No. 13-5136

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAROL GRUNEWALD, ET AL.

Plaintiffs-Appellants.

v.

JONATHAN JARVIS, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia (Wilkins, J.)

BRIEF OF APPELLANTS

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September 25, 2013

PARTIES, RULINGS, AND RELATED CASES

Parties: The Plaintiffs-Appellants are Carol Grunewald, Jeremy Rifkin, Anne Barton, Mary Rowse, Zhong-Ying Chen, and In Defense of Animals.

The Defendants-Appellees are Jonathan B. Jarvis, Director, National Park Service, and Sally Jewell, Secretary, U.S. Department of the Interior.

Rulings: The ruling under review is a decision by the district court granting summary judgment to Defendants and denying summary judgment for Plaintiffs, issued on March 14, 2013 (Docket Entries 45-46).

Related Cases: Plaintiffs-Appellants are unaware of any case that is related to this one.

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants are five individuals and the non-profit animal protection organization In Defense of Animals, which does not have any parent corporation and does not issue stock or shares.

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GLOSSARY

AR	Administrative Record
CEQ	Council on Environmental Quality
EIS	Environmental Impact Statement
GMP	General Management Plan
NEPA	National Environmental Policy Act
NPS	National Park Service
ROD	Record of Decision

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331, and entered final judgement on March 14, 2013. Plaintiffs filed a timely notice of appeal on May 10, 2013. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether, under the 1890 Enabling Act for Rock Creek Park which directs the National Park Service to "*preserv[e] from injury* and spoliation . . . *all* timber, *animals*, or curiosities within [the] park, and *their retention in their natural condition as nearly as possible*," the Service may nevertheless for the first time in the history of the Park decide to kill native wildlife to address a decline in native vegetation, when (a) the agency does not have the data it said were required as the "threshold for taking action" to reduce the deer population; and (b) the Administrative Record shows that, according to the Service itself, the "critical" problem affecting the native vegetation is the invasion of exotic plant species.

2. Whether the Park Service violated the National Environmental Policy Act (" NEPA") when, in deciding to kill the native deer in Rock Creek Park, it failed to (a) consider as an alternative means of preserving the native vegetation reducing the exotic plant species that are displacing the native plants; (b) analyze the impacts of its invasive exotic species and deer management plans as

"connected" or "similar" actions as required by the regulations implementing NEPA; and (c) consider how killing this native wildlife for the first time in the 123-year history of the Park will adversely impact the ability of the public to enjoy using this national park because its traditional character will be changed from a park where the harming of wildlife has never been allowed to one where the shooting of wildlife will occur on a regular basis.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to this brief.

STATEMENT OF THE CASE

This appeal involves whether the National Park Service ("Park Service," "Service") may, for the first time in the 123-year history of Rock Creek Park, kill native wildlife in the Park for the purpose of protecting the native vegetation, when the 1890 Enabling Act for the Park directs the Park Service to "preserve" all of the animals in the Park "in their natural condition, *as nearly as possible*," and the Administrative Record shows that there are other ways to protect the native vegetation – namely by reducing the exotic plants that for years have been displacing the native vegetation. Rather than deal with the exotic plant problem that the agency itself has long recognized is "critical" to the survival of the native

vegetation in the Park, the Service has decided to reduce the deer population by having sharpshooters bait and kill deer during up to five months each year.

The Record also shows that none of the usual signs that denote an overpopulation of deer are present in this Park – the deer are healthy and not malnourished, and, according to the Service itself, "the browse line" – i.e., the highest point at which the deer can reach the vegetation they consume – *"is not prominent at Rock Creek Park*." Record of Decision at 3, Joint Appendix ("JA") at . In addition, as the agency's own data demonstrate, the deer population in Rock Creek Park has remained relatively stable over the past ten years – with the two lowest density estimates (52 and 58 deer per square mile) reported in the last five years of reported data. *See* Final Environmental Impact Statement ("FEIS") at 16, Table 2 (JA).

Most significant, the scientific data that the agency identified as the "threshold for taking action" to reduce the deer population – a recorded decline in tree seedlings caused by deer browsing – has never been documented. Therefore, Plaintiffs showed that the Park Service's decision to kill this native wildlife violates its statutory duty to preserve the deer in their natural condition "as nearly as possible." Plaintiffs also showed that by failing to consider addressing the invasive exotic species problem as an alternative to killing deer, or even in

conjunction with its analysis of whether any deer must be killed, and by failing to consider that killing wildlife in this Park for the first time in over 120 years would ruin the experiences of those who use this national park precisely because it does *not* allow the killing of wildlife, the Park Service violated the "action-forcing" commands of NEPA. *See Robertson v. Methow Valley Citizens*, 490 U.S. 332, 350 (1989).

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. The Rock Creek Park Enabling Act

Rock Creek Park was established in 1890 as one of the first federal parks in the nation. *See* General Management Plan for Rock Creek Park (2005) ("GMP") at 5 (JA). It was established in the heart of the nation's capital to be "perpetually dedicated and set apart as a public park or pleasure ground for the benefit and pleasure of the people of the United States," and the Commissioners of the District of Columbia and Army Corps of Engineers, who had original authority for the Park's administration were charged to "care and manage[]" the Park and to "*preserv[e] from injury* or spoliation . . . all timber, *animals*, or curiosities within [the] park, and their *retention in their natural condition, as nearly as possible*." Rock Creek Park Enabling Act, 51st Cong. § 7 (1st Sess. 1890) (emphasis added).

The Park Service, which was subsequently charged with the administration of all national parks, *see* 16 U.S.C. § 1, has consistently explained that "Rock Creek Park was created by this specific legislation to provide for the preservation from injury or spoliation of all timber, animals, or curiosities within the said park, and *to try to keep them in their natural condition as much as possible*." *See, e.g.,* (JA) (emphasis added). Indeed, the final Environmental Impact Statement ("FEIS") at issue in this case explained that "[b]ased on the NPS's [National Park Service's] interpretation" this legislation requires the agency to "*[p]reserve and perpetuate* for this and future generations *the ecological resources* of the Rock Creek Park valley within the park *in as natural a condition as possible*." FEIS at 11 (JA). Consistent with that obligation, for 123 years, the Park Service has never allowed *anyone* – visitors and managers alike – to kill *any* wildlife in Rock Creek Park.

B. The Act Establishing The National Park Service

In 1916, Congress established the National Park Service to "promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose . . . to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and

by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. Section three of the Act allows the Secretary of the Interior to provide for the "destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations." *Id.* § 3. However, Congress made clear its intent that the agency's *general* authority over the park system is superseded by its responsibility to administer each particular park pursuant to the specific dictates of that park's original enabling legislation. *See id.* § 1c(b) ("[e]ach area within the national park system *shall be administered in accordance with the provisions of any statute made specifically applicable to that area*.") (emphasis added).

C. The National Environmental Policy Act

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1. The "twin aims" of the statute require agencies to "place[] upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action," and to "inform the public that [the agency] has indeed considered environmental concerns it its decisionmaking process." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, *Inc.*, 462 U.S. 87, 97 (1983) (citation omitted). Thus, as the Supreme Court has explained, NEPA's goals are "realized through a set of 'action-forcing' procedures that require that agencies

take a 'hard look' at environmental consequences.'" *Robertson v. Methow Valley Citizens*, 490 U.S. at 350 (citations omitted).

To accomplish these objectives, NEPA requires all federal agencies to prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). This statement, known as an EIS, must describe (1) "the environmental impact of the proposed action," (2) "any adverse environmental effects which cannot be avoided should the proposal be implemented," and (3) "alternatives to the proposed action." *Id.*

The Council on Environmental Quality ("CEQ") has promulgated regulations implementing NEPA's requirements that are "binding on all Federal agencies." 40 C.F.R. § 1500.3. Those regulations define "environmental effects" that must be included in the EIS as "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" aspects of a decision, whether "beneficial" or "detrimental." *Id.* § 1508.8.

The CEQ regulations further require that two or more agency actions "shall" be considered within the scope of a single NEPA document where they are "connected actions," meaning they are "closely related and therefore should be

discussed in the same impact statement," *id.* § 1508.25(a)(1), or "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*." *Id.* § 1508.25(a)(3) (emphasis added). Thus, as the Supreme Court has explained, "*when several proposals for . . . actions that will have a cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together*" in a single NEPA document. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (emphasis added).

As further required by the CEQ regulations, the EIS must "[r]igorously explore and objectively evaluate" the effect of each alternative on the "human environment," which is defined as "the natural and physical environment" as well as "the *relationship of people with that environment*." 40 C.F.R. §§ 1502.14, 1508.14 (emphasis added).

At the time of its decision to take a proposed action, the agency must prepare a concise public record of decision ("ROD") that identifies "all alternatives considered by the agency in reaching its decision," and states "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not." *Id.*

§ 1505.2.

II. Pertinent Factual Background

A. Rock Creek Park

Rock Creek Park is an oasis of 4.69 square miles of trees, fields, and creek in the heart of Washington, D.C. *See* FEIS at 5 (map of Rock Creek Park) (included in the Addendum at A-2). The Park Service has described the Park as "the largest unbroken forest in the Washington metropolitan area, *providing habitat for much of the city's wildlife* and acting as an important contributor to the region's biodiversity." ROD at 17 (JA) (emphasis added). Thus, "Rock Creek Park is unique because it is *the only major natural area in this urban environment*." GMP at 180 (JA) (emphasis added).

Approximately 2 million people visit the Park each year, many of whom are D.C. and Maryland residents who live near the Park and who go there to escape the noise, congestion, and stress of the city, and to enjoy the unique scenery, contemplative setting, and wildlife that lives there. Thus, Rock Creek Park is a special place in an otherwise urban area, where, in the words of Congress, "nature prevails." *See* H.R. Rep. No. 91-1265 at 3785 (1970). The Park is home to an array of wildlife, including white-tailed deer, raccoons, red and gray foxes, opossums, beavers, gray squirrels, chipmunks, dozens of bird species, and coyotes.

FEIS at 8 (JA).

B. The Rock Creek Park Deer

The Park Service estimates that Rock Creek Park has approximately 67 deer per square mile – or a total of 314 deer in the entire Park. FEIS at 16 (JA).[1] Deer are herbivores – their diet is comprised of twigs, tree buds, non-woody plants, and fruits. FEIS at 113 (JA). According to the Park Service, the deer in Rock Creek Park do not show any signs of malnutrition – i.e., the general appearance of the herd is "relatively good." FEIS at 114 (JA). In other words, the population is not so great that the deer are running out of food or currently exceeding what is referred to as the "biological carrying capacity" for deer in the Park. *See, e.g.*, An Evaluation of Deer Management Options (May 2009) at 5-6 (JA) (explaining that "[t]he number of deer that a given parcel can support in good physical condition over an extended period of time is referred to as the [b]iological [c]arrying [c]apacity").

Indeed, in other areas around the country where deer concentrations are much higher, the impact of a potential overpopulation problem can be visually detected by what is called a "browse line" in the habitat – the highest point at

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[1] This calculation is based on the fact that, according to the Park Service, there are approximately 67 deer per square mile, and the Park is approximately 4.69 square miles in size. *See* FEIS at 16, 5 (JA).

which the deer can reach the vegetation they consume. In those instances, shrubs and trees are clearly denuded below the browse line, while foliage remains abundant above it. *See e.g.*, Final White-Tailed Deer Management Plan/EIS Catoctin Mountain Park, at 4 (JA). According to the Park Service's own final Record of Decision in this case, "the browse line is not prominent" in Rock Creek Park, ROD at 3 (JA) (emphasis added) – meaning that this usual indicator of an overpopulation problem is *not* present in this Park.

Once plentiful in North America, deer were heavily exploited for food and other products when Europeans settled the land. FEIS at 13 (JA). Although the deer in Rock Creek Park have rebounded, they have not reached levels that exist elsewhere – where densities can exceed 100 or 200 deer per square mile. *See, e.g.*, FEIS at 21 (JA) (noting that "[a]t Valley Forge [National Historic Park in Pennsylvania], white-tailed deer monitoring between 1983 and 2009 indicated an increase in deer density from 31-35 deer per square mile to *241 deer per square mile within the park*.") (emphasis added).[2]

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[2] *See also* FEIS at 22 (JA) (noting that the deer density in Catoctin Mountain Park has reached 125 deer per square mile); NPS, Final Internal Scoping Report for Deer Mgmt. in Rock Creek Park at 21 (Nov. 28, 2005) (JA) (explaining that it has been established that *deer densities of 100 deer per square mile* "can have negative effects on plant and animal species") (emphasis added).

There is no question that the deer contribute greatly to the experience of visitors who go to the Park to escape the turmoil of the city and to appreciate a small piece of the natural world. *See, e.g.*, (JA) (describing the deer as "undeniably the most spectacular wildlife in Rock Creek Park").

C. Invasive Non-native Plants Are Destroying Rock Creek Park.

Although the Park Service premised its decision to kill native deer on the need to protect the native plant species in the Park, FEIS at i (JA), the Record shows that a much more serious threat to the native vegetation is the invasion of non-native "exotic" plant species – caused in large part by the ornamental landscaping that adorns many of the private houses and office buildings that surround the Park. In fact, the Administrative Record shows that the invasion of exotic plant species has been a serious problem for this Park for many years.

In 1996 the Service explained that "[m]ajor threats to the park's natural resources arise in large part from the park's location within a major urban area where development surrounds and strongly influences internal park processes," and that "41 [exotic] species . . . are presently considered to be aggressive and *displacing or killing native plants and eliminating habitats which the park should be protecting*." (JA) (emphasis added). As the Service also acknowledged, "[t]his process, if left unattended, will result in *significant impacts on parklands*

including loss of native trees and plant species, fundamental alterations of park ecosystems, adverse effects on wildlife habitat and species, and loss of desirable natural scenery both in the park[] and along entrance roads to the nation's capital." *Id.* (emphasis added).

In 2000 the Service issued a Report on the "Invasive Non-Native Plant Mitigation Program" for the Park, (JA), that reiterated that "invasive non-native plants (INPs) seriously threaten" the forest "*by aggressively displacing and killing native plants, reducing native habitats, and stifling forest regeneration*," (JA) (emphasis added), and stating that invasive non-native species are "*the most serious threat to this natural area and are the top management priority designated in the Resource Management Plan goals*." (JA).

Indeed, in 2004, the Park Service issued a "Draft Exotic Management Plan" that again repeated many of these dire conclusions. *See* Draft Exotic Management Plan (2004) (JA). That Draft Plan reiterated that "exotic infestations" had reached "critical levels," that "[f]orest fragmentation and the loss of interior habitat negatively impacts breeding neotropical migratory birds," and that "a number of the exotic species present in [Rock Creek Park] can disperse into forest interiors, *inhibit regeneration in canopy openings and even threaten mature trees*." *Id.* at 21 (JA) (emphasis added). Further, noting that the Enabling

Legislation for the Park "*mandates* that [the Park] *maintain its native ecosystems 'in as natural a condition as possible*' in perpetuity for the enjoyment of future generations," the 2004 Draft Plan again stressed that "[e]xotics are identified as the most serious threat to this natural area" and accordingly "are the top management priority" for resource management within the Park. *Id.* at 3 (JA) (emphasis added). Nevertheless, nine years later, the Park Service has yet to issue a final Plan to address this critical problem.

The 2005 General Management Plan for the Park further reported that "[t]he recent inventory of park vegetation [] determined that 238 of the plant species were introduced species, not native to the area," and that "[o]f this number, 42 species have been judged to be invasive exotic plants that, *unless controlled, are likely to spread and adversely affect native plant populations*." (JA) (emphasis added).

D. <u>The Park Service's Draft Environmental Impact Statement</u>

Meanwhile, while failing to ameliorate the most "critical" problem facing the native vegetation in the Park, in July 2009 the Park Service prepared a Draft EIS ("DEIS") to "develop a white-tailed deer management strategy that supports the long-term protection, preservation, and restoration of native vegetation and other natural and cultural resources in Rock Creek Park." DEIS, at 1 (JA).

The agency considered four alternatives, two of which involved killing large numbers of deer (Alternatives C and D), and two nonlethal alternatives.[3] It identified Alternative D as the agency's "preferred alternative," which required killing deer using a combination of high-power rifles and archery over a minimum of three years and then potentially shifting to reproductive controls. DEIS at 92 (JA).

E. Public Comment

Public comments on the DEIS overwhelmingly opposed killing the deer. *See* FEIS at 329-33 (JA). Indeed, given the Park Service's acknowledgment that "*the browse line is not prominent* at Rock Creek Park," DEIS at 17 (JA) (emphasis added), and that the deer population has fluctuated for years on its own without any human interference, many members of the public questioned whether an "overpopulation" of deer even exists. *See, e.g.*, (JA).

The public also repeatedly emphasized that the presence of deer – described as "undeniably the most spectacular wildlife in Rock Creek Park" – contributes greatly to their experiences in this national park. (JA); *see also* (JA) ("every time I see a deer [in the Park,] it brings wonder and joy to my heart"); (JA)

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[3] Alternative A would have continued educational efforts and fencing to protect plants; Alternative B would have employed sterilization and reproductive controls to reduce the deer population. *See* DEIS at 44-60 (JA).

("[f]or many city dwellers like myself, the [Rock Creek Park] deer are a real treasure, and their well-being in the middle of the city is something that we feel strongly about.").

People expressed particular concern that one of the methods of the proposed lethal control – archery – usually requires several shots before the animal finally collapses and bleeds to death. *See* (JA) (not wanting their children to "witness the spectacle of a deer with an arrow lodged in [it] dying on the street"); (JA) (example of a deer shot in Virginia that survived for months with an arrow protruding from its body); *see also* Science Team Minutes (JA) ("a shot with an arrow *may not be considered the most humane or efficient option for the Park . . .* [and] [w]ith archery *the animal may not die immediately"* (emphasis added)).[4]

The public also expressed concern that using rifles to kill deer will also mean that some of these animals will be maimed on the first shot and suffer from their wounds before dying. *See e.g.* (JA) ("[n]o matter how good the archer/shooter is, there is always a chance that there will not be a clean kill and *deer will go off and suffer for days before dying*") (emphasis added); *see also* (JA

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[4]Indeed, according to a summary of the data cited by the Humane Society of the United States ("HSUS"), "the average bow-hunting wounding rate is 55%, and several studies indicate that bow-hunting yields more than a 58 percent wounding rate." (JA). This means that for "every animal dragged from the woods by a bow hunter, at least one animal is left to suffer and die a slow, excruciating death." *Id.*

) ("[t]here is no guarantee that sharpshooters . . . will make a 'clean kill,'" and "[t]errified, half-dead deer tottering onto our property, only to collapse in the yard, would cause unnecessary suffering for the animals and traumatize adults and children alike.").

Several people warned that killing wildlife for the first time in the history of the Park would forever change the Park's traditional character as a peaceful place where the intentional harming of wildlife has never been allowed. As articulated by one individual, shooting the deer would "*mar[] the serenity and peace that many of us associate with this national treasure*." (JA) (emphasis added); *see also* (JA) (advocating nonlethal controls as the only acceptable means to preserve the "*peace and tranquility of Rock Creek Park*" (emphasis added)); (JA) (complaining that killing animals would transform the Park from a "*refuge for all animals*" into a "*killing ground*" (emphasis added)).

Other people commented that rather than kill this native wildlife the Park Service should focus its attention on dealing with the far more serious threat to the Park's native plant resources – i.e., the infestation of invasive exotic plants. Plaintiff Carol Grunewald stressed that although the Park Service purports to be concerned "about maintaining the natural balance of the Park and allowing the forest to regenerate and renew itself," it nevertheless allows "[o]ut-of-control

exotic vines" that "are smothering the woods to death." (JA); *see also* (JA) ("[i]f [the Park Service] is so concerned about the plant life, how about focusing on taking down invasive ivy and vines . . . ?"); (JA) (stating that "invasive plants . . . *probably account for a great deal more of the plant destruction*" than the deer (emphasis added)); (JA) (suggesting that the Park Service do something about "the Exotic Plants and Vines that [are] killing our Trees").

One organization submitted extensive comments that exotic species, not deer, are destroying the native vegetation, and urged the agency to address that problem rather than kill the native wildlife. *See* Animal Welfare Institute Comments (JA) ("Exotic invasive species . . . 'seriously threaten the integrity of native habitats . . . by aggressively displacing and killing native plants;" "*the impact of nonnative, invasive species in RCP may be far more serious that revealed by the NPS in the Draft EIS* and [] this could, in part, *provide an explanation for the alleged reduction in herbaceous cover, saplings, and overall forest regeneration*" (emphasis added)); (JA) ("NPS . . . *must demonstrate that the proposed action – killing of hundreds of deer – will actually address the alleged impacts that the NPS has attributed nearly entirely to deer, and that there*

are no non less lethal alternatives available to the proposed action" (emphasis added)).[8]

F. The Park Service's Decision To Kill The Deer

Despite these comments, and the fact that the Park Service's own estimates of deer densities were *lower in 2008 and 2009 than in 2007* – the last year recorded in the DEIS (JA) – the Park Service again identified Alternative D as its preferred alternative in the Final EIS. *See* FEIS at 16 (JA). Accordingly, to reach a goal of 15 to 20 deer per square mile, the Park Service adopted a plan to lure deer with bait to locations where they will be shot at close range with high-powered rifles, and to use crossbows in places where Park Service agents would be killing deer "*close to occupied buildings or residences*." FEIS at 63 (JA) (emphasis added). The management plan also includes capturing deer and killing

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[8] Members of the public also stressed that, even assuming the deer population needed to be reduced, there were other more humane ways to accomplish this objective, including by employing the use of fertility control, as has successfully been done in other areas of the country. *See e.g.*, Comments of Plaintiff Zhong-Ying Chen (JA) (pointing out that programs at Fire Island National Seashore in New York and the National Institute of Standards and Technology in Maryland have successfully reduced deer numbers using humane reproductive controls). Indeed, HSUS – which has been actively involved in assisting the Park Service with these other deer control programs – proposed a detailed nonlethal reproductive control plan for the deer in Rock Creek Park that was endorsed by several local members of Congress. *See* (JA) (letter from James Moran, Chris Van Hollen, and Eleanor Holmes Norton).

them with captive bolts to the brain or exsanguination. FEIS at 64 (JA). The killing would primarily occur at night during the late fall and winter, but could also take place during the day in areas that "would be closed to park visitors." FEIS at 63 (JA). The deer bodies would be buried, removed, or "left for natural decomposition" on the ground in the Park. FEIS at 203 (JA).

Under a section entitled "Threshold for Taking Action," the agency explained that "[b]ecause the deer population is to be managed based on the success of forest regeneration, *tree seedlings must be monitored to determine at what point the browsing impacts would warrant implementation of the selected management alternative*," and that *"[t]he point at which action would be needed is called the 'threshold for taking action*.'" FEIS at 45 (JA) (emphasis added).

The Park Service intends to kill the deer – with a preference for does – until there are only 70 to 94 remaining. FEIS at 64-65 (JA). Accounting for new births, the agency estimates that 296 deer will be killed in the first three years. *Id.* Most of the killing was expected to occur in the first year when the Park Service intended to halve the population by killing 157 deer "over a five-month period." FEIS at 64 (JA).

Most disconcerting, as demonstrated *supra*, although the Service has known for years that invasive exotic species are a much more serious threat to the survival

of native plant species in Rock Creek Park, the agency failed to consider undertaking additional measures to deal with *this* problem as a means of accomplishing its stated objectives of "protection, preservation, and restoration of native vegetation" in the Park, FEIS at i (JA), or even in conjunction with determining whether any deer actually need to be killed to accomplish these objectives.

In its subsequent ROD the Park Service admitted that "[d]eer density has ranged between 52 and 98 deer per square mile over the past 10 years," ROD at 20 (JA), that "current (2009) density is estimated at 67 deer per square mile," *id.*, and that "*the browse line is not prominent*" in Rock Creek Park. ROD at 3 (JA) (emphasis added). Nonetheless, the agency decided to go forward with its preferred alternative of killing the deer because "an unmanaged deer population could lead to . . . problems" in the future. *Id.* (emphasis added).

G. Proceedings In the District Court

The Park Service initially informed the public that it would begin killing deer in Rock Creek Park in December 2012. *See* Joint Stipulation, Docket No. 6 (JA). However, after Plaintiffs brought this case, the agency agreed to forego any plans to kill deer until March 15, 2013 so that the parties could brief, and the district court could decide, the merits of the case on an expedited basis. *See id.*

The case was briefed on cross-motions for summary judgment, and the district court issued its decision in favor of Defendants on March 14, 2013. (JA). Despite the Park Service's repeated statements that it would only kill deer during the fall and winter months, *see e.g.*, Mem. Op. at 26 (relying on the fact that the Park Service would kill the deer "*during the winter* when there are fewer visitors") (emphasis added), on the evenings of March 27-30, 2013 – without any advance notice to the public – the Park Service reportedly killed twenty deer.[9]

SUMMARY OF ARGUMENT

1. In deciding to kill native wildlife in Rock Creek Park for the first time in 123 years, the Park Service violated the Enabling Act for the Park which requires the Service to "preserv[e] from injury" all animals within the Park and retain them "in their natural condition, *as nearly as possible*." 51st Cong. § 7 (emphasis added). Although the Park Service has consistently construed this language as prohibiting the killing of *any* native wildlife in this Park, it argued

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[9] *See* Rock Creek Park Completes Winter/Spring 2013 Deer Management, Nat'l Park Service (April 1, 2013), http://www.nps.gov/rocr/parknews/rock-creek-park-completes-winterspring-2013-deer-mgmt.htm (NPS Press Release announcing that 20 deer has been killed); *see also* Press Release, Nat'l Park Service, Rock Creek Park to Begin Deer Reduction Operations (Mar. 27, 2013), *available at* http://www.nps.gov/rocr/parknews/upload/Rock-Creek-Park-to-Begin-Deer-Reduction-Operations_3-27-2013.pdf (identifying dates of sharpshooting as March 27-30, 2013).

below, for the first time in the history of the Park, that this language allowed it to kill native wildlife where necessary to "support[] the long-term protection, preservation, and restoration" of the native vegetation, Gov't Summary Judgment Brief, Docket No. 18, at 28-29 (JA), and that the court should defer to its interpretation under *Chevron* Step Two, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). However, it is well settled that a reviewing court should not afford any deference to a *post hoc* statutory interpretation offered for the first time in litigation. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

Moreover, even accepting the agency's newly articulated interpretation of the Enabling Act, the Administrative Record shows that the Service lacks evidence that killing deer is *necessary* to protect the native vegetation for two reasons.

First, the Record shows that the scientific data the agency said were *required* for the "threshold for taking action," FEIS at 45 (JA) – demonstrating that deer, as opposed to some other factor, are adversely affecting the tree seedling density in the Park and hence the ability of the natural forest to regenerate – have not been collected by the agency. Accordingly, the Service's explanation for its decision is arbitrary and capricious because it "runs counter to the evidence"

before the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Second, because, as the agency itself has for many years acknowledged, the presence of non-native plant species is the "critical" impediment to protecting and preserving the native vegetation in Rock Creek Park, *see e.g.,* (JA), dealing with *that* problem may lessen, or eliminate altogether, any need to kill the native wildlife. Therefore, because the agency failed to consider this approach to its stated objective of protecting the native vegetation, it has no basis for determining whether killing the deer in Rock Creek Park is "necessary" to preserve *any* of the native vegetation.

2. The Park Service also violated NEPA in several respects. First, by failing to consider removal of non-native plants that are pervasive in the Park as an *alternative* to killing the deer to protect the native vegetation, the Service violated NEPA's command that it consider all reasonable "alternatives" to the proposed action. *See* 42 U.S.C. § 4332; 40 C.F.R. § 1502.1.

Second, in failing to analyze its draft exotic species and proposed deer management plans in a single EIS, the Park Service violated the CEQ requirement that agencies consider the impacts of "connected" and "similar" actions in the same EIS. *See* 40 C.F.R. § 1508.25(a). Indeed, the agency's own General

Management Plan for Rock Creek Park explains that "an invasive species control plan" and "deer management" are "connected" and "similar" actions for purposes of this requirement (JA), and, in response to public comment that the Service focus on the exotic species problem rather than kill the deer, the agency acknowledged that these two issues are "related." FEIS at 380 (JA). The district court's conclusion that these matters can nevertheless be dealt with in separate planning documents is wrong, especially in light of the agency's specific duty under the Enabling Act to, in the words of the Service itself, preserve the native wildlife "in *as natural a condition as possible*." (JA) (emphasis added).

Third, the agency violated NEPA by failing to consider the impact its decision to kill native wildlife for the first time in the 123-year history of the Park will have on the public's ability to continue to enjoy using this Park in the future, now that it will be transformed from a national park where wildlife has *never* been allowed to be harmed to a place where the killing and maiming of native wildlife will occur on a regular basis. In agreeing with the Park Service that such impacts are "psychological" only and hence need not be analyzed under NEPA, the district court erred. As the CEQ regulations make clear, in deciding the impacts of their proposed actions, agencies must consider how their actions will affect "*the relationship of people with th[eir] environment*." 40 C.F.R. § 1508.14 (emphasis

added). Here, the agency's own General Management Plan explains that a change in the way Rock Creek Park is managed that would "substantially alter *a traditional park use or the quality of experience*" would be considered as having a "major effect" on the Park by most visitors. (JA) (emphasis added).

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo* applying the same standard that is applicable to the district court. *Hendricks v. Geithner*, 568 F.3d 1008, 1011-12 (D.C. Cir. 2009) (citation omitted). The Court "shall . . . set aside" an agency's decision that is "arbitrary, capricious, an abuse of discretion, or "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although this standard is deferential, "[d]eference, of course, does not mean blind obedience." *Garvey v. Nat'l Transp. Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999). Rather, the Court must "perform a searching and careful inquiry into the facts underlying the agency's decision" in an effort to "ensure that the [agency] has examined the relevant data and . . . articulated an adequate explanation for its action." *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009) (citations and quotation marks omitted).

ARGUMENT

I. THE PARK SERVICE'S DECISION TO KILL NATIVE WILDLIFE VIOLATES THE STATUTE THAT CREATED ROCK CREEK PARK.

The Park Service's decision to kill the native deer in Rock Creek Park violates the statute that created this particular park, which charges the agency with the duty to "preserv[e]" from injury "all . . . animals" within the Park, and to retain them "*in their natural condition, as nearly as possible*." 51st Cong. § 7 (emphasis added) (reproduced in the Addendum at A-3). As the Park Service itself has explained, this legislation "mandates" that the agency maintain the Park's native ecosystem "*in as natural condition as possible.*" *See* GMP at 12 (JA) (emphasis added). Thus, this command requires the agency to refrain from *killing* the native wildlife in the Park unless it has no other way to preserve other resources of the Park. It certainly does not authorize the Park Service to lure native wildlife with bait to be shot at close range with high-powered rifles or arrows, when (a) the Record does not demonstrate that deer are in fact impairing the ability of the forest to regenerate – the agency's own "threshold for taking action" – and (b) there are other ways to protect the native plants from further degradation, including removing the exotic plants that the agency itself has

determined are "*aggressively displacing and killing native plants, reducing native habitats, and stifling forest regeneration*." (JA) (emphasis added).

A. The District Court Erred In Deferring To The Agency's *Post Hoc* Construction Of The Rock Creek Park Enabling Statute.

In the district court the agency took the position – for the first time in the history of administering this Park – that the language of the Enabling Act allows the Park Service to kill wildlife in an effort to "support" the preservation of the native vegetation in the Park, regardless of whether there are other ways to preserve that vegetation. *See* Gov't Summary Judgment Brief, Docket No.18, at 28-29 (JA) ("[t]here is nothing in the RCP Enabling Act that explicitly prohibits the NPS from incorporating lethal reduction techniques when formulating a white-tailed deer management strategy *that supports the long term protection, preservation, and restoration of native vegetation and other natural and cultural resources in Rock Creek Park*" (emphasis added)). Finding that the "Enabling Act does not speak directly to the issue of deer management," and applying the analysis required by *Chevron* Step Two, the district court found that the agency's decision to kill the deer was based on a permissible construction of the statute, because the Enabling Act "refers to the preservation of all timber and animals, not just some." Mem. Op. at 17; *see also Chevron, U.S.A., Inc. v. Natural*

Res. Def. Council, Inc., 467 U.S. at 843 (explaining the two-step process for reviewing an agency's interpretation of a statute).

However, the agency's new interpretation of the Enabling Act appeared for the first time in its litigation brief. Nowhere in the FEIS or the Record of Decision did the Park Service explain to the public that the Enabling Act – which for over 120 years has consistently been construed by the agency as *prohibiting* the killing of any native wildlife – actually allows the agency to *kill* such wildlife to "support" the preservation of plant life in the Park when there are other ways to preserve the native vegetation. Such *post hoc* interpretations of statutes, made for the first time in a litigation brief, are simply not entitled to judicial deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212 ("we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to [agency] counsel the responsibility for elaborating and enforcing statutory commands.'") (citation omitted); *City of Kansas City, Mo. v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 191-92 (D.C. Cir. 1991) (rejecting as "patently insufficient" for purposes of *Chevron* the notion that deference is owed to a "permissible construction of the

statute" raised "as the agency's litigation posture") (quotations and citations omitted).

B. The Agency's New Interpretation Of The Enabling Act Cannot Pass Muster Under *Chevron* Step Two.

Even under a *Chevron* Step Two analysis, the agency's "newly minted" construction of the Enabling legislation, *See Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 n.11 (9th Cir. 2001), cannot withstand scrutiny because it requires the Court to completely disregard the words "as nearly as possible" in Section 7 of that statute – which, as demonstrated *supra* at 27, and even articulated in the government's brief to the district court, has consistently been construed by the Service to mean that it "*has a duty to '[p]reserve* and perpetuate for this and future generations the ecological resources of the Rock Creek valley within the park *in as natural a condition as possible* . . .." Gov't SJ Mem. at 29 (JA) (quoting FEIS at 11 (JA)) (emphasis added). Indeed, the agency's own General Management Plan – the document prepared to "guide park management" of the Park, *see* JA – states in no uncertain terms that the agency interprets the "*legislative mandate*[]" of the 1890 statute "to preserve and perpetuate for this and future generations the ecological resources of the Rock Creek valley within the park *in as natural a condition as possible*." (JA) (emphasis added).

Given the agency's consistent interpretation of the statute to mean that it must preserve *all* of the ecological resources of the Park, including the wild deer, "in as natural a condition as possible," the district court should not have deferred to the agency's new litigation stance that this language allows the agency to shoot this wildlife with guns and arrows if there are other less draconian ways to protect the native vegetation. *S*ee FEIS at 26 (JA) (agency emphasizing that *"[d]eer are a natural part of the ecosystem and play an important role in it*") (emphasis added); *see also Chevron*, 467 U.S. at 844 (an agency's interpretation of a statute is not entitled to deference when it is "manifestly contrary to the statute"); *Hearth, Patio & Barbecue Assoc. v. U.S. Dep't of Energy*, No. 10-113, slip op. at 15 (D.C. Cir. Feb. 8, 2013) (rejecting an agency's interpretation of a statute under *Chevron* Step Two that ignores language in the governing statute).

C. The Record Does Not Demonstrate That It Is "Necessary" To Kill Deer To Protect The Native Vegetation.

Even accepting the agency's position as articulated in its brief to the district court – that "NPS must reduce the deer population *if necessary* to prevent 'injury or spoliation' of the 'timber' and other resources of the Park, 'and their retention in their natural condition as nearly as possible,'" Gov't SJ Mem. at 30 (JA)

(emphasis added) – the Park Service simply cannot demonstrate that such circumstances are present here.

1. The Scientific Studies Relied On By The Agency Do Not Demonstrate That Deer Are Causing A Problem For Forest Regeneration.

To begin with, the Park Service does not have the data it said were needed before it could take *any* action to kill deer in this Park. Both the FEIS and the ROD explained that "*[b]ecause the deer population is to be managed based on the success of forest regeneration, tree seedlings must be monitored to determine at what point the browsing impacts would warrant implementation of the selected management alternative*," and that "*[t]he point at which action would be needed is called the 'threshold for taking action*.'" FEIS at 45 (JA); ROD at 4 (JA) (emphasis added). The Service further explained that "[t]he regeneration standard adopted by the park was developed based on research by Dr. Susan Stout (1998)." FEIS at 45 (JA); *see also id.* at 46 (JA) ("[b]ased on the science team's review of the literature, *the park decided to use Stout's suggested regeneration standard as the threshold for taking action under the plan*." (emphasis added)); (JA) (stating that "for successful forest regeneration, 67% of the plots . . . must reach or exceed" a particular tree seedling density).

However, as explained below, because the Park Service collected seedling density data for *unfenced* plots only, i.e., plots to which the deer were *not excluded,* the agency has no basis for determining whether deer – versus some other factor, including the pervasive exotic plant species – are in fact causing a problem for forest regeneration.

Thus, as Dr. Stout has explained – in the very study relied on by the government – "[n]atural regeneration of hardwood forests results from *complex interactions among a large number of highly variable factors*," and "[t]his high natural variation makes it *difficult to find statistically significant relationships between any single factor, such as deer browsing, and regeneration abundance*." S. Stout, "Assessing the Adequacy of Tree Regeneration on the Cuyahoga Valley National Recreation Area" (1998) (JA); *see also id.* at 4 (JA) ("site factors and *landscape context are additional sources of variation in natural regeneration outcomes"*) (emphasis added).

Therefore, Dr. Stout has explained that to determine whether deer – rather than some other factor present in the forest – are adversely affecting tree regeneration requires "long-term monitoring" of "*paired fenced and unfenced plots*" that "for a minimum of a decade" should be monitored to measure the number of seedlings that reach a certain height (meaning they are successfully

established to develop into trees). *See id.* at 2 (JA) (identifying the "three aspects" that must be included in such "long-term monitoring"). In other words, by comparing the fenced and unfenced plots over time – and the degree to which they are "stocked" with tree seedlings of a certain height – the Park Service could draw conclusions about whether deer are actually interfering with forest regeneration. *See id.*; *see also id.* at 15 (JA) (explaining the "stocking concept"). Dr. Stout further recommended that the "adequate stocking" level in a plot for forest regeneration would be 67% and above. *See id.* at 15 (JA). However, neither of the two studies relied on by the Park Service to demonstrate that deer are adversely impacting forest regeneration, *see* FEIS at 17-18 (JA), collected such data.

The agency relied on a long-term study of completely *unfenced* plots – Hatfield et al., Analysis of Vegetation Changes in Rock Creek Park (JA) (referred to as "Hatfield 2008" in the FEIS at 17 (JA)), which the agency states "indicate[s] that the mean seedling stocking rates . . . declined significantly from 1991 to 2007, with a stocking rate . . . in 2007, significantly below the 67% stocking rate recommended by regeneration." FEIS at 17 (JA) (citing Stout 1998). However, because that study used only *unfenced* plots, the authors themselves cautioned that "[i]t is *not possible to discern causes from these data*

for the significant differences found among some of these vegetation variables in Rock Creek Park,"and that while "[s]ome of these changes are consistent with what would be expected due to browse pressure from deer . . . *other causative factors are also possible*." (JA).

Therefore, given the extensive evidence in the Record that for many years invasive non-native plants have been "seriously threaten[ing]" the forest "*by aggressively displacing and killing native plants, reducing native habitats, and stifling forest regeneration*," (JA), and that, according to the Service's own internal records, these non-native plants pose "the most serious threat to this natural area," (JA), clearly one of the "other causative factors" responsible for the declining seedling numbers noted in Hatfield 2008 is the proliferation of invasive non-native species. *See also* Stout, *supra* at 15 (explaining that the "successful establishment" of a seed is "*influenced by the conditions on the forest floor* . . . [and] *the competitive environment created by other seedlings, shrubs, and herbaceous plants*") (emphasis added).[10]

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[10] Even in its brief in the district court the government admitted that Hatfield 2008 "was only designed to document changes in vegetation over time, and *was not designed to determine the explicit cause of those changes*." Defs.' Br. Summ. J. at 36 n.18 (JA) (emphasis added).

The only other study relied on by the Park Service to support its "threshold for action" was a paired-plot study that *did* compare paired vegetation plots that were fenced and unfenced (and hence excluded deer). *See* Krafft and Hatfield, "Impacts of Deer Herbivory on Vegetation in Rock Creek Park" (JA) (cited in FEIS at 17 as "Krafft and Hatfield 2011") at 12 (JA). However, as the authors of the study specifically acknowledged, *that* study did *not* examine tree seedling density. Rather, claiming that "it is currently possible to document the low rates of tree seedling regeneration in Rock Creek Park based on stocking rates calculated using data from the 26 *unfenced* long-term monitoring plots," (JA) (emphasis added) – i.e., the study discussed above, which concluded that it is "*not* possible to discern causes from these data for the significant differences found among some of these vegetation variables in Rock Creek Park," (JA) – the authors explained that "the addition of tree seedling density measurements to the herbivory study is *recommended*" for the future. *See* (JA). Thus, they explained, such data "*would permit statistical comparisons of stocking rates* in the paired exclosed and unfenced control plots and *provide a more direct measure of the impacts of deer herbivory on stocking rates*," which, in turn, "*could provide insights into possible impacts of deer herbivory on species composition of forest regeneration*." (JA) (emphasis added).

Therefore, because *neither* study relied on by the Park Service complied with the basic methodology outlined by Dr. Stout – which requires comparing stocking rates in *fenced and unfenced plots* – the agency does not have the data it claimed it needed as the "threshold for taking action" here. *See, e.g.* ROD at 4 (JA) (explaining that because "[f]orest regeneration is the primary measure of the plan's success . . . *tree seedlings must be monitored to determine at what point the browsing impacts would warrant implementation of the selected alternative*." (emphasis added)). Accordingly, the agency simply cannot demonstrate that killing deer in Rock Creek Park is "*necessary* to prevent 'injury or spoliation' of the 'timber' and other resources of the Park" – the standard it asserted it must meet under its own *Chevron* Step Two construction of the Enabling Act. *See* Gov't SJ Brief at 30 (JA) (emphasis added); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (the reviewing court must "consider whether the [agency's] decision was based on a *consideration of the relevant factors*" (emphasis added) (citation omitted); *id.* (an agency's decision is "arbitrary and capricious if the agency has . . . *offered an explanation for its decision that runs counter to the evidence before the agency*" (emphasis added)).

2. There Are Other Ways To Protect The Native Vegetation That Do Not Involve Killing The Native Wildlife.

Killing this native wildlife is also not "necessary" to protect the native vegetation in Rock Creek Park because, as demonstrated *supra* at 19, there are *other* ways to preserve the vegetation that do *not* involve killing any of the native wildlife – most notably by undertaking measures to reduce the presence of exotic plants that are displacing the native vegetation. Indeed, the Service's own General Management Plan identifies as the "Optimum Conditions" for this Park the "remov[al]" of "invasive species" "in numbers and area," or their *"eliminat[ion] from the natural areas of the park.*" GMP at 20 (JA) (emphasis added). Yet, not only did the Service fail to explain in its decision documents why it could not undertake such measures as an *alternative* to killing deer, but at the oral argument in the district court, agency counsel candidly admitted that in 2005 – the same year the Service published its General Management Plan – the agency decided to "shift" from "exotic plant management" to "focus on deer management." Transcript of District Court Argument (March 4, 2013) at 25 (JA) (emphasis added). In light of this admitted "shift" in focus from eliminating a *non native* cause of the Park's decline in vegetation to killing its *native* wildlife, the agency's contention that killing the deer is suddenly "necessary" to protect the native

vegetation in this Park – and hence permitted by the Enabling Act – simply does not withstand scrutiny.

II. IN DECIDING TO KILL THE NATIVE WILDLIFE IN ROCK CREEK PARK, THE PARK SERVICE VIOLATED NEPA.

In formulating its plan to kill white-tailed deer in Rock Creek Park, the Park Service also violated NEPA in several respects.

A. The Park Service Failed To Consider Dealing With The Exotic Plant Species Problem As An Alternative To Killing The Deer.

First, by failing to consider the reduction of exotic plant species as an alternative way to protect the native vegetation in the Park, the Service violated its duty under NEPA to consider "all 'reasonable alternatives' to the proposed action." *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006) (quoting 40 C.F.R. § 1502.14); *see also* 40 C.F.R. § 1502.1 (stating that the EIS "shall provide full and fair discussion of significant environmental impacts and *shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment*" (emphasis added)). Thus, "[t]he existence of a viable but unexamined alternative renders an [EIS] inadequate." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996) (citations omitted).

Here, some of the agency's own stated "objectives in taking action" to reduce the deer population are to "[p]rotect the natural abundance, distribution, and diversity of native plant species" within the park, and to "[m]aintain, restore, and promote a mix of native plant species and reduce the spread of nonnative plant species." *See* FEIS at i (JA). Further, as demonstrated *supra* at 12-14, the Record shows that, according to the Park Service itself, the invasion of exotic plants is the most "serious" and "critical" problem impairing the agency's ability to protect the natural resources of the Park. Nevertheless, in deciding to reduce the deer population for the stated purpose of protecting the native vegetation, the Service refused to consider reducing exotic plant species as an alternative to *killing* the deer. *See* FEIS at 380 (JA) (admitting in response to public comments that these two issues are "related," but declining to consider removal of exotic species as an alternative to killing the deer); *see also supra* at 17-18 (comments suggesting that this would be a far better way for the agency to spend its resources to protect the native plants).

The agency's failure to consider this obvious alternative is especially glaring in light of the Enabling Act's "legislative mandate" – as construed by the agency itself – that the Park Service "preserve and perpetuate for this and future generations the ecological resources of the Rock Creek valley within the park *in as*

natural a condition as possible." GMP at 5 (JA). Indeed, as this Court has explained, in choosing the range of alternatives, and agency should "'always consider the views of Congress' to the extent they are discernible from the agency's statutory authorization and other directives." *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)). Therefore, because this agency has a duty to protect the native wildlife in this Park "in as natural a condition as possible," under the "rule of reason" that applies to the selection of alternatives, *Citizens Against Burlington*, 938 F.2d at 195-96, the agency should at least have considered tackling the invasive exotic plant problem as an alternative way to protect the native vegetation before resorting to killing any of the native wildlife in the Park.

B. The Park Service Failed To Consider Its Invasive Species And Deer Management Plans As "Connected" Or "Similar" Actions.

The Park Service also violated NEPA by failing to analyze its draft exotic plant and deer management plans in a single EIS. Thus, as explained, *supra* at 7-8, the CEQ regulations require agencies to consider together in the same NEPA document multiple agency actions that are "connected" or "similar." 40 C.F.R. § 1508.25(a); *see also Kleppe*, 427 U.S. at 406 ("When several proposals for . . .

actions that *will have cumulative or synergistic environmental impact[s] upon a region are pending concurrently before an agency*, their environmental consequences must be considered together." (emphasis added)).

There can be no question that the agency's 2004 Draft Exotic Plant Management Plan for Rock Creek Park and its Deer Management Plan are extremely closely related – they both purport to consider ways to protect and restore the native vegetation in that Park. *Compare* Draft Exotic Management Plan at 5 (JA) (whose purpose is to ensure that "[p]opulations of native plant and animal species function in as natural a condition as possible") *with* FEIS at I (JA) (whose purpose is to develop a white-tailed deer management strategy "that supports long-term protection, preservation, and restoration of native vegetation and other natural and cultural resources in Rock Creek Park").

To determine the validity of this position, the Court need look no further than the agency's own General Management Plan for the Park, which includes "invasive species control plan" and "deer management" as "*Connected, Cumulative, and Similar Actions*" for purposes of NEPA. *See* GMP at 45 (JA) (emphasis added). Moreover, in response to public comments on the Draft EIS that evidence "indicates that the impact of nonnative, invasive species in [Rock Creek Park] may be far more serious than revealed by the [Park Service]," that

could "provide an explanation for the alleged reduction in herbaceous cover, saplings, and overall forest regeneration" rather than any overpopulation of deer, the Service acknowledged – as it must – that "*[t]hese two subjects [are] related*." FEIS at 380 (JA) (emphasis added).[11]

In fact, the Record is replete with evidence that the native plant life is being destroyed by invasive exotic species. *See supra* at 12-14. Indeed, in light of this well-documented situation, it is not surprising that deer are *perceived* as having an unacceptable adverse impact on the native vegetation that they evolved to eat – there is increasingly *less* of it to be consumed by the deer *because it is has been displaced by exotic invasive species*. *See* FEIS at 257 (JA) (acknowledging that "[e]xotic plants both inside and outside the park *have reduced deer forage*") (emphasis added). But the deer are also part of the natural ecosystem – and hence part of the native wildlife that must be *protected* in this Park if possible. Therefore, to blame the lack of native vegetation on the deer – without addressing the much more serious, *non native,* cause of the diminution in native plant species

[11] In response to the district court's question regarding the "stage of planning" for dealing with exotic species in the Park, government counsel explained that the 2004 Draft Exotic Management Plan remains in its draft form. S*ee* Transcript at 30 (JA) (stating that "there is not a pressing need for the park to finish or complete and finalize th[e] draft document,"and that the Service "intends to do so at some point in the future").

– illegally skews the environmental analysis that is required here. *See also Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 13 (D.D.C. 1998) ("If agency actions are similar in that they *share common timing or geography, such actions should also be addressed in the same environmental document so as to assess adequately their combined impacts*.") (emphasis added).

Indeed, the Park Service's own Science Team noted that "[i]nvasive plant management is *background noise* within the [draft deer management plan]," and that "[i]f the deer abundance is controlled but not exotics, *the habitat may not have true recovery*." Minutes of Science Team (Apr. 28, 2006) at 4 (JA) (emphasis added); *see also* (JA) (noting that the internal science review questioned whether the agency could actually maintain and restore the native plant species "*with all of the exotic vegetation in the Park*" (emphasis added)).

Nevertheless, the district court rejected this argument on the ground that it "goes against longstanding precedent that "[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities." Mem. Op. at 21 (JA) (citations omitted). However, *none* of the cases cited by the court for this proposition apply here. Thus, *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Cos.*, 498 U.S. 211 (1991), was not a NEPA case – and hence has no bearing on the specific NEPA

obligation relied on by Plaintiffs. Likewise, the passage cited by the district court from *Vermont Yankee Nuclear Power Corporation. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978), Mem. Op. at 21, also had nothing to do with the issue presented here, but simply held that agencies are free to fashion their *own rules of procedure* that apply to particular matters before them "[a]bsent constitutional constraints or extremely compelling circumstances." Plaintiffs are not challenging the rules of procedure employed here; rather, they challenge the Park Service's *substantive* violation of NEPA and the CEQ regulations.

Nor is the Ninth Circuit's holding in *Northwest Resource Information Center, Inc. v. National Marine Fisheries Service.*, 56 F.3d 1060, 1069 (9th Cir. 1995), upon which the district court relied, Mem. Op. at 21, applicable here. That case involved the issue of whether two Army Corps of Engineer programs intended to benefit endangered salmon – i.e., increasing the flow of the river in which the salmon migrate, and transporting juvenile salmon around the dams that interfere with migration – had to be considered in a single EIS because they were "connected" actions. In ruling that these actions were not "connected" within the meaning of the CEQ regulations, the Ninth Circuit relied heavily on the Corps' determinations that each program would need to continue, regardless of the other, in order to benefit the salmon. *See* 56 F.3d at 1068 & n.9 (noting that the Corps

based its decision on the conclusion by the National Marine Fisheries Service that the transportation program is beneficial to he salmon "under *all* flow conditions" for the river).

Here, however, in sharp contrast, as demonstrated above, the Park Service does not even have the data it said were needed to determine whether deer, versus some *other* factor – including the non-native invasive plant species – are impeding forest regeneration in Rock Creek Park. As further demonstrated, the agency also does not know whether, if it took measures to reduce or eliminate the "critical" exotic plant species problem, *see* (JA), it would need to kill *any* deer to protect the native vegetation. Indeed, as demonstrated above, in contrast to the situation at issue in *Northwest Resource Information Center*, not only has the agency not made *either* of these determinations, but its own scientists observed that "[i]f the deer abundance is controlled but not exotics, *the habitat may not have true recovery*." (JA) (emphasis added).

Also in sharp contrast to the situation in *Northwest Resource Information Center*, here the agency has a "legislative mandate" to "preserve and perpetuate for this and future generations *the ecological resources* of the Rock Creek valley within the park *in as natural a condition as possible*." GMP at 5 (JA). Therefore, because the native deer are *part* of the "ecological resources" of Rock

Creek Park that must be preserved – while the exotic invasive plant species are *destroying* ecological resources of the Park – the agency cannot possibly treat these two programs as equally beneficial to the environment. *See e.g.,* 56 F.3d at 1069 (noting that "[b]oth the transportation program and the flow improvement measures are intended to *benefit* the environment."). Rather, killing the deer has a major *adverse* impact on the environment, because it involves killing native wildlife in a national park for the first time, while reducing exotic species has no comparable adverse impact. Therefore, if the latter is not going to be considered as an *alternative* to killing this native wildlife, *see supra* at 39-41, at an absolute minimum these two actions must be considered together in a single EIS for the agency to determine whether it has to kill *any* deer at all to protect the native vegetation.

The district court also rejected Plaintiffs' reliance on *Kleppe* on the grounds that when the Supreme Court made the statement that proposals for actions "that will have a cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together," 427 U.S. at 410, it was referring to "'proposals for *coal related actions*,'" not "just any proposals," Mem. Op. at 22 (JA) (emphasis added), and because in *Kleppe* the Supreme Court ultimately rejected the NEPA

challenge, finding that where resolving issues "'requires a high level of technical expertise,' it 'is properly left to the informed discretion of the responsible federal agencies.'" *Id.* (quoting *Kleppe*, 427 U.S. at 412).

However, the mere fact that the Court's observation about what is required under NEPA was said in the context of "coal-related" actions is irrelevant – here, we have two agency proposals with the *same* overall objective, i.e., to protect the native vegetation in Rock Creek Park. Thus, as explained in *Kleppe*, "*[o]nly through comprehensive consideration of pending proposals can the agency evaluate different courses of action*." 427 U.S. at 410 (emphasis added).

Indeed, the Record in this case demonstrates that apparently one of the principal reasons the agency has refrained from taking more aggressive action to eliminate exotic species – e.g., it has not even finalized the 2004 Draft Exotic Plant Management Plan – is the cost of doing so. *See, e.g.,* GMP (JA) (explaining that "without adequate funding for control, invasive species will continue to be a problem"); (JA) (explaining that the "*lack of resources to do the job* ha[s] allowed the [invasive species] infestation to reach critical levels" (emphasis added)). Yet, the Record also shows that the Park Service is expecting to spend over a million dollars on killing deer under its Preferred Alternative. *See* FEIS at 70 (JA) (estimating the cost at $1,126,480).

However, if the agency has limited resources to spend on restoring the native vegetation in the Park, surely it should at least be required to *analyze* – in a public process subject to public comment – how best to spend those resources. For example, if, after considering these issues together as required by the plain language of the CEQ regulations, the agency were to find that 98% of the problem with dwindling native vegetation is due to invasive exotic species and only 2% of the problem can be attributed to deer, surely the agency could not claim that such information is not even *relevant* to its decision on how to spend its limited management resources. This is especially true when, again, the Service admits that the Enabling Act for *this* particular national park *requires* the agency to preserve the native wildlife "*in as natural a condition as possible*." GMP at 5 (JA).

Moreover, the "high level of technical expertise" to which the Supreme Court said it must defer in *Kleppe* concerned whether the "coal-related actions" at issue in that case all affected the same "region" of the country. 427 U.S. at 412. Here, there simply is no doubt – as the agency's own General Management Plan makes clear – that both the deer management plan and the exotic species management plan have environmental impacts on the *same* national park. Accordingly, under the plain language of the CEQ regulations, and the Supreme

Court's reasoning in *Kleppe*, their impacts must be analyzed in a single NEPA document.

Finally, after explaining that the agency was not required to analyze these two issues in one EIS, the district court nevertheless found that the Service *did* "properly address[] the subject of exotics in the FEIS," because the agency stated throughout the EIS that one of the reasons the deer population needs to be reduced is because deer *spread* exotic species, and because the agency also noted that its own scientific study showed that "[p]rotection of vegetation from deer herbivory appears to have had virtually *no impact on non native species richness*." *See* Mem. Op. at 24-25 (citing Hatfield 2011) (emphasis added). However, not only are these two statements inherently contradictory – either the deer increase the presence of exotic species in the Park or they are *irrelevant* to the increase in such species – but, more important, the EIS failed to analyze, as required by NEPA, whether reducing the non-native exotic plant species that have become the "critical" problem for the native vegetation in the Park (JA), would lessen, or even eliminate entirely, the need to kill *any* of this native wildlife.[12]

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[12] In fact, as the district court noted, contrary to the agency's insistence that deer are responsible for the spread of exotic plant species in the Park – versus the wind or even *other* animals carrying seeds from the nearby landscaping that the agency identified as the *major* contributor to this problem, *see, e.g.* (JA) (explaining that seeds are distributed by "animals, water, wind, etc."), the agency's own principal

Further, merely mentioning an issue in an agency document is not the same as "actually considering the problem." *Gerber v. Norton*, 294 F.3d 173, 183 (D.C. Cir. 2002); *see also id.* (noting that the agency "cannot point to any discussion in the agency's own decisional documents that addresses . . . [the] problems plaintiffs highlighted") (emphasis added)); *Getty v. Federal Savings and Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) ("Stating that a factor was considered, however, is *not a substitute for considering it.* [The court] must make a 'searching and careful' inquiry to determine if [the agency] actually *did consider it*" (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971))). Therefore, because the Park Service never considered whether dealing with the exotic species problem in the Park may impact its decision to kill the deer, its decision cannot be sustained under NEPA.[13]

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study demonstrates that deer are *not* causing the exotic species problem in the Park. Thus, Hatfield 2011 shows that even when deer are *excluded* from vegetation plots, over time non-native species actually *increase* in those plots. *See* Hatfield 2011 at 6 (JA) ("[c]over by non-natives did not differ significantly between paired exclosed [fenced] and unfenced control plots until the last two years of the study, when *exclosed [fenced] plot means were significantly greater than paired control plots means*" (emphasis added)).

[13] The district court also relied on the fact that the Science Team "concluded" that "deer reduction must occur first and then the management of invasive species would need to be evaluated to determine if they limit the recovery of the native habitat." Mem. Op. at 24 (JA) (quoting JA). However, this is not a "conclusion" made by the agency decision-maker or that appeared in the decision

C. The Park Service Failed To Consider The Adverse Impact On Visitor Use From Changing The Character Of Rock Creek Park From A Park Where Wildlife Is Completely Protected To One Where Wildlife Will Be Killed On A Regular Basis.

Finally, the Park Service violated NEPA by failing to consider the adverse impact its decision to kill wildlife will have on the public's ability to enjoy this extremely special national park which for over 120 years has been a very different place, completely free of any violence against wildlife. It is well established that courts reviewing claims under NEPA must "insure that the agency has taken a 'hard look' at [the] environmental consequences" of its action, *Kleppe*, 427 U.S. at 410 n.21, and that an agency's failure to consider an important environmental impact violates that duty. *See, e.g.*, *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 153-54 (D.C. Cir. 1985)(finding environmental assessment inadequate for failing to "address a major environmental concern"); *Nat'l Audubon Soc'y v.*

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documents at issue in this case. *See Secs. & Exch. Comm'n v. Chenery Corp.,* 318 U.S. 80, 88 (1943) (judicial review of an agency action is "confin[ed]" to "judgment upon the validity of the *grounds upon which the [agency] itself based its action*") (emphasis added). Moreover, as the Record makes clear, the Science Team was tasked *only* with advising the agency about how best to *reduce the deer population* – it was not asked to give advice on how best to protect the native vegetation in the Park. *See, e.g.,* (JA) (establishing the Science Team in 2005 as part of the "scoping process" for "the Rock Creek Park *Deer Management Plan*" (emphasis added)); JA (the purpose of the "scoping" was to "get ideas on how to deal" with "the deer population"); JA (making clear that "[t]he science team does not approve or define [the] alternatives – that is up to the park").

Hoffman, 132 F.3d 7, 18 (2d Cir. 1997) (failure to consider aesthetic harm from allowing off-road vehicle use in a national forest violated NEPA); *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1273 (S.D. Fla. 2009), *aff'd*, 362 F. App'x 100 (11th Cir. 2010) (EIS inadequate for failure to analyze certain environmental effects).

Members of the public repeatedly informed the Park Service that the agency's "preferred alternative"– which included baiting and killing deer – would significantly mar their ability to enjoy using this Park because it will fundamentally transform the overall character of the Park from a tranquil place where killing of wildlife has *never* been allowed to a place where wildlife is shot, maimed, and killed during up to five months a year. *See supra* at 17; *see also* FEIS at 7(JA) (noting that the Park was created to provide "serenity" to the people of D.C. as "an antidote to the stress of daily work and the congestion of the city"); FEIS at 64 (JA) (expecting "periodic removal efforts over a five-month period").

As noted, NEPA requires that agencies consider the "aesthetic" effects of their actions, including how their actions will affect "*the relationship of people with th[eir] environment*." 40 C.F.R. §1508.14 (emphasis added); *see also Minn. Pub. Interest Research Grp. v. Butz*, 498 F.2d 1314, 1322 & n.27 (8th Cir. 1974)

(finding that diminishment of the "feeling some people have just knowing that somewhere there remains a true wilderness untouched by human hands, such as the feeling of loss people might feel upon the extinction of the whooping crane even though they had never seen one," is an environmental effect under NEPA); *Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Serv.*, 157 F. Supp. 2d 1142, 1144 (D. Mont. 2000), aff'd, 12 F. App'x 498 (9th Cir. 2001) (affirming that a proposed action's effect on the recreational and tourist value of national lands – referred to as the "value of place" – is relevant to analyzing alternatives and making decisions under NEPA).

As the Service's own General Management Plan explains, the agency must consider the impact its actions will have on the *"traditional park character* and visitor experience," GMP at vii (JA) (emphasis added), and a "*major effect would be recognized by most visitors*" as a change in the Park that was "*markedly different from the existing character* and experience" that would "substantially alter a traditional park use or *the quality of the experience*" of those who use it. *Id.* at 214 (JA) (emphasis added).

Although the Park Service acknowledged that people who live near the park would hear the "sounds" of gunshot, and that, "if archery is used . . . wounded deer could then be seen by the public," FEIS at 245 (JA), it concluded that these

particular adverse impacts would be offset by "[e]ducational and interpretative information that would explain the purpose of the deer management activities," FEIS at 247 (JA), and because the killing of deer would take place "primarily during the late fall and winter months when . . . fewer visitors are in the park." FEIS at 236 (JA).

However, the Park Service failed to consider whether any amount of "educational and interpretative information" will assuage the concerns of members of the public who live around and near the Park, as well as those who routinely use it, who will stop using this Park to avoid coming across wounded deer, and who simply do not want to encounter such horrific situations in a national park that heretofore has been completely free of animals dead or dying because they were shot with guns or arrows. *See e.g.*, (JA) (individuals commenting that they did not want their children to "witness the spectacle of a deer with an arrow lodged in them dying on the street"); (JA) ("[t]here is no guarantee that sharpshooters, despite their name, will make a 'clean kill,'" and "[t]errified, half-dead deer . . . would cause unnecessary suffering for the animals and traumatize adults and children alike."); *see also* FEIS at 203 (JA) (noting that the Service may leave the deer that are shot in the Park "for natural decomposition").

Further, the Park Service's own Record shows that this Park is routinely used by many members of the public *throughout the fall and winter months*. *See* 1999 Visitor Study at 14 (JA) (77% of visitors visit the Park in the fall; 60% visit during the winter). And, in fact, in the immediate wake of the district court's ruling in favor of the government, the Service began killing deer for the first time on March 27, 2013 which by anyone's calculation constitutes *the spring* – when an even higher percentage of the population uses this Park. *See supra* at 22; *see also* 1999 Visitor Study at 14 (JA) (80% of visitors visit the Park in the spring).

Significantly, the Park Service *admits* that it did not take into account the impact its action will have on the public *simply avoiding use of this Park altogether* now that it will be transformed from a place *that was valued* ***because*** *it did not allow the killing of wildlife* to one where native wildlife will be maimed and killed on a regular basis. Instead, relying on *Metropolitan Edison Co. v. People Against Nuclear Energy ("PANE")*, 460 U.S. 766 (1983), the agency insisted that such "subjective, psychological, or emotional response[s]" to an agency's proposed action need not be considered under NEPA, Gov't SJ Brief at 66-67 (JA), and the district court agreed that such "psychological injury" is "not the type of injury NEPA is designed to protect." Mem. Op. at 27 (JA). Although the district court declined to cite *PANE* directly for this conclusion, *id.*, it cited two cases that do

rely on PANE, *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1396 (9th Cir. 1992) and *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989). *See* Memo Op. at 27.

However, neither *PANE* nor the cases cited by the district court support the agency's failure to look at this particular environmental impact here. In *PANE*, the Court held that the agency did not violate NEPA when it failed to consider the "psychological harm" experienced by individuals who lived near a nuclear power plant and were concerned about the risk of another nuclear accident in the future. 460 U.S. at 768. Although the agency had considered the *environmental* effects that would be caused by that possibility, it had not considered the additional "psychological health damage" alleged by Plaintiffs. *See id.* at 775. In holding that such concerns were not subject to NEPA review, the Court emphasized that "[a] risk, is by definition *unrealized in the physical world*," and that in requiring agencies to consider the environmental impact of their actions under NEPA, "Congress was talking about *the physical environment* – the world around us, so to speak." *Id.* at 772, 775 (emphasis added). *See also Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1396 (citing *PANE* for the proposition that NEPA does not create a cause of action for mere "psychological injury" that does not arise from a "direct sensory impact of a change in the [plaintiff's] physical environment");

Sierra Club v. Marsh, 872 F.2d at 504 (citing PANE for the statement that "the harm at stake in a NEPA violation is a *harm to the environment*, not . . . merely to psychological well-being") (emphasis added).

Here, however, this is precisely what Plaintiffs complain the agency failed to analyze – i.e., how changing this Park from one where maiming and killing of native wildlife has *never* been allowed to one where such activities will now occur on a regular basis will impact the public's overall use and enjoyment of the Park. Thus, Plaintiffs are not complaining about something that is "unrealized in the physical world," *Metro. Edison Co.*, 460 U.S. at 775. On the contrary, they complain that the agency failed to take the requisite "hard look," *Kleppe*, 427 U.S. at 410 n.21, at a major "effect" on their "physical environment," *Metro. Edison Co.*, 460 U.S. at 773 – i.e., a fundamental change in the way Rock Creek Park will now be managed that will impact how and whether members of the public even continue to use this Park in the future.

Further, in *PANE*, the Court was particularly concerned that requiring agencies to consider "psychological health damage caused by risk" would oblige agencies "to expend considerable resources developing psychiatric expertise that is not otherwise relevant to their congressionally assigned functions." 460 U.S. at 776. Yet, here – analyzing how its new management action will affect the use of

this Park by those who value Rock Creek Park precisely because it does not allow the killing of any wildlife falls squarely within *this* agency's area of expertise, as well as its duty under the Enabling Act to, in the words of the Service itself, protect the wildlife in *this* particular Park in as "natural a condition as possible." General Management Plan (2005) (JA).

For example, if the Park Service were to announce tomorrow that from now on there will be public hunting of deer in Rock Creek Park during the fall, winter, and spring months, it is hard to believe the agency would take the position that it need not consider how this fundamental change in the historic character of the Park would adversely impact the use of the Park by those who enjoy going there because it has *never* allowed hunting. Indeed, as Plaintiffs demonstrated below, in contrast to what occurred here, the Park Service has conducted "visitor studies" in other parks precisely for the purpose. *See* Notice of filing In Response To Court's Inquiry, Docket No. 44 (NPS conducted a visitor use study in deciding whether to authorize recreational hunting for the first time in an area of Big Cypress National Park in Florida). It cannot be – and certainly no rational explanation was provided in the agency's decision document – that simply because the Park Service itself will be undertaking the killing of this native wildlife in order to "manage" the population, this effect is no less one that is "realized in the physical world." *Metro*

Edison Co., 460 U.S. at 775; *see also Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) (an agency must provide a "rational connection between the facts found and the choice made").

Indeed, the agency's own statistics from the *last* visitor study it conducted for this Park in 1999 – long before it considered killing any of the native wildlife – show that 68% of the people who use the Park do so to enjoy the native plants and animals, 47% come to this Park to "escape the city environment," and 30% treasure the Park's "solitude." *See* FEIS at 16629-30 (citing 1999 Visitor Study). Yet the Park Service never asked the public, nor otherwise determined, whether its new plan to begin killing and maiming native wildlife during up to six months each year (October - March) will in any way diminish the public's enjoyment or use of the Park – i.e., whether some people would cease to use the Park altogether, others would only visit the Park in the summer months, or others would simply change or curtail their use of the Park in other ways in light of this drastic change in its traditional character. The agency's failure to take this significant aspect of its decision into account violates NEPA.

CONCLUSION

For these reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

I certify that this brief contains 13923 words, and that it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a096) because it has been prepared in a proportionally spaced typeface using Word Perfect in 14-Point Times New Roman.

CERTIFICATE OF SERVICE

I certify that on September 25, 2013, I caused the following brief to be filed upon the Court and served on the Defendants-Appellees through the use of the D.C. Circuit CM/ECF electronic filing system. All participants in the case are registered CM/ECF users and will be served by the appellant CM/ECF system.

/s/ Katherine Anne Meyer

Date: September 25, 2013

ADDENDUM

ADDENDUM OF STATUTES AND REGULATIONS

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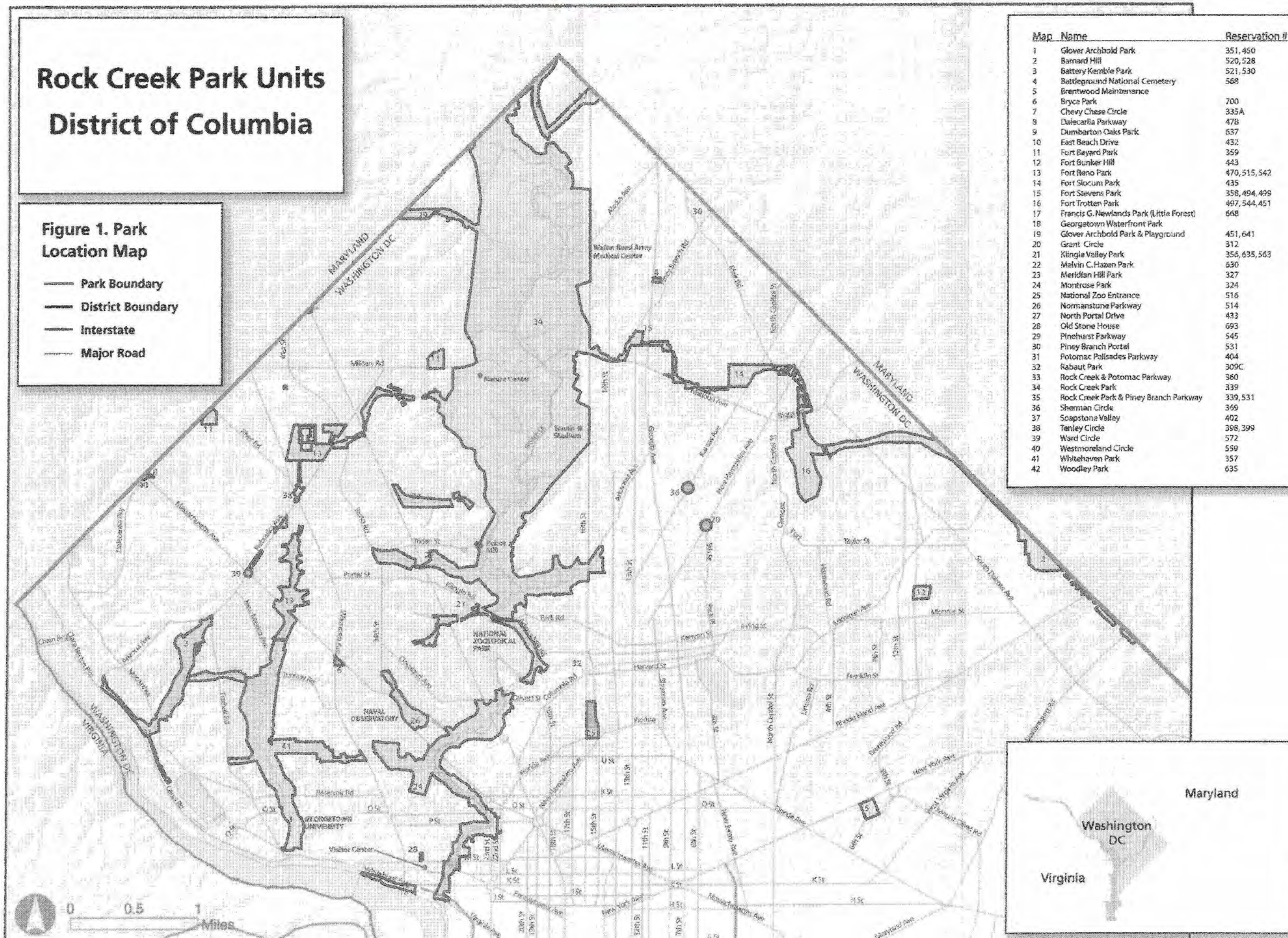

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ADDENDUM:

Enabling Act for Rock Creek Park, Section 7, 51st Cong. (1st Sess. 1890):

That the public park authorized and established by this act shall be under the joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army, whose duty it shall be, as soon as practicable, to lay out and prepare roadways and bridle paths, to be used for driving and for horseback riding, respectively, and footways for pedestrians; and whose duly it shall also be to make and publish such regulations as they deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury or spoliation of all timber, animals, or curiosities within said park, and their retention in their natural condition, as nearly as possible.

Administrative Procedure Act, 5 U.S.C. § 706:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Organic Act for the National Park Service, Section 1, 16 U.S.C. § 1:

Service created; director; other employees

There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director who shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall have substantial experience and demonstrated competence in land management and natural or cultural resource conservation. The Director shall select two Deputy Directors. The first Deputy Director shall have responsibility for National Park Service operations, and the second Deputy Director shall have responsibility for other programs assigned to the National Park Service. There shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

Organic Act for the National Park Service, Section 1c, 16 U.S.C. § 1c:

(a) ‘‘National park system’’ defined

The ‘‘national park system’’ shall include any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes.

(b) Specific provisions applicable to area; uniform application of sections 1b to 1d and other provisions of this title to all areas when not in conflict with specific provisions; references in other provisions to national parks, monuments, recreation areas, historic monuments, or parkways not a limitation of such other provisions to those areas

Each area within the national park system shall be administered in accordance with the provisions of any statute made specifically applicable to that area. In addition, the provisions of sections 1b to 1d of this title, and the various authorities relating to the administration and protection of areas under the administration of the Secretary of the Interior through the National Park Service, including but not limited to the Act of August 25, 1916 (39 Stat. 535), as amended [16 U.S.C. 1, 2, 3, and 4], the Act of March 4, 1911 (36 Stat. 1253), as amended (16 U.S.C. 5) relating to rights-of-way, the Act of June 5, 1920 (41 Stat. 917), as amended (16 U.S.C. 6), relating to donation of land and money, sections 1, 4, 5, and 6 of the Act of April 9, 1924 (43 Stat. 90), as amended (16 U.S.C. 8 and 8a–8c), relating to roads and trails, the Act of March 4, 1931 (46 Stat. 1570; 16 U.S.C. 8d), relating to approach roads to national monuments, the Act of June 3, 1948 (62 Stat. 334), as amended (16 U.S.C. 8e–8f), relating to conveyance of roads to States, the Act of August 31, 1954 (68 Stat. 1037), as amended (16 U.S.C. 452a), relating to acquisitions of inholdings, section 1 of the Act of July 3, 1926 (44 Stat. 900), as amended (16 U.S.C. 12), relating to aid to visitors in emergencies, the Act of March 3, 1905 (33 Stat. 873; 16 U.S.C. 10), relating to arrests, sections 3, 4, 5, and 6 of the Act of May 26, 1930 (46 Stat. 381), as amended (16 U.S.C. 17b, 17c, 17d, and 17e), relating to services

Organic Act for the National Park Service, Section 3, 16 U.S.C. § 3:

Rules and regulations of national parks, reservations, and monuments; timber;

leases

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1, 2, and 4 of this title shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months, or both, and be adjudged to pay all cost of the proceedings. He may also, upon terms and conditions to be fixed by him, sell or dispose of timber in those cases where in his judgment the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects in any such park, monument, or reservation. He may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations. No natural, curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public: *Provided, however*, That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze livestock within any national park, monument, or reservation herein referred to when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park: *And provided further*, That the Secretary of the Interior may grant said privileges, leases, and permits and enter into contracts relating to the same with responsible persons, firms, or corporations without advertising and without securing competitive bids: *And provided further*, That no contract, lease, permit, or privilege granted shall be assigned or transferred by such grantees, permittees, or licensees without the approval of the Secretary of the Interior first obtained in writing.

National Environmental Policy Act, 42 U.S.C. § 4332:

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and

administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local shortterm uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on

Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend

appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

40 C.F.R. § 1500.1, Purpose:

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains ''action-forcing'' provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences,

and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

40 C.F.R. § 1500.3, Mandate:

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq*.) (NEPA or the Act), except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

40 C.F.R. § 1502.1, Purpose:

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be

supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

40 C.F.R. § 1502.14, Alternatives including the proposed action:

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1505.2, **Record of decision in cases requiring environmental impact statements:**

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to

Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A–95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

40 C.F.R. § 1508.8, Effects:

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, 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 the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. Effects and impacts as used in these regulations are synonymous. Effects includes 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.

Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

40 C.F.R. § 1508.14, Human environment:

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of ‘‘effects’’ environment.(§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

40 C.F.R. § 1508.25, Scope:

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(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:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(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. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be:

(1) Direct;

(2) indirect;

(3) cumulative.