IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PHYSICIANS FOR SOCIAL RESPONSIBILITY, et al., Plaintiffs, v. PETE BUTTIGIEG, in his official capacity as Secretary of Transportation, et al., Defendants.	)	No. 1:24-cv-00061-TJK

PLAINTIFFS' MOTION FOR RELIEF FROM ORDER

Plaintiffs bring this motion under Federal Rule of Civil Procedure 60(b), pursuant to which a court may "relieve a party" from an "order" where there is "(1) mistake, inadvertence, surprise, or excusable neglect," or "(6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). As discussed below, Plaintiffs request a minor adjustment to the Court's Memorandum Opinion dated September 8, 2024 (the "Order") denying injunctive relief to prevent public access to the newly constructed Greenway Trail and crossings (the "Greenway Trail Project") onto the Rocky Flats National Wildlife Refuge (the "Refuge"). Plaintiffs assert that the Court was premature in determining the acceptability of the plutonium risks associated with the Greenway Trail Project because the relevant sampling and testing documents were not before the Court, as the administrative record had yet to be compiled. Plaintiffs are not asking the Court to reconsider its ultimate holding that denied injunctive relief. Rather, they request the Court rescind its finding that plutonium poses an acceptable risk to visitors until the Court is presented with actual sampling data and documents only referenced by Defendants at the preliminary injunction stage.

STANDARD OF REVIEW

Plaintiffs move for relief from judgment under F.R.C.P. 60(b)(1) due to a mistake of fact in the Court's Order. *See Kemp v. United States*, 142 S. Ct. 1856, 1862 (2022) (holding that both mistakes of fact and mistakes of law are cognizable under Rule 60(b)(1)). Rule 60(b)(1) authorizes a district court to relieve a party from the effects of a ruling based on the court's own mistake of fact. *In re 310 Assocs.*, 346 F.3d 31, 32 (2d Cir. 2003). "A motion for reconsideration is generally treated as a . . . Rule 60(b) motion if filed [after 28 days]." *Middlebrooks v. Godwin Corp.*, 279 F.R.D. 8, 10 n.3 (D.D.C. 2011) (*citing Mcmanus v. District of Columbia* 545 F. Supp. 2d 129, 133 (D.D.C. 2008)).

The Court's determination of safety at the Refuge was based on its pre-record analysis of sampling and testing undertaken by the government and parties, rather than the actual sampling documents themselves, resulting in its reliance on flawed (or at least seriously incomplete) data—a mistake of fact requiring correction under Rule 60(b).

The Court may also grant the requested relief under Rule 60(b)(6), which employs a fact-dependent, reasonableness standard. *Ashford v. Steuart*, 657 F.2d 1053, 1055 (D.C. Cir. 1981). To accomplish justice, "[a] movant seeking relief under Rule 60(b)(6) must demonstrate 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005); *see also Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1140 (D.C. Cir. 1988). Rule 60(b)(6) "permits reopening when the movant shows 'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)." *Gonzalez*, 545 U.S. at 528-29. "A litigant's diligence in pursuing review of a decision, either through appeal or through Rule 60(b)(6) relief, is relevant in

assessing whether extraordinary circumstances are present." *Twelve John Does*, 841 F.2d at 1118-19.[1]

ARGUMENT

1. Introduction

In its Order rejecting Plaintiffs' request for preliminary injunctive relief, the Court based its decision on the Defendants' discussion of prior sampling results to determine that Plaintiffs were unlikely to succeed on the merits of their claim. Defendants' cited materials were *not in the yet-to-be-compiled administrative record*, rather, they were merely summarized in Defendants' briefs and select portions of supporting materials. These materials fall into five (5) categories: (1) sampling referenced in the 2006 "Corrective Action Decision/Record of Decision," or "CAD/ROD," (2) "confirmatory sampling" undertaken by an independent contractor for the U.S. Fish and Wildlife Service ("FWS") in 2018, (3) sampling by the Colorado Department of Public Health & Environment ("CDPHE") in 2020 after discovery of the "Bill Ray particle," (4) testing undertaken by Plaintiff Rocky Mountain Peace & Justice Center ("RMPJC"), and (5) modeling with a dose assessment tool called RESRAD that assesses exposure risk to a hypothetical construction worker. Based solely on Defendants' discussion of these five sets of materials, the Court stated that the federal government's requisite look at the potential health effects of residual plutonium on visitors to the Refuge was "rock solid." Order at 14.

[1] This Motion was filed as soon as practicable after the Court's decision, well before Defendants compiled the record or presented a proposed scheduled to the Court. The Court balances the finality of judgments and orders with the "incessant command of the court's conscience that justice be done in light of all the facts." *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980) (*quoting Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), cert. denied, 26 L. Ed. 2d 793 (1970).

However, all five sets of materials, while purportedly showing minimal risk to Refuge visitors, contain significant methodological flaws that render premature the Court's preliminary determination of risk. As discussed below, these flaws counsel in favor of the Court withdrawing its premature determination of safety, which the Court may revisit once these materials are examined through summary judgment briefing after the administrative record is compiled.

2. Inaccuracies in the Materials Before the Court When it Made its Preliminary Determination

As mentioned, the five sets of data referenced in the Court's Order contain methodological flaws and do not demonstrate that residual plutonium on the Refuge poses an acceptable risk.

A. The 2006 CAD/ROD

The 2006 CAD/ROD decision by EPA, the U.S. Department of Energy ("DOE"), and CDPHE that "no hazardous substances . . . exist" in levels greater than the cleanup standard, relied on too few samples on the most dangerous area in the Refuge. Specifically, only 135 surface soil samples were taken from 66 locations in the Wind Blown EU area of the Refuge. AR at 5488.[2] Shockingly, only "586 surface soil samples [were] collected throughout the entire Refuge." AR at 875; *see also* AR at 5488. *This amounts to less than one surface soil sample for every* ***6.5 acres*** *of Refuge land.* Such an arbitrarily small number of samples cannot demonstrate safety in a methodologically defensible manner.[3]

[2] "AR" cites are taken from the administrative record in *Rocky Mountain Peace & Just. Ctr. v. FWS*, 18-cv-01017 (D. Colo. 2021). "App." cites are taken from the appendix in *Rocky Mountain Peace & Just. Ctr. v. FWS*, 40 F.4th 1133, 1145 (10th Cir. 2022), the case referenced in this Court's Order at 5, 7, 19, 22 and 28.

[3] Undersigned counsel (Randall Weiner) has handled numerous contamination remediation cases, where four samples per acre is the norm.

Moreover, the U.S. Government Accountability Office called into question DOE's reduced level of scanning and sampling at Rocky Flats after the remediation had been concluded. *See* **Exhibit 1** at 101 ("The approved site cleanup strategy was to remove contamination to a 90 percent confidence level, meaning confidence that at least 90 percent of the contamination had been remediated to agreed-upon levels. In contrast, MARSSIM . . . recommends applying a 100 percent verification strategy—that is, scanning areas most likely to contain residual radionuclide contamination. Accordingly, MARSSIM was sure to find 'hot spots' . . . [but] *DOE subsequently rejected that approach*." (emphasis added)).

Furthermore, the CAD/ROD failed to consider data points from 1952 to 1991 for human health risk. *See* **Exhibit 2, Declaration of Michael E. Ketterer, Ph.D.**, ¶ 6. It thus left out sampling undertaken at Rocky Flats (and the land where the Refuge is located) from the decades of contamination during Rocky Flats' manufacturing years (1952-1989), including the Federal Bureau of Investigation's ("FBI's") evidence after its seizure of environmental samples in 1989. The CAD/ROD also overlooked all the instances of plutonium contamination beyond the borders of the central operative unit into the surrounding area (including the Refuge and surrounding areas), as recounted during testimony at the preliminary injunction hearing held in U.S. District Court in Denver, Colorado on July 17, 2018. *See, e.g.,* Testimony of John Barton, App. 1128-29 (1998 "discharge below 771 building, which at one point was deemed the most hazardous building on the DOE site . . . through that remediation project . . . [and into the] Great Western Reservoir and Standley Lake . . . past the Refuge"); Testimony of Jon Lipsky, App. 1189 ("[T]hat initial connector point on Indiana Street is in the wind-blow area, and it's the most heavy contaminated are of plutonium . . . .").

Finally, the methodology for determining the Refuge's contaminant concentrations was inherently flawed because it took an average of averages. AR. at 5558 ("[A]verages were first calculated for 30-acre sub-areas of an [Exposure Unit ("EU")]. These averages were then combined to calculate an EU-wide average."). This sort of averaging masks the presence of higher plutonium concentrations—concentrations sufficient to pose a significant health risk at discrete locations.

B. "Confirmatory Soil Sampling"

An independent contractor's report that the Court labeled "confirmatory soil sampling" was performed in June 2018. Significantly, this report was *not* before the Court. Rather, the Court simply relied on the fact that "FWS discussed CDPHE's conclusion in its EA." Order at 14. The actual report of this sampling was prepared on behalf of five localities that, at that time, were partners in the Greenway Trail project (although two of the five entities have now abandoned their participation in the Greenway Trail Project due to safety concerns).[4] The report and related documents will be part of the agency's administrative record for review at a later stage of this litigation, when the Report's actual findings, *not just FWS's self-serving characterization of them*, can be analyzed and interpreted.

[4] In its Order, the Court referred to these cities as "offsite partners" in the Greenway Trail Project. Order at 14. As of this date, two of these five "partners" have pulled out of the Greenway Trail Project. The City and County of Broomfield (pop. 76,000) withdrew on October 27, 2020 after its City Council "expressed numerous concerns about the level of plutonium detected by the soil sampling." ECF No. 8-16 at 3. The City of Westminster (pop. 115,000) followed suit last month, on September 23, 2024, also citing health concerns. https://www.msn.com/en-us/news/us/westminster-pulls-out-of-rocky-flats-tunnel-and-bridge-access-project-citing-health-concerns/ar-AA1rpAuY. The City of Superior denied the project unanimously on April 25, 2016, and thus was never an offsite partner.

Attached hereto as **Exhibit 3** is the plan (the "Sampling Plan") for the "confirmatory sampling."[5] The Sampling Plan anticipated sampling solely at the two crossings into the Refuge, one of which (adjacent to the Wind Blown Area)[6] was replaced after Broomfield withdrew from the Greenway Project. *See* n. 1; *Compare* **Exhibit 3**, Fig. 1-1 (noting disturbance in Broomfield (BRMF)) *with* ECF 8-17 at 6. Thus, any "confirmatory sampling" at a now-irrelevant location is practically (and scientifically) meaningless.

Moreover, the samples were taken in a small area (well less than a mile) at the edge of the Refuge, which is insufficient to determine the extent of plutonium along the entire 8.2-mile Greenway Trail Project, or to "confirm" the sampling results referenced in the CAD/ROD. *See* ECF No. 8-17 at 5.

C. Sampling After Discovery of the "Bill Ray Particle"

CDPHE's 2020 sampling "in a 20-foot spaced grid pattern" after discovery of the Bill Ray particle (8.8 microns) involved only 25 sample points which "yielded results of less than 3 pCi/g." Order at 8. However, it is not solely the activity (in pCi/g) of a particular sample that is relevant, but the size and quantity of the individual particles found; to wit, soils near Rocky Flats contain plutonium in two distinct physical/chemical forms: i) relatively homogeneously distributed Pu, associated with soil minerals originating from the 0-3 Pad; and ii) particles of essentially pure plutonium dioxide, from fires such as the well-known events in 1957 and 1969.

The "grid pattern" sampling that followed the detection of the Bill Ray particle was not designed to detect plutonium dioxide particles, but rather, only the former type of

[5] The report is entitled "Sampling and Analysis Plan Rocky Mountain Greenway Trail Crossings." (the "Sampling Plan").

[6] **Exhibit 3** at 6-7.

homogeneously distributed contamination. ECF No. 11-1 at 5. **Exhibit 2**, ¶ 7. Nevertheless, it is the plutonium dioxide particles which pose special inhalation risks, particularly those in the 0.2 to 5 micron range, which are more likely to lodge in the lungs. **Exhibit 2**, ¶ 8. As previously noted, grid sampling tends to miss the plutonium hotspots. *See* **Exhibit 1** at 99-100. Thus, the sampling CDPHE performed after discovery of the Bill Ray particle was inadequate to assess the unexpected discovery of the large micron Bill Ray particle**. Exhibit** 2, ¶¶ 8-9. CDPHE should have used the discovery of the Bill Ray particle to conduct an entirely different, more accurate type of testing and sampling to determine the risk to visitors using the Greenway Trail Project, as Dr. Ketterer was, and is still, doing.

D. Testing by the Rocky Mountain Peace & Justice Center

Sampling and testing undertaken by independent academic and researcher Dr. Ketterer for the Rocky Mountain Peace & Justice Center and Rocky Flats Downwinders was significant not because the results "were well below the 50 pCi/g … remedial standard," Order at 8, but because it showed a prevalence of these non-homogeneously distributed *particles* that pose a heretofore unknown but significant risk to the public. *See* Section 2(C), above.

E. RESRAD Modeling

As a catch-all validation of the previously discussed sampling, the Court referenced "a regulatory dose assessment tool," known as RESRAD, which assessed exposure risks to a hypothetical construction worker. Order at 8. This RESRAD model has been called into question by rare cancer incidence in nearby neighborhoods. **Exhibit 4, Declaration of Shaunessy Kieng**,

¶¶ 12-14. Any RESRAD modeling should take a back seat to an analysis of actual epidemiological studies in the neighborhood. ECF No. 11-1 at 5.[7]

Furthermore, one of the major limitations of RESRAD is that it calculates risks from plutonium exposure on what is termed Reference Man, who is a 30-year-old Caucasian male and it is known that, for the same dose of ionizing radiation, women and children suffer from and die from cancer at a greater rate than men.[8]

In sum, there are significant methodological flaws in the materials relied upon by Defendants—and then endorsed by the Court—in determining safety along the Greenway Trail as part of preliminary injunction proceedings. Such materials require a balanced presentation by the parties after the administrative record is compiled at a subsequent stage of the litigation.

3. The Court's Finding of Apparent Safety was Based on Incomplete, Pre-Record Materials and Was Unnecessary for the Court's Determination.

The Court did not need to make a factual determination on safety at the Refuge in order to conclude that Plaintiffs had not proven a likelihood of success. Its determination that the EA

[7] The 50 pCi/g cleanup standard was used in RESRAD. However, the State of Colorado's plutonium soil standard, which is applicable across Indiana Street from the Refuge, is 2.0 dpm/g [corresponding to 0.9 pCi/g). **Exhibit 2**, ¶ 10.]. Construction in soil with more than this level of plutonium activity requires "special techniques." CDPHE Radiation Program Regulation, 4.60.1, 6 CCR 1007-1, Part 04 ("Plutonium"). Sampling for plutonium in soils next to the Refuge during "episodic high-wind events" was recently undertaken by Dr. Ketterer on April 6, 2014. **Exhibit 2**, ¶¶ 12-14. The sampling demonstrated that "*Rocky Flats plutonium is being dispersed under episodic high-wind conditions prevalent at the site, from contaminated source areas on the COU and/or RFNWR, and is being transported eastward towards non-Federal lands and populated areas*." **Exhibit 2**, ¶ 15 (emphasis added). Based on his sampling, he also concluded that "[t]he 239+240 Plutonium activity of particulate matter in the air on April 6, 2024 thus exceeds the State of Colorado 'construction standard' of 2 decompositions per minute of 239+240 Pu per gram of soil, equivalent to 0.88 pCi/gram." **Exhibit 2**, ¶ 16.

[8] National Research Council. 2006. *Health Risks from Exposure to Low Levels of Ionizing Radiation: BEIR VII Phase 2*. Washington, DC: The National Academies Press. https://doi.org/10.17226/11340.

"explicitly discussed potential health effects of residual plutonium radiation on the Refuge," Order at 2 and 13, was sufficient to reject Plaintiffs' NEPA procedural challenge. In addition, the Court's decision that irreparable harm had not been shown to be likely was based on its determination that Plaintiffs' case was not sufficiently developed. *See* Order at 27-28. As discussed in the previous section, the Court primarily relied on documents that the government *summarized*, but which were not actually before the Court, to determine that the government's look at the plutonium safety was solid. The Court did not have to go beyond that determination, especially at the preliminary injunction stage, to deny Plaintiffs' request.[9]

4. A Minor Adjustment to the Court's Order, Without Changing its Holding, is Requested to Reflect that Not all Record Materials Were Before the Court on the Issue of Safety at the Refuge at this Preliminary Stage of the Case

Plaintiffs seek a modest adjustment to the Court's Order that residual plutonium on the Refuge poses an acceptable risk to visitors. It was premature to find that Defendants' look at safety at the Refuge was "rock solid" based on a highly selective "discussion" by just one of the parties based on materials that were not before the Court, and, as a result, the flaws in those materials could not be tested (let alone disputed) by the parties and fairly assessed by the Court.

[9] A premature judicial ruling on safety is unsettling for those local, state and private entities working on the issue for years. For instance, seven local school districts which banned field trips to the Refuge prior to its opening. The school districts are:

- Boulder Valley School District - board resolution, 3/14/17
- St. Vrain Valley School District - commitment by the superintendent, 5/10/17
- Westminster Public Schools - commitment by the superintendent, 9/29/17
- Adams 14 School District - board resolution, 10/10/17
- Adams 12 School District - commitment by the superintendent, 12/6/17
- Jeffco Public Schools - commitment by the superintendent, 2/8/18
- Denver Public Schools - board resolution, 4/26/18

CONCLUSION

For the reasons stated above, Plaintiffs seek partial relief from the Court's preliminary injunction Order under Rule 60(b)(1) (mistake of fact) or, in the alternative, Rule 60(b)(6) (extraordinary circumstances). Plaintiffs respectfully request a minor adjustment to the Order to rescind any determination of safety at the Refuge, which the Court should not address or resolve until all relevant materials are before it in this record review case.

Respectfully submitted,

By: /s/ Randall M. Weiner
Randall M. Weiner
Admitted pro hac vice
Annmarie Cording
Admitted pro hac vice
WEINER & CORDING
3100 Arapahoe Avenue, Suite 202
Boulder, CO 80303
(303) 440-3321

By: /s/ William S. Eubanks II
William S. Eubanks II
EUBANKS & ASSOCIATES, PLLC
1629 K Street NW, Suite 300
Washington, DC 20006
(970) 703-6060
bill@eubankslegal.com

Attorneys for Plaintiffs