHERWISE, I WILL GET BACK INTO MY QUESTIONS.

3 MS. TAYLOR: IF I COULD SPEAK JUST A LITTLE

4 BIT TO FILL IN SOME OF THE CONTEXT, I WILL DO MY BEST TO

5 HELP OUT.

6 ONE AREA OF FOCUS IS WHAT YOU AND

7 SUPERINTENDENT MURRAY WERE JUST DISCUSSING IS, YOU KNOW,

8 COULD THE PARK CLOSE THE RAMPS. YES, SIR. OBVIOUSLY

9 WITH NIGHT DRIVING, WE HAVE ABILITY TO DO THAT. BUT ALSO

10 WITH THIS CONSENT DECREE, WE ARE MAINTAINING OUR

11 DISCRETION TO ENFORCE GREATER PROTECTIONS AS WE SIT FIT.

12 IT'S IN PARAGRAPH 22 OF THE PROPOSED CONSENT DECREE.

13 SO WHILE WE HAVE SET FORTH WHAT WE THINK ARE

14 THE NECESSARY MEASURES TO MEET OUR OBLIGATIONS, WE ALSO

15 RECOGNIZE THAT THERE ARE UNFORESEEN SITUATIONS THAT MAY

16 ARISE, AND WE STILL MAINTAIN OUR DISCRETION TO DO

17 WHATEVER IS NECESSARY.

18 IF YOU WOULD LIKE US, THE MOST IMPORTANT

19 ASPECTS OF THIS PROPOSAL MOST LIKELY ARE RELATED TO A

20 1,000 METER BUFFER FOR THE PIPING PLOVER AND UNFLEDGED

21 CHICKS. THAT GOES INTO PLAY ONCE THE PIPING PLOVER NESTS  
22 HAVE HATCHED, THE CHICKS HAVE HATCHED, AND THERE ARE  
23 UNFLEDGED CHICKS ON THE GROUNDS.

24           THERE IS A 30 TO 35 DAY TIME PERIOD BEFORE  
25 THEY ARE ABLE TO FLEDGE AND FLY AND TAKE CARE OF

1 THEMSELVES. AND PARAGRAPH 10 OF THE CONSENT DECREE AND  
2 PARAGRAPH 12 DEAL WITH HOW WE HANDLE ACCESS WHEN THAT  
3 1,000 METER BUFFER IS IN PLAY.

4 AND ESSENTIALLY THAT 1,000 METERS, IF THERE IS  
5 A PIPING PLOVER CHICK ON THE GROUND, IT LIKELY WILL  
6 PRECLUDE ALL ORV ACCESS AND PEDESTRIAN ACCESS TO THE  
7 SPITS AT CAPE POINT AND WHAT YOU WILL SEE IN PARAGRAPH 10  
8 AND PARAGRAPH 12 ARE THE MODIFICATIONS TO ALLOW FOR  
9 ACCESS TO THOSE AREAS OF INTEREST WHERE APPROPRIATE AND  
10 WHERE POSSIBLE.

11 SO I WANT TO DRAW THE COURT'S ATTENTION TO  
12 THAT. WE CAN ELABORATE ON THAT POINT, BUT THAT IS A KEY  
13 PROVISION.

14 YOUR HONOR HAS ALREADY RAISED THE NIGHT  
15 DRIVING ISSUE WHICH IS A KEY COMPONENT TO PROTECT THE SEA  
16 TURTLE AND ALSO THE OTHER SPECIES. AND JUST IN GENERAL,  
17 WE HAVE BUFFERS THAT ARE IN PLACE THAT ARE SOMEWHAT  
18 LARGER THAN WERE IN PLACE UNDER THE INTERIM STRATEGY AND  
19 THEY ARE IN OPERATION AND FORCE FOR A SLIGHTLY LONGER  
20 PERIOD OF TIME.

21 SO WHAT WE ATTEMPTED TO DO WITH THIS PROPOSAL  
22 WHICH IS OUR INJUNCTION, OUR SELF-INCREATED INJUNCTION --  
23 THE COURT: WELL, IT'S NOT AN INJUNCTION.  
24 IT'S AN AGREEMENT. THERE IS NO INJUNCTION IN THIS  
25 DOCUMENT AT ALL.

1 MS. TAYLOR: WE INTENDED THIS TO BE -- TO TAKE  
2 THE PLACE FOR WHATEVER INJUNCTION THE COURT WOULD CRAFT.  
3 WE DISCUSSED THAT ISSUE AT THE LAST HEARING OF WHAT WOULD  
4 THE CONSENT DECREE DO, AND IT IS OUR ATTEMPT TO ADDRESS  
5 THE ISSUES IN THIS LAWSUIT, RESOLVE THEM, AND THIS IS OUR  
6 SELF-IMPOSED INJUNCTION.

7 THE COURT: WELL, I THINK THAT IF THE COURT  
8 WERE TO ENTER AN INJUNCTION BY CONSENT, THAT WOULD BE A  
9 COMPLETELY DIFFERENT INSTRUMENT THAN DISMISSING THE CASE  
10 AND HAVING A CONSENT AGREEMENT. BUT ANYWAY, WE'LL GET TO  
11 THAT.

12 MS. TAYLOR: THE OTHER ISSUE THAT WE WERE  
13 DISCUSSING A LITTLE BIT EARLIER IS THE FOCUS OF THE  
14 CONSENT DECREE BECAUSE WE RECOGNIZE THAT THE COURT HAS  
15 THESE CONCERNS ABOUT SAFETY AND TYPES OF USE, THE  
16 APPROPRIATE AMOUNT OF USE, AND EVERYONE HERE SHARES THOSE  
17 SAME CONCERNS.

18 BUT WHILE IT'S FRUSTRATING, THOSE ARE NOT  
19 ISSUES THAT ARE WITHIN THE SCOPE OF THIS LAWSUIT.

20 THE COURT: WELL, THEY WOULD HAVE BEEN WITHIN

21 THE SCOPE OF THE LAWSUIT IF YOU HAD A PRELIMINARY  
22 INJUNCTION AND THEN A PERMANENT INJUNCTION BECAUSE ALL OF  
23 THOSE PROBABLY WOULD HAVE BEEN A PART OF IT.

24 SO YOU SAY IT'S NOT WITHIN THE LAWSUIT. IT'S  
25 NOT WITHIN THE LAWSUIT BECAUSE THE PARTIES HAVE CHOSEN TO

1 TAKE THIS LAWSUIT IN ANOTHER DIRECTION. THAT'S WHY IT'S  
2 NOT IN THIS LAWSUIT.

3 MS. TAYLOR: I WOULD DISAGREE WITH YOUR HONOR,  
4 THAT THAT IS NOT WHAT WAS RAISED. THIS -- THOSE ARE NOT  
5 ISSUES ADDRESSED IN THE COMPLAINT. THE ISSUE IN THE CASE  
6 IS SOLELY THE EXTENT OF THE PROTECTIONS PROVIDED UNDER  
7 OUR INTERIM STRATEGY.

8 THE COURT: WELL, BUT CLOSING THE RAMP WOULD  
9 HAVE BEEN ONE REMEDY FOR THE ISSUES PRESENTED IN THE  
10 COMPLAINT. AND THEN THERE WOULDN'T HAVE BEEN ANY  
11 VEHICLES ON THE BEACH.

12 MS. TAYLOR: THAT CERTAINLY WOULD BE ONE  
13 OUTCOME, BUT WE ENGAGED WHAT WOULD BE THE MOST NARROWLY  
14 TAILORED AS THE COURT'S RESPONSIBILITY, WHAT IS THE  
15 MAXIMUM EXTENT OF NON-HARMFUL ACTIVITY CAN WE ALLOW. AND  
16 THAT WOULD BE THE NARROWLY TAILORED INJUNCTION. AND SO  
17 CLOSING THE RAMP WAS NOT SOMETHING THAT WAS NECESSARY TO  
18 PROTECT THE SPECIES.

19 NOW, IF IT BECOMES NECESSARY, THIS PROPOSED  
20 CONSENT DECREE ALLOWS FOR THAT DISCRETION BECAUSE WE

21 WOULD EITHER SEEK A MODIFICATION IF WE THOUGHT IT NEEDED  
22 TO BE EXPRESSLY DONE, AND WE WOULD PRESENT THAT TO THE  
23 PARTIES AND THEN TO THE COURT, OR WE WOULD USE THAT  
24 PARAGRAPH 22, RETAIN DISCRETION, AND THEN WE WOULD DO SO.  
25 THE COURT: YOU ARE NOT GOING TO GET ME TO



1 AGREE THAT CONSTRICTING THE AMOUNT OF LAND THAT IS  
2 AVAILABLE FOR ORV DRIVING, BUT NOT CONTROLLING THE NUMBER  
3 OF ORV IS A GOOD THING.

4 IF YOU ARE GOING TO CONSTRICT THE AMOUNT OF  
5 LAND, YOU NEED TO CONSTRICT THE NUMBER OF ORV. IT'S JUST  
6 AS EVIDENT AS IT CAN BE. BUT I AM NOT -- I HAVE NO  
7 CONTROL OVER THIS. YOU HAVE MADE THAT PLAIN. AND SO  
8 YOU ARE GOING TO HAVE YOUR AGREEMENT WITH OR WITHOUT THE  
9 COURT BECAUSE IT'S YOUR AGREEMENT.

10 AND THE FILINGS HAVE MADE IT PLAIN THAT THE  
11 COURT CAN'T CHANGE, ADD, SUBTRACT, OR DO ANYTHING BUT  
12 SIGN THE AGREEMENT.

13 BUT I DON'T AGREE THAT THERE WAS ONLY ONE  
14 OUTCOME THAT WOULD HAVE RESULTED FROM THIS LAWSUIT  
15 BECAUSE I SEE IT DIFFERENTLY. BUT THAT IS FINE.

16 MS. TAYLOR: I WASN'T TRYING TO REPRESENT THAT  
17 THAT THERE WAS ONLY ONE OUTCOME. THIS IS THE OUTCOME  
18 THAT ALL OF THE PARTIES WHO HAVE THE IMMEDIATE  
19 STAKEHOLDERS, THE IMMEDIATE STAKEHOLDERS, DERIVED AS  
20 BEING THE MOST EFFICIENT OUTCOME THAT WAS STILL FAIR AND

21 REASONABLE AND IN THE PUBLIC INTEREST.

22 THE COURT: OKAY.

23 MS. TAYLOR: AT THIS TIME, YOUR HONOR, I HAVE

24 NOTHING FURTHER.

25 THE COURT: ALL RIGHT. DO THE PLAINTIFFS WANT

1 TO ADD ANYTHING TO THIS HEARING?

2 MR. CARTER: YOUR HONOR, I WILL JUST ADD THAT  
3 I THINK YOU HAVE IDENTIFIED SOME VERY IMPORTANT ISSUES  
4 RELATED TO OVERALL PUBLIC ACCESS AND USE AND THE AMOUNT  
5 OF USE THAT HAVE BEEN OCCURRING ON THE SEASHORE.

6 AND JUST TO FOLLOW UP ON MS. TAYLOR'S  
7 COMMENTS, WE WERE FOCUSED ON THE INTERIM STRATEGY AND THE  
8 INADEQUACIES THAT WERE IN THAT STRATEGY TO EVEN MAINTAIN  
9 THE STATUS QUO UNTIL A FINAL PLAN WAS ADOPTED FOR THE  
10 SEASHORE.

11 AT THE TIME WE FILED THIS LAWSUIT, THE  
12 NEGOTIATED RULEMAKING HAD NOT EVEN BEEN FORMALLY  
13 UNDERWAY, SO TO THE EXTENT THAT HAS OCCURRED, THAT IS A  
14 GOOD THING.

15 WE ALSO THINK IT'S A GOOD THING THAT THERE IS  
16 A HARD AND FAST DATE IN THIS CONSENT DECREE TO HAVE A  
17 FINAL PLAN AND A SPECIAL REGULATION PROMULGATED FOR  
18 MANAGEMENT OF THE SEASHORE.

19 BUT OUR PURPOSE -- OUR CLIENT'S INTERESTS HAVE  
20 BEEN VERY SHARPLY FOCUSED ON THE NATURAL RESOURCES,

21 PARTICULARLY THE NESTING BIRDS AND SEA TURTLES, AND WE  
22 HAVE ALSO BEEN FOCUSED ON THE INADEQUACY OF THE INTERIM  
23 STRATEGY WHICH, IN OUR OPINION, WOULD HAVE RESULTED IN  
24 CONTINUED DECLINES AND PERHAPS EVEN EXTRICATION OF MORE  
25 BIRDS FROM THE SEASHORE.

1 BUT WE RECOGNIZE THAT IMMEDIATELY THAT THE  
2 BIGGER CONTEXT OF THIS, LEGALLY, IS THE ABSENCE OF A PLAN  
3 WHICH WAS MANDATED BY THE EXECUTIVE ORDER IN 1972 AND  
4 REQUIRED BY PARK SERVICE REGULATIONS.

5 SO WE FULLY UNDERSTAND THAT BIGGER CONTEXT  
6 EXISTS IN TERMS OF THE LACK OF A PLAN AND THE VIOLATION  
7 OF THE EXECUTIVE ORDER AND REGULATION.

8 WE FULLY ACKNOWLEDGE THAT MANY ISSUES EXIST,  
9 AS YOUR HONOR HAS IDENTIFIED, RELATED TO THE AMOUNT OF  
10 USE, THE TYPES OF USE THAT OCCURS, THE PARK SERVICE'S  
11 MECHANISM FOR MANAGING THAT USE.

12 BUT IN FOCUSING VERY SHARPLY ON THE RESOURCES  
13 THAT ARE AT ISSUE, WE BELIEVE THE APPROACH THAT HAS BEEN  
14 CRAFTED OF THE SUBSTANTIALLY EXPANDED PRE-NESTING AREAS  
15 WHICH WILL ALLOW THE BIRDS WHICH MOSTLY NEST HISTORICALLY  
16 AT THESE POINTS AND SPITS TO COME IN AND ESTABLISH  
17 TERRITORIES IN AREAS AND HAVE A CHANCE TO AT LEAST BEGIN  
18 TO NEST COMBINED WITH THESE SIGNIFICANTLY EXPANDED  
19 BUFFERS, ONCE THEY DO SHOW UP IN THESE AREAS, THAT WOULD  
20 THEN LIMIT DISTURBANCE BY PREVENTING ORV FROM ENCROACHING

21 WITHIN THE BUFFERS IS A WORKABLE SOLUTION IN THE AREAS  
22 THAT CAN, AS A PART OF THAT, PROVIDE SOME AMOUNT OF  
23 ACCESS UNTIL THE BIRDS ARRIVE AND DECIDE TO TAKE UP  
24 RESIDENCE IN THAT AREA.

25 WE ALSO BELIEVE WITH RESPECT TO SEA TURTLES IT

1 WOULD BE A BIG STEP FORWARD IN TERMS OF PROHIBITING NIGHT  
2 DRIVING DURING THE PRIMARY NESTING SEASON AND THEN  
3 RESTRICTING NIGHT DRIVING FURTHER THROUGH A PERMIT SYSTEM  
4 DURING THE END OF THE TURTLE SEASON WHEN HATCHING IS  
5 OCCURRING WITH FULL BEACH NEST CLOSURES OF ALL NESTS THAT  
6 REMAIN AT THAT TIME.

7 SO FROM OUR PERSPECTIVE, IN TERMS OF OUR  
8 PRIMARY INTEREST AND FOCUS IN THE SEASHORE, WE BELIEVE  
9 THAT THE CONSENT DECREE WILL ACHIEVE THE OBJECTIVES OF  
10 REVERSING THE DECLINE THAT WE HAVE SEEN IN COLONIAL  
11 NESTING BIRDS AND OYSTERCATCHERS AND ALLOW THEM TO  
12 ESTABLISH TERRITORY NESTS IN THESE EXPANDED BUFFERS WHICH  
13 ARE CONSISTENT WITH THE U.S.G.S. GUIDELINES THAT WERE  
14 RECOMMENDED TO THE PARK SERVICE. THEY ARE CONSISTENT  
15 WITH THE PIPING PLOVER RECOVERY PLAN.

16 BUT WE RECOGNIZE THAT THERE ARE A HOST OF  
17 OTHER ISSUES THAT MUST BE ADDRESSED, AND I THINK THE PARK  
18 SERVICE RECOGNIZES THAT. I BELIEVE THE INTERVENORS  
19 RECOGNIZE THAT. AND THERE IS A PROCESS UNDER WHICH  
20 THROUGH THIS NEGOTIATED RULEMAKING THAT WOULD HOPEFULLY

21 RESOLVE SOME OF THE ISSUES.

22 AND WE ALSO BELIEVE IT WILL BE A SIGNIFICANT

23 INCENTIVE TO MAKE THAT PROCESS WORK THAT THE COURT WOULD

24 IMPOSE THIS DEADLINE OF A FINAL PLAN BY NO LATER THAN

25 DECEMBER 31, 2010, AND A FINAL REGULATION BY APRIL 1,



1 2011.

2 THE COURT: OKAY. THANK YOU. DO THE  
3 INTERVENORS WANT TO RESPOND?

4 MR. HORNTAL: THANK YOU, YOUR HONOR. THE  
5 INTERVENORS, OF COURSE, WERE ALLOWED TO INTERVENE IN THIS  
6 LAWSUIT, AND AS A REPRESENTATIVE OF THE INTEREST OF THE  
7 PUBLIC THAT IS DESIGNED TO HAVE CONTINUED USE AS MIGHT BE  
8 FOUND REASONABLE IN THIS NATIONAL SEASHORE.

9 THERE HAVE BEEN INTENSE NEGOTIATIONS BETWEEN  
10 THE PARTIES HERE. OUR CLIENTS HAVE PARTICIPATED IN THOSE  
11 NEGOTIATIONS IN GOOD FAITH. A SETTLEMENT HAS BEEN WORKED  
12 OUT THAT IS, I THINK, IN NOBODY'S MIND A PERFECT  
13 SOLUTION, BUT EVERYONE -- AND WE JOIN WITH THE OTHER  
14 PARTIES IN ASKING YOU TO ENTER THE CONSENT DECREE.

15 I MIGHT SAY THAT ON BEHALF OF OUR CLIENTS,  
16 THAT WE DO TAKE COMFORT IN SECTION 32 OF THIS ORDER WHICH  
17 ALLOWS FOR MODIFICATIONS. IT ALLOWS FOR ANY PARTY TO  
18 MAKE A MOTION IN THE CAUSE IN THE CASE OF A DISPUTE, AND  
19 IT SETS THE DISPUTE RESOLUTION IN PROCESS BEFORE THAT IS  
20 TO TAKE PLACE, AND WE WOULD TAKE COMFORT THAT THE COURT

21 WOULD HAVE THE RIGHT UNDER THE MOTION TO DEAL WITH SUCH  
22 ISSUES THAT COME UP.

23 WE BELIEVE THAT IF WE PARTICIPATE IN THE  
24 PROCESS IN GOOD FAITH AND WE JOIN IN ASKING THE COURT TO  
25 ENTER THE CONSENT DECREE.

1 THE COURT: WELL, THANK YOU FOR YOUR WORK AND  
2 YOUR PATIENCE AND YOUR FORBEARANCE IN LISTENING TO ME.  
3 IT'S NOT MY AGREEMENT. IT'S YOUR AGREEMENT. AND I AM  
4 NOT GOING TO STAND IN THE WAY OF IT. AND I WISH YOU THE  
5 BEST WITH IT. I WILL SIGN IT AND ENTER IT RIGHT NOW AND  
6 IT WILL BE EFFECTIVE IMMEDIATELY.

7 ALL RIGHT. THAT BRINGS THE LAWSUIT TO A  
8 CONCLUSION. THANK YOU. COURT IS IN RECESS.

9 (WHEREUPON, THE PROCEEDINGS WERE ADJOURNED.)

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CERTIFICATE

THIS IS TO CERTIFY THAT THE FOREGOING  
TRANSCRIPT OF PROCEEDINGS TAKEN IN THE UNITED STATES  
DISTRICT COURT IS A TRUE AND ACCURATE TRANSCRIPTION OF  
THE SHORTHAND NOTES OF THE PROCEEDINGS TAKEN BY ME IN  
MACHINE SHORTHAND AND TRANSCRIBED BY COMPUTER UNDER MY  
SUPERVISION.

DATED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2008.

\_\_\_\_\_  
SHARON K. KROEGER  
COURT REPORTER

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