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Via Electronic Submittal

National Park Service
Jonathan B. Jarvis, Director
1849 C Street NW
Washington, DC 20240

**Re: Draft Director's Order #100: Resource Stewardship for the 21st
Century – Fight for Cape Lookout Comments**

Dear Director Jarvis:

I am writing on behalf of Fight for Cape Lookout (the “Coalition”), an entity with members consisting of small business owners, recreational fishermen, and concerned citizens, with respect to Draft Director’s Order #100 – Resource Stewardship for the 21 Century (the “Directive”) issued by the National Park Service (“NPS”). The Coalition supports NPS’s objective to preserve the natural and cultural resources of our National Park System; however, federal law also mandates that NPS manage our national parks to provide for the enjoyment of the public, which the Directive completely fails to address. For the reasons discussed below, the Directive is inconsistent with the National Park Service Organic Act, 16 U.S.C. §§ 1, *et seq.* (“Organic Act”) and NPS policy and should be rescinded.

A. The Directive fails to recognize NPS’s statutory directive and the national parks’ fundamental purpose to provide for the enjoyment of park resources and values by the people of the United States and is therefore inconsistent with the Organic Act.

The Organic Act established NPS “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.*” 16 U.S.C. § 1. NPS has recognized:

The fundamental purpose of all parks also includes providing for the enjoyment of park resources and values by the people of the United States. The enjoyment that is contemplated by the statute is broad; it is the enjoyment of all the people of the

National Park Service
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United States and includes enjoyment both by people who visit parks and by those who appreciate them from afar.

NPS Management Guidelines § 1.4.3 (2006). Thus, NPS is mandated not only to conserve the natural resources and values of our National Parks, but also to provide for recreation and enjoyment of these resources. For example, the Enabling Legislation for Cape Lookout National Seashore (the “Seashore”) provides that “[t]he Secretary shall administer the Cape Lookout National Seashore for the general purposes of public outdoor recreation, including conservation of natural features contributing to public enjoyment.” 16 U.S.C. § 459g-4(a). Consistent with the Organic Act, the Seashore (as well as other national parks) was established for the dual purpose of preserving natural and cultural resources as well as providing for public recreation. The Directive, however, completely ignores the statutory duty to provide for public recreation at our national parks.

It is important to also recognize that NPS’s “no impairment” clause does not prohibit *any* impacts to the national parks’ resources and values. Rather, NPS has “the discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of a park, so long as the impact does not constitute impairment of the affected resources and values.” NPS Management Policies § 1.4.3 (2006). “Whether an impact [will impair park resources and values] depends on the particular resources and values that would be affected; the severity, duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts.” NPS Management Guidelines § 1.4.5 (2006).

We recognize that both NPS and courts generally take the position that when the protection of park resources and values and recreation conflict, the protection of park resources and values prevail. *See* NPS Management Policies § 1.5 (2006). As contemplated by the Organic Act, however, in many cases these dual purposes may coexist. For example, NPS has previously determined that existing off-road vehicle (“ORV”) use at the Seashore based on *current* regulations will not impair the Seashore’s resources or values.

In addition to providing outstanding natural resources, the Seashore provides a wide variety of recreational activities, including, among others, beach recreation, fishing, boating, camping, shell collecting, surfing, hunting, hiking, and photography. For many visitors, ORV use and beach driving provide access to these activities. ORV use at the Seashore predates authorization of the Seashore in 1966. Beginning in the 1930s, ORVs were transported to the Seashore by ferries and were used to provide access to fishing and other recreational activities. ORV use continues to provide access to these recreational activities at the Seashore and is an important part of the local culture. Although NPS is currently evaluating ORV use at the Seashore, NPS has previously determined that ORV use at the Seashore based on *existing* regulations will not result in significant impacts to the human environment and will not impair the Seashore’s resources or values. Interim Management Plan, FONSI, p. 26 (“Implementing the

National Park Service
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preferred alternative will not violate any federal, state, or local environmental protection law. There will be no impairment of Seashore resources or values resulting from implementation of the preferred alternative.”).

Because the Directive fails to recognize and consider the national parks’ fundamental purpose of providing for the enjoyment of park resources and values, it is inconsistent with the Organic Act and enabling legislation of individual parks and should be rescinded.

B. The “precautionary principle” proposed by the Directive fails to comply with NPS’s policy to use the best available information in making decisions on how to protect national park resources and values.

In the Directive, NPS proposes a “precautionary principle” to guide resource management. According to NPS:

The **Precautionary Principle** requires that, when activity raises *plausible or probable threats* of harm to park resources and/or human health, management should take *anticipatory action* even where there is *uncertainty*. When such uncertainty exists, NPS managers will take actions that *err on the side of caution* to protect natural and cultural resources in accordance with section 7 of this Order. Any decision made using the precautionary principle should take into account: (1) the threat of harm to park resources or public health; (2) the level of scientific uncertainty; and (3) the preventative, precautionary action.

Directive, § 6.2 (emphasis added). NPS further states that even “[i]f existing or future conditions are likely to result in unacceptable impacts to or impairment of park resources, managers should (1) consider action even if all cause-and-effect relationships are not fully established scientifically, and (2) modify the action as new information becomes available.” Directive, § 6.2.

The precautionary principle is inconsistent with NPS’s mandate to use the best *available* science in making decisions related to resource protection. “Decision-makers and planners will use the best *available* scientific and technical information and scholarly analysis to identify appropriate management actions for protection and use of park resources.” NPS Management Guidelines § 2.1.2 (2006) (emphasis added). With respect to natural resource management, NPS “will integrate the best *available* science and prescribe activities such as inventories, research, monitoring, restoration, mitigation, protection, education, and management of resource uses.” NPS Management Guidelines § 4.1.1 (2006) (emphasis added).

In making resource protection decisions, NPS must base its decisions on the best scientific data *available*, not the best scientific data that may be available in the future. *See Building Indus. Ass’n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246 (D.C.Cir. 2001) (The standard under the Endangered Species Act is that “the Service must utilize the ‘best scientific . .

National Park Service
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. data *available*,’ not the best scientific data *possible*.”). NPS is required to make decisions based on the best scientific data *available*, not data that may or may not be available in the future. Therefore, the Directive is inconsistent with NPS policy and should be rescinded.

C. The Directive fails to comply with NPS’s policy to fully understand and consider the public’s interests in our national parks.

In general, public participation is a key element to ensure that NPS fully understands and considers the public’s interests in our national parks.

Public participation in planning and decision-making will ensure that the Service fully understands and considers the public’s interests in the parks, which are part of the public’s national heritage, cultural traditions, and community surroundings. The Service will actively seek out and consult with existing and potential visitors, neighbors, American Indians, other people with traditional cultural ties to park lands, scientists and scholars, concessioners, cooperating associations, gateway communities, other partners, and government agencies. The Service will work cooperatively with others to improve the condition of parks; to enhance public service; and to integrate parks into sustainable ecological, cultural, and socioeconomic systems.

NPS Management Guidelines § 2.1.3 (2006).

To understand the long-term public interest, NPS will consider “both historical and current public values and perspectives with respect to parks, as well as the NPS mandate to provide enjoyment for future generations.” Directive, § 7.2. To achieve this objective, NPS will, among other things, “[d]evelop and maintain broad and inclusive public engagement strategies to identify and understand long-term public interest and foster “co-stewardship” of natural and cultural resources through sustained and committed collaborations with governmental partners, federally recognized and non-federally recognized Tribes and other indigenous peoples and other stakeholders.” *Id.*

Although the Directive does not identify “other stakeholders,” visitors to our national parks are an essential component to NPS’s management of our national parks. The Directive fails to address how NPS will understand and consider the public’s interests in our national parks, including interests related to recreation, and is therefore inconsistent with NPS policy.

We appreciate this opportunity to provide comments and respectfully request that NPS either rescind the Directive or develop a policy that is consistent with applicable laws and policies.

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Jonathan B. Jarvis, Director
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Washington, DC 20240

Sincerely,

KILPATRICK TOWNSEND & STOCKTON LLP



Todd S. Roessler

cc: The Honorable Richard Burr
The Honorable Thom Tillis
The Honorable Walter B. Jones
The Honorable Pat McCrory
The Honorable Norman W. Sanderson, North Carolina Senate
The Honorable Pat McElraft, North Carolina House of Representatives
Secretary Donald R. van der Vaart, NCDEQ
Director Braxton Davis, NCDCM