

JOHN J. HOFFMAN  
ACTING ATTORNEY GENERAL OF NEW JERSEY  
R.J. Hughes Justice Complex  
25 Market Street, P.O. Box 093  
Trenton, New Jersey 08625  
Attorney for Plaintiff,  
State of New Jersey

By: David C. Apy  
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.

NATIONAL SCIENCE FOUNDATION,  
FRANCE CORDÓVA, as director  
of the National Science  
Foundation, NATIONAL OCEANIC AND  
ATMOSPHERIC ADMINISTRATION, OFFICE  
OF OCEAN AND COASTAL RESOURCE  
MANAGEMENT, PAUL SCHOLZ,  
as director of the Office of Ocean and  
Coastal Resource Management,  
and LAMONT-DOHERTY EARTH OBSERVATORY

Defendants.

VERIFIED COMPLAINT FOR  
INJUNCTIVE AND  
DECLARATORY RELIEF

Plaintiffs State of New Jersey, Department of Environmental  
Protection ("NJDEP"), and Commissioner Bob Martin (together

"Plaintiffs"), 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, seeking injunctive and declaratory relief with respect to a Marine Seismic Survey Research Project ("the Project") off the coast of New Jersey that is currently being conducted by and with the funding and authorization of defendants. The Project is a high-energy, 3-D seismic survey in the northwest Atlantic Ocean ~25-85 km off New Jersey's shore. In determining to proceed, defendants have denied the State an opportunity to review the Project for consistency with its coastal zone management program as required by the Coastal Zone Management Act; and, further, defendants failed to make their Finding of No Significant Impact ("FNSI") available for a 30 day public review period as required by defendant National Science Foundation's ("NSF") own regulations, promulgated pursuant to the National Environmental Policy Act. In light of these procedural defects, 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. Moreover, the harms caused by these procedural

defects are especially acute as the Project has, or imminently will be, commenced.

#### JURISDICTION

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331 (federal question), 5 U.S.C. §701 et seq. (Administrative Procedure Act), and 28 U.S.C. §2201(a) (Declaratory Judgment Act).

#### VENUE

3. 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 have the potential to impact the residents and natural resources of the State of New Jersey.

#### PARTIES

4. Plaintiff 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.

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

6. 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. NSF is also the owner of the R/V Marcus G. Langseth, the research vessel being used to conduct the Project.

7. 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.

8. Defendant National Oceanic and Atmospheric Administration ("NOAA"), Office of Ocean and Coastal Resource Management ("OCRM"), 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; for reviewing state requests to review federally-assisted projects; and for generally assisting states in managing, preserving, and developing their marine and coastal resources.

9. Defendant Paul M. Scholz is the Acting Director of OCRM 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.

10. 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. (Certif. of Kevin Hassel at Par. 7).

#### STATUTORY BACKGROUND

##### **The Coastal Zone Management Act**

11. 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 by assisting the state; 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.

12. Pursuant to NOAA's regulations implementing the CZMA, states are entitled to request review for consistency with their coastal management program all federally assisted activities taking place outside of their coastal zone that a state determines will have reasonably foreseeable coastal effects in that state's coastal zone. 15 C.F.R. 930.98. "Federal assistance" is defined as "assistance provided under a federal program to an applicant agency through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other form of financial aid." 15 C.F.R. 930.91.

13. States are tasked with monitoring federally assisted activities that would have a reasonably foreseeable effect in their coastal zone, and they must then notify OCRM and other stakeholders if the state intends to review the proposed activity for consistency with its coastal management program. 15 C.F.R. 930.98.

## The National Environmental Policy Act

14. The National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 et seq., was enacted to encourage harmony between humans and the environment, 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.

15. The implementation of NEPA is overseen by the Council on Environmental Quality, which has its regulations promulgated at 40 C.F.R. 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.

16. NSF's regulations for complying with NEPA are located at 45 C.F.R. 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 shall 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 Administrative Procedure Act**

17. 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**

18. 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 it reflects, among other things, New Jersey's goal of managing its coastal zone to



protect its natural resources and support multiple uses, including commercial, recreational, and aesthetic uses. (Hassell Certif. at Pars. 3-4). The Coastal Zone Management Office within NJDEP administers the planning and enhancement aspects of New Jersey's federally approved Coastal Zone Management Program. (Hassell Certif. at Par. 5).

19. 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. (Hassell Certif. at Par. 6).

### **The Project**

20. Defendant Lamont-Doherty is using the R/V Marcus Langseth from NSF to conduct the Project, a high-energy 3-D seismic study in the Atlantic Ocean off the coast of New Jersey. (Hassell Certif. at Par. 7). The study area is within a 12 by 50 kilometer (km) rectangular area, approximately 25 to 85 km off the coast of New Jersey. Ibid.

21. The study will collect data using a 4- or 8-airgun subarray. (Hassell Certif. at Par. 8). According to NSF, potential impacts of the Project on the environment would be primarily a result of the operation of the airgun array. The airguns are a mixture of Bolt 1500 LL and Bolt 1900 LLX airguns ranging in size from 40 to 220 in<sup>3</sup>, and have a firing pressure of 1950 pounds per square inch. Ibid. The airguns will be fired every 5.4 seconds for thirty days, and when fired will emit a source level from 246 to 254 decibels. (Hassell Certif. at Par. 8).

22. Lamont-Doherty also plans to utilize a Kongsberg EM 122 multibeam echosounder concurrently with the airgun operations in order to map the ocean floor. (Hassell Certif. at Par. 9). Depending on the water depth, the echosounder will emit four or eight successive pulses of sound, two to 15 milliseconds in duration, at between 10.5 and 13.0 kilohertz, and with a maximum source level of 242 decibels. Ibid.

23. The study will also use a sub-bottom profiler, which will emit pings with a pulse interval of one second, with a maximum radiated power of 222 decibels. Ibid. Finally, the study will use an acoustic Doppler current profiler. Ibid. The source level for the profiler is proprietary, but has a maximum acoustic source level of 224 decibels. Ibid.

#### OCRM's Non-Compliance with the CZMA

24. NOAA's regulations implementing CZMA instruct states to monitor proposed federal assistance activities outside of the coastal zone. (Hassell Certif. at Par. 3). If a state determines that a proposed federal assistance activity will have reasonably foreseeable coastal effects, the state can request to review the activity for consistency with its management program by "immediately" providing notice to OCRM and other stakeholders. 15 C.F.R. 930.98.

25. On March 17, 2014, notice of Lamont-Doherty's application for an Incidental Harassment Authorization pursuant to the Marine Mammal Protection Act was published in the Federal Register. Although the publication in the Register discussed the Project, OCRM has acknowledged that there was no indication that NSF was providing federal assistance to Rutgers for the Project and is serving as the Principal Investigator.

26. On April 11, 2014, a representative from NJDEP contacted a representative from NOAA expressing NJDEP's concern over the proposed activity's reasonably foreseeable effects on New Jersey's coastal uses and resources.

27. On April 16, 2014, Dr. Gregory Mountain sent an email to NJDEP offering to answer questions that NJDEP may have in its review of the proposed Project. In that email, Dr. Mountain referred to himself as the "Principal Investigator in a planned research cruise . . . for a research project funded by the NSF."

Dr. Mountain, however, did not offer any indication that NSF was providing federal assistance, as defined at 15 C.F.R. 930.91, to an applicant agency.

28. On April 21, 2014, an email was sent from a representative at NOAA to NJDEP in anticipation of a teleconference being held the next day between OCRM, NJDEP, and NSF. (Hassell Certif. at Pars. 14, 26, Exh. J). Through the email, NJDEP was informed for the first time that NSF would be providing funding to Rutgers for the Project.

29. On May 16, 2014, NJDEP submitted to OCRM and other requisite stakeholders its request to review the Project for consistency with its coastal management program. (Hassell Certif. at Pars. 16-17, Exh. A).

30. On June 18, 2014, OCRM sent NJDEP a letter denying its request to review the Project. (Hassell Certif. at Par. 18, Exh. B). OCRM did not address NJDEP's determination that the Project will have reasonably foreseeable effects in New Jersey's coastal zone. Instead, OCRM denied NJDEP's request to review because OCRM found the request was not made within 30 days of when NJDEP received notice of the action, and was therefore not made in a timely manner under 15 C.F.R. 930.98.

31. NJDEP's May 16, 2014 request to review the Project was submitted less than 30 days after it received notice through the April 21, 2014 email of the federal assistance being provided to

Rutgers, the applicant agency. OCRM's denial of NJDEP's request to review the Project is unsupported by the record, contrary to established procedure required by NOAA's regulations, and deprived NJDEP of the ability to review the Project for consistency with its coastal management program.

32. On June 25, 2014, NJDEP sent a letter to OCRM requesting reconsideration of the denial. (Hassell Certif. at Par. 19, Exh. C).

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

33. 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.

34. On December 16, 2013 NSF issued a Draft Environmental Assessment for the Project because of numerous differences between the Project and the seismic testing considered in the PEIS. (Hassell Certif. at Par. 21, Exh. E). 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 PEIS considered projects on the shelf and slope. The Draft Environmental Assessment was made available for public comment for thirty days.

35. On July 1, 2014, NSF issued a final Environmental Assessment and a Finding of No Significant Impact (FNSI) pursuant to its regulations for complying with NEPA. (Hassell Certif. at Par. 24, Exh. H). 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.

36. NSF's FNSI included a section entitled "Public Involvement and Coordination with Other Agencies and Processes." That section noted only that the Draft EA was posted on NSF's website for a 30 day public comment period. The FNSI, Final EA, and NSF's website were all silent on NSF's duty, pursuant to 45 C.F.R. 640.4(e), to make FNSIs available for a 30-day period of public review and comment, if the proposed action is one that normally requires an EIS.

#### **Status of the Project**

37. On or about July 1, 2014, the R/V Marcus G. Langseth left New York Harbor and traveled off the coast of New Jersey. As of July 3, 2014, the Ship is located in the near vicinity of the survey area described in the project description.

## CLAIMS FOR RELIEF

### **First Count**

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

39. Defendants provided federal assistance for an activity that Plaintiffs believe will have reasonably foreseeable effects in New Jersey's coastal zone. (Hassell Certif. at Pars. 10-13). Plaintiffs timely requested the ability to review the activity for consistency with New Jersey's Coastal Management Program pursuant to 15 C.F.R. 930.98. Defendants arbitrarily denied NJDEP's review request based on an unsupported and inaccurate determination that NJDEP's request was untimely.

40. Defendants' denial of Plaintiffs' request to review the Project for consistency violates the CZMA, its implementing regulations, and is arbitrary, capricious, in violation of procedure, and otherwise not in accordance with law, in violation of the Administrative Procedure Act. 5 U.S.C. §706.

### **Second Count**

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

42. Defendants 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, Defendants issued a Draft Environmental Assessment ("EA"). (Hassell Certif. at Par. 21, Exh. E). Defendants thereafter issued a Final EA and FNSI for an activity - seismic testing - that it had already determined required an EIS. Pursuant to NSF's own regulations, New Jersey, its citizens, and other interested members of the public should have been given an opportunity to comment on the FNSI. 45 C.F.R. 640.4(e).

43. Defendants' decision to issue a FNSI for the Project without allowing a 30 day period of public review and comment is contrary to NEPA, Defendants' implementing regulations, and is 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.

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, and the Administrative Procedure Act;
- 2) That the Court enjoin defendants from proceeding with the Project unless and until defendants allow plaintiffs to review the Project for consistency with New Jersey's coastal management



program; and unless and until defendants publish its FNSI for a 30 day public review period before any action is taken; and  
3) Such other relief as the Court deems appropriate and just.

Respectfully submitted,

Dated: July 3, 2014

JOHN J. HOFFMAN  
Acting Attorney General of New Jersey

By: 

David C. Apy

Assistant Attorney General

R.J. Hughes Justice Complex

25 Market Street

P.O. Box 112

Trenton, NJ 08625

(609) 292-8567

David.Apy@dol.lps.state.nj.us

CERTIFICATION PURSUANT TO L.R. CIV PR. 11.2

JOHN GRAY, by way of certification, states that:

1. I am the Acting Director for the Office of Permit Coordination and Environmental Review, 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 the Verified Complaint are true and correct.

Executed on: July 3, 2014

By: 

John Gray  
Acting Director  
Office of Permit Coordination  
and Environmental Review  
New Jersey Department of Environmental  
Protection

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

I hereby certify pursuant to L.Civ. Rule 11.1 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: July 3, 2014

JOHN J. HOFFMAN  
Acting Attorney General of New Jersey

By: 

David C. Apy  
Assistant Attorney General  
R.J. Hughes Justice Complex  
25 Market Street  
P.O. Box 112  
Trenton, NJ 08625-0093  
(609) 292-8567  
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STATE OF NEW JERSEY, DEPARTMENT OF  
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BOB MARTIN, COMMISSIONER,  
NEW JERSEY DEPARTMENT OF  
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NATIONAL SCIENCE FOUNDATION,  
FRANCE CORDÓVA, as director  
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MANAGEMENT, PAUL SCHOLZ,  
as director of the Office of Ocean and  
Coastal Resource Management,  
and LAMONT-DOHERTY EARTH OBSERVATORY

Defendants.

UNITED STATES DISTRICT  
COURT FOR THE DISTRICT  
OF NEW JERSEY

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BRIEF AND EXHIBITS IN SUPPORT OF PLAINTIFFS' VERIFIED COMPLAINT  
FOR DECLARATORY AND INJUNCTIVE RELIEF

---

JOHN J. HOFFMAN  
ACTING ATTORNEY GENERAL OF  
NEW JERSEY  
R.J. Hughes Justice Complex  
25 Market Street, P.O. Box  
093  
Trenton, New Jersey 08625  
Attorney for Plaintiff,  
State of New Jersey

By: David C. Apy  
Assistant Attorney General  
(609) 292-8567

## TABLE OF CONTENTS

STATEMENT OF THE CASE ..... 1

STATEMENT OF FACTS ..... 3

### ARGUMENT

I. THE PRESENT APPLICATION SATISFIES THE STANDARDS FOR  
THE ISSUANCE OF TEMPORARY AND PRELIMINARY RELIEF  
AGAINST DEFENDANTS' VIOLATION OF THE CZMA AND NEPA ..... 11

A. Likelihood of Success on the Merits ..... 12

i. CZMA ..... 12

ii. NEPA ..... 16

B. Irreparable Harm ..... 20

C. Harm to the Nonmoving Parties ..... 24

D. The Public Interest ..... 24

CONCLUSION ..... 26

## TABLE OF AUTHORITIES

### Cases

<u>Amoco Prod. Co. v. Village of Gambell</u> , 480 <u>U.S.</u> 531 (1987) ....	20
<u>Ballas v. Tedesco</u> , 41 <u>F. Supp. 2d</u> 531 (D.N.J. 1999) .....	11
<u>Kos Pharms, Inc. v. Andrx Corp.</u> , 369 <u>F.3d</u> 700 (3d Cir. 2004) .....	11
<u>Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission</u> , 869 <u>F.3d</u> 719 (3d Cir. 1989) .....	16
<u>Marsh v. Oregon Natural Resources Council</u> , 490 <u>U.S.</u> 360 (1989) .....	16
<u>Massachusetts v. Watt</u> , 716 <u>F.2d</u> 946 (1st Cir. 1983) .....	21
<u>Monsanto Co. v. Geertson Seed Farms</u> , 561 <u>U.S.</u> 139 (2010) .....	21
<u>Natural Resources Defense Council v. Texaco Refining and Marketing, Inc.</u> , 906 <u>F.2d</u> 934 (3d Cir. 1990) .....	20
<u>Novartis Consumer Health v. Johnson &amp; Johnson-Merck Consumer Pharms. Co.</u> , 290 <u>F.3d</u> 578 (3d Cir. 2002) .....	11, 20
<u>Robertson v. Methow Valley Citizens Council</u> , 490 <u>U.S.</u> 332 (1989) .....	17, 23
<u>Sampson v. Murray</u> , 415 <u>U.S.</u> 61, 90 (1974) .....	24
<u>Sierra Club v. Army Corps of Eng'rs</u> , 645 <u>F.3d</u> 978 (8th Cir. 2011) .....	21
<u>South Camden Citizens in Action v. N.J. Dep't of Env't'l Prot.</u> , 145 <u>F. Supp. 2d</u> 446 (D.N.J. 2001) .....	20
<u>Southern Pacific Transportation Co. v. California Coastal Commission</u> , 520 <u>F. Supp.</u> 800 (N.D. Cal. 1981) .....	15
<u>Winter v. NRDC</u> , 555 <u>U.S.</u> 7 (2008) .....	20, 21
<u>Yankton Sioux Tribe v. Kempthorne</u> , 442 <u>F.Supp. 2d</u> 774 (D.S.D. 2006) .....	21

## Statutes

5 <u>U.S.C.</u> §706 .....	16, 19
16 <u>U.S.C.</u> §1451 et seq. ....	passim
<u>N.J.S.A.</u> 13:19-1 et seq .....	5
42 <u>U.S.C.</u> §4321 .....	24
42 <u>U.S.C.</u> §4332(2) (C) .....	17

## Regulations

15 <u>C.F.R.</u> §930.1 et seq. ....	6
15 <u>C.F.R.</u> §930.54 .....	13
15 <u>C.F.R.</u> §930.90 .....	12
15 <u>C.F.R.</u> §930.91 .....	12
15 <u>C.F.R.</u> §930.92 .....	12
15 <u>C.F.R.</u> §930.95 .....	7
15 <u>C.F.R.</u> §930.98 .....	13
40 <u>C.F.R.</u> §1501.3 .....	17
40 <u>C.F.R.</u> §1501.4 .....	17
40 <u>C.F.R.</u> §1508.9 .....	17, 18, 19
40 <u>C.F.R.</u> §1508.13 .....	17
45 <u>C.F.R.</u> §640.4(e) .....	16, 18
<u>N.J.A.C.</u> 7:7 et seq. ....	6
<u>N.J.A.C.</u> 7:7A et seq. ....	6
<u>N.J.A.C.</u> 7:7E-1.1 .....	6, 22, 25
<u>N.J.A.C.</u> 7:7E-4.4 .....	6

<u>N.J.A.C. 7:7E-4.5</u> .....	6
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## STATEMENT OF THE CASE

Plaintiffs New Jersey Department of Environmental Protection (NJDEP) and Bob Martin, Commissioner of the New Jersey Department of Environmental Protection (collectively referred to as "NJDEP"), seek a temporary restraining order and preliminary injunction to prevent a federally funded seismic study (the Project) undertaken by defendant Lamont-Doherty Earth Observatory (Lamont-Doherty) off the coast of New Jersey. Rutgers, the State University of New Jersey (Rutgers), is serving as the Principal Investigator, and has received federal funding for the Project.

On June 18, 2014, defendant National Oceanic and Atmospheric Administration (NOAA) and its Office of Ocean and Coastal Resource Management (OCRM) denied NJDEP's request to review the Project for consistency with New Jersey's federally-approved coastal zone management plan. In denying NJDEP's request, NOAA violated the Coastal Zone Management Act (CZMA) in not affording NJDEP the opportunity to review the Project for its effects on New Jersey's coastal resources and its long-term plan to promote healthy coastal ecosystems, effectively manage ocean resources, and promote water-dependent uses. NJDEP timely requested to review the project in accordance with NOAA's regulations, as the seismic study will have reasonably foreseeable effects on New Jersey's coastal uses and resources.

In violation of its regulations, NOAA refused to even consider NJDEP's request to review the proposal, erroneously asserting that NJDEP's request to review was untimely. NOAA subsequently issued an Incidental Harassment Authorization allowing the Project to harass marine mammals.

Additionally, on July 1, 2014, defendant National Science Foundation (NSF) issued a final Environmental Assessment and Finding of No Significant Impact related to the Project. Pursuant to its own regulations implementing the National Environmental Policy Act (NEPA), NSF is required to provide thirty days for public review of its findings prior to allowing the activity to proceed. NSF failed to follow this requirement, and the seismic study is commencing contemporaneously with this filing.

NJDEP's ability to protect its coastal uses and resources will be irreparably harmed should these violations of NEPA and the CZMA not be remedied. Furthermore, because of the imminent danger of irreparable harm, extraordinary circumstances exist requiring the court to entertain this request as an Order to Show Cause, as any remedy will be moot should this be heard as a motion in the regular course. See L.Civ.R. 65.1. Accordingly, NJDEP respectfully requests a temporary restraining order and preliminary injunction enjoining the implementation of NOAA's Incidental Harassment Authorization and commencement of the

Project, unless and until NSF allows 30 days for review of its Finding of No Significant Impact and New Jersey has the opportunity to review the project for consistency with its Coastal Management Program.

#### STATEMENT OF FACTS

##### A. The Seismic Study

Lamont-Doherty has proposed conducting a seismic study in the Atlantic Ocean off the coast of New Jersey aboard the vessel R/V Marcus G. Langseth, which is owned by NSF. 79 Fed. Reg. 14,781 (March 17 2014). The Project is being undertaken by a public entity, Rutgers, with federal assistance from NSF. Certification of Kevin Hassell ("Hassell Cert."), ¶18 (Exhibit B). The Project is to be conducted in a 12 by 50 kilometer (km) rectangular area in the Atlantic Ocean, approximately 25 to 85 km (15.5 to 52.8 miles) off the coast of New Jersey, and within the U.S. Exclusive Economic Zone. 79 Fed. Reg. 14,781 (March 17 2014); Hassell Cert. ¶24 (Exhibit H at 4). The stated purpose of the Project is "to collect and analyze data on the arrangement of sediments deposited during times of changing global sea level from roughly 60 million years ago to present. The 3-D survey would investigate features such as river valleys cut into coastal plain sediments now buried under a kilometer of younger sediment and flooded by today's ocean." 79 Fed. Reg. 14,781.

The study will collect this data through the use of a towed 4- or 8-airgun subarray. Hassell Cert. ¶24 (Exhibit H at 5). The airguns are a mixture of Bolt 1500 LL and Bolt 1900 LLX airguns ranging in size from 40 to 220 in<sup>3</sup>, and have a firing pressure of 1950 pounds per square inch. 79 Fed. Reg. 14782. The airguns are to be fired every 5.4 seconds continuously for thirty days, and when fired will emit a source level from 246 to 254 decibels. Ibid.

Lamont-Doherty also plans to utilize a Kongsberg EM 122 multibeam echosounder concurrently with the airgun operations to map the ocean floor. Ibid. Depending on the water depth, the echosounder will emit four or eight successive pulses of sound, two to 15 milliseconds in duration, at between 10.5 and 13.0 kilohertz, and with a maximum source level of 242 decibels. Ibid. The Project will also use a sub-bottom profiler, which will emit pings with a pulse interval of one second, with a maximum radiated power of 222 decibels. Ibid. Finally, the Project will use an acoustic Doppler current profiler. Ibid. Lamont-Doherty's proposal indicates that the source level for the profiler is proprietary, but has a maximum acoustic source level of 224 decibels. Ibid.

The proposal and an environmental assessment issued by NSF related to the Project demonstrate the ecological value of the waters off New Jersey's coast. These waters are within the

range of thirty-one cetacean species, i.e. marine mammals such as whales and dolphins, including six species listed as endangered under the U.S. Endangered Species Act. Hassell Cert. ¶24 (Exhibit H at 12). Several species of sea turtles are also common in the area. Id. at 25. The waters are additionally home to many fish and sharks, and the Project is located near two areas designated Essential Fish Habitats. Id. at 28.

#### B. New Jersey's Coastal Management Program

The federal Coastal Zone Management Act, 16 U.S.C. §1451 et. seq. (CZMA), was enacted in 1972 and expresses our national policy to "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." 16 U.S.C. §1452(1). Expressing strong principles of federalism and the primacy of state decision-making, the CZMA encourages states to develop coastal management programs and provided for federal activities to be carried out consistently with state plans. 16 U.S.C. §§1452(2), 1456.

In accordance with the CZMA, New Jersey enacted the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq. and developed a federally approved Coastal Management Program, founded on broad coastal goals: (1) promoting 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(c). These goals are enforceable policies as approved under the CZMA. Hassell Cert. ¶6.

This program is implemented through the Coastal Zone Management rules, N.J.A.C. 7:7E et seq., Coastal Permit Program rules, N.J.A.C. 7:7 et seq., and the Freshwater Wetlands Protection Act rules, N.J.A.C. 7:7A et seq. New Jersey's Coastal Management Program regulates coastal development, including the issuance of permits for docks and piers for commercial fisheries, N.J.A.C. 7:7E-4.4, and recreational docks and piers, N.J.A.C. 7:7E-4.5. The Coastal Management Office administers the planning and enhancement aspects of New Jersey's federally approved Coastal Management Program. Hassell Cert. ¶5. Staff develop and implement long-range planning projects involving coastal resource issues, and coordinate their efforts with complementary programs having similar initiatives in the coastal area. Hassell Cert. ¶5.

Federal regulations implementing the CZMA provide for consistency determinations and state review of proposed federal activities or federally funded activities. See 15 C.F.R. 930.1

et. seq. Federal consistency requires federal actions, occurring inside or outside of state's coastal zone, that have a reasonable potential to affect the coastal resources or uses of that state's coastal zone, to be consistent with that state's enforceable coastal policies to the maximum extent practicable. Hassell Cert. ¶3; 16 U.S.C. §1456(a)(2).

States are encouraged to include in their plans certain types of "listed" activities that require consistency determinations. 15 C.F.R. 930.95(a). Nevertheless, the regulations also provide for state review of activities that are not listed in the plans. 15 C.F.R. 930.95(d). Neither seismic research nor federal activities in federal waters are listed in New Jersey's Coastal Management Plan.

C. NJDEP's request to review the Project

On December 17, 2013, Lamont-Doherty filed an application with the National Marine Fisheries Service (NMFS) seeking an Incidental Harassment Authorization permit for the taking of marine mammals during its study. 79 Fed. Reg. 14,780 (March 17, 2014). Notice of the application was published in the March 17, 2014 Federal Register. Ibid. The Federal Register notice made no mention of the involvement of any public entity in the project or any public entity's receipt of federal funding. Ibid.

A draft Environmental Assessment was also prepared in support of the proposal. Hassell Cert. ¶21 (Exhibit E). A

Programmatic Environmental Impact Statement (PEIS) had previously been prepared in 2011 in support of seismic studies of all waters; however, the PEIS considered both different energy source levels and configurations, and different locations, as it had analyzed projects on the continental shelf and slope, while Lamont-Doherty's proposed study takes place only on the shelf. Hassell Cert. ¶¶21, 22 (Exhibits E at 1; Exhibit F).

NJDEP learned of the general proposal and communicated concerns about effects on New Jersey's coastal uses and resources to NOAA's Office of Ocean and Coastal Resource Management (OCRM) on April 11, 2014. Hassell Cert. ¶19 (Exhibit C). On April 16, NJDEP received an email from Dr. Gregory Martin, a Rutgers professor and the Principal Investigator on the study, offering to provide more information on the Project. Notably, while the email stated that the Project was NSF funded, it failed to disclose that Rutgers or any other public entity was receiving funding for the Project. Ibid. It was not until April 21 that NJDEP received notice by email that a public entity, Rutgers, was receiving federal assistance. Hassell Cert. ¶¶14, 26 (Exhibit J).

In a letter dated May 16, 2014, directed to Margaret Davidson, the Acting Director of OCRM, NJDEP stated that the proposed seismic study would impose direct and indirect



reasonably foreseeable effects on the uses and resources of New Jersey's coastal zone. Hassell Cert. ¶17 (Exhibit A). These concerns included the detrimental effect to the marine harvest and resulting impact on New Jersey's commercial and recreational fishing and boating, which utilize the entire reach of the testing area. Ibid. See also Hassell Cert. ¶13. OCRM received this letter no later than May 20, 2014. Hassell Cert. ¶18 (Exhibit B). Thus, NJDEP specifically requested to review the project for consistency with the policies of the New Jersey Coastal Management Program less than 30 days after first discovering on April 21 that the project includes significant grant funding to a public entity, Rutgers.

On June 18, 2014, OCRM denied NDJEP's request to review the application, concluding that New Jersey's request was untimely. Hassell Cert. ¶18 (Exhibit B). By letter dated June 25, 2014, NJDEP requested reconsideration of the denial by OCRM, as it did not receive actual notice that a public entity was receiving federal aid for the project until April 22, 2014, and therefore NJDEP's May 16 letter was timely in that it requested review within 30 days of receipt of actual notice of a federally assisted project.<sup>1</sup> Hassell Cert. ¶19 (Exhibit C).

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<sup>1</sup> While NJDEP did receive notice by email on April 21, not April 22, it still timely submitted its request to OCRM in less than 30 days.

Without even responding to NJDEP's request for reconsideration, NOAA issued an Incidental Harassment Authorization and Biological Opinion on July 1, 2014, authorizing the harassment of marine mammals during the survey. Hassell Cert. ¶23 (Exhibit G). Also on July 1, NSF issued a Final Environmental Assessment (EA) and a Finding of No Significant Impact (FNSI), allowing the project to proceed without any time for public review of the FNSI. Hassell Cert. ¶¶23, 24 (Exhibits G and H). The R/V Marcus G. Langseth has left port and is expected to commence the firing of its airguns contemporaneously with this filing.<sup>2</sup>

Because NOAA and NSF have violated the CZMA and NEPA by depriving New Jersey of its right to review a project with reasonably foreseeable effects on its coastal zone, and by allowing a project to proceed without allowing the required thirty days for public review of NSF's findings, NDJEP has filed this suit seeking a temporary restraining order and preliminary injunction to enjoin the seismic study off of New Jersey's coast.

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<sup>2</sup> The vessel's location can be tracked at <http://www.sailwx.info/shiptrack/shipposition.phtml?call=WDC6698>

## ARGUMENT

### I. THE PRESENT APPLICATION SATISFIES THE STANDARDS FOR THE ISSUANCE OF TEMPORARY AND PRELIMINARY RELIEF AGAINST THE DEFENDANTS' VIOLATION OF THE CZMA and NEPA

Injunctive relief is an "extraordinary remedy, which should be granted only in limited circumstances." Novartis Consumer Health v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 586 (3d Cir. 2002) (citation and quotation omitted). In order to prove its entitlement to a temporary restraining order or a preliminary injunction, the moving party must show:

(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.

[Kos Pharms, Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004); see also Ballas v. Tedesco, 41 F. Supp. 2d 531, 538 (D.N.J. 1999)]

NJDEP has met these criteria. NOAA and NSF's violation of the CZMA and NEPA constitutes irreparable harm to New Jersey's ability to implement its Coastal Management Program and ability to protect its coastal resources and uses. In contrast, there will be no irreparable harm to the NMFS should the injunction be issued as the Project is designed to measure sediments deposited during the last 60 million years. The public interest favors enforcing statutes designed to protect the environment. As

such, NJDEP is entitled to a temporary restraining order and preliminary injunction.

A. Likelihood of Success on the Merits

i. CZMA

The application for a temporary restraining order and a preliminary injunction demonstrates a substantial likelihood of success on the merits. NJDEP was inappropriately and arbitrarily denied an opportunity to review the application for consistency with its Coastal Management Program, despite giving adequate notice to NOAA of its request to review and comment on coastal impacts.

Under the regulations implementing the CZMA, states may assert their right to review federally assisted activities including activities occurring outside their coastal zones and activities unlisted in their coastal plans, for consistency with their coastal management programs. See 15 C.F.R. §930.90 et seq. The intent of these regulations is to ensure that "federal assistance to applicant agencies for activities affecting any coastal use or resource is granted only when such activities are consistent with approved management programs." 15 C.F.R. §930.90. Federal assistance includes a grant or any other form of financial aid, and an applicant agency is defined as "any unit of State or local government, or related public entity. . .

." 15 C.F.R. §§930.91, 930.92. Rutgers, a public university in New Jersey, qualifies as an applicant agency.

For activities which are not listed in the state's coastal plan as requiring consistency review, or for activities that occur outside of a state's coastal zone, the regulations instruct that:

State agencies should monitor proposed federal assistance activities . . . (e.g. by use of the intergovernmental review process, review of NEPA documents, Federal Register) and shall immediately notify applicant agencies, Federal agencies, and any other agency or office which may be identified by the State in its intergovernmental review process . . . of proposed activities which will have reasonably foreseeable coastal effects and which the State agency is reviewing for consistency with the management program.

[15 C.F.R. §930.98]

While "immediately" is not defined by regulation, the regulation itself points to 15 C.F.R. §930.54 in guiding the Director on whether to disapprove a request for review. Ibid.

15 C.F.R. §930.54(a), addressing unlisted activities requiring federal permits or licenses, requires that State agencies notify the Director of OCRM within 30 days from notice of the license or permit application. Additionally, prior to revision in 2000, 15 C.F.R. §930.54 also stated that a State must submit its request to review "immediately." The preamble to the revision removing the word noted that the revision was a

clarification rather than a change to the rule. Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,145-146 (Dec. 8, 2000). Therefore "immediately" under 15 C.F.R. 930.54 has long been interpreted as meaning 30 days. The "immediately" in 15 C.F.R. §930.98 should have been applied in this context, and 30 days notice deemed sufficient. NJDEP sent notice to the Director and applicant agency less than 30 days from receiving notice on April 21 that a federally assisted unlisted project was proposed off its coast.

In its letter denying NJDEP's request to review the project for consistency, NOAA found that Rutgers falls within the definition of an "applicant agency," "and that the review provisions of Subpart F for the Consistency for Federal Assistance to State and Local Governments apply." Hassell Cert. ¶18 (Exhibit B at 3). OCRM acknowledged "the Federal Register notice makes no mention of Rutgers, and the Draft EA only mentions Rutgers once as the Principal Investigator with no mention of NSF assistance to Rutgers." Ibid. Further, the denial acknowledges confusion over the role of Rutgers in the project in the communications between OCRM and NJDEP following NJDEP's initial email expressing concerns on April 11. Ibid.

Moreover, when Dr. Mountain, the Rutgers professor acting as the Principal Investigator contacted NJDEP via email on April 16, he stated that he was the Principal Investigator on a

"project funded by NSF." Hassell Cert. ¶19 (Exhibit C). The email never said that Rutgers or any other public institution was receiving the funding. Ibid.

In its denial letter, OCRM stated that NJDEP "had actual knowledge that the project was under Subpart F of NOAA's regulations by April 16, 2014" based on the email from Dr. Martin. Hassell Cert. ¶18 (Exhibit B at 5). In fact, NJDEP did not receive actual notice that Rutgers or any other public entity was receiving federal assistance for the project until it received an email April 21 clarifying the parties involved in the Project. Hassell Cert. ¶¶14 (Exhibit J).

Indeed, this email notes that OCRM had "done a little further research into the entities that would be considered to be the award recipients." Hassell Cert. ¶26 (Exhibit J). OCRM "apologize[d] for the confusion associated with which academic institutions might be involved with the proposed research." Ibid. Hence by NOAA's own admission, NJDEP did not receive notice, actual or constructive that a public entity, namely Rutgers, was receiving federal assistance until April 21. Cf. Southern Pacific Transportation Co. v. California Coastal Commission, 520 F. Supp. 800, 807-08 (N.D. Cal. 1981) (requiring actual notice under 15 C.F.R. §930.54).

Therefore, NJDEP submitted a timely request to review the project for consistency, and OCRM denied this request without

even examining the reasonably foreseeable effects to New Jersey's coastal resource and uses raised in its request, including its effects on its commercial and recreational fishing industries. NOAA's regulations instruct that "[t]he Director may only disapprove of NJDEP's decision to review the activity if the Director finds that the activity will not affect any coastal use or resource." 15 C.F.R. §930.98. By improperly rejecting NJDEP's request to review the Project on notice grounds, the Director has made no such determination.

The Administrative Procedure Act provides that courts may "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (D) without observance of procedure required by law[.]" 5 U.S.C. §706. NOAA has violated the CZMA, acted arbitrarily, and has failed to observe the procedures required by law. Consequently, NJDEP has demonstrated a likelihood of success on the merits.

ii. NEPA

NEPA requires all federal agencies to take a "hard look" at the environmental impact of their activities and the potential alternatives to those activities. See, e.g., Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989). The statute imposes "'essentially procedural'" duties upon administrative agencies considering actions that have the potential for



affecting the environment. Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission, 869 F.3d 719, 725 (3d Cir. 1989). These procedural requirements:

ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

[Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)]

Section 102(2)(C) of NEPA requires that whenever there is a "major federal action significantly affecting the quality of the human environment," the agency must prepare a detailed and elaborate document that has come to be known as an Environmental Impact Statement (EIS). 42 U.S.C. §4332(2)(C); 40 C.F.R. §1501.4. In order to make a threshold determination as to whether an EIS is required, the agency prepares an Environmental Assessment, accompanied by a Finding of No Significant Impact ("FNSI") if the EA supports such a finding. 40 C.F.R. §1501.3; 40 C.F.R. §§1508.9, 1508.13.

NSF has promulgated regulations to implement NEPA. See 45 C.F.R. §640 et seq. These regulations require allowing time for the public to review its NEPA determinations, particularly when issuing a FNSI related to a project:

[i]f, on the basis of an environmental assessment, it is determined that an EIS is not required, a Finding of No Significant Impact (FNSI) as described in 40 CFR 1508.13 will be prepared. The FNSI shall include the environmental assessment or a summary of it and will be available to the public from the Committee. If the proposed action is one that normally requires an EIS, is closely similar to an action normally requiring an EIS, or is without precedent, the FNSI shall be made available for a 30 day public review period before any action is taken.

[45 C.F.R. §640.4(e) (emphasis added)]

This action is clearly one that normally requires an EIS or is closely similar to one requiring an EIS, thus triggering the thirty day public review period in 45 C.F.R. §640.4(e). In fact, NSF and the U.S. Geological Society prepared a Programmatic Environmental Impact Statement (PEIS) for similar seismic research projects in 2011. Hassell Cert. ¶22 (Exhibit F). NSF's Final EA for the current project acknowledged this PEIS, but stated that a separate EA was necessary "because a different energy source level and configuration would be used for the proposed survey, and the proposed survey covers only shelf waters where the [detailed analysis area of the PEIS] was on the shelf and slope." Hassell Cert. ¶24 (Exhibit H at 1). Thus, by NSF's own admission, this as a project that is different from the activities covered by the PEIS, but is similar to one that previously required an EIS.

Furthermore, an EA is designed to be a concise document.  
40 C.F.R. §1508.9. According to guidance published by the Council on Environmental Quality, EAs should generally be no longer than 15 pages, and a lengthy EA indicates that an EIS is needed. Counsel on Environmental Quality, Memorandum for Federal NEPA Liasons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process (1981), available at <http://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf>. NSF's final EA for the seismic study off New Jersey's coast is 76 pages, not including hundreds of pages of appendices. Hassell Cert. ¶24 (Exhibit H).

Therefore, the preparation of an EIS for similar projects, as well as the length of the EA prepared here, was an implicit de facto admission which demonstrate that "the proposed action is one that normally requires an EIS, [or] is closely similar to an action normally requiring an EIS . . . ." 45 C.F.R. §640.4(e). Consequently, NSF was obligated by its own regulations to provide thirty days for public review of the FNSI.

NSF has failed to provide this opportunity. NSF issued its Final EA and FNSI on July 1, 2014, and it has already been acted upon. Hassell Cert. ¶¶ 23, 24 (Exhibits G and H). The R/V Marcus G. Langseth has already left port, and the seismic study is expected to begin imminently.

The Administrative Procedure Act provides that courts may "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (D) without observance of procedure required by law[.]" 5 U.S.C. §706. NSF has violated NEPA, acted arbitrarily, and has not observed procedures required by law. Consequently, NJDEP has demonstrated a likelihood of success on the merits.

#### B. Irreparable Injury

NJDEP will suffer irreparable harm to its ability to implement its Coastal Management Plan and to protect its coastal uses and resources should the defendants' violations of the CZMA and NEPA not be enjoined.

To show irreparable injury, a party must demonstrate potential harm that cannot be redressed by a legal or equitable remedy following a trial. Novartis, supra, 290 F.3d 595. The moving party "must demonstrate that irreparable harm is likely in the absence of an injunction." Winter v. NRDC, 555 U.S. 7, 22 (2008). Injury to the environment constitutes irreparable harm as it can seldom be adequately remedied by money damages and is often of permanent or at least of long duration. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987); see also Natural Resources Defense Council v. Texaco Refining and Marketing, Inc., 906 F.2d 934, 941 (3d Cir. 1990); South Camden

Citizens in Action v. N.J. Dep't of Env't'l Prot., 145 F. Supp. 2d 446, 499 (D.N.J. 2001).

Additionally, failure to comply with a procedurally based environmental statute such as NEPA or the CZMA "causes harm itself, specifically the risk that 'real environmental harm will occur through inadequate foresight and deliberation.'" Sierra Club v. Army Corps of Eng'rs, 645 F.3d 978, 995 (8th Cir. 2011). See also Yankton Sioux Tribe v. Kempthorne, 442 F.Supp. 2d 774, 781 (D.S.D. 2006) (finding that losing a procedural right to engage in inter-governmental consultation guaranteed by federal law and policy constituted irreparable harm). In Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983), the First Circuit explained why violating a procedural right constitutes irreparable harm:

[i]t is appropriate for the courts to recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based - a theory aimed at presenting governmental decision-makers with relevant environmental data before they commit themselves to a course of action. That is not to say that that a likely NEPA violation automatically calls for an injunction; the balance of harms may point the other way . . . It is simply to say that a plaintiff seeking an injunction cannot be stopped at the threshold by pointing to additional steps between the governmental decision and environmental harm.

The Supreme Court has made clear that, as Watt held, the traditional four-factor test for an injunction does indeed apply to NEPA, but notably has not ruled that a violation of NEPA cannot, in itself, constitute irreparable harm. See Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 157-58 (2010); Winter 555 U.S. at 31-33. The purposes behind statutes such as NEPA and the CZMA make clear that violation thereof, by themselves, indeed cause irreparable harm.

The CZMA has as its policy "to encourage and assist states to exercise effectively their responsibilities in the coastal zone . . . ." 16 U.S.C. §1452. Defendants' violation of the CZMA irreparably harms NJDEP by undermining its ability to implement effectively a federally-approved coastal management program and to exercise its responsibilities in the coastal zone.

New Jersey's Coastal Management Program includes as its goals to promote healthy coastal ecosystems, to effectively manage the ocean and estuarine resources, including the development and management of sustainable recreational and commercial fisheries, and to sustain and revitalize water-dependent uses. N.J.A.C. 7:7E-1.1(c). NJDEP's concern that the firing of underwater aircannons every five seconds for a full month adversely affects its commercial and recreational fishing and boating industries and other uses and resources within its

coastal zone have gone unaddressed. By refusing to even let NJDEP review the seismic study proposal for consistency with these goals, NJDEP's role as a partner in implementing the CZMA and its own coastal management plan has been irreparably harmed. See 16 U.S.C. §1452(2).

Likewise, the justification behind NEPA was to force government agencies to take a "hard look" at proposed activities, to promote informed decision-making, and to provide information to the public. See, e.g., Methow Valley Citizens Council, 490 U.S. at 349. By allowing the project to go forward without providing the mandated public review period, the policy behind NEPA and NJDEP's ability to review the FNSI and take appropriate action to protect its coastal resources and uses under its Coastal Management Plan is irreparably harmed. NJDEP cannot adequately review and provide comment on the FNSI to ensure that there are no impacts on its fishing industries or other resources and uses protected by its coastal management program. The violation of these statutes themselves, if not remedied, will cause irreparable harm to the policies underlying them and NJDEP's ability to implement these policies.

Accordingly, NJDEP has shown that NSF and NOAA's violations of NEPA and the CZMA will likely cause irreparable harm to its ability to effectively implement its coastal management program.

### C. Harm to the Nonmoving Parties

Defendants will not be harmed should an injunction be issued. In the Final EA, NSF states that issuing the IHA for another time period could result in significant delay and disruption of the study and additional studies using the vessel. Hassell Cert. ¶24 (Exhibit H at 57). However, time delays and increased expenses that may occur if an injunction is granted do not constitute irreparable harm to the opposing party. Sampson v. Murray, 415 U.S. 61, 90 (1974). Moreover, in this instance particularly, the seismic study is supposed to analyze sediment change over the last 60 million years. Delay could not possibly affect the analysis if the Project moves forward at a later time. Should defendants ultimately prevail on the merits, the seismic study can be rescheduled.

### D. The Public Interest

For the reasons set forth above, the public interest requires the entry of the requested relief pending New Jersey's review of the proposed activity for consistency with its Coastal Management Program and to allow for the appropriate review of NSF's FNSI. The CZMA has as its goal "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations[.]" 16 U.S.C. §1452. Likewise, NEPA has as its policy



to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation[.]

[42 U.S.C. §4321]


These statutes embody the public interest and must be enforced in order to vindicate it. Furthermore, the goals of New Jersey's Coastal Management Program to protect ecosystems, effectively manage ocean resources, and to promote water dependent uses embody the public interest, and these goals and the public interest will be harmed should an injunction not issue. See N.J.A.C. 7:7E-1.1(c).

CONCLUSION

For all the reasons, the motion for a temporary restraining order and a preliminary injunction should be granted, and defendants enjoined from implementing the IHA and undertaking a seismic study in the waters off of New Jersey's coast. Furthermore, NJDEP requests oral argument on this request if it is opposed.

Respectfully submitted,

JOHN J. HOFFMAN  
ACTING ATTORNEY GENERAL OF NEW JERSEY

  
By: David C. Apy  
Assistant Attorney General

Dated: 7/3/14