Case No.:_______

In The Supreme Court of the United States

TOWN OF SOUTHOLD,

Petitioner,

against

ROSSANA ROSADO, in her official capacity as New York State Secretary of State, BASIL SEGGOS, in his official capacity as Commissioner of the New York State Department of Environmental Conservation and STATE OF NEW YORK,

Respondents,

(See inside cover for continuation of caption)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

SCOTT J. KREPPEIN
Counsel of Record
DEVITT SPELLMAN BARRETT, LLP
Attorneys for Petitioner
50 Route 111, Suite 314
Smithtown, New York 11787
(631) 724-8833
s.kreppein@devittspellmanlaw.com

APPELLATE INNOVATIONS
(914) 948-2240

Printed on Recycled Paper **19005**

– and –

COUNTY OF SUFFOLK, ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DENNIS DEZIEL, in his official capacity as Regional Administrator of United States Environmental Protection Agency Region 1, CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION,

Respondents.

QUESTIONS PRESENTED FOR REVIEW

The Environmental Protection Agency ("EPA") designated a permanent dredge spoil disposal site at the edge of the Town of Southold's border, known as the Eastern Long Island Sound Disposal Site ("ELDS"), where the coastline most effected by the plumes of disposed material from disposal operations will be one of the Town's most sensitive and highly-protected habitats. The questions presented are:

I. Whether the EPA's designation of a permanent dredge spoil disposal site that flows into one or more protect habitats in the Town of Southold was "consistent to the maximum extent practicable with" the Town of Southold's "enforceable policies" that are part of New York's "approved State management programs" under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1456(c)(1)(A).

II. Whether, and to what extent, in judicial review as to the EPA's compliance with its consistency obligation under the CZMA, 16 U.S.C. § 1456(c)(1)(b) via the Administrative Procedures Act ("APA"), 5 U.S.C. § 701, the EPA's determination as to its own compliance, interpretation of the scope of its own authority, and interpretation of what its obligations under the Town's enforceable policies should consist of, were entitled to deference, and whether those issues present questions of law to be determined "in accordance with the law," or factual

findings subject to the more deferential "arbitrary and capricious" standard.

III. Whether the burden was on the Town to prove inconsistency as part of the notice and comment process, or if the EPA had an affirmative obligation to be consistent with the Town's federally-approved coastal management policies to the maximum extent practicable pursuant to the CZMA;

IV. Whether the EPA satisfied the procedural safeguards under the National Environmental Policy Act, 42 U.S.C. § 4332, and more specifically under the Town's federally-approved coastal management policies, and developed a sufficient basis for its environmental analysis, where, rather than specifically considering the Town's coastal and marine habitats, the EPA limited its geographic inquiry to the immediate disposal site just beyond the Town's borders, and otherwise deferring to the general sediment suitability criteria that would be used for future case-by-case permit applications.

PARTIES TO THE PROCEEDINGS

The Petitioner is the Town of Southold, a local government and municipal corporation of the State of New York with jurisdiction over the majority of what is commonly referred to as the North Fork of Long Island, including most of the Eastern Long Island Sound and the archipelago that partially encloses that waterbody and extends to the maritime border of New York, Connecticut, and Rhode Island. The Town of Southold was an intervenor-plaintiff before the District Court, and appellant before the Court of Appeals.

The State of New York was the plaintiff and plaintiff-appellant before the lower courts. New York's former Secretary of State, Rossana Rosado, was a plaintiff-appellant in her official capacity, and that position is currently held by Robert J. Rodrigues. The Commissioner of the New York State Department of Environmental Conservation, Basil Seggos, was also a plaintiff-appellant in his official capacity.

The County of Suffolk, a local government of the State of New York within which the Town of Southold is located, was a plaintiff before the district court, but did not join in the prior appeal.

The defendant-appellees before the Court of appeals were: the United States Environmental Protection Agency; Andrew Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency, a position that is now held by Michael S. Regan; and Dennis Deziel, in his official capacity as Regional Administrator of United States Environmental Protection Agency Region 1.

The Connecticut Department of Energy and Environmental Protection ("CT DEEP") was also a party to the action as a defendant-intervenor-appellee.

<u>RELATED PROCEEDINGS</u>

There are no directly related proceedings pending before this Court or any state or federal trial or appellate court. Prior proceedings, other than this action, that are potentially directly related are:

> *Nat. Res. Def. Council, Inc. v. Callaway*, 389 F. Supp. 1263, 1293 n. 66-67 (D. Conn. 1974), *rev'd in part,* 524 F.2d 79 (2d Cir. 1975)(dispute over initial temporary disposal site designation of adjacent location)
>
> *Fishers Island Cons., et al v. U.S. Army Corps Eng.*, E.D.N.Y. Docket No. 95-cv-04374 (dispute over interim temporary site designation of adjacent location)
>
> *Rosado v. Raimondo*, E.D.N.Y. Docket No. 22-cv-00788 (dispute, following permanent site designation at issue in this case, over exemption from application-specific consistency review in the interests of national security)

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS iii

RELATED PROCEEDINGS iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES xii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. SUMMARY 3

B. THE AFFECTED AREA 9

C. HISTORICAL BACKGROUND, 1955-1999 10

D. 1999 FORWARD – THE EPA BEGINS CONSIDERING A PERMANENT SITE DESIGNATION, SOUTHOLD OBTAINS FEDERAL APPROVAL FOR POLICIES DESIGNED TO ADDRESS ITS CONCERNS, AND

THE EPA IGNORES THOSE POLICIES 12

REASONS FOR GRANTING CERTIORARI 15

I. THIS CASE PRESENTS AN OPPORTUNITY TO FURTHER ADDRESS THE EPA'S ROLE IN DEFINING THE SCOPE OF ITS OWN AUTHORITY 15

II. THIS COURT'S GUIDANCE IS NECESSARY TO AVOID INCONSISTENCY WITH THIS COURT'S DECISIONS AND DISAGREEMENT OR CONFUSION AMONG THE LOWER COURTS AS TO THE STANDARDS APPLICABLE TO JUDICIAL REVIEW OF CZMA CONSISTENCY DETERMINATIONS 23

III. THIS MATTER INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE AND NATIONAL SIGNIFICANCE 28

CONCLUSION 30

APPENDIX

Appendix A — Mandate Judgment with Order of the United States Court of Appeals for the Second Circuit, dated November 28, 2022 .... A-1

Appendix B — Memorandum and Order of the Honorable Edward R. Korman, dated July 17, 2020 .... B-1

Appendix C — Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing, dated November 17, 2022 .... C-1

Appendix D — Pertinent Statutes and Regulations:

§ 930.1 OVERALL OBJECTIVES., 15 C.F.R. § 930.1 .... D-1

§ 930.4 CONDITIONAL CONCURRENCES., 15 C.F.R. § 930.4 .... D-4

§ 930.5 STATE ENFORCEMENT ACTION., 15 C.F.R. § 930.5 .... D-7

§ 930.6 STATE AGENCY RESPONSIBILITY., 15 C.F.R. § 930.6 .... D-9

§ 930.30 OBJECTIVES., 15 C.F.R. § 930.30 ...... D-12

§ 930.31 FEDERAL AGENCY ACTIVITY., 15 C.F.R. § 930.31 .... D-14

§ 930.32 CONSISTENT TO THE MAXIMUM EXTENT PRACTICABLE., 15 C.F.R. § 930.32 . D-17

§ 930.33 IDENTIFYING FEDERAL AGENCY ACTIVITIES AFFECTING ANY..., 15 C.F.R. § 930.33 .... D-22

§ 930.34 FEDERAL AND STATE AGENCY COORDINATION., 15 C.F.R. § 930.34 .... D-26

§ 930.35 NEGATIVE DETERMINATIONS FOR PROPOSED ACTIVITIES., 15 C.F.R. § 930.35 .... D-30

§ 930.36 CONSISTENCY DETERMINATIONS FOR PROPOSED ACTIVITIES., 15 C.F.R. § 930.36 .... D-34

§ 930.37 CONSISTENCY DETERMINATIONS AND NATIONAL ENVIRONMENTAL..., 15 C.F.R. § 930.37 .... D-39

§ 930.38 CONSISTENCY DETERMINATIONS FOR ACTIVITIES INITIATED PRIOR..., 15 C.F.R. § 930.38 .... D-41

§ 930.39 CONTENT OF A CONSISTENCY DETERMINATION., 15 C.F.R. § 930.39 .... D-43

§ 930.40 MULTIPLE FEDERAL AGENCY PARTICIPATION., 15 C.F.R. § 930.40 .... D-46

§ 930.41 STATE AGENCY RESPONSE., 15 C.F.R. § 930.41Q D-48

§ 930.42 PUBLIC PARTICIPATION.,
15 C.F.R. § 930.42 .... D-52

§ 930.43 STATE AGENCY OBJECTION.,
15 C.F.R. § 930.43 .... D-55

§ 930.44 AVAILABILITY OF MEDIATION
FOR DISPUTES CONCERNING...,
15 C.F.R. § 930.44 .... D-58

§ 930.45 AVAILABILITY OF MEDIATION
FOR PREVIOUSLY REVIEWED
ACTIVITIES., 15 C.F.R. § 930.45 .... D-60

§ 930.150 OBJECTIVES., 15 C.F.R. § 930.150.. D-63

§ 930.151 INTERSTATE COASTAL
EFFECT., 15 C.F.R. § 930.151 .... D-65

§ 930.152 APPLICATION.,
15 C.F.R. § 930.152 .... D-67

§ 930.153 COORDINATION BETWEEN
STATES IN DEVELOPING COASTAL...,
15 C.F.R. § 930.153 .... D-69

§ 930.155 FEDERAL AND STATE AGENCY
COORDINATION., 15 C.F.R. § 930.155 .... D-71

§ 930.156 CONTENT OF A CONSISTENCY
DETERMINATION OR., 15 C.F.R. § 930.156... D-74

§ 930.157 MEDIATION AND INFORMAL
NEGOTIATIONS., 15 C.F.R. § 930.157 .... D-76

§ 706. SCOPE OF REVIEW, 5 USCA § 706 ...... D-78

§ 1401. CONGRESSIONAL FINDING, POLICY, AND DECLARATION OF PURPOSE, 33 USCA § 1401 ....D-80

§ 1411. PROHIBITED ACTS, 33 USCA § 1411.D-82

§ 1412. DUMPING PERMIT PROGRAM, 33 USCA § 1412 ....D-84

§ 1413. DUMPING PERMIT PROGRAM FOR DREDGED MATERIAL, 33 USCA § 1413 ....D-92

§ 1451. CONGRESSIONAL FINDINGS, 16 USCA § 1451 ....D-97

§ 1452. CONGRESSIONAL DECLARATION OF POLICY, 16 USCA § 1452..........................D-101

§ 1453. DEFINITIONS, 16 USCA § 1453........D-105

§ 1454. SUBMITTAL OF STATE PROGRAM FOR APPROVAL, 16 USCA § 1454 ....D-112

§ 1456. COORDINATION AND COOPERATION, 16 USCA § 1456 ....D-113

§ 4332. COOPERATION OF AGENCIES; REPORTS; AVAILABILITY OF..., 42 USCA § 4332 ....D-122

OCEAN DISPOSAL; DESIGNATION OF A DREDGED MATERIAL DISPOSAL SITE..., 81 FR 87820-01 ....D-127

TOWN OF SOUTHOLD LOCAL WATERFRONT REVITALIZATION PROGRAM D-234

TABLE OF AUTHORITIES

Cases

AES Sparrows Point LNG, LLC v. Smith
527 F.3d 120 (4th Cir. 2008) 20

Bond v. United States,
572 U.S. 844 (2014) 17

California Coastal Comm'n v. Granite Rock Co.,
480 U.S. 572 (1987) 24

California Coastal Comm'n v. United States,
5 F. Supp. 2d 1106 (S.D. Cal. 1998) 25

Cape May Greene, Inc. v. Warren,
698 F.2d 179 (3d Cir. 1983) 26, 27

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) 27

Connecticut ex rel. Blumenthal v. Crotty,
346 F.3d 84 (2d Cir. 2003) 12

Conservation Law Foundation v. Watt,
560 F.Supp. 561 (D.C.Mass.,1983) 25

Delaware Dep't of Nat. Res. & Env't Control v. FERC,
558 F.3d 575 (D.C. Cir. 2009) 20

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 16

In re Border Infrastructure Env't Litig.,
915 F.3d 1213 (9th Cir. 2019) 25

Marsh v. Oregon Nat. Res. Council,
490 U.S. 360 (1989) 8, 11, 24

Nat. Res. Def. Council, Inc. v. Callaway,
389 F. Supp. 1263 (D. Conn. 1974) .... iv, 4, 10

Nat. Res. Def. Council, Inc. v. Callaway,
524 F.2d 79 (2d Cir. 1975)........................... iv, 4, 10

New Jersey v. Delaware,
552 U.S. 597, 623 (2008) 20

Ohio v. United States Army Corps of Engineers,
259 F.Supp.3d 732 (N.D.Ohio, 2017) 26

Rosado v. Pruitt,
2018 WL 262835 (E.D.N.Y., 1/2/2018) 1

Rosado v. Wheeler,
473 F. Supp. 3d 115 (E.D.N.Y. 2020)1, 8, 13, 20, 21

Sec'y of the Interior v. California,
464 U.S. 312 (1984) 20, 24

Shanty Town Assocs. Ltd. P'ship v. E.P.A.,
843 F.2d 782 (4th Cir. 1988) 26

SLPR, LLC v. San Diego Unified Port Dist.,
2009 WL 10672895 (S.D. Cal. Aug. 4, 2009) 25

Southold v. Wheeler,
48 F.4th 67 (2d Cir. 2022) 1, 8, 9, 13

State of Missouri v. State of Illinois,
180 U.S. 208 (1901) 28

U.S. Forest Serv. v. Cowpasture River Pres. Ass'n,
140 S.Ct. 1837 (2020) 17

Union Dep't, AFL-CIO v. Am. Petroleum Inst.,
448 U.S. 607 (1980) 18

Util. Air Regul. Grp. v. E.P.A.,
573 U.S. 302 (2014) 17

Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council,
589 F.3d 458 (1st Cir. 2009) 20, 25

West Virginia v. Environmental Protection Agency,
142 S. Ct. 2587 (2022) 16, 17

Will v. Mich. Dep't of State Police,
491 U.S. 58 (1989) 17

Williams v. Pennsylvania,
579 U.S. 1, 9 (2016) 18

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 24

Statutes

16 U.S.C. § 1451 .... 2, 18

16 U.S.C. § 1456............................ i, 2, 4, 5, 18, 19, 20

28 U.S.C. § 1254.. 2

33 U.S.C. § 1401.. 3

33 U.S.C. § 1412.. 4, 5

33 U.S.C. § 1413.. 3, 11

33 U.S.C. § 1416.. 11

42 U.S.C. § 4332.. 2, 4, 10

5 U.S.C. § 701.. i

5 U.S.C. § 706.. 2, 29

Rules

Ocean Disposal; Designation of a Dredged Material Disposal Site in Eastern Region of Long Island Sound; Connecticut," found at 81 F.R. 87820-01.. 1

Regulations

15 C.F.R. § 930.33.. 7, 21

Other Authorities

126 Cong. Rec. H34063.. 11

81 Fed. Reg. 87820.. 1, 3

35 Fed.Reg. 15623 10

60 F.R. 51782-01 12

70 Fed. Reg. 32498-01 and 32509 13

81 Fed. Reg. 24748 13

Ames, Some Factors in the Decline of the Osprey in Connecticut, 81 Auk 19 (April 1964) 10

Hayes, Abnormalities in Young Terns, 89 Auk. 19 (January 1972) 10

In Re Electric Boat (NOAA Nov. 2020) (https://coast.noaa.gov/data/czm/consistency/appeals/fcappealdecisions/mediadecisions/ebc-decision.pdf) 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Town of Southold, NY, respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

This action challenges a final rule by the EPA, entitled "Ocean Disposal; Designation of a Dredged Material Disposal Site in Eastern Region of Long Island Sound; Connecticut," found at 81 F.R. 87820-01.

The U.S. District Court for the Eastern District of New York granted the Town of Southold and CT DEEP permission to intervene in an unreported decision, found at *Rosado v. Pruitt*, E.D.N.Y. Docket No. 17-CV-4843, 2018 WL 262835 (E.D.N.Y., 1/2/2018).

The District Court then granted summary judgment in favor of the EPA, per the Order found at *Rosado v. Wheeler*, 473 F.Supp.3d 115, 147 (E.D.N.Y., 2020).

The Judgment of the District Court was affirmed by the Second Circuit Court of Appeals in *Town of Southold v. Wheeler,* 48 F.4th 67 (2d Cir. 2022).

By Order dated and entered November 17, 2022, the Second Circuit Court of Appeals denied the Town of Southold's Petition for *En Banc* review. *Town of Southold v. Wheeler, et al.*, 2d Cir. Docket Nos. 20-3188 and 20-3189, Docket Entry No. 232.

JURISDICTIONAL STATEMENT

Judgment was entered in the District Court on July 20, 2020. A Judgment was entered by the Second Circuit Court of Appeals on September 2, 2022 affirming the District Court's Judgment. A Petition for *en banc* review was denied by Order dated November 17, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The constitutional provisions, statutes, ordinances, and regulations involved in the case, which are set out verbatim in an appendix, are:

The Coastal Zone Management Act ("CZMA"), specifically 16 U.S.C. §§ 1451 – 1454 and 1456.

Department of Commerce Regulations, Part 930, entitled "Federal Consistency With Approved Coastal Management Programs, 15 C.F.R. §§ 93030 – 9345 and 930150 – 930157.

Policies 5, 6, 8, 10 and 11 of the Town of Southold's Local Waterfront Revitalization Plan, as incorporated into New York State's Coastal Management Plan with the concurrence of the U.S. Department of Commerce on July 24, 2014.

The Administrative Procedure Act ("APA"), 5 U.S.C. § 706

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332.

Marine Protection, Research, and Sanctuaries Act ("MPRSA"), specifically 33 U.S.C. §§ 1401 and 1411-1413

STATEMENT OF THE CASE

A. Summary

This is a dispute over the EPA's designation of a permanent waste disposal site in the Long Island Sound that it estimates will be used to dispose of over 20 million cubic yards of dredge spoils over the next 30 years, largely originating from contaminated industrial areas around the submarine base and related manufacturing facilities near Groton and New London, Connecticut. The EPA chose a location on the edge of the maritime border between New York and Connecticut – 0.19 nautical miles, or just over 1,150 feet, from the Town's waters – that is 2.3 nautical miles upstream from the western coast of Fishers Island, one of New York's most heavily protected habitats. (81 Fed. Reg. 87820; JA. 28, 32-33).[1]

The use of this site, particularly at the scale anticipated, presents an enormous risk of adverse environmental impacts and the creation of a public nuisance for the hamlet of Fishers Island and the surrounding islands and marine environments in the Town of Southold. Prior nearby dumping activities have, on a smaller scale, prompted concerns of "brown foam" washing onto beaches where children play and into particularly sensitive environmental areas. (*Id.*, E.D.N.Y. Docket No. 17-CV-4843, Docket Entry 72-5, Pgs. 5-8).

---

[1] References to "JA" are to the Joint Appendix before the Second Circuit Court of Appeals.

The Town and its residents have adamantly opposed dredge spoil disposal in this area, and it has been a hot-button issue since the EPA was first created and given the power to designate disposal sites and issue permits under the MPRSA, subject to the procedural requirements of NEPA and the jurisdictional limitations of the CZMA. *See, e.g. Nat. Res. Def. Council, Inc. v. Callaway*, 389 F. Supp. 1263, 1293 n. 66-67 (D. Conn. 1974), *rev'd in part,* 524 F.2d 79 (2d Cir. 1975).

The EPA projects that the coastline that will receive the greatest concentration of dissolved contaminants and fine grain material – by a factor of ten – will be a Significant Coastal Fish and Wildlife Habitat on the western coast of Fishers Island. (JA. 458, 460, 1216, 2058). The Agency's tracer study and modeling shows that, for every boatload of dredge spoils that will be dumped at this disposal site, a plume of material will flow towards Fishers Island, engulf it, and be pulled into and through a particularly-important marine habitat known as the Race. (JA. 458, 460, 1216, 2958).

Congress did not give the EPA authority to override or disregard federally-approved state and local policies, but instead has only authorized it to issue permits and designate disposal sites under 33 U.S.C. §§ 1411 – 1412 if those actions are "consistent to the maximum extent practicable with the enforceable policies of approved State management programs." 16 U.S.C. § 1456(c)(1)(A).

Before designating this site, the EPA was not only required to take a hard look at the environmental impacts of its action under NEPA, 42 U.S.C.A. § 4332,

and evaluate specific site selection criteria under the MPRSA, 33 U.S.C. § 1412, but also to ensure that its proposed action was consistent with the enforceable policies of the Town's federally-protected Local Waterfront Revitalization Plan, which is incorporated into New York State's Coastal Management Program, 16 U.S.C. § 1456(c)(1)(A), and includes requirements that a proposed action must:

> "Protect water quality of [Southold's] coastal waters from adverse impacts associated with excavation, fill, dredging, and disposal of dredged material. (Policy 5, Standard 5.3(C); SPA 193;[2] Town of Southold Local Waterfront Revitalization Plan ("LWRP"), III-19)
>
> Be preceded by an environmental analysis of the potentially impacted areas that identifies baseline values for the "natural ecological communities" potentially affected by the action so as to aid in mitigation, monitoring, and, if needed, restorative efforts; and, where the impacted area is a Significant Coastal Fish and Wildlife Habitats (of which at least three are in the path of the dredge spoil plume), this analysis must include a Habitat Impairment Test identifying the "tolerance range of important species of fish or wildlife" in the affected habitats to evaluate, among

---

[2] References to "SPA" are to the Town of Southold's Special Appendix before the Second Circuit Court of Appeals.

other things, whether the proposed action would result in the "adverse alteration of physical, biological, or chemical characteristics" of those habitats. (Policy 6, Standards 6.1 and 6.2; SPA. 195 – 197; LWRP III-22)

Ensure that "the dredging of toxic material from underwater lands and the deposition of such material shall be conducted in the most mitigative manner possible so as not to endanger fish and wildlife resources, in either the short or long term." (SPA 206; Policy 8, Standard 8.3(A), LWRP III–33).

Avoid the "placement of dredged material in Long Island Sound when upland alternatives exist" and take precautions to "[m]aintain the chemical, physical and biological integrity of [Fishers Island's] surrounding waters and harbors and their dependent habitats." (Policy 10, Standards 10.5 and 10.6, SPA 216-217 and 219; LWRP III–51). And,

Use the "best available scientific information in managing the resources" so as to maintain "the long-term health and abundance of marine fisheries" and protect "spawning grounds, habitats, and water quality." (Policy 11, Standards 11.1 and 11.2; SPA. 220; LWRP III-52-53).

In the narrative section of its LWRP, The Town explained that its policies were intended, in part, to take a "clear and strong stance regarding the dumping of contaminated dredge spoils in or near the Race or the Fishers Island conservation zone," such that dredge spoil disposal in the area that the EPA has now designated would "be contrary to the intents and purposes of" its policies. (SPA. 146, 157, 164).

However, based upon a contorted argument that site designation by itself will not affect the Town's coastal zone, the EPA determined that designation of this contested site was "fully consistent" with the Town's policies. Rather than evaluating the potential impact from the expected use of the site, exposing Southold's coastal and marine habitats to a large amount of material over an extended period of time, the EPA's analysis consisted of justifications for not engaging in that analysis, including that "designation of the site does not actually authorize the disposal of any dredged material;" that its only geographic area of concern under the CZMA was the immediate dumping zone rather than Southold's coastal zone; and that the sediment suitability criteria it uses as part of its case-by-case application process for federal and larger private projects should alleviate any concerns. (JA. 92, 3222 – 3223, 3248, 3262); *but see* 15 C.F.R. §§ 930.33 and 930.151.

New York State objected to the EPA's consistency determination, but the EPA overruled its objection and nonetheless issued a final rule designating the site. *Id.* New York sought judicial review; the Town of Southold intervened; and summary judgment as granted in favor of the EPA. The District Court limited its review, including as to

whether the designation was consistent with state and local policies, to the arbitrary and capricious standard, giving special deference to the EPA's scientific expertise, and placing the burden on the Town and State to prove inconsistency with their policies while limiting them to arguments that had been raised during the notice and comment process and had been addressed as part of the EPA's administrative record. *Rosado v. Wheeler*, 473 F. Supp. 3d 115, 131 (E.D.N.Y. 2020), *aff'd sub nom. Town of Southold v. Wheeler,* 48 F.4th 67 (2d Cir. 2022).

On appeal, the Second Circuit found that the EPA's determination as to whether its own actions were consistent with the Town's federally-approved policies was subject to arbitrary and capricious review, and that the APA's "in accordance with the law" standard was "inapplicable" because "this case turns on 'complex factual determinations,' not a 'pure question of statutory interpretation'." *Town of Southold v. Wheeler*, 48 F.4th 67, 79 (2d Cir. 2022) *citing Marsh v. Oregon Nat. Res. Council,* 490 U.S. 360, 376 (1989). With respect to Southold's argument that the designation was not consistent with its policies and the EPA had failed to analyze the impact on the Town's coastal and marine habitats, the Court of Appeals found that the EPA had "adequately responded" to objections raised during the notice and comment period by indicating that it was limiting its geographic analysis to the area "within the disposal site," that future applications for disposal permits would be subject to "suitability" criteria, and that any inconsistencies with its policies that the Town had not specifically raised during the notice and comment

period were waived. *Town of Southold v. Wheeler,* 48 F.4th 67, 85 (2d Cir. 2022).

B. The Affected Area

The area surrounding Fishers Island has the "highest quality marine waters" in the Long Island Sound. (SPA. 130). The western shore of the island has the most extensive series of eelgrass beds in New York State, which are "particularly sensitive to water quality parameters," as well as "one of the most significant concentrations of rare plants" in the State, with over 45 different rare, threatened or endangered plant species, all of which provide a home for over 90 bird species, some of which are threatened or endangered. (SPA. 131, 225-228). Fishers Island's residents have been adamantly opposed to dredge spoil disposal in this area. (SPA. 79-80).

The Race, a deep channel to the southwest of Fishers Island, is "a key foraging and migration route for various fish species and plays an important role in commercial, sport and lobster fishing." (SPA. 269 – 273). Among other things, it is home to one of the last remnants of the once thriving lobster population in the Long Island Sound. (SPA. 176 – 177, 269 – 270)(JA. 171)

Other protected habitats that are not discussed in the EPA's analysis but appear to be in the path of the plume of material from disposal operations include: the Dumpling Islands and Flat Hammock, located just north of Fishers Island, which contain a bird sanctuary operated by the Audubon Society and provide an important nesting ground for numerous bird species (SPA. 275-277); and Great Gull Island and Little Gull Island, located to the southwest of Fishers Island,

which are among the most important habitats in the country for the endangered roseate tern and threatened common tern and are home to a bird sanctuary operated by the American Museum of Natural History.

C. HISTORICAL BACKGROUND, 1955-1999

Disposing spoils from federal projects in the area adjacent to the ELDS goes back, on a much smaller scale, to 1955 (JA. 161, 184). Indeed, research regarding the effect of certain contaminants found in these dredge spoils, including DDT and PCBs, on local wildlife in the coastal areas of the eastern Long Island Sound was among the research that informed banning those chemicals in the first place.[3]

The EPA was created in 1970, a year after Congress passed NEPA. (42 U.S.C. § 4332; 35 Fed.Reg. 15623). In 1972, Congress passed both the MPRSA, prohibiting dumping without a permit, and the CZMA, requiring that federal actions be consistent to the maximum extent practicable with approved state policies.

At the time, the U.S. Navy was engaged in a dredging project near the submarine base in Connecticut, and intensified its operations prior to the MPRSA and CZMA taking effect, going from an average of 240,000 cubic yards per year to 2.1 million cubic yards in the first eight months of 1972. *Callaway*, 389 F. Supp., 1278 n. 66-67 (D. Conn. 1974) Assuming continued dumping in this area would no

---

[3] *See* Hayes, *Abnormalities in Young Terns*, 89 Auk. 19 (January 1972); see also Ames, *Some Factors in the Decline of the Osprey in Connecticut*, 81 Auk 19 (April 1964).

longer be permissible, the Navy sought a permit to dispose of the spoils off the coast of Rhode Island, but then the involved federal agencies conferred and determined that a waiver may be possible based upon the "economic desirability" of a closer location. *Id.*, 389 F. Supp., 1275, 1293 and N.53. An injunction was issued, *Id.*, but the EPA estimates that disposal operations continued until 1976. (JA 184).

In 1980, Congress amended the MPRSA to provide "greater protection" to the Long Island Sound, requiring compliance by "any" Federal project or any non-federal project disposing of over 25,000 cubic yards. 33 U.S.C.A. § 1416(f); Pub. L. 96-572, 94 Stat. 3345 (1980); (JA 3110); *See Marsh*, 859 F.2d, 1143 *citing* 126 Cong. Rec. H34063.

It is not clear from the record precisely how this area was re-designated as a disposal site, but dumping resumed for nine years, from 1982 to 1991, after which Congress "clarified" that temporary disposal site designations under the MPRSA are only permissible for "a period of not greater than 5 years," with one single 5-year extension on certain conditions. (JA 184, 189); 64 FR 29865-01; P.L. 102-580, 106 Stat. 4869; 33 U.S.C. 1413(b).

In 1995, the U.S. Navy again undertook dredging near the submarine base, and re-designated the area adjacent to the ELDS for disposal of 1.1 million cubic yards of "contaminated material." (60 FR 51782-01). As part of its decision, it observed that the EPA had interpreted the Federal Water Pollution Control Act as not requiring consideration of New York's water quality as long as the initial discharge occurred on Connecticut's side of the border, and

similarly interpreted the CZMA as only requiring consistency with Connecticut's coastal management policies. (60 FR 51782-01). This decision prompted litigation by environmental groups and the Town, as well as "concerted opposition from the State, and Town, particularly Fishers Island residents." (SPA 94); *See Fishers Island Conservancy v. U.S. Army Corps of Engineers, et al.*, E.D.N.Y. Docket No. 95-cv-04374.

D. 1999 Forward – The EPA Begins Considering a Permanent Site Designation, Southold Obtains Federal Approval For Policies Designed to Address its Concerns, And the EPA Ignores Those Policies

In 1999, the EPA announced its intention to prepare an environmental impact statement to consider permanently designating dredge disposal sites in the Long Island Sound. (64 FR 29865-01).

Around the same time, the lobster population in the Long Island Sound suffered a significant die-off, with various contributing factors. (*See* JA 53, 171; SPA 145 - 146). The disease was observed to be three times more prevalent on the side of the Fishers Island that faced the U.S. Navy's dredge disposal operations. *Id.* New York sought to restrict lobstering near Fisher's Island and exclude that area from its reciprocal permit arrangement with Connecticut, prompting Connecticut to sue, and the restriction was found unconstitutional. *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 88 (2d Cir. 2003).

In 2004, amid increased concerns and seeking greater federal protection for its coastal and marine habitats than what was already available under New

York State's existing Coastal Management Program ("CMP"), the Town of Southold adopted a Local Waterfront Revitalization Plan ("LWRP"), which was incorporated into New York's CMP with the concurrence of Department of Commerce (SPA 45, 57). As described above, the LWRP was specifically intended, in part, to obtain federal protection for policies protecting Fishers Island and Southold's other coastal and marine habitats from continued exposure to dredge spoils from dumping near this location. (SPA. 146, 157, 164).

The following year, the EPA issued a final rule designating disposal sites in the western and central Long Island Sound, but indicating an intention to prepare a Supplemental Environmental Impact Statement with respect to the eastern Long Island Sound. *Rosado v. Wheeler*, 473 F. Supp. 3d 115, 126 (E.D.N.Y. 2020), *aff'd sub nom. Town of Southold v. Wheeler*, 48 F.4th 67 (2d Cir. 2022) *citing* 70 Fed. Reg. 32498-01 and 32509.

Congress intervened to allow for one additional 5-year temporary designation while the EPA resumed consideration of a permanent dredge disposal site in the eastern Long Island Sound. *Id.* As part of this process, Southold's Town Supervisor wrote to the Director of the EPA and specifically drew their attention to Policies 5, 6, 8 and 11 in Southold's LWRP. (JA 4916). The Town Supervisor also spoke at a public hearing and urged the EPA to consider the "cumulative adverse impacts" of dredge spoil disposal in this area. (E.D.N.Y. Docket No. 17-cv-04843; D.E. 72-4, Pg. 4).

In April 2016, the EPA published a proposed rule designating the ELDS. 81 Fed. Reg. 24748. In its

supplemental environmental analysis, the agency observed that the water current will cause a plume of material from the dumping site to flow towards Fishers Island, exposed it a concentration of material that will be ten times greater than any other coastline. (JA. 458, 460, 1216, 2058). Specifically, a "cloud of material from disposal operations" would spread out into the Sound following each 3,000 cubic yard scow-load being dumped into the water. (JA. 457). The western coastline of Fishers Island would receive the "maximum concentration at representative coastal locations" by "a factor of approximately 10," which the EPA attributed to the effect of the material being pulled by and through the stronger currents of the Race. (JA. 458, 460, 1216). The plume would be expected to dilute sharply during the first few hours after each disposal event, but some of it would linger and taper off more slowly over a period of approximately two weeks. (JA. 460).

Nonetheless – in a report that reads more like advocacy than analysis – the EPA found that site designation would have no "direct effects" on the Town's coastline because site designation, by itself, "does not actually authorize the placement of dredged material" and the dumping zone was located "entirely outside of New York's waters." (JA. 3074, 3079, 3090).

Initially, the EPA adamantly refused to consider Southold's federally-protected policies at all, arguing that consistency was not required because it had reconfigured the boundaries of the dumping zone to be approximately 1,000 feet beyond the Town's border and thus scows would not be dumping dredge spoils directly into the Town's waters. (JA. 3101). Subsequently, it argued that a specific analysis of the

Town's policies and coastal and marine habitats was unnecessary because it had already addressed State's more general regional policies. (JA. 3101 - 3102). However, to be "doubly sure," the EPA included a specific finding that designating the ELDS "would be fully consistent with the policies of the LWRP of the Town of Southold [because the] EPA's site designation neither authorizes dredging nor dredged material disposal [and] [s]eparate case-specific approvals are needed to authorize dredging and dredged material disposal." (JA 3104).

Notably, in its analysis, the EPA repeatedly discusses the economic benefit of reducing the cost for two large near-term projects by the U.S. Navy and its submarine manufacturer, Electric Boat, but failed to engage in any inquiry as to the foreseeable environmental impact of disposing the material from those known projects. (See JA. 829; *See also* JA. 110, 383, 394, 548, 1143, 4903). After the site was designated, Electric Boat applied for a permit through the case-specific process the EPA used to rationalize limiting its environmental review for site designation, and New York attempted to object, but the Department of Commerce found that the case-specific application was exempt from further consistency review in the interest of national security.[4]

REASONS FOR GRANTING CERTIORARI

I. THIS CASE PRESENTS AN OPPORTUNITY TO FURTHER ADDRESS THE EPA'S ROLE IN

[4] In Re Electric Boat (NOAA Nov. 2020), Pgs. 8 and 18 (https://coast.noaa.gov/data/czm/consistency/appeals/fcappealdecisions/mediadecisions/ebc-decision.pdf).

DEFINING THE SCOPE OF ITS OWN AUTHORITY

An administrative agency exceeding its powers, usurping authority that Congress has expressly left to the states, the President, and the courts – circumventing procedures laid out by the legislature to facilitate the political resolution of matters that involve balancing interstate and federal/state policy considerations – is of sufficient importance to warrant this Court's review. The EPA has used the administrative process to claim authority that is adjacent to this Court's own original jurisdiction under Article III, while limiting judicial review, and undercutting congressionally-recognized powers of state and local governments to regulate and protect their coastal zones.

Situations where the EPA determines, over a state's objection, that its own actions are consistent with that state's laws will inherently involve significant issues, such that guidance from this Court on the standard of review is appropriate. Beyond that, such guidance may be beneficial in analogous situations where the EPA or other agencies seek to use administrative deference, waiver, and similar arguments to expands the scope of their own authority beyond what Congress intended.

As this Court recently explained when addressing the scope of an agency's authority, the issue is "whether Congress in fact meant to confer the power the agency has asserted." *West Virginia v. EPA*, ____ U.S. _____, 142 S. Ct. 2587, 2607-2608 (2022) *citing FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Even if an agency's interpretation of

its own statutory authority has "textual plausibility" or a "colorable textual basis," the agency's own interpretation cannot supersede "common sense as to the manner in which Congress" grants regulatory authority in light of "separation of powers principles and a practical understanding of legislative intent." *West Virginia*, 142 S. Ct., 2609.

When an administrative agency interprets a statute in a way that gives itself powers of "vast economic and political significance," such an interpretation should be met "with a measure of skepticism" rather than deference. *Util. Air Regul. Grp. v. E.P.A.,* 573 U.S. 302, 324 (2014). It is "incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014)(internal citations omitted). Congress may not "delegate power in areas of traditional state sovereignty unless Congress made that intent unmistakably clear in the language of the statute." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)(internal citations omitted). Federal courts must "presume Congress does not intend to make a dramatic departure from the Constitution's state-federal balance absent a clear statement of that purpose." *Id.* 572 U.S. 844, 866 (2014)(internal punctuation omitted). Congress must use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power," *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S.Ct. 1837, 1849-50 (2020), as it is incumbent upon "the people's representatives" to make "fundamental policy

decisions" and "hard choices." *Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980).

On its face, the APA explicitly says that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. To give deference to the EPA as to its own jurisdiction and compliance with statutory requirements violates the fundamental principal that "no man can be a judge in his own case." *Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016).

In the CZMA, Congress established a dispute resolution procedure for precisely this type of situation. The statute "encourage[s] the states to exercise their full authority over… the coastal zone" by creating "unified policies… for dealing with land and water use decisions of more than local significance" through "federally approved coastal zone management programs." 16 U.S.C. § 1451(h and i).

The EPA cannot override federally-protected coastal management policies but, instead, its role in the policy-making aspect of the process is limited to that of an involved agency whose views must be "adequately considered" by the Department of Commerce in approving such policies. 16 U.S.C. § 1456(b). Once coastal management policies are approved, agency actions "shall" be "to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1).

If there is a serious dispute as to consistency, the EPA is not the decision-maker. Congress specifically provided that in the case of a "serious disagreement

between any Federal agency and a coastal state," the issue must be referred to mediation overseen by the Secretary of Commerce and the "Executive Office of the President." 16 U.S.C. § 1456. Thus, rather than whether there was a rational basis for the agency's interpretation of its own authority in resolving a disagreement over consistency, the law deprives the EPA of jurisdiction once there is a serious disagreement.

Where, as here, an agency denies that any disagreement is serious and makes a finding of no impact or full consistency, the statute explicitly contemplates judicial review as to whether the agency is "in compliance" with its consistency obligation. 16 U.S.C. § 1456(c)(1)(b). It is not a subjective standard as to whether the agency had a rational basis to believe it was in compliance, but rather an objective standard as to whether the agency is or "is not in compliance" with its obligation to be "consistent to the maximum extent practicable with the enforceable policies" of an approved coastal management program. 16 U.S.C. § 1456(c)(1)(a-b). Although deference may be appropriate as to particular factual issues within its analysis, whether a proposed action is consistent is clearly a question of law, not fact, and deferring to the EPA in the manner that occurred here allows the agency to expand its own jurisdiction with very limited oversight.

If Congress intended for federal agencies to receive deference in connection with disputed consistency determinations, it would have said so, rather than including express language in the CZMA that strongly suggests the complete opposite. The plain language of the statute indicates that federal

agencies cannot act unless there is no "serious disagreement" as to consistency with approved coastal management policies, or the President waives the requirement, and whether "a specific Federal agency activity is not in compliance" with its statutory obligations is an issue to be determined by the courts if needed. 16 U.S.C. § 1456(c)(1)(b).

The District Court's rationale, which carried over (albeit not explicitly) in the Second Circuit's decision, was concern over transforming "coastal programs into a veto over otherwise lawful agency actions." *Rosado*, 473 F. Supp. 3d, 146. However, this reasoning flips the federal/state balance that Congress struck in the CZMA. Indeed, this Court has described the consistency requirement in terms of being a "veto" by the state. *Sec'y of the Interior v. California*, 464 U.S. 312, 340 (1984). *See also New Jersey v. Delaware,* 552 U.S. 597, 623 (2008)(Delaware had "authority to deny permission" to New Jersey for project affecting its coastal zone, per policies approved per the CZMA and other considerations); *Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council,* 589 F.3d 458, 462 (1st Cir. 2009)(describing consistency requirement as "conditional veto"); *AES Sparrows Point LNG, LLC v. Smith,* 527 F.3d 120, 123 (4th Cir. 2008)(same); *Delaware Dep't of Nat. Res. & Env't Control v. FERC*, 558 F.3d 575, 578 (D.C. Cir. 2009)(similar language).

The EPA's improper exercise of authority is harmful to the political process. Congress provided for a process whereby competing policy considerations can be balanced. The Town of Southold has an interest in protecting its habitats, and legitimate concerns about the consequences of dredge disposal at this site. The

EPA's analysis is essentially silent as to affected coastal and marine habitats in the Town of Southold -- despite site designation being an "event or series of events where coastal effects" to the Town's habitats "are reasonably foreseeable (15 C.F.R. § 930.33) -- but extensively discusses policy considerations that are beyond its purview and/or was not germane to its environmental analysis as pertains to the Town of Southold. For example, it considered Connecticut's concerns regarding the financial burden of transporting dredge spoils on small local businesses. (JA. 992). The U.S. Navy and its vessel manufacturer, whose dredging operations raise some of the most significant environmental concerns, are hard-pressed to argue that they are unable to travel past the nearest island and out towards the open ocean, but the EPA considered their role in the New London area economy and the benefit of having a long-term cost-effective solution for dredge spoil disposal. (JA. 385, 442-443, 977).

These are precisely the type of competing concerns that – but-for the EPA's attempt to resolve the matter by fiat – can and should be balanced via the political process contemplated by the CZMA. For example, one point of contention was whether, if designated, this site should have specific use restrictions beyond those in the western and central Long Island Sound. *Rosado*, 473 F. Supp. 3d, 146. The trial court found that there was "no good explanation for why those same restrictions are all of a sudden violative in the context of the Eastern Site," and credited the EPA's argument that there was a benefit to having "uniformity of site restrictions" and a "consistent regulatory regime" among the disposal

sites in the Long Island Sound. *Id.* However, Southold is not the same as its westerly counterparts, and its policies protect unique and highly sensitive habitats in an area where it is significantly more feasible to travel beyond the mouth of the Long Island Sound. Moreover, as some of the most significant concerns arise from large federal projects, compromise has the potential to result in a situation where the federal government can lead by example and, in the process, make it more feasible overall to dispose of material outside of the Eastern Long Island Sound.

Beyond that, the EPA's disregard of procedural safeguards, narrowly interpreting what it was required to look at rather than taking the requisite hard look (not only as required by NEPA, but also with specific considerations pursuant to the Town's policies), prevented the development of information that would have been within the agency's specialized expertise to aid in properly addressing this issue. Based on Fishers Island receiving the highest concentration of material outside of the dumping zone, there was a sufficient record to find inconsistency; but, to find that there would be no impact, or to assess full consistency or the maximum extent to which consistency would be practicable, or to otherwise inform future decision-making processes, a better – or at least some – understanding of the risks and foreseeable impact on Southold's coastal and marine habitats from the use of this disposal site, at scale over time, would be necessary and should have been undertaken.

The way in which the EPA designated this site improperly expanded the agency's powers, undermining a carefully crafted statutory scheme, and

let it tip the scales on an issue that should have been beyond its purview. The concerns raised by this matter warrant this Court's consideration.

II. THIS COURT'S GUIDANCE IS NECESSARY TO AVOID INCONSISTENCY WITH THIS COURT'S DECISIONS AND DISAGREEMENT OR CONFUSION AMONG THE LOWER COURTS AS TO THE STANDARDS APPLICABLE TO JUDICIAL REVIEW OF CZMA CONSISTENCY DETERMINATIONS

The Second Circuit's opinion in this case uses a more deferential standard of review for CZMA consistency determinations than what has been suggested by this Court's precedent and how other Courts of Appeals have approached the issue.

The EPA interpreted the CZMA and the Town of Southold's policies so narrowly as to effectively eliminate any factual analysis of the impact on the Town's coastal and marine habitats, and then limited judicial review by treating its analysis as a factual determination entitled to deference. A CZMA consistency determination involves, or should involve, a multi-faceted inquiry. An agency must engage in sufficient factual review to form a basis for any conclusions, but identifying what review is necessary for a given action will involve interpreting and applying state and local coastal management policies. Those policies may, as here, have both procedural requirements as to the nature and extent of the environmental analysis necessary, and substantive requirements as to what actions are permissible. While an agency's analysis may involve discreet factual determinations that would be entitled to deference,

that same deference should not apply to its opinion as to what is necessary to comply with its statutory obligations.

Contrary to the lower court's reading, this Court's decision in *Marsh v. Oregon Nat. Res. Council,* 490 U.S. 360, 376 (1989), involved a "narrow" factual issue and does not require that broader questions of consistency with the coastal management policies be treated as factual issues to be determined by the federal agency whose actions are subject to those limitations.

In contrast to the narrow issue in *Marsh*, when this Court reviewed an agency's determination – similar to the determination here -- that a proposed action would not affect a state's coastal zone, the Court engaged in an independent analysis without any deference to the agency making the determination. *Sec'y of the Interior v. California,* 464 U.S. 312, 321(1984).

This Court has not specifically addressed the standard of review for a disputed CZMA consistency determination, but its discussion of the CZMA in other contexts tends to support the view that the consistency requirement is a limitation on the EPA's authority, not a factual finding for which the agency would receive deference. In *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 592 (1987), the Court explained that the "congressional intent" of the CZMA to "enhance state authority" over coastal management issues. In *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008), this Court upheld the authority of "the President—the Commander in Chief," not the agency

proposing the action, to grant an exemption from the CZMA consistency requirement.

The analysis that has been used by the Ninth Circuit, First Circuit, and to some degree the Third and Fourth Circuits, provides better reasoning than the approach taken by the Second Circuit in this case.

The Ninth Circuit has treated CZMA consistency determinations as being subject to APA's "accordance with law" standard. *In re Border Infrastructure Env't Litig.,* 915 F.3d 1213, 1222 (9th Cir. 2019)(commenting on standard, but not reaching the merits). *See also California Coastal Comm'n v. United States,* 5 F. Supp. 2d 1106, 1111 (S.D. Cal. 1998)(explaining that "in accordance with law" standard applies to CZMA consistency review, and "the deferential standard of review should not apply" because "[t]raditional judicial review subserves that stated legislative intent" of the CZMA); *SLPR, LLC v. San Diego Unified Port Dist.,* 2009 WL 10672895, at *9 (S.D. Cal. Aug. 4, 2009)(invalidate dredging permit for violating CZMA under "not in accordance with law" and remanding for consideration of the impact on the affected coastline).

The First Circuit has also analyzed consistency review as a question of law, and emphasized that it is a question of state law, specifically rejecting the argument that a federal agency should receive deference in connection with its interpretation of that state law. *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council, 589 F.3d 458, 469-471 (1st Cir. 2009); See also Conservation Law Foundation v. Watt, 560 F.Supp. 561, 576 (D.C.Mass.,1983)("It is plain from the language of the*

Act and regulations that the burden of establishing compliance with a state program is on the federal agency proposing the contemplated action, and not on the state.")

Similar reasoning was aptly used by District Court in the Sixth Circuit, explaining that *the EPA is required "to accept the State's interpretation of its own standard," and to allow the EPA to "override its obligation to abide by state environmental standards" by reinterpreting them would give "the agency power in excess of its Congressionally delegated authority." Ohio v. United States Army Corps of Engineers, 259 F.Supp.3d 732, 756-757 (N.D.Ohio, 2017).*

The Fourth Circuit does not appear to treat "accordance with law" and "arbitrary and capricious" as distinct standards, but has found that deference is owed to the state with respect to interpreting its policies while deference is owed to the federal agency with respect to specific factual findings. *Shanty Town Assocs. Ltd. P'ship v. E.P.A.,* 843 F.2d 782, 795 (4th Cir. 1988).

The Third Circuit similarly discussed this issue in terms of a determination that is not in accordance being "arbitrary and capricious," but explained a heightened degree of scrutiny should apply when the issue involves "doubt about the agency's compliance with statutory constraints," particularly as "agency action moves toward the gray area at the outer limits of statutory authority," or when the agency "begins to encroach on congressional policies expressed elsewhere," and has explained that the "congressional preference for having [coastal management] policies initiated at the state level must be respected." *Cape*

May Greene, Inc. v. Warren, 698 F.2d 179, 190-191 (3d Cir. 1983).

Whether this site designation and the process used to make that decision were consistent to the maximum extent practicable with Town of Southold's federally-approved coastal management policies are questions of law for the courts to independently consider, not a factual determination to be made by the agency subject to only limited review. Similarly, what is required under the Town's policies is driven by the text of those policies, with ambiguity as to the intended meaning best informed by the narrative portions of the LWRP, and the EPA's interpretation of those obligations is not entitled to any special weight or deference because it is not the agency that has been entrusted to administer the Town's policies. *Cf. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 865 (1984).

This case is an appropriate vehicle for providing valuable guidance and clarity as to how disputed CZMA consistency determinations should be reviewed by the lower courts. It is an issue that, when raised, almost inherently involves a matter local, regional, or potentially national importance. Courts have carefully grappled with the issue, and have taken divergent but not necessarily incompatible approaches, and the decision in this case being an outlier in the wrong direction. This Court's guidance would be beneficial for future cases, and the circumstances of this case are particularly conducive to a discussion of these issues because – notwithstanding the lower court's analysis to the contrary – the matter turns on legal arguments and common sense rather than granular factual issues.

III. THIS MATTER INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE AND NATIONAL SIGNIFICANCE

A governmental action that results in one state's waste polluting another "is a matter of very great importance." *State of Missouri v. State of Illinois,* 180 U.S. 208, 246 (1901).

This dispute involves the interests of multiple states and multiple federal agencies, and has been brewing for a half-century since the applicable statutory and regulatory schemes were first established.

The areas Southold is trying to protect are of exceptional importance and value. The dredging needs in the area surrounding the Naval Submarine Base are also obviously of national importance, which elevates the importance of compliance with environmental laws and policies governing the disposal of those spoils. Ensuring that the decision as to where and how that material should be disposed of was made in accordance with the law is an issue, in its own right, that is deserving of the Court's attention.

Beyond the importance of the immediate dispute before the Court, the broader issue of defining the EPA's role in this type of dispute implicates concerns regarding federalism, administrative powers, and the rule of law. When the EPA was created and Congress gave it authority to issue dredge disposal permits, while at the same time passing separate legislation reserving power to the states and their local governments to manage their coastal zones subject a dispute resolution process that carefully balanced federal and interstate interest, it could not have

intended to entrust the most difficult policy-laden decisions to an administrative agency subject to extremely limited judicial review. Accordingly, this is an appropriate case for review by this Court.

CONCLUSION

WHEREFORE, it is respectfully requested that the Town of Southold's petition for certiorari be granted.

Dated: February 15, 2023

Respectfully submitted,

/s/Scott J. Kreppein
SCOTT J. KREPPEIN
Counsel of Record
DEVITT SPELLMAN BARRETT, LLP
Attorneys for Petitioner
50 Route 111, Suite 314
Smithtown, New York 11787
(631) 724-8833
s.kreppein@devittspellmanlaw.com