

UNITED STATES GENERAL SERVICES ADMINISTRATION AND
DEPARTMENT OF HOMELAND SECURITY

PUBLIC SALE OF
PLUM ISLAND, NEW YORK

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DRAFT ENVIRONMENTAL
IMPACT STATEMENT PROCESS
October 26, 2012

COMMENTS OF THE ATTORNEY GENERAL OF THE STATE OF CONNECTICUT

George Jepsen, Attorney General of the State of Connecticut, hereby files the following comments with the General Services Administration and the Department of Homeland Security in response to the July 2012 Draft Environmental Impact Statement (DEIS) for the sale of Plum Island, New York.

SUMMARY

The DEIS is deficient and should be revised. The DEIS recommends the sale of Plum Island by the federal government without a thorough review and careful evaluation of the impacts of a sale and subsequent development on the environment, without exploring whether that sale is actually required by applicable law, without exploring all reasonable or the most harmful potential development scenarios, and without analyzing or recommending sufficient conservation measures in the event of a sale to ensure the present and future protection of this vital area.

The DEIS analyzes four hypothetical reuses for Plum Island upon a sale. The hypothetical reuses do not thoroughly explore the environmental impacts of the reuse scenarios, and the DEIS fails to recognize other potential and more detrimental development scenarios and

their impacts on the environment. Unless the worst case development scenario is examined thoroughly, it is impossible to know the environmental consequences of a sale.

In recommending a sale of the Island, the DEIS does not evaluate and explore the availability of measures that could mitigate environmental impacts nor does it recommend that a sale be conditioned on a level of preservation. There are numerous conservation tools available to the federal government that permit a sale of some or all portions of the Island while preventing the probable resulting environmental consequences that an unrestricted sale could have, yet the DEIS fails to address them. Instead, it recommends a sale assuming, that some conservation will occur, without any assurance that assumption is accurate.

The deficiencies in the DEIS are magnified by Plum Island's environmental importance and the natural resources at stake. Plum Island is unique in its pristine environment and its location. Its ecological resources are invaluable not only on their own, but also because of their inextricable relationship to Long Island Sound, one of Connecticut's most significant natural resources.

The DEIS should be fully reconsidered because the deficiencies in the DEIS affect the core analysis and call into question the entire document.

BACKGROUND

1. Plum Island

Plum Island is located in Long Island Sound, twelve (12) miles off the Connecticut shoreline. (DEIS, at 3-3.) One of the striking characteristics of Plum Island is its lack of development by virtue of its historic uses as a military facility and, later, as home to the Plum Island Animal Disease Center. Of its approximately 840 acres, roughly 664 acres remain

undeveloped, including 96 acres of freshwater wetlands, 101 acres of beach/dune systems and 196 acres of relatively undisturbed upland forests. (DEIS, at 3-3.) Currently, “[t]here is less than 15 acres of impervious surface on Plum Island, including buildings and roads.” (DEIS, at 3-37.)

The beach and dune communities on Plum Island are recognized by the State of New York as “marine dune habitat,” and ranked as “significant habitat,” meaning that the state considers this habitat type to have high ecological and conservation value. (DEIS, at 3-61.) These areas also include breeding grounds for several protected avian species, including the endangered piping plover, the threatened northern harrier, and the osprey (a species of special concern). One rare plant species, the sea beach knotweed, is also known to occur in this area. (DEIS, at 3-61.) Plum Island has also been designated as an “Important Bird Area” by Audubon New York. (DEIS, at 3-68.)

Aquatic resources associated with Plum Island include fish, abundant surf clams, marine sea turtles (which are a federally listed species under the Endangered Species Act), and whales and dolphins. (DEIS, at 3-68.) Plum Island and its coastal waters also provide year round habitat to harbor seals, gray seals, and harp seals. *Id.* As a result, the New York State Division of Coastal Resources has designated Plum Gut, the open water area between Plum Island and Orient Point on Long Island, as “Significant Coastal Fish and Wildlife Habitat,” recognizing Plum Gut as an important recreational and commercial fishing resource and also as an important habitat for marine mammals and sea turtles. (DEIS, at 3-68.)

Recognizing its “exemplary” ecological significance, the United States Environmental Protection Agency, New York State Department of Environmental Conservation and Connecticut Department of Environmental Protection (now the Department of Energy and

Environmental Protection) designated Plum Island as one of the Long Island Sound Stewardship Areas through the Long Island Sound Stewardship Initiative in 2006. (DEIS, App. C, USEPA comment letter dated June 2, 2010, at C-85.) The federal government took another step towards supporting the preservation and enhancement of Long Island Sound with the passage of the Long Island Sound Stewardship Act in 2006. Public Law 109-359.

The Plum Island Light Station, which is listed on the National Register of Historic Places, is also located on the Island. (DEIS, at 3-3.) Additionally, there are other potentially significant historical and/or archaeological resources that have been identified on Plum Island. (DEIS, at 3-90.)

2. Long Island Sound

Long Island Sound is Connecticut's largest and most valuable natural resource. Between New York and Connecticut, the Sound's coastline stretches more than 600 miles. *Long Island Sound – By the Numbers*, <http://longislandsoundstudy.net/about-the-sound/by-the-numbers/>. The Sound is home to more than 120 species of finfish and countless varieties of birds and other animals. *Id.*; (DEIS, App. C, U.S. Department of the Interior, USFWS comment letter dated June 16, 2010, at C-92 – C-96). The Sound is one of the region's largest estuaries with an area of 1320 square miles, where

[t]he tidal, sheltered waters . . . support unique communities of plants and animals. Estuarine environments are among the most diverse and productive on earth, creating more organic matter each year than comparably-sized areas of forest, grassland, or agricultural land. . . . Birds, mammals, fish, and other wildlife depend on estuarine habitats as places to live, feed and reproduce. Numerous marine organisms, including most commercially valuable fish and shellfish species, depend on the estuaries at some point during their development.

Comprehensive Assessment and Report Part II, Task Force on Long Island Sound, June 3, 2003 (“Task Force Report”), Section 2.1, p. 7.

In addition to its ecological significance and its contributions to our quality of life, the Sound creates considerable economic value for the Connecticut-New York region. This value is derived principally through fishing, shellfishing, boating and other commercial and recreational activities. Commercial and recreational fishing has been valued at \$1 billion each year. Task Force Report, Section 2.1, p. 17. The total of all direct and indirect economic use of the Sound generates approximately \$5.5 billion annually. Task Force Report, Section 2.1, p. 24. This resource, however, has been devastated by pollution, overdevelopment and poor planning. *See* Task Force Report, Section 2.1, pp. 11 – 13. Associated with overdevelopment along the shoreline has been a steady increase in pollution which has damaged the Sound. Consequently, protecting Plum Island and its surroundings, one of the last undeveloped vestiges in a heavily impacted but critically important natural resource, is an important Connecticut interest.

While severely threatened by centuries of human activities, industrial pollution, and overfishing, the Sound remains “an ‘essential fish habitat’ (EFH), defined as being necessary for fish spawning, breeding, feeding, or growth to maturity, for a variety of fish species.” Connecticut Siting Council Findings of Fact, Dckt No. 197, *TransEnergie Application for Certificate of Environmental Compatibility and Public Need*, March 28, 2001, ¶ 86 (“CSC Findings of Fact”); *See also* Task Force Report, Section 2.1, pp. 16 - 18. In fact, “Long Island Sound is an environment used by Kemp’s ridley, Loggerhead, Green, and Leatherback marine turtles [which species] are listed as State or Federal Endangered or Threatened Species, according to Connecticut DEP and NOAA National Marine Fisheries Service.” CSC Findings of Fact, ¶ 83. This fact is of obvious importance even beyond the confines of the Sound because “[m]ore than 70 percent of [overall marine] commercial fish stocks are now considered fully exploited, overfished or collapsed. Sea birds and mammals are endangered. And a growing

number of marine species are reaching the precariously low levels where extinction is considered a real possibility.” William J. Broad and Andrew C. Revkin, *Has the Sea Given Up Its Bounty?*, New York Times, July 29, 2003.

3. Interests of the State of Connecticut

Connecticut’s interests are directly affected by the recommended action. The State of Connecticut has long had an interest in protecting its coastal resources. As early as 1786, the legislature of Connecticut recognized the importance of protecting the resources of the Long Island Sound and enacted legislation to regulate shellfishing in order to preserve oyster and clam beds from damage to the ecosystem that even then was beginning. (Connecticut Statutes, rev. 1786, p. 78.)

More recently, the Connecticut legislature has been very clear – the health of the overall ecosystem of the Long Island Sound is critical to the State and unchecked development and poorly-sited infrastructure are unacceptable.

The General Assembly finds that the growing population and expanding economy of the state have had a profound impact on the life-sustaining natural environment. The air, water, land and other natural resources, taken for granted since the settlement of the state, are now recognized as finite and precious. . . . Therefore the General Assembly hereby declares that the policy of the state of Connecticut is to conserve, improve and protect its natural resources and environment and to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state.

Conn. Gen. Stat. § 22a-1.

Further, the Connecticut legislature has expressly defined the policy of the state to be protective of Long Island Sound, such as the following legislative findings:

- (1) The waters of Long Island Sound and its coastal resources . . . form an integrated estuarine ecosystem which is both unique and fragile;
- (2) Development of Connecticut’s coastal area has been extensive and has had a significant impact on the Long Island Sound and its coastal resources;

- ...
- (5) The coastal area is rich in a variety of natural, economic, recreational, cultural and aesthetic resources, but the full realization of their value can be achieved only by encouraging further development in suitable areas and by protecting those areas unsuited to development;
- ...

- (7) Unplanned population growth and economic development in the coastal area have caused the loss of living marine resources, wildlife and nutrient-rich areas, and have endangered other vital ecological systems and scarce resources.

Conn. Gen. Stat. § 22a-91.

The state has supported its policies with action. Vast sums of public money have been spent to improve municipal waste treatment facilities and reduce pollution and runoff. Significant amounts of taxpayer dollars have been invested in the state's shellfish industry. Over the last three decades, Connecticut has made a significant commitment to protecting and restoring the Sound. Millions and millions of dollars have been invested in communities throughout its watershed to address pollution concerns and protect the tidal wetlands along its shore.

The State of Connecticut therefore has a direct and immediate interest in the marine environment that is impacted by any decisions related to the fate of Plum Island. Impacts to the Sound do not stop at state borders. "As custodian for half of Long Island Sound, Connecticut has an obligation to continue to protect and preserve this irreplaceable resource." Task Force Report, Section 2.1, p. 8.

COMMENTS

The hypothetical development scenarios which may result from an unrestricted sale of Plum Island present troubling unknowns and the potential for incalculable and unacceptable

detrimental impact to Plum Island as well as to Long Island Sound. The fundamental goal of an evaluation under the National Environmental Policy Act, or NEPA, is to require responsible government agencies involved with a particular project to undertake a careful and thorough analysis of the need for that project or action and its environmental impacts before committing to proceeding with the project or action. As the Tenth Circuit Court of Appeals has held:

The purpose of NEPA is to require agencies to consider environmentally significant aspects of a proposed action, and, in so doing, let the public know that the agency's decision making process includes environmental concerns. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983); *Sierra Club v. United States Dep't of Energy*, 287 F.3d 1256, 1262 (10th Cir. 2002).

Utahns For Better Transportation v. United States Dep't of Transportation, 305 F.3d 1152, 1162 (10th Cir. 2002).

The District of Columbia Circuit Court has explained the fundamental goal of an environmental evaluation under the National Environmental Policy Act, or NEPA:

. . . "NEPA was intended to ensure that decisions about federal actions would be made only after responsible decision-makers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs." *Jones v. District of Columbia Redevelopment Land Agency*, 162 U.S. App. D.C. 366, 499 F.2d 502, 512 (D.C.Cir. 1974) . . .

Illinois Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246, 1259 (D.C. Cir. 1988). Here, the failure to conduct a complete examination of the nature of the legal directive from Congress and of the likely consequences of development, even as a result of moderate development activities on Plum Island, denies the government and the public the ability to properly determine whether the public benefits of the proposed sale would outweigh its true environmental costs.

1. The DEIS Fails to Analyze the Actual Requirements of Public Law 110-329

The DEIS fails to explore the parameters and intent of Public Law 110-329, Section 540, in which Congress indicates that any liquidation of Plum Island would be limited to a sale of “real and related personal property . . . which support Plum Island operations” and that any such sale be “subject to such terms and conditions as necessary to protect government interests.” There is no explanation of how the DEIS arrives at its conclusion that the entirety of Plum Island is subject to sale. (DEIS, at ES-1.) Rather, this directive could be interpreted to subject only a more limited footprint to government sale, and the DEIS must consider and analyze that possibility and its consequences. Also, while the controlling statute specifically requires that any sale be subject to “terms and conditions necessary to protect government interests,” the DEIS makes no attempt to identify and analyze those interests. In fact, it is readily apparent that those interests must include protection of the Plum Island and Long Island ecosystems, including wildlife habitat, water and air quality, and the public trust interests in the entire Sound. Further, the DEIS fails to adequately analyze the availability and best use of all potentially available conservation tools to preserve the Island’s recognized natural resources, further ignoring the statutory directive to consider “such terms and conditions as necessary to protect government interests.”

2. The DEIS Fails to Examine More Environmentally Destructive Uses of Plum Island as a Result of a Sale

By confining itself to the bounds of four artificially discrete re-use options, the DEIS ignores the potential for far more detrimental and compounded environmental impacts which may result from a combination of the four hypothetical re-uses. The DEIS repeatedly states that its analysis of potential re-use options is entirely “speculative” since the federal government will

have no control over the nature and extent of future development once it sells the property. (DEIS, at 2-3, 2-7) Accordingly, there is no reasonable basis to conclude that the most intensive development studied is the most intensive development possible. More intensive development of the Island from a combination of the four hypothetical uses would have even greater impacts on the environment, yet this possibility was not explored. The most intensive development scenario studied by the DEIS, the high development scenario of Re-Use Option 3, would result in 195 acres (approximately 23% of the Island) being developed, yet it is impossible to speculate that that is the outer limit of possible development scenarios. A much greater disturbance should have been studied to examine the worst case development scenario.

Even under Re-Use Option 3, the DEIS recognizes that the environmental impacts would be significant. There would be an increased amount of waste water discharge to Long Island Sound, together with an increase in total loading of Biochemical Oxygen Demand (BOD) and associated nutrients to Long Island Sound. (DEIS, at 3-52.) The DEIS notes that, “[a]lthough this represents a small impact relative to the total daily loading of Long Island Sound, it will increase the [dissolved oxygen] impairment of the Sound and cause pronounced local reductions in [dissolved oxygen] near the [waste water treatment plant] discharge.” (DEIS, at 3-52.) These impacts can have potentially serious consequences for marine life in the Long Island Sound. *See* Fact Sheet, *How Low Dissolved Oxygen Conditions Affect Marine Life in Long Island Sound*, Long Island Sound Study, <http://longislandsoundstudy.net/2010/03/how-low-dissolved-oxygen-conditions-affect-marine-life-in-long-island-sound/>.

This level of mixed development in Re-Use Option 3 would also impact upland forests, which provide natural filtration and water storage capacity, leading to increased water flow to downstream receiving waters, including wetlands and ponds located on the Island, and increase

impervious surface area from a mere 15 to 74 acres. (DEIS, at 3-52.) The DEIS notes that, under this development scenario, “depending upon the degree of development and the available land for stormwater treatment, the probability of discharging poorly treated stormwater to Long Island Sound, especially during periods of heavy rainfall, increases with the amount of impervious surface and associated runoff.” (DEIS, at 3-53.) Surely, greater development of the Island will have greater impacts and evaluation of those impacts must be a part of an adequate EIS.

3. The DEIS Should Have More Fully Examined the Identified Hypothetical Development Scenarios

The DEIS did not carefully and thoroughly examine the limits on development that it recognized were essential to protecting the environment in the event of a sale and to its recommendation to sell the Island. The more conservative of the two residential development re-use options (Re-Use Option 2) presented in the DEIS, which contemplates up to ninety (90) single family residential units to be developed on 195 acres of Plum Island, could result in the development of an estimated 147 acres (or 34%) of the forested uplands on the Island. (DEIS, at 3-5.) Although the DEIS adds that the balance of Plum Island “would be set aside for conservation purposes,” (DEIS, at 3-5), there is no indication of whether or how that would happen.

Although one of the re-use options identified under the Action alternative contemplates use limited to “Conservation/Preservation,” there is no substantive discussion or analysis of any type of deed restriction or conservation easement that would be utilized to ensure the Island’s preservation in its natural state. The DEIS does make cursory and scattered references to various development limitations that may be imposed, but it does so unsatisfactorily, without delving beyond vague generalities. It fails to evaluate enforceable deed restrictions, for example,

preventing any further development beyond the existing footprint of the laboratory and administrative buildings, while protecting the undisturbed portions of the Island through conservation easements. There is simply too much at stake – rare and endangered wildlife, precious open space and undisturbed upland forests, and pristine visual and aesthetic qualities – to ignore a detailed discussion about whether the assumptions in the DEIS about future conservation measures are justified and how they would be achieved.

The DEIS also fails to explore a coordination of efforts with federal partners to capitalize on opportunities to preserve Plum Island. The United States Fish and Wildlife Service (USFWS), provides grants for land acquisition and preservation as part of its endangered species program. On August 14, 2012, the USFWS announced more than \$33 million in grants to support land acquisition and conservation planning for endangered species. As stated by Secretary of the Interior Ken Salazar, not only does such a commitment benefit imperiled species, but “improving the health of our land and water will also help the people, communities and economies that depend on these resources.” It would be unreasonable for the federal government to spend millions of dollars funding the acquisition of private property for conservation purposes on the one hand, while leaving the pristine natural habitat of Plum Island, *currently owned and controlled by the federal government*, to the whims of private market forces.

The DEIS also fails to examine the impact of greater utility needs for development. Although the DEIS did not anticipate additional utility connections for the scenarios examined, because the scenarios studies are speculative and not exhaustive, there is no assurance that existing utility service is adequate to serve all reasonably likely development needs. There is no reasonable basis to conclude that future development will not require more utility service. The

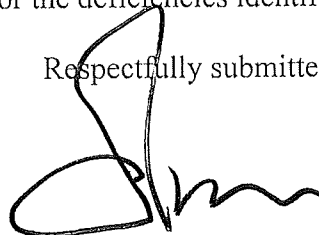
DEIS should have studied the impact of additional utility projects (whether electrical, telecommunications, water, waste, or otherwise) on the development scenarios in the hypothetical. Utility service impact together with the existing disruption to the sea floor and water quality of the Sound would be intolerably detrimental. The Sound has been repeatedly and heavily impacted by a never-ending succession of utility lines which, considered together, occupy a very significant portion of the seafloor. Each of these projects causes a loss of habitat. This loss of habitat is enormous in sum, and of great importance. Not only would future development of Plum Island permanently alter significant areas of natural habitat, it would also pose the threat of even greater damage going forward.

Further, although the DEIS anticipates the preparation of an “invasive species/wildlife management plan” along with the development scenarios outlined that would, among other things, “support formal designation of areas of Plum Island for conservation and preservation where these species are currently and/or potentially could occur on Plum Island,” (DEIS, at 3-81 – 3-82), the DEIS fails to identify the person or entity charged with preparing such a plan, under what legal authority the plan would be required, the person or entity responsible for designating certain areas of the Island for conservation purposes, and under what legal authority such a designation would be made. These are the types of critical details that the DEIS has not addressed but must analyze and explore before recommending the conveyance of Plum Island out of federal ownership. The DEIS does not simply evaluate this vital information inadequately; it fails to cover it at all. This failure, along with all of the others, means that the DEIS cannot meet its fundamental purpose as required by NEPA.

CONCLUSION

The resources of Long Island Sound should be protected against unnecessary pollution or disturbance that may result from the unrestricted sale of Plum Island. Potential development impacts could harm marine resources in the Sound including, but not limited to, commercial and recreational finfishing and shellfishing, water quality, plant resources, marine mammals, and waterfowl and migratory birds. Plum Island, by virtue of its limited development over the past century and a half, has blossomed into a kind of nature's laboratory – permitting us a glimpse into environmental and ecological forces in their undisturbed state, and fostering natural habitat for a number of threatened and/or endangered species. It would be a tragedy to squander this opportunity to preserve Plum Island in its relatively natural state for generations to come, and to help facilitate continued preservation efforts in support of Long Island Sound. Absent a complete and candid evaluation of what the applicable statute actually requires and exploration of all possible scenarios and their related impacts, it is impossible to use the DEIS as a guidance document in making important decisions about the future of the Island and of Long Island Sound. The DEIS should be revised to account for the deficiencies identified in these comments.

Respectfully submitted,



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Dated: October 26, 2012