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 U.S. 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, DEB HAALAND, in her capacity as U.S. Secretary of the Interior, and MYRNA PALFREY, in her capacity as Superintendent of the San Juan National Historic Site, Defendants.	Case No. 1:24-cv-876 (RDM)

PLAINTIFF ALLEY CAT ALLIES' MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiff Alley Cat Allies Incorporated ("ACA")[1] respectfully submits this memorandum of law in further support of its motion for summary judgment and in opposition to the cross-motion for summary judgment filed by NPS.

INTRODUCTION

NPS, like any other federal agency, must comply with its legal obligations to determine the effects of its actions and be transparent with the public whose interests the agency is meant to serve. The thrust of this action, and ACA's motion for summary judgment, is that NPS did *not* comply with those legal obligations when it summarily pursued its 2023 Plan for the unlawful, misguided, and cruel roundup and likely extermination of community cats who have inhabited the San Juan National Historic Site in Puerto Rico for many decades.

This case is about NPS's failure to adhere to the requirements imposed upon federal agencies by NEPA and the APA, resulting in a needless and cruel plan, which is virtually certain to require the killing of a beloved population of community cats. As demonstrated in the ACA Brief, NPS effectively treated the NEPA process as a non-binding suggestion, shortcutting the process in a manner evidently designed to accomplish NPS's desired objective rather than to remedy a demonstrated problem based on clear evidence. Specifically, ACA demonstrated that NPS:

- continuously misinformed the public regarding the contents of the 2023 Plan, the availability of shelter space, the efficacy of TNR, the "harm" being caused by cats in the Paseo, and the role of killing in the plan, undercutting effective public participation (ACA Br. at 19, 28-30)[2];

[1] All defined terms herein have the same meaning ascribed to them in ACA's opening brief dated October 4, 2024, ECF No. 26 (the "ACA Brief" or "ACA Br.").

[2] References to page numbers in documents filed on Pacer in this matter refer to the page number applied by Pacer on the top right-hand corner of each page at the time of filing.

- failed to measure sterilization rates to determine if it had implemented TNR in an efficacious manner consistent with its own cited literature (*see id.* at 25);

- used a deeply flawed process to tally the applicable cat population, despite heavily relying on the purported growth of the cat population to establish the alleged ineffectiveness of TNR and need for its removal plan (*see id.* at 22-23);

- failed to meaningfully address cat abandonments, which likely significantly contribute to any alleged growth of the cat population in the Paseo (*see id.* at 23, 25-26); and

- completely disregarded the Vacuum Effect, which will almost certainly prevent the 2023 Plan from accomplishing NPS's stated purpose and need (*see id.* at 25-27).

NPS makes no meaningful attempt to grapple with these points in its cross-motion for summary judgment. Instead, NPS repeatedly minimizes NEPA's import and authority, as well as the obligations and limitations NEPA places on federal agencies; provides lackluster explanations for the significant problems in its NEPA analysis; and asks the Court to forego any meaningful review of that process. NPS's position is inconsistent with the APA and NEPA, especially given the acute effect the 2023 Plan will have upon ACA's work, its supporters, the Puerto Rican community, and visitors to the Paseo who visit and care for the cats along the Paseo.

Accordingly, and for the reasons set forth herein, ACA respectfully reiterates its request for summary judgment in ACA's favor and submits that NPS's cross-motion for summary judgment must be denied based on NPS's failure to demonstrate compliance with NEPA and the APA.

ARGUMENT

ACA has identified serious defects in NPS's NEPA process, each of which individually is sufficient to establish that NPS violated NEPA, and all of which collectively require the 2023 Plan to be vacated. Rather than addressing these defects, NPS attempts to deflect the Court's attention elsewhere—questioning Plaintiff's motivations for bringing the suit and asserting that ACA lacks standing and is prohibited from challenging NPS's compliance with NEPA. NPS is incorrect on all counts. ACA has both organizational and associational standing to challenge the 2023 Plan (*infra*

pp. 4-8), and ACA cannot be disqualified from asserting claims based on a lack of direct participation in the public scoping period (*infra* pp. 8-10). As for the real issue at hand—*i.e.*, the critical question of whether NPS has complied with the law—NPS resorts to conclusory and unsupported arguments, evidently expecting the Court to operate as a rubberstamp on agency decisions. At the end of the day, the process leading to the 2023 Plan was little more than a formal papering of NPS's predetermined decision to remove cats from the Paseo, with no legitimate consideration of alternatives or honest assessment of relevant regulations or environmental concerns. As a result, the Court must enjoin NPS from moving forward with the 2023 Plan.

I. NEPA Requires That Agency Decisions Be Transparent And Well-Reasoned.

As a threshold matter, the arguments presented by the parties on these cross-motions for summary judgment should be assessed with NEPA's purpose front of mind. The primary function of NEPA is "information-forcing"; that is, "compelling federal agencies to take a hard and honest look at the environmental consequences of their decisions." *Am. Rivers v. F.E.R.C.*, 895 F.3d 32, 49 (D.C. Cir. 2018) (citation omitted). When it comes to NEPA, "it is better to ask for permission than forgiveness: if you can [kill] first and consider environmental consequences later, NEPA's action-forcing purpose loses its bite." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 471 F. Supp. 3d 71, 85 (D.D.C. 2020), *aff'd in part, rev'd in part sub nom.*, *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021). NEPA exists "to ensure that agency decisionmaking is fully environmentally informed" and "requires the agency to (1) identify *accurately* the relevant environmental concerns, (2) take a hard look at the problem in preparing its Environmental Assessment, (3) make a convincing case for any finding of no significant impact, and (4) show why, if there is an impact of true significance, there are sufficient changes or safeguards in the project to reduce the impact to a minimum, which would obviate the

need for an Environmental Impact Statement entirely." *Am. Rivers*, 895 F.3d at 49 (emphasis added).

ACA is seeking through this action to have NPS fulfill the express purpose and function of NEPA. NPS, for its part, is discernibly flippant about NEPA's purpose and requirements, essentially arguing that it is sufficient to give the *appearance* of complying with NEPA rather than addressing environmental questions in the substantive and coherent way required under the statute.

II. Plaintiff Has Standing To Challenge NPS's Cat Management Plan.

NPS leads with the untrue assertion that Plaintiff lacks standing. To have standing under Article III, a plaintiff must have "(1) ... suffered an injury-in-fact that was concrete and particularized and either actual or imminent; (2) there [must have been] a causal connection between the injury and the defendant's conduct (i.e. traceability); and (3) the injury [must have been] likely to be redressable by a favorable judicial decision." *People for Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc.*, 843 Fed. App'x 493, 495 (4th Cir. 2021) (citation omitted; citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Here, ACA has organizational standing because NPS's failure to adequately comply with NEPA has directly impaired ACA's work and required ACA to expend significant resources it otherwise would not have to use for those purposes. ACA also has associational standing on behalf of its supporters who will suffer injuries to their recreational, aesthetic, and environmental interests as well as emotional harm if NPS is allowed to move forward with its unlawful plan. These injuries would be redressed by a ruling in ACA's favor.

A. ACA Has Organizational Standing.

To establish organizational standing a plaintiff must have suffered a "concrete and demonstrable injury to [its] activities—with a consequent drain on [its] resources—constituting

more than simply a setback to the organization's abstract social interests." *People for Ethical Treatment of Animals, Inc. v. Perdue*, 464 F. Supp. 3d 300, 308 (D.D.C. 2020) (citation omitted). ACA easily meets this standard.

ACA's mission is to transform and develop communities to protect and improve the lives of cats through its key programs: advocacy, humane care, education and outreach, and law and policy change. *See* Ex. A, Declaration of Charlene Pedrolie ("Pedrolie Decl.") at ¶ 2. ACA empowers and mobilizes individuals, advocates, grassroots groups, shelters, veterinary professionals, and elected officials across the United States and around the world to improve their communities for cats through nonlethal, evidence-based approaches. *Id.* at ¶ 3. As a part of that mission, ACA expends resources educating the public about cats as community members whose lives have inherent value and supporting the direct care of cats and kittens, especially community cats.

ACA has been monitoring and supporting care for cats in Puerto Rico, and in Old San Juan and the Paseo specifically, for over a decade. *Id*. at ¶ 8. Animal caretakers and concerned advocates in Puerto Rico regularly work with ACA, which has provided food and other care to cats in the Paseo. *Id.* ACA's support has also included coordinating and funding Trap-Neuter-Return programs and sending ACA staff directly to Old San Juan to monitor and care for the cat population in the Paseo. *Id*.

NPS's 2023 Plan directly impacts ACA, its mission, and its work. The 2023 Plan threatens to undo years of work and spending by ACA to support cats in the Paseo and also has forced ACA to mobilize and increase its spending in new ways specifically to resist NPS's arbitrary and capricious attempt to remove and kill cats based on misinformation, and with no meaningful consideration of less harmful alternatives. *Id*. at ¶ 9. When ACA became aware of the 2023 Plan,

the organization immediately sent people to Puerto Rico to provide continuing support to the cats and the organizations that assist with their care, as well as to investigate NPS's claims, which ACA had reason to doubt given its expertise in the field and its long history in the Paseo. *Id.* at ¶¶ 6, 10.

On February 14, 2024, ACA entered into a Grant Agreement with Save a Gato, a nonprofit organization based in Puerto Rico that focuses on the community cats in the Paseo. *Id.* at ¶ 12. The agreement provided $18,000 in grant funding to support Save a Gato's Trap-Neuter-Return efforts in the Paseo, efforts which NPS's 2023 Plan threatens to discontinue in favor of removal and killing. Of this money, $15,000 was allocated to veterinarian expenses for care for the cats. Another $3,000 of the grant was used to purchase cat food. *Id.*

ACA has also spent resources to create video campaigns in response to NPS's new plan, raising awareness that cats living along the Paseo del Morro will be removed and killed if NPS is allowed to go forward with its 2023 Plan. These video campaigns highlight NPS's NEPA violations and make the public aware of NPS's lack of compliance as well as the imminent threat of removal and death faced by cats in the Paseo. *Id.* at ¶ 14. ACA has also sent staff and agents to the Paseo throughout 2024 to continue its efforts in the area, including but not limited, providing and funding care for community cats. *Id.* at ¶ 18.

In sum, ACA has diverted extensive resources to overcome the impediments to its work caused by NPS's failure to comply with NEPA, including correcting misinformation, raising awareness of NPS's 2023 Plan, and monitoring the situation in the Paseo. ACA will have to divert even more resources in the future to address the harm that will result from NPS's 2023 Plan. But for NPS's faulty NEPA process and its 2023 Plan, those resources would be used elsewhere to further ACA's efforts for the benefit of cats throughout the world, including in Puerto Rico, where ACA has long been active and invested. *Id.* at ¶ 19. *See People for Ethical Treatment of Animals*

v. U.S. Dep't of Agric., 797 F.3d 1087, 1097 (D.C. Cir. 2015) (organization has standing where it "has expended—and must continue to expend—resources due to the [government]'s allegedly unlawful failure to [comply with federal law] … its alleged injuries fit comfortably within our organizational-standing jurisprudence"). If ACA prevails in this action, at a minimum NPS will be forced to engage in a more thorough and compliant NEPA process, including providing accurate information about the cats in the Paseo and meaningfully considering alternatives other than removal and killing, including a *well-funded* and better supported TNR program in the Park. Pedrolie Decl. at ¶ 20.

B. ACA Has Associational Standing.

An organization like ACA has associational standing when "(1) at least one of its members would have standing to sue in his own right; (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 60-1 (D.D.C. 2019) (citation omitted). "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Id*. at 61 (citing *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (internal quotation marks omitted)). To establish standing, a plaintiff need only demonstrate that *one* of its members has a legally protected interest, and the requisite showing can be made by "affidavit or other evidence." *Zinke*, 368 F. Supp. 3d at 63 ("because at least one of WildEarth's members would have standing to bring this action, Plaintiffs have standing"); *Sierra Club v. E.P.A.*, 292 F.3d 895, 898 (D.C. Cir. 2002) ("in order to establish its standing" an organization can show "a 'substantial probability'" that the challenged action will "injure a member of the

organization"). Importantly, "[w]here plaintiffs allege injury resulting from violation of a *procedural* right afforded to them by statute and designed to protect their threatened concrete interest, the courts relax—while not wholly eliminating—the issues of imminence and redressability." *City of Dania Beach, Fla. v. F.A.A.*, 485 F.3d 1181, 1187 n. 1 (D.C. Cir. 2007) (emphasis in original and citation omitted).

ACA's supporters, donors, affiliates, and agents have concrete and protectable interests in preserving the population of community cats at the Paseo and ensuring NPS adequately complies with NEPA before enacting any plan to remove or kill them. These supporters have visited the Paseo specifically to enjoy the presence of the community cats, and many intend to return to the Paseo to visit the cats again. Pedrolie Decl. at ¶ 7. Through these visits, ACA's supporters have developed a bond with the community cats and remain highly concerned with the cats' continued well-being and their ability to continue to visit and care for them—interests that are directly injured by implementation of the 2023 Plan. *Id.*; *see also* Ex. B, Burton Declaration; Ex. C, Volovich Declaration; Ex. D, Julien Declaration. Some of ACA's supporters are local volunteers who work with Save a Gato and give their time to care for the cats, frequently visiting Paseo regularly to do so. *See* Ex. E, Salicrup Declaration (Salicrup Decl.) at ¶ 4; Ex. F, Colom Declaration (Colom Decl.) at ¶ 4. By disregarding NEPA's requirements, NPS deprived ACA's supporters of the procedural protections established to protect them from precisely the type of injury NPS's 2023 Plan will cause. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013) (finding associational standing where "[t]he procedural injury the [plaintiff] claim[s]—the allegedly deficient [NEPA Process]—is tied to their respective members' concrete aesthetic and recreational interests"). As in *Jewell*, "[v]acatur of the [government action] would redress the [Plaintiff] members' injuries because, if the [NPS] is required to adequately consider each environmental

concern, it could change its mind about [the 2023 Plan];" therefore, ACA has associational standing to challenge the 2023 Plan on behalf of its supporters. *Id.* at 306.

C. The Law Permits ACA to Challenge NPS's NEPA Compliance.

NPS also challenges ACA's ability to bring this lawsuit from an indirect angle, seeking to disqualify ACA's NEPA action on the ground that ACA did not participate in the public scoping period. However, the law is clear that a party's absence from an administrative process does not foreclose that party's ability to challenge an agency's actions in court—especially where, as here, any such participation would clearly have been futile. As explained in *Foundation on Economic Trends v. Heckler* nearly forty years ago, the "exhaustion doctrine is ultimately an exercise of judicial discretion" which is "premised on a view of fairness to the agency and to the litigants." 756 F.2d 143, 156 (D.C. Cir. 1985). This is because "the purpose of the exhaustion requirement is to ensure that [an] agency 'be given first shot at resolving a claimant's difficulties[.]'" *Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 937 (N.D. Cal. 2006) (citation omitted). As a result, the exhaustion requirement is relaxed where—as here—"it would be futile" to require a plaintiff "to exhaust their administrative remedies where such exhaustion would not have any effect on the [agency's] response." *Id.*

This is certainly a case where ACA exhausting administrative remedies would have been an exercise in futility, and NPS cannot show it was prejudiced. First, ACA's supporters *did* participate in the public-scoping process. *See* Salicrup Decl. at ¶ 6; Colom Decl. at ¶ 6. Second, the arguments ACA asserts in this litigation mirror arguments asserted by commenters during the public scoping period, which NPS steadfastly dismissed (often for demonstrably incorrect reasons). For example, ACA asserts that NPS failed to consider a bolstered TNR program to manage the cats in the Paseo, which was a suggestion repeatedly made by commenters—and

summarily dismissed by NPS—throughout the public scoping period. NPS_00003126 at 3142, 3147. Indeed, the response given by NPS during the public scoping period was identical to NPS's response in this proceeding: that continuing the previous TNR program would be "inconsistent with the park's purpose," and thus NPS must take action at this time to bring the park into compliance with NPS regulations and policies.[3] NPS_0003616 at 3643. As another example, ACA argues that NPS has not demonstrated any actual need for the 2023 Plan, including failing to demonstrate by a site-specific study any harm being caused by the community cats in the Paseo. The same argument was asserted by public commenters. *See id.* at 3628. Public commenters also asserted, as ACA does in this action, that pet abandonment is a significant factor for introducing new cats into the Paseo, and TNR's efficacy could not be meaningfully appraised until pet abandonment was addressed. *Id.* at 3629. And, commenters emphasized the Vacuum Effect and the potential for a new population of cats to move into the Paseo once NPS removes the current colony. *Id*. at 3632. NPS's responses to these assertions mirror their responses in this action. NPS cannot reasonably claim that it would have responded differently to ACA than it did to other commenters who raised these very same issues.

Second, prior to filing this suit, ACA sent a letter to NPS highlighting the issues with NPS's NEPA process and offering to assist in the long-term management of cats in the Paseo. *See* ECF No. 2-1 at 23 (¶ 68); Pedrolie Decl. at ¶ 16 and Ex. 7 attached thereto (ACA February 23, 2024 Letter to NPS, complaining of same defects under NEPA that are at issue in this litigation). NPS refused to engage with Plaintiff or otherwise respond to that letter in any substantive way. Again, NPS cannot credibly assert that it would have been more attentive to its obligations under NEPA if ACA had simply reminded NPS of its obligations *at an earlier date*. The record shows that NPS

[3] As detailed in section III.B, *infra*, this is a demonstrably false argument.

was determined to move forward with the 2023 Plan regardless of feedback received from ACA or any other member of the public.

Against this backdrop, it is clear that (i) NPS had ample notice of the deficiencies in its NEPA process and it chose not to address them (even though Plaintiff was willing to expend its resources to assist), and (ii) "the posture and substance of [this] litigation would not have been altered if [ACA] had exhausted [its] administrative remedies … such exhaustion would [have been] futile[.]" *See Bosworth*, 465 F. Supp. 2d at 937. Indeed, NPS only now invokes the exhaustion requirement to *again* try to shield its NEPA process from scrutiny or review. In other words, NPS has never been legitimately open to an examination of the process and reasoning behind the 2023 Plan. ACA urges the Court not to allow NPS to frustrate justice or NEPA's requirements in this manner, especially given ACA's significant and unrequited efforts to resolve this matter absent judicial intervention.

III. NPS's NEPA Process Suffered From Multiple Deficiencies And NPS Barely Attempts To Defend It.

In its opening brief, ACA identified glaring defects in NPS's NEPA process, including the extent to which NPS misled the public, failed to demonstrate any of the issues it cited as creating a need for the 2023 Plan were actually occurring at the Park, and, by NPS's own admission, failed completely to consider any alternative other than removal. NPS does not meaningfully address these points, but instead insists the 2023 Plan will have no significant environmental impact and invokes principles of agency deference. However, "[a]lthough the standard of review is deferential, [courts] have made it clear that [s]imple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Del. Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (citation and internal quotation marks omitted). And concerningly, NPS continues

the campaign of misinformation it started with the public during the public scoping period by misrepresenting pertinent facts to the Court.

A. NPS Outright Ignores Many of Plaintiff's Identified Deficiencies in its NEPA Process.

NPS's primary strategy in this litigation is apparently to disregard any of ACA's contentions that NPS is unable to substantively rebut. By asserting that this entire suit can be reduced to a policy disagreement that NEPA cannot resolve, NPS clearly hopes to sidestep ACA's legal arguments. But the law is clear: where "a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded." *Shaw v. Austin*, No. 20-2036 (RDM), 2023 WL 1438394, at *5 (D.D.C. Jan. 31, 2023) (quoting *Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014)). Notwithstanding, no amount of omission or obfuscation can erase the fact that NPS's NEPA process is facially and fatally flawed, and ACA's substantive criticisms of NPS's deficient NEPA process are amply supported by the administrative record.

1. NPS continuously misinformed the public regarding the contents of the 2023 Plan.

As detailed in ACA's opening brief, NPS misinformed the public about the availability of shelter space, the efficacy of TNR, the "harm" being caused by cats in the Paseo, the extent to which "euthanasia" would be utilized in the 2023 Plan, and the alternatives that were being considered. ACA Br. at 19-20, 28-30. In doing so, NPS eviscerated any opportunity for informed and effective public participation in the NEPA process. This was most powerfully demonstrated when, during one of the public comment meetings, a commenter stated "I was here at the last meeting when you guys absolutely promised that euthanasia would not be part of this solution. You promised it multiple times. And you mentioned euthanasia multiple times right here on this sheet, which means that these are promises that are already being made to be broken." *See*

NPS_0003401 at 3449-50. But NPS repeatedly dismissed these types of concerns by the public as nothing more than "sympathizing with free-ranging cats." *See* ECF No. 27-1 ("NPS Br.") at 26.

2. NPS failed to measure sterilization rates to see if it had implemented TNR in an efficacious manner consistent with its own cited literature.

According to multiple studies NPS purportedly relied on, TNR successfully curtails a cat population only if adequate sterilization levels are achieved within that population. NPS_0004649 at 4652; NPS_0005029 at 5033. A true evaluation of the efficacy of TNR in the Paseo would have necessitated measuring sterilization levels, which NPS did not do. ACA noted this in its opening brief, and further explained that if the sterilization levels were below the necessary threshold, bolstering TNR to achieve these levels represented a clear, reasonable alternative NPS did not consider. *See* ACA Br. at 25. In its cross-motion for summary judgment, NPS ignored this fact, stating incorrectly that "Plaintiff fails to identify any alternative that NPS should have, but unreasonably failed to, address." NPS Br. at 9.

3. NPS utilized a deeply flawed process to tally the cat population.

Despite NPS's heavy reliance on the purported growth in the cat population to establish the alleged ineffectiveness of TNR and the need for removal, ACA identified multiple issues with NPS's methods for counting the cat population in the Paseo which cast serious doubts over NPS's data and process. *See* ACA Br. at 22-23. NPS does not acknowledge Plaintiff's criticisms, likely because it would be difficult for NPS to validate how it was able to differentiate between cats with, according to NPS's records, identical fur patterns and colors in grainy photos taken across multiple weeks. NPS_0001436 at 1452-71 (dozens of cats designated as distinct have the same exact description). In its cross-motion for summary judgment, NPS focuses instead on its inaccurate interpretation of existing authorities (discussed in III.B, *infra*), only addressing the growth in the cat population in a footnote. *See* NPS Br. at 29, n. 7.

4. NPS failed to meaningfully consider the impacts of or address cat abandonments in the Paseo.

Cat abandonments are a consistent issue in the Paseo and throughout Puerto Rico. Because of NPS's lack of site-specific study or data collection, it is difficult to say with confidence what role cat abandonments play in any cat population increase in the Park, and even after the 2023 Plan is enacted, cat abandonments are almost certain to persist. ACA made these points in its opening brief. *See* ACA Br. at 23, 25-26. NPS's cross-motion only casually mentions abandonments twice: once to acknowledge that Plaintiff emphasizes the need to deal with abandonments (*see* NPS Br. at 29) and once to state that *prior* to the 2023 Plan, NPS had employed some vague efforts to decrease abandonments. *See* NPS Br. at 11. But NPS does not state what the efforts were that it utilized because that would reveal that NPS intends to utilize the same methods to curtail cat abandonments it claims were previously ineffective, revealing a significant oversight in its removal plan.

5. The 2023 Plan will do nothing to address the Vacuum Effect, which poses a serious and demonstrably harmful impact to the environment.

Plaintiff outlined the Vacuum Effect[4] and its consequences in its opening brief. *See* ACA Br. at 25-27. NPS ignores this issue entirely in its cross-motion, presumably because the law, record evidence, and common sense squarely support Plaintiff's arguments. The Vacuum Effect—the phenomenon by which an animal population will move into an area once an existing population is no longer there—represents a clear environmental impact that had to be addressed by way of an EIS. As noted in Plaintiff's opening brief, any cats moving into the Paseo because of the vacuum

[4] NPS's Free-Ranging Cat Management Plan Environmental Assessment specifically cites ACA as an authority on TNR programs and the Vacuum Effect. *See* NPS_0003126 at 3147, 3164, 3176.

left after NPS removes the existing community cat population are likely to be unvaccinated and unseen by veterinary doctors. *See id.*

B. NPS Has Not Shown Any Existing Authority Requiring It to Enact the 2023 Plan.

Contrary to NPS's repeated assertions, ACA has shown that NPS's identified "existing authorities" are not inconsistent with continued TNR and do not require NPS to enact the 2023 Plan. *See* ACA Br. at 20-21. Specifically, Plaintiff explained, *inter alia*, that existing regulations explicitly *permit* trapping and *permit* feeding by authorized park personnel (hence why NPS currently manages other animal species on federal land through means that include feeding). *Id.* This means that NPS was misinforming the public and misrepresenting the dictates of the law every time it stated in its EA, FONSI, or in response to a comment that it could not continue TNR because to do so was inconsistent with existing authorities.

In response, NPS states that "existing guidance instructs NPS to take efforts to manage the species in the Park in order to prevent damage to historic resources, disruptions to the management of the park unit, and health and public safety hazards." *See* NPS Br. at 24-25. But NPS provides no textual analysis or interpretation to validate this claim, does not show any damage to historic resources, disruptions to management of the park, or health and public safety hazards caused by the cats, and NPS makes no effort to explain why existing guidance precludes TNR or why ending TNR will have no significant environmental impact. This is the exact kind of conclusory statement that is entitled to no deference. *Del. Riverkeeper Network*, 753 F.3d at 1313. And, as the Court will see upon review of NPS's identified "existing authorities," there is no reading of the applicable regulations that is consistent with NPS's position. Regardless of the deference owed to an agency under the APA and NEPA, it cannot be that such deference extends to obvious misreading or

misrepresentations of the law. Having based its entire 2023 Plan on the flawed premise that "existing authorities" preclude feeding the cats in the Park, the entire 2023 Plan must fall.

C. NPS Failed to Consider Reasonable Alternatives.

NPS's consideration of alternatives was precluded by its restrictive purpose and need statement. This theme continues in NPS's own cross-motion: NPS concedes that "several variations of continued TNR were considered during the initial project planning" but "were dismissed from further analysis because they would not meet the purpose and need for the project[.]" *See* NPS Br. at 29-30. Given that an alternative that is inconsistent with the stated purpose and need for the project *necessarily* was not considered, NPS's assertion that it considered such alternatives is powerful evidence that it only considered "alternatives" it believed furthered its preferred outcome.

NPS purported to provide three alternatives for consideration. ACA has demonstrated that two of those three alternatives were complete façades. *See* ACA Br. at 27-30. NPS admits in its cross-motion that one of its three alternatives, the "no action alternative," was included only "as a baseline for comparison" and was not actually considered as an alternative means going forward. *See* NPS Br. at 27. The remaining two alternatives, alternatives 2 and 3, are as close to identical as two alternatives can be. NPS attempts to distract from this fact by providing an incomplete and misleading description of alternative 3. NPS states that "Alternative 3 allows for an animal welfare organization to remove free-ranging cats from the Park, and then allows that organization to use its best professional judgment to determine the appropriate outcome for the cats (shelter, adoption, euthanasia) after removal—in comparison, Alternative 2 allows for a contracted removal agency to undertake removal." *Id.* at 29. Omitted from this comparison is the fact that NPS has complete

discretion under alternative 3 to decide not to use an animal welfare organization at all and instead go straight to using a removal agency.

More directly, both "alternatives" *are removal*—that is the key feature of both alternatives and the key controversial aspect of the 2023 Plan; who does the removing is of no import if there is no removal in the first place. While "[a] federal agency need not consider all possible alternatives for a given action, nor must the agency select any particular alternative[,] the agency must consider a range of alternatives that covers the full spectrum of possibilities." *Sierra Club v. Watkins*, 808 F. Supp. 852, 872 (D.D.C. 1991). "The discussion of alternatives need not be exhaustive, but it must 'be sufficient to demonstrate reasoned decisionmaking.'" *Id*. (citation omitted).

In sum, NPS acknowledges it only seriously considered two alternatives, and ACA has shown that the two alternatives are essentially identical—and, in fact, NPS reserved discretion to make the alternatives one and the same (by deciding not to use an animal welfare organization to conduct the removals). If this were sufficient to meet NEPA's mandate to consider alternatives, the mandate would be rendered meaningless. Any agency would be able to satisfy NEPA by presenting its preferred alternative and then folding discretion into all other alternatives that enables that agency to transform the other alternatives into its preferred alternative. While this sounds absurd, that is precisely what NPS attempts here, and that is what NEPA was enacted to proscribe. *Id*. at 876 ("While courts should often defer to agency decisionmaking, they must be vigilant to ensure that agencies pushing the line of NEPA compliance do not overstep it, else the statute becomes of little meaning.").

D. NPS's NEPA Analysis Is Hampered by a Lack of Site-Specific Studies.

NPS argues it was not required to include site-specific studies in its NEPA analysis because (i) it had access to "reliable existing data and resources that [could] inform [its] analysis" and (ii)

"NEPA does not prevent NPS from taking action to manage invasive species until some certain amount of harm to native species is shown." *See* NPS Br. at 24-25. With respect to (i), ACA's review of those studies revealed that the implication of the scientific literature is mixed at best (especially when TNR is used to promote a healthy cat population, as has been the case in the Paseo for two decades), and NPS produced no data whatsoever that indicate or even suggest that any of the potential harms associated with some cats *globally* were occurring in Puerto Rico *specifically*. In fact, the studies NPS did cite that investigated harms caused by community cats in Puerto Rico ***all found no evidence of disease transmission***. *See* NPS_0006080; NPS_0003786. Thus, by NPS's logic, the government can act to "address" an issue in a specific location, so long as it can locate some evidence that that issue may be present *anywhere in the world* and despite a lack of evidence that that issue exists in the project area.

With respect to (ii), NPS cites *Grunewald v. Jarvis*, 776 F.3d 893 (D.C. Cir. 2015), implying that site-specific studies demonstrating harm are unnecessary before the government may act. But in that case, the court upheld the government's plan because the government *did* conduct site-specific studies and available evidence demonstrated that deer were at least partially responsible for the issues *identified within the project area*. *See Jarvis*, 776 F.3d at 902 ("the Park Service has conducted a paired plot study to isolate the effects of deer, and found that detrimental ecological 'impacts can be directly attributed to deer browsing'" and "the record shows that 'the deer are having negative impacts on Rock Creek Park[.]'") (citations omitted). Thus, NPS's own cited authority supports ACA's contention that a diligent NEPA process requires demonstrating that the issue being addressed actually exists. NPS has not made such a showing, making it plain that NPS is acting arbitrarily, capriciously, and in violation of NEPA and the APA.

IV. NPS Was Required To Prepare An Environmental Impact Study.

In this case, ACA has outlined the profound historical and cultural significance of cats in Puerto Rico, and in the Paseo specifically; the same sentiment permeates the public scoping comments, which contain hundreds of pleas to NPS not to remove or kill the cats living along the Paseo. *See* NPS_0002576. The removal and killing of the cats living along the Paseo will have a significant effect on the human environment because the cats have cultural significance, are loved and cared for, and many find that their beauty enhances the aesthetic appeal of the Paseo. NPS was required to prepare an EIS demonstrating the issues it purports to combat and considering the impact of a range of alternatives for addressing those issues on the human environment. NPS failed to do so, instead NPS treating NEPA as "a bureaucratic formality." *Zinke*, 368 F. Supp. 3d at 85.

A. NPS's 2023 Plan Will Significantly Impact the Human Environment in the Paseo.

The Council on Environmental Quality ("CEQ") Regulations provide that an agency, when analyzing whether a proposed action may have a significant effect, must consider "[t]he degree to which the action may adversely affect public health and safety." 40 C.F.R. § 1501.3(d)(2)(i). It is unsettling (and illegal) that NPS does not recognize that the forced removal and killing of culturally significant animals that are actively cared for will have "deleterious impacts to human health and safety." NPS Br. At 38-39; *see also Friends of Animals v. U.S. Bureau of Land Mgm't*, 232 F. Supp. 3d 53, 66 (D.D.C. 2017) ("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").

Instead, NPS attempts to avoid any consideration of this significant factor under NEPA by alleging community cats in the Paseo are an invasive species, and as such, that their removal will necessarily not have a significant environmental impact. Guidance from the Department of the

Interior's 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).[5] But NPS does not even attempt to identify or measure any actual harm being caused by the cats in the Paseo, instead relying on global case studies. Essentially, NPS argues that because there is evidence of *Toxoplasma Gondii* in cats in Asia (*see* NPS_0004824), NPS need not meaningfully consider the environmental impact of killing cats in Old San Juan.

Moreover, NPS refuses to acknowledge the likely consequence of ending TNR in the Paseo. Under the current cat management plan, NPS has found *no* disease transmission between cats and humans or any other wildlife. NPS_0003126 at 3163. NPS is required under NEPA to consider the potential change to the environment that may result from ending TNR, a proven method of promoting a healthy cat colony, especially where available evidence suggests that it is working. NPS's failure to prepare an EIS discussing the emotional harm and potential adverse consequences of ending TNR further negates any argument by NPS that its NEPA process was adequate.

B. NPS Admits That It Did Not Comply With Updated Environmental Regulations.

NPS states it prepared and issued the EA and FONSI in compliance with governing NEPA regulations in 2023. *See* NPS Br. at 40. The most current CEQ regulations require a broader consideration of significance factors to determine if an EIS is necessary. This change in regulations reflects CEQ's updated understanding that more factors are relevant in determining whether an

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

agency's actions will have a significant impact on the environment. NPS necessarily did not consider these factors—factors which CEQ believes are highly relevant to evaluation of an agency's NEPA obligations. NPS has not yet commenced its plan. It would suffer no prejudice if it had to consider how the 2023 Plan impacts significance factors promulgated by CEQ in 2024. Plaintiff has demonstrated how NPS, when conceiving the 2023 Plan, ignored its impacts on the unique characteristics of the Paseo, the Paseo's status as a historic site, and environmental justice concerns. *Utah Marblehead, LLC v. Kempthorne*, NPS's cited case for why it should only be held accountable to the standards of the 2023 CEQ regulations is not a NEPA case, and its holding should be disregarded because it is pertinent to a different regulatory scheme. *See Kempthorne*, No. 05-cv-00844-HKK, 2007 WL 1020822, at *1 n.4 (D.D.C. Mar. 29, 2007). NPS's argument that the updated CEQ regulation are inapplicable is false. According to CEQ "[a]n agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before July 1, 2024." 40 C.F.R. § 1506.12.

CONCLUSION

ACA has demonstrated robust and systemic issues with NPS's NEPA process with respect to the 2023 Plan. Rather than address those issues, NPS attempts to disqualify Plaintiff's challenge and reduce Plaintiff's claims to a policy disagreement that cannot be resolved under NEPA. Where NPS does respond to Plaintiff's arguments, it provides only conclusory statements and misinformation. This is precisely the conduct NEPA and the APA exist to curtail. The record demonstrates that ACA has standing to bring this action, that NPS failed to meaningfully comply with NEPA, and that NPS's planned action to remove and kill community cats will have a significant environmental impact. Accordingly, ACA is entitled to summary judgment in its favor and an order vacating NPS's 2023 Plan.

Dated: Washington, D.C.
December 10, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December 2024, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

Dated: Washington, D.C.
December 10, 2024

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