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.

MEMORANDUM IN SUPPORT OF THE 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

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INTRODUCTION

Intervenor-Defendants Dare County, North Carolina, Hyde County, North Carolina, and Cape Hatteras Access Preservation Alliance (collectively, "Intervenors"), respectfully submit this memorandum in support of their motion 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.

NATURE OF THE CASE

Plaintiffs Defenders of Wildlife and the National Audubon Society (collectively, "Plaintiffs") filed their Complaint on October 18, 2007, and subsequently filed their Amended Complaint on December 19, 2007 ("Complaint"), against the National Park Service ("NPS"); United States Fish and Wildlife Service ("FWS"); United States Department of the Interior; Dirk Kempthorne, Secretary of the Interior; Mary A. Bomar, Director of NPS; Michael B. Murray, Superintendent of the Cape Hatteras National Seashore ("CHNS"); and Dale Hall, Director, FWS (collectively, "Federal Defendants"). On December 14, 2007, Intervenors were granted the right to intervene.

In their Complaint, Plaintiffs seek broad-based relief that would require this Court to intervene in the National Park Service's ongoing management of off-road vehicle (ORV) use at the same time that NPS is working in a public process with a variety of stakeholders to develop just such a management plan; a process in which Plaintiffs themselves are participating. As detailed below, Plaintiffs' attempt to "short circuit" this ongoing regulatory process and have this court "police" the NPS's management of the CHNS should be rejected.

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 (collectively, "E.O. 11644"), Executive Order 13186, and NPS regulations at 36 C.F.R. § 4.10. To the extent these claims rely on 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, no jurisdiction exists 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. 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.* ("APA"). Their allegations amount to a broad-ranging attack on NPS management policies, but the 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 to the Interim Plan as arbitrary, capricious, or otherwise not in compliance with the law, or to an alleged 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 permitted under the APA. Therefore, Plaintiffs have failed to state a claim upon which relief can be granted.

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[1] Plaintiffs' First Claim for Relief challenges NPS's 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 Executive Order 11644 and 36 C.F.R. § 4.10 in connection with an alleged delay in developing a long-term management plan for CHNS.

REGULATORY & FACTUAL BACKGROUND

As relevant to this motion, Plaintiffs' Complaint alleges noncompliance by the Federal Defendants with provisions of the Organic Act, the Enabling Act, E.O. 11644, E.O. 13186 and NPS regulations at 36 C.F.R. § 4.10. These provisions charge NPS with, *inter alia*, managing ORV access to CHNS. As recently explained by the United States District Court for the District of Columbia, "The Organic Act . . . is silent on the specifics of individual park management, leaving the NPS with 'especially broad discretion on how to implement [its] mandate.'" *Friends of the Earth, Bluewater Network v. United States Dep't of the Interior*, 478 F. Supp.2d 11, 13 (D.D.C. 2007) (*"Bluewater"*) (quoting *Davis v. Latschar,* 202 F.3d 359, 365 (D.C.Cir.2000) (reprinting District Court opinion in *Davis v. Latschar,* 83 F.Supp.2d 1 (1999) (D.D.C.1999) (Friedman, J.)). "This discretion is generally exercised by individual park unit Superintendents, who make decisions on ORV authorizations in accord with 36 C.F.R. § 4.10." *Id.* Section 4.10 requires that routes for ORV use be promulgated by "special regulations," including opportunity for notice and comment. 36 C.F.R. §§ 4.10, 1.5. The regulations themselves recognize that at times such designations may be "highly controversial." *Id.* at § 1.5(b).

E.O. 11644 requires generally that ORV use in national parks be managed "so as to protect the resources of those lands, to promote the safety of all users of those lands, and to minimize conflicts among the various uses of those lands." E.O. 11644 § 1. The executive order likewise requires that regulations for ORV use in national parks be developed and that the public be given ample opportunity to participate in the designation of ORV routes. *Id.* at § 3. Executive Order 13186 requires executive agencies to develop memoranda of understanding with the FWS to promote the conservation of migratory bird populations. E.O. 13186 § 3(a).

While the NPS has not yet promulgated special regulations governing ORV use as required by 36 C.F.R. § 4.10, it has been actively involved in managing ORV use of CHNS while seeking to protect its resources. This ongoing effort was detailed in a letter from CHNS Superintendent Murray to the U.S. Attorney for the Eastern District of North Carolina dated July 31, 2007 ("the *Letter*"), which is referenced and quoted in paragraph 76 of the Complaint.[2] That *Letter* was filed with this Court by the U.S. Attorney in connection with *United States v. Matei*, 2:07-M-1075 BO on August 1, 2007.[3] In it, Mr. Murray describes in detail the steps that NPS has taken by way of interim management of CHNS and the process underway to develop a long-term management plan in compliance with all relevant statutes, regulations, and orders. As summarized in the *Letter*:

> During the past 18 months, under new leadership at [CHNS], NPS has made tangible, substantive progress in addressing these concerns and has initiated the processes to develop an ORV plan and regulation. The measures summarized in this letter – the Interim Protected Species Management Strategy, existing policies and regulations, enhanced information and [enforcement] programs, and the additional measures described above – provide the guidance and controls necessary to manage ORV use at [CHNS] until the ORV management plan and regulation can be completed. Work on both the ORV plan and the special regulation has formally begun and is ongoing.

[2] In considering a motion to dismiss, a court may, without transforming the motion into one for summary judgment, consider documents outside the pleadings that are referenced in the complaint, as well as materials that are a matter of public record. *See Secretary of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007). *See also Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (taking judicial notice of information on a website in considering a motion to dismiss); *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999) (court may rely on a document not attached to the complaint where document is relied on in complaint, integral to complaint, and plaintiffs do not challenged authenticity).

[3] Prior to receipt of the *Letter*, this Court issued a July 17, 2007 Order in the case of *United States v. Matei*, in which the Court commented on requirements and authorities for regulation of ORV use at CHNS. That order was issued in the context of a misdemeanor enforcement action; the case did not raise the broad-ranging issues presented here, and no party had briefed this Court on the complex issues and balance of interests involved in CHNS management. The Court did not, at that time, issue any injunction barring ORV use at CHNS until a final ORV rule was issued. The relief ordered was the requirement that Mr. Matei pay a $100 fine. Intervenors respectfully submit that, despite the comments made in that order, this Court should carefully re-examine the requirements and authorities regarding ORV management in light of this more thorough briefing on these topics.

Letter at 8. The *Letter* also details a Negotiated Rulemaking process currently underway to develop a long-term management strategy for ORV use at CHNS. *Id.* at 5. It explains that after completion of a Negotiated Rulemaking Feasibility Report, on June 28, 2007, NPS published a Notice of Intent in the Federal Register to establish a Negotiated Rulemaking committee. *See* 72 Fed. Reg. 35374 (attached to the *Letter*). That process is currently moving forward. *Letter* at 6. *See also* Complaint, ¶ 74 (acknowledging publication of the Notice of Intent). As announced in the Federal Register, the Advisory Committee for the process has been formed, consisting of some 30 members who represent a host of stakeholders. 72 Fed. Reg. 72316, 72318 (Dec. 20, 2007). Included among Committee members is Derb Carter, Plaintiffs' counsel. *Id.* In addition, the Notice announced that meetings were scheduled for January 3-4, 2008, and February 26-27, 2008. 72 Fed. Reg. 72316. *See also*, National Park Service Planning, Environment, and Public Comment website, discussing the Negotiated Rulemaking process and upcoming meetings, http://parkplanning.nps.gov/projectHome.cfm?parkID=&projectId=10641. Meetings have already begun, 72 Fed. Reg. 72316, and, as noted in the *Letter*, the process is expected to take 18-24 months to complete. *Letter* at 6. The *Letter* also includes an appendix listing 16 statutes and regulations that must be considered in balancing uses and access to CHNS. *Letter* at Appendix 1. In its Notice of Intent to conduct the Negotiated Rulemaking, NPS identified the following "list of interests significantly affected": Federal, State, and county government interests; local civic and neighborhood association and homeowner interests; environmental and conservation interests; various [CHNS] user interests, including ORV use, open access, recreation, water sports, recreational fishing, bird watching, and other general uses; and local tourism, visitation and business interests." 72 Fed. Reg. 35373, 35374 (June 28, 2007) attached to *Letter*.

Thus, as acknowledged in documents referenced by Plaintiffs in their Complaint, the process for development of a long-range ORV management plan is currently underway, *Letter*, within NPS, an agency delegated "especially broad discretion," *Bluewater*, 478 F.Supp.2d at 13, seeking input from numerous stakeholders, 72 Fed Reg. 35374 and 72 Fed. Reg. 72316, in order to balance a myriad of interests in making potentially "highly controversial" decisions, 36 C.F.R. § 1.5. Plaintiffs are participating in the very process over which Plaintiffs seek to have this Court intervene "in the interim, until a long term plan to manage ORV use at [CHNS]" by issuing "an injunction ordering Defendants to restrict ORV use . . . ." Complaint, Prayer for Relief, ¶ G. Plaintiffs' attempt to "have it both ways" should be rejected.

ARGUMENT

I. Plaintiffs' First, Fourth and Sixth Claims For Relief Must Be Dismissed For Lack of Jurisdiction.

Plaintiffs rely on the APA for their First, Fourth and Sixth Claims for Relief, but the APA is not an open-ended catch-all statute. It does not provide a cause of action where no jurisdiction is provided by the law sought to be enforced. *Bluewater,* 478 F.Supp.2d at 23 (APA is not jurisdictional). Because neither E.O. 11644 nor E.O. 13186 grants third parties enforcement rights, the APA does not provide Plaintiffs with a cause of action to enforce the order. Thus, to the extent the First, Fourth and Sixth Claims for Relief rely on executive orders for jurisdiction, they must be dismissed.

In addition, Plaintiffs' Sixth Claim for Relief is moot. In this claim, plaintiffs seek to have this Court order NPS to develop a long-term management plan for CHNS. That process is already underway, thus there is no further relief for this Court to order and the claim is moot.

A. This Court Is Without Jurisdiction To Hear Plaintiffs' Claims Regarding Alleged Violations Of Executive Orders.

Agency action "not in accordance with law" may be set aside under the APA, 5 U.S.C. § 706, but the President has no inherent power to make law. Thus, agency action that fails to comply with an executive order is not the same thing as agency action that fails to comply with the law. Therefore, agency action that fails to comply with an executive order is not automatically enforceable via the APA. An executive order is enforceable by private parties only if it is supported by a specific statutory foundation in which Congress delegates to the President authority to adopt binding rules. *See City of Albuquerque v. U.S. Dept. of the Interior*, 379 F.3d 901, 913-14 (10th Cir. 2004). The Fourth Circuit has held that the President has limited powers to adopt binding rules to implement statutes and that he can do so only if such power is *specifically delegated* by Congress. *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338-39 (4th Cir. 1995). Only when issued "pursuant to a statutory mandate or delegation of Congressional authority" is an executive order "law." *Id.; see also In re Surface Mining Litigation*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (requiring a "specific foundation in congressional action"). Only then is an agency's non-compliance with an executive order an action "not in accordance with law" that may be set aside under the APA. *See City of Albuquerque*, 379 F.3d at 913-914.

The Fourth Circuit has made clear that such a delegation of authority from Congress to the President is not to be lightly inferred. In *U.S. Dept. of Health and Human Serv. v. Fed. Labor Relations Auth.*, 844 F.2d 1087, 1095 (4th Cir. 1988), the Fourth Circuit cautioned that "chaos" would result in Executive Branch management if Presidential directives such as executive orders gave rise to "enforceable third party rights." Therefore, in the Fourth Circuit,

"an executive order is privately enforceable only if it was *intended* to create a private cause of action" *Chen Zhou Chai*, 48 F.3d at 1339 (emphasis added).

As to E.O. 13186, the matter is simple: this executive order on its face precludes such third party rights. Section 5(b) provides, "This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." Far from meeting the Fourth Circuit standard that an executive order demonstrate an intention to create a private cause of action, this executive order states unequivocally that no such right exists. Because Plaintiffs have identified no other source for its Fourth Claim for Relief, this claim must be dismissed for lack of jurisdiction.[4]

While E.O. 11644 is not quite so clear-cut, the result is the same. It is not based on any statutory mandate or delegation of Congressional authority and evidences no intent to create a private right of action. This executive order states that it is issued generally "in furtherance of the purpose and policy of" the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"). *See* E.O. 11644, preamble. Notwithstanding this reliance on general policy and lack of any specific statutory directive, some courts have found that E.O. 11644 is enforceable by third parties. *See, e.g., Nat'l Wildlife Fed. v. Morton,* 393 F. Supp. 1286 (D.D.C. 1975); *Sierra Club v. Clark*, 774 F.2d 1406 (9th Cir. 1985). Most such cases, however, simply assume without discussing, the enforceability of the order, *see id.*; even those that do discuss the matter fail to

[4] Plaintiffs reference the Migratory Bird Treaty Act ("MBTA") in connection with the Fourth Claim for Relief, but they allege no specific violation of the act, only of the Executive Order. Complaint ¶¶ 129-140. Although Plaintiffs do allege that the Federal Defendants actions "have already resulted in the unlawful taking" of various birds, this is insufficient to state a claim. The MBTA does not impose a blanket prohibition on "taking" such species, but requires it be done in specific circumstances. *See* 16 U.S.C. § 703(a) ("Unless and except as permitted by regulations made as hereinafter provided . . . it shall be unlawful" to "take" identified species). Plaintiffs have failed to make any allegations regarding the Federal Defendants' compliance with the specific requirements of the act or its regulations.

apply the rigorous analysis required by the Fourth Circuit. *See, e.g., Conservation Law Found. of New England v. Clark,* 950 F. Supp. 1467 (D.Mass. 1984) (the court held that NEPA "impliedly" authorized E.O. 11644, and allowed a third party action; the court offered no discussion, however, and made no finding regarding the Fourth Circuit standard of an "intent" to authorize a cause of action). E.O. 11644 provides no evidence of an intention to create a third party right of action as required by the Fourth Circuit, and no court has found such an intention.

Instead, this case is much more like *Nat'l Trust for Historic Pres. v. Dept 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 which the court held that Executive Order 11593, a NEPA-based executive order like E.O. 11644, was not judicially enforceable. The court in *Nat'l Trust* explained that a "cause of action [under an executive order] may be expressly created, not the case here, or 'inferred when necessary to effectuate the purpose of a statute or regulation.'" 834 F.Supp. at 451 (quoting *Nat'l Indian Youth Council v. Andrus,* 501 F.Supp 649, 679 (D.N.M.1980)). In the case before it, the court held that the purposes of the National Historic Preservation Act could be carried out without reading a right of action into the executive order. *Id.* The same analysis applies to this case. The purposes of underlying statutes at issue here—the Organic Act and the Enabling Act—are to manage resources so as to preserve natural resources and balance various competing interests. There is no need to read a right of action into E.O. 11644 in order to achieve these goals, since relevant statutes, regulations, and guidance provide ample resources.

In sum, E.O. 11644 does not expressly create a cause of action, nor was it issued to implement an express directive of Congress. The purposes of the underlying statutes at issue in this case can be carried out without reading a right of action into that executive order. Therefore, no jurisdiction exists for Plaintiffs to bring a claim under E.O. 11644.

B. Plaintiffs' Sixth Claim For Relief Is Moot.

"It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (quoting *Mills v. Green,* 159 U.S. 651, 653 (1895)). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496 (1969). *See also Mellen v. Bunting*, 327 F.3d 355, 363 (4th Cir. 2003) (same).

Here, 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 CHNS.[5] That process, as Plaintiffs acknowledge in their own Complaint, is underway. Complaint at ¶ 74. NPS has stated that it will complete this process within 18-24 months. *Letter* at 6. Further, Plaintiffs cannot claim that this falls within the exception to the mootness doctrine for situations "capable of repetition yet evading review."[6] NPS is proceeding with the Negotiated Rulemaking and is devoting extensive resources not only to this process, but to preparing an environmental impact statement under NEPA. Not only will Plaintiffs be "at the table" throughout the rulemaking, they will have an ample opportunity to comment during that NEPA process. In light of these facts, Plaintiffs cannot credibly argue that NPS will continue to delay; this Court need not intervene with an order that would only interfere with this process.

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[5] *See infra* for discussion of available remedies under the APA.

[6] In an "exceptional situation," a court may hear an otherwise moot issue where the complained-of action is "capable of repetition, yet evading review." *See Northwest Pipeline Co. v. FERC*, 863 F.2d 73, 77 (D.C. Cir. 1988). *See also Incumaa v. Oxmint*, 507 F.3d 281, 289 (4th Cir. 2007) ("jurisdiction on the basis that a dispute is 'capable of repetition, yet evading review' is limited to the 'exceptional situation[ ]'") (citing *Los Angeles v. Lyons,* 461 U.S. 95, 109 (1983)). This is not such an "exceptional situation." First, Plaintiffs have the burden to show that the delay they complain of is "likely to recur." Because the Negotiated Rulemaking process is already underway, any suggestion of further delay would be purely speculative. In addition, even if such a delay were to recur, there is no reason to believe it would evade review. *See Fund for Animals v. Hogan*, 428 F.3d 1059, 1064 (D.C. Cir. 2005).

Thus, as to the Sixth Claim for Relief, the issues are no longer live; any principles of law announced by this Court would not "affect the matter in issue in the case before it" and the matter is moot. *Church of Scientology*, 506 U.S. at 12.

II. This Court Must Dismiss The First And Sixth Claims For Failure To State A Claim Upon Which Relief Can Be Granted.

Even where a court has jurisdiction, the APA does not provide a cause of action to enforce general statutory objectives. It allows *only* challenges to specific, final agency actions or failures to take specific, final agency actions required by law. *See, e.g., Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) ("*SUWA*") (citing *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871 (1990)). Moreover, even where both jurisdiction and a cause of action are present, the APA does not provide for the broad-ranging declaratory and injunctive relief Plaintiffs seek.

A. Plaintiffs' Broad-Based Programmatic Challenges To NPS's CHNS Management Policies Do Not State A Claim For Relief Under The APA.

In addition to the executive orders discussed above, Plaintiffs' First and Sixth Claims for Relief rely on the Organic Act, the Enabling Act, land management policies, and 36 C.F.R. § 4.10 as grounds for relief. Specifically, in connection with their First Claim for Relief, Plaintiffs allege that NPS has violated these authorities by failing to "adequately protect the wildlife and natural resources" of CHNS, ¶ 93; by failing to comply with "recommended protocols," ¶ 94; by adopting an Interim Plan that is "incompatible with" preservation of certain features of CHNS, ¶ 95; and by failing to "minimize damage" to natural resources and wildlife, ¶ 96. Likewise, in connection with their Sixth Claim for Relief, Plaintiffs allege that NPS has "failed to minimize damage to soil, watershed, and vegetation;" "failed to minimize harassment of wildlife;" "failed to protect wildlife and other natural resources;" "failed to promote the safety of all users;" and failed to "minimize conflicts between ORV use and other uses of the land." ¶ 162.

These allegations amount to nothing more than broad-ranging dissatisfaction with NPS's Interim Plan and management policies. As the Supreme Court recently reaffirmed, however, the APA "precludes . . . broad programmatic attack[s]." *SUWA*, 542 U.S. at 64 (citing *Lujan*, 497 U.S. 871 (1990)). Indeed, Plaintiffs "cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Id.* (emphasis in original). Instead, Plaintiffs must identify a specific agency action unlawfully withheld or unreasonably delayed. *Id.* at 62 ("Sections 702, 704, and 706(1) [of the APA] all insist upon an 'agency action,' either as the action complained of (in §§ 702 and 704) or as the action to be compelled (in section 706(1)"). As the *Bluewater* court explained, "A plaintiff 'must direct its attack against some particular "agency action" that causes it harm,' because if a court does not limit its review to 'discrete' agency actions, it risks embarking on the kind of wholesale, programmatic review of general agency conduct for which courts are ill-suited, and for which they lack authority." *Bluewater*, 478 F.Supp.2d at 25 (quoting *Lujan*, 497 U.S. at 891).

The kinds of allegations identified above do not identify particular agency action subject to judicial review; instead they address program management, for which NPS is given "especially broad discretion," *Bluewater*, 478 F.Supp.2d at 13, and which this Court does not have authority to review. *See also*, *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) ("The federal courts are not authorized to review agency policy choices in the abstract").

An agency action is defined as "the whole or 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). Allegations like those identified above do not meet this standard. As the Supreme Court has

held, "[g]eneral deficiencies in compliance . . . lack the specificity requisite for agency action." *SUWA*, 542 U.S. at 66. The reason for this limitation, the Court explained, "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Id.* Were it otherwise, the courts "would ultimately be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." *Id.* at 66-67.

Plaintiffs' broad allegations of noncompliance with statutory mandates, therefore, do not give rise to a cause of action under the APA.

B. To The Extent Plaintiffs' Claims Can Be Construed As Challenges To Discrete Agency Actions, The Relief They Seek Is Not Available.

Although Plaintiffs' Complaint is not a model of clarity, it is possible that their First Claim for Relief could be construed as a claim that the Interim Plan is arbitrary and capricious or otherwise not in accordance with law—a challenge to the final agency action of adopting the Interim Plan. Similarly, the Sixth Claim for Relief can be read simply as a claim that the long-term management plan has been unreasonably delayed, challenging an alleged failure by NPS to take an action required by law. Stripping Plaintiffs' claims even to these straightforward challenges, however, (and assuming they overcome the jurisdictional hurdles identified above) does not save them because the sweeping declaratory and injunctive relief Plaintiffs request is simply not available under the APA.

Under the APA, where a court finds that an agency action is arbitrary and capricious or otherwise not in accordance with the law, the court may remand the action for reconsideration or explanation. *See, e.g., County of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999).

("[u]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards") (quoting and citing cases); *James Madison Ltd. v. Ludwig,* 82 F.3d 1085, 1096 (D.C. Cir. 1996) ("Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions"); *Fox Television Stations, Inc. v. Fed. Communications Comm'n*, 280 F.3d 1027, 1047 (D.C. Cir. 2002) ("Under the APA reviewing courts generally limit themselves to remanding for further consideration an agency order wanting an explanation adequate to sustain it. Thus, when an agency arbitrarily and capriciously denies a petition for rulemaking the proper remedy is typically to remand the case for reconsideration").

Likewise, when a court finds that a legally required action has been unduly delayed, it may order that the agency take the required action. *See SUWA,* 542 U.S. at 64-65. In no circumstance, however, is a court granted authority to instruct the agency in *how* to take action committed to agency discretion, whether or not the need to take some action is required by law. *Id.* at 65 ("when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel an agency to act, but has no power to specify what the action must be").

In this case, Plaintiffs do not simply ask this Court to declare that NPS's actions are arbitrary and capricious or unreasonably delayed and seek a remand for further agency action, instead they seek (1) a declaratory judgment with factual findings that the Interim Plan "is not protective of [CHNS] resources and does address user conflicts," and is thus in violation of numerous statutes; (2) an injunction requiring compliance with various statutes; (3) an injunction

ordering NPS to develop and implement an "appropriate and adequate long-term plan;" and (4) until a long-term plan is completed, an injunction restricting ORV use at CHNS "to provide adequate protection to resources and minimize conflict with other uses" of CHNS. Complaint, Prayer for Relief.[7] None of these remedies is available under the APA.

Indeed, these are the very types of remedies that would "inject[] the judge into day-to-day agency management," a result the Supreme Court has rejected. *SUWA*, 542 U.S. at 67. Under Plaintiffs' model, for example, it would be up to the Court to determine what kinds of uses are permissible, among the many competing interests, that would provide "adequate" protection to natural resources and "minimize" conflict with other uses. In addition, after making requisite factual findings regarding the supposed inadequacies of NPS's current management of CHNS, the Court would then have to fashion its own rules for purposes of the Plaintiffs' requested injunction, and presumably retain jurisdiction throughout the 18-24 month period of the Negotiated Rulemaking to ensure compliance with that injunction. This would be a particularly delicate process for this Court since few of the affected user interests are represented in this action.

The United States Circuit Court for the D.C. Circuit has held that where a district court determines an agency has made a legal error, the only authority the court has is to remand the action to the agency. In *Shalala,* the Court explained, "Not only was it unnecessary for the court to retain jurisdiction to devise a specific remedy for the Secretary to follow, but it was error to do so." 192 F.3d at 1011. Decisions regarding access to CHNS are fraught with careful balancing and the exercise of discretion. Congress, however, has granted that discretion to NPS, not to the Courts. *See Bluewater,* 478 F.Supp.2d at 13.

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[7] Plaintiffs seek additional relief in connection with their Second, Third, and Fifth Claims for Relief, not at issue in this motion.

Thus, even assuming this Court has jurisdiction over Plaintiffs' First, Fourth, and Sixth Claims for Relief, Plaintiffs have failed to state a claim upon which relief can be granted and these claims must be dismissed.

CONCLUSION

Intervenors respectfully move this Court to dismiss Plaintiffs' First, Fourth, and Sixth Claims for lack of jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted.

DATED: February 21, 2008

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