Scott Carey

From:	Saundra Edwards <saundra.edwards@barmail.ch>
Sent:	Wednesday, November 2, 2022 8:48 PM
To:	Scott Carey
Subject:	NTRPA GB Meeting # (2) Public Comment ~ Thursday Nov 3rd, 2022
Attachments:	POEX_Map.pdf; National-Park-ServicePony-Express-Map.pdf; NationalTrailsmap.pdf; El Dorado Beach_Scenic_Recreation_Area.pdf; El Dorado Beach_Scenic_Res_82 _Roadways.pdf; Delaware Riverkeeper Network v FERC, 753 F.3d 1304 (2014).pdf; Fund For Animals v Hall, 448 F.Supp.2d 127 (2006).pdf; Executive Order 13057—Federal Actions in the Lake Tahoe Region.pdf

Dear Nevada Tahoe Regional Planning Agency Governing Board,

I oppose the approval of the "Special Use Permit" for this indoor waterpark-rec facility. This project will clearly have a significant impact on the environment which must be studied and then mitigated through an alternative location for this indoor recreation facility (Cal. Public Resources Code § 21002).

Moreover, **the CEQA "negative declaration" for the proposed Bijou/Al Tahoe Community Plan** which is connected to the "Amendment Agreement and Ground Lease with El Dorado County for Development, Operation, and Maintenance of the 56-Acre Property," **is deficient**, as it does not consider the impact to National Historic resources including the famous Pony Express National Historic Trail (NHT), the Lincoln Highway (earliest transcontinental highway route), a Tahoe Regional Planning Agency designated scenic corridor, or to a California State Scenic Highway, and therefore I object.

56-ACRES "PLAN" IS TO CONSTRU

NATIONAL HISTORIC

The project area overbears upon the famous Lincoln Highway National Historic Road:

Pursuant to the National Environmental Policy Act (42 U.S.C. §§ 4321-4370m; *Fund For Animals v. Hall*, 448 F.Supp.2d 127, 134 (2006) (any statutory exemption must provide "procedurally and substantively," for the "functional equivalent" of compliance with NEPA); *Conservation Law Foundation v. Ross*, 374 F.Supp.3d 77, 110, 112 (2019) (NEPA has two aims: first, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, and second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process; in deciding whether an agency has considered all reasonable alternatives to its proposed action, as required by NEPA, the agency's objectives for its proposed action are unreasonably narrow if they compel the selection of a particular alternative); *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 518 (2010) (Under NEPA, agencies must permit the public to play a role in the decisionmaking process and the implementation of that decision). *See also*, *Sierra Club v. United States Army Corps of Engineers*, 64 F.Supp.3d 128, 142 (2014) (NEPA and APA as default law)), the National Historic

Preservation Act (54 U.S.C. §§ 300101-320303; *Mashack v. Jewell*, 149 F.Supp.3d 11, 30 (2016) (holding operational similarity between NEPA and NHPA)), the California State analogues (Public Resources Code "at large"), the federal Tahoe Regional Planning Agency Bi-State Compact (co-adopted into California Law as Government Code §§ 67040-67132), environmental review must be performed (*see also*, Public Law 96-551 Articles VI(g) & VII). The Pony Express NHT and the Lincoln Highway's scenic overlook "associate a memorable happening in the past," and "contain outstanding qualities reminiscent of an early state of development in the region." As South Tahoe historical locales critically functioned to support and service early interstate travel, this site is also "associat[ed] with important community functions in the past" which dictates protections according to TRPA Regional Plan Goal C-1 and TRPA Code of Ordinances § 67.6.1:

CHAPTER 67: HISTORIC RESOURCE PROTECTION
67.6 Criteria for Eligibility as a Historic Resource
67.6.1 Resources Associated with Historically Significant Events an

67.6.1. Resources Associated with Historically Signifi

Resources shall exemplify the broad cultural, political, econom history of the region, the states, or the nation, or be associated a significant contribution to the broad patterns of history, inclu resources shall meet one or more of the following criteria:

A. Association with an important community function i

B. Association with a memorable happening in the pas

C. Contain outstanding qualities reminiscent of an ea the region.

The project under review will cause the adopted environmental scenic threshold carrying capacities of the region to be exceeded (roadway unit 34); roadway distraction will have substantively increased in this corridor since 1982. It's purpose is to allow construction of a facility that will destroy an area of national significance. The purpose of this amendment has no substantial independent utility; without it, the recreation facility "cannot or will not proceed" unless this action is taken previously, and therefore the amendment is "connected" to that project (*see*, *Hammond v. Norton*, 370 F.Supp.2d 226, 248 (2005). *See also*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 301 F.Supp.3d 50, 68 (2018); *Taxpayers Watchdog, Inc. v. Stanley*, 819

F.2d 294, 298 (1987)). The conclusory negative finding evades discovery of the extent of this harm and exploration of an "analysis of alternative options" (*see*, *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1313 (2014). *See also*, *Hammond v. Norton*, 370 F.Supp.2d 226, 241 (2005) (holding "the 'reasonable alternatives' that an agency must consider under NEPA in preparing an environmental impact statement (EIS) must include the alternative of taking no action whatsoever"). Worse, it is the illegal "piecemeal" review "segmenting" "connected actions" into sizes designed to stay below the threshold of a significant environmental finding. The plan area amendment would degrade the area's architectural standards which will clearly result in a cumulative or synergistic environmental impact upon the region when combined with the hideous proposed facility of which it is purposed and designed to allow (*see Hammond* at 245). The courts will not allow an agency to supply post-hoc rationalizations for its actions, so post-decision information may not be advanced as a new rationalization (*San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 603 (2014)). There was a concerted effort by past City planners to prevent blight-fully aberrant or idiosyncratic Gambrel and Mansard roof designs in this historic corridor full of alpine and Bavarian style architecture, to prevent the continued denuding of natural forest near scenic corridors, and to remove roadway distractions from scenic resources:

1. Roadway Unit 34 El Dorado Beach increased was already in attain
increased due to the Alta Mira building being removed which inc
and the Harrison Avenue project which reconfigured parking, ins
improved landscaping.

Figure 9-3: *Photo of the Alta Mira building before (left) and after removal (rig*
Tahoe from U.S. Highway 50 in the City of South Lake Tahoe.

An indoor "waterpark" does not in any way utilize the parcel as a scenic resource. The substantive "amusement" facility threatens to not only overcrowd an area already heavily impacted by adjacent recreational beach use, but to impound an utterly incompatible indoor use upon an outstanding outdoor scenic area, in egregious violation of TRPA Regional Plan Goal R-5:

GOAL R-5

PROTECT NATURAL RESOURCES FROM OVERUSE AND RECTIFY AMONG USES.

Overcrowding of facilities or areas can lead to the deterioration of the and recreational experience. In the same manner, the quality of the recr can be affected by conflicting uses within the same area. Strategies that a are listed below.

POLICIES:

R-5.1 RECREATION DEVELOPMENT IN THE TAHOE REGION SHA WITH THE SPECIAL RESOURCES OF THE AREA.

The physical and biological characteristics of the Tahoe R create a unique variety of recreational opportunities. These types of recreational activities that are compatible with th features. Those activities that can best be served elsew incompatible with the Region's natural qualities should be av

It is also important to point out that the proposed indoor amusement park (with "waterslides" and "a lazy river") would be constructed within 300 feet of the high water mark of the lake, and thus would be destroying "shoreland" currently used for outdoor recreation and camping—for a hedonistic indoor novelty:

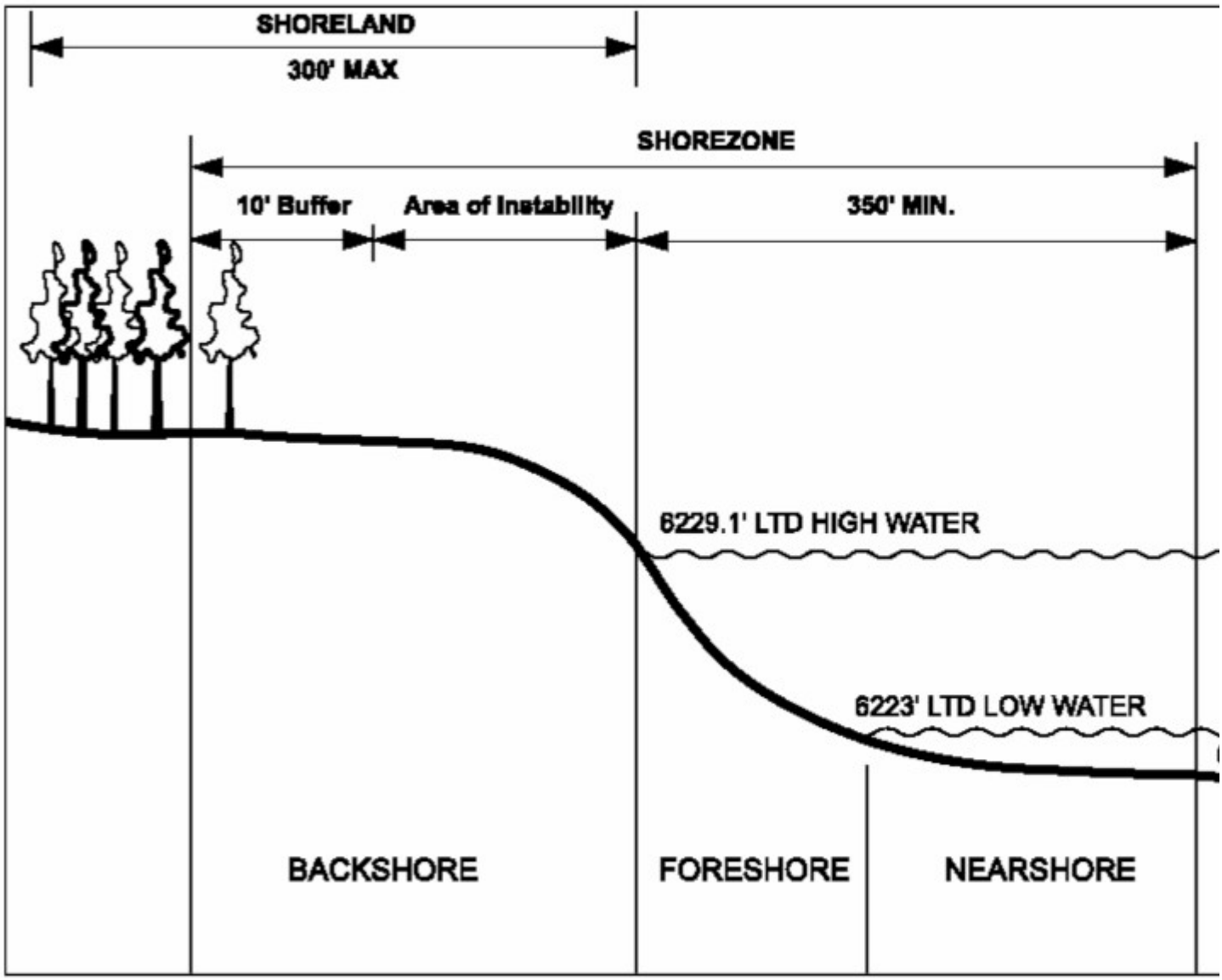


Figure 6-1. Definitions of Scenic Quality Terms

The proposal has been the source of tremendous controversy, accusations of corruption, misconduct, malfeasance of office by public officials, and an apparent abusive exploitation of the COVID-19 pandemic (*See*, *Fund For Animals v. Hall*, 448 F.Supp.2d 127, 132 (2006) (holding "[t]o determine whether an action 'significantly affects' the environment, the agency must consider several factors, among them the degree to which the effects on the quality of the human environment are likely to be **highly controversial** or highly uncertain, the degree to which the action may establish a precedent for future actions, the degree to which the action may cause loss of significant scientific, **cultural**, or **historical resources**, and the degree to which the action may adversely affect an endangered or threatened species")). The City Manager and Clerk have—unlawfully—suppressed public comment and conversation on the matter, the Developmental Services Director appears to have had a material conflict-of-interest, also her "lieutenant" is married to a TRPA planning officer (who is alleged to

be logrolling his projects through her agency), two Planning Commissioners involved have conflicts as real estate agents and a third (President Williams) as director of the South Lake Tahoe Lodging Association, and a planner on the Parks & Recreation Commission (Treasurer Bindel), has pushed for this development which is right next to the hotel owned by Vice President Bodine of this very Association. There is outrage that the clearly inappropriate location of this proposed facility is purely myopically motivated as a lodging amenity for the SLTLA at the expense of the local community, and the greater long-term state and national interests towards scenic and historic preservation.

To make matters worse, the City Mayor (Middlebrook) is also an employee of the TRPA which is an agency quite visibly "captured" by real estate developers, and thus the City and State have lost a significant check in power on account of said mayoral incompatibility of office (*e.g.,* Gov. §§ 1099 & 1126). This conflict is constitutionally illegal because the Mayor, as an employee of the TRPA, currently holds "lucrative office under the United States or other power" in violation of California Constitution Article VII, Section 7. It is settled law that the TRPA is a federal power (*see*, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402, n.22 (U.S. Supreme Court, 1979) (holding TRPA is not in fact an arm of the State subject to its control). *See also*, *People of State of Cal ex rel Younger v Tahoe Regional Planning Agency*, 516 F.2d 215 (9th Cir. 1975)). The TRPA itself in a recent hearing held that it "having been created by an interstate compact, is a creature of federal law" (Staff Report. TRPA Hearings Officer Meeting. p.4, Oct. 14, 2021).

Mayor Middlebrook has put tremendous pressures on City officials and may partly be responsible for the aforementioned unethical conduct by the City Manager and City Clerk. A petition to the Attorney General's office for a *Writ of Quo Warranto* has been pending for well over a year. Cal. Const. Art. VII, Sec. 7's purpose is "to prohibit conjunction of federal and state office of profit in same person, without any condition whatever, to prevent dual office holding by one person under two separate and distinct governments and separation of allegiance justly due one government by its officers from that due to another power" (*McCoy v. Board of Sup'rs of Los Angeles County*, 18 Cal.2d 193, 196 (California Supreme Court, 1941)). Middlebrook was not even allowed to run for office. The term 'eligible,' as used in our state constitution, relates to capacity of holding, as well as capacity of being elected to, an office (*People ex rel. Atty. Gen. v. Leonard*, 73 Cal. 230, 234 (California Supreme Court, 1887)). Because this is a fundamental constitutional violation, the GOV. § 1099(b) forfeiture rule is preempted, and hence does not apply; he does not get to "accede" or keep thereafter his elected office; state and local agencies have no authority whatsoever to forfeit his federal office.

There has been tremendous local interest is setting aside this land in its natural state, and having it potentially become a National Monument under the Antiquities Act (54 U.S.C. §§ 320301-320303), run by the National Park Service, with a Museum and

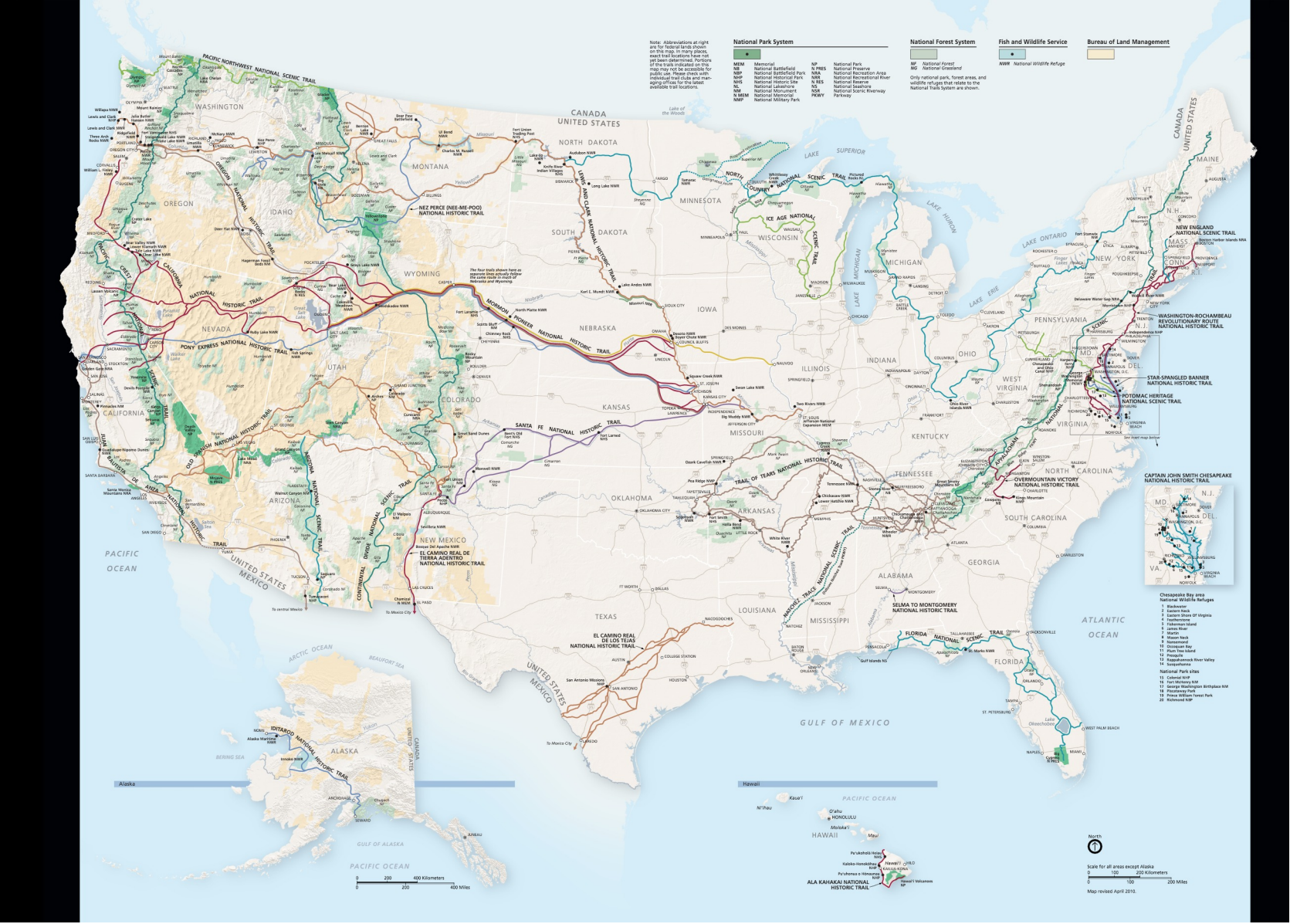
Visitor's Center dedicated to the Pony Express National Historic Trail & Lincoln Highway and other nearby national trails (*e.g.,* Pacific Crest Trail), but far removed away from view from the scenic bluff. The center would also offer interpretation for Friday's Station National Historic Site. This would bring both federal monies, federal jobs, and national visitors to the area, but needs time to play out. The proposed indoor recreation center could be placed almost anywhere else as there is abundant vacant land.

Suffice it to say, I oppose any agreement or resolution to move the restrooms. These restrooms actually serve the world-class camping location on a bluff overlooking Lake Tahoe, a National Treasure. This campground needs to be protected, which means protecting the restrooms on which the campsite users depend.

Thanks,

Saundra Edwards

56-ACRES "PLAN" IS TO CONSTRUCT FACILITIES UPON NATIONAL HISTORIC TRAIL


Note: Abbreviations at right are for federal lands shown on this map. In many places, exact trail locations have not been determined. The location of the trails indicated on this map may not be accessible for public use. Please check with individual trail clubs and managing offices for the latest available trail locations.
National Park System
MEM Memorial
NB National Battlefield
NBP National Battlefield Park
NHP National Historical Park
NHS National Historic Site
NM National Monument
NM National Monument
N MEM National Memorial
NMP National Military Park
NP National Park
N PRES National Preserve
NRA National Recreation Area
NRR National Recreational River
NR National Reserve
NS National Seashore
NSR National Scenic Riverway
PKWY Parkway
National Forest System
NF National Forest
NG National Grassland
Only national park, forest areas, and wildlife refuges that relate to the National Trails System are shown.
Fish and Wildlife Service
NWR National Wildlife Refuge
Bureau of Land Management
PACIFIC NORTHWEST NATIONAL SCENIC TRAIL
WASHINGTON
OREGON
IDAHO
CANADA
UNITED STATES
NORTH DAKOTA
MONTANA
MINNESOTA
SOUTH DAKOTA
WYOMING
NEZ PERCE (NEE-ME-POO) NATIONAL HISTORIC TRAIL
LEWIS AND CLARK NATIONAL HISTORIC TRAIL
OREGON NATIONAL HISTORIC TRAIL
CALIFORNIA NATIONAL HISTORIC TRAIL
MORMON PIONEER NATIONAL HISTORIC TRAIL
PONY EXPRESS NATIONAL HISTORIC TRAIL
NEVADA
UTAH
COLORADO
NEBRASKA
IOWA
KANSAS
MISSOURI
ILLINOIS
INDIANA
OHIO
MICHIGAN
WISCONSIN
ICE AGE NATIONAL SCENIC TRAIL
NORTH COUNTRY NATIONAL SCENIC TRAIL
LAKE SUPERIOR
LAKE MICHIGAN
LAKE HURON
LAKE ERIE
LAKE ONTARIO
NEW ENGLAND NATIONAL SCENIC TRAIL
WASHINGTON-ROCHAMBEAU REVOLUTIONARY ROUTE NATIONAL HISTORIC TRAIL
STAR-SPANGLED BANNER NATIONAL HISTORIC TRAIL
POTOMAC HERITAGE NATIONAL SCENIC TRAIL
CAPTAIN JOHN SMITH CHESAPEAKE NATIONAL HISTORIC TRAIL
OVERMOUNTAIN VICTORY NATIONAL HISTORIC TRAIL
TRAIL OF TEARS NATIONAL HISTORIC TRAIL
SANTA FE NATIONAL HISTORIC TRAIL
OLD SPANISH NATIONAL HISTORIC TRAIL
ARIZONA NATIONAL SCENIC TRAIL
CONTINENTAL DIVIDE NATIONAL SCENIC TRAIL
EL CAMINO REAL DE TIERRA ADENTRO NATIONAL HISTORIC TRAIL
EL CAMINO REAL DE LOS TEJAS NATIONAL HISTORIC TRAIL
NATCHEZ TRACE NATIONAL SCENIC TRAIL
SELMA TO MONTGOMERY NATIONAL HISTORIC TRAIL
FLORIDA NATIONAL SCENIC TRAIL
ATLANTIC OCEAN
PACIFIC OCEAN
GULF OF MEXICO
ARCTIC OCEAN
BEAUFORT SEA
BERING SEA
GULF OF ALASKA
ALASKA
IDITAROD NATIONAL HISTORIC TRAIL
HAWAII
ALA KAHAKAI NATIONAL HISTORIC TRAIL
Chesapeake Bay area National Wildlife Refuges
1 Blackwater
2 Eastern Neck
3 Eastern Shore Of Virginia
4 Featherstone
5 Fisherman Island
6 James River
7 Mason
8 Mason Neck
9 Nansemond
10 Occoquan Bay
11 Plum Tree Island
12 Presquile
13 Rappahannock River Valley
14 Susquehanna
National Park sites
15 Colonial NHP
16 Fort Monroe NM
17 George Washington Birthplace NM
18 Piscataway Park
19 Prince William Forest Park
20 Richmond NBP
See inset map below
North
Scale for all areas except Alaska
0 100 200 Kilometers
0 100 200 Miles
Map revised April 2010.

PONY EXPRESS
NATIONAL HISTORIC TRAIL
Pony Express National Historic Trail
Designated routes of the Pony Express National Historic Trail
Additional routes
Major sites
Additional sites
Pacific Ocean
CALIFORNIA
OREGON
IDAHO
NEVADA
UTAH
MONTANA
WYOMING
COLORADO
SOUTH DAKOTA
NEBRASKA
KANSAS
MINNESOTA
IOWA
MISSOURI
WISC.
COAST RANGES
CASCADE RANGE
SIERRA NEVADA
GREAT BASIN
SNAKE RIVER PLAIN
ROCKY MOUNTAINS
GREAT PLAINS
COLORADO PLATEAU
SALMON RIVER MOUNTAINS
GREAT SALT LAKE DESERT
GREAT DIVIDE BASIN
SACRAMENTO
SAN FRANCISCO
SALT LAKE CITY
DENVER
B.F. Hastings Building
Sand Springs Station
Cold Springs Station
Fort Churchill
Willow Springs Station
Simpson Springs
Boyd Station
Camp Floyd Stagecoach Inn
Faust's Station
Indian Ford
Big Mountain Pass
The Needles
Church Butte
Fort Bridger
Bear River Crossing
Big Sandy Crossing
Parting of the Ways
Dry Sandy Crossing
Little Sandy Crossing
South Pass
Pacific Springs
Burnt Ranch
Rocky Ridge
Split Rock
Three Crossings
Devil's Gate
Independence Rock
Willow Springs
Prospect Hill
Avenue of Rocks
Fort Caspar
Guernsey Ruts
Laramie Peak
Fort Laramie
Scotts Bluff / Mitchell Pass
Chimney Rock
Courthouse Rock/Jail Rock
O'Fallon's Bluff
Plum Creek Station
Fort Kearny
Thirty-two Mile Station
The Narrows
Rock Creek Station
Hollenberg Station
Marysville Pony Express Barn
Guittard's Station
St. Joseph Riverfront Ferry Landing / Pony Express Stables / Patee House

448 F.Supp.2d 127
United States District Court,
District of Columbia.

The FUND FOR ANIMALS et al., Plaintiffs,
v.
Dale HALL et al., Defendants,
and
The U.S. Sportsmen's Alliance Foundation et al., Defendant–Intervenors.

Civil Action No. 03–0677 (RMU).
|
Aug. 31, 2006.

Synopsis

Background: Nonprofit organization brought action against United States Fish and Wildlife Service (FWS), alleging that six rules creating or expanding hunting opportunities at individual National Wildlife Refuges violated National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA). Following dismissal, 391 F.Supp.2d 132, of one claim, cross-motions for summary judgment were brought.

[Holding:] The District Court, Urbina, J., held that FWS violated NEPA by proceeding on basis of Environmental Assessments (EA) prepared by individual refuges.

Motions granted in part and denied in part.

West Headnotes (9)

[1] **Environmental Law** Assessments and Impact Statements

Role of the courts, in an action under the National Environmental Policy Act (NEPA), is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[2] **Environmental Law** Assessments and Impact Statements

In reviewing, under the National Environmental Policy Act (NEPA), an agency's Finding of No Significant Impact (FONSI), courts examine whether the agency (1) accurately identified the relevant environmental concern, (2) took a hard look at the problem in preparing the Environmental Assessment (EA), (3) is able to make a convincing case for its FONSI, and (4) if there was an impact of true significance, convincingly established that changes in the project sufficiently reduced it to a minimum. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[3] **Environmental Law** Scope of Project; Multiple Projects

If an agency is involved in several actions which, cumulatively, have a significant impact on the environment, then under the National Environmental Policy Act (NEPA) these actions should be considered in the same environmental document. 40 C.F.R. § 1508.25(a)(2).

1 Cases that cite this headnote

[4] **Environmental Law** Sufficiency

Under the National Environmental Policy Act (NEPA), an agency's Environmental Assessment (EA) must give a realistic evaluation of the total impacts of proposed actions and cannot isolate a proposed project, viewing it in a vacuum. 40 C.F.R. § 1508.25.

[5] **Environmental Law** Necessity

Environmental Law Land Use in General

Fish and Wildlife Service (FWS), in issuing six rules creating or expanding recreational hunting at individual National Wildlife Refuges, violated National Environmental Policy Act (NEPA) by proceeding on basis of Environmental Assessments (EA) prepared by individual

refuges; EAs only considered the impact of increased hunting on the particular refuge, rather than its cumulative impact on the entire refuge system, and neither the Migratory Bird Hunting Frameworks nor the Endangered Species Act's (ESA) § 7 consultation process were the functional equivalents of NEPA's environmental review process. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

1 Cases that cite this headnote

[6] **Environmental Law** Categorical Exclusion; Exemptions in General

Under the National Environmental Policy Act (NEPA), an agency may be exempt from conducting a NEPA environmental review if a statute provides, procedurally and substantively, for the functional equivalent of compliance with NEPA. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[7] **Environmental Law** Necessity

Environmental Law Land Use in General

Migratory Bird Hunting Frameworks were not functional equivalent of National Environmental Policy Act's (NEPA) environmental review process, for purposes of determination whether Fish and Wildlife Service (FWS), in creating or expanding recreational hunting at individual National Wildlife Refuges, violated NEPA by proceeding on basis of Environmental Assessments (EA) prepared by individual refuges; Frameworks only considered the effects of actions related to migratory birds and did not provide for public comment, and in any case some refuge managers did not consider the Frameworks in deciding whether to expand or create hunting opportunities at their refuges. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; 40 C.F.R. § 1500.1(b).

1 Cases that cite this headnote

[8] **Environmental Law** Assessments and Impact Statements

Court's review, in an action under the National Environmental Policy Act (NEPA), is limited to the administrative record that was before the agency at the time it made its decision. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[9] **Environmental Law** Necessity

Environmental Law Land Use in General

Endangered Species Act's (ESA) § 7 consultation process was not functional equivalent of National Environmental Policy Act's (NEPA) environmental review process, for purposes of determination whether Fish and Wildlife Service (FWS), in creating or expanding recreational hunting at individual National Wildlife Refuges, violated NEPA by proceeding on basis of Environmental Assessments (EA) prepared by individual refuges; ESA only required agencies to consider the cumulative impacts of non-federal actions and did not provide for public comment in same way NEPA did, and in any case refuge managers did not consider the cumulative impacts on the entire refuge system of increased hunting.

3 Cases that cite this headnote

Attorneys and Law Firms

***129** Tanya Sanerib, Eric Robert Glitzenstein, Meyer Glitzenstein & Crystal, Jonathan Russell Lovvorn, The Humane Society of the United States, Of Counsel, Washington, DC, for Plaintiffs.

Peter Blumberg, United States Attorney's Office, Civil Division, Washington, DC, for Defendants.

Barbara A. Miller, Kelley Drye & Warren, LLP, William P. Horn, Birch, Horton, Bittner and Cherot, Anna Margo Seidman, Safari Club International, Washington, DC, for Defendant–Intervenors.

MEMORANDUM OPINION

URBINA, District Judge.

Granting the Plaintiffs' Motion for Summary Judgment; Denying the Defendants' and Defendant–Intervenors' Motions for Summary Judgment

I. INTRODUCTION

This case comes before the court on the parties' cross-motions for summary judgment. The plaintiffs allege that the Fish and Wildlife Service (the "FWS") violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.,* and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706 *et seq.* Specifically, the plaintiffs claim that the defendants failed to analyze the cumulative effects of increased hunting prior to issuing six final agency rules initiating or expanding sport hunting in thirty-seven National Wildlife Refuges. Because the defendants did not consider the cumulative impacts of increased hunting, the court grants the plaintiffs' motion for summary judgment ***130** and denies the defendants' and defendant-intervenors' motions for summary judgment.

II. BACKGROUND

A. Factual Background

First established by President Theodore Roosevelt in 1903, the National Wildlife Refuge System (the "refuge system") consists of over 500 wildlife refuges, with locations in all fifty states. Compl. ¶ 81; Defs.' Opp'n to Pls.' Mot. for Summ. J. and Cross–Mot. for Summ. J. ("Defs.' Opp'n") at 6. Congress designed the Refuge System to "administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." Compl. ¶ 83 (citing 16 U.S.C. § 668dd(a)).

Since the refuge system's inception, Congress has gradually authorized the practice of recreational activities in the refuges, including sport hunting. Compl. ¶ 85; Defs.' Opp'n at 9. Congress has simultaneously attempted to mitigate the detrimental effects of increased recreational use of the refuges. For example, in 1997, Congress enacted the National Wildlife Refuge Improvement Act, to "ensure that opportunities are provided within the System for compatible wildlife dependent recreation," including "fishing and hunting." Defs.' Opp'n. at 9 (citing 16 U.S.C. § 668dd(a)). At the same time, however, the FWS must still "provid[e] for the conservation of fish, wildlife, plants, and their habitats," "monitor[ ] the status and trends of fish, wildlife, and plants in each refuge," and "ensure[ ] the biological integrity, diversity, and environmental health of the system." 16 U.S.C. § 668dd(a)(3)-(4); Compl. ¶ 97.

To ensure compliance with the 1997 Act, the FWS reviews its recreational programs annually to determine whether to maintain, diminish, or expand opportunities for activities such as hunting and fishing. Defs.' Opp'n at 10. Before opening a refuge to recreational hunting, the FWS develops a proposed hunting plan, which involves the development of refuge-specific regulations to ensure compatibility. But, ultimately, it is the individual refuges that determine whether to allow hunting or fishing on their grounds. *Id.* at 3.

Between 1997 and 2002, the FWS issued six final rules creating or expanding recreational hunting opportunities at numerous wildlife refuges. Compl. ¶ 99; *see also* 67 Fed.Reg. 58936 (Sept. 18, 2002); 66 Fed.Reg. 46346 (Sept. 4, 2001); 65 Fed.Reg. 56396 (Sept. 18, 2000); 65 Fed.Reg. 30771 (May 12, 2000); 63 Fed.Reg. 46910, 46912 (Sept. 3, 1998); 62 Fed.Reg. 47372, 47374 (Sept. 9, 1997). The plaintiffs allege that, prior to issuing the six final rules, the FWS did not analyze the cumulative impacts on the environment. According to the plaintiffs, the failure to analyze the rules' cumulative impacts constitutes a violation of NEPA. *See generally* Compl. Though admitting that it did not prepare an Environmental Impact Statement ("EIS") or an Environmental Assessment ("EA") prior to the publication of the six final rules, Ans. ¶ 103, Defs.' Opp'n at 40, the FWS claims that the individual refuges prepared EAs prior to the actual opening or expansions of refuges. Defs.' Opp'n at 3. According to the FWS, the individual refuges that conducted EAs concluded that creating or expanding recreational hunting would not have a significant impact on the environment. Defs.' Opp'n at 44. Because of the this Finding of No Significant Impact ("FONSI"), the FWS did not conduct an EIS. *Id.*

***131 B. Procedural History**

The plaintiff Fund for Animals (the "Fund") is a national nonprofit membership organization dedicated to "preserving animal and plant species in their natural habitats and ... preventing the abuse and exploitation of wild and domestic animals." Compl. ¶ 3. The Fund initiated this action on its own behalf and on behalf of its members, who regularly engage in educational, recreational and scientific activities on and near national wildlife refuges. *Id.* ¶ 5.

After the Fund filed this action, the court, concluding that it lacked subject-matter jurisdiction, granted the defendants' motion to dismiss the plaintiffs' allegations that the FWS violated NEPA and the APA by publishing its long-term goals in a Strategic Plan. That dismissal, however, left the plaintiffs' NEPA challenge to the six agency rules intact. The plaintiffs now moves for summary judgment on their claim challenging the six rules creating or expanding hunting opportunities at individual refuges. The defendants and the defendant-intervenors, in their opposition to the plaintiffs' motion, cross-move for summary judgment. The court now turns to the parties' motions.

III. ANALYSIS

A. Legal Standard for a Motion for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Diamond v. Atwood,* 43 F.3d 1538, 1540 (D.C.Cir.1995). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex,* 477 U.S. at 322, 106 S.Ct. 2548; *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505.

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson,* 477 U.S. at 255, 106 S.Ct. 2505. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252, 106 S.Ct. 2505. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322, 106 S.Ct. 2548. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *Id.*

In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton,* 164 F.3d 671, 675 (D.C.Cir.1999); *Harding v. Gray,* 9 F.3d 150, 154 (D.C.Cir.1993). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Greene,* 164 F.3d at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. at 249–50, 106 S.Ct. 2505 (internal citations omitted).

***132 B. Legal Standard for the National Environmental Policy Act**

Under NEPA, an agency must prepare an EIS for any proposed major federal action "significantly affecting" the quality of the human environment. 42 U.S.C. § 4332(C). To determine whether an action "significantly affects" the environment, the agency must consider several factors, among them the degree to which the effects on the quality of the human environment are likely to be highly controversial or highly uncertain, the degree to which the action may establish a precedent for future actions, the degree to which the action may cause loss of significant scientific, cultural, or historical resources, and the degree to which the action may adversely affect an endangered or threatened species. 40 C.F.R. § 1508.27(b).

If it is not clear whether an EIS is required, the agency must draw up an EA, defined as a "concise public document" that sets forth the evidence and analysis for proceeding with an EIS. *Id.* §§ 1501.4(b), 1508.9. If, based on the EA, the agency determines that an EIS is warranted, it must proceed with the EIS. *Id.* § 1501.4(d). If not, the agency must issue a FONSI explaining why the proposed action would not significantly affect the environment. *Id.* §§ 1501.4(e), 1508.13.

[1] **[2]** Because the NEPA process "involves an almost endless series of judgment calls ... [t]he line-drawing decisions ... are vested in the agencies, not the courts." *Coalition on Sensible Transp., Inc. v. Dole,* 826 F.2d 60, 66 (D.C.Cir.1987). Therefore, the "role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *City of Olmsted Falls, Ohio v. Fed. Aviation Admin.,* 292 F.3d 261, 269 (D.C.Cir.2002) (citing *Baltimore Gas & Elec. v. Natural Res. Def. Council,* 462 U.S. 87, 97–98, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983)). In reviewing an agency's FONSI, courts in this circuit apply a four-part test that looks to see if the agency (1) accurately identified the relevant environmental concern, (2) took a "hard look" at the problem in preparing the EA, (3) is able to make a convincing case for its FONSI, and (4) if there was an impact of true significance, convincingly established that changes in the project sufficiently reduced it to a minimum. *Grand Canyon Trust v. Fed. Aviation Admin.,* 290 F.3d 339, 341 (D.C.Cir.2002); *Humane Soc'y v. Hodel,* 840 F.2d 45, 62 (D.C.Cir.1988).

C. The Court Grants the Plaintiffs' Motion for Summary Judgment

The plaintiffs move for summary judgment, arguing that the FWS has not complied with NEPA in issuing six agency rules creating or expanding recreational hunting at thirty-six refuges. Pls.' Mot. for Summ. J. ("Pls.' Mot.") at 1. In this case, the individual refuges prepared EAs to analyze the impact that expanding hunting opportunities would have on the refuge. Pls.' Mot. at 16; Defs.' Opp'n at 3. The plaintiffs claims that the defendants violated NEPA because many of the EAs prepared by the individual refuges only consider the impact from increased hunting on the particular refuge, and thus the EAs fail to properly consider the impact of increased hunting on the entire refuge system.[1] Pls.' Mot. at 16. As stated by the ***133** plaintiffs, "the FWS did not engage in any cumulative impacts analysis that looked at the overall, synergistic effect of significantly expanding hunting on various Refuges, particularly Refuges in the *same* general geographic areas." *Id.* (emphasis in original). In short, the plaintiffs argue that the FWS failed to take the requisite hard look at the cumulative impacts of the rules. *Id.* at 21.

The defendants, on other hand, concede that the individual EAs did not analyze the cumulative impacts of increasing hunting opportunities throughout the refuge system, but they aver that the FWS has nevertheless considered the adverse cumulative effects from expanding hunting, thereby satisfying NEPA's requirement that the agency take a "hard look" at the problem. Defs.' Opp'n at 4. According to the defendants, the FONSIs in the individual refuges' EAs were not arbitrary or capricious because the FWS analyzes the cumulative impacts of increased hunting through its Migratory Bird Hunting Frameworks[2] and through consultations conducted pursuant to the Endangered Species Act. *Id.* at 4–5, 44. That is, the FWS claims that it was not required to analyze the cumulative impacts of increased hunting in the NEPA-mandated EAs because other, non-NEPA statutory schemes already require it to do so. *Id.* at 4–5.

1. Cumulative Impact Under NEPA

[3] **[4]** "If an agency is involved in several actions which, cumulatively, have a significant impact on the environment, then these actions should be considered in the same environmental document." *Fund for the Animals v. Clark,* 27 F.Supp.2d 8, 13 (D.D.C.1998) (citing 40 C.F.R. § 1508.25(a)(2)). Further, an agency should consider actions having common timing or geography in the same environmental document. 40 C.F.R. § 1508.25(a)(3). "Importantly, an agency may not segment actions to unreasonably restrict the scope of the environmental review process." *Clark,* 27 F.Supp.2d at 13 (citing *Found. of Econ. Trends v. Heckler,* 756 F.2d 143, 159 (D.C.Cir.1985)). Stated differently, "the agency's EA must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum." *Grand Canyon Trust,* 290 F.3d 339 at 342.

2. The FWS did Not Analyze the Cumulative Impacts of the Six Final Agency Rules

[5] The defendants concede that neither the FWS nor the individual refuge EAs analyzed the cumulative impacts of the six final agency rules. Defs.' Opp'n at 4. The defendants assert that "NEPA does not require FWS to duplicate work that it is already doing [pursuant to other statutes]." *Id.* at 31. Relying on a footnote in *Izaak Walton League of America v. Marsh,* the defendants point out that "[c]ompliance with NEPA's environmental impact statement requirement has not been considered necessary when the agency's organic legislation mandates procedures ***134** for considering the environment that are 'functional equivalents' of the environmental impact

statement process."[3] *Izaak Walton League of Am. v. Marsh,* 655 F.2d 346, 367 n. 51 (D.C.Cir.1981).

[6] An agency may be exempt from conducting a NEPA environmental review if a statute provides, "procedurally and substantively," for the "functional equivalent" of compliance with NEPA. *Basel Action Network v. Maritime Admin.,* 285 F.Supp.2d 58, 63 (D.D.C.2003); *see also Amoco Oil Co. v. EPA,* 501 F.2d 722, 749 (D.C.Cir.1974); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior,* 344 F.Supp.2d 108, 134 (D.D.C.2004). *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n,* 869 F.2d 719, 729 n. 7 (3d Cir.1989) (stating that "where one statute requires the 'functional equivalent' of NEPA's environmental review process, a second, repetitive review under NEPA need not be undertaken"). In this case, however, the defendants' reliance on the "functional equivalency" doctrine is misplaced because neither the Migratory Bird Hunting Frameworks or the Endangered Species Act's ("ESA") Section 7 consultation process are the functional equivalents of NEPA's environmental review process.

a. The Migratory Bird Hunting Frameworks

[7] The defendants argue that they analyze the overall impact of hunting on migratory bird populations through their Migratory Bird Hunting Frameworks. Defs.' Opp'n at 4. Because "the 'cumulative' part of the analysis ... is done by another branch of FWS," the defendants contend that neither the FWS nor the individual refuge managers are required to conduct a separate analysis of cumulative impacts. *Id.* The defendants' arguments are unconvincing for a number of reasons. First, the Migratory Bird Hunting Frameworks only consider the effect of actions related to migratory birds. Under NEPA, however,

> a meaningful cumulative impacts analysis must identify: (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

Grand Canyon Trust, 290 F.3d at 345. The Migratory Bird Hunting Frameworks, which the defendants contend consider the cumulative impacts of hunting, only consider the effects of hunting migratory birds. *See* 67 Fed.Reg. 12502 (explaining that the FWS "develops migratory bird hunting ***135** regulations by establishing the frameworks, or outside limits, for season lengths, bag limits, and areas for migratory game bird hunting"). Thus, the Migratory Bird Hunting Frameworks do not consider the cumulative impacts of other forms of hunting, such as upland game and big game hunting, on migratory birds. Pls.' Reply at 19. The framework process, moreover, only considers the impact of hunting on migratory bird populations, but it does not consider the overall environmental effect of increased migratory bird hunting. *Id.*

Second, the Migratory Bird Hunting Frameworks' process does not provide for public comments in the same way that NEPA does. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b); *see also Fund for the Animals v. Norton,* 281 F.Supp.2d 209, 228 (D.D.C.2003) (ruling that a FONSI was arbitrary and capricious because, *inter alia,* the FWS' "efforts to ensure public involvement in the EA process were deficient"). "[T]he point of the cumulative impact analysis in an EA is to provide 'sufficient [information] to alert interested members of the public to any arguable cumulative impacts involving [ ] other projects.' " *Nat'l Wildlife Fed'n v. Norton,* 332 F.Supp.2d 170, 182–83 (D.D.C.2004) (quoting *Coal. on Sensible Transp. v. Dole,* 826 F.2d 60, 71 (D.C.Cir.1987)). While the FWS provides information and solicits some public comments in establishing the migratory bird hunting quotas, the information available to the public and the comments solicited from the public necessarily relate only to migratory bird hunting.

[8] Third, the administrative record does not support the defendants' contention that refuge managers rely on the Migratory Bird Hunting Frameworks in deciding whether to open the refuges to hunting. Pls.' Reply at 25. This court's "review is limited to the administrative record that was before the agency at the time it made its decision." *Rock Creek Pack Station, Inc. v. Blackwell,* 344 F.Supp.2d 192, 201 (D.D.C.2004). The record before the court shows that not all of the individual refuge managers considered the Migratory Bird Hunting Frameworks in deciding whether to expand or create hunting opportunities at their refuges.[4] Defs.' Reply at 13 (stating that "a number" of the individual refuge managers "reference" the Migratory Bird Hunting Frameworks in their analysis of the impact of increased hunting). Indeed, although the NEPA implementing regulations allow agencies to

"incorporate material into an environmental impact statement by reference when the effect will be to cut down on ***136** bulk," 40 C.F.R. § 1502.21, most of the EAs do not incorporate any non-NEPA documents by reference. In short, the record before the court does not show that the FWS adequately considered and disclosed the environmental impact of its actions.

b. ESA's Section 7 Consultation Process

[9] The defendants also argue that the refuge managers adequately considered the cumulative impacts of the six final agency rules on endangered and threatened species because "[w]hen appropriate, the refuge managers are required to consult with an FWS Ecological Services Officer to either obtain a concurrence that no impact is expected, or a determination that a full biological opinion should be prepared" pursuant to the ESA. Defs.' Opp'n at 5. But, the ESA's Section 7 consultation process differs from the cumulative impacts analysis required by NEPA in a number of important ways. First, the ESA Section 7 consultation process does not define cumulative impacts in the same way that NEPA does. Under the ESA, cumulative effects "are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02. NEPA, on the other hand, defines "cumulative impacts" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. Thus, the ESA only requires agencies to consider the cumulative impacts of non-federal actions, while NEPA requires agencies to consider the cumulative impacts of all actions.[5]

Second, the ESA's Section 7 consultation process fails to provide for public comment in the same way that NEPA does. Specifically, under the ESA's Section 7 consultation process, "there is no substitute ... for the public comment commanded by NEPA." *Portland Audubon Soc'y v. Lujan,* 795 F.Supp. 1489, 1509 (D.Or.1992), *aff'd,* 998 F.2d 705 (9th Cir.1993). As stated *supra,* however, "the point of the cumulative impact analysis in an EA is to provide 'sufficient [information] to alert interested members of the public to any arguable cumulative impacts involving [ ] other projects.' " *Nat'l Wildlife Fed'n,* 332 F.Supp.2d at 182–83 (quoting *Coal. on Sensible Transp. v. Dole,* 826 F.2d 60, 71 (D.C.Cir.1987)).

Lastly, the administrative record in this case does not support the defendants' contention that refuge managers rely on the information gleaned from the ESA Section 7 consultation process (or that the refuge managers even engage a Section 7 consultation in all situations) in deciding whether to open the refuges to hunting.[6] Pls.' Reply at 25. This court's "review is limited to the administrative record that was before the agency at the time it made its decision." *Rock Creek Pack Station, Inc.,* 344 F.Supp.2d at 201. But, the administrative record does not contain any indication that the refuge managers considered the cumulative impacts on the entire refuge system of increased hunting on endangered species. Thus, the ESA Section 7 consultation process is not the functional ***137** equivalent of the cumulative impacts analysis required by NEPA.

IV. CONCLUSION

For the foregoing reasons, the court grants the plaintiffs' motion for summary judgment and denies the denies the defendants' and defendant-intervenors' motions for summary judgment.[7] An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this 31st day of August, 2006.

All Citations

448 F.Supp.2d 127, 63 ERC 1720

Footnotes

1 Specifically, the plaintiffs claim that "[i]n none of these EAs did the agency seriously grapple with the potential cumulative effects of its actions on migratory bird populations or habitat, endangered species recovery efforts, or the overall ability of non-hunters to enjoy bird watching or other non-consumptive pursuits on Refuges." Pls.' Mot. for Summ. J. ("Pls.' Mot.") at 16. While both parties address the issue of cumulative effects on migratory birds, endangered species, and non-hunters, "this case is about the cumulative impacts of *all* forms of hunting that Wildlife Refuges have been opened to under the six

challenged rules." Pls.' Opp'n to Defs.' Cross–Mot. for Summ. J. and Reply in Support of Pls.' Mot. for Summ. J. ("Pls.' Reply") at 19 n. 6 (emphasis added).

2 The Migratory Bird Hunting Frameworks "place limits on hunting that are designed to ensure that annual harvests are at a level that permits an adequate hunt while allowing the population's ability to maintain itself." Defs.' Opp'n at 29 (citing 67 Fed.Reg. 12, 502). That is, the frameworks establish the "outside limits[ ] for season lengths, bag limits, and areas for migratory game bird hunting." 67 Fed.Reg. 12, 502.

3 The defendants do not explicitly invoke the "functional equivalency" doctrine, although they quote and cite case law applying the doctrine. Further, the defendants' reply to the plaintiffs' opposition states that it is not claiming that the Migratory Bird Frameworks and the ESA Section 7 consultation process obviates the need to prepare EAs for each refuge opening. Defs.' Reply at 4. The defendants still argue, however, that compliance with the Migratory Bird Frameworks and the ESA Section 7 consultation process allows the FWS "to ascertain whether the consequences of hunting at a given refuge is expected to have an environmentally significant impact." *Id.; see also id. at 7* (stating that the Migratory Bird Frameworks and the Section 7 consultation process "inform the 'hard look' demanded by NEPA"). The court, therefore, treats their argument that the Migratory Bird Frameworks and the ESA Section 7 consultation process makes a separate NEPA review of cumulative effects unnecessary as invoking the functional equivalency doctrine.

4 Although the defendants argue that "[a] number of refuge managers reference the Frameworks in their opening documentation," Defs.' Reply at 13, the Administrative Record does not indicate that all of the individual refuge managers considered the cumulative impacts on the refuge system of increased hunting. Indeed, many refuge managers only considered the impact of increased hunting on their particular refuge. *See, e.g.,* 1 AR 33, 1 AR 77, 1 AR 269, 2 AR 471–472, 5 AR 1494–95, 6 AR 1690; 7 AR 2046, 7 AR 2113, 7 AR 2155, 8 AR 2362, 8 AR 2415, 8 AR 2455; 10 AR 3034, 10 AR 3100, 11 AR 3133–34, 11 AR 3419, ;12 AR 3601–3602, 12 AR 3638; 12 AR 3681, 12 AR 3734, 13 AR 3839–40, 14 AR 4236–37, 15 AR 4487–88, 16 AR 5022; 17 AR 5293, 17 AR 5360, 18 AR 557. Those refuge managers that did consider the cumulative impacts of increased hunting did so in a very limited fashion without considering the cumulative impacts of increased hunting on species other than migratory birds and endangered species. *See, e.g.,* 1 AR 86, 2 AR 399, 408–09, 2 AR 501–05, 6 AR 1612 1665, 6 AR 1739, 11 AR 2280; 18 AR 5592, 5552; 5561.

5 Additionally, the plaintiffs allege that the six rules affect not just endangered or threatened species, but other animals as well. *See* footnote 1, *supra.*

6 *See* footnote 5, *supra.*

7 The plaintiffs claim that the court must vacate the six challenged rules pending the FWS' completion of a meaningful cumulative impacts analysis. Pls.' Mot. at 44. The defendants do not address this argument in their opposition. Although the defendants do briefly address the argument in their reply to the plaintiffs' cross-motion for summary judgment, they fail to propose an alternative course of action for the court. Accordingly, the court orders the parties to submit supplemental briefs discussing a proposed solution of this issue in light of this court's Memorandum Opinion.

Federal Register
Vol. 62, No. 148
Friday, August 1, 1997

Presidential Documents

Title 3—

The President

Executive Order 13057 of July 26, 1997

Federal Actions in the Lake Tahoe Region

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure that Federal agency actions protect the extraordinary natural, recreational, and ecological resources in the Lake Tahoe Region (''Region'') (as defined by Public Law 91-148), an area of national concern, it is hereby ordered as follows:

Section 1. *Tahoe Federal Interagency Partnership.*

1-101. The Federal agencies and departments having principal management or jurisdictional authorities in the Lake Tahoe Region are directed to establish a Federal Interagency Partnership on the Lake Tahoe Ecosystem (''Partnership'').

1-102. Members of the Partnership shall include the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Transportation, the Administrator of the Environmental Protection Agency, the Secretary of the Army, and the heads of any other Federal agencies operating in the Region that choose to participate. Representation on the Partnership may be delegated. The Partnership shall be chaired by the Secretary of Agriculture for the first year after its establishment. The Chair of the Partnership shall thereafter be rotated among the members on an annual basis.

1-103. The Partnership will:

(a) facilitate coordination of Federal programs, projects, and activities within the Lake Tahoe Region and promotion of consistent policies and strategies to address the Region's environmental and economic concerns;

(b) encourage Federal agencies within the Region to coordinate and share resources and data, avoid unnecessary duplication of Federal efforts, and eliminate inefficiencies in Federal action to the greatest extent feasible;

(c) ensure that Federal agencies closely coordinate with the States of California and Nevada and appropriate tribal or local government entities to facilitate the achievement of desired terrestrial and aquatic ecosystem conditions and the enhancement of recreation, tourism, and other economic opportunities within the Region;

(d) support appropriate regional programs and studies needed to attain environmental threshold standards for water quality, transportation, air quality, vegetation, soils (stream environment zone restoration), wildlife habitat, fish habitat, scenic resources, recreation, and noise;

(e) encourage the development of appropriate public, private, and tribal partnerships for the restoration and management of the Lake Tahoe ecosystem and the health of the local economy;

(f) support appropriate actions to improve the water quality of Lake Tahoe through all appropriate means, including restoration of shorelines, streams, riparian zones, wetlands, and other parts of the watershed; management of uses of the lake; and control of airborne and other sources of contaminants;

(g) encourage the development of appropriate vegetative management actions necessary to attain a healthy Lake Tahoe ecosystem, including a program of revegetation, road maintenance, obliteration, and promotion of forest health;

(h) support appropriate regional transportation and air quality goals, programs, and studies for the Region;

(i) support appropriate fisheries and wildlife habitat restoration programs for the Region, including programs for endangered species and uncommon species;

(j) facilitate coordination of research and monitoring activities for purposes of developing a common natural resources data base and geographic information system capability, in cooperation with appropriate regional and local colleges and universities;

(k) support development of and communication about appropriate recreation plans and programs, appropriate scenic quality improvement programs, and recognition for traditional Washoe tribal uses;

(l) support regional partnership efforts to inform the public of the values of managing the Lake Tahoe Region to achieve environmental and economic goals;

(m) explore opportunities for public involvement in achieving its activities; and

(n) explore opportunities for assisting regional governments in their efforts.

1-104. The Partnership will report back to the President in 90 days on the implementation of the terms of this order.

Sec. 2. *Memorandum of Agreement.*

2-201. The Partnership shall negotiate a Memorandum of Agreement with the States of California and Nevada, the Washoe Tribal Government, the Tahoe Regional Planning Agency, and interested local governments.

2-202. The Memorandum of Agreement shall be designed to facilitate coordination among the parties to the Agreement, and shall document areas of mutual interest and concern and opportunities for cooperation, support, or assistance.

Sec. 3. *General Provisions.*

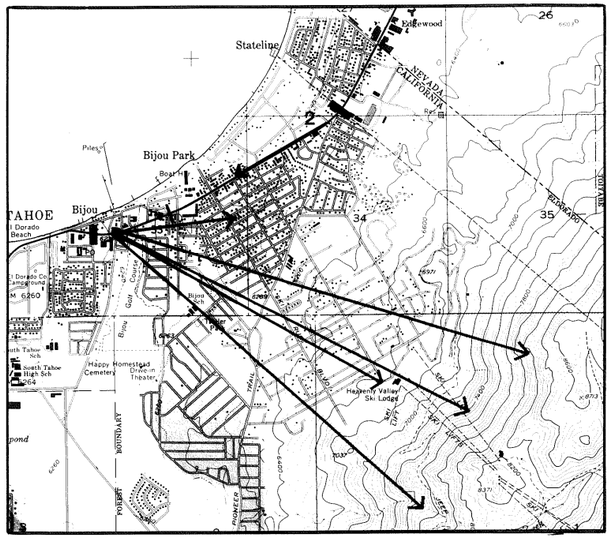
3-301. The Chair of the Partnership shall advise the President on the implementation of this order. The Chair may recommend other administrative actions that may be taken to improve the coordination of agency actions and decisions whenever such coordination would protect and enhance the Region's natural, ecological, and economic values.

3-302. Nothing in this order shall be construed to limit, delay, or prohibit any agency action that is essential for the protection of public health or safety, for national security, or for the maintenance or rehabilitation of environmental quality within the Region.

3-303. Nothing in this order is intended to create, and this order does not create, any right to administrative or judicial review, or any other right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

THE WHITE HOUSE,
July 26, 1997.

[FR Doc. 97–20497
Filed 7–31–97; 8:45 am]
Billing code 3195–01–P



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ROADWAY UNIT 33. THE STRIP.

Roadway Unit 33. The Strip

Heavy strip commercial development dominates foreground views beyond the public beach area. In some areas, however, scenic, long-distant background vistas of mountain areas to the southeast are available, including Monument Peak to the east and Mt. Tallac to the southwest. Heavenly Valley ski development is prominent in middleground in vistas between buildings. There are virtually no glimpses of the lake.

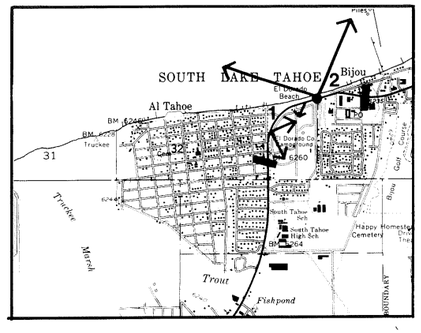
Roadway Unit 33. The Strip Summary

Views of natural landscape from roadway

33-1. Long-distant views to Monument Peak and Heavenly Valley ski area
Scenic quality: moderate
Rating: 2

33-2. Focal view of Mt. Tallac down strip is dominated in foreground by commercial activity and roadway. Some coniferous forest remains on the north side of the road.
Scenic quality: low
Rating: 1

Overall unit scenic quality: low
Rating: 1



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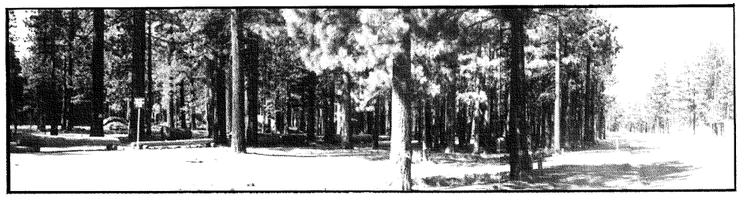

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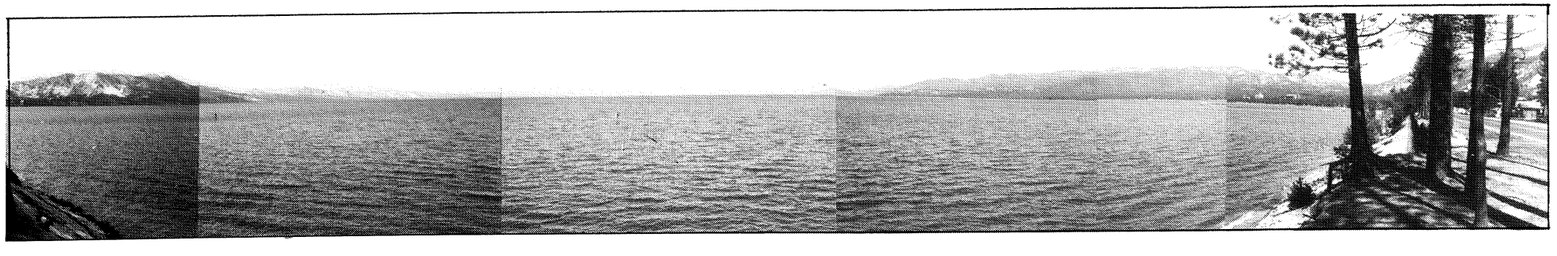

ROADWAY UNIT 34. EL DORADO BEACH.

Roadway Unit 34. El Dorado Beach

This very short road segment is characterized by heavy forest growth to the southeast in park lands of the South Lake Tahoe Recreation Area, and wide expansive panoramas (180°+) of Lake Tahoe and surrounding mountains for about .6 km (.4 mi), where the roadway closely parallels the shoreline. Some commercial development (motels, resorts and restaurants) occurs in forested areas but does not block lake views.

Roadway Unit 34. El Dorado Beach Summary

Views of lake from roadway

34-2. Major panorama of lake at 150°+ for approximately 6 km to the north, seen through a line of pine trees.
Scenic quality: high
Rating: 3

Views of natural landscape from roadway

34-1. Heavy forested area of South Lake Tahoe Recreation to east and south; no understory, recreation facilities or vehicles are visible.
Scenic quality: moderate
Rating: 2

Overall unit scenic quality: moderate
Rating: 2

36. EL DORADO BEACH AND CAMPGROUND

El Dorado Beach is located on the south shore of the lake on Lakeview Avenue between Highway 50 and Harrison Avenue. The beach is owned and operated by the City of South Lake Tahoe. The facilities include a boat launch and picnic area in addition to the beach.

The El Dorado recreation area is actually divided into three areas by the junction of Lakeview Boulevard and Highway 50 (Lake Tahoe Boulevard). The beach portion consists of a long narrow stretch of land bordered by the lake to the north and Lakeview Avenue and Lakeshore Boulevard to the south. The second portion of the recreation area, which contains the parking and restroom facilities, is a small triangular area defined by the intersection of Lakeview Avenue, Lake Tahoe Boulevard, and Harrison Avenue. The third portion of the recreation area is the camping area which is situated south of Highway 50.

These streets are significant in determining the character of the recreation area, particularly since Highway 50/Lakeshore Boulevard, which divides the site, is such a busy thoroughfare. The presence of traffic is felt both visually and aurally from everywhere except the beach and the campsites away from the road. These thoroughfares give the area a very urban feeling and create a fragmentation which discourages movement from one area to another.

The parking area is a pleasantly landscaped lot which also includes the restroom facilities and the entry to the boat ramp. From this area the lake is visible through the stand of trees on the other side of Lakeview Avenue. This stand of trees covers a very flat, narrow strip of land which runs along the edge of Highway 50. No other vegetation grows in this area, so the contrast between the trees and the very flat, bare ground is quite distinctive. The picnic area is located within this wooded strip. From the picnic area, one has an elevated perspective down to the lake which is approximately 20-25 feet lower. To the east, casinos tower over the landscape. Other development is evident around the Stateline area and then begins to thin out as one looks farther north. Directly north, the opposite shoreline is very distant across the length of the lake. The shoreline becomes very distinctive around the Emerald Bay area but the view is cut off by the motel perched on the cliff adjacent to the west end of the beach. At the beach level three piers extend out into the lake. The campground area south of Highway 50 is densely forested with conifers and provides no significant external views. Landscaping along Highway 50 has recently been added to create some buffer between the campsites and the busy roadway.

The view of the lake does not change significantly as one descends to the beach. The main difference is the removal of the distracting backdrop of traffic which accompanies the view from the picnic area. The change in elevation from picnic area to beach significantly decreases one's awareness of the street above.

El Dorado Beach--Components

Views from the Recreation Area

36-1. View of lake from the picnic area (Photos #12-17).
Rating: 12 Unity 4; Vividness 3; Variety 3; Intactness 2.

36-2. View of lake from the east end of the recreation area (Photos #1-7).
Rating: 12 Unity 4; Vividness 3; Variety 3; Intactness 2.

Natural Features of El Dorado Beach

36-3. Stand of pine trees (Photos #15, 16, 23).
Rating: 10 Unity 3; Vividness 3; Variety 2; Intactness 2.

36-4. Beach (Photos #21, 24, 25, 27).
Rating: 9 Unity 4; Vividness 2; Variety 2; Intactness 1.

Man-Made Features of El Dorado Beach

36-a. Restrooms (Photos #14, 32)
Rating: 11 Coherence 3; Condition 3; Compatibility 2; Design Quality 3.

36-b. Parking area (Photos #12, 14).
Rating: 14 Coherence 3; Condition 4; Compatibility 3; Design Quality 4.

36-c. Picnic area (Photos #7, 15, 16, 22, 23).
Rating: 12 Coherence 3; Condition 4; Compatibility 3; Design Quality 2.

36-d. Boat ramp (Photos #13, 17, 18).
Rating: 10 Coherence 3; Condition 4; Compatibility 1; Design Quality 2.

Summary:

El Dorado Beach is different from the majority of the recreation areas in that it is located more in an urban than a natural setting. This is not inherently disadvantageous, although in this case elements such as the traffic, motels, and the casinos do compete with more scenic natural features. The view down the length of the lake is a scenic viewshed but because of the distance it is not especially distinctive.

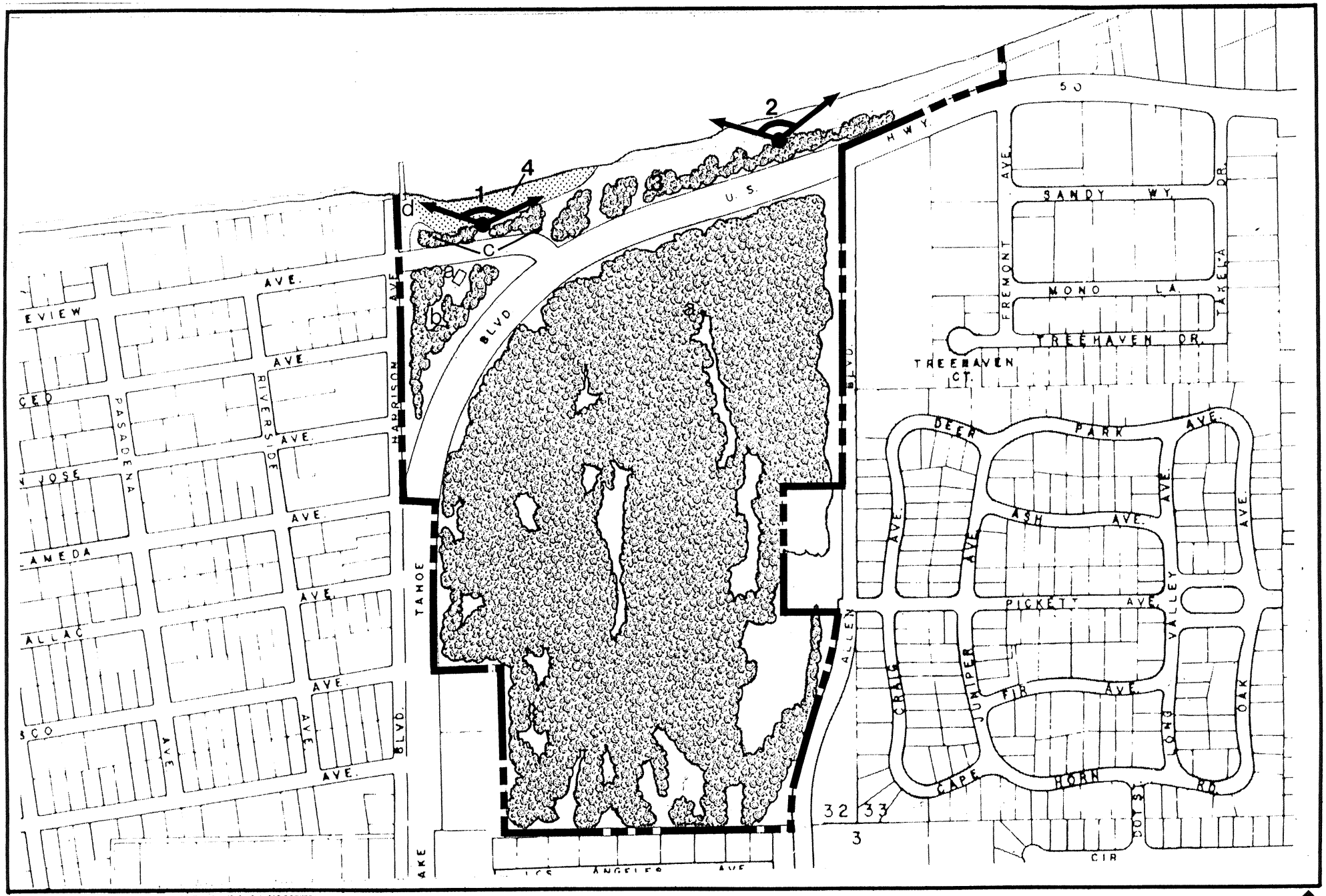

Figure 36a Scenic Resources

NORTH

EL DORADO BEACH AND CAMPGROUND

SCALE: 1"=400'

Elements That Contribute to the Scenic Quality of El Dorado Beach

A. Panoramic view north across the lake

B. The forested, yet manicured picnic area presents an interesting combination of urban and natural elements. In addition, its elevated position above the lake adds a dramatic character to the view.

C. The enclosed beach area forms a kind of natural amphitheater facing the lake.

Elements That Detract from the Scenic Quality of El Dorado Beach

A. The proximity of Highway 50 to the picnic area and the constant movement and noise of automobiles significantly affects the use of this area.

B. The hotel and casino development east of the recreation area stands out boldly above the forest cover and is completely out of scale with its surroundings.

C. The motel just west of the recreation area is an unattractive foreground element that projects out in front of one of the more distinctive landscape features in the viewshed (i.e., Emerald Bay area).

D. The boat launch area is a major structure where it passes under the roadway. The mass of concrete and the cyclone fencing around it visually dominate the west end of the beach. The combined effect of this area with the motel adjacent to it is distinctly unappealing visually.

E. The erosion of the bank at the east end of the beach is undercutting existing trees and preventing the establishment of new vegetation.

Recommendations for Preserving the Scenic Quality of El Dorado Beach

A. Area west of El Dorado Beach

1. The area that is visually sensitive from the recreation area includes just the first few parcels to the west which have already been developed. Any future development or change of status of this area should require measures to mitigate the existing visual problems. This would consist primarily of landscaping to screen the structures and soften some of the hard edges. (Photos #7, 17, 18, 36)

B. Area east of El Dorado Beach

1. Existing trees should be preserved as a visual screen between structure(s) and major public use areas. This is particularly important on the beachfront since structures sited there are visible from many points around the lake.

2. Structures should not be permitted to exceed the height of the existing tree cover.

3. Development should not be permitted where tree cover is too sparse to visually absorb new structures, road cuts, and other attendant improvements.

4. Use of reflective materials should be restricted and use of materials which blend into the surrounding landscape encouraged. Hues should fall within a range of natural colors that complements rather than contrasts with the existing vegetation and earth tones. Values should be equal to or darker than those of surrounding colors. The recommendations should apply to all visible surfaces of structures including roofs, siding, fences, etc. (Photos 1, 2, 21, 25)

C. El Dorado Beach

1. Some effort to lessen the impact of Highway 50 on the picnic area is necessary. Screening and/or buffering is needed along the edge of the recreation area which borders the busy thoroughfare. Either structural or landscape solutions could be used. The best solution would be to screen the view of the road; however, even a buffer that provides only psychological relief would be an improvement. (Photos #1, 22, 23)

2. Landscaping should be introduced on the slopes on either side of the boat ramp tunnel to mitigate the visual impact of this structure and to screen the development to the west. The plantings would have to be of significant size to be effective. If the cyclone fencing were replaced with wooden fencing, the rather industrial look it currently gives the boat ramp area would be mitigated.

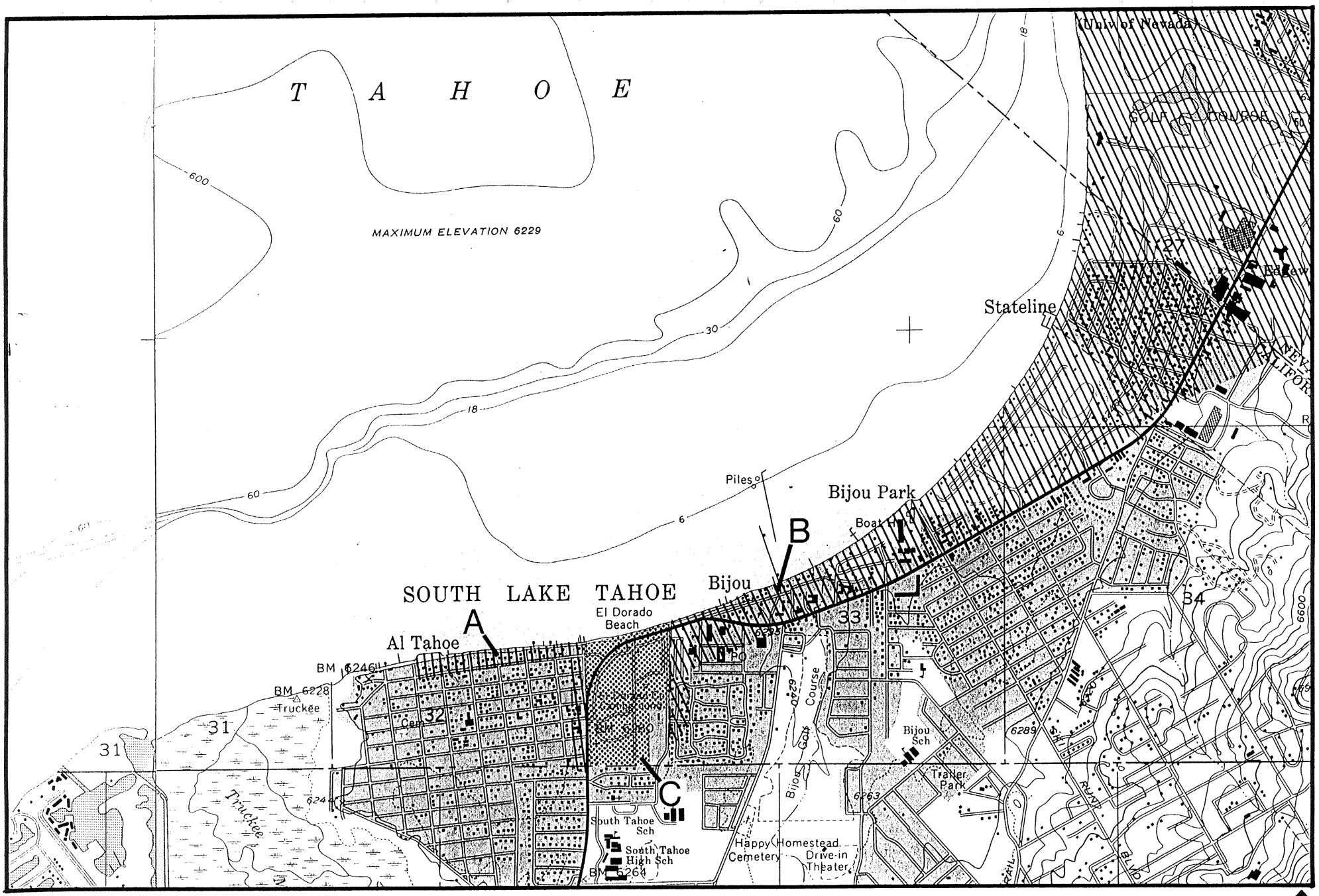

Figure 36b Visually Sensitive Areas

EL DORADO BEACH AND CAMPGROUND

SCALE: 1"=2000'

753 F.3d 1304
United States Court of Appeals,
District of Columbia Circuit.

DELAWARE RIVERKEEPER NETWORK, et al., Petitioners
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent.
Tennessee Gas Pipeline Company, LLC and Statoil Natural Gas, LLC, Intervenors.

No. 13–1015.
|
Argued Feb. 24, 2014.
|
Decided June 6, 2014.

Synopsis

Background: Environmental advocacy organizations petitioned for review of an environmental assessment of the Federal Energy Regulatory Commission (FERC), 2013 WL 240878, which found a natural gas pipeline upgrade project did not have a significant environmental impact.

Holdings: The Court of Appeals, Edwards, Senior Circuit Judge, held that:

[1] FERC impermissibly segmented National Environmental Policy Act (NEPA) review by failing to consider the cumulative impacts of all related upgrade projects, and

[2] FERC failed to meaningfully assess the cumulative impact of the four projects.

Remanded.

Brown, Circuit Judge, filed an opinion concurring in part and concurring in the judgment.

Silberman, Senior Circuit Judge, filed a concurring opinion.

West Headnotes (21)

[1] **Environmental Law** Lead agency; responsible entity

The Federal Energy Regulatory Commission (FERC) is responsible for NEPA review associated with natural gas pipeline construction. Natural Gas Act, § 7(c)(1)(A), 15 U.S.C.A. § 717f(c)(1)(A); National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C).

2 Cases that cite this headnote

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

NEPA is essentially procedural, designed to ensure fully informed and well-considered decisions by federal agencies. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

9 Cases that cite this headnote

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

NEPA itself does not mandate particular results in order to accomplish its ends; rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

9 Cases that cite this headnote

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

The procedures required by NEPA are designed to secure the accomplishment of the vital purpose of NEPA, which can be achieved only if the prescribed procedures are faithfully followed. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[5] **Environmental Law** Sufficiency

Environmental Law Consideration and disclosure of effects

In preparing an environmental assessment or environmental impact statement (EIS), an agency need not foresee the unforeseeable, but reasonable forecasting and speculation is implicit in NEPA, and courts must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

3 Cases that cite this headnote

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

While NEPA does not demand forecasting that is not meaningfully possible, an agency must fulfill its duties to the fullest extent possible. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

2 Cases that cite this headnote

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

Judicial review of agency actions under NEPA is available to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

12 Cases that cite this headnote

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

Courts may not use their review of an agency's environmental analysis under NEPA to second-guess substantive decisions committed to the discretion of the agency. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

3 Cases that cite this headnote

[9] **Administrative Law and Procedure** Scientific and technical matters

Where an issue requires a high level of technical expertise, the Court of Appeals defers to the informed discretion of the agency.

2 Cases that cite this headnote

[10] **Environmental Law** "Hard look" test; reasoned elaboration

Environmental Law Negative declaration; statement of reasons

Simple, conclusory statements of no impact are not enough to fulfill an agency's duty under NEPA; an agency must comply with principles of reasoned decisionmaking, NEPA's policy of public scrutiny, and the Council on Environmental Quality's regulations. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

4 Cases that cite this headnote

[11] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

Under the applicable arbitrary and capricious standard of review, an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.

[12] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

Administrative Law and Procedure Review for correctness or error

In reviewing an agency's explanation for a decision, a court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

6 Cases that cite this headnote

[13] **Administrative Law and Procedure** Arbitrariness and capriciousness; reasonableness

Normally, an agency rule 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.

9 Cases that cite this headnote

[14] **Administrative Law and Procedure** Theory or grounds not provided or relied upon by agency

A court reviewing an agency decision should not attempt itself to make up for deficiencies in the agency's decision; a court may not supply a reasoned basis for the agency's action that the agency itself has not given.

[15] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

An agency action will be set aside as arbitrary and capricious if it is not the product of reasoned decisionmaking.

6 Cases that cite this headnote

[16] **Environmental Law** Sufficiency

Four separate natural gas pipeline upgrade projects were connected, closely related, and interdependent, and thus the Federal Energy Regulatory Commission (FERC) impermissibly segmented NEPA review of the third project when it failed to consider the cumulative impacts of all four upgrade projects, where the four projects upgraded a linear and physically interdependent pipeline, each project did not have substantial independent utility separate from the other projects, and all four projects were in some stage of development at the same time. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; 40 C.F.R. § 1508.25.

9 Cases that cite this headnote

[17] **Environmental Law** Adequacy of Statement, Consideration, or Compliance

An agency impermissibly segments NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

14 Cases that cite this headnote

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

An agency's consideration of the proper scope of its NEPA analysis should be guided by the governing regulations. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

1 Cases that cite this headnote

[19] **Gas** Mains, pipes, and appliances

The Federal Energy Regulatory Commission (FERC) has a threshold requirement for pipelines proposing new projects that the pipeline must be prepared to support the project financially without relying on subsidization from existing customers.

1 Cases that cite this headnote

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

NEPA does not require agencies to commence NEPA reviews of projects not actually proposed. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

1 Cases that cite this headnote

[21] **Environmental Law** Sufficiency

The Federal Energy Regulatory Commission's (FERC) conclusory statement that four connected natural gas pipeline projects were not expected to significantly contribute to cumulative impacts in the project area failed to include any meaningful analysis of the cumulative impacts of the projects, as required for an environmental assessment under NEPA. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; 40 C.F.R. § 1508.7.

4 Cases that cite this headnote

***1306** On Petition for Review of an Order of the Federal Energy Regulatory Commission.

Attorneys and Law Firms

Aaron Stemplewicz argued the cause for petitioners. With him on the briefs was Susan Kraham. Jane P. McClintock entered an appearance.

Karin L. Larson, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With her on the brief were David L. Morenoff, Acting General Counsel, and Robert H. Solomon, Solicitor.

John F. Stoviak argued the cause for intervenors. With him on the brief were Pamela S. Goodwin, Thomas S. Schaufelberger, William G. Myers III, and Kirstin Elaine Gibbs. Christopher M. Heywood entered an appearance.

Before: BROWN, Circuit Judge, and EDWARDS and SILBERMAN, Senior Circuit Judges.

Opinion

Opinion for the Court filed by Senior Circuit Judge EDWARDS.

***1307** Opinion filed by Circuit Judge BROWN concurring in part and concurring in the judgment.

Concurring opinion filed by Senior Circuit Judge SILBERMAN.

EDWARDS, Senior Circuit Judge:

****140** In May 2012, the Federal Energy Regulatory Commission ("Commission" or "FERC") issued a certificate of public convenience and necessity to Tennessee Gas Pipeline Company, L.L.C. ("Tennessee Gas"), authorizing it to build and operate the Northeast Upgrade Project ("Northeast Project"). The project included five new segments of 30–inch diameter pipeline, totaling about 40 miles, and modified existing compression and metering infrastructure. Petitioners, Delaware Riverkeeper Network, New Jersey Highlands Coalition, and Sierra Club, New Jersey Chapter (collectively, " Riverkeeper"), contend, *inter alia,* that in approving the Northeast Project, FERC violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370h, by: (1) segmenting its environmental review of the Northeast Project—*i.e.,* failing to consider the Northeast Project in conjunction with three other connected, contemporaneous, closely related, and interdependent Tennessee Gas pipeline projects—and (2) failing to provide a meaningful analysis of the cumulative impacts of these projects to show that the impacts would be insignificant.

The Northeast Project upgraded a portion of a much longer natural gas pipeline known as the 300 Line. Taken together, the Northeast Project and the three other connected, closely related, and interdependent Tennessee Gas upgrade projects on the 300 Line constituted a complete upgrade of almost 200 miles of continuous pipeline. FERC was responsible for the environmental review of these projects because, under the Natural Gas Act, any party seeking to construct a facility for the transportation of natural gas in interstate commerce must first obtain a certificate of public convenience and necessity from the Commission. 15 U.S.C. § 717f(c)(1)(A). And before FERC may issue such a certificate, it must satisfy the requirements of NEPA by identifying and evaluating the environmental impacts of the proposed action. This

means that FERC was required to prepare an Environmental Assessment ("EA") and, if significant impacts were found, to prepare a more comprehensive Environmental Impact Statement ("EIS"). 40 C.F.R. § 1501.4.

The 300 Line carries natural gas from wells in western Pennsylvania to points of delivery east of Mahwah, New Jersey. When it was first constructed in the 1950s, the entire pipeline was built of 24–inch diameter pipe, with compressor stations located every several miles to keep the gas moving through the pipeline. The 300 Line has a Western Leg and an Eastern Leg. Expansions to the Western Leg of the pipeline added 30–inch diameter pipe and allowed it to accommodate skyrocketing natural gas production in the Marcellus Shale region, a drilling area that spreads across western Pennsylvania and neighboring states. By 2010, the Western Leg consisted of parallel, connected 24–inch and 30–inch pipes, while the Eastern Leg consisted almost entirely of 24–inch pipe.

In 2010, the pipeline's owner, Tennessee Gas, commenced construction of what has turned out to be a complete overhaul of the Eastern Leg of the 300 Line. Tennessee Gas's upgrades to the Eastern Leg have included construction of new 30–inch pipe segments, as well as renovations to compression and monitoring infrastructure. As with the Western Leg, the improvements to the Eastern Leg produced ****141 *1308** parallel and connected 24–inch and 30–inch pipes. The result was fifteen interlocking loop segments of new pipeline that completed a full and continuous upgrade of the Eastern Leg of the 300 Line.

Tennessee Gas submitted four separate project proposals to FERC for the upgrade work on the Eastern Leg. The four upgrade projects—the third being the Northeast Project—were reviewed separately by FERC, approved, and then constructed in rapid succession between 2010 and 2013.

In November 2011, FERC completed the EA for the Northeast Project—the project that is the subject of the petition for review in this case—and recommended a Finding of No Significant Impact. FERC's NEPA review of the Northeast Project did not consider any of the other upgrade projects, even though the first upgrade project was under construction during FERC's review of the Northeast Project, and even though the applications for the second and fourth upgrade projects were pending before FERC while it considered the Northeast Project application. In May 2012, the Commission approved the Northeast Project, incorporating its EA and the Finding of No Significant Impact and issuing a certificate of public convenience and necessity to Tennessee Gas. *Tenn. Gas Pipeline Co.,* 139 FERC ¶ 61,161, 2012 WL 1934728 (May 29, 2012) ("*Order* ").

Petitioners contend that FERC violated NEPA when it segmented its review of the Northeast Project, giving no consideration to that project in conjunction with the three other connected, contemporaneous, closely related, and interdependent Eastern Leg projects. Petitioners also claim that FERC failed to provide a meaningful analysis of the cumulative impacts of these projects to show that the impacts would be insignificant.

FERC argues that because each project resulted in a measurable increase in the pipeline's overall capacity, the agency was justified in completing the NEPA analysis of the Northeast Project separately from the other projects. But FERC's position cannot be squared with the record, which shows that by May 2012, when FERC issued the certificate for the Northeast Project, it was clear that the entire Eastern Leg was included in a complete overhaul and upgrade that was physically, functionally, and financially connected and interdependent. During the pendency of Tennessee Gas's Northeast Project application, the other three projects that would constitute the revamped Eastern Leg were either under construction or were also pending before the Commission for environmental review and approval. Given the self-evident interrelatedness of the projects as well as their temporal overlap, the Commission was obliged to consider the other three other Tennessee Gas pipeline projects when it conducted its NEPA review of the Northeast Project.

Under applicable NEPA regulations, FERC is required to include "connected actions," "cumulative actions," and "similar actions" in a project EA. 40 C.F.R. § 1508.25(a). "Connected actions" include actions that are "interdependent parts of a larger action and depend on the larger action for their justification." *Id.* § 1508.25(a)(1)(iii). The four pipeline improvement projects are certainly "connected actions."

There is a clear physical, functional, and temporal nexus between the projects. There are no offshoots to the Eastern Leg. The new pipeline is linear and physically interdependent; gas enters the system at one end, and passes through each of the new pipe sections and improved compressor stations on its way to extraction points beyond the Eastern Leg. The upgrade ****142 *1309** projects were completed in the same general time frame, and FERC was aware of the interconnectedness

of the projects as it conducted its environmental review of the Northeast Project. The end result is a new pipeline that functions as a unified whole thanks to the four interdependent upgrades.

FERC has not shown that there are logical termini between the new segments of the Eastern Leg or that each project resulted in a segment that has substantial independent utility apart from the other parts of the Eastern Leg. Rather, FERC merely argues that one terminus was "no more logical than another," Br. of Resp't at 25, and that the capacity added by each project was contracted separately. These explanations are insufficient to address Riverkeeper's segmentation claim.

On the record before us, we hold that in conducting its environmental review of the Northeast Project without considering the other connected, closely related, and interdependent projects on the Eastern Leg, FERC impermissibly segmented the environmental review in violation of NEPA. We also find that FERC's EA is deficient in its failure to include any meaningful analysis of the cumulative impacts of the upgrade projects. We therefore grant the petition for review and remand the case to the Commission for further consideration of segmentation and cumulative impacts.

I. Background

A. *Applicable Statutory and Regulatory Framework*

The Natural Gas Act grants FERC jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. § 717(b)-(c). Any person seeking to construct or operate a facility for the transportation of natural gas in interstate commerce must first obtain a certificate of public convenience and necessity from the Commission. *Id.* § 717f(c)(1)(A). FERC is authorized to issue such a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility is required by the public convenience and necessity. *Id.* § 717f(e).

[1] NEPA requires that federal agencies fully consider the environmental effects of proposed major actions, including actions that an agency permits, such as pipeline construction. 42 U.S.C. § 4332(2)(C); *see also La. Ass'n of Indep. Producers & Royalty Owners v. FERC,* 958 F.2d 1101 (D.C.Cir.1992). FERC is therefore responsible for the NEPA review associated with natural gas pipeline construction. *Midcoast Interstate Transmission, Inc. v. FERC,* 198 F.3d 960, 967 (D.C.Cir.2000).

After determining the scope of the federal action, an agency produces an EA, which is a "concise public document" that "provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9. The scope of an agency's NEPA review must include both "connected actions" and "similar actions." *Id.* § 1508.25(a)(1), (3). Actions are "connected" if they trigger other actions, cannot proceed without previous or simultaneous actions, or are "interdependent parts of a larger action and depend on the larger action for their justification." *Id.* § 1508.25(a)(1). And actions are "similar" if, "when viewed with other reasonably foreseeable or proposed agency actions, [they] have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." *Id.* § 1508.25(a)(3).

[2] **[3]** **[4]** **[5]** **[6]** NEPA is "essentially procedural," designed to ensure "fully informed and ****143** ***1310** well-considered decision[s]" by federal agencies. *Vt. Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 558, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). " 'NEPA itself does not mandate particular results' in order to accomplish [its] ends. Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 756–57, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)). "The procedures required by NEPA ... are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed...." *Lathan v. Brinegar,* 506 F.2d 677, 693 (9th Cir.1974). In preparing an EA or EIS, an "agency need not foresee the unforeseeable, but ... [r]easonable forecasting and speculation is ... implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.' " *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n,* 481 F.2d 1079, 1092 (D.C.Cir.1973). While the statute does not demand forecasting that is "not meaningfully possible," an agency must fulfill its duties to "the fullest extent possible." *Id.*

B. ***Factual and Procedural History***

Both the Eastern and Western Legs of the 300 Line were initially constructed with 24–inch pipe. To accommodate increased production and demand in the natural gas market, however, Tennessee Gas embarked on upgrades installing what is known as "looped" pipeline. In a looped structure, the old pipeline is left in place, while a larger pipeline is installed in parallel, connecting to the old pipe so that the two lines function as one system. As the overall system structure expands, each additional length of 30–inch pipe or compression horsepower results in increasing returns to the pipeline's capacity. For example, the first upgrade to the Eastern Leg (which commenced in 2010 and was completed in 2011) resulted in the installation of approximately 130 miles of new 30–inch pipe and added 350,000 dekatherms per day to the pipeline's capacity (with each dekatherm roughly equivalent to 1,000 cubic feet of gas). The Northeast Upgrade, in comparison, added only 40 miles of new pipe but added 636,000 dekatherms per day to the system. Abbreviated Appl. of Tenn. Gas Pipeline Co. for a Certificate of Public Convenience and Necessity at 2 n. 1, 4, *reprinted in* Joint Appendix ("J.A.") 188, 190 ("Application"); Br. of Resp't at 21.

Between 2010 and 2013, Tennessee Gas commenced four upgrade projects along the Eastern Leg. In chronological order, they are: (1) the 300 Line Project; (2) the Northeast Supply Diversification Project; (3) the Northeast Project; and (4) the MPP Project. In May 2010, FERC certified the 300 Line Project, which placed eight sections of 30–inch pipeline along the Eastern Leg of the 300 Line, and upgraded various facilities and compressor stations along the entire line. The new pipe segments were also looped, or connected, to the existing 24–inch pipeline, and covered approximately 130 miles of the Eastern Leg, leaving seven sections of the pipeline with only the decades-old 24–inch pipe.

As construction of the 300 Line Project was underway, Tennessee Gas initiated the three additional projects mentioned above to fill in the gaps that would be left by the 300 Line Project. Specifically, in November ****144 *1311** 2010, the company applied for certification of the Northeast Supply Diversification Project to add a 6.8–mile segment to the pipeline, connecting two of the 300 Line Project sections; in March 2011, it applied for certification of the Northeast Project to add five segments (40 miles in total) of new pipeline as well as compression upgrades and various infrastructure improvements; and in December 2011, four months after soliciting contracts for the project, it applied for certification of the MPP Project, which would cover the only remaining 7.9–mile segment that was still served solely by 24–inch pipe. In November 2011, the company completed construction on the 300 Line Project.

As each of the four projects was planned, the expected increased capacity on the 300 Line (measured in dekatherms per day) was contracted to natural gas shippers through a binding open season bidding process. *See, e.g.,* Application at 10, *reprinted in* J.A. 196. All of the gas transported through the Eastern Leg, however, uses all of the now-complete sections from the four projects, passing from one segment to the next on its way to the pipeline's delivery point in New Jersey. In other words, even though each project's incremental increase in pipeline capacity was contracted for separately, all of the projects function together seamlessly.

The 24–inch pipeline is buried underground in a corridor that is maintained and kept accessible by keeping major tree growth cleared. In general, the new 30–inch pipe was added by widening the original corridor by 25 feet, clearing and grading this strip, blasting or digging a trench, installing the pipe in the trench, covering the pipe, and then restoring the vegetation. As new segments of pipe were added, they were connected to the old pipe, to adjacent sections of new pipe, and to the compressor stations between the sections.

In its challenge to the Northeast Project, Riverkeeper is concerned with habitat fragmentation, hydrology impacts to wetlands and groundwater, and "edge effects" of deforestation. *See* Br. of Pet'rs at 29, 37, 42–43. Riverkeeper claims that the Northeast Project alone cleared 265 acres of forest and impacted 50 acres of wetlands, and that the four projects together permanently deforested 628 acres. *Id.* at 4. Riverkeeper and other commenters raised these concerns before the Commission.

In July 2010, Tennessee Gas invoked FERC's pre-filing process for the Northeast Project, and in October 2010 the agency issued a Notice of Intent to prepare an EA. Petitioners submitted comments on the Notice of Intent in November 2010, arguing, *inter alia,* that

> [i]t is clear that the 300 Line Project and the Project at issue here are all part of a larger development plan, as they involve interlocking loop upgrades of the same pipeline. [Tennessee Gas] must not be allowed to circumvent heightened environmental scrutiny by segmenting their upgrades in such a way. The cumulative consequences

> of all these projects, many of them previously subject to FERC approval, must be assessed in the NEPA document.

Response to Notice of Intent to Prepare Environmental Assessment on Behalf of Delaware Riverkeeper et al., Nov. 12, 2010 at 13, *reprinted in* J.A. 162; *see also* Pa. Dep't of Conservation & Natural Res. Comments on Notice of Intent, Nov. 23, 2010 at 7, *reprinted in* J.A. 184 (noting that the Bureau of Forestry "previously urged FERC to evaluate the entire corridor parallel to the existing ... line").

On March 31, 2011, Tennessee Gas submitted its certificate application for the Northeast Project. Application, *reprinted in* J.A. 186. On November 21, 2011, ****145 *1312** FERC issued an EA that recommended a Finding of No Significant Impact. Northeast Upgrade Project Environmental Assessment at 4–1, *reprinted in* J.A. 580 ("Northeast Project EA"). Petitioners and other interested parties intervened and submitted timely comments. These comments reiterated the concern that the Project's NEPA analysis was improperly segmented and deficient in its cumulative impacts inquiry:

> Remarkably, the EA fails to assess the additive effect of the Project together with the effects of existing or reasonably foreseeable gas development activities in the Project area, including ... compressor stations, and other infrastructure....
>
> The EA is likewise inadequate in considering the combined environmental impacts of related existing and reasonably foreseeable pipelines within the Commission's Jurisdiction. The EA identifies ten existing or proposed pipelines within fifty miles of the Project area, totaling at least 240 miles of new or improved pipeline construction. EA at 2–123–124. Five of these projects will either connect or be adjacent to the Project. EA at 2–126. However, the EA provides absolutely no detailed information or analysis relating to the additive environmental impacts of these past, present, and proposed actions.

Comments on Environmental Assessment at 13, 17, *reprinted in* J.A. 699, 703; *see also* Hay & Newman Comments, Aug. 25, 2011 at 2, *reprinted in* J.A. 390 ("The fact that the '300 Line' gas pipeline project was approved by FERC the same year of the submission of the subject application raises concerns of impermissible segmentation. It seems unlikely the approved ... projects are not related segments to a broader phased development plan...."); Pike Cnty. Conservation Dist. Comments, Dec. 20, 2011 at 3, *reprinted in* J.A. 746 (raising the same concerns).

On May 29, 2012, FERC issued the Order including a Finding of No Significant Impact and certificate approval for the Northeast Project. *Order,* 2012 WL 1934728, at *1, *11. On June 28, 2012, Petitioners submitted a request for rehearing. Petitioners claimed that:

> The Commission violated NEPA by granting the Certificate for construction of the [Northeast Project] without properly applying the NEPA regulations in evaluating the significance of the Project's impacts, without ensuring an adequate review of the Project's cumulative impacts, and without ensuring that necessary mitigation measures would be fully implemented and complied with to minimize and avoid significant negative environmental impacts. Moreover, the Commission violated NEPA by unlawfully segmenting consideration of the [Northeast Project's] impacts from other interdependent and inter-related projects on the Eastern Leg of the 300 Line.

Request for Reh'g at 3–4, *reprinted in* J.A. 837–38.

FERC denied this request for rehearing. It reiterated the position it took in the May 29 Order, stating that it "found that each project is a stand-alone project and designed to provide contracted-for volumes of gas to different customers within different timeframes." *Tenn. Gas Pipeline Co.,* 142 FERC ¶ 61,025, 2013 WL 240878, at *10 (Jan. 11, 2013) ("*Reh'g Order* "). Petitioners timely filed the instant petition for review in this court.

II. Analysis

A. Standard of Review

[7] [8] [9] Judicial review of agency actions under NEPA is available "to ensure that ****146 *1313** the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 97–98, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983); *see also Nat'l Comm. for the New River, Inc. v. FERC,* 373 F.3d 1323, 1327 (D.C.Cir.2004). Courts may not use their review of an agency's environmental analysis to second-guess substantive decisions committed to the discretion of the agency. Where an issue "requires a high level of technical expertise," we "defer to the informed discretion of the [Commission]." *Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 377, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (internal quotation marks omitted).

[10] **[11]** **[12]** **[13]** **[14]** **[15]** Although the standard of review is deferential, we have made it clear that "[s]imple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Found. on Econ. Trends v. Heckler,* 756 F.2d 143, 154 (D.C.Cir.1985). The agency must comply with "principles of reasoned decisionmaking, NEPA's policy of public scrutiny, and [the Council on Environmental Quality's] regulations." *Id.* at 154 (citations omitted). And under the applicable arbitrary and capricious standard of review,

> the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be 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. The reviewing court should not attempt itself to make up for such deficiencies: We may not supply a reasoned basis for the agency's action that the agency itself has not given.

Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks and citations omitted). In sum, an agency action will be set aside as arbitrary and capricious if it is not the product of "reasoned decisionmaking." *Id.* at 52, 103 S.Ct. 2856.

B. ***Segmentation***

[16] **[17]** An agency impermissibly "segments" NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration. The Supreme Court has held that, under NEPA, "proposals for ... actions that will have cumulative or synergistic environmental impact upon a region ... pending concurrently before an agency ... must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." *Kleppe v. Sierra Club,* 427 U.S. 390, 410, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976).

Regulations promulgated by the Council on Environmental Quality in 1978 dictate the appropriate scope of a NEPA document. The regulations state, in relevant part, that:

> To determine the scope of environmental impact statements, agencies shall consider 3 types of actions.... They include:
>
> ***1314** ****147** (a) Actions (other than unconnected single actions) which may be:
>
> (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> * * *
>
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.
>
> (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
>
> (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography....

40 C.F.R. § 1508.25.

The justification for the rule against segmentation is obvious: it "prevent [s] agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *NRDC v. Hodel,* 865 F.2d 288, 297 (D.C.Cir.1988) (internal quotation marks omitted). NEPA is, "in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration." *NRDC v. Callaway,* 524 F.2d 79, 88 (2d Cir.1975).

Thus, when determining the contents of an EA or an EIS, an agency must consider all "connected actions," "cumulative actions," and "similar actions." 40 C.F.R. § 1508.25(a); *see also, e.g., Am. Bird Conservancy, Inc. v. FCC,* 516 F.3d 1027,

1032 (D.C.Cir.2008) (reviewing the agency's application of the regulations in its preparation of an EA); *Allison v. Dep't of Transp.,* 908 F.2d 1024, 1031 (D.C.Cir.1990) (reviewing the agency's application of the regulations in its preparation of an EIS). As noted above, in their claims before FERC, Petitioners and other commenters argued that, in the NEPA review of the Northeast Project, FERC was obliged to consider the impacts from other connected actions on the Eastern Leg of the 300 Line, and to assess the cumulatively significant impacts of the four closely related and interrelated projects. In our view, these claims are meritorious.

The disputed Northeast Project was the third of the four pipeline construction projects completed in quick succession on the Eastern Leg of the 300 Line. As noted above, when FERC issued the certificate for the Northeast Project, it was clear that the entire Eastern Leg was included in a complete overhaul and upgrade. During the course of FERC's review of the Northeast Project application, the other three upgrade projects were either under construction (as with the 300 Line Project) or were also pending before FERC for environmental review and approval (as with the Northeast Supply Diversification Project and the MPP Project). The end result is a single pipeline running from the beginning to the end of the Eastern Leg. The Northeast Project is, thus, indisputably related and significantly "connected" to the other three pipeline upgrade projects.

[18] It is noteworthy that FERC does not at all address the requirements of 40 C.F.R. § 1508.25(a)(1) or § 1508.25(a)(3) in defending its determination that the four ****148 *1315** projects should be treated separately. Indeed, FERC never even cites the applicable regulations which form the basis of Petitioners' claims in this case. *See* Br. of Resp't at ix (nowhere citing 40 C.F.R. § 1508.25). Instead, FERC relies on the four factors we announced in *Taxpayers Watchdog v. Stanley,* 819 F.2d 294 (D.C.Cir.1987), to argue that it did not impermissibly "segment" its NEPA analysis. But as we made clear in *Coalition on Sensible Transportation, Inc. v. Dole,* 826 F.2d 60, 68 (D.C.Cir.1987), an agency's consideration of the proper scope of its NEPA analysis should be guided by the governing regulations. There, we stated that "[i]n considering the proper scope of the ... project, the district court quite properly referred to Federal Highway Administration regulations." *Id.* We then quoted the agency-specific scoping regulations that govern in the context of a federal highway project. *Id.* (quoting 23 C.F.R. § 771.111(f)). We then remarked that *Taxpayers Watchdog* relied on "the same or closely similar factors." *Id.* But even if the analyses were closely related, the point remains: the agency's determination of the proper scope of its environmental review must train on the governing regulations, which here means 40 C.F.R. § 1508. 25(a). In any event, as we explain below, FERC's position fails even on its own terms.

In *Taxpayers Watchdog* we stated that "[t]he rule against segmentation ... is not required to be applied in every situation." 819 F.2d at 298. It is possible, in some circumstances, for an agency to determine that physically connected projects can be analyzed separately under NEPA. *Taxpayers Watchdog,* for example, involved a NEPA review of a subway construction project in which plans for a large project were abandoned in favor of a shorter length of rail. The court explained that the new plans could be properly analyzed without regard to potential further development because the shorter segment "(1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects." *Id.* The first two factors cited in *Taxpayers Watchdog* are relevant in this case.

Logical Termini

FERC has not articulated any viable reason why it completed its NEPA review of the Northeast Project without regard to the other three projects on the Eastern Leg of the 300 Line. The agency does not contend that the four projects were properly divided pursuant to some "logical termini," or rational end points. Rather, FERC simply asserts—in its brief to this court, not in the agency action under review—that its choice is not arbitrary and capricious if "one terminus is no more logical than another." Br. of Resp't at 25. This will not do. Under this line of reasoning, FERC could have certified pipeline construction in one-mile sections, or hundred-yard sections, or one-foot sections.

FERC relies on a NEPA case that addressed highway construction, *Coalition for Sensible Transp.,* 826 F.2d 60. But that case lends little support to the agency's position. *Coalition for Sensible Transportation* concerned a road construction project in Montgomery County, Maryland. *Id.* at 62. The project was intended to widen approximately sixteen miles of Interstate 270 and modify five interchanges along the way. "The stretch of I–270 at issue runs north from the Spur connecting I–270 to I–495 (the Washington Beltway). It is a heavily travelled route for traffic entering and leaving the District of Columbia and also for local traffic between and within the various nearby towns." *Id.* The opinion noted that "in the context of a highway within a single metropolitan

****149** ***1316** area—as opposed to projects joining major cities—the 'logical terminus' criterion is unusually elusive.... Fully 45 percent of the traffic now using the road neither originates nor terminates at the Beltway. Thus the Beltway is no more logical as a terminus than the Spur." *Id.* at 69. To the extent that the Eastern Leg pipeline is comparable to a highway, it is more analogous to a highway that connects two major points than one section of a web of metropolitan roadways for which the logical termini criterion loses significance.

In rejecting the appellants' claims in *Coalition for Sensible Transportation,* the court also noted that "it is inherent in the very concept of a highway network that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility." *Id.* The same cannot be said about a single pipeline on which each newly constructed part facilitates service only within the bounds of the same start and end points. There are no spurs, interchanges, or corridors connected to the Eastern Leg. There is a single pipeline running from the beginning to the end of the Eastern Leg. The pipeline is linear and physically interdependent, and it contains no physical offshoots. In sum, *Coalition for Sensible Transportation* is inapposite.

Substantial Independent Utility

FERC has also failed to show that the Northeast Project had substantial independent utility separate from the other three pipeline renovation projects on the Eastern Leg of the 300 Line. Tennessee Gas and FERC contend that the Northeast Project has independent utility because the company secured new shipping contracts in anticipation of the increased capacity that would come with the completion of the project. Br. of Resp't at 20–24; Br. of Intervenors at 10–12. This argument is unpersuasive.

[19] First, FERC has a "threshold requirement" for pipelines proposing new projects: the "pipeline must be prepared to support the project financially without relying on subsidization from existing customers." *Order,* 2012 WL 1934728, at *4. As a result of this policy, Tennessee Gas was required to contract for increased capacity prior to upgrading the Eastern Leg of the pipeline. The commercial and financial viability of a project when considered in isolation from other actions is potentially an important consideration in determining whether the substantial independent utility factor has been met. FERC's reliance on the shipping contracts in this case, however, is insufficient because the contracts do not show that the Northeast Project was driven by independent financial considerations apart from the other projects.

Indeed, it is clear from FERC's Order that the upgrade projects on the Eastern Leg are financially interdependent. The *Order* states:

> Tennessee calculated this [Northeast Project capacity] rate using the costs and design capacities of both the proposed Northeast Upgrade Project and the ... 300 Line Project.... The 300 Line Project makes it possible for Tennessee to achieve the capacity increase of the Northeast Upgrade Project at a much lower cost than would have been possible absent construction of the 300 Line Project Market Component facilities.

Id. at *2.

It is also noteworthy that Tennessee Gas sought an "exception" to the normal policy of "incremental pricing for all projects" in its Northeast Project application. FERC explained this in its *Order*:

> ***1317** ****150** Tennessee maintains the inexpensive expansibility of the Northeast Upgrade Project facilities is a result of the earlier, more expensive capacity created by the 300 Line Project.... Although Tennessee is not proposing to roll the Northeast Upgrade Project costs into its general system rates, Tennessee contends its proposal to roll the project's costs into the rates of the 300 Line Project ... is consistent with the premise that such rolled-in rate treatment is appropriate in cases of inexpensive expansibility made possible because of earlier costly construction.
>
> Tennessee further notes that in the precedent agreement that provided the market support for the 300 Line Project, Tennessee and EQT Energy, LLC agreed to a rate adjustment to the negotiated rate "to the extent a subsequent project meeting certain criteria would be constructed and eventually placed in-service within a specified time period." Tennessee also explains that the parties agreed to this negotiated rate adjustment in recognition that Tennessee would likely be able to construct a subsequent project (such as the Northeast Upgrade Project) at a lower cost than would have been possible without the 300 Line Project.

Id. at *6. Not only did Tennessee Gas acknowledge the functional interdependence of the 300 Line Project and the Northeast Project, it made clear that the projects are financially interdependent as well. Indeed, Tennessee Gas's

prior agreement with EQT Energy was made in *express contemplation* of the synergies to be obtained between the 300 Line and the Northeast Project. Even if the Northeast Project has utility, it is plainly not *independent* utility.

FERC's argument in this case that the "substantial independent utility" standard is satisfied when an individual project is "completed and in-service" and "meets specific customer demand," Br. of Resp't at 21, proves too much. Under this approach, Tennessee Gas could have proposed two-mile segments, or one-mile segments, or one-hundred-yard segments for NEPA review, so long as it produced shipping contracts in anticipation of the increased capacity attributable to each of these new segments. To interpret the "substantial independent utility" factor to allow such fractionalization of interdependent projects would subvert the whole point of the rule against segmentation.

The "specific customer demand" argument relied on by FERC paints a false picture. In truth, what happened is that Tennessee Gas had to justify its applications for pipeline upgrades by showing that there would be customers to purchase the increased gas volume that would come as a result of an upgrade. There are no "Northeast Project customers" as such. Gas does not enter and exit the pipeline between segments on the Eastern Leg of the 300 Line. *See* Application at 1, 15, *reprinted in* J.A. 187, 201; Tennessee Gas Pipeline Environmental Report at 10–5, *reprinted in* J.A. 329. And customers do not take gas from the Northeast Project portion of the Eastern Leg. In this respect, the Northeast Project portion of the pipeline is not the equivalent of a highway spur, interchange, or corridor that has utility independent of another highway to which it connects. The Northeast Project's utility is inextricably intertwined with the other three improvement projects that, together, upgrade the entire Eastern Leg of the 300 Line.

Project Timing

[20] FERC also argues that the timing of the project applications defeats Petitioners' segmentation claim because NEPA analyses should not cover projects already ****151 *1318** completed or not yet proposed. Br. of Resp't at 26. NEPA, of course, does not require agencies to commence NEPA reviews of projects not actually proposed. *E.g., Weinberger v. Catholic Action of Haw.,* 454 U.S. 139, 146, 102 S.Ct. 197, 70 L.Ed.2d 298 (1981). While Riverkeeper's challenge is limited to FERC's NEPA review of the Northeast Project, this challenge includes the question whether FERC was obliged to take into account the other "connected" or "similar" projects on the Eastern Leg when it conducted the NEPA review for the Northeast Project.

The temporal nexus here is clear. Tennessee Gas proposed the Northeast Project while the 300 Line Project was under construction, and FERC plainly was aware of the physical, functional, and financial links between the two projects. And FERC's consideration of the Northeast Project application overlapped with its consideration of the remaining two projects. Indeed, FERC's review of the Northeast Project overlapped with its review of the Northeast Supply Diversification Project for the first six months and with the MPP Project's review for the final six months. Thus, FERC was obliged to take into account the condition of the environment reflected in the recently related and connected upgrades. The adjacent lands were recently disturbed, wildlife faced a larger habitat disruption, there was an increase in pressure and gas moving through the system, and wetlands and groundwater flow was disrupted. These effects could not be ignored in FERC's NEPA review of the Northeast Project.

Tennessee Gas states that it did not know at the time it commenced the 300 Line Project that it was embarking on a series of upgrade projects that would soon transform the entire pipeline. That may be so. But the important question here is whether FERC was justified in rejecting commenters' requests that it analyze the entire pipeline upgrade project once the Northeast Project was under review and once the parties had pointed out the interrelatedness of the sequential pieces of pipeline which were, in fact, creating a complete, new, linear pipeline. Because of the temporal overlap of the projects, the scope and interrelatedness of the work should have been evident to FERC as it reviewed the Northeast Project. Yet FERC wrote and relied upon an EA that failed to consider fully the contemporaneous, connected projects.

We emphasize here the importance we place on the timing of the four improvement projects. Separated by more time, the projects could have utility *independent* of the other projects. That is, the indications of the financial and functional interdependence of the projects might have been subsumed by the fact that Tennessee Gas constructed each project to be a standalone improvement for a substantial period of time. To take an obvious example, if the 300 Line Project had been placed into service a decade before FERC considered the Northeast Project application, the timing of the projects would support, rather than undermine, the conclusion that the projects had utility independent of each other. Here, however, the timing does not support the independence of

the projects; rather, we are left with the fact that financially and functionally interdependent pipeline improvements were considered separately even though the there was no apparent logic to where one project began and the other ended.

* * *

For the reasons explained above, we find that FERC's NEPA review of the Northeast Project violated the segmentation rule. When FERC was reviewing the Northeast Project application, it was undeniably aware that the previous and following ****152** ***1319** projects were also under construction or review, and that each phase of the development fit with the others like puzzle pieces to complete an entirely new pipeline.

FERC has suggested that the Petitioners should have anticipated the future upgrades and raised their concerns during FERC's NEPA review of the 300 Line Project. This argument rings hollow in light of Tennessee Gas's and FERC's assertions that they did not know of the future upgrades when FERC initially reviewed the 300 Line Project. Petitioners raised their objections to FERC's segmented analysis of the connected projects once it became clear that there were going to be four connected and interrelated upgrade projects on the Eastern Leg of the 300 Line. When the connections and interdependencies became clear and were brought to FERC's attention, the agency was obliged to assess the entire pipeline for environment effects.

On the record before us, we find that FERC acted arbitrarily in deciding to evaluate the environmental effects of the Northeast Project independent of the other connected actions on the Eastern Leg. There were clear indications in the record that the improvement projects were functionally and financially interdependent, and the absence of logical termini suggests that the four projects functioned as one unified upgrade of the Eastern Leg. And the temporal overlap serves to reinforce this conclusion.

C. *Cumulative Impacts*

[21] Many of the same points that support Riverkeeper's segmentation claim also sustain its contention that FERC's EA is deficient in its failure to include any meaningful analysis of the cumulative impacts of Tennessee Gas's projects.

Cumulative effects are defined by the Council on Environmental Quality as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. We have explained that "a meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate." *Grand Canyon Trust v. FAA,* 290 F.3d 339, 345 (D.C.Cir.2002). The three Eastern Leg upgrade projects preceding and following the Northeast Project were clearly "other actions—past, present, and proposed, and reasonably foreseeable." *Id.*

FERC's Order approving the Northeast Project acknowledges that commenters requested that the agency consider the other upgrade projects on the Eastern Leg and the cumulative impacts of the projects viewed together. *Order,* 2012 WL 1934728, at *49. In response, FERC summarily stated that the construction impacts "were temporary," and "separated by time and distance" from the Northeast Project. *Id.* As we have explained, the record simply does not support this conclusion.

FERC's EA for the Northeast Project states, in conclusory terms, that the connected pipeline projects were "not expected ****153** ***1320** to significantly contribute to cumulative impacts in the Project area." Northeast Project EA at 2–127, *reprinted in* J.A. 557. This cursory statement does not satisfy the test enunciated in *Grand Canyon Trust.* The EA also contains a few pages that discuss potential cumulative impacts on groundwater, habitat, soils, and wildlife, but only with respect to the Northeast Project. It is apparent that FERC did not draft these pages with any serious consideration of the cumulative effects of the other project upgrades on the Eastern Leg of the 300 Line. In light of the close connection between the various sections of the line that have been upgraded with new pipe and other infrastructure improvements, FERC was obliged to assess cumulative impacts by analyzing the Northeast Project in conjunction with the other three projects.

III. Conclusion

For the foregoing reasons, we grant the petition for review insofar as it challenges FERC's segmentation of its NEPA review of the Northeast Project, and its failure to adequately address the cumulative impacts of the four upgrade projects on the Eastern leg of the 300 Line. We hereby remand the case to FERC for further consideration of these two issues.

BROWN, Circuit Judge, concurring in part and concurring in the judgment:
I join Part II. C of the majority opinion, granting the petition for FERC's failure to adequately address the cumulative impacts of the four upgrade projects. As I see it, the practical effect of the Court's segmentation holding—now that several of the projects are complete—can only be FERC's need for a more thorough cumulative impacts analysis. Therefore, I would have focused on that aspect of Petitioners' wide-ranging and evolving challenges, and I would have declined to delve into the murky waters of backwards-looking segmentation review, especially since improper segmentation was raised only at the end of the lengthy approval process and scarce case law is available concerning gas pipelines, which, as the majority also explains, are distinct from highways and railways.

Nevertheless, I agree with the majority that "[m]any of the same points [from] Riverkeeper's segmentation claim ... sustain its contention that FERC's EA is deficient in its failure to include any meaningful analysis of the cumulative impacts of Tennessee Gas's projects." Maj. Op. at 1319. The close timing, functional interdependence, and physical connectedness of the four upgrade projects inform the need for FERC to address the cumulative impacts of the other projects within the Northeast Project's EA. Here, FERC utterly failed to explain why timing and distance—factors that actually show the connectedness of the projects—justify excluding the other upgrade projects from the cumulative impacts analysis. *See* J.A. 554–57 (excluding consideration of the Northeast Supply Project because it was "at least 25 miles from" the Northeast Upgrade Project). For this reason, I would grant the petition and remand the case to FERC for further consideration of the appropriate cumulative impacts.

SILBERMAN, Senior Circuit Judge, concurring:
I join Judge Edwards' opinion because of the emphasis he puts on the timing of these different projects, but I do think Judge Brown has a good point in suggesting that the "cumulative impact" issue is a stronger ground upon which to base the decision.

* * *

Petitioner's brief, unfortunately, was laden with obscure acronyms notwithstanding ****154 *1321** the admonitions in our handbook (and on our website) to avoid uncommon acronyms. Since the brief was signed by a faculty member at Columbia Law School, that was rather dismaying both because of ignorance of our standards and because the practice constitutes lousy brief writing.

The use of obscure acronyms, sometimes those made up for a particular case, is an aggravating development of the last twenty years. Even with a glossary, a judge finds himself or herself constantly looking back to recall what an acronym means. Perhaps not surprisingly, we never see that in a brief filed by well-skilled appellate specialists. It has been almost a marker, dividing the better lawyers from the rest.

We have recently been rejecting briefs that do not adhere to our instructions, and counsel should be warned that if a brief is rejected and has to be rewritten, they will not be able to alter the word limits.

All Citations

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