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Outer Banks Group

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May 11, 2010

Mike Murray, Superintendent
Cape Hatteras National Seashore
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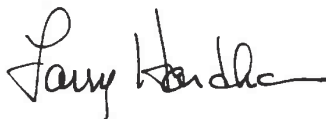
Re: Draft Environmental Impact Statement for the Cape Hatteras National
Seashore Off-Road Vehicle Management Plan

Dear Superintendent Murray,

Please find enclosed the comments of the Cape Hatteras Access
Preservation Alliance in response to the National Park Service's request for
comments on the Draft Environmental Impact Statement for the Cape Hatteras
National Seashore Off-Road Vehicle Management Plan, released in March 2010.

Please do not hesitate to contact me if you should have any questions.

Sincerely,



Larry Hardham
Cape Hatteras Access Preservation Alliance

Enclosure

Larry Hardham
Cape Hatteras Access Preservation Alliance
P.O. Box 1355
Buxton, NC 27920

May 11, 2010

Mike Murray, Superintendent
Cape Hatteras National Seashore
1401 National Park Drive
Manteo, North Carolina 27954

Re: Draft Environmental Impact Statement for the Cape Hatteras National Seashore Off-Road
Vehicle Management Plan

Dear Superintendent Murray:

The Cape Hatteras Access Preservation Alliance (“CHAPA” or “Coalition”) submits the following comments in response to the National Park Service’s (“NPS”) Draft Environmental Impact Statement for the Cape Hatteras National Seashore Off-Road Vehicle Management Plan (“DEIS”), noticed in the Federal Register on March 5, 2010.¹

I. INTRODUCTION

The Outer Banks Preservation Association (“OBPA”) organized CHAPA as a coalition for the purpose of preserving and protecting a lifestyle and way of life historically prevalent on the Outer Banks of North Carolina, including the area now comprising Cape Hatteras National Seashore (“Seashore” or “CHNSRA”). The Coalition includes the Cape Hatteras Anglers Club (with its 1,100 members), the North Carolina Beach Buggy Association (4,700 members), and OBPA (with over 4,300 active members located in more than 20 states and Canada). Many of CHAPA’s members reside in eight unincorporated villages that lie within or adjacent to the boundaries of the Seashore: Rodanthe, Waves, Salvo, Avon, Buxton, Frisco, Ocracoke, and Hatteras Village. The individuals and businesses represented by CHAPA regularly operate off-road vehicles (“ORVs”) in order to access beaches at the Seashore for both recreational and commercial purposes.

For example, CHAPA’s membership includes commercial fishermen who, in order to make a living, must be able to access the beaches of the Seashore using off-road vehicles (“ORVs”) to both carry fishing tackle and related gear and to find suitable spots for fishing. Beach closures or ORV access restrictions within the Seashore would effectively shut down the

¹ *Notice of Availability of a Draft Environmental Impact Statement for Cape Hatteras National Seashore*, 75 Fed. Reg. 10307 (Mar. 5, 2010).

Seashore to commercial fishing industry, denying these individuals a livelihood that predates the establishment of the Seashore.

CHAPA advocates the protection and preservation of the surrounding beaches within a framework of responsible and meaningful access to the sound and to ocean beaches for all users, including pedestrians and properly licensed drivers and their vehicles. Meaningful access to the shore is fundamental to the continued growth and economic vitality of the Outer Banks. CHAPA continues to be interested in working with the NPS and other stakeholders to develop an ORV management plan and regulation that will satisfy the concerns of protecting the Seashore's resources, but do so *without compromising the area's distinctive shore-oriented culture and economy*.

CHAPA and its members, along with many local businesses and individual users of the Outer Banks, are concerned that the DEIS's Preferred Alternative F unnecessarily limits motorized access and pedestrian use at the Seashore. Such restrictions will have a devastating effect on the entire Outer Banks coastal economy and threaten a lifestyle that predates the establishment of the Seashore. Recreational access to the CHNSRA beaches using ORVs is an essential component of the area's tourism-based economy. Visitors to the Outer Banks routinely utilize ORVs to engage in recreational activities to reach the significant portion of the CHNSRA that is not accessible by paved roads.

CHAPA believes that, as written, the DEIS and the NPS's Preferred Alternative F do not meet the NPS's dual mandate set forth by its Organic Act to promote and regulate the use of the national parks "by such means and measures as conform to the fundamental purpose to conserve the scenery and the natural and historic objects and the wild life therein *and to provide for the enjoyment for the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.*" 16 U.S.C. § 1 (emphasis added). The closures and restrictions imposed as a result of the April 30, 2008 Consent Decree in *Defenders of Wildlife v. USFWS* (No. 2:07-cv-45-BO (E.D. N.C.)) already have had a serious adverse impact—economic and otherwise—on CHAPA's members. CHAPA and its members fear that the ORV management plan envisioned under the DEIS will result in even more stringent use restrictions on vehicles and closure of beaches or access points that will further significantly affect the way of life that area residents have enjoyed since long before the establishment of the Seashore—reducing recreational access, depriving fishermen dependent upon vehicles for their daily work of their livelihoods, shrinking economic activity, and changing the very culture that has defined the Outer Banks for so many years.

CHAPA has important concerns regarding the NPS's proposed plan that we believe must be addressed in order to ensure that the final plan is in the best interests of the public. Beach access and recreation are important to the Counties and to the lifestyles of their residents, from both an economic and environmental standpoint. CHAPA continues to urge the NPS to recognize the importance of public access to and use of the Seashore to area residents as it completes the ORV management planning process. CHAPA continues to urge the NPS to ensure that the long-established values of ORV use at the Seashore are appropriately recognized in the development of an ORV management plan that maintains the cultural, resource protection, and diverse visitor experience within the Cape Hatteras National Seashore Recreational Area.

CHAPA asks that, in developing its final plan and EIS, the NPS give favorable consideration to these comments, and incorporate the principles and recommendations found in the Cape Hatteras National Seashore Recreational Area ORV Access Environmental Impact Position Statement prepared by the Coalition for Beach Access (“Position Statement”), dated March 5, 2010. This Position Statement, a copy of which is enclosed and incorporated herein by reference, enjoys the support of a broad representation of the local community, including the following organizations: American Sportfishing Association; Avon Property Owners Association; Cape Hatteras Anglers Club; North Carolina Beach Buggy Association; Outer Banks Preservation Association; United Mobile Sportsfishermen; Watersports Industry Association, Inc.; Outer Banks Chamber of Commerce; Cape Hatteras Business Allies; United Four Wheel Drive Associations; Rodanthe-Waves-Salvo Civic Association – Board of Directors; Ocracoke Civic and Business Association; Hyde County Board of Commissioners; Dare County Tourism Board; Hatteras Village Civic Association; and Recreational Fishing Alliance.

CHAPA’s concerns regarding the DEIS are further discussed in the comments that follow, as well as in the Coalition for Beach Access Position Statement. We believe that the final ORV management plan must address each of these issues in order to meet the NPS’s obligations to ensure reasonable public access to the Seashore while sufficiently protecting the area’s resources.

I. THE DEIS IS INCONSISTENT WITH THE SEASHORE’S ENABLING STATUTE’S REQUIREMENTS GOVERNING MANAGEMENT FOR RECREATIONAL ACTIVITIES AND COMMERCIAL FISHING

The 1937 Enabling Act that created the Cape Hatteras National Seashore expressly recognized the unique character of the islands and communities within the National Seashore, and particularly sought to preserve public access to the Seashore and use of the Seashore for recreational purposes, as well as for commercial fishing by residents of the area. The Act that created the “Cape Hatteras National Seashore Recreation Area” required that the land 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). Section 3 of the Seashore’s enabling legislation as amended, 16 U.S.C. § 459a-1, states that “the administration, protection, and development of the aforesaid national seashore recreational area shall be exercised under the direction of the Secretary of the Interior by the National Park Service, subject to the provisions of [16 U.S.C. §§ 1-4],” commonly known as the Organic Act.² But that provision is expressly subject to several important provisos, as well as additional provisions in section 4, which explicitly aim to protect public access to and use of the Seashore. In one of these provisos, Congress prescribed that “the legal residents of [the] villages . . . shall have the right to earn a livelihood by fishing within the boundaries to be designated by the Secretary of the Interior,

² The Redwoods Act of 1978 reiterated the purposes of the Organic Act by stating, “Authorization of activities shall not be exercised in derogation of the values and purposes for which these various areas have been established, *except as may have been or shall be directly and specifically provided by Congress*.” 16 U.S.C. § 1a-1. As discussed herein, in the case of the Seashore, recreational use is a clear purpose of the Seashore and Congress did in fact otherwise specifically except areas whereby the no impairment standard and the no-derogation of values standard was to be applied on balance with the legislatively-protected rights of recreation.

subject to such rules and regulations as the said Secretary may deem necessary in order to protect the area for recreational use” 16 U.S.C. § 459a-1 (cited at DEIS at 11). And, in section 4, Congress specifically directed that:

Except for 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, which shall be developed for such uses as needed, the said 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 (quoted at DEIS at iv, 46).³

NPS recognized its legal obligations in its March 1938 Prospectus of Cape Hatteras National Seashore, when it noted that the area is to be managed “[p]rimarily” as “a recreation area. . . . [W]hile provision for bathing may be the first consideration of these areas, it must be kept in mind that a far greater number of people will be more interested in using a seashore area for other recreational purposes. It is desirable therefore to provide ample shoreline for all types of beach recreation. The Cape Hatteras National Seashore provides such an area in that there is extensive shoreline for all forms of recreation both for immediate use and for future development.” DEIS at 12. “The development and operation of the Seashore area shall follow the normal national park standards with the understanding that recreational pursuits shall be emphasized to provide activities in as broad a field as is consistent with the preservation of the area. It shall be the policy of the Service to permit fishing, boating and other types of recreation under proper regulations and in designated areas where such activities may not conflict with other factors of greater importance.” *Id.* (quoting Prospectus of Cape Hatteras National Seashore, NPS (1938)).

The high priority that is to be afforded to public use and access of the Seashore was again emphasized in the fall of 1952, when the NPS responded to serious criticism of the NPS and its

³ Given these specific provisions modifying the applicability of the Organic Act with respect to the management of the Seashore, the DEIS’s statements at pages 11 and 46 of the DEIS, quoting selectively from section 3 of the enabling legislation are overly simplistic and misleading. DEIS at 11 (“In addition to articulating the recreation and preservation mission of the Seashore as stated in the ‘Purpose and Significance of Cape Hatteras National Seashore’ section of this chapter, the enabling legislation provided that the administration, protection, and development of the national seashore shall be exercised under the direction of the Secretary of the Interior by the NPS, subject to the provisions of the *Organic Act*.”); DEIS at 46 (“Section 3 of the Seashore’s enabling legislation (the Act) states, ‘the administration, protection, and development of the aforesaid national seashore shall be exercised under the direction of the Secretary of the Interior by the National Park Service, subject to the provisions of the Act of August 25, 1916 (39 Stat. 535),’ which is more commonly known as the *Organic Act*.”).

failure to provide adequate information about the Seashore to residents of the Outer Banks and others affected by the proposal to create the Seashore. DEIS at 15. Among other concerns, these criticisms included “concern about the rights of individuals to continue commercial and sport fishing” and “concern that once the Seashore is established, the local people would be denied access to the ocean beach.” *Id.* Thus, in an open letter to the “people of the Outer Banks,” the NPS Director reiterated that, “when the lands for the Recreational Area are acquired and become public property there will always be access to the beach for all people, whether they are local residents or visitors from the outside.” Conrad L. Wirth, *A Letter to the People of the Outer Banks*, *The Coastland Times*, Oct. 31, 1952 (characterized as “a social contract between the Seashore and residents of the villages” in *The Creation and Establishment of Cape Hatteras National Seashore*, C. Binkley, Director, Southeast Region, NPS (Aug. 2007) at 209). He further explained that “it will be necessary to establish certain regulations, such as to designate places for vehicles to get to the beach in order to reduce said dune erosion to a minimum; to manage ocean fishing where large numbers of bathers are using the beach; and to confine bathing to certain areas. These latter are safety measures, as it would be dangerous to permit surf fishing where there are large numbers of people in bathing and, likewise, fishermen would not want bathers to interfere with their fishing.” *Id.*

Thus, in the very statute establishing the Seashore, and as reflected for a time in the NPS’s policies implementing that statute, Congress specifically directed that NPS develop and manage areas of the Seashore that provide opportunities for recreational use in a manner that enables those uses to continue. In establishing the Seashore, Congress drew a clear distinction between portions of the Seashore “especially adaptable for recreational uses” and other portions of the Seashore, and clearly mandated that the two types of areas be developed and managed differently. In managing areas “especially adaptable for recreational uses,” the NPS must, under the statute, consider and accommodate recreational uses. It is not to manage such areas as “primitive wilderness.”

Remarkably, except for a one-sentence reference on page 527, the DEIS contains no further reference to this requirement, and the DEIS contains no discussion about how this mandatory statutory language will be reflected in its management of ORV use at different areas of the Seashore. The DEIS inexplicably fails to acknowledge the differential treatment that it must accord to the two categories of lands under the statute, and therefore fails to comply with its directive to develop and manage those areas “especially adaptable for recreational uses . . . as needed.” The DEIS reflects little to no effort by the NPS to attempt to accommodate public access and use, particularly in those portions of the Seashore “especially adaptable for recreational uses.” Indeed, the NPS appears inclined to accept the unreasonable goal of having the entire Seashore managed as a “primitive wilderness,” regardless of the extent to which the specific area is adaptable for recreational use. The NPS’s total failure to distinguish between areas that it may continue to manage as a primitive wilderness and areas that are especially adaptable for recreational uses is wholly inconsistent with the Seashore’s enabling statute.

Based upon the nature of the activities specifically identified in the enabling legislation, the location of those areas especially adapted for recreational use should include all waters and shorelines of the Seashore. *See* Position Statement at 11-15. These areas should not be managed as primitive wilderness, as would be the practical effect of the implementation of NPS’s

Preferred Alternative F, but in a manner that recognizes and accommodates the important recreational uses of these areas as contemplated and required by the Seashore's enabling legislation.

II. THE DEIS LACKS SOUND SCIENTIFIC BASIS AND OTHERWISE IMPAIRS MEANINGFUL AGENCY AND PUBLIC REVIEW

- A. The Purpose and Effectiveness of the DEIS as a Decisionmaking Tool Based Upon Meaningful Agency and Public Review and Participation is Undermined by the Document's Size and Complexity, and its Selective and Incomplete Use and Explanation of Scientific Data

The Council on Environmental Quality's ("CEQ") *Regulations For Implementing the Procedural Provisions of the National Environmental Policy Act* provide Federal agencies with important direction for complying with NEPA's EIS requirement. As CEQ's NEPA-implementing regulations explain: "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. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail." Unfortunately, the DEIS and the NPS's process fails these purposes. The document is massive, yet 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. And it appears to be biased in its selective use of information and by an inappropriate attempt to rely selectively upon a negotiated rulemaking process that did not achieve consensus.⁴

Pursuant to CEQ's regulations, among other requirements, EISs "shall provide full and fair discussion of significant environmental impacts" and "shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses." 40 C.F.R. § 1502.1. To achieve their purposes, EISs "shall be analytic rather than encyclopedic," "shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with [CEQ's] regulations," and "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R. § 1502.2. Moreover, EISs "shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them" and "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.

The DEIS is inconsistent with these provisions of CEQ's regulations in several key respects. First, the DEIS is neither concise, clear, to the point, nor supported by evidence that NPS has made the necessary environmental analyses, as required by 40 C.F.R. § 1502.1.

⁴ The DEIS appears to rely upon information from the negotiated rulemaking process that supports its course of action, and ignore information that does not. Moreover, the NPS has relied upon the existence of the process as a basis for confining a period for public review and comment that is unreasonably short under the circumstances.

Similarly, it is not written in a way that decisionmakers and the public can readily understand it, as required by 40 C.F.R. § 1502.8. The DEIS is exceedingly long, and extraordinarily difficult to follow. Evaluation of, and comparisons between, the various alternatives, and their respective impacts, are extraordinarily difficult due to the repetition of information and conclusory statements that purport to be based upon scientific data, but, upon closer scrutiny, are not.

In addition, the DEIS makes vague references to “studies” and other materials that purport to support the NPS’s “analysis,” without actually identifying the studies that are being referred to. *See, e.g.,* DEIS at 339 (“In 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).”); DEIS at 320 (“Potential 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.”)

In sum, the considerable size and complexity of DEIS, and the DEIS’s selective and incomplete use and explanation of scientific data make it difficult for the public to respond meaningfully to the DEIS and to provide specific criticisms and recommendations, particularly within the relatively short 60-day period provided for public comment. And rather than seriously consider requests for an extension of this period to allow sufficient time for the public to adequately review and respond to such a complex, lengthy, and significant document, the NPS has apparently determined to move full steam ahead on its current track, stating that organizations interested in the issue “were well represented and actively participated on the CAHA negotiated rulemaking advisory committee . . . and related sub-committees and work groups . . .” and that several of the alternatives—though notably *not* Preferred Alternative F—purportedly are “substantially the same” as alternatives “described to the committee and released to the public at a committee meeting on November 14, 2008.” Letter from D. Vela, Regional Director, NPS to J. Simon, Van Ness Feldman (Mar. 29, 2010). In effect, the DEIS appears to have become a *fait accompli*, immune from valuable public comment, and a fatally flawed tool for helping to develop an appropriate ORV management plan for the Seashore.

- B. The DEIS Ignores Certain Relevant Studies and Other Information Presented During the Early Stages of the Planning Process and Negotiated Rulemaking Process

A great deal of information was made available to the NPS during the early stages of the planning process and the negotiated rulemaking process with respect to the development of the ORV management plan. Inexplicably, much of this information is neither addressed nor so much as acknowledged in the DEIS. For example, the DEIS states that the NPS received a total of 386

completed "Alternative Option Workbooks" during the public comment period. DEIS at 634-35. Yet, although the DEIS makes the assertion that "[a]ll workbooks were reviewed and considered during the alternatives development process" and acknowledges that "[m]ost comments offered options for protected species management, law enforcement, ORV permitting, closures, and ORV ramp and route configuration," DEIS at 635, the DEIS contains practically no reference to or consideration of these materials. Similarly, an enormous amount of information was presented as part of the negotiated rulemaking process, some of which directly questions the conclusions and recommendations made by NPS in the DEIS. Yet, again, the DEIS contains practically no reference to or consideration of these materials.

In this regard, the DEIS also ignores certain studies presented during the negotiated rulemaking process, including studies addressing resource protection buffers and other protection measures. One of these studies, for example, among other things, supports the creation of buffers during the fall and winter that would allow ORV traffic in certain key shorebird colony sites, and concludes that beach closures "are unnecessary and are not likely to favorably impact breeding piping plovers on the islands." Jaime A. Collazo, J.R. Walters, and J.F. Parnell, *Factors Affecting Reproduction and Migration of Waterbirds on the North Carolina Barrier Islands, Final Report to the National Park Service Cape Hatteras and Cape Lookout Seashores* (1995) (cited in Addendum to the Final Report of the Proceedings of the Negotiated Rulemaking Advisory Committee for Off-Road Vehicle Management at Cape Hatteras National Seashore, American Sportfishing Ass'n, et al., Mar. 27, 2009, at 15-16). Another study seriously questions using the flushing of incubating American oystercatchers to determine the need for adjustments to pass-through corridor widths, by concluding that "there was little or no association between ORV traffic and the rate at which incubating oystercatchers made trips to and from their nests or the percent time they spent incubating." Conor P. McGowan, Simons, T.R., *Effects of Human Recreation on the Incubation Behavior of American Oystercatchers*, *The Wilson Journal of Ornithology* 118(4): 485-493, 2006, at 489 (cited in Addendum to the Final Report of the Proceedings of the Negotiated Rulemaking Advisory Committee for Off-Road Vehicle Management at Cape Hatteras National Seashore, American Sportfishing Ass'n, et al., Mar. 27, 2009, at 16).

By stating that its Preferred Alternative F incorporates the recommendations and input of the Negotiated Rulemaking Advisory Committee and "the Committee members," and at the same time flatly disregarding the substantial relevant comments and information provided to the NPS in the negotiated rulemaking process by the many participants who presented well-reasoned arguments and support for less restrictive buffers, closures, and other "resource protection" measures, the DEIS misrepresents the level of support behind this alternative and suggests that the entire DEIS process has been unduly tainted. As stated in the DEIS, in December 2007, a Negotiated Rulemaking Advisory Committee was formally established in an effort to work towards a consensus recommendation. DEIS at 27. CHAPA engaged in this process along with other stakeholders in good faith to explore the possibility of reaching a consensus on various aspects of management of the Seashore. According to the NPS, "The NPS used the Negotiated Rulemaking Advisory Committee's input to create this action alternative [F], which is designed to provide visitors to the Seashore with a wide variety of access opportunities for both ORV and pedestrian users." DEIS at xi-xii. "Although the Committee did not reach a consensus on a complete alternative, management elements suggested by the Committee members were

reviewed and incorporated into the range of alternatives in this plan/EIS, primarily in alternative F.” DEIS at 27. Yet, many of the substantive elements of Preferred Alternative F were neither reviewed nor agreed to by the participants in the negotiated rulemaking process, and, like many other participants, the CHAPA members who participated in that process do not endorse Alternative F. And, in fact, the majority of the participants in the process did not recommend that many of the Consent Decree’s restrictions be incorporated into the final ORV management plan.

C. The DEIS Lacks Sound Scientific Support and is Not Based on the Best Available Science

Despite its statements to the contrary, to the extent the scientific basis for its determinations are even apparent, the DEIS does not “incorporate[] the best available scientific literature applicable to the region and setting, the resource evaluated, and the actions considered in the alternatives,” DEIS at 292, and therefore cannot be said to “be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts” as required by 40 C.F.R. § 1502.8.

The DEIS is woefully lacking in sound scientific support. As discussed above, the DEIS fails to consider significant, relevant scientific studies and information that was presented to the NPS in connection with the ORV management planning process.

In addition, aside from simply referencing species recovery plans and the USGS Protocols, the DEIS provided no explanation of the scientific methods that were used to determine the standard buffer sizes included in each of the action alternatives. The DEIS presented certain shorebird species data such as species occurrence, number of nests, nest survival, and fledge rate at the Seashore and also presents recommended buffers for state-listed species based on various studies at various locations, including the Seashore (refer to DEIS at 233, Table 28 for American Oystercatcher; and DEIS at 243, Table 31 for colonial waterbirds), as well as some data for sea turtles. However, the DEIS did not present any clear scientific bases for the need for buffers of the size included in the action alternatives and did not explain any clear methods to illustrate how the NPS determined what size those buffers should be. *Compare, e.g., Semlitsch (1998) (deducing that an adequate vernal pool buffer should be based on how far a certain percentage of the species disperses).*

Data and/or other studies justifying the need for larger buffers for Management Level 1 (ML1) are not provided. The DEIS establishes a 300 meter buffer under ML1 for all state-listed bird species. This applies to breeding behavior, nests, and unfledged chicks. Table 28, Page 233, presents recommended buffers for American Oystercatchers from various studies. None of the recommended buffers from these previous studies, including a study conducted at the Seashore, are greater than 200 meters. In addition, the number of nesting pairs of American Oystercatchers has remained constant since 2006, suggesting that buffers prior to the interim plan were adequate to maintain the population of American Oystercatchers at the Seashore and that the DEIS buffers are excessive. Table 31, Page 243, presents numerous buffer recommendations from various studies for colonially nesting waterbirds. While two of the studies presented recommend buffers of at least 300 meters, studies conducted at the *Seashore*

only recommend, at most, buffers of 100 meters for Least Tern and 200 meters for Black Skimmer, Common Tern, and Gull-billed Tern.

In addition, one of the primary scientific documents relied upon by the DEIS to support the buffer distances in Preferred Alternative F and the other action alternatives suffers from an extraordinary appearance of impropriety and conflict of interest. According to the DEIS, “[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 2005 USGS protocols for the Seashore, as well as relevant scientific literature (research, studies, reports, etc.) for the respective species.” DEIS at 73. There are several issues with the 2005 USGS protocols, however, that suggest significant bias in favor of species protection and against ORV use. First, 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.” <http://www.usgs.gov/usgs-manual/500/502-3.html>. Although made publicly available and utilized by the NPS beforehand, this document was only officially published in late March 2010. Cohen, J.B., Erwin, R.M., French, J.B., Jr., Marion, J.L., and Meyers, J.M., 2010, A review and synthesis of the scientific information related to the biology and management of species of special concern at Cape Hatteras National Seashore, North Carolina: U.S. Geological Survey Open-File Report 2009–1262.

And notably, one of the key authors of the 2005 USGS protocols (Cohen) recently signed an advocacy letter coordinated by North Carolina Audubon with respect to the DEIS and ORV management plan, urging the NPS “to implement the highest level of protection to the extent possible.” Letter from Brad A. Andres, et al. to Michael B. Murray, Superintendent, Outer Banks Group, NPS, December 21, 2009. Along similar lines, the same author had earlier, in 2008, signed a sworn affidavit in support of the Consent Decree for the Southern Environmental Law Center, which had sued the NPS over its management of ORV use at the Seashore. The participation by this author in these activities to influence the agency 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.

These failures bring into question the agency’s objectivity in developing a document that must ensure that it has taken a “hard look” at all the issues that must be reviewed in the EIS, including both the environmental and socioeconomic issues.

III. THE DEIS ADOPTED TWO INAPPROPRIATE NO ACTION ALTERNATIVES, ESTABLISHING THE WRONG BASELINE AND THEREBY MASKING THE TRUE EXTENT OF THE IMPACTS OF THE ACTION ALTERNATIVES ON PUBLIC ACCESS AND RECREATION

Section 1502.14(d) of the CEOQ’s NEPA-implementing regulations requires that the alternatives analysis in an EIS to “include the alternative of no action.” 40 C.F.R. § 1502.14(d). The analysis of the no action alternative “provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives.” NEPA’s Forty Most Asked Questions, CEOQ, available at <http://ceq.hss.doe.gov/nepa/regs/40/1-10.HTM#3>. Rather

than adopt a single no action alternative, the DEIS took the unusual step of adopting two such alternatives. Unfortunately, neither of these alternatives is appropriate in this instance or reflects the proper baseline for evaluating the environmental impacts of the various alternatives. The DEIS's choice of two no action alternatives that are not true no action alternatives and that already reflect movement toward the proposed action has the effect of grossly understating the impacts of Preferred Alternative F and the other alternatives on recreational, cultural, historic, and socioeconomic values. Accordingly, the NPS must reconsider its choice of no action alternative and baseline, adopt an appropriate no action alternative, and re-assess the environmental impacts of the proposed action and reasonable alternatives against an appropriate baseline.

Under Alternative A, "management of ORV use and access at the Seashore would be a continuation of management based on the selected alternative identified in the July 2007 FONSI for the 2006 Interim Strategy and the 2007 Superintendent's Compendium, as well as elements from the 1978 draft interim ORV management plan that were incorporated in Superintendent's Order 7, as amended in 2006." DEIS at 60. In October 2007, a lawsuit was filed on the Interim Strategy that resulted in the Consent Decree. Notably, Alternative A in the DEIS is actually Alternative D from the "Interim Protected Species Management Strategy / Environmental Assessment" published on January 18, 2006, which, in fact was an action alternative. The Federal action to which the DEIS relates is the development of a long-term ORV management plan and associated special regulation in accordance with Executive Order 11644, as amended by Executive Order 11989, and 36 C.F.R. § 4.10. Given that the current DEIS is all part of the same ongoing planning effort that now began more than five years ago, Alternative A cannot legitimately be viewed here as a no action alternative.

Further, Alternative B, "Continuation of the Terms of the Consent Decree Signed April 30, 2008, and amended June 4, 2009," clearly has no place in the DEIS as a no action alternative to establish a baseline for purposes of assessing the impacts of the various other alternatives. The Consent Decree, by its terms, states that the document shall have no precedence. Paragraph 34 of the Consent Decree specifically provides that "Plaintiffs, Federal Defendants, and Intervenor-Defendants stipulate and agree that this Consent Decree is entered into solely for the purpose of settling this case, and for no other purpose" Consent Decree at 17. Utilizing the Consent Decree, then, as a no action alternative is contrary to the agreement of the parties in that document, and entirely inappropriate.

The true no action alternative that the DEIS should have considered is the no action alternative that was referenced in the "Interim Plan" assessment, the first step in NPS's effort to assess the impacts associated with management of ORV use as the Seashore. The cover letter to that document explained that "This document presents the evaluation of four alternatives for managing protected species at Cape Hatteras National Seashore in the interim period until a Long-term Off-Road Vehicle (ORV) Management Plan and associated regulations are developed." It then explained the no action alternative as follows:

Alternative A – Continuation of 2004 Management (baseline or no action)
The no-action alternative would continue management as expressed
in Superintendent's Order #07, which was issued in 2004. Under

alternative A, the seashore would implement protective measures for recent piping plover breeding areas (areas used at some time during the past 3 breeding seasons); American oystercatchers and colonial waterbirds, if a territory or colony or nest is established; sea turtle nests; and seabach amaranth plants or seedlings. Measures vary for special status bird species according to the activity. Any species management closures would require the Superintendent's approval. Management would continue for predator removal, recreation use restriction, and public outreach.

It is this alternative that should have been identified as the no action alternative and used to establish the baseline for consideration of the various alternatives in the DEIS. By failing to use the baseline, the DEIS's analysis understates the significance of the impact of Alternative F and the other action alternatives on recreational, cultural, historic, and socioeconomic values. All six alternatives are in fact "action alternatives," when compared to the policies and practices in place when the ongoing ORV management planning process began.

IV. THE PREFERRED ALTERNATIVE'S BUFFERS AND CLOSURES DO NOT REFLECT CONSIDERATION OF A REASONABLE RANGE OF ALTERNATIVES AND ARE UNSUPPORTABLE AND UNNECESSARILY BROAD

The DEIS proposes overly restrictive resource protection buffers and closures for various species at the Seashore, without justification. Given the substantial impact that such additional, unnecessary buffer areas and closures will have on access to and use of the Seashore, and the lack of any evidence that these additional buffer areas or closures are necessary to ensure the protection of the affected species, the NPS's establishment of these buffers and closures is specious at best.

- A. The DEIS Failed to Consider a Reasonable Range of Action Alternatives With Respect to Buffer Distances and Other Key Elements of the ORV Management Plan, in Violation of NEPA and CEQ Regulations

To satisfy NEPA's procedural requirements, agencies must prepare a statement on the environmental impact of the proposed action and "a detailed statement by the responsible official on . . . alternatives to the proposed action." CEQ's NEPA-implementing regulations make clear that every EIS must assess not only the environmental consequences of the action, but also reasonable alternatives to that action. In fact, the regulations describe alternatives analysis as "the heart of the [EIS]." 40 C.F.R. § 1502.14. It is this part of the EIS that "sharply defin[es] the issues and provid[es] a clear basis for choice among options by the decisionmaker and the public." *Id.* Thus, the alternatives analysis must "[f]igorously explore and objectively evaluate all reasonable alternatives; and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated," and "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits." *Id.*

The NPS failed to properly analyze a range of alternatives to the proposed action in the DEIS with respect to buffer distances, a key element of the ORV management plan.⁵ The DEIS identified two no action alternatives and four action alternatives. Each of the four action alternatives would apply identical “standard buffers” to limit access and potentially close access corridors. DEIS at 444 (Alternative C), 452 (Alternative D), 459 (Alternative E), 468 (Alternative F); *see* DEIS at 73 (“The buffer distances identified as common to all action alternatives are intended to provide adequate protection to minimize the impacts of human disturbance on nesting birds and chicks in the majority of situations, given the level of visitation and recreational use in areas of sensitive wildlife habitat at the Seashore and issues related to non-compliance with posted resource protection areas.”). The DEIS did not identify or analyze a single action alternative that would apply different buffer distances than those specified in Table 10 of the DEIS. DEIS at 121-26. Among other reasonable alternatives, the DEIS should have analyzed the alternative method of establishing buffer distances and protection measures specifically outlined by Appendix G of the Piping Plover Recovery Plan, discussed further herein. The NPS’s failure to consider any such reasonable alternatives violates the letter and spirit of NEPA and CEQ’s implementing regulations.

The NPS further circumscribed any meaningful evaluation of reasonable alternatives by making other key elements of an ORV management plan “common to all action alternatives.” These include the following:

- ORV routes and areas would be officially designated in accordance with the executive orders.
- Year-round ORV routes and areas would be designated only in locations without sensitive resources or high pedestrian use.
- Year-round non-ORV areas would be designated.
- A new standard set of species management and monitoring measures would include “species management areas” (SMAs) and two levels of species management effort. SMAs include areas at the spits and points in addition to other sensitive resource areas.

DEIS at x. The DEIS’s alternatives analysis, if done properly, also would have identified and considered alternatives that included variations on each of these key elements. By considering only alternatives that assumed and were identical as to each of these key criteria, the NPS improperly and unlawfully confined its alternatives analysis.

⁵ As noted above, although the DEIS’s range of alternatives is overly narrow in terms of the range of *action* alternatives considered, CHAPA also believes that its presentation of two *no action* alternatives, instead of the typically and appropriately singular no action alternative, may impede a proper and meaningful comparison of the impacts of the various alternatives against a defined baseline.

B. The DEIS Improperly Adopted Buffer Distances Without Any Balancing of Species Protection With Other Relevant Considerations

The DEIS improperly adopted the buffer distances included in the USGS protocols and Piping Plover Recovery Plan based only on consideration of species protection, without balancing species protection with other relevant considerations. According to the DEIS, “[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 2005 USGS protocols for 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 two years implementing the consent decree (2008–2009).” DEIS at 73. “Appendix G of the Piping Plover Recovery Plan was used as a basis for determining appropriate management measures under all of the action alternatives.” DEIS at 65. Rather than reflect any independent consideration of the multiple objectives that the NPS must weigh in developing its ORV management plan, and consider any alternative buffer distances in any of its action alternatives, the DEIS simply adopted the buffer distances specified in the USGS protocols and Piping Plover Recovery Plan. By their own admission, however, “[t]hese protocols do not attempt to balance the need for protection of these species with other activities that occur at CAHA.” Cohen, J.B., Erwin, R.M., French, J.B., Jr., Marion, J.L., and Meyers, J.M., 2010. A review and synthesis of the scientific information related to the biology and management of species of special concern at Cape Hatteras National Seashore, North Carolina: U.S. Geological Survey Open-File Report 2009–1262, at 99.

Moreover, Appendix G of the Piping Plover Recovery Plan explicitly provides managing agencies with flexibility to address situations such as those at the Seashore where restrictions would impede vehicle access. The Recovery Plan specifically states that, while the USFWS recommends the protection measures described in Appendix G, “[s]ince restrictions to protect unfledged chicks often impede vehicle access along a barrier spit, a number of management options affecting the timing and size of vehicle closures are presented here.” Piping Plover Recovery Plan at 66, 193.⁶ Thus, Appendix G sets forth two methods of motor vehicle management. The first option reflects the 1,000 meter buffer incorporated into each of the DEIS’s action alternatives. The second—again, designed for situations just like that at the Seashore where restrictions would impede vehicle access—allows for management pursuant to a plan that obtains the concurrence of the USFWS, and 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.” According to Appendix G, under this second method:

⁶ Piping Plover Recovery Plan at 74 (“Since restrictions to protect unfledged chicks often impede vehicle access along a barrier spit, a number of management options affecting the timing and size of vehicle closures are presented; some of these options are contingent on implementation of intensive plover monitoring and management plans by qualified biologists.”).

Unless substantial data from past years show that broods on a site stay very close to their nest locations, vehicle-free areas should extend at least 200 meters on each side of the nest site during the first week following hatching. The size and location of the protected area should be adjusted in response to the observed mobility of the brood, but in no case should it be reduced to less than 100 meters on each side of the brood. In some cases, highly mobile broods may require protected areas up to 1,000 meters, even where they are intensively monitored. Protected areas should extend from the ocean-side low water line to the bay-side low water line or to the farthest extent of dune habitat if no bay-side intertidal habitat exists. However, vehicles may be allowed to pass through portions of the protected area that are considered inaccessible to plover chicks because of steep topography, dense vegetation, or other naturally-occurring obstacles. In a few cases, where several years of data documents that piping plovers on a particular site feed in only certain habitat types, the Service or the State wildlife management agency may provide written concurrence that vehicles pose no danger to plovers in other specified habitats on that site.

Piping Plover Recovery Plan at 194-95. Clearly, the development of the ORV management plan for the Seashore is just the type of situation that this second method was intended to cover.

DEIS's failure to consider the impact on public access in the determination of buffer distances is only exacerbated by its failure to inform the public about the full extent of the closures that can be expected to occur under Preferred Alternative F. The NPS possesses specific data relating to closures from the implementation of the Consent Decree during 2008 and 2009 that will provide a strong indication of the extent to which Preferred Alternative F will result in the closure of the Seashore to public access, not only for ORV use, but for pedestrian use as well. The DEIS does provide some data for 2008: "From May 15 through August 21, 2008, an average of 10 miles of oceanfront beach at the Seashore was closed to both pedestrians and ORVs. The largest amount of beach closures was reported on May 29, 2008, when 12.8 miles of beach were closed to all recreational use to protect piping plovers exhibiting breeding, nesting, and/or foraging behavior." DEIS at 267. As the NPS is aware, and as the Superintendent for the Seashore recently testified, the following closures occurred in 2009: Bodie Island Spit – 136 days; Cape Point – 101 days; Hatteras Island Spit – 125 days; and south Ocracoke – 80 days. These closures affected some of areas of the Seashore that are most used by the public for recreation, during the late spring and summer months when recreational use is most desirable. Despite the fact that this record of closure provides valuable data for public review and comment, it appears nowhere in the DEIS. This would have been important information to share with the public to accurately inform the public review process.

Particularly given the NPS's statutory obligations with respect to managing the Seashore for recreational use, the NPS's failure to balance species protection with providing for visitor use and enjoyment of the area, and the agency's failure to consider reasonable alternatives to the highly-restrictive buffer distances set forth in each of the action alternatives, are arbitrary and capricious.

C. The Preferred Alternative's Highly Restrictive Buffers and Closures Will Not Meaningfully Reduce the Seashore's High Sea Turtle Nest Loss Rates

Because most of the extensive sea turtle nest loss historically experienced at the Seashore cannot be attributed to ORV use, the highly restrictive buffers and closures that would be required under Preferred Alternative F are an inappropriate and unnecessary tool to protect sea turtle species. Nesting success has been particularly poor near the Seashore's points and spits due to the especially high erosion rates at those locations. Hatchlings in these areas also face significant risk of mortality due to being swept into inlets upon entering the ocean or getting caught up in the violence of Cape Point without sufficient energy to escape. Nests in these areas should be relocated to improve the likelihood of successful emergence and hatchling survival.

The DEIS inexplicably diminishes the true extent of sea turtle nest loss at the Seashore due to the damaging storms that frequently strike the area. As the DEIS recognizes, "Periodic, short-term, weather-related erosion events (e.g., atmospheric fronts, Nor'easter storms, tropical storms, and hurricanes) are common phenomena throughout the loggerhead nesting range and may vary considerably from year to year." DEIS at 219. The DEIS then describes six storm-related losses that occurred in Florida and Georgia between 1985 and 2001, which caused an average of 27.3 percent loss of loggerhead nests. DEIS at 219-20. With respect to the Seashore, the DEIS provides surprisingly little information relating to storm losses. All it says is that "The majority of turtle nest losses at the Seashore from 1999 to 2007 were weather related, particularly due to hurricanes and other storms. During this time, six hurricanes caused impacts to nests. In 2003, Hurricane Isabel destroyed 52 of the 87 nests (34 had hatched before the storm); there was so much water and sand movement along the beaches that no evidence of any nests could be found afterward. The Seashore also felt the effects of numerous tropical storms and hurricanes as they passed by offshore." DEIS at 220. This amounted to a 59.8 percent loss, higher than any other catastrophic event listed in the DEIS.

In fact, the DEIS fails to mention that, between 2000 and 2009, 36.4% of nests laid at the Seashore have been lost. Last year, with no hurricanes or tropical storms within 400 miles, the Seashore lost 35.58 percent of its nests due to weather-related events. The USFWS Recovery Plan—which inexplicably does not even mention the Seashore's severe losses from Hurricane Isabel in 2003—appears to believe that Georgia's loss of 16 percent of nests in 2001 due to weather-related erosion events was catastrophic. Certainly, a 10-year average loss of 37.25 percent ought to be of concern. But, given that the causes of these losses cannot be attributed to ORV use, the ORV closures that would be required under Preferred Alternative F will not make a dent in these loss rates. Other appropriate management actions are required.

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V. THE DEIS'S APPROACH TO SEA TURTLE PROTECTION WILL LIMIT PUBLIC ACCESS WITHOUT FURTHER IMPROVING SPECIES RECOVERY

The revised Loggerhead Recovery Plan⁷ covers treatment of the entire North West Atlantic population of the loggerhead sea turtle all the way from southern Virginia to the Caribbean. Implementation of the Recovery Plan varies to some extent from one area of the coast (or one coastal state) to the next. Looking at these different areas, Proposed Alternative F would create what appears to be the most extreme sea turtle protection policy of any jurisdiction, resulting in the most restrictive public access provisions without commensurate benefit to the breeding program and species recovery. CHAPA recognizes that, in an ideal situation, loggerhead sea turtles would be permitted to recover without human manipulation and using natural processes. However, the historical record shows that following such a policy for sea turtle recovery at the Seashore has yielded exceedingly poor results, and primarily due to natural causes rather than public visitation and use. See Cape Hatteras National Seashore Sea Turtle Annual Reports, 2000 – 2009. The Seashore's percentage of nests lost is approximately three times that in Georgia and South Carolina, both of which allow for more manipulative species protection measures and impose fewer restrictions on access. From 2000 to 2009, the Seashore has lost an average of 37.25 percent of nests, with an additional 6.22 percent having a hatch rate of under 20 percent—totaling 43% of nests. These rates are well above the loss rates experienced in other areas, and they will not contribute to species recovery. And nothing in the proposed ORV management plan will materially change this.

Rather than consider relocation of sea turtle nests as a viable measure to protect and enhance sea turtle populations at the Seashore, the DEIS, without any meaningful analysis, quickly dismissed nest relocation from further consideration as an alternative element. DEIS at 87. Although the DEIS discussed some of the concerns with nest relocation, it erroneously concluded—without scientific or other support—that conditions at the Seashore *other than recreation* do not present a high risk to sea turtle nests.

As a premise for its dismissive treatment of nest relocation, the DEIS states that “The revised Loggerhead Sea Turtle Recovery Plan (NIMFS and USFWS 2008) recommends the use of the least manipulative method to protect nests and states that as a general rule, nests should only be relocated if they are low enough on the beach to be washed daily by tide or if they are situated in well documented high-risk areas that routinely experience serious erosion and egg loss.” DEIS at 87. The DEIS, however, inexplicably concludes that the Seashore is not such a well documented high-risk area and does not present “special conditions” warranting further consideration of nest relocation as a species protection measure. *Id.* It should go without question, however, that the beaches of the Outer Banks, and particularly Ocracoke and Hatteras Islands, are part of an extraordinarily dynamic system that experiences strong ocean currents and wave action, significant storm activity, high tidal action, and rapid erosion rates.⁸ These

⁷ Recovery Plan for the Northwest Atlantic Population of the Loggerhead Sea Turtle (*Caretta caretta*), Second Revision, National Marine Fisheries Service, 2008.

⁸ See, e.g., <http://islandfreepress.org/2010/Archives/01.28.2010-USGeologicalSurveyCoastalErosionStudyIsComingtoCapePoints.html> (discussing new USGS study on Carolina Coastal Change Processes).

environmental characteristics (along with a significant predatory ghost crab population)—*all having nothing to do with recreation*—present severe challenges to successful sea turtle reproduction. The DEIS's conclusion that they do not present a high-risk situation or special circumstances for sea turtle nesting and hatching survival simply cannot be justified.

Data from the Seashore's annual reports indicate that nests laid late in the season (*i.e.*, after July 9) have a more than 50 percent chance of being lost. Many of these nests would benefit from relocation, owing to the special, high-risk, non-recreation related conditions present at the Seashore.

The NPS's stated concerns with regard to nest relocation also bear further examination. Changes in temperature (which may result in changes to the sex ratio) as well as increased hatch failure are known issues that can be addressed through the proper handling of eggs by properly trained personnel. Moreover, relocation can actually be beneficial to the sex ratio by taking advantage of temperature gradients to increase the percentage of female hatchlings.⁹ This is similarly the case with potential storm damage and predation at relocation sites. These issues can be addressed through utilization of multiple relocation sites, and appropriate corrals and screening to prevent predation. In fact, data from the Seashore and other coastal areas such as Cape Romain National Wildlife Refuge in South Carolina and Cape Lookout National Seashore in North Carolina consistently show that relocated nests have better hatch success than nests left in-situ. *See, e.g.*, Cordes, J. and Rikard, M., Cape Lookout National Seashore 2005 Sea Turtle Monitoring Program; http://www.fws.gov/caperomain/exit/Sarahforweb_poster.pdf (stating that “[h]atcheries should continue to be used on Cape Island as a management tool” due to the island's high erosion rate and other factors). With adherence to appropriate protocols, these risks can be addressed in a manner that ensures that relocation benefits, rather than harms, the species.

In sum, natural nesting has and can be expected to continue to be associated with a decline in turtle species populations. Rather than dismiss routine nest relocation out of hand as inconsistent with species protection, with no scientific support, the final EIS should seriously evaluate and consider routine nest relocation as a legitimate and beneficial species protection measure to address the special hazards to sea turtle breeding at the Seashore.

VI. NPS SHOULD REVISIT THE DEIS'S PREFERENCE FOR “FIXED” RATHER THAN “FLOATING” CLOSURES

During the negotiated rulemaking process, beach user groups recommended that the NPS maximize the use of “floating” resource closures in the place of fixed closures. Such closures would move along with the range of the birds and, the groups advocated, would provide both better protection for shorebirds and more access for the public. Given that the NPS envisions that the ORV management plan will be in effect for ten to fifteen years, making the plan flexible and adaptable to the Seashore's dynamic conditions only makes sense. Fixed closures do not satisfy the DEIS's stated objective to “[e]stablish ORV management practices and procedures

⁹ *See* Hardham, L.H. and Davis, R.B., Summer 2007-Beach Sand Temperature Study, NPS Scientific Research Permit #CAHA-2007-SCI-0005.

that have the ability to adapt in response to changes in the Seashore's dynamic physical and biological environment," DEIS at iii, and should not be used in the final plan.

The DEIS explains that Preferred Alternative F would include three "floating" nonbreeding shorebird habitat areas that "would be adjusted on a yearly basis to provide nonbreeding habitat in these areas. The closure would float year to year, depending on where the most effective wintering habitat is located which would be determined based on a review of the previous year's monitoring results." DEIS at xxxi, 81. All other seasonal and year-round closures under the Preferred Alternative would be fixed.

Year-round closures that are fixed rather than floating are not adaptable to the changing nature of the Seashore's barrier islands. Over time, areas designated for permanent closure today due to their current value as species habitat may no longer be attractive habitat. Map 4 of the Seashore's 2009 Annual Piping Plover Report, titled "Hatteras Inlet PPL Nesting Activity 2000-09," is illustrative of this point. Piping Plover (Charadrius Melodus) Monitoring Cape Hatteras National Seashore 2009 Annual Report, Appendix A, Map 4. This map depicts piping plover nests from 2000 through 2009, as well as 2009 prenesting areas. As depicted on the map, as of the date the aerial photograph was taken (indicated to be August 2008), every piping plover nest site identified on the map was underwater. Although the NPS continues to maintain that primary constituent elements remain at the area and established prenesting closures there for this year, the area is nonetheless a poor nesting site, as there are ephemeral pools at the area only at low tide.

Floating closures provide appropriate flexibility to ensure that the areas subject to closure reflect those areas that actually have value as species habitat, and help ensure that areas no longer suitable for species habitat are not being unnecessarily closed to recreational use and enjoyment. CHAPA believes the use of floating closures for the protection of breeding birds represents sound adaptive management practices that can be beneficial to both natural resources and recreational activities. CHAPA recommends that NPS revisit the permanent closures contemplated under Preferred Alternative F and incorporate floating closures instead of fixed closures where practical. However, CHAPA also believes that the three floating closures currently including in Preferred Alternative F are unnecessary and should be omitted from the final plan, because their purpose is to isolate migratory birds during the non-breeding season.

VII. THE PREFERRED ALTERNATIVE'S NIGHT-DRIVING RESTRICTIONS ARE STATED INCONSISTENTLY AND IGNORE IMPORTANT RELEVANT SCIENTIFIC DATA AND INFORMATION

Preferred Alternative F's night-driving restrictions are not supported by relevant scientific data and are unnecessarily restrictive. The Consent Decree established a prohibition on night driving on beaches between the hours of 10:00 p.m. and 6:00 a.m. from May 1 through September 15, with night driving allowed from September 16 through November 15 under the conditions of a permit. Preferred Alternative F goes even further. In fact, it is unclear how restrictive Alternative F's night-driving restrictions really are, because the DEIS itself states them inconsistently. At page 358, the DEIS states that "Under alternative F, all nonessential ORV traffic would be prohibited from all areas (other than soundside access areas), from one hour after sunset until approximately one-half hour after sunrise from May 1 to November 15.

From November 16 to April 30, ORV use would be allowed 24 hours per day in designated ORV routes for vehicles with a valid ORV permit. Furthermore, the NPS would retain the discretion to limit night driving to certain areas or routes, based on resource protection considerations.” Yet, at pages 81-82, the DEIS states that “Designated ORV routes would be open to ORV use 24 hours a day from November 16 through April 30. From May 1 through September 15, all potential sea turtle nesting habitat (ocean intertidal zone, ocean backshore, and dunes) would be closed to non-essential ORV use from 1 hour after sunset until NPS turtle patrol has checked the beach in the morning (by approximately one-half hour after sunrise) to provide for sea turtle protection and allow enforcement staff to concentrate their resources during the daytime hours. From September 16 through November 15, selected ORV routes with no or a low density of turtle nests remaining (as determined by the NPS) would reopen to night driving, subject to the terms and conditions of a required permit.” Although it appears that the description at pages 81-82 is the intended one, and it is clear that one way or the other the night-driving restrictions in Alternative F are more restrictive than those in the Consent Decree, the DEIS’s inconsistency is troubling and makes it difficult for the public to respond appropriately to this element of the NPS’s proposal.

The DEIS justifies the night-driving restrictions as necessary for the protection of sea turtles and piping plovers. See, e.g., DEIS at 95. But the DEIS ignores critical information that is specific to the Seashore and that illustrates that the night-driving restrictions in Preferred Alternative F are unnecessarily broad.

First, the DEIS’s assumptions with respect to the need for and benefit of night-driving restrictions at the Seashore to protect sea turtles are flawed, as they disregard what appears to be a critical factor in sea turtle false crawls at the Seashore—*i.e.*, the use of white carsonite stakes in lieu of wood stakes (or brown carsonite stakes) at closures. From 2000 to 2003, with night driving and use of 2x2 wood stakes at closures, the false crawl to nest ratio was 0.75:1. In 2004 and 2005, with white carsonite stakes replacing wood stakes at closures, the false crawl to nest ratio jumped to 1.62:1. For some reason, neither the NPS, USFWS, nor the North Carolina Wildlife Resources Commission appeared to be concerned by this dramatic increase. In 2006 and 2007, after this issue was brought to the NPS’s attention, the NPS started to use brown carsonite stakes at closures while night driving was still allowed and the false crawl to nest ratio dropped to 0.98:1, without the unexplained 24 false crawls at the hook bird closure at Cape Point. The USFWS’s expected false crawl to nest ratio on an undeveloped beach is 1:1. In 2008 and 2009, with brown carsonite stakes and no night driving the false crawl to nest ratio was 0.95:1. Thus, recent evidence at the Seashore shows that night driving is not a material factor in false crawls and that the night driving restrictions are unnecessary to reduce false crawls. It is clear that at the Cape Hatteras National Seashore Recreational Area *false crawls have been increased by the use of carsonite stakes* (and even more so by white carsonite stakes) and *not, as the DEIS suggests, reduced by a ban on night driving or recreational use.*

The DEIS’s rationale for night-driving restrictions to protect piping plovers is also flawed. The DEIS states that “Because plovers are known to be active at night (Staine and Burger 1994; Maker and Shaffer 2008), and plover chick and fledgling response to vehicles can increase their vulnerability to ORVs (USFWS 1996a), the high level of protection at night from May 1 to November 15 under alternative F would result in long-term moderate beneficial

impacts because it would reduce the potential for disturbance to plovers that could result in mortality.” DEIS at 358. Yet, at page 347, the DEIS explicitly acknowledges that, although night-driving restrictions “would further reduce the potential for disturbance to night-foraging plover that could result in mortality, . . . *foraging of piping plover outside of the SMAs is unlikely.*” DEIS at 347 (emphasis added). So the DEIS itself appears to recognize that the more restrictive limits on night-driving are likely to be unnecessary outside of the SMAs, and can be limited without jeopardizing the piping plover.

VIII. THE DEIS FAILS TO MEANINGFULLY AND ACCURATELY ASSESS THE ECONOMIC IMPACTS OF THE RESTRICTIONS ON BEACH ACCESS AND USE UNDER THE PROPOSED ACTION AND ALTERNATIVES

The need to appreciate the socio-economic impacts of each of the identified alternatives is acutely important for the Seashore. As this Nation’s first national seashore, Congress contemplated that the Seashore would only become part of the NPS system if the local community supported the proposal. Congress conditioned its creation, in fact, on the condition that state and private donors would purchase the land, which would then be turned over to the NPS for administration. This is different from other seashores created in the 1960s and 1970s, such as the Cape Code National Seashore, where the government committed to purchasing the property. And in 1938, Secretary Ickes explained that such seashore reservations were designed to ensure that the nation’s beaches would be accessible, and not monopolized, to the American public:

When we look up and down the ocean fronts of America, we find that everywhere they are passing behind the fences of private ownership. The people can no longer get to the ocean. When we have reached the point that a nation of 125 million people cannot set foot upon the thousands of miles of beaches that border the Atlantic and Pacific Oceans, except by permission of those who monopolize the ocean front, then I say it is the prerogative and the duty of the Federal and State Governments to step in and acquire, not a swimming beach here and there, but solid blocks of ocean front hundreds of miles in length. Call this ocean front a national park, or a national seashore, or a state park or anything you please—I say that the people have a right to a fair share of it.

DYAN ZASLOWSKY, T.H. WATKINS, THESE AMERICAN LANDS 33-34 (The Wilderness Society 1994). See also Nathaniel T. Kenney, B. Anthony Stewart, *Our Changing Atlantic Coastlines*, 122 NATIONAL GEOGRAPHIC 860 (Dec. 1962) (noting need for open coastlines for recreational activity). The concept that the Seashore would be accessible for recreational activity and that the local community could support that activity and become economically interdependent with that activity is, therefore, a necessary objective of any planning effort for the Seashore.

Yet, the DEIS fails to meaningfully address the economic impact of the restrictions on beach access and use under any of the alternatives other than the two no action alternatives.¹⁰ NEPA requires that an agency take a “hard look” at the effects of a proposed action on the “human environment,” which expressly includes the socio-economic impacts of an action. But the DEIS is wholly deficient in evaluating the economic impacts of Alternative F. Indeed, the DEIS relies on incomplete and not very rigorous economic analysis. As a result, the economic impacts are treated only marginally and minimized. Throughout its economic analysis, for example, the NPS presents broad ranges of potential economic impacts. *See, e.g.,* DEIS at 562, Table 61. The NPS then, without supporting justification and without exception, consistently uses the low end of these ranges to support its decisions to adopt the broader access and use restrictions.¹¹ And it did this without conducting any statistically meaningful survey,¹² as well as without any meaningful inquiry into the local community and how the restrictions would affect that community. Rather, it used such tools as the region of influence (ROI) to mask the effect on small businesses dependent on the seashore-related economic activity.¹³ The impact of tourism

¹⁰ The analysis of the economic impact of each of the alternatives oddly truncates the analysis of Alternatives E & F.

¹¹ When the DEIS suggests that, “[i]f the trends seen in the publicly-available data continue, the economic impacts of the alternatives would likely occur in the lower range of projected impacts,” DEIS at 568, its assumptions not only are unsupported but also ignore what has occurred nationally during the past few years and, as such, the snapshot of the few years mentioned in the DEIS inappropriately skews the outcome.

¹² At one point, the DEIS states that it is in the process of developing a visitor survey, under the auspices of RTI, International, and that the results will be available at the FEIS. DEIS at 566. NEPA does not allow an agency to first provide the public with critical information at the FEIS stage, and effectively deny the public a meaningful opportunity to comment. This comment, moreover, undermines the credibility of the DEIS’s suggestion elsewhere about quantifying the economic impact through the use of a questionable business survey. *See* DEIS at 561 (“A range of changes in business revenue was developed based on a business survey conducted of a sample of potentially impacted businesses and informed by visitation statistics for the last 10 years at the Seashore and other coastal national parks in North Carolina and other economic indicators (see ‘Business Survey’ below for more information). Many businesses found it difficult to provide a quantitative estimate of the impact different features of the alternatives would have on their businesses because of the unpredictable factors discussed in the preceding paragraph. Currently, the analysis draws heavily from the business survey; however, data from an ongoing visitor survey will be used to supplement the business survey when the data are available in summer 2010.”). *See also* DEIS at 567.

¹³ The ROI incorporates the Northern Beach communities, including Southern Shores and Duck. These areas are almost completely disconnected from ORV use and access issues relating to the Seashore. Inclusion of the Northern Beaches in analysis significantly dilutes estimates of economic impact on the Seashore Villages. For instance, while Dare County experienced an unemployment rate of 6.8% in 2009, when the area is narrowed to those communities most directly affected, the Island had an unemployment rate of 12.8% and then the villages for the most part experienced an even higher rate of unemployment. But even the discussion about the ROI simply offers speculation. *E.g.,* DEIS at 582 (“Overall, it is expected that businesses in the ROI would experience long-term negligible to minor adverse impacts, with the potential for

and corresponding restrictions on such activity on the local economy has been well recognized for quite some time. CLAWSON & KNEITSCH, *ECONOMICS OF OUTDOOR RECREATION* (1971). And, while we encourage NPS's use of modern econometric models that employ methods for measuring the economic impact on local communities, such methods are dependent upon developing more detailed and accurate inputs before deploying such models as the IMPLAN model.¹⁴ Although IMPLAN is a valuable tool in many instances, its use here did not, for instance, discern that communities like Ocracoke could potentially be devastated. The DEIS merely notes that small businesses could be impacted disproportionately, not recognizing that such communities are a collection of such businesses and the notion that they might in the future be able to adapt is without any factual support in the DEIS.

Also, the DEIS inappropriately avoids examining many aspects of the socio-economic impacts by simply hypothesizing likely future scenarios. In one place, for instance, the DEIS speculates that economic impacts might be offset by substitute economic opportunities, DEIS at 561, but the DEIS offers no factual support for this supposition. In another place, the DEIS states that businesses would experience "uncertain adverse impacts," impacts that "may ripple through the economy," but then speculates that the economy may "adapt" without any basis for its conclusion. DEIS at 595-96. In other instances, the DEIS similarly speculates that, for most scenarios, the visitor mix may change but not necessarily the level of visitation—again without any support. DEIS at 562. Of course, some of these assumptions appear inconsistent with the construct of the IMPLAN model based on certain input/output assumptions.

Where the DEIS does not hypothesize, it instead suggests that economic impacts are too dependent on variations from year to year to quantify. DEIS at 561. For instance, the DEIS observes that "[v]ariation in nesting patterns from year to year makes the socioeconomic impacts of the alternatives more difficult to forecast. Impacts could be low in years when beach closures are minimal or short lived. Impacts would be higher if beach closures are widespread and long

larger impacts on individual businesses located in the Seashore villages that are tied most directly to ORV users and to traffic at vehicle access ramps. Small businesses are expected to experience long-term negligible to moderate adverse impacts. Based on the visitation statistics, the probability of negligible to minor impacts is greater than the probability of moderate adverse impacts.").

¹⁴ IMPLAN is only as good as the inputs, as the NPS recognizes (DEIS at 561-62), and the model is an input/output model dependent upon assumptions and the efficacy of the inputs. The DEIS discusses the outputs, but fails to provide enough information for the public to meaningfully comment on the assumptions and the inputs. Rather, the DEIS contains speculation on adjustments in the economy that could adapt over time, but that speculation contained in the discussion about the business survey is not even a product of the business survey. *E.g.*, DEIS at 562. Another example of how a desktop application of IMPLAN can create hypothetical rather than real world analysis is where unreliable data is potentially employed for the inputs, such as relying on "yellow pages, web sites," or random and not clearly explained surveys of businesses. DEIS at 566. The same problem occurs when random and potentially statistically insignificant surveys are conducted by phone, DEIS at 567, with small sample sizes and low response rates, with the questions and responses easily capable of being distorted due to the nature of the medium. *Id.*

lasting. Widespread closures for several years in a row may discourage some visitors from returning in future years, while a series of years with minimal impacts on beach access may invite larger crowds.” But in skirting any attempt at analysis, the DEIS failed to examine available data, such as from the 2009 closures.¹⁵

IX. THE DEIS FAILS TO CONSIDER THE DETRIMENTAL IMPACTS OF YEAR-ROUND CLOSURES ON BIRD HABITAT, AND THE POTENTIAL ROLE OF PROPERLY REGULATED ORV USE IN PRESERVING SUITABLE HABITAT

The DEIS improperly fails to consider the detrimental impacts of year-round closures on bird habitat, as well as the potential role that properly regulated ORV use can play in preserving suitable habitat. Year-round closures, such as those contemplated under Preferred Alternative F, encourage vegetation growth that destroys existing bird habitat. Properly regulated ORV use can help control vegetation growth and therefore actually help preserve suitable shorebird habitat. The final EIS should consider to what extent year-round closures contribute to vegetation growth that reduces suitable shorebird habitat, and the extent to which properly regulated ORV use can assist in controlling such vegetation growth and preserving suitable habitat.

The Atlantic Coast Piping Plover Revised Recovery Plan recommends that “[i]n some areas, especially those where natural processes that set back succession of vegetation are impeded by coastal management practices, land managers should consider remedial efforts to remove or reduce vegetation that is encroaching on piping plover nesting and foraging habitat or obstructing movement of chicks from Oceanside nesting areas to bayside feeding flats.” The Recovery Plan notes, with respect to “a small-scale vegetation removal experiment” conducted at the Seashore in 1993, that “[t]he results were encouraging, with piping plovers and other shorebirds using the treated area for nesting and foraging immediately” (J. Nicholls *in litt.* 1994). This program was expanded during the next two seasons, and in 1995, it encompassed approximately 90 acres at Cape Point and 20 acres at Hatteras Spit (Collier and Lyons *in NPS 1995*).” Atlantic Coast Piping Plover Revised Recovery Plan at 69-70.

X. CONCLUSION

CHAPA continues to believe that it remains possible for the NPS to develop a long-term ORV management plan and special regulation to meet the NPS’s dual mandate to preserve the Seashore’s natural resources and to protect the traditional, cultural, recreational, and commercial values associated with the public use and enjoyment of the Seashore. However, for this to happen, NPS will have to be willing to seriously revisit its approach. Unfortunately, the existing DEIS appears to have abandoned the second part of the agency’s mandate. NPS has disregarded

¹⁵ In fact, in its analysis of Alternative B (Consent Decree), the DEIS focuses on 2008 data. The DEIS states that “[t]he low impact of no change (0% increase or decrease) reflects the visitor statistics for 2008, which were within normal yearly variation.” DEIS at 577. “The percent impacts [in the mid scenario] reflect responses from the business survey and a comparison between 2007 and 2008 visitation data.” *Id.* Yet, the Decree did not become effective until April 30, 2008, potentially compromising the efficacy of the data, which the DEIS fails to explain. This further questions, however, how the NPS will portray the 2009 data.

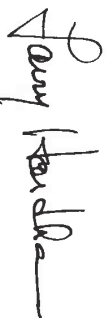
critical portions of the very legislation establishing the Seashore. It has produced a document that is so massive and complex, and that so selectively and incompletely uses and explains scientific information, that it undermines meaningful agency and public review and participation. The agency has masked the true extent of the impacts of the alternatives considered on public access and recreation by using an inappropriate baseline. It has failed to consider a reasonable range of alternatives. And it has adopted overly stringent species protection measures that will substantially restrict public enjoyment of the Seashore without further improving species survival and recovery. As a result, Preferred Alternative F would unnecessarily restrict motorized access and pedestrian use at the Seashore, flattening the Outer Banks coastal economy and threatening a lifestyle that predates the establishment of the Seashore.

Meaningful access to the shore, including through the use of ORVs, is essential to the shore-oriented culture and the continued growth and economic vitality of the Outer Banks. There is no need to eliminate such access in order to protect the Seashore's natural resources. Public enjoyment and resource conservation at the Seashore are not, as the DEIS often suggests, incompatible.

CHAPA's comments and recommendations in these comments and as further included in the Position Statement provide an appropriate balance between the need to conserve natural resources with the mandate to provide for the enjoyment of them. We urge the NPS to take these proposals into consideration. Given the nature and extent of the issues raised in these comments, we believe that it is essential for the long-term success of the ORV management plan that the NPS develop a revised or supplemental DEIS for further public comment, rather than proceed directly to an FEIS.

Thank you for the opportunity to participate in the development of this important management effort.

Respectfully submitted,



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