IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Save Ohio Parks, *et al*.	:	Case No. 23-CV-8540
	:	Judge: JAIZA PAGE
Appellants,	:	
	:	Magistrate: MARK PETRUCCI
v.	:	
	:	
Oil and Gas Land Management Commission,	:	
	:	
	:	
Appellee.	:	
	:	

APPELLANTS' EMERGENCY MOTION FOR SUSPENSION OF AGENCY ORDERS

Pursuant to R.C. 119.12(E), Appellants move the Court for an emergency order suspending execution of the seven orders that are the subject of this appeal: Approvals by the Oil and Gas Land Management Commission ("Commission" or "Appellee") of Nomination Nos. 23-DNR-0001; 23-DNR-0002; 23-DNR-0003; 23-DNR-0004; 23-DNR-0005; 23-DNR-0006; and 23-DNR-0007 (collectively, "Nominations"). Execution of the orders during the pendency of this appeal will cause unusual hardship to Appellants.

Without urgent action from this Court, the Commission is poised to further execute the orders as soon as February 26, 2024—committing Salt Fork State Park, Valley Run Wildlife Area, and Zepernick Wildlife Area to oil and gas development and irreversibly harming Appellants and their members. *See* Oil and Gas Land Management Commission Announcement of Public Meeting, attached as Exhibit A (listing "Discussion and Possible Action on the Bids Received for the" Nominations as an agenda item).

As more fully explained in the attached Memorandum of Support, an emergency suspension is within this Court's full authority under R.C. 119.12(E). A suspension serves the public interest because it preserves the status quo, where these public lands are not available for oil and gas development, and ensures these lands are not opened to development without the opportunity for a hearing and full consideration of required statutory factors. A suspension will not harm third parties because no parties are entitled to lease and develop these public lands. Lastly, Appellants have demonstrated they are likely to succeed on the merits.

PRAYER

For the above reasons, and those further described in the attached Memorandum of Support, Appellants respectfully ask this Court to suspend the execution of the Commission's Orders pursuant to R.C. 119.12(E) and prohibit the Commission from taking any further action pursuant to the Orders, including selecting a "highest and best" bid for the Nominations.

Due to the Commission's impending meeting, we request that the Court issue a suspension by February 25, 2024.

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Respectfully submitted this 20th day of February, 2024 by,

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MEMORANDUM IN SUPPORT OF
APPELLANTS' MOTION FOR SUSPENSION OF AGENCY ORDERS

I. INTRODUCTION

During the pendency of this appeal, the Commission has rushed to execute its orders approving the Nominations to ensure the leasing of Salt Fork State Park, Valley Run Wildlife Area, and Zepernick Wildlife Area before the Court can decide this appeal. The Commission began the bidding process nearly three months sooner than required by statute. Now, the Commission intends to select the "highest and best" bids on February 26, 2024, despite being under no statutory deadline to do so. Once the Commission selects the "highest and best" bids, the statute requires the Ohio Department of Natural Resources ("ODNR") to lease the Nominated Lands to those bidders. R.C. 155.33(E). Thus, the Commission's rush to select the highest and best bid is also a rush for ODNR to sign the leases for these public lands—committing these lands to high volume unconventional oil and gas development ("fracking") for the first time in the state's history.

Appellants move this Court for an emergency suspension of orders under R.C. 119.12(E) to preserve the status quo, where these lands remain unleased and protected, and to prevent unusual hardship to Appellants and their members.

II. STATEMENT OF LAW

The Ohio Revised Code empowers the Court to stay the execution of an appellee's licensing order if it appears that an "unusual hardship" to the appellant will result absent a stay:

> If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms.

R.C. 119.12(E). The plain language of the statute gives full discretion to this Court to grant a suspension without briefing from the parties, allowing for emergency relief. R.C. 119.12(E). *See Morrison v. Dep't of Ins.*, 4th Dist. Gallia No. 01CA13, 2002-Ohio-5986, ¶ 19-23 (4th Dist.) (affirming the trial court's granting of a stay ex parte in a R.C. 119.12 appeal, finding that any hypothetical error by the trial court in granting the stay of the agency order before the agency could respond was harmless because the trial court invited and entertained the agency's subsequent motion to dissolve the stay); *Forest Hills Util. Co. v. Whitman*, 41 Ohio St. 2d 25, 27, 34-35, 322 N.E.2d 646 (1975) (holding—where the trial court granted a stay of execution of agency order on the same day the appellant filed its notice of appeal—that the trial court's subsequent denial of the agency's motion to dissolve the stay was comparable to a trial court overruling a motion to vacate a temporary injunction and thus not a final appealable order); *Women's Med Center of Dayton v. State of Ohio Department of Health,* Montgomery C.P, Case No. 2016 CV 06088 (Dec. 2, 2016) (granting emergency stay in R.C. 119.12 appeal).

The Tenth District has identified four "logical considerations" for courts exercising their discretion under R.C. 119.12(E) and determining whether to stay an administrative order pending appeal. Those factors are: (1) whether appellant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether appellant has shown that it will suffer irreparable injury; (3) whether the issuance of a stay will cause harm to others; and (4) whether the public interest would be served by granting a stay. *Bob Krihwan Pontiac-GMC Truck, Inc. v. Gen. Motors Corp.*, 141 Ohio App. 3d 777, 783, 753 N.E.2d 864 (10th Dist. 2001) (citations omitted).

These "*Krihwan* factors" "are not prerequisites that must be met but are interrelated considerations that must be balanced together." *Prince-Paul v. Ohio Bd. of Nursing*, 2015-Ohio-

3984, 43 N.E.3d 13, ¶ 13 (10th Dist.) (citations omitted); *see e.g. Hudson Twp. Trustees v. State Emp. Rels. Bd.*, Summit C.P. No. CV 86 3 0903, 1986 WL 295943, *1 (May 30, 1986) (harm did not need to be irreparable to weigh in favor of granting a stay).

III. ARGUMENT

A. Appellants Will Suffer Unusual Hardship Absent an Emergency Suspension.

Appellants and their members will suffer unusual hardship if the Commission fully executes its Orders approving the Nominations. Once the Commission selects the highest and best bid, ODNR must enter an oil and gas lease with the selected bidder. R.C. 155.33(E). A lease commits these state resources—Ohio's largest state park and two invaluable wildlife areas—to fracking, depriving Appellants of an adjudicatory hearing and a decision based on the statutory factors in R.C. 155.33(B)(1) prior to leasing. The conversion of these public lands from tranquil parks and wildlife areas used primarily for recreation, hunting, and fishing, to industrial zones used for high-volume oil and gas extraction will irreparably harm the environment and Appellants' members.

The Tenth District has noted that "unusual hardship" is not defined in R.C. 119.12(E), but the plain and ordinary meaning of "unusual" is "not usual," "uncommon" or "rare," and "hardship" means "suffering" or "privation" or "something that causes or entails suffering or privation." *Khemsara v. Ohio Veterinary Med. Licensing Bd.*, 2022-Ohio-833, ¶ 13 (10th Dist.). The Tenth District has also characterized unusual hardship as requiring "a showing of some kind of 'extraordinary' harm." *Id*. (citations omitted).

The hardship now before the Court is not only unusual, but unprecedented. This is the first time the Commission is executing the statutory process to open Ohio's public lands for fracking. The fracking of Salt Fork State Park— public lands ODNR once referred to as "a

priceless gem to be cherished by the people of Ohio"—would also be unprecedented and its resultant harms uniquely devastating. *See* Memo Contra at Ex. H (Ex.C).

Appellants have members whose home lives and everyday experiences will be forever altered and unpredictably changed because of the Commission executing its Orders. *See e.g.* Memo Contra. at Ex. K, Ex. M. Save Ohio Parks member Alissa Kovack invested in property abutting Salt Fork on the premise that it would remain a pristine public resource free of extractive industry. She now stands to lose her sole source of income—a vacation rental promising a "clean and quiet" environment—and jeopardize the health and wellbeing of herself and her family due to the imminent development of Salt Fork for oil and gas production under the Commission's nomination approvals. Memo Contra Ex. K at ¶ 11-13, 15-20. Like Ms. Kovack, Appellants' member Terri Sabo, who lives so close to Salt Fork State Park that she "can smell the campfires in the summertime," was so excited when she first bought her property because she "would always have the land to the east undeveloped and natural." Memo Contra. at Ex. M, ¶ 7. The Commission's execution of its Orders will commit this area to industrial development, subjecting Ms. Sabo to health and safety risks and depriving her of the qualities of her home that she most enjoys. *Id.* at ¶ 9-12 (stating that "noise and light pollution from the rigs" will negatively impact "the dark night sky and solitude of the area, one of the few remaining such areas in the state," expressing concern about increased truck traffic posing a risk to her and her loved ones as they travel in the area, "pollution effects" from "when the wells flare releasing who knows what," and the "high potential for a rollover and the resultant spill of these trucks on the winding roads of Guernsey Couty and contamination of the lake and its feeder streams."). *Cf. de Bourbon v. State Medical Board of Ohio*, 2017-Ohio-5526, ¶ 10 (10th Dist.) (denying motion for stay where harms were "predictable").

The Court has before it an extraordinary situation in which extraordinary hardship is at stake. The leasing of Ohio state parks for fracking has been a continuing subject of significant public interest, controversy, and media coverage since at least 2011 when Ohio House Bill 133 established Appellee Commission and the leasing nomination process. The Commission's Approval Orders opening Salt Fork State Park and two state wildlife areas to oil and gas bidding and leasing are far from ordinary—with respect to their unprecedented nature, the public interest and controversy surrounding them, and the acute and societal public health, environmental, and recreational harms they threaten.

Courts have found unusual hardship in far more commonly encountered situations than this one. *See, e.g.*, *Hudson Twp. Trustees v. State Emp. Rels. Bd.*, Summit C.P. No. CV 86 3 0903, 1986 WL 295943, *1-2 (May 30, 1986) (whether police sergeants have the right to collectively bargain); *Lake Cty. Bd. of Mental Retardation & Dev. Disabilities (MRDD) v. State Unemployment Rels. Bd. (SERB)*, Franklin C.P. No. 92CVF02-1504, 1992 WL 699882, *1 (Apr. 14, 1992) (whether two bargaining units would be merged into one).

B. Appellants Have a Strong or Substantial Likelihood or Probability of Success on the Merits.

Courts have deemphasized the likelihood of success on the merits factor in the context of R.C. 119.12(E) stay requests when the merits of an appeal have not yet been fully examined. *Lake Cty. MRDD* at *1 ("whether or not the moving party will prevail on the merits is not a particularly helpful factor since a motion for a stay comes at a time when the merits of an appeal have not been fully examined.") (citing *Hudson Twp.* at *1). Such is the case here, where Appellants filed their opening merits brief on February 8, 2024, and the parties remain in the middle of briefing the merits.

Even so, Appellants have a substantial likelihood of success on the merits. As detailed in Appellants' Merits Brief, the Orders are not in accordance with the law and are not supported by reliable, probative, and substantial evidence because the Commission did not consider five of the nine statutory factors enumerated in R.C. 155.33(B)(1). Appellants' Merits Brief at 9-12. The Orders are not in accordance with the law because the Commission did not provide the opportunity for a hearing as required by R.C. Chapter 119 and the Commission improperly relied on extra-statutory considerations. *See id.* at 12-15.

The Commission concedes that it did not provide opportunity for a hearing under R.C. Chapter 119. *See* Appellees' Mot. at 3, 5-6 (describing the Commission only conducting and meeting and arguing the Commission lacks authority to conduct a hearing). R.C. 119.06 states that an agency adjudication order is not valid "unless an opportunity for a hearing is afforded in accordance with" R.C. Chapter 119. To provide opportunity for a hearing, an agency must provide notice in accordance with R.C. 119.05, informing the party that they are entitled to a hearing if they request one within thirty days of service; that they may appear in person or by their legal representative or may present their arguments in writing; and that at the hearing they may present evidence and examine witnesses. R.C. 119.07. The Commission did none of these things, and this fact is not disputed. Thus, Appellants have demonstrated a high likelihood of success on the merits.

C. Appellants Will Suffer Irreparable Injury Absent Suspension of the Commission's Order.

Appellants and their members will suffer irreparable harm absent this Court's suspension of the Commission's Orders and stay of their execution. Irreparable harm is "an injury for the redress of which, after its occurrence, there could be no plain, adequate and complete remedy at law, and for which restitution in specie (money) would be impossible, difficult or incomplete."

Prince-Paul, 2015-Ohio-3984, 43 N.E.3d 13, ¶ 14 (citations and internal quotation marks omitted). "[I]rreparable harm is best avoided by maintaining the status quo," which is all that Appellants request in this motion. *See Lake Cty. MRDD*, Franklin C.P. No. 92CVF02-1504, 1992 WL 699882, at *1. Appellants merely seek to preserve the status quo of Salt Fork State Park, Valley Run Wildlife Area, and Zepernick Wildlife Area as unleased and protected lands while this Court considers the merits of their appeal.

Appellants have no plain, adequate and complete remedy at law, and no possible, easy, or complete monetary restitution for the existing and threatened imminent harm they have and will suffer. Appellants' members' loss of enjoyment of their property is not fully or adequately compensable. *See e.g.* Memo Contra at Ex. K, Ex. M. Threatened loss of enjoyment of one's property constitutes irreparable harm. *Karam v. High Hampton Dev., Inc.*, 2003-Ohio-3310, ¶ 46 (9th Dist.) (holding trial court did not abuse its discretion in finding irreparable harm to homeowners from permanent modifications made to adjoining property); *Jaussen v. Fleming*, 11th Dist. Trumbull No. 93-T-4973, 1995 WL 378696, *2 (May 12, 1995) ("Although it is possible to compute the decrease in value of appellees' property, the loss of comfort and the use and enjoyment of their property would be difficult, if not impossible, to compensate in monetary terms. The proposed street would surround appellees' property with increased traffic, noise, congestion and possible danger. Because of the intangible nature of these injuries, appellees' damages would be impossible to calculate.") (citing *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992) (holding trial court did not abuse discretion in finding irreparable harm because competitive injuries and loss of goodwill are difficult to quantify)).

Similarly, there is no plain, adequate, and complete remedy at law for the Commission depriving Appellants and their members of a hearing and a decision based on the statutory

factors prior to moving forward with leasing of the Nominated Lands. *See also Lake Cnty. MRDD,* 1992 WL 699882, at *1 (holding potential for labor unrest constituted irreparable harm).

Further, adequate and complete monetary restitution for the inescapable environmental, recreational, aesthetic, and human health impacts of fracking the approved parcels would be impossible. Fracking is associated with dangerous levels of hazardous air pollutants, including carcinogenic and endocrine disrupting chemicals; childhood leukemia; increased mortality in elderly populations; more heart attacks; low birth weight and extreme premature births; asthma attacks; and headaches and fatigue. Memo Contra at Ex. H (Exhibit A at 1-4, citing peer-reviewed studies). There is no plain, adequate, and complete remedy at law for these harms.

In addition, numerous federal courts have recognized that harm to the environment is typically irreparable in nature. *E.g., Ohio Env't Council v. U.S. Forest Serv.*, S.D. Ohio No. 2:21-CV-04380, 2023 WL 6370383, *5 (Aug. 3, 2023) (Chief Judge Marbley) ("[C]ourts generally recognize that environmental injuries cannot be adequately remedied by monetary damages."). This is especially true where, as here (R.C. 155.33(B)(1)), government agencies are under a legal duty to consider environmental impacts before authorizing those impacts, because "the lack of an adequate environmental consideration looms as a serious, immediate, and irreparable injury." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985). "[T]he risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation"; "[t]he difficulty of stopping a bureaucratic steam roller, once started, [] seems to us, . . . a perfectly proper factor for a district court to take into account in assessing that risk, on a motion for a preliminary injunction." *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (Breyer, J.); *see also W. Watersheds Proj. v. Zinke*, 336 F. Supp. 2d 1204, 1240 (D. Idaho 2018)

("Federal courts elsewhere have held, sensibly in this Court's view, that 'bureaucratic momentum' can support an argument of irreparable harm.").

Should this Court not find irreparable harm, it should still issue a suspension of the Commission's Orders because a showing of irreparable harm is not a requirement for an R.C. 119.12(E) stay; rather, it is one consideration to be balanced in the Court's discretion. *Prince-Paul*, 2015-Ohio-3984, 43 N.E.3d 13, ¶ 13 ("*Krihwan* factors" "are not prerequisites that must be met but are interrelated considerations that must be balanced together.") (citations omitted); *see also Hudson Twp.,* 1986 WL 295943 at *1 ("While this harm does not rise to the level of irreparable harm, it is harm nonetheless and weighs slightly in favor of granting the stay."). Appellants face extraordinary harms that weigh heavily in favor of granting a suspension.

D. Issuance of a Stay Will Not Cause Harm to Others and *Not* Issuing a Stay Will Harm Third Parties.

The potential harm to Appellee Commission is minimal to nonexistent. The orders here appealed are among the very first issued by the Commission. Settling the points of law here in issue prior to the full execution of the Commission's orders will help provide regulatory certainty and minimize disruption to all interested stakeholders. *See, e.g.*, *Lake Cnty. MRDD,* 1992 WL 699882 at *2 (holding potential harm to opposing parties minimal where maintaining status quo through stay of agency order would generate less disruption than execution and subsequent reversal of agency order). In addition, a suspension will not harm third parties because no parties are entitled to lease and develop these public lands. Moreover, a stay prevents environmental harms, which are often impossible to reverse once inflicted. *See Ohio Env't Council,* 2023 WL 6370383 at *5 ("[T]he balance of harms will usually favor the issuance of an injunction to protect the environment") (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)).

In addition, third parties will be harmed *absent* a stay from this Court. *See Women's Med Center of Dayton v. State of Ohio Department of Health,* Montgomery C.P, Case No. 2016 CV 06088 (Dec. 2, 2016) (weighing the negative impact of *not* granting a stay on third parties in issuing suspension order under R.C. 119.12(E)). In Ohio, oil and gas companies can force property owners who are unwilling to lease their property for oil and gas development into mandatory pooling or mandatory unitization orders that give companies the right to extract oil and gas under their property. *See* R.C. 1509.27 and R.C. 1509.28. If an oil and gas company obtains consent from landowners for at least 65 percent of land overlaying the proposed unit, the company can go through the State mandatory unitization process to obtain the right to extract oil and gas from beneath the properties of the remaining non-consenting landowners without a lease. *See* R.C. 1509.28. Thus, the leasing of the Nominated Lands also results in more non-consenting landowners potentially being forced to allow fracking beneath their property, harming their property rights and interests. *See e.g.* Memo Contra at Ex. M (describing increased interest in oil and gas development on private properties surrounding Salt Fork State Park due to the imminent opening of the Park to leasing).

E. Granting a Suspension Serves the Public Interest.

Granting Appellant's stay request will preserve the status quo while the Court decides important matters of great public interest. *See Lake Cnty. MRDD,* 1992 WL 699882 at *2 (emphasizing preservation of status quo); *Ohio Env't Council,* 2023 WL 6370383 at *5 (enjoining timber harvests in Ohio national forest pending environmental review would "serve the public interest in protecting the environment from any threat of permanent damage, and in ensuring meticulous compliance with the law by public officials.") (internal citations and quotation marks omitted). No entity has ever leased or drilled the shale oil and gas formations in

the public parcels subject to the Commission's orders. Oil and gas deposits that took hundreds of millions of years to form can surely wait while this litigation is pending.

The public has a powerful interest in the disposition, status, health, and quality of their public lands. The over 2,700 comments submitted to the Commission by state residents and users of the Nominated Lands objecting to the Nominations indicate that it serves the public interest to (1) preserve the status quo where Salt Fork State Park, Valley Run Wildlife Area, and Zepernick Wildlife Area are unleased and protected areas; (2) ensure the Commission thoughtfully considers the impacts of leasing and the objections raised by the public prior to taking further action on the Nominations; and (3) ensure all parties who stand to be adversely impacted by leasing have the opportunity for an adjudicatory hearing. *See* Appellants Merits Brief at 11.

A suspension will pause the bureaucratic steamroller that the Commission put in place when it issued its orders approving the Nominations. It will preserve the status quo, allowing this Court to settle important points of law before a third party can plow ahead with leasing and fracking the beloved public lands in question. It is in the public interest to have this legal clarity prior to selecting bids and signing leases to allow for the uniform application of process by the Commission to the parcels now in question and to those that may be nominated for leasing in the future. Having legal clarity before bids are selected and leases are signed will spare the public and the state from "an impression of official disorder in this important matter." *Hudson Twp.*, 1986 WL 295943 at *2.

IV. CONCLUSION

Appellants respectfully request that this Court order a suspension of the Commission's Orders, staying the execution of those Orders during the pendency of this litigation. Absent a suspension, Appellants will suffer unusual hardship. Furthermore, Appellants satisfy the

Krihwan factors that courts in the Tenth District balance when deciding R.C. 119.12(E) motions for a suspension of orders.

Due to the Commission's impending meeting on February 26, 2024, where the Commission has set "Discussion and Possible Action of Bids Received for the" Nominations as an agenda item, Appellants respectfully request that the Court take emergency action on this Motion and grant the Proposed Order without further briefing on or before February 25, 2024.

Respectfully submitted this 20th day of February, 2024 by,

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CERTIFICATE OF SERVICE

I, Megan Hunter, certify that a copy of the foregoing **MOTION FOR STAY** was served on this 20th day of February, 2024 via the Court's electronic filing system on the following counsel for the Appellee:

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