

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

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.

Case No. 1:17-cv-01210-CMA

**PLAINTIFFS' SURREPLY**

The Service states that its decision is not a “final action” because the MOU and IA contemplate a two-phase process for construction of the multipurpose facility, and that phase two – involving DOE approval and funding -- has not commenced. Def. Rep. at 2-3. This is inaccurate. In reality, the Service is well into its Phase 2 process. First, the Service does not dispute that *by of the end of September, 2017* it will have received from DOE the full amount of the promised \$8,315,000 set forth in the IA. ECF No. 22-3 at 3. Second, it has completed its public consultation process, i.e., the four “sharing sessions,” that is included in the second phase. **Exhibit 1.** Third, the Service’s David Lucas told the public that the site of the multipurpose facility “has been selected” as of April 20, 2017. **Exhibit 2** (0:01:46:350).<sup>1</sup> Finally, the Service still notes on its website that it will open the Refuge to visitors in “Summer 2018” after building the multi-use building [and] trails. [https://www.fws.gov/refuge/rocky\\_flats/](https://www.fws.gov/refuge/rocky_flats/).

<sup>1</sup> As Plaintiffs may not upload an MP3 file, this exhibit is a computer generated transcript of the “sharing session” occurring on April 20, 2016 conducted by the U.S. Fish & Wildlife Service concerning the design of the multi-purpose facility.

With the public process finished, the money in hand and the site selected, and no otherwise established process for review, there is nothing significant left *but* construction. This is the epitome of final agency action.

Similarly, the Service fully acknowledges that it accepted \$1.7 million in FTA Transit in Parks Grant by the Rocky Mountain Greenway partnership. Def. Rep. at 8 (acknowledging “The grant” referred to by Plaintiffs). However, the Service argues that the grant “does not specify where trails must be constructed” or constructed “at all.” In reality, the Service has issued maps of the proposed trails traversing the Refuge. ECF No. 28-7. In the absence of an established process of agency review, this is final action in every significant aspect except the agency admitting that its decision is “final.” But the agency's refusal to describe an action as final is not dispositive of reviewability. *Her Majesty the Queen ex rel. Ontario v. Env'tl. Prot. Agency*, 912 F.2d 1525 1531 (D.C. Cir.1990) (citing *Ciba-Geigy Corp.*, 801 F.2d 430, 435 (D.C. Cir. 1986).

Finally, Plaintiffs reiterate that this case can get no riper. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998) (“a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper.”) (emphasis added); 40 C.F.R. § 1501.2 (“Agencies shall integrate the NEPA process with other planning at the *earliest possible time* to insure that *planning* and decisions reflect environ-mental values....”) (emphasis in the original); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996) (“The injury of an increased risk of harm due to an agency’s uninformed decision is precisely the type of injury [NEPA] was designed to prevent.”); *Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1221 (D.Colo. 2007) (“the irreparable injury threatened here is not simply whatever ground-disturbing activities are conducted ...).

Respectfully submitted this 30th day of August, 2017.

**LAW OFFICES OF RANDALL M.  
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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on August 30, 2017, the foregoing will be electronically filed with the Clerk of the Court via the CM/ECF system, which will generate automatic service upon all Parties enrolled to receive such notice, including:

Jessica Held  
U.S. Department of Justice  
Environment and Natural Resources Division Natural Resources Section  
P.O. Box 7611  
Washington, DC 20044-7611  
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/s/ Randall M. Weiner  
Randall M. Weiner  
Counsel for Plaintiffs

# PLEASE JOIN US FOR SHARING SESSION

#1



Share your ideas and help us shape the future of  
**Rocky Flats National Wildlife Refuge**

## SHARING SESSION #1 **PROGRAM**

### **Engagement Process Overview**

*Our proposal for working together to make Rocky Flats NWR a success*

### **Refuge Staff Report**

*Background, ongoing projects, refuge opening timeline*

### **Rocky Flats NWR Film Footage Preview**

### *DISCUSSION TOPICS:*

#### **The Story of Rocky Flats**

*Bring ideas for future exhibits and programs*

#### **Building Support for the Refuge**

*What tools can we provide to help you spread the word  
about the refuge opening?*

#### **Future Sharing Sessions**

*What do you want to explore/discuss at the next Sharing Session?*

**Parkview Swim  
and Fitness Club**

**THURSDAY,  
OCTOBER 6  
6:30 - 8:30 PM**

**19865 W 94th Ave.  
Arvada, CO 80007**

This is **not** just another regulatory public meeting. This session will be the first in a series of **collaborations** and the beginning on an **ongoing dialogue** with refuge neighbors and supporters.



0:00:02.100,0:00:17.640

This stake has been knocked over by someone. Westside of trail so we are standing here right now this is the Rock Creek

0:00:17.640,0:00:21.600

drainage so the Rock Creek drainage starts up here on the refuge heading

0:00:21.600,0:00:26.795

towards the mountains and it's going to head all the way down and tie into the Platte River

0:00:26.795,0:00:30.720

the Rock Creek drainage is one of the cooler drainage is here you can

0:00:30.720,0:00:35.969

see kind of the size and scope of this those cottonwood trees down there couple

0:00:35.969,0:00:40.800

hundred feet tall so there's big terrain here - oh wow - so

0:00:40.800,0:00:44.340

pretty neat area and the Rock Creek drainage is also where we found most of

0:00:44.340,0:00:50.879

our prebles meadow jumping mice pretty neat little area. So this is where we're standing right now is where

0:00:50.879,0:00:56.780

they selected as the proposed site for a new building that would be sort of a

0:00:56.780,0:01:01.350

place for the visitors to begin their excursion also a place where we can put

0:01:01.350,0:01:07.380

a repository of information about the history of this place - um - and we think

0:01:07.380,0:01:11.400

that's a real important I mean do you

have to have a building to tell a story

0:01:11.400,0:01:16.860

no but it provides a sense of place so  
if you are coming out to learn the story

0:01:16.860,0:01:20.700

of the Rocky Flats  
you're here it's easier to kind of look

0:01:20.700,0:01:24.540

around and understand how all this comes  
together so what they proposed was a

0:01:24.540,0:01:29.820

pretty modest facility - um -  
it was like 4,000 square feet a parking

0:01:29.820,0:01:33.659

lot and some trails immediately around  
this that would kind of orient folks on

0:01:33.659,0:01:38.369

the Prairie the Rock Creek drainage and  
obviously it gets tremendous views here the

0:01:38.369,0:01:42.090

Flatirons  
and everything else out here so pretty

0:01:42.090,0:01:46.350

neat the spot and then from here they  
could go on out and take one of these

0:01:46.350,0:01:52.200

trails to visit one of the other facilities - so  
this will be the multi-purpose - this is

0:01:52.200,0:01:55.680

the site that has been selected - okay -  
they came out they did an assessment of

0:01:55.680,0:02:02.149

a whole bunch of different locations down by the west gate down by the new neighborhood, um,  
then they said they looked

0:02:02.360,0:02:15.150

three different sites here almost based on the clusters of trees you can see one there one here one over there they had different pros and cons obviously the further away from the the road the more

0:02:15.150,0:02:20.340

construction cost you have for the road and the water but also the flight lines

0:02:20.340,0:02:24.209

the further you move down that way that movement the wind towers got right your

0:02:24.209,0:02:26.390

view