

May 11, 2009

U. S. Fish & Wildlife Service
Office of Law Enforcement
300 Westgate Center Drive
Hadley, MA 01035

TO: USFWS Region 5 Office of Law Enforcement
FROM: Christine Erickson, Staff Counsel, Public Employees for Environmental
Responsibility (PEER)
**RE: Criminal Complaint for Violations of Statutes within the Jurisdiction of the
U.S. Fish & Wildlife Service**

This is a formal request for an investigation of apparent criminal violations of the Endangered Species Act and Migratory Bird Treaty Act. What makes these actions especially egregious is that they are occurring on lands within the Prime Hook National Wildlife Refuge.

It is unclear to PEER whether Prime Hook National Wildlife Refuge management is aware of or condones the actions described below.

Background

Two county roads transect Prime Hook National Wildlife Refuge (“the Refuge”), Fowler’s Beach Road to the north and Prime Hook Beach Road to the south. Both roads are owned by the Fish and Wildlife Service and contain a restriction that public travel must be provided across the roads. To the north of Fowler’s Beach Road is Refuge Management Unit I, a salt water marsh which provides critical habitats for a diverse community of invertebrates, fish, migrating and breeding shorebirds, waterfowl, and other migratory birds.

Between Fowler’s Beach Road and Prime Hook Beach Road sits Refuge Management Unit II, a 1,500 acre impounded wetland area which was created by the Service in 1987 at considerable expense to increase the Refuge’s carrying capacity for migrating and wintering waterfowl.

To the south of Prime Hook Beach Road is Refuge Management Unit III, which contains Prime Hook Creek as well as a 2,500 acre freshwater impoundment, the largest on the East Coast. The Delaware Department of Transportation (“DelDOT”) has a “way of maintenance” to maintain Prime Hook Beach and Fowler’s Beach roads. In June 2008,

DelDOT began construction and repair activities on these roads which has in turn jeopardized and degraded the habitat of many plant, fish, bird, and other wildlife species in the Refuge.

In late summer and early fall of 2008, DelDOT began persistent digging, ditching and draining the northern side of Fowler's Beach Road in an attempt to protect the road from damage that occurs when a large storm is brought in along the coast. In and around March 2009, DelDOT commenced additional ditching and draining of new areas along the south side of Fowler's Beach Road. Over the past few months, DelDOT has also opened up three road culverts along Fowler's Beach Road that the Refuge had previously plugged up in order to help prevent the constant salt water intrusion into the 1,500 acre Unit II freshwater impoundment. Since June of 2008, DelDOT has also used gravel, and rotomill (an asphalt-based material) to patch top of the old and sinking Fowler's Beach Road and to expand the road shoulders. As a result, each high tide cycle washes the toxic materials into the Unit II wetlands.

Moreover, in July 2008, DelDOT began new construction on Prime Hook Beach Road. In the past 10 months, the department has installed nine new free-flowing culverts along this road. These culverts have significantly increased salt water intrusion into the 2,500 acre freshwater impoundment south of Prime Hook Beach Road. Together, the installation of culverts and construction of ditches by DelDOT along both roads has degraded the water quality and freshwater integrity of nearly 4,000 acres of freshwater wetlands.

DelDOT claims that these activities constitute "road maintenance" and are necessary to protect the road during storms. To the contrary, DelDOT has been constructing brand new ditches and installing new culverts across and along these roads. Moreover, regardless of the classification of the activity, the highway department is not authorized to maintain the roads to the detriment of the Refuge's wildlife species and their habitats.

These activities have resulted in a Delaware wetland violation as well as the violation of a number of federal criminal environmental laws and regulations.

Criminal Violations

A. Endangered Species Act

The United States Supreme Court has observed that the Endangered Species Act ("ESA") is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). Beyond any doubt, "Congress intended endangered species to be afforded the highest of priorities, as the "plain intent of Congress in enacting [the] statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184.

DelDOT has violated the Endangered Species Act by engaging in activities which constitute significant habitat modification and degradation and further the trend

toward extinction of the Delmarva Fox Squirrel, a federally listed endangered species.

Section 9(a)(1) of the Endangered Species Act provides that “with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to... (B) take any such species within the United States or the territorial sea of the United States.” 16 U.S.C. § 1538(a)(1)(B). Section 3(19) of the Act defines the statutory term “take” as meaning “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

The Interior Department’s implementing regulations define the statutory term “harm” as any “act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 CFR § 17.3 (1994). Moreover, in *Babbitt v. Sweet Home*, the U.S. Supreme Court found that in defining the term “harm” Congress intended to go beyond the actual infliction of direct force and include such actions that threaten species less directly by impairing their ability to breed or to find food or shelter. *See Babbitt v. Sweet Home Chapt. Comms. for Ore.*, (94-859), 515 U.S. 687 (1995).

While taken alone, habitat modification or degradation is not enough to show a taking under the ESA, the showing of some nexus between habitat modification and injury to the species is enough to show a taking under Section 9. *Morrill v. Lujan*, 802 F. Supp. 424 (S.D. Ala. 1992). In *Morrill*, the court held that a mere showing that the species existed on a property, without showing that destruction of that habitat could adversely impact the species, was not enough to uphold a finding that a taking had occurred.

In accordance with the court’s ruling in *Morrill*, the court in *Palila v. Hawaii Department of Human Resources* found that there was no question that the habitat of the Palila, an endangered species of bird, was being destroyed by the mouflon sheep which ate the mamane tree critical to the Palila's existence. *Palila v. Hawaii Department of Human Resources*, 649 F. Supp. 1070, 1077 (D. Ha. 1996). Moreover, the court stated that “a finding of ‘harm’ does not require death to individual members of the species; nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under Section 9 of the Endangered Species Act.” *Id.* at 1075. Consequently, the court found that the continued existence of mouflon sheep in the same area as the Palila constituted a taking under Section 9 of the Act. *Id.* at 1082.

Similarly, in *Sierra Club v. Lyng*, the court found that the past timber practices of the Forest Service was largely responsible for the rapid decline in the red cockaded woodpecker populations and, therefore, that a “taking” had occurred because these habitat modifications actually killed or injured wildlife. *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988), *modified*, *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991),

Here, as in *Palila* and *Lyng*, **there is a clear causal link between the destruction of the freshwater impoundment through the intrusion of salt water, and injury to the Delmarva fox squirrel.** Refuge Management Unit III, south of Prime Hook Beach Road, contains a 2,500 acre freshwater impoundment which, in addition to containing some of the rarest and most unique freshwater wetlands communities in Delaware, also provides forested wetland and upland habitats critical to the Delmarva fox squirrel. DelDOT recent placement of nine new culverts along Prime Hook Beach Road has caused salt water to invade the Unit III freshwater impoundment, including the forested wetlands.

During the spring, summer, and fall months, the fox squirrel inhabits the upland forested areas of the impoundment, where they make their dens in oak or pine trees and feed primarily on nuts, seeds and acorns from oak trees, and in the winter and early spring they depend on maple trees for food. The salt water intrusion has caused significant red maple and oak tree mortality as well as harm to other wetland and upland trees, upon which the squirrels depend for survival. DelDOT's construction activities have altered the natural habitat of the impoundment and pose long-term threats that negatively impact both the feeding and sheltering behavior of the Delmarva Fox Squirrel.

In significantly altering the Delmarva fox squirrel's critical environment, with both short-term and long term negative impacts, DelDOT has impaired the survival of a very small population of this rare species on the Refuge that is already in danger of extinction. According to the Supreme Court's ruling in *Babbitt*, DelDOT's construction and installation of culverts on Prime Hook Beach Road, which has brought about both direct and indirect harm to the Delmarva's habitat and continued existence, is a criminal violation of § 9 of the ESA as it has resulted in a taking of a federally listed endangered species. *See Babbitt*, 515 U.S. at 687.

B. Migratory Bird Treaty Act

DelDOT has also engaged in the taking of a number of migrating bird species in violation of the Migratory Bird Treaty Act, including the federally threatened Piping Plover, the state endangered American Oystercatcher, as well as the Red Knot, Ruddy Turnstone, and nesting Bald Eagles.

The Migratory Bird Treaty Act, as amended, implements various treaties and conventions between the U.S. and Canada, Japan, Mexico and the former Soviet Union for the protection of migratory birds. *See* 16 U.S.C. § 703 *et seq.* The Act makes it unlawful for anyone to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill" any migratory bird or "any part, nest, or egg" of any migratory bird as defined by the Act. While the term "take" is not defined in the Migratory Bird Treaty Act, it has been construed broadly through other regulations and court decisions as including significant habitat modification or degradation where it actually kills or injures wildlife.

The recent digging and ditching by DelDOT along the northern and southern edges of Fowler's Beach Road, as well as the opening up of three previously plugged culverts on the road by the department, has caused daily flows of high saline waters to be introduced into the 1,500 acres of freshwater wetlands. Further salt water intrusion into the 2,500 acres of freshwater marshes in the Unit III impoundment has also occurred due to the installation of nine new culverts across Prime Hook Beach Road.

The increasing salt water intrusion is destroying the freshwater integrity of many freshwater wetland communities and isolated roadless islands. The saline waters kill freshwater aquatic vegetation upon which these species feed. It also harms the anadromous fish spawning areas, reduces the quality and quantity of freshwater resources, and damages the breeding areas heavily relied upon by uncommon freshwater waterbird species like the least bittern, rails, and state endangered nesting pied-billed grebes and Bald Eagles. **State endangered species biologists and shorebird managers have been trying to get the Refuge Manager at Prime Hook National Wildlife Refuge to close down portions of Fowler's Beach Road in order to protect the Piping Plovers and American Oystercatchers which are trying to establish nesting territories at this time.**

By undertaking the digging and ditching of Fowler's Beach and Prime Hook Beach roads, and installing new and opening up old culverts, DelDOT is responsible for significant habitat destruction which has resulted in harm to a number of migrating bird species. As previously explained, this habitat modification has impaired their essential behavioral patterns, including breeding, feeding, and sheltering. As such, DelDOT has engaged in a taking under the Migratory Bird Treaty Act.

Conclusion

DelDOT has violated the criminal provisions of the Migratory Bird Treaty Act and § 9 of the Endangered Species Act by engaging in activities which amount to the "taking" of protected species under both statutes. Both statutes are enforced by the U.S. Fish & Wildlife Service.

Please let me know whether your office intends to pursue this matter.