UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
No. 2:07-cv- 00045 BO

DEFENDERS OF WILDLIFE and THE NATIONAL AUDUBON SOCIETY Plaintiffs, v. **NATIONAL PARK SERVICE, et al.** Defendants, **DARE COUNTY, NORTH CAROLINA** P.O. Box 1000 Manteo, NC 27954 and **HYDE COUNTY, NORTH CAROLINA** P.O. Box 178 Swan Quarter, NC 27885 and **THE CAPE HATTERAS ACCESS PRESERVATION ALLIANCE** P.O. Box 1355 Buxton, NC 27920 Intervenor-Defendants.	**MOTION BY DARE COUNTY, NORTH CAROLINA, HYDE COUNTY, NORTH CAROLINA, and THE CAPE HATTERAS ACCESS PRESERVATION ALLIANCE TO DISMISS CERTAIN CLAIMS FOR LACK OF JURISDICTION OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, Intervenor-Defendants Dare County, North Carolina, Hyde County, North Carolina, and Cape Hatteras Access Preservation Alliance (collectively, "Intervenors"), hereby move this Court to dismiss the First, Fourth, and Sixth Claims of Plaintiffs' Amended Complaint for lack of subject matter jurisdiction, or, in the alternative, for failure to state a claim upon which relief can be granted.

Specifically, Plaintiffs' First, Fourth, and Sixth Claims for Relief must be dismissed for lack of subject matter jurisdiction.[1] Plaintiffs allege violations of the Organic Act for the National Park Service, 16 U.S.C. §§ 1 *et seq.* ("the Organic Act"), the Cape Hatteras National Seashore Enabling Legislation, 16 U.S.C. §§ 459 *et seq.* ("the Enabling Act"), Executive Order 11644, as amended by Executive Order 11989 ("E.O. 11644"), Executive Order 13186, and NPS regulations at 36 C.F.R. § 4.10. To the extent these claims rely on the executive orders, this Court is without jurisdiction to hear them. Neither of the executive orders cited here grants third parties, such as Plaintiffs, a right to bring an action. In addition, there is no jurisdiction for Plaintiffs' Sixth Claim for Relief because the long-term management plan they claim has been unreasonably delayed is already in development, so there is no further relief for this Court to order and this claim is moot.

As to any remaining elements of these three claims, Plaintiffs have failed to state a claim under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* Their allegations amount to a broad-ranging attack on NPS management policies, but the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"), does not provide a cause of action for such programmatic challenges. To the extent these Claims for Relief can be construed as a narrow challenge under the APA to the Interim Plan as arbitrary, capricious, or otherwise not in compliance with law or as an unreasonable delay in the development of a long range management plan, the relief Plaintiffs' seek is not available. Plaintiffs have requested detailed factual findings and injunctive relief which would involve this Court in the day-to-day management of CHNS, a result not

[1] Plaintiffs' First Claim for Relief challenges NPS' interim management of CHNS pending development of a long-term management plan, alleging violations of the Organic Act, the Enabling Act, and Executive Order 11644; the Fourth Claim for Relief alleges violates of Executive Order 13186 in connection with requirements of the Migratory Bird Treaty Act; and the Sixth Claim for Relief alleges violations of the Executive Order 11644 and 40 C.F.R. § 4.10 in connection with an alleged delay in developing a long-term management plan for CHNS.

permitted under the APA. Therefore, Plaintiffs have failed to state a claim on which relief can be granted.

In support of this motion, Defendant rely on the Memorandum filed herewith.

DATED: February 20, 2008

HOLLAND AND KNIGHT

By:_____/s/_____

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