IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MILWAUKEE INNER-CITY
CONGREGATIONS FOR HOPE (MICAH)
and BLACK HEALTH COALITION
OF WISCONSIN,

OPINION AND ORDER

Plaintiffs,

12-cv-556-bbc

v.

MARK GOTTLIEB, in his official capacity
as the Secretary of the Wisconsin Department
of Transportation; VICTOR MENDEZ, in his
official capacity as Administrator of the Federal
Highway Administration; GEORGE POIRIER,
in his official capacity as Division Administrator
of the Wisconsin Division of the FHWA;
FEDERAL HIGHWAY ADMINISTRATION;
RAY LAHOOD, in his official capacity as Secretary
of the U.S. Department of Transportation; and
U.S. DEPARTMENT OF TRANSPORTATION,

Defendants.

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Plaintiffs Milwaukee Inner-City Congregations for Hope and Black Health Coalition of Wisconsin are organizations concerned with issues affecting African Americans and other minority groups living in the Milwaukee area. In this civil action brought under the National Environmental Policy Act, 42 U.S.C. §§ 4331-4370, plaintiffs are challenging the proposed reconstruction and expansion of the "zoo interchange" in western Milwaukee County, a joint federal-state project. Plaintiffs contend that the project will have adverse

social, racial, economic and environmental impacts, particularly because the project fails to incorporate any public transportation options. Plaintiffs have asserted claims against the federal and state defendants involved in the project, including the Federal Highway Administration and its Administrator, Victor Mendez; the Division Administrator of the Highway Administration for Wisconsin, George Poirier; the United States Department of Transportation and its Secretary, Ray LaHood; and the Secretary of the Wisconsin Department of Transportation, Mark Gottlieb.

Under the National Environmental Policy Act, an agency undertaking a "major federal action" is required to produce a "detailed statement" concerning "the environmental impact of the proposed action" and "possible alternatives" to the action. 42 U.S.C. § 4332(C). Because the Federal Highway Administration and Wisconsin Department of Transportation determined that the zoo interchange project would be a major federal action significantly affecting the quality of the environment, the federal and state defendants undertook the preparation of an environmental impact statement. Defendants completed the environmental impact statement process in October 2011 and the Federal Highway Administration issued a final decision approving the project in February 2012.

In their amended complaint, plaintiffs assert four claims challenging the adequacy of defendants' environmental impact statement. They contend that defendants failed to (1) analyze the effects of the proposed interchange; (2) consider appropriate alternatives; (3) comply with Title VI of the Civil Rights Act; and (4) supplement the environmental impact statement as necessary. Plaintiffs assert all claims against the federal defendants and claims

1,2 and 4 against defendant Gottlieb. In their request for relief, plaintiffs seek an order vacating the environmental impact statement and prohibiting all construction related activities on the zoo interchange project until an adequate statement has been prepared.

Now before the court are motions to dismiss filed by the state and federal defendants. Dkt. ##20, 26. The federal defendants have moved to dismiss only plaintiffs' third claim. Defendant Gottlieb filed a motion to dismiss all claims against him on the ground that neither the National Environmental Policy Act nor the Administrative Procedures Act provides a cause of action against state officials and that, even if such a cause of action exists, Gottlieb has sovereign immunity under the Eleventh Amendment.

I conclude that the federal defendants' motion must be granted because they are correct that plaintiffs cannot use the National Environmental Policy Act to enforce the requirements of Title VI. However, defendant Gottlieb's motion must be denied. Although the National Environmental Policy Act does not expressly provide a cause of action against state officials, a significant number of courts have allowed plaintiffs to proceed against state officials and other nonfederal entities in National Environmental Policy Act cases. I find the decisions of these courts persuasive. Additionally, I conclude that plaintiffs' claim is not barred by sovereign immunity.

OPINION

A. Federal Defendants' Motion to Dismiss

The federal defendants have moved under Fed. R. Civ. P. 12(b)(6) to dismiss

plaintiffs' third claim for failure to state a claim upon which relief may be granted. In their third claim, plaintiffs contend that the federal defendants violated the National Environmental Policy Act by failing to comply with the requirements of Title VI of the Civil Rights Act, which prohibits discrimination on the basis of race, color and national origin in programs and activities receiving federal financial assistance. 42 U.S.C. § 2000d. Under § 602 of Title VI, federal agencies are authorized to "effectuate the provisions of section 2000d . . . by issuing rules, regulations, or orders of general applicability" for each program or activity that receives federal financial assistance. 42 U.S.C. § 2000d-1. Plaintiffs contend that defendants were "obligated to comply with Title VI in the [environmental impact statement] process," Am. Cpt. at ¶ 87, and failed to do so because they did not (1) evaluate issues relating to transit dependence, segregation and the indirect and cumulative impacts on minorities and their communities, id. ¶¶ 88(a), (b); (2) insure that the Wisconsin Department of Transportation complied with a prior settlement agreement from an earlier administrative complaint alleging race discrimination, id. ¶ 88(c); and (3) insure that the Wisconsin Department of Transportation was in compliance with the requirements of Title VI. Id. ¶ 88(d).

Plaintiffs concede that they cannot bring a disparate impact claim against the federal defendants under Title VI directly. Plts.' Br., dkt. #31, at 1-2. The Supreme Court has interpreted § 601 of Title VI to confer a private right of action only for claims of intentional discrimination, Alexander v. Choate, 469 U.S. 287, 293 (1985); Alexander v. Sandoval, 532 U.S. 275, 279-80 (2001), and plaintiffs are not bringing claims of intentional

discrimination. Additionally, the Supreme Court has held that although § 602 of Title VI "confers the authority to promulgate disparate impact regulations" upon federal agencies, Sandoval, 532 U.S. at 286, it does not confer a private right of action to enforce those regulations. Id. at 293.

Because plaintiffs cannot proceed against the federal defendants under Title VI, they are seeking to enforce the statutory and regulatory requirements of Title VI and obtain judicial review of the federal defendant's enforcement of Title VI through the National Environmental Policy Act. However, plaintiffs cite no case law, statutory or regulatory provisions to support their assertion that they can use the National Environmental Policy Act to enforce Title VI. Plaintiffs contend that it is good policy for federal agencies to consider social, economic and racial issues as part of the environmental review process, but whether it would be a good idea for agencies to consider those issues does not mean that agencies are required to comply with Title VI as part of the National Environmental Policy Act review process.

The National Environmental Policy Act is a procedural statute that exists to insure that the federal government makes decisions on the basis of an understanding of the environmental consequences of its proposed actions. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). The Act does not set substantive limits on an agency's decision making, does not require compliance with any other law and does not provide an avenue through which plaintiffs may seek compliance with other laws. Thus, even if an agency action "run[s] afoul of a duty imposed by a different statute,[] it would not violate

any duty imposed by NEPA." Sierra Club v. Van Antwerp, 526 F.3d 1353, 1361-62 (11th Cir. 2008). A court's role in judicial review of a challenge under the National Environmental Policy Act is only to insure "that the agency has taken a 'hard look' at environmental consequences." Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). Plaintiffs cannot use the Act to obtain judicial review of a Title VI disparate impact claim that they would otherwise be precluded from bringing. Accordingly, I am dismissing plaintiffs' third claim.

B. Defendant Gottlieb's Motion to Dismiss

Defendant Gottlieb has moved to dismiss plaintiffs' claims 1, 2 and 4 against him on the ground that the National Environmental Policy Act applies only to federal agencies and does not provide a private cause of action against state agencies or officials. In the alternative, Gottlieb contends that even if the Act could be applied to state agencies or officials, he would be immune from suit under the Eleventh Amendment.

1. Applicability of the National Environmental Policy Act to state actors

Defendant Gottlieb is correct that by its terms, the National Environmental Policy Act seems to apply only to federal agencies. 42 U.S.C. § 4332 ("agencies of the Federal Government" must comply with requirements of Act). See also Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971) (Act does not impose duties on state); Environmental Rights Coalition, Inc. v. Austin, 780 F. Supp. 584, 596 (S.D. Ind. 1991) (Act applies "only to agencies of the federal government"). Additionally, it is true that the National Environmental Policy Act

does not provide a cause of action against state agencies or officials. In fact, the National Environmental Policy Act does not confer a private right of action at all. Rather, judicial review of agency action under the National Environmental Policy Act is governed by the Administrative Procedures Act, Habitat Education Center, Inc. v. United States Forest Service, 673 F.3d 518, 525 (7th Cir. 2012), which applies only to federal agencies. 5 U.S.C. § 702 (authorizing judicial review of "agency action"); 5 U.S.C. § 701(b)(1) (defining an "agency" as "each authority of the Government of the United States"). See also Department of Transportation & Development of Louisianna v. Beaird-Poulan, Inc., 449 U.S. 971, 973 (1980) ("[T]he APA is of course not applicable to state agencies.").

However, there is a split in authority regarding whether plaintiffs may assert claims for violations of the National Environmental Policy Act against nonfederal defendants. I have found three cases in which courts concluded that because the National Environmental Policy Act does not apply explicitly to the states and neither that Act nor the Administrative Procedures Act creates a right of action against state entities, private plaintiffs may not assert claims against state defendants. E.g., Karst Environmental Education & Protection, Inc. v. E.P.A., 475 F.3d 1291, 1298 (D.C. Cir. 2007) (affirming dismissal of National Environmental Policy Act claims against county and other nonfederal entities on grounds that "nothing in the APA authorizes claims against nonfederal entities"); Southwest Williamson County Community Association v. Slater, 173 F.3d 1033, 1035 (6th Cir. 1999) (affirming dismissal of National Environmental Policy Act claims against state defendants on grounds that "APA does not apply to state agencies"); Friends of Tims Ford v. Tennessee

Valley Authority, Case No. 4:06-cv-66, 2008 WL 782512, *1 (E.D. Tenn. Mar. 20, 2008) (explaining that plaintiff could not assert claims against state defendants under APA for violations of National Environmental Policy Act).

On the other hand, in numerous decisions involving the National Environmental Policy Act courts have considered or even granted injunctive relief against nonfederal entities. The courts that decided Karst, Southwest Williamson County and Friends of Tims Ford did not address these other decisions. In the cases considering injunctive relief against nonfederal entities, the courts have generally concluded that if the nonfederal entity has engaged in a "partnership" or "joint venture" with a federal agency, it may be necessary to enjoin the nonfederal entity to prevent construction or implementation of a project that violates federal law. E.g., Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1397 (9th Cir. 1992) (stating that state entities may be enjoined under National Environmental Policy Act if "federal and state projects are sufficiently interrelated to constitute a single 'federal action' for NEPA purposes"; if the state "enters into a partnership or joint venture" with the federal government; or if "proposed action cannot proceed without the prior approval of a federal agency") (citing Homeowners Emergency Life Protection Committee v. Lynn, 541 F.2d 814, 818 (9th Cir. 1976) ("[T]he city, being in partnership with the federal government, is bound by the mandates of NEPA. . . .")); Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 329 (9th Cir. 1975) (nonfederal entities may enjoined if "federal and state projects are sufficiently interrelated to constitute a single 'federal action' for NEPA purposes"); Biderman v. Morton, 497 F.2d 1141, 1147 (2nd Cir. 1974) ("[I]t is well settled that non-federal

parties may be enjoined . . . where those non-federal entities have entered into a partnership or joint venture with the Federal Government"); Silva v. Romney, 473 F.2d 287, 289-90 (1st Cir. 1973) (enjoining private developer from continuing construction until federal agency filed environmental impact statement because developer and agency were "in partnership" with each other on housing project); Sierra Club v. United States Fish & Wildlife Service, 235 F. Supp. 2d 1109, 1123 (D. Or. 2002) ("[A]n injunction may issue against a non-federal party in a NEPA action if it receives federal assistance for the challenged activity."); Zarrilli v. Weld, 875 F. Supp. 68, 71 (D. Mass. 1995) (holding that "[b]ecause [] Massachusetts has entered into a partnership with the federal government . . . and because the federal government is largely funding the [] Project, the NEPA applies, and [plaintiffs'] suit against state officers acting in their official capacities cannot be dismissed on this ground"); Don't Ruin Our Park v. Stone, 749 F. Supp. 1386, 1388 (M.D. Penn. Aug. 31, 1990) (nonfederal entity may be enjoined under National Environmental Policy Act if it "enters into a partnership or joint venture with the federal government and becomes the recipient of federal funding" or "cannot lawfully begin or continue without the prior approval of a federal agency"); Town of North Hempstead v. Village of North Hills, 482 F. Supp. 900, 903 (E.D.N.Y. 1979) ("NEPA . . . by its express language operates only upon federal agencies and imposes no duties on the States or on municipalities . . . except to the extent that a non-federal entity is found to be acting in partnership with the federal government"); Greenspon v. Federal Highway Administration, 488 F. Supp. 1374, 1382 (D. Md. 1980) (holding that city and other nonfederal entities could be enjoined under National

Environmental Policy Act if they were in "partnership" with federal entities).

Defendant Gottlieb's briefs gloss over this line of cases, suggesting that in those cases the courts considered only whether it was appropriate to enjoin nonfederal defendants who were not parties to the case. Dft.'s Br., dkt. #30, at 2-3 ("Defendant Gottlieb concedes that *non-parties* may be enjoined under certain circumstances, and that those circumstances may be appropriate in NEPA cases. . . ."). He contends that although a state agency or official may be enjoined, it does not follow that the state agency or official would be a "proper party" to the action. However, only some of the cases cited above concerned injunctions against non-parties. Other cases involved injunctions and judgments against state and other nonfederal entities that were named defendants to the National Environmental Policy Act claims. E.g., Sierra Club, 235 F. Supp. 2d at 1142 (enjoining Oregon Department of Fish and Wildlife as defendant) Don't Ruin Our Park, 749 F. Supp. at 1388-90 (holding that defendant Adjutant General of Pennsylvania National Guard could be enjoined pending completion of environmental impact statement). The Court of Appeals for the Seventh Circuit has also concluded that a state agency may be subject to the requirements of the National Environmental Policy Act if it is working on a federal project. Scottsdale Mall v. Indiana, 549 F.2d 484, 489 (7th Cir. 1977) (holding that defendants state and state highway commission were subject to requirements of National Environmental Policy Act in construction of highway). See also Davis v. Mineta, 302 F.3d 1104, 1126 (10th Cir. 2002) (instructing district court to enjoin state and federal agency defendants in National Environmental Policy Act highway case); Ross v. Federal Highway Admin., 162 F.3d 1046,

1055 (10th Cir. 1998) (affirming injunction against defendants state and local highway officials in National Environmental Policy Act case); Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept., 446 F.2d 1013, 1027-28 (5th Cir. 1971) (enjoining defendant state highway department from constructing highway and nothing that "[t]he state, by entering into this venture, voluntarily submitted itself to federal law"); Boston Waterfront Residents Association v. Romney, 343 F. Supp. 89 (D. Mass. 1972) (enjoining defendant Boston Redevelopment Authority from proceeding with demolition work).

In those cases involving named nonfederal defendants, few of the courts included any discussion about whether the language of the National Environmental Policy Act or the Administrative Procedures Act provided any obstacle to the plaintiffs' claims. Instead, they concluded that it was necessary to permit plaintiffs to challenge the activities of state and other nonfederal actors to preserve the federal rights provided under the National Environmental Policy Act. As the Court of Appeals for the Fourth Circuit has explained, although "[n]either NEPA nor the Administrative Procedure Act [] in itself provides a cause of action against state actors," "[w]here the challenged activities of state actors would make a sham of the reconsideration required by federal law, federal courts may entertain suits against state actors. . . ." South Carolina Wildlife Federation v. Limehouse, 549 F.3d 324, 330 (4th Cir. 2008) (citation and internal quotation marks omitted). "Were it otherwise," a state action could "undermine" and "eviscerate the federal remedy." Id. (holding that plaintiffs could proceed with National Environmental Policy Act claims against director of

state department of transportation).

I agree with the reasoning of the Court of Appeals for the Fourth Circuit and the significant number of other courts concluding that state officials may be named as defendants in National Environmental Policy Act cases under certain circumstances. Additionally, I conclude that those circumstances are present in this case. The zoo interchange project is a joint state-federal project and defendant Gottlieb and the Wisconsin Department of Transportation were integrally involved in planning the project and creating the environmental impact statement required by the National Environmental Policy Act. Because plaintiffs allege that the environmental impact state is inadequate and that the state and federal officials are planning to proceed with the project despite their failure to comply with the requirements of the National Environmental Policy Act, it is necessary to include both state and federal officials as defendants to this action.

Further, although defendant Gottlieb suggests that plaintiffs could obtain an injunction against him regardless whether he was a defendant, Gottlieb has not explained why, as a practical matter, allowing plaintiffs to proceed against Gottlieb as a party defendant would be significantly different from allowing plaintiffs to seek a non-party injunction against Gottlieb. Under either circumstance, Gottlieb would be required to provide information about the zoo interchange project and the environmental impact statement process. If plaintiffs show that Gottlieb and the federal defendants failed to prepare an adequate environmental impact statement, Gottlieb may be prohibited from proceeding with the interchange project. By remaining a defendant, Gottlieb will have a

greater opportunity to respond to plaintiffs' accusations and explain his position to the court. Accordingly, I decline to dismiss Gottlieb simply because he is not a federal actor.

2. Sovereign immunity

I am also not persuaded by defendant Gottlieb's second argument regarding sovereign immunity. Gottlieb contends that even if plaintiffs could state a claim under the National Environmental Policy Act or the Administrative Procedures Act, their claims are barred by the doctrine of sovereign immunity. That doctrine is derived from the Eleventh Amendment and "bars actions in federal court against a state, state agencies, or state officials acting in their official capacities," Indiana Protection & Advocacy Services v. Indiana Family & Social Services Administration, 603 F.3d 365, 370 (7th Cir. 2010), unless the state waives immunity, Congress abrogates it or the plaintiff's claim falls under the exception articulated by the Supreme Court in Ex Parte Young, 209 U.S. 123 (1908). Council 31 of the American Federation of State, County & Municipal Employees, AFL-CIO v. Quinn, 680 F.3d 875, 882 (7th Cir. 2012); Virginia Office for Protection & Advocacy v. Stewart, 131 S. Ct. 1632, 1637-38 (2011).

In this case, plaintiffs' claims fall under the Ex Parte Young exception, which permits claims against "individual state officials for prospective relief to enjoin ongoing violations of federal law." Council 31, 680 F.3d at 882 (quoting MCI Telecommunications. Corp. v. Illinois Bell Telephone Co., 222 F.3d 323, 337 (7th Cir. 2000)). See also Alden v. Maine, 527 U.S. 706, 747 (1999). Plaintiffs' claims satisfy the first element, which requires them

to show that defendant's violation of federal law "is ongoing as opposed to cases in which federal law has been violated at one time or another over a period of time in the past.'" Papasan v. Allain, 478 U.S. 265, 277–78 (1986). See also Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (Ex Parte Young "does not permit judgments against state officers declaring that they violated federal law in the past[.]"). Specifically, plaintiffs contend that defendant Gottlieb is continuing to violate federal law by proceeding with a major federal project without satisfying the requirements of the National Environmental Policy Act.

Defendant Gottlieb contends that plaintiffs have not alleged an ongoing violation because they are simply accusing him of failing to comply with the National Environmental Policy Act in the past. In other words, Gottlieb states that plaintiffs are challenging the environmental impact statement and the environmental review process, something that was complete months ago. However, Gottlieb is reading plaintiffs' claims and the requirements of the National Environmental Policy Act too narrowly. Although plaintiffs contend that the environmental review process violated the law, they also contend that further actions pursuant to the allegedly unlawful process are violations of the law. In particular, plaintiffs contend that it is a violation of federal law to proceed with the zoo interchange project without an adequate environmental impact statement. Because it is a violation of the National Environmental Policy Act to proceed with a major federal project without an adequate environmental analysis, 42. U.S.C. 4332, several courts have concluded that doing so qualifies as an ongoing violation of federal law. E.g., South Carolina Wildlife Federation,

549 F.3d at 332; Merritt Parkway Conservancy v. Mineta, Case No. 3:05CV860(MRK), 2005 WL 2648683, *7 (D. Conn. Oct. 14, 2005); Joseph v. Adams, 467 F. Supp. 141, 148 (E.D. Mich. 1978).

Additionally, plaintiffs are seeking relief that is "properly characterized as prospective." Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 645 (2002). Generally, it is retroactive monetary relief against the state that is barred, and plaintiffs do not seek monetary damages. As the Supreme Court explained in Edelman v. Jordan, 415 U.S. 651, 663 (1974), relief qualifies as retroactive if it "is in essence one for recovery of money from the state . . . even though individual officials are nominal defendants." In other words, retroactive relief is that relief "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." Id. at 668. In contrast, prospective relief includes request that "state officials be restrained from enforcing an order in contravention of controlling federal law." Verizon Maryland, 535 U.S. at 645.

In this case, plaintiffs are not requesting monetary relief. Instead, they are seeking to enjoin defendant Gottlieb and the federal defendants from proceeding with the zoo interchange project until after they have complied with the requirements of the National Environmental Policy Act and produced an adequate environmental impact statement. Such relief is properly characterized as prospective injunctive relief. Merritt Parkway Conservancy, 2005 WL 2648683, *6 (request for injunction of highway project properly characterized as prospective injunctive relief); Joseph, 467 F. Supp. at 148 ("[P]laintiffs are

seeking to enjoin state officials from continuing with the Dort Highway project until an [environmental impact statement] has been filed and the required hearings have been held. This prospective equitable relief does not trigger the Eleventh Amendment."). Cf. Ragland v. Mueller, 460 F.2d 1196, 1197 (5th Cir. 1972) (stating that defendant secretary of state department of transportation sovereign immunity defense to National Environmental Policy Act claim "borders on the frivolous").

Defendants cite one unpublished case in which the district court dismissed a pro se plaintiff's claims against state officials under the National Environmental Policy Act on the basis of sovereign immunity. Bullwinkel v. United States Department of Energy, Case No. 11-1082-JDB-EGB, 2012 WL 3526829 (W.D. Tenn. Aug. 13, 2012). However, the case has little persuasive value, because the court did not explain with any detail why the claims were barred by sovereign immunity and did not discuss Ex Parte Young at all. In light of the many other cases that have permitted plaintiffs to proceed against state officials in similar cases, and the fact that plaintiffs are seeking to enjoin defendant Gottlieb from proceeding with a project in violation of federal law, I conclude that plaintiffs' claims are not barred by sovereign immunity. Therefore, I am denying defendant Gottlieb's motion to dismiss.

ORDER

IT IS ORDERED that

1. Defendant Mark Gottlieb's motion to dismiss, dkt. #20, is DENIED.

2. The motion to dismiss filed by defendants Victor Mendez, George Poirier, Ray LaHood, Federal Highway Administration and United States Department of Transportation, dkt. #26, is GRANTED. Plaintiffs Milwaukee Inner-City Congregations for Hope and Black Health Coalition of Wisconsin's third cause of action for violations relating to Title VI of the Civil Rights Act are DISMISSED.

Entered this 29th day of January, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge