UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NARRAGANSETT INDIAN TRIBE,

Plaintiff,

v.

STEPHANIE POLLACK, Acting Administrator of the Federal Highway Administration, et al.,

Defendants.

Civil Action No. 20-0576 (RC)

FEDERAL DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT I

Pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1), Federal Defendant Stephanie Pollack, Acting Administrator of the Federal Highway Administration, respectfully moves to dismiss Count I of the First Amended Complaint for lack of subject matter jurisdiction. Plaintiff lacks standing. In addition, Federal Defendant opposes Plaintiff's motion for summary judgment on Count I of the first amended complaint (ECF No. 43) brought under the Administrative Procedure Act and cross-moves on the same claim under Rule 56. The grounds for these motions are set forth in the accompanying memorandum of points and authorities. Because the Court has a duty to consider its jurisdiction first, it should address the Federal Defendant's motion to dismiss before turning, if necessary, to the competing arguments on the merits of the alleged final agency action.

Dated: September 30, 2021

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NARRAGANSETT INDIAN TRIBE, *Plaintiff,* v. STEPHANIE POLLACK, Acting Administrator of the Federal Highway Administration, et al., *Defendants*.	Civil Action No. 20-0576 (RC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, AND CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT I

The National Historic Preservation Act ("NHPA"), codified at 54 U.S.C. § 300101, et seq, requires covered federal agencies to "take into account" the preservation of historic sites when implementing federal projects. In this action, Plaintiff, the Narragansett Indian Tribe ("Plaintiff" or the "Tribe") purports to challenge the Federal Highway Administration's (the "Agency's") compliance with NHPA in abandoning parts of a programmatic agreement among and between the stakeholders, including Plaintiff, and including certain elements (including land transfers to Plaintiff) to help mitigate the impact of a massive redesign of part of Interstate 95 on the culturally, religiously, and historically significant land in or near Providence, Rhode Island.

Plaintiff treats the programmatic agreement here as equivalent to the binding legal contracts necessary to transfer the particularly identified parcels of land (which it is not) and takes no account of Plaintiff's own role (however legitimate as a matter of law) in the impasse that arose and the Agency's need to move beyond it after years of attempting to resolve the impasse

unsuccessfully and with mostly only the power of persuasion. During the entire relevant time, the Agency considered Plaintiff's positions and, as the record reflects, notified Plaintiff that it was contemplating terminating the programmatic agreement and considered the comments Plaintiff submitted in response to that notification. Plaintiff's comments did not supply a ready-made solution for the impasse or propose halting or modifying the massive construction project by then years underway with the Agency's procedures at a much earlier mid-point in time increasingly overtaken by events.

Because the Agency complied with the procedural requirements of NHPA and ultimately took other steps to mitigate the impacts, Count I does not show arbitrary and capricious agency action or abuse of discretion under deferential judicial review afforded by the Administrative Procedure Act ("APA"). And as pled in the amended complaint, Plaintiff fails to show it has standing to assert the particular APA claim asserted. Plaintiff has moved for summary judgment on the APA claim (ECF No. 53), and the Agency opposes and cross-moves for summary judgment in its favor as well as moving to dismiss based on its challenge to Plaintiff's standing.

BACKGROUND

A. Formation of the Programmatic Agreement

As alleged in the amended complaint and noted in the Court's earlier decision in this case, the State of Rhode Island received funding from the Agency to build the I-95 Providence Viaduct Bridge ("Viaduct Project"). *See* July 22, 2020 Mem. Op. at 5. The Agency determined that the Viaduct Project would have adverse effects on the Providence Covelands Archaeological District, an area protected under the NHPA. *Id.* This district has historical and cultural significance to the Tribe, which is a Federally Recognized Sovereign Tribe in the State of Rhode Island. *Id.* at 6.

Accordingly, the Agency was required to go through a Section 106 process and consult with the Tribe, as the Covelands were an NHPA protected area. *See generally*, 36 C.F.R. § 800.2(c) ("the act requires the agency official to consult with any . . . tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking"); 36 C.F.R. § 800.14. After these consultations, the Agency must resolve adverse effects, finding amicable alternatives that could avoid, minimize, or mitigate these impacts on historic resources. 36 C.F.R. § 800.6. A programmatic agreement is a mitigation alternative to the Section 106 process often used when a project is complex and the "effects on historic properties cannot be fully determined prior to approval of an undertaking." 36 C.F.R. § 800.14(b). When the programmatic agreement is executed, it satisfies Section 106 requirements as the parties agree to mitigate adverse effects. *Id.*

There can be no reasonable dispute that the Viaduct Project was complex. The Agency worked with the Tribe and stakeholders in preparing a programmatic agreement. *Narragansett Indian Tribe v. Nason*, Civ. A. No. 20-0576 (RC), 2020 WL 4201633, at 5 (D.D.C. July 22, 2020). The Agency had initial conversations with the Tribe and other signatories about replacing archeological information lost with the reconstruction of I-95, settling on mitigation through property transfer. *Id.*

On October 3, 2011, a programmatic agreement was prepared by the Agency and the State. *See* Am. Compl. ¶ 21; *Narragansett Indian Tribe v. R.I. Dep't of Transp.*, Civ. A. No. 17-0125, 2017 WL 4011149, at 2 (D.R.I. Sept. 11, 2017). The Agency, the Rhode Island Department of Transportation ("Rhode Island DOT"), the Rhode Island Historic Preservation Office ("Rhode Island Preservation Office"), and the Narragansett Indian Tribal Historic Preservation Office ("Tribe's Preservation Office") (collectively, the "signatories") executed a programmatic

agreement effective October 3, 2011. *Id.* The initial programmatic agreement stipulated the mitigation measures for the Viaduct Project. The signatories amended the initial programmatic agreement on January 17, 2013 (the programmatic agreement as amended, the "Programmatic Agreement"). *See* Am Compl. ¶¶ 22-25; AR000039. Subsequently, construction began on segments of the Viaduct Project in June 2013. *See* Am. Compl. ¶ 31; AR000040. Pursuant to the Programmatic Agreement before its amendment, concerning the Viaduct Project undertaking, the signatories agreed that "in order to take into account the foreseen and unforeseen future effects of the Undertaking on historic properties," the Viaduct Project would be implemented in accordance with certain stipulations. AR000039.

In the Programmatic Agreement as amended, Rhode Island DOT agreed to transfer: (1) Salt Pond Archaeological Preserve, (2) Chief Sachem Nighthawk Property, (3) Providence Boys Club-Camp Davis, and (4) a 105-acre property in Charlestown. Additionally, the Programmatic Agreement included a Fish and Wildlife Grant. *Id.* Before transferring the properties, Rhode Island DOT purchased the properties and prepared deeds to transfer the properties with the requirement that the Tribe "waive tribal sovereign immunity only as it applied to the deed covenants" and that the "property shall be subject to civil and criminal laws and jurisdiction of the State of Rhode Island." *Narragansett Indian Tribe,* 2017 WL 4011149, at *4. The Tribe refused to sign any document waiving its sovereign immunity, and the State declined to transfer the properties without the limited waiver. *Id.*

B. The Agency's Three Years of Arranging Meetings and Complying with the Section 106 Process

The signatories to the Programmatic Agreement spent three years attempting to resolve the impasse blocking the land transfers. To summarize:

- The Agency arranged a mediator from the Udall Foundation U.S. Institute for Environmental Conflict Resolution to identify solutions or alternatives. The mediator held four conflict resolution sessions with an impartial mediator. However, the signatories were unable to reach a compromise. AR000097.

- Thereafter, the Rhode Island DOT and Preservation Office wrote to the Advisory Council on Historic Preservation (the "Advisory Council")[1] about this impasse. Through a letter, the Advisory Council declined to conduct dispute resolution under Stipulation 7 of the Amended Agreement on October 30, 2014. AR000120. The Advisory Council noted that (1) under stipulation 8 of the Amended Agreement, an impasse must be resolved through consultation or amendment, and (2) under Stipulation 9, if any impasse cannot be resolved, any signatory can terminate the agreement. *Id.* For any unresolved impasse, the Advisory Council noted that the Agency "would have no recourse but to terminate the [the Amended Agreement] and comply with subpart B of 36 C.F.R. part 800. Further consultation consistent with the requirements of subpart B without the [Advisory Council's] involvement and assistance may very well lead to the same impasse and the need for formal [Advisory Council] comments under 36 C.F.R. 800.7." *Id.*

- On December 9, 2014, the Advisory Council met with the Tribe, the Rhode Island DOT and Preservation Office, and the Agency. The meeting was civil, and the signatories voiced their concerns. The positions of the signatories remained unchanged. The Tribe was unwilling to accept the partial waiver in a programmatic agreement. AR000121.

[1] The Advisory Council is an independent federal agency, charged with the mission to promote the preservation of our Nation's diverse historic resources. *See* Advisory Council, https://www.achp.gov/.

- On August 17, 2015, signatories held a conference call between the Tribe's Preservation Office, Rhode Island Preservation Office, the Advisory Council, and the Agency. The positions of the signatories remained unchanged. AR000132.

- In September 2016, the Agency emails indicated that the agency looked through all other alternatives. Internal emails from the Agency expressed its view that a programmatic agreement can only be enforceable if the Tribe agrees to a limited waiver. The Agency also noted that Rhode Island DOT indicated that they would transfer when the Tribe agreed to the limited waiver. Such a waiver is a customary provision and prepared frequently through the Bureau of Indian Affairs. AR000143.

On September 1, 2016, the Agency sent notification to the Advisory Council that they were unable to take federal action on the Viaduct project until the commitments by the Tribe were met. AR000155.

C. Termination of the Programmatic Agreement and Initiation of New Proposal.

On January 19, 2017, the Agency terminated the Programmatic Agreement and referred to the Advisory Council for comment. *Id.* The Advisory Council responded on January 27, 2017, noting that the Agency is required to take comments into account before making a final decision on a project. AR000157. In February 2017, the Agency provided additional information about the termination, attaching comments and letters between 2009 and 2016. AR000159.

The Advisory Council submitted their comments on May 3, 2017, recommending that the project should not be delayed because the I-95 corridor is "one of the most heavily used transportation corridors in the eastern United States." AR000175. The Advisory Council recommended that Agency "forego the requirement for a protective covenant on these two properties and its related demand for a waiver of tribal sovereign immunity" but keep state

jurisdiction for Boys Club-Camp Davis and Chief Sachem Night Hawk properties. AR000176. In response to the letter by Advisory Council, the Tribe's Preservation Office wrote the same day that Advisory Council's "reasoned logic is not supported by existing law and is outside the scope of your review. The Narragansett Indian Tribe is not a PL 83-280 Indian tribe and is not subject to state law." AR000178. On May 12, 2017, the Agency stated that they would take those comments into account and address them. AR000181.

On June 28, 2018, the Agency initiated a new proposed programmatic agreement, terminating the existing Programmatic Agreement. AR000486-487. The proposal did not require a transfer of the Providence Boys Club-Camp Davis or Chief Sachem Night Hawk Properties. *Id.* Instead, the Agency would work with all parties on the new proposed programmatic agreement and included mitigative alternatives including a Rhode Island Public Schools curriculum, a documentary, a training video, and an academic document about the Tribe. *Id.* The Tribe objected to the proposed programmatic agreement. AR000490; AR000499. The Agency informed the Tribe that "they are considering all points of view" and will "protect the interests of all parties," but it required reconciliation and choices best afforded appropriate recognition of the interests of stakeholders other than the Tribe and including the driving public by then using the completed southbound lanes. *See* AR000498.

ARGUMENT

I. Standards of Review

To survive a motion to dismiss under Rule 12(b)(1), a plaintiff bears the burden of proving that the Court has subject-matter jurisdiction to hear its claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *U.S. Ecology, Inc. v. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). A court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C.

2001). For this reason, "'the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Id*. at 13–14 (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1987) (alteration in original)). Additionally, unlike when considering a motion to dismiss under Rule 12(b)(6), the Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharmaceuticals v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005); *see also Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359, 366 (D.C. Cir. 2005) ("[G]iven the present posture of this case—a dismissal under Rule 12(b)(1) on ripeness grounds—the court may consider materials outside the pleadings."); *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

The elements of Article III standing are "an indispensable part of the plaintiff's case," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561. At the pleading stage, a plaintiff's factual allegations must be more than merely conclusory legal statements to the effect that standing exists or that the plaintiff was injured. As the Supreme Court has stated, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. 490, 518 (1975); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (complaint's statement of the grounds for relief requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and a court need not accept as true "'naked assertion[s]' devoid of 'further factual enhancement'") (quoting *Twombly*, 550 U.S. at 557).

Should the Court find that Plaintiff has standing and reach the merits, then under the APA, courts may only set aside final agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In evaluating agency actions under this standard, courts must consider "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (internal quotations and citation omitted); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The scope of judicial review under this standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983). Additionally, judicial review is limited to the administrative record before the decision-maker at the time of its decision, and the administrative decision is entitled to a presumption of validity. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

II. Count I Should Be Dismissed Because Plaintiff Lacks Standing for the Claim Brought Against the Federal Defendant

In paragraph 4 of the Amended Complaint, the Tribe claims that it has standing to sue the Agency by virtue of being aggrieved by final agency action. In paragraph 45, Plaintiff identifies the supposedly final agency action as a June 28, 2018, determination by the Agency to "reinitiate Section 106 consultation for the project and draft a new [programmatic agreement] committing to [ ] mitigation items to address the known and potential adverse effects to historic properties on the I-95 Viaduct Project in Rhode Island." Am. Compl. ¶ 45. This Court previously found (July 22, 2020, Mem. Op. (ECF No. 30) at 8-10) that Plaintiff has alleged the minimum requirements to set forth a claim under the APA, but that is insufficient to proceed because Plaintiff lacks Constitutional standing for the claim against the Agency based on these allegations.

Standing must be established for each claim and is evaluated at the time it is brought. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); *see also Friends of Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 180 (2000); *Barker v. Conroy*, 921 F.3d 1118, 1124 (D.C. Cir. 2019) (Holding that at the pleading stage a plaintiff is "required only to state a plausible claim that each of the standing elements" existed at the time the complaint was filed) (citing *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017)). Here Plaintiff's allegations of harm are not caused by the Agency or redressable by a decision in Plaintiff's favor, in large measure because this Court lacks personal jurisdiction over the non-federal defendants after the case was transferred from Rhode Island at Plaintiff's request. The Court may not assume standing exists and proceed to the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

Plaintiff's alleged injury stems from a pivot point in 2017 to 2018 during an ongoing and massive infrastructure project that began in 2013 and proceeded uninterrupted in Rhode Island despite litigation in Rhode Island brought by Plaintiff against the Agency and the Rhode Island DOT. Am. Compl. ¶ 31 (alleging that the "Viaduct Project" began in 2013); *id*. ¶ 36 (alleging the southbound lane project was completed in "Fall of 2016); *Narragansett Indian Tribe v. R.I. Dep't of Transp*., Civ. A. No. 17-0125, 2017 WL 4011149, at *2 (D.R.I. Sept. 11, 2017), *aff'd*, 903 F.3d 26 (1st Cir. 2018).[2] According to the Amended Complaint, Plaintiff's injury stems from the contemplated but never consummated transfer of certain lands from Rhode Island to Plaintiff "as sole owners, without covenants, without waiver of sovereign immunity, but with the state retaining jurisdiction" and the alleged failure to preserve the Salt Pond Archaeological Preserve. Am.

[2] According to the Rhode Island Department of Transportation's website, ongoing construction to replace the northbound lanes of I-95 is expected to be completed in the fall of 2022 (http://www.dot.ri.gov/projects/I-95ViaductNorth/index.php).

Compl. ¶ 42; *see id*. ¶¶ 23-24 (alleging the location of the parcels). Although Plaintiff complains about certain "new mitigation items" (*id*. ¶ 44) adopted by the Agency after the first programmatic agreement broke down (*id*. ¶ 39), Plaintiff does not allege that those caused any harm. Nor does Plaintiff allege specifically what happened to the land (Salt Pond Archaeological Preserve, the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk properties) other than to claim that funding expenditures for the southbound lanes of I-95 caused harm. *See id*. ¶¶ 50-51. Rather, it is plain that at least for the APA claim, the alleged injury is harm to particular land not transferred or preserved and now practically subsumed by the relocation of the southbound lanes of I-95 in Rhode Island. *See id*. ¶¶ 45-46; Ex. 1 (proposed 2019 programmatic agreement describing the properties and attaching map as Appendix A).

At bottom, Plaintiff is claiming that the Agency's acts or omissions harmed Plaintiff by depriving it of the benefits of the land transfers or other provisions included in the Programmatic Agreement that did not come to fruition after the Plaintiff declined to grant a limited waiver of sovereign immunity for enforcement of certain covenants requested by the Rhode Island DOT. *See* Am. Compl. ¶ 39; Pl.'s Mem. at 19 (complaining about the Agency's purported "failure to transfer" land). This is essentially the same injury alleged in the first-filed case in which the First Circuit held that the claims as pled in the first action were not within the waiver of sovereign immunity relied upon by Plaintiff there, and now the defect is that no amount of additional consideration process by the Agency can ever undo the impacts of a massive highway project or force Rhode Island, a third party for purposes of the APA claim, to land transfers and outside the personal jurisdiction of this Court. *See* Am. Compl. ¶ 16.[3]

[3] The reference to a "Phase III archaeological data recovery program" in the Amended Complaint is specifically alleged to not have been feasible, and Plaintiff does not seek one in its prayer for relief. *See* Am. Compl. ¶ 19. Additionally, it is axiomatic that the APA does not provide

Even more significantly, the June 28, 2018 letter from the Agency, which the Court can consider, demonstrates that the Agency contemporaneously considered the concerns alleged in the Amended Complaint. *See* AR AR000486-487 (June 28, 2018 letter); *see also* AR000120-121 (Advisory Council urging the Agency to consult to resolve impasse) AR000520-521(the Agency acknowledges on Oct. 19, 2017, it cannot require waiver of sovereign immunity of Tribe) AR000496-497. The Tribe's allegation to the contrary is unsupported by well-pled facts or evidence, and further undercutting an inference that the Agency's challenged actions or omissions caused harm is Plaintiff's allegation that the Agency considered its views and implemented new mitigation measures. *See* Am. Compl. ¶¶ 43-44. Although the Tribe may quarrel with the comparative benefits of the new mitigation items, the more rigorous standards applicable to public notice and comment procedures do not apply here so the Agency's substitution of, for example, proposing changes to school curricula instead of land transfers, is not properly reviewable because it is policy or because it presents a political question. The Agency's extensive and consistent attention for years to try to implement the Programmatic Agreement and specific process for signaling a change of direction when those efforts bore no fruit are the only challenged actions, but the context of the overall Viaduct Project is pertinent.

In federal courts, jurisdiction must be established as a threshold matter. *Steel Co.*, 523 U.S. at 94-95. To invoke federal subject matter jurisdiction, a plaintiff must establish the existence of a "justiciable controversy" with the adverse party—one that is "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S.

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for compensatory damages, nor would Plaintiff have standing to seek requiring return of federal funds for the Viaduct Project because that is a generalized grievance common for taxpayers or a broad programmatic challenge. *See Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347 (2006).

227, 240-41 (1937). Thus, plaintiffs bringing suit in federal courts must demonstrate that they have standing to seek the relief sought in the complaint. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). To establish constitutional standing, a plaintiff must satisfy three requirements: First, a plaintiff must show an "injury-in-fact," which is defined as "an invasion of a legally protected interest that is (a) concrete and particularized [meaning that the injury must affect the plaintiff in a personal and individual way], and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 & n.1(citations and quotation marks omitted); *see also Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-41 n.16 (1972). Second, the plaintiff must demonstrate a "causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. This means that the injury has to be "fairly. . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org*., 426 U.S. 26, 41-42 (1976). Third, the injury in question must be redressable by the relief sought by the complaint. This means that it "must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S.at 561 (quoting *Simon*, 426 U.S. at 38); *see also Allen*, 468 U.S. at 750-51.[4]

In this case, the alleged injury is fairly traced to the dispute between the Rhode Island DOT and Plaintiff. It is not fairly traced to the Agency. As required by statute, the Agency "stop[ped], look[ed], and listen[ed,]" *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 166 (1st Cir. 2003), when the Tribe expressed its concerns and views, and nothing more is either

[4] In addition to the constitutional requirements for standing, the Court must consider whether any prudential limitations should restrain it from exercising its judicial power. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). One of those limitations is the political question doctrine, and Plaintiff's assertion that FHWA "reversed its position for purely political reasons" (Pl.'s Mem. 19) falls squarely within it and provides an alternative basis for dismissal.

required or could make any practical difference by the time Plaintiff initiated this action in Rhode Island in 2019.[5] The Agency has not taken any action impeding Plaintiff from pursuing any activity. Rather, the causes of Plaintiff's alleged injury—the failure to acquire the parcels of land identified in the 2011 Programmatic Agreement to protect culturally, religiously and historically significant property from destruction — are those who are allegedly insisting on conditions Plaintiff finds objectionable, who are third parties not before this Court for purposes of Count I. *See, e.g., Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 936-37 (D.C. Cir. 2004) ("The direct causes of appellants' asserted injuries—loss of collegiate-level wrestling opportunities for male student-athletes—are the independent decisions of educational institutions that choose to eliminate or reduce the size of men's wrestling teams."); *Am. Sports Council*, 850 F. Supp. 2d at 299-300 ("causation and redressability turn on the independent decisions of third party activist groups"). Where, as here, "a plaintiff's asserted injury arises from the Government's regulation of a third party that is not before the court, it becomes 'substantially more difficult' to establish standing." *Nat'l Wrestling Coaches*, 366 F.3d at 938 (quoting *Lujan*, 504 U.S. at 562); *see also Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 802 (D.C. Cir. 1987) ("[C]ausation is

[5] In 2017 and 2018, the District Court of Rhode Island and the First Circuit ruled on an earlier-filed lawsuit brought by the Tribe alleging breach-of-contract claims stemming from the Rhode Island DOT's refusal to transfer properties. *Narragansett Indian Tribe*, 2017 WL 4011149, at *2. The district court dismissed the claims against the federal defendants because the Complaint was "devoid of any assertion that Federal Defendants' final agency action caused Plaintiff harm." *Id.* at 3. The court reasoned that the Tribe's claims were generally premised on [Rhode Island] DOT's refusal to transfer the land, not any action taken by [the Agency], and therefore the court lacked subject-matter jurisdiction with respect to the claims against the federal agency. *Id.* On appeal, the Tribe argued that the NHPA creates a private cause of action that encompassed the claims against the Agency. *Narragansett Indian Tribe*, 903 F.3d at 29-30. Instead, the First Circuit saw the complaint as an attempt to compel "the federal defendants to participate as parties in a suit . . . arising out of [Rhode Island] DOT's alleged breach of contract." *Id*. The First Circuit affirmed the dismissal and noted that "[n]othing in the regulations requires a federal agency to enter into [a programmatic agreement]. And nothing in the regulations prevents the agency from terminating such an agreement." *Id.*

extremely unlikely if the causal chain involves a prediction about the independent actions of third parties."). When causation or redressability hinges on the action of third parties, a plaintiff bears a heightened burden to "allege additional facts linking defendant's conduct to the third party['s] . . . decisions." *Am. Sports Council*, 850 F. Supp. 2d at 299 (citing *Lujan*, 504 U.S. at 561-62). Although other named defendants are before the Court with respect to Count II, that does not help the Tribe establish standing in this case for Count I because of limits on the Court's ability to craft the relief that the Tribe seeks to redress the particular injury alleged. Stated differently, even if the Tribe might theoretically be able to establish its standing for some APA claim, it has failed to do so for the one in the Amended Complaint.

Further, Plaintiff's standing premised on the Programmatic Agreement is flawed because the Programmatic Agreement did not consummate the Agency's actions on the Viaduct Project or its remediation efforts, nor was any party legally obligated to specific terms of any land transfer (which must be in writing pursuant to the state statute of frauds) or other transactions. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (final agency action is one that marks the "consummation of the agency's decisionmaking process" and by which "rights or obligations have been determined, or from which legal consequences will flow." citations and internal quotation marks omitted). Plaintiff's argument is express: without the land transfers, the project was doomed, but a violation of the Programmatic Agreement, even if accepted as true for purposes of argument, is not a proper basis for standing for an APA claim because neither a Programmatic Agreement nor any other means of remediation is required by statute. Pl.'s Mem. at 10 ("it was inconsistent with law and logic for the Agency to allow for the construction of the highway without transferring the properties subject to the PA").

Accordingly, the Court should find that Plaintiff lacks standing for Count I and dismiss it. *See* Fed. R. Civ. P. 12(h)(3).

III. The Agency Rationally and Transparently Pivoted When Other Parties to the Programmatic Agreement Balked and the Agency's Actions Were Neither Arbitrary Nor Capricious

A. Terminating the Programmatic Agreement and Moving Ahead Was Reasonable and Lawful.

Although Plaintiff was a necessary and critical stakeholder in the Programmatic Agreement's creation, amendment, and negotiation process, it was not the only one, and the decision to terminate after impasse negotiations were unfruitful fully comports with NHPA requirements and the procedural stipulations of the Programmatic Agreement. Consequently, the Agency's actions and explanations for them should be upheld.

First, the dispute resolution mechanism agreed upon and contained in the Programmatic Agreement are clear and unequivocal, and Plaintiff's motion fails to acknowledge key aspects of the Programmatic Agreement in its effort to turn back time and enforce what was envisioned but not ever fully agreed upon in terms of land transfers to Plaintiff from Rhode Island DOT. *See* AR001219. The existence of the dispute resolution provisions exemplify that Programmatic Agreement did not contain the details of every identified transaction or agreement attendant to a massive infrastructure project. The Programmatic Agreement obligated the Agency to consult any party who objects "to any actions proposed" or the manner of the implementation of the terms. *Id*. If possible, the contesting party shall contact the other signatories to request an amendment. AR001220. If a remedy cannot be reached through amendment, any signatory can terminate in accordance with Stipulation 9. *Id.*

In turn, Stipulation 9 of the Programmatic Agreement shares the termination procedures of 36 C.F.R. § 800.7(a). If there is an impasse, the Agency "may determine that further consultation

will not be productive" and "shall notify the other consulting parties and provide them the reasons for terminating in writing." *Id.* Upon terminating consultation, the Agency must request that Advisory Council comment. *Id.* After receiving comment by Advisory Council , the Agency "shall take into account the Council's comments in reaching a final decision on the undertaking" by "preparing a summary of the decision" with the rationale and advisory comments by the Advisory Council, providing the summary to all parties, and making the decision public for public inspection. 36 C.F.R. § 800.7(c)(4).

Over six years, the Tribe was a necessary and critical stakeholder in the Programmatic Agreement's creation and amendment process. During this time, the Agency arranged for an impartial mediator from the Udall Foundation. AR000099. The Agency arranged multiple meetings with the Rhode Island DOT and Preservation Office, the Advisory Council, and the Tribe's Preservation Office. AR000132; AR000097. The Agency's Associate Administrator for the Environment had an in-person meeting with both parties but it was unsuccessful. AR000139. Ultimately, the decision to terminate the Programmatic Agreement was identified as the appropriate course of action by Advisory Council if the signatories were unable to avoid an impasse. In 2014, the parties worked with the Advisory Council to conduct dispute resolution in accordance with Stipulation 7. AR000101; *see* AR001294. On October 30, 2014, the Advisory Council emailed the Agency, noting that "the impasse should be addressed as a matter where the "terms [of the Programmatic Agreement] will not or cannot be carried out" per the amendment and termination clauses of the Programmatic Agreement, rather than through dispute resolution. AR000120. The Advisory Council averred that, if an amendment cannot be obtained, the Agency "would have no recourse but terminate the PA and comply with" 36 C.F.R. § 800.7(a). *Id.*

The stalemate between the Tribe and Rhode Island DOT created an uncompromising circumstance. On the record, the Agency expressed concern with a termination. AR000140. The Agency took time to explore other options, considering whether it had any other options available under the law before termination, including exploring any and all alternatives that did not require a waiver by the Tribe of its sovereign immunity. AR000140. After years of review, lack of superior and available alternatives, and the Tribe's refusal to negotiate, the Agency felt it reasonable and prudent to resolve the dispute through the termination proceedings outlined in Stipulation 9. Because the Tribe did not agree to even the partial waiver, the Rhode Island DOT would not transfer the properties to the Tribe. This resulted in the impasse devolving into an unproductive conversation and an unenforceable Programmatic Agreement. Even after the Advisory Council delivered its post termination comments, the Tribe's Preservation Office was unwilling to compromise. Mr. Brown from Tribe's Preservation Office called Advisory Council's comments "flawed," and "untenable." AR000178. He stated that the Tribe "is not subject to state law" and requested the Advisory Council to "redress this error and remove the flawed determination." *Id.*

Even if reasonable minds may differ over the minutiae of legal intricacies involving Plaintiff's sovereignty, the Court's role here is limited to ensuring compliance with a statute requiring a process rather than a particular agency action, and it may only set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That was not the case here, and Plaintiff's motion for summary judgment fails to show otherwise. The Agency's actions were in accordance with the law. The rational and reasonable connection to the termination of the agreement was based upon the procedural agreements, Advisory Council review, and multiple meetings, which resulted after negotiations,

impartial mediation, and exploring any and all suggested alternatives. Therefore, the Agency's decision to terminate was based on reason and fact and does not support an arbitrary and capricious claim.

B. Following the Guidelines Set by the Advisory Council, the Agency Did Not Act Unilaterally in Terminating the Programmatic Agreement.

Incorporating ACHP's comments and guidance, the Agency did not act unilaterally in terminating the Programmatic Agreement. Plaintiff claims that the Agency not involving the Advisory Council earlier in the resolution process shows the Agency acted unilaterally in deciding to terminate the Programmatic Agreement, but agencies have the power to declare consultation at an impasse and to terminate if it finds that further consultation would not be productive. *See* 36 C.F.R. § 800.7(a). If an agency does terminate consultation, it must give notice of the termination to the Advisory Council and allow 45 days for Advisory Council comments. 36 C.F.R. § 800.7(c)(2). Once the Advisory Council enters the proceedings, the agency, although not required to follow the comments and suggestions of the Advisory Council at any stage, is required to take these comments into account and to indicate that the comments were given genuine attention on their merits. *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246 (3d Cir. 2001).

In the decision to terminate the Programmatic Agreement, the Advisory Council was supportive of the Agency's decision due to the impasse. In 2014 when the lack of compromise was at its peak, the Advisory Council recognized that if the impasse would remain, the Agency would have no recourse but to terminate the Programmatic Agreement. AR000120. The Advisory Council suggested its direct involvement to avoid termination. *Id.* However, even with the Advisory Council's involvement and after a face-to-face meeting, the impasse did not improve. AR000172. Recognizing the inflexibility of the parties, the Advisory Council supported the

Agency's termination of the Programmatic Agreement. *See* AR000158 (letter stating, the Advisory Council "is generally aware of the outstanding issues and accepts [the Agency's] rationale for moving toward terminating the" Programmatic Agreement). The Advisory Council's support of the termination is evidence that Agency was not acting unilaterally in its termination of the Programmatic Agreement. While the comments from the Advisory Council urged the Agency on future projects to consider seeking the Advisory Council's assistance earlier (AR000172), as long as the Agency considers this comment, it remains free to decide for itself. *Friends of the Atglen-Susquehanna*, 252 F.3d at 268.

Additionally, the Agency involving ACHP in this project shows that the Agency took into consideration ACHP's comments. *See Concerned Citizens All., Inc. v. Slater,* 176 F.3d 686, 697 (3d Cir. 1999) (stating that the record showing the Advisory Council was heavily involved in the project and involved in drafting mitigation measures demonstrates that the defendant considered ACHP's comments). Early on in the project, the Agency invited the Advisory Council's participation in consultation, however, the Advisory Council declined to participate and therefore was not a signatory on the Programmatic Agreement. AR000172. However, the Advisory Council was heavily involved in the project since 2014 to help with dispute resolution. AR000120. After suggesting a face-to-face meeting with the consulting parties with the Advisory Council's assistance, the signatories and the Advisory Council met in Providence to resolve the impasse. AR000122. Though the meeting was unsuccessful in creating a solution, the Agency remained engaged with the Advisory Council. AR000177.

The Advisory Council also assisted in drafting the new proposed programmatic agreement, adding in comments and recommendations which were placed in the proposed revised agreement. *See* AR000147 (email from the Advisory Council providing comments on the draft programmatic

agreement to modify language in Section VI); AR001180 (draft programmatic agreement highlighting modifications suggested by the Advisory Council). Even though the Advisory Council chose not to participate in the early stages of consultation, it had ample notice and the Advisory Council was heavily involved throughout the rest of the negotiations which shows the Agency's consideration of the Advisory Council's comments.

C. The Agency Should Be Afforded Some Deference on its Decision to Terminate the Programmatic Agreement Because the Agency Took the Advisory Council Comments Into Consideration, Therefore Complying With Section 106.

Because the Agency took the Advisory Council's comments on terminating the Programmatic Agreement into consideration and was required to do nothing more, the Court should not disturb the Agency's decision. Plaintiff claims the Agency should not be given deference because the Agency failed to utilize the Advisory Council's expertise by not considering its recommendations. But "although the views of the [the Advisory Council] are entitled to deference, [it] cannot mandate a particular outcome." *Concerned Citizens*, 176 F.3d at 686. The Advisory Council's regulations state that after allowing it an opportunity to comment, "the Federal agency may adopt any course of action it believes is appropriate." 36 C.F.R. § 60.2(a). Although the Advisory Council comments must be considered and integrated into the decision-making process, program decisions rest with the agency implementing the undertaking. *Id.*

The Agency complied with the procedures established by the Advisory Council and therefore the Agency's decision must be given the same deference. *See* 36 C.F.R. § 800.14 (stating compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council). Once (i) the Programmatic Agreement was terminated, (ii) the Advisory

Council was given the opportunity to comment, and (iii) those comments were taken into consideration, the Agency was free to take any course of action it believed was appropriate. 36 C.F.R. § 60.2(a).

In this case, the Agency took into account the Advisory Council's comments and adopted them into its decision-making. On May 3, 2017, the Advisory Council provided comments for the termination of the I-95 Providence Viaduct PA. AR000172. Within these comments, the Advisory Council recommended (1) the construction of the project should not be delayed (2) the Salt Pond Archaeological Preserve should be preserved and (3) the Agency should encourage to proceed transfer of Providence Boys Club-Camp David and Chief Sachem Night Hawk properties to the Tribe as sole owner. *Id.* On June 28, 2018, the Agency took "into consideration the . . . [the Advisory Council's] comments . . . in regards to termination . . . [and the Agency] has made a decision." AR000262. The Agency agreed to reinitiate Section 106 consultation of the project, draft a new programmatic agreement addressing the mitigation items the Advisory Council proposed, and preserve the Salt Pond Archaeological Preserve as recommended by the Advisory Council. *Id.*

The decision to reinstate the Section 106 consultation and preserve the Salt Pond Archaeological Preserve are direct reflections of the Agency taking into account the Advisory Council's comments since those recommendations were adopted into the new, draft programmatic agreement. *See* AR001187. That said, the Agency did not adopt the recommendation to transfer Providence Boys Club-Camp David and Chief Sachem Night Hawk properties to the Tribe as sole owner because the Agency did not (and does not) hold fee title to these properties—i.e., it could not transfer property it does not own. *See* AR000040 (stating Rhode Island DOT is to transfer the three properties to the Tribe's Preservation Office). Nevertheless, this does not cancel out the

Agency's consideration of the Advisory Council's comments. *See Coalition Against a Raised Expressway, Inc. v. Dole,* Civ. A. No. 84-1219, 1986 WL 25480 (S.D. Ala. Oct.20, 1986) (holding that the agency complied with Section 106 when its responses to the Advisory Council comments indicated that it took the comments into consideration even though it ultimately disagreed with them).

Because the Agency complied with the Advisory Council's procedures and was not arbitrary or capricious in its actions, the Court should give deference to the Agency's decision to terminate the Programmatic Agreement. *See City of Ridgeland v. Nat'l Park Serv.*, 253 F. Supp. 2d 888 (S.D. Miss. 2002) (finding that the Court was not able to grant relief to plaintiffs given the absence of evidence that the National Park Service failed to comply with the process dictated by the NHPA or that its decision, in the end, was arbitrary or capricious).

D. The Agency Followed Section 106 Procedures and Vindicated the Integrity of the Public Policy.

Section 106 regulations authorize but do not require, the negotiation of a "programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings," 36 C.F.R. § 800.14(b). The implementation of a programmatic agreement "evidences the agency official's compliance with section 106 . . . and shall govern the undertaking and all of its parts." *Id*. §§ 800.6(c); 800.14(b)(3). If a signatory to a programmatic agreement determines that the terms of the agreement cannot be, or are not being, carried out, the regulations require the signatories to consult and seek amendment of the agreement. 36 C.F.R. § 800.6(c)(8). If an amendment is not agreed upon, any signatory may terminate the agreement, and the agency official shall then either execute a memorandum of agreement with signatories under section 800.6 (c)(1) of the regulations or request the comments of the Advisory Council according to section 800.7(a). 36 C.F.R. § 800.6(c)(8).

The Tribe claims that the failure to transfer the property, without a reasoned decision, undermines the trust in Section 106 process and national policy of significant public interest. This is not correct. Section 106 itself contemplates the possibility that if the parties do not reach an agreement and according to the Programmatic Agreement itself, the agreement can be terminated. 36 C.F.R. § 800.6(a). Therefore, Federal Defendant correctly implemented Section 106 without causing grievances, much less undermining the credibility, terms, or spirit of the purely procedural statute in question.

The Agency participated in these efforts per the Agency's consultation requirements under the Programmatic Agreement and Section 106 of the NHPA. Since September 2013, the Tribe, the Tribe's Preservation Office, and Rhode Island DOT attempted to resolve their dispute about the transfer of ownership in the Tribal Historic Properties pursuant to the terms of Paragraph 7 ("Dispute Resolution") of the PA. *See* AR000039. The Agency participated in these efforts in accordance with the its own consultation requirements under the Programmatic Agreement and Section 106 of the NHPA. Ultimately, however, despite their extensive efforts, the parties were unable to agree on the implementation of the Programmatic Agreement, and specifically concerning Rhode Island DOT's condition on transferring title to the Tribal Historic Properties. *See* AR000320; AR000165.

Accordingly, on February 15, 2017, the Agency terminated the agreement and referred the matter to the Advisory Council for comment as required by the Advisory Council's NHPA regulations and the dispute resolutions provision in the Programmatic Agreement. *See* 36 C.F.R. §§ 800.2(b); AR000159. On May 3, 2017, the Advisory Council provided its comments for the termination of the agreement, noting that the Agency is required to take the comments into account and respond before making a final decision on the project. AR000165. The Agency is entitled to

appropriate respect in drawing lines involving balancing the interests of the Plaintiff, the State, and the public. *See Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1320 (D.C. Cir. 1998) (where a matter involves scientific or technical decisions within the agency's area of expertise, a reviewing court must afford the agency a "high level of deference."); *Consumer Federation of Am. v. Consumer Prod. Safety Comm'n*, 990 F.2d 1298, 1305 (D.C. Cir. 1993) (regarding with "high respect" agency action concerning the sale of all-terrain vehicle sales to minors). In light of the intractable impasse that Plaintiff was well aware of as a participant, FHWA did not belabor the obvious when it pivoted from the PA without Plaintiff having described a feasible alternative it would have accepted as equivalently remediating. AR 000262-263 (June 28, 2018 letter). Taking the extensive background of negotiations Plaintiff was part of into account, that should be sufficient under the APA. *See State Farm*, 463 U.S. at 51-52; *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977); *see generally Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (the more complex or complicated the subject of agency action, the more judicial restraint is warranted in conducting APA review, and in some cases administrative rationality can be presumed from strict compliance with procedural requirements).

Because the consulting parties had been unable to reach an agreement, the Agency's decision and the application of the standard to terminate the agreement was a reasoned one which upholds the integrity of Section 106 of the Advisory Council as Congress enacted. Because the Tribe is a party to the impasse that prompted abandonment of the Programmatic Agreement and sought no interim relief while the highway project continued, the asserted error by the Agency in the process challenged in the amended complaint should be deemed not prejudicial with respect to Plaintiff. *See Fogo De Chao (Holdings) Inc. v. Dep't of Homeland Sec.*, 769 F.3d 1127, 1149 (D.C. Cir. 2014) (applying prejudicial error standard). There is little, if anything, the Agency could

now do to address what come perilously close to policy or political questions raised by Plaintiff; the disruptive consequences of reopening far earlier stages of a project on the scale of the Viaduct Project to undertake additional or different remediation are staggering, and the Agency would still lack authority to compel the precise remedy for the particular injury Plaintiff seeks a remedy for from this Court, especially after transfer here from Rhode Island at Plaintiff's request. *See* Pl.'s Mem. at 19 ("reversed its position for purely political reasons"). As such, the litigation tactic has backfired, and the Court should deny the remedy solicited by Plaintiff.

E. Plaintiff's remaining arguments lack merit.

Plaintiff overplays its hand by arguing that surviving a motion to dismiss on the sufficiency of its APA claim plays any role at summary judgment because the standards are significantly different. *See* Pl.'s Mem. at 8. Even accepting Plaintiff's premise (Pl.'s Mem. at 9) that "transfer of ownership was a reasonable and appropriate means to mitigating the negative effects of a highway project" (AR000172-177, Apr. 3, 2017, Comments by the Advisory Council), that is a far cry from showing that the Agency ignored other suggested, reasonable means of mitigation incrementally or otherwise. *See, e.g.*, *WildEarth Guardians v. EPA*, 751 F.3d 649, 655-56 (D.C. Cir. 2014); *City of Waukesha v. EPA*, 320 F.3d 228, 258 (D.C. Cir. 2003) (agency's "comment response sufficient if it 'demonstrates that the agency at least considered whether it should adopt [an alternative] model'").

Under the deferential standard applicable to an agency's determination of a need for a change in an area under its general authority and expertise to manage large infrastructure projects, and particularly because the agency lacked any authority to force the land transfer (with or without particular covenants or a limited waiver of Plaintiff's sovereign immunity), the Court should find that moving past the PA was neither arbitrarily nor capriciously undertaken. *See Stilwell v. Off. of*

Thrift Supervision, 569 F.3d 514, 519 (D.C. Cir. 2009). Plaintiff's at least implicit arguments that still more time in further negotiations might have changed the minds of state officials or that other superior alternatives for remediation might have been explored represents the sort of policy second-guessing that courts generally decline to do under the APA. *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981) (explaining that the "focal point" of APA review is the record before the agency). Plaintiff's arguments against affording the agency deference are misplaced. *See* Pl.'s Mem. at 22. They fail to cite authority of any comparable agency actions overturned under the APA.

In support of its motion for summary judgment (Pl.'s Mem. at 7), Plaintiff cites *Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 847 (10th Cir. 2019). *Dine Citizens* is inapplicable because the Agency here did not violate any terms of the Programmatic Agreement; the challenged agency action in this case is not letting the perfect be the enemy of the good by replacing the Programmatic Agreement with an alternative when an irreconcilable impasse developed in attempting to implement a programmatic agreement containing dispute resolution and termination provisions. But in any event, issue preclusion bars Plaintiff from arguing that the Agency could not terminate the Programmatic Agreement. The doctrine of issue preclusion "applies to threshold jurisdictional issues," such as justiciability. *See Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015); *see also* 18A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4436 (2d ed.) ("Dismissals for want of justiciability are controlled by the same principles as apply to want of subject-matter jurisdiction. The decision should preclude relitigation of the very issue of justiciability actually determined, but does not preclude a second action on the same claim if the justiciability problem can be

overcome."). The doctrine of issue preclusion also "clearly appl[ies] to standing determinations." *Cutler v. Hayes*, 818 F.2d 879, 889 (D.C. Cir. 1987).

To invoke issue preclusion—also called collateral estoppel—a defendant must show that (1) "the same issue now being raised [was] contested by the parties and submitted for judicial determination in the prior case"; (2) "the issue [was] actually and necessarily determined by a court of competent jurisdiction in that prior case; and (3) "preclusion in the second case [will] not work a basic unfairness to the party bound by the first determination." *Martin v. Dep't of Just.*, 488 F.3d 446, 454 (D.C. Cir. 2007) (quoting *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)). All three requirements are met here.

Plaintiff is raising the same argument it raised before in the first-filed case in the Rhode Island District Court and the First Circuit rejected it. The parties are sufficiently identical since the Tribe, the Agency, and Rhode Island DOT are all the same parties in the original suit. *Narragansett Indian Tribe*, 2017 WL 4011149, at *1. The Rhode Island District Court and First Circuit, clearly a court of competent jurisdiction, *see Lightfoot v. Cendant Mortg. Corp.,* 137 S. Ct. 553, 560 (2017) (defining competent jurisdiction as "a court with an existing source of subject-matter jurisdiction."), ruled that nothing required the Agency to enter the Programmatic Agreement and nothing prevented it from terminating it either. *Narragansett Indian Tribe*, 903 F.3d 26. That ruling was necessary to upholding the dismissal and Plaintiff had every opportunity to have the First Circuit consider the sort of administrative procedural injury it claims in this lawsuit under the APA, but it knowingly declined that option while pursuing breach of contract remedies before, so it works no basic unfairness for this Court now to find that enough is enough on this claim or issue. *See id.* at 29 (noting the Tribe's position in the first action that the APA was "'too limit[ed]' for its purposes").

CONCLUSION

For all these reasons, the Court should dismiss Count I of the amended complaint for lack of standing. Alternatively, and based on the entire administrative record, Plaintiff's motion for summary judgment should be denied and Federal Defendant's cross-motion for summary judgment should be granted.

Dated: September 30, 2021

Respectfully submitted,

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