



January 5, 2014

The Honorable Jeh Johnson
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The Honorable Daniel Tangherlini
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Sent via Certified Mail Return Receipt Requested, Electronic Mail, and Facsimile

Re: 60-Day Notice of Intent to Sue for Violations of the Consultation Requirements of Section 7 of the Endangered Species Act in Connection with the Proposed Sale of Plum Island, NY

Dear Secretary Johnson and Administrator Tangherlini:

Pursuant to § 1540(g)(1) and § 1536 of the Endangered Species Act, 16 U.S.C. § 1531 et seq. (“ESA” or “the Act”), Connecticut Fund for the Environment, its permanent, regional program Save the Sound (“Save the Sound”) and Soundkeeper, Inc. (“Soundkeeper”) hereby provide notice that your agencies are in violation of section 7(a)(2) of the ESA by failing to sufficiently consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) before issuing the Plum Island, NY Final Environmental Impact Statement (“FEIS”) on June 25, 2013 and the associated Record of Decision (“ROD”) on August 29, 2013. These documents recommend the sale of Plum Island with no restrictions on development and as such may adversely affect a number of listed species. Unless these violations are corrected within the next 60 days Save the Sound and Soundkeeper intend to file a civil action against the General Services Administration (“GSA”) and the Department of Homeland Security (“DHS”) in the appropriate judicial forum to enforce the requirements of the ESA and implementing regulations.

The failure to conduct and finalize a section 7 consultation resulted in a faulty FEIS alternatives analysis. One alternative, which a section 7 review may have uncovered, is a restricted sale of

Plum Island based on existing threatened or endangered species and critical habitat. By failing to consider such an alternative, the FEIS and subsequent final action contained in the ROD—which relies on the conclusions of the FEIS—are fundamentally flawed.

I. PARTIES

Save the Sound is a non-profit, member-supported organization incorporated under the laws of Connecticut with a principal place of business at 142 Temple Street, New Haven, CT, with an additional office at 545 Tompkins Ave., Mamaroneck, NY. Save the Sound works on behalf of its 3,525 households, or approximately 5,287 members, to protect and improve the land, air, and water of Connecticut, New York and Long Island Sound. It and its members have been actively involved in providing public input during the Plum Island, New York (“Plum Island” or “island”) Scoping Process, the Draft Environmental Impact Statement (“DEIS”) and the FEIS. Save the Sound’s members live, work, and/or recreate in the states, communities, and waters near and around Plum Island.

Soundkeeper is a non-profit, member-supported organization incorporated under the laws of Connecticut with a principal place of business at 7 Edgewater Place, Norwalk, CT. Soundkeeper works on behalf of its 1,500 members to protect and enhance the biological, physical, and chemical integrity of Long Island Sound and its watershed. Soundkeeper’s members live, work, and/or recreate in the states, communities, and waters near and around Plum Island.

II. FACTUAL HISTORY

Plum Island is an extraordinary property: a federally-owned, de-facto wildlife sanctuary. The island is 840 acres, but high security measures¹ have protected the vast majority—approximately 634 acres—from extensive development, allowing the property to remain in a highly natural state. It is located off Orient Point, New York, within the narrow section of eastern Long Island Sound that separates New York from Connecticut.

A. Critical Habitats

Plum Island contains a unique mix of habitats and wildlife species, some of which are considered threatened or endangered by the United States Fish and Wildlife Service (“FWS”),² National Marine Fisheries Service (“NMFS”)³ (jointly “the Services”) and the New York Department of

¹Over the last 115 years, a portion of the island has housed a military installation, served as an aid to navigation, and functioned as a foreign animal disease research facility.

² Letter from David Stilwell, Field Supervisor, *United States Fish and Wildlife Service*, to Phil Youngberg, Environmental Manager, *United States General Services Administration* (June 16, 2010); Letter from David Stilwell, Field Supervisor, *United States Fish and Wildlife Service*, to John Kelly, Director of Real Property Utilization and Disposal, *United States General Services Administration* (October 19, 2010).

³ Letter from Mary Colligan, Assistant Regional Administrator for Protected Resources, *National Marine Fisheries Service*, to Phil Youngberg, Environmental Manager, *United States General Services Administration* (April 12, 2010), *United States General Service Administration and Department of Homeland Security, Final Environmental Impact Statement for the Sale of Plum*

Environmental Conservation (“NYDEC”).⁴ Four of the “significant natural communities”⁵ include 63 acres of maritime dunes;⁶ 45 acres of maritime beach, known to support three rare species including Seabeach Knotweed, Piping Plover, and Hairy-necked Tiger Beetle;⁷ 44 acres of Maritime bluff;⁸ and 34 acres of marine rocky intertidal.⁹ Additionally there are 197 acres of relatively undisturbed upland forests and 96 acres of freshwater wetlands.¹⁰ This mix of varied habitats forms a community mosaic that sustains wildlife throughout the island, including species like the federally endangered Roseate Tern and the federally threatened Piping Plover.¹¹

Additionally, the National Oceanic and Atmospheric Administration (“NOAA”), through its NMFS program, has designated Long Island Sound—which surrounds the northern, eastern and southern shores of Plum Island—as “Essential Fish Habitat”¹² for at least 45 species.¹³ The Magnuson-Stevens Act foresaw that “a national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the Nation’s fishery resources.”¹⁴

While not vital to the ESA claim, Plum Island has numerous other critical habitat designations that demonstrate its importance to species that rely on the expertise of FWS and NMFS to ensure their protection. It has been included as part of a federally recognized Long Island Stewardship System¹⁵ for its significant ecological value. The purpose of that Act was “to establish the Long

Island, New York C99-C101 (June 25, 2013), available at

http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

⁴ Letter from Sherri Aicher, Environmental Analyst, *New York State Department of Environmental Conservation*, to Phil Youngberg, Environmental Manager, *United States General Services Administration* 3-4 (April 30, 2010); MATTHEW SCHLESIGNER, AISSA FELDMANN AND STEPHEN YOUNG, NEW YORK NATURAL HERITAGE PROGRAM, BIODIVERSITY AND ECOLOGICAL POTENTIAL OF PLUM ISLAND, NEW YORK (May 2012).

⁵ Letter from Georgia Basso, Co-chair, *Long Island Sound Study Stewardship Work Group* and David Kozak, Co-chair, *Long Island Sound Study Stewardship Work Group*, to Nancy Seligson, Co-chair, *New York Citizens Advisory Committee* and Curt Johnson Co-chair, *New York Citizens Advisory Committee* 5 (September 25, 2012); MATTHEW SCHLESIGNER, AISSA FELDMANN AND STEPHEN YOUNG, NEW YORK NATURAL HERITAGE PROGRAM, BIODIVERSITY AND ECOLOGICAL POTENTIAL OF PLUM ISLAND, NEW YORK (May 2012).

⁶ Letter from Georgia Basso, Co-chair, *Long Island Sound Study Stewardship Work Group* and David Kozak, Co-chair, *Long Island Sound Study Stewardship Work Group*, to Nancy Seligson, Co-chair, *New York Citizens Advisory Committee* and Curt Johnson Co-chair, *New York Citizens Advisory Committee* (September 25, 2012).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island, New York* 3-3 (June 25, 2013), available at

http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

¹¹ MATTHEW SCHLESIGNER, AISSA FELDMANN AND STEPHEN YOUNG, NEW YORK NATURAL HERITAGE PROGRAM, BIODIVERSITY AND ECOLOGICAL POTENTIAL OF PLUM ISLAND, NEW YORK (May 2012).

¹² 16 U.S.C. § 1801 et seq. (1976); 50 C.F.R § 600.

¹³ Summary of Essential Fish Habitat (EFH) Designations, Long Island Sound, New York, available at

<http://www.greateratlantic.fisheries.noaa.gov/hcd/ny4.html>; See Appendix J Essential Fish Habitat (EFH) Assessment, Final Environmental Impact Statement (FEIS) on the Broadwater LNG Project J-19 – J-21 available at http://www.ct.gov/csc/lib/csc/broadwater/bfeis_appx_j_-_fish_hab.pdf.

¹⁴ 16 U.S.C. § 1801(a)(6) (1976).

¹⁵ See Long Island Sound Stewardship Act, Pub. L. No. 109–359, 120 Stat. 2049 (2006); see also Long Island Sound Study, *Long Island Sound Stewardship Initiative Proposed List of Inaugural Stewardship Areas—Public Comment Summary & Response*, (2006) available at http://longislandsoundstudy.net/wp-content/uploads/2010/02/stewardship_public06.pdf; Letter from Nancy

Island Sound Stewardship Initiative to identify, protect, and enhance upland sites within the Long Island Sound ecosystem with significant ecological, educational, open space, public access, or recreational value through a bi-state network of sites best exemplifying these values.”¹⁶ In 1990 Congress recognized the ecological and economic value of the Northeastern coastal area’s natural resources; it appropriated \$150,000 for FWS to identify habitats and areas of natural diversity in southern New England that need protection. FWS designated Plum Island as one of these *Northeast Coastal Areas Study Significant Coastal Habitat* sites.¹⁷ It has been recognized as an important coastal resource pursuant to the Coastal Barrier Resources Act. 16 U.S.C. 3501 *et seq.*¹⁸ The Congressional purpose of that Act is to “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 along the Atlantic and Gulf coasts and along the shore areas of the Great Lakes by restricting future Federal expenditures and financial assistance which have the effect of encouraging development of coastal barriers . . . and by considering the means and measures by which the long-term conservation of these fish, wildlife, and other natural resources may be achieved.” 16 U.S.C. 3501 *et seq.* In addition to being part of the Long Island Sound National Estuary Program, it is included in the Peconic National Estuary Program, which has identified Plum Island as an area where sea turtles and marine mammals frequent.¹⁹ EPA administers the National Estuary Program, which was established under the Clean Water Act’s Section 320 to protect and restore the water quality and ecological integrity of estuaries of national significance.²⁰

B. *Affected Species*

1. Federally Endangered or Threatened Species

GSA identified three listed plants²¹ (Sandplain Gerardia (Endangered), Seabeach Amaranth (Threatened), and Small Whorled Pogonia (Threatened)) and two avian species (Roseate Tern (Endangered) and Piping Plover (Threatened))²² in the FEIS “Notice of Threatened or Endangered Species.”²³ Over the decades, Piping Plovers have attempted to breed on the “east-

Seligson, Co-chair, *New York Citizens Advisory Committee* and Curt Johnson Co-chair, *New York Citizens Advisory Committee*, to Phil Youngberg, Environmental Manager, *United States General Services Administration* 1 (October 15, 2012).

¹⁶ Long Island Sound Stewardship Act, Pub. L. No. 109–359, 120 Stat. 2049 (2006).

¹⁷ U.S. FISH AND WILDLIFE SERVICE, FINAL REPORT NORTHEAST COASTAL AREAS STUDY: SIGNIFICANT COASTAL HABITATS OF SOUTHERN NEW ENGLAND AND PORTIONS OF LONG ISLAND, NEW YORK (August 1991). See site 7 (NY), Orient Point - Islands Complex.

¹⁸ John H. Chafee Coastal Barrier Resources System NY-24 *available at* http://www.fws.gov/cbra/Maps/Locator/NY_Long_Island.pdf.

¹⁹ Peconic Estuary Program, *Comprehensive Conservation Management Plan* 4-58 (November 2001).

²⁰ 33 U.S.C. § 1330 (1987).

²¹ United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island, New York* F-1 (June 25, 2013), *available at* http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

²² *Id.*

²³ *Id.*

facing portion of the southern shore of Plum Island”²⁴ and nesting pairs have been seen occasionally.²⁵ Roseate Terns use Plum Island’s shores for foraging and resting habitat, and are easily seen in the summer months.²⁶ Plum Gut—the stretch of water between the island and Orient Point—is a nutrient-rich and important foraging area for this species.²⁷

GSA’s “Notice of Threatened or Endangered Marine Mammals”²⁸ states that “there are a number of federally listed or endangered species likely to be present in the waters surrounding the Property.”²⁹ These include Atlantic Hawksbill Sea Turtle, Atlantic (Kemp’s) Ridley Sea Turtle, Green Sea Turtle, Leatherback Sea Turtle and Loggerhead Sea Turtle,³⁰ and the Atlantic Sturgeon (candidate species).³¹

These species are entitled to the special protections provided by the Endangered Species Act, including protection from harassment or harm and interference with vital breeding, feeding and behavioral activities. Additionally, section 7 requires that federal agencies must ensure that any action authorized, funded, or carried out by them is not likely to jeopardize the continued existence of any protected species or result in the adverse modification of any designated critical habitat.

2. Other Species

There are numerous other species and habitats that could be affected by the sale absent conservation restrictions on development. The importance of Plum Island as a place of distinctive habitats is demonstrated through its estimated 14-20 rare plants³² and 217 species of birds including 57 New York State Species of Greatest Conservation Need.³³ These include but are not limited to Osprey, American Oystercatcher,³⁴ Northern Harrier,³⁵ and Common Eider.³⁶

²⁴ MATTHEW SCHLESIGNER, AISSA FELDMANN AND STEPHEN YOUNG, NEW YORK NATURAL HERITAGE PROGRAM, BIODIVERSITY AND ECOLOGICAL POTENTIAL OF PLUM ISLAND, NEW YORK 22 (May 2012).

²⁵ *Id.*

²⁶ Please note there is at least one historical reference of a former tern colony on the island. MATTHEW SCHLESIGNER, AISSA FELDMANN AND STEPHEN YOUNG, NEW YORK NATURAL HERITAGE PROGRAM, BIODIVERSITY AND ECOLOGICAL POTENTIAL OF PLUM ISLAND, NEW YORK 22 (May 2012).

²⁷ *Id.*; See also NEW YORK STATE, SIGNIFICANT COASTAL FISH AND WILDLIFE HABITAT NARRATIVE (March 1987 as modified in October 2005) which lists Plum Gut as a New York State designated Significant Fish and Wildlife Habitat.

²⁸ United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island*, New York F-1 (June 25, 2013), available at

http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

²⁹ *Id.*

³⁰ MATTHEW SCHLESIGNER, AISSA FELDMANN AND STEPHEN YOUNG, NEW YORK NATURAL HERITAGE PROGRAM, BIODIVERSITY AND ECOLOGICAL POTENTIAL OF PLUM ISLAND, NEW YORK 26 (May 2012).

³¹ United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island*, New York F-2 (June 25, 2013), available at

http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

³² MATTHEW SCHLESIGNER, AISSA FELDMANN AND STEPHEN YOUNG, NEW YORK NATURAL HERITAGE PROGRAM, BIODIVERSITY AND ECOLOGICAL POTENTIAL OF PLUM ISLAND, NEW YORK 36 (May 2012).

³³ *Id.* at 19; E-mail from North-Fork-Birds@googlegroups.com, to North-Fork-Birds@googlegroups.com, RE: [NFBirds Report 2454] Plum Island Survey 12/12/14 (December 14, 2014, 11:41pm EST) (on file with author).

³⁴ MATTHEW SCHLESIGNER, AISSA FELDMANN AND STEPHEN YOUNG, NEW YORK NATURAL HERITAGE PROGRAM, BIODIVERSITY AND ECOLOGICAL POTENTIAL OF PLUM ISLAND, NEW YORK 22 (May 2012).

³⁵ *Id.* at 23.

Furthermore many thousand migrating birds use the island for stopover habitat within the Atlantic Flyway.³⁷ Audubon NY has stated “With its mixture of rocky shoreline, sand beaches, wetlands, and various upland shrub, grassland, and forest habitats, Plum Island stands out as a critically important migratory bird stopover site on Long Island Sound. In 1997 Plum Island was recognized as part of the Orient Point to Plum Island Important Bird Area (“IBA”) because it supports a great diversity of at-risk species including large concentrations of waterbirds.”³⁸ Lastly, the island’s shore-area is also a significant seal haul-out area for southern New England.³⁹

C. Critical Procedural Facts

On September 30, 2008, the U.S. Congress passed Public Law 110-329, the “Consolidated Security, Disaster Assistance and Continuing Appropriations Act, 2009,” (“Appropriations Act”). Section 540 of the Appropriations Act states that:

Notwithstanding any other provision of law, should the Secretary of Homeland Security determine that the National Bio and Agro-defense Facility be located at a site other than Plum Island, New York, the Secretary shall liquidate the Plum Island asset by directing the Administrator of General Services to sell through public sale all real and related personal property and transportation assets which support Plum Island operations, subject to such terms and conditions as necessary to protect government interests and meet program requirements. (emphasis added).

In January 2009, and in keeping with the language of the act, the DHS made a determination to construct and operate a new National Bio and Agro-Defense Facility (“NBAF”) in Manhattan, Kansas, and to move the current operations from the Plum Island Animal Disease Center (“PIADC”) to the NBAF.⁴⁰ This determination triggered the Plum Island sale provisions of the Appropriations Act.⁴¹ That potential sale of Plum Island by GSA and DHS was an agency action requiring National Environmental Policy Act (“NEPA”) review.⁴² Pursuant to NEPA, Public Scoping meetings were held on May 19, 2010 and May 20, 2010.⁴³ The DEIS was issued by the agencies on July 20, 2012.⁴⁴ The FEIS was issued by the agencies on June 25, 2013.⁴⁵ The FEIS

³⁶ *Id.* at 50.

³⁷ *Id.* at 25.

³⁸ Letter from Carolyn Spilman, Long Island Bird Conservation Coordinator, *Audubon NY*, to Phil Youngberg, Environmental Manager *United States General Services Administration* (June 2, 2010).

³⁹ United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island, New York* 3-62 (June 25, 2013), available at http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

⁴⁰ Record of Decision, National Bio and Agro-Defense Facility Environmental Impact Statement (January 16, 2009).

⁴¹ Consolidated Security, Disaster Assistance and Continuing Appropriations Act, Pub. L. No. 110-329 § 540, 122 Stat. 3682 (2009).

⁴² United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island, New York* 1-6 (June 25, 2013), available at http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

⁴³ *Id.* at 1-7.

⁴⁴ *Id.* at 1-8.

included a section entitled “Reuse Option 2: Development.”⁴⁶ GSA indicated that this Reuse Option 2 would likely have moderate impacts to Plum Island and Orient Point land use and visual resources⁴⁷ and minor to moderate impact to Plum Island and Orient Point biological resources.⁴⁸

In the years between the Scoping document and the FEIS, FWS and the Connecticut Attorney General highlighted the fact that protecting wildlife habitat and threatened and endangered species pursuant to the ESA was in fact a “government interest” that required “terms and conditions” on the sale.⁴⁹ EPA issued a similar comment recommending that “the EIS include as an alternative the permanent protection of the entire undeveloped portion of the property...”⁵⁰ continuing that “the future of Plum Island must be decided with due consideration to the full spectrum of public interest, including existing federal and state conservation policies and interests...”⁵¹ Throughout the EIS process, Save the Sound, and many other conservation organizations, repeatedly commented that GSA/DHS must consider a conservation sale alternative—one that protects important habitats and species but allows for the sale and use of the previously developed portions of the island.

On August 29, 2013, GSA and DHS issued the Record of Decision (ROD), which “communicates the Joint Lead Agencies' decision to implement the Proposed Action which is the administrative act of transferring ownership of the Property out of federal ownership via public sale...”⁵² FWS submitted written comments highlighting concern for the critical habitats and species of Plum Island at least twice during this process.⁵³ At least once during this process NMFS provided comment highlighting that a Section 7 consultation would be necessary “if GSA determines that the proposed sale may affect listed species.”⁵⁴ Notwithstanding these comments

⁴⁵ United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island, New York* (June 25, 2013), available at http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

⁴⁶ *Id.* at 2-8.

⁴⁷ *Id.* at 2-11.

⁴⁸ *Id.* at 2-14.

⁴⁹ Letter from David Stilwell, Field Supervisor, *United States Fish and Wildlife Service*, to John Kelly, Director of Real Property Utilization and Disposal, *United States General Services Administration* (October 19, 2010); see Comments from George Jepsen, Attorney General, *State of Connecticut* 9 (October 26, 2010); United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island, New York C-142* (June 25, 2013), available at http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

⁴⁹ 16 U.S.C. § 1531(b) (1973).

⁵⁰ Letter from Judith Enck, *Regional Administrator EPA Region 2* and H. Curtis Spalding, *Regional Administrator EPA New England*, to Phil Youngberg, Environmental Manager, *United States General Services Administration* (June 2, 2010).

⁵¹ *Id.*

⁵² Record of Decision, Public Sale of Plum Island, NY 1 (August, 29, 2013).

⁵³ Letter from David Stilwell, Field Supervisor, *United States Fish and Wildlife Service*, to Phil Youngberg, Environmental Manager, *United States General Services Administration* (June 16, 2010); Letter from David Stilwell, Field Supervisor, *United States Fish and Wildlife Service*, to John Kelly, Director of Real Property Utilization and Disposal, *United States General Services Administration* (October 19, 2010).

⁵⁴ United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island, New York C-101* (June 25, 2013), available at http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

from FWS and NMFS neither GSA nor DHS has initiated formal consultation as required by 50 CFR 402.14.

III. ENDANGERED SPECIES ACT

In 1973, Congress made clear its desire to protect and conserve the country's at-risk species and habitats: "The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section."⁵⁵ The power to administer and enforce the Act's requirements has been delegated to the FWS and NMFS,⁵⁶ but it is the responsibility of each federal agency "to seek to conserve endangered species and threatened species and...utilize their authorities in furtherance of the purposes of this chapter."⁵⁷ To ensure agencies have the best information when carrying out responsibilities, Congress set forth that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary...."⁵⁸ Therefore an agency must conduct a Section 7 consult when 1) there is an "agency action" that 2) may affect a listed species or result in the "destruction or adverse modification" of their habitat.⁵⁹

This consultation is not merely procedural; it ensures that the consulting agency is able to fulfill the Act's substantive requirement⁶⁰: that the agency's action not jeopardize a listed species in the action area.⁶¹ Lastly, the agency cannot make "any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures..." until the biological opinion is issued.⁶²

IV. ESA VIOLATION: GSA/DHS FAILED TO COMPLETE A SECTION 7 CONSULTATION WITH FWS AND NMFS PRIOR TO ISSUING THE FEIS RECOMMENDATION AND PLUM ISLAND RECORD OF DECISION.

⁵⁵ 16 U.S.C. § 1531(b) (1973).

⁵⁶ 50 C.F.R. § 402.01(b).

⁵⁷ 16 U.S.C. §1531(c)(1).

⁵⁸ 16 U.S.C. §1536(a)(2) (1973).

⁵⁹ 50 C.F.R. § 402.14.

⁶⁰ "The procedural requirements are designed to ensure compliance with the substantive provisions . . . If an [action] is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter is of course, impermissible." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

⁶¹ "Action area" includes "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02.

⁶² 16 U.S.C. § 1536(d) (1973).

GSA/DHS acknowledges that 1) endangered species are present on the island and in surrounding waters;⁶³ 2) development is a foreseeable outcome of the sale of Plum Island;⁶⁴ 3) the foreseeable development may impact land use and biological resources of Plum Island;⁶⁵ and 4) that those land use and biological resources include endangered or threatened species and their habitat.⁶⁶ Yet still they failed to conduct and finalize a Section 7 consultation with FWS and NMFS prior to assessing Action Alternatives, providing their FEIS recommendation, and issuing the ROD—the Agencies’ final official step in the NEPA review.⁶⁷

In preparing the FEIS and ROD, GSA/DHS must consider the indirect effects of agency action. Specifically, “indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.”⁶⁸ Furthermore, when it comes to endangered or threatened species, the burden on the agency is even higher: they must insure that the indirect effects of their actions will not harm listed species.⁶⁹ The type of sale recommended by GSA/DHS in its ROD has great potential to impact—both directly and indirectly—one or more endangered or threatened species, as identified by the FEIS. The increased development that would follow the recommended sale could eliminate critical habitat, deter increased nesting and increase pollution impacts. For example, it is well established that Piping Plovers are particularly susceptible to disturbances on or near their nesting sites. Development and future traffic within the vicinity of the beach, where their nests are found, could increase noise, soil erosion, and stormwater run-off, all damaging the ability of the Piping Plovers to thrive. Additionally, sources of light pollution and habitat conversion created by increased development could disrupt the use of the property by the several dozen Roseate Terns that can be found on the island. Furthermore, the waters surrounding Plum Island are “rich in nutrients and are vital feeding and courting grounds for birds such as terns and waterfowl,”⁷⁰ and increased water pollution may result in loss of food source for these species.

Under section 7(a)(2) of the ESA, federal agencies must consult with the appropriate, expert fish and wildlife agency to determine whether their actions will jeopardize any listed species’ survival or adversely modify designated critical habitat and, if so, identify alternatives to the action that will avoid that result. In this case, GSA/DHS’s FEIS analyzed the action of selling Plum Island. However because they did not conclude their Section 7 review, no alternatives, such as a conservation sale, easement, or other conditions that would protect these species, were

⁶³ United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island, New York* 3-71 – 3-74 (June 25, 2013), available at http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

⁶⁴ *Id.* at 2-7.

⁶⁵ *Id.* at 2-11, 2-14.

⁶⁶ *Id.* at F1-G1.

⁶⁷ United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island, New York* B-5 (June 25, 2013), available at http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

⁶⁸ 50 C.F.R. § 402.02.

⁶⁹ *National Wildlife Federation v. Coleman*, 529 F.2d 359 (6th Cir. 1976).

⁷⁰ Audubon NY, *The Fate of Plum Island*, available at <http://ny.audubon.org/iba-news>.

considered. This failure was despite findings that the agency action “may affect” listed species or critical habitat, as noted in the ROD,⁷¹ and correspondence from both FWS⁷² and NOAA.⁷³

GSA/DHS’s FEIS did determine a Section 7 consultation was required⁷⁴ and subsequently acknowledged the consultation was incomplete.⁷⁵

At the time of any such supplemental EIS, the Joint Lead Agencies will be able to re-examine what further work should be done to bring it up to date to ensure that the federal government meets its responsibilities under requirements such as the Endangered Species Act and Marine Mammals Protection Act, including the government's responsibility to properly identify to potential buyers the presence of protected flora and fauna, migratory birds, and marine mammals, and their habitat.

ROD p.4

This conditioned language runs afoul of NEPA and ESA and misperceives the obligations of the agencies to ensure that the sale of the property does not result in any harm to the protected species or their habitat. As stated previously, the section 7 consultation process is a substantive process, despite the ROD language attempts to frame it as merely procedural. The information from such a consultation process should have been given due consideration during the development of the alternatives analysis, a key component of the EIS process.

GSA/DHS has officially concluded the required NEPA review despite acknowledging that it has not actually concluded its environmental review, a paradox that undermines the requirements and intent of NEPA and ESA’s Section 7. Notwithstanding numerous unknowns, and without benefit of potential protective alternatives from FWS and NMFS, GSA/DHS decided to move forward with a full, unencumbered sale, stating that “having given consideration to all of the factors discovered and analyzed during the NEPA process, it is the Joint Lead Agencies' decision to proceed with the Proposed Action”⁷⁶

⁷¹ “As part of the NEPA analysis conducted by the Joint Lead Agencies, the flora, fauna, and marine resources present on the Property were examined based on currently available data.... Under reuse option 2 (Development), minor to moderate impacts would occur.” Record of Decision, Public Sale of Plum Island, NY p4 (August, 29, 2013).

⁷² Letter from David Stilwell, Field Supervisor, *United States Fish and Wildlife Service*, to Phil Youngberg, Environmental Manager, *United States General Services Administration* (June 16, 2010). (noting the presence of several federally endangered species on and around Plum Island, including Piping Plover and Kemp’s ridley sea turtles).

⁷³ Letter from Mary Colligan, Assistant Regional Administrator for Protected Resources, *National Oceanic and Atmospheric Administration*, to Phil Youngberg, Environmental Manager, *United States General Services Administration* (April 12, 2010). (noting a number of species listed under the ESA that use/inhabit the waters in the vicinity of Plum Island. NOAA also noted the presence of federally endangered Northern right whales and humpback whales in the waters off of New York and the potential for federally endangered fin whales near the project site).

⁷⁴ United States General Service Administration and Department of Homeland Security, *Final Environmental Impact Statement for the Sale of Plum Island, New York* 3-71 (June 25, 2013), available at http://www.gsa.gov/portal/mediaId/183123/fileName/2013_06_25_Sale_of_Plum_Island_FEIS_GSA-DHS.action.

⁷⁵ Record of Decision, Public Sale of Plum Island, NY 4 (August, 29, 2013).

⁷⁶ *Id.* at 5.

V. CONCLUSION

In conclusion, it is reasonably foreseeable that species listed under the ESA may be impacted as a direct or indirect result of an unencumbered sale of Plum Island; and it is clear that GSA and DHS did not comply with Section 7 when they failed to complete the required FWS and NMFS consultation before finalizing the recommendation to proceed with an unfettered sale of Plum Island. Because GSA and DHS did not adequately consult FWS and NMFS, they did not consider a conditioned sale or conservation sale alternative in the FEIS nor did they analyze the degree to which habitats should be conserved to protect identified threatened or endangered species. These missteps resulted in a finalized path that 1) fails to ensure the agencies' action will pose no jeopardy to endangered or threatened species, and 2) fails to protect against destruction or adverse modification of critical habitat. For the forgoing reasons the final decision of GSA and DHS to move forward with an unfettered sale of Plum Island, as articulated in the ROD, is contrary to law and constitutes an ongoing violation of the ESA.

Furthermore, this flawed approach, unless corrected, has practical implications: it will foreclose a conservation sale as an actual real-world opportunity. First, conservation buyers require market appraisals and cannot pay significantly more than that appraised value. It is highly likely that a full sale appraisal—which ignores the need to protect threatened and endangered species and their habitat, as well as the effect of those protections on limiting development—would be significantly higher than a conservation sale appraisal; this leads to two undesirable outcomes for any potential conservation buyer: an unreasonably inflated appraised value as a starting point for the bidding war and the likelihood that they cannot out compete the deep-pocket developer interests, which are not limited by the same appraised-value cap that bind the conservation purchasers. Second, conservation purchases often take several years to structure. There are multiple financial contributors (such as federal, state, and local partners) and complicated stewardship agreements. Without signaling a conservation sale option, these partnerships will not develop.

If GSA/DHS does not act within 60 days to correct the violations described in this letter, our organizations may pursue litigation against you and your agencies and officials in federal court. We will seek injunctive and declaratory relief, as well as legal fees and costs regarding these violations. To prevent litigation, GSA/DHS must 1) initiate and complete formal consultation with FWS and NMFS as required under 50 CFR part 402; 2) re-open the FEIS and ROD subject to the completion of the section 7 consultation process; 3) make necessary changes to the alternatives analysis in the FEIS to reflect FWS and NMFS recommendations to conserve species and necessary habitats, including but not limited to a conservation sale option; and 4) refrain from making any irreversible or irretrievable commitment of resources, including

marketing the island to potential purchasers, pursuant to Section 7(d). Should you like to discuss this matter further, please feel free to contact the undersigned.

Sincerely,

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