

ensure that environmental consequences have been fully evaluated.⁹⁹ Under *Robertson v. Methow Valley Citizens Council*,¹⁰⁰ the mitigation measures contained in the record were reasonably sufficient and thorough enough to satisfy NEPA.

F. EXTENSION OF THE VEGETATION MODIFICATION PERMIT RADIUS

In the Final EIS and 2002 SMP, the COE increases the area in which a landowner adjacent to the government's easement may mow or cut vegetation from a radius of 50 feet from the edge of a habitable structure (as permitted under previous SMPs) to 100 feet, unless the radius extends into a vegetation "buffer" area of 100 feet from the shoreline. This increase, Plaintiffs assert, is "without scientific justification or reasonable basis, and is arbitrary and capricious" because the National Fire Protection Standard only recommends a 30-foot vegetation clearance. Any increase, according to Plaintiffs, will cause significant adverse environmental impact by: (1) reducing the amount of natural vegetation around the Lake, which could lead to increased soil erosion and sedimentation; and (2) increasing the amount of pesticide/herbicide used in the Lake's vicinity, which could cause indirect adverse effects to wetland vegetation. Plaintiffs contend that the COE has completely ignored the potential environmental impact on the Lake's shoreline and ecology. I disagree.

Before 1971, vegetation modification permits were issued to beautify the shoreline in front of property, and to provide a better view of the Lake.¹⁰¹ Individuals were allowed to remove brush, weeds, and dead trees on government property. In 1975, the Lakeshore Management Plan allowed the Project's resident identify, on a case-by-case basis, those persons who could mow up to 200 feet from certain buildings.¹⁰² In 1982, the Resident Engineer at Greers Ferry Lake reduced the approved

⁹⁹ *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 527 (9th Cir. 1994).

¹⁰⁰ 490 U.S. 332 (1989).

¹⁰¹ ARE at 912.

¹⁰² *Id.* at 887. At that time, only hand-operated tools could be used—no tractors or bulldozers. Also, only dead or diseased trees could be cut and removed. Flowering trees or shrubs could not,

maximum mowing radius from 200 feet to 50 feet, removed the condition that only previously inspected dead or diseased trees could be cut, and added a requirement that requests for landscape activities must be accompanied by a detailed or well-described landscape plan.¹⁰³

A review occurred in 1993, and approximately 1450 petitions or letters requested that the radius be extended to 200 feet. Eighty-one letters or comments favored the retention of the 50-foot limit.¹⁰⁴ The COE decided not to modify the 50-foot radius without first preparing an EA or environmental study. Thus, the acceptable radius has ranged from 200 feet to 50 feet.

Defendant now want to extend the mowing radius to 100 feet. This decision is not arbitrary or capricious, according to Defendants, because it was based on publications from the United States Fire Administration and other experts,¹⁰⁵ which explain that vegetation cleared to within 30 feet of a habitable structure is a *minimum* distance for wildfire protection. In fact, Defendants point out, the experts suggest that the mowing radius could be extended to as much as 150 feet under certain environmental circumstances. According to Defendant, the 100 feet falls within the radius advocated by the government and other experts, and because the decision was also based on a desire to protect the Lake, and with respect to homeowners' desire to protect their homes,¹⁰⁶ it was not arbitrary, capricious, or an abuse of discretion.

I am forced to agree with Defendants because, if the formerly-established 200-foot mowing radius did not violate NEPA, I cannot conclude that a decision to establish a 100-foot radius violates

nor could healthy trees larger than two inches in diameter in most circumstances. Finally, trimming of healthy trees to enhance the view was absolutely prohibited.

¹⁰³ *Id.* at 2012.

¹⁰⁴ *Id.* at 2056-57.

¹⁰⁵ *Id.* at 16707-08, 16711-13, 16678-87, and 16726.

¹⁰⁶ ARE at 19899.

NEPA, particularly when Defendants have provided what appears to be a reasonable explanation for its decision. In cases such as this, I am not permitted to replace the agency's judgment with my own.

G. VERY HIGH SCENIC AREAS

For the same reason that I am not permitted to substitute my judgment for that of Defendants, I cannot say that Defendants' decision to designate certain areas of the Lake as very high scenic areas was arbitrary and capricious because Defendants should have included other areas of the Lake.¹⁰⁷ Plaintiffs also point out that the only shoreline classifications recognized in the 2002 SMP are Limited Development Areas, Public Recreation Areas, Protected Shoreline Areas, and Prohibited Access Areas. If the VHSA classification is indeed new and provides additional safeguards, Plaintiffs assert, it should be included in the SMP as a separate classification and should be included on the shoreline allocation maps.

I note that the four classifications included in the 2002 SMP are those provided for by the COE's regulations, including 36 C.F.R. § 327.30. No new classifications are permitted. Although the COE is permitted to establish very high scenic areas, it is certainly not required to do so. In this case, the COE has chosen to designate certain areas as VHSA's. In those areas, no shoreline reallocation requests may be approved, although grandfathered boat docks in the VHSA's could not be ordered to be removed, and could be improved in accordance with the SMP. NEPA requires agencies to reach "line-drawing decisions," such as this.¹⁰⁸ I could not compel the COE to establish this new classification of VHSA, nor would it be appropriate for the Court to substitute its own judgment for that of the COE in identifying areas of the lake that should be designated as a VHSA.

¹⁰⁷ Those areas which were excluded by the COE, according to Plaintiffs, include the Sugarloaf Mountain area; the area south of Miller Point and Eden Isle; the area known as Peters Creek; the area between Dam Site Park and Location Marker 1; and the area across from Dam Site Park.

¹⁰⁸ See *Methow Valley Citizens Council*, 490 U.S. at 350.

H. BOAT DOCK SIZES

Next, Plaintiffs contend that the COE violated its regulations and guidelines regarding the permitted size of boat docks at the Lake. According to Plaintiffs, the COE wants to grant 56 rezoning requests for boat docks: 4 docks will contain 20 slips; 2 will contain 8 slips; 1 will contain 7 slips; 6 will contain 6 slips; 9 will contain 4 slips; 2 of the "conditional" permits will contain 4 slips each; and the remainder will contain either 2 or 3 slips. However, there is no indication in the Final EIS or 2002 SMP that the COE obtained information from any of the applicants regarding the number of boats that each applicant personally owns, despite the fact that the COE's regulations provide that: "no private floating facility will exceed the minimum size required to moor the owner's boat or boats plus the minimum size required for an enclosed storage locker of oars, life preservers, and other items essential to watercraft operation."¹⁰⁹ By allowing the construction and installation of docks on the Lake without determining the number of boats that each applicant owns, Plaintiffs contend, the COE has acted in an unreasonable, arbitrary, and capricious manner.

In response, Defendants point out that Appendix A of 36 C.F.R. § 327.30 provides that "group-owned boat mooring facilities may be permitted in limited development areas where practical (i.e., where physically feasible in terms of access, water depth, wind protection)."¹¹⁰ The Final EIS also states that "a family household may have a maximum of two slips in any dock and may not own an interest in more than one facility. Valid state boat registration will be necessary to verify slip

¹⁰⁹ 36 C.F.R. § 327.30.

¹¹⁰ 36 C.F.R. § 327.30, App. A, provides that "permits for individually or group owned shoreline use facilities may be granted only in Limited Development Areas when the sites are not near commercial marine services and such use will not despoil the shoreline nor inhibit public use or enjoyment thereof. The installation and use of such facilities will not be in conflict with the preservation of the natural characteristics of the shoreline nor will they result in significant environmental damage. Charges will be made for Shoreline Use Permits in accordance with the separately published fee schedule.

needs."¹¹¹ The Final EIS also provides that a family household may have only one of the following: (1) a permit for a floating facility; (2) ownership of a slip in a community dock; (3) a real estate instrument for a tramway. The Operations Manager will approve the size, configuration, and anchoring plan for docks. The maximum size of a group-owned private floating facility will be 20 slips for safety reasons and to assure maneuverability of the dock during periods of pool fluctuation.

Defendants insist that group-owned boat mooring facilities are allowed under the applicable regulations, but admit that each dock can only be as large as is necessary to house the boats and gear of the owner, *i.e.*, the group, and that only one permit is necessary for a group owned mooring facility, no charge may be made for use on any permitted facility by others nor shall any commercial activity be engaged thereon. After considering the regulations, it appears that Defendants are correct, and that I cannot hold that group-owned private uses are not permitted as a matter of law.

V. CONCLUSION

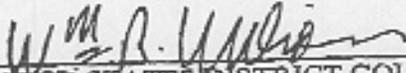
After reviewing the parties' papers and the accompanying record, I conclude that I cannot invalidate the Final EIS, ROD, and 2002 SMP prepared by Defendants. However, Defendants are enjoined from issuing permits to those applications which do not satisfy the 90 percent requirements established by the COE in the 2002 SMP. To the extent that any of the five docks constructed on the lake under the invalid 2000 SMP do not satisfy the 90 percent requirement and remain on the Lake, they must be removed within ninety (90) days of this Order. Thus, Plaintiffs' Summary Judgment Motion (Doc. No. 18) is GRANTED in PART and DENIED in PART, as is Defendants' Cross Motion for Summary Judgment (Doc. No 28).¹¹²

¹¹¹ ARE at 17519.

¹¹² Although not discussed in detail in this Order, I also hold that the 2002 SMP *does* adequately depict those areas designated as VHSAs; that there is no way for this Court to prohibit Defendants from accepting rezoning requests during the next SMP review; and that the full text of "A Study of the Recreational Capacity of Greers Ferry Lake" which was referenced in the record, need not be included in the record because it is available online and by request.

I point out again that I am precluded from substituting my judgment for that of an agency (here, the COE), unless the agency's decisions were "arbitrary or capricious." I am uneasy with some of the agency's decisions discussed above but, in my judgment, these decisions do not go beyond the pale, i.e., the evidence does not support a conclusion that they were "arbitrary and capricious."

IT IS SO ORDERED this 30th day of September, 2004.


UNITED STATES DISTRICT COURT
WM. R. WILSON, JR.

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ON 9/30/04 BY [Signature]