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555 Twelfth Street, NW
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January 30, 2006

BY EMAIL

Ona Ferguson
Consensus Building Institute
Cambridge, MA

Re: Comments on Proposed Composition of Negotiated Rulemaking
Committee at Cape Hatteras

Dear Ms. Ferguson:

I am writing on behalf of the National Parks Conservation Association and Bluewater Network, a Division of Friends of the Earth, pursuant to your email of December 23, 2005 asking for comments on the draft recommendations for members and alternates for the potential negotiated regulation committee for Cape Hatteras National Seashore ("Cape Hatteras"). One of the questions on which you asked for comments is whether the proposed committee is balanced in terms of the points of view represented and the functions to be performed.

In our letter of June 30, 2005, at 9-10, we commented that a negotiating group of approximately 25 individuals would be unbalanced if it had only two representatives of the national environmental and natural resource conservation community. Since that time, you have expanded to three the number of seats representing that community. We continue to believe, however, that the committee is woefully unbalanced.

As we said in our letter of June 30, 2005, the issue being addressed is not a strictly local issue. What is at stake here is the health and well-being of a unit of the National Park System. The parks are a collective, and the statutes provide that the Park System is to be "preserved and managed for the benefit and inspiration of all the people of the United States." 16 U.S.C. § 1a-1 (emphasis added). Each unit is united through "inter-related purposes and resources into one national park system as cumulative expressions of a single national heritage." 16 U.S.C. § 1a-1. The National Park System belongs to all the citizens, not only to those who live in adjacent communities to a particular unit or even to those who utilize the resources of a particular unit. Likewise, the Endangered Species Act recognizes that listed species are "of value to the Nation." 16 U.S.C. § 1531(a)(3). Visitors come to Cape Hatteras from throughout the Southeast and Northeast regions, as well as from other parts of the country.

At this time, all the other members of the committee will be local in orientation. In addition, it appears that most of them will be supporting off-road vehicle use and

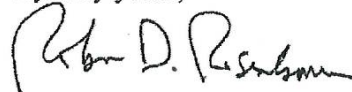
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opposing conservation. The Dare County and Hyde County governments represented on your proposed committee have adopted a pro-off-road vehicle position. Those two counties have filed a motion to intervene in the lawsuit we have initiated on behalf of our clients against the National Park Service and the Department of the Interior. In their motion, these counties argue that "recreational access to the [Cape Hatteras] beaches via ORV is an essential component of the County's [sic] tourist-based economy." See Exhibit 1 hereto, at 5. There is also reason to believe that those representing the "tourism, visitation and businesses" group will be opposed to the conservation point of view on this issue, along with those two counties. In addition, it can certainly be expected that the off-road vehicle user groups will be supporting off-road vehicle use. There is even reason for concern that the "water sports" representatives from REALKiteBoarding might also be supportive of off-road vehicle usage, by which they transport their equipment to the water. By our count, it is therefore likely that at least 11 members of the committee, and maybe more, will have a perspective opposed to that of the national environmental community. Yet there are only 3 representatives of that community, together with two representatives of the state/regional/local environmental community.

This is far from the type of balanced committee required by the Federal Advisory Committee Act. We accordingly urge that you expand the committee beyond 25 and add at least three additional representatives of the national environmental community.

Very truly yours,



Robert D. Rosenbaum

cc: Mr. Robert Fisher
Mr. Patrick Field
Ms. Mary Doll
Mr. Michael B. Edwards
Mr. Carl Schneebeck, Bluewater Network
Elizabeth Fayad, Esq., National Parks Conservation Association

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH, BLUEWATER
NETWORK DIVISION, *et al.*

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR, *et al.*

Defendant,

No. 05 CV 2302 (RCL)

THE CAPE HATTERAS ACCESS
PRESERVATION ALLIANCE
P.O. Box 1355
Buxton, NC 27920

and

THE AMERICAN SPORTFISHING
ASSOCIATION
225 Reinekers Lane
Suite 420
Alexandria, VA 22314

and

DARE COUNTY, NORTH CAROLINA
P.O. Box 1000
Manteo, NC 27954

and

HYDE COUNTY, NORTH CAROLINA
P.O. Box 178
Swan Quarter, NC 27885

and

THE UNITED FOUR WHEEL DRIVE
ASSOCIATIONS
7135 S. PR Royal Springs Dr.
Shelbyville, IN 46176

and)
)
THE UNITED MOBILE SPORTSFISHERMEN)
 26 Leaf Lane)
 Levittown, New York, 11756)
)
 and)
)
THE UNITED LAND ACTION FUND)
 3308 Oak Hill Road)
 Evansville, IN 47711-3674)
)
 and)
)
RECREATIONAL FISHING ALLIANCE)
 P.O. Box 3080)
 New Gretna, NJ 08224)
)
 Intervenor-Defendants)
)

THE CAPE HATTERAS ACCESS PRESERVATION ALLIANCE, AMERICAN SPORTFISHING ASSOCIATION, DARE COUNTY, NORTH CAROLINA, HYDE COUNTY, NORTH CAROLINA, THE UNITED FOUR WHEEL DRIVE ASSOCIATIONS, THE UNITED MOBILE SPORTSFISHERMEN, THE UNITED LAND ACTION FUND, AND THE RECREATIONAL FISHING ALLIANCE'S MOTION TO INTERVENE

The Cape Hatteras Access Preservation Alliance, the American Sportfishing Association, Dare County, North Carolina, Hyde County, North Carolina, The United Four Wheel Drive Associations, The United Mobile Sportsfishermen, the United Land Action Fund, and the Recreational Fishing Alliance ("Intervenors") hereby move this Court for leave to intervene as a defendant in the above-captioned action, pursuant to Rule 24 of the Federal Rules of Civil Procedure and Local Rule 7.1(j). Intervenors should be granted intervention as of right because Intervenors have a direct interest in the subject matter of this litigation that may be impaired by the disposition of this action and their interests are not adequately represented by the existing government agency defendants. Alternatively, Intervenors should be granted permissive intervention because Intervenors' defenses to Plaintiffs' claims involve common questions of law

and fact to those presented in this suit, and intervention will not unduly delay or prejudice the adjudication of the existing parties' rights.

Pursuant to Local Rule 7.1(m), counsel for Intervenorors have sought consent for this Motion from counsel to all parties currently in the case. Counsel for the Defendants state that they do not oppose this intervention. Counsel for Plaintiffs state that they take no position on this motion.

This Motion is supported by a Memorandum of Points and Authorities and a proposed Order. An Answer to Plaintiffs' Complaint has also been filed along with this Motion as Exhibit 3.

Respectfully submitted,

HOLLAND & KNIGHT LLP

DATED: 1/13/06



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH, BLUEWATER)
NETWORK DIVISION, *et al.*)

Plaintiffs,)

v.)

No. 05 CV 2302 (RCL)

UNITED STATES DEPARTMENT OF THE)
INTERIOR, *et al.*)

Defendant,)

THE CAPE HATTERAS ACCESS)
PRESERVATION ALLIANCE, *et al.*)

Intervenor-Defendants)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
THE CAPE HATTERAS ACCESS PRESERVATION ALLIANCE, AMERICAN
SPORTFISHING ASSOCIATION, DARE COUNTY, NORTH CAROLINA, HYDE
COUNTY, NORTH CAROLINA, THE UNITED FOUR WHEEL DRIVE
ASSOCIATIONS, THE UNITED MOBILE SPORTSFISHERMEN,
THE UNITED LAND ACTION FUND, AND THE
RECREATIONAL FISHING ALLIANCE'S MOTION TO INTERVENE

The Cape Hatteras Access Preservation Alliance, the American Sportfishing Association, Dare County, North Carolina, Hyde County, North Carolina, The United Four Wheel Drive Associations, The United Mobile Sportsfishermen, the United Land Action Fund, and the Recreational Fishing Alliance ("Intervenors") submit the following Memorandum of Points and Authorities in support of their Motion requesting intervention as of right, or in the alternative, permissive intervention at the Court's discretion.

STATEMENT OF INTEREST

This case involves a challenge to the National Park Service's current policy of allowing responsible Off-Road Vehicle ("ORV") use within the United States National Park System where

such use does not result in harm to the Park. The Intervenor – a collection of ORV enthusiasts, recreational anglers, ORV service providers, and local governments whose economic health is heavily dependent on revenues from tourism related to ORV use – are the parties that will be most immediately and directly affected by the outcome of this case.

Plaintiffs suit seeks an immediate moratorium on ORV use within all National Recreation Areas, National Seashores, National Lakeshores and National Preserves pending further ORV-related regulatory activity from the National Park Service. See Complaint at 35. Plaintiffs also request a permanent ban on ORV use in all National Parks other than National Recreation Areas, National Seashores, National Lakeshores and National Preserves unless such use is specifically authorized by the enabling statute creating the Park. Id. If the Plaintiffs are awarded the relief they seek, the interests of each of the proposed Intervenor will be significantly and immediately harmed.

Description of Proposed Intervenor

The Cape Hatteras Access Preservation Alliance ("CHAPA") is a project of the Outer Banks Preservation Association, which is dedicated to preserving and protecting a lifestyle and way of life historically prevalent on the Outer Banks of North Carolina, and specifically the Cape Hatteras National Seashore. CHAPA's goal is to work with the National Park Service ("NPS") to develop a comprehensive ORV use and management plan that will meet the concerns of protecting the Seashore's resources without compromising the Islands' distinctive lifestyle and economic health. With over 2,200 active members (representing over 28 states and Canada), the OBPA and CHAPA work to protect and preserve local beaches within a framework of free and open beach access for all users, including properly licensed drivers and vehicles. Recreational ORV users of the CHNS are the heart of OBPA's membership. As the court noted in Cape

Hatteras Access Preservation Alliance v. Norton, 344 F. Supp. 2d. 108, 116 (D.D.C. 2004), "CHAPA members regularly operate off road vehicles, the main means of accessing seashore beaches for both recreational and commercial purposes. Off road vehicles provide recreational access to seashore beaches that is essential for the area's tourist based economy."

The American Sportfishing Association ("ASA") represents the interests of the sportfishing industry and strives to safeguard and promote the enduring social, economic, and conservation values of sportfishing in America. Uniting more than 650 members of the sportfishing and boating industries, the ASA advocates for the interests of its members and America's 44 million anglers. ASA members regularly fish in numerous National Recreational Areas, National Parks, National Seashores and National Lakeshores, often utilizing ORVs for access. ASA members also include a number of businesses and organizations located in or near Cape Hatteras National Seashore. Such members' livelihoods are tied to supplying goods and services to recreational anglers who fish at the Seashore. A majority of these anglers utilize ORVs access to reach ocean and bay side fishing spots.

The United Four Wheel Drive Associations ("UFWDA") consists of more than 10,000 individuals, clubs and associations who share a common interest in recreational off-road activities, including the use of All Terrain Vehicles and Four-Wheel Drive Vehicles. UFWDA has members in each of the 50 states, as well as several foreign countries. UFWDA members routinely engage in recreational off-road driving in United States National Parks, including, but not limited to: Grand Canyon National Park, Big Bend National Park, Canyon de Chelly National Monument, Cape Lookout National Seashore and the Cape Hatteras National Seashore. UFWDA also has numerous corporate members who service the needs of the ORV community.

United Land Action Fund ("ULAF") provides education and assistance to four wheel drive enthusiasts in their quest for reasonable and equitable motorized use and recreational access. Its mission includes advocating for ORV users' continued access to public lands, include those targeted by the Plaintiffs' suit. ULAF endeavors to educate ORV enthusiasts and the general public concerning responsible land use ethics and the conservation of our natural resources. ULAF also works with various businesses, aftermarket and manufacturers, in seeking to fulfill the goals and objectives set forth. To this end, ULAF strives to build a better understanding of enthusiasts' needs and concerns to meet the ongoing challenges of vehicle ownership and recreational use. Among other major activities, ULAF has made contributions to the UFWDA Conservation Volunteer Program, Volunteer Trail Patrol, the Adopt-a-Road 4 Conservation project, and 4WD Safety and Awareness Clinics and created a four wheeling conservation ethics brochure.

The United Mobile Sportsfishermen ("UMS") was formed in the early 1960s to share the common interest of mobile sportfishing and to preserve anglers' right to beach access. The New Jersey Beach Buggy Association, the Massachusetts Beach Buggy Association, the Long Island Beach Buggy Association, the Montauk Surfcasters, and the Rhode Island Mobile Sportsmen are among the members of UMS. UMS promotes safe beach driving, environmental education, and community involvement. Many a Boy Scout, Girl Scout, Cub Scout and Brownie have earned their environmental patch through one of UMS's many programs and many a nurse or doctor has been transported to and from the hospital during a time of hurricane or blizzard by UMS members. UMS members routinely engage in ORV use in numerous National Parks and Seashores, including the Cape Hatteras National Seashore, the Assateague National Seashore and the Fire Island National Seashore.

Recreational Fishing Alliance ("RFA") is a national 501(c)(4) non-profit grassroots political action organization whose mission is to safeguard the rights of salt water anglers, protect marine, boat, and tackle industry jobs, and ensure the long-term sustainability of our nation's marine fisheries. RFA members both routinely access surfishing locations within public lands via ORV, including the Cape Hatteras and Assateague Island National Seashores, and provide goods and services as part of the industry that services such sportfishermen.

Dare County, North Carolina contains much of what is known as North Carolina's "Outer Banks" resort and vacation areas and contains approximately one-fourth of the North Carolina coastline. Recreational access to the CHNS beaches via ORV is an essential component of the County's tourist-based economy. As this court noted in CHAPA, 344 F. Supp. 2d. at 116, "Dare County encompasses seven of the seashore's eight unincorporated villages and six municipalities, Duck, Kill Devil Hills, Kitty Hawk, Manteo, Nags Head, and Southern Shores. While the County's permanent population is 29,000, the county's average daily population during the summer months ranges from 200,000 to 225,000. Dare County's 2001 revenue from Tourism was over \$365 million." Visitors to the Outer Banks routinely utilize ORVs to engage in recreational activities such as surf fishing, and picnicking, as well as to reach the significant portion of the CHNS and Cape Lookout that is not accessible by paved roads.

Hyde County, North Carolina is located in Northeastern North Carolina. Hyde County is one of North Carolina's largest by acreage, but has fewer than 5,500 residents. County attractions include the Ocracoke Island portion of the Cape Hatteras National Seashore. Mainland residents make their living farming or commercial fishing while Ocracokers depend heavily on the tourist industry, "which generated an economic impact of \$24 million in 2001. Ocracoke Beach is nationally known tourist destination and is the sixth best beach in the U.S. as

ranked by Dr. Stephen Leatherman of Florida International University" CHAPA, 344 F. Supp. 2d. at 116. Many areas of Hyde County, including a large portion of Ocracoke Island, are remote and accessible only by ORV.

ARGUMENT

Under Federal Rule of Civil Procedure 24(a)(2), a party shall be permitted to intervene as of right "when the applicant claims an interest in the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). In turn, a party may intervene at the discretion of the court, upon timely application, "when the applicant's claim or defense and the main action have a question of law or fact in common." See Fed. R. Civ. P. 24(b)(2). The proposed intervention at issue here is proper under either of these tests.

I. INTERVENORS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

The D.C. Circuit has restated the requirements of Rule 24(a)(2) as a four part test:

- 1) the application to intervene must be timely;
- 2) the applicant must demonstrate a legally protected interest in the action;
- 3) the action must threaten to impair that interest; and
- 4) no party to the action can be an adequate representative of the applicant's interests.

SEC v. Prudential Sec. Inc., 136 F.3d 153, 156 (D.C. Cir. 1998); see also Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994). The requirements of Rule 24(a)(2) are to be construed liberally in favor of the proposed intervenors. See United States v. Am. Tel. & Telegraph, 642 F.2d 1285, 1291-92 (D.C. Cir. 1980) (citing Nuesse v. Camp, 385

F.2d 694, 701 (D.C. Cir. 1967)). Intervenors satisfy these requirements and therefore this Court should grant its Motion to Intervene as a matter of right.

A. Intervenor's Motion is Timely

The consideration of whether an application to intervene is timely is based upon a consideration of "all of the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the [intervenor's] rights, and the probability of prejudice to those already parties in the case." AT&T, 642 F.2d at 1295 (various citations omitted).

An application of these factors in this case shows that Intervenor's Motion is timely. This case remains in its infancy, having been filed less than two months ago. Neither of the Defendants have yet answered the Complaint, and their Answer is not due until late January. In light of these facts, the addition of Intervenors to this suit will not prejudice the existing parties and Intervenor's motion should be deemed timely.

B. Intervenors Have a Legally Protected Interest in the Subject Matter of this Action

Rule 24(a)(2) requires that an applicant for intervention claim "an interest relating to the property or transaction which is the subject matter of the action." Fed. R. Civ. P. 24(a)(2). The 'interest' inquiry "is primary a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Huron Env'tl Activist League v. United States EPA, 917 F. Supp. 34, 42 n.7 (D.D.C. 1996) (quoting Nuesse, 385 F.2d at 700). In effect, the party must demonstrate that it has standing to participate in the action. See In re Vitamins Antitrust Class Actions, 215 F.3d 26, 29 (D.C. Cir. 2000).

The focus of this inquiry is "not whether the applicant is likely to prevail on the merits" but rather whether the prospective intervenor has alleged a "legally sufficient claim or defense. . .

" Williams & Humbert, Ltd. v. W. & H. Trademarks Ltd., 840 F.2d 72, 75 (D.C. Cir. 1988) (citing AT&T, 642 F.2d at 1291).

This Circuit has held that the interest in intervention is clear where the disposition of a claim in the favor of plaintiffs would directly impact the applicant's interests. See Dimond v. D.C., 792 F.2d 179, 192 (D.C. Cir. 1986). In addition, this Circuit has held that the interest in intervention is sufficient even where the individual claims of the parties differ, provided that the asserted claim is "the result of the same 'significantly protectable interest.'" Foster v. Gueory, 655 F.2d 1319, 1325 (D.C. Cir. 1981) (quoting Donaldson v. United States, 400 U.S. 517, 531 (1970)).

Fundamentally, the focus of the inquiry is the potential of injury to the Intervenor. The proposed Intervenor's interest in this case is therefore relatively straightforward. Plaintiffs challenge the National Park Service's currently policy of permitting responsible ORV use within numerous types of public land. They seek an immediate moratorium on all ORV use within all National Recreation Areas, National Seashores, National Lakeshores and National Preserves pending the promulgation of regulations for ORV use. See Complaint at p. 35. They seek a moratorium on all ORV use within National Parks where there is not a regulation adopting a park-specific ORV management plan. If Plaintiffs' are granted the relief they seek, the impact upon the Intervenor will be immediate and significant. This would effect Intervenor by: (1) denying access to public lands regularly utilized by the ORV enthusiasts and anglers; (2) decreasing overall ORV usage, thereby affecting the numerous businesses that provide goods and services to anglers and ORV enthusiasts; and (3) impacting the tourist economy that is reliant on continued access to public lands via ORV users.

A victory for Plaintiffs would drastically reduce the recreational opportunities of various types of ORV enthusiasts. For example, a ban or temporary moratorium on ORV use in the Cape Hatteras National Seashore ("CHNS") would devastate the recreational fishing community, which relies upon ORVs to reach remote beach locations within the CHNS. See Affidavit of John Couch at ¶ 8, attached hereto as Exhibit 1. Without ORVs, much of the CHNS would be effectively off-limits to the recreational fishermen that have fished the waters of the CHNS for decades. See Id. Such a ban would also significantly limit other recreational activities at the CHNS, including flounder gigging (fishing for flounder in the shallows near the beach in a flat hulled boat), scalloping, clamming, oystering, gathering seashells, as well as family picnics within the CHNS. See Affidavit of John Couch at ¶ 5.

A victory for Plaintiffs would also deny members of the United Four Wheel Drive Associations ("UFWDA") access to the National Parks they routinely explore and enjoy on ORVs. For example, UFWDA member Frank Noel regularly utilizes an ORV at Canyon de Chelly National Park in Arizona. ORV opportunities in Canyon de Chelly are by guided use only. Mr. Noel's particular favorite is the Canyon de Chelly trip with hired American Indian guides. The trip culminates at Spider Rock at the Indian ruins featuring the unique experience of traversing near quicksand areas. See Affidavit of Carla Boucher at ¶ 6, attached hereto as Exhibit 2.

UFWDA member Shawn Pagan enjoys ORV use within Big Ben National Park in Texas. Mr. Pagan typically spends a three-day weekend at the park utilizing any number of the 136 miles of primitive unpaved roads in the park planned for four wheel drive motor vehicles to enjoy the high desert scenery of cactus, shrub vegetation, arroyos, and other scenic vistas. See Affidavit of Carla Boucher at ¶ 7.

UFWDA member Robert Fuller enjoys ORV use at Canyonlands National Park in Utah as well as Death Valley National Park in California. At Canyonlands National Park Mr. Fuller especially enjoys the Shaffer trail, a series of switchbacks down the cliff connecting to White Rim Trail. White Rim 4x4 Trail culminates at Musselman Arch, the unparalleled arch formation located four miles from the trail head. The 4x4 trails at Canyonlands provide access to the plateau above the rim of the canyon and into the canyons themselves. At Death Valley National Park Mr. Fuller utilizes the ORV trails to access most of the points of interest in the park, such as the Lippincott Mine Road, a 7-mile trip from the Saline Valley to the famed Racetrack Playa. See Affidavit of Carla Boucher at ¶ 8.

If Plaintiffs prevail, UWDA members Noel, Pagan and Fuller may no longer be able to engage in the ORV-related recreation they have enjoyed for many years and will be deprived of access to many of the remote and scenic areas of the National Parks they visit.

Proposed Intervenors American Sportfishing Association, the United Mobile Sportsfishermen, the Recreational Fishing Alliance also face direct harm from this suit. The membership of these organizations regularly engage in responsible ORV use to access fishing areas within a number of the public lands at issue in this suit. Any curtailment of ORV use that limits or restricts recreational fishing within these areas will have a devastating impact on the members of these organizations.

Plaintiffs' requested relief will decrease overall ORV usage. This will have a collateral impact on the businesses that depend on such access – negatively impacting the numerous businesses that provide goods and services to anglers and ORV enthusiasts. This would cause significant economic injury and disruption to several of the proposed Intervenors. For example, UWDA members St. Clair's 4XPlus and Olympic 4x4 Supply provide after-market four wheel

drive motor vehicle parts as well as installation and service on four wheel drive vehicles. See Affidavit of Carla Boucher at ¶ 9. If Plaintiffs are successful in their bid to ban ORVs from vast reaches of the Nation's public lands, ORV suppliers will face a significant economic hardship resulting from decreased ORV use and the concomitant decrease in demand for ORV-related services.

For example, John Couch of CHAPA also faces direct harm from Plaintiffs' suit. As a small business owner who receives 85% of his revenue from tourists visiting the Outer Banks, Mr. Couch is heavily dependent upon the continuing growth of the Outer Banks as a tourist destination. See Affidavit of John Couch at ¶¶ 9-11. Research commissioned by OBPA shows that a ban on ORV use would cause 24% of visitors not to return to the Outer Banks and would cause an additional 18% of visitors to return less often. These tourism losses would significantly harm Mr. Couch's business, and cause him a direct economic injury. See id.

Decreases in ORV use will also impact proposed Intervenor United Land Action Fund. ULAF is a non-profit, tax exempt organization whose mission is to educate and assist four wheel drive enthusiasts in their quest for reasonable and equitable motorized use and recreational access. In addition to outreach in the form of education of responsible use, ULAF provides advocacy for continued reasonable access to public lands. The request by Plaintiffs to severely restrict and/or stop recreational ORV access on public land is directly at odds with ULAF's mission of reasonable access.

For local governments such as Dare County and Hyde County North Carolina, the relief sought by Plaintiffs threatens significant economic harm in the form of reduced tourist revenues. ORV use at the Cape Hatteras National Seashore is part of the culture in Dare County and Hyde County, North Carolina, and has been so for decades. As discussed above, research has shown

that a ban on ORV use would reduce tourism. Such tourism losses would result in significant economic harm to both Dare and Hyde Counties, which derive large portions of their revenues from tourism-related activity.

This court has already recognized the potential injury to the CHAPA and the Counties in holding that the Counties had standing to challenge a rule promulgated under the Endangered Species Act that "designated" certain areas of the Cape Hatteras National Seashore as "critical habitat" for protected birds. See CHAPA, 344 F.Supp.2d 108. As this court held, "the Counties assert harm related to their tourism economy and their ability to maintain and repair infrastructure and seashore. The counties, like CHAPA business owners, fear that any restrictions or beach closures within the habitat will have a negative impact on their tourism based economy. . . . Both CHAPA and the Counties have . . . alleged injuries that are actual or imminent . . . [and] . . . are causally related to the Service's designation...." Id. at 117. Here, the harm to CHAPA and the Counties is even more direct because ORV closures will have an immediate adverse impact on the tourist based economy.

C. Denial of Intervention Will Directly Impair Intervenors' Ability to Protect Their Interests

The disposition of this case threatens to impair Intervenors' recreational and economic interests as articulated above. Plaintiffs challenge the National Park Service's currently policy of permitting responsible ORV use within public lands, and seek an immediate moratorium pending further regulation. If Plaintiffs are successful, ORV users, ORV service providers, and local government's dependant upon tourism related spending and taxes would suffer an immediate and significant harm.

As noted by the District of Columbia Circuit, the Supreme Court has stated that intervention aims to protect interests that "are of such a direct and immediate character that the

intervenor will either gain or lose by the direct legal operation and effect of the judgment." Am. Tel. & Telegraph, 642 F.2d at 1292 (quoting Smith v. Gale, 144 U.S. 509, 518 (1992)). Here, Plaintiffs' complaint directly targets ORV users and seeks to enjoin such users from America's National Parks. Without intervention, the Intervenor's face the "obvious injustice" of having their claims erased or impaired by this action without ever being heard. See AT&T, 642 F.2d at 1292 (internal citation omitted).

D. Intervenor's Have an Interest in the Outcome of this Litigation That is not Adequately Represented by the Defendants

The burden of proving that a proposed intervenor's interests are not adequately represented by the existing parties is "minimal" and is met by showing that representation "may" be inadequate, not that the representation will in fact be inadequate. See Foster, 655 F.2d at 1325 (quoting Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1971)).

Intervenor's interests are not adequately represented by the federal defendants. As noted by this Circuit on numerous occasions, where the government does not have a financial stake in the outcome of a challenge it will not necessarily adequately represent the interests of private parties. See Dimond, 792 F.2d at 192 (noting the "large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances"). Indeed, a government entity is charged with representing the broader interests of the public, which are at times at odds with more narrow financial interests of private parties. See id. at 192-93; NRDC v. Costle, 561 F.2d 904, 912 (D.C. Cir. 1977). Thus, it is improper to assume that the government will adequately represent the recreational and economic interests of Intervenor's.

The fact that the federal government may share Intervenor's viewpoint that its actions were legal is not enough. The courts have held that, "a shared general agreement with [the

Agency] that the [action] is lawful does not necessarily ensure agreement in all particular respects about what the law requires." NRDC, 561 F.2d at 912.

The decision in American Horse Protection Association, Inc. v. Veneman, 200 F.R.D. 153 (D.D.C. 2001) (hereinafter "AHPA") is instructive on this point. In AHPA, a nonprofit association sued the United States Department of Agriculture ("USDA") alleging that regulations developed by the USDA to protect show horses from the abusive practice of "soaring" were too lenient and contrary to the requirements of the Horse Protection Act. The Show Horse Support Fund ("SHSF"), a coalition of horse trainers and breeders, moved to intervene in the case in support of the Government.

In rejecting the argument that SHSF's interests were adequately represented by the USDA, the Court found that the USDA represents "a broad spectrum of interests, which includes the general public, groups aimed primarily at animal welfare and organizations focused on the show horse industry" whereas the SHSF has "more narrow interests and concerns related exclusively to the obligations of those who train and breed horses for show." AHPA, 200 F.R.D. at 159. Based on this dichotomy, the Court found that – although USDA had a "general interest" in defending its regulation – USDA's "obligations to interests other than those represented by the [SHSF]" rendered its "representation of the show horse groups inadequate." Id.

The dichotomy of interests between the Government Defendants and the intervenors recognized in AHPA is even more evident here. NPS is charged with managing the Nation's National Parks and is primarily concerned with the health and well-being of those Parks. NPS and the Department of Interior ("DOI") have no duty or obligation to represent the interests of the ORV community, and have no incentive to fight for ORV access. Thus, as in AHPA the

NPS and DOI's "general interest" in defending the NPS' regulatory actions is inadequate to represent the direct and more focused interests of the Intervenors.

II. ALTERNATIVELY, THIS COURT SHOULD ALLOW INTERVENORS TO PERMISSIVELY INTERVENE

In the alternative, Intervenors requests that they be permitted to intervene pursuant to the broad discretion afforded the Court under Rule 24(b). Rule 24(b) provides:

Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or facts in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). Thus, permissive intervention is based upon consideration of the following: (1) timeliness; (2) common questions of law or fact; and (3) no undue delay or prejudice to the parties.

A. Intervenors Motion is Timely and Will Not Unduly Prejudice the Parties to this Action

As discussed supra, this Motion is timely and will not unduly prejudice other parties to this litigation, which remains in the very early stages. Intervenors participation in this case will not delay resolution of this case and will not prevent Plaintiffs from effectively asserting their legal theories. Thus, criteria 1 and 3 of the permissive intervention test are satisfied, and the only remaining consideration is whether Intervenors' defense has questions of law or facts in common with the main action.

B. Intervenors Have Defenses That Have Questions of Law and Facts In Common with Plaintiffs Claims

Intervenors have defenses that have questions of law in common with this action. Although Rule 24(b) speaks in terms of a "claim or defense" this Circuit has concluded that these terms are not to be interpreted strictly to preclude permissive intervention. See Nuesse, 385 F.2d at 704.

Here, it is clear that Intervenor's defenses to Plaintiffs' claims have common questions of law and fact, *i.e.*, whether the NPS's policy of permitting responsible ORV use in National Parks is contrary to Executive Order 11644, and more broadly, whether ORVs can be – and presently are being – utilized within National Parks in a manner that does not adversely affect the Park's natural, aesthetic or scenic values. Obviously, ORV enthusiasts – who are the ones using ORVs within National Parks on a day-to-day basis – are an important source of factual information on the impact of ORV's upon National Parks. This Court should permit these users to intervene in this litigation and allow their views to be heard.

CONCLUSION

For the forgoing reasons, Intervenor respectfully requests that this Court grant their Motion to Intervene.

Respectfully submitted,

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DATE: 1/13/06

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH, BLUEWATER)
 NETWORK DIVISION, *et al.*)
)
 Plaintiffs,)
 v.)
 UNITED STATES DEPARTMENT OF THE)
 INTERIOR, *et al.*)
)
 Defendant,)
)
 THE CAPE HATTERAS ACCESS)
 PRESERVATION ALLIANCE, *et al.*)
)
 Intervenor-Defendants)
 _____)

No. 05 CV 2302 (RCL)

ORDER

Having considered the Motion to Intervene filed by The Cape Hatteras Access Preservation Alliance, the American Sportfishing Association, Dare County, North Carolina, Hyde County, North Carolina, The United Four Wheel Drive Associations, The United Mobile Sportsfishermen, the Recreational Fishing Alliance and the United Land Action Fund and any Opposition filed thereto, it is this ____ day of _____, 2006 hereby:

ORDERED that the motion to intervene is GRANTED.

 Hon. Royce C. Lamberth
 United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2006 a copy of the foregoing Motion to Intervene, supporting Memorandum, proposed order and Answer was served via the Court's Electronic Filing System upon:

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