2024 WL 1756829
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Court of Appeals of Oregon.

GUNNER, LLC, an Oregon limited liability company, Plaintiff-Appellant,
v.
John D. MILLER, an individual, Defendant-Respondent.

A178469
|
Argued August 23, 2023.
|
April 24, 2024

Marion County Circuit Court 19CV06925;

J. Channing Bennett, Judge.

Affirmed.

Attorneys and Law Firms

Zachary Dablow argued the cause and filed the briefs for appellant.

Tricia M. Olson argued the cause for respondent. Also on the brief were Andrew D. Campbell and Heltzel Williams PC.

Before Shorr, Presiding Judge, Mooney, Judge, and Pagán, Judge.

Opinion

MOONEY, J.

MOONEY, J.

Plaintiff purchased an industrial property from defendant and afterwards discovered an active underground storage tank (UST) beneath a concrete planter box. Plaintiff paid to decommission the UST and subsequently filed a breach of contract claim against defendant to recover the decommissioning costs on the basis that defendant fraudulently misrepresented the existence of the UST. The trial court entered a judgment in favor of defendant. Plaintiff appeals that judgment and in its sole assignment of error, asserts that the trial court erred by granting defendant's motion for directed verdict. We conclude that because plaintiff had actual knowledge of the existence and location of the UST prior to the purchase, no reasonable factfinder could find in its favor, and therefore, defendant was entitled to judgment as a matter of law. We therefore affirm.

We review a trial court's decision to grant a motion for directed verdict for legal error. *Kelley v. Washington County*, 303 Or App 20, 21, 463 P3d 36 (2020). "[A] directed verdict is appropriate only in the exceptional case where reasonable people could draw only one inference and that inference is that defendant was not liable." *Johnson v. Keiper*, 308 Or App 672, 678, 481 P3d 994 (2021). Accordingly, "we view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party—in this case, plaintiff[ ]—and determine whether any reasonable factfinder could find in their favor." *Sherertz v. Brownstein Rask*, 314 Or App 331, 333, 498 P3d 850 (2021), *rev den*, 369 Or 338 (2022).

We state the facts consistently with our standard of review and further note that a detailed recitation of the facts would not benefit the parties, the bench, or the bar. Accordingly, we describe the facts only to the extent necessary to explain our decision.

Before defendant John Miller purchased the property in 2004, he ordered an environmental site assessment, which revealed an abandoned UST and fuel pump island. Miller's predecessor in interest reported that the UST had been decommissioned. Soil tests at that time revealed no contaminants in the vicinity of the UST. Miller purchased the property, and between 2008 and 2010, he installed two concrete planter boxes directly above the fuel pump island and UST as part of an asphalt regrading and landscape project.

Before purchasing the property in 2018, plaintiff Gunner, LLC (Gunner) hired Point Source Solutions, LLC (Point Source) to conduct an environmental site assessment. As part of its review, Point Source asked Miller to complete a

four page environmental site assessment questionnaire. The pertinent questions and answers included:

> "[Question]: Are there currently any registered or unregistered storage tanks (above or underground) located on the Property?
>
> "[Answer]: No.
>
> "[Question]: Do you have any prior knowledge that there have been previously, any registered or unregistered storage tanks (above or underground) located on the Property?
>
> "[Answer]: Yes.
>
> "[Question]: Are there currently any vent pipes, fill pipes, or access ways indicating a fill pipe protruding from the ground on the Property or adjacent to any structure located on the Property?
>
> "[Answer]: Yes.
>
> "[Question]: Do you have any prior knowledge that there have been previously, any vent pipes, fill pipes, or access ways indicating a fill pipe protruding from the ground on the Property or adjacent to any structure located on the Property?
>
> "[Answer]: No."

Miller also provided the 2004 environmental report and soil test results to Point Source. Point Source identified a UST decommissioned in-place in the general vicinity of the planter boxes on its written report for Gunner prior to Gunner's purchase of the property.

After purchasing the property, Gunner removed the planter boxes and discovered a metal pipe that was part of a fuel island connected to the UST which, as it turned out, had not been decommissioned. Gunner incurred approximately $10,000 in decommissioning and removal costs related to that UST. It then filed the underlying breach of contract suit against Miller to recover those costs on a theory of fraudulent misrepresentation based on Miller's failure to disclose the existence of the UST in his questionnaire responses and concealment of the pipe beneath the planter boxes. At trial, Gunner's principal and its business manager each testified that, based on a review of the environmental reports, they were aware of the existence and general location of the UST at the time of purchase, although they believed that it had been decommissioned. Miller moved for a directed verdict at the close of all the evidence. The trial court granted the motion, reasoning that "there is a disclosure of a tank in advance of the sale. That seems to be the end of the inquiry."

On appeal, Gunner argues that Miller actively concealed the UST through his responses to the questionnaire and by building the planter boxes over the vicinity of the UST, which triggered a duty on Miller's part to fully disclose the UST and its current status. In Gunner's view, Miller's disclosures were insufficient because the disclosures indicated that the UST had been decommissioned when in fact, it had not been. Miller contends that, notwithstanding the questionnaire responses and planter boxes, his disclosure of the previous **environmental assessment** and soil tests was sufficient because those reports revealed the existence and location of the UST and provided the information in Miller's possession regarding the status of the UST.

To prove actionable fraud, a party must establish the following: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that it should be acted upon, (6) the injured party's ignorance of its falsity, (7) the injured party's reliance upon the truth of the representation, and (8) the injured party's right to rely on its truth. *Gardner v. Meiling*, 280 Or 665, 671, 572 P2d 1012 (1977).

A false representation may result from an affirma-tive misrepresentation or actions that conceal a material fact. *Ogan v. Ellison*, 297 Or 25, 34, 682 P2d 760 (1984). A party conceals a fact through "words or acts which create a false impression covering up the truth," or actions that "remove an opportunity that might otherwise have led to the discovery of a material fact." *Paul v. Kelley*, 42 Or App 61, 66, 599 P2d 1236 (1979) (internal quotation marks omitted). "[W]here there has been an active concealment[,]" the injured party need not prove a duty to speak, and the concealing party has a duty to sufficiently disclose what it has concealed. *See id.* at 65-66.

If the party claiming to have been defrauded knows or has reason to know that the alleged misrepresentation is false or otherwise has knowledge of the truth, their claim based on that misrepresentation necessarily fails as a matter of law. *See*

Fleishhacker v. Portland News Pub. Co., 158 Or 476, 478-79, 483, 77 P2d 141 (1938) (explaining that the "vital question" on appeal of a judgment setting aside a verdict in favor of the defendant on a cross-claim for fraudulent inducement into a stock purchase agreement was whether the only inference to be drawn from the evidence was that the defendant had knowledge of the matter it claimed had been fraudulently concealed from it at the time it executed the contract). Actual knowledge defeats a fraud claim because one cannot claim to have reasonably relied on a representation that is at odds with what one knows about the thing represented. *See Andrews v. United Finance Company*, 204 Or 429, 435, 283 P2d 652 (1955) (holding that as a matter of law, plaintiff did not rely on a representation because of "the formal acknowledgement by him in a written instru-ment of the existence of a fact which is utterly inconsistent with his contention that he was deceived"); *see also Merten v. Portland General Electric Co.*, 234 Or App 407, 417, 228 P3d 623 (2010) (explaining that the right to rely element of a fraud claim requires proof of reasonable reliance measured "in the totality of the parties' circumstances and conduct" (internal quotation marks omitted)).

We conclude that because Gunner had actual knowledge of the existence of the UST, it was not reasonable for him to rely on the representations made in response to the questionnaire. To be sure, Miller's answers raised some uncer-tainty about whether there were currently any USTs on the property, and neither Point Source nor Gunner would have been able to visibly locate the UST during their site inspections because the metal pipe was concealed by the planter boxes. However, Miller made sufficient disclosures related to the concealed UST. Specifically, he provided the previous environmental reports to Point Source, which revealed an abandoned UST beneath a pump island. Gunner's agent testified that, based on those disclosed reports, she knew that the UST existed on the property at the time of purchase. Point Source included those reports and soil tests results in its own report to Gunner. The trial court did not err in directing a verdict in Miller's favor on this record, where no reasonable factfinder could find in plaintiff's favor.

Affirmed.

All Citations

Not Reported in Pac. Rptr., 2024 WL 1756829

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United States District Court, N.D. California.

OCEANA, INC., Plaintiff,
v.
GINA RAIMONDO, et al., Defendants.

Case No. 21-cv-05407-VKD
|
Filed 04/22/2024

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

VIRGINIA K. DEMARCHI United States Magistrate Judge

***1** Plaintiff Oceana, Inc. ("Oceana"), a non-profit ocean conservation and advocacy organization, sues Secretary of Commerce Gina Raimondo, the National Oceanic and Atmospheric Administration ("NOAA"), and the National Marine Fisheries Service ("NMFS"), challenging defendants' management of the Pacific sardine under the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1801 *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*

After proceedings regarding completion of the administrative record, the parties filed cross-motions for summary judgment. Dkt. Nos. 43, 44. On July 11, 2023, the Court held a hearing on the motions. Dkt. No. 48. After the hearing, the parties stipulated to allow Oceana to file an amended complaint adding a challenge to NMFS's 2023-2024 annual specifications for the Pacific sardine. *See* Dkt. Nos. 47, 50. They also agreed that defendants would file a supplemental administrative record regarding the annual specifications and that the parties would file supplemental briefs in support of their respective motions. *Id.*

In its operative complaint, Oceana claims that NMFS's plan to rebuild the Pacific sardine's population after it was declared overfished in 2019 violates the MSA because NMFS: (1) failed to set a reasonable rebuilding target for the sardine population based on the best available science (claim 1); (2) failed to demonstrate, based on the best available science, that the plan will rebuild the sardine population (claim 2); (3) failed to demonstrate, based on the best available science, that the plan will prevent overfishing (claim 3); (4) failed to failed to consult regarding the plan's impact on essential fish habitat (claim 7); and (5) failed to demonstrate, based on the best available science, that the 2023-2024 annual specifications will prevent overfishing or rebuild the sardine population (claim 8). Dkt. No. 51 ¶¶ 140-161, 182-191. Oceana also claims that NMFS's approval of the plan violates NEPA because they: (1) failed to analyze the impacts of the authorized action (claim 4); (2) failed to take a hard look at the plan's impacts on sardine population and marine predators (claim 5); and (3) failed to prepare an environmental impact statement for the plan, even though the plan will have significant impacts on the environment (claim 6). *Id.* ¶¶ 162-181.

Having considered the parties' briefing and oral arguments, the Court grants Oceana's motion in part and denies it in part, and grants defendants' cross-motion in part and denies it in part.

I. BACKGROUND

A. Statutory and Regulatory Background

1. The Magnuson-Stevens Fishery Conservation and Management Act

After overfishing threatened the survival of some fish species, Congress enacted the Magnuson-Stevens Fishery Conservation Act in 1976 to conserve and manage the fisheries off the coasts of the United States. *See* 16 U.S.C. § 1801(a), (b). The MSA establishes eight regional fishery management councils, each of which is charged with developing a "fishery management plan" ("FMP") for the fisheries in its region. 16 U.S.C. § 1852(a)(1), (h)(1). The regional councils are assisted in the work of developing and amending fishery management plans by scientific and statistical committees ("SSCs") whose members must have "strong scientific or technical credentials and experience." 16 U.S.C. § 1852(g)(1)(A), (C).

***2** FMPs must contain the conservation and management measures "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and

rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. § 1853(a)(1)(A). FMPs must also comply with ten national standards, including the requirements that conservation and management measures must "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry" (National Standard 1), and must "be based upon the best scientific information available" (National Standard 2). 16 U.S.C. § 1852(a)(1), (2). The Secretary of Commerce has promulgated regulations in the form of "advisory guidelines" based on these national standards "to assist in the development and review of FMPs, amendment and regulations" prepared by the regional councils. *See* 16 U.S.C. § 1851(b); 50 C.F.R. § 600.305 *et seq.*

Among many other requirements, FMPs must "establish a mechanism for specifying annual catch limits ... at a level such that overfishing does not occur in the fishery, including measures to ensure accountability." 16 U.S.C. § 1853(a)(15). FMPs must also "specify objective and measurable criteria for identifying when the fishery ... is overfished ... and, in the case of a fishery which [has been determined to be] overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery." 16 U.S.C. § 1853(a)(10). In addition, they must also "describe and identify essential fish habitat [("EFH")] for [a] fishery" and "minimize to the extent practicable adverse effects on such habitat caused by fishing." 16 U.S.C. § 1853(a)(7).

NMFS, an agency of the United States Department of Commerce, has primary responsibility for ensuring that the requirements of the MSA are followed and enforced.[1] *See Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1170 (9th Cir. 2016).

2. National Environmental Policy Act

NEPA establishes a national policy to "encourage productive and enjoyable harmony between man and his environment" and to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. NMFS, as a federal agency, is bound by NEPA and its implementing regulations. 42 U.S.C. § 4332; 40 C.F.R. § 1500.3.

An agency must take a "hard look" at the environmental effects of a proposed action, including considering all foreseeable direct and indirect impacts as well as cumulative impacts. *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 916-17 (9th Cir. 2012); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also* 42 U.S.C. § 4321. However, NEPA "imposes only procedural requirements on federal agencies" and " 'does not mandate particular results.' " *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting *Robertson*, 490 U.S. at 350).

Under NEPA, a federal agency must prepare an environmental impact statement ("EIS") for any major federal action significantly affecting the human environment. 42 U.S.C. § 4332(C); 40 C.F.R. § 1501.3(a)(3). If an action is not likely to have a significant impact on the environment or if the environmental impact is unknown, the agency must prepare an **environmental assessment** ("EA"). 40 C.F.R. § 1501.3(a)(2). An EA is a "concise, public document" providing "sufficient evidence and analysis" for the agency to determine "whether to prepare an environmental impact statement." 40 C.F.R § 1508.1(h). If the EA demonstrates that the action is likely to significantly impact the environment, then the agency must prepare an EIS. 40 C.F.R. § 1501.5(c)(1). If the EA demonstrates that the action is not likely to significantly impact the environment, then the agency must prepare a finding of no significant impact. 40 C.F.R. §§ 1501.6(a), 1501.5(c)(1).

B. Management of the Pacific Sardine

***3** The northern subpopulation of Pacific sardine ("Pacific sardine") is a small pelagic fish that travels in large schools. AR 12. This subpopulation is found off the west coast between southeast Alaska and the northern portion of Baja California in Mexico.[2] AR 12. The Pacific sardine is an important source of forage for larger fish, marine mammals, and seabirds. AR 24. Multiple fisheries take the Pacific sardine, including (1) the primary directed commercial fishery, which directly targets sardine at a large scale, (2) the live bait fishery, which harvests sardines for bait, (3) the minor direct fishery, comprised of small-scale fishing that directly targets sardines, (4) the tribal fishery, which includes directed fishing by Native American tribes, and (5) fisheries that target other fish species, but catch sardines incidentally.[3] AR 16-19.

The Pacific sardine population naturally fluctuates in abundance and productivity over time. AR 12. Overfishing can occur at any time, but fishing during a period of low abundance and productivity may contribute to the rapid decline of the population and delay its recovery—although scientists disagree regarding the extent to which fishing impacts sardine population fluctuations. AR 15, 5823, 6323, 6339, 6371. For example, scientists agree that a natural decline in sardine population, combined with overfishing, led to the sudden collapse of the Pacific sardine fishery in the 1950s. AR 15-16, 6320, 6339. More recently, the population of Pacific sardine peaked in 2006 with an estimated biomass of over 1.5 million metric tons ("mt"),[4] after which it declined significantly over the next several years to an estimated biomass of only 28,276 mt in 2020. AR 15-16; AR 28 (graph showing sardine biomass 2005-2019).

The Pacific Fishery Management Council ("the Council") is the regional council responsible for fisheries off the coasts of California, Oregon, and Washington. 16 U.S.C. § 1852(a)(1)(F). Effective January 1, 2000, the Council amended its Coastal Pelagic Species Fishery Management Plan ("CPS FMP") to cover the Pacific sardine. AR 12, 1939, 5442. Like all FMPs, the CPS FMP must "prevent overfishing" while also achieving the "optimum yield" from the fishery on a sustained basis. *See* 16 U.S.C. § 1851(a)(1).

The MSA defines "overfishing" as a "rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis." 16 U.S.C. § 1802(34). The "optimum yield" of a fishery is "the amount of fish" that "will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities," while "taking into account the protection of marine ecosystems." 16 U.S.C. § 1802(33)(A). The optimum yield is meant to be "the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor." 16 U.S.C. § 1802(33)(B). The "maximum sustainable yield" or "MSY" is defined by regulation as "the largest long-term average catch" that can be taken from a stock "under prevailing ecological, environmental conditions and fishery technological characteristics." 50 C.F.R. § 600.310(b)(2)(i), (e)(1)(i)(A). If a fishery is "overfished," the optimum yield means "the amount of fish" that "provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery." 16 U.S.C. § 1802(33)(C).

***4** Closely related to MSY are exploitation rate at maximum sustainable yield ("E_{MSY}"), which is "the fishing mortality *rate* that, if applied over the long term, would result in MSY," and biomass at maximum sustainable yield ("B_{MSY}"), which is "the long-term average *size* of the stock or stock complex ... that would be achieved by fishing at [E_{MSY}.]" 50 C.F.R. § 600.310(e)(1)(i)(B)-(C) (emphasis added).

To prevent overfishing, an FMP must "specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished." 16 U.S.C. § 1853(a)(10). One such measure is an overfishing limit ("OFL"), which is the annual amount of catch "above which overfishing is occurring." 50 C.F.R. § 600.310(e)(2)(i)(C), (D). To prevent overfishing, regulators set annual catch limits below the OFL, using two additional measures: the acceptable biological catch and annual catch limits. Acceptable biological catch ("ABC") reflects an adjustment to OFL "to account for scientific uncertainty in the estimate of OFL." 50 C.F.R. § 600.310(f)(1)(ii). The annual catch limit ("ACL") is the maximum amount of fish that may be caught each year for the fishery and serves as the trigger for invoking accountability measures. 50 C.F.R § 600.310(f)(1)(iii); 16 U.S.C. § 1853(a)(15). The ACL "cannot exceed" the ABC and may be set lower because of "ecological, economic, and social factors" to ensure the optimum yield from a fishery. 50 C.F.R. § 600.310(f)(1)(iii), (f)(4)(i), (f)(4)(iv); *see also* 16 U.S.C. § 1851(a)(1). To account for uncertainty and ensure that catch does not exceed the ACL, an annual catch target ("ACT") may also be set. 50 C.F.R. § 600.310(g)(4).

In addition to requiring calculation of catch limits using these measures, the CPS FMP adopts two different management approaches for the Pacific sardine depending on whether the sardine population is above or below a "cutoff" biomass level of 150,000 mt. AR 8-9, 5475-76. If the stock has an estimated biomass of more than 150,000 mt, NMFS uses a "harvest guideline" to set the catch limit for the year, which is based on the stock's estimated biomass, reduced by 150,000 mt. AR 5474-76. Typically, the harvest guideline will produce a lower catch limit than the limit calculated using the OFL/ABC measures. AR 5474-76. If the stock has an estimated biomass at or below the 150,000 mt cutoff, NMFS automatically closes

the primary directed commercial fishery, which eliminates the main source of Pacific sardine removals, and then sets an annual catch limit for the remaining fisheries using the OFL/ABC measures. AR 5443, 5474-76.

C. Overfishing and Development of the Pacific Sardine Rebuilding Plan

In 2015, Pacific sardine biomass fell below 150,000 mt. AR 7. As required by the CPS FMP, NMFS closed the primary directed commercial fishery. AR 7, 16. Although the live bait, minor directed, and tribal fisheries remained open, and the incidental harvest of sardines by fisherman targeting other species continued, AR 16-18, the closure of the primary directed commercial fishery had a substantial impact on the amount of catch, AR 20. The annual Pacific sardine catch fell from 19,440 mt in the 2014-2015 fishing year to 2,329 mt in the 2015-2016 fishing year.[5] AR 7, 20. Over the next several years, while the primary directed commercial fishery remained closed, the annual catch averaged approximately 2,200 mt. AR 20.

***5** As required by the MSA, the CPS FMP specifies a threshold for determining when the Pacific sardine is overfished—here, 50,000 mt. AR 5476; 16 U.S.C. § 1853(a)(10). An April 2019 stock assessment showed that Pacific sardine biomass had fallen below 50,000 mt. AR 6, 3118. In June of 2019, NMFS declared the Pacific sardine overfished, triggering NMFS's and the Council's obligation under the MSA to prepare and implement a rebuilding plan. AR 6101-02; *see also* 16 U.S.C. § 1854(e).

Once the NMFS identifies a fishery as overfished, the responsible regional council is given two years to "prepare and implement a fishery management plan, plan amendment, or proposed regulations" to prevent or end or prevent the overfishing. 16 U.S.C. § 1854(e)(3). The plan must "specify a time period for rebuilding the fishery" that is "as short as possible, taking into account the status and biology of any overfished stocks of fish, the needs of fishing communities, ... and the interaction of the overfished stock of fish within the marine ecosystem." 16 U.S.C. § 1854(e)(4)(i). This period may "not exceed 10 years, except in cases where the biology of the stock of fish [or] other environmental conditions ... dictate otherwise." 16 U.S.C. § 1854(e)(4)(ii); *see also Nat. Res. Def. Council, Inc. ("NRDC") v. NMFS*, 421 F.3d 872, 879-81 (9th Cir. 2005) (describing 16 U.S.C. § 1854(e)(4)'s requirements).

To ensure that its rebuilding plan complied with 16 U.S.C. § 1854(e), the Council first had to set a rebuilding target—i.e. the level of sardine population at which rebuilding would be deemed a success. The Council's SSC used a model called "Rebuilder" to estimate the Pacific sardine's B_{MSY} under low and moderate productivity levels, drawing on sardine recruitment data from 2005 to 2018. AR 36, 48, 50-51. Under low productivity conditions, modeled on data from 2010 to 2018, the SSC estimated a B_{MSY} of 38,112 mt spawning biomass (which is roughly equivalent to 48,994 mt 1+ biomass).[6] AR 36. Under moderate productivity levels, modeled on data from 2005 to 2018, the SSC estimated a B_{MSY} of 137,812 mt spawning biomass (which is roughly equivalent to 169,929 mt 1+ biomass). AR 36. The SSC recommended that the Council set the rebuilding target at the median of the two values, a B_{MSY} of 116,374 mt spawning biomass (which is roughly equivalent to 143,495 mt 1+ biomass). AR 37. The Council chose a target of 150,000 mt 1+ biomass, equivalent to 121,650 mt spawning biomass, explaining that it was slightly above the SSC's recommendation and consistent with the cutoff threshold already used in the FMP. AR 37.

After setting the rebuilding target, the Council formulated and analyzed three potential rebuilding plans for the Pacific sardine. AR 6-7. Alternative 1 ("Status Quo Management") would adopt and maintain all existing management measures and rules already in place for the Pacific sardine. AR 8. Alternative 2 ("Zero U.S. Harvest Rate") would eliminate all Pacific sardine fishing under U.S. jurisdiction, including complete closure of the remaining fisheries that target Pacific sardine. AR 9. Alternative 3 ("Five Percent Fixed U.S. Harvest Rate") would set the annual catch limit for the Pacific sardine at 5% of the stock's biomass for the year, bypassing the other formulas in the CPS FMP. AR 9.

***6** To predict the effects the alternative proposals would have on the Pacific sardine population over time, the Council again used the Rebuilder model. AR 10. The SSC modeled how long it would take each proposal to rebuild the sardine, defined as the point at which there was a 50% or greater probability that sardine biomass would exceed the target. *See* AR 14, 45-56. Each proposal was modeled under both

moderate and low productivity conditions. AR 10-11. The model did not eliminate the uncertainty caused by sardine's natural fluctuations in population. As the Council noted, because "Pacific sardine recruitment and productivity are largely driven by environmental conditions, which cannot be accurately predicted, ... the modeling results [ ] have limitations in informing realistic rebuilding timelines." AR 10. Even so, the SSC endorsed the use of the Rebuilder model to analyze the sardine's recovery. AR 3667.

For Alternative 2, where no fishing was allowed, the model predicted rebuilding would require 12 years. AR 14. For Alternative 3, where the annual catch was limited to 5% of biomass, the model predicted rebuilding would require 16 years, assuming that the full amount of catch permitted was taken each year. AR 14-15. For Alternative 1, which contemplated the level of catch currently permitted under the CPS FMP would be allowed to continue, the model predicted rebuilding *would never occur*, assuming the full ABC would be taken each year. AR 14. However, the Council decided to model Alternative 1 a second time using a different assumption; rather than assuming an annual catch up to the limit of ABC, it assumed the annual catch would be 2,200 mt per year, consistent with the actual average catch for the proceeding five years, which was significantly below the ABC. AR 14, 20. This time, the model predicted rebuilding would require 17 years. AR 14. Comparing the revised rebuilding timeline for Alternative 1 with the timelines for the two other alternatives, the Council reasoned that it was "unclear" whether Alternative 3 "would allow the stock to realistically rebuild any faster" than Alternative 1, noting that there was only a one-year difference between the projected rebuilding timelines for these two alternatives. AR 15. The Council observed that "the rebuilding timeline under Alternative 3 is expected to be longer than the 12 years for Alternative 2, but potentially shorter than the 16 years initially modeled." AR 15. But, it ultimately concluded that "no management alternative is expected to significantly impact the ability of the Pacific sardine resource to rebuild in the near or long term, as fishing mortality is not the primary driver of stock biomass." AR 15.

Having modeled the rebuilding timelines for the three alternatives, the Council then considered the impact of each alternative on the fishing industry. Because the primary directed commercial fishery would remain closed until the rebuilding target was reached under all three plans, the Council focused its analysis on the smaller fisheries that had remained open after the cutoff was reached in 2015, most notably the live bait fishery, the minor directed fishery, and the incidental harvest of sardines by other fisheries.[7] *See* AR 16. According to the Council, under Alternative 1, these fisheries would experience "minimal" negative impacts; under Alternative 2, they would be "severely and adversely impacted," until sardine biomass was rebuilt and fishing was permitted again; and under Alternative 3, "there would inevitably be negative economic impacts to the smaller-scale fishery sectors when biomass is at 50,000 mt and below." AR 19-21. Weighing these considerations, the Council determined that "Alternative 3 would impose unnecessary economic impact to the industry with minimal change in the rebuilding timeline." AR 23.

***7** As required by NEPA, the Council also considered the environmental impacts of the three alternative proposals. It noted that Pacific sardine is prey for "several commercially important marine fishes," including salmon and tuna. AR 24. It also acknowledged that sardines are forage for two endangered species, the marbled murrelet and the humpback whale. AR 24. However, the Council concluded that "none of the proposed management alternatives are expected to significantly affect forage availability, as most Pacific sardine predators are generalists that are not dependent on the availability of a single species but rather on a suite of species, any one (or more) of which is likely to be abundant each year." AR 27.

Based on these analyses, in September 2020 the Council selected Alternative 1 as its preferred alternative. AR 4911. The Council then a proposed an amendment, Amendment 18, to the CPS FMP incorporating Alternative 1, and transmitted the proposed amendment to NMFS for approval in January of 2021. AR 4324. NMFS solicited public comment on the proposed amendment. AR 3113; 86 Fed. Reg. 14,401. Oceana urged the agency not to approve it, arguing that Amendment 18 violated the MSA and the APA. *See* AR 5279. Several fishing industry groups filed comments in support of the amendment. *See* AR 4877, 4881, 4904. NMFS approved the amendment on June 14, 2021. AR 4910, 4883. Along with its approval, the agency issued a finding of no significant impact under NEPA. AR 158-63.

D. 2023-2024 Annual Specifications

The CPS FMP requires the Council and NMFS to set annual specifications, including the OFL, ABC, ACL, and accountability measures, for the Pacific sardine. AR 5479. Annual specifications are set after a rulemaking process including consultation with the SSC, a public meeting, and an opportunity for public comment. AR 5479-80.

On June 23, 2023, NMFS published in the Federal Register annual specifications "based on the annual specification framework, control rules, and management guidelines in the [CPS] FMP" for the Pacific sardine during the 2023-2024 fishing year.[8] Dkt. No. 53-2 at 12-15; 88 Fed. Reg. 41,040-43. Based on a biomass estimate of 27,369 mt, the specifications included an OFL of 5,506 mt, an ABC of 3,953 mt, an ACL of 3,953 mt, and an ACT of 3,600 mt. Dkt. No. 53-2 at 13. The primary directed commercial fishery remained closed. *Id.* The 2023-2024 annual specifications also included the following management measures to limit live bait and incidental catch fishing: "(1) If landings in the live bait fishery reach 2,500 mt of Pacific sardine, then a 1-mt per-trip limit of sardine would apply to the live bait fishery. (2) An incidental per-landing limit of 20-percent (by weight) Pacific sardine applies to other CPS primary directed fisheries (*e.g.*, Pacific mackerel). (3) If the ACT of 3,600 mt is attained, then a 1-mt per-trip limit of Pacific sardine would apply to all CPS fisheries (*i.e.*, (1) and (2) would no longer apply). (4) An incidental per-landing allowance of 2 mt of Pacific sardine applies to non-CPS fisheries until the ACL is reached." *Id.*

II. STANDARD OF REVIEW

Judicial review of agency decisions under the MSA and NEPA is governed by the APA's standard of review. 16 U.S.C. § 1855(f)(1); *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1116 (9th Cir. 2006) (MSA); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (NEPA). Agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if the agency acts without observing "procedure required by law." 5 U.S.C. § 706(2)(A), (D). Agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

***8** While a court must "conduct a 'searching and careful' inquiry" into the agency's decision, *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1050 (9th Cir. 2012) (quoting *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989)), the scope of this review is narrow and "a court is not to substitute its judgment for that of the agency." *Snoqualmie Valley Pres. All. v. U.S. Army Corps of Eng'rs*, 683 F.3d 1155, 1159 (9th Cir. 2012) (quoting *State Farm*, 463 U.S. at 43). The court looks only to whether the agency "examined 'the relevant data' and articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made.' " *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *State Farm*, 463 U.S. at 43).

A court must defer to the expert agency in factual disputes, particularly "when the analysis requires a high level of technical expertise." *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 954 (9th Cir. 2003). However, "the deference accorded an agency's scientific or technical expertise is not unlimited" and can be rebutted "when its decisions, while relying on scientific expertise, are not reasoned." *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001).

Although courts routinely resolve APA challenges to an agency's administrative decisions by summary judgment, they need not conduct the traditional search for genuine disputes of material fact, because "there are no disputed facts that the district court must resolve." *Occidental Eng'g Co. v. INS.*, 753 F.2d 766, 769 (9th Cir. 1985). Rather, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.*

III. DISCUSSION

A. Whether Disputed Agency Action Is Subject to Judicial Review

In their motion for summary judgment, defendants initially contended that this Court lacks jurisdiction to decide Oceana's claims. *See* Dkt. No. 44 at 12-15. Citing *Alaska Factory Trawler Association v. Baldridge*, 831 F.2d 1456, 1464 (9th Cir. 1987), defendants argued that (1) the MSA provides

for judicial review only of regulations and "actions" taken to "implement a fishery management plan," and not FMPs themselves, *see id.* at 12-13 (quoting 16 U.S.C. § 1855(f)(1)-(2)), and (2) judicial review is unavailable under the APA because an FMP is not a "final agency action," *see id.* at 13-15. Oceana responded that Amendment 18 is a regulation, or alternatively an agency action, reviewable under the MSA and the APA. Dkt. No. 45 at 3-9.

However, the parties agree that the annual specifications implementing the FMP *are* subject to judicial review, and defendants concede that if Oceana challenges the annual specifications, that challenge may encompass the FMP amendment on which the specifications are based. Dkt. No. 46 at 2, 6; *see also Oregon Trollers*, 452 F.3d at 1113 ("[A timely] petition ... of an action may challenge both the action and the regulation under which the action is taken."); *Gulf Fishermen's Ass'n v. Gutierrez*, 529 F.3d 1321, 1323 (11th Cir. 2008) (same). Pursuant to the parties' stipulation, Oceana filed an amended complaint that includes a challenge to the 2023-2024 annual specifications. *See* Dkt. Nos. 50, 51. The parties agree that the amendment "eliminate[s] any dispute as to whether the Court has jurisdiction over this suit." Dkt. No. 50 at ECF 2.

B. Magnuson-Stevens Act Claims

***9** Oceana claims that in approving Amendment 18 and the 2023-2024 annual specifications implementing the amendment, NMFS violated the MSA in five ways: (1) it failed to set a reasonable rebuilding target for the sardine population (claim 1); (2) it failed to demonstrate that the rebuilding plan will rebuild the sardine population in the statutory timeframe (claim 2); (3) it failed to demonstrate that the plan will prevent overfishing (claim 3); (4) it failed to consult regarding the plan's impact on essential fish habitat (claim 7); and (5) it failed to demonstrate that the 2023-2024 annual specifications will prevent overfishing or rebuild the sardine population (claim 8). Dkt. No. 51 ¶¶ 140-161, 182-191.

1. Claim 1: Rebuilding Target

Oceana claims that NMFS failed to use the best available science to set a rebuilding target for the Pacific sardine. *Id.* ¶¶ 140-147; Dkt. No. 43 at 12-15. It argues that the rebuilding target in Amendment 18 conflicts with the agency's own scientific estimates of the long-term biomass necessary to support MSY. Specifically, Oceana contends that "the rebuilding target must reflect the long-term average B_{MSY}," and because the sardine population fluctuates over a period of about 60 years, NMFS must estimate B_{MSY} using data from a 60-year population cycle or at least periods of both low and high productivity. *See* Dkt. No. 43 at 13-14 (citing 50 C.F.R. § 600.310(e)(1)(i)(C)). Oceana faults NMFS for calculating a B_{MSY} value based on data from a "shorter timeframe of 14 years (from 2005-2018) that only included years when sardine productivity was low," when the agency had superior data for longer periods of time. *Id.* at 14.

Defendants respond that NMFS relied on the best available science when setting the rebuilding target at 150,000 mt biomass. Dkt. No. 44 at 20-22. They note that NMFS has never specified a single B_{MSY} for the Pacific sardine because its population is subject to dramatic, natural fluctuations. *Id.* at 20 (citing AR 3062). They also argue that the older B_{MSY} estimates proffered by Oceana are "inconsistent with current conditions," *id.* at 21, and that the applicable regulations direct that MSY should be estimated "under prevailing ecological, environmental conditions," Dkt. No. 46 at 10 (citing 50 C.F.R. § 600.310(1)(i)(A)); *see also* AR 4928 ("[W]hen developing a rebuilding plan it is important to consider the current environmental and/or reproductive conditions the stock is experiencing."). Finally, defendants emphasize that the B_{MSY} estimates and the Rebuilder model used to calculate the estimates were reviewed and endorsed by the SSC, reflect the best available science, and are therefore entitled to deference. Dkt. No. 44 at 20, 22 (citing AR 3667).

Once a fishery becomes overfished, the MSA requires NMFS to implement an FMP, FMP amendment, or regulation to end overfishing immediately and rebuild the stock "to a level consistent with producing the maximum sustainable yield in such fishery"—i.e. B_{MSY}. 16 U.S.C. §§ 1802(33)(C), 1851(a)(1), 1854(e); 50 C.F.R. § 600.310(j)(3)(i); *see also AML Int'l, Inc. v. Daley*, 107 F. Supp. 2d 90, 98 (D. Mass. 2000) ("The primary purpose of a rebuilding program for overfished stock is to rebuild the stock to produce MSY on a continuing basis."). NMFS's MSA regulations provide guidelines for "specifying MSY." *See* 50 C.F.R. § 600.310(e)(1)(v). "Ecological and environmental information should be taken into account," when estimating MSY or B_{MSY} and

these values "should be re-estimated as required by changes in long-term environmental or ecological conditions, fishery technological characteristics, or new scientific information." 50 C.F.R. § 600.310(e)(1)(v)(A), (B). These estimates "must be based on the best scientific information available." 50 C.F.R. § 600.310(e)(1)(v)(A); *see also* 16 U.S.C. § 1851(a)(2). The guidelines also recognize that MSY estimates "will have some level of uncertainty associated with them" and suggest that "[t]he degree of uncertainty in the estimates should be identified, when practicable, ... and should be taken into account when specifying the ABC Control rule" and "[w]hen data are insufficient to estimate MSY directly, Councils should adopt other measures of reproductive potential that can serve as reasonable proxies for [MSY or B_{MSY}]." 50 C.F.R. § 600.310(e)(1)(v)(B), (D).

***10** "Where scientific and technical expertise is necessarily involved in agency decision-making, a reviewing court must be highly deferential to the judgment of the agency." *Oregon Trollers*, 452 F.3d at 1120 (quoting *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1174 (9th Cir. 2004). However, no deference is owed if the "agency's decision is without substantial basis in fact" or it "did not consider all the relevant factors and [ ] there is no rational connection between the facts found and the determination made." *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 766 (9th Cir. 2007) (quoting *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 463 (1972) and *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001)).

The Court concludes that NMFS's decision to set the rebuilding target at 150,000 mt does not violate the MSA or the APA. Oceana is correct that NMFS must set a target that reflects long-term average B_{MSY}, but neither the MSA nor its implementing regulations defines "long-term" to mean the entire productivity cycle of a species. *See generally* 50 C.F.R. § 600.310. More importantly, neither the MSA nor its implementing regulations specifies whether, for a species with natural productivity fluctuations like the Pacific sardine, the agency *must* set a target that reflects periods of *both* low and high productivity, regardless of whether the stock is presently in a natural period of low productivity, or conversely, high productivity. Rather, the guidelines contemplate that *current* ecological and environmental conditions may be taken account in estimating B_{MSY}. *See* 50 C.F.R. § 600.310(e)(1)(i), (v).

The rebuilding target adopted by NMFS is based on a rebuilding analysis prepared the SSC, whose members must have "strong scientific or technical credentials and experience." 16 U.S.C. § 1852(g)(1)(C); *see also* AR 45-56 (SSC rebuilding analysis). The SSC acknowledged that the results of its rebuilding analysis "are difficult to interpret as the target biomass levels and times to achieve rebuilding are strongly dependent on assumptions of the state of nature." AR 53. Likewise, the SSC noted that its analysis relies on data "represent[ing] a relatively narrow time frame" and thus provides "a limited snapshot of the long-term population fluctuations." AR 53. Citing the Pacific sardine's "highly variable recruitment success and related population abundance based primarily on oceanographic factors," the SSC also concluded that accurate projections of the Pacific sardine's population over a longer period could not be made. *See* AR 53 ("Detailed understanding of the relationship between specific environmental drivers and a [small pelagic fish] stock's productivity is generally lacking or at the very least, refuted when evaluated over longer time periods."). Similarly, the SSC acknowledged that the rebuilding model it adopted also could not accurately project the size of the Pacific sardine stock over a longer period. AR 54 ("[T]he results presented here are likely to be more accurate in capturing short-term projected stock and fishery dynamics as opposed to the longer term since there is an absence of critical environmental data generally believed to be the underlying/overriding factors that influence this species' population dynamics."); *see also* AR 4928 (stating in response to Oceana's comment that "[a]lthough history and science have shown that the Pacific sardine population can recover quickly when conditions are favorable ... it is unknown when those conditions will change."). In view of these uncertainties, the SSC used data from a period of low and moderate productivity for purposes of setting the rebuilding target, taking into account existing and reasonably anticipated ecological and environmental conditions. Based on the SSC's analysis, the NMFS concluded that the Pacific sardine fishery can support a specified maximum average catch during a sustained period of low productivity when the stock is at 150,000 mt. This reflects a reasoned determination based on scientifically relevant data, rather than a "clear error of judgment," *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). [9]

***11** On this record, the Court finds that NMFS did not ignore or disregard the best available science. While NMFS could have rationally relied on different data and/or different models in setting the rebuilding target, the agency has articulated a rational connection between the scientific evidence and its decision to set the rebuilding target at 150,000 mt. *See Oregon Trollers*, 452 F.3d at 1119 ("[W]e will uphold a regulation against a claim of inconsistency with a 'national standard' under § 1851 if [NMFS] had a 'rational basis' for it.").

Accordingly, the Court concludes that NMFS's rebuilding target does not fail to use the best available science.

2. Claim 2: Failure to Rebuild Within Statutory Timeframe

Oceana claims that defendants have failed to demonstrate that Amendment 18 will rebuild the sardine population. Dkt. No. 51 ¶¶ 148-155. It argues that NMFS's modeling of the plan's effects assumes that only 2,200 mt of sardine will be caught each year, while NMFS has implemented no measures to ensure that catch will not exceed this level. Dkt. No. 43 at 17; Dkt. No. 55 at 3. Defendants respond that the assumptions underlying its modeling are sound because the existing conservation and management measures result in a real-world Pacific sardine catch consistent with these assumptions. Dkt. No. 44 at 16-19; Dkt. No. 54 at 2.

After a fishery has been identified as overfished, the MSA requires the Council to develop a rebuilding plan that specifies a time period for rebuilding that is "as short as possible," taking into account, among other factors, "the status and biology of any overfished stocks of fish" and "the needs of fishing communities." 16 U.S.C. § 1854(e)(4)(A)(i). The rebuilding period may not exceed 10 years, unless "the biology of the stock of fish" or "other environmental conditions" dictate otherwise. 16 U.S.C. § 1854(e)(4)(A)(ii). If the rebuilding period must exceed 10 years, NMFS may still take into account the needs of fishing communities "so long as the weight given is proportionate to the weight the Agency might give to such needs in rebuilding periods under 10 years." *NRDC v. NMFS*, 421 F.3d at 881. Regulations implementing the MSA require NMFS to estimate the minimum and maximum times required for rebuilding the stock, and to select a time that is within the resulting range. *See* 50 C.F.R. § 600.310(j)(3)(i). The minimum time period is the amount of time it can be expected, with at least 50% probability, that the stock would reach B_{MSY} with no fishing mortality, while the maximum time is set at a default of 10 years, although it may exceed 10 years if conditions require. 50 C.F.R. § 600.310(j)(3)(i)(A), (B).

In developing the rebuilding plan adopted by NMFS, the Council modeled how long it would take to rebuild the Pacific sardine using three alternative approaches. As explained above, it initially determined that if catch met the limit permitted in Alternative 1 (i.e. ABC, which was calculated as 4,288 mt in 2020-2021), then the Pacific sardine biomass would never [10] reach the rebuilding target. AR 14, 22. By contrast, the Council determined that biomass would reach the rebuilding target in 12 years under Alternative 2 (i.e. no fishing mortality), and in 16 years under Alternative 3 (i.e. an ACL of 5% of biomass, which was calculated as 1,414 mt in 2020-2021). AR. 14, 22. Thereafter, it modeled Alternative 1 again, this time assuming that only 2,200 mt of sardines would be caught each year, consistent with the average sardine catch for the preceding five years, even though the ABCs during those years ranged from 4,514 mt to 15,479 mt. *See* AR 14, 20. Under this assumption, the model predicted that Alternative 1 would rebuild the sardine population in 17 years. AR 14. Because the Council viewed this 17-year period as "comparable" to the 16-year period estimated for Alternative 3, and because Alternative 1 did not require additional economically disruptive fishery closures, the Council and NMFS ultimately adopted Alternative 1. *See* AR 23.

***12** The Court agrees with Oceana that NMFS violated the MSA by assuming that the sardine harvest would never reach the ABC or the ACLs authorized by the rebuilding plan. The statute requires FMPs to "establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability." 16 U.S.C. § 1853(a)(15). Specifically, NMFS and the regional councils must set "hard, science-based caps on how many fish could be caught each year" and requires that those caps be backed by "accountability measures [that are] triggered when fishermen exceeded those caps." *Conservation Law Found.*

v. Pritzker, 37 F. Supp. 3d 254, 266 (D.D.C. 2014) (citing Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, sec. 103, 104, Pub. L. No. 109-479, 120 Stat. 3575, 3580, 3584); *see also Oceana v. Locke*, 831 F. Supp. 2d 95, 119-20 (D.D.C. 2011) (quoting 50 C.F.R. § 600.310(g)(3)) ("The Council *must* determine as soon as possible after the fishing year if an ACL was exceeded. If an ACL was exceeded, [accountability measures] *must* be triggered and implemented as soon as possible...") (cleaned up, emphasis in original). The legislative history of the 2006 amendments to the MSA suggests that Congress added this requirement because it was dissatisfied with NMFS's and the regional councils' exercise of discretion in the past and intended to further constrain their ability to exceed the SSC's recommendations. *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d at 266 ("Congress fundamentally altered American fishing regulation by requiring regional fishing Councils to set hard, science-based caps on how many fish could be caught each year.... [This] system was necessary because the prior regime—which was less data driven—had resulted in continued overfishing."); *see also* 16 U.S.C. § 1852(h)(6) (requiring that ACLs not exceed the recommendations of a council's SSC).

Defendants argue that the MSA permits NMFS to rely on conservation and management measures, in addition to annual catch limits, to achieve the agency's rebuilding goals. Dkt. No. 44 at 18; Dkt. No. 46 at 9. They cite 16 U.S.C. § 1853(a)(10), which requires that FMPs "contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery." 16 U.S.C. § 1853(a)(10). According to defendants, management measures, like those implemented in the 2023-2024 annual specifications, "form the core of the rebuilding plan." Dkt. No. 54 at 1; *see also* Dkt. No. 53-2 at 13 (2023-2024 management measures). They claim that because "[c]hanges to the OFL and annual catch limits will not have an on-the-ground effect when the management measures are already limiting the fishery to landing only 1% of NSP sardine biomass," these measures validate the rebuilding timeframe modeled for Alternative 1. Dkt. No. 54 at 3.

However, NMFS may not avoid the "[e]xpress limits set by Congress" in the MSA's ABC/ACL requirement. *See Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d at 266. While the CPS FMP contains conservation and management measures that may have the practical effect of significantly limiting sardine harvest, as Oceana points out, the agency's own regulations make clear that an agency *must* use ABCs, from which ACLs are derived, to rebuild the fishery, even if other measures are also employed. *See* Dkt. No. 45 at 13; 50 C.F.R. § 600.310(f)(3)(ii) ("For overfished stocks and stock complexes, a rebuilding ABC *must* be set to reflect the annual catch that is consistent with the schedule of fishing mortality rates (i.e., $F_{rebuild}$) in the rebuilding plan.") (emphasis added). These regulations are entitled to "considerable deference." *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 198 (D.D.C. 2014). Moreover, defendants' argument that conservation and management measures adequately constrain the *fishery* does not address the fact that the MSA's ACL requirement is intended to constrain the *regulators*—i.e. NMFS and the regional councils—as well. *See Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d at 266.

In assessing Alternative 1 the second time, NMFS modeled an annual catch—2,200mt—that was substantially less that the catch limits set in Alternative 1. The FMP does not expressly limit harvest to 2,200 mt nor does the FMP require NMFS to set annual specifications that do not exceed this level. *See* Dkt. No. 55 at 3; AR 5476; Dkt. No. 53-2 at 6, 13. In effect, NMFS modeled *an entirely different* alternative and then relied on *that* modeling as support for Alternative 1. *See* Dkt. No. 43 at 17. This approach to evaluating Alternative 1—the alternative the agency ultimately adopted as Amendment 18—was arbitrary and capricious and not in accordance with the law. *Oceana v. Ross*, 483 F. Supp. 3d 764, 785 (N.D. Cal. 2020) (rejecting agency's argument that ACLs would prevent overfishing because past harvests fell below the levels authorized by the ACLs); *see also Oceana v. Locke*, 670 F.3d 1238, 1243 (D.C. Cir. 2011) ("When a statute commands an agency without qualification to carry out a particular program in a particular way, the agency's duty is clear; if it believes the statute untoward in some respect, then it should take its concerns to Congress, for in the meantime it must obey the statute as written.") (cleaned up).

***13** Accordingly, the Court concludes that Amendment 18 violates the MSA because it does not set catch limits that will rebuild the Pacific sardine population within the statutory timeframe.

3. Claim 3: Failure to Prevent Overfishing

Oceana claims that Amendment 18 will not prevent overfishing, as required by the MSA. Dkt. No. 51 ¶¶ 156-161. Specifically, Oceana argues that the formula NMFS used to calculate E_{MSY} for the Pacific sardine, which is based on a set of ocean temperature measurements made by the California Cooperative Oceanic Fisheries Investigations ("CalCOFI"), is scientifically unsound and overstates the stock's productivity. Dkt. No. 43 at 18-20. According to Oceana, NMFS's use of the CalCOFI data produces artificially high OFLs that do not reliably indicate when overfishing has occurred. Dkt. No. 45 at 19.

Defendants respond that while the current methodology for calculating E_{MSY} is imperfect, NMFS's estimates are nevertheless based on the best scientific information available. *See* Dkt. No. 44 at 24; Dkt. No. 54 at 2. They acknowledge that "the SSC has recommended additional investigation" into the use of the CalCOFI data to estimate E_{MSY}, but defendants maintain that the SSC "has *not* ... found that evidence sufficient to recommend a change for this fishing year." Dkt. No. 54 at 2 (emphasis in original).

As noted above, overfishing refers to a rate of fishing mortality "that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis." 16 U.S.C. § 1802(34). "The overfishing limit is the numerical instantiation of this concept"—i.e. catch levels above the limit constitute overfishing. *Oceana v. Coggins*, 606 F. Supp. 3d 920, 933 (N.D. Cal. 2022). E_{MSY} is the maximum rate of fishing that can occur over time without causing overfishing. *Id.*; 50 C.F.R. § 600.310(e)(1)(i). Like all aspects of an FMP, OFLs must be determined using the best available science. 16 U.S.C. § 1851(a)(1).

Oceana's critique of NMFS's use of the CalCOFI data finds support in the administrative record. In April of 2021, during the process of setting the 2021-2022 annual specifications, both the Council's SSC and the Coastal Pelagic Species Management Team, noted serious concerns regarding the E_{MSY} estimates calculated from the CalCOFI data. The SSC stated: "There are several urgent research priorities to consider revisiting to better inform the next benchmark assessment. The SSC strongly recommends that these issues be addressed in time for the next benchmark assessment.... The value for E_{MSY} based on the CalCOFI temperature index suggests a productive stock but this is not evident from recent assessments, suggesting the need to re-evaluate the best way to calculate E_{MSY} for the northern subpopulation sardine stock." AR S-1618. The Management Team stated: "The CPSMT recommends evaluation of the E_{MSY} term based on the [CalCOFI] temperature index because it no longer appears to adequately reflect sardine productivity.... This environmental proxy was designed to reflect stock productivity, yet it has been near that upper cap for the last five years, while the most recent benchmark assessment stated that actual recruitments have been some of the lowest on record during that same time period." AR S-498-99. When Oceana raised this issue in a comment on the proposed rebuilding plan that became Amendment 18 in June of 2021, NMFS responded that it was monitoring the situation, but that a change was not yet warranted. AR 4926-27 ("NMFS is aware of the scientific publications and ongoing Council discussions related to E_{MSY}, and is committed to participating in these ongoing discussions about new science, and whether that new science justifies a change for how E_{MSY} is calculated for management purposes.... If a change is determined to be necessary, NMFS will promulgate a new action that will go through the proper Council process and will include public input during the Council process and during NMFS'[s] subsequent rulemaking process.").

***14** Despite the acknowledged flaws in this methodology, when NMFS calculated E_{MSY} for use in the 2023-2024 annual specifications, it continued to rely on the CalCOFI data. Dkt. No. 53-2 at 60. Defendants point out that the SSC approved the use of this data. *Id.* at 60. However, the SSC's own comments reflect its continued concerns about NMFS's use of this data, including its recommendations that something be done to address the concerns: "The SSC noted last year that since this [harvest control rule] was revised in 2013, the temperature has suggested an E_{MSY} close to the upper end of the recommended range, despite evidence for low productivity and abundance since that time. The SSC recommends that a workshop be convened to revisit the analysis and assumptions that have been used to inform the NSP Pacific sardine [harvest control rule], as there continues to be evidence that the adopted relationship between sardine productivity and ocean temperatures is not currently valid."

Id. at 60-61. So far, NMFS has not taken the recommended action.

The question presented is whether, in setting an overfishing limit in Amendment 18, NMFS relied on the best available science. Oceana does not propose a specific alternative to NMFS's use of the CalCOFI data to calculate E_{MSY}; instead, it argues that NMFS should set limits that do not rely exclusively on E_{MSY}. Dkt. No. 55 at 2. The Court agrees. While the agency has a statutory obligation to "assess and specify the present and probable future condition of, and the maximum sustainable yield ... from the fishery," 16 U.S.C. § 1853(a)(3), neither the MSA nor its implementing regulations require the agency to adopt, without adjustment, the results of its E_{MSY} calculation as the overfishing limit. *See* 50 C.F.R. § 600.310(e)(2) (guidelines for setting "status determination criteria" for overfishing). Rather, the MSA requires NMFS to "specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery)." 16 U.S.C. § 1853 (a)(10); 50 C.F.R. § 600.310(e)(2).

The best available science demonstrates that the CalCOFI data does not yield a reliable measure of Pacific sardine productivity in existing or anticipated conditions. It is not that the scientific information is "uncertain" or has "gaps." Rather, the record reflects that use of the CalCOFI temperature index to calculate E_{MSY} consistently and materially overstates the productivity of the Pacific sardine. The SSC has expressed doubts about use of the CalCOFI data for several years and most recently describes the NMFS calculation that relies on that data as "not currently valid." Dkt. No. 53-2 at 61. And while the SSC identified this issue as an "urgent research priorit[y]" in 2021, NMFS has made no changes to its E_{MSY} formula. AR S-1618; Dkt. No. 53-2 at 60-61. The Court appreciates that developing a new E_{MSY} model for the Pacific sardine is a time-consuming and resource-intensive endeavor, but there appears to be no reasonable justification for NMFS's continued reliance on an E_{MSY} value without addressing, in any way, the unreliability of its methodology when setting the overfishing limit. *See* 50 C.F.R. § 600.315(a)(2) ("Scientific information that is used to inform decision making should include an evaluation of its uncertainty and identify gaps in the information. Management decisions should recognize the ... risks associated with the sources of uncertainty and gaps in the scientific information."). NMFS "cannot use insufficient evidence as an excuse" when "*all* of the evidence" before it indicates that its current methodology for calculating sardine E_{MSY} produces directionally incorrect results. *See Brower*, 257 F.3d at 1071.

NMFS has failed to demonstrate that it relied on the best available science to set the overfishing limits and that Amendment 18 will prevent overfishing.

4. Claim 7: Essential Fish Habitats

***15** Oceana contends that NMFS failed to consult as required regarding Amendment 18's adverse effects on essential fish habits ("EFHs"). Dkt. No. 1 ¶¶ 175-179; Dkt. No. 43 at 20-21. Defendants respond that NMFS determined Amendment 18 would have no adverse effects on EFHs, and thus no consultation was required. Dkt. No. 44 at 24-25; Dkt. No. 46 at 14; *see also* AR 4915.

The MSA requires that FMPs "minimize to the extent practicable adverse effects on [EFHs] caused by fishing." 16 U.S.C. § 1853(a)(7). This mandate applies to FMP amendments and extends to EFHs designated under other FMPs. 50 C.F.R. § 600.815(a)(2)(ii). "Adverse effect" means "any impact that reduces quality and/or quantity of EFH" and includes "individual, cumulative, or synergistic consequences of actions." 50 C.F.R. § 600.810(a). "[A]ctions that reduce the availability of a major prey species ... may be considered adverse effects on EFH." 50 C.F.R. § 600.815(a)(7). In addressing adverse effects, an agency may apply its "expertise and discretion in determining how best to manage fishery resources." *Conservation Law Found. v. Ross*, 374 F. Supp. 3d 77, 91 (D.D.C. 2019) (quoting *Conservation Law Found. v. Evans*, 360 F.3d 21, 28 (1st Cir. 2004)). NMFS need not adopt measures to minimize effects on EFHs when the available scientific evidence suggests no such measures are required or that sufficient measures are already in place. *See Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 13 (D.D.C. 2000); *Friends of Del Norte v. Cal. Dep't of Transp.*, No. 18-CV-00129-JD, 2023 WL 2351649, at *11 (N.D. Cal. Mar. 3, 2023).

The MSA also requires federal agencies to consult with NMFS "with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken" that may "adversely affect" an EFH. 16 U.S.C. § 1855(b)(2); 50 C.F.R. § 600.920. The consultation requirement applies to NMFS, as a federal agency, thereby requiring NMFS to consult with itself regarding any action within the scope of the requirement. *See* AR 5432; *cf. Turtle Island Restoration Network v. NMFS*, 340 F.3d 969, 974 (9th Cir. 2003) (noting that NMFS "must consult within its own agency" to fulfil the Endangered Species Act's consultation requirement). When consulting on an action that may adversely affect EFHs, NMFS must provide an assessment that includes an "analysis of the potential adverse effects of the action on EFH and the managed species" as well as "alternatives that could avoid or minimize adverse effects on EFH." 50 C.F.R. § 600.920(e)(3) (ii), (iv). Consultation under the MSA may be consolidated and coordinated with other review procedures, such as those required by NEPA. 50 C.F.R. § 600.920(f)(1).

Oceana argues that NMFS was required to consult with respect to the impact of Amendment 18 on EFHs but failed to do so. Dkt. No. 43 at 21. Oceana's premise is that Amendment 18, and the annual specifications implementing it, "will keep sardines at low levels for the foreseeable future," which may adversely affect EFHs for marine predators, like groundfish, tuna, sharks, and salmon, that rely on the Pacific sardine as a key food source. Dkt. No. 45 at 20. Defendants respond that because Amendment 18 and the annual specifications rely on existing management measures for the Pacific sardine, including application of the harvest guidelines and closure of the primary directed commercial fishery, the amendment creates no new fishing pressures and therefore no additional anticipated impacts to EFH. Dkt. No. 44 at 25; Dkt. No. 46 at 14; *see also* AR 4915, 4929. In addition, defendants point to the results of an EFH consultation in 2013 on which they continue to rely. Dkt. No. 44 at 25; AR 5432. Oceana objects that the 2013 consultation "addresses a single year of fishery removals from a sardine population that was an order of magnitude larger than it is now," and addresses circumstances that are not at all comparable to the FMP implemented by Amendment 18 and the annual specifications. Dkt. No. 43 at 21.

***16** In determining that adoption of Amendment 18 did not require consultation, NMFS reasoned that because the primary directed fishery would remain closed for the foreseeable future and other existing management measures would remain in place, Amendment 18 would have no new or different adverse impacts on EFHs. *See* AR 4915-16 ("This action maintains the closure of the primary directed fishery for Pacific sardine; therefore, [NMFS has] determined that this action would have no adverse impact on any areas identified as EFH for U.S. fisheries[.]"). NMFS relied on similar reasoning when it found that the 2023-2024 annual specifications would not adversely impact EFHs. Dkt. No. 53-2 at 21 ("Because this proposed action is prohibiting fishing by the primary directed fishery for sardine, there is no affected area. As such, the proposed action in this context will not have an adverse impact on EFH; therefore, an EFH consultation is not required."). The rebuilding plan discusses the fact that Pacific sardine are important forage for marine predators, while observing that most such predators are generalists that also rely on other forage species, including some that are presently abundant and likely to be so in the future. AR 24-25; *see also* 4919-20. The agency also specifically considered that, under the amendment, fishing would remain at minimal levels, as required by the MSA, due to closure of the primary directed commercial fishery, and noted the scientific uncertainty regarding the extent to which fishing impacts natural sardine population fluctuations. AR 12-13, 4915, 4924, 4929. NMFS's assessment that sufficient measures were in place to minimize fishing and protect EFHs because Amendment 18 and the annual specifications implemented existing constraints is rationally connected to the evidence in the record and consistent with the statutory and regulatory requirements. [11]

In sum, NMFS's determination that Amendment 18 and its annual specifications required no EFH consultation was not arbitrary and capricious, as NMFS did consider whether Amendment 18 may adversely affect EFH and the agency's conclusion that it would not is rationally connected to the factors it considered.

5. Claim 8: 2023-2024 Annual Specifications

In its amended complaint, Oceana challenges NMFS's 2023-2024 annual specifications for the Pacific sardine. Dkt. No. 51 ¶¶ 187-191. These specifications "set annual catch levels for the Pacific sardine fishery based on the annual

specifications framework, control rules, and management measures in the FMP." Dkt. No. 53-2; 88 Fed. Reg. 41,040, 41,041. Oceana argues that the annual specifications fail to rebuild the sardine population and fail to prevent overfishing. Dkt. No. 51 ¶¶ 187-191. As discussed above, the annual specifications implement Amendment 18 and provide Oceana with a vehicle to challenge it. *See Oregon Trollers*, 452 F.3d at 1115-16. And, as explained above, the Court concludes that NMFS has set a rebuilding target that does not violate the MSA, but that it has failed to demonstrate that the rebuilding plan will rebuild the sardine population in the statutory timeframe and that the plan will prevent overfishing. These conclusions apply equally to Oceana's challenges to the annual specifications in claim 8.

C. NEPA Claims

Oceana claims that NMFS's approval of Amendment 18 violated NEPA in three ways: (1) it failed to analyze the impacts of the authorized action (claim 4); (2) it failed to take a hard look at the plan's impacts on the sardine population and marine predators (claim 5); and (3) it failed to prepare an environmental impact statement (claim 6). Dkt. No. 51 ¶¶ 162-181.

1. Claim 4: Action Analyzed Based on Incorrect Assumptions

Oceana contends that NMFS's **environmental assessment** ("EA") failed to analyze the impacts of the actions Amendment 18 authorizes because the agency assumed that only 2,200 mt of sardine would be caught each year under Alternative 1, rather than the higher amount permitted under the plan's ABC or ACLs. Dkt. No. 51 ¶¶ 162-166. Like Oceana's challenge to NMFS's rebuilding plan in claim 2, this challenge relies principally on the agency's assumption that the full ACLs would not be caught under Alternative 1. *See* Dkt. No. 43 at 22-25. Oceana argues that NMFS applied this assumption inconsistently in its environmental analysis, preventing both the agency and the public from making an informed assessment of the alternative plans. *Id.* Defendants disagree, arguing that it was reasonable for NMFS to consider what Alternative 1's actual effects would be. Dkt. No. 44 at 26-27.

***17** When reviewing a proposed action, an agency must take a "hard look" at all foreseeable impacts and "may not rely on incorrect assumptions or data." *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 872 (9th Cir. 2022) (quoting *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005)); *see also* 40 C.F.R. § 1502.23 ("Agencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents."). The agency's EA must "provide [a] full and fair discussion of significant environmental impacts and inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) (quoting 40 C.F.R. § 1502.1) (cleaned up). If the agency "entirely fail[s] to consider an important aspect of the problem," then its actions are arbitrary and capricious. *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002) (quoting *State Farm*, 463 U.S. at 43).

The Court agrees with Oceana that NMFS's analysis of how Alternative 1 compares to the other two alternatives relied on flawed assumptions and therefore was arbitrary and capricious. As explained above, ACLs play a significant role in the MSA regulatory framework, most notably in requiring NMFS and the Council to ensure the catch limits are not exceeded. NMFS cited the "flexibility" to increase harvests if future conditions allowed as a reason to adopt Alternative 1. AR 22. However, it did not consider the effect that such increases, whether intentional or accidental, would have on rebuilding. NMFS's justification for modeling Alternative 1 based on the assumption that annual catch would average 2,200 mt was that it "represent[ed] a more realistic projection of fishery landings" given "the prohibition on primary directed fishing, restrictions on incidental harvest, and to some degree market dynamics." AR 14. NMFS acknowledged that the same circumstances also could lead to catches below the ACL under Alternative 3, but it made no attempt to adjust for or model this possibility. AR 15, 26. In effect, NMFS compared apples and oranges: predictions of future catches, which had no binding effect, for Alternative 1; and binding ACLs, which might overestimate catch, for Alternative 3.

Defendants point out that the EA made no attempt to mask how NMFS conducted its assessment of the relevant

alternative. Dkt. No. 44 at 28 (citing AR 15, 30). However, merely noting a potential issue or discrepancy is not sufficient for the "hard look" required by NEPA. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) ("General statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided."). Here, NMFS made no attempt to quantify the differences between its alternative rebuilding plans, beyond observing that "[t]he modeling [for Alternative 3] also does not account for restrictions on incidental catch that might restrict harvest, or the fact that industry may not take the full five percent for other socioeconomic reasons." AR 15.

NMFS acted arbitrarily and capriciously and failed to take the hard look required by NEPA by relying on inconsistent assumptions and by ignoring important aspects of the proposed rebuilding plans under consideration. *See State Farm*, 463 U.S. at 43; *Env't Def. Ctr.*, 36 F.4th at 872.

2. Claim 5: Impact on Marine Predators

Oceana contends that defendants also failed to take a hard look at the impact that Alternative 1 would have on the marine predators that rely on the Pacific sardine for food, including specifically the endangered humpback whale. Dkt. No. 43 at 28-30. Defendants respond that the EA concisely noted the sardine's importance to many of these species, consistent with NEPA's requirements. Dkt. No. 44 at 28-29 (citing 40 C.F.R. §§ 1501.5(c)(1)-(2) ("An **environmental assessment** shall briefly [discuss various factors.]"), 1508.1(h) ("**Environmental assessment** means a concise public document... ")); AR 24. They also argue that the EA acknowledged the possibility of effects on other predators, but concluded that these effects would not be materially different under the other alternatives. Dkt. No. 44 at 28-29.

***18** "To satisfy the 'hard look' requirement, an agency must provide 'a reasonably thorough discussion of the significant aspects of the probable environmental consequences.' " *350 Montana v. Haaland*, 50 F.4th 1254, 1265 (9th Cir. 2022) (quoting *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin. ("NHTSA")*, 538 F.3d 1172, 1194 (9th Cir. 2008)). "A 'hard look' includes considering all foreseeable direct and indirect impacts [and] should involve a discussion of adverse impacts that does not improperly minimize negative side effects." *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006). The agency must also consider reasonably foreseeable cumulative effects of the proposed action, *see* 40 C.F.R. § 1508.1(g)(2)-(3), and must provide a convincing statement of reasons explaining why the proposed action will have no significant impact on the environment, *see Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005). Among the factors agencies are directed to consider in this analysis are the effects on "listed species and designated critical habitat under the Endangered Species Act." 40 C.F.R. § 1501.3(b).

When reviewing an agency decision to determine whether the hard look standard is met, courts must "employ a 'rule of reason,' " rather than "fly speck" the agency's analysis or "act[ ] as a type of omnipotent scientist." *Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 984 (9th Cir. 2022) (cleaned up). The agency need not affirmatively address every uncertainty—thought it must "acknowledge and respond to comments by outside parties that raise significant scientific uncertainties and reasonably support that such uncertainties exist." *The Lands Council v. McNair*, 537 F.3d 981, 1001 (9th Cir. 2008). If the agency's decision is "fully informed and well-considered," then the court must defer to it. *N. Alaska Env't Ctr*, 457 F.3d at 975.

The record reflects that NMFS did consider the reasonably foreseeable impacts of the proposed alternatives on marine predators generally, including how those impacts would likely be mitigated by the availability of other forage fish species. The agency explained:

> [M]ost Pacific sardine predators are generalists that are not dependent on the availability of a single species but rather on a suite of species, any one (or more) of which is likely to be abundant each year. For example, while the biomass of Pacific sardine is currently low, the central population of northern anchovy biomass is high (approximately 800,000 mt in 2019 ...). Therefore,

> it is unclear whether there would be any measurable difference in benefits between the rebuilding timelines for Pacific sardine from the aspect of prey availability.

AR 25. For the reasons explained above, *see* III.B.1, the Court disagrees with Oceana's characterization of Amendment 18 as an action that "keeps" the sardine population at a biomass of 150,000 mt, and further disagrees that NMFS failed to analyze how the rebuilding target and other aspects of the rebuilding plan impact marine predators. *See* Dkt. No. 43 at 28.

However, Oceana also argues that NMFS failed to consider how Amendment 18 and its annual specifications may impact the endangered humpback whale and its critical habitat, contrary to NEPA regulations. Dkt. No. 51 ¶¶ 10, 121-22; Dkt. No. 43 at 29; *see also* 50 C.F.R. § 226.227(f); 86 Fed. Reg. 21,082, 21,084 (listing the Pacific sardine among "species that have been recognized and documented as key prey species within the diet of humpback whales"). Oceana specifically raised this issue in public comments submitted in response to NMFS's draft and final rebuilding plans. *See* AR 148, 5290-91. Defendants' response is limited to the observation that the EA "acknowledged that endangered humpback whales are part of the assemblage of predators that use NSP sardine." Dkt. No. 44 at 29 (citing AR 24). [12]

***19** To comply with NEPA, NMFS need only have "sufficiently considered the issue and arrived at a reasonable conclusion that the effects would not be significant." *WildEarth Guardians v. Provencio*, 923 F.3d 655, 675 (9th Cir. 2019). However, neither the EA nor any other environmental document discusses whether or how Amendment 18 may impact the humpback whale's critical habitat. *See* AR 1-43 (EA), 158-63 (finding of no significant impact), 4910-30 (NMFS decision memorandum). The agency's mere acknowledgment of the humpback whale's endangered status is not enough to satisfy NEPA's "hard look" requirement. *See Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 997 (EAs that failed to discuss impact of timber sales on northern spotted owl's critical habitat "[did] not satisfy the requirements of the NEPA").

Accordingly, while the NMFS prepared an adequate EA regarding the impact of Amendment 18 and its implementing annual specifications on marine predators generally, it failed to take a hard look at the impact on the endangered humpback whale, as required by NEPA. *See* 40 C.F.R. § 1501.3(b).

3. Claim 6: Failure to Prepare an Environmental Impact Statement

Oceana claims that NMFS violated NEPA by failing to prepare an EIS. Dkt. No. 51 ¶¶ 173-172; Dkt. No. 43 at 30. Defendants disagree that an EIS was required. Dkt. No. 44 at 29-30.

A reviewing court must examine an EA "with two purposes in mind: to determine whether it has adequately considered and elaborated the possible consequences of the proposed agency action when concluding that it will have no significant impact on the environment, and whether its determination that no EIS is required is a reasonable conclusion." *Env't Def. Ctr.*, 36 F.4th at 872 (quoting *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d at 1215). "An EIS *must* be prepared if substantial questions are raised as to whether a project *may* cause significant degradation of some human environmental factor." *Ocean Advocs.*, 402 F.3d at 864 (cleaned up, emphasis in original). If an agency opts not to prepare one, it must give a "convincing statement of reasons" why the project's environmental impact will not be significant. *Id.* (quoting *Blue Mountains Biodiversity Project*, 161 F.3d at 1212). "[C]onclusory assertions that an activity will have only an insignificant impact on the environment" are insufficient. *Id.* However, "it does not follow that the presence of some negative effects necessarily rises to the level of demonstrating a significant effect on the environment." *Barnes v. Fed. Aviation Admin.*, 865 F.3d 1266, 1275 (9th Cir. 2017) (quoting *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005)).

"[P]reparation of an EIS is not mandated in all cases simply because an agency has prepared a deficient EA or otherwise failed to comply with NEPA." *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d at 1225. If an "EA [is] prepared in reliance" on an erroneous legal conclusion, remand to the agency for the preparation of a new EA may be proper. *San Luis Obispo Mothers for Peace v. Nuclear Regul. Comm'n*, 449 F.3d 1016,

1035 (9th Cir. 2006); *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d at 1225.

As described above, NMFS violated NEPA by relying on inconsistent assumptions and failing to take a hard look at the impact of Amendment 18 and the annual specifications on the endangered humpback whale. Because of these errors, the EA was deficient. However, the significance of these deficiencies, and whether they can be remedied, is unclear. As such, "the record is insufficiently complete for [the Court] to order the immediate preparation of an EIS." *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d at 1227.

IV. REMEDY

***20** Oceana asks the Court to vacate Amendment 18 and the 2023-2024 annual specifications and remand to NMFS with instructions to promulgate a new rebuilding plan within nine months, as well as regulations implementing it. Dkt. No. 43 at 30; Dkt. No. 55 at 3. Defendants claim that "nine months is not sufficient time to comply with the requirements of the MSA" and requests the opportunity to submit briefing on the question of remedy. Dkt. No. 44 at 30. They also assert that if the 2023-2024 annual specifications are vacated "all the limitations placed on the fishery would be lifted and the management measures would no longer control catch levels." Dkt. No. 54 at 1.

Where agency action is found to be arbitrary and capricious or not in accordance with the law, a court typically vacates the decision or action and remands to the agency for further proceedings. *350 Montana*, 50 F.4th at 1273; *Earth Island Institute v. Hogarth*, 494 F.3d at 770. However, remand without vacatur is proper in "limited circumstances." *350 Montana*, 50 F.4th at 1273 (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)). "Whether agency action should be vacated depends on how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed." *Id.* (quoting *Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 929 (9th Cir. 2020)). The Ninth Circuit considers "whether vacating a faulty rule could result in possible environmental harm" and has "chosen to leave a rule in place when vacating would risk such harm." *Pollinator Stewardship Council*, 806 F.3d at 532; *see also All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) ("When equity demands, however, the regulation can be left in place while the agency reconsiders or replaces the action, or to give the agency time to follow the necessary procedures.").

Given defendants' representations regarding the possible effect of an order vacating Amendment 18 and/or the annual specifications, the Court declines to issue such an order at this time. Instead, the parties must confer regarding what further proceedings are necessary to resolve the question of an appropriate remedy.

V. CONCLUSION

The parties' cross-motions for summary judgment are granted in part and denied in part, as follows:

1. On claim 1 (unlawful rebuilding target under the MSA), defendants' motion is granted and Oceana's cross-motion is denied.

2. On claim 2 (failure to rebuild within statutory timeframe under the MSA), Oceana's motion is granted and defendants' cross-motion is denied.

3. On claim 3 (failure to prevent overfishing under the MSA), Oceana's motion is granted and defendants' cross-motion is denied.

4. On claim 7 (failure to analyze and minimize adverse effects on EFHs under the MSA), Oceana's motion is denied and defendants' cross-motion is granted.

5. On claim 8 (challenge to 2023-2024 annual specifications under the MSA), Oceana's motion is granted and defendants' cross-motion is denied.

6. On claim 4 (incorrect assumptions in environmental analysis under NEPA), Oceana's motion is granted and defendants' cross-motion is denied.

7. On claim 5 (failure to take a hard look at impacts on marine predators under NEPA), Oceana's motion is granted and defendants' cross-motion is denied with respect to Oceana's claim that NMFS failed to consider Amendment 18's effects on the humpback whale's critical habitat. In all other respects, defendants' motion is granted and Oceana's cross-motion is denied.

8. On claim 6 (failure to prepare an EIS under NEPA), Oceana's motion is granted and defendants' cross-motion

is denied with respect to Oceana's claim that the EA was deficient. However, defendants' motion is granted and Oceana's cross-motion is denied with respect to Oceana's claim that an EIS is required.

***21** By **May 6, 2024**, the parties shall jointly submit their agreed or respective proposals for further proceedings regarding the question of an appropriate remedy.

IT IS SO ORDERED.

All Citations

Slip Copy, 2024 WL 1745031

Footnotes

1 The Secretary of Commerce is ultimately responsible for overseeing the proper administration and implementation of the MSA. *See* 16 U.S.C. §§ 1802(39), 1851-1855. The Secretary has delegated responsibility for ensuring compliance with the MSA to NMFS, an agency within NOAA. *See Pac. Dawn LLC*, 831 F.3d at 1170.

2 A different subpopulation, the southern subpopulation of Pacific sardine, is found off the coast of southern California and the Baja California peninsula and overlaps with the northern subpopulation in southern California. AR 12. The southern subpopulation sardine is not managed by the NMFS under the MSA. *See* AR 12; Dkt. No. 44 at 5.

3 In addition, some sardine fishing is exempt from regulation and is permitted for scientific purposes. *See* AR 5462.

4 Sardine populations may be described in terms of metric tons of biomass. There are two different ways to measure biomass. “Spawning biomass” measures sardines two years or older, when the fish become old enough to reproduce, while “1+ biomass” measures sardines one year or older. Dkt. No 43 at 13 n.4; Dkt. No. 44 at 20 n.7; AR 6150. Unless otherwise stated, this order uses “biomass” to refer to the “1+ biomass” measure.

5 These figures include all sardine catch in the United States, of which the northern subpopulation sardine is only a portion. *See* AR 13, 15.

6 For these calculations, the Court assumes that the ratio of spawning biomass to +1 biomass approximates that reported at AR 37.

7 Of the three fisheries, the live bait fishery is the largest, catching an average of 2,522 mt of sardines per year between 2005 and 2015. AR 17-18.

8 The fishing year runs from July 1st of one year to June 30th of the next. *See* Dkt. No. 53-2 at 12.

9 Oceana argues that 150,000 mt “represents a vulnerable, low sardine population level,” Dkt. No. 43 at 15 (quoting AR 2590), and that by adopting this biomass as the rebuilding target “Amendment 18 keeps the sardine population at levels too low to support either dependent predators or the primary sardine fishery for half a century or more,” *id.* at 1, 12-15. Nothing in the MSA or its implementing regulations prohibits NMFS from setting the rebuilding target at the 150,000 mt level, even if that is the same level at which NMFS has

decided to automatically close the primary directed fishery when biomass is declining. Defendants explain that NMFS adopted the 150,000 mt cutoff as a conservative measure—a "precaution built into [the FMP's] framework"—that is intended to automatically protect the fishery from overfishing in the first instance. Dkt. No. 44 at 22; *see also* AR 4924, 4928. As such, defendants argue—and the Court agrees—there is no inherent inconsistency arising from the fact that NMFS set the cutoff and the rebuilding target at the same level. *See* Dkt. No. 44 at 22.

10 The modeling period extended only through 2050, and the model projected the Pacific sardine would not rebuild by that date. AR 14.

11 The Court agrees with Oceana that to the extent defendants rely on the 2013 EFH consultation, their reliance is not supported by the record. No one disputes that fishery conditions in 2013 differed from fishery conditions at the time Amendment 18 was adopted, and there is no indication in the record that the findings reflected in the 2013 memorandum have any relevant bearing on the circumstances presented by Amendment 18. *See* AR 5432.

12 NMFS's decision materials refer to "prior ESA consultations on the Pacific sardine fishery." *See* AR 159, 4929. However, neither party raised these consultations in their briefs, nor do they appear to be a part of the administrative record.

97 F.4th 1077
United States Court of Appeals, Seventh Circuit.

PROTECT OUR PARKS, INC.,
et al., Plaintiffs-Appellants,
v.
Pete BUTTIGIEG, Secretary of
Transportation, et al., Defendants-Appellees.

No. 22-3190
|
Argued October 24, 2023
|
Decided April 8, 2024

Synopsis

Background: Citizens group and city residents brought action against city, state, and federal entities and officials and nonprofit foundation to block construction of presidential memorial center on land in city park. Following dismissal of plaintiffs' state law claims, 2022 WL 910641, and denial of their motion to amend complaint, the United States District Court for the Northern District of Illinois, John Robert Blakey, J., entered summary judgment in defendants' favor, and plaintiffs appealed.

Holdings: The Court of Appeals, Wood, Circuit Judge, held that:

[1] city residents' status as municipal taxpayers did not give them standing to assert claim that foundation breached terms of its master agreement with city;

[2] Court of Appeals' ruling upholding district court's denial of citizen groups' motion for preliminary injunction was law of the case;

[3] federal agencies satisfied their obligation under National Environmental Policy Act (NEPA) to take hard look at project's likely environmental consequences;

[4] city's plan to use federal funds to construct new roads near center's site was not major federal action under NEPA;

[5] federal agencies had no obligation under NEPA to consider alternative sites;

[6] Federal Highway Administration (FHWA) had no obligation under Department of Transportation Act to evaluate alternative sites;

[7] FHWA had no obligation under National Historic Preservation Act (NHPA) to consider alternative sites;

[8] city's approval of foundation's proposal did not violate public trust doctrine; and

[9] city did not unlawfully delegate its authority to fix center's location to foundation.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion to Amend the Complaint; Motion to Dismiss for Failure to State a Claim.

West Headnotes (34)

[1] Federal Courts Pleading

Court of Appeals reviews for abuse of discretion district court's denial of request to amend complaint. Fed. R. Civ. P. 15(a)(2).

[2] Federal Civil Procedure Amendment as of course

Federal Civil Procedure Form and sufficiency of amendment; futility

Although district court should freely give leave to amend complaint when justice so requires, leave to amend is not to be automatically granted, and district court does not abuse its discretion in denying motion to amend when amending pleading would be futile act. Fed. R. Civ. P. 15(a)(2).

[3] Contracts Privity of Contract in General

Contracts Agreement for Benefit of Third Person

Cause of action based on contract may be brought only by party to that contract, by someone in privity with such party, or by intended third-party beneficiary of contract.

[4] **Contracts** Presumptions and burden of proof

Contracts Agreement for Benefit of Third Person

Illinois law holds strong presumption against creating contractual rights in third parties, and this presumption can only be overcome by showing that language and circumstances of contract manifest affirmative intent by parties to benefit third party.

[5] **Municipal Corporations** Nature and scope in general

Under Illinois law, city residents' status as municipal taxpayers did not give them standing to assert claim that nonprofit foundation breached terms of its master agreement with city for transfer of city parkland for creation of presidential memorial center, absent allegation that master agreement violated state or municipal law.

[6] **Municipal Corporations** Nature and scope in general

Illinois courts allow taxpayer to bring suit on behalf of local governmental unit to enforce cause of action belonging to local governmental unit, but recovery must run in local government's favor.

[7] **Municipal Corporations** Nature and scope in general

Under Illinois law, city residents could not bring taxpayer derivative action to enforce city's contractual rights under its master agreement with nonprofit foundation for transfer of city parkland for creation of presidential memorial center, where residents sought relief against city.

[8] **Implied and Constructive Contracts** Unjust enrichment

Under Illinois law, unjust enrichment is condition that may be brought about by unlawful or improper conduct as defined by law.

[9] **Implied and Constructive Contracts** Unjust enrichment

Under Illinois law, party may not dress up unsuccessful contract claim in garb of unjust enrichment.

[10] **Federal Courts** Summary judgment

Federal Courts Summary judgment

Court of Appeals evaluates district court's grant of summary judgment de novo, construing record in light most favorable to nonmovant and drawing all reasonable inferences in its favor.

[11] **Courts** Previous Decisions in Same Case as Law of the Case

"Law of the case doctrine" is rule of practice, based on sound policy that, when issue is once litigated and decided, that should be end of matter.

[12] **Courts** Previous Decisions in Same Case as Law of the Case

Law of the case doctrine establishes presumption that ruling made at one stage of lawsuit will be adhered to throughout suit.

[13] **Courts** Previous Decisions in Same Case as Law of the Case

Law of the case doctrine is not straightjacket nor hard and fast rule, and strength of presumption that ruling made at one stage of lawsuit will be adhered to throughout suit varies with circumstances.

[14] **Courts** Previous Decisions in Same Case as Law of the Case

Where Court of Appeals made fully considered ruling on issue of law on preliminary injunction appeal, its earlier legal conclusion underlying ruling may establish law of the case.

[15] **Federal Courts** Law of the case in general

Court of Appeals' ruling upholding district court's denial of citizen groups' motion for preliminary injunction in action seeking to block construction of presidential memorial center on city parkland was law of the case in subsequent proceedings; Court of Appeals had ample time to consider identical record, there were no new facts, legal issues remained same, Court of Appeals issued fully considered ruling on issues of law, and there was no intervening inconsistent ruling from Court of Appeals or Supreme Court.

[16] **Courts** Previous Decisions in Same Case as Law of the Case

Party is free to argue that intervening change in law or other changed or special circumstance warrants departure from law of the case.

[17] **Environmental Law** Assessments and impact statements

Only role for court in applying arbitrary and capricious standard in National Environmental Policy Act (NEPA) context is to insure that agency has taken hard look at environmental consequences. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

[18] **Environmental Law** Duty of government bodies to consider environment in general

National Environmental Policy Act (NEPA) is process statute, not one that imposes enforceable environmental standards. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

[19] **Environmental Law** Land use in general

Environmental assessment (EA) prepared by National Park Service (NPS) and Department of Transportation for proposed presidential memorial center construction project in city park satisfied their obligation under National Environmental Policy Act (NEPA) to take hard look at project's likely environmental consequences; EA included, among other things, natural resources technical memorandum that discussed habits of migratory birds and how project would affect their nests, as well as tree technical memorandum that considered each species of tree that would be cut down to build center, and after reviewing each of these effects, agencies concluded that none would have significant impact. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

[20] **Environmental Law** Surface transportation; highways and bridges

City's plan to use federal funds to construct new roads near site of presidential memorial center on city parkland was not major federal action for which federal agencies that provided funds had any obligations under National Environmental Policy Act (NEPA); federal agencies had no control over where center was being built, and NEPA imposed no requirement that they oversee

city's actions. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

[21] **Environmental Law** Land use in general

National Park Service and Department of Transportation had no obligation under National Environmental Policy Act (NEPA) to consider alternative sites in evaluating environmental effects of proposed presidential memorial center construction project on city parkland; it was city, not federal agencies, that selected park, center was not federal project, and no federal agency had authority to dictate where center would be located. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

[22] **Highways** Highways in general

Federal Highway Administration (FHWA) had no obligation under Department of Transportation Act to evaluate alternative sites before approving project to construct presidential memorial center on city parkland, even though project required city to close some roadways and construct new ones using federal highway funds; FHWA had no authority either to tell nonprofit foundation created to construct center to build it somewhere else or to forbid city from authorizing that location. 49 U.S.C.A. § 303(c).

[23] **Environmental Law** Construction, demolition, alteration, or repair

City's approval of nonprofit foundation's plan to construct presidential memorial center on city parkland was not federal undertaking, and thus Federal Highway Administration (FHWA) had no obligation under National Historic Preservation Act (NHPA) to consider alternative sites for center, even though project required city to close some roadways and construct new ones using federal highway funds. 54 U.S.C.A. § 306108.

[24] **Federal Civil Procedure** Insufficiency in general

To survive motion to dismiss for failure to state claim, complaint's factual content must allow court to draw reasonable inference that defendant is liable for misconduct alleged. Fed. R. Civ. P. 12(b)(6).

[25] **Dedication** Use of Property

Public Lands Governmental authority and control

Under Illinois law, "public trust doctrine" requires governmental entity to hold properties acquired and dedicated for public purpose in trust for uses and purposes specified and for public's benefit.

[26] **Municipal Corporations** Parks and Public Squares and Places

To state cause of action under public trust doctrine under Illinois law, facts must be alleged indicating that: certain property is held by governmental body for given public use; governmental body has taken action that would cause or permit property to be used for purpose inconsistent with its originally intended public use; and such action is arbitrary or unreasonable.

[27] **Dedication** Revocation or lapse of dedication before acceptance

Dedication Revocation after acceptance

Under Illinois law, dedication to public purpose is not irrevocable commitment.

[28] **Public Lands** Illinois

Under Illinois law, when reallocation of trust land to new public purpose is challenged, courts can serve only as instrument of determining

legislative intent as evidenced by existing legislation measured against constitutional limitations.

[29] **Municipal Corporations** Grants of rights to use public property

Under Illinois law, city's approval of private nonprofit foundation's proposal to construct presidential memorial center on city parkland did not violate public trust doctrine, even if foundation would receive benefits from center; state legislature expressly permitted construction and operation of presidential centers in parks held in public trust, center fell within this legislative grant of authority, and center's main purpose was to benefit public. 70 Ill. Comp. Stat. Ann. 1290/1.

[30] **Municipal Corporations** Parks and Public Squares and Places

Under Illinois law, benefit to private organization does not by itself violate public trust doctrine, but doctrine would be violated if direct and dominating purpose would be private one or if public purpose to be served would be only incidental and remote.

[31] **Constitutional Law** Delegation of Powers

Under Illinois law, legislature cannot delegate its legislative power to determine what law should be. Ill. Const. art. 2, § 1.

[32] **Constitutional Law** Delegation of Powers

Under Illinois law, legislature may delegate authority to do those things it might properly do, but cannot do as understandably or advantageously, if authority that is granted is delineated by intelligible standards. Ill. Const. art. 2, § 1.

[33] **Constitutional Law** To non-governmental entities

Municipal Corporations Grants of rights to use public property

Under Illinois law, city council did not unlawfully delegate its legislative authority to fix location of presidential memorial center to private nonprofit foundation when it expressed its confidence that President and his foundation would exercise sound judgment as to center's ultimate location; city subsequently approved foundation's plan to construct center on city parkland and passed ordinances authorizing it to enter into agreements governing foundation's use of parkland. Ill. Const. art. 2, § 1.

[34] **Federal Courts** In general; necessity

Appellant who does not address district court's rulings and reasoning forfeits any arguments he might have that those rulings were wrong.

***1081** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:21-cv-02006 — **John Robert Blakey**, *Judge.*

Attorneys and Law Firms

Richard Epstein, Attorney, Norwalk, CT, Thomas G. Gardiner, Catherine M. Keenan, Attorneys, Gardiner Koch Weisberg & Wrona, Chicago, IL, Michael Rachlis, Attorney, Rachlis, Duff, Adler & Peel LLC, Chicago, IL, for Plaintiffs-Appellants.

Allen M. Brabender, Attorney, Department of Justice, Environment & Natural Resources Division, Washington, DC, for Defendants-Appellees Pete Buttigieg, Stephanie Pollack, Arlene Kocher, Matt Fuller, Deb Haaland, Shawn Benge, Paul B. Cullberson, Christine Wormuth.

Myriam Z. Kasper, Attorney, Office of the Corporation Counsel, Appeals Division, Chicago, IL, Elizabeth Tisher,

Attorney, City of Chicago Law Department, Chicago, IL, for Defendant-Appellee City of Chicago.

Joseph P. Roddy, Elizabeth M. Pall, Attorneys, Burke, Warren, MacKay & Serritella, P.C., Chicago, IL, for Defendant-Appellee Chicago Park District.

Tacy Fletcher Flint, David H. Hoffman, Attorneys, Sidley Austin LLP, Chicago, IL, Peter R. Steenland, Jr., Attorney, Sidley Austin LLP, Washington, DC, for Defendant-Appellee Barack Obama Foundation.

Randall E. Mehrberg, Attorney, Jenner & Block LLP, Chicago, IL, for Amici Curiae Adler Planetarium, Art Institute of Chicago, Bronzeville Children's Museum, Chicago Academy of Sciences/Peggy Notebaert Nature Museum, Chicago Architecture Center.

Craig C. Martin, Attorney, Willkie Farr & Gallagher LLP, Chicago, IL, for Amici Curiae Civic Committee of the Commercial Club of Chicago, Civic Committee of the Commercial Club of Chicago, Chicago Urban League, Chicago Community Trust.

Kenneth L. Schmetterer, Attorney, DLA Piper LLP, Chicago, IL, for Amicus Curiae University of Chicago.

Mary Eileen Cunniff Wells, Attorney, Miller Shakman Levine & Feldman LLP, Chicago, IL, for Amicus Curiae Community Representatives.

Before Rovner, Wood, and Hamilton, Circuit Judges.

Opinion

Wood, Circuit Judge.

***1082** This appeal represents, we hope, the final installment in the long-running challenge led by a group called Protect Our Parks, Inc. ("POP"), which strenuously objects to the location of the planned Obama Presidential Center in Chicago. See *Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722 (7th Cir. 2020) ("*POP I*"), *cert. denied sub nom. Protect Our Parks, Inc. v. City of Chicago*, —— U.S. ——, 141 S. Ct. 2583, —— L.Ed.2d —— (2021); *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758 (7th Cir. 2021) (*per curiam*) ("*POP II*"); *Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389 (7th Cir. 2022) ("*POP III*"). Throughout the present phase of the case, the Center has been under construction. But the rub is this: it is rising in a corner of Chicago's historic Jackson Park on a site selected by the Barack Obama Foundation. POP contends that Jackson Park should have been off-limits, and it insists that the Center easily could have been placed elsewhere. Raising a bevy of arguments—seven based on federal law, eight on state law—all seeking to prevent the construction of the Center in Jackson Park, POP and its co-plaintiffs sued numerous state and federal defendants. (We refer to the plaintiffs collectively as POP unless the context requires otherwise.) Construction is now well underway, and the Center is expected to be completed in late 2025.

Earlier adverse rulings from this court, plus the on-the-ground reality of the construction, have not deterred POP. Most recently, it asked us to enjoin construction until the courts resolve its federal-law theories. But it failed to make the requisite showing that it was likely to succeed with those contentions, and so we declined to grant the preliminary injunction it sought. See *POP III*, 39 F.4th at 397. In the meantime, the district court refused POP's request to amend its pleadings and dismissed the state-law causes of action. At the request of the parties, the district court then awarded summary judgment against POP on the federal-law theories.

POP has now asked us to overturn the district court's final judgment in its entirety. In support of its federal-law theories, it presents the identical factual record that we reviewed in *POP III*, supported by the same arguments. Those arguments remain unpersuasive. Moreover, we have identified no legal error in our earlier analysis of POP's case, and so we stand by that decision. We also conclude that POP's state-law theories were rightly dismissed and that the district court did not abuse its discretion when it denied POP's motion to amend the complaint. In summary, we affirm the judgment of the district court.

***1083 I. Background**

Although this ground has been well trodden, we review the underlying facts and the course of the litigation for the convenience of those who do not wish to track down and re-read our earlier decisions.

A. The Proposed Locations for the Center

In March 2014, the Barack Obama Foundation ("the Foundation"), a private not-for-profit organization, initiated a nationwide search for a future home for the Obama Presidential Center ("the Center"), a presidential library that would honor the work and legacy of the 44th president. Various organizations around the country and in Chicago recommended potential sites for the Center.

The University of Chicago proposed two locations near its campus: one in Washington Park and another in Jackson Park. Both are historic public parks in Chicago's South Side; the latter is a 551-acre park that sits in the Hyde Park and Woodlawn neighborhoods where President Obama once lived, worked, and began his public career. The Foundation eventually ranked these potential sites as two of its top three choices for the future location of the Center and communicated its assessment to the City of Chicago ("City").

In 2015, the Chicago City Council passed an ordinance ("the 2015 Ordinance") in which it expressed its "robust commitment to bringing the Presidential Center to Chicago." The City Council determined that the Center would "expand the City's cultural resources, promote economic development, strengthen surrounding communities, ... and serve other important public purposes." The 2015 Ordinance described several possible locations for the Center, including the Jackson Park site that the University of Chicago had proposed. That site is a 19.3-acre portion of parkland that lies on the western edge of Jackson Park, bounded on the north by Midway Plaisance Drive North, on the east by South Cornell Drive, on the south by East Hayes Drive, and on the west by Stony Island Avenue.

The 2015 Ordinance did not authorize any kind of development. It stated only that "the City will introduce a separate ordinance authorizing the development, construction and operation of the" Center on whatever site was chosen. But to achieve the "public purpose of facilitating the location, development, construction and operation of" the Center, the 2015 Ordinance authorized the City to accept a transfer of the proposed portion of Jackson Park from the Chicago Park District ("the Park District") if the Foundation settled on that site.

The Park District had held Jackson Park in the public trust since 1934, when a law passed by the Illinois General Assembly took effect. That law consolidated all existing parkland that lay entirely or partly within the territorial boundaries of Chicago and created the Park District to manage it. See 70 ILCS 1505/1. (The Park District later lost authority over parkland outside Chicago's corporate limits, but that change has no effect on our case. See *id.* 1505/1a.) Before the 1934 legislation, the parkland was held by the South Park Commission, which had been created in 1869 with the authority to select certain lands that would "be held, managed and controlled by them and their successors as a public park, for the recreation, health, and benefit of the public, and free to all persons forever[.]" 1 LAWS OF THE STATE OF ILLINOIS 1869, at 360. In addition to enjoying the status of public-trust land since it was acquired by the South Park Commissioners, Jackson Park has been on the National Register of Historic Places since ***1084** 1972 for, among other things, serving as part of the grounds for the 1893 Columbian Exposition.

Shortly after the City passed the 2015 Ordinance, the General Assembly amended the Park District Aquarium and Museum Act. See 70 ILCS 1290/1 ("Museum Act"). The amendment, which became effective on January 1, 2016, allows cities and park districts to build museums, including presidential centers, in their public parks. *Id.* It also authorizes cities and park districts to contract out the construction, maintenance, and operation of those museums to private entities organized for that purpose. *Id.* Finally, the amended Museum Act "reaffirmed" the General Assembly's view that museums "serve valuable public purposes[.]" *Id.*

B. The Selection of Jackson Park as the Site

After evaluating its options, the Foundation selected Jackson Park as its preferred site for the Center. It then submitted a specific proposal to the Chicago Plan Commission to build the Center at that location. Along with the proposal, the Foundation applied for the various permits and approvals needed to undertake the development. According to the plans, the Center will include four buildings and an underground parking facility, all situated on a campus at the northwestern edge of the park. It will feature a museum, a branch

of the Chicago public library, spaces for cultural and educational events, athletic spaces, green space, and an archive commemorating the lives and legacies of President Barack Obama and First Lady Michelle Obama. In its proposal, the Foundation offered to cover all costs associated with the Center's construction.

The Plan Commission reviewed the Foundation's submissions, held public hearings on the proposal, and in May 2018 unanimously recommended approval of the application. The City Council approved the Plan Commission's recommendation and granted the necessary permits. A few months later, the City Council passed an ordinance ("the 2018 Ordinance") that allowed the City to accept title to the Jackson Park site from the Park District. The 2018 Ordinance also authorized the City to enter into agreements governing the Foundation's use of the site. A second ordinance authorized the City to vacate portions of Midway Plaisance Drive South and Cornell Drive to make way for the Center.

Pursuant to the 2018 Ordinance, the City entered into an agreement with the Foundation ("Use Agreement") that set the terms of the Foundation's use of the Jackson Park site. It provides that the Foundation may use the Jackson Park site for 99 years, but that the City will retain title to the land and acquire title to the buildings and site improvements built on it. The Use Agreement also requires the Foundation to fund the construction of the Center and to operate it consistently with the requirements of the Museum Act. Finally, an option allows the City to terminate the Use Agreement if the Foundation fails to use the Center for its authorized purpose.

In May 2019, the City and the Foundation finalized a second agreement ("Master Agreement"). Section 12 of the Master Agreement sets forth various conditions precedent to the City's obligation to execute the Use Agreement. Relevant here are sections 12(h), which requires the Foundation to certify to the City in writing that it has received funds equal to the projected total cost of constructing the Center, and 12(j), which requires the Foundation to establish an endowment for the purpose of operating and maintaining the Center during the term of the Use ***1085** Agreement. A provision in the Master Agreement gives the City the option to waive these or any other conditions precedent. Found in the final paragraph of section 12, it states, in pertinent part, that "[i]f any one of the above conditions [including 12(h) and 12(j)] is not satisfied by the Closing Date, the City may, at its option, waive such condition[.]"

C. The Federal Review Process

The federal government took no part in the process of selecting the Jackson Park site as the location for the Center, nor did it participate in the design of the campus. The City did not need federal approval to close portions of existing roads in Jackson Park. But the project was not entirely clear of federal legal obligations. The choice of Jackson Park triggered five mandatory federal reviews: (1) one by the Federal Highway Administration ("Highway Administration") pursuant to section 4(f) of the Department of Transportation Act of 1966 ("Transportation Act"), see 49 U.S.C. § 303; (2) a joint **environmental assessment** by the National Park Service ("the Park Service") and the U.S. Department of Transportation pursuant to the National Environmental Policy Act ("NEPA"), see 40 C.F.R. § 1501.4 (2019); (3) a review by the Park Service under the Urban Park and Recreation Recovery Act ("UPARR Act"), see 54 U.S.C. §§ 200501–200511; (4) a review by the Highway Administration pursuant to section 106 of the National Historic Preservation Act ("NHPA"), see 54 U.S.C. § 306108; and (5) a review by the United States Army Corps of Engineers of the City's requests for a section 408 permit, see 33 U.S.C. § 408, and a permit to fill less than an acre of navigable waters temporarily, see 33 U.S.C. § 1344(a).

We thoroughly examined each of those agency reviews in *POP III*. See 39 F.4th at 393–96. None of the parties has pointed to any flaw in the recitation of the facts we drew from the administrative record and set forth in that decision. Indeed, the parties jointly stipulated that there are no pertinent facts other than those in the administrative record and there are no disputes of material fact relevant to the legal theories before us. Thus, rather than restate undisputed facts, we simply assume familiarity with this portion of *POP III*.

D. Procedural History

1. *POP I*

In 2018, POP (along with a few others not involved with this case) launched a lawsuit arguing that the plan for the Center violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. When that lawsuit came before this court, we affirmed the district court's grant of summary judgment for the defendants on the constitutional theories, but we vacated judgment on the state-law theories and dismissed them without prejudice because POP had not suffered an injury in fact and thus lacked Article III standing. See *POP I*, 971 F.3d at 728.

2. *POP II*

No sooner was the ink dry on *POP I* when POP joined forces with others who share its opposition to the Jackson Park site: Nichols Park Advisory Council, which is an Illinois not-for-profit organization that shares POP's mission of advocating for public parks, and five individuals who reside in Chicago and who have long used and appreciated the aesthetic beauty of Jackson Park. POP and its new allies initiated the present action in April 2021 against the City and the Park District (collectively, "the City"), the Foundation, and a group of federal and state officers. The individual defendants, all of whom ***1086** were sued only in their official capacities,[1] are Pete Buttigieg, the Secretary of Transportation; Shailen Bhatt, the Administrator of the Highway Administration; the Environmental Programs Engineer of the Illinois Division of the Highway Administration;[2] Deb Haaland, the Secretary of the Interior; Frank Lands, the Deputy Director of Operations of the National Park Service; Christine Wormuth, the Secretary of the Army; and Kenneth Rockwell, the Commander of the Chicago District of the Army Corps of Engineers.

POP relied on the Administrative Procedure Act, 5 U.S.C. § 702, for seven of the fifteen counts in its new complaint. Those counts raised the following theories: (1) the City, the Foundation, and the Highway Administration defendants violated section 4(f) of the Transportation Act (Count I); (2) all federal defendants violated NEPA (Count II); (3) the City, the Foundation, the Park Service, and the Department of Interior violated the UPARR Act (Count III); (4) all defendants violated section 106 of the NHPA (Count IV); (5) the City and the Army Corps violated section 408 of the Rivers and Harbors Act, 33 U.S.C. § 408, and section 404 of the Clean Water Act, *id.* § 1344 (Count V); (6) all defendants violated Article I, Section 1 of the United States Constitution (Count X); and (7) all defendants violated section 110(k) of the NHPA, 54 U.S.C. § 306113 (Count XIV).

The other eight counts allege violations of various state laws: the public-trust doctrine (Count VI); the prohibition on *ultra vires* actions (Count VII); Article VIII, Section 1 of the Illinois Constitution (Count VIII); the Takings Clause of the Illinois Constitution (Count IX); Article II, Section 1 of the Illinois Constitution, which prohibits improper delegations of authority (Count XI); Article I, Section 2 of the Illinois Constitution (Count XII); Article I, Section 16 of the Illinois Constitution (Count XIII); and the Illinois State Agency Historic Preservation Resources Act, 20 ILCS 3420/1 (Count XV). Those counts fall within the district court's supplemental jurisdiction. See 28 U.S.C. § 1367.

Soon after filing its complaint, and just days before the Foundation was scheduled to break ground on the Center, POP moved for a preliminary injunction based on the federal-law theories. It insisted that construction of the Center in Jackson Park had to be enjoined because the federal review process fell short—woefully so, in its view—of the statutory requirements. The district court concluded that POP was unlikely to prevail on the merits of its contentions and promptly denied its motion. POP then turned to us, seeking a preliminary injunction pending appeal, but, finding that POP had not shown the necessary likelihood of success on the merits, we denied this interim relief. See *POP II*, 10 F.4th at 763.

3. *POP III*

POP then moved ahead with its appeal of the district court's order denying its motion for a preliminary injunction. See 28 U.S.C. § 1292(a)(1). After full briefing and oral arguments, we held that POP failed to make "at least ... a 'strong' showing of likelihood of success ... under any of the ***1087** theories it ... invoked." *POP III*, 39 F.4th at 397. POP's principal theory was that the federal agencies' decision not to prepare a full-blown environmental impact statement for purposes of NEPA (as opposed to a more abbreviated **environmental assessment**, which was done) was arbitrary and capricious. It was unlikely to succeed on this theory, we said, because

"the record shows that the Park Service and Department of Transportation took the necessary hard look at the likely environmental consequences of the project before reaching their decisions." *Id.* at 398. The agencies had "thoroughly studied the project through the lens of the required regulatory factors before reaching their decision that no environmental impact statement was required," and so, we concluded, their decision "implicates substantial agency expertise and is entitled to deference." *Id.* at 399 (quotation omitted).

POP's second theory was that the Park Service and the Department of Transportation were under an obligation imposed by NEPA to evaluate alternative locations for the Center throughout Chicago. The agencies had avoided this alleged requirement, POP contended, by treating the City's selection of Jackson Park as a given. It saw the Department's decision not to question the selection of the Jackson Park site as an unlawful "segmentation" of the project to make the environmental impact appear smaller.

We concluded that this argument was "fatally flawed for three reasons." *Id.* "First, NEPA reaches only major federal actions, not actions of non-federal actors," and because "[t]he Center was not a federal project, ... no federal agency had the authority to dictate to the [Foundation or the City] where the Center would be located." *Id.* Second, POP failed to establish causation. We explained that "NEPA requires agencies to consider only environmental harms that are both factually and proximately caused by a relevant federal action." *Id.* Notably, "the federal government has no authority to choose another site for the Center or to force the City to move the Center, and so no federal action was a proximate cause of any environmental harms resulting from the choice of Jackson Park." *Id.* at 400. Finally, we said that POP "ignore[d] the 'reasonable' half of the reasonable-alternatives requirement" because "[i]t would be unreasonable to require agencies to spend time and taxpayer dollars exploring alternatives that would be impossible for the agency to implement." *Id.*

The same problems undermined many of POP's other theories. For example, it argued that the Highway Administration should have evaluated alternative locations for the Center when conducting its section 4(f) review. But the Highway Administration's decision to take the location of the Center as a given was not arbitrary and capricious because the agency "could not have compelled the City to locate the Center at a different site." *Id.* at 401. POP's other arguments suffered from the same flaw. Thus, after thoroughly reviewing the administrative record and addressing each of POP's arguments, we concluded that the district court had properly denied its request for a preliminary injunction.

4. Events Following *POP II*

A few things happened between the time POP filed its interlocutory appeal and the date of our decision in *POP III*. In August 2021, the Foundation broke ground on the project. The construction in Jackson Park continues to this day. Press reports indicate that the Foundation expects the Center to be completed by late 2025. See, *e.g.*, Lynn Sweet, *Halfway Built, the Obama Presidential Center Is Already a South* ***1088** *Side Landmark*, CHICAGO SUN TIMES (Oct. 13, 2023).

Back in the district court, there were two important developments. First, the City and the Foundation filed a motion to dismiss the state-law counts for failure to state a claim. See FED. R. CIV. P. 12(b)(6). Second, after the motion to dismiss was briefed and argued but before the court ruled on it, POP sought leave to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a). It wanted to add breach-of-contract and unjust-enrichment theories against the City and the Foundation, on the ground that two conditions precedent of the Master Agreement had not been satisfied. The district court concluded that the two theories would be futile because POP had no enforceable rights under the Master Agreement; it accordingly denied leave. About three months later, the court granted the motion to dismiss the state-law counts.

Following this dismissal and our mandate in *POP III*, the parties submitted a joint stipulation to the district court. As we noted earlier, they agreed that all pertinent facts could be found in the administrative record and that no additional briefing was necessary beyond what was submitted at the preliminary-injunction stage. They also requested a final judgment on the federal-law counts in favor of the defendants in order to pave the way for appellate review. The district court adopted the parties' proposed order and entered final judgment for the defendants.

POP now appeals the judgments dismissing its state-law theories and awarding summary judgment to the defendants

on the federal-law counts, as well as the district court's order denying leave to amend. We address these rulings in reverse sequence.

II. The Motion to Amend

[1] POP filed its motion to amend in November 2021, seven months after its initial complaint. The amendment would have added two additional state-law theories against the City and the Foundation. The first asserts that the City violated the Master Agreement because the conditions precedent to the transfer of parkland to the Foundation set out in sections 12(h) and 12(j) were not satisfied; the second attempts to raise an unjust-enrichment claim predicated on that failure. The district court denied the request, concluding that amendment would be futile because the Master Agreement does not confer legally enforceable rights on any of the plaintiffs. We review that decision for abuse of discretion. See *Johnson v. Cypress Hill*, 641 F.3d 867, 871 (7th Cir. 2011).

[2] Once the time for amendments as a matter of course has expired, a party may amend its complaint only with leave from the district court or written consent of the adverse parties. See FED. R. CIV. P. 15(a)(2). Although a district "court should freely give leave when justice so requires," *id.*, "leave to amend is not to be automatically granted," *Johnson v. Methodist Medical Center of Illinois*, 10 F.3d 1300, 1303 (7th Cir. 1993), and "[a] district court does not abuse its discretion in denying a motion to amend when amending the pleading would be a futile act," *Wilson v. Am. Trans Air, Inc.*, 874 F.2d 386, 392 (7th Cir. 1989). An amendment would be futile "if the amended pleading could not survive a motion for summary judgment." *Wilson*, 874 F.2d at 392.

POP's first new theory, as we said, focuses on sections 12(h) and 12(j) of the Master Agreement. Section 12(h) provides that the Foundation must certify in writing that it has sufficient funds to cover the cost of constructing the Center; 12(j) requires ***1089** the Foundation to establish an endowment to operate, enhance, and maintain the Center for the duration of the lease term set forth in the Use Agreement. According to POP, neither of these conditions was satisfied by the time construction of the Center began. As we noted earlier, the Master Agreement authorizes the City to waive any conditions precedent to the contract, but no one suggests that the City pursued this option.

[3] Even assuming, as we must, that the requirements of sections 12(h) and (j) have not been satisfied, POP's breach-of-contract theory is still futile. It is a "rather vanilla statement of contract law" that "a cause of action based on a contract may be brought only by a party to that contract, by someone in privity with such a party, or by an intended third-party beneficiary of the contract." *Northbound Group, Inc. v. Norvax, Inc.*, 795 F.3d 647, 651 (7th Cir. 2015) (quotation omitted). The Master Agreement is a contract between only the City and the Foundation: the plaintiffs play no part in it.

[4] Neither can POP point to any rights as a third-party beneficiary of the Master Agreement. "Illinois law holds a strong presumption against creating contractual rights in third parties, and this presumption can only be overcome by a showing that the language and circumstances of the contract manifest an affirmative intent by the parties to benefit the third party." *Estate of Willis v. Kiferbaum Const. Corp.*, 357 Ill.App.3d 1002, 294 Ill.Dec. 224, 830 N.E.2d 636, 642–43 (2005) (citing *Bates & Rogers Const. Corp. v. Greeley & Hansen*, 109 Ill.2d 225, 93 Ill.Dec. 369, 486 N.E. 2d 902 (1985)). Section 34 of the Master Agreement states that the contract confers no benefits upon non-parties, thereby expressly disavowing any intention to confer contractual rights on POP and its co-plaintiffs.

[5] POP does not argue that general principles of contract law provide the necessary enforceable rights. Rather, it argues that it can enforce the terms of the Master Agreement because the plaintiffs are municipal taxpayers and residents. POP contends that *Malec v. City of Belleville*, 384 Ill.App.3d 465, 322 Ill.Dec. 748, 891 N.E.2d 1039 (2008), supports this theory. We read that case differently. *Malec* is one of several cases holding that, under Illinois law, " 'a taxpayer has standing to bring suit, even in the absence of a statute, to enforce the equitable interest in public property which he claims is being illegally disposed of.' " *Id.*, 322 Ill.Dec. 748, 891 N.E.2d at 1042 (quoting *Martini v. Netsch*, 272 Ill.App.3d 693, 208 Ill.Dec. 974, 650 N.E.2d 668, 670 (1995)). Those cases might allow a taxpayer to challenge a land use that violates state or municipal law, see *id.*, 322 Ill.Dec. 748, 891 N.E.2d at 1042–43, but they do not establish that an alleged violation of a municipal contract is grounds for a taxpayer suit. *Malec* does not recognize a cause of action that would

allow a plaintiff to challenge a land use made in violation of a contract to which it is not a party. POP has not directed us to any authority that supports its position, and so it would be futile for it to add the proposed breach-of-contract claim.

[6] **[7]** Perhaps recognizing that its first theory falls short, POP suggests an alternative theory that we charitably will call unusual. It tells us that its self-styled breach-of-contract claim is actually a "taxpayer derivative action," and that it is merely trying to enforce contractual rights belonging to the City. While we appreciate POP's creativity in this respect, we are unable to connect this new line of argument with the claim POP described in the proposed amended complaint. Illinois courts do allow a taxpayer to bring suit ***1090** "on behalf of a local governmental unit to enforce a cause of action belonging to the local governmental unit." *Scachitti v. UBS Fin. Servs.*, 215 Ill.2d 484, 294 Ill.Dec. 594, 831 N.E.2d 544, 550 (2005). But recovery must run in favor of the local government. See *Feen v. Ray*, 109 Ill.2d 339, 93 Ill.Dec. 794, 487 N.E.2d 619, 621 (1985). Here, POP seeks relief *against* the City (which is a defendant-appellee in this case, and which is having no trouble speaking for itself). The lack of a relation between the relief requested in the amended pleading, on the one hand, and the nature of a taxpayer derivative suit, on the other, shows that this theory would not so much recharacterize the claim as it would transmogrify it. Because POP's proposed complaint is inconsistent with this new theory, it does not belong in the case. See *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996).

[8] **[9]** POP's second proposed new theory is also doomed. Under Illinois law, unjust enrichment "is a condition that may be brought about by unlawful or improper conduct as defined by law." *Alliance Acceptance Co. v. Yale Ins. Agency, Inc.*, 271 Ill.App.3d 483, 208 Ill.Dec. 49, 648 N.E.2d 971, 977 (1995) (quotation omitted). A party may not dress up an unsuccessful contract claim in the garb of unjust enrichment, but that is what POP is doing here. Its unjust-enrichment claim cannot stand on its own: "the request for relief based on unjust enrichment is tied to the fate of the [breach-of-contract] claim." *Vanzant v. Hill's Pet Nutrition, Inc.*, 934 F.3d 730, 740 (7th Cir. 2019). The district court acted well within its discretion when it denied leave to amend.

III. The Federal-Law Theories

[10] We now turn to familiar ground: POP's federal-law arguments. The district court awarded summary judgment to the defendants on all seven of those counts. On appeal, POP has presented adequate arguments challenging the rulings on only three of them. (We briefly address its four other points in Part V of this opinion.) We evaluate the district court's ruling *de novo*, construing the record in the light most favorable to POP and drawing all reasonable inferences in its favor. See *Burton v. Downey*, 805 F.3d 776, 783 (7th Cir. 2015).

A. Application of Law of the Case

As we noted at the outset, we covered much of this territory in *POP III*, where we concluded that POP had failed to establish a strong likelihood of success on the merits. See 39 F.4th at 397. With that decision in hand, the defendants urge us to conclude that *POP III* establishes the law of the case.

[11] **[12]** **[13]** "The law of the case doctrine is a rule of practice, based on the sound policy that, when an issue is once litigated and decided, that should be the end of the matter." *Tully v. Okeson*, 78 F.4th 377, 380 (7th Cir. 2023) (cleaned up). It "establishes a presumption that a ruling made at one stage of a lawsuit will be adhered to throughout the suit." *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995). Nonetheless, the rule is neither "a straitjacket," *id.*, nor "hard and fast," *Tice v. Am. Airlines, Inc.*, 373 F.3d 851, 854 (7th Cir. 2004). The strength of the presumption "varies with the circumstances." *Avitia*, 49 F.3d at 1227.

POP argues that the law-of-the-case rule has no force here because *POP III* was a preliminary-injunction ruling. As it sees things, a court may apply the doctrine only if its prior ruling was a final judgment on the merits. This argument misunderstands the doctrine.

It is true that in many circumstances it is inappropriate to allow a decision granting ***1091** or denying a preliminary injunction to supply the law of the case in a later appeal. See, *e.g.*, *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951); *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277 (7th Cir. 1998). We noted in *Thomas*

two reasons why "[a] court must be cautious in adopting findings and conclusions from the preliminary injunction stage in ruling on a motion for summary judgment." 138 F.3d at 292 (quotation omitted). First, "findings of fact and conclusions of law made at the preliminary injunction stage are often based on incomplete evidence and a hurried consideration of the issues." *Id.* Second, "different standards apply in the two contexts (reasonable likelihood of success on an injunction, and the existence of any genuine issues of material fact on summary judgment)." *Id.* As we have noted elsewhere, "a less-than-developed record, a short timeline, and a concomitant truncated legal analysis ... usually counsel against invoking the law of the case doctrine in a way that would preclude a full merits determination." *Tully*, 78 F.4th at 381.

[14] But "rarely" does not mean "never." We, like our sister circuits, have recognized that "this general rule does not apply to 'a fully considered appellate ruling on an issue of law made on a preliminary injunction appeal.' " *Id.* (cleaned up and quoting 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478.5 (3d ed. 2019)); see also *Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015) (collecting cases from other courts of appeals). In other words, where the concerns we have discussed are not present, an earlier legal conclusion underlying a ruling on a motion for a preliminary injunction may establish the law of the case.

[15] This case falls comfortably into that exception to the general rule. We had ample time in *POP III* to consider the identical record that is now before us, and so there are no new facts we must incorporate. The legal issues have also remained the same. These were litigation choices POP made. All it has done during this round is to present the same legal arguments that we rejected in *POP III* and to insist that our earlier conclusions of law were erroneous. Its arguments are no more persuasive now than they were then.

[16] In the interest of completeness, however, we are willing to consider whether POP has offered any reason that would justify our setting aside those earlier legal conclusions. A party is "free to argue that an intervening change in law or other changed or special circumstance warrants a departure" from law of the case. *Tice*, 373 F.3d at 854. We have identified various circumstances in which the court ought not to follow the law of the case, such as when there is "a decision of the Supreme Court [or of this court sitting *en banc*, see *Kathrein v. City of Evanston*, 752 F.3d 680, 685–86 (7th Cir. 2014),] after the first review that is inconsistent with the decision on that review ... [or] a conviction on the part of the second reviewing court that the decision of the first was clearly erroneous." *Chicago & N.W. Transp. Co. v. United States*, 574 F.2d 926, 930 (7th Cir. 1978).

We can find no decision of either this court or the Supreme Court that both post-dates and is inconsistent with our ruling in *POP III*. POP draws our attention to several decisions in which the Supreme Court has invoked the so-called "major questions" doctrine. See *Am. Hosp. Ass'n v. Becerra*, 596 U.S. 724, 142 S.Ct. 1896, 213 L.Ed.2d 251 (2022); *Becerra v. Empire Health Foundation*, 597 U.S. 424, 142 S.Ct. 2354, 213 L.Ed.2d 685 (2022); *West Virginia v. EPA*, 597 U.S. 697, 142 S.Ct. 2587, —— L.Ed.2d —— (2022). It argues that judicial deference to administrative ***1092** agencies is now disfavored. That may be so (we have no need to express a view on the matter), but POP does not argue that this case presents a major question, nor has it drawn any other connection between this supposed general legal development and the issues raised in this case. It has not, for example, suggested that those cases changed the way courts review claims under the Administrative Procedure Act. And in any event, each of those decisions was issued before our decision in *POP III*, and so they do not present the kind of unusual circumstances that warrant displacing the presumption that law of the case applies.

In a last gasp, POP also contends that our decision in *POP III* was clearly erroneous. See *Agostini v. Felton*, 521 U.S. 203, 236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) ("The doctrine does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice." (cleaned up)). Rehearsing the same arguments that we heard and rejected in our earlier ruling, it urges us to reverse course and accept them this time around. We decline the invitation. Far from finding "manifest error" in our earlier analysis, *Tully*, 78 F.4th at 381 (quotation omitted), our fresh look at the matter convinces us that *POP III* was correctly decided. Our earlier ruling therefore controls the federal-law theories on appeal. We could stop there, but for the sake of completeness, we summarize our key findings on POP's principal federal theories.

B. NEPA (Count II)

As in *POP III*, POP argues that the defendants violated NEPA in three distinct ways. It first says that the federal agencies were required to prepare an environmental impact statement, rather than an **environmental assessment**. Their decision that the assessment was enough was arbitrary and capricious in POP's estimation, because the project requires the City to remove approximately 800 trees that provide nesting spaces for local and migratory birds, and it will affect an historically and culturally significant area. This argument fails for several reasons.

[17] **[18]** **[19]** First, it misunderstands what NEPA is supposed to do. " 'The only role' for a court in applying the arbitrary and capricious standard in the NEPA context 'is to insure that the agency has taken a "hard look" at environmental consequences.' " *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 953 (7th Cir. 2003) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976)) (alteration omitted). In other words, NEPA is a process statute, not one that imposes enforceable environmental standards. As we explained in *POP III*, the administrative record shows that "the agencies were very thorough." 39 F.4th at 398. The **environmental assessment** includes, among other things, a Natural Resources Technical Memorandum that discusses the habits of migratory birds and how the project will affect their nests, as well as a Tree Technical Memorandum that considers each species of tree that will be cut down to build the Center.[3] After reviewing each of these effects, the agencies concluded that none would have a significant impact. The **environmental assessment** thus confirms that the agencies took the necessary hard look at the likely environmental impact before reaching a decision. Having found and explained that "the proposed action will not significantly affect the environment," the agencies were not also required to prepare the more elaborate environmental impact statement. ***1093** *Indiana Forest Alliance, Inc. v. United States Forest Service*, 325 F.3d 851, 856 (7th Cir. 2003).

Second, POP argues that the agencies unlawfully segmented their NEPA review. Segmentation " 'allows an agency to avoid the NEPA requirement that an [environmental impact statement] be prepared for all major federal action with significant environmental impacts by segmenting an overall plan into smaller parts involving actions with less significant environmental effects.' " *Mineta*, 349 F.3d at 962 (quoting *City of West Chicago v. United States Nuclear Regulatory Comm'n*, 701 F.2d 632, 650 (7th Cir. 1983)). In an effort to prove that the agencies unlawfully segmented the project when reviewing it, POP points solely to the fact that the Foundation's selection of the Jackson Park site requires the City to close some roadways and construct new ones using federal highway funds.

[20] The City's plan to use federal funds to construct new roads near the site does not have the implications POP believes that it does. NEPA covers only "major Federal actions." 42 U.S.C. § 4332(2)(C); see also *Mineta*, 349 F.3d at 962. The project is a local, not a federal, initiative. The federal agencies had (and have) no control over where the Center is being built, and NEPA imposes no requirement that they oversee the Foundation's or the City's actions. For that reason too, this argument fails; we need not restate the many other problems with it. See *POP III*, 39 F.4th at 399.

[21] POP's third contention is that NEPA required the federal agencies to consider alternative sites for the Center. This argument suffers from the same flaws as the last two. The federal agencies lacked the authority to dictate where the Center would be located, and so it would be unreasonable of them to waste time and resources exploring potential alternative sites. The federal agencies did all that NEPA required of them.

C. Transportation Act (Count I)

POP makes much the same reasonable-alternatives argument in support of its assertion that the City, the Foundation, and the Highway Administration defendants violated section 4(f) of the Transportation Act. Under that section, the Department of Transportation may approve a "transportation program or project" in a public park only if "(1) there is no prudent and feasible alternative to using the land; and (2) the program or project includes all possible planning to minimize harm to the park ... or historic site[.]" 49 U.S.C. § 303(c). According to POP, section 4(f) required the defendants to consider reasonable alternatives to the Jackson Park site.

[22] Its view is mistaken. The Highway Administration had no authority either to tell the Foundation to build the Center somewhere else or to forbid the City from authorizing that location. As we explained in *Old Town Neighborhood Association, Inc. v. Kauffman*, "[e]ntities that proceed on their own dime need not meet conditions for federal assistance or approval." 333 F.3d 732, 736 (7th Cir. 2003). POP points out that the project in *Old Town* did not involve the use of federal funds. But the federal agencies did not somehow acquire the authority to approve or deny the Jackson Park site through the City's request for road-building funds. The only difference that the request makes is that it required the Highway Administration to conduct federally mandated reviews. The agency was entitled to take the Jackson Park site as a given when carrying out its duties.

D. NHPA (Count IV)

[23] POP's NHPA claim is the last of the federal-law theories. It argues yet ***1094** again that a federal agency —here again, the Highway Administration—was required to consider alternative sites for the Center. The Highway Administration conducted a review pursuant to section 106 of NHPA, which is a procedural statute that requires agencies to "take into account the effect of the[ir] undertaking[s] on any historic property." 54 U.S.C. § 306108. Like NEPA, section 106 applies only to federal projects, not to local work such as the Foundation's plan to build the Center with the City's assistance. For that reason, and because the Highway Administration followed the procedural requirements of section 106, the defendants were entitled to summary judgment on this count.

IV. State-Law Theories

[24] We arrive, finally, at POP's supplemental state-law theories. Upon a motion by the state defendants, the district court dismissed all eight of them pursuant to Federal Rule of Civil Procedure 12(b)(6). POP now appeals that decision, but we deem it necessary to discuss only two grounds. In so doing, we take a fresh look at the district court's decision to dismiss those two theories, accepting all well-pleaded factual allegations in the complaint as true and drawing all reasonable inferences in POP's favor. See *St. John v. Cach, LLC*, 822 F.3d 388, 389 (7th Cir. 2016). To survive a motion to dismiss, "the complaint must state a claim that is plausible on its face," *id.* (quotation omitted), which means that the "factual content [must allow us] to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

A. The Public Trust (Count VI)

POP's primary state-law contention rests on the public-trust doctrine, which, it alleges, was violated by the actions of the City and the Foundation. It argues that Jackson Park is public-trust property under Illinois law, and, drawing an analogy to private trust law, that the City is akin to a trustee subject to fiduciary duties. The City breached its fiduciary duties, says POP, by transferring a portion of its parkland to the Foundation and giving the Foundation control over it.

Although we had no occasion to resolve POP's public-trust theory in *POP I*, we did explain the contours of the doctrine upon which it rests. In brief, "the public trust doctrine, established in American law by *Illinois Central Railroad Co. v. Illinois*, [146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892),] prohibits a state from alienating its interest in public lands submerged beneath navigable waterways to a private party for private purposes." 971 F.3d at 729. As originally formulated in *Illinois Central*, the doctrine permitted a state to "alienate publicly owned submerged land to a private party [only] if the property will be 'used in promoting the interests of the public' or 'can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.' " *Id.* (quoting *Illinois Central*, 146 U.S. at 453, 13 S.Ct. 110).

[25] The public-trust doctrine has evolved in Illinois so that it now applies to a broader swath of lands. Thus, as an Illinois appellate court has explained, although the doctrine applies to "mostly submerged land under Lake Michigan or the Chicago River," it extends also to "parks" and "conservation areas." *Timothy Christian Schools v. Village of Western Springs*, 285 Ill.App.3d 949, 221 Ill.Dec. 261, 675 N.E. 168, 174 (1996). What matters is that land has been acquired and dedicated for a public purpose "by the sovereign," at which point "the agencies created by [the sovereign] hold the properties in trust for the uses and purposes specified and for the benefit

of ***1095** the public." *Paepcke v. Public Bldg. Comm'n of Chicago*, 46 Ill.2d 330, 263 N.E.2d 11, 15 (1970).

[26] Illinois courts have developed a three-part test for determining whether a plaintiff may prevail on an alleged public-trust violation:

> [T]o state a cause of action under the public trust doctrine, facts must be alleged indicating that: certain property is held by a governmental body for a given public use; the governmental body has taken action that would cause or permit the property to be used for a purpose inconsistent with its originally intended public use; and such action is arbitrary or unreasonable.

Paschen v. Village of Winnetka, 73 Ill.App.3d 1023, 29 Ill.Dec. 749, 392 N.E.2d 306, 309–10 (1979); see also *Timothy Christian Schools*, 221 Ill.Dec. 261, 675 N.E.2d at 174. The parties agree that Jackson Park is public-trust land that has never been submerged, and that the Park District was created to administer it for the benefit of the public. See 1 THE LAWS OF THE STATE OF ILLINOIS 1869, at 360; 70 ILCS 1505/1. Their disagreement turns on whether the construction of the Center and the formation of agreements allowing the Foundation to maintain the Center violate the requirement that the parkland be put to a public use.

[27] **[28]** We observed in *POP I* that a "[d]edication to a public purpose isn't an 'irrevocable commitment,' and judicial review of any reallocation is deferential, particularly if the land in question has never been submerged." 971 F.3d at 730 (cleaned up and quoting *Paepcke*, 263 N.E.2d at 16). When a reallocation of trust land to a new public purpose is challenged, " '[t]he courts can serve only as an instrument of determining legislative intent as evidenced by existing legislation measured against constitutional limitations.' " *Friends of Parks v. Chicago Park Dist.*, 203 Ill.2d 312, 271 Ill.Dec. 903, 786 N.E.2d 161, 170 (2003) (quoting *Paepcke*, 263 N.E.2d at 21). So long as constitutional limitations are not transgressed, our role is limited to ensuring that "there has been a sufficient manifestation of legislative intent to permit the diversion and reallocation contemplated by the plan." *Paepcke*, 263 N.E.2d at 18.

The Illinois General Assembly expressly permitted the construction and operation of presidential centers in parks held in the public trust with the passage of the Museum Act. See 70 ILCS 1290/1. That law authorizes cities and park districts "to purchase, erect, and maintain within any such public park or parks edifices to be used as ... museums ..., including presidential libraries, centers, and museums[.]" *Id.* The Museum Act also permits municipalities to contract with certain private entities to erect, maintain, and operate presidential centers. *Id.* In enacting this legislation, the General Assembly "reaffirmed and found that the ... museums [ ] described in this Section, and their collections, exhibitions, programming, and associated initiatives, serve valuable public purposes[.]" *Id.* Among those purposes are "furthering human knowledge and understanding, educating and inspiring the public, and expanding recreational and cultural resources and opportunities." *Id.*

[29] We have no doubt that the Center falls within this legislative grant of authority. As part of its efforts to honor the legacy of the nation's first Black president, the Center will feature records and artifacts from that president's administration and offer educational programming and initiatives to the public. It was also within the City's authority to contract with the Foundation, which was "organized for the construction [and] maintenance and operation of" the Center. *Id.* The Museum Act, ***1096** coupled with the intended use of the Center and the City's existing arrangements with the Foundation, is enough to satisfy us that the portion of Jackson Park set aside for the Center will continue to serve a public purpose, as Illinois's public-trust doctrine requires.

POP does not dispute that the Center will bring these benefits to the public. Instead, it argues that we must apply some form of heightened scrutiny to the proposed land use, because, in its view, the Use Agreement and the Master Agreement were flawed transactions. In POP's telling, these transactions somehow undermine the Center's eligibility for public-trust treatment, because the doctrine incorporates well-established fiduciary duties from private trust law. But POP supports this theory with just two sources: a law review article that does not discuss the public-trust doctrine in Illinois and a decision from a New York state trial court. It has not directed

us to any decision from an Illinois court recognizing this theory, nor have we found such a case. That is the end of it. POP brought this contention to federal court under the supplemental jurisdiction, 28 U.S.C. § 1367, and so we are bound to apply the existing law of Illinois, not whatever POP hopes Illinois law may someday be. See *id.* § 1652; see also *Felder v. Casey*, 487 U.S. 131, 151, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988).

Changing tacks, POP argues that the General Assembly had no authority to modify the public purpose that originally supported the establishment of Jackson Park. It points to a passage in *Paepcke* that "refer[s] to the approach developed by the courts of ... Wisconsin, in dealing with diversion [of public-trust land] problems." 263 N.E.2d at 19. The approach to which *Paepcke* refers involves the application of five factors, one of which is to consider whether "the public uses of the original area would be destroyed or greatly impaired" by the proposed reallocation. *Id.* But that language is plainly *dicta*: the court referred to the Wisconsin approach only "[i]n passing," and it stated that the approach was "not controlling" and only "a useful guide for future administrative action." *Id.* More recent cases confirm this understanding of *Paepcke*. In *Friends of Parks v. Chicago Park District*, for example, the Supreme Court of Illinois understood *Paepcke* as we have here, without mentioning the passage POP seizes on. See 271 Ill.Dec. 903, 786 N.E.2d at 170.

[30] Finally, although POP has not alleged any specific profits that the Foundation will receive, we assume that the Foundation will benefit from maintaining and operating the Center. But under Illinois law, benefit to a private organization does not by itself violate the public-trust doctrine. See *id.* The doctrine would of course be violated if "the direct and dominating purpose here would be a private one" or if "the public purpose to be served [would] be only incidental and remote." *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill.2d 65, 4 Ill.Dec. 660, 360 N.E.2d 773, 781 (1976). But, as we have explained, the General Assembly determined that the main purpose of museums such as the Center is to benefit the public and there is nothing in the record that suggests otherwise. POP's allegations suggest at most that any "benefit to private interest [is] to further [the] public purpose and [is] incidental to the public purpose." *Id.* (discussing *People ex rel. Moloney v. Kirk*, 162 Ill. 138, 45 N.E. 830 (1896), which upheld a grant of submerged land to a private organization because the benefits to that organization were incidental to the public purpose). It is not our role to second-guess the re-purposing of a portion of Jackson Park for that new use, especially because the park was never submerged in navigable waters. ***1097** Compare *Paepcke*, 263 N.E.2d 11 (never submerged land), with *Scott*, 4 Ill.Dec. 660, 360 N.E.2d 773 (submerged land). For all these reasons, POP has failed to state a plausible public-trust claim.

B. Improper Delegation (Count XI)

POP also argues that the City unlawfully delegated its authority to fix the location of the Center to the Foundation in violation of Article II of the Illinois Constitution, which provides that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST., art. II, § 1. Its "smoking-gun" evidence appears in a recital in the 2015 Ordinance: "Whereas, while the City Council is confident in the quality and thoroughness of both UIC's and [the University of] Chicago's proposals, the City defers to the sound judgment of the President and his Foundation as to the ultimate location of the Presidential Library[.]" POP sees further proof of unlawful delegation in the City's decision to defer to the Foundation's preferred location for the Center.

[31] **[32]** Under Illinois law, "the legislature cannot delegate its legislative power to determine what the law should be." *East St. Louis Fed. of Teachers, Local 1220 v. East St. Louis Sch. Dist. No. 189*, 178 Ill.2d 399, 227 Ill.Dec. 568, 687 N.E.2d 1050, 1063 (1997). Nevertheless, it "may delegate the authority to do those things it might properly do, but cannot do as understandably or advantageously, if the authority that is granted is delineated by intelligible standards." *R.L. Polk & Co. v. Ryan*, 296 Ill.App.3d 132, 230 Ill.Dec. 749, 694 N.E.2d 1027, 1033 (1998) (citations omitted). Although this rule usually is invoked when the legislature confers authority upon an executive agency, it also has been applied when authority is delegated to a private organization. See, *e.g.*, *People v. Pollution Control Bd.*, 83 Ill.App.3d 802, 38 Ill.Dec. 928, 404 N.E.2d 352, 356 (1980). Even though the Illinois courts have not formulated extensive principles "on the question of delegation of legislative power to private parties," *id.*, they consistently have held that legislative bodies may not confer upon private organizations the authority to "decide what the law shall be," *People ex*

rel. Chicago Dryer Co. v. City of Chicago, 413 Ill. 315, 109 N.E.2d 201, 204 (1952).

[33] We find no possible (let alone plausible) problem with delegation in POP's complaint. The recital at the heart of its allegations does not delegate anything; it is merely a statement by the City acknowledging that the Foundation was conducting a nationwide search for a location for the Center and expressing its desire that the site be in Chicago. A look at another recital in the 2015 Ordinance confirms that the City did not delegate any authority to the Foundation. It states that "the City will introduce a separate ordinance authorizing the development, construction and operation of the Presidential Center on the Selected Site, if [the University of] Chicago's proposal is selected[.]" The City did exactly that when it approved the plan and passed the 2018 Ordinance.

POP apparently takes issue with that process as well, but it cites no authority supporting the notion that preparing a project proposal is a legislative function, let alone a power that may not be delegated. And the fact that the City ultimately approved the location is evidence that it, not the Foundation, exercised the legislative function of authorizing the proposed development. Because POP's complaint contains no allegations of wrongful delegation, it fails to state a claim under the ***1098** separation-of-powers clause of the Illinois Constitution.

V. Remaining Theories

As we have now said several times, POP's complaint is chock-full of alternate legal theories, all directed at the same end: stop the Center and restore Jackson Park to its previous condition. We have discussed every approach that was adequately developed in the briefs, but there are still more. Four of the remaining theories (Counts III, V, X and XIV) are based on federal law: the UPARR Act; section 408 of the Rivers and Harbors Act and section 404 of the Clean Water Act; Article 1, Section 1, of the United States Constitution; and section 110(k) of the NHPA, respectively. Each of the other six theories (Counts VII, VIII, IX, XII, XIII, and XV) alleges a violation of Illinois law. The district court rejected all ten. On appeal, POP insists that it is actively pursuing all fifteen. Yet its briefs say hardly a word about the remaining ten, and so we will be equally brief with them.

[34] "An appellant who does not address the rulings and reasoning of the district court forfeits any arguments he might have that those rulings were wrong." *Hackett v. City of South Bend*, 956 F.3d 504, 510 (7th Cir. 2020). The briefs are entirely silent on Counts III, V, IX, XII, XIV, and XV, which means that POP has forfeited any challenges to the district court's rulings on those theories. See *Klein v. O'Brien*, 884 F.3d 754, 757 (7th Cir. 2018).

POP devotes a little space to Count VII, which alleges an *ultra vires* claim against the City, and so, therefore, will we. It describes three allegedly unlawful acts, but it does not identify a law that was violated or otherwise explain how the City acted unlawfully. Because POP's contentions in this connection are "unsupported by pertinent authority," *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991), they have been forfeited.

Last, we have Counts VIII, X, and XIII. The single sentence POP offers to support the first and last of these is representative of the way it treats all three: "as Plaintiffs' constitutional claims in Counts VIII and XIII rely upon the transfer and the sham nature of the 'use' agreement, it was erroneous for the [district court] to dismiss those claims for similar reasons." We do not know which "similar reasons" it intended to invoke, but that vagueness is not the only problem here. As we have said, "[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments, as [POP's] did." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (*per curiam*) (citation omitted). Any arguments about the district court's disposition of these three theories have been forfeited.

VI. Conclusion

POP and its co-plaintiffs have opposed the City's plan to build the Center in Jackson Park from the start. When we last had this case before us, the plaintiffs were trying to secure a preliminary injunction against the entire project, but they failed to show that they were entitled to such extraordinary relief. Construction of the Center is now well underway, and yet the plaintiffs demand that we put a stop to it and, we assume, order the defendants to restore the site. But they have

failed to show that they are entitled to any relief relating to their overarching claim against the Center, no matter under what theory. The district court did not abuse its discretion by denying the plaintiffs' request for leave to amend. The court also properly ruled that the state-law counts had to be dismissed and, consistent with *POP III*, ***1099** that the defendants were entitled to summary judgment on the federal-law counts.

The judgment of the district court is AFFIRMED.

All Citations

97 F.4th 1077

Footnotes

1 Some of the officials named in POP's complaint have since been replaced by new officers. Pursuant to FED. R. APP. P. 43(c)(2), we have substituted the current officials.

2 This office is currently vacant. We note that it is unclear whether entities such as the Environmental Programs section of the Highway Administration are suable entities. The answer here does not matter, however. This is not a jurisdictional question, and the presence of the City, the Secretary, and the Administrator assures us that there are ample proper defendants.

3 Given the broad scope of the relief measures POP seeks, the fact that the trees are by now long gone does not render this appeal moot.