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

No. 2:07-CV-45-BO

DEFENDERS OF WILDLIFE, et al., Plaintiffs, v. NATIONAL PARK SERVICE, et al., Defendants, and DARE COUNTY, et al., Intervenor-Defendants.	FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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 Plaintiffs' Motion for Preliminary Injunction.

STATEMENT OF THE CASE

Plaintiffs, Defenders of Wildlife and the National Audubon Society, filed suit against Federal Defendants, not including FWS, on October 18, 2007, challenging the adoption of an interim

management plan ("Interim Strategy") to manage off-road vehicle ("ORV") use on the Seashore and alleging violations of the National Park Service Organic Act ("Organic Act"), 16 U.S.C. § 1, et seq.; the Seashore enabling legislation, 16 U.S.C. §§ 459-459a-10; Executive Order 11644, as amended by Executive Order 11989; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712, and Executive Order 13186; and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq.

On November 24, 2007, Intervenor-Defendants, Dare County, North Carolina; Hyde County, North Carolina; and the Cape Hatteras Preservation Alliance, filed their Motion to Intervene in the case. The Court granted the Motion on December 18, 2007.

On December 19, 2007, Plaintiffs amended their Complaint to add FWS as a Federal Defendant and to allege violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544.

Intervenor-Defendants answered the Amended Complaint on January 4, 2008. On January 18, 2008, Federal Defendants filed their Answer to the Amended Complaint, denying the substantive allegations.

Plaintiffs filed this Motion for Preliminary Injunction on February 20, 2008.

ARGUMENT

Federal Defendants dispute that Plaintiffs have met their burden of showing a likelihood of success on the merits of their

claims that the Interim Strategy violates the Organic Act, the Seashore's enabling legislation, NEPA, and the ESA.[1] But,

---

[1]In the Fourth Circuit, the entry of a preliminary injunction is governed by the four-part test set forth in Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977), which requires a court to consider "'(1) the likelihood of irreparable harm to the plaintiff[s] if the preliminary injunction is denied,(2) the likelihood of harm to the defendant[s] if the requested relief is granted, (3) the likelihood that the plaintiff[s] will succeed on the merits, and (4) the public interest.'" The Scotts Co. v. United Indus. Corp., 315 F.3d 264, 271 (4th Cir. 2002) (quoting Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 812 (4th Cir. 1991)). "'Plaintiff[s] bear[] the burden of establishing that each of these factors supports granting the injunction.'" Direx 952 F.2d at 812 (citation omitted).

Federal Defendants note that Plaintiffs misstate the applicable standard for preliminary injunctive relief for claims brought under the ESA. While the Supreme Court's decision in Tennessee Valley Authority v. Hill, 437 U.S. 153, 173 (1978), altered the district courts' exercise of traditional equitable discretion in reviewing ESA Section 7 claims, it does not entirely foreclose the balancing of interests that takes place under the traditional four-part test for injunctive relief. See, e.g., Water Keeper Alliance v. United States Dep't of Defense, 271 F.3d 21, 34-35 (1st Cir. 2001) (noting that "the ESA restricts the equity power of the court as to findings of irreparable injury," but applying traditional four-part test in denying preliminary injunction and rejecting argument that procedural violation of ESA Section 7 constitutes *per se* irreparable harm). See also North Slope Borough v. Andrus, 486 F. Supp. 326, 329-332 (D.D.C. 1979) (applying traditional four-part test in denying preliminary injunction in ESA case); Alabama v. U.S. Army Corps of Eng'rs, 441 F. Supp. 2d 1123, 1131-32 (N.D. Ala. 2006) (same).

Plaintiffs cite no Fourth Circuit authority for their assertion that courts may not consider the balance of harms and the public interest in granting a preliminary injunction in an ESA case. See Pl. Mot. Prelim. Inj. at 11. Nothing in the ESA forecloses courts from exercising their equitable discretion. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge . . . is not mechanically obligated to grant an injunction for every violation of law.").

Federal Defendants recognize that the Court need not reach these claims in order to enjoin the Federal Defendants from allowing ORV use on the Seashore. See The Scotts Co., 315 F.3d at 271.

Federal Defendants do not dispute that, pursuant to 36 C.F.R. 4.10, the NPS regulation implementing Executive Orders 11644 and 11989, ORV use is unauthorized at the Seashore in the absence of a special regulation designating ORV routes and areas. See United States v. Matei,2:07-M-1075 (E.D.N.C. July 17, 2007); United States v. Worthington, 2008 WL 194386 (E.D.N.C. January 2, 2008). Accordingly, Federal Defendants do not dispute that Plaintiffs have met their burden of showing a likelihood of success on the merits with respect to the alleged violation of 36 C.F.R. 4.10. On this basis, the Court could find Plaintiffs are entitled to a preliminary injunction, pending adjudication on the merits of Plaintiffs' remaining claims and on the scope of any appropriate, permanent injunctive relief. See The Scotts Co., 315 F.3d at 271.

Injunctive relief may be granted only if Plaintiffs demonstrate both an underlying legal violation and irreparable injury. See id. This burden applies with full force in the ESA context. See Nat'l Wildlife Fed'n v. Burlington N. R.R., 23 F.3d 1508, 1511 (9th Cir. 1994) ("[T]hese cases [including TVA] do not stand for the proposition that courts no longer must look at the likelihood of future harm before deciding whether to grant an injunction under the ESA. Federal courts are not obligated to grant an injunction for every violation of the law.").

But, as the Court is aware, a judge is not "'mechanically obligated to grant an injunction for every violation of the law.'" Nat'l Audubon Soc'y v. Dept. of Navy, 422 F.3d 174, 200 (4th Cir. 2005) (quoting Weinberger, 456 U.S. at 313). The Court "must look to traditional principles of equity to determine what form of injunctive relief, if any, is appropriate to remedy a [regulatory] violation." Id. An injunction "'should be tailored to restrain no more than what is reasonably required to accomplish its ends[,]'" and can be overly broad "if it restricts nonharmful actions - even ones that are precursors to other actions that are potentially harmful." Id. at 201 (quoting S.C. Dep't of Wildlife & Marine Res. v. Marsh, 866 F.2d 97, 100 (4th Cir. 1989)).

Federal Defendants question whether Plaintiffs' proposed injunction, adopting the restrictions set forth in Option B of the United States Geological Survey Management Protocols, is the appropriate relief, given the Court's duty to "pay particular regard for the public consequences of employing the extraordinary remedy of injunction." Nat'l Audubon Soc'y, 422 F.3d at 201 (quoting S.C. Dep't of Wildlife & Marine Res., 866 F.2d at 100).

At this time, Federal Defendants do not take a position as to the appropriate scope of any injunction. Federal Defendants will make a good faith effort between the date of this filing and the date of the hearing to reach an agreement with the other

parties as to the terms of an appropriate injunction which will attempt to equitably balance the potential harms to the environment, recreational users, and resident commercial fishermen at the Seashore. Additionally, Federal Defendants will be prepared to argue this Motion, including the scope of any injunction, at the hearing on April 4, 2008.

Respectfully submitted, this 14th day of March, 2008.

GEORGE E.B. HOLDING
United States Attorney

BY: /s/ R. A. Renfer, Jr.
R. A. RENFER, JR.
Assistant United States Attorney
Federal Building, Suite 800
310 New Bern Avenue
Raleigh, N.C. 27601
Telephone: (919) 856-4287
Facsimile: (919) 856-4821
N.C. Bar No. 11201

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

Of Counsel

MICHAEL STEVENS
Department of the Interior
Office of the Regional Solicitor
75 Spring Street, S.W.
Suite 304
Atlanta, Georgia 30303
Telephone: (404) 331-4447
Facsimile: (404) 730-2682

JASON WAANDERS
Department of the Interior
Office of the Solicitor
1849 C. Street, N.W.
Washington, District of Columbia 20240
Telephone: (202) 208-7957
Facsimile: (202) 208-3877

CERTIFICATE OF SERVICE

I do hereby certify that I have this 14th day of March, 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
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