Rocky Mountain Peace & Justice Center v. USFWS—Environmental groups' NEPA challenge to modification of trail paths within the Rocky Flats National Wildlife Refuge rejected by Tenth Circuit

Congress established the 6200-acre Rocky Flats National Wildlife Refuge in 2001 six years prior to the completion of a CERCLA cleanup of a nuclear defense facility near Denver, Colorado that the Refuge encircled. Pub. L. No. 107-107, 115 Stat. 1012. The statute provided for transfer of administrative jurisdiction over the area from the Department of Energy to the United States Fish and Wildlife Service once the Environmental Protection Agency deemed the cleanup completed. Also pursuant to the statute, the eventual 2007 jurisdictional handover did not include the former facility's "Industrial Area." The Service issued a Comprehensive Conservation Plan and Environmental Impact Statement in 2004 as to the Refuge's management and public use, including creation of a 16-mile trail system. The CCP/EIS's preferred alternative was adopted in a 2005 record of decision. The Service annexed a 640-acre parcel to the Refuge in 2012 after preparation of an Environmental Assessment finding no significant impact from the agency action.

The Service next issued an Environmental Action Statement in 2018 that prompted this litigation. First, the EAS modified, inter alia, the Rocky Mountain Greenway trail that, as proposed to be configured, would run between the Refuge's northern border in a southwest direction before turning eastward to south of the Industrial Area. The Service concluded, based on several categorical exclusions, that the trail modifications did not warrant EA or EIS review and further "that the changes did not involve any extraordinary circumstances prohibiting the use of the categorical exclusions." Second, the EAS identified "potential changes" to the eastern portion of the Greenway trail, one of which would shift it into the "Wind Blown Area" that lies east of the Industrial Area. The Service excluded this potential re-routing from the EAS analysis because it "'may or may not occur in the future'" and, if it did, "'an additional NEPA determination will be required[.]'"

After issuance of the EAS, various environmental groups sued the Service, alleging violation of NEPA, the Endangered Species Act, and the Administrative Procedure Act. The district court dismissed the plaintiffs' ESA claim for lack of Article III standing and, as to the remaining claims, deemed "[t]he question before [it] ... a narrow one: whether the Fish and Wildlife Service followed the proper procedural processes in approving limited modifications to the planned multi-use trail system in Rocky Flats National Wildlife Refuge[;]" answered it affirmatively; and entered judgment in the Service's favor. *Rocky Mountain Peace & Just. Ctr. v. U.S. Fish & Wildlife Serv.*, 548 F. Supp. 3d 1042, 1066-67 (D. Colo. 2021).

The Tenth Circuit affirmed. *Rocky Mountain Peace & Just. Ctr. v. U.S. Fish & Wildlife Serv.*, No. 21-1310, 2022 WL 2812879 (10th Cir. Jul. 19, 2022). The panel began by denying the Service's newly mounted challenge to the plaintiffs' standing to raise the NEPA claims but affirming the district court's dismissal of the ESA claim on Article III grounds. Addressing the merits, it rejected the plaintiffs' argument that "the Service violated NEPA by (1) segmenting the proposed trail modification into the Wind Blown Area from the 2018 EAS's analysis, (2) relying on the categorical exclusions to avoid conducting an EA, and (3) failing to prepare a supplemental EIS based on significant new circumstances."

The panel subjected the segmentation claim to the independent-utility test; i.e., "'projects that have independent utility are not connected actions.'" Here, "[t]he modifications made to the Rocky Mountain Greenway trail remain viable even if the Service never proceeds with expansion of the trail into the Wind Blown Area or creates an access point there. Nor does the Service's stated goal of trail interconnectedness undermine the independent utility of the modifications to the Rocky Mountain Greenway trail."

As for the allegedly improper reliance on categorical exclusions, the panel noted that the plaintiffs did not challenge the exclusions themselves but instead "argue[d] that two extraordinary circumstances foreclosed the use of the categorical exclusions: (a) the impact on public health, and (b) the highly controversial nature of the project." Neither held sway, however, given that (1) "[t]he potential trail modification into the Wind Blown Area is not part of the challenged agency action because the Service excluded it from the 2018 EAS" and (2) any assertion that "different parts of the Refuge have varying levels of plutonium radiation" ran headlong into (a) the CCP/EIS's determination "that the Refuge was generally safe for public use" and (b) the plaintiffs' failure "to show why the trail modifications approved by the 2018 EAS present an added risk to public health on this ground." Nor were the trail modifications "highly controversial." As the panel explained, any "controversy surrounding the opening of the Refuge for public use" arose from the CCP/EIS, not the EAS issued 14 years later.

Lastly, a supplemental EIS was unnecessary because the Service made no "'substantial changes in the proposed action that are relevant to environmental concerns'":

> Neither the acquisition of the Section 16 Parcel nor the decision to extend a trail onto it amounted to a significant new circumstance requiring a supplemental EIS. As to the acquisition of the Section 16 Parcel, the Service evaluated that issue in 2011. The acquisition is not the challenged agency action here. As to the one-mile trail extension into the Parcel, which is part of the challenged agency action here, the Center fails to explain how the modification of a trail that cuts into the Section 16 Parcel is a significant new circumstance.

The panel additionally affirmed the district court's denial of the plaintiffs' request to supplement the administrative record and to consider extra-record evidence.

Decision link: https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110713092.pdf