IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

No. 2:13-cv-1-BO

CAPE HATTERAS ACCESS PRESERVATION ALLIANCE, Plaintiffs, v. KENNETH L. SALAZAR, *et al.*, Defendants, and DEFENDERS OF WILDLIFE, NATIONAL AUDUBON SOCIETY, AND NATIONAL PARKS CONSERVATION ASSOCIATION, Defendant-Intervenors.	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF CAPE HATTERAS ACCESS PRESERVATION ALLIANCE'S MOTION FOR SUMMARY JUDGMENT**

This 10th day of July, 2013.

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INTRODUCTION AND NATURE OF THE CASE

This case is based on the failure of the National Park Service ("NPS") to account adequately for recreational uses of the Cape Hatteras National Seashore Recreational Area ("CHNSRA" or "Park") and assess environmental and socioeconomic impacts when it established a Final Rule creating Special Regulations for CHNSRA ("Final Rule") and issued a Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD") for the official Off-Road Vehicle Management Plan for CHNSRA ("Final Plan").

Plaintiff, the Cape Hatteras Access Preservation Alliance ("CHAPA"), brings this civil action for judicial review against the U.S. Department of the Interior ("DOI") and the responsible agencies and officials within DOI, for multiple violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h (2006 & Supp. V), Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (2012), Cape Hatteras National Seashore Recreation Area Enabling Legislation ("Enabling Act"), 16 U.S.C. §§ 459-459a-10 (2006 & Supp. V), and National Park Service Organic Act ("Organic Act"), 16 U.S.C. §§ 1, *et seq*.

The Final Plan and Final Rule impose severe closures and restrictions on off-road vehicle ("ORV") use and other public access to and use of the beaches at CHNSRA—a result of an NPS planning process that was committed from the start to substantially reducing ORV use, regardless of public participation or the potential adverse impacts on visitor use and enjoyment of the area. In its drive to minimize ORV use, NPS ignored key provisions of the Enabling Act; failed to give meaningful consideration to any views or information that might be inconsistent with the agency's desired result; marginalized likely socioeconomic impacts on small businesses and the local economy on Hatteras and Ocracoke Islands; and adopted buffers and other restrictions unsupported by sound science and that unnecessarily limit recreational use and enjoyment of CHNSRA without commensurate benefits to bird and turtle species. The FEIS, ROD, and Final Plan are therefore arbitrary and capricious, and otherwise contrary to NEPA, APA, the Enabling Act, and the Organic Act.

STATEMENT OF FACTS

In 1937, Congress created CHNSRA as a national seashore recreation area under the management of NPS. The Enabling Act sought to preserve public access and use of CHNSRA for recreational purposes, and for commercial fishing. It directed that portions of the Park that are well-suited for recreational uses—including swimming, fishing, and other recreational activities—be developed for those uses, with other areas reserved as primitive wilderness.

ORV access to and over the area's beaches has been important to recreational use since before establishment of CHNSRA as a recreational area. In 1952, recognizing the recreational value of ORV access, NPS installed permanent beach access ramps throughout CHNSRA. Over the years, the area's unique, shore-oriented culture and economy expanded around this long-term, continuing use of ORVs. ORVs remain a critical part of the local culture and economy.

The beaches on CHNSRA traditionally have been used by the community for a wide and diverse range of activities—social, economic, and cultural. ORVs allow the public to access the beaches for recreational activities such as bird and wildlife viewing, fishing, shelling, swimming, and water sports. Many areas desirable and used for recreation are far from highways and parking areas and large areas of CHNSRA are not accessible by paved roads. ORV access allows equipment that is necessary for recreational use of the beaches to be transported easily, and visitors with disabilities, the elderly, children, and the health-disadvantaged to access the beach to enjoy activities that they would otherwise not be able to take advantage of.

Access by ORVs to the areas that support social and cultural activities must continue to ensure that this traditional way of life survives. Barrier island culture is a unique and disappearing way of life that needs to be preserved. The connection between the people of the Outer Banks and the surf zone is intangible. The surf zone is essential to defining the communities' sense of self. The transitional nature of the land that lies between the mainland and the ocean provides communities with a sense of place and sustains the collective identity of the people. Similarly, ORVs are also essential to commercial fishing operations. Commercial fishing long has been a source of revenue and livelihood for residents of

CHNSRA. Besides being specifically recognized in the Enabling Act, commercial fishing—especially commercial beach seining—has been practiced since the arrival of the original settlers to the area.

Access to the beach using ORVs is an essential component of the area's tourism-based economy. Family and locally-owned small businesses depend on tourists that come to experience the beaches of CHNSRA and the recreation it offers. Tourists occupy the motels and rent houses on the seashore, eat at the local restaurants, buy food at the grocery stores, prepare for recreational activities by buying necessary equipment, and buy souvenirs from local vendors.

Before 2005, CHNSRA was managed using a variety of draft or proposed plans, though none were finalized or used to promulgate a special regulation. In 2005, NPS commenced an effort to prepare and gain required approvals for an ORV management plan for CHNSRA. NPS also commissioned studies from the U.S. Geological Survey ("USGS") to manage several species at CHNSRA. NPS issued an Environmental Assessment ("EA") and a Finding of No Significant Impact ("FONSI") for an ORV management plan, and issued the Interim Protected Species Management Strategy ("IPSMS" or "Interim Strategy") on July 13, 2007 for ORV use in CHNSRA.

At the same time the IPSMS was being issued, NPS published a notice of intent to establish a negotiated rulemaking committee to negotiate and develop special regulations for management of ORVs within CHNSRA. The Negotiated Rulemaking Advisory Committee discussed many management issues, but after more than a year, it failed to reach any consensus on a proposed regulation for ORVs.

In October 2007, Defenders of Wildlife and the National Audubon Society filed suit in the U.S. District Court for the Eastern District of North Carolina challenging the IPSMS and the failure by NPS to issue a long-term plan and special regulation. The court issued a consent decree ("Consent Decree") in April 2008, which imposed conditions on the use of the IPSMS, including restrictions on prenesting sites for birds, buffers, ocean backshore closures, and night driving. The Consent Decree also imposed a deadline requiring issuance of a final plan by December 31, 2010 and issuance of a special regulation by April 1, 2011.

In March 2010, NPS issued a draft environmental impact statement ("DEIS") for the ORV management plan and special regulation. NPS held a 60-day comment period on the DEIS, during which CHAPA submitted substantive comments. NPS issued its FEIS on November 15, 2010. NPS published a proposed rule on July 6, 2011 ("Proposed Rule"), relying on the FEIS. CHAPA also submitted comments on the Proposed Rule. The Final Rule was published in the *Federal Register* on January 23, 2012.

Restrictions on ORV use in the Final Rule have severely reduced ORV *and* pedestrian access to the area's beaches and significantly impacted the local economy, without achieving additional species protection. Without ORVs, much of the beach within CHNSRA is effectively off-limits to the recreational fishermen that have fished the waters of CHNSRA for generations. Such restrictions also significantly limit other recreational activities at CHNSRA. These restrictions, in turn, have had collateral effects on the local economy that depends on such access, negatively impacting the numerous businesses that provide goods and services to visitors and area residents.

STANDARD OF REVIEW

"Summary judgment is appropriate when, after reviewing the record taken as a whole, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Moore v. Bennett*, 777 F. Supp. 2d 969, 973-74 (E.D.N.C. 2011) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). Judicial review of CHAPA's claims in this action is governed by the APA, which requires courts to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

NEPA "is a clear mandate to all federal agencies to give careful and informed consideration to environmental values in their decision making process." *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973) (citations omitted). Thus, in evaluating CHAPA's NEPA claims, the court must assure itself that NPS took "a 'hard look' at the environmental consequences" of its action, *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)), and "adequately considered and disclosed" those consequences before taking action. *Id*. at 97-98; *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir.

1996). To meet this standard, NPS was required to prepare an EIS that, in addition to ensuring that the agency takes a hard look at the environmental impacts, ensures that relevant information is made available to the public so they may meaningfully participate in the decisionmaking process and implementation of the decision. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

If the court is satisfied that the agency has taken the mandated "hard look" at the environmental effects of its proposed action, the court must then consider whether the agency's conclusions are arbitrary or capricious. *Hughes River*, 81 F.3d at 443. Thus, the court "must make a 'searching and careful' inquiry into the facts and a review of 'whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.'" *City of Alexandria v. Fed. Highway Admin.*, 756 F.2d 1014, 1017 (4th Cir. 1985) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977)); *see Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Hodges v. Abraham*, 300 F.3d 432, 438, 445 (4th Cir. 2002).

ARGUMENT

I. NPS Failed to Comply with the Enabling Act in Developing the Final Plan

NPS's issuance of the Final Plan and FEIS violate provisions of the Enabling Act that delineate two categories of lands within CHNSRA and establish different directives to apply to the development and management of each category. The Enabling Act expressly recognized the unique character of the islands and their communities, and sought to preserve public access to, and use of, CHNSRA for recreational purposes. Section 1 of the Enabling Act required that certain lands and waters on the Outer Banks of North Carolina be "established, dedicated, and set apart as a national seashore recreation area *for the benefit and enjoyment of the people*." 16 U.S.C. § 459 (emphasis added). And, Congress directed in section 4 that "certain portions of the area, deemed to be especially adaptable for recreational uses, particularly swimming, boating, sailing, fishing, and other recreational activities of similar nature, . . . shall be developed for such uses as needed" while the remainder of the area "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." 16 U.S.C. § 459a-2.

Thus, in establishing CHNSRA, Congress drew a clear distinction between portions "especially adaptable for recreational uses" and other portions of the CHNSRA, clearly mandating that the two types of areas be developed and managed differently. Accordingly, when NPS undertakes planning and management actions, it must first consider and determine which areas of CHNSRA are "especially adaptable for recreational uses." It must then develop and manage any areas so identified for such recreational uses. Although Congress did not specifically mention ORV use in the Enabling Act, ORV use historically has been, and remains today, an important means of access to recreational uses in CHNSRA.

Under the APA, "[i]nformal agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573-74 (10th Cir. 1994) (quoting *Citizens to Pres. Overton Park*, 401 U.S. at 413-14 n.30); 5 U.S.C. § 706(2); *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1335 (4th Cir. 1995). When the question before a reviewing court involves an agency's interpretation of a statute it administers, the court utilizes the two-step approach announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). When Congress has spoken to the precise question at issue, the court must give effect to the express intent of Congress. *See id.* If the statute is silent or ambiguous, however, the court defers to the agency interpretation, if it is a permissible one. *See id.* at 844.

Here, the specific question at issue is whether NPS acted contrary to the Enabling Act by failing to consider whether certain areas of CHNSRA are "especially adaptable for recreational uses," and then failing to consider whether any such areas should be developed and managed differently with respect to ORV use and the development and designation of ORV ramps and routes as a means of access for recreational uses. Congress clearly intended that these provisions impose *some* affirmative obligation

upon NPS in managing CHNSRA. The record, however, gives no indication that NPS gave *any* consideration to that obligation in developing the Final Plan and FEIS. The question therefore fails the first step of *Chevron*. But even if the statute were deemed to be ambiguous, the agency's interpretation is impermissible and fails the second step.

Even though CHAPA repeatedly raised this issue, NPS completely ignored the distinction between the two types of areas in developing the Final Plan and FEIS, and failed to even consider whether ORV use in areas "especially adaptable for recreational uses" should be regulated differently from other areas. In fact, other than several throwaway word-for-word restatements of section 4, *see, e.g.*, Administrative Record 37692-93, 37764, 37771, 37807 (hereinafter "AR"), the FEIS's only reference to this requirement is contained in the appendix addressing public comments on the DEIS. *See* AR 38681-84. The ROD also quotes the Enabling Act and states that NPS considered it, but nothing in the remainder of the document supports this statement. *See* AR 39759, 39768. Based upon the nature of the activities identified in the Enabling Act, areas "especially adaptable for recreational uses" should include all waters and shorelines of CHNSRA. NPS, however, never considered whether, and, if so, how, these areas should be managed differently from other areas of the Park. Instead, NPS effectively decided to manage all of CHNSRA for species preservation.[1] For example, NPS never considered whether the designation of ORV routes and the accompanying elements, such as buffer distances for birds, should differ in areas "especially adaptable for recreational uses" from the other areas of CHNSRA.[2]

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[1] Even NPS's impairment determination only addresses areas that it purports are to be managed as primitive wilderness. *See* AR 39786, 39788, 39790, 39793, 39796, 39799, 39803, 39805. "According to NPS *Management Policies 2006*, an action constitutes an impairment when its impact 'would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values' (NPS 2006, sec. 1.4.5)." AR 39783. Yet, NPS's impairment interpretation fails to identify the adverse impacts on recreational use and enjoyment of the Park's resources.

[2] The buffer distances proposed by NPS in each of its alternatives rely primarily on the USGS 2005 Recommendations for Management of Endangered Species at Cape Hatteras National Seashore ("USGS Protocols"), which are based only on species protection, and do not balance that objective with other relevant considerations. *See* AR 23687 (statement by Superintendent Michael B. Murray that given their "sole focus of resource protection without regard to other park management objective [*sic*], it is difficult to defend [the USGS Protocols] as 'good science' from constant attacks").

When it does reference section 4, NPS grossly misstates what it requires. NPS states that "[t]he Seashore's enabling legislation provides that outside those areas where the Seashore develops facilities to support recreation such as swimming, boating, sailing and fishing, the Seashore shall be permanently reserved as a primitive wilderness and the unique flora and fauna and physiographic conditions prevailing in the area preserved." AR 39786, 39788, 39790, 39793, 39796, 39799, 39803, 39805. But the Enabling Act does not require all areas *without developed facilities* to be managed as primitive wilderness. It requires that areas not "deemed to be especially adaptable for recreational uses" be so managed. The effect of NPS's erroneous interpretation is to expand significantly the Park area that is managed as primitive wilderness.

Further, in the comments appendix to the FEIS, NPS purports that it

> understands the language of the enabling legislation as authorizing it to provide infrastructure and facilities for visitors in selected areas to support recreational use, as needed (e.g. parking areas, day-use facilities for beach-goers, life-guarded beaches, boat launch areas, and campgrounds, ORV ramps), even though this would not be appropriate in primitive wilderness.

AR 38682. It further states that, because 16 U.S.C. § 459a-1 of the Enabling Act provides "that 'the administration, protection and development' of the Seashore shall be exercised 'subject to the provisions of sections 1, 2, 3, and 4 of this title,' with section 1 being the Organic Act, . . . recreation must be managed to provide for resource conservation." *Id*. However, Congress has made clear its intent that the agency's general authority over the park system be superseded by its responsibility to administer each particular park pursuant to the mandates of that park's enabling legislation. 16 U.S.C. § 1c(b); *see also Fund for Animals v. Mainella*, 294 F. Supp. 2d 46, 54 (D.D.C. 2003) (the enabling statute establishing a particular park controls over the general provisions of the organic statute). The Organic Act does not give NPS *carte blanche* to ignore provisions of a park enabling statute, as the agency has here.[3] Moreover, NPS's statement that it understands the Enabling Act's language to authorize ORV ramps, but apparently

[3] When two related statutes appear to conflict, courts have a duty to construe them harmoniously and give each effect. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

not ORV routes—which are akin to roads and are necessary for ramps to have any value—defies logic, and would render any applicability of the language to ORV ramps meaningless.

As NPS recognizes, although management of units of the National Park System generally is governed by the general provisions of the Organic Act, a different management direction may be required "where Congress explicitly directs specific treatment for particular park units." AR 38682. Yet, although NPS correctly states that the "Seashore's enabling legislation and the Organic Act must be read in tandem," *id.*, it is wrong when it makes the blanket statement that "the former supplements, but does not supersede, the latter," *id.*, as Congress's specific direction in a park enabling act certainly can supersede the general directions of the Organic Act. And it is particularly wrong when, other than in meaningless restatements and in its response to CHAPA's comment on the issue in an appendix to the FEIS, it completely ignores Congress's direction with respect to the management of areas deemed to be "especially adaptable for recreational uses." NPS cannot hide behind the Organic Act in an effort to ignore provisions of the Enabling Act that require heightened consideration of recreational uses. Such ignorance and failure is arbitrary and capricious, and otherwise contrary to the provisions of the Enabling Act, in violation of the APA.

II. NPS Violated NEPA by Failing to Take the Required "Hard Look" at the Environmental Impacts of the Plan

The Fourth Circuit has stated that, in examining whether the agency took the requisite "hard look" at a proposed action's environmental effects before acting, the court must "assess whether 'the adverse environmental effects of the proposed action [have been] adequately identified and evaluated' prior to final decisionmaking." *Hodges*, 300 F.3d at 445 (quoting *Robertson*, 490 U.S. at 350). As explained above, the court must ensure that the agency considered the relevant factors and that there was no clear error of judgment. NPS's planning decision here fails such scrutiny. It is replete with unsupported and conclusory assertions and lacking in rigorous analysis, it fails to give any meaningful consideration to certain relevant factors, and it demonstrates critical errors of judgment. NEPA demands more.

NPS has used two no action alternatives that misrepresent baseline conditions at CHNSRA, rendering it unable to assess accurately the impacts of alternatives on CHNSRA. In addition, both cultural and socioeconomic impacts of the alternatives were marginalized without rational reason. NPS failed to adequately analyze alternatives that included a range of buffer distances, or account for relevant factors when determining what buffer distances to include. Public participation in the NEPA process was impeded by a failure to provide documents with which NPS disagreed regarding cultural impacts for public review. Overall, NPS failed to take a "hard look" in its FEIS, rendering the FEIS inadequate and in violation of NEPA and the APA.

A. NPS's Use of Two No Action Alternatives, Neither of Which Represented the Proper Baseline for Evaluating the Environmental Impacts of the Various Alternatives, Was Arbitrary and Capricious.

The Council on Environmental Quality's ("CEQ") regulations require that the alternatives analysis in an Environmental Impact Statement ("EIS") must "[i]nclude the alternative of no action." 40 C.F.R. § 1502.14(d) (2012). The analysis of the no action alternative plays a critical role in establishing the proper baseline for an agency's NEPA analysis. It "provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, Question 3, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981) (hereinafter "*Forty Questions*"). "The 'no action' alternative . . . sets a baseline of existing impact continued into the future against which to compare impacts of action alternatives. This is important context information in determining the relative magnitude and intensity of impacts (*see also*, section 4.2(a))." DOI, NPS, Director's Order #12: Conservation Planning, Environmental Impact Analysis and Decision Making, Handbook for Environmental Impact Analysis 21 (2011) (hereinafter "DO-12 Handbook"), *available at* http://planning.nps.gov/document/do12handbook1.pdf. "[W]ithout [accurate baseline] data, an agency cannot carefully consider information about significant environment impacts . . . resulting in an arbitrary and capricious decision." *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085

(9th Cir. 2011). Use of the wrong baseline can result in an agency overstating or understating the potential impacts of the action alternatives. Accordingly, courts often find NEPA violations when an agency miscalculates the no action baseline or when the baseline assumes the existence of other conditions or projects. *See, e.g.*, *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1037-38 (9th Cir. 2008); *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 690 (M.D.N.C. 2001).

Here, despite CEQ's command that an agency examine only a singular no action alternative, and contrary to agency practice of only having a single no action alternative, NPS took the highly unusual step of adopting *two* no action alternatives. Alternative A proposed to manage ORV use and access at CHNSRA based on the FONSI and EA for the Interim Strategy and the Superintendent's Compendium 2007. Alternative B proposed to manage ORV use in the same manner as alternative A, except as modified by the Consent Decree. This alternative imposed earlier, larger, and longer-lasting ORV and pedestrian closures than Alternative A and, unlike Alternative A, contained certain restrictions on night driving.

Neither alternative, however, reflects the proper baseline for evaluating the environmental impacts of the various alternatives. The FEIS's choice of two no action alternatives that are not true no action alternatives and that already reflect movement toward the proposed action had the effect of impeding meaningful analysis and public comment, as well as obfuscating and grossly understating the impacts of the Final Plan and the other action alternatives on recreational, cultural, historic, and socioeconomic values and resources. NPS's failure to identify and assess a true no action alternative in the FEIS is contrary to NEPA and CEQ's regulations, and is arbitrary and capricious under the APA.

1. By Identifying Two Very Different Alternatives to Establish Baseline Conditions, NPS Confused the Extent of the Impacts of the Action Alternatives and Deprived the Public of the Clear, Transparent Review Process That NEPA Requires

In its comments, CHAPA repeatedly raised questions regarding the agency's choice of baseline and use of two no action alternatives, as the NEPA documents failed to make clear which of those

alternatives the agency used to measure the magnitude and intensity of the potential impacts of the various action alternatives. *See generally* AR 8464-89. Yet, rather than taking the opportunity to clarify the baseline for its analysis, NPS continued to obfuscate its alternatives analysis with its highly unusual use of two baseline alternatives.

Given the significant differences in management between the two alternatives, NPS cannot reasonably assert that Alternative A, which the agency asserts "represented the most recent NPS decision as to the management of the Seashore" at the "time the DEIS was initiated," AR 38526, *and* Alternative B, which the agency asserts reflected "current management," AR 38527-28, both represent a "no action" baseline from which potential impacts of the action alternatives may be analyzed. NPS claims that "the no-action alternative(s) provide a baseline of existing impacts continued into the future against which to compare the impacts of action alternatives." AR 38524. However, because management under Alternatives A and B differs significantly, the two alternatives represent different conditions, and therefore, the impacts of the various action alternatives, including their magnitude and intensity, measured against those conditions must be different. NPS cannot have it both ways.

NPS's use of *two* no action alternatives impeded meaningful public participation and deprived the public of the clear, transparent environmental review process that NEPA requires. "The very purpose of public issuance of an environmental impact statement is to 'provid[e] a springboard for public comment.'" *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) (quoting *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004)). NPS's use of two no action alternatives undermined that purpose. NPS's indifference to these concerns was arbitrary and capricious, and contrary to the requirements of NEPA.

2. Alternatives A and B Are Invalid as No Action Alternatives Because They Incorporate Changes to be Made in the Proposed Plan.

As CHAPA commented during the planning process, the two so-called no action alternatives also are invalid under NEPA because they reflect conditions that already incorporate some of the changes made in the planning process, enabling NPS to mask the true extent of the public access, recreation,

cultural and historic, and socioeconomic impacts of the various action alternatives. "A no action alternative in an EIS is meaningless if it assumes the existence of the very plan being proposed." *Friends of Yosemite Valley*, 520 F.3d at 1037-38; *see also N.C. Alliance for Transp. Reform*, 151 F. Supp. 2d at 690. By assuming the continuing operation of either the FONSI and EA for the IPSMS and the Superintendent's Compendium 2007 (Alternative A) or the Consent Decree (Alternative B) to create a no action scenario, which already imposed certain restrictions on ORV use and caused a certain level of impacts on recreational, cultural, historic, and socioeconomic resources and values, NPS was able to grossly understate the impacts of the various action alternatives on those resources and values by relying on the wrong baseline to analyze the impacts of the Final Plan. This enabled NPS to avoid taking the required "hard look" at the potential impacts of its proposed action.

The two identified no action alternatives improperly incorporate data from an ongoing planning effort, rather than using the state of management existing when the effort to determine and manage the impacts of ORV use was initiated. With respect to Alternative A, NPS's attempts to justify reliance on the IPSMS as an appropriate no action alternative by arguing that "[t]he IPSMS and the ORV management plan/EIS are two separate management documents with different purposes" are belied by the history and the record. AR 38525. The IPSMS's management objectives and the Final Plan's stated purposes are strikingly similar—generally, to manage ORV use and access in a manner consistent with management of protected species and other resources. *Compare* AR 65254-93 (IPSMS FONSI) and 37690 (FEIS); *id.* at 38525 (explaining that Alternative A comprises IPSMS Alternative D with some elements of IPSMS Alternative A, and further supporting the similar purpose and nature of the IPSMS and Final Plan). The Consent Decree issued as a result of the Intervenors' challenge to the IPSMS but also directing NPS to issue the Final Plan challenged in this case further demonstrates the integrated nature of the IPSMS, Consent Decree, and Final Plan. For NPS to then state that the IPSMS and Final Plan have different purposes, and to suggest that they are unrelated, is disingenuous at best.

Alternative B, incorporating the Consent Decree, raises even more significant concerns in this respect. If this Court were to uphold the use of Alternative B as a no action alternative, federal agencies

and parties to litigation would be free to craft consent decrees and other agreements, without public participation, to establish an entirely new set of baseline conditions, effectively allowing agencies to minimize the significance of impacts in NEPA compliance documents. Such a possibility could have a chilling effect on the purposes of NEPA.

Given that the current FEIS is part of the same ongoing planning effort that began with the development of the IPSMS, and continued through the Consent Decree, until the issuance of the Final Rule, neither Alternative A nor B can legitimately be viewed here as a true no action alternative. In fact, the Final Plan is the result of the same ongoing planning effort that began in 2005 and that generated both the IPSMS and the Consent Decree along the way. Both no action alternatives incorporate management changes made during and as part of the planning process. Accordingly, any no action alternative that incorporates elements of either the IPSMS or the Consent Decree, or data from the process leading to those documents, as do Alternative A and Alternative B, assumes the existence of the very plan being proposed and is meaningless, arbitrary and capricious, and in violation of NEPA.

CHAPA repeatedly has asserted that the management measures enforced in 2004—as reflected in the no action alternative referenced in the IPSMS assessment, the first step in NPS's effort to develop an ORV management plan and assess the impacts associated with management of ORVs on CHNSRA—should be the basis of the true no action alternative. *See generally* AR 8474-76; *see also* AR 38525. NPS, however, rejected the proposal because doing so "would fail to meet the agency's purpose and need to regulate ORVs in a manner that is consistent with applicable law, and would not appropriately address resource protection (including protected, threatened, or endangered species), potential conflicts among the various Seashore users, and visitor safety." AR 37820. In addition, NPS argued that doing so would not bring CHNSRA into compliance with "the criteria of Executive Orders 11644 and 11989 for designation of ORV routes." *Id.*

However, as NPS separately recognized in addressing comments on Alternative B, AR 38529-30, a no action alternative may provide a meaningful measure of baseline and potential future conditions against which the impacts of the action alternatives can be compared without itself being a reasonable

alternative. Contrary to NPS's assumption to the contrary, there is no requirement that a no action alternative meet the agency's purpose and need to be included in the EIS. *See, e.g.*, *Route 9 Opposition Legal Fund v. Mineta*, 75 Fed. Appx. 152, 154 (4th Cir. 2003) (unpublished) (identifying the no build alternative in the FEIS, but dismissing it from further consideration because it did not meet purposes and needs of highway project).

Indeed, because it represents the status quo, a no action alternative generally will not meet the purpose and need identified for the proposed action. Moreover, as CEQ has explained, "the regulations require the analysis of the no-action alternative even if the agency is under a court order or legislative command to act." *Forty Questions*, Question 3, 46 Fed. Reg. at 18027. As the DO-12 Handbook states,

> If choosing the true no action alternative (i.e., continuing as is) would violate laws or your park's own policies, you may want to add a 'minimum management' alternative to your range. This should not substitute for the no action alternative, because you may lose valuable information on existing impacts by not evaluating the impacts of ongoing activities.

DO-12 Handbook at 21.[4]

Allowing agencies the discretion to adapt no action alternatives to the extent they believe necessary to make them compatible with various laws, regulations, and other authorities would give agencies the power to distort their analyses of environmental impacts and undermine NEPA's primary purpose in requiring a no action alternative. That is just the sort of arbitrary and capricious action that NPS has taken here. Alternatives A and B should have been presented, if at all, as action alternatives, because they do not appropriately reflect current management direction or level of management intensity (but only reflect temporary court-ordered or other non-final, interim management) or set an appropriate "baseline of existing impact continued into the future against which to compare impacts of action alternatives" as required by CEQ guidance and the DO-12 Handbook. DO-12 Handbook at 21. NPS has provided no rational reason for rejecting the management measures enforced in 2004 as the basis of a

[4] With respect to no action alternatives for plan modifications, the DO-12 Handbook further states that "[a]s allowed by CEQ (Q3), you may group all existing plans and policies into an alternative to show the impacts of implementing them in the future. This alternative should be considered one of the action alternatives, rather than no action." *Id.* at 21-22.

single true no action alternative. The agency's obfuscation of the effects analysis through the use of two no action alternatives, and its failure to identify and use a true no action alternative against which to compare the effects of the various action alternatives is arbitrary and capricious and a violation of NEPA.

B. NPS Failed to Meaningfully and Accurately Assess the Social and Economic Impacts of the Final Plan's Restrictions on ORV and Pedestrian Beach Access and Use.

NEPA establishes a process of fully informed, participatory decisionmaking to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, *economic*, and other requirements of past, present, and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added). Thus, in an EIS, the agency must detail the economic and social impacts and take them into consideration. *See* 40 C.F.R. § 1508.14; DO-12 Handbook at 5; *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125-26 (8th Cir. 1999) (loss of revenue for local governments and area businesses within scope of NEPA's requirement for review of an action's effects on the human environment). NEPA regulations further explain that an agency is required to consider the impact of agency action "in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). EISs are to be based on "analysis and supporting data from the natural and social sciences and the environmental design arts." 40 C.F.R. § 1502.8(b). Agencies considering significant action must examine, *inter alia*, the "historic, cultural, economic, social, or health [effects of agency action], whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8; *see also* 40 C.F.R. § 1502.16(a), (b).

Here, NPS failed to evaluate sufficiently all of the significant social and economic effects of the plan. Among other critical errors, NPS underrepresented the magnitude of impacts to small businesses, which, as NPS recognized, comprise nearly the entire local economy. It failed to appropriately consider the substantial differences between the local communities most affected by the plan and more remote northern areas, allowing it to understate the economic impacts of the plan on those local communities. And, it cut short its assessment of socioeconomic impacts, including reversing its earlier plan to prepare a

regulatory flexibility analysis recommended by the Small Business Administration ("SBA") and failing to provide an opportunity for public review and comment on important surveys and studies, out of concern for meeting the Consent Decree deadline.

1. NPS's Characterization of the Economic Impacts of the Plan on Small Businesses as Negligible to Moderate is Arbitrary and Capricious

NPS's conclusion that, under the Final Plan, small businesses would be expected to experience long-term "negligible to moderate adverse impacts," AR 38362, is not supported by the record. The FEIS recognizes that "[t]he threshold for impacts on small businesses is lower than for the regional economy." AR 38337. Thus, the FEIS thresholds for small business impacts at the minor and moderate levels clearly state that "[n]o business closures or disproportionate impacts on small businesses would result." AR 38338. Further, the thresholds state that minor impacts involve a less than one percent ratio of change in revenue to total sales, while moderate impacts involve a one to three percent ratio of change. *Id.*

The FEIS clearly acknowledges that the plan will result in disproportionate impacts to small businesses:

> [S]mall entities may experience larger impacts than large entities because of decreased flexibility to respond to changes. Small businesses, such as recreation equipment, lodging, and restaurants, comprise the majority of businesses relying directly on ORV users as a large source of revenue. These small businesses may not have the resources to respond to increased fluctuation in visitation from year to year, and they may be disproportionately affected relative to large businesses.

AR 38336; *see* AR 38362 (recognizing that the uncertainty associated with Alternative F "may impact small businesses disproportionately"). The FEIS also suggests that the percentage change in revenue to total sales exceeds three percent. AR 38338. In this regard, the FEIS recognizes that 95 percent of business establishments in the region of influence ("ROI") and 98 percent of establishments in the Seashore Villages could be small entities. AR 38337. It then concludes that

> [t]he range of direct impacts by business category is projected to vary from 0% to a decrease of 50% for commercial fishermen, 0% to a decrease of 10% for other businesses in the Seashore villages, and 0% to a decrease of 2% in the rest of the ROI under alternative F (table 79).

AR 38361. Further, the visitor intercept survey found that an estimated six percent of respondents would be unlikely to have taken their trip under a scenario similar to Alternative F, and the small business survey found that the median change in expected revenue ranged from 12 percent to no change (consistent with an average of six percent). *Id.* Based upon these conclusions, under its own standards, NPS should have concluded that the impacts on small businesses were "major," rather than "negligible to moderate."

2. By Focusing its Economic Analysis on an Expansive ROI, NPS Understates the True Potential Economic Impact of the Plan on Local Communities

By expanding the geographic area of analysis to include larger towns, including Southern Shores and Duck, which have little connection to the ORV use and access issues that the Seashore villages—Ocracoke, Hatteras, Frisco, Buxton, Avon, Salvo, Waves, and Rodanthe—encounter, NPS masks the magnitude of the direct, indirect, and cumulative social and economic impacts of the Final Plan on the local communities most affected by the Final Plan.

The FEIS is replete with evidence that the Seashore villages have entirely different socioeconomic conditions from the northern beach communities of Southern Shores, Kitty Hawk, Kill Devil Hills, and Nags Head. In addition to the fact that, geographically, visitors must travel around these communities in order to reach the Seashore villages, the FEIS shows substantial differences in: unemployment rates, AR 38071; per capita income, AR 38065; places of birth, AR 38063; percentage of population living under the poverty line, AR 38067; and change in employment from 2000 to 2007, AR 38069. The FEIS further noted "growing differences in the population characteristics and income levels," AR 38062, with "especially rapid," *id.*, change in the northern areas and "smaller gains or reductions in employment," AR 38068, in other areas such as the Seashore villages.

Yet, despite these substantial differences in baseline socioeconomic conditions, NPS's recognition that economic activity in the ROI's northern communities dwarfs economic activity in the Seashore villages, *see, e.g.*, AR 38068 (recognizing that the Seashore villages represents only 13 percent of employees within the ROI), and NPS's acknowledgment that the Seashore villages will bear the brunt of the impacts of the Final Plan, NPS's conclusions inexplicably are presented on a regional, ROI level.

The FEIS concludes that the ROI could experience long-term negligible-to-minor adverse impacts, AR 38362-63, but it never characterizes whether the impacts on the Seashore villages will be negligible, minor, moderate, or major. Thus, by employing an ROI that includes the northern communities that dwarf the economic activity of the Seashore villages and that are substantially less directly affected by the plan than the Seashore villages, and then presenting its conclusion regarding the magnitude of economic impacts only on the basis of that larger ROI, NPS distorts and marginalizes the magnitude of economic impacts on the Seashore villages.

3. NPS's Arbitrarily and Capriciously Presumes That Economic Impacts Will be at the Low End of the Range of Effects

Throughout its assessment of economic impacts, the FEIS sets forth ranges of potential economic impacts that are so broad as to be effectively meaningless. *See, e.g.*, AR 38328 (Table 61). NPS then, without exception, marginalizes the economic impacts of the Final Plan's access and use restrictions by adopting the low end of these ranges. AR 37743. NPS attempts to justify its use of the low range of economic impacts of Alternative F by pointing to trends in NPS visitation statistics that it claims indicate that visitation to CHNSRA "has remained relatively steady during implementation of the Interim Strategy and the consent decree," AR 38334, presuming that "[t]he extra efforts to increase ORV access and pedestrian access should increase the probability that the impacts are low rather than high," AR 38362, and speculating that "the economy would likely adapt over to the implementation" of the Final Plan. *Id.* But, after acknowledging that "this does not provide information of what visitation might have been without the Interim Strategy or consent decree or how the mix of visitor spending may have changed in that time," NPS mysteriously concludes that "the information does not support projections of decreases in visitation under the no-action alternatives, or under action alternatives with similar ORV restrictions." AR 38334.

There are several problems with NPS's analysis. First, if NPS doesn't know what visitation would have been without the Interim Strategy or Consent Decree, how can it possibly conclude that additional restrictions would not further decrease visitation? Second, the selected alternative does not

impose "similar ORV restrictions" to the IPSMS or the Consent Decree and, as such, the comparison is misleading. If it did, then NPS should have selected a no action alternative. At some point, restrictions on access and use become so severe that visitors and businesses cannot reasonably adapt. Although NPS presumes that visitors and businesses *will* adapt, this assumption is belied by NPS's recognition elsewhere in the FEIS that it is difficult to predict how visitors will change their behavior over time, that the study it cites relating to adaption "does not provide proof that the economy will adapt," and that how visitors and the business community might adjust to the plan is uncertain. AR 38334-35; *see* AR 38363. NPS's assumption then that economic impacts on businesses will be minimized because the economy will adapt over time is severely flawed, resulting in NPS grossly underrepresenting the magnitude of the Final Plan's adverse economic impacts on the local economy.

4. NPS's Assessment of Socioeconomic Impacts was Inappropriately Cut Short by a Rush to Meet the Consent Decree Deadline

Instead of focusing on meaningful completion of the NEPA process, NPS's consideration of socioeconomic impacts was given short shrift as a result of the agency's overwhelming concern with meeting the deadline imposed in the Consent Decree. Because of this concern, public and congressional requests to extend the DEIS comment period were denied, a regulatory flexibility analysis of impacts on small businesses was not prepared as originally planned, and the public was denied the opportunity to review and respond to important information on economic impacts not finalized until after the closure of the DEIS comment period.

Courts have stated that they must use a "totality of the circumstances" approach to assessing NEPA compliance and thus "view deficiencies in one portion of an EIS in light of how they affect the entire analysis." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 186 (4th Cir. 2005). If the deficiencies in the way the process was conducted were "significant enough to defeat the goals of informed decisionmaking and informed public comment," *Utahans for Better Transportation v. U.S. Department of Transportation*, 305 F.3d 1152, 1162 (10th Cir. 2002), *modified on reh'g*, 319 F.3d 1207

(10th Cir. 2003), as in the instant case, then the court must find the EIS deficient and require that the agency undertake further review.

NPS has made it clear throughout the entire NEPA process that meeting the deadline imposed by the Consent Decree was paramount, and would occur whether the public was able to participate or not. For example, many members of the public, including organizations, members of Congress, and individuals, requested that the comment period for the DEIS be extended because 60 days was insufficient time to comment on a complex document that was over 800 pages long. AR 25803, 25809-10, 26156-67, 26220. NPS rejected all of these requests, explaining that it believed 60 days was ample opportunity for responding to the DEIS and that thousands of public comments had been received. AR 38673. However, the record shows that NPS's primary rationale was that extending the public comment period would make it extremely difficult to meet the deadline imposed by the Consent Decree. AR 25803, 25809, 26156.

Additionally, rather than prepare an analysis of indirect impacts under the Regulatory Flexibility Act, 5 U.S.C. §§ 601, *et seq.* , as recommended by the SBA, AR 30829, NPS took the position that the Final Rule would not directly regulate small businesses and would only have indirect economic effects, and, therefore, that no such analysis was required. AR 30843, 40006. Again, it is clear that NPS's decision to reject SBA's recommendation was driven by the deadline imposed by the Consent Decree. *See* AR 30843 (explaining that NPS "do[es] not believe that such an analysis is necessary," in part, because the Seashore is operating under a "court order/consent decree" and "[t]he Court is unlikely to react favorably to any further extension requests"); AR 30834 (email from NPS's Senior Regulatory Analyst stating "I can't see doing an IRFA with the deadline we have looming."). NPS's conclusion that the only economic effects would be indirect, however, is inconsistent with the Superintendent's explicit recognition that the Final Plan would have direct economic impacts on commercial fishermen whose "access to the beach could be regulated," and on "businesses that may need to buy permits to drive on the beach." AR 24995, 24998. Moreover, the record shows that NPS originally intended to prepare a regulatory flexibility analysis, *see generally* AR 24994-99, but it fails to provide a rational basis for NPS's change in position.

Finally, although NPS had approved a survey and study plan for assessing socioeconomic impacts, the results of the small business and visitor use surveys, as well as a survey to count vehicles on the beach at ORV ramps, were not finalized until after the end of the DEIS comment period. AR 73098-234 (visitor intercept survey); AR 72932-73020 (business survey); AR 73072-97 (ramp counts). Once the studies were completed, those results were simply added to the FEIS without any opportunity for CHAPA or other members of the public to review the results or to respond to the agency's assessment of the socioeconomic impacts of the management plan based upon those results. Again, however, NPS rushed to judgment.

Once it became apparent that the studies would not be completed until after the comment period ended, the agency should have either extended the comment period or made provisions to draft a supplemental DEIS that would allow it to meaningfully incorporate comments on the socioeconomic effects of the Final Plan. The Fourth Circuit has held that if new information is produced, as here, a supplemental EIS may be required to allow for public comment on such new information. *Hughes River*, 81 F.3d at 443. CEQ regulations state that if there are "significant new circumstances or information relevant to environmental concerns and bearing the proposed action or its impacts," a supplemental DEIS must be prepared. 40 C.F.R. § 1502.9(c)(1)(ii); *see also Klamath Siskiyou Wildlands Ctr.v. Boody*, 468 F.3d 549 (9th Cir. 2006). "In reviewing an agency's decision not to prepare a supplemental EIS, the court . . . must determine whether the agency took a hard look at the proffered new information;" if so, the court looks at "whether the decision not to prepare a supplemental EIS was arbitrary or capricious." *Hughes River*, 81 F.3d at 443; *see also Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 190 (4th Cir. 1999). The focus is on "the value of the new information to the still pending decision-making process." *Marsh*, 490 U.S. at 374. "[I]f the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Id.*

NPS's claim that the survey results did not require public comment or a supplemental DEIS because the study findings did not introduce significant new information, AR 38673-74, is not supported

by the record. For example, the visitor intercept survey measured the activities that visitors engaged in the most, as compared to a study conducted in 2002. The percentage of visitors engaging in different types of activities on CHNSRA differed between the surveys, and such a difference changes the magnitude of effects of each of the different alternatives on visitor use and experience. AR 38044. The survey showed a higher percentage of visitors participating in beach driving, meaning that more people would be impacted by the Final Plan. AR 38043-44. It showed a significant decrease in the percentage of people visiting historic sites, from 70% to 40%, which NPS attempted to explain (without any substantiation) as the difference in survey locations. AR 38044. It also showed that six percent of respondents would have been somewhat or very unlikely to have taken their trip under Alternative F, AR 38361, which, as noted above supports a finding that economic impacts on small businesses are "major." Such new information is crucial to determining how many people and to what extent the Final Plan would affect visitation and types of activities visitors would engage in.

Indeed, the visitor intercept survey, and NPS's use thereof, suffer from several critical flaws that resulted in further understating the impacts of the Final Plan on visitor use and enjoyment, and therefore on the local economy as well. First, given the more than two million visitors to CHNSRA each year, AR 37689, 245 interviews over 96 beach segments, AR 38043, does not present a statistically valid sample size. Second, the Alternative F that was presented in the DEIS and as the basis for the questions in the survey was considerably less restrictive of use and access than the Alternative F that ultimately was included in the FEIS. *Compare* AR 37839-42 *with* AR 36865-67. For instance, the FEIS version of Alternative F doubled the number of year-round vehicle-free areas. AR 38898. As a result, the public's concerns that the access restrictions were too severe and would significantly affect visitation would have been greater if visitors had been presented with a situation more representative of the closures and restrictions contained in the Final Plan.

The ORV ramp count survey, while not an economic study per se, also provided significant new information relevant to socioeconomic impacts (as well as visitor use and enjoyment), to which the public had no opportunity to respond. *See* AR 38052-54, 38295, 38303, 38308-09, 38313, 38321, 38050-51

(noting that the earlier data from ramp counters "were deemed not reliable for constructing estimates of ORV use at the seashore"). Given the significant public concern with the socioeconomic impacts of the plan, and the highly controversial nature of NPS's assessment of those impacts, such new information was crucial to assessing the effects the Final Plan would have on surrounding communities. In sum, NPS impeded public participation in the Final Plan's assessment of socioeconomic resources and failed to take the requisite "hard look" at socioeconomic impacts.

C. NPS Unreasonably Failed to Consider and Assess a Reasonable Range of Buffer Distances in Its Alternatives Analysis in the FEIS.

NPS failed to consider a reasonable range of alternatives when it unreasonably constrained its alternatives analysis by using the same buffer distances in each of its alternatives, and correspondingly then failed to assess environmental impacts associated with distinct buffers. CHAPA raised the reasonable alternative of using a wide range of buffer distances during the comment period for the DEIS. AR 8476-77. Yet, the FEIS proceeded with four action alternatives that considered the impacts of substantially the same buffer distances outside of closures for certain species of shorebirds or waterbirds during three potentially sensitive phases of their lives (breeding, nesting, and during the presence of unfledged chicks). Alternatives C, D, and E applied exactly the same sets of buffers for each of these stages to limit access and potentially close access corridors. *See* AR 37892-97 (Table 10). In almost every case, Alternative F simply chose one of the two management levels offered in Alternatives C, D and E without separately considering different buffers. *See* AR 37898-903 (Table 10-1).

NPS's NEPA analysis fails at the most fundamental level by not engaging in a reasonable alternatives analysis. NEPA requires that federal agency actions must "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . alternatives to the proposed action . . . ." 42 U.S.C. § 4332(2)(C). CEQ regulations refer to an EIS alternatives analysis as "the heart of the environmental impact statement." 40 C.F.R. § 1502.14 (an agency's assessment of alternatives "sharply defin[es] the issues and provid[es] a clear basis for choice among options by the decisionmaker and the

public"); *see also Monroe Cnty. Conservation Council Inc. v. Volpe*, 472 F.2d 693, 697-98 (2d Cir. 1972) (the alternatives requirement is the "linchpin" of the EIS).

CEQ's regulations thus establish important requirements for compliance, including that agencies "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 40 C.F.R. § 1501.2(c). To achieve its purposes, an EIS "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." *Id.* § 1502.2(g).

CEQ also emphasizes that a "'range of alternatives' . . . includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. Section 1502.14." *Forty Questions*, Question 3, 46 Fed. Reg. at 18026. Where there could be a very large or infinite number of alternatives, "[w]hat constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case." *Id.* at 18027.

Courts review the appropriate range of alternatives under a "rule of reason" standard, which admittedly does not require that an agency consider every available alternative, but those "alternatives that appear reasonable and appropriate for study . . . , as well as significant alternatives suggested by other agencies or the public during the comment period." *Roosevelt Campobello Int'l Park Comm'n v. U.S. Envtl. Prot. Agency*, 684 F.2d 1041, 1047 (1st Cir. 1982) (quotations omitted); *Valley Citizens for a Safe Env't v. Aldridge*, 886 F.2d 458, 462 (1st Cir. 1989); *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1996). "'[A] viable but unexamined alternative renders an environmental impact statement inadequate.'" *Res. Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993) (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)). The Fourth Circuit interprets the rule of reason standard to require study of "'realistic alternatives that will be reasonably available within the time the "decision making" official intends to act.'" *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021, 1027 (4th Cir. 1975) (quoting *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360, 1388

(D. Md. 1973). Therefore, a reviewing court must determine whether an agency acted reasonably in omitting an alternative from analysis.

In the FEIS, NPS provides tables that present a variety of buffer distances from various studies for shore birds and water birds. *See* AR 38011 (Table 28), 38022 (Table 31). There is no evidence, however, that NPS actually considered these different buffer distances to determine which one would be optimal for CHNSRA, given the multiple purposes for which NPS is required to manage the Park; rather, it appears that NPS simply chose one without assessing the impacts for a range of options. For example, in an email exchange between Superintendent Murray and an NPS Environmental Protection Specialist, the Superintendent states that

> [a]lthough the proposed nest buffer for PIPL is less than 100 m (it is 75 m), the reality is that most (all?) PIPL nests in recent years have been well inside of the prenesting areas with at least a 100m buffer, often more, to the boundary of the prenesting closure.

AR 29113. Clearly, NPS could have considered an alternative that included a range of buffer distances that were less than 100 meters to determine what the optimal buffer for nesting piping plovers would be, rather than just choosing to institute a 75-meter buffer. In addition, NPS recognized that there were not any "standard buffer distances" for birds at a critical stage in their life cycle. AR 22026. NPS, therefore, should have analyzed a variety of buffer distances to assess the environmental impacts of each distance during each critical stage for each species at issue.

NPS, however, failed to consider and evaluate a reasonable and wider range of buffer distances in the FEIS. Rather than consider a range of buffer distances in its alternative analysis, alternatives that would take into account both species protection and recreation, or even consider different buffer distances and eliminate them from consideration, NPS explained:

> NPS Director's Order 12 requires that a full range of alternatives be analyzed in an EIS and that the alternatives meet the project objectives to a large degree. The six alternatives analyzed in the DEIS contained considerably different buffer distances. For example, buffers for piping plover ranged from 50 to 1000 meters and buffers for American oystercatcher included "behavior-based" buffers, 150-foot buffers, 150-meter, 200-meter, and 300-meter buffers. The action alternatives contained two different buffer distance scenarios based on two different management strategies. A limited number of buffer types were included in the action alternatives because proposed buffers were determined by minimum distances that would provide adequate species protection

> to best meet the objectives for threatened, endangered, and other protected species as documented in table 12 of the DEIS, entitled "Analysis of How Alternatives Meet Objectives". The inclusion of inadequate buffer distances in the action alternatives would not meet the natural resource protection objectives of the plan or the provisions of the Endangered Species Act and other relevant law and policy nor allow progress towards achieving desired conditions for shorebirds at the Seashore.

AR 38545. NPS's explanation suffers from several critical flaws.

First, NPS's statement that the alternatives contained "considerably different buffer distances" is simply untrue. Each of the four action alternatives provides for the exact same 75-meter breeding behavior/nest buffer for piping plovers, and the exact same 1,000-meter buffer for unfledged piping plover chicks. AR 37904 (Table 11) (categorizing alternatives C, D, and E in the same column to describe considered buffers). This does not reflect consideration of a range of alternatives. It is simply a reflection of different buffers for different stages of the birds' life cycle.

Second, NPS's flawed alternatives analysis is similar in this respect to that ruled to be fatally inadequate by the court in *Center for Biological Diversity v. Bureau of Land Management*, 746 F. Supp. 2d 1055 (N.D. Cal. 2009), where the agency had prepared an EIS for a land management plan that designated an ORV route network and that used the same 5,098 miles of designated ORV routes in each of its seven alternatives. Noting that the plaintiffs had presented other alternatives that would have provided for a different size route network, the court found that "providing a range of alternatives that allow for [ORV] use to differing . . . degrees on the same basic route network does not satisfy the requirement to provide a reasonable range of alternatives" and thus concluded that the EIS failed to "provide a truly meaningful range of alternatives." *Id.* at 1089. NPS's alternatives analysis here demands the same result.

Third, NPS states that including "inadequate" buffer distances would not meet the natural resource protection objectives of the Final Plan, the Endangered Species Act, and other laws. AR 38545. However, NPS failed to explain why every other buffer distance it could consider other than what was contained in the FEIS would be "inadequate," or fail to meet the objectives of the Final Plan. In fact, other buffer distances may have met objectives other than the Final Plan's natural resources objectives.

In *Town of Matthews v. U.S. Department of Transportation*, the court invalidated an FEIS for a highway construction project that limited its discussion of a town's request to consider an alternative that would entail constructing a bypass around the town to one paragraph and contained no comparison of the alternative's environmental effects, because the agency viewed the alternative as outside the scope of the project. 527 F. Supp. 1055, 1057-59 (W.D.N.C. 1981). The court held that the EIS failed to include sufficient discussion of the bypass alternative, and directed the Department of Transportation to consider all reasonable alternatives to its plans to improve the streets to handle heavy traffic. *Id.*

The court reasoned that NEPA "does not permit the agency to eliminate from discussion or consideration a whole range of alternatives, merely because they would achieve only some of the purposes of a multi-purpose project. *Id.* (citing *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972) ("(it is not) appropriate, as Government counsel argues, to disregard alternatives merely because they do not offer a complete solution to the problem"); *Rankin v. Coleman*, 394 F. Supp. 647, 659 (E.D.N.C. 1975) ("The extremes between which discussable alternatives fall are the alternatives of no action and of an action that fully accomplishes the original goal but without any of its objectionable features.")); *Envtl. Def. Fund v. Corps of Eng'rs*, 325 F. Supp. 749, 762 (E.D. Ark. 1971) (single purpose alternatives must be described and discussed in the EIS for a multi-purpose project, at least where the single purpose served is significant). The court further explained that "any genuine alternative to a proposed action will not fully accomplish all of the goals of the original proposal," observing that "[o]ne of the reasons that Congress has required agencies to set out and evaluate alternative actions is to give perspective on the environmental costs, and the social necessity, of going ahead with the original proposal." *Town of Mathews*, 527 F. Supp. at 1058.

Like in *Town of Matthews*, here, just because other buffer distances might not "fully accomplish all of the goals of the original proposal" does not mean they should not have been considered. The alternative buffer distances could have fulfilled some of the other seventeen objectives listed in the FEIS for the Final Plan. However, NPS could not have made such a determination without exploring why other buffer distances would not meet other objectives or explaining why such alternatives were dismissed from further

consideration. Including buffer distances was reasonable, even if they might not have met all of the FEIS's objectives.

A reasonable alternatives analysis would have considered a wide range of buffers in each of the critical stages of the bird's life, for each species. NPS failed to conduct such an evaluation, and in doing so undermined the entire purpose of an EIS, once again reflecting its apparent effort to ensure a quick rulemaking process to limit ORV access.

D. NPS Acted Arbitrarily and Capriciously and Violated NEPA When It Failed to Consider All Relevant Issues and Effects When It Adopted Buffer Distances and Closures.

In crafting its Final Plan, NPS was required to take into account the recreational use of CHNSRA. But in its rush to issue the Final Rule, the result of which was pre-ordained, NPS failed to consider adequately the effects of its actions on recreation and visitor use and enjoyment. This failure flouts both the APA and NEPA, and is arbitrary and capricious, an abuse of discretion, and contrary to law.

The FEIS and Final Rule adopted the buffer distances in the USGS Protocols and Piping Plover (*Charadrius melodus*) Atlantic Coast Population Revised Recovery Plan ("Piping Plover Recovery Plan") based solely on consideration of species protection, without examining other relevant considerations and whether there could be any accommodation of both species protection and visitor use and enjoyment. According to the FEIS,

> [t]he buffer distances identified in the action alternatives were developed after consideration of the best available science, which includes existing guidelines and recommendations, such as the Piping Plover Recovery Plan (USFWS 1996a) and the USGS Open-File Report 2009-1262 (2010) on the management of species of special concern at the Seashore, as well as relevant scientific literature (research, studies, reports, etc.) for the respective species. In addition, buffer distances were developed using the practical knowledge gained by NPS resources management staff during two years of implementing the Interim Strategy (2006–2007) and three years implementing the consent decree (2008–2010).

AR 37832. Rather than reflect any independent consideration of the multiple objectives that NPS was required to address when developing the Final Plan, which would have resulted in exploring different buffer distances in its action alternatives, the FEIS merely employed and adopted the buffer distances specified in

the USGS Protocols and Piping Plover Recovery Plan. The USGS Protocols, however, clearly state that they "do not attempt to balance the need for protection of these species with other activities that occur at CAHA." AR 72351. The Piping Plover Recovery Plan similarly has the singular objective "to ensure the long-term viability of the Atlantic Coast piping plover population in the wild." AR 48293. NPS's responsibility is not so limited.

Yet, even with the Piping Plover Recovery Plan's narrow objective, Appendix G of the Piping Plover Recovery Plan specifically provides for flexibility in situations when restrictions impede vehicle access, as they do at CHNSRA. While the U.S. Fish and Wildlife Service ("FWS") recommends the protection measures described in Appendix G, "[s]ince restrictions to protect unfledged chicks often impede vehicle access along a barrier spit," it presents "a number of management options affecting the timing and size of vehicle closures." AR 48310, 48414. Appendix G thus provides two approaches to manage motor vehicles.

The first option represents the approach taken in the action alternatives, the 1,000-meter buffer for ORVs. The second option provides a management approach using a FWS concurred-in plan that: (1) "[p]rovides for monitoring of all broods during the chick-rearing phase of the breeding season and specifies the frequency of monitoring"; and (2) "[s]pecifies the minimum size of vehicle-free areas to be established in the vicinity of unfledged broods based on the mobility of broods observed on the site in past years and on the frequency of monitoring." AR 48415-16. This second method was intended to cover precisely the type of situation contemplated by the development of the Final Plan for CHNSRA.

By failing to explore fully this second method and accordingly respond to the need to examine impacts on recreational activity, NPS again unreasonably constrained its NEPA analysis. In responding to CHAPA's concerns regarding the use of Appendix G of the Piping Plover Recovery Plan and NPS's failure to independently weigh considerations other than species protection, NPS described the changes it made for Preferred Alternative F by adjusting buffer sizes of several species. AR 38566. Yet, most of CHAPA's comments focused on the alternate approach in Appendix G of the Piping Plover Recovery Plan, and NPS noted that it did not make any changes to the piping plover buffer distances and never adequately addressed

the possibility of the alternative approach. Instead, NPS simply used the buffers in one set of management levels from the DEIS, rather than buffers from the second management level in the DEIS. *Id.*

NPS was clearly aware that these buffers were based only on species protection and did not account for recreation or visitor use and enjoyment. For example, when instructing CHNSRA's Chief of Resource Management that resource protection measures needed to be drafted for the ORV management plan, the Deputy Superintendent flagged access as an issue to be considered in determining buffers. He stated that "[b]uffers should be based on science, but not necessarily following the USGS protocols as they are written. What do staff think should trigger implementation of an AMOY or CWB buffer? Are there other buffer sizes that provide adequate protection, but may allow some type of access?" AR 21884. Like CHAPA's comments raising these critically important issues, the record shows that NPS never made any effort to answer these critically important questions. Despite the integration of recreational access and species conservation objectives provided for in the Piping Plover Recovery Plan, and the recognition that buffers were based solely on species protection, NPS failed to consider relevant factors such as visitor use, enjoyment, and recreation when it established the buffers.

When an agency fails to consider all the relevant factors, it violates NEPA as well as the APA. *Marsh*, 490 U.S. at 378 (citing *Citizens to Preserve Overton Park*, 401 U.S. at 416); *Fayetteville Area Chamber of Commerce*, 386 F. Supp. 572, 575 (E.D.N.C 1974); *Nat'l Audubon Soc'y*, 422 F.3d at 185.[5] NPS's failure to consider an adequate range of buffers violated NEPA's and the APA's requirement that all relevant factors be considered and was, therefore, arbitrary and capricious under the APA.

[5] For example, in *Village of Palantine v. U.S. Postal Service*, the court found that an EA did not properly consider the potential impact on the floodplain when constructing a new building, where the Postal Service had failed to consider potential problems associated with runoff created by construction of the building that could reach the floodplain. 742 F. Supp. 1377, 1390 (N.D. Ill. 1990).

E. NPS Used a DEIS and FEIS That Lack Sound Scientific Basis and Otherwise Impaired Meaningful Agency and Public Review as the Basis for Its Final Plan and Final Rule.

NPS acted arbitrarily and capriciously, and violated NEPA, when it failed to ensure the quality of the scientific information used in the FEIS. This failure further unduly and unreasonably constrained the opportunity for meaningful public review.

CEQ's regulations provide:

> NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.

40 C.F.R. § 1500.1(b). Pursuant to CEQ's regulations, an EIS "shall be supported by evidence that the agency has made the necessary environmental analyses." 40 C.F.R. § 1502.1. Moreover, EISs shall "be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts." 40 C.F.R. § 1502.8.[6] Indeed, the Data Quality Act, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 (2000), and NPS Director's Order No. 11B reinforce the point that information disseminated by NPS "must comply with basic standards of quality to ensure and maximize the objectivity, utility, and integrity of information disseminated to the public" and that scientific information is to be presented in an "accurate, clear, complete, and unbiased manner." Department of the Interior, NPS, Director's Order #11B: Ensuring Quality of Information Disseminated by the National Park Service ¶¶ III, VI.C (Oct. 16, 2002), *available at* http://www.nps.gov/policy/DOrders/11B-final.htm.[7] Courts too require that agencies ensure the integrity of their information. *See, e.g.*, *Earth Island Inst. v. Carlton*, 626 F.3d 462,

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[6] Additionally, agencies are required to "insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement." 40 C.F.R. § 1502.24.

[7] NPS Director's Order No. 12 states that "[p]eer review will be used to address conflicts among resource specialists regarding validity and interpretation of data and resource information" and that the peer review process must be "reflected in the decision file." DOI, NPS, Director's Order #12: Conservation Planning, Environmental Impact Analysis and Decision Making, ¶ 4.7 (effective Oct. 15, 2011), *available at* http://www.nps.gov/policy/DOrders/DO-12.pdf.

472 (9th Cir. 2010); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1213-14 (9th Cir. 2004).

NPS erroneously claims that its effects analysis in the FEIS is supported and that it satisfies NEPA requirements. AR 38676. In reality, the FEIS lacks transparency and scientific analysis and fails to present information in a manner that enables meaningful and critical review by public officials and other interested parties. *See* 40 C.F.R. § 1502.1. In *Natural Resources Defense Council, Inc. v. Grant*, for instance, the court granted a preliminary injunction because the EIS prepared in connection with a project to be constructed in a watershed stated that the project would increase the sediment load carried downstream, but did not include any discussion of the effects downstream, and concluded without any scientific justification, that there would be no significant reduction in water quality downstream. 355 F. Supp. 280, 287 (E.D.N.C. 1973). "Where there is no reference to scientific or objective data to support conclusory statements, NEPA's full disclosure requirements have not been honored." *Id.* (citing *Envtl. Def. Fund*, 325 F. Supp. at 762).

Additionally, in *North Carolina Alliance for Transportation Reform*, the court looked at whether the FEIS complied with NEPA on several grounds, including the agency's use of an older modeling tool to assess impacts of a highway project on air quality. 151 F. Supp. 2d at 695. The court relied on *Seattle Audubon Society v. Espy*, which found an EIS inadequate in part because of its reliance on stale scientific evidence, 998 F.2d 699, 704-05 (9th Cir. 1993), and on NEPA's statement that an "[a]ccurate scientific analysis . . . [is] essential to implementing NEPA" 40 C.F.R. § 1500.1(b), to find that the analysis was inadequate. *N.C. Alliance for Transp. Reform*, 151 F. Supp. 2d at 695. The court followed other circuits in determining that though an agency is not required to use the best scientific methodology, it must explain why the information is lacking. *Id.* (citing *Sierra Club v. U.S. Dep't of Transp.*, 962 F. Supp. 1037, 1043 (N.D. Ill. 1997) (internal citations omitted); 40 C.F.R. § 1502.22). The court held that the agency's failure to update the EIS with more up-to-date information prevented decision makers and the public from understanding the effects of the project, and therefore the air quality analysis did not meet NEPA standards. *Id.*

NPS here has similarly used inadequate scientific data without an explanation of why the information is lacking. As explained in Section II.C *supra*, NPS arbitrarily chose buffers from a list of different studies for use at CHNSRA. It did so without presenting any clear scientific bases for the need for buffers of the size included in the action alternatives, or explaining any methodology to illustrate how NPS determined what size those buffers should be, the rationale for choosing one of the buffer distances for each species for each critical stage of their lives, or a determination of which scientific study was closest to the circumstances at CHNSRA.

A critical scientific document relied upon by the FEIS to support the buffer distances in Preferred Alternative F and the other action alternatives, the USGS Protocols, suffers from an extraordinary appearance of impropriety and conflict of interest. According to the FEIS,

> [t]he buffer distances identified in the action alternatives were developed after consideration of the best available science, which includes existing guidelines and recommendations, such as the Piping Plover Recovery Plan (USFWS 1996a) and the USGS Open-File Report 2009-1262 (2010) on the management of species of special concern at the Seashore, as well as relevant scientific literature (research, studies, reports, etc.) for the respective species.

AR 37832. There are several serious problems with the USGS Protocols.

There are significant indications that this document was not developed and reviewed in accordance with the published USGS peer review guidelines, which reflect "a cornerstone of scientific practice" and are designed to "validate[] and ensure[] the quality of published USGS science." U.S. Geological Survey, Manual, Section 502.3 (Dec. 16, 2011), *available at* http://www.usgs.gov/usgs-manual/500/502-3.html. Although made publicly available and utilized by NPS before publication, the USGS Protocols were only officially published in late March 2010.

Also, one of the key authors of the USGS Protocols (Cohen) signed an advocacy letter coordinated by North Carolina Audubon with respect to the DEIS and ORV management plan, urging NPS to maintain CHNSRA with the highest possible level of protection. *See* AR 25669 (discussing Letter from Brad A. Andres, *et al*. to Michael B. Murray, Superintendent, Outer Banks Group, NPS, Dec. 21, 2009). Along similar lines, in 2008, the same author signed a sworn affidavit in support of the Consent Decree for the

Southern Environmental Law Center, which had sued NPS over its management of ORV use at CHNSRA. *Id.* Participation by this author in activities to influence NPS to act in a particular manner through administrative and judicial processes exposes a potential conflict of interest and raises serious questions about the objectivity of the document.

In fact, NPS was aware of serious problems with the USGS Protocols. In an email exchange with the Chief, Science & Natural Resources Division, Southeast Regional Office, NPS, Superintendent Murray stated:

> When I compare the USGS protocols to the nonbreeding shorebird monitoring protocol recently developed for CAHA by the SECN [Southeast Coast Network] staff (Bryne etc.), I have to say that the SECN protocol "looks and sounds" very professional and credible, but the USGS protocols simply do not. **The lack of a true formal peer review of the USGS protocols (they were reviewed by NPS staff and a few other people perceived as having a stake in the issue such as David Rabon and Walker Golder) raises major concerns, especially since the USGS policy in recent years has been to conduct a true peer review of all USGS "information products" before issuing them as official documents that USGS can stand behind.** The informal format of our USGS protocols (e.g., no report # and no formal sign-off by a USGS official) gives them a less-than-official appearance.

AR 23687 (emphasis added). Yet, NPS continued to use them. Although NPS modified its citation to the document, it never meaningfully addressed the conflict of interest or peer review issues.

NPS's response to CHAPA's concerns also failed to address these problems. First, NPS attempted to minimize the relevance of the USGS Protocols by claiming that the "DEIS does not state that the USGS protocols (Cohen et al 2010) are the primary source of information used in the Plan. Information presented in the plan/EIS is based on a wide range of guidance and scientific data, of which the USGS protocols are but one source." AR 38666-67. However, as indicated by the excerpts of the FEIS quoted above, the USGS Protocols are still an important source of information for determining buffer distances, and problems with the objectivity of its data are not made any less serious by the fact that they are not the "primary" source or that other data is also used to make decisions. NPS then shifts the burden of ensuring proper science is used in the FEIS to USGS, stating that "[c]onflict of interest complaints about the USGS protocols should be directed by commenters to the USGS." AR 38667. NPS simply disclaims

responsibility for ensuring there was no conflict of interest, and disregards the potential problems with the study.

In addition, some of the data used in the USGS Protocols do not have a discernible source. When reviewing the sea beach amaranth protocols in 2005, NPS's Acting T & E Coordinator and SE Region Wetlands Ecologist requested a citation for a statement that supposedly came from FWS and documented an increase in plants in 2002 and 2003. AR 19384-85. Dale Suiter, Endangered Species Biologist, FWS, to which the statement had been attributed, had no study or survey, and tried to reconcile sea beach amaranth numbers in the USGS Protocols with records and reports in his files. AR 19383. He then indicated that the data in the USGS Protocols is "old, outdated information" and that he would prefer use of the most up-to-date information. *See* AR 19382. However, the exact same statement remains in the current USGS Protocols without a citation to a study or survey. AR 72341. The FEIS does not explain that it relies on old information or even acknowledge that it is relying on incomplete information. Similarly, in revisions to resource protection tables discussing nesting buffers, a comment states that the "majority of buffers specified by USGS and used by other nesting beaches only reference single studies without those studies being replicated by other researchers." AR 22039. Instituting buffers based on an FEIS that uses the USGS Protocols to justify buffer distances violates the agency's directive to use sound science.

Additionally, in an exchange discussing possible future studies of American oystercatcher disturbance at CHNSRA, USGS Professor Ted Simons notes the following:

> It is still not clear to me how the 150 m buffer was derived. I have a copy of the overview document by Cohen et al. and Sabine's 2008 paper in Waterbirds (both attached) that was derived from his 2005 thesis. The Cohen overview simply provides a recommended buffer of 150m, while Sabine uses 137 m based on the rationale below. If there are reasons for the current 150 m buffer I have not seen them.

AR 26283. Superintendent Murray states that the "apparent contrast between pedestrian disturbance and vehicular disturbance described in Sabine 2005 does not seem to support the recommendation of an absolute 150 meter buffer for ALL recreation during AMOY incubation that is found in the USGS protocols." AR 26280. Simons also observed that "birds respond most readily to pedestrians, dogs, and ATV's and less to vehicles," AR 26277, and further agreed that

> Sabine's data do not show a strong effect of vehicles during incubation. In general, as long as nests are not run over, most birds will acclimate to low levels of vehicle traffic adjacent to their nests. If traffic is not continuous, so that birds have access to foraging areas in front of their nests day and night, there is some likelihood their eggs will hatch.

AR 26284.

And, while working on the EIS, an NPS Environmental Protection Specialist requested from a FWS Endangered Species Biologist a citation for the data to support a statement in the Management and Protection Protocols for the Threatened Piping Plover (*Charadrius melodus*) on Cape Hatteras National Seashore, North Carolina, AR 57345, indicating banding data that showed Great Plains piping plovers used CHNSRA while wintering. AR 27714-15. The response mentions some sightings listed in the CHNSRA 2002 piping plover report, and a reference to another study that discussed the importance of North Carolina to banded populations, but does not provide the data requested to back up that statement. AR 27714. The NPS Environment Specialist also states that "most PIPL [piping plovers] seen at CAHA are unbanded." *Id.* The record fails to show that data ever was found to support this statement.

There was also discussion about the validity and relevance of sources in the Piping Plover Recovery Plan. In an email exchange between David Rabon Jr., FWS, and Superintendent Murray, Mr. Rabon discusses pedestrian buffers around breeding piping plovers, stating that he did not "find a reference that could be considered the authority on buffers for chicks. Most papers referenced in the PIPL Recovery Plan did not measure that type of disturbance or, if so, did not do it in sufficient detail to develop a 'standard' buffer distance." AR 22026. The FEIS nonetheless uses the Piping Plover Recovery Plan to justify the piping plover buffer distances.

In addition, the FEIS makes vague references to "studies" and other materials that purport to support NPS's "analysis," without actually identifying the referenced studies. When attempting to justify why it put in place more protective buffers than the science recommends, NPS states that

> [i]n addition to the establishment of prenesting areas, alternative C provides for protection of piping plover nests outside of the SMAs through the use of buffer distances recommended, in part, under the Piping Plover Recovery Plan (USFWS 1996a). Deviation from these recommendations and establishment of a 75-meter buffer around known nests is based on studies that show a greater susceptibility to disturbance in

> similar environments and Seashore staff observation (see "Elements Common to All Action Alternatives," in chapter 2).

AR 38126. And, when looking at the impacts on piping plover populations, NPS states that

> [p]otential impacts on the federally threatened piping plover populations and habitat were evaluated based on available data on the species' past and present occurrence at Cape Hatteras National Seashore, scientific literature on the species, life history, scientific studies on the impacts of human disturbance on piping plovers, as well as documentation of the species' association with humans, pets, predators, and ORVs. Information on habitat and other existing data were acquired from staff at Cape Hatteras National Seashore, the USFWS, and available literature.

AR 38109. These statements lack any references to what specifically was relied upon and how conclusions were arrived at, and are unsupported by record evidence. The systemic use of unsubstantiated data and studies that are supposed to justify the analysis and effects discussed in the FEIS violate NEPA's requirement that analysis be based on sound information and record evidence.

F. NPS Failed to Take a Hard Look at Using Floating Closures Rather Than Fixed Closures, Resulting in the Use of Fixed Closures That Potentially Restrict ORV and Pedestrian Access Without Furthering Species Protection.

NPS also failed to meaningfully address CHAPA's concern that the use of fixed rather than floating closures would potentially restrict ORV and pedestrian access without furthering species protection. As NPS acknowledges, CHNSRA "is part of a dynamic barrier island system," influenced through "the processes of erosion and accretion of the shoreline; overwash across the islands; and the formation, migration, and closure of the inlets." AR 37771. In fact, as NPS notes, the area is so dynamic that the agency had to revise its maps depicting ORV routes and closures in the FEIS to reflect accurately "changes in the land area that have occurred since the development of the DEIS." AR 38589. Moreover, NPS had to change the description of the Hatteras Inlet spit from the description included in the Proposed Rule as a result of a change in the landscape created by Hurricane Irene. *Special Regulations, Areas of the Nat'l Park Sys., Cape Hatteras Nat'l Seashore – Off-Road Vehicle Mgmt.*, 77 Fed. Reg. 3123, 3138 (Jan. 23, 2012). It is because of this dynamic nature that CHAPA repeatedly suggested that the plan employ floating closures, which would provide NPS with the flexibility to ensure that areas subject to

closure are those areas that actually continue to have value as species habitat *and* that areas no longer used or suitable for species habitat are not unnecessarily closed to public access. AR 13086-87, 31599.

As CHAPA pointed out, fixed closures do not meet NPS's stated objective to "[e]stablish ORV management practices and procedures that have the ability to adapt in response to changes in the Seashore's dynamic physical and biological environment." AR 37691. If changes were necessary due to dynamic, natural processes during the short time between development of the DEIS and development of the FEIS, it is difficult to see how the closures established in the plan will continue to be relevant well into the ten-to-fifteen year (or longer) term of the plan.

Although NPS's response to CHAPA's comments discusses how it could continue to ensure species protection under fixed closures, the record does not show that NPS gave any meaningful consideration to the resource impacts associated with using fixed rather than floating closures or to CHAPA's specific concern that areas will continue to be closed to recreational use even when they no longer serve any functional habitat value. NPS attempts to justify its use of fixed closures by stating that "[f]loating closures were removed from alternative F to be able to provide closures that are more predictable and based on historic breeding activity. While they would not have the flexibility of floating closures, the year-round and seasonal closures under revised alternative F would be more consistent and predictable." AR 38689. NPS also stated that

> [i]f habitat changes, the NPS would be able to revise these areas under the Periodic Review element, which includes responding to changes after storm events, which would provide the needed flexibility and more accurately reflect nesting habitats. Areas designated for year-round ORV access would still be subject to safety and resource closures if breeding activities are seen or a nest is found.

AR 38569. But NPS never compared the costs and benefits of floating versus fixed closures, or addressed the likelihood that areas will remain unnecessarily closed to access even after they no longer serve any role in species protection. This simply fails NEPA's "hard look" standard.

G. NPS Failed to Meaningfully Consider and Provide the Public an Opportunity to Review the Cultural Impacts of the Proposed Action and Other Alternatives.

NPS also failed to meaningfully consider, and impaired public review of, the impacts of the proposed action and other alternatives on cultural resources. CEQ regulations require that an EIS consider and discuss effects on historic, cultural, and social resources, whether direct, indirect, or cumulative. 40 C.F.R. §§ 1502.16(g), 1508.8. The regulations also require that "information is available to public officials and citizens before decisions are made and before actions are taken," 40 C.F.R. § 1500.1(b), and that the EIS "provide full and fair discussion of significant environmental impacts and . . . inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. NPS failed in both of these obligations.

Throughout its planning process, NPS received multiple letters and comments, as well as input from a qualified cultural resource professional, regarding the significant cultural importance of CHNSRA and asserting that "traditional cultural properties" ("TCPs") might be present on CHNSRA and should be protected. AR 9575, 9624, 9655, 9696, 9706, 9864, 11210, 22104-09, 22494-97, 23067-69, 23080, 23153-60, 23294-95, 25325-26. At 8:29 am on October 9, 2008, for instance, James Keene, President of North Carolina Beach Buggy Association ("NCBBA"), emailed Superintendent Murray explaining the position of NCBBA, the Outer Banks Preservation Association ("OBPA"), CHAPA, and others that certain areas of CHNSRA are potentially eligible for inclusion on the National Register of Historic Places as TCPs. AR 22104-09. However, the record shows that NPS never had an open mind on this issue. Mere hours after he received Mr. Keene's email, Superintendent Murray already suggested that NPS would not expend much effort looking at the significance of these cultural resources, stating in an email to the Park's Historian/Cultural Resource Program Manager that he "doubt[ed] that we would go through the level of study and analysis of 'beach driving' as was conducted on the dune shack issue at Cape Cod." AR 22114 (referring to assessment of whether dune shacks at Cape Cod National Seashore qualified as TCPs).

On April 29, 2009, CHAPA subsequently submitted a letter to the North Carolina Department of Cultural Resources ("NCDCR") providing information about these areas as potential TCPs. *See generally* AR 23591-94. NPS ultimately did hire a cultural anthropologist to determine the eligibility of the potential TCPs for inclusion. AR 25298-300 (transmitting draft report to NPS). Dr. Barbara Garrity-Blake conducted an analysis of the area and concluded that the sites did have some potential to be TCPs, AR 72869, and that "[s]ustained loss of access would affect the integrity of these cultural practices that continue to occur in Bodie Island Spit, Cape Point, Hatteras Inlet, South Point, and adjoining beaches. Continued access and use insures that the integrity of association between people and place is maintained . . . ." AR 25851.

NPS staff, however, was highly critical of the draft, once again reflecting its unwillingness to prescribe any meaningful cultural value to the local, native community's historic use of the beaches and thus its fundamental disagreement with the conclusion that the beaches could be eligible as TCPs. *See generally* AR 25834-51. NPS's Chief, Ethnography Program and Senior Cultural Anthropologist Midwest Region, went so far as to share his belief that "[p]erhaps because of all the publicity about the issues surrounding beach access and use, . . . the author found it hard to be objective," AR 25840, as well as to attribute the consideration of this issue to "pressure applied by various local and not-so-local proponents of *unfettered* beach access and use"—something that NCBBA, OBPA, and CHAPA *never* have advocated for. AR 25839-40 (emphasis added). And the Park's Environmental Protection Specialist wrongly, yet again tellingly, commented that "[t]he controversy around periodic closures has far less to do with the sink net or beach haul seine fishing community or a 'historically-rooted people' community, than with the Dare County tourism / recreational fishing / retired to the beach to fish interests that have fomented much of the controversy." AR 25841. In sum, there was no chance of NPS giving this issue adequate consideration, affecting not only the TCP question, but also NPS's failure to give any serious consideration to the cultural importance of the beaches to the local community in its analysis of the Final Plan alternatives and the resulting beach closures.

NPS's process was further flawed because NPS deprived the public of the opportunity to review this and other documents relating to the traditional and cultural importance of the beaches.[8] The FEIS states that "[s]ince publication of the DEIS NPS has completed an analysis of the potential eligibility for the areas proposed by the Outer Banks Preservation Association as traditional cultural property." AR 38655. Yet, rather than make this report available to the public, along with any documents supporting NPS's contrary opinion that it does not consider these areas to be TCPs, NPS effectively buried the report, giving it only to the NCDCR/State Historic Preservation Officer ("SHPO"), AR 28574; *see* AR 28552, and stating in the FEIS only that "[f]ollowing an additional review, NPS determined the areas ineligible and provided its determination to the NCDCR/SHPO, and the NCDCR/SHPO offered no opinion." AR 37796. "[T]he broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time." *Marsh*, 490 U.S. at 371 (citing *Robertson*, 490 U.S. at 349). As the Fourth Circuit has stated, "compliance with NEPA procedures 'ensures that relevant information about a proposed project will be made available to members of the public so that they may play a role in both the decisionmaking process and the implementation of the decision.'" *Hodges*, 300 F.3d at 438 (quoting *Hughes River*, 81 F.3d at 443). NPS's failure to make the public aware of and provide the public with the Garrity-Blake report that supported the presence of TCPs, along with any documentation upon which NPS relied in reaching a contrary conclusion, deprived the public of this ability and was a violation of NEPA. *See Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1204 (N.D. Cal. 2004) (holding that U.S. Forest Service "fail[ed] to provide the public with notice of its reliance on the document and depriv[ed] the public of the opportunity to review the document" when it could not point to any place in the EA where it incorporated by reference a biological opinion that it had considered).

[8] This failure to provide an opportunity for public review was characteristic of the lack of seriousness with which NPS regarded this issue. In this respect, in undertaking its review of TCPs, NPS arguably also violated its obligations under section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, by failing to actively identify and engage potential consulting parties, including CHAPA and Dare County in its review.

CONCLUSION

For the foregoing reasons, CHAPA respectfully asks this Court to grant its Motion for Summary Judgment on all claims.

Respectfully submitted, this 10th day of July, 2013.

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