UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

IN THE MATTER OF Alaska LNG Project LLC	))	Docket No. 14-96-LNG

MOTION OF ALASKA GASLINE DEVELOPMENT CORPORATION FOR LEAVE TO ANSWER AND ANSWER TO INTERVENORS' REQUEST FOR REHEARING

Pursuant to the Department of Energy's ("DOE") Rules of Procedure, the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(a), and 10 C.F.R. § 590.501, Alaska Gasline Development Corporation ("AGDC")[1] respectfully moves for leave to answer, and to answer, the Request for Rehearing filed by the Center for Biological Diversity, Cook Inletkeeper and Sierra Club ("Intervenors") of Order No. 3643-C, "Order Affirming and Amending DOE/FE Order No. 3463-A Following Partial Grant of Rehearing" issued by DOE's Office of Fossil Energy and Carbon Management on April 13, 2023 ("Order 3643-C").[2]

MOTION FOR LEAVE

Although DOE's regulations do not permit answers to requests for rehearing unless otherwise permitted by the decisional authority, DOE has accepted answers to requests for rehearing for good cause when the answers are likely to assist with its decision-making process.[3] AGDC submits that

[1] Alaska LNG Project LLC, the authorization holder, joins in support of AGDC's Answer.

[2] 10 C.F.R. § 590.501(a) requires that an application for rehearing "shall be served on all parties." Neither AGDC nor Alaska LNG Project LLC, or their counsel of record, were served with a copy of the request for rehearing and therefore the request is procedurally deficient.

[3] *See Alaska LNG Project LLC,* DOE/FE Order No. 3643-B at 11 (Apr. 15, 2021) (granting AGDC's Motion for Leave to Answer because it was relevant to DOE's consideration of the issues raised in Sierra Club's

its answer is relevant to the issues raised in Intervenors' Rehearing Request, will assist DOE in its decision-making process, and enable DOE to compile a complete record. Accordingly, AGDC submits that good cause exists to waive the general rule and accept this Answer.

RELEVANT PROCEDURAL HISTORY

The Alaska LNG Project ("Project") requires the approval of the Federal Energy Regulatory Commission ("FERC") for construction and operation of the facilities that comprise the Project and authorization from DOE to export LNG from the Project. As is typically the case for LNG projects, FERC was the lead agency for complying with the National Environmental Policy Act ("NEPA"). DOE was a cooperating agency that participated in the preparation of FERC's comprehensive 1,500-page Final Environmental Impact Statement ("EIS"). In May 2020, FERC approved the construction and operation of the Project facilities.[4] In August 2020, DOE adopted FERC's EIS and granted export authorization in Order 3643-A.[5]

In response to Sierra Club's request for rehearing of Order 3643-A, DOE stated its intention to conduct two additional studies: (1) a study of upstream impacts associated with natural gas production on the North Slope of Alaska; and (2) a life cycle analysis of greenhouse gas ("GHG")

Rehearing Request of Order 3643-A); *Magnolia LNG, LLC*, DOE/FE Order No. 3909-A at n. 23 and Ordering Paragraph (A) (Mar. 30, 2018) (granting Motion for Leave to Answer because it "is relevant to our consideration of the issues raised in Sierra Club's Rehearing Request); *Golden Pass Products LLC*, DOE/FE Order No. 3978-A at n. 23 and Ordering Paragraph (A) (Mar. 30, (2018) (granting Motion for Leave to Answer because it "is relevant to our consideration of the issues raised in Sierra Club's Rehearing Request).

[4] *See Alaska Gasline Development Corp.,* 171 FERC ¶ 61,134 at PP 37-41 (2020*), order on reh'g*, 172 FERC ¶ 61,214 (2020).

[5] Order 3643-A at 32; Order 3643-C at 30. When FERC is the lead agency, DOE may incorporate its analysis of environmental impacts for purposes of NEPA compliance. This means that DOE can adopt FERC's analysis as its own "for purposes of any additional NEPA review triggered by an export authorization request" as long as the DOE independently reviews FERC's work and determines that its comments have been satisfied. *Sierra Club v. DOE*, 867 F.3d 189, 193 (2017) (internal quotation marks omitted).

emissions associated with LNG exported from the Project. DOE subsequently issued a Final Supplemental Impact Statement ("FSEIS") including and discussing these two studies.

On April 13, 2023, DOE issued Order 3643-C affirming its decision in Order 3643-A to grant export authorization and amending that order to include one additional condition relating to the venting of byproduct CO_2. On May 15, 2023, Intervenors filed their rehearing request. The next day, the D.C. Circuit issued an opinion rejecting all of the NEPA-based challenges made by two of the Intervenors herein, and affirmed FERC's order approving the Project in its entirety.[6]

SUMMARY OF ANSWER

In their rehearing request, Intervenors allege several errors pertaining to a variety of issues. They contend (at 2) that as a result of these errors: (a) DOE's conclusion that LNG exports from the Project are consistent with the public interest is arbitrary and capricious and (2) DOE's FSEIS does not comply with NEPA.

Intervenors' arguments suffer from three fundamental flaws. First, Intervenors misstate DOE's findings, as well as the applicable statutory standard. The standard of DOE's review of export authorizations under Section 3(a) of the Natural Gas Act (NGA") is not whether the exports are consistent with the public interest. Rather, the statute provides that DOE "shall authorize exports to non-FTA nations *unless* …. it finds that the proposed exportation … will *not* be consistent with the public interest." 15 U.S.C. § 717(b)(a) (2022) (emphasis added). This standard creates a presumption favoring export authorization.[7] Consistent with this standard, DOE found in Order 3643-C (at 6)

[6] *Center for Biological Diversity, et al. v. FERC*, No. 20-1379 (D.C. Cir. May 16, 2023).

[7] *Sierra Club v. DOE*, 867 F.3d 189, 203 (D.C. Cir. 2017) (*Freeport), quoting W. Va. Pub Servs Comm'n v. DOE,* 681 F.2d 847, 856 (D.C. Cir. 1987).

that the environmental impacts presented in the FSEIS are not sufficient to alter DOE's determination in Order 3643-A that exports from the Project are not inconsistent with the public interest.

Second, many of the errors advanced by Intervenors fail to recognize the statutory and procedural posture of this proceeding. Prior to its issuance of Order 3643-C, DOE addressed Intervenors' environmental concerns by adopting, and incorporating the reasoning of FERC's EIS, and by independently finding that FERC's EIS covered all reasonably foreseeable environmental impacts of the Project. Order 3643-A, at 32-34. As DOE's finding quoted above indicates, Order 3643-C confirms DOE's prior findings in light of the two additional environmental studies performed by DOE to supplement the record. In other words, these two additional studies provide further information to inform the public about the environmental impacts that might result from LNG export authorization. The additional studies and analyses performed by DOE in the FSEIS buttress the NEPA analysis performed by FERC and adopted by DOE. They do not provide any justification for challenging DOE's determination that export authorization is not inconsistent with the public interest.

In this vein, Intervenors also fail to acknowledge the dual jurisdiction that FERC and DOE have over the Project and the exports of LNG from the Project, respectively. As discussed below, with a few exceptions Intervenors' arguments relate to the matters subject to FERC's jurisdiction that have been raised and rejected by FERC in orders that have been affirmed by the D.C. Circuit Court of Appeals,[8] or could and should have been raised before FERC and the Court. As a result, these arguments represent an impermissible collateral attack on orders affirming that FERC's EIS complies with NEPA. The bulk of Intervenors' arguments, as discussed in more detail below, are barred by the doctrines of collateral estoppel and *res judicata*.

[8] *Center for Biological Diversity, et al. v. FERC,* No. 20-1379 (D.C. Cir. May 16, 2023).

Third, Intervenors' arguments are internally inconsistent and overstate DOE's obligations under NEPA. As to many alleged environmental impacts, Intervenors fault DOE for concluding that the additional analyses that Intervenors claim are needed would be speculative because they would necessarily rely on economic and other assumptions that constantly change. On the other hand, when DOE performs the additional analyses Intervenors request despite substantial uncertainties, they simply disagree with DOE's analyses. Neither of these arguments have merit. The first argument ignores established law that agencies are required to consider only indirect impacts that are reasonably foreseeable.[9] The second argument fails because DOE fulfills its NEPA obligations by adequately disclosing and considering environmental impacts. Intervenors' disagreement with DOE's studies does not constitute a violation of NEPA.[10]

ANSWER

A. The Doctrines of Collateral Estoppel and Res Judicata Bar All Arguments Made By Intervenors That Have Been, or Could Have Been, Raised in the FERC Proceedings.

The doctrines of collateral estoppel and *res judicata* are related preclusion doctrines intended to prohibit the relitigation of claims that have already been decided, or issues that should have been raised in prior litigation. The doctrine of collateral estoppel (or issue preclusion) forecloses litigation of issues that were actually litigated and necessarily decided by a valid and final judgment between the parties on the same or a different claim. The doctrine of *res judicata* (or claim preclusion)

[9] *Sierra Club v. DOE*, 867 F.3d 189, 193 (2017), *citing* 40 C.F.R. § 1508.8.

[10] NEPA does not mandate particular results. It requires only that the agency adequately identify and evaluate adverse environmental effects. *Id.* at 203, *citing Robertson v. v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989).

prohibits parties from relitigating claims or arguments that were or could have been raised in a prior action.[11] Both doctrines are equally applicable to administrative proceedings.[12]

Intervenors challenged FERC's orders approving the construction and operation of the Alaska LNG Project on numerous grounds, including FERC's failure to sufficiently consider environmental impacts to numerous resources, including wetlands, permafrost, upstream gas production, downstream LNG consumption, air quality, climate change and endangered species, among others. FERC addressed those concerns in its EIS, and Intervenors challenged the Commission's orders and the sufficiency of FERC's EIS at the Court of Appeals.[13] On May 16, 2023, the D.C. Circuit rejected Intervenors' arguments that FERC's environmental analysis failed to comply with NEPA.

In its rehearing request of DOE's Order 3643-A, Intervenors contend that DOE also failed to comply with NEPA for many of the same reasons they asserted at FERC and before the Court of Appeals with respect to FERC's EIS. Intervenors starkly state their position (at 12) as follows – "it is undeniable that the *Project, if constructed*, will cause significant environmental harm that *DOE* failed to appropriately evaluate or weigh in its public interest determination." But these construction impacts were considered in FERC's EIS, which was recently found to be in compliance with NEPA by the Court of Appeals. In other words, all issues relating to the sufficiency of FERC's EIS, which DOE has adopted, have actually been litigated and necessarily decided by the Court of Appeals and

---

[11] *Clark-Cowlitz Joint Operating Agency v. FERC,* 775 F.2d 366, 373-74 (D.C. Cir. 1985), *citing United States v. Mendoza,* 464 U.S. 154, 157-59 (1984)*; Allen v. McCurry,* 449 U.S. 90, 94 (1980)*; Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 (1979)*; Faucett Associates, Inc. v. AT & T,* 744 F.2d 118, 125 (D.C. Cir. 1984)*, Otherson v. Department of Justice,* 711 F.2d 267, 271, 273 (D.C. Cir. 1983).

[12] *See Questar Pipeline Co*., 57 FERC ¶ 61,287, at 61,939 (1991), *quoting Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Southwest Gas Corp*., 44 FERC ¶ 61,165, at 61,545-46 (1988).

[13] For purposes of this discussion of the Court appeal, Intervenors include only CBD and Sierra Club.

are barred by the doctrine of collateral estoppel. Similarly, all issues concerning FERC's EIS that could have been litigated in the FERC proceeding are barred by the doctrine of res judicata.

If Intervenors are permitted to relitigate the sufficiency of FERC's EIS a second time in connection with DOE's adoption of that same EIS, not only would such a result be prohibited by the the doctrines of collateral estoppel and *res judicata*, it would result in duplicative and costly environmental reviews contrary to the entire purpose of having a lead agency conduct NEPA reviews that other permitting agencies can rely upon and adopt. The result would be inefficient duplicative reviews of the same project by two agencies.[14]

In the FERC proceeding, Intervenors contended that emissions from downstream consumption of LNG exports are an indirect impact of construction of the Project and therefore the downstream environmental impacts of such exports in foreign countries must be quantified and analyzed by FERC in its EIS.[15] In the instant DOE proceeding, Intervenors appear to take the opposite view of cause and effect. Intervenors argue (at 14-15) that an indirect impact of a grant of export authorization by DOE will be the construction of the facilities needed to produce and deliver North Slope natural gas for liquefaction and export. In other words, Intervenors argued at FERC that exports are an indirect impact of FERC's facilities authorization and argue at DOE that construction of the facilities is an indirect impact of DOE's export authorization. If Intervenors' arguments were adopted, both agencies would be required to perform their own independent and duplicative analysis

[14] DOE's decision to perform additional studies and issues a supplemental EIS was not based on any perceived deficiencies in FERC's EIS, but rather was intended to comply with two Executive Orders requiring agencies to review, *inter alia,* all orders that may increase GHG emissions or impact climate change. Order 3643-B.

[15] *See Alaska Gasline Development Corp.,* 171 FERC ¶ 61,134 at PP 37-41 (2020), *order on reh'g,* 172 FERC ¶ 61,214 (2020), *aff'd, Center for Biological Diversity, et al. v. FERC,* No. 20-1379, slip op. at 12-13 (D.C. Cir. May 16, 2023).

of the same environmental impacts. The result advocated by Intervenors is inconsistent with the lead agency concept and numerous pronouncements by the Council on Environmental Quality ("CEQ"), which has repeatedly encouraged agencies to avoid duplicative NEPA review by adopting other agency's environmental analyses.[16]

At least one court has applied collateral estoppel in similar circumstances. A U.S. District Court in Florida ruled that a party was collaterally estopped from arguing that the United States Army Corps of Engineers ("Corps") violated NEPA and the Clean Water Act by refusing to select an alternative runway for an airport expansion.[17] The Court found that the Federal Aviation Agency ("FAA"), as the lead agency for the NEPA review of the expansion project under a different Act, had already performed an EIS that considered reasonable alternatives, and that the Corps, as a cooperating agency, properly deferred to the FAA.[18] In a related case, the D.C. Circuit affirmed the FAA's rejection of the alternative in question.[19]

The Court first ruled that because the causes of action under the CWA and the D.C. Circuit case were different, *res judicata* (claim preclusion) did not apply.[20] The Court held, however, that the plaintiff was collaterally estopped (issue preclusion) from challenging the Corps' rejection of the

---

[16] *See, e.g,* CEQ's 2012 Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act. In this Guidance, CEQ encouraged agencies to coordinate and take advantage of existing documents and studies. CEQ stated that "coordinated and concurrent environmental reviews are appropriate whenever other analyses, surveys, and studies will consider the same issues and information as a NEPA analysis." 77 Fed. Reg. 14473 (2012).

[17] *City of Dania Beach v. United States Army Corps of Engineers*, No. 12-60989-CIV, 2012 U.S. Dist. LEXIS 93458, 2012 WL 3731516 (S.D. Fla. July 6, 2012). (Attached as Attachment A)

[18] 2012 U.S. Dist. LEXIS 93458 at 12-15 (Attachment A at 4-5 of 10).

[19] *Id.* at 10, 16, *citing City of Dania Beach v. FAA,* 628 F.3d 581, 591, 393 U.S. App. D.C. 353 (D.C. Cir. 2010). (Attachment A at 4 & 6 of 10)

[20] *Id.* at 21 (Attachment A at 6 of 10).

alternative because the DC Circuit had affirmed the FAA's rejection of that alternative.[21] In the instant case, because the D.C. Circuit has affirmed that FERC's environmental review complies with NEPA, Intervenors are collaterally estopped from challenging DOE's compliance with NEPA on all issues that FERC reviewed. Moreover, because both FERC and DOE have reviewed the same project under the same statutes -- NEPA and the NGA -- the causes of action are the same and Intervenors are also barred by the doctrine of *res judicata* from challenging the sufficiency of the FERC EIS that DOE adopted.

DOE should find in its rehearing order that all arguments advanced by Intervenors that were raised, or could have been raised, in the FERC proceeding concerning the sufficiency of FERC's EIS are barred by these two preclusion doctrines. These issues include (1) the purpose and need for the Project, which is the same purpose and need for LNG exports; (2) direct impacts on all resources considered by FERC; (2) cumulative and indirect impacts; (3) alternatives, including No Action Alternatives; and (4) environmental justice issues. The only NEPA-based argument that is not barred by these preclusion doctrines is whether DOE's analysis of downstream impacts of exports comports with NEPA. That issue is not barred because FERC has no jurisdiction to examine these impacts,[22] and in fact did not do so.[23]

---

[21] *Id.* at 22. (Attachment A at 7 of 10) ("Because the City of Dania Beach had a full and fair opportunity to litigate this issue before the DC Circuit, the Court finds that Plaintiffs are collaterally estopped from arguing before this Court that the North Runway alternative presents a practicable alternative for the Airport's expansion plans.")

[22] *See Alaska Gasline Development Corp.,* 171 FERC ¶ 61,134 at PP 37-41, *order on reh'g,* 172 FERC ¶ 61,214 (2020), *aff'd, Center for Biological Diversity, et al. v. FERC,* No. 20-1379, Slip op. at 13 (D.C. Cir. May 16, 2023), *citing Sierra Club v. FERC,* 827 F.3d 36, at 46-47 (D.C. Cir. 2016)*; Sierra Club v. FERC,* 867 F.3d 1357, 1373 (D.C. Cir. 2017) *("Sabal Trail").*

[23] FERC's EIS did consider the indirect impacts caused by upstream emissions in its discussion of cumulative impacts, including an analysis of greenhouse gas emissions that would result from changes to non-jurisdictional upstream production facilities and the associated sale of North Slope gas that was previously shut-in. The EIS found that 8 Bcf of gas per day is currently being produced and reinjected into the ground

B. In Addition to Being Prohibited Relitigation, Intervenors' Arguments Should Be Rejected Because FERC's Environmental Analysis, As Supplemented By DOE's FSEIS, Took the Necessary Hard Look at Environmental Impacts.

Although Intervenors focus on the FSEIS, DOE's environmental analysis is comprised of both FERC's comprehensive EIS, which DOE adopted, and the FSEIS. When viewed correctly, DOE's supplemental environmental analysis merely enhances the recent finding by the Court of Appeals that FERC's EIS comports with NEPA. While Intervenors make numerous overstatements and mischaracterize the record in several regards, AGDC will address below only some of the arguments included in Intervenors' rehearing request in an effort to assist DOE in its consideration of Intervenors' rehearing request.

1. Upstream Impacts and Missing Information

Intervenors argue (at 31-32) that DOE's order "summarily dismisses" upstream impacts on the North Slope due to a lack of specific information. As discussed above, however, impacts from the construction of upstream production facilities were described and analyzed in FERC's EIS.[24] As a result, Intevenors' argument concerning upstream impacts is barred.

In addition, even if it was not barred, this argument is meritless. It is based on one statement in the FSEIS that the exact locations of components of the PTU Expansion are unknown at this time. FSEIS at 4.1-2. The full sentence in the FSEIS is "[a]lthough the exact locations of components of the PTU Expansion are unknown at this time, the majority of activities would only affect surficial

due to a lack of infrastructure to deliver that gas to market. Because the Project would avoid the emissions impacts associated with the reinjection process at Prudhoe Bay, there would be a net decrease in emissions at this field. FERC EIS at Section 4-1208. FERC also found that the Project would not induce development of additional fields for at least twenty years after it goes into the service. FERC EIS at Section 4-1160.

[24] *See Alaska Gasline Development Corp.,* 171 FERC ¶ 61,134 at P 237 (2020), discussing FERC's evaluation of non-jurisdictional facilities, including new and modifications to upstream production facilities in its EIS at 4-1159-60.

soil resources and have minimal impact on the deep geological features encompassed in the area." While Intervenors argue that DOE failed to comply with CEQ requirements when information is unavailable, they also ignore DOE's detailed explanation that in the absence of specific locations for a project feature, DOE developed a range of potential impacts based on other design data, which includes an upper bound that provides decision-makers with needed information. FSEIS at 4.21-1.

While Intervenors flyspeck the one statement concerning a lack of exact locations for certain pads, wells and access roads, they ignore DOE's robust discussion of the upstream facilities that will be needed on the North Slope as part of the Project. Specifically, Section 2.2 of the FSEIS includes detailed descriptions of these facilities that will be impacted at Point Thomson, Prudhoe Bay and Kuparuk River. It should also be noted that DOE's detailed analysis of upstream impacts provided in the FSEIS is in addition to the analysis provided in FERC's EIS, which DOE has adopted. Together, these analyses more than meet the requirements of NEPA.

2. Environmental Justice

Intervenors argue (at 13-14) that DOE did not adequately consider the *Project's* impact on environmental justice and subsistence. As discussed above, and acknowledged by Intervenors, potential impacts to subsistence users in environmental justice communities will be caused by *construction and operation of Project facilities*, not by LNG exports. For this reason, these impacts were fully analyzed in FERC's EIS.[25] Intervenors challenged the sufficiency of FERC's EIS on appeal but chose not to pursue judicial review of FERC's analysis of these issues. Intervenors do not get a second bite at the apple by challenging DOE's reliance on FERC's EIS.

[25] *See Alaska Gasline Development Corp.,* 171 FERC ¶ 61,134 at PP 164-176, 193-201, *order on reh'g,* 172 FERC ¶ 61,214 at PP 114-116 (2020).

Moreover, Intervenors' argument is a gross exaggeration of what DOE actually stated. Intervenors contend (at 13) that the Order acknowledges that the Project *will* have disproportionately high and adverse impacts on environmental justice communities, and they characterize the Order as "summarily conclud[ing] that those impacts do not matter, because subsistence users will simply move their activities elsewhere" and "simply must adapt." In the Order, DOE did not conclude the Project *will* have such impacts, it noted the *potential* for such impacts. Order at 15, *citing* FSEIS Table S-4 at S-19-20. And DOE did not dismiss this potential by concluding that subsistence users will simply move their activities elsewhere. DOE cited its finding in the FSEIS that potential impacts to subsistence users could be reduced with appropriate mitigation measures, including, among others, constructing facilities during winter months and localizing construction to existing locations where development is already occurring and adhering to standard BMPs and project-specific plans. Order at 15, *citing* FSEIS at 4.14-6. The FSEIS also discusses impacts to these communities and mitigation measures that would minimize these impacts. FSEIS at Section 4.11.4.

Finally, Intervenors' argument ignores the fact that the local Alaska communities they portend to protect *support* the Project. In comments filed with DOE on the draft SEIS, the Alaska Eskimo Whaling Commission ("AEWC"), which represents 11 bowhead whale subsistence hunting villages, including Nuiqsut and Kaktovik -- the two environmental justice communities the FSEIS identified – provided a resolution supporting the Alaska LNG Project. This resolution recognizes many of the project benefits in the form of lower energy costs, energy security, and economic boosts to these communities. This resolution, which is attached as Attachment B to this answer, was submitted by AEWC to DOE during the public comment period on the Draft SEIS.

From a broader perspective, the environmental justice arguments made by Intervenor environmental groups are emblematic of the irony of their positions in this proceeding. While they

purport to protect the people and environment in Alaska, they ignore the real needs and desires of indigenous and other Alaskans that support the Project due to the many benefits that will result from this Project. Alaskans, including subsistence users, are aware of the impacts on the environment that could result from the Project, but overwhelmingly support the Project because they have concluded, as have FERC and DOE, that with appropriate mitigation measures, the benefits of the Project outweigh its environmental impacts. DOE should not permit Intervenors to thwart the desires and needs of Alaskans under the guise of protecting them.

3. Venting of ByProduct Co_2

In comments on DOE's draft SEIS, Sierra Club, an Intervenor sponsoring this request for rehearing, requested that DOE condition its export authorization by requiring AGDC to demonstrate that byproduct CO2 "produced alongside this gas was not vented." Based on this request, DOE conditioned its authorization with a requirement that AGDC certify monthly that the natural gas produced for export "did not result in the venting of *byproduct* carbon dioxide into the atmosphere, unless required for emergency, maintenance, or operational exigencies and in compliance with the FERC Order."[26] Order 3643-C at 6-7 and n.6 citing Sierra Club Comments on Draft SEIS at 14-15 (emphasis added).

In their rehearing request, Intervenors now seek (at 30) to extend the "no venting" certification requirement beyond the separation of CO_2 from methane when feed gas is treated and routed to the pipeline. They request that this requirement apply to later steps in the process, including the transportation, injection and long-term storage of CO_2. Contrary to Intervenors' claim (at 31) that this requirement was "unclear," the venting of *byproduct* CO_2 clearly applies only to the gas

[26] Sierra Club Comments on the Draft SEIS at 14-15 (emphasis added).

treatment process of separating CO_2 from the feed gas stream. An expansion of this condition to facilities downstream of the gas treatment plant ("GTP") is unwarranted, would duplicate and overlap existing regulatory requirements, and in some cases would be entirely infeasible.

In addition, other federal and state regulations already address reinjection wells, carbon sequestration and the use of carbon after it is separated from feed gas. The EPA has a detailed permitting, monitoring and reporting program governing carbon capture, injection and storage ("CCS"). EPA's regulations include requirements for permitting, injection well siting criteria, financial responsibility, well construction and operation, mechanical integrity, testing and monitoring, reporting, post-injection site care and site closure, and emergency and remedial response.[27] In addition, the Alaska Oil and Gas Conservation Commission regulates injection wells and the State of Alaska has proposed legislation specifically addressing geologic carbon sequestration.[28]

A no venting requirement applied beyond the activity of separating byproduct CO2 from feed gas would impose burdensome requirements that greatly exceed conditions imposed on other projects. DOE should allow the agencies with the authority and expertise over carbon dioxide emissions to regulate them in order to avoid inconsistent, overlapping and infeasible requirements. AGDC respectfully submits that Intervenors' proposed expansion of this condition be denied.

Intervenors also claim that the venting exception for "operational exigencies" is too vague. They claim (at 31) that "this exception might allow venting for years while sequestration or EOR equipment is offline." Intervenors' concern is misplaced. DOE is more than capable of determining

---

[27] 40 C.F.R. §§ 146.81, *et seq.*

[28] *See* § 20 AAC 25. https://gov.alaska.gov/governor-dunleavy-outlines-carbon-management-bill-package/

what qualifies as an operational exigency. Moreover, the consequence postulated by Intervenors that could ensue from this exception cannot happen. The GTP plant design and operating configuration is based on separating the CO_2 stream for compression into an outlet pipeline that will be tied into a CO_2 pipeline for transmission to the injection location. The CO_2 offtake pipeline and injection facilities must be in place for the GTP to operate as designed. Thus, CO_2 cannot be vented for years while sequestration or enhanced oil recovery ("EOR") equipment is offline. The venting of CO_2 at the GTP can only occur during plant startup, emergency shut-down/blow down upset events or major maintenance/repair. Moreover, venting is subject to the GTP air permit and the type of extended venting hypothesized by Intervenors would not be in compliance with this permit.

4. Other Project Facilities Impacts

Toward the end of their rehearing request (at 27-37), Intervenors discuss a number of impacts they contend DOE did not adequately consider, including black carbon, seismic impacts from carbon storage, and methane leakage. These impacts are also related to the construction and operation of the facilities subject to FERC jurisdiction, not exports, and were identified and analyzed in FERC's EIS.[29] By adopting FERC's EIS, DOE adequately considered these impacts.

For example, Intervenors argue (at 27) that DOE's FSEIS does not adequately disclose or analyze the significant black carbon emissions associated with the Project, including upstream infrastructure. The FSEIS in fact identifies and describes the impacts of black carbon in Section 3.15.6. In Section 4.15.6, the FSEIS describes how construction and operation of the Project would

[29] *See Alaska Gasline Development Corp.,* 171 FERC ¶ 61,134 at PP 37-41, *order on reh'g,* 172 FERC ¶ 61,214 at PP 70-72, 81-87 (2020).

emit black carbon, and explains that because black carbon is a component of $PM_{2.5}$, black carbon estimates were included within the $PM_{2.5}$ emissions estimates.

Intervenors complain (at 33) that the FSEIS does not separately quantify black carbon emissions. Intervenors made this same argument in response to FERC's EIS, which also quantified carbon emissions as a component of $PM_{2.5}$.. FERC fully addressed this argument, concluding, among other things, that Intervenors "fail to demonstrate how the claimed traits of black carbon make it necessary to conduct an additional, tailored evaluation of impacts and mitigation measures."[30] The same conclusion is appropriate here. Likewise, seismic impacts from carbon storage were also addressed in FERC's EIS.[31]

Intervenors' arguments regarding DOE's analysis of methane leakage consist primarily of quibbling over the level of precision included in the study. Thus, Intervenors argue (at 35-36) that the FSEIS fails to identify emissions factors for each stage of the supply chain or to clearly account for methane emissions from each stage examined. They also take issue (at 36-37) with the +/- 5% sensitivity analysis DOE chose to examine the effect of changes in methane emissions on overall lifecycle emissions. While Intervenors contend the 5% is arbitrary, they provide no basis for challenging DOE's conclusion that the impact that methane leaks have on total lifecycle emissions is modest. Nor is the level of precision Intervenors demand required by NEPA.

C. Global Market Need, Downstream Global Impacts and the No Action Alternatives

Intervenors present a convoluted and confusing argument that melds the concepts of market need, downstream global impacts and the No Action Alternatives together. As discussed below,

---

[30] *See Alaska Gasline Development Corp.,* 172 FERC ¶ 61,214 at P 72 (2020), *aff'd, Center for Biological Diversity, et al. v. FERC,* No. 20-1379 (D.C. Cir. May 16, 2023).

[31] *See* FERC EIS at Sections 4.1.3.

Intervenors' arguments about global market need and downstream global impacts are contrary to well-established policy and precedent, both at DOE and the Court of Appeals. Their arguments regarding the two No Action Alternatives boil down to a complaint that DOE provided a range of impacts from taking no action given the uncertainties in projecting future markets in light of changing economic conditions. DOE's sensible approach provides more than sufficient analysis to comply with NEPA's requirement to analyze a No Action Alternative.

1. Market Need / Global LNG Demand

Intervenors devote seven pages (at 4-10) to a discussion intended to show that there is no demonstrated global need for the Project's LNG. This argument is premised on speculation that the global need for natural gas created by Russia's invasion of Ukraine "will rapidly diminish" or will be met by renewables due to the climate change goals of the Asian countries targeted by the Project. Neither AGDC nor DOE need respond to this speculative argument because a showing of need in the form of global demand is not required for DOE to conclude that LNG exports are not inconsistent with the public interest.

As Intervenors acknowledge, DOE's longstanding policy is that market need not be shown to approve LNG exports because the market will decide which projects move forward.[32] DOE examines the impacts that LNG exports may have on the domestic need for natural gas, not the need

[32] Order 3643-at 22. *See* Policy Guidelines and Delegation Orders Relating to the Regulation of Imported Natural Gas, 49 Fed. Reg. 6684 (Feb. 22, 1984); *Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC*, DOE/FE Order No. 3282 at 112 (May 17, 2013) (the market is the most efficient means of allocating natural gas supplies).

for LNG in importing countries.[33] Intervenors provide no basis for DOE to reverse its long-standing policy.

2. Downstream Global Emissions

Apart from their arguments on the no-action alternatives discussed below, it does not appear that Intervenors contest the life-cycle analysis performed by DOE in its FSEIS, including its analysis of global emissions. That is likely because several decisions from the D.C. Circuit have already rejected Intervenors' challenges to similar DOE lifecycle studies and have affirmed DOE's rationale that the more detailed analyses and quantifications Intervenors constantly demand are not required by NEPA because such global impacts are not reasonably foreseeable.

Most prominent of these cases is *Sierra Club v. DOE*, 867 F.3d 189, 193 (2017) (*Freeport*) In that case, Sierra Club argued DOE failed to perform a tailored analysis of the indirect and cumulative environmental effects of LNG exports, relying instead on lifecycle studies that evaluated generic amounts of LNG exports. With respect to downstream impacts of LNG consumption in importing countries, the Court upheld DOE's finding that such impacts were not reasonably foreseeable. *Id.* at 202. The Court cited with approval DOE's explanation that modeling the net effect that LNG exports would have in each destination country given the potential for LNG to substitute for other fuel sources would require consideration of the dynamics of all energy markets in these countries. The Court agreed with DOE that such an analysis would be "too speculative to inform the public interest determination." *Id.* DOE's lifecycle analysis in this proceeding was more than sufficient to comply with NEPA.

[33] Order 4800 at 28*; Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC*, DOE/FE Order No. 3282 at 6 (May 17, 2013).

3. The No Action Alternatives

In its FSEIS, DOE identified two No Action Alternatives. No Action Alternative 1 assumes that if LNG from the Project was not exported, equivalent amounts of LNG would be exported, and oil would be produced from other capacity not located in Alaska. In this scenario, the same amount of LNG would be exported (and oil produced) whether the Project was built or not. In response to comments on the draft FSEIS challenging this assumption, DOE calculated a No Action Alternative 2 that assumes continued production of oil on the North Slope and that no LNG would substitute for the LNG that would be exported from the Project. In other words, No Action Alternative 2 is the "true" no action alternative that commenters sought and presents a worst-case calculation of downstream emissions.

Intervenors' primary complaint appears to be that DOE provided two No Action Alternatives that provide a range of downstream impacts instead of predicting "where in the middle [of that range] impacts would likely fall." See Rehearing Request at 15-19. Intervenors claim that the FSEIS lacks a "true" No Action Alternative. *Id.* at 21-25. This argument ignores DOE's rationale for providing the range and is based on the same demand for more precision that the Courts have already held would be speculative and DOE does not have to provide.

As DOE explained, given the complexities of energy markets and the uncertainties inherent in predicting further energy market behavior and energy consumption, including fuel-switching, around the world, any attempt to make a definitive conclusion about the magnitude of GHG emissions and resulting climate change impacts would be speculative. Order 3643-C at 23-25, 41-42. As DOE stated, its approach of calculating best-case and worst-case scenarios provides decision-makers and the public with a wide range of useful information to assess potential emissions.

Intervenors' demand that DOE make a more precise prediction about where in this range impacts may fall is irrational and inconsistent with the Court's holding in *Freeport* discussed above. DOE reasonably concluded that the extent of fuel switching that would occur in foreign countries was too speculative for the same reasons the Court stated in *Freeport.* The specificity demanded by Intervenors is neither possible nor required by NEPA. By assuming all LNG exported from the Project would be incremental to global markets in No Action Alternative 2, DOE has presented a "true" No Action Alternative that allows a comparison of the Project's impacts to a scenario where LNG exports from the Project do not occur. The notion that DOE violated NEPA by analyzing a second No Action Alternative that provided *more* information is ludicrous.[34]

Intervenors state (at 25) that "the FEIS does not even attempt to make specific projections of the market demand for LNG exports from the Project which could serve as the basis for more precise GHG emissions, instead providing two bookends and stating that it takes 'no position' on whether one, the other, or some point in the middle represents reality." They contend that DOE should have relied on the NERA modeling submitted in the application for export authorization in this proceeding in 2014, and that its failure to do so runs afoul of CEQ regulations that govern missing information.[35]

Intervenors' attempt to characterize DOE's rationale for not providing more specificity within the no action range of outcomes as based on missing information is misplaced. As discussed above, DOE's decision not to provide greater specificity is not that information is missing, it is that any study that would attempt to provide greater specificity would be too speculative and unreliable due to changing market conditions, including fuel switching. Indeed, recent world events like the

[34] Indeed, the D.C. Circuit affirmed FERC's use of two No Action Alternatives in its EIS, including a "true" no action alternative. *Center for Biological Diversity, et al. v. FERC,* No. 20-1379, Slip op. at 7 (D.C. Cir. May 16, 2023).

[35] Rehearing for Request at 25-26, *citing* 40 C.F.R. § 1502.21.

Ukraine invasion illustrate that such studies cannot reliably predict future LNG demand despite being based on the best information known at the time.

CONCLUSION

For the aforementioned reasons, AGDC requests that DOE find on rehearing that (1) all arguments made by Intervenors that were made or could have been made at FERC in connection with FERC's EIS that DOE adopted are barred by the doctrines of collateral estoppel and/or *res judicata*; (2) DOE's environmental analysis, comprised of the adopted FERC EIS, as supplemented by DOE's FSEIS, fully complies with NEPA; and (3) no changes to DOE's export authorization or its byproduct CO_2 venting certification requirement are warranted.

Respectfully submitted,

Jennifer Brough

Jennifer Brough
Locke Lord LLP
701 8th Street NW, Suite 500
Washington, DC 20001
(202) 220-6965
jbrough@lockelord.com
Counsel for Alaska LNG Project LLC

Howard L. Nelson

Howard L. Nelson
Kenneth M. Minesinger
Jack Lebris Erffmeyer
Greenberg Traurig, LLP
2101 L Street, NW, Suite 1000
Washington, DC 20037
(202) 331-3100
nelsonh@gtlaw.com

June 7, 2023

ATTACHMENT A

City of Dania Beach v. United States Army Corps of Eng'rs

United States District Court for the Southern District of Florida

July 6, 2012, Decided; July 6, 2012, Entered on Docket

CASE NO. 12-60989-CIV-COHN/ROSENBAUM

Reporter
2012 U.S. Dist. LEXIS 93458 *; 2012 WL 3731516

CITY OF DANIA BEACH, FLORIDA, et al., Plaintiffs, vs. U.S. ARMY CORPS OF ENGINEERS, Defendant, and BROWARD COUNTY, FLORIDA, Intervenor/Defendant.

Prior History: *City of Dania Beach v. United States Army Corps of Engrs, 2012 U.S. Dist. LEXIS 81625 (S.D. Fla., June 13, 2012)*

Counsel: [*1] For City of Dania Beach Florida, Rae Sandler, Grant Campbell, Plaintiffs: Angela Freda Benjamin, LEAD ATTORNEY, Thomas Neal McAliley, White & Case, Miami, FL.

For U.S. Army Corps of Engineers, Defendant: C. Scott Spear, Reuben "Ben" Schifman, U.S. Department of Justice, Environment and Natural Resources Division, Washington, DC.

For Broward County, Intervenor Defendant: Edwin Andrew Steinmeyer, LEAD ATTORNEY, Lewis Longman & Walker, Tallahassee, FL; James David Rowlee, Broward County Attorney's Office, Fort Lauderdale, FL; Michelle Diffenderfer, Lewis Longman & Walker, West Palm Beach, FL.

Judges: JAMES I. COHN, United States District Judge.

Opinion by: JAMES I. COHN

Opinion

ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

THIS CAUSE is before the Court upon Plaintiffs' Motion for Preliminary Injunction [DE 4] ("Motion"). The Court has carefully considered the Motion, Defendant U.S. Army Corps of Engineers' Response [DE 15] ("Corps Response"), Defendant/Intervenor Broward County's Response [DE 22] ("Broward County Response"), Plaintiffs' Reply to the U.S. Army Corps of Engineers' Response [DE 18] ("Corps Reply"), Plaintiffs' Reply to Broward County's Response [DE 28] ("Broward County Reply"), the argument **[*2]** of counsel at the July 3, 2012 hearing, and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiffs City of Dania Beach, Rae Sandler, and Grant Campbell (collectively "Plaintiffs") filed suit against Defendant U.S. Army Corps of Engineers (the "Corps") on May 23, 2012. Complaint [DE 1]. The Complaint challenges a permit the Corps issued which allows Intervenor/Defendant Broward County [1] to fill approximately 8.87 acres of wetlands and secondarily impact 39.17 acres of wetlands in order to expand Runway 9R/27L ("South

[1] On June 6, 2012, Broward County moved to intervene. **[*3]** See DE 12. The Court granted this motion on June 13, 2012, finding that Broward County was entitled to intervene as a matter of right. See DE 17.

Runway") at the Fort Lauderdale-Hollywood International Airport (the "Airport"). Id. ¶ 1. Plaintiffs contend that the Corps issued the permit without considering the impact of increased noise levels on the health of residents in neighborhoods in the City of Dania Beach, thus violating both the National Environmental Policy Act ("NEPA") and the Clean Water Act ("CWA"). Id. ¶ 2. Plaintiffs argue that the Corps authorized the permit for the South Runway despite another practicable alternative, namely a north parallel runway ("North Runway"), which would have resulted in less noise and environmental impacts. Id. ¶ 3.

Plaintiffs seek a declaration from this Court that the permit issued by the Corps violates NEPA, the CWA, and the Administrative Procedure Act ("APA"), to vacate the Corps' record of decision and the permit, and to enjoin the Corps and Broward County (collectively "Defendants") from any further construction of the South Runway until it complies with NEPA, the CWA, and the APA. Complaint at 20-21. On May 24, 2012, Plaintiffs filed the instant Motion which seeks to enjoin further construction of the South Runway while the Court considers Plaintiffs' Complaint on the merits. Both the Corps and Broward County oppose the Motion.

II. DISCUSSION

A. Legal Standards.

To obtain a preliminary injunction, a plaintiff must establish: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the defendant is not enjoined; (3) the threatened injury to plaintiff outweighs the harm an injunction may cause defendant; and (4) the injunction would not disserve the public interest. See *Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995)*. **[*4]** "[A] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each of the four prerequisites." *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003)* (quoting *McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir.1998)* (internal citations and quotations omitted)).

The National Environmental Policy Act ("NEPA"), *42 U.S.C. §§ 4321-4370h*, is "essentially a procedural statute that requires federal agencies to inform themselves of the environmental effects of proposed federal actions." *Fla. Keys Citizens Coal., Inc. v. U.S. Army Corps of Eng'rs, 374 F. Supp. 2d 1116, 1123 (S.D. Fla. 2005)* (citing *Sierra Club v. U.S. Army Corps of Eng'rs, 295 F.3d 1209, 1214 (11th Cir. 2002))*. When an agency proposes any "major [f]ederal action[] significantly affecting the quality of the human environment," NEPA mandates the preparation of an environmental impact statement ("EIS"). *42 U.S.C. § 4332(2)(C)*. "Agencies are not required to duplicate the work done by another federal agency which also has jurisdiction over a project." *Sierra Club, 295 F.3d at 1215*. When a **[*5]** project has both a ***lead agency*** and cooperating agencies, a cooperating agency may adopt an EIS signed by a ***lead agency***, provided it conducts "an independent review of the statement" and finds that its "comments and suggestions have been satisfied." Id. (quoting *40 C.F.R. § 1506.3(c)*).

"If, after the original EIS is prepared, the agency 'makes substantial changes in the proposed action that are relevant to environmental concerns,' or if there are 'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,' the agency is required to prepare a supplemental environmental impact statement" ("SEIS"). Id. (quoting *40 C.F.R. § 1502.9(c)(1)*). The standard for determining when a SEIS is required is "essentially the same" as the standard for determining when an EIS is required. *Id. at 1215-16* (quoting *Envtl. Def. Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. Unit A July 1981))*. [2] If "'the post-[original EIS] changes in the [project] will have a "significant" impact on the environment that has not previously been covered by the [original] EIS,'" a supplement is necessary. *Id. at 1216* (quoting *Nat'l Wildlife Fed'n v. Marsh, 721 F.2d 767, 782 (11th Cir.1983))*.

---

[2] The **[*6]** decisions of the former United States Court of Appeals for the Fifth Circuit decided before September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981)*.

The Clean Water Act ("CWA"), *33 U.S.C. § 1251, et seq.*, "prohibits the discharge of pollutants, including dredged spoil, into waters of the United States, except in compliance with various sections of the CWA." *Fla. Keys Citizens Coal., Inc., 374 F. Supp. 2d at 1124*. Section 404(a) of the act authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into waters of the United States. *33 U.S.C. § 1344(a)*. "Waters of the United States" include wetlands. *33 C.F.R. § 328.3(a)*, *(b)*.

"Challenges to agency action under NEPA are governed by the arbitrary-and-capricious standard set forth in the Administrative Procedure Act [("APA")], *5 U.S.C. § 706(2)(A)*." *Wildlaw v. U.S. Forest Serv., 471 F. Supp. 2d 1221, 1231 (M.D. Ala. 2007)* (citing *Marsh v. Or. Natural Res. Council, 490 U.S. 360, 375-76, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)*; *N. Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538 (11th Cir.1990))*. [3] The APA requires that a reviewing court shall "hold unlawful **[*7]** and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*. The arbitrary and capricious review standard is a "deferential one." *Wildlaw, 471 F. Supp. 2d at 1231* (citing *Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir.1996))*. The court may not substitute its own judgment for that of the agency. Id. (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)*; *Skinner, 903 F.2d at 1539*)). The court must also "look beyond the scope of the decision itself to the relevant factors that the agency considered . . . to ensure that the agency took a 'hard look' at the environmental consequences of the proposed action." *Sierra Club, 295 F.3d at 1216* (citations omitted).

"An agency has met its 'hard look' requirement if it has examine[d] the relevant data and articulate[d] **[*8]** a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Id. (quoting *Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43* (internal quotation marks omitted)). A court may overturn an agency's decision as arbitrary and capricious under "hard look" review only if: "(1) the decision does not rely on the factors that Congress intended the agency to consider; (2) the agency failed entirely to consider an important aspect of the problem; (3) the agency offers an explanation which runs counter to the evidence; or (4) the decision is so implausible that it cannot be the result of differing viewpoints or the result of agency expertise." *Id.* (citing *Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43*). The burden of establishing that the decision was arbitrary and capricious falls upon the party seeking to overturn the agency decision. *Sierra Club, 935 F. Supp. at 1565*; *Citizens for Smart Growth v. Peters, 716 F. Supp. 2d 1215, 1221 (S.D. Fla. 2010)*.

B. Plaintiffs Have Failed to Demonstrate a Likelihood of Success on the Merits.

Plaintiffs first argue that they are likely to succeed on the merits. Motion at 9. Plaintiffs contend that the Corps violated **[*9]** NEPA by failing to disclose or analyze how high noise levels caused by the South Runway expansion would affect the health of Dania Beach residents despite Plaintiffs repeatedly raising this issue with the federal agencies. Id. at 10-11. Plaintiffs also state that neither the 2008 EIS, 2011 Written Reevaluation, nor the 2011 Memorandum for Record/Environmental Assessment addressed the health effects of high noise levels on residents and that the Corps' failure to prepare a SEIS regarding these health effects "render[ed] arbitrary and capricious its decision." Id. at 11. Finally, Plaintiffs contend that the Corps violated the CWA by approving the South Runway because a practicable alternative, i.e. the North Runway, existed which would avoid or minimize wetlands impacts. Id. at 14.

Both the Corps and Broward County dispute that Plaintiffs will suffer irreparable harm. The Corps argues that it fully complied with NEPA because, as a cooperating agency, it was required to defer to the Federal Aviation Administration ("FAA") on analysis of aviation issues such as noise. Corps Response at 7. The Corps also contends that it was not required to prepare a SEIS because the 2008 EIS "extensively **[*10]** discusses noise impacts using an established methodology and the Corps reasonably relied upon it; information regarding health impacts was not

---

[3] This standard also applies to challenges under the CWA. *Sierra Club v. U.S. Army Corps of Engr's, 935 F. Supp. 1556, 1565 & n.10 (S.D. Ala.1996)*.

'new'; and a mitigation plan is in place to address the impacts of noise." Id. Finally, the Corps argues that it fully complied with the CWA and that it could not consider the North Runway proposal advocated by Plaintiffs because the FAA had already rejected this alternative as impractical. Id. at 15. The Corps also points out that the D.C. Circuit Court of Appeals in *City of Dania Beach v. FAA, 628 F.3d 581, 591, 393 U.S. App. D.C. 353 (D.C. Cir. 2010)*, already determined that there was no practicable alternative to the proposed South Runway. Id. In its separately filed response, Broward County similarly contends that Plaintiffs' claims pursuant to NEPA, the CWA, and the APA are barred by the doctrine of claim preclusion as a result of this D.C. Circuit Court of Appeals decision. Broward County Response at 4. Broward County also argues that the Corps reasonably considered and rejected the North Runway alternative despite Plaintiffs' contention that it was a practicable alternative that would have minimized environmental impacts. See id. at 7

1. Plaintiffs Have Failed **[*11]** to Establish a Likelihood of Success on the Merits of Their NEPA Claim.

Plaintiffs first argue that the Corps violated NEPA when approving the permit for the South Runway. Motion at 9-13. Plaintiffs contend that the Corps violated NEPA by failing to consider the impact of noise levels upon the health of residents of Dania Beach despite being provided with studies which explained how noise levels might impact residents' cardiovascular health, hypertension, or the cognitive performance of children. Id. at 11. Plaintiffs argue that the Corps' failure to consider these health effects and to prepare a SEIS render the Corp's decision to issue the permit arbitrary and capricious. Id. at 12. Broward County disputes that a SEIS was necessary because the Corps was entitled to rely on the FAA's analysis of noise impacts under both NEPA and the Vision 100-Century of Aviation Reauthorization Act ("Vision 100 Act"). Broward County Response at 6. The Corps also contends that it was required to defer to the FAA on the issue of noise impacts and that it nonetheless was not required to prepare a SEIS because "the 2008 EIS extensively discusses noise impacts using an established methodology and the Corps **[*12]** reasonably relied upon it; information regarding health impacts was not 'new'; and a mitigation plan is in place to address the impacts of noise." Corps Response at 7.

"Review of NEPA claims is limited to procedural compliance with NEPA rather than the substance of the decision." *Fla. Keys Citizens Coal., Inc., 374 F. Supp. 2d at 1144*. The Court may not "call into question any reasonable agency methodologies used in arriving at its conclusion." Id. (quoting *Protect Key West, Inc. v. Cheney, 795 F. Supp. 1552, 1559 (S.D. Fla. 1992)*). Applying this narrow standard of review, the Court agrees with the Defendants that Plaintiffs have failed to demonstrate a likelihood of success on their NEPA claim.

As Broward County points out, the Vision 100 Act requires that "[t]he Secretary [of transportation, acting through the FAA] shall determine the reasonable alternatives to an airport capacity enhancement project at a congested airport or a project designated under *subsection (b)(2)*. Any other Federal agency, or State agency that is participating in a coordinated review process under this section with respect to the project shall consider only those alternatives to the project that the Secretary **[*13]** has determined are reasonable." *49 U.S.C. § 47171(k)*. The Act further provides that the FAA "shall be the ***lead agency*** for . . . airport capacity enhancement projects at congested airports and shall be responsible for defining the scope and content of the environmental impact statement, consistent with regulations issued by the Council on Environmental Quality. Any other Federal agency or State agency that is participating in a coordinated environmental review process under this section *shall give substantial deference*, to the extent consistent with applicable law and policy, *to the aviation expertise of the Federal Aviation Administration.* *49 U.S.C. § 47171(h)* (emphasis added). Thus, the Corps, as a mere coordinating agency on this airport expansion project, was required to defer to the FAA regarding all matters of "aviation expertise." See Broward County Response at 7. [4] This necessarily includes impacts to residents from increased aviation noise. See

[4] In their reply to Broward County's Response, Plaintiffs assert that "[i]t has come to Plaintiffs' attention that the Corps was *not a cooperating agency at all*, which weakens Defendants' position even further." Broward County Reply at 3 n.1 (citing April 3, 2008 email frm the FAA to the Corps, Exhibit A to the Broward County Reply [DE 28-1] (emphasis in original). The Court disagrees. While this email does state the that Corps "is not a cooperating agency" on the EIS, no where does it state that the Corps is the ***lead agency***. Furthermore, as pointed out by counsel for the Corps at the July 3, 2012 hearing, the FAA Record of Decision

Fla. Keys Citizens Coal., Inc., 374 F. Supp. 2d at 1157 (finding that the Corps could rely upon the judgment of other agencies with particular expertise related to managing sensitive marine environments); *Nat'l Mitigation Banking Ass'n v. U.S. Army Corps of Eng'rs, No. 06-cv-2820, 2007 U.S. Dist. LEXIS 10528, 2007 WL 495245, at *22 (N.D. Ill. Feb. 14, 2007)* **[*14]** (noting that "[w]here multiple agencies are involved, a ***lead agency*** prepares an EIS and a cooperating agency can adopt that EIS if it independently reviews the EIS and is satisfied that its comments and suggestions are satisfied.").

Moreover, the Court agrees with the Corps that the scope of its environmental **[*15]** review was properly limited to the impact of the runway expansion on the nearby wetlands. See Corps Response at 7-9. "Although it specifies a broad range of impacts which must be considered, NEPA does not expand the authority of the Corps to either approve or disapprove activities outside waters of the United States." *Environmental Quality; Procedures for Implementing the National Environmental Policy Act (NEPA), 53 Fed. Reg. 3120, 3121 (Feb. 3, 1988)* (to be codified at 33 C.F.R. pt. 230, 325). Here, as the Corps points out, it determined that its jurisdiction was "limited to the work in jurisdictional waters" because the project was "under the purview of the FAA." October 21, 2011 Memorandum for Record, Exhibit 3 to the Declaration of Angela F. Benjamin [DE 4-8] at 8. The Corps' decision to limit its review to the waters impacted by the project should be accorded deference. *Fla. Wildlife Fed'n v. U.S. Army Corps of Engr's, 401 F. Supp. 2d 1298, 1312 (S.D. Fla. 2005)* (citing *Marsh, 490 U.S. at 375-76*). Plaintiffs therefore have failed to demonstrate a likelihood that this decision will be found arbitrary and capricious. [5]

Even if the Corps was required to independently consider aviation noise impacts, Plaintiffs have failed to establish that it is likely that the Corps' failure to prepare a SEIS will be found arbitrary **[*17]** and capricious. A SEIS should only be prepared when new circumstances "present a *seriously* different picture of the environmental impact of the proposed project from what was previously envisioned." *Fla. Keys Citizens Coal., Inc., 374 F. Supp. 2d at 1145* (citations and internal quotation marks omitted) (emphasis in original). The record here establishes that noise impacts were considered in the 2008 EIS. See June 2008 Final Environmental Impact Statement, Exhibit 1 to the Declaration of Angela F. Benjamin [DE 4-4] at 7-19; [DE 4-5] at 1-2. Additionally, as the Corps points out, back in January 2008, before the EIS was issued, Plaintiffs "provided FAA with more than ten recent studies that linked high aviation noise levels with stress-related health impacts." Compl. ¶ 33. The 2008 EIS reflects that the FAA received a comment regarding the adverse health effects of airport noise, but decided to apply its existing aviation noise methodology. June 2008 Final Environmental Impact Statement, Exhibit 1 to the Declaration of Angela F. Benjamin [DE 4-5] at 17. Thus, Plaintiffs have failed to demonstrate that the Corps failed to take a "hard look" at the health effects of aviation noise or that **[*18]** the 2011 Word Health Study constitutes "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" sufficient to require a SEIS. See *40 C.F.R. § 1502.9(c)(1)*; *City of Bridgeton v. FAA, 212 F.3d 448, 459 (8th Cir. 2000)* (declining to "second-guess the FAA's noise level findings" because "[t]he agency, not a reviewing court, is entrusted with the responsibility of considering the various modes of scientific evaluation and theory and choosing the one appropriate for the given circumstances.") (citations and internal quotation marks omitted). [6]

---

contains numerous references to the Corps' role as a coordinating agency. See FAA Record of Decision, Exhibit C to the Corps' Response [DE 15-3] at 7, 79, 99-100.

[5] In their reply to the Corps' Response, Plaintiffs contend that **[*16]** "regulations prohibit the Corps from limiting its analysis to the direct effects of filling wetlands and ignoring indirect and cumulative effects, as it has done here." Corps Reply at 4. This argument misstates the issue. Where, as here, the project was under the control of another federal agency, the Corps was permitted to adopt the EIS of the ***lead agency***. See *40 C.F.R. § 1506.3(a)* (stating that cooperating agency may adopt ***lead agency***'s EIS if it concludes that its NEPA requirements have been satisfied); see also *North Carolina v. City of Va. Beach, 951 F.2d 596, 605 (4th Cir. 1991)* (holding that Federal Energy Regulatory Commission was not required to perform NEPA review over portions of the project over which it did not have jurisdiction where NEPA "requirements were previously satisfied by the Corps"); *Cal. Trout v. Schaefer, 58 F.3d 469, (9th Cir. 1995)* (limiting scope of Corps review to effects of filling wetlands where another agency had the responsibility of protecting fisheries).

[6] Plaintiffs state that the only mention of health effects related to aviation noise in the 2008 EIS is an FAA response to Plaintiffs' comment "buried in an appendix to the 2008 EIS." Corps Reply at 2. Plaintiffs argue that this cannot possibly constitute a "'hard

2. **[*19]** Plaintiffs are Collaterally Estopped from Arguing that the North Runway Alternative was a Practicable Alternative.

Broward County contends that "[t]hrough this suit, the City of Dania Beach is collaterally attacking the FAA EIS and ROD on the same grounds it asserted, or could have asserted, in the D.C. Circuit litigation." Broward County Response at 6. According to Broward County, the City of Dania Beach is "precluded from challenging the Corps' decision to adopt the FAAs EIS, ROD, and alternatives analysis, because the City already challenged the very basis for that decision and lost." Id. In their reply to Broward County's Response, Plaintiffs dispute that claim preclusion applies here. Broward County Reply at 2-3. They fail, however, to address whether issue preclusion might apply.

"The doctrine of claim preclusion (or ***res judicata***) bars the parties to an action from relitigating matters that were or could have been litigated in an earlier suit." *Shurick v. Boeing Co., 623 F.3d 1114, 1116 (11th Cir. 2010)*. A claim is barred "whenever (1) a court of competent jurisdiction has (2) rendered a final judgment on the merits in another case involving (3) the same parties and (4) the same **[*20]** cause of action." *Id. at 1116-17* (citing *Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999)*). The doctrine of issue preclusion or ***collateral estoppel*** "precludes the re-adjudication of the same issue, where the issue was actually litigated and decided in the previous adjudication, even if it arises in the context of a different cause of action." *Cmty. State Bank v. Strong, 651 F.3d 1241, 1263-64 (11th Cir. 2011)*. Where as here, the decision which supposedly has preclusive effect was rendered by a federal court, federal law of issue preclusion applies. *CSX Transp., Inc. v. Bhd. of Maint. of Way Emps., 327 F.3d 1309, 1316 (11th Cir. 2003)*. Under federal law, for issue preclusion to apply, "(1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding." *Id. at 1317* (quoting *I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1549 (11th Cir.1986)*).

Here, **[*21]** the City of Dania Beach previously challenged the FAA's approval of Alternative B1b, the South Runway. *City of Dania Beach, 628 F.3d at 583*. In that litigation, the City of Dania Beach challenged the approval of the South Runway under the Airport and Airway Improvement Act, the Department of Transportation Act of 1966, and Executive Order 11,990. [7] *Id. at 584*. Here, Plaintiffs bring their challenge pursuant to NEPA and the CWA. Thus, because there is not overlap between the causes of action, the Court disagrees with Broward County that claim preclusion applies. Nonetheless, the Court finds the analysis of the D.C. Circuit regarding the practicability of the North Runway persuasive and preclusive.

The D.C. Circuit found that "[e]ven assuming for the purposes of argument that **[*22]** Alternative C1 [the North Runway] would cause no impacts to wetlands, the FAA's determination was not arbitrary and capricious. . . . Alternative C1's inferiority to Alternative B1b, in its longer delays (particularly in poor weather) and the safety drawbacks of the requisite runway-crossing, render it not only imprudent under *§ 47106(c)(1)(B)* [of the Airway Improvement Act of 1982] but impracticable under the Executive Order." *City of Dania Beach, 628 F.3d at 591*. Thus, applying the same arbitrary and capricious review standard the Court must apply here, Plaintiff City of Dania Beach already litigated the issue of whether the North Runway presents a practicable alternative for Airport

---

look' sufficient to comply with NEPA." Id. Because the Court may not determine the appropriate "mode[] of scientific evaluation and theory" that the Corps must apply, the Court finds that Plaintiffs have failed to meet their burden of establishing a likelihood of success on the merits of their NEPA claim. See *City of Bridgeton, 212 F.3d at 459*.

[7] Executive Order 11,990, § 2(a), 42 Fed. Reg. 26,961 (May 24, 1977), conditions federal assistance for construction in wetlands on a finding that there is no practicable alternative. Actions taken pursuant to Executive Order 11,990 are subject to the same standard of review under the APA as actions under NEPA and the CWA. *Nat'l Wildlife Fed'n v. Babbitt, No. 88-0301, 1993 U.S. Dist. LEXIS 10689, 1993 WL 304008, at *8-9 (D.D.C. July 30, 1993)*.

expansion. Because the City of Dania Beach had a full and fair opportunity to litigate this issue before the DC Circuit, the Court finds that Plaintiffs are collaterally estopped from arguing before this Court that the North Runway alternative presents a practicable alternative for the Airport's expansion plans. See *City of Dania Beach, 628 F.3d at 584* (finding that "the agency was not arbitrary or capricious in viewing Alternative C1 as 'impracticable' within the meaning of the Executive Order.").

The **[*23]** heart of Plaintiffs' Clean Water Act claim is that the Corps violated the CWA by not selecting an alternative that was not the least environmentally damaging practicable alternative. Motion at 14. Under the CWA regulations, "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharged which would have less adverse impact on the aquatic ecosystem." *40 C.F.R. § 230.10(a)*. The regulations further provide that "[a]n alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *40 C.F.R. § 230.10(a)(2)*. Plaintiffs argue throughout their Motion that the North Runway is a practicable alternative to the South Runway. See, e.g., Motion at 14 ("The record shows that the North Parallel Runway (Alternative C1) is such a practicable alternative."). Plaintiffs contend that the "Corps' reasons for rejecting the North Parallel Runway as impracticable are legally invalid." [8] Id. at 15. However, because the D.C. Circuit already rejected The City of Dania Beach's argument that the North Runway was a practicable alternative, **[*24]** the Court finds that Plaintiffs are unlikely to succeed on the merits of their challenge to the permit under the Clean Water Act. [9]

3. Even if Plaintiffs Are Not Collaterally Estopped From Arguing that the North Runway Alternative was a Practicable Alternative, They Still Have Failed to Demonstrate a Likelihood of Success on the Merits of Their Clean Water Act Claim.

Even if the D.C. Circuit's opinion in City of Dania Beach does not have preclusive effect, Plaintiffs have still failed to demonstrate a likelihood of success on the merits of their CWA claim. The FAA determined that the North Runway was not a reasonable alternative due to delay, capacity, displacement, and limited potential future development. FAA Record of Decision, Exhibit C to the Corps' Response [DE 15-3] at 53. Pursuant to the Vision 100 Act, the Corps was required to give deference to the FAA's expertise and determination **[*26]** that this alternative did not serve the project purpose. *49 U.S.C. § 47171(h)*; *Nat'l Mitigation Banking Ass'n, 2007 U.S. Dist. LEXIS 10528, 2007 WL 495245, at *27* ("The Vision 100 Act makes the Corps's conclusion unassailable."). As the Northern District of Illinois held in National Mitigation Banking Association v. United States Army Corps of Engineers, a case involving a challenge to a permit issued by the Corps to fill wetlands in conjunction with proposed expansion of Chicago's O'Hare International Airport, "[r]equiring the Corps to consider other alternatives would only waste the Corps's time, because alternatives rejected by the FAA could never be selected." *2007 U.S. Dist. LEXIS 10528, 2007 WL 495245, at *24*; see also *Nat'l Mitigation Banking Ass'n, 2007 U.S. Dist. LEXIS 10528, 2007 WL 495245, at *27* ("Because the FAA found the off-site and blended alternatives to be unreasonable, the Corps was prohibited from

---

[8] Specifically, Plaintiffs contend that (1) CWA regulations do not allow the Corps to reject an alternative because the applicant is unwilling to do it; (2) the North Runway Alternative "would achieve the planning target of maintaining average annual operational delays in 2010 below 6 minutes;" (3) the relocation of ground facilities does not render the North Runway impracticable from a constructability or cost standpoint; and (4) increased runway crossings and the need for additional air traffic control coordination necessitated by the North Runway do not render that alternative "unsafe." Motion at 15-16.

[9] Plaintiffs argue that "there is a different-and lesser-legal standard governing practicability under the Executive Order than there is under the Clean Water Act." Motion at 16 n.6. The Court finds this argument unpersuasive. In addition to finding the North Runway alternative impracticable under Executive Order 11,990, the D.C. Circuit also concluded that this alternative was "imprudent" within the meaning of *§ 47106(c)(1)(B)* of the Airport and Airway **[*25]** Improvement Act. Even if the Court were to find that Plaintiffs are not collaterally estopped from arguing that the North Runway is a practicable alternative, the issue here is whether Plaintiffs are likely to succeed on the merits of their CWA claim. The Court finds the D.C. Circuit's opinion highly persuasive that Plaintiffs are unlikely to succeed on the merits of their CWA claim, as discussed in more detail in subsection 3 below.

considering them in further detail and was not arbitrary or capricious in declining to do so."). That court also noted that "it was not arbitrary and capricious for the Corps to rely on the conclusions in the FEIS regarding which alternatives were reasonable under NEPA" [10] when the District of Columbia Circuit had previously found that the FAA "acted with **[*27]** great care in conducting its analysis for the EIS and ROD." *2007 U.S. Dist. LEXIS 10528, [WL] at *25* (citations and internal quotation marks omitted). Similarly here, because the FAA rejected the North Runway alternative, the Corps was not required to consider this alternative when issuing the permit. [11]

Because the Court has found that Plaintiffs have failed to meet their burden as to the first factor, the Court will deny the Motion. See *Fla. Clean Water Network, Inc. v. Grosskruger, No. 3:08-cv-120-J-32TEM, 2008 U.S. Dist. LEXIS 11100, 2008 WL 435156, at *1 (M.D. Fla. Feb. 14, 2008)* ("Plaintiffs having failed to demonstrate a substantial likelihood of success as to any of their claims **[*28]** against the Corps, the Court need not determine whether the other prongs of the injunction standard are met."). However, even if the Court were to find for the Plaintiffs as to this factor, the Court would nonetheless deny the Motion because, as discussed below, Plaintiffs have also failed to meet their burden as to the other three factors.

C. Plaintiffs Have Failed to Demonstrate a Threat of Irreparable Injury.

Plaintiffs contend that they will suffer irreparable injury in the absence of an injunction because initial steps to build the South Runway extension have begun and will continue during the course of the proceedings. Motion at 17. [12] According to Plaintiffs, destruction of the wetlands, noise and air impacts from continued construction, visual blight from the runway, and "the risk implied by a violation of NEPA" are irreparable injuries that Plaintiffs will suffer. Id. at 17-18. Both Defendants challenge whether Plaintiff has demonstrated a threat of irreparable injury. The Corps contends that because Plaintiffs waited more than seven months before seeking an injunction "protection of the wetlands was not previously in the forefront of Plaintiffs' concerns related to the Runway **[*29]** project." Corps Response at 17. Broward County asserts that neither of Plaintiffs' alleged irreparable injuries-destruction of wetlands and construction impacts-are "irreparable or particularly injurious to Plaintiffs." Broward County Response at 12.

The Court finds that Plaintiffs have failed to demonstrate that they will suffer an irreparable injury. As Broward County points out, Plaintiffs have alleged "no particular personal connection with or benefit from the impacted wetlands, alleging only general platitudes about wetlands." Broward County Response at 12. Moreover, Plaintiffs' complaints about construction noise, dust, and visual blight are not tied to their causes of action which concern the impact of aviation noise upon the residents of Dania Beach. See id. Plaintiffs will not suffer any supposed ill effects from aviation noise while the runway is still under construction. See id. Finally, as the Corps points out, the permit to fill 8.87 acres of federal wetlands and to secondarily impact 39.17 acres of wetlands, was issued on November 8, 2011, and includes substantial mitigation measures. See Corps Response at 18; Permit, Exhibit 12 to the

---

[10] The court later went on to say that "[t]he corps was justified in relying on that conclusion in the CWA context just as it was in the NEPA context discussed above." *Nat'l Mitigation Banking Ass'n, 2007 U.S. Dist. LEXIS 10528, 2007 WL 495245, at *27*.

[11] Moreover, the North Runway alternative advocated by Plaintiffs was projected to impact 15.41 acres of wetlands versus 15.40 for the selected South Runway alternative. FAA Record of Decision, Exhibit C to the Corps' Response [DE 15-3] at Table 3, p. 36. Thus, the effect on the waters of the United States was similar under both alternatives.

[12] In their reply to Broward County's Response, Plaintiffs assert that since this lawsuit was filed, Broward County "has *increased* the rate at which it is filling the wetlands." Broward County Reply at 5 (emphasis in original). To support this contention, Plaintiffs rely upon the Declaration of Christopher Johnston, an individual who has claimed to have regularly visited the construction site since April 2012 "to monitor the pace of work." Declaration of Christopher Johnston, Exhibit B to Broward County Reply [DE 28-2] ¶ 2. The Court does not find this evidence compelling. Mr. Johnston's Declaration does not establish that wetlands are being filled due to the lawsuit rather than according to the existing schedule of work. Additionally, at the July 3, 2012 oral argument, counsel for Broward County stated on the record that the Youtube videos referenced in Mr. Johnston's Declaration are actually of the County's construction staging area and **[*30]** not wetlands.

Declaration of Angela F. Benjamin [DE 4-19]. Accordingly, Plaintiff has failed to articulate why they now face irreparable injury if the wetlands are destroyed.

D. The Balance of Equities Do Not Weigh in Favor of a Preliminary Injunction.

Plaintiffs also argue that the irreparable **[*31]** injuries they will suffer outweigh the harms that might be suffered by the Corps as a result of any delay. Motion at 19. Plaintiffs argue that the Corps "would not be affected in any significant way by an injunction, because it would only be required to reconsider its permit decision." Id. Plaintiffs further argue that any costs of delay suffered by the Broward County Aviation Department would not be irreparable and would be minimal compared to the "irreparable harm to the Plaintiffs' environmental interests." Id. Plaintiffs also contend that Broward County's claims of harm are "exaggerated" and that Broward County brought any harm related to delay upon itself. Broward County Reply at 7. Broward County disputes that it would not suffer irreparable harm from a delay. Broward County Response at 12-13. According to Broward County, it has already expended approximately $82 million dollars in land acquisition, planning, design, and construction for the South Runway project. Id. at 13 (citing Declaration of David Roepnack, Exhibit 3 to Broward County Response [DE 22-3] ("Roepnack Decl.") ¶ 4). Broward County also asserts that Plaintiffs' claim that the North Runway alternative would save **[*32]** the County $276 million is disingenuous because Plaintiffs ignore the costs of delay and redesign if the Plaintiffs could somehow require construction of this alternative. Id. The Corps adds that the South Runway alternative, actually selected by the FAA, provides enormous public benefits. Corps Response at 20.

The Court agrees with Defendants that the alleged injury to the Plaintiffs does not outweigh the harm an injunction would cause Defendants. As discussed in Section C above, Plaintiffs have failed to demonstrate an irreparable injury. Given the immense costs to Broward County and the community at large if the construction is halted or otherwise delayed, the balance of the equities weigh in favor of denying the Motion. See Roepnack Decl. ¶ 12 (noting that aggregate delay costs would total $66,175 per day or $1,985,250 per 30-day month); Declaration of Stephen Belleme, Exhibit E to Broward County Response [DE 22-5] ¶ 3 (noting that the total economic effect of the runway expansion project is 11,000 jobs and $1.4 billion); Declaration of Douglas Webster, Exhibit D to Broward County Response [DE 22-4] ¶ 9 (noting that construction of the runway expansion project has been timed so **[*33]** that the Airport will only have to suffer one peak season with one runway). [13]

E. The Public Interest Would Not Be Served by a Preliminary Injunction.

Finally, Plaintiffs contend that the public interest will be served by issuance of a preliminary injunction because "[i]t is in the public interest to require the Corps to follow the law. . . [and] to prevent the destruction of irreparable wetlands and the visual blight, and noise and air impacts that will result from construction of the South Runway." Motion at 20. As discussed above, both Broward County and the public would not be served by a delay of the South Runway construction. **[*34]** As the Corps notes, the South Runway alternative is designed to "address[] long-term capacity needs, and ensures the availability of future expansion and growth at the airport." Corps Response at 20. Given the vast costs of delay-both monetary and an increase in the time required to complete the South Runway expansion project- and Plaintiffs failure to articulate sufficient threat of irreparable injury, the Court finds that the public interest would not be served by an injunction. [14]

---

[13] Given that a permit has already been issued by the Corps, Broward County is proceeding with the construction in accordance with that permit, and it is Plaintiffs, not Broward County, who seek to change the status quo, the Court disagrees that Broward County brought harm upon itself by proceeding with construction contracts. See Broward County Reply at 7-8. As noted in note 12, supra, the Court does not believe that Plaintiffs have sufficiently substantiated their claims that Broward County has accelerated filling of wetlands in response to the filing of this lawsuit.

[14] Because the Court has determined that Plaintiffs are not entitled to a preliminary injunction, the Court does not consider Broward County's request that Plaintiffs be required to post an injunction bond. See Broward County Response at 15-17.

III. CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Preliminary Injunction [DE 4] is **DENIED.** The Court will enter a separate order regarding scheduling of this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6TH day of July, 2012.

/s/ James I. Cohn

JAMES I. COHN

United States District Judge

End of Document

ATTACHMENT B

ALASKAESKIMO
WHALING COMMISSION

RESOLUTION 2022 — 10

A RESOLUTION TO SUPPORT THE ALASKA LNG PROJECT

WHEREAS, the Alaska Eskimo Whaling Commission (AEWC) is a non-profit organization representing Alaska Native Subsistence Whaling Captains in Northern coastal Alaska and represents the 11 bowhead whale subsistence hunting villages of Utqiaġvik (Barrow), Nuiqsut, Kaktovik, Pt. Hope, Kivalina, Wales, Savoonga, Gambell, Little Diomede, Wainwright and Pt. Lay; and

WHEREAS, our Whaling Captains and communities rely on the subsistence harvest of bowhead whales and other marine mammals in or adjacent to the Beaufort and Chukchi Seas, and importantly, our hunters also share the fruits of our harvest beyond our 11 communities, with Alaskan Native families and communities throughout the state; and

WHEREAS, the Alaska LNG Project uses a pipeline for transport of natural gas off the North Slope instead of using tankers, decreasing potential impacts on marine waters and the bowhead whale; and

WHEREAS, the Alaska LNG Project provides opportunities for gas offtakes in Alaska communities, which we support to help lower energy costs for our Whaling villages; and

WHEREAS, Alaska has an abundance of natural resources, yet our communities are remote, and have some of the highest energy costs in the nation and some of the most extreme cold weather; and

WHEREAS, the Alaska LNG Project would significantly lower our energy costs, improve energy security and provide a strong economic boost to our communities; and

WHEREAS, the Alaska LNG Project has been studied extensively by the Federal Energy Regulatory Commission (FERC) as well as the Department of Energy (DOE) and all of the cooperating resource agencies for many years and received project authorizations; and

WHEREAS, the Alaska Gasline Development Corporation (AGDC) has committed to continue working with the AEWC as noted in its project authorizations, permits and presentations, including joining the Conflict Avoidance Agreement to minimize any interactions with bowhead whales during construction.

NOW, THEREFORE, BE IT RESOLVED that AEWC urges DOE to:

1. Finalize the Supplemental Environmental Impact Statement as soon as possible; and

2. Reaffirm the existing Order, as the project is clearly in the public interest.

DULY ADOPTED THIS 16th DAY OF JULY, 2022

John Hopson, Jr.

ATTEST:

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of June 2023, served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Howard L. Nelson

Howard L. Nelson