

May 25, 2023

via E-Mail and U.S. Mail

David Hallac, Superintendent
Cape Hatteras National Seashore
1401 National Park Drive
Manteo, NC 27954

Re: Impairment of Cape Hatteras National Seashore by Collapsing Houses and Failing Septic Systems

Dear Superintendent Hallac:

The Southern Environmental Law Center, on behalf of the North Carolina Coastal Federation, writes to draw your attention to the imminent threats to public health, welfare, and safety and the ongoing degradation of valuable natural resources created by collapsing houses and exposed and abandoned septic tanks in the village of Rodanthe. The National Park Service has a duty to eliminate hazards that threaten visitor safety and to protect and preserve Cape Hatteras National Seashore for the safe use and enjoyment of this and future generations, but the circumstances at Rodanthe are creating unacceptable risks to these values. It is imperative that NPS fulfill its duty to the public and the nation by acting swiftly to address the deteriorating houses and unsanitary septic conditions before even more people are put at risk.

Background

Five houses have collapsed in Rodanthe since 2020, four of which have fallen within the last 15 months. Each has left a miles-long debris field in its wake, littering the beaches of Cape Hatteras National Seashore and neighboring properties with dangerous nails, boards, and an array of hazardous materials, including insulation foam, drywall, asphalt shingles, household chemicals, fiberglass shards, and items potentially containing lead and asbestos. Other houses in Rodanthe are damaged, leaning, and on the verge of collapse. And as many of the oceanfront houses in Rodanthe have become increasingly unstable, their septic tanks have also become exposed and unmoored, often before the house itself collapses—directly discharging sewage onto public beaches and into ocean waters. This untenable situation poses unacceptable health and safety risks to residents of the Outer Banks and visitors to Cape Hatteras National Seashore alike, and the National Park Service (“NPS”) has an obligation to protect the Seashore’s visitors as well as its natural resources. Three of the five house collapses to occur in Rodanthe since 2020 have happened during the month of May, when park visitation rates typically begin to accelerate,

and, as in past years, the number of visitors to the area this year can be expected to grow tremendously over the next several months of summer.¹

Due to the rapid rates of shoreline erosion at Rodanthe, approximately 6 to 14 feet of beachfront is being lost each year, depending on the precise location.² Houses that were once built comfortably inland are now precariously straddling the sandy shoreline or even situated fully on the wet sand beach in some cases, and septic tanks that may have once been adequately buried with their septic fields above the water table are now discharging human waste directly onto the sandy beach or into the ocean.³ On May 29, 2020, a house on 23238 Sea Oats Drive in northern Rodanthe disappeared into the ocean in the middle of the night. Then, in 2022, three different houses from the same street toppled into the sea—the first at 24183 Ocean Drive on February 9, 2022, and the next two at 24235 Ocean Drive and 24265 Ocean Drive, both on May 10, 2022. Most recently, yet another Rodanthe house fell on March 13, 2023, at 23228 East Point Drive, leaving a debris field in its wake that stretched a whopping 21 miles south to the village of Avon.⁴

Unfortunately, the barrier island beaches of the Outer Banks are particularly vulnerable to increases in sea level rise, hurricanes, and erosion, and these threats are only getting progressively worse as a result of climate change. Increases in global temperatures are linked to increases in sea level rise,⁵ and accelerating sea level rise along the Atlantic coast of the United States will further increase coastal erosion rates.⁶ The National Oceanic and Atmospheric Administration 2022 Sea Level Rise Technical Report shows that under the most likely modeling scenarios, Cape Hatteras will experience between approximately 1.7-2.1 feet of sea level rise by 2060 and 4.0-5.4 feet by 2100.⁷ Coastal erosion will also be exacerbated by other climate-induced changes such as increased storm intensity and changes in prevailing currents, both of which are projected to lead to increased erosion and beach loss. The Atlantic coast already sees

¹ More than two-thirds of the roughly 2.86 million visitors to Cape Hatteras National Seashore in 2022 visited between May and September. See National Park Service, Public Statistics Office, [https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Summary%20of%20Visitor%20Use%20By%20Month%20and%20Year%20\(1979%20-%20Last%20Calendar%20Year\)?Park=CAHA](https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Summary%20of%20Visitor%20Use%20By%20Month%20and%20Year%20(1979%20-%20Last%20Calendar%20Year)?Park=CAHA).

² Online GIS Layer, *Erosion Rates (2020) – Oceanfront*, N.C. Div. Coastal Mgmt., <https://ncdenr.maps.arcgis.com/home/item.html?id=64fe39e71e5747e4859c44b42f7ad7a4>.

³ See, e.g., Catherine Kozak, *A cycle of septic repairs, washouts on park service beaches*, Coastal Review Online (Nov. 4, 2022), <https://coastalreview.org/2022/11/a-cycle-of-septic-repairs-washouts-on-park-service-beaches/>.

⁴ National Park Service, *News Release: Cape Hatteras National Seashore Implements Response to March 13 House Collapse* (March 14, 2023), <https://perma.cc/VWV9-Y6JG>; see also Cape Hatteras National Seashore Flickr – 23228 East Point Drive, <https://perma.cc/9SWZ-4FEW>.

⁵ William V. Sweet et al., *Sea Level Rise*, in *Climate Science Special Report: Fourth National Climate Assessment*, Volume I, 333 (Donald J. Wuebbles et al. eds., 2017).

⁶ See Stephen P. Leatherman et al., *Sea Level Rise Shown to Drive Coastal Erosion*, 81 *EOS* 55, 56 (2000); Roshanka Ranasinghe et al., *Climate Change Impact Assessment for Inlet-Interrupted Coastlines*, 3 *Nature Climate Change* 83 (2013).

⁷ Sea Level Rise Viewer for Cape Hatteras, NC, <https://coast.noaa.gov/slr/#/layer/slr> (select “local scenarios;” then search “Cape Hatteras, NC”; Intermediate and Intermediate-High modeling scenarios) (last visited May 24, 2023) (see <https://perma.cc/EDS3-ENNR>).

more Category 4 and Category 5 hurricanes compared to the 1980s, and North Carolina ranks second among U.S. states for the number of tropical storms and hurricanes that have affected its shores.⁸ Even a single hurricane or major storm can remove considerable amounts of sand from a beach, particularly if that beach has been artificially filled.⁹

Allowing the cycle of collapse and contamination to continue contradicts various laws and policies that govern the National Park Service's management of its units, including the Organic Act, the Service's mission statement, several federal regulations, and the National Park Service Management Policies 2006 ("Management Policies"). NPS must act immediately to abate the exposed or abandoned septic tanks that can endanger the health of the public and the environment in Rodanthe before thousands of beachgoers are exposed to raw sewage. NPS must also act immediately to mitigate public health hazards created by debris remaining from prior collapses and to eliminate the risk caused by those houses that have been identified as the most likely to collapse next. In addition, since the dangers of collapsing houses and exposed septic tanks observed at Rodanthe will only become more pervasive as a result of climate change, NPS must develop and implement a systematic approach to addressing these issues *before* another house falls onto the foreshore or a septic tank floats into the ocean.¹⁰ It is imperative that NPS use the full extent of its legal authorities to prevent and mitigate the public health hazards created by unstable homes before they predictably become dangerous and unmanageable debris fields.¹¹ We ask that you fulfill the National Park Service's duty to protect the public, preserve Cape Hatteras National Seashore for this and future generations, and enforce applicable laws and regulations in order to respond to these present threats and stop the ongoing and highly predictable cycle of collapsing houses and exposed septic tanks rendering the seashore's beaches unsafe. Below, we discuss some of the laws that establish the Service's duties and support our request.

The Hazards Posed by Collapsing Houses and Compromised Septic Systems Violate the National Park Service Organic Act and Related Laws

The National Park Service has a mandatory duty to protect and preserve Cape Hatteras for the safe use and enjoyment of present and future generations. In creating the National Park Service in 1916, Congress passed the National Park Service Organic Act and directed the Service to manage units like Cape Hatteras "by means and measures" that serve its purpose "to conserve

⁸ Brian Donegan, *North Carolina Second Only to Florida for U.S. Tropical Storms and Hurricanes*, The Weather Channel (Sept. 11, 2018), <https://weather.com/storms/hurricane/news/2018-06-05-map-shows-how-many-tropical-storms-hurricanes-struck-each-state>.

⁹ See, e.g., Michalis I. Voudoukas et al., *Sandy Coastlines Under Threat of Erosion*, 10 *Nature Climate Change* 260, 263 (Mar. 2, 2020); Jennifer M. Johnson et al., *Recent Shifts in Coastline Change and Shoreline Stabilization Linked to Storm Climate Change*, 40 *Earth Surface Processes and Landforms* 569 (2014).

¹⁰ The N.C. General Assembly declared the purposes of the public health system to include: preventing health risks and disease; identifying and reducing health risks in the community; detecting, investigating, and preventing the spread of disease; and promoting a safe and healthful environment. N.C. Gen. Stat. § 130A-1.1(a).

¹¹ See, e.g., *House Collapse in Rodanthe Leads to Large Debris Field Along the Beach*, Island Free Press (May 29, 2020), <https://islandfreepress.org/outer-banks-news/oceanfront-house-collapse-in-rodanthe-leads-to-large-debris-field-along-the-beach/>.

the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired of the enjoyment of future generations.”¹² The Organic Act further mandates that the “regulation of the various System units shall be consistent with and founded in” that purpose for “the common benefit of all the people of the United States.”¹³ It concludes by stating,

The authorization of activities shall be construed and the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established.¹⁴

From this mandate, the National Park Service developed a mission statement whereby it obligated itself to manage park units in a way that “preserves unimpaired the natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this and future generations.”¹⁵ In 1970, Congress enacted the National Park System General Authorities Act to further mandate the preservation of natural resources at National Parks for the benefit of present and future generations. That Act provides,

The authorization of activities [at units of the National Park System] shall be construed and the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established.¹⁶

With regard to Cape Hatteras in particular, Congress created Cape Hatteras National Seashore Recreational Area as a unit of the National Park System, subject to the above mission.¹⁷ It further dictated that the Seashore “shall be permanently reserved as a primitive wilderness and 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 or the physiographic conditions now prevailing in this area.”¹⁸

These federal requirements mandate that the National Park Service prioritize conservation of the Seashore for the public and for future generations and ensure that collapsing and close-to-collapsing houses and failing septic systems described above do not create health hazards and dangerous conditions on the beaches of Cape Hatteras. Objectively, no one visiting

¹² National Park Service Organic Act, 54 U.S.C. § 100101(a) (“Organic Act”).

¹³ 54 U.S.C. § 100101(b)(2).

¹⁴ *Id.*

¹⁵ National Park System Mission, <https://www.nps.gov/aboutus/index.htm>; National Park Service Management Policies 2006, at p. ii, https://www.nps.gov/subjects/policy/upload/MP_2006.pdf.

¹⁶ 54 USC 100101(b).

¹⁷ 16 U.S.C. § 459.

¹⁸ 16 U.S.C. § 459a-2.

the beach in front of the village of Rodanthe after a house has collapsed would recognize it as the unique primitive wilderness seashore that Congress directed the National Park Service to preserve when it created the Seashore for generations to enjoy.

The Park Service's authority – and duty – to act to remedy the current situation and act decisively to stop the harm being caused to the public caused by the collapsing houses and failing septic systems is bolstered by the Park's own interpretation of its boundaries. After passage of the laws that authorized Cape Hatteras National Seashore, the state of North Carolina conveyed land to the National Park Service to create the Seashore in 1958 with a boundary originally defined as the "lands, waters, and submerged lands from the mean low water line on the east to a stationary line 500 feet westward of the mean high water line of the Atlantic Ocean."¹⁹ The Department of the Interior's Southeast regional solicitor noted, "In places the private lands acquired between mean high water and the 500 foot line have eroded away, and the 500 foot line which was once the western boundary of the National Seashore has been engulfed by the waters of the Atlantic Ocean."²⁰ He concluded that, "where the foreshore has migrated westward of the 500 foot line, the lands between mean low and mean high water continue to be owned by the United States by virtue of the 1958 deed from the State of North Carolina."²¹ To the extent that the regional solicitor's advice leads the National Park Service to determine that the harms described above are being created by conditions on Park Service land, its authority and obligation to eliminate the hazards to public safety and natural resources is all the more clear.

Finally, the National Park Service Management Policies 2006 also obligate the National Park Service to address the situation at Rodanthe. The Management Policies state that the National Park Service must be guided by certain underlying principles, including that it should "ensure that conservation will be predominant when there is a conflict between the protection of resources and their use," and that it should "pass on to future generations natural, cultural, and physical resources that meet desired conditions better than they do today, along with improved opportunities for enjoyment."²² With regard to disposal of waste materials, the Management Policies contain an entire section on "Waste Management and Contamination Issues," which states that the National Park Service "recognizes the far-reaching impacts that waste products, contaminants, and wasteful practices have, not only on national park resources, but also on biotic and abiotic resources ..."²³ That section goes on to explain that the "disposal in parks of solid wastes generated by non-NPS activities" – such as results when a house collapses or a septic system fails near or on the wet sand beaches of Cape Hatteras – "is, in most cases, incompatible with national park values."²⁴ It requires that any such waste disposal "must comply with NPS

¹⁹ Memorandum from Horace G. Clark, Department of the Interior Regional Solicitor, Southeast Region, to David Vela, Regional Director, Southeast Region, National Park Service, 2 (August 27, 2009).

²⁰ *Id.* at 5.

²¹ *Id.*

²² National Park Service Management Policies 2006, at 2, 5, 10-13.

²³ *Id.* § 9.1.6.

²⁴ *Id.* § 9.1.6.1.

regulations” in order to “(1) prevent the deterioration of air and water quality; (2) prevent the degradation of natural and cultural resources; and (3) reduce adverse effects on visitor enjoyment.”²⁵

The Organic Act, National Park System General Authorities Act, the Cape Hatteras Enabling Legislation, and the Management Policies together create a mandate that the National Park Service act now, before more houses collapse and render miles of Cape Hatteras unsafe for use by Seashore visitors, before more septic systems pollute the beaches, and before anyone is seriously hurt.

Nuisance and Trespass Claims

In order to fulfill the duties and obligations imposed by the foundational laws described above, the National Park Service has several tools to address the harms caused by collapsing houses and failing septic systems. In other circumstances, the National Park Service has used common law claims to abate harms created by a nuisance or trespass on National Park System land.²⁶ In these cases, the Park Service sometimes brings such claims in conjunction with the federal regulations codified to govern such behavior, either in the same case or in related proceedings.²⁷ We ask that you use the full extent of your legal authorities, including trespass and nuisance laws, as applicable and appropriate, to address the ongoing threats caused by collapsing houses and failing septic systems at Cape Hatteras when other efforts to address these hazards fall short.

Under North Carolina common law, a private nuisance requires proof of “the existence of a substantial and unreasonable interference with the use and enjoyment of [plaintiff’s]

²⁵ *Id.*

²⁶ *United States v. Jenkins*, No. CV 208-149, 2009 WL 10702956 (S.D. Ga. Dec. 4, 2009) (describing nuisance and trespass claims against a person who built a building and septic system in violation of the terms of a 40-year estate within Cumberland Island National Seashore); *United States v. Skorepa*, No. 5:05 CV 750, 2005 WL 3634605 (N.D. Ohio Dec. 20, 2005) (lawsuit involving claims for trespass and violations of several federal regulations against a person who attempted to build a building on Cuyahoga Valley National Park land, drove across that land, and disposed of trash on that land, mistakenly believing it to be his own land); *United States v. Schmitt*, 999 F. Supp. 317 (E.D.N.Y. 1998) (lawsuit for trespass arising out of dock construction in excess of single dock allowed under grandfathered rights and construction debris at Gateway National Recreation Area); *United States v. 733 Acres of Land, More or Less, Situated in Town of Truro*, 552 F. Supp. 1 (D. Mass. 1982) (holding that “their presence on the land is in the nature of trespass” when owners of building did not remove it within specified period of time after underlying land became part of Cape Cod National Seashore).

²⁷ *United States v. Town of Lincoln Zoning Bd. of Appeals*, No. CIV. 12-10179-LTS, 2014 WL 3696026 (D. Mass. July 22, 2014) (discussing trespass claim and violation of 36 C.F.R. §5.7 in case involving house and road that existed at time Minute Man National Historic Park was expanded to include and/or surround them); *Jenkins*, 2009 WL 10702956, at *2 n.2 (discussing violation of 36 C.F.R. § 5.7 in context of nuisance and trespass claims); *Skorepa*, 2005 WL 3634605 at *3 (discussing violation of 36 C.F.R. §§ 2.14, 4.10, 5.7, 6.12 in context of a trespass claim); *United States v. Garfield Cnty.*, 122 F. Supp. 2d 1201, 1215 (D. Utah 2000) (discussing both trespass claims and violations of 36 C.F.R. § 5.7 in case involving unauthorized expansion of a road through Capital Reef National Monument).

property.”²⁸ A public nuisance is one that affects the wider community as opposed to affecting only an individual neighboring landowner. North Carolina courts have described a public nuisance as follows:

A public nuisance exists wherever acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights. . . .

To constitute a public nuisance, the condition of things must be such as injuriously affects the community at large, and not merely one or even a very few individuals.... Whatever tends to endanger life, or generate disease, and affect the health of the community; whatever shocks the public morals and sense of decency; whatever shocks the religious feelings of the community, or tends to its discomfort—is generally, at common law, a public nuisance²⁹

Similarly, one federal court defined a public nuisance simply as “the doing of or the failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience or injury to the public generally.”³⁰ Accordingly, the focus of a nuisance claim is the harm to either a neighboring landowner or to the public at large.

To establish a trespass, the offending activity must take place on Park Service land. North Carolina law requires that a plaintiff show: “(1) his possession of the property at the time the trespass was committed; (2) an unauthorized entry [on the land of the plaintiff] by the defendant [or the defendant’s property]; and (3) resulting damage to the plaintiff.”³¹ Generally, to be actionable, a trespass must either occur as the result of an abnormally dangerous activity or be an intentional or negligent entry on the plaintiff’s land.³² The focus of a trespass claim is an intentional or negligent “entry” onto the land of another.

Certain circumstances may give rise to legal violations under both nuisance and trespass. As an example, one court explained that an action that interferes with the flow of water and causes water to flow onto another person’s land, resulting in damage, can constitute both a nuisance and a trespass.³³ These cases are instructive in addressing the harms being caused by

²⁸ *Wagner v. City of Charlotte*, 269 N.C. App. 656, 671–72, 840 S.E.2d 799, 809 (2020) (quoting *Shadow Grp., LLC v. Heather Hills Home Owners Ass’n*, 156 N.C. App. 197, 200, 579 S.E.2d 285, 287 (2003)).

²⁹ *Twitty v. State*, 85 N.C. App. 42, 49, 354 S.E.2d 296, 301 (1987) (quoting *State v. Everhardt*, 203 N.C. 610, 617–18, 166 S.E. 738, 741–42 (1932))

³⁰ *E.g., United States v. Cnty. Bd. of Arlington Cnty.*, 487 F. Supp. 137, 139, 143 (E.D. Va. 1979) (nuisance action applying federal common law and citing Nuisances, 58 Am.Jur.2d); *United States v. Perry*, No. 2:14-CV-537, 2018 WL 11356695, at *5 (S.D. Ohio Nov. 7, 2018) (noting that analysis would be the same under state or federal common law for claim of trespass to federal land).

³¹ *Wagner*, 269 N.C. App. at 671–72, 840 S.E.2d at 809 (quoting *Shadow Grp., LLC*, 156 N.C. App. at 201, 579 S.E.2d at 287).

³² *Id.*

³³ *Shadow Grp., LLC*, 156 N.C. App. at 200-01, 579 S.E.2d at 287.

the collapsing houses and failing septic systems at Rodanthe.³⁴ For instance, once a house is determined to be so structurally debilitated that it is in imminent danger of collapsing and harming anyone on the public beach at the time, and the owner of the building fails to remedy the problems after receiving notice from government officials, the dangers likely constitute a public nuisance. And if the owner is notified of the danger that the building is creating but fails to remedy the situation, and the building later collapses and strews board with exposed nails, metal shards, broken glass, household chemicals, and other hazardous debris along miles of the Seashore's beaches, it creates an even greater nuisance by rendering portions of the Seashore unavailable for safe use by the public. In addition, the presence of the debris on Park Service property also creates a trespass. The owner's knowing failure to take action to eliminate a danger caused by his or her property after it has been brought to his or her attention rises to the level of knowledge or negligence to support the trespass claim. The same analysis can be applied to the various harms caused by a failing or detached septic tank that endangers the public health by leaking sewage onto Seashore beaches or that is physically located on the Seashore beaches.

Lest there be any doubt that Congress intended for the National Park Service to be able to address these harms on Park land, federal law provides that "any person that . . . injures any System unit resource is liable to the United States for response costs and damages resulting from the destruction, loss, or injury,"³⁵ and authorizes the government to "bring a civil action in United States district court against any person or instrumentality that may be liable under [the foregoing statute] for response costs and damages."³⁶ Congress also gave the National Park Service authority to adopt regulations to enforce the governing statutes and manage System units,³⁷ and the Park Service has, in turn, codified federal regulations (discussed in more detail in the next section) that, among other things, prohibit the creating and maintaining nuisances and trespassing on National Park Service lands.³⁸

³⁴ Notably, courts have endorsed applying these principles to require removal or destruction of a building without compensating the building owner if the building "is a nuisance threatening public health or safety, as that action is within the proper exercise of the State's police power." *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 40, 738 S.E.2d 819, 827 (2013) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030, 112 S.Ct. 2886, 120 L.Ed.2d 798, 821-22 (1992) and *Horton v. Gullede*, 277 N.C. 353, 362, 177 S.E.2d 885, 891 (1970), *overruled on other grounds*, *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982)).

³⁵ 54 U.S.C. §§ 100722; *United States v. Wild Rock W. Virginia*, No. 2:21-CV-00341, 2022 WL 1071531, at *2 (S.D.W. Va. Apr. 8, 2022) (damages recovered for common law trespass claim under System Unit Resource Protection Act); *United States v. Schmitt*, 999 F. Supp. 317, 368 (E.D.N.Y. 1998), *aff'd*, 28 F. App'x 63 (2d Cir. 2002) ("Under the delegation of Congress, the Secretary of the Interior has been given the responsibility to manage the public wildlife lands.").

³⁶ 54 U.S.C. § 100723.

³⁷ 54 U.S.C. §§ 100101, 100751.

³⁸ 36 C.F.R. §§ 5.13, 2.31.

Federal Regulations

In addition to the common law authority described above, federal regulations also provide for penalties to address the current situation at Rodanthe³⁹ and further emphasize the Park Service's duty to address the problems at Rodanthe. Depending on the circumstances, the regulations described below may be available to address health hazards and safety threats at Cape Hatteras: failing septic systems, collapsing houses, houses that are in imminent danger of collapsing, and perhaps even houses that are now located seaward of the mean high water line and therefore technically within park boundaries.

First, 36 C.F.R. § 2.14 ("Sanitation and Refuse") prohibits:

Disposing of refuse in other than refuse receptacles.
Polluting or contaminating park area waters or water courses.

...

In nondeveloped areas, the disposal of human body waste within 100 feet of a water source [or] high water mark of a body of water⁴⁰

Each of these violations occurs when a house collapses on a National Seashore beach and its debris is spread downshore by the tide, littering up to twenty miles of the Seashore's beaches. Even when a house has not yet collapsed, septic system failures can result in human body waste and other raw sewage being deposited on National Seashore property. The septic tanks themselves can become unmoored and end up on the wet sand beaches. The result is a tank containing human waste, sometimes leaking, that is not just "within 100 feet of the high water mark of the" ocean but actually in the water during high tides. Septic pipes sometimes become detached from the rest of the system and exposed, and, again, the result is a source for human waste to flow directly onto the beach. All of these scenarios create health hazards that endanger visitors to the Seashore and the entire community.

Similarly, 36 C.F.R. § 2.22 prohibits people from "abandoning property" on park land. This prohibition could apply to septic tanks and other detached parts of septic systems that end up on Seashore land as well as furniture, appliances, recreation equipment, and other similar property that ends up strewn along the beach along with the destroyed remains of a house after it collapses, when the owner fails to remove it.

³⁹ 36 C.F.R. § 1.3.

⁴⁰ 36 C.F.R. § 2.14 (a)(1), (6), (8), (9).

Finally, other Park Service regulations prohibit unauthorized construction,⁴¹ vandalism,⁴² obstruction,⁴³ trespass,⁴⁴ and creating nuisances⁴⁵ on Park land. In sum, all of these regulations give the National Park Service ample authority to fulfill its duty to protect the public by addressing the dangers caused by the imminently threatened houses at Rodanthe and their failing septic systems.

A Beach Nourishment Project at Rodanthe Would Not Fulfill the National Park Service's Duties

As explained above, the Organic Act obliges the National Park Service to manage units like Cape Hatteras “to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life” in order to “leave them unimpaired of the enjoyment of future generations”⁴⁶ The National Park Service mission statement echoes that sentiment by requiring it to manage park units in a way that “preserves unimpaired the natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this and future generations.”⁴⁷ With regard to Cape Hatteras National Seashore in particular, Congress mandated that it be 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 or the physiographic conditions now prevailing in this area.”⁴⁸ The National Park Service’s Management Policies reiterate these priorities generally,⁴⁹ and, with regard to beach nourishment in particular, they specifically provide that such projects be allowed “*only if* the superintendent first finds that the proposed

⁴¹ 36 C.F.R. § 5.7 (prohibiting “constructing, or attempting to construct a building, or other structure . . . upon . . . any park area”); *see supra*. n.27.

⁴² 36 C.F.R. § 2.31(a)(3) (prohibiting “[d]estroying, injuring, defacing, or damaging property or real property”). Large items of debris from collapsed houses deface the Seashore’s beaches and could physically damage Park Service property such as fences, signs, and buildings. Months after each house has collapsed in recent years, even after the large items of debris have been cleared, the beaches remain defaced with smaller pieces of carpet, shingles, nails, and other building materials.

⁴³ 36 C.F.R. § 2.31(a)(5) (“reckless obstruction of any . . . public passage.” When a house collapses, miles of beach may be rendered off limits and unusable by the public for days at a time, including both sections of beach that are available for off-road vehicle use and sections that are not).

⁴⁴ 36 C.F.R. § 2.31(a)(1) (prohibiting “entering or remaining in or upon property or real property not open to the public”). While the Seashore’s beaches are generally open to the public, at times sections of the Seashore’s beaches are closed to the public for various reasons, including for the safety of the public after and for the protection of wildlife. Septic system parts and portions of collapsed houses that end up within these enclosures constitute trespasses.

⁴⁵ 36 C.F.R. § 5.13 (prohibiting “the creation or maintenance of a nuisance upon the federally owned lands of a park area or upon any private lands within a park area under the exclusive legislative jurisdiction of the United States”).

⁴⁶ National Park Service Organic Act, 54 U.S.C. § 100101(a).

⁴⁷ National Park System Mission, <https://www.nps.gov/aboutus/index.htm>; National Park Service Management Policies 2006, at p. ii, https://www.nps.gov/subjects/policy/upload/MP_2006.pdf.

⁴⁸ 16 U.S.C. § 459a-2.

⁴⁹ National Park Service Management Policies 2006, at 2, 5, 10-13.

nourishment or activity will not impair park resources and values and that the proposed activity is consistent with park planning documents.”⁵⁰

Beach fill at Rodanthe will not meet the Park Service’s obligations laid out above to protect Cape Hatteras and its natural resources for the use and enjoyment of the public for future generations. It is well known that sea level is expected to rise at Cape Hatteras by as much as 1.7 to 2.1 feet by 2060 and 4.0 to 5.4 feet by 2100.⁵¹ In addition, the shoreline at Rodanthe is receding at a rate of 10 to 14 feet per year, while elsewhere on Cape Hatteras the erosion rate ranges up to 22 feet per year in particularly vulnerable spots.⁵² At most, a beach fill project could delay the next collapsed house by a year or two, until the newly placed sand has eroded, while in the meantime degrading the natural resources and other values of the National Seashore in violation of the Service’s duties under the various federal laws listed above. Moreover, such a project would neither serve the spirit nor satisfy the constraints imposed by several specific management documents, including the “Dare County Highway 12 Task Force Report” issued last winter and the “Sediment Management Framework” adopted by the National Park Service in May 2021.

These conclusions are supported by the data and projections provided by Dare County itself. At the public meeting it held on January 18, 2023, the County presented information demonstrating that beach nourishment is simply not a feasible solution to address sea level rise, erosion, and the resulting failure of houses, septic systems, and other structures at Rodanthe. As you and Dare County Manager Bobby Outten so thoroughly explained at the January meeting, there simply is not enough money to pay for nourishing two or more miles of beach in front of Rodanthe, either in Dare County’s current coffers or in the NPS’s prioritized budgeting or to be raised from property taxes. And the recently released “Rodanthe Sand Needs Assessment” further confirms that beach nourishment is not a feasible solution. This study, commissioned by Dare County and released in mid-May, concluded that such a project would cost up to \$40.1 million for the initial placement of sand and could cost a total of \$175.3 million over a thirty-year period.⁵³

Accordingly, based on available data and the National Park Service’s obligation to prioritize conservation of the Seashore for the public and for future generations, beach nourishment should, therefore, only be used where necessary to preserve Park resources and protect infrastructure that benefits the public at large, and not where it will degrade and detract from the values for which Cape Hatteras was set aside.

⁵⁰ *Id.* at § 9.1.3.3 (emphasis added).

⁵¹ Sea Level Rise Viewer for Cape Hatteras, NC, <https://coast.noaa.gov/slr/#/layer/slr> (select “local scenarios;” then search “Cape Hatteras, NC”; Intermediate and Intermediate-High modeling scenarios) (last visited April 5, 2023).

⁵² N.C. Div. of Coastal Management Oceanfront Construction Setbacks and Erosion Rates (interactive map), <https://www.deq.nc.gov/about/divisions/coastal-management/coastal-management-oceanfront-shorelines/oceanfront-construction-setback-erosion-rate>.

⁵³ Coastal Science & Engineering, Rodanthe Sand Needs Assessment, Dare County, North Carolina, 19, 25-26 (2023).

Conclusion

In sum, we implore you to take action to prevent future contamination of Cape Hatteras National Seashore and to hold private property owners responsible for preventing and remediating the damage caused by their collapsing buildings and failing septic systems.

Sincerely,



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cc (via e-mail only):

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