IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

ROCKY MOUNTAIN PEACE & JUSTICE CENTER; CANDELAS GLOWS/ROCKY FLATS GLOWS; ROCKY FLATS RIGHT TO KNOW; ROCKY FLATS NEIGHBORHOOD ASSOCIATION; and ENVIRONMENTAL INFORMATION NETWORK (EIN) INC.,

Plaintiffs,

v.

UNITED STATES FISH AND WILDLIFE SERVICE;
JAMES KURTH, in his official capacity as Acting Director of the United States Fish and Wildlife Service; and
RYAN ZINKE, in his official capacity as Secretary of the Interior.

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Rocky Flats is among the nation's most polluted places. Its name is synonymous with plutonium, a laboratory-developed, radioactive chemical element that was used at the facility to produce nuclear triggers for almost 40 years during the Cold War.[1] After the FBI raided Rocky Flats and the operators' mismanagement and misconduct was exposed, a federal jury in *Cook v. Rockwell* found that Rocky Flats plutonium had migrated onto neighboring properties, where it will remain "indefinitely" causing an "increased risk of health problems." The case concluded in 2016 with a settlement of $375 million to Rocky Flats' original neighbors.

2. During the three decades between the plant's shutdown and the present, Congress

[1] Plutonium is extremely carcinogenic. The half-life of plutonium is around 25,000 years.

created the Rocky Flats National Wildlife Refuge (the "Refuge") out of lands surrounding Rocky Flats' highly contaminated central operable unit (the "COU"). The U.S. Fish and Wildlife Service ("FWS") now wishes to open the Refuge to the public with hiking, biking and equestrian trails, and a major visitors' center, despite new developments and evolving evidence that the plutonium has migrated beyond the COU. The developments and evidence include surveys indicating higher than expected cancer rates among neighbors, unprecedented precipitation events in 2013 and 2015, and information discrediting assumptions made in 2006 (when the last comprehensive sampling was done) concerning the inability of the plutonium to migrate beyond the COU.

3. Rather, such information suggests that migration of plutonium is likely. The plutonium contaminated building materials in the COU are covered with little more than dirt. Such dirt is continually brought to the surface by burrowing animals, where winds of up to 90 mph can suspend surface contaminants and deposit them onto Rocky Flats' visitors, and throughout the region. Subsequent analysis suggests that the plutonium sampling used to justify a finding that the Refuge is safe for "unrestricted use" was inadequate, possibly as a result of a successful effort to remediate the site at 20% of its originally estimated cost.

4. While the FWS may seek to allow the public on the Refuge, it may not do so based on a myopic view of its own organizational goals to the exclusion of the nation's environmental laws, which require federal agencies to consider the impacts of their actions on the environment and public health.

5. The National Environmental Policy Act ("NEPA") is the nation's oldest and primary environmental statute ensuring that Federal agencies take a "hard look" at their actions that may impact the quality of the human environment. The NEPA planning process must be

undertaken "at the earliest possible time" to ensure that decisions avoid conflicts, reflect environmental values, and are not used simply to rationalize or justify decisions already made. 40 C.F.R. § 1501.2.

6. Defendant U.S. Fish and Wildlife Service (the "FWS") has published its plans to open the 4,883 acre Rocky Flats National Wildlife Refuge (the "Refuge") to public trails (the "Trails") and to open a multipurpose facility and visitor center (the "Multipurpose Facility") in the Summer, 2018. It has been conducting private tours on the Refuge for the last two years.

7. FWS plans to commence construction of the Trails and/or Multipurpose Facility in June, 2017, more than 12 years after the last environmental review, when conditions at Rocky Flats and the proposals considered were vastly different.

8. Recent developments, including the announcement of the Rocky Mountain Greenway initiative, and the U.S. Department of Energy's (the "DOE's") transfer of $8.3 million to FWS to fund construction in the Refuge, have changed the plans analyzed 12 years ago.

9. Despite FWS' imminent construction, and its repeated promise to produce its NEPA analysis for the public, FWS has not prepared an environmental impact statement ("EIS"), a supplemental EIS ("SEIS"), or even an environmental assessment (EA) as required by NEPA.

10. FWS has locked in its construction plans before considering the risks and alternatives thereof, in contravention of the express purpose of NEPA to require an analysis of environmental effects *before* the agency's plans are too far developed to change. By avoiding the NEPA mandate, FWS is virtually thumbing its nose at its obligations to consider the impacts of its plans on the human environment.

11. FWS also has failed to revise its 2005 Comprehensive Conservation Plan ("CCP") to determine if the Trails and Multipurpose Facility are compatible with the Refuge and not

inconsistent with public safety, as required by the National Wildlife Refuge Systems Administration Act ("NWRSAA"). FWS is proceeding with Compatibility Determinations ("CDs") approved for the 2005 CCP, one of which (for the previously configured trails) expired in September, 2014. Language in the old (and expired) CDs have little, if any, relation to the agency's current plans.

12. Plaintiffs also challenge FWS' violation of its duty to protect and conserve wetland habitat on federal property under Executive Order 11990, which seeks to minimize the impacts of new construction on wetlands.

13. Plaintiffs seek a declaratory judgment that FWS has violated NEPA, NWRSAA and EO 11990, and injunctive relief enjoining the FWS from commencing construction of the Trails and Multipurpose Facility until FWS complies with its obligations under NEPA, the NWRSAA and EO 11990.

JURISDICTION AND VENUE

14. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question), 5 U.S.C. §§ 551 *et seq.* (Administrative Procedure Act); and the Equal Access to Justice Act, 28 U.S.C. § 2412.

15. Venue is proper pursuant to 28 U.S.C. § 1391(e)(3) because Plaintiffs reside in this judicial district. Venue is also appropriate under 28 U.S.C. § 1391(e)(1) because FWS has offices in this district. Additionally, venue is proper pursuant to 28 U.S.C. § 1391(e)(2) because "a substantial part of the events or omissions giving rise to the claim" took place in Colorado.

PARTIES

16. Plaintiff ROCKY MOUNTAIN PEACE & JUSTICE CENTER ("RMP&JC") is a non-profit organization based in Boulder, Colorado. RMP&JC was founded in 1983, and has

more than 1000 members. RMP&JC and its members are dedicated to ensuring that the contaminants in the soil at Rocky Flats, including plutonium, beryllium and uranium, do not become a source of harm to the public on the Rocky Flats site and the surrounding communities.

17. Plaintiff CANDELAS GLOWS/ROCKY FLATS GLOWS is committed to raising awareness in the local community and beyond about Rocky Flats' nuclear history and the ongoing issues concerning the Superfund site and surrounding area. After forming in 2013 to speak out against housing developments being built adjacent to the contaminated land at Rocky Flats, the community group has been influential in keeping the memory of Rocky Flats alive and helping the community stay up to date with ongoing public safety and development issues. Through presentations, community meetings and events, media, collaborations and more, Candelas Glows/Rocky Flats Glows is committed to educating the community, honoring the stories of former Rocky Flats workers and community members new and old.

18. Plaintiff ROCKY FLATS RIGHT TO KNOW, started by two grandmothers who live in Arvada, is an organization devoted to "keeping kids off Rocky Flats" and the installation of permanent signage around the former nuclear weapons plant. Rocky Flats Right to Know advocates for robust public participation and fully informed decisionmaking for all residents affected by the Rocky Flats site.

19. Plaintiff ROCKY FLATS NEIGHBORHOOD ASSOCIATION was founded by a Claimant Representative of the Energy Employees Occupational Illness Compensation Program **Act (**EEOICPA**)** and Arvada resident Dale Simpson Jr., focusing on social media communication to engage with residents and other interested parties in dialogue about assumptions, misinformation and misconceptions about the history and state of Rocky Flats.

20. Plaintiff ENVIRONMENTAL INFORMATION NETWORK (EIN) INC. ("EIN") was formed as an educational organization to disseminate technical information to lay persons to

help them understand the issues associated with radiotoxic and hazardous waste issues in the region, especially regarding contamination from the Rocky Flats Nuclear Weapons Facility. EIN has worked for more than 15 years researching information and preparing briefings about Rocky Flats to help individuals make educated decisions regarding hazards they may be exposed to, and their health effects.

21. Defendant U.S. FISH AND WILDLIFE SERVICE ("FWS") manages the National Wildlife Refuge System, including the Rocky Flats National Wildlife Refuge (the "Refuge"). The Refuge was transferred to FWS in 2007 by the U.S. Department of Energy. *WildEarth Guardians v. U.S. Fish and Wildlife Service*, 784 F.3d 677, 681 (10th Cir. 2015). The U.S. Department of Interior, FWS' parent agency, has "administrative jurisdiction over all Refuge land…." *Town of Superior, et al. v. U.S. Fish and Wildlife Service*, 913 F. Supp. 2d 1087, 1105 (2012), *aff'd, WildEarth Guardians v. U.S. Fish and Wildlife Service,* 784 F.3d 677 (10th Cir. 2015).

22. Defendant RYAN ZINKE is being sued in his official capacity as Secretary of the Interior. In that capacity, he is responsible for ensuring executive agency actions comply with EO 11990.

23. Defendant JAMES KURTH is being sued in his official capacity as Acting Director of the FWS. In that capacity, he is responsible for ensuring FWS actions comply with the ESA, NEPA, and EO 11990.

BACKGROUND

Rocky Flats Plant Operations and Shutdown

24. In 1951, the U.S. government acquired property located in unincorporated Jefferson County, between Denver and Boulder, Colorado, and developed the Rocky Flats Plant

to manufacture nuclear weapon triggers, commonly called plutonium "pits."

25. In 1975, the government purchased additional lands surrounding the facility from private landowners to create a buffer zone (the "Buffer Zone"), increasing its size to approximately 6,500 acres. It was operated by the DOE and its predecessors.

26. "Over the course of almost forty years, manufacturing activities, spills, fires, and waste disposal released plutonium and other radionuclides, […] were dispersed by wind and rain into the soil and water systems in the Buffer Zone."[2]

27. In 1989, agents of the FBI, led by Jon Lipsky, along with investigators from the Environmental Protection Agency ("EPA"), engaged in the first-ever environmental raid on a federal agency facility based on a two-year investigation into mismanagement and misconduct related to handling of the raw materials, manufacturing processes and disposal of toxic wastes at the Rocky Flats Plant.

28. Also in 1989, the EPA placed the entire Rocky Flats Plant site on the National Priority List ("Superfund") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") due to plutonium and other radionuclides contamination.

29. In 1996, the DOE, EPA and the Colorado Department of Public Health and Environment ("CDPHE") entered into the Rocky Flats Cleanup Agreement documenting the remediation plan for the site.

The National Wildlife Refuge

30. In 2001, Congress passed the Rocky Flats National Wildlife Refuge Act ("Rocky Flats Act") to create a refuge after the Rocky Flats Plant site was remediated.

31. In 2004, the FWS issued a Comprehensive Conservation Plan/Environmental

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[2] *Town of Superior v. U.S. Fish and Wildlife Service*, 913 F.Supp.2d 1097, 1099 (D.Colo. 2012).

Impact Statement outlining the plans it had evaluated for managing the Refuge (the "2004 CCP/EIS").

32. The 2004 CCP/EIS evaluated four different alternatives for management of the Refuge, each with a specific map of planned trails, facilities, and public access points.

33. The 2004 CCP/EIS also included four Compatibility Determinations for uses approved for the Refuge by the Secretary.

a. Hunting, which was found to be a "form of wildlife-dependent recreation and is a priority public use of the NWRS" approved subject to mandatory re-evaluation in September 2019.[3]
b. Interpretation and Environmental Education, which were found to be "forms of wildlife-dependent recreation and are priority public uses of the NWRS" approved to limiting stipulations and mandatory re-evaluation in September 2019.[4]
c. Multi-Use (Equestrian, Bicycle and Foot access) Trails (the "Trails CD"). These activities were found to be not a priority use and "not a form of wildlife dependent recreation." They were approved with five stipulations and a mandatory re-evaluation in September 2014.[5] This CD has expired.
d. Wildlife Observation and Photography, Including a Public Use Facility (the "Public Use Facility CD") to support those uses, which was found to be a "form of wildlife-dependent recreation and is a priority public use of the NWRS" approved with stipulations and subject to mandatory re-evaluation in September 2019.[6]

34. The Trails CD allowed:

> "Multi-use trails with equestrian and bicycle access are limited to those trail segments designated in the Comprehensive Conservation Plan for Rocky Flats NWR. *Development or opening of additional areas for these uses will require additional evaluation under the National Environmental Policy Act, a new Compatibility Determination, and a new Intra-Service Section 7 Consultation."*[7]

35. In February 2005, FWS issued a record of decision adopting Alternative B:

In Alternative B/Wildlife, Habitat and Public Use, the FWS would "emphasiz(e)

[3] *Id.* at 256.
[4] *Id*. at 259.
[5] *Id*. at 263.
[6] *Id*. at 266-67.
[7] 2004 CCP/EIS p. 263, sub (a) (emphasis added).

both wildlife and habitat conservation along with a moderate level of wildlife-dependent public use."[8]

36. It also approved the CCP and the four CDs as its 15-year management plan for the Refuge, however the Trails CD expired in 2014. The Public Use Facility CD approved a "Visitor Contact Station," defined as a "small (700 – 1000 square foot building)."[9] Alternative B describes this as seasonally staffed "(e.g. weekends from May through October)." The map for the chosen Alternative B locates the Visitor Contact Station on the west side of the DOE-retained Superfund site with public access from an existing DOE gravel road from Highway 93.

37. Physical cleanup of the Rocky Flats Plant site was completed in October 2005 at a contract expense of $7.7 billion over the ten-year project.[10] The agencies declared this cleanup a success because it came in under the original estimates of approximately $37 billion and 65 years.[11]

38. In 2006, the DOE, EPA and CDPHE jointly issued a final cleanup corrective action decision/record of decision ("CAD/ROD"), recommending continued DOE jurisdiction over 1,308 acres that required further cleanup, but finding the surrounding property "acceptable for unrestricted use and unlimited exposure."[12]

39. The CAD/ROD carved out the COU, retained by DOE for future remediation.[13]

40. In 2007, the remaining property, the peripheral operable unit (the "POU") was removed from Superfund. Jurisdiction was transferred by DOE to FWS to establish the 3,953-

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[8] *Id*.
[9] 2004 CCP/EIS p. 264.
[10] U.S. Department of Energy, Legacy Management, "CERCLA/RCRA Fact Sheet, Rocky Flats, Colorado Site," p. 2, (2016).
[11] *Id.*
[12] U.S. Department of Energy, U.S. Environmental Protection Agency, Colorado Department of Public Health and Environment, "Corrective Action Decision/Record of Decision for Rocky Flats Plant (USDOE) Peripheral Operable Unit and Central Operable Unit" (2006), p. 3-5.
[13] *Id*. at 15-16.

acre Refuge.

Unrestricted Use and Unlimited Exposure

41. Since the agencies' 2006 decision to allow "unrestricted use and unlimited exposure, " there have been numerous developments suggesting that plutonium has not been contained in the COU, but has migrated to the Refuge and beyond. Such developments include multiple federal court decisions, statements by federal officials, and private studies.

42. Two federal decisions at the beginning of the decade found that plutonium had migrated. *WildEarth Guardians v. U.S. Fish and Wildlife Service*, 784 F.3d 677, 681 ("As a result of the weapons work, some of the land became polluted by various hazardous materials, including plutonium."); *Town of Superior, et al. v. U.S. Fish and Wildlife Service*, 913 F. Supp. 2d at 1099 ("… over the course of forty years, manufacturing activities, spills, fires, and waste disposal released plutonium and other radionuclides, which were dispersed by wind and rain into the soil and water systems in the buffer zone.").

43. Such migration may be linked to the massive amount of plutonium that went missing during the years the Rocky Flats Plant was producing nuclear triggers. *See Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1145–46 (D. Colo. 2006) ("It is undisputed that the cumulative MUF [material unaccounted for] during Defendants' operation of Rocky Flats is more than 2,600 pounds.").

44. Significantly, a jury found that plutonium from Rocky Flats' operations had contaminated a wide area of land beyond Rocky Flats' borders, and that such plutonium would "continue to be present" on these neighboring properties "indefinitely." *Cook v. Rockwell International Corporation, etc.*, Civ. 90-cv-181-JLK (Jury Verdict Form, Feb. 14, 2006) at ¶¶ A(1-3) and B(1-3). The jury found the plaintiffs would suffer "increased risk of health problems

as a result of this exposure." *Id*. at C(1) and D(1). The jury awarded damages totaling into the hundreds of millions of dollars. *Id*. at pp. 15, 24-27. A settlement was achieved between the parties in 2016 for $375,000,000. *Cook v. Rockwell International Corporation, etc.*, Civ. 90-cv-181-JLK (Settlement Agreement, May 18, 2016) at p. 4.

45. The potential for plutonium migration was also cited by DOE if there was ever "erosion" on site, as contamination in the COU "may be brought to the surface by erosion or slumping of slopes."[14] Such erosion has occurred recently. The area experienced a 1000-year rainfall in September, 2013, with upwards of 10 inches of rain upstream of the Refuge, with "runoff from outside the Refuge flowing onto the Refuge [that] caused fast moving water and debris of over 2-3 feet in the drainages to impact roads and embankments… The dike embankment of Lindsay Pond #1 [on the Refuge] was breached causing the loss of the outlet structure…."[15] Damages to the dike, roads and monitors were assessed at $3 million. *Id.*

46. Similarly, between May and July, 2015 there was "over 20 inches of precipitation" (it was the wettest May in Colorado's recorded history).[16] This caused the plutonium contaminated "Original Landfill" in the COU to "subside" and the "ground surface [] to move."[17]

47. The sampling used to ascertain plutonium levels in 2006, including on the Refuge lands, has been subject to subsequent reviews that raised the following concerns:

1. The sampling methodology excluded plutonium samples taken more than 8 feet below the surface,[18] even though significant sources of plutonium, such as

[14] U.S. Fish & Wildlife Service, "Modified Leve III Preacquisition Environmental Contaminants Survey (2006), at 37.
[15] U.S. Fish & Wildlife Service, pamphlet on 2013 "Flooding Effects."
[16] U.S. DOE, Rocky Flats Site Regulatory Contact Record, 2015-06 at 1.
[17] U.S. DOE, Rocky Flats Site Regulatory Contact Record, 2015-03 at 1.
[18] CRA Facility Investigation – Remedial Investigation/Corrective Measures Study – Feasibility Study Report for the Rocky Flats Environmental Technology Site ("CRA"), Vol. 2 ("Methodology and Data Description") at 8, 4, and 11, n.5. *See also* CRA, Executive Summary at 4.

building, tunnels and duct work, are buried at or below this depth.[19]

2. The U.S. Government Accountability Office (GAO) disparaged the cleanup in 2006 for "DOE's failure to conduct independent assessments."[20] The methodology ultimately lowered the confidence level from 100% to 90% which reduced the likelihood of finding "hot spots" of plutonium.[21].

3. The sampling minimized attempts to detect alpha particles, even though plutonium is primarily "an alpha emitter."

4. The sampling methodology rejected the potential impacts from prairie dogs and other burrowing animals, although independent scientific research states that18 species of burrowing animals present at Rocky Flats dig down to as much as 16 feet, constantly redistributing soil and its contents, and disturb as much as 10 to 12 percent of the surface soil at the site annually.[22]

48. Disturbingly, surveys compiled in 2016 by Metropolitan State University of Denver of individuals who lived downwind of Rocky Flats from 1952 to 1996 found that of the 1,745 surveys, there were 848 reports of cancer, with 414 of those cancers designated as "rare," typically occurring in 15 out of 100,000 people.

49. Although CDPHE's response to the Metropolitan State University surveys stated that "the incidence of all cancers combined… was no different in the communities surrounding Rocky Flats than would be expected[23],… the agency found significant elevations of lung, esophagus, colorectal, or prostate cancer in some of the communities surrounding Rocky Flats for 1990 – 2014."[24]

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[19] U.S. DOE, Rocky Flats Site Regulatory Contact Record, 2011-07 at 2.
[20] United States Government Accountability Office, GAO-06-352, NUCLEAR CLEANUP OF ROCKY FLATS: DOE Can Use Lessons Learned to Improve Oversight of Other Sites' Cleanup Activities, p. 48-9 (2006).
[21] *Id. at 101.*
[22] K. Shawn Smallwood, "Animal Burrowing Attributes Affecting Hazardous Waste Management," 22 Environmental Management 831 (1998); Morrison, Smallwood and Beyea, "Monitoring the dispersal of contaminants," at 293 (1997).
[23] LeRoy Moore, PhD, in comments to the Rocky Flats Stewardship Council, refuted the CDPHE summary findings as misrepresentative by inclusion of inappropriately remote zip codes north and west of the site in the Rocky Flats "neighborhood area." LeRoy Moore, PhD, "Health Risk of Living Downwind of Rocky Flats," p. 1-2, (2017).
[24] Colorado Department of Public Health & Environment, "Summary, Ratios of Cancer Incidence in Ten Areas around Rocky Flats, Colorado Compared to the Remainder of Metropolitan Denver, 1990-2014," p. 1-2, (2017).

50. As a result of public concern about contamination in the Refuge property, FWS had promised to proceed with "full public involvement":

> FWS recognized that the issue of plutonium in the transportation corridor is "controversial" and that there is public concern regarding plutonium contamination. [citations omitted] These instances do not reflect a legal or scientific conclusion, but instead indicate the FWS' intention to "approach this slowly and with full public engagement in order to garner support."

Town of Superior, et al. v. U.S. Fish and Wildlife Service, 913 F. Supp. 2d at 1124.

51. The Rocky Mountain Greenway, a collaboration between federal, state and local governments announced in 2012, is envisioned as a continuous trail or transportation corridor from the Rocky Mountain Arsenal to Rocky Mountain National Park.[25]

52. In 2016, the FWS revised its Trails plans to incorporate the Rocky Mountain Greenway's trail section through the Refuge, abandoning the previously planned routes around the Refuge's perimeter.

53. Also in 2016, the FWS announced plans to construct a (4,168 s.f.) Multipurpose Facility on the north side of the Refuge, open year round, with paved-road access from Route 128. By contrast, the previously analyzed "visitor contact station" was to be no larger than 1,000 s.f., located on the west side of the COU, open during the summer season, and accessed by gravel road from Route 93.

54. With respect to the Trails and Multipurpose Facility, Defendants have taken no action under NEPA, by either preparing an EA, an EIS or an SEIS.

55. The Refuge is subject to airborne migration of soils contaminants. High winds prevail through most of Rocky Flats, blowing from the west to the east. DOE created the 280-acre National Wind Technology Center at Rocky Flats in 1970s to conduct wind research. The

[25] Adkins and PKM Design Group, "America's Great Outdoors, Rocky Mountain Greenway Feasibility Study, Phase 1: Broomfield to Boulder," p. 1 (2016).

National Wind Technology Center is located adjacent to the northwest portion of Rocky Flats, where winds peak at 90 miles per hour.

56. Today, soils and sediments within portions of Rocky Flats that remain on the Superfund list and those portions that have been transferred to the FWS remain contaminated with plutonium and other radionuclides above background levels.

57. Since it obtained jurisdiction in 2007, the only public access FWS has allowed at the Refuge has been guided tours provided by FWS staff since 2015.

LEGAL FRAMEWORK

I. The National Environmental Policy Act (NEPA)

58. NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).

> NEPA establishes "action-forcing" procedures that require agencies to take a "hard look" at environmental consequences.
> …
> An EIS serves two purposes:
>
> First, [i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Center for Biological Diversity v. Dept. of Interior, 623 F.3d 633, 642 (9th Cir. 2010).

59. NEPA "serve[s] as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government." 40 C.F.R. § 1502.1.

60. NEPA also requires federal agencies to take a "hard look" at the environmental effects of their proposed action. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989). "NEPA procedures must insure that environmental information is available to public officials

and citizens before decisions are made and before actions are taken … Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b).

61. Infused within NEPA is the directive that agencies commence the process at the "earliest possible time." 40 C.F.R. § 1501.2 ("Agencies shall integrate the NEPA process with other planning at the earliest possible time…"). *See also* 40 C.F.R. § 1502.5 ("The [environmental impact] statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be use to rationalize or justify decision already made…").

62. NEPA requires that all federal agencies "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a). The agencies "shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by [40 C.F.R. §] 1508.9(a)(1)." 40 C.F.R. § 1501.4(b); *see also* 46 Fed. Reg. 18,026 (March 23, 1981) ("Forty Most Asked Questions Concerning CEQ's NEPA Regulations," answer to question 38: "Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSIs. These are public 'environmental documents' under Section 1506.6(b) and, therefore, agencies must give public notice of their availability."). *See also* 40 C.F.R § 1500.2 (federal agencies "shall to the fullest extent possible ... [e]ncourage and facilitate public involvement in the decisions which affect the quality of the human environment...."). Agencies must "insure the professional integrity, including scientific integrity," of the analysis in an EIS. 40 C.F.R. § 1502.24.

63. The fundamental purpose of NEPA is to engender more informed decisions by

federal agencies and protect the environment as a result. Accordingly, NEPA requires an agency to consider a reasonable range of alternatives to the proposed action. The agency must rigorously explore and objectively evaluate all reasonable alternatives to its initially proposed course of action. 40 C.F.R. § 1502.14.

64. NEPA and its implementing regulations promulgated by the Council on Environmental Quality require federal agencies to prepare an "environmental impact statement" (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11.

65. If an agency is unsure whether a proposed action will have significant environmental effects, it may prepare a shorter document called an "environmental assessment" (EA) to determine if the proposed action may have significant environmental effects and whether an EIS is necessary. 40 C.F.R. §§ 1501.4(b), 1501.3, 1508.9.

66. If an agency decides not to prepare an EIS, an EA must "provide sufficient evidence" to support a Finding of No Significant Impact ("FONSI"). *Id*. § 1501.4(e).

67. "If *any* 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared *before* agency action is taken." *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 340 (D.C. Cir. 2002), citing *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphases in original). The potential presence of even one significance factor is sufficient to require the preparation of an EIS. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005) citing *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001).

68. The Council on Environmental Quality's NEPA regulations specifically require that the "effects" that must be reviewed in a NEPA document include "ecological (such as the

effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8.

69. NEPA requires that changes to plans also are thoroughly reviewed, such that "(a) supplemental EIS is required when it is necessary to update an existing EIS because of either "substantial changes in the proposed action" or the development of "significant new circumstances or information" pertaining to that action or its impacts. 40 C.F.R. § 1502.9(c)(1) (1979). To comply with NEPA, an agency must take a "hard look" at any new information and assess whether supplementation might be necessary." *Rags Over the Arkansas River, Inc. v. Bureau of Land Mgmt., 77* F. Supp. 3d 1038, 1052 (D. Colo. 2015) (internal citations omitted.)

II. The National Wildlife Refuge Systems Administration Act (NWRSAA)

70. The National Wildlife Refuge System Administration Act ("NWRSAA"), as amended by the National Wildlife Refuge System Improvement Act of 1997, is a comprehensive organic statute establishing FWS as the administrator of the National Wildlife Refuge System.[26]

71. The System's original mission was "to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans."[27]

72. The FWS may not "initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use and that the use is not inconsistent with public safety."[28]

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[26] 16 U.S.C. §§ 668dd-668ee
[27] 16 U.S.C. § 668dd(a)(2).
[28] 16 U.S.C. § 668dd(d)(3)(A)(i).

73. When the conditions significantly change, or new information becomes available about the effects of an approved use, the FWS must re-evaluate the use compatibility determination, including offering the public an opportunity to comment.[29]

74. Once a CCP is completed, the FWS is required to manage a refuge "in a manner consistent with the plan and shall revise the plan at any time if the Secretary determines that conditions that affect the refuge… have changed significantly."[30]

75. The FWS' CCP process must "ensure an opportunity for *active public involvement* in the preparation and revision of comprehensive conservation plans."[31]

III. Executive Order (EO) 11990

76. EO 11990 seeks to "avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative."

77. Under EO 11990, federal agencies "shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measure to minimize harm to wetlands which may result in such use." EO 11990, § 2.

78. An agency may consider economic, environmental and other pertinent factors in making these finding. *Id.*

79. In 2001, the U.S. District Court for the District of Colorado analyzed the FWS responsibilities under EO 11990 and determined that those requirements "have not been

[29] 16 U.S.C. § 668dd(d)(3)(A)(viii).
[30] 16 U.S.C. § 668dd(e)(1)(E).
[31] 16 U.S.C. § 668dd(e)(4)(A) (emphasis added)

triggered" because the permittee had not submitted construction proposals for the Rocky Flats site. *Sierra Club v. U.S. Dept. of Energy*, 150 F.Supp2d 1099, 1106 (D.Colo. 2001), *aff'd*, 287 F.3d 1256 (10th Cir. 2002).

80. To date, FWS has not made any of the wetlands constructions findings required by EO 11990.

FIRST CLAIM FOR RELIEF

(Failure to Comply with the National Environmental Policy Act)

81. Each and every allegation set forth in this complaint is incorporated herein by reference.

82. Defendants are planning to construct and/or facilitate the construction of the Trails and Multipurpose Facility on the Refuge.

83. The Trails and Multipurpose Facility constitute a significant change to the plans that were analyzed during the prior NEPA analysis.

84. The construction of the Facility and Trails is to commence on or around June 2017.

85. The construction of the Trails and Multipurpose Facility constitutes Federal action.

86. The construction of the Trails and Multipurpose Facility are significant or major.

87. The construction of the Trails and Multipurpose Facility will impact the environment.

88. To date, Defendants have failed to comply with NEPA for the Trails and Multipurpose Facility.

89. Defendants have not prepared an environmental assessment (EA) for the Trails and Multipurpose Facility.

90. Defendants have not prepared a finding of no significant impact (FONSI) for the Trails and Multipurpose Facility.

91. Defendants have not prepared an environmental impact statement (EIS) for the Trails and Multipurpose Facility.

92. Defendants have not prepared a supplemental environmental impact statement (SEIS) for the Trails and Multipurpose Facility.

93. Defendants are in violation of NEPA.

94. In the absence of compliance with NEPA, Defendants actions authorizing and facilitating the Trails and Multipurpose Facility are arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law and without observance of procedure required by law, within the meaning of Administrative Procedure Act review standards. 5 U.S.C. § 706(2)(A)(A) & (D).

SECOND CLAIM FOR RELIEF

(Violation of the National Wildlife Refuge Systems Administration Act)

95. Each and every allegation set forth in this complaint is incorporated herein by reference.

96. Defendants are planning to construct and/or facilitate the construction of the Trails and Multipurpose Facility on the Refuge.

97. The Trails and Multipurpose Facility constitute a significant change to the plans that were analyzed during the 2004 CCP/EIS analysis.

98. The Compatibility Determination approved for trails at the Refuge expired in September 2014.

99. Defendants have not followed the required process to prepare a revised CCP incorporating the Trails, as expressly required whenever *additional areas in the Refuge are*

opened for development. That process requires additional evaluation under NEPA, a new Compatibility Determination, and a new Intra-Service Section 7 Consultation (under the Endangered Species Act).[32]

100. Defendants have not followed the required process to prepare a revised CCP incorporating the Multipurpose Facility.

101. Defendants have not proposed or approved new Compatibility Determinations authorizing the use of the Trails and the Multipurpose Facility.

THIRD CLAIM FOR RELIEF
(Violation of Executive Order (EO) 11990)

102. Each and every allegation set forth in this complaint is incorporated herein by reference.

103. EO 11990 requires that federal agencies avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds 1) that there is no practicable alternative to such construction, and 2) that the proposed action includes all practicable measures to minimize harm to wetlands which may results from such use.

104. Defendants are planning to construct and/or facilitate the construction of the Trails and Multipurpose Facility in wetlands at the Refuge.

105. The Trails and/or Multipurpose Facility entail construction located in wetlands.

106. The Secretary of the Interior, Ryan Zinke, and FWS' James Kurth, have made no finding that there is no practicable alternative to construction of the Trails and Multipurpose Facility.

107. The Secretary of the Interior, Ryan Zinke, and FWS' James Kurth, have made no finding that the construction of the Trails and Multipurpose Facility includes all practicable

[32] 2004 CCP/EIS p. 263.

measures to minimize harm to wetlands which may results from such use.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare FWS, James Kurth and Ryan Zinke have violated NEPA, the NWRSAA, and the EO 11990;

2. Enjoin any future work by Defendants and/or their agents on the Multipurpose Facility and/or Trails until they have complied with their obligations under NEPA, the NWRSAA and the EO 11990;

3. Vacate and set aside any plans, designs, contracts, requests for proposals, memorandums of understanding, decisions, opinions or findings by Defendants until they have complied with their obligations under NEPA, the NWRSAA and EO 11990;

4. Award Plaintiffs its costs and expenses, including reasonable attorneys' fees, as provided by the Equal Access to Justice Act, 28 U.S.C. § 2412 and ESA 16 U.S.C. § 1540(g)(4); and

5. Grant Plaintiffs such further declaratory and injunctive relief as may be necessary and appropriate or as the Court deems just and proper.

PLAINTIFFS DEMAND A JURY TRIAL.

Respectfully submitted this 17th day of May, 2017.

LAW OFFICES OF RANDALL M. WEINER, P.C.

Original Signature on file at
Law Offices of Randall M. Weiner, P.C.

By: */s/ Randall M. Weiner*
Randall M. Weiner, #23871
Law Offices of Randall M. Weiner, PC
3100 Arapahoe Avenue, Suite 202

Boulder, CO 80303
Telephone: (303) 440-3321
FAX: (720) 292-1687
E-mail: randall@randallweiner.com
Attorney for Plaintiffs

/s/ Annmarie Cording
Annmarie Cording, #42524
Law Offices of Randall M. Weiner, PC
3100 Arapahoe Avenue, Suite 202
Boulder, CO 80303
Telephone: (303) 440-3321
FAX: (720) 292-1687
E-mail: annmarie@randallweiner.com
Attorney for Plaintiffs