UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CONNECTICUT FUND FOR THE ENVIRONMENT, INC., d/b/a SAVE THE SOUND, SOUNDKEEPER, INC., PECONIC BAYKEEPER, GROUP FOR THE EAST END, RUTH ANN BRAMSON, JOHN POTTER, JOHN TURNER, Plaintiffs, v. UNITED STATES GENERAL SERVICES ADMINISTRATION, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, DENISE TURNER ROTH, in her official capacity as ADMINISTRATOR OF THE U.S. GENERAL SERVICES ADMINISTRATION, and JEH JOHNSON, in his official capacity as SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY, Defendants.	Case No. 16 Civ. 3791 (Hurley, J.) (Shields, M.J.) **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiffs Save the Sound, a program of Connecticut Fund for the Environment ("Save the Sound"), Soundkeeper, Inc., Peconic Baykeeper, Group for the East End, Ruth Ann Bramson, John Potter, and John Turner (collectively "Plaintiffs") submit this memorandum in opposition to the Federal Rule of Civil Procedure 12(b)(1) motion to dismiss Plaintiffs' July 7, 2007 Complaint (the "Complaint") filed by Defendants U.S. General Services Administration ("GSA"), U.S. Department of Homeland Security ("DHS"), Tim Horne, Acting GSA Administrator, and John Kelly, DHS Secretary (collectively, "Defendants").

PRELIMINARY STATEMENT

Plaintiffs challenge Defendants' failure to comply with the requirements of the National Environmental Policy Act (NEPA) in preparing an Environmental Impact Statement (EIS) related to Defendants' proposed sale of Plum Island. Plaintiffs' Complaint alleges that Defendants, through the EIS process, misconstrued their statutory mandate, ignored reasonable environmentally preferable alternatives, failed to consider a variety of important government interests, and otherwise failed to comply with the rigorous requirements of NEPA. Defendants do not contest these allegations. Instead, they argue that they might, at some future time, conduct a supplemental EIS process which might correct these mistakes. But NEPA requires more. Defendants' violations of NEPA occurred the moment they issued their final EIS (FEIS) and Record of Decision (ROD) commemorating their decision.

Defendants' motion to dismiss rests on the flawed premise that Plaintiffs challenge Defendants' decision to sell Plum Island. We do not. Instead, Plaintiffs challenge Defendants' fatally flawed EIS as a violation of NEPA. Because NEPA guarantees procedural rights and not substantive outcomes, Plaintiffs need not wait until bulldozers descend on Plum Island to bring

this challenge. Plaintiffs' claims were ripe the moment that Defendants issued their flawed FEIS and ROD.

Plaintiffs' Complaint properly states eight causes of action based on Defendants' failure to comply with NEPA's rigorous requirements. Because NEPA does not contain a private right of action, Plaintiffs' claims are properly pleaded as violations of the Administrative Procedure Act. First, Plaintiffs allege that Defendants misconstrued its statutory mandate to sell Plum Island by interpreting it to require a sale of the entirety of Plum Island and thus failed to adequately analyze reasonable alternatives. Second, Plaintiffs allege that Defendants ignored its statutory mandate by failing to consider a variety of important government interests even when those interests were expressly highlighted to them by local, state, and federal government officials. Third, Plaintiffs allege that Defendants misinterpreted its statutory mandate authorizing a "public sale" to require a sale of the entirety of Plum Island where the highest monetary bid will be the sole consideration. Fourth, Plaintiffs allege that Defendants failed to specify in their EIS a single environmentally preferable alternative to their proposed sale as required by NEPA. Fifth, Plaintiffs allege that Defendants failed to engage in formal consultation as required by NEPA and the Endangered Species Act. Sixth, Plaintiffs failed to rely on the special expertise of the Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Services (USFWS) as required by NEPA. Seventh, Plaintiffs violated NEPA by failing to conduct a consistency analysis to determine the consistency of their proposed sale with state coastal management programs. And, eighth, Plaintiffs allege that Defendants violated NEPA by failing to properly assess the environmental impact of its proposed action.

Each and every one of these violations occurred the moment Defendants issued their flawed FEIS and ROD. Defendants devote pages of their motion to dismiss to describing the

ongoing activities necessary to prepare Plum Island for sale. But none of these future contingencies can cure Defendants' NEPA violations which were actionable on the day the FEIS and ROD were finalized. Based on the allegations in Plaintiffs' well-pleaded Complaint, Plaintiffs' NEPA claims are constitutionally and statutorily ripe for review. Further, accepting Plaintiffs' well-pleaded allegations as true, as this Court must, Plaintiffs sufficiently allege that they have suffered an injury-in-fact as a result of Defendants' flawed EIS process and that that this injury can be redressed by this Court. Finally, this Court should reject Defendants' invitation to decline jurisdiction because they have not firmly committed to remedying any of the flaws alleged by Plaintiffs. Indeed, Defendants do not even concede that these flaws exist.

RELEVANT FACTUAL BACKGROUND

Plum Island is a small island off the coast of Long Island, New York, which has been owned and operated by the federal government since 1826. (Compl. ¶ 1.) Plum Island is the former home of the U.S. Army's Fort Terry, which was established as a coastal artillery post in 1897 and utilized through World War II. (*Id.* ¶ 38.) In 1954, Plum Island was transferred to the U.S. Department of Agriculture ("USDA") to establish a research facility for foot-and-mouth disease. (*Id.* ¶ 39.) In 2003, it was transferred to the DHS, while the USDA continues to use the Plum Island Animal Disease Center ("PIADC"). (*Id.*) The PIADC is comprised of buildings, industrial facilities and equipment, roadways, utilities, and a water treatment plant. (*Id.*) The DHS also owns and operates transportation assets and a 9.5-acre facility to support PIADC at Orient Point, New York, which includes buildings, utilities, and ferry docking facilities. (*Id.*)

The total developed and maintained area of Plum Island comprises approximately 170 acres and human activity on Plum Island has largely been restricted to these 170 acres. (*Id.* ¶ 40.) This includes 35 acres associated with the PIADC and its transportation and support

facilities and approximately 30 acres associated with the former Fort Terry. (*Id.*) Due to the nature of the PIADC's mission, access to Plum Island has been limited and highly regulated. (*Id.* ¶ 41.) This relative isolation and lack of human disturbance has allowed the resident flora and fauna to develop unmolested. (*Id.*) As such, the vast undeveloped portion of the island has been left largely in its natural state. (*Id.*) Plum Island's undisturbed habitat includes 196 acres of upland forest, 96 acres of freshwater wetlands, and 101 acres of a beach/dune system. (*Id.* ¶ 42.)

Plum Island's unique and vital habitat has been recognized by a variety of state and federal agencies. Plum Island was designated as a Long Island Sound Stewardship site by the Long Island Sound Study, under the authority of the federal Clean Water Act. (*Id.* ¶ 43.) Plum Island has also been recognized as an important coastal resource pursuant to the Coastal Barrier Resources Act, and is included within the Coastal Barrier Resources System. (*Id.* ¶ 45.) The USFWS designated Plum Island as a Northeast Coastal Areas Study Significant Coastal Habitat site. (*Id.* ¶ 47.)

Further, Plum Island is home to a variety of plants and wildlife, many of which have been classified as endangered or threatened. (*Id.* ¶ 49.) Plum Island contains one of the highest concentrations of rare plants—fourteen to twenty varieties—in New York, including several federally endangered and threatened species, such as sandplain gerardia, seabeach knotweed, seabeach amaranth, and small whorled pogonia. (*Id.* ¶ 50.) Over 217 species of birds have been identified on Plum Island. (*Id.* ¶ 51.) This includes Roseate Terns, a federally endangered species that use the island for courting, and Piping Plovers, a federally threatened species that use the shoreline for breeding and foraging. (*Id.*) Fifty-seven of New York State's species of greatest conservation need call Plum Island home, including osprey, American oystercatcher, Northern harrier, and common eider. (*Id.* ¶ 52.) Seven active osprey nests and an active colony

of bank swallow, a declining bird species in New York, were identified on Plum Island in 2009. (*Id.*) Several hundred common terns, a New York State threatened species, also make use of the island. (*Id.*) There are a number of federally listed or endangered marine species present in the waters surrounding Plum Island. (*Id.* ¶ 53.) These include Atlantic hawksbill sea turtle, Kemp's Ridley sea turtle, green sea turtle, leatherback sea turtle, loggerhead sea turtle, and the Atlantic sturgeon. (*Id.*) The New York Department of Environmental Conservation (NYDEC) has designated the waters of Long Island Sound as critical habitat for the federally endangered Kemp's Ridley sea turtle. (*Id.* ¶ 54.) Several other species, many of which are endangered, are also known to frequent the waters surrounding Plum Island, including but not limited to humpback whale, beluga whale, the federally endangered North Atlantic right whale and bottlenose dolphins. (*Id.* ¶ 55.) Plum Island is one of the most important seal haul-out areas in southern New England. (*Id.* ¶ 56.)

The Appropriations Act

On September 30, 2008, Congress passed Public Law 110-329, the "Consolidated Security, Disaster Assistance and Continuing Appropriations Act, 2009" (the "Appropriations Act"), which among other provisions, directed the sale of the "real and related personal property and transportation assets which support Plum Island operations, subject to such terms and conditions as necessary to protect government interests and meet program requirements," if it should be determined that the PIADC should be moved to a new location. Pub. L. No. 110-329, § 540, 122 Stat. 3574, 3688 (2008). In January 2009, the DHS made this determination and began carrying out its mandate under the Appropriations Act. (Compl. ¶ 60.) The terms of the Appropriations Act are clear. Any public sale of Plum Island is limited to the property "which support[s] Plum Island operations," and any sale is "subject to such terms and conditions as

necessary to protect government interests and meet program requirements." Pub. L. No. 110-329, § 540.

NEPA's Requirements

Pursuant to NEPA, all federal agencies are required to prepare a detailed statement in advance of major Federal actions significantly affecting the quality of the human environment, known as an Environmental Impact Statement (EIS). *See* 40 C.F.R. § 1502.16. NEPA requires agencies designated with responsibility for preparing the EIS ("lead agencies"), to comply with rigorous requirements. Defendants GSA and DHS acted as joint lead agencies in preparing the EIS. NEPA requires that lead agencies:

> (a) Rigorously explore and objectively evaluate all reasonable alternatives and, for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
>
> (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
>
> (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
>
> (d) Include the alternative of no action.
>
> (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
>
> (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1502.14. "This section is the heart of the environmental impact statement." *Id.* An EIS must also include an analysis on "the environmental impacts of the alternatives including the proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." *Id.* § 1502.16.

NEPA's implementing regulations also allow lead agencies to rely on the relative expertise of other "cooperating agencies" in preparation of the EIS. *Id*. § 1501.6. The EPA and USFWS, acted as cooperating agencies in the preparation of the EIS for the sale of Plum Island. NEPA mandates that the lead agencies shall "[u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency." *Id*. § 1501.6(a)(2).

Public Scoping

Consistent with their obligations under NEPA, in May 2010, Defendants held public scoping meetings to determine the scope of the proposed EIS and any significant issues that should be considered. (Compl. ¶¶ 71-72.) Throughout the scoping period, a number of federal, state, and local government agencies and departments, including the EPA and USFWS as cooperating agencies, Governor Rell of Connecticut, the NYDEC, the Connecticut Department of Energy and Environmental Protection (CTDEEP), the Long Island Sound Study Citizens Advisory Council, and Plaintiff Save the Sound offered specific comments on important government interests to be taken into account when considering the final disposition of Plum Island. (*Id.* ¶¶ 73-74.) Several commenters, including Connecticut Governor Rell and Plaintiff Save the Sound, expressly warned Defendants that a public sale of the entire island would likely exclude any entities who would want to purchase the island for conservation purposes. (*Id.* ¶¶ 76, 81.) These commenters suggested alternatives such as "offering for private sale only the portion(s) of the island presently developed and occupied (approximately 10%), while preserving the remaining, undeveloped acreage as natural habitat." (*Id.* ¶ 76.) Defendants did not consider any of these alternatives and did nothing to address the possibility that a public sale of the entire

island would likely exclude any entities who would want to purchase the island for conservation purposes. (*Id.* ¶¶ 76, 81.)

Consultation Under the Endangered Species Act

The Endangered Species Act (ESA) requires that a federal agency must initiate formal consultation with the NMFS (which has jurisdiction over marine species) or USFWS (which has jurisdiction over terrestrial and freshwater species) whenever it undertakes an "action" that "may affect" a listed species or critical habitat. 50 C.F.R. § 402. Both the NMFS and USFWS made Defendants aware that their actions would affect several endangered and threatened species on Plum Island, including Piping Plovers, Kemp's Ridley sea turtles, green and leatherback sea turtles, loggerhead turtles, Northern right whales, and humpback whales. (Compl. ¶¶ 85-86.) The NMFS expressly informed Defendants that a formal consultation pursuant to Section 7 of the ESA would be necessary "if GSA determines that the proposed sale may affect listed species." (*Id.* ¶ 86.)

Draft Environmental Impact Statement (DEIS)

Following the public scoping sessions, on July 20, 2012, Defendants, as Joint Lead Agencies, issued the DEIS. The DEIS considered only two options: sale of the entirety of Plum Island or no sale at all. (March 2, 2017 Declaration of Cameron Tepfer ("Tepfer Decl.") Ex. A (July 13, 2012 DEIS) at ES-4, ES-6.) While the DEIS opined on potential "reuse options," the DEIS made clear that these were not options to be pursued by Defendants, but options that a potential purchaser of the land might consider. (*Id.* at ES-6.) In other words, the only conservation option considered by Defendants was the possibility that an individual or entity might purchase the entire Plum Island "for conservation or preservation purposes." (*Id.*) Defendants did not consider—even in their initial DEIS—the possibility of a parceled sale of

Plum Island or a sale with conservation easements. Indeed, the DEIS made clear that "[a]ny additional restrictions that may be placed on the Property would occur only after the Property has left federal ownership." (*Id.*)

While the Appropriations Act limited a public sale to that "real and related personal property and transportation assets which support Plum Island operations," Pub. L. No. 110-329, § 540, the DEIS proposed a sale of all 840 acres of Plum Island and the entire 9.5 acre parcel in Orient Point, New York. (*See* Tepfer Decl. Ex. A (July 13, 2012 DEIS) at ES-1.) In other words, Defendants interpreted "real and related personal property and transportation assets which support Plum Island operations" to mean the entirety of Plum Island, even those areas that had never been used or developed by the federal government.[1] Following the issuance of the DEIS, Defendants received more than one-hundred additional comments, including comments from federal, state, and local governmental agencies, as well as private citizens and non-profit organizations, urging Defendants to collect more natural resources data and to consider alternatives that would promote conservation of Plum Island's valuable natural resources. (Compl. ¶ 94.)

The Final Environmental Impact Statement (FEIS)

On June 25, 2013, Defendants issued an FEIS. Rather than use the FEIS to reconsider its interpretation of the Appropriations Act, Defendants reiterated their determination that the Appropriations Act required it to sell all 840 acres of Plum Island and the entire 9.5 acre parcel in Orient Point, New York. (*See* Feb. 2, 2017 Declaration in Support of MTD ("MTD Decl.") Ex. 5 (June 25, 2013 FEIS) at ES-1.) Regardless of the many comments Defendants received, the FEIS did not consider transferring parts of the island that did not support the PIADC to the

[1] In the many years following the DEIS, Defendants have never departed from this interpretation of the Appropriations Act.

federal government and did not consider disposing of parts of the island through a public conservation sale. The FEIS, like the DEIS, considered only two options: sale of the entirety of Plum Island, or sale of none of Plum Island. While the FEIS, like the DEIS, referenced a single conservation/preservation option, it did not consider it as an option to be pursued by Defendants, instead it was referenced as a potential course of action that might ultimately be taken by a private party after sale of the entire site. (*See* MTD Decl. Ex. 5 (June 25, 2013 FEIS) at ES-4, ES-6.) The FEIS, like the DEIS, did not consider any conservation easements or other restrictions on development that would protect the natural resources of Plum Island and the government interest in protecting those natural resources. (*See id*.)

In response to the FEIS, Defendants received additional comments from state and federal agencies, as well as interested stakeholders such as Plaintiffs and other non-profits which underscored the continued deficiencies in the EIS process. For example, in an August 5, 2013 letter, the EPA commented that the FEIS failed to consider "an ordinance that would create a conservation area that would limit development and preserve much of the island," and failed to "offer mitigation options as EPA recommended in our comment letter on the DEIS." (Tepfer Decl. Ex. B (Judith A. Enck, *Comments to the FEIS*, U.S. Envtl. Prot. Agency, at 1-3 (August 5, 2013).)) The Preserve Plum Island Coalition highlighted the comments to the DEIS that the FEIS failed to address, including: the failure to consider a sale of only portions of the entire island, the failure to conduct a four-season ecological inventory, failure to provide current information on the number of bird species on the island, and the failure to evaluate potential adverse impacts to wetlands areas. (Compl. ¶ 117.)

Many groups and government agencies highlighted the fact that the manner of the proposed sale would limit opportunities for conservation groups to participate. For example, in

an August 5, 2013 Letter, the Trust for Public Land noted: "As a non-profit conservation organization that identifies opportunities for land conservation, we are concerned that the process of selling Plum Island by public auction, particularly if GSA moves forward with an outright, full sale of the entire island, may exclude interested conservation groups and organizations that may wish to protect and preserve the island or parts for the general public." (*Id*. Ex. C (Mark Matsil, *Plum Island, New York*, Trust for Public Land, at 1 (August 5, 2013).)) Similarly, CTDEEP noted:

> The Department continues to believe that sale of the island as a single parcel would limit the pool of potential purchasers and price the island out of the reach of entities who would want to acquire portions of it for conservation purposes. In contrast, acquisition of sensitive portions of the island for conservation would guarantee protection of its natural resources in perpetuity and not rely on subsequent regulatory mechanisms.

(*Id*. Ex. D (David J. Fox, *CTDEEP Comment on the FEIS*, CTDEEP, at 1 (August 1, 2013).)) CTDEEP further noted that:

> It is appropriate that a federal action of separate sales of development parcels and significant natural areas be employed to ensure continued protection of these critical biological and natural resources. Multiple sales would also comply with the mandate for sale specified in the Consolidated Security, Disaster Assistance and Continuing Appropriations Act.

(*Id.* at 1-2.) These suggestions were all ignored.

The Record of Decision (ROD)

Two months after issuing the FEIS, Defendants, as Joint Lead Agencies, issued their ROD on August 29, 2013. The ROD memorialized Defendants' decision to proceed with a public sale of the entirety of Plum Island, as well as the Orient Point assets, notwithstanding the extensive comments they received regarding the deficiencies of the FEIS, and their failure to respond to comments to the DEIS. (*See* MTD Decl. Ex. 6 (August 29, 2013 ROD) at 1.)

By its plain terms, the ROD is not interlocutory: "The General Services Administration (GSA) and the Department of Homeland Security (DHS) have proposed to transfer Plum Island, New York and its support facilities out of federal ownership by way of public sale. This Record of Decision (ROD) documents the decision to proceed with that process." (*Id*.) The ROD did not commit Defendants to any future supplemental EIS. Instead, it noted that Defendants could "update the information in the EIS with a supplemental EIS and ROD, *as necessary*." (*Id*. at 2 (emphasis added).)

While the Appropriations Act limited a public sale to that "real and related personal property and transportation assets which support Plum Island operations," Pub. L. No. 110-329, § 540, the ROD proposed a sale of all 840 acres of Plum Island and the entire 9.5 acre parcel in Orient Point, New York. (*See* MTD Decl. Ex. 6 (August 29, 2013 ROD) at 1.) The ROD did not consider transferring parts of the island that did not support the PIADC to the federal government and did not consider disposing of parts of the island through a public conservation sale. While the Appropriations Act expressly required that any public sale be "subject to such terms and conditions as necessary to protect government interests and meet program requirements," Pub. L. No. 110-329, § 540, the ROD failed to meaningfully consider numerous government interests and program requirements, including, but not limited to, conservation, endangered species protection, coastal zone management, environmental cleanup, and historic preservation. (*See* MTD Decl. Ex. 6 (August 29, 2013 ROD).) The ROD—like the DEIS and FEIS before it—only considered two options: sale of the entirety of Plum Island or sale of none of Plum Island. While the ROD referenced a single conservation/preservation option, it did not consider it as an option to be pursued by Defendants, instead it was referenced as a potential course of action that might ultimately be taken by a private party after an auction of the entire

site to the highest bidder. (*See id.* at 2-3.) Indeed, the ROD expressly stated "The Joint Lead Agencies have no authority to implement any of the reuse or development options described." (*Id*. at 3.) The ROD did not consider any conservation easements or other restrictions on development that would protect the natural resources of Plum Island and the government interest in protecting those natural resources. (*See id*.)

ARGUMENT

Defendants move solely under Federal Rule of Civil Procedure 12(b)(1) to dismiss Plaintiffs' claims for lack of subject matter jurisdiction. Dismissal of a complaint under Rule 12(b)(1) is only appropriate "when the district court lacks the statutory or constitutional power to adjudicate it." *See Basile v. Levittown United Teachers*, 17 F. Supp. 3d 195, 204 (E.D.N.Y. 2014) (quoting *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000)). While the plaintiff has the burden to prove subject matter jurisdiction by a preponderance of the evidence, "[i]n reviewing a motion to dismiss under Rule 12(b)(1), the Court must accept all facts in the complaint as true." [2] *Id*.

I. DEFENDANTS' FAILURE TO COMPLY WITH NEPA IS CONSTITUTIONALLY AND STATUTORILY RIPE FOR REVIEW.

The ripeness requirement is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over

[2] While a court may refer to and rely on evidence outside of the pleadings in deciding a Rule 12(b)(1) motion to dismiss, a court has discretion to order jurisdictional discovery and conduct a hearing where genuine disputes of material fact exist. *See All. for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 (2d Cir. 2006). Defendants' motion to dismiss challenges many of the facts alleged in Plaintiffs' Complaint. (*See, e.g.*, MTD at 24 n.9 (challenging Plaintiffs' characterization of Defendants' proposed action as "an auction to the highest bidder); *id*. at 30 (challenging Plaintiffs' assertion that it will be precluded from participating in the sale envisioned by Defendants).) Defendants also allege additional facts related to when the ultimate sale of Plum Island may occur (*id*. at 24), and additional analysis that Defendants are conducting to prepare Plum Island for sale. (*Id*. at 28, 29.) While Plaintiffs believe that these additional facts related to the ultimate disposition of Plum Island are not relevant to Plaintiffs' claims related to Defendants' procedural violations of NEPA, to the extent this Court intends to rely on these disputed or newly alleged facts, Plaintiffs respectfully request that they be permitted to seek jurisdictional discovery and that the Court hold a hearing to resolve any genuine disputes of material fact. *See Fountain v. Karim*, 838 F.3d 129, 131, 134 (2d Cir. 2016) (vacating district court's dismissal of claims "in light of an unresolved factual dispute" related to jurisdiction and remanding "for an evidentiary hearing and further proceedings.").

administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967). Defendants argue that Plaintiffs' claims are neither constitutionally ripe under Article III nor statutorily ripe under the APA. They are wrong. Plaintiffs' claims became constitutional and statutorily ripe the moment Defendants issued their flawed FEIS and ROD.

A. Plaintiffs' Claims are Constitutionally Ripe Because Defendants Failed to Comply with NEPA's Requirements Before Issuing the FEIS and ROD.

Defendants argue that Plaintiffs' claims are unripe based on the factors articulated by the Supreme Court in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). But where plaintiffs allege procedural harms under NEPA, courts generally do not apply these factors.[3] In *Ohio Forestry*, the plaintiff challenged a plan proposed by the United State Forest Service under the National Forest Management Act, arguing that the agency's plan permitted too much logging. *Id.* at 728. The Court noted that while the plan set certain logging goals, specified areas suitable for logging, and specified the methods of logging, it did not "authorize the cutting of any trees." *Id.* at 729. The Court explained that before the agency could permit logging, it was required to take a number of steps, including conducting an environmental analysis required by NEPA. *Id.* at 729-30. Because no NEPA analysis had yet taken place,

[3] Should this Court nonetheless apply the *Ohio Forestry* factors, Plaintiffs' claims are ripe for review. First, delayed review would cause hardship to Plaintiffs because Defendants' FEIS and ROD have determined that a sale of the entire Plum Island will proceed, without considering reasonable and environmentally preferable alternatives such as a parceled sale. Any additional steps Defendants take to prepare and market Plum Island for sale will be consistent with and naturally shaped by this determination. Such a sale will necessarily preclude Plaintiffs from participating in a conservation purchase. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1091 (9th Cir. 2003) (holding that "because the ROD pre-determines the future through the selection of a long-term plan (to the exclusion of others which will not be among the available options at the implementation phase), it is ripe for review"). Second, judicial intervention would not interfere with further administrative action because the complained of administrative action—the EIS process—has already culminated in an FEIS and ROD. Third, no further factual development is necessary because the relevant violations occurred when Defendants issued their flawed FEIS and ROD.

plaintiff had not brought a procedural challenge alleging that the agency had failed to comply with NEPA. The Court expressly distinguished plaintiff's unripe challenge under the National Forest Management Act from a potentially ripe challenge under NEPA: "That is because in this respect NEPA, unlike the NFMA, simply guarantees a particular procedure, not a particular result. . . . Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Id.* at 737.

For purposes of constitutional ripeness it is clear that a NEPA violation is ripe the moment an agency fails to comply with NEPA's procedures. "[W]here the allegation is that an agency's final NEPA documentation fails to comply with NEPA procedure, there is no doubt the agency's determination is ripe for judicial review." *Nat. Res. Def. Council, Inc. v. U.S. Army Corps of Eng'rs*, 457 F. Supp. 2d 198, 216 (S.D.N.Y. 2006) ("*NRDC II*"); *see also Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1174 (11th Cir. 2006) ("Because of the rather special nature of the injury (that is, the failure to follow NEPA), the issue is ripe at the time the agency fails to comply."). And here, based on Plaintiffs' well-pleaded allegations, which this Court must accept as true, Defendants failed to comply with NEPA in issuing their FEIS and ROD, regardless of any future actions they may or may not take.

Plaintiffs allege that Defendants violated NEPA by failing to conduct an adequate analysis of reasonable alternatives in a variety of ways. Defendants failed to consider the possibility of a bifurcated sale, conservation of those portions of the property not directly related to PIADC operations, or a sale of property containing express conservation easements. (Compl. ¶¶ 140-141, 159.) As alleged in Plaintiffs' Complaint, these reasonable alternatives were repeatedly suggested to Defendants, and yet they failed to address and include them in their FEIS

and ROD. (*Id*. ¶¶ 76, 82, 99, 101.) While NEPA requires that an agency must specify in its Record of Decision any alternatives considered to be environmentally preferable, Defendants failed to do so. (*Id*. ¶¶ 166-169.) Defendants failed to provide any analysis in their FEIS and ROD as to how the proposed sale of Plum Island would impact a variety of important government interests including the protection of threatened and endangered species pursuant to the ESA, minimizing the damage to fish, wildlife, and other natural resources associated with coastal barriers pursuant to the Coastal Barriers Resource Act, preserving the nation's historic resources pursuant to the National Historic Preservation Act and National Historic Lighthouse Preservation Act, and minimizing the degradation of wetlands pursuant to the Long Island Sound Stewardship Initiative and the CZMA. (*Id*. ¶¶ 146-151.) Defendants failed to engage in formal consultation with the NMFS and USFWS before issuing the FEIS and ROD as required by NEPA even though the USFWS expressly informed them that their actions would have an adverse effect on federally endangered and threatened species. (*Id*. ¶¶ 172-175.) Defendants also failed to rely on the EPA and USFWS as cooperating agencies before issuing their FEIS and ROD, even though they were required to do so "to the maximum extent possible" under NEPA. *See* 40 C.F.R. § 1501.6(a)(2); (Compl. ¶¶ 180-185.) Defendants failed to conduct a "consistency determination" to ensure that its proposed action was consistent with state coastal management programs "at the earliest practicable time," before issuing the FEIS and ROD, as required by NEPA. *See* 15 C.F.R. § 930.36. (Compl. ¶¶ 190-199.) Finally, Defendants failed to include an analysis on "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided" within the FEIS and ROD. *See* 42 U.S.C.A. § 4332(C); (Compl. ¶¶ 204-213.)

Each and every one of these well-pleaded violations occurred the moment that Defendants issued their flawed FEIS and ROD. *See, e.g.*, *NRDC II*, 457 F. Supp. 2d at 226 ("The harm plaintiffs will suffer here is procedural and such harm accrues when the NEPA document is issued, not when action is taken or contracts issued . . . . The Final EA is the Corps' last step in the NEPA process."). The fact that Defendant might, some day in the future, take additional steps to address these violations, does not remedy their failure to do so before issuing the FEIS and ROD as required by NEPA. Defendants devote much of their brief to describing a litany of future events that may or may not occur before Plum Island will be sold to the highest bidder.[4] (*See* Defendants' Brief in Support of MTD ("MTD") at 7-12, 22-31.) But this misses the point. Plaintiffs are not challenging the sale of Plum Island. Instead, Plaintiffs challenge the flawed EIS process that was finalized the moment Defendants issued their FEIS and ROD. And Defendants do not cite a single case in which a court found that a NEPA challenge was unripe where an agency had issued an FEIS and ROD.[5]

Defendants' motion confuses a substantive challenge to an agency's actions (*i.e.*, the ultimate sale of Plum Island) with the procedural challenge brought by Plaintiffs here (*i.e.*, the failure to conduct the EIS consistent with NEPA). But courts have made clear that the

[4] Defendants take issue with Plaintiffs' characterization of Defendants' plan to sell Plum Island at "auction to the highest bidder" and instead explain that Plum Island will "be sold either through an online action or sealed bid method, where the highest monetary bid would be the sole consideration in making an award." (MTD at 24 n.9 (quoting MTD Decl. Exs. 5, 8).) It is not clear what distinction Defendants are attempting to draw, but assuming there is one, it is immaterial. In any sale "where the highest monetary bid would be the sole consideration in making an award," whether online or through a sealed bid method, potential conservation purchasers like Plaintiffs will be necessarily precluded. Conservation purchasers, unlike private developers, are constrained in their ability to raise funds. While conservation purchasers could raise funds or seek grants to target a specific appraisal value, they are unlikely to succeed in a competitive bidding process "where the highest monetary bid would be the sole consideration in making an award." (*Id.*)

[5] Indeed, the only case that Defendants cite to suggest that Plaintiffs' claim is not yet constitutionally ripe is *Norton v. Federal Highway Administration*, in which plaintiff challenged the Federal Highway Administration for failing to file a notice of intent to prepare a supplemental EIS. No. 01-CV-0891E(SC), 2002 WL 31017416, at *2 (W.D.N.Y. Aug. 8, 2002). There, the court correctly found that because defendants had no duty under NEPA to file such a notice, or to even prepare a supplemental EIS, plaintiff's claims were not yet ripe. *Id.* Here, Defendants were required to comply with NEPA *before* they issued the FEIS and ROD. They failed to do so.

procedural violation of NEPA is ripe for review the moment an agency completes the EIS process. For example, in *Friends Of Marolt Park v. United States Department of Transportation*, the Tenth Circuit distinguished between plaintiff's substantive claim under the Transportation Act that the Transportation Department failed to minimize environmental harm with plaintiff's procedural claim under NEPA that the Transportation Department failed to follow NEPA's procedures, finding: "Unlike a claim concerning a substantive violation, such as [plaintiff's] allegation that the Agency failed to minimize the harm resulting from the project as required by § 4(f) of the Transportation Act, a claim that an agency violated NEPA's procedural requirements becomes ripe when the alleged procedural violation occurs." 382 F.3d 1088, 1095 (10th Cir. 2004); *see also Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1090 (9th Cir. 2003) (recognizing "the distinction between substantive challenges which are not ripe until site-specific plans are formulated, and procedural challenges which are ripe for review when a programmatic EIS allegedly violates NEPA."). Because Plaintiffs challenge Defendants' violation of NEPA in issuing the flawed FEIS and ROD, Plaintiffs' claims are constitutionally ripe.

B. Plaintiffs' Claims are Statutorily Ripe Because an FEIS and ROD Constitute "Final Agency Action" Under the APA.

It is black-letter law that where a plaintiff challenges the sufficiency of a NEPA evaluation, an FEIS and the ROD issued thereon constitutes "final agency action" under the APA. *See, e.g., Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1118–19 (9th Cir. 2010) ("Once an EIS's analysis has been solidified in a ROD, an agency has taken final agency action, reviewable under § 706(2)(A)."); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 187 (4th Cir. 1999) ("This designation of the ROD as final agency action under the APA is generally recognized."); *Ouachita*, 463 F.3d at 1173 ("It is well settled that 'a final EIS or the record of decision issued thereon constitute[] final agency action.'")

(alteration in original) (citation omitted); *Goodrich v. U.S.*, 434 F.3d 1329, 1335 (Fed. Cir. 2006) (collecting "case law from our sister circuits holding that, for purposes of the [APA] a ROD is a 'final agency action'"); *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 815 (8th Cir. 2006) ("*Sierra Club v. Corps I*") (noting that "[t]he Supreme Court has strongly signaled that an agency's decision to issue . . . an environmental impact statement is a 'final agency action' permitting immediate judicial review under NEPA") (citing *Ohio Forestry*, 523 U.S. at 737). The regulations implementing NEPA make this clear. *See* 40 C.F.R. § 1500.3 ("It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement . . . .").

Here, it is undisputed that Defendants have issued an FEIS and ROD thereon. Because Plaintiffs challenge the sufficiency of the FEIS and ROD, Defendants' issuance of an FEIS and ROD constitutes final agency action that is ripe for review. Even Defendant GSA's website makes this clear: "A Record of Decision is the final step in the EIS process which formally documents the government's decision to proceed with the proposed actions - the sale of the property - having given consideration to all of the factors discovered and analyzed during the NEPA process." (Tepfer Decl. Ex. E (GSA, *Sale of Plum Island, New York, FAQs,* http://www.gsa.gov/portal/content/ 180075 (FAQ #7) (last accessed March 1, 2017)).)

Defendants argue that an ROD does not necessarily constitute final agency action under the APA. (MTD at 28.) Yet they do not cite a single decision in which a court found that an ROD did not constitute final agency action. Instead, they rely upon dicta in *South Portland Avenue Block Ass'n, Inc. v. Pierce*, a case in which the court found that that an FEIS constituted final agency action, No. 87 CV 4210, 1988 WL 101306, at *3 (E.D.N.Y. Sept. 28, 1988), and *National Wildlife Federation v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir. 1982), in which the

Second Circuit found that a claim was not yet ripe given the pendency of a subsequent FEIS. Both cases are inapposite.

In *Pierce*, plaintiffs challenged the construction of Atlantic Terminal in downtown Brooklyn. 1988 WL 101306, at *1. Defendants in the case had outlined a "21-step procedure that must be completed" before funds could be released to begin construction on the project. *Id*. The FEIS, which plaintiffs challenged, was only step 7 in the 21-step process. *Id.* at *4 n.2. And yet the court still found the claims was ripe for review because plaintiffs challenged "the substance—the adequacy—of the DEIS and the FEIS." *Id.* at *3. On the other hand, in *Goldschmidt*, plaintiffs challenged the construction of a highway spanning Connecticut and Rhode Island when only one of two required FEISs had been completed. The Department of Transportation had expressly conditioned the approval of the highway on a completed FEIS for *both* the Connecticut and Rhode Island sections but only the Connecticut FEIS had been completed. The court found that because "[t]he line drawn by the Secretary in this case is unambiguous as to the future events which must occur for the project to go forward. . . . judicial review should await either those events or modification of the Secretary's order." 677 F.2d at 264.

Here, Plaintiffs challenge the "substance—the adequacy—of the DEIS and the FEIS." *See Pierce*, 1988 WL 101306, at *3. While Defendants argue that the ultimate sale of Plum Island awaits several contingencies— "waiting for the construction and certification of NBAF and the complete transition of PIADC"—Plaintiffs do not challenge the ultimate sale of Plum Island. Plaintiffs challenge Defendants' flawed NEPA process. And the flaws in that process were ripe for challenge the moment Defendants issued the FEIS and ROD. Unlike *Goldschmidt*, Defendants ROD is completely "[ ]ambiguous as to the future events which must occur for the

project to go forward." 677 F.2d at 264. Indeed, Defendants only commit to "supplement the EIS and ROD *as necessary*." (MTD at 10 (quoting MTD Decl. Ex. 6 (Aug. 29, 2013 ROD) at 4) (emphasis added). This provides Plaintiffs with no assurances whatsoever that the NEPA violations that have already occurred will be remedied and no timetable for when that might happen.

C. Defendants' Violations of NEPA Related to the CZMA and ESA Are Similarly Ripe for Review.

Defendants argue that there has been no final agency action with respect to standalone violations of the CZMA or ESA. (MTD at 28, 29.) But Plaintiffs do not allege standalone violations of the CZMA or ESA.[6] Instead, Plaintiffs allege that Defendants violated NEPA with reference to the responsibilities of Defendants and other agencies as outlined in the CZMA and ESA. As explained above, these violations were ripe for review the moment Defendants issued the FEIS and ROD.

Plaintiffs' Complaint alleges that Defendants violated NEPA by failing to conduct a consistency determination. NEPA expressly requires that an EIS "discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned)" and requires that "[w]here an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law." 40 C.F.R. § 1506.2(d). Defendants concede that this required consistency determination has not yet been made (MTD at 28), but argue that Plaintiffs' claims are not yet ripe because Defendants might—at some point in the future—conduct the required determination. But NEPA requires that an EIS address any inconsistency within "the statement" and describe how the agency will reconcile such inconsistency within "the statement." 40 C.F.R. § 1506.2(d). It does not permit Defendants

[6] With respect to the CZMA, Plaintiffs made this clear in its October 27, 2016 letter response to Defendants' request for a pre-motion conference. (ECF No. 27.)

to ignore these requirements or insulate them from challenge by including precatory placeholders in their FEIS and ROD. Because Defendants issuance of the FEIS and ROD constituted final agency action, Defendants violation of the consistency determination provisions of NEPA is ripe for review.

Plaintiffs' Complaint also alleges that Defendants violated NEPA by failing to incorporate the guidance of the NMFS and USFWS into the FEIS and ROD. Pursuant to Section 7 of the ESA a federal agency must initial formal consultation with the NMFS (which has jurisdiction over marine species) or USFWS (which has jurisdiction over terrestrial and freshwater species) whenever it undertakes an "action" that "may affect" a listed species or critical habitat. Both the USFWS and NMFS informed Defendants that their proposed actions could affect several endangered and threatened species. (Compl. ¶¶ 84-86.) The NMFS specifically noted that formal consultation would be necessary. (*Id.* ¶ 86.) Notwithstanding, Defendants failed to engage in formal consultation before issuing their FEIS and ROD. NEPA requires that an EIS include an analysis of "the environmental impacts of the alternatives including the proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." 40 C.F.R. § 1502.16. But Defendants failure to engage in formal consultation rendered such an analysis impossible because it could not incorporate the results of such consultation into the EIS. While Defendants might someday engage in consultation sufficient to meet the ESA's requirements, this will not remedy their failure to incorporate the results of such consultation within the FEIS and ROD as required by NEPA. And this failure was actionable the moment Defendants issued their flawed FEIS and ROD.

D. The Possibility that Defendants Might Reconsider Their Decision Does Not Render Plaintiffs' Claims Unripe.

Defendants argue that the FEIS and ROD do not constitute final agency action because the agencies may reevaluate their decision in light of changing environmental conditions between now and Plum Island's ultimate sale. As an initial matter, the vague possibility that Defendant agencies might someday reconsider their decision does not make the FEIS and ROD issued thereon any less final. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016) ("The Corps may revise an approved JD within the five-year period based on 'new information.' That possibility, however, is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal."). In *Sierra Club v. United States Department of Energy*, the Tenth Circuit rejected this exact argument. 287 F.3d 1256, 1263–64 (10th Cir. 2002). There, the Sierra Club challenged the Department of Energy (DOE) alleging that it failed to comply with NEPA with respect to the approval of a road. The DOE argued "Sierra Club's procedural claims are not ripe because construction of the road cannot proceed without prior approval of the DOE and any construction would be subject to DOE supervision. Thus, according to the DOE, the road may never be built." *Id*. at 1264. The Tenth Circuit rejected the DOE's argument, holding that "a challenge to the failure of an agency to comply with the NEPA procedures becomes ripe at the time the failure takes place." *Id*. at 1263.

Further, the only additional analysis that Defendants claim is ongoing has nothing to do with the core NEPA violations alleged by Plaintiffs. As the ROD makes clear, the additional analysis envisioned by Defendants is "specifically for the purpose of ensuring that [the EIS] reflects the then current knowledge of conditions on the property, versus those conditions that existed on the date of this ROD." (MTD at 33 (quoting MTD Decl. Ex. 6 (Aug. 29, 2013 ROD) at 5).) In other words, the agency will conduct further environmental study in order to "properly

identify to potential buyers the presence of protected flora and fauna" (*id*. at 23 (quoting ROD at 4), and will seek "input from the marketplace of potential future owners to assist in the development of a sound marketing and sale strategy." (*Id*. at 24 (quoting MTD Ex. 9 at 23).) But there is nothing in the administrative record to suggest that the underlying decision—the sale of the entire Plum Island in a process in which price is the sole consideration—is likely to change.

II. PLAINTIFFS SUFFICIENTLY ALLEGE STANDING.

To demonstrate standing a plaintiff must demonstrate: (1) that he has suffered an "injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) that his injury is "fairly traceable to the challenged action of the defendant"; and (3) that his injury will "likely . . . be redressed by a favorable decision." *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). A party challenging a "procedural right"—i.e., the right to have an agency observe legally mandated procedures—can possess standing "without meeting all the normal standards for redressability and immediacy." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992). Accepting Plaintiffs' well-pleaded allegations as true, Plaintiffs sufficiently allege that they have suffered an injury-in-fact as a result of Defendants' flawed EIS process and that that this injury can be redressed by this Court.

A. Plaintiffs Sufficiently Allege Injury-in-Fact.

In the NEPA context, the injury-in-fact requirement has been interpreted to require that a plaintiff demonstrate: "1) that in making its decision without following the NEPA's procedures, the agency created an increased risk of actual, threatened or imminent environmental harm; and 2) that this increased risk of environmental harm injures its concrete interest." *Sierra Club v. DOE*, 287 F.3d at 1265; *see also Nat. Res. Def. Council, Inc. v. U.S. Army Corps of Eng'rs*, 399 F. Supp. 2d 386, 401 (S.D.N.Y. 2005) ("*NRDC I*") ("Because plaintiffs assert a violation of a

procedural right under NEPA, a lesser showing of immediacy and redressability is required. Plaintiffs need not show that the preparation of an SEIS would change the Army Corps' ultimate decision regarding the HDP, but only that 'the disregard of NEPA could impair a separate concrete interest of plaintiffs.'") (alterations omitted). As the court explained in *New York v. United States Army Corps of Engineers*, "a plaintiff can show an injury-in-fact through showing the creation of an increased risk of invasion of concrete interests; in NEPA cases, this chain of reasoning is extended to allow for an injury based on the increased risk in uninformed decision-making that will create an increased risk in the invasion of a concrete interest." 896 F. Supp. 2d 180, 194 (E.D.N.Y. 2012).

Here, Plaintiffs have properly alleged that Defendants' flawed FEIS and ROD "created an increased risk of actual, threatened or imminent environmental harm." *Sierra Club v. DOE*, 287 F.3d at 1265. Defendants' flawed and inadequate EIS analysis resulted in Defendants' decision to sell the entirety of Plum Island in a single transaction to the party willing to pay the most. Such a sale necessarily precludes a conservation sale in whole or in part and guarantees the commercial development of previously undeveloped portions of Plum Island.[7] As alleged in Plaintiffs' Complaint, Defendants failed to consider important government interests, reasonable environmentally preferable alternatives, the expertise of coordinating agencies, the consistency of their plan with state coastal management plans, and based their decision on incomplete ecological and contamination data. (Compl. ¶¶ 147-151.) Had Defendants considered these

[7] Defendants claim that Plaintiffs might not be injured by Defendants' actions because "Plaintiffs are free to purchase the property, if it is publicly sold in the future." (MTD at 30.) But this contradicts Plaintiffs' well-pleaded allegations. Plaintiffs allege that a public sale of the entirety of Plum Island as a single parcel will necessarily preclude their participation. And Plaintiffs allege that Defendants were specifically made aware of this concern at multiple points throughout the EIS process. (*See, e.g.*, Tepfer Decl. Ex. C (Mark Matsil, *Plum Island, New York*, Trust for Public Land, at 1 (August 5, 2013)); *id*. Ex. D (David J. Fox, *CTDEEP Comment on the FEIS*, CTDEEP, at 1 (August 1, 2013)); Compl. ¶¶ 76, 81.) Defendants ignored these comments and failed to consider reasonable alternatives that would have permitted a conservation sale in whole or in part.

factors and taken the "hard look" that NEPA requires, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989), they would have arrived at an environmentally preferable decision.

Specifically, Plaintiffs allege that Defendants misinterpreted the Appropriations Act by requiring the sale of 680 acres of Plum Island that were previously (1) undeveloped and unimproved, (2) associated with the Fort Terry historic site, or (3) associated with the Plum Island lighthouse, notwithstanding the fact that the Appropriations Act only authorized the sale of those assets that directly support the PIADC. (Compl. ¶ 138.) This decision creates a clear risk that these 680 acres of Plum Island will be developed, threatening the endangered plant and animal species that use Plum Island, the waters surrounding Plum Island, and the historical landmarks on Plum Island. Plaintiffs allege that Defendants misinterpreted the Appropriations Act by interpreting "public sale" to mean a sale "where the highest monetary bid would be the sole consideration in making an award" ignoring numerous and repeated comments to consider reasonable, environmentally-preferable, alternatives. (*Id.* ¶¶ 156-158.) This decision creates a clear risk that potential conservation purchasers will be priced-out, precluding a conservation sale and thus threatening environmental harm to the endangered plant and animal species that live on and around Plum Island. Plaintiffs also allege that Defendants failed to specify environmentally preferable alternatives to their proposed sale in its ROD. (*Id.* ¶¶ 158-168.) Defendants' failure to do so indicates that they failed to reasonably consider such alternatives, notwithstanding the many comments Defendants received suggesting environmentally preferable alternatives, creating a clear risk of environmental harm. Plaintiffs also allege that Defendants failed to rely on the expertise and advice of other state and federal agencies during the EIS process, and therefore may not have been made aware of the significant effects their proposed

actions would have on federally endangered and threatened species, as well as state coastal management zones. (Compl. ¶¶ 180-185; 190-199.) This creates a clear risk of environmental harm, as it indicates that Defendants did not properly consider the impact of their proposed action on endangered and threatened species as well as neighboring state coastal management zones.[8]

Plaintiffs have also sufficiently alleged that this increased risk of environmental harm will harm their concrete interests. Courts have found that environmental plaintiffs can establish an injury in fact by "showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859-60 (9th Cir. 2004) (citation omitted); *see also Fund for Animals v. Norton*, 365 F. Supp. 2d 394, 406 (S.D.N.Y. 2005) ("Environmental plaintiffs have suffered cognizable injury when aesthetic and recreational enjoyment are hindered by a certain action."), *aff'd sub nom. Fund for Animals v. Kempthorne*, 538 F.3d 124 (2d Cir. 2008).

Plaintiffs allege such a connection because the increased risk of environmental harm resulting from Defendants' flawed EIS process threatens to harm each Plaintiff's concrete interests. Each Plaintiff and their members live, work, and recreate in the communities and waters surrounding Plum Island. (Compl. ¶ 23.) Plaintiffs and their members sail and boat

[8] Defendants argue that because Plaintiffs do not necessarily have a right to enter Plum Island, they cannot be injured if their future entry is prohibited. (*See* MTD at 31-32.) But Plaintiffs would have standing even if they never set foot on Plum Island. *See, e.g.*, *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001) ("[W]e have never required a plaintiff to show that he has a right of access to the site on which the challenged activity is occurring, or that he has an absolute right to enjoy the aesthetic or recreational activities that form the basis of his concrete interest. If an area can be observed and enjoyed from adjacent land, plaintiffs need not physically enter the affected area to establish an injury in fact."); *Conservation Law Found. v. Gen. Servs. Admin.*, 427 F. Supp. 1369, 1373 (D.R.I. 1977) (holding that plaintiffs use of the area and waters surrounding a proposed project were cognizable interests for the purposes of Article III standing). Here, Plaintiffs assert a variety of concrete interests that are threatened by Defendants' actions, most of which do not require that Plaintiffs ever again enter Plum Island.

around Plum Island, conduct bird-watching of Plum Island, fish in the waters adjacent to Plum Island, conduct marine life watching, and study the environmental and structural history of the grounds and buildings on Plum Island. (*Id*. ¶ 24.) Plaintiffs have a direct interest in the preservation of Plum Island. (*Id*. ¶ 25.) If the option to preserve all or part of the island as a state or federal park were studied and adopted in full or in part, it would make it more likely that Plaintiffs could continue these activities unabated. (*Id*. ¶ 27.) But Defendants' flawed EIS process did not consider these reasonable alternatives, and the only option they realistically considered—sale of the entire Plum Island without any conservation restrictions or easements—is likely to result in broad development of Plum Island, which threatens harm to the aesthetic, conservation, recreational, economic, scientific, informational, and procedural interests of Plaintiffs and their respective members.

As alleged in the Complaint, Defendants' actions will directly harm Plaintiff Ruth Ann Bramson's "ability to appreciate Plum Island's uninhabited stretches of sandy beaches, hundreds of species or birds, seals, and other wildlife" (*id*. ¶ 30), Group for the East End's "ability to continue offering educational programs that rely heavily on the use of the local environment as a living laboratory for students" (*id*. ¶ 31), Peconic Baykeeper's "ability to protect and enjoy local watersheds like the Peconic Estuary from the pollution and degradation that would flow from the development of Plum Island" (*id*. ¶ 32), John Turner's "ability to appreciate the birds, seals, and other wildlife that occupy Plum Island" (*id*. ¶ 33), and John Potter's "ability to fish in the waters surrounding Plum Island" because "[t]he development of Plum Island—and attendant pollution and traffic—would harm the fisheries surrounding Plum Island" (*id*. ¶ 34). *See Humane Soc'y v. Babbitt*, 46 F.3d 93, 97 (D.C. Cir. 1995) (finding that plaintiffs had standing where agency's "conduct threaten[s] to diminish or deplete the *overall* supply of endangered animals available

for observation and study"). Therefore, Plaintiffs have adequately alleged that they have "an aesthetic or recreational interest in a particular place, or animal, or plant species and that interest is impaired by a defendant's conduct." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000).

Defendants claim that a number of uncertainties undermine Plaintiffs' injury-in-fact. They argue that "[t]he agencies . . . do not know when the sale will take place," and that such sale "will likely not occur until at least 2023." (MTD at 31.) Similarly, Defendants argue that "the agencies have not determined the exact method of public sale, nor do they know who will purchase the property or if that purchaser will limit any one's access to Plum Island and the Orient Point Facility." (*Id*. at 30.) But this has no impact on Plaintiffs' standing to raise Defendants' violations of NEPA. The Supreme Court has made clear: "[U]nder our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, *even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years*." *Lujan*, 504 U.S. at 572 n.7; *see also Sierra Club v. DOE*, 287 F.3d at 1265 ("In the context of a NEPA claim, the harm itself need not be immediate, as 'the federal project complained of may not affect the concrete interest for several years."'). Plaintiffs allege a procedural harm based on Defendants' failure to comply with NEPA, and that harm occurred when Defendants issued their flawed FEIS and ROD.

B. Plaintiffs Sufficiently Allege that Defendants Caused Their Injury.

Plaintiffs also have properly alleged that the risk of environmental harm to their concrete interests resulted from Defendants' actions. To meet this requirement in the NEPA context, a plaintiff must show that the increased risk of environmental harm to her concrete interests is

"fairly traceable" to the agency's failure to comply with NEPA. *Sierra Club v. DOE*, 287 F.3d at 1264-65. "The nexus between some uses of a given area by a plaintiff and the effect of defendant's proposed actions may be more tenuous . . . . This does not necessarily mean, however, that the nexus must be explicitly elaborated in the pleadings; it is sufficient that a connection be reasonably inferable from the facts alleged." *Sierra Club v. Mason*, 351 F. Supp. 419, 424 (D. Conn. 1972).

Here, Plaintiffs have plainly alleged that the harm to their concrete interests is "fairly traceable" to Defendants' flawed EIS process. It was Defendants—and not some third-party—that conducted a fundamentally flawed EIS process that ignored government interests, failed to conduct an adequate analysis of reasonable alternatives, failed to consult with the required state and federal agencies, and based their EIS analysis on incomplete or inadequate information. *See Vt. Pub. Interest Research Grp. v. U.S. Fish & Wildlife Serv.*, 247 F. Supp. 2d 495, 512 (D. Vt. 2002) ("There is no allegation that the independent actions of a third party will somehow cause the increased environmental harm."). And it was Defendants—and not some third-party—that determined that all of Plum Island would be sold in a unitary sale without conservation parcels or easements "where the highest monetary bid would be the sole consideration in making an award." (MTD at 24 n.9 (quoting MTD Exs. 5, 8).) Because Plaintiffs' Complaint alleges that the increased likelihood of environmental harm is attributable to Defendants' failure to follow NEPA's requirements, it sufficiently establishes causation. *See Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996) ("[O]nce the plaintiff has established the likelihood of the increased risk for purposes of injury in fact, to establish causation, . . . the plaintiff need only trace the risk of harm to the agency's alleged failure to follow the National Environmental Policy Act's procedures."); *see also Ouachita*, 463 F.3d at 1173 ("Since the [agency] (according

to [plaintiff]) failed to follow NEPA, it is clear that the [agency] caused [plaintiff's] alleged injury. That is the extent of [plaintiff's] burden to establish causation.").

C. Plaintiffs' Injuries Can Easily Be Redressed by This Court.

Defendants' violations of NEPA can be redressed by this Court. Redressability requires that "it is likely, as opposed to merely speculative, that the injury [to Plaintiffs] will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 181. But "[t]he requirement of redressibility is relaxed in the NEPA context." *Vt. Pub. Interest Research Grp.*, 247 F. Supp. 2d at 513. A plaintiff "who asserts inadequacy of a government agency's environmental studies under NEPA need not show that further analysis by the government would result in a different conclusion. It suffices that, as NEPA contemplates, the [agency's] decision could be influenced by the environmental considerations that NEPA requires an agency to study." *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001).

Plaintiffs' claims meet this standard. Plaintiffs allege that Defendants violated NEPA by failing to consider important government interests, reasonable environmentally preferable alternatives, the expertise of coordinating agencies, the consistency of their plan with state coastal management plans, and based their decision on incomplete ecological and contamination data. This Court plainly has the power to remedy these violations: it can order Defendants to comply with NEPA. If this Court ordered compliance with NEPA, it would obviate any concern that Defendants failed to explore and evaluate all reasonable alternatives and analyze the environmental impacts of the alternatives including the proposed action. *See Comm. to Save the Rio Hondo*, 102 F.3d at 452 ("Compliance with the National Environmental Policy Act would avert the possibility that the [agency] may have overlooked significant environmental consequences of its action."). Because this court has the authority to order Defendants to comply with the procedural requirements of NEPA, Plaintiffs' injury is plainly redressable. *See*

Ouachita, 463 F.3d at 1173 ("The court, if it concludes that the [agency] has failed to follow NEPA, has the power to order the agency to comply. As the injury [Plaintiff] asserts is the [agency's] failure to comply with NEPA, that injury is plainly redressable.").

Defendants attempt to avoid this clear application of law by claiming that Plaintiffs challenge Congress' decision to sell Plum Island. (MTD at 31.) Nonsense. Plaintiffs do not—and could not—challenge Congress' determination to: "to sell through public sale all real and related personal property and transportation assets which support Plum Island operations, subject to such terms and conditions as necessary to protect government interests and meet program requirements." Pub. L. No. 110-329, § 540. Instead, Plaintiffs challenge Defendants' misinterpretation of Congress' determination in the context of Defendants' NEPA process. Congress did not misinterpret "public sale" to mean a sale "where the highest monetary bid would be the sole consideration in making an award." Congress did not misinterpret the language "all real and related personal property and transportation assets which support Plum Island operations" to mean every single acre of Plum Island, even those acres that have never been used or developed in any capacity. And Congress did not fail to conduct the NEPA process as required. It was Defendants—and not Congress—who conducted a fundamentally flawed EIS process by failing to consider important government interests, reasonable environmentally preferable alternatives, the expertise of coordinating agencies, the consistency of their plan with state coastal management plans, and based their decision on incomplete ecological and contamination data.

III. PLAINTIFFS' CLAIMS ARE NOT PRUDENTIALLY MOOT BECAUSE ANY FURTHER AGENCY ACTION IS UNCERTAIN IN TIMING AND SCOPE.

Failing all else, Defendants argue that this Court should decline to exercise its jurisdiction over this matter because of the possibility that Defendants might, at some time uncertain, remedy their violations of NEPA. This Court should reject that invitation.

Under the doctrine of prudential mootness, a court "may decline to exercise [its] discretion to grant declaratory and injunctive relief if the controversy is 'so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 277 F. App'x 170, 172 (3d Cir. 2008) ("*Sierra Club v. Corps II*") (citation omitted). Prudential mootness is usually applied "in the context of a request for preliminary injunction, where it seems that the defendant (usually the government) is in the process of changing its policies such that any repeat of the actions in question is unlikely." *A.C.L.U. v. Davidson*, 211 F.3d 1277, 2000 WL 488460, at *2 (10th Cir. 2000). "The central question in a prudential mootness analysis is 'whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief.'" *Sierra Club v. Corps II*, 277 F. App'x at 172–73 (citation omitted).

In support of their contention that prudential mootness applies here, Defendants cite to *Los Alamos Study Group v. DOE*, in which the District of New Mexico found a NEPA challenge moot where the DOE had already begun preparing a supplemental EIS (SEIS). 794 F. Supp. 2d 1216, 1222-23 (D.N.M. 2011), *aff'd*, 692 F.3d 1057 (10th Cir. 2012). There, plaintiffs alleged that the defendant agency had violated NEPA with respect to its EIS analysis related to the construction of a laboratory facility and requested that the court order the defendant to complete an SEIS. *Id.* at 1220. After plaintiffs filed the lawsuit, defendants began taking steps to do just

that. *Id.* at 1224. Defendants published a Notice of Intent in the Federal Register, formally committing to undertake the exact SEIS process that plaintiffs requested. *Id.* The defendant agency halted all work on the facility for the duration of the SEIS review, held two public scoping meetings, released a draft SEIS to the public, and began a formal, 45-day public comment period. *Id.* at 1221-22.

The facts in *Los Alamos* could not be more different than the facts here. Defendants here have not committed to undertaking an SEIS process and have not filed a Notice of Intent in the Federal Register. And they have not halted their preparations for the marketing and sale of Plum Island. Instead, Defendants point to vague non-binding references in the ROD: "the Joint Lead Agencies will supplement the EIS and ROD *as necessary* when the timing of the sale becomes clearer." (MTD at 10 (quoting MTD Decl. Ex. 6 (Aug. 29, 2013 ROD) at 4) (emphasis added).)[9] But this commits Defendants to absolutely nothing. Defendants provide no details as to what might trigger an SEIS, what the basis for that SEIS would be, and Defendants conveniently decline to commit to any formal agency process or timetable.

Further, dismissing a case based on prudential mootness is inappropriate where the government has not firmly committed to future remediation. For example, in *Colorado Environmental Coalition v. Office of Legacy Management*, Plaintiffs sought an injunction requiring that the defendant agency conduct an EIS process. 819 F. Supp. 2d 1193, 1203–05 (D. Colo. 2011). During the course of the litigation, the defendant published a Notice of Intent in the Federal Register and began preparing such an EIS. *Id.* at 1203-04. Even so, the court refused to decline jurisdiction based on prudential mootness. *Id.* at 1204. The court founds that the

[9] Defendants' other references to an SEIS are equally illusory. For example, Defendants state: "Because the sale of the Property will not occur for a number of years, the Joint Lead Agencies *may* have to supplement the EIS when the timing of sale becomes clearer." (MTD at 9 (quoting MTD Decl. Ex. 5 (June 25, 2013 FEIS) at ES-12, 2-1) (emphasis added).) Defendants provide no details as to what the basis for an SEIS might be or what might trigger a potential SEIS.

agency's "vague and unspecific explanation" of its decision to pursue an EIS based on "does not sufficiently assure the Court that the EIS will indeed be completed without unacceptable or undue delay, or at all." *Id.* The Court noted that the defendant agency had "provided no timetable to the Court for when the EIS will be completed" and had not agreed to forego its planned project in the meantime. *Id.*

Defendants here have taken a similarly nebulous approach to NEPA compliance. They suggest that Plaintiffs "may seek to invoke the Court's jurisdiction *if* and when there is a supplemental EIS or ROD or final decisions as to the agencies' consistency determinations under the CZMA, a determination under Section 7 of the ESA . . . , or even a determination as to the methodology of any public sale to be made." (MTD at 33-34 (emphasis added).) But Defendants have not committed to the completion of an SEIS in the first instance. They have provided this Court with no assurances as to when an SEIS might be forthcoming or what flaws that SEIS might address.

Moreover, Defendants do not concede that anything in their EIS process was flawed and in need of supplementation. In the NEPA context, courts have found that prudential mootness does not apply where agencies have not conceded that an EIS is necessary. *See, e.g.*, *Colo. Envtl. Coal.*, 819 F. Supp. 2d at 1205 (finding prudential mootness inapplicable where "it does not appear that DOE concedes or even believes that its preparation of an EIS is required by law"); *Blue Ocean Preservation Soc'y v. Watkins*, 767 F. Supp. 1518, 1523 (D. Haw. 1991) ("[T]he government unequivocally states its position that it is *not* required to prepare an EIS. It has consistently maintained that NEPA does not require it . . . . Thus the government reaffirms its position that nothing but its own volition is prompting the preparation of the EIS, and in so doing concedes that nothing would prevent it from again changing its position."). Because

Defendants do not concede that the many failures of which Plaintiffs complain violated NEPA, they provide this Court with no assurance that these failures would be remedied in an SEIS.

Plaintiffs' ability to assert ripe procedural claims based on Defendants' failure to comply with NEPA should not be held hostage based on the mere possibility of further decision-making at some time uncertain. Because circumstances have not changed since Plaintiffs filed suit and because the court remains able to provide meaningful relief, it would be inappropriate to dismiss this case based on the doctrine of prudential mootness. *See Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1244 (E.D. Cal. 1999) ("[T]he court concludes that relief is available to Plaintiffs. Accordingly, the court rejects as meritless Defendants' contention that this action is moot.").

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss Plaintiffs' Complaint in its entirety.

Dated: March 2, 2017 MORRISON & FOERSTER LLP

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