UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 24-1065
No. 24-1066
(consolidated)

Badger Helicopters, Inc.; Black Hills Aerial Adventures, Inc.; Rushmore Helicopters, Inc.,
Petitioners,

versus

United States Department of Transportation, Federal Aviation Administration; United States Department of the Interior, National Park Service,
Respondents,

Public Employees for Environmental Responsibility; The Coalition to Protect America's National Parks,
Respondent-Intervenors.

RESPONDENT-INTERVENORS' RESPONSE IN OPPOSITION TO PETITIONERS' MOTION FOR A STAY

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INTRODUCTION

Respondent-Intervenors Public Employees for Environmental Responsibility (PEER) and the Coalition to Protect America's National Parks (CPANP) (collectively, Respondent-Intervenors) herein oppose Petitioners' May 5, 2024, Motion for Stay pending appeal. Document No. 5390571 [24-1065]. The Motion relies on misrepresentations of key facts. Further, it lacks any expert opinion supporting the two main technical challenges it makes. It also offers contradictory arguments about the harms to the Petitioners and is not adequately supported by the law. In particular, the Motion does not demonstrate that the Petitioners are likely to eventually succeed on the merits. Nor have they shown irreparable harm to them or that weighing the balance of harms, taking into account the public interest, favors them. Indeed, they have not offered any facts or argument that account for the significant public interests at stake, which this Response will show align strongly against the requested Stay.

FACTS

Respondent-Intervenors support this opposition with the four appended declarations of: Paula Dinerstein, Michael Pflaume, Cheryl Schrier, and Kurt Fristrup, Ph.D. The key fact points will be cited in the Argument section, but two preliminary fact issues are addressed here.

Petitioners' Memorandum Contains Inaccuracies and Incorrect Citations.

At p. 3, Petitioners' Memorandum is incorrect where it states: "Although the NPATMA [the National Parks Air Tours Management Act] was adopted in 2000, the Agencies did not finalize any ATMP for the next nineteen years." In fact, the Agencies did not complete the first ATMPs until July of 2022, which was 22 years after NPATMA's adoption.[1] [2]

Petitioners Misrepresent the Chronology.

As demonstrated in the attached Declaration of Paula Dinerstein, the Petitioners' Memorandum and Exhibit A thereto, the Declaration of Mark Schlaefli, present significant inaccuracies regarding the effect of the D.C. Circuit Court of Appeals' ruling in *In Re Public Employees for Environmental Responsibility*, 957 F3d 267 (D.D.C 2020), on the development of the Mount Rushmore National Memorial and Badlands National Park Air Tour Management Plans (ATMPs). Ms.

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[1] *In Re Public Employees for Environmental Responsibility*, United States Court of Appeals for the District of Columbia Circuit, Case No. 19-1044, Joint Supplemental Report of the Federal Aviation Administration and the National Park Service, Document No. 1955988, p. 19.

[2] At pp. 12 (second time cited), 21, and 23, the Memorandum incorrectly cites to "Ex. F, at 5," "Ex. F at 7-9," and "Ex. F, at 5-6," respectively, but none of those citations refer to language supporting the assertions in the Memorandum. Exhibit F is the Aviation Environmental Design Tool (AEDT), Version 3e, Technical Manual. It does not contain language supporting Petitioners' assertions on environmental impacts and other matters.

Dinerstein was, and is, PEER's lead attorney in that matter; the D.C. Circuit still has continuing jurisdiction over it.

Petitioners repeatedly allege that the National Park Service (NPS) and Federal Aviation Administration (FAA) adopted those two ATMPs under a "rushed" and "compressed timeline." But, in fact, the timelines for the agencies to complete the two ATMPs were neither "rushed" nor "compressed." After 19 years of what the D.C. Circuit found was "egregious" delay in completing ATMPs, the Court ordered that they be completed for all parks that required them in two more years, by August 2022. The Agencies did not meet this deadline for Badlands or Mount Rushmore, and the Court allowed the Agencies to set their own extended deadline more than a year beyond the original deadline. Dinerstein Dec., ¶¶ 6-10. The Agencies were allowed until December 31, 2023, to finalize the ATMPs, but they actually voluntarily did so more than a month prior to their deadline, on November 15, 2023. *Id.*, ¶ 9. Thus, the Agencies were not "rushed" or "compressed," but set their own timeline and were able to complete the ATMPs early.

The only claimed support put forth by the Petitioners about "compressed timelines" is in the Schlaefli Declaration. At ¶ 16, Mr. Schlaefli, the President of the Petitioners, alleges "the Agencies" - without naming any particular official - made statements about a compressed timeline in a very recent advisory group meeting. However, his statement is gross hearsay and not even claimed by Mr. Schlaefli to be

on his personal knowledge of actually hearing any person make such statements. See Dinerstein Dec., at ¶ 11. He claims the Agencies complained about only having "two years for completion of the ATMPs". That unattributed and inadmissible hearsay alleging incorrect facts by an obviously biased declarant ignores that the Agencies actually had more than 3 1/2 years to complete the ATMPs from the time of the D.C. Circuit decision, as established in the Dinerstein Declaration per the docket of the D.C. Circuit case. That whole thread of "rushed" and "compressed timeline" arguments by Petitioners based on the Schlaefli Declaration should be stricken and/or ignored.

There is little need to dwell on the false "compressed timeline" allegation because Petitioners' Memorandum itself shows there was no compressed timeline. At page 4, they quote the D.C. Circuit's opinion, dated **May 1, 2020**, saying the NPS and FAA were expected by the Court to finalize the ATMPs "within the next two years." But, then the Memorandum, at page 5, acknowledges these two ATMPs were not actually finalized and issued until **November 15, 2023**. See Dinerstein Dec., ¶ 5. The Agencies in fact had plenty of time to put together well-supported ATMPs, which they did.

ARGUMENT

1. **Petitioners Are Not Likely to Succeed on the Merits.**

A. Inadequate support for a Stay.

Obtaining a stay of a Federal agency action pending appeal is a difficult burden. See the four-part test in *Nken v. Holder*, 556 U.S. 418, 434 (2009), as cited in Petitioners' Memorandum, p. 6. Here the only evidence submitted is the self-serving Declaration of the President of the Petitioners, Mr. Schlaefli. Despite resting predominately on two highly technical issues involving noise measurement methods and air safety concerns, the Motion for a Stay neglected to append any expert declarations demonstrating any methodology failure by the Agencies or any resulting damage to the Petitioners. This fact alone suggests they failed to satisfy their burden.

The Motion also neglects the judicial review standard under the National Parks Air Tour Management Act (NPATMA, 49 U.S.C. § 40128, under which the ATMPS were promulgated, a standard that is deferential to the Agencies. Under 49 U.S.C. § 46110(c), the findings of fact in support of the two ATMPs "… if supported by substantial evidence, are conclusive." According to the Supreme Court in *Consolo v. Fed. Mar. Com.*, 383 U.S. 607, 619-20, 86 S. Ct. 1018, 1026 (1966) (in pertinent part, citations omitted):

> We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229. …. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Here, the FAA's and NPS's findings of fact are set forth in the two massive and very thorough Administrative Records (ARs) before the Court. Document Nos. 5386858 [24-1065] and 5386860 [24-1066]. The Agencies filed the ARs two weeks before Petitioners' filed their Motion for a Stay, dated May 5th. The ARs provide supporting evidence for the ATMP approvals that go far beyond the selected excerpts the Petitioners used for their Motion. Petitioners made no argument and submitted no declaration addressing the totality of the ARs and whether their key findings met the *Consolo* standard, *supra,* of "a reasonable mind might accept as adequate to support a conclusion." This Court should rule at this stage that Petitioners are unlikely to prevail on the merits because they have merely shown that they draw a different "conclusion from the evidence," but they have not demonstrated a lack of "substantial evidence" supporting the ATMP decisions under NPATMA.

B. **Mischaracterization of NEPA's requirements.**

Petitioners' Memorandum, at 14, mischaracterizes a threshold issue under the National Environmental Policy Act (NEPA; 42 U.S.C. § 4321, et seq.) regarding the Agencies' alleged failure to consider "significance" of all the non-selected alternatives during the Finding of No Significant Impacts (FONSI) phase. Without support or citation, they seem to argue there was a violation of NEPA and an arbitrary and capricious action. But, what the Agencies did was not arbitrary nor

capricious -- it was entirely consistent with the regulations and long-standing NEPA practice.

The foundation for their argument at p. 14 is the claim that, "the Agencies pre-determined" an "outright ban" in order that "the Agencies would not need to specifically consider any reasonably foreseeable environmental effects of any of the alternatives that offered reduced air tours." However, Petitioners provide no evidence of improper predetermination, and they are false in asserting the Agencies did not consider the environmental effects of the alternatives. That they did consider the effects is obvious from the two Environmental Assessments (EAs) attached as exhibits with Petitioners' Motion. The EA on the Mount Rushmore National Memorial ATMP, Exh. E, under "3 Affected Environment and Environmental Consequences," at pp. 37-137, clearly assesses and compares, at length, the effects of all four of the action alternatives. The same is true for the EA for the Badlands National Park ATMP. Exh. D, at pp. 38-151.

Under the definitions in the Council on Environmental Quality's (CEQ) NEPA-implementing regulations, 40 C.F.R. Parts 1500–1508, while the

environmental effects of all alternatives are assessed in an EA, a FONSI is only prepared for the chosen action:[3]

> §1508.1(l) Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise categorically excluded (§1501.4 of this chapter), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.

There is simply no need to consider the "significance" *vel non* of non-chosen alternative actions in a FONSI because they are not agency "actions" that can drive the decision to later prepare, or not prepare, a full Environmental Impact Statement (EIS). That decision is the main point, per the regulation, of making a FONSI significance determination.[4] Petitioners have not cited any NEPA regulation, policy, or case law that indicates otherwise.

Their false assertions about the Agencies not considering the environmental effects of all four alternatives in the two EAs, combined with their apparent misunderstanding of the purpose of a FONSI, further demonstrate that the Petitioners

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[3] The CEQ's NEPA regulations have gone through several iterations in recent years. The cited regulation is the language that was in effect from 2020 through 2023, at the time that the EAs here were prepared. Available at, www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf .

[4] If a "significance" determination is made for the proposed action at any stage then, instead of a FONSI, a full EIS will be prepared. See §1502.3 "Statutory requirements for statements" and §1501.3(b), under "Determine the appropriate level of NEPA review."

lack arguments likely to prevail in showing a NEPA violation during the merits phase.

C. Incorrect noise analysis argument.

At pp. 7-15, the Memorandum cobbles together an argument that the Agencies used inadequate methodology in their noise analyses for all the alternatives for both Park units. This reads like an attorney-constructed, rather than a science-based, argument. Petitioners apparently could not find an expert who agreed with them. They also failed to recognize that courts typically defer to FAA and fellow expert agencies on technical noise analyses, when their methods are well-documented, rather than substituting their own judgment. See *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir. 1998).

Respondent-Intervenors counter with an expert declaration by Dr. Kurt Fristrup, attached, that lays out the scientific basis for the noise analysis methods the NPS employed. With a Ph.D. from Harvard and multiple years of experience, Dr. Fristrup is plainly a qualified expert. Dec., ¶ 1. Indeed, he worked at a high level for the NPS on the very noise analysis topic involved here for 15 years before retiring. *Id.*, ¶¶ 1-3. He reviewed the noise analyses supporting both the EAs here and found they used the "most recent" and best data. *Id.*, ¶ 5. He offered high praise that the noise analyses were "impeccable, based on decades of research, development, and field testing" and "represent the best standard practices". *Id.*, ¶ 10.

This should thoroughly put to rest Petitioners' attorneys' critique. They were flat wrong in their repeated suggestion that use of the 2003 natural sound levels in the noise analyses was somehow arbitrary and capricious. See Fristrup Dec., ¶¶ 6-7. The analyses did not use "outdated or inaccurate data" as their Memorandum repeatedly cavalierly argued. Petitioners' attorneys also failed to proffer how their critique would lead to a different outcome of the EAs' noise assessments that would somehow alleviate the claimed harm to their client and therefore merit a Stay.

D. Indirect future flight safety risks are not effects that required analysis under NEPA.

Effects that should be assessed in an EA include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative" effects. 40 C.F.R. § 1508.1(g)(4).[5] While direct effects are "caused by the action and occur at the same time and place," indirect effects are "those effects caused by the action that are reasonably foreseeable but later in time or farther removed in distance." 40 C.F.R. § 1508.1(g)(1)-(2).

[5] The applicable definitions of "effects" cited is the revision of that term promulgated in the CEQ NEPA-implementing regulations in April of 2022, at: https://www.federalregister.gov/documents/2022/04/20/2022-08288/national-environmental-policy-act-implementing-regulations-revisions . This is distinct from the CEQ regulations version cited in footnote 3, *supra,* that applied with respect to the definition of a FONSI, which was not revised in 2022.

Here Petitioners' Memorandum, pp. 15-18, claims that their own future flight safety risks as they conduct air tours outside the Park units are indirect effects that the Agencies needed to assess. However, the speculative risks of future flights outside of the two units here - and which are manageable by Petitioners themselves, certainly not by the NPS - do not constitute "reasonably foreseeable" effects of the ATMPs that required analysis under NEPA, because: 1) there was not a reasonably close causal or predictable relationship between the ATMPs and flight safety outside the Park units; and 2) the speculative safety risk lacked a sufficient connection to changes in the physical environment. Further, contrary to Petitioners' arguments, both EAs did consider the possibility of flights outside the Park unit boundaries. Appendix B to their Memorandum, the Badlands National Park EA, p. 61, states that extra-Park air tour actions would be too speculative in nature "to assess noise and other potential indirect and cumulative impacts," which includes the safety impacts about which Petitioners complain:

> Specific routes, altitudes and numbers would be relevant in assessing noise and other potential indirect and cumulative impacts associated with eliminating air tours within the ATMP planning area. Consistent with the CEQ regulations, the agencies are disclosing that specific air tour routes, altitudes, and numbers of tours are not available with enough specificity to assess noise and other potential indirect and cumulative impacts associated with reducing or eliminating air tours within the ATMP planning area.

The same statement is found in the Mount Rushmore National Memorial EA. Exhibit E, p. 58.

When considering whether an agency must assess an effect in an EA, "[a] 'but for' causal relationship is not enough to make an agency responsible for a particular effect under NEPA." *Sierra Club v. Clinton*, 689 F. Supp. 2d 1123, 1134 (D. Minn. 2010) (quoting *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004)). In particular, "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *U.S. Dep't of Transp.*, 541 U.S. 774, n. 7.

For example, in *Metro. Edison Co. v. People Against Nuclear Energy*, a case where Respondent-Intervenor claimed psychological impacts due to perceived safety risk, the Supreme Court held that "the element of risk lengthens the causal chain beyond the reach of NEPA." 460 U.S. 766, 775 (1983). Simply put, "NEPA does not require agencies to evaluate the effects of risk *qua* risk." *Id.* at 779. The Court further held that "[i]f a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply." *Id.* at 778.

Like the risks to Respondent-Intervenors in *Metro. Edison Co.*, the alleged risks to Petitioners here would not result from changes in the environment *per se* and they are speculative, such that the Court should defer to the Agencies' statements in

the two EAs, *supra*, that they could not reasonably foresee and assess them. Further, safety concerns can be avoided or reduced if Petitioners themselves act to develop flight safety plans to mitigate the risks. The Agencies were not obligated to assess such risks because "the element of risk lengthens the causal chain beyond the reach of NEPA". 460 U.S. 766, 775 (1983).

Here, the private actions would occur outside of the Mount Rushmore National Memorial and Badlands National Park and outside the Agencies' direct control, which lengthens the causal chain beyond effects the EAs were required to assess. Petitioners' arguments are equivalent to arguing that an EA for building a new airport must assess the risk that some passengers will be injured in the future because they will not wear their seat belts in planes that fly out of that airport. In sum, speculative flight safety risks did not constitute specific foreseeable effects of the two ATMPs under NEPA.

2. <u>Petitioners Have Not Shown Irreparable Harm.</u>

The Petitioners unreasonably delayed in seeking a Stay, which undermines their overheated argument that one is urgently needed to prevent "certain, great, imminent" harm. Memorandum, pp. 19, 21. They delayed more than six months after the date of the two ATMPs' adoption (Nov. 15, 2023) before filing their Stay motion on May 5, 2024. That enabled the two ATMPs to take effect on May 13th unimpeded.

The ban on overflights over Mount Rushmore National Memorial and Badlands National Park now has been in effect for two weeks as of the date this filing. Petitioners have not demonstrated actual harm from this new *status quo.*

Their "certain, great, imminent" harm assertion is fatally undermined by the fact that the two main arguments in their Memorandum are self-contradictory. First, they claim that without a Stay they will lose all their annual revenue, totaling more than $5.5 million. Memorandum, p. 19. These claims rely on completely unsubstantiated assertions in the Schlaefli Declaration, with no statement from an accountant or any calculation backing him.

But then, in their flight safety argument, Petitioners claim their own continuing nearby flights are at risk because of the Agencies' failure to adequately address that issue under NEPA. That Petitioners' helicopter overflights are still carrying passengers outside the buffers created in the ATMPs is confirmed at least as to Mount Rushmore National Memorial by the attached Declaration of Cheryl Schreier of CPANP, at ¶ 6, who is the knowledgeable former Superintendent of that Memorial.[6] She states: "I have observed them continuing outside of the one-half

[6] Petitioners' damages argument due to the ATMPs' overflight prohibitions also is contradicted by their own website, which continued to claim ten days after the May 13th effective date of the restrictions, that their helicopters can legally fly over the two Park units at issue: https://blackhillsaerialadventures.com/ (accessed May 23, 2024; emphasis added):

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mile buffer that was set up in the new ATMP since it went into effect on May 13. They appear to have regular customers still for flights outside that buffer boundary."

Petitioners cannot have it both ways, claiming total economic losses while also claiming ongoing safety hazards to their continuing income-generating flights. They have not convincingly demonstrated irreparable harm.

3. Petitioners Have Not Satisfied the Balance of Harm and Public Interest Prongs for Obtaining a Stay.

A. Petitioners entirely ignored the public interest, which weighs against them.

In their argument regarding the balance of harms and the public interest, Petitioners propose a test applicable "when the Government is the opposing party," citing *Nken*, 129 S. Ct. at 1762. Memorandum, p. 21. They ignore the fact that the Respondent-Intervenors here, consisting of two private, non-profit, public interest organizations, are not the Government. Thus, their proposition of merging or shortcutting the consideration of public interest that may apply when the Government is the sole Respondent in a Motion for a Stay does not apply here. As stated in *Nken*, 129 S. Ct. at 1761, and cases cited therein, e.g., *Hilton v. Braunskill,*

Black Hills Aerial Adventures has the finest pilots in the industry, and we hire and train to the highest standard. Black Hills Aerial Adventures is the ***only helicopter touring company that has permission to operate within the boundaries of the Black Hills National Parks and the Badlands****. This allows us to get you the best possible views of sites and monuments in the area.*

481 U.S. 770, 776, 107 S. Ct. 2113 (1987), the traditional fourth prong of determining "where the public interest lies" must be resolved.

Petitioners offered zero evidence or argument regarding public interest, other than repeating the obvious: there is a "public interest in having governmental agencies adhere to federal law". Memorandum, p. 21, 24. They proceed then to claim that overflights present only "speculative and unsubstantiated environmental harm". *Id*., pp. 22-23. This ignores the detailed assessment and substantiation of the environmental impacts of Petitioners' overflights in the two EAs and FONSIs that they appended with their Memorandum. Exhs. B, C, D, E.

Respondent-Intervenors attach two declarations herewith from CPANP members, who are the former Superintendents of Mount Rushmore National Memorial and Badlands National Park. Decs. of Cheryl Schreier and Michael Pflaume. Both state that in their opinions, based on their close familiarity with all the air overflights issues and impacts, "broad public support in the area exists for the elimination of those impacts". Schreier Dec., ¶ 3; Pflaume Dec., ¶ 3. The new *status quo* since May 13th is no overflights. The Schrier Dec., ¶ 5, observes, based on her recent May 24th visit to Mount Rushmore, how much better it was than before: "… an extremely positive experience without the visual and noise distractions of the air tours."

In short, the public interest and the balance of harms weigh heavily against a Stay, whereas the Petitioners have added nothing on the public interest side of the balance favoring a Stay other than the obvious, but unhelpful, notion of supporting compliance with Federal law. Of course, Respondent-Intervenors support such compliance as well.

B. A Stay would undermine the ruling of the DC Circuit Court of Appeals on impacts to the public.

In the still-ongoing D.C. Circuit's Writ of Mandamus case, the court ruled more than four years ago that the long-delayed ATMPs, including the two at issue here, must be timely finalized and implemented. *In Re Public Employees for Environmental Responsibility, supra*. This was not just because of the 19-plus years of delay in implementing NPATMA, it also aimed at protecting the public. In weighing the public interest, the DC Circuit specifically cited the negative impacts to Park visitors from overflights, stating: "the agencies' failure to regulate air tours harms visitor welfare to some extent by exposing visitors to unmitigated noise pollution." *Id*., 957 F3d, at 274. That ruling should certainly inform this Court that the public interest would be harmed by staying the two ATMPs here, which would allow the noise disturbance from overflying helicopters to continue unregulated and unabated in Mount Rushmore National Memorial and Badlands National Park.

CONCLUSION

For the foregoing reasons, Respondent-Intervenors respectfully request that the Court deny Petitioners' Motion for a Stay. This case is already set for briefing on the merits very soon, beginning on June 7th, based on the full AR rather than just selected excerpts. Document No. 5389829 [24-1065, 24-1066]. That is what should occur.

Dated: May 28, 2024

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CERTIFICATE OF COMPLIANCE

I, the undersigned counsel of record for Respondent-Intervenors, hereby certify that this Response complies with the type-volume limit, typeface requirements, and type-style requirements of the Federal Rules of Appellate Procedure.

1. This motion complies with the type-volume limitation of Fed. R. App. P 27(d)(2)(a). It contains 3,999 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Times New Roman, 14 point.

Respectfully submitted on May 28, 2024,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Intervene was served by email this 28th day of May, 2024 on the following:

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