UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HORSES OF CUMBERLAND ISLAND, *et al.,*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	No. 1:23-cv-01592-SEG
DEB HAALAND, in her official capacity as Secretary of the Department of interior, *et al.,*	)	
	)	
	)	
Defendants.	)	

FEDERAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Federal Defendants, by their undersigned counsel, hereby file their Memorandum of Law in support of their Motion to Dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that the Court lacks subject matter jurisdiction and Plaintiffs failed to state a claim upon which relief can be granted.

Table of Contents

I. INTRODUCTION

This Court lacks jurisdiction to hear this matter. First, Plaintiffs have not established that the Administrative Procedure Act's (APA) limited waiver of sovereign immunity applies to their APA claims (Counts I-III) because Plaintiffs neither identify an "agency action" nor a discrete action that the agency was required to take. *See* Plaintiffs' Complaint ("Compl."), ECF No. 1 ¶¶ 60-118. Second, although Plaintiffs appear to assert state law claims against the United States (Counts V-VII), no waiver of sovereign immunity exists for these claims and, indeed, Plaintiffs do not allege that such a waiver exists. *See* Compl. ¶¶ 165-86. Finally, Plaintiffs fail to meet their burden of establishing standing for their Endangered Species Act ("ESA") claim (Count IV). Id. ¶¶ 119-64. Plaintiffs' ESA claim also fails because horses are not a "person" under the ESA and cannot "take" an ESA-listed species under Section 9, and Plaintiffs do not identify any "agency action" that would trigger the ESA's consultation requirements under Section 7. For these reasons, the Court must dismiss Plaintiffs' Complaint pursuant Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. BACKGROUND

In 1972, Congress created the Cumberland Island National Seashore (the "Seashore") "to provide for public outdoor recreation use and enjoyment" and "to preserve related scenic, scientific, and historical values[.]" 16 U.S.C. § 459i. The

Act requires that the island be "permanently preserved in its primitive state" and that no development "shall be undertaken which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions [then] prevailing[.]" *Id.* § 459i-5. When Congress established the Seashore, horses were feral on the island.[1] Historic accounts suggest that horses have been on the island since at least 1742.[2]

III. LEGAL STANDARDS

a. SOVEREIGN IMMUNITY[3]

The federal courts' jurisdiction is limited to "only that power authorized by Constitution and statute[.]" *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citations omitted). "Federal courts have jurisdiction over suits against the United States and its agencies only to the extent that sovereign immunity has been waived." *Thompson v. McHugh*, 388 Fed. Appx. 870, 872 (11th Cir. 2010) (citation omitted). The federal government may not be sued without its consent; thus, a waiver of sovereign immunity is a prerequisite for federal subject matter jurisdiction. *Id*. (citing *Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 475

[1] Nat'l Park Serv., Cumberland Island: Feral Horses, https://www.nps.gov/cuis/learn/nature/feral-horses.htm (last visited July 27, 2023).
[2] *Id*.
[3] Although Plaintiffs assert three state law claims, Compl. ¶¶ 165-186, Federal Defendants have not included a statutory background for these laws because, as discussed in Section IV(c), the United States has not waived sovereign immunity for these claims.

(1994)). Plaintiffs bear the burden of establishing federal subject matter jurisdiction and of demonstrating that the federal government waived sovereign immunity. *Id*.

b. THE ADMINISTRATIVE PROCEDURE ACT

The APA provides a limited waiver of sovereign immunity by permitting judicial review of an "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court[.]" 5 U.S.C. § 704. APA Section 706(2) authorizes a reviewing court to hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, or in excess of statutory authority. *Id*. § 706(2). In cases where Plaintiffs seek to "compel agency action unlawfully withheld or unreasonably delayed" under Section 706(1), a claim may proceed "only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All*., 542 U.S. 55, 64 (2004) ("*SUWA*"); *see also Fanin v. U.S. Dep't of Veterans Affs.*, 572 F.3d 868, 878 (11th Cir. 2009) ("The important point is that a 'failure to act' is properly understood to be limited . . . to a *discrete* action.") (cleaned up). This limitation ensures that plaintiffs direct their attacks against specific agency actions, instead of lodging generalized attacks that interfere with the role of the legislative and executive branches and avoid entangling courts in day-to-day management

decisions that Congress entrusted to the agencies. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990); *SUWA*, 542 U.S. at 66-67.

c. NATIONAL PARK SERVICE ORGANIC ACT

The National Park Service Organic Act, 54 U.S.C. § 100101 ("Organic Act"), provides that the Secretary shall "promote and regulate the use of the National Park System" units, which is "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[4]

d. THE CUMBERLAND ISLAND NATIONAL SEASHORE ACT

In 1972, Congress enacted the Cumberland Island National Seashore Act, 16 U.S.C. § 459i (the "Seashore Act"), establishing the Seashore in order to "provide for public outdoor recreation use and enjoyment" and to "preserve related scenic, scientific, and historical values[.]" The Seashore Act generally provides that the Seashore "shall be permanently preserved in its primitive state," with the exception for certain recreational uses and activities. *Id.* § 459i-5.

[4] Plaintiffs cite to the Organic Act at 16 U.S.C. § 1, however the Organic Act was recodified at 54 U.S.C. § 100101 in 2014, and thus Federal Defendants will refer to the current statute citation throughout this brief.

e. THE WILDERNESS ACT

The Wilderness Act, 16 U.S.C. § 1131, sets forth the policy of securing the "benefits of an enduring resource of wilderness" for "present and future generations" through the establishment of federally owned areas designated by Congress as "wilderness." *Id.* § 1131(a). Wilderness areas shall be administered "in such manner as will leave them unimpaired for future use and enjoyment as wilderness[.]" *Id.* "Wilderness" has a lengthy definition which includes, among other characteristics, "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions[.]" *Id.* § 1131(c). Congress created the Cumberland Island Wilderness by Public Law 97-250 in 1982, which created 8,840 acres of wilderness and 11,718 as "potential wilderness." Pub. L. 97-250 §2(a), 96 Stat. 709 (1982).

f. THE ENDANGERED SPECIES ACT

Section 7(a) of the ESA imposes consultation requirements on federal agencies when they engage in "agency actions" or "any action authorized, funded, or carried out by such agency[.]" 16 U.S.C. § 1536(a)(2). Section 7(a)(1) of the ESA directs agencies to "utilize their authorities" to conserve endangered or threatened species. *Id*. § 1536(a)(1). Section 7(a)(2) of the ESA requires federal agencies to engage in consultation with the Fish and Wildlife Service or the

National Marine Fisheries Service to insure that their actions are not likely to jeopardize species listed as threatened or endangered or result in the destruction or adverse modification of critical habitat for such species. *Id*. § 1536(a).

Section 9 of the ESA makes it illegal for any person to "take" an endangered species. *Id*. § 1538(a)(1)(B). '"[T]ake' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). "Harm" means an act that actually kills or injures fish or wildlife and includes "significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102.

IV. ARGUMENT

a. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' APA SECTION 706(2) CLAIMS (COUNTS I(B), II(B), and III(B))

Plaintiffs assert that Federal Defendants violated the APA, 5 U.S.C. § 706(2)(A) and (C), by failing to "affirmatively act" to remove the Seashore's feral horse population. According to Plaintiffs, Federal Defendants' failure to remove the feral horses is unlawful under the APA because such action is required by the Organic Act, 54 U.S.C. § 100101 (Count I(B)),[5] the Seashore Act, 16

[5] Plaintiffs cite to the Organic Act at 16 U.S.C. § 1, however the Organic Act was recodified at 54 U.S.C. § 100101 in 2014, and thus Federal Defendants will refer to

U.S.C. § 459i (Count II(B)), and the Wilderness Act, 16 U.S.C. § 1131 (Count III(B)). Plaintiffs' APA Section 706(2) claims, suffer from a fatal flaw—Plaintiffs identify *no agency action* which this Court could even review, much less hold unlawful. This alone deprives the Court of jurisdiction over these claims and requires dismissal.

Under the APA, this Court has jurisdiction only to review "final agency action[s]." 5 U.S.C. § 704; *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003) (federal jurisdiction is "lacking when the administrative action in question is not 'final' within the meaning of 5 U.S.C. § 704"); *see also Canal A Media Holding, LLC v. U.S. Citizenship & Immigr. Servs.*, 964 F.3d 1250, 1255 (11th Cir. 2020) ("In our circuit, dismissal for the reason that the challenged agency action was not a final order is a dismissal for lack of subject matter jurisdiction.") (citation omitted). To be "final," an agency action must "mark the 'consummation' of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations omitted); *Nat'l Parks Conservation Ass'n*, 324 F.3d at 1236-37.

In this case, the Court need not even determine whether the challenged agency action satisfies the test for finality under *Bennett v. Spear* because there

---

the current statute citation throughout this brief.

simply is no agency action at issue. Plaintiffs admit to such: "NPS has neither initiated nor consummated a decision-making process on the management of the horses of Cumberland Island." Compl. ¶ 59; *see also id*. ¶ 56 ("Since 1996, NPS has taken no formal action to manage, care for, or otherwise control the Island's feral horses."). Without any agency activity on the matter, much less final agency action, this Court lacks subject matter jurisdiction over Plaintiffs' APA Section 706(2) claims (Counts I(B), II(B), and III(B)), and these claims must be dismissed. *Nat'l Parks Conservation Ass'n*, 324 F.3d at 1240 (finding that because *Bennett* test for "final agency action" was not satisfied, court lacked subject matter jurisdiction and dismissal of claims was required).

b. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' SECTION 706(1) CLAIMS (COUNTS I(A), II(A), and III(A))

Plaintiffs also bring claims under APA Section 706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1). *SUWA* provides the legal framework for analyzing these claims. A claim may "proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action," as defined by 5 U.S.C. § 551(13), "that it is *required to take*." *SUWA,* 542 U.S. at 64; *see also Fanin*, 572 at 875. In reaching this formulation, the Court emphasized that "the APA carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs – principally writs of mandamus[.]" *SUWA*, 542 U.S. at

63. That remedy "was normally limited to enforcement of 'a specific, unequivocal command,' the ordering of a 'precise, definite act . . . about which [an official] had no discretion whatever[.]'" *Id.* (citations omitted, ellipsis and bracketing in *SUWA*); *see also United States v. Salmona*, 810 F.3d 806, 811 (11th Cir. 2016) (noting that a writ of mandamus is a "drastic remedy" to be used "only in extraordinary situations") (cleaned up).

The Court further explained that APA Section "§ 706(1) empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing *how* it shall act.'" *SUWA*, 542 U.S. at 64 (emphasis in original) (quoting Attorney General's Manual on the Administrative Procedure Act 108 (1947)). The APA's term of art – "agency action" – "does not encompass everything an agency does, but is limited to circumscribed, discrete actions." *Alabama v. United States*, 198 F.Supp.3d 1263, 1273 (N.D. Ala. 2016) (citations omitted). This "limited jurisdiction" is intended to "protect agencies from undue judicial interference' and 'to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.'" *Hasan v. Wolf*, 550 F.Supp.3d 1342, 1345 (N.D. Ga. 2021) (quoting *SUWA*, 542 U.S. at 66).

Plaintiffs' claims under the Organic Act (Count I(A)), the Seashore Act (Count II(A)), and the Wilderness Act (Count III(A)) seek to compel NPS to

remove all feral horses located within the Seashore and the Cumberland Island Wilderness, including potential wilderness area. A court, however, "can compel agency action under this section only if there is 'a specific, unequivocal command' placed on the agency to take a 'discrete agency action,' and the agency has failed to take that action." *Viet. Veterans of Am. v. CIA*, 811 F.3d 1068, 1075-76 (9th Cir. 2016) (quoting *SUWA,* 542 U.S. at 63-64). And the "agency action must be pursuant to a legal obligation 'so clearly set forth that it could traditionally have been enforced through a writ of mandamus.'" *Id.* (quoting *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010)). As discussed below, Plaintiffs' claims do not meet this standard because none of the statutory or regulatory provisions cited by Plaintiffs compel *discrete* agency action, either procedurally or substantively, that NPS is *required* to take. Because Plaintiffs fail to identify any such action in this case, the Court does not have jurisdiction and must dismiss their claims under Rule 12(b)(1).

i. Plaintiffs Fail to Identify Any Discrete, Legally Required Duty to Remove the Seashore's Feral Horses Under the Organic Act (Count I(A))

Plaintiffs allege that NPS violated the Organic Act by failing to remove the feral horse population from the Seashore. Compl. ¶ 81. According to Plaintiffs, NPS has a "discrete nondiscretionary duty to remove the feral horses from the Seashore as a non-native exotic species and livestock," *Id.* ¶ 77, and the "ongoing

failure" to do so "is an agency action unlawfully withheld or unreasonably delayed in violation of 5 U.S.C. § 706(1)." *Id.* ¶ 81. Contrary to Plaintiffs' assertions, the Organic Act does not impose a discrete, nondiscretionary duty on NPS to take specific actions at particular sites, much less to remove the Seashore's feral horses.

In support of their argument, Plaintiffs cite to NPS's duty under the Organic Act to regulate the use of the Seashore in a manner that conforms to the "fundamental purpose" of the National Park System units—conservation and enjoyment while providing the same for future generations. *See* 54 U.S.C. § 100101(a).[6] Plaintiffs also cite to Pub. L. 95-250, 92. Stat. 163 (Mar. 27, 1978), stating that the amendment to the Organic Act created an "absolute duty" to "fulfill the mandate of the 1916 Act to take whatever actions and seek whatever relief as will safeguard the units of the national park system." Compl. ¶ 62.[7] It is true that under the Organic Act, Congress has tasked NPS with the responsibility to conserve and provide for enjoyment in a manner that preserves the National Park System for future generations. 54 U.S.C. § 100101(a). Thus, NPS has an

[6] The current statute language varies slightly from the former version cited in Plaintiffs' Complaint at paragraph 61.

[7] As a point of clarification, the language quoted by Plaintiffs is from a Senate Report, not the Act itself. *See* Senate Report 95-528, 95th Cong., 1st Sess., (Oct. 21, 1977) (describing Congress' reassertion of the statutory standards for managing the National Park System in Section 101(b) of Pub. L. 95-250, mainly, that authorization of activities "shall not be exercised in derogation of the values and purposes for which these areas have been established"); *see also Sierra Club v. Andrus*, 487 F.Supp.3d 443, 447-48 (D.D.C. 1980) (describing same).

obligation to "promote and regulate" the use of the Seashore, as a unit of the Park System, in a manner that conforms to this general purpose. *Id.* However, Plaintiffs do not—and indeed cannot—identify in this overarching directive a *discrete*, nondiscretionary duty relevant to *how* NPS meets this obligation.

In *Sierra Club v. Andrus*, the United States District Court for the District of Columbia analyzed whether 16 U.S.C. § 1 (the previous codification of the Organic Act, 54 U.S.C. § 100101(a)) imposed a specific duty on the Secretary of the Interior with respect to water rights within the park system. The court observed that "nowhere in either 16 U.S.C. § 1 or 1a-1 is there a specific direction as to how the protection of Park resources and their federal administration is to be effected." *Sierra Club,* 487 F.Supp. at 448. The court noted that "[c]ertainly the Secretary is not restricted in the protection and administration of Park resources to any single means." *Id.* The court therefore concluded that the Secretary had "broad discretion in determining what actions are best calculated to protect Park resources . . . ." *Id.* The Supreme Court reaffirmed this general principle in *SUWA*, holding that the Federal Land Policy and Management Act's directive to manage "wilderness study areas" in a manner that does not impair their preservation is "mandatory as to the object to be achieved," but "leaves . . . a great deal of discretion in deciding how to achieve it." 542 U.S. at 66 (citing 43 U.S.C. § 1782(c)).

More recently, the Tenth Circuit addressed whether the National Wildlife

Refuge System Improvement Act's ("NWRSIA") mandate to "assist in the maintenance of adequate water quantity and water quality to fulfill the mission of the System and the purposes of each refuge" was actionable under APA § 706(1). *Audubon of Kan., Inc. v. U.S. Dep't of Interior*, 67 F.4th 1093, 1109 (10th Cir. 2023) (cleaned up). In holding that the NWRSIA lacked a "specific, unequivocal command," the Court held that the duties were "phrased as mandatory objectives to balance and consider competing interests, leaving the Service discretion about how to fulfill them." *Id.* at 1110 (citation omitted). Thus, the statute lacked a discrete, legally required action as required for a claim under APA § 706(a). The Organic Act is no different. Although it sets forth a mandatory objective—conservation and preservation of Park System units for future generations' enjoyment—it provides discretion to the Secretary in deciding *how* that objective is achieved.

Plaintiffs cite to several other sources of authority which purportedly support their assertion that NPS has a nondiscretionary duty to remove the feral horses under the Organic Act: the NPS Management Policies 2006; Executive Orders 13112 and 13751; and two regulations—50 C.F.R. § 30.11 and 36 C.F.R. § 2.60. Because 50 C.F.R. § 30.11 is a regulation applicable to the United States Fish and Wildlife Service and its management of the National Wildlife Refuge System, not the National Park Service, Federal Defendants do not discuss it further here. The remaining provisions do not support Plaintiffs' argument.

First, the NPS Management Policies define "exotic species" as "species that occupy or could occupy park lands directly or indirectly as the result of deliberate or accidental human activities[,]" and are commonly referred to as "nonnative, alien, or invasive species." Management Policies § 4.4.1.3.[8] The Management Policies provide for how park units treat and manage exotic species, including the circumstances under which NPS may remove exotic species. Plaintiffs cite section 4.4.4.2, which provides the following: "All exotic plants and animal species that are not maintained to meet an identified park purpose will be managed—up to and including eradication—if (1) control is prudent and feasible", and (2) the exotic species meets certain criteria, such as interfering with native species. *Id.* § 4.4.4.2[9]

[8] Although Plaintiffs' Complaint neither attaches the Management Policies, nor explicitly incorporates them by reference, the Court can nevertheless consider the Management Policies without converting this motion into a motion for summary judgment because they are "central" to Plaintiffs' claims and "undisputed," meaning "the authenticity of the document is not challenged." *See Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (noting that "a document need not be physically attached to a pleading to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, we may consider such a document provided it meets the centrality requirement"). Plaintiffs extensively cite the Management Policies as legal support for NPS's alleged nondiscretionary duty to remove the feral horses, and thus they are "central" to Plaintiffs' claims. The Management Policies (2006) are available at: https://www.nps.gov/subjects/policy/upload/MP_2006.pdf (last visited July 27, 2023).

[9] Plaintiffs misquote the Management Policies, alleging that where exotic species are deemed to have a substantial impact on park resources, "NPS shall give 'high priority' to the removal of the exotic species from the park." Compl. ¶ 65. The Management Policies do provide that high priority be given to *managing* exotic species that have or potentially could have a substantial impact on park resources.

Whether certain management actions are prudent and feasible requires an exercise of discretion and balance of competing priorities with limited resources.

The Management Policies also cite to Executive Order ("E.O.") 13112 on Invasive Species, as amended by E.O. 13751, Safeguarding the Nation from the Impacts of Invasive Species, 81 Fed. Reg. 88609 (Dec. 5, 2016), upon which Plaintiffs also rely. *See* Compl. ¶¶ 69-71. Contrary to Plaintiffs' assertion, E.O. 13751 does not require NPS to undertake any *specific actions* for the "prevention, eradication, and control of invasive species." *Id*. ¶ 71. Importantly, section 2 providing for "federal agency duties" states at the outset that agency actions are "subject to the availability of appropriations, and within administrative, budgetary, and jurisdictional limits[.]" E.O. 13751 § 2.[10] Thus, NPS's potential management actions, if any, of invasive species are subject to the agency's discretion and budgetary constraints.

The Management Policies also briefly cover "Trespass and Feral Livestock," providing that "[w]ild living or feral livestock having no known owner may also be disposed of in accordance with 36 C.F.R. § 2.60." Management Policies § 8.6.8.3. The Management Policies provide no other guidance and no duty to dispose of

---

Management Policies § 4.4.4.2.

[10] E.O. 13751 also specifically states that it does not "create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States . . . ." Thus, Plaintiffs cannot compel any goals outlined in the E.O.

trespass of feral livestock. 36 C.F.R. § 2.60 likewise provides that trespassing livestock *may* be impounded and disposed of in accordance with certain provisions (in the absence of applicable Federal or State law). It is not clear that the feral horses even constitute "trespassing livestock" for purposes of this regulatory provision. Even assuming they do, the cited regulatory provision merely provides NPS with the authority, but not the mandatory duty, to impound and dispose of trespassing livestock.

At bottom, the relevant language indicates that NPS has broad discretion to determine what actions are best calculated to protect resources within the Seashore, and they are not restricted to any single means, such as removal of feral horses. Plaintiffs fail to identify authority under the Organic Act, NPS Management Policies, or the cited Executive Orders and regulations, for a specific, mandatory duty to remove the Seashore's feral horse population. Absent this, the Court could not compel Federal Defendants to comply with such a duty and the Court lacks jurisdiction over Count I(A).

ii. Plaintiffs Fail to Identify Any Discrete, Legally Required Duty to Remove the Seashore's Feral Horses Under the Seashore Act.

Plaintiffs assert that NPS violated the Seashore Act and related management plans by failing to remove the feral horse population from the Seashore. Compl. ¶ 92. Plaintiffs state that the Seashore Act and management plans impose a

nondiscretionary legal duty to remove the Seashore's feral horses as non-native exotic species and livestock. *Id*. ¶ 94. But neither the Seashore Act, nor the Seashore's management plans, set forth a mandatory legal duty to remove the feral horses.

Plaintiffs rely on 16 U.S.C. § 459i-5(b), which provides that the Seashore "shall be permanently preserved in its primitive state[.]" Notably, the term "primitive state" is not defined in the Seashore's enabling legislation, nor is it defined in any applicable precedent. Plaintiffs do not cite to any statute, regulation, or other legal authority linking NPS's obligation to preserve the Seashore in its "primitive state" to the alleged duty to remove the Seashore's feral horses, and for good reason—there is none. Merely because the goal—preservation of the Seashore's primitive state—is mandatory, does not mean that NPS lacks discretion in implementing that goal. *See SUWA*, 542 U.S. at 66.

Plaintiffs additionally cite to the General Management Plan for Cumberland Island National Seashore (January 1984),[11] which provides that "[f]eral animals will be removed where they are detrimental to natural and cultural resources, and they will be transported to the mainland." *Id*. at 22. This language cannot reasonably be said to require the removal of the entire horse herd, as the plan also

[11] Plaintiffs cite to the "*General Management Plan for Cumberland Island National Seashore of 1982*," Compl. ¶ 86, however the plan is dated January 1984. *See* https://www.nps.gov/cuis/learn/management/upload/GMP.pdf.

states that the "feral horse population will be managed to insure a []healthy (sic) representative herd. . . ." *Id*. Plaintiffs also cite to a 1990 Statement for Management for Cumberland Island National Seashore which provided several long-term management objectives, including reducing the impact on native wildlife and effect on vegetation by exotic animals. Compl. ¶ 87. Neither of these documents set forth a discrete duty to remove the Seashore's feral horses. Accordingly, the Court lacks jurisdiction over Plaintiffs' claims and Count II(A) must be dismissed.

iii. Plaintiffs Fail to Identify Any Discrete, Legally Required Duty to Remove the Seashore's Feral Horses Under the Wilderness Act.

Plaintiffs next assert that NPS violated the Wilderness Act, 16 U.S.C. § 1131, by failing to remove the feral horse population from the Seashore. Compl. ¶ 109. According to Plaintiffs, the Wilderness Act and a related Director's Order impose a nondiscretionary legal duty to remove the Seashore's feral horses as non-native exotic species and livestock. *Id*. ¶ 114. No such mandatory duty exists.

According to Plaintiffs, failing to remove the Seashore's feral horses directly contravenes NPS's affirmative duty to preserve the "natural condition" of the Seashore's wilderness. *Id*. ¶ 109. However, the Wilderness Act does not define "natural condition," and Plaintiffs offer no explanation as to why "natural condition" within the meaning of the Wilderness Act necessarily excludes the

Seashore's feral horses. Moreover, a broad duty to preserve wilderness in its "natural condition" simply cannot be interpreted as imposing a specific, mandatory duty that would be actionable under APA § 706(1). *See SUWA*, 542 U.S. at 66; *Audubon of Kan., Inc.*, 67 F.4th at 1110.

The only alleged support for Plaintiffs' assertion is NPS Director's Order No. 41, Wilderness Stewardship.[12] Plaintiffs inaccurately paraphrase § 6.9 by alleging that the "objective of the management of non-native animal species within wilderness areas is to remove the invasive species." Compl. ¶ 112. Rather, § 6.9 provides that "[n]on-native invasive plant and animal species must not be brought into wilderness." Director's Order #41 § 6.9. Further, "[t]he objective of treatment within wilderness should be the eradication of the invasive species. If eradication is not feasible, the objective of treatment should be to contain the invasion, preventing spreading." *Id.* Section 6.9 also notes that "management of non-native invasive species can result in both positive and negative impacts to wilderness character." *Id.* Section 6.9 instructs parks to complete a "minimum requirements analysis" to identify whether a proposed action is necessary for administration of the wilderness area, *see id*. § 6.4, and to "inventory, monitor, control or eradicate non-native invasive species." Director's Order No. 41 does not contain a legal

[12] United States Department of Interior, National Park Service, Director's Order #41: Wilderness Stewardship (May 13, 2013), available at: https://www.nps.gov/policy/DOrders/DO_41.pdf (last visited July 27, 2023).

requirement to remove non-native invasive species, as removal/eradication is only one of several options available to parks management.

Neither the Wilderness Act itself, nor Director's Order No. 41, set forth a discrete, nondiscretionary duty to remove the Seashore's feral horses. As such, this Court lacks jurisdiction over Plaintiffs' claims, and Count III(A) must be dismissed.

c. PLAINTIFFS' STATE LAW CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY

To the extent that Plaintiffs assert state law claims against Federal Defendants (Counts V-VII), such claims are barred by sovereign immunity. Federal courts have jurisdiction over suits against the United States and its agencies only to the extent that sovereign immunity has been waived. *Thompson*, 388 Fed. Appx. at 872. "[T]he APA does not borrow state law or permit state law to be used as a basis for seeking injunctive or declaratory relief against the United States." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 854 (D.C. Cir. 2010) (Kavanaugh concurring).

Plaintiffs' state law claims at times refer only to Georgia Defendants (*see, e.g.*, Compl. ¶¶ 165, 166, 182, 185, 186), but at other times Plaintiffs appear to include Federal Defendants in such claims (*see, e.g.*, ¶¶ 169, 170, 172-175, 178). The United States has not waived its sovereign immunity to these claims, and Plaintiffs have not alleged any basis for establishing a waiver of sovereign

immunity for the state law claims. *See* Compl. Thus, to the extent Plaintiffs assert state law claims against Federal Defendants, this Court lacks jurisdiction and the claims must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).[13]

d. THE ENDANGERED SPECIES ACT

i. Plaintiffs fail to meet their burden of establishing standing for their ESA claim (Count IV).

Plaintiffs lack standing to pursue their ESA claim because they have not met their burden of pleading factual allegations to establish the elements of standing.

To satisfy Article III's case and controversy requirement, plaintiffs must establish that they have standing by proving three elements: "(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). "To establish injury in fact, a Plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2009) (citing *Lujan*, 504 U.S. at 560). When a plaintiff is not the object of the government action, "standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan*, 504 U.S. at 562

[13] The United States reserves the right to assert arguments, if necessary, regarding federal preemption of state law regarding management of the Seashore.

(cleaned up). "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). "[A]t the pleading stage, the plaintiff must 'clearly…allege facts demonstrating' each element." *Spokeo, Inc.,* 578 U.S. at 338 (citation omitted).

Plaintiffs fail to assert any factual allegations that show a concrete and particularized interest or injury to support their ESA claim. *See* Compl. ¶¶ 10-24. Plaintiffs' Complaint is utterly devoid of allegations that any plaintiff has a personal interest in either the loggerhead turtle or the piping plover – let alone that such an interest is injured here. *See id*. Instead, the Complaint contains only broad and general allegations regarding Plaintiffs' alleged interests in Cumberland Island or its resources. *See id*. Although the Complaint states generally that "Plaintiffs are, or will be, 'adversely affected or aggrieved'" within the meaning of the APA by "Defendants' management actions," *Id*. ¶ 23, Plaintiffs must satisfy the standing requirement by including sufficient factual allegations – "mere conclusory statements…do not suffice." *Glynn Env't Coal. v. Sea Island Acquisition*, LLC, 26 F.4th 1235, 1240 (11th Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). As described in Section IV.d.ii, below, Plaintiffs also fail to allege a sufficient causal connection between the Federal Defendants' actions and the alleged harm to the loggerhead turtle or the piping plover.

Two of the Plaintiffs are equine organizations whose missions are "to help horses in need" and to "promot[e], educat[e], and unify[] equine-interested persons." Compl. ¶¶ 11, 16. Plaintiffs' Complaint does not suggest that either of these equine organizations or their members will suffer an injury in fact traceable to the ESA claim. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977). Plaintiffs also name two individuals, Will Harlan and Carol Ruckdeschel, but again offer only the general allegations that these Plaintiffs "derive[] aesthetic pleasure from seeing healthy and thriving ecosystems on the island." Compl. ¶ 17, 20. Such general "ecosystem" interests are insufficient to demonstrate an injury to Plaintiffs' concrete interest in particular listed species on Cumberland Island. *See Lujan*, 504 U.S. at 565-66 (rejecting plaintiffs' "ecosystem nexus" theory to support standing for ESA claims). Although Plaintiffs also allege Mr. Harlan "derives aesthetic pleasure…from observing native, rare, and imperiled species thriving," Plaintiffs fail to describe Mr. Harlan's special interest in the particular species at issue in this case – let alone how Mr. Harlan will be "directly and adversely affected" in a manner that is traceable to the alleged ESA violations. *Id*. ¶ 20; *Lujan*, 504 U.S. at 563.

Plaintiffs also name the Horses of Cumberland Island as Plaintiffs in this matter. Compl. ¶ 10. Yet the horses lack standing to press the ESA claim – or indeed any other claim. Although the Eleventh Circuit appeared to sanction the view that

ESA-listed species could have independent statutory standing, *Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla.*, 148 F.3d 1231, 1255 (11th Cir. 1998), the horses are not ESA-listed species and thus an alleged failure to comply with that statute does not impact them one way or another. Moreover, the Ninth Circuit has since revisited the case the Eleventh Circuit relied on and found it to be "nonbinding dicta." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004). As the Ninth Circuit explained, in the context of a similar prior ruling, such statements "were little more than rhetorical flourishes. They were certainly not intended to be a statement of law, binding on future panels, that animals have standing to bring suit in their own name under the ESA." *Id*. at 1174. The *Cetacean* court noted that the statutory structure of the ESA presented a clear dichotomy between the animals that are protected and the legal "persons" who are authorized to protect them. *Id*. at 1178. Put simply, "[a]nimals are not authorized to sue in their own names to protect themselves." *Id*. The court concluded by holding that animals could only obtain standing under federal legislation where there is express authorization for a private right of action from Congress. *Id*. at 1176. Even if the horses could sue in their own name, the Complaint fails to allege that the horses will be injured in a manner that is traceable to alleged ESA violations. *See* Compl. ¶ 10.

This Court must dismiss Count IV because Plaintiffs' Complaint fails on its face to establish standing for their ESA claim. Fed. R. Civ. Pro. 12(b)(1); *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017).

ii. In the alternative, Plaintiffs fail to state an ESA claim upon which relief can be granted (Count IV).

1. Plaintiffs fail to plead a basis for a Section 9 violation or "take" under the ESA.

Plaintiffs advance a stunningly broad theory of "take" liability that finds no support in either the ESA's statutory language or the case law.

Plaintiffs fail to identify an affirmative action taken by Federal Defendants that resulted in the alleged take. Under the ESA, to "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). In turn, "harm" means "an act which actually kills or injures wildlife." 50 C.F.R. § 17.3. The language of the statutory prohibition is tied to actions. Thus, Plaintiffs must identify an affirmative act by Federal Defendants that allegedly resulted in the "take" at issue. *E.g., Defs. of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000) (to prevail on an ESA Section 9 claim, plaintiffs "had to prove that the [defendant's] *actions* would result in an unlawful 'take'" of the species at issue) (emphasis added). Plaintiffs have failed to identify such an affirmative agency action here.

Instead, Plaintiffs claim that the horses of Cumberland Island are taking the loggerhead turtle and piping plover and suggest that this Court should impute such take to Federal Defendants. *See, e.g.,* Compl. ¶¶ 130-31, 151-53. Although some courts have recognized vicarious liability in ESA Section 9 cases involving regulatory actions, *see, e.g., Loggerhead Turtle*, 148 F.3d at 1247, Federal Defendants are unaware of any cases in which a court has held that a federal agency is liable for a take of one animal perpetrated by another animal. Indeed, such a legal theory is at odds with common law requirements for vicarious liability, which require that the plaintiff prove both the existence of a principal-agent relationship and that the agent is liable for the wrongdoing. *See, e.g., Crawford v. Signet Bank*, 179 F.3d 926, 929 (D.C. Cir. 1999) (finding that in the absence of agent liability "none can attach to the principal"). Such a theory is also inconsistent with the ESA's own language, which makes it unlawful to "cause to be committed [] any *offense* defined in this section." 16 U.S.C. § 1538(g) (emphasis added). Here, Plaintiffs cannot show that the horses effected a take or committed an offense under Section 9 of the ESA because the take prohibition applies only to persons.

The ESA establishes a scheme where "any person" is afforded both rights and obligations – namely, the right to enforce the ESA and the obligation to refrain

from taking ESA-listed species. *Id*. §§ 1540(g), 1538(a).[14] Neither the ESA nor the APA defines "person" to include animals. *Id*. § 1532(13); 5 U.S.C. §§ 551(2), 701; *see also Cetacean Cmty.*, 386 F.3d at 1177-78. In fact, the ESA and its regulations include numerous animal definitions (e.g., species, fish or wildlife, endangered species, threatened species) – none of which overlap with the definition of person. *See* 16 U.S.C. § 1532. Because horses are not a "person" under the ESA, they cannot "take" loggerhead turtles or piping plovers as Plaintiffs suggest. Compl. ¶¶ 130-31, 151-53. And by extension Federal Defendants cannot be held liable for take perpetrated by the horses. This also makes practical sense because federal agencies often make difficult choices about how to manage competing resources – including how to manage multiple ESA-listed species that reside in the same action area. Imposition of vicarious liability for animal-perpetrated take under the ESA would ignore the express limitations of ESA Section 9 liability (to offenses committed by persons) and would also interfere with the exercise of agencies' discretion on how best to manage resources. Moreover, such a broad interpretation of Section 9 liability could expose federal agencies and their employees to civil and criminal liability for the performance of their duties. 16 U.S.C. § 1540(a), (b);

[14] Section 9 of the ESA makes it "unlawful for any *person* subject to the jurisdiction of the United States" to "take any [ESA-listed] species within the United States or the territorial sea of the United States" or "to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section." *Id*. § 1538(a)(1)(B), (g) (emphasis added).

see also, Bennett, 520 U.S. at 173-174 (finding that "violation" is unlikely to refer to a failure by federal officers and employees who perform their duties in administering the APA).

2. Plaintiffs' ESA Section 7 subclaim fails to identify a cognizable agency action.

Plaintiffs' ESA Section 7 claims fares no better because their Complaint does not identify an "agency action."

Plaintiffs fail to identify an affirmative agency action taken by Federal Defendants that would trigger ESA Section 7's requirements for either the loggerhead turtle or the piping plover. Instead, they allege that Federal Defendants' non-compliance with a series of management plans constitutes an "agency action" under Section 706(1) of the APA. Complaint ¶ 164.[15] Thus, Plaintiffs appear to suggest that the Park Service has violated ESA Section 7(a)(2) by failing to act. *See e.g.,* Complaint ¶¶ 155. But courts are clear that Section 7(a)(2) consultation requirements applies only to "affirmative actions" of an agency." *See, e.g., W. Watersheds Project*, 468 F.3d at 1107-10 ("'inaction' is not 'action' for section 7(a)(2) purposes") (citation omitted); *Forest Guardians v. Forsgren*, 478 F.3d

[15] Plaintiffs claim that "[a] 'take of [the Loggerhead turtle] necessarily jeopardizes its continued well-being." Compl. ¶ 132. While that could make sense in a colloquial sense, it misunderstands the legal parameters for a jeopardy determination under the ESA. An "agency action" is a prerequisite for the ESA's Section 7(a)(2) consultation and jeopardy determination obligations. *See e.g., W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1107-10 (9th Cir. 2006).

1149, 1156 (10th Cir. 2007); *see also Int'l Ctr. For Tech. Assessment v. Thompson*, 421 F.Supp.2d 1, 11 (D.D.C. 2006) (finding that FDA's refusal to engage in enforcement activity was not an agency action). Thus, Plaintiffs' claim that Federal Defendants failed to take some affirmative step to actively manage the horses cannot be deemed an "agency action" triggering the ESA Section 7 requirements.

For all the foregoing reasons, Plaintiffs have failed to state an ESA claim upon which relief can be granted; thus, the Court should dismiss Count IV pursuant to 12(b)(6) of the Federal Rules of Civil Procedure.

V. CONCLUSION

Federal Defendants respectfully request that the Court dismiss Plaintiffs' claims for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Federal Defendants prepared this submission in accordance with the font and point selections approved in LR 5.1(b).

Dated: July 27, 2023

Respectfully Submitted,

TODD KIM
Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

/s/ Frances B. Morris
FRANCES B. MORRIS (DC Bar No. 1016833)
Natural Resources Section
ERIKA FURLONG (PA Bar No. 319350)
Wildlife & Marine Resources Section
Trial Attorneys
150 M Street NE
Washington, DC 20002
Tel: (202)514-2855
Fax: (202)305-0506
Frances.morris@usdoj.gov
Erika.furlong@usdoj.gov

Attorneys for Federal Defendants