

**B. DEFENDANTS' CONSIDERATION OF ALL
FEASIBLE AND REASONABLE ALTERNATIVES**

Plaintiffs next contend that the Final EIS and ROD are invalid because the COE did not consider all feasible and reasonable alternatives. Under NEPA, "federal agencies [are required] to 'study, develop, and describe appropriate alternatives . . . in any proposal which involves unresolved conflicts concerning alternative uses of available resources.'"⁵⁸ The COE must include a detailed discussion of each alternative so that reviewers can evaluate the merits of each, and must also discuss "mitigation measures not already included in the proposed action or alternatives."⁵⁹ However, an "agency's choice of which alternatives to discuss and the extent to which the EIS must discuss them [is reviewed by the Court] under the 'rule of reason.'"⁶⁰ This rule requires the Court to determine whether the EIS was "'compiled in good faith' and adequately sets forth sufficient information to allow the decision-maker to . . . make a reasoned decision after balancing the risks of harm to the environment against the benefits of the proposed action."⁶¹

For rejected alternatives, the COE must briefly discuss the reason for the alternative's rejection.⁶² An EIS need not be exhaustive;⁶³ nor must a court "'fly speck' an EIS for inconsequential or technical deficiencies."⁶⁴ However, "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate."⁶⁵

⁵⁸ *Friends of Boundary Waters Wilderness*, 164 F.3d at 1128.

⁵⁹ *Id.*

⁶⁰ *City of Carmel-By-The-Sea*, 123 F.3d at 1155.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Friends of Boundary Waters Wilderness*, 164 F.3d at 1128.

⁶⁵ *Dubois*, 102 F.3d at 1287.

Plaintiffs contend that the SMP is invalid because the COE did not consider the alternatives of off-lake dry storage facilities and commercial docks. According to Plaintiffs, it has long been the COE's policy to manage and protect the Lake's shoreline by encouraging boat owners to moor their boats at commercial marinas, utilize dry storage facilities off of project land, or trailer their boats to public launching ramps. The use of dry storage facilities and commercial docks, Plaintiffs maintain, is not an unreasonable method of shoreline management, and should have been evaluated by the COE in the Final EIS.⁶⁶ The statement in the Final EIS which provides that "some demand could be met by an increase in the availability of dry dock storage facilities in the area surrounding the lake" does not constitute a "rigorous exploration and objective evaluation of all reasonable alternatives," under 40 C.F.R. § 1502.14(a).

In response, Defendants contend that dry storage on the Lake has always been, and will always be, available on private land, but the COE cannot control off-site storage. Defendants point out that off-site dry storage at commercial marinas was discussed for various resource areas, but was rejected because dry-dock storage hurts "scenic attractiveness." The issue was also addressed during preliminary stages, including the possibility of providing road access, ramps, and courtesy docks on public land, but the public's reaction indicated a lack of interest.⁶⁷ Because the public did not

⁶⁶ See 40 C.F.R. § 1502.14; see also 45 Fed. Reg. 18026 (March 23, 1981), as amended by 51 Fed. Reg. 15618 (April 25, 1986) (providing that "an alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable."). *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 826 (D.C. Cir. 1972). Regarding dry storage facilities, Plaintiffs contend that COE should have fully considered off-site storage, even if the public's reaction to the proposed use of off-site storage was minimal during the scoping process. See *DuBois*, 102 F.3d at 1291 (holding that an agency must on its own initiative study all alternatives that appear reasonable and appropriate for study at the time, and must also look into other significant alternatives that are called to its attention by the public during the comment period).

⁶⁷ ARE at 12609. The record does not contradict the COE's statement that public interest during the Scoping process was minimal; however, Plaintiffs did submit comments regarding the issue of off-site storage after the COE completed the Draft EIS and Final EIS, on January 28 and June 11, 2002.

respond to the topic of off-site dry storage, the COE contends, it concluded that the topic was insignificant and did not analyze off-site storage as a separate alternative.

Next, Plaintiffs contend that the alternative use and/or development of commercial marinas as a reasonable and feasible alternative to the use of private boating facilities should have been fully developed in the Final EIS. Instead, this alternative was hardly mentioned, although the COE clearly recognized the benefit of commercial facilities when it noted in the Final EIS that "the services and storage facilities provided by these commercial operations will reduce the need for individually owned docks along the shoreline."⁶⁸

Although I agree that none of the six Alternatives studied by the COE during the preparation of the Final EIS was entitled "Off-Site Dry Storage," or "Commercial Docks," the possible use of such facilities permeates the record. For example, under the "No Action" alternative, if no additional private uses were allowed by the COE, patrons and guests of the Lake would be forced to rely on off-site dry storage and commercial facilities for all additional docking needs. Moreover, under the other alternatives, some, if not most, applications for permits would be denied. Those applicants who did not receive permits under any alternative discussed in the Final EIS will also be forced to choose between two alternative methods of storage--off-site storage, and commercial facilities.

The COE may encourage every single person to use off-site storage facilities, or commercial docks, but it cannot control where the Lake's users store their boats--particularly not when the storage involves the use of off-site facilities and commercial docks, over which the COE has no control. Because the COE has no control over the use of off-site and commercial facilities, and because the use of such facilities is implicit in the various alternatives discussed by the COE in the Final EIS, the 2002 SMP is not invalid simply because the COE did not include a detailed discussion of off-site and commercial facilities as separate alternatives to private uses.

⁶⁸ ARJ at 17098.

C. CONDITIONAL APPROVAL OF 15 REZONING APPLICATIONS

Plaintiffs next assert that the COE's decision to conditionally approve 15 applications for rezoning, each of which scored less than 90 percent on the COE's rezoning criteria is arbitrary and capricious. The origin of this issue can be traced back to the invalid 2000 SMP, under which the COE only required a score of 80 percent. Under the earlier SMP, there were 98 rezoning requests for private boat docks, and the COE issued 32 permits before this Court enjoined the implementation of the 2000 SMP.

Now, under the 2002 SMP, the COE has raised the requisite score to 90 percent. Of the 32 permits approved under the 2000 SMP, approximately 15 fail to satisfy the new criteria. Rather than deny those applications, the COE wants to conditionally approve those applications, which would allow those applicants to install boat docks in rezoned areas, but not to expand such docks in the future. Because the COE has raised its criteria, Plaintiffs insist, any attempt to grant these 15 permits is unreasonable, arbitrary, and capricious.

According to Defendants, the COE's scoring system consists of a Criteria Worksheet,⁶⁹ which has two categories. An application is automatically eliminated if the proposed location falls within a park buffer area or within a VHSA under the 2002 SMP. The second category contains elements for which up to 100 points may be given based on suitability, and a score of 80 percent was required for approval in 1999.

The COE notes that Plaintiffs never challenged the lower score, which was used in the EA prepared by the COE several years ago. According to the COE, a number of commentators believed that the 80 percent score was too low; and the COE ultimately decided to raise the score. A number of docks had already been approved under the previous system, and the COE believes that those docks should also given conditional approval under the new system because the applicants believed

⁶⁹ ARE at 19910.

they would be permitted to build their docks. According to Defendants, the decision to permit conditional approval to the 15 applicants under the original criteria is not unreasonable and is within the discretion permitted to the COE.

I agree with Plaintiffs in this instance. Although I agree that those individuals who received a permit under the 2000 SMP may have expected to be able to build a dock if the COE determined that the earlier SMP would result in no significant impact or other problem, I have previously held that the COE's finding of no significant impact was incorrect and unsupported by the record. When I so held, any expectation that the 32 applicants had of building a dock at the Lake ended. Later, when the COE decided to establish new criteria for rezoning requests, it was not compelled to do so by this Court, or by the general public. Nonetheless, once the COE establishes new criteria, it is bound to follow them. Approval of docks which do not meet the new criteria is arbitrary and capricious, and will not be approved. Plaintiffs ask me to strike, or to enjoin Defendants from implementing that portion of the 2002 SMP in which the COE expressed its intent to approve non-qualifying permits, without invalidating the entire 2002 SMP, and to the extent that I have jurisdiction to do so, Defendants are enjoined from issuing any permits to those applications which do not satisfy the 90 percent criteria. Furthermore, I am also aware that five docks have already been constructed on the Lake under permits issued under the invalid 2000 SMP. I previously allowed those docks to remain on the Lake, provided they were maintained to prevent movement or deterioration, and provided that they were not used for recreational purposes, until a new SMP was developed. If any of these docks are still located on the Lake, to the extent that they do not satisfy the new 90 percent criteria, they must be removed within ninety (90) days of this Order.

D. THE EXAMINATION OF CUMULATIVE IMPACTS

Plaintiffs also contend that the COE failed to adequately examine the cumulative impacts of the COE's other proposed actions concerning the Lake; therefore, the Final EIS and ROD are invalid.

According to Plaintiffs, the Defendants failed to consider the cumulative impact of a new commercial dock on Cove Creek near the South Lake Area; future subdivision development; and various studies which might lead to action by Defendants in the future. These projects and studies, according to Plaintiffs, will result in additional consumption of the Lake's drinking water, a higher demand to sustain the White River, and a higher demand for water for irrigation projects. As a result, frequent and substantial water level fluctuations will occur, boat docks and moorings will be effected, and the shoreline will erode. Alternatively, Plaintiffs contend that the COE's discussion of cumulative impacts in the Final EIS is too brief, unfocused, inconclusive, and unscientific to satisfy NEPA, and that the EIS's limited evaluation period, which begins 10 years ago and ends 5 years in the future, is inadequate to assess the cumulative impacts of the Final EIS and the 2002 SMP.

Under NEPA, agencies are required to consider "connected actions," "cumulative actions," and "similar actions,"⁷⁰ to "prevent an agency from 'dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact."⁷¹ The term "cumulative impact" is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions."⁷² Cumulative impacts may result from individually minor but collectively significant actions taking place over a period of time.⁷³ Agencies are required to

⁷⁰ 40 C.F.R. § 1508.25.

⁷¹ *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000).

⁷² 40 C.F.R. § 1508.7; see also *Lakes Region Legal Defense Fund, Inc. v. Slater*, 986 F. Supp. 1169, 1197 (N.D. Iowa 1997).

⁷³ 40 C.F.R. § 1508.7.

consider cumulative impacts because, although the impact of a particular project may be inconsequential when considered in isolation, the impact of that project may be quite significant when considered in conjunction with other planned projects.⁷⁴

This inquiry requires "some quantified or detailed information . . . [g]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided."⁷⁵ The agency's analysis must also be "more than perfunctory; it must provide a 'useful analysis of the cumulative impacts of past, present, and future projects."⁷⁶ But, agencies are not required to blindly hypothesize or speculate on the possible impacts of uncertain future actions.⁷⁷

When a contemplated action reaches the stage where an actual proposal is prepared, a later impact statement "will take into account the effect of . . . [its] approval upon the existing environment; and the conditions of that environment presumably will reflect earlier proposed actions and their effects."⁷⁸ A future project which is only in the preliminary stages may be excluded from this examination if the end result is highly speculative.⁷⁹ The Supreme Court has stated that "[w]here no . . . plan exists, any attempt to produce an impact statement would be little more than . . . [an] estimate[] of potential development and attendant environmental consequences."⁸⁰ Ultimately, the

⁷⁴ *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 809 (8th Cir. 1998); see also *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 180 (3d Cir. 2000).

⁷⁵ *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002).

⁷⁶ *Id.*

⁷⁷ *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.20 (1976).

⁷⁸ *Id.*

⁷⁹ *Society Hill*, 210 F.3d at 182.

⁸⁰ *Sierra Club v. Marsh*, 769 F.2d 868, 879-80 (1st Cir. 1985).

question which must be answered by the court is whether the other projects are "reasonably foreseeable future actions."⁸¹

As a preliminary matter, I am inclined to agree that a 15-year evaluation period for past and future actions (particularly when another SMP will be completed in 5 years which must also comply with NEPA's requirements) is sufficient to satisfy NEPA. Moreover, I agree that Defendants are only required to examine "actual and immediate cumulative impacts" (the five-year period considered by Defendants satisfies this requirement). Defendants are not required to examine every "potential and hypothetical cumulative impact" that might occur in the future. The question, therefore, is whether the projects and studies cited by Plaintiffs are too speculative or too remote to compel inclusion in the Final EIS and 2002 SMP, or whether they truly are "reasonably foreseeable future actions." For simplicity's sake, I will address each separately.

1. The Cove Creek Marina

In the Final EIS, the COE mentions that the "only important future action known to be planned and included in the analysis [Final EIS] was the new marina under consideration for Cove Creek in the south lake area."⁸² Plaintiffs contend that the COE failed to consider the impact of the new marina as an alternative to private boat docks in the south lake area, or the cumulative impact of that commercial dock in addition to several new private docks under the 2002 SMP.

The record contains multiple references to the Cove Creek marina, and although the COE is required to evaluate cumulative impacts, there is no evidence in the record that the Cove Creek marina had proceeded beyond the planning or speculative phase when the Final EIS for the 2002 SMP was prepared. Nonetheless, Defendants considered the Marina when preparing the Final EIS,

⁸¹ *Kern*, 284 F.3d at 1075.

⁸² ARE at 17104.

and stipulated that an additional EA (or EIS, presumably) will be completed when and if the project every proceeds beyond the speculative phase.

Plaintiffs' primary complaint is that Defendants should have treated the Marina as an alternative to private uses. The phrase "cumulative impacts," however, presumes the development and coexistence of both the Marina and the proposed private uses, not the alternative use of one or the other. Because the record considers the future construction of the Marina throughout the EIS, and because the record is clear that an additional environmental study will occur when the plans for the Marina are more certain, NEPA is satisfied.⁸³

2. Subdivision Development

According to the Final EIS, "more than 200 subdivisions adjoin the Greers Ferry Lake project property," of which 30 percent have been developed.⁸⁴ Plaintiffs assert that the Final EIS is deficient because it does not evaluate the cumulative impacts of the subdivisions on future boat dock proliferation, road development, septic and sewage systems, and related infrastructure development. Plaintiffs also contend that the COE's failure to consider the increased demand for dock permits should have been considered by Defendants. Finally, Plaintiffs insist that the development of the subdivisions will also impact the quality of the Lake's water, to the detriment of humans, fish, and wildlife.

Although I am mindful of Plaintiffs concern, I note first that the 200 subdivisions mentioned by Plaintiffs have existed since 1974, when the original Lakeshore Management Plan was drafted. At that time, only 10 percent of the subdivisions were developed.⁸⁵ By 1982, 20 percent of the lots

⁸³ *Id.*

⁸⁴ *Id.* at 17043.

⁸⁵ *Id.* at 880.