

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

Civil Action No. 1:18-cv-1746

THE TOWN OF SUPERIOR, a Colorado municipality

Plaintiff,

v.

UNITED STATE FISH AND WILDLIFE SERVICE;
GREG SHEEHAN, in his official capacity as Acting Director of the United States Fish and
Wildlife Service; and
DAVID LUCAS, in his official capacity as Project Leader and Refuge Manager, Region 6 of the
United States Fish and Wildlife Service

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, the Town of Superior (“Superior”), by and through its attorneys, Gablehouse
Granberg, LLC, states the following as its Complaint against these Defendants:

INTRODUCTION

1. This is an action for declaratory and injunctive relief under the Administrative
Procedure Act, 5 U.S.C. § 701 *et seq.*, based on Defendants’ failure to comply with the National
Environmental Policy Act (“NEPA”) when making decisions about public lands at the Rocky
Flats National Wildlife Refuge (the “Refuge”).

2. Defendants are responsible for the management of the Refuge. In March 2018,
Defendants announced their plans to open the Refuge in mid- to late-2018 for unguided public
access. This announcement was accompanied by a decision document, the March 23, 2018
Environmental Action Statement (the “2018 EAS”), which purports to satisfy NEPA’s

environmental review requirements in connection with certain decisions pertaining to the development of a trail network within the Refuge for unguided public use.

3. Unfortunately, the 2018 EAS falls short of meeting NEPA's environmental review requirements. NEPA requires federal agencies to analyze separate components of a single larger project together. Here, Defendants are impermissibly segmenting their analyses of proposed and planned public visitor facilities, including trails, trail connections, and a visitor center, under the auspice that some of the envisioned visitor facilities have not reached a point in the planning process to warrant environmental review. Superior, however, asserts all of the planned public use facilities and activities are ripe for environmental review and must be considered together under NEPA.

4. Defendants are further violating NEPA by: (1) ignoring extraordinary circumstances surrounding the opening of the Refuge as contemplated in the 2018 EAS; and (2) re-designating portions of the trails previously planned for the Refuge as instead being part of a different and larger project, known as the Rocky Mountain Greenway, envisioned to connect metro Denver to Rocky Mountain National Park with an uninterrupted pedestrian and bicycle transportation/trail network, without conducting a NEPA compliant environmental review prior to this re-designation.

5. Accordingly, this action involves three separate claims for relief. First, Superior seeks a declaration that Defendants violated NEPA by segmenting their analyses of environmental impacts from proposed and planned connected actions relating to public use at the Refuge. Second, Superior requests a declaration that Defendants failed to take extraordinary circumstances into account when considering the environmental impacts of various proposed and planned actions pertaining to public access and use at the Refuge, in contravention of NEPA.

Third, Superior asks the Court to declare Defendants violated NEPA by re-designating planned trails in the Refuge as being part of the Rocky Mountain Greenway without first considering the potential environmental impacts of this re-designation.

6. In addition to declaratory relief, Superior is seeking an injunction to halt implementation of Defendants' current plans, as proposed in the 2018 EAS, to develop internal trails at the Refuge until such time as NEPA's environmental review requirements have been satisfied.

PARTIES

7. Plaintiff SUPERIOR is a statutory municipality located in Boulder and Jefferson counties, Colorado.

8. Superior is home to over 12,000 residents. The Town is approximately four-square miles in area and located directly northeast of the Refuge.

9. Superior has approximately 594 acres of parks, greenspace, and open space and 27 miles of trails.

10. Superior's 27 miles of trails are linked to a greater trail network encompassing Boulder County open space and the neighboring cities of Westminster, Broomfield, Louisville, and Boulder.

11. Superior is committed to protecting the health, safety, and welfare of its residents.

12. Superior's residents live and recreate near the Refuge. Due to its close proximity, opening the planned internal Refuge trail network for unguided public use, and connecting trails within the Refuge to external trail networks (e.g. the Rocky Mountain Greenway), will result in use of the Refuge by residents of Superior.

13. Superior, on behalf of its residents, has an interest in ensuring Defendants' decisions regarding the adjacent Refuge comply with all applicable federal statutes and regulations. Superior's Board of Trustees has expressed, and acted in response to, concerns and uncertainty over the safety of developing open public trails within the Refuge and linking Refuge trails to existing external trail networks, which include trails through and around the Town of Superior.

14. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS") is a federal agency of the United States Department of Interior. USFWS is responsible for managing and developing the Refuge.

15. Defendant GREG SHEEHAN is sued in his official capacity as the Acting Director for USFWS. As Acting Director, Mr. Sheehan is ultimately responsible for ensuring USFWS' activities comply with NEPA.

16. Defendant DAVID LUCAS is sued in his official capacity as the Project Leader for the Refuge. Mr. Lucas is the signatory of the primary decision document underlying this lawsuit.

JURISDICTION AND VENUE

17. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1346 (United States or its agencies named as defendant); and 5 U.S.C. § 701 *et seq.* (granting jurisdiction to federal courts to adjudicate matters brought by parties claiming to be aggrieved by final federal agency actions).

18. The Court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 and 5 U.S.C. § 706(2).

19. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because: (1) Defendants are an agency of the United States with offices located in this State and officers or employees of the United States acting in their official capacity; (2) a substantial part of the events or omissions giving rise to the claims stated herein occurred in Colorado; (3) the property that is the subject of this matter is located in Colorado; and (4) Superior is a Colorado municipality.

LEGAL FRAMEWORK

I. The National Environmental Policy Act

20. NEPA, 42 U.S.C. § 4321 *et seq.*, was enacted to ensure federal agencies consider the environmental impacts of their actions and identify measures to mitigate damages to the environment. 42 U.S.C. § 4331.

21. NEPA and its implementing regulations require federal agencies to integrate NEPA evaluation “at the earliest possible time to insure [sic] that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” 40 C.F.R. § 1501.2. Agencies must consider and make environmental information available to the public before decisions are made and before actions are taken. *Id.*, § 1500.1(b). “The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” *Id.*

22. Federal agencies must prepare an Environmental Impact Statement (“EIS”) for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C).

23. An Environmental Assessment (“EA”) is the primary tool to determine whether a proposed action may have a significant effect on the environment and whether an EIS is necessary. 40 C.F.R. § 1501.4(b)-(c).

24. Under USFWS’ applicable policy, most additions to existing installations require an EA. Department of Interior Manual, 516 DM 8, § 8.6(A).

25. NEPA directs agencies to simultaneously consider connected, cumulative, or similar actions when determining the potential scope of an EIS. 40 C.F.R. § 1508.25(a).

26. Connected actions are activities that “are closely related and therefore should be discussed in the same impact statement.” *Id.*, § 1508.25(a)(1). Actions are connected if they: (1) automatically trigger other actions which may require environmental review; (2) cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) are interdependent parts of a larger action and depend on the larger action for their justification. *Id.*

27. Cumulative actions are those “which when viewed with other proposed actions have cumulatively significant impacts” on the environment. *Id.*, § 1508.25(a)(2).

28. Similar actions share connections, “such as common timing or geography,” that provide a basis for evaluating their environmental impacts together. *Id.*, § 1508.25(a)(3).

29. Environmental impacts that are direct, indirect, or cumulative must also be considered together. *Id.*, § 1508.25(c).

30. Indirect effects are those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” *Id.*, § 1508.8(b).

31. Cumulative impact is 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.” *Id.*, § 1508.7.

32. If an agency determines that a proposed action will not significantly impact the environment, it must document and make its analysis available to the public via a Finding of No Significant Impact (“FONSI”). *Id.*, § 1501.4(e).

33. Activities that “do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency” are categorically excluded from NEPA’s EA, EIS, and FONSI requirements. *Id.*, § 1508.4. However, agencies must provide “for extraordinary circumstances in which a normally excluded activity may have a significant impact,” warranting further analysis under NEPA – i.e. the preparation of an EA and EIS or FONSI. *Id.*

34. Activities which: (1) “have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources”; (2) “represent a decision in principle about future actions with potentially significant environmental effects”; or (3) “have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects” are recognized by USFWS policy as extraordinary circumstances that warrant additional review for otherwise categorically excluded actions. 46 C.F.R. § 46.215(c), (e), and (f).

II. The Administrative Procedure Act

35. The Administrative Procedure Act (“APA”), 5 U.S.C. § 500 *et seq.*, governs judicial review of federal agency actions under NEPA.

36. Under the APA, courts must hold unlawful and set aside agency actions which are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

GENERAL ALLEGATIONS

I. The History of Rocky Flats and the Creation of the Refuge

37. Rocky Flats consists of approximately 6,200 acres of land located 16 miles northwest of Denver. The area is straddled by Jefferson, Boulder, and Broomfield counties and primarily surrounded by open space.

38. Rocky Flats is perhaps best known for its use as a nuclear weapons component manufacturing facility during the Cold War and the environmental contamination and cleanup that resulted from such use. Portions of the site were first acquired and put to use as a weapons manufacturing facility by the United States Atomic Energy Commission (later consolidated into the Department of Energy (“DOE”)) in the early 1950s. Over time, DOE and its predecessors expanded the facility, including by purchasing roughly 4,000 acres of land surrounding the manufacturing facilities to serve as a buffer zone separating the weapons plant from surrounding communities for security and safety purposes.

39. Throughout Rocky Flat’s operational lifetime, numerous releases of plutonium and other potentially harmful substances occurred due to fires, leaking containers, and poor waste management and disposal practices. Due to these releases, the site was added to the

Environmental Protection Agency's ("EPA") National Priority List in 1989. Weapons component manufacturing ceased in 1992.

40. After Rocky Flats was added to EPA's National Priority List, the long-term environmental investigation and cleanup began to take shape. Ultimately, Rocky Flats was divided into two separate areas: (1) the Central Operable Unit, consisting of approximately 1,300 acres of land, including the areas where the former manufacturing facilities were located, which is currently managed by the Department of Energy; and (2) the Peripheral Operable Unit, which consists of the buffer zone surrounding the former manufacturing facilities.

41. Ownership and control of approximately 4,000 acres of the Peripheral Operable Unit were transferred to USFWS in 2007 for use as the Refuge. *Id.*

42. In total, the Refuge now spans about 5,300 acres of land.

II. The 2004 Comprehensive Conservation Plan and Environmental Impact Statement

43. On September 16, 2004, before ownership and control of the Refuge were transferred to USFWS by the Department of Energy, USFWS issued a combined Comprehensive Conservation Plan and Environmental Impact Statement ("CCP/EIS") for the Refuge.

44. The CCP/EIS considered four alternative management plans for the Refuge.

45. Two of the alternatives analyzed by the CCP/EIS, alternatives A and C, limited public access to guided tours.

46. The two other alternatives considered in the CCP/EIS, alternatives B and D, proposed allowing wildlife-dependent, unguided public use. Under alternatives B and D, the Refuge was proposed to be open to the public for wildlife observation and photography, interpretation (i.e. signs, maps, and information to provide an educational experience regarding

site specific resources), volunteer opportunities, environmental education targeted at high-school and college students, and limited hunting.

47. Alternative B emphasized conservation over public use; while Alternative D placed the greatest emphasis out of all four alternatives on public use.

48. As shown in the following table from the CCP/EIS summarizing the anticipated volume of visitors under the four alternatives, USFWS considered visitation ranging from 300-135,000 Refuge visitors per year:

Table 16. Estimated Visitation and Associated Vehicles Per Day

Period	Alternative A		Alternative B		Alternative C		Alternative D	
	Annual Visitation	Vehicles/day						
Weekday Years 1-3	100	<1	3,300	12	333	<1	8,000	30
Weekend Years 1-3	200	<1	6,700	24	667	<1	17,000	60
Weekday Years >5	100	<1	28,000	102	333	<1	45,000	162
Weekend Years >5	200	<1	57,000	204	667	<1	90,000	325

49. Under alternatives A and C, minimal visitor facilities, such as a restroom and a short trail to an overlook, were envisioned.

50. Under alternatives B and D, more extensive visitor facilities were proposed, such as 16-21 miles of primarily multi-use (pedestrian, bicycle, and horse) trails with portions of the trail network restricted to pedestrian-only use, associated trailheads, parking areas, multiple wildlife viewing overlooks and blinds, informational kiosks and signs, restrooms, and a small visitor contact station (Alternative B) or larger visitor center (Alternative D).

51. The CCP/EIS does not assess the potential environmental impacts of constructing grade separated crossings for connections between Refuge trails and external trails.

52. The CCP/EIS does not discuss alternative options for connections between Refuge trails and external trails.

53. The CCP/EIS does not consider using the Refuge as a transportation corridor for an uninterrupted trail connection between the front range and Rocky Mountain National Park.

III. The Record of Decision and Final Comprehensive Conservation Plan for the Refuge

54. Following the publication of the CCP/EIS, USFWS issued its Record of Decision (“ROD”) for the management of the Refuge in February 2005.

55. The ROD adopts Alternative B: Wildlife, Habitat, and Public Use from the CCP/EIS as the management plan for the Refuge.

56. Alternative B was selected because in USFWS’ judgment, it “best satisfies the missions of the Service and the National Wildlife Refuge System, the direction of the Refuge Act, and the long-term needs of the habitats and wildlife at Rocky Flats.”

57. Alternative D, which envisioned more extensive public use programs and facilities than Alternative B, was rejected by USFWS because the cost and extent of public use programs and facilities under Alternative D “would be unnecessarily large, would preclude some habitat restoration and monitoring efforts, and would result in more extensive environmental impacts.”

58. On April 19, 2005, USFWS issued its Final Comprehensive Conservation Plan (“FCCP”) for the Refuge.

59. The FCCP is the guiding document for the management of the Refuge.

60. Having selected Alternative B as the management plan for the Refuge, the FCCP “emphasizes both wildlife and habitat conservation along with a moderate level of wildlife-dependent public use.”

61. Under this wildlife and habitat conservation emphasis, visitor facilities are to be designed and constructed in a manner that will minimize impacts to sensitive areas.

62. The facilities proposed by the FCCP include: 12.8 miles of multi-use and 3.8 miles of pedestrian-only trails, trailheads, four parking areas with a combined total space for approximately 54 cars and one bus, developed scenic overlooks, and a seasonally staffed (May-October) visitor contact station described as a “small structure (approximately 750 to 1,000 square feet)” to house interpretive displays and staff office space.

63. The primary public access point for the Refuge is designated by the FCCP to be the road entering the Refuge off Highway 93 on the west. Additional access points are contemplated to allow entry by foot, bike, or horse on the north, east, and south boundaries of the Refuge.

64. As described in detail in the CCP/EIS, this moderate level of wildlife-dependent public use is estimated to include 10,000 annual visitors in years 1-3 after the Refuge is opened for unguided public access, increasing to 85,000 annual visitors after year 5.

65. Public use activities are to be “carefully managed to avoid harmful impacts to wildlife and their habitat.”

66. Bike and equestrian uses are neither wildlife-dependent nor priority public uses. “They are modes of access and transportation that facilitate public participation in wildlife observation, wildlife photography, and interpretation.”

67. To mitigate the environmental impacts of allowing bicycles on the Refuge, “[t]rails open to bicycle use will be located on level ground to the maximum extent possible to discourage use by recreational mountain bikers for ‘thrill riding.’”

IV. Rocky Mountain Greenway Project

68. The Rocky Mountain Greenway (the “Greenway”) is a federal, state, and local collaboration to build a continuous pedestrian and bicycle transportation/trail network connecting Denver to Rocky Mountain National Park.

69. The Greenway was conceptualized in 2011 and the formal partnership agreement launching the Greenway initiative was signed in 2012 by the Department of Interior and State of Colorado.

70. The “Core Team” of the Greenway partnership includes agencies from various front range municipalities responsible for the management of parks and trails, the Colorado Department of Transportation, Colorado State Parks, USFWS, and the U.S. Federal Highway Administration (“FHWA”).

71. David Lucas, the Refuge Manager, is the co-chair of the Greenway steering committee.

72. The proposed Greenway includes links to the three national wildlife refuges in the Denver metro area: The Rocky Mountain Arsenal National Wildlife Refuge, The Two Ponds National Wildlife Refuge, and The Rocky Flats National Wildlife Refuge (the Refuge).

73. USFWS describes the connections to the metro area national wildlife refuges as “central” to the Greenway “because [the refuges] serve as ‘anchor points’ to which planners can tie various segments of the trail network.”

74. Phase One of the Greenway is the portion linking the Rocky Mountain Arsenal Refuge to Two Ponds Refuge. Phase One is mostly complete.

75. Phase two of the Greenway is the portion of the trail linking Two Ponds Refuge to the Rocky Flats Refuge (the Refuge). Phase Two is considered to be in the planning and study stages.

76. Phase Three, which is still in the conceptual stage, is the portion of the Greenway linking the Refuge to Rocky Mountain National Park.

77. The Greenway partners commissioned a feasibility study to evaluate options for the portion of the Greenway trail connecting the Two Ponds Refuge in northwestern Arvada to the Refuge (“Phase Two”).

78. According to the feasibility study report, on the average weekday, Phase Two of the Greenway will attract close to 300 daily users on weekdays, with higher rates of visitation expected on weekends (i.e. more than 109,500 annual visitors). Due to proximity to population centers, the number of daily users is expected to be higher closer to the Two-Ponds Refuge and reduce as the trail moves towards Rocky Flats, although the study does not provide specific numbers in this regard.

79. The Greenway partners believe routing the Greenway through the Refuge has the potential to make the Refuge one of the most visited public land destinations on Colorado’s front range.

80. During a public meeting held on April 4, 2016 before the Rocky Flats Stewardship Council, which provides ongoing local government and community oversight of the management of Rocky Flats, David Lucas opined that the Refuge would see somewhere between 100,000 and 200,000 annual visitors with the Greenway connection. Mr. Lucas stated, however, that this was only a guess and he did not have an exact estimate for the number of visitors the Refuge will have with the Greenway connection.

81. Weekday and weekend use in Phase Two will consist of utilitarian and recreational pedestrian and bicycle trips. As would be expected, utilitarian use (travel to work, school, shopping, etc.) is anticipated to be higher on weekdays, while more recreation use is expected to occur on weekends.

82. In 2016, six local governments from the Greenway partnership applied for \$5.4 million in grant funding from the Colorado Federal Land Access Program (the “FLAP Grant”).

83. The applicants for the FLAP Grant were Jefferson County, The City and County of Broomfield, the City of Arvada, the City of Westminster, Boulder County, and the City of Boulder (collectively, the “Applicants”).

84. The FLAP Grant funding is designated for the construction of grade-separated crossings linking the Greenway to the Refuge. Specifically, the FLAP Grant application states “[t]his proposal will create key linkages in the [Greenway] that will provide safe, non-motorized access to [the Refuge] for a broad constituency of diverse underrepresented visitors . . . If trail access to the Refuge is developed, [the Refuge] has the potential to be one of the most visited public land destinations on the Front Range.”

85. One crossing is planned for Indiana Street on the eastern border of the Refuge to provide a safe link for the Greenway between the Refuge and Westminster open space. The other crossing is planned for CO-HWY 128, connecting the portion of the Greenway traversing the Refuge to Boulder County open space directly north of the Refuge.

86. Disbursement of the FLAP Grant is contingent on the Applicants’ committing approximately \$1.3 million in matching funds.

87. In response to residents' concerns about the safety of routing the Greenway through the Refuge, the Applicants each conditioned their share of the matching funding on confirmatory soil sampling for radionuclides in the areas where the crossings will be located.

88. USFWS promised to await the results of confirmatory sampling before routing the Greenway through the Refuge.

89. In a document titled Rocky Flats National Wildlife Refuge: Frequently Asked Questions, which was published in June 2016, USFWS stated: "Will any additional sampling be done before the Rocky Mountain Greenway Trail is routed through Rocky Flats NWR? Yes, the Service and local governments plan to work together to conduct a new round of soil sampling in conjunction with the FLAP projects to ensure construction activities and the areas being opened to [sic] public are safe."

90. During a public "sharing session" held on May 15, 2017, USFWS presented a PowerPoint slide stating it would be "happy to conduct this additional soil confirmatory sampling" as part of the planning process for construction of the Refuge trail system and visitor center.

91. In August 2016, FHWA notified the Applicants that the crossings were added to FHWA's Colorado Multi-Year Program of Projects List, sometimes referred to as the "short list." Upon listing the project, FHWA instructed the Applicants to proceed with the radionuclide soil sampling. *See* the Draft Sampling and Analysis Plan for the Rocky Mountain Greenway Crossings, June 2018, § 1.0 (Ex. 1).

92. The Applicants issued a request for proposals for the confirmatory soil sampling in October 2017. *Id.*

93. The contract for the sampling was awarded to Engineering Analytics, Inc. in December 2017. *Id.*

94. Engineering Analytics finalized the draft soil sampling plan in or about June 2018, at which time the Applicants released the draft sampling plan for public review and comment. The public comment period is currently set to end on August 24, 2018.

95. In addition to accepting written comments, the Applicants also scheduled two open house forums for the public to learn about and provide input on the proposed sampling. The first meeting is scheduled for July 17, 2018. The second meeting is set for July 24, 2018.

96. According to the sampling proposal, this is a one-time sampling event that is limited to the footprints of the crossing structures, new trails connecting the crossings to existing trail systems east of Indiana Street and north of CO HWY-128, and new trails connecting both crossings to planned Refuge trails “stopping at the Refuge boundary.” Ex. 1 § 1.2.

97. Superior was asked to support the FLAP Grant application and provide matching funds. Superior declined to support the FLAP Grant and decided not to pledge matching funds because of concerns and uncertainty over the safety of opening public trails in the Refuge and tying the Refuge trails to Superior’s trail network.

V. The March 23, 2018 Environmental Action Statement

98. On March 23, 2018, USFWS issued the 2018 EAS for the Refuge as a NEPA compliance related decision document. March 23, 2018 Environmental Action Statement (Ex. 2).

99. The 2018 EAS relies on the evaluation of alternatives in the CCP/EIS and management decisions included in the FCCP. *Id.* at 1 and 11.

100. The 2018 EAS purports to make only minor modifications to the FCCP. *Id.* at 1.

101. As such, the 2018 EAS asserts the modifications are exempt from NEPA’s environmental review requirements based on three categorical exclusions recognized by USFWS policy: (1) 516 DM 8.5(B)(7) covering minor changes in the amounts or types of public use on Service or State-managed lands, in accordance with existing regulations, management plans, and procedures; (2) 516 DM 8.5(B)(9) covering minor changes in existing master plans, comprehensive conservation plans, or operations when no or minor effects are anticipated; and (3) 516 DM 8.5(B)(10) covering the issuance of new or revised site, unit, or activity-specific management plans for public use, land use, or other management activities when only minor changes are planned. *Id.*

102. The 2018 EAS modifies the FCCP, in part, by re-designating 8.3 miles of the multi-use trails planned in the FCCP as Greenway trail. *Id.* at 7.

103. The 2018 EAS provides that “[a]ny further improvements to the refuge’s visitor amenities (e.g. whether or not to construct a slightly larger visitor facility than proposed in the [F]CCP; whether or not to construct an additional vault toilet; and/or whether or not to construct additional trail connections to the north and east of the refuge) *may* occur in the future and would be subject to future NEPA determinations.” *Id.* at 5.

104. With regard to consideration of extraordinary circumstances that require additional environmental review, the 2018 EAS asserts no such circumstances surround the modifications to the FCCP.

105. USFWS claims there is no significant public controversy over the 2018 EAS’ modifications to FCCP. *Id.* at 9-10.

106. The only explanation for this conclusion is provided in a footnote stating “[a] small but often vocal group contends everything and anything concerning the former Rocky Flats

site is controversial. The Service does not expect there to be actual controversy over potential environmental impacts of the very minor changes proposed to the [FCCP].” *Id.* at 10.

107. Prior to and after the issuance of the 2018 EAS, David Lucas produced sworn declarations for litigation in the U.S. District Court for Colorado over the Refuge trail system.

108. In the first declaration, dated June 9, 2017, Mr. Lucas described the Greenway trail connections for which FLAP Grant funding was conditionally awarded as being consistent with plans in the FCCP and as “important to realizing the original vision for the [Greenway] by facilitating regional trail connections to [the Refuge] and beyond.” June 9, 2017 Decl. of David Lucas, Rocky Flats Nat’l Wildlife Refuge Manager, ¶ 7 (Ex. 3). Then Mr. Lucas said “[c]onstruction of internal trails on [the Refuge] as discussed in the [FCCP] will be timed in connection with the trail crossings described in this Declaration if any such trail crossings are ultimately built.” *Id.* ¶ 8. Mr. Lucas estimated planning for the trail crossings would begin in October 2017, “with construction funding anticipated in Fiscal Year 2019 (October 2018).” *Id.* ¶ 7.

109. Mr. Lucas attached a map to his June 9, 2017 Declaration contemplating dedicating 8.7 miles of the Refuge’s internal trail system to the Greenway. *Id.* at p. 10. Mr. Lucas stated “USFWS will ultimately make a decision about the location of internal trails and trail crossings at [the Refuge], and that decision-making will be accompanied by compliance with NEPA and any other applicable laws.” *Id.* ¶ 9.

110. In the second declaration, dated June 11, 2018, Mr. Lucas stated USFWS planned to open the Refuge for unguided public use “no earlier than September 15, 2018.” June 11, 2018 Decl. of David Lucas, ¶ 5 (Ex. 4). Mr. Lucas claimed, “[i]n the near future,” USFWS plans to issue an EA evaluating whether construction of the external trail connections, multi-purpose

visitor center, and Greenway improvements may significantly impact the environment. *Id.* ¶ 6(a). Mr. Lucas declared no construction would begin on the visitor facility and trail crossings in 2018. *Id.* ¶¶ 8 and 10. Mr. Lucas also asserted “it is still not known exactly where and how each of the crossings may be built.” *Id.* ¶ 8.

VI. Controversy Over the 2018 EAS

111. In the time leading up to and directly after the issuance of the 2018 EAS, the controversy over opening the Refuge to the public heated up in public meetings and the media.

112. The growing controversy caused governing bodies in surrounding communities to respond to their constituents’ concerns about the safety of opening the Refuge for unguided public access.

113. Seven Denver metro-area school districts banned field trips to the Refuge over concerns regarding student safety.

114. Superior’s Board of Trustees voted against supporting the FLAP Grant and connecting the Refuge’s internal trails to existing and planned trails in neighboring open spaces due to the controversy surrounding the Refuge.

115. The FLAP Grant Applicants each adopted resolutions conditioning disbursement of their share of the \$1.3 million in matching funds on the results of confirmatory sampling for radionuclides in the areas of the proposed Refuge-Greenway trail connections.

116. Media coverage of USFWS’ decision to open the Refuge has been extensive in both local and national publications. Numerous articles have covered the opinions of proponents and opponents to opening the Refuge.

117. Shortly after the 2018 EAS was issued and USFWS announced its decision to open the Refuge for unguided public access, the Executive Director of Jefferson County’s

Department of Public Health, Dr. Mark Johnson, openly questioned whether it was safe to develop the Refuge for public use. Mr. Lucas responded by demanding a retraction of Dr. Johnson's critical comments. No such retraction has been made.

FIRST CLAIM FOR RELIEF

Violation of NEPA – Impermissible Segmentation

118. Superior incorporates the preceding paragraphs by reference as though stated fully herein.

119. The proposed trail crossings, visitor center, and Greenway connections and improvements, which are reasonably foreseeable future actions, are connected, similar, and cumulative to USFWS' proposal to develop public trails for unguided access to the Refuge.

120. The proposed trail crossings and visitor center are part of the FCCP's larger public use plan for the Refuge and rely on the construction and opening of internal trails within the Refuge for their justification.

121. The 8.3 miles of the Greenway network that will span the Refuge is interdependent on construction of Phase Two of the Greenway trail and relies on completion of the Greenway for its justification.

122. The proposed trail crossings cannot and will not be constructed unless the internal trails are completed.

123. The proposed internal trails, trail crossings, visitor center, and Greenway share common geography.

124. USFWS acknowledged this common geography by aligning the internal trail network with existing or planned external trails, designing the internal trails to intersect with the

preferred visitor center and Greenway trail crossing locations, and re-designating almost half of the FCCP's planned internal trail network as Greenway trail.

125. Decisions made in the 2018 EAS regarding the internal trails will dictate future decisions regarding visitor facilities, trail crossings, and the Greenway.

126. Decisions made in the 2018 EAS will foreclose future opportunities to consider alternatives for the visitor facilities, trial crossings, and Greenway.

127. Under NEPA, USFWS must consider the direct, indirect, and, cumulative environmental impacts of connected, similar, and cumulative actions in the same decision document(s) before it makes decisions or takes action that may adversely impact the environment.

128. According to the 2018 EAS and Mr. Lucas' sworn statements, USFWS is planning to prepare an EA for the trail crossings and visitor center "in the near future," but nevertheless after final decisions have been made regarding the internal trails.

129. Likewise, USFWS is proposing to analyze the environmental impacts of the Greenway and related improvements in a future EA, after the decision was made to re-designate portions of the internal trails as Greenway trail.

130. In so doing, USFWS is treating the internal trails, the visitor center, the trail crossings, and the Greenway link to the Refuge as separate projects.

131. USFWS is segmenting these projects despite assurances given to the public that the environmental reviews for these projects would be timed together, after confirmatory sampling for radionuclides was completed.

132. USFWS' decision to segment the internal trails, visitor facilities, trail crossings, and Greenway connections in this manner violates NEPA and is arbitrary, capricious, not in accordance with the law, and without observance of procedures required under the law.

SECOND CLAIM FOR RELIEF

Violation of NEPA – Failure to Account for Extraordinary Circumstances

133. Superior incorporates the preceding paragraphs by reference as though stated fully herein.

134. USFWS' reliance on categorical exclusions in the 2018 EAS is improper because:

- a. The decisions made in the 2018 EAS are controversial, and unresolved conflicts exist regarding the opening of the Refuge for unguided public use and routing the Greenway through the Refuge. The controversy and unresolved conflicts are apparent in the decisions of seven local school boards to ban trips to the Refuge. The controversy and unresolved conflicts also caused local governments to make legislative decisions (e.g. Superior's decision to not support the FLAP Grant and the local government partners of the Greenway's decision to condition FLAP Grant matching funds on environmental sampling) in response to their residents' concerns regarding the safety of the Refuge. The controversy and unresolved conflicts are further apparent in the media coverage, opinion pieces voicing support and opposition to the decisions made in the 2018 EAS, and the public feud between the Director of Jefferson County Public Health and the Refuge Manager.
- b. The decisions made in the 2018 EAS represent decisions in principle about future actions regarding the route for the Greenway through the Refuge, the

locations of trail crossings, and the location of the visitor center and other visitor facilities, which may have significant environmental impacts that USFWS plans to analyze in a future EA (or EAs); and

- c. The decisions made in the 2018 EAS have direct relationships to the trail crossings, visitor center, and Greenway, which independently or cumulatively, may have significant environmental impacts.

135. In light of these circumstances, USFWS' reliance on categorical exclusions when issuing the 2018 EAS violates NEPA and was arbitrary, capricious, not in accordance with the law, and without observance of procedures required under the law.

THIRD CLAIM FOR RELIEF

Violation of NEPA – Failure to Conduct an EA for Inclusion of Greenway Trail in the Refuge

136. Superior incorporates the preceding paragraphs by reference as though stated fully herein.

137. The 2018 EAS states the re-designation of 8.3 miles of the internal trails in the Refuge as Greenway trail represents a minor modification to the FCCP and only a minor change to the amounts and types of public uses contemplated for the Refuge.

138. The FCCP does not contemplate routing the Greenway through the Refuge.

139. The CCP/EIS also did not analyze the environmental impacts of routing the Greenway through the Refuge.

140. The proposal to route the Greenway through the Refuge has not been considered in an EA nor EIS.

141. USFWS proposes to evaluate the environmental impacts the Greenway may have on the Refuge in a future EA, despite having made the decision to designate 8.3 miles of Refuge trail as being part of the Greenway.

142. Greenway use will include utilitarian pedestrian and bicycle traffic and recreational bicycle trips, which are neither wildlife-dependent public uses, nor priority uses under the FCCP.

143. Routing the Greenway through the Refuge will result in more Refuge visitors than anticipated for the moderate level of wildlife-dependent public use allowed for in the FCCP.

144. The decision to route the Greenway through the Refuge constitutes major changes to the FCCP's trail alignment and contemplated levels and types of public use for the Refuge.

145. Thus, it was a violation of NEPA, arbitrary, capricious, not in accordance with the law, and without observance of procedures required under the law for USFWS to rely on categorical exclusions in lieu of preparing an EA when re-designating portions of the Refuge's internal trails as Greenway trail.

PRAYER FOR RELIEF

WHEREFORE, Superior respectfully requests that this Court grant the following relief:

1. Declare that the 2018 EAS is invalid because Defendants impermissibly segmented environmental reviews for the Refuge's internal trails, trail connections, visitor facilities, and Greenway connections and improvements;
2. Declare that the 2018 EAS is invalid because Defendants failed to take into account extraordinary circumstances pertaining to the decisions made in the 2018 EAS;
3. Declare that the 2018 EAS is invalid because the re-designation of Refuge trail as Greenway trail constitutes a major modification to the FCCP;

4. Enjoin Defendants from developing the Refuge trails proposed in the 2018 EAS and opening said trails to the public until the requirements of NEPA have been met;
5. Awarding Superior costs and reasonable attorneys' fees associated with this action; and
6. Granting such other relief as this Court deems proper.

Respectfully submitted this 10th day of July, 2018.

s/ Evan C. Singleton
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