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

HORSES OF CUMBERLAND ISLAND, **THE GEORGIA EQUINE RESCUE LEAGUE, LTD,** **THE GEORGIA HORSE COUNCIL, INC.,** **WILL HARLAN, AND CAROL RUCKDESCHEL** **PLAINTIFFS,** **v.** **HON. DEB HAALAND, in her official capacity as** **SECRETARY OF THE INTERIOR,** **1849 C STREET, N.W.** **WASHINGTON, D.C. 20240** **MARK FOUST, in his official capacity as DIRECTOR** **SOUTH ATLANTIC-GULF REGION** **NATIONAL PARK SERVICE** **DEPARTMENT OF THE INTERIOR** **ATLANTA FEDERAL CENTER, 1924 BUILDING** **100 ALABAMA STREET, S.W.** **ATLANTA, GA 30303** **GARY INGRAM, in his official capacity as** **SUPERINTENDENT,** **CUMBERLAND ISLAND NATIONAL SEASHORE** **NATIONAL PARK SERVICE** **DEPARTMENT OF THE INTERIOR** **101 WHEELER STREET** **ST. MARYS, GEORGIA 31558** **WALTER RABON, in his official capacity as** **COMMISSIONER** **GEORGIA DEPARTMENT OF** **NATURAL RESOURCES** **2 MARTIN LUTHER KING JR. DR., S.E.** **SUITE 1252** **ATLANTA, GA 30334**	)	**CIVIL ACTION** **FILE NO.** **1:23-cv-01592-SEG**

TYLER HARPER, in his official capacity as COMMISSIONER GEORGIA DEPARTMENT OF AGRICULTURE 19 MARTIN LUTHER KING, JR. DR., S.W. ATLANTA, GA 30334

DEFENDANTS.

I. INTRODUCTION

The Defendants removed cattle running at large as livestock from the Cumberland Island National Seashore in the 1980's. In the 1990's the Defendants began managing and removing feral hogs as livestock from the Seashore. Cumberland Island National Seashore has recently received $760,000 through the Inflation Reduction Act to further the "feral swine reduction" program. Consistent with Defendants' removal and control of cattle and hog livestock, Plaintiffs now ask the Court to prohibit the Defendants from continuing to permit the feral horses from running at large on Cumberland Island. Rather than work collaboratively towards this end and towards the betterment of both the Island's natural resources and the well-being of the horses, Defendants attempt to bury the problem by seeking dismissal of this suit. That attempt is without merit and should be rejected by this Court.

II. ARGUMENT

a. The Court Has Jurisdiction Over Plaintiffs' Administrative Procedure Act (APA) Section 706(2) Claims (Counts I(B), Ii(B), and Iii(B)) Because Defendants' "Failure to Act" Is an Affirmative Act.

Defendants ask the Court to dismiss Plaintiffs' Section 706 (2) Claims (Counts I(B), II(B), and III (B)) because Plaintiffs identify "no agency action" for the Court to review, yet alone a "final agency action". See Defendants' Brief at 7-8.

Here, the "agency action" at issue is Defendant NPS's continued failure to prevent feral "free range" horses from running free over the Cumberland Island National Seashore (the Seashore) and to remove these livestock animals from the island. These failures to act are in knowing violation of NPS's duty to employ proper use, management, and protection of persons, property, and natural and cultural resources within areas under the jurisdiction of the National Park Service. 5 U.S.C § 551 (13) and 36 C.F.R. 2.60.

Defendants' motion to dismiss Plaintiffs' APA section 706 (2) claim is defeated by the recognized principle of law cited in the case upon which the federal Defendants ("Defendants" unless otherwise specified) heavily rely. In *National Park Conservation Association v. Norton*, 324 F.3d 1229 (11th Cir. 2003), the 11th Circuit sstated,"as a general matter, ... an administrative agency cannot legitimately evade judicial review forever by continually postponing any consequence-laden action and then challenging federal jurisdiction on 'final

agency action' grounds." Id. at 1239, (citing *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C.Cir.2001)); *In re Mdl–1824 Tri–state Water Rights Litigation*, 644 F.3d 1160, 1182 (11th Cir. 2011). That is precisely the case here.

i. The Defendants' Failure to Act Constitutes an Affirmative Act for Purposes of "Final Agency Action" Review.

"[W]here an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers `final agency action' review." *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (explaining that an agency's failure to act when required by law to do so, either by an implicit refusal to act or simply by an unreasonable bureaucratic delay, is reviewable under the APA).

1. *The National Park Service's Mandatory Duties to Act to Remove the Feral Horses from the Seashore*

The National Park Service has a mandatory, non-discretionary duty to protect the natural resources, wildlife, and wilderness of the Seashore by prohibiting feral horses as free ranging livestock from having access to the Seashore. Plaintiffs and Defendants agree that in creating the National Park System, Congress tasked the Secretary through the National Park Service with the overarching duty to promote and regulate the use of the Cumberland Island National Seashore as a unit of the National Park System in a manner that *preserves it unimpaired for the use of future generations*. 54 U.S.C. § 100101(a).

(Defendants' Brief in support of motion to dismiss (hereinafter "Brief") at 11, 12 and 14).

The Cumberland Island National Seashore was created by Congress in 1972 through the *Cumberland Island National Seashore Act* (the "*Seashore Act*"), Public Law 92-536, 1972, 16 U.S.C. § 459i-1 - 459i-9. The Seashore Act "empowered the Park Service to use any other available statutory authority for conservation and management of Cumberland island's natural resources, instructing that all land within the park be managed with an eye towards preserving non-recreational areas in their "primitive state." *Id.;* 16 U.S.C. § 459i-5(b). *High Point, LLLP v. National Park Serv.*, 850 F.3d 1185, 1199 (11th Cir. 2017) (interpreting "available statutory authority" to include the Wilderness Act for purposes of managing natural resources on Cumberland Island within areas designated wilderness and potential wilderness "with an eye towards preserving non- recreational areas in their 'primitive state'".)

The Cumberland Island Wilderness Area was designated by Congress on September 8, 1982, under the Wilderness Act, 16 U.S.C. § 1131 *et seq*, creating 8,840 acres of wilderness and 11,718 acres as "potential wilderness" on the island. Pub. L. No. 97-250, § 2(a), 96 Stat. 709. "The [Wilderness] Act seeks to preserve wilderness areas 'in their natural condition' for their 'use and enjoyment *as wilderness.'* " 16 U.S.C. § 1131(a) (emphasis added). The Act promotes the benefits of wilderness "for the American people," especially the "opportunities for

a primitive and unconfined type of recreation." *Id.* at § 1131(c). Thus, the statute seeks to provide an opportunity for a primitive wilderness experience as much as to protect the wilderness lands themselves from physical harm. *See also* National Park Service, *Reference Manual 41* at 14 ("In addition to managing these areas for the preservation of the physical wilderness resources, planning for these areas must ensure that the wilderness character is likewise preserved.")." *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1094 (11th Cir. 2004). *See also High Point, LLLP v. Nat'l Park Serv.*, 850 F.3d 1185, 1197 (11th Cir. 2017) (the clear purpose of the Wilderness Act is "the preservation of untrammeled natural areas," citing *Wilderness Watch*, 375 F.3d at 1091). "[T]he Park Service [is] properly empowered - and indeed obligated - [ ] based on its authority and responsibility to protect the marshlands within Cumberland Island National Seashore as wilderness." *Id*. at 1200.

The Secretary of the Interior is authorized to promulgate rules and regulations to effectuate the goals of Congress in preserving and managing the National Parks, including the Cumberland Island National Seashore. *U.S. v. Brown*, 364 F.3d 1266, 1276 (11th Cir. 2004) ("[I]n Title 16, Congress delegated to the Secretary the authority to promulgate rules and regulations that were necessary and proper to effect Congress's stated goal of preserving and managing national parks.") The rules codified at Chapter 36 of the C.F.R. are addressed to those - such as the Defendants - charged with "the proper use, management,

government, and protection of persons, property, and natural and cultural resources within areas under the jurisdiction of the National Park Service." Those rules are obviously not, as suggested by the Defendants, addressed to the horses of Cumberland Island.

The following selected portions of codified rules are especially relevant to defining the National Park Service's mandatory and discrete duty to prohibit the running-at-large and grazing of feral horses within the Cumberland Island National Seashore, including the Cumberland Island Wilderness.

36 C.F.R. § 1.1 Purpose states in relevant part:

> (b) These regulations will be utilized to fulfill the statutory purposes of units of the National Park System: to conserve scenery, natural and historic objects, and wildlife, and to provide for the enjoyment of those resources in a manner that will leave them unimpaired for the enjoyment of future generations.
>
> (d) The regulations contained in parts 2 through 5, part 7, and part 13 of this section shall not be construed to prohibit administrative activities conducted by the National Park Service, or its agents, in accordance with approved general management and resource management plans, or in emergency operations involving threats to life, property, or park resources.

36 C.F.R. § 1.6 Permits states in relevant part:

> (g) The following are prohibited:
>
> (1) Engaging in an activity subject to a permit requirement imposed pursuant to this section without obtaining a permit;

36 C.F.R § 2.60 Livestock use and agriculture states in relevant part:

> (a) The running-at-large, herding, driving across, allowing on, pasturing or grazing of livestock of any kind in a park area or the use of a park area for agricultural purposes is prohibited, except:
>
> (1) As specifically authorized by Federal statutory law; or
>
> (2) As required under a reservation of use rights arising from acquisition of a tract of land; or
>
> (3) As designated, when conducted as a necessary and integral part of a recreational activity or required in order to maintain a historic scene.
>
> (b) Activities authorized pursuant to any of the exceptions provided for in paragraph (a) of this section shall be allowed only pursuant to the terms and conditions of a license, permit or lease. Violation of the terms and conditions of a license, permit or lease issued in accordance with this paragraph is prohibited and may result in the suspension or revocation of the license, permit, or lease.
>
> (c) Impounding of livestock. (1) Livestock trespassing in a park area may be impounded by the superintendent and, if not claimed by the owner within the periods specified in this paragraph, shall be disposed of in accordance with applicable Federal and State law. (2) In the absence of applicable Federal or State law, the livestock shall be disposed of in the following manner:. ..

The rules above clearly prohibit NPS from knowingly allowing "the running-at-large, herding, driving across, allowing on, pasturing or grazing of livestock of any kind in a park area" (also referred to herein generally and in the vernacular as the "free ranging of livestock"). NPS has the duty and authority not only to prohibit the feral horses from running at large and otherwise trespassing on the Seashore property, but also to take the necessary action to dispose of the livestock once the horses are deemed to be without an owner. 36 C.F.R. 2.60 (c).

While 2.60 (a) provides certain exceptions under which livestock may be allowed to run at large or to graze on Park properties, those exceptions may only be implemented pursuant to the explicit terms of a permit issued by the Superintendent. 36 C.F.R. 2.60(b). Because there is no issued permit for the otherwise illicit action of the feral horses running at large and grazing within the Cumberland Island National Seashore, that action (livestock running at large without a permit) is also in violation of 36 C.F.R. 1.60 (g)(1), prohibiting "engaging in an activity subject to a permit requirement imposed pursuant to this section without obtaining a permit." A court review is mandated where an agency fails to abide by its own rules and regulations. *Jean v Nelson*, 727 F.2d 957, 982 (11th Cir. 1984) affirmed by *Jean v. Nelson*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed. 2d 664 (1985).

Defendants' 50 years of bureaucratic inertia and non-feasance cannot justify their ignoring the statutes, rules, and regulations designed to protect the Cumberland Island National Seashore. The act of Defendants permitting horse livestock to run at large at the Seashore is an affirmative act for purposes of establishing "final agency action" review. For that reason, the Court should deny Defendants' motion to dismiss Plaintiffs' Section 706 (2) Claims (Counts I(B), II(B), and III (B)) based on lack of "final agency action."

b. SECTION 706 (1) - DISCRETE AGENCY ACTION

Defendants seek the dismissal of Plaintiffs' Section 706(1) claims (Counts I (A), II (A), and III (A)), claiming that Plaintiffs failed to satisfy the conditions established in *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55 (2004). *SUWA* requires plaintiffs to assert that the Defendant NPS "as an agency failed to take a *discrete* agency action that it is *required to take*." *Id*. at 64. Because Plaintiffs have satisfied the two conditions of *SUWA*, Defendants' motion to dismiss on that basis should be denied.

i. Discrete Agency Action.

Defendants mistakenly argue that "none of the statutory or regulatory provisions cited by Plaintiffs compel *discrete* agency action, either procedurally or substantively, that NPS is *required* to take." (Emphasis original). Defendants' Brief at p. 10. But Plaintiffs have satisfied the *SUWA* conditions by alleging that Defendants took the discrete act of failing to prohibit feral livestock from running-at-large in the Seashore, contrary to its obligations under federal law and regulations.

In *SUWA* the Court addressed the issue of "discrete agency action" in the context of an agency's "failure to act." The Court defines "[A]gency action" in §551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act. (Emphasis added)* " *Id*. at 62. "The APA provides relief for a failure to act in § 706(1): "The reviewing

court shall . . . compel agency action unlawfully withheld or unreasonably delayed." *Id*. The *SUWA* Court concluded: "[t]he final term in the definition, 'failure to act,' is in our view properly understood as a failure to take an *agency action.*" Emphasis in original. *Id.*

The *SUWA* Court noted that § 551(13), "[i]n defining "agency action" in terms such as "agency rule, order, license, *sanction [or] relief*" necessarily implied that "[a]ll of those categories involve circumscribed, discrete agency actions, as their definitions make clear: . . . *a 'prohibition . . . or . . . taking [of] other compulsory or restrictive action' (sanction)*; . . . ." Emphasis provided. *Id*. at 62. The Court further noted "[a] "failure to act" is not the same thing as a "denial." The latter is the agency's act of saying no to a request; the former is simply *the omission of an action* without formally rejecting a request . . .." Emphasis provided. *Id.* at 63. "The important point is that a 'failure to act' is properly understood to be limited, as are the other items in § 551(13), to a *discrete* action." *Id*.

Applying the terms of the APA as interpreted by the Supreme Court in *SUWA*, Plaintiffs correctly claim the Defendant NPS took the requisite "discrete action" when NPS "failed to act" by failing to "take compulsory or restrictive action (sanction)" in prohibiting feral livestock from running-at-large in the Seashore. Plaintiffs have phrased this "failure to act" in their Complaint as a "failure to remove" rather than as a failure to "take the compulsory action" to

prohibit the horses as livestock from running at large in the Seashore. Plaintiffs contend the two phrases have equivalent meaning and effect, but from different perspectives. The first (failure to remove) is retrospective and the second prospective. Both reflect and serve the same Congressional intent: to permit no livestock to run at large in National Parks.

ii. Defendant NPS is Required to Prohibit the Feral Horses as Livestock from Running at Large in Cumberland Island National Seashore.

Plaintiffs also satisfy the second element of the *SUWA* criteria: that the agency action be one the agency "is required to take." Defendant NPS is legally bound "by specific statutory mandates that define the Service's mission and impose independent requirements upon the agency." *Greater Yellowstone Coalition v. Kempthorne*, 577 F.Supp.2d 183, 190 (D. D.C. 2008**).** These statutory and regulatory provisions pertaining to the National Park System, the Cumberland Island National Seashore, and the Cumberland Island Wilderness Area are summarized above in Part III., (a), i.,1. They provide that rules creating a specific duty to act are abrogated by a failure to perform required statutory and regulatory duties.

iii. Plaintiffs Do Not Seek to Dictate How the Objective is Achieved, but Rather, to Assure Defendants Achieve the Mandated Objective: Prohibition of Livestock within the Seashore.

Defendants argue that even if the Organic Act and its enabling rules and regulations require the preservation of the Seashore in its natural state, the Court is

restricted from directing the Defendants as to how they should accomplish that mandate. Defendants' Brief, pp. 12-16.

To reiterate, Defendants have the non-discretionary duty to prohibit the feral horses as livestock from running at large in the Seashore. While Plaintiffs have asked the Court to enforce the non-discretionary duty articulated specifically in 36 CFR 2.60 (mandating the general prohibition of livestock in National Parks), they do not seek to involve the Court in any unnecessary[1] "judicial entanglement in abstract policy disagreements," as voiced by the Court in *SUWA*. *SUWA* at 542 U.S. at 66.

In re Public Employees for Environmental Responsibility [PEER], 957 F.3d 267 (D.C. Cir. 2020), involved a challenge to federal agencies' decision to forego producing a management plan under the Air Tour Management Act, which requires that agencies "*shall* establish an air tour management plan . . .." for all non-exempt parks. The agencies argued "completion of a management plan is not a ministerial, clear-cut, or non-discretionary duty" because they must exercise their "discretion" over "the environmental analyses and action [that they] will approve." *Id*. at 273. In upholding the Petitioners' request, the D.C. Circuit Court stated: "Petitioners do not seek to control the content of the plans; they simply seek

[1] Plaintiffs, including Plaintiff Horses of Cumberland, reserve the right to seek intermediate equitable relief from the Court to remediate the horses' inhumane living conditions on Cumberland Island.

[ ] to compel the [agencies] to make decisions within the statutory time frames." *Id*.

As the *Peer* Court succinctly recognized, "[the defendants'] argument confuses the *creation* of the plans with their *content*. While the latter may be discretionary, the former is not." *Id*. at 273. In the current case, the NPS confuses the *result* of prohibition with *how it would be achieved*. The latter may be discretionary but the former is definitively not.

Conclusion

Plaintiffs have properly alleged that Defendants have the non-discretionary discrete duty to prevent feral horses as livestock from running at large within the Seashore and have failed to perform that duty Plaintiffs ask the Court to enforce this non-discretionary discrete duty against Defendants, which may be performed without the Court's having to specify the exact manner in which that requirement must be discharged.

c. STATE LAW CLAIMS AND SOVEREIGN IMMUNITY.

Plaintiffs will move to withdraw their state law claims against the federal Defendants only.

d. PLAINTIFFS' ENDANGERED SPECIES ACT CLAIMS.

In part IV d., Defendants challenge the standing of Plaintiffs to bring a claim under the Endangered Species Act (ESA) and alternatively challenge whether

Plaintiffs have stated a claim for which relief can granted under sections 7 and 9 of the ESA. Neither contention survives close analysis.

i. Plaintiffs have Standing to Bring Their Claims Under the Federal Endangered Species Act.

In IV d. (i) Defendants challenge the sufficiency of Plaintiffs' factual allegations supporting their standing to assert claim(s) under the Endangered Species Act. While Plaintiffs' current allegations are sufficient to sustain their claims, the attached affidavits of Plaintiffs Will Harlan (Exhibit A) and Carol Ruckdeschel (Exhibit B) provide "particularized allegations of fact" that support Plaintiffs' standing.[2]

To show standing Plaintiffs must establish they have suffered 1) an "injury in fact" that is 2) fairly traceable to the challenged action of the defendant and 3) that the injury is likely to be redressed by a favorable decision of the court. Lujan v *Defenders of Wildlife*, 504 U.S. 555, 560- 61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[2] The Court may permit plaintiffs to provide additional averments in support of standing by affidavit rather than amendment. *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993) ("[I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing." quoting *Warth v. Seldin*, 422 U.S. 490, 510, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975).)

When defendants challenge standing by a motion to dismiss, "both trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). Further, in making its determination, the trial court "is not restricted to the face of the complaint--it is free to rely on affidavits submitted by the plaintiff in support of the complaint." *Region 8 Forest Service*, 993 F.2d at 806.

Applying the elements above to Plaintiffs' newly updated allegations of particularized facts demonstrates that Plaintiffs have proper standing to assert their claims under the ESA.

1. Injury in Fact.

An injury in fact must be "concrete, particularized, and actual or imminent." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924, 925 (11th Cir. 2020) (en banc). An injury that is "conjectural or hypothetical" is constitutionally insufficient. *Id.* As the Supreme Court stated in *Bennett v Spears*, 520 U.S. 154 (1997), "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." Internal punctuation and citation omitted. *Id*. at 168. See also. *Glynn*

Environmental Coalition, Inc. v. Sea Island Acquisition, LLC, 26 F.4th 1235, 1240 (11th Cir. 2022).

Aesthetic and Recreational Injury.

In *Glynn Environmental Coalition*, the 11th Circuit affirmed that "[a]n individual suffers an aesthetic injury when she "use[s] the affected area" and is a person "for whom the aesthetic ... value [ ] of the area will be lessened by the challenged activity." *Id*. (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 183, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (internal quotation marks omitted); *accord Sierra Club v. Johnson*, 436 F.3d 1269, 1279 (11th Cir. 2006)).

The individual meets her burden of establishing an aesthetic injury at the pleading stage "by attesting that [s]he uses ... an area affected by the alleged violations and that h[er] aesthetic ... interests in the area have been harmed." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engr's*, 781 F.3d 1271, 1280 (11th Cir. 2015).

It is well established that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Lujan*, 504 U.S. at 562-63, 112 S.Ct. at 2137. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008) (declarations by several individual plaintiffs that the individuals engage in whale watching and the studying of whales, activities that ship strike mortalities threaten, sufficient to satisfy injury in fact

component for standing). See also. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n. 4, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (holding that plaintiffs "undoubtedly have alleged a sufficient `injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting").

Plaintiffs have sufficiently alleged that they regularly traverse the shoreline and dune system in which the loggerhead sea turtle and piping plover reside, not only to recreate, but also to study the habitat of those species and advocate for the habitat's protection. (Ruckdeschel Aff. ¶¶ 14,15, 17, 18; Harlan Aff. ¶¶ 3-13).

It would be disingenuous to suggest an equivalence between the plaintiffs in *Lujan* and those in this action. Unlike the complainants in *Lujan*, Plaintiffs Carol Ruckdeschel and Will Harlan are not one-time visitors to Cumberland who "plan" to return some day in the indeterminate future. Rather, Ms. Ruckdeschel has *resided* on Cumberland for the past 50 years and experiences on a continual basis the aesthetic pleasure and scientific knowledge she gains from her exposure to the habitat that serves as home for the very species whose existence is threatened. She has studied piping plovers for almost 50 years and has studied and advocated for the protection of loggerhead sea turtles on Cumberland for 53 years. (Ruckdeschel Aff. ¶ 3). She has a *daily, first-person connection to*

the living beings whose existence is threatened by the actions or complicity of the federal Defendants.

Plaintiff Will Harlan has frequently visited and been actively involved with Cumberland Island for more than 25 years. (Harlan Aff. ¶¶ 6-20). He visits the island for recreation and to study the subject species within the Seashore and the remainder of the island.

Each Plaintiff is a staunch advocate for the island, for the protection of the seashore, and especially for the protection of those habitats and areas deemed critical to the species subject to this lawsuit. (Ruckdeschel ¶¶ 5-7,13-17; Harlan ¶¶ 19-23).

Plaintiffs sufficiently allege they have been injured and will continue to be injured by Defendants' act of permitting the running of feral horses at large in the Seashore. Those acts have caused direct harm to both the loggerhead sea turtle and the piping plover and their critical habitat and threaten Plaintiffs' interests in being able to view, study, and take pleasure in the endangered species. (Ruckdeschel Aff. ¶¶ 14,15, 17, 18; Harlan Aff. ¶¶ 26, 27,30, 33, 34).

One would be hard-pressed to find two plaintiffs whose injuries are more concrete than those of Plaintiffs Carol Ruckdeschel and Will Harlan. To contend that they have no standing to assert their claims is nonsensical.

Procedural Injury.

In addition to its substantive ESA claims, Plaintiffs' additionally "claim that the [NPS] failed to meet its statutory consultation obligation—that is, the [NPS] failed to 'insure' that its action was 'not likely to jeopardize the continued existence of any endangered species or threatened species.' 16 U.S.C. § 1536(a)(2) describes an 'archetypal procedural injury.'" *Center for Biological Diversity v. Environmental Protection Agency*, 861 F.3d 174 (D.C. Cir. 2017).

Where plaintiffs allege deprivation of their procedural rights under ESA section 7, courts relax the normal standards of redressability and imminence. *Sierra Club v. FERC*, 827 F.3d 59, 65 (D.C. Cir. 2016). To establish causation, the plaintiffs

> need demonstrate only that "the procedural step was connected to the substantive result," not that "the agency would have reached a different substantive result" but for the alleged procedural error. An adequate causal chain must contain at least two links: one connecting the omitted [ESA Sec. 7 duty to consult] to some substantive government decision that may have been wrongly decided because of the lack of [information gained from the duty to consult] and one connecting that substantive decision to the plaintiff's particularized injury.

(Internal punctuation and citation omitted.) *American Rivers v. Federal Energy Regulatory Commission* (FERC), 895 F.3d 32, 42 (D.C. Cir. 2018) (citing *WildEarth Guardians v Jewell*, 738 F.3d 298 at 306 (D.C. Cir. 2013). See also, *Sierra Club v. Johnson*, 436 F.3d 1269 (11th Cir. 2006)

Plaintiffs Ruckdeschel and Harlan allege that the failure of NPS to engage in the mandatory consultation requirement for all federal actions that may threaten a

listed species is causally connected to the feral horses running at large on Cumberland Island. (Ruckdeschell Aff. ¶ 19; Harlan Aff. ¶ 35). Under Section 7 of the ESA, federal agencies must consult with the Service to "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 §1536(a)(2). Defendants do not dispute that feral horses are causing harm to the island and particularly to the habitats critical to the loggerhead sea turtle and the piping plover. (Petition, ¶¶ 30-38, 72-76, 126-140, 146-156). Plaintiffs allege that the feral horses running at large in the Seashore, including on the seashore and dunes, will harm their ongoing interests in using and enjoying this area and in studying and protecting the subject protected species and the habitat critical to their existence. By alleging there is a "substantial probability" that NPS's failure to consult has and will continue to cause them harm, Plaintiffs have satisfied the injury in fact element.

2. Causation.

The second element of the standing analysis requires "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant...." *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks and alterations omitted). "Essentially, this requirement focuses on whether the line of causation between the illegal conduct

and injury is too attenuated." *Federal Deposit Ins. Corp. v. Morley*, 867 F.2d 1381, 1388 (11th Cir.), cert. denied 493 U.S. 819, 110 S.Ct. 75, 107 L.Ed.2d 41 (1989).

Of course, there would be no injury to Plaintiffs without the presence of the feral horse on the Seashore.. There is a direct causal connection between the Plaintiffs' injuries and the Defendants' allowing feral horses to run-at-large and graze in the Seashore. . The feral horses of Cumberland Island are impairing the natural resources of the Seashore, including the loggerhead sea turtle and the piping plover (Petition, ¶¶ 30-38, 72-76, 126-140, 146-156; Ruckdeschel Aff. ¶¶ 8, 11, 13; Harlan Aff. ¶¶ 31-32). In turn, the harm afflicting the protected species and their habitats are injuring the Plaintiffs. (Ruckdeschel Aff. ¶¶17, 18; Harlan Aff. ¶¶ 33, 34). Plaintiffs are additionally harmed from the procedural injury, discussed above, caused by Defendants' failure to consult pursuant to Section 706 (a)(2). (Ruckdeschel Aff. ¶¶ 18,19; Harlan Aff. ¶ 35).

This case is far removed from cases such as *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008) and *Florida Audubon Society v. Bentsen*, 94 F.3d 658 (D.C.Cir.1996) *(en banc)*, in which the courts found that plaintiffs "premise[d] their claims of particularized injury and causation on a lengthy chain of conjecture." *Id.* at 666. Neither do the Plaintiffs claim "speculative" injuries based on "past random acts" of the Defendants. *Alabama-Tombigbee Rivers Coalition*, 338 F.3d at 1253.

Plaintiffs have met their burden of causation by properly alleging and showing by affidavits that the Defendants, by permitting horses to run at large in the Seashore and taking no action to remove them, have injured the Plaintiffs.

3. Redressability.

"The 'redressability' prong of the standing doctrine asks whether it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."(internal quotation marks omitted) *Loggerhead Turtle* at 1253 (citing *Lujan*, supra, 504 U.S. at 561).

In Plaintiffs' request for relief, they ask the Court to find and declare that the Defendants have violated the National Park System Organic Act and its implementing rules and regulations "by failing to remove the feral horses as non-native exotic species and livestock from the Cumberland Island National Seashore and the Cumberland Wilderness." Plaintiffs ask the Court to order Defendants "to immediately remove all feral horses from the Cumberland Island Wilderness, including potential Wilderness Area."

The Plaintiffs have met their burden of satisfying the "redressability" prong. Should the Court grant the relief Plaintiffs request, their injuries would be immediately and directly diminished and, ultimately, fully remediated. As the 11th Circuit observed in *Loggerhead Turtle* at 1254, "the district court in this case has available a wide range of effective injunctive relief" with which to redress the

Plaintiffs' injuries. The proper remedy in this case will not only address Plaintiffs' direct injuries, but will also effect the humane treatment of Cumberland's horses and the protection of the island's natural and wilderness resources. The optimal relief would involve a collaborative effort among the parties and the Court's continued supervision.

Because Plaintiffs have shown the injury in fact, causality, and redressability necessary to establish standing to bring their claims under the Endangered Species Act, the Court should deny Defendants' standing challenge.

ii. Defendants' use of the Seashore to run-at-large feral horses has resulted in a "take' in violation of Section 9 of the Endangered Species Act.

Alternatively, Defendants attack the substance of Plaintiffs' ESA section 9 takings claim by asserting (again) that Plaintiffs fail to allege an "affirmative agency action" linking the harm done to the protected loggerhead sea turtle and piping plover with an action by the Defendants.

It is fundamental that the NPS is authorized to act only in accordance with the law, including its own rules and regulations. Administrative Procedures Act, 5 U.S.C. § 706 (2)(A) & (C); *Mc Donnell Douglas Corp. V. Widnall*, 57 F.3d 1162 (U.S. App. D.C. 1995) (agency action may be challenged under 5 USC 706(2)(A) if it is contrary to the law); *Clouser v. Espy*, 42 F.3d 1522 (C.A. 9, 1994) (agency action must be consistent with governing statutes and regulations).

NPS is obligated under the Organic Act, Cumberland Island National Seashore Act, and the rules and regulations passed by the Secretary to effectuate the goals of Congress in preserving and managing the National Parks, including the Cumberland Island National Seashore. Those regulations, codified at Chapter 36 of the C.F.R., are addressed to the federal Defendants, who are charged with "the proper use, management, government, and protection of persons, property, and natural and cultural resources within areas under the jurisdiction of the National Park Service . . .."

Plaintiffs allege the Defendants, by permitting the running-at-large and grazing of the feral horse livestock in the Seashore, contrary to C.F.R. 2.60 and the Organic Act, is causing the "take" of the protected species to which the Complaint refers. "Take" is defined to mean "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 (20). "To "take" a species includes to "harm" it. *Id*. § 1532(19). "Harm" is defined to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2006). *Miccosukee Tribe of Indians of Fla. v. United States*, 716 F.3d 535 (11th Cir. 2013).

The ESA is intended to conserve endangered species through protecting the broader physical and biological features essential to their recovery, such as the value of a species' critical habitat. This measure is separate and apart from avoiding more direct actions jeopardizing the species. See *N. New Mexico Stockman's Association v. U.S. Fish & Wildlife Service,* 30 F.4th 1210 (10th Cir. 2022).

NPS does not dispute that it has the authority over the Seashore to remove the horses. In fact, NPS has removed the livestock cattle completely from the Seashore (Ruckdeschel Aff. ¶ 6) and is currently managing and removing livestock hogs from the Seashore. (Ruckdeschel Aff. ¶ 6)[3]. Similarly, NPS has the mandatory duty to remove the livestock horses from the Seashore. This duty originates in the Organic Act and the 2006 *NPS Policies*, Section 1.4 and is made more explicit at 36 C.F.R. 2.60. *Greater Yellowstone Coalition*, 577 F.Supp.2d 183 at 193 ("NPS cannot circumvent this limitation [duties of the Organic Act] through conclusory declarations that certain adverse impacts are acceptable, without explaining why those impacts are necessary and appropriate to fulfill the purposes of the park. *See* NPS Policies, § 1.4.3.").

[3] On or about August 17,2023, Cumberland Island National Seashore announced it will increase efforts to reduce the feral swine population this year with $760,000 from the Inflation Reduction Act.
https://www.nps.gov/cuis/learn/news/inflation-reduction-act-to-invest-760-000-in-restoration-and-resilience-in-cumberland-island-national-seashore.htm

But for NPS's failure to meet this duty, the illegal "take" of the loggerhead sea turtle and the piping plover would not be occurring and would not continue to occur. Causation in this case is neither attenuated nor contrived. At a minimum, the Plaintiffs have alleged that the Defendants have violated the regulations implementing the Organic Act, including 36 C.F.R. § 2.60, which prohibits the running-at-large of livestock within the Seashore; and that this violation in turn has resulted in a take of the subject species. "Whether or not this interpretation can be sustained, it is clearly a question on the merits which should be addressed later — not an appropriate ground for finding that plaintiffs have failed to state a claim [under section 9]." *Edmonds Institute v. Babbitt*, 42 F.Supp.2d 1, 16 (D.C. Cir. 1999).

iii. Plaintiffs ESA Section 7 claim is viable as Defendants continue to maintain decision-making authority over Defendants' challenged actions.

Defendants contest Plaintiffs' 7(a)(2) claim, contending the consultation requirement applies only to "affirmative actions" by the agency. However, the case cited by Defendants, *West Watersheds Project v. Matejko*, 468 F.3d 1099 (9th Cir. 2006), is dispositive of this issue and defeats Defendants' assertion. In *W. Watersheds Project*, the 9th Circuit stated: "It is true that 'where the challenged action comes within the agency's decision-making authority *and remains so*, it falls within section 7(a)(2)'s scope. *Defenders of Wildlife*, 420 F.3d at 969." (Emphasis added). *Id*. at 1109.

The 9th Circuit cited additional cases of "continuing decision-making authority" where "[i]n those types of cases, there is a duty to consult." *Id*. at 1109, 1110. In *Washington Toxics Coalition v Environmental Protection Agency*, 413 F.3d 1024,1033 (9th Cir. 2005), the EPA had a continuing duty "to register pesticides, alter pesticide registrations, and cancel pesticide registrations." "Ongoing agency action" also existed in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994), where the Forest Service maintained continuing authority under a comprehensive and long-term management plan that was still in effect. In *Turtle Island Restoration Network v National Marine Fisheries Service*, 340 F.3d 969, 977 (9th Cir. 2003), the Ninth Circuit found the requisite residual decision-making authority where the NMFS had retained discretion in its previously granted fishing permits specifically to protect species.

In the present case, Defendant NPS's decision-making authority to control the allowance of feral horses to run at large warrants a duty to consult under Section 7. NPS has been, and is currently, engaged in decision-making related to its continuing duty to prohibit the running-at-large and grazing of livestock in the Seashore, having removed cattle as livestock over a several-year period from the late 1970's to the early 1980's (Ruckdeschel Aff. ¶ 6) and continuing to remove and manage feral hogs. (Ruckdeschel Aff. ¶ 6; see also Fn. 2).

Just as it did in *Washington Toxics Coalition*, *supra*, NPS has a continuing duty rooted in the Organic Act to promote and regulate the use of Cumberland Island in a manner that preserves it for the use of future generations. NPS likewise has continuing authority and a duty to act pursuant to its regulatory authority, including CFR 2.60. Like *Turtle Island Restoration Network*, *supra*, Defendants have retained the "requisite decision- making authority" through the Management Plan for the Protection of Nesting Loggerhead Sea Turtles and Their Habitat in Georgia (attached as Exhibit B to Plaintiff's Complaint), in which NPS agreed with the State of Georgia and the federal Fish &Wildlife Service to protect the designated critical habitat of the loggerhead sea turtle by "control[ling] hogs, horses, and other non-native grazers so that beach vegetation is not adversely impacted."

Because NPS remains actively involved with controlling both feral hogs and feral horses on Cumberland Island, including the decision-making process related thereto, Plaintiffs' Section 7 claims are viable and Defendants' motion to dismiss should be denied.

III. CONCLUSION

Plaintiffs have sufficiently alleged Defendants have the non-discretionary discrete duty to prohibit feral horses as livestock from running-at-large within the Seashore and that Defendants have failed to meet that duty.

Because the facts alleged by Plaintiffs and contained in Plaintiffs' affidavits are sufficient under the law to support Plaintiffs' ESA claims, the Court should deny Defendants' Motion to Dismiss Plaintiffs' ESA claims for lack of standing and failure to state a claim upon which relief can be granted.

This 5th day of September, 2023.

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CERTIFICATE OF SERVICE

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This 5th day of September, 2023.

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