

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

DELAWARE AUDUBON SOCIETY, and))	
PUBLIC EMPLOYEES FOR))	
ENVIRONMENTAL RESPONSIBILITY,))	
)	
Plaintiffs,))	Case No.
)	
vs.))	
)	COMPLAINT FOR DECLATORY
KEN SALAZAR, Secretary, United))	AND INJUNCTIVE RELIEF
States Department of the Interior, and))	
ROWAN GOULD, Acting Director of US))	
Fish And Wildlife Service, and UNITED))	
STATES FISH AND WILDLIFE))	November 17, 2010
SERVICE, an administrative agency))	
of the United States Department of the))	
Interior,))	
)	
Defendants.))	
_____))	

COMPLAINT

Plaintiffs, Delaware Audubon Society, Inc. and Public Employees for Environmental Responsibility on behalf of themselves and their members, allege as follows:

I. NATURE OF ACTION

1. This action concerns the Defendants’ management and operation of the Prime Hook National Wildlife Refuge (Prime Hook) in Sussex County, Delaware. The Fish and Wildlife Service (FWS) issued a Draft Environmental Assessment (“Draft EA”) proposing short-term interim measures to scrape sand and sediment from washover areas (areas where sand has been deposited by overwash on the Refuge), to build up dunelines and fill recently created inlets, primarily on private property. Subsequently, the FWS issued a Final EA and Finding of No Significant Impact (FONSI). The FWS’s Proposed Action violates the National Environmental Policy Act (NEPA) by engaging in a major federal action which significantly impacts the quality

of the environment without the preparation of an Environmental Impact Statement (EIS) as required by NEPA. The action is controversial in that FWS proposes to use federal funds to benefit private land owners in a way which has potentially harmful effects on federally listed species and habitat, as well as the integrity of the Refuge and its natural resources. The FWS also entered into a Memorandum of Agreement (MOA) with the State of Delaware's Department of Natural Resources and Environmental Control (DNREC) allowing DNREC to maintain and manage a water control structure on Refuge land for 20 years plus an additional 10 years without any form of NEPA compliance. Additionally, the FWS's action violates the National Wildlife Refuge System Improvement Act (RIA), because the FWS failed to complete a compatibility determination (CD) for the proposed sand scraping action on private lands that adequately considers the explicit mission and goals of the National Wildlife Refuge System. For these reasons, the FWS's action is arbitrary, capricious, contrary to law, and therefore in violation of the Administrative Procedure Act (APA).

2. Plaintiffs seek a declaration that Defendants have violated NEPA, RIA and the APA. Plaintiffs also seek injunctive relief preventing the Defendants from scraping sand and sediment from the Refuge until they have satisfactorily fulfilled their statutory obligations under NEPA and the RIA by preparing a full EIS and CD.

II. JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgment), and 5 U.S.C. § 702 (APA).

4. Venue in this Court is proper under 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because all or a substantial part of the events or omissions giving rise to the claims

herein occurred within this judicial district, and Defendant Fish and Wildlife Service, having authority over the action or inactions alleged herein, has offices located in this judicial district.

III. PARTIES AND STANDING

5. Plaintiff DELAWARE AUDUBON SOCIETY, INC. (“Delaware Audubon”) is a chapter of the National Audubon Society. It currently serves over 1500 members in Delaware. Delaware Audubon participates in programs at the Refuge. Members of Delaware Audubon live near, use, recreate, and/or are keenly interested in the activities at Prime Hook Refuge, which directly affect and impact the economic, aesthetic, and/or recreational interests of Delaware Audubon Society, Inc. members.

6. Plaintiff PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (“PEER”) is a national nonprofit organization, based in Washington, D.C. and has field offices throughout the United States, including the Northeast. Members of PEER retreat to Prime Hook National Wildlife Refuge to partake of its unique birding and other recreational opportunities and have firm plans to do so again in the future.

7. Defendant KEN SALAZAR is the Secretary of the United States Department of the Interior (“Secretary”). Specifically, he is the official ultimately responsible for management of the Prime Hook Refuge and for compliance with all laws applicable to the Prime Hook Refuge, including NEPA, RIA and APA. He is sued in his official capacity.

8. Defendant ROWAN GOULD is the Acting Director of the US Fish and Wildlife Service. He is legally responsible for overseeing the activities of FWS, including the actions of FWS agents who plan to scrape sand and sediment at the Prime Hook Refuge. He is sued in his official capacity.

9. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the Federal Agency responsible for the administration of National Wildlife Refuges and charged with the task of ensuring National Wildlife Refuges are in compliance with the regulations and laws that govern them, including NEPA, RIA, and APA.

10. Members of the Plaintiff organizations live adjacent to or near the Refuge and/or enjoy the use of the Prime Hook Refuge. The above-described educational, aesthetic, and recreational interests of the Plaintiff organizations and their members have been, are being and will continue to be adversely affected and irreparably injured by the Defendants' failure to prepare an EIS and CD to determine whether the Proposed Action will have significant impacts to the environment and wildlife on Prime Hook Refuge. Therefore, Plaintiff organizations bring this action on behalf of themselves and their members.

IV. LEGAL BACKGROUND

National Environmental Policy Act

11. The National Environmental Policy Act of 1969 (NEPA) sets forth substantive environmental quality goals for the government and the nation. *See* 42 U.S.C. §4331. Under NEPA, every agency of the United States Government must include an EIS in every "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

12. NEPA's implementing regulations, promulgated by the Council on Environmental Quality (CEQ), provide that if the action is not covered by a categorical exclusion from NEPA, the agency must prepare an EA to determine whether or not an EIS is required. 40 C.F.R. § 1501.4(a) –(c). If the action is one that normally requires an EIS, the agency is to prepare an EIS without first preparing an EA. *Id.*, § 1501.4(a) and (b); §1501.3(a).

13. The CEQ regulations define the term “significantly” as used in NEPA to determine when an EIS is required, to require consideration of the unique characteristics of the geographical area impacted, such as park lands, wetlands, ecologically critical areas, or prime farmland, *id.* § 1508.27(b)(3); “the degree to which the effects on the quality of the human environment are likely to be highly controversial,” *id.* § 1508.28(b)(4); “the degree to which the possible effects on the environment are highly uncertain or involve unique or unknown risks,” *id.* § 1508.27(b)(5); and “whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” *Id.* § 1508.28(b)(10).

14. NEPA requires that agencies “study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources,” even where an EIS is not required. 42 U.S.C. § 4332(E); 40 C.F.R. § 1508.9(b).

15. NEPA’s implementing regulation at 40 C.F.R. §§ 1500.1(b) provides in part that:

NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.

16. The CEQ regulations at 40 C.F.R. § 1506.1 further provide that:

- (a) Until an agency issues a record of decision [on an EIS] ... no action concerning the proposal shall be taken which would:
- (1) Have an adverse environmental impact; or
 - (2) Limit the choice of reasonable alternatives.

National Wildlife Refuge System Improvement Act

17. Under the RIA, the Secretary in accordance with 16 U.S.C. § 668dd(d)(3)(A)(i) shall not:

initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use and that the use is not inconsistent with public safety. The Secretary may make the determinations referred to in this paragraph for a refuge concurrently with development of a conservation plan under subsection (e) of this section.

The RIA defines “compatible use” as:

(1) ... a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.

(3) The term "sound professional judgment" means a finding, determination, or decision that is consistent with principles of sound fish and wildlife management and administration, available science and resources, and adherence to the requirements of this Act and other applicable laws.

16 U.S.C. 668ee(1) and (3).

Administrative Procedure Act

18. Under the APA, courts “shall compel agency action unlawfully withheld or unreasonably delayed” 5 U.S.C. § 706(1), and hold unlawful and set aside agency action, findings, and conclusions found to be “. . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). Courts may only review a final agency action, 5 U.S.C. §551, and “agency action” includes a “failure to act.” *Id.*

V. FACTUAL BACKGROUND

19. Prime Hook National Wildlife Refuge was established in 1963 under the authority of the Migratory Bird Conservation Act for use as an inviolate sanctuary, or any other management purpose, expressly for migratory birds. 16 U.S.C. 715-715r.

20. In 1988, FWS and the State of Delaware created two freshwater impoundments on the Refuge (referred to as Unit II and Unit III) by impounding a salt marsh with a large concrete water control structure and filling it with fresh water. Unit II was created directly behind a natural dune system.

21. When the FWS drafted the EA in 1988 covering the actions of converting the salt marsh areas to freshwater impoundments, the EA did not discuss how the dune system or barriers separating the bay from the impoundments would be maintained if storm action or erosion lowered them.

22. In 1988, FWS also entered into a Memorandum of Agreement (MOA) with DNREC giving DNREC the ability to maintain and manage the water control structure for the freshwater impoundments for the estimated life of the structure, which was 20 years.¹ There is no evidence of an EA or EIS prepared in conjunction with the MOA.

23. The duneline in front of Unit II has been repeatedly over-washed and breached by hurricanes, Nor'easters, storm surges and erosion since 1991. The State and FWS have engaged in minor duneline repair several times since 1988, which required pushing sand from the overwash back eastward to heighten the dunes, as well as scraping sand with bulldozers to replace the duneline lost to storm activity.

24. Repeated Nor'esater storms in the fall and winter of 2009 created additional storm surges which overwashed the dune along Unit II.

25. On July 27, 2010, Defendant FWS published a Draft EA in which it proposed, under its Preferred Alternative (Alternative II), to scrape sand and sediment from the Refuge and use this sand to build up the duneline on approximately 700 feet of Refuge land and extend it approximately 3,200 feet on adjacent private lands.

26. In addition to the Preferred Alternative, the Draft EA included two other alternatives: Alternative I (No Action) and Alternative III (duneline reconstruction using material from off-site sources).

¹ Because FWS has not made the MOA publicly available, Plaintiffs filed a Freedom of Information Act request on November 10, 2010, for a copy of the original MOA and any subsequent amendments.

27. The Draft EA states that removal of sand under the Preferred Alternative will be done until the FWS can complete its Comprehensive Conservation Plan (CCP) process that was initiated in 2005.

28. The CCP is intended to provide for long-term, large-scale habitat management on the Refuge over the next 15 years. The CCP will address shoreline management from a holistic perspective that is more in line with the National Wildlife Refuge System mission than the ad hoc actions in the Preferred Alternative.

29. On August 16, 2010, Plaintiffs Public Employees for Environmental Responsibility (PEER) submitted comments to the Draft EA.

30. PEER's comments emphasized the need for a full Environmental Impact Statement (EIS), based on the environmental impacts conceded by the FWS in the Draft EA. Further, PEER's comments outlined several serious environmental concerns and reasonable alternatives that were not addressed in the Draft EA. Specifically, PEER argued that: 1) the EA did not adequately analyze all of the harms the Preferred Alternative will cause on Prime Hook; 2) the Preferred Alternative violates several federal laws, including the Refuge Improvement Act, the Endangered Species Act, the Clean Water Act and the Migratory Bird Treaty Act; 3) the EA is not accompanied by a Compatibility Determination for the proposed project; 4) the EA admits that the Preferred Alternative will impact the habitat of Endangered Species; 5) the Preferred Alternative lacks the required § 7 Consultation, as required under the Endangered Species Act; 6) the FWS determined a FONSI was proper before receiving public comment; 7) the EA failed to analyze the alternative of elevating the access road; and 8) the FWS analysis of the actual cost of the preferred alternative significantly underestimated the cost.

31. On August 25, 2010, DNREC, the relevant state agency which would be involved in the work outlined in the Preferred Alternative, submitted comments to the FWS in a memo analyzing the proposed action in the Draft EA. DNREC warned that the Draft EA did not adequately consider all of the negative impacts that the Preferred Alternative is likely to have on Prime Hook, including negative impacts on candidate species for the Endangered Species Act. Additionally, DNREC concluded that the Preferred Alternative would only be a short-term fix that would not likely achieve the FWS's goals.

32. On November 1, 2010, FWS issued a Final EA, accompanied by a FONSI.

33. In the Final EA and FONSI, FWS concluded that despite the concerns raised by the public and DNREC, the project would not have a significant impact on the environment and therefore a full EIS was unwarranted.

34. The Final EA referenced an amendment to the original 1988 MOA between FWS and DNREC to include an additional 10 years. The extended MOA, which otherwise expired in 2008, will allow DNREC to carry out the actions in the Preferred Alternative and rebuild the dunelines on Refuge, as contemplated in the EA. There is no evidence of an EA or EIS prepared in conjunction with this amendment to the MOA.

35. On November 1, 2010, FWS also issued a Draft Compatibility Determination to allow DNREC to cross Refuge lands and utilize sand from the Refuge to conduct dune work on private lands to carry out the Preferred Alternative, as contemplated in the EA.

36. The FWS has not finalized a Compatibility Determination in order to export sand from the Refuge for use on private lands.

FIRST CAUSE OF ACTION

THE DEFENDANTS HAVE VIOLATED NEPA

37. Plaintiffs hereby incorporate by reference paragraphs 1 through 36 as if set forth herein.

38. The issuance of a Final EA and FONSI under NEPA is a final agency action under 5 U.S.C. §701.

39. Because the sand scraping project will be a major Federal action that has potential environmental consequences, is highly controversial, and has unknown risks, FWS has violated Section 4332(2)(C) of NEPA by failing to prepare a full EIS.

40. Execution of a MOA, including a 10-year extension, with a state agency for purposes of maintaining a water structure on Refuge lands is also a final agency action under 5 U.S.C. §701.

41. Because the MOA is a major Federal action authorizing work that has potential environmental consequences, is highly controversial, and has unknown risks, FWS has violated Section 4332(2)(C) of NEPA by failing to prepare an EA or EIS.

42. Defendants' final agency actions described herein violate Section 706 of the APA, 5 U.S.C. § 706, in that Defendants acted arbitrarily, capriciously, abused their discretion, and failed to act in accordance with the law by failing to adhere to NEPA and its implementing regulations which require the preparation of an EIS where the action is likely to have significant impact on the environment.

SECOND CAUSE OF ACTION

THE DEFENDANTS HAVE VIOLATED RIA BY FAILING TO PERFORM A COMPATIBILITY DETERMINATION

43. Plaintiffs hereby incorporate by reference paragraphs 1 through 36 as if set forth

herein.

44. FWS's Final EA permits DNREC to remove sand from the Refuge for transportation and use on private property. The Secretary has not issued a final determination that this use is compatible with the purpose of the refuge, in violation of 16 U.S.C. § 668dd(d)(3)(A)(i).

45. Defendants' actions described herein violate Section 706 of the APA, 5 U.S.C. § 706, in that Defendants acted arbitrarily, capriciously, abused their discretion, and failed to act in accordance with the law by failing to adhere to RIA statutory requirements and regulations requiring the preparation a Compatibility Determination for a new use of the Refuge.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Declare that Defendants have violated NEPA by issuing a FONSI and failing to prepare an EIS for the sand scraping project, a major Federal action that will have significant environmental consequences;
- B. Declare that Defendants have violated NEPA by failing to conduct any environmental review or prepare an EA or EIS for the MOA and subsequent 10-year extension with DNREC;
- B. Declare the Defendants have violated RIA by failing to complete a Compatibility Determination prior to engaging in a new use on the refuge;
- C. Issue preliminary and permanent injunctive relief barring Defendants from proceeding with the project outlined in the EA scraping sand from the Refuge for the reconstruction of dunes on private property until compliance with NEPA and RIA is achieved;
- D. Award Plaintiffs their costs and reasonable attorneys fees under the Equal Access to

Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412, or other applicable statutes; and,

E. Grant Plaintiffs such further relief as this Court deems to be just, proper, and equitable.

Dated this 17th day of November 2010.

Respectfully submitted,

DELAWARE AUDUBON SOCIETY and PUBLIC EMPLOYEES
FOR ENVIRONMENTAL RESPONSIBILITY

By: /s/ Mary Jacobson

Mary Jacobson, Esq. (DE Bar #3508)
Mid-Atlantic Environmental Law Center
4601 Concord Pike
Wilmington, DE 19803
Tel: (302) 477-2086
majacobson@widener.edu

Attorney for Plaintiffs

Kenneth T. Kristl, Esq. (DE Bar #5200)
Widener Environmental and Natural Resources Law Clinic
4601 Concord Pike
Wilmington, DE 19803
Tel: (302) 477-2053
Fax: (302) 477-2032
ktkristl@widener.edu

Attorney for Plaintiffs

Christine Erickson, Esq. (CA Bar #263862)
Paula Dinerstein, Esq. (DC Bar #333971)
Public Employees for Environmental Responsibility
2000 P Street, NW Suite 240
Washington, D.C. 20036
Tel: (202) 265-7337

Attorneys for Public Employees for Environmental Responsibility