UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

NATURAL LAND INSTITUTE, Plaintiff, v. THE GREATER ROCKFORD AIRPORT AUTHORITY, *et al.*, Defendants.	)	No. 21 C 50410 Judge Iain D. Johnston

MEMORANDUM IN SUPPORT
OF FEDERAL DEFENDANTS' MOTION TO DISMISS

Natural Land Institute (NLI) seeks to challenge FAA's November 2019 decision that pertains to an environmental assessment of a proposed expansion project at the Chicago-Rockford International Airport. In particular, NLI asserts two claims against FAA and the other federal agency defendants: failure to comply with NEPA, and failure to comply with the Illinois Endangered Species Protection Act (IESPA). But NLI has sued the federal defendants in the wrong court. As required by the FAA's direct review statute, 49 U.S.C. § 46110, an action challenging an FAA order can be brought only in the courts of appeals. Moreover, NLI lacks standing under Article III to bring this suit. Therefore, this court lacks jurisdiction to hear NLI's challenge to the federal agencies' actions. But even if this court *could* hear NLI's claims against the federal agencies on the merits (which it cannot), NLI's challenge to FAA's environmental determination is time barred, and NLI failed to exhaust administrative remedies before filing suit. As for NLI's claim brought under Illinois state law, the IESPA by its terms does not establish any requirements for federal agencies. There is nothing that federal agencies need to do to comply with the IESPA. Accordingly, NLI does not have any viable claims against the federal defendants that can be heard in this court. The complaint should be dismissed as to these defendants.

Background

NLI's complaint sets forth the essential facts for this case, which for purposes of a motion to dismiss must be presumed true. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). According to the complaint, NLI is a not-for-profit organization "dedicated to preserving land and natural diversity for future generations." Dkt. 1 at ¶ 12. NLI seeks to challenge the FAA's NEPA determination that a certain proposed development at the Chicago Rockford International Airport would not have significant environmental impacts.

The proposed development at the Rockford Airport is being undertaken by the Greater Rockford Airport Authority (GRAA) and consists of two parts. Ex. 1 at 11. The first part is an expansion of the northwest air cargo area to construct, light, and mark an airplane staging area to accommodate ten wide-body-aircraft parking positions northwest of current runways, together with supporting infrastructure. *Id.* The second part is a midfield air cargo development to construct, light, and mark an air cargo building along with a staging area that can accommodate 12 wide-body aircraft in the midfield area between the airport's two runways. *Id.* Both elements of the proposed development take place entirely within the airport's current footprint. *Id.* at 6. NLI's complaint challenges only the midfield development project.

For development projects such as this one that will be implemented by a local airport but that require FAA's approval for modifications to its "airport layout plan" (ALP), the FAA ensures that such projects receive the appropriate level of environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, ("NEPA"). FAA Order 1050.1F, Paragraph 6-2.2; FAA Order 5050.4B, Ch. 7, Sections 702, 703. Therefore, as is customary in airport projects, the GRAA, through its consultant, prepared an environmental assessment (EA) for FAA's independent review and approval/adoption. Dkt. 1., ¶ 66.

The environmental assessment — which is attached to this motion to dismiss as Exhibits 1 through 9[1] — consisted of a wide-ranging analysis, looking at noise impacts, socioeconomic and environmental justice concerns, air quality, climate, water impacts, and archeological and cultural resource effects, among other considerations. *See* EA Ch. 3 at Ex. 1 and Ex. 2. The potential impacts on endangered or threatened species and critical habitats were also analyzed. EA App'x F (Agency Coordination), Ex. 9 at 21-28. In particular, as part of the agency's wetland delineation report, the FAA noted that the midfield cargo development area contained an area of sensitive habitat that might impact the rusty patched bumble bee and/or prairie bush clover (both listed as endangered species). EA App'x E (Water Resources), Ex. 7 at 4. *See also id*. at Ex. 7 p. 23 (U.S. Fish and Wildlife Service (FWS) review of Endangered Species Act Section 7 consultation). Having reviewed the FWS analysis as well as the Illinois Department of Natural Resources' (IDNR's) comments on the draft environmental assessment, Ex. 9 p. 27, FAA ultimately concluded that the proposed project did not impact any critical habitat for these endangered species. EA Ch. 3, Ex. 2 at 41-42.

Once the environmental assessment was completed, FAA issued a finding of no significant impact (FONSI) on November 25, 2019, in which the FAA concluded that the proposed project would have no significant impact on the quality of the human environment and allowed the project to move forward. Ex. 10. This FONSI also specified that it was an order of the FAA Administrator, "subject to review by the courts of appeal of the United States in accordance with

[1] The complaint makes repeated reference to FAA's environmental assessment. *See* Compl. at ¶¶ 67, 124-129. As such, the court may consider FAA's environmental assessment in deciding a motion to dismiss. *Williams v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013). *See also Hecker v. Deere & Co.*, 556 F.3d 575, 582-83 (7th Cir. 2009) (court has discretion to consider documents outside the pleadings when they are central to plaintiff's claim and when the parties do not dispute their authenticity). The EA is filed in nine parts in order to fit within ECF file size limitations.

the provisions of Section 1006 of the Federal Aviation Act of 1958, as amended 49 U.S.C. 46110." *Id.* GRAA published public notice of the FONSI in the Rockford Register Star on December 15, 2019, and made it available on the airport's website and at the airport. Ex. 9 at 56-57.

According to NLI's complaint, in August 2021, more than a year and a half after FAA's FONSI order, a rusty patched bumble bee was identified to IDNR at the airport. Compl. at ¶ 71. This sighting triggered informal consultation by GRAA with FWS. Following the consultation, FWS issued a September 21, 2021 letter that concluded certain mowing restrictions within the affected area would be adequate "to avoid direct impacts to this species." Dkt. 5-13. According to FWS, in light of the fact that the proposed work would "remain on airport property," and would "not require land acquisition, in-stream work or tree removal," GRAA's mowing restrictions "adequately address[] the potential impacts" on federally listed threatened and endangered species, thereby precluding the need for further action under the Endangered Species Act. *Id*. In light of FWS's assessment, no additional NEPA environmental review has been undertaken by FAA with respect to the proposed project.[2]

Argument

I. This Court Lacks Jurisdiction over Claims Against the Federal Defendants.

NLI filed this suit in federal district court, but 49 U.S.C. § 46110 requires that a suit challenging an order by the FAA (which this suit is) must be brought in the first instance in the courts of appeal. This is so even if the plaintiff names other non-FAA federal agencies as co-defendants; even if the plaintiff seeks to challenge a *failure* to act by the FAA rather than an action

[2] Indeed, FAA is currently informally consulting with FWS, and no determination has been made as to whether additional environmental review (*i.e.*, supplemental EA or written re-evaluation) is warranted with regard to the project. Any determination related to additional environmental review would be a new FAA action subject to a "separate" challenge. *See also infra*, n.3.

itself; and even if the plaintiff includes other related claims that do not directly challenge the FAA order at issue. In short, there exists no viable legal theory for NLI to keep its claims against the federal defendants in district court. This case should be dismissed accordingly.

Under 49 U.S.C. § 46110(a):

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator of the Federal Aviation Administration . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 46110(a). This jurisdictional language "could not be plainer." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 628 (7th Cir. 2007). "When a statute specifies a procedure for obtaining judicial review of a federal agency's actions, that procedure is normally exclusive, even if the statute does not say that the procedure is exclusive." *Maxon Marine, Inc. v. Director, Office of Workers' Compensation Programs*, 39 F.3d 144, 146 (7th Cir. 1994). Here, the statute is explicit that it is the *court of appeals*, and not the district court, that has "exclusive jurisdiction to affirm, amend, modify or set aside any part of the order." 49 U.S.C. § 46110(a). *See Jones v. United States*, 625 F.3d 827, 829 (5th Cir. 2010) ("Section 46110(a) of the Federal Aviation Act vests the exclusive jurisdiction over challenges to FAA orders in certain United States Courts of Appeals."); *Friends of Richards–Gebaur Airport v. F.A.A.*, 251 F.3d 1178, 1184 (8th Cir. 2001) ("A court of appeals reviewing a petition for judicial review of an order of the FAA has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order."). *See also Fleming v. U.S. Dep't of Transp.*, 348 F. App'x 736, 737 (3d Cir. 2009) ("[W]hen the resolution

of a plaintiff's claims in federal court requires an examination of the underlying FAA proceedings, the district courts lack subject matter jurisdiction over any such claims.").

NLI's claims against FAA and the other federal defendants arise from FAA's November 25, 2019 order finding no significant environmental impact (FONSI) attributable to the proposed development project. Ex. 10. The FONSI was supported by a final environmental assessment (EA) issued by FAA issued the same day. Ex. 1-9. Under NEPA, federal agencies are required to prepare an environmental impact statement (EIS) for "every . . . major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In order to fulfill this mandate, agencies as a threshold matter may prepare an environmental assessment (EA) to determine whether the proposed action's environmental impact will be "significant." 40 C.F.R. § 1508.9(a); *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983). Once the EA is complete, the agency can either issue a FONSI (concluding that any environmental impacts will not be significant), or proceed with the more comprehensive EIS. In either case, plaintiffs seeking to challenge the agency's decision must ordinarily proceed under the Administrative Procedures Act, 5 U.S.C. § 702, as NEPA itself does not contain a private right of action. *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996). APA review of a decision to issue a FONSI is confined to making sure the agency has taken a "hard look" at the environmental consequences of its proposed action. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976). As long as sufficient evidence exists that a reasonable mind might accept as adequate to support a conclusion, the agency's findings must be upheld. *Suburban O'Hare Com'n v. Dole*, 787 F.2d 186, 198 (7th Cir. 1986). The FAA's findings of fact in any NEPA environmental review, where supported by substantial evidence, are "conclusive." 49 U.S.C. § 46110(c).

Where the agency issuing its final decision in compliance with NEPA happens to be the FAA, courts have consistently held that 49 U.S.C. § 46110(a) vests jurisdiction to review FAA's actions with the courts of appeal. *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 628 (7th Cir. 2007); *Suburban O'Hare Com'n v. Dole*, 787 F.2d at 194; *Nat'l Parks and Conservation Ass'n v. FAA*, 998 F.2d 1523, 1528 (10th Cir. 1993*); City of Alexandria v. Helms*, 728 F.2d 643, 645 n. 2 (4th Cir. 1984). That is to say, a final agency action by the FAA pursuant to NEPA counts as an "order" within the meaning of 49 U.S.C. § 46110(a). *City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007) (noting that the term "order" in § 46110(a) should be read 'expansively') (citing cases); *Citizens Ass'n of Georgetown v. FAA*, 896 F.3d 425, 434 (D.C. Cir. 2018) ("The December 2013 publication of the FONSI/ROD satisfied both elements of this court's finality test: it marked the consummation of the agency's decisionmaking process and was a source of legal consequences."). *See also City of West Chicago, Ill. v. United States Nuclear Regulatory Comm'n*, 701 F.2d 632, 652 n. 21 (7th Cir. 1983) (holding that where a final agency action is reviewable only in the court of appeals, the existence of a NEPA claim does not vest the district court with concurrent jurisdiction); *Kaufmann v. FAA*, No. 16-cv-801, 2017 WL 489422 (W.D. Ky. Feb. 6, 2017) (same).

Other Federal Agency Defendants. Jurisdiction lies with the court of appeals even if (as is the case here with the Department of Interior and Fish and Wildlife Service), there are other non-FAA federal agency defendants in the case and FAA worked with those agencies or relied on their work product in taking its action. In *National Parks and Conservation Ass'n v. FAA*, 998 F.2d 1523 (10th Cir. 1993), plaintiffs sought to challenge the actions taken by FAA to approve construction of an airport in Utah, as well as actions taken by the National Park Service and Bureau of Land Management in support of FAA's decisionmaking. *Id*. at 1525. Plaintiffs argued that

even if § 46110 required claims against FAA to be brought in the circuit court, they were still free to sue the other federal agencies in district court. The Tenth Circuit rejected this argument for three reasons. First, the non-FAA agencies only acted in furtherance of the FAA's underlying objective — to authorize construction of the airport. *Id*. at 1529. Without the airport project, the other agencies had no action to undertake. Second, the notion that one set of facts should be litigated in *both* the court of appeals with respect to the FAA, *and* the district court for the other agencies is nonsensical and would lead to duplication, delay, and the prospect of inconsistent and overlapping rulings. *Id*. And third, to the extent there was any ambiguity as to the reach of § 46110, that ambiguity should be resolved in favor of appellate court jurisdiction. *Id*.

So too with this case. Here, it is the *FAA's* (and not the other federal agency defendants') authorization of the project through the EA and FONSI that lies at the heart of plaintiff's claims. DOI and FWS played a role in the consultation and assessment process, but without the FAA's review of GRAA's proposed expansion project, the other agencies would not have had an action to undertake. And to the extent a theoretical action by DOI or FWS *could* be reviewed in district court, the directive in § 46110 to have FAA's actions reviewed in the circuit court takes precedence. *Denberg v. U.S. R.R. Ret. Bd.*, 696 F.2d 1193, 1197 (7th Cir. 1983) ("[W]here it is unclear whether review jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter."); *Connors v. Amax Coal Co.*, 858 F.2d 1226, 1231 (7th Cir. 1988) ("Generally, when jurisdiction to review administrative determinations is vested in the courts of appeals these specific, exclusive jurisdiction provisions preempt district court jurisdiction over related issues under other statutes.").

Failure to Act vs. Action Itself. NLI may argue that their suit is really an action to compel the FAA to undertake a supplemental environmental review, rather than an attack on the November

2019 FONSI itself. But a suit challenging FAA's decision *not* to do something still belongs in the same court where NLI would need to challenge FAA's affirmative actions — *i.e.*, the court of appeals. *See Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (holding that a challenge to an agency's unreasonable delay in issuing a decision could be construed as an "order" for purposes of a direct-review statute because of the potential effect on the court's future jurisdiction over that decision); *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 535 (1st Cir. 1997) (noting it is "well established that the exclusive jurisdiction given to the courts of appeals to review FAA actions also extends to lawsuits alleging FAA delay in issuing final orders"); *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1420 (11th Cir. 1993) (holding that the direct-review provision in § 46110 extends to lawsuits involving claims of unreasonable delay). To the extent NLI's claims are grounded in a theory of inaction or delay on the part of the FAA in conducting a future environmental assessment, the suit still belongs in an appellate court.

Non-NEPA Claims Inextricably Intertwined. NLI's complaint also contains a claim against the federal agency defendants for violation of the Illinois Endangered Species Protection Act, 520 ILCS 10/1-11. This likewise is not a sufficient reason to keep any portion of this case in district court. The jurisdictional path prescribed by Congress in § 46110 does not "hang[] on the ingenuity of the complaint." *St. John's United Church of Christ v. City of Chicago*, 401 F. Supp. 2d 887, 902 (N.D. Ill. 2005) *aff'd*, 502 F.3d 616 (7th Cir. 2007). Where an FAA decision is "mixed" with other agency actions or legal theories that are not themselves subject to § 46110, the issues are still "inextricably intertwined" so as to make appellate jurisdiction proper. *Suburban O'Hare Comm'n v. Dole*, 603 F. Supp. 1013, 1023 (N.D. Ill. 1985), *aff'd*, 787 F.2d 186 (7th Cir. 1986). This court should not attempt to tease out a portion of the claims against federal agencies that can be separated from the NEPA review undertaken by the FAA. Doing so would only run

the risk of inconsistent verdicts and confusion of the issues. *See Mokdad v. Lynch*, 804 F.3d 807, 809 (6th Cir. 2015) ("Under the doctrine of inescapable intertwinement, statutes such as Section 46110(c) that vest judicial review of administrative orders exclusively with the courts of appeals also preclude district courts from hearing claims that are inescapably intertwined with review of such orders.").

Moreover, plaintiff's *state* law claim against the *federal* agencies is itself nonsensical. The Illinois Endangered Species Protection Act imposes a consultation requirement that must be met before any endangered plant or animal species may be taken, possessed, transported, purchased, or disposed of. 520 ILCS 10/4. The procedures for consulting the Illinois Department of Natural Resources (IDNR) are set forth in the Illinois Administrative Code, 17 Ill. Admin. Code pt. 1075.40. Importantly, the consultation is required to take place between "state and local units of government" and "the Department" (meaning IDNR). *Id*. Neither the Illinois statute nor the accompanying Illinois regulations impose *any* requirements on federal agencies or federal officials. Count II of plaintiff's complaint is premised on a set of obligations that simply do not exist for the federal defendants.

II. NLI Lacks Standing to Bring Its Claims.

As argued in the GRAA defendants' brief, NLI lacks a cognizable injury in fact that would establish Article III standing for filing suit. The doctrine of standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum" of standing contains three elements: an injury in fact; a causal link between the injury and the challenged action such that the challenged conduct is fairly traceable to the defendant; and redressability through a favorable court decision. *Id*. at 560-61 (1992); *Lopez-Aguilar v. Marion Cty. Sheriff's Dept.*, 924

F.3d 375, 384-85 (7th Cir. 2019). In cases such as this one where the plaintiff is an association or civic group, an association has standing to represent the interests of its members if the individual members would have standing in their own right; the interests represented are germane to the association's purpose; and the relief sought does not require the participation of the individual members. *Tex. Indep. Prod. And Royalty Owners Assoc. v. Env'l Prot. Agency*, 410 F.3d 964, 971 (7th Cir. 2005); *Speech First, Inc. v. Kileen*, 968 F.3d 628, 638 (7th Cir. 2020). At all times, it remains the plaintiffs' burden to establish the elements of standing where the plaintiff is the party invoking federal jurisdiction over the alleged case or controversy. *Doe v. County of Montgomery, Ill.*, 41 F.3d 1156, 1159 (7th Cir. 1994).

Here, NLI's complaint fails to allege an injury in fact that satisfies the first requirement of Article III standing. An "injury in fact" is an "invasion of a legally-protected interest which is (1) concrete and particularized, that is, affecting the plaintiff in a personal and individual way and (2) actual or imminent and not merely conjectural or hypothetical." *Id.* (citing *Lujan*, 504 U.S. at 561); *Speech First, Inc.*, 968 F.3d at 638. The requirement that the injury be "particularized" means that a plaintiff cannot simply raise a "generalized harm to the . . . environment." *Summers v. Earth Island Institute*, 555 U.S. 488, 494 (2009). Nor can a plaintiff "raise only a generally available grievance about the government." *Lac Du Flambeau*, 422 F.3d at 496. They instead must allege and ultimately prove an interest in the *specific* area or animals affected by the project and not simply those lands or animals "roughly in the vicinity" of the project. *Lujan*, 503 U.S. at 563, 565-66; *Friends of the Earth*, 528 U.S. at 183 (plaintiffs must allege they "use *the affected area* and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity.") (emphasis added) (citation omitted). Where the plaintiff "claims only harm to his and every citizen's interest in proper application of the Constitution and laws, and

[seeks] relief that no more directly and tangibly benefits him than it does the public at large," the plaintiff fails to state an Article III case or controversy. *Lac Du Flambeau*, 422 F.3d at 496.

Such is the case with NLI and the rusty patched bumble bee. As pled in NLI's complaint, the bee habitat at issue in this case exists entirely within the midfield air cargo development project, land that is part of larger Chicago Rockford International Airport, which is owned and operated as a Part 139 public use airport by GRAA. *See generally* 14 C.F.R. § 139.1. As a Part 139 public use airport, GRAA must meet certain safety and security requirements, including limitations on the public's access to various portions of the airport. *See* 14 C.F.R. § 139.329(a), .335(a) (Each Part 139 airport must "[l]imit access to movement areas and safety areas only to those pedestrians and ground vehicles necessary for airport operations" and provide "[s]afeguards to prevent inadvertent entry to the movement area by unauthorized persons or vehicles."). In other words, GRAA is *required* to prohibit access to the land that is the subject of the midfield air cargo development project. The bee habitat at issue in this case sits between two active runways at a Part 139 public use airport, and is wholly inaccessible to NLI's members or the public at large. NLI members cannot credibly profess an injury that is particular to themselves over alleged impacts to bees or habitats located in a place they cannot visit. *Pollack v. U.S. Dep't of Justice*, 577 F.3d 736, 742 (7th Cir. 2009) (explaining that jurisdiction is lacking when plaintiff and its members "never claimed to have a specific interest in the actual area affected"); *Prairie Rivers Network v. Dynegy LLC*, 2 F.4th 1002, 1009 (7th Cir. 2021) (finding that plaintiffs failed to establish standing when, "based on the face of the complaint," they failed to identify specific members or establish "how exactly the alleged [action challenged] will harm them individually"); *see also cf. Deutch v. Travis County Shoe Hospital, Inc.*, 721 F. App'x 336, 340 (5th Cir. 2018) and *Access 4 All, Inc. v. Chicago Grande, Inc.*, No. 06 C 5250, 2007 WL 1438167, *7 (N.D. Ill.

2007) (both analyzing standing under the Americans with Disabilities Act in terms of whether the plaintiff had adequately alleged an intention to visit or return to the allegedly inaccessible facility). NLI therefore lacks a particularized injury that is justiciable in this or any Article III court.

III. Even if Considered on the Merits, NLI's Claims Against the Federal Agency Defendants Are (1) Time-Barred; and (2) Procedurally Improper.

Though this court should not reach the merits of NLI's claims for all the reasons stated above, it is worth noting that NLI's suit is both untimely and procedurally improper. Section 46110(a) allows the circuit court to review FAA orders but limits the time for bringing suit to just 60 days after the order is issued. 49 U.S.C. § 46110(a); *Avis Dynamics, Inc. v. FAA*, 641 F.3d 515, 519 (D.C. Cir. 2011) ("Section 46110(a) requires that a petition be filed within sixty days of the date the order 'is issued,' which we read to mean that the filing period begins to run on the date the order is officially made public."). The court may allow for a challenge after 60 days, but only if there exist "reasonable grounds" for not having met the 60 day deadline. § 46110(a). Courts "rarely [find] reasonable grounds under § 46110(a)." *City of Phx. v. Huerta*, 869 F.3d 963, 969 (D.C. Cir. 2017) (alteration in original) (*quoting Elec. Privacy Info. Ctr. v. FAA*, 821 F.3d 39, 43 (D.C. Cir. 2016)). Here, NLI filed suit about *20 months* after FAA issued the November 2019 FONSI — well beyond any amount of time that could be attributable to a "reasonable" delay. *See Avis Dynamics*, 641 F.3d at 521 (holding that a petition filed 68 days after the issuance of an FAA order was untimely); *Citizens Ass'n of Georgetown v. Federal Aviation Administration*, 896 F.3d 425, 434 (D.C. Cir. 2018); (dismissing a challenge to FAA's FONSI as untimely because petitioners filed more than 60 days after it was issued and holding there were no reasonable grounds for their untimely petition).[3]

[3] NLI may respond that environmental analyses under NEPA or the Endangered Species Act are ongoing and, thus, their challenge is neither untimely nor procedurally defaulted. But no

NLI's claims against the federal agencies are also procedurally improper because, prior to filing this lawsuit, NLI failed to exhaust its administrative remedies. Indeed, it never raised any of its concerns about the rusty patched bumble bee or any other protected species with the FAA. The public was given 45 days to review and comment on the draft EA. An open house workshop and public hearing was held on September 10, 2019. Ex. 9 at 45-62 (Transcript of Public Hearing). The agency received, reviewed, and responded to multiple public comments as part of the EA process (although NLI did not submit any comments itself). *Id*. at 29-44. But NLI's complaint attempts to bypass this engagement process entirely, without having given FAA the opportunity to consider any of NLI's objections. This move is squarely prohibited by 49 U.S.C. § 46110(d), which allows judicial review of objections to FAA orders "only if the objection was made in the proceeding conducted" by the FAA. The agency should not be put in the position of speculating as to what it *might* have done, had NLI raised its concerns in a timely manner at the agency level. *See Wallaesa v. FAA*, 824 F.3d 1071, 1078 (D.C. Cir. 2016) ("It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review.").

IV. The Proper Remedy Is Dismissal.

Where, as here, a court lacks subject matter jurisdiction over the issues raised in the complaint, the proper course of action is dismissal. Fed. R. Civ. P. 12(h)(3). Nevertheless, 28 U.S.C. § 1631 allows a district court to transfer a case to the court of appeals to cure a jurisdictional defect — but only if it is in the interest of justice to do so. No such justification exists here. For one, transfer "in the interest of justice" is only applicable in cases that are non-frivolous and where

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new action has occurred, and NLI cannot establish that its challenge to past actions is proper based on potential, speculative future actions. *See Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010) ("Until such time as the agency decides whether and how to exercise its regulatory authority, however, the courts have no cause to intervene.").

additional adjudication would not be a waste of judicial resources. If a case cannot be maintained in the court that has jurisdiction (in the conventional sense) over it, "then the court in which it is initially filed — the court that does not have jurisdiction — should dismiss the case rather than waste the time of another court." *Phillips v. Seiter*, 173 F.3d 609, 611 (7th Cir. 1999). NLI's lawsuit — filed well more than a year too late, without having satisfied administrative exhaustion prerequisites and without having established Article III standing — easily meets this standard. This court should simply dismiss NLI's case outright, rather than transfer the case to an appellate court so that an appellate court can dismiss it. Moreover, even by its own terms, 28 U.S.C. § 1631 allows for transfer to a court only where the action "could have been brought at the time it was filed." As discussed above, NLI's lawsuit was doomed at the outset for a whole host of reasons. It does not meet the threshold requirement of being a case that "could have been brought," and therefore is not one that should be transferred in the interest of justice.

Conclusion

For all the reasons stated herein, this court should dismiss NLI's complaint as to the federal agency defendants.

Respectfully submitted,

JOHN R. LAUSCH, JR.
United States Attorney

By: s/ Nigel B. Cooney
NIGEL B. COONEY
MONICA V. MALLORY
Assistant United States Attorneys
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-1996
nigel.cooney@usdoj.gov