UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SAVE OUR PARKS, GENEVA HESTER, ALBERTHA HUNTER, LUZ I. ROLDOS, ESTER ROSA, LUCRECIA SANTIAGO, FRANCES TEJADA, and BRONX COUNCIL FOR ENVIRONMENTAL QUALITY,

Plaintiffs,

- against -

DIRK KEMPTHORNE, Secretary, UNITED STATES DEPARTMENT OF THE INTERIOR; FRAN MAINELLA, Director, NATIONAL PARK SERVICE; MARY A. BOMAR, Regional Director, Northeast Region, NATIONAL PARK SERVICE; BERNADETTE CASTRO, Commissioner, New York State Office of Parks, Recreation and Historic Preservation; ADRIAN BENEPE, Commissioner, New York City Department of Parks and Recreation; and NEW YORK YANKEES PARTNERSHIP,

Defendants.

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MEMORANDUM AND ORDER

06 Civ. 6859 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff Save Our Parks ("SOP") is an unincorporated membership organization comprised of individuals interested in the "protection, restoration, preservation, expansion[,] and improvement of Macomb[']s Dam and John Mullaly Parks" in the area surrounding the current Yankee Stadium, located in the

South Bronx. Plaintiff's Complaint ("Pl. Compl.") ¶ 13. Plaintiff Bronx Council for Environmental Quality ("Bronx Council") is a non-profit organization "dedicated to working to preserve the natural and historic heritage of the Bronx." Id. at 14. After unsuccessful attempts at stopping the plans to develop a new Yankee Stadium through state litigation, SOP and the Bronx Council, along with various individual members of the two groups, brought this action against various federal, state, and local government officials, in their official capacities, and the New York Yankees Partnership ("Yankees"), requesting declaratory and injunctive relief.

The construction of the new Yankee Stadium requires that a portion of parkland currently protected by the federal Land and Water Conservation Fund ("L&WCF") be converted to private use. The narrow question before us in plaintiffs' present action is whether the National Park Service's ("NPS") approval of this conversion was arbitrary and capricious and in contravention of Section 6(f)(3) of the Land and Water Conservation Fund Act ("L&WCFA").[1] See L&WCFA, 16 U.S.C. § 460l-8(f)(3). This action is specifically directed to the approval by the NPS of the conversion of a portion of parkland to private use and the

[1] We note that although we shall refer to the Land and Water Conservation Fund as the L&WCF and the Act as the L&WCFA, sources cited herein use a variety of acronyms to stand for both the Fund and the Act. When quoting or citing these sources, we have preserved the acronyms used in the original.

substitution of another piece of property as parkland. The involvement of the NPS with the property began in 1979 when the federal government originally invested $302,914.21 in a portion of parkland in the South Bronx through a Land and Water Conservation Fund Act grant. See United States Department of the Interior, Heritage Conservation and Recreation Service, Land and Water Conservation Fund Project Agreement (May 21, 1979) ("Original L&WCF Project Agreement") at 4. Under the L&WCFA, the NPS may only approve of this conversion for private use if it concludes that the conversion of public parkland would be in accord with the comprehensive statewide outdoor recreation plan ("SCORP") and "only upon such conditions as [the NPS] deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location." 16 U.S.C. § 460l-8(f)(3). Our review of the NPS's decision to approve the conversion is under the arbitrary and capricious standard. See 5 U.S.C. § 706(2)(A).

Plaintiffs initially sought a temporary restraining order, which was denied by Judge Crotty, sitting as a Part I judge.[2] A

[2] Judge Crotty declined to issue a temporary restraining order after learning that plaintiffs' irreparable harm argument was based on the harm to mature trees, and that the issue had become moot since the trees had already been razed. Transcript for Hearing on Temporary Restraining Order of September 7, 2006 ("TRO Tr.") at 45, lines 5-22. Moreover, Judge Crotty found that the balance of equities tipped

hearing was set for October 4, 2006 on plaintiffs' motion for a preliminary injunction. At the hearing, plaintiffs consented to defendants' earlier motion, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, to consolidate the merits with plaintiffs' motion for a preliminary injunction.[3] For the reasons set forth below, defendants' motion pursuant to Rule 65(a)(2) is granted; plaintiffs' motion for preliminary injunction is denied; and plaintiffs' claims are denied for lack of merit.

BACKGROUND[4]

The New York Yankees are a Major League Baseball team. The Yankees determined that it was necessary to build a "state-of-the-art" ballpark with better amenities to accommodate the rising cost of fielding the Yankees roster, which outpaces stadium revenues at the team's current location. Joint Opposition of the New York City Parks Commissioner Adrian Benepe and the New York Yankees Partnership to Plaintiffs' Preliminary Injunction Motion ("Joint Opp. City Yankees") at 6. It has been over a decade since the Yankees began working with the City and

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"substantially in favor of the defendants here." Id. at 46, lines 1-2.

[3] Rule 65(a)(2) provides that "[b]efore or after the commencement of the hearing of an application for preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Fed.R.Civ.P. 65(a)(2).

[4] Except where indicated, there are no genuine issues regarding the following facts.

State of New York to devise a suitable plan that, using limited public funding, would address the needs of the team and minimize disruption to the surrounding neighborhoods. Id. at 3-4; Declaration of Joshua Laird ("Laird Decl.") ¶ 11; Declaration of Daniel L. Doctoroff ("Doctoroff Decl.") ¶¶ 4-5. After much deliberation, the final Yankee Stadium Project ("project" or "final plan") contemplates a state-of-the-art facility, to be located directly north of the Yankees' current home, and four new parking garages, which will result in a net increase of almost 50% of the current parking capacity. See Laird Decl. ¶ 13. In addition, the parklands surrounding the Yankees' new complex will be expanded and improved.

Although the question before us now is narrow in scope –- specifically, whether the NPS acted arbitrarily and capriciously in approving the conversion of federal parklands -- we believe it to be important to put plaintiffs' current challenge in context. To this end, we will review in some detail the origins of the project to build a new Yankee Stadium, the various opportunities for public review and challenges to the project which occurred throughout the process, the changes to the project made in response to public concerns, and the administrative and judicial proceedings that have been associated with the plaintiffs' efforts to block the project.

A. Final Plan for the Project: New Facilities and New Parklands

When the project to build the new Yankee Stadium and its surrounding parklands is finished, the City of New York and the residents of the South Bronx will have a complete replacement of all parkland facilities torn down as a result of construction, and an expansion of total parkland acreage available for their enjoyment. The final plan for the new Yankee Stadium involves construction on 22.42 acres of New York City parkland, in Macomb's Dam and John Mullaly Parks, which are adjacent to the current stadium grounds. Yankee Stadium Redevelopment Project, Final Environmental Impact Statement ("FEIS") at S-2. Upon completion of the project, there will be 24.56 acres of public parkland, complete with new recreational facilities to replace those worn by the public's use over the years, a new Yankee Stadium, and enlarged parking facilities to stem traffic congestion around the stadium. Laird Decl. ¶ 18.

Macomb's Dam Park is a 28.4 acre public park, administered by the New York City Department of Parks and Recreation ("DPR"). FEIS at 4-3. The specific portion of Macomb's Dam Park at issue in plaintiffs' challenge is the northern segment of the park, approximately 10.67 acres in size and bordered by East 162nd Street to the north, River Avenue to the east, East 161st Street to the south, and Jerome Avenue to the west. This northern

portion of Macomb's Dam Park is the parkland which was improved with federal L&WCF assistance; under the plans for the project, it is the only segment of Macomb's Dam Park subject to NPS's approval for conversion pursuant to Section 6(f)(3). See Finding of No Significant Impact, LWCF Section 6(f) conversion of Macomb's Dam Park, New York, New York ("FONSI") at 1. These lands (the "conversion parcel") used to contain a 400 meter running track, a softball field, and two baseball fields, most of which have already been razed as of September in anticipation of construction of the new park. See FEIS at 22-21; Declaration of Bruce E. Phillips ("Phillips Decl.") at ¶ 10. The project designates three parcels of land which are not currently parkland to serve as a substitute for the conversion parcel: the old site of Yankee Stadium, parkland running alongside the Harlem River, and a city street to be converted into a landscaped walkway.

Upon completion of the new stadium, the land which constitutes the footprint of the old stadium and other adjacent land will be developed into new parklands, with baseball, soccer, tennis, and basketball facilities, a track, and passive recreational space for sitting, strolling, and picnics. See FEIS at 22-17 to 22-19, 22-20 to 22-22. All existing ball fields will be replaced with new ones, centrally located at the former situs of the original Yankee Stadium, and in the vicinity

of those which were displaced.[5] FEIS at 22-18, 22-21. West of these new ball fields will be a new 400 meter athletic track, and a full-size soccer field will replace the existing track and field in Macomb's Dam Park. FEIS at 22-18 & Fig. 22-3. The basketball courts will double in number, as the two existing courts will be replaced with four new courts. FEIS at 22-18. Also to be placed in this area are nine handball courts and a tot-lot with climbing and play equipment. FEIS at 22-18 & Fig 22-3. These new facilities will be located relatively close to the original location of those which they will replace. Compare FEIS at Fig. 4-3 with FEIS at Fig. 22-3.

The new parklands will include riverside access to the Harlem River for recreational purposes, which is not currently available to the public. FEIS at S-2, 22-17 to 22-19. The waterfront park will include sixteen new tennis courts to replace the sixteen that are currently located in John Mullaly Park. FEIS at 22-18 & Fig. 22-3. Lawn space and a pedestrian esplanade will be provided on the waterfront, running along the area currently reserved for the new tennis courts. FEIS at 22-18. The new park will also have improved space for passive park use, including sitting, picnicking, and lying out on the lawns. FEIS at S-8, 22-18.

[5] These ball fields will be placed 600 feet away from those which they will replace. See FEIS at 22-21.

Ruppert Place, a street within the central park area, will be converted into a landscaped walkway, to be named "Ruppert Plaza", complete with benches and shaded resting areas. FEIS at S-10, 22-21. A pedestrian bridge will link Ruppert Plaza and the waterfront areas. See FEIS at S-10.

These new parklands will be the fruit of a significant investment from the City of New York, which has committed upwards of $130 million to renovate and create new parks in the South Bronx as part of the overall effort to construct a new Yankee Stadium. Laird Decl. ¶ 23. When combined with the City's other financial commitments in the Bronx, there will be a near $500 million spent to improve parks in the Bronx over the next five years. Id.; FEIS at 25-35. For at least three years of the project, while the Yankees continue to use their present stadium, there will be construction in the northern section of Macomb's Dam Park and in John Mullaly Park. During this period, public recreational facilities will consist of fields and courts in the southern section of Macomb's Dam Park. See FEIS at 25-36. To address the concerns of the public that its use of the parks will be disrupted during this interim period, the DPR has said it will convert an existing surface parking lot into a "multi-purpose interim field," which will be available for softball or soccer uses, and will provide a temporary running

course which would shift location as construction on the project continues. See FEIS at 22-20 to 22-21.

B. Administrative and Procedural History

The final plan for the new Yankee Stadium is part of a comprehensive plan to transform the existing landscape in the South Bronx. Since the project to build a new stadium would impact parkland and open space, it required approval from every level of government -- city, state, and federal -- in order to ensure compliance with the City Environmental Quality Review ("CEQR"), the Uniform Land Use Review Procedure ("ULURP"), the New York State Environmental Quality Review Act ("SEQRA"), and the federal National Environmental Policy Act ("NEPA"), as well as the L&WCFA, upon which plaintiffs bring their current challenge.[6] See Laird Decl. ¶¶ 1, 3, 8. There were two phases of the NPS's involvement in the project: coordination with state and city actors to ensure that one comprehensive assessment of the project could adequately be relied upon for evaluating its conformity to all of the applicable acts, including the NPS's conversion determination, and evaluation of

[6] Joshua Laird, the Assistant Commissioner for Planning and Natural Resources with the DPR, notes that because the project would affect parkland and open space in the City, the DPR acted as a lead agency under SEQRA and CEQR, and that early on in the process, the City asked for and received input from the NPS and the New York State Office of Parks, Recreation, and Historic Preservation ("OPRHP"), in order to enable the NPS to use the FEIS in its evaluation of the project's compliance with the NEPA and the L&WCFA's conversion requirements. See Laird Decl. ¶¶ 8, 31.

the project for Section 6(f)(3) compliance. See Laird Decl. ¶¶ 5, 8, 25-28. There have been no fewer than nine public hearings, during which plaintiffs, as members of the public, were afforded the opportunity to have their concerns heard. Joint Opp. City Yankees at 1. These hearings helped to provide for full consideration of the potential environmental consequences of the parks upon the surrounding areas. Over the course of the project's evaluation, at least six distinct forms of authorization have been granted by many governmental actors, including the NPS. We shall examine the progression of the project and each step of governmental approval here.

NPS's initial involvement with regard to coordination started in March of 2005, when the OPRHP contacted the NPS with regard to a proposal to convert part of Macomb's Dam Park for the construction of the new Yankee Stadium. See Conversion of L&WCF-Assisted Site: Macomb's Dam Park, New York, New York (#36-00776E) ("Summary of Conversion Process") at 1. The OPRHP wanted early guidance on the L&WCFA conversion process: specifically, the OPRHP sought to determine what it should require from the City so that the City's submission would meet the prerequisites for NPS's evaluation of the conversion. Id. The NPS was "pleased" with the OPRHP's proactive approach to ensuring that the City would be apprised early on in the process of all applicable federal requirements, in order to "avoid any

misunderstanding and unnecessary duplication of effort and resources." Id.

The NPS then requested a site visitation in response to the State's inquiry; the site visit regarding the conversion application for the northern section of Macomb's Dam Park took place on June 7, 2005, with representatives of the NPS, the OPRHP, the DPR, and the New York Yankees present. Id. After the site visit, the agencies decided that the DPR Environmental Quality Review, or CEQR process, would include an environmental review of L&WCFA § 6(f) conversion, in order to meet the requirements set forth by the NPS and L&WCFA for environmental assessments under the NEPA. Id. Throughout the process of the OPRHP's preparation of proposals to convert Macomb's Dam Park, the NPS and OPRHP were in frequent consultation to ensure that the conversion process and required environmental review met NPS conversion requirements; the NPS actively encouraged OPRHP to allow it to review draft documents to ensure that deficiencies were adequately addressed. Id.

On June 19, 2005, the New York State legislature authorized the leasing of the parkland for the project, for the construction of both a new Yankee Stadium and associated parking facilities. See 2005 of the Laws of the State of New York, Chapter 238. The legislature, in so doing, specifically authorized an alienation of parkland pursuant to the project

plan. Id. § 2.c. Included in the legislative findings is a declaration that the new stadium and its associated facilities (including parking) would benefit the City of New York and serve a public purpose. Id. § 1; Laird Decl. ¶ 12.

The DPR began preparation of a Draft Environmental Impact Statement ("DEIS"). Laird Decl. ¶ 32. After a Draft Scope for the Environmental Impact Statement ("EIS"), setting forth proposed analyses and methodologies, was presented at a public scope meeting on July 18, 2005, the public, governmental agencies, community board, and elected officials were invited to comment on it. Id. ¶ 33. Their comments were incorporated into the Final Scope, issued September 21, 2005. Id. The DEIS was certified as complete on September 23, 2005, and distributed and made available for public review. Copies were sent to various public officials and notices of the availability of the DEIS as well as the date and location of the public hearing were advertised widely. Id. ¶¶ 34-35.

During the period between the Draft Scope and the Final Environmental Impact Statement certification, the public, including the plaintiffs, had opportunities to contribute and affect the plans of the project. In total, 155 substantive comments from various parties were received on the DEIS, and the FEIS incorporated and responded to each of them. Id. ¶ 36. The

public's input, including that of the plaintiffs,[7] did affect the ultimate plans of the parks. For example, in response to public comment on the DEIS, an alternative plan (labeled the "Alternative Park Plan") for the configuration of replacement park facilities was developed and evaluated in the subsequent FEIS. Laird Decl. ¶ 14. On the basis of the FEIS, the DPR chose to implement the Alternative Park Plan, which modifies some of the replacement park features and expedites the provision of interim and replacement facilities. See Laird Decl. ¶ 40.

In addition, members of the public, in response to the DEIS, stated a desire for more contiguous park area, a concentration of ball fields closer to the neighborhood areas, and a schedule which would better accommodate the public's access to park recreation while construction proceeded by minimizing the duration of unavailability of park facilities. Laird Decl. ¶¶ 14, 18. As a result, the project was adjusted to create a total of 24.56 acres of park land, including a unified, contiguous park of 17.36 acres -- an area larger than the displaced parkland at issue. Id. ¶ 18. The adjusted plans for the project, in the form of the Alternative Park Plan, include

[7] Many of the plaintiffs made numerous public comments during this process. See Laird Decl. ¶ 36; see generally FEIS Chapter 25 ("Responses to Comments on DEIS") (responding to comments submitted by representatives from SOP and Bronx Council, and individual plaintiffs Frances Tejada, Geneva Hester, and Albertha Hunter).

new and improved recreational facilities, centralize three ball fields by placing them at one location, and provide for multi-phased construction and interim facilities to reduce disruption of access to recreational facilities over the course of construction. See Laird Decl. ¶¶ 14-18; Declaration of Debra Allee ("Allee Decl.") ¶¶ 12-15; FEIS at 22-17 to 22-18, 22-20, 22-28. The Alternative Park Plan, as compared to the original proposal, accelerates the construction of all the replacement recreational facilities with the exception of the ball fields. FEIS at 22-28 to 22-31. Nearly all permanent facilities will be operational by the time the new Yankee Stadium opens in 2009, and the remaining three ballparks to be located on the existing Yankee Stadium fields will become accessible by 2010. FEIS at 22-29. During periods where neither permanent nor temporary facilities are available, the DPR has pledged to accommodate park users at other existing park facilities. See FEIS at 22-29 to 22-30.

The placement of the new tennis courts was adjusted as well to reflect concerns of the public which were voiced in reaction to the DEIS. Originally, the plan was to have the tennis courts situated more centrally, on a portion of Macomb's Dam Park currently allocated to parking. See FEIS at 22-17 to 22-18. After members of the public voiced their concern that the winter bubble over the courts would be aesthetically undesirable if the

courts were to be placed centrally, the tennis courts were moved to the waterfront location under the Alternative Park Plan. See id. Despite this change of location, the tennis courts will be moved less than a half mile away from their existing location. FEIS at 22-21.

Pursuant to the City's ULURP, the DPR submitted several land use applications to the New York City Planning Commission (the "CPC"). These were referred to Bronx Community Board 4 and the Bronx Borough President in accordance with Article 3 of the ULURP. Laird Decl. ¶ 43. On November 22, 2005, Bronx Community Board 4 held a public hearing with regard to the applications and adopted a resolution recommending their disapproval. Id. ¶ 44. A month later, the Bronx Borough President recommended approving the application subject to conditions set forth in the CPC's resolution, concerning the construction of ball fields on the current stadium site and the inclusion of interim facilities on Parking Garage C which would be available to the public while the project progressed. After a Town Hall meeting and public hearing, these conditions were adopted in the Alternative Park Plan. Id. ¶ 45. Following the implementation of these conditions, the Bronx Borough President supported the project in a joint hearing on the ULURP applications held before the CPC concurrently with the SEQRA/CEQR hearing on January 11, 2006. Id.

Upon unanimous adoption by the CPC, the ULURP applications came before the New York City Council. The City Council held further public hearings, upon due notice, on the CPC decisions and applications on March 28, 2006. Id. ¶ 47. A week later, on April 5, 2006, the City Council voted overwhelmingly in favor of approving the CPC decisions authorizing the project. Id. ¶¶ 46-47. Notably, however, before the City Council voted to approve the project, the DPR agreed to additional revisions, beyond those in the Alternative Park Plan, to accommodate the concerns of the community. Specifically, the DPR agreed to provide more funding for Bronx parks projects, construction of two temporary ballparks in place of the waterfront tennis courts, which would remain open until the permanent ballparks were completed, and a provision to open stadium parking facilities to the public. Id. ¶ 48.

The FEIS included an analysis of the proposed conversion and its compliance with the requirements of the L&WCFA. See FEIS at 4-10 to 4-16. However, since the Alternative Park Plan differed from that of the original DEIS, the NPS suggested that OPRHP provide another opportunity to comment upon the revised plans for conversion before seeking final approval from NPS. See Email from Pat Gillespie, NPS, to Michael Wilson and Wayne Strum, NPS (Feb. 16, 2006, 08:56 EST) ("Re: Update on Macomb's Dam Park/Yankee Stadium Conversion"). OPRHP then issued a

notice of opportunity for the public to comment on whether the Alternative Park Plan met the NPS's requirements under L&WCFA § 6(f)(3), and whether there had been proper review of environmental impacts in compliance with NEPA. See Notice of Opportunity to Comment on Proposed Conversion of Parkland in Connection with the Proposed Development of a New Yankee Stadium. Between March 3 and April 3, 2006, comments were accepted by OPRHP; responses to these comments, prepared by the DPR in coordination with the OPRHP and the NPS, were completed in May 2006. See Comments and Responses to Public Comments on the Proposed Conversion of Parkland in [C]onjunction with the Proposed Development of the New Yankee Stadium (May 2006) ("Conversion Comments and Responses"); Email from Kevin Burns, OPRHP, to Jean Solokowski, NPS (Mar. 27, 2006, 11:30 EST) ("Re: NEPA Process"); Email from Thomas Lyons, OPRHP, to Kevin Burns, OPRHP (Apr. 4, 2006, 16:28 EST) ("Re: Comments NEPA review Yankee Stadium Proposal"). As a result of this round of comments, further adjustments were made to the construction schedule for replacement facilities.

After this final round of notice, comment, and response, OPRHP submitted a formal request for NPS conversion, on June 27, 2006; materials from the environmental review process and other supporting documentation for NPS were submitted to the NPS to be considered as part of its administrative record. See Letter

from Kevin Burns, Alternate State Liaison Officer, OPRHR, to Jean Sokolowski, New York State Project Manager, NPS (June 27, 2006) (formally requesting approval of conversion). This submission initiated the second phase of the NPS's involvement: that of its evaluation of the compliance of the proposed conversion with L&WCFA § 6(f)(3). Given the NPS's extensive participation in the preparation of the environmental review reports, it was able to review and approve the conversion request in a relatively short period of time. On July 14, 2006, the NPS found that the conversion would have no significant impact on the environment. See FONSI. A few days thereafter, on July 17, 2006, the NPS approved the conversion as having met the requirements set forth by Section 6(f)(3) of the L&WCFA, concluding that the replacement parkland would be of at least equal fair market value and of reasonably equivalent usefulness and location, that the conversion was in accordance with the Statewide Comprehensive Outdoor Recreation Plan for New York, and that all practical alternatives had been considered. See Summary of Conversion Process at 1. The NPS approved an amended NPS grant agreement to substitute the parcel to be converted in Macomb's Dam Park with the replacement parcels, see Amendment to Project Agreement, Project Amendment No. 5 (July 17, 2006) ("Project Agreement Amendment"), and formally notified the State of the amendment the following day. See Letter from Jack W.

Howard, Manager, Recreation, Conservation and Grants Assistance, NPS, to Kevin Burns, Chief Bureau of Grants Management, OPRHP (Jul. 18, 2006).

Plaintiffs,[8] despite the opportunities afforded them for comment throughout the administrative process of approval of the project and the resulting adjustments made to the project's plans, were unsatisfied with the ultimate approved project. Thus, on August 2, 2006, shortly before the CPLR's Article 78 four month statute of limitations was due to expire and two weeks before construction was slated to begin on August 17, 2006, plaintiffs sued the City and the Yankees in the Supreme Court of the State of New York, seeking both a temporary restraining order and a preliminary injunction. See Declaration of David Paget ("Paget Decl.") ¶ 2; Save Our Parks v. City of New York, Index No. 1108356/06, slip. op (N.Y. Sup. Ct. Aug. 15, 2006). Before the state court, the plaintiffs claimed that the City, in violation of the SEQRA, had failed to adequately consider: (1) the project's impact on schools and schoolchildren; (2) the loss of mature trees as a consequence of

[8] We understand that there is not a complete identity between the plaintiffs before us here and those of the state court proceedings. However, there is significant overlap, as both sets of plaintiffs include SOP and the Bronx Council. The only difference between the plaintiffs in the present case and those in the state case arises from the individual plaintiffs. The individual plaintiffs are members of these two groups suing in their personal capacities. These members do not suggest that they do not share identical concerns with regard to the building of the new park and its attendant consequences on the environs of Macomb's Dam and John Mullaly Parks.

construction; and (3) alternatives to the location of the new stadium, including, specifically, the possibility of building a new stadium on the footprint of the existing Yankee Stadium. See id. Justice Richter, after hearing arguments on both sides, denied plaintiffs' request for a temporary restraining order and scheduled a preliminary injunction hearing before Justice Cahn.

On August 11, 2006, Justice Cahn held a hearing with regard to plaintiffs' motion for a preliminary injunction, and after an expedited briefing schedule, he denied plaintiffs' motion on August 15, 2006. See Save Our Parks, slip. op. Justice Cahn concluded that plaintiffs failed to show a likelihood of success on the merits of their claim that the FEIS' evaluation of the project and its attendant environmental impact on the community was insufficient. Id. at 17. After evaluating the plaintiffs' argument with regard to impact on schoolchildren and concluding it lacked merit, id. at 10-12, Justice Cahn then specifically rejected the contention that the DPR had not adequately addressed the alternative of construction on the existing Yankees Stadium site. Id. at 13-14 ("In fact, however, the FEIS considered the reconstruction alternative . . . . The Parks Department determined that it was not feasible for a number of critical reasons and/or would not meet the goals and objectives of the project."). Justice Cahn concluded that since plaintiffs, at oral argument, had conceded that lost parkland

could be restored, their argument for irreparable injury rested solely on the loss of mature trees, a loss which "could be ameliorated, to some extent, by the planting of replacement trees . . . ." Id. at 17. Lastly, upon an examination of the facts of the case, Justice Cahn noted that "[a] balancing of the equities clearly favors the respondents. There is a real and significant possibility that delaying the scheduled start of construction will cause significant harm to the Yankees, the City, and the residents of the South Bronx, and might well cause the project to be completely terminated." Id. Thus, Justice Cahn denied the motion for a preliminary injunction. Plaintiffs did not seek appellate review of Justice Cahn's decision.

Subsequent to the state court decision, $955 million worth of bonds were sold to finance the project; these bonds are to be repaid starting in 2009, financed from projected increased revenues generated by the new Yankee Stadium. See Declaration of Lon Trost ("Trost Decl.") ¶ 34. Construction on the project began on August 27, 2006. Phillips Decl. ¶ 10. In addition, construction has begun at the stadium site. As of mid-September, the construction site contained a 200 by 600 foot hole, the size of a city block, about 15 feet deep, with soil being removed at the rate of 140,000 cubic feet per day. See Phillips Decl. ¶ 10.

DISCUSSION

We will now turn to the discussion of the merits of the plaintiffs' complaint, which, as noted above, has been consolidated with plaintiffs' request for preliminary injunctive relief.

A. The Land and Water Conservation Fund Program

Congress established the Land and Water Conservation Fund Program to preserve and protect the quality and quantity of outdoor recreation resources for the public by providing, among other things, federal funds and assistance to states in planning, acquisition, and development of needed land and water areas and facilities. See 16 U.S.C. § 460l-4. To this end, Section 6 of the L&WCFA authorizes the Secretary of the Interior to provide financial assistance to states, subject to several requirements. See id. § 460l-8. Section 6(f)(3), at issue in the present case, prohibits any property acquired or developed with L&WCF assistance from being converted from public outdoor recreational use unless the Secretary of the Interior approves the conversion. Id. § 460l-8(f)(3). The Secretary, in turn, is only authorized to approve conversions: (1) if she finds it to be in accord with an existing statewide comprehensive outdoor recreational plan ("SCORP"); and (2) only upon such conditions as she deems necessary "to assure the substitution of recreational properties of at least equal fair market value and of reasonably equivalent usefulness and location." Id. The

Secretary of the Interior has delegated the authority for approval of conversions pursuant to the L&WCFA to the Director of the NPS, who has redelegated that authority to NPS Regional Directors. 51 Fed. Reg. 34,181 (Sept. 25, 1986).

B. Standard of Review for NPS's Determination

A challenge to the NPS's determination that a conversion meets the requirements of L&WCFA § 6(f)(3) is reviewed using the "arbitrary and capricious" standard of the Administrative Procedure Act ("APA"). See 5 U.S.C. § 706(2)(A); Sierra Club v. Davies, 955 F.2d 1188, 1192 (8th Cir. 1992). The arbitrary and capricious standard of review is "particularly deferential." Envt'l. Def. v. U.S. E.P.A., 369 F.3d 193, 201 (2d Cir. 2004). To properly evaluate whether an agency's action conforms with the requirements of Section 706(2)(A) of the APA, we must determine whether the decision was based on a consideration of the relevant factors and whether there is a clear error in judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Although we are charged to ensure that our inquiry into the facts relevant to the agency's decision is "searching and careful, the ultimate standard of review is a narrow one," and we are "not empowered to substitute [our] judgment for that of the agency." Id.

C. Plaintiff's Objections to NPS Approval of the Conversion

Plaintiffs object to several aspects both of the procedure the NPS followed in evaluating the proposed conversion of the northern portion of the Macomb's Dam Park, and also of the NPS's ultimate decision to approve the conversion. The plaintiffs' objections to the NPS's procedure are that the NPS did not neutrally nor objectively evaluate the proposed conversion, that the NPS failed to adequately evaluate alternatives to the conversion, and that the NPS did not evaluate the project for compliance with the New York Statewide Comprehensive Outdoor Recreation Plan, or SCORP. In addition, plaintiffs contend that the NPS's decision to allow for the conversion was in contravention of the L&WCFA, in that the replacement parcel was not reasonably equivalent in usefulness and location, and was not of at least equal or fair market value, mainly because the NPS unduly relied upon the state and local assessments of the project. We shall address each of these in turn.

1. NPS as a Neutral and Objective Decisionmaker

Plaintiffs argue that in light of the NPS's early involvement with the project's development and the preparation of the EIS, it did not objectively evaluate the conversion request, but, instead, acted as an "interested party advocating for the conversion of Macomb's Dam Park." See Plaintiffs' Reply Memorandum of Law ("Reply Mem.") at 1. Plaintiffs posit that "[s]ince June 2005, NPS has worked to insure that the Yankee

Stadium plan would succeed, and has never made an independent analysis whether the plan meets the requirements for conversion under Section 6(f)." Mem. Supp. at 9. For support, plaintiffs point to an internal email between NPS personnel describing the June 7, 2005 meeting, which notes the NPS representatives' confidence that the NPS "will be able to work with the city and state to ensure that the conversion process has been satisfied without [ ] preventing the proposed project from being developed." E-mail from Jack Howard, NPS, to John Maounis, NPS, et al. (June 13, 2005 15:16 EST) ("Re: Yankee Stadium -- Site Inspection & meeting"). Plaintiffs rely on the language in the email to show that "[f]rom that early date, NPS abdicated its responsibility for an objective, independent review and avoided raising questions about alternatives that would have avoided or minimized the impacts to parks and the extent of conversion." Mem. Supp. at 9.

Plaintiffs' suggestion that the communication and coordination between the NPS, the OPRHP, and the DPR are indicia of a failure of the NPS to execute faithfully its duties under the L&WCF is misplaced, and their reliance on the above email misguided. First, early consultation between state actors and the NPS is contemplated by Congressional findings and the declaration of policy supporting the L&WCFA, and is promoted by both the NPS regulations and the Land and Water Conservation

Fund Grants Manual ("L&WCF Manual"). See, e.g., 16 U.S.C. § 460l ("The Congress finds and declares . . . that it is desirable for all levels of government and private interests to take prompt and coordinated action to the extent practicable . . . to conserve, develop, and utilize [recreational] resources for the benefit and enjoyment of the American people."); 36 C.F.R. § 59.3(c) ("[A]mendment requests [by the State] should be submitted concurrently with conversion requests or at such time as all details of the conversion have been worked out with NPS"); L&WCF Manual ch. 630.2.12 ("When a State wishes to change its project it should discuss the proposed changes with the Regional Office personnel prior to submitting an amendment to the project agreement."). In addition, one aspect of the consideration of a proposed conversion is a review under the National Environmental Policy Act, or NEPA, to determine whether the proposed conversion will have any significant impact on the environment. See 42 U.S.C. §§ 4321-4347; L&WCF Manual ch. 650.2. The streamlining of state and federal review processes is encouraged by federal NEPA regulations as well as the L&WCF Manual. See 40 C.F.R. § 1506.2(b) ("Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements . . . ."); L&WCF Manual ch. 650.2.3 ("A State that has environmental laws equivalent to or more stringent than NEPA may

submit environmental documentation meeting both State and Federal requirements."). Thus, plaintiffs' decrying of the coordination between agencies and levels of government not only contradicts the guidance of Congress and established agency practice, but would invite duplication and inefficiencies to the detriment of taxpayers.

Second, plaintiffs' argument ignores the full context of the OPRHP's efforts to effectively and efficiently coordinate the review of the project's compliance with numerous regulatory and statutory requirements of three levels of government. Since both state and local laws independently required the DPR to prepare a comprehensive Environmental Impact Statement, spanning all components of the proposed project, the NPS, consistent with the above-cited regulations, advised the OPRHP to ensure that the DPR's EIS also included a review of the proposed conversion. See Summary of Conversion Process at 1; Fed Mem. Opp. at 6. This review of the conversion would then be reviewed by the NPS and, if found acceptable, used as the environmental assessment for purposes of compliance with NEPA and for evaluation of the conversion under L&WCFA § 6(f)(3). See Fed Mem. Opp. at 6-7; Summary of Conversion Process at 1; E-mail from Pat Gillespie, NPS to Thomas Lyons, OPRHP (June 10, 2006 16:05 EST) ("Re: NPS comments -- Next Steps/Agreements from meeting with NYC Parks").

Following the June 7, 2005 site inspection, the DPR and the OPRHP continued the planning and review process encompassing, as we discussed earlier, the preparation of the DEIS and the FEIS, public hearings, and City Council approval. The formal application for conversion of Macomb's Dam Park by the OPRHP to the NPS did not occur until over one year later, on July 7, 2006. See Summary of Conversion Process at 1; Fed Mem. Opp. at 7. Apart from their substantive objections, plaintiffs proffer no evidence to show that the conversion approval process by the NPS was anything but proper. Plaintiffs' argument that the NPS strayed from its proper role rests solely on inferences made on the basis of phrases gleaned from emails passed amongst agency individuals during the coordination and planning phase, prior to the formal application to the NPS on July 7. See Mem. Supp. at 8-10. The provision of guidance by the NPS to the OPRHP and the DPR to ensure that the EIS being prepared for the project would address the L&WCF's requirements is encouraged by law and regulation. To say that, as a necessary consequence of its previous guidance, the NPS's subsequent review of the FEIS's contents upon the formal application for L&WCF approval was but a mere rubber stamp is a conclusion we are unwilling to adopt on the facts before us. Plaintiffs can point to nothing which occurred after the OPRHP's official submission to the NPS for conversion approval which gives us pause in concluding that the

NPS's review of the matter was anything but objective. Plaintiffs' argument also suffers from their failure to fully appreciate the narrow role of the NPS: to evaluate the adequacy of the replacement land for the converted parcel. As defendants point out, the NPS has never had "any intrinsic interest in whether the new stadium is built. Its only interest in the project stems from where the new stadium will be built." Fed. Mem. Opp. at 1 (emphasis in original). Thus, we conclude that the NPS acted appropriately as a neutral and objective decisionmaker in approving the proposed conversion.

2. NPS's Evaluation of Alternatives

Plaintiffs state that the NPS failed to meet its obligations for conversion approval pursuant to the L&WCFA in that the NPS did not undertake an independent analysis as to whether "[a]ll practical alternatives to the proposed conversion ha[d] been evaluated." See Mem. Supp. at 27-29 (quoting 36 C.F.R. § 59.3(b)(1)). Plaintiffs' argument is simply contradicted by the written record. An entire chapter of the FEIS evaluates the feasibility of all alternatives suggested by the plaintiffs, including their preferred construction of the new stadium on the current site of the park. See FEIS at ch. 22. Specifically, with respect to plaintiffs' preferred alternatives, the FEIS concluded: (1) that the new stadium would be too large for the current site and would protrude into

the southern portion of Macomb's Dam Park west of Ruppert Plaza, without freeing up any land for the development of replacement parkland, thus forcing displaced ball fields to be relocated at the Harlem River waterfront parcel, in contravention of the desires of the community; (2) that reconstruction at the current site would not allow for new parking facilities to be constructed, which would result in a failure to alleviate the current on-street parking problems in the areas surrounding the stadium; and (3) that such a plan would require moving the Yankees to Shea Stadium, the home of the Mets, depriving the Yankees of a major source of revenue from team sponsors for a period of four years. See id. at 22-5 to 22-6.

Moreover, NPS made specific findings with regard to the examination of viable alternatives, concluding that the analysis in the FEIS was responsive to comments by plaintiff Save Our Parks which suggested that not all practical alternatives had been adequately evaluated. See Conversion Comments and Responses at 6-10; FONSI at 2 (noting that alternatives had been considered, including plaintiffs' preferred "rebuilding at the current site," but that none "proved viable in meeting the project goals and objectives"). The NPS has fulfilled its obligations under the regulations. Pursuant to 36 C.F.R. § 59.3, a State Liaison Officer must submit a request for permission to convert federally funded property to a NPS

Regional Director in writing. While the NPS will only consider the conversion request if the request meets a list of several requirements, including that "[a]ll practical alternatives to the proposed conversion have been evaluated," 36 C.F.R. § 59.3, the regulations do not require the NPS to undertake an independent evaluation of all practical alternatives to the proposed conversion. Rather, the only NPS mandate is to ensure that the state has done this analysis prior to the submission of a conversion. Thus, plaintiffs seek to measure NPS's obligations under a standard far more expansive than the limited one that actually applies to the NPS.

Finally, we note the state court's rejection of plaintiffs' "claim that the FEIS's discussion of alternatives to the project was 'superficial and disingenuous,' or that the discussion fails to provide the information necessary to make a rational choice between these other options."[9] Save Our Parks v. City of New York, Index No. 110836/06, slip op. at 15 (N.Y. Sup. Ct. Aug. 15, 2003). Thus, we conclude that the NPS adequately ensured that all practical alternatives to the project with regard to conversion had been evaluated.

[9] Indeed, this conclusion by Justice Cahn precludes plaintiffs from alleging that the NPS failed to consider viable alternatives in their arguments on the merits of this case, under the principles of collateral estoppel. See Pl. Compl. ¶ 70; Mem. Supp. at 27-29; Save Our Parks, slip op. at 12-15; see also discussion infra note 11 (discussing the collateral estoppel effects of the state case upon the present controversy).

3. The Project's Compliance with the NY SCORP

Plaintiffs also argue that it is "not clear from the record" that NPS conducted an independent review of the project's compliance with the SCORP. Mem. Supp. at 31. Plaintiffs' main contention for this is that the NPS did not address how the SCORP's goals are met by "the removal of existing parkland and the destruction of nearly 400 mature trees with the intention of creating other parkland in the future and waiting generations for replacement trees to mature." Id. The NPS, however, concluded that the proposed conversion was in accordance with the New York SCORP, since the SCORP identifies, as one of its goals, improved delivery of recreational services, including field game and general park uses for the Bronx. See Summary of Conversion Process at 2. In addition, the NPS explicitly addressed the issue of destruction of trees in its Responses to Conversion Comments, noting that the DPR's tree placement program would work to replace the environmental functions of the trees lost with construction. Conversion Comments and Responses at 21-22. Given that plaintiffs cannot point to any particular goals contained within the New York SCORP which the project undermines, we conclude that this objection to the approval is spurious as well.

4. Reasonable Equivalence in Usefulness and Location

Plaintiffs further contend that the substitute properties are not of "reasonably equivalent usefulness and location" pursuant to the L&WCFA because: (1) the recreational facilities to be placed at the site of the current Yankee Stadium will not be available to the community for some period of time, thus failing to meet the Secretary's standard for substitute properties; (2) there are no guarantees that replacement facilities will ever be built; (3) the substitute properties do not adequately replace the current park's function as the community's "buffer zone" with regard to the existing Yankee Stadium; and (4) the substitute properties do not meet the recreation needs of the community because they include "passive" areas with no recreation facilities and because they are intended primarily for private or non-community use. Mem. Supp. at 3-4. Although we shall address each of these concerns specifically below, we note at the onset the high degree of deference this Court should afford the NPS in its conversion determination. Our role in evaluating the agency's decision to approve of the conversion is not to ask whether we would have come to the same conclusion, but instead to determine whether the NPS so erred in its decision to approve the conversion as to constitute an abuse of its discretion. See Overton Park, 401 U.S. at 416. This inquiry properly starts with "a delineation of the scope of the Secretary's authority and discretion." Id.

Section 6(f)(3)'s promulgated standards afford a considerable degree of discretion to the Secretary of the Interior, and the NPS through delegation, to approve of proposed conversions "upon such conditions as [the Secretary] deems necessary," in order to ensure that any converted parkland is replaced with land of "reasonably equivalent usefulness and location." See L&WCFA, 16 U.S.C. § 460l-8(f)(3). In other words, the Secretary and the NPS may impose conditions upon a conversion in order to ensure that the replacement land is, by their own determination, of reasonable equivalence. This high degree of discretion afforded the NPS under the L&WCF, in combination with the deferential standard for review of agency determinations pursuant to the APA, informs the proper scope of our review.

As we discuss the various arguments raised by plaintiffs, it should be recalled that the planned conversion replaces a 10.67 acre piece of parkland with 16.44 acres of new parkland, a gain of nearly 6 acres, along with brand new recreational facilities to replace those razed over the course of construction. The majority of this parkland will remain centrally located, directly across the street from the land replaced, and the remainder will consist of newly accessible waterfront parkland on the banks of the Harlem River, a short

walk away.[10] We examine each of plaintiffs' individual objections against this backdrop.

First, plaintiffs argue that they will not be able to access the replacement facilities for a period of time while construction is completed. In support, plaintiffs point to language, contained both within the regulations and the L&WCF Manual, stating "[o]nce the conversion has been approved, replacement property should be immediately acquired." See Supp. Mem. at 2-4 (quoting 36 C.F.R. § 59.3(c) and L&WCF Manual ch. 675.9.3C). Based on this language, plaintiffs contend that the delay in access to the replacement facilities is contrary to law. Although plaintiffs' interpretation of the quoted language is plausible if read in isolation, it is not so when read in the broader context of the regulations. The title of the subsection of the regulations upon which plaintiffs rely is "Amendments for Conversion", and requires that "amendment requests [to the original project agreements] should be submitted concurrently with conversion requests or at such time as all details of the conversion have been worked out with NPS." 36 C.F.R. § 59.3(c).

[10] It is also worth noting that the regulations governing L&WCFA conversion do not require close proximity between the converted parklands and their substitute grounds. See 36 C.F.R. § 59.3(b)(3)(ii) ("Replacement property need not necessarily be directly adjacent to or close by the converted site. This policy provides the administrative flexibility to determine location recognizing that the property should meet existing public outdoor recreation needs."); see also L&WCF Manual ch. 675.9.3 ("[T]he replacement property need not provide identical recreational experiences or be located at the same cite, provided it is in a reasonably equivalent location.").

Thus, the regulations only require that the federal government immediately acquire the replacement land for the converted parcel upon the NPS's approval of a conversion request; this acquisition is demonstrated by an amendment to the original project agreement memorializing the conversion of the L&WCF parcel and its replacement with a substitute parcel. The NPS is not required by the regulations to reject a conversion proposal if the proposed substitute parcels are not immediately available to the public as equivalent recreational parklands, but instead must only amend the original project agreement to substitute the replacement parcel for the parcel of land which was converted. See 36 C.F.R. § 59.3(c). This was done in the present case on July 17, 2006, immediately after the NPS's conversion approval. See Project Agreement Amendment.

In addition, defendants point to other portions of the L&WCF Manual and regulations which suggest that the L&WCF program does not require immediate availability of replacement facilities at the time of conversion. Specifically, they note that the NPS regulations even recognize that in certain instances it may not be possible for "replacement property to be identified prior to the State's request for a conversion," thus calling into question plaintiffs' assertion that a delay in access to replacement parkland should have led the NPS to reject the project's conversion request. See 36 C.F.R. § 59.3(c).

Further, the L&WCF Manual's rules for parkland acquisition are explicit in their contemplation of a delayed development of parklands, allowing for the acquisition of "property for which the development of outdoor recreation facilities is planned at a future date" if "[i]n the interim . . . the property [is] open for those public recreation purposes which the land is capable of supporting or which can be achieved with a minimum public investment." L&WCF Manual ch. 640.2.8 (allowing for delay in development); see also id. ch. 675.9.3.B4 (incorporation of parkland acquisition regulations by reference into rules for conversion).

We also note that plaintiffs' objections to the timeframe should also be considered within the context of adjustments made by the DPR and the OPRHP to accommodate the community's concerns with regard to access to facilities during construction. Indeed, as a specific response to a comment from plaintiff Save Our Parks with regard to the EIS, the OPRHP noted that "every effort has been made to ensure that [the replacement facilities] will be available for use by the community as quickly as possible after the conversion parcel is taken out of use. As described in the FEIS, a construction schedule has been developed that would minimize, to the maximum extent practicable, the time that recreational facilities would be unavailable." Conversion Comments and Responses at 23 (Response

to Comment 26). These accommodations include: (1) construction of an interim playing field and track on the site of Yankees Parking Lot Number 1; (2) potential plans to delay construction of the tennis courts to allow for temporary baseball fields along the Harlem River until the permanent structures can be built; and (3) meeting with groups of individuals who use Macomb's Dam Park field to help them find alternative existing parks in the area. Id. It is well within the bounds of reasonableness for the NPS to have found that the DPR and OPRHP's mitigation efforts would adequately compensate for the short term displacement of facilities due to conversion and construction.

Second, plaintiffs object to the adequacy of the substitution on the basis that "there appears to be nothing that guarantees that the [replacement] facilities will be built at all." Mem. Supp. at 21; see also Repl. Mem. at 3-4. Under the L&WCFA, states who are beneficiaries are held to binding agreements, which must be amended pursuant to a conversion. See L&WCF Manual ch. 660.2 (detailing application and amendment procedures for L&WCF projects, noting that agreements must "set forth the obligation assumed by the State through its acceptance of Federal assistance, including the rules and regulations applicable to the conduct of a project under the Act and any special terms and conditions to the project established by the

[NPS] and agreed to by the state," id. ch 660.2.5.A.1). Plaintiffs argue that agreements obligating New York State to construct recreational facilities were only required upon initial approval of funding by the NPS, and that "it is anomalous and irresponsible that there are not similar assurances for development of replacement properties when a conversion is authorized." Supp. Mem. at 6. This is a mischaracterization of the original agreement at issue here and its amendment, which must be made upon NPS's approval of conversion. The original Land and Water Fund Conservation Project Agreement for the parcel at issue here is a document, four pages in length, which sets forth the total amount of funds to be allocated to the project from the L&WCF -- $302,914.21 -- and contains a list of recreational facilities, several of which are circled to indicate the purposes behind this specific grant. See Original L&WCF Project Agreement at 4 (circled recreational facilities to be developed include sports and playfields, including baseball/softball fields, football/soccer fields, and a track facility, and support facilities of various types). Whatever conditions appear in the original agreement with regard to the type of facilities to be developed on the land are explicitly incorporated into the amendment to the grant agreement, executed immediately after the NPS's approval of the conversion at issue here. See Project Agreement Amendment ("In

all other respects, the agreement of which this is an amendment, and the plans and specifications relevant thereto, shall remain in full force and effect."). In other words, the amendment ensures that in light of the conversion, the State of New York is required to provide equivalent facilities pursuant to the original L&WCF grant on the new substituted parcel.

In addition, the question as to whether or not the State will ultimately provide for the recreational facilities outlined within the scope of the project itself is not something that is currently ripe for consideration. At the present time, there is no reason not to take the State at its word with regard to its intention to create new parklands for the residents of the South Bronx pursuant to this project. Were this construction not to occur some time in the future, the NPS would have ample authority under its regulations and its Manual to take remedial and disciplinary steps to ensure that state compliance occurs. States are required to submit on-site inspection reports to ensure projects are progressing as planned, and make these reports available to the NPS for review. See L&WCF Manual ch. 675.1.6. As defendants pointed out at oral argument, the L&WCF creates for an "ongoing, repeat player type of situation," whereby the federal government can exclude the State of New York from future participation in the L&WCF if it does not follow through on its commitments. Tr. at 57. For example, the past

history of applicants and their compliance and completion of previous federal projects is taken into consideration in making new L&WCF grants. See L&WCF Manual ch. 660.5.3E. Failure to comply with regulation requirements can result in the NPS withholding funding to the state for the project at issue or other state projects, withholding approval of future projects, and taking "such other action deemed appropriate under the circumstances until compliance or remedial action has been accomplished by the State to the satisfaction of the Director." Id. ch. 675.1.12; see also id. ch. 675.1 Attachment A (detailing Executive Order 12549 (Feb. 18, 1988) providing for a government-wide system of debarment and suspension of funding as a remedy for noncompliance with the terms of project funding). This system of compliance and monitoring will adequately provide incentives for the State of New York to comply with the conditions of its L&WCF grant, as amended upon the NPS's approval of the conversion.

Third, plaintiffs contend that the substitute properties do not adequately replace the current park's function as the community's "buffer zone" with regard to the existing Yankee Stadium. For this, plaintiffs rely heavily on Friends of the Shawangunks, Inc. v. Clark, 754 F.2d 446 (2d Cir. 1985), a case we find inapposite to the present controversy. In Shawangunks, the land in dispute was a conservation easement which had been

granted an L&WCF grant "for the purpose of . . . conservation and preservation of unique and scenic areas" and for "exposing scenic vistas and serving as a buffer zone between [an adjacent state park] and developed areas." Id. at 448, 449. The Second Circuit concluded that the construction of a golf course on this protected land would require approval under Section 6(f)(3), since the plan would be "inconsistent with the original easement's prohibition of new facilities" and "call[] into question the basis for the original federal funding." Id. at 451-52. Here, however, the basis of the original L&WCF grant for Macomb's Dam Park was simply for "[r]ehabilitation of sports and playfields," and makes no mention of the need to protect or create a buffer zone. Original L&WCF Project Agreement at 2. Given this critical difference in the original purposes behind these two grants, the argument by analogy that the NPS was obligated to evaluate the loss of a "buffer zone" as it was obligated to do in Shawangunks fails. In addition, plaintiff Save Our Parks already had brought the issue of the loss of a "buffer zone" to the attention of the OPRHP and the DPR, and the issue was addressed not only in a response to SOP's comment, but also in the FEIS itself. See Conversion Comments and Responses at 25-26; FEIS at ch. 8; see also FEIS at ch. 2, 3, 6, 7, 15, 16 & 18. Even assuming that the statute required consideration of

this matter, the issue was known to the NPS and presumably considered.

Fourth, plaintiffs argue that the substitute properties do not meet the recreational needs of the community because they include "passive" areas with no recreation facilities and because they are intended primarily for private or non-community use. Neither of these assertions withstands an examination of the proposed project. As noted earlier, new recreational facilities are designed specifically to replace all existing fields and courts. Although the replacement parkland will include passive park space, this space does not come at the expense of the "active" recreational facilities. Nor is the capacity for passive park use an undesirable feature of the new parklands, by any standard. See, e.g., L&WCF Manual ch. 640.2.2 (noting that areas acquired with L&WCF funding "may serve a wide variety of outdoor recreation activities," including "walking for pleasure" and "picnicking"); New York SCORP for 2003, ch. 2, at 43-44 (identifying high demand for "general park uses," which include "[r]elaxing in the park; picnicking; playground use, etc."). In addition, plaintiffs' objection that the tennis courts will be run by a private concessionaire during the winter, see Mem. Supp. at 8, is equally baseless since the new courts are to be operated in the same manner as the old ones were. User fees are to be charged with oversight by the DPR,

which has traditionally required not only that below market rates be charged, but also that the private concessionaire provide free or low-cost court time for tennis programs targeting low-income children. Conversion Comments and Responses at 16-17.

5. Equal Fair Market Value

Plaintiffs argue that the method the NPS used in order to ensure the substitute properties were of "equal fair market value" was flawed in that the NPS "did not comply with either accepted appraisal practices," nor did it, in plaintiffs' view, conform with federal appraisal guidelines. Mem. Supp. 4. As a result, plaintiffs contend that the substitute properties are not of equal fair market value because: (1) the stadium property is encumbered with a lease that allows the Yankees to continue to play at the site, and (2) because both the stadium and the waterfront property may require remediation for contamination, thus compromising their value. Id.

Plaintiffs' argument in this regard proceeds from a fundamental misunderstanding of the requirement that substitutions for converted lands be of property of at least equal fair market value. Rather than providing a basis for community members to challenge projects, the requirement exists to protect the federal government in their budgetary allocation to the L&WCF. Section 6(f) is structured to ensure proper

accounting procedures and fiscal oversight of L&WCF allocation. See 16 U.S.C. § 460l-8(f)(1)-(8). The equal fair market value requirement ensures that L&WCF grants are not squandered as a result of a conversion which replaces L&WCF-sponsored lands with property which is less valuable, resulting in a net loss of federal investment. See, e.g., 36 C.F.R. § 59.3 (explaining purpose behind requirements for conversion); L&WCF Manual ch. 675.2.E4 (fair market value of parkland is used "as the basis of L&WCF assistance"). Thus, the sole rationale behind the requirement that the NPS evaluate the conversion at issue here is to ensure that the initial investment made by the federal government -- $302,914.21 –- is not lost when the parkland currently protected by the L&WCFA is converted and substituted with another parcel of land. Here, the protection of the federal investment in building fields and courts is assured by the replacement of all these facilities as provided for in the project.

One consequence of the properly understood purpose of the equal fair market value requirement, which defendants note, is the effect on plaintiffs' standing to challenge the NPS's reliance on state certification. Even assuming that the replacement parcel of land is not of reasonably equivalent usefulness and location, the injury is a fiscal one borne solely by the government. In the absence of any particularized injury

which harms them "in a personal and individual way," Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992), plaintiffs' general interest in the substitution of equivalent parcels of land is insufficient to provide standing for a viable challenge. See generally id. at 572-76 (1992) (holding that "a generally available grievance about government –- claiming only harm to . . . every citizen's interest in proper application of the Constitution and laws" is not sufficient to provide Article III standing for suit).

Plaintiffs also attack the NPS's reliance upon documents and assessments prepared by others. Such reliance is provided for in the L&WCF Manual. When states apply to the NPS for conversion approval, they must certify that appraisals of the properties at issue have been prepared in accordance with federal standards, and that the replacement parcel meets the requisite equal fair market value standard. See L&WCF Manual ch. 675.9.3.B2 (state certifications may be used instead of submissions of separate appraisals prepared pursuant to the Manual); Id. ch. 675.5.4 (standards for grantee financial management, applicable to state and local government systems); Memorandum from NPS, Associate Director, Cultural Resource Stewardship and Partnerships, to NPS Regional Directors (Jul. 9, 1998) ¶ 3 (making this practice standard procedure). Regular program compliance reviews of state grantee agencies by means of

random selection of recent appraisals for NPS review provide a mechanism to guard against fraudulent or negligently prepared certifications. See L&WCF Manual ch. 600.8.4.C8. If the NPS finds noncompliance, it may require the state to take appropriate corrective measures or impose appropriate penalties. See id. ch. 675.9.10 (list of potential penalties for noncompliance).

Plaintiffs try to construe language in Chapter 675.9.3.B2 of the L&WCF Manual as requiring the NPS to independently review appraisals for conversion. See Supp. Mem. at 8. The section of the Manual which plaintiffs cite reads as follows:

> Generally, this will necessitate a review of appraisals prepared in accord with Chapter 675.2 for both the property proposed to be converted and that recommended for substitution. However, at the discretion of the Regional Director, a State certification that appraisals of both properties are acceptable and reveal that the replacement property is of at least equal fair market value as that of the property to be converted can be accepted. Exercising this authority should be consistent with the State's review responsibilities with respect to donation appraisals. (see 675.2.6E)

L&WCF Manual ch. 675.9.3.B2. Plaintiffs assert that the substitute parcel here constitutes a donation, and that pursuant to chapter 675.2.6E of the Manual, "the Regional Director may authorize the State Liaison Officer to review and approve donation appraisals where the value of the property to be donated is $100,000 or less." Id. at ch. 675.2.6E. Since the appraisal of the parcel here is for more than $100,000,

plaintiffs argue, the NPS was obligated to independently assess the value of the land. Plaintiffs again misread the regulations. The requirement for independent appraisal does not apply here, since the substitute parcel of land was not donated by a private party and instead was transferred from the State and the City of New York. See FEIS at 4-10 to 4-11 (describing parcels for substitution), L&WCF Manual ch. 640.1.10 ("property cannot be 'donated' between a State and its political subdivisions to serve as a match for grant assistance"); see also id. ch. 670.2.2 (defining donations as including "cash and in-kind contributions including real property to project sponsors by private parties," as opposed to public or governmental entities). Thus, the NPS was acting in a manner consistent with the established practice under the L&WCF when it relied upon the New York State's assessments of fair market value for its conversion determination.

Nor is there a basis to challenge the NPS's practice of reliance on assessments provided by state and local agencies as a means of protecting the expenditure of federal funds. We note that uniform federal regulations, applicable to all federal grant programs, state that in analogous situations where it is necessary to establish the market value of land, "the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be

certified by the grantee." 43 C.F.R. § 12.64(g); see generally Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 53 Fed. Reg. 8,034, 8,034-35, 8,077 (Mar. 11, 1988) (policy of certification is part of uniform federal grant regulations); Administrative and Audit Requirements and Cost Principles for Assistance Programs, 43 C.F.R. § 12.1-12.51, L&WCF Manual ch. 675.3 Attachment A.

Plaintiffs' only support for a contrary conclusion stems from their reliance on Schicke v. Romney, 474 F.2d 309 (2d Cir. 1973). In Schicke, petitioners challenged the Department of Housing and Urban Development ("HUD") Secretary's approval of a parkland conversion under a statute which parallels L&WCF § 6(f)(2). See id. at 312 (statute limited the Secretary's capacity to approve of parkland conversion "only upon such conditions as he deems necessary to assure the substitution of other open-space land of at least equal fair market value and of as nearly as feasible equivalent usefulness and location"). However, the Second Circuit's objection to the HUD's action in Schicke was not their assessment of equivalence; instead, the court took issue with the fact that the HUD had neglected to adequately ascertain whether the proposed conversion conformed to the City of Norwalk's comprehensive plan, pursuant to the authorizing statute. Id. at 316. The HUD Secretary in Schicke relied on statements made by state and local officials that

statutory regulations had been met, but the Second Circuit concluded the statute required the Secretary and his staff to conduct their own review of relevant materials. Id. at 316. The dispositive factor for the Second Circuit was the dearth of evidence in the administrative record which defendants could point to in order to justify the Secretary's determination that the conversion was in conformity with the comprehensive plan. The court concluded that the Secretary had made his determination largely on the basis of three brief letters and that "[n]owhere in the documents submitted [to the court] is there a copy of any comprehensive plan, a statement of what the plan contains, or a reference to where it is to be found." Id. at 317. Against this backdrop, the Second Circuit concluded that the "bare, unsupported conclusions of local officials" contained in three brief letters that the agency pointed to at trial to justify its decision did not "fulfill the statutory obligation of HUD and the Secretary to ascertain that there is in fact a plan or plans" which could be considered "comprehensive" within the meaning of the statute. Id. Here, unlike in Schicke, the administrative record is replete with evidence of constant NPS involvement in ensuring that assessments made with regard to the L&WCF conversion were in conformity with statutory requirements, along with a comprehensive system in place to monitor and ensure that state

agencies are not negligent in their assessment of equivalence. See discussion supra. Thus, we conclude that the concerns present in Schicke –- which involved an agency's reliance on three short letters to make an important determination -- do not apply to the present situation, where the NPS had an administrative record of literally thousands of pages of relevant documents and where the NPS was involved from the outset in the review of the project.

Plaintiffs further posit that "other circuits have similarly held that a federal agency, absent statutory or regulatory authority[,] cannot delegate its duties to a state agency." Repl. Mem. at 10 (citing Southern Natural Gas Co. v. Ponchartrain Materials Inc., 711 F.2d 1251 (5th Cir. 1983); Mem'l Hosp. of Roxborough v. Nat'l Labor Relations Bd., 545 F.2d 351 (3d Cir. 1976)). However, the cases cited by plaintiffs are inapposite, since the NPS has not delegated its duty to evaluate proposals for conversion. To the contrary, there is a comprehensive system in place which allows the NPS to rely upon assessments made by the state in their applications for conversions, in order to eliminate needless duplication. The decision to approve of the conversion was made entirely by the NPS in the present case.

Finally, even assuming that land appraisals were required to evaluate the substitution when the federal investment was for

fields and courts and the replacement land parcels were larger than the parcel to be converted, the three appraisals submitted in support of the conversion process and relied upon by the NPS were sufficiently reliable to constitute a reasonable basis for the NPS's approval of the conversion. While plaintiffs submit a declaration from an appraiser, Mr. Gelbtuch, who endeavors to impeach the methods employed by the defendants' licensed, certified and professional appraisers, Mr. Gelbtuch does not proffer a materially different bottom line appraisal. See Decl. Gelbtuch ¶¶ 19-22. Recognizing, as we do, that appraisal is not an exact science, plaintiffs' submission does not provide a sufficient basis for us to depart from the traditional deference owed to an agency's expertise in matters of fact finding. See Dorman v. Harris, 633 F.2d 1035, 1036 (2d Cir. 1980) ("Fundamental tenets of administrative law and sound judicial administration require that courts show some measure of deference to an agency's findings of fact. Evaluations of . . . complex information are best performed by those who . . . have special expertise in the particular subject matter."). Thus, we conclude that the NPS's determination that the substitution parcel would be of at least equal market value as compared to the parcel to be converted was not arbitrary or capricious.

D. Plaintiffs' Motion for Preliminary Injunction

Ordinarily, in this circuit, for plaintiffs to obtain a preliminary injunction, they "must show irreparable harm absent injunctive relief, and either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in plaintiff's favor." Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108, 114 (2d Cir. 2006) (citing Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam)); see also Otokayama Co. Ltd. v. Wine of Japan Import, Inc., 175 F.3d 266, 270 (2d Cir. 1999). However, in situations where the moving party seeks a preliminary injunction which would affect "government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous 'likelihood-of-success standard.'" No Spray Coalition, Inc. v. City of New York, 252 F.3d 148, 150 (2d Cir. 2001) (quoting Beal v. Stern, 184 F.3d 117, 122 (2d Cir. 1999)). This latter, more demanding standard applies in the instant case, since the NPS acted pursuant to an environmental statute, the Land and Water Conservation Fund Act, and its attendant regulations, designed to preserve parklands for the enjoyment of the public. See 16 U.S.C. § 460l-4 ("Land and water conservation provisions; statement of purposes"). Given our conclusion that plaintiffs' objections to the NPS's

approval of the proposed conversion fail on their merits, plaintiffs' motion for preliminary injunction must similarly be denied, as they cannot meet the second prong of the test for a preliminary injunction.[11]

[11] Although we need not reach the issue of irreparable harm given our conclusions with regard to the merits of the claims brought here, the plaintiffs also failed to show irreparable harm sufficient to warrant a preliminary injunction. Plaintiffs have argued inter alia, over the course of their pursuit of relief, that they will suffer irreparable harm: (1) from the loss of mature trees, Mem. Supp. 16; (2) from the loss of a "buffer" zone of parkland between their community and Yankee Stadium; and (3) because "[t]he more difficult it is to undo what has been done and restore the park to its proper use, the more difficult it would be for NPS to make an impartial determination on the conversion." Pl. Rep. Mem. at 4. However, when asked by this court in oral argument to describe the exact nature of their claim to irreparable harm in the present case, counsel conceded that, at its core, plaintiffs' claim of irreparable harm is duplicative of their merits-based contentions. See Transcript of Oral Argument, October 5, 2006 ("Tr.") at 68 (Plaintiffs' lawyer conceding that he is not "isolating a sort of separate irreparable harm argument" and that there is "essentially no distinction at this point between [plaintiffs'] preliminary injunction argument and [plaintiffs'] argument on the merits.").

Even if plaintiffs had not made such a concession, they are barred by the doctrine of collateral estoppel from invoking several of these arguments, as they have already been decided in the state proceeding before Justice Cahn. Before the state court, plaintiffs alleged that they would be irreparably harmed if the project was allowed to proceed because of the loss of the northern portion of Macomb's Dam Park and the loss of mature trees in the area. See Save Our Parks, slip op. at 17. However, at oral argument, plaintiffs' counsel conceded that the only real example of possible irreparable harm was the loss to mature trees. See Transcript of Hearing before Judge Cahn in Save Our Parks v. City of New York (Aug. 11, 2006) at 9-10 (Plaintiffs' counsel conceding that the only irreparable harm is from the trees, for [w]hile you can replace buildings and restore the park land, only God can make a 75 year old tree."). Justice Cahn ultimately rejected this contention because "the harm of losing mature trees could be ameliorated, to some extent, by the planting of replacement trees larger than saplings." Save Our Parks, slip op. at 17.

Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action are the same." La Fleur v.

CONCLUSION

For the aforementioned reasons, we find that the National Park Service, in its approval of the proposed conversion of parkland protected by the Land and Water Conservation Fund pursuant to the project to build a new Yankee Stadium, did not act in contravention of the Land and Water Conservation Fund Act, 16 U.S.C. § 4601, part B, nor did it act arbitrarily and capriciously in violation of the Administrative Procedure Act, 5 U.S.C. §§ 553, 706(2)(A). Accordingly, plaintiffs' motion for a preliminary injunction is denied; defendants' motion for a

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Whitman, 300 F.3d 256, 271 (2d Cir. 2002) (quoting Ryan v. New York Telephone Co., 62 N.Y.2d 494, 478 N.Y.S.2d 823, 826 (1984)). Thus, we are obliged to give Justice Cahn's decision the same preclusive effect as if we were a New York State Court. See Full Faith and Credit Act, 28 U.S.C. § 1738; Hoblock v. Albany County Bd. of Elections, 422 F.3d 77, 93 (2d Cir. 2005). In other words, collateral estoppel applies if "(1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." Levich v. Liberty Central School District, 361 F.Supp.2d 151, 157 (S.D.N.Y. 2004). The issue presented here is identical to the issue raised in New York state court, since the Second Circuit standard is in accord with state standards as both require a finding of irreparable harm to issue a preliminary injunction. See W.T. Grant Co. v. Srogi, 438 N.Y.S.2d 761, 52 N.Y.2d 496, 517 (N.Y. 1981). In addition, complete identity between the plaintiffs in the present action and those who appeared in state court is not a prerequisite to collateral estoppel, especially in a situation where defendants invoke the doctrine defensively. See Drug Purchase, Inc. v. Dubroff, 485 F.Supp. 887, 890 (S.D.N.Y. 1980) (citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 324 (1971)). Moreover, the plaintiffs here consist of the same two community group plaintiffs (SOP and the Bronx Council) and two of the same individual plaintiffs (Albertha Hunter and Frances Tejada) who sued in state court and who, raising essentially the same arguments, had a full and fair opportunity to litigate the issue of irreparable harm before Justice Cahn in state court. Thus, collateral estoppel precludes them from invoking these arguments in support of a showing of irreparable harm now.

consolidation of our review of plaintiffs' motion for a preliminary injunction and of plaintiffs' claims on their merits pursuant to Rule 65(a)(2) is granted; and plaintiffs' claims are denied for lack of merit.

IT IS SO ORDERED.

Dated: New York, New York
November 15, 2006

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Memorandum and Order have been mailed on this date to the following:

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