IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALLEY CAT ALLIES INCORPORATED,

Plaintiff,

v.

UNITED STATES NATIONAL PARK SERVICE, an agency of the U.S. Department of the Interior, CHARLES F. SAMS III, in his capacity as Director of the National Park Service, MARK FOUST, in his capacity as the Regional Director of the South Atlantic-Gulf region of the U.S. National Park Service, and DEB HAALAND, in her capacity as U.S. Secretary of the Interior, MYRNA PALFREY, in her capacity as Superintendent of the San Juan National Historic Site,

Defendants.

No. 1:24-cv-876-RDM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65.1, Plaintiff Alley Cat Allies Incorporated ("ACA") respectfully submits this memorandum of law in support of its motion for a temporary restraining order and preliminary injunction enjoining all Defendants (collectively, "Defendants"), pending resolution of this dispute, from (i) taking any steps in furtherance of the plan announced by the U.S. National Park Service in 2023 to remove the community cats living along the Paseo Del Morro (the "Paseo") in the San Juan National Historic Site (the "Park") in Puerto Rico ("the 2023 Plan"), including from continuing with the August 1, 2024 Request For Quotation (the "RFQ", attached as Exhibit 10), or (ii) otherwise interfering with the *status quo*.

PRELIMINARY STATEMENT

If Defendants have their way, the area around the Paseo is about to become a lethal environment for the community cat population that has inhabited the area for decades, well before the Paseo was under federal control. For reasons that cannot be gleaned from the administrative record, the federal government has decided that it does not want cats on federal land in Puerto Rico—and it wants them removed immediately. Pursuant to a new "cat management plan" announced by the U.S. National Park Service ("NPS") last fall, Defendants intend to have all cats living along the Paseo trapped and removed from the Park, with many (if not all) of those cats to be subsequently killed. Now, despite the pendency of this action, Defendants are going forward with the process of selecting a removal contractor and intend to start implementing the plan within months.

The new cat management plan is a stark reversal of the policy NPS has implemented and overseen for nearly two decades, through which NPS facilitated and funded the provision of multiple feeding stations for the free-ranging cat population in the Park, as well as a "trap, neuter, release" program that allowed the cats to inhabit the Park while using humane methods to control

the overall cat population in the area. Federal law requires that such a drastic change in policy (and to the environment) be considered and implemented through careful agency analysis and with transparent justification—but in this case, NPS's administrative record contains no legally sufficient justification for the agency's 180-degree shift in its "cat management" approach. By way of this lawsuit, Plaintiff seeks to have the Court declare Defendants' new cat management invalid.

It now turns out that Defendants are not only determined to implement their new plan regardless of Plaintiff's concerns; they are determined to implement the plan *this fall*, before the Court has any reasonable chance to decide this case on the merits. To that end, on August 1, 2024, NPS announced that it was going ahead with the RFQ. Plaintiff's counsel reached out to counsel for NPS and demanded that NPS pause the RFQ and otherwise cease moving forward with its new cat management plan during the pendency of this action, but NPS rejected Plaintiff's demands and indicated that the agency intends to go forward with a bidding and selection process which, if successful, will result in the removal of cats as early as November 1, 2024.

It is alarming to Plaintiff—as it may be to other members of the compassionate public—that Defendants appear to care more about immediately removing and destroying Puerto Rico's community cats than resolving the question of whether it is lawful for them to do so in the first place. Allowing NPS to begin implementing its "cat management plan," including by soliciting bids and awarding a contract to a third-party removal contractor, would necessarily cause irreparable harm that cannot be remedied after final adjudication. Plaintiff therefore respectfully requests a temporary restraining order and preliminary injunction to pause the RFQ process and otherwise preserve the *status quo* until this Court can determine whether Defendants' new cat management plan meets the requirements of the National Environmental Protection Act ("NEPA") and the Administrative Procedure Act ("APA"). Given how long cats have been living in the Park,

Defendants will suffer no harm by allowing the *status quo* to be preserved until this Court can decide the core issue in this case.

BACKGROUND

Cats have lived in Puerto Rico for centuries and are a recognized and treasured part of the historic culture and contemporary community in the city of San Juan in particular. A significant population of these community cats live in the Old San Juan neighborhood, including along and around the Paseo. The Paseo was paved in 1999, replacing a dirt path constructed four years earlier. It became a national recreation trail in 2001. After the Paseo was created, community cats already in the area quickly made their home along the new path—an inevitable result given that cats were already living on those grounds and in the area and given the number of community cats in Puerto Rico generally.

I. For Nearly Two Decades, NPS Successfully Maintained The Paseo's Cat Population Through A Humane "Trap-Neuter-Release" Policy.

In 2003, the federal government conducted an environmental assessment (the "2003 EA") to develop a "management plan" for the cats in the Paseo. Ex. 1, NPS_0000174.[1] Then in 2005, based on the findings made in the 2003 EA, NPS entered into a Memorandum of Understanding with a local volunteer animal welfare organization called Save A Gato, Inc. (the "2005 MOU"). Ex. 2, NPS_0000251 at 252-3. The 2005 MOU granted Save A Gato unlimited access to the Paseo to establish a Trap-Neuter-Release ("TNR") program and committed NPS funding to provide traps and materials in aid of the program, as well as five feeding stations to feed the cats returned to the Park after they were neutered, eartipped, and evaluated by a veterinarian pursuant to the TNR program. *Id.*

[1] All citations in this form are citations to the Administrative Record, *see* Doc. 19.

In 2006, NPS promulgated the *NPS Management Policies*, section 4.4.4 of which details the policies under which NPS declared it would manage alleged invasive species within federally managed parks and public lands like the Paseo. Importantly, the management plan states:

> The decision to initiate management should be based on a determination that the species is exotic. For species determined to be exotic and where management appears to be feasible and effective, superintendents should (1) evaluate the species' current or potential impact on park resources; (2) develop and implement exotic species management plans according to established planning procedures; (3) consult, as appropriate, with federal, tribal, local, and state agencies as well as other interested groups; and (4) invite public review and comment, where appropriate.

NPS Management Policies (2006), Section 4.4.4.2, Removal of Exotic Species.

NPS evidently deemed the TNR program to be a success because NPS doubled down on the program in 2008, entering into another Memorandum of Understanding with Save A Gato (the "2008 MOU"), extending Save A Gato's unlimited access to the Park and increasing the number of feeding stations in the Park from five to eight. Ex. 2 at 254. NPS also pledged continued material support to Save A Gato's TNR efforts, which was critical given that Save A Gato is powered entirely by the efforts of motivated volunteers. *Id.* at 254. The 2008 MOU remained operative until a sudden about-face by NPS in 2022 (*see infra*). In other words, the community cat population in the Park has successfully been managed for nearly *two decades* through a TNR program that was first established in 2005. More specifically, the TNR program has addressed many of the issues cited in the 2003 EA by reducing procreation and mating behavior among the cats (including yowling, spraying, and fighting), while simultaneously preserving the species' historical, social, and cultural role within the Park and in the broader Puerto Rican community.

II. In 2022, NPS Began Exploring Less Humane Alternatives To Its Historic TNR Policy Without Explanation Or Justification.

In the fall of 2022, NPS initiated a public comment period to determine a new cat management plan for the Paseo. Then in August 2023, NPS issued what it called a "Free-Ranging

Cat Management Plan Environmental Assessment" (the "2023 EA"), and indicated that the agency was considering three "alternatives" for managing the community cat population going forward:

> Under the no-action alternative (alternative 1), no changes would be made to the current management of free-ranging cats. Under the original proposed action (alternative 2), the [NPS] would enter into an agreement with an organization(s) or agency(s) to remove the cats … and feeding stations from the park. Following public scoping, the [NPS] added an alternative that revised the original proposed action. The revised proposed action (alternative 3 / NPS preferred alternative) would allow an animal welfare organization six months to trap and remove cats from the park with the use of the current feeding stations, after which time the feeding stations would be permanently removed from the park.

Ex. 3, NPS_0003126 at 3127 (p. i).

Importantly—for the first time, and in a reversal of its prior position—NPS asserted in the 2023 EA that the existing TNR program was inconsistent with "existing authorities." *Id.* at 3142, 3147 (pp. 12, 17). In support of that assertion, NPS specifically identified 36 C.F.R. § 2.2, which governs wildlife protections on federal lands, and NPS's 2006 Management Policies (addressed *supra*). *Id.* at 3142 (p. 12). The problem for NPS, however, is that Section 2.2 of the C.F.R. and the 2006 Management Policies were *both* in existence—and certainly known to NPS—when NPS entered into the 2008 MOU (which continued and expanded the TNR program established by the 2005 MOU). NPS never has explained, in the 2023 EA or otherwise, how or why a decades-old cat management plan suddenly became "inconsistent" with authorities that were already in place when the agency reembraced the 2005 plan. *See infra*.

In November 2023, NPS issued a Finding of No Significant Impact (the "FONSI") and ruled out the no-action alternative (*i.e.*, alternative 1) set forth in the 2023 EA—meaning that NPS was abandoning the previous program altogether. NPS asserted without explanation that the no-action alternative "violates NPS regulations and policies related to invasive species, abandonment, and feeding wildlife within the park." Ex. 4, NPS_0003616 at 3621 (p. 6). It is unclear how that

could be true, because: (i) the purportedly "violat[ive]" no-action alternative would do nothing more than continuing the policy implemented by NPS for the past eighteen years without incident (or any known complaints of illegality), (ii) the FONSI does not identify any new specific regulation or policy that would be violated if NPS simply continued its historic practice, and (iii) the categorization of the community cats as an "invasive" species is inconsistent with NPS's past conduct as well as the fact that the community cats pre-dated the Paseo. *See infra*. Regardless, the FONSI reflects NPS's unequivocal rejection of the *status quo*.

Instead, NPS intends to implement alternative 3 (the "2023 Plan"), which will consist of "a phased approach to management of [community] cats, [and] will include continued trapping and removal efforts by an animal welfare organization [if one is found suitable, and otherwise by a removal agency], removal of all feeding stations in the park, monitoring, and additional removal efforts if deemed necessary." *Id*. at 3618 (p. 3). Not only that, but NPS acknowledges that its plan will include euthanizing any removed cats that are deemed unsuitable for adoption or cannot be placed in animal shelters due to limited space. *Id.* at 3620 (p. 5); Ex. 3 at 3144 (p. 14).

NPS asserts in the FONSI that the 2023 Plan is necessary to: (1) improve the safety of Park visitors and employees; (2) protect Park resources and reduce impacts to native wildlife species associated with "free-ranging cats"; (3) alleviate nuisance issues and align the visitor experience with the purpose of the Park; [2] and (4) bring the Park into compliance with existing authorities for invasive species. Ex. 4 at 3620-1 (pp. 5-6). These purported justifications are conclusory at best and undermine the record on multiple levels. First, NPS presents no evidence that removing and euthanizing the *current* community cat population will keep cats out of the Park on any long-term

[2] In the administrative record there are six (6) "complaints" about cats in the Paseo over the past nearly fifteen (15) years. *See* Ex. 7.

basis. To the contrary, NPS specifically "anticipate[s] that multiple removal efforts will be needed" (*id*. at 3620 (p. 5))—suggesting that NPS's *actual* plan going forward is to do periodic round ups of the community cats in the Park, followed by the killing of any cats that do not fit in local shelters or that are deemed "unadoptable." Second, NPS never explains exactly how removing the community cats will actually achieve the claimed objectives of the 2023 Plan—apparently expecting the public to accept NPS's conclusory justifications as gospel—and the reality is that because there is a robust community cat population surrounding the Paseo, there is no realistic chance that removal efforts would not need to continue in perpetuity if NPS intends to keep community cats outside of the Paseo.

III. After Delaying This Case Through A Motion To Change Venue, Defendants Forged Ahead With Their Challenged Plan On An Expedited Basis.

Plaintiff filed this action in March of 2024, asserting that the 2023 Plan violates the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* ("NEPA") and the Administrative Procedure Act, 5 U.S.C. §§ 701 – 706 (the "APA"). Plaintiff asserts that the EA and FONSI are inadequate under NEPA, because (1) the EA's "purpose and need" statement is improper, Doc. 1 at 23–25 (Compl. ¶¶ 69–76); (2) the EA and FONSI do not show valid consideration of mitigation and preventative measures, *id*. at 25–26 (Compl. ¶¶ 77–81); (3) the EA does not reflect the consideration of reasonable alternatives, *id*. at 26–28 (Compl. ¶¶ 82–89); and (4) the EA contains no assessment of the impact of the proposed action and misinforms the public about important details relating to the plan, *id*. at 28–29 (Compl. ¶¶ 90–96).

On May 30, 2024, in response to Plaintiff's suit, Defendants filed a motion to transfer this case to the District of Puerto Rico. Doc. 16. Briefing on that motion concluded on July 15, 2024. On July 27, 2024, the Court denied Defendants' motion, ruling that Defendants would be required to litigate the merits of this case in the District of Columbia. Doc. 21. Just days after the Court's

decision, on July 31, 2024, counsel for NPS alerted Plaintiff that NPS intended to move forward with the Plan without delay and would be posting a solicitation the next day for letters of interest from potential removal agencies, which will lead directly to awarding a contract and beginning implementation of the 2023 Plan. Ex. 9 & 10. According to NPS, the solicitation period will last 30 days (until August 31, 2024). *Id*. Once the solicitation period ends and assuming NPS awards a contract, removal could begin as early as November 1, 2024. *Id*.

As detailed below, Plaintiff responded to the July 31 notice with a demand that NPS refrain from proceeding with the solicitation, in order to preserve the *status quo* until this Court adjudicates whether NPS's 2023 Plan complies with NEPA and the APA. *Id*. In response, NPS stated it does not believe that the pendency of this lawsuit precludes NPS from moving ahead. *Id*. Given NPS's unwillingness to abide by this Court's review of the legitimacy of the 2023 Plan, Plaintiff is now forced to apply for immediate injunctive relief to prevent the irreparable harm that will result if NPS proceeds with taking steps to implement the 2023 Plan, including the imminent selection of a third-party removal contractor.

ARGUMENT

The instant motion easily satisfies the criteria for injunctive relief to maintain the *status quo*. First, Plaintiff is likely to succeed on the merits because Plaintiff's claims are supported by facts set forth in (or absent from) the administrative record. Second, the harm to be expected from the implementation of the 2023 Plan is nothing if not irreparable: the community cats, once removed and euthanized, cannot be brought back from the dead. Third, given that community cats have been living in the Park for decades, there is no risk of substantial injury to NPS if the 2023 Plan is delayed until this Court can review its *bona fides*. Finally, injunctive relief is necessary to

protect the crucial public interest in ensuring that federal agencies act within the scope of their vested authority and consistent with the law.

I. Legal Standard

Ultimately, the purpose of a preliminary injunction "is to preserve the object of the controversy in its then existing condition—to preserve the *status quo*." *Sabino Canyon Tours, Inc. v. USDA Forest Serv.*, 298 F. Supp. 3d 60, 66 (D.D.C. 2018) (citation omitted). To succeed on a motion for preliminary injunction, a movant has the burden of demonstrating: "(1) a substantial likelihood of success on the merits, (2) irreparable injury if the injunction is not granted, (3) that there will be no substantial injury to other interested parties, and (4) that the public interest would be served by the injunction." *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 219 (D.D.C. 2003); *see also Nat'l Parks Conservation Ass'n v. United States Forest Serv.*, No. 15-CV-01582 (APM), 2016 WL 420470, at *6 (D.D.C. Jan. 22, 2016) (same). These four factors "interrelate on a sliding scale and must be balanced against each other"; that is, no one factor is determinative in and of itself. *Norton*, 281 F. Supp. 2d at 219 (citation omitted). However, "[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." *CityFed Fin. Corp. v. Off. of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995); *Nat'l Parks Conservation Ass'n*, 2016 WL 420470 at *7 ("if a movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor") (citation and quotation marks omitted). Here, all four factors strongly favor granting Plaintiff's motion for a preliminary injunction.

II. Plaintiff Is Likely To Succeed On The Merits Based On The Undisputed Administrative Record And Well-Established Principles Of Law.

Plaintiff is likely to succeed on the merits of its claims because the administrative record is utterly devoid of evidence of the appropriate considerations that an agency is required to

undertake before implementing a new environmental policy—especially in instances like this, where the new policy effectively reverses a previous one. Despite the significant environmental impact the 2023 Plan will have, NPS has not issued an Environmental Impact Statement relating to the Plan—opting instead to issue the FONSI—and NPS has not properly considered reasonable alternatives to the Plan as it is required to do. As shown below, the FONSI issued by NPS is riddled with contradictions and misinformation, and directly states the agency's refusal to consider certain alternatives based on the unreasonably narrow "purpose and need" statement crafted by NPS.

An agency's finding of no significant action and its decision to forego preparing an environmental impact statement may be overturned by a federal court where the agency's decision "was arbitrary, capricious or an abuse of discretion." *Norton*, 281 F. Supp. 2d at 224 (citation omitted). "The D.C. Circuit has adopted a four part test to guide judicial review of an agency's finding that a proposed action will not 'significantly affect the quality of the human environment' as that language is used in NEPA . . .:'(1) whether the agency took a 'hard look' at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and (4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.'" *Id.* (cleaned up). Importantly, any proposal to change the *status quo* "normally" triggers an agency's duty to prepare an environmental impact statement—as opposed to merely issuing a finding of no significant impact, as NPS has done here. *See Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 29 (D.D.C. 2007).

In the Paseo, the *status quo* for almost two decades—the entirety of the time the federal government has overseen the Paseo as national park land—has been to provide the community

cats with feeding stations placed around the Park and to control the overall population through the TNR program. The 2023 Plan, requiring the removal (and likely killing) of the community cats, is an outright reversal of that *status quo*. Plaintiff alleges that NPS acted arbitrarily and capriciously and abused its discretion by (1) issuing an EA and FONSI with an improper "purpose and need" statement, which had the effect of arbitrarily and unlawfully restricting the options NPS could consider, Doc. 1 at 23–25 (Compl. ¶¶ 69–76); (2) failing to meaningfully consider mitigation and preventative measures in the EA and FONSI, *id.* at 25–26 (Compl. ¶¶ 77–81); (3) failing to consider reasonable alternatives, *id.* at 26–28 (Compl. ¶¶ 82–89); and (4) failing to assess the impact of the proposed action and misinforming the public as to the efficacy of TNR and the impact community cats are having in the Park, *id.* at 19, 28–29 (Compl. ¶¶ 57, 90–96). As shown below, the 2023 Plan does not pass muster under the four-part test that applies to this challenge.

1. **NPS's Purpose And Need Statement Is Improperly And Arbitrarily Narrow, Resulting In NPS's Failure To "Take A Hard Look" At The Problem And Consider Alternatives To Removal.**

To satisfy NEPA's "hard look" requirement, a federal agency *must* present the environmental impacts of the proposed action and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for the choice being considered. 40 C.F.R. § 1502.14. This requirement is meant to benefit the agency as well as the public. *See id*.

At "the heart" of the required NEPA analysis is the requirement that an agency consider and analyze all reasonable alternatives to a proposed action. *Id.*; *see also* 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1507.2(d). Specifically, the federal agency must "evaluate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination;" and it must "[d]iscuss each alternative considered in

detail, including the proposed action, so that reviewers may evaluate their comparative merits. 40 C.F.R. § 1502.14(a)–(c).

The range of reasonable alternatives an agency must consider is defined, in turn, by the "purpose and need statement" required by 40 C.F.R. § 1502.13. Accordingly, an agency may not define the "purpose and need" of a proposed action in a narrow way, such that the agency automatically eliminates competing alternatives or otherwise fails to consider a reasonable range of alternatives to the proposed action. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991); *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgm't*, 606 F.3d 1058, 1072 (9th Cir. 2010) (an agency may not adopt a purpose and need statement which "necessarily and unreasonably constrains the possible range of alternatives"). "The D.C. Circuit has repeatedly explained that an agency's unexplained 180 degree turn away from precedent is arbitrary and capricious, and that an agency's decision to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 18 (D.D.C. 2009), *judgment entered*, CIV.A. 08-2243 CKK, 2009 WL 8161704 (D.D.C. July 30, 2009), and *case dismissed*, No. 09-5093, 2009 WL 2915013 (D.C. Cir. Sept. 8, 2009) (cleaned up).

a. NPS Used Its Purpose And Needs Statement To Artificially And Arbitrarily Eliminate Alternatives To The Proposed Action.

NPS claims through its purpose and need statement that the 2023 Plan furthers the wide-ranging goals of "protect[ing] park resources," "reduc[ing] impacts to native wildlife species associated with free-ranging cats," "alleviat[ing] nuisance issues," "align[ing] the visitor experience with the purpose of the park," and "bring[ing] the park into compliance with existing authorities for invasive species." Ex. 4 at 3617 (p. 2). However, NPS then uses the final goal—purportedly "bring[ing] the park into compliance with existing authorities"—to forego

consideration of reasonable and meaningful alternatives to achieve the other purposes and needs NPS identifies. *See, e.g., id.* at 3626-45 (pp. 11-30) (NPS repeatedly dismisses suggestions from the concerned public solely because they will not bring the Park into compliance with existing authorities). In other words, if a potential alternative did not, in NPS's view, "bring the park into compliance with existing authorities," NPS simply did not consider that alternative. This is problematic for multiple reasons.

First, the existing authorities identified by NPS—36 C.F.R. § 2.2 and *NPS Management Policies* (2006) Section 4.4.4.2—were already in existence when NPS committed to the current TNR management plan. NPS has provided no discernible explanation for its view that it must suddenly reverse its policy now to comply with "existing authorities," especially given that there has been no known challenge to the legality of the old plan over the past two decades.

Second, NPS's claim that the current TNR management plan violates existing authorities is premised, at least in part, on the notion that the community cats are an invasive species. The federal definition of invasive species is "an alien species whose introduction does or is likely to cause economic or environmental harm or harm to human health." Executive Order No. 13112, 64 Fed. Reg. 6183 (Feb. 3, 1999). Guidance from the Department of the Interior's ("DOI") own Invasive Species Advisory Committee explains that determining whether a species is invasive requires "comparing negative effects caused by a non-native organism to its potential societal benefits." Invasive Species Advisory Committee, Invasive Species Definition Clarification and Guidance, p. 2 (April 27, 2006).[3]

NPS makes no meaningful effort to square Puerto Rico's community cats with the criteria for an "invasive species," simply asserting that "[t]he free-ranging cat is an invasive species in any

[3] Available at https://www.doi.gov/sites/doi.gov/files/uploads/isac_definitions_white_paper_rev.pdf.

habitat." Ex. 4 at 3617 (p. 2). NPS does not identify any harm actually caused by the cats in the Paseo and makes no attempt to demonstrate that any such harms outweigh the societal, cultural, and historical benefits of the cats.[4] Indeed, NPS admits that "**there are no site-specific studies documenting cats preying on wildlife in the park or contributing to *T. gondii* [or any other disease] in the environment**[.]" Ex. 3 at 3163 (p. 33) (emphasis added). Nor does NPS acknowledge or address the fact that cats have been in Puerto Rico for centuries, long before Puerto Rico became a U.S. Territory and obviously long before the creation of the Paseo. NPS's designation of the community cats in the Paseo as an invasive species is arbitrary, capricious, and not legally sound. Accordingly, NPS's use of that designation to anchor its purpose and need statement is likewise arbitrary and capricious.

Finally, NPS's lopsided focus on "compliance with existing authorities" is exactly the kind of approach that was rejected in *Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 229 F. Supp. 2d 1140 (D. Or. 2002) ("BMBP"), which is highly instructive on these facts. In *BMBP*, the U.S. Forest Service attempted to implement a plan to remove non-native vegetation from the Malheur National Forest. The District Court found that the agency violated NEPA because its environmental assessment did not provide a "specific 'prevention' alternative." *Id.* at 1144. The court rejected defendants' argument that "prevention measures were not emphasized in the alternatives, [because] their focus was on the goal of eliminating weed infestations at the project sites." *Id.* at 1146. In doing so, the court reasoned that "[w]hile it may be true that defendants chose to focus upon weed eradication, the purpose statement of the EA also plainly calls for controlling weeds." *Id*. Thus, "the court reject[ed] defendants' position that the project scope can be fairly construed as emphasizing eradication over control, and conclude[d] that their failure to address

[4] Plaintiff notes that community cats were not designated an invasive species in the 2003 EA.

prevention in any action alternative was unreasonable and indicative of a greater failure to take a hard look and render an adequately reasoned choice." *Id.* at 1147. That same reasoning applies equally here, where NPS gave no consideration whatsoever (let alone meaningful consideration) to the other stated purposes and needs in the FONSI, instead construing the entire purpose and need as bringing the Park into compliance with existing authorities. Therefore, as in *BMBP*, NPS failed to take the requisite "hard look" and "render an adequately reasoned choice." *Id.*; *see also Audubon Society of Portland v. U.S. Army Corps of Engineers*, No. 3:15-cv-665-SI, 2016 WL 4577009, at *7-8 (D. Or. Aug. 31, 2016) (finding agency plan violated NEPA where agency refused to consider possible alternatives, asserting "alternative courses of action would not achieve the specific objective").

b. NPS Does Not Even Pretend That The 2023 Plan Is Necessary To Achieve Any Of The Other "Purposes or Needs" Identified In The FONSI.

NPS would and should have considered other reasonable alternatives if it were genuinely guided by the other objectives contained in its purpose and need statement, such as "protect[ing] park resources," "reduc[ing] impacts to native wildlife species associated with free-ranging cats," "alleviat[ing] nuisance issues," and "align[ing] the visitor experience with the purpose of the park." But it did not.

For one thing, it does not appear that NPS's policy reversal is warranted by any sudden or troubling uptick in the community cat population that led to any additional nuisance issues, impacts to other wildlife species, or wasting of Park resources. None are cited in the administrative record. The current population of cats in the Paseo is alleged by NPS to be approximately 200 cats, which would be an increase from 120 cats identified in the Park eighteen years ago—meaning that only four new cats a year (on average) moved into the Park while the TNR program was in place. Such an objectively small increase in the cat population in the Park over 18 years could easily be

interpreted as demonstrating the success of TNR: obviously without the TNR program, the cat population could have ballooned significantly. But NPS did not assess the efficacy of the TNR program, nor did it consider the potential impact of a bolstered and better funded TNR program. Meanwhile, scientific data show that TNR reduces mating behavior, assists in stabilizing the cat population, and decreases the already extremely unlikely possibility of any disease transmission between cats and humans or other species within the Park[5] (and, in fact, NPS has found no such transmissions). Ex. 3 at 3163 (p. 33). By these measures, the TNR program has been, and continues to be, immensely successful, and only stands to enjoy further success if TNR funding and community cat education efforts are increased.

Moreover, it is not clear that the current population is even as high as 200 in the first place. NPS arrived at this number by using six motion-activated cameras around the Park and recording images for two weeks, analyzing only those images taken between 7 p.m. and 7 a.m. Ex. 5, NPS_0001436. The images from the cameras were then downloaded and reviewed, with NPS scientists determining the number of individual cats by reference to differences in "fur color/pattern, body shape, size (relative to surrounding permanent objects), and other defining features (e.g., presence of collars, ear-tip)." Ex. 3 at 3136 (p. 6).

NPS openly admits that "[i]t was difficult for NPS scientists to identify the number of cats in the photographs with ear tips," *i.e.*, the number of cats that had been subject to TNR, and the camera study only identified nine kittens and three unneutered cats. *Id.* This means that many of the observed cats could have resulted from abandonments, or from cats in neighboring colonies

[5] *See* https://www.alleycat.org/resources/why-trap-neuter-return-feral-cats-the-case-for-tnr/ (last accessed Aug. 16, 2024).

coming into the Park. These phenomena caused the initial surge of cats into the Park after the Paseo was constructed, and the 2023 Plan will do nothing to change that.

Notwithstanding these serious gaps in NPS's reasoning, NPS summarily rejects the "no-action" alternative (continued TNR), claiming that TNR, by itself, would not eliminate the cat population in the Paseo, and that "the cats would persist in the park and may even continue to increase in abundance." *Id.* at 3147 (p. 17). This conclusion does not meaningfully engage with the viability of TNR to manage the cat population when combined with other measures, such as increased security and education and messaging to reduce cat abandonment—the exact measures NPS recognizes it must couple with the 2023 Plan. These measures in conjunction with the existing TNR program should have been considered as an alternative but were not, because, according to Defendants, the TNR program purportedly would not comply "existing authorities." *See supra*. After dismissing the no-action alternative, all that remained of NPS's proposed alternatives were alternative 2 and 3, and these options only varied by a single detail: who would remove the cats (as opposed to whether the cats would or should be removed). By proceeding from a misleading and unreasonably narrow starting point, NPS failed to consider reasonable alternatives to removal and thus violated NEPA by issuing the 2023 Plan.

2. NPS Overlooked Crucial Areas Of Environmental Concern And Did Not Show That The Environmental Impact Of The 2023 Plan Would Be Insignificant.

In the FONSI, NPS identified the areas of environmental concern as the Park visitor experience, the impacts on wildlife and wildlife habitat, and the impact on the free-ranging cats themselves—underselling the significant, adverse impact the 2023 Plan will necessarily have on the community cat population, future visitors who miss the presence of the community cats, and those who will experience vicarious emotional distress because of the harm visited upon the cats. This Court has acknowledged that "vicarious emotional distress might qualify as irreparable harm

where the challenged defendant is taking action that could kill (or seriously injure) significant numbers of animals." *Friends of Animals v. U.S. Bureau of Land Mgm't*, 232 F. Supp. 3d 53, 66 (D.D.C. 2017) (citing *Norton*, 281 F. Supp. 2d at 209).

Additionally, NPS does not grapple with the scale of the environmental impacts that could result from the wholesale elimination of a long-established animal population from the Park—simply announcing instead that "[t]he impacts of the selected action, including direct, indirect, and cumulative effects do not reach the level of a significant effect." Ex. 4 at 3622 (p. 7). This conclusion is difficult to reconcile, for instance, with the hundreds of comments NPS received, pleading with NPS not to remove the cats because they are considered an important part of the Paseo and the visitor experience therein. *See* Doc. 1 at 13-14 (Compl. ¶ 43); *see also* Ex. 6, NPS_0002576. Conversely, the administrative record reveals that from 2010 to 2019, NPS only received six complaints about the cats, and these complaints primarily related to odors. *See* Ex. 7, NPS_0000305-11.[6] And in any event, the actual conditions at the Park relating to any of NPS's identified areas of environmental concern cannot be ascertained beyond anecdotal accounts because NPS did not conduct any site-specific studies. Courts have found that a failure to conduct site-specific studies undermines NEPA by providing the public with only "a general level of analysis." *Mountaineers v. U.S. Forest Serv.*, 445 F. Supp. 2d 1235, 1249-50 (W.D. Wash. 2006).

NPS also failed to meaningfully consider the environmental impact of the Vacuum Effect. Due to the "Vacuum Effect,"[7] the community cats removed from the Paseo are highly likely to be replaced by community cats from neighboring colonies, and cat abandonment at the Park is also

[6] The notion that there is widespread dissatisfaction caused by nuisance odors associated with the cats is contradicted quite strongly by the fact that the visitation to the Paseo Del Morro, where the cats are concentrated, remains high with 365,849 visits to the park in 2022, according to NPS's numbers. Ex. 3 at 3155 (p. 25).

[7] NPS's Free-Ranging Cat Management Plan Environmental Assessment cites Plaintiff ACA as an authority on TNR programs and the Vacuum Effect. *See* Ex. 3 at 3147, 3164, 3176 (pp. 17, 34, 46).

likely to continue. Cat abandonment within the Paseo is no small issue. NPS recognizes that "[p]et abandonment is an ongoing issue in Puerto Rico" and "animals that are abandoned are often not spayed or neutered, and those animals contribute to the cycle of reproduction and unwanted pets." Ex. 3 at 3192 (p. 62). But NPS ignores the obvious connection between these abandonments and the increasing cat population in the Paseo, instead attributing the increased population to the alleged failure of TNR. *Id.* at 3147 (p. 17). The only way to ascertain the impact of cat abandonment and the Vacuum Effect—and the efficacy of TNR in combating these phenomena—would be an EIS studying these issues. But, because NPS asserts ending TNR and removing the cats will have no significant impact, no such study was done. Instead, to address cat abandonment, NPS states that it will simply continue doing what it has already been doing—*i.e.* prohibiting abandonments, continuing educational efforts, and closing the gate entrance of the Paseo—with the addition of installing new lighting. *Id.* at 3141 (p. 11). NPS makes no attempt to establish whether such measure have been successful in curbing pet abandonments. The presence of new kittens and cats with no ear tips within the Park suggests these efforts have had questionable success. The ultimate result of all of this is that the cats currently inhabiting the Paseo will be removed, and likely killed, only to inevitably be replaced by cats who are less likely to have been spayed or neutered and vaccinated through a TNR program—and the end of the TNR program means the new cats will never receive such treatment. The population is thus likely to quickly rebound or even surpass the number of cats currently on federal lands and the concerns that allegedly prompted NPS's plan in the first place will be far more pronounced. And, because TNR will be discontinued in favor of eradication, there will be no recourse against an endless cycle of removal and killing.

3. Despite NPS's Assertion, The Environmental Impact Of The Selected Action Will Be Significant, And NPS's Changes To The Selected Action Do Not Reduce That Impact.

Instead of meaningfully engaging with the reality of the 2023 Plan, NPS suggests that its selected action will result in a more humane outcome because, initially, NPS will contract with an animal welfare organization and give that organization six months to remove and relocate the cats. Critically, though, NPS acknowledges that shelters and animal welfare facilities have limited capacity and that few of the cats that will be removed may be eligible for adoption. Ex. 8, NPS_0001236 at 1240 (p. 5); Ex. 3 at 3148 (p. 18) ("The animal welfare organization could relocate the cats to shelters or cat rescues where the cats have the potential to be adopted; however, shelters and animal rescues in Puerto Rico are already overwhelmed due to the number of stray and free-roaming animals on the island."); Ex. 3 at 3192 (p. 62). NPS therefore acknowledges, as it must, that some cats that are "removed" pursuant to alternative 3 will likely be exterminated—a patently cruel and inhumane outcome even if there were some legitimate justification for it (which there is not).

To be sure, NPS claims it created alternative 3 to address concerns raised by residents and tourists that the cats would be killed, but the reality of the limited shelter space and opportunity for these cats to be housed and/or adopted means the actual consequence of alternative 3 will be the killing of many of these cats—the exact consequence NPS purports alternative 3 was designed to avoid, and the exact concern that hundreds of people and entities raised in response to the proposed plan. This means that when NPS represented to the public that it would create another alternative to avoid "euthanasia" (*i.e.*, killing), it was knowingly misleading the public, directly contradicting NEPA's aims of accountability and informed public participation. Moreover, because of the Vacuum Effect, removal of the cats is, at best, a temporary half-measure requiring additional periodic roundups.

NPS is now actively soliciting third-party bids to commence the removal process this fall, using federal resources to hastily execute the 2023 Plan before this Court can evaluate its NEPA compliance. As explained below, this will upset the *status quo*, harm the human environment, and irreparably harm Plaintiff's ability to vindicate the procedural rights afforded by NEPA.

III. Irreparable Harm Is A Feature—Not A Bug—Of The 2023 Plan.

Irreparable harm is virtually guaranteed if injunctive relief is not granted in this case. Irreparable injury "is the kind for which monetary damages do not provide adequate compensation," and "[t]his element is fulfilled if plaintiffs can prove that they are likely to suffer this harm before a decision is rendered on the merits." *Puerto Rico Conservation Foundation v. Larson*, 797 F. Supp. 1066, 1071 (D. P.R. 1992) (granting injunctive relief where record showed that proceeding with construction project could constitute a NEPA violation); *see also Sierra Club v. U.S. Dep't of Agric., Rural Utilities Serv.*, 841 F. Supp. 2d 349, 359 (D.D.C. 2012) ("[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages") (citation omitted). Importantly, in the environmental context, "a violation of NEPA can itself be considered irreparable injury" because the harm at stake is "a harm to the environment, no[t] merely to a legalistic 'procedure' nor, for that matter, merely to the psychological well-being." *Larson*, 797 F. Supp. at 1072 (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989)); *see also Friends of Animals*, 232 F. Supp. 3d at 66 (citing *Norton*, 281 F. Supp. 2d at 222) ("vicarious emotional distress might qualify as irreparable harm where the challenged defendant is taking action that could kill (or seriously injure) significant numbers of animals").

The harm at stake here could be used as a hornbook example of irreparable injury. If Defendants are allowed to proceed with critical steps to implementing the 2023 Plan, it will result

in the immediate removal and almost certain death[8] of the community cat population that has inhabited the Park for decades. This would not only be an alteration of the environment (although it certainly would be that); it would also be an irreversible disruption and destruction of the lives of an unidentified number of cats, which are guilty of nothing more than continuing to populate an environment where they have been provided with feeding stations for the past 19 years (and where they preexisted the creation of the Paseo). That harm is by no means speculative or ancillary: it is the *stated goal* of NPS to eliminate the cats from the Park by whatever means are necessary. And by pressing forward immediately with selecting a contractor to implement the 2023 Plan, Defendants are guaranteeing that the harm will be suffered "before a decision is rendered on the merits"—unless the Court intervenes to maintain the *status quo* until the merits have been reached.

IV. An Injunction Will Cause No Harm.

Defendants cannot legitimately argue that any real harm would result if the 2023 Plan is held in abeyance for the duration of this litigation. Again, the presence of the cats in the Park was not only approved but *facilitated* by NPS for almost twenty years—leading many park visitors to "perceive the cats as part of the park experience" (Ex. 4 at 3623 (p. 8))—until the agency summarily attempted to reverse its own policy just last fall. The administrative record contains no suggestion that the presence of the community cats in the Park is creating an environmental or public health emergency that must be dealt with on an urgent basis. Indeed, the record does not establish even a long-term justification—let alone an urgent need—for removing the cats in the first place. *See supra*. An injunction will cause no harm; it will simply maintain the *status quo*

[8] NPS provides no estimate—in the FONSI, 2023 EA, or otherwise—as to the number of cats that will need to be killed rather than "rehomed" in shelters or through adoption. But it is no secret that the nation's animal shelters have been at capacity for years now, and it seems unlikely (at best) that Puerto Rico's shelters can or will accommodate a sudden influx of *all the community cats* that presently reside in the Park.

until this Court can determine whether the 2023 Plan comports with the requirements of NEPA and the APA.

V. An Injunction Is Necessary To Protect The Public Interest.

Defendants' failure to establish a legitimate basis for the 2023 Plan is exactly the reason an injunction is necessary to protect the public interest. Defendants are not private actors; they are part of the federal government with activities funded through taxpayer dollars. Plaintiff alleges that the 2023 Plan violates the requirements of federal law, and Defendants have not posed any legal challenge to the Complaint through a motion to dismiss or otherwise. Accordingly, the Court should assume that Plaintiff has (at minimum) raised a colorable question regarding Defendants' compliance with the law. Whatever unsubstantiated risk the public faces from the community cat population in a park in Puerto Rico cannot be outweighed by the risk the public faces when government agencies are allowed to operate without accountability or regard for the law.

VI. An Immediate Injunction Is Necessary To Protect The *Status Quo*.

Defendants may try to have it both ways by arguing that this motion is premature because the intended removal is still months away, even while they actively work to procure a third-party contract to execute their removal plans according to their intended schedule. Any such argument should be rejected. As explained in *Marsh*, each part of NPS's plan "represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues. Once large bureaucracies commit to a course of action, it is difficult to alter change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide.'" 872 F.2d at 500; *see also Am. Tunaboat Ass'n v. Ross*, 391 F. Supp. 3d 98, 110 (D.D.C. 2019) ("this injury grows over time since it is far easier to influence an initial choice than to change a mind already made up") (citation and quotation marks omitted). Here, permitting Defendants to

go ahead with key preparatory steps such as the RFQ will further strengthen the chain of bureaucratic commitment such as to permanently alter the *status quo*.

CONCLUSION

Injunctive relief is necessary to prevent Defendants from altering the *status quo* in a manner designed to cause imminent and irreparable harm. Accordingly, Plaintiff respectfully requests that the Court issue a temporary restraining order and preliminary injunction enjoining Defendants, during the pendency of this dispute, from (i) implementing any aspect of the 2023 Plan, including the August 1, 2024 RFQ, or (ii) otherwise disturbing the *status quo*.

Dated: Washington, D.C.
August 19, 2024

/s/ Yonaton Aronoff

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CERTIFICATE OF CONFERNCE

Pursuant to Local Rule 7(m), on August 7, 2024, undersigned counsel contacted counsel for Defendants via electronic mail with the hope of preserving the *status quo* without the need for motion practice. Defendants' counsel responded stating: "in response to your request, the NPS will not agree to 'cease any further steps to solicit contractors or otherwise begin implementation plans.' … As I also stated in my June 7 email, to the extent Plaintiff believes preliminary injunctive relief is warranted under these circumstances, you are free to seek it from the Court." Thus, this Court's involvement is necessary to resolve the matters outlined herein.

/s/ Yonaton Aronoff
Yonaton Aronoff

LOCAL CIVIL RULE 65.1 CERTIFICATION

I hereby certify, pursuant to Local Civil Rule 65.1, that I have provided all defendants notice of this application, along with copies of all papers to be presented to the Court at the hearing on this motion. Defendants will also receive notification of this filing via Pacer.

/s/ Yonaton Aronoff
Yonaton Aronoff