IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAPE HATTERAS ACCESS PRESERVATION ALLIANCE, Plaintiff, v. KENNETH LEE SALAZAR, et al. Defendants, and DEFENDERS OF WILDLIFE; NATIONAL AUDUBON SOCIETY; NATIONAL PARKS CONSERVATION ASSOCIATION, Intervenor-Defendants.	)	Case No. 12-cv-219 (EGS) Judge Emmet G. Sullivan

PLAINTIFF'S OBJECTION TO *SUA SPONTE* TRANSFER

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PLAINTIFF'S OBJECTION TO *SUA SPONTE* TRANSFER

Plaintiff Cape Hatteras Access Preservation Alliance ("CHAPA"), in response to the Court's July 26, 2012 order, submits this objection to the Court's *sua sponte* transfer of this matter to the United States District Court for the Eastern District of North Carolina as related to Case No. 2:07-CV-45-BO in that court or otherwise.

INTRODUCTION

Plaintiff CHAPA filed this action in the District of Columbia on February 9, 2012 to challenge the issuance by the National Park Service ("NPS") of a Final Rule establishing Special Regulations for the Cape Hatteras National Seashore Recreational Area ("CHNSRA") to designate off-road vehicle ("ORV") routes ("Final Rule") and the accompanying Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD") for the ORV Management Plan for the Cape Hatteras National Seashore Recreational Area ("ORV Management Plan"). NPS issued a draft environmental impact statement ("DEIS") for the ORV Management Plan and the Special Regulation in March 2010, and issued its FEIS on November 15, 2010. NPS published a proposed rule for the Special Regulation on July 6, 2011, relying on the FEIS. Special Regulations, Areas of the National Park System, Cape Hatteras National Seashore, 76 Fed. Reg. 39,350 (July 6, 2011) ("Proposed Rule"). The Final Rule was published in the Federal Register on January 23, 2012. Special Regulations, Areas of the National Park System, Cape Hatteras National Seashore-Off-Road Vehicle Management, 77 Fed. Reg. 3123 (Jan. 23, 2012). NPS's final agency action significantly affects the surrounding communities and interests in and around Cape Hatteras, as well as the many tourists from across the nation who look forwarding to visiting the Seashore.

CHAPA Litigation

In this action, CHAPA challenges both the Final Rule and the ORV Management Plan. As stated in its Complaint, CHAPA asserts that, in issuing the Final Rule and ORV Management Plan, NPS violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370f, NEPA's implementing regulations, 40 C.F.R. §§ 1500-1508, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, the Cape Hatteras National Seashore Recreation Area Enabling Legislation ("Enabling Act"), 16 U.S.C. §§ 459-459a-10, and the National Park Service Organic Act ("Organic Act"), 16 U.S.C. §§ 1, *et seq*.

Defenders of Wildlife Litigation

According to NPS, prior to 2005, CHNSRA was managed using a variety of draft or proposed plans. In 2005, NPS commenced an effort to prepare an ORV Management Plan for CHNSRA. NPS issued an Environmental Assessment and a Finding of No Significant Impact ("FONSI") under NEPA for the ORV Management Plan, and issued the Interim Protected Species Management Strategy ("Interim Plan") on July 13, 2007 to permit and control the use of ORVs within CHNSRA.

In October 2007, Defenders of Wildlife ("DOW") and the National Audubon Society ("Audubon") filed suit in the United States District Court for the Eastern District of North Carolina challenging the Interim Plan and the failure by NPS to issue a long-term plan and a Special Regulation designating routes for ORV use. Complaint, Defenders of Wildlife v. Nat'l Park Serv., No. 2:07-CV-45-BO (E.D.N.C. 2008) ("DOW case"). In its amended complaint, filed in December 2007, DOW and Audubon asked the court to vacate the FONSI and Interim Plan and to require NPS to develop and implement a long-term plan to manage ORV use at CHNSRA, and to restrict ORV use at CHNSRA until such a long-term plan was implemented.

Amended Complaint, Defenders of Wildlife v. Nat'l Park Serv., No. 2:07-CV-45-BO (E.D.N.C. 2008).

In April 2008, the court issued a consent decree, which provided for the Interim Plan to continue in operation pending implementation of a final Special Regulation subject to specified modifications, including additional restrictions on prenesting sites for birds, buffers, ocean backshore closures, and night driving. Consent Decree, Defenders of Wildlife v. Nat'l Park Serv., No. 2:07-CV-45-BO (E.D.N.C. 2008) ("Consent Decree"). The Consent Decree also imposed a deadline requiring issuance of the ORV Management Plan by December 31, 2010 and issuance of the Special Regulation by April 1, 2011. Consent Decree at ¶ 1. On November 15, 2011, Federal Defendants filed a motion to modify the Consent Decree to extend the deadline for issuing the Special Regulation to February 15, 2012. Motion to Modify Consent Decree, Defenders of Wildlife v. Nat'l Park Serv., No. 2:07-CV-45-BO (E.D.N.C. filed Nov. 15, 2011). The court granted this motion on November 20, 2011. Order Granting Modification of Consent Decree, Defenders of Wildlife v. Nat'l Park Serv., No. 2:07-CV-45-BO (E.D.N.C. 2011).

The terms of the Consent Decree specifically provided for the Consent Decree to "expire automatically upon the effective date of the Special Regulation." Consent Decree at ¶ 30. Moreover, the Consent Decree provided that "[b]ased upon the representations and commitments herein, Plaintiffs' claims are hereby DISMISSED WITH PREJUDICE pursuant to Fed. R. Civ. P. 41(a)(2)." Consent Decree at ¶ 31. Further, pursuant to the Consent Decree, "Plaintiffs, Federal Defendants, and Intervenor-Defendants agree[d] that any challenge to the ORV Management Plan, the Special Regulation, or other agency action set forth in Paragraph 1 [of the Consent Decree] *shall be brought in a separate action* and not pursuant to this Consent Decree." Id. at ¶ 37 (emphasis added).

On February 9, 2012, the Federal Defendants in the DOW case filed with the Eastern District of North Carolina a "Notice of Compliance and Notice of Expiration of Consent Decree" showing the court that the final Special Regulation had been published and would be effective February 15, 2012 and affirmatively stating that, consistent with Paragraph 30 of the Consent Decree, "the Consent Order will expire on February 15, 2012." Notice of Compliance and Notice of Expiration of Consent Decree, Defenders of Wildlife v. Nat'l Park Serv., No. 2:07-CV-45-BO (E.D.N.C. filed Feb. 9, 2012). Nonetheless, despite the clear language of paragraph 30 of the Consent Decree and NPS's Notice, on February 28, 2012, U.S. District Judge Terrence W. Boyle issued an order holding that the Consent Decree "remains active and in effect" and stating that the court "will revisit the consent decree 120 days from the date of entry" of the order. Defenders of Wildlife v. Nat'l Park Serv., No. 2:07-CV-45-BO (E.D.N.C. 2012) (order holding Consent Decree active and in effect). Accordingly, despite the Consent Decree's terms regarding expiration and the Federal Defendants' Notice of Compliance and Notice of Expiration of Consent Decree, as a result of Judge Boyle's order—which appears to have been issued in reaction to CHAPA's filing of the lawsuit with this Court—that action remains unanticipatedly pending. Most recently, Judge Boyle held a status conference on July 27, 2012 on the implementation of the Final Rule. The docket indicates that he will set the case for another status conference in December 2012.

ARGUMENT

Section 1404(a) of Title 28 of the United States Code authorizes a court to transfer a civil action to any other district or division where it could have been brought "[f]or the convenience of the parties and witnesses, in the interest of justice . . . ." 28 U.S.C. § 1404(a). As the U.S. Supreme Court has stated, the purpose of section 1404(a) "is to prevent the waste 'of time,

energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense. To this end it empowers a district court to transfer any civil action if the transfer is warranted by the convenience of parties and witnesses and promotes the interest of justice." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (citation omitted). Section 1404(a) vests "discretion in the district court to adjudicate motions to transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp*., 487 U.S. 22, 29 (1988) (quoting *Van Dusen*, 376 U.S. at 622). Under section 1404(a), it is the moving party that bears the burden of establishing that transfer is proper. *Trout Unlimited v. Dep't of Agric.*, 944 F. Supp. 13, 16 (D.D.C. 1996).

Although the district court has broad discretion to adjudicate motions for transfer under § 1404(a), *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955), it may not transfer a case "from a plaintiff's chosen forum simply because another forum, in the court's view, may be superior to that chosen by the plaintiff." *Pain v. United Technologies Corp.*, 637 F.2d 775, 783 (D.C.Cir.1980), *cert. denied*, 454 U.S. 1128 (1981). As this Court has stated, "[t]ransfer under section 1404(a) involves a multi-part analysis: first, the court must determine that venue is proper in the transferor district; next, it must ensure both jurisdiction and venue will lie in the proposed transferee district; and finally, it must weigh several private and public interest factors to determine whether transfer would, indeed, be 'in the interest of justice.'" *Elemary v. Holzmann*, 533 F. Supp. 2d 144, 149 (D.D.C. 2008). These private interest considerations include: (1) the plaintiffs' choice of forum; (2) the defendants' choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) the ease of access to sources of proof. *Trout Unlimited*, 944 F. Supp. at 16. The public interest factors include: (1) the degree to which the courts in both venues are familiar with the

governing laws; (2) the relative congestion of the calendars of the transferee and transferor courts; and (3) the local interest in deciding local controversies at home. *Id*. *See also Brannen v. Nat'l RR Passenger Corp*., 403 F. Supp. 2d 89 (D.D.C. 2005), *Sierra Club v. Flowers*, 276 F. Supp. 2d 62 (D.D.C. 2003); *Akiachak Native Cmty. v. Dep't of Interior*, 502 F. Supp. 2d 64 (D.D.C. 2007). Courts also may look at the conservation of judicial resources. *Air Line Pilots Ass'n v. Eastern Airlines*, 672 F. Supp. 525 (D.D.C. 1987), *Trout Unlimited*, 944 F. Supp. at 19.

Although neither the Federal Defendants nor the Intervenor-Defendants have asserted that jurisdiction and venue are improper here and sought transfer of this case to another court, this Court has advised the parties that it is considering transferring this case *sua sponte* to the U.S. District Court for the Eastern District of North Carolina. Before doing so, this Court must determine whether convenience and the interests of justice support transfer to that district and then that those interests outweigh the Plaintiff's choice of forum. CHAPA maintains that transfer to the Eastern District of North Carolina is not necessary or appropriate for convenience or fairness, or for judicial economy. Cases involving the management of national parks and other public lands often are brought outside of the locale (and frequently in the District of Columbia), and little if anything about the earlier case brought before the Eastern District of North Carolina informs whether *NPS's present final agency actions not before that court* are arbitrary or capricious or otherwise violate the law.

A. The Private Interest Factors Favor Retaining the Action in this Forum

1. Plaintiff's Choice of Forum Deserves Deference

At the outset, the plaintiff's choice of forum is a "paramount consideration in any determination of transfer request." *Thayer/Patricof Educ. Funding, LLC v. Pryor Res.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002) (internal quotation marks omitted). Plaintiff's choice of forum is

due substantial deference. *International Bhd. of Painters and Allied Trades Union v. Best Painting and Sandblasting Co.*, 621 F. Supp. 906, 907 (D.D.C.1985); *see also Gross v. Owen*, 221 F.2d 94, 95 (D.C.Cir.1955) ("It is almost a truism that a plaintiff's choice of a forum will rarely be disturbed and, so far as the private interests of the litigants are concerned, it will not be unless the balance of convenience is strongly in favor of the defendant."). However, this Court has recognized that this deference is mitigated when the plaintiffs' chosen forum has "no meaningful ties to the controversy and no particular interest in the parties or subject matter" and if the plaintiffs' choice of forum has "no meaningful nexus to the controversy and the parties." *Greater Yellowstone Coal. v. Bosworth*, 180 F. Supp. 2d 124, 128 (D.D.C. 2001) (quoting *Chung v. Chrysler Corp.*, 903 F. Supp. 160, 165 (D.D.C. 1995)); *see also Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 12 (D.D.C. 2000). That is not the case here.

CHAPA's choice of forum deserves deference for the same reasons that this Court concluded that such deference was due to the plaintiffs' choice of forum in *Bosworth:* because the Plaintiff's counts focus on interpretation of federal statutes and because federal government officials in the District of Columbia were involved in the decision to issue the Final Rule and ORV Management Plan, "this case has some national significance and has a nexus to the District of Columbia." *Bosworth*, 180 F. Supp. 2d at 129. This national significance is discussed further below in the discussion of the local interest in deciding local controversies at home. It is further reflected in the fact that Plaintiff CHAPA represents the interests of 10,000 active members in 38 states (including the District of Columbia) and Canada, working to protect and preserve local beaches within a framework of free and open beach access for all users, including properly licensed drivers and vehicles.

Accordingly, Plaintiff's choice of forum deserves deference. However, even if this Court does not find that this is the case, the remainder of the public and private interest factors weighs in favor of retaining the case in this forum.

2. Defendants' Choice of Forum Does Not Support Transfer

Despite their obvious ability to have done so, neither Federal Defendants nor either of the Intervenor-Defendants initially objected to Plaintiff's choice of forum and/or independently sought transfer of this case to another venue. Accordingly, this factor at best supports keeping the litigation in this Court and, at worst, should be irrelevant to the Court's determination.

3. Where the Claim Arose is Inconclusive

The facts are not entirely clear as to exactly where Plaintiff's claim arose. The challenged FEIS appears to have been drafted primarily in North Carolina. However, the Record of Decision was signed by David Vela, Regional Director, Southeast Region, located in Atlanta, Georgia, and at least some policy review occurred in Washington, DC. Moreover, the entire rulemaking process had a national dimension as comments were received from various states and public meetings were held not only in North Carolina, but also in Washington, DC and Hampton, Virginia. The outcome of this factor is, therefore, as it was in *Babbitt*, inconclusive. *See Babbitt*, 104 F. Supp. 2d. at 15 (concluding that the outcome of this factor was inconclusive where the Department of the Interior conducted its research in Alaska, the disputed final environmental impact statement was drafted in Alaska, the record of decision was signed in the District of Columbia, at least some policy review occurred at the Department's Washington headquarters, comments were received from all 50 states, and public meetings were held both inside and outside of Alaska).

4. Convenience of the Parties Supports Litigation in the District of Columbia

The convenience of the parties supports keeping this case in the District of Columbia. Obviously, Federal Defendants have offices in Washington, DC and ready access to counsel in Washington, DC as well. Defendant-Intervenor DOW is headquartered in Washington, DC, and at least one of its attorneys, Jason Rylander, works out of DOW's Washington, DC office. Defendant-Intervenor Audubon also has an office in Washington, DC. Plaintiff, of course, voluntarily filed the litigation in Washington, DC. One of the primary reasons for its doing so was the convenience to its counsel in this case (different from its counsel in the DOW case), which CHAPA retained early in the planning process specifically for its experience and expertise with APA, NEPA, and national parks and land management matters. Accordingly, Plaintiff obviously does not view Washington, DC as an inconvenient forum. In fact, no party has asserted any particular hardship in litigating this suit in Washington, DC. On the other hand, given that its chosen counsel is in Washington, DC, and given its limited resources, transfer to North Carolina would create a hardship for CHAPA. For these reasons, convenience of the parties does not support transfer.

5. Convenience of Witnesses Does Not Favor Transfer

The convenience of the witnesses does not favor transfer. Judicial review in this case will generally be limited to the administrative record that was before Federal Defendants at the time that they issued the Final Rule and ORV Management Plan. It is unlikely that there will be any witnesses at all in this matter. Accordingly, this factor does not favor transfer. *See Babbitt*, 104 F. Supp. 2d at 15; *Bosworth*, 180 F. Supp. 2d at 128 n.3.

6. Ease of Access to Sources of Proof Does Not Favor Transfer

This Court has stated that, "[w]hen the administrative record is the only 'source of proof' that will be seen by the Court, it is appropriate to consider its location." *Babbitt*, 104 F. Supp. 2d at 16. As is now typically the case, however, Plaintiff believes that it is safe to assume that the administrative record will be made available for review in electronic format, likely on compact disc. Litigation of this case in Washington, DC, therefore, is unlikely to affect ease of access to sources of proof. Accordingly, this factor does not favor transfer.

B. Public Interest Factors Favor Retaining the Action in this Forum

1. The Degree to Which the Courts are Familiar with the Governing Laws Does Not Favor Transfer

In determining the degree to which transferor and transferee courts are familiar with the governing laws, when involving the interpretation of federal statutes, particularly federal environmental law, the District of Columbia generally follows the "principle that the transferee federal court is competent to decide federal issues correctly." *Otay Mesa Property L.P. v. United States Dep't of Interior*, 584 F.Supp.2d 122, 126 n. 1 (D.D.C. 2008). Accordingly, both courts are deemed to be familiar with the federal laws at issue in this case. Further, this case does not involve any issues of state law, so there is no advantage to having a federal court "thoroughly familiar and experienced" in the state law of North Carolina adjudicate this case. Thus, there is no reason to transfer the case on the basis of this factor.

2. The Relative Congestion of the Courts Does Not Favor Transfer

Where a transferee court is more congested than the transferor court, this factor can weigh against transfer. *Nat'l Wildlife Fed'n v. Harvey*, 437 F.Supp.2d 42, 49 (D.D.C 2006) (relative congestion of the courts would weigh in favor of denying the motion to transfer, as the

Southern District of Florida received more filings than the District of Columbia at the time). In the instant case, based on Federal Court Management Statistics, in 2011, the Eastern District of North Carolina had 4 judgeships, and received 2,511 filings, for a total of 628 actions per judgeship. Federal Court Management Statistics, Eastern District of North Carolina, Sept. 2011, *available at* http://www.uscourts.gov/uscourts/Statistics/FederalCourtManagementStatistics/2011/District%20FCMS%20Profiles%20September%202011.pdf#page=21. The median time for a civil case to be completed, from filing to disposition, was 8.6 months. *Id.* In 2011, the District of Columbia had 15 judgeships, and though it received a total of 3,051 filings, the actions per judgeship were only 203. Federal Court Management Statistics, District of Columbia, Sept. 2011, *available at* http://www.uscourts.gov/uscourts/Statistics/FederalCourtManagementStatistics/2011/District%20FCMS%20Profiles%20September%202011.pdf#page=2. The median time for a civil case to be completed, from filing to disposition, was 7.2 months. *Id.* Based on these numbers, it appears that the District of Columbia is slightly less congested than the Eastern District of North Carolina. As such, this factor would weigh in favor of retaining the case in this forum.

3. The Local Interest in Deciding Local Controversies at Home Does Not Favor Transfer

As the Supreme Court has noted, "[t]here is a local interest in having localized controversies decided at home." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). However, the mere presence of a local interest, in the form of property located within the proposed transferee district, is not dispositive in the transfer analysis. *See Otay Mesa Prop., L.P.*, 584 F. Supp. 2d at 126; *Akiachak*, 502 F. Supp. 2d at 68. *See also Fund for Animals v. Norton*, 352 F. Supp. 2d 1, 2 (D.D.C. 2005) (identifying a strong local interest in the dispute, but holding that

this factor was not dispositive); *Nat'l Ass'n of Home Builders v. EPA*, 675 F. Supp. 2d 173 (D.D.C. 2009). Determining local interest can include whether the controversy has some national significance. *Harvey*, 437 F. Supp. 2d at 49; *Flowers*, 276 F. Supp. 2d at 70. Where the essential claim is a violation by the federal government of a federal law, or involves national significance or a national resource, the controversy is not necessarily a local one that needs to be decided at home.

The Federal Defendants' decision to issue the Final Rule and ORV Management Plan is not a local dispute affecting only the local residents of the Outer Banks of North Carolina. This Court has found, on multiple occasions, that the management of national parks and other federal lands and, more broadly, the interpretation of federal mandates governing NPS and other federal resource agencies, present questions of national significance. *See, e.g.*, *Bosworth*, 180 F. Supp. 2d at 128-29 (noting the "national significance" of a case challenging issuance of a cattle-grazing permit under the APA, NEPA, and other federal laws as a result of concerns regarding potential impact on bison in Yellowstone National Park); *Babbitt*, 104 F. Supp. 2d at 13, 17 (concluding that the Department of the Interior's decision to open the National Petroleum Reserve-Alaska ("NPR-A") to oil and gas leasing "is a decision of national significance," not an "isolated, local environmental issue"); *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 13 (D.D.C. 2007) (finding that, although development activity authorized by a disputed Clean Water Act section 404 permit would have a localized impact on the Middle District of Florida's residents, based on Congress's express declarations of the national character of the Clean Water Act and Endangered Species Act and the fact that the issue was whether federal agencies complied with federal law, the alleged violations of federal law were "national in scope"). *See also Greater Yellowstone Coal. v. Kempthorne*, 2008 U.S. Dist. LEXIS 33641 (D.D.C. Apr. 24, 2008) ("The management

of the National Parks and the interpretation of federal environmental statutes are nationwide concerns.").

Like Yellowstone National Park, which has been the subject of various matters adjudicated before this Court on grazing permits, snowmobile use, and other management decisions, CHNSRA is truly a national treasure and a resource of national significance. The FEIS itself recognized CHNSRA's significance to the nation's natural and cultural heritage. The FEIS includes this park significance statement regarding the importance of CHNSRA to the nation:

> Park significance statements capture the essence of the park's importance to the nation's natural and cultural heritage. Understanding park significance helps managers make decisions that preserve the resources and values necessary to the park's purpose. The following significance statements recognize the important features of the Seashore. As stated in the 2006–2011 Strategic Plan, the Seashore has the following significance (NPS 2007b): This dynamic coastal barrier island system continually changes in response to natural forces of wind and wave. The flora and fauna that are found in a variety of habitats at the park include migratory birds and several threatened and endangered species. The islands are rich with maritime history of humankind's attempt to survive at the edge of the sea, and with accounts of dangerous storms, shipwrecks, and valiant rescue efforts. Today, the Seashore provides unparalleled opportunities for millions to enjoy recreational pursuits in a unique natural seashore setting and to learn of the nation's unique maritime heritage.

FEIS at 11. Moreover, just as this Court recognized the national significance of statutes such as the Clean Water Act and the Endangered Species Act in *Van Antwerp*, Congress has similarly indicated the national significance of NEPA. *See, e.g.*, 42 U.S.C. § 4321 (stating that one of the purposes of NEPA is to "enrich the understanding of the ecological systems and natural resources *important to the Nation*") (emphasis added); 42 U.S.C. § 4331(b) (setting forth one of the goals of NEPA as "preserv[ing] important historic, cultural, and natural aspects of our

national heritage, and maintain[ing], wherever possible, an environment which supports diversity, and variety of individual choice").

Interested parties are not located only in North Carolina, but outside as well, as evidenced by the comments submitted on the DEIS. In addition, public scoping meetings on the EIS and public meetings to present the draft plan/DEIS were held both inside and outside of North Carolina. Visitors come from all over the nation and the world to visit CHNSRA for its different recreational activities. In 2006, according to documents provided by the Federal Defendants, 31% of participants in recreational fishing and 56% of participants in away from home wildlife watching were non-residents. Carol Mansfield, et al., RTI International, Benefit-Cost Analysis of Proposed ORV Use Regulations in Cape Hatteras National Seashore (Jan. 2011); *see also* Carol Mansfield, et al., RTI International, Visitor Intercept Survey: Off-Road Vehicle Management, Cape Hatteras National Seashore (Oct. 2011) (emphasizing importance of out of town visitors). Cape Hatteras is viewed as one of the top watersports destinations in the world by kiteboarders, surfers, windsurfers, and kayakers; the current and past world champions in each of these sports visit Cape Hatteras annually, considering it one of their most anticipated trips every year. Trip Forman & Matt Nuzzo, Watersports Industry Association, Addendum to the Final Report of the Proceedings of the Negotiated Rulemaking Advisory Committee for Off-Road Vehicle Management at Cape Hatteras National Seashore, Addendum 6 at 1 (Mar. 30, 2009).

The issues to be decided in this litigation will not affect only North Carolinians, but people across the nation. The issues raised by Plaintiff concerning ORV use in CHNSRA are issues of national significance involving a national resource. Because this case involves a national rather than local controversy, this factor does not favor transfer.

4. Interests of Judicial Economy Do Not Warrant Transfer

During the July 26, 2012 status conference in this case, the Court suggested that interests of judicial economy may warrant transfer of this case to the North Carolina court, expressing concern that retaining this case would result in two federal judges expending their resources to resolve the same controversy. The suggestion was that transferring this action to the Eastern District of North Carolina, and specifically to Judge Boyle, would promote judicial economy because Judge Boyle has presided over closely related issues.

The case that Judge Boyle has presided over, however, the DOW case, is very different from the instant case. The controversy is not the same. As explained above, the DOW case focused on vacating the Interim Plan then in effect and on NPS's failure to prepare a Special Regulation and ORV Management Plan. NPS has now done what the DOW case sought. Under the terms of the Consent Decree, the claims of the plaintiffs in that case were dismissed with prejudice based on the commitments and representations in the Consent Decree, the Consent Decree (as NPS acknowledged in its February 9, 2012 Notice in that case) should be deemed to have automatically expired effective February 15, 2012, and CHAPA or anyone else dissatisfied with the Final Rule and ORV Management Plan should have been free to challenge those actions in a separate action, *i.e.*, a new case. Whereas the DOW case focused on forcing NPS to act (and what would happen in the interim), the instant case focuses on whether that action, now taken, was proper. The focus of the inquiry into the administrative record will, therefore, be entirely different.

By the explicit terms of the Consent Decree in the DOW case, agreed to by all parties in this case, a challenge to the Final Rule and ORV Management Plan such as that brought by CHAPA in this Court is outside the scope of the Eastern District of North Carolina's and Judge

Boyle's oversight. It is not at all clear what, if anything, remains pending in the North Carolina court and, if something is deemed to remain pending, on what basis. In sum, CHAPA respectfully maintains that there should be nothing left for Judge Boyle to adjudicate in the DOW case such that this Court and his court would both be expending resources to resolve the specific controversy brought before this Court or that there should be any risk of inconsistent judgments. Interests of judicial economy, therefore, do not warrant transfer of this case to the North Carolina court, to Judge Boyle or otherwise.

Indeed, if this Court retains jurisdiction, it would not be the first time that this Court has adjudicated a dispute involving management of the resources of CHNSRA. In 2001, CHAPA sought judicial review of the U.S. Fish and Wildlife Service's designation of four units of critical habitat for the piping plover (one of the species that NPS sought to protect in the Final Rule and ORV Management Plan) in North Carolina's Outer Banks. In 2004, the Court ruled in favor of CHAPA and remanded the designation to the agency. *CHAPA v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004). In 2008, the Fish and Wildlife Service announced revisions to its designation. *Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Wintering Population of the Piping Plover in North Carolina*, 73 Fed. Reg. 28,084 (2008). "Meanwhile, environmental groups filed [the DOW case] in the United States District Court for the Eastern District of North Carolina, alleging that the National Park Service (NPS) failed to promulgate a final regulation to manage off-road vehicle use at Cape Hatteras in violation of the ESA, two presidential executive orders, NPS regulations and the Migratory Bird Treaty Act." *CHAPA v. U.S. Dep't of the Interior*, No. 09-0236, slip op. at 5 (D.D.C. Aug. 17, 2010) (Memorandum Opinion). In 2009, CHAPA subsequently challenged the revised critical habitat designation under the ESA and NEPA, again in this Court. Chief Judge

Lamberth upheld the revised designation on cross motions for summary judgment in August 2010. *Id.*

CONCLUSION

For the reasons set forth above, a balancing of the private and public factors relevant to transfer does not favor transfer of this case. Accordingly, Plaintiff respectfully requests that this Court retain this case and not transfer it *sua sponte* to the U.S. District Court for the Eastern District of North Carolina.

Respectfully submitted,

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