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

CAPE HATTERAS ACCESS PRESERVATION ALLIANCE, Plaintiff	CASE NO. 2:13-CV-1-BO ELIZABETH CITY, NC MARCH 24, 2014
V.	
KENNETH LEE SALAZAR, ET AL., Defendants	
V.	
DEFENDERS OF WILDLIFE, ET AL.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE TERRENCE W. BOYLE
JUDGE, UNITED STATES DISTRICT COURT

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THE COURT: This is the Cape Hatteras Alliance versus Interior. And, Plaintiff, you're represented by Mr. Simon and Mr. Roessler. Who's going to make the argument?

MR. SIMON: Jonathan Simon, Your Honor.

THE COURT: All right. I'll hear from you regarding the summary judgment.

MR. SIMON: Thank you, Your Honor.

Good morning, Your Honor, may it please The Court. My name is Jonathan Simon. I represent Cape Hatteras Access Preservation Alliance. I am joined at the table here by Todd Roessler.

In April 2008 Your Honor issued a Consent Decree in Defenders of Wildlife v. National Park Service, Case No. 2:07-CV-45-BO, that among other things required the National Park Service to --

THE COURT: Your client was a party to that; they were Intervenors in that.

MR. SIMON: Yes, Your Honor.

Among other things required the Park Service to complete an off-road vehicle management plan for Cape Hatteras National Seashore Recreation Area by the end of 2010 and promulgate a final special regulation governing ORV use in the area by April 2011. This case is about the failure of the Park Service in its efforts to complete the final regulation in compliance with the Consent Decree, to

meet its obligations under the Enabling Act legislation for Cape Hatteras National Seashore Recreation Area, and to adequately consider alternatives and properly assess impacts under the National Environmental Policy Act.

Recreational use and enjoyment of the seashore employing ORV use as a means of access has been a critical part of the culture and way of life for the area's residents before the establishment of the seashore. While CHAPA seeks to preserve access to the seashore and that cultural way of life, to be clear, CHAPA does not, as has been alleged, seek unfettered ORV use.

THE COURT: You know what the Enabling Act says, don't you?

MR. SIMON: Yes, Your Honor.

THE COURT: It says "Certain portions of the area deemed to be especially adaptable for recreational use, particularly swimming, boating, sailing, fishing and other recreational activities of a similar nature shall be developed as needed." This is 1937, isn't it?

MR. SIMON: Yes, Your Honor.

THE COURT: Do you see anything in there about advance four-wheel drive automobiles and four-wheelers and things like that in 1937 in sailing, boating and fishing of a similar nature?

MR. SIMON: No, Your Honor, but ORVs are used as access for those activities, and I would note also there is evidence

in the record --

THE COURT: So were horses back then, you know, and your two feet.

MR. SIMON: Yes, Your Honor. But in the -- in the FEIS there is a statement --

THE COURT: Congress hasn't amended the Enabling Act to broaden -- they didn't amend it to put modern technology on the seashore, did they?

MR. SIMON: No, they did not, Your Honor.

THE COURT: All right.

MR. SIMON: But I would note that in the FEIS, when it was talking about this provision, Park Service referred to facilities as needed under that provision to include parking areas, day use facilities for beach goers, lifeguarded beaches, boat launch areas, and campgrounds as well as ORV ramps. So the Park Service has recognized that the technology has changed and kept up with the times there.

For purposes of the argument I want to focus on three areas, one of which is the Enabling Act language.

THE COURT: You know that in the 2000s, the period around 2008 or thereabouts -- I don't know the precise year, but I could find it out -- that the Cape Hatteras National Seashore, putting aside Cape Lookout, was the only national seashore on the East Coast that didn't have a driving

permit plan?

MR. SIMON: Yes, Your Honor.

THE COURT: And that there was a '72 or '71 Executive Order that required a permit plan?

MR. SIMON: Yes, Your Honor.

THE COURT: Okay.

MR. SIMON: And we understand that the Park Service prepared a plan. Our concern was with how they prepared the plan and some of the things they did as they were preparing the plan.

THE COURT: Your client served on the committee that put the plan together, didn't it?

MR. SIMON: The -- well, our client was on the negotiated rulemaking.

THE COURT: Rulemaking committee?

MR. SIMON: Yes. But as you know that was a failed effort and didn't result in a plan. It just kind of led to litigation, then a Consent Decree and then here.

THE COURT: But they were a party to the Consent Decree?

MR. SIMON: Yes, Your Honor.

THE COURT: Go ahead.

MR. SIMON: So with respect to the Enabling Act, CHAPA maintains that the Park Service acted arbitrarily and capriciously under the APA and contrary to the Enabling Act when it failed to consider in accordance with Section 4 of

that Act to what extent areas of the area are especially adaptable for recreational uses and to what extent ORV ramps, routes and other infrastructure possibly are necessary to provide for such recreational uses in those areas. Like any other unit of the National Park Service, Park Services' management of the Cape Hatteras National Seashore Recreation Area is subject to the Organic Act. So the law also requires that amendments to the Organic Act at 16 U.S.C. 1c that "Each area within the national park system shall be administered in accordance with the provisions of any statute made specifically applicable to that area." As CHAPA described in its comments in the DEIS in the 1938 prospectus for the Park, the Park Service stated the understanding that recreational pursuits shall be emphasized to provide activities in as broad a field as is consistent with the preservation of the area. It's in that context that the 1937 Enabling Act contained certain provisions like Section 4 that reflect the Park Service's recognition at the time of the need to preserve public access to the seashore and the use of the seashore for recreational purposes and commercial fishing by residents. As you are aware and pointed out, Section 4 of the Enabling Act provides that certain portions of the area deemed to be especially adaptable for recreational uses, particularly swimming, boating, sailing, fishing and other recreational

activities of a similar nature shall be developed for such uses as needed while any remaining areas shall be permanently reserved as a primitive wilderness.

Now the Park Service in its reply brief has suggested that this is meaningless because there are no parts of the area in this case that are permanently reserved as a primitive wilderness. But we think that misses the point because one thing, that seems to concede that all the areas of the park that are at issue here are deemed to be especially adaptable for recreational purposes. And if that's the case, then they should have been required to look at the impact and import of this provision and determine to what extent facilities such as ORV ramps and routes are needed.

THE COURT: You just said that all of the areas of the seashore are eligible for that?

MR. SIMON: I did not say that, but on page 6 of its reply the Park Service says that this provision, being Section 4 of the Enabling Act, is meaningless in the context of this case because quote -- meaningless in the context of this case is their language, not ours -- that because quote no part of this case involves lands permanently reserved as a primitive wilderness unquote.

THE COURT: But the Enabling Act says that the remainder of the seashore quote shall be permanently reserved as a

primitive wilderness and no development of the project or plan for the convenience of visitors shall be undertaken which would be incompatible with the preservation of unique flora and fauna or the physiographic conditions now prevailing, in 1937.

MR. SIMON: That's correct.

THE COURT: What do you think it was like in 1937?

MR. SIMON: Excuse me, Your Honor?

THE COURT: What do you think it was like in 1937?

MR. SIMON: I don't know for certain, but I'm sure it was a bit different than it is now.

THE COURT: I mean the whole island was worth about $50, you know. It was a -- anyway.

MR. SIMON: So, again, this was a novel explanation that didn't appear anywhere in the record, nor in the FEIS, anywhere in the record of decision, but it appeared in the reply brief. So we thought it was an interesting comment as well. The FEIS itself largely ignored the substance of the provision making two interesting comments, both of which we think were incorrect. The first of which was that the Enabling Act supplements but does not supersede the Organic Act, which to us is inconsistent with Section 1c of the Amendments to the Organic Act, which I read before as explaining that it is the National Park Service's duty to manage in accordance with the provisions of the Enabling

Act. And that secondly, according to standard principles and statutory construction, it doesn't make sense that a general statute or a specific statute wouldn't supersede.

THE COURT: Is it your goal to have no plan?

MR. SIMON: No, not at all, Your Honor.

THE COURT: So you know what the plan is now.

MR. SIMON: Yes, Your Honor.

THE COURT: You want a plan that's more generous than the one that exists now up to no plan.

MR. SIMON: We want a plan, Your Honor, that takes into appropriate consideration the Park Service's statutory obligations under applicable law.

THE COURT: Well, don't they have an obligation under the Endangered Species Act to preserve birds and turtles that are endangered and threatened and at some point have to be preserved or else the law is violated.

MR. SIMON: Yes, Your Honor.

THE COURT: And driving has been proven to be the single greatest threat and destruction of those fauna and birds.

MR. SIMON: I agree with you that they have an obligation to protect endangered species. I disagree respectfully that --

THE COURT: Well, how can they do that if they allow unlimited driving during periods when fragile species that are about to expire are propagating? I mean, I just don't

understand how you think they can have no plan, have unlimited beach driving and yet fulfill their obligations under the Endangered Species Act.

MR. SIMON: Your Honor, as I mentioned in my introductory remarks, we're not arguing for unfettered access. We recognize that protections are necessary to protect threatened and endangered species. But there are other obligations of the Park Service that as long as they do not conflict with that goal that the Park Service should have properly taken into account.

THE COURT: Okay.

MR. SIMON: So, in conclusion, with respect to our Enabling Act or CHAPA's Enabling Act claim, we believe that -- we maintain that the Park Service acted arbitrarily and capriciously and failed to consider an important aspect of the problem when it did not take into account to what extent recreational facility -- or infrastructure ORV routes, ORV ramps and whatever appropriate other infrastructure is necessary.

THE COURT: Well, there are the same number of ramps in existence today as were in existence prior to the plan. You know that?

MR. SIMON: Yes, sir.

THE COURT: Okay.

MR. SIMON: But as long as they were going to go through

this exercise and determine what ramps and routes were appropriate in the future, and they did consider the ramps and routes obviously in this process, then they should have taken into account what Section 4 of the Organic Act -- or the Enabling Act provides.

THE COURT: Yeah, but just to reiterate, to my knowledge the numbered ramps that leave Highway 12 and enter the beach on Cape Hatteras Seashore is exactly the same today as it was ten years ago.

MR. SIMON: I don't know that for certain, Your Honor.

THE COURT: Okay.

MR. SIMON: But I do know there were changes in the plans to ramps going forward.

THE COURT: Okay.

MR. SIMON: The second issue I wanted to -- the second claim I wanted to raise was CHAPA's claim regarding the unusual use of two no-action alternatives. CHAPA maintains the Park Service acted arbitrary and capriciously when it failed to adequately and clearly explain in the FEIS the basis for its conclusions regarding the magnitude and intensity of impacts which stems from its use of two different no-action alternatives without clearly explaining how those conclusions relate to the two different base lines that are used. As CHAPA has iterated, the Park Service's use of two no-action alternatives as a base line

for its environmental review is highly unusual and we believe not rational. The Government and Intervenors response to that is essentially that more is better. They are given the critical role of no-action alternatives phrase in the context of NEPA environmental review. More here instead created confusion and led the Park Service to inadequately explain its conclusions.

We contend there is nothing in NEPA or the CEQ or the Park Service's regulations or guidance to support that multiple no-action alternatives representing different circumstances at different points of time is ever appropriate. CEQ's regulations and guidance and the Park Service's own guidance, Director's Order Number 12 NEPA handbook, both speak in terms of the singular v. no-action alternative. There is of course good reason for this. As the Park Service stated in its Forty Most Asked Questions Concerning NEPA Regulations, the no-action alternative provides a benchmark, enabling decision makers to compare the magnitude of environmental effects of the action alternatives. The Park Service's Handbook similarly recognizes the importance of the no-action alternative for providing quote important context information in determining the relative magnitude intensity of impacts unquote. Given that, multiple baselines make no cognitive sense. That's at least what one court has said.

Rationally there can only be one baseline. This is not just, as the Government asserts, harmless error. The major problem with the Park Service's use of multiple no-action alternatives here is that the FEIS fails to make clear which baseline the agency is using at any point in time to measure the magnitude, intensity and context of the potential impacts of the various action alternatives. Because the two action alternatives have different circumstances at different points in time the impacts of the various action alternatives as measured against them, including the magnitude and intensity, have to be different. We believe the problem here is most apparent with respect to review of the socioeconomic impacts and visitor use and experience. For example, the FEIS projected a range of protected annual business revenue impacts from Alternative F, which is the selected alternative in terms of the protected species. Throughout the EIS the Park Service also establishes thresholds for the magnitude of impacts ranging from negligible, minor, moderate, to major. For instance, in visitor experience the threshold takes into account changes in characteristics, the existing visitor experience, changes in visitor satisfaction and changes in the number of visitors engaged in a specified activity. But the question for all of us is decreases or changes relative to what?

Without the Park Service being clear as to what set of conditions, thresholds and the changes are measured against, the characterizations are unclear and not meaningful.

The Fourth Circuit has stated the very purpose of public issuance of an EIS is to provide a springboard for public comment. The Park Service's use of multiple no-action alternatives here undermine that purpose and is arbitrary and capricious and not consistent with NEPA.

THE COURT: Is that your argument?

MR. SIMON: Yes, Your Honor.

THE COURT: Thank you very much.

MR. SIMON: One more thing, Your Honor.

THE COURT: Sure.

MR. SIMON: The Plaintiffs just have one more claim if that is helpful to you, and I'll leave that to your judgment. I'd like to address a few issues regarding standing. Again, I don't know if that is a concern of yours. It has been raised.

THE COURT: Well, I think it's a concern of yours because you have to have standing.

MR. SIMON: Understood, Your Honor. So in addition to the two no-action alternatives, another concern we have with the alternative analysis was the Park Service's failure to adequately respond to CHAPA's recommendations for floating

closures instead of fixed closures. CHAPA maintains that deciding to reject floating closures in favor of fixed closures the Park Service failed to adequately respond to CHAPA's comments and reached a decision that was based on conclusory statements and not supported by evidence in the record. As the Consent Decree noted, Plaintiffs, Federal Defendants and Intervenor Defendants recognized that Bodie Island Spit, Cape Point/South Beach Hatteras Spit, North Ocracoke and Ocracoke South Point are dynamic areas that will change from year to year. I think you probably agree that that applies generally to the area that we're talking about here. It should not be surprising to know if these changes in the area there are also changes in wildlife use and visitor use patterns. In fact, between the eight months that the Park Service issued the DEIS and the FEIS -- we're talking eight short months here -- the Park Service's math affecting the overview rates and closures had to be changed to reflect changes in the land area that occurred just as it was developing the EIS. At the same time between the issuance of the proposal and the final rule, Park Service had to change the description of Hatteras Inlet Spit as a result of changes in the landscape created by Hurricane Irene. These circumstances are not unique. It's a very dynamic ecosystem. This happens regularly. So given that the Park Service provisions of

the plan will be in effect for at least 10 or 15 years, making the plan flexible and adaptable to the areas's dynamic conditions only makes sense. So it was for this reason with this in mind that during the planning process it was recommended the use of floating closures that will move along with the range of the birds, and as CHAPA suggested, will provide both greater protection for shore birds as well as more access to the public. So a win/win. As CHAPA asserted floating closures clearly meet the Park Service's stated goal of establishing practices and procedures that have the ability to adapt to the areas dynamic environment. And that provide appropriate flexibility and ensure that the areas subject to closure reflect those areas that actually have wildlife species habitat as well as also ensure that areas no longer suited for species habitat are not necessarily closed to recreational use and enjoyment by the public. Nonetheless, the Park Service rejected them even removing three floating nonbreeding shore bird habitat areas that would be adjusted on a yearly basis based on the previous years' monitoring results, because as stated in a brief conclusory statement, fixed closures would be more consistent and predictable and that as habitat changed the Park Service could revise these areas under its periodic review element.

But while the Park Service's response to CHAPA's and

other comments on this issue discuss how the Park Service can continue to ensure species protection under fixed closures, the record does not reflect that the Park Service gave any meaningful consideration to CHAPA's comments a floating closure might actually provide greater benefits for species protection or that CHAPA's specific concern that with fixed closures areas would continue to be closed to recreational use even when they no longer serve any functional habitat value. The Park Service argued in its reply that CHAPA fails to account for the fact that the agency retains full discretion of habitat changes to revise its closure areas, but again this misses the whole point. While the Park Service retains authority under its rule in terms of additional temporary closures, again, this does not address CHAPA's concern that these areas could remain permanently closed and unnecessarily closed to access even after they no longer serve any role in species protection. In fact despite these statements regarding periodic review and the final rule, the Park Service appears to concede that these things are not so adaptable after all. The final rule states that the designation of ORV routes in a regulation does not lend itself to the principles of adaptive management. If at some point in the future the Park Service needs to revise the designated ORV routes, additional NEPA compliance would be required followed by

the proposed and final rule. So we're back starting all over again because circumstances have changed based on a dynamic environment over a 15 year plan. It seems inevitable that things will change.

Finally, in its reply brief the Park Service makes a curious statement that neither fixed nor floating closures were meant to address the issue of changing physical conditions at the National Seashore leaving one to kind of wonder what sort of conditions the Park Service had in mind. It's hard to imagine how the Park Service could separate its decision making from the on the ground conditions at Cape Hatteras National Seashore which everybody seems to agree are dynamic and seems to be beyond question.

So in conclusion, the Park Service's decision to reject floating closures in favor of fixed closures was based on conclusory statements that failed to adequately address CHAPA's comments and simply not reasonable in light of the evidence in the record and the objectives of the plan which purported to value adaptive management and was therefore arbitrary and capricious, in other words, contrary to law.

THE COURT: Okay.

MR. SIMON: And with respect to standing, Your Honor, we believe, as we have stated, that standing here is self-

evident. And when it was challenged for the first time by the Government and by the Intervenors in their Motion for Summary Judgment, we supported it. We provided additional support and provided additional argument further backing up our claims of standing.

THE COURT: You think you have Article III standing and/or prudential standing?

MR. SIMON: We do, Your Honor.

THE COURT: Both or one or the other?

MR. SIMON: Both, Your Honor. This is not the first time the Government and the Intervenors have tried to get CHAPA thrown out of court based on standing. There is a precedent in Cape Hatteras Access Preservation Alliance v. Norton in D.C. District Court, 2004, which involved the designation of critical habitat for the piping plover at the Outer Banks under the Endangered Species Act. And the U.S. District Court in D.C. clearly rejected similar claims by both the Department of the Interior and Defenders of Wildlife that CHAPA lacks constitutional and prudential standing in challenging the agency actions that could impact ORV use. They raised issues both with respect to constitutional and prudential standing, and both claims were rejected. The Government attempts to distinguish this case from the D.C. District Court and is just completely wrong in doing so. The first claim is that -- or their

major claim is that this is a totally different case because standing there was based on the fact that there was land ownership asserted there. And land ownership and critical habitat, there would certainly be an interest there. But the Court did not rely on land ownership as a basis for finding constitutional standing. Instead it specifically recognized that quote CHAPA asserts a variety of economic and recreational harms unquote and that in addition some members own land in the critical habitat. Quote, CHAPA members also engage in recreational activities that require access to the Cape Hatteras National Seashore by means of off-road vehicles over routes falling within the critical habitat. Members fear that the Service's administration of the critical habitat will result in use restrictions on the vehicles and closure of beaches or access points, affecting not only recreation, but the livelihood of fishermen dependent on the vehicles for their daily work. So based on this, the Court held that CHAPA had quote alleged injuries that are actual or imminent and causally related to the Service's action. So we've made the same arguments there. There's no reason for distinction here on constitutional standing. And the same goes for prudential standing. With regard to prudential standing, the D.C. Court clearly found that CHAPA's assertion of future recreational harms were within the zone

of interest protected by the statute. Our client here has clearly represented that its members have particularized recreational and aesthetic interests in the area, that they use the area, and that their interest would be harmed by this plan. That is all they need to do.

THE COURT: Okay.

MR. SIMON: Thank you, Your Honor.

THE COURT: Thank you for your argument. I'll hear from the other side. First, the federal defendants, who's going to speak to that?

MR. KIM: Good morning, Your Honor. My name is Joseph Kim, and I'll be speaking for The United States.

THE COURT: All right.

MR. KIM: With me I have Mike Stevens with the Department of Interior Solicitor's Office and behind him is Mr. Barclay Trimble who is the current Superintendent of the Cape Hatteras National Seashore.

THE COURT: Okay.

MR. KIM: Subject to your questions, I guess I'll just start by briefly responding to the three focal points that Plaintiff raised in its opening argument. Let me start -- simply start with the Enabling Act. I think that really is just a red herring here. It is true that the Enabling Act does something more and different in the abstract than the Organic Act does. It does allow for these permanent

reservations of primitive wilderness lands within the National Seashore as Plaintiffs pointed out we did point out in our brief. That is just not an issue here. None of the lands that are at issue in this case have been permanently reserved as a primitive wilderness. So we're only talking about lands that the Park had analyzed to determine what types of recreational use to allow. And that would be a matter of the Park Service's discretion. So it considered among outdoor recreational uses, ORV use. It considered outdoor recreation without ORVs in the area. And it also considered these other kind of natural resources responsibilities whether it was mandated by things like the Endangered Species Act or if it were a nonthreatened endangered species just a general mandate of the Organic Act to kind of manage the natural resources of the land under its stewardship. And so it balanced all those things in its discretion and came up with the plan, as Plaintiff pointed out had been mandated by the Consent Decree. So we are here to discuss if that plan is correct, but whether that plan violated the Enabling Act really is just a nonissue. It doesn't relate to what we are talking about at all. That, I think, relates more clearly to the NEPA claims. That's the context that we raised the standard -- I guess I would kind of like to raise them together.

THE COURT: Put this plan in perspective. We had a period of the '70s, the '80s, the '90s and into the 2000's, almost 35 years of having the seashore operate in violation of federal policy because it didn't have a plan.

MR. KIM: And that is something we had stipulated to as a part of the Consent Decree, so it had -- I can't think exactly now what they titled it, but they had some different --

THE COURT: It's not like this abuse of the resource could go on in perpetuity. It had to be brought into line with national policy. You had a national policy of having regulated access and driving on national seashores, at least in the Eastern Continental United States. Are you aware of that?

MR. KIM: Yes. I'm aware -- obviously it was the -- I think it was called the Interim Strategy before. I wouldn't categorize it as kind of the use of the resources. The park was managing it; we had stipulated that it essentially had been not managed it the procedurally, correct way.

THE COURT: No, the interim plan was addressing the fact that there was no plan prior to that. He knows. Isn't that right?

MR. STEVENS: That's correct, Your Honor.

THE COURT: Go ahead.

MR. KIM: I think all that is kind of beside the point here, so whatever happened in the past, whether it was correct or not, I think this case has to start with the Consent Decree, which takes us to the --

THE COURT: My only point is it wasn't -- there was no election involved to decide, let's have a plan. There had to be a plan.

MR. KIM: Correct. That's exactly what we've said.

THE COURT: It wasn't a discretionary matter.

MR. KIM: There's no dispute. So part of the plan not to require the NEPA analyses, the Park did NEPA analyses. One of the main points the Plaintiffs have raised was this alternative analyses. And I don't think it's enough to say that most NEPA analyses start with a single no-action alternative. That may well be true. The real question from the Plaintiffs here is going to be whether it was improper to have a second analysis.

THE COURT: The bulk of the land that's accessible is south of the Oregon Inlet bridge. It's south of Oregon Inlet. It's on Hatteras Island and Ocracoke Island, linear land that's accessible. I don't know what it is, 50 miles or something like that. The part from Whalebone to the bridge is the least geographic amount of the seashore. You understand that?

MR. KIM: Yes, Your Honor.

THE COURT: And when the bridge goes out, like it did in December, the access is virtually reduced to being nominal because nobody can drive there. You've got to take a ferry. You can't put your car on a boat, can't pull up a 22 foot boat and put a 21 foot SUV on it. And so, you know, much of this is completely academic and contingent on what the weather is going to be and what the physical structures are that allow you to get there.

MR. KIM: That's correct.

THE COURT: And, you know, I just mentioned the bridge as an example. In 2012 -- they didn't say it, but Sandy came through here and limited access. 2011 Irene came through here and limited access. '03 Isabel came through and destroyed everything. The opportunity to enjoy the seashore and operate a motor vehicle on it is a situational event. We go long periods of time when nobody can get there.

MR. KIM: Yes, sir, like any kind of outdoor recreational activity --

THE COURT: No, not like any kind. I mean, this is like no other kind. The barrier islands on the North Carolina coast aren't like any other outdoor recreation spot. They're subject to drastic circumstances that don't occur in other places.

MR. KIM: I don't think we have any dispute about that. So

I think really the question is about their plan to the extent that conditions allow access under the plan then where would access be allowed pursuant to the plan as opposed to pursuant to natural environment -- natural environmental constraints. So on the no-action alternative issue, I don't think there's any dispute that Alternative B is the correct -- is a correct no-action alternative. I'm not sure Plaintiffs explicitly stated that, but I don't see them having briefed any argument against it. They just seem to be confused by having more than one no-action alternative. And the point of no-action alternative -- getting back to the point of NEPA in general -- is to provide information to the public. It's a procedural only statute. It doesn't prevent, as case law said, unwise decisions; it prevents uninformed decisions. So it's supposed to be providing information about agency actions that may affect the natural environment.

The no-action alternative, the subset of that is supposed to provide a base line, supposed to represent the status quo of where you are now so that the action component of the environmental analysis can be compared to that. Here, you know, there was a choice made to use two no-action alternatives and simply two different definitions of the status quo. And here's this type of function of how this case has evolved. There's no question or at least

some point of view, that the Consent Decree, which explicitly ordered the creation of a plan also set forth certain requirements and limitations for ORV access, that that had to have served as the status quo going to the plan. Perhaps because it was related some thought that just using that as the status quo might seem confusing or cheery picking. So it also offered a second no-action alternative, which was the status quo that immediately preceded the Consent Decree in case the Consent Decree was seen as part of a linear --

THE COURT: What do you mean the status quo that preceded the Consent Decree. The case was pending in front of this Court, and it was for an injunction. And rather than the Court go ahead and enter a preliminary injunction, the parties consented to do what they wanted to do rather than have the Court order no beach access. You understand that?

MR. KIM: Correct.

THE COURT: So there wasn't any status quo prior to the Consent Decree. Prior to the Consent Decree there was just violation.

MR. KIM: Well, that may be true as well. I think the status quo isn't necessarily a guarantee of being lawful. It is just simply the way it was at a certain point in time. So it may well have been unlawful at that point in time, but that was the set of regulations that were in

place at that point in time.

THE COURT: But there weren't any regulations that were restricting beach driving or regulating who could drive on the beach. Anybody could drive on the beach. You know that? With or without a vehicle that could make it on the beach. It was unregulated. People were being convicted in criminal court for doing that.

MR. KIM: There were being convicted, from what my understanding is, because law enforcement, the Rangers of the National Park Service were enforcing what was then the Park Service's interim strategy of how to regulate ORVs.

THE COURT: I don't think there was an interim strategy. I'm not aware of any official interim strategy prior to the Consent Decree.

MR. STEVENS: In 2000 the interim strategy that the Park Service -- recognizing that it was only an interim strategy, recognizing --

THE COURT: When did this occur?

MR. STEVENS: This was in 2006, Your Honor.

THE COURT: But that's after people were convicted.

MR. STEVENS: Correct.

THE COURT: So historically there was no interim strategy.

MR. STEVENS: Not historically, no, Your Honor.

MR. KIM: And it wouldn't be correct for the no-actual alternative to go back too far in history. I mean --

THE COURT: Go back to what?

MR. KIM: -- it's a question whether a third no-action alternative could have been chosen.

THE COURT: Well, you couldn't go back to an unregulated national seashore. By your own regulations you had to have a regulated national seashore. That was part of an Executive Order that was binding.

MR. KIM: I'm not sure there is any disagreement as to no action alternatives. So there is no real no-action alternatives that's chosen. So the only -- I think that the bottom line on this is that Alternative B is kind of uncontested by Plaintiffs as being a proper no-action alternative. So they're only left with saying, well, two no-action alternative are sometimes too confusing for us. And I just don't think that's properly grounded under NEPA. Usually you've got federal agencies getting in trouble for not providing enough information. It's not inconceivable that for some people they find the information to be too much, but that's not really a properly grounded critique under NEPA, that you've given me too much information and it's hard for me to sift through. The whole point of NEPA is to provide the public information and allow them to be able to sift through it. It's not a question of somehow obfuscating the information. There's plenty of information to compare it to, not just to Alternative A or Alternative

B. The Environmental Impact Statement compares all the action alternatives to each other. It tries to provide as much information as possible, the same kind of a critique and the same kind of response with, for example, the economic impact analysis. There's a question of whether is it too large a region to analyze it. But analyze it by subregions as well. You can get the information on smaller regions, you can get the information on larger regions. There's nothing wrong with providing more information. To me that's kind of precisely the purpose of NEPA. It's one thing to say -- I'm not going to tell you -- it doesn't require that type of information, but I'm just telling you there's nothing wrong providing more information under NEPA, to provide more information to the public.

I think it's in that context that you interpret their standing on it. I'll admit the case law is less than clear about separating out which parts of the standing analysis in certain case, which parts are constitutional standing, which parts are prudential. I suspect that prudential standing is really what we're talking about, zone of interest. It's not that the Plaintiffs don't have an interest in outdoor recreation; they certainly do. They spent their time raising complaints about failure to properly protect shore birds and things like floating versus mixed closures. They did not establish that they

have any interest here that they need protecting within the natural environment, the flora and fauna within the natural environment.

Subject to your questions, I am prepared to stand on my briefs.

THE COURT: I don't have any more question about standing. Is that your whole argument?

MR. KIM: I'm happy to answer any questions Your Honor may have about any aspect, but I am also prepared to stand on the briefs.

THE COURT: Okay. Thank you. Ms. Youngman, do you want to make a statement?

MS. YOUNGMAN: Yes, thank you. So I'll be brief. I don't want to belabor any points that have been made.

THE COURT: Well, be comprehensive. You're a party to the case.

MS. YOUNGMAN: Yes, Your Honor. So I'm Julia Youngman from the Southern Environmental Law Center. We represent the Intervenors, Defenders of Wildlife, Audubon Society and National Park Conservation Association. I would like to start by making a point that the fundamental issue here is I think what you've been trying to get at, Your Honor, absent a final plan, driving at Cape Hatteras --

THE COURT: Nobody is going to be on the beach. It's going to be like whatever they called it back in the fall when

you stop the Government. I forget what they called it, embargo or something like that. What did they call that?

MR. SIMON: The sequester.

THE COURT: Sequester, there you go. You put a chain up and you say, come back later. And the later is four years from now when there's a new plan. And that's the way it's going to be. If there's no plan, there's just going to be a chain from one post to the other, and that's the end of it.

MS. YOUNGMAN: Yes, Your Honor. So for 30-some years --

THE COURT: The chain was down.

MS. YOUNGMAN: The chain was down.

THE COURT: Because no one was looking.

MS. YOUNGMAN: ORV access was happening but in violation of several federal laws. And absent this rulemaking process coming up with a final rule, the end result is going to be ORV driving on the beach is not going to be legal. And we were either going to continue to operate under the Consent Decree or there was going to be no driving. And so you've heard a lot about the harms -- and in the briefs in particular -- the harms to off-road vehicle enthusiasts' interests that resulted from the plan, but, in fact, the plan is what allows them -- it actually finally after all these years has designated routes.

THE COURT: Annually now how many people buy permits,

40,000? Do you know?

MS. YOUNGMAN: I believe -- I don't know exactly. I know Mr. Trimble probably does, but I believe --

THE COURT: You don't know?

MS. YOUNGMAN: What is it, hundreds of thousands?

THE COURT: No, it's not that many.

MR. PAUL STEVENS: Your Honor, it's around 30,000.

THE COURT: Thirty thousand (30,000), annually.

MS. YOUNGMAN: Yes, sir.

THE COURT: Either buy new ones or renew them.

MS. YOUNGMAN: Yes, Your Honor. We've also heard a lot about whether there was appropriate consideration or appropriate decisions made, but most of the claims are brought under NEPA, and I think it bears repeating early and often that NEPA requires identification and consideration of alternatives and impacts, but it guarantees no result. So appropriate in the eyes of CHAPA is not really the question. It's whether the National Park Service properly identified alternatives, considered all their impacts to human environment, including wildlife, economic interests and other things and then exercises discretion in an appropriate manner to develop a final rule. So I wanted to talk for a little bit about the Enabling Act. I don't disagree with anything my colleague from the Government has said. I did want to draw your

attention to a couple of cases that really do provide a road map for the Court to follow. The first one is the Southern Utah Wilderness Alliance versus National Park Service case that involved an off-road vehicle plan for Canyonlands National Park. In that case the District Court for the District of Utah very methodically went through. It looked at the Enabling Act for that park, it looked at the Organic Act, it looked at the National Park Service management policies, which are derived from the Organic Act, and it looked at that superintendent's efforts to create a final rule to govern off-road vehicle use at that park. And the Court takes you very methodically through Chevron deference to the decisions that were made, and I would submit that that's what needs to happen here. We need to -- the first step of Chevron is, is the statute clear on its face? I would submit that as we have explained in our brief, the Enabling Act read together with the Organic Act are very clear that an off-road vehicle plan needed to be put in place, along with the Endangered Species Act, the Executive Order 11-644 that mandated that off-road vehicle use of national parks would not be allowed absent a designation of routes and areas. So going back to the actual words of the Enabling Act, it does say that Cape Hatteras would be set aside as a national seashore recreational area for the benefit and enjoyment of people.

But then it does go on to say that the administration, protection and development of the seashore must be exercised in accordance with the provisions of the Organic Act. And so you have to read those two together.

And so that brings me to the second case that as far as I can recall CHAPA did not attempt to distinguish. It's the Bicycle Trails Council of Marin versus Babbitt. And there it talks specifically about -- that one involved setting aside routes for bicycles, off-road bicycle -- cross-country bicycle routes of a national park unit. And in that one it specifically talks about the long history that the park service had of managing different parks differently, some primarily for resource protection and wilderness, others for recreation, others as historic units. And in the '80s Congress clarified that that's not what it intended with the creation of the National Park Service. Congress enacted amendments to the Organic Act that made it clear that all parks have to be managed with conservation of natural resources as the primary goal. And if there are conflicts between a particular recreational use and conservation of resources for future generations, the conservation must predominate. Those amendments were in the 1980s, and as Your Honor pointed out, the Enabling Act for Cape Hatteras was in 1937. So to the extent that there are conflicts between the two, and the Enabling Act

could be read to -- and I don't think it could -- but to the extent that somebody would want to read the Enabling Act to say that recreation should predominate, you can't read it that way in light of the statement in the Enabling Act that you have to -- that the management of that park has to be in accordance with the Organic Act and the later clarification of the Organic Act that conservation of natural resources must predominate. So we would submit that just going methodically through the requirements of those laws, the Enabling Act, the Organic Act, the Executive Orders saying that no off-road vehicle use should be allowed except to the extent that it doesn't harm the natural resources and the Endangered Species Act and look at what the Park Service did in this case, and it actually did interpret these laws correctly, and it exercised its discretion in an appropriate and purposeful way. So we would submit there is no basis for the Enabling Act claim.

I'll touch more briefly on the NEPA claims. I think our briefs are pretty exhaustive on pointing out the enormous amount of -- well, let me start by saying CHAPA's claims seem to be that there wasn't enough science to support the Park Service's final rule. There wasn't enough economic analysis, that an appropriate range of alternatives were not examined and that there wasn't a sufficient opportunity for public review. As I mentioned

before, NEPA requires the Park Service to identify and evaluate an appropriate range of alternatives and evaluate their consequences and impacts. And our briefs go on ad nauseam identifying the places in the administrative record where the overwhelming weight of science, peer reviewed science, favors what the Park Service -- the alternatives that the Park Service identified. Where other alternatives were proposed, such as floating closures and broader opportunities for off-road driving, the FEIS is very clear on explaining why those were not selected as alternatives for in depth analysis.

THE COURT: The closures only take place during seasonal periods of the year.

MS. YOUNGMAN: Well, it depends. So each of the alternatives identified a different amount of area to be set aside as vehicle free areas versus off-road vehicle areas all year long. So Alternative D I think sets aside 28 miles of the seashore -- it's about 67 in total -- about 28 miles of the seashore as year round off-road vehicle areas. Twenty-six point four (26.4) as year round vehicle free areas where no driving will take place at any time, and then there is the 12.7 miles left over that is seasonal where if it's in front of -- many of those are in front of villages where there is just a lot more tourists during the summer and it's just not safe to have vehicles and people

together. And then you're right, Your Honor, then the overlay on top of all that is the buffers to protect breeding wildlife, and those are seasonal because breeding is seasonal.

THE COURT: Right.

MS. YOUNGMAN: So, for instance, the prenesting closures will get set off at a particular point in the spring and then removed if no nests are laid. If they are laid then the buffers that are specific to each species of bird will be in place around each nest, and then when the chicks hatch before they learn to fly the buffers expand because of the activity of the chicks. So, yes, those are seasonal and just in place during the time that the wildlife is breeding.

If I could talk for a minute about the no-action alternative idea. There has been a lot of discussion this morning about that, whether one or two or none is appropriate. It is clear that NEPA required there to be a no-action alternative. In this case the Park Service identified two. The first one being the interim strategy that got put in place in 2007 and the second one being Alternative B. That's the interim strategy as amended by the Consent Decree. They are very clear that --

THE COURT: Yeah, but there couldn't be a no-action alternative that went back to the way it was in the '80s

and '70s and '90s. That was an illegal action and so it wasn't one of the choices.

MS. YOUNGMAN: And there's lots of law, case law and CEQ guidance on what a no-action alternative should look like, but I have racked my brains, and I cannot think of any that says you revert to some illegal method of management. Most of the guidance says you go with the status quo at the moment you begin rulemaking, and that is the Consent Decree. That is the way the seashore was being managed the day rulemaking began.

THE COURT: The interim plan was more restrictive than the Consent Decree, wasn't it, on beach driving?

MS. YOUNGMAN: Well, I don't know about that, Your Honor. I know the Consent Decree imposed additional protections for certain wildlife like night driving restrictions during turtle breeding season.

THE COURT: Well, night driving restrictions entirely.

MS. YOUNGMAN: Pardon me? Yes.

THE COURT: Night driving restrictions entirely.

MS. YOUNGMAN: During the summertime when turtles are breeding and then starting, I believe, September 15th you can drive in the evening with a permit. Is that right, under the Consent Decree? Anyway -- and during the wintertime I don't believe there were any night driving restrictions.

THE COURT: Okay.

MS. YOUNGMAN: So, anyway, that, to me seems -- if you read all the guidance in the case law, the status quo and the baseline to compare the final rule to was what was in effect at the time rulemaking began. I agree with -- I think where you were headed before that another appropriate baseline would have been no driving at all, because that was the legal status quo. If there were not a rule in place, the legal status quo would have been no driving at all. These event -- and we explained in our brief that that -- by not selecting that -- to the extent that that's error not to have selected that as a no-action alternative is really harmless error vis a vis the CHAPA claims. Because to compare the final rule to the no-action alternative of no driving they wouldn't have any harm at all. They would be benefitting. Anybody that wanted to do ORV driving on the beach would be benefitted by a plan that allowed some versus the status quo of not having any be legal. And by the same token harms to wildlife would have been -- the final rule would represent a great harm to wildlife as opposed to a no-action alternative of no driving. So if anything by not choosing that as the no-action alternative, CHAPA's position was made stronger. But we would submit that any confusion --

THE COURT: I don't know that the plan takes into account,

the plan that is in litigation here, public safety. But if it were drafted tomorrow, rather than yesterday, one of the most dramatic and critical aspects of the permit process is the saving of lives. This venue, the national seashore, on many occasions during the preceding years without a plan was the site of deaths, motor vehicle deaths, that ended up in criminal prosecutions. And the records of this Court and the notice of the Eastern District of North Carolina will document that without dispute. And the advent of permitted beach driving has, thank goodness, at least for now, resulted in there being no deaths during the period in question. And the incidents of serious criminal behavior, including driving under the influence on park service property, has declined dramatically. And the incidence of -- this is all part of the record in United States District Court if you care to look at it. It wasn't in the plan because they didn't know it would happen, but the incidents of people who are pedestrians, meaning on foot, on the seashore being struck by vehicles has declined dramatically. So the plan has a -- and regulated beach driving has a consequence that dramatically improves public safety and public health -- public life, rather, which should be one of the paramount considerations of the Government and the parties in the case.

MS. YOUNGMAN: Yes, Your Honor. And I know Mr. Stevens is

here from the Park Service and he knows the details more than I, but you are right we have had testimony in the preceding case, year after year annual reports have been produced that showed the dramatic decline in all those things, traffic incidents and drunk driving.

THE COURT: I mean the conclusion is that people who go to the trouble of obtaining a permit, taking a safety course and having equipment that conforms to the requirements of this specialized area are much safer in the operation of their vehicles than the general public.

MS. YOUNGMAN: Yes, Your Honor. Speaking to the point that having two no-action alternatives just made it all too confusing to understand, there's in the Executive Summary of the FEIS there's about a 16 page long chart that goes through wetlands and species by species and socioeconomic impacts and visitor experience impacts and summarizes the effects of each of those side by side, so there is really no confusion. And then within the body of the FEIS starting at about page 341, there is a lot of narrative to support and explain that, and I know that safety was discussed in those sections and the benefits that would accrue from a permitting program and a public education program. And to the extent that the Consent Decree has many of the same features that the final ruling ended up having, we've got four years of evidence under the Consent

Decree and then the last two years of data collected under the final rule to support that you are exactly right, that human safety has been improved under the final ruling and Consent Decree.

So I didn't want to spend a lot of detail going through the scientific studies and the adequacy of the peer reviewed science and the adequacy of the various alternatives and the adequacy of the public comment period, but I can answer any questions about those. Certainly they more than met the requirements of NEPA to give a hard look at a variety of alternatives, each of which needed to be an appropriate and legal alternative and look at the consequences of those. There was an extraordinary amount of public comment. I don't know that I have ever been involved in a rulemaking that had more comments. There was the DEIS comment period that gave rise to some nearly 16,000 public comments, the majority of which were pro an even more restrictive rule, more restrictive on beach driving and more protective of wildlife. There was another comment period when the proposed rule was published, and I think there was something like 21,000 comments received, again the majority of which were for an even more protective -- or a rule that would be even more protective of wildlife and pedestrian experiences. And one of the -- I believe the latter of those two was even extended to

after Hurricane Irene so that everybody that had been impacted by that would have an opportunity to comment. So we would submit that the process more than complied with NEPA.

THE COURT: Thank you. Well, I appreciate your arguments. And we've got cross-motions for summary judgment. I'll weigh those and have a detailed examination of the record and give you a ruling as soon as I can.

The Court will be in recess.

STATE OF NORTH CAROLINA)
) C-E-R-T-I-F-I-C-A-T-I-O-N
COUNTY OF PERQUIMANS)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Sandra A. Graham, CVR-M *4/30/2014*

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