IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NATIONAL AUDUBON SOCIETY,

Plaintiff,

v.

DAVID BERNHARDT, *et al*.,

Defendants,

BOROUGH OF AVALON, *et al.*,

Defendant-Intervenors.

Case No. 20-cv-5065 (LJL)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

The United States' thousands of miles of undeveloped coastal barriers—landforms like islands, sand bars, and sand dunes—are not all-purpose beaches. On one hand, the barriers are potent sentries against storm surge and sea level rise, particularly in a changing climate. They are also vital, irreplaceable habitat for wildlife, including federally protected shorebirds like the Piping Plover and *rufa* Red Knot. On the other hand, undeveloped barriers make for poor human settlements: the flat, ephemeral landscape that absorbs hurricanes and protects flightless chicks is not firm ground on which to build human dwellings or infrastructure. Maintaining that construction, when it occurs, requires an endless, costly battle against wind, waves, and erosion.

In 1982, Congress decided that the federal government should get out of the business of subsidizing construction in these sensitive areas, and that the scenic beauty of coastal barriers was worth protecting. It therefore enacted the Coastal Barrier Resources Act, ("CBRA" or "the Act") which designated millions of acres of undeveloped coastal barriers as the federal "Coastal Barrier Resources System" ("CBRS" or "System"). The CBRA protects the integrity of these barriers by prohibiting federal projects "within" the System, 16 U.S.C. § 3504, subject to a handful of exceptions that must also transpire "within" the System. *Id.* § 3505. By these measures, Congress sought to end federal assistance for those who would build on coastal barriers or dismantle the barriers to replenish developed beaches outside the System. The Act has been a roaring success, protecting the coast's scenic beauty while saving taxpayers billions of dollars in avoided storm damage and Sisyphean engineering projects.

In November of 2019, however, Secretary of the Interior David Bernhardt gutted the CBRA by fiat. In that month, three Congressmen requested that the Secretary rewrite the CBRA to allow transportation of System sand outside the System, where it would be deposited on developed beaches like those in the Congressmen's districts. The Secretary dutifully complied in

only six business days, issuing a two-page rule (the "Excavation Rule") countermanding a quarter century of agency practice and almost four decades of progress protecting the nation's coasts. The Rule is a conclusory document that simply reads the key limitation "within the System" out of the CBRA and that brusquely ignores this obvious truth: the Excavation Rule enables *exactly* the wasteful and damaging projects the Act was designed to arrest.

The National Audubon Society ("Audubon") is a national nonprofit dedicated to protecting birds and the places they need. Since the CBRA's inception, Audubon and its members have worked to expand and preserve the System. Now, with the Act's key safeguard turned on its head, Audubon must reorient its operations to plug countless new holes in a once sturdy conservation regime. The new demands on Audubon's resources have been matched by imminent threats to the organization's membership: the Rule has already greenlit several dredging projects in fragile CBRS units where Audubon members recreate and work to protect shorebird habitat.

Audubon therefore brings this suit to set aside the Excavation Rule, which is contrary to the plain text of the CBRA. The Rule effectively reads the Act's use of the word "within" to mean "without," nullifying the Act's operative provisions and rendering the statute nonsensical. Moreover, Congress carefully crafted not one but two *circumscribed* exceptions for the activities now blessed across-the-board by the Excavation Rule. On their face, these narrow exceptions show that Congress could have—but did not—authorize the unlimited dredging that Secretary Bernhardt would enable. Were there any doubt, the Act's legislative history is unanimous: Congress did not want to throw good money after bad by pillaging undeveloped barriers for the benefit of their developed neighbors.

Audubon also brings two procedural claims. Consistent with Secretary Bernhardt's knee-jerk decision to rewrite the CBRA, the Department of the Interior ("Department") did not provide notice and seek public comment as required by the Administrative Procedure Act ("APA"). Nor did the Department analyze the environmental impacts of the Rule under the National Environmental Policy Act ("NEPA"), an egregious omission for an agency action implicating millions of acres of land, countless species, and billions of dollars of disaster preparedness. No less than Audubon's substantive claims, these oversights require that the rule be vacated.

Simultaneously, the government has moved to dismiss Audubon's Complaint. Whether couched as arguments going to standing, ripeness, or lack of "final agency action" under the APA, Defendants' Motion boils down to a contention that the Rule is a nonjusticiable abstraction. But it is not an abstraction for Audubon, which has already diverted substantial resources away from meritorious programs in order to counter the Rule's effects. It is not an abstraction for the United States Army Corps of Engineers ("Corps") or the United States Fish and Wildlife Service ("Service"), which have recently moved to mine specific CBRA units in New Jersey, South Carolina, and North Carolina. And it is not an abstraction for Audubon members who enjoy watching and protecting shorebirds on suddenly imperiled coastal barriers. As eager as Secretary Bernhardt was to promulgate the Excavation Rule, he may not now complain that a federal court must wait to review his work. This Court should deny Defendants' Motion to Dismiss and grant Plaintiff's Motion for Summary Judgment.

BACKGROUND

I. The Importance of Coastal Barriers to Wildlife and Coastal Communities

The United States is fortunate to have "[o]ne of the longest and best defined chains of coastal barriers in the world," with over 2,700 miles of shorelines along the Atlantic Ocean and

Gulf of Mexico shielded by these barriers. *Coastal Barrier Resources System: What are Coastal Barrier Landforms?* United States Fish and Wildlife Service ("FWS" or "Service"), (last updated Apr. 16, 2018), https://www.fws.gov/CBRA/Coastal-Barriers.html. When intact, the barriers safeguard the nation's geology, ecology, and economy. For example, coastal barriers protect communities along the Gulf of Mexico and the Atlantic seaboard from hurricanes and nor'easters. The Service has explained that in areas, "[s]torm waves break on the barrier beach, leaving a diminished wave" to travel inland, while the wetland portions of coastal barriers "store[] storm flood waters, easing the flood pressure on the mainland." *Id.* Without the protection of coastal barriers, damages from storms would cost billions more. *See* Andrew S. Coburn and John C. Whitehead, *An Analysis of Federal Expenditures Related to the Coastal Barrier Resources Act (CBRA) of 1982*, 35 J. of Coastal Res. 1358 (Mar. 15, 2019).

Anthropogenic climate change will make coastal barriers even more important to the nation's security. According to the Service, "[e]astern coastal areas . . . and the Gulf Coast are especially vulnerable to sea level rise, and the mid-Atlantic coast has been identified as a 'hotspot' of accelerated sea level rise." U.S Fish and Wildlife Service, *Final Report to Congress: John H. Chafee Coastal Barrier Resources System Digital Mapping Pilot Project* 1 (2016). As climate change raises the sea level and prompts more severe storms, coastal barriers are expected to mitigate as much as $108 billion of disaster related damages over the next 50 years. Coburn and Whitehead, *An Analysis of Federal Expenditures*, at 1360.

Coastal barriers are also vibrant and crucial ecosystems for a variety of wildlife. Millions of fish, shellfish, birds, mammals, and other wildlife depend on barriers and their associated wetlands for vital feeding, spawning, nesting, nursery, and resting habitat. The country's commercial fish and shellfish industries also rely on coastal barriers, which are critically

important breeding and feeding grounds for countless valuable species. And coastal barriers nurture downdrift marshes and beaches—themselves important habitats—by supplying those areas with mobile sediment.

Of particular importance to Audubon is coastal barriers' irreplaceable role in the life cycle of many seabirds and migratory birds. One pillar of Audubon's coastal program is a focus on 16 "flagship" species, which collectively represent the various habitat and resource needs of over 350 other bird species. Hyun Decl. ¶ 10. Nearly all of these flagship species rely on the resources provided by the barrier island and inlet ecosystems protected by the CBRA. *Id.* ¶¶ 14-21. Nesting seabirds, such as terns, require coastal barrier habitat (i.e., sandy with bare to sparse vegetation) and physical separation from mainland predators to construct their nests, which are on the ground. Similarly, migratory seabirds rely on the habitat and food resources of coastal barriers during migrations that can extend from northern Canada to the Caribbean and South America. Collectively, therefore, Audubon's flagship species depend heavily on the System: in the Carolinas, for example, Audubon estimates that a majority of the populations of several flagship species are found within the System, including 97% of breeding Piping Plovers (*Charadrius melodus*), 90% of breeding American Oystercatchers (*Haematopus palliatus*), and 93% of breeding Least Terns (*Sternula antillarum*). *Id.* ¶ 20.

Nearly all federal conservation and recovery plans for shorebirds and seabirds warn that these species face serious threats from sand mining, inlet modifications, and/or beach renourishment projects in coastal habitat.[1] Sand mining projects displace individual birds from

[1] *See, e.g.*, *Piping Plover (Charadrius melodus) Atlantic Coast Population Revised Recovery Plan*, FWS 34 (May 2, 1996) ("The wide, flat, sparsely vegetated barrier beaches preferred by the piping plover are an unstable habitat, dependent on natural forces for renewal and susceptible to degradation by development and shoreline stabilization efforts."); *Piping Plover (Charadrius melodus), 5-Year Review: Summary and Evaluation*, FWS 34 (2020) (describing similar threats

nesting, resting/roosting, and foraging habitat and degrade water quality and prey base. These projects also disrupt the natural sediment transport processes, which ordinarily reduce erosion and therefore ensure coastal barriers' utility as wildlife habitats and as storm buffers. *See* Orrin H. Pilkey et al., *Mining of Coastal Sand: A Critical Environmental and Economic Problem for Morocco*, Coastal Care (2009), https://coastalcare.org/2009/03/mining-of-coastal-sand-a-critical-environmental-and-economic-problem-for-morocco/.

II. The Coastal Barrier Resources Act

In 1982, Congress concluded that careless and excessive development threatened coastal barriers, nearby coastal communities, and the nation's wildlife. Congress further concluded that this development flowed in part from certain federal funding to coastal zones—e.g., grants, subsidies, flood insurance, and Corps engineering projects—that artificially lowered the cost of construction on and near coastal barriers. Congress passed the CBRA to remove these incentives and minimize "the loss of human life, wasteful expenditure of federal revenues, and the damage to fish, wildlife, and other natural resources associated with the coastal barriers." 16 U.S.C. § 3501(b).

The CBRA establishes the System, a set of "undeveloped coastal barriers and other areas located on the coasts of the United States that are identified and generally depicted on . . . maps on file with the Secretary." *Id.* § 3503(a). The System is organized into individual tracts, or "System units," defined as "any undeveloped coastal barrier, or combination of closely-related undeveloped coastal barriers" within the System. *Id.* § 3502(7). A "coastal barrier," in turn, is a

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to wintering grounds); *Comprehensive Conservation Strategy for the Piping Plover (Charadrius melodus) in its Coastal Migration and Wintering Range in the Continental United States*, FWS 16 (Dec. 2012) (same); *Recovery Outline for the Rufa Red Knot (Calidris canutus rufa)*, FWS 4 (Mar. 2019), (Identifying "coastal engineering"—including "beach nourishment, and dredging"—as a high-severity, high-urgency threat to the red knot).

"geologic feature" and its "associated aquatic habitats." *See* 16 U.S.C. § 3502(1). Put differently, the System *is* its resources, and System maps are merely derivative of those resources. *Accord id.* § 3503(c) (directing the Secretary to periodically make "modifications to the boundaries of System units as are necessary solely to *reflect* changes that have occurred in the size or location of any System unit as a result of natural forces") (emphasis added).

The CBRA's operative provisions work to maintain the integrity of these geological features and aquatic habitat. The lynchpin of these provisions is the command that "no new expenditures or new financial assistance may be made available under authority of any Federal law for any purpose *within the system*." *Id.* § 3504(a) (emphasis added). Among the enumerated examples of these forbidden expenditures is "the carrying out of any project to prevent the erosion of, or to otherwise stabilize, any inlet, shoreline, or inshore area." *Id.* § 3504(a)(3). As the CBRA's author (Senator John Chafee) explained, this specific prohibition was motivated by a recognition that "[g]eologic processes are constantly eroding the physical composition of [coastal barriers], and man's efforts to stabilize" coastal barriers "are almost hopeless—and . . . very costly." 127 Cong. Rec. 7,571 (1981).

The CBRA contains limited exceptions to its general prohibition, allowing an "appropriate Federal officer . . . [to] make Federal expenditures and [to] make financial assistance available *within the System*" for certain activities. 16 U.S.C. § 3505(a) (emphasis added). Among these exceptions are "[n]onstructural projects for shoreline stabilization that are designed to mimic, enhance, or restore a natural stabilization system." *id.* § 3505(a)(6)(G). A federal officer invoking this exception may authorize a qualifying project only following consultation with the Secretary, whereby the Secretary determines if the project is otherwise

"consistent" with the CBRA. *Id.* § 3505(a)(6). The Secretary has delegated this consultation authority to the Service.

III. The Excavation Rule

In a 1994, the Service's Assistant Solicitor was asked by the agency's Assistant Director if the CBRA's exceptions encompassed renourishment projects outside the System that used sand taken from inside the System. Consistent with the plain text of § 3505(a)(6)(G)—which allows only federal funding for work "within" the System and under limited circumstances—the Assistant Solicitor explained that "the language of section 6(a)(6) of the CBRA . . . refer[s] to nonstructural projects devoted to stabilizing the shoreline *of a Unit of the CBRS* by mimicking, enhancing, or restoring the natural stabilization systems *of the Unit*." Memorandum from Charles P. Raynor, Assistant Solicitor, Fish and Wildlife, to Ralph Morgenweck, Assistant Dir., Fish and Wildlife Enhancement, FWS (1994) (emphasis in original) (attached as Exhibit A). The Service therefore concluded that "beach renourishment projects must be aimed at renourishing the beach of the CBRA Unit in order to qualify for Federal funding under section 6(a)(6)." *Id.*

The 1994 Memorandum's straightforward reading of § 3505(a)(6)(G) was undisturbed for a quarter century. Indeed, in late 2018, the Service's Principal Deputy Director explained that the 1994 Memorandum's conclusion "has been the basis for [the Service] interpretation and advice to other federal agencies for over 20 years," noting that Congress had subsequently reauthorized the CBRA twice since the Memorandum without contradicting the Service's plain reading of § 3505(a)(6)(G). Letter from Margaret Everson, Principal Deputy Dir., FWS, to the Hon. Garret Graves, House of Reps. (Dec. 21, 2018) (attached as Exhibit B). In that time, the Service cited the 1994 Memorandum to reject proposals to move System resources outside the system. *See, e.g.*, ECF No. 31-6.

This operation of the Act made it more expensive for developed beachfront communities to renourish their beaches. Those beaches, like System beaches, are subject to constant erosion and can be temporarily replenished with new sand. In many cases, the nearest source of this sand is protected System units. While beachfront communities can mine System sand for replenishment projects at their own cost, they would prefer to enjoy federal subsidies by way of Corps engineering projects. Because the Act prohibits those subsides for CBRA mining, beachfront communities have instead relied on Corps projects that mine sand from more distant areas, and that therefore may replenish developed beaches more slowly. In an effort to sidestep these limitations and obtain the cheapest possible sand, beachfront communities have recently lobbied Congress and the Department to drop the CBRA's protections. The latest entreaty came on October 25, 2019, when three Members of Congress, each representing a coastal district in Louisiana, New Jersey, or North Carolina, requested that Secretary Bernhardt "correct" the Department's plain reading of CBRA Section 6. *See* Letter from Reps. Jeff Van Drew, David Rouzer & Garret Graves to the Hon. David Bernhardt (Oct. 25, 2019) (attached as Exhibit C).

A mere six business days later, Secretary Bernhardt abruptly jettisoned over two decades of agency precedent, announcing the Excavation Rule in a two-page letter. ECF No. 1-1. Secretary Bernhardt explained that he had asked the Department's Office of the Solicitor to review the 1994 Memorandum, and that the Solicitor had concluded that the Section 3505(a)(6)(G) exception is *not* limited to projects within the System. Secretary Bernhardt also explained that he had personally reviewed the question and agreed with the Solicitor's opinion.

The Bernhardt Letter is terse, and its chief rationale for deviating from Congress' express requirements is the single, conclusory sentence that "[t]he language [of 16 U.S.C. § 3505(a)(6)(G)] is not ambiguous." The Bernhardt Letter goes on to argue that, assuming that

CBRA Section 3505 is ambiguous, the Rule is nonetheless appropriate. His explanation on this score is set forth below in its entirety:

> Congress did not intend to constrain the flexibility of agencies to accomplish the CBRA's broader purposes of protecting coastal barrier resources by requiring beach renourishment to occur "solely" within the System. Thus, even to the extent the statutory language could be considered ambiguous, it should be interpreted in a way that furthers Congress' stated purpose of protecting coastal barrier resources.

ECF No. 1-1 at 2.

The Excavation Rule concludes that "sand from units within the System may be used to renourish beaches located outside of the System, provided the project is consistent with the purposes of the Act." *Id*. at 2. It further explains that the Secretary has "directed the U.S. Fish and Wildlife Service to bring its communications into compliance" with the new Rule. *Id.* Indeed, Plaintiff is aware of at least two North Carolina projects for which the Service has recently advised the Corps that proposals to remove sand from the System may proceed in light of the Excavation Rule. *See* Memorandum from the U.S. Army Corps of Engineers to the Assistant Sec'y of the Army (Civil Works) (July 2, 2020) (attached as Exhibit D); Letter from Pete Benjamin, Field Supervisor, FWS, to Christine Brayman, Deputy District Engineer for Programs and Project Management, U.S. Army Corps of Engineers (Mar. 10, 2020) (attached as Exhibit E). The Corps has likewise relied upon the Rule to advance significant sand mining projects in South Carolina, including a proposal to move roughly four million cubic yards of sand out of System Unit M07. *See* Gilbert Decl. ¶ 23.

IV. The Stone Harbor Project

Among the congressionally authorized projects implicated by the Excavation Rule is the dredge and fill of developed beaches in the seaside resort towns of Cape May County, New Jersey. It was these projects that prompted Congressman Jeff Van Drew, of New Jersey's Second District, to join two of his colleagues in their October 2019 request that Secretary Bernhardt

issue the Excavation Rule. *See* Ex. C. After the Secretary obliged, Congressman Van Drew issued a press release characterizing the Rule as a "fix" for the "stalled" operations at Cape May.[2]

The Cape May Peninsula is the southernmost point in New Jersey, providing habitat for non-migratory birds such as the Snowy owl and brown pelicans. It is also a waypoint for southward migrating birds, providing an important opportunity to rest and feed before crossing Delaware Bay's twelve miles of open water. The Peninsula includes the Cape May National Wildlife Refuge and two System units. One of these units, known as "NJ-09," is "a sand-sharing system" that replenishes part of the unit called Stone Harbor Point. 62 Fed. Reg. 8258-02 (Feb. 24, 1997). *See also* Exhibit F (Service's System map of the Peninsula). Stone Harbor Point is an undeveloped beach that "provides habitat for a variety of migratory birds including colonial nesting waterbirds," as well as resources for "shellfish and finfish." ECF 31-2 at 1. Stone Harbor *Point* is a different beach than Stone Harbor, a developed beach to the north of Stone Harbor Point and completely outside NJ-09.

By 1996, Stone Harbor had badly eroded, in part due to a nearby Corps jetty. In that year, the Corps proposed renourishing Stone Harbor Point and sought CBRA consultation with the Service. According to the Service, it concurred that the project was consistent with the CBRA because the project would renourish a coastal barrier *within the System* and, by altering the jetty, ensure that Stone Harbor Point would be renourished naturally. ECF No. 31-5 at 1. Corps

[2] Press Release, Rep. Jefferson Van Drew, Van Drew Overcomes Bureaucratic Objections to Help Local Governments in Cape May County Move Forward with Life-Saving Coastal Storm Damage Reduction Project, Improving Wildlife Habitat and Saving Taxpayers Millions (Nov. 5, 2019) (available at https://vandrew.house.gov/media/press-releases/van-drew-overcomes-bureaucratic-objections-help-local-governments-cape-may).

documents from 2016 represent that one source of this renourishment was Hereford Inlet, which lies south of Stone Harbor Point and is also in NJ-09. *Id*.

Separately, in 1999, Congress authorized funding for an ongoing, 50-year Corps project to replenish the Cape May Peninsula, including the developed beaches surrounding NJ-09 and Stone Harbor Point. *See* Water Resources Development Act of 1999, Pub. L. No. 106-53, § 101(a)(26). But Congress has not exempted this project from the CBRA, and the Corps and the Service have not always agreed on the project's compliance with the Act. Since 1996, the Corps has periodically dredged Hereford Inlet without "formally" consulting to the Service's satisfaction. ECF No. 31-6 at 3. And in 2016, the Corps proposed to move sand from Hereford Inlet to the developed beach at Stone Harbor, i.e., outside the System. ECF No. 31-5. Invoking the exception in 16 U.S.C. § 3505(a)(6)(G), the Corps argued that movement of sand outside the System nonetheless complied with the CBRA because littoral patterns would allegedly sweep displaced sand back from Stone Harbor to NJ-09. *Id.* at 3.[3]

The Service ultimately determined that the project was unlawful under the CBRA for the straightforward reason that it proposed replenishing a formation that was not "within" the System. ECF No. 31-6 at 2 (citing 6 U.S.C. § 3505(a)(6)(G)). By preventing the Corps' access to the nearby sand at Hereford Inlet, Defendant-Intervenors claim that the price of Stone Harbor project increased by $6 million. ECF No. 31 ¶ 32. The Excavation Rule eliminates this obstacle

[3] The project, as reflected in the record, leaves several questions unanswered. In correspondence with the Service, the Corps did not compare the project's effects on Stone Harbor Point with a baseline scenario, i.e., one in which Hereford Inlet received littoral deposits from Stone Harbor but did not preemptively sacrifice sand to that beach through out-of-System renourishment projects. Nor does the correspondence evaluate effects to the Inlet or Stone Harbor Point in the interval between the Inlet's excavation and the alleged return of sediment. And the correspondence does not acknowledge the obvious point that if Stone Harbor Point requires renourishment, it could be replenished from Hereford Inlet directly, without using Stone Harbor as an intermediary.

by foreclosing the Service's rationale for its 2016 determination of inconsistency. Defendant-Intervenors therefore conclude that a favorable judgment in this case will, by leaving the Excavation Rule intact, allow the Corps to cheaply dredge Hartford Inlet for the benefit of developed beaches in Stone Harbor. ECF No. 33 at 12-13; ECF No. 31 ¶ 33.

V. Procedural History

Plaintiff's lawsuit advances four claims under the Administrative Procedure Act. *See* 5 U.S.C. §§ 701-704. Plaintiff's first claim for relief alleges that the Excavation Rule is "not in accordance with law" because it is an unlawful reading of the CBRA. *Id.* § 706(2)(A). Plaintiff's second claim contends that Defendants' decisionmaking, as reflected in the Excavation Rule's administrative record, is "arbitrary [and] capricious." *Id.* Its third and fourth claims allege that the Excavation Rule was adopted "without observance of procedure required by law," namely NEPA review and APA notice and comment. *Id.* § 706(2)(D).

Defendant-Intervenors are three local governments near NJ-09. The developed beaches in this area (including Stone Harbor) are subject to erosion, a natural process that also renders the beaches less useful for human recreation or habitation. Defendant-Intervenors have therefore championed projects that would temporarily halt this erosion by dredging sand from other sources and depositing it on developed beaches in Cape May. Hereford Inlet is an inexpensive source of sand for these projects, but, prior to the Excavation Rule, was off limits to Defendant-Intervenors by dint of its protected status under the CBRA. Defendant-Intervenors' asserted interest in this matter is therefore the maintenance of the Excavation Rule and its provision for Hereford Inlet as a source for extra-System replenishment.

STANDARD OF REVIEW

"When a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal, and the entire case on review is a question of law." *New York v. HHS*, 414 F.

Supp. 3d 475, 516 (S.D.N.Y. 2019) (citation omitted). "Summary judgment is generally appropriate in such cases, as these legal issues are amenable to summary disposition." *Id.* (citation omitted). Audubon has moved for summary judgment on its first, third, and fourth claims, deferring adjudication of its second claim until Defendants lodge the administrative record (if necessary). *See Am. Hosp. Ass'n v. HHS*, No. 18-2112, 2018 WL 5777397, at *2–3 (D.D.C. Nov. 2, 2018) ("in APA cases early summary judgment motions are often appropriate"). Although the merits of Plaintiff's claims are questions of law, summary judgment requires Audubon to "'set forth' by affidavit or other evidence 'specific facts'" necessary for the Court's jurisdiction, including facts demonstrating its standing to sue. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting Fed. Rule Civ. P. 56(e)). "Notably, in determining whether this standard has been met, [the Court] may rely not only on the declarations submitted by Plaintiff[] in support of [its] motion, but also on common sense, basic economics, and reasonable inferences." *New York v. Trump*, No. 20-5770, 2020 WL 5422959, at *16 (S.D.N.Y. Sept. 10, 2020) (citations omitted).

Concurrently, Defendants have moved to dismiss all of Plaintiff's claims for want of jurisdiction and claims three and four for failure to state a claim. Because the jurisdictional arguments in support of Plaintiff's Motion for Summary Judgment are applicable to each of Audubon's claims and meet a higher evidentiary standard than that required under Federal Rule of Civil Procedure 12(b)(1), those arguments answer and rebut the jurisdictional defenses in the government's motion. *Lujan*, 504 U.S. at 561. Likewise, Defendants' arguments under Federal Rule 12(b)(6) are pure questions of law that are equally amenable to resolution on summary judgment. *Am. Hosp. Ass'n v.* 2018 WL 5777397, at *2–3.

ARGUMENT

I. The Court Can Adjudicate Each of Plaintiff's Claims

Defendants raise a host of threshold defenses to Plaintiff's suit, each on the theory that Audubon brings its claims too early. That theory is wrong no matter its form. The Excavation Rule immediately bound Defendants to a new safe harbor regime, with immediate consequences for specific sand mining projects nationwide. The effects of this new regime will be felt not only by Plaintiff's members (who will suffer imminent impairments to their aesthetic and recreational interests in coastal wildlife), but also by Audubon (which has *already* diverted organizational resources in an effort to arrest the Rule's worst effects). Under these circumstances, there are no obstacles to adjudicating Plaintiff's claims now.

A. Audubon Has Demonstrated Article III Standing

Audubon has a personal stake in the Excavation Rule for two reasons, either of which is independently sufficient to confer standing. First, the Rule is already diverting Audubon's limited resources away from a variety of programs to previously unnecessary coastal conservation strategies. Second, there is a substantial likelihood that the Rule will injure the recreational and aesthetic interests of Audubon's members by facilitating sand mining at particular locations along the nation's coasts. Because Audubon has substantiated these injuries through specific facts, there is no Article III barrier to the Court's resolution of Plaintiff's claims.

i. Audubon Has Standing in its Own Right

In *Havens Realty Corp. v. Coleman*, the Supreme Court held that an organization satisfies Article III when it suffers a "concrete and demonstrable injury to [its] activities — with the consequent drain on [its] resources." 455 U.S. 363, 379 (1982). In the Second Circuit, an organization meets this standard when it "diverts its resources away from its current activities" in response to the defendant's action. *Moya v. DHS*, No. 19-1002, 2020 WL 5523213, at *6 (2d Cir.

Sept. 15, 2020). This diversion need only be "perceptible" to satisfy Article III, and even "scant" evidence of the diversion will satisfy plaintiff's burden at summary judgment. *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011).

Audubon's diversion of resources is manifest and supported by robust testimonial evidence. Prior to the Excavation Rule, Audubon relied on the Act's protections to safeguard coastal ecosystems and wildlife from federally funded development, structuring its CBRA program to advocate for the System's expansion and document its successes. Hyun Decl. ¶¶ 22-28. The Rule worked a fundamental change on these operations, blasting a hole in a previously firm prohibition against federally funded transit of resources outside the System. Now, instead of working solely to expand the System, Audubon must also *defend* the System from a wide-ranging threat of improper sand mining under the Rule. This work has comprised (1) identifying, monitoring, and safeguarding sites that could be unlawfully mined under the Rule; (2) organizing a coalition to protest the new Rule, including via written comments,[4] and; (3) submitting a FOIA request related to the Rule. *Id.* ¶ 30. The first of these tasks is particularly demanding given the System's vast size and the growing list of federal projects that have already relied on the Rule for the planned mining of protected habitat (including multiple projects in the Carolinas). *Id.* ¶¶ 33-35.

[4] The government mocks Audubon and its partners for offering the Secretary feedback on his abrupt and unannounced decisionmaking, characterizing Audubon's necessarily *post hoc* comments on the Excavation Rule as a "wast[e]," "unnecessary," and "premature." Mem. of Law in Support of Defs. Mot. to Dismiss the Compl. And Cross-Claim (hereinafter "Br.") at 14 n.4. But the standing inquiry asks only whether a plaintiff diverted its resources, not whether the defendant views that diversion as futile or unworthy. Whatever Defendants' stance on public participation in federal policymaking, that opinion is irrelevant to the Audubon's organizational injury under Article III.

This ongoing work is costly and disruptive. Audubon has already renewed a consultant's contract for the explicit purpose of monitoring the Rule's implementation, and staff have devoted hundreds of hours of time responding to the Rule. *Id.* ¶¶. 32-34, 39. Were it not for the Rule, these resources (worth tens of thousands of dollars in lost time) would have been used for Audubon's other programmatic initiatives, including (1) reforming the National Flood Insurance Program to disincentivize risky construction and restore previously-developed areas; (2), championing nature-based flood risk reduction projects to protect marshland and nesting habitat, and; (3) advocating for coastal resilience measures in disaster relief legislation and existing federal programs. *Id.* ¶¶ 37-38. These opportunity costs establish that Plaintiff has far more than a "mere interest" in the Excavation Rule, Br. at 12 (quotation omitted), and mirror dispositive facts in a long line of cases recognizing standing under *Havens Realty*.[5]

Defendants assert that an organization diverts resources from its "current activities" only where those activities are "different" from the object of the diversion. Br. at 12 (citing *Centro*, 868 F.3d at 110-11). On this theory, Defendants conclude that Audubon does not satisfy Article III because its pre- and post-Rule work ostensibly falls under a general rubric of System preservation. But the government's test fails on its own terms: at set forth above, Audubon *has* diverted resources from programs unrelated to the CBRA, such as advocacy for flood and infrastructure policy.

[5] *See, e.g.*, *Centro de La Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110-11 (2d Cir. 2017) (diversion where plaintiff "devote[d] attention, time, and personnel to prepare its response" to the challenged action); *New York v. DHS*, 969 F.3d 42, 61 (2d Cir. 2020) (same, where plaintiff hired two part-time staff members and conducted several workshops to ensure adequate access to public assistance); *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285, 307 (S.D.N.Y. 2020) (hiring a contractor to conduct voter outreach); *Nat. Res. Def. Council v. Dep't of Interior*, 410 F. Supp. 3d 582, 594 (S.D.N.Y. 2019) (activities including "resorting to FOIA to obtain information").

In any event, the government's theory is wrong as a matter of law. To the extent Plaintiff has diverted resources from one type of CBRA-related work to another, Defendants' real quarrel is not with Audubon's articulation of its organizational injury, but "with the cases [this Court] [is] bound to follow." *Moya*, 2020 WL 5523213, at *6 (rejecting Defendants' theory). In the Second Circuit, any similarity between pre- and post-diversion work is "of no consequence" for injury in fact, *De Dandrade v. DHS.*, 367 F. Supp. 3d 174, 182 (S.D.N.Y. 2019), because an organization "does not lose standing simply because the proximate cause of [an] economic injury is the organization's noneconomic interest in encouraging a particular policy preference." *Brooklyn Ctr. for the Indep. of the Disabled*, 290 F.R.D. 408, 417 (S.D.N.Y. 2012) (citation omitted). In *New York v. Trump*, for example, a three- judge panel of this Court recognized standing where plaintiff organizations were "dedicated to serving . . . communities that have traditionally been undercounted by the census" and subsequently diverted resources for a similar purpose: ensuring "participation in the census." 2020 WL 5422959, at *19-20. So too here.

Defendants also assert that Audubon's organizational outlays are not a justiciable injury because the outcome they are designed to foreclose—i.e., the actual excavation of protected barriers—is itself not "imminent' within the meaning of Article III. Br. at 14. This argument is beside the point: even if sand mining were a distant concern (and it is not, *see infra* at 21-22, Plaintiff's *organizational* injury is "actual" because it is diverting resources *now*. *Lujan*, 504 U.S. at 560. Indeed, this Court has rejected the government's argument at least twice in the last two years, explaining that organizational injuries "do[] not mean that a plaintiff must allege a second form of independently adequate injury," a standard that "would render the category of plaintiffs that could establish standing under a *Havens Realty* theory a null set and make *Havens Realty* a dead letter." *New York v. Trump*, 2020 WL 5422959, at *19 (citation omitted).

See also New York v. U. S. Dep't of Commerce, 351 F. Supp. 3d 502, 616 (S.D.N.Y. 2019) ("the argument . . . makes no sense"). There is no reason to depart from this authority and reward the government's misguided persistence.

Finally, Audubon's injuries are traceable to the Excavation Rule and redressable by this Court. The government believes that neither the Rule nor relief from this Court will have any effect on the frequency of coastal sand mining nationwide, a proposition that is both wrong, *see infra* at 21-22, and inapplicable to Audubon's organizational injuries. Those injuries depend not on particular sand mining projects but on the organization's immediate outlay of resources to arrest those projects and combat the Excavation Rule, a phenomenon that sprang solely from the Rule's adoption and would cease with an appropriate order from this Court. Hyun Decl. ¶¶ 4-41. *See New York v. Trump*, 2020 WL 5422959, at *19-20. Audubon has thus demonstrated all three components for organization standing.

ii. Audubon Has Standing on Behalf of its Members

Although Audubon's organizational standing is sufficient to resolve this issue, Audubon has independently demonstrated standing to sue on behalf of its members because it has identified at least one such member "who aver[s] that they use the . . . area" affected by the government's activities and is a "person[] 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (citation omitted). Specifically, Audubon has offered sworn testimony from four members who routinely view fragile shorebird species (including Piping Plovers and Red Knots) at or near System areas where the Corps has explored and/or approved dredging operations. Two such members view these species in Cape May, where federal renourishment projects are so tied to the Excavation Rule that multiple New Jersey governments intervened in this lawsuit. The remaining two declarants view birds in North and

South Carolina units the Corps has recently proposed to dredge for the benefit of developed beaches. This testimony is more than sufficient to substantiate an aesthetic and recreational injury, *Laidlaw*, 528 U.S. at 183.

The government believes these injuries to be speculative, claiming that they will arise only after a chain of contingencies. As a threshold matter, the Article III imminence and redressability requirements are less onerous where a plaintiff suffers a so-called "procedural injury," as Audubon has alleged in connection with Defendants' decision to forgo APA compliance and NEPA analyses in connection with Excavation Rule. *See New York Pub. Interest Res. Grp. v. Whitman*, 321 F.3d 316, 326 (2d Cir. 2003) (citing *Lujan*, 504 U.S. at 573 n.7). For these claims, Audubon need show only that the relevant procedure "both is designed to protect some threatened concrete interest" and that procedure "if not followed will cause a distinct risk" to the interest. *Huron v. Cobert*, 809 F.3d 1274, 1279 (D.C. Cir. 2016) (quotations and citation omitted). *See also Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("[a] litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant").

Under the applicable standards, Audubon has demonstrated imminent injuries in fact to its members. Most obvious are the injuries from Hereford Inlet dredging, the very project that helped prompt the Excavation Rule in the first place and that compelled Defendant-Intervenors to participate in this action. *See* ECF No. 32 ¶ 6; ECF No. 33 at 12-13. ECF No. 37 ¶ 149.[6] Plaintiff has established that its members will continue to recreate in this area, and that the sand

[6] Were it otherwise, Defendant-Intervenors would presumably lack standing to participate in this matter because the benefits they will accrue from their requested relief would be as speculative as the costs to Plaintiff. *Cf. Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1651 (2017). If Defendant-Intervenors have standing to champion the regulatory underpinnings of the Stone Harbor project, then Audubon must have standing to attack those underpinnings.

mining championed by Defendant-Intervenors will injure those members' aesthetic and recreational interests by raiding a sand transfer system vital to populations of shorebirds. *See* Starwood Decl. ¶¶ 11-22; Buchanan Decl. ¶¶ 8-13. Audubon has therefore demonstrated associational standing with respect to the injuries specified in the declarations of Colette Buchanan and Janet Starwood.

The remaining declarants have also satisfied Article III by demonstrating that there is a "substantial risk" of injury at likely sand mining sites around the country. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 432-33 (2013). Declarant Kathy Hannah views shorebirds dozens of times each year in Wrightsville Beach, North Carolina, which is also represented by a Congressman (Representative David Rouzer) who requested the Excavation Rule. *See* Hannah Decl. ¶¶ 7-18. Citing the Rule, the Service has *already* rendered consistency determinations for the Corps' proposal to dredge CBRS units in this area, notwithstanding the Service's "significant concern" for an area hosting thousands of shorebirds. *See* Ex. E. at 6. And declarant Steve Gilbert views shorebirds near his home at Folly Beach, South Carolina, where the Corps has likewise proposed extensive renourishment at the expense of CBRA units. *See* Gilbert Decl. ¶¶ 12-27.

It does not matter that the Corps has not yet commenced dredging for these projects. "[W]hat matters" for Article III injury "is not the length of the chain of causation, but rather the plausibility of the links that comprise the chain." *New York v. Scalia*, No. 20-1689, 2020 WL 2857207, at *10 (S.D.N.Y. June 1, 2020). Here, the chain is short on links and long on plausibility: Plaintiff's members routinely visit areas where shorebird species depend on CBRS units, where the Corps has documented an interest in mining those units under the standard set forth in the Rule, and where the Service and Plaintiff's declarants have documented links

between sand mining and harm to the relevant species. These facts are worlds away from the "conjectural or hypothetical" disputes that courts lack the constitutional power to resolve. *Lujan*, 504 U.S. at 560. *See Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 183-84 (D.C. Cir. 2017) (standing where member "hope[d]" to view certain beetles in the wild and there was a "potential" for application of EPA-approved pesticide near the beetle).

Defendants' final argument against Audubon's associational standing is a theory that the Excavation Rule will not change the frequency of sand mining across the System, leaving coastal habitats and Plaintiff's members no worse off than before. Br. at 11. This belief runs counter to the evidence that the Rule has already eased barriers to sand mining projects in three states. It also defies "common sense and basic economics." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 105 (2d Cir. 2018). As Defendant-Intervenors accurately observe, ECF No. 33 at 12-13; ECF No. 31 ¶ 33, federal funding drastically lowers the cost of shoreline projects for developers, encouraging otherwise costly excavations and increasing the number of sites where coastal habitat is under siege. This assumption is baked into the CBRA itself, 16 U.S.C. §§ 3501(a)(4)-(5), (b), and into the requests to promulgate the Excavation Rule in the first place. *See* ECF No. 31 ¶¶ 31-36; Ex. B. This self-evident dynamic more than answers Defendants' vague critiques of traceability and redressability. [7] *See Nat'l Highway Traffic Safety*

[7] *Simon v. Eastern Kentucky Welfare Rights Organization* does not aid the government. There, the Supreme Court doubted an alleged link between plaintiff's favored tax policy and hospitals' provision of services to indigent patients. 426 U.S. 26, 42-43 (1976). "Central to the Court's analysis" was its recognition that an "'undetermined financial drain' arising from the costs of supplying such services may have outweighed the benefits of favorable tax treatment." *Citizens for Resp. & Ethics in Washington v. Trump*, 953 F.3d 178, 193 (2d Cir. 2019) (quoting *Simon*, 426 U.S. at 43). "It was therefore just as plausible that the hospitals to which [plaintiffs] may apply for service [under a favorable judicial decision] would elect to forgo favorable tax treatment to avoid the costs of providing those services." *Id.* (citation omitted). Here, by contrast, all the evidence points in only one direction: sand mining is cheaper and therefore more widely available when it is federally funded. *See id.* at 194.

Admin., 894 F.3d at 104 ("petitioners need not prove a cause-and-effect relationship with absolute certainty . . . even in cases where the injury hinges on the reactions of the third parties . . . to the agency's conduct"); *New York v. Trump*, 2020 WL 5422959, at *16, *22-*24 ("[t]he law does not require Plaintiffs to submit a randomized control trial or other rigorous statistical analysis demonstrating [causation] beyond peradventure").[8]

B. Plaintiff's Claims are Ripe

The government argues that this case is unripe under Article III for much the same reason that Audubon allegedly lacks standing. According to Defendants, "[the Department's] legal interpretation is by no means a guarantee of approval for any specific federal expenditure for a shoreline stabilization project," and it would therefore be "premature for the Court to consider the . . . interpretation before it is applied to a specific project." Br. at 16-17. Because this argument goes to the imminence of injuries to Plaintiff and its members, the constitutional "ripeness inquiry merges almost completely with standing." *New York v. Trump*, 2020 WL 5422959, at *9, and this case is therefore ripe for the same reasons that Plaintiff has standing: Audubon has demonstrated two forms of Article III injury. *Id.* at *23.

Defendants also invoke the test for *prudential* ripeness, though they do not acknowledge it as such or bother to explain the difference between Article III and prudential ripeness. *See* Br. at 17 (describing "fitness" and "hardship" prongs of the prudential inquiry). "Unlike standing and constitutional ripeness, prudential ripeness does not relate to the Court's jurisdiction." *New*

[8] A further link in Defendants' chain of causation is the argument that sand mining is uncertain because federal agencies can simply ignore the CBRA, proceeding with non-compliant projects without consultation or over the Service's objections. *See* Br. at 39 (citing Coastal Barrier Resources Act: Advisory Guidelines, 48 Fed. Reg. 45664, 45667 (Oct. 6, 1983)). But the government (rightfully) does not argue that it actually flouts the CBRA in this manner, an omission that further moves Plaintiff's injuries out of the realm of the speculative.

York v. Trump, 2020 WL 5422959. "Instead, 'when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay.'" *Id.* (quoting *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003)). "In recent years, the Supreme Court has cast doubt on the 'continuing vitality of the prudential ripeness doctrine,' on that ground that it 'is in some tension with . . . the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.'" *Id.* at n.12 (quoting *Susan B. Anthony List v. Driehous*, 573 U.S. 149, 167 (2014)). Accordingly, at least one court in this District has explained that it "would have to find overwhelming prudential considerations to decline jurisdiction on [ripeness] grounds." *Vullo v. Office of Comptroller of Currency*, 378 F. Supp. 3d 271, 288 (S.D.N.Y. 2019). *See also Fowler v. Guerin*, 899 F.3d 1112, 1116 n.1 (9th Cir. 2018) (describing prudential ripeness as "disfavored").

In any case, Plaintiff easily meets both elements of the test for prudential ripeness. The merits of all four of its claims are "fit for judicial decision." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). Audubon's first claim asks whether the Excavation Rule is a permissible reading of the CBRA, i.e., it presents "purely [a question] of statutory interpretation that would not benefit from further factual development of the issues presented." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 479 (2001) (quotations and citation omitted). Plaintiff's second claim contends that the Excavation Rule is arbitrary and capricious. 5 U.S.C. § 706(2)(A). As such, it merely tests the legal sufficiency of the administrative record for the Excavation Rule, and is reviewable upon production of the record. *See Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007). Audubon's third and fourth claims ask whether Defendants complied with APA and NEPA processes. Because these two statutes

merely "guarantee[] a particular procedure, not a particular result[,]" Audubon "may complain of [a] failure [to observe those procedures] at the time the failure takes place, for the claim can never get riper." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). *See also Sharkey v. Quarantillo*, 541 F.3d 75, 89 (2d Cir. 2008).

Defendants' argument that this case would benefit from further factual development "is a throwaway," since they "do not explain what facts needs to be developed" and the merits of Audubon's claims do not "require[e] evidentiary support." *Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 397 F. Supp. 3d 430, 451 (S.D.N.Y. 2019). Unlike the challenge to agency action in *National Park Hospital Association*, for example, Plaintiff's claims do not "rely on specific characteristic of certain types" of sand mining projects and thus do not "await a concrete dispute about a particular [project]." 538 U.S. at 812. They instead attack only facial shortcomings of the Excavation Rule, and are therefore "as 'fit' for judicial decision today as [they] will ever be." *Id.* at 814-815 (Stevens, J., concurring). *See also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 464 (D.C. Cir. 2006) (a claim is ripe where "[t]he legality *vel non* of the . . . challenged features will not change from case to case or become clearer in a concrete setting").

Plaintiff would also suffer hardship from delayed review. "In assessing this possibility of hardship, [courts] ask whether the challenged action creates a direct and immediate dilemma for the parties." *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 134 (2d Cir. 2008) (Sotomayor, J.) (citation omitted). The Excavation Rule meets this test: it operates to the "present detriment" of Audubon and its members, *id.*, by draining organizational resources and facilitating ecological damage at a variety of coastal sites. *See supra* at 15-23. These showings conclusively rebut the government's arbitrary "presumption" that Audubon will "have ample

opportunity later to bring its legal challenge," i.e., when agencies consummate particular sand mining projects. Br. at 18 (citation omitted). And even if Plaintiff had not demonstrated hardship, its claims for relief would be ripe because "there are no significant agency or judicial interests militating in favor of delay[.]" *Nat'l Ass'n of Home Builders*, 440 F.3d at 465. In short, this suit is both prudentially and constitutionally ripe.

C. The Excavation Rule is Final Agency Action

The government contests only the second prong of the "pragmatic" inquiry for final agency action under the APA, claiming that the Excavation Rule is not "an action . . . from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1810 (2016). That is wrong: the Excavation Rule "made it lawful . . . , for the first time," for federal agencies and other entities to obtain federal funding for renourishment projects that transport sand out of the System. *Bhd. of Locomotive Engineers & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 99 (D.C. Cir. 2020). More precisely, the Rule "creates a safe harbor" such that the Fish and Wildlife Service "may not deny" concurrence for a shoreline stabilization project on the grounds that the project moves resources outside the System and in violation of the general prohibition of CBRA Section 3504(a)(3). *Scenic Am., Inc. v. U. S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016). The Rule is therefore "an action from which. . . legal rights changed" for federal agencies like the Corps. *Bhd. of Locomotive Eng'rs*, 972 F.3d at 88 (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). *See also Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 397 F. Supp. 3d at 449 (applying *Scenic America* to conclude that Department's policy of non-enforcement was final).

Were there any doubt, the Department has characterized the Excavation Rule as binding and therefore final under *Hawkes* and *Bennett*. *See State of New York v. U.S. Immigr. & Customs*

Enf't, 431 F. Supp. 3d 377, 386 (S.D.N.Y. 2019) (citing *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014)). The Rule itself clarifies that deviation from its conclusion is not "permissible" and directs the Fish and Wildlife Service to "bring [itself] into compliance" with the Rule. ECF No. 1-1 at 2. Predictably, therefore, the Department "does not contend that in practice it has not treated the [Rule] as binding." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 385 (D.C. Cir. 2002). To the contrary, Defendant-Intervenors sought participation in this case on the understanding that the Excavation Rule would remove impediments to dredging in specific areas like Hereford Inlet. Likewise, the Service has relied on the Rule to approve significant dredging projects in North Carolina. *See supra* at 10. Collectively, the agency's characterization and implementation of the Rule confirm that Rule does what it says it does: create a new legal regime for sand mining. *See State of New York*, 431 F. Supp. 3d. at 386.

The governments' Motion offers various definitions of "final agency action" without explaining how those definitions place the Excavation Rule outside of 5 U.S.C. § 704. Br. at 18-19. The closest Defendants come to applying these standards is a citation to *Oregon Natural Desert Association v. United States Forest Service*, which held that agency instructions for federal grazing permittees are final because they affect "the day-to-day business of the permit holder." 465 F.3d 977, 990 (9th Cir. 2006). *See also* Br. at 19 n.5 (offering similar examples). To be sure, the legal consequences of the Excavation Rule are not like those from the Forest Service's grazing instructions, but nor must they be to qualify as final agency action: the Ninth Circuit in *Oregon Natural* was careful to note that 5 U.S.C. § 704 "provide[s] several avenues for meeting the second finality requirement," and that the "second requirement can be met through different kinds of agency actions." *Id.* at 986-87. Nothing in the decision signals that the legal effects here do not qualify.

At bottom, Defendants' theory of finality is a rerun of its misplaced ripeness argument, i.e., a belief that the most "appropriate" challenge to the Excavation Rule, Br. at 20, is one attacking "the specific facts of [a] concrete [sand mining] proposal involving an identified site." *Id.* at 18. That argument is wrong in its own right, but it also has no bearing on the APA: unlike prudential limitations on the judicial power, the purpose of the APA's finality requirement is to "allow an agency the opportunity to correct its own mistakes, to avoid judicial disruption of [its] processes, and to prevent piecemeal judicial review." *Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 397 F. Supp. 3d at 450. Accordingly, an "agency's action is final notwithstanding the possibility of further proceedings . . . on related issues, so long as judicial review at the time would not disrupt the administrative process." *Sharkey* 541 F.3d at 89 (quotations and citation omitted). There is no possibility of that disruption here, nor do Defendants suggest any. By urging the Court to nonetheless punt on Audubon's claims, "Defendants' approach . . . undermine[s] [the APA's] purposes by focusing the finality inquiry on the particular circumstances of the plaintiff who happens to challenge an agency action rather than the character and effect of the action itself." *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 397 F. Supp. 3d at 450. The Court should reject this effort.

II. Plaintiff is Entitled to Judgment on its First, Third, and Fourth Claims

A. The Excavation Rule is Contrary to Law

The Excavation Rule misreads the CBRA's exception allowing specifically defined projects "within" the System, determining that a project is "within" the System so long as an activity *related* to the project is within the System. 16 U.S.C. § 3505(a). By this logic, a project stabilizing a non-System beach is nonetheless "within" the System because it relies on sand dredged from the CBRS. This reading offends common sense and would turn the CBRA inside

out, dismantling precious System resources at taxpayer expense and for the benefit of extra-System beaches. That scenario, of course, is exactly Congress sought to prevent when passing the Act. The Court should enforce this intent, as embodied in the statute's plain language and legislative history, and declare that the Rule is not in accordance with law.

i. The CBRA's Text Unambiguously Forecloses the Excavation Rule

When evaluating an agency's interpretation of a statute, "a reviewing court must first ask whether Congress has directly spoken to the precise question at issue." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (citation omitted). In so doing, the Court must "place[] in context" the relevant words or phrases, "interpret the statute as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into a harmonious whole." *Id.* at 132-33 (citations omitted). *See also Abramski v. United States*, 573 U.S. 169, 179 (2014) ("we must . . . interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose") (citations omitted). If this evaluation reveals that Congress has addressed the issue at hand, then "the inquiry is at an end," and "the court must give effect to the unambiguously expressed intent of Congress." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132.

Such is the case here, where Congress has unambiguously foreclosed the Excavation Rule by limiting permissible renourishment projects to those "within the System." This limitation is a lynchpin of the CBRA. Section 3504(a) of the Act prohibits federal funding for projects "within the System," including projects to "stabilize[] any inlet, shoreline, or inshore area," 16 U.S.C. § 3504(a)(3). In the following section, the CBRA exempts certain projects "within the System" from that prohibition. *id.* § 3505(a). Among these exemptions are "shoreline stabilization [projects] that are designed to mimic, enhance, or restore a natural stabilization system" and that are further "consistent with" the CBRA's purposes. *Id.* §§ 3505(a)(g)(6). In

both Sections, the word "within" is an unambiguous term of "enclosure." *Within*, Webster's Dictionary, https://www.merriam-webster.com/dictionary/within (last visited 11/5/2020). *See also Within*, Oxford U. Press, https://www.lexico.com/en/definition/within (last visited 11/5/2020) ("within" is "[i]nside the range of (an area or boundary")).

This "natural and obvious" meaning of "within" dooms the Excavation Rule. *United States v. Temple*, 105 U.S. 97, 99 (1881). A shore stabilization project cannot be "within" the System, as required by CBRA Section 3505, where the shore to be stabilized is *outside* the System. "In any definition of [within], in any application, there is not the slightest hint that something within the parameters of containment can also, at the same time, be 'without.'" *In re Sw. Aircraft Servs., Inc.*, 831 F.2d 848, 854 (9th Cir. 1987) (Anderson, J., dissenting). The Excavation Rule could not have squared this circle had it tried.

What is more, the Act *does* explicitly provide for cross-System projects, just not as the Excavation Rule would have it. First, in 16 U.S.C. § 3505(d), Congress created a distinct CBRA exception entitled "Services and facilities outside System." This provision allows "expenditures or assistance provided for services or facilities and related infrastructure located *outside* the boundaries of [System] unit T-11," an area on South Padre Island, Texas. *Id.* § 3505(d)(1) (emphasis added). The key words in both the subsection's title and its operative text are "outside the System," a phrase reflecting Congress' understanding that the Act's remaining exceptions would not so operate. If the CBRA's drafters had wished to generally authorize dredging inside the System for the benefit of beaches outside the system, it needed have only included "outside the system" somewhere within the exception in 16 U.S.C. § 3505(a)(6)(G) or listed restoration projects among the exceptions for work "outside [the] System" in 16 U.S.C. § 3505(d)(1)). "That Congress failed to do so . . . argues forcefully that such authorization was not its intention."

Dynegy Midstream Servs. v. Trammochem, 451 F.3d 89, 95 (2d Cir. 2006). *See also Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) ("Although section headings cannot limit the plain meaning of a statutory text, they supply cues as to what Congress intended.") (citation omitted).

Likewise, CBRA Section 3504(a)(3) exempts "units . . . S01 through S08 and LA07" from the CBRA's general restrictions on funding within the System. The House Committee Report explained that this Section would enable "stabilization and erosion projects in . . . areas along the coast of Louisiana," i.e., the very type of project blessed by the Excavation Rule. H.R. 97-841, at 15 (1982) (hereinafter "House Report"). This exception would have been superfluous if Congress had already authorized replenishment in Louisiana via Section 3505, as the Excavation Rule concludes. *See New York v. DHS*, 969 F.3d at 72 ("legislative history . . . may be helpful when the interpretive clues speak almost unanimously, making Congress's intent clear beyond reasonable doubt") (citation omitted).

Beyond these flaws, the Excavation Rule "contravene[s] the [CBRA's] statutory design." *Maracich v. Spears*, 570 U.S. 48, 60 (2013). The Rule allows the System to be subdivided, rearranged, and shrunk, an outcome in irreconcilable tension with Congress' presumption that System boundaries should move "as a result of natural forces," not federal intervention. 16 U.S.C. § 3503(c). Worse, the Rule would destroy the System to renourish developed beaches that Congress chose not to protect, precisely the activity that Senator Chafee criticized as ignoring "the warnings of geologists that the [replenished] sand will disappear again." 7 Cong. Rec. S4031 (daily ed. Apr. 8, 1981) (statement of Sen. John Chafee). The Senate Committee Report similarly explained that because "[s]torms and other natural processes inevitably undermine the attempt to stabilize [developed areas]," federal outlays for that stabilization will necessarily be

"lost and . . . replaced with new Federal investment in a continuing cycle of wasted Federal funds." S. Rep. No. 97-419 at 2–3 (1982). And the House Committee Report lamented the practice of "artificial beach nourishment," explaining that the CBRA should "preclude" "all forms of direct Federal assistance for projects," including "[f]ederal assistance for erosion control." House Report at 9, 15. *See United States v. Awadallah*, 349 F.3d 42, 54 (2d Cir. 2003) ("we may look to [Committee reports] in discerning Congressional intent"). The Excavation Rule blithely flouts this *raison d'etre*, opening the flood gates to futile renourishment projects in a manner "inconsistent with the design and structure of the statute as a whole." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014).[9]

ii. The Department Solicitor's Reading of the CBRA is Faulty

On October 30, 2020, the Department's Office of the Solicitor issued a memorandum ("Memorandum") reaching the same conclusions as the Excavation Rule. *See* ECF No. 1-2. The Excavation Rule does not explicitly incorporate the Memorandum's rationale, but, to the extent that Defendants now invoke that reasoning to justify the Rule, the Memorandum is unpersuasive.

First, the Memorandum invokes the "last antecedent" canon to justify an application of the modifier in Section 3505 ("within") to its preceding phrase ("[f]ederal expenditures or . . . financial assistance") but not its proceeding phrases (the CBRA's itemized exceptions). *Id.* at 2 (citing 16 U.S.C. § 3505(a)(6)). But the last antecedent rule is used to apply a modifier to only

[9] It is no answer that projects under the Excavation Rule must be "consistent" with the CBRA's purposes, 16 U.S.C. § 3505(a)(6). By themselves, the statutory purposes in CBRA Section 3501 are not specific enough to cabin the universe of "particular projects" invoking the exception. For instance, almost any renourishment project outside of the System can be disingenuously characterized as an effort to further the CBRA's goals by preventing erosion and therefore "minimize[ing] the loss of human life," a framing that would allow federal agencies to strip mine the System virtually without limitation. *Id.* § 3501(b). The statutory language that prevents this land grab—the requirement that "consistent" renourishment projects also transpire "within the System"—is the very language the Excavation Rule would read out of the CBRA.

one (the "last") of several preceding phrases (the "antecedents"). *See Lockhart v. United States*, 136 S. Ct. 958, 962 (2016). It has no application in CBRA Section 3505, where the modifier "within" does not follow a list of phrases and therefore raises no questions as to its application across several antecedents. Instead, "within" applies prospectively, to the objects of federal funding enumerated in Section 3505(a). This construction—an application of the so-called "series qualifier canon"— "reflects the completely ordinary way that people speak and listen, write and read." *Lockhart v. United States*, 136 S. Ct. at 970 (Kagan, J., dissenting).

More fundamentally, limiting the modifier "within" only to "federal expenditures and financial assistance" renders Section 3505 nonsensical. The government cannot provide funding "within the System" in the abstract—it cannot leave a blank check or unlocked ATM on Stone Harbor Point—so, as a matter of grammar and common sense, it must also direct its funds at some specified *action* "within the System." That is why the Memorandum immediately walks back its invocation of the last antecedent rule, conceding that "within the System" modifies not only "federal expenditures and financial assistance," but also activities "associated with" those funds, including "removing sand from . . . the System." *See* ECF No. 1-2 at 2. Here, the Memorandum gives up the game: it is true, as the Memorandum tacitly concedes, that "within the System" must also extend to activities associated with government funding, but the permissible activities are the projects carefully listed by Congress in 16 U.S.C. § 3505(a). The self-serving activity conjured by the Memorandum ("removing sand from the System") is not among these exceptions, and may not be read in to the CBRA.

Second, the Memorandum objects that "within the system" does not appear in 16 U.S.C. § 3505(a)(6). But Congress has no need to repeat itself. As set forth above, the phrase "within the system" in Section 3505(a) necessarily qualifies the Section's subsequent noun phrases.

Repetition of "within the System" in any one of those noun phrases would have run counter to the anti-surplusage canon, making it impossible to "give effect . . . to every clause and word" of 16 U.S.C. § 3505. *United States v. Johnson*, 961 F.3d 181, 188 (2d Cir. 2020).

Third, the Memorandum argues that an overbroad reading of "within" would confine a project's ancillary activities to System boundaries. The Memorandum therefore believes that the Excavation Rule is necessary so that a project under 16 U.S.C. § 3505(a)(2)—allowing for "maintenance or construction of improvements of . . . Federal navigation channels"—may dispose of waste from these projects outside the System. ECF No. 1-2 at 2. But the word "within" in Section 3505 operates only on the categories of projects specified by Congress, not ancillary activities that Congress left outside the Section's ambit. The specified project in 16 U.S.C. § 3505(a)(2), for example, is "maintenance and construction" not "waste disposal," and so only the "maintenance and construction" must be "within" the System.[10] Likewise, "shoreline stabilization projects" are a project enumerated by Congress in Section 3505(a)(6)(g), and so must transpire within the System, even if their ancillary components occur elsewhere.

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[10] The exception in 16 U.S.C. § 3505(a)(2) exempts maintenance and construction activities, "including the disposal of dredge materials related to such maintenance or construction." Because the word "including" can be read as either "illustrative" or "enlarging," one might argue that the "project" transpiring "within" the System under Section 3505(a)(2) must (in the absence of the Excavation Rule) encompass the project's waste disposal. *State v. Dep't of Justice*, 951 F.3d 84, 102 (2d Cir. 2020). That would be wrong: "[t]he context here signals illustration rather than enlargement." *Id.* There is no conceivable reason why Congress would require disposal of waste within the System rather than merely permit that disposal. And indeed, the legislative history confirms that the "including" clause in Section 3505(a)(2) means that disposal of waste within the System is permissible and discretionary, not that it must transpire within the System. *See, e.g.*, House Report at 16 ("The use of disposal sites for dredge materials is *not precluded* by this legislation so long as they are related to, and necessary for, the maintenance of an existing project.") (emphasis added). The Excavation Rule is unnecessary to "solve" a "problem" of mandatory waste disposal in the System, because there is no problem to begin with.

B. The Excavation Rule Was Unlawfully Promulgated Without Notice or an Opportunity for Public Comment

The Excavation Rule is a "rule" under the APA, i.e., it is an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). As such, Defendants were obligated to submit the Rule for public comment. *Id.* § 553. Because they did not, the Rule was adopted "without observance of procedure required by law" and is invalid. *Id.* § 706(2)(D). *See White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993).

Defendants would exempt the Excavation Rule from the APA's notice-and-comment requirement under the Act's exception for so-called "interpretive rules," which the statute does not further define. 5 U.S.C. § 553(b)(A). The Second Circuit has indicated that interpretive rules are those that "*merely* clarify an existing statute or regulation," while rules subject to the notice-and-comment requirement (sometimes called "legislative" or "substantive" rules) "create new laws, rights, or duties, in what amounts to a legislative act." *Sweet v. Sheahan*, 235 F. 3d 80, 91 (2d Cir. 2000) (citations omitted) (emphasis added).

The Excavation Rule has two indicia of legislative rulemaking. First, it "appears on its face to be binding" on Defendants, brooking no exceptions to its terms and commanding the Service to implement the Rule on the ground. *Am. Inst. of Certified Pub. Accountants v. Internal Revenue Serv.*, 746 Fed. App'x 1, 10 (D.C. Cir. 2018). Second, the Rule *is* binding: "in the absence of the rule there would not be an adequate legislative basis for . . . agency action to confer [the] benefits" of System resources on non-System beaches. *Sweet*, 235 F. 3d at 91 (citing *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110–12 (D.C. Cir. 1993)). The Secretary is candid on this point, explaining that the Rule's "consequence" is to allow "sand from units within the System [to] be used to renourish beaches located outside of the System."

ECF No. 1-1 at 2. If the Rule were "merely clarify[ing]" the CBRA, *Sweet*, 235 F. 3d at 91, there would be no such consequences.

Defendants' authority is mostly irrelevant. In *White v. Shalala*, the Second Circuit rejected an argument that rules are *per se* legislative when they represent a "change from the [agency's] prior interpretation." 7 F.3d at 304. Here, it is the Excavation Rule's binding effects—not its departure from prior agency practice—that renders it legislative. And in *Saget v. Trump*, the court determined that stripping visas from Haitian nationals was not a legislative rule because it was a one-off exercise of statutory discretion with no binding effect on future decisions under the Immigration and Nationality Act. 375 F. Supp. 3d 280, 364 (E.D.N.Y. 2019). The Excavation Rule, on the other hand, governs all future CBRA consultations.

As for *Natural Resources Defense Council, Inc. v. Department of the Interior*, Audubon respectfully disagrees with that decision's test for legislative rulemaking. 397 F. Supp. 3d at 453. There, the court concluded that the rule at issue had legal effects, namely the "insulat[ion] [of] private actors" from liability for harming birds in violation of the Migratory Bird Treaty Act. *Id.* The court nonetheless held that the rule was "interpretive" because the Department had "base[d] its conclusion on the [Act's] text, its legislative history, and on judicial decisions interpreting the Act." *Id.* But these sources of authority equally inform interpretive *and* legislative rulemaking, rendering them poor tools for distinguishing between the two. *Compare, e.g.*, 83 Fed. Reg. 66514, 66527 (Dec. 26, 2018) (interpreting "single function of the trigger" in 26 U.S.C. § 5845(b) with reference to legislative history and judicial decisions interpreting the National Firearms Act) *with Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 30 (D.C. Cir. 2019) (deeming that rule legislative). That is why the salient test under the APA is whether a rule "merely" interprets a statute or whether that interpretation *also* imposes "new

laws, rights, or duties," rendering it legislative. *Sweet*, 235 F. 3d at 91. Under that test, which the court in *Natural Resources Defense Council* did not apply, the Excavation Rule is legislative for the reason set forth above: on its own terms, the Rule's "consequence[s]" include a new right to transport System resources outside of the System. ECF No. 1-1 at 2.

C. The Excavation Rule Violates NEPA

Congress enacted NEPA to ensure that federal agencies consider the environmental consequences of their actions. 42 U.S.C. § 4331(a)–(b). NEPA requires that agencies prepare an Environmental Impact Statement ("EIS") for any "major Federal action[] significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C), including "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18(a). An EIS must describe: (1) the "environmental impact of the proposed action;" (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented;" (3) "alternatives to the proposed action;" (4) "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;" and (5) "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." *Id.*

An agency may prepare an "environmental assessment" to determine if its action will have a "significant" impact on the environment and therefore requires an EIS. 40 C.F.R. § 1508.9(a)(1). An environmental assessment must "provide sufficient evidence and analysis for determining whether to prepare an [EIS]" and discuss "the need for the proposal, [] alternatives . . . [, and] environmental impacts of the proposed action and alternatives[.]" *Id.* § 1508.9(a), (b). If a lawful environmental assessment (or other authorized process) reveals that the proposed action will not have a significant impact on the environment, the preparing agency may render a

"finding of no significant impact," which absolves of the agency of a need to prepare an EIS. *See id.* §§ 1501.4, 1508.13, 1508.9.

The Excavation Rule wholly ignored this process. Regardless of whether the Excavation Rule is a legislative or interpretive rule, it is a "formal" document purporting to "adopt" and "establish" agency policy and therefore triggered NEPA's requirements. *Id.* § 1508.18(b). In this instance, the need for robust environment analysis is axiomatic: the Rule opens millions of acres of undeveloped habitat to exploitation and threatens to strip innumerable coastal communities of a vital defense against storm surges and climate change. *Accord* 43 C.F.R. § 46.215(b) (Department NEPA regulations, encouraging NEPA review where actions affect "wetlands . . . , floodplains . . . , migratory birds . . . , [or] other ecologically significant or critical areas"). Defendants' failure to apply NEPA and thoroughly investigate these possibilities requires vacatur. *See Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, 397 F. Supp. 3d at 454.

Aside from a misplaced argument that the Excavation Rule is not final agency action, *see supra* at 26-28, the government's only excuse for ignoring NEPA is a conclusory argument that environmental analysis of the Rule is appropriate only at some unspecified point in the future, when there are "specific, concrete, and measurable environmental effects" from projects invoking the Rule. Br. at 24. Given the Rule's sweep, that assumption is mistaken. *Cf. Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002) ("An agency may not avoid an obligation to analyze . . . environmental consequences that foreseeably arise from a[] [programmatic document] merely by saying that the consequences are unclear or will be analyzed later"). But equally important, NEPA and the APA obligated Defendants to set forth this rationale in a "finding of no significant impact" accompanying the Final Rule, not as a litigating position several months later. The government's *post hoc* justification for its oversight

is no substitute for contemporaneous adherence with the bare procedural requirements of NEPA, and Audubon is therefore entitled to summary judgment on its fourth claim for relief. *See DHS. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1908 (2020).

CONCLUSION

For the forgoing reasons, the Court should deny Defendants' Motion to Dismiss and Grant Plaintiff's Motion for Summary Judgment on its first, third, and fourth claims for relief.[11]

Dated: November 6, 2020

Respectfully submitted,

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[11] Plaintiff notes that any judgment in its favor will necessarily resolve Defendant-Intervenors' cross-claim, which seeks a declaration that the Excavation Rule "was correct and was not in violation of the [APA], [NEPA], or any other statute, regulation, or rule." ECF No. 37 ¶ 206. Should the Court reject each of Audubon's claims, Audubon reserves all arguments against the relief sought by Defendant-Intervenors.