UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Date of Service of Brief:
January 12, 2012

STATE OF NEW YORK,

Plaintiff,

v.

CV-11-2599
(Garaufis, J.)
(Pollak, M.J.)

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Defendants.

DELAWARE RIVERKEEPER NETWORK, et al.,

Plaintiffs,

v.

CV-11-3780
(Garaufis, J.)
(Pollak, M.J.)

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Defendants.

DAMASCUS CITIZENS FOR SUSTAINABILITY, INC.,

Plaintiff,

v.

CV-11-3857
(Garaufis, J.)
(Pollak, M.J.)

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Defendants.

FEDERAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT OF NYS AND COMPLAINTS OF OTHER PLAINTIFFS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The Federal Defendants[1] respectfully submit this memorandum of law in support of their motion to dismiss the amended complaint of Plaintiff State of New York and the complaints of the other plaintiffs for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure ("Rule") 12(b)(1), and for failure to state a claim pursuant to Rule 12(b)(6) or, in the alternative, for summary judgment.

The three actions that the Federal Defendants seek to dismiss, which have been consolidated for pre-trial purposes, attempt to stop the Delaware River Basin Commission ("DRBC") from adopting regulations that would authorize the development of natural gas within the Delaware River Basin ("DRB"). Plaintiffs contend that the defendant federal agencies and officials and/or the DRBC must prepare a draft environmental impact statement ("EIS") under the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. ("NEPA"), before the DRBC issues the regulations.

As shown below, Plaintiffs' complaints should be dismissed, *inter alia*, pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction because (i) Plaintiffs' complaints are barred by well-settled principles of sovereign immunity, (ii) Plaintiffs lack Article III standing to maintain this action, and (iii) Plaintiffs' claim are not ripe for judicial review. Even if the Court found standing and ripeness, Plaintiffs' complaints should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim or, in the alternative, for summary judgment, on the grounds that: (i) NEPA is not applicable to the Federal Defendants here because, among other things, the "action" that Plaintiffs challenge is not a "major federal action" under NEPA; and (ii) mandamus jurisdiction is precluded because Plaintiffs cannot assert their NEPA claim

[1] "Federal Defendants" refers herein to all of the defendants named in the amended complaint of NYS except for the non-federal agency defendants Delaware River Basin Commission ("DRBC") and its Executive Director (collectively, "DRBC Defendants"). The Department of Justice does not represent the DRBC Defendants.

against the Federal Defendants under the mandamus statute.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

In 1961, through an interstate compact, the Delaware River Basin Compact, the states of New York, New Jersey, Delaware and Pennsylvania, and the United States agreed to establish the Delaware River Basin Commission to manage and protect water resources within the multi-state region of the Delaware River Basin. NYS Complt. ¶¶ 3, 25-27.[2] Under the Compact, the DRBC is charged with developing and administering a comprehensive, multi-purpose plan for "the conservation, utilization, development, management, and control of the water and related resources of the Delaware River Basin." Id. ¶ 25 (citing DRB Compact, Whereas Clause).

The DRB Compact established that the DRBC consists of five commissioners, who are referred to as "members" in the Compact, representing each of the Governors of the four signatory states, and the President of the United States.[3] DRB Compact §§ 2.5, 14.1(b). The five commissioners serve as the governing body of the DRBC and are responsible for making decisions about all matters that come before the DRBC. DRB Compact § 2.5. Each commissioner is entitled to one vote on such matters, and actions of the Commission are decided by majority vote of the membership, with no veto power for any member. Id. § 2.5; see NYS Complt. ¶ 27.

Congress and the legislatures of the four state members of the Commission enacted the DRB Compact by concurrent legislation. See id. ¶ 26; Pub. L. 87-328, 75 Stat. 688 (Sept. 27, 1961). The federal enacting legislation conditions the participation of the United States on certain

[2] "NYS" Complt." refers herein to NYS's Amended Complaint filed on November 22, 2011.

[3] The President's representative on the DRBC is the commander of the North Atlantic Division, U.S. Army Corps of Engineers *ex officio*. DRB Compact § 2.2, as amended by Pub. L. 110-114 § 5019.

provisions, including that "[n]othing contained in the Compact or elsewhere in th[e] Act shall be construed as a waiver by the United States of its immunity from suit." DRB Compact § 15.1(p). The Compact further expressly provides that the DRBC shall not be subject to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). Id. § 15.1(m).[4]

On December 9, 2010, the DRBC proposed regulations governing the development of natural gas within the DRB over the objection of the Governor of NYS. NYS Complt. ¶ 54. The DRBC made the regulations available for public comment through April 15, 2011. Id. ¶ 56. On April 18, 2011, the Attorney General of Plaintiff New York State, Eric T. Schneiderman, wrote to the then-federal Commissioner on the DRBC, Defendant Brigadier General Peter A. DeLuca, Commander of the U.S. Army Corps of Engineers North Atlantic Division ("Brigadier General DeLuca"), with copies to the other defendant federal agencies. See NYS Complt., Ex. A. In his letter, Attorney General Schneiderman requested that the DRBC and the defendant federal agencies prepare a draft EIS before finalization of the DRBC regulations, contending that it was required by NEPA. Id.

Brigadier General DeLuca responded to Attorney General Schneiderman on May 24, 2011. See NYS Complt., Ex. B. In his letter, Brigadier General DeLuca stated that the DRBC is not a federal agency subject to NEPA, and that the mere participation of a federal officer in the DRBC regulatory process does not make the DRBC's action a federal action subject to NEPA. Id. As such, he noted that the federal Commissioner is not required to produce an EIS under NEPA as part of the DRBC's process of developing regulations for natural gas development within the DRB. Id.

The NYS Action followed by complaint filed on May 31, 2011. The DRN and Damascus

[4] The Compact refers to the APA in its earlier codification at 5 U.S.C. §§ 1001 and 1011.

Actions followed by complaints filed on August 4, and August 10, 2011, respectively.

A conference was held before the Honorable Nicholas G. Garaufis on August 10, 2011 at which, among other things, the Court ordered the consolidation of the three actions for pre-trial purposes only. While "[c]onsolidation under Rule 42(a), Fed. R. Civ. P., is a procedural device designed to promote judicial economy, [] consolidation cannot effect a merger of the actions or the defenses of the separate parties. It does not change the rights of the parties in the separate suits." Cole v. Schenley Indus., Inc., 563 F.2d 38, 38 (2d Cir. 1976) (citations omitted). The Court "must therefore consider the jurisdictional basis of each complaint separately." Id. As such, each set of plaintiffs must separately satisfy their respective burdens of establishing subject matter jurisdiction over their claims against the Federal Defendants.

Pursuant to a court-approved briefing schedule, the Federal Defendants and the DRBC Defendants served motions to dismiss on November 1, 2011. NYS filed an amended complaint on November 22, 2011, which amended certain allegations and added a new claim against the DRBC Defendants.

STANDARD OF REVIEW

In ruling on a motion to dismiss under Rule 12(b)(1), a court "must accept as true all material allegations in the complaint." Shipping Fin. Serv. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998) (citation omitted). A court must not draw inferences from the pleadings favorable to the party asserting jurisdiction, id., and may refer to evidence outside the pleadings. Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). A plaintiff has the burden of proving subject matter jurisdiction by the preponderance of the evidence. Id.

In ruling on a motion to dismiss under Rule 12(b)(6), a court accepts as true all allegations of fact and draws all reasonable inferences in the plaintiff's favor. ATSI Communications, Inc. v.

Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). A court, however, "need not accept as true inferences unsupported by facts in the complaint or legal conclusions cast as factual allegations." See Int'l Ctr. for Tech. Assessm't v. Thompson, 421 F. Supp. 2d 1, 9 (D.D.C. 2006) (citation omitted). A court may consider any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference, required public disclosure documents, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit. Id. To survive a Rule 12(b)(6) motion, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2007) (quoting Bell Atl. Corp. v. Twombly, 555 U.S. 544, 570 (2007)). The complaint must set forth sufficient factual allegations "to raise a right to relief above the speculative level." Twombly, 555 U.S. at 555.

ARGUMENT

I.

BECAUSE THERE IS NO WAIVER OF SOVEREIGN IMMUNITY, THE ACTIONS SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

The well-settled doctrine of sovereign immunity bars suits against the United States, except to the extent that the United States consents to be sued. Lehman v. Nakshian, 453 U.S. 156, 161 (1981). A court must therefore find that a plaintiff has identified an applicable waiver of sovereign immunity in order to have subject matter jurisdiction over claims against the United States. U.S. v. Mitchell, 463 U.S. 206, 212 (1983). The sovereign immunity doctrine extends to agencies and federal officials. See FDIC v. Meyer, 510 U.S. 471, 475 (1994); Hawaii v. Gordon, 373 U.S. 57, 58 (1963).

A waiver of sovereign immunity of the United States "must be unequivocally expressed in statutory text and will not be implied." Lane v. Pena, 518 U.S. 187, 192 (1996) (citations

omitted). Furthermore, waivers of sovereign immunity are "construed strictly in favor of the sovereign" and against waiver. U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 614 (1992).

As set forth below, Plaintiffs allege various grounds for subject matter jurisdiction over the claims against the Federal Defendants. However, none of Plaintiffs' alleged grounds for subject matter jurisdiction waives the sovereign immunity of the United States here. The Court should therefore dismiss the claims against the Federal Defendants in all three complaints for lack of subject matter jurisdiction.

A. Subject Matter Jurisdiction Allegations in Complaints

1. NYS Complaint

In its amended complaint, Plaintiff NYS names all ten of the defendants that comprise the "Federal Defendants" as well as the DRBC Defendants.[5] NYS alleges that its action against the Federal Defendants "arises under" NEPA, the APA, the DRB Compact, and the federal question and mandamus statutes. NYS Complt. ¶ 10. NYS further alleges that this Court has subject matter jurisdiction over the Federal Defendants under 28 U.S.C. § 1331, 28 U.S.C. § 1361, and under Section 15.1(p) of the DRB Compact. Id. ¶ 11. NYS seeks declaratory and injunctive relief from the Federal Defendants pursuant to 28 U.S.C. §§ 2201 and 2202, and the APA. Id. ¶ 11.

2. DRN Complaint

The DRN Plaintiffs name the Army Corps and Brig. Gen. DeLuca as defendants. DRN does not name any of the other federal agencies or officials as defendants. The DRN Plaintiffs also name the DRBC and its Executive Director as defendants.

[5] In its original complaint, Plaintiff asserted that it had not sued the DRBC because the DRB Compact exempts the DRBC from the APA. See NYS Original Complaint ¶ 3.

The DRN Plaintiffs allege that the Court has subject matter jurisdiction over their claims against the Federal Defendants under 28 U.S.C. § 1331, the mandamus statute, and the APA. DRN Complt. ¶ 34. The DRN Plaintiffs seek declaratory and injunctive relief from the Federal Defendants pursuant to 28 U.S.C. §§ 2201 and 2202, and the APA. Id. ¶ 35.

3. Damascus Complaint

Plaintiff Damascus names all ten of the defendants that comprise the "Federal Defendants" as well as DRBC and its Executive Director as defendants in its action.

Damascus alleges that its action "arises under" NEPA, the APA, and the DRB Compact. Damascus Complt. ¶ 8. Damascus further alleges that this Court has subject matter jurisdiction under 28 U.S.C. § 1331 "because it raises a federal question under NEPA, the APA and the Compact." Id. ¶ 9. Damascus also asserts that this Court has jurisdiction under Section 15.1(p) of the DRB Compact "because this action arises under the Compact." Id. Damascus further asserts that this Court has jurisdiction under the mandamus statute "because the statutory duty to comply with NEPA may be enforced by an action in mandamus." Id. Damascus seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, the APA, and the Compact. Id.

B. The DRB Compact Bars Suits Against the United States That Arise Under the Compact.

The DRB Compact does not waive the sovereign immunity of the United States. The DRB Compact vests original jurisdiction in the United States district courts for all cases and controversies arising under the Compact. DRB Compact § 15.1(p). To the extent that the DRBC has consented to sue and be sued under the Compact, this jurisdiction pertains to suits against the DRBC, and not to suits against signatory parties of the DRBC. See Oley Tp. v. DRBC, 906 F. Supp. 284, 286-87 (E.D. Pa. 1995) (Section 15.1(p) pertains to suits against

DRBC and not against Pennsylvania as signatory party of DRBC); see also DRB Compact §§ 3.3, 3.8, 4.3, 10.6 (certain specific actions of DRBC "shall be subject to judicial review in any court of competent jurisdiction"). See generally id. § 14.1(a)(1) ("the commission, for purposes of this compact, may . . . sue and be sued in all courts of competent jurisdiction").

Contrary to Plaintiffs' allegations, neither Section 15.1(p) nor any other language of the Compact provides for jurisdiction for suits against the United States or its agencies or officials based on the federal government's participation in the Compact. Rather, Section 15.1(p) of the DRB Compact expressly states to the contrary, in providing that "[n]othing contained in the Compact or elsewhere in this Act shall be construed as a waiver by the United States of its immunity from suit." DRB Compact § 15.1(p); see Del. Val. Conserv. Ass'n v. Resor, 392 F. 2d 331, 334 (3d Cir.) (holding that Section 15.1(p) of the DRB Compact did not waive sovereign immunity of United States for actions taken in furtherance of proposed development of reservoir project), cert. denied, 393 U.S. 915 (1968); cf. Jacobson v. Tahoe Reg. Planning Agency, 566 F.2d 1353, 1362 (9th Cir. 1977) (there was no language in interstate compact that indicated that Congress had given its consent to suit against United States), aff'd and rev'd in part on other grds., 440 U.S. 391 (1979).

Section 15.1(p) is part of Section 15.1 of the Compact, through which the United States Congress specifically provided that "the consent to and participation in the Compact of the United States is subject to the [] conditions and reservations [set forth under Section 15.1]." See DRB Compact § 15.1. As such, Congress expressly conditioned the participation of the federal government in the Compact on the non-waiver of the sovereign immunity of the United States. The Compact therefore does not provide a waiver of sovereign immunity for Plaintiffs' claims against the Federal Defendants. Cf. Oley Township, 906 F. Supp. at 286-87 (action could not be

brought against state of Pennsylvania based on its participation in the DRB Compact because Pennsylvania had not waived its Eleventh Amendment immunity from suit).

C. The Federal Question, Declaratory Judgment, Mandamus and NEPA Statutes Do Not Waive the Sovereign Immunity of the United States.

Nor do any of the other statutes that Plaintiffs identify constitute a waiver of the sovereign immunity of the United States. Neither the federal question statute, 28 U.S.C. § 1331, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, nor the mandamus statute, 28 U.S.C. § 1361, provides an independent basis of jurisdiction, and, thus, none waives the sovereign immunity of the United States for the claims asserted against the Federal Defendants herein. See Mack v. U.S., 814 F.2d 120, 122 (2d Cir. 1987) (federal question statute); Smith v. Lehman, 533 F. Supp. 1015, 1018 (E.D.N.Y.) (Declaratory Judgment Act), aff'd, 689 F.2d 342 (2d Cir. 1982), cert. denied, 459 U.S. 1173 (1983); Watson's Estate v. Blumenthal, 586 F.2d 925, 934 (2d Cir. 1978) (mandamus statute).

Further, there is no waiver of sovereign immunity in NEPA, and it does not provide a private right of action. See Karst Env'tl. Educ. and Prot'n, Inc. v. EPA, 475 F.3d 1291, 1295 (D.C. Cir. 2007). Rather, a NEPA claim must be brought under the judicial review provisions of the APA, and must fall within the APA's limited sovereign immunity waiver to establish jurisdiction over agencies and officials of the United States. See id. The APA's limited waiver does not apply here.

D. There is No Jurisdiction Over the Claims Against the Federal Defendants Under the APA.

Under the APA, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review." 5 U.S.C. § 704. For the APA to be applicable, a court must therefore find, *inter alia*, that there is an "action"

taken by an "agency" and that such "agency action" is "final."

1. Plaintiffs Have Failed to Allege an "Agency Action" by the Federal Defendants.

In their complaints, Plaintiffs define the "Action" being challenged as "[t]he development of the DRBC Regulations authorizing natural gas development within the Basin under the Compact." See NYS Complt. ¶ 95; DRN Complt. ¶153; Damascus Complt. ¶ 84. Plaintiffs further allege that "the DRBC is a federal agency, is drafting and promulgating the regulations, and is responsible for their implementation." See NYS Complt. ¶ 95; Damascus Complt. ¶¶ 72, 84; DRN Complt. ¶ 140. As such, Plaintiffs themselves admit that the purported "Action" that they seek to challenge in this action is being undertaken by the DRBC, and not by the Federal Defendants. This alone is enough to dismiss the Plaintiffs' claims against the Federal Defendants.

As Plaintiffs acknowledge, the purported "Action" of the DRBC is not subject to APA review because DRB Compact expressly exempts the DRBC from the APA, but they seek to circumvent that bar by suing the Federal Defendants. See Compact § 15.1(m); NYS Complt. ¶ 29; DRN Complt. ¶ 40; Damascus Complt. ¶ 27. As set forth below, a NEPA claim cannot be brought against the DRBC because the APA is the only means of obtaining judicial review of a NEPA claim. See Point V, below. A NEPA claim cannot be brought against the DRBC for the further reason that it is not a federal agency. See DRBC Defendants' memorandum of law in support of their motion to dismiss, dated November 1, 2011 ("DRBC Mem."), at Point II(C). Plaintiffs nevertheless attempt to make an end run around this express bar against alleging a NEPA violation against the DRBC by (i) alleging a NEPA violation against the defendant federal agencies and officials, and (ii) improperly seeking to utilize the mandamus statute – which is not available for a claim under NEPA, see Point V, below – to allege a NEPA violation against the

DRBC.

Plaintiffs attempt to attribute to the Federal Defendants the actions of the DRBC in developing and proposing the regulations in an effort to support their erroneous legal conclusion that the Federal Defendants have undertaken an "agency action" that is subject to judicial review. Because, as demonstrated below, Plaintiffs assert legal conclusions of "agency action" that are improperly cast as factual allegations in their complaints, see Int'l Ctr., 421 F. Supp. 2d at 9, the Court should not accept such legal conclusions as true on the instant motion.

For example, Plaintiffs assert the following legal conclusions, improperly cast as factual allegations, about the Federal Defendants' purported role in relation to the "Action": (1) "[Federal Defendants] play a significant role in conducting, approving and implementing the Action;" (2) "[Federal Defendants] "have 'jurisdiction by law' over the Action because they have authority to approve the DRBC Regulations and, in doing so, to prevent all other federal agencies from taking actions with regard to water and related land resources in the Basin that substantially conflict with such regulation;" (3) Federal Defendants "approved the commencement of the Action" by voting to approve the DRBC's drafting, publication, and modification of the regulations; and (4) Federal Defendants "helped carry out the Action" by making the proposed regulations available for public comment on the NPS website and participating in Commission meetings and discussions about the regulations. See, e.g., NYS Complt. ¶¶ 96, 98-100; DRN Complt. ¶¶ 153, 154, 157; Damascus Complt. ¶¶ 85, 86, 88. Plaintiffs further erroneously assert that Defendants Army Corps, Colonel Larsen, DOI, FWS, and/or NPS have "decision-making authority under the Compact." See NYS Complt. ¶¶ 16, 17, 18, 20; DRN Complt. ¶ 32; Damascus Complt. ¶¶ 14, 15, 17.

In so contending, Plaintiffs mischaracterize the role of the Federal Defendants under the

Compact. Contrary to Plaintiffs' allegations, the Federal Defendants have neither "authority to approve" the DRBC's development and proposal of these regulations nor "decision-making authority under the Compact." Rather, as noted, pursuant to the express, unambiguous terms of the DRB Compact, the Federal Commissioner, like the other Commissioners, has just one of five votes. DRB Compact § 2.5. Further, the structure of the DRB Compact provides for a majority vote with no veto power by any member. Id. As such, the Federal Defendants do not have "decisionmaking" or "approval authority" over the DRBC's issuance of the regulations any more than Plaintiff NYS or any other commissioner does. Cf. Ramsey v. Kantor, 96 F.3d 434, 443 (9th Cir. 1996) (federal participation in interstate compact is not sufficient to federalize project for purposes of NEPA); Almond Hill School v. U.S.D.A., 768 F.2d 1030, 1039 (9th Cir. 1985) (same with respect to federal participation in state entity). Stated simply, the Federal Defendants do not – and cannot -- cause the regulations to issue or not to issue, or veto a decision of the DRBC.

Further, Plaintiffs NYS and Damascus erroneously refer to the Federal Defendants collectively in their generalized allegations of a NEPA violation against them. See, e.g., NYS Complt. ¶¶ 98, 99-107; Damascus Complt. ¶¶ 86, 88-94. They do not, however, identify a specific action by any single one of the agencies or officials, with the possible exceptions of citing to the vote by the federal Commissioner in favor of commencement of the development of the regulations, referring to Brig. Gen. DeLuca's response to NYS Attorney General Schneiderman's letter. See NYS Complt. ¶¶ 52, 59; Damascus Complt. ¶ 56. The other allegations about individual defendant federal agencies or officers are in the "parties" section, and in NYS's complaint, in references to statements that have been made by NPS, FWS and EPA. NYS Complt. ¶¶ 16-24, 51, 67; DRN Complt. ¶¶ 31-32; Damascus Complt. ¶¶ 13-23. Not one of these allegations could possibly constitute "agency action" by one or more of the federal

defendants within the meaning of the APA judicial review provision. See 5 U.S.C. § 551 ("agency action" defined in APA as rule, order, license, sanction, relief, or equivalent or denial thereof).

The bottom line is that the limited role of the federal government as one of five commissioners of the DRBC with equal voting power and no veto power does not transform the actions of the DRBC in developing and proposing the regulations into an "agency action" of the Federal Defendants that is subject to judicial review under the APA. See N.Y. v. Atlantic Marine Fisheries Comm'n, 609 F.3d 524, 535 (2d Cir. 2010) (court held that federal involvement in congressionally approved interstate compact did not transform interstate entity into federal entity subject to suit under APA); cf. Public Citizen v. U.S. Trade Rep., 5 F.3d 549, 553 (D.C. Cir. 1993) (court held that President's submission of trade agreement to Congress was not an action of an "agency" subject to suit under APA), cert. denied, 510 U.s. 1041 (1994). For this reason alone, the APA's limited waiver of sovereign immunity does not apply to Plaintiffs' respective claims against the Federal Defendants.

2. Plaintiffs Have Failed to Allege a Final Agency Action Because the DRBC Has Not Completed the Rulemaking Process.

Moreover, the "Action" that Plaintiffs challenge -- besides being fatally flawed because it is not an action of the Federal Defendants -- is not "final" within the meaning of the APA. Rather, as Plaintiffs concede in their complaints, the DRBC has not completed the rulemaking process and the regulations have not been issued. NYS Complt. ¶¶ 1, 54, 93, 99, 101; Damascus Complt. ¶ 4, 72, 89; DRN Complt. ¶¶ 2, 105, 107, 127-129, 137, 140-41, 157. For an agency action to be final, "[f]irst, the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And, second, the action must be one

by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted).

The "decisionmaking process" for the DRBC regulations has not "consummated," and the challenged "Action" is "preliminary, procedural or intermediate." See Lunney v. U.S., 319 F.3d 550, 554 (2d Cir. 2003). Further, draft regulations do not represent an "action . . . by which rights or obligations have been determined, or from which legal consequences will flow." See Bennett, 520 U.S. at 178.

In the absence of an action by the Federal Defendants that is final, the APA's limited waiver of sovereign immunity is not applicable and, thus, there is no jurisdiction over Plaintiffs' claims against the Federal Defendants under the APA.[6]

II. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIMS AGAINST THE FEDERAL DEFENDANTS

The complaints should be dismissed on the additional ground that Plaintiffs have not met their burden of demonstrating that they have standing under Article III of the Constitution. See Summers v. Earth Island Instit., 555 U.S. 488, 493 (2009) (plaintiff has burden of demonstrating standing). "Article III standing [is] . . . a limitation on the authority of a federal court to exercise jurisdiction." Alliance for Env'tl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F. 3d 82, 89 (2d Cir. 2006). As such, "the proper procedural route" for a challenge to Article III standing "is a motion under Rule 12(b)(1)." Id. Because standing is a component of jurisdiction, the Court must consider the standing basis of each of the three consolidated complaints separately. See Cole, 563 F.2d at 38.

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[6] The Second Circuit has treated the APA final agency action requirement as jurisdictional. See Air Espana v. Brien, 165 F.3d 148, 152 (2d Cir. 1999). In light of subsequent Supreme Court precedent, it has more recently raised, but declined to answer, the question whether the requirement is jurisdictional, or rather an essential element of an APA claim for relief. See Sharkey v. Quarantillo, 541 F.3d 75, 87-88 & n. 10 (2d Cir. 2008).

To meet their burden of establishing standing, Plaintiffs must demonstrate that: (1) they have suffered an "injury in fact" – an invasion of a judicially cognizable interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the [Federal Defendants] and not the result of some independent action of some third party not before the Court; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Where, as here, the challenged proposed regulations neither require nor forbid any action on the part of any of the plaintiffs, standing is "substantially more difficult to establish." Summers, 555 U.S. at 493-94 (citation omitted).

A. Plaintiff New York State Lacks Standing To Pursue Its Action

Plaintiff NYS asserts that it "brings this action in its proprietary capacity and as parens patriae on behalf of its citizens and residents to protect public health, safety, welfare, and the environment." NYS Complt. ¶ 13. NYS further alleges that it "brings this action to protect its waters, air quality, climate, public health, landholdings within the Basin, and other proprietary interests which have been placed at risk by Defendants' NEPA violations and to vindicate the State's procedural rights under that statute." Id. ¶ 9.

1. The *parens patriae* bar against actions by states against the United States precludes NYS's claims against the Federal Defendants.

In the proper circumstances, the doctrine of *parens patriae* standing permits a state to sue to protect "the health and well-being – both physical and economic – of its residents." See Alfred L. Snapp & Sons v. Puerto Rico, 458 U.S. 592, 607 (1982). "A state does not have standing as *parens patriae* to bring an action against the Federal Government," however, because in such a situation, "it is the United States, and not the State, which represents the [citizens] as *parens*

patriae." Id. at 609, n. 16 (citations omitted); see Pa. v. Kleppe, 533 F.2d 668, 676-77 (D.C. Cir.), cert. denied, 429 U.S. (1976). Therefore, NYS's alleged "injury in fact" cannot be based on *parens patriae* interests in this case. See, e.g., Mich. v. EPA, 581 F.3d 524, 529 (7th Cir. 2009); Wyoming v. Lujan, 969 F.2d 877, 883 (10th Cir. 1992); Nevada v. Burford, 918 F.2d 854, 858 (9th Cir. 1990), cert. denied, 500 U.S. 932 (1991); Iowa v. Block, 771 F.2d 347, 354-55 (8th Cir. 1985), cert. denied, 478 U.S. 1012 (1986).[7]

Despite the labels that NYS gives to the interests it seeks to assert in this action, all of the interests it asserts are *parens patriae* interests in "the health and well-being – both physical and economic – of its residents." See Snapp, 458 U.S. at 607. For example, NYS asserts what it labels "proprietary interests" in the "River and State wildlife, the State's boat launches, fishing access sites, wildlife viewing facilities, the Mongaup Valley Bird Conservation Area, Route 97, and other New York interests in land in the Upper Delaware." NYS Complt. ¶ 78. NYS further asserts what it also labels "proprietary interests" in its air quality, Medicaid program, and compliance with the State Implementation Program under the Clean Air Act. Id. ¶¶ 86, 90. NYS also alleges interests that are not labeled in the complaint. See id. ¶¶ 63-74 (NYC drinking water);[8] 76 (New Yorkers' enjoyment of fishing, recreational boating, birding, hiking, camping

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[7] But see City of New York v. Heckler, 578 F. Supp. 1109, 1122-23 (E.D.N.Y.), aff'd on other grounds, 742 F.2d 729 (2d Cir. 1984), aff'd on other grounds, 476 U.S. 467 (1986). One of the primary cases on which the City v. Heckler court relied for support was reversed by the Ninth Circuit on *parens patriae* grounds. See Nevada, 918 F.2d at 858 (reversing Wash. Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142, 1153 (9th Cir.), cert. denied, 423 U.s. 836 (1975)). See generally Connecticut v. American Elec. Power Co., Inc., 582 F.3d 309, 334-39 (2d Cir. 2009) (court analyzed state *parens patriae* standing in the context of claims by states against private defendants and did not address state *parens patriae* standing against federal government), aff'd on standing grds. by an equally divided court and rev'd on other grds., 131 S. Ct. 2527 (2011).

[8] NYS also seeks to assert an interest in New York City's drinking water. See NYS Complt. ¶¶ 5, 63-74. If NYS seeks to assert a *parens patriae* interest in the NYC watershed, it is precluded by the *parens patriae* bar described above. If, alternatively, NYS seeks to assert a proprietary interest in New York City's drinking water, NYS cannot do so because it has alleged that the City – and not the State – of New York has spent monies on the Delaware sub-watershed. See id. ¶¶ 5, 65-67.

and sightseeing on the Upper Delaware River and their "use of facilities owned and/or operated by the State in doing so"); id. (citation to finding of NYS legislature that all fish and wildlife in the state, except those in private ownership, are owned by the state and held for the use and enjoyment of the people of the state); 78 ("health, safety and welfare of New Yorkers who use the River for contact recreation"); 81-90 (air pollution); 91-93 ("climate change will result in harm to New York's environment, public health, safety and welfare" and unspecified "proprietary interests"). All of these "interests" clearly implicate the *parens patriae* interest rather than the proprietary interest of the state. See Kleppe, 533 F.2d at 671. NYS cannot circumvent the *parens patriae* bar by placing a "proprietary interest" label – or no label at all -- on the interests it alleges. Because NYS has alleged no interests other than *parens patriae* interests, it is barred altogether from pursuing its action against the Federal Defendants.

2. Even if the Court Found a Non-*Parens Patriae* Interest, NYS Has Not Alleged a Cognizable Injury In Fact.

Even if the Court somehow found NYS to have alleged a non-*parens patriae* interest, NYS's allegations of threatened harm to its purported interests are conjectural and hypothetical, and not actual or imminent. See, e.g., NYS Complt. ¶¶ 67, 73, 78, 90, 93. NYS assumes that the DRBC will issue regulations governing natural gas development, and that the development of gas wells within the DRB would proceed in a manner that would risk harm to its purported "proprietary interests." See, e.g., id. ¶¶ 78, 93. NYS does not, however, identify any specific development sites in the nearly 14,000-square-mile, multi-state DRB, or the manner in which those sites would impact its alleged interests. Further, as described in detail in the memorandum of law of the DRBC Defendants in support of their motion to dismiss the amended complaint of NYS, to the extent that NYS retains regulatory authority over natural gas development within its own

borders under the DRBC's natural gas development regulations, NYS fails to allege how the proposed regulations would harm any interests of NYS at all. At bottom, NYS assumes that the DRBC necessarily will approve unidentified future natural gas development sites with inadequate protection of NYS's interests. Allowing NYS to proceed on this hypothetical possibility would impermissibly transform standing into "an ingenious academic exercise in the conceivable." Summers, 555 U.S. at 499 (citation omitted).

NYS's allegation of procedural injury, see NYS Complt. ¶ 9, does not save its claim from dismissal. As the Supreme Court has aptly held, "deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing." See Summers, 555 U.S. at 496. As such, an allegation of procedural injury alone is not enough; a plaintiff must still show that "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." See Lujan, 504 U.S. at 573, n. 8; see also Lee v. Bd. of Govs., 118 F.3d 905, 911 (2d Cir. 1997) ("procedural irregularity . . . does not dispense with the constitutional requirement that the plaintiff be among the injured") (citation omitted). Here, although Plaintiff NYS has alleged a violation of NEPA, it has not alleged a concrete, particularized, cognizable interest that is actually and imminently affected by the DRBC's development and proposal of regulations.

3. NYS Has Failed to Allege that Its Purported Injury is Fairly Traceable to the Federal Defendants or That Its Purported Injury Is Redressable By An Order Against Them.

Nor are NYS's allegations sufficient to meet Article III's requirement that its alleged injuries are "fairly traceable" to an action by the Federal Defendants. First, the alleged start of Plaintiff NYS's causation chain – the "Action" of "the development of the DRBC Regulations authorizing natural gas development within the Basin under the Compact," see NYS Complt. ¶

95 – is not an "action" by the Federal Defendants. As noted, the DRBC can issue regulations on the basis of a majority vote of the five members of the Commission, and the federal Commissioner (like the NYS and other state Commissioners) has one single vote, with no veto power over a decision by the DRBC. Thus, any hypothetical injuries that NYS may suffer are attributable to the potential future decision by the DRBC (in which NYS has a representative) to issue the regulations and not any action by the Federal Defendants. Stated differently, the vote by the federal Commissioner on the DRBC does not "cause" the regulations to issue, and the federal Commissioner cannot veto a vote by the DRBC as a whole.

Further, NYS's allegations of causation are based on its conclusory and speculative assertions that large-scale development of natural gas wells "will likely proceed . . . under the DRBC Regulations" and that such development "would risk harm" to its interests. See, e.g., NYS Complt. ¶ 77-78. NYS provides no specifics about that asserted development and, thus, there is no actual and concrete injury from which the Court can attempt to trace causation to the Federal Defendants. In addition, as noted above and in DRBC's motion to dismiss the amended complaint, NYS can prevent any harm to its interests by exercising its own regulatory authority over natural gas development in the state.

Finally, and for similar reasons, NYS lacks standing because its alleged injuries are not redressable in its action. See generally N.Y. Coastal Partnership, Inc. v. U.S. DOI, 341 F.3d 112, 116-118 (2d Cir. 2003), cert. denied, 546 U.S. 820 (2005). Boiled down to its essence, NYS seeks to stop the DRBC (in which it has a representative) from issuing regulations governing natural gas development before a "draft EIS for development of the DRBC Regulations" is prepared. See NYS Complt. at pg. 40, ¶ (a). In a misguided attempt to accomplish this objective, NYS seeks, among other things, to enjoin the Federal Defendants to "promptly

prepar[e] a draft EIS subject to public comment . . . and tak[e] all further measures required by NEPA" and to "immediately to cease approving or carrying out any aspect of the Action until they have complied with their obligations under NEPA." Id. at pg. 40 ¶¶ (d) & (e). Contrary to NYS's conclusory assertions, however, the Federal Defendants do not "approve" or "carry out" the DRBC's regulations. Rather, as noted, the federal Commissioner has only one vote of five on the DRBC, with no veto power, and the DRBC can issue the regulations on the basis of a majority vote of the members of the Commission. DRB Compact §§ 2.2 & 2.5; NYS Complt. ¶ 27. As such, the federal Commissioner has no more – or less -- power to "approve" – or, for that matter, "disapprove" -- the DRBC's regulations than does the Commissioner of Plaintiff New York State, or the other Commissioners of the DRBC.

Thus, there is simply no redress available against the Federal Defendants that would enjoin the DRBC from issuing the regulations, whether or not the Federal Defendants conducted a review of the regulations or even whether or not the Federal Commissioner voted in favor of their issuance. Either way, the goal of stopping the DRBC from issuing the regulations cannot be accomplished through a judgment against the Federal Defendants. Cf. Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1226-27 (9th Cir. 2008) (alleged violation not redressable against administrative agency where ultimate decision was made by Executive Branch). For all of these reasons, NYS lacks standing and its action should be dismissed.

B. The DRN Plaintiffs Lack Standing to Pursue Their Action.

To establish associational standing, an organizational plaintiff such as the three organizations that are plaintiffs in the DRN Action must show either that it has "representational standing," or "organizational standing." See Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982). Under the theory of "representational standing," an organization can sue on behalf of its

members if it can demonstrate that: (1) "its members would otherwise have standing to sue in their own right;" (2) "the interests at stake are germane to the organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),. Inc., 528 U.S. 167, 181 (2000); Bano v. Union Carbide Corp., 361 F.3d 696, 713 (2d Cir. 2004). Thus, an organization must first establish that at least one identified member has suffered an injury in fact sufficient to satisfy the first requirement for representational standing. See Summers, 555 U.S. at 498; Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

Under the theory of "organizational standing," an organization can "have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." NYCLU v. NYCTA., __F.3d __, 2012 WL 10972, at *6 (2d Cir. Jan. 4, 2012) (citation omitted). "To qualify, the organization itself 'must meet the same standing test that applies to individuals.'" Id. (citation omitted).

The DRN Plaintiffs assert the following:

- **Delaware Riverkeeper Network** ("DRN") asserts that it is a non-profit organization that engages in, *inter alia*, streambank restorations, a volunteer monitoring program, educational programs, advocacy, recreational activities, and "environmental law enforcement efforts" and that its "more than 8,000 members" have "interests in the health and welfare of the Delaware River and its watershed." DRN Complt. ¶ 8.

- **The Delaware Riverkeeper** is an individual, Maya van Rossum, who asserts that she is a "full-time, privately funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed." Id. ¶ 9; see id. ¶¶ 10-15.

- **Riverkeeper, Inc.** asserts that it is a not-for-profit organization with a "mission [that]

includes safeguarding the environmental, recreational and commercial integrity of the watershed that provides New York City its drinking water, a portion of which is in the Delaware River Basin." Id. ¶ 16.

- **The Hudson Riverkeeper** is an individual, Paul Gallay, who asserts that he is a "full-time, privately-funded ombudsman" who "advocates for the protection of the New York City Watershed, including the portion in the Delaware River Basin." Id. ¶ 20; see id. ¶¶ 17-19, 20-21.

- **National Parks Conservation Association** ("NPCA") asserts that it is a not-for-profit corporation that has an interest is in "protecting and enhancing the National Park System." Id. ¶ 23. It further asserts that it is engaged in "lobbying campaigns and coordination with environmental groups, government agencies, and legislators, as well as, participation in the government agency decision-making process for actions potentially impacting natural resources," and that it "works on projects that protect and enhance national parks, including national park properties in the Delaware River Basin." Id. ¶¶ 23-24. It also alleges that its members "enjoy the open space, recreation, views and experiences available at the park properties in the Basin." Id. ¶ 25; see also id. ¶¶ 26-28 (further describing the activities of the NPCA).

1. The Organizational Plaintiffs in the DRN Action Lack Standing to Pursue Their Claim Against the Federal Defendants Because They Have Not Alleged a Cognizable Injury in Fact.

The DRN organizational plaintiffs assert that they "bring this action on [their] own behalf and on behalf of [their] members, board, and staff." Id. ¶¶ 8, 16, 27. They assert that their "missions include protecting the resources of the Delaware River Basin through educating their members and the general public on the consequences of government action or inaction for these resources." Id. ¶ 163. They also allege that their members "rely on the resources of the

Delaware River Basin for aesthetic, professional, commercial, scientific and recreational interests as well as for drinking water." Id. They further contend that the failure of the Army Corps and Brigadier General DeLuca to perform a NEPA analysis "has denied Plaintiffs of the right to understand the impacts of natural gas development on these resources, to educate members on these impacts, to comment and testify on the likely impacts of the Draft Regulations, and to suggest what revisions to the Draft Regulations are needed to protect these resources." Id.

The organizational plaintiffs in the DRN Action appear to assert a procedural injury, along with a subset of a procedural injury that some courts have called an "informational injury." As noted, the Supreme Court has made clear that a procedural injury cannot be asserted *in vacuo*; a plaintiff still must show that it has a concrete interest that is affected by the deprivation. See Summers, 555 U.S. at 496, and discussion above at pp. 17-18, above, which is incorporated by reference herein. Although the DRN plaintiffs have asserted a procedural injury in the form of an alleged violation of NEPA, they have not asserted a concrete, particularized, cognizable interest that is actually and imminently affected by the DRBC's development and proposal of the natural gas development regulations without an EIS.

Similarly, "informational harm, without more, does not confer standing in a NEPA case as it is inconsistent with the requirement of establishing a concrete and particularized harm." See Atlantic States Legal Found'n v. Babbitt, 140 F. Supp. 2d 185, 194 (N.D.N.Y. 2001). If an assertion of lack of information about environmental impact and damage to the organization's interest in disseminating information were enough, "[i]t would potentially eliminate any standing requirement in NEPA cases." See Found'n of Econ. Trends v. Lyng, 943 F.2d 79, 84-85 (D.C. Cir. 1991).

The fact that DRN, Riverkeeper, Inc. and NPCA are organizations does not change the Article III analysis in this regard; as the Supreme Court has aptly held, "[a]n organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." Simon v. E. Ky. Welfare Rts. Orgn, 426 U.S. 26, 40 (1976) (citations omitted); accord Campbell v. Jilik, 2010 WL 2605239, at *3 (N.D. Wash. June 25, 2010). An organization does not have standing to challenge federal agency action simply because it has an organizational interest in environmental protection. Sierra Club, 405 U.S. at 739. A "'mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." Id. Frustration of an organization's objectives "is the type of abstract concern that does not impart standing." NTEU v. U.S., 101 F.3d 1423, 1429 (D.C. Cir. 1996) (citation omitted). The DRN organizational plaintiffs' failure to assert concrete and demonstrable injuries to their organizational activities beyond "a setback to the organization's abstract societal interests," Havens, 455 U.S. at 379, dooms their effort to establish organizational standing.

The allegations in the DRN Complaint that appear to attempt to establish a concrete interest fail to allege an injury in fact cognizable under Article III. See DRN Complt. ¶¶ 90-92, 94, 96, 97, 105, 107, 137. The DRN Plaintiffs' allegations share the fatal flaw of the allegations of NYS as to alleged impacts of the DRBC's proposed regulations in that they are conjectural and hypothetical and not actual or imminent. See discussion above, at pg. 17, above, incorporated by reference. These allegations also fail because they are not individualized in that they do not assert that any of these threats are particular to their members or to the organization, as distinguished from the public as a whole. It is well settled that "[a] generally available grievance

about government – claiming only harm to his and every citizen's interest in proper application of . . . the laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy." See Lujan, 504 U.S. at 573-74; see also Warth v. Seldin, 422 U.S. 490, 499 (1975).

1. The DRN Plaintiffs Have Failed to Assert that their Alleged Injury Is Fairly Traceable to the Federal Defendants or Redressable Against Them.

Because there is no discernible allegation of an injury in fact against the Federal Defendants, it is not possible to address whether the DRN Plaintiffs have sufficiently pled that an alleged injury is "fairly traceable" to the Federal Defendants. To the extent the DRN Plaintiffs assert, however, that the DRBC's proposal of regulations without a NEPA review is "traceable" to the Federal Defendants, the DRN complaint would suffer from the same infirmity as the NYS Complaint in that the federal Commissioner does not "cause" the DRBC regulations to be proposed by his single vote of five Commissioners, and he cannot veto a vote by the DRBC as whole. To the extent that the DRN Plaintiffs intend to assert as such, the Federal Defendants incorporate by reference the discussion above as to the absence of causation. See Point II(A)(3), above, at pp. 18-19.

With respect to redressability, at first blush, the DRN Action may appear to present a different analysis than the NYS action because the DRN Plaintiffs direct their plea for relief from the Federal Defendants to the officer who is the *ex officio* federal member of the DRBC, and not to the other Federal Defendants named in the NYS and Damascus Actions. Although this may remove one of the infirmities of the NYS Complaint, it does not obviate the fundamental misstep of all of the complaints as to relief sought from the Federal Defendants: because the federal Commissioner does not – and cannot – cause the regulations to be issued or not be issued, and he

cannot veto any vote by the DRBC as a whole, any relief directed at the federal Commissioner will not provide the redress Plaintiffs seek – an EIS and an injunction against action by the Federal Defendants with respect to the regulations. The DRN Plaintiffs' claim against the Army Corps and the federal Commissioner therefore fails on this aspect of standing as well. See Point II(A)(3), above, at pg. 19.

2. The Riverkeeper Individual Plaintiffs Lack Standing Because They Cannot Assert The Interests of Third Parties in their Action.

The Delaware Riverkeeper, Maya van Rossum, and the Hudson Riverkeeper, Paul Gallay, are individual plaintiffs who appear to rely on their self-described roles as "full-time, privately-funded ombudsmen" in an effort to establish standing for themselves as plaintiffs. See DRN Complt. ¶¶ 9, 20. As a general rule, an individual plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth, 422 U.S. at 499. This is not a constitutional mandate, but, rather, a "prudential limitation created by the Courts." Farrell v. Burke, 449 F.3d 470, 494-95 (2d Cir. 2006). This type of "third-party standing" is permitted where a plaintiff can demonstrate (1) "a close relationship to the injured party, and (2) a barrier to the injured party's ability to assert its own interests." W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP, 549 F.3d 100, 109 (2d Cir. 2008).

To the extent that the alleged "injured parties" that the Riverkeeper individual plaintiffs seek to represent are members of the public, they "cannot establish standing simply by asserting a role as public ombudsman." KERM, Inc. v. FCC, 353 F.3d 57, 61 (D.C. Cir. 2003). To the extent that the alleged "injured parties" whom the Riverkeeper individual plaintiffs seek to represent are the members of their respective Riverkeeper organizations, these members are already purportedly represented by the organizational plaintiffs themselves who appear to have identical

interests to the Riverkeeper individuals. Further, there is no barrier to the organizations' ability to assert those interests, as reflected in the organizations' status as plaintiffs in the DRN Action.[9] Therefore, the prudential limitation against third-party standing prevents the Riverkeeper individual plaintiffs from being proper party plaintiffs in this action. For all of these reasons, none of the five DRN plaintiffs has standing to maintain the DRN action and it should be dismissed as well.

C. Plaintiff Damascus Lacks Standing

In its complaint, Plaintiff Damascus asserts that it brings this action "on behalf of its members and itself" in order to "protect the interests of the organization and its members in the environment and ecosystems of the Delaware River Basin from the impacts to the Basin from natural gas development that would be allowed under the DRBC Gas Development Regulations that have been proposed." Damascus Complt. ¶¶ 1, 11. Damascus further asserts that its members "live in and/or own property in the Basin." Id. ¶ 12; see also id. ¶ 11 (members "live, work and recreate in the Pennsylvania and New York portions of the Delaware River Basin"). Damascus alleges that its members have various interests in the Basin, including business owners "that depend on the clean water and air resources of the Basin," "part time residents" who "escape on weekends to their refuge in the upper Delaware River Basin," "avid bird watchers[,] . . . fishermen[,] . . . hunters," and those who do "hiking, biking, or boating" in the Basin. Id. ¶ 12.

This is the sum total of the allegations in the Damascus complaint that appear to pertain to

[9] As shown above, the DRN organizational plaintiffs fail to satisfy Article III standing requirements. This does not mean, however, that the individual plaintiffs have the right to represent the members of the organizations; if anybody is entitled to represent the organizations' members (provided they can meet Article III requirements), it is the organizations themselves under a theory of "representational standing."

standing for Damascus' claim against the Federal Defendants. Damascus does not satisfy any of the three elements of standing, in that it does not set forth a single allegation of concrete, particularized injury to the organization itself or to one of its members, or that some such injury is traceable to an action of the Federal Defendants that can be redressed by this Court.

1. Damascus Has Failed to Allege a Cognizable Injury in Fact.

Damascus' complaint asserts simply that the Federal Defendants have violated NEPA. See Damascus Complt. ¶¶ 83-94. In this regard, the Damascus complaint impermissibly asserts a generalized grievance without asserting that it is a particularized injury to the organization or its members. See Point II(B)(1) at pp. 25-26, hereby incorporated by reference.

In its first claim for relief, which is against the DRBC Defendants only and not against the Federal Defendants, Damascus makes assertions about the alleged impact on Damascus of the DRBC Defendants' "failure to . . . perform a NEPA analysis." Damascus Complt. ¶ 81. These allegations are not incorporated by reference into the second claim for relief, which is against both the Federal Defendants and the DRBC Defendants. See id. ¶ 83 (incorporating by reference paragraphs 1-69, and not paragraph 81). Particularly where, as here, a plaintiff is represented by counsel, the complaint cannot reasonably be read to pertain to the claim for relief against the Federal Defendants.

In the event that the Court nevertheless finds that paragraph 81 is somehow applicable to the claim against the Federal Defendants, the Federal Defendants incorporate by reference (a) the argument above, that a procedural injury must be shown to affect a concrete, particularized interest because, as noted, Damascus has failed to allege a cognizable interest, see Point II(A)(2), at pp. 18-19, and (b) the argument above that an organization's alleged "informational injury" is not cognizable standing alone. See Point II(B)(1), at pp. 24-25. For both of these types of

"procedural injury," Damascus fails to demonstrate the required concrete, particularized interest that is actual and imminent and not conjectural or hypothetical, and, thus, its claim would fail even if the allegations in paragraph 81 had been asserted against the Federal Defendants.

2. Damascus Has Failed to Allege That Its Alleged Injury is Fairly Traceable to the Federal Defendants or Redressable Against the Federal Defendants.

Because there is no discernible injury in fact alleged against the Federal Defendants, it is not possible to address whether Plaintiff Damascus has sufficiently asserted that an alleged injury is "fairly traceable" to the Federal Defendants. To the extent that Plaintiff Damascus attempts to assert that the DRBC's development and proposal of regulations without a NEPA review is "fairly traceable" to the Federal Defendants, the Damascus complaint is deficient in its causation allegations in a similar manner to the complaints of NYS and DRN. The Federal Defendants therefore incorporate by reference the discussion in Point II(A)(3), at 18-19, with respect to causation.

With respect to redressability, the allegations in the Damascus action are flawed in a similar manner to the allegations in the DRN action. The Federal Defendants therefore incorporate by reference the discussion at Point II(A)(3), at pp. 19-20, above, with respect to redressability. For all of these reasons, Plaintiff Damascus lacks standing to pursue its action and it should be dismissed as well.

III. THE ACTIONS ARE NOT RIPE BECAUSE THE CHALLENGED REGULATIONS ARE STILL IN DRAFT FORM AND HAVE NOT BEEN ISSUED

The Court should also dismiss this case on the ground that it is not ripe. "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies.'" Nat'l Park Hosp. Ass'n v. DOI, 538 U.S. 803, 807 (2003) (citation omitted).

The term "ripeness" is "used to describe two overlapping threshold criteria for the exercise of a federal court's jurisdiction" – constitutional ripeness and prudential ripeness. Simmonds v. INS, 326 F.3d 351, 356-57 (2d Cir. 2003). "Constitutional ripeness is a doctrine that, like standing, is a limitation on the power of the judiciary[,] . . . prevent[ing] courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it." Id. at 357. Prudential ripeness is a doctrine whereby "a court declares that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay." Id. (emphasis in original).

Ripeness overlaps with standing in some ways, "most notably in the shared requirement that the [plaintiff's] injury be imminent rather than conjectural or hypothetical." Bronx Household of Faith v. Bd. of Educ., 492 F.3d 89, 111 (2d Cir. 2007) (citation omitted), cert. denied, ___ S. Ct. __, 2011 WL 4479210 (Dec. 5, 2011). The concept of ripeness is distinct from standing, however, in that standing "focuses on the party seeking to get his complaint before a federal court and whether that party suffers a sufficiently direct and concrete injury." Id. (citation omitted). Ripeness focuses on "whether *at the time* of the litigation the issues are 'fit' for judicial decision." Id. (emphasis in original) (citation omitted).

Pursuant to a general framework set forth by the Supreme Court, a court evaluates this "fitness" for judicial decision, as well as whether, and to what extent, the parties will endure hardship if the court withholds consideration. Simmonds, 326 F.3d at 359; see also Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-33 (1998) (describing ripeness considerations). For the "fitness" prong, courts are "concerned with whether the issues to be adjudicated are contingent on future events or may never occur." Simmonds, 326 F.3d at 359 (citation omitted). "Final agency action pursuant to the [APA] . . . is a 'crucial prerequisite' to ripeness" and lack of

final agency action renders a challenged action "unfit" for decision. See Nevada v. Dep't of Energy, 457 F.3d 78, 85 (D.C. Cir. 2006) (citations omitted); accord, Connecticut v. Duncan, 612 F.3d 107, 113-114 (2d Cir. 2010) (not ripe due to lack of final agency action), cert. denied, 131 S. Ct. 1471 (2011); N.Y. v. U.S. Dep't of Health and Human Servs., 2008 WL 5211000, at *10- *12 (S.D.N.Y. Dec. 15, 2008) (same); Norton v. FHA, 2002 WL 31017416, at *2, n. 5 (W.D.N.Y. Aug. 8, 2002) (same).

Here, Plaintiffs' claims are not fit for decision and are not constitutionally or prudentially ripe. The DRBC proposed regulations in December 2010, and carried out a public comment period through April 2011. See NYS Complt. ¶ 54; DRN Complt. ¶¶ 127, 130; Damascus Complt. ¶¶ 3, 61. By Plaintiffs' own admission, the DRBC's rulemaking process has not been concluded. See NYS Complt. ¶¶ 1, 54, 93, 99, 101; Damascus Complt. ¶ 4, 72, 89; DRN Complt. ¶¶ 2, 105, 107, 127-129, 137, 140-41, 157. As such, as noted, Plaintiffs do not allege a final action of anyone, let alone of the Federal Defendants. See Point I(D)(2), at pp. 13-14, hereby incorporated by reference. Because the challenged regulations are in draft form, this is a quintessential example of an issue that is "unfit" for decision in that it is "contingent on future events." See, e.g., Occidental Chem. Corp. v. FERC, 869 F.2d 127, 129-30 (2d Cir. 1989) (court dismissed action as unripe where rulemaking process was pending); cf. Mobil Oil Corp. v. FTC, 562 F.2d 170, 172-74 (2d Cir. 1977) (court dismissed action as premature where adjudicatory proceeding was pending). For similar reasons, Plaintiffs cannot be found to endure "hardship" if a decision is delayed on their claims against the Federal Defendants until (or unless) there is a final agency action taken by the Federal Defendants.

In sum, if the Court issued a decision at this time, it would be "declaring the meaning of the law in a vacuum and [] constructing generalized legal rules," which would contravene the limits

of Article III jurisdiction. See Simmonds, 326 F.3d at 357. It would also contravene prudential limits on a court's jurisdiction for a court to adjudicate the claim against the Federal Defendants in the absence of a final agency action of the Federal Defendants. For these reasons, the case should additionally be dismissed because it is not ripe.

IV. EVEN IF THE COURT FOUND JURISDICTION, IT SHOULD DISMISS PLAINTIFFS' CLAIMS BECAUSE NEPA IS NOT APPLICABLE TO THE FEDERAL DEFENDANTS HERE

"Under NEPA, an agency is required to provide an EIS only if it will be undertaking a 'major Federal actio[n] which 'significantly affects the quality of the human environment.'" DOT v. Public Citizen, 541 U.S. 752, 763 (2004) (quoting 42 U.S.C. § 4332(2)(C)); see also Karst, 475 F.2d at 1295 ("In the NEPA context, the 'final agency action' required by the APA must . . . be a 'major federal action' under NEPA.") (citation omitted). As Section 4332(2)(C) of NEPA clearly suggests, "[t]o trigger the application of NEPA, an action must be 'federal.'" Rattlesnake Coalition v. EPA, 509 F.3d 1095, 1101 (9th Cir. 2007); see 40 C.F.R. § 1508.18 (major federal actions include "actions which are potentially subject to Federal control and responsibility"). "If there is no 'major Federal action,' that is the end of the inquiry; the agency need not prepare an EIS." Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 53, n. 27 (D.D.C. 2003)(citation omitted). Because the action that Plaintiffs challenge is not "federal action" within the meaning of NEPA, NEPA is not applicable to the Federal Defendants as a matter of law and, thus, Plaintiffs have failed to state a claim against the Federal Defendants.

Here, Plaintiffs assert that the development of the DRBC Regulations authorizing natural gas development within the DRB is a "major federal action" within the meaning of NEPA and allege that: (1) the DRBC is a federal agency; (2) authorization of natural gas development pursuant to the regulations is a "project that is 'conducted, financed and approved' by DRBC" within the

meaning of 40 C.F.R. § 1508.18; (3) the Federal Defendants "play a significant role in conducting, approving, and implementing the Action;" and (4) the Federal Defendants have "'jurisdiction by law' over the Action because they have authority to approve the DRBC Regulations and, in doing so, to prevent all federal agencies from taking action with regard to water and related land resources in the Basin that substantially conflict with such regulations." NYS Complt. ¶¶ 95-98; DRN Complt. ¶¶ 140, 141 (as against DRBC Defendants), 153-155 (as against Federal Defendants); Damascus Complt. ¶¶ 84-87. To maintain a claim against the Federal Defendants, Plaintiffs must allege that the challenged action – the DRBC's development and proposal of natural gas regulations -- constitutes a "federal action" in and of itself for which the Federal Defendants (as opposed to the DRBC) are responsible for complying with NEPA, or that the Federal Defendants played a role in a non-federal activity that "federalizes" it for NEPA purposes and requires the Federal Defendants to comply with NEPA. Where, as here, the DRBC is not a federal agency, and the Federal Defendants do not exercise decisionmaking power, authority, or control over the DRBC's development and proposal of regulations as a matter of law, there is no "major federal action."

1. The DRBC Is Not a Federal Agency.

As a threshold matter, the DRBC is not a federal agency but, rather, a unique entity that is neither federal nor state. As then District Judge Raggi observed with respect to another interstate compact agency, "Compact Clause entities are hybrids, occupying a special position in the federal system." See B'klyn Bridge Park Coalition v. Port Auth. of N.Y. and N.J., 951 F. Supp. 383, 393 (E.D.N.Y. 1997); see also id. (Congressional approval of an interstate compact "does not mean that Congress intends to subsume the Compact Clause agency within the federal government or to subject its operations to general federal regulatory schemes."); Jacobson v.

Tahoe Regional Planning Agency, 566 F.2d 1353, 1362-63 (9th Cir. 1977) (Congressional approval of interstate compact and limited Presidential appointment power do not establish interstate compact agency as agency of the United States), aff'd and reversed in part on other grounds, 440 U.S. 391 (1979); ASMFC, 609 F.3d at 535 ("[T]he fact that federal interests are implicated by activities of the [interstate compact agency] does not transform [it] into a federal agency"). On this point, the Federal Defendants incorporate by reference the arguments set forth in Point II(C) of the DRBC Mem. Because the DRBC is not a federal agency, the challenged action of the DRBC's development and proposal of natural gas development regulations is not a "federal action" in and of itself within the meaning of NEPA but is, rather, a non-federal activity.

2. The Federal Defendants Do Not Have Decision-Making Power, Authority or Control Over the DRBC's Development and Proposal of Regulations As a Matter of Law.

The relevant framework for analyzing the applicability of NEPA to the Federal Defendants here is found in the case law concerning whether alleged federal government involvement in non-federal activity is of a nature and scope sufficient for a non-federal activity to constitute "major federal action." The relevant inquiry is whether the Federal Defendants have the degree of "decision-making power, authority, or control" over the DRBC's development and proposal of the regulations "to render it a major federal action." See Ka Makani 'O Kohala Ohana v. Water Supply, 295 F.3d 955, 960 (9th Cir. 2002). Key to this requirement is that "[t]he touchstone of major Federal activity constitutes a federal agency's authority to influence nonfederal activity. The federal agency must possess actual power to control the nonfederal activity." See U.S. v. Southern Fla. Water Mgmt. Dist., 28 F.3d 1563, 1573 (11th Cir. 1994) (citation omitted), cert. denied, 514 U.S. 1107 (1995); Save Barton Creek Ass'n v. FHA, 950 F.2d 1129, 1134-36 (5th Cir.), cert. denied, 505 U.S. 1220 (1992). This is because "[t]he purpose of NEPA is to 'bring

environmental considerations to the attention of *federal* decision-makers. This presupposes that [the federal agency] has judgment to exercise." Ka Makani, 295 F.3d at 960-61 (emphasis added) (citations omitted); Rattlesnake Coalition, 509 F.3d at 1107 ("The United States must maintain decisionmaking authority over the local plan for it to become a major federal action.").

"While '[t]here are no clear standards for defining the point at which federal participation transforms a state or local project into a major federal action[,] . . . '[m]arginal' federal action will not render otherwise local action federal." Rattlesnake Coalition, 509 F.3d at 1101 (citation omitted). To determine if a non-federal activity constitutes a "major federal action" under NEPA, the Court must examine "the nature of the federal funds used and the degree of federal involvement." Id. Thus, the key question in this case is whether the Federal Defendants have authority to control whether the DRBC's regulations are adopted.

As to this issue, Plaintiffs contend that the Federal Defendants "play a significant role in conducting, approving, and implementing the Action" and that certain Federal Defendants have "decisionmaking authority" over actions proposed to be taken by the DRBC. See NYS Complt. ¶¶ 16-18, 96; DRN Complt. ¶ 32, 153; Damascus Complt. ¶¶ 14, 15, 17, 85. Plaintiffs further assert the legal conclusion that "the [Federal Defendants] have 'jurisdiction by law' over the Action because they have authority to approve the DRBC Regulations and in doing so, to prevent all other federal agencies from taking actions with regard to water and related land resources in the Basin that substantially conflict with such regulations." NYS Complt. ¶ 98; DRN Complt. ¶ 154; Damascus Complt. ¶ 86.[10] These allegations are belied by the DRB Compact and by the

[10] "Jurisdiction by law" is defined as "agency authority to approve, veto, or finance all or part of a proposal." 40 C.F.R. § 1508.15. In order to have "jurisdiction by law," it must first be established that there is a "federal action" over which a federal agency purportedly has such jurisdiction. Because, as demonstrated below, there is no "federal action" here, the question of "jurisdiction by law" need not be reached. In any event, the facts that demonstrate that there is no "federal action" would also demonstrate that the Federal Defendants do not have "jurisdiction by law."

operation and structure of the DRBC.

a. With Just One Vote of Five and No Veto Power, The Federal Commissioner Does Not Have Approval Authority Over the DRBC's Regulations.

As noted, under the DRB Compact, the federal Commissioner has just one of five votes, along with the other four Commissioners representing Plaintiff New York State and the states of Pennsylvania, Delaware, and New Jersey. DRB Compact § 2.2. The structure of the DRB Compact provides for a decision by the DRBC to be done by majority vote of the Commissioners with no veto power by any member. Id. § 2.5. A vote by the federal Commissioner in favor of an action by the DRBC does not make it a "major federal action." See, e.g., Rattlesnake, 509 F.3d at 1102 (Federal agency approval of local plan does not make it "major federal action"); Mayaguezanos por La Salud y El Ambiente v. U.S., 198 F.3d 297, 301-02 (1st Cir. 1999) (same); N.J. DEP v. LIPA, 30 F.3d 403, 417 (3d Cir. 1994) (same with respect to private project); see also Karst, 403 F. Supp. 2d 74, 81 (D.D.C. 2005) ("the power to give nonbinding advice to a nonfederal actor" does not federalize action) (citation omitted), aff'd, 475 F.3d 1291. As such, the Federal Defendants do not have "decisionmaking authority" over actions to be proposed by the DRBC any more than the Commissioner representing Plaintiff NYS or any other Commissioner does. See Ramsey, 96 F.3d at 443 ("mere fact" of federal participation in interstate compact was not sufficient federal involvement to constitute "major federal action"); Almond Hill, 768 F.2d at 1039 (same with respect to federal involvement in actions of state entity).

b. Mere Technical Assistance Does Not Constitute Control Over the DRBC's Actions.

Plaintiff NYS further asserts that Federal Defendants' alleged actions in participating in discussions, meetings and drafting of the DRBC Regulations are relevant to the determination

that the challenged action is a "major federal action" under NEPA. See NYS Complt. ¶¶ 99-100. However, any advice, information or other such technical assistance to the DRBC, does not constitute control over the DRBC's development and proposal of regulations such that it is a "major federal action" for the purposes of NEPA. See Ka Makani, 295 F.3d at 961 (advisory or informational role of federal agencies to local project without control not sufficient to constitute "major federal action"); see also DRB Compact § 15.1(h) (although executive agencies of the United States may agree, or the President may direct them, to perform services for the DRBC, "Nothing in the Compact shall be deemed to require the United States to furnish administrative services or facilities for carrying out functions of the Commission except to the extent that the President may direct."). As one court aptly held, "NEPA applies only when there is federal decisionmaking, not merely when there is federal involvement in non-federal decisionmaking." So. Fla. Water, 28 F3d at 1573.

c. The Federal Defendants Do Not Exercise Authority Over the DRBC's Development and Proposal of Regulations Through Federal Funding.

Neither do the Federal Defendants exercise authority over the DRBC's development of the proposed natural gas regulations. The structure of the DRBC provides for contributions to the DRBC's General Fund Operating Budget by all five of the signatory parties. Compact §§ 13.3; Declaration of Richard C. Gore, dated November 1, 2011 (filed with DRBC Mem.) ("Gore Dec.") ¶ 5. The federal government has not made a contribution to the DRBC's operating budget since 1998, except for fiscal year 2009, when the federal government contributed $715,000 in that single year. Gore Dec. ¶¶ 6-10 & Ex. B thereto. The federal government made no contribution to the DRBC's annual operating budget in fiscal year 2010 or 2011.[11] Id. ¶ 9-10 &

[11] Since 2009, when the DRBC began developing its natural gas development regulations, certain federal agencies

Ex. B thereto.

The DRBC began developing its natural gas regulations in 2009. NYS Complt. ¶ 43; DRN Complt. ¶ 114; Damascus Complt. ¶ 55; Gore Dec. ¶ 11. The total costs associated with the DRBC's development of natural gas regulations to date are approximately $548,200. Id. ¶ 11. These costs are totally accounted for within the DRBC's General Fund and continue to accrue. Id.

During the years 2009 to 2011, during which DRBC was developing its natural gas regulations, total DRBC General Fund revenue equaled $10,639,451. Id. The $715,000 contribution by the federal government to the operating fund over these three years was 6.7%, of which 6.7% equals $36,716. Id.

The very limited degree of federal government funds contributed to the DRBC's General Fund during the DRBC's development of the natural gas regulations, combined with no other indicia of federal government control, are not sufficient to transform the non-federal activity of the development and proposal of the DRBC regulations into a "federal action." For examples of "no major federal action" found, see, e.g., Sancho v. U.S. Dep't of Energy, 578 F. Supp. 2d 1258, 1266-67 (D. Hi. 2008) (less than 10%), aff'd on other grds., 392 Fed. Appx. 610, 2010 WL 3314562 (9th Cir. Aug. 24, 2010); Rattlesnake, 509 F.3d at 1101 (less than 6%); Ka Makani, 295 F.3d at 960 (less than 2%); Village of Los Ranchos de Alberquerque v. Barnhart, 906 F.2d 1477, 1482 (10th Cir. 1990) ("minimal" proportion), cert. denied, 498 U.S. 1109 (1991); Riverfront Garden Dist. Ass'n v. New Orleans, 2000 WL 35801851, at *7 (E.D. La. Dec. 11, 2000) (18%).

Plaintiffs' assertion that a contribution by the federal government to the DRBC was

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have awarded special-purpose grants to the DRBC. No portion of these funds has been allotted to the activities associated with the DRBC's development of natural gas regulations, which have been accounted for exclusively within the DRBC's General Fund. Gore Dec. ¶¶ 12-16.

authorized by the Water Development Act of 2007, Pub. L. 110-114, does not change this conclusion. NYS Complt. ¶ 16; DRN Complt. ¶ 31; Damascus Complt. ¶ 13. Congress did not appropriate the funds at that time, but, rather, as noted, did so in a single subsequent year, 2009. Gore Dec. ¶ 8. Further, speculation about any possible future contributions by the federal government to the DRBC's annual operating budget is not a basis for concluding that an action is a "major federal action." See Rattlesnake, 509 F.3d 1095, 1101-02.

The Federal Defendants simply do not have sufficient control over the outcome of the issuance of the regulations by the DRBC to impose a NEPA obligation on them and, thus, the "Action" that Plaintiffs challenge is not a "federal action" under NEPA. For these reasons, the complaints should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim because NEPA is not applicable to the Federal Defendants as a matter of law.

V. PLAINTIFFS CANNOT ASSERT THEIR NEPA CLAIM AGAINST THE FEDERAL DEFENDANTS UNDER THE MANDAMUS STATUTE

Plaintiffs assert mandamus as one basis of jurisdiction against the Federal Defendants. NYS Am. Complt. ¶¶ 10-11; DRN Complt. ¶ 34; Damascus Complt. ¶ 9. As noted in Point I, the mandamus statute fails to waive the sovereign immunity of the United States. In addition, mandamus is not an appropriate mechanism for asserting a NEPA claim. Rather, a NEPA claim must be brought under the judicial review provisions of the APA. See Karst, 475 F.3d at 1295. Plaintiffs cannot circumvent the limitations on the APA, which doom their claim, by attempting to assert a NEPA claim under the mandamus statute.

The mandamus statute cannot be used to undermine the jurisdictional limitations of more specific statutes. In this case, as noted above, the limitations on the waiver of sovereign immunity in the APA bar this lawsuit. The Supreme Court has cautioned against allowing "artful

pleading" such as "the device of an officer's suit" to be employed to circumvent such "carefully crafted provisions." Block v. North Dakota, 461 U.S. 273, 284-85 (1983). If, for example, a plaintiff could obtain review of any agency action under the mandamus statute, then the provisions of the APA that limit review of agency action would be nullified. For that reason, mandamus has specifically been found to be inappropriate when its use would undermine statutory limits on jurisdiction or waivers of sovereign immunity in the APA, see Drake v. Panama Canal Comm'n, 907 F.2d 532, 534-35 (5th Cir. 1990). It is similarly inappropriate here. Cf. Bennett, 520 U.S. at 173-74 (interpreting Endangered Species Act provision to include suits alleging procedural errors by agency officials inappropriate because it would abrogate final agency action requirement of APA).

Moreover, the "extraordinary remedy of mandamus under 28 U.S.C. § 1361 will issue only to compel the performance of 'a clear nondiscretionary duty.'" Pittston Coal Group v. Sebben, 488 U.S. 105, 121 (1988) (citation omitted) (emphasis added); see also Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980) (mandamus is "drastic" remedy, "to be invoked only in 'extraordinary situations.'") (citation omitted). The plaintiff has the burden to show that its right to mandamus is "clear and indisputable." Id. at 35. As the Supreme Court further explained in Heckler v. Ringer, "The common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." 466 U.S. 602, 616 (1984); accord, Caremark Ther. Servs. v. Thompson, 2003 WL 22513569, at *2 (2d Cir. Nov. 6, 2003).

As shown above, the Federal Defendants have no duty to comply with NEPA here, let alone a "clear, nondiscretionary duty," because there is no "major federal action" here. See Point IV, above. For these reasons, mandamus jurisdiction is precluded.

CONCLUSION

For the reasons set forth herein, the Federal Defendants respectfully request that the Court dismiss the claims against the Federal Defendants in Plaintiffs' complaints in their entirety.

Dated: Brooklyn, New York
January 12, 2012

Respectfully submitted,

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