IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CAPE HATTERAS ACCESS PRESERVATION ALLIANCE, *et al.*,	
Plaintiffs,	
v.	
UNITED STATES DEPARTMENT OF INTERIOR, *et al.*,	**C.A. No. 09 0236 RCL**
Defendants,	
and	
DEFENDERS OF WILDLIFE and NATIONAL AUDUBON SOCIETY,	
Defendant-Intervenors.	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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GLOSSARY OF TERMS

APA	Administrative Procedure Act
CHAPA	Cape Hatteras Access Preservation Alliance
CHNSRA, CHNS or CAHA	Cape Hatteras National Seashore Recreation Area
EA	Environment Assessment
EIS	Environmental Impact Statement
FONSI	Finding of No Significant Impact
IPSMS or IP	Interim Protected Species Management Strategy
NEPA	National Environmental Policy Act
NPS	National Park Service
OBPA	Outer Banks Preservation Association
ORV	Off-Road Vehicles
PCE	Primary Constituent Element
USFWS or FWS	U.S. Fish and Wildlife Service

Plaintiffs, the Cape Hatteras Access Preservation Alliance ("CHAPA"), Dare County, NC and Hyde County, NC (together the "Counties"), submit the following Memorandum in Support of Motion for Summary Judgment.

INTRODUCTION

This is the second time that the challenge to the U.S. Fish & Wildlife Service (USFWS or Service) critical habitat designation for units within the Cape Hatteras National Seashore ("Seashore" or "CHNS") for wintering piping plover population has come before the court. In 2004, this Court struck down the 2001 designation finding numerous violations of the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and the Administrative Procedures Act (APA), and remanded the designation to the USFWS. Cape Hatteras Access Preservation Alliance ("CHAPA") et.al. v. DOI, 344 F. Supp. 2d. 108 (D.D.C. 2004) ("CHAPA I"). The USFWS has now issued a final designation rule that again fails to comply with the law and to address the shortcomings identified by this Court in 2004.

STATUTORY FRAMEWORK

THE ENDANGERED SPECIES ACT

Designation of Critical Habitat

When the Service lists a species as threatened or endangered, Section 4 of the ESA concurrently requires it to specify critical habitat for that listed species "to the maximum extent prudent and determinable". 16 U.S.C. § 1533(a)(3). ESA section 3(5)(A) defines critical habitat as "the specific areas

within the geographical area occupied by the species, at the time it is listed . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management consideration or protection." 16 U.S.C. § 1532(5)(A)(i). In addition, the Secretary may designate "specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C).

The Secretary must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2).

The Secretary "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2).

Section 7 Consultation

Once a species is listed as threatened or endangered, ESA Section 7 requires that all other federal agencies "shall, in consultation with and with the assistance of the Secretary, 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 result in the destruction or adverse modification of habitat of such species . . . ." Id. § 1536(a)(2). If the Service or the federal agency determines that the contemplated action "may affect listed species or critical habitat" the agency and USFWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a).[1] If formal consultation is undertaken, USFWS issues a biological opinion as to how the project "affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). If the Service determines that the project will jeopardize the continued existence of the species or destroy or "adversely modify" its critical habitat, then the Service must provide "reasonable and prudent" alternatives that the action agency can take to avoid such impact. Id. § 1536(b)(3)(A); 50 C.F.R. § 402.14.

Thus, Section 7 requires the agencies to consider the impacts both in terms of "jeopardy" to any species present and the "destruction or adverse modification" of critical habitat.[2]

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[1] Formal consultation is not required, however, if the agency determines that the proposed action is not likely to have an adverse effect on a listed species or its critical habitat and the Service concurs in this determination in writing. 50 C.F.R. § 402.13.

[2] The ESA does not define these terms but FWS regulations define them to mean actions that diminish "both survival and recovery of a listed species." 50 CFR 402.02.

STATEMENT OF FACTS

I. PLAINTIFFS' INTERESTS IN THE CASE

Plaintiff CHAPA is a coalition established as a project of the Outer Banks Preservation Association ("OBPA") for the purpose of preserving and protecting a lifestyle and way of life historically prevalent on the Outer Banks of North Carolina, specifically, Cape Hatteras National Seashore (Seashore).[3] 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 representing more than 20 states and Canada). As noted by the CHAPA I Court, CHAPA members regularly operate off-road vehicles, the main means for accessing seashore beaches, for both recreational and commercial purposes. 344 F. Supp. 2d 108, 116 (D.D.C. 2004).

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[3] The 1937 Enabling Act that created the Cape Hatteras National expressly recognized the unique character of the Islands and Communities within the National Seashore, and particularly sought to preserve right of free and open public access. The Act that created the "National Seashore Recreation Area" required that the land be "set apart as a national seashore for the benefit and enjoyment of the people . . . ." 16 U.S.C. 459. Section 4 of the legislation states that "certain portions of the area are 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." 16 U.S.C. 459a2. In Senate Report No. 75-1196 (August 9, 1937) by the Committee on the Public Land, then acting Secretary of Interior Oscar L. Chapman expressed the need for Congress to protect the coast line for the public noting that "Sea bathing is the primary recreational feature of the area but excellent fishing and opportunities for safe sailing on the protected waters . . . and that fishing is unusually good in this area." S. Rep. No. 75- 1196 at 2. Subsequently, NPS Director Wirth, in open letter to the People of the Outer Banks, addressing the new boundaries of the National Seashore, assured that "there will always be access [including by vehicles] 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. [letter characterized as "a social contract between the Service and residents of the villages" see " The Creation and Establishment of Cape Hatteras National Seashore" by Cameron Binkley, southeast Director, SE Regional Office, National Park Service, August 2007 at 209]

Like OBPA, CHAPA has a goal to work with the National Park Service (NPS) to develop a comprehensive vehicle and pedestrian use and management plan that will meet the concerns of protecting the Seashore's resources without compromising the area's distinctive lifestyle and economic health.

CHAPA advocates the protection and preservation of our beaches within a framework of responsible, free, and open access to the sound and to ocean beaches for all users including pedestrians and properly licensed drivers and their vehicles. Such access is fundamental to the continued growth and economic vitality of the Outer Banks.

Many of CHAPA's members reside in seven unincorporated villages that lie within or adjacent to the boundaries of the Seashore..[4] CHAPA's members, along with many businesses of the Outer Banks, are concerned that the critical habitat designation will lead to substantial limits or an outright ban on motorized access and pedestrian use within designated areas. Such restrictions will have a devastating effect on the entire Outer Banks coastal economy and threaten a lifestyle that predates the Seashore.

Plaintiff, Dare County, formed in 1870, is located in northeastern North Carolina along the Atlantic seaboard. The County seat at Manteo is approximately 200 miles east of Raleigh, the State capital. The County contains much of what is known as North Carolina's "Outer Banks" resort

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[4] They are Rodanthe, Waves, Salvo, Avon, Buxton, Frisco and Hatteras Village.

and vacation areas and contains approximately one-fourth of the North Carolina coastline. It is host to the Seashore, Pea Island National Wildlife Refuge (Pea Island), the Wright Brothers National Monument, and numerous other cultural and historical attractions.

Dare County has a permanent population of approximately 32,000. However, the County's tourism industry results in a large seasonal population with an average daily population from June through August estimated to be approximately 225,000 to 275,000 (a total of five million visitors in 2008) whose primary activity while on vacation is to enjoy the beaches of the Outer Banks. Six municipalities are located within the County: Duck, Kill Devil Hills, Kitty Hawk, Manteo, Nags Head, and Southern Shores. The Seashore is a major tourist destination, attracting approximately 2.2 million visitors per year. The County's economic health is heavily dependent on revenues from tourism; as noted by the CHAPA I Court, Dare County's 2001 revenue from tourism was over $365 million. 344 F. Supp. 2d at 116. Motorized and pedestrian access to Seashore beaches is an essential component of the County's tourist-based economy.

Hyde County is located in northeastern North Carolina. Hyde County is one of North Carolina's largest counties by acreage, but has fewer than 5,500 residents and is one of the poorest counties in the State. Attractions include the Ocracoke Island portion of the Seashore. Ocracoke Island, once home to the pirate Blackbeard and now a tourist Mecca, is accessible only by

air or water. As noted by the CHAPA I Court, the island and its famous beach is "a nationally known tourist destination" that depends on tourism, "which generated an economic impact of $24 million in 2001." 344 F. Supp. 2d at 116. Indeed, Ocracoke Beach was ranked first in a 2007 survey of "America's Best Beaches" compiled by Dr. Stephen Leatherman of Florida International University. Mainland residents make their living farming or commercial fishing while Ocracokers depend heavily on the tourist industry. Ocracoke Village, an unincorporated community, lies within the Seashore and is the only inhabited area on the island. A large percentage of the tourism revenue in Hyde County is related to Ocracoke Island - 97 percent of the County's 2007-2008 occupancy taxes were generated there.

Both Counties and the municipalities that lie therein are responsible for providing vital health and safety services to their residents. Beach access and recreation are important to the Counties and to the lifestyles of their residents, from both an economic and environmental standpoint. The improper designation of critical habitat within the Outer Banks has and will continue to negatively impact the waters economic well-being as well as their ability to provide governmental services which directly affects both the residents and visitors alike.

II. BACKGROUND

The Court's 2004 opinion sets forth the background of the challenge to the 2001 critical habitat designation leading up to the decision remanding the designation to the Secretary. CHAPA I, 344 F. Supp. 2d. at 114-117. The

court granted Plaintiffs' Motion for Summary Judgment, finding major violations of the ESA, NEPA, and the APA; vacated the critical habitat designation of units NC-1, -2, -4, and -5; and remanded the rule to the Service. Id. at 137.

On remand, the Service has essentially "repackaged" its proposed critical habitat for these four areas and failed to adequately address the serious violations of law found by the CHAPA I Court. See 72 Fed. Reg. 30,326 (May 31, 2007) and 73 Fed. Reg. 28,084 (May 15, 2008). The Final Rule made no significant changes in the North Carolina designation. In fact, the acreage of the four units increased from 1,827 to 2,043 acres. Final Rule, 73 Fed. Reg. 62,816 (Oct. 21,2008).

Further, while FWS was in the process of redesignating critical habitat, the National Park Service developed and finalized the Interim Protected Species Management Strategy for the Seashore ("IPSMS" or "IP") on July 13, 2007. (AR 169 at 3122-3161.) Accordingly, in NPS Superintendant Murray's July 30, 2007 comment letter to FWS Field Supervisor Benjamin, recommending against designation, Mr. Murray states that the IPSMS "provides a conservation benefit to the species, assurance that the conservation management strategies and actions will be implemented and assurance that the conservation strategies and measures

will be effective." (Murray Comments, AR 169 at 3118.)[5] The IPSMS was amended and expanded in a Consent Decree entered on April 30, 2008 in the case of Defenders of Wildlife v. National Park Service, No. 2:07-cv-45-BO (E.D.N.C., 2008). (Consent Decree, AR 289.) The Park Service is currently preparing a final ORV Management Plan and Environmental Impact Statement for the Seashore.[6]

STANDING

As noted by this court in its 2004 CHAPA I decision, "Article III of the Constitution requires a 'concrete and particularized injury' that is: '(1) actual or imminent; (2) caused by, or fairly traceable to an act challenge in the instant litigation; and (3) redressible by the court.'" 344 F. Supp. 2d at 117 (citing Lujon v. Defenders of Wildlife, 504 U.S. 555 (1992); Util. Air Regulatory Gp. v. EPA, 320 F.3d. 272 (D.C. Cir. 2003). CHAPA I found that these very same plaintiffs had standing. The Court referred to the "variety of economic harms" of CHAPA members noting that its "members fear that the Service's administration of the critical habitat will result in use restrictions on vehicles and closure of beaches or access points, affecting not only recreation, but the livelihood of fishermen dependent on vehicles for their daily work." 344 F. Supp. 2d at 117. The Court also noted that "[t]he

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[5] Superintendant Murray's letter also noted that "On August 14, 2006 the USFWS, Raleigh Field Office, issued a biological opinion (BO) stating that implementation of the Strategy as proposed, is not likely to jeopardize the continued existence of the piping plover." (AR 169 at 3118.)

[6] See Cape Hatteras National Seashore Off- Road Vehicle Negotiated Rulemaking Management Plan/EIS, http://www.nps.gov/ caha /parkmanagment/planning.htm.

Counties, like CHAPA business owners, fear that any restrictions or beach closures within the habitat will have a negative impact on their tourism economy . . . . [and that] [b]oth CHAPA and the counties have alleged injuries that are actual or imminent. These injuries are causally related to the Service's designation . . . ." Id. at 117-18. Further, this Court held that Plaintiffs have prudential standing by demonstrating that the injury arguably falls within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit. Id. at 118 (citing Bennett v. Spear, 520 U.S. 154, 162 (1997)).

As in the prior case, Plaintiffs have alleged very similar harms as a result of the 2008 redesignation. John Couch, OBPA President, notes that, "Recreational users of the CHNS are the heart of OBPA's membership [and] regularly travel hundreds, and even thousands of miles, to enjoy the resources of the Seashore." (Couch Decl. 1/27/10, ¶ 7.) He states that

> OBPA's membership also includes commercial fishermen [and that] [i]n order to make a living, commercial fisherman must be able to access the beaches of CHNS by ORV in order to both carry fishing tackle and related gear and to find suitable spots for fishing. Beach closures or ORV access restrictions within the CHNS would effectively shut down the CHNS to commercial fishing industry - denying these individuals a livelihood that predates the establishment of the CHNS.

(Id. at ¶ 8.) He also notes that "[t]he 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.) have already had a serious adverse economic impact on OBPA members . . . ." (Id. at ¶¶ 9-11.) Citing to the

decline in revenue by Mr. Couch and other OBPA members who own and operate businesses within the CAHA, he notes that "[b]usinesses have already cut back on employees, causing a reduction in the work force in all occupations." (Id. at ¶ 10.) Mr. Couch also explains that "OBPA members . . . are very concerned that additional closures and restrictions due to critical habitat designations will only worsen the severe economic impact experienced since the 2008 Consent Decree . . . . [noting that] in some instances, areas designated as 'critical habitat' are directly between the access ramps and the prime fishing grounds and historic recreational areas that OBPA members regularly visit." (Id. at ¶ 11.)

The declaration from Mr. Raymond Sturza II, Planning Director of Dare County, sets forth the harm to Dare County's interests. He explains that "CHNSRA [Cape Hatteras National Seashore Recreation Area] is a major tourist destination, with approximately 2.2 million visitors per year, and the County's economic health is heavily dependent on revenues from tourism." (Sturza Decl., 1/27/10, at ¶ 4.) He states the following:

> Recreational access to the CHNSRA beaches via Off Road Vehicles (ORVs) is an essential component of the County's tourism-based economy. Visitors to the Outer Banks routinely utilize ORVs to engage in recreational activities such as surf fishing as well as to reach the significant portion of the CHNSRA that is not accessible by paved roads.

(Id. at ¶ 5.) Mr. Sturza attaches "notarized affidavits from a cross section of business owners describing how the consent decree has hurt their businesses, families and employees" (Id.). Further, Mr. Sturza notes that

> In 2008, the County experienced the lowest overall increase in economic impact of travel to Dare County in over 15 years . . . [and that] [t]he County is very concerned that any further closures and restrictions due to Critical Habitat designation could significantly reduce tax revenues as visitors travel elsewhere during the crucial spring and summer months . . . [and that] [t]his could result in the county reducing or even eliminated certain services currently provided.

(Id.) Mr. Sturza also notes that "Critical Habitat designation could lead to additional delays and expenses to the County for certain vital projects due to consultations with FWS [providing the example regarding Section 7 consultation to repair the breach in the Island caused by Hurricane Isabel." (Id. at ¶ 8.)

As this Court noted in CHAPA I, "for each claim of constitutional and prudential standing can be shown for at least one plaintiff, standing may extend to all plaintiffs, and court need not consider the standing of the other plaintiffs to raise that claim." 344 F. Supp. 2d at 118 n.2 (citing Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1232 (D.C. Cir. 1996). In light of this Court's ruling in CHAPA I and the Declarations submitted with this Motion, Plaintiffs submit that they have established standing to pursue their claims.

STANDARD OF REVIEW

The Service's designation of critical habitat is reviewed under the standard in the Administrative Procedure Act ("APA"), 5 U.S.C. 706 as articulated by this court in CHAPA I, 344 F. Supp. 2d at 118-119.

SUMMARY OF ARGUMENT

1. The USFWS failed to comply with this court's remand order in CHAPA I to "address the crystal clear statutory requirement that [Primary Constituent Elements] (PCE's) must be those that may require special management considerations." 344 F. Supp. 2d at 124. On remand, FWS simply repeated its prior error by listing 12 activities as examples of actions that have effects on wintering piping plover habitats" and listing 7 ways that these activities "may destroy or adversely affect critical habitat." The rule does not contain any analysis of why each PCE is "essential" to plover recovery and fails to identify the kind of special management measures that may be required to protect thus PCEs from possible threats.
2. Without any explanation, the Service deviated from its prior long standing practice of reviewing and analyzing the conservation benefits of existing management plans and simply relied on Center for Biological Diversity vs. Norton[7] in concluding that "if a habitat is already under some sort of management for its conservation . . . . [it] meets the definition of critical habitat." 73 Fed. Reg. at 62817. This was a marked shift form the Service's 2001 designation of the plover wintering critical habitat that excluded portions of Padre Island Texas National Seashore due to an existing management plan as well as the

[7] 240 F.Supp 2d. 1090, 1099 (D. Arz. 2003)

Service's 2006 proposal to exclude Pea Island and other Outer Banks Islands based on analysis of existing plans. Service staff even admitted that it changed its "mind about special management needs . . . with no supporting analysis."

3. FWS's failure to adequately consider the 2007 Interim Plan violated the mandatory requirements of Section 4(b)(2) of the ESA given that the impact of the Plan on the designation was clearly a "relevant" consideration. The relevance of the plan is especially evident in the comments of NPS Seashore Superintendent Murray who requested exclusion of the Seashore, detailing specific conservations measures in place under the plan and the additional administrative burdens that would be imposed on NPS staff from the designation.
4. The Service failed to comply with the Court's order on remand in its consideration of the economic impact of the designation. The record reflects the Service's "skewed" analysis of economic factors that, in essence, "tilted" the Service's analysis of costs and benefits to factor designation. Not only did the analysis continue to rely on the "functional equivalence" doctrine, it's analysis largely extrapolates from flawed data, including the discredited "Vogelsong" study, as well as from highly questionable assumptions and an indecipherable baseline analysis in concluding that the "incremental costs" of the

designation would likely be at the low end of its projected wide range of potential additional costs.

5. The Service's exclusion analysis under Section 4(b)(2), based on both economic and non-economic factors, was arbitrary and capricious. The Rule does not identify any real tangible benefits to conserving plover habitat beyond the NPS administration of the Seashore under the Interim Plan, noting only that designation would "help identify areas essential to conserve the species" and "alert the public to the importance of these areas." These alleged benefits were far outweighed by the considerable administrative and costs burdens on the Park Service. Thus the Record does not support FWS's conclusion that the economic analysis did not identify any "disproportionate costs" likely from the designation.

6. The Services' Environmental Assessment (EA) and Finding of No Significant Impact under NEPA was inadequate. The EA did not meet NEPA's "hard look" mandate because (1) the EA's analysis of environmental consequences of alternatives considered relies heavily on a flawed economic analysis; and (2) the EA lacks sufficient scientific information regarding the importance of the Seashore as wintering habitat and its relation to wintering piping plover populations throughout the nation. These flaws go to the very heart of the CHAPA

I court's criticism that "partial fulfillment of NEPA's requirements is not enough." 344 F. Supp. 2d at 135.

ARGUMENT

I. THE SERVICE VIOLATED THE CRITICAL HABITAT DESIGNATION CRITERIA UNDER THE ESA AND APA BY ARBITRARILY DETERMINING THAT ALL OF THE UNITS MET THE DEFINITION OF CRITICAL HABITAT

A. The Service Failed to Comply With the Remand order Regarding Specific Management Determinations for Each Primary Constituent Element (PCE).

In CHAPA I, this Court explicitly stated:

> Nowhere does the Service directly address the crystal clear statutory requirement that PCE's must be those that may require special management considerations or protections . . . . Rather than discuss how each identified PCE would need management or protection, the Service lists activities that once resulted in consultations and makes a conclusory statement that dredging or shoreline management could result in permanent habitat loss.

344 F. Supp. 2d at 124. The Court found that the Service had merely listed 12 activities, such as dredging and beach nourishment, noting that it appeared from the record that "the Service never considered the requirement in any meaningful way . . . . and needs to revisit its analysis on this point on remand." Id.

With the redesignation once again, the Service failed to meet its "crystal clear statutory duty." After describing the relevant PCEs, the Final Rule again simply lists 12 activities as "[e]xamples of actions that have effects on wintering piping plover habitats." 73 Fed. Reg. at 62, 829. It then lists 7 ways that these activities "may destroy or adversely modify critical

habitat . (Id).The Rule then refers the reader to the unit descriptions, presumably for an analysis and discussion of why those units "may require special management." (Id.) However, those unit descriptions are devoid of any such analysis for each PCE. For example, Unit NC-1 (Oregon Inlet) simply contains a description of the unit, the general location of the PCEs within the unit, the kinds of activity that "has the potential to disturb foraging and roosting plovers and their habitats" (e.g., off road vehicle use, dredged sediments from maintenance dredging), Id., and a statement regarding the need for "special management". Id. at 62829-30. Similar descriptions are found for Units NC-2, -4, and -5. Id at 62831. These descriptions do not contain any analysis of how each identified PCE within each unit "may require" such special protections. For example, there is no analysis of the biological factors as to why certain PCEs, such as mud flats or sand flat habitat (much of which are still closed to all human use under the Interim Strategy as amended by the Consent Decree) are so "essential" to the plover nor is there discussion of the kind of special management measures that may be required to protect that PCE from possible threats. Rather, the Rule simply concludes that certain activities may impact plover's habitat requirements and, therefore, may be in need of "special management" protections. Id. The reader is left to guess as to the Service's basis for its conclusion.[8] Thus, the Service has failed to meet the Court's mandate to

[8] For example, regarding Unit NC- 2, the rule states that "A recent visitor use study of the

revisit this issue in order to meet the ESA's "crystal clear" statutory requirement.

B. The Service arbitrarily determined that certain portions of unit *per se* meet the definition of critical habitat because they are under an existing management plan.

Not only did the Service fail to comply with the Court's explicit remand order, it also arbitrarily shifted its long-standing analysis of existing management plans in determining whether an area meets the critical habitat definition. The final rule relies solely on a district court's ruling in Center for Biological Diversity v. Norton,("CBD") 240 F. Supp. 2d 1090, 1099 (D. Ariz. 2003), in opining that "if a habitat is already under some sort of management for its conservation, that particular habitat required special management considerations or protection and therefore meets the definition of critical habitat." 73 Fed. Reg. 62817 This was marked shift from the 2006 proposed rule proposing that portions of the Pea Island National Wildlife Refuge, as well as certain island units in Dare and Hyde County owned by the State, do not meet the definition of Critical Habitat under ESA Section 3(5)(A) based analysis of existing for management plans for those areas..[9]. Apparently

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park found that Cape Hatteras Point had the most ORV use within the park (Vogelsong 2003). As a result, the sandy beach and mud and sand flat habitats in this unit may require special management considerations or protection, as discussed in 'Special Management Considerations or Protections' above." 73 Fed. Reg. at 62,831.

[9] The FWS proposed rule stated that the FWS considers a current plan to provide adequate management or protection if it meets three criteria:

(1) The plan is complete and provides a conservation benefit to the species (i.e., the plan must maintain or provide for an increase in the species' population, or the enhancement or restoration of its habitat within the area covered by the plan); (2) the plan provides assurances that the conservation management strategies and actions will be implemented

relying on CBD, the Final Rule never analyzed the Interim Protected Species Management Plan (IPSMS) (AR 169).[10] finalized in July 2007 and amended in the April 2008 Consent Decree. (AR 289.).[11] In so doing, the Service never explained why it now relied on a completely different theory for its "may require" finding under the statute (designation required if plan is in place) than it historically used (analysis of current management plans). In fact, the Service has historically analyzed management plans in declining to designate critical habitat, including the 2001 Rule's exclusion of Padre Island Texas National Seashore from Critical Habitat designation for wintering piping plovers, due to the protective measures in the Padre Island Oil and Gas Management Plan. 66 Fed. Reg. 36,038 (July 10, 2001).[12] The arbitrariness of this unexplained shift is reflected in an internal FWS staff email:

(i.e., those responsible for implementing the plan are capable of accomplishing the objectives, and have an implementation schedule or adequate funding for implementing the management plan); and (3) the plan provides assurances that the conservation strategies and measures will be effective (i.e., it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan and achieve the plan's goals and objectives).

Amended Proposed Designation of Critical Habitat for the Winter Population of Piping Plover, 71 Fed. Reg. 33,703, 33,712-13 (June 12, 2006).

[10] This document is also sometimes referred to as the Interim Protected Species Management Strategy.

[11] The proposed rule discussed the 3 part criteria at length and referenced the fact that the NPS was developing an Interim Plan and solicited comments "on the inclusions or exclusion analysis." Id. at 33,714.

[12] After reviewing the plan, FWS found that "We do not feel that a designation of critical habitat would result in any benefits from an increased awareness of the species presence on the part of Federal agencies and possibly an increased number of consultations. This is due to the fact that the [Padre Island] Seashore has Plans in place requiring consultation with the Service when any activities that may affect a federally listed species are proposed within the boundaries of the Seashore." 66 Fed. Reg. at 36,083. See also Home Builders Ass'n of N. Cal. v. USFWS, 2007 WL 201248 at 4 (E.D. Cal. Jan 24, 2007) "After lengthy analysis, this court found that FWS had reasonably concluded that the non-economic exclusions were

> 2) We say on one hand that areas with sufficient existing management will not be included, but then say on the other hand that we may have improperly excluded the subject areas. This clearly indicates to me that we've made some determination that existing management of these sites may be inadequate, though we offer no specifics. **To the contrary, there is no analysis anywhere in the record to indicate that existing management of these sites is inadequate . . . . As I've said before, we at the Field Office can't think of any "special management" needed at these sites beyond what is being done, or could be done, through existing management authorities. This would seem to me to make us vulnerable to an APA challenge, given that we've apparently changed our mind about the "special management" needs of these areas with no supporting analysis.** (emphasis supplied).

Email from Emily Bizwell, Listing Biologist, to David Rabon, FWS, Nov. 28, 2007 (AR 257.)

FWS has not provided any "reasoned analysis" to support its shift of interpretation. FWS's "unexplained" shift should not be entitled to any deference under Chevron v. NRDC, 467 U.S. 837 (1984), and subsequent cases.[13] Thus, the record fails to provide a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 53 (1983).

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governed by alternative land management plans which already adequately incorporated the ESA's recovery goals."

[13] The D.C. Circuit in Alabama Education Association v. Chao, 455 F.3d 386, 396-97 (D.C. Cir. 2006) has held that "[A]n agency's interpretation of a statute is entitled to no less deference . . . simply because it has changed over time. Rather, the question raised by the change is whether the Department has supported its new reading . . . with a reasoned analysis sufficient to command our deference under Chevron." (internal citations omitted). See also S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 760 (10th Cir. 2005) (citing United States v. Mead Corp., 253 U.S. 218, 228 (2001). Such reasoned analysis was utterly lacking here — just as feared by USFWS's own staff.

In fact, if FWS had actually analyzed the CBD decision under its 2006 exclusion criteria, it would have found that the management plan in that case was substantially different from the Interim Plan. In CBD, the court found that certain Forest Service plans, which were the sole basis for excluding lands in Arizona and New Mexico, were inadequate and legally insufficient. CBD, 240 F. Supp. 2d at 1103. In 2002, the Arizona District Court had found that the Forest Service had not properly implemented its grazing standard since 1996. Id. at 1104. The CBD court noted that grazing poses a primary threat to the Mexican spotted owl and its habitat. Id. at 1103-04. Nonetheless, the CBD court found that FWS used these inadequate plans to justify exclusion from critical habitat designation even though the FWS had notice that the plans had not been implemented. Id. at 1103-04.[14]

In contrast, the Cape Hatteras Interim Plan has none of the deficiencies found by the CBD court. It provides protections for both wintering and breeding piping plovers by establishing closures to protect roosting and foraging habitat for wintering birds: "[f]rom approximately September 15 to late March to close suitable interior habitats at Bodie Island Spit, Cape Point, Hatteras Spit, and South Ocracoke . . . ." (Murray Decl., AR

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[14] FWS acceptance of the CBD court's reading of the language would necessarily constrain the Secretary's historic reliance on his discretion to evaluate the effectiveness of existing federal, state and local management measures in addressing the definitional language. As FWS stated in the proposed rule, "there are multiple ways to provide management for species habitat . . . . State, local or private management plans as well as management under Federal agencies jurisdiction can provide protection and management to avoid the need for designation of critical habitat." 71 Fed. Reg. at 33,712.

263 at 4997.) The Interim Plan also provides an ORV-free zone in the "ocean backshore" between March 15 and November 30. (Consent Decree, AR 289 at 5908) Furthermore, the Interim Plan provides for winter habitat monitoring of piping plovers, (AR 169 at 3128 ¶ 6), provides protections for breeding piping plovers, including monitoring, during the breeding season, (Murray Decl., AR 263 at 4999), implements closures when nesting behavior is observed (IP, AR 169 at 3126), and creates a 1,000 meter ORV buffer for unfledged chicks that will be increased upon sign of disturbance. (Consent Decree, AR 289 at 5904-06) The Interim Plan also provides for education of NPS field staff and of visitors on the value of wildlife and protective species management. (IP, AR 169 at 3130-31, 3136.) The Plan requires the NPS to take 22 actions, provides performance measures to track success, and allocates the appropriate time and resources necessary for implementation. (See Id. at 3125-31, 3134-35.) Finally, the Interim Plan sets performance measures based on the 2007 Amended Biological Opinion to track the piping plovers' recovery.[15] (Id. at 3133-34.) Indeed, Superintendent Murray forcefully recommended that FWS not designate Critical Habitat in large part due to the Plan. (Murray Comments, AR 169 at 3117-21.)

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[15] The Interim Plan provides a detailed analysis of various alternatives with the NPS's rationale for the selected alternative and the basis for rejecting other alternatives. (IP, AR 169 at 3137-42.) The NPS conducted an extensive ESA Section 7 consultation with the Service, which resulted in initial and amended Biological Opinion with terms and conditions that the NPS has been and will continue to implement until a final ORV plan is adopted. (Id. at 3142.)

Thus, the record would have supported non-designation based on the Service's three part criteria articulated in the 2006 proposed rule. First, the Plan has been completed and is being implemented. Second, the Plan provides assurances that the conservation management strategies will be implemented to accomplish the objectives. Third, the Plans' performance measures provide assurances necessary to track and report progress.

II. THE SECRETARY'S CONSIDERATION OF THE STATUTORY FACTORS FOR DESIGNATION UNDER SECTION 4(b)(2) OF THE ESA WAS ARBITRARY AND CAPRICIOUS.

Section 4(b)(2) of the ESA, sets forth the criteria and process for both designation and exclusion of critical habitat. While the second sentence contains "may exclude" language, the first sentence sets forth mandatory considerations. It states that the "Secretary shall designate critical habitat, on the basis of the best scientific data available after taking into consideration the economic impact, the impact on national security and any other relevant impact . . . ." 16 U.S.C. § 1533 (b) (2)

A. Consideration of the Impact of the Interim Protected Species Management Plan was a "relevant factor" that the Service did not adequately assess in designating Critical Habitat.

There is no doubt from this record that the Service was required to give careful consideration to the IP as a "relevant impact" in order to comply with the first provision of section 4(b)(2). The impact of the Plan on the Service's critical habitat designation decision, especially regarding the Park Service's administration of the Seashore, was never thoroughly reviewed or

adequately assessed. As noted above, this is especially evident in the comments of Superintendant Murray on the proposed Interim Plan. Mr. Murray requested exclusion from critical habitat, detailing the specific measures already in place that benefit the wintering plover population (year round closures, monitoring, information generation for the public, etc.). Mr. Murray particularly addressed the additional financial and management burdens on his staff if designation occurred:

> Considering the level of consultation involved with development of the Strategy and the pending development of the ORV plan and regulation, exclusion of CAHA from critical habitat designation would avoid any additional regulatory costs and allow NPS to direct available funding towards implementation of the Strategy and completion of the ORV plan and regulation.

(Murray Comments, AR 169 at 3120)

Mr. Murray's comments are particularly relevant, given the NPS's direct role in managing the Seashore and protecting its resources for the public. His analysis and recommendations should have been given special consideration; yet the record contains no evidence that his comments were ever meaningfully addressed. This is another fundamental failure of the Service's rule.

B. The Service Failed to Comply with this Court's Order on Remand Regarding the Economic Impacts of Critical Habitat Designation

The final rule's consideration of economic impacts suffers from many of the same defects that this Court found in overturning the 2001 designation. In issuing the new rule, the Service continues to relying on the discredited

"functional equivalence" doctrine and fails to clearly identify the baseline economic impacts or to perform a proper "incremental baseline" analysis to accurately assess the additional economic impacts of designation. The Service also relies on discredited and incomplete data in assessing the real world costs of the designation, and then fails to consider and correctly analyze those costs. The net result is that the economic analysis was so skewed as to "tip the scales" against excluding the Seashore from designation on economic grounds These errors are serious and go to the very heart of USFWS's duties in meeting its obligation to fairly consider the economic impacts of designation.

1) USFWS continues to rely on the discredited Functional Equivalence Doctrine.

In its 2004 memorandum opinion, the Court cited the rationale of the Fifth and Ninth Circuits in rejecting of USFWS's application of the "functional equivalence doctrine" in the context of a "baseline" economic analysis. CHAPA I, 344 F. Supp. 2d at 130.[16] Functional equivalence is the discredited theory that the costs associated with listing a species – in particular those associated with Section 7 consultations with the USFWS – subsume those associated with the designation of critical habitat because actions that would trigger consultations due to the designation would already

[16] N.M. Cattle Growers Ass'n v. U.S. FWS 248 F.3d. 1277 (10th Cir, 2001); Gifford Pinchot Task Force v. U.S. FWS, 378 F.3d. 1059 (9th Cir. 2004).

be required because of the listing. See id. at 127-29..[17] Thus, the Court determined that the record supporting the Service's 2001 rule was unclear – that while some evidence indicated that the USFWS underestimated the economic impact of designation by relying on the functional equivalence doctrine, other evidence indicated that the USFWS considered additional economic impacts of the designation beyond those caused by the listing of the species in the first place. See id. at 130-131. The court instructed USFWS "to clarify or modify its position on remand," stating that "[t]he Service's regulations and practices that embrace functional equivalence have been confusing for too long." Id. at 131.

The Final Rule fails to comply with the Court's instructions for remand. The USFWS fails to adequately "modify or explain" how it considered the costs of efforts designed to meet the recovery goals for critical habitat. The Service acknowledges that the Fifth and Ninth Circuits invalidated its definition of "destruction and adverse modification," and claims not to rely on that definition. 73 Fed. Reg. at 62,832. Instead, the Service redefines that phrase to mean that Section 7 consultations would be required by critical habitat designation when the action impacts whether "the

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[17] The CHAPA I Court explained that the functional equivalence doctrine leads the USFWS "to undercut the importance of critical habitat, to underestimate the number of Section 7" consultations, and thus, to undercount the economic impact of its regulations while simultaneously under-protecting the species is it statutorily charged with protecting." 344 F. Supp. 2d at 129. It also noted the concerns by circuit courts that USFWS's combined use of the functional equivalence doctrine and the baseline approach "threatens to, as a practical matter, remove from consideration the economic analysis required by statute." Id. at 127.

affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species." Id. The Service then explains that "[a]ctivities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for the piping plover." Id. at 62,833. The Service then lists seven activities that may "appreciably reduce the conservation value of critical habitat for the piping plover" and simply states that "we consider all of the units designated as critical habitat to contain features essential to the conservation of the wintering population of piping plover . . . ." Id. The Service never explains how the costs of consultation for these activities would differ from Section 7 consultations for listing, given the lower "consultation" threshold necessary to meet the recovery objective of critical habitat. See id. These statements in no way meet the letter and spirit of the remand and offer no insight into the likely costs of increased Section 7 consultations caused by the designation of critical habitat. The USFWS's failure to "clarify or modify" its position on remand necessarily taints the USFWS's subsequent analysis of economics impacts of critical habitat designation.

2) FWS Failed to Conduct a Proper Baseline Analysis of Section 7 Consultation Costs

The Service's application of the functional equivalence doctrine in the context of a baseline economic analysis underestimates and fails to properly consider the number of Section 7 consultations that likely will result from

Service's designation of critical habitat. This Court adopted the baseline approach as "a reasonable method for assessing the actual costs if a particular critical habitat designation." CHAPA I, 344 F. Supp. 2d at 130. That approach compares "the state of the world without or before the designation, the baseline, with the state of the world with or after designation." Id. at 127. While the Court agreed with the baseline approach, it expressed concern over the Service's simultaneous application of the functional equivalence doctrine. Id. at 127-29. The Court criticized the 2001 Rule because, although the Service purported to follow the baseline approach, it failed to identify the baseline costs. The Court explained that "the Service's analysis of what costs belong to the baseline and what costs are 'but for' designation is scant," which the Court surmised was "likely attributable to the Service's reliance on functional equivalence and the discredited regulatory definitions [of 'jeopardize' and 'adverse modification'] in 50 C.F.R. § 402.02." Id. at 132. Yet, the Service failed to clearly articulate a baseline.

In fact, as discussed more fully below,[18] the analysis performed by the Service's consultant, Industrial Economics, Inc. (IEc) devotes slightly more than one page purporting to define the baseline by simply setting out a high

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[18] The analysis of the cost of the Final Rule can be separated to a degree between costs associated with increased Section 7 consultations (e.g., for actions related to beach replenishment and modifications to the Bonner Bridge over Oregon Inlet) and the economic impact of the Rule on the local economy. The IEc study follows that format by suggesting ranges for costs associated with both categories (IEc Study, AR 320 at 2-21 to 2-22, 4-4.) Both sets of costs overlap, however, in the context of increased Section 7 consultation costs associated with any new rules that the NPS imposes on ORV use. The USFWS's identification of costs, both below and above the baseline, is deficient in both respects.

end scenario that "assumes that incremental impacts would result from NPS closing additional areas of the beach beyond those that would be closed under current NPS management" and a "low end estimate assum[ing] no trips will be lost" because NPS does not implement additional closures. (IEc Study, AR 320 at 1-5, 1-6.) IEc never attempts to actually quantify the true baseline costs if critical habitat had not been designated. The USFWS cannot simply use a "best case/worst case" methodology based on the "uncertainty" of economic impacts to mask its failure to properly conduct a true incremental baseline analysis.

Further, while the USFWS notes that just about anything that will destroy or adversely modify critical habitat would already trigger a Section 7 consultation due to the listing of the species because it would "jeopardize" the species, 73 Fed. Reg. at 62,833, the record reveals the Service's rather confusing and convoluted attempt to analyze the incremental consultation costs associated with the designation. The Service vaguely explains that "Federal activities that may affect the piping plover or its designated critical habitat will require section 7(a)(2) consultation under the Act." Id. at 62,832. IEc provides a range of future administrative costs between $101,000 and $252,000. (IEc Study, AR 320 at 4-3, 4-4.) However, IEc fails to provide a basis for those costs, aside from reference to a 2002 review of historical Section 7 consultations from Service offices around the country (id. at 4-1),

and it fails to explain the extent to which any new costs would already be required by the listing of the species.[19]

IEc's economic analysis also fails to adequately quantify and consider Section 7 consultation costs. The analysis states that "there may be an increased rate of Section 7 consultation for [] dredging projects following critical habitat designation" without ever identifying a baseline. " (Id. at 3-1.) The analysis states that it "assumes that the rate of consultation will increase slightly after the designation of critical habitat," and that "NPS also may need to consult on its future ORV management plan" (Id. at 4-2), but the extent of those consultations and the extent to which they would be already be required by the listing of the species remains unclear. The analysis also excludes administrative costs associated with consultations required by the replacement of the Bonner Bridge because that massive project "is not expected to affect proposed critical habitat." (Id at 4-2) At the same time, the analysis acknowledges that "expansion of closure areas could occur based on unfledged chick movement, with nest buffers between 600 and 3,000 feet depending on bird behavior (Id. at 2-6), and fails to consider the fact that the bridge spans the constantly shifting Oregon Inlet.

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19 The Service contradicts itself in the Final Rule. It states that the "intent of the final economic analysis is to quantify the economic impacts of all conservations efforts... [and] It estimates costs that will likely be incurred regardless of whether we designate critical habitat (baseline)." 73 Fed. Reg. at 62,834. Yet the record reveals that the USFWS fails to take the necessary first step of properly defining the baseline costs incurred by the listing.

IEc's economic analysis also fails to address the costs associated with other activities that might require consultation due to critical habitat. Specifically, an August 22, 2006 email from Deputy Superintendant Mark Hargrove lists a number of activities that might require formal consultation due to the fact they are not part of the IPSMS. Those include "re-establishing access after major storm events, delaying re-opening causing loss of use by visitors . . . re-establishing historic access roads lost in previous storms . . . formally consult in the event of an emergency . . ." (Hargrove Email, AR 146.) The record does not reflect any attempt by the USFWS to quantify consultation costs associated with those activities, or to project what additional costs might be above the "baseline" after critical habitat designation. Mr. Hargrove even cites to the expected formal consultation needed to "restore access following the new inlet that formed from Hurricane Ophelia." Id. The USFWS should have foreseen the need to identify those costs and their economic implications in issuing its new rule on remand. It utterly failed to do so.

3) The USFWS Still Fails to Adequately Consider Other Costs of Critical Habitat Designation.

The Court criticized the 2001 Rule's contradictory conclusions that critical habitat designation was expected to have no effect on tourism and recreation (including ORV use) and that the NPS can protect critical habitat by redesignating beach routes and access points and through temporary beach closures. CHAPA I, 344 F. Supp. 2d at 132-33. The Court noted its

inability to locate the Service's analysis of the economic impacts of possible NPS actions, and concluded that "the 'no effect' conclusion has no connection to the facts found and is therefore arbitrary and capricious and must be revisited." Id. at 133.

In the new rule, the Service claims to address the court's concerns. It asserts that its economic analysis:

> estimates the foreseeable economic impacts of conservation measures associated with the revised designation of critical habitat . . . on government agencies, private businesses, and individuals (incremental costs).

73 Fed. Reg. at 62,834. The Service assumes that the primary method of protecting the habitat would be beach closures that would reduce recreational use opportunities. Id. As in the 2001 rule, the Service then states that it "believes that additional beach closures due to the designation of critical habitat . . . are unlikely," Id., without any real factual analysis to support that prediction.

The problem is that the Service's economic analysis presents vast ranges of potential costs, the low end of which the Service then uses to support its decision to designate critical habitat and to not exclude areas from designation under Section 4(b)(2). The Service estimates that:

> [C]osts associated with conservation activities . . . would range from $0 to $11.9 million in lost consumer surplus and $0 to $20.2 million in lost trip expenditures using a real rate of 7 percent over the next 20 years, with an additional $190,000 to $476,000 in administrative costs. This amounts to $0 to

> $985,000 in lost consumer surplus and $0 to $1.6 million in lost trip expenditures annually.[20]

Id. The Service concludes that the high end of the ranges "are highly improbable" based on the NPS's purported position that "ORV access to the beach will not be affected by the designation of critical habitat . . . . [and that] it is highly unlikely that the Service would recommend any additional closures." Id. at 62,835. At the same time, the Service justifies the vast ranges in the economic analysis on "two major uncertainties," one of which is "[h]ow NPS will manage beach access differently because of the critical habitat designations (e.g., whether any additional closures will be implemented)." Id. at 62,834.[21]

The Service's skewed treatment of closures and restrictions under April 30, 2008, settlement agreement is particularly striking. The Rule explains that the cost estimate ranges "are not related to, or the result of, the recently announced beach closures designed to protect breeding piping plovers and other sea birds resulting from the April 30, 2008, settlement agreement" and does not consider such closures as above the baseline. (Id. at 62834-66; IEc Study, AR 320 at 1-5, 1-6, 2-7.) However, (a) the Service

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[20] The rule explains that the high end of the ranges is even higher using a real rate of 3 percent. 73 Fed. Reg. at 62,834.

[21] The ranges presented by the economic analysis fail to adequately predict the costs associated with the designation will be, and the Service acted no less arbitrarily or capriciously here than it did in 2001 by picking the low end of the cost range (0) to support its decision to designate critical habitat. At the Court's direction, the Service simply provided an analysis of other possible costs, but then promptly ignored them on the basis of its continued unsupported belief that the designation will not result in "any disproportionate" costs. Id. at 62,835.

acknowledges that "habitat is often dynamic, and species may move from one area to another over time," 73 Fed. Reg. at 62,828, and (b) that closures under current management "change frequently." (IEc Study, AR 320 at 2-1.) The Service and its consultants significantly discount these variables in attributing not only past but future beach closings to the consent decree.[22] Putting aside the Service's characterization of the future management of CHNS as having a "high level of uncertainty" 73 Fed. Reg. at 62,826; (IEc Study AR 320 at 2-8, 2-15), it is clear that further beach closures and restrictions will continue. Thus, the Service's consideration of expected economic costs is artificially low because it fails to consider future closings by attributing them to the consent decree.[23]

Further, the Service's economic analysis relies on incomplete and discredited information in determining the potential range of costs to local businesses and governments caused by the designation of critical habitat. The economic analysis used by the Service to support the Final Rule explains that it forecasts the potential economic impacts of the designation on ORV use by estimating the number and economic value of current ORV trips, and then "determin[ing] the impact of proposed ORV closures on visitation by estimating the percentage of trips that may be lost" due to critical habitat

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[22] The Service repeatedly references the NPS's assertion that it does not foresee changes in management or additional beach closures due to the designation of critical habitat. 73 Fed. Reg. at 62,823, 62,834; (IEc Study, AR 320 at 1-6).

[23] For the Service to define the baseline here as not only the costs associated with the listing of the species in 1985, but to also include present and apparently future management efforts, leads the Service to underestimate the cost of the designation.

designation. (IEc Study, AR 320 at 2-10) IEc's methodology suffers from a fundamental flaw — it treats any one beach the same as another by calculating the costs and benefits based simply on a percentage of visitors that will not visit the Park if additional closures are implemented, factoring in seasonal visitor variations. (Id. at 2- 16 – 2-17). As CHAPA noted in its July 30, 2007 comments, "[t]he *location* of any additional closures is at least as important as its *acreage*" and would greatly affect the analysis of true economic impacts.[24] (CHAPA 7/3/07 Comments, AR 169 at 2944)

Equally problematic is that FWS and its consultant rely on the flawed 2003 study by Hans Vogelsong (the "Vogelsong study"). His analysis uses a current annual estimate of 73,256 to 110,288 ORV trips but acknowledges that figure likely underestimates the number of ORV visitors. (IEc Study, AR 320 at 2-14.) IEc's study also notes that the Vogelsong study's ORV trip estimate "has been criticized because (1) it is based on a series of brief, on-site counts of ORVs rather than daily totals obtained from on-site observation throughout the entire day; and (2) it is not based on a 'probability sample' of visitors (i.e., a sample in which each visitor has an equal probability of being selected to respond to the survey)." (Id. at 2-13). IEc concedes that "[t]his will lead to an underestimate of the total number of ORVs . . . . [and]

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[24] As CHAPA noted "NC-2 (Cape Point), the most popular surf fishing area in the east coast, could also be closed down at disproportionate cost. Closure of NC-2 and NC-4 would destroy both the Hatteras Village Civic Association Surf Fishing Tournament and the Cape Hatteras Anglers Club Surf Fishing Tournament that attract an estimated 1,236 fishermen and additional 100 judges plus family members annually." (CHAPA 7/30/07 Comments, AR 169 at 2944).

acknowledges that Vogelsong's study may underestimate ORV visitation," (id. at 2-14), but then rationalizes the use of the study as the basis for the economic analysis by stating that "these data are the best available data, [and] the biases in the results obtained using these data are well understood and described" in the study. Id. Similarly, the analysis responds to the second criticism by conceding that probability sampling is "clearly preferable" but asserts that the Vogelsong study is "sufficiently representative" for use in the economic analysis. Id. Finally, the analysis cites a peer review concluding that the Vogelsong study "did not 'appear to provide a sound scientific basis for estimating ORV use at CAHA'" id. — apparently discounting the logical conclusion from the peer review that the Vogelsong study should not be used in the first place. Instead, the analysis opts for the review's fall-back position, by permitting a range of estimates while "recogniz[ing] that, due to the sampling approach used in the study, these ORV estimates should probably be considered a lower bound estimate." Id.

CHAPA commented that Vogelsong study is unreliable and should not be used as a basis for estimating ORV visitation to the park. 73 Fed. Reg. at 62,824. However, while the Service acknowledges the peer reviewers' criticisms of the Vogelsong study, id., the Service still concludes that "the results contained in the Vogelsong study represent the best available information" and that the Rule's use of ranges "represents a reasonable application of the study consistent with the concerns raised in the peer

review process." Id. In so finding, the Service dismissed without explanation an alternative report submitted by CHAPA's expert, William Neal, that examined visitor usage and included an extensive critique of the Vogelsong Report. Although peer reviewers found Mr. Neal's report to be "equally problematic," id., the USFWS provided no explanation as to why it felt that Vogelsong's work is superior to Neal's, or why the Vogelsong study was more reliable for meeting the USFWS's statutory duty to assess economic effects of the designation.

Indeed, the peer reviewers' severe criticism of Vogelsong begs the question of why the Service chose to rely on that report over Neal without any explanation.[25] Four of the five peer reviewers concluded that the Vogelsong study did not provide a sound scientific basis for estimating ORV use at the CAHA or the economic impact of visitor spending associated with ORV use. (Peer Reviewers Comments, AR 357 at 3.) Further, all reviewers concluded that the information provided in the report was insufficient for making a decision regarding limiting or prohibiting the use of ORVs at the national seashore and all five reviewers were unanimous in their concern about the lack of detail on research methods provided in the report. Id.

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[25] The Peer Review panel found that the "design of the Vogelsong study served certain purposes well, such as documenting attitudes of park visitors and comparing ORV users with non-ORV users," (Peer Reviewers Comments, AR 357 at 3) but it then listed ten major criticisms of his report, including the fact that failed to estimate turnover rates throughout the day or to discuss weekday-weekend or seasonal variations that would be required to arrive at an overall annual estimate of ORV use; that it "contain[ed] virtually no information about the methods used to collect the visitor use data," id. and the study's failure to provide information about the ORV observation dates and locations indicated that the study may not constitute a representative probability sample." Id.

Even with the well documented deficiencies in the Vogelsong study, the Service still considers the study to be "the best available information" despite acknowledging its flaws, and accepts its use as the basis for determining the economic impact of the designation. FWS's reliance on the report as the primary source of information for its economic analysis in the face of such strong criticism is clear evidence that the Service acted arbitrarily and capriciously in issuing the Final Rule.[26]

The Service's economic analysis errs at an even more fundamental level. The USFWS's primary source of information consisted of communications with USFWS and NPS personnel. IEc never sought or considered "on the ground" information from business owners on the devastating effects additional closures and restrictions will have on the local economy. The Rule instead dismissed the importance of such information by stating in the Rule's comment/response section that "a survey regarding specific management closures on individual businesses is beyond the scope of this analysis." 73 Fed. Reg. at 62,824. Rather than obtaining verifiable "best available" information directly from affected businesses, the USFWS opted instead to rely on vague business size and annual sales statistics reported by

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[26] Unlike Building Industry Association of Superior California v. Norton, 247 F.3d 1241, 1247 (D.C. Cir. 2001), where the court held that "appellants have pointed to no data that was omitted from consideration . . . and that assuming that studies the Service relied on were imperfect, that alone is insufficient to undermine those authorities' status as the best scientific . . . data available."(Internal quotations omitted.) The record here involves FWS use of the Vogelsong study that peer reviewers found to highly flawed over the Neal study submitted by Plaintiffs, that was also found to be flawed, but without any explanation as to why and how it made that choice.

Dunn & Bradstreet. Id. CHAPA submitted letters from business owners and operators indicating that the economic costs are more likely to reach and perhaps surpass IEc's "high end" projection. Comments by CHAPA reveal the range of information that IEc would have found, if it only had looked:

- "To our understanding an economic analysis was to be done by visiting the local businesses. No one ever came by our business. Your proposal would be devastating to the entire economy and community of Hatteras Island." (Owners, Cape Woods Campground).
- "Whether you are a fisherman, surfer or windsurfer, the Cape Point area cannot be duplicated any where else in the Cape Hatteras National Seashore. Speaking from 35 years of experience, I can assure you the loss of 60 to 70 percent of business will be devastating to my business as well as the whole business community." (Owner, Lighthouse View Oceanfront Lodging).

(Attach. A to CHAPA 7/3/07 comments, AR 169 at 2960, 2971.)

All told, the record reflects the Service's skewed analysis of economic factors that, in essence, tilted the Service's analysis of the costs and benefits to favor the designation. Not only did the economic analysis still rely on the discredited functional equivalence doctrine and ignored actual "on the ground data" of potential costs of critical habitat designation to local businesses and governments, it largely extrapolates from flawed data, questionable assumptions and confusing baseline analysis to conclude that the low range of the economic analysis more accurately reflects the "incremental" costs associated with the designation. Thus, the Service's economic analysis does not comply with the Court's remand nor comply with the ESA's command to adequately consider economic impacts.

III. THE SERVICE'S EXCLUSION ANALYSIS UNDER ESA SECTION 4(b) (2) WAS ARBITRARY AND CAPRICIOUS

A. The Service's Exclusion Analysis Based on Economic Factors was faulty

The Final rule declined to exclude "any areas" for the designation based on one finding — the "economic analysis did not identify any disproportionate costs that are likely to result from the designation." 73 Fed. Reg. 62,835. That analysis refers to the OMB guidance under Executive Order 12866 noting that "OMB acknowledges that it may not be feasible to monetize, or even quantify, the benefits of environmental regulations due to either an absence of defensible, relevant studies or lack of resources on the implementing agency's part to conduct new research." (IEc Study, AR 320 at 1-7.) The report then states that "the direct benefits of the proposed rule are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking." (Id. at 1-7.) However, the record does not support the Service's rationale for two reasons.

First, the Rule does not identify any real tangible benefits to protecting the plover beyond NPS's management of the Seashore. The Service's Environmental Assessment (EA) repeatedly discusses the management and conservation provisions in the Seashore's Interim Strategy (or future ORV management plan) noting that the "existing management and conservation provisions . . . already address impacts to the species' habitat, and these would not change whether or not critical habitat is designated." (EA, AR 333 at 15-16.) In fact, the EA identifies only two possible benefits from the

designation: 1) helping to focus conservation activities by identifying areas essential to conserve species; and 2) alerting the public and land managers to the importance of these areas. (Id. at 23.) These alleged benefits stand in marked contrast to the very specific biological protections under the Interim Plan as detailed in NPS Superintendent Murray's July 30, 2007 comments opposing the designation, (AR 169 at 3117-21), and acknowledged in the EA. (AR 333 at 6-7).

Second, aside from the deficiencies with the underlying economic data and analysis discussed above, the Service fails to analyze the very real administrative costs and burdens described by Superintendent Murray in his comments opposing the designation. Mr. Murray states that "considering the level of consultation involved with the development of the Strategy and the pending development of the ORV plan and regulation, exclusion of CAHA from critical habitat designation would avoid any additional regulatory costs and would allow NPS to direct available funding towards implementation of the Strategy and completion of the ORV plan and regulation." (AR 169 at 3117-21.) Mr. Murray supports his statement with data on NPS expenditures related to the Interim Plan.[27]

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[27] The NPS Environmental Quality Division (EQD) expended an estimated $273,000 for contractor support to prepare the Strategy/EA documents. In 2006 the NPS's Resources Management (RM) Division spent an estimated $414,782 to implement the Strategy. This included $245,848 in project funds for temporary staffing and $168,934 in permanent staff time. In addition, EQD has budgeted an estimated $1,204,000 to develop the ORV management plan, environmental impact statement (EIS), related economic analysis, and prepare the regulation; and $600,000 for contractor support of the negotiated rulemaking process. (AR 169 at 3120.)

Thus, the Service's "disproportionate costs" finding is in error because it completely ignores these very real costs cited by Superintendent Murray and completely discounts its own EA's findings which fail to identify any real tangible biological benefits to the species over and above the existing management of the Seashore by NPS.

B. The Service's Exclusion Analysis was improperly based on non-economic factors

The Service's exclusion analysis was based on non-economic factors and failed to weigh and balance the benefits of the Interim Plan against the benefits of the designation. The Rule's analysis for exclusion enumerated very limited factors, including "whether the land is owned or managed by the Department of Defense...whether landowners have developed any conservation plans for the area or either there are conservation partnerships that would be encouraged and whether there are tribal issues . . . ." 73 Fed. Reg. at 62,833-34. The Service concluded that none of the enumerated factors existed, therefore, the Service decided not to exclude any areas based on non-economic factors. The Service gave no consideration of whether there is an existing federal, state or local government management plan in place under the Service three part criteria, *supra*. Indeed, the Service never assessed the Interim Plan and its implementation under the Consent Decree, despite the strong objections raised by Mr. Murray. Thus, the Service's

exclusion analysis was clearly biased because the record is replete with evidence about the important biological benefits and protections under the Interim Plan and its implementation.

IV. THE SERVICE'S DETERMINATION THAT AN EIS WAS NOT REQUIRED UNDER NEPA WAS BASED ON AN INADEQUATE AND FLAWED ENVIRONMENTAL ASSESSMENT

In CHAPA I, the Court severely criticized the Service for not complying with NEPA, reminding the Agency that "partial fulfillment of NEPA's requirements is not enough "and that NEPA calls for compliance "to the fullest extent possible." 344 F. Supp. 2d at 135. The Service has since prepared an Environmental Assessment and issued a Finding of No Significant Impact (FONSI) as summarized in the Final Rule, 73 Fed. Reg. at 62,838.

While Plaintiffs recognize that the EA is only supposed to provide sufficient evidence to determine if an EIS is required, 40 C.F.R. 1508.12, the decision as to whether to prepare a full EIS must not be based on incomplete unreliable information. See Marsh, 490 U.S. at 371 ("NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to start".)

The Service's EA is deficient in two major respects. First, its discussion of Environmental Consequences regarding impact to recreational, economic and social resources relies heavily on the flawed economic analysis as discussed above. Indeed, the EA repeats the same conclusions as the economic analysis — "That is, both the No Action

Alternative and the Action Alternative would have no impact on the economic vitality of existing businesses within the area, business districts, the local economy, tax revenues, public expenditures or municipalities beyond those impacts already resulting from the 1985 listing . . ." (AR 333 at 18.) That statement is misleading because the economic analysis relies on the flawed Vogelsong study, fails to gather "real word "data from affected business and arbitrarily "skews "the cost benefit analysis in favor of designation.

Second, the EA lacks sufficient scientific information regarding the importance of the Seashore as wintering habitat and its relation to the wintering piping plover populations throughout the nation. As noted in comments submitted by CHAPA's biologist, Lee Walton in his March 2008 declaration, the EA provides no analysis or discussion of piping plover population changes since the bird was first listed in 1985 and the scientific basis for determining that the critical habitat designation will contribute to the species recovery. (Walton Decl., AR 263) In fact, the EA makes no mention of recovery. These violations go to the very heart of the Court's criticism that "partial fulfillment of NEPA's requirements is not enough." 344 F. Supp at 135.[28]

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[28] There is no current or even recent scientific information in the EA about the current status of the plover and the importance of the critical habitat designation for recovery. The EA does not address the extensive information submitted by Plaintiffs biologist Walton in his declaration in the Defenders of Wildlife case attached to CHAPA's June 16, 2008 comments (Walton Decl. AR 263 at 5070-5108). In addition to noting that piping plover numbers are

CONCLUSION

For the above-cited reasons, Plaintiffs request the court vacate the Final Rule and remand it to the Service for further consideration.

Respectfully Submitted,

/s/

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increasing in North Carolina. (Id. at 5080.) Mr. Walton concludes that "suitable protection for migrating, wintering and early nesting piping plovers . . . will be provided in the [interim plan] by establishing year round closures of important nesting, migrating and wintering areas." Id. at 5098 ¶ 23.

INDEX OF DOCUMENTS IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT[1]

Declarations in Support of Motion for Summary Judgment:

Declaration of John Couch, January 27, 2010

Declaration of Raymond Sturza II, January 27, 2010

Record Documents in Support of Motion for Summary Judgment:

A/R Desig.

338 Final Rule, 72 Fed. Reg. 62816 (Oct. 21, 2008) (WPP-CH007400-7425)

169 NPS Superintendent Michael Murray's July 30, 2007 Comments (WPP-CH003117-3121)

169 NPS' Interim Protected Species Management Strategy (IP) (WPP-CH003122-61)

169 CHAPA's July 30, 2007 Comments with attached Comments from Owners of Cape Woods Camp Ground and Lighthouse View (WPP-CH002940-71)

289 Consent Decree, April 16, 2008 (WPP-CH005898-5920)

257 Emily Bizwell's Nov. 28, 2007 Email (WPP-CH004182-84)

263 NPS Superintendent Michael B. Murray's April 29, 2008 Declaration (WPP-CH004993-5011)

263 CHAPA's June 16, 2008 comments with attached Declarations of Raymond Sturza, John Couch and Lee Walton (WPP-CH004971-72, 5013-5108, 5098)

320 IEc Study, August 19, 2008 (WPP-CH006541-6603

146 Mark Hargrove's August 22, 2006 Email (WPP-CH001578-79)

357 Peer Reviewer's Comments (WPP-CH009480-9494)

333 Environmental Assessment, September 2008 (WPP-CH007243-7274)

[1] Plaintiffs will comply with Local Rule 7(n) regarding preparation and submission of the Appendix