

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

No. 2:07-CV-45-BO

DEFENDERS OF WILDLIFE, <u>et al.</u> ,)	RESPONSE TO ORDER
)	DATED APRIL 22, 2008
Plaintiffs,)	
)	
v.)	
)	
NATIONAL PARK SERVICE, <u>et al.</u> ,)	
)	
Defendants,)	
)	
and)	
)	
DARE COUNTY, <u>et al.</u> ,)	
)	
Intervenor-Defendants.)	

Defendants, the National Park Service ("NPS"); the United States Fish and Wildlife Service ("FWS"); the United States Department of the Interior ("DOI"); Dirk Kempthorne, Secretary of the Interior; Mary A. Bomar, Director of NPS; H. Dale Hall, Director of FWS; and Michael B. Murray, Superintendent of Cape Hatteras National Seashore ("Seashore") (hereinafter "Federal Defendants," collectively), by and through their undersigned counsel, hereby respond to the Court's Order dated April 22, 2008. Docket Entry 59.

Federal Defendants responded to the Court's initial inquiries, as set forth in its April 18, 2008 Order, in a Response filed April 22, 2008. Docket Entry 61. Shortly before Federal Defendants filed their Response, the Court issued a second Order setting forth four additional areas of inquiry.

Docket Entry 59. NPS¹ now responds to the Court's additional inquiries as follows:

1. *Has the Park Service projected its manpower needs in order to implement the proposed Consent Decree? Are budget authorizations in place and available to add personnel for Park Rangers and resource management, during the appropriate times given the requirements of the proposed Consent Decree?*

During the hearing, the Court raised a concern about whether NPS has sufficient resources to handle the increased demands of the proposed Consent Decree. Hr'g Tr. at 15 (April 4, 2008). NPS carefully considered this issue before entering into the proposed Consent Decree. NPS projected the staffing and resources needed to implement the proposed Consent Decree and concluded that federal implementation will be feasible with the resources NPS has for this fiscal year.

Of course, no money can be paid out of the Treasury unless it has been appropriated for such purpose by an act of Congress. See, e.g., Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424-25 (1990) (quotations and citations omitted). Further, formal requests for funds from Congress must be made through the President, acting through the President's Office of Management and Budget, not by Federal Defendants. See Sierra Club v. Dept. of Interior, 424 F. Supp. 172, 173, 175 (N.D. Cal. 1976). Thus, NPS recognizes that some uncertainty about the adequacy of the

¹Superintendent Michael B. Murray assisted with the preparation of these responses.

agency's resources for settlement implementation in future fiscal years is inevitable. At this juncture, however, such speculation does not warrant rejection of the parties' proposed Consent Decree.

2. *Has the Park Service considered alternative access other than off-road vehicle traffic in order to provide the public using the Cape Hatteras National Seashore, with access to the beach including areas adjacent to closures, through the services of concession carriers and publicly available transportation similar to that currently employed on Cape Lookout, to provide pedestrian beach access for bathing, fishing and ordinary beach use?*

During the hearing, the Court suggested NPS consider providing alternative forms of public access at the Seashore, if the current level of access was going to be affected. Hr'g Tr. at 33-34 (April 4, 2008). NPS agrees that the issue of alternative access is a factor to be considered in crafting the long-term ORV management plan and Special Regulation pursuant to 36 C.F.R. § 4.10. But, improving alternative access through, for example, constructing additional parking lots or entering into contracts with concession carriers cannot feasibly or properly be analyzed and implemented as part of the proposed Consent Decree. As discussed in NPS's Response to the Court's April 18, 2008 Order, the proposed Consent Decree would impose interim measures to be in place only until NPS completes the long-term management plan and Special Regulation governing ORV use at the Seashore. It is during that process that NPS will consider the relevant

factors, including potential forms of alternative access, solicit public comment, conduct the appropriate NEPA analysis, and promulgate a Special Regulation governing ORV use at the Seashore for the long term. Under the proposed Consent Decree, the Special Regulation must be completed by no later than April 1, 2011.

The Seashore currently has an estimated 1,040 beach access parking spaces scattered across Bodie Island, Hatteras Island, and Ocracoke Island. Therefore, in NPS's view, availability of adequate parking, as opposed to concession carriers and additional public transportation, is a more significant factor relating to public access to the Seashore. But, while sufficient parking clearly is an important issue in the development of the long-term ORV management plan, construction of parking lots requires careful planning and environmental compliance, and as result, is beyond the scope of this lawsuit and the proposed Consent Decree.

While the Court's suggestion that NPS consider alternative access methods at the Seashore such as those that occur at Cape Lookout National Seashore ("Cape Lookout" or "CALO") has merit as a factor to consider in the development of a comprehensive ORV management plan, as the Court is aware, the contrast between the two Seashores is striking. Cape Hatteras received 2.35 million visitors in 2007; Cape Lookout experienced 860,602 recreational

visitors. Approximately 250,000 of the CALO visitors were at the banks, but the vast majority were at Harkers Island.² The CALO figure includes a total of 109,029 ferry passengers and 5,777 vehicles. Approximately one half of the total vehicle count constitutes return trips transported by ferries over the course of the season.

CALO reports that commercial ground transportation services were offered on a reservation basis from the Lighthouse to the Cape point in 2007. Portsmouth Village, located at the north end of the North Core Banks, offers a historic tour to transport visitors from the beach to the historic village. CALO reports that the service provided from the Lighthouse operated with limited success in 2007; of 59,657 visits to the Lighthouse Visitor Center in 2007, 2350 visitors (3.9%) used the ground transportation service offered at the Lighthouse area. This service will not be operating in 2008. CALO also reports that visitor use of the services at the other site in 2007 also was low; although the actual numbers are not known, there was not a significant amount of use.

Based upon this variety of factors, it appears public access to beach parking at the Seashore is a more significant factor to visitor access than a lack of alternative transportation. But,

²The information about CALO was provided by CALO Superintendent Russel J. Wilson.

both issues will be considered by the Reg. Neg. and NPS in developing the final Special Regulation and ORV management plan.

3. *Does the Park Service anticipate that as part of the consideration of this proposed Consent Decree, a period of public comment will be provided, and a "fairness" hearing will be scheduled prior to the court's ruling on the proposed Consent Decree?*

NPS highly values public involvement in its decision making processes. This is demonstrated by the numerous public meetings and comment periods held during the Interim Strategy planning process and thus far during the ORV management planning process, along with NPS's decision to use the negotiated rulemaking process to develop an ORV regulation; NPS's goal is to have a final Special Regulation that is a product of careful consideration of all relevant factors, including the public input from all interested parties.³ See Ex. 1 to NPS's first Response to Court's Inquiry.

The Court has noted previously the importance that case matters, which would include the approval of the proposed Consent Decree, be open, public, and transparent. See Hr'g Tr. at 3 (April 4, 2008). The proposed Consent Decree is a product of exhaustive negotiations on the part of all parties to reach a reasonable resolution of this lawsuit, consistent with the public interest. The proposed Consent Decree has been approved and

³The Court should be aware that the public will have ample opportunity to comment and participate in both the final rulemaking process and the related NEPA review.

entered into by Dare County, Hyde County, and the Cape Hatteras Access Preservation Alliance ("CHAPA"), which collectively represent the large majority of the public most acutely impacted by the proposed Consent Decree. The Dare County Board of Commissioners and Hyde County Board of Commissioners, which are composed of publicly elected officials, consulted with leading members of the business and user communities and held a meeting and a vote before agreeing to the terms of the proposed Consent Decree and before authorizing their counsel to sign the proposed Consent Decree on their behalf. Likewise, CHAPA held a meeting and voted to authorize their counsel to sign the proposed Consent Decree on their behalf. Therefore, the public interests most likely to be affected by the terms of the proposed Consent Decree already have been represented in the process and the proposed Consent Decree is a product of their input and agreement.

NPS, along with Plaintiffs and Intervenors, will be prepared to discuss and defend the proposed Consent Decree at the hearing before the Court on April 30, 2008. This will insure that the Court has an adequate opportunity to evaluate whether the proposed Consent Decree is fair, reasonable, consistent with applicable laws, and in the public interest, which is the sole prerequisite for approval of a Consent Decree that has been negotiated in good faith by all parties in the case. United States v. North Carolina, 180 F.3d 574, 581 (4th Cir. 1999);

Isby v. Bayh, 75 F.3d 1191, 1196 (7th Cir. 1996).

While NPS highly values public involvement, the undersigned counsel are not aware of any legal requirement that NPS hold public comment periods or that the Court conduct fairness hearings prior to approving a Consent Decree in a case brought against the United States under the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the NPS Organic Act, or the Administrative Procedure Act. Certain environmental statutes, such as the Clean Air Act and the Comprehensive Environmental Response, Compensation and Liability Act, do require notice and public comment before a proposed consent order or settlement agreement, to which the United States is a party, may be finalized. See 42 U.S.C. §§ 7413(g), 9622(I); see also 28 C.F.R. § 50.7(a). But the statutes at issue in this case contain no such requirement.

Accordingly, although public participation will continue to be an integral part of the rulemaking process that is already underway, a public comment period or fairness hearing is not a prerequisite to approval and entry of the proposed Consent Decree.⁴

⁴NPS recognizes the Court conducted a fairness hearing in North Carolina, after provisionally entering the consent decree. This case is distinguishable from North Carolina, not only because of the subject matter and statutory basis of the lawsuit, but also because in this action the United States is a defendant not the prosecuting party and because all parties bound by the settlement are known. Further, the proposed Consent Decree in

4. *With respect to the maps that have been attached to the proposed Consent Decree, is the Park Service prepared to tender technical witnesses apart from counsel, in order to provide testimony and evidence as to the location, duration, and affect of the closures on current beach driving and to relate the maps to the actual beach locations on the Seashore in order to make sense out of the maps and their anticipated areas of closure?*

Yes, an NPS representative will attend the hearing on April 30, 2008, and will be prepared to explain the location, duration, and effect of the closures on current beach driving, as well as the relation of the maps and the anticipated areas of closure. Additionally, prior to the hearing, NPS will provide a declaration explaining the maps and the impact of the closures.

The Court has identified important issues applicable to crafting the final Special Regulation required by 36 C.F.R. § 4.10 that will govern ORV use at the Seashore for the long term. As the Court is aware, the proposed Consent Decree is not intended to be a substitute for the Special Regulation, nor is it intended to resolve all of the issues to be addressed during the rulemaking process, such as the issues raised by the Court. The

this case does not involve a "wide array of expensive and intrusive mandates of unresolved value, necessity, and legality[;]" North Carolina, 180 F.3d at 579; rather, the proposed Consent Decree is narrowly tailored to address only those issues in dispute in the lawsuit and only those areas in the Interim Strategy that needed to be enhanced to provide sufficient protection of the wildlife, while still allowing for ORV use and other forms of recreation, until a final Special Regulation can be promulgated.

proposed Consent Decree is intended to provide enhanced protection of wildlife at the Seashore, while still allowing for ORV use and other forms of recreation; it will remain in place on an interim basis until NPS completes the final Special Regulation. Under the proposed Consent Decree, the Special Regulation must be completed no later than April 1, 2011.

"In considering whether to enter a proposed consent decree, a district court should be guided by the general principle that settlements are encouraged." North Carolina, 180 F.3d at 581. While the entry of a consent decree is a judicial act and requires approval of the Court, public policy concerns "create a presumption in favor of approving the settlement." Donovan v. Robbins, 752 F.2d 1170, 1177 (7th Cir. 1985). The Court should approve a settlement if it is fair, adequate, reasonable and consistent with the applicable law. North Carolina, 180 F.3d at 581.

In reviewing a proposed consent decree, the inquiry is directed not to whether the Court itself would have reached the particular settlement but rather to whether the proposed settlement is a reasonable compromise and otherwise in the public interest. EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1985). In addition, where, as here, "a government agency charged with protecting the public interest has pulled the laboring oar in constructing the proposed settlement, a reviewing

court may appropriately accord substantial weight to the agency's expertise and public interest responsibility." American Canoe Ass'n, Inc. v. EPA, 54 F. Supp. 2d 621, 625 (E.D. Va. 1999) (internal quotations omitted).

Finally, although the Court should not blindly accept a consent decree, it may not "rewrite the settlement agreed upon by the parties. [The Court] may not delete, modify, or substitute certain provisions of the consent decree. Of course, the [C]ourt may suggest modifications, but ultimately, it must consider the proposal as a whole and as submitted." Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 630 (9th Cir. 1982).

For the reasons set forth in this Response, its Response to the Court's April 18, 2008 Order, and the parties' Joint Motion for Approval and Entry of the Consent Decree, NPS believes the proposed Consent Decree is fair, adequate, and reasonable, and that it is not illegal, the product of collusion, or against the public interest. See North Carolina, 180 F.3d at 581. All parties, after extensive and comprehensive negotiations, willingly entered into the proposed Consent Decree and agreed to resolve all matters in dispute in this case. Accordingly, Federal Defendants respectfully request, on behalf of all parties in the case, that the Court enter the proposed Consent Decree as an Order of the Court concluding this litigation. The approval

of the proposed Consent Decree and the resolution of this case will bring much needed finality to a situation that has aroused much public uncertainty and unrest. Then, all parties will be able to focus their time and energy on expeditiously drafting a final Special Regulation, as required under 36 C.F.R. § 4.10.

Respectfully submitted, this 25th day of April, 2008.

GEORGE E.B. HOLDING
United States Attorney

BY: /s/ Lora M. Taylor
LORA M. TAYLOR
Assistant United States Attorney
Federal Building, Suite 800
310 New Bern Avenue
Raleigh, N.C. 27601
Telephone: (919) 856-4907
Facsimile: (919) 856-4821
Maryland Bar

BY: /s/ Kevin W. McArdle
KEVIN W. McARDLE
Trial Attorney
Wildlife & Marine Resources Section
Environment & Natural Resources
Division
United States Department of Justice
601 D Street, N.W.
Room 3912
Washington D.C. 20004
Telephone: (202) 305-0219
Facsimile: (202) 305-0275

CERTIFICATE OF SERVICE

I do hereby certify that I have this 25th day of April, 2008, served a copy of the foregoing upon the below listed parties 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:

Derb S. Carter, Jr.
Julia F. Youngman
Geoff Gisler
200 W. Franklin Street, Suite 330
Chapel Hill, NC 27516

Jason C. Rylander
1130 17th Street N.W.
Washington, DC 20036-4604

Greer S. Goldman
1150 Connecticut Ave., NW
Washington, DC 20036

Lawrence R. Liebesman
Lois Godfrey Wye
2099 Pennsylvania Ave., N.W., Suite 100
Washington, DC 20006

L.P. Hornthal, Jr.
L. Phillip Hornthal, III
P.O. Box 220
Elizabeth City, NC 27907-0220

/s/ Lora M. Taylor
Assistant United States Attorney
Civil Division