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DRAWING A LINE IN THE SAND: OFF-ROAD VEHICLE USE ON NATIONAL SEASHORES

Ocean and Coastal Law Journal

Kurt Peterson¹

ABSTRACT

The National Park System is comprised of hundreds of parks, monuments, preserves, and other lands that are administered by the National Park Service. Included in this National Park System are ten “national seashores.” These national seashores are ripe for many recreational activities, such as fishing, camping, and “off-road vehicles.” The use of off-road vehicles is a common practice on many of these national seashores, and it has resulted in a contentious debate about the appropriateness of off-road vehicles on national seashores. This comment examines the tension between the dual-purposes of the National Park Service and the sanctioning of off-road vehicle access on national seashores. Additionally, this comment examines the legal disputes that have taken place involving off-road vehicle use on Cape Cod National Seashore and on Cape Hatteras National Seashore.

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When we look up and down the ocean fronts of America, we find that everywhere they are passing behind the fences of private ownership. *The people can no longer get to the ocean.* When we have reached the point that a nation of 125 million people cannot set foot upon the thousands of miles of beaches that border the Atlantic and Pacific Oceans, except by permission of those who monopolize the ocean front, then *I say it is the prerogative and the duty of the Federal and State Governments to step in* and acquire, not a swimming beach here and there, but solid blocks of ocean front hundred of miles in length. Call this ocean front a national park, or a national seashore, or a state park or anything you please—*I say the people have a right to a fair share of it.*²

I. INTRODUCTION

² DYAN ZASLOWSKY & T.H. WATKINS, THE WILDERNESS SOCIETY, THESE AMERICAN LANDS 33-34 (, 1994) (quoting Harold Ickes, Secretary of the Department of Interior) (emphasis added).

As long as you let some air out of your tires, you can drive just about any all wheel drive vehicle on the beach. This recreational activity is known as “oversand” or “off-road vehicle driving” (“ORV”). ORV is a truly unique and enjoyable experience, not only for the sheer aspect of being able to drive on miles of unspoiled beachfront, but also because it allows people access to otherwise inaccessible areas of shoreline. With that said, there is well founded evidence that ORV access on coastal beaches results in adverse environmental and ecological impacts. This discord makes ORV access on national seashores a ripe topic for examining the mutually exclusive purposes of the National Park Service (“NPS”).

In 1916, the United States Congress passed legislation that created a bureau within the Department of Interior called the NPS.³ Congress entrusted the NPS with a two-pronged purpose: “to *conserve* the scenery and the natural and historic objects and the wild life therein and to provide for the *enjoyment* of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”⁴ These twin purposes—conservation and enjoyment—are often unable to see eye to eye with one another. When it comes to ORV access on the beaches and coastlines of national seashores, they are plainly incompatible.

This Comment will examine the tension between the NPS’s two-part function in the context of ORV access on national seashores. Part II of this Comment will provide an overview of the relevant legal frameworks that are implicated by ORV access on national seashores. Part III explores the creation of the ten national seashores in the United States. Part IV analyzes the

³ Organic Act of 1916, ch. 408, 39 Stat. 535 (codified as amended at 54 U.S.C. § 100101 (2012)).

⁴ *Id.* (emphasis added).

legal battles that have occurred over the use of ORV's on national seashores, and Part V will offer some conclusions and predictions for the future of ORV use on national seashores.

II. THE LEGAL LANDSCAPE OF ORV ACCESS ON NATIONAL SEASHORES

Well before the NPS was established, Yellowstone National Park became the first national park in the United States and acted as the mainspring for a national park movement.⁵ It was not until 1916 when Congress created the NPS and tasked the service with its dual-purpose of conservation and enjoyment.

A. *The National Park Service Organic Act of 1916*

The statutory framework for the NPS is currently codified under Title 54 of the United States Code, after Congress overhauled the original codification under Title 16, Chapter 1.⁶ The overhaul was consistent with its original policy and purposes of the NPS, but it amended and revised certain ambiguities, contradictions, and other imperfections that existed in the original enactment.⁷ Along with the two-pronged purpose, the NPS's framework addresses a widerange of authority and duties. Additionally, the framework identifies the areas which encompass the NPS, which are known as "System units."⁸ These System units fall under the administrative

⁵ *History*, NATIONAL PARK SERVICE, <https://www.nps.gov/aboutus/history.htm>
[<https://perma.cc/LEG4-D6AN>].

⁶ Act of Dec. 19, 2014, Pub. L. No. 113-287, 128 Stat. 3094 (2014).

⁷ *Id.*

⁸ 54 U.S.C. § 100501 ("The System shall include any area of land and water administered by the Secretary, acting through the Director, for park, monument, historic, parkway, recreational, or

jurisdiction of the NPS.⁹ Perhaps the most significant portion of the NPS Organic Act is the delegation of rulemaking authority.¹⁰

Although the original codification of the NPS Organic Act under Title 16 was overhauled, there still exist some sections under the original Title 16 codification that are of great importance. The remaining codification under Title 16 is composed of the enabling legislation for the nearly four-hundred National Park System units.¹¹ These System units are designated with a specific classification, such as a: national park, national monument, national military park, recreation area, conservation area, national lakeshore, or national seashore, to name a few.¹²

other purposes.”); *see also id.* at § 100102(6) (defining “National Park System” as “the areas of land and water described in section 100501.”).

⁹ *Id.* § 100501; *see also id.* § 102701(a)(1) (providing for the use of park rangers and other officers or employees of the Department of Interior to “maintain law and order and protect individuals and property within System units.”); *See Daingerfield Island Protective Soc’y v. Babbitt*, 823 F.Supp 950, 955 (D.D.C. 1993) (System units are “clearly covered by the Organic Act and thus is within the administrative jurisdiction of the NPS. . . . Congress clearly intended the Secretary of the Interior (‘Secretary’) to have an affirmative duty ‘to take whatever actions and seek whatever relief as will safeguard the units of the National Park System.’”).

¹⁰ *Id.* § 100751(a) (“The Secretary shall prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units.”).

¹¹ 16 U.S.C. §§ 21-23 (2016).

¹² *Id.*

Each of these classifications are each established differently and, depending on the classification of the unit, are conveyed different legal obligations.¹³

B. *The National Environmental Policy Act of 1969*

In 1969, Congress passed the National Environmental Policy Act (“NEPA”), which requires an environmental review of any major action by the federal government which significantly affects the quality of the human environment.¹⁴ NEPA’s process for reviewing the environmental impacts of federal government action is, in theory, quite simple, but in practice it is extremely complex and, as articulated in Part IV of this article, can be a litigation breeder.

The NEPA process begins with an initial determination of whether the federal government action would have any effect on the environment; if it is determined that there would be no effect, then the action is categorically excluded from the NEPA process.¹⁵ If an action is not categorically excluded from the NEPA process, then an environmental assessment (“EA”)

¹³ See generally Garrett R. Rose, “Reservations of Like Character”--*The Origins and Benefits of the National Park System’s Classification Hierarchy*, 121 Penn. St. L. Rev. 355 (2016) (discussing the NPS’s classification hierarchy).

¹⁴ National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2016).

¹⁵ 40 C.F.R. § 1501.4 (2016) (“In determining whether to prepare an environmental impact statement the Federal agency shall: (a) Determine under its procedures . . . whether the proposal is one which: (1) Normally does not require an environmental impact statement, or (2) Normally does not require an environmental impact statement or an environmental assessment (categorical exclusion).”).

must be performed.¹⁶ Put simply, an EA is a concise public report that determines whether the federal action is significant enough to require an environmental impact statement (“EIS”).¹⁷ If there is not a finding of no significant impact, then the NPS begins a process of “scoping” the required EIS.¹⁸ Next, a draft environmental impact statement (“DEIS”) is prepared, which discusses the environmental consequences and provides the public with an opportunity for comment.¹⁹ Following the comment period of the DEIS, a final environmental impact statement (“FEIS”) is prepared, and another comment period ensues.²⁰

Although NEPA requires certain procedures to be employed when performing an EIS, NEPA does not dictate the substantive results and production of an EIS.²¹ In sum, NEPA is a

¹⁶ *Id.* § 1501.4(b).

¹⁷ *Id.* § 1508.9 (if it is determined that there is no need to conduct an EIS, then they declare a “finding of no significant impact”).

¹⁸ *Id.* § 1501.7 (defining scoping as “the range of actions, alternatives, and impacts to be considered” in an EIS).

¹⁹ *Id.* § 1502.15-1502.16.

²⁰ *Id.* § 1503.4.

²¹ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) (“When the Government conducts an activity, ‘NEPA itself does not mandate particular results.’ Instead, NEPA imposes only procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.”) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)); *Dept. of Transp. v. Pub Citizen*, 541 U.S. 752, 757 (2004) (“At the heart of NEPA is a requirement that

procedural law that establishes a comprehensive policy for the protection and enhancement of the human environment. NEPA organized the Council on Environmental Quality (“CEQ”), which is delegated the authority to promulgate regulations for the effective implementation of NEPA,²² and to discharge the three levels of environmental review: (1) categorical exclusions; (2) environmental assessments, and; (3) environmental impact statements.

C. Executive Orders Concerning Use of ORV on Public Lands

In furtherance of NEPA’s policy, and to address the increasing damage to federal public lands by ORV use, President Richard Nixon issued Executive Order 11644.²³ The Executive

federal agencies ‘include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (i) the environmental impact of the proposed action, (ii) any adverse environmental affects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.’”).

²² 42 U.S.C. § 4342.

²³ Exec. Order No. 11644, 37 C.F.R. 2877 (Feb. 8, 1972) (“It is the purpose of this order to establish policies and provide for procedures that will ensure that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands, to promote the safety of all users of those lands, and to minimize conflicts among the various uses of those lands.”).

Order required federal agencies to establish regulations and policies that would limit ORV use on public lands only to certain designated routes or areas.²⁴ Furthermore, the Executive Order required federal agencies to monitor the effects of ORV use and to amend or rescind the designated routes or areas as necessary.²⁵ In 1977, President Jimmy Carter amended Executive Order 11644, bolstering it considerably by providing for the closing of any route or area to ORV access if it is found that such use “will cause or is causing considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat or cultural or historic resources of particular areas or trails of the public lands, . . .”²⁶

D. *The Endangered Species Act of 1973*

In 1973, the Endangered Species Act (“ESA”) was enacted to provide for the conservation, protection, and propagation of endangered and threatened species.²⁷ Additionally, the law directed all Federal agencies and departments to utilize their authority and cooperate with

²⁴ *Id.* § 3 (“Each respective agency head shall develop and issue regulations and administrative instructions . . . to provide for administrative designation of the specific areas and trails on public lands on which the use of off-road vehicles may be permitted, and set a date by which such designation of such areas and trails will be based upon the protection of the resources of the public lands, promotion of the safety of all users of those lands, and minimization of conflicts among the various uses of those lands.”).

²⁵ *Id.* § 8; see also *Utah Shared Access All., v. Carpenter*, 463 F.3d 1125, 1129 (10th Cir. 2006).

²⁶ Exec. Order 11989, 42 C.F.R. 26959, at § 2 (May 24, 1977).

²⁷ Endangered Species Act of 1973 § 2, 16 U.S.C. § 1531(b) (2016).

State and local agencies in order to further the purposes of the ESA.²⁸ In order to protect endangered and threatened species, section 9 of the ESA makes it unlawful for any person to “take” any species that is listed as endangered under section 4.²⁹ Section 7 of the ESA imposes a responsibility on federal agencies to insure the protection of species that are listed as endangered or threatened before taking any action “authorized, funded or carried out by such agency.”³⁰ In a similar fashion to NEPA’s process involving EA and EIS, the ESA requires a “Biological Assessment” be performed if a species listed as endangered or threatened is present.³¹ In sum, the ESA mandates a listing procedure for endangered and threatened species, prohibits the taking of listed species, and provides for agency consultation, among other objectives. It is quite clear why this legislation has an impact on ORV access, given the danger that motor vehicles pose to species that live and nest on the shoreline.

III. ESTABLISHING THE NATIONAL SEASHORES OF THE UNITED STATES

Every national seashore is founded by an enabling statute, which formally establishes the area as a national seashore, and addresses the manner of acquiring, administering, and the purposes for the national seashore’s creation. In total, there are ten national seashores in the United States, six of which will be examined in this Comment. The rationale for not fully addressing the other four national seashores is simply because ORV access is not sanctioned at

²⁸ *Id.* § 1531(c).

²⁹ *Id.* § 1538(a)(1)(B).

³⁰ *Id.* § 1536(a)(2).

³¹ *Id.* § 1536(c).

those national seashores.³² It is important to note that, although the enabling legislation for these national seashores are very similar, their ORV regulations are often very distinct. What follows is a discussion about the creation of the six national seashores that sanction the use of ORV's.

A. *Cape Hatteras National Seashore*

Off the coast of North Carolina is a 200-mile-long chain of barrier islands, commonly known as the "Outer Banks." Within this chain of barrier islands is the Cape Hatteras National Seashore ("CAHA"), the first national seashore to ever be established in the United States.³³ A hot-spot for tourist, people flock to CAHA to visit the unspoiled and undeveloped beaches,³⁴ and

³² The four other national seashores are: Canaveral National Seashore, Cumberland Island National Seashores, Gulf Island National Seashore, and Point Reyes National Seashore. *See generally*, Kurt Repanshek, *Park History: How the National Seashores Came to Be*, National Parks Traveler (Nov. 27, 2007), <http://www.nationalparkstraveler.com/2007/11/park-history-how-national-seashores-came-be2174> [<https://perma.cc/76W7-6WG7>].

³³ *Learn About the Park*, NAT'L PARK SERV., <https://www.nps.gov/caha/learn/index.htm> [<https://perma.cc/NY5L-JKXT>].

³⁴ *See* Dr. Beach, *2016 Top Beaches* <http://drbeach.org/online/portfolio/3-ocracoke-lifeguarded-beach-outer-banks-of-north-carolina-2/> [<https://perma.cc/366G-JJKJ>]; *see also* CBS News, *America's Best Beach? Expert Says in N.C.* (June 8, 2007), <https://www.cbsnews.com/news/americas-best-beach-expert-says-in-nc/> [<https://perma.cc/8RNC-Y4X3>].

other tourist-attractions like the first English settlement in America on Roanoke Island.³⁵ CAHA is also visited for its unique geological features,³⁶ which are some of the most dynamic landscapes inhabited by man, due to its exposure to extreme climatic conditions.³⁷ Considering all of these recreational, historic, and other attractions, it is understandable why CAHA was the first national seashore to be established.

Seventeen years after the NPS's inception, the United States was embroiled in the Great Depression. President Franklin D. Roosevelt's New Deal policies included the expansion of the

³⁵ David Stick, *Roanoke Island, the Beginnings of English America*, Preface (1983, The University of North Carolina Press) (The disappearance of this early settlement on Roanoke Island is one of the greatest unsolved mysteries of our time, giving Roanoke the haunting epithet: "The Lost Colony.").

³⁶ For example, look no further than Jockey's Ridge State Park, the tallest, natural and mountain-like sand dune. See North Carolina State Parks, *Jockey's Ridge State Park* <https://www.ncparks.gov/jockeys-ridge-state-park> [<https://perma.cc/757Q-4TN8>].

³⁷ See David Walbert, *Graveyard of the Atlantic*, <http://soe.unc.edu/resources/technology/support/learn/index.php> [<https://perma.cc/3JCU-VDNB>]; see also OuterBanks.com, *Hurricanes and Storms* <https://www.outerbanks.com/hurricanes-storms.html> [<https://perma.cc/M5JY-JFSK>] (noting the vulnerabilities of the Outer Banks to hurricanes and storms).

NPS.³⁸ The expansion of the NPS induced the passage of CAHA’s enabling legislation on August 17, 1937, but the formation of CAHA was conditioned upon the acquisition of certain lands within the Outer Banks.³⁹ Consequently, although CAHA was authorized in 1937, it was not effectively established until January 12, 1953, when the Secretary of the Department of the Interior approved an order conveying a total of 12,414 acres of land within the Outer Banks, officially representing the first ever national seashore.⁴⁰

CAHA’s enabling legislation discusses the balance of preservation and recreation by permanently reserving CAHA as a “primitive wilderness,” except for certain areas, which were deemed to be especially adaptable for recreation uses.⁴¹

“Except for certain portions of the area, deemed to be especially adaptable for recreational uses, particularly swimming, boating, sailing, fishing, and other recreational activities of similar nature . . . the said area *shall be permanently*

³⁸ *The New Deal Years 1933-1941*, NAT’L PARK SERV., https://www.nps.gov/parkhistory/online_books/anps/anps_3.htm [<https://perma.cc/3R6Q-URUH>].

³⁹ 16 U.S.C. § 459 (“When title to all lands . . . have been vested in the United States, said area shall be, and is, established, dedicated, and set apart as a national seashore recreational area for the benefit and enjoyment of the people and shall be known as the Cape Hatteras National Seashore Recreational Area . . . such lands shall be secured by the United States only by public of private donation.”).

⁴⁰ CAMERON BINKLEY, THE CREATION AND ESTABLISHMENT OF CAPE HATTERAS NATIONAL SEASHORE 220-221 (2007), https://www.nps.gov/parkhistory/online_books/caha/caha_ah.pdf [<https://perma.cc/H4P5-UMDK>].

⁴¹ 16 U.S.C. § 459a-2.

reserved as a primitive wilderness and no development of the project or plan for the convenience of visitors shall be undertaken which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing in this area: . . .⁴²

The plain language of CAHA's enabling statute treats the interest of preservation with greater priority than the interests associated with recreational activities and enjoyment. The general rule is to favor preservation, while the exception is to favor recreation.

The regulations pertaining to the use of ORV use are codified under 36 C.F.R. § 7.58, and cover a range of issues, including: hunting, fishing, and ORV. The ORV regulations provide a requirement that an ORV permit "is required to operate a vehicle on designated ORV routes at the Seashore."⁴³ These ORV permits are referred to as a "form of NPS special park use permits,"⁴⁴ which may be issued, without limitation as to the number of permits issues,⁴⁵ as long as the activity will not "unduly interfere with normal park operations or cause derogation of the

⁴² *Id.* (emphasis added); see also *Wilderness Society v. Norton*, 2005 WL 3294006, 15 (United States District Court, District of Columbia) (dismissing counts 5 and 6 of the complaint after determining that no assessment of CAHA's wilderness need be conducted under the 2001 NPS Management Policies because "Congress has already determine that [CAHA] is 'reserved as a primitive wilderness,').

⁴³ 36 C.F.R. § 7.58(c)(2)(i).

⁴⁴ *Id.* § 7.58(c)(2).

⁴⁵ *Id.* § 7.58(c)(2)(iii).

park's resources or values, or present a threat to public safety or property.”⁴⁶ Individuals seeking an ORV permit must comply with the vehicle and equipment requirements, must take an educational ORV course, and may only use designated ORV routes.⁴⁷ The Superintendent retains that ability to temporarily limit, restrict, or terminate access to ORV routes on the basis of public health and safety, ORVE management considerations, natural and cultural resource protection, species management strategy, and desired future conditions for species listed as threatened, endangered, and special status.⁴⁸

B. *Cape Cod National Seashore*

On August 7, 1961, President John F. Kennedy signed an Act that authorized and established the Cape Cod National Seashore (“Cape Cod”), the second national seashore in the United States.⁴⁹ After the signing, President Kennedy reflected his desire that it “be one of a whole series of great seashore parks which will be for the use and benefit of all our people . . . to acquire and preserve the natural and historic values of a portion of Cape Cod[]”⁵⁰ Cape Cod

⁴⁶ *Permits & Special Park Use*, NAT’L PARK SERV., <https://www.nps.gov/colo/special-use-permits.htm> [<https://perma.cc/W65U-TCBS>] (defining “special park use” as “a short-term activity benefitting an individual, group, or organization, rather than the general public”).

⁴⁷ 36 C.F.R. § 7.58(c)(2)-(9) (2017).

⁴⁸ *Id.* § 7.58(10)(i)(A)-(E).

⁴⁹ 16 U.S.C. § 459b(a)(b), (Pub. L. 87-126, § 1, Aug. 7, 1961, 75 Stat. 284).

⁵⁰ *Remarks on Signing Bill Authorizing Cape Cod National Seashore*, JOHN F. KENNEDY PRESIDENTIAL LIB. & MUSEUM (Aug. 7, 1961), <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-035-034.aspx> [<https://perma.cc/X53W-X3YG>].

is located at the southeaster corner of Massachusetts and is made up of forty miles of pristine beaches and coastline. Although Cape Cod may not have been the first enacted national seashore, it is certainly the first national seashore when it comes to tourism, as nearly 4.7 million people visited Cape Cod in 2016.⁵¹

Similar to Cape Hatteras National Seashore’s enabling legislation, Cape Cod’s enabling legislation discusses the balance of preservation and recreation and tilts the scales in favor of preservation:

In order that the seashore *shall be permanently preserved* in its present state, no development or plan for the convenience of visitors shall be undertaken therein which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing or with the preservation of such historic sites and structures as the Secretary may designate: . . . That the *Secretary may provide for the public enjoyment* and understanding of the unique natural, historic, and scientific features of Cape Cod within the seashore by establishing such trails, observation points, and exhibits and providing such services as he may deem desirable for such public enjoyment and understanding: . . . That the *Secretary may develop for appropriate public uses* such portions of the seashore as he deems especially adaptable for camping, swimming, boating, sailing, hunting, fishing, the appreciation of historic sites and structures and natural features of Cape Cod, and other activities of similar nature.⁵²

⁵¹ *Annual Park Recreation Visitation*, NAT’L PARK SERV.,

[https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Recreation%20Visitation%20\(1904%20-%20Last%20Calendar%20Year\)?Park=CACO](https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Recreation%20Visitation%20(1904%20-%20Last%20Calendar%20Year)?Park=CACO)

[<https://perma.cc/BK8Y-DNJ5>] (last visited Mar. 7, 2017).

⁵² *See* 16 U.S.C. § 459b-6(1) (emphasis added); *U.S. v. Knauer*, 707 F.Supp.2d 379, 385-386 (D. N.Y., Apr. 20, 2010) (noting the importance of the linguistic differences between the words “shall” and “may” in national parks enabling legislations).

The regulations pertaining to Cape Cod National Seashore are enumerated under 36 C.F.R. § 7.67 and, like CAHA, regulate activities such as hunting, fishing, and CAHA.⁵³ The regulations provide for certain requirements to obtain an ORV (referred to as oversand vehicle in Cape Cod), enumerate specific ORV routes, and permits the Superintendent to close any route at any time “for weather, impassable conditions due to changing beach conditions, or to protect resources.”⁵⁴ Cape Cod National Seashore’s regulatory framework is very similar to CAHA’s, but unlike CAHA, Cape Cod limits the amount of ORV permits that may be issued annually, currently the Superintendent will issue no more than 3,400 ORV permits annually.⁵⁵

C. Padre Island National Seashore

Padre Island National Seashore (“Padre Island”) is the longest stretch of undeveloped barrier island in the world, protecting approximately seventy miles of South Texas’s coastline.⁵⁶ For over half a century, Padre Island was used almost exclusive for ranching, other uses of this land included: the exploitation of oil and natural gas reserves, a Navy bombing range, and

⁵³ *See generally Craft v. Hodel*, 683 F.Supp. 289, 302 (. D Mass., Apr. 4, 1988) (holding that Cape Cod’s ban of public nudity under this regulatory section was not invalid because the enabling legislation did not explicitly authorize the regulation of nude bathing, and did not violate any constitutional rights).

⁵⁴ 36 C.F.R. § 7.67(a)(1)(2) (2018).

⁵⁵ *Id.* § 7.67(a)(11)(i) (2018).

⁵⁶ *Padre Island*, NAT’L PARK SERV., available at <https://www.nps.gov/pais/index.htm> [<https://perma.cc/YRR3-PKEA>].

eventually a tourism industry.⁵⁷ Unlike CAHA and Cape Cod, the enabling legislation for Padre Island does not emphasize preservation and conservation over recreation: on September 26, 1962, Padre Island National Seashore was officially opened “[i]n order to save and preserve, *for purposes of public recreation*, benefit, and inspiration, a portion of the diminishing seashore of the United States remains undeveloped, . . .”⁵⁸ Padre Island’s enabling legislation only carves out an exception by which the Secretary may perform conservation and preservation functions if it serves the primary purpose of Padre Island.⁵⁹ Compare that exception, with CAHA and Cape Cod’s, where there is an exception to permit certain recreational activities in lieu of preserving of the area. The regulations for Padre Island National Seashore are located under 36 C.F.R. § 7.75. Padre Island does not currently require an ORV special use permit, and ORV access is “permitted on all of the beach . . . except for the approximately 4 ½ miles of beach between the North and South Beach Access Roads.”⁶⁰

D. *Fire Island National Seashore*

⁵⁷ National Park Service, *History & Culture*, <https://www.nps.gov/pais/learn/historyculture/index.htm> [<https://perma.cc/V65S-8W9A>] (last visited Mar. 7, 2017).

⁵⁸ 16 U.S.C. § 459d (emphasis added).

⁵⁹ 16 U.S.C. § 459d-4 (“except that authority otherwise available to the Secretary for the conservation and management of natural resources may be utilized to the extent he finds such authority will further the purposes of sections 459d. . .”).

⁶⁰ See 36 C.F.R. § 7.75(a)(1)-(2) (2018).

Fire Island National Seashore (“Fire Island”) is a thirty-mile long barrier island located off of Long Island, New York, that was visited by approximately 431,303 people in 2016.⁶¹ A unique aspect of Fire Island National Seashore is the Sunken Forest Preserve, which is a “maritime forest” that is globally recognized as a “rare ecological community.”⁶² Fire Island National Seashore was established by Congress on September 11, 1964, for the “purpose of conserving and preserving for the use of future generations certain relatively unspoiled and undeveloped beaches, dunes, and other natural features”⁶³ This enabling legislation, unlike the other national seashores, *only* considers the interests of preservation and conservation.⁶⁴ However, Fire Island National Seashore’s regulatory framework, codified under 36 C.F.R. §

⁶¹ *Fire Island NS Annual Park Recreation Visitation*, NAT’L PARK SERV., [https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Recreation%20Visitation%20\(1904%20-%20Last%20Calendar%20Year\)?Park=FIIS](https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Recreation%20Visitation%20(1904%20-%20Last%20Calendar%20Year)?Park=FIIS) [<https://perma.cc/3N8K-Q35P>] (last visited Mar. 7, 2017).

⁶² National Park Service, *Sunken Forest* (last visited Apr. 22, 2017), *available at* <https://www.nps.gov/fiis/planyourvisit/sunken-forest.htm> [<https://perma.cc/6WRA-CG6H>].

⁶³ 16 U.S.C. § 459e(a) (2018).

⁶⁴ *Id.* at § 459e-6(a) (2018) (“The Secretary shall administer and protect the Fire Island National Seashore with the primary aim of conserving the natural resources located there. The area known as the Sunken Forest Preserve shall be preserved from bay to ocean in as nearly its present state as possible, without developing roads therein, but continuing the present access by those trails already existing and limiting new access to similar trails limited in number to those necessary to allow visitors to explore and appreciate this section of the seashore.”).

7.20, provides for the use of ORV.⁶⁵ ORV access is limited only to designated routes and to individuals who maintain the required ORV permit.⁶⁶ However, obtaining an ORV permit on Fire Island is very restrictive; only certain eligible persons and groups may submit permit applications.⁶⁷ Not only does Fire Island restrict ORV permits to those who meet specific eligibility requirements, but there is a limitation on the amount of permits that can be issued, and the seashore provides for alternative means of transportation for people to access the national seashore.⁶⁸ This restrictive-approach is further recognizable from NPS's webpage about ORV

⁶⁵ 36 C.F.R. § 7.20(a) (2005).

⁶⁶ *Id.* at § 7.20(a)(2)(4) (2005).

⁶⁷ *Id.* at § 7.20(a)(5)(i)-(vi) (2005) (“limiting eligibility to only persons who are year-round residents; persons who held part-time permits prior to January 1, 1978; persons, firms, partnerships, corporations, organizations, or agencies which provide services essential to public facilities and the occupancy of residences on the Island; persons who desire access by motor vehicle to Seashore lands in order to engage in fishing or hunting thereon, provided such access is compatible with conservation and preservation of Seashore resources; owners of estates in real property located on the Island who have a demonstrated need for temporary access to that property on days when there is no alternative transportation; holders of reserved rights of use and occupancy.”).

⁶⁸ *Id.* at § 7.20(a)(3) (2005) (“In providing for access to the island, the Superintendent shall require maximum possible reliance on those means of transportation which are other than private motor vehicles and which have the minimum feasible impact on Seashore lands”); *see*

on Fire Island: “Because there are 17 residential communities within the boundaries of the Fire Island National Seashore, limited driving is permitted by contractors, utilities, and a small number of residents to support the maintenance of these communities. Such permits are tightly restricted and regulated.”⁶⁹

E. Assateague Island National Seashore

Assateague Island National Seashore (“Assateague Island”) is located on Maryland’s Eastern Shore, just south of Ocean City, Maryland. With the NPS looking to expand this concept of a national seashore, Assateague Island had been in the agency’s sights for quite a while, and in 1965 the NPS published a promotional brochure describing Assateague “as the largest undeveloped seashore between Cape Cod and Cape Hatteras.”⁷⁰ Upon arriving to probe Assateague Island as a potential new national seashore, NPS found that ORV use was widespread and that many “local vehicle owners were members of the Assateague Beach Buggy Association Their primary purpose was to lobby for continued use and expanded beach

Christianson v. Hauptman, 991 F.2d 59, 63-64 (2nd Cir. 1993) (holding that the rescission and banning of seaplanes in Fire Island National Seashore was not arbitrary nor capricious).

⁶⁹ National Park Service, Oversand Vehicle Operation, Fire Island, (last visited NEED DATE), <https://www.nps.gov/fiis/planyourvisit/oversand-vehicle-operation.htm> [<https://perma.cc/V8JF-P9BD>].

⁷⁰ BARRY MACKINTOSH, ASSATEAGUE ISLAND NATIONAL SEASHORE AN ADMINISTRATIVE HISTORY 23 (1982), *available at* <https://www.nps.gov/asis/learn/management/upload/asisadminhistory.pdf> [<https://perma.cc/M6GG-JWHN>].

access in the face of conservationist pressures to restrict or eliminate ORV's."⁷¹ The Superintendent of Assateague Island in the 1970's maintained a dim outlook on the future of ORV use on Assateague, believing that they would eventually be completely banned.⁷²

Congress responded to the NPS's promotion of Assateague Island by passing legislation that established and authorized the creation of Assateague Island National Seashore on September 21, 1965.⁷³ The enabling legislation of Assateague Island National Seashore favors the interests of recreation use and enjoyment: "For the purpose of protecting and developing Assateague Island in the States of Maryland and Virginia and certain adjacent waters and small marsh islands for public outdoor recreation use and enjoyment, . . ."⁷⁴ Further, the administration section of Assateague Island's enabling legislation expresses that, except for national wildlife refuge lands and waters, "the Secretary shall administer the Assateague Island National Seashore for general purposes of public outdoor recreation, including conservation of natural features contributing to public enjoyment." The regulatory framework governing Assateague Island is situated under 36 C.F.R. § 7.65. The regulations require individuals to

⁷¹ *Id.* at 119.

⁷² *Id.* at 120 ("In brief, the staff here recognizes that beach vehicles are destined to be banned from the public beaches. The only question is when such activity will cease to be a pleasure and become a total nuisance. Each season the number and variety of beach vehicles increases and it is just a matter of time until the outcry against them becomes even stronger than the great political pressure exerted by them.").

⁷³ 16 U.S.C. § 459f (2018).

⁷⁴ *Id.*

obtain ORV permits and authorize ORV travel only to designated routes that not prohibited under the regulations or by the Superintendent.⁷⁵

F. *Cape Lookout National Seashore*

On March 10, 1966, Congress established Cape Lookout National Seashore (“Cape Lookout), “[i]n order to preserve for public use and enjoyment an area in the State of North Carolina possessing outstanding natural and recreation values, there is hereby authorized to be established the Cape Lookout National Seashore, . . .”⁷⁶ Although Cape Lookout is located immediately south of CAHA, separated only by an inlet, Cape Lookout’s enabling legislation diverges from CAHA’s enabling legislation by not designating Cape Lookout as a “primitive wilderness” and not expressing a preference for preservation and conservation.⁷⁷ The enabling statute for Cape Lookout National Seashore additionally requires the Secretary to administer Cape Lookout “for the general purposes of public outdoor recreation, including conservation of natural features contributing to public enjoyment.”⁷⁸ The regulations relating to Cape Lookout National Seashore are located under 36 C.F.R. § 7.67. The regulations require ORV permits, and allow access to only designated routes, but unlike CAHA Cape Lookout limits the amount of ORV permits that can be issued in a given year.⁷⁹

⁷⁵ 36 C.F.R. §7.65(b)(2)-(4) (2003).

⁷⁶ 16 U.S.C. § 459g (1974).

⁷⁷ National Park Service, *Annual Park Recreation Visitation Cape Lookout NS* (Apr. 18, 2018), <https://perma.cc/EPJ8-BQP2> (In 2016 there were 458,000 visitors to Cape Lookout, compare this with Cape Hatteras’s over 2.4 million visitors in 2016).

⁷⁸ 16 U.S.C. § 459g-4(a) (2005).

⁷⁹ 36 C.F.R. § 7.67(a)(1)-(11) (2012).

IV. LEGAL BATTLES RELATING TO ORV'S ON NATIONAL SEASHORES

When you take into account the divergent, yet equally impassioned positions among conservationists and recreationists in the context of ORV use, and the various legal and regulatory frameworks that are implicated by ORV access, it is rather surprising that there has been so little litigation on the issue of ORV access on national seashores. The legal challenges to ORV use on national seashores are covered in this section. Specifically highlighted are two battles: one challenging ORV access on Cape Cod National Seashore, and another on CAHA.

A. *Conservation Groups Take on ORV on Cape Cod*

The first legal attack on ORV use on national seashores came out of Cape Cod National Seashore. The lawsuit was launched in 1984 by three environmental organizations: Conservation Law Foundation (“CLF”); Audubon Society, and the Sierra Club.⁸⁰ Although ORV access on Cape Cod was not initially a significant recreational practice by its visitors, it became increasingly common by 1978.⁸¹ This fast growing trend of driving on Cape Cod’s shoreline, along with a five-year study detailing the effects of such use by the University of

⁸⁰ *Conservation Law Foundation of New England, Inc. v. Clark*, 590 F.Supp 1467 (D. Mass. 1984).

⁸¹ *Id.* at 1471 (“ORV’s were not a major recreational use of the Seashore when it was first established. By 1964, the first year ORV permits were issued . . . 964 vehicles were registered. Thereafter, interest skyrocketed and by 1978 the number of permits had jumped to almost 6,000. Between 1975 and 1978 ORV use doubled.”).

Massachusetts Amherst, motivated the NPS to review their ORV management policy and to implement an updated plan in 1981.⁸²

Unsatisfied with the NPS's updated plan, CLF, Audubon Society, and Sierra Club filed suit. The environmental-group plaintiff's raised a number of issues in their complaint, alleging that the Management Plan violated the Cape Cod's enabling legislation, the Organic Act of 1916, the Secretary of the Department of Interiors general public trust obligations, the Administrative Procedures Act ("APA"), and NEPA.⁸³ The relief sought was the performance of an EIS, and a permanent injunction barring all ORV use on Cape Cod National Seashore until the NPS adopted an ORV Management Plan that sufficiently protected the Seashore and did not interfere with the other recreational uses of the seashore.⁸⁴ The Massachusetts court dealt swiftly with the procedural claims brought by plaintiffs under the APA,⁸⁵ and turned to the more substantive

⁸² *Id.* ("The Plan, in capsule form, permits the following: use of ORV's in unlimited numbers along a thirty-mile stretch of the Outer Beach except when seasonal high tides or tern nesting seasons prevent continuous beach travel (under such conditions ORV's are allowed along a connecting six-mile inner dune trail); use of a half-mile cross-land trail by commercial dune taxis and dune cottage residents; and use by 100 self-contained ORV's of two overnight sites on the beach; no limits on the daily or annual numbers of ORV's.").

⁸³ *Id.* at 1471-72.

⁸⁴ *Id.* at 1472.

⁸⁵ *Id.* at 1475-76 (finding "no grounds for relief in plaintiff's claim that defendants violated the APA by failing to publish the Management Plan in the Federal Register" because of the fact that the plaintiff's filed the present lawsuit on the date the Management Plan became effective, which

claims involving the alleged violation of Cape Cod’s enabling legislation, the Organic Act, and the ORV Executive Orders.

Initially, the court looked at the enabling legislation to determine what restrictions and duties the Secretary was under while managing and administering Cape Cod National Seashore.⁸⁶ The legislative history was emphasized by the court, as it shed light on the purpose behind the national seashore and touched on the constraint between conservation and enjoyment.⁸⁷ Based on the plain language of the enabling legislation and its legislative history,

demonstrated that the plaintiff’s had actual notice; additionally concluding that the Secretary’s decision not to prepare an EIS was not arbitrary due to the expertise of the NPS in environmental matters and due to the fact that the NPS implemented a plan after a five-year study and analysis of the ecological effects of ORV use which was subject to public comment).

⁸⁶ *Id.* at 1478-79; 16 U.S.C. § 459b-6(1) (1961).

⁸⁷ *See id.* at 1479 (“The House Report goes on to elucidate this ‘primary purpose’: ‘[T]he major emphasis of the bill is, and *the major emphasis of the National Park Service in administering the seashore must be, on conserving the values* which now make Cape Cod so attractive to so many people and which are in such great danger of being lost—*its scenery, its historical association, its reminders of an older and quieter way of life than most of us now enjoy, its wildlife and flora* The committee . . . recommends strongly that the Secretary of the Interior use all powers at his command to prevent any such indiscriminate use of the seashore as might seriously depreciate the very values which it is being created to preserve.’” (citing H.R. Rep. No. 673, 87th Cong., Sess., *reprinted in* 1961 IV House Miscellaneous reports on Public Bills 118).

the court declared that the statute gave “*primacy to preservation.*”⁸⁸ Thus, any use of the Cape Cod National Seashore “which would be incompatible with the preservation of the unique flora and fauna” at the time the seashore was created in 1961, was deemed to fall outside of the statutory power of the Secretary, and “any authorized recreational use must not only be ecologically ‘*compatible*’ but ‘*appropriate*’ in the light of these values the Act seeks to preserve.”⁸⁹ Next, the court looked at the NPS Organic Act and, in similar fashion to Cape Cod’s enabling legislation, the Massachusetts court also interpreted the Organic Act to favor preservation and conservation over enjoyment and recreation.⁹⁰ Lastly, the court found that the

⁸⁸ *Id.*

⁸⁹ *Id.* (emphasis added).

⁹⁰ *Id.* (“The [Organic] Act thus emphasizes the preservation of park lands in their natural scenic, and historic condition Both [enabling legislation and the Organic Act] allow for a balancing of preservation and development only to the extent that such development does not derogate from the overriding preservation mandate.”); *see also id.* n. 7 (providing a helpful comparison between ORV and National Forest lands: “Thus the [enabling act and Organic Act] require a level of protection greater than that generally extended to National Forest lands under the “multiple use” concept of 16 U.S.C. §§ 528 *et seq.* (1960) . . . (national forests to be ‘administered for outdoor recreation, range, timber, wildlife, and fish purposes’), but less than that afforded to National Wilderness lands under 16 U.S.C. §§ 1131 *et seq.* (1974) (‘Wilderness Act’) (national wilderness lands to ‘be administered . . . in such a manner as will leave them unimpaired for future use and enjoyment as wilderness.’ The statute further provides that ‘there shall be . . . no use of motor vehicles’) . . .”).

two ORV Executive Orders “add specificity to the preservation and appropriateness mandates” and that under the Executive Orders, the Secretary, “must prohibit any ORV use that adversely affects the natural, aesthetic or scenic values of the Seashore.”⁹¹ In sum, the court concluded that the enabling legislation, Organic Act, and the two Executive Orders “reflect[ed] an understanding that a particular recreational activity can be fully compatible with the preservation of the Seashore’s ecology but nonetheless be inappropriate as a public use.”⁹²

Needless to say, this was a major win for the conservation and environmental-group plaintiffs, as the court had clearly declared preferential treatment of the interests of preservation in lieu of the interests of recreation and enjoyment. The Supreme Court of the United States has never interpreted the Organic Act and its conflicting mandates, so this interpretation is similarly of significant precedential value as the court’s interpretation provides conservationists with authority in prospective legal battles concerning the interpretation of other national seashores enabling legislation that have similar language.

Following the court’s interpretation of the applicable law, they moved on to address the remaining substantive legal claims brought by plaintiffs of whether the Management Plan violated the Cape Cod enabling legislation; the Organic Act, and; the Executive Orders. The Management Plan that was implemented by the NPS on Cape Cod National Seashore relied predominantly on the University of Massachusetts at Amherst study on the effects of ORV’s on

⁹¹ *Id.* at 1480 (the court added that “in making such a determination, the Secretary must look not only at the ecological impacts of ORV’s but also their compatibility with other recreational uses and values for which the Seashore was created.”).

⁹² *Id.* at 1484.

the ecology of the seashore.⁹³ The Management Plan designated ORV zones and created routes for ORV travel on areas of Cape Cod National Seashore which were found to be the least ecologically vulnerable.⁹⁴ The NPS established zones which either permitted or restricted ORV access by adhering to the University of Massachusetts at Amherst study. Thus, the court held that the decision to adopt the plan was not arbitrary, capricious, or an abuse of discretion because the Secretary's decision to adopt the Management Plan sufficiently complied "with the mandate of the [enabling legislation and Organic Act] to preserve the Seashore ecology . . . [was] in accordance with . . . the requirement of Executive Orders . . . that such zones be established so as not to 'adversely affect' the Seashore's ecology."⁹⁵ Lastly, the court considered whether the use of ORV's on Cape Cod could be deemed an "appropriate public use" in conformity with the administration section of Cape Cod's enabling legislation.⁹⁶ On this question, the court found that because the Secretary only considered the preservation of the Seashore's ecology and did not adequately consider whether ORV use constituted an appropriate public, the case was remanded for thorough consideration of whether ORV use would be an appropriate public use.⁹⁷

⁹³ *Id.* (additionally, the court pointed out that this study was the first of its kind to examine the impacts of ORV use on the coast).

⁹⁴ *Id.* at 1481.

⁹⁵ *Id.*; *see also id.* at 1484 (finding that implementation and enforcement of the plan was effectively protecting the ecology of the Seashore from the impacts of ORV use).

⁹⁶ 16 U.S.C. § 459b-6.

⁹⁷ On remand, the court again affirmed their denial of injunctive relief and further stipulated that the then-current Management Plan should remain in full force and effect, "[g]iven the court's

1. First Circuit Appeal and Some Insight from Justice Breyer

Following the Massachusetts District Court ruling, CLF filed an appeal to the First Circuit Court of Appeals, challenging the district court's findings that ORV was "appropriate for public use" and that the Management Plan was protecting the ecology of Cape Cod National Seashore.⁹⁸ The First Circuit affirmed the lower court's decision on both of those counts.⁹⁹ A very intriguing aspect of the First Circuit affirming decision comes, not in the majority opinion,

finding that there is a rational basis in the record for defendants' assertion that the Plan is adequately protecting the Seashore ecology, and in light of the substantial reliance of ORV users on the present regulations" *Conservation Law Found. of New England, Inc. v. Clark*, 590 F.Supp. 1481, 1489 (1984).

⁹⁸ *Conservation Law Found. of New England, Inc. v. Sec'y of Interior*, 864 F.2d 954, 957 (1st Cir. 1989).

⁹⁹ *Id.* at 959 (first on the challenge of appropriateness: "Given the Secretary's careful treatment of the issue on remand and the considerable restrictions placed on ORV use under the 1985 Plan, we cannot say that the Secretary's decision has no rational basis or represents an abuse of discretion. Accordingly, we affirm the district court in granting defendants' motion for summary judgment on the appropriateness issue under Section 7 of the [enabling legislation]."; second on the challenge of ecological damage: "Though some ecological damage to the Seashore may have occurred prior to adoption of the 1981 Plan, we believe sufficient evidence exists to support defendants' conclusion that ORV use has caused no significant ecological damage at the Seashore since that time. We therefore affirm the district court on the issue of ecological protection under the 1981 and 1985 Plans.").

but in the concurring judgment written by then First Circuit Judge, now Supreme Court Justice Stephen Breyer. Justice Breyer agreed with the overall holding, but seemingly attempted to limit the holding to leave the door open for potentially more restrictive ORV regulation:

I agree with the panel that, given the statute's *proviso*, one may not reasonably read it as imposing an absolute ban on ORVs, particularly since many fishermen and campers like to use them. I also agree with the panel's opinion; we cannot now say that the Interior Department regulations are "arbitrary, capricious" or an "abuse of discretion." I add only that this latter question is quite a close one. The Conservation Law Foundation, in its brief, notes that recreational "vehicles are used by less than 2.5 percent of the summertime visitors to the Seashore." The National Seashore beachfront miles, or 16 percent of the beach, for ORV use. *Although it seems fairly obvious that those who use ORVs need a length of coastline in which to use them, it is also fairly obvious that their use is often incompatible with the quiet enjoyment of the seashore that the Cape Cod National Seashore Act contemplated the vast majority of visitors would seek. At some geographical point, reserving miles of coastline for ORVs would amount to taking too much from too many for the enjoyment of too few.* We here hold that, giving full and appropriate weight to the judgment of the administrators, we cannot say, on the basis of the record before us, that 16 percent actually crosses the line marked by the statutory word "arbitrary."¹⁰⁰

This passage by Justice Breyer is an interesting glimpse into the mind of a current Supreme Court Justice on the issue of ORV use on national seashores. Although he declines to interpret Cape Cod's enabling legislation as imposing an absolute ban on ORV's, he takes a middle-ground position and reserves for future cases a point at which too much ORV access would infringe on the ability of others to enjoy the seashore.

Justice Breyer seems to indicate a threshold point where reserving more than the amount

¹⁰⁰ *Id.* at 961 (emphasis added).

reserved in the present case—involving 16 percent of the seashore—may be considered by Justice Breyer as stepping over the agency’s discretion and the enabling legislation.¹⁰¹

B. The Legal Saga of ORV’s on Cape Hatteras

Cape Hatteras was largely undeveloped throughout the 1950’s; the lack of infrastructure, specifically roads, made accessing the area impracticable, but improved automotive technologies led residents and visitors of CAHA to begin accessing the beach using motor vehicles.¹⁰² On August 30, 1961, the NPS issued a press release discussing its support for legislation that would allow the agency to assist the State of North Carolina to build a bridge across the Oregon Inlet, which would reduce the overcrowding of the sole ferry boat that transported vehicles to CAHA.¹⁰³ There was some pushback to the building of the bridge, believing that its construction would run afoul CAHA’s enabling legislation which dedicated the area as a “primitive wilderness.” Notwithstanding the opposition, the legislation for the bridge passed and President

¹⁰¹ See also Lisa Heinzerling, *Justice Breyer’s Hard Look*, 8 Admin. L.J. Am. U. 767, 770 (1995).

¹⁰² Binkley, *Supra* note 40, at 195 (“At first, the few [residents] with vehicles, and occasional visitors, did not relish the notion of beach-driving and did so simply because there were almost no roads on which to drive. After World War II, improved automotive technologies allowed more villagers and visitors to drive along the seashore, but without roads this activity still entailed the onerous rituals of re-inflating tires, digging out from occasional sandpits, and risking getting stuck.”).

¹⁰³ *Id.* at 190.

John F. Kennedy would sign the bill into law on October 11, 1962.¹⁰⁴ The creation of the “Bonner Bridge,” along with the construction of a road, led to a surge in visitors.¹⁰⁵ These improvements to infrastructure on CAHA were intended to better protect the environment by curtailing the necessity of beach driving, but it actually had the opposite effect.¹⁰⁶ As discussed

¹⁰⁴ *Id.* at 193; Act of October 11, 1962, Pub. L. No. 87-799, 76 Stat. 909 (Herbert C. Bonner Papers (3710), National Seashore Files, Box 47, Folder 2232 (August-December 1962)).

¹⁰⁵ Binkley, *Supra* note 40, at 193-196 (“Upon completion, the bridge brought in waves of tourists whose numbers increased with each passing year, an indisputable and considerable economic benefit to all the villages on Hatteras and Ocracoke Islands. More immediately, there would no longer be frustrating wait times or dread by visitors over the possibility of being stranded on one side of the inlet if one were unlucky and missed the last scheduled ferry.”); *see generally*, *Bonner Bridge Replacement Project*, NCDOT, <https://www.ncdot.gov/projects/bonnerbridgereplace/> [<https://perma.cc/4PWH-ZKYG>] (this bridge is called the “Bonner Bridge” and it is currently being replaced, which has produced several legal challenges by environmental groups); *see generally* Jeff Jeffrey, *With lawsuits dropped, NCDOT prepares to replace Bonner Bridge*, *Triangle Business Journal* (Aug. 18, 2015, 5:23 pm) <https://www.bizjournals.com/triangle/news/2015/08/18/ncdot-bonner-bridge-replacement-plans.html> [<https://perma.cc/WAE8-ADSY>].

¹⁰⁶ Binkley, *Supra* note 40, at 196 (“[E]arly ramps . . . gave access to increasing numbers of tourists. Still, such uses did not begin to elicit great controversy until after the Bonner Bridge opened in 1964. With the bottleneck at Oregon Inlet removed, there was no limit to the number of park visitors who in a day’s span could drive down the banks and out onto the beach.

earlier, the land needed to establish CAHA was not acquired until 1953 and the initial focus of the park was not on ORV management, but on sand dune stabilization and beach erosion control.¹⁰⁷ Managing and regulating CAHA got off to a very slow start, in large part due to a depletion of funding from a swell of hurricanes in 1955,¹⁰⁸ and an expensive condemnation judgment.¹⁰⁹ It was not until 1959 that regulation of the seashore began, when NPS submitted a final rule relating primarily to hunting and also establishing speed limits.¹¹⁰ Prompted by NEPA and the ORV Executive Orders almost two decades later, the NPS issued its first interim policy

Completion of the Bonner Bridge, therefore, marks a key demarcation point in the history of the first national seashore.”).

¹⁰⁷ *Id.* at 160 (these focuses were referred to as “Mission 66”).

¹⁰⁸ See Gordon E. Dunn & Walter R. Davis & Paul L. Moore, *Hurricanes of 1955*, Weather Bureau Office, Miami, Fla. (December 1955),

<http://www.aoml.noaa.gov/general/lib/lib1/nhclib/mwreviews/1955.pdf> [<https://perma.cc/5WAL-VGKC>].

¹⁰⁹ Binkley, *Supra* note 40, at 210 (“The largest single condemnation for Cape Hatteras National Seashore is heard in federal court. Unfortunately, the court awards \$533,400 in the case of Winfield A. Worth, far more than NPS officials had anticipated, thus creating a financial crisis.”).

¹¹⁰ Parks, Forests, and Memorials 36 Fed. Reg. 11001 (Dec. 30, 1959) (NPS rulemaking continued on the issues of hunting and fishing within CAHA, but no management policy was yet established for ORV access on the shoreline).

related to ORV use on CAHA, but the interim policy barely grappled with ORV use.¹¹¹ Given the intense use of ORV's on CAHA and the lack of any official rule or ORV management plan, three factions emerged that would be involved in ensuing litigation: numerous environmental groups¹¹²; the Department of Interior¹¹³, and; ORV access groups, recreational groups, and business groups.¹¹⁴

1. *CHAPA I*: The Piping Plover Shuts Down the Beach

¹¹¹ Nat'l Park Serv., *Statement for Management Cape Hatteras National Seashore* (January 1978), <https://perma.cc/425B-D3V2> (“Vehicular use off paved roads is restricted to the ocean beach and to old sand roads used before park establishment The beach from Ramp 22 to the Loran State is closed to vehicles all year. Certain small areas of high beach on all three islands are closed to both vehicles and pedestrians in early summer to protect nesting terns, but visitors can pass seaward of such nesting sites.”).

¹¹² These environmental groups consisted of: Defenders of Wildlife; Center for Biological Diversity; Southern Appalachian Biodiversity Project; National Audubon Society; National Parks Conservancy Associations, and; Southern Environmental Law Center.

¹¹³ Including the Fish and Wildlife Service and the NPS.

¹¹⁴ Including “beach-buggy” organization formed to preserve free and open beach access, such as the Outer Banks Preservation Alliance, North Carolina Beach Buggy Association, Cape Hatteras Anglers Club, and the Cape Hatteras Access Preservation Alliance.

The Piping Plover is a small, sand-colored, shorebird that is currently listed as endangered in the Great Lakes region and listed as threatened on the Atlantic coast.¹¹⁵ “Wintering piping plovers” refers to the migration of plovers from areas like the Great Lakes to Atlantic areas like Cape Hatteras.¹¹⁶ Wintering plovers on CAHA have been listed as a threatened species under the ESA since 1985.¹¹⁷ In 2001, FWS designated 126 linear miles of the CAHA coast as critical habitat for the wintering piping plover population.¹¹⁸ Fourteen months following this designation, the Cape Hatteras Preservation Alliance (“CHAPA”), Dare and Hyde County and several business associations filed a lawsuit challenging the designation on several grounds, including: the FWS’s definition of the term “occupied” in the ESA as arbitrary and capricious; deficiencies in the FWS’s findings of primary constituent elements, and; failing to consider the economic impacts of the designation.¹¹⁹ The court granted summary judgment to CHAPA on several grounds, which successfully vacated the critical habitat designation for

¹¹⁵ U.S. Fish and Wildlife Service, *Piping Plover Fact Sheet* (last updated Apr. 23, 2015), [<https://perma.cc/23QM-ACQY>].

¹¹⁶ *Id.*

¹¹⁷ Determination of Endangered and Threatened Status for the Piping Plover, 50 Fed. Reg. 50726 (Dec. 11, 1985).

¹¹⁸ *Cape Hatteras Access Pres. All. v. U.S. Dept. of Interior*, 344 F.Supp.2d 108, 114 (D.D.C. 2004).

¹¹⁹ *Id.* at 119-127.

wintering plovers and re-opened the portions of the beach which had been closed-off.¹²⁰

Following the court's order, the FWS began reevaluating the critical habitat designation and would eventually release a similar designation on June 12, 2006.¹²¹

2. Defenders Go On the Offensive to Compel an ORV Management Plan

In 2007, the NPS had still not issued a long-term final ORV management rule, and was still relying on the interim strategy. Unimpressed with the status quo, several environmental groups, including Defenders of Wildlife, Southern Environmental Law Center, and National Audubon Society filed suit on October 18, 2007, against the NPS, the Superintendent of CAHA and the Department of Interior.¹²² The case was resolved on April 16, 2008, pursuant to a consent decree that would serve, along with the interim plan, as the *de facto* ORV access and

¹²⁰ *Id.* at 136 (the court granted summary judgment on the following grounds: FWS failed to comply with its statutory obligation to only designate as occupied critical habitat the areas where biological features of the wintering plovers were found and areas that “may require special management consideration or protection”; FWS failed to consider the economic impacts of designating critical habitat for the wintering plover; FWS failed to comply with NEPA).

¹²¹ U.S. Fish & Wildlife Service, *News Release* (October 21, 2008), *available at* https://www.fws.gov/raleigh/pdfs/20081021_P IPLCH_fNewsRelease.pdf [<https://perma.cc/B7BQ-KZRC>].

¹²² *Defenders of Wildlife v. Nat'l Park Serv.*, 2:07—CV—45—BO, 3-4 (E.D. N.C. 2008); *see also* Outer Banks Preservation Alliance, *About Us* (May 1, 2010) (CHAPA intervened in the lawsuit).

management plan.¹²³ In addition, the Consent Decree required that the NPS complete an ORV Management Plan for CAHA by December 31, 2010, and enact a final rule by April 1, 2011.¹²⁴ Another focal point of the consent decree was establishing protected pre-nesting areas for wintering piping plovers and other shorebirds by establishing buffer zones, beach closures, and limiting driving at night to protect sea turtles, seabeach amaranth, and the plovers.¹²⁵ The NPS retained enforcement authority and the ability to adopt more restrictive protective measures under the Consent Decree,¹²⁶ which ORV access groups like CHAPA believed to be already overly-restrictive.¹²⁷

In March 2011, the NPS notified the court and the parties of the consent decree that the final rule would not be completed by the original April 1, 2011, deadline established by the consent

¹²³ *See id.* at 3-4 (“Pending the implementation of the final Special Regulation . . . the Interim Strategy . . . shall remain in full force and effect, except as modified by the [Consent Decree].”).

¹²⁴ *Id.* at 3.

¹²⁵ *Id.* at 4-11.

¹²⁶ *Id.* at 15.

¹²⁷ *See* Outer Banks Preservation Alliance, *OBPA History* (May 1, 2010),

http://obpa.org/index.php?option=com_content&view=article&id=103&Itemid=100

[<https://perma.cc/7ZFK-3P7R>] (“The consent decree forced more restrictive and unnecessary closures of the seashore beaches than previously outlined in the Interim . . . Plan. The effect was devastating. On July 9, 2009, 67% of the seashore beaches were closed to ORVs. Additionally, pedestrian access was denied to Cape Point and the inlet splits for the entire summer tourist season.”).

decree.¹²⁸ The court modified the Consent Decree to extend the deadline, and finally the Cape Hatteras National Seashore ORV Management Plan and Draft Environmental Impact Statement was released to the public for comment on March 5, 2010.¹²⁹ The final Management Plan and EIS was completed on December 20, 2010.¹³⁰

Under the NPS's general regulations, ORV operation within areas of the National Park System is prohibited unless authorized by special regulation. The Management Plan required individuals who intended on accessing CAHA's beach in their vehicles to obtain ORV permits, and to use only designated ORV routes which serve to limit ORV use within CAHA in a manner that protects and preserves natural and cultural resources, provides for a variety of safe visitor experiences, and minimizes conflicts among CAHA's various users.¹³¹

3. *CHAPA II*: Challenging FWS's Revised Critical Habitat Designation

Prior to the enactment of the final ORV Management Plan as compelled by the 2008 consent decree, CHAPA again went on the offensive against FWS's revised critical habitat designation. CHAPA asserted that the revised critical habitat designation was simply a

¹²⁸ Special Regulations, Areas of the National Park System, Cape Hatteras National Seashore—Off-Road Vehicle Management, 77 Fed. Reg. 3123-01 (Jan. 23, 2012) (to be codified at 36 C.F.R. pt. 7).

¹²⁹ *Id.*; see also 42 U.S.C. § 4332(2)(C) (2016) (because the Management Plan was considered a major Federal action that would significantly affect the quality of the human environment, NEPA demanded the NPS to perform an EIS).

¹³⁰ *Id.*

¹³¹ *Id.* at 3138.

repackaged version of the initial designation, and therefore was continuing to violate the remand order from the 2004 *CHAPA I* case.¹³² On February 6, 2009, CHAPA filed suit against the Department of Interior, and the Defenders of Wildlife and National Audubon Society intervened.¹³³

In an attempt to advocate for the less-restrictive interim ORV strategy, CHAPA moved to supplement FWS's administrative record with a biological report which was used to develop the interim strategy.¹³⁴ CHAPA's strategy was to use the report to show that FWS did not consider all the relevant factors needed to make its decision to designate critical habitat and, as a result,

¹³² Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 7-8, *Cape Hatteras Access Pres. All.*, 667 F. Supp. 2d 111 (D.D.C. 2009) ("The Court's 2004 opinion sets forth the background of the challenge to the 2001 critical habitat designation . . . The court granted Plaintiffs' Motion for Summary Judgment, finding major violations of the ESA, NEPA, and the APA; vacated the critical habitat designation . . . and remanded the rule to the Service. On remand, the Service has essentially "repackaged" its proposed critical habitat for these four areas and failed to adequately address the serious violations of law found by the *CHAPA I* Court.").

¹³³ *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 19 (D.D.C. 2010).

¹³⁴ *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 112-113 (D.D.C. 2009) ("At issue is whether this Court should consider a report that relates to the conservation of piping plovers . . . either because it was actually a part of the administrative record before the Service, though FWS did not designate it as such, or as extra-record evidence in the even the Court finds it was not a part of the administrative record. "

obtain a vacatur of the designation like in *CHAPA I*. Put more straightforward, CHAPA was simply attempting to preserve the interim ORV management status quo. However, the court even confessed that the likelihood that CHAPA's motion would conquer the strong presumption in favor of FWS would be a "rare bird."¹³⁵ As anticipated by the court, CHAPA did not overcome this presumption and the motion to supplement the administrative record was denied.¹³⁶

Failing to vacate the rule on this procedural motion, CHAPA still had the underlying lawsuit to try and convince the court that the revised critical habitat designation should be vacated. Unlike *CHAPA I*, the court found that FWS had fulfilled its statutory duties under the ESA and NEPA, and the court ultimately concluded that the revised critical habitat designation was legally sufficient and had evaluated all necessary considerations.¹³⁷ This was certainly a setback for CHAPA and recreationists, but the fight was continuing behind the scenes of this litigation, where the negotiations for the long-term ORV Management Plan and a draft EIS were being conducted.

¹³⁵ *Id.* at 112.

¹³⁶ *Id.* at 116.

¹³⁷ *Cape Hatteras Pres. All. v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 36 (D.D.C. 2010) ("the Service properly designated and evaluated the special management considerations for each primary constituent element as required by the EA. Further, the Service properly considered economic and other impacts as required by the ESA. Finally, after taking a "hard look" at the potential environmental consequences, the Service correctly determined that an EIS was not required pursuant to NEPA."),

4. *CHAPA III*: The Final ORV Management Plan Gets Hauled into Court

On January 23, 2012, CAHA finally had issued a final, long-term ORV Management Plan.¹³⁸ It did not take long for CHAPA to respond; on February 9, 2012, CHAPA filed suit against the NPS and the Superintendent of CAHA seeking a declaratory judgment that the ORV Management Plan violated NEPA, the Organic Act of 1916, CAHA enabling legislation, and the APA.¹³⁹ Furthermore, CHAPA sought to enjoin the implementation of the ORV Management Plan.¹⁴⁰

CHAPA's first argument contested the ORV Management Plan's conformity with CAHA's enabling legislation and the Organic Act, asserting that the enabling legislation expressly "sought to preserve public access . . . and use of CAHA for recreational purposes [by] . . . requir[ing] that certain lands and waters on the Outer Banks of North Carolina be 'established, dedicated, and set apart as a national seashore recreation area for the benefit and enjoyment of

¹³⁸ Special Regulations, Areas of the National Park System, Cape Hatteras National Seashore—Off-Road Vehicle Management, 77 Fed. Reg. 3123-01 (Jan. 23, 2012) (to be codified at 36 C.F.R. pt. 7) ("This rule designates [ORV] routes and authorizes limited ORV use within [CAHA] in a manner that will protect and preserve natural and cultural resources, provide a variety of safe visitor experiences, and minimize conflicts among various users.").

¹³⁹ *Cape Hatteras Pres. All. v. Jewell*, 28 F.Supp.3d 537, 544-551 (E.D.N.C. 2014) (Defenders of Wildlife, National Audubon Society, and National Parks Conservancy Association intervened in the lawsuit).

¹⁴⁰ *Id.* at 539.

the people.”¹⁴¹ Additionally, CHAPA argued that although the enabling legislation does not mention ORV use, it did draw a distinction between two types of land: one specially adaptable for recreation, and the other as a primitive wilderness.¹⁴² The court, however, did not find that these assertions prevailed over the broad discretion the NPS maintains in implementing the mandatory ORV Management Plan.¹⁴³ Similar to CLF’s ORV challenge on Cape Cod National Seashore, the court here proclaimed that conservation was the predominant facet of the legislation, not enjoyment and recreation.¹⁴⁴

The remaining arguments rested on a general theory that the development of the EIS and the subsequent ORV Management Plan had violated NEPA, the ESA and the APA.¹⁴⁵ As a starting point, the EIS that was developed in conjunction with the ORV Management Plan

¹⁴¹ Memorandum of Points and Authorities in Support of Plaintiff Cape Hatteras Access Preservation Alliance’s Motion for Summary Judgment at 5, 9, *Cape Hatteras Access Pres. All. v. Jewell*, 28 F. Supp. 3d 537 (E.D.N.C. 2014)(No. 2:13-CV-1-BO) (emphasis omitted) (citing 16 U.S.C. § 459).

¹⁴² Memorandum of Points and Authorities in Support of Plaintiff Cape Hatteras Access Preservation Alliance’s Motion for Summary Judgment at 5-6, *Cape Hatteras Access Pres. All. v. Jewell*, 28 F. Supp. 3d 537 (E.D.N.C. 2014)(No. 2:13-CV-1-BO)

¹⁴³ *Cape Hatteras Pres. All. v. Jewell*, 28 F. Supp. 3d at 545 (“[E]ntering judgment in favor of CHAPA on its Enabling Act claim would require the Court to override the broad discretion enjoyed by the NPS to implement its mandate to provide for an ORV management plan on the Seashore, which the Court finds no basis . . . to do . . .”).

¹⁴⁴ *Id.*

¹⁴⁵ *See Cape Hatteras Pres. All. v. Jewell*, 28 F. Supp. 3d at 545-552.

included six action alternatives: (1) “Alternative A – No Action: Continuation of Management under the Interim Protected Species Management Strategy”; (2) “Alternative B – No Action: Continuation of Terms of the Consent Decree Signed April 30, 2008, and amended June 4, 2009”; (3) “Alternative C – Seasonal Management”; (4) “Alternative D – Increased Predictability and Simplified Management”; (5) Alternative E – Variable Access and Maximum Management”, and; (6) “Alternative F, the NPS preferred alternative” which was selected as the action to be implemented.¹⁴⁶ With regard to the two “no action” alternatives, the first of which CHAPA had advocated for before in *CHAPA I & II*, the group argued that those alternatives were not “true no action alternatives” because a true no action alternative would have been no restrictions whatsoever on ORV use, and therefore NPS had failed to identify and assess a true no action alternative.¹⁴⁷ The court held that CHAPA had failed to demonstrate that the use of the

¹⁴⁶ U.S. DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE, RECORD OF DECISION: CAPE HATTERAS NATIONAL SEASHORE OFF-ROAD VEHICLE MANAGEMENT PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT at 8, 9, 11,15 (2010); Final Environmental Impact Statement and Cape Hatteras National Seashore Off-Road Vehicle Management Plan, 75 Fed. Reg. 219 (Nov. 15, 2010).

¹⁴⁷ Memorandum of Points and Authorities in Support of Plaintiff Cape Hatteras Access Preservation Alliance’s Motion for Summary Judgment at 11, *Cape Hatteras Access Pres. All. v. Jewell*, 28 F. Supp. 3d 537 (E.D.N.C. 2014)(No. 2:13-CV-1-BO) (“The FEIS’s choice of two no action alternatives that are not true no action alternatives and that already reflect movement toward the proposed action had the effect of impeding meaningful analysis and public comment, as well as obfuscating and grossly understating the impacts of the Final Plan and the other action

two no action alternatives was arbitrary and capricious; reasoning that the management plan at the time the NPS was performing the EIS was the consent decree (Alternative B) which “served as the appropriate baseline for comparison purposes.”¹⁴⁸ The decision to attack the use of the no action alternatives is in-line with CHAPA’s “free and open access” mission statement because, although they are called “no action alternatives,” those alternatives consider an ORV baseline that represents a regulated ORV access plan. What CHAPA was after was for the NPS, public commenters, and the EIS to consider and analyze, as the baseline alternative, an ORV access regime that would be unregulated, as it was before the interim strategy began in 1978. This theory, however, runs afoul a swell of case law standing for the proposition that it is not improper to examine no action alternatives that represent the “status quo” as the baseline.¹⁴⁹ As

alternatives on recreational, cultural, historic, and socioeconomic values and resources. NPS’s failure to identify and assess a true no action alternative in the FEIS is contrary to NEPA . . . regulations, and is arbitrary and capricious under the APA.”).

¹⁴⁸ *Cape Hatteras Pres. All. v. Jewell*, 28 F. Supp. 3d at 547-548 (also adding that “[t]he interim strategy was the status quo immediately prior to the implementation of the consent decree in 2008, and thus was a reasonable additional no action alternative as it represented the period of time just before the implementation of the consent decree.”).

¹⁴⁹ *E.g., Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (stating that under NEPA, “no action alternative[s] in an EIS allow [] policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action, . . . [and] is meant to provide a baseline against which the action alternative . . . is evaluated”); *Custer Cty. Action Ass’n v. Garvey*, 256 F.3d 1024, 1040 (10th Cir. 2001)

the court put it: “Though CHAPA has demonstrated that it is dissatisfied with NPS’s no alternative selections, it has simply failed to demonstrate that such selections were arbitrary and capricious.”¹⁵⁰

Next, CHAPA contends that the NPS failed to properly evaluate all of the significant social and economic effects of the ORV Management Plan.¹⁵¹ Specifically, CHAPA argued that because the NPS expanded the geographic area of the analysis to include larger towns that have little-to-no connection with ORV access and use, the NPS had masked the true and direct social and economic impacts of the plan on the local communities that would be most affected by the plan.¹⁵² This argument is compelling because the assessment of the social and economic impacts on locations within the Outer Banks, but outside the scope of CAHA, may have distorted the actual impacts of CAHA’s distinct economy. CAHA is more driven by recreational activities, such as ORV use, and less on an industry-based tourism economy, like in the northern areas of the Outer Banks. Nonetheless, the secondary nature of socioeconomic impacts under NEPA, the court’s finding that the NPS had taken the appropriate “hard-look,” and the finding that the

(“Council on Environmental Quality intended that agencies compare the potential impacts of the proposed . . . action to the known impacts of maintaining the status quo . . .”). *See also Mont. Wilderness Ass’n v. McAllister*, 460 Fed. App’x. 667, 671 (9th Cir. 2011) (upholding the use of two no action alternatives); *Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1453 (9th Cir. 1984).

¹⁵⁰ *Cape Hatteras Pres. All. v. Jewell*, 28 F. Supp. 3d at 548.

¹⁵¹ Memorandum of Points and Authorities in Support of Plaintiff Cape Hatteras Access Preservation Alliance’s Motion for Summary Judgment at 18-19, *Cape Hatteras Access Pres. All. v. Jewell*, 28 F. Supp. 3d 537 (E.D.N.C. 2014)(No. 2:13-CV-1-BO).

¹⁵² *Id.*

broadening of the scope of the assessment did not obfuscate the data moved the court to hold that NPS's conclusions were not arbitrary and capricious.¹⁵³

The next claim related to the EIS and ORV Management Plan's adoption of buffer distances to minimize the impact of human disturbance on nesting birds and chicks, among other species like sea turtles.¹⁵⁴ CHAPA's primary contention on this claim was that the NPS did not consider a reasonable range of buffer distances and instead used bias in favor of species protection over ORV use.¹⁵⁵ This was true, but not unlawful; the court discussed CAHA's enabling legislation which mandates that the NPS "implement no 'project or plan for the convenience of visitors . . . which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions' of the Seashore."¹⁵⁶ Thus, the NPS had acted reasonably in its consideration and execution of buffer distances and closures.

Lastly, CHAPA contended that the EIS was unsupported by sound scientific evidence and consequently did not satisfy the requirements of NEPA. More specifically, CHAPA argued that the NPS used inadequate scientific data when focusing on buffer zones created for the protection and preservation of wildlife.¹⁵⁷ The court contemplated that CHAPA's "challenge to the underlying science of the FEIS appea[red] to be a veiled attempt to argue that recreational interests, specifically ORV interests, should have been assigned more weight in NPS's

¹⁵³ *Cape Hatteras Pres. All. v. Jewell*, 28 F. Supp. 3d at 548-549.

¹⁵⁴ *Id.* at 550; *see also Cape Hatteras Access Pres. All.*, 731 F. Supp. 2d at 19.

¹⁵⁵ *Cape Hatteras Pres. All. v. Jewell*, 28 F. Supp. 3d at 550.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 551.

analysis.”¹⁵⁸ Further, the court concluded that the NPS’s decision and ORV Management Plan was “based on sound scientific data and that NEPA’s hard look requirement had been satisfied.”¹⁵⁹

In sum, the court closed the door on CHAPA’s attempt to strike down the ORV Management Plan, which called for more restrictions to ORV access on CAHA.¹⁶⁰ The decision not only had critical impacts on ORV access on CAHA, but it also endorses the proposition that the NPS Organic Act and CAHA’s enabling legislation favors the concerns of conservation and preservation, not enjoyment and recreation.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (relying primarily on: (1) the fact that CHAPA had failed to identify any study or data which contradicted or would invalidate the NPS’s conclusions; (2) deference afforded to agencies in evaluating scientific data within its technical expertise, and; (3) support by FWS, stating that the buffer distances represented their current understanding of the biological needs of the wintering piping plover and other at-risk species).

¹⁶⁰ *Id.* at 552 (“At bottom, CHAPA asks this Court to flyspeck NPS’s environmental analysis in order to identify any minor deficiency to propound a basis to reject the final rule, which the Court will not and cannot do. A holistic analysis of the process reveals that NPS engaged in a careful and detailed study of the Seashore, its wildlife and vegetation, and the visitors and residents who utilize the beaches to arrive at a plan which is based on the factors that Congress intended to be considered and was not preordained or a *fait accompli* It is clear from the record in this matter that NPS sufficiently considered all viewpoints when determining how to regulate ORV use on the Seashore”).

V. CONCLUSION

Although the NPS Organic Act's two-pronged purpose can function as a contradiction, various courts and the NPS have consistently interpreted the Organic Act as favoring preservation and conservation over recreation and enjoyment. This notion is sure to be frustrating to those "beach-buggy" associations and the like who favor minimally restricted or non-existent ORV regulation. However, it is important for recreationists not to take away from this interpretation that ORV access should be, or will be, banned in the future. One reason for this is because the interpretation of the NPS Organic Act in the context of ORV use have only been litigated in national seashores where the enabling legislation text plainly favors the interests of preservation, and only carves out an exception for uses relating to recreation and enjoyment. Therefore, the takeaway should not be that ORV access will always be secondary, nor should it be that an outright ban is impending. Rather, the takeaway should be that a one-size-fits-all approach to ORV access on all of our country's national seashores is not a feasible strategy, either legally or in public policy.

An outright ban on ORV access would not make sense in the case of a national seashore such as Padre Island or Assateague Island, where the enabling legislation promotes recreation, not as an exception, but as the general rule. Arguably, neither would an outright ban be feasible in a national seashore like CAHA, where ORV use is deeply imbedded in the cultural, recreational, historic, and economic constitution of the area. Such an approach would arguably supersede the purposes of the NPS Organic Act and CAHA's enabling legislation. The corollary to an outright ban: a "free and open access" policy, where there is absolutely no protection for the ecology and environment, would be improper for the same reasons as an outright ban, and because of the function of environmental legislation like NEPA and ESA.

Every national seashore is different: from their ecological composition, to the ways in which the seashore was and is used and enjoyed. This is exactly why each national seashore has different enabling legislation and different regulatory frameworks. As a result, each national seashore should be regulated commensurate with its distinct characteristics and its distinct legal frameworks. This is precisely the reason why the NPS is furnished with such great discretion; so that it can draw lines in the sand after determining which parts of the seashore have the capacity for ORV use, and which parts do not.¹⁶¹ This position is consistent with Justice Breyer's concurrence in *Clark*, and it is consistent with the two-pronged purpose of the NPS. What remains to be seen is whether the inclination toward preservation and conservation will persist in the upcoming years, or instead, if there will be a recreationally friendly policy change in how the NPS exercises their vast discretion on the issue of ORV access on national seashores.

¹⁶¹ For a visual on what this looks like, see House Committee on Natural Resources, *Press Release*, <https://naturalresources.house.gov/uploadedphotos/highresolution/d5804cb3-0849-4c08-993b-db6f63961a03.jpg> [<https://perma.cc/UWY4-4SU5>].