

JS 44 (Rev. 12/12)

**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

State of New Jersey, Department of Environmental Protection; and Bob Martin, Commissioner, New Jersey Department of Environmental Protection

(b) County of Residence of First Listed Plaintiff Mercer County, NJ  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, Email and Telephone Number)

John J. Hoffman, Acting Attorney General of New Jersey, by David Apy NJ Div. of Law, R.J. Hughes Justice Complex, 25 Market Street, Box 093 Trenton, NJ 08625; David.Apy@lps.state.nj.us; 609-292-8567

**DEFENDANTS**

National Science Foundation; France Cordova, Director, NSF; NOAA Office for Coastal Mgmt; Jeffrey Payne, Director, OCM; NOAA NMFS; Eileen Sobeck, Asst Admin, NMFS; Lamont-Doherty Earth Observ.

County of Residence of First Listed Defendant Arlington County, VA  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

**V. ORIGIN** (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
 APA, 5 U.S.C. 701; Coastal Zone Mgmt Act, 15 U.S.C. 1451; MMPA, 16 U.S.C. 1361 ; NEPA, 42 U.S.C. 4321;  
 Brief description of cause:  
 Defendants violated numerous environmental statutes in proceeding with a seismic testing project off NJ's coast

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ \_\_\_\_\_ CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY**

(See instructions): JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE \_\_\_\_\_ SIGNATURE OF ATTORNEY OF RECORD \_\_\_\_\_

06/05/2015

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

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Of Environmental Protection and  
Bob Martin, Commissioner of the  
Department of Environmental Protection

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Assistant Attorney General  
(609) 292-8567

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

STATE OF NEW JERSEY, DEPARTMENT OF :  
ENVIRONMENTAL PROTECTION, and :  
BOB MARTIN, COMMISSIONER, :  
NEW JERSEY DEPARTMENT OF :  
ENVIRONMENTAL PROTECTION, :

Plaintiffs, :

vs. :

VERIFIED COMPLAINT FOR  
INJUNCTIVE AND  
DECLARATORY RELIEF

NATIONAL SCIENCE FOUNDATION, :  
FRANCE CORDÓVA, as director :  
of the National Science Foundation, :  
NATIONAL OCEANIC AND ATMOSPHERIC :  
ADMINISTRATION, OFFICE FOR COASTAL :  
MANAGEMENT, JEFFREY PAYNE, :  
as Acting Director of the Office for :  
Coastal Management, NATIONAL OCEANIC :  
AND ATMOSPHERIC ADMINISTRATION, NATIONAL :  
MARINE FISHERIES SERVICE, :  
EILEEN SOBECK, as Assistant :  
Administrator for Fisheries, :  
and LAMONT-DOHERTY EARTH OBSERVATORY, :

Defendants. :

Plaintiffs State of New Jersey, Department of Environmental Protection ("NJDEP"), and Commissioner Bob Martin (together "Plaintiffs" or "NJDEP"), by their attorney, John J. Hoffman, Acting Attorney General of the State of New Jersey, allege as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action on behalf of the State of New Jersey and its citizens, in response to Defendants' repeated disregard for the State of New Jersey's coastal uses and resources and for the State of New Jersey's rights under applicable federal law. Defendants seek, for the second year in a row, to perform a Marine Seismic Survey Research Project ("the Project"), where Rutgers received federal funding and is the Principal Investigator, off the coast of New Jersey during the peak of the State's fishing season. The Project will shoot powerful sonic blasts every five seconds for thirty days into prime fishing areas and waters used by marine mammals and threatened and endangered species. The full extent of impacts from seismic testing are still being learned, but what is known is the impacts will be felt far outside of the study area and are likely to include reduced catch rates for New Jersey's commercial and recreational fishing industries, and harassment of marine mammals.

2. To prevent these harms, NJDEP attempted to exercise its rights as a coastal state under the Coastal Zone Management Act ("CZMA"), 15 U.S.C. § 1451 et seq., in addition to raising objections throughout the federal environmental compliance process. However, NJDEP's well-founded concerns were rejected by Defendants.

3. In deciding to proceed with the Project, Defendants improperly decided to override New Jersey's objections raised under the CZMA. Defendants also violated multiple aspects of the required environmental compliance process, including the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 et seq.. For the second year in a row, Defendants' collective decisions have allowed the Project to proceed in a manner that is arbitrary, capricious, in violation of procedure, and otherwise not in accordance with law, all in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq..

4. Plaintiffs seek declaratory and injunctive relief to end Defendants' repeated disregard for the State's coastal uses and resources.

#### JURISDICTION

5. This Court holds jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question),

because Plaintiffs allege violations of federal law. The Court is authorized to provide declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202.

**VENUE**

6. Venue over this action is proper in this District pursuant to 28 U.S.C. § 1391(e)(3), which establishes venue in an action against an officer or agency of the United States in any judicial district in which one of the plaintiffs resides, if no real property is involved in the action. Venue is additionally appropriate in this District pursuant to 5 U.S.C. § 703 and because the regulatory decisions sought to be reviewed will likely adversely affect the residents and natural wildlife resources that use the State of New Jersey's coastal waters.

**PARTIES**

7. Plaintiff New Jersey Department of Environmental Protection is a principal State agency of the State of New Jersey, with offices located at 401 East State Street, Trenton, New Jersey 08625, and is responsible for the environmental protection of the waters, lands, air, wildlife, and plant life of and in the State of New Jersey, including waters, lands, air, wildlife, and plant life that may be adversely impacted by the Project. The State of New Jersey holds a sovereign interest in all of the natural resources within its territory that will be affected by Defendants' Project.

8. Plaintiff Bob Martin is the Commissioner of the New Jersey Department of Environmental Protection, with offices located at 401 East State Street, Trenton, New Jersey 08625, and is responsible for the implementation of New Jersey's environmental protection laws, regulations, and standards that pertain to the Project.

9. Defendant National Science Foundation ("NSF"), with offices located at 4201 Wilson Boulevard, Arlington, VA 22230, is responsible for administering the funding for various federally supported research projects, including this Project. NSF is also the owner of the R/V Marcus G. Langseth, the research vessel being used to conduct the Project.

10. Defendant France A. Córdova is the Director of the National Science Foundation and oversees all NSF activities, from the development of policy priorities to the establishment of administrative and management guidelines.

11. Defendant National Oceanic and Atmospheric Administration ("NOAA"), Office for Coastal Management ("OCM"), with offices located at 1305 East-West Highway, Silver Spring, MD 20910, is responsible for administering the Coastal Zone Management Act's federal consistency program, reviewing state requests to review federally-assisted projects, and for generally assisting states in managing, preserving, and developing their marine and coastal resources.

12. Defendant Jeffrey Payne is the Acting Director of OCM within NOAA, and is responsible for deciding whether states are granted an opportunity to review federally assisted projects for consistency with their coastal management program.

13. Defendant National Marine Fisheries Service ("NMFS"), with offices located at 1315 East-West Highway Silver Spring, MD 20910, is responsible for the stewardship of the nation's ocean resources and their habitats. NMFS is charged with implementing the Marine Mammal Protection Act through, among other things, issuing Incidental Harassment Authorizations.

14. Defendant Eileen Sobek is the Assistant Administrator for Fisheries at NMFS. She oversees the management and conservation of marine fisheries and the protection of marine mammals, sea turtles, and coastal fisheries habitat within the U.S. exclusive economic zone.

15. Defendant Lamont-Doherty Earth Observatory ("LDEO"), with offices located at P.O. Box 1000, 61 Route 9W, Palisades, NY 10964, is a component of the Earth Institute within Columbia University. Defendant LDEO operates the R/V Marcus G. Langseth which is being used to conduct the Project.

STATUTORY BACKGROUND

**The Coastal Zone Management Act**

16. The Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 et seq., was enacted, among other reasons, to ensure coordination and consistency between federal, state, and local actions in the coastal zone; to encourage states to exercise their full authority over the lands and waters in the coastal zone; and to recognize that states have substantial and significant interests in the protection, management, and development of the resources of the coastal zone that can only be served by the active participation of coastal states in all federal programs affecting such resources. 16 U.S.C. § 1451.

17. Pursuant to NOAA's regulations implementing the CZMA, a state is entitled to request to review activities occurring outside of its coastal zone, if the State determines the activity will have reasonably foreseeable coastal effects in that state's coastal zone. 15 C.F.R. 930.34 (Subpart C - federal agency activity), 15 C.F.R. 930.54 (Subpart D - federal license or permit), 15 C.F.R. 930.98 (Subpart F - federal assistance to a state or local government).

18. Federal agencies are required to issue a Consistency Determination for a federal agency activity which will affect a coastal use or resource. 15 C.F.R. 930.36. The state for which the Consistency Determination was prepared has the right to

object to the Consistency Determination, in which case the federal agency can only proceed with the activity if the agency overrides the objection by determining the activity is consistent to the maximum extent practicable with the state's coastal management program. 15 C.F.R. 930.43

#### **The National Environmental Policy Act**

19. The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., was enacted to encourage harmony between humans and the environment, to promote efforts that prevent or eliminate damage to the environment, and to enrich the understanding of the ecological systems and natural resources important to the Nation. 42 U.S.C. § 4321. NEPA requires all federal agencies, in every proposal for major federal action, to prepare and consider a detailed Environmental Impact Statement ("EIS") that includes the proposed action's adverse effects that cannot be avoided, alternatives to the action, and the action's long term effects. 42 U.S.C. § 4331.

20. The implementation of NEPA is overseen by the Council on Environmental Quality. See 40 C.F.R. Part 1500. Pursuant to 40 C.F.R. 1507.3, federal agencies must adopt procedures to implement NEPA's requirements. Further, 40 C.F.R. 1501.3 allows individual agencies to adopt procedures setting forth when an individual agency is required to prepare an Environmental Assessment. Environmental Assessments are concise public

documents which assist federal agencies in the threshold determination of whether a more comprehensive EIS is necessary.

40 C.F.R. 1508.9. If a federal agency concludes from its Environmental Assessment that an EIS is not necessary, the agency must issue a "Finding of No Significant Impact" ("FNSI").

40 C.F.R. 1508.13.

21. NSF's regulations for complying with NEPA are located at 45 C.F.R. Part 640. Pursuant to 45 C.F.R. 640.4(e), when an Environmental Assessment prepared by NSF determines that an EIS is not required, the corresponding FNSI must be made available for a 30-day public review period before any action is taken, if the proposed action is one that normally requires an EIS or is closely similar to an action normally requiring an EIS.

#### **The Marine Mammal Protection Act**

22. The Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 et seq., was enacted because Congress determined "marine mammals . . . should be protected and encouraged to develop to the greatest extent feasible . . . and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem." 16 U.S.C. § 1361. To effectuate this goal, Congress imposed, with limited exceptions, a moratorium on the "taking" of marine mammals.

23. The MMPA also created the Marine Mammal Commission, which serves as an independent agency of the U.S. Government to

provide independent oversight of the marine mammal conservation policies implemented by federal regulatory agencies, including NMFS. 16 U.S.C. § 1401.

24. The MMPA is implemented by NMFS, which is authorized to issue Incidental Harassment Authorizations for the "take" of marine mammals in limited circumstances. 16 U.S.C. § 1361. Congress expressly directed NMFS to make its take decisions "in consultation" with the Marine Mammal Commission. 16 U.S.C. § 1371.

#### **The Administrative Procedure Act**

25. The Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., provides a right of review for any person suffering legal wrong because of agency action. 5 U.S.C. § 702. Reviewing courts are authorized to hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, without observance of procedure required by law, or otherwise not in accordance with law. 5 U.S.C. § 706.

#### **FACTS**

##### **New Jersey's Management of its Coastal Zone**

26. The CZMA and its implementing regulations set forth the process by which NOAA reviews and approves a state's coastal management program. 16 U.S.C. § 1455(d). New Jersey's coastal program was approved by NOAA in 1978 and the program reflects, among other things, New Jersey's goal of managing its coastal

zone to protect its natural resources and support commercial, recreational, and aesthetic uses.

27. The Coastal Zone Management Office within NJDEP administers the planning and enhancement aspects of New Jersey's federally approved Coastal Zone Management Program.

28. As set forth in N.J.A.C. 7:7E-1.1(c), New Jersey's Coastal Zone Management Program goals and supplemental policies include: (1) healthy coastal ecosystems; (2) effective management of ocean and estuarine resources; (3) meaningful public access to and use of tidal waterways and their shores; (4) sustained and revitalized water-dependent uses; (5) coastal open space; (6) safe, healthy and well-planned coastal communities and regions; (7) coordinated coastal decision-making, comprehensive planning and research; and (8) coordinated public education and outreach. N.J.A.C. 7:7E-1.1.

29. To effectuate these goals, New Jersey's Coastal Zone Management Program contains enforceable policies that protect prime fishing areas, N.J.A.C. 7:7E-3.4, marine fish and fisheries, N.J.A.C. 7:7E-8.2, and endangered or threatened wildlife or plant species habitat, N.J.A.C. 7:7E-3.38.

#### **The Project**

30. For the second consecutive year, Defendant Lamont-Doherty seeks to use the R/V Marcus Langseth, a research vessel owned by Defendant NSF, to conduct the Project. The Project is a high-

energy 3-D seismic study in the Atlantic Ocean off the coast of New Jersey. The study area is an approximately 12 by 50 kilometer (km) rectangular area off the coast of New Jersey.

31. In 2014, the Project was cancelled due to mechanical problems with the research vessel.

32. The Project will collect data using a subarray of four airguns with a total discharge volume of  $\sim 700 \text{ in}^3$ . The airguns are a mixture of Bolt 1500 LL and Bolt 1900 LLX airguns ranging in size from 40 to 220  $\text{in}^3$ , with a firing pressure of 1950 pounds per square inch. The airguns will be fired every 5.4 seconds for approximately thirty days, and when fired will emit a source level from 246 to 253 decibels.

33. During the Project, Defendant Lamont-Doherty also plans to utilize a Kongsberg EM 122 multibeam echosounder simultaneously during airgun operations to map the ocean floor. The echosounder operates between 10.5 and 13.0 kilohertz, with a maximum source level of 242 decibels.

34. The Project also will involve use a sub-bottom profiler, which will emit pings with a pulse interval of one second, with a maximum radiated power of 204 decibels.

35. Finally, the Project will use an acoustic Doppler current profiler with an acoustic source level over 200 decibels.

### Status of the Project

36. On or about June 1, 2015, the R/V Marcus G. Langseth left New York Harbor and traveled off the coast of New Jersey. As of June 4, 2015, the ship is located in or near the survey area described in the Project description.

### NSF's Violation of the CZMA

37. Federal agencies are required to develop consistency determinations for proposed federal agency activities which affect any coastal use or resource. 15 C.F.R. 930.36 (Subpart C). Pursuant to this provision, on December 22, 2014, NSF issued to NJDEP a Consistency Determination for the Project, concluding the Project is consistent with NJDEP's federally-approved coastal management program.

38. On March 6, 2015, NJDEP exercised its right to object to NSF's Consistency Determination, by issuing an Inconsistency Determination. As required by 15 C.F.R. 930.43, the Inconsistency Determination explained why the Project is inconsistent with NJDEP's enforceable policies and proposed alternative measures that would improve the Project.

39. NJDEP's Inconsistency Determination explained that the Project violates NJDEP's enforceable policies prohibiting or discouraging adverse impacts to prime fishing areas, N.J.A.C. 7:7E-3.4, marine fish and fisheries, N.J.A.C. 7:7E-8.2, and

endangered or threatened wildlife or plant species habitat,  
N.J.A.C. 7:7E-3.38.

40. To make the Project more consistent with NJDEP's enforceable policies, NJDEP proposed, among other things, that the Project be rescheduled to take place in September or October to reduce impacts to the State's coastal uses and resources. NJDEP also objected to the lack of data relied upon by NSF in making its Consistency Determination, and proposed incorporating a study into the Project to better assess the impacts of seismic testing.

41. Pursuant to the coastal zone management regulations, NSF was not authorized to conduct the Project unless it made a final determination that the Project was consistent with NJDEP's enforceable coastal policies, despite NJDEP's objections. On May 26, 2015, just five days before the Project's proposed start date, NSF informed NJDEP that it "has decided to authorize the Proposed Activity to move forward over NJDEP's 'objection' under CZMA," and attached a Final Consistency Determination.

42. NSF's Final Consistency Determination concluded that "the Proposed Activity is consistent to the maximum extent practicable" with the enforceable policies of New Jersey's Coastal Management Program. NSF reached that conclusion through a flawed analysis of New Jersey's Coastal Management Program.

43. For example, NSF dismissed NJDEP's reference to N.J.A.C. 7:7E-8.2, in part, because NSF found "[t]he enforceable policy described at N.J.A.C. 7:7E-8.2 Marine Fish and Fisheries 'discourages' but does not prohibit activities that adversely impact the natural functioning of marine fish." However, NSF neglected the fact that "discouraged" is defined in New Jersey's Coastal Management Program to mean the Department, exercising its discretion, "may permit the use provided that mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern." N.J.A.C. 7:7E-1.8. In other words, NSF was not authorized to disregard N.J.A.C. 7:7E-8.2 unless NJDEP authorized the activity based on a finding the Project would be in the public interest and mitigation would cause a net benefit. No such finding was made by NJDEP, and consequently NSF's Final Consistency Determination is legally flawed.

44. NSF also improperly disregarded NJDEP's proposed alternatives for the Project. A primary suggestion by NJDEP was to reschedule the Project to September or October of this year (or some year in the future), in order to reduce adverse impacts to New Jersey's prime fishing areas, marine fish and fisheries, and endangered or threatened wildlife species and habitats. NSF rejected this suggestion, in part, because the Primary Investigators have "teaching obligations" and the

science team conducting the Project includes students. NSF also cited scheduling challenges for the research vessel. These considerations have no bearing on whether the Project is consistent with NJDEP's Coastal Management Program, and it was therefore improper for NSF to rely upon them in overriding NJDEP's objection to the Project.

**OCM's Non-Compliance with the CZMA**

45. NOAA's regulations implementing the CZMA instruct states to monitor proposed activities outside of the State's coastal zone involving federal permitting or federal assistance. 15 C.F.R. 930.54 (Subpart D - federal permit); 15 C.F.R. 930.98 (Subpart F - federal assistance). If a state determines that either activity will have reasonably foreseeable coastal effects, the state can request to review the activity for consistency with its management program by providing notice to OCM and other stakeholders. Ibid.

46. On April 21, 2015, NJDEP submitted to OCM and other requisite stakeholders its request to review the Project under Subparts D and F for consistency with its coastal management program.

47. On April 30, 2015, OCM sent NJDEP a letter denying its request to review the Project under Subparts D and F. OCM failed to address NJDEP's determination that the Project will have reasonably foreseeable effects in New Jersey's coastal

zone. Instead, OCM denied NJDEP's request because it found the Project was properly categorized as a Subpart C activity.

48. OCM's categorization of the Project as a Subpart C activity is in direct conflict with its own 2014 determination that the Project is a Subpart F activity. Moreover, NSF, in a December 22, 2014 letter to NJDEP, stated the Project is a Subpart D activity because a federal license or permit is required for the activity. Thus, it was inappropriate, arbitrary and capricious for OCM to determine the Project is a Subpart C activity.

49. OCM's denial of NJDEP's request to review the Project under Subparts D and F was contrary to OCM's own regulations, its determination last year, and the determination of its sister agency, NSF. As a result of OCM's improper denial, NJDEP was deprived of the ability to review the Project for consistency with its coastal management program. If NJDEP had been granted the opportunity to review the Project under Subparts D and F, it would have had an additional opportunity to review the Project and raise its objections before OCM, rather than just NSF. Compare 15 C.F.R. 930.43 with 15 C.F.R. 930.54 and 930.98. Consequently, OCM's improper denial frustrated the CZMA's goal of allowing NJDEP to protect the coastal uses and resources within its coastal zone by participating in the federal decision-making process.

**NSF's Non-Compliance with NEPA**

50. NEPA requires federal agencies to prepare an EIS for major federal actions that may significantly affect the environment. In June 2011, NSF issued a Programmatic Environmental Impact Statement ("PEIS") for Marine Seismic Research Funded by the National Science Foundation.

51. On December 19, 2014, NSF issued a Draft Environmental Assessment for the Project because of numerous differences between the Project and the seismic testing considered in the PEIS. Namely, the Project will: (1) use a different energy source level and configuration; and (2) the Project will occur only in the shelf area, whereas the Draft Analysis Areas in the PEIS considered projects on the shelf and slope.

52. On May 26, 2015, NSF issued a final Amended Environmental Assessment and a FNSI. The FNSI included NSF's determination that no significant environmental impacts will result from implementing the proposed action and, therefore, no further study under NEPA is required.

53. NSF failed to consider the scale of the environmental impacts that will result from the Project, and therefore erred in relying on the PEIS in deciding not to prepare a full EIS. Moreover, NSF deviated from the PEIS by failing to conduct mitigation for commercially important fisheries, which was an express consideration of the PEIS. Finally, NSF failed to

comply with its own regulations, because it issued a FNSI for a proposed action that normally requires an EIS and failed to make the FNSI available for a 30-day period of public review and comment. 45 C.F.R. 640.4(e).

**NMFS' Non-Compliance with the MMPA**

54. On March 17, 2015, NMFS issued a proposed Incidental Harassment Authorization ("IHA") for the take of marine mammals incidental to the Project.

55. The proposed IHA contemplated authorizing the take of 32 species of marine mammals. The proposal included a Table of the estimated possible number of takes for each species. The public was given 30 days to submit comments on the proposed IHA.

56. On May 14, 2015, NMFS published Notice of its Issuance of a Final IHA for the take of 32 species of marine mammals. NMFS noted that it received comments on the proposal from over 35 interested parties, including NJDEP.

57. During the public comment period, the Marine Mammal Commission submitted comments identifying that Lamont-Doherty and NMFS used an erroneous methodology for calculating the number of takes that would occur for each species. Specifically, NMFS used a "snapshot approach for take estimation" and "d[id] not account for the survey occurring over a 30 day period."

58. In response to the Marine Mammal Commission's comments, NMFS recalculated the estimated number of takes for each of the 32 species. Using the revised methodology, the estimated takes in the Final IHA drastically increased – in many cases exponentially – from the proposed IHA. For example:

- authorized takes for bottlenose dolphins increased from 411 to 12,532 – or from 3.6% to 16.2% of the species/stock;
- authorized takes from Atlantic spotted dolphin increased from 133 to 4,067 – or from 0.3% to 18.2% of the species/stock;
- authorized takes of Risso's dolphin increased from 50 to 1,532 – or from 0.3% to 16.8% of the species/stock.

59. Because of the gravity of NMFS' miscalculation, the Marine Mammal Commission expressed concern that the erroneous calculations deprived the public, including Plaintiffs, of a meaningful opportunity to comment on the impacts of the Project. However, NMFS arbitrarily rejected the Commission's recommendation to re-notice the IHA for public comment. NMFS improperly concluded that "the changes to the methodology and resulting estimates do not have any substantial effect on our . . . analyses and determinations[.]"

#### CLAIMS FOR RELIEF

##### **First Count: NSF's Violation of the CZMA**

60. Plaintiffs hereby incorporate and reassert all of the foregoing paragraphs of the Complaint.

61. Defendant NSF issued a Consistency Determination for the Project, as contemplated by 15 C.F.R. 930.36.

62. Plaintiffs responded by issuing a timely Inconsistency Determination, based on foreseeable adverse impacts to the State's Marine Fish and Fisheries, Prime Fishing Areas, and Endangered or Threatened Wildlife or Plant Species and Habitats. 15 C.F.R. 930.43.

63. Defendant NSF nonetheless decided to proceed with the Project, pursuant to 15 C.F.R. 930.43(d) and (e), because it erroneously determined the Project was consistent to the maximum extent practicable with the enforceable policies of New Jersey's Coastal Management Program.

64. The coastal zone management regulations instruct that a federal agency "shall not proceed with the activity over a State agency's objection" unless the federal agency concludes the activity is consistent with the State's coastal management program. 15 C.F.R. 930.43.

65. Defendants' decision to proceed with the Project was in violation of the Administrative Procedure Act, 5 U.S.C. § 706, because it was arbitrary and not in accordance with law.

**Second Count: OCM's Violation of the CZMA**

66. Plaintiffs hereby incorporate and reassert all of the foregoing paragraphs of the Complaint.

67. State agencies hold the right to request review of activities involving federal permits and federal assistance, if the activity will have reasonably foreseeable coastal effects. 15 C.F.R. 930.54 (Subpart D), 930.98 (Subpart F).

68. Plaintiffs attempted to exercise their right by requesting to review the Project under Subparts D and F, because NMFS issued an IHA to Lamont-Doherty and Rutgers received federal funding from NSF.

69. Defendant OCM improperly denied NJDEP's request because it determined the Project was not a federally-assisted activity, despite the fact that NSF provided funding to Rutgers and last year OCM considered the same Project to be a federally-assisted activity.

70. Defendant OCM also improperly denied Plaintiff's request because it determined the Project did not involve a federal license or permit, despite the fact that NMFS issued an IHA and NSF considered the Project to be an activity requiring a federal permit.

71. Defendant OCM's decision to deny NJDEP's request to review the Project under Subparts D and F was made in violation of the Administrative Procedure Act, 5 U.S.C. § 706, because it was arbitrary and capricious and not in accordance with law or the agency's past practice.

**Third Count: NSF's Violation of NEPA**

72. Plaintiffs hereby incorporate and reassert the foregoing paragraphs of the Complaint.

73. Defendant NSF previously determined that seismic testing is a major federal action thereby requiring the development of a PEIS. Because this Project utilizes a distinct form of seismic testing not covered by Defendants' prior PEIS, NSF was required to prepare a full Environmental Impact Statement rather than just prepare an Environmental Assessment and FNSI.

74. In addition to failing to prepare a full EIS, NSF also erred in its publication of the FNSI it ultimately issued. Pursuant to NSF's own regulations, because seismic testing is an activity that normally warrants an EIS, the public (including NJDEP) should have been given a 30-day period opportunity to comment on the FNSI. 45 C.F.R. 640.4(e).

75. NSF's decision to issue a FNSI for the Project without allowing a 30-day period of public review and comment is contrary to NEPA, NSF's implementing regulations, and is therefore arbitrary, capricious, without observance of procedure, and otherwise not in accordance with law in violation of the Administrative Procedure Act. 5 U.S.C. § 706.

**Fourth Count: NMFS' Violation of the MMPA**

76. Plaintiffs hereby incorporate and reassert the foregoing paragraphs of the Complaint.

77. Section 101(a) of the MMPA creates a moratorium on taking marine mammals unless an exception applies.

78. Section 101(a)(5)(D) creates a limited exception for the incidental taking by harassment of small numbers of marine mammals, if the take will have a negligible impact on the species or stock. However, the Secretary must offer the public an opportunity to comment on the proposed authorization before finding that the impact will be negligible. 16 U.S.C. § 1361 (a)(5)(D)(iii).

79. The Final IHA issued by NMFS authorized exponentially more takes than the proposed IHA, thereby altering the public's understanding of the nature of the Project. The public, including NJDEP, never had an opportunity to comment on the IHA's drastic increase in authorized takes of marine mammals.

80. Defendant NMFS' failure to provide the public with a meaningful opportunity to comment on the IHA is in violation of the MMPA, 16 U.S.C. § 1361 (a)(5)(D)(iii), and the APA, 5 U.S.C. § 706.

WHEREFORE, Plaintiffs demand as relief:

1) That the Court declare Defendants' decision to proceed with the Project to be arbitrary, capricious, an abuse of discretion, in violation of law and in violation of the CZMA, NEPA, MMPA, and the APA;

2) That the Court set aside Defendant NSF's Final Consistency Determination and decision to override NJDEP's objection;

3) That the Court set aside Defendant OCM's denial of NJDEP's request to review the Project under Subparts D and F of the coastal management regulations;

4) That the Court set aside Defendant NMFS' Incidental Harassment Authorization;

5) That the Court set aside Defendant NSF's Finding of No Significant Impact;

6) That the Court enter Judgment ordering that, prior to authorizing or conducting any future seismic testing within 100 miles of New Jersey, Defendants:

a. conduct an area-specific Environmental Impact Statement or, at a minimum, provide a 30-day comment period after issuing a FNSI;

b. offer the State a thorough opportunity to review the proposed seismic testing under the appropriate Subpart of the coastal management regulations for consistency with its coastal management program;

c. mitigate impacts to fish and marine mammals, including but not limited to the timing of the testing; and

d. collect data on fish stocks and impacts.

7) Such other relief as the Court deems appropriate and just.

Respectfully submitted,

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Acting Attorney General of New Jersey

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Dated: June 5, 2015

CERTIFICATION PURSUANT TO L.R. CIV PR. 11.2

JOHN GRAY, by way of certification, states that:

1. I am the Deputy Chief of Staff within the New Jersey Department of Environmental Protection.
2. I have read the Verified Complaint.
3. I certify under penalty of perjury that the foregoing factual allegations contained in the Verified Complaint are true and correct.

Executed on: June 4, 2015

By:   
John Gray  
Deputy Chief of Staff  
New Jersey Department  
of Environmental Protection

ADDITIONAL CERTIFICATION PURSUANT TO L.R. CIV. PR. 11.2

I hereby certify pursuant to L.Civ. Rule 11.2 that, to the best of my knowledge, this matter is not the subject of any other action pending in any court or of any pending arbitration or administrative proceeding.

Executed on: June 5, 2015

JOHN J. HOFFMAN  
Acting Attorney General of New Jersey

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