

**STATEMENT OF HERBERT FROST, ASSOCIATE DIRECTOR, NATURAL RESOURCE STEWARDSHIP AND SCIENCE, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON NATIONAL PARKS OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, CONCERNING S. 2372, TO AUTHORIZE PEDESTRIAN AND MOTORIZED VEHICULAR ACCESS IN CAPE HATTERAS NATIONAL SEASHORE RECREATIONAL AREA, AND FOR OTHER PURPOSES**

**June 27, 2012**

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 S. 2372, a bill entitled "to authorize pedestrian and motorized vehicular access in Cape Hatteras National Seashore Recreational Area, and for other purposes."

The Department strongly opposes S. 2372. This bill would reinstate the 2007 Interim Protected Species Management Strategy (Interim Strategy) governing off-road vehicle (ORV) use at Cape Hatteras National Seashore (Seashore). In response to a lawsuit challenging its adequacy, the Interim Strategy was modified by a court-approved Consent Decree on April 30, 2008. The Seashore was managed under the Consent Decree through 2011. Meanwhile, the final ORV Management Plan / Environmental Impact Statement (EIS), and special regulation went into effect on February 15, 2012.

The Department supports allowing appropriate public use and access at the Seashore to the greatest extent possible, while also ensuring protection for the Seashore's wildlife and providing a variety of visitor use experiences, minimizing conflicts among various users, and promoting the safety of all visitors. We strongly believe that the final ORV management plan and special regulation will accomplish these objectives far better than the defunct Interim Strategy.

The final ORV management plan for the first time provides long-term guidance for the management of ORV use and the protection of affected wildlife species at the Seashore. The plan is designed to not only provide diverse visitor experience opportunities, manage ORV use in a manner appropriate to a unit of the National Park System, and provide a science-based approach to the conservation of protected wildlife species, but also to adapt to changing conditions over the life-span of the plan. It includes a five-year periodic review process that will enable the NPS to systematically evaluate the plan's effectiveness and make any necessary changes.

The Seashore's dynamic coastal processes create important habitats, including breeding sites for many species of beach-nesting birds, among them 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 these species experienced declines in breeding population at Cape Hatteras over the 10–20 years prior to the implementation of the Consent Decree in 2008. For example, in 1989 the Seashore had 15 breeding pairs of piping plovers; and by 2001-2005, that number had dropped to only 2-3 pairs 2

attempting to nest each year. The numbers of colonial waterbird nests within the Seashore also plummeted from 1,204 nests in 1999 to 320 nests in 2007.

Under the National Park Service Organic Act, the Endangered Species Act, the Migratory Bird Treaty Act, the Seashore's enabling act, and National Park Service (NPS) regulations and policies, the NPS has an affirmative responsibility to conserve and protect all of these species, as well as the other resources and values of the Seashore. Executive Order 11644 (1972), amended by Executive Order 11989 (1977), requires the NPS to issue regulations to designate specific trails and areas for ORV use based upon resource protection, visitor safety, and minimization of conflicts among uses of agency lands. The regulation that the NPS subsequently promulgated (36 C.F.R. § 4.10) requires the NPS to designate any routes or areas for ORV use by special regulation and in compliance with Executive Order 11644.

The special regulation that went into effect on February 15 brings the Seashore into compliance with that regulation and with the Executive Orders and other applicable laws and policies, after many years of non-compliance. In addition to resource impacts, the approved plan addresses past inconsistent management of ORV use, user conflicts, and safety concerns in a comprehensive and consistent manner.

The Interim Strategy was never intended to be in place over the long-term. At the time it was developed, the Seashore had no consistent approach to species protection and no ORV management plan or special regulation in place. While the Interim Strategy took an initial step toward establishing a science-based approach, key elements such as buffer distances for American oystercatchers and colonial waterbirds, and the lack of night driving restrictions during sea turtle nesting season, were inconsistent with the best available science. The 2006 USFWS biological opinion for the Interim Strategy indicated that it would cause adverse effects to federally listed species, but found no jeopardy to those species mainly because of the limited duration of implementation (expected to be no later than the end of 2009).

Similarly, the 2007 NPS Finding of No Significant Impact (FONSI) for the Interim Strategy indicated the action had the potential to adversely impact federally listed species and state-listed species of concern, but found that a more detailed analysis (an EIS) was not needed because of the limited period of time that the Interim Strategy would be implemented.

By contrast, the species-specific buffer distances and the night driving restrictions contained in both the Consent Decree and in the plan/EIS are based on scientific studies and peer-reviewed management guidelines such as the U.S. Fish and Wildlife Service (USFWS) Piping Plover and Loggerhead Turtle Recovery Plans, and the U.S. Geological Survey (USGS) Open-File Report 2009-1262 (also referred to as the "USGS protocols,") on the management of species of special concern at the Seashore. Buffer distances for state-listed species are based on relevant scientific studies recommended by the North Carolina Wildlife Resources Commission, USFWS, and USGS.

Although breeding success depends on a number of factors, with the measures in place under the Consent Decree, there has been a striking improvement in the condition of protected beach-nesting wildlife species. The Seashore has experienced a record number of piping plover pairs and fledged chicks, American oystercatcher fledged chicks, least tern nests, and improved 3

nesting results for other species of colonial waterbirds. The number of sea turtle nests also significantly increased, from an annual average of 77.3 between 2000-2007 to an average of 129 between 2008-2011. These improvements occurred even though many miles of beach remained open, unaffected by species protection measures, and Seashore visitation numbers remained stable.

During the preparation of the EIS for the management plan, the NPS evaluated the potential environmental impacts of long-term implementation of the Interim Strategy. The analysis determined that if the Interim Strategy were continued into the future, it would result in long-term, moderate to major adverse impacts to piping plovers, American oystercatchers, and colonial waterbirds, and long-term, major adverse impacts to sea turtles. Impacts to sea turtles and three species of colonial waterbirds had the potential to rise to the level of “impairment,” which would violate the National Park Service Organic Act.

Because the number of nesting birds has increased significantly since 2007, if the Interim Strategy were to be reinstated, it could be counterproductive to visitor access. Many popular destinations, such as Cape Point and the inlet spits, would still experience resource protection closures, particularly when highly mobile piping plover and American oystercatcher chicks are present. Several of the beach-nesting bird species at the Seashore may renest several times during the same season if eggs or very young chicks are lost. Under the Consent Decree, with its science-based buffers, there has been a noticeable reduction in the number of renesting attempts for piping plovers and American oystercatchers, which means the duration of closures is typically shorter. No matter which management approach is in effect, the birds will continue to attempt to nest at these sites, even if resource protection is inadequate, because that is where the most suitable habitat is located. The Interim Strategy would allow a higher level of human disturbance in proximity to nests and chicks at these key sites, which increases the chances that nests and young chicks will be lost, which in turn increases the likelihood that birds will renest one or more time at those sites. This could extend the length of time that any particular site would be closed due to breeding activity, even if the apparent size of the closure is smaller than that under the ORV plan or Consent Decree.

In addition to reinstating the Interim Strategy, S. 2372 provides authority for additional restrictions only for species listed as “endangered” under the Endangered Species Act of 1973, and only for the shortest possible time and on the smallest possible portions of the Seashore. This would conflict with numerous other laws and mandates including the National Park Service Organic Act, the Migratory Bird Treaty Act, the Seashore’s enabling act, the aforementioned Executive Orders, and NPS regulations implementing these laws, which provide for the protection of other migratory bird species and other park resources.

S. 2372 also provides that the protection of endangered species at Cape Hatteras shall not be greater than the restrictions in effect for that species at any other national seashore. Species protection measures cannot reasonably be compared from seashore to seashore without considering the specific circumstances at each site and the context provided by the number and variety of protected species involved, the levels of ORV use, and the underlying restrictions provided by the respective ORV management plans and special regulations. Even though Cape Hatteras has a wider variety of beach nesting wildlife species than Cape Cod or Assateague, for 4

example, its plan actually allows for a much higher level of ORV use on larger portions of the Seashore. It would be neither reasonable nor biologically sound for Cape Hatteras to use less protective measures if they were designed for a location where the level of ORV use is much lower to begin with. Nor does it appear that such an arbitrary approach could possibly comply with the “peer-reviewed science” requirement imposed elsewhere in the bill. The Cape Hatteras plan was specifically designed to be effective for the circumstances at Cape Hatteras.

The bill would require, to the maximum extent possible, that pedestrian and vehicle access corridors be provided around closures implemented to protect wildlife nesting areas. This concept was thoroughly considered during the preparation of the plan and EIS. The plan already allows for such access corridors when not in conflict with species protection measures. But because of the Seashore’s typically narrow beaches, and the concentrations of nests at the best available habitat near the inlets and Cape Point, nesting areas are often close to the shoreline, and access corridors cannot always be allowed without defeating the fundamental purpose of such closures, which is to protect beach-nesting wildlife. Several species of shorebirds that nest at the Seashore have highly mobile chicks, which can move considerable distances from nests to foraging sites. Inadequate resource closures in the past have resulted in documented cases of human-caused loss or abandonment of nests and chick fatalities. Corridors that cut through a resource closure area would essentially undermine the function of the closure and render it compromised or even useless.

Finally, the final ORV management plan/EIS and special regulation, are the products of an intensive five-year long planning process that included a high level of public participation through both the National Environmental Policy Act (NEPA) process and negotiated rulemaking, including four rounds of public comment opportunities. The NPS received more than 15,000 individual comments on the draft plan/EIS and more than 21,000 individual comments on the proposed special regulation. In completing the final ORV management plan/EIS and special regulation, the NPS considered all comments, weighed competing interests and ensured compliance with all applicable laws.

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