

**United States District Court
for the District of Columbia**

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PUBLIC EMPLOYEES FOR)	
ENVIRONMENTAL RESPONSIBILITY,)	
)	
Plaintiff,)	
)	
v.)	Case No. 10-cv-01274 (ESH)
)	
U.S. DEPARTMENT OF THE INTERIOR et al.,)	
)	
Defendants.)	
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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Fed.R.Civ.P., Plaintiff Public Employees for Environmental Responsibility (PEER) hereby moves for summary judgment in this case. Plaintiff contends that it is entitled to judgment as a matter of law on both Counts of its Complaint. This motion is accompanied by a Memorandum of Points and Authorities, two Declarations from PEER members, and a proposed order.

This case is one in which judicial review is based on the administrative record, and is thus subject to amended Local Rule 7(h)(2). A statement of facts with references to the administrative record is included within the Memorandum of Points and Authorities.

For the reasons detailed in the accompanying Memorandum of Points and Authorities, Plaintiff's Motion for Summary Judgment should be granted.

No. 10-cv-01274 (ESH)

United States District Court
for the
District of Columbia Circuit

PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

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March 21, 2011

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IN THE UNITED STATES DISTRICT COURT
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This case concerns Defendants’ decision on a petition for rulemaking seeking federal regulations governing hunting in the Mojave National Preserve (Mojave Preserve), which was submitted by Plaintiff Public Employees for Environmental Responsibility (PEER) and other organizations in 2002. The petition sought specific regulations governing hunting in the Mojave Preserve, which is under the authority of Defendant National Park Service (NPS). Petitioners contended that such regulations were necessary to bring the NPS into compliance with the Mojave Preserve’s General Management Plan (GMP) and Environmental Impact Statement (EIS), the Endangered Species Act (ESA), the ESA 1994 Recovery Plan for the threatened desert tortoise, NPS Management Policies and the ESA Biological Opinion (BO) for the GMP.

The GMP/EIS, which is still in force today, committed NPS to adopting special hunting regulations which would restrict hunting on the Mojave Preserve beyond what is required by state hunting regulations. Specifically, the GMP/EIS determined to restrict hunting to certain

species and seasons in order to protect the desert tortoise and other wildlife and park values, and to enhance visitor safety and the visitor experience. The BO completed by the Department of Interior's (DOI) Fish and Wildlife Service (FWS) under the ESA found that the GMP was not likely to jeopardize the desert tortoise, and was therefore in compliance with the ESA, in part based upon NPS's commitment to adopt these hunting regulations.

Plaintiff's petition sought hunting regulations in conformance with those set out in the GMP/EIS. In correspondence concerning Plaintiff's petition over several years, NPS repeatedly stated that it would be adopting special hunting regulations as provided in the GMP. Plaintiff originally filed this case to challenge Defendants' unreasonable delay in responding to its petition. The same day Defendants filed their Answer to the original complaint, NPS denied Plaintiff's petition, and for the first time determined *not* to adopt special hunting regulations. NPS's decision agreed that it had the authority to promulgate special hunting regulations. It acknowledged NPS's commitment to do so in the GMP and that the BO on the GMP assumed that hunting regulations would be adopted. It also acknowledged that NPS Management Policies require special hunting regulations for units of the NPS where hunting is allowed. The Petition Decision nevertheless concluded that such regulations were not warranted "at this time" and the NPS Director waived NPS Management Policies in order to decline to adopt special hunting regulations for the Mojave Preserve.

Plaintiff filed an amended and supplemental complaint claiming that NPS's decision on its petition is arbitrary and capricious under the Administrative Procedure Act (APA) because its reversal of its previous decision to adopt special hunting regulations is not adequately explained or supported by competent evidence in the record. Plaintiff also claimed that Defendants' failure

to consider the environmental effects of its decision not to adopt special hunting regulations in a supplemental EIS (SEIS) violates the National Environmental Policy Act (NEPA).

II. JURISDICTION AND STANDING

This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question) and the APA, 5 U.S.C. §§ 701-706, and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201, 2202. The United States has waived sovereign immunity with respect to the claims set forth herein in 5 U.S.C. § 702. Venue is properly vested in this Court under 28 U.S.C. § 1391(e).

For the reasons set forth in the Complaint and the Declarations filed herewith, Plaintiff has standing to bring this case. The three basic elements of standing are: 1) injury in fact which is concrete, particularized, actual and imminent (not conjectural or hypothetical); 2) that is fairly traceable to Defendants' actions; and 3) which is likely to be redressed by a favorable judicial decision. *E.g. Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009); *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 180-181 (2000).

Plaintiff PEER is a non-profit organization with tax-exempt status dedicated to research, public education and advocacy concerning the activities and operations of the federal government. PEER, along with other organizations, filed the petition for rulemaking which is the subject of this case. PEER has a field office in California and a southwest regional field office in Arizona. PEER has members who regularly visit the Mojave Preserve and are harmed by Defendants' failure to adopt special hunting regulations. In particular, Howard Wilshire, a member of PEER's Board of Directors who lives in California, is a retired geologist who has spent many years both working and vacationing at the Mojave Preserve. He worked with biologists in their efforts to protect the desert tortoise. Wilshire Decl., Ex. 1 hereto, ¶ 6. He

continues to enjoy the Mojave Preserve for both research interests and personal enjoyment, and plans to return there regularly in the future, and specifically in late April of this year and again during Thanksgiving, 2011. *Id.*, ¶¶ 7, 8. Mr. Wilshire avers that hunting and its impacts, including the sound of guns and damage to trees, diminishes his enjoyment of the Mojave Preserve. He is also concerned that the absence of special hunting regulations will harm the desert tortoise, other wildlife and wildlife habitat, and the peaceful enjoyment of the Preserve by himself and other visitors. *Id.*, ¶¶ 9, 11, 12. The aesthetic enjoyment and research interest he derives from the Mojave preserve are diminished by NPS's failure to promulgate special hunting regulations. *Id.*, ¶ 12.

Kevin Emmerich is a member of PEER who resides in Nevada. He has lived in the Mojave Desert for 20 years. Emmerich Decl., Ex. 2 hereto, ¶¶ 2, 5. He worked for NPS from 1985 to 2002, primarily as a Park Ranger. He has worked on desert tortoise monitoring projects, including in the Mojave Preserve. *Id.*, ¶¶ 6, 8. He has been visiting the area that is now the Mojave Preserve since 1981 and has hiked and backpacked in many of its regions. He owns land within the boundaries of the Mojave Preserve, where he camps frequently. *Id.* ¶ 9. He will be visiting the Mojave Preserve again next month and plans to continue to visit the area long into the future. He enjoys photographing the desert tortoise and other wildlife. *Id.* ¶ 11. He has personally experienced adverse impacts from varmint hunting (which would be largely prohibited if NPS adopted the special hunting regulations contained in the GMP and sought in PEER's petition), including trash and bullet shells and vehicle tracks associated with hunting camps. Trash and animal carcasses at these camps may attract ravens, which feed on the desert tortoise. Unlimited hunting of "varmint" like jackrabbits could cause predators to turn more to the desert tortoise. *Id.*, ¶¶ 12, 13. Off-road driving by hunters destroys habitat, can directly kill

desert tortoises, plants and other wildlife and proliferates the spread of invasive plants. *Id.* ¶ 13. Thus, his enjoyment of the Preserve is diminished by the lack of special hunting regulations, and their adoption would make his visits safer and more aesthetically pleasing, and allow him to view more wildlife. *Id.*, ¶ 16.

Plaintiff alleged in its petition and in its Complaint in this case that the absence of special hunting regulations at the Mojave Preserve harms the ecosystems and wildlife of the Preserve in general and the desert tortoise in particular. For the purpose of evaluating standing, a court must “assume that on the merits the plaintiffs would be successful in their claims.” *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *Public Citizen v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007) (citation omitted). *See also Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008) (citations omitted). Therefore, the Court must assume that the absence of the special hunting regulations sought in this case harms the interests of PEER members as described above, *i.e.* that PEER members are suffering injury in fact. That injury is directly traceable to Defendants’ action in denying Plaintiff’s petition and declining to adopt special hunting regulations for the Mojave Preserve. That injury is redressable by this Court, which could, pursuant to the APA, set aside the Defendants’ decision to deny Plaintiff’s petition and to decline to adopt special hunting regulations.

With regard to “procedural claims” such as those under NEPA, a Plaintiff need not:

meet[] all the normal standards for redressability and immediacy [A plaintiff] has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.

Massachusetts v. EPA, 549 U.S. 497, 517-18 (2007) (citation omitted).

[P]rocedural rights are special. This is because they are prophylactic in nature. Such requirements reflect Congress's reasonable judgment that a government decision will better protect particular interests with the specified procedures in place.

Center for Law & Education v. Dep't of Education, 396 F.3d 1152, 1166 (D.C. Cir. 2005) (Edwards, J. concurring) (citation and internal quotation marks omitted). Thus, injury under NEPA is established if “plaintiffs suffer harm from the agency’s failure to follow NEPA procedures, compliance with which might have changed the agency’s mind” *Lemon v. Geren*, 514 F.3d 1312, 1314-15 (D.C. Cir. 2008) (citations omitted).¹

NEPA’s procedural requirements are designed to protect the interests of PEER and its members (as described in the attached Declarations), by requiring that NPS consider the effects of its decision not to adopt special hunting regulations on the ecosystems and wildlife of the Mojave Preserve, as well as impacts on visitor safety and experience. *See City of Dania Beach v. Fed. Aviation Admin.*, 485 F.3d 1181, 1185 (D.C. Cir. 2007); *Lemon*, 514 F.3d at 1314-15. Plaintiffs need not establish that the lack of special hunting regulations will surely harm the environment, but only that in making its decision without following NEPA procedures, NPS created an increased risk of environmental harm. *Florida Audubon Soc’y*, 94 F.3d at 667; *see also Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 92 (D.D.C. 2006).

The fact that the absence of special hunting regulations creates at the least an increased risk of environmental harm is established by the findings of Defendants themselves, *i.e.* DOI and its sub-agencies NPS and FWS. In its GMP/EIS for the Mojave Preserve, NPS found that special hunting regulations should be adopted, based on FWS’ findings in its 1994 Desert Tortoise Recovery Plan that such regulations would minimize desert tortoise mortality associated with hunting. NPS also found that the special hunting regulations would be beneficial to other native wildlife and would enhance the non-hunter visitor experience. *See, e.g.* A1, 151-152, 545-46.²

¹ *See also Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 668 (D.C. Cir. 1996) (procedural injuries are “easily redressable, as a court may order the agency to undertake the procedure”).

² The Administrative Record was submitted to the Court in four parts. Docket entry 19-1 is the index to the record. Docket entries 19-2, 19-2 and 19-4 are sequential portions of the administrative record. The citations herein are to A1, A2, or A3, referring to the three portions of the record that are Docket Nos. 19-2 (A1), 19-

FWS's BO on the GMP noted the benefits to the desert tortoise from the special hunting regulations provided in the GMP, and concluded that there would not be jeopardy to the continued existence of the species in part based on NPS's stated intention to adopt special hunting regulations. A1, 391, 393-94, 404.

As Plaintiff argues below, the decision denying its petition and declining to adopt special hunting regulations was not based on any in-depth review of scientific literature, or in fact any scientific evidence or quality environmental information at all. The preparation of an SEIS would require NPS to secure "high quality" environmental information and "accurate scientific analysis" to inform its decision, as well as subjecting that decision to expert agency comments and public scrutiny. *See* 40 C.F.R. §1500.1(b). Compliance with the requirements of NEPA and its implementing regulations would lead NPS to at least a better-informed, and very possibly a different decision concerning special hunting regulations on the Mojave Preserve. The Court can redress the injury stemming from the lack of the type of consideration required by NEPA by ordering NPS to produce an SEIS with regard to its decision to abandon its earlier commitment to adopt special hunting regulations for the Mojave Preserve.

III. STANDARD OF REVIEW

Summary Judgment Standard. Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986); *Waterhouse v. District of Columbia*, 298 F.3d 989, 991 (D.C. Cir. 2002) (citations omitted).

In cases like this one where review is on an administrative record, there are no facts for the court to determine, and summary judgment is the proper mechanism for deciding whether the

2 (A2) and 19-4 (A3) The page numbers following those section numbers are to the pages the Court has marked on the top of the documents.

agency action is supported by the administrative record and consistent with the APA standard of review. *Alliance to Save the Mattaponi v. United States Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 127 (D.D.C. 2009) (citations omitted). “The function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” *Id.*, 606 F. Supp. at 128, citing *Occidental Eng'g Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769-70 (9th Cir. 1985) and *Nw. Motorcycle Ass'n v. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir.1994).

B. Administrative Procedure Act Standard. Defendants’ decision to deny Plaintiff’s petition and not to adopt special hunting regulations for the Mojave Preserve is final agency action reviewed under the APA. The APA requires that the Court “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (2005). Review is to be based on “the full administrative record that was before the agency at the time it made its decision.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The court may only consider the reasons relied upon by the agency and may not consider *post hoc* rationalizations by government counsel. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983) (hereinafter “*State Farm*”). See also *Chamber of Commerce v. Securities & Exchange Comm'n.*, 412 F.3d 133, 143 (D.C. Cir. 2005).

An agency decision is arbitrary and capricious under the APA if it violates the governing legal standard or if it has “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

expertise.” *State Farm*, 463 U.S. at 43. The “agency must examine the relevant data and articulate a satisfactory explanation for its action.” *Id.*

Claims based on NEPA are reviewed under the APA. Review of a challenge to a failure to issue an SEIS is controlled by the arbitrary and capricious standard of the APA. 5 U.S.C. § 706(2)(A); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 375-76, (1989). Courts are to “carefully review[] the record and satisfy[] themselves that the agency has made a reasoned decision based on its evaluation of the significance -- or lack of significance -- of the new information.” *Id.* at 378 (internal quotation marks omitted).

IV. STATUTORY AND REGULATORY BACKGROUND

The National Environmental Policy Act. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. Congress passed NEPA “in order to insure that all agencies of the federal government consider the environmental effects of proposed actions.” *Sierra Club v. Watkins*, 808 F. Supp. 852, 858 (D.D.C. 1991). Its purposes are to “help public officials make decisions that are based on understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment,” as well as to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b)-(c); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). *See also, Oceana v. Locke*, 725 F. Supp. 2d 46, 50 (D.D.C. 2010) (NEPA “has twin aims of placing upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action and ensuring that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process”), *citing Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S.

87, 97 (1983) (*quoting Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978) (internal quotation marks omitted).

All federal agencies are required to include an EIS for every “recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332 (2)(C). The EIS must fully analyze “the environmental impact of the proposed action” and its alternatives. *Id.*; 40 C.F.R. § 1502.14. NEPA also requires that all federal agencies “study, develop, and describe appropriate alternatives to the recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). Under NEPA, if “any significant environmental impact *might* result” from an agency's actions, an EIS is required. *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339 (D.C. Cir. 2002) (second emphasis added).

An important factor in determining whether a federal action may have a significant impact on the environment is whether the proposed action *may* adversely affect species listed as endangered or threatened under the Endangered Species Act (16 U.S.C. § 1536). 40 C.F.R. § 1508.27(b)(9). *See Pacific Shores Subdivision California Water District v. United States Army Corps of Eng’rs*, 538 F. Supp. 2d 242, 247, 261 (D.D.C. 2008); *Klamath-Siskiyou Wildlands Ctr. v. United States Forest Serv.*, 373 F.Supp.2d 1069, 1080-81 (E.D. Cal. 2004).

An EIS must be supplemented when changes in the project or new information or circumstances indicate environmental impacts not previously reviewed. *Marsh*, 490 U.S. at 371; 40 C.F.R. § 1502.9(c).

V. LOCAL RULE 7(h) STATEMENT OF FACTS

1. On October 31, 1994, Congress enacted the California Desert Protection Act (CDPA). 16 U.S.C. § 410aaa *et seq.*, reproduced in the Administrative Record at A1, 534-543. The CDPA designated a 1,419,000-acre Mojave National Preserve, comprised largely of federal lands formerly administered by the Bureau of Land Management. Congress directed that the Secretary administer the Preserve as a unit of the National Park System. Sec. 506(a), CDPA, 16 U.S.C. § 410aaa-46(a), A1, 536.

2. As a unit of the National Park System, the Mojave Preserve is to be managed in accordance with the NPS Organic Act of 1916, 16 U.S.C. §1, which provides that the primary purpose of park units is:

... to conserve the scenery and the natural and historic objects and the wildlife 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.

3. Hunting is not permitted in national park units unless Congress makes an exception to that general rule when authorizing the particular unit. National Park System units which allow hunting are usually called preserves rather than parks.

4. The CDPA contains the following provision regarding hunting:

Sec. 506. Administration of Lands.

....

- (b) The Secretary shall permit hunting...on lands and waters within the preserve designated by this Act in accordance with applicable Federal and State laws except that the Secretary may designate areas where, and establish periods when, no hunting...will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law. Except in emergencies, regulations closing areas to hunting...pursuant to this subsection shall be put into effect only after consultation with the appropriate State agency having responsibility for fish and wildlife.

16 U.S.C. § 410aaa-46, A1, 536.

5. On December 28, 2000, NPS announced the adoption of new Management Policies, known as Management Policies 2001, which were modified and re-published in 2006. (Citations herein are to the 2006 Management Policies). The Policies require that NPS publish special regulations to govern hunting in all areas of the National Park System (except Alaska) where hunting is authorized in law as either a mandated or discretionary activity. Management Policies 8.2.2.6, *available at* <https://www.nps.gov/policy/mp2006.pdf>.³

6. NPS Management Policies also direct that when harvesting of animals (*e.g.*, by hunting) is allowed in a park, NPS will allow harvesting only when “the Service has determined that the harvesting will not unacceptably impact park resources or natural processes, including the natural distributions, densities, age-class distribution, and behavior of ...” harvested species or of native species that use or are used by the harvested species. Management Policies 4.4.3.

7. The Mojave population of the desert tortoise has been listed as threatened under the ESA since 1990. 55 Fed. Reg. 12178 (Oct. 13, 1990). In 1994, FWS designated critical habitat for the desert tortoise. 59 Fed. Reg. 5820 (Feb. 8, 1994).

8. Approximately one half of the land area of the Mojave Preserve is designated critical habitat for the desert tortoise. A1, 467-68.

9. In June 1994, as required by the ESA, 16 U.S.C. §1533(f), the FWS adopted a Recovery Plan for the desert tortoise (hereinafter “1994 Recovery Plan”). A1, 1-354.

10. The 1994 Recovery Plan recommended that in desert tortoise recovery areas, hunting be prohibited except for hunting of big game and upland game birds from September through February. A1, 72.

³ Units of the National Park System in Alaska are governed instead by the Alaska National Interest Lands Conservation Act and its implementing regulations. *Id.*

11. In its critical habitat determination, FWS declared that the 1994 Recovery Plan “represents the best available biological information on the conditions needed to bring the Mojave population of the desert tortoise to the point where listing under the [ESA] is no longer necessary (i.e. recovery).” 59 Fed. Reg. at 5823.

12. On July 6, 2001, FWS issued a BO for the Mojave EIS/GMP. A1, 355-413. The BO concluded that the “proposed action,” *i.e.* the GMP, was not likely to jeopardize the continued existence of the desert tortoise. A1, 403. This “no jeopardy” conclusion meant that the GMP was in compliance with the ESA. The “no jeopardy” conclusion was based in part on the understanding that:

[t]he NPS will work with the California Department of Fish and Game to limit hunting in the Mojave National Preserve to big game and upland game bird species during the normal hunting seasons. This action, combined with existing policy on no target shooting, would eliminate the discharge of firearms when desert tortoises are active in the spring.

A1, 362. The BO further stated that:

In accordance with NPS regulations at 36 C.F.R., the discharge of firearms (including target shooting or random plinking) is prohibited throughout the Mojave National Preserve, except for hunting of upland game birds and big game during the seasons designated for these species by the California Department of Fish and Game.

A1, 379.

13. The BO noted the benefits to the desert tortoise from the hunting restrictions promised by the NPS, including reducing the likelihood of mortality of desert tortoises from shooting, A1, 391, and that the elimination of small game hunting could reduce the availability of carcasses upon which common ravens feed, and therefore the prevalence of common ravens at the Mojave Preserve and their predation of desert tortoises. A1, 393-94.

14. The BO concluded that permitted hunting under NPS's proposed restrictions was "unlikely to substantially affect the desert tortoise" because the hunting season would be restricted to avoid the desert tortoise's spring activity period. A1, 399.

15. The BO provided an Incidental Take Statement which exempted from the "take" prohibitions of the ESA various activities, including hunting, permitted in the GMP, finding that: "Because of the measures that NPS proposed as part of its action to minimize the mortality of desert tortoises . . . we anticipate that . . . hunting . . . [is] likely to result in few mortalities or injuries to desert tortoises." A1, 404. The BO further provided that NPS was to contact FWS immediately if a desert tortoise was killed or injured, but that permitted activities including hunting could continue during a review of the incident "provided that the NPS's proposed protective measures and any appropriate terms and conditions of this biological opinion have been and continue to be fully implemented." A1, 404.

16. While the specific "Reasonable and Prudent Measures" and "Terms and Conditions" in the BO did not include the hunting restrictions, the BO's finding of no jeopardy is premised upon the protective actions the NPS represented that it would take in the GMP. In addition to the references to the hunting restrictions set out above, the BO states that:

The Service's evaluation of the effects of the proposed action includes consideration of the measures developed by the NPS and repeated in the Description of the Proposed Action portion of this biological opinion, to minimize the adverse effects of [various activities including hunting] on the desert tortoise. . . . *These reasonable and prudent measures are intended to clarify or supplement the protective measures that were proposed by the NPS as part of the proposed action.*

A1, 405 (emphasis added).

17. On September 7, 2001, the Superintendent of the Mojave Preserve issued a memo to the FWS requesting a minor amendment in the BO to include small game hunting as an activity covered by the BO's Incidental Take Statement. A1, 556.

18. On September 19, 2001, the FWS responded, approving the request for amendment. A1, 556. As a result, the GMP/EIS was amended to reflect this change.

19. On September 21, 2001, the NPS Regional Director responsible for the Mojave Preserve signed the Record of Decision (ROD) for the Mojave Abbreviated Final EIS/GMP.⁴ (The ROD is reproduced at A1, 544-557). The ROD noted the changes to the hunting proposal, stating the regulations would be changed to add cottontails and jackrabbits to the list of species that could be hunted, and to allow hunting only September through January, "in keeping with the goals of the Desert Tortoise Recovery Plan." A1, 545.

20. The Abbreviated Final GMP/EIS went beyond the Recovery Plan in proposing to restrict hunting in the entire Mojave Preserve, not just the desert tortoise recovery areas or the critical habitat area. A1, 545.

21. In April 2002, the GMP was published. (The GMP is reproduced at A1, 420-583).

The GMP states:

The National Park Service will work with the California Department of Fish and Game to limit hunting in Mojave to big game and upland game bird species during their normal state seasons and cottontails and jackrabbits from September through January. This action, combined with the existing policy on no target shooting will eliminate the discharge of firearms during the active tortoise period in the spring.

A1, 470; *see also* A1, 446. Under "Plan Actions," the GMP states with while the CDPA provided for hunting at the Mojave Preserve,

⁴ The Final EIS was "Abbreviated" because it contained only contained changes from the draft EIS and incorporated by reference the draft EIS.

Congress also clearly provided the NPS with a mandate in our 1916 Organic Act, to preserve wildlife, and other resources within park units. They also reiterated in the CDPA our mandate to preserve wildlife by affording the new Preserve full recognition and statutory protection to establish periods when, no hunting, fishing, or trapping will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law.

Therefore, it is appropriate to recognize public safety and resource protection issues and to balance the mandate from the CDPA with the NPS resource preservation and visitor enjoyment mission. *The goal is to provide better protection to desert tortoise and other park resources and to enhance visitor safety. It is also to strike a balance with the mission of the park, which is preservation of resources. The NPS goal is to provide opportunities for hunters to take game species during the fall and winter, while also providing a park experience with no hunting or shooting during the spring and summer.*

....

In accordance with the Desert Tortoise Recovery Plan, hunting would be limited to upland game birds (mourning dove, quail, chukar), cottontails, jackrabbits, and big game (deer and bighorn sheep) during their designated CDF&G seasons. Cottontails and jackrabbits may be hunted only from September through January.

A1, 505 (emphasis added).

22. Under the game laws of the State of California, persons with licenses from the State may take animals traditionally classed as game during specified seasons, but may also take nongame animals and “varmints” year-round with few, if any, restrictions. Varmints include skunks, badgers, coyotes and the like. *See* A1, 446.

23. The NPS never promulgated hunting regulations as promised in the Final EIS/GMP, thus allowing hunting on the Mojave Preserve to continue as permitted by the game laws of the State of California.

24. Plaintiff and other interested parties (“petitioners”) jointly submitted a petition for rulemaking dated June 20, 2002 to the Secretary of the Interior and the Director of the NPS. A1, 590-614.

25. The petition sought specific regulations governing hunting in the Mojave Preserve. Petitioners contended that such regulations were necessary to bring the NPS into compliance

with the Preserve's GMP, the 1994 Recovery Plan, NPS Management Policies and the BO for the GMP. A1, 592.

26. On October 29, 2002, Mr. Jay Tutchton of the Earthjustice Legal Defense Fund submitted a letter on behalf of petitioners seeking acknowledgement of receipt of the petition for rulemaking. A2, 1.

27. By letter dated November 27, 2002, the then NPS Regional Director Jonathan Jarvis, on behalf of the Secretary of the Interior, acknowledged receipt of Plaintiff's petition for rulemaking. A2, 2. The letter stated that NPS would seek federal regulation of hunting as sought by the petition only if a process involving potential amendments to state hunting regulations was unsuccessful. A2, 2.

28. On January 24, 2003, Mr. Tutchton again wrote to the Regional Director, requesting that the petition be published in the Federal Register, as authorized by 43 C.F.R. § 14.4, and that the agency otherwise respond to the petition. A2, 3-4. Mr. Tutchon pointed out that federal hunting regulations were legally required regardless of the existence or content of state hunting regulations. A2, 3-4.

29. Plaintiff PEER, in a letter dated May 12, 2003, referenced the petition and the letter from Tutchon regarding the petition, and requested documents under FOIA regarding correspondence between DOI, NPS, and the California Department of Fish and Game concerning hunting on the Mojave Preserve. A2, 5-6.

30. The NPS Regional Director, by letter dated September 22, 2003, stated to PEER that it had:

correctly identified the Management Policies (8.2.2.6) that we [NPS] follow. Rest assured we will follow the General Management Plan for Mojave National Preserve, in which you indicate concerns about our moving ahead with a

regulation on hunting. Timing is everything – for our staff workload and our ability to management [sic] a public process.

A2, 10.

31. All petitioners, by letter dated September 26, 2003 to the Secretary of the Interior, again requested prompt consideration of the petition, noting that it had been 15 months since it had been filed. A2, 11-12. Petitioners alleged that a private individual had obtained a copy of the petition and communicated his opposition to it to then DOI Deputy Secretary Paul Hoffman. Petitioners asked that the impropriety be addressed by making the petition available for comment by all members of the public by publication in the Federal Register. A2, 11.

32. In a letter dated April 7, 2004, Craig Manson, then Assistant Secretary for Fish and Wildlife and Parks, stated that the petition for rulemaking would not be published in the Federal Register and that “[t]he park fully intends to pursue promulgation of federal regulations” A2, 13-15 (emphasis added). The letter further stated that the content of the federal regulations would be dependent on the actions of the State Commission. Assistant Secretary Manson continued, “[t]he promulgation of federal regulations with regard to species and seasons for hunting, therefore, is *temporarily* on hold in anticipation of a response from the State.” A2, 14 (emphasis added).

33. Plaintiff sent a letter dated May 13, 2009 to current Secretary of the Interior Kenneth Salazar recounting the correspondence between the agency and petitioners. A3, 20-21. Plaintiff again requested a prompt and substantive response to the petition from the agency. Plaintiff received no response to this letter.

34. On July 28, 2010, Plaintiff filed its original Complaint in this action, alleging unreasonable delay in responding to its petition. On October 14, 2010, the same day that Defendants filed their Answer to the Complaint, Defendant NPS denied Plaintiff’s petition in a

letter to PEER's Executive Director from NPS Director Jonathan Jarvis (hereinafter "Petition Decision"). A3, 149-154.

35. In the Petition Decision, A3, 149-154, NPS acknowledged that it had authority to promulgate special regulations restricting hunting in the Mojave Preserve, and that the GMP provided that NPS would seek special regulations for hunting, relying on the 1994 Recovery Plan. The response also acknowledged that the BO on the GMP assumed that hunting regulations would be adopted, and also that NPS Management Policies require special hunting regulations for units of the NPS where hunting is allowed. The Petition Decision nevertheless concluded that such regulations were not warranted "at this time," and formally waived NPS Management Policies in order to deny Plaintiff's petition. NPS's Petition Decision repeatedly claimed that it was NPS's "experience" that hunting in accordance with California game laws without further restriction had not actually harmed the desert tortoise. NPS also claimed "lack of evidence" of harm. Yet, the letter provides only anecdotal evidence, if that, to support its conclusions, and provides no citations to any studies or scientific evidence.

36. The Petition Decision repeatedly relies on a 2008 Draft Revised Recovery Plan for the desert tortoise. A3, 151-52. This Plan is in draft form and has not been adopted. A2, 19. The Draft Revised Recovery Plan acknowledges the threat to the desert tortoise from hunting (A2, 98) and from predation by ravens (A2, 103). It notes that "little additional information regarding maiming and killing of desert tortoises [by gunshot] has been obtained since the 1994 Recovery Plan," A2, 124, and acknowledges that there "are no data correlating [non-motorized recreation including hunting] with impacts to the desert tortoise" and that "very few studies have been conducted to document the effects of non-motorized activities [including hunting] to the desert tortoise." A2, 166.

37. On September 30, 2010, the FWS published the “Mojave Population of the Desert Tortoise (*Gopherus agassizii*) 5-Year Review: Summary and Evaluation” (hereinafter “2010 5-Year Review”), A3, 26-149. In it, FWS repeatedly states that there is insufficient data to quantify or evaluate the severity of various threats to the desert tortoise. *E.g.* A3, 47, 73, 78, 91, 92, 106, 108.

38. The 2010 5-Year Review discusses deliberate maiming and killing by humans as among the non-quantifiable threats to the desert tortoise. It cites research finding that a significant percentage of carcasses collected at California desert sites showed evidence of gunshots. A3, 73. It notes that little additional information on this subject has been obtained since the 1994 Recovery Plan. A3, 73, 74. It also notes the significant threat to the desert tortoise from predation by ravens. A3, 77-79, 104. With regard to non-motorized recreation, including hunting, it concluded that while there are no data correlating these activities with impacts to the desert tortoise, it may be inferred that they bring with them threats to the tortoise such as handling and disturbance of tortoises, increased collection, road kill and vandalism, and increased raven populations. A3, 91.

39. The 2010 5-Year Review confirms that the same threats identified in the original rule listing the tortoise under the ESA continue to exist today, A3, 107, and that “little information since 1994 contradicts” the recommended actions in the 1994 Recovery Plan. A3, 110.

40. Defendants did not conduct any environmental review under NEPA, such as an SEIS, when they determined to abandon the commitment in the GMP to adopt special hunting regulations for the Mojave Preserve. Defendants’ Answer to Amended and Supplemental Complaint, ¶ 12.

VI. ARGUMENT

A. Defendants' Denial of Plaintiff's Petition and Determination Not to Adopt Special Hunting Regulations for the Mojave Preserve Was Arbitrary and Capricious

1. Legal Standards.

As described above, in order to avoid a finding that its action was arbitrary and capricious, an "agency must examine the relevant data and articulate a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43. When, as here, an agency reverses a prior position, *i.e.*, that special hunting regulations for the Mojave Preserve should be adopted to protect the desert tortoise, other park values, and visitor experience, it must supply a persuasive reason that is documented in the administrative record. *Atchinson v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (where agency modifies or overrides longstanding precedents or policies, it "has a duty to explain its departure from prior norms"); *Am. Tel. & Tel. v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992) (court "will not uphold an agency's action where it has failed to offer a reasoned explanation supported by the record.").

The Supreme Court has recently clarified that changes in agency positions are not always subject to a heightened standard of review. *FCC v. Fox TV Stations*, 129 S. Ct. 1800, 1810, (2009). However, the agency must still provide a reasoned explanation for its action as required by *State Farm*. In some circumstances, a change in position will require a more detailed justification, such as when – as here -- "its new policy rests upon factual findings that contradict those which underlay its prior policy" *Id.* at 1811. *See also, Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009) ("Of course, it is axiomatic that agency action must either be consistent with prior action or offer a reasoned basis for its departure from precedent") (citations and internal quotations omitted); *accord Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009).

As Justice Kennedy explained in his concurrence in *Fox TV*,

Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.

129 S. Ct. at 1824. *See also Louisiana Pub. Serv. Com'n v. F.E.R.C.*, 184 F.3d 892, 897 (D.C. Cir. 1999) ("For the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious.")

While a court should defer to an agency's exercise of expertise, it should "not defer to the agency's conclusory or unsupported assertions." *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 210 (D.D.C. 2008), *citing McDonnell Douglas Corp. v. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004). Reliance on expertise without supporting findings and analysis will be found arbitrary and capricious.

There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such . . . practice. . . . Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.

State Farm, 463 U.S. at 48, *quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (internal quotation marks and citations omitted). *See also, Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 866 (D.C. Cir 2001) (agency must demonstrate its case by "substantial evidence -- not mere assertions"); *Natural Res. Def. Council v. Daley*, 209 F.3d 747, 755 (D.C. Cir 2000) (conclusion unsupported by evidence is "manifestly insufficient"); *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 766 (9th Cir. 2007) ("Although in recognition of its

technical expertise and experience, we often defer to the analysis of an agency, especially within its area of competence, we need not do so when the agency's decision is without substantial basis in fact”), citing *Fed. Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972).

2. Defendants’ Decision Not to Adopt Hunting Regulations Reversed the Agency’s Prior Position and Factual Findings Without Adequate Explanation or Supporting Evidence.

- a. Defendants determined the need for special hunting regulations on the Mojave Preserve based on the best available scientific information.

After exhaustive analysis of the status of the desert tortoise and what was needed for its recovery as a species, Defendants concluded in the 1994 Recovery Plan that in desert tortoise recovery areas, the discharge of firearms should be prohibited, except for hunting of big game or upland game birds from September through February. A1, 72. The FWS found that “extensive anecdotal as well as other data” . . . “strongly suggest[ed]” that these restrictions were needed “if population trends are to be reserved and recovery is to occur within a reasonable period of time.” A1, 71.

FWS had concluded that human “predation,” including collecting and shooting, “is a major factor in the decline of the desert tortoise.” A1, 20. The 1994 Recovery Plan cited to studies showing that large numbers of desert tortoises had been killed by vehicles or gunshot. A1, 21, 324. It also noted that younger desert tortoises were subject to intense predation by common ravens, and that studies had shown a 15-fold increase in raven populations in the Mojave Desert between 1968 and 1988. A1, 20. It noted that one researcher believed that predation by ravens had led to such high losses of juvenile tortoises in the Mojave region that recruitment of immature tortoises into the adult population had been halted. This and drastically lowered survivorship of adult tortoises was likely responsible for observed “catastrophic” declines in desert tortoise populations. A1, 20-21.

DOI declared in its desert tortoise critical habitat determination that the 1994 Recovery Plan “represents the best available biological information on the conditions needed to bring the Mojave population of the desert tortoise to the point where listing under the Act [the ESA] is no longer necessary (i.e. recovery).” 59 Fed. Reg. 5823.

NPS’s GMP/EIS for the Mojave Preserve adopts the findings, goals and recommendations of the 1994 Recovery Plan. It states with regard to the desert tortoise:

The management goal of this plan is the full recovery and delisting of the desert tortoise following recovery of the Mojave population. NPS manages for multiple species and protection of habitats for all native species. Desert tortoise management is directly linked with the management of grazing, burros, hunting, and camping (see those discussions for details).

A1, 468.

With regard to hunting, the GMP states that its reasons for restricting hunting include not only protection of the desert tortoise, but also preservation of other wildlife and park resources, visitor safety and visitor experience.

Section 506(b) of the CDPA provides for hunting, fishing and trapping within Mojave National Preserve, in accordance with applicable Federal and State laws. Congress also clearly provided the NPS with a mandate in our 1916 Organic Act, to preserve wildlife, and other resources within park units. They also reiterated in the CDPA our mandate to preserve wildlife by affording the new Preserve full recognition and statutory protection to establish periods when, no hunting, fishing, or trapping will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law.

Therefore, it is appropriate to recognize public safety and resource protection issues and to balance the mandate from the CDPA with the NPS resource preservation and visitor enjoyment mission. The goal is to provide better protection to desert tortoise and other park resources and to enhance visitor safety. It is also to strike a balance with the mission of the park, which is preservation of resources. The NPS goal is to provide opportunities for hunters to take game species during the fall and winter, while also providing a park experience with no hunting or shooting during the spring and summer.

A1, 505. On this basis, the Preserve announced its intention to seek special regulations including:

In accordance with the Desert Tortoise Recovery Plan hunting would be limited to upland game birds (mourning dove, quail, chukar), cottontails, jackrabbits, and big game (deer and bighorn sheep) during their designated CDF&G seasons. Cottontails and jackrabbits may be hunted only from September through January. The hunting season for the Preserve will be from September 1 to January 31 (except through the first Sunday in February for bighorn sheep).

A1, 505. These restrictions applied to the entire Preserve, not only the areas designated in the 1994 Recovery Plan as desert tortoise recovery areas or areas which are designated as critical habitat for the desert tortoise.

In the EIS ROD on the GMP, NPS noted that there some changes were made in the hunting regulation proposal since the draft GMP and EIS were published. As a result “[c]ottontails and jackrabbits would be added to the list of species that may be hunted, and the NPS would seek to adjust the seasons to allow hunting only from September through January, in keeping with the goals of the Desert Tortoise Recovery Plan.” A1, 545.⁵ The EIS considered other alternatives related to hunting, including the allowance of all hunting permitted under state law, the option which the Petition Decision has now selected. The ROD explained that NPS rejected that alternative because the selected alternative including additional hunting restrictions was “consistent with desert tortoise recovery and the mission of the NPS to protect wildlife for future generations” and “more fully achieves the intent of the Recovery Plan with regard to hunting in the Preserve.” A1, 549-50. Also with regard to an alternative that would have allowed hunting in accordance with state law from July through January, NPS stated that this

⁵ See also, A1, 551 (the GMP’s proposed restrictions on hunting, which result in “elimination of firearm discharge during the desert tortoise active season implement recommendations of the Recovery Plan for the threatened desert tortoise.”)

alternative was not chosen because it “would negatively impact more native wildlife species and continue to affect the non-hunter visitor experience year-round.” A1, 552.

When the FWS produced a BO on the GMP, it determined that the hunting restrictions contained in the GMP would reduce the likelihood of mortality of desert tortoises from shooting, A1, 391, and could reduce the availability of carcasses upon which common ravens feed, and therefore the prevalence of common ravens at the Mojave Preserve and their predation of desert tortoises. A1, 393-94. It found that the GMP would not jeopardize the continued existence of the desert tortoise, in part in reliance on NPS’s commitment in the GMP to adopt special hunting regulations. A1, 399, 404, 405.

Thus, DOI, through its sub-agencies FWS and NPS, determined, based on “the best available biological information,” that special hunting regulations were needed to protect the desert tortoise and other park resources, and to enhance visitor experience and safety. NPS committed to adopting such regulations. Defendants took this position beginning in 1994, and at least until April 2004, NPS remained affirmatively committed to adopting special hunting regulations. A2, 13-15.

- b. Defendants did not offer a justification supported by significant new scientific study or data supporting reversal of their position on special hunting regulations.

In fact, the first indication that Defendants’ position had changed was in NPS’s October 2010 Petition Decision. The Petition Decision faults the petitioners for not providing new information beyond what was in the Recovery Plan, GMP, EIS and BO, A3, 150, and repeatedly claims that there is “no evidence” or “no current evidence” to support the need for special hunting regulations.⁶ However, it is not the petitioners’ responsibility to supply new evidence to

⁶ A3, 150 (“we do not believe [the petition] has shown that restrictions on non-game hunting are warranted”); A3 151 (the possibility that non-game hunting may leave carcasses leading to increased raven populations, as stated in

defend determinations that the agency has already made based on factual findings and “the best available biological information.” Instead, it is the agency’s responsibility to explain and support -- with actual evidence, not conclusory and unsupported assertions -- its determination to reverse the position to which it adhered from 1994 until 2010. *See e.g. State Farm*, 463 U.S. at 48; *Burlington Truck Lines*, 371 U.S. at 167; *Cement Kiln Recycling*, 255 F.3d at 866; *Natural Res. Def. Council*, 209 F.3d at 755; *Greater Yellowstone Coalition*, 577 F. Supp. 2d at 210), *citing McDonnell Douglas Corp. v. Dep’t of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004). The lack of any new evidence or data in fact prevents Defendants from having a reasoned basis to change their position.

Moreover, the Petition Decision addresses only impacts on public safety and on the desert tortoise, and not the effects of hunting on other wildlife and park resources and visitor experience which were relied on by NPS when it determined in the GMP/EIS to adopt special hunting regulations. A1, 505. The Petition Decision claims that the petitioners offered no reasons other than impacts on the desert tortoise for concluding that non-game hunting presented issues under the NPS Organic Act or NPS Management Policies, and that it would not further restrict hunting unless petitioners or others could supply “specific credible reasons” for it do so. A3, 150. It is not true that the petition did not address these other issues. *See* A1, 595, 602-03. However, regardless of whether petitioners or others raised these issues, an agency reversing a prior position “cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.” *Fox TV*, 129 S. Ct. at 1824.

the 2001 BO, “is not supported by current evidence” . . . “no evidence that ravens feeding on carcasses left by hunters . . . are a problem for the tortoises”); A3, 152 (“no evidence over the last 15 years that suggests that [shooting of desert tortoises] is a significant threat to the tortoise in the preserve. . . . NPS has no evidence that the lack of special regulations and the continuation of non-game hunting have caused any harm or threat to the desert tortoise”).

To the extent that the Petition Decision purports to support the agency's change in position with anything beyond the absence of evidence, its claims are unsupported and unscientific. The Petition Decision does not cite a single scientific study, and provides no information which could lead to a conclusion that any systematic study or observation underlies its conclusions. For example, NPS states that "[o]ur experience has not indicated that shooting of tortoises during their active season is actually occurring on the preserve." A3, 151. NPS claims that since the "monitoring of desert tortoise populations was initiated in 2001, only one carcass has been discovered in the preserve with a bullet hole." *Id.* Yet, as NPS acknowledges, *id.*, the Mojave Preserve is 1.6 million acres or 2,500 square miles (approximately the size of the State of Delaware), and hunters are spread out through this area. *Id.* NPS does not give any details as to the operation of its "monitoring" or how it could possibly determine that shooting of tortoises is not occurring over such a vast area.⁷ *Cf. W. Watersheds Project v. Kraayenbrink*, 2011 U.S. App. LEXIS 1143, slip op. at 50-52 (9th Cir. 2011) (finding that where the agency had no monitoring data on the vast majority of the land in question, and offered no corroborating scientific evidence, its finding was unsupported and therefore arbitrary and capricious).

Likewise, no research is cited to support NPS's conclusion that the acknowledged threat to the desert tortoise from increased raven populations and predation is not attributable to hunters leaving carcasses upon which ravens feed. A3, 151. The Petition Decision downplays the finding in the 2001 BO that non-game hunting may leave more carcasses that could lead to increased raven populations and therefore increased predation on desert tortoises, calling it was "speculat[ion] . . . not supported by current evidence." *Id.* NPS does not explain what in the

⁷ See e.g. Kristin H. Berry and Kevin Keith, Status of The Desert Tortoise in Red Rock Canyon State Park, *California Fish and Game* 94(2):98-118 at 99, 101 (2008), where the status of desert tortoise is studied by creating 160 meter by 160 meter quadrats which were surveyed by field biologists at 10-m intervals, recording data on all live tortoises, signs (scats, cover sites, egg-shell fragments), and shell-skeletal remains.

available evidence has changed since the finding in the BO. In fact, it is the claim that the BO's conclusion is "not supported by current evidence" which is unsupported and speculative.

The Petition Decision claims, without evidentiary support, that most of the extra food for ravens provided by human activity is the result of road kills and materials at landfills and sewage ponds. While acknowledging that non-game carcasses could also provide food for ravens, NPS speculates, again without any supporting data, that "the carcasses are just as likely to be eaten by other predators like coyotes and foxes." *Id.*⁸ Even if there were evidence in the record supporting the claim that hunting is a relatively minor factor in the increase of raven populations (which there is not), that would not mean that the contribution from non-game hunting should be ignored, especially since it was considered significant enough to warrant action to restrict hunting in the 1994 Recovery Plan, the 2001 GMP and the BO.

NPS goes on to rely on observations as to where ravens are found in the Preserve, claiming that there are not "large numbers in the areas where hunters typically shoot non-game species." The Petition Decision notes that there had been only one observation of a raven feeding on a coyote carcass in the Preserve. A3, 151. There is no indication as to who made these observations, over what time period and geographical area, or whether they were in any way systematic. Nor does NPS explain how the claim that hunters and ravens are in different areas squares with the statement on the same page that hunters are spread throughout the 1.6 million acre Preserve. *Id.* Based on all of this unsupported speculation, NPS then concludes that "there is no evidence that ravens feeding on carcasses left by hunters (usually jackrabbits and coyotes) are a problem for tortoises." *Id.*

The Petition Decision acknowledges the findings in the 1994 Recovery Plan, the BO and the GMP, but attempts to downplay them as inconclusive or not legally binding, as if that

⁸ NPS then goes on to identify coyotes as one of the two primary species whose carcasses are left by hunters. *Id.*

discharged Defendants' responsibility to explain and support the reversal of their earlier conclusions. For example, the Petition Decision states that although the 1994 Recovery Plan identifies intentional shooting and killing of tortoises as a threat to the species, that Plan recognized that this was not as much of a problem in the eastern Mojave, where the Preserve is located. A3, 151. However, the 1994 Recovery Plan in fact determined, based on the evidence it examined, that hunting should be restricted in the Mojave Preserve. FWS, and NPS in adopting that recommendation, obviously did not conclude that there was so little problem at the Mojave Preserve that hunting regulations were unnecessary.

The Petition Decision also argues that the GMP, the 1994 Recovery Plan, and the BO do not create legal obligations to implement their provisions. A3, 152, 153. Plaintiff disagrees with respect to the BO. However, whether the NPS has violated the ESA or other statutes is not at issue at this time. The issue instead is whether the decision not to adopt special hunting regulations is arbitrary and capricious, even assuming that Defendants could have legally made such a decision if it were rational and adequately supported by the record.

With regard to the GMP, the Petition Decision claims that NPS is not required to implement its commitments with regard to hunting regulations "in the face of conflicting or new information." A3, 152. Rather than presenting any actual conflicting or new information, NPS simply claims that "there has been no evidence over the last 15 years that suggests that [indiscriminate shooting] is a significant threat to the tortoise in the preserve." *Id.* Again, NPS relies on a lack of evidence of harm to the desert tortoise even though there has been no systematic effort to look for it, but instead only a few isolated unscientific observations in a 1.6 million acre area. *Cf. W.R. Grace & Co. v. EPA*, 261 F.3d 330, 342 (3rd Cir. 2001) (With no

technical study ever performed, “we have no choice but to conclude that the EPA arbitrarily and capriciously settled on the . . . standard.”)

As to any potential new information on which to base Defendants’ about-face, the Petition Decision repeatedly cites the 2008 “Draft Revised Recovery Plan for the Mojave Population of the Desert Tortoise,” (hereinafter “Draft Revised Recovery Plan”). A2, 16-242. Although not explicitly relied upon in the Petition Decision, the 2010 “Mojave Population of the Desert Tortoise (*Gopherus agassizii*) 5-Year Review: Summary and Evaluation” (hereinafter “2010 5-Year Review”) is also included in the administrative record. A3, 26-148. These documents, however, basically confirm the concerns with hunting expressed in the 1994 Recovery Plan, GMP/EIS and BO, and demonstrate that there is no significant new evidence that could support reversing the prior policy.

Regarding the Draft Revised Recovery Plan, first of all it should be noted that as its name implies, it is in fact a draft, and does not represent the official position of the agency. Its “disclaimer” section states that:

Recovery Plans represent our official position *only* after they have been signed by the Regional Director as *approved*. Recovery Plans are reviewed by the public and submitted to peer review before we adopt them as approved final documents.

A2, 19 (emphasis in original).

In any event, the Draft Revised Recovery Plan continues to identify hunting as one of the threats to the desert tortoise, and as creating threats of deliberate maiming and killing, as well as increased raven predation. A2, 47, 166. It lists as a recovery action the need for increased law enforcement to prevent deliberate maiming and killing of tortoises. A2, 98. In doing so, it cites a 2002 study finding that shooting is “by far . . . the most prevalent method” of deliberate maiming and killing of tortoises. *Id.* Other than the citation of this more recent study which

supports a concern with hunting, the FWS concludes that “[l]ittle additional information regarding maiming and kill of desert tortoises has been obtained since the 1994 Recovery Plan.” A2, 125, 154. With regard to hunting in general, the Draft Revised Recovery Plan finds that there “are no data correlating [non-motorized recreation including hunting] with impacts to the desert tortoise” and that “very few studies have been conducted to document the effects of non-motorized activities [including hunting] to the desert tortoise.” A2, 166. Thus, the Draft Revised Recovery Plan provides no evidentiary support for reversing Defendants’ prior conclusions concerning the need for special hunting regulations.

The Petition Decision attempts to rely on the fact that in discussing the threat of shooting to the desert tortoise, the Draft Revised Recovery Plan does not explicitly recommend the special hunting regulations contained in the 1994 Recovery Plan, but instead states that “[p]reventing the discharge of firearms, except for hunting authorized by state game and fish departments, in problem or other sensitive areas could help minimize this threat.” A3, 151; A2, 98. However, the Draft Revised Recovery Plan does not give any explanation or justification as to why it does not repeat the prior recommendation for special hunting regulations, and contains no *evidence* that would support a change in position. As noted above, it in fact acknowledges that there is no new evidence on this subject.

The 2010 5-Year Review finds that the same threats identified in the original listing rule (in 1990) continue to affect the species today, A3, 107, and that “the recommended actions in the 1994 Recovery Plan formed a logical basis for recovery . . . [and] little information since 1994 contradicts these recommendations.” A3, 110 (citations omitted). Similarly to the Draft Revised Recovery Plan, it acknowledges that little additional information on the maiming or killing of desert tortoises has been obtained since the 1994 Recovery Plan, and thus “the relative

significance of this threat remains unknown.” A3, 73. It also notes the predation of young desert tortoises by common ravens as a conservation concern. A3, 73, 79. It finds while there are no quantitative data correlating recreational activities such as hunting with impacts on the desert tortoise, it may be inferred that these activities bring threats such as increased handling and vandalism of tortoises and increased raven populations. A3, 73, 91.

In short, these more recent documents in fact confirm that the same threats that prompted the decision to promulgate special hunting regulations remain, and that there is no new data leading to a different conclusion. *Cf. Earth Island Inst.*, 494 F.3d at 767 (inconclusive evidence cannot support a finding of no adverse effects).

- c. The Petition Decision is also arbitrary and capricious because it does not adequately explain or support its deviation from NPS Management Policies.

The Petition Decision states that it might find that special hunting regulations were warranted

[i]f faced with specific credible reasons suggesting that non-game hunting were violating the NPS Organic Act or the California Desert Protection Act, or that it were making it impossible for the preserve to comply with the resource management guidelines in the NPS management policies

A3, 150. But the Petition Decision declines to address this issue because it claims that NPS had not been presented with such reasons. *Id.* As explained above, the petition did in fact cite the provisions of the Organic Act and of the Management Policies, which it contended were violated by the absence of special hunting regulations. A1, 596, 603, 604. However, even if such inconsistencies were not raised by a petition, it would not absolve NPS of the responsibility to explain and justify them in order to avoid a finding that its decision to reverse course was arbitrary and capricious.

The Petition Decision's reference to the fact that the Management Policies are not enforceable by members of the public, citing *Wilderness Society v. Norton*, 434 F.3d 584, 596 (D. C. Cir. 2006), is equally unavailing to absolve NPS of the responsibility to explain and justify its deviation from its own policies. A3, 153. While the Management Policies may not be legally enforceable, they reflect NPS's interpretation of its statutory mandate and are an important indication of the principles that govern its actions.⁹ Moreover, as noted above, NPS conceded that it might determine that special hunting regulations were warranted if it were alerted to credible reasons that the lack of such regulations was making it impossible to comply with the Management Policies, but refused to explore that possibility on its own. A3, 150. The Petition Decision also acknowledges that "[a]dherence to policy is mandatory unless specifically waived or modified by . . . the Director." A3, 153, citing the Introduction to the 2006 Management Policies. In order to deny Plaintiff's petition, the NPS Director waives the relevant portion of 8.2.2.6, which requires special hunting regulations in all parks that allow hunting. A3, 153.

Under the principles of review discussed above, the fact that there was a need to waive a Management Policy in order to reach the decision under review, and that other Management Policies were not observed, requires a cogent explanation, supported by record evidence, as to why the usual policy was abandoned.

As noted in the statement of facts, NPS Management Policies *require* special hunting regulations beyond the restrictions imposed under state law for all units of the National Park System which allow hunting. Management Policies 8.2.2.6. In addition, NPS Management Policies direct that when harvesting of animals (e.g., by hunting) is allowed in a park, it will be

⁹ The Management Policies were noticed in the Federal Register and subject to public comment. They were described as containing the agency's "official interpretation" of its governing statutes. 65 Fed. Reg. 2084 (Jan. 19, 2000); 56 Fed. Reg. 56,003 (Sept. 15, 2000).

allowed only when “the Service has determined that the harvesting will not unacceptably impact park resources or natural processes, including the natural distributions, densities, age-class distribution, and behavior of ...” harvested species or of native species that use or are used by the harvested species. Management Policies 4.4.3.

On a more over-arching level, NPS’s Management Policies are intended to implement the Park Service’s basic conservation mandate, found in the NPS Organic Act, that the purpose of national parks is “to conserve the scenery and the natural and historic objects and the wildlife,” and to provide for their use and enjoyment only “in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 16 U.S.C. §1. *See* Management Policies 1.4.1. (recognizing this provision as “the key management-related provision of the Organic Act”); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 105-06 (D.D.C. 2003). The Management Policies implement this statutory directive by providing that conflicts between conservation and use of park resources are to be decided in favor of conservation.

The fundamental purpose of the national park system, established by the Organic Act and reaffirmed by the General Authorities Act, as amended, begins with a mandate to conserve park resources and values. ... NPS managers must always seek ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values. ... Congress, recognizing that the enjoyment by future generations of the national parks can be ensured only if the superb quality of park resources and values is left unimpaired, has provided that when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant. This is how courts have consistently interpreted the Organic Act.

Management Policies 1.4.3.

While the Director waived section 8.2.2.6, he did not waive these other Management Policies. Given that NPS has statutory authority to impose special hunting regulations for the Mojave Preserve, that its Management Policies *require* that it do so, and that it previously found that special regulations were needed to protect the desert tortoise and other park values, it is

impossible to square a decision not do so with the Management Policies' basic instruction, based on NPS's interpretation of its statutory mandate, to choose conservation over use and to prevent impairment of park resource values. In addition, NPS did not comply with the more specific requirement in the Management Policies that hunting will be allowed only when "the Service has determined that the harvesting will not unacceptably impact park resources or natural processes, including the natural distributions, densities, age-class distribution, and behavior of ..."

harvested species or of native species that use or are used by the harvested species. Management Policies 4.4.3. There is no analysis in the Petition Decision or elsewhere as to the impact of hunting at the Mojave Preserve on park values and wildlife as described in this section of the Management Policies.

Thus, the deviation from Management Policies (whether officially waived or not) is not adequately explained or supported and renders the Petition Decision arbitrary and capricious.

B. Defendants' Failure to Prepare a Supplemental EIS on the Mojave Preserve GMP When it Abandoned its Commitment to Adopt Special Hunting Regulations Violates NEPA

Under applicable legal authorities, Defendants must prepare an SEIS to examine the environmental impacts of their decision not to adopt special hunting regulations for the Mojave Preserve. The prior EIS on the GMP reviewed a proposed agency action (the GMP), which included the adoption of special hunting regulations. It needs to be supplemented now that that commitment has been abandoned, thereby significantly changing the project under review and creating impacts which were not previously given the "hard look" that NEPA requires. *Marsh*, 490 U.S. at 372; *Oceana*, 725 F. Supp. 2d at 50, citing *Balt. Gas & Elec.* 462 U.S. at 97.¹⁰

¹⁰ The administrative record contains no evidence that the agency even considered supplementing the GMP/EIS with an SEIS or even an environmental assessment when it determined not to adopt special hunting regulations.

The Council on Environmental Quality (CEQ) regulations implementing NEPA direct when an SEIS is required and how it shall be adopted:

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

- (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
- (ii) There are significant new circumstances or information bearing on the proposed action or its impacts.

....

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

40 C.F.R. § 1502.9(c). The key issue is whether the prior EIS is an adequate statement for the current program. *Fund for Animals v. Mainella*, 283 F. Supp. 2d 418, 432 (D. Mass. 2003).

The Supreme Court has held that NEPA requires the preparation of post-decision supplemental environmental impact statements in order to

satisfy the Act's 'action-forcing' purpose. . . . It would be incongruous with [NEPA's] approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

Marsh, 490 U.S. at 371 (footnotes omitted).

[I]n the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance -- or lack of significance -- of the new information. A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.

Id. at 378 (internal quotation marks omitted).

Here, the agency made a substantial change in the proposed action (*i.e.* the GMP) which was relevant to environmental concerns by deciding to allow hunting in accordance with state regulation rather than to further restrict hunting as provided in the GMP/EIS. The fact that the hunting provisions of the GMP/EIS were a significant aspect of the project relevant to environmental concerns is reflected in the ROD, which briefly summarizes the crucial elements of the proposed action and its alternatives without addressing many less significant details. The proposed hunting regulations and their alternatives, however, play a prominent role in the ROD. In introducing the selected action, the ROD immediately refers to the changes in the hunting proposal. A1, 545. The alternative proposals considered each contain a different proposal with regard to hunting regulations, and these differences are addressed in the ROD's discussion and comparison of the alternatives. A1, 547, 549-50, 552. The superiority of the hunting restrictions that were adopted in the GMP over the less restrictive approaches in the alternatives was relied upon to support the selection of the proposed alternative. The stricter hunting regulations were found to be more consistent with the 1994 Desert Tortoise Recovery Plan and with NPS's mission to protect wildlife, to better protect the non-hunter visitor experience, to meet NPS's non-impairment mandate, and to comply with NEPA's environmental policy goals.

The ROD describes Alternative 2, which would allow the continuation of all hunting under state law, and Alternative 3, which would allow all hunting permitted under state law from September through January. It found that in comparison, Alternative 1 (the selected alternative, including further hunting restrictions) was "consistent with desert tortoise recovery and the mission of the NPS to protect wildlife for future generations," and "more fully achieves the intent of the Recovery Plan with regard to hunting in the Preserve." A1, 549-50. Specifically, "[h]unting of game species during the adjusted state seasons (or a limited season for small game)

and the resulting elimination of firearm discharge during the desert tortoise active season implement recommendations of the Recovery Plan for the threatened desert tortoise.” A1 151. With regard to NPS’s mandate to avoid impairment of park resources and values, NPS found that the selected alternative would minimize the impacts of congressionally-mandated activities such as hunting below the threshold of “impairment.” *Id.*

In comparing the alternatives considered, NPS notes that Alternative 3 would allow more hunting, and concludes that “[t]his action would negatively impact more native wildlife species and continue to affect the non-hunter visitor experience year-round.” A1, 552. NPS found that the selected alternative “will realize each of the provisions of the national environmental policy goals stated in NEPA Section 101” by means of various of its provisions, including implementing recovery measures for the threatened desert tortoise. *Id.*

In other words, the GMP/EIS clearly relied on the stricter hunting regulations in the selected alternative to support its conclusions that the GMP was consistent with NPS statutory authorities and policies and met the goals of NEPA. NPS cannot change the GMP to eliminate the proposed hunting restrictions without revisiting the conclusions reached in the EIS through an SEIS. The SEIS must explore the environmental impacts of hunting which is unrestricted except in accordance with state law on the desert tortoise, other wildlife and park values, and the visitor experience, and determine whether those impacts are acceptable. The prior EIS, which found that alternatives allowing more hunting created unacceptable impacts, is not an adequate statement for the current program. *See Fund for Animals*, 283 F. Supp. 2d at 432.

The need for an SEIS is further supported by the fact that the changes in the GMP involve an ESA-listed threatened species. As described above, the ESA approval of the GMP in the BO was dependent on the hunting restrictions, indicating that the GMP would not be in

compliance with the ESA without those hunting restrictions. NPS recognized this fact when it sought approval and an amendment to the Incidental Take Statement in the BO before amending the GMP to allow limited small game hunting. A1, 556. NPS addressed this change, and the concurrence it received from FWS, in the ROD. A1, 545, 556.¹¹ This illustrates that even a small change in the hunting regulations was considered to have a potentially significant impact on an ESA-listed species, to require an alteration in the BO, and to require explanation in the GMP/EIS and ROD. Now, NPS has made a much larger change in the hunting restrictions of the GMP without any consultation with FWS to determine whether the impacts on the desert tortoise are acceptable under the ESA, and without any additional NEPA review. Any potential adverse effect on an endangered or threatened species is considered “significant” under NEPA, therefore requiring an EIS. 40 C.F.R. § 1508.27(b)(9); *Pacific Shores Subdivision California Water District*, 538 F. Supp. 2d at 247, 261; *Klamath-Siskiyou Wildlands Ctr.*, 373 F.Supp.2d at 1080-81. Therefore, the current EIS on the GMP must be supplemented to take a “hard look” at the impacts on the desert tortoise of the decision to abandon the commitment to adopt special hunting regulations.

Further support for the NEPA significance of the change in the project is the fact, described above, that NPS had to waive one of its Management Policies and ignored others in order to make this change. An action which is contrary to the agency’s usual guiding policies in a manner that diminishes protection for the environment in several respects, and for a threatened species in particular, should not escape NEPA review.

¹¹ The ROD describes FWS’s approval of NPS’s request to allow hunting of cottontails and jackrabbits only September through January, and states that “[t]herefore, the NPS decided to [so] modify the hunting proposal” in the GMP. A1, 556.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)
RESPONSIBILITY (PEER))

Plaintiff,)

v.)

U.S. DEPARTMENT OF THE INTERIOR AND)
MR. KENNETH SALAZAR AND)

Civil Action No. 10-cv-01274 (ESH)

U.S. NATIONAL PARK SERVICE (NPS) AND)
MR. JONATHAN B. JARVIS)

Defendants.)

DECLARATION OF HOWARD G. WILSHIRE

I, Howard Wilshire, declare the following based upon personal knowledge to which I am competent to testify:

1. This Declaration is being submitted pursuant to 28 U.S.C. § 1746.
2. I am an adult citizen of the State of California.
3. I received my PhD in geology from the University of California, Berkley. I was an employee of the U.S. Geological Survey for more than thirty-five years. My work and research have been focused on arid lands in the western United States.
4. I have more than 150 publications, mostly in peer-reviewed journals. My research efforts have included mapping and resource assessment studies in the Mojave Desert. Many of my publications relate directly to the Mojave Preserve. These include resource assessments, the geologic mapping of 6 quadrangles in the Preserve, and studies of human impacts on natural landscapes, soils, vegetation, and wildlife.
5. I am member of the Board of Directors of PEER, the plaintiff in the case of *PEER v. USDOJ*, et al. D.D.C. No. 1:10-cv-01274. I support this lawsuit as an effort to protect the desert tortoise and the Mojave Preserve and to keep hunting limited to those times of year that avoid mixing hunting with incompatible uses of the Preserve.

6. I have spent many years working and vacationing in the Mojave Preserve. It is a favorite vacationing spot for Thanksgiving with friends. The Preserve is one of my favorite spots on the Earth and I have seen a lot of it. I have worked closely with eminent biologists in their efforts to protect the desert tortoise and have witnessed the wanton destruction of the desert tortoise's habitat.

7. I continue to enjoy the Preserve for both research interests and personal enjoyment.

8. I expect to continue visiting and enjoying the Mojave Preserve regularly and often so long as I am able. Specifically, I plan to visit the Preserve in late April of this year for photographic documentation of land forms in the Cinder Cones, and again for an annual visit for pleasure during Thanksgiving, 2011. My primary concern is that the Preserve remains an attractive and vital place to visit in the future and remains a suitable habitat for wildlife, specifically the desert tortoise.

9. It is my opinion that people with guns don't mix well with those people visiting the Preserve for its magnificent silence. The sound of guns is an unpleasant experience. Additionally, seeing small trees literally shot down, the shredded trunk surrounded by dozens of shotgun shells, is both unsettling and disgusting. Order needs to be brought to avoid mixing incompatible uses. Enforcement of the Preserve's waived management policies requiring the adoption of special hunting regulations for the Preserve would help bring some increased order.

10. I understand that the 2001 ESA Biological Opinion for the desert tortoise for the General Management Plan of the Mojave Preserve was premised on the understanding that the National Park Service would promulgate special hunting regulations for the threatened desert tortoise. I understand that the National Park Service delayed the promulgation of hunting regulations for more than eight years while periodically stating that they intended to eventually do so. I also understand that on October 14, 2010, NPS Director Jon Jarvis waived management policies requiring the Park Service to do so.

11. I am concerned that the waiver of management policies and the ongoing failure of the National Park Service to promulgate hunting regulations in the Preserve will harm the desert tortoise and take away from the peaceful enjoyment of the park by myself and other visitors. The aesthetic enjoyment and research interest I derive from the Preserve is diminished by the National Park Service's failure to promulgate hunting regulations.

12. The injuries to my interests are traceable to the defendants' violations addressed in this lawsuit. My interests in the Mojave Preserve would be better protected if the National Park Service followed through with its original commitment to promulgate hunting regulations for the preserve. This would reduce my concerns that off-season hunters are causing unnecessary harm to wildlife, wildlife habitat and public enjoyment, and thereby restore my professional pride in and aesthetic enjoyment of the Mojave Preserve.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 17, 2011

A handwritten signature in cursive script, appearing to read "Howard G. Wilshire".

Howard G. Wilshire

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)
RESPONSIBILITY (PEER))

Plaintiff,)

v.)

U.S. DEPARTMENT OF THE INTERIOR AND)
MR. KENNETH SALAZAR AND)

Civil Action No. 10-cv-01274 (ESH)

U.S. NATIONAL PARK SERVICE (NPS) AND)
MR. JONATHAN B. JARVIS)

Defendants.)

DECLARATION OF KEVIN R. EMMERICH

I, Kevin Emmerich, declare the following based upon personal knowledge to which I am competent to testify:

1. This Declaration is being submitted pursuant to 28 U.S.C. § 1746.
2. I am an adult citizen of the State of Nevada. I currently reside in Nye County, Nevada.
3. I attended Utah State University and the University of Utah. I studied Geography and Geomorphology. I have worked for the National Park Service for 17 years as a Park Ranger and Biological Resource Technician and the Bureau of Land Management for two years as a Recreation Technician on the Colorado and San Juan rivers, Utah.
4. I am a member of PEER, the plaintiff in the case of *PEER v. USDOJ*, et al. D.D.C. No. 1:10-cv-01274. I support this lawsuit as an effort to protect the desert tortoise and the Mojave Preserve and to keep hunting limited to those times of year that avoid mixing hunting with incompatible uses of the Preserve.
5. From 1985 to 2002, I mostly worked for the National Park Service (NPS), but did have two seasons as a Recreation Technician for the Bureau of Land Management in the State of Utah. Most of the jobs I held in the NPS were in the capacity of a Park Ranger. During this period I worked at seven National Parks and Monuments. The last 11 of these years were spent working full time in Death Valley National Park. The primary duties of these jobs were quite varied and included providing interpretive presentations, helping visitors plan backcountry trips and resource monitoring projects. I have served on Backcountry/Wilderness committees and have provided input on several varied park wilderness and General Management Plans. I have lived in

the Mojave Desert for 20 years and have been hiking and exploring the remote backcountry here since I was 13 years old. I value recreation opportunities in public land, including parks, wilderness areas, exploring wild areas off the beaten track and wildlife photography.

6. I have worked on several Resource Monitoring projects for biological resources for both the National Park Service and independently. These projects include desert tortoise surveys and telemetry monitoring, Mojave fringe-toed lizard surveys, bighorn sheep remote camera monitoring, flat-tail horned lizard surveys, Panamint alligator lizard surveys, and western toad surveys.

7. I have been visiting the Mojave National Preserve since 1981 when it was under the jurisdiction of the Bureau of Land Management and known as the East Mojave National Scenic Area. I have hiked and backpacked in the Providence, New York, Granite, Old Dad, Castle, Clark and Ivanpah Mountains as well as Lanfair Valley, Devil's Playground, Kelso Dunes, Cima Dome and Hole in the Wall.

8. I have about 1,000 hours of experience surveying for desert tortoise for the United States Geological Survey in the Ivanpah Valley.

9. In 1992, I purchased a 160-acre plot of land in Lanfair Valley, which is now a part of the Mojave National Preserve. In 1995, I purchased a 240-acre inholding in the Devil's Playground, which I later sold to the National Park Service. I still own the Lanfair property and camp on the land quite frequently.

10. The Mojave National Preserve has always meant a lot to me. It conserves 1.5 million acres of diverse scenery, cultural and biological resources. The Mojave National Preserve contains robust populations of desert tortoise. Just about all of the mid to low elevations are tortoise habitat and very large populations are found near Goffs and Ivanpah Valley. These populations represent essential segments of habitat and connectivity. The Ivanpah Valley occurs within the Northeastern Recovery Unit for the desert tortoise and has been determined to be genetically unique.

11. I will be visiting the Preserve again next month and plan to continue to visit the area and camp on my property long into the future. I will continue to photograph wildflowers, desert tortoise and other wildlife. I will continue to be active with our group, Basin and Range Watch, to help protect the Mojave National Preserve from large sprawling wind and solar farms.

12. I have encountered "varmint" hunters in the preserve on 3 occasions. On one occasion, not too far from my property, the road I was driving on was blocked by 8 four-wheel vehicles. The vehicles were modified with spotlights and special racks. Hanging off one of the racks were 2 dead coyotes and what looked like about 7 or 8 dead black tailed jackrabbits. I politely asked them to move so I could get by, but I was met with hostility and one of them was even pointing a gun in my direction. I ended up turning around. I was definitely frightened by this experience. On the other two occasions, I intentionally avoided getting too close to the vehicle caravans. I have also found trash and bullet shells scattered around varmint hunter camps. It is not uncommon to find vehicle tracks going off into the desert in association with these camps.

13. From a conservation standpoint, it makes no sense to allow unlimited slaughter of animals that are considered “varmint” under some old state law. The very classification of “ varmint” for animals like coyotes and jackrabbits is an offensive classification for animals that are important parts of the ecological process of the Mojave Desert. There is no limit on how many animals may be taken for this purpose. Removal of so many animals upsets ecological process and predator/prey relationships. For example, removal of so many jackrabbits may cause various predators to turn to less conventional prey such as the Federally Threatened desert tortoise. Large hunting camps that leave trash and animal carcass parts attract and increase the populations of ravens, which can be predators of desert tortoise. Driving off road is illegal, destroys habitat, can directly kill and impact desert tortoise, plants and other wildlife and proliferates the spread of invasive plants.

14. This kind of hunting hurts the visitor experience for others. There is less wildlife to enjoy, caravans of hunters can be unsightly and impede the backcountry experience. Racks of dead animals and illegal highway vehicle tracks impede the visual experience for visitors.

15. I understand that the 2001 ESA Biological Opinion for the desert tortoise for the General Management Plan of the Mojave Preserve was premised on the understanding that the National Park Service would promulgate special hunting regulations for the threatened desert tortoise. I understand that the National Park Service delayed the promulgation of hunting regulations for more than eight years while periodically stating that they intended to eventually do so. I also understand that on October 14, 2010, NPS Director Jon Jarvis waived management policies requiring the Park Service to do so.

16. Adoption of regulations that would limit varmint hunting would make my visits to the preserve less dangerous and hopefully would allow me to see more wildlife in the parts of the preserve where this hunting is popular. Regulation of this kind of hunting would also assist in the recovery of the desert tortoise. There would not be hunting camps that leave unsightly and ecologically damaging trash and off highway vehicle tracks. There would be more natural, self-sustaining populations of local wildlife and less predator/prey disruptions in the Mojave National Preserve.

17. The injuries to my interests are traceable to the defendants' violations addressed in this lawsuit. My interests in the Mojave Preserve would be better protected if the National Park Service followed through with its original commitment to promulgate hunting regulations for the preserve. This would reduce my concerns that off-season hunters are causing unnecessary harm to wildlife, wildlife habitat and public enjoyment, and thereby restore my professional pride in and aesthetic enjoyment of the Mojave Preserve.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 18, 2011

A handwritten signature in blue ink, appearing to read "Kevin R. Emmerich", is shown within a light blue rectangular box.

Kevin R. Emmerich

**United States District Court
for the District of Columbia**

_____)	
PUBLIC EMPLOYEES FOR)	
ENVIRONMENTAL RESPONSIBILITY)	
)	
Plaintiffs,)	
)	
v.)	Case No. 10-cv-01274 (ESH)
)	
U.S. DEPARTMENT OF THE INTERIOR, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

ORDER

Upon consideration of Plaintiff’s Motion for Summary Judgment, the Points and Authorities in Support thereof, and Declarations submitted in support, the Court finds that the Motion should be granted.

It is therefore this _____ day of _____, 2011,

HEREBY ORDERED, That Plaintiff’s Motion for Summary Judgment is GRANTED.

U.S. District Judge