

STATEMENT OF DANIEL N. WENK, DEPUTY DIRECTOR, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON NATIONAL PARKS, FORESTS, AND PUBLIC LANDS OF THE HOUSE COMMITTEE ON NATURAL RESOURCES, CONCERNING H.R. 6233, A BILL TO REINSTATE THE INTERIM MANAGEMENT STRATEGY GOVERNING OFF-ROAD VEHICLE USE IN THE CAPE HATTERAS NATIONAL SEASHORE, NORTH CAROLINA, PENDING THE ISSUANCE OF A FINAL RULE FOR OFF-ROAD VEHICLE USE BY THE NATIONAL PARK SERVICE.

September 11, 2008

Mr. Chairman and members of the subcommittee, thank you for the opportunity to appear before you today to present the Department of the Interior's views on H.R. 6233, a bill to reinstate the Interim Management Strategy governing off-road vehicle (ORV) use at Cape Hatteras National Seashore (Seashore), North Carolina, pending the completion of an ORV management plan and issuance of a final rule for ORV use. The Interim Management Strategy was adopted on July 13, 2007 by the National Park Service to provide resource protection guidance in areas subject to ORV use. The bill would make inapplicable the consent decree that implements a settlement agreement modifying this Interim Management Strategy, to which all parties involved in a lawsuit agreed just five months ago.

The Department supports allowing public use and access at Cape Hatteras National Seashore to the greatest extent possible while ensuring protection for the Seashore's wildlife, including the federally protected species that are the focus of present concern, for this and future generations of park visitors. Because we believe that the April 30, 2008, consent decree will accomplish this objective better than the original 2007 Interim Management Strategy for the period until a final ORV plan and rule are adopted, the Department cannot support H.R. 6233. The Department

took the same position in testimony on companion legislation, S. 3113, at a hearing before the Senate Subcommittee on National Parks on July 30, 2008.

Background on Protected Species and ORV Management at Cape Hatteras

Beach driving, also known as ORV use, predates the 1937 authorization of the National Seashore and has become a popular method of access for recreational pursuits such as swimming, fishing, and water sports.

Executive Order 11644 (1972), amended by Executive Order 11989 (1977), requires the National Park Service to issue regulations on the designation of specific trails and areas for ORV use based upon resource protection, visitor safety, and minimization of conflicts among uses of agency lands. The Executive Order directs that these “[a]reas and trails...be located to minimize harassment of wildlife or significant disruption of wildlife habitats.” Furthermore, “...whenever [the agency] determines that the use of off-road vehicles will cause or is causing considerable adverse effects on ...wildlife (or) wildlife habitat, [it shall] immediately close such areas or trails to the type of off-road vehicle causing such effects until such time as [it] determines that such adverse effects have been eliminated and that measures have been implemented to prevent future occurrence.” In response to the Presidents’ direction, the National Park Service promulgated the regulation at 36 C.F.R. § 4.10, which requires the Park Service to designate, by special regulation, ORV use areas and routes in compliance with Executive Order 11644. In 1978, the Park Service drafted an interim ORV management plan for Cape Hatteras National Seashore but never finalized it. In 1973 and 1990, the Park Service drafted ORV regulations for the Seashore but never promulgated them.

To date, the National Park Service has not met the requirements of its own regulation. However, subsequent to a feasibility assessment process which queried numerous stakeholder groups, in December 2007 the Secretary of the Interior established a negotiated rulemaking committee under the Federal Advisory Committee Act (FACA) to aid the Service in the development of an ORV management plan and special regulation to meet the requirements of 36 C.F.R. § 4.10. The committee, which has met five times thus far in 2008, is making progress toward this goal. The committee is scheduled to meet again in September, October, November, and December 2008. Under the April 30, 2008, consent decree, the ORV management plan must be completed by December 31, 2010, and the special regulation by April 1, 2011.

The Seashore is the breeding site for many species of beach-nesting shorebirds and waterbirds, including the federally listed threatened piping plover, the state-listed threatened gull-billed tern, and a number of species of concern including the common tern, least tern, black skimmer, and the American oystercatcher. All of the above species have experienced breeding population declines at Cape Hatteras over the past 10–20 years. For example, in 1989 the Seashore had 15 breeding pairs of the federally threatened piping plover. By 2001-2005, the Seashore experienced only 2-3 pairs attempting to nest each year. The numbers of colonial waterbird nests on the Seashore have declined from 1,155 nests in 1999 to 217 nests in 2007. Individual colonial waterbird species have experienced the following reduction in nests on the Seashore from 1999 to 2007: gull-billed tern, 103 nests to zero; least tern, 306 nests to 196; common tern, 440 nests to 19; and black skimmer, 306 nests to 2. American oystercatcher numbers on the Seashore have declined from 41 breeding pairs in 1999 to 22 breeding pairs in 2007.

While a complex array of variables including weather events and predation contribute to these declines, human disturbance is certainly a factor, reflecting the inherent conflict resulting from the fact that peak visitor demand for access to key breeding sites, which are also popular fishing sites, occurs at approximately the same time as the primary period of wildlife breeding activity. The overall trend of declining numbers and the low numbers for specific species (piping plover, gull-billed tern, common tern, and black skimmer) at Cape Hatteras National Seashore has been of particular concern, because the National Park Service by law and policy is committed to preventing impairment of park resources, and preserving and restoring the natural abundance, diversity and distribution of native animal populations and ecosystems in which they occur in units of the National Park System.

In July 2007, the National Park Service approved an Interim Protected Species Management Strategy and Environmental Assessment for the Seashore. This Interim Management Strategy provides guidance for the protection of beach-nesting shorebirds and sea turtles, and a threatened beach plant species, until a long-term ORV management plan and regulation can be developed. Meanwhile, in consultation with the negotiated rulemaking committee that was established in December 2007, the Service is working on the development of a long-term ORV management plan and environmental impact statement.

In October 2007, Defenders of Wildlife and the National Audubon Society, represented by the Southern Environmental Law Center (Plaintiffs), filed a complaint in the U.S. District Court for the Eastern District of North Carolina challenging the Interim Management Strategy. In

December, the complaint was amended to include the U.S. Fish and Wildlife Service as co-defendant based on Endangered Species Act claims related to its biological opinion.

Additionally, two local counties, Dare and Hyde, and the Cape Hatteras Access Preservation Alliance, which is a coalition of local ORV and fishing groups, were granted intervenor status by the court. All of these entities are members of the negotiated rulemaking committee.

On February 20, 2008, the Plaintiffs filed a motion for a preliminary injunction requesting the court to direct the National Park Service to completely close six key breeding sites (Bodie Island Spit, Cape Point, South Beach, Hatteras Spit, North Ocracoke, and South Ocracoke) to ORV use on a year-round basis consistent with the 2005 management recommendations provided to the Park Service by scientists from the U.S. Geological Survey (referred to as the “USGS protocols.”) These six sites are also the most popular fishing areas that are traditionally accessed by ORV users.

In April 2008, the Plaintiffs, Federal defendants, and intervenors jointly filed a proposed consent decree with the U.S. District Court to implement a settlement reached by the parties, which the court issued on April 30. Reaching this settlement prevented a complete year-round shutdown of ORV access to the six popular fishing areas. The consent decree is not expected to affect the fall or winter fishing season. It will also allow many areas of the beach to remain open to recreational use, even during the breeding season.

The consent decree provides for increased resource protection during the breeding season, while allowing for continued ORV access to the six key sites during the non-breeding season. It

addresses individual species concerns and specifies buffer sizes and types, timing restrictions, and monitoring efforts to protect beach-nesting bird species, including piping plover, American oystercatcher, and four species of colonial waterbirds; and three species of federally protected sea turtles. It settles all claims raised in the lawsuit and does not set a precedent for the long-term ORV management plan or the regulation.

Compared to the Interim Management Strategy, the consent decree includes larger, non-discretionary buffer distances to protect beach-nesting birds once breeding activity is observed. It also includes a new prohibition on night driving on seashore beaches from 10:00 p.m. until 6:00 a.m. during the sea turtle nesting season. The consent decree does not directly mandate an outright closure of the six popular fishing areas. The National Park Service had to close these areas earlier this summer, however, to comply with the consent decree's criteria for determining buffer distances once breeding activity was observed. These areas are being reopened as breeding activity concludes; by the end of August, all six sites were at least partially accessible by pedestrians and vehicles. We are working hard to keep the public informed of beach access status.

Many sections of beach have remained open to ORV and pedestrian access during the breeding season. As of August 26, 2008, of approximately 67 total miles of Seashore beaches, 36.6 miles were open to ORVs and pedestrians, an additional 29.4 miles were open to pedestrians only (totaling 66 miles open and accessible to pedestrians), and 1 mile was closed to ORVs and pedestrians to protect breeding and nesting areas.

Preliminary Results of Resource Protection Measures Taken in Accordance with the Consent Decree

Although the breeding season is not yet completed, it appears that actions taken under the consent decree have been beneficial for resource protection. Under the consent decree, the Seashore has experienced an increase in the number of breeding pairs of piping plover from 6 pairs in 2006 and 2007, to 11 pairs in 2008. As of August 29, 2008, the Seashore has had 112 sea turtle nests compared to 49 nests last year at this time.

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H.R. 6233 would reinstate the Interim Strategy for ORV use at the Seashore and declare the consent decree inapplicable. A return to managing the Seashore under the Interim Management Strategy would result in a reduction in the size, frequency, and timing of the buffers protecting federally and state listed species, and a likely reduction in the increase in nesting activity observed in 2008.

We reiterate our commitment to providing for everyone's enjoyment of Cape Hatteras National Seashore's wonderful resources to the greatest extent possible while ensuring protection of park resources, including federally protected species, for this and future generations. We strongly believe that completion of the long-term ORV management plan and special regulation is the best way to involve all interested parties, including the general public, and meet the Service's responsibilities under the Endangered Species Act, National Park Service Organic Act, Cape Hatteras National Seashore enabling act, Migratory Bird Treaty Act, and other applicable laws. Through this process, the National Park Service will determine how to provide appropriate

resource protection and reasonable visitor access at the Seashore. While we continue to implement the consent decree, we are actively working with all interested stakeholders in the development of the regulation and plan, and we look forward to continuing to work with the subcommittee, the local communities, and the involved stakeholders as these processes move forward.

Mr. Chairman, that concludes my testimony. I would be glad to answer any questions that you or other members of the subcommittee may have.