IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLEAN AIR COUNCIL, et al., Plaintiffs, v. **UNITED STATES OF AMERICA, et al.,** Defendants.	Case No. 2:17-cv-04977-PD

Pursuant to this Court's Order, ECF No. 29, Federal Defendants hereby file this Supplemental Motion to Dismiss Plaintiffs' Amended Complaint and move the Court to dismiss the Amended Complaint with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The bases for this motion are more fully set forth in the accompanying Memorandum of Law. The Memorandum of Law addresses (1) Plaintiffs' state-created danger claim in Part II.B. and (2) Plaintiffs' claim that the United States deprived Plaintiffs of life, liberty and happiness in Part II.C.

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Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

/s/ Sean C. Duffy
MARISSA A. PIROPATO (MA Bar No. 651630)
SEAN C. DUFFY (NY Bar No. 4103131)
Trial Attorneys
GUILLERMO A. MONTERO (MA Bar No. 660903)
Assistant Chief
Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tel | (202) 305-0470
Fax | (203) 305-0506

Attorneys for Federal Defendants

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DEFENDANTS' MEMORANDUM IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS AND REPLY TO PLAINTIFFS' RESPONSE

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INTRODUCTION

Plaintiffs have a policy disagreement with the federal government, not a judicially cognizable claim. Their scattered objections to federal environmental policies are precisely the kind of generalized grievances that federal courts lack authority to adjudicate, and Plaintiffs cannot plausibly connect the isolated policy actions that they identify in their Amended Complaint with the asserted harms flowing from the complex phenomenon of global climate change. Even if they could establish standing, they could at most challenge some of the identified agency actions through the familiar procedures set forth in the Administrative Procedure Act. There is no basis for the Plaintiffs' asserted substantive due process right to particular climate conditions; indeed, the Third Circuit rejected just such a claim in *National Sea Clammers Association v. City of New York*. The D.C. Circuit has similarly rejected plaintiffs' misguided attempt to apply the state-law public trust doctrine to the federal government. This lawsuit is fundamentally flawed; the Complaint should be dismissed.

I. Plaintiffs Lack Article III Standing

Article III of the Constitution restricts the jurisdiction of the federal courts to "cases" and "controversies" "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102

(1998); U.S. CONST. art. III, § 2, cl. 1. But this lawsuit is not a "case" or controversy" of that kind; it is an effort to use "the judicial process … to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (citations omitted). Instead of asking the Court to address "specifically identifiable Government violations of law," Plaintiffs ask this Court to assess the constitutionality of the entirety of various federal policies. *Allen v. Wright*, 468 U.S. 737, 459 (1984) (citations omitted), *abrogated in non-relevant part by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Such a request is not "consistent with a system of separate powers . . ." *Id.* at 752.

Article III does not allow for suits that seek "broad-scale investigation" into government functions, because this "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action . . . ." *Laird v. Tatum*, 408 U.S. 1, 14-15 (1972). That is all the more true when the Executive action pertains to a highly complex matter like global climate change that is uniquely suited to redress by the political branches. As the Supreme Court recently explained, "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 428 (2011). Plaintiffs' claims fail at the threshold and should be dismissed.

A. Plaintiffs Allege Generalized Grievances, Not Particularized Harm

To have standing, a plaintiff must allege an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and inner quotation marks omitted). The injury must be peculiar to the plaintiff or a group of which he is a part and not one "shared in substantially equal measure by all or a large class of citizens." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (citation omitted). "[S]tanding to sue may not predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974).

The injuries that Plaintiffs allege are not particular to them or cognizable for purposes of Article III. Rather, they involve generalized phenomena on a global scale.[1] Indeed, in many instances, it is hard to see how the consequences of the

[1] In the Amended Complaint ("Complaint") Plaintiffs allege that climate change is contributing to increases in human physical and mental illnesses (Am. Compl. ¶ 59, ECF No. 16 ("Compl.")); that it is increasing the frequency of extreme weather events (*Id.* ¶ 64); that devastating hurricanes are becoming more commonplace (*Id.* ¶ 65); that it will result in extreme precipitation in Pennsylvania causing increased risk of flooding and storm surges (*Id.* ¶ 66); that it increases the potential for, and severity of, droughts, flash floods, and wildfires (*Id.* ¶¶ 68-69); that it increases wildfires, shifting precipitation patterns, higher temperatures, and drought

phenomena about which they complain will affect them at all. For example, given that Plaintiffs are a Philadelphia-headquartered environmental organization and two individuals who reside in the Philadelphia area (Compl. ¶¶ 8-10), it is hard to discern how Plaintiffs would be injured in any concrete, particularized way from phenomena such wildfires, drought, retreating glaciers, or ocean acidification that happen elsewhere.

Nor do the alleged injuries that focus on the Philadelphia region rise to the level of particularized harm to Plaintiffs.[2] To the extent the alleged climate-related injuries affect Plaintiffs, they do so no more than they affect any person anywhere in the Philadelphia region, the Commonwealth of Pennsylvania, or the world at large. For this reason, Courts have repeatedly held that injuries predicated on the

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conditions (*Id.* ¶ 70); that it causes more precipitation to fall as rain rather than snow in higher altitude and latitude regions (*Id.* ¶ 71); that it is causing mountain glaciers to melt (*Id.* ¶ 72); that it is projected to increase monetary costs associated with inland flooding (*Id.* ¶ 73); that it is causing sea levels to rise, which submerges low-lying lands, erodes beaches, converts wetlands to open water, exacerbates coastal flooding, and increases the salinity of estuaries and freshwater aquifers (*Id.* ¶ 77) and if left unabated will devastate the coast and inundate coastal regions (*Id.* ¶¶ 75-76); that it adversely affects agriculture (*Id.* ¶ 79); that it is projected to increase unsuitable work conditions resulting in lost labor hours (*Id.* ¶ 80); that it causes increased ocean acidity and places coral reefs at risk (*Id.* ¶¶ 81-82); and that it threatens the survival and wellbeing of plants, fish, wildlife, and biodiversity (*Id.* ¶ 83).

[2] Decl. of J. Minott ("Minott Decl."), ECF No. 28-1 ¶¶ 5, 11-25. The declarant alleges injuries based on flooding along the Schuykill River, higher ozone levels in Bucks and Philadelphia County, and elevated greenhouse gases in Pennsylvania.

general harms of climate change do not suffice for purposes of standing. *See, e.g.*, *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1141-47 (9th Cir. 2013); *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 475-79 (D.C. Cir. 2009); *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77 (D.D.C. 2012), *aff'd sub nom., Wildearth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013); *Amigos Bravos v U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118 (D.N.M. 2011); *Sierra Club v. U.S. Def. Energy Support Ctr.*, No. 01:11-cv-41, 2011 WL 3321296 (E.D. Va. July 29, 2011).

Plaintiffs insist that their injuries are particularized, despite being widely shared, but this contention finds no support in the referenced evidence or allegations. Plaintiffs direct the Court to paragraphs 8-10 and 66 of the Complaint and a declaration submitted by the Executive Director of Clean Air Council that discusses flooding, ozone levels, and greenhouse gases in the Philadelphia region or Commonwealth, Minott Decl., but those referenced sources merely state that Plaintiffs have an interest in the topic of climate change (Compl. ¶¶ 8, 10), that one of them suffers from "severe seasonal allergies" that are "impacted by the climate" (*Id.* ¶ 9), that another suffers from asthma "which is exacerbated by climate change" (*Id.* ¶ 10), and that climate change will result in extreme precipitation in Pennsylvania causing increased risk of flooding and storm surges (*Id.* ¶ 66).

None of the cases Plaintiffs cite suggests that alleged injuries so lacking in particularity are sufficient to support standing. Although Plaintiffs rely heavily on *Massachusetts v. EPA*, 549 U.S. 497 (2007), that decision illustrates why Plaintiffs lack standing in this case. In *Massachusetts*, the Supreme Court considered a challenge by states, local governments, and environmental organizations to the EPA's denial of a rulemaking petition asking it to regulate greenhouse gas emissions from new motor vehicles under the mobile source provisions of the Clean Air Act. EPA had denied the petition primarily because it then believed that greenhouse gases were not "air pollutants" within the meaning of the Clean Air Act. *Id.* at 513. In a 5-4 decision, the Court found that Massachusetts had standing to challenge the denial, based primarily on its loss of state-owned lands to rising sea levels caused by climate change. *Id.* at 522-23.

Two facts, critical to the Court's standing determination, distinguish *Massachusetts* from the present case. First, in *Massachusetts*, Congress had "authorized this type of challenge to EPA action" by statute. *Id.* at 516 (citing 42 U.S.C. § 7607(b)(1)). This "authorization [was] of critical importance to the standing inquiry," because as the Court recognized, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* (internal quotation omitted).

Congress exercised that power in the Clean Air Act by authorizing plaintiffs to challenge EPA's denial of a rulemaking petition. *Id.* at 517-18. A Congressional authorization of that nature is entirely absent here. Second, the State's alleged injury consisted of the loss of its sovereign lands. The Supreme Court found that it was "of considerable relevance that the party seeking review. . . [was] a sovereign State and not … a private individual." *Id.* at 518. But Plaintiffs here are individuals, not sovereigns. They are entitled to no special solicitude. And their failure to assert sufficiently particularized injuries requires dismissal of the case.

B. Plaintiffs' Alleged Injuries Cannot be Traced to Particularized Government Actions

Even if Plaintiffs' asserted injuries were sufficiently particularized, Plaintiffs have failed to plausibly allege that the challenged government policies caused those injuries, which is an independent requirement for standing. *See Lujan*, 504 U.S. at 560. While Plaintiffs would prefer to defer this causation inquiry, Mem. of Law in Supp. of Pls.' Resp. in Opp'n to Defs.' Mot. to Dismiss 9-10, ECF No. 28 ("Pls.' Resp."), this Court must determine at the outset whether Plaintiffs have pled injuries that can fairly be traced to Defendants' conduct. The answer to that question is no.

Plaintiffs complain generally of "rollbacks" to the programs, policies, and regulations of the prior administration, but fail to show how those rollbacks—or

any other government conduct—are likely to cause the harms they allege. Compl. ¶¶ 141, 143. Among their widely scattered objections, for example, Plaintiffs allege that the United States is repealing regulatory requirements that energy companies report methane gas emissions. See *id.* ¶ 141. But Plaintiffs cannot plausibly draw a causal link between these individual policy decisions and the harms that they allege. They do not and cannot allege, for example, what role any particular challenged rollback has or could play in the creation of the alleged climate injuries, which are caused by global CO_2 emissions and therefore depend on actions by private persons both within and outside the United States.

In *Washington Environmental Council*, the Ninth Circuit rejected a similar attempt to link alleged climate injuries to a state agency's inaction in reducing greenhouse gas emissions by regulating oil refineries. 732 F.3d 1131. The court found that "simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way and to some undefined degree) to their injuries, relies on an attenuated chain of conjecture insufficient to support standing." *Id.* at 1142-43 (citation and internal quotation marks omitted). It concluded that "[b]ecause a multitude of independent third parties are responsible for the changes contributing to Plaintiffs' injuries, the

causal chain is too tenuous to support standing." *Id.* at 1144. (citation omitted).[3] The same is true here.

Even if Plaintiffs could trace the alleged injuries solely to the conduct of the Defendants, they cannot manufacture standing by aggregating a series of diffuse federal actions. Article III requires that a plaintiff identify with particularity the specific government action or inaction that is the cause of the injury alleged, and that it establish standing for each challenged administrative action. As the Supreme Court has stated:

> If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.

Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996) (citing *Blum v. Yaretsky*, 457 U.S. 991, 998-99 (1982)); *see also Allen*, 468 U.S. at 759-60. Because Plaintiffs do not adequately allege a causal connection between any specific action taken by a

[3] *Massachusetts v. EPA* does not mandate a different result. There, the Supreme Court found that an "incremental step" may be sufficient to show causation in the context of the EPA's refusal to regulate motor vehicle emissions when it had a potential statutory mandate to do so under the Clean Air Act. *Massachusetts*, 549 U.S. at 523-24. The Court there did not however conclude, as Plaintiffs suggest, that there are relaxed traceability standards when the United States is defendant in a climate change suit. ECF No. 28 at 8. And even if it had, Plaintiffs here do not complain about an agency's failure to take an "incremental step" in the context of a specific statutory obligation.

Defendant and their generalized allegations of harm, their claims should be dismissed.

C. Plaintiffs' Alleged Injuries Cannot be Redressed by The Court

Plaintiffs also lack standing because the injuries they allege cannot be redressed by an order within the Court's authority to issue. For their claims to be redressable, Plaintiffs must trace their injury to a prohibited government action, the reversal of which will concretely address their injury. There is no standing where "the prospect of obtaining relief from the injury as a result of a favorable ruling [is] too speculative[.]" *Allen,* 468 U.S. at 752.

Plaintiffs attempt to satisfy the redressability requirement by contending generally that "[t]he power of the federal courts to grant equitable relief for constitutional violations has long been established." Pls.' Resp. 10 (quoting *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995)). The redressability inquiry, however, requires more than a mere recitation of the district courts' equitable powers: Plaintiffs must show that an order by this Court would successfully redress the harms alleged. That is not possible here because the remedy Plaintiffs seek would necessarily violate separation of powers principles.

For any climate-change remedy to have any practical effect, it would at least have to potentially lead to a significant global reduction in CO_2 emissions. Even if

the United States were to eliminate all emissions that it causes or could eliminate via conceivable forms of regulation, it would not necessarily move the needle on global climate change. Any relief that would move the needle on global climate-change policy would require new laws and policies, necessarily infringing on the constitutional powers of the legislative and executive branches.

Plaintiffs respond that the relief they seek is merely declaratory in nature, and would not require this Court to order Defendants to perform particular discretionary Executive acts or for Congress to enact additional authority. Pls.' Resp. 11-12. But a lawsuit seeking a declaration concerning the propriety of the alleged "rollbacks" of regulations, policies, and programs would only serve to embroil the Court in a political debate as to what constitutes a "rollback" and whether such action interfered with the climate in a manner contrary to sound policy. Perhaps for this reason, Plaintiffs also acknowledge that they would likely seek an order "enjoining Defendants' actions." *Id.* at 10. Such an order would necessarily infringe on the Executive and Legislative branches by curtailing administrative discretion under existing statutes or requiring that Congress enact new laws.

Finally, Plaintiffs suggest that the Supreme Court's decision in *Massachusetts v. EPA* supports a finding of redressability here, Pls.' Resp. 12, but

again that case is easily distinguished. In *Massachusetts*, the Clean Air Act's judicial review provision expressly authorized plaintiffs to challenge EPA's final action denying a petition for rulemaking. 549 U.S. at 516; 42 U.S.C. § 7607(b)(1). And the Supreme Court concluded that because EPA's refusal to regulate a major source of greenhouse gas emissions was premised on incorrect legal interpretations, Massachusetts could show that its alleged injury was traceable to the challenged agency action, and the Court could potentially redress the injury by remanding to EPA for further proceedings consistent with the statute. *Id.* at 524-25. Unlike in *Massachusetts*, Plaintiffs can point to no statutory authority that requires Defendants to act in a manner contrary to their actions, or that allows the Court to provide the relief they seek.

Because the Complaint does not identify specific government actions that the Court has authority to reverse and whose reversal would concretely address the injuries Plaintiffs allege, the claims are not redressable and must be dismissed.

II. Plaintiffs' Claims Fail To Satisfy the Requirements of the Administrative Procedure Act

Even if Plaintiffs could establish standing to bring this suit, their claims must be dismissed for failing to satisfy the requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

A. To the Extent Plaintiffs' Claims Are Justiciable, They Must Proceed Under the APA

To bring suit in federal court, a plaintiff must have a valid cause of action. *See, e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 279 (2001); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). Congress provided an express cause of action for plaintiffs seeking to bring claims against federal agencies, in the APA: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[4] 5 U.S.C. § 702. The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 396 (3d Cir. 2012) (citations omitted). Section 706 of the APA provides the standards by which a courts review agency action:

> [T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (B) contrary to *constitutional right, power, privilege, or immunity*[.]

[4] Other statutes, such as Section 307 of the Clean Air Act, may also provide relevant rights of action to challenge agency actions that regulate or otherwise relate to greenhouse gas emissions. But, as with the APA, Plaintiffs do not invoke any such statutory right of action.

5 U.S.C. § 706 (emphasis added). The APA thus contemplates, "in the absence of a clear expression of contrary congressional intent, that judicial review will be available for colorable constitutional claims . . . ." *Lincoln v. Vigil*, 508 U.S. 182, 189-195 (1993) (analyzing Fifth Amendment Due Process claim under the framework of the APA); *see also Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (finding Due Process Clause and Equal Protection claims can proceed under APA judicial review provisions).

Plaintiffs claim that the procedural mandates of the APA do not apply to this lawsuit. Pls.' Resp. 13. That is incorrect. Although a court has equitable authority "to enjoin unlawful executive action," that power is "subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015). Here, the APA provides such an "express … statutory limitation[]." *Id.* "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Id.* (quoting *INS v. Pangilinan*, 486 U.S. 875, 883 (1988)); s*ee also Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873) (a court of equity may not "create a remedy in violation of law, or even without the authority of law."). Given Congress' creation of a cause of action to bring a suit of the kind Plaintiffs have brought here, Plaintiffs have no colorable argument that the Constitution should be read to imply

a different cause of action. Where Congress has provided a remedy, it has shown its "intent to foreclose" any other relief. *Armstrong*, 135 S. Ct. at 1385. In other words, "the 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id.* (quoting *Alexander*, 532 U.S. at 290). Insofar as Plaintiffs challenge discrete agency action or inaction, their claims are accordingly governed by the APA.

Insofar as Plaintiffs seek to require each Defendant federal agency to examine or adopt broad programmatic policies separate from challenges to particular agency actions, the APA forecloses such a suit. See *infra*, Part II.B. Nor has Congress otherwise provided for such a suit, and the Constitution does not require it to do so. And to the extent Plaintiffs seek to have the Court marshal the resources and expertise of various agencies of the Executive Branch, outside of their statutory responsibilities, to assess the causes and effects of climate change and develop possible measures to address them, their request usurps the role the Constitution assigns to the President. Specifically, the Constitution grants the President the authority to "require the Opinion … of the principal Officer in each of the executive Departments," U.S. CONST. art. II, § 2, cl. 1, and to "recommend to" Congress for "Consideration such Measures as he shall judge necessary and expedient," U.S. CONST. art. II, § 3.

The admonition against fashioning implied rights of action for constitutional claims is rooted in separation of powers concerns. As Justice Scalia explained, the Supreme Court "has abandoned [the] power to invent 'implications' in the statutory field. There is even greater reason to abandon it in the constitutional field, since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). That is particularly true where "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration . . . ." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988); *see also Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *Bush v. Lucas*, 462 U.S. 367, 386-88 (1983) (no private right of action under the First Amendment where Congress provided administrative mechanisms that provided meaningful redress). Even if the remedial scheme created by Congress does not provide "complete relief," its existence indicates that Congress has balanced the competing interests and implicitly foreclosed any additional remedy. *Schweiker*, 487 U.S. at 425-29.

The cases that Plaintiffs cite do not support their assertion that they are exempt from the APA's procedures. In *Treasurer of New Jersey*, states sued the U.S. Department of the Treasury seeking payment of proceeds of United States

savings bonds. 684 F.3d 382. The narrow issue before the court was simply whether the states could invoke the waiver of sovereign immunity contained in the second sentence of 5 U.S.C. § 702, despite asserting claims that were not directed at final agency action within the meaning of 5 U.S.C. § 704. *Id.* at 397. The court explained that Section 702 contains both a private right of action (first sentence) and a waiver of sovereign immunity (second sentence), and observed that the latter has only three express prerequisites: that claims invoking the waiver seek non-monetary relief, in federal court, and against federal agencies. *Id.* at 399-400. The court therefore concluded that the plaintiffs could invoke the APA's waiver of sovereign immunity without satisfying the finality requirement in Section 704.

Nothing in *Treasurer of New Jersey* suggests that the APA's judicial review standards and procedures do not apply to Plaintiffs' claims. 684 F.3d 382. To the contrary, the court expressly recognize that the private right of action in the first sentence of Section 702—the only right of action available to Plaintiffs here—requires that litigants direct their claims against particular agency action that is final. *Id.* Indeed, in *Jaffee v. United States*, the Third Circuit specifically rejected the plaintiff's argument that claims involving a "deliberate violation of . . . constitutional rights" should not be subject to the APA. 592 F.2d 712, 717-718 (3d

Cir. 1979) (distinguishing "the suits in *Bivens* and *Butz* [which] were against individual federal officers and not against the United States").

In sum, to the extent that Plaintiffs' claims are justiciable, they fall with the sole purview of APA Section 706, which Congress has established as the vehicle to review Plaintiffs' constitutional claims concerning action or inaction by government agencies. Because Congress has provided a statutory remedy in Section 706 for constitutional claims seeking equitable relief, it "obviates the need to imply a constitutional remedy on the plaintiffs' behalf . . . ." *Mahone v. Waddle*, 564 F.2d 1018, 1024-25 (3d Cir. 1977); s*ee also Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 777 (D.C. Cir. 2002) (Freedom of Information Act's comprehensive scheme precludes a *Bivens*-type remedy); *Sinclair v. Hawke*, 314 F.3d 934, 940 (8th Cir. 2003) ("right to judicial review under the [APA] is sufficient to preclude a *Bivens* action.").

B. Plaintiffs' Claims Do Not Satisfy The Requirements of the APA

Because the APA provides the only vehicle for judicial review of plaintiffs' constitutional claims against federal agencies, Plaintiffs may proceed only under the requirements of the APA. Plaintiffs' claims, however, fail to satisfy the requirements of the APA in at least two respects.

First, plaintiffs improperly seek to challenge wholesale an alleged broad set of programs or policies reversing "regulations, practices, and research" related to climate change. Compl. ¶ 31. Such claims are prohibited by the Supreme Court's decisions in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 892 (1990) and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) ("The limitation to discrete agency action precludes . . . broad programmatic attack[s]" (quoting *Lujan*, 497 U.S. at 891)). A plaintiff must instead "direct its attack against some particular 'agency action' that causes it harm." *Lujan*, 497 U.S. at 891. Plaintiffs do not even dispute that they bring a programmatic challenge in the Complaint, and therefore their complaint should be dismissed on that basis.

Second, Plaintiffs' claims are not ripe. Because APA review is limited to "final agency action," 5 U.S.C. § 704, the Court has no authority to prohibit future agency actions that have not yet occurred, *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (agency action is not final and reviewable unless it marks the consummation of the agency's decision making process and one by which rights and obligations have been determined), or wade into "abstract disagreements over administrative policies" that have yet to formalized or finalized. *Abbott Labs. v. Gardner,* 387 U.S. 136, 148 (1967). Plaintiffs seek to have the Court declare policies that have yet to be implemented unlawful. Under the APA (and Article III

ripeness principles), this Court does not have authority to consider a challenge any "rollbacks" unless and until an agency actually undertakes the conduct that Plaintiffs complain of. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998).

Plaintiffs contend that their claims are ripe because they are seeking a declaratory judgment. Pls.' Resp. 16-19. However, Plaintiffs' reliance on the Declaratory Judgment Act to avoid the ripeness requirement is not well-founded because Plaintiffs' challenge to federal agency action is only viable, if at all, under the APA. The Declaratory Judgment Act does not independently supply jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). And it cannot be used as an end-run around the APA. *Williams v. Nat'l Sch. of Health Tech., Inc.*, 836 F. Supp. 273, 281 (E.D. Pa. 1993) ("The Declaratory Judgment Act cannot be used to circumvent the enforcement mechanism which Congress established."), *aff'd*, 37 F.3d 1491 (3d Cir. 1994).

III. Plaintiffs Fail To State a Claim for a Protected Constitutional Right

Plaintiffs allege a single Due Process claim in their Complaint, premised on the existence of a "fundamental right to a life-sustaining climate system." Compl. ¶ 175. Specifically, they contend that Defendants, with "deliberate indifference,"

acted to roll back programs that protected this putative constitutional right in violation of the Fifth and Ninth Amendments of the Constitution. *Id.* ¶¶ 184, 187, 191. Now, in their Response to the Motion to Dismiss, Plaintiffs assert that this constitutes not one, but three separate "forms of due process violations": (1) a violation of a fundamental right to a life-sustaining climate system, (2) a violation under the state-created danger doctrine, and (3) a violation of the rights to life, liberty, and property. Pls.' Resp. 20. As explained below, all three arguments fail, and all for essentially the same reason: Plaintiffs disagree with certain policies adopted by Defendants, but that disagreement does not come close to a violation of due process.

A. This Circuit's Rejection that There is a Fundamental Right Under the Due Process Clause to be Free From Pollution is Dispositive

Plaintiffs' First Cause of Action must be dismissed because there is no cognizable fundamental right to a life-sustaining climate system.[5] The Due

[5] In its Memorandum of Law in Support of its Motion to Dismiss, Defendants noted that Plaintiffs may not base their claims on the Ninth Amendment because that amendment has never been recognized as independently securing any constitutional right. Mem of Law in Supp. of Defs.' Mot. to Dismiss 15-16, ECF No. 18, ("Defs.' Mem."); *see* Compl. ¶ 171. In their Response, Plaintiffs do not refute this. To the extent the Complaint asserts a Ninth Amendment claim, that claim should be dismissed.

Process clause provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. While due process confers both procedural and substantive rights, *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846–47 (1992), there is no basis for the substantive rights plaintiffs assert here.

The Due Process clause requires heightened scrutiny of governmental actions that interfere with individual fundamental rights. Any substantive due process analysis begins with a "careful description" of the asserted right, because "[t]he doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). The party asserting the right has the burden of establishing it. *See Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989). The Supreme Court has identified fundamental rights under the Due Process clause in discreet and intimate areas such as the right to marry, to have children, to direct the upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015); Pls.' Resp. 29 n. 21. The common touchstone of these rights is that they are intrinsically personal and individual, not

aggregate, rights that are "deeply rooted in [the] Nation's history and tradition[,]" *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977), and "implicit in the concept of ordered liberty . . ." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

Plaintiffs cannot carry their burden here because neither the Supreme Court nor the Third Circuit (or any court of appeals) has ever recognized either a fundamental right to be protected from climate change or any sort of environmental fundamental right. To the contrary, the Third Circuit has dismissed arguments seeking to establish a constitutionally-protected right to specific environmental conditions: "It is established in this circuit and elsewhere that there is no constitutional right to a pollution-free environment." *Nat'l Sea Clammers Ass'n v. City of N. Y.*, 616 F.2d 1222, 1237-38 (3d Cir. 1980), *vacated on other grounds sub nom.*, *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981). Any rights that a plaintiff may have to desired environmental conditions are set forth in statutes and regulations, not in the Constitution. *See, e.g.*, *AEP*, 564 U.S at 427-28 (Congress has chosen EPA "as best suited to serve as primary regulator," and left it to the EPA to determine "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector[,]" after balancing other important national interests such as "our Nation's energy needs and the

possibility of economic disruption . . . ."); *see also* Pls.' Resp. 30 (identifying federal legislation through which Congress has provided for environmental protection, such as the Clean Water Act and the Clean Air Act).

Plaintiffs contend that the Third Circuit's decision in *National Sea Clammers* is "irrelevant and outdated," and suggest that the Supreme Court's decision in *Glucksberg* was "effectively overrule[d]" by *Obergefell*. 135 S. Ct. at 2621. Contrary to Plaintiffs' claims, binding precedent does not come with expiration dates, and neither case is irrelevant or overruled. The Third Circuit's holding in *National Sea Clammers*—that there is no constitutional right to a pollution-free environment—remains good law. 616 F.2d at 1238. And while Chief Justice Roberts in his dissent in *Obergefell* decried what he characterized as the majority opinion "jettison[ing] the 'careful' approach to implied fundamental rights taken by [the] Court in *Glucksberg*[,]" the *Obergefell* majority maintained that the "careful description" requirement in *Glucksberg* was appropriate given the novel right being asserted in that case (physician-assisted suicide). *Obergefell*, 135 S. Ct. at 2602, 2620-21. Because the right that Plaintiffs seek to establish is far more novel and sweeping than the physician-assisted suicide right that the plaintiffs in *Glucksberg* sought to establish, the careful approach is compelled here as well. In sum, the inquiry before this Court is whether the Due Process clause

provides a fundamental right in every individual to a particular climate and atmospheric condition for the entire Nation and indeed the entire world. The Third Circuit in *National Sea Clammers* has already made clear that it does not, and that decision is dispositive here.[6]

B. The State-Created Danger Doctrine Is Inapplicable

As a general matter, the "[Due Process] clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). Thus, "the Due Process Clause imposes no affirmative duty

[6] Tellingly, the only support Plaintiffs offer for their Due Process theory is the District of Oregon's recent decision in *Juliana v. United States*, where the court created a new fundamental right to "a climate system capable of sustaining human life . . . ." 217 F. Supp. 3d 1224, 1250 (D. Or. 2016). Notably, the court in that case observed that "[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it." *Id.* at 1262. This judicial philosophy cannot be reconciled with the Supreme Court's admonition that "the doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field [of substantive due process rights]." *Reno*, 507 U.S. 302 (citations omitted). Even if *National Sea Clammers* were not dispositive, there is no basis for adopting the approach of *Juliana* here.

to protect a citizen who is not in state custody." *Bright v. Westmoreland Cty.*, 443 F.3d 276, 281 (3d Cir. 2006).

Courts have recognized a limited exception to this general rule "when state authority is affirmatively employed in a manner that injures a citizen or renders him 'more vulnerable to injury from another source than he or she would have been in the absence of state intervention.'" *Id.* (quoting *Schieber v. City of Phila.*, 320 F.3d 409, 416 (3d Cir. 2003)). In such circumstances, a plaintiff can assert a violation of an interest protected by the Due Process clause if it can establish four elements:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) a state actor acted with a degree of culpability that shocks the conscience;
>
> (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
>
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Bright, 443 F.3d at 281 (internal citations and quotation marks omitted).

As a threshold matter, Plaintiffs cannot assert a Due Process claim under the state-created danger doctrine because the injuries they allege do not infringe on

any established Due Process right. Plaintiffs' arguments in this context are completely derivative of the claim that the United States infringed on their asserted fundamental right to a life-sustaining climate system. As discussed in Part II.A above, no such fundamental right exists and, accordingly, Plaintiffs' state-created danger claim necessarily fails.

In any event, Plaintiffs' claim would fail under the four-part test articulated in *Bright*. Unlike the cases they cite, Plaintiffs do not allege that they suffered a concrete physical injury; they rely instead on anticipated harms, such as the possibility that Plaintiffs' allergy or asthma symptoms will worsen due to climate change. Plaintiffs also cannot show that Defendants' actions "shock the conscience" merely because they disagree with environmental and energy policies of the democratically-elected Congress and Executive. Nor can Plaintiffs show that a relationship between the state and the Plaintiffs existed such that they were in particular a foreseeable victim of the Defendants' acts or members of a discreet class of persons subjected to the potential harm (as opposed to a member of the public in general).[7] Finally, Plaintiffs cannot identify any affirmative government

[7] Plaintiffs attempt to satisfy this third prong of the *Bright* test relying solely on the foreseeability of climate-based impacts, Pls.' Resp. 24, but the law requires that they also demonstrate a special relationship with the state, and here there is none. *Bright*, 443 F.3d at 281.

action that could give rise to a claim under this doctrine because no actual injury has yet occurred, and no recognized Due Process right has been infringed upon.

In sum, all of the cases awarding relief under a state-created danger theory involved a clear and present danger of imminent physical harm to a specific plaintiff with whom the government had a distinct relationship, an overt government act that proximately caused the dangerous situation, deliberate indifference by the government to the particular plaintiff's safety, and subsequent physical harm or loss of life. None of those circumstances are present here. And insofar as Plaintiffs ask this Court to radically extend the state-created danger doctrine to cover broad grievances involving federal policy-making affecting the public at large, the invitation should be declined. Under Plaintiffs' reasoning, the Due Process clause would be violated anytime the United States takes an action that in any way decreases a person's level of security. The Court should not adopt Plaintiffs' position, as it would have no boundaries. Every foreign-policy decision by the President, for example, has the potential to increase resentment toward the United States and thus endanger its citizens at home and abroad. But such decisions do not, and should not, provide the basis for claiming a violation of substantive due process rights. For the same reasons, the contributions to climate

change alleged here by way of policy changes, cannot serve as a basis for a constitutional claim against the Defendant agencies.

C. Plaintiffs Have Not Alleged the Deprivation of a Liberty or Property Interest

Though not fully articulated in the Complaint, in their Response, Plaintiffs claim to have also brought a "straight" substantive due process claim based on "a constitutional liberty interest in personal bodily integrity" and a "deprivation of property due to flooding resulting from the United States' increased contributions to climate change . . . ." Pls.' Resp. 26-27. Because these substantive due process claims were not alleged in the Complaint, they should be dismissed on that basis alone.

Even if the claims were properly before the Court, they should be dismissed for failure to state a claim upon which relief can be granted. Plaintiffs make no effort to describe the alleged infringement on their "liberty interest in personal bodily integrity." And while they attempt to substantiate their property right claim, those arguments fail because they rely on irrelevant jurisprudence involving the Just Compensation clause. Specifically, Plaintiffs rely on the Supreme Court's decision in *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23, 27 (2012), and the recently reversed Court of Federal Claims' decision in *St. Bernard Parish Government v. United States*, 121 Fed. Cl. 687 (2015), *rev'd*, 2018 WL

1882913 (Fed. Cir. Apr. 20, 2018).[8] But neither case involved a substantive Due Process claim. Instead, both involved claims alleging that actual flooding of the plaintiffs' land amounted to the taking of a flowage easement under the Fifth Amendment. A necessary precondition to bringing a takings claim is that "the government physically takes possession of an interest in property for some public purpose," in which case it has "a categorical duty to compensate the former owner" for what was taken. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citing *United States v. Peewee Coal Co.*, 341 U.S. 114, 115 (1951)). Such claims can only be brought in the Court of Federal Claims under the Tucker Act. 28 U.S.C § 1491(a).

Plaintiffs have not and cannot assert a takings claim in this case because no property interest has been taken from them. Instead, they merely contend that "climate change is akin to a taking resulting from government-caused flooding . . . ." Pls.' Resp. 27. But Plaintiffs do not even allege that they own property within a flood plain or otherwise adjacent to a water-way, much less that they have

[8] Plaintiffs rely on *Vargas v. City of Philadelphia*, 783 F.3d 962 (3d Cir. 2015) in support of their so-called "straight" substantive due process claim. Pls.' Resp. 26. But *Vargas*, like the cases discussed in the previous section, is a claim under 42 U.S.C. § 1983 that sought money damages under the state-created danger doctrine based on police officers allegedly preventing plaintiffs from driving to the hospital during a fatal asthma attack. 783 F.3d at 967. It has no relevance here.

experienced flooding, due to the actions of the United States, or at all. No court has endorsed their theory that the *potential* for increased rainfall due to climate change, the *potential* for increased flooding of waterways, and the resulting *potential* of damage to property that Plaintiffs may own (but do not allege that they own) provides a basis for asserting a Fifth Amendment claim. In sum, takings jurisprudence provides no support for Plaintiffs' arguments, even by analogy.

Because Plaintiffs never alleged a substantive due process claim based on life, liberty or property interests in the Complaint, and because they failed to substantiate such a claim in their Response, the Court should reject Plaintiffs' efforts to assert a due process claim based on liberty or property interests.

IV. Plaintiffs Cannot Assert a "Public Trust" Cause of Action

Whatever its contours or origins, the public trust doctrine does not provide a cause of action allowing a plaintiff to sue the federal government for a violation of its asserted trust obligations. *See, e.g., Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012) (rejecting plaintiffs' contention that the public trust doctrine arises under federal law), *aff'd sub nom., Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014). "In this country the public trust doctrine has developed almost exclusively as a matter of state law" and the "the doctrine has functioned as a constraint on *states'* ability to alienate public trust lands." *District of Columbia v.*

Air Fla., Inc., 750 F.2d 1077, 1082 (D.C. Cir. 1984) (emphasis added). Both the Supreme Court and the Third Circuit have confirmed this understanding of the doctrine.

In *PPL Montana, LLC v. Montana*, the State argued that if the Court denied it title to riverbeds under the equal footing doctrine, it would "undermine the public trust doctrine" by interfering with the state's rights over navigable waters within its borders. 565 U.S. 576, 603 (2012). It asserted that the public trust doctrine is grounded in the Constitution as part of the equal footing doctrine, Brief for Respondent at 53, *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012) (No. 10-218), and therefore binding as a matter of federal law. *Id.* at 25 & n.11. The Supreme Court rejected Montana's position and explained that, "[w]hile equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the Constitution" but "remains a matter of state law." 565 U.S. at 603-04. That conclusion—that the public trust doctrine does not apply as a matter of federal law and therefore could not support Montana's claim to title—forecloses the possibility that Plaintiffs can assert a federal public trust claim against the United States. The Third Circuit is in accord. *See W. Indian Co. v. Gov't of Virgin Islands*, 844 F.2d 1007, 1019 (3d Cir. 1988) ("the common law public trust doctrine varies from state

to state and has been altered by statute and in a number of state constitutions"). And, as explained in Defendants' opening brief, Defs.' Mem. at 16-18, the courts in the D.C. Circuit have recently and resoundingly rejected public trust claims against federal agencies identical to the claims asserted by Plaintiffs here. *See Alec L*, 863 F. Supp. 2d 11.

In response, Plaintiffs cite *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), for the proposition that the United States is charged with a duty to protect asserted public trust resources from "unlawful appropriation" and to refrain from "substantial impairment" of such resources. Pls.' Resp. 32 (quoting *Ill. Cent.*, 146 U.S. at 435). But as the Supreme Court has stated, *Illinois Central* was "necessarily a statement of Illinois law," not federal law. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997) (quoting *Appleby v. City of N.Y.*, 271 U.S. 364, 395 (1926)). It therefore provides no support for Plaintiffs' contentions here.

The holdings in these cases are consistent with the Property Clause of the Constitution, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]" U.S. CONST. art. IV, § 3, cl. 2. In *Kleppe v. New Mexico*, the Supreme Court held that "[t]he power over the public land thus entrusted to Congress is without limitations." 426 U.S. 529, 539 (1976) (quoting

United States v. City & Cty. of S.F., 310 U.S. 16, 29 (1940)); *see also Alabama v. Texas*, 347 U.S. 272, 273 (1954). Because the Constitution makes plenary Congress's power over federal property, that power is not subject to, or in any way constrained by, any common law public trust doctrine.[9]

Finally, even if there were an established federal public trust doctrine, a claim on that basis would still be non-justiciable, both for lack of a private right of action and because any such common law action has been displaced by federal pollution laws. No case other than the district court's decision in *Juliana*, 217 F. Supp. 3d at 1261, has recognized a right of action against the United States for the enforcement of its alleged public trust duties, and for good reason. In concluding that the Fifth Amendment provides a right of action for public trust claims against

[9] Faced with this same argument, the district court in *Juliana* concluded that the United States had misinterpreted *Kleppe v. New Mexico*. 217 F. Supp. 3d at 1259. Despite conceding that Congress's "power over public lands" is "without limitations[,]," that court emphasized that "the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved[.]" *Id.* (quoting *Kleppe*, 426 U.S. at 539). The court concluded on that basis that *Kleppe* did not necessarily foreclose the common law public trust claims before it. *Id.* But as the Tenth Circuit has recently explained, the uncertainty to which the *Kleppe* Court was referring "appears to concern not power over federal land but power over property outside federal land." *See United States v. Bd. of Cty. Comm'rs of Cty. of Otero*, 843 F.3d 1208, 1212-13 (10th Cir. 2016), *cert. denied*, 138 S. Ct. 84 (2017). Contrary to the *Juliana* court's reading of the case, nothing in *Kleppe* supports the view that Congress's power over its own property could be limited by court-fashioned common law. *Id.*

the United States, the district court in *Juliana* ignored established law that federal courts may not find implied rights of action where Congress has already provided a statutory vehicle for redress—in this case, the APA—as explained in more detail in Part II above.

And any cause of action against the federal government under the public trust doctrine for climate-related injuries would necessarily be displaced by federal statutes addressing the relevant natural resource, such as the Clean Air Act (for atmospheric resources), the Clean Water Act (for water resources), the Federal Land Policy and Management Act (for Public Lands), the National Forest Management Act (for forests), and the Mineral Leasing Act (for oil, gas, and coal). *See AEP*, 564 U.S. at 423-24 ("[T]he Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."). For all of these reasons, Plaintiffs' public trust claim must be dismissed.

CONCLUSION

This Court should dismiss the Complaint for a lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Dated: May 3, 2018

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

/s/ Sean C. Duffy
MARISSA A. PIROPATO (MA Bar No. 651630)
SEAN C. DUFFY (NY Bar No. 4103131)
Trial Attorneys
GUILLERMO A. MONTERO (MA Bar No. 660903)
Assistant Chief
Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tel | (202) 305-0470
Fax | (203) 305-0506

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I, Marissa Piropato, hereby certify that, on May 3, 2018, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

Dated: May 3, 2018

/s/ Sean C .Duffy
Sean C. Duffy

Attorney for Federal Defendants