Exhibit D

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIMON V. KINSELLA, *Plaintiff-Appellant,* v. BUREAU OF OCEAN ENERGY MANAGEMENT, et al., *Defendants-Appellees*, and SOUTH FORK WIND, LLC, *Intervenor-Defendant-Appellee.*	Case No. 22-5316

INTERVENOR-DEFENDANT-APPELLEE SOUTH FORK WIND, LLC's RESPONSE IN OPPOSITION TO PLAINTIFF-APPELLANT'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Intervenor-Defendant-Appellee South Fork Wind, LLC ("South Fork Wind") is the developer of the South Fork Wind Farm and South Fork Export Cable (together, the "Project"), a renewable offshore wind project to provide clean energy in New York State. Plaintiff-Appellant ("Plaintiff") lives in the Town of East Hampton, New York ("Town") and challenged the Project's federal approvals in the District of Columbia District Court after as-yet unsuccessfully seeking to halt the Project in state court. Plaintiff has now—over a year after the Project was approved and more than six weeks after his notice of appeal—filed an "Emergency Motion for a Temporary Restraining Order and Preliminary Injunction" ("Motion"), in yet another attempt to halt ongoing Project construction.

Plaintiff's Motion should be denied for three independent reasons. *First*, this Court lacks jurisdiction over Plaintiff's appeal, as explained in South Fork Wind's fully-briefed Motion to Dismiss and in Federal Defendants' Motion to Dismiss. *Second*, Plaintiff's Motion violated this Court's rules in multiple respects. *Third*, Plaintiff has not met the high bar for the extraordinary relief requested: he has shown no irreparable harm; Plaintiff is not likely to succeed on the merits; and the balance of the equities and public interest strongly favor denial of his Motion.

Nothing in Plaintiff's delayed Motion justifies granting the "emergency" relief he seeks to stop ongoing Project construction. For these and other reasons detailed below, the Court should deny Plaintiff's Motion.

BACKGROUND

South Fork Wind will construct, operate and maintain the South Fork Wind Farm ("Wind Farm"), located 35 miles east of Montauk Point, Long Island (in federal waters) and the South Fork Export Cable ("Export Cable") to deliver power from the Wind Farm to Long Island, New York. *See* Mem. Op., *Kinsella v. Bureau of Ocean Energy Mgmt.* ("*Kinsella*"), Dkt. 48, Case No. 1:22-cv-02147-JMC (D.D.C. Nov. 10, 2022) ("Mem. Op.") (Ex. A) at 2. The Project is a key component of federal, state, and local plans to fight climate change. *See* Decl. of Melanie Gearon, *Kinsella*, Dkt. 40-3 (D.D.C. Nov. 5, 2022) ("Gearon Decl. I") ¶¶ 2, 6, Ex. A to Second Decl. of Melanie Gearon in Support of South Fork Wind's Response to Plaintiff-Appellant's Emergency Mot. for Temporary Restraining Order and Preliminary Injunction ("Gearon Decl. II"). To date, South Fork has invested over $1 billion in planning and constructing the Project, which is well underway. *Id.* ¶ 40.

The New York State Public Service Commission ("State Commission") exercises regulatory jurisdiction over the 7.6-mile segment of the Export Cable that runs from the seaward limit of State territorial waters to a substation located in the

Town, known as the Export Cable-New York. *Id.* ¶ 19. The federal Bureau of Ocean Energy Management ("Bureau") has jurisdiction over the portion of the Export Cable on the Outer Continental Shelf beyond state waters, *see* 43 U.S.C. §§ 1301(a), 1331(a), and over the Wind Farm itself.

The Project has undergone a robust multi-year, multi-agency environmental review process before both federal and state agencies. Under Bureau regulations, in June 2018 South Fork Wind submitted to the Bureau a detailed Construction and Operations Plan to develop its Outer Continental Shelf lease offshore, kicking off a three-and-a-half-year environmental review in cooperation with federal, state, and local agencies, including three virtual public meetings and multiple opportunities for written public comment. Gearon Decl. I ¶¶ 15, 16; Mem. Op. at 2. The Bureau published a Final Environmental Impact Statement under the National Environmental Policy Act in August 2021, issued its Record of Decision for the Project in November 2021, and approved the Construction and Operations Plan in January 2022. Gearon Decl. I ¶¶ 16, 18. The Project started construction in February 2022. *Id.* ¶ 24.

The State Commission also conducted a multi-year proceeding (with Plaintiff's participation) and environmental review of the installation of concrete duct banks and vaults in the Town and other work in New York state waters under state law before unanimously approving the Export Cable-New York in March 2021.

Id. ¶¶ 19-20. The State Commission's process led to a Joint Proposal containing 195 conditions that, among other things, avoid and minimize, to the extent practicable, any significant adverse environmental impacts associated with the Export Cable-New York. *Id*. ¶ 21. Plaintiff unsuccessfully petitioned for a rehearing and stay of the State Commission's order adopting the Joint Proposal. *Id*. In January 2022, the State Commission issued a Notice to Proceed with Construction. *Id*. ¶ 24.

Plaintiff and others have filed multiple challenges seeking to halt the Project. In state court lawsuits, Plaintiff sued the State Commission over its environmental review and the Long Island Power Authority ("Power Authority") for selecting the Project in a request for proposals, in each case raising contentions like those asserted in his Motion. *Id*. ¶¶ 21-22. Plaintiff never filed a state court motion for a preliminary injunction. A small group of Town residents also sued in state court (and unsuccessfully sought preliminary injunctive relief). *See* Mem. Op. at 2-3. These residents then filed a case in the Eastern District of New York, asserting substantially similar allegations as Plaintiff relating to construction in Town roads; the Eastern District of New York denied plaintiffs' requests for two temporary restraining orders and a preliminary injunction. *See* Order, *Mahoney v. U.S. Dep't of the Interior* ("*Mahoney*"), Dkt. 17 (E.D.N.Y. Mar. 14, 2022); Electronic Order, *Mahoney*, (E.D.N.Y. Mar. 17, 2022); *Mahoney v. U.S. Dep't of the Interior*, No. 22-cv-01305-FB-ST, 2022 WL 1093199 (E.D.N.Y. Apr. 12, 2022).

Plaintiff then filed this case in the District of Columbia District Court on July 20, 2022. *See Kinsella* Docket (Ex. B) (complaint amended Nov. 2, 2022). Plaintiff's operative First Amended Complaint asserts claims under the Administrative Procedure Act, National Environmental Policy Act, Coastal Zone Management Act, Outer Continental Shelf Lands Act, and Freedom of Information Act. *See* First Am. Compl., *Kinsella*, Dkt. 34-2 ¶¶ 441-603.

On September 8, 2022, Federal Defendants moved to transfer Plaintiff's case to the District Court for the Eastern District of New York, as Plaintiff's complaint primarily alleged harm on and offshore Long Island, New York—and Plaintiff himself lives on Long Island—and given the ongoing *Mahoney* litigation in that court. Plaintiff opposed transfer.

On November 2, 2022 (after the transfer motion was fully briefed), Plaintiff filed in the District Court a temporary restraining order and preliminary injunction motion seeking to stop ongoing Project construction. The District Court denied Plaintiff's motion for a temporary restraining order, and left the preliminary injunction motion pending. Nov. 10, 2022 Minute Order (Ex. B); Nov. 9, 2022 Hearing Tr. (Ex. C) at 23:24-25. The District Court considered Plaintiff's arguments regarding drinking water contamination, impacts to cod spawning habitat, and other purported economic harms, and determined that Plaintiff's claims did not constitute irreparable harm. Nov. 9, 2022 Hearing Tr. at 19:19, 20:6-22, 21:19-25, 23:5-8. The

District Court found that Plaintiff provided no evidence regarding groundwater contamination "other than conclusory statements," after repeatedly giving Plaintiff an opportunity to present evidence on the subject. *See id.* at 11:16-20, 17:20-24, 18:6-15, 21:5-9, 23:12-21.

On November 10, 2022, the District Court granted Federal Defendants' motion to transfer this case to the Eastern District of New York, finding that the public interest weighed heavily in favor of transfer because any Project impacts would directly affect the residents of the transferee district and, through the *Mahoney* litigation, the transferee court has significant familiarity with this controversy. Mem. Op. at 5-6.

On November 29, 2022, Plaintiff filed the instant appeal. *See* Notice of Expedited Appeal, No. 22-5316, Doc. 1975591. On December 20, 2022, South Fork Wind moved to dismiss Plaintiff's appeal for lack of jurisdiction. South Fork Wind Mot. to Dismiss, Doc. 1978478. That motion is now fully briefed and pending before this Court. On January 10, 2023, Federal Defendants filed a motion to dismiss Plaintiff's appeal for the same reasons. Doc. 1980934. On January 13, 2023, Plaintiff filed the instant Motion seeking a "temporary restraining order and preliminary injunction" to enjoin "*all* onshore and offshore construction and construction-related activity pending this Court's ruling on a motion for partial

summary judgment to be filed within the next fourteen days." Mot. at 14 (emphasis in original).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S MOTION

The Motion should be denied because this Court lacks jurisdiction over Plaintiff's appeal, as described in South Fork Wind's Motion to Dismiss and in Federal Defendants' motion. The District Court's order (i) denying Plaintiff's motion for a temporary restraining order and (ii) striking as premature Plaintiff's motion for partial summary judgment, without prejudice, is not appealable because it is not a final judgment or among the limited exceptions to the final judgment rule. *See* South Fork Wind Mot. to Dismiss at 5-10.

II. PLAINTIFF FAILED TO COMPLY WITH COURT RULES

Plaintiff's Motion should be denied because he has not followed this Court's requirements for seeking injunctive relief.

First, Plaintiff failed to meet the requirements of Federal Rule of Appellate Procedure 8(a) to move first for stay or injunctive relief pending appeal in the district court (and provide information on the district court's denial of this relief). Nor has Plaintiff provided any showing that doing so would be impracticable. Plaintiff's original temporary restraining order motion in the District Court does not satisfy this requirement because it is not a request for an injunction "pending appeal" and the

instant Motion raises new arguments not previously presented to the District Court and purports to rely on new "evidence" filed with this Court in the first instance. Therefore, Plaintiff's Motion must be denied. *See, e.g.*, *Teva v. Pharm. USA, Inc. v. Food & Drug Admin.*, No. 05–5401, 2005 WL 6749423, at *1 (D.C. Cir. Nov. 16, 2005) (motion for stay pending appeal denied on those grounds).

Second, Plaintiff's Motion is late-filed and should be denied. A motion for an injunction pending appeal is a procedural motion, *see* D.C. CIRCUIT HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES (2021) at 32, which was required to be filed by December 30, 2022, Scheduling Order (Doc. 1975602).

Third, Plaintiff filed this Motion for an improper purpose, admitting he seeks injunctive relief as a stalling tactic to allow him time to file a "motion for partial summary judgment" with this Court. *See* Mot. at 14, 33. Plaintiff also lacks a basis to file a "motion for partial summary judgment" under this Court's rules, and the District Court informed him he is free to refile that *in the district court* "at the appropriate time." *See* Nov. 10, 2022 Minute Order; Nov. 9, 2022 Hearing Tr. at 3:6-25. Plaintiff's clear abuse of the appellate process provides an additional ground to deny the Motion and undercuts his arguments for irreparable harm. *See infra* Section III.A.

Finally, Plaintiff's Motion, which contains 6,431 words,[1] exceeds the 5,200 word limit under Federal Rule of Appellate Procedure 27(d)(2) without permission to do so.

III. PLAINTIFF IS NOT ENTITLED TO THE EXTRAORDINARY RELIEF REQUESTED

Plaintiff has not met the high burden to show he is entitled to the extraordinary relief requested. To obtain a temporary restraining order or other preliminary injunctive relief, Plaintiff must "establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); *see also* Circuit Rule 8(a)(1).

A. Plaintiff Has Not Proven Irreparable Harm

Plaintiff has not proven "irreparable harm" absent temporary relief that is "both certain and great" and "actual and not theoretical." *See Wis. Gas Co. v. Fed. Energy Regul. Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985). A "possibility" of irreparable harm is insufficient; irreparable harm must be "*likely*" in the absence of the injunction. *Winter*, 555 U.S. at 22 (emphasis in original). Further, a "procedural

[1] Plaintiff also filed three affidavits and a Statement of Issues, among other things, containing extensive legal argument.

harm" under the National Environmental Policy Act in the absence of a concrete harm, "is insufficient . . . to constitute irreparable harm" to justify granting preliminary injunctive relief. *Nat'l Parks Conservation Ass'n v. U.S. Forest Serv.*, No. 15-cv-01582, 2016 WL 420470, at *11 (D.D.C. Jan. 22, 2016).

Plaintiff's only purported "evidence" of irreparable harm comes from his new affidavits[2] and attachments, material that is outside the record on appeal under Federal Rule of Appellate Procedure 10(a), and that he improperly filed with his Statement of Issues. *See*, *e.g.*, Mot. at 17-18, 21, 28-29. But this improper material fails to show an actual likelihood of irreparable harm. The District Court gave Plaintiff multiple opportunities to introduce evidence—"anything other than conclusory statements"—supporting his claims of irreparable harm, and he failed to do so. The District Court properly concluded that Plaintiff had not demonstrated irreparable harm. *See* Nov. 9, 2022 Hearing Tr. at 11:16-20, 17:20-24, 18:6-15, 21:5-9, 23:12-21. Plaintiff's new affidavits do nothing to change that conclusion.

1. Alleged Harms From Pre-Existing Contamination

The majority of Plaintiff's allegations of irreparable harm center on the Project's alleged exacerbation of pre-existing PFAS[3] groundwater contamination

[2] Plaintiff's affidavits were filed in the first instance in this Court, and include points not raised in the District Court.

[3] Plaintiff's contamination allegations relate to per- and poly-fluoroalkyl substances, often referred to collectively as "PFAS".

through installation of concrete duct banks and vaults underground Town roads for the Export Cable-New York onshore. *See* Mot. at 17-26. Plaintiff, who is not a technical expert, provides nothing to support his claims other than conclusory statements, as the District Court found. *See* Nov. 9, 2022 Hearing Tr. at 21:5-9.

Moreover the harm Plaintiff alleges (without support) would not be irreparable in any event. The Eastern District of New York, considering substantially similar allegations regarding the Project, found no showing of irreparable harm because "it is possible to remediate PFAS contamination[,]" and "the New York State Department of Environmental Conservation is undertaking remedial measures in East Hampton to address PFAS contamination in the area." *Mahoney*, 2022 WL 1093199, at *2.

Furthermore, in its approval, the State Commission imposed a series of conditions on construction of the Export Cable-New York that require identification, handling, and disposal of any PFAS-contaminated soil or groundwater encountered during construction. *See* Decl. of Jeffrey Holden in Support of South Fork Wind's Response to Plaintiff-Appellant's Emergency Mot. for Temporary Restraining Order and Preliminary Injunction ("Holden Decl."), ¶¶ 8.e, 8.f (conditions result in net environmental benefit). Trenching and construction of the concrete duct banks and vaults in Town roads is now complete, and has only encountered groundwater at the Transition Joint Bay, located approximately 600 feet from the Atlantic Ocean. *Id.* ¶

13.a. South Fork Wind tested this groundwater, and no PFAS were detected above New York State Department of Environmental Conservation regulatory requirements. *Id.*

Plaintiff fails to provide *any* technical evidence to support his assertion (at 21-23) that pre-existing PFAS contamination will diffuse into the Project's concrete duct banks and vaults, and would then "back-diffuse" into the groundwater to become a secondary source of contamination even after groundwater contamination has been remediated. Nor could he. Diffusion has no effect on the amount or concentration of PFAS in the groundwater and therefore cannot exacerbate any pre-existing contamination. Holden Decl. ¶ 13.c.[4] Plaintiff's sole support for his theory is an example of diffusion referenced in an Interstate Technology and Regulatory Council[5] document involving a high volume of concentrated PFAS firefighting foam being repeatedly sprayed directly onto a concrete pad for over three decades. *See* Mot. at 21-22; Holden Decl. ¶ 13. That lone example of diffusion is irrelevant here, where those conditions are not present—particularly because Project construction

[4] That conclusion is also not affected by the "air-water interface" referenced by Plaintiff, *see* Mot. at 23-24, which simply refers to the surface of the groundwater table, Holden Decl. ¶¶ 15-20.

[5] Although the Project introduced the document before the State Commission for a point unrelated to Plaintiff's argument, the document acknowledges—in phrases that Plaintiff elides—that diffusion is relatively insignificant. Holden Decl. ¶¶ 13.b n.5, 21, 22. And the document's evaluation (on which Plaintiff relies) of direct and routine spraying of PFAS foam is entirely distinguishable. *Id.* ¶ 13.b.

has not even detected groundwater containing PFAS exceeding applicable regulatory requirements. Holden Decl. ¶¶ 8.b, 13.a, 13.c, 19, 24.b.

Finally, the primary case Plaintiff cites (at 16-17, 24-26), *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 149, 151 (D.D.C. 1993), is distinguishable as those claims presented certain harm by a federal program relating to the capture and eventual slaughter of bison. In contrast, Plaintiff's "unsubstantiated and speculative" allegations of contamination-related harm do not suffice to demonstrate irreparable harm. *See Wis. Gas Co.*, 758 F.2d at 674.

2. Other Alleged Harms

First, Plaintiff also alleges that "mass fraud" constitutes irreparable harm, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) and *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944). Mot. at 20-21. But neither case addresses the injunctive relief that Plaintiff requests. *See Lujan*, 504 U.S. at 573 (addressing Article III standing); *Hazel-Atlas*, 322 U.S. at 245 (concerning court's ability to set aside judgments obtained through fraud). Plaintiff's baseless arguments fail to show how the purported procedural flaws in the administrative process he alleges could constitute irreparable harm from "fraud."

Second, Plaintiff's claims (at 27-28) that the Project will increase greenhouse gas emissions—because it allegedly has a higher cost than other offshore wind projects—is illogical, false, and highly speculative. The State Commission

concluded the Project would *reduce* emissions. Gearon Decl. I ¶ 50. Plaintiff relies (at 27) on his own cost comparisons (which South Fork Wind does not concede), and fails entirely to show the Project will increase greenhouse gas emissions (it will not) or any irreparable harm. Plaintiff's citation (at 27) to yet another case that has absolutely nothing to do with injunctive relief or irreparable harm—*Michigan v. U.S. Environmental Protection Agency*, 576 U.S. 743 (2015)—is inapposite and similarly fails to demonstrate the required showing.

Third, although Plaintiff claims (at 28-29) he suffered "personal direct injury", including because he spent an "immense amount of time" challenging the Project, this alleged "harm" is solely the result of Plaintiff's choice to challenge the Project in multiple fora, not the result of an action by Federal Defendants (or South Fork Wind). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Wis. Gas Co.*, 758 F.2d at 674. "[T]he expense and disruption of defending [oneself] in protracted adjudicatory proceedings" is not an irreparable harm. *John Doe*, 849 F.3d at 1135 (internal citations omitted).

Finally, all of Plaintiff's alleged "irreparable harms" are undercut by Plaintiff's delay in seeking what he now claims as "emergency relief." Plaintiff never sought preliminary injunctive relief in his 2021 state court cases, and filed a temporary restraining order motion in the District Court almost a year after the

Bureau issued its Record of Decision, nearly 10 months after the Bureau approved the Project's Construction and Operations Plan, and nine months after construction began. *See* Gearon Decl. I ¶ 18. Despite appealing to this Court on November 29, 2022, Plaintiff waited over six weeks to file the instant "emergency" Motion. Plaintiff's improper appeal has only further delayed his pending preliminary injunction motion from being heard by a district court, and cannot now manufacture urgent "harms" in an effort to halt the Project.

B. Plaintiff Is Not Likely To Succeed on the Merits

Plaintiff is not likely to succeed on the merits of any of his claims. To satisfy this factor, the movant must demonstrate "a substantial indication of probable success." *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). Theories based on "pure hypothesis" will not suffice. *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 877 F.3d 1066, 1067 (D.C. Cir. 2017).[6]

1. Plaintiff's National Environmental Policy Act and Outer Continental Shelf Lands Act Claims Are Not Likely to Succeed

Plaintiff is not likely to succeed on the merits of his claims under the National Environmental Policy Act or Outer Continental Shelf Lands Act. Notably, Plaintiff makes no effort to argue the merits, relying on conclusory allegations that Federal

[6] South Fork Wind preserves all jurisdictional arguments, including that Plaintiff lacks standing. *See* South Fork Wind's Opposition to Plaintiff's Motion for Temporary Restraining Order, *Kinsella*, Dkt. 40-1 (Nov. 5, 2022) at 20-27.

Defendants violated both statutes in approving the Project and cross-referencing his First Amended Complaint, his own affidavits, and his Statement of Issues. *See* Mot. at 15-16. This Court's rules do not allow legal arguments in these documents to be incorporated by reference in Plaintiff's Motion. *See* Fed. R. App. P. 27(a)(1)(C)(i).[7] Notwithstanding these procedural errors, Plaintiff's claims are unlikely to succeed on the merits.

The Administrative Procedure Act's deferential arbitrary and capricious standard of review applies to the Bureau's compliance with the National Environmental Policy Act. *See Nevada v. U.S. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). A court's role is "not to flyspeck an agency's environmental analysis" but rather is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Birckhead v. Fed. Energy Regul. Comm'n*, 925 F.3d 510, 515 (D.C. Cir. 2019) (internal citations and quotations omitted). Similarly, the Outer Continental Shelf Lands Act, 43 U.S.C. § 1337(p)(4), requires only that the Bureau "strike a rational balance" between the statute's enumerated goals, reserving in the

[7] Pursuant to this rule, "[a]ll legal arguments must be presented in the body" of the filing; multiple separate briefs or memoranda supporting a motion "may not be filed." D.C. CIRCUIT HANDBOOK at 29.

Secretary "wide discretion to weigh those goals as an application of her technical expertise and policy."[8]

PFAS Contamination. Plaintiff is wrong to suggest Federal Defendants did not conduct an adequate review of PFAS-related impacts under the National Environmental Policy Act and Outer Continental Shelf Lands Act. *See, e.g.,* Mot. at 17. The Final Environmental Impact Statement analyzed potential PFAS-related impacts to groundwater onshore and incorporated the testing, handling, and treatment requirements imposed by the State. Decl. of Janice Schneider, *Kinsella*, Dkt. 40-2 (D.D.C. Nov. 5, 2022) ("Schneider Decl.") Ex. 8 (Final Environmental Impact Statement excerpts) (Ex. D) at H-22, 23 (describing groundwater and uses); *id.* at H-23 (recognizing PFAS in soil and groundwater); *id.* at H-27 (acknowledging disturbance of soils near existing remediation sites); *id.* at A-3 (incorporated State testing, handling, and treatment requirements); *id.* at G-5 (again referencing State control measures). Based on all of these analyses and State requirements, the Bureau concluded that "all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources." *Id.* at H-28. Nothing more is required under either the National Environmental Policy Act or Outer Continental Shelf Lands Act.

[8] M-Opinion 37067, U.S. Dep't of the Interior Office of the Solicitor at 1-2 (Apr. 9, 2021), https://www.doi.gov/sites/doi.gov/files/m-37067.pdf.

Moreover, Plaintiff did not raise his new "diffusion" arguments in his comments on Federal Defendants' environmental analyses, *see* Plaintiff's 2018 Comments, *Kinsella*, Dkt. 3-1, such that Plaintiff is precluded from raising these issues now, *see U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764-65 (2004).

Economic Analysis. Plaintiff's arguments (at 9-10) regarding the Bureau's alleged failure to adequately assess, under National Environmental Policy Act, the price of power and the Project's purported impact on ratepayers are similarly without merit. First, the State Commission—not Federal Defendants—has jurisdiction over whether there is a need for the Project's power generation, and the Power Authority has jurisdiction to enter into agreements to purchase power from any private entity at a negotiated price. N.Y. Public Authorities Law § 1020-f(r). The Power Authority's decision to enter into a power purchase agreement with South Fork Wind resulted from a competitive process and was approved by the New York Attorney General and Office of State Comptroller. Gearon Decl. I ¶ 50. Recognizing this issue is a matter of state law, Plaintiff has challenged—thus far unsuccessfully—the Power Authority over that decision in state court. *Id*. ¶ 22.

Moreover, the Bureau considered and responded to Plaintiff's ratepayer cost allegations in the Final Environmental Impact Statement and response to comments. Final Environmental Impact Statement at I-343, I-345 (Ex. D). The Bureau considered socioeconomic impacts of the Project, *see id.* at 3-153–3-168, and

appropriately based its final decision on the relevant considerations under the Outer Continental Shelf Lands Act, *see* Schneider Decl., Ex. 9 (Record of Decision excerpts) at 17; *id*. at Appx. D, D-11 to D-14 (Ex. E). Nothing more was required.

2. Plaintiff's Fraud Claims Are Not Likely to Succeed

Plaintiff's unsubstantiated fraud claims are also unlikely to succeed. Plaintiff's claims of "fraud" in the Motion generally allege, without evidence, that Federal Defendants and South Fork Wind ignored pre-existing PFAS contamination in the Town and did not consider socioeconomic impacts during the Project approval process. *See, e.g.*, Mot. at 11. Plaintiff is simply wrong on both counts. *See supra* Section III.B.1. The "fraud" Plaintiff attempts to assert is merely Plaintiff's disagreement with Federal Defendants' conclusions regarding the Project. This disagreement does not constitute "fraud," nor could such claims ever justify the emergency injunctive relief Plaintiff seeks. *See supra* Section III.A. Federal Defendants' approvals for the Project "are entitled to a presumption of administrative regularity and good faith." *See, e.g., Fed. Trade Comm'n v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975 (D.C. Cir. 1980).

Further, while this Motion alleges "fraud" claims against South Fork Wind, Plaintiff's operative First Amended Complaint only seeks relief for purported "fraud" from Federal Defendants. *See* First Am. Compl., *Kinsella*, Dkt. 34-2 ¶¶ 604-706. Plaintiff has no right of action against South Fork Wind—which is not a federal

agency—under the Administrative Procedure Act, National Environmental Policy Act, or Outer Continental Shelf Lands Act.

Plaintiff's fraud claims against Federal Defendants must fail because the United States has not waived its sovereign immunity from such claims of "fraud." While the Federal Tort Claims Act waives the United States' sovereign immunity from tort claims generally, *see* 28 U.S.C. § 2674, that waiver does *not* apply to any claims arising out of "misrepresentation" or "deceit," *id.* § 2680(h). Thus, Plaintiff's "fraud" claims, which he explicitly ties to alleged "misrepresentation" and "deceit" by Federal Defendants, *see* Mot. at 32-33, cannot succeed.

Plaintiff's argument (at 12-13) that the District Court failed to consider his "fraud" allegations is incorrect. Plaintiff raised fraud arguments in his District Court motion and during the hearing, and the District Court did not find those arguments sufficient to overcome the lack of irreparable harm. *See* Nov. 9, 2022 Hearing Tr. at 22:9–23:25.

Finally, contrary to Plaintiff's allegation (at 11-12) that the District Court failed to "state [its] finding and conclusions that support its action," quoting Federal Rule of Civil Procedure 52(a), the District Court fully explained its rationale for denying Plaintiff's temporary restraining order request. *See* Nov. 9, 2022 Hearing Tr. at 16:12-23, 18:6-18, 20:2-21:25, 22:24-23:25.

C. The Balance of the Equities and the Public Interest Strongly Favor Denial of the Motion

When "the competing claims of injury" and "effect[s] on each party of the granting or withholding of the requested relief" are analyzed, including economic harm, the balance of equities strongly weighs in favor of denying Plaintiff's Motion. *See Winter*, 555 U.S. at 24; *see also Sherley v. Sebelius*, 644 F.3d 388, 398-99 (D.C. Cir. 2011). While Plaintiff will not suffer any irreparable harm if his Motion is denied, *see supra* Section III.A, South Fork Wind will face certain and substantial harm if the relief is granted.

South Fork Wind has entered into contracts for the manufacture, transport, and installation of Project components in order to complete construction this year, expending over $1 billion to date. Gearon Decl. I ¶¶ 40-41. The Project is subject to numerous timing restrictions on construction during the tourist season and to protect wildlife, so any delays in construction would have cascading effects, causing South Fork Wind to incur significant additional expenses. Schneider Decl., Ex. 4 (Decl. of Kenneth Bowes excerpts) ("Bowes Decl.") (Ex. F), ¶¶ 37-38; *id.* at Ex. A, Attachment A, Appendix D at Certificate Conditions 72[b], 69, 71, and 72[a]; Gearon Decl. II ¶ 9.

There are seven separate vessels associated with Export Cable installation in both state waters and on the Outer Continental Shelf. Gearon Decl. II ¶ 6. South Fork Wind would be required to pay significant day rates, totaling approximately

$377,000 per day, for each day the vessels are placed on standby and would not be able to retain these vessels through lengthy delay. *Id.* ¶¶ 6, 7. If Export Cable installation were halted, technical steps required to safely halt and resume Export Cable installation would require an estimated additional $15 million. *Id.* ¶ 7. A stop to the Project's onshore substation construction would cost South Fork Wind approximately $80,000-$90,000 per day. *Id.* ¶ 8.

Separately, the Project must pay $26,400 per day for each day of delayed commercial operation, and the Power Authority reserves the right to terminate the power purchase agreement if commercial operation is not achieved within 365 days after the target date. Gearon Decl. I ¶¶ 42, 46. If the agreement were terminated, South Fork Wind could lose all of its over $1 billion investment in the Project. *Id.* ¶¶ 40, 46. Against this backdrop and Plaintiff's wholly speculative injuries, the balance of the equities strongly favors denying Plaintiff's Motion.

The public's interest in the local economy, job security, securing reliable energy, achieving clean energy goals, and reducing greenhouse gas emissions also strongly favors denying Plaintiff's motion. *See, e.g., Western Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) (upholding denial of preliminary injunction based on public interest in growth in renewable power supply and meeting federal and state clean energy goals). The State Commission found the Project will advance State renewable energy policy and greenhouse gas emission goals, Bowes

Decl. Ex. A at 79, and it will assist the Power Authority in meeting renewable energy goals and addressing the reliability needs, Gearon Decl. I ¶ 50; Bowes Decl. ¶ 41. The Project is anticipated to create up to 1,611 full-time equivalent jobs during Project construction and up to 96 full-time equivalent jobs annually for the Project's operations and maintenance work, many of which will be union jobs. Gearon Decl. I ¶ 51.

Plaintiff fails to demonstrate that his requested injunctive relief is in the public interest; indeed, he ignores the harm to the public interest from Project delays. *See* Mot. at 30-32. Plaintiff relies on *League of Women Voters of U.S. v. Newby*, but this case is distinguishable because the plaintiffs there showed "a substantial risk" of citizen disenfranchisement in federal elections. *See* 838 F.3d 1, 12 (D.C. Cir. 2016). Plaintiff offers no analogous and similarly imminent public interest in halting this critical renewable energy project.

CONCLUSION

For these reasons, the Court should deny Plaintiff's Motion.

Dated: January 20, 2023

Respectfully submitted,

By /s/ Janice M. Schneider
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Counsel for Intervenor-Defendant-Appellee South Fork Wind, LLC

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32, this document contains 5,193 words, as determined by the word-count function of Microsoft Word.

This document complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: January 20, 2023

Respectfully submitted,

By */s/* Janice M. Schneider
Counsel for Intervenor-Defendant-Appellee
South Fork Wind, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2023, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system on participants in the case who are registered CM/ECF users. I further certify that I caused four copies of the foregoing to be sent via First-Class Mail to the Clerk of the Court.

Dated: January 20, 2023

Respectfully submitted,

By */s/* Janice M. Schneider
Counsel for Intervenor-Defendant-Appellee
South Fork Wind, LLC

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIMON V. KINSELLA, *Plaintiff-Appellant,* v. BUREAU OF OCEAN ENERGY MANAGEMENT, et al., *Defendants-Appellees*, and SOUTH FORK WIND, LLC, *Intervenor-Defendant-Appellee.*	Case No. 22-5316

INTERVENOR-DEFENDANT-APPELLEE SOUTH FORK WIND, LLC's CIRCUIT RULE 32.1 ADDENDUM OF UNPUBLISHED DECISIONS

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January 20, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PAMELA MAHONEY; MICHAEL MAHONEY; LISA SOLOMON; and MITCH SOLOMON, Plaintiffs, -vs- U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF OCEAN ENERGY MANAGEMENT; U.S. DEPARTMENT OF THE ARMY; and U.S. ARMY CORPS OF ENGINEERS, Defendants.	Case No. 2:22-cv-01305

Upon the Complaint filed March 9, 2022, the Memorandum of Law in Support of a Motion for a Temporary Restraining Order and Preliminary Injunction, the Declaration of Crystal V. Venning and attached exhibits, the Declaration of John A. Conrad and the attached exhibits, the Declaration of Mitch Solomon and the attached exhibits, the Declaration of Michael Mahoney and the attached exhibits, and the Declaration of Pamela Mahoney; ~~and Plaintiffs having demonstrated sufficient need for temporary and preliminary relief;~~ it is hereby

ORDERED, that the above-named Defendants show cause before a motion term of this Court before the Hon. Frederic Block, United States District Judge, at Room 10C, United States Court House, Cadman Plaza East, Brooklyn, New York, on the 6 Day of April 2022, ~~2022~~, at 4:00 PM o'clock, or as soon thereafter as counsel may be heard, why an order should not be issued pursuant to Federal Rule of Civil Procedure 65 enjoining Defendants during the pendency of this action

from continuing to undertake, either directly or indirectly, or causing or allowing contractors of Defendants to continue to undertake, further trenching related to the installation of the South Fork Export Cable in Wainscott; and it is further

ORDERED, that Plaintiff, having demonstrated that Defendants' imminent trenching related to the installation of the South Fork Export Cable in Wainscott will cause PFAS contamination of groundwater and consequently irreparably harm the interests of Plaintiffs, that Plaintiffs are likely to succeed on the merits of their National Environmental Policy Act claims, 42 U.S.C. §§ 4321-4375, Clean Water Act claims, 33 U.S.C. § 1311 et seq, and Outer Continental Shelf Lands Act claims, 43 U.S.C. §§ 1331 et seq; and that the balance of hardships and public interest weigh in Plaintiffs' favor, effective immediately Defendants are temporarily restrained and enjoined from continuing to undertake, either directly or indirectly, or causing or allowing contractors of Defendants to continue to undertake, further trenching related to the installation of the South Fork Export Cable in Wainscott, pending a ruling on plaintiff's motion for a preliminary injunction; and it is further

ORDERED, that personal service of a copy of this order and annexed Declarations, Complaint, and Memorandum of Law upon Defendants' counsel on or before 5:00 PM o'clock on the 11 Day of March, 2022, shall be deemed good and sufficient service thereof; and it is further

ORDERED, that Defendants shall serve their papers in opposition to Plaintiffs' motion for a Temporary Restraining Order and Preliminary Injunction on Plaintiffs' counsel on or before 5:00PM o'clock on the 25 Day of March, 2022; and it is further

ORDERED, that any reply papers shall be served on Defendants' counsel on or before 5:00 PM o'clock on the 1 Day of April, 2022

DATED: March 14, 2022

/S/ Frederic Block
United States District Judge

U.S. District Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was entered on 3/17/2022 at 11:58 AM EDT and filed on 3/17/2022

Case Name: Mahoney et al v. U.S. Department of the Interior et al
Case Number: 2:22-cv-01305-FB-ST
Filer:
Document Number: No document attached

Docket Text:
ELECTRONIC ORDER: The Court has carefully considered the plaintiffs Second Motion for Order to Show Cause for Temporary Restraining Order and all the parties related submissions. The plaintiffs [25] motion is denied. Oral argument is scheduled for April 6, 2022 at 4:00 p.m. on the plaintiffs pending motion for a preliminary injunction. Details are contained in the Courts previous scheduling order, which remains unchanged. Ordered by Judge Frederic Block on 3/17/2022. (Innelli, Michael)

2:22-cv-01305-FB-ST Notice has been electronically mailed to:

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2:22-cv-01305-FB-ST Notice will not be electronically mailed to:

2022 WL 1093199
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

Pamela MAHONEY, et al., Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants.

Case No. 22-cv-01305-FB-ST
|
Signed 04/12/2022

Attorneys and Law Firms

For the Plaintiffs: ERIC GRANT, Hicks Thomas LLP, 701 University Ave., Ste. 106, Sacramento, CA 95825, JOHN B. THOMAS, JUSTIN BRAGA, CRYSTAL VICTORIA VENNING, Hicks Thomas LLP, 700 Louisiana, Ste. 2300, Houston, TX 77002.

For Defendants: VINCENT LIPARI, United States Attorney's Office, Eastern District of New York, 610 Federal Plaza, 5th Floor, Central Islip, NY 11722.

For Intervenor Defendant: JANICE SCHNEIDER, STACEY VANBELLEGHAM, Lathan & Watkins LLP, 555 Eleventh St., N.W., Ste. 1000, Washington, D.C. 20004, KEGAN ANDREW BROWN, Lathan & Watkins LLP, 1271 Avenue of the Americas, New York, NY 10020.

MEMORANDUM AND ORDER

BLOCK, Senior District Judge:

***1** Plaintiffs Pamela Mahoney, Michael Mahoney, Lisa Solomon, and Mitch Solomon ("Plaintiffs") are two married couples with residences in the Wainscott hamlet of East Hampton, New York. They seek a preliminary injunction [1] to halt onshore trenching for the South Fork Wind Farm and South Fork Export Cable Project (the "project"). Plaintiffs claim that the onshore digging will disrupt perfluoroalkyl and polyfluoroalkyl substances ("PFAs") present in the groundwater, worsening the existing PFAS pollution in the wells on Plaintiffs' properties. Defendants U.S. Department of the Interior ("DOI"), Bureau of Ocean Energy Management ("BOEM"), U.S. Department of the Army ("Army"), and U.S. Army Corps of Engineers ("Army Corps") (together, "Defendants") are the federal government agencies that issued the permits for the offshore portion of the project and the final environmental impact statement ("FEIS") required by law to grant those permits. Defendant-Intervenor South Fork Wind, LLC ("SFW") is the developer of the project. For the following reasons, Plaintiff's motion is denied.

[1] The Court previously denied the Plaintiffs' First and Second Motions for Order to Show Cause insofar as they pertained to the temporary restraining order that plaintiffs sought. Therefore, the Court only addresses the preliminary injunction in this order.

I. FACTS

SFW is the developer of a commercial wind farm off the eastern shore of Long Island. The wind farm is located in federal waters 35 miles east of Montauk Point, Long Island. To export the energy from the windmills to an existing onshore electric grid in East Hampton, trenches will be excavated to store underground cables which will transfer the energy. The onshore route for the underground electric cables will pass by properties owned by the Plaintiffs in Wainscott. Plaintiffs, whose groundwater is presently contaminated by PFAS to the extent that they do not use their onsite water wells for drinking water, allege that trenching will exacerbate PFAS contamination of the water on their properties.

The permits to conduct the offshore portion of the project were issued by Defendants. For the onshore portion of the project, and specifically the trenching that Plaintiffs claim will lead to further contamination of their groundwater, the permits were issued by the New York Public Service Commission ("NYPSC"). After years of administrative proceedings, the NYPSC issued a Certificate of Environmental Compatibility and Public Need under Article VII of the Public Service Law allowing the project to move forward. These proceedings considered, among other things, the potential of the project to exacerbate PFAS contamination. The public was able to participate in the proceedings through hearings and the submission of testimony or comments. Plaintiffs participated in this process. The NYPSC found that the project would not exacerbate existing PFAS contamination, in part because as proposed, the project provided for preventative measures to ensure that groundwater flow was not materially altered. The NYPSC

later denied a rehearing of the issue, holding that petitioners had not submitted sufficient evidence to demonstrate that the project's provisions for dealing with PFAS were inadequate.

***2** Subsequently, a non-profit organization called Citizens for the Preservation of Wainscott, Inc. ("CPW") appealed NYPSC's decision to New York state court, asking the court to enjoin SFW from onshore trenching. The state court denied the appeal on January 26, 2022. Separately, CPW and the Plaintiffs in this action filed a petition in New York state court challenging the easement that the town of East Hampton had granted to SFW for the trenching in question. The state court denied that petition on February 17, 2022. It held that any potential migration of PFAS as a result of the project could not stem from the grant of the easement, but from the manner in which the trenching is conducted. The court also found that challenges to the manner of construction were properly considered by the NYPSC, and that any further challenges to this should have been brought in the NYPSC's proceedings, not before the state court.

On March 9, 2022, Plaintiffs brought the current action. They argue that Defendants did not conduct an adequate review of the project's effect on PFAS contamination in the FEIS, and therefore violated the National Environmental Policy Act ("NEPA"), the Clean Water Act ("CWA"), Outer Continental Shelf Lands Act ("OCSLA"), and Administrative Procedure Act ("APA"). Plaintiffs seek preliminary injunctive relief to halt construction of the onshore export cable.

II. PRELIMINARY INJUNCTION

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). If an injunction "disrupt[s] the status quo, a party seeking one must meet a heightened legal standard by showing 'a clear or substantial likelihood of success on the merits.' " *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (quoting *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2nd Cir. 2012)).

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." *Bell & Howell: Mamiya Co. v. Masel Supply Co. Corp.*, 719 F.2d 42, 45 (2d Cir. 1983). To establish irreparable harm, a movant "must demonstrate an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (internal quotation omitted).

III. ANALYSIS

Plaintiffs argue that without a preliminary injunction they will be irreparably harmed by the likely exacerbation of preexisting PFAs contamination of the groundwater on their properties. To succeed on this prong, Plaintiffs must demonstrate that irreparable harm is not just possible, but likely. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). Plaintiffs have failed to do so. They rely heavily on their expert John A. Conrad's ("Conrad") declaration which concludes that "it is likely that the trench will become a preferential pathway for PFAS movement, carrying PFAS contaminants to locations that would otherwise not be impacted [...] and, more likely than not, will contaminate or further impact the Mahoney's water supply well located on their property." Declaration of John A. Conrad at ¶ 16-17. However, Conrad's assertion is conclusory. He does not provide support as to why this result is "likely," nor does he address the effect of the mitigation measures provided for in SFW's plan, which was approved by the NYPSC.

At oral argument, Plaintiffs' counsel stated that "one problem with PFAS is that it's difficult to remediate." Tr. at 9.[2] However, it is possible to remediate PFAS contamination. *See* Declaration of Kenneth Bowes at ¶ 29. Currently, the New York State Department of Environmental Conservation is undertaking remedial measures in East Hampton to address PFAS contamination in the area. *See id.* This likewise undercuts the Plaintiffs' claims of irreparable harm. Also, assuming that the project risks spreading PFAS, counsel for the Defendants argues that "[t]here are measures in place" to ensure that this does not occur. Tr. at 12. These measures were conditions on the issuance of the project's permits by the NYPSC and were later incorporated by reference into the FEIS by the federal agencies. Tr. 12. In addition, PFAS already exists on Plaintiffs' properties. Finally, that Plaintiffs failed to seek injunctive relief in this court until months after the FEIS was issued and until after they received

unfavorable decisions in state court further "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Tough Traveler, Ltd. v. Outbound Prod.*, 60 F.3d 964, 968 (2d Cir. 1995) (quoting *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 277 (2nd Cir. 1985)).

2 The parties were heard at oral argument on April 6, 2022.

CONCLUSION

***3** The Court finds that Plaintiff failed to establish irreparable harm—"the single most important prerequisite for the issuance of a preliminary injunction," *Masel Supply Co. Corp.*, 719 F.2d at 45—and so denies Plaintiff's motion.

SO ORDERED.

All Citations

Slip Copy, 2022 WL 1093199

End of Document

2005 WL 6749423
Only the Westlaw citation is currently available.
United States Court of Appeals,
District of Columbia Circuit.

TEVA PHARMACEUTICALS USA, INC., Appellee
v.
FOOD & DRUG ADMINISTRATION, et al., Appellees
Apotex, Inc., Appellant.

No. 05–5401.
|
Nov. 16, 2005.

Attorneys and Law Firms

Jay P. Lefkowitz, Steven Andrew Engel, Michael David Shumsky, Kirkland & Ellis LLP, John Caviness O'Quinn, U.S. Department of Justice (DOJ) Office of The Attorney General, Washington, DC, for Appellee.

Andrew E. Clark, Attorney, U.S. Department of Justice (DOJ) Office of Consumer Litigation, Washington, DC, for Food & Drug Administration, et al., Appellees.

William Andrew Rakoczy, Lara Monroe-Sampson, Christine J. Siwik, Esq., Rakoczy Molino Mazzochi Siwik LLP, Chicago, IL, Arthur Ya-Shih Tsien, Olsson, Frank & Weeda, Washington, DC, for Appellant.

Before: ROGERS, TATEL, and GRIFFITH, Circuit Judges.

ORDER

PER CURIAM.

***1** Upon consideration of the emergency motion for a stay pending appeal and the emergency motion to expedite consideration of the appeal, it is

ORDERED that the motion for a stay pending appeal be denied. Appellant has not moved first in the district court for a stay of the judgment, nor has appellant shown that doing so would be impracticable. *See* Fed. R. of App. P. 8(a). It is

FURTHER ORDERED that appellee Teva Pharmaceuticals USA, Inc. file a response to the motion to expedite by 12:00 noon on Tuesday, November 22, 2005. Any response by the Food & Drug Administration is also due at that time.

All Citations

Not Reported in F.3d, 2005 WL 6749423

End of Document

2016 WL 420470
Only the Westlaw citation is currently available.
United States District Court, District of Columbia.

NATIONAL PARKS CONSERVATION ASSOCIATION, Plaintiff,

v.

UNITED STATES FOREST SERVICE, et al., Defendants,

and

Elkhorn Minerals LLC, Intervenor.

Civil No. 15-cv-01582 (APM)
|
Signed January 22, 2016

Attorneys and Law Firms

Jennifer Lynn Cassel, Jennifer Elyse Tarr, Howard A. Learner, Chicago, IL, for Plaintiff.

Tyler L. Burgess, Shawn Derek Shugert, U.S. Department of Justice, Washington, DC, for Defendants.

MEMORANDUM OPINION AND ORDER

Amit P. Mehta, United States District Judge

I. INTRODUCTION

***1** This case concerns gravel mining on 24.6 acres of land located in Billings County, North Dakota. On December 14, 2015, Intervenor Elkhorn Minerals LLC received final approval from Defendant United States Forest Service to begin mining operations on a five-acre parcel of that land. The approved operations started the very next day and are ongoing. Plaintiff National Parks Conservation Association has moved this court for a preliminary injunction that, if granted, would halt mining operations immediately.

The 24.6 acre tract has a storied history. It was once part of Theodore Roosevelt's expansive Elkhorn Ranch, which the former president purchased in 1884. Today, it is adjacent to the Elkhorn Ranch Unit of Theodore Roosevelt National Park, where President Roosevelt's ranch house once stood. Motivated by the area's historical significance, in 2007, the United States Forest Service, with the assistance of private funds, acquired the 24.6 acres as part of a 5,200 acre purchase of land surrounding the Elkhorn Ranch Unit. The Forest Service's purchase, however, was limited only to the land's surface rights. The land's sub-surface rights remained under the control of various private parties.

Elkhorn Minerals holds sub-surface rights in the 24.6 acre parcel. In 2010, its owners took initial steps to exercise those rights. That began a nearly six-year process–involving extensive negotiations with the Forest Service, the preparation of an Environmental Assessment pursuant to the National Environmental Policy Act, and the issuance of a Decision Notice and Finding of No Significant Impact–that culminated in the start of mining operations on December 15, 2015. Two days later, Plaintiff filed a Motion for Preliminary Injunction, alleging that the Forest Service's approval of mining operations violated the National Environmental Policy Act, the National Forest Management Act, and the Administrative Procedure Act.

Injunctive relief is an extraordinary remedy. To receive it, a moving party must show that, absent such relief, it will suffer irreparable harm. It also must show that the balance of equities and the public interest favor a preliminary injunction. Upon consideration of the parties' filings, the Administrative Record, and the parties' representations at oral argument, the court

finds that Plaintiff has failed to make those required showings. The court therefore denies Plaintiff's Motion for a Preliminary Injunction.

This Memorandum Opinion does not address Plaintiff's claims on the merits. The court, however, will address those arguments on an expedited basis. The Forest Service and Elkhorn Minerals have represented that mining operations on the first five-acre parcel are expected to continue through mid-March 2016. To enable the court to reach a final decision on the merits before then, the parties will be required to complete merits briefing on an expedited schedule. An Order setting forth a briefing schedule accompanies this Memorandum Opinion.

II. BACKGROUND

A. Factual Background

1. Purchase of the Elkhorn Ranchlands

***2** In 2007, Defendant United States Forest Service ("Forest Service") and "a group of more than 100 private individuals and organizations from around the United States" purchased the Elkhorn Ranchlands from a private landholder for 4.8 million dollars. Pl.'s Mem. in Supp. of Mot. for Prelim. Inj., ECF No. 31–1 [hereinafter Pl.'s Mot.], at 4; *see also* Defs.' Opp'n to Mot. for Prelim. Inj., ECF No. 35 [hereinafter Defs.' Opp'n], at 6. The approximately 5,200–acre parcel lies within an area called the Dakota Prairie Grasslands and is under the domain of the Forest Service's Medora District Ranger. *See* Defs.' Opp'n at 6. The parcel "surround[s] the Elkhorn Ranch Unit of the [Theodore Roosevelt] National Park," Pl.'s Mot. at 4, which is one of three "main units of the Park," Intervenor's Mem. in Opp'n to Mot. for Prelim. Inj., ECF No. 36 [hereinafter Int.'s Opp'n], Decl. of David C. Fredley, ECF No. 36–3 [hereinafter Fredley Decl.], ¶ 9.

The Elkhorn Ranch Unit includes the site of Theodore Roosevelt's former home. *See* Pl.'s Mot. at 4. The historical significance of that site motivated the purchase of the Elkhorn Ranchlands. *See* FS–002296 ("Acquisition of this parcel will preserve the integrity and historic character of the area around the Theodore Roosevelt Elkhorn Ranch[.]"); *see also* Pl.'s Mot. at 4; Defs.' Opp'n at 6. It also motivated the 2012 designation of portions of the Elkhorn Ranchlands, along with the Elkhorn Ranch Unit and other historically significant lands, as the "Theodore Roosevelt's Elkhorn Ranch and Greater Elkhorn Ranchlands Historic District" (the "Elkhorn Ranchlands NHD"). Pl.'s Mot., Ex. A, Environmental Assessment: Elkhorn Gravel Pit [hereinafter EA], at 29. The 24.6 acres that Elkhorn Minerals intends to mine (the "Gravel Pit") lie within both the Elkhorn Ranchlands and the Elkhorn Ranchlands NHD, approximately 0.8 miles from the Elkhorn Ranch Unit. EA at 31–32, 35, 48, 55–56.

The Forest Service's 2007 purchase of the Elkhorn Ranchlands was subject to all valid, existing mineral rights. *See* FS–003443–4 ("Reserving [u]nto the Grantor [a]ll metals, ores and minerals of any nature whatsoever in or upon the [Elkhorn Ranchlands] and including ... gravel that may be owned together with the right to enter upon said lands for the purpose of [mining operations] and to occupy and make use of so much of the surface of said land as may be reasonably necessary[.]"); *see also* EA at 7 (quoting FS–003443–4); Defs.' Opp'n, Second Decl. of Shannon Boehm, ECF No. 35–1 [hereinafter Sec. Boehm Decl.], ¶ 3 ("All transaction documents made clear that surface and subsurface minerals were not included in the acquisition of Elkhorn Ranchlands."). In other words, while the Forest Service acquired the surface rights to the Elkhorn Ranchlands, the tract's sub-surface rights remained in private hands. Indeed, the Elkhorn Ranchlands has "approximately forty different third party surface mineral and/or subsurface mineral owners," whose rights "were not available for purchase by the government" in 2007. EA at 6. Peggy Braunberger, one of Elkhorn Minerals' owners, *id.* at 9, purchased "26.86% [of the] mineral ownership from [a] third party in 2009," *id.* at 6.

2. Development of the Gravel Pit and Compliance with NEPA

i. *Initial steps*

On February 9, 2010, Braunberger submitted to the Medora District Ranger the "initial Operating Plan to mine and develop the" Gravel Pit. *Id.* at 4. [1] This Operating Plan, however, was "too generic and did not address all resource, surface use, and operation concerns." *Id.* On September 1, 2011, after "approximately eighteen months of negotiations" with the Forest Service, Braunberger submitted her final Operating Plan. *Id.* at 4, 19; *see also* Defs.' Opp'n at 8. The Forest Service, through the Medora District Ranger, then issued a "Public Scoping Letter" to "one hundred contacts, including county commissioners, state, and federal agencies, tribal governments, environmental groups, private interested individuals, and the press," Defs.' Opp'n at 8, soliciting comments on the Operating Plan, *see* FS–000625–27. It received 71 comments in response. *See* FS–000628–740; *see also* Defs.' Opp'n at 8.

[1] The Environmental Assessment also indicates that Ms. Braunberger submitted an "application for [broader] gravel exploration and development on October 8, 2008." EA at 4. This assertion contradicts the Environmental Assessment's later statement that Ms. Braunberger purchased her mineral rights in 2009. *Id.* at 6. Because the Forest Service's decision at issue in this case is unrelated to any October 8, 2008 (or, perhaps, October 8, 2009) application, this discrepancy has no bearing on the court's analysis.

ii. *Preparation of the Environmental Assessment and Issuance of the* Decision Notice and Finding of No Significant Impact

***3** The National Environmental Policy Act ("NEPA") requires federal agencies to issue an exhaustive, in-depth analysis document referred to as an "Environmental Impact Statement" ("EIS") in connection with "proposals for ... major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). NEPA, however, permits agencies as a first step to prepare an Environmental Assessment ("EA")–a comprehensive but less-detailed analysis of a proposed project's environmental impact–to determine whether an EIS is necessary. *See* 40 C.F.R. § § 1501.3–4. If, based on a completed EA, an agency determines that a proposal will *not* significantly affect the quality of the environment, it may issue a Decision Notice and Finding of No Significant Impact ("DN/FONSI") instead of proceeding with an EIS. *Id.* § 1501.4(e)(1). A DN/FONSI includes the EA or a summary of it and "briefly present[s] the reasons why an action ... will not have a significant effect on the human environment and for which an [EIS] therefore will not be prepared." *Id.* § 1508.13.

As relevant to this case, the public-facing NEPA process began in May 2012, approximately eight months after Braunberger had submitted the Gravel Pit's final Operating Plan. On May 11, 2012, the Forest Service issued a second Public Scoping Letter, this time soliciting comments on a draft EA it had prepared for the Gravel Pit. *See* FS–000958–59; FS–000081–151. The Forest Service received 54 comments on its draft EA. *See* FS–000974–1086; *see also* Defs.' Opp'n at 9. Instead of modifying the draft based on these comments, the Forest Service entered into an agreement with Braunberger and Roger Lothspeich–a current co-owner of Elkhorn Minerals to whom Braunberger had granted Power of Attorney, *see* EA at 20– "to put processing of the Operating Plan on hold to search for possible exchange properties and to explore alternatives to development of the [Gravel Pit]," Defs.' Opp'n at 9; *see also* FS–003914–15.

This "Agreement in Principal" was in effect from July 18, 2012, to August 2, 2013, at which point Braunberger and Lothspeich withdrew. *See* EA at 20–21; Defs.' Opp'n at 9. In a letter to the Forest Service, counsel for Braunberger and Lothspeich explained that his clients "remain open to considering alternative resolutions," but chose to withdraw "because of the lack of progress that has occurred over the past year in pursuing the mineral exchange option, and because of various acknowledged feasibility problems which have arisen[,] raising questions about whether it is realistic to hope to achieve the mineral exchange as a solution." FS–003916. In that same letter, counsel "request[ed] that the Forest Service ... bring the Operating Plan review process to a favorable conclusion expeditiously." FS–003917. Three months later, on November 15, 2013, Braunberger and Lothspeich "transferred [their mineral rights] by Quit Claim to Elkhorn Minerals." EA at 9.

The Forest Service thereafter "incorporate[d] changes resulting from public and agency input" into the draft EA and, on April 21, 2014, issued an updated EA. Defs.' Opp'n at 9. Three days later, on April 24, 2014, the Forest Service issued a draft DN/FONSI, which it then subjected to a "pre-decisional objection period." Defs.' Opp'n at 10. Following the close of the objection period, the Forest Service made alterations to both the updated EA and the draft DN/FONSI. *Id.*

iii. *Content of the Environmental Assessment and the Decision Notice and Finding of No Significant Impact*

On January 6, 2015, the Forest Service issued the final versions of the EA and the DN/FONSI for the Gravel Pit. *Id.* The final EA is an 80–page document that analyzes the proposed Gravel Pit, the Operating Plan, and their environmental effects. *See generally* EA. It contains background on the Gravel Pit's development and discusses, among other issues, its "purpose and need"; the private rights involved; applicable rules and regulations; alternative projects considered; mitigation measures to be implemented; and direct, indirect, and cumulative environmental impacts. *Id.* The 19–page DN/FONSI summarizes and at times quotes directly from the EA. *See* FS–000576–95 [hereinafter DN/FONSI]. It finds that the Gravel Pit "will not significantly affect the quality of the human environment" and that the project's impacts "are not significant." *Id.* at 15. Accordingly, the DN/FONSI concludes that "the preparation of an [EIS] is not needed." *Id.*

***4** Notwithstanding that conclusion, the Forest Service, in both the DN/FONSI and the EA, acknowledged that the project may, and in some cases will, have "adverse effects." *See, e.g.,* DN/FONSI at 16 ("The project may have an 'adverse effect' on the overall integrity of the Elkhorn Ranch."); EA at 47 ("[M]itigation measures will reduce but not eliminate the impacts.").

First, the Forest Service acknowledged that the mining operations may have temporary and intermittent adverse impacts on the visitor experience at and around the Elkhorn Ranch Unit. *See* EA at 37 ("The Elkhorn Ranchlands NHD experience may be negatively affected during the normal mining operating season from April through November for approximately two [to] three years."). "Specifically," the EA stated, "the gravel pit operation may have visual (pit, machinery), audible (equipment and vehicle noise), and atmospheric (dust, equipment and vehicle fumes) effects that will diminish the property's historical integrity." *Id.* at 38; *see also id.* at 41 ("[N]oise from the mining proposal ... would clearly be noticeable from within the park, adjacent state lands, and from the residential area during daily operations."); *id.* at 53 ("Mining operations would be visible from the higher elevation portions of the park ... [and] Park visitors would see the heavy equipment used to remove the gravel."); *id* at 37 ("Dust may be visible during mining, loading of trucks and hauling."). The Forest Service found that mitigation measures "will reduce, though not eliminate, the[se] adverse effects." *Id.* at 39. It nevertheless concluded that, because the effects are "temporal and mitigatable," they "are not significant." DN/FONSI at 15.

Second, the Forest Service acknowledged that the Gravel Pit will have one *permanent* adverse impact: "an average elevation drop of eight feet within the pit area." EA at 37, 50, 52. According to the final EA, this "subtle permanent fingerprint on the landscape ... may detract from the overall integrity of the Elkhorn Ranchlands NHD." *Id.* at 39. Nevertheless, the Forest Service concluded that this adverse effect was not significant because Elkhorn Minerals would be required to undertake extensive reclamation efforts after finishing each phase of mining. "[R]eclamation will ensure a natural form, line, color, texture and pattern common to the natural landscape," *id.* at 37, "will reestablish the natural rolling hills and remove the filled in low spots [previously created by decades of mining and other activities on the land,] and [will] eliminate the current altered landscape appearance," *id.* at 38; *see also* DN/FONSI at 8–9. In fact, the Forest Service determined that these particular mitigation measures "will have a positive effect on the current conditions." EA at 39. It conceded, however, that it "may take decades to reclaim the overall landscape of the entire ... area." *Id.* at 37.

iv. *Mining and associated operations*

Although the Forest Service had issued the final EA and the DN/FONSI in January 2015, Elkhorn Minerals still had to obtain additional agency approvals before mining operations could begin. On May 29, 2015, the Forest Service issued permits allowing

Elkhorn Minerals to use certain access roads. *See* FS–004728–35; FS–004842–53. On that same date, the Forest Service also issued a "Surface Occupancy Permit," which authorized Elkhorn Minerals to make use of the land's surface for mining activities through April 1, 2017. *See* FS–004617–26. With these permits having issued, from November 11, 2015, to December 14, 2015, Billings County–who Elkhorn Minerals contracted to perform road work and mining operations–improved the Gravel Pit's access roads. *See* Sec. Boehm Decl. ¶¶ 4–7.

***5** On December 14, 2015, after inspecting the road work and other "pre-work" that Elkhorn Minerals and Billings County had performed, the Forest Service issued a "Notice to Proceed" with "Phase 2," "the first of 4 mining phases ... each [of which] involve an approximately 5–acre sub-site of the overall 24.6–acre authorization." *Id.* ¶¶ 7–8. Each of these four phases will involve the removal of topsoil, the extraction of gravel, and then the reclamation of a five-acre parcel. *Id.* ¶ 9. The reclamation process, which will begin as soon as the five-acres have been "completely mined," EA at 45, will include "replacement of overburden, re-contouring, ... replacement of topsoil, and undertaking erosion measures," Sec. Boehm Decl. ¶ 9; *see also* EA at 25–26. And before Elkhorn Minerals can start mining the next 5–acre parcel–that is, before it can move on to the next "phase"–it must obtain an approval from the Forest Service. The Forest Service must conduct "a field-check" and then, before mining may commence, issue a "Notice to Proceed." Sec. Boehm Decl. ¶ 10; EA at 44.

Each five-acre phase is expected to take approximately two months, subject to weather conditions. *See* Tele. Conf. Tr., Dec. 18, 2015 (draft), at 7:23–8:1 ("It's [the Forest Service's] understanding at this stage, given the amount of gravel that's found, [that it] will take approximately two months to complete, but it could take longer if weather ... conditions delay the operation."); *id*. at 9:21–23 (Elkhorn Minerals' counsel stated that "it will take at least two months to get through this current phase of disturbance of up to five acres"); Int.'s Mot., Second Decl. of Jeff Iverson, ECF No. 36–2, ¶ 4 ("It will take at least two to three months to carry out the planned gravel extraction and reclamation activities in the five-acre area that we are currently operating within."). At oral argument, Elkhorn Minerals represented that the current phase of mining will end, and the next will begin, "[m]ost likely ... sometime after March 2015." Mot. Hr'g Tr., Jan. 8, 2016, ECF No. 41 [hereinafter Mot. Hr'g], at 68:14–15. Elkhorn Minerals added that current mining operations "could well extend out beyond March as the weather has been mild, but if the heavy winter in North Dakota sets in, that period could be longer." *Id.* at 68:15–17; *see also id.* at 90:9–10 (Plaintiff's counsel stating that "[t]he gravel pit miner is moving forward with phase two, which is now toward about March"). Thus, as of this date, the court understands that mining has occurred on no more than five acres of the 24.6 acre parcel.

B. Procedural History

Plaintiff National Parks Conservation Association ("NPCA") is a "nonpartisan non-profit organization headquartered in Washington, D.C. whose mission is to provide an independent voice for protecting and enhancing America's National Park System for present and future generations." Compl., ECF No. 1, ¶ 34. Its 360,000 members "use, enjoy and work to conserve [the] National Park System, including Theodore Roosevelt National Park." *Id.* As pertinent here, NPCA alleges that its members use and enjoy the Elkhorn Ranch Unit of Theodore Roosevelt National Park, as well as other areas surrounding the Gravel Pit. *Id.* ¶¶ 35–36.

Plaintiff filed its Complaint on September 29, 2015–eight months after the Forest Service issued the final EA and DN/FONSI for the Gravel Pit and four months after it issued the road permits and Surface Occupancy Permit, but before road improvements began. *See generally* Compl. In its Complaint, Plaintiff alleged that the Forest Service and five individuals in their official capacities[2] violated NEPA, 42 U.S.C. § 4321 *et seq.,* the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq.,* and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq. See id.* ¶¶ 1, 38–46. Specifically, NPCA claimed that Defendants acted arbitrarily and capriciously in connection with the Gravel Pit by (1) filing a deficient Environmental Assessment, or EA; (2) approving a Decision Notice and Finding of No Significant Impact, or DN/FONSI; and (3) failing to prepare an Environmental Impact Statement, or EIS. *Id.* ¶¶ 1–2, 23–25. Plaintiff further alleged that Defendants' failure to update the Dakota Prairie Grasslands' Land and Resource Management Plan prior to their issuance of the DN/FONSI was unlawful. *Id.* ¶ 26.

[2] The individual Defendants are: Secretary of the United States Department of Agriculture Tom Vilsack; Chief of the Forest Service Tom Tidwell; Regional Forester for the Northern Region of the Forest Service Leanne Marten; Forest/Grasslands Supervisor for the Dakota Prairie Grasslands Dennis Neitzke; and District Ranger for the Medora Ranger District of the Dakota Prairie Grasslands Shannon Boehm. *See* Compl. ¶¶ 42–46.

***6** On October 14, 2015, Elkhorn Minerals, as the owner of "the dominant mineral rights at issue in this case," filed a Motion to Intervene. *See generally* Mot. to Intervene, ECF No. 4. On November 9, 2015, in response to Plaintiff's Complaint, Defendants filed a Motion to Transfer the case to the District of North Dakota. *See generally* Defs.' Mot. to Transfer Venue, ECF No. 15.

On November 30, 2015, before the court had ruled on those pending motions, Plaintiff filed a Motion for a Temporary Restraining Order ("Motion for TRO") based on its understanding that mining operations soon would commence. The Motion for TRO asked the court "to suspend the January 6, 2015[DN]/[FONSI] and related permits authorizing construction of [the Gravel Pit] and associated roads that would be seen and heard from the ... National Park and its historic Elkhorn Ranch." Mot. for TRO, ECF No. 20, at 1. On December 8, 2015, the court denied that Motion because "Plaintiff ... made an insufficient showing as to both likelihood of success on the merits *and* irreparable harm." Memo. Opinion & Order, ECF No. 29, at 4.

On December 16, 2015–the day after mining operations started–Plaintiff filed its Motion for Preliminary Injunction. *See generally* Pl.'s Mot. for Prelim. Inj., ECF No. 31. Two days later, on December 18, 2015, the court held a telephone conference with the parties during which it orally denied Defendants' Motion to Transfer and set an expedited briefing schedule. *See* Dkt. Entry (Dec. 18, 2015).

The court held a hearing on the Motion for Preliminary Injunction on January 8, 2016. *See* Dkt. Entry (Jan. 8, 2016). At the start of the hearing, the court orally granted Elkhorn Mineral's Motion to Intervene. *See* Hr'g. Tr. 3:16–20. The court also inquired whether the parties would consent to consolidate the motion for preliminary relief with the "trial" [3] on the merits, as permitted under Federal Rule of Civil Procedure 65(a)(2). *See id.* at 4:16–5:6. The parties declined to do so. *See id.* at 5:13–6:12, 7:13–9:25, 10:10–21. Thus, the only ripe matter before the court is Plaintiff's Motion for Preliminary Injunction.

[3] As this case seeks review of an administrative decision under the APA, there will be no "trial." The merits will be evaluated based on the administrative record and any additional evidence that the court may allow. *See Camp v. Pitts,* 411 U.S. 138, 142 (1973) (stating that under the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court").

III. DISCUSSION

A. The Preliminary Injunction Standard

A preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as [a matter] of right." *Munaf v. Geren,* 553 U.S. 674, 689–90 (2008) (citations and internal quotation marks omitted). A court may only grant the "extraordinary remedy ... upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (per curiam)). Specifically, a plaintiff must show: (1) that it "is likely to succeed on the merits"; (2) that it "is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "that the balance of equities tips in [its] favor"; (4) "that an injunction is in the public interest." *Winter,* 555 U.S. at 20 (citations omitted).

***7** Courts in this Circuit traditionally have evaluated these four factors on a "sliding scale"– if a "movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp,* 571 F.3d 1288, 1291–92 (D.C.Cir.2009). The Supreme Court's decision in *Winter,* however, called that approach into doubt and sparked disagreement over whether the "sliding scale" framework continues to apply, or whether a movant must make a positive showing on all four factors without discounting the importance of a factor simply because one or more other factors have been convincingly established. *Compare Davis v. Billington,* 76 F.Supp.3d 59, 63 n.5 (D.D.C.2014) ("[B]ecause it remains the law of this Circuit, the Court must employ the sliding-scale analysis here."), *with ABA, Inc. v. District*

of Columbia, 40 F.Supp.3d 153, 165 (D.D.C.2014) ("The D.C. Circuit has interpreted *Winter* to require a positive showing on all four preliminary injunction factors." (citing *Davis v. Pension Benefit Guaranty Corp.,* 571 F.3d 1288, 1296 (D.C.Cir.2009) (Kavanaugh, J., concurring))).

Regardless of whether the sliding scale framework applies, it remains clear that a movant must demonstrate irreparable harm, which has "always" been "[t]he basis of injunctive relief in the federal courts." *Sampson v. Murray,* 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v.* Westover, 359 U.S. 500, 506–07 (1959)). "A movant's failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C.Cir.2006). Indeed, if a court concludes that a movant has not demonstrated irreparable harm, it need not even consider the remaining factors. See CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C.Cir.1995) ("Because [the plaintiff] has made no showing of irreparable injury here ... [w]e ... need not reach the district court's consideration of the remaining factors relevant to the issuance of a preliminary injunction."); see also Econ. Research Servs., Inc. v. Resolution Econ., LLC, No. 15–cv–1282, 2015 WL 6406390, at *3 (D.D.C. Oct. 21, 2015) ("Given that [the plaintiff] has not demonstrated 'irreparable harm,' the Court's inquiry begins, and ends, with this factor alone.").

Here, as discussed below, the court finds that Plaintiff has failed to show that it is likely to suffer irreparable harm absent preliminary relief. Though that failure alone requires the court to deny Plaintiff's Motion, the court also finds that neither the balance of equities nor the public interest favors granting injunctive relief. The court need not and does not reach today the Plaintiff's likelihood of success on the merits. Whether Plaintiff can prevail on the merits, and obtain permanent injunctive relief, is a question for another day.

B. Irreparable Harm

The Court of Appeals "has set a high standard for irreparable injury." *Chaplaincy of Full Gospel,* 454 F.3d at 297; *see also Save Jobs USA v. Dep't of Homeland Sec.,* 105 F.Supp.3d 108, 113 (D.D.C.2015) ("The standard for irreparable harm is particularly high in the D.C. Circuit."); *Coalition for Common Sense in Gov't Procurement v. United States,* 576 F.Supp.2d 162, 168 (D.D.C.2008) ("The irreparable injury requirement erects a very high bar for a movant."). The injury claimed "must be both certain and great; it must be actual and not theoretical." *Wisc. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C.Cir.1985) (per curiam). Critical to establishing "certain" and "actual" harm is a demonstration of imminence–"[t]he injury complained of [must be] of such *imminence* that there is a 'clear and present' need for equitable relief." *Id.* (citation omitted). Further, the alleged "injury must be beyond remediation." *Chaplaincy of Full Gospel,* 454 F.3d at 297.

***8** The movant bears the burden of substantiating, with evidence, that the injury is certain, imminent, great, and beyond remediation. *Wisc. Gas Co.,* 758 F.2d at 674. "Bare allegations of what is *likely* to occur are of no value since the court must decide whether the harm will *in fact* occur." *Id.* (first emphasis added). Thus, "[t]he movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Id.*; *see also United States v. Sum of $70,990,605,* 991 F.Supp.2d 154, 161 (D.D.C.2013). This court's Local Rules underscore the need for the movant to present such proof, requiring that "[a]n application for a preliminary injunction ... be supported by all affidavits on which the plaintiff intends to rely" and prohibiting the filing of "[s]upplemental affidavits" without "permission of the Court." Local Civ. R. 65.1(c).

Environmental groups, like Plaintiff, can establish standing to bring suit at the pleadings stage by alleging injury to their "members' use and enjoyment" of a particular area, such as a national park. *See, e.g., Wilderness Soc'y v. Norton,* 434 F.3d 584, 594 (D.C.Cir.2006). But such injury, though necessary, is not sufficient to show *irreparable* harm. For one, under the preliminary injunction standard, the harm to the members' use and enjoyment of a particular area must be certain, imminent, great, and beyond remediation. *See Wisc. Gas Co.,* 758 F.2d at 674; *see also Taylor v. Resolution Trust Corp.,* 56 F.3d 1497, 1508 (D.C.Cir.1995) (finding that the plaintiff "adequately pled facts supporting its standing to bring suit" before noting that "to establish the grounds for a preliminary injunction [the plaintiff] must show more," including "demonstrat[ing] ... an irreparable injury that the proposed injunction would avert"); *In re Navy Chaplaincy,* 534 F.3d 756, 766 (D.C.Cir.2008) (Rogers, J.,

dissenting) ("[T]o show irreparable harm '[a] plaintiff must do more than merely allege ... harm sufficient to establish standing.' " (citation omitted)). Additionally, the injunction standard demands actual *proof* of injury, as opposed to the mere allegation of an injury sufficient to establish standing at the pleadings stage.

Here, Plaintiff contends that, absent injunctive relief, it likely will suffer irreparable harm because its "members frequently visit, use and enjoy national parks, including Theodore Roosevelt National Park," and the Gravel Pit "will irreparably damage the Elkhorn Ranchlands and the scenic landscape, quiet solitude and historic values of the ... Park, which Plaintiff NPCA and its members work to protect." Pl.'s Mot. at 28. Plaintiff alleges that it will suffer irreparable injury as a result of the Gravel Pit's temporary and permanent adverse effects. It also claims that Defendants' violation of NEPA caused it to incur a procedural injury, which supports a finding of irreparable harm. The court finds that none of these asserted injuries satisfies the demanding requirements of the irreparable harm standard.

1. Audible, Visual, and Atmospheric Adverse Effects During Mining Operations

Plaintiff first asserts that irreparable harm will arise from "the sound, visual, and other impacts of the gravel mining construction and operation[.]" Pl.'s Reply in Supp. of Mot. for Prelim. Inj., ECF No. 39 [hereinafter Pl.'s Reply], at 20; *see also id.* at 22 ("[T]he gravel mining construction and operation ... is causing and will continue to cause irreparable harm[.]"). That harm is not at all speculative. Indeed, the EA and DN/FONSI make clear that during mining operations, visitors to the areas surrounding the Gravel Pit, including the Elkhorn Ranch Unit, may experience adverse visual, audible, and atmospheric effects. *See, e.g.,* EA at 38.

***9** Plaintiff, however, has failed to show that these adverse effects are of "such *imminence* " to its members "that there is a 'clear and present' need for equitable relief." *Wisc. Gas Co.,* 758 F.2d at 674 (citation omitted). As the cases on which Plaintiff relies demonstrate, a finding of imminent harm requires at least *some* evidence that a member of an association–or a co-plaintiff in the suit–will soon be in the area where the adverse effects will occur. *See Fund For Animals v. Norton,* 281 F.Supp.2d 209, 214, 214 n.1 (D.D.C.2003) (finding irreparable harm where two plaintiffs could view and hear the animals allegedly threatened by the challenged government action from their home, and noting that the claims of two other plaintiffs who did "not allege that they live in or travel to the [area] ... are not relevant to the motion presently before the Court"); *Fund for Animals, Inc. v. Espy,* 814 F.Supp. 142, 144, 151 (D.D.C.1993) ("Plaintiffs are the Fund for Animals, Inc .... and four individuals who reside near Yellowstone National Park ... and frequent it."); *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.,* 657 F.Supp.2d 1233, 1240 (D.Colo.2009) (finding irreparable harm where environmental organization provided "[e]vidence ... from several members ..., all of whom live in close proximity to the Refuge and have interests in the [area]"). That requirement is logical. After all, when an association's asserted injury rests on disruption of the visitor experience, such injury cannot be imminent unless at least one of the association's members intends to visit the location in the near future–here, in the next several months, before the court resolves this case–and thereby experience the environmental consequences of the challenged action–here, adverse audible, visual, and atmospheric effects.

Plaintiffs have submitted five affidavits to demonstrate irreparable harm. But not one of them establishes that the affiant will imminently experience the adverse environmental effects stemming from the mining operations. Affiant Tweed Roosevelt, who is the grand-grandson of Theodore Roosevelt, does not claim to be a member of NPCA. But even if he were a member, he does not say anything about when he intends to visit the Elkhorn Ranchlands or Theodore Roosevelt National Park. *See generally* Pl.'s Mot., Ex. J, Decl. of Tweed Roosevelt, ECF No. 3111. Another affiant says that Roosevelt "enjoys his annual fall visit" to the area, *see id.,* Ex. L, Decl. of James Fuglie, ECF No. 31–13 [hereinafter Fuglie Decl.], ¶ 23, but that statement, like those of Roosevelt, does not demonstrate that Roosevelt will imminently be harmed by the Gravel Pit's adverse effects.

Affiant Bart Melton, who is the Regional Director of NPCA's Northern Rockies Regional Office, makes no assertion about any past or intended future visit to the area by him. *See generally id.,* Ex. S, Decl. of Bart Melton, ECF No. 31–20. And Greg A. Vital, who serves on NPCA's Board of Directors, says only that he "first visited the Elkhorn Ranch Unit ... in June 2015" and

that he "would love to return." *Id.,* Ex. N, Decl. of Greg A. Vital, ECF No. 31–15, ¶¶ 6, 9. At most, Vital has expressed a "vague desire" to return to the area. *Summers v. Earth Island Inst.,* 555 U.S. 488, 496 (2009). In *Summers,* the Supreme Court held that a "vague desire to return is insufficient to satisfy the requirement of imminent injury" for purposes of establishing standing. *Id.* If such a vague desire is insufficient to establish standing, it certainly does not establish irreparable harm. *See Taylor,* 56 F.3d at 1508; *In re Navy Chaplaincy,* 534 F.3d at 766.

A fourth affiant, Timothy R. Stevens, a current member of NPCA, states that he has "visited Theodore Roosevelt National Park over five times"; that he "frequently stops at Park overlooks when ... driving nearby in order to experience the Park"; that he has "visited the Elkhorn Ranch Unit ... and the Greater Elkhorn Ranchlands two to three times"; that he "last visited the Elkhorn Ranch Unit of Theodore Roosevelt National Park in September or October of 2014"; and that he "intends to return to the Elkhorn Ranch Unit within the next year or two," but "will not go back ... if the proposed gravel pit is allowed to move forward." Pl.'s Mot, Ex. M, Decl. of Timothy R. Stevens, ECF No. 31–14, ¶¶ 5–6, 18. Again, like Vital, Stevens has expressed, at most, a "vague desire to return," which is not enough to prove irreparable harm. If anything, Stevens has said that he will *not* return because mining operations have moved forward.

***10** A final affidavit–that of NPCA member James C. Fuglie–merits a harder look. Fuglie attests that he "visits the Elkhorn Ranch Unit of Theodore Roosevelt National Park and the ranchlands surrounding the Park ... at least a half-dozen times each year"; "last visited ... on October 15, 2015"; "visited ... almost every week during the summer of 2015, and plan[s] to continue to do so"; visited with his wife "on a crisp January day many years ago ... and [they] return each year"; and visited on August 28, 2015. Fuglie Decl. ¶¶ 9–11, 23. Although Fugile attests to numerous, consistent visits to the area, he does not say that he intends to visit in the coming months. Plaintiff asks the court to interpret Fuglie's statement that he and his wife "came to the Elkhorn Ranch ... on a crisp January day many years ago ... and return each year," to mean that the affiant and his wife return *every January*. *See* Hr'g Tr. 90:15–17 ("We have Mr. [Fuglie]'s affidavit that says he and his wife had a special moment at Elkhorn Ranch one January. They come to Elkhorn Ranch every January."). But a straightforward reading of the affidavit does not support that interpretation. While Fuglie states that he and his wife return each year, he does not specify when those visits take place. Given that the bar for irreparable injury is "very high" and that Plaintiff bears the burden for establishing such injury with actual proof, the court will not make the assumption Plaintiff urges.

Furthermore, other record evidence supports the absence of irreparable injury. Valerie Naylor, a United States Park Service employee who is the Superintendent of Theodore Roosevelt National Park, wrote in a letter to the Forest Service that Elkhorn Ranch receives 99 percent of its visitors from April to November. *See id.,* Ex. Q, Letter to Medora District Ranger (June 11, 2012), ECF No. 31–18, at 2. The record also contains a statement, albeit hearsay, from an employee of one the Park's Visitor Centers that the Elkhorn Ranch Unit receives "maybe 1,000 [visitors] per year," Fredley Decl. ¶ 9; *see also* Int.'s Opp'n at 28–29. Plaintiff has not offered any evidence indicating otherwise. Thus, it appears that few people visit the area near the Gravel Pit from January to March.

In short, based on the record evidence, the court cannot conclude that any of Plaintiff's members will be in the vicinity of the Gravel Pit in the coming months and thus be imminently harmed by the visual, audible, and atmospheric effects of mining operations.

2. Permanent Effect

Plaintiff also claims that the permanent adverse effect of the Gravel Pit–namely, an eight-foot drop in elevation of the mined land–constitutes irreparable harm to its members. *See* Pl.'s Reply at 21–22 ("Th[e] long time to reclaim the overall landscape suffices to establish irreparable harm."). The court takes seriously any permanent alteration to the natural environment. But the permanent injury to the land at issue in this case does not rise to the level of "great" that the irreparable harm standard requires. *Cf. Fund For Animals v. Norton,* 281 F.Supp. at 220 (finding irreparable harm where the granting of permits would result in the killing of 525 of the 3,600 mute swans in a particular area); *Fund for Animals, Inc. v. Espy,* 814 F.Supp. at 143, 151 (finding

irreparable harm where agency decision would result in "the capture ... of 10 to 60 pregnant wild bison ... their transportation by truck 2000 miles ... their artificial infection with [a] microorganism ... and, after a few months of study, their slaughter."); *San Luis Valley,* 657 F.Supp.2d at 1241 (finding irreparable harm where the drilling of an oil well threatened one of two habitats of an "extremely sensitive" and endangered species and posed risk to an "aquifer that [was] critical in supplying water to the area").

Here, Elkhorn Minerals presently is mining on five acres of land–less than .001 percent of the 5,200–acre Elkhorn Ranchlands that surrounds the Elkhorn Ranch Unit. Though the mining operations will cause a permanent eight-foot drop to the mined land, that harm is mitigated by the requirement that Elkhorn Minerals start to perform land reclamation measures immediately upon the completion of mining on each 5–acre parcel. Those reclamation measures "will reestablish the natural rolling hills and remove the filled in low spots," thereby "eliminat[ing] the current altered landscape." EA at 53. They will also "reestablish the natural vegetative colors and textures of the land" through the planting of "native seed mixtures." *Id.* Although these environmental improvements will not come to fruition immediately, and will not fully mitigate the loss of the eight feet of soil, they do diminish the harm of which Plaintiff complains. *See Sierra Club v. United States Army Corps of Eng'rs,* 990 F.Supp.2d 9, 39 (D.D.C.2013) (considering "extensive mitigation plans" in determining that the plaintiffs would not suffer great harm in the absence of injunctive relief). The court therefore finds that the permanent eight-foot drop of the presently mined five-acre parcel, when combined with required mitigation measures, is not sufficiently "great" to permit the court to grant the extraordinary relief requested. [4]

[4] As indicated, the court will endeavor to reach a decision on the merits of this case before the next phase of mining operations begins. However, should additional mining commence on the next five-acre phase before a final decision, that fact alone would not convince the court that Plaintiff has suffered irreparable harm. The permanent loss of elevation on an additional .001 percent of the Elkhorn Ranchlands, when offset by mitigation measures, would not be so great as to warrant preliminary injunctive relief.

3. Procedural Harm

***11** Plaintiff also invites the court to "consider the procedural harm to Plaintiff from uninformed environmental decisionmaking in assessing irreparable harm." Pl.'s Mot. at 30. In *Summers,* the Supreme Court concluded that "deprivation of a procedural right without some concrete interest that is affected by the deprivation–a procedural right *in vacuo* –is insufficient to create Article III standing." 555 U.S. at 496. The same is true for demonstrating irreparable harm. As stated in *Fund For Animals v. Norton,* "procedural harm arising from a NEPA violation is insufficient, *standing alone,* to constitute irreparable harm justifying issuance of a preliminary injunction." 281 F.Supp.2d at 222; *see also Amoco Prod. Co. v. Vill. of Gambell, AK,* 480 U.S. 531, 544–45 (1987) (finding that a lower court's presumption of irreparable harm "when an agency fail[ed] to evaluate thoroughly the environmental impact of a proposed action ... [was] contrary to traditional equitable principles" (quoting *People of Village of Gambell v. Hodel,* 774 F.2d 1414, 1423 (9th Cir.1985) (citation and internal quotation marks omitted))).

The court has weighed the potential procedural harm of a NEPA violation. But even assuming that Defendants did violate NEPA here, that procedural harm would largely "stand alone"–the only identified immediate concrete injury being the permanent loss of some soil, which the court has concluded does not constitute "great" injury. Accordingly, Plaintiff's claimed procedural harm does not add sufficient weight to establish irreparable harm.

C. Balance of Equities

The court now turns to the balance of equities. In assessing this factor, courts generally consider whether the requested injunctive relief would "substantially injure other interested parties." *Ark. Dairy Co-op Ass'n, Inc. v. U.S. Dep't of Agric.,* 573 F.3d 815, 821 (D.C.Cir.2009). Here, that analysis involves a consideration of the effect of an injunction on Plaintiff, Defendants, and Intervenor Elkhorn Minerals. The court has discussed above the injury that will befall Plaintiff in the absence of immediate injunctive relief, concluding that it does not rise to the level of irreparable harm. Defendants, for their part, do not allege that

they will suffer harm if the requested relief is granted. *See* Defs.' Opp'n at 34–35; *see also* Pl.'s Reply at 22 ("Defendants do not allege that they will be harmed if the preliminary injunction is granted ... and thus waive that argument."). Elkhorn Minerals, however, asserts that as "a direct target of the NPCA's preliminary injunction motion [it] certainly stands to be harmed by an injunction." Int.'s Opp'n at 29. The company argues that "after years of planning, governmental scrutiny, and negotiations with other stakeholders, [it] – as the owner of the dominant mineral estate – should at long last be allowed to proceed with the development of its minerals as a matter of fundamental fairness." *Id.*

The court finds that Elkhorn Minerals would suffer harm if a preliminary injunction were granted. Nearly six years of negotiations with the Forest Service preceded the start of operations at the Gravel Pit. According to the EA, Elkhorn Minerals "agreed to every negotiated mitigation measure with the exception of [two]." EA at 22. The DN/FONSI further notes that Elkhorn Minerals "has been exceedingly cooperative in identifying and agreeing to all reasonable stipulations." DN/FONSI at 15. And the Administrative Record makes clear that Elkhorn Minerals undertook substantial efforts to explore alternatives to the project that was ultimately approved. *See, e.g.,* FS–003916. Elkhorn Minerals and its contractor, Billings County, have incurred substantial expenses preparing for and commencing mining operations. *See* Int.'s Opp'n at 21. The company undoubtedly would be prejudiced if the court issued an injunction that halted operations.

***12** An additional fact weighs against Plaintiff in the balance of equities: Plaintiff's request for an injunction could have been avoided had Plaintiff filed its suit earlier in time. Plaintiff filed its Complaint on September 29, 2015. *See generally* Compl. However, the final EA and DN/FONSI were issued on January 6, 2015, and Plaintiff could have filed suit immediately thereafter to challenge the final agency action that it now argues is unlawful. *See* 5 U.S.C. § 704. Had Plaintiff filed this lawsuit in, for example, February 2015, the court likely would have resolved the dispute before the commencement of road work or mining activities, thereby obviating the need for the extraordinary relief requested. Plaintiff's delay in filing this lawsuit therefore weighs against it in the court's balance of equities. When combined with the harm to Intervenor Elkhorn Minerals, the court finds that Plaintiff has failed to make a positive showing on this third preliminary injunction factor. Indeed, the balance of equities weighs against granting a preliminary injunction.

D. The Public Interest

Finally, the court finds that Plaintiff has failed to make a positive showing that the public interest favors an injunction. Plaintiff argues that the public interest is served by an agency's compliance with NEPA. *See* Pl.'s Mot. at 32. The court agrees. *See Brady Campaign to Prevent Gun Violence v. Salazar,* 612 F.Supp.2d 1, 26 (D.D.C.2009) ("There is no question that the public has an interest in having Congress' mandates in NEPA carried out accurately and completely."). But ensuring compliance with NEPA–even if the court were to determine that a NEPA violation occurred–is not the only public interest at stake. As Defendants and Elkhorn Minerals note, "[t]here is high demand for gravel and scoria in Billings County and western North Dakota" and the "Gravel Pit will provide an additional source of gravel to serve this need." Defs.' Mot. at 39–40; *see also* Int.'s Mot. at 31 ("[A]s of December 2015, there was an immediate need for the gravel from the ... Gravel Pit to be applied to road surfacing over an approximately three-mile area of Mike's Creek Road, which is several miles away from the ... site."). The interests of the traveling public in Billings County will be served by the extraction of gravel from the Gravel Pit.

Additionally, the relief Plaintiff seeks–an immediate halt to mining operations–may result in otherwise avoidable damage to the very land Plaintiff aims to protect. Medora District Ranger Shannon Boehm has stated that "[s]ince mining has begun on Phase 2 it is critical to complete this entire phase through reclamation." Sec. Boehm Decl. ¶ 20. "Leaving [topsoil and overburden] stockpiles in place during late winter snowfalls and spring precipitation will result in ... the likely loss of material ... that is essential to reclaim the site." *Id.* ¶ 21. At oral argument, Plaintiff acknowledged this issue and agreed to work with the parties involved to solve it should the court grant its requested relief. *See* Hr'g Tr. 36:18–37:16. Although the court does not doubt the sincerity of Plaintiff's representations, given the modest size of the acreage of the present mining operations, the court finds that the public interest is better served by completion of that phase of mining operations, including planned land remediation measures.

Although Plaintiff has shown that the public interest, in part, favors granting a preliminary injunction, others factors favor allowing the presently approved mining operations to continue. Thus, this fourth factor is, for Plaintiff, neutral at best. Plaintiff therefore has failed to make a positive showing that the public interest favors injunctive relief.

IV. CONCLUSION AND ORDER

As Plaintiff has failed to carry its burden of demonstrating irreparable harm and has failed to show that the balance of equities and the public interest weigh in favor of injunctive relief, the court denies Plaintiff's Motion for Preliminary Injunction. Because the court denies Plaintiffs' Motion for Preliminary Injunction, it denies as moot Plaintiff's Motion for Imposition of a Nominal Bond. A separate Order accompanies this Memorandum Opinion, which sets the schedule for further proceedings in this matter.

All Citations

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