

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

No. 02:07-CV-0045-BO

DEFENDERS OF WILDLIFE and)
 THE NATIONAL AUDUBON SOCIETY,)
)
 Plaintiffs,)
)
 v.)
)
 NATIONAL PARK SERVICE; UNITED STATES)
 FISH AND WILDLIFE SERVICE; UNITED)
 STATES DEPARTMENT OF THE INTERIOR;)
 DIRK KEMPTHORNE, SECRETARY OF THE)
 INTERIOR; MARY A. BOMAR, DIRECTOR OF)
 THE NATIONAL PARK SERVICE; H. DALE)
 HALL, DIRECTOR OF THE U.S. FISH AND)
 WILDLIFE SERVICE; and MICHAEL B.)
 MURRAY, SUPERINTENDENT OF THE CAPE)
 HATTERAS NATIONAL SEASHORE,)
)
 Defendants,)
)
 and)
)
)
 DARE COUNTY, NORTH CAROLINA; HYDE)
 COUNTY, NORTH CAROLINA; and THE CAPE)
 HATTERAS ACCESS PRESERVATION)
 ALLIANCE,)
)
 Defendant- Intervenors.)
 _____)

MEMORANDUM OF LAW
IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

[Fed. R. Civ. P. 65,
E.D.N.C. Local Rule 7.1]

INTRODUCTION

This is a case about government agencies (“Federal Defendants”) flouting the requirements of numerous federal laws that oblige them to manage Cape Hatteras National Seashore (the “Seashore” or “Cape Hatteras”) primarily for the conservation and preservation of its wildlife and other natural resources, and instead allowing off-road vehicle (“ORV”) driving to endanger the Seashore’s fragile ecosystem. The Federal Defendants have defied statutes, executive orders, regulations, case law, and

even their own internal management policies. Each of these requirements mandates that when human recreational uses of national seashores conflict with the needs of the seashore's natural resources, the conflicting recreational use (here, ORV driving) must be curbed in favor of preservation of the natural resources for future generations. For decades, the Federal Defendants have also failed to comply with a specific federal requirement to implement a plan for managing ORV driving that ensures ORV driving does not damage the wildlife, wildlife habitat, and other natural resources of the Seashore. This Court recognized the Federal Defendants unlawfulness in doing so less than one year ago, fining an individual for driving on the Seashore. The Federal Defendants have refused to exclude ORVs from the very habitat most needed for breeding and foraging by the endangered, threatened, and sensitive species that inhabit the Seashore, despite having been provided detailed protocols for protecting those species from ORVs, and warned of the consequences of not providing this protection by their own United States Geological Survey ("USGS") scientists.

The Federal Defendants' failure to implement a protective ORV management plan threatens to irreparably harm Plaintiffs. All species of breeding waterbirds and shorebirds on the Seashore have declined precipitously in recent years. Last year (2007), the first year under the Interim Management Plan, was one of the worst nesting seasons on record on the Seashore. The upcoming bird breeding season on the Seashore will begin in mid-March. If the current, inadequate Interim Management Plan is left in place during that period, ORV use will again prevent birds from establishing territories, courting mates, nesting, laying eggs, producing chicks, and maintaining viable populations on the Seashore. Further, ORV use under the current management creates a significant risk that nests, eggs, chicks, and adult birds will be disturbed, injured, or killed. As explained in the affidavits filed as an Appendix to this document from some of the nation's leading experts in shorebirds and waterbirds, the situation on the

Seashore is dire and failure to adequately protect these species this nesting season could imperil their existence on the Seashore.

By their Motion for Preliminary Injunction (the “Motion”), Plaintiffs seek to enjoin Federal Defendants from allowing the use of ORVs (except for essential vehicles) at certain critical bird nesting areas on the Seashore described in the “Moderate Protection” protocols and identified in Figure 1 of the USGS Management Protocol for Piping Plover until such time as they have met their obligation to implement an adequate long-term plan and regulation to manage ORV use of the Seashore. Plaintiffs submit this Memorandum of Law in support of their Motion.

FACTS

Congress created Cape Hatteras National Seashore in 1937, intending that it be “permanently preserved as a primitive wilderness” and that “no development of the project or plan for the convenience of visitors shall be undertaken which would be incompatible [] with the preservation of the unique flora and fauna of the physiographic conditions now prevailing in the area.” 16 U.S.C. § 459a-2. Congress noted that certain portions of the Seashore might be particularly suited for water-based recreational uses such as swimming, boating, sailing, and fishing, but made no mention of driving vehicles on the beach itself. Id. The Seashore became a component of the system of national parks, created “to conserve the scenery and the natural and historical objects and the wildlife therein and to provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 16 U.S.C §1. The Seashore serves as home and/or breeding ground for numerous endangered, threatened, and otherwise protected species, including several species of sea turtles, shorebirds such as piping plovers, American oystercatchers, black skimmers and other species of colonially nesting waterbirds, and the seabeach amaranth plant.

ORV use has dramatically increased on the Seashore in recent years. As explained in the declaration of Steven Harrison, Chief of Resource Management on the Seashore from 1997 to 2005,

“protection of birds and other natural resources was often compromised by Seashore management to accommodate ORV use and ORV user groups.” Affidavit of Steven Harrison ¶ 19 (Exhibit 8 to Appendix). In the worst nesting season on record for colonial waterbirds, less than 250 pairs of all colonially nesting waterbird species nested at the Seashore in 2007, down from as many as 1,508 nests per season in 1997. Affidavit of Walker Golder ¶ 5; Affidavit of Erica Nol ¶ 15 (Exhibits 7 and 11, respectively, to Appendix).¹ Over the past ten years, nests of common terns declined 97%, least terns 42%, gull-billed terns declined 100%, and black skimmers declined 100%. Golder Aff. ¶ 5. In 2007, black skimmers failed to nest and gull-billed terns disappeared from the Seashore. Threatened piping plovers breeding on the Seashore have declined from 16 pairs in 1989 to only 6 pairs in 2007. Golder Aff. ¶ 6. Likewise, the number of breeding pairs of American oystercatchers has declined by 50% in the last eight years. Nol Aff. ¶ 16.

These declines correspond with increased popularity of ORV driving at Cape Hatteras. As a result of the growth in ORV recreation on federally protected lands, President Nixon signed Executive Order 11644 on February 8, 1972; in that Order he noted that the “popularity [of ORV driving on public lands] continues to increase rapidly. The widespread use of such vehicles on the public lands – often for legitimate purposes but also in frequent conflict with wise land and resource management practices, environmental values, and other types of recreational activity – has demonstrated the need for a unified Federal policy toward the use of such vehicles on the public lands.” Exec. Order No. 11644, 37 Fed. Reg. 2,877 (Feb. 8, 1972) (Exhibit 12 to Appendix). The Order requires that Federal Defendants implement regulations to govern the location, manner, and condition in which ORVs may be used at each national park and seashore, including Cape Hatteras. It also requires that the regulations minimize damage to the wildlife and other natural resources at each park and seashore. When Federal Defendants determine that ORV use is adversely affecting, or may adversely affect, wildlife or wildlife habitat, the area must be

¹ Golder and Nol cite 212 and 246 nests respectively due to multiple sources of data indicating low nesting number during the 2007 breeding season. While the cause of the discrepancy is unclear, it is clear that colonial waterbird nesting numbers on the Seashore have drastically declined in the past decade.

immediately closed to ORV use.

Nationwide, national seashores implemented regulations in compliance with the Order, including Assateague Island National Seashore, Cape Cod National Seashore, Gulf Islands National Seashore, Fire Island National Seashore, and Padre Island National Seashore. See 36 C.F.R. §§ 7.65, 7.67, 7.20, 7.12, and 7.75. Both Cumberland Island National Seashore and Canaveral National Seashore prohibit recreational motor vehicles on the beach entirely. See <http://www.nps.gov/cuis/planyourvisit/hours.htm>; <http://www.nps.gov/cana/faqs.htm>. But the Cape Hatteras management has yet to adopt regulations to comply with the Order. Instead, ORV use has continued and increased virtually unabated.

Despite the “long-standing requirements for an ORV management plan and special regulation,” Federal Defendants have yet to implement the required plan and regulation to govern ORV use at the Seashore. See letter from Seashore Superintendent Michael Murray to the U.S. Attorney for the Eastern District of North Carolina of July 31, 2007 (Exhibit 13 to Appendix). On January 2, 2008, after Plaintiffs filed their Complaint in this action, the Secretary of the Interior established a negotiated rulemaking advisory committee for ORV management at Cape Hatteras to negotiate and possibly recommend the initial special regulations for the long-term management of ORVs at the Seashore. 72 Fed. Reg. 72,316 (Dec. 20, 2007). Federal Defendants estimate that the process of developing a final ORV management plan will take at least three years after approval of the committee, if the process results in a plan and special regulation at all. National Park Service Negotiated Rulemaking Outline (Exhibit 23 to Appendix). Until a final rule is in place, there will still be no long-term plan for managing ORV use for the protection of the endangered, threatened, and sensitive species at the Seashore and otherwise preserving its natural resources for future generations.

In July 2007, Federal Defendants adopted an interim plan, ostensibly to protect the natural resources at the Seashore until a long-term plan is implemented. In reality, that plan allows ORV use to continue to harm the protected species of the Seashore. Prior to developing the interim plan, Federal Defendants first commissioned a set of studies from the USGS (a scientific research agency within Defendant Department of the Interior) to develop and recommend management protocols to protect the

endangered, threatened, and otherwise protected species that live and breed at the Seashore. In October 2005, the USGS staff and contract scientists issued reports entitled “Management, Monitoring, and Protection Protocols” for the Seashore’s piping plovers, colonially nesting waterbirds, and American oystercatchers. See USGS Management Protocols (Exhibits 14-16 to Appendix). The USGS synthesis of those protocols explains why and how they were developed:

The management of endangered and threatened species is mandated by law and should be based on the best available information, including published research, reports and the practical experience of scientists and wildlife managers themselves. All of these sources were consulted and formed the basis of the management recommendations found in the protocols. USGS PWRC scientists searched and evaluated the literature and consulted wildlife managers to form the first draft of the protocols, which was sent to species experts for scientific review. Corrections based on those comments were incorporated into the draft protocols. The protocols are the best recommendations from USGS PWRC to the NPS for management of these species at CAHA, based on the sources noted above.

Synthesis of Management, Monitoring, and Protection Protocols for Threatened and Endangered Species and Species of Special Concern at Cape Hatteras National Seashore, North Carolina, United States Geological Survey, at 4 (Exhibit 17 to Appendix) .

The USGS Management Protocols for each species or group of species includes three alternative protocols, providing respectively for a “Highest Degree of Protection,” “Moderate Protection,” and “Minimum Protection” from the adverse effects of ORV use in the Seashore, particularly during the critical breeding season. The protocols vary in the amount of habitat closed to beach driving, the range of dates that beach driving would be prohibited in those habitat areas, and the size of the protective buffers to be erected around nests of various species. The protocols also include an assessment of the predicted effect on the species of each level of protection. The “Minimum Protection” protocols would result in adverse effects and harm to all species subjected to this level of management. For example, under the “Minimum Protection” protocol “American oystercatchers may persist mainly as unsuccessful nesters...for 5-10 years, but will eventually be extirpated from areas of high human use.” Management, Monitoring, and Protection Protocols for American Oystercatchers at Cape Hatteras National Seashore, United States Geological Survey (“USGS Management Protocol for American Oystercatcher”) at 18. Similarly, “[a]dult [colonially nesting waterbirds] are placed at risk by pedestrians and recreational ORVs and boats at the focal sites and all other areas. Nest and/or chicks may be crushed.” Management,

Monitoring, and Protection Protocols for Colonially Nesting Waterbirds at Cape Hatteras National Seashore, United States Geological Survey (“USGS Management Protocol for Colonial Waterbirds”) at 14. Finally, “[piping plover] [a]dults are at risk of being harmed, and nests may be damaged before they are found and protected.” Management and Protection Protocols for the Threatened Piping Plover (*Charadrius Melodus*) on Cape Hatteras National Seashore, United States Geological Survey (“USGS Management Protocol for Piping Plover”) at 36.

The “Moderate Protection” protocols recommended by Federal Defendants’ scientists at USGS included one key and consistent recommendation for each bird species or group of species that address the shortcomings of the “Minimum Protection” protocols. They recommend:

Piping Plover (“Moderate Protection” recommendation):

- (1) Close all potential piping plover nesting, roosting, and foraging habitat (ocean and soundside intertidal zone and other MOSH [moist substrate habitats], ocean backshore, dunes, dry sand flats, overwashes and blowouts) to ORV traffic 24h/day year round, at Bodie Island Spit, Cape Point, South Beach, Hatteras Spit, North Ocracoke, South Ocracoke (Fig 4-8).

USGS Management Protocol for Piping Plover at 31.

Colonially nesting waterbirds (“Moderate Protection” recommendation):

- (1) Completely close all potential breeding, roosting, and foraging habitat to ORV traffic and boat landings, at all sites where any terns or black skimmers have nested in the past decade, from April 15 until September 30. Even if no colony is established early in the season, late-season nesting by least terns and skimmers is common, and re-nesting may occur as late as August in some years. This should include Bodie Island Spit, Green Island, Hatteras Island, including Cape Point, South Beach, Hatteras Spit, and Ocracoke Island, including North Ocracoke (inlet area), and South Ocracoke (Fig.1).

USGS Management Protocol for Colonial Waterbirds at 13.

American oystercatcher (“Moderate Protection” recommendation):

- (1) Close specific areas for nesting American Oystercatchers in coordination with closures of beaches for nesting colonial waterbirds and Piping Plovers (*Charardrius melodus*). Important nesting areas and one that have been closed in the past for oystercatchers are Hatteras Island: Cape Point, South Beach, Hatteras Inlet; Bodie Island: Bodie Island Flats; and Ocracoke Island: areas from ramp 59 to ramp 72 in addition to site mentioned in Option B for colonial waterbirds. See Figures 1-6 for locations in colonial waterbird sections.

USGS Management Protocol for American Oystercatcher at 16.

After receiving the USGS Protocols, Federal Defendants issued an Environmental Assessment (“EA”) discussing alternatives for an interim plan to manage ORV usage and protected species until they develop a long-term ORV management plan. See Interim Protected Species Management Plan/Environmental Assessment, Cape Hatteras National Seashore (Jan. 18, 2006) available at <http://www.nps.gov/caha/parkmgmt/planning.htm>. In the EA, Federal Defendants describe four alternative plans, including a “No-Action Alternative,” “Preferred Alternative,” “Tailored Management Focus,” and a more protective “Environmentally Preferred Alternative.” The EA “Preferred Alternative” and the USGS recommended management protocols differ fundamentally. The USGS protocols promote resource protection and emphasize pre-nesting closures of quality habitat used over the last ten breeding seasons. These closures provide for courtship, breeding, and the opportunity for birds to nest in undisturbed habitat. The EA “Preferred Alternative” promotes continuous ORV access, establishes limited pre-nesting closures based on the previous three breeding seasons, and relies extensively on limited staff observations to trigger additional closures if birds nest in otherwise unprotected habitat.

On July 13, 2007, Federal Defendants issued a “Finding of No Significant Impact” or “FONSI,” in which they selected and approved an interim management plan (the “Interim Plan”) and concluded that the implementation of the Interim Plan would have “no significant impact” on the Seashore’s protected bird, turtle, and plant species. See Finding of No Significant Impact: Interim Protected Species Management Strategy/Environmental Assessment, Cape Hatteras National Seashore (July 13, 2007) (Exhibit 18 to Appendix). According to the FONSI, the Interim Plan will remain in effect until a long-term ORV management plan and associated EIS are completed.

The Interim Plan is a combination of the “Preferred Alternative” from the final EA and the even less protective “No-Action Alternative.” In several important ways, the Interim Plan is simply a continuation of prior management practices. The elements of previous management, represented by the “No-Action Alternative,” that are incorporated into the Interim Plan demonstrate that the Interim Plan is

little more than reducing previous management to writing. Like previous management, the Interim Plan:

- Does not provide pre-nesting closures for any species other than piping plovers. FONSI at 5.
- Does not provide minimum set buffers for American oystercatcher nests. Id.
- Only provides 150 to 300 ft closures for colonial waterbird nests, though the EA's "Preferred Alternative" required 300 to 450 ft closures. FONSI at 6.
- Only provides 150 ft buffers for non-federally protected chicks, though the "Preferred Alternative" required 300 to 600 ft buffers. Id.

Consequently it does not meet the standards from the "Environmentally Preferred Alternative" in the EA or the protections prescribed by Federal Defendants' own scientists in the USGS Management Protocols as necessary to provide even "Minimum Protection" from the adverse impacts of ORV use.

In light of the dramatic declines and disappearance of some species from the Seashore due to management under the Interim Plan, on October 18, 2007, the Plaintiffs filed the Complaint in this action against Federal Defendants, and sent Federal Defendants a letter giving them the 60 days notice required by the Endangered Species Act, 16 U.S.C. §§ 1531-1544, that they intended to bring additional claims under that Act. On December 19, 2007, upon expiration of the 60-day notice period, the Plaintiffs filed an Amended Complaint, adding claims under the Endangered Species Act against certain of the Federal Defendants.

The Amended Complaint challenges Federal Defendants' failure to implement an adequate plan to govern ORV use at Cape Hatteras that will protect the Seashore's natural resources and minimize conflicts with other uses of the Seashore under Executive Order 11644, and their corresponding obligations to protect and preserve the natural resources of the Seashore under the Endangered Species Act, 16 U.S.C. §§ 1531-44, the National Park Service Organic Act, 16 U.S.C. § 1 et seq., the Cape Hatteras National Seashore enabling legislation, 16 U.S.C. §§ 459-459a-10, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370f, and the National Park Service's own management policies.

The 2008 breeding season will begin at Cape Hatteras for many species in mid-March, and, from all indications, Federal Defendants plan to manage ORV use under the inadequate Interim Plan. Because management of ORV use at the Seashore under the terms of the 2007 Interim Plan for even one more breeding season will likely prove to be disastrous for the endangered, threatened, and otherwise protected species at the Seashore, and will likely lead to the extirpation from the Seashore of additional species, a preliminary injunction is necessary to preserve the status quo and ensure that a viable population of each species still exists at the Seashore at the termination of this litigation.

ARGUMENT

I. Preliminary Injunction Standards.

A preliminary injunction is meant to preserve the status quo during the pendency of litigation and prevent irreparable harm that cannot later be remedied by legal relief. See Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 812 (4th Cir. 1991); Merck & Co. v. Lyon, 941 F. Supp. 1443, 1455 (M.D.N.C. 1996). In the instant case, the status quo is the use of the Seashore by breeding piping plovers, American oystercatchers, several species of colonial waterbirds, and sea turtles. As evidenced by the extremely poor 2007 breeding season, the status quo is threatened by the Interim Plan. See Cape Hatteras National Seashore 2007 Annual Piping Plover (*Charadrius melodus*) Report; Affidavit of Jonathan Cohen ¶¶ 9 (Exhibit 5 to Appendix), 15; Nol Aff. ¶¶ 15, 19; Golder Aff. ¶¶ 5, 6. This Court should grant this request for preliminary injunction in order to maintain the status quo and to prevent further declines of these species.

Two preliminary injunction standards are applicable to the Plaintiffs' motion before this Court. The first, the generally applicable standard, has four factors, known as the Blackwelder factors, including: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest." Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch., 373 F.3d 589, 593 (4th Cir. 2004) (citing Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 195-96 (4th Cir. 1977); Direx Israel, Ltd., 953 F.2d at 812). If a plaintiff

demonstrates that it is virtually assured of success on the merits, its burden of proof on the balance of harms is lessened. Id. By the same token, as the balance of harm tips in favor of the plaintiff, the plaintiff has a lesser burden in showing its likelihood of success on the merits. Manning v. Hunt, 119 F.3d 254, 263 (4th Cir. 1997).

The second preliminary injunction standard that is relevant here is the standard applied to claims brought under the Endangered Species Act. When a preliminary injunction is sought for violations of the Endangered Species Act, “the standard is different” because “the third and fourth prongs of the injunction analysis” – the analysis of the balance of harms and public interest – “have been foreclosed by Congress.” Fla. Key Deer v. Brown, 386 F. Supp. 2d 1281, 1284 (S.D. Fla. 2005). When considering a preliminary injunction for violations of the ESA, “(1) the Court does not have the ‘traditional equitable discretion’ to balance the parties’ interests, (2) any threatened harm is per se irreparable harm, and (3) the public interest always favors the imposition of an injunction under the Act.” Loggerhead Turtle v. Volusia County, 896 F. Supp. 1170, 1178 (M.D. Fla. 1995) (emphasis in original) (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174, 184 (1978)). According to the Supreme Court, “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities” Tenn. Valley Auth. 437 U.S. at 194. Consequently, the preliminary injunction standard for ESA claims has two parts. Parties “seeking a preliminary injunction under the Act must show: (1) that the wildlife at issue is protected under the Endangered Species Act, and (2) that there is a reasonable likelihood that defendant will commit future violations of the Endangered Species Act.” Loggerhead Turtle 896 F. Supp. at 1180.

II. A Preliminary Injunction is Appropriate and Necessary Because the Plaintiffs Are Virtually Certain to Prevail on Their Claims Against Federal Defendants.

Where a plaintiff demonstrates that it is highly likely to succeed on the merits of its claims, a preliminary injunction is appropriate without regard to the balancing of harms. Child Evangelism Fellowship of Md., Inc., 373 F.3d at 593. Here, Federal Defendants have admitted that they are in

violation of the governing laws, and the Plaintiffs are highly likely to succeed on the merits of one or more of its claims,² and thus Federal Defendants should be enjoined from further violation.

A. The Federal Defendants Have Admitted Continuing Violation of Executive Order 11644 and Park Service Regulations.

Federal Defendants have violated Executive Order 11644 by failing to adopt special regulations governing ORV use on the Seashore, by failing to manage ORV use in a way that protects the Seashore's wildlife and conserves its natural resources, and by failing to immediately close the Seashore to ORV use when it became abundantly clear that the level of ORV use has caused and is causing significant adverse effects to numerous endangered, threatened, and otherwise protected species.

As explained above, Executive Order 11644 (and its implementing regulation, 36 C.F.R. § 4.10) requires that Federal Defendants implement special regulations governing the use of ORVs at the Seashore that ensure ORV use minimizes damage to the wildlife and other natural resources. Defendant National Park Service admitted that it "has not met the long-standing requirements for an ORV management plan and special regulation at" the Seashore. Letter from Seashore Superintendent Michael Murray to the U.S. Attorney for the Eastern District of North Carolina of July 31, 2007 at 8. The Order also requires that, when the Defendant National Park Service determines that ORV use is causing or may cause adverse effects to wildlife or wildlife habitat, the Seashore must be immediately closed to ORV use. See Exec. Order at 2. Pursuant to the National Park Service's own regulations, "[o]perating a motor vehicle is prohibited except on park roads, in parking areas and on routes and areas designated for off-road motor vehicle use." 36 C.F.R. § 4.10(a) (emphasis added). Rather than closing all or even critical portions of the Seashore to reverse the documented population declines of numerous rare, threatened, or endangered species, the Seashore management has consistently favored ORV users over natural resources. See Harrison Aff. ¶ 19.

² Note that, because each of Plaintiffs' claims is independently adequate to support a preliminary injunction, this section of the argument will address only the likelihood of success on the merits of the first several claims.

As this Court concluded in another case involving beach driving at Cape Hatteras, “where the Park Service fails to create a plan for ORV use, [it] is prohibited. [Cape Hatteras] does not have regulations in place to govern ORV traffic. Consequently, it is [illegal] to operate a motor vehicle on Cape Hatteras National Seashore” United States v. Matei, No. 2:07-M-1075-BO (July 17, 2007) at 3 (Exhibit 19 to Appendix). Cape Hatteras Park Ranger Paul Stevens testified in the same case that the Park Service did not have an ORV management plan in place as of July 2007, that beach driving is therefore not allowed at Cape Hatteras. United States v. Matei, No. 2:07-M-1075-BO (July 16, 2007), Hr’g Tr. at 11 (Exhibit 20 to Appendix). He admitted, correctly, the Seashore management is in violation of the Executive Order and Park Service regulations. Id. In other words, it is beyond question that because the Federal Defendants still have not developed and implemented a long-term plan for managing ORV use at Cape Hatteras 35 years after Executive Order 11644, any use of ORVs at the Seashore is per se illegal. Thus, any operation of vehicles on the beach and other off-road areas of the Seashore is, in fact, currently prohibited by operation of law.

Defendant National Park Service’s flawed attempt to implement a species management plan – the Interim Plan – likewise fails to satisfy Executive Order 11644. Federal Defendants acknowledge that the plan is merely a temporary set of management measures to be used until a long-term plan is developed in accordance with the procedural requirements of the Executive Order and its implementing regulation, 36 C.F.R. § 4.10(a). FONSI at 26. There is no dispute the Interim Plan is not the special regulation required by the Executive Order. Moreover, even if the Interim Plan had satisfied procedural requirements of the Executive Order, the manner, location, and conditions of recreational ORV use of the Seashore allowed under the Plan are contrary to the recommendations of Federal Defendants’ own scientists and have harmed and will continue to harm the endangered, threatened, and otherwise protected species at the Seashore.

For instance, the Interim Plan provides only for the closure of areas of the beach where nesting by piping plovers and certain other protected shorebirds have been detected in the past three years, instead of the ten years recommended by the USGS protocols. According to Dr. Jonathan Cohen, the USGS

contract scientist who authored the piping plover and sea turtle protocols for the Federal Defendants, because populations of those species have been so small in the last several years, the ten year nesting data would provide a more complete sampling of potential nesting habitat. See Cohen Aff. ¶¶ 13(b), 14. Likewise, the Interim Plan provides for weekly monitoring of bird activity and only allows for beach closures in areas in which birds are observed engaged in territorial or mating behavior on two consecutive weekly observations. This reliance on chance observations on two weekly occasions ensures that most birds will be disturbed by ORVs and will abandon efforts to nest long before their area of the beach is closed to ORV use. In contrast, the USGS protocols provide for earlier beach driving closures that do not depend on human observation of bird behavior, which allow birds to establish territory and build nests without being deterred by human disturbance. Id. ¶¶ 13(c)-(d), 14. The Interim Plan also includes non sequitur provisions that provide for protected nesting areas at the base of dunes without also protecting nearby foraging areas at the water's edge, thereby allowing chicks to hatch in safety, only to be run over when they try to eat, whereas the USGS Protocols protect the entire expanse of the beach where birds nest, hatch, and forage. See Affidavit of Scott Melvin ¶¶ 18, 20 (Exhibit 10 to Appendix); Affidavit of Francesca Cuthbert ¶¶ 8, 10 (Exhibit 6 to Appendix); Nol Aff. ¶¶ 15, 18.

The number of breeding pairs of each type of protected waterbird and shorebird has been drastically reduced in recent years and 2007 was the worst breeding season on record for colonial waterbirds. (See supra p. 4). Only a few individuals of some species remain, such as piping plovers, least terns, American oystercatchers, and common terns. Gull-billed terns disappeared entirely and black skimmers failed to nest successfully on the Seashore in 2007. Golder Aff. ¶ 5. Experts on each of these species, including Dr. Jonathan Cohen, cite the ORV use that would continue under the Interim Plan for the decline in each species. Cohen Aff. ¶¶ 9-14; Cuthbert Aff. ¶¶ 8-11; Nol Aff. ¶¶ 9-19; Melvin Aff. ¶¶ 15-22. These same experts agree that, unless ORV use is managed at least as strictly as prescribed by the USGS Moderate or Highest Level Protocols, the waterbird and shorebird species will continue to decline and eventually be eliminated from the Seashore altogether. Cohen Aff. ¶¶ 14-16; Cuthbert Aff. ¶¶ 10-11; Nol Aff. ¶¶ 17-19; Melvin Aff. ¶¶ 19-22.

Other courts have held that to satisfy Executive Order 11644, management plans must protect park resources. In Nat'l Wildlife Fed. v. Morton, the court struck down regulations allowing ORV use of lands owned by the federal Bureau of Land Management that failed to satisfy the requirements of Executive Order 11644. 393 F. Supp. 1286 (D.D.C. 1975). In an ORV user group's challenge to an ORV management plan implemented pursuant to the Executive Order, the court upheld restrictions and prohibitions on ORV use of federal lands, finding the restrictions necessary to resolve conflicts between ORVs and non-ORV uses of the land and also to protect natural resources. Nw. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468 (9th Cir. 1994).

In Fund for Animals v. Norton, the court held that a new rule allowing the off-road use of snowmobiles at Yellowstone and several other national parks was not adequately supported by the Park Service and violated the "clear conservation mandate" of the Executive Orders and other laws, and was therefore arbitrary, capricious, and unlawful. 294 F. Supp. 2d 92, 106-08 (D.D.C. 2003). The court sharply criticized the Park Service for rejecting the "Environmentally Preferred Alternative" in favor of "an alternative whose 'primary beneficiaries' are the 'park visitors who ride snowmobiles in the parks and the businesses that serve them.'" Id. at 108.

That holding is instructive in the present case, where the Defendants' rejection of their own scientists' recommendations and the EA's "Environmentally Preferred Alternative" in favor of the FONSI's approval of the far less protective Interim Plan benefits ORV users and the businesses that serve them, to the detriment of the wildlife that the Seashore management is legally obliged to protect. The FONSI acknowledges that "environmental impacts [from the Interim Plan are] mainly due to recreational activities that will continue under this interim strategy." FONSI at 30. Moreover, it concludes that the Interim Plan avoids harming ORV, business, or economic interests at the expense of the environment. ORV and business impacts from the Interim Plan will be, at worst, minor. Id. Impacts to local businesses will maximally be negligible. Id. In contrast, the Interim Plan authorizes severe impacts to the wildlife and natural resources at the Seashore, those adverse impacts described above, that it describes as "moderate." Id. In other words, the Interim Plan intentionally elevates the interests of ORV users and

local businesses over those of the Seashore's natural resources, in direct conflict with the legal duty of the National Park Service.

As Steve Harrison explains, "during my tenure as Chief of Resource Management at the Seashore, protection of birds and other natural resources was often compromised by Seashore management to accommodate ORV use and ORV user groups." Harrison Aff. ¶ 19. Further, "[a]lthough Seashore staff attempted to develop standardized science-based guidance for closures, these were never accepted by Seashore management." *Id.* ¶ 18. To have wholly ignored and disregarded the recommendations of the USGS protocols, which were scientifically documented and carefully developed by the Federal Defendants' own scientists, and instead adopt a vague and far less protective management plan that so clearly elevates the wishes of a few ORV drivers over the legally enforceable requirements of the Seashore's wildlife, is arbitrary and capricious. *See Kent County v. U.S. Env'tl. Prot. Agency*, 963 F.2d 391 (D.C. Cir. 1992) (holding that EPA's actions that disregarded its own experts was arbitrary and capricious).

B. The Plaintiffs Will Likely Prove that The Defendants Have Violated the National Park Service Organic Act, the Cape Hatteras National Seashore Enabling Legislation, and the Park Service's Own Regulations and Management Policies.

Plaintiffs are also highly likely to prevail on the merits of their claim that the Interim Plan violates the National Park Service Organic Act, the Cape Hatteras enabling legislation, and related regulations by failing to manage ORV use in a way that protects the Seashore's wildlife, conserves its natural resources, and promotes conservation of natural resources over conflicting recreational uses.

The National Park Service Organic Act requires that the Federal Defendants manage the Seashore and all park lands in a manner consistent with and supportive of the fundamental purpose for which the park system was created, namely "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." 16 U.S.C. § 1 (emphasis added). It demands that management authority "shall not be exercised in derogation of the values and purposes for which [units of the National Park System] have been established." 16 U.S.C. § 1a-1. The Organic Act

requires that, when a recreational use of a park conflicts with the conservation of wildlife and the park's other natural resources, the conservation of natural resources for present and future generations must prevail. See, e.g., Southern Utah Wilderness Alliance v. Dabney, 222 F.3d 819 (6th Cir. 2000) (citing 16 U.S.C. § 1 and Park Service Management Policies); Fund for Animals v. Norton, 294 F. Supp. 2d 92, 102-06 (D.D.C. 2003) (holding that goal of conserving natural resources must be predominant over conflicting off-road recreational use of park by snowmobiles). Indeed, the National Park Service has promulgated management policies that interpret the Organic Act to mandate such an ordering of priorities, and require the Federal Defendants to elevate the conservation of natural resources at Cape Hatteras over the protection of ORV interests. See National Park Service Management Policies 2006, § 1.4.3; National Park Service Management Policies 2001, § 1.4.3 ("when there is a conflict between conserving resources and value and providing for enjoyment of them, conservation is predominant").

Even if ORV use at the Seashore was not already illegal under the Executive Order, there is a clear conflict between the current terms under which ORV use is being allowed under the Interim Plan and the well-being and conservation of the wildlife and other natural resources of the Seashore. See supra pp. 13-14. Accordingly, the Federal Defendants are affirmatively obliged to halt all incompatible ORV use under the Organic Act and its interpretation in the Park Service's Management Policies. As one court explained, in light of the clear mandate to promote conservation of natural resources over conflicting recreational uses, when the Defendants find that ORV use will impair natural resources, it must explain any decision to nevertheless allow conflicting ORV use to the detriment of the natural resources. Fund for Animals, 294 F. Supp. 2d at 108. Where, as at Cape Hatteras, the Federal Defendants ignore the advice and well-documented scientific reports of their own USGS scientists regarding the level of protection necessary to protect wildlife from ORV disturbances, and instead implement an ORV management plan that favors ORV users, that plan must be found arbitrary and capricious and therefore unlawful.

C. The Balance of Harms Tips Decidedly in the Plaintiffs' Favor.

Where a plaintiff demonstrates that it is highly likely to succeed on the merits of its claims, a preliminary injunction is appropriate without regard to the balancing of harms. Child Evangelism Fellowship of Md., Inc., 373 F.3d at 593. As explained above, the Plaintiffs in this case are highly likely to succeed on the merits of one or more of their claims, each of which is independently adequate to support the requested preliminary injunction, and so their burden on the balance of harms is correspondingly reduced. The balance of harms nevertheless tips decidedly in favor of the interests promoted by the Plaintiffs and also supports the granting of a preliminary injunction.

1. The Plaintiffs Have Shown Irreparable Harm if an Injunction Does Not Issue.

Plaintiffs will suffer immediate and irreparable harm in the event that the requested injunction is not issued. A new breeding season will begin by mid-March, and, if an injunction does not issue, certain, serious, and irreparable harm to the environment will result, in the form of further decline of the endangered and threatened species that reside at the Seashore, near certain extirpation of one or more of those species, and the death and take of endangered and threatened animals. See Cohen Aff. ¶ 9; Nol Aff. ¶ 19.

As the United States Supreme Court has emphasized,

Environmental injury, by its nature, seldom can be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Amoco Prod. Co. v. Village of Gambell, 480 U. S. 531, 545 (1987) (emphasis added). This is so because while environmental injuries are “palpable and concrete, they are not ownership interests in property susceptible to monetary valuation.” Fund for Animals v. Espy, 814 F. Supp. 142, 151 (D.D.C. 1999). In essence, for the purpose of a preliminary injunction, the terms environmental and irreparable are interchangeable modifiers of “harm,” where there is environmental harm there is irreparable harm. See Fla. Key Deer v. Brown, 386 F. Supp. 2d 1281, 1286 (S.D. Fla. 2005) (stating that “in determining whether the irreparable injury has been satisfied, the Court considers whether environmental harm is

likely to occur”). See also Marbled Murrelet v. Pac. Lumber Co., 83 F.3d 1060, 1064-65 (9th Cir. 1996) (stating that “an imminent threat of future harm [to a threatened species] is sufficient for the issuance of an injunction” and citing Forest Conserv. Council v. Rosboro Lumber Co., 50 F.3d 781, 783 (9th Cir. 1995) for proposition that the threat of harm to a threatened species’ habitat also justifies a preliminary injunction); Amer. Rivers v. U.S. Army Corps of Eng’rs, 271 F. Supp. 2d 230, 259 (D.D.C. 2003) (in light of the “strong congressional mandate” to protect species, even the threat of loss of just a few individual piping plovers, terns, and other species justifies a preliminary injunction). In this case, there is ample indication of the risk to the environment in the event that the Federal Defendants are allowed to continue operating under the Interim Plan during this litigation.

As discussed above, the numbers of breeding pairs of each type of protected waterbird or shorebird have been drastically reduced, with only a few pairs of some species successfully nesting in the 2007 breeding season and at least two failing to nest on the Seashore in 2007. See supra p. 4. In addition, the Seashore failed to satisfy the incidental take standards set by the Fish and Wildlife Service (“FWS”) under the Endangered Species Act, “taking” piping plovers. See infra pp. 25-26. Experts on each protected bird species cite the ORV use allowed under the Interim Plan for the continued decline in each species. Cohen Aff. ¶¶ 9-14; Cuthbert Aff. ¶¶ 8-11; Nol Aff. ¶¶ 9-19; Melvin Aff. ¶¶ 15-22. These same experts agree that, unless an ORV management plan that is at least as protective as the USGS “Moderate” or “Highest” Protocols is implemented by the next (2008) breeding season, the waterbird and shorebird species will continue to decline and eventually be eliminated from the Seashore altogether. Cohen Aff. ¶¶ 14-16; Cuthbert Aff. ¶¶ 10-11; Nol Aff. ¶¶ 17-19; Melvin Aff. ¶¶ 19-22. The decline of bird populations on the Seashore irreparably harms birdwatchers as well as other Seashore visitors.

Courts have held that such environmental degradation satisfies the required showing of harm to justify a preliminary injunction. In Washington County v. U.S. Dep’t of the Navy, this Court held that the disruption of roosting birds, elimination of bird feeding habitat, and the creation of a significant threat of direct bird mortality through collisions with jets constituted an irreparable harm. 317 F. Supp. 2d 626, 635 (E.D.N.C. 2004). The threats are almost identical in this instance, where current ORV management

on the Seashore disturbs courting and nesting birds, destroys or isolates important bird feeding habitat, creates a significant risk that birds, chicks, and nests will be run over. See Cohen Aff. ¶ 8; Nol Aff. ¶ 14.

Other courts have also intervened to prevent environmental harm. The Ninth Circuit has upheld preliminary injunctions to halt the steady decline of water quality in Lake Tahoe due to development, California ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1308 (9th Cir. 1985), and to prevent reliance on a biological opinion that authorized actions that adversely affected salmon and steelhead on the Snake and Columbia Rivers. Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv., 422 F.3d 782 (9th Cir. 2005). Similarly, the Southern District of Alabama granted a preliminary injunction preventing the reliance on an improperly granted incidental take permit that allowed developers to “take” the endangered Alabama Beach Mouse. Sierra Club v. Norton, 207 F. Supp. 2d 1310 (S.D. Ala. 2002).

Based on the existing case law and the facts before the Court, the Plaintiffs will suffer an irreparable harm due to the adverse impacts of the Interim Plan on the Seashore’s wildlife as demonstrated by the continued population declines of protected species. Further, this type of harm is exactly the kind that has been recognized by this Court and others as requiring a preliminary injunction.

Moreover, the decline of current species populations under the Interim Plan will bias future protections. Since each proposed protection protocol relies on closing breeding areas used in the previous three or ten years, continuing population declines will directly restrict future protective efforts. If the Interim Plan is left in place, and populations continue to decline and consequently use less habitat, fewer habitat areas will be closed for these protected species in successive breeding seasons.

Finally, the longer that the faulty Interim Plan stays in effect, the more likely it is to become so completely entrenched in the lives of the people involved – the ORV users, local businesses, local governments, and other members of the recently approved negotiated rulemaking committee – that the committee will face great difficulty diverging from its terms in any meaningful manner. This “bureaucratic steamroller” effect has been acknowledged by courts considering similar motions for preliminary injunction. See Md. Conservation Council v. Gilchrist, 808 F.2d 1309 (4th Cir. 1986) (enjoining completion of two road segments that would bias future decision making regarding a proposed

highway through a park). This future restriction on increasing protections for rare, threatened, and endangered species on the Seashore is not an innocuous inconvenience. Rather, “[t]he difficulty of stopping a bureaucratic steamroller, once started . . . [is] . . . a perfectly proper factor for the district court to take into account in assessing [environmental] risk, on a motion for preliminary injunction.” Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989).

Implementing the closures on Bodie Island Spit, Cape Point, South Beach, Hatteras Spit, North Ocracoke, and South Ocracoke as recommended in the “Moderate” USGS Management Protocols for piping plovers, American oystercatchers, and colonial waterbirds will reduce the harm allowed under the Interim Plan. These closures are identified in Figures 1 and 4-8 of the USGS Management Protocol for Piping Plover. By closing these areas, there is “less probability adults or nests [of piping plovers] may be harmed.” USGS Management Protocol for Piping Plover at 34. Similarly, for colonial waterbirds, the closures mean “less probability of mortality of adults or nests.” USGS Management Protocol for Colonial Waterbirds at 13. Further, excluding ORVs from these critical breeding areas would provide relief at these locations from the territorial, courtship, breeding, nesting, fledging, and feeding disturbances to piping plovers, American oystercatchers, and colonial waterbirds. See Cohen Aff. ¶ 8; Nol Aff. ¶ 14; Cuthbert Aff. ¶ 7; Melvin Aff. ¶ 15.

2. By Comparison, Any Injury to the Defendants if an Injunction Issues Is Negligible.

In contrast to the certain and irreparable harm to the Plaintiffs if injunctive relief is not granted, Federal Defendants will suffer no harm if injunctive relief is granted. Federal Defendants admit that they are currently in violation of their duty to implement special regulations to govern ORV use at Cape Hatteras. See letter from Seashore Superintendent Michael Murray to the U.S. Attorney for the Eastern District of North Carolina of July 31, 2007 at 8. Under such circumstances, they can hardly claim to be harmed by being enjoined from further violation of the governing laws.

The only parties that may arguably suffer any detriment if a preliminary injunction issues are the Defendant-Intervenors. However, their injury – any curtailment of their ability to drive on the certain

beaches of the Seashore – is slight and limited both temporally and geographically. Closure to ORV use of the critical areas recommended by USGS scientists in the “Moderate Protection” protocol affects approximately eight to ten miles of the 64 miles of beach on the Seashore, or approximately 12 to 15 % of the Seashore beach. While additional temporary closures of other areas may occur to protect nesting birds or sea turtles, those closures will occur under the Interim Plan regardless of an injunction closing the critical areas to ORV use.

Any claim of economic harm if an injunction is issued is misplaced. In a 2007 study prepared for Defendant U.S. Fish and Wildlife Service,³ Industrial Economics, Inc. concludes ORV users represent only approximately 2.7 to 4.0% of all visitors to the Seashore.⁴ If additional areas are closed to ORV use in the critical areas for piping plovers at the inlets and point, the study concludes economic impact resulting from lost trip expenditures and lost consumer surplus would represent a negligible 0.05 to 0.08% of economic value generated through all visitors to the Seashore.⁵ Moreover, any diminished visitation by ORV users could be compensated for by the 13% of Seashore visitors who would visit more often if ORVs were not allowed on the beach.⁶

In any event, such injury that may be asserted by Defendant-Intervenors is not recognized by law. The uniform policy of the National Park Service Organic Act, the Executive Order, their implementing regulations, and the National Park Service Management Policies, is that the conservation of natural resources and the protection of wildlife, particularly endangered and threatened species, is of paramount importance, and that recreational uses of the Seashore must be subordinated and curtailed or prohibited if necessary.

³ This study was prepared as part of the process to designate critical habitat under the Endangered Species Act for the endangered piping plover. In Cape Hatteras Access Preservation Alliance v. U.S. Dep’t. of the Interior, 344 F. Supp. 2d 108 (D.D.C. 2004), the court vacated and remanded the rule designating piping plover critical habitat in Dare and Hyde counties because in designating initial critical habitat in these counties the USFWS failed to comply with NEPA and failed to assess the economic effects of the designation as required by the habitat provisions of the critical ESA.

⁴ Industrial Economics, Inc., Economic Analysis of Critical Habitat Designation for the Wintering Piping Plover (Draft April 2, 2007) at 2-12 (Exhibit 25 to Appendix)

⁵ Id. at ES-3.

⁶ Id. at 2-15.

In sum, for the Plaintiffs the danger of immediate and irreparable harm in the event the Court declines to issue a preliminary injunction is great. Harm to the environment, in the form of further decline and/or extirpation of species from the Seashore, death of endangered and threatened animals, and degradation of natural resources, is exactly the type of grave and irreversible injury that preliminary injunctions are designed to prevent. Further, this environmental harm irreparably injures birdwatchers and other visitors who enjoy viewing wildlife at the Seashore. Conversely, injunctive relief pending trial poses no hardship to the Federal Defendants, and only slight inconvenience the Defendant-Intervenors. The balance of hardships tips clearly and decisively in favor of issuance of the a preliminary injunction halting further ORV use on the areas most critical to declining and imperiled species until an adequate ORV management plan is in place, in line with the “Moderate” recommendations of Federal Defendants own scientists.

D. The Public Interest in Protecting the Natural Resources of the Seashore Weighs in Favor of an Injunction.

The final Blackwelder factor is the public interest in preserving the status quo until the merits of a serious controversy can be fully considered by the trial court. Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 196-97 (4th Cir. 1977). This “public interest” includes “preserving the status quo ante litem until the merits of a serious controversy can be fully considered by a trial court.” Id. at 197. Here, the status quo can only be preserved by taking steps to abate further decline of each endangered, threatened, or rare species at the Seashore.

Maintaining and restoring these species while this litigation is pending advances “the strong interest of the public in protecting the environment.” Ohio River Valley Env’tl Coalition v. Callaghan, 133 F. Supp. 2d 442, 449 (S.D. W.Va. 2001). If the 2007 Interim Plan remains in effect, that will surely not be the case, as predicted by Federal Defendants’ own scientists. If beach driving in critical areas, and the disturbances that it creates, is halted until an adequate ORV management plan is in place, however, the chance of viable populations remaining at the end of the litigation increases tremendously. Cohen

Aff. ¶¶ 14-16; Cuthbert Aff. ¶¶ 10-11; Nol Aff. ¶¶ 17-19; Melvin Aff. ¶¶ 19-22. Thus, entry of a preliminary injunction in this case will serve the public interest of preserving the status quo.

Moreover, the public has a strong interest in “assuring that policies of elected representatives are carried out by bureaucracies assigned that responsibility.” Ohio River Valley Env’t Coalition v. Callaghan, 133 F. Supp. 2d 442, 449 (S.D. W.Va. 2001). “[T]here is a strong public interest in meticulous compliance with the law by public officials.” Fund for Animals v. Espy, 814 F. Supp. 142, 152 (D.D.C. 1999). The requested preliminary injunction would force Federal Defendants to “turn square corners,” id., and comply with their legal duty to protect the natural resources entrusted to them on the Seashore. As explained above, the unwavering priority of all the laws discussed herein – the National Park Service Organic Act, the Executive Order, National Park Service regulations, and the National Park Service Management Policies – is to conserve the Seashore’s natural resources, to protect its wildlife, and to promote such conservation above recreational uses of the Seashore that pose a harm to the wildlife and natural resources. Thus, the final Blackwelder factor – the dictates of public interest – also weighs heavily in favor of the granting of the Plaintiffs’ motion for preliminary injunction. See Washington County v. U.S. Dep’t of the Navy, 317 F. Supp. 2d 626 (E.D.N.C. 2004).

III. A Preliminary Injunction is Appropriate Because it is Likely that ORV Use on the Seashore Will Continue to Harm Threatened Piping Plovers.

As discussed above, evaluating a motion for preliminary injunction under the Endangered Species Act requires a two factor test. See supra p. 10-11. Under this standard, the Plaintiffs must show “(1) that the wildlife at issue is protected under the Endangered Species Act, and (2) that there is a reasonable likelihood that defendant will commit future violations of the Endangered Species Act.” Loggerhead Turtle v. Volusia County, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995).

It is beyond dispute that the piping plovers found on the Seashore are protected by the ESA. The piping plovers that breed, stopover on migration, and winter on the Seashore each spring are listed as threatened. 50 C.F.R. § 17.11; see Nol Aff. ¶ 11; Cohen Aff ¶ 7. Some of these birds belong to the Great

Lakes population of piping plovers, and are listed as endangered on their breeding grounds and threatened elsewhere under the ESA. 50 C.F.R. § 17.11; see *Nol Aff* ¶ 11.

There is a reasonable likelihood that management under the Interim Plan will continue to harm threatened piping plovers on the Seashore. Management for piping plovers under the Interim Plan is significantly less protective for this threatened species than even the inadequate “Minimum Protection” protocols developed by Federal Defendants’ scientists. Both the “Minimum” management protocols for piping plovers and the Interim Plan allow ORV use in an oceanside corridor through the critical breeding areas on the spits and point. However, even the inadequate “Minimum” management protocols require a mandatory 50 meter buffer around nests, expanded to 100 meters then 200 meters if the nesting birds are disturbed. The Interim Plan requires a 50 meter buffer, expanded in “flexible increments” and an allowance for “alternative ORV routes.” The “Minimum Protection” protocols require a mandatory 1000 meter buffer around nests the week prior to hatching and a 1000 meter buffer around brood’s center of activity. The Interim Plan requires only a 200 meter buffer around broods which may be reduced to 100 meters.

Federal Defendants’ scientists concluded the “Minimum Protection” protocols would harm piping plovers:

Adults are at risk of disturbance by pedestrians and recreational ORVs and boats at the focal sites... Adults are at risk of being harmed, and nests may be damaged before they are found and protected... The wrackline is likely to be degraded by ORV traffic and the beach profile altered by vehicle passage, even with an escort option
Young chicks may become trapped in ORV ruts

USGS Piping Plover Protocol at 36.

Since the Interim Plan is substantially less protective of piping plovers than the “Minimum” management protocols, one can only conclude the Interim Plan will result in substantially greater harm to this threatened species.

Since the National Park Service began monitoring in 1989, the number of breeding pairs of piping plovers has declined from 16 pairs in 1989 to only 6 pairs in 2007. *Golder Aff.* ¶ 6. During its evaluation of alternative ORV management plans in early 2007, the National Park Service and Cape Hatteras

National Seashore requested that Defendant FWS provide consultation on its proposed interim plan pursuant to section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a). In response, the FWS issued a document entitled “Biological Opinion for Cape Hatteras National Seashore’s Interim Protected Species Management Strategy” (the “Biological Opinion”) on August 14, 2006, and amended it on April 24, 2007. (Exhibits 21 and 22, respectively, to Appendix).

The Biological Opinion, as amended, embodied the FWS’s assessment of the Interim Plan’s likely effects on the populations of endangered or threatened piping plover, sea turtles, seabeach amaranth, and their habitat, and included an “incidental take statement” for piping plovers and sea turtles. It documents the risk of chicks being killed by vehicles, id. at 25, and notes that “[v]ehicles also significantly degrade piping plover habitat or disrupt normal behavior patterns.” Id. The FWS further concedes that “[d]emographic models for piping plovers indicate that even small declines in adult and juvenile survival rates will cause very substantial increase in extinction risk” and “insufficient protection of non-breeding piping plovers has the potential to quickly undermine the progress toward recovery achieved at other sites.” Id. at 27. The incidental take statement sets the level at which the Defendants could “take”⁷ endangered and threatened species at the Seashore; any “take” in excess of that amount is, by definition, a violation of the Endangered Species Act. 16 U.S.C. § 1539(a)(1); 50 C.F.R. § 402.14.

For piping plovers, the permissible incidental take set by the Amended Biological Opinion is that 75% of all known pairs of piping plovers must make a nest and that the Seashore must yield 1.0 fledged chick per nest. Amendment to the Biological Opinion for Cape Hatteras National Seashore’s Interim Protected Species Management Strategy (April 24, 2007) at 2. In fact, in the 2007 breeding season, the Seashore yielded only four fledged chicks for 11 nests, far less than the required 1.0 chick per nest. Cape Hatteras National Seashore 2007 Annual Piping Plover (*Charadrius melodus*) Report at 5. In contrast, 13 piping plover chicks were lost. Id. Accordingly, the Defendants have violated section 9 of the

⁷ To “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, or capture or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1538(a)(1).

Endangered Species Act, 16 U.S.C. § 1538, both by relying on and exceeding the incidental take levels set by the FWS in its Amended Biological Opinion.

Reliance on the incidental take statement does not indemnify Federal Defendants. While consultation with the FWS is the procedural manifestation of an agency's obligations under Section 7, that "alone does not satisfy an agency's duty under the [ESA]" to avoid jeopardy. Resources Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1994), citing Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990). Therefore, an agency cannot "abrogate its responsibility to ensure that its actions will not jeopardize a listed species" simply because it has consulted and received a biological opinion; "its decision to rely on a FWS biological opinion must not [be] arbitrary or capricious." Pyramid Lake, 898 F.2d at 1415. The Seashore's reliance on a biologically unsound incidental take statement, see Cohen Aff. ¶ 10, was arbitrary and capricious and cannot excuse their take of piping plovers by mismanagement under the Interim Plan.

Moreover, because ORV use is currently per se illegal under the Executive Order, see supra pp. 11-12, the Biological Opinion itself constitutes a per se violation of the Endangered Species Act. The Endangered Species Act only allows incidental take statements to be issued for "take" that is "incidental to . . . an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). Thus, because the implementation of the Interim Plan, and any ORV driving allowed pursuant to that plan, is currently illegal, the incidental take statement contained in the Amended Biological Opinion was issued in violation of the Endangered Species Act.

For these reasons, the Plaintiffs will likely succeed on the merits of their claim under the Endangered Species Act. Unless enjoined, the Federal Defendants will allow ORV use under the terms of the faulty 2007 Interim Plan and will violate the incidental take statement again in upcoming breeding seasons. Plaintiffs have no adequate remedy at law for some or all of the injury that will be sustained as a result, including the unlawful take of endangered and threatened animals, and the Federal Defendants must therefore be enjoined.

In Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv., the Ninth Circuit Court of Appeals faced a situation similar to the instant case – ongoing operations of hydroelectric dams on the Columbia and Snake Rivers violated the ESA and harmed eight threatened or endangered species. 422 F.3d 782, 796-97 (9th Cir. 2005). The district court granted, and the Ninth Circuit Court of Appeals upheld, a preliminary injunction modifying the operation of the dams to reduce their adverse impacts on the listed species so that those threatened and endangered species in question would not be further harmed during the remainder of the litigation. Id. at 800. This Court should follow a similar tack here and modify the Interim Plan to provide protection to critical piping plover breeding areas consistent with “Moderate” protections prescribed by the USGS protocols.

IV. In Light of the Circumstances of the Case, No Bond Should Be Required.

Plaintiffs respectfully submit that, in view of the circumstances of this case, no bond should be required. “[I]t is common for courts in environmental cases brought by environmental groups or individuals with limited means, particularly in NEPA cases, to require little or no security.” Bragg v. Robertson, 54 F. Supp. 2d 635, 652 (S.D. W.Va. 1999). Accordingly, in this case, no bond should be required.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court grant Plaintiffs’ motion for preliminary injunction, and enjoin the Federal Defendants from allowing any ORV driving (except for essential vehicles) in the critical areas at Bodie Island Spit, Cape Point, South Beach, Hatteras Spit, North Ocracoke, and South Ocracoke on Cape Hatteras National Seashore as described in the “Moderate Protection” recommendations of the USGS Management Protocols for piping plovers, colonial waterbirds, and American oystercatchers and depicted in Figures 1 and 4 through 8 of the USGS Management Protocol for Piping Plover. Plaintiffs request that these measures be maintained through the duration of this litigation or until Federal Defendants have implemented an adequate final regulation regulating ORV use on the Seashore. Plaintiffs further request that, in light of the upcoming breeding

seasons, the Court set this matter on for expedited hearing and that, in light of the circumstances of this case, that no bond be required.

Respectfully submitted this 20th day of February, 2008.

SOUTHERN ENVIRONMENTAL LAW CENTER

/s/ Derb S. Carter, Jr.

Derb S. Carter, Jr.

NC Bar No. 10644

/s/ Julia F. Youngman

Julia F. Youngman

NC Bar No. 21320

200 W. Franklin Street, Suite 330

Chapel Hill, NC 27516

Telephone: (919)967-1450

Facsimile: (919)929-9421

Email: dcarter@selcnc.org

Email: jyoungman@selcnc.org

Attorneys for Plaintiffs

DEFENDERS OF WILDLIFE

Jason C. Rylander

1130 17th Street N.W.

Washington, D.C. 20036-4604

Telephone: (202) 682-9400

Facsimile: (202) 682-1331

Email: jrylander@defenders.org

Attorney for Plaintiff Defenders of Wildlife

NATIONAL AUDUBON SOCIETY

Greer S. Goldman

1150 Connecticut Avenue, NW

Washington, D.C. 20036

Telephone: (202) 861-2242

Facsimile: (202) 861-4290

Email: ggoldman@audubon.org

Attorney for Plaintiff National Audubon Society

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of February, 2008, served a copy of the foregoing pleading upon the parties listed below by electronically filing the foregoing with the Court on this date using the CM/ECF system or by placing a copy in the U.S. Mail:

Lora M. Taylor
R.A. Renfer, Jr.
US Department of Justice
310 New Bern Avenue, Suite 800
Raleigh, NC 27601
Counsel for Defendants

Kevin W. McArdle
US Department of Justice
601 D Street NW, 5th Floor
Washington, DC 20004
Counsel for Defendants

Lawrence R. Liebesman
Lois Godfrey Wye
Holland and Knight
2099 Pennsylvania Ave., N.W., Suite 100
Washington, DC 20006
Counsel for Defendant-Intervenors

L.P. Hornthal, Jr.
L. Phillip Hornthal, III
Hornthal, Riley, Ellis & Maland, LLP
P.O. Box 220
Elizabeth City, NC 27907-0220
Counsel for Defendant-Intervenors

/s/ Julia F. Youngman
Attorney for Plaintiffs