UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CHESAPEAKE & OHIO CANAL ASSOCIATION and WASHINGTON CANOE CLUB,	)	
Plaintiffs,	)	Case No. 1:04-cv-01714
	)	Judge Ricardo M. Urbina
v.	)	
GALE NORTON, Secretary of the U.S. DEPARTMENT OF THE INTERIOR, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Introduction

This action was brought by Plaintiffs Chesapeake and Ohio Canal Association and Washington Canoe Club (hereinafter "Plaintiffs") on October 7, 2004, challenging the decision by Defendants Gale Norton, Secretary of the U.S. Department of the Interior, and Fran Mainella, Director of the National Park Service (hereinafter referred to collectively as "NPS") to execute a Land Exchange Agreement with Georgetown University to facilitate the University's construction of a new boathouse on a parcel of land owned by the NPS within the C & O Canal National Historical Park. The complaint asserts that the NPS's decision to enter into the Land Exchange Agreement violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*, the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470f, 470h-2(*l*), and Section 22(b) of the Land, Water, and Conservation Fund Act ("LWCF"), as amended, 6 U.S.C. § 4601-22(b).

The NPS has moved to dismiss the complaint under Fed. R. Civ. P., Rules 12(b)(1) and 12(b)(6). In its motion, the NPS asserts that this Court lacks jurisdiction over this case based on the following arguments: (1) the Land Exchange Agreement does not constitute "final agency action" that is reviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704; (2) Plaintiffs' claims under NEPA are barred by the six-year statute of limitations under the Tucker Act, 28 U.S.C. § 2401(a); (3) this case is either not ripe for judicial review or is moot because the NPS is presently in the process of undertaking additional reviews under NEPA and Section 106 to consider changes in the design of Georgetown University's proposed boathouse that exceed the size limitations mandated by the Memorandum of Agreement ("MOA") adopted as part of the Section 106 review for the Land Exchange Agreement; and (4) Plaintiffs lack standing because the proper remedy -- a remand to the NPS to undertake additional Section 106 and NEPA reviews to address the excessive size of the boathouse – is already underway. For the reasons discussed in more detail below, Plaintiffs oppose this motion to dismiss.

Summary of Argument

NPS's motion to dismiss should be denied. The Land Exchange Agreement, which was fully executed on October 20, 1998, is plainly a final agency action that is subject to judicial review under the APA. The Agreement has been recorded as a covenant on the land, establishes binding and enforceable rights and responsibilities, and provides the legal framework for, and imposes significant constraints on, the circumstances under which the exchange of land between the NPS and Georgetown University can occur. All subsequent decisions by the NPS respecting the land exchange are made in reliance on this agreement. See Daingerfield Island Protection Society v. Lujan,797 F. Supp. 25 (D.D.C. 1992), aff'd, 40 F.3d. F.3d 442 (D.C. Cir. 1994)

(holding that a cause of action challenging a land exchange accrues, for purposes of starting the statute of limitations running, when the land exchange agreement is executed by the NPS.).

The Tucker Act's six-year statute of limitations does not bar any of the claims asserted by Plaintiffs, notwithstanding the fact that the Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") for the land exchange were issued more than six years prior to the filing of this action. The statute of limitations on Plaintiffs' NEPA claims did not begun to run (or was tolled) until October 1998, which was when the NPS executed the Preliminary Land Exchange Agreement, which is the agency action subject to NEPA, and executed the MOA under Section 106, signifying the completion of the NPS's environmental review. See Taxpayers Opposed to Oz v. Barram, 2000 WL 1595754 * 3 (D. Kan. 2000) (statute of limitations on FONSI did not begin to run until completion of Section 106 review); Montana Wilderness Ass'n v. Frye, 310 F. Supp.2d 1127 (D. Mont. 2004) (statute of limitations on a NEPA cause of action does not begin to run before the substantive federal action is taken). This lawsuit, filed within six years of those final actions, is therefore timely.

The NPS's announcement of an intent to prepare a new EA for the changed boathouse design on October 14, 2004, does not deprive Plaintiffs of standing to challenge the lawfulness of the NPS's NEPA compliance in connection with the execution of the Land Exchange Agreement. Plaintiffs have suffered injury-in-fact caused by the NPS's failure to prepare a full EIS, and to consider an adequate range of alternatives prior to execution of the Land Exchange Agreement, and only an injunction voiding the Land Exchange Agreement and requiring the NPS to prepare the necessary NEPA reviews will redress this injury.

The challenge to the Land Exchange Agreement is also ripe for judicial review. The fully executed, binding Land Exchange Agreement is a final agency action, judicial review will not interfere with this already-completed decision, and withholding judicial review of the land exchange agreement will result in hardship to Plaintiffs. The NPS's decision, announced on October 14, 2004, to prepare a new EA to evaluate the excessive size of the boathouse does not alter the analysis of ripeness, nor can these subsequent events support a defense that Plaintiffs' lack standing, since questions of ripeness and standing are determined as of the date the lawsuit was commenced (October 7, 2004), or when the final decision was made (October 7, 1998).

Nor does the NPS's recent announcement of its intent to prepare a new EA to evaluate the changed boathouse design and to hold additional "open houses" under Section 106 satisfy the NPS's heavy burden of proving that this lawsuit is moot. The NPS has not: (a) rescinded the previous EA and FONSI; (b) prepared a full EIS for the boathouse; (c) prepared a NEPA document that adequately address alternatives to the land exchange, including alternative sites for the boathouse; (d) taken action to enforce the boathouse size limitations mandated by the MOA; or (e) required Georgetown University to pay compensation to equalize the value of the land exchange, as required by the LWCF. Therefore, there is still a need for judicial relief to enforce the NPS's obligations under NEPA, the LWCF, and the MOA with respect to the execution of the Land Exchange Agreement. Accordingly, this action is not moot.

Factual Background

On July 14, 1995, the NPS prepared an Environmental Assessment ("EA") to evaluate the impacts of its proposal to exchange land with Georgetown University to facilitate the University's construction of a new boathouse, followed by a Finding of No Significant Impact

("FONSI") on September 6, 1995, pursuant to NEPA.[1] Complaint, ¶¶ 18, 23. This NEPA documentation did not consider the impact of constructing a boathouse on the NPS-owned tract of land, but instead focused on the effects of the exchange of lands. Id. ¶ 22. As a result, the EA contained no information disclosing the size, design, height, or massing of the boathouse, and failed to evaluate the specific impacts of the boathouse on natural and historic resources, such as the impact of boathouse construction on views of the Potomac River from the C & O Canal Tow Path, and impacts on the Capital Crescent Trail.

The NPS did not finalize the land exchange immediately upon completion of the NEPA studies. Instead, in October 1995, the NPS initiated consultation with the D.C. Historic Preservation Officer ("DCHPO") to evaluate the effects of the proposed land exchange on historic properties under Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f.[2] During the course of the Section 106 consultation, the DC SHPO determined that the proposed exchange may costitute an adverse effect on the Georgetown Historic District

---

[1] The purpose of an Environmental Assessment is to determine whether to prepare an Environmental Impact Statement ("EIS") for a proposed major federal action. 40 C.R.R. §§ 1501.3, 1501.4. A FONSI is the agency's determination that no EIS is necessary because the proposed action will not have a significant impact on the environment. *Id.* § 1508.13.

[2] Section 106 of the NHPA, 16 U.S.C. § 470f, prohibits federal agencies from engaging in any federal undertaking (or federally assisted, licensed or permitted undertaking) unless the agency first (1) takes into account the potential effects of the undertaking on historic properties; and (2) affords the Advisory Council on Historic Preservation ("Advisory Council" or "ACHP") a reasonable opportunity to comment on the undertaking. 16 U.S.C. § 470f. Although both NEPA and Section 106 are "designed to ensure that Federal agencies take into account the effect of Federal or Federally-assisted programs,' Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 278-79 (3d Cir.1983), NEPA requires consideration of the environment, whereas the NHPA requires a more involved consideration of historic sites. See United States v. 0.95 Acres of Land, 994 F.2d 696, 698 (9th Cir.1993) ("NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment.").

and the C & O Canal National Historical Park. Complaint, ¶ 24. Therefore, the parties proceeded to negotiate a Memorandum of Agreement ("MOA") in order to resolve these adverse effects. 36 C.F.R. § 800.6(c).

The Section 106 process was completed in October 1998, as evidenced by the execution of an MOA between the NPS, the DCHPO, and the Advisory Council on Historic Preservation setting forth agreed-to measures for mitigating impacts of the proposed land exchange on historic properties. Id. The MOA provides that any land exchange agreement entered into by the NPS and the 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." Complaint ¶ 25 (emphasis added).

Following execution of the MOA , the NPS entered into a "preliminary agreement to exchange real property" ("the Land Exchange Agreement") in October 1998. Id. ¶ 25. The Land Exchange Agreement provided "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." Land Exchange Agreement, at 1 (Exhibit 1 to Declaration of Joseph Lawler, attached to Defendants' Motion to Dismiss).[3] The Land Exchange Agreement provides for a 180 day "study period" during which the parties will undertake a number of reviews to determine whether they can use the parcels as intended, and

[3] The NPS executed the land exchange agreement on October 7, 1998, a week before the Advisory Council provided the final signature to the MOA, putting the NPS in technical violation of Section 106, which requires that consultation be completed "prior to" approving the undertaking. 16 U.S.C. § 470f.

sets forth a number of conditions that must be met prior to the formal transfer of the property, including congressional approval of the exchange, local zoning approval, and approval of the boathouse design by the NPS and various other agencies. Id., ¶ 11. The Agreement provides that "[i]f the parties determine that the parcels to be conveyed to them, respectively, can be used as intended and that the exchange can be complete, this agreement shall remain in full force and effect and shall be binding upon the Parties without further communication, subject to the terms hereof." Id., ¶ 2. The agreement was recorded in the land records of the District of Columbia on November 12, 1998. Complaint, ¶ 25.

After the execution and recordation of the Land Exchange Agreement, the NPS and Georgetown University proceeded to work cooperatively under the terms of the Land Exchange Agreement to proceed with boathouse development plans. A proposed boathouse design was reviewed and approved by various federal agencies, and by the D.C. Zoning Commission, pursuant to the procedures set forth in the Land Exchange Agreement. Complaint, ¶ 31. The design for the boathouse, as approved, was for a massive structure with a total square footage of approximately 35,000 square feet (with a first floor footprint of 18,600 square feet), thereby exceeding the maximum footprint specified in the MOA. Id.. The boathouse would also stand 54 feet at its highest point, thereby exceeding the 40 foot height limitation specified in the MOA, with a roofline more than nine feet above the C & O Canal Tow path and will be clearly visible from both the C & O Canal National Historical Park and the Capital Crescent Trail. Id. In addition, a portion of the Capital Crescent Trail will be taken to provide an roadway for vehicular access to the boathouse. Id. ¶ 32.

Mindful of the potential applicability of the Tucker Act's six-year statute of limitations to the challenge to the Land Exchange Agreement, which was executed in October 1998, Plaintiffs filed this lawsuit on October 7, 2004, alleging that the execution of the Agreement violates NEPA and the LWCF. See Complaint, First and Third Claim for Relief. The complaint also alleges that the NPS violated the MOA executed under Section 106 by proposing, jointly with the University, a boathouse structure that exceeded the maximum footprint and height specified in the MOA. See Complaint, Second Claim for Relief.

On October 14, 2004, one week after the complaint was filed, the NPS issued a press release announcing its plans to prepare a new Environmental Assessment to analyze the impacts associated with the larger boathouse proposed by Georgetown University. Lawler Decl, Exhibit 2. The NPS also held several "open houses" to allow interested parties an opportunity to comment on the potential effects of the boathouse design on historic properties. Lawler Decl, Exhibit 3. However, the NPS did not rescind either the previous EA and FONSI, or terminate the Land Exchange Agreement pending completion of these studies.

Argument

I. The Executed Land Exchange Agreement is A Final Agency Action Under the APA.

The NPS argues that this Court lacks jurisdiction over Plaintiffs' challenge because the Land Exchange Agreement does not constitute a "final agency action" withing the meaning of Administrative Procedure Act ("APA"), which supplies the requisite waiver of sovereign immunity in this case. 5 U.S.C. § 704. Specifically, the NPS argues that the Land Exchange Agreement is not "final" because NPS has not yet sought congressional approval for the land exchange, and because the D.C. Court of Appeals has not yet ruled on the Plaintiffs' appeal of

the zoning order approving the boathouse, and therefore, "two major conditions precedent in the preliminary Agreement have yet to occur and may not occur." NPS Memorandum in Support of Motion to Dismiss ("Motion to Dismiss"), at 17.

As we now discuss, the Land Exchange Agreement is fully executed and recorded as a binding covenant on the land, establishes enforceable rights and responsibilities, and alters the legal regime under which the exchange of land between the NPS and Georgetown University can occur. The existence of conditions precedent to the formal transfer of title do not render this binding contract for the transfer of land any less final.

A. The Land Exchange Agreement Represents the Completion of the NPS Decisionmaking Regarding the Terms and Conditions Under Which A Land Exchange Will Be Consummated.

The Supreme Court has held that in order for an agency action to be "final" within the meaning of the APA, it must satisfy two conditions. First, the "action must mark the 'consummation' of the agency's decision-making process.; . ."it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Bennett v. Spear,520 U.S. 154, 178 (1997). Interpreting this language, the Courts have held that, in determining whether a particular agency action is final, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Franklin Sierra Club v. Slater, 120 F.3d 623 (6th Cir. 1997).

Applying these principles, it is plain that the Land Exchange Agreement marks the consummation of the NPS's decision-making with respect to the terms and conditions under which the exchange of land with Georgetown University will take place. The Agreement is fully

executed by the parties, and has been recorded as a covenant on the land in the land records of the District of Columbia. Complaint, ¶¶ 26, 28. The terms of the Agreement make clear that it was intended to be a binding, enforceable contract that sets forth in detail "the respective rights and responsibilities of the parties in this transaction. " Land Exchange Agreement, at 1. Following the 180-day study period, the Agreement "shall remain in full force and effect and shall be binding upon the Parties without further communication, subject to the terms hereof." Id., and ¶ 2.

The fact that the actual transfer of the land under the terms of the Agreement has not yet occurred does not, as the NPS suggests, undercut the finality of the Land Exchange Agreement. It is hornbook law that a contract for the conveyance of real property conveys equitable title to the property, and is enforceable by specific performance even prior to the closing. See Standiford v. Thompson, 135 F. 991, 997 (4th Cir. 1905). Here, it is the Land Exchange Agreement that creates enforceable legal rights that "alter the legal regime to which the agency action is subject." Bennett v. Spear, 520 U.S. at 178. The "Exchange Closing" will take place in accordance with the Land Exchange Agreement, and will be a ministerial action involving no more than formal execution and recordation of the pre-prepared deed. Rather, it is the Land Exchange Agreement" that determines the parties' "rights and obligations" Bennett v. Spear, 520 U.S. at 178.

Indeed, this court has specifically held that the statute of limitations starts running on a cause of action challenging a land exchange when the land exchange agreement is executed by the NPS, and *not* when title is transferred. In Daingerfield Island Protection Society v. Lujan, 797 F. Supp. 25 (D.D.C. 1992), aff'd, 40 F.3d. F.3d 442 (D.C. Cir. 1994), the court held that a challenge to a NPS decision to enter into a land exchange accrued, *not* in 1984 when the deed to

the property was recorded, but 13 years earlier "on the date when the [Land Exchange] Agreement, by its terms, became effective, July 6, 1971." 797 F. Supp. at 28 n. 4. Because the Plaintiffs had waited until after the actual transfer of property had occurred, the Court held that the challenge to the land exchange agreement was barred by the Tucker Act's six-year statute of limitations. Id.

Plaintiffs sought to avoid precisely this result by filing this lawsuit within six years of the execution of the Land Exchange Agreement. A holding that the Land Exchange Agreement is not "final agency action" for purposes of judicial review therefore cannot be squared with the Daingerfield Island Protection Society decision, and would have the anomalous result that execution of the Land Exchange Agreement is sufficiently final to start the statute of limitations running but is not final enough to permit judicial review. This would effectively preclude judicial review altogether over the Land Exchange Agreement, since by the time there is a reviewable "final agency action," the statute of limitations will have long expired .

Consistent with the reasoning of the Court in Daingerfield Island Protection Society , there are numerous instances in which the courts asserted jurisdiction over a challenge to an agency decision to exchange or sell land in advance of the actual closing of the transaction. See Center for Biological Diversity v. U.S. Dept. of Interior, 255 F. Supp.2d 1030 (D.Ariz.,2003.) (BLM approval of land exchange was final agency action); National Coal Ass'n v. Hodel, 675 F.Supp. 1231, 1235 (D.Mont.1987) (decision of Department of the Interior to approve proposal to exchange land was a final agency action); Western Land Exchange Project v. U.S. Bureau of Land Management, 315 F.Supp.2d 1068 (D..Nev.2004.) (BLM's offering of public lands for bid at auction demonstrate that its decision to privatize federal land was final.); Sierra Club v.

Dombeck, 161 F. Supp.2d 1052, 1074 (D. Ariz. 2001) (holding that the details of a proposed land exchange are sufficiently concrete and particularized to warrant judicial review even though the closing of the transaction was not imminent). Accordingly, the Land Exchange Agreement constitutes a final agency action that is subject to judicial review under the APA.

B. The Existence of Conditions Precedent to the Closing of the Land Exchange Does Not Mean that the Land Exchange Agreement Itself Lacks Finality.

The NPS argues that the conditions precedent to the actual transfer of land set forth in the Land Exchange Agreement, including the need for congressional and other agency approvals, the completion of a new appraisal, and the resolution of the pending zoning litigation, deprive the Agreement of finality. However, a "final" agency action "need not be the very last" action. Isbrandtsen Co. v. United States, 211 F.2d 51, 55 (D.C. Cir. 1954). See, e.g., State of Tennessee v. Herrington, 626 F. Supp. 1345, 1354 (M.D. Tenn. 1986) (proposal for construction of MRS facility was final agency action, despite the need for congressional approval and preparation of a full EIS, since the proposal was a definitive recommendation for action, and not a tentative action); Jersey Heights Neighborhood Association v. Glendening, 174 F.3d 180, 190 (4th Cir. 1999) (holding that a cause of action challenging the FHWA's approval of highway accrued when the Record of Decision was issued and not when the FHWA approved the detailed design and committed funds to property acquisition, since these subsequent actions were "all in reliance on the validity of that decision.")

Indeed, the fact that the Agreement contains a number of contingencies and conditions that control the circumstances under which the transfer will (or will not) occur simply reinforces the fundamental fact that the Land Exchange Agreement fixes the legal relationship between Georgetown and the NPS, and establishes the legal regime under which the Exchange Closing

will take place. See, e.g., Bennett v. Spear, 520 U.S. at 178 (existence of "prescribed conditions" in a biological opinion that limited agency action was evidence that the opinion had "direct and appreciable legal consequences" that "affected the legal rights of the relevant actors."). As the NPS notes (Motion to Dismiss, at 16), the Land Exchange 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." Land Exchange Agreement, at 2, ¶ 1. Immediately upon execution of the Land Exchange Agreement, the parties embarked in this process, following the legal framework established by the Agreement. Therefore, these subsequent actions are "all in reliance on the validity" of the Land Exchange Agreement. Jersey Heights Neighborhood Association v. Glendening, 174 F.3d at 190.

Accordingly, numerous courts have found that conditions to a final decision do not prevent the agency action from being sufficiently final for purposes of judicial review. See, e.g., National Steel Corp., Great Lakes Steel Div. v. Gorsuch, 700 F.2d 314, 325 n. 16 (6th Cir. 1983) (holding that conditional approval by agency was still final agency action where it was "promulgated in a formal manner" and was a "definitive" statement of the agency's final position); First Nat. Bank of Fayetteville v. Smith, 508 F.2d 1371, 1379 (8th Cir. 1974). ("While the grant of preliminary approval contained numerous conditions for the organizers of the proposed bank to fulfill . . ., these conditions appear to have been imposed not as means of subjecting the preliminary approval to subsequent revision but rather in the exercise of the Comptroller's ongoing supervisory power").

It is irrelevant that the failure of one of the conditions may prevent the NPS from actually consummating the land exchange through the transfer of title. NEPA guarantees only a particular procedure, not a particular result, and therefore the relevant question is whether the Land Exchange Agreement comports with NEPA, regardless of whether the transfer of title contemplated by the Land Exchange Agreement is imminent. See City of Williams v. Dombeck, 151 F. Supp.2d 9 , 16 (D.D.C. 2001) (NEPA challenge to decision to enter into land exchange was ripe notwithstanding passage of local referendum that precludes the agency from completing the land exchange by the actual transfer of title or recordation of deeds.)

Likewise, the fact that the parties have the ability to terminate the Land Exchange Agreement if the terms and conditions are violated does not mean that the Agreement lacks finality. If that were so, then very few agency orders or regulatory actions would be final, since conditional approvals, backed up by an agency's inherent supervisory power to enforce compliance with such conditions, are the principal ways in which agencies carry out their regulatory responsibilities.

Moreover, while the land exchange provides for a number of instances in which the NPS must "approve" aspects of the project, such as the boathouse design and the location of above-ground utility service lines, the Agreement is clear that these approvals are not to be "unreasonably withheld, delayed or conditioned," or even "shall not be withheld," in the case of design review, provided that the specified conditions are met. Land Exchange Agreement, ¶ 11(a)(iii). Thus, the fact that the Land Exchange Agreement authorizes the NPS to make further decisions about the Land Exchange does not alter the fact that these decisions will be made in reliance on the Land Exchange Agreement. It is the Land Exchange Agreement that provides the

legal framework for, and imposes significant constraints on, this decision-making process. Accordingly, the Land Exchange Agreement constitutes final agency action.

II. Plaintiffs NEPA Claims Are Not Barred by the Tucker Act's Statute of Limitations

The NPS's argument that Plaintiffs' NEPA claims are barred by the Tucker Act's six-year statute of limitations statute of limitations because the NPS's Finding of No Significant Impact ("FONSI"), which represents the agency's decision not to prepare a full Environmental Impact Statement ("EIS"), was issued more than six years prior to the filing of this lawsuit, is also in error.[4] Assuming that the NEPA claims asserted in the complaint are subject to the Tucker Act's six-year statute of limitations,[5] the statute of limitations did not begun to run (or was tolled) until October 1998, which was when the NPS executed the Preliminary Land Exchange Agreement, which is the agency action subject to NEPA, and executed the MOA under Section 106, signifying the completion of the NPS's environmental review.

---

[4] It should be noted that only Plaintiffs' NEPA claims are even arguably affected by the statute of limitations. The claim asserted by Plaintiffs under Section 106 of the NHPA did not accrue until April 2004, when the NPS and Georgetown University received local zoning approval for a boathouse that violated the historic preservation conditions contained in the binding MOA that restricted the size and height of the boathouse. Complaint, ¶¶ 31, 56. Therefore, Plaintiffs' cause of action under Section 106 was plainly timely. Likewise, as noted above, the cause of action under LWCF accrued when the Land Exchange Agreement was signed, which was within six years of the filing of this action.

[5] "The vast majority of cases that have considered questions of litigation delay apply principles of laches to decide this issue." Mandelker, Daniel, NEPA Law and Litigation, § 4.34. As one court explained,"a blind application of a statute of limitations in a context in which its application was not envisioned . . . would result in illogical and capricious administration of an important environmental statute." Park County Resource Council v. U.S. Dept. Of Agriculture, 817 F.2d 609, 617 (10th Cir. 1987), *overruled on other grounds by* Village of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir.1992)

A. The Statute of Limitations Does Not Begin To Run In A NEPA Challenge Until the Agency Take the Substantive Decision Constituting the Major Federal Action.

The Tucker Act's six-year statute of limitations could not have started to run in 1996, when the NPS issued its FONSI, as the NPS asserts. See Motion to Dismiss, at 16. As the D.C. Circuit has stated, "an agency's failure to prepare an EIS, by itself, is not sufficient to trigger APA review in the absence of identifiable substantive agency action putting the parties at risk." Public Citizen v. U .S. Trade Representative, 5 F.3d 549, 552 (D.C. Cir. 1993). As a result, the courts have held that NEPA challenges are not ripe for judicial review until the agency authorizes the major federal action, either by issuing a permit or license, or awarding grant funds. See, e.g.,Citizens Alert Regarding the Environment v. EPA, 259 F. Supp.2d 9, 20 (D.D.C. 2003), aff'd 102 Fed. Approx. 167 (D.C. Cir. 2004) (NEPA challenge is not ripe for review until agency makes "firm commitment" to fund project); Macht v. Skinner, 916 F.2d 13, 17 (D.C. Cir. 1990) (same). Accordingly, the Plaintiffs' cause of action under NEPA did not accrue, for purposes of the statute of limitations, until the NPS took the substantive "major federal action" triggering the agency's NEPA responsibilities. This occurred in October 1998, when the Land Exchange Agreement was executed.

A recent decision addressed precisely this question of whether the statute of limitations on a NEPA cause of action can begin to run before the substantive federal action is taken. In Montana Wilderness Ass'n v. Frye, 310 F. Supp.2d 1127 (D. Mont. 2004), the court held that a NEPA challenge to an agency decision granting an oil and gas lease did not accrue for purposes of the statute of limitations until the agency issued the lease, even though the EA and FONSI had been issued more than six years previously. The Court reasoned:

> Plaintiffs' challenges to those final agency actions are premised on challenges to the underlying NEPA documents. . . .In analyzing whether an EIS or an EA suffices under

> NEPA, therefore, the court will look to the substance of those documents to determine whether they took the requisite "hard look" at environmental consequences, as well as the extent to which the public was able to participate in the process. *This inquiry is not limited by a statute of limitations as long as the final agency action that requires the NEPA process is within that period.*

Id. at 1143 (emphasis added). See also Barnes v. Babbitt, 329 F. Supp.2d 1141(D. Ariz. 2004) (holding that a NEPA challenge to final agency decision was timely, even through the associated environmental document was issued more than six years prior to filing of the lawsuit); Daingerfield Island Preservation Society v. Lujan, 797 F. Supp. at 34 (Tucker Act's statute of limitations began to run on July 6, 1971, when the Land Exchange Agreement was fully executed by both parties).

The NPS argues that the issuance of a FONSI in connection with a proposed federal action is itself a "final agency action" that starts the statute of limitations running. Motion to Dismiss, at 15. However, the NPS relies on cases in which the FONSI also marked the completion of the agency's substantive decision-making process.[6] See Southwest Williamson County Community Ass'n, Inc. v Slater, 173 F.3d 1033, 1036 (6th Cir. 1999); Benton County v. U.S. Department of Energy, 256 F. Supp.2d 1195, 1198 (E.D. Wash. 2003). That is not the case here.

---

[6] Citizens Alert Regarding the Environment v. EPA, also cited by the NPS (Motion to Dismiss at 15), in fact supports Plaintiffs' position on the issue of when a NEPA cause of action accrues for purposes of the statute of limitations. The Court noted that the Tucker Act's statute of limitations began to run when the agency took the substantive action (approval of a state environmental plan) that was alleged subject to NEPA. 259 F. Supp.2d at 25. While the D.C. Circuit noted in passing the applicability of the six-year statute of limitations to NEPA claims in Humane Society of the United States v. Hodel, 840 F.2d 45 (D.C. Cir. 1988), also cited by the NPS (Motion to Dismiss, at 15), the Court did not discuss whether the statute of limitations on a NEPA challenge could begin to run before the agency took the substantive action that requires the NEPA review.

Rather, here, as noted above, the Land Exchange Agreement, executed in October 1998, is " the final agency action that requires the NEPA process." Montana Wilderness Ass'n v. Frye, 310 F. Supp.2d at 1143. Therefore, the statute of limitations in this case did not start to run on Plaintiffs' NEPA claims until October 1998. This action, filed in October 2004, was therefore within the Tucker Act's six-year statute of limitations.

B. The NPS's Environmental Decisionmaking Was Not Concluded Until the Completion of the Section 106 Process in October 1998.

The NPS's 1996 FONSI does not even mark the completion of the NPS's environmental review of the proposed land exchange. Rather, the NPS continued to consult under Section 106 of the NHPA, which review concluded with the execution of the Memorandum of Agreement ("MOA") in October 1998, which marked the completion of the Section 106 process. 36 C.F.R. § 800.6(c). See Complaint, ¶¶ 23, 24, 25. The MOA contained the agreed-upon measures for mitigating the impacts of the land exchange on historic properties, including a stipulation requiring that the Boathouse to be constructed by Georgetown have a footprint "not more than 15,000 square feet for a building rising no more than 40 feet above grade." Complaint, ¶ 25. . Accordingly, the statute of limitations on any NEPA challenge to the Land Exchange Agreement did not start to run until October 1998, when the NPS executed the MOA under Section 106, thereby completing its environmental review.

This was the holding in Taxpayers Opposed to Oz v. Barram, 2000 WL 1595754 * 3 (D. Kan. 2000), a very similar case involving a NEPA challenge to an EA and FONSI prepared in connection with its decision to transfer federal property: The Court held that "[b]ecause defendant has not completed the § 106 consultation process required under the NHPA, the court finds no final agency action is present that satisfies the APA jurisdictional requirement." Id. The

Court expressly distinguished Southwest Williamson County Community Ass'n, (on which the NPS relies here), stating "None [of these cases] involved the situation before the court, where the NEPA regulatory review process was substantially complete, but the NHPA regulatory review process was not." Taxpayers Opposed to Oz v. Barrarm, 2000 WL 1595754 at * 4.

The facts are virtually identical in this case. Here, the NPS's issuance of the EA and FONSI did *not* mark the culmination of the NPS's environmental review on the land exchange. Rather, the NPS's environmental review concluded when the MOA was fully executed under Section 106, which did not occur until October 15, 1998. Complaint, ¶ 25. Indeed, the NPS's press release of October 14, 2004, acknowledges the interrelationship between the reviews under NEPA and Section 106 when it determined that a new EA was required based on the University's proposal for an 18,600 square foot boathouse, which was inconsistent with the 15,000 footprint stipulated in the 1998 MOA. Lawler Decl., Exhibit 2.

A finding that the FONSI lacks sufficient finality to warrant judicial review prior to the completion of the Section 106 process is supported by considerations of judicial economy. The courts have held that determinations of finality must take into account pragmatic considerations, including the interest in averting piecemeal reviews of agency actions. See National Wildlife Fed'n v. Goldschmidt, 677 F.2d 259, 263 (2d Cir.1982). In Taxpayers Opposed to Oz v. Barrarm, the Court specifically found that it would be illogical to bifurcate judicial review of the NEPA and NHPA claims arising out of the agency's transfer of land, explaining

> Such bifurcation does not serve the court, counsel, nor the parties as it would unduly multiply the time, energy, and effort necessary to complete the action. Examining the facts in a pragmatic manner, as required, the court finds no final agency action present.

2000 WL 1595754 at * 4.

A rule that allowed – indeed required – each of the challenges to the Land Exchange Agreement to be raised at separate intervals as environmental reviews are completed – first, in 1996 when the FONSI was issued, then later, in 1998, when the Land Exchange Agreement was signed – rather than as part of a single lawsuit arising out of the execution of the Land Exchange Agreement would be inefficient and wasteful of judicial resources. Accordingly, the statute of limitations did not begun to run in 1996 (or if it began to run, was tolled) until October 1998, when the MOA and Land Exchange Agreement were executed. This lawsuit, filed on October 7,.2004, was therefore timely.

III. There Are No Article III Justiciability Bars to Judicial Review.

The NPS argues that this case is nonjusticiable under Article III of the Constitution because of the NPS's decision, on October 14, 2004, to prepare a new Environmental Assessment and hold additional "open houses" to consider the effect of a boathouse design that exceeded the size limitations stipulated by the MOA. According to the NPS, as a result of these subsequent actions, Plaintiffs lack standing to bring their NEPA challenge, and the complaint is also barred by the constitutional doctrines of ripeness and mootness. Each of these defenses is without merit.

A. At the Time This Action Was Commenced, There Were No Factors That Even Arguably Deprived Plaintiffs Of Standing To Challenge the Land Exchange

The NPS makes no attempt to argue that, as of the date on which this action was filed, Plaintiffs lacked the requisite elements of constitutional standing to challenge the NPS's NEPA compliance in federal court.[7] Instead, the NPS argues only that the redressability prong of the

[7] The three elements of constitutional standing are (1) that the Plaintiff must have suffered personal injury or threat of injury; (2) that the injury fairly can be traced to the action ("causation") and (3) that the injury is likely to be redressed by the requested relief

standing inquiry has not been met based on the NPS's recent announcement of its intention to undertake "additional environmental analysis," demonstrating that the NPS has "undertaken the relief sought by Plaintiffs." Motion to Dismiss, at 25.

However, as the Supreme Court has pointed out,"standing" is "[t]he requisite personal interest that must exist at the commencement of the litigation." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), 528 U.S. 167, 189 (2000). Here, the NPS's decision to prepare a new EA to remedy the violation of the MOA was made on October 14, 2004, one week *after* Plaintiffs' filed this lawsuit. Accordingly, the NPS's announcement, on October 14, 2004, of its intent to prepare "additional environmental analysis," has no bearing on whether the injury alleged by Plaintiffs was redressable on October 7, 2004, when this lawsuit was filed.

In any event, however, a party asserting a procedural injury arising from noncompliance with NEPA need only show a "reasonable probability" that the challenged action will pose a threat to his interests." Hall v. Norton, 266 F.3d 969, 977 (9th Cir. 2001); Lujan v. Defenders of Wildlife, 504 U.S. at 573. As will be discussed in more detail in Section III.C., *infra*, the NPS's announcement of an intent to prepare an EA for the changed boathouse design does not redress Plaintiffs' NEPA injuries, arising from the NPS's failure to prepare a full EIS, or consider an adequate range of alternatives, in connection with its execution of the Land Exchange Agreement, since the NPS has not withdrawn the prior EA and FONSI, or prepared a full EIS for the land exchange. Accordingly, Plaintiffs have standing to raise the NEPA challenges to the Land Exchange Agreement.

("redressibility"). Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). For purposes of this motion to dismiss, these elements are satisfied by the allegations in the complaint. See Complaint, ¶¶ 10,11.

B. At the Time This Action Was Commenced, This Challenge to the NPS's Execution of the Land Exchange Agreement Was Ripe for Judicial Review.

The NPS also argues that the case is no longer ripe for judicial review as a result of "the re-opened NEPA and NHPA reviews." Motion to Dismiss, at 19. However, like standing, "ripeness is determined at the time of the filing of the complaint" or "when the agency action was sufficiently final." Sierra Club v. Dombeck, 161 F. Supp.2d at 1062 (holding that NEPA challenge to execution of land exchange agreement was ripe at time the agreement was executed, notwithstanding subsequent decision by the U.S. Forest Service to undertake additional environmental analysis). Accordingly, the NPS's belated decision to prepare additional environmental analysis for the changed boathouse design is not relevant to whether this challenge to the Land Exchange Agreement is ripe for judicial review.[8]

This case was plainly ripe for review at the time this lawsuit was filed. Determining whether an issue is ripe for judicial review requires an evaluation of both the fitness of the issues for judicial resolution and the hardship to the parties of withholding court consideration. Abbott Laboratories v. Gardner**,** 387 U.S. 136, 149 (1966). The first factor, fitness, evaluates two criteria: (1) "existence of a specific, concrete, and important right; and (2) finality in the administrative decision" Id. The second factor looks at the hardship to the parties of withholding review. Id.

[8] Therefore, Town of Fairview, Texas v. U.S Dep't of Transportation, 201 F. Supp.2d 64, 75 (D.D.C. 2002), cited by the NPS in support of its "ripeness" argument (Motion to Dismiss, at 20) is distinguishable from the instant case. In that case, the Court held that plaintiffs' lawsuit seeking to require the FAA to prepare an EIS was premature, since the lawsuit was filed before the agency had even issued a final, appealable order that constituted final agency action. Unlike the present case, the factors that rendered those challenge unripe existed at the time the lawsuit was filed.

Here, as the NPS itself concedes in the context of its statute of limitations argument, at the time this action was filed, the NPS had made a final agency decision not to prepare an EIS, and had executed the Land Exchange Agreement on the basis of that completed NEPA analysis.[9] As previously discussed, the Land Exchange Agreement establishes binding, concrete rights and responsibilities, and its execution in October 1998 completed the NPS's decision-making on the land exchange. Therefore, Plaintiffs' challenge to this completed agency action is fit for judicial review.

Judicial review of the Land Exchange Agreement will not interfere with the NPS's present plans to prepare a new EA or hold additional Section 106 "open houses." As will be discussed in more detail below, these ongoing reviews are limited to review of the boathouse design, and will not address the lawfulness of the land exchange under the LWCF, nor will these reviews address alternatives to the land exchange (as distinct from the boathouse) or ensure enforcement of the 1998 MOA. Moreover, judicial review of the adequacy of these new reviews will involve a new set of facts, and likely a different set of parties, than those presently challenging the lawfulness of the NPS's execution of the Land Exchange Agreement. As the Court explained in Sierra Club v. Dombeck, in holding that a challenge to a land exchange was ripe for judicial review notwithstanding the agency's decision to undertake "additional environmental analysis," and denying the agency's motion to stay the case pending completion of these reviews:

---

[9] Indeed, the NPS's ripeness defense is inconsistent with the NPS's statute of limitations defense, which is premised on the notion that Plaintiffs should have filed this lawsuit within six years of the issuance of the FONSI. Plaintiffs' NEPA challenge cannot be both too early and too late at the same time.

> the allegations may change, the facts will change and even some of the parties are likely to change. Ultimately, this Court would likely be presented with an entirely new case or no case at all. *Simply stated, allowing the parties to litigate an entirely new agency action under this case name and number is totally inappropriate*

Sierra Club v. Dombeck, 161 F. Supp.2d at 1062 (emphasis added)

Finally, withholding judicial until the completion of the new EA will result in hardship to Plaintiffs. Upon expiration of the 180-day Study Period, the NPS will be bound by the Land Exchange Agreement to consummate the exchange of land with Georgetown University if the conditions specified in the Agreement are satisfied. At that point, the NPS will no longer have the unconstrained authority to withdraw from the land exchange agreement or consider alternative sites for the boathouse. Accordingly, this challenge to the lawfulness of the Land Exchange Agreement is ripe for judicial review.

C. This Case Is Not Moot.

The NPS also asserts that this case is moot "because the NPS has committed to doing additional NEPA analysis and NHPA consultation." Motion to Dismiss, at 23. It is well established that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonable be expected to recur." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), 528 U.S. 167, 189 (2000). Moreover, the party claiming mootness must show that "interim relief or events must have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). The declarations and exhibits filed by the NPS fall well short of this heavy burden.

1. The NPS's Decision to Prepare A New EA For the Changed Boathouse Design Does Not Remedy Plaintiffs' NEPA Claims Where the NPS Has Not Withdrawn Its Prior EA and FONSI, and Has Made No Commitment to Prepare A Full EIS for the Land Exchange.

The NPS has failed to demonstrate that it has fully eradicated the effects of each of the violations of NEPA alleged in the complaint. First, the NPS's announcement that it will prepare a new EA, regardless of its scope, does not remedy Plaintiffs' challenge to the NPS's refusal to prepare an Environmental Impact Statement ("EIS") – a much more comprehensive document assessing impacts and evaluating alternatives, with more defined public participatory rights. A suit to compel an EIS is rendered moot only when the EIS is completed and filed. See Blue Ocean Preservation Society v. Watkins, 767 F. Supp. 1518, 1523 (D. Haw. 1991) (Defendants' promise to prepare an EIS does not moot NEPA claim where agency has not yet completed, or even begun, the EIS, and the agency has "consistently maintained that NEPA does not require [an EIS]."); Romero-Barcel v. Brown, 643 F.2d 835, 862 (1st Cir. 1981).

Here, there is no indication that the NPS intends to prepare a full EIS for the land exchange. To the contrary, the decision to prepare another EA strongly indicates that the NPS does *not* intend to prepare an EIS.[10] Moreover, the NPS has not withdrawn the prior EA or FONSI, nor has it rescinded the Preliminary Land Exchange agreement. See Malama Makua v. Rumsfield, 136 F. Supp.2d 1155, 1164-65 (D. Hawaii 2001) (NEPA challenge to EA and FONSI not moot by the Army's voluntary decision to reconsider EA and FONSI in order take into account new information in public comments since the Army could still decide to re-issue the previous EA and FONSI unchanged.). By contrast, in Burton v. Norton, 308 F. Supp.2d 16

[10] By contrast, when considering the approval of a new Boathouse on the Potomac River, in Arlington County, VA, the NPS announced in June 2004, that it would prepare a full EIS to consider and compare the impacts or alternative locations. See www.nps.gov/gwmp/boathouse.

(D.D.C. 2004), cited by the NPS (Motion to Dismiss, at 23-24), the finding of mootness was predicated on the fact that the agency had not only withdrawn the challenged EA, but also withdrawn the underlying substantive permit, and agreed to refrain from issuing any new permits until a new NEPA review had been conducted. Accordingly, the NPS's decision to issue a new EA does not moot Plaintiffs' challenge to the NPS's failure to prepare an EIS.

Moreover, the NPS has indicated that the new EA is only intended to evaluate the impacts of the changed boathouse design.[11] However, the Plaintiffs' challenge the Land Exchange Agreement is based, not simply on the NPS's failure to consider the impacts of the boathouse on the C & O Canal Historical Park, but also on the NPS's failure to consider alternative means of achieving the objectives of the land exchange:

> The NPS violated NEPA by failing to analyze all reasonable alternatives to the proposed action, including the alternative of the NPS acquiring the Georgetown University parcel by purchase or condemnation rather than through the exchange of land, facilitating boathouse use of the NPS site through a cooperative agreement with a nonprofit organization, school, or consortium, or a combined alternative including purchase of the Georgetown University tract and NPS development of a boathouse on the NPS tract.

Complaint, ¶ 47. NEPA requires the agency to consider alternatives to its proposed action even if no EIS is required. 42 U.S.C. § 4332(2)(E). Thus, a NEPA document that evaluates only the proposed design of the boathouse without looking at alternative sites for the boathouse does not eradicate the effects of this NEPA violation.

It is well-established that an agency is required by NEPA to "consider environmental consequences at every stage of its decision." Silentman v. Federal Power Commission, 566 F.2d

---

[11] As the complaint alleges, and the NPS has conceded on the record in the prior zoning proceeding, the NEPA documentation prepared by the NPS in connection with the Land Exchange Agreement "does not discuss the impacts of the design or construction of the proposed boathouse on the Chesapeake and Ohio Canal National Historical Park and other historic and natural resources." Complaint, ¶ 22.

237, 241 (D.C. Cir. 1977. Thus, even if the NPS's new EA and Section 106 "open houses" intend to review the impacts of Georgetown University's massive boathouse design on the C & O Canal Historical Park and other natural and historic resources, there is no indication that the NPS intends to re-visit its 1998 decision to enter into a land exchange agreement with Georgetown University, or consider alternative means of achieving the dual goals of the land exchange: protection of the parcel within the C & O Canal Historical Park owned by Georgetown University and facilitating the University's construction of a non-motorized boathouse.[12] While the EA may provide a vehicle to re-visit aspects of the design of the boathouse, the location for the boathouse is fixed by the Land Exchange Agreement. The fact that the NPS is preparing a new EA in connection with its review of the boathouse design therefore does not obviate its responsibilities to comply with NEPA in connection with the exchange of land, and does not moot Plaintiffs' NEPA challenge to the Land Exchange Agreement.

2. The Preparation of A New EA to Address the Changed Boathouse Design Does Not Remedy the NPS's Violation of the MOA

The preparation of a new EA to address the changed boathouse design does not eradicate the effects of the NPS's violation of the MOA or eliminate the need for judicial action to enforce the limitations on the size of the boathouse mandated by the MOA. Here, the NPS violated the stipulation in the binding MOA requiring that any land exchange agreement entered into by the NPS and the University "*shall* contain the following provisions concerning the parcel that the

[12] See Complaint, ¶ 47. An EA evaluating the impacts of the boathouse, as presently designed and located, does not address the allegations in the complaint that the NPS was required to evaluate the alternative of condemning Georgetown University's upriver parcel to further protect the C & O Canal Historical Park, and identifying alternative sites for the University's boathouse that are not within the C & O Canal Historical Park, such as locations downstream of Key Bridge, or on the Anacostia River.

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." Complaint ¶ 25 (emphasis added).

Under Section 106 of the NHPA, once an agency has entered into a Memorandum of Agreement, "it has voluntarily assumed an obligation that is enforceable for as long as [the agency] is involved in the project." Waterford Citizens Association v. Riley, 970 F.2d 1287, 1290 (4th Cir. 1992). The adoption of this MOA by the parties rendered this a binding agreement that governs the undertaking and all of its parts. 16 U.S.C. § 470h-2(l). In reliance on compliance with Section 106, the NPS executed the Land Exchange Agreement, in which the limitation on the boathouse's height and footprint became a binding covenant that runs with the land. Complaint, ¶¶ 27, 28.

The NPS violated the MOA by approving a boathouse with a footprint of 18,600 square feet, which would stand 54 feet at its highest point. Complaint, ¶¶ 31, 56. The NPS has not required Georgetown University to reduce the size and height of the boathouse. Instead, the NPS has simply held two "open houses" "to permit interested parties to identify, discuss, and consider potential effects of the boathouse on historic properties." Lawler Decl., Exhibit 3.

The NPS's decision to prepare a new EA and to allow "interested parties" another opportunity to comment on the boathouse has not "completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. at 631. The NPS has made no commitment to comply with the MOA. The relief requested by Plaintiffs in the complaint to remedy this violation of the MOA is an injunction of any construction of a boathouse in violation of the height and size restrictions specified in the MOA. Complaint ¶ 57. Accordingly, Plaintiffs' claim that the NPS violated the MOA is not moot.

3. The NPS Has Not Even Attempted To Voluntarily Comply With the LWCF.

Finally, even if the NPS had withdrawn its prior FONSI and agreed to prepare a full EIS on the changed boathouse design, these actions would still not remedy the claim asserted in the complaint that the NPS violated the LWCF by agreeing to exchange a valuable parcel owned by the NPS for an unbuildable parcel owned by the University without equalizing the value of the exchange through the payment of compensation. Complaint, ¶ 60, 61. Preparation of new NEPA documents evaluating the impacts of the changed boathouse design on historic properties at the NPS-owned tract within the C & O Canal Historical Park will not obviate the need for a judicial order enforcing the LWCF with respect to the land exchange.

Thus, this case is similar to Fund for Animals v. Jones, 151 F. Supp. 2d 1 (D.D.C. 2001), in which the Court rejected an argument that Plaintiffs' NEPA challenge to the approval of a plan to hunt bison on federal land was moot, even though the agencies had withdrawn the FONSI that had approved the plan, and had signed assurances that no hunts would occur until the preparation of a new plan. The court found that the Plaintiffs had challenged, not only the bison plan but also the agencies' failure to consider the impacts of a separate program to feed elks on federal lands, which resulted in the overpopulation of bison, and therefore withdrawal of the FONSI would not address this claim since the elk feeding program remained in effect. By the same token, the NPS has not terminated the Land Exchange Agreement, or required the University to pay compensation equalizing the value of the land exchange, as required by the LWCF. Therefore, the NPS's decision to prepare another EA on the boathouse design does not eliminate the need for judicial action to enforce the LWCF.

Conclusion

For the foregoing reasons, the NPS's motion to dismiss should be denied.

Respectfully submitted,

_____

Andrea C. Ferster
D.C. Bar # 384648
1100 17th Street, N.W. 10th Fl.
Washington, D.C. 20036
(202) 974-5142

Counsel for Plaintiffs