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

No. 2:07-CV-00045-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.	PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [Fed. R. Civ. P. 65, E.D.N.C. Local Rule 7.1]

Plaintiffs, Defenders of Wildlife ("Defenders") and National Audubon Society ("Audubon") (collectively the "Plaintiffs"), pursuant to Rule 65 of the Federal Rules of Civil Procedure and E.D.N.C. Local Rule 7.1, move the Court for a preliminary injunction against Defendants 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 (collectively the "Federal Defendants"). In support of this Motion, Plaintiffs respectfully show the Court the following:

1. On October 18, 2007, the Plaintiffs filed the Complaint in the above-captioned action against the Federal Defendants, and sent the 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 is incorporated herein by reference.

2. The Amended Complaint challenges the Federal Defendants' failure to implement an adequate plan to govern off-road vehicle ("ORV") use at Cape Hatteras National Seashore ("Cape Hatteras" or the "Seashore") that will protect the Seashore's natural resources and minimize conflicts with other uses of the Seashore. The Federal Defendants have been under a legal obligation to implement such a plan since 1972. See Exec. Order No. 11644, 37 Fed. Reg. 2,877 (Feb. 8, 1972) (Exhibit 12 of the Plaintiffs' Appendix). For 35 years, they have failed to implement such a long-term plan and only recently implemented an inadequate temporary, interim plan instead. In so doing, the Federal Defendants have failed to meet their obligations under the Executive Order and its implementing regulations, and their corresponding obligations to protect and preserve the natural resources of the Seashore under the Endangered Species Act, 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, 42 U.S.C. §§ 4321-4370f (NEPA), and the National Park Service's own management policies.

3. Executive Order 11644 requires that the Federal Defendants implement regulations to govern the location, manner, and condition in which ORVs may be used at the Seashore. Because, 35 years after Executive Order 11644, the Federal Defendants still have not developed and implemented a long-term plan for managing ORV use at the Seashore, any use of ORVs at the Seashore is by definition illegal. Pursuant to the Federal Defendants' 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). Thus, any operation of vehicles on the beach and other off-road areas of the Seashore is currently prohibited.

4. Executive Order 11644 also requires the ORV regulations to minimize damage to the wildlife and other natural resources at the park, and mandates that, when the Federal Defendants determine that ORV use is causing or may cause adverse effect to wildlife or wildlife habitat, the Seashore must be immediately closed to ORV use.

5. More generally, 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 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.

Southern Utah Wilderness Alliance v. Dabney, 222 F.3d 819 (6th Cir. 2000) (citing 16 U.S.C. § -1 and Park Service Management Policies); National Park Service Management Policies 2006, § 1.4.3.

6. After many false starts and aborted attempts, the Federal Defendants have begun working on a regulation to manage ORV use. See letter from Seashore Superintendent Michael Murray to the U.S. Attorney for the Eastern District of North Carolina of July 31, 2007 (describing the history of failed attempts and acknowledging that the National Park Service "has not met the long-standing requirements for an ORV management plan and special regulation at" the Seashore) (Exhibit 13 of the Plaintiff's Appendix). On December 20, 2007, the Secretary of the Interior established a negotiated rulemaking advisory committee for ORV management at Cape Hatteras National Seashore to negotiate and develop special regulations for the long-term management of ORVs at the Seashore. 72 Fed. Reg. 72,316 (Dec. 20, 2007). The Federal Defendants have estimated that the process of developing a final, long-term ORV management plan, assuming the process results in a final regulation, will take at least three years after approval of the committee. See National Park Service Negotiated Rulemaking Outline: ORV Management Plan/Environmental Impact Statement (Exhibit 23 of the Plaintiffs' Appendix). As a part of the process of developing a final ORV plan, Defendant National Park Service has issued a set of maps depicting where ORV driving is currently allowed or restricted on the Seashore. (Exhibit 24 of the Plaintiff's Appendix).

7. In the meantime, the Federal Defendants commissioned a set of studies from the U.S. Geological Survey ("USGS") (a scientific research agency within Defendant Department of the Interior) to develop 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 five reports and a synthesis entitled "Management, Monitoring, and Protection Protocols," one each for the Seashore's piping plovers, sea turtles, colonially nesting waterbirds, American oystercatchers, and seabeach amaranth plant and a synthesis for all species. See USGS Management Protocols (Exhibits 14-17 of the Plaintiffs' Appendix).

8. The USGS Management Protocols for each species include three levels of protocols, providing respectively for the "Highest Degree of Protection," "Moderate Protection," and "Minimum Protection" from the effects of ORV use in the National Seashore.

9. Defendant National Park Service next issued an Environmental Assessment ("EA") discussing alternatives for an interim plan to manage ORV usage and protected species for the several years during which Federal Defendants have stated an intent to develop a long-term ORV management plan. The final version of the EA, issued on January 25, 2006, included a "Preferred Alternative" and a more protective "Environmentally Preferred Alternative."

10. Defendant National Park Service also requested that Defendant Department of the Interior, through the Fish & Wildlife Service, provide consultation on its proposed interim plan pursuant to the Endangered Species Act. In response, the Fish & Wildlife Service 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. (Exhibit 21 of the Plaintiffs' Appendix). The document embodied the Fish & Wildlife Service'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.

11. In July 2007, Defendant National Park Service issued a "Finding of No Significant Impact" or "FONSI," which selected and approved an interim management plan (the "Interim Plan") and declared that its implementation will 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 of the Plaintiffs' Appendix). The Interim Plan is to be in effect until a long-term ORV management plan and the associated Environmental Impact Statement ("EIS") are completed.

12. The Interim Plan represents a combination of previous management practices and elements of the "Preferred Alternative" from the EA. It is less protective of the natural resource of the Seashore than either the "Preferred Alternative" or the "Environmentally Preferred Alternative." Moreover, the Interim Plan does not contain all the protections prescribed by the Federal Defendants' own scientists in the USGS Management Protocols as necessary to provide even "minimum protection" from the adverse impacts of ORV use at the Seashore, and is far less protective of the natural resources than any of the USGS Management Protocols. For instance, the Interim Plan provides for shorter periods of time that critical beach habitat is closed to ORV use (beginning after ORV use will have forced many birds to abandon efforts to nest) and smaller areas of closure (for instance, prohibiting driving only on nesting territory at the base of dunes without also prohibiting the adjacent area of the beach near the water that is necessary for the chicks and parents to forage for food). Consequently, the Interim Plan, while putatively protecting waterbirds and shorebirds, actually prevents many birds from establishing nests at the outset of the breeding season and, for those that manage to establish a nest, preventing the chicks and parents from being able to eat near their nests and therefore survive. See Affidavit of Jonathan Cohen, at Exhibit 5 of the Plaintiffs' Appendix, ¶¶ 9-13; Affidavit of Francesca Cuthbert, at Exhibit 6, ¶¶ 8-11; Affidavit of Erica Nol, at Exhibit 11, ¶¶ 15-19; Affidavit of Scott Melvin, at Exhibit 10, ¶¶ 18-22.

13. The manner, location, and conditions of recreational ORV use of the Seashore allowed under the Interim Plan has clearly harmed the endangered, threatened, and otherwise protected species at the Seashore and adversely affected the suitability of the beach as habitat for those species. Less than 250 pairs of all colonially nesting waterbird species nested at the Seashore in 2007, down from 1,516 per season in the last ten years and as many as 6,395 in 1984. Nol Aff. ¶ 16.

14. Under the Interim Plan, none of the species of concern experienced breeding success, and their numbers have dropped to near all-time lows in the 2007 breeding season. If the management of ORVs continues under the Interim Plan, piping plovers will almost surely be extirpated – that is, eliminated entirely from the Seashore – within two to three years, and the remaining species of concern will likely experience drastic declines in their numbers, if not extirpation also. Cohen Aff. ¶14; Cuthbert Aff. ¶ 7; Nol Aff. ¶ 19; Melvin Aff. ¶ 22.

15. Experts on these species, including Dr. Jonathon Cohen, the USGS scientist who developed the USGS Management Protocols for both piping plovers and sea turtles, blame the ORV use allowed 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 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.

16. To maintain the status quo, the existence of viable populations of the species of concern at the Seashore, for the several years until a final plan is in place, ORV use must be managed under at least as strict a set of protocols as the Moderate or Highest USGS protocols.

Cohen Aff. ¶ 14; Cuthbert Aff. ¶ 10; Nol Aff. ¶¶ 16-19; Melvin Aff. ¶ 21. The most important element of those plans is the protection of the most critical breeding habitat at the Seashore, found at Cape Point and the various inlets on the Seashore. See 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 31; 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 13; Management, Monitoring, and Protection Protocols for American Oystercatchers at Cape Hatteras National Seashore, United States Geological Survey ("USGS Management Protocol for American Oystercatchers") at 16.

. Specifically, maintaining the status quo requires the Seashore management to take the following actions to protect the species of concern:

> 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)."
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> 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 renesting 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)."
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> 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.

18. As a part of the process of designating critical habitat for piping plovers on the Seashore, Defendant US Fish & Wildlife Service commissioned a study of the economic impacts of such designation. Industrial Economics, Inc. prepared a report that concludes, *inter alia*, additional closure of critical bird nesting areas to ORV use on the Seashore could result in lost trip expenditures and lost consumer surplus of only 0.05 to 0.08 percent of the economic value generated through all visitation to the Seashore. (The Industrial Economics, Inc. economic analysis is attached at Exhibit 25).

19. A preliminary injunction against the Federal Defendants is necessary pending a trial on the merits in this case because (a) the balance of harm tips decidedly in favor of the requested injunction, with the irreparable injury of extirpation of endangered, threatened, and rare species juxtaposed against the de minimus injury to ORV users caused by a limited reduction in the area of beach open to their driving, (b) Plaintiffs are highly likely to succeed on the merits of their claims, and (c) the public interest embodied in the statutes that give rise to the Plaintiffs' claims favors the issuance of an injunction.

20. Plaintiffs respectfully submit that, in view of the circumstances of this case, no bond or only a nominal bond should be required. See Bragg v. Robertson, 54 F. Supp. 2d 635,

652 (S.D. W.Va. 1999) ("[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").

WHEREFORE, Plaintiffs respectfully request that:

1. The Court enter a preliminary injunction enjoining all ORV driving (except for essential vehicles) in the areas identified by USGS scientists as critical for nesting waterbirds and shorebirds at Bodie Island Spit, Cape Point, South Beach, Hatteras Spit, North Ocracoke, and South Ocracoke on Cape Hatteras National Seashore. Plaintiffs request that ORV use be enjoined as described in the "Moderate Protection" recommendations of the USGS Management Protocols for piping plovers, colonial waterbirds, and American oystercatchers and depicted on Figures 1 and 4 through 8 of the USGS Management Protocol for Piping Plover. Plaintiffs request that these measures be kept in place for the duration of this litigation or until the Federal Defendants have implemented an adequate final regulation governing ORV use on the Seashore.

2. The Court set this matter on for expedited hearing at a date and time certain on Plaintiffs' request for a preliminary injunction within a reasonable time; and

3. The Court grant such other and further relief as is just and proper.

Respectfully submitted this 20th day of February, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of January, 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:

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