

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided solely on legal grounds.²⁷ The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

The inquiry is . . . whether there is a need for trial—whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.²⁸

The Eighth Circuit Court of Appeals has cautioned that summary judgment should be invoked carefully, so that no person will be improperly deprived of a trial of disputed factual issues.²⁹ The Eighth Circuit set out the burden of the parties in connection with a summary judgment motion in *Counts v. MK-Ferguson Company*:³⁰

[T]he burden on the moving party for summary judgment is only to demonstrate, *i.e.*, '[to] point out to the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.³¹

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.³²

²⁷ *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); FED. R. CIV. P. 56.

²⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

²⁹ See *Inland Oil & Transport Co. v. United States*, 600 F.2d 725 (8th Cir. 1979), *cert. denied*, 444 U.S. 991 (1979).

³⁰ 862 F.2d 1338 (8th Cir. 1988).

³¹ *Id.* at 1339 (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988) (citations omitted) (brackets in original)).

³² *Liberty Lobby*, 477 U.S. at 248.

III. NEPA STANDARD OF REVIEW

Plaintiffs challenge the EIS prepared by Defendants under the National Environmental Protection Act ("NEPA").³³ NEPA "declares a broad national commitment to protecting and promoting environmental quality"³⁴ and has "twin aims."³⁵ First, NEPA "ensures that [an] agency takes a 'hard look' at the environmental consequences of its proposed action"³⁶ Second, it "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process."³⁷ NEPA "does not mandate particular results, but instead prescribes only a process to ensure that federal agencies consider the environmental consequences of particular actions."³⁸

Under NEPA, a federal agency is required to prepare "a detailed statement . . . on the environmental impact" of any proposed major federal action "significantly affecting the environment."³⁹ As the Eighth Circuit has explained in *Friends of Boundary Waters Wilderness v. Dombeck*,⁴⁰

NEPA requires that the agency take a hard look at the environmental consequences of a project before taking a major action. The statute requires a detailed statement from which a court can determine whether the agency has made a good faith effort

³³ 42 U.S.C. § 4321, *et seq.*

³⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 328 (1989).

³⁵ *See, e.g., Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983).

³⁶ *Dubois v. USDA*, 102 F.3d 1273, 1286 (1st Cir. 1996) (identifying the EIS as the "primary mechanism for implementing" NEPA), *cert. denied*, 521 U.S. 1119 (1997).

³⁷ *Baltimore Gas*, 462 U.S. at 94.

³⁸ *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1293 (8th Cir. 1990); *see also Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1172 (10th Cir. 1999); *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1150 (9th Cir. 1997).

³⁹ 42 U.S.C. § 4332(2)(C)(i).

⁴⁰ 164 F.3d 1115 (8th Cir. 1999).

to consider the values NEPA seeks to protect. The statement must not merely catalog environmental facts, but also explain fully its course of inquiry, analysis and reasoning. The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious. Adequate agency consideration is evidenced through the EIS's form, content, and preparation. We need not fly speck an EIS for inconsequential or technical deficiencies. Instead, we consider whether the agency's actual balance of costs and benefits was arbitrary or clearly gave insufficient weight to environmental values.⁴¹

The "arbitrary and capricious" standard requires the reviewing court to carefully evaluate the record to determine whether the agency's decision was based on a "reasoned evaluation of relevant factors."⁴² Moreover, courts have been unwilling to give a merely cursory review of an agency's action, or to act as a simple rubber stamp. As explained by the Supreme Court:

Courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information. A contrary decision would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation of relevant facts.⁴³

Plaintiffs also contend that, although actions and decisions involving technical expertise "uniquely within the purview of the agency may be entitled to deference," those actions and decisions concerning legal issues, requirements, or procedure, or within the realm of common human experience, are entitled to less deference.⁴⁴ In this case, Plaintiffs contend that the determination of whether Defendants failed to follow NEPA and applicable regulations involve issues which are entitled to less deference by this Court.

⁴¹ *Id.* at 1128.

⁴² *Oregon Natural Desert Ass'n v. Green*, 953 F. Supp. 1133 (D. Ore. 1997).

⁴³ *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989); see also *Audubon Soc. of Cent. Ark., et al v. Dailey*, 977 F.2d 428, 434 (8th Cir. 1992).

⁴⁴ See *Powell v. Heckler*, 789 F.2d 176 (3d Cir. 1986); *Everhart, et al. v. Bowen*, 649 F. Supp. 1518 (D. Colo. 1988).

IV. DISCUSSION

Plaintiffs assert that summary judgment should be granted in their favor because the COE's regulations prohibit the COE from issuing permits for private boat docks. Because the 2002 SMP provides for such permits, Plaintiffs contend, the 2002 SMP is invalid and should be declared void. If the Court agrees with this argument, it need not address the other issues; if not, Plaintiffs argue that the Final IIS is deficient because: (1) the COE did not analyze all reasonable and feasible alternatives to the proposed Alternative 6; (2) the COE did not evaluate the cumulative environmental impact of several federal and non-federal actions which might occur in the future; (3) the COE decision to extend the mowing radius 100 feet was arbitrary and capricious; (4) the COE did not adequately discuss mitigation measures; (5) the COE did not adequately justify or establish criteria for the designation of "Very High Scenic Areas" ("VHSAs") at the Lake, and omitted areas which should have been included; (6) the COE's decision to grant rezoning permits to 15 applications which fell below the COE's 90 percent evaluation criteria is arbitrary and capricious; and (7) the COE violated its own regulation regarding the maximum size of private boat docks. I will address each of these arguments, and Defendants' responses, in turn.

A. THE COE'S REGULATIONS REGARDING PRIVATE USES

According to Plaintiffs, the 2002 SMP is invalid because the COE would allow additional private uses on the Lake, in violation of its own Shoreline Management regulations. Specifically, Plaintiffs contend that the COE's regulations prohibit private shoreline uses on the Lake after December 13, 1974 (for non-boat dock private uses), or after November 17, 1986 (for boat docks). Plaintiffs first point to 36 C.F.R. § 327.30(d)(2), which provides that:

Private shoreline uses may be authorized in designated areas consistent with approved use allocations specified in the Shoreline Management Plans. Except to honor written commitments made prior to publication of this regulation, *private shoreline uses are not allowed on water resources projects where construction was initiated after December 13, 1974, or on water resources projects where no private shoreline uses existed as of that date. Any existing permitted facilities on these*

projects will be grandfathered until the facilities fail to meet the criteria set forth in § 327.30(h)(emphasis added).⁴⁵

According to Plaintiffs, the word "construction" in section 327.30(d)(2) refers to "private shoreline uses." Plaintiffs contend that any other interpretation of this regulation would render the last sentence of this section, which provides that permitted facilities will be grandfathered in until they no longer meet certain criteria, meaningless and superfluous. Plaintiffs also insist that, if private uses were permitted, there would have been no need for Congress to extend the 1974 date to December 31, 1989 for docks in place under a valid permit as of November 17, 1986, as it did in in Pub. L. 97-140.⁴⁶ Under these two provisions, Plaintiffs maintain, Defendants are prohibited from permitting any private shoreline uses, including boat docks, mowing, and other private uses to be located on the government-owned portion of the Lake's shoreline; thus, to the extent that the 2002 SMP allows new private shoreline uses, the SMP is contrary to the COE's regulations and should be declared invalid.

Defendants, however, contend that the word "construction" in 36 C.F.R. § 327.30(d)(2) refers to "water resource projects" rather than the word "uses." Defendants submit that, because the Lake existed before December 13, 1974, and because private uses were allowed on the Lake before that date, private shoreline uses may be authorized by the Corps, if a valid SMP is prepared.⁴⁷ Defendants

⁴⁵ 36 C.F.R. § 327.30(d)(2). In Pub. L. 99-662 (enacted November 17, 1986), Congress has stated that docks that were in place as of December 31, 1989, need not be removed (including houseboats, boathouses, floating cabins, sleeping facilities at marinas, or lawfully installed dock or appurtenant structures), if they: (1) are properly maintained; (2) do not threaten any life or property; and (3) the owner substantially complies with existing leases or licenses. This law provide, however, that such docks may be removed "where necessary for immediate use for public purposes . . . or for a navigation or flood control project." This exception has been incorporated into 36 C.F.R. § 327.30(h).

⁴⁶ See also 36 C.F.R. 327.30(h).

⁴⁷ Defendants contend that this interpretation has been followed by the COE for more than 30 years, and that, under this regulation, the COE reviewed and permitted hundreds of private docks in the Little Rock District and thousands of docks throughout the United States after 1974. See also

agree that no private shorelines uses are permitted (1) on those projects that were constructed under the COE's direction after 1974, or (2) on projects where no private shoreline uses existed in 1974, and that no SMPs are required for those two types of projects.

To support their position, Defendants also refer to 36 C.F.R. § 327.30(d)(3), which provides that "[a] Shoreline Management Plan . . . will be prepared for each Corps project where private shoreline use is allowed . . . [and] will be reviewed at least once every five years and revised as necessary."⁴⁸ This section also provides that: "[e]xcept to honor written commitments made prior to the publication of this regulation, shoreline management plans are not required for those projects where construction was initiated after December 13, 1974, or on projects not having private shoreline use as of that date."⁴⁹ In such cases, "a statement of policy will be developed by the district commander to present the shoreline management policy . . . [which] will be subject to the approval of the division commander."⁵⁰

After reading the parties' briefs, hearing oral arguments, and reading the cited regulations and laws, I must agree with Defendants' interpretation of the regulations for several reasons. First and foremost, there is the language of the regulations. The first regulation provides that "private shoreline uses are not allowed on water resources projects where construction was initiated after December 13, 1974, or on water resources projects where no private shoreline uses existed as of that date."⁵¹ The very next section of this regulation provides that "shoreline management plans are not required for those projects where construction was initiated after December 13, 1974, or on projects

Aff. of George E. Tabb, Jr., Chief, Natural Resources Management Branch, Operations and Regulatory Division, U.S. Army Corps of Engineers.

⁴⁸ 36 C.F.R. § 327.30(d)(3).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 36 C.F.R. § 327.30(d)(2).

not having private shoreline use as of that date."⁵² Under these two sections, it appears that SMP are only required for projects, such as the Lake, which existed before 1974 and allowed private shoreline uses before that date. Otherwise, only a policy statement approved by a division commander is required. If the Court were to adopt Plaintiffs' interpretation, in view of the language of the regulation, why would an SMP even be permitted?

Moreover, the language of the two statutes is similar in that both refer to "construction" and "projects." The phrase missing in the second section, which is so similar to the first, is the phrase "private shoreline uses." In view of the similarities between the two regulations, and the fact that the word "construction" clearly refers to the word "projects" in the second regulation, I cannot accept Plaintiff's argument that "construction" refers to "private shoreline uses" in the first regulation.

There is another aspect of Plaintiff's interpretation with which I take issue. Plaintiffs note that, under Pub. L. 99-662, Congress has provided that the COE could not compel the removal of docks in place under a valid permit as of November 17, 1986. Also, in Pub. L. 97-140, Congress provided that no "lawfully" installed dock may be ordered to be removed before December 31, 1989, if the dock was located on the project on December 29, 1981. Under the Plaintiffs' interpretation of the applicable regulations, I do not understand how any private uses after 1974 could be "lawful." This is another reason why I cannot adopt Plaintiffs' interpretation of the regulations.

Finally, I note that the specific challenge against private shoreline uses raised by Plaintiffs in this case has never, as far as I can tell, been challenged in any court of the United States. In *Liddle v. Corps of Engineers*,⁵³ the COE leased land to the Metropolitan Development and Housing Agency, which in turn subleased the land to the Young Men's Christian Association of Nashville and Middle

⁵² 36 C.F.R. § 327.30(d)(3).

⁵³ 981 F. Supp. 544 (M.D. Tenn. 1997).

Tennessee.⁵⁴ According to the Master Plan prepared in that case, a portion of the lake was designated as an "urban park" to benefit the public, because of its location in a highly populated area and the site's large amount of undeveloped land. The COE concluded that the YMCA's use of the land fit within the definition of a public use.⁵⁵

Plaintiffs contended that the COE violated its regulations by not preparing a Shoreline Management Plan because the day camp sought to be operated by the YMCA was, according to Plaintiffs, a private use, rather than a public use. The court held that the camp's purposes were consistent with the public nature of the urban park. The court also noted in a footnote that, "[i]f the Corps authorizes private shoreline use, it must prepare a Shoreline Management Plan in compliance with its regulations."⁵⁶ The court later reiterated that, because no private shoreline uses were created, "the Corps was not required to comply with the regulations requiring a Shoreline Management Plan."⁵⁷ In 1997, when the opinion was issued, there is no reason why a Court would recognize that SMPs are required when private shoreline uses are permitted, if, in fact, such uses were not permitted after 1974 (or as late as the mid- to late-1980s, as Plaintiffs insist). This suggests to me that the regulation permits private uses on Corps projects that were constructed on or before December 14, 1974, such as Greers Ferry Lake. Thus, Plaintiffs' Motion for Summary Judgment with respect to this point is DENIED.

⁵⁴ The lake in question in that case, Priest Lake existed before December 13, 1974, the relevant date for our purposes.

⁵⁵ The proposed development of the land included boat docks, a fishing pier, and other things.

⁵⁶ *Liddle*, 981 F. Supp. at 552 n.13.

⁵⁷ *Id.* at 554.