

*Testimony of*  
*Derb S. Carter, Jr.*  
*Southern Environmental Law Center*  
*before the*  
*Subcommittee on National Parks*  
*Senate Committee on Natural Resources and Environment*  
*on Senate Bill 2372*  
*“Preserving Public Access to Cape Hatteras Beaches Act”*  
*Hearing held on June 27, 2012*

My name is Derb S. Carter, Jr. I am an attorney and Director of the North Carolina office of the Southern Environmental Law Center. I present this testimony on behalf of the National Audubon Society, Defenders of Wildlife, and National Parks and Conservation Association. We strongly oppose S 2372. If enacted, the bill would eliminate sensible safeguards to preserve Cape Hatteras National Seashore for future generations to explore and enjoy. Those safeguards are embodied in a Final Rule duly adopted by the National Park Service following many years of input from visitors to the National Seashore and local residents, as well as science-based measures to protect the wildlife and natural resources of the Seashore.

I grew up in North Carolina, and I have driven on the beaches of Cape Hatteras for over forty years. Over the years, I have observed many changes to the Seashore. In the past, there were few vehicles on the beaches, mostly recreational fishermen in rusted vehicles and a few commercial fishermen pulling nets. In recent years, though, as more and more people acquired vehicles capable of off-road use, or ORVs, the numbers of vehicles began to overwhelm the beaches. *See attached photographs 1, 3.* As the numbers of vehicles on the beaches increased, I observed dramatic declines in wildlife. Several species of waterbirds nest directly on the dry sand beaches of Cape Hatteras. Repeated disturbance of birds during the nesting season, and in some cases direct mortality from being crushed by vehicles, contributed to significant declines in some species, and some disappeared from the Seashore entirely. The same is true for several threatened and endangered species of sea turtles that nest on the beaches of Cape Hatteras. *See attached photographs 2, 3, 5-7.*

Some are surprised that driving is allowed at all on the beaches of a national seashore, but it has long been part of the culture at Cape Hatteras. Our organizations have not proposed or supported a complete prohibition of driving on Cape Hatteras. Rather, we have supported sensible protections for wildlife that relies on the Seashore’s beaches and the designation of some areas for pedestrians to enjoy beaches without vehicles. The Final Rule struck a balance between ORV use, pedestrian use, and resource protection that should be preserved.

We support the Final Rule adopted by the National Park Service that provides for reasonable ORV use of the beaches of Cape Hatteras National Seashore while providing some minimum protections for wildlife, and we oppose S 2372, which would abolish that Rule.

## ***Background***

Congress established Cape Hatteras National Seashore as the nation's first national seashore in 1937. The enabling legislation for Cape Hatteras National Seashore declares that it shall be "permanently preserved as a primitive wilderness" and that "no development of the project or plan for the convenience of visitors shall be undertaken which would be incompatible [] with the preservation of the unique flora and fauna of the physiographic conditions now prevailing in the area." 16 U.S.C. § 459a-2.

The Park Service Organic Act declares that national parks and seashores must be managed "to conserve the scenery and the natural and historical objects and the wildlife therein and to provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. If a conflict exists between recreational uses and natural resource protection, natural resource protection predominates.

Executive Order 11644, issued by President Nixon in 1972, directs all federal land managers to adopt plans to manage ORV use and requires that those plans not harm wildlife or degrade wildlife habitat. National Park Service regulations require adoption of special regulations to authorize ORV use in national parks and seashores. 36 C.F.R. § 4.10. The National Park Service neglected adopting an ORV management plan and special regulation for Cape Hatteras National Seashore until a final rule was published earlier this year. It is this special regulation (the "Final Rule") that this bill seeks to overturn.

### ***The Consent Decree: Both tourism and wildlife thrived under its terms.***

In April 2008, conservation organizations, ORV users, two counties, and the National Park Service recommended in a federal lawsuit<sup>1</sup> that the U.S. District Court for the Eastern District of North Carolina enter a consent decree that included beach driving restrictions and minimum wildlife protection measures on Cape Hatteras National Seashore until an ORV management plan and special regulation was put in place. The Consent Decree recommended by the parties imposed beach driving restrictions and wildlife protections beginning in 2008 that are very similar to those in the Final Rule. As such, the past four years leading up to the Final Rule adopted in February 2012 previews the potential environmental benefits and potential economic effects of additional restrictions on beach driving on the Seashore.

Prior to the Consent Decree, beach driving restrictions and wildlife protections on the Seashore were somewhat ad hoc, more responsive than pro-active, and implemented primarily by Superintendent's Orders and on-the-ground decisions. These approaches and measures to address the impacts of ORV use on wildlife were pulled together in an "Interim Protected Species Management Strategy" in 2007. The strategy was "interim" because the Park Service planned to use it only as long as it took to meet its longstanding obligation to develop an ORV management plan and Final Rule, which would supplant the interim strategy. The Interim Strategy generally reflected ongoing Park Service approaches and attempts to manage the conflicts between ORV use and wildlife on the Seashore, approaches and attempts that had not stopped precipitous declines in many species.

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<sup>1</sup> *Defenders of Wildlife et al. v. National Park Service et al.* (E.D.N.C. case no. 2:07-CV-45)

Over the past four years, management under the measures recommended by the parties to the Consent Decree has been a resounding success. Wildlife has returned to the Seashore. The various federally endangered, federally threatened, and state-protected species of shorebirds, water birds, and sea turtles that live and breed at Cape Hatteras National Seashore have rebounded. In the last two years (under protections that are very similar to the Final Rule's), records have been set for the number of sea turtle nests, piping plover breeding pairs, piping plover fledged chicks, American oystercatcher fledged chicks, least tern nests, and gull-billed tern nests. Under the Consent Decree, two species, gull-billed terns and black skimmers, have returned to the Seashore to nest after disappearing for several years.

Endangered and threatened sea turtle nests have increased dramatically with record nesting years in 2010 and 2011. Nests have exceeded abandoned nests or false crawls every year since 2007, reversing the previous trend.

Tourism has also thrived in the four years under reasonable wildlife protections and ORV restrictions similar to those implemented in the Final Rule. Park visitation has held steady and increased in some years, and tourism revenues grew. Notably, in the last two years, new records have been set for visitor occupancy and tourism revenue in Dare County, North Carolina, where most of the Cape Hatteras National Seashore land is located. This economic success has been enjoyed despite a nationwide recession, high gas prices, and hurricanes.

ORV restrictions have not hurt park visitation. For the past eight years, Cape Hatteras visitation has held steady between a low of 2,125,005 (in 2006) and a high of 2,282,543 (in 2009). In 2011, visitation dipped to 1,960,711, when Hurricane Irene cut off access to Hatteras Island for nearly seven weeks from August 24 to October 11. Dare County, NC, visitor occupancy receipts for each year under the Consent Decree's ORV restrictions (2008 to 2011) exceeded receipts in 2007 and prior years, with 2008, 2010, and 2011 setting successive records for all-time high receipts. Hatteras Island visitors spent a record-setting \$27.8 million on lodging during the month of July 2010 (surpassing July 2009 by 18.5 %). July 2011 occupancy receipts on Hatteras Island then set a new high of \$29,587,938 (surpassing July 2010 by 6.26%).

The NPS commissioned a study of the economic impact of the Final Rule, which concluded among other things that the local economy would likely adapt to the Final Rule. Several other studies show that the large majority visitors to Cape Hatteras prefer numerous non-vehicular activities such as swimming, sunbathing, visiting historic sites, walking, enjoying solitude, photography, and bird watching/wildlife viewing, over beach driving, and the majority of people who visit Cape Hatteras come to engage in these other activities rather than beach driving. A 2008 study by the US Fish and Wildlife Service concluded that only 2.7% to 4% of Cape Hatteras visitors each year are ORV users and that restrictions on beach driving would likely significantly increase visitation by other categories of visitors. In sum, there is little to no support for predictions that the Final Rule will harm tourism and the local economy.

Moreover, those who want to drive on the beach continue to visit the Seashore in large numbers. Over 11,500 ORV permits have been sold since the Final Rule went into effect on February 15, 2012

## *The Final Rule*

The Final Rule this bill would overturn should be given a chance to build on the Consent Decree's success. The public process informing the National Park Service's management plan included numerous public meetings, a negotiated rulemaking process that included opportunity for public comment at each monthly meeting, and two public comment periods, during which tens of thousands of people commented on the draft Final Rule and its supporting environmental impact statement. The NPS received 21,258 written comments on the draft rule, the vast majority of which were in favor of greater wildlife protections and ORV restrictions.

The Park Service's extensive review culminated in lengthy economic reports and cost-benefit analyses, an environmental impact statement that examined six alternatives to the Final Rule, and a detailed biological opinion issued by the U.S. Fish & Wildlife Service, all of which supported the Final Rule as it was written. The management measures in the Final Rule are based on a robust scientific record supported by leading experts. In contrast, the Interim Strategy that this Bill would reinstate is not supported by science and would cause wildlife to decline.

The Final Rule provides a balanced approach to Seashore visitation, reserving 28 miles of Seashore beaches as year-round ORV routes and an additional 13 miles as seasonally open to ORVs, but reserved for pedestrians during the peak tourism seasons. Sixty two percent of the Seashore's beaches are designated ORV routes. Most other national seashores either have regulations in place to manage and restrict ORV use or do not allow ORV use at all; only one national seashore continues to allow beach driving without a regulation in place, and it is working on one. Four national seashores have long prohibited ORVs entirely, while the remaining ones have regulations restricting ORV use. All of those (except Padre Island, by operation of Texas state law), allow driving on a much smaller percentage of their beaches than does the Hatteras Final Rule. Thus, if anything, the number of miles Cape Hatteras's beach set aside for ORV use in the Final Rule is unreasonably large rather than overly restrictive.

The Rule designates 26 miles as year-round vehicle-free areas for pedestrians, families, and wildlife, to promote pedestrian access and reduce user conflicts between motorized and non-motorized visitors. The new plan also proposes new parking facilities, access ramps, and water shuttles to increase visitor access to beaches. We have supported the NPS's proposal of, and planning for, those facilities, and support additional appropriations to make those proposals a reality.

Wildlife protection measures in the Final Rule generally follow those in place for four years under the Consent Decree and are designed to allow ORV and pedestrian access consistent with giving a chance to birds and turtles that nest on the beach. U.S. Geological Survey recommendations for wildlife management at Cape Hatteras National Seashore used "best available information," including "published research as well as practical experience of scientists and wildlife managers" and were peer reviewed by more than 15 experts. Buffers to prevent disturbance are set up and closed to ORV or pedestrian entry only when birds attempt to nest and are removed once the nest fails or the chicks fledge. The buffers are species-specific and based on the peer-reviewed recommendations of scientists at the U.S. Geological Survey. Sea turtles are protected by prohibiting night driving on the beaches during turtle nesting season, posting nests, and establishing corridors to the beach for hatchlings just prior to hatching.

In sum, the Final Rule designates nearly two-thirds of the Seashore beaches as year-round or seasonal ORV routes, provides some pedestrian-only areas for the vast majority of visitors who are non-ORV users, and allows pedestrians access to all the beaches except for minimal disturbance buffers around nesting birds during the breeding season.

### ***Interim Strategy***

S 2372 would ignore four years of planning, the comments of tens of thousands of citizens, and the best available science, and it would return Cape Hatteras National Seashore to the failed protocols of the Interim Protected Species Management Strategy that proved to be devastating to birds, sea turtles, other natural resources, and the public's enjoyment of the Cape Hatteras National Seashore beaches prior to the introduction of the Consent Decree.

The Interim Strategy, to which S 2372 seeks to revert, was not developed as a long-term solution for managing ORV use at Cape Hatteras, but rather expressly and repeatedly states that it was intended only to be implemented temporarily "while a long-term ORV management plan is developed." The Interim Strategy references specific guidance on species management developed for the Seashore by U.S. Geological Survey scientists and then explains this "best scientific information" is not fully incorporated in the Interim Strategy. In sum, management under the Interim Strategy will harm wildlife.

The USFWS Biological Assessment for the Interim Strategy reiterates that it will negatively impact the natural resources of the Seashore in the long-term. It concludes that under the Interim Strategy "there may be risk of disturbance, injury or death if the ORV by-pass is within the area utilized by the [piping plover] brood" and that "[t]here could also be negative impacts if disturbance from the ORV route restricted the brood's movements." The Biological Assessment of the Interim Strategy's analysis of the Strategy's effect on sea turtles states that "negative impacts [of night driving] on nesting females in the surf zone may be particularly severe" and observed that the NPS at Cape Hatteras and Cape Lookout are "the only federal agencies within the nesting range allowing night time driving on beaches."

In contrast to the Final Rule, the Interim Strategy that S 2372 seeks to reinstate:

1. Was not supported by the same degree of public participation and contradicts the wishes of the vast majority of people who commented on the Final Rule;
2. Is not supported by any data or evidence that it will have a greater positive impact (or avoid a negative impact) on tourism than the Final Rule;
3. Is not supported by an environmental impact statement or extensive economic studies;
4. Will reserve an extraordinary percentage of the miles of Seashore beaches for a small minority of park users, to the exclusion of the majority of park users who do not visit the Seashore to drive ORVs on the beaches;
5. Is not supported by the great weight of scientific literature is;
6. Was responsible, in part, for the decline in population of the many protected species at the Seashore by 2007; and

7. Will undermine the goals and requirements of the Park Service Organic Act to manage our parks so as to leave them unimpaired for future generations, and the enabling act for the Seashore to preserve the unique flora and fauna of the region.

### ***Conclusion***

The National Park Service's Final Rule for managing ORV use on Cape Hatteras National Seashore is supported by facts and reason, and will maintain balanced access for all visitors to the Seashore while providing enhanced protection to wildlife. The Final Rule is the outgrowth of several years of planning and public participation. It builds on the management measures in place at Cape Hatteras for the last four years during which visitation and tourism flourished and wildlife began to rebound on the Seashore. Please oppose S 2372, and instead support the National Park Service's common sense management plan.

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# PHOTOGRAPHS OF CAPE HATTERAS NATIONAL SEASHORE

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NATIONAL PARK SERVICE

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NATIONAL PARK SERVICE

*"...to conserve the scenery...and wildlife therein...and leave them unimpaired for the enjoyment of future generations."*  
— National Park Organic Act of 1916.

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*"...permanently preserved as a primitive wilderness. No...plan for the convenience of visitors shall be undertaken which would be incompatible...with preservation of the unique flora and fauna."*  
— Cape Hatteras National Seashore Enabling Act of 1937.

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