IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ERIE UNIT 2262 and CITIZENS FOR PENNSYLVANIA'S FUTURE, Plaintiffs	)	
v.	)	CIVIL ACTION NO. 20-362 Judge Susan Paradise Baxter
FEDERAL HIGHWAY ADMINISTRATION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NAACP and PennFuture ("Plaintiffs") move the court for immediate injunctive relief restraining the Pennsylvania Department of Transportation ("PennDOT") from proceeding with the Bayfront Parkway Project ("Project"). Plaintiffs filed this action in 2020 to, among other things, compel PennDOT to comply with federal law by completing an environmental assessment that properly analyzes alternatives to the Project and holding a public hearing soliciting public feedback. ECF No. 1 ¶ 6.

Plaintiffs return to this Court because construction of the Project is scheduled to begin as early as November 2022, and in September 2022 PennDOT will begin accepting construction bids. Ex. 1; Ex. 2. Any contract awarded by PennDOT will set in motion a governmental process that will be difficult to stop—what courts call the "bureaucratic steamroller." *See Sierra Club v.*

Marsh, 872 F.2d 497, 500 (1st Cir. 1989). PennDOT's decision-making will then be prejudiced in favor of the Project, even if Plaintiffs prevail and the Court orders PennDOT to conduct a proper environmental analysis. As a result, Plaintiffs' right to an unbiased consideration of alternatives, to a full environmental review, and to meaningfully participate in a public hearing will be irreparably harmed.

Plaintiffs respectfully seek a preliminary injunction to enjoin PennDOT from awarding any construction contract for the Project pending resolution of this litigation.

RELEVANT FACTS

Plaintiffs provided a detailed statement of facts in their pending summary judgment materials filed in September 2021, and provided additional procedural history in papers filed in January and February 2022. ECF No. 45; ECF No. 46; ECF No. 76. Plaintiffs highlight a few key facts that are particularly pertinent to this motion and provide additional facts regarding PennDOT's imminent activity.

I. THE PROPOSED ERIE BAYFRONT PROJECT

The Bayfront Parkway runs along the northern edge of the City of Erie, acting as a barrier between downtown Erie residents and the waterfront. AR-1 at 5; AR-11 at 5; AR-25 at 239. In February 2018, PennDOT began the environmental review for a project to redesign the parkway, called the Bayfront Parkway Project ("the Project"). AR-19 at 16. In 2018, 2019, and 2020, PennDOT repeatedly told stakeholders that the Project would receive an environmental assessment under the National Environmental Policy Act ("NEPA"), and therefore the environmental review would be subject to public comment and a public hearing. AR-19 at 18, 41; AR-23 at 80, 83; AR-28 at 96, 98; AR-46 at 396; AR-47 at 544; AR-49 at 286; AR-50 at 54.

However, in early 2020, PennDOT's consultants stated that PennDOT wanted environmental approval in time to apply for a federal Better Utilizing Investments to Leverage Development or "BUILD" grant. AR-50 at 148. PennDOT requested on March 31, 2020, that the Project's environmental review be "down-scoped" from an environmental assessment to a categorical exclusion, the bare minimum level of environmental review under NEPA. AR-13 at 2–6. The Federal Highway Administration approved the request on April 15, 2020. AR-19 at 41–42. PennDOT applied for a BUILD grant on May 12, 2020. AR-28 at 37–72. On June 9, 2020, PennDOT submitted its Categorical Exclusion Evaluation package to the Federal Highway Administration. AR-19 at 4. Federal Highway Administration approved the categorical exclusion on June 15, 2020. AR-19 at 364.

PennDOT has never held a public hearing for the Project. ECF No. 46 ¶ 16; ECF No. 58 ¶ 16.

II. PROCEDURAL HISTORY

Plaintiffs filed this action on December 15, 2020, challenging PennDOT's failure to hold a hearing on the Project as required by the Federal-Aid Highway Act[1] and challenging Federal Highway Administration's approval of PennDOT's environmental review under NEPA. ECF No. 1. Federal Highway Administration certified the administrative record on August 19, 2021. ECF No. 41. On September 24, 2021, Plaintiffs filed their Motion for Summary Judgment. ECF No.

[1] Under the Federal-Aid Highway Act, "[a]ny State transportation department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community." 23 U.S.C. § 128(a).

43. On November 5, 2021, Defendants filed their Responses in Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motions for Summary Judgment. ECF No. 55; ECF No. 59.

On December 6, 2021, Federal Highway Administration filed a "Notice of Correction" of the Administrative Record seeking to change two numbers in the Administrative Record pertaining to the speed and number of vehicles that would travel on the expanded parkway. ECF No. 68. Plaintiffs had asked Federal Highway Administration about those numbers before the Administrative Record was certified, and had relied on those numbers in arguing that approving the categorical exclusion was arbitrary and capricious. *See* ECF No. 76 at 27. Specifically, Plaintiffs had argued that the Project's noise and traffic analysis had improperly relied on inaccurate numbers—precisely the numbers that Federal Highway Administration attempted to alter in amending the record. *See id.*; ECF No. 45 at 25–28.

On December 10, 2021, Plaintiffs accordingly opposed Federal Highway Administration's attempt to change the record. ECF No. 71. The Court held a hearing on January 5, 2022, on the propriety of the notice of correction. ECF No. 72. The evening before the hearing, Federal Highway Administration filed an out-of-time reply to Plaintiffs, which included two additional documents that should have been in the Administrative Record. ECF No. 73. Those documents also pertain to the speed and number of vehicles that will travel on the expanded parkway. ECF No. 73-1 at Exs. A & B.

At the January 5 hearing and in a January 19 minute order, the Court gave Plaintiffs the opportunity to detail how the litigation should move forward. In a January 21 filing, Plaintiffs argued that Federal Highway Administration's treatment of the record justified summary judgment because the agencies cannot show a "rational connection between the facts found and the choice made" when the facts keep changing and the record lacks integrity. *See* ECF No. 76 at

20–21, 30–31 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Plaintiffs also stated that, if the Court declined to grant summary judgment based on the state of the record, Plaintiffs would ask the Court to enjoin PennDOT from moving forward with the Project during the remainder of the litigation. ECF No. 76 at 32–33. PennDOT responded that injunctive relief was inappropriate because "PennDOT remains engaged in final design activities for the Project and does not anticipate awarding a construction contract for the Project *before August 2022*." ECF No. 78 at 11 (emphasis added). PennDOT also argued that a preliminary injunction would cause irreparable harm by leading Pennsylvania to lose its BUILD grant, which must be obligated by September 30, 2022. ECF No. 78 at 11–12.

III. PENNDOT'S IMMINENT ACTIVITY

Construction of the Project could begin in November 2022, according to information that PennDOT shared at an August 24, 2022 Open House about the Project and then posted on its website. *See* Ex. 2. PennDOT will begin accepting construction bids for the Project as soon as September 15, 2022. Ex. 1. One page of PennDOT's website states that bidding will open on September 15. *See* Ex. 1. Another page on PennDOT's website states that bidding will open on September 29. *See* Ex. 3.

Once bidding opens, PennDOT must award a contract within sixty days. 62 Pa.C.S. § 3911(a).[2] PennDOT must then execute the contract within sixty days of the award. *Id.* § 3912. Of course, PennDOT could take less than sixty days to complete either step, and as discussed, PennDOT expects construction to begin as early as November. The terms of the BUILD grant

[2] This deadline can be extended by mutual agreement of PennDOT and the lowest responsible bidder. 62 Pa.C.S. § 3911(c).

require grantees to begin construction expeditiously following obligation of grant funds. *See* Notice of Funding Opportunity for the Department of Transportation's National Infrastructure Investments Under the Consolidated Appropriations Act, 2020, 85 Fed. Reg. 10,811, 10,816 (Feb. 25, 2020).

Additionally, in May 2022 PennDOT completed a key prerequisite to the Project: construction of a bridge between the City of Erie and the Pennsylvania Soldiers' and Sailors' Home. *See* Ex. 4; AR-19 at 7; AR-28 at 41 (the Soldiers' and Sailors' Bridge will "make way" for the Project"). The Soldiers' and Sailors' Bridge allows for the removal of railroad tracks just east of the Bayfront Parkway. AR-19 at 7, 55; AR-28 at 41. The removal of railroad tracks, in turn, will allow the Bayfront Parkway to be lowered beneath State Street as required for the planned expansion. *See* AR-19 at 7, 55; AR-28 at 41.

ARGUMENT

The decision of whether to grant a preliminary injunction is committed to the Court's sound discretion. *Reilly v. City of Harrisburg*, 858 F.3d 173, 178–79 (3d Cir. 2017).

To obtain a preliminary injunction, Plaintiffs must demonstrate: (1) a likelihood of success on the merits; (2) that they are likely to suffer irreparable harm in the absence of injunctive relief; (3) that the balance of equities favors an injunction; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Council of Alt. Pol. Parties v. Hooks*, 121 F.3d 876, 879 (3d Cir. 1997). The first two factors are the most critical. *Reilly*, 858 F.3d at 179 (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). If the first two factors are met, the court then considers the remaining two and determines whether the four factors, taken together, balance in favor of granting preliminary relief. *Id*.

Plaintiffs have satisfied all four prongs and should accordingly be granted a preliminary injunction.[3]

I. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS

As explained in Plaintiffs' Memorandum in Support of Summary Judgment, Plaintiffs have demonstrated a likelihood of success on three separate grounds: (1) approval of the categorical exclusion was arbitrary and capricious; (2) the Project violates NEPA because PennDOT failed to take a "hard look" at the Project's potential impacts; and 3) PennDOT violated the Federal-Aid Highway Act by failing to hold a public hearing about the Project. ECF No. 45. As fully explained in Plaintiffs' January briefing, Federal Highway Administration's attempts to alter the record also justify summary judgment. ECF No. 76.

A. THE CATEGORICAL EXCLUSION VIOLATES NEPA

Federal Highway Administration unlawfully determined that the Project will have no significant impacts and is therefore eligible for a categorical exclusion. AR-19 at 2. This circular logic runs afoul of NEPA requirements and it was, as fully described and briefed, arbitrary and capricious.

Categorical exclusions are available only for *categories of actions* that Federal Highway Administration has determined, "based on [its] past experience with similar actions, do not involve significant environmental impacts." 23 C.F.R. § 771.117(a); 40 C.F.R. § 1508.4 (2019).[4]

[3] In the alternative, the Court could at this point grant summary judgment to Plaintiffs on the merits of the claims based on the briefing already submitted. All parties have had an opportunity to move for summary judgment and Defendants have responded to Plaintiffs' motion for summary judgment. Summary judgment in favor of Defendants would be inappropriate at this time because Plaintiffs have not had an opportunity to respond to Defendants' Cross-Motions for Summary Judgment.

[4] Plaintiffs cite to the Council on Environmental Quality regulations that applied on June 15, 2020, the date the categorical exclusion was approved. For the Court's convenience, a copy of these regulations is attached as Exhibit 6.

Actions that "do not involve significant impacts" are not their own category; rather, before a category can join the list of categories for which a categorical exclusion is available, Federal Highway Administration must *already* have concluded that actions in that category do not result in significant impacts. *See* ECF No. 45 at 5–7. Federal Highway Administration erred by treating projects that "do not involve significant impacts" as a category on that list. In approving the categorical exclusion here, Federal Highway Administration read the word "category" out of the NEPA regulations. *See* 40 C.F.R. § 1508.4 (2019) ("Categorical exclusion means a category of actions . . . .").

Additionally, NEPA regulations specify that categorical exclusions are not available for projects, such as this one, that will induce significant impacts to planned growth or have significant impacts on travel patterns. *See* 23 C.F.R. § 771.117(a); ECF No. 45 at 8–11. Federal Highway Administration violated NEPA by approving a categorical exclusion for a project that did not meet the applicable criteria.

B. FEDERAL HIGHWAY ADMINISTRATION VIOLATED NEPA BECAUSE PENNDOT FAILED TO ASSESS THE PROJECT'S POTENTIAL ENVIRONMENTAL IMPACTS

As detailed in Plaintiffs' Memorandum in Support of Summary Judgment, Federal Highway Administration's approval of PennDOT's request for a categorical exclusion was also arbitrary and capricious because PennDOT failed to take a "hard look" at the Project's potentially significant impacts. *See* *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citation omitted); ECF No. 45 at 11–32. These include potential impacts on water quality, air quality, greenhouse gas emissions, environmental justice, and aesthetics; and climate impacts, such as flooding, on the Project. ECF No. 45 at 11–32.

C. PENNDOT VIOLATED THE FEDERAL-AID HIGHWAY ACT BY FAILING TO HOLD A PUBLIC HEARING

Under the Federal-Aid Highway Act, a state transportation agency seeking federal funding for a highway project must: (1) certify that a public hearing was held or that an opportunity for public hearing was afforded; and (2) submit a hearing transcript to the U.S. Department of Transportation. *See* 23 U.S.C. § 128. Additionally, Federal Highway Administration regulations specifically require a public hearing for any project, like this one, that "substantially changes the layout . . . of connecting roadways." 23 C.F.R. § 771.111(h)(2)(iii); *see also* AR-11 at 5 (the Project involves reconfiguring three major intersections of the Bayfront Parkway with other roadways and building a new structure to carry a connecting roadway over the Bayfront Parkway).

PennDOT was therefore required to hold a public hearing and submit a transcript to the U.S. Department of Transportation. PennDOT failed to do so, in violation of the Federal-Aid Highway Act. *See* ECF No. 46 ¶ 16; ECF No. 58 ¶ 16.

D. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BASED ON THE STATE OF THE RECORD

The Plaintiffs have also established the first prong of the test for a preliminary injunction because this is an Administrative Procedure Act case, which turns on whether Federal Highway Administration's approval of the categorical exclusion was arbitrary and capricious. *See State Farm*, 463 U.S. at 34. As explained in Plaintiffs' January 21 Briefing in Support of Summary Judgment or Remand and Vacatur Based on the State of the Administrative Record, Federal Highway Administration's attempts to alter numbers that Plaintiffs had argued were inaccurate further demonstrates that the conclusion of no significant impacts relied on "incorrect assumptions or data." *See Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964

(9th Cir. 2005). This, in turn, establishes that the agencies failed to take a "hard look" at the Project's environmental impacts as required by NEPA. *See* Kleppe, 427 U.S. at 410 n.21; *see also* ECF No. 76.

Additionally, the Court cannot discharge its duty of "evaluat[ing] the challenged agency action on the basis of the record before it" because the record now has no integrity. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). The state of the record thus also entitles Plaintiffs to summary judgment.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

If PennDOT is permitted to award any construction contract for the Project, then construction could begin in November. The "bureaucratic steam roller" will be in motion and PennDOT's decision-making will be biased in favor of the Project. As discussed below, courts have recognized that this procedural injury constitutes irreparable harm under NEPA.

A. A NEPA VIOLATION CAN CAUSE IRREPARABLE HARM

It is axiomatic that environmental injury can constitute irreparable harm. *See Nat. Res. Def. Council v. Texaco Refin. & Mktg., Inc.*, 2 F.3d 493, 506 (3d Cir. 1993) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable.") (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)).

Under NEPA, plaintiffs can be injured even where there are no physical impacts: environmental harm occurs when an agency fails to comply with NEPA's procedural requirements. *See Sierra Club*, 872 F.2d at 500 ("[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.") (quoting *Massachusetts v. Watt*, 716 F.2d 946,

953 (1st Cir. 1983), *abrogated on other grounds by Marsh v. Or. Nat. Res. Council*, 490 U.S. 360 (1989)); *see also* Davis v. Mineta, 302 F.3d 1104, 1114 (10th Cir. 2002) ("In mandating compliance with NEPA's procedural requirements as a means of safeguarding against environmental harms, Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment."), *abrogated on other grounds by Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016).

B. UNDER NEPA, PROCEDURAL INJURY IS RECOGNIZED AS IRREPARABLE HARM

NEPA provides only procedural remedies: vacatur of the challenged agency action and a proper environmental review. *See* Sierra Club, 872 F.2d at 500 (1st Cir. 1989) ("NEPA is not designed to prevent all possible harm to the environment . . . . Rather, NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account."). If an agency takes steps that commit resources or foreclose alternatives, it becomes more likely that—even if the agency action is vacated—the same action will be chosen following a fuller environmental review. *See* Watt, 716 F.2d at 952–53 (1st Cir. 1983) ("Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide.'").

Courts have accordingly recognized that plaintiffs can suffer irreparable harm if an agency engages in activities that could bias the bureaucracy towards completion of the challenged project. *See* Sierra Club, 872 F.2d at 504 (1st Cir. 1989) ("The difficulty of stopping a bureaucratic steam roller, once started, . . . seems to us . . . a perfectly proper factor for a district court to take into account in assessing that risk [of harm], on a motion for a preliminary injunction."); *see also* Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs, 826

F.3d 1030, 1039 (8th Cir. 2016) (finding that preliminary construction activities would cause irreparable harm because "there would be added difficulty in stopping the specific iteration of the larger project"); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011) (recognizing "the difficulty of stopping a bureaucratic steam roller, once started") (citation omitted); *Davis*, 302 F.3d at 1115 n.7 (10th Cir. 2002) (finding that plaintiffs will be irreparably harmed if "a serious risk arises that the analysis of alternatives required by NEPA will be skewed toward completion of the entire Project"); *Nat'l Wildlife Fund v. Nat'l Marine Fisheries Serv.*, No. 20-cv-00362, 2017 WL 1829588, at *12 (D. Or. Apr. 3, 2017) (recognizing that "bureaucratic steamroller" harm can be irreparable under NEPA); *Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1220–21 (D. Colo. 2007) ("[Defendants] ignore the primary injury that would result from allowing the proposed activities to proceed, which is the difficulty of stopping 'a bureaucratic steam roller' once it is launched."); *Sierra Club v. Larson*, 769 F. Supp. 420, 423 (D. Mass. 1991) ("Under NEPA courts have recognized the bureaucratic commitment theory as a relevant factor in considering whether or not to grant injunctive relief.").

C. GOVERNMENT-ISSUED CONTRACTS CAN CAUSE IRREPARABLE PROCEDURAL INJURY

Preliminary activities—such as lease sales or contract awards— that do not themselves create physical impacts can inflict "bureaucratic steamroller" injury. *See Watt*, 716 F.2d at 952–53; *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F. Supp. 2d 656, 663 (W.D. Wis. 2013).

For example, in *Watt*, plaintiffs sought to preliminarily enjoin the government from auctioning rights to drill for oil. *Watt*, 716 F.2d at 947. The First Circuit rejected the government's argument that because additional steps were required between the lease sales and any oil exploration, the lease sales themselves could not threaten irreparable harm. *Id.* at 951–52.

The court reasoned that if the lease sales took place during the pendency of the litigation, the plaintiffs would be irreparably harmed even if the court subsequently ordered further NEPA review. *Id*. at 952. This is because successful oil companies, the federal government, and state agencies would have committed time and effort to planning development of the leased blocks, and "[e]ach of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Id*.

Similarly, in *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, plaintiffs challenging a highway project under NEPA were deemed likely to suffer irreparable harm under the "bureaucratic steamroller theory" because—even though the bulk of the work on the project would not occur until the following year—the state transportation agency "ha[d] made plans to implement the project and [wa]s in the process of awarding contracts to bidders and making other commitments that would be difficult to break." 944 F. Supp. 2d at 663.

D. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF PENNDOT AWARDS ANY CONSTRUCTION CONTRACT

Any contract awarded for the Project will allow construction to begin as early as November and become "a link in a chain of bureaucratic commitment" that makes the Project's completion more likely. *Watt*, 716 F.2d at 952 (1st Cir. 1983). If PennDOT awards any construction contract now and Plaintiffs' summary judgment motion is granted later, "to set aside the agency's action at a later date will not necessarily undo the harm." *Sierra Club*, 872 F.2d at 500 (1st Cir. 1989). At that point, PennDOT's decision-making on remand could be prejudiced by the agency's own contractual obligations and the private reliance interests it has created. *See id.* ("The agency as well as private parties may well have become committed to the previously chosen course of action, and new information—a new [environmental impact statement]—may bring about a *new* decision, but it is that much less likely to bring about a *different* one.")

If PennDOT is permitted to make contractual commitments now, Plaintiffs' rights to an unbiased evaluation of alternatives and to provide meaningful input at a public hearing will be permanently and irreparably injured. *See* ECF No. 43-10, Bonomo Decl. ¶ 8 ("PennFuture is . . . harmed by PennDOT's refusal to hold a public hearing . . . ."); *see also Izaak Walton League of America v. Marsh*, 655 F.2d 346, 365 (D.C. Cir. 1981) ("A public meeting after an agency has already made its decision would be an empty gesture." (citations omitted)).

Even if the Court later vacates the categorical exclusion, orders PennDOT to prepare an environmental assessment, and requires a public hearing, PennDOT's financial and bureaucratic investment in the Project will bias the agency in favor of the same course of action. If construction has begun—or even if PennDOT has only made contractual commitments—PennDOT will be less likely to seriously consider alternatives to the Project. As a result, Plaintiffs' input at a public hearing will be less meaningful and Plaintiffs will be more likely to be harmed by increases in noise, air, and water pollution, and decreased pedestrian safety, in areas where their members live and recreate. *See* ECF No. 43-11, Horton Decl. ¶¶ 10–12; ECF No. 43-14, Watson Decl. ¶¶ 4–6. Allowing PennDOT to award any contract for the Project at this stage will accordingly activate the "bureaucratic steamroller" and result in irreparable harm to Plaintiffs.

III. THE BALANCE OF EQUITIES TIPS IN PLAINTIFFS' FAVOR

Where, as here, environmental injury is likely, "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Nat. Res. Def. Council, Inc. v. Texaco Refin. & Mktg., Inc.*, 906 F.2d 934, 941 (3d Cir. 1990) (quoting *Amoco*, 480 U.S. at 545). Permitting PennDOT to award any construction contract would deprive Plaintiffs of their right to participate in a meaningful alternatives analysis, including by attending a public hearing to voice

their views to PennDOT—and, through the transcript required by federal law, to the U.S. Department of Transportation. *See* 23 U.S.C. § 128. As discussed, allowing PennDOT to proceed at this stage would also increase Plaintiffs' likelihood of being harmed by pollution and traffic risks.

In February 2022, counsel for PennDOT stated that a preliminary injunction would cause irreparable harm by leading Pennsylvania to lose a BUILD grant from Federal Highway Administration, which must be obligated by September 30, 2022. ECF No. 78 at 11–12. The $21 million BUILD grant will partially fund the Project, whose total cost exceeds $63 million. *See* ECF No. 78 at 11; AR-28 at 35. PennDOT's claim of irreparable harm is unconvincing for at least three reasons.

First, PennDOT has not offered any evidence to suggest that a preliminary injunction would result in a loss of the BUILD grant. According to guidance provided by the U.S. Department of Transportation, "[t]he obligation deadline, September 30, 2022, is the date by which [PennDOT] must have a signed and executed grant agreement in place with the [U.S. Department of Transportation]." Ex. 5 at 9. PennDOT has not shown that it needs to award a construction contract in order for obligation to occur; PennDOT is very unlikely to award a contract prior to the September 30 obligation deadline, given that bidding will open on either September 15 or September 29. *See* Ex. 1; Ex. 3. If PennDOT has not signed and executed a grant agreement with DOT at this stage, a preliminary injunction will not make obligation any more or less likely.

Second, even if PennDOT could lose the BUILD grant, that loss would be the result of PennDOT's own actions and cannot justify denial of a preliminary injunction. *See* *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 728 (3d Cir. 2004) ("[W]hen the potential harm to each party

is weighed, a party 'can hardly claim to be harmed where it brought any and all difficulties occasioned by the issuance of an injunction upon itself.'") (quoting *Opticians Ass'n of America v. Indep. Opticians of America*, 920 F.2d 187, 197 (3d Cir. 1990)); *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 806 (3d Cir. 1998) ("The self-inflicted nature of [defendant's] harm . . . weighs in favor of granting preliminary injunctive relief."). Recipients of BUILD grant funding must comply with all applicable federal law, including environmental laws. *See* 85 Fed. Reg. at 10,822. PennDOT failed to meet this requirement by violating NEPA and the Federal-Aid Highway Act as discussed above. PennDOT's reliance on federal funding cannot excuse those violations or shield the agency from this Court's authority to enjoin the Project. *See Kos*, 369 F.3d at 729 ("[T]he injury a defendant might suffer if an injunction were imposed may be discounted by the fact that the defendant brought that injury upon itself.") (quoting *Novartis Consumer Health, Inc. v. Johnson & Johnson–Merck Consumer Pharms. Co.*, 290 F.3d 578, 596 (3d Cir. 2002)); *Richland/Wilkin*, 826 F.3d at 1040 (defendant bore "some of the responsibility for its harm" because it "jumped the gun" by beginning construction before completing NEPA review); *Davis*, 302 F.3d at 1116 (10th Cir. 2002) (finding that "the state defendants are largely responsible for their own harm" because they prematurely entered into contractual obligations before complying with NEPA).

Third, to the extent that PennDOT stands to lose any funding as a result of a preliminary injunction, monetary loss does not constitute irreparable harm for purposes of balancing the equities. *See Kos*, 369 F.3d at 727 ("Irreparable harm must be of a peculiar nature, so that compensation in money alone cannot atone for it.") (quoting *Pappan*, 143 F.3d at 805). The Third Circuit has held that district courts should not consider the nonmovant's potential financial damages when deciding whether to grant a preliminary injunction. *Id*. at 728. Additionally, delay

of any significant infrastructure project will always occasion costs; if such losses alone were permitted to outweigh environmental and public health, then unlawful projects could routinely be approved and built without the threat of an injunction. *See* *Milwaukee Inner-City Congregations*, 944 F. Supp. 2d at 675 ("[A]llowing delay-related costs to automatically tip the balance of harms in the agencies' favor could render NEPA toothless, at least in the context of major highway projects.").

For these reasons, the balance of equities tips in Plaintiffs' favor.

IV. AN INJUNCTION WOULD SERVE THE PUBLIC INTEREST

A preliminary injunction would promote the public interest by protecting the environment and safeguarding public participation rights. *South Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) ("Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest."); *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1242 (D. Colo. 2009) ("[T]he public has an undeniable interest in the [government's] compliance with NEPA's environmental review requirements and in the informed decision-making that NEPA is designed to promote . . . [and] there is a public interest in maintaining the status quo pending proper review.") (citing *Colorado Wild, Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1223 (D. Colo. 2007)).

If the Project is permitted to proceed as planned, Erie residents will be deprived of the opportunity to have a say in their city's future, be further divided from the Bayfront amenities, and be subjected to greater pollution and safety risks as a result of increased vehicle traffic. *See*

Milwaukee Inner-City Congregations, 944 F. Supp. 2d at 675 ("[A]n agency's failure to fully consider the environmental effects of a project before committing itself to a course of action can impact an entire region for generations to come.").

PennDOT has argued that a preliminary injunction would harm the public interest by delaying the Project and, possibly, depriving PennDOT of funding required to restructure the Bayfront Parkway. ECF No. 78 at 12. However, completion of a project of this size simply for completion's sake is not in the public interest, especially where the required environmental review and public input has not occurred. *See Davis*, 302 F.3d at 1116 ("[T]he public interest associated with completion of the Project must yield to the obligation to construct the Project in compliance with the relevant environmental laws."). Moreover, as discussed, PennDOT has offered no support for the claim that a preliminary injunction would result in a loss of the BUILD grant.

A preliminary injunction would cause little if any harm to the public interest, whereas allowing the Project to proceed without requiring compliance with NEPA and the Federal-Aid Highway Act would substantially injure the public interest.

V. PLAINTIFFS REQUEST A BOND WAIVER OR NOMINAL BOND

If this Court issues a preliminary injunction, "[t]he amount of the bond is left to the "[C]ourt's discretion." *Sixth Angel Shepherd Rescue, Inc. v. Bengal*, 448 Fed. Appx. 252, 254 n.2 (3d Cir. 2011) (quoting *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988)). The Third Circuit held "on several occasions, that there may be instances in which a strict reading of Rule 65(c) would be inappropriate" and an exception to the bond requirement should be made. *Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991). Courts in the Third Circuit have waived the bond requirement where movants are nonprofits seeking to

advance the public interest, including by suing to enforce federal statutes. *See, e.g., id*. at 220; *Marland v. Trump*, 498 F. Supp. 3d 624, 645 (E.D. Pa. 2020); *Gilliam v. U.S. Dep't of Agric.*, 486 F. Supp. 3d 856, 882 (E.D. Pa. 2020); *Borough of Palmyra, Bd. of Educ. v. F.C. Through R.C.*, 2 F. Supp. 2d 637, 646 (D.N.J. 1998); *see also Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 426 (3d Cir. 2010) (court can excuse bond required for injunction on a "specific finding" that a "rare exception" applies).

In NEPA cases, courts typically waive the bond requirement or require only a nominal bond because of "the important public interest in the enforcement of NEPA." *Richland/Wilkin*, 826 F.3d at 1043 (8th Cir. 2016)); *Davis*, 302 F.3d at 1126 ("Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered."); *Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012) ("Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond."). Courts have also recognized that requiring public interest environmental litigants to post a bond when seeking a preliminary injunction could have a "chilling effect on litigation to protect the environment and the public interest." *Landwatch*, 905 F. Supp. 2d at 1198.

Plaintiffs are nonprofit organizations seeking to protect the environment and their communities. Accordingly, Plaintiffs respectfully request that the bond requirement be waived, or in the alternative, that only a nominal bond be imposed.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enjoin PennDOT from proceeding with the Project, including from awarding any construction contracts for the Project.

Respectfully submitted this 29th day of August, 2022,

s/ Hillary Aidun
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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2022, I electronically filed the foregoing with the Clerk of the Court for the Western District of Pennsylvania by using the CM/ECF system. I certify that all counsel of record in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Bobbie D. Norman