

August 16, 2010

Department of the Interior  
U.S. Fish and Wildlife Service  
Prime Hook National Wildlife Refuge  
11978 Turtle Pond Road  
Milton, DE 19968

**Re: Comments on Draft Environmental Assessment for Dune Work at  
Prime Hook National Wildlife Refuge (July 27, 2010)**

Dear Sir/Madam:

Public Employees for Environmental Responsibility (“PEER”) appreciates the opportunity to comment on the Draft Environmental Assessment (“Draft EA”) that has been proposed by the United States Department of Interior (“DOI”). The Draft EA, prepared by the Fish and Wildlife Service (“FWS”), addresses the management of the shoreline and dune barrier system along the coast of Prime Hook National Wildlife Refuge (“Refuge”) and adjacent lands.<sup>1</sup> According to the Draft EA, the FWS is proposing short-term interim measures to scrape sand and sediment from washover areas on the Refuge to build up dunelines and fill recently-created inlets, primarily on private property.<sup>2</sup> The FWS has concluded that the proposed alternative warrants the issuance of a Finding of No Significant Impact (“FONSI”) because the action would not have a significant effect on the human environment.<sup>3</sup>

As detailed below, the Preferred Alternative (project) violates several environmental laws, service and state policies. In addition, the Draft EA is legally deficient. Among its deficiencies is that the Draft EA does not even mention let alone analyze the alternative of simply elevating the roads so that the benefit to the private property owners could be realized without admitted harm to refuge wildlife and natural resources and damage and jeopardy to federally listed species and habitat.

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<sup>1</sup> *Draft Environmental Assessment for Dune Work at Prime Hook National Wildlife Refuge* (hereinafter “Draft EA”), United States Fish and Wildlife Service, available at [http://www.fws.gov/northeast/primehook/pdf/PMH\\_Dune\\_Work\\_DraftEA\\_FINAL072710.pdf](http://www.fws.gov/northeast/primehook/pdf/PMH_Dune_Work_DraftEA_FINAL072710.pdf).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 33.

Further, even assuming these other problems could be surmounted this project will require a full Environmental Impact Statement (“EIS”) and cannot legally proceed with a FONSI.

Apart from its legal faults, the project is ill-conceived and would be environmentally counter-productive. In addition, the FWS concedes in the Draft EA that the project would only be a stop-gap measure that would have to be repeated, perhaps infinitely, to achieve the intended benefit.

Finally, this proposal to sacrifice refuge resources to protect private property interests would set a disturbing precedent. The poor quality of this EA and the circumstances surrounding this effort reinforce our conclusion that FWS has abandoned prudent resource management under intense local political pressure.

## I. Preferred Alternative Violates Federal Laws

The Service is proposing to scrape sand and sediment from washover areas in Unit II on Prime Hook Refuge in order to build up approximately 700 feet of duneline south of Fowler Beach, and fill in recently-created inlets, which are partly on refuge lands and partly on private property. The Service contends that this proposed action, also known as Alternative 2 or the Preferred Alternative, would minimize both the impacts of coastal flooding and erosion in the short-term. However, we believe the Preferred Alternative violates federal law, including the Refuge Improvement Act, the Endangered Species Act, the Coastal Barrier Resources Act, the Clean Water Act, and the Migratory Bird Treaty Act.

### A. Refuge Improvement Act

On October 9, 1997, President Clinton signed the National Wildlife Refuge System Improvement Act of 1997 (“RIA”),<sup>4</sup> to amend the National Wildlife Refuge System Administration Act of 1966 (“NWRSA”) in order to provide an “Organic Act” for the Refuge System (“System”).<sup>5</sup> The RIA’s main component is a *strong* and *singular* wildlife conservation mission for the System. § 4(2) of the RIA states:

The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit present and future generations of Americans.

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<sup>4</sup> National Wildlife Refuge System Improvement Act, Public Law 105-57 (1997)(hereinafter “RIA”), available at <http://www.fws.gov/northeast/planning/downloads/NWRSimprovementact.pdf>.

<sup>5</sup> National Wildlife Refuge System Administration Act, 16 USC § 668dd, available at <http://www.fws.gov/refuges/policiesandbudget/16USCSec668dd.html>.

The RIA also explicitly states that the purpose of the System is to “conserve fish, wildlife, and plants and their habitats and this conservation mission has been facilitated by providing Americans opportunities to participate in compatible wildlife-dependent recreation, including fishing and hunting, on System lands and to better appreciate the value of and need for fish and wildlife conservation.”<sup>6</sup> Furthermore, the RIA stresses that the System “serves a pivotal role in the conservation of migratory birds, anadromous and interjurisdictional fish, marine mammals, endangered and threatened species, and the habitats on which these species depend.”<sup>7</sup>

The Draft EA, as written, violates the RIA because it fails to adequately consider the explicit mission and goals of the National Wildlife Refuge System and completely ignores the refuge’s very specific management purposes in selecting Alternative 2 as the preferred action. The proposed action sacrifices Prime Hook’s natural resources for private uses with no apparent benefit to refuge wildlife and habitats. Moreover, the FWS and Refuge’s failure to complete a compatibility determination for the proposed action violates the RIA.

1. *The Proposed Alternative Sacrifices Refuges Resources for Private Purposes*

Alternative 2, or the Preferred Alternative, proposes:

[S]hort-term interim measures to scrape sand from washover areas in Unit II on Prime Hook National Wildlife Refuge to build up approximately 700 feet of duneline south of Fowler Beach, and fill recently created inlets, which are partly on refuge lands and *partly on private property*. The proposed action will also permit the utilization of sediment scraped from refuge lands to repair approximately 3,200 feet of duneline *on private lands* connected to the refuge’s dune. Overwash sand from refuge land will also be used to fill in other mini-inlet(s) *on private property* south of Fowler Beach Road. Staging of equipment, sand, and personnel may take place on the refuge land during project construction.<sup>8</sup>

The proposed action is a plan to remove natural resources from refuge lands in order to transport and use them on private property for purposes that are in no way related to purposes of the refuge, conservation mission or management of the refuge itself. According to the FWS, the legislative authorities and specific purposes for Prime Hook include:

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<sup>6</sup> RIA § 2(2).

<sup>7</sup> RIA § 2(3).

<sup>8</sup> Draft EA at 1 (emphasis added).

[F]or the use as an inviolate sanctuary, or for any other management purpose, for migratory birds...<sup>9</sup>

[S]uitable for (1) incidental fish and wildlife-oriented recreational development, (2) the protection of natural resources, (3) the conservation of endangered species or threatened species...<sup>10</sup>

[T]he Secretary ... may accept and use ... real ... property. Such acceptance may be accomplished under the terms and conditions of restrictive covenants imposed by donors.<sup>11</sup>

We believe that the FWS's Preferred Alternative would set a dangerous precedent for all NWR System coastal refuges facing new global warming, climate change, and sea level rise challenges, by introducing a new refuge use of "mining sand" on refuge coastal wetland and sandy beach habitats in order to protect private beach properties that are also experiencing accelerated beach erosion and effects of subsidence and sea level rise. NWR lands were established for the purposes of managing migratory birds, conserving endangered and threatened species, and protecting refuge natural resources. The refuge system was not created in order to protect and shore-up private beach properties and appease local beach communities.

As detailed above, the primary goal of the System under the RIA is the protection and conservation of wildlife, and the primary management purposes of the refuge are migratory birds, as established under the authority of the Migratory Bird Conservation Act, protecting natural resources, and conserving endangered and threatened species, with recreation as secondary and incidental to the other primary purposes, established under the Refuge Recreation Act. However, the Draft EA never once mentions these very basic facts of refuge administration and management principles required by Service policies and the RIA. Instead, the Draft EA specifically states that rebuilding dunes to protect private property adjacent to the refuge is necessary to "minimize impacts of coastal flooding and reduce erosion for the short term."<sup>12</sup> The FWS ignores the fact that nowhere does the System's mission and management goals, or Prime Hook's specific refuge purposes, refer to the protection and enhancement of private property with refuge resources as an acceptable objective. Nor do the System's mission and management goals or refuge purposes say anything about reducing the animosity of local communities against the FWS. It is evident from the Draft EA that the FWS made no attempt to rely on the System's mission or the Refuge's purposes as a justification for concluding that Alternative II was the preferred action.

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<sup>9</sup> Migratory Bird Conservation Act, 16 U.S.C. 715d.

<sup>10</sup> 16 U.S.C. 460k-1.

<sup>11</sup> 16 U.S.C. 460k-2 (Refuge Recreation Act, as amended, *available at* <http://www.fws.gov/refuges/policiesandbudget/purposes/>).

<sup>12</sup> Draft EA at 4.

Moreover, the Draft EA expressly admits that the proposed action, though it will currently benefit private land owners south of the refuge, will “further weaken the integrity of the dune and marsh system over time.”<sup>13</sup> Given that the FWS appreciates that further maintenance will counteract the natural processes that sustain the dune system in the face of storm events, sea level rise, and significant subsidence, it is astonishing that they would propose the one alternative which perpetuates these problems, solely for the benefit of the local community and private property owners adjacent to the refuge.

In our view, the proposed action points to a critical failing on the part of the FWS in neglecting to consider whether the action generates appreciable benefits to the refuge as prescribed under the RIA. Because the proposed action is primarily for the benefit of private land owners adjacent to the refuge, the preferred alternative is not only contrary to the RIA, it is also counter to the specific purposes for which Prime Hook NWR was created.

## 2. *The Project Lacks Required Compatibility Determination*

In addition to establishing a mission for the System, the NWRSAA, RIA, and relevant regulations also require refuge managers to complete a compatibility determination (“CD”) to demonstrate that any new use of the refuge is compatible with the purpose of the refuge in his/her “sound professional judgment.”<sup>14</sup> The regulations state that “the Secretary shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use and that the use is not inconsistent with public safety.” The term “compatible use” means “a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.”<sup>15</sup> Sound professional judgment must be consistent with the principles of sound wildlife management, be based on available science, and comport with relevant laws.<sup>16</sup> Additionally, a CD must be re-evaluated if there are significant changes to the conditions surrounding a use, or new information is found regarding the effects of the

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<sup>13</sup> *Id.*

<sup>14</sup> 50 C.F.R. § 25.12.

<sup>15</sup> RIA § 5(1).

<sup>16</sup> 16 U.S.C. § 668ee. The mission of the Refuge System is to “administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit present and future generations of Americans.” “The terms ‘conserving’, ‘conservation’, ‘manage’, ‘managing’, and ‘management’, mean to sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife, and plants utilizing, in accordance with applicable Federal and State laws, methods and procedures associated with modern scientific resource programs. Such methods and procedures include, consistent with the provisions of this Act, protection, research, census, law enforcement, habitat management, propagation, live trapping and transplantation, and regulated taking.” RIA § 5(4).

use.<sup>17</sup> Scraping sand and sediment from overwash habitats on Prime Hook NWR in order to build up dunelines along the coast is considered a “new use” of Prime Hook NWR resources and must be determined to be compatible with the purposes of the refuge before the proposed action can be approved. Before making any final determination of compatibility, the Manager must also provide the public with an opportunity for comment and review.<sup>18</sup>

The FWS website clearly explains the Service’s methods in administering and managing refuges. The RIA and FWS policies use definitive benchmarks against which the new standards of compatibility are measured - the System’s mission and a refuge’s specific legislative purposes. The RIA’s mission is one of wildlife conservation which the refuges’ specific purposes can trump if a conflict arises. But it is against a refuge’s legislative purposes which the effects of a new refuge use must be gauged and the effects of any proposed “new use” are then analyzed and measured for compatibility.

Here, the Refuge Manager failed to prepare a compatibility determination for purposes of evaluating whether the proposed action is compatible with the mission of the System and the purposes of the refuge. Hence, we are of the opinion that introducing this “new use” of mining refuge sand, a refuge natural resource, for the benefit of private beach land owners, at the expense of wildlife and degrading refuge Barrier Beach Island habitats, is a violation of the RIA, as well as the FWS compatibility determination policy.

According to the FWS’s own words, “the RIA establishes a unifying mission for the Refuge System, a process for determining compatible uses of refuges, and a requirement for preparing comprehensive conservation plans. This Act states first and foremost that the mission of the National Wildlife Refuge System be focused singularly on wildlife conservation.”<sup>19</sup>

As such, the FWS has violated § 668dd(d)(3)(A)(i) of the NWR SAA and its implementing regulations by failing to perform a compatibility determination for its intention to use sand and sediment from the Prime Hook Refuge to build up dunes on adjacent private property. New compatibility standards require that the FWS not initiate or permit a new use of a refuge unless a written CD analysis has been made and the Secretary has determined that this new use is a compatible use.

## B. The Coastal Barrier Resources Act

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<sup>17</sup> 50 C.F.R. § 25.21.

<sup>18</sup> Fish and Wildlife Service Refuge Manual, Refuge Management, Chapter 2: Compatibility, 603 FW 2.12(a)(9). Moreover, if the refuge’s Comprehensive Conservation Plan (“CCP”) is not released before EA activities commence then a written CD including Public Notice and comment period by law must be made available to the public.

<sup>19</sup> NWR SYSTEM –Legislative Mandates and Authorities homepage, *available at* <http://www.fws.gov/refuge/policiesandbudget/mandates.html>.

The Coastal Barrier Resources Act of 1982 (CoBRA) was enacted by Congress to prevent the use of federal dollars or other types of federal assistance in building build on coastal barriers or destroyed coastal barrier island habitats especially of on or near identified Barrier Resource System Units. This law prohibits most federal expenditures, including federal flood insurance and other general federal assistance that would damage environmentally sensitive areas that are subjected to regular storm surge and flooding.

The provisions of CoBRA bar FWS from planning habitat management activities or actions that damage storm-created inlets on refuge lands (such as filling in breaches both on and immediately adjacent to refuge CoBRA designated areas – precisely the activities contemplated by the Preferred Alternative. Moreover, the bar on the use of federal dollars would also limit the ability of the Delaware Department of Natural Resources and Environmental Control (“DNREC”) to rebuild artificial dunes to stabilize natural shoreline positions even in the absence of FWS participation.

Further, the Army Corps of Engineers would also be remiss in issuing such permits as will be sought by FWS and DNREC to mine “refuge overwash sand” and fill in naturally, storm-created inlets of undeveloped coastal barrier habitats on both refuge and immediately adjacent private beach properties.

Notably, the Dune EA does not even mention CoBRA or that Prime Hook NWR is included as designated Coastal Barrier System Unit in the “John H. Chafee Coastal Barrier Resources System” [see Delaware map at [http://www.fws.gov/habitatconservation/coastal\\_barrier.html](http://www.fws.gov/habitatconservation/coastal_barrier.html)]

Ironically, the Department of Interior, through the FWS, is designated by law as the responsible agency for administering CoBRA. In fact the FWS has a “Coastal Barrier Resources System Policy”<sup>20</sup> This policy specifically protects any “bay barrier, tombolo, barrier spit or barrier island” that “is subject to wave, tidal, and wind energies” as well as “protects all associated aquatic habitats, including the adjacent wetlands, marshes, estuaries, inlets”<sup>21</sup>

Further, these provisions also specify that protected areas include any “undeveloped coastal barrier within the boundaries of an area established under Federal, state or local law, or held by a qualified organization, primarily for wildlife refuge, sanctuary, recreational, or natural resources conservation purposes”. This definition clearly covers both Refuge Units I and II as wildlife refuge lands they would not even need the additional designation of a “CBRS Unit” in which fill-in of storm created-inlets or “mine refuge overwash sands” is explicitly prohibited.

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<sup>20</sup> 651 FW 1.

<sup>21</sup> 651 FW 1 Part 1.7

Moreover, in 2009 FWS designated 70 pilot project units in 5 state (Delaware, NC, SC, GA, & FL) to improve digital mapping techniques of CBRS Units. Both Bombay Hook and Prime Hook NWRs shorelines were included in these projects.

### C. The Endangered Species Act

#### *1. Draft EA Admits Impact to Habitat of Listed Species*

The FWS expressly admits that the construction work may negatively impact habitat for federally listed shorebirds but that the “refuge manager will coordinate with State and federal biologists” to minimize negative impacts.<sup>22</sup>

While acknowledging these short-term impacts, the Draft EA ignores long-term and cumulative impacts of rebuilding artificial dunes. These impacts include the elimination of beach wrack communities, the loss of sandy beach and tidal salt marsh habitats, and the destruction of overwash habitat suitable for nesting piping plovers. These effects will have negative consequences for migratory birds and shorebirds, in particular the piping plover, American oystercatcher, black skimmer, least and common terns.

In addition, the Draft EA concedes that the project will have negative consequences for beach invertebrates, including spawning horseshoe crabs.<sup>23</sup>

As with migratory birds, the Draft EA ignores cumulative effects on beach invertebrates, critical food resources for endangered and migratory bird species. The cumulative impacts of repeatedly stabilizing dunes will also significantly narrow the shoreline strands and overwash habitats eventually leading to the disappearance of critical habitat for piping plovers, while significantly increasing the vulnerability of back-barrier marshes to sea level rise.

According to the FWS “Legislative Mandates and Authorities” webpage, the Endangered Species Act (“ESA”) should directly affect management activities within the NWR System as the Act directs Federal agencies to take actions that would further the purposes of the ESA and to ensure that actions they carry out, authorize, or fund do not jeopardize endangered species or their critical habitat.

In short, the Draft EA does not come close to fully evaluating potential negative consequences to federally listed species.

#### *2. The Project Lacks Required § 7 Consultation*

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<sup>22</sup> Draft EA at 24.

<sup>23</sup> *Id.* at 25-27.



Section 7 of the Endangered Species Act requires all federal agencies to consult with the appropriate agency if they are proposing an action that may affect listed species or their designated habitat.<sup>24</sup>

Here, the FWS has proposed an action that will most likely affect several listed species and their designated habitat and has still concluded that the action will not have a significant effect on the environment. Yet, the FWS will not be conducting the ESA Section 7 consultation until *after* the issuance of the Final EA. It is unclear as to how a consultation after issuance of the EA and FONSI will ensure that the individual and cumulative impacts associated with the proposed action will be minimal on listed species. Moreover, it is unclear how its issuance complies with 40 C.F.R. § 230.10(b)(3), which states that no discharge of dredged or fill material shall be permitted if it: “[j]eopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended.”

#### D. The Clean Water Act

While the Draft EA does not explicitly state that the dunes area scraped are jurisdictional wetlands, they in fact are. By way of backhand acknowledgment of this fact, the Draft EA states that FWS will need permits from the U.S. Army Corps of engineers under § 404 of the Clean Water Act and § 10 of the Rivers and Harbors Act.<sup>25</sup>

Indeed, FWS and its partner in this proposed project, the DNREC already have committed violations of these statutes in doing initial dunes scraping on May 3, 2010 without any required permits.

The Army Corps enforcement office in Philadelphia District Office has informed PEER that it is conducting a criminal investigation of both DNREC and FWS over previous work on the dunes. It is highly unlikely that the corps would allow these agencies to complete their crimes by giving them permits.

Moreover, the destruction of wetlands falls outside of Corps guideline for permit issuance, in part because the project lacks any corresponding environmental benefit.

#### E. The Migratory Bird Treaty Act

The FWS proposed action would also result 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.

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<sup>24</sup> 16 U.S.C. Section 1536(a)(2).

<sup>25</sup> Draft EA at 32.

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.<sup>26</sup> 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.<sup>27</sup> 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 proposed scraping of sand from washover areas in Unit II of Prime Hook to build up dune lines south of Fowler’s Beach is likely to cause harm and degradation to habitats critical to migratory bird species. This is particularly troubling in light of the fact that Prime Hook NWR was established expressly for use as an inviolate sanctuary for migratory birds. The FWS itself admits that beach overwash habitats are beneficial to and sustain many nesting shorebirds and other migratory birds, such as the piping plover, American oystercatcher, least tern, common tern, and black skimmer.<sup>28</sup> However, the environmental consequences analysis in the Draft EA completely ignores the glaringly evident fact that neither Alternatives 1 nor 3 would not result in the destruction of critical migratory bird habitat, while Alternative 2 would destroy existing and critical nesting and feeding habitats in the short-term by scraping existing overwash sand to plug recent storm created inlets. There are no FWS policies, mandates, or environmental laws that recommend, sanction, or encourage “short-term” destruction of migratory bird or migratory endangered species habitats in any season, just because the birds are not present. The EA seems to imply that it is acceptable to destroy overwash habitats when the migratory birds are not around.

Moreover, the proposed action introduces a new use with several long-term repercussions that were not considered by the FWS. The EA Preferred Alternative would not only require annual use of bull-dozers and other heavy equipment on refuge land to stage equipment for private property repairs, build and maintain the dunes on private and public properties, but also the scraping of sand every year to repair inevitable chronic storm damage. The long-term and cumulative consequences of prior and proposed actions were not considered. Such annual disturbances would keep endangered and migratory birds away from Prime Hook’s coastal Barrier Beach Island habitats and discourage piping plovers from establishing nesting territories.

The FWS has not justified how the Preferred Alternative implements the refuge’s purposes to guide management decisions and support the notion that its preferred action sustains the refuge “as an inviolate sanctuary, or for any other management purpose, for

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<sup>26</sup> 16 U.S.C. § 703 *et seq.*

<sup>27</sup> *Id.*

<sup>28</sup> *See* Draft EA at 23.

migratory birds.”<sup>29</sup> Instead, the FWS is proposing a new “extractive activity” in its Preferred Alternative of mining sand from overwash areas for the use and benefit of private land owners. The new extractive use and activity would materially interfere with and detract from the refuge’s purposes of managing for migratory birds, protecting natural resources, and conserving endangered migratory bird species.

By undertaking the mining of sand and sediment from Prime Hook in order to build up dunelines, FWS will be responsible for significant habitat destruction which will likely result in harm to a number of migrating bird species. Such habitat modification will impair the essential behavioral patterns, including breeding, feeding, and sheltering, of these species. For these reasons, we feel that the proposed action will result in a violation of the Migratory Bird Treaty Act and the RIA.

## II. Preferred Alternative Violates Both Federal and State Agency Policies

### A. FWS Manual – Biological Integrity, Diversity, and Environmental Health and Other Service Policies

The FWS website clearly explains the FWS methods in administering and managing refuges. FWS policies use definitive benchmarks against which the new standards of compatibility are measured and these two benchmarks are the NWR System mission and a refuge’s specific legislative purposes. The mission of the NWR System is “wildlife conservation” – not protecting private beach properties or homes.

The FWS Service Manual “contains the standing and continuing directives of the Service and that Service employees must comply with the requirements of the Manual.” This manual sets forth policies such as the Biological Integrity, Diversity, and Environmental Health Policy (effective 4/16/2001), NWR System Mission, Goals, and Refuge Purposes’ Policy (effective 7/26/2006) and the Compatibility Determination policy (effective 11-17-2000). The analysis and thinking displayed in this EA appear to be completely at odds with these policies. For example –

- The NWR System mission “is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” It is unclear how the Preferred Alternative serves this mission, as the primary benefit of the project is intended for private and political interests.
- We are hard pressed to explain how the Preferred Alternative achieves the refuge’s purposes of 1) “as an inviolate sanctuary, or for any other management purpose, for migratory birds” (Migratory Bird Conservation Act purpose 16 USC 715 d) or 2) “...for the protection of natural resources or 3) the conservation of endangered or threatened species (Refuge Recreation Act purposes 16 USC 460 k-1), or achieves the System mission.

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<sup>29</sup> Migratory Bird Conservation Act purpose 16 USC 715(d).

- We fail to see how the chronic re-building of artificial dunes, as futile attempts to stop the movement of the refuge’s shoreline in Unit II, maintains, enhances, or restores the biological integrity, diversity, or environmental health of Barrier Beach Island habitats and associated back-barrier wetlands on the refuge.
- FWS is proposing a new “extractive activity” in its Preferred Alternative of “mining sand” from overwash areas for the use and benefit of private land owners. This “new extractive use and activity” would give away “mined sand” for free without assigning a dollar value to this precious natural resource. Sand is now and will become an even more valuable resource for both public and private coastal properties facing climate change and sea level rise environments. Sand represents the “Gold Standard” of “elevational capital” for Barrier Island and back-barrier wetland habitats. We would strongly discourage the FWS to give it away for nothing and thereby setting the precedent for other coastal refuges to be encouraged to do the same for the enhancement of private beach properties adjacent to their refuges.
- In a Freedom of Information Act request, PEER obtained what the Marsh and Water Management Plan for Unit II. This plan does not describe mining sand as being needed to achieve refuge specific habitat goals and objectives. It also makes no mention of needing to stop migration of the shoreline landward to manage water and marshes.
- Since the new Comprehensive Conservation Plan (CCP) has not been released yet, it is not possible that such “extractive activities” are needed on refuge lands at this time in order to meet current refuge habitat and wildlife management objectives.

#### B. FWS Climate Change Strategy

The FWS Climate Change Strategic Plan establishes a basic framework within which the Service and its employees are supposed to work to help ensure the sustainability of fish, wildlife, and habitats in the face of accelerating climate change. The plan employs three key strategies to address climate change: Adaptation, Mitigation, and Engagement.

Remarkably the project put forward by FWS for this refuge flies in the face of all three strategies. Rather than adapt, the project seeks to futilely resist inexorable sea level rise, severe storms, and subsidence effects. Rather than mitigate, the Preferred Alternative aggravates negative effects. Rather than engage the public on its true mission and purposes in the face of climate change challenges, the FWS goes behind closed doors to make political commitments to a small group of politically connected individuals. This project is designed to benefit a local few at the expense of natural resources that belong to the nation.

### C. Delaware Beach Management Policy

The Delaware state beach management policy stipulates that undeveloped state lands “shall be managed to allow for the natural movement of the shoreline”. Refuge Managers across the NWR System often adopt state policies and regulations.

Rather than adopting a policy of rebuilding this shoreline as put forward in the Draft EA, the refuge should allow the area to naturally adapt to changing conditions no differently than the state of Delaware does on its undeveloped, state-owned lands.

## **III. Environmental Assessment Is Legally Deficient**

### A. Presumes FONSI Prior to Public Comment

The Draft EA is flawed in that it presumes the Final EA will generate a finding of no significant impact on the environment prior to receiving important public comment. In light of the serious concerns expressed by several groups and citizens, the FWS cannot conclude that a FONSI is appropriate for the Preferred Alternative before it reviews and considers all comments in developing the Final EA.

### B. Omits Conditions Imposed by Permits Not Yet Obtained

The Draft EA lists several permits and approvals that will be required from the Corps, DNREC, the State Historic Preservation Officer, and the Delaware Coastal Zone Management program.<sup>30</sup> To our knowledge, none of the required permits or approvals have yet been obtained.

It is conceivable that as a condition of obtaining any of these permits or approvals, FWS may have to significantly alter the proposed project. In that case, FWS should be legally required to reinitiate the National Environmental Policy Act (NEPA) review process.

### C. Fails to Analyze Alternative of Elevating Roads

The Draft EA is also deficient because it fails to consider one of the easiest and least problematic alternatives to the proposed action: namely, elevating CR 39 in order to reduce the impact of the overwash on the private community south of Fowler’s Beach.

From the data provided in the Draft EA on current road elevation, it is apparent that Prime Hook Road is sinking badly. The temporal breach plugs proposed in the Draft EA will not stop the effects of sea level rise and land subsidence of this road. Similarly, the Preferred Alternative would not stop the flooding of Prime Hook Road during storm events.

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<sup>30</sup> Draft EA at 32-33.

The road, CR-39, lies atop Prime Hook NWR marshlands, to which the state of Delaware has an “easement” or “right of maintenance” to maintain the surface of the road and facilitate ingress and egress of the public across refuge lands. A short and long-term solution that would assuage beach community animosity and not destroy potential piping plover overwash habitats, nor squander away refuge sand resources, would be to simply raise the elevation of the road beds of Prime Hook Road so that property owners can reach their properties.

The FWS has failed to consider this obvious alternative by simply declaring that the state owns the road but review of FWS property deeds would suggest otherwise. Therefore it would be appropriate and probably easier to obtain federal funds to properly elevate this FWS road that crosses FWS wetlands, which would avoid the destruction and degradation of refuge natural resources, beach and overwash habitats and would achieve the same goal as the alternatives considered in the Draft EA. The FWS’s failure to consider such an alternative highlights the deficiency of the Draft EA.

#### D. Misanalysis of Relative Costs of Alternative 2 versus Alternative 3

Many of the negative environmental consequences from the Preferred Alternative (Alternative 2) arise from scraping away refuge sand for re-deposit elsewhere. Alternative 3, importing sand from elsewhere, was dismissed due to the added cost. However, it appears that the Draft EA inappropriately minimized the costs of its Preferred Alternative in the following ways:

- The Draft EA assigned no monetary value to the sand that would be mined from the refuge yet beach sand clearly has a monetary value.
- On page 14, the EA states “The estimated volume of sand needed for the project ranges between 84,000 and 140,000 cubic feet”. If the estimated volume needed for this Dune Project in the Preferred Alternative more realistically included “mined sand off of refuge barrier beach island habitats,” then between 84,000 and 140,000 cubic feet will be needed. Based on the estimated cost of such sand in Alternative 3 (page 15 = \$15/cubic yard), then the actual cost to taxpayers of “mining refuge sand” in the Preferred Alternative (Alternative 2) costs more than the refuge manager claims, falling within a range between **\$140,000** (9,333 cubic yards x \$15) and **\$233,000** (15,555 cubic yards x \$15) added to the estimated range of \$11,000 to \$13,000 for the entire project.
- The more realistic final cost to taxpayers ranges from \$151,000 to \$246,000, making the Service preferred alternative the most expensive alternative in reality, compared to (Alternative 1 = Zero cost) and Alternative 3 ranges from \$47,000 to \$78,000.

The Draft EA claims that the Preferred Alternative 2. will “alleviate current concerns, while causing minimal environmental impacts, to allow the Service to proceed with the Comprehensive Conservation Plan ...” Alternative 3 would also have the same

social and political result, probably even be more favorable to local community while not destroying plover habitats.

#### **IV. Preferred Alternative Is Imprudent**

##### A. Draft EA Concedes Project Is Likely Counterproductive

The Draft EA itself concedes that the proposed alternative is likely to be counterproductive in the long term. Specifically, the Draft EA states:

A scenario of continual rebuilding of artificial dunes could have long-term and cumulative negative impacts and consequences....Geologists recommend that artificial dunes not be rebuilt after storm damage to allow tidal inlet and overwash formation that reduces the vulnerability of back-barrier marshes to sea level rise by increasing vertical sediment accretion.<sup>31</sup>

The following paragraph continues –

Cumulative impacts of human activities that repetitively stabilize dunelines on sandy beach habitats also have negative consequences of significantly narrowing barrier island shoreline strands. This can ultimately lead to the collapse and disappearance of these ribbons of sand, and significantly increase the vulnerability of back-barrier marshes to sea level rise.

On page 4 of the Draft EA, the FWS explains that previous actions moved sand bayward and the building of artificial dunes counteracted the natural processes that sustain dune systems in the face of storm events, sea level rise, and shoreline movement and that the continuation of these practices is likely to further weaken the integrity of the dune and marsh systems over time. This section of the Draft EA ends with the statement, “However, given the degree of degradation of the current system, we are concerned that inaction in the short term may inadvertently increase the amount of open water in the impoundments.” This seems contradictory to current environmental conditions of the breached impoundment where tidal flow is bringing in sand to the open water area of the impoundment making it “shallower” due to the migration of sand landward. Significantly, the alternatives that plug these breaches, stop sand accretion both in the short and long term. The Preferred Alternative would have the effect of creating “deeper” open water by digging out and scraping existing sand in the refuges’ current barrier wetland open water area, and stop newly created tidal flow. In other words, sand mining and cutting off tidal flow would concentrate salt conditions of the open water area, and create a deeper, brine, open water pit in Unit II behind the re-stabilized shoreline.

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<sup>31</sup> Draft EA at 32.

On the other hand, the other two alternatives would not “mine sand” from back-barrier refuge wetland habitats for use on private beach properties.

The Draft EA environmental consequences analysis of Impacts on Soils and Coastal Sediment Budgets explains that Alternative 1 is best for Barrier Beach Island sandy beach and wetland habitats and that Alternatives 2 and 3 would negatively impact marine transgression of the shoreline with subsequent degradation to the marsh system behind the duneline. The Preferred Alternative compared to 1 and 3 would remove sand which represents what the FWS calls “elevational capital” with respect to combating sea level rise, from scraping and mining activities of sand for dune reconstruction and inlet filling. Nonetheless and with no analysis, the FWS concludes that Alternative 2 is their preferred alternative. This type of magical thinking suggests that the Preferred Alternative was pre-selected before any rational analysis of alternatives.

#### B. Draft EA Concedes Project Is Stop Gap

The most recent dune repairs conducted by FWS (2008) did not even last one year. FWS now proposes another short-term Band-Aid fix that has negative environmental consequences in violation of law and federal and state policies.

It is important for the public to know how long the Refuge Manager intends to pursue this ill-conceived counterproductive course of action in Unit II. Will FWS need to repeat this project every year, every two years, five years or ten years? Until the CCP is completed? Or will this counterproductive course continue for 5, 10 or 15 years after the CCP is completed while the refuge studies the situation? Or will FWS wait until the beach strand is finally irreversibly submerged because it could not make a decision to defend barrier beach island habitats because it was too politically uncomfortable?

FWS does not need years of additional study to learn what geologists and other coastal scientists already know about sustaining healthy Barrier Beach Island habitats – that none recommend rebuilding artificial dunes and stopping the movement of shorelines. Rather than placating local landowner interests, FWS should spend more time and effort educating the public and politicians about climate change, sea level rise and how they are related to the FWS conservation mission and refuge’s purposes.

#### C. Draft EA Does Not Articulate Wildlife Benefits

FWS argues that Alternative 2 is needed to reduce the animosity between “some community members and the Service” and the lack of action (Alternative 1) would not alleviate this situation: The Draft EA notes that three adjacent landowners to the refuge will be recipients of “mined refuge sand” to improve and protect their current beach properties from storm erosion. The Draft EA does not name these three landowners, although the public should know who will benefit from the mining of refuge resources. Moreover, the public should know how much these three private landowners have spent on protecting their property from storm damage and erosion in the last twenty years,



while state and federal governments were probably illegally repairing their private lands at public expense.

The Draft EA does not articulate any benefit to the refuge, although it concedes there is the potential for detriment to refuge natural and migratory bird resources. Instead, the Draft EA proposes a public project solely to benefit unnamed private interests. Moreover, the Draft EA offers no evidence or reasoning to suggest that local animosity will significantly decrease.

## **V. The Draft EA Cannot Legally Support a FONSI**

As detailed above, the Preferred Alternative violates several environmental laws, as well as FWS and state policies, which will result in a significant impact on the environment. In addition, the Draft EA is legally deficient in that it omits conditions imposed by permits not yet obtained and fails to analyze simple and cost effective alternatives, such as elevating the roads so that the benefit to the private property owners could be realized without admitted harm to refuge wildlife and natural resources and damage and jeopardy to federally listed species and habitat.

Apart from its legal faults, the project is misguided and would be environmentally counter-productive. The FWS itself concedes in the Draft EA that the project would only be a stop-gap measure that would have to be repeated, perhaps infinitely, to achieve the intended benefit.<sup>32</sup> Yet, the FWS has failed to consider the impact that repeated repairs and constant rebuilding of artificial dunes on refuge lands would have on the refuge. Such an alternative perversely contradicts the Refuge's multiple legislative purposes and NWR System mission.

Finally, this proposal to sacrifice refuge resources to protect private property interests would set a disturbing precedent. The circumstances surrounding this effort reinforce our conclusion that FWS has abandoned prudent resource management under intense local political pressure.

Based on all of these factors, it is clear that the Preferred Alternative will have a significant impact on the environment. Accordingly, FWS is precluded from issuing a FONSI, and instead must prepare a full Environmental Impact Statement detailing the extent of the project's impact on the environment.

## **VI. Conclusion**

The FWS's preferred alternative would set a dangerous precedent for all National Wildlife Refuge System coastal refuges facing new global warming, climate change, and sea level rise challenges by "mining sand" on refuge coastal wetland and sandy beach habitats in order to protect private beach properties that are also experiencing accelerated beach erosion and effects of subsidence and sea level rise.

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<sup>32</sup> Draft EA at 32.

These lands were established for the purposes of managing migratory birds, conserving listed species and protecting refuge natural resources – not to protect and “shore-up” private beach properties and appease local beach communities.

The questionable rationales and varying contradictory analyses used in this EA makes it evident that the FWS is simply buckling to political pressures. The FWS appears to make no effort to educate its state partners or the public about its mandate of wildlife first.

Submitted by:

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