

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONTERS FOR A CLEAN ENVIRONMENT, INC.,)
JUSTIN LINDHOLM, ANNETTE SMITH,)
JOHN DAVID GEERY, THOMAS E. SHEA,)
GEORGE S. HALFORD, KATHY HALFORD, AND)
TYLER RESCH)

Plaintiffs,)

v.)

Docket No. 1:12-CV-73

COLLEEN MADRID, FOREST)
SUPERVISOR OF THE GREEN MOUNTAIN)
NATIONAL FOREST; BOB BAYER, PROJECT)
COORDINATOR OF THE DEERFIELD WIND PROJECT,)
MANCHESTER DISTRICT; NORA RASURE,¹)
REGIONAL FORESTER OF THE EASTERN REGION,)
IN THEIR OFFICIAL CAPACITIES AS EMPLOYEES)
OF THE U.S.D.A FOREST SERVICE)

Defendants,)

DEERFIELD WIND, LLC)

Defendant-Intervenor.)

**FEDERAL DEFENDANTS’ STIPULATED MOTION TO STAY, AND, IN THE
ALTERNATIVE, MOTION FOR AN EXTENSION OF TIME TO RESPOND TO
PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT
EXPEDITED TREATMENT REQUESTED**

Pursuant to Fed. R. Civ. P. 6(b) and Local Rule 7, Federal Defendants, with the consent of all parties, move to stay this litigation. Given the briefing schedule in this case with Federal Defendants’ response to Plaintiffs’ motion for summary judgment currently due next

¹ The complaint in this case named Charles L. Myers as a defendant in his capacity as the Regional Forester of the Eastern Region. Ms. Rasure has replaced Mr. Myers as Regional Forester of the Eastern Region and therefore is substituted as a defendant pursuant to Fed. R. Civ. P. 25(d).

Wednesday, November 7, Federal Defendants request expedited consideration of this stipulated motion. In support of this motion, Federal Defendants state as follows:

MEMORANDUM IN SUPPORT OF STIPULATED MOTION

Factual Background

On October 8, 2012, Defendant-Intervenor sent the Forest Service written notice that some of the blades to be used on the wind turbines for the Deerfield Wind Project are no longer available. Because of this unavailability, Defendant-Intervenor explained that it would need to use different, longer blades for some of the Deerfield Wind Project wind turbines. Defendant-Intervenor also explained in its October 8 letter that it would be providing the Forest Service with its updated studies with analyses of the effects of the proposed blade length change on sound impacts, visual impacts, wildlife impacts, and shadow flicker impacts. As of November 1, 2012, the Forest Service has received the sound, visual, wildlife, and flicker reports from Defendant-Intervenor. Federal Defendants will provide these reports to Plaintiffs within a reasonable time.

With the change to the blade lengths, as proposed by Deerfield Wind, the Deerfield Wind Project specifications have changed from what was previously provided by Defendant-Intervenor and considered during the National Environmental Policy Act (“NEPA”) process. Defendants, under the applicable law, are required to analyze the change in circumstances to determine if a Supplemental Environmental Impact Statement (“EIS”) is required. 40 C.F.R. § 1502.9(c). To meet this requirement, the Forest Service will independently evaluate the information Deerfield Wind provides and decide whether the changed specifications present “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id.* Once this analysis is complete, the Forest Service will either issue a

Supplemental Information Report (“SIR”) stating that the information does not present significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts addressed in the Final EIS and Record of Decision, or stating that the Agency will undertake a Supplemental EIS.

The blade length change proposed by Defendant-Intervenor implicates many of the same issues already raised by Plaintiffs in this litigation, including the visual, sound, and wildlife impacts of the Project. Federal Defendants anticipate that Plaintiffs will seek to amend their complaint and challenge the Agency’s analysis and conclusions. Depending on the Agency’s actions, some of the existing claims may become moot.

Legal Authority And Rationale For A Stay

Federal Defendants believe a stay is warranted and within this Court’s discretion to grant. It is well-established that “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The Supreme Court further noted, “[e]specially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.” *Id.* at 256.

It is illogical and inefficient to continue the current briefing on the issues raised by Plaintiffs’ Motion for Summary Judgment, and later address several of the same issues in the context of challenges to the Agency’s analysis of and determinations regarding the blade length change issue. Federal Defendants submit that, in the interests of judicial economy and the efficient use of the parties’ resources, the Court should stay the litigation during the time that it takes the Forest Service to analyze the blade length change requested by Defendant-Intervenor.

A stay will clarify the litigation landscape by updating the environmental analysis and the claims that will be considered by this Court. Moreover, a stay will eliminate the need for duplicative briefing and multiple oral arguments for different phases of this litigation.

Logistics Of The Proposed Stay And Alternative Request For Extension

In response to the proposed change to blade lengths, the Forest Service will either issue a SIR or a Supplemental EIS. At this time, the Forest Service is unable to determine when it will complete one or the other of these processes. Therefore, Federal Defendants seek a six-month stay of the litigation or a stay of the litigation until the Forest Service either issues a SIR or there is a final Supplemental EIS and any related modification to the Record of Decision (including the completion of any required administrative appeal or objection process), whichever comes first. During the stay, Federal Defendants will file a status report with the Court every six weeks describing the progress of the Forest Service's analysis of the blade length change. If the Forest Service is still engaged in the environmental review process at the end of the six month stay, Federal Defendants will confer with the other parties regarding an extension of the stay. If the case is stayed, Federal Defendants request that the Court order the parties to confer and submit to the Court a revised case management and briefing schedule within thirty days following the Forest Service's issuance of a SIR or completion of a Supplemental EIS and any related modification to the ROD as described above. This procedure will allow Plaintiffs reasonable time to file an Amended Motion for Judgment following the Forest Service's decision regarding the blade length change.

As of today, the briefing and oral argument schedule is as follows:

- Plaintiffs' motion for judgment – 9/26/12 (Done)
- Defendants' motion for judgment – 11/7/12
- Intervenor's motion for judgment – 11/21/12
- Plaintiffs' reply brief – 12/12/12

- Defendants' and Intervenor's reply briefs – 1/11/13
- Oral Argument on motions for judgment – 1/28/13

Under the current schedule, Federal Defendants' response to Plaintiffs' Motion for Summary Judgment is due next Wednesday, November 7, 2012. If the Court denies this motion to stay, Federal Defendants request that the due date for their response to Plaintiffs' Motion for Summary Judgment be extended to one week following the Court's order denying the motion to stay. Should the Court deny the motion to stay, Federal Defendants also request that all other deadlines on the briefing schedule be extended in accordance with the original timeline.

Availability For Telephonic Status Conference

To answer any questions the Court might have, Federal Defendants are available at the Court's convenience for a telephonic status conference to discuss any of the issues raised by this stipulated motion.

Plaintiffs and Defendant-Intervenor, through their respective counsel, have given their consent to the relief requested herein.

This motion is filed in good faith and not for purposes of delay.

WHEREFORE, Federal Defendants, with the consent of Plaintiffs and Defendant-Intervenor, request a six-month stay of the litigation or a stay of the litigation until the Forest Service either issues a SIR or there is a final Supplemental EIS and any related modification to the Record of Decision (including the completion of any required administrative appeal or objection process), whichever comes first. During the stay, Federal Defendants will file a status report with the Court every six weeks describing the progress of the Forest Service's analysis of the blade length change. If the case is stayed, Federal Defendants request that the Court order the parties to confer and submit to the Court a revised case management and briefing schedule

within thirty days following the Forest Service's issuance of a SIR or completion of a Supplemental EIS and any related modification to the ROD as described above.

In the alternative, if the Court denies this motion to stay, Federal Defendants seek an extension of time to file their response to Plaintiffs' pending Motion for Summary Judgment until one week following the Court's denial of the motion to stay.

Dated at Burlington, in the District of Vermont, this 2d day of November, 2012.

Respectfully submitted,

Defendants:

COLLEEN MADRID, FOREST SUPERVISOR OF THE GREEN MOUNTAIN NATIONAL FOREST; BOB BAYER, PROJECT COORDINATOR OF THE DEERFIELD WIND PROJECT, MANCHESTER DISTRICT; NORA RASURE, REGIONAL FORESTER OF THE EASTERN REGION, IN THEIR OFFICIAL CAPACITIES AS EMPLOYEES OF THE U.S.D.A FOREST SERVICE

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