UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Date of Service of Brief:
February 13, 2012

DELAWARE RIVERKEEPER NETWORK, the DELAWARE RIVERKEEPER, RIVERKEEPER, INC., the HUDSON RIVERKEEPER, and NATIONAL PARKS ASSOCIATION,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Defendants,

-and-

AMERICAN PETROLEUM INSTITUTE, et al.,

Putative Defendant-Intervenors.

No. 11-CV-3780 (NGG) (CLP)

ECF Case

DAMASCUS CITIZENS FOR SUSTAINABILITY, INC.,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Defendants,

-and-

AMERICAN PETROLEUM INSTITUTE, et al.,

Putative Defendant-Intervenors.

No. 11-CV-3857 (NGG) (CLP)

ECF Case

STATE OF NEW YORK, Plaintiff, v. UNITED STATES ARMY CORPS OF ENGINEERS, et al., Defendants, -and- AMERICAN PETROLEUM INSTITUTE, et al., Putative Defendant-Intervenors.	:	No. 11-CV-2599 (NGG) (CLP) ECF Case

MEMORANDUM OF LAW OF PLAINTIFFS DELAWARE RIVERKEEPER NETWORK, THE DELAWARE RIVERKEEPER, RIVERKEEPER, INC., THE HUDSON RIVERKEEPER, NATIONAL PARKS CONSERVATION ASSOCATION, AND DAMASCUS CITIZENS FOR SUSTAINABILITY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

SUSAN J. KRAHAM (SK-0612)
Environmental Law Clinic
Columbia University School of Law
435 West 116th Street
New York, NY 10027

JANE P. DAVENPORT (pro hac vice)
JORDAN YEAGER (pro hac vice)
KATHERINE HUDSON (pro hac vice)
MACKENZIE SCHOONMAKER (MS-7342)
JOHN J. ZIMMERMAN (pro hac vice)

Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Rules

Regulations

Federal Register

Other Authorities

PRELIMINARY STATEMENT

Plaintiffs submit this combined memorandum in opposition to Defendants' motions[1] and in support of Plaintiffs' cross-motion for summary judgment. On December 8, 2010, the Delaware River Basin Commission voted 4-1 to approve the release of draft regulations for natural gas development in the Delaware River Basin ("Draft Regulations"). Plaintiffs filed suit to challenge the DRBC Defendants (Delaware River Basin Commission and Executive Director Carol Collier, collectively "DRBC") and the U.S. Army Corps of Engineers Defendants[2] (the U.S. Army Corps of Engineers and Col. Christopher Larsen, sued in his official capacity, collectively "Corps"). Defendants failed to comply with their mandatory, non-discretionary duties under the National Environmental Policy Act (NEPA) to issue a draft Environmental Impact Statement (EIS) to accompany the Draft Regulations, a major federal action that will significantly affect the quality of the human environment. Plaintiffs have standing to bring these claims, which are ripe and not barred by principles of sovereign immunity. Therefore, Plaintiffs' claims are ripe and are suitable for disposition as questions of law that do not require resolution of any disputed material facts. Accordingly, Plaintiffs respectfully request that the Court deny Defendants' motions and enter summary judgment for Plaintiffs on both counts.

STATUTORY AND REGULATORY FRAMEWORK

The Delaware River Basin Compact and the Delaware River Basin Commission

Following the entry of a consent decree in New Jersey v. New York, 347 U.S. 995 (1954), the States of New York, New Jersey, Pennsylvania, and Delaware and the federal government negotiated

[1] Defendants U.S. Army Corps of Engineers and Col. Christopher Larsen (sued in his official capacity and substituted for Brig. Gen. Peter A. DeLuca pursuant to Fed. R. Civ. P. 25(d)) filed a single combined memorandum dated Jan. 12, 2012 in support of their motion to dismiss or, in the alternative, for summary judgment, in all three consolidated actions ("Corps Br."). Defendants Delaware River Basin Commission and Carol Collier, Executive Director, Delaware River Basin Commission (sued in her official capacity) filed two separate memoranda in support of their motions to dismiss, one dated Nov. 1, 2011, ("DRBC Nov. Br.") and another dated Jan. 12, 2012 ("DRBC Jan. Br."). Amici Curiae/Putative Defendant-Intervenors American Petroleum Institute et al. filed a single combined memorandum ("API Br."), while amicus curiae Susquehanna River Basin Commission filed memoranda dated Nov. 1, 2011 and Jan. 12, 2012 ("SRBC Nov. Br." and "SRBC Jan. Br." respectively).

[2] For purposes of the DCS Complaint, "Corps" refers to all non-DRBC Federal Defendants named in DCS's Complaint.

the Delaware River Basin Compact (Compact), which entered into force in 1961. The Compact created the Delaware River Basin Commission (DRBC) to conserve and manage the resources of the Delaware River. In forming the Compact, the parties agreed that "the conservation, utilization, development, management, and control of the water and related resources of the Delaware River Basin under a comprehensive multipurpose plan will bring the greatest benefits and produce the most efficient service in the public welfare." Compact, Whereas Clause (introducing a Comprehensive Plan).[3]

Article 3, Section 3.8 of the Compact requires that

> No project having a substantial effect on the water resources of the basin shall hereafter be undertaken by any person, corporation, or governmental authority unless it shall have been first submitted to and approved by the commission, subject to the provisions of Sections 3.3 and 3.5. . . . The Commission shall provide by regulation for the procedure of submission, review and consideration of projects, and for its determinations pursuant to this section. Any determination of the Commission hereunder shall be subject to judicial review in any court of competent jurisdiction.

See also 18 C.F.R. § 401.32. DRBC implements the Compact's directives and objectives and the Comprehensive Plan through the Water Code and the Administrative Manual: Rules of Practice and Procedure (RPP). DRBC's regulations are published in the Code of Federal Regulations at 18 C.F.R. Parts 401, 410, 415, 420, and 430.

National Environmental Policy Act

The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq., is our nation's basic national charter for the protection of the environment. It is a planning statute that requires a federal agency, prior to undertaking a major federal action, to evaluate that action's impacts on the human environment. 42 U.S.C. § 4332. The twin goals of NEPA are to obligate federal agencies to consider every significant aspect of the environmental impact of a proposed action and ensure that the agency will inform the public that it has truly considered environmental concerns in its decision making process. Balt. Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983). NEPA requires federal agencies to

[3] See DRBC's website, http://www.state.nj.us/drbc/; Plaintiffs' Appendix of Public Record Documents.

take a "hard look" at environmental consequences prior to a major action to integrate environmental consequences into the decision making process. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); Balt. Gas & Elec. Co., 462 U.S. at 97. NEPA requires that all agencies of the federal government prepare a "detailed statement" for all "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C). This detailed statement must be "include[d] in every recommendation or report on proposals for . . . major Federal actions." Id. Copies of the statement must "accompany the proposal through the existing agency review processes." Id.

The Council on Environmental Quality (CEQ) promulgated regulations implementing NEPA that are binding on all federal agencies pursuant to Executive Order No. 11,991 (May 24, 1977). 40 C.F.R. Parts 1500-1508. CEQ's implementing regulations are afforded substantial deference. Andrus v. Sierra Club, 442 U.S. 347, 357-58 (1979). The CEQ regulations mandate that an agency must comply with NEPA "at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. § 1501.2. They further require that

> [a]n agency shall commence preparation of an [EIS] as close as possible to the time the agency is developing or is presented with a proposal . . . so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.

40 C.F.R. § 1502.5. In turn, the CEQ regulations define "proposal" as

> that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an [EIS] on a proposal should be timed . . . so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal.

40 C.F.R. § 1508.23.

"Major Federal actions" requiring preparation of an EIS include projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies, as well as new agency rules, regulations, plans, policies, or procedures. 40 C.F.R. § 1508.18(a). Where multiple agencies have proposed or are involved in the same action, or are "involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity," one of those agencies "shall supervise the preparation of an environmental impact statement" as "lead agency." 40 C.F.R. § 1501.5(a). CEQ regulations require agencies to request the participation of other federal agencies with jurisdiction by law or special expertise and to provide copies of a draft EIS to other concerned agencies for review and comment. 40 C.F.R. §§ 1501.5(a), 1501.6(a), 1501.7(a), 1503.1. "Jurisdiction by law" means "agency authority to approve, veto, or finance all or part of the proposal." 40 C.F.R. § 1508.15. "Special expertise" "means statutory responsibility, agency mission, or related program experience." 40 C.F.R. § 1508.26.

DRBC and NEPA

Ten months after the statute's enactment, DRBC published its first set of proposed regulations to implement NEPA. 35 Fed. Reg. 16,487 (Oct. 22, 1970). By resolution dated November 24, 1970, Resolution No. 70-23, DRBC voted to amend its RPP to incorporate the proposed regulations, stating: "WHEREAS, the National Environmental Policy Act (P.L. 91-190) requires an environmental statement to accompany certain projects, and it is the purpose of the Commission to implement the Federal statutory requirement with appropriate regulations." These regulations were finalized "in compliance with the provisions of the National Environmental Policy Act (Public Law 91-190)." 36 Fed. Reg. 20,381 at 20,381-82 (Oct. 21, 1971). With respect to inter-agency NEPA coordination, these regulations stated:

> (k) When any project listed in section (a) hereof is subject to the requirement of an [EIS] to be prepared by another Federal agency, the Executive Director will consult with such agency and

> establish appropriate lead agency arrangements that will meet the requirements of the National Environmental Policy Act to avoid duplication.

Id. (emphasis added) (documents cited in this section are attached in the Appendix: Public Records).

In 1973, CEQ issued updated guidelines for federal agencies on preparing EISs. 38 Fed. Reg. 20,550 (Aug. 1, 1973). These guidelines identified DRBC as a federal agency with jurisdiction by law and/or special expertise over the water resources of the Delaware River. Id. at 20,557. DRBC's second and more detailed set of NEPA regulations were published on July 11, 1974. 39 Fed. Reg. 25,473. Until 1980, DRBC did NEPA analyses and defended its compliance in federal court. See, e.g., Bucks County Bd. of Comm'rs v. Interstate Energy Co., 403 F. Supp. 805 (E.D. Pa. 1975); Borough of Morrisville v. DRBC, 399 F. Supp. 469 (E.D. Pa. 1975), aff'd mem., 532 F.2d 745 (3rd Cir. 1976).

In 1980, via Resolution No. 80-11 (July 23, 1980), DRBC suspended its NEPA regulations solely because it did "not have available to it sufficient financial resources to permit the continuation of this program at the present time and to carry out its responsibilities mandated by the Compact." Therefore, it stated, "an appropriate agency of the executive branch of the federal government can assume the 'lead agency' and other environmental assessment functions for significant projects within the basin involving federal loans, grants or permits." Accordingly, it resolved that: "The Commission shall not act as lead agency for environmental assessments and the preparation of environmental impact statements unless funding therefor is expressly provided by Commission action or otherwise approved by the Commission." Final regulations deleting DRBC's NEPA regulations from 18 C.F.R. Part 401 were published in December 1997. 62 Fed. Reg. 64,154 (Dec. 4, 1997).

DRBC's suspension and revocation of its NEPA regulations notwithstanding, CEQ continues to identify DRBC on its list of federal and federal-state agencies with NEPA responsibilities. See 49 Fed. Reg. 49,750 (Dec. 21, 1984) at 49,573 (Appendix I, Federal and Federal-State Agency NEPA Contacts); 49,574 (Appendix II, Federal and Federal-State Agencies With Jurisdiction by Law or

Special Expertise on Environmental Quality Issues); 49,781 Appendix III, Federal and Federal-State Agency Offices for Receiving and Commenting on Other Agencies' Environmental Documents).

STATEMENT OF FACTS

The Marcellus Shale, a geologic formation underlying more than a third of the Delaware River Basin, is a recent target of the fossil fuel industry because of its potential as a source of natural gas. If the Delaware River Basin is opened to unconventional shale gas development, thousands of wells will be installed in the Basin. Complaint at ¶¶ 84-86. Because natural gas is tightly bound in the shale rock formations, it can only be obtained by first drilling deep vertical wells and then drilling outward horizontally so that the shale layer can be blasted at extreme pressure with millions of gallons of water mixed with chemicals and proppant materials such as sand. Complaint at ¶¶ 87-89. Shale gas development is an extraordinarily land- and water-intensive process that converts agricultural, forest, and range lands to industrial uses, destroys and degrades wildlife habitat, consumes millions of gallons of water per well, and generates huge quantities of air pollution (including greenhouse gases), hazardous wastes, and toxic wastewater. Complaint at ¶¶ 90-98, 112. Shale gas drilling puts at risk the drinking water relied on by more than fifteen million people, including the residents of New York City and Philadelphia. Complaint at ¶¶ 90, 99, 103-105. Shale gas drilling in the Delaware River Basin threatens the health, aesthetic, recreational, economic, professional, and ecologic interests of Plaintiff organizations' members. Complaint at ¶¶ 11-28, 137; see also Section III, infra.

The extraordinarily high water quality of the entire non-tidal Delaware River is protected by Special Protection Waters (SPW) anti-degradation regulations. Complaint at ¶¶ 10, 49-50. DRBC has identified three major areas of concern with respect to shale gas development's impacts to SPW water quality and quantity: first, that "gas drilling projects in the Marcellus Shale or other formations may have a substantial effect on the water resources of the basin by reducing the flow in streams and/or

aquifers used to supply the significant amounts of fresh water needed in the natural gas mining process"; second, that "on-site drilling operations may potentially add, discharge or cause the release of pollutants into the ground water or surface water"; and third, that the flowback fluids, which include not only natural gas and chemicals added to the high-volume hydraulic fracturing mixture but also naturally occurring brines and contaminants, must be treated and disposed of properly.[4]

In May 2009, Defendant Carol Collier, DRBC's Executive Director, invoked her discretionary authority under the RPP to issue a determination that natural gas extraction projects could not proceed in the Basin without DRBC approval because of the potential impacts to Special Protection Waters. Complaint at ¶¶ 114-116; see also http://www.state.nj.us/drbc/library/documents/EDD5-19-09.pdf. A year later, in May 2010, DRBC approved a resolution to direct commission staff to draft regulations for natural gas development targeting shale formations in the Basin. This resolution also postponed consideration of well pad dockets (permits) until after the promulgation of final regulations.[5] In June 2010, DRBC issued a statement recognizing that the "collective effects of the thousands of wells and supporting facilities that are projected in the basin pose potentially significant adverse effects on the surface water and groundwater of the basin."[6]

At its December 8, 2010 meeting, DRBC approved the release of the Draft Regulations in a 4-1 vote. Representatives of the Army Corps, Pennsylvania, New Jersey, and Delaware voted in favor while the New York representative voted against the resolution. On December 9, 2010, DRBC published the Draft Regulations.[7] On January 4, 2011, a notice of the issuance of the Draft Regulations

[4] See Natural Gas Drilling Index Page, DRBC (Feb. 1, 2012), http://www.state.nj.us/drbc/programs/natural/.
[5] See "May 2010 – DRBC Will Review Natural Gas Well Pad Projects After Adoption of New Regulations," DRBC (Dec. 30, 2011), http://www.state.nj.us/drbc/programs/natural/archives.html#3.
[6] Statement by the Delaware River Basin Commission (DRBC) on the Upper Delaware River Being Named by American Rivers to its "America's Most Endangered Rivers" List, June 2, 2010, available at http://www.state.nj.us/drbc/library/documents/DRBCstatement_EndangeredRivers_6-2-2010.pdf .
[7] See Draft Natural Gas Development Regulations, DRBC (Dec. 29, 2011), http://www.state.nj.us/drbc/programs/natural/draft-regulations.html (describing history of DRBC action); 2010 Draft Regulations, available at http://www.state.nj.us/drbc/library/documents/naturalgas-draftregs.pdf.

was published in the Federal Register. 76 Fed. Reg. 295 (Jan. 4, 2011). On November 8, 2011, DRBC released substantially modified Revised Draft Regulations but refused to allow additional public comment.[8] On November 9, 2011, DEC Commissioner Joe Martens announced that New York would vote against adoption of the Revised Draft Regulations.[9] On November 17, 2011, Governor Jack Markell of Delaware sent a letter to the other DRBC Commissioners announcing that Delaware would also vote against adoption of the Revised Draft Regulations.[10] On November 18, 2011, DRBC announced that it was postponing the special meeting scheduled for November 21, 2011, called to consider adoption of the Revised Draft Regulations.[11]

STANDARD OF REVIEW

Plaintiffs hereby adopt Plaintiff State of New York's statement on standard of review. N.Y.S. Br. at 11-12.

ARGUMENT

Plaintiffs filed suit stating claims against DRBC and the Corps. As to DRBC, Plaintiffs invoke this Court's jurisdiction under 28 U.S.C. § 1361 seeking relief in the nature of mandamus pursuant to the doctrine of non-statutory review. Alternatively, Plaintiffs seek equitable relief against DRBC within this Court's federal question jurisdiction. 28 U.S.C. § 1331. As to the Corps, Plaintiffs invoke this Court's federal question jurisdiction, 28 U.S.C. § 1331, seeking relief in the nature of mandamus pursuant to 5 U.S.C. § 706(1). Alternatively, Plaintiffs assert a claim under 5 U.S.C. § 706(2). These claims survive each and every attack by Defendants and Amici. Plaintiffs' claims are not precluded by

[8] See Fact Sheet, available at http://www.state.nj.us/drbc/library/documents/naturalgas-REVISEDdraftregs-factsheet110811corrected.pdf ; Revised Draft Regulations, available at http://www.state.nj.us/drbc/library/documents/naturalgas-REVISEDdraftregs110811.pdf.

[9] Martens: NY likely to vote 'no' on DRBC regs, Democrat and Chronicle (Nov. 9, 2011 5:36 PM), http://blogs.democratandchronicle.com/voteup/2011/11/09/martens-ny-likely-to-vote-no-on-drbc-regs/.

[10] See Letter of Gov. Jack Markell, Nov. 17, 2011, available at http://www.delawarefirst.org/wp-content/uploads/2011/11/gov-fracking.pdf.

[11] See Draft Natural Gas Development Regulations, DRBC (Dec. 29, 2011), http://www.state.nj.us/drbc/programs/natural/draft-regulations.html .

either the APA or the Compact. Nor are they barred by sovereign immunity or ripeness considerations. Plaintiffs have standing. As demonstrated below, Plaintiffs survive Defendants' Motions to Dismiss and, moreover, Plaintiffs are entitled to summary judgment on each of their claims.

I. DRBC Failed to Fulfill Its Mandatory, Non-Discretionary Duty Under NEPA to Prepare an EIS in Connection with the Draft Regulations

DRBC has proposed rules for shale gas development in the Delaware River Basin that will have significant effects on human health and the environment. This proposal is a "major" action under NEPA. Congress plainly intended that NEPA analyses would accompany all "proposals for . . . major Federal actions," 42 U.S.C. § 4332(C) (emphasis added); see Andrus, 442 U.S. at 351 (recognizing that NEPA "require[s] federal agencies to integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values" (emphasis added) (internal quotations omitted)). DRBC's failure to prepare an EIS in conjunction with the draft rules is an abdication of its statutory obligation.

A. DRBC Is a Federal Agency with Mandatory, Non-Discretionary NEPA Duties

As a federal agency, DRBC is subject to NEPA's mandatory, non-discretionary environmental review obligations. The Compact expressly provides for the creation of a "federal agency," and the purpose and structure of the Compact underscore Congress' intent that DRBC would function as a federal agency. Immediately following NEPA's enactment, DRBC understood its obligation and routinely conducted NEPA review of major federal actions. Likewise, CEQ and courts have interpreted and treated DRBC as a federal agency with NEPA obligations. Thus, DRBC's failure to prepare an EIS in connection with the Draft Regulations violates DRBC's mandatory, non-discretionary duty under NEPA.

1. DRBC Is a Federal Agency

The Constitution requires Congressional consent for the formation of an interstate or federal-interstate compact. U.S. Const. Art. I, § 10, cl. 3. Once granted, "congressional consent transforms an interstate compact . . . into a law of the United States." Cuyler v. Adams, 449 U.S. 433, 438 (1981); see also NYSA–ILA Vacation & Holiday Fund v. Waterfront Comm'n of N.Y., 732 F.2d 292, 297 (2d Cir. 1984). "[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." Texas v. New Mexico, 462 U.S. 554, 564 (1983). The express terms of the Compact provide for the creation of a federal agency, unambiguously and repeatedly referring to DRBC as a "federal agency" throughout the compact. Compact § 15.1(o) ("Neither the Compact nor this Act shall be deemed to enlarge the authority of any Federal agency other than the commission . . . .")[12]; id. § 2.1 (defining DRBC as "an agency and instrumentality of the governments of the respective signatory parties" and thus "an agency and instrumentality" of the federal government[13]); id. § 15.1(s) ("any officer, agency, or instrumentality of the United States other than the commission").

These carefully considered references to DRBC as a "federal agency" embody the signatories' intent to create—through interstate-federal Compact—a federal "basin agency," and distinguish the DRBC from the interstate commission in New York v. Atlantic States Marine Fisheries Commission, where "there [was] no indication that the contracting states understood themselves to be compacting to create a federal agency,"[14] 609 F.3d 524, 533 (2d Cir. 2010). To hold otherwise would be plainly inconsistent with express terms of the Compact and therefore violative of Supreme Court precedent

[12] Section 15.1 of the Compact provides the "conditions and reservations" upon which "the consent to and participation in the Compact by the United States is subject." Thus, from Congress' plain language, it intended that one of those conditions upon which its consent and participation would be subject was the definition of DRBC as a "Federal agency." Id. § 15.1(o).
[13] Cf. 42 U.S.C. § 4332 (NEPA applies to "all agencies of the Federal Government").
[14] Defendants argue that, because the Compact itself is forged by "interstate-federal" cooperation, the "agency" it creates is ipso facto a "Federal-interstate agency." DRBC Nov. Br. at 23. But Defendants' argument overlooks the basic distinction between, on the one hand, the hybrid authority embodied in the Compact, and on the other hand, the nature of the entity it creates. Congress defines the Compact in the Preamble as "an interstate-Federal compact," defining elsewhere that the "basin agency," it creates as a "federal agency."

requiring strict adherence to the express terms of compacts. New Jersey v. Delaware, 552 U.S. 597, 615-16 (2008) ("Interstate compacts, like treaties, are presumed to be the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties." (quotations omitted)).

In addition to expressly referring to DRBC as a federal agency, the Compact specifically exempts DRBC from certain statutes applicable to federal agencies. See Compact § 15.1(m). These limited exemptions necessarily imply that, for all other purposes, DRBC is properly considered a "federal agency."[15] To hold otherwise would violate the "cardinal principle of statutory construction" against rendering words in a statute superfluous. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001); cf. New Jersey v. New York, 523 U.S. 767, 811 (1998) ("Just as if a court were addressing a federal statute, then, the first and last order of business of a court addressing an approved interstate compact is interpreting the compact." (quotations omitted)). Because the plain language of the Compact expressly provides for the creation of a "federal agency," and because holding otherwise would render superfluous the statutory exemptions of Compact § 15.1(m), this Court must conclude that DRBC is a "federal agency."[16]

[15] It is not unprecedented for a federal agency to be exempt from the APA and subject to NEPA. For example, the United States Postal Service is specifically exempt from the procedural and judicial review provisions of the APA, and yet is still subject to NEPA. See 39 U.S.C. § 410; 39 C.F.R. §§ 775 et seq. See also, e.g., Landmark W.! v. U.S. Postal Serv., 840 F. Supp. 994, 1006 (S.D.N.Y. 1993), aff'd, 41 F.3d 1500 (2d Cir. 1994).

[16] Because Congress' intent to establish the DRBC as a federal agency is clear, DRBC's statutory interpretation denying that it is a federal agency with NEPA obligations deserves no deference. New York Public Interest Research Group v. Whitman, 321 F.3d 316, 324 ("We will not defer to an agency's interpretation that contravenes Congress' unambiguously expressed intent.")(citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)). Yet even if the Compact's statutory language were ambiguous, allowing room for deference to a reasonable agency construction, DRBC's current reading would warrant considerably less deference than its original, contemporaneous interpretation. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987)("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.")(quotation and citations omitted).

Congress signed on to the Compact to address the "national interests" involved in managing the Delaware River Basin. Compact § 1.3. To ensure due consideration for those "national interests," the federal member participates in the development and implementation of the Comprehensive Plan, id. § 13.1, and votes on matters before the Commission, id. § 2.5. The federal government additionally provides funding to the Commission's operating budget, id. § 13.3. Express Congressional intent to both join and exercise control over DRBC fundamentally distinguishes the Compact, a federal-interstate agreement, from purely interstate compacts. Del. Water Emergency Grp. v. Hansler, 536 F. Supp. 26, 28 n.4 (M.D. Pa. 1981) ("Unlike most interstate compacts where Congress merely 'consents' to an interstate compact pursuant to [the Compact Clause], the federal government became a formal signatory member [to the Compact], subject to various express conditions and reservations."), aff'd, 681 F.2d 805 (3d Cir. 1982); cf., e.g., Atl. States Marine Fisheries Comm'n, 609 F.3d at 535 (reasoning that, because the ASMFC is composed "'only of its constituent' states"—that is, because it has no federal member—its "structure and composition . . . weigh against characterizing it as a 'quasi-federal' agency" under the APA).

The express terms of the Compact provide the federal government with substantially greater power over DRBC than is afforded the member states. The Compact specifically provides the federal government the authority unilaterally to "alter, amend, or repeal" the Compact in its entirety, and thus dissolve DRBC in toto, Compact § 15.1(q), powers not provided to the states. See also id. §§ 1.4, 1.6 (providing additional rights to the federal government alone). The fundamentally asymmetric relationship between the states and the federal government, in which the federal government exercises substantially greater authority over the Compact, underscores that DRBC is not, as Defendants suggest, an unprecedented hybrid institutional form fundamentally distinct from the federal government. Rather, the structure and purpose of the Compact indicate DRBC is simply a federal agency.

DRBC's basic administrative procedures also demonstrate its operation as a federal agency. DRBC's rules and regulations are codified in the Code of Federal Regulations, 18 C.F.R. §§ 401, 410, 415, 420, and 430, adjacent to the regulations of the Federal Energy Regulatory Commission, 18 C.F.R §§ 1 et seq., and the Tennessee Valley Authority, id. §§ 1300 et seq., both of which are federal agencies subject to NEPA. This distinctly federal procedure distinguishes DRBC from the ASMFC and other purely inter-state agencies whose "decisions are implemented through rule-making by the individual [member] states." ASFMC, 609 F.3d at 536. Similarly, DRBC notices of meetings, rulemakings, and other actions are recorded in the Federal Register. See, e.g., 76 Fed. Reg. 295 (Jan. 4, 2011) (noticing the availability of the Draft Regulations issued in this case). Even "The U.S. Government's Official Web Portal" identifies DRBC as a "U.S. government agency." See A-Z Index of U.S. Government Departments and Agencies, USA.gov (Feb. 1, 2012), http://www.usa.gov/directory/federal/D.shtml.

Although DRBC and SRBC argue that an agency created by a federal-interstate Compact "is a fundamentally different institutional construct than a federal agency," DRBC Nov. Br. at 19-23; SRBC Nov. Br. at 6-15, they fail to cite any cases actually involving federal-interstate compacts that support their contention. Their references to cases involving purely interstate compacts may support the proposition that "[b]istate entities occupy a significantly different position in our federal system than do the States themselves," Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 40 (1994), but that in no way supports the inverse proposition that an agency created by Congress pursuant to a federal-interstate compact necessarily occupies a different position than a federal entity.

2. DRBC Itself, CEQ, and Courts Historically Have Considered DRBC a Federal Agency Subject to NEPA

At the time of NEPA's enactment in 1969, DRBC understood itself as a federal agency subject to NEPA and operated accordingly, moving quickly to develop implementing regulations. See supra. DRBC's initial and contemporaneous determination that it was subject to NEPA is telling. DRBC's

focus at that time was solely on statutory implementation—it was not concerned with potential litigation or the financial effect of its compliance. See Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933) ("[Administrative] practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion . . . while [it is] yet untried and new."). Even in the face of challenges to its environmental review processes, DRBC during the 1970s unfailingly conceded that it was a federal agency subject to NEPA. See, e.g., Borough of Morrisville v. DRBC, 399 F. Supp. at 477; Bucks County Bd. of Comm'rs, 403 F. Supp. at 808.

In 1980, however, DRBC proposed to suspend its NEPA regulations, explaining it did "not have available to it sufficient financial resources." Resolution No. 80-11 (July 23, 1980). DRBC cited no legal authority for exempting itself from NEPA because there was no such authority on which it could have relied. Obviously, authority to cherry-pick which federal statutes apply to it was not one of the powers granted to DRBC in the Compact.[17] Thus, DRBC's current position that it is not subject to NEPA descends from an anomalous and illegitimate procedural amendment in contravention of the express terms of the Compact and DRBC's own original understanding of itself as a federal agency under NEPA.

As described above, in its public notices, rules, and regulations, CEQ has consistently stated DRBC is a federal agency subject to NEPA. See supra. Because CEQ is the agency responsible for overseeing NEPA compliance by Defendants and other federal agencies, CEQ's interpretation of the statute, including its determination that DRBC is a federal agency subject to NEPA, is accorded substantial deference. Andrus, 442 U.S. at 357-58. The views of Defendants, DRBC and Corps alike,

[17] DRBC and SRBC both note that if the Court holds that DRBC is a federal agency, and thus subject to NEPA, the Basin Commissions may be subject to other statutes applicable to federal agencies. But courts cannot grant relief inconsistent with Congressional intent. Congress created DRBC as a federal agency exempt from only three specified statutes. If DRBC seeks further exemptions, it must obtain such relief from Congress, not the Court.

on NEPA's applicability are not. Citizens Against Rails-to-Trails v. Surface Tranps. Bd., 267 F.3d 1144, 1150-51 (D.C. Cir. 2001); Canyon Trust v. FAA, 290 F.3d 339, 342 (D.C. Cir. 2002) ("[T]he court owes no deference to the FAA's interpretation of NEPA or the CEQ regulations because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to the FAA alone.").[18]

Like CEQ, courts have previously acknowledged DRBC as a federal agency subject to NEPA, a characterization DRBC has never contested in litigation until now. Stated most simply, the "[DRBC] is the Federal agency designated to implement NEPA for all projects affecting the Delaware River Basin." Bucks County Bd. of Comm'rs, 403 F. Supp. at 808 (holding that DRBC satisfied NEPA requirements in preparing a detailed EIS for a proposed oil pipeline); see also Borough of Morrisville, 399 F. Supp. at 477.[19]

B. Plaintiffs Assert a Cause of Action Against DRBC for Its Failure to Perform Its Mandatory, Non-Discretionary Duty Under NEPA

Plaintiffs state a claim for relief against DRBC for its failure to perform its mandatory, non-discretionary duty under NEPA. Plaintiffs are entitled to relief based on the doctrine of non-statutory review and this Court has jurisdiction to grant relief to Plaintiffs in the nature of mandamus pursuant to 28 U.S.C. § 1361.

1. Plaintiffs State a Claim for Relief Under the Doctrine of Non-Statutory Review

[18] DRBC notes that, on at least one page of CEQ's website, DRBC is not listed as a federal agency under NEPA. DRBC Nov. Br. at 40. Elsewhere on the website, however, DRBC is indeed listed as a federal agency. See, e.g., Agency Resources on NEPA and Environmental Justice, Nat'l Envtl. Policy Act (Feb. 10, 2012, 9:56 PM), http://ceq.hss.doe.gov/nepa_information/agency_resources.html (listing DRBC under "Independent Agencies"). Regardless, the inclusion or omission of DRBC from one page of the CEQ website cannot compare to CEQ's numerous, published references in the Federal Register to DRBC as a federal agency subject to NEPA.

[19] Plaintiffs acknowledge the existence of two contrary opinions questioning the applicability of federal obligations to DRBC. In Delaware Water Emergency Group, the court questioned in dicta whether a commission composed of four states and the federal government can be a federal agency subject to NEPA, but noted that either way a vote by the federal member might itself be deemed major federal action, and found in any event that the question "need not be presently decided." 536 F. Supp. at 35-36. In M & M Stone Co. v. Pennsylvania Department of Environmental Protection, the court erroneously reasoned that "for the same reasons [DRBC] cannot assert [state] sovereign immunity under the Eleventh Amendment [citing Hess][,] [DRBC] is not an arm of the federal government and therefore cannot assert federal tort immunity." 07-CV-04784, 2008 WL 4467176, at n.19 (E.D. Pa. Sept. 29, 2008).The Compact itself exempts DRBC from the Federal Tort Claims Act, Compact § 15.1(m), and the district court erroneously interpreted the provision stating DRBC "shall not be considered a federal agency [under three specified statutes]" to mean that DRBC is not a federal agency at all.

Plaintiffs seeking to challenge agency action in excess of statutory authority may bring claims under the doctrine of non-statutory review. Plaintiffs in the instant action state a claim for relief under that doctrine. As one scholar explained,

> [t]here is another category of review, denominated 'nonstatutory review,' under which courts review agency action that is covered neither by a specific review provision nor by the APA. These challenges to agency action include petitions for mandamus, general federal question equity actions, and actions for declaratory relief under the federal Declaratory Judgment Act.

Jack M. Beermann, Common Law and Statute Law in Administrative Law, 63 Admin. L. Rev. 1, 10 (2011) (footnotes omitted). In fact, "[n]onstatutory review has produced some of our most important opinions defining the legitimate scope of government action." Peter L. Strauss et al., Gellhorn and Byse's Administrative Law, Cases and Comments 1198 (11th ed. 2011) (citing, inter alia, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) and Osborn v. Band of the United States, 22 U.S. (9 Wheat.) 738 (1824)). To state a claim under the doctrine of non-statutory review, a plaintiff must demonstrate 1) that an agency has acted in excess of its statutory authority, and 2) the absence of a legislative intent to preclude review of that action.

DRBC's actions are ultra vires and thus meet the first element of a claim for non-statutory review. See Aid Ass'n for Lutherans v. USPS, 321 F.3d 1166, 1173 (D.C. Cir. 2003). As Plaintiffs demonstrate, there is a "specific provision of [an act] which, although it is 'clear and mandatory', has nevertheless been violated." Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492, 496 (D.C. Cir. 1980) (quoting Leedom v. Kyne, 358 U.S. 184, 188 (1958)). DRBC acted in excess of its authority by violating a clear and mandatory provision of NEPA. NEPA conditions DRBC's authority to conduct a "major federal action" on the preparation of an EIS. 42 U.S.C. § 4332. Proposing regulations is a major federal action. Statutory and Regulatory Background, supra. DRBC failed to prepare an EIS before proposing the rules. As a result, this proposal is in excess of DRBC's statutory authority.

Plaintiffs satisfy the second prong for non-statutory review as well. There is no evidence of a legislative intent to preclude DRBC's noncompliance with NEPA from non-statutory review. Dart v. United States, 848 F.2d 217, 223 (D.C. Cir. 1988). DRBC's exemption from the APA is a provision of general preclusion and does not speak to a specific congressional intent to preclude non-statutory review of DRBC's actions. While clear and convincing evidence of a contrary specific legislative intent is sufficient to preclude non-statutory review, a provision generally precluding review is not sufficient evidence of specific intent to preclude. See Griffith v. Fed. Labor Relations Auth., 842 F.2d 487, 492 (D.C. Cir. 1988) (non-statutory review available "[e]ven where Congress is understood generally to have precluded review"); Leedom, 358 U.S. at 188 (reviewing the ultra vires actions of the NLRB under non-statutory review in spite of provisions in the National Labor Relations Act generally precluding review).

2. Mandamus Is the Appropriate Remedy to Compel DRBC to Follow Its Mandatory Non-Discretionary NEPA Obligations

While non-statutory review provides the right of action, 28 U.S.C. § 1361 vests subject matter jurisdiction in this Court to "compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Mandamus relief is the vehicle by which a court compels the performance of a nondiscretionary duty.[20] Mandamus is appropriate where an agency "has a clear obligation to perform a duty, the plaintiff has a clear right to relief, and there is no other adequate remedy available to the plaintiff. . . ." Freedom Watch, Inc., v. Obama, 807 F. Supp. 2d 28, 34 (D.D.C. 2011) (citation omitted). A court may not use mandamus to control an official's discretion. See Marbury v. Madison, 5 U.S. (1 Cranch) at 170-71.

Mandamus is a traditional form of relief in a non-statutory review action. See Richard H. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and The Federal System 855-56 (6th ed. 2009);

[20] Fed. R. Civ. P. 81(b) abolished the technical writ of mandamus in the district courts, but provided for the "relief previously available through [mandamus]" through appropriate action under the rules, such as a claim under 28 U.S.C. § 1361.

see generally Clark Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensible Parties, Mandamus, 75 Harv. L. Rev. 1479 (1962). This traditional relief was made more accessible through the passage of 28 U.S.C. § 1361 and has continued even after the adoption of the APA. See generally Clark Byse & Joseph V. Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308 (1967). Courts have exercised their § 1361 jurisdiction to require federal agencies, including DRBC, to issue an EIS under NEPA. Borough of Morrisville , 382 F. Supp. at 546 ("The procedures surrounding the preparation of a NEPA [EIS] . . . can be mandamused. . . ."); Joseph v. Adams, 467 F. Supp. 141, 147-48 (E.D. Mich. 1978) ("[A] a duty to file an [EIS] can be enforced by way of mandamus."). Here, DRBC has a mandatory, non-discretionary duty to perform a NEPA analysis in conjunction with the Draft Regulations. Mandamus relief is the only remedy available to Plaintiffs. Importantly, Plaintiffs do not ask this Court to control DRBC's discretion. Rather, they ask the Court to ensure that the duty owed to them—environmental review pursuant to NEPA requirements—is executed.

3. In the Alternative, the Court Can Provide Equitable Relief to Plaintiffs Against DRBC's Ultra Vires Action

Prior to the passage of the § 1361, mandamus actions could be maintained only in the District Court for the District of Columbia. To avoid the jurisdictional bar, plaintiffs outside the D.C. District sought injunctive and declaratory decrees against agencies and officials. Beermann, 63 Admin. L. Rev. at 10; see also Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902) (providing equitable relief against Postmaster General's ultra vires action); Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & Steamship Clerks, 281 U.S. 548 (1930) (recognizing availability of equitable relief to remedy agency action in excess of statutory authority). The passage of § 1361 expanded mandamus jurisdiction to all U.S. district courts, but courts continued to provide equitable remedies against ultra vires agency action.

See Dart, 848 F.2d at 224 (providing equitable relief against Secretary of Commerce for his ultra vires action); Aid Ass'n for Lutherans, 321 F.3d at 1173 (providing equitable relief against Postal Service's ultra vires regulations). In the instant case, DRBC clearly acted in excess of its authority under NEPA. This Court has jurisdiction to review Plaintiffs' challenges against DRBC's noncompliance under the doctrine of non-statutory review and grant mandamus relief. Should the Court decline to exercise its §1361 jurisdiction, it has jurisdiction under 28 U.S.C. § 1331 to provide injunctive and declaratory relief to Plaintiffs.

4. DRBC Executive Director Carol Collier Is a Proper Party to This Action

Contrary to DRBC's assertions, DRBC Nov. Br. at 18-19, Executive Director Carol Collier, named in her official capacity, is a proper party. The Compact provides that the Commissioners shall "[a]ppoint the principal officers of the commission and delegate to and allocate among them administrative functions, powers, and duties." Compact § 14.1(b)(4); see also Compact § 14.5(a) ("The officers of the commission shall consist of an executive director and such additional officers, deputies and assistants as the commission may determine."). The Executive Director has broad authority under the Compact and the RPP; she may appoint all of the officers and employees below her, see Compact § 14.5(a), and may issue binding determinations pursuant to her discretionary authority.

Section 2.3.5 of the RPP grants the Executive Director discretionary authority to determine which projects will have a substantial effect on water resources of the Basin and will therefore require Commission approval regardless of project size. As described supra, Defendant Collier exercised this discretionary authority to determine that natural gas extraction projects could not proceed in the Basin without Commission permission. Decisions of the Executive Director pursuant to Section 2.3.5 are binding, unless appealed. RPP Art. 5, 6. The RPP further provides that the Executive Director may "require such additional information as may be needed" to permit adequate Commission consideration

of proposed changes to the comprehensive plan, such as the Draft Regulations at issue here. RPP Art. 1, § 2.1.6. Review and consideration of such changes is then based on the recommendation of the Executive Director and the further direction of the Commission. Id. Given the Executive Director's broad authority to issue binding determinations and require additional information, it is well within her purview to order an environmental review.[21]

The situation here is therefore inapposite to the cases DRBC cites, all of which involve instances where the Executive Director did not have the authority to take the action requested. While it may be well-settled law that "official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," Goldberg v. Town of Rocky Hill, 973 F.2d 70, 73 (2d Cir. 1992) (quoting Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 690 n.55 (1978)), such statement by no means "stand[s] for the legal principle that the claims against an individual defendant in [her] official capacity must be dismissed where the governmental entity or municipality is also named," Delguerico v. Springfield Twp., No. Civ.A. 02-3453, 2002 WL 32341774, at *7 (E.D. Pa. Nov. 26, 2002). Consequently, Plaintiffs' claim against Defendant Collier in her official capacity should stand and DRBC's motion should be denied.

5. Plaintiffs Need Not Assert a Statutory or APA Cause of Action to Bring a NEPA Challenge Under Non-Statutory Review

Defendants' arguments notwithstanding, the APA is not the exclusive means to review NEPA compliance. Neither need Plaintiffs rely on a statutory or implied private right of action created by

[21] Under DRBC's previous two sets of NEPA regulations, the Executive Director had authority to order an EIS. Both provided that an environmental report or EIS was required for an action which "the Executive Director, in his discretion, determines is a major action." 36 Fed. Reg. 20,381 at 20,382 (Oct. 21, 1971) (section 2-3.5.2(a)(7)); 39 Fed. Reg. 25,473 at 25,480 (July 11, 1974) (section 401.56(i)). The regulations further provided that it is the Executive Director who "shall prepare a draft environmental [impact] statement." 36 Fed. Reg. at 20,382 (section 2-3.5.2(c)); 39 Fed. Reg. at 25,480 (section 401.52, 401.60) ("impact" appears in 1974 draft). Moreover, the regulations clarified that the Executive Director had broad authority to determine the scope of and to process and finalize the EIS. 36 Fed. Reg. at 20,382; 39 Fed. Reg. at 25,480-81. In recognition of this authority, CEQ identifies the Executive Director as lead contact on its list of federal agencies with NEPA responsibilities. See 49 Fed. Reg. 49,750 (Dec. 21, 1984) at 49,573 (Appendix I, Federal and Federal-State Agency NEPA Contacts).

NEPA or the Compact. The enactment of the APA in 1946 did not replace or diminish the availability of non-statutory review. This Court has expressly recognized the continued availability of non-statutory review, holding "'[a]n agency's exemption from [the APA] does not negate the applicability of common law review principles that preexisted and operate apart from [their] subsequent codification' in the APA." Lutz v. USPS, 538 F. Supp. 1129, 1133 (E.D.N.Y. 1982) (quoting Peoples Gas, Light & Coke Co. v. USPS, 658 F.2d 1182, 1190-91 (7th Cir. 1981)).

Courts continue to provide non-statutory relief in the absence of either a statutory cause of action or the APA when plaintiffs seek to challenge action beyond an agency's authority. See Chamber of Commerce v. Reich, 74 F.3d 1322, 1327 (D.C. Cir. 1996) (recognizing that plaintiffs unable to bring their claims under a "specific or a general statutory review provision . . . may still be able to institute a non-statutory review action."); Dart, 848 F.2d at 224 (granting non-statutory equitable relief against Secretary of Commerce through non-statutory review); Aid Ass'n for Lutherans, 321 F.3d 1173.[22]

6. The APA Does Not Bar Plaintiffs from Seeking Non-Statutory Review

The APA in no way restricts the availability of non-statutory review of NEPA claims. In fact, the APA specifically contemplates the continued use of non-statutory review. See 5 U.S.C. § 703. Where the APA is unavailable, § 703 provides that "the traditional nonstatutory avenues for declaratory and injunctive relief, and for mandamus, continue to function." Strauss, supra, at 1200 (citing R.I. Dep't of Envtl. Mgmt v. United States, 304 F.3d 31 (1st Cir. 2002) and Reich, 74 F.3d at 1322). As a result, there is no reason to preclude non-statutory review of Plaintiffs' challenge to DRBC's failure to do the

[22] DRBC asserts that mandamus relief requires an implied statutory right of action, and cites several INS cases to support this erroneous conclusion. DRBC Nov. Br. at 16-17 (citing Aguirre v. Meese, 930 F.2d 1292, 1293 (7th Cir. 1991) (per curiam)); Gonzalez v. INS, 867 F.2d 1108, 1110 (8th Cir. 1989); United States v. Egwu, No. 92cv1291 (SJ), 1992 WL 266934, at *1 (E.D.N.Y. 1992). Mandamus was denied in these cases because there was no clear obligation to perform a duty as required by mandamus. See Freedom Watch, Inc., 807 F. Supp. 2d at 34. DRBC also cites District Lodge No. 166 v. TWA Services, Inc., 731 F.2d 711, 718 (11th Cir. 1984), which denied mandamus because the plaintiff was not seeking to remedy a failure to perform a "clear, ministerial, and non-discretionary duty." DRBC Nov. Br. at 17-18. Finally, DRBC cites CETA Workers' Organizing Committee v. City of New York, 617 F.2d 926 (2d Cir. 1980). DRBC Nov. Br. at 16-17. In CETA, mandamus review was denied because the statute specifically precluded such review. Id. at 930-31. None of these cases stands for the general proposition that mandamus requires a statutory right of action.

required NEPA analysis. Defendants cite to Karst Environmental Education and Protection v. EPA, 475 F.3d 1291, 1295 (D.C. Cir. 2007) and Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 939 (9th Cir. 2005) for the proposition that the APA is the exclusive cause of action for NEPA claims. Corps Br. at 39, DRBC Nov. Br. at 12-13. But the language in these cases does not affirmatively make the APA the exclusive remedy. The decisions focus instead on the availability of an implied statutory right of action under NEPA. Plaintiffs again emphasize that mandamus relief is based on a non-statutory cause of action, in contrast to an explicit or implied statutory cause of action.

Defendants do not and cannot marshal a single case genuinely suggesting that non-statutory review is unavailable in NEPA challenges. In every case Defendants cite, the plaintiffs sought relief under the APA, not under non-statutory review. Those courts, therefore, did not have the opportunity to consider the availability of non-statutory review where the APA was unavailable.

7. There Is No Sovereign Immunity Bar to Plaintiffs' Claim Against the DRBC

"The Supreme Court has held that mandamus actions are not barred by sovereign immunity." Hart and Wechsler's, supra, at 854 (citing Houston v. Ormes, 252 U.S. 469, 472-74 (1920) ("[A] suit brought by the person entitled to the performance of the duty against the official charged with its performance is not a suit against the government")); Minnesota v. Hitchcock, 185 U.S. 373, 386 (1902); Wash. Legal Found. v. U.S. Sentencing Comm'n, 89 F.3d 897, 901 (D.C. Cir. 1996) ("If a plaintiff seeks a writ of mandamus to force a public official to perform a duty imposed upon him in his official capacity, however, no separate waiver of sovereign immunity is needed"). Sovereign immunity "bars unconsented suits against the United States." Hart and Wechsler's, supra, at 841. However, when the authority of a government official is limited by statute, "his actions beyond those limitations are considered individual and not sovereign actions." See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949). When acting beyond those limitations, the agency official "is not doing the

business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief." Id. By proposing rules for a major federal action without NEPA compliance, DRBC acted in a way "which the sovereign has forbidden." Id. DRBC actions exceeding its statutory authority cannot be attributed to the sovereign, and therefore cannot be barred by sovereign immunity.

8. The Theory of Functional Equivalence Does Not Apply

Grasping at straws, DRBC argues that its "mission and procedure vindicate NEPA's policy objectives." DRBC Nov. Br. at 37. This effort to invoke the narrow doctrine of functional equivalence should be rejected on its face. The functional equivalence doctrine was adopted first by the Court of Appeals for the District of Columbia Circuit in response to the assertion by the Portland cement industry that EPA should be required to prepare an EIS under NEPA before adopting new source performance standards applicable to the cement industry under Section 111 of the Clean Air Act of 1970. See Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973). After carefully examining the legislative history of NEPA and reviewing in detail the scientific basis for the proposed new source standards, Judge Leventhal, writing for a unanimous court, reasoned that the procedural requirements placed on EPA by Section 111 of the Clean Air Act assured that the environmental review preceding adoption of the standards would be the functional equivalent of an EIS. In reaching this result, he concluded, "we refrain from a determination of any broader claim of NEPA exemption." 486 F.2d at 385.

Subsequent decisions have extended the equivalence doctrine to other EPA regulatory programs, but none of these decisions has blindly granted EPA a broad exemption predicated solely on the general environmental protection mission of the agency. Each time the functional equivalence doctrine has been extended to another EPA regulatory program, the courts have done so because the

environmental protection scope and procedures under a particular statutory program are designed and implemented in a way that assures that the environmental evaluation components and public involvement procedures of NEPA and the CEQ implementing regulations have been met by the program in question. To demonstrate a sufficient level of equivalence of DRBC process leading up to publication of the Draft Regulations, the record would need to show a "hard look" consideration of the five core issues enumerated in Section 102(2)(C) for evaluation in an EIS[23] as well as a meaningful opportunity for public review and comment on the Commission's record of consideration of these core issues before publication of the proposed regulations. See EDF, Inc. v. EPA, 489 F.2d 1247, 1256 (D.C. Cir. 1973); Found. on Economic Trends v. Heckler, 587 F. Supp. 753, 766 (D.D.C. 1984).

Where, as in this case, none of the five core issues has been examined and subjected to public review and comment, the concept of equivalence is inapposite. There is no record of any kind to demonstrate that DRBC took the requisite "hard look" at environmental issues before it approved publication of the Draft Regulations. DRBC has not prepared nor shared with the public any written document addressing any of the core environmental issues involved in NEPA review. To assert that it has met the functional equivalence doctrine standard is to make a mockery of that doctrine.

II. The Corps Failed to Fulfill Its Mandatory, Non-Discretionary Duty Under NEPA to Prepare an EIS in Connection with the Draft Regulations

A. The Corps Had an Independent Duty Under NEPA to Perform an Environmental Analysis by the Time of the Proposal of the Draft Regulations

The Corps, a federal agency subject to the APA, has an independent duty to ensure NEPA compliance in developing the Draft Regulations. The Corps must fulfill this duty under any of three possible scenarios. First, if DRBC as a federal agency had fulfilled its own obligation to perform NEPA

[23] The core issues are: (i) the environmental impact of the proposed action (including the cumulative impacts); (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C).

review in relation to the Draft Regulations, then the Corps could have fulfilled its own duties merely by consulting with DRBC at DRBC's request as a "cooperating agency" pursuant to 40 C.F.R. § 1501.6. Second, if DRBC as a federal agency were derelict in performance of its NEPA duties relating to the Draft Regulations—which it is here—then the Corps would have no choice but to perform its own NEPA analysis to fulfill its independent obligation and avoid similar noncompliance with NEPA. Third, even if this Court were to conclude that DRBC is not a federal agency—which it is—as demonstrated below, the Corps' involvement in DRBC and the development of the Draft Regulations would sufficiently federalize that action such that it would necessitate NEPA review by the Corps prior to issuance of the Draft Regulations. Thus, under each of these scenarios, the Corps has NEPA obligations with respect to the Draft Regulations that it has unlawfully failed to execute. Plaintiffs bring suit under 5 U.S.C. § 706(1) to compel the Corps' production of an EIS, an action "unlawfully withheld" within the meaning of that provision.[24]

CEQ defines "federal" actions broadly, as those "which are potentially subject to Federal control and responsibility . . . including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies." 40 C.F.R. § 1508.18 (emphasis added). To determine whether an ostensibly non-federal project or plan constitutes a major federal action under NEPA, courts look to "[i] the nature of the Federal funds used and [ii] the extent of Federal involvement." Sierra Club v. Penfold, 857 F.2d 1307, 1314 (9th Cir. 1988). Pursuant to the Compact, the federal member and the states jointly fund DRBC's operations. Compact § 13.3. Yet even were this not the case, federal funding is not necessary in order to subject an action to NEPA: sufficient interrelation of federal and non-federal action or the exercise of sufficient "power, authority, or control" over the action will do. See, e.g., Citizens Alert Regarding Env't v. EPA, 259 F. Supp. 2d 9, 20 (D.D.C. 2003).

[24] Plaintiffs bring suit against the Corps, in the alternative, under 5 U.S.C. § 706(2).

1. The Corps' Role in the Commission Sufficiently Interrelates Federal and Non-Federal Action, Necessitating Compliance with NEPA Regardless of Whether DRBC Is Deemed a Federal Agency

The Corps is independently obligated to perform a NEPA analysis where the "federal action [is] sufficiently 'interrelated' to otherwise non-federal action." Landmark West! v. USPS, 840 F. Supp. 994, 1006 (S.D.N.Y. 1993), aff'd, 41 F.3d 1500 (2d Cir. 1994). Indeed, even "nonfederal defendants may be enjoined if Federal and state projects are sufficiently interrelated to constitute a single Federal action for NEPA purposes." Laub v. DOI, 342 F.3d 1080, 1092 (9th Cir. 2003) (citations omitted); see also Biderman v. Morton, 497 F.2d 1141, 1147 (2d Cir. 1974). Acting pursuant to a federal-interstate compact, the Corps' actions and DRBC actions on the Draft Regulations are sufficiently interrelated to subject the Corps to NEPA requiements. The Corps is substantially involved in DRBC as a one-fifth voting member on the entirety of every matter before the Commission. Cf. Macht v. Skinner, 916 F.2d 13, 19 (D.C. Cir. 1990) (finding lack of federalization where federal agency "has discretion over only a negligible portion of [non-federal action]"). Indeed, the federal government participates in every essential aspect of DRBC, from development and implementation of the Comprehensive Plan, Compact § 13.1, to funding DRBC's operating budget, id. § 13.3.

Moreover, the DRBC Comprehensive Plan and amendments thereto—including the Draft Regulations at issue here—are distinctly affected by the federal member's vote and thus substantially interrelated with federal action. Pursuant to section 15.1(s) of the Compact, if the federal member votes to implement proposed rules, other federal agencies are barred from implementing rules, regulations, or actions that "substantially conflict" with such rules. Id. § 15.1(s). On the other hand, if the Corps votes against a set of rules that nevertheless pass, other federal agencies will not be bound by those rules. With the federal member's vote, DRBC in effect enacts federal regulations binding on other agencies.

Because the Draft Regulations are substantially interrelated with federal action, the Corps has an independent duty to prepare an EIS in conjunction with their proposal.

2. The Corps Has Sufficient Power, Authority, and Control over the Rules to Subject the Rules to NEPA Regardless of Whether DRBC Is Deemed a Federal Agency

Ostensibly non-federal action must also be subjected to NEPA where an involved federal actor exercises sufficient "power, authority, or control" over the action so as to render it a "major Federal action" under NEPA. See, e.g., Ka Makani 'O Kohala Ohana v. Dep't of Water Supply, Inc., 295 F.3d 955, 960 (9th Cir. 2002). "'[T]he distinguishing feature . . . is the ability to influence or control the outcome in material respects.'" Vill. of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1482 (10th Cir. 1990) (quoting W. Rodgers, Environmental Law § 7.6, at 763 (1977)); Rattlesnake Coal. v. EPA, 509 F.3d 1095, 1101 (9th Cir. 2007). Under the Compact, the Corps exercises sufficient "decision-making power, authority, or control" to require preparation of an EIS in connection with any major DRBC action significantly affecting the human environment. The federal member has a vote equal to each of the state members, equivalent to twenty percent of the voting power, categorically greater than the power to give "nonbinding advice." Ka Makani, 295 F.3d at 961. Courts have required federal agencies to prepare EISs in connection with otherwise non-federal action where the agency has substantial authority to influence the non-federal action, regardless of the actual control the federal agency chooses to exercise, and even where the federal agency has no power to entirely deny or veto the non-federal action. See, e.g., Sierra Club v. Hodel, 848 F.2d 1068, 1090-91 (10th Cir. 1988), overruled on other grounds, Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992). Thus it is no matter that the Corps is not a "but-for" cause of the Draft Regulations, since "but-for" causation is not required before a non-federal action may be deemed subject to NEPA. See also Save the Bay, Inc. v. U.S. Corps of Eng'rs, 610 F.2d 322, 327 (5th Cir. 1980).

Further, the Corps has the authority—alone and independent of other members of DRBC—to determine the basic function and significance of DRBC's rules in the scheme of federal government. As discussed above, pursuant to section 15.1(s) of the Compact, if the Corps votes in favor of the Draft Regulations, other federal agencies will be barred from implementing rules, regulations, or actions that "substantially conflict" with the proposed rules. Compact § 15.1(s). Thus, it is misleading for the Corps to assert that "the Federal Defendants do not have 'decisionmaking' or 'approval authority' over actions to be proposed by DRBC any more than the Commissioner[s] representing [the member states]." Corps Br. at 36. The Corps alone has decision making power, authority, and control over whether the Draft Regulations will supersede other federal agency decisions affecting the Basin. Thus, the Corps exercises sufficient decision making power, authority, and control so as to render the Draft Regulations a major federal action under NEPA for which the Corps must prepare an EIS.

B. Plaintiffs' Claim Against the Corps Is Not Barred by Sovereign Immunity

Sovereign immunity is no bar to this Court's review of the Corps' failure to perform its mandatory and nondiscretionary duties under NEPA. The APA provides a general waiver of sovereign immunity to plaintiffs bringing claims for non-monetary relief against an agency. 5 U.S.C. § 702. There is wide agreement that this waiver of sovereign immunity applies "to any suit whether under the APA or not." Trudeau v FTC, 456 F.3d 178, 186 (D.C. Cir. 2006) (citing Reich, 74 F.3d at 1328); see also Sharkey v. Quarantillo, 541 F.3d 75, 91 (2d Cir. 2008); United States v. City of Detroit, 329 F.3d 515, 521 (6th Cir. 2003) (listing cases in other circuits where the § 702 waiver of sovereign immunity was "not limited to suits brought under the APA"). The expansive scope of the APA's waiver of sovereign immunity is clearly articulated in the House and Senate Judiciary Committee reports on the 1976 amendment to the APA, which state that the purpose of § 702 is the "'elimina(tion of) the sovereign immunity defense in all equitable actions for specific relief against a Federal agency.'" Sea-Land Serv.,

Inc. v. Alaska R.R., 659 F.2d 243, 244 (D.C. Cir. 1981) (quoting S. Rep. No. 940996, at 8 (1976) and H.R. Rep. No. 94-1656, at 9 (1976)). Given that the waiver is not limited to APA cases, "[the waiver] applies regardless of whether the elements of an APA cause of action are satisfied." Trudeau, 456 F.3d at 344; see also The Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518 (9th Cir. 1989).[25]

In the instant case, the APA waives the Corps' sovereign immunity against Plaintiffs' claims. Plaintiffs bring suit for specific non-monetary relief against the Corps' failure to act in the face of its clear statutory duties under NEPA. 5 U.S.C. § 706(1). The APA, under § 702, waives the Corps' sovereign immunity against Plaintiffs' § 706(1) claim. This Court, accordingly, has jurisdiction to review Plaintiffs' claims and provide appropriate relief. The Corps attempts to evade the APA's expansive waiver of sovereign immunity by erroneously arguing that it has not performed an "agency action" under the APA. Corps Br. at 10-13. As articulated above, the Corps has an independent obligation to comply with NEPA here. The Corps' "failure to act" in the face of those clear obligations is the "agency action" subject to APA review in this case. 5 U.S.C. §§ 551(13), 706(1).

Further, contrary to the Corps' assertion, Corps. Br. at 7-8, the Compact itself does not immunize the Corps from suit here. It is true that Compact § 15(p) of the Compact states that "nothing contained in this Compact or elsewhere in this Act shall be construed as a waiver by the United States of its immunity from suit." However, that provision does not insulate the Corps from waivers of immunity that exist outside the Compact. The § 702 waiver is applicable notwithstanding the language of § 15(p).[26]

III. Plaintiffs Have Individual, Associational, and Organizational Standing

[25] The Corps argues that Plaintiffs cannot claim a waiver of sovereign immunity under the APA because the rule-making process is not sufficiently final. Corps Br. at 13-14. As Trudeau makes clear, finality is not required for application of the APA's waiver of sovereign immunity. 456 F.3d at 344. Plaintiffs' claims under the APA alleging "legal wrong because of agency action" and seeking an order from the court to "compel agency action unlawfully withheld," fall squarely within the APA's waiver of sovereign immunity. 5 U.S.C. §§ 702, 706(1).

[26] In the event this Court were to find that Plaintiffs cannot state a claim against the Corps under the APA, Plaintiffs would still state a claim against the Corps pursuant to non-statutory review of agency action and its 28 U.S.C. §1361 jurisdiction. See Section I.B.

A. Standards—Article III and Prudential Standing

Article III of the Constitution limits the authority of federal courts to decide actual cases and controversies. See Allen v. Wright, 468 U.S. 737, 750 (1984). In Lujan v. Defenders of Wildlife, the Supreme Court held that, to demonstrate the "irreducible constitutional minimum of standing" under Article III, a plaintiff must prove, first, an injury in fact: "an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." 504 U.S. 555, 560-61 (1992) (citations omitted).

An organization has associational standing to sue on behalf of its members where "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Adver., 432 U.S. 333, 343 (1977). With respect to (a), the organization must show that its members can demonstrate injury-in-fact, causation, and redressability. Bldg. and Const. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc., 448 F.3d 138, 144 (2d Cir. 2006). An organization may have standing in its own right for injuries to its organizational interests. N.Y. Civil Liberties Union v. N.Y. City Transit Auth., -- F.3d --, 2012 WL 10972 at *6 (2d Cir. Jan. 4, 2012). "Under this theory of 'organizational' standing, the organization . . . . must 'meet[ ] the same standing test that applies to individuals.'" Id. (quoting Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 649 (2d Cir. 1998)).

Environmental plaintiffs possess a concrete interest where "they aver they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 183 (2000) (quoting

Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). Activities such as fishing, boating, swimming, drinking water, and hiking along a river have been found to meet this test. Riverkeeper, Inc., v. Mirant Lovett, LLC, 675 F. Supp. 2d 337, 351 (S.D.N.Y. 2009); see also Vt. Pub. Interest Research Grp. v. U.S. Fish and Wildlife Serv., 247 F. Supp. 2d 495, 509-11 (D. Vt. 2002); Pres. Coal. of Erie Cnty. v. FTA, 129 F. Supp. 2d 551, 561-62 (W.D.N.Y. 2000). The injury-in-fact requirement is not onerous. An aesthetic or recreational injury "need not be large, an identifiable trifle will suffice." La Fleur v. Whitman, 300 F.3d 256, 270-71 (2d Cir. 2002)(quotation omitted). Allegations of harm from increased health-related uncertainty also satisfy the injury-in-fact requirement. NYPIRG v. Whitman, 321 F.3d 316, 326 (2d Cir. 2003); NRDC v. U.S. Army Corps of Eng'rs, 399 F. Supp. 2d 386, 401 (S.D.N.Y. 2005).

"The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements." Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 160 (4th Cir. 2000) ("Threatened environmental harm is by nature probabilistic . . . ."). The threat of harm need not be great: "'[E]ven a small probability of injury is sufficient to create a case or controversy – to take a suit out of the category of the hypothetical – provided of course that the relief sought would, if granted, reduce the probability.'" Massachusetts v. EPA, 549 U.S. 497, 525 n.23 (2007) (quoting Vill. of Elk Grove v. Evans, 997 F.2d 328, 329 (7th Cir. 1993)). [27]

[27] API asserts that a high degree of proof is needed to establish an injury-in-fact for future harms. API Br. at 10-11. However, three of the four cited cases are not environmental cases and cannot overcome the weight of Supreme Court authority holding the contrary. See Amnesty Int'l USA v. Clapper, 638 F.3d 118, 134 (2d Cir. 2011) (involving communications monitoring); Baur v. Veneman, 352 F.3d 625 (2d Cir. 2003) (involving food labeling), Ly-Luck Restaurant v. U.S. Dep't of Labor, No. C-92-3852, 1993 WL 121780 (N.D. Cal. Apr. 1, 1993) (involving labor markets). In Mountain States Legal Foundation v. Glickman, the fourth case API cites, the D.C. Circuit stated that probabilistic injuries may be sufficient to establish standing, and that "[t]he more drastic the injury that government action makes more likely, the lesser the increment in probability necessary to establish standing." 92 F.3d 1228, 1235 (D.C. Cir. 1996). Put another way, the probability of an injury need not be great if the magnitude of the potential harm is immense. Applying Mountain States Legal Foundation to the immediate case, injury in fact has been established: because the potential harms caused by gas drilling are so enormous, the probability of an accident could be near zero and yet sufficient to establish standing.

Although the standing doctrine is based on Article III, "it also implicates . . . prudential limitations on a court's authority to hear a case." Lee v. Bd. of Governors of the Fed. Reserve Sys., 118 F.3d 905, 910 (2d Cir. 1997). Under the doctrine of prudential standing, a plaintiff's asserted interest should be "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Sullivan v. Syracuse Hous. Auth., 962 F.2d 1101, 1106 (2d Cir. 1992) (quoting Assoc. of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)). Courts have interpreted NEPA's zone of interests to encompass claims of harms to the recreational use and aesthetic enjoyment of the environment. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 886 (1990). Additionally, courts have also found a threatened economic harm to a business that is inextricably linked to the environment to constitute injury-in-fact within NEPA's zone of interests. See Gerosa Inc. v. Dole, 576 F. Supp. 344, 348-49 (S.D.N.Y. 1983); see also Mobil Oil Corp. v. FTC, 430 F. Supp. 855, 860-61, 864 (S.D.N.Y. 1977), rev'd on other grounds, 562 F.2d 170 (1977).

In the NEPA context, plaintiffs may assert a concrete, particularized injury when an agency fails to follow specific procedural requirements that are "designed to protect some threatened concrete interest" that forms the ultimate basis for standing. Defenders of Wildlife, 504 U.S. at 573 n.8.

> To establish an injury-in-fact from failure to perform a NEPA analysis, a litigant must show: 1) that in making its decision without following the NEPA's procedures, the agency created an increased risk of actual, threatened or imminent environmental harm; and 2) that this increased risk of environmental harm injures its concrete interests.

Sierra Club v. DOE, 287 F.3d 1256, 1265 (10th Cir. 2002); see also City of Sausalito v. O'Neill, 386 F.3d 1186, 1197-98 (9th Cir. 2004).

Because NEPA involves procedural rights and obligations, the Article III prongs of "causation" and "redressability" for standing are relaxed in NEPA cases. Standing thus only requires that the violation of a procedural requirement could impair a separate concrete interest of a plaintiff. A plaintiff challenging an agency's environmental studies need not show that further analysis would result in a

different conclusion; rather, it suffices that the agency's decision could be influenced by the environmental considerations that the relevant statute requires an agency to analyze or evaluate. Friends of Hamilton Grange v. Salazar, No. 08 Civ. 5220(DLC), 2009 WL 650262, at *14 (S.D.N.Y. Mar. 12, 2009) ("When asserting a procedural right, a party need not definitively establish that further review or consultation would result in the outcome it desires in order to demonstrate redressability."); see also Massachusetts v. EPA, 549 U.S. at 518.

B. Maya van Rossum and Paul Gallay Have Individual Standing

Defendants argue that "prudential limitations against third-party standing prevents the Riverkeeper individual plaintiffs from being proper party plaintiffs in this action." Corps Br. at 27. However, named plaintiffs Maya van Rossum, the Delaware Riverkeeper, and Paul Gallay, the Hudson Riverkeeper, do not assert third-party standing but rather their own. Ms. van Rossum lives within the Delaware River Basin and frequently spends time swimming, hiking, and enjoying the scenery in, and around, the Delaware River. Ex. A at ¶¶ 18-19. She plans to continue these uses in the future, and she is concerned that her enjoyment of these activities will be diminished by gas drilling activities in the Delaware River Basin. Ex. A at ¶¶ 18-19. Additionally, Ms. van Rossum expresses health related concerns from air pollution and chemical exposure as a result of gas drilling. Ex. A at ¶ 19. Her recreational, aesthetic, and health-related interests are threatened by Defendants' failure to comply with NEPA, and are sufficiently concrete to satisfy the requirements of an injury in fact. Mr. Gallay receives nearly half of his drinking water, both at work and at his residence, from the Delaware River Basin. Ex. K at ¶¶ 2, 16. He has alleged significant concerns regarding his drinking water supply being compromised if gas drilling proceeds in the region, ranging from potential impacts to the New York City Watershed infrastructure to adverse impacts from increased stormwater pollution, water withdrawals, wastewater issues, and air pollution. Ex. K at ¶¶ 9-16.

C. Plaintiff Organizations Demonstrate Associational Standing

Plaintiff organizations, in their representative capacity, have standing to sue on behalf of their affected members. Plaintiffs' members have provided declarations[28] stating their individualized, particular concerns that their aesthetic, recreational, economic, and health related interests will be harmed as a result of gas drilling in the Delaware River Basin. The declarations articulate that gas drilling in the Basin will negatively affect their aesthetic and recreational interests, including: boating (Ex. F. at ¶ 5; Ex. O at ¶ 1), hiking (Ex. C at ¶ 24; Ex. D at ¶ 21; Ex. F at ¶ 6; Ex. H at ¶ 5; Ex L. at ¶ 3; Ex. P at ¶ 2), canoeing (Ex. B at ¶ 14; Ex. C at ¶ 24; Ex. D at ¶ 21; Ex. E at ¶ 6; Ex. N at ¶2; Ex. P at ¶ 2), swimming (Ex. B at ¶ 13; Ex. C at ¶ 24; Ex. D at ¶ 21; Ex. E at ¶ 6; Ex. F at ¶ 5; Ex. N at ¶2; Ex. O at ¶ 1; Ex. P at ¶ 2), tubing (Ex. B at ¶ 14), bird-watching (Ex. E at ¶ 23; Ex. H at ¶ 5), fishing (Ex. D at ¶ 21; Ex. F. at ¶ 5; Ex. G at ¶ 5; Ex. L at ¶ 5; Ex. L at ¶ 5; Ex. P at ¶ 2), and appreciating the biological diversity and local scenic beauty (Ex. B at ¶ 14; Ex. C at ¶ 24; Ex. E at ¶ 5; Ex. H at ¶ 5; Ex. L. at ¶¶ 7-11; Ex. N at ¶2).

Plaintiffs' members also aver that, if gas drilling activities begin in the Basin, they will suffer economic injuries to their businesses that are entirely dependent on the preservation and purity of the local environment. These "green" commercial activities include a chemical-free floral shop (Ex. B at ¶ 11), organic farms (Ex. C at ¶¶ 4, 14; Ex. D at ¶ 4), ecotourism-related businesses, (Ex. A at ¶ 7; Ex. B at ¶ 12; Ex. D at ¶ 12), a medicinal plant sanctuary (Ex. H at ¶ 7), and an organic food co-op (Ex. I at ¶¶ 7-10). These harms certainly exceed the requisite "mere trifle." See Gerosa Inc., 576 F. Supp. at 348; Mobil Oil Corp., 430 F. Supp. at 864.

[28] Because the parties have cross-moved for summary judgment, Plaintiffs do not rest on the standing allegations of the Complaints but have filed declarations setting forth specific facts which, for purposes of the summary judgment motion, are to be taken as true. Defenders of Wildlife, 504 U.S. at 561 (party invoking jurisdiction bears the burden of establishing standing elements "with the manner and degree of evidence required at the successive stages of the litigation").

Plaintiffs' members further aver they have significant health-related concerns related to gas drilling in the Basin, including concerns about drinking contaminated water (Ex. B at ¶ 11; Ex. C at ¶ 23; Ex. D at ¶¶ 16- 17; Ex. E at ¶ 16; Ex. F at ¶ 6; Ex. G at ¶ 4; Ex. H at ¶ 3; Ex. J at ¶¶ 3–4; Ex. K at ¶¶ 9–12; Ex. N at ¶¶ 4, 5; Ex. O at ¶ 2; Ex. P at ¶ 7); chemical exposure (Ex. C at ¶ 24; Ex. D at ¶ 14; Ex. E at ¶ 17; Ex. G at ¶ 9; Ex. L at ¶ 11; Ex. N at ¶¶ 4, 5; Ex. O at ¶ 2; Ex. P at ¶ 7); growing and consuming produce from contaminated soil (Ex. D at ¶¶ 4, 14; Ex. C at ¶¶ 4, 14, 24; Ex. I at ¶¶ 7-10; Ex. O at ¶ 2); breathing polluted air (Ex. C at ¶¶ 18, 21; Ex. D at ¶ 16; Ex. F at ¶ 6; Ex. G at ¶ 8; Ex. H at ¶ 12; Ex. J at ¶ 7; Ex. K at ¶ 13; Ex. N at ¶¶ 4, 5; Ex. P at ¶ 7); and radon exposure (Ex. J at ¶ 8). Defendants' NEPA violations have exposed these members to at least the same level of danger, and likely significantly more so, as those dangers found to constitute a concrete injury in fact in NRDC v. Corps. See 399 F. Supp. 2d at 401.

Defendants[29] and API do not dispute that Plaintiffs have suffered a procedural injury due to Defendants' failure to perform any NEPA analysis on the Draft Regulations. Corps Br. at 23; API Br. at 13-14. Rather, Defendants argue that Plaintiffs' allegations of procedural injury are not accompanied by sufficient allegations that such injuries are linked to actual, imminent, and concrete harms to their interests. Corps Br. at 23-24; API Br. at 11-13. Defendants also contend that the allegations are insufficient 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." Corps Br. at 24. However, as demonstrated by the attached declarations, Plaintiffs' individual members identified in the declarations are at special risk as they currently live, work, and/or recreate within the affected area—the Delaware River Basin—and they plan on continuing their uses of the area in the

[29] DRBC states that "[t]he DRBC Defendants also incorporate by reference and adopt the standing arguments made by the United States, as well as all other arguments made by the United States to the extent that they are equally applicable to DRBC Defendants." DRBC Nov. Br. at n.3. Accordingly, Plaintiffs' rebuttal herein applies to the arguments advanced by both the Corps and DRBC.

future. The harms to these interests they state are precisely the type of harms that have been recognized to fulfill the injury-in-fact and zone of interests requirements. See Laidlaw, 528 U.S. at 183; Riverkeeper, 675 F. Supp. 2d at 351. Because these are precisely the types of interests that NEPA was designed to protect, and because Defendants' failure to comply with NEPA's mandatory procedural requirements on the Draft Regulations has impaired identified Plaintiffs' members' ability to vindicate their specific concrete interests, the relaxed standards of causation and redressability apply and Plaintiffs have adequately demonstrated injury-in-fact. Defenders of Wildlife, 504 U.S. at 572 n.7; see also NRDC v. U.S. Army Corps of Eng'rs, 399 F. Supp. 2d at 401.

Accordingly, Plaintiff organizations have met the first part of the associational standing test. On the second prong—germaneness to the organization's purpose—the Second Circuit has found that this requirement "is 'undemanding'; 'mere pertinence between litigation subject and organizational purpose' is sufficient." Bldg. and Constr. Trades Council, 448 F.3d at 148 (quoting Humane Soc'y of the U.S. v. Hodel, 840 F.2d 45, 58 (D.C. Cir. 1988)). In other words, "[a] court must determine whether an association's lawsuit would, if successful, reasonably tend to further the general interests that individual members sought to vindicate in joining the association and whether the lawsuit bears a reasonable connection to the association's knowledge and experience." Id. at 149. Here, Plaintiff organizations are dedicated to preserving the environmental integrity of the Delaware River Basin. Their members have a direct interest in ensuring that Defendants comply with NEPA on the Draft Regulations to ensure informed government decision making and to vindicate their underlying recreational, aesthetic, professional, economic, and health interests in a safe and healthy Delaware River Basin. Complaint at ¶¶ 9-15, 16-19, 20-21; Ex. A at ¶ 7; Ex. K at ¶ 3; Ex. O at ¶ 3; Ex. Q at ¶¶ 2-6. With respect to the third prong of the associational standing test, the Second Circuit has found that, "where the organization seeks a purely legal ruling without requesting that the federal court award

individualized relief to its members, the Hunt test may be satisfied." Bano v. Union Carbide Corp., 361 F.3d 696, 714 (2d Cir. 2004). Here, Plaintiffs' members do not seek individualized relief, and thus participation by Plaintiff organizations' members is not required.

D. Plaintiffs Have Organizational Standing

Because Defendants' failure to comply with NEPA on the Draft Regulations has directly harmed Plaintiffs' organizational and institutional interests, Plaintiff organizations may also assert their standing directly. Here, Defendants' failure to comply with NEPA has harmed Plaintiff organizations by causing them to divert their limited resources from other activities central to their organizational purposes. In addition, Defendants' NEPA violations have directly harmed Plaintiffs' organizational interests in disseminating information on the environmental impacts of gas drilling in the Basin to their members and to the general public and in commenting on the Draft Regulations based on a full understanding of the DRBC's or Corps' evaluation of the environmental impacts thereof.

The opportunity cost of diverting resources to respond to alleged unlawful activity is sufficient to establish the injury in fact requirement for standing purposes. Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 905 (2d Cir. 1993); see also NRDC v. U.S. Army Corps of Eng'rs, 399 F. Supp. 2d at 401. Here, Defendants' failure to comply with NEPA on the Draft Regulations has caused Plaintiff organizations concrete and demonstrable harms to their institutional interests. Defendants assert that Plaintiff organizations have not suffered more than a "setback to the organization's abstract societal interests," and therefore Plaintiffs fail the injury in fact test for organizational standing. Corps Br. at 24. However, protection of the Delaware River Basin is not an "abstract societal concern" but a central focus of Plaintiffs' organizational missions. Because Defendants refused to conduct a comprehensive EIS on the Draft Regulations, Plaintiffs were forced to divert resources from existing programs to efforts to analyze the likely impacts of gas drilling in the Basin. Ex. A at ¶¶ 9, 14-17; Ex. K at ¶¶ 5-8.

Plaintiffs also have organizational standing based on their informational injury. The D.C. Circuit suggests that, similar to procedural injury, informational injury accompanied by a concrete harm may be sufficient to satisfy the standing requirement of an injury-in-fact for an organization. See Competitive Enter. Inst. v. NHTSA, 901 F.2d 107, 122-23 (D.C. Cir. 1990). Foundation on Economic Trends v. Lyng, 943 F.2d 79 (D.C. Cir. 1991), cited by Corps Br. at 23, is not to the contrary. There, the D.C. Circuit held: "[P]laintiffs seeking judicial review under section 702 of the APA for an alleged violation of NEPA and claiming only an 'informational injury' must show the particular agency action – in addition to the agency's refusal to prepare an impact statement – that allegedly triggered the violation and thereby caused the injury." Id. at 87 (emphasis in original). Here, Plaintiffs' claims are not based solely on informational injury; yet their organizational interests in gathering and disseminating information of particular interest to their members and in submitting fully informed comments on the Draft Regulations have, nonetheless, been harmed. Moreover, Plaintiffs here have identified a major federal action triggering the obligation to prepare an EIS – the Draft Regulations – and the violation of this obligation has injured Plaintiffs organizations' interests in informing their members and in commenting on the Draft Regulations.[30]

IV. Plaintiffs' Claims Are Ripe for Review

Plaintiffs' claim against DRBC is ripe under the mandamus statute 28 U.S.C. § 1361 and the doctrine of non-statutory review. Consideration of jurisdiction and the merits merge under such an inquiry. By fulfilling all requirements under non-statutory review and § 1361, Plaintiffs are entitled to relief. Even when considered under the conventional ripeness analysis as set forth in Abbott Labs. v. Gardner, Plaintiffs' claim against DRBC is still ripe. 387 U.S. 136 (1976), overruled on other grounds,

[30] Although Defendants deny that an informational injury exists here, they themselves cite caselaw finding that informational injury may exist where the informational injury is paired with a concrete harm. See Corps Br. at 23 ("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.'") (quoting Atl. States Legal Found. v. Babbitt, 140 F. Supp. 2d 185, 194 (N.D.N.Y. 2001)(emphasis added)).

Califano v. Saunders, 430 U.S. 99 (1977). Similarly, Plaintiffs' claim against the Corps is ripe under a second mandamus provision, 5 U.S.C. § 706(1). As with 28 U.S.C. § 1361, the conventional ripeness inquiry has no place under § 706(1). If Plaintiffs have demonstrated that an agency subject to the APA has unlawfully withheld a discrete action it is required to take, which Plaintiffs have, then a court must compel that action. Finally, Plaintiffs' claim against the Corps is ripe even when conceived of as a challenge to arbitrary and capricious agency action under 5 U.S.C. § 706(2). That ripeness analysis proceeds much as the conventional ripeness analysis of DRBC claim does. The additional requirement for final agency action under the APA (applicable to the Corps alone) is satisfied by the definitive and unequivocal stance of the Corps that it will not conduct a NEPA analysis in relation to DRBC Natural Gas Development Regulations.

A. The Conventional Ripeness Analysis Is Inapposite in the Mandamus Context of 28 U.S.C. § 1361

DRBC, by raising ripeness against Plaintiff New York alone, appears to concede that the claims of Plaintiffs are ripe for review. Nevertheless, Plaintiffs note briefly that 1) questions of ripeness and finality are not proper components of the mandamus inquiry, and 2) as discussed in Section V(C) below, even if the ripeness inquiry is applied, Plaintiffs' claim against DRBC satisfies the criteria set forth in Abbott Labs. Plaintiffs proceed against DRBC under 28 U.S.C. § 1361. 28 U.S.C. § 1361 is a mandamus statute "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[31] Considerations of ripeness are not properly a part of the mandamus inquiry. Instead, Plaintiffs are entitled to relief upon satisfaction of the mandamus test alone, because jurisdictional inquiries and consideration of the merits merge under § 1361. See, e.g., Wash. Legal Found., 89 F.3d at 900; Davis Assocs. v. Dep't of Hous. and Urban Dev., 498 F.2d 385, 388 (1st

[31] Plaintiffs proceed against the Corps under another mandamus statute, 5 U.S.C. § 706(1). See Nat'l Assoc. of Home Builders v. Corps of Eng'rs, 417 F.3d 1272 (D.C. Cir. 2005) (noting that actions under § 706(1) are "similar to a petition for mandamus").

Cir. 1974) ("In mandamus actions, the usually separate questions of jurisdiction and failure-to-state-a-claim merge. There can be no mandamus jurisdiction if no 'duty' exists on the part of the defendants. On the other hand, if a duty does exist, then not only is there jurisdiction under § 1361 but plaintiff has also adequately stated a claim in asking that such duty be fulfilled."). Finality in agency decision making is not required in a mandamus action. See, e.g., In re Aiken County, 645 F.3d 428, 436 (D.C. Cir. 2011); Conversion Chem. Corp. v. Gottschalk, 341 F. Supp. 754, 756 (D. Conn. 1972). To the extent that certain courts have chosen to broach the topic of ripeness in the § 1361 context, see Harlem Valley Transp. Assoc. v. Stafford, 500 F.2d 328 (2d Cir. 1974), Plaintiffs' claim against DRBC is ripe for substantially the same reasons set forth below demonstrating, in the alternative, the viability of a 5 U.S.C. § 706(2) claim against the Corps.[32]

B. Defendants' Ripeness and Final Agency Action Arguments Are Irrelevant to Plaintiffs' Claim Under 5 U.S.C. § 706(1)

Defendants' arguments that Plaintiffs' claim against the Corps is unripe demonstrate a fundamental misapprehension as to the nature of this claim. The ripeness inquiries set forth by the Corps and API suggests a belief that Plaintiffs' claim is brought pursuant to 5 U.S.C. § 706(2), in order to "hold unlawful and set aside agency action . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." While the Corps' failure to undertake an environmental analysis pursuant to NEPA as necessitated by its role in the development of DRBC regulations is surely arbitrary and capricious, Plaintiffs in actuality bring suit under 5 U.S.C. § 706(1), to "compel agency action unlawfully withheld or unreasonably delayed." Under 5 U.S.C. § 706(1), the ripeness inquiry is inapposite. The Corps and API additionally point to a lack of final agency action, a

[32] The relevant inquiries are identical, with the notable exception that "final agency action" under the APA is not required as Plaintiffs do not bring suit under that statute. While it is true that finality is one facet of the Abbott Labs fitness prong, it is but one consideration of several. Moreover, finality in that context need not be synonymous with "final agency action" as defined under the APA. Defendant DRBC misstates the nature of the finality inquiry in trying to graft the Bennett v. Spear test for final agency action under the APA into the generalized ripeness analysis outside the purview of the APA.

separate facet of the ripeness inquiry, unique to claims arising under the APA. See 5 U.S.C. § 704; Bennett v. Spear, 520 U.S. 154, 175 (1997). While this language is clearly applicable to claims brought under § 706(2), final agency action is not and cannot be required under § 706(1). By its very nature, § 706(1) addresses an agency's unlawful failure to act. One cannot compel what has already occurred. For this reason, courts have deemed § 706(1) an exception to the requirement for final agency action. See, e.g., Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999); Sierra Club v. Thomas, 828 F.2d 783, 793 (D.C. Cir. 1987); Independence Mining Co. v. Babbitt, 105 F.3d 502, 511-12 (9th Cir. 1997); see also 5 U.S.C. § 551(13) (including "failure to act" in the definition of "agency action").

The courts of the Second Circuit have limited history evaluating claims under § 706(1). Of the published cases, the majority focus on claims of unreasonable delay. The sole case to examine the divergent meanings of "unlawfully withheld" and "unreasonably delayed" in any depth, NRDC v. Fox, adopted the reasoning of the Tenth Circuit in determining that they are mutually exclusive terms. 93 F. Supp. 2d 531, 543 (S.D.N.Y. 2000) (citing Forest Guardians v. Babbitt, 164 F.3d 1261, 1272 (10th Cir. 1998) and Sierra Club v. Thomas, 828 F.2d at 794-95 & nn.77-80), rev'd in part and on other grounds, NRDC v. Muszynksi, 268 F.3d 91 (2d Cir. 2001)).[33] Thus, "[a]n agency action may be deemed 'unreasonably delayed' where the governing statute does not require action by a date certain, whereas an action is 'unlawfully withheld' when an agency fails to meet a clear deadline prescribed by Congress." Id. As Forest Guardians v. Babbitt elaborated:

> if an agency has no concrete deadline establishing a date by which it must act, and instead is governed only by general timing provisions . . . a court must compel only action that is delayed unreasonably. Conversely, when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act. . . . [W]hen Congress by organic

[33] NRDC v. Fox cites to a pre-amendment version of the Forest Guardians opinion. The amended opinion, available at 174 F.3d 1178, contains an identical discussion of "unlawfully withheld" vs. "unreasonably delayed."

> statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline.

174 F.3d 1178, 1190 (10th Cir. 1998). The Tenth Circuit explicitly declined to apply the D.C. Circuit's six-part test governing "unreasonable delay" to inform deliberation of action "unlawfully withheld." Id. (citing Telecomms. Research Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984) ("Neither TRAC nor any of the cases it relied on to 'discern the hexagonal contours of a standard' involved agency inaction in the face of a mandatory statutory deadline."). Rather, the Tenth Circuit concluded that "shall means shall" and once a court finds action either unlawfully withheld or unreasonably delayed, it is bound to compel mandatory agency action. Id. at 1187-89, 1193.

Though Forest Guardians refers to an agency's organic statute, and both Forest Guardians and NRDC v. Fox reference Congressional action, the fundamental inquiry is whether or not an agency is compelled to adhere to a specific deadline mandated by a controlling authority. See Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 65 (2004) ("The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law)."). CEQ's NEPA regulations are mandatory and binding on federal agencies. Andrus, 442 U.S. at 356-58. The Corps, as an agency subject to NEPA, must comply with the CEQ regulations by conducting a NEPA analysis on proposed DRBC regulations. Moreover, compliance is mandated by a date certain: the draft EIS shall accompany the proposed regulations. 40 C.F.R. § 1502.5. Thus, both NEPA and the CEQ regulations impose a duty on the Corps to issue a draft EIS with the Draft Regulations. The Corps' failure to do so constitutes agency action unlawfully withheld under § 706(1).

The Supreme Court has clarified that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." Norton, 542 U.S. at 64. This limitation was demarcated in express opposition to broad programmatic attacks

and assertions of "general deficiencies in compliance, [which] lack the specificity requisite for agency action." Id. at 64, 66. In contrast to the broad statutory mandate challenges hypothesized in SUWA, e.g., a challenge that "the Secretary had failed to 'manage wild free-ranging horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance,'" id. at 67, Plaintiffs here target the Corps' failure to take a discrete agency action that it is required to take: the preparation of a draft EIS to accompany the Draft Regulations. This is not a generalized challenge to the Corps' failure to comply with the spirit and purpose of NEPA. Because the Corps has unlawfully withheld a discrete agency action that it is required to take, Plaintiffs are entitled to relief. Plaintiffs' claim became "ripe" at the time the Corps unlawfully withheld required action—here, by failing in its mandatory duty to produce an EIS to accompany the Draft Regulations. While this properly concludes the analysis under § 706(1), as demonstrated in Section IV(C) below, Plaintiffs' claim against the Corps is also "ripe" when evaluated, in the alternative, under the rubric of 5 U.S.C. § 706(2).

C. Plaintiffs' Claims Are Ripe for Review Under the Conventional Abbott Labs Inquiry

NEPA analysis must be conducted at the earliest possible time in the decision making process and a draft EIS should accompany a proposed rule. The development of the Draft Regulations has long since passed the point at which a NEPA analysis was required: the Draft Regulations were released for comment in 2010. Rather than comply with NEPA, both DRBC and the Corps have adamantly denied that NEPA applies to their actions and unequivocally stated their intention never to conduct a NEPA analysis on the Draft Regulations. It is this action, to forswear adherence to NEPA and develop gas drilling regulations in the absence of NEPA procedures, that is relevant to the ripeness inquiry, and not, as Defendants and API suggest, the eventual promulgation of the regulations. The exact form taken by the final regulations is irrelevant, as Plaintiffs challenge the procedural failure to comply with NEPA in developing the regulations and do not bring a substantive challenge to the content of the regulations

themselves. This procedural failure exists and ultimately invalidates the regulations no matter their content.

Plaintiffs' claims are constitutionally and prudentially ripe. The constitutional ripeness inquiry is effectively coexistent with the Article III standing "injury in fact" analysis discussed in Section III, supra. Wolfson v. Brammer, 616 F.3d 1045, 1058 (9th Cir. 2010); see also Simmonds v. INS, 326 F.3d 351, 357-58 (2d Cir. 2003). Prudential ripeness is generally governed by the test developed in Abbott Labs, requiring evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149. "[T]he ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" Ohio Forestry Assoc. v. Sierra Club, 523 U.S. 726, 732-33 (1998) (quoting Abbott Labs, 387 U.S. at 148–49).

As a threshold matter, the hardship prong of the Abbott Labs inquiry is subordinate to the fitness prong. As elaborated over several cases in the D.C. Circuit:

> '[T]he hardship prong of the Abbott Laboratories test is not an independent requirement divorced from the consideration of the institutional interests of the court and agency.' . . . Where there are no significant agency or judicial interests militating in favor of delay, 'hardship' cannot tip the balance against judicial review . . . or, alternatively, when a case is clearly 'fit' to be heard, the 'hardship' factor is irrelevant in applying the ripeness doctrine.

Askins v. District of Columbia, 877 F.2d 94, 98 (D.C. Cir. 1989) (citations omitted) (quoting Payne Enters. v. United States, 837 F.2d 486, 493 (D.C. Cir. 1988)); see also Conrail v. United States, 896 F.2d 574, 578 (D.C. Cir. 1990) ("Even if we believed that no such hardship would result, the Commission's concession that its decision is 'purely legal,' and our finding that it is effectively as well as formally 'final,' would lead us to conclude that it is ripe for review."); API v. EPA, 906 F.2d 729, 739 n.13 (D.C.

Cir. 1990) ("A secondary concern under the ripeness doctrine is 'the hardship to the parties of withholding court consideration.' We reach the issue of hardship, however, only if the fitness of the issue for judicial resolution is in doubt." (citations omitted)). Where no interests favor postponement of review, it is unnecessary to evaluate the hardship prong of Abbott Labs—the only hardship required is that needed to satisfy Article III. Consolidation Coal Co. v. Fed. Mine Safety & Health Review Comm'n, 824 F.2d 1071, 1081-82 (D.C. Cir. 1987). Conversely, if a claim is found not yet fit, courts will still proceed to the hardship analysis because "it alone can, if sufficiently weighty, render a claim ripe." Connecticut v. Duncan, 612 F.3d 107, 115 (2d Cir. 2010).

Further, the procedural nature of NEPA claims requires a modified ripeness inquiry. "NEPA, unlike the NFMA, simply guarantees a particular procedure, not a particular result. . . . Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." Ohio Forestry, 523 U.S. at 737. The Eleventh Circuit has elaborated:

> [Abbott Labs] is straightforward enough for a general ripeness inquiry, but NEPA adds an important twist. In a NEPA suit, the issue presented for review typically is whether the agency has complied with the statute's particular procedures. Because of the rather special nature of the injury (that is, the failure to follow NEPA), the issue is ripe at the time the agency fails to comply. . . . As we see it, that is the end of the proper ripeness analysis in a NEPA suit.

Ouachita Watch League v. Jacobs, 463 F.3d 1163, 1174 (11th Cir. 2006) (citing Ohio Forestry, 523 U.S. at 737). In the instant case, DRBC and the Corps have already failed to comply with NEPA by refusing to prepare an EIS to inform the development of and accompany the release of the Draft Regulations. Thus, Plaintiffs' claims are ripe under Ohio Forestry and Ouachita. Moreover, Plaintiffs' claims are also ripe under the conventional Abbott Labs analysis.

In evaluating the fitness prong of Abbott Labs, courts have asked "whether judicial intervention would inappropriately interfere with further administrative action [and] whether the courts would

benefit from further factual development of the issues presented." Ohio Forestry, 523 U.S. at 733; see also Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905, 915 (D.C. Cir. 1985) (relating fitness to an "agency's interest in crystallizing its policy"). Purely legal questions are "presumptively suitable for judicial review." Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 92 (D.C. Cir. 1986). Claims under the APA must additionally challenge "final agency action." In determining whether "final agency action" under the APA has occurred, courts examine 1) whether the action "mark[s] the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature;" and 2) whether the action is one by which "rights or obligations have been determined" or from which "legal consequences will flow." Bennett v. Spear, 520 U.S. at 177-78. This requirement of finality has been interpreted in a "pragmatic" way. Abbott Labs, 387 U.S. at 149.

There can be no question that Plaintiffs' claims are ripe for review. Review at this juncture would not inappropriately interfere with further administrative action. Both DRBC and the Corps have stated time and again that they are not obligated to conduct a NEPA analysis on the Draft Regulations as a matter of law and therefore will not be conducting such review. Though the fitness inquiry encompasses an interest in affording agencies an opportunity to correct their own mistakes, see Occidental Chem. Corp. v. FERC, 869 F.2d 127, 129 (2d Cir. 1989) (quoting Fed. Trade Comm'n v. Standard Oil Co., 449 U.S. 232, 242 (1980), both DRBC and the Corps are resolute in their refusal to conduct a NEPA analysis, denying their very obligation to do so. See Bell v. New Jersey, 461 U.S. 773, 780 (1983). Because DRBC and the Corps failed even to begin the NEPA process, there is no ongoing process to interfere with. Indeed, immediate review would "foster, rather than impede, effective . . . administration by the agency." Occidental, 869 F.2d at 129 (quoting Pennzoil Co. v. FERC, 742 F.2d 242, 244 (5th Cir. 1984)); see also Consolidation Coal Co., 824 F.2d at 1080. Immediate review will benefit Defendants in determining, before further funds are expended in the development of final

regulations, the process they must follow. Should Plaintiffs prevail on their claim—now or in the future—the procedural violation necessarily renders the final regulations void from their very inception. Thus, immediate review may prevent the expenditure of agency resources on a futile cause. Similarly, there is no benefit to future factual development in this matter. This matter is unlike the non-procedural NFMA claim at issue in Ohio Forestry. 523 U.S. at 726. Rather, the disposition of Plaintiffs' claims relies entirely on the purely legal task of interpreting statutory language, and the provisions of DRBC Compact. There are simply no relevant facts here to develop.

The decision not to conduct a NEPA analysis marked the consummation of the agencies' relevant decision making processes and unlawfully foreclosed Plaintiffs' right to informed participation in the development of the Draft Regulations. The decision not to conduct a NEPA review in the first instance, as evidenced by DRBC's and the Corps' numerous and explicit statements to that effect, is every bit as definitive and final as is the conclusion, following preliminary NEPA review and as expressed in a Finding of No Significant Impact (FONSI), that agency action is not likely to substantially affect the environment. Both determinations "conclude" environmental review of a proposed action—one in due course and the other preemptively. Moreover, both the issuance of a FONSI and the determination to do no NEPA evaluation whatsoever determine rights and produce legal consequences in equal measure. Thus, "[t]he decision not to prepare an EIS is reviewable as a final action, just as a final EIS or a Finding of No Significant Impact (FONSI) is." United States v. City of Detroit, 288 F. Supp. 2d 836, 839 (E.D. Mich. 2003), vacated as moot, 401 F.3d 448 (6th Cir. 2005); Te-Moak Tribe of W. Shoshone of Nev. v. DOI, 608 F.3d 592, 598 (9th Cir. 2010); Sierra Club v. Army Corps of Eng'rs, 446 F.3d 808, 816 (8th Cir. 2006); Found. on Econ. Trends v. Lyng, 943 F.2d 79, 89 (D.C. Cir. 1991); see also Trustees for Alaska v. Hodel 806 F.2d 1378, 1379-81 (9th Cir. 1986) (disregarding the lack of finality as to the 1002 report itself, focusing instead on the Department's stated

refusal to allow presubmission review); S. Portland Ave. Block Assoc. v. Pierce, No. 87 CV 4210, 1988 U.S. Dist. LEXIS 10714, at *7 (E.D.N.Y. Sept. 23, 1988) ("[T]he dispositive question is whether the Project will be subject to further study.").

Defendants suggest that Plaintiffs' claims cannot be ripe because Defendants have not taken final agency action in promulgating final regulations. This misstates the focus of Plaintiffs' claims and thus also the focus of the ripeness inquiry. Plaintiffs are not challenging the (non-existent) final regulations. Rather, Plaintiffs challenge Defendants' action in issuing Draft Regulations while failing to complete the requisite accompanying environmental analysis. This action has already occurred. Stated another way:

> This is not an action under the Administrative Procedure Act in which we are limited to review of "final agency action." NEPA is, by its own terms, addressed to agency action which is non-final . . .The action which is reviewable here is not whether in fact phases 2 and 3 should be funded, but whether the decision not to prepare an EIS was in violation of NEPA. The EPA's action is final with respect to that decision.

Twp. of Parsippany-Troy Hills v. Costle, 503 F. Supp. 314, 319 (D.N.J. 1979), aff'd mem., 639 F.2d 776 (3d Cir. 1980). Consequently, Defendants' and API's reference to cases dealing with not-yet-proposed rules or turning on the ultimate finalized content of draft regulations and/or NEPA documents are immaterial. See Motor Vehicle Mfrs. Ass'n of the U.S. v. N.Y. State Dep't of Envtl. Conservation, 79 F.3d 1298 (2d Cir. 1996); Isaacs v. Bowen, 865 F.2d 468 (2d Cir. 1989); Occidental, 869 F.2d 127. Nor are Plaintiffs' claims "contingent on future events" in the manner of the claims in Simmonds, 326 F.3d at 359 (declining to adjudicate claim because real uncertainty remained as to both the potential for parole and the body of law that would govern at that time). Here, in contrast, Plaintiffs' claims are not nearly so hypothetical: the Draft Regulations have already been proposed (twice), the NEPA violation has already occurred, and Defendants have made clear they will take no steps to correct the NEPA

violation absent a court order. The state of the law at the time of violation is fixed and the precise form taken by the final regulations is irrelevant to the viability and disposition of Plaintiffs' claims.

Because the fitness of Plaintiffs' claims is clear, it is unnecessary to proceed to the hardship analysis. Nevertheless, Plaintiffs do so here in order to demonstrate that a delay in review will result in hardship to themselves; conversely, as demonstrated above, no institutional hardship will result from immediate review. The hardship prong is primarily concerned with impacts to plaintiffs. Ohio Forestry, 523 U.S. at 733 (restating prong as "whether delayed review would cause hardship to the plaintiffs"). In assessing hardship, courts have looked to whether the challenged action creates "adverse effects of a strictly legal kind," id., or a "direct and immediate dilemma." Simmonds, 326 F.3d at 360. These characterizations of the hardship prong are misplaced in the NEPA context, however, because, as stated above, the procedural nature of NEPA claims modifies and substantially abbreviates the ripeness inquiry. If consideration of Plaintiffs' claims is withheld, Plaintiffs will suffer hardship stemming from their inability to take part in the agency decision making process fully informed of the agency's analysis as set forth in an EIS, and from their consequent inability to suitably inform the agency's decision making process. Plaintiffs will be forced to divert yet more resources to investigating and addressing on their own the environmental hazards posed by shale gas development in the Basin, as Defendants refuse to fulfill their legal obligation to do so through preparation of an EIS. Moreover, Defendants' failure has resulted in Plaintiffs' pronounced and prolonged state of uncertainty as to the dangers inherent in shale gas development. Failure by the court to review Plaintiffs' claims at this time will inflict further uncertainty.

CONCLUSION

For the above-stated reasons, Plaintiffs are entitled to summary judgment, and respectfully request that the Court grant Plaintiffs' motion and deny Defendants' motions.

Respectfully submitted,

Dated: February 13, 2012

NATIONAL PARKS CONSERVATION ASSOCIATION
DELAWARE RIVERKEEPER NETWORK
RIVERKEEPER, INC.
DAMASCUS CITIZENS FOR SUSTAINABILITY

By: /s/ Susan J. Kraham

SUSAN J. KRAHAM (SJK0612)
Environmental Law Clinic
Columbia University School of Law
435 West 116th Street
New York, NY 10027
SKraha@law.columbia.edu

Attorney for Plaintiff
National Parks Conservation Association

JANE P. DAVENPORT (pro hac vice)
NICHOLAS B. PATTON (NP1948)
Senior Attorney
Delaware Riverkeeper Network
925 Canal St., Suite 3701
Bristol, PA 19007
jane@delawareriverkeeper.org
nick@delawareriverkeeper.org

JORDAN YEAGER (pro hac vice)
Curtin & Heefner LLP
Heritage Gateway Center
1980 South Easton Road, Suite 220
Doylestown, PA 18901
JBY@curtinheefner.com

Attorneys for Plaintiffs Delaware Riverkeeper Network and the Delaware Riverkeeper

KATHERINE HUDSON (pro hac vice)
MACKENZIE SCHOONMAKER (MS7342)
Riverkeeper, Inc.
E-House
78 North Broadway

White Plains, NY 10603
KHudson@riverkeeper.org
MSchoonmaker@riverkeeper.org

Attorneys for Plaintiffs Riverkeeper, Inc.
and the Hudson Riverkeeper

JOHN J. ZIMMERMAN (pro hac vice)
Zimmerman & Associates
13508 Maidstone Lane
Potomac, MD 20854
jjzimmerman@comcast.net

Attorney for Plaintiff Damascus Citizens for
Sustainability