

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

No. 02:07-CV-00045-BO

DEFENDERS OF WILDLIFE and)
THE NATIONAL AUDUBON SOCIETY,)

Plaintiffs,)

v.)

NATIONAL PARK SERVICE; UNITED)
STATES FISH AND WILDLIFE SERVICE;)
UNITED STATES DEPARTMENT OF THE)
INTERIOR; DIRK KEMPTHORNE,)
SECRETARY OF THE INTERIOR; MARY)
A. BOMAR, DIRECTOR OF THE)
NATIONAL PARK SERVICE; H. DALE)
HALL, DIRECTOR OF THE U.S. FISH)
AND WILDLIFE SERVICE, and MICHAEL)
B. MURRAY, SUPERINTENDENT OF THE)
CAPE HATTERAS NATIONAL)
SEASHORE,)

Defendants,)

and)

DARE COUNTY, NORTH CAROLINA;)
HYDE COUNTY, NORTH CAROLINA; and)
THE CAPE HATTERAS ACCESS)
PRESERVATION ALLIANCE,)

Intervenor-Defendants.)
_____)

**AMENDED
COMPLAINT**

[Fed. R. Civ. P. 15(a)]

Now come the plaintiffs in this action and amend the complaint as a matter of course prior to service of a responsive pleading, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, by filing the following amended complaint.

NATURE OF THIS CASE

1. This action challenges the Defendants' adoption of an interim management plan to manage off-road vehicle ("ORV") use on Cape Hatteras National Seashore ("Seashore") that fails to adequately protect Seashore resources and the failure to enact a long-term plan to regulate ORV use on the Seashore. The interim management plan and failure to enact a long-term ORV regulation violate National Park Service Organic Act, 16 U.S.C. § 1 et seq.; the Cape Hatteras National Seashore enabling legislation, 16 U.S.C. §§ 459-459a-10; Executive Order 11644, entitled "Off-Road Vehicles on Public Lands," as amended by Executive Order 11989; the Endangered Species Act, 16 U.S.C. §§ 1531 – 1544; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712, and Executive Order 13186, entitled "Responsibilities of Federal Agencies to Protect Migratory Birds;" the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 et seq.; and the National Park Service's own regulations and management policies. The National Park Service issued an Environmental Assessment ("EA") evaluating alternative interim plans in January 2006, and a Finding of No Significant Impact ("FONSI") on July 7, 2007, selecting and approving an interim plan (the "Interim Plan") to permit and control the use of ORVs at Cape Hatteras National Seashore.

2. Cape Hatteras National Seashore was authorized in 1937 as the nation's first national seashore, under the management of the National Park Service. It consists of approximately 30,000 acres along approximately 64 miles of shoreline in the North Carolina Outer Banks, specifically on Bodie Island, Hatteras Island, and Ocracoke Island in Dare and Hyde Counties. ORV use has increased exponentially at the Seashore in recent years, with as many as 2,200 vehicles traveling on the beach in a given day. This increase in ORV use has coincided with a steady decline in the numbers and breeding success of numerous protected

species of shorebirds and sea turtles – some rare, endangered, or threatened – that live and breed at the Seashore. Increased ORV use also interferes with and conflicts with other public uses of the Seashore.

3. The National Park Service's Interim Plan and the ORV use it allows are substantially harming – and will continue to harm – important populations of endangered and threatened sea turtle species, threatened, special concern, or significantly rare bird species, and a threatened plant species, as well as other natural resources, serenity, and other recreational uses of the Seashore generally.

4. The National Park Service and other Defendants have been under a legal obligation under Executive Order 11644 to implement a long-term plan to govern ORV use that will protect natural resources and minimize conflicts with other uses of the Seashore since 1972. For 35 years, they have failed to implement such a long-term plan and only recently implemented an inadequate Interim Plan instead. In so doing, the Defendants have failed to meet their obligation under the Executive Order and implementing regulations. In addition, the Defendants' corresponding failure to protect the natural resources of the Seashore violates the Organic Act, the Seashore's enabling legislation, the Migratory Bird Treaty Act, the Endangered Species Act, and the National Park Service's own regulations and management policies. Finally, in adopting the Interim Plan, the Defendants have also violated their obligations under NEPA, including the obligation to take a hard look at the environmental impacts of a proposed action that will significantly harm the environment and disclose those impacts to the public in an EIS.

JURISDICTION AND VENUE

5. This action arises under numerous federal laws, regulations, and orders, including without limitation the National Park Service Organic Act, the Cape Hatteras National Seashore

enabling legislation, the Migratory Bird Treaty Act, the Endangered Species Act, and NEPA. This Court therefore has jurisdiction over this action pursuant to 28 U.S.C. § 1331, and may issue a declaratory judgment and grant further relief pursuant to 28 U.S.C. §§ 2201, 2202. Plaintiffs have a right to bring this action pursuant to, inter alia, the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

PARTIES AND STANDING

Plaintiffs

7. Plaintiff Defenders of Wildlife (“Defenders”) is a national non-profit, public interest organization founded in 1947. It has approximately one million members and supporters, including approximately 25,000 members and 25,000 e-activists in North Carolina.

8. Defenders has members who live in the general vicinity of the Seashore, and members from across the country, who visit, recreate, observe birds and other wildlife, photograph and otherwise use and enjoy the public lands, wetlands and other lands in the vicinity of the Seashore.

9. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities, and the preservation of the habitat on which they depend. Defenders advocates new approaches to wildlife conservation that will help keep species from becoming endangered, and it employs education, litigation, research, legislation and advocacy to defend wildlife and their habitat. For example, Defenders organized the Commission on New Directions for the National Wildlife Refuge System, which identified threats to wildlife refuges, including harmful test bombing, oil and gas drilling, grazing and other “secondary uses.”

10. Defenders has long been active in eastern North Carolina. For instance, Defenders promoted the introduction of the endangered red wolf to Alligator River National Wildlife Refuge (near Cape Hatteras National Seashore), and then successfully defended that program in court. The red wolves now range throughout much of northeastern North Carolina. Defenders was also active in commenting on and opposing a permit issued to allow certain erosion-control measures to be introduced in Oregon Inlet in the northern section of the Seashore.

11. Specifically, Defenders has been actively engaged in encouraging Defendants to comply with their legal obligations to regulate ORV use in the Seashore, in participating in the environmental review process for the interim plan, and preparing and submitting comments on the draft Environmental Assessment. Defenders also brought a lawsuit in 1996 to require designation of critical habitat for piping plovers, which led to the designation of parts of the Seashore as critical habitat.

12. Defenders, its staff, and its members derive scientific, aesthetic, and spiritual benefit from the existence of the Seashore and from the abundant wildlife species that depend on this ecosystem. Defenders' members have educational and scientific interests in the preservation of the Seashore and the wildlife of eastern North Carolina.

13. Plaintiff the National Audubon Society (“Audubon”) is a not-for-profit corporation organized under the laws of the State of New York, with its principal office at 700 Broadway, New York, New York 10003. Audubon has more than one million members and supporters, offices in 23 states, and a presence in all 50 states through more than 450 certified chapters and through its nature centers, sanctuaries, and education and science programs. Locally, Audubon maintains a North Carolina state office, which works on behalf of Audubon’s

nine chapters and 10,000 members and supporters in the state. Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. It carries out that mission nationally through a variety of activities including education, habitat conservation and public policy advocacy.

14. Audubon has members and staff who live in the general vicinity of the Seashore, as well as members from across the country, who visit, recreate, conduct research, work, observe birds and other wildlife, conduct educational activities, photograph and otherwise use and enjoy the public lands, wetlands, and other lands and waters of the Seashore. They also observe, study, photograph, and enjoy the natural resources and wildlife on the Seashore. The North Carolina office of Audubon also organizes periodic wildlife viewing trips to the Seashore and other such educational events.

15. In furtherance of Audubon's mission, it maintains a national network of community-based nature centers and chapters, engaging millions of people of all ages and backgrounds in positive conservation experiences and educating them about important natural resources.

16. In addition to chapter meetings and programs at its nature centers, Audubon communicates with its members and supporters through a magazine and newsletters that are used to inform and educate them about their interests and matters of importance to the organization's mission. Its magazine, Audubon, is published six times per year with a readership of approximately 1.6 million people. In addition, the North Carolina office distributes a newsletter (Audubon North Carolina) at least semi-annually. The magazine and newsletters are distributed to public libraries and schools, and reach millions of people.

17. Two issues of Audubon magazine have included stories on ORV use on National Seashores. The January 2005 issue included a story, “A Beachhead for Birds,” by Frank Graham, Jr., concerning the harm to the birds and other wildlife of Cape Hatteras National Seashore caused by ORVs. The January-February 2007 issue included an article entitled “Beach Bums,” by Ted Williams, that specifically discussed the failings of the interim plan. The same issue’s web-based version contained another article, “Where the Birds Are,” by Sidney Horton, which discussed the much different outcome in Cape Cod National Seashore, where ORV usage is more appropriately controlled for the benefit of birds and other wildlife.

18. Audubon has extensive expertise in identifying important bird habitat, assessing threats to that habitat, and analyzing trends in bird populations. Audubon also conducts numerous scientific and educational programs, and advocates for the protection and conservation of areas that sustain important bird populations.

19. Audubon scientists work with state offices and chapters to organize and implement an annual Christmas Bird Count (CBC) around the country. The CBC, which is in its 104th year, is the oldest continuous bird survey in the entire country. Audubon scientists collect and analyze the data from the CBC and make that data available to other scientists for use in their own studies. Audubon scientists also participate in regular, coastwide surveys for nesting waterbirds and shorebirds; collect data on migrating and wintering shorebirds; participate in state, regional, and national working groups and conservation initiatives; and work closely with state and federal agencies to develop and implement conservation plans for selected bird species. Audubon North Carolina staff monitor bird populations at the Seashore and surrounding areas.

20. Within North Carolina, the CBC is conducted at many locations in and around the Cape Hatteras National Seashore, including Ocracoke Island, Cape Point, Bodie Island, Pea

Island National Wildlife Refuge, Alligator River National Wildlife Refuge, and parts of Cape Lookout National Seashore.

21. Audubon scientists' data and expertise are also used to manage biologically sensitive lands around the country, including in North Carolina. Audubon owns and manages the 6,000-acre Pine Island Sanctuary, and either owns or manages 19 coastal island sanctuaries between the mouth of the Cape Fear River and Ocracoke Island. In addition, the National Audubon Society is the U.S. Partner for Birdlife International, which administers the International Important Bird Areas Program, for which it identifies the most important remaining habitat areas for birds. The Cape Hatteras National Seashore, Pea Island National Wildlife Refuge, Alligator River National Wildlife Refuge, and several islands in northeastern Pamlico Sound are among those that have been officially designated as Global Important Bird Areas pursuant to this program.

22. The continued use of ORVs by visitors to the Seashore pursuant to the Interim Plan, sometimes thousands of ORVs per day, will disrupt and destroy the natural resources of the Seashore by, among other things, disrupting wildlife activity in the area, preventing federally-designated endangered and threatened birds and sea turtles from successfully nesting and reproducing, disturbing and increasing the mortality of the same species during nesting season, disturbing and increasing the mortality of several bird species during migration and wintering, causing bird and turtle populations to scatter, disperse, and possibly move to other areas, and destroying at least one federally threatened plant. In addition, management of the use of ORVs by the National Park Service under the interim plan does not even meet the minimum steps deemed necessary by the Park Service's own scientists and consultants to preserve the natural resources of the Seashore. Such disruption of wildlife, reduction in numbers, and destruction of

natural resources will preclude Defenders' and Audubon's members and staff from deriving scientific, aesthetic, and spiritual benefits from the Seashore. The continued use of ORVs by visitors to the National Seashore pursuant to the Interim Plan will reduce the fitness of the Seashore for wildlife habitat, thereby interfering with and harming the interests of Defenders and Audubon and their members and staff.

23. As set forth above, Defenders and Audubon and their members have interests which are adversely affected and irreparably harmed by the actions of the Defendants regarding use of ORVs at Cape Hatteras National Seashore. These actual and potential injuries have been and continue to be caused by the illegal decisions of the Defendants regarding use of ORVs at the Seashore. The injuries will not be redressed except by an order from this Court vacating the Interim Plan and FONSI, requiring Defendants to develop and institute a new plan that satisfies scientific protocols necessary to preserve and protect the natural resources at the Seashore and meets the requirements of the applicable laws, regulations, and orders, requiring Defendants to develop and implement a long-term plan to govern ORV use, requiring Defendants to prepare adequate environmental documents for the actions included in that new plan, and ordering the other relief sought in this action.

Defendants

24. Defendant National Park Service is a subordinate agency of the United States Department of the Interior, organized and existing pursuant to Title 16, Chapter 1, of the United States Code. The National Park Service is the federal agency that took the final agency actions challenged herein and unlawfully withheld or unreasonably delayed in issuing a long-term special regulation for the Cape Hatteras National Seashore, as required by law.

25. Defendant U.S. Fish & Wildlife Service is a subordinate agency of the United States Department of the Interior, organized and existing pursuant to Title 16, Chapter 1, of the United States Code. The Fish & Wildlife Service is the federal agency that issued the Biological Opinion and Incidental Take Statement for the Interim Plan—final agency actions challenged herein.

26. Defendant Department of the Interior is an agency of the United States, organized and existing pursuant to Title 43, Chapter 31, of the United States Code. The Department of the Interior is the federal agency that took the final agency actions challenged herein and unlawfully withheld or unreasonably delayed in issuing a long-term special regulation for the Cape Hatteras National Seashore, as required by law.

27. Defendant Dirk Kempthorne is the Secretary of the Interior, appointed pursuant to 43 U.S.C. § 1452, and is sued in his official capacity as the head of the federal agency that took the final agency actions challenged herein and unlawfully withheld or unreasonably delayed in issuing a long-term special regulation for the Cape Hatteras National Seashore, as required by law.

28. Defendant Mary A. Bomar is the Director of the National Park Service, appointed pursuant to 16 U.S.C. § 1, and is sued in her official capacity as the head of the federal agency that took the final agency actions challenged herein and unlawfully withheld or unreasonably delayed in issuing a long-term special regulation for the Cape Hatteras National Seashore, as required by law.

29. Defendant H. Dale Hall is the Director of the U.S. Fish & Wildlife Service, appointed pursuant to 16 U.S.C. § 1, and is sued in his official capacity as the head of a federal agency that took final agency actions challenged herein.

30. Defendant Michael B. Murray is the Superintendent of the Cape Hatteras National Seashore, and is sued in his official capacity. Defendant Murray recommended the Interim Plan and FONSI.

FACTS

Environmental Background

31. Over two million people visited Cape Hatteras National Seashore last year to enjoy the beaches, recreate, fish, observe wildlife, and visit the lighthouses and other historic sites. The Seashore provides important habitat to numerous wildlife species, and is particularly important habitat for waterbirds, shorebirds and sea turtles.

32. The Seashore is home to the following species of significance to this action:
- a. Loggerhead turtles (*Caretta caretta*), listed as threatened under the federal Endangered Species Act and threatened under the North Carolina Endangered Species Act;
 - b. Green turtles (*Chelonia mydas*), listed as threatened under the federal Endangered Species Act and threatened under the North Carolina Endangered Species Act;
 - c. Leatherback turtles (*Dermochelys coriacea*), listed as endangered under the federal Endangered Species Act and endangered under the North Carolina Endangered Species Act;
 - d. Piping plovers (*Charadrius melodus*), listed as threatened under the federal Endangered Species Act and threatened under the North Carolina Endangered Species Act;
 - e. Gull-billed terns (*Sterna nilotica*), listed as threatened under the North Carolina Endangered Species Act;
 - f. Common terns (*Sterna hirundo*), listed as a species of special concern by the North Carolina Wildlife Resources Commission;
 - g. Least terns (*Sterna antillarum*), listed as a species of special concern by the North Carolina Wildlife Resources Commission;
 - h. Black skimmers (*Rynchops niger*), listed as a species of special concern by the North Carolina Wildlife Resources Commission.

- i. American oystercatchers (*Haematopus palliatus*), listed as significantly rare by the North Carolina Wildlife Resources Commission;
- j. Seabeach amaranth (*Amaranthus pumilus*), a plant listed as threatened under the federal Endangered Species Act and threatened under the North Carolina Endangered Species Act.

33. **Loggerhead turtles:** The loggerhead turtle more commonly occurs on the Seashore than the other two sea turtle species. They migrate to nesting beaches and nest between late April and mid-September. Females emerge onto the beach, select a nest site on open sand, dig a nest cavity with hind flippers, lay an average of 112 eggs, then cover the nest, and return to the sea. If disturbed during this process, they will likely abandon the effort. Hatchlings emerge from the nest, typically at night, and crawl to the sea, likely orienting toward the brightest horizon and away from darkness; thus, they are sensitive to light and can be thrown off-course by artificial light, including vehicle headlights. An average of 72 nests per year on the Seashore have been documented from 1996 to 2005.

34. **Green turtles:** Green turtles reproduce in much the same manner as loggerheads and their nesting season lasts from late May to mid-September. Green turtle populations at Cape Hatteras National Seashore have hovered around three nests per year in Cape Hatteras National Seashore from 1996 to 2005.

35. **Leatherback turtles:** This species is the largest living turtle and reproduces in much the same manner as loggerheads. Only seven nests have been documented at Cape Hatteras National Seashore since 1998.

36. **Piping plovers:** The piping plover is a small sand-colored shorebird that nests on the open beach. Its breeding season lasts from late March to mid-August. The Atlantic Coast and Great Plains populations are listed as threatened under the federal Endangered Species Act. The Great Lakes population is listed as endangered on the breeding range and threatened while

in migration or in wintering areas. In 2001, an intensive range-wide census observed only 5,945 adult piping plovers, including an estimated 2,747 breeding pairs. The piping plover breeding population has declined from 15 nesting pairs in 1989 at Cape Hatteras National Seashore to only six nesting pairs in 2007. In addition, Cape Hatteras National Seashore is critical habitat for wintering piping plovers that are either passing through the area during their migration or are wintering at the Seashore, and these wintering populations are also experiencing reduced numbers. According to the U.S. Fish & Wildlife Service's recovery plan for the threatened and endangered piping plover, ORVs significantly degrade piping plover habitat and disrupt normal behavioral patterns. Beaches used by vehicles during nesting and brood-rearing periods generally have fewer breeding plovers than available nesting and feeding habitat can support. Typical behaviors of piping plover chicks increase their vulnerability to vehicles.

37. **Colonially nesting waterbirds:** Common terns, least terns, gull-billed terns, and black skimmers are all colonially nesting waterbirds that nest on the open sandy beaches. Their breeding season lasts from as early as mid-March to late August, depending upon the species, and they all nest in the sand. All four species of colonial nesting waterbirds have experienced dramatic declines in their populations in recent years, at the same time that the number of ORV users at the Seashore has increased dramatically. According to National Park Service reports, the numbers of colonial waterbirds on the Seashore have declined from 1,155 breeding pairs in 1999 to only 217 breeding pairs in 2007, and one species no longer bred on the Seashore in 2007. Individual species have experienced the following population reductions on the Seashore from 1999 to 2007: least terns, 306 breeding pairs to 196; common terns, 440 breeding pairs to 19; gull-billed terns, 103 breeding pairs to zero breeding pairs; black skimmers, 306 breeding pairs

to 2 breeding pairs. Based on these dramatic declines, it is likely some of these colonial nesting birds will soon be extirpated from the Seashore, and one by now be extirpated.

38. **American oystercatchers:** Although not currently listed as threatened or endangered, the American oystercatcher population has also been steadily declining on the Seashore in recent years. Oystercatchers also nest on or near the beach close to the water and their breeding period lasts from March to August. Oystercatcher numbers on Hatteras and Ocracoke Islands have declined from 41 breeding pairs in 1999 to an estimated 20-22 breeding pairs in 2007.

39. The following table based on National Park Service reports summarizes the precipitous declines in colonial waterbirds on the Seashore from 1999 to 2007. The numbers represent breeding pairs for each species.

	1999	2007	% change
Gull-billed Tern	103	0	- 100%
Common Tern	440	19	- 96%
Least Tern	306	196	- 40%
Black Skimmer	306	2	- 99%
American Oystercatcher	41	Estimated 20-22	- approx. 49%

40. **Seabeach amaranth:** This plant species is an annual plant that grows on the beach, mainly on coastal overwash flats at the ends of islands and lower foredunes, often in the same areas selected by nesting shorebirds such as piping plovers and terns. Its brittle, fleshy stems are easily crushed by ORVs. Numbers of this plant have declined from approximately 15,800 in Cape Hatteras National Seashore in 1988 to only 54 individuals found in 2003.

41. Nesting of piping plovers, American oystercatchers, and colonial waterbirds occurs most frequently within Cape Hatteras National Seashore at Bodie Island Spit, Cape Point,

South Beach, Hatteras Spit, and North and South Ocracoke, though nesting does occur in other areas. Sea turtle species nest throughout the Seashore's beaches.

42. The declining populations and lack of breeding success for each of the ten species listed above at Cape Hatteras National Seashore has been caused, at least in part, by human disturbance associated with ORV use.

43. ORV use in Cape Hatteras National Seashore in particular has increased in recent years to up to 2,200 per day in 2006, as reported by Defendants in the Federal Register. Much of the ORV use occurs at the same places that would otherwise be optimal for nesting and breeding of the ten species listed above: Bodie Island Spit, Cape Point, South Beach, Hatteras Spit, and North and South Ocracoke.

44. Disturbances related to ORV usage— including but not limited to movement, noise, vibration, light, actual contact by ORVs – harm wildlife in many ways. The magnitude of this threat is particularly significant because ORVs extend impacts to remote stretches of beach where human disturbance would be very slight if access were limited to pedestrians. These harms include:

- a. Preventing birds attempting to nest from establishing nesting territories and nesting;
- b. Causing nesting birds to abandon nests and/or chicks;
- c. Crushing nests, eggs, and chicks under the tires of the ORVs;
- d. Frightening birds from nests on hot days, thereby exposing eggs to loss from overheating in direct sun;
- e. Frightening bird chicks from their nests by ORV disturbance, causing the chicks to starve, become hypothermic, or be eaten by predators before finding their way back;
- f. Crushing wrack into the sand, precluding its use as cover or a foraging substrate;

- g. Killing American oystercatchers and other birds after they are disoriented by or attracted to ORV headlights and hit by the vehicle;
- h. Preventing turtles from attempting to nest;
- i. Causing “false crawls” in which turtles abandon efforts to nest;
- j. Crushing turtle nests and hatchling turtles attempting to reach the sea;
- k. Disorienting hatchlings and female turtles during their travel to the sea by vehicle shadows, headlights, and other sources of artificial light;
- l. Trapping bird chicks and hatchling turtles in tire tracks and ruts from which they are unable to emerge;
- m. Crushing amaranth stems during its growing season;
- n. Burying amaranth seeds so deep they do not later germinate;
- o. Pollution-related illness;
- p. Increased predation, after predators are attracted to the area by fish, bait, food, and other such edible refuse discarded by humans;
- q. Compaction, erosion, and/or displacement of sand which leads to steeper beaches inappropriate for bird nests and amaranth growth, compacted sand that is difficult for female turtles to nest in or hatchlings to emerge from, etc.;
- r. Other degradation of habitat, for instance by destruction of prey, destruction of habitat used for foraging, etc.;
- s. Drowning out the natural soundscape of the Seashore; and
- t. ORV use forcing pedestrians and other beach recreation into sensitive areas.

Legal Background

45. Numerous federal statutes, regulations, orders, and policies govern the Defendants’ acts and omissions in this case. A brief description of each is provided below as background for a better understanding of the implications of the facts of this case.

46. The Organic Act: The National Park System was created in 1916 to manage lands assigned to the United States Department of the Interior. The National Park Service Organic Act provides that the National Park Service “shall promote and regulate the use of” national parks

“by such means and measures as conform to the fundamental purpose of the [parks], which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of 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). It imposes duties on the Defendants to manage National Parks and Seashores in a manner that is consistent with their purpose and that conserves natural resources.

47. Cape Hatteras National Seashore Enabling Legislation: The Cape Hatteras National Seashore was created in 1937 by specific legislation, 16 U.S.C. §§ 459-459a-10, which provides that “[e]xcept for certain portions of the area, deemed to be especially adaptable for recreational uses, particularly swimming, boating, sailing, fishing, and other recreational activities of a 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 the area.” 16 U.S.C. § 459a-2 (emphasis added). The list of recreational uses are all water-based and do not include driving with ORVs or any other similarly destructive, land-based activity.

48. Executive Orders 11644 and 11989: By 1972, the use of ORVs in national park service lands had increased and was causing such environmental degradation that President Richard Nixon issued Executive Order, 11644, entitled “Off-Road Vehicles on Public Lands,” seeking to minimize the detrimental effects of ORV usage on public lands by requiring regulation of such use. In 1977, President Jimmy Carter issued Executive Order 11989, which amended Executive Order 11644 by adding a final provision, section 9, reaffirming the schedule for implementation and strengthening its restrictions to eliminate adverse effects.

49. Defendant Department of the Interior later published a regulation stating that “[r]outes and areas designated for off-road motor vehicle use shall be promulgated as special regulations” in compliance with the Executive Order. 36 C.F.R. § 4.10. Defendant Department of the Interior issued special regulations for various national parks and national seashores in compliance with that regulation and the Executive Order. See, e.g., 36 C.F.R. § 7.67 (the off-road vehicle plan for Cape Cod National Seashore). No such regulation has been issued for Cape Hatteras National Seashore.

50. The Migratory Bird Treaty Act: This Act prohibits the taking or killing of certain migratory birds, or their nests or eggs. The Cape Hatteras National Seashore piping plover, American oystercatcher, and colonial nesting waterbird populations described herein are protected under the Migratory Bird Treaty Act.

51. Executive Order 13186: President Clinton issued Executive Order 13186 on January 17, 2001, which provides that each federal agency taking actions that have or could have a measurable negative effect on migratory bird populations must implement a memorandum of understanding with the Fish & Wildlife Service within two years (by January 17, 2003) that establishes protocols to promote the conservation of migratory bird populations.

52. The Endangered Species Act: This Act (a) requires federal agencies to use their authorities to further the purposes of the Act to provide for the conservation and recovery of endangered and threatened species, 16 U.S.C. § 1536(a)(1); (b) prohibits federal agencies from authorizing or carrying out actions which may jeopardize the continued existence of endangered or threatened species or adversely modifying their critical habitat, 16 U.S.C. § 1536(a)(2); (c) prohibits any entity from taking (by harassing or killing) endangered species without a permit, 16 U.S.C. § 1538; and (d) requires federal agencies whose actions may affect an endangered species

to consult with the U.S. Fish & Wildlife Service to obtain a biological opinion regarding the impact of a proposed action on listed species. 16 U.S.C. § 1536 et seq.

53. The National Environmental Policy Act: This Act requires federal agencies to assess the environmental impacts of proposed actions and prepare a detailed environmental impact statement on major federal actions that have a significant effect on the environment. 42 U.S.C. § 4321 et seq.

**Defendants' Failure to Protect the Natural Resources of
Cape Hatteras National Seashore**

54. Defendants have failed to comply with the requirements of the Organic Act, the Cape Hatteras enabling legislation, the Executive Orders, the Endangered Species Act, the Migratory Bird Treaty Act, and the National Environmental Policy Act. Specifically, they have adopted an Interim Plan to manage ORV use on the Seashore that fails to adequately protect natural resources and fails entirely to address conflicts with other recreational uses and they have also failed to adopt a long-term plan by special regulation for managing ORV use in Cape Hatteras National Seashore, both in violation of the Executive Order and 36 C.F.R. § 4.10. The Interim Plan that they have issued is not sufficiently protective of Seashore's natural resources to satisfy the standards of any of the governing statutes, regulations, orders, and policies described above, nor is it being adequately administered or enforced.

55. For years, Plaintiffs have been urging Defendants to comply with the Executive Orders and other applicable laws, regulations, and policies to regulate the use of ORVs in the Seashore and to protect the wildlife living and reproducing there. Defendants have yet to comply, despite a few false starts at creating an ORV management plan.

56. On May 17, 2005, Defendants sent Defendants a notice of intent to sue regarding their violation of the Endangered Species Act by allowing ORV use in areas where such use

harmed endangered and threatened species without consulting with the Fish & Wildlife Service. In 2005, in response to Defenders' notice of intent to sue and 33 years after the deadline for doing so had passed, the Defendants began attempting to comply with the law, but still have not complied. They commissioned a set of studies from the U.S. Geological Survey ("USGS") (a scientific research agency within Defendant Department of the Interior) entitled "Management, Monitoring, and Protection Protocols" for the Seashore's piping plover, seabeach amaranth, sea turtles, colonially nesting waterbirds, and American oystercatcher populations described above ("Management Protocols").

57. The Management Protocols were issued in October 2005, one for each species. They include three levels of protocols for each species, providing respectively for a conservative "highest degree of protection," a more liberal "moderate protection," and a "minimum protection" from the effects of ORV use in the National Seashore.

58. In general terms, the recommendations that provide for the "highest degree of protection" permit no recreation in any habitat used in the previous ten years by the species in question, in order to eliminate the threat of direct mortality or disturbance due to recreation and greatly reduce indirect impacts. The "moderate" level of recommendations allow pedestrian recreation but not ORV traffic in a narrow corridor in the ten-year historically-used habitat, except that, for sea turtle habitat areas, ORVs and optionally pedestrians are prohibited from the corridors at night, and certain sections of sea turtle habitat remain completely closed to all recreation. The moderate protections provide that, once narrowed or closed, the recreation corridor should not be widened or reopened without the approval of the U.S. Fish and Wildlife Service and the North Carolina Wildlife Resources Commission on a case by case basis. The moderate recommendations reduce the risk of direct mortality, disturbance, and indirect effects

from ORV use, but not to the same extent at the highest protection. The “minimum” recommendations allow both ORV and pedestrian use in a narrow corridor in the historically-used habitat, and allow night use of the corridors by ORVs even in some sea turtle habitat in conjunction with user education programs, with some areas of sea turtle habitat remaining completely closed. There is an even higher risk of mortality, disturbance, and indirect effect with the minimum protections. The protections provided by the “highest,” “moderate,” and “minimum” protocols for each species also differ in terms of the size of restricted areas and buffer zones and the length of time that restrictions are in place. Notably, though, even the “minimum protections” provide for year-round closings of the most critical areas of habitat.

59. Defendants next issued a draft EA discussing alternatives for an interim plan to manage ORV usage and protected species for the several years during which Defendants have stated an intent to develop a long-term ORV management plan.

60. Plaintiff Defenders submitted lengthy comments objecting to the adequacy of the analysis in the EA to Defendants on November 17, 2005. Plaintiff Audubon also submitted written comments and objections on the EA and the Seashore’s management of ORVs on March 1, 2006 and March 15, 2007, at a minimum.

61. Defendants issued the final EA on January 25, 2006. The EA described four alternative plans to guide management practices for recreational ORV use on the Seashore and protection of species for the several years during which Defendants plan to attempt to develop a long-term ORV management plan. It recommended one of those as the preferred alternative and identified another as the “environmentally preferred alternative.”

62. The preferred alternative required the park management to: seasonally close areas used for breeding by any protected bird in the last three years beginning in April each year; set

up buffers around nests and foraging chicks of predetermined sizes for each species; provide for beach closures around historic and extant amaranth populations; and mark turtle nests during incubation periods.

63. In contrast, the alternative identified as the “environmentally preferred alternative” included terms similar, though not identical, to those recommended in the USGS protocols. It required the park management to: implement year-round protective measures for areas in which piping plovers have nested in the past 10 breeding seasons (“historic” breeding areas); prohibit ORVs from the most critical of these areas year-round; establish seasonal protective measures for recent American oystercatcher breeding areas and historic colonial waterbird breeding areas; provide for beach closures around historic and extant amaranth populations; and establish more protective measures for sea turtles (including marking and buffering actual nests and entirely closing some nesting areas during potential breeding seasons).

64. Defendants also requested that Defendant Department of the Interior, through the Fish & Wildlife Service, provide consultation on its proposed interim plan pursuant to the Endangered Species Act. In response, the Fish & Wildlife Service issued a document entitled “Biological Opinion for Cape Hatteras National Seashore’s Interim Protected Species Management Strategy” (the “Biological Opinion”) on August 14, 2006. The document embodied the Fish & Wildlife Service’s assessment of the Interim Plan’s likely effects on the populations of endangered or threatened piping plover, seabeach amaranth, sea turtles, and their habitat.

65. According to the Biological Opinion, “unrestricted use of motorized vehicles on beaches is a serious threat to piping plovers and their habitats.” The Biological Opinion failed to set permissible limits on “incidental takes” of the endangered and threatened species living in the

National Seashore, as it was required to do. Instead, it allowed for an “undeterminable level of incidental take” that should be “a proportion of” the piping plover and sea turtle populations, allowing for virtually unlimited take.

66. On December 18, 2006, Defenders sent Defendants another 60-day notice of intent to sue under the Endangered Species Act, related to the failure of the Biological Opinion to set specific permissible levels of incidental takes for each species and other deficiencies.

67. In December 2006, the Defendants published a “Notice of Intent (NOI) to Prepare a Draft Environmental Impact Statement (DEIS) for an Off-Road Vehicle Management Plan (ORV Management Plan) for Cape Hatteras National Seashore, NC” (the “Scoping Notice”). 71 Fed. Reg. 71552 (Dec. 11, 2006).

68. On March 15, 2007, Audubon sent Defendants lengthy comments on the use of ORVs at the Seashore generally, and asked them to adopt protection measures that complied with the recommended management protocols they requested and received from the USGS scientists, as described above.

69. On April 24, 2007, the Fish & Wildlife Service issued amendments to its Biological Opinion on permissible incidental takes and performance measures. Specifically, the Service declared that the permissible incidental take would be all animals that exceeded the following minimum performance measures. For breeding piping plovers, the Seashore must have at least four breeding pairs per year, resulting in at least three nests and at least one chick fledged per nest. Any additional breeding pairs, nests, and chicks could permissibly be “taken” under the amended Biological Opinion. (The Biological Opinion set these levels even while acknowledging that they were not sufficient to maintain a stable population or help the population recover.) For wintering piping plovers, the Opinion did not set limits, but rather only

provided for future development of performance measures and incidental take allowances. For sea turtles, the false crawl (where a female turtle attempts to nest but abandons the effort and returns to the sea) to nest ratio must not exceed 1:1, and the Seashore must have a number of sea turtle nests that is at least 10% of the average of North Carolina's total sea turtle nests for the past five years.

70. In July 2007, Defendants issued a FONSI, which selected and approved an interim management plan (the "Interim Plan"). The Interim Plan is to be in effect until a long-term ORV management plan and associated EIS are completed. The Defendants thereby decided that the implementation of the Interim Plan would have no significant impact on the bird, turtle, and plant species described above.

71. The Interim Plan does not contain all of the terms of either the alternative identified in the final EA as the "preferred alternative" or the "environmentally preferred alternative." The Interim Plan does not contain all the protections described in the USGS Management Protocols. The Interim Plan selected is identified as the "modified preferred alternative" and is described on pages 4-15 of the FONSI, and allows less protective measures than did either the "preferred alternative" or the "environmentally preferred alternative." Among the key terms of the Interim Plan are the following:

- a. No year-round closings for any areas used by any species;
- b. Closing only areas used by piping plovers in the previous three years and only closing those areas beginning on April 1, subject to the Superintendent's approval or disapproval;
- c. For American oystercatchers and colonially nesting waterbirds, closing areas only upon discovery of nesting rather than closing areas pre-nesting, which could encourage the establishment of nests;
- d. For American oystercatchers and colonially nesting waterbirds, indefinite and inadequate sizes for existing nests, allowing park employees to use their best professional judgment to determine the minimal buffer they believe individual

birds will tolerate, within certain ranges, thereby reducing buffers to allow for more ORV use;

- e. Identification and marking of actual sea turtle nests, but no pre-nesting closing of any areas to encourage nesting;
- f. No mention of closing areas for seabeach amaranth;
- g. Designation of a 100-foot wide ORV corridor each year between April 1 and August 31; and
- h. No analysis of user conflict and management actions to address those conflicts.

72. The Interim Plan adopted the performance measures and incidental take allowances of the amended Biological Opinion.

73. The protective measures required by the Interim Plan are not at the level of those measures identified by the Defendants' own scientists in the USGS protocols as necessary to provide even "minimum protection." For instance, even the most minimal recommendations of the Defendants own scientists included closing the most critical areas of habitat year round or at least with the beginning of mating behavior, prior to the establishment of the first nest.

74. On June 28, 2007, Defendant Secretary of the Interior gave notice in the Federal Register of intent to establish a negotiated rulemaking advisory committee for ORV management at Cape Hatteras National Seashore to negotiate and develop special regulations for the long-term management of ORVs at the Seashore. The notice invited comment on the formation of such a committee and recommendations for membership in the committee.

75. On July 17, 2007, the United States District Court for the Eastern District of North Carolina, the Honorable Terrence W. Boyle presiding, entered an order in United States v. Matei, Case No. 2:07-M-1075-BO (a criminal case involving a beach driving traffic violation at the Seashore), noting the failure of the Defendants to publish an ORV plan for Cape Hatteras National Seashore and stating that, "where the Park Service fails to create a plan for ORV use,

[it] is prohibited. CAHA does not have regulations in place to govern ORV traffic.

Consequently, it is also a violation to operate a motor vehicle on Cape Hatteras National Seashore without prior authority”

76. Despite the entry of the Matei order declaring ORV use in the Seashore illegal, the Defendants have continued to allow ORV use in the Seashore under the Interim Plan and have also failed to implement a long-term plan for the management of ORV use. In response to the Matei order, Seashore Superintendent Murray wrote a letter to the U.S. Attorney for the Eastern District of North Carolina on July 31, 2007, acknowledging that Defendant National Park Service “has not met the long-standing requirements for an ORV management plan and special regulation at” Cape Hatteras National Seashore.

77. In addition, the Defendants have failed to adequately administer and enforce even the Interim Plan. Specifically, the Defendants have continued to allow virtually unfettered ORV use to continue in the Seashore all during the summer of 2007. In addition, in certain areas, Defendants have failed to provide even the minimum, inadequate buffer distances for nesting birds set forth in the Interim Plan.

78. At the time of the filing of this amended complaint, current evidence demonstrates that the Defendants have failed to satisfy the performance measures and incidental take levels set out in the amended Biological Opinion. Of eleven piping plover nests on the Seashore in 2007, only four chicks fledged, failing to meet the Fish and Wildlife Service’s Biological Opinion’s requirement that one chick fledge per nest. Likewise, the 110 sea turtle “false crawls” significantly exceeded the 86 nests during the 2007 season and the Biological Opinion’s requirement that “false crawls” to nests not exceed a ratio of 1:1.

79. Although the incidental take statement required Defendants to cease activities constituting take and immediately reinitiate consultation with the Fish & Wildlife Service if take were to be exceeded, Defendants failed to do so.

80. To date, the Defendants have failed to meet their legal obligations to control ORV use in the Seashore in violation of substantive federal law and NEPA in the following respects: the Interim Plan is clearly inadequate to protect the natural resources of the Seashore, failing even to meet the protocols necessary to provide “minimum protection” as identified by the Defendants’ own scientists in the USGS management protocols, the Interim Plan fails entirely to address conflicts between ORV use and other public uses of the Seashore, the FONSI for the Interim Plan is arbitrary and capricious, the Defendants have failed to administer and enforce even the woefully inadequate Interim Plan, and the Defendants have failed after 35 years to comply with the Executive Order to institute a long-term ORV management plan to protect and preserve the natural resources at the Seashore.

FIRST CLAIM FOR RELIEF

(Against All Defendants: Adoption of an inadequate and unlawful Interim Plan for ORV use and failure to comply with the Organic Act, Cape Hatteras National Seashore Enabling Legislation, Executive Order 11644 and implementing regulations in violation of the APA)

81. Plaintiffs repeat the allegations of the preceding paragraphs as if set forth in full.

82. Pursuant to the Administrative Procedure Act, a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. Plaintiffs have suffered a legal wrong and are aggrieved because of Defendants’ actions and omissions in violation of the National Park Service Organic Act (the “Organic Act”), 16 U.S.C. § 1 et seq., the

Cape Hatteras National Seashore Enabling Legislation, 16 U.S.C. §§ 459 - 459a-10, Executive Order 11644, and implementing regulations including 36 C.F.R § 4.10.

83. The Organic Act provides that the National Park Service “shall promote and regulate the use of” national parks “by such means and measures as conform to the fundamental purpose of the [parks], which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of 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).

84. The Organic Act further provides that the “authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and 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.

85. The Organic Act charges the Secretary of the Department of the Interior, together with the Director of the National Park Service, and such subordinate employees of the National Park Service as the Regional Directors and the Superintendent of each national park, with implementing and enforcing the Organic Act and administering, supervising, managing and controlling the national parks in a manner consistent with and supportive of the fundamental purpose for which the park system was created. 16 U.S.C. § 1 et seq.; 43 U.S.C. § 1437.

86. Under the Organic Act, when there is a conflict between the conservation of wildlife and other natural resources in a national park on the one hand and a recreational use on

the other hand, the conservation of natural resources – for their own sake and for the enjoyment of future generations – must prevail.

87. In 2006, the National Park Service published its new Management Policies 2006, which replaced the 2001 edition. Management Policies 2006 is the basic policy document of the National Park Service, designed to provide its management and staff with clear interpretations of their responsibilities and duties under the Organic Act and other legislation. Section 1.4.3 confirms that “when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant.”

88. The Cape Hatteras National Seashore enabling legislation provides that, “[e]xcept for certain portions of the area, deemed to be especially adaptable for recreational uses, particularly swimming, boating, sailing, fishing, and other recreational activities of a 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 the area.” 16 U.S.C. § 459a-2 (emphasis added). The list of recreational uses are all water-based and do not include driving or use by ORVs.

89. Executive Order 11644, as amended by Executive Order 11989, also requires the Defendants to manage the Seashore in a manner that protects natural resources. The purpose of the Order is to “establish policies and provide for procedures that will ensure that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands, to promote the safety of all users of those lands, and to minimize conflicts among the various uses of those lands.” (emphasis added) It provides that each agency head must,

within six months, issue regulations governing the locations in which ORV may be used on its lands and, within one year, issue regulations prescribing the manner and conditions in which ORVs may be used. The regulations must minimize damage to soil, vegetation, wildlife, and wildlife habitat and minimize conflicts with other uses, among other things. Whenever the agency head determines that ORV use is causing adverse effect to soil, vegetation, wildlife, or wildlife habitat, the public lands must be immediately closed to ORV use.

90. The term, “respective agency head” is specifically defined in the Executive Order to include the Secretary of the Interior, and the term “public lands” is specifically defined in the Executive Order to include lands under the custody and control of the Secretary of the Interior, such as national parks and national seashores. Accordingly, the Executive Order applies to Defendants with respect to the Cape Hatteras National Seashore.

91. Accordingly, since 1972, Defendants have been under an obligation to implement special regulations to designate areas in which ORVs may and may not be used in Cape Hatteras National Seashore and prescribe conditions for operating ORVs in Cape Hatteras National Seashore. Since 1972, Defendants have been obliged to design those regulations in such a manner to protect wildlife and other natural resources in Cape Hatteras National Seashore, and to ban the use of ORVs in Cape Hatteras National Seashore upon determining that ORV usage will cause or is causing “considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat.”

92. 36 C.F.R. § 4.10 provides that “[r]outes and areas designated for off-road motor vehicle use shall be promulgated as special regulations” in compliance with the Executive Order. Various national parks and national seashores have complied with that regulation and the

Executive Order by publishing such special regulations, but Cape Hatteras has not. See, e.g., 36 C.F.R. § 7.67 (the off-road vehicle plan for Cape Cod National Seashore).

93. Defendants have adopted an Interim Plan for ORV use that does not adequately protect the wildlife and natural resources of the Seashore and have improperly allowed a destructive recreational use of national park resources to prevail over the conservation of wildlife and natural resources, in violation of the Organic Act, the Cape Hatteras National Seashore Enabling Legislation, and National Park Service management policies, in the myriad ways described above.

94. The Interim Plan does not comply with the recommended protocols for wildlife management on the Seashore from the Defendants' own scientists and is arbitrary, capricious and an abuse of discretion in violation of the APA.

95. Defendants have adopted an Interim Plan that allows ORV use on the Seashore that is incompatible with "the preservation of the unique flora and fauna or the physiographic conditions now prevailing in the area" in violation of the Organic Act and Cape Hatteras National Seashore Enabling Legislation.

96. Defendants have adopted an Interim Plan that allows ORV use that fails to minimize damage to the soil, vegetation and other natural resources, fails to minimize harassment of wildlife or significant disruption of wildlife habitats, fails to minimize conflicts between off-road vehicle use and other recreational uses in violation of Executive Order 11644 and 36 C.F.R. § 4.10.

97. Defendants have failed to adopt the Interim Plan for ORV use by special regulation as required by 36 C.F.R. § 4.10.

98. Defendants have failed to enforce even the inadequate Interim Plan.

99. Defendants' actions and omissions violate the Organic Act, Cape Hatteras National Seashore enabling legislation, Executive Order 11644 as amended by Executive Order 11989, C.F.R. § 4.10, National Park Service Management policies and are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. §§ 701-706.

SECOND CLAIM FOR RELIEF

(Against Defendant U.S. Fish & Wildlife Service: Adoption of an inadequate and unlawful Biological Opinion and Incidental Take Statement and failure to comply with the Endangered Species Act and the APA)

100. Plaintiffs repeat the allegations of the preceding paragraphs as if set forth in full.

101. Plaintiffs have suffered a legal wrong and are aggrieved because of the actions and omissions of Defendant Fish & Wildlife Service in violation of the Endangered Species Act, and are entitled to review under that Act and the APA.

102. Section 7 of the ESA directs all federal agencies, in consultation with the Fish & Wildlife Service, to use their existing authorities to conserve threatened and endangered species, 16 U.S.C. § 1536(a)(1), and to “insure that any action authorized, funded , or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat] of such species.” *Id.* § 1536(a)(2).

103. Agency actions subject to this requirement include “all activities or programs of any kind authorized, funded, or carried out, in whole or in part” by the agency, and “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R § 402.02.

104. The ESA provides that “[i]n fulfilling the requirements of [section 7(a)(2)] each agency shall use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

105. In formulating a Biological Opinion during the consultation process, the Fish & Wildlife Service is required to “use the best scientific and commercial data available,” 50 C.F.R. 402.14(g)(8), and determine whether the agency’s action, “taken together with cumulative effects,” is likely to result in jeopardy or adverse modification. Id. at § 402.14(g)(4).

106. The effects of the action include both “the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” Id. at § 402.02.

107. Each Biological Opinion must contain, among other things, “[a] detailed discussion of the effects of the action on listed species or critical habitat.” Id. § 402.14 (h)(2).

108. If, at the conclusion of the consultation process, the Fish & Wildlife Service concludes that the action is likely to jeopardize a listed species or result in the destruction or adverse modification of critical habitat, and will therefore violate Section 7, the Fish & Wildlife Service “shall suggest those reasonable and prudent alternatives which [Fish & Wildlife Service] believes would not violate subsection (a)(2)” of the ESA. 16 U.S.C. § 1536(b)(3)(A).

109. If the Fish & Wildlife Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), “the Service will provide with the biological opinion a statement concerning incidental take that: (i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species; (ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact.” 50 C.F.R. § 402.14.

110. Section 9 of the ESA makes it unlawful for any person to “take” an endangered species, *id.* § 1538(a)(1), which means to “harass, harm, pursue, hunt, shoot, would, kill, trap, or capture or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(1).

111. Section 10 of the ESA provides a limited exception to this prohibition for take that is incidental to an *otherwise lawful activity*. *Id.* § 1539(a)(1)(B).

112. Although incidental take statements may only be issued to allow for take incidental to otherwise lawful activities, here Defendant Fish & Wildlife Service issued an incidental take statement to the National Park Service for an activity that is presently unlawful under Executive Order 11644 as amended by Executive Order 11989, C.F.R. § 4.10, and National Park Service Management policies in violation of 16 U.S.C. § 1539(a)(1)(B).

113. The incidental take statement also contains no meaningful limits on the take of listed species at the Seashore and proffers no reasonable and prudent measures as required by the Endangered Species Act and implementing regulations.

114. Defendant Fish & Wildlife Service also issued a Biological Opinion that is inconsistent with both the Fish & Wildlife Service’s Recovery Plan for the piping plover and the recommended protocols for wildlife management on the Seashore from the Department of the Interior’s own scientists.

115. Defendant Fish & Wildlife Service failed to articulate a rational connection between the facts found and its conclusions in conducting its jeopardy analyses, in violation of the Endangered Species Act and the APA.

116. The Biological Opinion does not use the best available scientific information and is arbitrary, capricious and an abuse of discretion in violation of the APA.

117. Defendant Fish & Wildlife Service failed to include in the Biological Opinion an adequate analysis of cumulative effects of other State and private activities affecting the Seashore in violation of 50 C.F.R. § 402.14(g)(4).

118. Defendant Fish & Wildlife Service's actions and omissions violate the Endangered Species Act and its implementing regulations and are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. §§ 701-706.

THIRD CLAIM FOR RELIEF

(Against Defendants National Park Service and Cape Hatteras National Seashore: Failure to comply with the Endangered Species Act)

119. Plaintiffs repeat the allegations of the preceding paragraphs as if set forth in full.

120. Plaintiffs have suffered a legal wrong and are aggrieved because of Defendants' actions and omissions in violation of the Endangered Species Act, and are entitled to review under 16 U.S.C. § 1540(g) .

121. The Endangered Species Act directs all federal agencies, in consultation with the Fish & Wildlife Service to use their existing authorities to conserve threatened and endangered species, 16 U.S.C. § 1536(a)(1), and to "insure that any action authorized, funded , or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat] of such species." Id. § 1536(a)(2).

122. Agency actions subject to this requirement include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part" by the agency, and "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R § 402.02.

123. Defendants National Park Service and Cape Hatteras National Seashore adopted an Interim Plan for ORV use that does not adequately protect the threatened and endangered

species of the Seashore and have improperly allowed a destructive recreational use of national park resources to prevail over the conservation of such species, in the myriad ways described above.

124. Defendants National Park Service and Cape Hatteras National Seashore's Interim Plan is based upon a Biological Opinion that is legally deficient for the reasons described above, and thus Defendants have not complied with the 16 U.S.C. § 1536(a)(2).

125. Defendants National Park Service and Cape Hatteras National Seashore's Interim Plan is based upon a legally-deficient Incidental Take Statement that was issued to further activities that are presently unlawful at the Seashore, and thus Defendants are in violation of 16 U.S.C. § 1539(a)(1)(B).

126. Defendants National Park Service and Cape Hatteras National Seashore's failure to comply even with this inadequate Incidental Take Statement is a further violation of 16 U.S.C. § 1539(a)(1)(B) and 16 U.S.C. § 1538, and their failure to "immediately" reinstate consultation "[i]f during the course of the action the amount or extent of incidental taking ... is exceeded, is a violation of 50 C.F.R. § 402.14.

127. Defendants National Park Service and Cape Hatteras National Seashore have failed to ensure against jeopardy to threatened and endangered species at the Seashore in violation of 16 U.S.C. § 1536(a)(2), have failed to "utilize their authorities in furtherance of the purposes of" the Endangered Species Act, and have failed to "carr[y] out programs for the conservation of endangered species and threatened species" in violation of 16 U.S.C. § 1536(a)(1).

128. Defendants National Park Service and Cape Hatteras National Seashore's actions and omissions and failure to act violate the Endangered Species Act and its implementing

regulations, and are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. §§ 701-706.

FOURTH CLAIM FOR RELIEF

(Against All Defendants: Violation of the Migratory Bird Treaty Act and Executive Order 13186 in violation of the APA)

129. Plaintiffs repeat the allegations of the preceding paragraphs as if set forth in full.

130. Plaintiffs have suffered a legal wrong and are aggrieved because of Defendants' actions and omissions in violation of the Migratory Bird Treaty Act, and are entitled to review under the APA.

131. The Migratory Bird Treaty Act extends protection to "any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof," which is covered by four migratory bird treaties listed in 16 U.S.C. § 703 and which is "native to the United States or its territories." 16 U.S.C. § 703.

132. The Migratory Bird Treaty Act declares that "[u]nless and except as permitted by regulations made as hereinafter provided, it shall be unlawful at any time, by any means or in any manner, to . . . take, . . . kill, attempt to take . . . or kill . . . any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof." 16 U.S.C. § 703.

133. The Migratory Bird Treaty Act does not itself define the term "migratory bird." Instead, in 50 C.F.R. § 10.12, defendant Department of the Interior defined "migratory bird" as "any bird, whatever its origin and whether or not raised in captivity, which belongs to a species listed in [50 C.F.R.] § 10.13."

134. In 50 C.F.R. § 10.13, Defendant Department of Interior listed piping plovers, American oystercatchers, common terns, least terns, gull-billed terns, and black skimmers as “migratory birds” to be protected by the Migratory Bird Treaty Act.

135. Piping plovers, American oystercatchers, common terns, least terns, gull-billed terns, and black skimmers are all native to the United States.

136. Piping plovers, American oystercatchers, common terns, least terns, gull-billed terns, and black skimmers are all protected under the Migratory Bird Treaty Act.

137. Defendants’ actions and omissions and failure to act, described above, have already resulted in the unlawful taking of American oystercatchers, common terns, least terns, and black skimmers, and may have or may in the future result in the unlawful taking of piping plovers, American oystercatchers, common terns, least terns, gull-billed terns, and black skimmers in violation of the Migratory Bird Treaty Act, by killing, destroying, and otherwise taking adult birds, fledglings, chicks, eggs, and nests of those species.

138. In support of the Migratory Bird Treaty Act, President William J. Clinton issued Executive Order 13186, entitled “Responsibilities of Federal Agencies to Protect Migratory Birds,” on January 17, 2001. It states that “Migratory birds [are] of great ecological and economic value to this country.” It “directs executive departments and agencies to take certain actions to further implement” the Migratory Bird Treaty Act. Specifically, it provides that “[e]ach Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations.” It further provides that “each agency shall . . . support the conservation intent of the migratory bird conventions by . . . avoiding or

minimizing , to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions, . . . restore and enhance the habitat of migratory birds”

139. Upon information and belief, Defendants have failed to implement such a memorandum of understanding between the National Park System and the Fish and Wildlife Service within the required time, still have not implemented one, and are now in violation of Executive Order 13186.

140. Defendants’ actions and omissions and failure to act violate the Migratory Bird Treaty Act, its implementing regulations, and Executive Order 13186, are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law and constitute agency action unlawfully withheld or unreasonably delayed and are reviewable under the APA, 5 U.S.C. §§ 701-706.

FIFTH CLAIM FOR RELIEF

(Against All Defendants: NEPA – Failure adequately to assess and disclose environmental impacts in an EIS)

141. Plaintiffs repeat the allegations of the preceding paragraphs as if set forth in full.

142. NEPA requires that federal agencies prepare a detailed EIS of every proposal for a major federal action that may “significantly affect the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

143. Factors an agency must consider in determining whether a proposal significantly affects the environment include unique characteristics of the geographic area including proximity to park lands, wetlands, or ecologically critical areas; the degree to which the action may adversely affect an endangered or threatened species or its critical habitat; the degree to which the possible effects on the environment are highly uncertain; and the degree to which the effects on the environment are controversial. 40 C.F.R. § 1508.27(b).

144. The Defendants arbitrarily and capriciously concluded that the impacts of the ORV use authorized under the Interim Plan on park lands, ecologically critical areas and endangered and threatened species are not significant.

145. In fact, the impacts of the ORV use authorized under the Interim Plan on park lands, ecologically critical areas, and endangered and threatened species are significant, as evidenced by the failure of the Seashore to meet the performance objectives and incidental take levels set out in the Fish & Wildlife Service's amended Biological Opinion, or even implement the minimum protocols recommended by Defendant's own scientists at U.S.G.S., among other things.

146. The Defendants arbitrarily and capriciously concluded that the "adverse effects" that the ORV use authorized under the proposed Interim Plan would have on at least five endangered and threatened species, numerous other protected species of concern, and each of their habitats are "negligible to moderate." The adverse environmental effects include but are not limited to:

- a. Disrupting and preventing birds from establishing nesting territories, nesting, breeding, and caring for their chicks in the myriad ways described above;
- b. Crushing nests, eggs, chicks, turtle nests, and turtle hatchlings under the tires of the ORVs;
- c. Frightening bird chicks from their nests by ORV disturbance, causing the chicks to starve, become hypothermic, or be eaten by predators before finding their way back;
- d. Destroying bird and chick cover or a foraging substrate;
- e. Preventing turtles from attempting to nest and causing false crawls;
- f. Disorienting American oystercatchers, other birds, female turtles, and hatchlings by vehicle headlights and other sources of artificial light;
- g. Trapping bird chicks and hatchling turtles in tire tracks and ruts from which they are unable to emerge;

- h. Crushing amaranth stems during its growing season and burying amaranth seeds so deep they do not later germinate;
- i. Increased predation by predators attracted to the area by human refuse;
- j. Compaction, erosion, and/or displacement of sand and dunes;
- k. Other degradation of habitat, for instance by destruction of prey, destruction of habitat used for foraging, etc.; and
- l. Drowning out the natural soundscape of the Seashore.

147. In fact, the “adverse effects” of ORV use authorized under the Interim Plan on endangered, threatened, and special concern species, their habitats, and the beaches generally is highly significant, as evidenced by the failure of the Seashore to meet the performance objectives and incidental take levels set out in the Fish & Wildlife Service’s amended Biological Opinion, management protocols recommended by U.S.G.S. scientists among other things.

148. The Defendants arbitrarily and capriciously concluded that implementing the Interim Plan “will not violate any federal, state, or local environmental protection law.”

149. In fact, implementing the Interim Plan will violate numerous environmental protection laws, including the Organic Act, the Migratory Bird Treaty Act, the Seashore’s Enabling Legislations, several federal regulations and executive orders, and the Park Service’s own internal policies, as described elsewhere in this amended complaint.

150. The Defendants arbitrarily and capriciously concluded that the Interim Plan would cause “no impairment of park resources or values.”

151. In fact, the ORV use allowed under the Interim Plan will cause significant impairment of park resources and values, as evidenced by the failure of the Seashore to meet the performance objectives and incidental take levels set out in the Fish & Wildlife Service’s amended Biological Opinion and scientific assessments in the record, among other things.

152. Because the potential effects of the Interim Plan on piping plovers, sea turtles, colonially nesting waterbirds, American oystercatchers, seabeach amaranth, each of their habitats, and other environmental resources are at least highly uncertain, an EIS is required.

153. In fact, the effects of the Interim Plan on the various protected species that live and breed at the Seashore is highly predictable and likely to occur, as evidenced by the predictions of the Fish and Wildlife Service's Biological Opinion itself and by the failure of the Seashore to meet the performance objectives and incidental take levels set out in the Fish & Wildlife Service's amended Biological Opinion, recommended management protocols by U.S.G.S. scientists, among other things.

154. Effects on the environment of the Interim Plan are indisputably controversial and require preparation of an EIS.

155. The Defendants' decision that the Interim Plan, including the authorized ORV use, has no significant effects on the environment and the decision not to prepare an EIS to examine alternative proposals violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law.

156. The Defendants must prepare an EIS that adequately evaluates alternatives to manage ORV use at the Seashore, takes a hard look at the environmental impacts, including cumulative impacts, of the proposed action, and discloses those impacts to the public in an EIS.

SIXTH CLAIM FOR RELIEF

(Against All Defendants: Failure to act and unreasonable delay in enacting a long-range ORV management plan as required by Executive Order 11644 and 36 C.F.R. § 4.10 and in violation of the APA)

157. Plaintiffs repeat the allegations of the preceding paragraphs as if set forth in full.

158. Pursuant to the Administrative Procedure Act, a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. A reviewing court may hold unlawful and set aside agency action and compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706. Plaintiffs have suffered a legal wrong and are aggrieved because of Defendants’ actions and omissions in failing to implement, and unreasonably delaying or withholding the implementation of, special regulations to manage ORV use at the Seashore, in violation of Executive Order 11644 as amended by Executive Order 11989 (the “Executive Order”) and 36 C.F.R. § 4.10.

159. Since 1972, Defendants have been under an obligation under the Executive Order to implement special regulations to designate areas in which ORVs may and may not be used in Cape Hatteras National Seashore and prescribe conditions for operating ORVs in Cape Hatteras National Seashore. Since 1972, Defendants have been obliged to design those regulations in such a manner to protect wildlife and other natural resources in Cape Hatteras National Seashore, to promote the safety of all users of the Seashore, and to minimize conflicts with other uses. They have also been obliged to ban the use of ORVs in Cape Hatteras National Seashore upon determining that ORV usage will cause or is causing considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat.

160. In a letter of July 31, 2007, from Cape Hatteras National Seashore Superintendent Michael Murray to U.S. Attorney George E.B. Holding, Murray admits “[National Park Service] has not met the long-standing requirements for an ORV management plan and special regulation at [Cape Hatteras National Seashore].”

161. Defendants have, to date, failed to implement such special regulations, and have thereby unreasonably delayed or withheld the implementation of a long-term plan for regulating ORV use in Cape Hatteras National Seashore, in violation of the Executive Order and 36 C.F.R. § 4.10.

162. Defendants' failure to act and unreasonable delay in publishing a long-term plan violate the Executive Order, 36 C.F.R. § 4.10, and the APA, 5 U.S.C. § 706, in the following respects:

- a. Defendants have failed to specifically designate areas in which ORVs may and may not be used in Cape Hatteras National Seashore;
- b. Defendants have failed to specifically prescribe conditions under which ORVs may and may not be operated in Cape Hatteras National Seashore;
- c. Defendants have failed to minimize damage to soil, watershed, and vegetation;
- d. Defendants have failed to minimize harassment of wildlife and disruption of wildlife habitats;
- e. Defendants have failed to protect wildlife and other natural resources in Cape Hatteras National Seashore;
- f. Defendants have failed to promote the safety of all users of Cape Hatteras National Seashore;
- g. Defendants have failed to minimize conflicts between ORV use and other uses of the land;
- h. Defendants failed to meet the six-month and one-year deadlines in the Executive Order for issuing such regulations;
- i. Defendants have failed to satisfy the requirements of the Executive Order and 36 C.F.R. § 4.10 in such other respects as may be revealed by discovery in this action.

163. Defendants' actions and omissions and failure to act, as described above, including the failure to implement a long-term plan to manage ORV use and the authorization of the use of ORVs in the Seashore under the Interim Plan without adequate limitations and without being promulgated as special regulations have violated the Executive Order and 36 C.F.R. § 4.10

as described above, are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law and constitutes agency action unlawfully withheld or unreasonably delayed and are reviewable under the APA, 5 U.S.C. §§ 701-706.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Issue a declaratory judgment stating that by adopting an Interim Plan for management of ORV use that is not protective of Seashore resources and does not address user conflicts the Defendants have violated the National Park Service Organic Act and its implementing regulations, the Cape Hatteras National Seashore Enabling Legislation, the Migratory Bird Treaty Act and its implementing regulations, Executive Order 13186, Executive Order 11644 as amended by Executive Order 11989, 36 C.F.R. § 4.10, which are all reviewable under the APA and in the respects set forth above;

B. Issue an injunction requiring the Defendants to comply with the provisions of the National Park Service Organic Act and its implementing regulations, the Cape Hatteras National Seashore Enabling Legislation, the Endangered Species Act and its implementing regulations, the Migratory Bird Treaty Act and its implementing regulations, Executive Order 13186, Executive Order 11644 as amended by Executive Order 11989, 36 C.F.R. § 4.10, which are reviewable under the APA, as described above;

C. Issue a declaratory judgment stating that the Defendants have violated NEPA and its implementing regulations in the respects set forth above;

D. Issue an injunction requiring the Defendants to comply with the provisions of NEPA and its implementing regulations as described above;

E. Order that the FONSI and Interim Plan dated July 10, 2007 be vacated, set aside, or rescinded;

F. Issue an injunction ordering the Defendants to develop and implement an appropriate and adequate long-term plan to manage ORV use at Cape Hatteras National Seashore that complies with all the requirements of NEPA, APA, the National Park Service Organic Act, the Endangered Species Act, and the Migratory Bird Treaty Act and their implementing regulations, Executive Order 11644 as amended by Executive Order 11989, and 36 C.F.R. § 4.10;

G. In the interim, until a long-term plan to manage ORV use at the Seashore is implemented, issue an injunction ordering Defendants to restrict ORV use at the Seashore to provide adequate protection to resources and minimize conflict with other uses of the Seashore.

H. Allow plaintiffs to recover all costs of this action, including reasonable attorneys' fees; and

I. Grant plaintiffs such further and additional relief as the Court deems necessary and appropriate.

Respectfully submitted this 19th day of December, 2007.

SOUTHERN ENVIRONMENTAL LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of December, 2007, served a copy of the foregoing Amended Complaint upon the parties listed below by electronically filing the foregoing with the Court on this date using the CM/ECF system (or by placing a copy in the U.S.

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