

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

NO. 2:13-CV-60-BO

RED WOLF COALITION, et al.)	
)	
Plaintiffs,)	
)	
v.)	RESPONSE IN OPPOSITION
)	TO DEFENDANTS' MOTION
NORTH CAROLINA WILDLIFE)	TO DISMISS
RESOURCES COMMISSION, et al.)	
)	
Defendants.)	
_____)	

On October 17, 2013, Plaintiffs brought suit against the North Carolina Wildlife Resources Commission (“the Commission”), its Commissioners, named individually in their official capacities, and Executive Director of the Commission, Gordon S. Myers, for their violations of the Endangered Species Act (“ESA”) in causing the unlawful take of endangered red wolves through their authorization of coyote hunting in the Red Wolf Recovery Area. *See* Dkt. #1 (Compl.). On December 3, 2013, Defendants filed a Motion to Dismiss the Commission and the Commissioners as defendants in the case before the Court. They did not, however, seek to dismiss Mr. Myers, who is sued in his official capacity as Executive Director of the Commission. *See* Dkt #34 (Defs.’ Mot. to Dismiss). This is because the doctrine of *Ex Parte Young* clearly allows suits against government officials in their official capacities when plaintiffs are seeking prospective relief to remedy state agency violations of the ESA. *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (applying *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), to ESA challenge of state authorized fishing practices resulting in illegal take

of endangered whales). The same principle also makes the Commissioners appropriate for suit and the Court should accordingly deny Defendants' Motion to Dismiss.¹

STATEMENT OF FACTS

Hunting is not allowed in North Carolina without a hunting license issued by the Wildlife Resources Commission. *See* N.C. Gen. Stat. § 113-270.1B; N.C. Gen. Stat. § 113-270.2.

Furthermore, hunting is not allowed if it is not in compliance with all applicable laws and regulations. 15A N.C. Admin. Code 10B .0201. The Commission's hunting regulations include 15A N.C. Admin. Code 10B .0219, which provides that coyote hunting is authorized year-round within the State of North Carolina, including within the Red Wolf Recovery Area, with no limits or reporting requirements, and, as of August 1, 2013, at night with the use of artificial lights.

The Commission has the authority to prescribe the manner of take and to set hunting seasons and bag limits for wild animals classified as game animals, as well as those not classified as game, such as coyotes. N.C. Gen. Stat. §§ 113-291.1; 113-291.2.

Defendants are correct that, pursuant to North Carolina law, the "function, purpose, and duty" of the Commission is to "manage, restore, develop, cultivate, conserve, protect, and regulate the wildlife resources of the State of North Carolina, *and to administer the laws* relating to game, game and freshwater fishes, and other wildlife resources." *See* Defs.' Mem. at 3 (*citing* N.C. Gen. Stat. Ann. § 143-239 (emphasis added)). Defendants are further correct that the

¹ Plaintiffs do not contest Defendant's Motion to Dismiss the Wildlife Resources Commission itself as protected from suit by Eleventh Amendment. However, the Court need not decide this issue because properly named defendants exist that can provide Plaintiffs with the full relief they seek. *See Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645, 122 S. Ct. 1753, 1760, 152 L. Ed. 2d 871 (2002) (declining to reach question of whether commission waived its immunity because suit could proceed against the individual commissioners in their individual capacities).

Executive Director of the Commission is “charged with the supervision of all activities under the jurisdiction of the Commission and shall serve as the chief administrative officer of the said Commission.” *Id.* (citing N.C. Gen. Stat. Ann. § 143-246). Other sections of North Carolina statute further command the Commission’s specific duties and responsibilities. *See* N.C. Gen. Stat. Ann. §§ 113-270.1B (requiring that “no person may hunt, fish, or participate in any other activity *regulated by the Wildlife Resources Commission* for which a license is provided by law without having first procured a current and valid license authorizing the activity” and discussing fees for the “hunting, fishing, trapping, and activity *licenses issued and administered* by the Wildlife Resources Commission”) (emphasis added); 113-270.1 (discussing the Commission’s authority to issue licenses and permits through various agents and mechanisms); 113-270.2 (listing different types of hunting licenses “issued by the Wildlife Resources Commission”); 113-301.1 (directing the Commission to prepare and distribute information materials relating to hunting, fishing, trapping, and boating laws and rules *administered* by the Commission); 143-254.2 (specifying that “[i]t shall be the duty and responsibility of the [Commission] to enforce all local acts” regarding hunting). *Compare to* N.C. Gen. Stat. Ann. § 113-283 (*directing the Executive Director* to furnish registered property owners with permit forms for hunting and fishing on registered property and requiring that the registrant’s signature be on file with the *Commission*).

In addition to the licensing, enforcement, and regulatory duties prescribed by statute, the Commission’s own regulations further clarify what duties flow to the Commission and its Executive Director. For example, the new coyote night hunting rule grants the Commission the authority to issue special permits for the night hunting of coyotes on public lands. *See* 15A N.C. Admin. Code 10B .0219(a). *Compare to* 15A N.C. Admin. Code 10B.0106 (specifying that

Commission employees may generally issue depredation permits but only the Executive Director may issue such permits for Special Concern species).

ARGUMENT

Neither Eleventh Amendment sovereign immunity nor legislative immunity shields the Commissioners and the Executive Director from Plaintiffs' suit. The Court has jurisdiction over the claims brought against both the Commissioners and the Executive Director and therefore should deny Defendants' Motion to Dismiss.

I. SOVEREIGN IMMUNITY DOES NOT BAR PLAINTIFFS' CLAIMS AGAINST THE COMMISSIONERS OR THE EXECUTIVE DIRECTOR

As the Supreme Court held in *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 122 S. Ct. 1753, 1760, 152 L. Ed. 2d 871 (2002), "In determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon*, 535 U.S. at 645, 122 S. Ct. at 1760 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (O'Connor, J., concurring in part)). In that case, like the one before the Court, the Supreme Court allowed a suit to proceed against individual members of a state commission sued in their individual capacities. There, as here, Plaintiffs' Complaint seeks prospective injunctive and declaratory relief, and "no past liability of the State, or of any of its commissioners, is at issue." *Verizon*, 535 U.S. at 646. See also *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10, (1989); *Kentucky v. Graham*, 473 U.S. 159, 169 n.18 (1985) ("In an injunctive or declaratory

action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants"); *Ex Parte Young*, 209 U.S. 123.

Defendants have made no substantive showing that the Commissioners are not appropriately before the Court. While they have generally cited the statutory provisions for creation and organization of the Commission to argue that the individual members "only meet periodically and are not 'clothed' with the duty to enforce the rules they promulgate," Defs.' Mem. at 6, this claim is belied by the additional statutory provisions cited above. *See supra* at 2-4. Rather, specific statutory duties related to the authorization and permitting of coyote hunting flow directly and specifically to the Commission, while others flow to the Executive Director. *Compare* N.C. Gen. Stat. Ann. §§ 113-270.1B, 113-270.2, and 113-283. This factor distinguishes the current case from the cases cited by Defendants in their Memorandum in Support of their Motion to Dismiss. *See* Defs.' Mem. at 5-6. Both *McBurney v. Cucinelli*, 616 F.3d 393, 399 (4th Cir. 2010) and *Children's Healthcare is a Legal Duty v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996), *see* Defs.' Mem. at 5, dismissed claims against state attorneys general on the grounds that their general duty to enforce the law did not translate into a specific duty under the statute at issue. Similarly, in *West Virginia Oil & Natural Gas Ass'n v. Wooten*, 631 F. Supp. 2d. 788, 795 (S.D. W.Va. 2008), the court examined specific statutory language that vested the executive director of a state board with enforcement authority, rather than the board itself. The facts before this Court – in which the Wildlife Resources Commission is clearly vested with the statutory authority to regulate, authorize, and permit hunting in North Carolina – demonstrate a different relationship between the Commissioners and the Commission's authorization of coyote hunting than in any of the cases on which Defendants rely.

Defendants' reliance on cases involving the Surface Mining Control and Reclamation Act ("SMCRA") is similarly unavailing. Defs. Mem. at 4. As discussed at length in *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 274 (4th Cir. 2001), SMCRA "provides for *either* State regulation of surface coal mining within its borders *or* federal regulation, but not both." *Id.* at 289 (emphasis in original). Thus, SMCRA cases like *Bragg* "make the [sovereign immunity] analysis complex because SMCRA was expressly designed to hand over to the States the task of enforcing minimum national standards for surface coal mining, providing only limited federal mechanisms to oversee State enforcement." *Id.* at 293. That those cases have not allowed *Ex Parte Young* suits because they are effectively seeking federal enforcement of *state* laws makes them irrelevant to the federal ESA claims currently before the Court.

Instead, this case is analogous to *Strahan v. Coxe*, 127 F.3d 155, and *Animal Protection Institute v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008), both of which are ESA cases authorizing injunctive relief against state officers for state agency violations of the ESA's take prohibition. The First Circuit in *Strahan* held, "[t]he very fact that Congress has limited its authorization to suits allowed by the Eleventh Amendment reinforces the conclusion that Congress clearly envisioned that a citizen could seek an injunction against a state's violations of the ESA." 127 F.3d at 166-67. *See also Palilla v. Hawaii Dep't of Land and Nat. Resources*, 471 F. Supp. 985, 997 (D. Ha. 1979) (finding that the statutory reference to the Eleventh Amendment does not mitigate the force of the ESA and "is most sensibly construed... to bar equitable relief tantamount to money damages.") Noting that the ESA's statutory prohibition on takings extends to "any officer, employee, agent department, or instrumentality of the Federal Government, of any State, or of any foreign government," 16 U.S.C. § 1532, the *Strahan* court found that "[b]y including the states in the group of actors subject to the Act's prohibitions,

Congress implicitly intended to preempt any action of a state inconsistent with and in violation of the ESA.” *Id.* at 167-68. *See also Animal Prot. Inst.*, 541 F. Supp. 2d at 1081 (ordering state Department of Natural Resources to “promptly take all action necessary to insure no further taking of threatened Canada Lynx by trapping or snaring activities within the core Canada Lynx ranges.”).

Because Plaintiffs have properly named state officials in their suit for prospective relief, their claims are not barred by Eleventh Amendment sovereign immunity concerns and this Court should deny Defendants’ Motion to Dismiss.

II. LEGISLATIVE IMMUNITY DOES NOT BAR PLAINTIFFS’ CLAIMS AGAINST THE COMMISSIONERS OR THE EXECUTIVE DIRECTOR

Defendants are also incorrect that “[t]he individual members of the Commission have been named in this case due to their legislatively delegated rulemaking authority for promulgating rules regarding the management of the wildlife resources of the State.” Defs.’ Mem. at 7. Rather, Plaintiffs have alleged:

The preponderance of the evidence shows that the Commission is causing the unlawful take of red wolves to be committed by authorizing coyote hunting within the Red Wolf Recovery Area *through its rules, licensing, and other permits*, in violation of Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(G). The Commission authorized coyote hunting within the Red Wolf Recovery Area despite being fully aware that this authorization would result in the killing of red wolves.

Complaint ¶ 90 (emphasis added). Thus, although the Commission may have legislative immunity for its actions that are legislative or quasi-legislative in nature, no such actions are at issue before the Court. Rather, the Commission’s executive and administrative duties related to the individual licensing and permitting of hunting that is causing the take of endangered red wolves are being challenged.

“Legislative immunity only attaches to legislative actions... Executive and administrative actions are not protected.” *Alexander v. Holdren*, 66 F.3d 62, 65 (4th Cir. 1995) (internal citations omitted); *see also Scott v. Greenville Cnty.*, 716 F.2d 1409, 1423 (4th Cir. 1983) (“Because the County Council’s members assumed non-legislative roles in dealing with Scott’s permit application, legislative immunity does not extend to them.”). “An act is legislative if the facts involve ‘generalizations concerning a policy or state of affairs’ and the ‘establishment of a general policy’ affecting the larger population.” *Id.* at 66. This suit does not challenge any such actions. Indeed, although the Commission’s action in amending the coyote hunting rule to allow hunting at night with spotlights is a serious concern for Plaintiffs, this suit more generally challenges the permitting of coyote hunting that is causing the take of red wolves. *See* Compl. ¶¶ 71-79 (discussing red wolf deaths prior to implementation of the night hunting rule). That permitting is administrative and executive action, rather than legislative, and extends beyond the night hunting newly allowed by the Commission’s regulation. *See generally*, Comp. ¶ 84 (quoting April 16, 2012 U.S. Fish and Wildlife Service letter to the Commission that “recent gunshot mortalities have occurred during daylight hours. Providing additional hunting opportunities at night will likely exacerbate the problem and increase the number of animals lost”).

Because Plaintiffs have not challenged any legislative actions of the Commissioners, their claims are not barred by legislative immunity and this Court should deny Defendants’ Motion to Dismiss.

CONCLUSION

For the foregoing reasons, Defendants’ Motion to Dismiss should be denied. The Commissioners are proper defendants before this court pursuant to the *Ex Parte Young* doctrine

and their actions challenged in this case are not protected by legislative immunity. Regardless of the Court's ruling on Defendants' Motion, moreover, Defendants have not challenged the Court's jurisdiction over Executive Director Myers, who is the chief administrative officer for the Commission. Director Myers alone could provide Plaintiffs with the relief they seek from the Court, as could the Commissioners.

Respectfully submitted, this the 22nd day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2013, I electronically filed the foregoing **RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to counsel for Defendants.

This the 22nd day of December, 2013.

/s/ Sierra B. Weaver
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