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

No. 02:07-CV-0045-BO

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| DEFENDERS OF WILDLIFE and THE NATIONAL AUDUBON SOCIETY,<br><br>Plaintiffs,<br><br>v.<br><br>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,<br><br>Defendants,<br><br>and<br><br>DARE COUNTY, NORTH CAROLINA; HYDE COUNTY, NORTH CAROLINA; and THE CAPE HATTERAS ACCESS PRESERVATION ALLIANCE,<br><br>Defendant- Intervenors. | MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT-INTERVENORS' MOTION TO DISMISS<br><br>[Fed. R. Civ. P. 12, E.D.N.C. Local Rule 7.1] |

## INTRODUCTION

Plaintiffs respectfully submit this Memorandum of Law in Opposition to the Motion to Dismiss filed by the Defendant-Intervenors (the "Motion").

For decades, the government agencies named as defendants in this action (the "Federal Defendants") have flouted the 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. Instead, the Federal Defendants have allowed excessive off-road vehicle ("ORV") driving to spoil the Seashore's fragile ecosystem and endanger its numerous protected species, which so many Cape Hatteras residents and visitors value.

The Plaintiffs' Amended Complaint (the "Complaint") identifies the federal statutes, regulations, and executive orders that impose those obligations on the Federal Defendants. Each claim seeks to ensure that the Federal Defendants fulfill their duties to the American public, the Seashore, and the wildlife at Cape Hatteras. The Defendant-Intervenors ("Intervenors") – entities interested in ensuring that ORV traffic can reach as much of the Seashore as possible – have filed this Motion, seeking dismissal of several of the Plaintiff's claims. The Federal Defendants did not join Intervenors' Motion.

## FACTS

Congress created Cape Hatteras National Seashore in 1937, declaring 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. The Seashore is part of the National Park system, 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. Am. Compl. ¶¶ 32-40.

ORV use has increased exponentially on the Seashore in recent years. Am. Compl. ¶ 2. At the same time, the numbers of the Seashore's many protected species have plummeted, and at

least one threatened species failed to nest on Seashore beaches altogether last year. Am. Compl. ¶¶ 32-40. The ability of these same species to nest and reproduce at Cape Hatteras has also declined. Am. Compl. ¶¶ 32-40. These declines correspond with increased popularity of ORV driving at Cape Hatteras. Am. Compl. ¶¶ 2, 42-44.

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 "widespread use of [ORVs] on the public lands" was "in frequent conflict with wise land and resource management practices, environmental values, and other types of recreational activity." Exec. Order No. 11644, 37 Fed. Reg. 2,877 (Feb. 9, 1972). The Order requires federal agencies to implement regulations to manage ORV use 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 an agency determines that ORV use is adversely affecting, or may adversely affect, wildlife or wildlife habitat, the area must be immediately closed to ORV use.

The requirements of the Executive Order were codified at 36 C.F.R. § 4.10, which requires that the ORV management plans for each park or seashore be issued as a special regulation. Nationwide, national seashores either banned ORV use altogether or implemented special regulations restricting ORV use in compliance with the Order. See 36 C.F.R. §§ 7.65, 7.67, 7.20, 7.12, and 7.75; http://www.nps.gov/cuis/planyourvisit/hours.htm; http://www.nps.gov/cana/faqs.htm. The Cape Hatteras management, however, has yet to adopt special regulations to comply with the Order and 36 C.F.R. § 4.10. Instead, ORV use has continued virtually unabated – and has even increased – at Cape Hatteras. Am. Compl. ¶¶ 2-4, 54-55, 76.

The Federal Defendants have admitted that they have not met "the long-standing requirements for an ORV management plan and special regulation," by failing to implement the required plan and regulation to govern ORV use at the Seashore. Am. Compl. ¶ 76. On December 20, 2007, 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). The Federal Defendants estimate that the process of developing a final ORV management plan will still take at least three years; it is possible that there will be further delays in the process and/or that the process will not result in a plan and special regulation at all. See ORV Management Plan/Environmental Impact Statement Planning Process. 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 Protected Species Management Plan, ostensibly to protect the natural resources at the Seashore until a long-term ORV management plan is implemented. The July 13, 2007, "Finding of No Significant Impact" or "FONSI" for the Interim Plan concluded that implementing the Interim Plan would have "no significant impact" on the Seashore's protected bird, turtle, and plant species. In reality, that plan allows ORV use to continue to harm the protected species of the Seashore. Am. Compl. ¶¶ 70-73, 80. Before developing the interim plan, Federal Defendants first commissioned a set of studies from the United States Geological Survey ("USGS") to develop and recommend protocols for the protected species that live and breed at the Seashore. In October 2005, the USGS issued reports entitled "Management, Monitoring, and Protection Protocols" for the Seashore's various protected species ("USGS Management Protocols"). Am. Compl. ¶¶ 57-58.

The Interim Plan is little more than written documentation of the previous ORV practices, and does not satisfy the recommendations of the government's own scientists, embodied in the USGS Management Protocols, for protecting the Seashore's wildlife from ORV use. Am. Compl. ¶ 73. Yet it will remain in effect until a long-term ORV management plan and associated EIS are completed. Am. Compl. ¶¶ 70-71. Moreover, the Federal Defendants have failed even to thoroughly enforce the Interim Plan or to meet restrictions imposed by the Fish & Wildlife Service under the Endangered Species Act. Am. Compl. ¶¶ 77-80.

In light of the dramatic declines and disappearance of some species from the Seashore due to excessive ORV use allowed under the Interim Plan, the Plaintiffs initiated this lawsuit on October 18, 2007 and filed an amended complaint on December 19, 2007. The Complaint challenges the 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 numerous other federal statutes, regulations, and executive orders.

The Intervenors are a consortium of interests dedicated to preserving unfettered access to the Seashore for ORVs. See generally Mem. of Points and Authorities in Supp. of Mot. to Intervene, filed Nov. 28, 2007. They intervened in this action by first filing a motion to intervene on November 28, 2007, an answer on January 4, 2008, and then filing the present Motion to Dismiss on February 21, 2008.

## ARGUMENT

The Motion raises grounds so unfounded that the actual defendants in the case – the Federal Defendants – did not venture to raise them. The Intervenors argue that this Court has no jurisdiction to decide whether the Federal Defendants have violated their obligations under

various federal laws as alleged in the Plaintiffs' First, Fourth, and Sixth claims for relief. Next, they argue that even if the Court finds it has jurisdiction over Plaintiffs' Sixth Claim, that it is moot because Seashore management has initiated an open-ended, non-binding Negotiated Rulemaking to begin development of a final regulation. They finally argue that, even if the Court has such jurisdiction, it must dismiss the Claims for failure to state a claim on the strained grounds that the discrete arbitrary and capricious actions identified by the Plaintiffs – publishing the FONSI, implementing the Interim Plan, failing to implement special regulations, failing to enforce the Interim Plan, etc. – are really broad management policies that this Court is powerless to address.

These overreaching arguments are without merit. The claims that the Intervenors seek to have dismissed are these:

- The First Claim for Relief concerns the Federal Defendants' adoption of an arbitrary and capricious Interim Plan, which fails to satisfy the legal mandate to protect and preserve the Seashore's natural resources and contradicts even the Federal Defendants' own scientists' recommendations. The claim alleges that Federal Defendants violated the National Park Service Organic Act (16 U.S.C. §§ 1 et seq.), the Cape Hatteras National Seashore Enabling Act (16 U.S.C. §§459 – 459a-10), Executive Order 11644 (which requires management of ORV use on federal lands to protect wildlife), and 36 C.F.R.§ 4.10 (which requires the ORV management plans mandated by Executive Order 11644 to be adopted as special regulations).

- The Fourth Claim for Relief concerns the destruction of protected migratory birds and their nests and eggs. The claim alleges that Federal Defendants violated the Migratory Bird Treaty Act (16 U.S.C. §§ 703-712) and Executive Order 13186, which both require protection of migratory birds and their nests and eggs.

- The Sixth Claim for Relief concerns the Federal Defendants' failure to fulfill their obligation to manage ORVs under Executive Order 11644 and 36 C.F.R. § 4.10 and their unreasonable delay in acting to adopt a long-term ORV management plan as required by those laws.

This Court has jurisdiction over each of those claims. Specifically, it has jurisdiction to decide whether the Federal Defendants have violated Executive Order 11644 (and the related regulation, 36 C.F.R. § 4.10, and other laws) and Executive Order 13186 (and the related Migratory Bird

Treaty Act). Moreover, this Court has jurisdiction to decide whether the implementation of special regulations to govern ORV use at Cape Hatteras – now more than three decades overdue – has been unreasonably delayed, to enforce the Federal Defendants' obligations in that regard, and to grant the relief requested by the Plaintiffs. Finally, this Court is empowered to review the discrete agency actions and omissions identified in the Complaint. The Motion therefore cannot succeed.

## I. STANDARD OF REVIEW

Dismissal under Rule 12 of the Federal Rules of Civil Procedure without reaching the merits of a claim is generally disfavored by the courts. Hayes v. Crown Cent. Petroleum Corp., 78 Fed. Appx. 857, 862 (4th Cir. 2003) (citing Mylan Labs, Inc. v. Matkari, 7 F.3d 1130 (4th Cir. 1993)); Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1471 (4th Cir. 1991). This broad policy favors the resolution of lawsuits on their merits, and resolves close calls in favor of denying motions to dismiss.

When considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), a district court must accept "'all well-pleaded allegations in the plaintiff's complaint as true and draw[] all reasonable factual inferences from those facts in the plaintiff's favor.'" Chao v. Rivendell Woods, Inc., 415 F.3d 342, 346 (4th Cir. 2005) (quoting De'lonta v. Angelone, 330 F.3d 630, 633 (4th Cir. 2003)). After so doing, the court should only dismiss a claim if "it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." Id. Under the federal rules' "scheme of notice pleading and broad discovery, consideration of a motion to dismiss must account for the possibility that a noticed claim could become legally sufficient if the necessary facts were to be developed during discovery." Teachers' Ret. Sys. of La. v. Hunter, 477 F.3d 162, 170 (4th Cir. 2007).

Correspondingly, when a considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court also looks to the pleadings, but "may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Velasco v. Gov't of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004) (citing Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982); Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999)). "The district court should grant the Rule 12(b)(1) motion to dismiss 'only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.'" Evans at 647 (quoting Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991)).

Under these standards, and giving the allegations of the Complaint due consideration, the Intervenors' Motion to Dismiss should be denied.

## II. THE COURT HAS JURISDICTION OVER THE FIRST, FOURTH, AND SIXTH CLAIMS, AND THE MOTION TO DISMISS PURSUANT TO RULE 12(B)(1) SHOULD BE DENIED.

### A. The Court Has Jurisdiction to Decide the First and Sixth Claims, Which Allege Violations of Executive Order 11644, As Well As Other Laws.

No court that has addressed the issue has ever held that Executive Order 11644 is not privately enforceable by parties like the Plaintiffs. In making their motion to dismiss for lack of subject matter jurisdiction, Intervenors all but ignore the overwhelming weight of authority holding Executive Order 11644 privately enforceable, as well as the other laws providing ample support for Plaintiffs' First and Sixth Claims. These claims are based on actions that violate not only Executive Order 11644, but also the regulation that enforces the Executive Order's mandates (36 C.F.R. § 4.10), the National Park Service Organic Act, and the Cape Hatteras National Seashore Enabling Act. By failing to argue otherwise, Intervenors have admitted that

the court has subject matter jurisdiction over the claims insofar as they are based on these other laws.

Intervenors neglect to discuss the importance of 36 C.F.R. § 4.10, which, by its terms, incorporates the standards of Executive Order 11644. Assuming arguendo that Intervenors are correct in their claim that Executive Order 11644 is not enforceable by third parties, this Court should still deny their Motion. Since the regulation incorporates the standards of the Executive Order, when Federal Defendants violate the order they violate the regulation, which is enforceable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

But Intervenors' assertion that Executive Order 11644 itself is not enforceable by private parties must also fail. The Intervenors attempt to overcome the myriad cases finding that Executive Order 11644 creates a private right of action by citing to a Fourth Circuit immigration case. They rely heavily on the Chen Zhou Chai v. Carroll case in their argument against the enforceability of executive orders; although they are correct in their general understanding of one part of that case, they are mistaken in their attempt to apply it to Executive Order 11644. 48 F.3d 1331 (4th Cir. 1995), superseded by statute on other grounds, 8 U.S.C. § 1101(a)(42)(B), as recognized in Li v. Gonzales, 405 F.3d 171, 176 (4th Cir. 2005). In Chai, the Fourth Circuit did, as the Intervenors explain, hold that one way for an executive order to be privately enforceable is for it to have been "issued pursuant to a statutory mandate or delegation of congressional authority." Chai, 48 F.3d at 1338. The Chai court went on, however, to identify other methods by which an executive order could be privately enforceable, but ruled out each as not applicable to the facts of the Chai case. Id. at 1339-40 (discussing whether an executive order was ratified

by later legislation, whether it was intended to create a private right of action, and whether it constituted something more than an internal management directive, among other things).[1]

Focusing on the specific method of creating private enforceability addressed by the Intervenors in this case – a direct delegation of authority by Congress – the facts of the Chai case are easily distinguishable from the facts of the present case. When President Bush signed the executive order at issue in the Chai case, Executive Order 12711, he did not cite to any statutory authority for his action, stating simply that he was acting "[b]y the authority vested in me as President by the Constitution and laws of the United States of America . . . ." Exec. Order 12711, 55 Fed. Reg. 13,897 (Apr. 13, 1990). As the Chai court explained, the "source of authority for Executive Order 12,711 was the President's general constitutional powers," but Congress had specifically delegated to the Attorney General – and not the President – the discretion to make the decisions putatively governed by Executive Order 12711. Chai, 48 F.3d at 1338 (citing 8 U.S.C. § 1101(a)(42)(A) and 8 U.S.C. § 1158(a)). Thus, the Chai court ruled that the executive order was not privately enforceable because its goal – providing asylum for Chinese citizens and other immigrants faced with forced abortion or sterilization in their native countries – did not have any basis in a congressional delegation to the President, and in fact invaded the discretion granted to the Attorney General by Congress. Id.

In marked contrast, when President Nixon signed Executive Order 11644, he explained that he was acting "in furtherance of the purpose and policy of the National Environmental Policy Act of 1969 (42 U.S.C. 4321) . . . ." Exec. Order 11644, 37 Fed. Reg. 2,877 (Feb. 9, 1972) (amended by Exec. Order 11989 (May 24, 1977) and Exec. Order 12608 (Sep. 9, 1987)).

[1] Another case cited by Intervenors identifies at least one other circumstance in which an executive order may support a private claim for its violation: such a right may be "inferred when necessary to effectuate the purpose of a statute or regulation." Nat'l Trust for Historic Pres. v. Dep't of State, 834 F. Supp. 443 (D.D.C. 1993), rev'd in part on other grounds, 49 F.3d 750

As numerous federal courts have held, the National Environmental Policy Act of 1969 ("NEPA") and other such environmental laws are an adequate congressional mandate to render an executive order enforceable by third parties. In National Wildlife Federation v. Babbitt, the court held that an executive order was enforceable because it had been entered pursuant to NEPA. No. 88-0301, *34 (D.D.C. July 30, 1993) (Attachment 1). The court explained:

> The President promulgated Executive Order 11,990, based on authority derived from the Constitution and unspecified statutes, "in furtherance of" NEPA**,** and in particular NEPA § 101(b)(3), codified at 42 U.S.C. § 4331(b)(3). The court is not faced with a situation where the President has acted in contradiction to a statute, or in the absence of legislative action. Rather, 42 U.S.C. § 4331(b) mandates ongoing executive action to promote the broad policies of NEPA. Congressional authorization for executive orders can be either "express or implied." The President acted under NEPA's implied authorization when he issued Executive Order 11,990. Consequently, the court finds that Executive Order 11,990 should be accorded "the force and effect of a statute."

Id. at **34-35 (citations and footnotes omitted) (emphasis added). Other courts have also found executive orders enforceable by virtue of having been issued pursuant to NEPA and other environmental laws. For instance, in Conservation Law Foundation v. Clark, the court held that the same Executive Orders at issue in the present case – 11644 and 11989, which amends 11644 – are enforceable by private parties; it explained that "[c]ongressional authorization for executive orders can be either 'express or implied,' and executive orders based on NEPA have been given substantive effect by federal courts." 590 F. Supp. 1467, 1477 (D. Mass. 1984), aff'd, 864 F.2d 954 (1st Cir. 1989).[2]

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(D.C. Cir. 1995).

[2] See also Sierra Club v. Clark, 756 F.2d 686, 688-91 (9th Cir. 1985), appeal after remand, 774 F.2d 1406 (9th Cir. 1985) (Executive Orders 11644 and 11989); Romero-Carcelo v. Brown, 643 F.2d 835, 859 (1st Cir. 1981) (Executive Order 11593); Nat'l Wildlife Fed'n v. Adams, 629 F.2d 587, 591-92 (9th Cir. 1980) (Executive Order 11990); City of Waltham v. U.S. Postal Serv., 786 F. Supp. 105, 130-31 (D. Mass. 1992) (Executive Orders 11990 and 11988); No Oilport! v. Carter, 520 F. Supp. 334, 368 (W.D. Wash. 1981) (Executive Order 11988).

Here, just as in the caselaw cited above, Executive Order 11644 was entered pursuant to NEPA's broad implied authorization of power to promote the policies of NEPA, which include:

> • "It is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony . . . ." 42 U.S.C. §4331(a).
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> • "It is the continuing responsibility of the Federal Government to use all practicable means . . . to improve and coordinate Federal plans . . . [to] . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations . . . [and] attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." 42 U.S.C. § 4331(b).
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> • "It shall be the duty and function of the Council [on Environmental Quality] . . . to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation." 42 U.S.C. § 4344.

Because it was entered pursuant to NEPA's implied grant of power to the President, Executive Order 11644 has the force of law. And, as the Intervenors themselves point out, so long as an executive order has the force of law, administrative action taken pursuant to that executive order "is 'agency action' within the meaning of the [APA]" and is reviewable under the APA. Nat'l Wildlife Fed'n, No. 88-0301 at * 33 & n.39.

Federal courts have overwhelmingly found Executive Order 11644 to provide grounds for review of agency action under the APA. In Conservation Law Foundation v. Clark, an environmental conservation group challenged the ORV driving allowed in Cape Cod National Seashore as a violation of Executive Orders 11644 and 11989. 590 F. Supp. at 1477. As discussed above, the court held that the Executive Orders at issue in the present case are enforceable by private parties, with NEPA providing the implied delegation of authority to the President. Id. Likewise, in Sierra Club v. Clark, an environmental conservation group challenged the ORV usage allowed in Dove Springs Canyon in California as violating Executive

Orders 11644 and 11989. 756 F.2d 686, 688-91 (9th Cir. 1985), appeal after remand, 774 F.2d 1406 (9th Cir. 1985). The Court of Appeals for the Ninth Circuit found that it had jurisdiction to hear the environmental group's claims, and that the district court had erred in refusing to hear them. Id.

Similarly, in National Wildlife Federation v. Morton, an environmental protection group challenged the designation of public lands as open to ORV usage under Executive Order 11644. 393 F. Supp. 1286 (D.D.C. 1975). The court held that the government's ORV plan violated Executive Order 11644, implicitly finding that it had jurisdiction to do so. Id. Other courts have ruled likewise on claims alleging violations pursuant to Executive Order 11644 without first expressly addressing jurisdiction. See, e.g., Reetz v. United States, 224 F.3d 794, 796-97 (6th Cir. 2000) (exercising jurisdiction over ORV driver's challenge that method of marking trails violated Executive Order 11644); Friends of the Kalmiopsis v. U.S. Forest Serv., No. 98-35793, 10-11 (9th Cir. 1999) (exercising jurisdiction over environmental group's challenge to ORV monitoring methods) (Attachment 2); Nw. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3rd 1468, 1472-78 (9th Cir. 1994) (exercising jurisdiction over ORV user group's claim that driving prohibition in the Wenatchee National Forest violated Executive Order); Humboldt County v. United States, 684 F.2d 1276, 1284-85 (9th Cir. 1982) (upholding ORV closures as authorized by Executive Order); Friends of the Earth v. U.S. Dep't of the Interior, 478 F. Supp. 2d 11, 24-28 (D.D.C. 2007) (finding jurisdiction, despite inartful pleading, to review some of environmentalists' claims that ORV management plans violated Executive Order 11644); Fund for Animals v. Norton, 294 F. Supp. 2d 92, 102, 105-06 (D.D.C. 2003) (finding Executive Order 11644 as binding on government, in case in which environmental groups challenged ORV use in Yellowstone under NEPA).

The weight of this authority supporting federal jurisdiction over claims to enforce Executive Order 11644 overshadows the single case cited by the Intervenors to the contrary. The Intervenors ask this Court to ignore the directly applicable precedent cited above, and to instead apply by analogy a case involving an entirely different executive order. Intervenors' Mem. in Supp. of Mot. to Dismiss, at 9 (citing Nat'l Trust for Historic Pres. v. Dep't of State, 834 F. Supp. 443 (D.D.C. 1993), rev'd in part on other grounds, 49 F.3d 750 (D.C. Cir. 1995). In that case, a district court examined an executive order that requires federal agencies to implement procedures to preserve non-federally-owned sites of cultural importance. The plaintiffs sought to rely on that Executive Order to prevent the nation of Turkey from demolishing a building it owned in Washington, D.C. Perhaps not surprisingly, the court found that the Executive Order's support of the policies of NEPA was insufficient to provide jurisdiction for it to hear that challenge. Id. at 451.

That single case cited by Intervenors is insufficient to justify deviating from the many decisions regarding Executive Order 11644 – the same one at issue in the present case – that are directly on point. Accordingly, the Plaintiffs properly alleged violations of Executive Order 11644 in their First and Sixth claims, and, therefore, this Court has jurisdiction over those claims. The Intervenors' motion to dismiss claims based on the enforceability of Executive Order 11644 should therefore be denied.

### B. The Court Has Jurisdiction to Decide the Fourth Claim, Which Alleges Violations of the Migratory Bird Treaty Act and Executive Order 13186.

Intervenors' muddled attack on Plaintiffs' Fourth Claim fails to meaningfully dispute the core elements of that claim and should therefore be denied. The heart of the claim is that Federal Defendants have violated the MBTA by authorizing illegal ORV use that has taken or killed, or will take or kill, protected migratory birds. Within a footnote to their discussion of jurisdiction

under 12(b)(1), Intervenors argue that Plaintiffs' MBTA claim fails to state a claim upon which relief can be granted. Intervenors' Mem. in Supp. of Mot. to Dismiss at 8 n.4. The Fourth Claim also describes President Clinton's Executive Order 13186 – which expands on federal agencies' responsibilities under the MBTA – and alleges that the Defendants have not fulfilled the mandates of that order. Am. Compl. ¶¶ 138-39. Intervenors assert that this aspect of the Fourth Claim should be dismissed for lack of jurisdiction.

The MBTA makes it "unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, hunt, capture, or kill . . . any migratory bird, any part, nest or egg of any such bird" without a permit. 16 U.S.C. § 703. The individual species protected by this sweeping provision are listed by regulation. See 50 C.F.R. § 10.13. In addition to outlawing hunting or poaching by private parties, this protection precludes federal agencies from undertaking or allowing activities that "take" or "kill" migratory birds without the necessary permit, even if that is not the primary purpose of the activity. See Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161 (D.D.C. 2002), vacated as moot by Ctr. for Biological Diversity v. England, No. 02-5163 (D.C. Cir. Jan. 23, 2003) (Attachment 3); Sierra Club v. U.S. Dep't of Agric., No. 94-CV-4061-JPG, *58-*59 (S.D. Ill. 1995) (Attachment 4). Under the APA, courts have held that federal agencies violate this provision by undertaking or allowing activities that indirectly "take" or "kill" protected birds, nests, or eggs, including military training and authorizing logging in an area known to contain migratory bird nesting habitat. Id.

Many of the species threatened by ORV use at the Seashore are protected by the MBTA. Defendant Department of the Interior lists piping plovers, American oystercatchers, common terns, least terns, gull-billed terns, and black skimmers as "migratory birds" protected by the Act. 50 C.F.R. § 10.13. Each of these species has nested on the Seashore in significant numbers in

the past, but has declined over the last decade. Am. Compl. ¶ 39. Gull-billed terns failed to nest on the Seashore last breeding season at all. Am. Compl. ¶ 39.

In the Complaint, Plaintiffs assert that each of these protected species has or will be taken or killed by ORV use at the Seashore, and that by allowing that use, Federal Defendants violate the MBTA. Am. Compl. ¶ 137. Plaintiffs document increased ORV use, highlight the correlated population declines of protected species, and identify numerous ways that ORV use impacts the protected species. Am. Compl. ¶¶ 39, 41-44.

If the facts in the Complaint are accepted as true, which they must be for the purpose of Intervernors' Motion, they demonstrate that Defendants have violated and will continue to violate the MBTA through their actions and omissions. See Chao v. Rivendell Woods, Inc., 415 F.3d 342, 346 (4th Cir. 2005) (quoting De'lonta v. Angelone, 330 F.3d 630, 633 (4th Cir. 2003)) (finding that "'all well-pleaded allegations in the plaintiff's complaint as true and draw[] all reasonable factual inferences from those facts in the plaintiff's favor'"). Further, because discovery and the to-be-filed administrative record[3] could reveal information supporting this claim – for example, evidence of birds or nests being destroyed by ORVs – Intervenors cannot claim that "plaintiff[s] cannot prove any set of facts in support of [their] claim entitling [them] to relief." Id. Because Plaintiffs have alleged a set of facts that entitle them to relief under the MBTA, Intervenors' Motion should be denied.

Further, Executive Order 13186 is not irrelevant, as Intervenors suggest. Executive Order 13186 represents the Federal Defendants understanding of their responsibilities under the MBTA. See Fund for Animals v. Norton, 294 F. Supp. 2d 92, 105-06 & n.8 (D.D.C. 2003) ("The NPS's Management Policies offer the best interpretation of its mandate"). Intervenors argue that this Court should overlook the Federal Defendants' unlawful, arbitrary, and capricious

actions of the past 35 years because new management is in place at the Seashore and that management is, in the Intervenors' view, moving towards lawful management of the Seashore. Federal Defendants have failed to comply with Order 13186 because Federal Defendants have not accepted their responsibility to protect the natural resources of the Seashore and are not "seeking to protect its resources." Intervenors' Mem. in Supp. of Mot. to Dismiss at 4. Intervenors' Motion to Dismiss Plaintiffs' Fourth Claim for Relief must be denied because Plaintiffs allege facts that show that Federal Defendants have violated the MBTA and this Court has jurisdiction over such violations under the APA.

**C. The Relief Requested by the Sixth Claim for Relief Is Not Moot.**

Intervenors' Motion to Dismiss Plaintiffs' Sixth Claim for Relief as moot must be denied because it fails to consider the panoply of relief that this Court may grant to prevent Defendants' continuing violation of Executive Order 11644 and 36 C.F.R. § 4.10. Plaintiffs' Sixth Claim asserts that "Plaintiffs have suffered a legal wrong and are aggrieved because of Defendants' actions and omissions in failing to implement, and unreasonably delaying or withholding the implementation of, special regulations to manage ORV use at the Seashore, in violation of Executive Order 11644 . . . and 36 C.F.R. § 4.10." Am. Compl. ¶ 158. Intervenors contend that the Claim is moot because "the only relief Plaintiffs would be entitled to if they were to prevail on their Sixth Claim for Relief, would be limited to an order that NPS develop a long-term management plan for ORV use at [the Seashore]" and that a long-term management plan is already being developed through a Negotiated Rulemaking process. Intervenors' Mem. in Supp. of Mot. to Dismiss at 10. Because Intervenors overstate the relief granted by the initiation of the Negotiated Rulemaking process and underestimate the authority of this Court to prevent ongoing

[3] The administrative record is to be filed March 14, 2008.

violations of the law, Intervenors' Motion to Dismiss must be denied as it relates to Plaintiffs' Sixth Claim for Relief.

Intervenors' reliance on the Negotiated Rulemaking process to dismiss Plaintiffs' Sixth Claim has four flaws: (1) it fails to accept the advisory role of the committee; (2) it fails to acknowledge that the committee may produce a limited agreement, if any; (3) it fails to recognize that there is no certain date by which a regulation that would legalize ORV use on the Seashore must be in place, and (4) it fails to recognize the pattern of aborted attempts by the NPS to adopt an ORV management plan over the past three decades. These flaws undermine Intervenors request that this Court dismiss Plaintiffs' Sixth Claim for Relief.

First, as the federal register notice establishing the Negotiated Rulemaking Committee acknowledges, "[t]he duties of the committee are solely advisory." 72 Fed. Reg. 72,316 (Dec. 20, 2007). The purpose of the "advisory" committee is not to produce a regulation, but rather the "basis" for that regulation. Id. In short, the initiation of Negotiated Rulemaking does nothing to force the Federal Defendants to create and implement the required special regulation, it simply starts the process that will ultimately provide the starting point for Federal Defendants in the development of the final regulation.

Second, the committee is not guaranteed to produce an agreement on all issues that must be addressed by a final regulation, as all members must reach "consensus on concepts and language to be used as the basis for a proposed special regulation." Id. Should the 30 member committee comprised of a variety of interests fail to agree on the exact wording of every recommendation for every relevant issue, the Negotiated Rulemaking may not even produce the "basis" for the final regulation. Federal Defendants would then need to supplement the limited

recommendation from the Negotiated Rulemaking committee with additional management measures, further delaying the final regulation.[4]

Third, while the Seashore management anticipates that the Negotiated Rulemaking will conclude in approximately two years and that a final regulation will be produced in approximately three years, there is no deadline by which the committee must reach a resolution or a special regulation must be in place. See ORV Management Plan/Environmental Impact Statement Planning Process; see 72 Fed. Reg. 72,316 (Dec. 20, 2007). Even if the Negotiated Rulemaking reaches a consensus in two years, that consensus agreement will not satisfy Order 11644 and 36 C.F.R. § 4.10 until it is developed into a special regulation. As Federal Defendants are now 36 years late in finalizing such a regulation, this Court cannot, as Intervenors would have it, assume that Federal Defendants would promptly develop any consensus reached by the Negotiated Rulemaking into a special regulation.

Finally, Federal Defendants have embarked on at least three years previous attempts to adopt ORV management plans, never reaching the required special regulations. See letter from Seashore Superintendent Michael Murray to the U.S. Attorney for the Eastern District of North Carolina of July 31, 2007. This does not inspire confidence that the current process will result in a final long-term ORV management plan.

This Court has the ability to grant relief that would address the weaknesses of the Negotiated Rulemaking process by mandating a deadline by which Defendants must have a regulation that complies with Order 11644 in place. See Fund for Animals, 294 F. Supp. 2d at 112-15 (imposing a deadline on federal agencies to develop ORV regulations). Under the APA,

[4] Delay of a final regulation is a real possibility. The Negotiated Rulemaking at Fire Island National Seashore began in 2002, resulted in a limited consensus agreement, and has yet to result in a final regulation. See http://www.nps.gov/archive/fiis/negreg/negreglist.htm.

this Court must "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706. "There is a point when the court must 'let the agency know, in no uncertain terms, that enough is enough.'" In re: Int'l Chem. Workers Union, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (quoting Pub. Citizen Health Research Group v. Brock, 823 F.2d 626, 627 (D.C. Cir. 1987)). Under the APA, it may do so by imposing a deadline by court order that the agency must comply with. See id. Should the Court find for Plaintiffs on their Sixth Claim, it could implement a deadline for a final regulation, relief that has not been provided by the initiation of the Negotiated Rulemaking process.

Beyond failing to ensure compliance with Executive Order 11644 at any certain date, the Negotiated Rulemaking does nothing to ameliorate the illegal ORV use that Federal Defendants intend to allow on the Seashore until a final special regulation is in place. By their Motion, Intervenors ostensibly claim that this Court, in addition to being unable to set a deadline for the final regulation, is powerless to address illegal ORV use during the years before a final regulation is put in place. See Intervenors' Mem. in Supp. of Mot. to Dismiss at 10. Said another way, Intervenors argue that this Court could find that Federal Defendants "unlawfully withheld or unreasonably delayed" implementing a final regulation managing ORV use, but must allow ORV use – that Federal Defendants admit is illegal – to continue until that final regulation is in place. To the contrary, the APA allows this Court to enjoin ongoing violations of federal law. In two NEPA challenges brought pursuant to the APA, the Fourth Circuit has enjoined ongoing activities that would violate federal law. In Hughes River Watershed Conservancy v. Glickman, the Fourth Circuit "stayed" further construction on a dam project until the agencies involved complied with NEPA. 81 F.3d 437, 450-51 (4th Cir. 1996). In National Audubon Society v. Department of the Navy, the Fourth Circuit upheld the portions of this Court's injunction that prohibited activities that would violate NEPA. See 422 F.3d 174, 201 (4th Cir.

2005). This Court may grant similar relief here, enjoining ongoing ORV use on the Seashore that Federal Defendants continue to allow in knowing violation of federal law. This relief would go beyond any granted by the initiation of Negotiated Rulemaking. As there are at least two forms of relief that this Court could grant to redress Plaintiffs' Sixth Claim, Intervenors' Motion to Dismiss that Claim as moot must be denied.

## III. THE FIRST AND SIXTH CLAIMS STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AND THE MOTION TO DISMISS PURSUANT TO RULE 12(B)(6) SHOULD BE DENIED.

The Intervenors have also moved to dismiss the First and Sixth Claims for failure to state a claim upon which relief can be granted under Rule 12(b)(6), on the theory that the Complaint either makes impermissible "broad-based programmatic challenges to the National Park Service's Management Policies" or seeks relief that is not available. Intervenors' Mem. in Supp. of Mot. to Dismiss at 11-15. Neither theory is supported by the applicable caselaw. In fact, the claims challenge discrete agency actions and omissions that are properly reviewable under the APA, and seek relief that is within the power of this Court to award. The Motion to Dismiss for failure to state a claim must therefore also be denied.

### A. The First and Sixth Claims Are Reviewable By This Court Under the APA Because They Challenge Discrete, Final Agency Actions.

The APA provides that this Court has the power to review "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. In addition, the APA provides that this Court has the power to review and "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The APA also gives this Court the power to "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). For the purposes of each of these

powers, the APA defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

In their present Motion, the Intervenors argue that the First and Sixth Claims of the Complaint challenges government policies, as opposed to final agency actions. Those claims, however, challenge a list of discrete, final agency actions – or failure to act – each of which is alleged to violate a specific provision of law and each of which is alleged to be "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." Am. Compl. ¶ 99, 163 (quoting 5 U.S.C. §§ 701-706). Each challenged action is, therefore, properly reviewable under the APA.

These discrete, final agency actions include the Federal Defendants' implementation of the faulty and inadequate Interim Plan and publication of the FONSI. Am. Compl. ¶¶ 70-71, 81, 93-94. It is well-settled that publishing a FONSI constitutes final agency action that may be reviewed under the APA. Rattlesnake Coalition v. U.S. EPA, 509 F.3d 1095 , 1104 (9th Cir. 2007); Sierra Club v. U.S. Army Corps of Eng'rs, 446 F.3d 808, 815 (8th Cir. 2006) (quoting Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 737 (1998)); Sw. Williamson County Cmty. Ass'n v. Slater, 243 F.3d 270, 274 n.3 (6th Cir. 2001). Likewise, the implementation of a management plan such as the Interim Plan at issue in this case also constitutes a "final agency action" warranting APA review. See, e.g., Nw. Motorcycle Ass'n v. U.S. Dep't of Agric, 18 F.3d 1468 (9th Cir. 1994) (evaluating whether ORV closures included in a land management plan violated the law); Sierra Club v. Clark, 756 F.2d 686, 688-91 (9th Cir. 1985) (reviewing conservation plan that included ORV plan as a final agency action); N. Cascades Conservation Council v. U.S. Forestry Serv., 98 F. Supp. 2d 1193 (W.D. Wash. 1999) (reviewing forest management and ORV plan, implemented following a FONSI, under APA); Wash. Trails Ass'n

v. U.S. Forest Serv., 935 F. Supp. 1117 (W.D. Wash. 1996) (reviewing challenge to an ORV closure that was implemented without an environmental assessment).

The First and Sixth Claims also challenge the Federal Defendants' failure to implement a long-term plan through special regulations, as required by 36 C.F.R. § 4.10. Am. Compl. ¶¶ 97, 157-63. Furthermore, the Claims challenge the failure of the Federal Defendants to act primarily to preserve the natural resources of the Seashore, when faced with a situation where a recreational use of the Seashore conflicts with the preservation of the Seashore's natural resources. Am. Compl. ¶¶ 86-87, 93. These failures and omissions are reviewable under the APA. For instance, in Fund for Animals v. Norton, the court reviewed a claim under the APA that a plan that allowed ORV access by snowmobiles in Yellowstone National Park violated the Park Service's mandate to prioritize conservation over a competing recreational use. 294 F. Supp. 2d 92, 105-06 (D.D.C. 2003). The same court also reviewed another claim under the APA, that the Park Service's delay in responding to a request for a rule to ban snowmobiling in Yellowstone had been "unreasonably withheld or unreasonably delayed." Id. at 112-13. In that case, the Park Service claimed that it was in the process of "studying the issues" and "prioritizing myriad responsibilities," much as the Federal Defendants in the present case are in the process of, at long last, weighing competing interests and uses of the Seashore. Id. at 114. Yet, the Fund for Animals court ultimately held that agency action had indeed been unreasonably delayed, because snowmobiling was continuing unabated during the long delay, and the Park Service's "conservation mandate can rarely be trumped by other considerations." Id. at 115. The court explained that "a reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade." Id. at 113. In light of such precedent, it strains credulity for the Intervenors to argue that the three decade delay in the Federal Defendants developing a long-term ORV management plan – and the more than three years they intend to

continue to draw out the process – cannot form the basis of a claim for agency action unreasonably delayed.

Finally, the Intervenors' argument that the agency actions described above are merely "program management" that should be left to the Federal Defendants' discretion is also unavailing. Any exemption from APA review for actions committed to an agency's discretion "is not applicable when there is 'law to apply.'" Project B.A.S.I.C. v. Kemp, 776 F. Supp. 637, 642 (D.R.I. 1991) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe , 401 U.S. 402, 413 (1971), rev'd on other grounds, 947 F.2d 11 (1st Cir. 1991). In other words, a court may review an agency action under the APA where law "places substantive limits on agency action." Chrysler Corp. v. Brown, 441 U.S. 281 (1979). The Complaint specifically alleges the myriad statutes, regulations, executive orders, and management policies that provide the substantive legal basis for the various obligations that the Federal Defendants have violated. Am. Compl. ¶¶ 82-91,158-63.

Intervenors' references to Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) ("SUWA") and Friends of the Earth v. U.S. Department of the Interior ("Bluewater") do not counter the weight of this caselaw. 478 F. Supp. 2d. 11 (D.D.C. 2007). Both are of limited relevance here. In SUWA, the Court decried judicial intervention in "[g]eneral deficiencies in compliance" by federal agencies and "abstract policy disagreements which courts lack both expertise and information to resolve." 542 U.S. at 66. Those limitations on judicial involvement are not relevant here. Plaintiffs allege that Federal Defendants have been specifically deficient in compliance with specific laws, that that deficiency has adversely affected numerous protected species, and that Federal Defendants have rebuffed their own experts advice for mending those deficiencies. Am. Compl. ¶¶ 82-91,158-63. The "broad programmatic attack" that Intervenors seek to compare to this case was an effort to reform nation-wide policy regarding federal land

retention, a far cry from Plaintiffs' challenge to mismanagement of the approximately 64 miles of federal property within the Seashore. 542 U.S. at 64 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990)).

Bluewater is no more helpful for the Intervenors. The facts of Bluewater distinguish it from this case. There, in discussion of the plaintiffs challenge of management at 18 park units, the court held that "[t]he regulations thus prohibit all [ORV] use that is not specifically authorized," but found that the plaintiffs "did not identify *any* discrete, historical agency action that resulted in the existing authorization of ORV use at a specific park unit." 478 F. Supp. 2d. at 13, 25 (emphasis in original). Further, rather than claiming that they identified discrete agency actions, the plaintiffs contended that "there is no need for them to spell the relevant agency actions out in their complaint." Id. at 26. In contrast, Plaintiffs have identified several specific agency actions at a single park unit, the Seashore, within the Complaint. Am. Compl. ¶¶ 82-91,158-63.

In sum, the Complaint alleges specific, discrete, final agency actions taken by the Federal Defendants, and also identifies the legal standards that each action violates. Each such violation is alleged to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In short, each identified agency action is reviewable under the APA, and the Motion to Dismiss must fail.

**B. The First and Sixth Claims Seek Relief That This Court Is Empowered to Grant.**

Likewise, despite the Intervenors' erroneous argument to the contrary, the Complaint seeks relief that is available under the APA, and the Motion to Dismiss fails for that reason also.

In the present case, in the prayer for relief, the Complaint seeks (1) declaratory relief that the final agency actions described above violate the law, (2) injunctive relief ordering the Federal

Defendants to comply with their obligations under the law, and (3) an order setting aside the unlawful agency actions identified above. Each of these items of relief is available under the APA.

First, declaratory relief is available under the APA. See, e.g., Nat'l Wildlife Fed'n v. Morton, 393 F. Supp. 1286 (D.D.C. 1975) (declaring that agency's ORV use regulations violated Executive Order 11644, NEPA, and other laws). In the present case, similarly, this Court will be able to examine the Interim Plan, the FONSI, and the obligations imposed on the Federal Defendants by various laws, and declare the ways in which the Federal Defendants' actions and failures to act have violated those obligations, without becoming unduly enmeshed in the management of the Seashore.

Second, injunctive relief is available under the APA. Section 5 U.S.C. 706(1) provides that a court may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). A court may also "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. See also Nat'l Audubon Soc'y v. Dep't of the Navy, 422 F.3d 174, 201 (4th Cir. 2005) (upholding injunction that prohibited activities that would violate NEPA); Fund for Animals, 294 F. Supp. 2d at 112-15 (ordering federal defendants to provide the agency action it had previously unreasonably delayed, within two months of court's order). Again, in the present case, this Court will be able to identify the obligations imposed on the Federal Defendants by various laws and the ways in which they have failed to meet their obligations, and enter an order requiring the Federal Defendants to satisfy their obligations without becoming unduly enmeshed in the management of the Seashore.

Third, under the APA, a court may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law." 5 U.S.C. § 706(2)(A). It may also "hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence." 5 U.S.C. § 706(2)(E). In the Fund for Animals case, the court set aside and vacated the agency's environmental impact statement, record of decision, and final rule, on the grounds that, in allowing ORV use at Yellowstone, the agency failed to consider several issues that it should have, and failed to comply with the mandate that conservation concerns must trump conflicting recreational uses. 294 F. Supp. 2d at 111, 115. The court instructed the agency to reconsider its ORV plan consistent with the court's opinion and the various considerations identified therein. Id. Similarly, in Bluewater, after dismissing various plaintiffs and claims for which the allegations did not support standing, the court held that several plaintiffs could proceed with their claim requesting repeal of ORV plans for several parks. 478 F. Supp. 2d 11, 24, 29 (D.D.C. 2007). Similarly, here, the Plaintiffs are seeking an order that vacates the faulty Interim Plan and identifies the elements that render it arbitrary and capricious and the mandates that it violated, and that remands it to the Federal Defendants with instructions to implement a new plan not inconsistent with the Court's opinion, e.g., a plan that uses the "moderate protection" recommendations of the Federal Defendants' scientists. The Court will be able to enter such an order, without, as Intervenors suggest, essentially drafting and implementing the new ORV management plan for the Federal Defendants.

In sum, this Court will be able to grant the relief requested in this case without taking over the province of the agencies. Accordingly, contrary to the Intervenors' arguments, each item of relief requested by the Plaintiffs is within the power of this Court to award under the APA.

## CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny Intervenors' Motion to Dismiss.

Respectfully submitted this 14th day of March, 2008.

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CERTIFICATE OF SERVICE

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