

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In the Matter of Defend H2O et al.,

Plaintiffs,

-against-

**REPORT &
RECOMMENDATION**
CV 15-cv-2349 (ADS)(AYS)

TOWN BOARD OF THE TOWN OF EAST
HAMPTON, THE COUNTY OF SUFFOLK,
THE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION OF THE STATE OF NEW
YORK, THE UNITED STATES ARMY
CORPS OF ENGINEERS

Defendants.

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In the Matter of Defend H2O et al.,

Plaintiffs,

-against-

**REPORT &
RECOMMENDATION**
CV 15-cv-5735 (ADS)(AYS)

THE UNITED STATES ARMY CORPS OF
ENGINEERS and Col. DAVID CALDWELL,
In his official capacity as Commander of the
New York District of the United States Army
Corps of Engineers; TOWN BOARD OF THE
TOWN OF EAST HAMPTON, THE COUNTY
OF SUFFOLK, DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
OF THE STATE OF NEW YORK, and Acting
Commissioner MARC GERSTMAN, in his
Official Capacity as Acting Commissioner of
the Department of Environmental Conservation
of the State of New York,

Defendants.

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ANNE Y. SHIELDS, United States Magistrate Judge:

This is a consolidated proceeding consisting of: (1) a New York State Court petition commenced in March of 2015, that was removed to this court in April of 2015, bearing docket number 15-2349 (the “Removed Petition” or “Removed Action”), and (2) a lawsuit filed in this court on October 2, 2015, bearing docket number 15-5735 (the “Federal Action”). In both actions Plaintiffs take issue with the decision of Defendants to go forward with an erosion and storm damage project to be constructed on the beach in downtown Montauk, New York. Plaintiffs refer to this project as the “Revetment” project, a broad term used to define structures, such as retaining walls, built for protection. Defendants refer to the project as the “Beach Stabilization Project.” The Court describes the project in sufficient detail below, without the necessity of adopting either party’s label, and refers simply to the project at issue herein simply as the “Project.”

The Removed Petition was commenced in the Supreme Court of the State of New York, County of Suffolk, by way of a petition dated March 19, 2015, that was filed pursuant to Article 78 of the New York CPLR, and seeking declaratory relief pursuant to Article 30 thereof (the “Article 78 Proceeding”). Named as Respondents in the Article 78 Proceeding were the Town of East Hampton (the “Town”), The County of Suffolk (the “County”), the New York State Department of Environmental Conservation (the “DEC”) and the United States Army Corps of Engineers (the “USACE” or the “Corps”). On April 24, 2015, in view of the facts that: (1) the USACE is an agency of the Federal Government, and (2) the proceeding is related to acts performed under color of such office, the Article 78 Proceeding was removed to this court pursuant to 42 U.S.C. §1442(a)(1). On April 29, 2015, Petitioners filed a “Verified Amended Petition” herein (the “Amended Petition”). The Amended Petition was filed in Suffolk County Supreme Court on April 23, 2015, the day prior to removal of the Article 78 Proceeding to this

Court. The April 29, 2015 filing was made by Petitioners as the operative pleading in the Removed Petition. See Letter dated April 30, 2015, appearing as Docket Entry (“DE”) No. 6. Following removal, all Defendants moved to have this matter dismissed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. DE Nos. 19, 21, 25 and 26.

On October 1, 2015, within days of the full briefing of the motions to dismiss (after the granting of extensions, including those requested by Plaintiffs) Plaintiffs brought the present motion seeking a temporary restraining order (“TRO”) and preliminary injunctive relief. Plaintiffs’ Proposed Temporary Restraining Order, DE No. 54. That motion sought to stop the Project from moving forward. The proposed TRO and preliminary injunction sought no relief with respect to any imminent action by the Town, County, or State DEC. Instead, the motion sought only to enjoin the Corps from “excavating or constructing any revetment that will disrupt or destroy naturally occurring coastal processes and systems.” Plaintiffs’ Proposed Temporary Restraining Order, DE No. 54-2. More specifically, Plaintiffs sought to immediately require the Corps to “stop any activity related to the commencement and/or construction of [the] revetment until February 15, 2016.” Id.

On the same day that Plaintiffs’ motion for temporary and preliminary injunctive relief was filed, the Honorable Arthur D. Spatt, the United States District Court Judge to whom this matter is assigned, held a hearing and denied the TRO. Judge Spatt requested further briefing on the issue of whether a preliminary injunction should be granted, and referred the matter to this Court to hold a hearing, if necessary, and for a recommendation as to whether the District Court should grant the motion for a preliminary injunction. DE No. 50. On the day of that referral, this Court held a conference to confirm and set a briefing schedule, which provided for Plaintiffs to reply by October 9, 2015.

On October 2, 2015, the day after Judge Spatt denied the TRO, Plaintiff filed the Federal Action, bearing docket number 15-5735. Three days later, Plaintiff filed an amended complaint in the Federal Action. Federal Action DE No. 2. While the Federal Action is based upon the same set of facts set forth in support of the Removed Petition, and indeed, incorporates by reference the factual assertions therein, the Federal Action sets forth two federal statutory claims action pursuant to the Federal Administrative Procedure Act, 5 U.S.C. §§701-706 (the “APA”). Federal Action DE No. 2. In addition to claiming the right to relief, for the first time, pursuant to federal causes of action, the Federal Action adds as named defendants Col. David Caldwell (“Caldwell”) and Marc Gerstman (“Gerstman”). Both Caldwell and Gerstman are named in their official capacities – the former as the Commander of the New York District of the USACE, and the latter as the Acting Commissioner of the Department of Environmental Conservation of the State of New York. Id.

In an order dated October 7, 2015, Judge Spatt deemed the Removed Proceeding and the Federal Action to be related actions. On October 9, 2015, this Court held a status conference with counsel to discuss the most procedurally efficient manner in which to move forward. At the conference, certain facts were made clear. While no Defendant had yet been served with the Amended Complaint in the Federal Action, that pleading is available for viewing on the Court’s electronic filing system. Plaintiffs’ counsel confirmed that both the Removed Proceeding and the Federal Action seek to enjoin the USACE from proceeding with the Project. While the Removed Petition sets forth only a New York State Law claim, the Federal Action alleges those claims, as well as the APA claims referred to above. For their part, the USACE made clear that work on the Project had already begun as of October 1, 2015. Such work consisted of commencement of mobilization efforts, including the placement of heavy equipment. The Corps further represented

that the construction phase of the Project is now set to begin on October 15, 2015.¹ In view of these facts, and the fact that injunctive relief is sought only with respect to the Corps, the court issued an order providing that:

- The Removed Action shall be closed and the motions pending therein (which include defendants' motions to dismiss) shall be terminated;
- The preliminary injunction motion, which has been briefed in the context of the Removed Action, shall proceed under the docket number assigned to the Federal Action;
- The Corps was granted until October 13, 2015, in which to submit papers in further support of their opposition to the motion for a preliminary injunction. This additional briefing was intended to allow the Corps the opportunity to brief any issue as to whether Plaintiff would be entitled to injunctive relief pursuant to the federal claims asserted in the Federal Action;
- In view of the fact that no injunctive relief is sought, at this time, with respect to any Defendant other than the Corps, no other Defendant was required to submit any additional papers in connection with the preliminary injunction motion;
- The termination of the motions in the Removed Action would be without prejudice to any rights of the parties and, in particular, without prejudice to the renewal of any motion to dismiss that may be interposed in the Federal Action. No such motions shall be filed, however, until disposition of the motion seeking preliminary injunctive relief against the USACE is decided;
- While Plaintiffs supplied Defendants with courtesy copies of the amended complaint in the Federal Action, the provision of such papers was not deemed service of those papers, and,
- No party need file an answer or otherwise move in the Federal Action until 30 days after service is made, or 30 days after a decision on the motion for preliminary injunction, whichever is later.

See Minute Order dated October 9, 2015. DE No. 12.

The additional briefing allowed in this Court's order of October 9, 2015 is now complete, and the Court is in a position to issue its Report and Recommendation as to whether a hearing is necessary, and whether the District Court should issue preliminary injunctive relief stopping the

¹ By letter dated October 14, 2015, the Corps indicates that the earliest date for construction to begin is Friday October 16, 2015. Federal Action DE No. 71.

Project until February of 2016. For the reasons set forth below, this Court finds that no hearing is necessary, and respectfully recommends that the District Court deny the preliminary injunction sought.

BACKGROUND

I. The Parties and Factual Declarations Submitted

Plaintiff Defend H2O (“H2O”) is a not-for profit organization incorporated in the State of New York. See Federal Action, DE No. 2 ¶15. Plaintiffs characterize H2O as an organization that is involved in public education regarding the management of water and other issues related to “bays, oceans, wetlands, aquifers, and shorelines” on the East End of Long Island. Id. Individual Plaintiffs in this action are members of H2O. These individuals are alleged to either live, work or recreate near or at the location of the Project. See Federal Action DE No. 2 ¶16 (incorporating by reference background allegations contained in paragraphs 1-26 of the Removed Action). Defendant USACE, the only Defendant as to the present motion for a preliminary injunction, is an agency of the Federal Government charged with, among other things, protecting the nation’s coastal resources. Among the duties of the USACE are the construction of coastal storm management projects.

Both Plaintiffs and the Corps have submitted factual declarations in support of their positions as to the present motion. Plaintiffs submit the declaration of Kevin McAllister (“McAllister”), a member of H2O. See Removed Action DE No. 54-3. McAllister’s undergraduate training includes degrees in natural resources and marine biology. He states that he has conducted Master’s level research in a “case statement for dune restoration as the appropriate alternative approach to hardened shoreline protection.” DE No. 54-3 ¶1. McAllister states that he was involved in the Town of East Hampton’s Local Waterfront Revitalization Program, which is part of the statutory scheme at the heart of this lawsuit. DE No. 54-3 ¶6. In

opposition to the present motion the USACE submits the declarations of: (1) Frank Verga, the Project Manager for the Project (the “Verga Declaration”); (2) Susan D. McCormick, P.E., the Chief of the Coastal Erosion Management Program within the Bureau of Flood Protection and Dam Safety in the Division of Water of the New York State Department of Environmental Conservation (the “McCormick Declaration”) and (3) Kevin Merenda, a Resident Engineer and Administrative Contracting Officer for the Project (the “Merenda Declaration”). See Removed Action DE Nos. 58-8-10. The Corps also submits the Declaration of counsel, properly setting before the Court relevant documents. See Removed Action DE No. 58-1. Those documents include the Main Report of the USACE, Final Downtown Montauk Stabilization Project; Hurricane Sandy Limited Reevaluation Report, dated October 2014 (hereinafter the “Main Report”). The Main Report describes, in detail, the statutory, historical, social, and environmental background of the Project. See Removed Action DE No. 58-3.

II. The Project

A. Federal Efforts to Control Erosion and the Impact of Hurricane Sandy

Federal involvement in the effort to control beach erosion in the area that includes downtown Montauk is part of an ongoing project known as the “Fire Island Inlet to Montauk Point, New York, Combined Beach Erosion Control and Hurricane Protection Project” (the “FIMP Project”). Cortes Declaration, Removed Action DE No. 58, Exhibit 1 at 1. The FIMP Project was first authorized by the River and Harbor Act of 14 July 1960. In 1978, the Corps began a study to reformulate the project (the “FIMP Reformulation Project”). The FIMP Reformulation Project is ongoing and has not been fully implemented due to the funding constraints. Verga Declaration, Removed Action DE No. 58-8 at ¶ 5.

History shows that that downtown area of Montauk, New York is vulnerable to nor-easters and hurricanes that produce storm surges and waves resulting in beach erosion. Main Report, Removed Action DE No. 58-3 at 10 (¶1.5). On October 29, 2012, Hurricane Sandy (“Sandy”) hit New York, devastating and causing severe beach erosion to the shoreline and other areas of Montauk. In particular, Sandy resulted in erosion of the beach that provides protection to downtown Montauk. Sandy’s storm surge thus resulted in damage to downtown Montauk’s commercial buildings. See Main Report, Removed Action DE No. 58-3 at 10, 23 (¶ 1.5 (describing Sandy-related coastal erosion and depletion of dune and berm system); ¶3.1-2 (noting vulnerability of Project area and comparing pre-Sandy and post-Sandy conditions); Verga Declaration, Removed Action DE No. 58-8 ¶ 6.

In response to Sandy’s devastating impact, Congress passed the Disaster Relief Appropriations Act, Public Law 113-2, providing, inter alia, for full Federal funding of the FIMP Reformulation Project. Verga Declaration, Removed Action DE No. 58-8 ¶7; see Main Report, Removed Action DE No. 58-3 at 65 (¶ 9.2). Once funding became available, the New York District of the Corps considered existing information from the FIMP Reformulation Project to expedite its Hurricane Sandy Limited Evaluation Report. Main Report, Removed Action DE No. 58-3 at I (Executive Summary). That study resulted in the decision of the USACE to go forward with the Project.

B. The Project

The Project does not constitute the Corps’ full efforts to undertake and implement the ongoing FIMP Reformulation Project. Rather, it is a one-time, stand-alone storm protection measure aimed at addressing an area stated to be especially, and immediately, vulnerable to storm damage. Main Report, Removed Action DE No. 58-3 at 10 (¶1.5). The area of Project

construction is the downtown Montauk beach area from South Emery Street to the Atlantic Terrace Motel. The stated purpose of the Project is to provide protection to downtown Montauk – protection that the Sandy-eroded beach can no longer provide. Main Report, Removed Action DE No. 58-3 at I (Executive Summary).

The Project is one of five alternative approaches considered by the USACE when determining the way in which to proceed to protect the area at issue. See Main Report, Removed Action DE No. 58-3 at 35-40. Identified as “Alternative 4” in the Main Report, the Project consists of “stabilizing and reinforcing the existing dune along 3,100 ft. of the shoreline in downtown Montauk.” Main Report, Removed Action DE No. 58-3 at 38. The dune to be built by the Project will consist of a core containing hydraulically filled containers of sand referred to as “Geotextile Sand Containers” (the “GSC’s”) filled with locally available sand. Each GSC is approximately 5.5 feet long, 3.5 feet wide, and 1.5 feet tall. Main Report, Removed Action DE No. 58-3 at 52. The Project envisions the use of approximately 14,171 GSC’s, each weighing approximately 1.7 tons, which will be laid along the shoreline sought to be protected. Id. After the GSC’s are filled and put in place, they will be covered by a layer of at least three feet of sand. The GSC’s will be covered in furtherance of the efforts to maximize their longevity, and decrease the likelihood that they will be exposed for long periods of time during “a small storm event.” Id. The Corps expects that the GSC’s will provide a fifteen year period of protection. Main Report, Removed Action DE No. 58-3 at 42.

Factual declarations submitted in support of the Corps opposition to the present motion support the description of the Project and the needs identified by the Corps as set forth above. Thus, the McCormick Declaration describes the Project as a “hurricane and storm damage risk reduction project, which entails the construction of a protective dune and berm along

approximately 3,100 feet of shoreline near downtown Montauk.” McCormick Declaration, Removed Action DE No. 58-10 ¶ 5. Construction is described as placing thousands of geotextile bags or “tubes,” weighing 1.7 tons, filled with sand, to be used for reinforcement. See McCormick Declaration ¶ 5; See also Verga Declaration, Removed Action DE No. 58-8 ¶ 9 (Project involves placing of “thousands of geotextile tubes filled with sand” in order to “provide coastal storm risk management from coastal erosion”).

The McAllister Declaration, submitted by Plaintiffs, does not differ from the description of the Project as described above by the Corps. See Removed Action DE No. 54-3. Thus, the McAllister Declaration concurs that the Project will involve the placement of “over 14,000 geobags, each weighing approximately 1.7 tons, over 3,200 linear feet of shoreline” McAllister Declaration, Removed Action DE No. 54-3 at ¶ 9; 17. While Plaintiffs agree with Corps’ description of the Project, they disagree with the labeling of the Project as either a “dune,” “non-structural,” or as a “reinforced dune.” McAllister Declaration, Removed Action DE No. 54-3 at ¶¶ 9; 17. While this may appear as a mere disagreement in nomenclature, the use of the term “structural,” as discussed below, goes to the heart of Plaintiffs’ objections to the Project and, indeed, forms the basis for the majority of their claims.

C. Progress of the Project to Date

The Project has been awarded by the Corps to a company known as H&L Contracting, LLC (“H&L”) at a cost of \$8.4 million. Id. at 10. To avoid interference with beach season, the Corps agreed to delay commencement of construction until October of 2015. Verga Declaration, Removed Action DE No. 58-8 ¶ 11. As noted, H&L began its work on October 1, 2015, by beginning mobilization efforts. This involves setting up equipment, machinery, office trailers, and any other equipment necessary to begin and finish construction. Merenda Declaration,

Removed Action DE No. 58-9 ¶ 5. Any effort to demobilize will not only result in a delay in getting the Project underway in a timely fashion, but will also likely result in contractually related damages due to H&L, and payable by the USACE. In the event of a delay requiring complete demobilization, followed by re-mobilization, the Corps estimates such damage to be in excess of \$1 million. See generally Merenda Declaration, Removed Action, DE Nos. 58-9 ¶¶ 6-12. Even a short delay will result in the Corps daily loss of approximately \$6,700.00. Id. at ¶11-12.

In the absence of a grant of the preliminary relief sought, the construction phase is set to begin on October 15, 2015. Parts of the beach will be closed until the completion of the Project, which is scheduled for February 2016. The Corps states that upon completion of the Project, the “full beach will re-open and the citizens of downtown Montauk will have full access to the beach.” Verga Declaration, Removed Action DE No. 58-8 ¶ 22.

Having described the parties and the Project, the court turns next to discuss the relevant statutory and regulatory framework. Such discussion is necessary to properly understand Plaintiffs’ objections to the Project and the legal causes of action asserted. In particular, the Court discusses the interacting roles of the Federal, State and local authorities in creating policy to maintain and protect the nation’s coastal areas.

III. Management of Coastal Zones: Statutory and Regulatory Framework

A. The Coastal Zone Management Act (the “CZMA”)

Federal, State and Local governments all play a role in deciding issues of coastal management, with each level of government seeking to act in a manner that is consistent with documented goals. At the Federal level, the Federal Coastal Zone Management Act (the “CZMA”), enacted in 1972, provides for management of the nation’s coastal resources. The

overriding goal of the CZMA is to “preserve, protect, develop, and where possible to restore or enhance the resources of the nation’s coastal zone.” 16 U.S.C. §1452. When passing the CZMA, Congress recognized the value of encouraging and assisting States “to exercise effectively their responsibilities in such areas through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone” 16 U.S.C. 1452(2). To that end, the CZMA specifically authorizes each State to develop a Coastal Management Program (“CMP”). Such CMP’s are defined as “comprehensive” statements “setting forth objectives policies and standards to guide public and private uses of lands and waters in the coastal zone.” 16 U.S.C. §1453 (12). Federal approval of a State CMP allows the state to receive Federal CZMA grants. See 16 U.S.C. §§ 1454, 1455. Such approval also requires that Federal agency action be undertaken, as discussed below, in a manner that is consistent with the State CMP, to the maximum extent practicable.

New York State’s legislation implementing the State’s role in the CMZA process is found in the New York State Waterfront Revitalization of Coastal Areas and Inland Waterways Act, 42 N.Y. Exec. L. §§910-23 (the “NYS Coastal and Waterways Act”); See generally 19 NYCRR Part 600. Pursuant to the NYS Coastal and Waterways Act, New York State not only develops a State CMP, but also encourages localities along coastal waterways to participate in coastal management by preparation of a Local Waterfront Revitalization Program (“LWRP”), in cooperation with the New York State Department of State. See 42 N.Y. Exec. L. §912 (9) (declaration of policy) (noting policy of NYS Coastal and Waterways Act to, inter alia, work cooperatively with “accepted waterfront revitalization programs”). The LWRP is an optional, locally prepared land and water use plan for a community’s waterfront and waterfront resources. 42 N.Y. Exec. L. §915. Like the State CMP, the LWRP considers a broad range of issues

important to waterfront communities, including access to the water and coastline protection. Local governments submit their LWRP to the New York State Secretary of State for approval. State approval of an LWRP requires State agency actions to be undertaken in a manner consistent with the LWRP, to the maximum extent practicable. In the event that the Federal government, through its Office of Coastal Resources Management, also approves the LWRP, that document constitutes an addition to the State CMP.

Section 307 of the CZMA (the “Federal Consistency Provision”) recognizes and gives voice to State and local interests in coastal zone management, as expressed in their CMP’s and LWRP’s. Specifically, Federal agency activity within or affecting a coastal zone must be carried out in a manner “consistent to the maximum extent practicable with the enforceable policies” of an approved State CMP. 16 U.S.C. §1456(a)(1)(A). Where a State has submitted and obtained Federal approval for an incorporated LWRP, Federal agencies must act, to the maximum extent practicable, in a manner consistent with both the CMP and the incorporated LWRP. State and Federal approval of the LWRP allows the goals of local communities, as expressed in the LWRP, to be coordinated with State and Federal actions affecting the waterfront.

The process of determining whether Federal agency action is consistent within the policies set forth in the CMP and LWRP is known as a “consistency review.” Pursuant to such review, a Federal agency seeking to undertake a project affecting a State’s coastal use or resource must provide the state with a “Consistency Determination.” That document sets forth the Federal agency’s determination that the proposed project shall be, as required by the CZMA, “carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies” of the approved State CMP. 16 U.S.C. §1456(c)(1)(A), (C); see 15 C.F.R. § 930.30. Once the Federal Consistency Determination is made, the State decides whether to

concur with, or object to that determination. 15 C.F.R. §930.41(a). In the event that a State objects to the Federal Consistency Determination, the State must describe the reasons for its objections, setting forth particular supporting information. 15 C.F.R. § 930.43. Disputes concerning the propriety of a Consistency Determination may be handled via mediation provided for in the applicable regulatory framework. 15 C.F.R. §930.44-45. Consistency determinations in New York are made by the New York State Department of State's Division of Coastal Resources, the state's coastal management agency (the "State CMA").

B. National Environmental Policy Act ("NEPA")

The National Environmental Policy Act ("NEPA") requires federal agencies to make "high quality" environmental information available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). Under NEPA, a federal agency must prepare an environmental impact statement ("EIS") before taking any major action that significantly affects the quality of the human environment. 42 U.S.C. § 4332(2)(C). The agency-produced NEPA document that determines whether or not proposed action will "affect the quality of the human environment" so as to require the preparation of an EIS, is referred to as an environmental assessment ("EA"). An EA is a "concise public document" that briefly "provides sufficient evidence and analysis for determining whether to prepare an Environmental Impact Statement or a finding of no significant impact (a "FONSI"). 40 C.F.R. § 1508.9(a). If the agency finds that proposed action will not affect the environment within the meaning of NEPA, no EIS is required, and instead a FONSI is prepared. 40 C.F.R. § 1501.4(e).

NEPA does not guarantee or mandate any particular result. Instead, the statute "imposes only procedural requirements" designed to ensure that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant

environmental impacts.” Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 22 (2008) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)). Since NEPA mandates only a process, not a particular result, the statute “does not command an agency to favor any particular course of action, likely but rather requires the agency to withhold its decision to proceed with an action until it has taken a ‘hard look’ at the environmental consequences.” Brodsky v. U.S. Nuclear Regulatory Com'n, 704 F.3d 113, 118-19 (2d Cir. 2013); Coalition on West Valley Nuclear Wastes v. Chu, 592 F.3d 306, 310 (2d Cir. 2009); Stewart Park & Reserve Coalition, Inc. v. Slater, 352 F.3d 545, 557 (2d Cir. 2003); Sierra Club v. United States Army Corps of Eng'rs, 701 F.2d 1011, 1029 (2d Cir. 1983).

IV. The CZMA and NEPA Procedures Followed Herein

A. CZMA Procedure

On August 11, 2014, the Corps issued its Consistency Determination letter (the “Consistency Determination”) to the State CMA. See Declaration of Edwin R. Cortes in Support of Defendant’s Motion to Dismiss, Removed Action DE 25-2 ¶2; Exhibit A attached as DE No. 25-3. The Consistency Determination refers to the purposes of the Project, as discussed above. In addition to its reference to Sandy, the Consistency Determination refers also to effects of Hurricane Irene in leaving the south shore of Montauk vulnerable to future storm damage. DE No. 25-3 at 2-3. The Consistency Determination is comprised of a cover letter, and two reports. One report addresses potentially impacted LWRP policies, and the other addresses potentially impacted State CMP policies. While the reports attached to the Policy Statements bear the word “Draft,” the court has no reason to doubt the representation that inclusion of that term was inadvertent, and the reports are represented to be the final work of the Agency. Supplemental Declaration of Frank Verga, Removed Action DE No. 67.

The reports annexed to the August 11, 2014, Consistency Determination identify several LWRP and State CMP policies at issue with respect to the Project. Specifically, the Corps set forth twenty-one LWRP policies, and twenty-four State CMP policies as potentially applicable to the Project. Each such policy is separately noted, along with the Corps' detailed position as to whether the policy identified is consistent with the Project. As set forth in the Consistency Determination, the Project is ultimately deemed either not directly applicable to each policy identified, or consistent therewith. DE No. 25-3 at 4-16.

Of particular significance to Plaintiffs' claims are those LWRP and CMP policies referring to the so-called "structural" nature of the Project. As to the Town's policies, the LWRP states broadly that "only non-structural measures are permitted to minimize flooding and erosion." LWRP Policy 17A. The State CMP's discussion of structural measures sets forth several policies governing the use of such structures. See, e.g., State CMP Policy 17 (preferring use of non-structural erosion protection measures); State CMP Policy 13 (referring to "construction or reconstruction of erosion protection structures" only if they have a reasonable probability of controlling erosion for at least thirty years); State CMP Policy 14 (stating that "construction or reconstruction of erosion protection structures shall not be constructed to measurably increase erosion or flooding").

As to each policy implicating the so-called "structural" nature of the Project, the Consistency Determination letter notes the LWRP and State CMP restrictions on the placing of hard structures on the beach. The Consistency Determination letter states, however, that the Project does not run afoul of those restrictions because dune reinforcement via the use of GSC's is "non-structural". Further, the use of GSC's are described as consistent with the "nourishment of beaches and dunes with appropriate material" as allowed pursuant to New York State's coastal

erosion hazard area regulations contained in 6 NYCRR Part 500. See Removed Petition DE 25-3. The Corps further responds to State and local concerns by noting that the GSC's will be covered by a minimum of three feet of sand. The Corps additionally finds support for the Project by stating the need to provide a temporary measure to protect downtown Montauk. With respect to the State CMP Policy that erosion protection structures shall be undertaken only if there is a reasonable probability of a thirty year period of erosion control, the Consistency Determination states that the Project is aimed at immediate protection of the vulnerable area, and that the life of the Project is to be incorporated into the 50 year plan of the Reformulated FIMP.

On October 24, 2014, the State CMA issued a "Concurrence with Consistency Determination, agreeing with the Corps that the Project was, indeed, consistent with the State CMP and the LWRP. See Removed Petition DE No. 41-5 at 2-3. On November 3, 2013 the Town reached the same conclusion. See Removed Petition DE No. 41-5 at 4-5.

B. NEPA Procedure

On August 27, 2014, the Corps released, in a press release and on its website: (1) a Draft Environmental Assessment, see Reply Affidavit of Edwin R. Cortes, submitted in support of Motion to Dismiss Docket No. 15-2349 ("Cortes Reply Aff") Draft Environmental Assessment (Removed Petition DE 41-3 ("Draft EA")), and (2) a Draft Finding of No Significant Impact on the Environment, see Cortes Reply Aff. (Removed Petition DE 41-4 ("Draft FONSI")). Both drafts were made available for public comment for a 30 day period. See Cortes Reply Aff. 41-5. The Environmental Assessment was finalized in October of 2014, and the FONSI was finalized on November 12, 2014. Cortes Reply Aff. at DE 41-6 and DE 41-7. On December 8, 2014, the Corps released the final EA and the FONSI on its website. See "December 8, 2014 Update" available at:

<http://www.nan.usace.army.mil/Missions/CivilWorks/ProjectsInNewYork/FireIslandtoMontaukPointReformulationStudy.aspx>.

V. Claims Alleged Against the Corps in the Removed Petition and the Federal Complaint

The Removed Petition mentions the Corps in only one of the seven causes of action set forth in that case. Specifically, the Fifth Cause of Action therein alleges that the Corps' Consistency Determination is irrational, arbitrary and capricious. See Amended Petition filed in Removed Action, DE 5 No. 5 at ¶¶ 413-420. As with all other allegations of the Removed Petition, the cause of action against the Corps is set forth only pursuant to Article 78 of New York State law. The Federal Complaint asserts that Plaintiffs are entitled to APA review of: (1) the USACE Consistency Determination under the CZMA (Count 1) Federal Action DE No. 2 at ¶¶ 76-93, and (2) the FONSI determination as an alleged violation of NEPA. Federal Action DE No. 2 at ¶¶ 94-111.

VI. The Parties' Positions and the Documents Considered

In view of the fact that this Court entered the procedural order described above, the Court allowed the Corps until October 13, 2015 to submit additional briefing with respect to the Federal APA claims asserted, for the first time, in the context of the Federal Action. The court requested such briefing despite the fact that Plaintiffs had yet to formally serve any Defendant in the Federal Action. The reason for the Court's request was to allow this Court to consider, on a fully briefed record, the preliminary injunction motion as if brought in both the Removed Proceeding and the Federal Action. Procedurally, this order ensures that the parties will have the benefit of a ruling as to all legal theories (including the newly pleaded Federal claims) alleged in support of, and in opposition to Plaintiffs' motion for injunctive relief.

Despite this Court's clear order requiring additional briefing by the Corps, Plaintiffs urge the Court to ignore the Corps' submission as an "unauthorized *de facto* sur-reply." See "Letter

opposition to de facto sur-reply of army corps” dated October 13, 2015. Removed Action DE No. 68; Federal Action DE No. 14. The Court denies the request to ignore briefing specifically requested. Further, the Court observes that it is, in fact, Plaintiffs who have submitted unauthorized additional briefing in this matter. Thus, in addition to the unauthorized five page letter objecting to the Corps’ court-ordered submission, Plaintiffs submit a supplemental declaration of counsel. See “Letter Supplemental Declaration of Carl irace in opposition to de facto sur-reply of Army Corps,” dated October 13, 2015. Removed Action DE No. 69; Federal Action DE No. 15. That declaration attaches what appears to be an unsigned “Letter to the Editor” sent to a local East Hampton publication stating the writer’s opinion objecting to the Project. Id.

Although the Plaintiffs’ October 13, 2015 submissions were neither ordered nor contemplated by this Court’s October 9, 2105 order, the Court states that in reaching its decision it has reviewed all materials submitted on the dockets of both the Removed Petition and the Federal Action and all documents submitted therewith.

DISCUSSION

I. Legal Principles

A. Standard for Grant of Preliminary Injunctive Relief

A preliminary injunction is an extraordinary remedy constituting “one of the most drastic tools in the arsenal of judicial remedies.” Two Locks, Inc. v. Kellogg Sales Co., 68 F. Supp.3d 317, 324 (E.D.N.Y. 2014) (quoting Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007).

In Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008), the Supreme Court of the United States held that governmental action may be enjoined as a violation of environmental law only if the plaintiff seeking injunctive relief can “establish that he is likely to

succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter, 555 U.S. at 20. As to irreparable harm, plaintiff must establish more than the mere “possibility” thereof, he must establish that such harm is *likely* in the absence of an injunction. Id. (emphasis in original). The standard set forth in Winter differs somewhat from the long articulated Second Circuit standard allowing preliminary injunctive relief only where a plaintiff can show “(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.” Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

The Second Circuit has rejected the argument that the standard articulated in Winter was meant to abrogate the more flexible long articulated standard applied in this Circuit. See Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 38 (2d Cir. 2010). Nonetheless, that Court has made clear that the “less rigorous” alternative to demonstrating a likelihood of success on the merits, *i.e.*, the “fair ground for litigation” alternative, is not available where the plaintiff challenges “governmental action taken in the public interest pursuant to a statutory or regulatory scheme.” Id. at n. 4 (quoting Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989)); Otoe–Missouria Tribe of Indians v. New York State Dep’t of Fin. Servs., 769 F.3d 105, 110 (2d Cir. 2014); National Audobon Society, Inc. v. United States Fish and Wildlife Service, 55 F. Supp.3d 316, 349-50 (likelihood of success standard applies in case seeking NEPA review); Habitat for Horses v. Salazar, 745 F. Supp. 2d 438, 447 (S.D.N.Y. 2010) (NEPA). Additionally, both the Supreme Court in Winter, and the Second Circuit agree that the court must consider the impact of an injunction, or lack

thereof, on the public interest. Thus, an injunction is appropriately granted only if, in addition to meeting the standard referred to above, the grant would be in the public interest. See Winter, 555 U.S. at 22; Metropolitan Taxicab Bd. of Trade v. City of New York, 615 F.3d 152, 156 (2d Cir. 2010) (injunction sought in case alleging violation of Energy Policy Conservation Act and Clean Air Act); see also Red Earth LLC v. United States, 657 F.3d 138, 143 (2d Cir. 2011); Town of Brookhaven v. Sills Road Realty LLC, 2014 WL 2854659 at *1, *6-*7 (E.D.N.Y. 2014)

B. Standard of Review Under the APA

The APA provides, in relevant part, that one who suffers “legal wrong because of agency action,” or is “adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. The party challenging agency action bears the burden of proving that the challenged action violated the law, and that burden is high. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989); see also Natural Res. Def. Council, Inc. v. U.S. Army Corps of Eng'rs, 457 F.Supp.2d 198, 220 (S.D.N.Y. 2006); Boatmen v. Gutierrez, 429 F.Supp.2d 543, 548 (E.D.N.Y. 2006). Thus, a court may overturn an agency decision only if it is “‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,’ in excess of the agency's statutory jurisdiction or authority, or ‘without observance of procedure required by law.’” Brodsky v. United States Nuclear Regulatory Comm'n, 704 F.3d 113, 119 (2d Cir. 2013) (quoting 5 U.S.C. § 706(2)(A), (C), (D)); Habitat for Horses, 745 F. Supp.2d at 449-50 (quoting Natural Res. Def. Council, Inc. v. United States Dep't of Agriculture, 613 F.3d 76, 83 (2d Cir. 2010) This standard is “particularly deferential.” Env'tl Def. v. U.S. Env'tl Prot. Agency, 369 F.3d 193, 201 (2d Cir. 2004). An agency's action should be set aside under the APA only “if it relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the

agency, or is so implausible that it could not be ascribed to a difference in view or the products of expertise.” Natural Res. Def. Council, 613 F.3d at 83 (quoting Fund for Animals v. Kempthorne, 538 F.3d 124, 132 (2d Cir. 2008)).

When applying the required deferential standard of review, a court cannot substitute its judgment for that of the agency. Natural Res. Def. Council v. Fed. Aviation Admin., 564 F.3d 549, 555 (2d Cir. 2009); see also Fed. Communications Commission v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009). This recognizes the rule that an agency faced with conflicting views must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.” Marsh, 490 U.S. at 378.

III. Disposition of the Motion

A. Likelihood of Success

1. Article 78 Claims

Article 78 of the New York Civil Practice Laws and Rules is a codification of the common law writs of certiorari, mandamus and prohibition. See CPLR 7801. As such, it provides a procedural vehicle whereby an aggrieved party can obtain review of decisions of state or local agencies and officers. While Article 78 may be the proper vehicle to challenge local decisions, the Federal government has not waived sovereign immunity with respect to such proceedings. Thus, an Article 78 proceeding is the wrong vehicle for obtaining review of a decision of the Federal government or any agency thereof. Nouredinne v. Administration for Child and Family, 2015 WL 967594, at *3 (E.D.N.Y. 2015) (dismissing plaintiff’s claims against Federal Agency where the “only legal basis for jurisdiction alleged in the complaint” was Article 78 jurisdiction).

Plaintiffs have made no real argument in support of the notion that they may pursue an Article 78 proceeding in this court against the Corps. See Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss, Removed Petition DE No. 31. Instead, they have continually sought to avoid dismissal on the sovereign immunity ground by amending their complaint to assert APA claims that allege violations of the CZMA and NEPA. Plaintiffs' apparent concession that they cannot proceed against the Corps under Article 78 leaves this Court with little doubt that Plaintiffs show no likelihood of success as to any such claim. Accordingly, the Court respectfully recommends that preliminary injunctive relief, to the extent sought pursuant to any Article 78 claim originally asserted in the Removed Petition and, to the extent claimed under the Federal Action, be denied.

2. Federal Claims

Plaintiffs' federal claims assert, as set forth above, APA review of the USACE actions with respect to the CZMA and NEPA.

i. CZMA

As to the CZMA, Plaintiffs find fault and seek review of the Corps' Consistency Determination. Plaintiffs are unlikely to succeed on any such claim. As described in detail above, the CZMA allows Federal projects to go forward where there has been compliance with consistency determination procedures. Where a State expresses its concurrence with a Federal consistency determination, the Federal agency is, and must be, entitled to rely on the State's expression of concurrency and go forward with the planned project. See accord Save Lake Washington v. Frank, 641 F.2d 1330, 1338-39 (9th Cir. 1981) ("[w]here procedures to resolve potential federal-state disagreements over matters affecting the jurisdiction of both have been established, we should be reluctant to set aside determinations made pursuant to those procedures

absent a compelling reason to do so.”); Enos, 616 F. Supp. at 64 (“there can be no violation of the CZMA when the consistency determination is approved by the state, since the Corps is entitled to rely upon the state's agreement with the determination”).

Thus, where, as here, the State (and in this case the Local government as well) agree with the Federal Consistency Determination, CZMA compliance is complete and the planned project may move forward. In such cases, any CZMA claim is moot and must be dismissed. E.g., Knaust v. City of Kingston, 1999 WL 31106, at *1, *7 (N.D.N.Y. 1999) (dismissing Plaintiffs’ CZMA claim against United States Department of Commerce as moot where the State concurred with the Federal agency’s consistency determination); accord Save Lake Washington, 641 F.2d at 1337-39; Enos v. Marsh, 616 F. Supp. 32, 63-64 (D. Hawaii 1984), aff’d, 769 F.2d 1363 (9th Cir. 1985).

Plaintiffs’ opposition to the mootness argument fails to cite to any case law rejecting application of the mootness doctrine in a CZMA case. Instead, Plaintiffs argue that the facts of this case “warrant a departure from existing caselaw.” Removed Action DE No. 68 at 5. Such departure is alleged to be proper because the Project in this particular case, is, according to Plaintiffs, inconsistent with the LWRP. The Court declines to depart from law and allow any group or individual to require a Court to revisit joint decisions made, and agreed to, by Federal, State and local governments finding consistency in actions covered by the CZMA. Citizens, including Plaintiffs and the groups they belong to, have a voice in contributing to the fashioning of State CMP’s and local LWRP’s. Indeed, Kevin McAllister, a named Plaintiff here, states that he offered his opinions in the drafting of the LWRP at issue. Once those policies were drafted and finalized, they became the documents to consider under the CZMA Section 307 “Federal Consistency Provision” described in detail above.

Even if Plaintiffs' CZMA claims were not moot, they would nonetheless be unlikely to succeed, and therefore cannot support a grant of injunctive relief. This is because, as a matter of substance, the CZMA requires only that Federal projects conform with State CMP's "to the maximum extent practicable." 16 U.S.C. §1456(a)(1)(A). As noted above and in Plaintiffs' pleadings, the chief complaint regarding the Project focuses on Plaintiffs' characterization of the use of GSC's as the construction of a "structure" that is explicitly prohibited by the LWRP. The Corps' Consistency Determination addresses this issue and those regarding possible exposure of the GSC's, explaining its well-supported assertions that the Project is non-structural, and will be well-covered by three feet of sand.

Plaintiffs' amended complaint in the Federal Action is simply wrong when it states that the LWRP "replaces and supersedes" the CMZA and the State CMP. See Federal Action DE No. 2 ¶ 34. Instead, the standard requires only conformance "to the maximum extent practicable." 16 U.S.C. §1456(a)(1)(A). The documents before the Court support a holding that the Corps complied with the standard requiring conformance "to the maximum extent practicable" when making its determination to go forward with the Project. Thus, it is clear that the Corps considered several other options prior to arriving at the decision to go forward with the Project, including a "no action" option. These options were rejected for reasons set forth in the Main Report. The Corps' consideration of such alternatives supports the argument that the Project design was decided in light of all policy considerations (including the "structural" policies set forth in the LWRP and the State CMP). Ultimately, there is more than sufficient evidence to conclude that Corps reasonably decided to go forward with the Project in an effort to accommodate both the local and State plans "to the maximum extent practicable." No more is required.

ii. NEPA

Plaintiffs are unlikely to succeed on any NEPA claim for both procedural and substantive reasons. Procedurally, Plaintiffs waived any objections to the EA or FONSI by failing to object during the 30 day public comment period. Even if a substantive APA review of these documents were appropriate, the limited review set forth in the APA would confirm the findings of the Corps, and Plaintiffs are therefore unlikely to succeed on the merits of their NEPA claim.

First, as to procedure, a party waives raising NEPA objections to an EA or a FONSI if it fails to object to such documents during the period when they are available for public comment. See Dep't. of Transp. v. Public Citizen, 541 U.S. 752, 764-65 (2004) (plaintiff forfeited right to object to EA on any ground not specifically and properly raised to the agency); Eastern Queens Alliance, Inc. v. FAA, 589 Fed. Appx. 19 (2d Cir. 2014) (affirming denial of review of EA and FONSI where, inter alia, grounds for objection were not “brought to the agency’s attention during the public comment period”); accord Benton v. United States Dep’t of Energy, 256 F. Supp.2d 1195, 1198 (E.D. Wash. 2003) (waiver of right to raise argument not raised during the EA and PEIS comment process). Plaintiffs failed to timely raise any specific objections during the period of public comment, and therefore any such objections are waived.

As to the possibility of any challenge on the merits, the court notes that agencies do bear the primary responsibility to ensure compliance with NEPA, and a NEPA document may be so obviously flawed “that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.” Dep’t. of Transp. v. Public Citizen, 541 U.S. at 765. However, even assuming that APA review of the Corps’ NEPA documents is available to Plaintiffs here, the Court would find no likelihood of success as to any such NEPA claim.

It is important to reiterate that NEPA imposes procedural requirements only, and mandates no particular result. The Court's role is to determine only whether such procedures were followed and whether the agency decision was reasonable. As to procedure, the Corps filed its 55 page draft EA, and the draft FONSI on August 27, 2014 on its website. Both drafts were made available for public comment for a 30 day period. The Environmental Assessment was thereafter finalized in October of 2014, and the FONSI was finalized on November 12, 2014. On December 8, 2014, the Corps released the final EA and the FONSI on its website. The documents make clear that NEPA procedures were followed.

As to any APA claim on the merits, it is clear that, as a matter of substance, the EA and FONSI are well-supported documents. The EA discusses the possibility of alternate approaches and the environmental impacts of each. See EA at 33-42. Significantly, as to the "no action" alternative (which appears to be Plaintiffs' preferred course) the Corps noted that "no action" would leave the Project area protected only by periodic sand replenishment undertaken by the local community. EA at 1.12 Removed Action DE No. 41-3 at 38. The Corps concluded that taking no action would will:

likely result in major damage to structures and possibly human safety, since the majority of the Downtown Montauk project area lies within the 100-year flood plain. Therefore, even no action has negative environmental consequences, since during catastrophic storm events, no action will probably mean a loss of property and potentially even human life. Since the No Action alternative does not meet the needs of the downtown Montauk community, it is not the preferred alternative.

Id. Environmental consequences of a "no action" alternative are set forth in the EA, and include physical losses of structures, as well as long term economic setbacks including the loss of property, jobs, access to transportation, recreation areas and cultural resources. Id. With respect to the Project alternative, the EA notes, inter alia, a positive impact on land use in the Project area. Thus, the EA notes that:

due to the reduced likelihood of breaching and inundation of the bayshore, residential, recreational and commercial structures are much less likely to be damaged or destroyed, access to homes and businesses are less likely to be interrupted, and utility service is less likely to be disrupted.

Id. at 41. Additionally, in view of the fact, inter alia, that the Project is set to be completed outside of the summer tourist season, the EA also found no negative socioeconomic effect associated with the Project. Id. at 42.

The FONSI, which reflects review of the EA, similarly finds that the Project “would result in no significant adverse environmental impacts and is the alternative that represents sound engineering practices and meets environmental standards.” Removed Petition DE No. 41-4. That document also reaches the NEPA determination that the Project, which is limited in scope and time, does not constitute “a major Federal action significantly affecting the quality of the human environment,” and therefore does not require the preparation of a detailed NEPA environmental impact statement. Id.

It is not necessary for the Court to set forth every statement and finding in the EA and FONSI to reach the conclusion that, even if permitted to state a claim for an APA review of those documents, Plaintiffs are unlikely to succeed. This would be the Court’s conclusion even if further expert testimony, which the Court does not find necessary, were allowed. Ultimately, Plaintiffs show no more than their general disagreement with the decision to go forward with the Project, and their particular disagreements with the findings of the Corps with respect to environmental consequences. It is not for the Court to revisit agency decisions simply because Plaintiffs’ proffered experts may disagree with agency conclusions. Instead, as noted, NEPA is designed to ensure that the agency decision carefully considered “detailed information concerning significant environmental impacts.” Winter, 555 U.S. at 22 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)). The review of the NEPA

documents properly before the Court show that the Corps took the required “hard look,” at the environmental consequences of the Project and reached its decision based upon reasonable grounds. See Brodsky, 704 F.3d at 118-19. Plaintiffs are certainly unlikely to succeed on any claim that the decision to proceed with the Project was “‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,’ in excess of the agency's statutory jurisdiction or authority, or ‘without observance of procedure required by law.’” Accordingly, Plaintiffs will not likely succeed on any claim that the Corps’ NEPA decisions were taken in violation of the APA.

B. Additional Grounds to Deny Injunctive Relief

Plaintiffs’ failure to show likelihood of success is fatal to their claim for injunctive relief. Consideration of additional factors, as set forth below, similarly lead to the conclusion that injunctive relief should be denied.

i. Delay in Seeking Relief Supports a Holding that Relief is Barred by Laches

Plaintiffs commenced the Removed Proceeding in State Court in March of 2015, over six months after the August 2014 Consistency Determination that forms the basis of all of Plaintiffs’ claims. They then waited until October 1, 2015, over one year after the Consistency Determination, to seek preliminary injunctive relief.

Laches bars injunctive relief where: (1) the party seeking relief has not acted diligently and, (2) the lack of diligence results in prejudice to the party opposing the injunction. Costello v. United States, 365 U.S. 265, 282 (1961); New Era Publications Int’l, ApS v. Henry Holt & Co., 684 F. Supp. 808, 809 (S.D.N.Y. 1988). Though rarely invoked in environmental cases, laches is available as a defense when the facts of the case call for its application. Sierra Club v.

Alexander, 484 F. Supp. 455, 472 (N.D.N.Y. 1980); see City of Rochester v. United States Postal Service, 541 F.2d 967, 977 (2d Cir. 1976).

There is no question but that Plaintiffs have failed to act diligently. Documents before the Court indicate that Plaintiffs were well aware, no later than April of 2015, that the Corps intended to commence construction in October of 2015. Indeed, the same local publication referred to in Plaintiffs' latest submission herein, Federal Action DE No. 69, (which is obviously a publication closely followed by Plaintiffs) reported in April of 2015 that the Project would begin in October of 2015. See Cortes Declaration, Removed Action, DE No. 58-4 ¶3 Exhibit 2. Additionally, the Consistency Determination, released for public comment in August of 2014, was also made public on the Corps' website, as discussed above, in early December of 2014. Moreover, Plaintiffs' own admissions indicate they received FOIA documents several months prior to seeking a preliminary injunction. Removed Action, DE No. 64 at 5. The evidence before the Court makes clear that Plaintiffs cannot claim surprise to excuse their lack of diligence.

As to the second prong of the laches test, it is clear that Plaintiffs' delay has prejudiced the Corps in several ways. As described in the Merenda Declaration, the Corps has undergone extensive and costly preparation efforts that would have to be repeated if an injunction resulted in a delay of the Project. See generally Merenda Declaration, Removed Action, DE No. 58-9 ¶¶ 6-12. Specifically, the Merenda declaration indicates that because Plaintiffs waited until the Corps had already begun to mobilize before filing its motion, it will cost the Corps roughly \$6,700 per day if an injunction is granted, and up to \$1.1 million if H&L is required to demobilize and re-mobilize at a later date. Id. These are considerable burdens that could have been ameliorated if Plaintiffs had earlier filed their motion.

Where, as here, plaintiffs delay in seeking court intervention, their unexcused delay speaks strongly against granting a preliminary injunction. See, e.g. National Council of Arab Americans v. City of New York, 331 F.Supp.2d 258, 266 (S.D.N.Y. 2004) (laches applied to delay of one and one half months after final ruling, and fifteen days before action sought to be enjoined was to take place); Irish Lesbian and Gay Org. v. Giuliani, 918 F.Supp. 732, 749 (S.D.N.Y. 1996) (finding prejudice to defendants “where plaintiff sought to enjoin the issuance of a parade permit only 19 days before the parade and over one month after the permit had been denied”). The prejudice to defendants both in the ability to prepare their case, and the substantial efforts undertaken in connection with commencement of the Project is sufficiently severe to warrant the application of laches. See Allens Creek/Corbetts Gel Preservation Group, Inc. v. West, 2 Fed. Appx. 162, 165 (2d Cir. 2001) (affirming denial of preliminary injunction in environmental case where Plaintiffs failed to seek such relief until project was nearly complete); Irish Lesbian and Gay Org., 918 F. Supp. at 749 (S.D.N.Y. 1996) (noting prejudice to defendant’s ability to prepare case as a result of plaintiff’s delay in seeking relief).

ii. Plaintiffs Fail to Show Irreparable Harm

The delay in seeking relief not only supports the Corps laches argument, it also militates against a finding of irreparable harm. As recognized by the Second Circuit, “[p]reliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs’ rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action.” Citibank N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir. 1985).

Plaintiffs’ submission on the merits also fails to support a showing of irreparable harm. It is well established that irreparable harm sufficient to support a preliminary injunction must not

be “remote or speculative.” Jackson Dairy, 596 F.2d at 72 (citation omitted). Such harm is not presumed, even if there has been a statutory violation, and must be “proved, not assumed.” Town of Huntington v. Marsh, 884 F.2d 648, 653 (2d Cir. 1989).

Plaintiffs attempt to prove irreparable harm by submission of the McAllister Declaration. As noted above, McAllister states that he has received undergraduate degrees in natural resources and marine biology, and has conducted Master’s level research in the area of dune restoration. See McAllister Declaration Removed Action DE No. 54-3 ¶1. In addition to setting forth his opinion that the Project violated the LWRP, McAllister states that the Project will cause harm to “environmental, ecological, recreational, aesthetic, and economic interests in Montauk.” McAllister Declaration Removed Action DE No. 54-3 ¶ 27.

Apart from the fact that even McAllister does not purport to be an expert in all of the fields in which he offers an opinion (including the field of economics), his declaration is insufficient to show irreparable harm sufficient to support a grant of injunctive relief. Plaintiffs assume irreparable harm based upon assertions that: (1) the Project will increase erosion; (2) the best alternative is taking no action at all, and (3) the Project will ruin the beach and public access thereto. See McAllister Declaration Removed Action DE No. 54-3 ¶¶39-51. The McAllister Declaration, however, states nothing more than disagreement with the Corps’ erosion control decisions, and its conclusions regarding the LWRP.

Plaintiffs’ positions with respect to the value of taking no action are unsupported and, indeed, contradicted by the declaration submitted. Thus, while McAllister concedes the disastrous effects of storm-related flooding, see Id. at ¶43, he simply assumes that doing nothing will result in no further damage. As set forth above, the Corps considered and rejected the “no action” alternative as having its own set of potentially disastrous negative effects. Plaintiffs’

endorsement of a strategy of “retreat,” see Federal Action DE 69, while different from the strategy sought to be further by the Project, does nothing to prove that the Project will result in irreparable harm to the beach.

Additionally, there is no evidence to support the claim of irreparable harm in the form of rendering the beach unusable. As to this issue, the Corps states that the GSC’s will be covered by sand and, if the Project is allowed to go forward, the public will have full access to the beach by the start of the next summer season. Plaintiffs reject this determination based only on the unsupported assertion that the Corps is being “blindly optimistic,” and maintaining a three foot sand cover is “financially and mechanically unsustainable.” Id. at ¶ 41. Far from proving irreparable harm, the McAllister Declaration does nothing more than state an unsupported opinion that is at odds with the well supported opinion of the Corps to move forward with the Project. As such, it is insufficient to support a claim of irreparable harm.

iii. Balance of Equities and the Public Interest

As a final and important matter, this Court finds that the balance of equities and the public interest also weigh heavily against an order enjoining the Project from going forward. The USACE has made clear the financial cost of delay. Although financial issues are significant, this Court’s recommendation as to the balance of equities question is not based solely upon the potential cost of delay, and the loss of funding. Instead, the Court relies additionally on the clear public interest that will be hindered by a grant of the preliminary relief sought by Plaintiffs.

There can be no question but that Long Islanders, including all those who live, work or visit the area sought to be protected by the Project, have suffered catastrophic property and personal loss as a result of past hurricanes and other storms. New York’s latest tragic flooding took place almost three years to the date of this opinion in the form of Hurricane Sandy. It was

that event that finally led the Federal government to fully fund disaster relief aimed at protecting coastal communities and citizens from future storms. In the short period of time that this motion for injunctive relief has been pending, Long Island was largely spared the effect of Hurricane Joaquin. While autumn is the time of year when hurricanes and storms are likely to pose a threat to the Project area, the Corps represents that present beach conditions appear favorable for the Project to safely move forward toward timely completion. Verga Declaration at ¶¶14-19. It is clear that any order delaying the Project, for even a short period of time, will put the shoreline in danger, and expose Montauk's population to unnecessary risk. It is thus clear that the balance of equities and public interest weigh overwhelmingly against the injunctive relief sought.

CONCLUSION

For the foregoing reasons, this Court respectfully reports and recommends that that the District Court deny Plaintiffs' motion for a preliminary injunction as filed under Docket No. 54 in the Removed Action (DE No. 54 in No. 15-2349).

In accord with the procedural order of this Court, it is further recommended that the District Court direct the Clerk of the Court to close the action filed under Docket No. 15-2349, terminate, without prejudice to re-filing, the motions to dismiss pending as Docket Nos. 19, 21, 25, 26 and 29 therein, and deny the motion for a temporary restraining order and preliminary injunction appearing as Docket No. 54.

OBJECTIONS

A copy of this Report and Recommendation is being provided to defense counsel via ECF. Furthermore, the Court directs defense counsel to (1) to serve a copy of this Report and Recommendation by first class mail to Plaintiff at his last known addresses, and (2) to file proof of service on ECF within two days. Any written objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this report. 28

U.S.C. § 636(b)(1) (2006 & Supp. V 2011); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the district judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. **Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court or Court of Appeals.** Thomas v. Arn, 474 U.S. 140, 145 (1985) (“[A] party shall file objections with the district court or else waive right to appeal.”); Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Cir. 2008) (“[F]ailure to object timely to a magistrate’s report operates as a waiver of any further judicial review of the magistrate’s decision.”).

Dated: Central Islip, New York
October 15, 2015

/s/ Anne Y. Shields
ANNE Y. SHIELDS
United States Magistrate Judge