

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**DAVRIC MAINE CORPORATION,** )  
**et al.,** )  
 )  
          **Plaintiffs** )  
 )  
**v.** )  
 )  
**UNITED STATES POSTAL SERVICE,** )  
**et al.,** )  
 )  
          **Defendants** )

**Docket No. 99-344-P-H**

**RECOMMENDED DECISION ON DEFENDANTS’ MOTIONS TO SUBSTITUTE,  
TO DISMISS AND FOR SUMMARY JUDGMENT<sup>1</sup>**

The defendants, the United States Postal Service and Joseph Leonti, move to substitute the United States for Leonti as a party defendant and to dismiss all counts of the complaint in this action alleging state-law torts, constitutional violations, and violation of state and federal statutes. I recommend that the court grant the motions to substitute and to dismiss.

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<sup>1</sup> While the title of the motion states that it seeks summary judgment, the body of the defendants’ memorandum of law deals only with the motions to substitute and to dismiss. Summary judgment therefore is not an issue before the court at this time. For this reason, the plaintiffs’ Motion to Strike Defendants’ Motion to Substitute, Dismiss and for Summary Judgment (Docket No. 6), to the extent that it addresses any motion for summary judgment, is moot. The plaintiffs’ motion does not discuss the defendants’ motion to dismiss; to the extent that it may nonetheless be construed to apply to the motion to dismiss, it is denied. To the extent that the plaintiffs’ motion purports to seek the striking of the defendants’ motion to substitute, it provides no basis to strike that motion but rather presents an argument against that motion on the merits. Accordingly, that portion of the plaintiffs’ motion to strike will be considered as an opposition to the motion to substitute.

## I. Applicable Legal Standards

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(1), (2), (5) and (6). For the reasons set forth below, I conclude that it is unnecessary to consider the issues of personal jurisdiction (Rule 12(b)(2)) and sufficiency of service of process (Rule 12(b)(5)).

When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). The court does not draw inferences favorable to the pleader. *Hodgdon v. United States*, 919 F. Supp. 37, 38 (D. Me. 1996). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); see *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

The defendants assert that the complaint fails to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6). “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); see also *Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

## II. Factual Background

The complaint includes the following relevant factual allegations. Plaintiff Davric Maine Corporation owns land in Scarborough, Maine that it offered to sell to the defendant United States Postal Service (“USPS”) as a site for the construction of a new processing and distribution center. Complaint (Docket No. 1) ¶¶ 3, 10-12. Plaintiff Joseph Ricci is the sole owner of the stock of Golden Arc Enterprises, Inc., a holding company that owns all of the stock of Davric. *Id.* ¶ 4. Defendant Joseph Leonti manages the regional USPS processing and distribution center in Portland, Maine. *Id.* ¶ 8.

Prior to 1997 the USPS developed a plan to build a new processing and distribution center to replace the current facility located in Portland. *Id.* ¶ 10. The USPS undertook preliminary studies of forty sites in the greater Portland area and performed a detailed study of Davric’s property. *Id.* ¶ 13. In the spring of 1997 the USPS focused its attention on a site located on Rand Road in Portland as its preferred location for the new facility. *Id.* ¶ 15. In January 1998 the plaintiffs’ real estate broker wrote a letter to the USPS outlining inadequacies in the environmental assessment of the Rand Road site filed by the USPS with the Army Corps of Engineers and other government agencies in 1997. *Id.* ¶¶ 19-21. An attorney for neighbors of the Rand Road site objected to the actions of the USPS in December 1998 and the defendants perceived this action to have been prompted by the plaintiffs. *Id.* ¶ 25.

In January 1999 the USPS abandoned the Rand Road site and announced that it would search for a new site. *Id.* ¶ 26. During the summer of 1999 the USPS represented that it was again considering Davric’s property, along with four other sites. *Id.* ¶ 27. The USPS decided not to build on Davric’s property “[i]n retaliation for the fact that Davric and its agents had exposed the flaws

in the plans to build at the Rand Road site,” despite the fact that it knew that the Davric site “provided a practicable alternative.” *Id.* ¶ 31. In response to an article that appeared in the Portland newspaper on October 19, 1999, suggesting that the USPS had chosen Lewiston, Maine as the site for the new facility, the defendants scheduled meetings with all USPS employees.<sup>2</sup> *Id.* ¶¶ 29, 31. At meetings held on October 20, 1999, “conducted primarily by” Leonti, Leonti “expressed great hostility toward” Armstrong, “made false and disparaging remarks about both Mr. Armstrong and Davric, and about Davric’s property and clientele” before approximately 1000 employees. *Id.* ¶¶ 32-33. Leonti expressed his belief that Davric had interfered with the USPS’s ability to gain approval of the Rand Road site. *Id.* ¶ 33.

During his presentation to the employees, Leonti used a chart grading each potential site in eight categories from A to F. *Id.* ¶ 35. The USPS “helped generate” the chart. *Id.* Davric’s property was rated F for wetlands impact, D for soil contamination, C for water contamination, F for infrastructure, F for traffic, and C for residential impact. *Id.* Each of these rankings allegedly constituted a false and libelous statement about Davric’s property. *Id.* During his presentations, Leonti also suggested criminal wrongdoing by Davric and Ricci, falsely stated that the Davric site was contaminated, and stated that there were dead horses and bodies buried on the site and “maybe even Jimmy Hoffa could be buried there.” *Id.* Leonti also stated falsely that the Davric site had serious wetlands problems and falsely suggested that Davric could not offer a 40-acre parcel that could be built upon without violating wetlands laws. *Id.* ¶ 36. Leonti intended his statements “to denigrate Davric, Mr. Ricci and Mr. Armstrong.” *Id.* ¶ 37. Other statements made by Leonti at these

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<sup>2</sup> Although the complaint does not say so, it is reasonable to conclude that the employees at issue included only those from southern Maine, or only those then employed at the Portland facility.

meetings that the plaintiffs consider to be false and defamatory were that Davric's clientele, when coming and going from the adjacent racetrack owned by Davric, *id.* ¶ 3, might be dangerous to USPS employees and that "only losers attended the racetrack and that these losers would present risks to employees as they came to or left from work." *Id.* ¶ 42.

An open letter published by the defendants in the Portland newspaper on October 31, 1999 falsely stated that the Davric property was not "practicable" for the USPS's needs. *Id.* ¶ 44. It also falsely "insinuated that working in Scarborough would be unsafe and/or unhealthful for workers and that building in Scarborough would damage Maine's environment." *Id.* On or about November 4, 1999 the defendants prepared hundreds of copies of a videotape in which Leonti and another USPS official falsely stated that none of the sites in the greater Portland area could meet the USPS's criteria and repeated the statement that the Davric site "flunked with respect to wetlands impact," showing the grade of F for the site on a "Wetlands Report Card." *Id.* ¶ 48.

The false statements made by the defendants have diminished the value of Davric's property and will continue to do so. *Id.* ¶ 50. The false statements have "caused substantial damages" to Ricci. *Id.* Some of the false statements were defamatory *per se* and made with actual malice. *Id.*

### **III. Discussion**

#### **A. Motion to Substitute**

The defendants move to substitute the United States for Leonti as a defendant pursuant to 28 U.S.C. § 2679(d). That statute provides that, upon certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the claim arose, the action shall be deemed an action against the United States and the United States shall be substituted for the employee as a party. The statute also provides that a suit

against the United States shall be the exclusive remedy for torts allegedly caused by any federal employee. 28 U.S.C. § 2679(b). The exclusive remedy does not apply to actions alleging a violation of the United States Constitution or a federal statute under which action against an individual is otherwise authorized. 28 U.S.C. § 2679(b)(2). The Attorney General has delegated her certification authority under this statute to the United States attorneys. 28 C.F.R. § 15.3(a).

The complaint raises claims against Leonti in Counts I-III: defamation, interference with contract or potentially advantageous relationships, and unspecified “constitutional torts.” Complaint ¶¶ 52-53, 56, 59. The United States Attorney for the District of Maine has certified that Leonti was acting within the scope of his federal employment at the time of the conduct alleged by the plaintiffs as the basis for their claims against him. Certification, Exh. C to Defendants’ Motions to Substitute, Dismiss and for Summary Judgment, etc. (“Defendants’ Motion”) (Docket No. 4). This certification is provisional and subject to judicial review. *Aversa v. United States*, 99 F.3d 1200, 1208 (1st Cir. 1996). The scope of an individual defendant’s employment is to be determined under the law of the state in which the alleged tortious conduct occurred. *Kelly v. United States*, 924 F.2d 355, 357 (1st Cir. 1991).

The plaintiffs object to the substitution on the grounds that the certification is “equivocal;” that the Tort Claims Act, of which section 2679 is a part, does not apply to claims of defamation, interference with contract rights, and constitutional torts and therefore does not apply to their claims against Leonti; that the certification is not sworn and made on personal knowledge; that the certification is signed by an assistant United States attorney rather than the United States attorney himself; and that “it seems likely from the fact of the document that [the United States attorney] conducted no investigation.” Motion to Strike at 3-4. The plaintiffs cite no authority for their claims

that certification under section 2679 must be unequivocal, sworn, made upon personal knowledge or issued only after investigation, and no such requirements are apparent in the statute or the related regulation. Accordingly, I will not consider them further. Similarly, the plaintiffs cite no authority for their contention that the certification must only be signed by the United States attorney, rather than an assistant United States attorney clearly acting on his behalf, and no such requirement is included in the statute or the related regulation. Again, this argument will not be considered further.

The plaintiffs' argument that the Federal Tort Claims Act does not apply to constitutional torts is correct. *FDIC v. Meyer*, 510 U.S. 471, 480-82 (1994); *Aversa*, 99 F.3d at 1213 n.12; *McDonald v. Hassard*, 1989 WL 139219 (D. Me. July 13, 1989), at \*2. Therefore, the certification is ineffective as to Count III of the complaint. The plaintiffs are incorrect with respect to the appropriate interpretation of the Tort Claims Act, however. The fact that the Tort Claims Act by its terms "shall not apply to . . . [a]ny claim arising out of . . . libel, slander, misrepresentation, deceit, or interference with contract rights," 28 U.S.C. § 2680(h), does *not* mean that such claims may be brought against federal agencies and federal employees. To the contrary, as discussed in more detail below, the Tort Claims Act creates exceptions to the general sovereign immunity of the federal government, *Smith v. United States*, 507 U.S. 197, 201 (1993); *Shansky v. United States*, 164 F.3d 688, 690 (1st Cir. 1999), and any exceptions to the coverage of the Tort Claims Act accordingly retain that immunity, *Aversa*, 99 F.3d at 1207, 1209; *Jimenez-Nieves v. United States*, 682 F.2d 1, 6 (1st Cir. 1982) (claims for libel and slander must be dismissed). *See also Siegert v. Gilley*, 500 U.S. 226, 234 (1991) (suit cannot be brought against the United States for defamation). To the extent that the plaintiffs contend that Leonti was acting within the scope of his employment, therefore, the certification is effective and the United States will be substituted for Leonti as a defendant.

To the extent that the plaintiffs contend that their claims against Leonti are made against him personally rather than in his official capacity or that their claims are based on actions taken by Leonti that were outside the scope of his employment, the burden is on the plaintiffs to present evidence of those facts. *Schrob v. Catterson*, 967 F.2d 929, 936 (3d Cir. 1992); *see Rogers v. Management Tech., Inc.*, 123 F.3d 34, 37 (1st Cir. 1997). The plaintiffs do not make either argument and have not provided any such evidence, and accordingly the motion to substitute should be granted as to Counts I and II without exception.

### **B. Immunity**

The defendants contend that sovereign immunity bars the plaintiffs' claims against them in Counts I and II (defamation and interference with contract). The plaintiffs argue that the USPS's "sue and be sued" authority, 39 U.S.C. § 401(1), enacted after the Tort Claims Act had been in effect for approximately twenty years, waives any sovereign immunity that the agency might otherwise enjoy and makes the Tort Claims Act inapplicable to claims against it and its employees. Memorandum in Opposition to Defendants' Motions to Substitute, Dismiss and for Summary Judgment ("Plaintiffs' Memorandum") (Docket No. 9) at 3-10. The plaintiffs rely primarily on the Supreme Court's decisions in *Loeffler v. Frank*, 486 U.S. 549 (1988), and *Meyer*, 510 U.S. at 475-78, to support this sweeping argument. However, numerous federal courts have concluded since *Loeffler* that defamation claims may not be asserted against the USPS.

First, the plaintiffs do not suggest that the United States does not retain its sovereign immunity against claims for defamation and interference with contract. If the United States is substituted for Leonti as a defendant on Counts I and II as I have recommended, those counts must be dismissed as to the United States. Since Count II is asserted only against Leonti, Complaint ¶¶

55-57, no further discussion of the allegation of interference with contract is necessary.

Next, Congress has clearly expressed, *see Meyer*, 510 U.S. at 481, its intention that the sue-and-be-sued clause applicable to the USPS does not waive sovereign immunity, at least for state-law torts, to an extent greater than the waiver provided by the Tort Claims Act: “The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.” 39 U.S.C. § 409(c). The plaintiffs do not contend that defamation, the basis of Count I, is not a tort, nor could they seriously do so.

All of the case law cited by the plaintiffs in support of their position that 39 U.S.C. § 409(c) does not subject their state-law defamation claim to the Tort Claims Act, Plaintiffs’ Memorandum at 7-8, deals only with federal statutory tort claims, and all but one of the cases cited, *Grandison v. United States Postal Serv.*, 696 F.Supp. 891, 892 (S.D.N.Y. 1988) (claims under federal Civil Rights Act and Age Discrimination in Employment Act), expressly state that the USPS *does* have immunity from state-law claims by virtue of the Tort Claims Act and section 409(c). *Federal Express Corp. v. United States Postal Serv.*, 151 F.3d 536, 541 (6th Cir. 1998) (Lanham Act claim; FTCA supplies sole remedy for state-law tort claims against federal agencies);<sup>3</sup> *Global Mail Ltd. v. United States Postal Serv.*, 142 F.3d 208, 211 (4th Cir. 1998) (same); *United States v. Q Int’l Courier, Inc.*, 131 F.3d 770, 775 (8th Cir. 1997) (same).

Even if the First Circuit’s holding in *Aversa* that any claim arising out of slander cannot proceed against a federal agency or employee, 99 F.3d at 1207, did not control on this issue, the

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<sup>3</sup> In an apparent attempt to bolster their argument, the plaintiffs include in their memorandum a separate citation to the district court decision in this case, *Federal Express Corp. v. United States Postal Serv.*, 959 F. Supp. 832 (W.D.Tenn. 1997). Plaintiffs’ Memorandum at 8. The point for which the citations are made is the same; under these circumstances, the appellate decision is the only appropriate source of authority.

authority cited by the plaintiffs makes clear that, where the named defendant is the USPS, state-law tort claims are barred. *See also Dynamic Image Techs., Inc. v. United States*, 18 F.Supp.2d 146, 150 (D.P.R. 1998) (federal courts lack subject-matter jurisdiction over claims against USPS and its employees for defamation). *See generally, e.g., Apampa v. Layng*, 157 F.3d 1103, 1104 (7th Cir. 1998) (Tort Claims Act bars suits for defamation); *Heuton v. Anderson*, 75 F.3d 357, 361 (8th Cir. 1996) (same).

The defendants are entitled to dismissal of Counts I and II.

### **C. Constitutional Tort**

In Count III, the plaintiffs allege that the defendants committed “constitutional torts under the doctrine set forth by the United States Supreme Court in its decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).” Complaint, ¶ 59. *Bivens* actions are not available against federal agencies. *Meyer*, 510 U.S. at 486; *Pereira v. United States Postal Serv.*, 964 F.2d 873, 876-77 (9th Cir. 1992). By discussing this count only in connection with Leonti, the plaintiffs appear to concede this point. Plaintiffs’ Memorandum at 11. The motion to dismiss Count III should be granted as to the USPS.

With respect to the claim against Leonti, the failure of the complaint to specify the constitutional tort or even the provision of the Constitution at issue would ordinarily require dismissal pursuant to Fed. R. Civ. P. 8(a). *Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 864-65 (1st Cir. 1993). However, the plaintiffs state that they “are willing to file a motion to amend their Complaint to further detail the nature of Mr. Leonti’s constitutional misdeeds” if necessary. Plaintiffs’ Memorandum at 11. In that event, they would apparently allege that Leonti, “without due process of law, deprived Plaintiffs of their liberty interests in a recognized ‘stigma-

plus' situation since they [sic] were made in conjunction with altering the Plaintiffs' legal status (*i.e.*, in conjunction with publicly rejecting a site that had become a widely recognized finalist)." *Id.* The "they" to which this sentence refers are presumably the allegedly defamatory statements. The plaintiffs cite Supreme Court case law with respect to good name and reputation in support of their position. *Id.*

Leave to amend a complaint need not be granted where the proposed amendment would be futile. *Grant v. News Group Boston, Inc.*, 55 F.3d 1, 5 (1st Cir. 1995). For all that appears in the plaintiffs' submission, that is the case here.

"Futility" means that the complaint, as amended, would fail to state a claim upon which relief could be granted. In reviewing for "futility," the district court applies the same standard of legal sufficiency as applies to a Rule 12(b)(6) motion.

*Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996) (citations omitted). In *Siegert*, a decision issued well after the case law upon which the plaintiffs rely, the Supreme Court held that damage that flows from injury to reputation "may be recoverable under state tort law but it is not recoverable in a *Bivens* action." 500 U.S. at 234. In the First Circuit, a plaintiff may not recover for an alleged constitutional tort arising out of defamation unless his damages resulted from "some further action by the defendant in addition to the defamation." *Aversa*, 99 F.3d at 1216. The plaintiffs make no such allegation in the complaint or in their memorandum. Leonti is therefore entitled to dismissal of Count III. See *Simpkins v. District of Columbia Gov't*, 108 F.3d 366, 372 (D.C.Cir. 1997) (defamation not actionable under *Bivens* against individual defendant).

#### **D. Count IV**

Count IV alleges that the USPS violated the National Environmental Policy Act ("NEPA"),

42 U.S.C. § 4321 *et seq.*, by failing to prepare an environmental impact statement (“EIS”) “with respect to this proposed development,” Complaint ¶ 61, and by refusing “to consider alternatives in Greater Portland which do not have the severe impact of the Lewiston or Auburn sites,” *id.* ¶ 75 (presumably meaning severe environmental impact). The plaintiffs allege that they have been injured by these failures to act because “their property [is] being denigrated” and “they have long-standing significant interests in preserving and maintaining environment quality generally in Maine.” *Id.* ¶ 76. The USPS contends that the plaintiffs’ claim is not ripe<sup>4</sup> and they lack standing to bring it. Defendants’ Memorandum at 17-24.

### *1. Ripeness*

The section of NEPA invoked in the complaint is 42 U.S.C. § 4332. Complaint ¶ 72. That statute directs federal agencies to issue a detailed statement with respect to every “major Federal action” concerning, *inter alia*, the environmental impact of the proposed action. The role of a court reviewing a claim of violation of NEPA is to determine whether the federal agency complied with NEPA’s procedural requirements. *City of Waltham v. United States Postal Serv.*, 786 F. Supp. 105, 115 (D. Mass. 1992), *aff’d* 11 F.3d 235, 240 (1st Cir. 1995). The review is based on the administrative record. *Id.* at 115-117. A claim for administrative review of agency action is not ripe until the agency’s action is final. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-54 (1967).

Assuming *arguendo* that section 4332 applies to the USPS, *but see* Defendants’

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<sup>4</sup> The plaintiffs’ contention that ripeness may only be resolved in the context of a summary judgment motion, Plaintiffs’ Memorandum at 20 n.9, is incorrect. In fact, my research has located no reported decisions in which the First Circuit or this court has considered the ripeness of a claim in a context other than that of a motion to dismiss. *See generally Ernst & Young v. Depositors Econ. Protection Corp.*, 45 F.3d 530, 535-41 (1st Cir. 1995) (discussing ripeness of a claim in context of motion to dismiss for lack of subject-matter jurisdiction).

Memorandum at 20 n.4, and if so, that it applies to the USPS's decision to build a new processing and distribution center in southern Maine, and that there is a private right of action under this statute, the case law makes clear that no such claim is ripe until the federal agency involved has made an "irretrievable commitment of resources such that its decision to undertake construction is irrevocable." *City of Waltham*, 786 F. Supp. at 135 (internal quotation marks and citation omitted). While the NEPA process is underway, any NEPA claim is not ripe for review. *Sierra Club v. Larson*, 769 F. Supp. 420, 423 n.2 (D.Mass. 1991), *aff'd* 2 F.3d 462 (1st Cir. 1993); *accord*, *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1196-97 (9th Cir. 1997).

Here, the USPS has provided the sworn statement of the responsible USPS employee that the NEPA process for the processing and distribution center at issue is still underway. Declaration of Tina Norwood, Exh. B to Defendants' Memorandum, ¶ 3. She also states that the plaintiffs' property is currently under consideration for this facility. *Id.* ¶ 9. The plaintiffs insist that the court nevertheless resolve the motion to dismiss on the basis of the unverified allegations in the complaint that a newspaper article published in October 1999 stated that the USPS had "ruled out" sites in Portland for the facility and was "focusing on" a site in Lewiston, Complaint ¶ 29; that on October 20, 1999 Leonti informed USPS employees that "management had narrowed the search to Lewiston and Auburn," *id.* ¶¶ 32-33; that on October 31, 1999 the defendants published an open letter in the Portland newspaper that said that "moving north" would be best for the USPS and its employees, *id.* ¶ 44; that the defendants in a videotape prepared and copied on November 4, 1999 said that the USPS "was required to go the Lewiston-Auburn area," *id.* ¶ 48; and that the USPS "has announced to its employees that they *will be going* to Lewiston or Auburn," *id.* ¶ 67 (emphasis in original). Plaintiffs' Memorandum at 19-20. The plaintiffs make this demand despite their admission that,

since their complaint was filed, the USPS has “beg[un] looking at the sites in the Greater Portland area and retracting its prior statements that it was irrevocably leaving for the Lewiston area.” *Id.* at 22. This court will not engage in the empty exercise urged on it by the plaintiffs. Even if it were remotely possible that this court would consider the claim as framed in the complaint, despite the occurrence of events making the allegations of the complaint no longer accurate, the allegations cited by the plaintiffs and set forth above do not establish that the “irretrievable” commitment of resources necessary to make a NEPA claim reviewable by the courts has yet occurred.<sup>5</sup>

The motion of the USPS to dismiss Count IV as unripe should be granted.

## 2. *Standing*

Even if the plaintiffs’ NEPA claim were ripe for consideration, the plaintiffs lack standing to pursue it. In order to demonstrate standing sufficient to meet the requirements of Article III of the Constitution,

the party who invokes a federal court’s authority must show that (1) he or she personally has suffered some actual or threatened injury as a result of the challenged conduct; (2) the injury can fairly be traced to that conduct; and (3) the injury likely will be redressed by a favorable decision from the court.

*New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996). The

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<sup>5</sup> The plaintiffs contend that their NEPA claim, even if it is not ripe, is not moot because they are entitled to attorney fees as a prevailing party under 28 U.S.C. § 2412(d)(1)(A) because they “deterred the Postal Service from proceeding forward in violation of the environmental laws.” Plaintiff’s Memorandum at 23. If the plaintiffs’ NEPA claim was never ripe, it could never have compelled the USPS to take any action in a sense that would make the plaintiffs a prevailing party; it is highly unlikely that this litigation was, as the plaintiffs assert, a “material factor” in the USPS’s decision to reconsider Portland sites, including that owned by Davric, or that it played a “catalytic role” in that decision. *Id.* The point is that the USPS has not yet violated NEPA, for all that appears in the record, and the plaintiffs accordingly are not entitled to recover attorney fees as prevailing parties. In none of the case law cited by the plaintiffs in support of this claim did the court award attorney fees when an action was dismissed as unripe.

burden is on the plaintiffs “clearly to allege facts demonstrating that [they are] proper part[ies] to invoke federal jurisdiction.” *Dubois v. United States Dep’t of Agriculture*, 102 F.3d 1273, 1281 (1st Cir. 1996) (internal quotation marks and citation omitted).

Here, the plaintiffs allege no actual or threatened injury to themselves as the result of the USPS’s claimed failure to generate a full environmental impact statement on the Auburn or Lewiston properties upon which it may or may not locate the facility. Each of the cases cited by the plaintiffs in support of their position involved direct injury to the complaining party. Here, paragraph 76 of the complaint, which is the paragraph identified by the plaintiffs as establishing their standing, Plaintiffs’ Memorandum at 16, states only the conclusion that they will be “adversely affected and injured.” The only specifics offered in the paragraph are allegations that (i) Davric’s property is being “denigrated in the selection process” in order to punish Davric “for raising public consciousness of environmental issues with respect to this project;” (ii) the plaintiffs “have long-standing significant interests in preserving and maintaining environment quality generally in Maine;” and (iii) the USPS “has improperly suggested that the Plaintiffs are responsible for forcing the Postal Service to relocate to Lewiston or Auburn and therefore require its employees to travel the 7.8 million additional miles per year.”

The third allegation could not be addressed by an environmental assessment of any property and could not under any circumstances create NEPA standing. The second allegation states an interest that does not differ in any significant way from that of the general public and accordingly will not confer standing. *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C.Cir. 1996). *See generally United States v. AVX Corp.*, 962 F.2d 108, 117-18 (1st Cir. 1992) (generalities, unsupported by factual foundation, will not support standing, nor will generalized interest in

preserving resources). The first allegation, despite an attempt to dress it in environmental clothing, suggests injury to the reputation of Davric's property due to the failure of the USPS to follow NEPA procedure with respect to noncontiguous property owned by someone else. This is not the type of injury that confers standing under NEPA. *Conservation Law Found. of Rhode Island v. General Servs. Admin.*, 427 F. Supp. 1369, 1373-74 (D.R.I. 1977) (geographical nexus and proximity required to establish standing). In addition, by alleging that their primary injury is to their property, the plaintiffs have failed to show that their claim is more than "marginally related" to and "not inconsistent with" the purposes underlying NEPA. *City of Los Angeles v. United States Dep't of Agriculture*, 950 F. Supp. 1005, 1012 (C.D.Cal. 1996). See *Nevada Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions."); *Hurd Urban Dev., L.C. v. Federal Highway Admin.*, 33 F.Supp.2d 570, 575 (S.D.Tex. 1998) (claim of plaintiffs seeking "exposure to arguably greater environmental harm for their own economic benefit" not protected by NEPA).

The plaintiffs lack standing to bring a NEPA claim, and the USPS is accordingly entitled to dismissal of Count IV.

#### **E. Count V**

Count V, presented in the complaint as a second Count IV, alleges violation of Maine's Site Location of Development Act ("SLDA"), 38 M.R.S.A. § 481 *et seq.* The USPS again contends that this claim is not ripe; in addition, they assert that there is no private right of action to force a third party to comply with this state statute. Defendants' Memorandum at 25-26. The plaintiffs' entire argument in response is the following: "The same standing and mootness principles would call for

denial of the motion as to the Site Location and [sic] Development Act.” Plaintiffs’ Memorandum at 24. Since the USPS has not argued that the claim raised in Count V is moot nor that the plaintiffs lack standing to bring it, the plaintiffs’ memorandum requires extremely generous interpretation to allow the court to conclude that they have not waived any opposition to this portion of the defendants’ motion.

If it is necessary to reach the merits of the defendants’ motion on this count, the issue is easily resolved. The complaint alleges that the USPS is required to comply with the SLDA, but that the Postal Service “has claimed that it does *not* have to comply with these statutes.” Complaint ¶ 81 (emphasis in original). The plaintiffs allege that locating the facility in Lewiston or Auburn “will substantially affect air quality in Central and Southern Maine.” *Id.* They seek injunctive relief prohibiting the USPS from proceeding with the construction of the facility until they have applied for approval under the SLDA from the Maine Department of Environmental Protection. *Id.* ¶¶ 79, 82 & at 29.

The SLDA requires that a person obtain approval from the Maine Department of Environmental Protection for the construction or operation of any “development of state or regional significance that may substantially affect the environment.” 38 M.R.S.A. § 483-A. A “development of state or regional significance that may substantially affect the environment” is defined to include any federal development that occupies a land area in excess of 20 acres. 38 M.R.S.A § 482(2)(A). As I have already noted, the USPS has not yet decided to build this facility in Lewiston or Auburn. Under these circumstances, the request for relief is premature. *See Southridge Corp. v. Board of Envntl. Protection*, 655 A.2d 345, 348 (Me. 1995) (“The DEP will review an application for a permit only when the applicant has demonstrated sufficient title, right or interest in all of the property which

is proposed for development or use.”). Even by the terms of the complaint, the USPS does not yet have a sufficient interest in any property to trigger application of the SLDA.

In addition, the SLDA provides only one remedy when a person subject to its terms fails to apply for approval. When a developer begins construction or operation of a development covered by the SLDA without notifying the Department of Environmental Protection and seeking approval, the Department may schedule a hearing on that project. 38 M.R.S.A. § 485-A(3). After the hearing, the Department may grant or deny permission to construct or operate the development. 38 M.R.S.A. § 486-A(3). In the event of violation of the SLDA, the state attorney general may bring action in court. 38 M.R.S.A. § 348(1). A private action is available only after the Department has taken final action and may be brought only by a person upon whose property, pecuniary or personal rights the Department’s action has had a direct and prejudicial effect. *Storer v. Department of Env’tl. Protection*, 656 A.2d 1191, 1192 (Me. 1995); *Great Hill Fill & Gravel, Inc. v. Board of Env’tl. Protection*, 641 A.2d 184, 184 (Me. 1994). Even if there had been final agency action in this case, the complaint fails to allege any direct injury to the plaintiffs that would confer standing to pursue their claim.

The USPS is entitled to dismissal of Count V.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendants’ motions to substitute the United States for Joseph Leonti as a party defendant be **GRANTED** as to Counts I and II and otherwise **DENIED** and that the defendants’ motion to dismiss be **GRANTED**.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge’s report or*

*proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 29th day of March, 2000.*

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*David M. Cohen  
United States Magistrate Judge*