UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHESAPEAKE & OHIO CANAL ASSOCIATION, and WASHINGTON CANOE CLUB Plaintiffs, v. GALE NORTON, in her official capacity, as Secretary of the U.S. DEPARTMENT OF THE INTERIOR and FRAN MAINELLA, in her official capacity as Director, National Park Service Defendants.	)	Case No. 1:04-cv-01714 Judge Ricardo M. Urbina

FEDERAL DEFENDANTS' MOTION TO DISMISS

Defendants Gale Norton, the United States Department of the Interior, and Fran Mainella (collectively "Defendants"), by and through undersigned counsel, respectfully move pursuant to Fed. R. Civ. P. 12(b)(1) and/or 12(b)(6), to dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief dated October 7, 2004, for lack of subject matter jurisdiction and/or failure to state a claim upon which relief can be granted. Plaintiffs seek to challenge the lawfulness of Defendants' actions in entering into a preliminary agreement to exchange land with the President and Directors of Georgetown College. At this time, this Court lacks subject matter jurisdiction over Plaintiffs' claims because Plaintiffs have failed to identify a final agency action under the Administrative Procedure Act ("APA"). In addition, Plaintiffs' claims are not ripe for judicial review, Plaintiffs' claims are moot, and Plaintiffs have failed to establish standing to assert these claims. Therefore, dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and/or 12(b)(6) is appropriate.

Respectfully submitted this 19th day of January, 2005.

THOMAS L. SANSONETTI
Assistant Attorney General
United States Department of Justice

/s/ Devon M. Lehman
Devon M. Lehman, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington D.C. 20044-0663
(202) 305-0434 (tel.)
(202) 305-0267 (fax)
Devon.Lehman@usdoj.gov

Of Counsel:

Maria Lurie
United States Department of the Interior
Office of the Solicitor
Division of Parks and Wildlife
Washington, D.C. 20240

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STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF THE FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Plaintiffs Chesapeake and Ohio Canal Association and Washington Canoe Club (hereinafter "Plaintiffs") challenge the National Park Service's ("NPS") actions related to Defendants' entering into a preliminary agreement to exchange land with the President and Directors of Georgetown College ("Georgetown University") in order to allow Georgetown University to establish a boathouse. See Compl. for Declaratory and Injunctive Relief (hereinafter "Compl.") ¶ 1. Plaintiffs' Complaint should be dismissed because they have failed to identify any final agency action within the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 704 ("APA"). Even if, however, Plaintiffs had challenged final agency action, their claims must be dismissed because the NPS has committed itself to doing further analysis under the National Environmental Policy Act ("NEPA") and Section 106 of the

National Historic Preservation Act ("NHPA"), and Plaintiffs' claims under those acts, therefore, are not ripe and/or moot. Further, Plaintiffs lack standing to assert these claims.

BACKGROUND

A. Factual Background

Plaintiffs challenge concerns a potential boathouse to be built by Georgetown University. See Compl. for Declaratory and Injunctive Relief (hereinafter "Compl.") ¶ 1. In 1971, Congress established Chesapeake & Ohio ("C&O") Canal National Historical Park "[i]n order to preserve and interpret the historic and scenic features of the Chesapeake and Ohio Canal, and to develop the potential of the canal for public recreation, including such restoration as may be needed." Id. ¶ 15; 16 U.S.C. § 410y-1. The C & O Canal National Historical Park is listed in the National Register of Historic Places. Compl. ¶ 15. In 1987, the NPS, which administers the C&O Canal National Historical Park, released the Georgetown Waterfront Plan, which graphically depicts the Georgetown Waterfront Park and the C&O Canal National Historical Park. Id. ¶ 16. This plan identified a proposed area for a boathouse extending west of Key Bridge. Id. ¶ 16.

On July 14, 1995, the NPS issued an "Environmental Assessment for the Proposed Exchange of Properties between the NPS and Georgetown University within the District of Columbia and within the Boundary of Potomac Palisades Park within the Chesapeake and Ohio Canal National Historic Park." Id. ¶ 18. The Environmental Assessment ("EA") described a proposed exchange of a 1.09-acre parcel of land administered by NPS (Tract 102-114) with a parcel of land owned by Georgetown University, located approximately one mile upriver (Tract 102-109). Id. ¶ 18. On September 6, 1995, the NPS issued a Finding of No Significant Impact

("FONSI"), concluding that the land exchange would not have a significant impact on the human environment. Id. ¶ 23.

On August 8, 1995, the NPS initiated consultation with the D.C. State Historic Preservation Office ("SHPO") under Section 106 of the NHPA, 16 U.S.C. § 470f. Id. ¶ 24. On October 15, 1998, the Advisory Council on Historic Preservation executed a Memorandum of Agreement ("MOA") with the NPS and the D.C. SHPO in connection with the proposed land exchange. Id. ¶ 25. The MOA includes a stipulation that any land exchange agreement entered into by the NPS and Georgetown University "shall contain the following provisions concerning the parcel that the University would receive: . . . that the facility's footprint or aggregate footprints are not more than 15,000 square feet for a building rising no more than 40 feet above grade." Id. ¶ 25.

On October 7, 1998, Joseph M. Lawler, Acting Regional Director of the National Capital Region at the NPS, executed a Preliminary Agreement to Exchange Real Property (hereinafter "Preliminary Agreement"). Id. ¶ 26. The Preliminary Agreement states that the parties' intent is to establish a non-motorized recreational boathouse facility on Tract 102-114, and that

> the parties wish to provide both a process through which the parties can determine whether an exchange of Tracts 102-114 and 102-109 undertaken to develop a non-motorized recreational boathouse facility, in perpetuity, should be consummated, and to set out the respective rights and responsibilities of the parties in this transaction.

See Exh 1 to Lawler Decl. [Preliminary Agreement] at 1. As recognized in the Preliminary Agreement, several conditions precedent are necessary before the NPS and the University may consummate an exchange of interests in real property. The Preliminary Agreement requires,

inter alia, that the University secure unappealable zoning approval[1/]:

> It is understood that approval by the Commission of Fine Arts, the National Capital Planning Commission, District of Columbia Zoning Commission, Historic Preservation Review Board and other authorities (collectively referred to as the "Authorities"), if within the jurisdiction of such authorities, of a zoning classification to permit such use of the tract for non-motorized boating and ancillary recreational uses and of the design of the boathouse facilities to be constructed will be necessary in order to allow the University to make such use of Tract 102-114. Accordingly, prior to the Exchange Closing, the University's obligations hereunder to proceed to the Exchange Closing are expressly contingent upon final, unappealable approvals by the Authorities of the zoning of Tract 102-114 to a zoning classification that will permit the University's intended use under the Zoning Regulations of the District of Columbia and of a design acceptable to the University for such improvements being obtained by the time of the Outside Closing Date.

Id. at 7, ¶ 11(a).

Another precursor to the consummation of the exchange is the written approval of the proposed exchange by the Appropriations Committees of the U.S. Senate and the U.S. House Representatives. Id. at 4, ¶ 5. As set forth in paragraph 5 of the Preliminary Agreement:

> The United States shall . . . submit a comprehensive informational package to the Appropriations Committees of the Senate and the U.S. House of Representatives for a 30-day period to examine the proposed exchange. The United States will not be obligated to proceed with the exchange as proposed until such time as it receives written notification from the Appropriations Committees of both the Senate and the U.S. House of Representatives approving the exchange.

Id. The United States, acting by and through the National Capital Region of the NPS, has not yet received written approval from the Appropriation Committees for the proposed exchange. Lawler Decl. ¶ 6. This is because the NPS is awaiting completion of certain underlying factors

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[1/] In April 2004, the D.C. Zoning Commission approved an application by the NPS and Georgetown University for a special exception to construct a boathouse on the NPS site with a total square footage of approximately 35,000 square feet. Compl. ¶ 31. That matter has been appealed and is currently pending before the District of Columbia Court of Appeals.

before presenting the proposed exchange to the Appropriation Committees for approval. Specifically, the NPS is awaiting: (a) completion of additional analysis and coordination in accordance with NEPA and NHPA of the boathouse that Georgetown proposes to construct on the parcel of property presently in federal ownership; and (b) completion of an appraisal, conducted in accordance with federal acquisition standards, including the "Uniform Appraisal Standards for Federal Land Acquisition" and the "Uniform Standards of Professional Appraisal Practice" of the Appraisal Foundation, and certification of its acceptance by the U.S. Department of the Interior's Office of Appraisal Services. Id. ¶ 7.

Given the complexity of the conditions precedent, the Preliminary Agreement gives the parties up to ten years in which to close on the proposed exchange of properties. See Exh. 1 [Preliminary Agreement] at 3 ¶ 4. The Preliminary Agreement contemplates that upon the satisfaction of all conditions specified in the Preliminary Agreement, there will be an "Exchange Closing," which is the simultaneous exchange of deeds of conveyance. Id. On October 20, 1998, Georgetown University countersigned the Preliminary Agreement. Compl. ¶ 26. The Preliminary Agreement was recorded in the land records of the District of Columbia on November 12, 1998. Id. ¶ 28.

B. Procedural History

On October 7, 2004, Plaintiffs filed a complaint in this Court, seeking declaratory and injunctive relief. Id. ¶¶ 1–62. The Complaint alleges three claims, for violation of (1) NEPA, (2) NHPA, and (3) the Land, Water, and Conservation Fund Act, 16 U.S.C. § 460*l*-22(b) ("LWCFA"). Id.

Plaintiffs' first claim for relief is for violation of NEPA. Id. ¶¶ 33–49. Plaintiffs allege

that the NPS violated NEPA by (1) failing to adequately analyze the reasonably foreseeable environmental impacts of the land exchange agreement with Georgetown University; (2) failing to analyze all reasonable alternatives to the proposed action; and (3) failing to consider measures to mitigate harm to the environment from the proposed action. Id. ¶ 44. Plaintiffs also allege that the NPS's FONSI is arbitrary and capricious. Id. ¶¶ 45–46.

Plaintiffs' second claim for relief is for violation of Section 106 of the NHPA. Id. ¶¶ 50–57. According to Plaintiffs' complaint, the NPS violated the Memorandum of Agreement between the NPS and the District of Columbia SHPO, executed October 15, 1998. Id. ¶ 56. Plaintiffs' Complaint alleges that the NPS violated Stipulation 1 of the MOA by approving and submitting to the Zoning Commission a design that permits Georgetown University to construct a boathouse with a footprint of more than 15,000 square feet and that exceeds 40 feet in height. Id. ¶ 56.

Plaintiffs' third claim for relief is for violation of the LWCFA. Compl. ¶¶ 58–62. Specifically, Plaintiffs allege that the value of the land tracts to be exchanged are not approximately equal, and that the parcel owned by the United States has a significantly higher value than the parcel owned by Georgetown University. Id. ¶ 60. According to Plaintiffs, the NPS violated Section 22(b) of the LWCFA by approving the land exchange without requiring Georgetown University to make a payment to the Secretary of Interior to equalize the value of the land exchange. Id. ¶ 61.

C. NPS's Determination to Conduct Additional NEPA and NHPA Work

In June and July, 2004, the NPS conducted public meetings to determine whether to revise the MOA, given Georgetown University's proposal of a 18,600 square foot boathouse.

Lawler Decl. ¶ 9. As a result of those public meeting and public comments that followed, the NPS determined to conduct a new Environmental Assessment on the construction of the project. Id. ¶ 8. On October 14, 2004, the NPS issued a press release announcing its intent to do additional analysis and coordination with NEPA. Id. The NPS also committed to doing additional Section 106 consultation as part of the NEPA process. Id. ¶ 9.

STATUTORY FRAMEWORK

A. The National Environmental Policy Act

The purpose of NEPA, 42 U.S.C. §§ 4321, et seq., is to focus the attention of the federal government and the public on a proposed action so that the consequences of the action can be studied before the action is implemented and so that potential negative environmental impacts can be avoided. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989). Regulations promulgated by the Council on Environmental Quality (CEQ), 40 C.F.R. §§ 1500–1508, provide guidance in the application of NEPA. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). NEPA's mandate to the agencies is "essentially procedural . . . It is to insure a fully informed and well-considered decision . . . ." Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S.519, 558 (1978); Goos v. Interstate Commerce Comm'n, 911 F.2d 1283, 1293 (8th Cir. 1990). "NEPA does not mandate particular results, but instead prescribes only a process to ensure that federal agencies consider the environmental consequences of particular actions." Goos, 911 F.2d at 1293.

The United States is immune from suit except when it clearly and unequivocally expresses that it is waiving its sovereign immunity. See United States v. Mitchell, 445 U.S. 535,

538 (1980). "Limitations and conditions upon which the government consents to be sued must be strictly observed and exceptions thereto are not to be implied." Soriano v. United States, 352 U.S. 270, 272 (1957). As NEPA does not contain an independent waiver of sovereign immunity, a NEPA challenge must be brought pursuant to the APA. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882–83 (1990).

The APA requires that there be a final agency action as a prerequisite to judicial review. 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review."). The term "final agency action" under the APA is a term of art and an action becomes "final" under the APA when the agency's decision-making process has been consummated and when rights and obligations have been fixed. Bennett v. Spear, 520 U.S. 154, 178 (1997); In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig., 340 F.3d 749, 757 (8th Cir. 2003); see also Alaska Dept. of Envtl. Conservation v. E.P.A., 124 S. Ct. 983, 999 (January 21, 2004) (citing Bennett for the proposition that "to be 'final,' agency action must 'mark the "consummation" of the agency's decisionmaking process,' and must either determine 'rights or obligations' or occasion 'legal consequences'"). "To determine when an agency action is final, we have looked to, among other things, whether its impact 'is sufficiently direct and immediate' and has a 'direct effect on . . . day-to-day business.'" Franklin v. Massachusetts, 505 U.S. 788, 796–97 (1992) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 152(1967)).

B. National Historic Preservation Act

The NHPA directs federal agencies to consider historic resources when carrying out their discretionary activities. It creates essentially procedural obligations. It "neither . . . forbid[s] the

destruction of historic sites, nor . . . command[s] their preservation." United States v. 162.20 Acres of Land, 639 F.2d 299, 302 (5th Cir.), cert. denied, 454 U.S. 828 (1981).

Section 106 of the NHPA, 16 U.S.C. § 470f, requires a federal agency with jurisdiction over a federally approved undertaking to take into account the effects of the undertaking on properties included in, or eligible for inclusion in, the National Register of Historic Places. See Attakai v. United States, 746 F. Supp. 1395, 1405 (D. Ariz. 1990). The agency must afford the Advisory Council a reasonable opportunity to comment on such an undertaking before approving the funding or licensing for the project. Id. The Advisory Council[2/] has established regulations for compliance with section 106. 36 C.F.R. Part 800. See Attakai at 1405. Federal agencies are to identify properties within the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist. 36 CFR §§ 800.2, 800.4. The agency is to review existing information, request the views of the SHPO, and seek information in accordance with agency planning processes from local governments, Indian tribes and others likely to have knowledge of or concerns with historic properties in the area. 36 C.F.R. § 800.4(a). Criteria for locating historic properties that may be affected and evaluating the historical significance of such properties are set out in 36 C.F.R. §§ 800.4(b)-(c). If no historic properties are found, the agency will document that finding to the SHPO and notify designated interested persons. 36 C.F.R. § 800.4(d). This completes the "section 106 process." Attakai at 1406. The determination of a property's eligibility is the responsibility of the federal

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[2/] The Advisory Council is an independent federal agency whose composition is listed at 16 U.S.C. § 470i. The Council's duties are prescribed in the NHPA at 16 U.S.C. § 470j. The SHPO coordinates state participation in the implementation of the NHPA and "is a key participant in the Section 106 process." 36 C.F.R. 800.1(c)(ii).

agency and the SHPO and, absent an abuse of discretion, their application of the regulations to the facts must be sustained. Wilson v. Block, 708 F.2d 735, 755 (D.C. Cir. 1983). If eligible properties are located, but the agency makes a "no effect" determination, the agency must inform the SHPO. 36 C.F.R. § 800.5(b). The agency is not required to take any further steps, unless the SHPO objects within 15 days of such notification. Id.

If an effect is found, the agency applies the criteria set forth in 36 C.F.R. § 800.9(b) to determine whether the effect of the undertaking should be considered "adverse." 36 C.F.R. § 800.5(c). If a "not adverse" determination is made, the agency (1) obtains the concurrence of the SHPO, and (2) notifies the Council. If, however, a determination is made that the proposed action could have adverse effects, the agency is required to continue consultation with the SHPO to develop alternatives or mitigation that would "could avoid, minimize, or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a). If the agency and SHPO are able to agree on a way to resolve the adverse effects, they shall enter into a memorandum of agreement. The agency must submit the memorandum of agreement to the Advisory Council to complete Section 106 requirements. 36 C.F.R. § 800.6(b)(iv).

C. Land, Water, and Conservation Fund Act

The Land, Water, and Conservation Fund Act allows the Secretary of the Interior to accept title to non-federal property within the National Park System in exchange for federally-owned property. 16 U.S.C. § 460*l*-22(b). The statute provides that the value of the lands exchanged must be approximately equal, or that "the values shall be equalized by the payment of cash to the grantor from funds appropriated for the acquisition of land for the area, or to the Secretary as the circumstances require." Id.

STANDARD OF REVIEW

Dismissal for failure to challenge a final agency action under the APA may be proper pursuant to both Rule 12(b)(6) and 12(b)(1). See Reliable Automatic Sprinkler Co. v. Consumer Product Safety Comm'n, 324 F.3d 726, 731 (D.C. Cir. 2003) ("[i]f there was no final agency action here, there is no doubt that appellant would lack a cause of action under the APA. Dismissal is therefore appropriate pursuant to 12(b)(6)"); CropLife America v. Environmental Protection Agency, 329 F.3d 876, 882 (D.C. Cir. 2003) ("In Reliable, we determined that the District Court lacked jurisdiction to review the Consumer Product Safety Commission's ("CPSC") process absent final agency action"); Invention Submission Corp. v. Rogan, 357 F.3d 452 (4th Cir. 2004) (concluding that failure to challenge final agency action is a jurisdictional defect); National Parks Conservation Ass'n v. Norton, 324 F.3d 1229 (11th Cir. 2003) (same). In any event, failure to challenge a ripe case or controversy and establish standing are both jurisdictional defects subject to dismissal pursuant to 12(b)(1). See Steffan v. Cheney, 733 F. Supp. 115, 115 (D.D.C. 1989) (stating that a motion to dismiss for lack of standing can only be brought under Fed. R. Civ. P. 12(b)(1)); Virginia v. Reno,117 F. Supp. 2d 46 (D.D.C. 2000)(dismissing claims pursuant to 12(b)(1) for ripeness considerations).

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for dismissal of a claim if the court lacks jurisdiction over the subject matter of a claim. A party seeking federal court jurisdiction bears the burden of demonstrating that jurisdiction exists. McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936); Commodity Futures Trading Com'n v. Nahas, 738 F.2d 487 (D.C. Cir. 1984). The Supreme Court presumes that federal courts lack jurisdiction unless the contrary appears affirmatively from the record. United States Dep't of

Energy v. Ohio, 503 U.S.607. 614 (1992); Renne v. Geary, 501 U.S. 312, 315 (1991). As courts of limited jurisdiction, federal courts may only decide cases after the party asserting jurisdiction demonstrates that the dispute falls within the court's constitutional and statutory jurisdiction. Rasul v. Bush, 124 S. Ct. 2686, 2701 (2004) quoting Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994) (federal courts "possess only that power authorized by Constitution and statute"). Faced with a 12(b)(1) motion, a plaintiff bears "the burden of establishing by a preponderance of the evidence that the court has jurisdiction to entertain his claims." Bennett v. Ridge, 321 F. Supp. 2d 49, 51 (D.D.C. 2004); Grand Lodge of the Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001).

"[I]n deciding a 12(b)(1) motion, it is well established that a court is not limited to the allegations in the complaint but may consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case." Bennett, 321 F.Supp.2d at 52; see also Ashcroft, 185 F. Supp. 2d at 14; Haase v. Sessions, 835 F.2d 902, 905–906 (D.D.C. 1987) (holding that a court's consideration of materials outside the pleadings in deciding a 12(b)(1) motion does not require that the court treat the motion as one for summary judgment).

A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is proper when the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief. Neitzke v. Williams, 490 U.S. 319, 326-327 (1989) (internal citation omitted). In reviewing a 12(b)(6) motion, the Court must accept as true all well-pleaded facts, as distinguished from conclusory allegations, and view those facts in the light most favorable to the nonmoving party. Sinclair v. Kleindienst, 711 F.2d 291, 293 (D.C. Cir. 1983), see also Kowal v. MCI Communications Group, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (noting

that court need not accept conclusory allegations, nor unreasonable inferences or unwarranted deductions of fact). However, "if as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." Neitzke, 490 U.S. at 327 (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

ARGUMENT

I. Plaintiffs' Claims Must Be Dismissed Because They Have Not Identified Any Final Agency Action Under the APA.

It is axiomatic that the United States cannot be sued in any court without a waiver of sovereign immunity. See United States v. Mitchell, 463 U.S. 206, 212 (1983). Neither NEPA, NHPA, nor the LWCFA provide for a private right of action and, therefore, none of these statutes waives sovereign immunity for judicial review of the government's actions. Similarly, 28 U.S.C. § 1331 does not waive the United States' sovereign immunity. In these circumstances, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706 provides the only waiver of sovereign immunity available to Plaintiffs.

Section 704 of the APA defines the limits of this waiver of sovereign immunity. It provides for judicial review of only two categories of administrative action: (1) "[a]gency action made reviewable by statute;" and (2) "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Because the substantive statutes under which Plaintiffs bring suit do not provide Plaintiffs a private right of action, they must rely on the second category of 5 U.S.C. § 704 for a waiver of sovereign immunity, and thus have the burden of

establishing "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

The Supreme Court recently clarified the type of actions that may be challenged under the APA by noting that agency actions can include "five categories of decisions made or outcomes implemented by an agency–'agency rule, order, license, sanction [or] relief.'" Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2378 (2004) (citing 5 U.S.C. §551(13)). "Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm." Id. at 2380 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990)). The Court noted that these must be "circumscribed, discrete agency actions." Id. at 2379–80. In determining whether the agency action is final, the Court should consider "whether the agency's position is definitive and whether it has a direct and immediate . . . effect on the day-to-day business of the parties." IPAA v. Babbitt, 235 F.3d 588, 594 (D.C. Cir. 2000)(internal quotations omitted). "Agency action is final when it 'imposes an obligation, denies a right, or fixes some legal relationship.'" Action on Smoking and Health v. Dep't of Labor, 28 F.3d 162, 165 (D.C. Cir. 1994), quoting NRDC v. United Stated Nuclear Regulatory Comm'n, 680 F.2d 810, 815 (D.C. Cir. 1982).

Plaintiffs bear the burden of identifying a final agency action under the APA in order to show that this Court has subject matter jurisdiction. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction."). In this case, Plaintiffs have failed to identify any final agency action that gives this Court subject matter jurisdiction over their claims. In terms of Plaintiffs' NEPA claims,

they allege that the NPS violated NEPA in issuing an EA and FONSI. While a FONSI might ordinarily provide a final agency action for challenge under the APA, in this case, those claims are barred by the statute of limitations because the EA and FONSI were issued in 1995. Plaintiffs have also not alleged any other final agency action because the Preliminary Agreement is, by its own terms, not final action. Likewise, Plaintiffs' NHPA and LWCFA claims both challenge a potential land exchange that is contingent upon several factors and has not yet occurred. Accordingly, there is no final agency action under the APA, and this Court does not have subject matter jurisdiction over Plaintiffs' claims.

A. Plaintiffs' NEPA Claims Are Not Based on Any Final Agency Action.

1. Plaintiffs' NEPA Claims Based Upon the EA and FONSI Are Barred By the Statute of Limitations Because The EA and FONSI Were Completed More than Six Years Ago.

Plaintiffs' challenge to the EA and FONSI is barred by the statute of limitations because they were completed more than six years ago. The civil action statute of limitations provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). The six-year statute of limitation applies to challenges alleging procedural irregularity under the APA. See Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988) (action brought under APA against federal agency is action against the United States, and § 2401(a) applies). See also Humane Society of the United States v. Hodel, 840 F.2d 45, 50 (D.D.C. 1988) (noting a six-year statute of limitation applies to NEPA claims); Citizens Alert Regarding the Environment v. U.S. E.P.A., 259 F. Supp. 2d 9, 25 (D.D.C. 2003) (noting six-year statute of limitations on APA claims).

An agency's issuance of a FONSI generally is considered final agency action. See, e.g., Southwest Williamson County Community Ass'n, Inc. v. Slater,173 F.3d 1033, 1036 (6th Cir. 1999) ("Because a FONSI is for purposes of finality analogous to an [Environmental Impact Statement], the statute of limitations should run from the time the FONSIs issued."); Benton County v. U.S. Dept. of Energy, 256 F. Supp. 2d 1195, 1198 (E.D. Wash. 2003) (holding that six-year statute of limitations ran from issuance of FONSI). Accordingly, the statute of limitations in this case began to run on September 6, 1995, when the NPS issued its FONSI. This action was brought more than nine years after the FONSI was issued, far outside the six-year period. Any challenge to the 1995 FONSI, therefore, is barred by the statute of limitations.

2. The Preliminary Agreement is Not Final Agency Action.

Plaintiffs have not identified any other final agency action that could provide this Court with subject matter jurisdiction. Plaintiffs' Complaint appears to be filed to challenge the Preliminary Agreement entered into between the NPS and Georgetown University for the potential land exchange. The Preliminary Agreement is not final agency action under the APA because by its own terms, it is not a final agreement. The Preliminary Agreement does not impose an obligation, deny a right, or fix a legal relationship because the Preliminary Agreement itself is not an exchange of land. See Action on Smoking and Health, 28 F.3d at 165. By its own terms, the Preliminary Agreement provides a "process through which the parties can determine whether an exchange of [the two parcels of land] undertaken to develop a non-motorized recreational boathouse facility, in perpetuity, should be consummated." Exh. 1 [Preliminary Agreement] at 2 ¶ 1. No deeds will be exchanged until the Exchange Closing, which cannot take place until the satisfaction of all conditions precedent established in the Preliminary Agreement.

In addition, two major conditions precedent in the Preliminary Agreement have yet to occur and may not occur. First, the NPS is required to submit a comprehensive informational package, including a valid appraisal, to the Appropriations Committee of the Senate and U.S. House of Representatives and "will not be obligated to proceed with the exchange as proposed until such time as it receives written notification from the Appropriations Committees of both the Senate and the U.S. House of Representatives approving the exchange." Lawler Decl. ¶¶ 6–7, 10; Exh. 1 [Preliminary Agreement] at 4. This has not yet occurred, and will not occur until the NPS (a) completes the additional analysis under NEPA and NHPA, and (b) completes an appraisal in accordance with federal acquisition standards. Lawler Decl. ¶¶ 6–7. Because of the ongoing review process, a number of elements relative to the federally-owned site and its prospective use may be modified, affecting the value of the site. Id. ¶ 10. At the point when the NPS knows precisely what the size, location, and land use restrictions will be, the agency will obtain an appraisal. Id. Once an appraisal, certified as acceptable to the U.S. Department of the Interior's Office of Appraisal Services, is complete, the NPS will rely on such appraisal to ensure that the proposed exchange of interests in real property is either approximately equal, or if it is not, that the values are equalized in accordance with 16 U.S.C. § 460*l*-22(b). Id.

A second precursor to the consummation of the exchange is the establishment of zoning for the lands presently titled in the United States. Exh. 1 [Preliminary Agreement] at 7, ¶ 11(a). As set forth in paragraph 11(a) of the Preliminary Agreement, the University need not consummate the proposed exchange unless it has secured unappealable zoning approval. Id. This has not yet occurred, as an appeal before the District of Columbia Court of Appeals is presently pending.

Because these two conditions precedent have not been met, the conditions necessary to make the Preliminary Agreement binding have not yet occurred. There has not yet been an Exchange Closing or exchange of deeds between the NPS and Georgetown University. Accordingly, no rights or obligations have been fixed, and, therefore, there is no final agency action.

B. Plaintiffs' NHPA and LWCFA Claims Challenge a Potential Land Exchange Which is Not Final Agency Action.

Likewise, Plaintiffs' NHPA and LWCFA claims suffer the same fatal flaw: they are based on the potential land exchange. At this time, the NPS has merely executed a Preliminary Agreement to exchange land. As noted above, the potential land exchange has not been consummated. No land has been exchanged in violation of the NHPA or the LWCFA. The Preliminary Agreement contains several conditions precedent before any land can be exchanged. The potential land exchange, therefore, is still contingent on those conditions being met, including non-appealable zoning approval, a valid appraisal accepted by the Department of the Interior's Office of Appraisal Services, and written notification from the Appropriations Committees of both the Senate and the U.S. House of Representatives approving the exchange. All of these uncertainties render the NPS's position preliminary. Accordingly, there is no final agency action for judicial review.

II. Even if Plaintiffs Have Identified Final Agency Action, Their Claims Are Barred by the Doctrines of Mootness, Ripeness, and Standing.

In any event, to the extent that this Court determines that there were final agency actions that would otherwise be subject to judicial review, Plaintiffs' claims are barred because they are both not ripe and moot. The NPS has committed to conducting further NEPA analysis and

NHPA consultation in this case. Accordingly, Plaintiffs' claims are not ripe because the agency's decisions have not yet been made. Alternatively, Plaintiffs' claims are moot because the challenged agency actions are no longer viable. Further, Plaintiffs lack standing to challenge the agency's actions in this case because their alleged injury cannot be redressed.

A. Plaintiffs' Claims Are Not Ripe.

The Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967)[3/] explained that the "basic rationale" of the ripeness doctrine as applied to review of administrative action:

> is 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.

Id. at 148–49 (emphasis added); see also Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732–33 (1998). Plaintiffs here, however, seek to involve the Court in speculation and ask for judicial intervention prior to the conclusion of the reopened NEPA and NHPA reviews and issuance of the attendant final agency decisions. Certainly, as a practical matter, it cannot reasonably be disputed that judicial review here should be withheld until the conclusion of Defendants' compliance with the very statutes challenged by Plaintiffs in this action.

The Supreme Court, in Abbott Laboratories established a two-part test to determine ripeness, requiring courts to consider both the fitness of the issue for judicial determination and the hardship to the parties of withholding consideration. Abbott Laboratories 387 U.S. at 149.

[3/] Abbott Laboratories v. Gardner was overruled on other grounds by the U.S. Supreme Court in 1976 in Califano v. Saunders, 430 U.S. 99 (1976).

The Supreme Court in Ohio Forestry elaborated on this test, holding that courts are to consider three factors to evaluate the fitness of a case for judicial review. These factors include: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." Ohio Forestry, 523 U.S. at 733. Applying these three factors here results in a conclusion that this case is not ripe.

Judicial intervention at this time would indeed inappropriately interfere with Defendants' ongoing administrative process of complying with NEPA and the NHPA. Thus, permitting judicial review at this premature juncture would only result in piecemeal litigation and confusion and delay with regard to Defendants' ongoing agency decision-making. See id. at 736 (premature judicial review "denies the agency an opportunity to corrects its own mistakes and apply its expertise"); 40 C.F.R. § 1500.3 ("judicial review of agency compliance with [the CEQ] regulations [should] not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury"). In Town of Fairview, Texas v. United States Dep't of Transp., 201 F. Supp. 2d 64 (D.D.C. 2002), the court granted the federal defendant's motion to dismiss because the plaintiff's claim was not ripe. In that case, the federal agency stated that an environmental review pursuant to NEPA must be conducted before the proposed airport could be constructed. 201 F. Supp. 2d at 75. The court held, therefore, that reviewing the plaintiff's claims before the agency could conduct such a review would be premature and would deny the agency the opportunity to apply its expertise. Id. at 75 (citing Wyoming Outdoor Council v. United States Forest Serv., 165 F.3d 43, 50 (D.C. Cir.

1999)).

It also cannot reasonably be disputed that this Court would benefit from awaiting the conclusion of the NEPA and NHPA reviews before opining on whether Defendants complied with these statutes. Indeed, the administrative record has not yet been compiled in this matter — nor can it be until after the final agency actions under NEPA and the NHPA have been issued. Because judicial review of agency actions in APA cases is limited to the administrative record compiled by the agency, consideration of Plaintiffs' claims before there is an administrative record would require this Court to make a ruling on Defendants' compliance under NEPA and the NHPA based on "some new record made initially in the reviewing court," — a judicial action which was expressly rejected by the Supreme Court. See Camp v. Pitts, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review [of agency action] should be the administrative record already in existence, not some new record made initially in the reviewing court."); see also Florida Power & Light Co. v. Lorton, 470 U.S. 729, 743 (1985). Accordingly, judicial review of this matter is premature and should be withheld so that Defendants can complete their pending reopened NEPA and NHPA reviews before this Court attempts to review them.

For the same reasons, Plaintiffs' LWCFA claim is not ripe. Again, Plaintiffs cannot meet the three factors established in Ohio Forestry. See Ohio Forestry, 523 U.S. at 733. First, delayed review would not cause hardship to the plaintiffs. Second, there is no imminent injury because no land has yet been exchanged, nor can any land be exchanged before the conditions precedent to the Preliminary Agreement are met. Third, judicial intervention at this time would interfere with further administrative action because once the NPS obtains an appraisal that is approved by the Department of the Interior's Office of Appraisal Services, the NPS can use that

appraisal to ensure that the value of the lands to be exchanged is approximately equal or that the values are equalized. Further, the Court would benefit from further factual development of the issues. At this point, there is no administrative record, and no appraisal has been approved by the Department of the Interior's Office of Appraisal Services. Lawler Decl. ¶ 10. Neither the Court nor the parties, therefore, have a basis by which to judge the value of the two tracts of land and it is unknown whether a cash payment will be required to equalize the value of the properties. Accordingly, Plaintiffs' claim should be dismissed because it is not ripe for review.

B. Plaintiffs' Claims Are Moot.

Alternatively, Plaintiffs' claims are moot because the agency has agreed to do further NEPA and NHPA work. The jurisdiction of the federal courts extends only to live cases and controversies. See U.S. Const. art. III, § 2. That requirement persists throughout all stages of the litigation. Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review."). Indeed, if a case becomes moot, it does not satisfy the "case or controversy" requirement of Article III of the Constitution and "the federal courts are powerless to decide it." SEC v. Medical Committee for Human Rights, 404 U.S. 403, 407 (1972). A federal court lacks jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue before it." Church of Scientology v. United States, 506 U.S. 9, 12 (1992).

"A case becomes moot whenever it 'los[es] its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." Cantrell v. City of Long Beach, 241 F.3d 674, 678 (9th Cir. 2001) (quoting Hall v. Beals, 396 U.S. 45, 48 (1969)). "Simply stated, a case is moot when the issues are no longer 'live' or the

parties lack a legally cognizable interest in the outcome." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Courts, therefore, should "'refrain from deciding [a case] if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" Coalition of Airline Pilots Associations v. F.A.A., 370 F.3d 1184, 1189 (D.C. Cir. 2004) (quoting Nat'l Black Police Ass'n v. District of Columbia, 108 F.3d 346, 349 (D.C. Cir. 1997)).

This applies to all cases, including those seeking a declaratory judgment. In the context of a request for declaratory judgment, the Supreme Court has set forth the following test for mootness:

> The question is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and finality to warrant the issuance of a declaratory judgment."

Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1174-1175 (9th Cir. 2002) (quoting Maryland Casualty Co. v. Pacific & Oil Co., 312 U.S. 270, 270 (1941)).

In this case, because the NPS has committed to doing additional NEPA analysis and NHPA consultation, the agency decisions simply do not "presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." See Coalition of Airline Pilots Ass'ns, 370 F.3d at 1189. The new NEPA documentation can be challenged in its own right when it is completed and is a final agency action. Likewise, because the NPS has committed to further NHPA consultation as part of the renewed NEPA process, Plaintiffs' challenge to the agency's actions under the previous MOA is moot.

In Burton v. Norton, 308 F. Supp. 2d 16 (D.D.C. 2004), this Court found that the

plaintiffs' challenge to an EA and FONSI was moot when the agency withdrew its EA and stated its intent to perform a new environmental review in accordance with NEPA. 308 F. Supp. 2d at 17. In that case, the United States Fish and Wildlife Service withdrew its EA and FONSI, and announced that it would not issue new permits until a new NEPA review was conducted. Id. The court found, therefore, that the case did not present a live case or controversy. Id. at 18. See also Center for Marine Conservation v. Brown, 917 F. Supp. 1128, 1150 (S.D. Tex. 1996) (dismissing plaintiff's NEPA claim as moot or not ripe for review because agency agreed to issue supplemental Environmental Impact Statement).

C. Plaintiffs Lack Standing to Raise Its NEPA Claim Because Their Claim Is Not Redressable.

Article III, Section 2 of the Constitution gives the judiciary power over "cases and controversies." See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998). "Standing to sue is part of the common understanding of what it takes to make a justiciable case." Id. at 102 (citing Whitmore v. Arkansas, 495 U.S. 149, 155–56 (1990)). The party invoking federal jurisdiction bears the burden of proving the existence of standing. Id. at 103. One element of standing is that "a plaintiff must show the '"substantial likelihood" that the requested relief will remedy the alleged injury in fact.'" McConnell v. Fed. Election Comm'n, 540 U.S. 93, 225–26 (2003) (citing Vermont Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 771 (2000)); Steel Co., 523 U.S. at 102 (holding that because relief sought would not remedy alleged injury, party lacked standing and court did not have jurisdiction to entertain case). Accordingly, the plaintiffs must demonstrate "that a decision in their favor 'will produce tangible, meaningful results in the real world,'" meaning that the plaintiffs must show that their claim is redressable. See Pritikin v. Dep't of Energy, 254 F.3d 791, 799 (9th Cir. 2001) (quoting Common Cause v.

Dep't of Energy, 702 F.2d 245, 254 (D.C. Cir.1983)).

This Court should also grant Defendants' motion to dismiss based on Plaintiffs' lack of standing. In this case, Plaintiffs lack standing because they cannot show that the relief they request will remedy their alleged injury. In short, the proper remedy in a NEPA case is remand to the agency for further consideration. See, e.g., Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.") Defendants have already committed themselves to complete additional environmental analysis. Defendants, therefore, have undertaken the relief sought by Plaintiffs. This Court should not order an agency to take an action that the agency has already begun. See, e.g., Southern Utah Wilderness Alliance v. Smith, 110 F.3d 724, 728 (10th Cir. 1997) ("There is no point in ordering an action that has already taken place."); Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Com'n, 680 F.2d 810, 813–14 (D.C. Cir. 1982) ("Even if this attack was originally well-founded, we can hardly order the NRC at this point to do something that it has already done."). Accordingly, this Court cannot grant Plaintiffs the relief they request and Plaintiffs, therefore, lack standing to assert their NEPA claim.

CONCLUSION

In this case, the NPS has executed a Preliminary Agreement for a potential exchange of land. Neither this agreement nor the agency's previous NEPA and NHPA work provide a final

agency action subject to challenge under the APA. In any event, the NPS has committed to doing additional NEPA analysis and NHPA consultation, which render Plaintiffs' claims both not ripe and moot, and also deprive Plaintiffs of standing to challenge Defendants' actions at this time. For the foregoing reasons, Defendants request that this Court dismiss Plaintiffs' complaint.

Respectfully submitted this 19th day of January, 2005.

THOMAS L. SANSONETTI
Assistant Attorney General
United States Department of Justice

/s/ Devon M. Lehman
Devon M. Lehman, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington D.C. 20044-0663
(202) 305-0434 (tel.)
(202) 305-0267 (fax)
Devon.Lehman@usdoj.gov

Of Counsel:

Maria Lurie
United States Department of the Interior
Office of the Solicitor
Division of Parks and Wildlife
Washington, D.C. 20240