UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANIMAL WELFARE INSTITUTE; and WILDLIFE PRESERVES, INC., Plaintiffs, v. KELLY FELLNER, in her official capacity as Acting Superintendent of FIRE ISLAND NATIONAL SEASHORE, and the UNITED STATES NATIONAL PARK SERVICE, an agency of the U.S. Department of the Interior, Defendants.	Civil Action No.: 2:17-cv-06952-SJF-AYS

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' COMBINED MOTION FOR EMERGENCY ENFORCEMENT OF THE PARTIES' AGREEMENT AND MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTIVE RELIEF

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INTRODUCTION

Plaintiffs appear before the Court on a matter of life and death for at least 100 deer residing on the William Floyd Estate, which is located in the Fire Island National Seashore ("FINS"). On February 8, 2019, Defendants informed the Court via letter (the "February 8 Letter") of their intent to enact the Deer and Vegetation Management Plan ("Plan"), including the lethal deer control aspect of the Plan, from February 20, 2019, through March 31, 2019. The Plan is the subject of this litigation. Defendants' imminent action is in direct violation of an agreement reached between the parties in February 2018, whereby Defendants agreed that the Plan would not be enacted in so far as deer will not be killed, culled or hunted through the duration of the litigation.

Plaintiffs seek three forms of relief to guard against Defendants' imminent action. First, Plaintiffs seek summary enforcement of the agreement between the parties. The parties entered into a valid, enforceable contract that met the four elements necessary under New York law to form a contract, which Defendants did not dispute in their February 8 Letter. Enforcing the agreement would protect Plaintiffs from Defendants' imminent breach of the agreement and serve the interests of justice.

Plaintiffs also seek a temporary restraining order ("TRO") and preliminary injunction pursuant to their Fourth Claim for Relief based on Defendants' violation of the National Environmental Policy Act ("NEPA") and Fifth Claim for Relief based on Defendants' violation of the National Park Service Organic Act and implementing regulations. Plaintiffs are able to satisfy the elements required to obtain such relief. First, Plaintiffs will experience irreparable injury if Defendants implement lethal control of deer on William Floyd Estate. As one of AWI's members, Mr. John Di Leonardo, attests, he will suffer actual, imminent harm to his long-standing interest in viewing and photographing deer on the William Floyd Estate, which cannot be remedied

through monetary compensation. Second, Plaintiffs are likely to succeed on the merits of their Fourth and Fifth Claims for Relief. Plaintiffs are likely to prevail on their NEPA claim because Defendants failed to consider a variety of reasonable alternatives and failed to disclose, analyze, consider, or discuss other factors, independent of deer, which may impact forest regeneration and vegetation diversity and productivity on FINS. Both of these additional analyses are required, and Defendants' failure to include them renders the Plan's Environmental Impact Statement ("EIS") arbitrary and capricious. Plaintiffs are likely to succeed on their Organic Act claim because in order to permit hunting on FINS, Defendants must first promulgate regulations that are subject to notice and public comments requirements, which Defendants have failed to do. Defendants have also failed to meet the statutory requirement of proving that deer are detrimental to the use of FINS.

Lastly, the balance of the hardships and the public interest weigh strongly in favor of granting Plaintiffs' requested relief because the public has a strong interest in government officials' compliance with the law and because the public is overwhelmingly opposed to lethal management of deer on FINS, as demonstrated by comments received by Defendants on the Plan's Draft EIS ("DEIS").

A TRO and preliminary injunction would preserve the status quo while the Court reviews Plaintiffs' claims on the merits.

FACTUAL BACKGROUND

In June 2011, the National Park Service ("NPS") published a notice in the Federal Register announcing its intent to prepare an EIS for a "Deer and Vegetation Management Plan" for FINS. Am. Compl. at ¶ 32. In 2014, NPS published a notice in the Federal Register announcing the availability of a DEIS for the White-tailed Deer Management Plan on FINS. *Id.* at ¶ 33.

In the DEIS, NPS considered only four alternatives: a no-action alternative (Alternative A), a non-lethal alternative (Alternative B); a lethal control alternative (Alternative C), and a lethal control followed by fertility control alternative (Alternative D). The DEIS also provided the results of a 2008 survey of FINS visitors, which found approximately 50 percent indicated that the opportunity to see deer improved their visitor experience, that 20 percent reported that deer did not affect their visit, 29 percent indicated that they did not observe deer, and that only 2 percent of survey respondents expressed any concerns or complaints about deer. Fire Island DEIS at 108. NPS did not explain what the concerns were for these 2 percent of respondents. *Id.*

NPS accepted public comment on the DEIS until October 10, 2014. Am. Compl. at ¶ 35. NPS received 1,631 comments on the DEIS, 21 of which were not actually comments. *Id.* Of the 1,610 actual comments, 1,442 opposed lethal control, 107 supported lethal control, 11 stated no position, and 50 did not clearly identify a position. *Id.*

In April 2016, FINS issued a Record of Decision for the FINS White-Tailed Deer Management Plan and Final Environmental Impact Statement. *Id.* at ¶ 37. Despite the fact that an overwhelming number of public comments were opposed to lethal control, the Plan approves the killing of deer throughout FINS, including on William Floyd Estate, a portion of FINS, by: a) sharpshooting; b) capture and euthanasia, where sharpshooting would not be safe; and c) public deer hunting. *Id.* at ¶ 38. The Plan indicated that NPS would utilize immunocontraception only after it reduces the deer population to some predetermined level via lethal control. *Id.* The Plan justifies the need for a reduction in deer numbers due primarily to alleged deer impacts to FINS vegetation and to address reported deer-human conflicts. *Id.*

On November 29, 2017, Plaintiffs filed this action against Defendants seeking a declaratory judgment, ejectment and a permanent injunction to protect the land on FINS conveyed to the

United States in 1966 pursuant to deed restrictions that require the land to be maintained in its natural state, operate as a preserve and sanctuary, and prohibit the killing or disruption of any flora or fauna. Plaintiffs also asserted claims against Defendants for violation of NEPA and the Organic Act and implementing regulations.

After Plaintiffs filed the Complaint, in early February 2018, Defendants requested that Plaintiffs agree to extend the time for Defendants to respond to the Complaint by nearly two months. Plaintiffs agreed to this request in exchange for Defendants agreement that the Plan would not be enacted in so far as deer will not be killed, culled or hunted through the duration of the litigation. In addition, Plaintiffs requested that Defendants agree that the fence around Sunken Forest as contemplated by the Plan would not be erected until at least September 30, 2018. Plaintiffs' offer was memorialized in an email from Plaintiffs' counsel to Defendants' counsel, dated February 5, 2018. Defendants agreed to Plaintiffs' offer and memorialized the agreement in a letter to the Court, dated February 5, 2018. Dkt. 14.

On January 3, 2019, AWI received an email via its website from a concerned citizen who overheard two people while on line at a deli discussing a "deer eradication plan" for FINS that "was supposed to start this month but might run into a delay with the government shutdown." Declaration of Catherine Pastrikos Kelly, dated February 15, 2019 ("Kelly Decl. 2"), at 6. Thereafter, on January 21, 2019, Plaintiffs received an inquiry from a reporter at the Fire Island News, Shoshanna McCollum, who received an anonymous tip about a deer "cull" reportedly planned for February or March 2019. *Id.* at 7. Ms. McCollum's article was published on January 29, 2019, and included a quote from NPS stating "Funding for deer reduction in 2019 has been approved." *Id.*

As a result of these communications, on February 1, 2019, Plaintiffs sent an email to Defendants' counsel seeking clarification of the information in the news article and demanding that Defendants cease and desist any plans of deer reduction on FINS immediately, in accordance with the parties' agreement. *Id*. at 8. Rather than honor the parties' agreement, on February 8, 2019, Defendants' counsel sent letters to the Court and to Plaintiffs advising that Defendants intend to proceed with implementing the Plan based on purported "changed" circumstances. Dkt. 35. Defendants did not provide the Court or Plaintiffs with any further explanation. *Id.* On February 11, 2019, NPS announced in a press release that it would implement the Plan starting on February 20, 2019, *only twelve days after notifying Plaintiffs.*

In the press release and a corresponding documents released by NPS entitled "2019 Deer Management Plan Implementation Frequently Asked Questions," ("FAQ") NPS indicated that it would implement "deer removal operations" during a "window of action from February 20 to March 31, 2019 at the William Floyd Estate." Firearm experts from the United States Department of Agriculture, Animal and Plant Health Inspection Service who have "experience in conducting wildlife reduction operations within lands adjacent to a suburban environment would be used to conduct the removal operation." Although not referenced in the press release or FAQ, the Record of Decision indicates that "[b]ait stations will be placed in park-approved locations away from the public use areas to maximize the efficiency and safety of the reduction program." FEIS at 8. The removal operations would be "carried out over a period of at least two years to achieve a deer density of approximately 20 to 25 deer per square mile." As indicated in the FAQ, "distance sampling (ground-based) surveys from 2016-2018 indicate there are approximately 400 deer on Fire Island and 100 deer at the William Floyd Estate." Subsequent lethal control operations on

William Floyd Estate would be undertaken in 2020 and 2021 with such operations to be initiated on FINS in the winter of 2020 if funding is available.

EMERGENCY MOTION FOR ENFORCEMENT OF AGREEMENT

I. Legal Standard for Enforcement of Agreement between Parties

The agreement reached between the parties in this case constitutes, in effect, an interim settlement agreement that is applicable pending final disposition of Plaintiffs' lawsuit. A settlement agreement is intended to resolve some or all of the legal claims of the parties to a lawsuit. The agreement between the parties in this case resolved Plaintiffs' most pressing concern in bringing the lawsuit—the lethal control of deer—for the pendency of the litigation and Defendants' most pressing concern at the time—sufficient time to respond to the Complaint. Therefore, not an exact comparison, it is appropriate for the Court to examine caselaw that governs settlement agreements to resolve this Motion. Even if this agreement is not a settlement agreement, it still constitutes an agreement that is enforceable by this Court.

"A 'district court has the power to enforce summarily, on motion, a settlement agreement reached in a case that was pending before it.'" *Benicorp Ins. Co. v. National Medical Health Card Systems, Inc.*, 447 F. Supp. 2d 329, 336 (S.D.N.Y. 2006) (quoting *Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974)). "A party seeking to enforce a purported settlement agreement has the burden of proof to demonstrate that the parties actually entered into such an agreement." *Id.* "As settlement agreements are contracts, they must be construed according to general principles of contract law." *Id.* (citing *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999)); *Omega Engineering, Inc. v. Omega, S.A.*, 432 F.3d 437, 443 (2d Cir. 2005). "To form a valid contract under New York law, there must be an offer, acceptance, consideration, mutual assent and intent to be bound." *Id.* (citing *Register.com,*

Inc. v. Verio, Inc., 356 F.3d 393, 427 (2d Cir. 2004)). "The fundamental basis of a valid, enforceable contract is a meeting of the minds of the parties, and, if there is no meeting of the minds on all essential terms, there is no contract." *Id.* (citing *Schurr v. Austin Galleries of Ill.*, 719 F.2d 571, 576 (2d Cir. 1983)).

Whether there has been a meeting of the minds on all essential terms is a question of fact that must be resolved by analyzing the totality of the circumstances. *Id.* (citing *United States v. Sforza*, 326 F.3d 107, 116 (2d Cir. 2003), *Bazak Int'l Corp. v. Tarrant Apparel Group*, 378 F. Supp. 2d 377, 389 (S.D.N.Y. 2005) ("To determine the presence of mutual assent, . . . [t]he totality of parties' acts, phrases and expressions must be considered, along with the attendant circumstances, the situation of the parties, and the objectives they were striving to attain."). "If the Court finds substantial ambiguity regarding whether both parties have mutually assented to all material terms, then the Court can neither find, nor enforce, a contract." *Id.* (citing *Express Industries and Terminal Corp. v. New York State Dep't of Transp.*, 93 N.Y.2d 584, 693 (1999) ("To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.") (additional citations omitted)).

II. The Parties Entered into a Binding Agreement that the Court Should Summarily Enforce

The Court should enforce the parties' valid, binding agreement that is applicable pending final disposition of Plaintiffs' lawsuit. In February 2018, the parties agreed via a series of electronic communications that in exchange for Plaintiffs' agreeing to allow Defendants a nearly two month extension of time to file a response to the Complaint, Defendants would not enact the Plan in so far as deer would not be killed, culled or hunted through the duration of the litigation. There was a clear offer made by Plaintiffs, acceptance of that offer by Defendants, mutual

consideration in the form of a modified litigation schedule and an altered timeline for enactment of the Plan as it pertained to lethal control of deer, mutual assent by both Plaintiffs and Defendants, and an intent to be bound. *See Benicorp*, 447 F. Supp. 2d at 336. The intent to be bound is underscored by the fact that Defendants filed a letter with the Court on February 5, 2018, memorializing the parties' agreement. There was a meeting of the minds on all essential terms of the agreement, and no substantial ambiguity exists as to whether both parties mutually assented to all material terms. *See id.* Indeed, in their letter to the Court on February 8, 2019, indicating their intent to breach the agreement, Defendants did not argue that the parties failed to enter into a valid agreement. Nor is there any evidence that counsel for the Defendants did not have authority to enter into the agreement on Defendants' behalf. *See Fennell v. TLB Kent Co.*, 865 F.2d 498, 502 (2d Cir. 1989) ("if an attorney has apparent authority to settle a case, and the opposing counsel has no reason to doubt that authority, the settlement will be upheld"). Therefore, the parties entered into a legally binding and enforceable agreement.

This Court has "has the power to enforce summarily, on motion, a settlement agreement reached in a case that was pending before it," *Benicorp*, 447 F. Supp. 2d at 336, and Plaintiffs request that the Court exercise its power in this case. "Courts have the inherent power to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction." *Colondres v. Scoppetta*, 290 F. Supp. 2d 376, 380 (E.D.N.Y. 2003); *see also Haitian Ctrs. Council, Inc. v. Sale*, 817 F. Supp. 336, 337 (E.D.N.Y. 1993) ("A district court may exercise its inherent power to protect the parties appearing before it, to preserve the integrity of an action, to maintain its ability to render a final judgment and to ensure the administration of justice."). Enforcing the agreement would protect Plaintiffs from Defendants' imminent breach of the agreement. Defendants entered into a legally binding agreement, and it is not in the interests of

justice to allow Defendants to brush their legal obligations aside when such obligations are no longer convenient. Furthermore, it is routine for parties to enter into agreements of this general nature during the pendency of litigation, and it is in the interests of justice to uphold such agreements to facilitate cooperation among parties in litigation and to instill confidence in legal proceedings.

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. Legal Standard for Temporary Restraining Order and Preliminary Injunction

The purpose of a preliminary injunction is "to preserve the status quo" during the pendency of the lawsuit. *State of N.Y. v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 754 (2d Cir. 1977). A party seeking a preliminary injunction is generally required to show (1) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation,[1] (2) that the moving party is likely to suffer irreparable injury in the absence of a preliminary injunction, (3) a balance of the hardships tipping in favor of the moving party, and (4) that the public interest would not be disserved by the issuance of a preliminary injunction. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 684 (2d Cir. 2013); *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). "It is well established . . . that the standard for an entry of a TRO is the same as for a preliminary injunction." *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y 2008), *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l, Ltd.*, 190 F. Supp. 2d 577, 580 (S.D.N.Y. 2002) ("The standard for granting a

[1] However, "a plaintiff cannot rely on the 'fair ground for litigation' alternative" where . . . the plaintiff "challeng[es] 'governmental action taken in the public interest pursuant to a statutory or regulatory scheme,'" but must "establish a likelihood of success on the merits." *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir. 2010) (quotation omitted).

temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Procedure are identical.").

II. The Court Should Enter a TRO and Preliminary Injunction to Maintain the Status Quo Pending Disposition of the Case on the Merits

a. Plaintiffs Will Experience Irreparable Injury if Defendants Implement Lethal Control of Deer on William Floyd Estate

"A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009). "To satisfy the irreparable harm requirement, [p]laintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (internal quotation marks omitted). Additionally, "[i]rreparable harm is injury for which a monetary award cannot be adequate compensation." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996); *see also Ives Labs., Inc. v. Darby Drug Co., Inc*., 601 F.2d 631, 644 (2d Cir. 1979) (irreparable injury means "that if [a plaintiff] is entitled to a final injunction, its interim damages cannot be calculated with sufficient accuracy to make damages an adequate substitute"). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). In instances involving wildlife, the removal and death of animals has been found to constitute irreparable harm due to the fact that "[s]uch injury is not compensable in money damages because, while the injury threatened to these plaintiffs' aesthetic interests would be palpable and concrete, they are not

ownership interests in property susceptible to monetary valuation. In addition, most states (if not all) deny damage awards for pain and suffering not accompanied by physical injury." *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 151 (D.D.C. 1993).

NEPA's statutory scheme and purpose is an important criterion weighing in favor of a finding of irreparable harm where a NEPA violation is likely. NEPA's purpose is to serve as our "national charter for protection of the environment," 40 C.F.R. § 1500.1, which is a substantive goal that can only be accomplished through compliance with the statute's procedural requirements. In contrast to other environmental statutes, because NEPA contains only procedural requirements, "[a]n injunction is . . . the only means of ensuring compliance" with the statute. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) (noting that, unlike other environmental statutes such as NEPA, the procedures in the FWPCA are not the main objectives of the Act). "Nor can money damages compensate plaintiffs' procedural injury caused by defendant's NEPA violation. Thus, the injury experienced and threatened would be irreparable." *Fund for Animals*, 814 F. Supp. at 151.

AWI will suffer imminent irreparable harm if Defendants proceed with their plan to kill deer on the William Floyd Estate. Mr. John Di Leonardo, a member of AWI whose declaration accompanies this motion, makes very clear that he will suffer irreparable injury as a result of Defendants' imminently planned actions to kill deer on William Floyd Estate. Mr. Di Leonardo has visited the William Floyd Estate in the past and plans to return later this year. Decl. at ¶ 10. In the past, he visited William Floyd Estate with his father, wife, and other family members, and his particular interest in visiting FINS and the William Floyd Estate is to observe wildlife, including deer. Decl. at ¶ 10. Mr. Di Leonardo states that deer are part of the history of the estate and of Long Island, that they have been present on the land far longer than the estate has existed,

and that "our homes and business are located in their habitat, and they are trying to survive and raise their families just as we are." Decl. at ¶ 7, 11.

Mr. Di Leonardo is familiar with the planning process that resulted in the decision by the NPS to kill deer in FINS and on William Floyd Estate. Decl. at ¶ 8. He believes that this decision "is horrible and is not what I expect from this agency which is responsible for the protection of some of the most grandiose and superlative national parks, preserves, and seashores in the United States and the wildlife that inhabit those parks. NPS should be responsible for protecting, not killing, wildlife." Decl. at ¶ 9. Furthermore, Mr. Di Leonardo is "appalled" by the decision to begin killing deer at William Floyd Estate "since lethal control, regardless of how it is done, is cruel, ineffective, and won't solve the perceived problem, as the surviving deer will respond to the killing by increasing their productivity, giving birth to more fawns who will have a higher likelihood of survival." Decl. at ¶ 12. Mr. Di Leonardo is aware that, based on deer density and populations estimates collected by the NPS in 2013 and during more recent deer surveys conducted between 2016 and 2018, approximately 43 to 92 or more deer could be killed on William Floyd Estate during the first year of killing in an attempt to ultimately reduce the density of deer on the estate from 93 to 20-25 deer per square mile. Decl. at ¶ 11; *see also* Record of Decision at 30.

Mr. Di Leonardo reaction to Defendants' enactment of the Plan demonstrates that he will irreparably harmed:

> This killing, if allowed, will grievously harm my ability to enjoy future visits to William Floyd Estate by reducing the deer population, thereby diminishing my opportunities to observe and photograph deer on estate grounds. If the deer are killed, visiting William Floyd Estate would be like visiting a graveyard for wildlife; a place where I will know that just weeks or months earlier the deer that I cherish were slaughtered. Given the potential for large numbers of deer (perhaps more than 100) in a single year to be killed leaving only a few dozen survivors,[2] there is no

[2] *See also* Record of decision at 31.

> question that my opportunity to see deer on William Floyd Estate – the primary reason I visit the estate – would be unalterably impaired.
>
> Not only would killing the deer reduce my opportunities to see deer on estate grounds, because of their smaller numbers but it would impair my ability to enjoy the surviving deer. Unlike deer in other areas that are subject to annual hunting seasons, deer on William Floyd Estate have been protected for decades, making them less skittish and less likely to flee in the presence of humans. This provides me with opportunities to observe and photograph deer up close when visiting the estate; opportunities that would be lost to me during my next visit to William Floyd Estate if the killing is allowed proceed this winter.

Decl. at ¶¶ 13, 14.

This demonstrates that even though deer will not be completely removed from the area, the reduced deer population will negatively impact Mr. Di Leonardo's ability to view and photograph deer, and that the lethal control of these deer will alter their behavior in a manner that will injure Mr. Di Leonardo. Furthermore, the psychological harm inflicted upon Mr. Di Leonardo if the Plan is implemented makes clear that he will be irreparably injured, and that this is not simply a monetary loss. *See Fund for Animals*, 814 F. Supp. at 151 ("Each of them enjoys the neighboring Yellowstone bison in much the same way as a pet owner enjoys a pet, so that the sight, or even the contemplation, of treatment in the manner contemplated [capture, experimentation, and death] would inflict aesthetic injury . . . in the nature of that recognized by the Ninth Circuit in *Fund for Animals v. Lujan*[3] and our Court of Appeals in *Humane Soc'y v. Hodel.*"[4]).

Lastly, the likelihood of irreparable injury is supported by the speed with which Plaintiffs have appeared in Court to stop the Defendants from implementing the Plan. *See Central Point Software Inc. v. Global Software & Assessories, Inc.*, 859 F. Supp. 640, 645 (E.D.N.Y. 1994) ("Preliminary injunctions are generally granted under the theory that there is an urgent need for

[3] *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391 (9th Cir. 1992).
[4] *Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988).

speedy action to protect the plaintiff's rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action.") (quoting *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985)). Here, Plaintiffs received notice of Defendants' intent to breach the agreement on the evening of Friday, February 8, 2019, Plaintiffs gave notice to the Court of their intent to file for relief the following Tuesday, and Plaintiffs then filed this motion less than one week after first receiving notice from Defendants.

b. Plaintiffs are Likely to Succeed on the Merits of their NEPA and NPS Organic Act Claims

Plaintiffs' Fourth and Fifth Claims for Relief were based upon violations of NEPA, the Organic Act and associated regulations, and the Administrative Procedure Act ("APA"), which are addressed below. Plaintiffs will not address their remaining claims because the imminent lethal control of deer will be implemented only on William Floyd Estate, not on the WP Tracts that are the subject of Plaintiffs' remaining claims.

i. Plaintiffs are likely to prevail on their claim that NPS's EIS is arbitrary, capricious, and not in accordance with NEPA and the APA

As stated above, the National Environmental Policy Act, 42 U.S.C. § 4321-4370h ("NEPA"), "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA's fundamental goal is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. This is accomplished, in part, by ensuring fully informed decision-making and providing for public participation in environmental analyses and decision-making. 40 C.F.R. §§ 1500.1(b), (c). NEPA obligates the agency to make available to the public high-quality information, which must be subject to accurate scientific analyses, expert agency comments, and public comments, before decisions are made and actions are taken. 40 C.F.R. § 1500.1(b). The scope of NEPA review is

quite broad, including the consideration of all reasonable alternatives, 40 C.F.R. § 1502.14(a), and direct, indirect and cumulative effects on "ecological . . . aesthetic, historic, cultural, economic, social, or health" interests. 40 C.F.R. § 1508.8.

The "heart" of the NEPA process is an agency's duty to "study, develop, and describe appropriate alternatives to recommended courses of action[.]" 42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(E). The Council on Environmental Quality's NEPA regulations require the action agency to: (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; and (c) include reasonable alternatives not within the jurisdiction of the lead agency. 40 C.F.R. § 1502.14(a)–(c). The Second Circuit Court of Appeals has recognized the vital importance of the alternatives analysis, stating: "[i]t is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as 'the linchpin of the entire impact statement.'" *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975) (citation omitted). "[T]he EIS must . . . consider such alternatives to the proposed action as may partially or completely meet the proposal's goal and it must evaluate their comparative merits." *Id.* at 93.

Agency actions taken pursuant to NEPA are reviewable by this Court under the APA, 5 U.S.C. §§ 702, 704. Under the APA, a court "shall" "set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or when they are adopted "without observance of procedure required by law." 5 U.S.C.

§ 706(2)(A), (D); *Natural Res. Def. Council v. U.S. Dep't of Agriculture*, 613 F.3d 76, 83 (2d Cir. 2010). Agency action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or if the agency's decision "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Natural Res. Def. Council v. U.S. Dep't of Agriculture*, 613 F.3d 76, 83 (2d Cir. 2010). The Court must ensure that the agency reviewed the relevant data and articulated a satisfactory explanation establishing a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43.

The Fire Island DEIS violates NEPA and the APA for at least two reasons. First, NPS failed to satisfy NEPA's "hard look" requirement in evaluating reasonable alternatives to the proposed action. NPS seriously considered only four alternatives: a no-action alternative (Alternative A), a non-lethal alternative (Alternative B); a lethal control alternative (Alternative C), and a lethal control followed by fertility control alternative (Alternative D). NPS should have considered several additional alternatives, including a New York State Department of Environmental Conservation ("NYSDEC") alternative, a public education/fencing only alternative, and an incremental deer removal alternative,[5] because these are reasonable options that would have aided NPS in achieving its management objectives and largely addressed the principal problems that NPS attributed to the deer in the DEIS.

[5] Plaintiffs offer these as examples of alternatives that should have been fully evaluated under NEPA, but not alternatives that they would necessarily support.

The NYSDEC alternative would involve NPS working with NYSDEC to expand its deer management activities outside of FINS and the William Floyd Estate in order to reduce the population and density of deer in the area, which would reduce migration of deer from non-NPS lands to FINS, and potentially increase emigration of deer off FINS and estate lands, thereby likely reducing growth of the deer population within FINS. For example, NYSDEC could liberalize deer hunting opportunities on non-NPS lands, including on private land in FINS, and work with non-federal land agencies, like the New York State Parks, Recreation and Historic Preservation agency, to increase hunting of deer on Robert Moses State Park and other non-NPS lands.

A public education/fencing only alternative would represent a version of Alternative B without the fertility control element, but that would implement reasonable actions well beyond those anticipated in Alternative A. Nearly all of the alleged deer-related impacts identified by NPS are linked to either inappropriate human behaviors (i.e., feeding deer, improperly securing garbage receptacles) or are a product of deer consumption of vegetation in either unique or culturally significant landscapes. Public education and fencing could be employed to address the bulk of the alleged impacts, thereby addressing NPS's concerns.

An incremental deer removal alternative would permit the NPS to remove a specific number of deer that would be much smaller than what is anticipated under the current Alternatives C or D and then assess the results of that action before necessarily continuing it, instead of identifying a specific deer density goal to achieve through lethal or non-lethal control. This alternative would reduce the number of deer killed while achieving the long-term vegetation management objectives of the NPS. It would also require the immediate implementation of fertility control and fencing. This is a modified version of Alternative D.

The NPS also unlawfully pre-determined the outcome of its analysis on the use of immunocontraceptive vaccines to humanely manage deer on FINS and William Floyd Estate by developing self-serving criteria as to what constitutes a safe and efficacious vaccine without any public input. These criteria, which are quite restrictive, were then used by the NPS to conclude that no immunocontraceptive vaccine could meet the safety and efficacy standards and that, therefore, lethal control of deer was the only feasible option to address deer management concerns on FINS and William Floyd Estate until immunocontraceptive vaccines and their associated delivery systems improved. This flawed decision-making process related to the NPS evaluation of immunocontraception as a viable alternative to lethal control for management deer on FINS and William Floyd Estate is particularly troubling considering that FINS implemented a successful experimental deer immunocontraception program from 1993 to 2009.

Furthermore, the NPS erred in dismissing from serious consideration the option of incorporating deer sterilization (through surgical procedures) as a component of the existing Alternative B. It is logical that, if deer numbers/density is a concern on FINS, then NPS should consider any action that may reduce those numbers or density absent complete extirpation of the deer. While there would be inherent risks associated with this option, this is a far more humane approach compared to NPS's plan to employ sharpshooting, capture and euthanasia, and public hunting to reduce the deer population on FINS.

Second, the Fire Island DEIS violates NEPA and the APA because it entirely failed to consider important aspects of the problem, which renders NPS's analysis arbitrary and capricious. The problem that the Plan is intended to address is lack of forest regeneration, devastation of forest structure, reduction in diversity of vegetation, destruction of plants beneath the forest canopy, reduction of vegetation productivity, and reduction of shrub and herbaceous plant species, which

in turn, have reportedly reduced animal and plant diversity. DEIS at 2. Yet NPS has failed to disclose, analyze, consider, or discuss other factors, independent of deer, which may impact forest regeneration and vegetation diversity and productivity on FINS.

For example, NPS has failed to analyze factors such as: a) soil characteristics including soil type, salinity, and composition; b) impact of storm surge on vegetative health; c) soil disease; d) precipitation amounts and patterns; e) ambient temperature; f) plant/tree disease; g) competition with exotic/invasive species; h) insects composition and ecology particular for insects known to kill harm plants/trees; i) air quality/pollution; j) water quality; k) canopy cover and its impact on primary production; l) plant/tree health and vigor; m) herbivore (not deer) impact on plant (woody, herbaceous and other) production, diversity, and health; n) soil erosion and erosive potential (wind and/or water) of soil types; and o) impact of sea level rise on vegetation and soil ecology and health. Invasive plant and insect species in particular are a critically important issue, yet NPS provided no information about the severity of the invasive/exotic species infestation on FINS, where the invasive species "hotspots" are located, what efforts and methods are being used to combat these infestations, the success of such methods, and how the invasive species may be affecting native species on FINS. Nor does it evaluate what role, if any, deer play in controlling any of the invasive species through consumption of their leaves, stems, or flowers.

NPS also failed to evaluate any anthropogenic factors that may impact vegetation health, ecology, and productivity. In its 2007-2011 Strategic Plan, FINS indicates that "the biggest manageable threats to wilderness character at FINS are encroachment of exotic/invasive species and overuse of the wilderness by backcountry campers and day use from beach users[.]" This information, however, is not disclosed in the DEIS. In addition, the FINS superintendent's compendium permits the public to collect a number of floral species on FINS, Superintendent's

Compendium at 36 CFR 2.1-1, yet this is not discussed in the Fire Island DEIS either. This is important because it indicates that people are likely influencing the composition of plant species on FINS. Any other anthropogenic impacts such as any garbage dumping, illegal trail creation, illegal cutting or collection of vegetation, should also be evaluated as a threat to FINS vegetation.

In regards to reduction in species diversity, NPS failed to consider a number of non-deer factors that can affect other wildlife on FINS, none of which NPS disclosed, analyzed, or discussed in the Fire Island DEIS. These factors include: a) wildlife disease; b) direct or indirect impacts of exotic/invasive species; c) predator/prey dynamics; d) existence of feral animals (e.g., dogs and/or cats) on FINS; e) habitat fragmentation; f) habitat quality changes (unrelated to alleged deer impacts); g) intra and inter-specific competition; h) impacts inherent to human-use of FINS; i) random, sudden events; and j) climate change and implications of its effects on barrier island ecology.

The DEIS contains virtually no information regarding these factors identified above, despite their obvious relevance to vegetative health, ecology and productivity on FINS.
NPS's failure to disclose and discuss these issues violates NEPA and the APA, and Plaintiffs have demonstrated a likelihood of success on the merits for their Fourth Claim for Relief.

ii. Plaintiffs are likely to prevail on their claim that NPS violated the Organic Act and its implementing regulations

Plaintiffs are likely to prevail on their claim that NPS's decision to permit the lethal control of deer in FINS violates the Organic Act and its implementing regulations because NPS failed to satisfy the statutory requirements to permit lethal control of deer on FINS via hunting, sharpshooting, or capture and euthanasia. The NPS was created in 1918 through the promulgation of the National Park Service Organic Act, 39 Stat. 535, 16 U.S.C. § 1. This act established that the purpose of the NPS is to "promote and regulate the use of the Federal areas known as national

parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

With regard to the management of wildlife within units of the NPS, "The Secretary may provide for the destruction of such animals and plant life as may be detrimental to the use of any System unit." 54 U.S.C. § 100752. That standard has not been met in this case because NPS has not demonstrated that deer are detrimental to the use of FINS. In fact, as discussed in detail in the next section below, only 2 percent of FINS users have complained about deer within the park, which demonstrates that deer are not detrimental to the use of FINS.

Additionally, sport hunting of wildlife in national parks is not permitted unless it is explicitly allowed in the enabling legislation or proclamation creating the national park unit. The enabling legislation for FINS permits hunting but only upon promulgation of relevant regulations. The FINS Enabling Act, 16 U.S.C. § 459e(4) states:

> The Secretary shall permit hunting, fishing, and shellfishing on lands and waters under his administrative jurisdiction within the Fire Island National Seashore in accordance with the laws of New York and the United States of America, except that the Secretary may designate zones where, and establish periods when, no hunting shall be permitted for reasons of public safety, administration, or public use and enjoyment. Any regulations of the Secretary under this section shall be issued after consultation with the Conservation Department of the State of New York.

16 U.S.C. § 459e(4).

NPS has promulgated regulations to supplement these requirements. To permit hunting in any national park where hunting is specifically authorized, "hunting … is specifically authorized . . . if the superintendent determines that such activity is consistent with public safety and

enjoyment, and sound resource management principles." 36 C.F.R. § 2.2(b)(2). In the latter case, any hunting that is permitted must be done so through the promulgation of "special regulations." *Id*. Consequently, the type of hunting, what species can be targeted, when it can occur, where it can occur, or what weapons could be used is left to the discretion of the superintendent, but the process of adopting special regulations to permit hunting requires compliance with rulemaking procedures, including providing an opportunity for public participation. Also, if any FINS lands were closed to public use to facilitate such hunting, the NPS would have to engage in rulemaking to close these lands, even if the closure is only temporary, because of the highly controversial nature of a deer hunt on FINS. *See* 36 C.F.R. §1.5(b) (If a park intends to close any portion of the park to facilitate the hunt, the closure must be published as a rulemaking in the Federal Register if the "closure … is of a highly controversial nature.").

In order to comply with the law, NPS must promulgate special regulations to permit hunting on FINS, and assuming that closure of FINS is required, NPS must promulgate special regulations for that as well. Yet NPS has failed to do this. As such, Plaintiffs are likely to prevail on their claim that NPS has violated the Organic Act and its implementing regulations.

c. The Balance of the Hardships Tips Strongly in Plaintiffs' Favor and the Public Interest Favors a TRO and Preliminary Injunction

The balance of the hardships and the public interest weigh strongly in favor of granting Plaintiffs' requested relief. Plaintiffs are "attempting to effect compliance by public officials with duties imposed by Congress under NEPA. Given the strong public interest in effecting such compliance," this factor weighs in favor of granting a TRO and preliminary injunction. *Steubing v. Brinegar*, 511 F.2d 489, 495 (2d Cir. 1975) (noting the fact that "citizen groups play a key role in policing agency compliance with NEPA"); *see also Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998) (discussing public's interest in the "meticulous compliance with the law by

public officials"). An injunction would give the Court more time to fully consider Plaintiffs' claims that NPS acted arbitrarily and capriciously in violation of NEPA and the Organic Act, which would serve the public interest in ensuring that NPS is complying with the law.

Furthermore, the widespread public opposition to lethal control of deer on FINS, as evidenced by the comments NPS received on the DEIS, indicates that halting Defendants from moving forward with lethal control until this case is resolved on the merits is in the public interest. NPS received 1,631 comments on the DEIS. Am. Compl. at ¶ 35. Of the 1,610 actual comments (excluding duplicate, blank, or substantive comments that had to be separated into smaller segments to submit via the NPS planning page), 1,442 opposed lethal control, 107 supported lethal control, 11 stated no position, and 50 did not clearly identify a position, *id.*, which demonstrates overwhelming public opposition to lethal control. Additionally, the DEIS provided the results of a 2008 survey of FINS visitors, which found approximately 50 percent indicated that the opportunity to see deer improved their visitor experience, that 20 percent reported that deer did not affect their visit, 29 percent indicated that they did not observe deer, and that only 2 percent of survey respondents expressed any concerns or complaints about deer. Fire Island DEIS at 108. Even for those two percent, NPS did not explain how they may have been adversely impacted by deer, which is critical in this case since those concerns may not have been linked to deer's impact on vegetation in FINS.

Moreover, an injunction would preserve the status quo and would neither imperil NPS's ability to ultimately implement the lethal control aspect of the Plan, nor cause NPS any harm through such delay.

CONCLUSION

For the reasons stated above, the Court should grant Plaintiff's request for enforcement of the agreement between the parties, and issue a TRO and preliminary injunction to preserve the status quo until the Court fully resolves this case on the merits.

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