

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| CAROL GRUNEWALD, et al., |) | |
| |) | |
| |) | |
| Plaintiffs, |) | |
| |) | Civ. No. 12-1738 (RLW) |
| |) | |
| JONATHAN JARVIS, |) | |
| Director, National Park Service, et al., |) | |
| |) | |
| |) | |
| Defendants. |) | |

PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs hereby move for summary judgment in this case challenging the National Park Service’s decision to kill wildlife in Rock Creek Park for the first time in 120 years, on the grounds that there are no material factual issues in dispute and Plaintiffs’ are entitled to judgment as a matter of law under both the Rock Creek Park enabling legislation, 51st Cong. § 7 (1st Sess. 1890) and the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. In support of this motion, Plaintiffs submit the accompanying memorandum of law and Exhibits A - H.

Respectfully submitted,

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Date: January 4, 2013

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

For a hundred and twenty years, Rock Creek Park has been an oasis in the middle of our bustling capital city, providing refuge to visitors tired of the urban grind. This small jewel of forest, meadow, and creek, which comprises fewer than five square miles, has also provided sanctuary to native wildlife, protecting the animals and their habitat from the encroachment of human development. Visitors to the Park know that this is a place given over to nature. For the most part, trees that fall are not cleared and nature is allowed to take its course. No one has ever been allowed to kill any of the native wildlife that lives there.

This suit challenges a decision by the National Park Service (“Park Service” or “Service”) to depart radically from this tradition by killing hundreds of native white-tailed deer in the Park – even though, according to the Park Service’s own records, there is no overpopulation of deer that is currently impairing any of the Park’s resources – and without taking into account that transforming this historic place of peace and tranquility into a nightly killing ground will forever change the traditional character of this Park for the people who love it most.

The Administrative Record also reveals that, at the same time the Park Service has decided to kill this native wildlife for the stated purpose of protecting the native plant species from the threat of “overbrowsing” by deer, the agency has failed to address a far more critical and *current* threat to the survival of the native plants species in the Park – i.e. the pervasive presence of exotic plant species that the agency’s own records show are ruining the natural ecology of the Park. Most egregious, although the Park Service emphasizes that killing the deer will have the “beneficial” impact of *protecting* the expensive ornamental landscaping of residents who live near the Park, the Record reveals that it is this *very landscaping that is largely*

responsible for the presence and spread of the exotic species that are ruining the Park. Not only is it beyond dispute that the National Park Service has no authority to kill native wildlife in a national Park to protect the property interests of those living *outside* of the Park, but the Record further shows that in reaching its decision the agency completely failed to analyze the *negative* environmental impact its action may have on continuing to *promote* the spread of these injurious exotic species in Rock Creek Park.

Moreover, to the extent that the Park Service has any legitimate concern that the deer population could gradually increase over time to unacceptable levels and adversely impact native plant life in the Park in the future, the Record demonstrates that there are plenty of alternative management actions that can be taken to address that situation that do not involve killing native wildlife for the first time in 120 years, including not only addressing the much more critical exotic plant species problem, but also using fertility control methods that have proven effective to control over-populations of wildlife in other natural areas, including those under the Park Service's jurisdiction. As demonstrated below, Congress did not authorize the Park Service to kill native wildlife in Rock Creek Park when there are far less drastic ways to mitigate any damage that wildlife may have on Park resources in the future.

By adopting a draconian approach to reduce the population of this native wildlife, by failing to consider the impact this management choice will have on the traditional character of this special place, and by completely failing to take into account the impact its actions may have on *exacerbating* the already critical exotic plant problem in the Park, the Park Service has violated the Rock Creek Park Enabling Act, 51st Cong. § 7 (1st Sess. 1890), the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370f, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500-706.

BACKGROUND

To put this case in context, it is important to review the relevant statutory and regulatory framework, as well as the facts that have given rise to Plaintiffs' claims.

I. Statutes and Regulations

A. The Rock Creek Park Enabling Act

Rock Creek Park was established over 120 years ago in 1890 as one of the first federal parks in the nation. See Final General Management Plan for Rock Creek Park, at 5 (AR 18633). It was created in 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 those charged with administering the Park were directed 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).

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 (emphasis added). 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." 16 U.S.C. § 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 dictates of that park's original enabling legislation. 16 U.S.C. § 1c(b); see also Fund for Animals v. Mainella, 294 F. Supp. 2d 46, 54 (D.D.C. 2003) (the enabling statute establishing a particular park controls over the general provisions of the organic statute). Thus, as explained supra with respect to Rock Creek Park, the Park Service must preserve the native wildlife “as nearly as possible.”

C. The Park Service's Management Policies

The Park Service has promulgated its own Management Policies that “set[] the framework and provide[] direction for all management decisions.” Management Policies (2006), at 4 (AR 7589). As explained by the agency itself, these Policies are “mandatory” unless “specifically waived or modified by the Secretary, the Assistant Secretary, or the Director.” Id. at 3 (AR 7597); see also Davis v. Latschar, 83 F. Supp. 2d 1, 7 (D.D.C. 1999) (“The Park Service has further bound its own discretion through the adoption of Management Policies.”). Those Policies provide that “[t]he National Park Service will maintain as parts of the natural ecosystems of parks all plants and animals native to the park ecosystem.” Management Policies at 4.4.1 (AR 7636). They further provide that this will be accomplished by “*minimizing human impacts on native plants, animals, populations, communities, and ecosystems, and the processes that sustain them.*” Id. (emphasis added).

The Policies further state that “[t]o meet its commitment for maintaining native species in parks,” the Service will “*prevent the introduction of exotic species into units of the national park system, and remove, when possible, or otherwise contain individuals or populations of these species that have already become established in parks.*” Id. 4.4.1.1 (AR 7637) (emphasis added). They also state that “[w]here the need to reduce animal populations may be due to

persistent human/animal conflicts, the Service will determine whether or not it can eliminate or mitigate the conflicts by modifying *or curtailing the conflicting* visitor use or other *human activities*,” and that it is only when such “*human activities cannot be modified or curtailed*” that the Service “may directly reduce the animal population.” Id. 4.4.2.1 (AR 7638-39) (emphasis added).

D. The National Environmental Policy Act

NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. The statute has twin aims: “it places upon an agency the obligation to consider *every significant aspect of the environmental impact of a proposed action*, and it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” Ctr. for Food Safety v. Salazar, Civ. No. 11-1934, 2012 WL 4857793, at *8 (D.D.C. Oct. 15, 2012) (emphasis added) (citations and quotation marks omitted).

To accomplish these objectives, NEPA requires all agencies of the federal government 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 Environmental Impact Statement (“EIS”) – must describe the “environmental impact of the proposed action,” any “adverse environmental effects which cannot be avoided should the proposal be implemented,” and “alternatives to the proposed action.” Id. § 4332.

The Council on Environmental Quality (“CEQ”) – an agency within the Executive Office of the President – 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 . . . aesthetic, historic, cultural, economic, social, or health” aspects of a decision, “whether direct, indirect or cumulative.” Id.

§ 1508.8. “Indirect effects” are defined as those that “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” Id. § 1508.8(b).

The CEQ regulations also require that multiple agency actions “shall” be considered within the scope of a single NEPA document where they are (1) “connected actions,” meaning they are “closely related and therefore should be discussed in the same impact statement,” id. § 1508.25(a)(1); (2) “cumulative actions,” which “when viewed with other proposed actions have cumulatively significant impacts,” id. § 1508.25(a)(2); or (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.*” 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, 406 (1976) (emphasis added). As required by the CEQ regulations, the EIS must “rigorously 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.*” Id. § 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 EIS (AR 16450-17041) at 5 (AR 16486) (map of Rock Creek Park) (Plaintiffs' Exhibit ("Pl. Ex.") A. It is described by the Park Service 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 (AR 17745) (emphasis added). Thus, "Rock Creek Park is unique because it is *the only major natural area in this urban environment.*" 2005 General Management Plan at 180 (AR 18810) (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 go there to escape the noise, congestion, and stress of the city, and to enjoy the Park's unique scenery, contemplative setting, and wildlife. Thus, nestled in an otherwise urban area, Rock Creek Park is a special place where, in the words of Congress, "nature prevails." See H.R. Rep. No. 91-1265 at 2 (1970). The Park is home to an array of wildlife, including white-tailed deer, raccoons, red foxes, gray foxes, opossums, beavers, gray squirrels, chipmunks, dozens of bird species, and even coyotes. EIS at 8 (AR 16489).

B. The Rock Creek Park Deer

The Park Service estimates that Rock Creek Park currently has approximately 67 deer per square mile – or a total of 314 deer in the entire Park. EIS at 16 (AR 16497).

Deer are herbivores. Their diet is comprised of twigs, tree buds, non-woody plants, and fruits. EIS at 113 (AR 16598). When food is plentiful, deer tend to have twins and even triplets; when food is scarce, they have single fawns, or stop reproducing altogether. Id. 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.” EIS at 114 (AR 16599). In other words, the population is not so large 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 (AR 13171) (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 “Biological Carrying Capacity”).¹

Indeed, in other areas around the country where deer concentrations are much higher, the impact of a potential overpopulation problem can be seen by what is called a “browse line” in the habitat – the highest point at 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 (AR 20043) (showing deer browse line at Catoctin Mountain Park in Maryland). 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 (AR 17731) (emphasis added) – meaning that this usual indicator of an overpopulation problem is *not* present in Rock Creek Park.

Once plentiful in North America, deer were heavily exploited for food and other products when Europeans settled the land. EIS at 13 (AR 16494). The deer in Rock Creek Park, have not rebounded to the levels that exist elsewhere – where densities can exceed 100 or 200 deer per

¹ This definition is based on science, in contrast to what is known as the “Cultural Carrying Capacity” which is defined as the maximum number of deer that can coexist compatibly with local human populations.” AR 13172. Because “[c]ultural carrying capacity is a function of the sensitivity of local human populations to the presence of deer,” it *can be considerably lower than [biological carrying capacity].*” *Id.* (emphasis added).

square mile.² However, 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., EIS at 30 (AR 16511) (“[f]or some park visitors, seeing a deer is an important part of the park experience”); see also Photograph of Fawn in Rock Creek Park, <http://www.dcnature.com/photos/index.cfm?photoID=203> (Pl. Ex. B).

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

The Park Service premises its decision to kill the native deer on the need to protect the native plant species in the Park. See EIS at i (AR 16456) (stating that the purpose of the action is to support “*long-term protection, preservation, and restoration of native vegetation*” in Rock Creek Park (emphasis added)). However, the Record shows that a much more serious threat to the native vegetation is the invasion of “exotic” plant species into the Park – caused in large part by the ornamental landscaping that adorns many of the private houses and office buildings that surround the Park.

The invasion of exotic plant species has been a serious problem for the Park for many years. Thus, for example, the Natural Resources Management Plan that the Park Service prepared in 1996 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 Rock Creek Park is a “virtual island[] amidst the

² For example, in other locations in the country where the Park Service has adopted management plans that involve killing deer, densities have exceeded 100 deer per square mile. See, e.g., EIS at 21 (AR 16502). (“At 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.”); id. at 22 (AR 16503) (noting that the deer density in Catocin Mountain Park has reached 125 deer per square mile); see also NPS, Final Internal Scoping Report for Deer Mgmt. in Rock Creek Park, at 21 (Nov. 28, 2005) (AR 7419) (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).

extensive residential and commercial areas of metropolitan Washington.” Natural Resource Management Plan (1996), at 6 (AR 2320) (emphasis added). As a result, “[t]he city’s paved, *landscaped and densely inhabited lands cause undesirable flows of stormwater and inevitable migrations of exotic or feral species into the park[]*.” Id. (emphasis added).

As that document further explained, “41 [exotic] species . . . are presently considered to be aggressive and displacing or killing native plants and eliminating habitats which the park should be protecting.” Id. at 18 (AR 2332). As the Park 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 parks and along entrance roads to the nation’s capital.” Id. (emphasis added). However, the Park Service also noted that “[c]urrent efforts to control these pest species and to prevent their spread are minimal and ineffective,” id. at 21 (AR 2335), and that “[c]omprehensive management activities to fully accomplish this basic park requirement [protection of the native forest] and *to correct man-caused adverse influences* on the forest resources are thus not initiated.” Id. at 36 (AR 2352) (emphasis added).

Indeed, the ecological havoc caused by invasive species has become so critical throughout the country that in 1999 President Clinton issued an Executive Order “*to prevent the introduction of invasive species and provide for their control*” by directing “each Federal agency whose actions may affect the status of invasive species” to “identify” all such actions, to “use relevant programs and authorities to [] prevent the introduction of invasive species” and to “*control populations of such species.*” Exec. Order No. 13,112, Invasive Species, 64 Fed. Reg. 6183, 6184 (Feb. 3, 1999) (Pl. Ex. C), cited in EIS at 37 (AR 16518) (emphasis added). The

Executive Order further provides that federal agencies “shall . . . not authorize, fund, or carry out actions that it believes are likely to cause *or promote the introduction or spread of invasive species,*” and that “Federal agencies shall pursue” the duties imposed by the Order “*in consultation with the Invasive Species Council*” – an entity that is co-chaired by defendant Salazar as the Secretary of the Interior – “*consistent with the Invasive Species Management Plan.*” Id. (emphasis added).

In 2000, the Resource Management Staff for Rock Creek Park issued a “Final Report” on the “Invasive Non-Native Plant Mitigation Program” for the Park, AR 3593, reiterating that “invasive non-native plants (INPs) seriously threaten” the forest “*by aggressively displacing and killing native plants, reducing native habitats, and stifling forest regeneration.*” AR 3596 (emphasis added). It further stated 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.*” AR 3597. The Report explained that the agency’s “lack of understanding of how to control [invasive non-native plants] and lack of resources to do the job have *allowed the [invasive non-native plant] infestations to reach the critical levels that now exist.*” AR 3596-97 (emphasis added). Most relevant for purposes of this litigation, the Report stated that in Rock Creek Park, “more than one-third (36%) of the 656 documented plants species . . . are exotic,” “of these 41 are aggressive invaders,” and that the “*numerous landscaped private properties*” that surround the Park are “*sources of 40 out of 41*” *invasive non-native species.* Id. at 4 (AR 3596) (emphasis added). In other words, according to the Park Service’s own Report issued over twelve years ago, **the private landscaping that surrounds the Park is a major contributor to this “critical” problem that “seriously threaten[s] the integrity” of the Park’s forest and other native plant life.** Id. at 4-5 (AR 3596-97).

Indeed, in 2004, the Park Service issued a Draft Exotic Management Plan which again repeated many of these dire conclusions. See Draft Exotic Management Plan (2004) (AR 5297). That 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 (AR 5317) (emphasis added). The 2004 Draft Plan again emphasized that the private landscaping that surrounds the Park is a major source of this critical problem. See id. at 3 (AR 5299) (noting that the Park’s boundary “interfaces the forest with streets and other urban landscape components, especially numerous landscaped private properties,” and that “[o]f the 41 most aggressive exotics, 40 are horticultural plants”) (emphasis added); see also id. at 11 (AR 5307) (“[a]djacent home and office gardens are filled with exotic plants . . . *from which seeds can disperse into the park*”) (emphasis added); see also id. at 29, 30, 40, 42, 47, 48, 50, 51, 52, 54, 55, 57, 61, 66, 72, 79, 80, 83, 84, 85 (identifying the injurious invasive plants that are “*widely used in landscaping*” around the Park) (emphasis added).

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,” and that the Executive Order requires the Park Service to do something about this problem, the Plan once 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 (AR 5299) (emphasis added). Nevertheless, more than eight years later, the Park Service has not even issued a final Plan to address this critical problem.³

The 2005 General Management Plan for Rock Creek Park, AR 18607, 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.” *Id.* at 143 (AR 18773) (emphasis added). Thus, the Park Service again stressed that “[c]ontrol of these invasive exotic plants is a serious problem in the park,” and that “control efforts are not able to keep pace with the rate of invasive plant introduction and spread.” *Id.* (emphasis added).

D. The Park Service’s Draft Environmental Impact Statement

Meanwhile, while failing to adequately deal with the most critical problem facing the native vegetation in the Park, in July 2009, the Park Service prepared a draft EIS to “develop a white-tailed deer management strategy” for the stated purpose of “the long-term protection, preservation, and restoration of native vegetation and other natural and cultural resources in Rock Creek Park.” Draft EIS (AR 13674-14072), at 1 (AR 13701). Specifically, the Park Service explained that immediate action was needed to address: the “*potential of deer becoming the dominant force in the park’s ecosystem, and adversely impacting native vegetation and other wildlife;*” “[a] decline in tree seedlings caused by excessive deer browsing and the ability of the forest to regenerate in Rock Creek Park;” “[e]xcessive deer browsing impacts on the existing shrubs and herbaceous species;” “[d]eer impacts on the character of the park’s cultural

³ This fact was confirmed by counsel for Defendants, when Plaintiffs requested that any final versions of this document be included in the Administrative Record.

landscapes;” and “[o]pportunities to coordinate with other jurisdictional entities currently implementing deer management actions beneficial to the protection of park resource and values.” Draft EIS at 1-2 (AR 13701-02) (emphasis added).⁴

Recognizing that deer are an “important park resource,” the Park Service affirmed the importance of “maintain[ing] a deer population in the Park” Draft EIS at 26 (AR 13726). Nevertheless, the Park Service stated that it needed to reduce deer numbers “to support forest regeneration and to protect, conserve, and restore native species and cultural landscapes.” Draft EIS at 42 (AR 13742).

The agency considered four alternatives to accomplish this objective, two of which involved killing large numbers of deer, despite the fact that the Service did not articulate any immediate problem requiring such drastic action. On the contrary, the Draft EIS stressed that “[a]n overabundance of deer *could possibly* alter and affect forest regeneration patterns” *in the future*, that “high deer densities *may* adversely affect plants and other wildlife species,” that deer “*have the potential to* adversely affect unique and important fish habitats,” and that habitat for threatened and endangered species “*may be vulnerable to impacts*” from deer. Draft EIS at 25-

⁴ Although the Park Service never explained what was meant by the need to “coordinate with other jurisdictional entities currently implementing deer management actions,” Draft EIS at 2 (AR 13702), the agency mentioned that neighboring Montgomery County had implemented the sharpshooting of deer in response to “[c]itizen complaints about the effects of deer, including deer/vehicle collisions and damage to landscape vegetation,” *id.* at 18 (AR 13718), and that it “continues to express interest in working [with the Park Service] to coordinate management efforts.” *Id.* at 20 (AR 13720). Thus, it appears that in deciding to kill the deer in Rock Creek Park, the Park Service may be trying to accommodate Montgomery County’s desire to reduce human-deer conflicts occurring along their shared border, even though the Park Service has no statutory authority to kill wildlife in a national park for this purpose. *See* 16 U.S.C. § 3 (permitting the destruction of wildlife in a national park only to the extent such wildlife is “*detrimental to the use of any [] said park[]*”) (emphasis added).

27 (AR 13725-27) (emphases added).

The Draft EIS also demonstrated that, while deer density in the Park had varied over the preceding eight years – with estimates ranging between 52 to 98 deer per square mile – there was no evidence that deer numbers were increasing or would do so in the future. See Draft EIS at 16 (AR 13716). In fact, as the agency’s own data demonstrate, *the Park Service reported the two lowest density estimates in the three most recent years* recorded in the draft EIS – demonstrating that the deer population appears to regulate itself without any need for human intervention:

TABLE 2. DISTANCE SAMPLING RESULTS IN ROCK CREEK PARK

| Year | Deer per Square Mile (density) | Standard Error of the Mean (±) |
|-------------|---|---|
| 2000 | 62 | 11.6 |
| 2001 | 63 | 6.9 |
| 2002 | 60 | 8.0 |
| 2003 | 98 | 17.3 |
| 2004 | 75 | 7.8 |
| 2005 | 52 | 6.9 |
| 2006 | 58 | 8.9 |
| 2007 | 82 | 10.21 |

Source: K. Ferebee pers comm. 2007b, 2008f

Id. (showing lowest densities – 52 and 58 deer per square mile – in 2005 and 2006).

The Park Service discussed, but ultimately rejected, two nonlethal alternatives to reducing the deer population. It rejected Alternative A, which would have continued educational efforts and fencing to protect plants, on the ground that this alternative would still allow the deer

density to “*gradually* increase with annual fluctuations.” Draft EIS at 166 (AR 13866) (emphasis added). As to Alternative B, using sterilization and reproductive controls to reduce the deer population – methods that have been successfully used in other jurisdictions to control wildlife populations – the Park Service conceded that this approach would “*provide continued protection of certain areas of the Park over the long term, would meet the minimum of protecting 5% to 10% of the Park at any one time, and would introduce reproductive controls that could reduce deer numbers gradually over an extended period of time.*” Draft EIS at 168-69 (AR 13868-69) (citation omitted) (emphasis added). Nevertheless, the agency rejected this non-lethal alternative on the grounds that deer numbers would only be *reduced* “gradually over an extended period of time,” Draft EIS at 169 (AR 13869) – a solution that appears to be ideally tailored to the problem the Park Service claims to be addressing, *i.e.*, the gradual increase in the number of deer, yet would not require killing any of this native wildlife.⁵

Alternatives C and D both identified a goal of drastically reducing the deer population to only 15 to 20 deer per square mile within three years, requiring the Park Service to *kill* deer – with a preference for does over bucks – until only 70 to 94 remain, after which time the Park Service would continue to kill deer in lower numbers or use reproductive controls to maintain the

⁵ For example, the Administrative Record shows that the fertility vaccine porcine zona petlucida (“PZP”) has been successfully used at Assateague Island National Seashore to reduce the wild horse population. EIS at 305 (AR 16796); see also AR 14237-39 (comments regarding success of fertility control programs for white-tailed deer at Fire Island National Seashore and the National Institute of Standards and Technology in Gaithersburg, Md.); see also EIS at 55 (AR 16538) (describing successful reproductive control of deer at Milwaukee County Zoo); EIS at 305 (AR 16796) (“At Assateague Island National Seashore, [reproductive controls reduced] the wild horse population 16% (from 160 to 135 individuals) between 1994 and 2009 (15 years).”); id. (describing reductions of “up to 55% over 15 years” in the most intensively treated areas of Fire Island National Seashore, where the Park Service uses reproductive controls on deer); EIS at 306-07 (AR 16797-98) (further reproductive control successes, including an “approximately 85-90% decrease in the number of fawns born per female”); EIS at 308 (AR 16799) (describing studies finding that reproductive controls have successfully reduced deer populations).

reduced population. Draft EIS at 61-69 (AR 13761-69). To accomplish this objective, both alternatives required luring deer with grain, apples, and hay to specific locations in the Park where they would then be shot at close range with high-powered rifles or, where the killing would occur close to people's homes, with crossbows and arrows. Draft EIS at 61-62 (AR 13761-62), 67 (AR 13767). 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 the park visitors." Draft EIS at 61 (AR 13761). These alternatives also include using nets, traps, or tranquilizers to capture deer and then killing them using "a penetrating captive bolt gun" – a device which penetrates the skull of the animal, enters the cranium, and crushes the cerebrum and cerebellum – or "exsanguination," *i.e.*, bleeding the animals to death. Draft EIS at 62 (AR 13762).⁶

The deer bodies would be buried, removed, or "left for natural decomposition" on the ground in the Park, Draft EIS at 200 (AR 13900), and, for the deer that were removed, the Park Service planned to donate the meat to "local charitable organizations to the maximum extent possible," Draft EIS at 62 (AR 13762) – although there is no evidence that any such organizations want, or would be able to use, any such meat.

The only significant difference between Alternatives C and D was the method of control that would be used after the first three years of killing to maintain the drastically reduced populations: Alternative C proposed to do so by continuing to kill deer each year, while Alternative D would shift to reproductive controls for this purpose. Draft EIS at 61-69 (AR

⁶ The draft EIS characterized this particular method of killing as "capture and euthanasia," Draft EIS at 62 (AR 13762), despite the fact that, as public comments explained, the deliberate killing of healthy animals does not qualify as "euthanasia," which refers to death for the purpose of relieving suffering. *See, e.g.*, AR 14262; 14317; 14356, 14359.

13761-69). However, the Park Service acknowledged that “getting close enough to deer to administer remote injections [of fertility drugs] would become increasingly difficult *after sharpshooting efforts*” – because the deer in the Park will become wary of, and hence will avoid, humans. Draft EIS at 67 (AR 13767) (emphasis added); see also Minutes of Science Team (March 27, 2006) (AR 8482) (recommending that if fertility controls “are used in conjunction with a reduction method . . . *the reproductive control is initiated prior to the reduction to make it easier to capture and treat individuals*”) (emphasis added). Nevertheless, the Park Service identified Alternative D, which requires killing deer using a combination of high-power rifles and archery over a minimum of three years and then potentially shifting to reproductive controls, as its “preferred alternative.” Draft EIS at 92 (AR 13792).

Conceding that sharpshooting would adversely affect some visitor experiences in the Park, the Service nevertheless concluded that any such adverse effect would be “negligible,” because the killing would “primarily occur during fall and winter and at night” when fewer visitors use the Park – meaning that the public would not actually *see* most of the killing – and not all of the deer would be killed. Draft EIS at 244 (AR 13944). However, the agency failed to consider the impact killing wildlife in this Park will have on destroying the overall aesthetic character of the Park as a place of peace and tranquility, which for over 120 years has been completely free of such violence to wildlife.

E. Public Comment

Public comments on the Draft EIS overwhelmingly opposed killing the deer. See EIS at 329-33 (AR 16820-24) (categorizing all comments received, and showing, for example, that 53 times as many comments supported “Alternative B: Non-lethal Actions” than opposed it, and 14 times as many comments opposed “Lethal Reduction” of deer than supported it). Indeed, given

the Park Service's admissions that "*the browse line is not prominent* at Rock Creek Park," Draft EIS at 17 (AR 13717) (emphasis added), and that the deer population has fluctuated for years on its own without any human interference, commenters routinely questioned whether any "overpopulation" of deer even exists. See, e.g., AR 14233; AR 14244; AR 18582.

However, even assuming there was an overpopulation problem, the public consistently stressed that there are other ways to either protect vegetation from deer, such as increased use of fencing around sensitive areas, or to actually reduce the number of deer through the use of reproductive controls that are currently available and have been successfully used elsewhere. For example, Plaintiff Zhong-Ying Chen referred to programs at Fire Island National Seashore in New York and the National Institute of Standards and Technology in Maryland that successfully reduced deer numbers using humane reproductive controls. See AR 14237-39; see also supra n.5. In fact, the Humane Society of the United States ("HSUS") – which has been actively involved in assisting the federal government with these other deer control programs – proposed a detailed nonlethal reproductive control plan for the deer in Rock Creek Park that was endorsed by local members of Congress, including Rep. Eleanor Holmes Norton (DC), Rep. James P. Moran (VA), and Rep. Chris Van Hollen (MD). See Letter from Rep. Holmes Norton et al. to Sec'y Kenneth Salazar (Aug. 31, 2011) (AR 18567-68); see also, e.g., AR 14269 (comments of Karin Adams, President of Melvin Hazen Community Gardens, explaining that this community vegetable garden adjacent to the Park has successfully protected its plants simply by using deer fencing).

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 experience. AR 14254; see also AR 14205 ("every time I see a deer [in the Park,] it brings

wonder and joy to my heart”); AR 14208 (the “wildlife who live in the park are the main reason that I love it”); AR 14211 (“[w]ildlife [including deer] in Rock Creek Park are part of *what give the beloved park its magic*”) AR 14224 (“[f]or many city dwellers like myself, the [Rock Creek Park] deer are a real treasure, and their wellbeing in the middle of the city is something that we feel strongly about.”); AR 14314 (describing the “thrill” of catching sight of “an unsteady fawn or a magnificent buck.”); AR 14232 (describing the wonderment of seeing a doe grazing in the Park at sunset, and stressing that “it is [not] emotional or sentimental to regard this creature as worthy of living; the animal’s beauty speaks for itself.”).

People expressed particular concern that the use of archery would greatly impact their ability to enjoy the Park because it usually requires several shots with arrows before the animal finally collapses and bleeds to death. See AR 14256 (not wanting their children to “witness the spectacle of a deer with an arrow lodged in them dying on the street”); AR 14285 (the D.C. organization “City Wildlife” presenting evidence confirming a “well-publicized incident [the previous year] in Virginia involving a doe with an arrow shot completely through her head, who survived for months in this condition despite the best efforts of both government and citizens to capture her and remove it.”); see also Science Team Minutes (AR 8512) (“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).⁷

The public also expressed concern that even using rifles to kill deer will mean that some of these animals will be maimed on the first shot and suffer excruciating pain and fear before

⁷ Indeed, according to a summary of nineteen different reports and studies cited by HSUS, “the average bow-hunting wounding rate is 55%, and in fact, several studies indicate that bow-hunting yields more than a 58 percent wounding rate.” AR 14318. 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.”

dying. See eg., AR 14206 (“[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 or have permanent injuries that cause them pain for the rest of their lives.*”) (emphasis added); see also AR 14256 (“[t]here is no guarantee that sharpshooters, despite their name, 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.”). As Plaintiff Carol Grunewald inquired, “[i]f injured animals are still at large when it is time for the ‘sharpshooters’ to punch out and go home, what will happen?” AR 14360.

The Park Service’s “capture-and-euthanasia” part of the plan elicited similar concerns, with one commenter stating that “[t]he captive-bolt gun can barely be used reliably on sedentary animals such as cows, let alone deer, which are incredibly fast-moving,” and expressing concerns that deer may still be conscious when they are left to bleed to death. AR 14262. Commenters were also concerned that killing pregnant deer – a likely outcome, considering that mating season extends from October to early December – would “compound[] the ugliness of the entire operation,” AR 14254, and Plaintiff Jeremy R. Rifkin emphasized the complete disconnect between the supposed problem the Park Service claimed to be addressing and the severity of the chosen solution. See AR 14286 (questioning why “such drastic action is required to alleviate” any impacts a gradual increase in deer may be having on other resources of the Park.); see also AR 14254 (“such drastic action should [not] be contemplated without first resorting to a more conservative, humane approach that strives to protect the deer”).

Many people warned that killing wildlife for the first time in the history of the Park would forever change its traditional character by “disturb[ing] the peace.” AR 14266. As articulated by the president of the Crestwood Citizens Association, shooting the deer would

“*mar[] the serenity and peace that many of us associate with this national treasure.*” AR 14285 (emphasis added); see also AR 142225 (humane, nonlethal controls are the only acceptable means to control deer in order to preserve the “*peace and tranquility of Rock Creek Park*”) (emphasis added); AR 14248 (killing animals in the Park would transform it from a “refuge for all animals” into a “killing ground.”). Several commenters expressed concern that what happens in Rock Creek Park – which one group referred to as “America’s park” because of its prominence in our capital, AR 18573 – reflects on the entire nation, imploring the Park Service to choose humane, science-based reproductive controls rather than killing the deer. See, e.g., AR 14239.

Several people commented that rather than kill this native wildlife, the Park Service should be focusing its attention on dealing with a far more serious threat to the Park’s native plant resources – the infestation of invasive exotic plants. Thus, Plaintiff 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.” AR 14358; see id. (“*Humans have . . . introduced aggressive exotic plant species that are not indigenous to the area*”) (emphasis added); see also AR 14205 (“If [the Park Service] is so concerned about the plant life, how about focusing on taking down invasive ivy and vines . . . ?); AR 14310-11 (“invasive plants . . . *probably account for a great deal more of the plant destruction*” than the deer) (emphasis added); AR 14295 (suggesting that the Park Service do something about “the Exotic Plants and Vines that [are] killing our Trees”). Indeed, the Animal Welfare Institute noted that “*the impact of nonnative, invasive species in RCP may be far more serious than revealed by the NPS in the Draft EIS,*” and could “*provide an explanation for the alleged reduction in*

herbaceous cover, saplings, and overall forest regeneration,” which was being cited as the basis for killing the deer. AR 18587 (emphasis added).

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

Despite all of 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 draft EIS – the Park Service again identified Alternative D as its preferred alternative in the final EIS. See EIS at 16 (AR 16497). Thus, 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 that crossbows would be used in those places where Park Service agents would be killing deer “*close to occupied buildings or residences.*” EIS at 63 (AR 16546) (emphasis added). Alternative D also includes capturing deer – a feat much more difficult than darting a deer with contraceptives – and killing them with captive bolts to the brain or exsanguination. EIS at 64 (AR 16547).

The Park Service intends to kill the deer – with a preference for does – until there are only 70 to 94 remaining. EIS at 64-65 (AR 1547-48). Accounting for new births, the agency estimates that 296 deer will be killed in the first three years. Id. Most of the killing will occur in the first year when the Park Service intends to halve the population by killing 157 deer “over a five-month period.” EIS at 64 (AR 16547). The Park Service concedes that where crossbows are used, “there is a possibility of a deer not succumbing immediately and fleeing the area,” where the wounded animals could be seen by the public. EIS at 245 (AR 16732).

Once again, the Park Service purported to justify its decision to kill wildlife in the Park for the first time in 120 years on the ground that failure to do so could cause unacceptable impacts to the native vegetation *in the future*. Although the agency noted that a study comparing

the impacts of deer to vegetation in the Park showed that there was more vegetation in fenced plots from which deer were excluded, EIS at 17 (AR 16498) – i.e. deer do in fact eat plants – it nevertheless also acknowledged that “there is some understory vegetation” and that “*the browse line is not prominent at Rock Creek Park.*” EIS at 18 (AR 16499). Thus, the agency based its decision to kill the deer on the grounds that “*trends indicate that an unmanaged deer population could lead to these problems.*” Id. (emphasis added).

Most startling, as demonstrated supra 9-13, although the Park Service has known for years that invasive exotic species are a much more serious – and *current* – threat to the survival of native plant species in Rock Creek Park, and that the existence and spread of these extremely damaging plants can be *directly traced to the private landscaping that surrounds the Park*, the agency failed to consider doing anything more about *this* problem as a means of accomplishing its stated objectives of “protection, preservation, and restoration of native vegetation” in the Park, EIS at i, before, or even in conjunction with, slaughtering the native wildlife.

Moreover, despite its obligations under the 1999 Executive Order on Invasive Species to “use” its authority to “prevent the introduction of invasive species” and to “*control populations of such species,*” 64 Fed. Reg. at 6184 (emphasis added), and its additional duty under NEPA to consider both the “direct” and “indirect” effects of its actions, 40 C.F.R. § 1508.8, the Park Service failed to consider the impact that killing the deer may have on *promoting* the expansion of exotic species into the Park. This omission is particularly glaring in light of the fact that the Park Service emphasized the *beneficial* “socio-economic” impacts its decision to kill the deer will have on the private properties that surround the Park as part of its environmental analysis. See e.g., EIS at 153 (AR 16638) (stressing that “[l]andscaping can have a significant impact on property values,” that “improvements to landscaping may be seen as a successful way to improve

property values,” and that in the residential areas surrounding Rock Creek Park, “deer cause virtually year-round damage to landscaping, which can be costly to replace”); EIS at 260 (AR 16744) (explaining that if nothing is done to control the deer, “[d]amage to landscaping may result in a decline in property values for affected landowners,” and that accordingly killing the deer will “*result[] in beneficial impacts.*”) (emphasis added). Thus, while the agency considered the “beneficial” impacts of killing this wildlife to private landscape owners, it completely ignored the fact that, according to the agency’s own internal records, this same landscaping is the single biggest contributor to the invasive species problem that is destroying the native vegetation in Rock Creek Park.

Moreover, despite overwhelming public comments imploring the Park Service to consider the disastrous impact killing this wildlife will have on the public’s ability to continue to enjoy using this Park, which for 120 years has been completely *free* of any such violence against wildlife, the final EIS again failed to consider the impact this approach will have on the traditional character of the Park and “*the relationship of people [to their] environment,*” as required by NEPA, 40 C.F.R. § 1508.14 (emphasis added).

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 (AR 17748), 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 (AR 17732) (emphasis added). Nonetheless, the agency decided to go forward with its preferred Alternative D because “an unmanaged deer population *could* lead to . . . problems” in the future. *Id.* (emphasis added). Despite recognizing that there is no *immediate* need to kill this wildlife to preserve any of the other resources of the Park, the agency further noted that “[i]f an acceptable reproductive control agent becomes

available sooner than expected, the park could select to use that *first (before the initial sharpshooting) . . .*” ROD at 4 (AR 17732) (emphasis added). However, despite the fact that HSUS had already submitted evidence demonstrating the availability of such methods, AR 14316-28, that the agency’s own Science Team had recommended that fertility control should be used before killing any animals, AR 8482, and the agency’s own concession that using reproductive controls *before* killing was far preferable “so that deer are not as hard to capture and more can be treated,” *id.*, the Park Service rejected this approach in favor of killing large numbers of deer.

G. Proceedings To Date

The Park Service had initially informed the public that it would begin killing deer in Rock Creek Park as early as December 2012. However, after this case was filed, and to avoid the Court having to consider this matter on an emergency basis, the Park Service agreed to forego any plans to kill deer until March 15, 2013, so that the parties could brief, and the Court decide, the case on the merits. See Joint Stipulation, Docket No. 6.

ARGUMENT

Under the APA, the Court “shall . . . set aside” an agency’s decision if it is arbitrary, capricious, an abuse of discretion, or “otherwise not in accordance with law” or was adopted “without observance of procedure required by law.” 5 U.S.C. §§ 706(2)(A), (D). 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 has 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).

In addition, the Court “must consider whether the decision was based on a consideration of the relevant factors.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30-31 (1983). Thus, a decision is “arbitrary and capricious if the agency has *relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . .*” *Id.* at 43 (emphasis added). Here, as discussed below, the Record demonstrates that the Park Service has committed several of these errors. Accordingly, its decision to kill this native wildlife must be set aside.

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 deer violates the statute that created Rock Creek Park Enabling Act which charged the agency with the duty to “preserv[e] from injury” all animals within Rock Creek Park, and to retain them “in their natural condition, *as nearly as possible.*” 51st Cong. § 7 (emphasis added). This command requires the agency to refrain from killing the native wildlife in the Park unless it has no other option available to preserve the other resources of the Park. 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,*” Draft Exotic Management Plan, at 3 (AR 5299) (emphasis added) – it certainly does *not* authorize the Park

Service to lure native deer with bait to be shot at close range with high-powered rifles or arrows, when the Record demonstrates other ways to protect the native plants from further degradation.⁸

Yet, nowhere did the Park Service demonstrate that circumstances in the Park have made it impossible to preserve the deer while addressing any concomitant need to protect other resources in the Park from any harm posed by deer in the *future*. On the contrary, in explaining its decision to kill the deer the Park Service relied on “trends” indicating that “an unmanaged deer population *could* lead to . . . problems” with depletion of understory vegetation, as well as concerns that “an overabundance of deer in Rock Creek Park *could* adversely affect regeneration of vegetation in riparian areas.” EIS at 27 (AR 16508) (emphasis added). However, particularly when there are myriad ways to “manage” impacts from deer *without* resorting to killing them, see supra 16, 19, the agency’s concern that a completely “unmanaged” deer population could lead to problems in the future simply does not justify the draconian approach chosen here.

Similarly, the Park Service explained that “deer densities *may* adversely affect plants and other wildlife species,” that deer browsing and footpaths “have *the potential* to adversely affect unique and important fish habitats,” and that threatened and endangered species “have *the potential* to be impacted by an overabundance of deer.” EIS at 28-29 (AR 16508-09) (emphasis

⁸ Thus the word “nearly” means “with an approach to completeness or exactness.” Webster’s Third International Dictionary 1510 (1993); see also The Oxford Essential Dictionary American Edition 399 (1998) (defining “nearly” as “closely”). Therefore, the language “as nearly as possible” imposes an obligation on the Park Service to protect the wildlife in Rock Creek Park to the fullest extent possible. See also Fund for Animals v. Babbitt, 903 F. Supp. 96, 107 (D.D.C. 1995) amended, 967 F. Supp. 6 (D.D.C. 1997) (explaining that a requirement under the Endangered Species Act, 16 U.S.C. § 1533, that a species’ recovery plan shall, “to the maximum extent practicable,” incorporate site-specific management actions necessary for the conservation and survival of the species “imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible”); Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249, 1254 (10th Cir. 1998) (language of statute requiring the Secretary to act on petitions to list species within 90 days “to the maximum extent practicable” imposes a duty to act to the extent possible).

added). Thus, as repeatedly made clear by the Park Service's own statements, the deer in Rock Creek Park pose no threat to the Park *now*. Hence, there is no reason this wildlife must be *killed* to protect these resources, particularly when there are other less drastic ways to accomplish that objective that do not run afoul of the agency's statutory mandate.

Moreover, the Park Service's speculation about *future* harm was predicated upon a significant increase in the current deer population. See, e.g., EIS at 1 (AR 16454) (stating that action is needed to address the "*potential of deer becoming the dominant force* in the park's ecosystem, and adversely impacting native vegetation and other wildlife") (emphasis added); EIS at 27 (AR 16508) ("*Increased deer activity can promote nonnative species through habitat alteration and seed dispersal.*") (emphasis added); EIS at 28 (AR 16509) ("*As the deer population increases, the amount of deer browsing and trampling of vegetation increases, thus reducing the amount of ground cover within the forest. As ground cover decreases, stormwater runoff and erosion increase.*") (emphasis added). However, as the agency's own data demonstrated, the deer in Rock Creek Park have maintained a relatively stable population over the past ten years. See EIS at 16, Table 2 (AR 16497) (showing that the deer density in 2000 and 2009 was 62 and 67 respectively, that it has been both lower and higher in the intervening years, and that the densities for 2008 and 2009 were less than in 2007, 2004, and 2003); see also supra 15.

Moreover, although the EIS stated that "Park staff [members] are concerned that deer *may be affecting other species*, including breeding birds," EIS at 28 (AR 16509), in fact the Park Service found "*no park specific data* to show that impacts to ground-nesting birds have occurred from deer browsing." Id. (emphasis added); see also AR 10508 (noting that "[t]he breeding bird data for the park . . . is not directly related to deer").

Further, although the Park Service recorded declines in shrub cover and seedlings within certain vegetation plots, EIS at 17-18 (AR 16498-99), it also admitted that “the browse line is not prominent in Rock Creek Park,” EIS at 18 (AR 16499) (emphasis added) – meaning that the deer simply have not reached the level that typically denotes an overpopulation problem. Compare with EIS at 21 (AR 16502) (finding “[d]ata collected between 1987 and 1992 [at Gettysburg National Military Park] showed that deer were excessively abundant and were causing losses to [historically relevant] crops and forest regeneration”); Internal Comment by Senior Science Consultant (AR 11373) (noting that predicting a “general trend” toward an increased deer population “was written for [the Catoctin National Park] where their numbers were going up every year,” but that Rock Creek Park’s “*numbers don’t show the same steady increase over the past years*”) (emphasis added). Thus, as the Park Service itself has explained in the past, “[e]vidence of high deer densities or heavy vegetation browsing does not necessarily mean deer are causing unacceptable harm to park resources.” National Park Service Fact Sheet (AR 3572) (emphasis added).

Likewise, as demonstrated supra 9-13, the Record shows that the *real* cause of the decline in native species in the Park is the infestation of exotic plant species. Indeed, in contrast to the potential *future* problem posed by the deer, for over twelve years the Park Service has identified the invasion of exotic species as the most “serious” and “critical” problem *currently* facing the agency’s ability to protect the natural resources of the Park. See Rock Creek Park Invasive Non-Native Plant Mitigation Program Final Report (2000) at 4-5 (AR 3596-97); see also Draft Exotic Plant Management Plan (2004) at 3 (AR 5299). Thus, as the agency’s own documents explain, it is these invasive plants that “seriously threaten the integrity” of the forest “by aggressively

displacing and killing native plants, reducing native habitats, and stifling forest regeneration.” Rock Creek Park Invasive Non-Native Plant Mitigation Program Final Report at 3 (AR 3595).

Indeed, while the EIS admits that there are “*no park-specific data to show that impacts to ground-nesting birds have occurred from deer browsing,*” EIS at 28 (AR 16509), the Record does show that “[f]orest fragmentation and the loss of interior habitat” caused by invasive plants “negatively impacts breeding neotropical migratory birds,” and that “a number of exotic species present in [Rock Creek Park] *can disperse into forest interiors, inhibit regeneration in canopy openings and even threaten mature trees.*” Draft Invasive Exotic Plant Management Plan at 21 (AR 5317) (emphasis added). In other words, while there is also no evidence that deer are currently causing adverse impacts to bird species in the Park, the Record shows that the exotic plant infestation continues to be a major problem for this other wildlife.

Therefore, in choosing to kill the *native* wildlife on the grounds that, if left “unmanaged,” it could become a problem for native plant species in the future, rather than first dealing with the current and long-standing actual threat to these species – i.e., the invasive *non-native* species in the Park – the Park Service has violated its duty to “preserv[e] from injury” all animals within Rock Creek Park, and to retain them “in their natural condition, *as nearly as possible.*” 51st Cong. § 7 (emphasis added). Indeed, as the Park Service itself informed the public years ago, the agency must have “scientific data on environmental conditions that suggest deer as *the principal cause for not achieving*” the Park’s objectives before it may kill this wildlife – a tenet that the agency has clearly ignored here. See Park Service Fact Sheet (AR 3572-73) (emphasis added).⁹

⁹ Indeed, the Record shows that both studies relied on by the agency as the basis for deciding to kill the deer clearly acknowledge that they cannot identify deer, to the exclusion of other sources

Finally, even if the deer were causing a *present* problem to shrub cover and seedlings in the Park – which based on the agency’s own assessment simply is *not* the case – the EIS demonstrates that there are many less drastic ways to deal with any such problem than killing the deer. For example, as demonstrated supra 15-16, 20, fencing has been successful in protecting plants from deer. See also AR 14354-55 (comments of the Washington Humane Society, explaining that based on its experience assisting Washington DC residents with perceived deer problems, nonlethal approaches can solve human-wildlife conflicts in a “*long term and cost effective manner*”) (emphasis added). As further demonstrated by the Record, reproductive controls have also been successfully used to control deer populations in other parts of the country, including the Park Service’s Fire Island National Seashore in New York, and the National Institutes of Standards and Technology in Maryland. See AR 14237-39; EIS at 305 (AR 16796).¹⁰

– including invasive species – as the cause of the unnatural decline in native plant species. See, e.g., Hatfield et al., Analysis of Vegetation Changes in Rock Creek Park (AR 12669) (referred to as “Hatfield 2008 ” in the EIS at 17 (AR 16498)) at 6 (AR 12680) (admitting that “[i]t is not possible to discern causes from these data for the significant differences found among some of the vegetation variables in Rock Creek Park over the period 1991-2007,” and noting that while “[s]ome of these changes are consistent with what would be expected due to browsing pressure from deer, . . . other causative factors are also possible”) (emphasis added); see also Krafft and Hatfield, Impacts of Deer Herbivory of Vegetation in Rock Creek Park (AR 15219) (cited at EIS at 17 (AR 16498)) at 12 (AR 15238) (acknowledging that the study omitted “tree seedling density measurements” that would be necessary to “*document significant impacts due to deer herbivory in the Park*”) (emphasis added).

¹⁰ Moreover, the “criteria” the Park Service used to reject reproductive controls as a means of controlling the deer population are inconsistent with the very literature and discussion included in Appendix D of the EIS (AR 16796-811). For example, the mere fact that some reproductive control agents lack federal approval is not a legitimate basis for rejecting this approach, EIS at 57 (AR 16540), since, as the Park Service itself acknowledges in Appendix D, the EPA allows these fertility drugs to be used on an experimental basis. See AR 16797 (“[p]rior to EPA registration, products can be studied in free-ranging populations to gather safety and efficacy data *under an experimental use permit*”) (emphasis added). In fact, as the agency also acknowledges – in the Appendix – the two most effective forms of immunocontraception, PZP and GonaCon, have

Therefore, in light of the facts that (a) the deer population has remained stable for years; (b) the Record shows that the degradation of native species is principally caused by the spread of non-native plant species; (c) there are far less drastic ways to control any harm from population increases in the future; and (d) the agency itself concedes that killing deer will make it harder to use less drastic means in the future, see supra 18, the Park Service simply cannot reconcile its chosen management approach of killing this wildlife with its duty to “preserve” the deer in their “natural condition, *as nearly as possible*.”¹¹

II. THE NATIONAL PARK SERVICE HAS VIOLATED NEPA.

In choosing to kill the native wildlife in Rock Creek Park, the National Park Service has also violated NEPA in several respects.

already both successfully been used to control wild deer populations. See AR 16799 (noting that “*deer populations of relatively small size (<300-500 individuals) . . . may be gradually reduced using PZP treatments*”) (emphasis added); id. (noting that “deer density on Fire Island National Seashore was *significantly reduced*” in some areas through the use of PZP) (emphasis added); see also AR 16800 (noting that “[i]n free-ranging white-tailed deer, GonaCon is estimated to be 88% effective in preventing pregnancy during the first year post-treatment.”)

¹¹ Thus, this case is very different from both New Mexico State Game Commission v. Udall, 410 F.2d 1197 (10th Cir. 1969), and Davis v. Latschar, 83 F. Supp. 2d 1 (D.D.C. 1998), which upheld the Park Service’s decisions to kill deer in certain other national parks. Those parks were not governed by the same restrictive language that applies to Rock Creek Park. Moreover, in those cases the Park Service not only specifically invoked its authority under Section 3 of the Organic Act to authorize the “destruction” of “such animals” that may be “detrimental to the use” of the park, 16 U.S.C. § 3, it also produced evidence that killing the wildlife was absolutely necessary to preserving those parks – facts that are demonstrably absent here. See New Mexico State Game Comm’n, 410 F.2d at 1201 (evidence showed that killing the deer was “absolutely necessary for the proper management and administration of Carlsbad Caverns National park”); Davis, 83 F. Supp. 2d at 6 (concluding that the agency “made a sufficient ‘finding of detriment’” under Section 3 of the Act because it had determined that the historic woodlots and cropfields at Gettysburg National Park “could not be maintained” because of overbrowsing by deer). Here, not only did the Park Service fail even to invoke Section 3 of the organic statute as the basis for killing the deer, but, as demonstrated supra, it has no basis for finding that the deer are detrimental to *anyone’s* use of the Park.

A. The Park Service Has Violated NEPA By Failing To Address The Invasive Species Problem As Part Of Its Management Decision.

As explained, supra 5-6, the CEQ regulations require agencies to consider together in the same NEPA document multiple agency actions that are “connected,” “cumulative,” or “similar.” 40 C.F.R. § 1508.25(a); see also Kleppe v. Sierra Club, 427 U.S. at 406 (“[w]hen 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”) (emphasis added); Found. on Econ. Trends v. Heckler, 756 F.2d 143, 159 (D.C. Cir. 1985) (agencies may not segment their actions to unreasonably constrict the scope of the environmental review process); Fund for Animals v. Clark, 27 F. Supp. 2d 8, 13 (D.D.C. 1998) (“[i]f 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).

Here, there can be no question that the agency’s 2004 Draft Exotic Plan 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 native vegetation in that Park. Compare Draft Exotic Management Plan at 5 (AR 5301) (to control “ecologically harmful non-native plants” to ensure that “[p]opulations of native plant and animal species function in as natural a condition as possible”) (emphasis added) with Deer EIS at i (AR 16456) (explaining that the purpose of the action 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”) (emphasis added). Indeed, the EIS specifically lists as one of the

“objectives” of the deer management plan “*reduc[ing] the spread of nonnative plant species through effective deer management*”). Deer EIS at i (AR 16456) (emphasis added).

Moreover, the Record is replete with evidence that the native plant life is being destroyed by invasive exotic species. See supra 9-13. In light of this evidence, it is rather unremarkable that the deer could be perceived as having an adverse impact on this vegetation – there is increasingly less of the vegetation to be consumed *because of the exotic species problem*. But the deer are also part of the natural ecosystem – and hence part of the native wildlife that must be protected in the Park if at all possible. Therefore, to blame this problem on the deer, without addressing the underlying – *non-native* – cause of the diminution in native plant species illegally skews the environmental analysis that is required here. See also EIS at 28 (AR 16509) (acknowledging that “deer themselves are an important park resource”).

Thus, for example, in Fund for Animals v. Clark, the court held that the Service violated NEPA when, in deciding to allow the hunting of bison located on federal lands in Wyoming to reduce the population, the agency failed to take into consideration its own elk feeding program which is located in the same geographic area and was contributing to the increase in the bison population. 27 F. Supp. 2d at 13. As Judge Urbina of this Court found, “it is undisputed that the elk feeding program, the bison feeding program and the bison management plan all take place in the same geographic area,” and “that the elk feeding program has a profound effect on the bison herd.” Id. at 14. Accordingly, as required by NEPA, these programs “*should have been considered together* in the bison management [NEPA document] so that the involved agencies could *determine the combined impact of the programs.*” Id. (emphasis added).¹²

¹² Because the issues concerning the invasive non-native plant problem were not detailed in Plaintiffs’ original Complaint, Plaintiffs requested the government’s consent to amend the

Here, likewise, there can be no legitimate dispute that the Park Service’s exotic species draft management plan for the Park and its plan to reduce the deer population are closely related. Indeed, in response to public comments 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],” and that this could “provide an explanation for the alleged reduction in herbaceous cover, saplings, and overall forest regeneration” rather than any overpopulation of deer, the agency acknowledged – as it must – that “[t]hese two subjects [are] related.” EIS at 380 (AR 16871) (emphasis added). Nevertheless, the agency explained that these two issues were being “addressed in two different planning efforts,” *id.* (emphasis added) – precisely what NEPA does not allow.

Thus, as the Park Service’s internal records show, its own “Science Team” responsible for drafting the deer management plan noted that “[i]nvasive plant management is *background noise within the working document*,” 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 (AR 8515) (emphasis added). For these reasons, at least one member of the Science Team suggested that “the invasive species be wrapped into the EIS.” Minutes of Science Team (Dec. 16, 2005), at 2 (AR 7487); see also AR 17868 (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?”); AR 1471 (scientific literature noting that the “[p]otential for white-tailed deer to negatively affect songbirds and their habitats *must be evaluated concurrently with existing habitat conditions and other effects such as forest fragmentation . . . and*

Complaint to add these additional arguments. However, the government today informed Plaintiffs that they do not consent to this course of action, and, accordingly, Plaintiffs will be filing a motion to amend as soon as possible.

silvicultural practices”) (emphasis added). Indeed, if killing the deer each year for the next three years and beyond – as currently planned – will have no real effect on the native habitat because of the out-of-control invasive plant problem, this wildlife will be killed completely in vain, in violation of both NEPA and the Park Service’s separate mandate to preserve this wildlife.¹³

B. The Park Service Violated NEPA By Failing To Consider The Impact Its Action May Have On Promoting The Spread Of Exotic Species.

The Park Service also violated NEPA by failing to consider the adverse impact its decision to kill deer may have on actually promoting the spread of exotic species into the Park. Thus, 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 v. Sierra Club, 427 U.S. 390, 410 n.21 (1976), and an agency’s failure to consider an important environmental impact violates this duty. See, e.g., Nat’l Audubon Soc’y v. 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); Found. on Econ. Trends v. Heckler, 756 F.2d at 153-54 (finding environmental assessment inadequate for failing to “address a major environmental concern”); 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); Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183, 210 (D.D.C. 2008) (EIS failed to consider impacts of snowmobile use in national parks); City of Williams v. Dombeck, 151 F. Supp. 2d 9, 19-21 (D.D.C. 2001) (EIS inadequate for omitting analysis of certain impacts).

¹³ For similar reasons, by failing to finalize and execute its exotic species management plan rather than killing this native wildlife, the agency also failed to “rigorously explore and objectively evaluate” alternatives as required by NEPA. 40 C.F.R. § 1502.14.

As explained, supra 5-6, the CEQ regulations require agencies to consider all of the “environmental effects” their actions may have on the environment, including both “direct” and “indirect effects” – defined as those that are “reasonably foreseeable.” 40 C.F.R. § 1508.8; see also Friends of the Earth v. U.S. Army Corps of Eng’rs, 109 F. Supp. 2d 30, 40 (D.D.C. 2000).

Here, the agency’s own documents repeatedly stress that a major cause of the exotic species problem in the Park is the ornamental landscaping that is used in the surrounding residential neighborhoods. See Rock Creek Park Invasive Non-Native Plant Mitigation Program Final Report at 4 (AR 3596) (identifying the “numerous landscaped private properties” that surround the Park as “sources of 40 out of 41” of the invasive non-native plants that are “seriously threaten[ing] the integrity” of the Park; see also Draft Exotic Management Plan (AR 5297) at 29, 30, 40, 42, 47, 48, 50, 51, 53, 54, 55, 57, 61, 66, 72, 79, 80, 83, 84, 85 (identifying specific plants that are *widely used in landscaping* around the Park).

The Park Service also goes out of its way to stress that one of the *beneficial* environmental impacts of its decision to kill the deer is that this will alleviate the “[d]amage to landscaping” and concomitant “decline in property values for affected landowners” that is caused by deer eating these plants. EIS at 260 (AR 16747); id. at 257 (AR 16744); see also id. at 153 (AR 16638). Thus, the agency clearly identifies the *protection* of the exotic landscaping as an environmental plus of its action. Id.; see also EIS at 87 (listing as a negative environmental consequence of taking no action “additional damage to landscaping in the surrounding areas,” and as a “beneficial effect[.]” of killing the deer “fewer deer leaving the park and browsing landscaping on adjacent lands”). Yet, nowhere in the EIS does the agency even discuss the impacts its decision may have in exacerbating the already “critical” problem of invasive species

invading the Park from residential neighborhoods. Draft Exotic Management Plan at 2 (AR 5299).

This omission is particularly glaring in light of the fact that defendant Salazar chairs the “Invasive Species Council” that was established by Presidential Executive Order and which charges all agencies, and specifically the Department of the Interior, with the duty “*to prevent the introduction of invasive species and provide for their control.*” Exec. Order 13,112, 64 Fed. Reg. 6183, 6184 (emphasis added). Indeed, as the Council’s own Management Plan explains, one way that “all Federal Agencies” can carry out these important directives is through “[c]ompliance with the National Environmental Policy Act.” National Invasive Species Council Management Plan (2001), Pl. Ex. D. Thus, that document – which was co-authored by staff for the Department of the Interior, *see id.* at ii – stresses that compliance with NEPA “can serve to identify actions that are likely to affect invasive species or be affected by them.” *Id.* at 69. The Council’s Management Plan further explains:

[t]he rationale behind the NEPA process – *that agencies should be fully informed of the consequences of their actions before making a decision – is especially important when dealing with an issue like invasive species, where problems are often unanticipated side effects of otherwise desirable actions.* Analysis and interagency, intergovernmental, and public review and comment identify potential problems with invasive species for a particular proposed action may also yield ideas for alternative methods of approaching an issue or other forms of mitigation.

Id. (emphasis added).¹⁴

¹⁴ Although the Invasive Species Council’s Management Plan is referenced in the Executive Order which is cited in the EIS, *see* AR 16518, and defendant Salazar is the co-chair of the Council, 64 Fed. Reg. at 6184, the Park Service has refused to include this Management Plan in the Administrative Record for this case. However, because this document was clearly before the agency when it rendered the decision at issue here, it is definitely part of the “whole record” that the Court must take into account in deciding this case. *See* 5 U.S.C. § 706; *see also* Boswell Mem’l Hosp. v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984) (“[t]o review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the

That the Park Service violated its duty to consider this “indirect impact” of its chosen action is further underscored by the agency’s own Management Policies which provide that “[t]o meet its commitment[s] for maintaining native species in parks,” the Service will “prevent the introduction of exotic species,” § 4.4.1.1 (AR 7637); “[h]igh priority will be given to managing exotic species,” § 4.4.4.2 (AR 7642); and that “[w]here an exotic species cannot be successfully eliminated, *managers will seek to contain the exotic species to prevent further spread or resource damage.*” *Id.* (emphasis added). Clearly, by taking an action that the agency touts as “beneficial” to protecting the very exotic landscaping that it elsewhere admits is ruining the native vegetation in the Park, the agency is failing to do everything it can to “contain” these exotic species “to prevent further spread or resource damage.” *Id.*¹⁵

C. The Park Service Violated NEPA By Failing To Consider The Impact That Killing Native Wildlife Will Have On Important Aesthetic And Recreational Experiences Of Those Who Use The Park.

Finally, the Park Service violated NEPA by failing to consider the devastating impact its decision to kill this native wildlife will have on the public’s ability to enjoy this extremely special national park, which for over 120 years has been completely free of such violence against nature. As the Service’s own General Management Plan for the Park explains, the agency must

APA requires review of ‘the whole record.’”); *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197-99 (D.D.C. 2005) (“[A]gency may not skew the record in its favor by excluding pertinent but unfavorable information, [n]or may the agency exclude information on the grounds that it did not rely on the excluded information in its final decision.”) (citation omitted). Accordingly, Plaintiffs are also filing a motion to supplement the Record with this document.

¹⁵ Indeed, as demonstrated *supra* 5, the agency’s own Policies explain that it is only when the “human activities” causing a problem with a park’s wildlife “*cannot be modified or curtailed*” that the Service “may directly reduce the animal population.” NPS Management Policies, § 4.4.2.1 (AR 7638-39) (emphasis added).

consider the impact its actions will have on the “*traditional park character* and visitor experience.” Management Plan at vii (AR 18615) (emphasis added).

Here, as demonstrated, members of the public repeatedly informed the Park Service that the agency’s “preferred alternative” – which included baiting and killing deer with guns and arrows – would significantly mar their ability to enjoy using the Park as they have done for years because it will fundamentally change the overall character of the Park from a sacred tranquil place for peaceful contemplation and communing with wildlife to a place where wildlife is shot, maimed, and bled to death for almost half of each year. See supra 19-22. Moreover, many of these people visit the Park specifically to observe the deer, because the mere sight of these animals bring them “wonder,” “joy,” and a “thrill.” See supra 19-20. Not only will the killing program scheduled to take place each year over a period of five months severely diminish these particular experiences, but merely knowing that wildlife is being killed each night will itself generate extremely negative impacts, including not only distress and worry, but the irreparable transformation of this very special place of “peace and tranquility” in the middle of our nation’s capital into a common urban park where wildlife is “managed” with bullets, arrows, and other forms of violence. Supra 21-22; see also EIS at 7 (AR 16488) (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”) (emphasis added); 2005 Management Plan at 52 (AR 18681) (noting that a “desired visitor experience” for Rock Creek Park is the “opportunit[y] for . . . *contemplation of the forest*”) (emphasis added).

However, as explained supra 5-6, 37, NEPA requires that agencies consider the “aesthetic” effects of their actions, including how their actions will affect “*the relationship of people with th[e] environment.*” 40 C.F.R. §§ 1508.8, 1508.14 (emphasis added); see also Minn.

Public 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). As Judge Kessler explained in Bluewater Network v. Salazar, 721 F. Supp. 2d 7 (D.D.C. 2010), NEPA requires an agency to consider how a change in the “critical characteristics” of a park affects visitor experience. Id. at 42-43; see also 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 “value of place” – is relevant to analyzing alternatives and making decisions under NEPA); cf. Friends of the Earth v. Laidlaw Env’tl Servs., 528 U.S. 167, 181-82 (2000) (recognizing injury-in-fact for purposes of Article III standing where plaintiffs who wished to swim and fish in a river they used in the past were refraining from doing so because of their concern that the water was polluted, even though there had been “no demonstrated proof of harm to the environment”).

Here the Park Service not only failed to take the requisite “hard look” at these particular environmental consequences of its action, Kleppe v. Sierra Club, 427 U.S. at 410 n.21 – but took no look at all at these myriad adverse impacts of its chosen course. On the contrary, rather than include these extremely valid aesthetic concerns in the calculus when deciding what to do about a possible future overpopulation of deer, the agency summarily dismissed *all* adverse impacts to visitors as “negligible” simply because the killing would “primarily occur during fall and winter and at night” and not all of the deer would be killed. EIS at 247 (AR 16734). However, nowhere does the EIS consider how killing this native wildlife for the first time in the

history of this Park will destroy the overall experience of the Park for many members of the public who go there to enjoy and interact with this wildlife, and to appreciate the contemplative, peaceful setting that the Park provides in the midst of our nation's capital. This flagrant omission of an important aesthetic interest concerning "*the relationship of people with [their] environment*" violates NEPA, 40 C.F.R. § 1508.14 (emphasis added) – particularly when, in the words of the Park Service itself "*Rock Creek Park serves as an ambassador for the national park idea.*" EIS at 11 (AR 16492) (emphasis added).¹⁶

CONCLUSION

For all of the foregoing reasons, Plaintiffs are entitled to summary judgment.

¹⁶ As demonstrated in the accompanying declarations, Plaintiffs have Article III standing to bring this case – the individual plaintiffs and the organization's members live by and/or use Rock Creek Park on a routine basis; they will suffer aesthetic injuries from the Park's decision to begin killing deer in the Park for the first time in 120 years; those injuries are caused by the Park Service's decision; and the injuries will be redressed if plaintiffs prevail. See Declarations of Carol Grunewald (Pl. Ex. E), Jeremy Rifkin (Pl. Ex. F), Anne Barton (Pl. Ex. G), and Joseph Haptas (Pl. Ex. H); see also Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (requirements for standing). Moreover, all of Plaintiffs' interests fall well within the zone of interests of the Rock Creek Park enabling statute, the Organic Act, and NEPA.

Respectfully submitted,

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