IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

PAT WEBSTER, *et al.*,

Plaintiffs,

v. **Civil Action No. 2:09-CV-138**
Chief Judge John Preston Bailey

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Presently before this Court are cross-motions for summary judgment. Plaintiffs Pat Webster, Joem Webster, Elizabeth Webster, Charles Foltz, Linda Foltz, Gloria Foltz Walker, and Elizabeth Webster as Executrix for the Estate of Allaina Garrett Whetzel (collectively "plaintiffs") filed a Motion for Summary Judgment [Doc. 35] on January 7, 2011. Defendants Natural Resources Conservation Service ("NRCS"), United States Department of Agriculture ("USDA"), West Virginia Conservation Agency, Potomac Valley Conservation District, and Hardy County Commission (collectively "defendants"[1]) filed a Cross-Motion for Summary Judgment [Doc. 40] on March 1, 2011. The Court has reviewed the record and the arguments of the parties and, for the reasons set forth below, concludes that Plaintiffs' Motion for Summary Judgment [Doc. 35] should be **DENIED**, and that Defendants' Cross-

[1]Federal, State, and local defendants will be referred to collectively to avoid confusion. Defendant West Virginia Conservation Agency filed a Reply in Support of Federal Defendants' Cross-Motion for Summary Judgment [Doc. 54] on May 18, 2011. Defendants Potomac Valley Conservation District and Hardy County Commission filed a Reply in Support of Federal Defendants' Cross-Motion for Summary Judgment [Doc. 53] on May 18, 2011.

Motion for Summary Judgment [Doc. 40] should be **GRANTED**.

BACKGROUND

Plaintiffs filed suit in this Court on November 23, 2009, pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"), its regulations, and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA"). Plaintiffs seek injunctive and declaratory relief arising from NRCS/USDA's approval of plans to construct a dam/impoundment on Lower Cove Run in Hardy County, West Virginia ("Site 16"). Plaintiffs claim that in reaching the decision to approve the Site 16 proposal, defendants did not adequately discharge various statutory duties.

A. Overview

The Potomac River Watershed Program was Congressionally authorized more than 60 years ago by the Flood Control Act of 1944, Pub. L. 78-534, 58 Stat. 887, 906 (Dec. 22, 1944). The NRCS (then the Soil Conservation Service), an agency of the USDA, was charged with administration of the program. See AR Doc. 25 at 1 (AR000000331)[2]. In the early 1970s, in response to a long history of recurring floods in the Lost River Subwatershed of the Potomac River Watershed, federal and state agencies began planning a major project to address flooding, sediment damage, and other issues relating to management of the water supply. See id. at 21-22 (AR339-40). To meet the objectives of the project, NRCS proposed, *inter alia*, the construction of five dam/impoundment facilities on tributaries of the Lost River, including the Site 16 facility on Lower Cove Run. Id. at 13 (AR331).

[2]Zeroes will hereafter be omitted from citations to the Administrative Record.

In October 1974, NRCS completed an Environmental Impact Statement ("EIS"), as required by NEPA, which analyzed the potential environmental effects of the Lost River Subwatershed Project in its entirety, including its component land treatment and structural projects. See generally AR Doc. 26 (AR407-553). In February 1975, the Chief of the NRCS gave approval for the project to begin operations. See 71 Fed. Reg. 39054-01 (July 11, 2006). To date, three of the five dam/impoundments originally proposed have been constructed; environmental impact analyses of each individual site were prepared before construction began. See AR Docs. 31 [Environmental Assessment Report for Dam Site No. 4]; 56 [Environmental Information Report: Dam Site No. 27]; 70 [Environmental Assessment re: Site 10]. Additionally, the 1974 EIS itself has been supplemented several times over the years, and each supplement contains an updated cost/benefit analysis and explanation of environmental effects of the project. See AR Docs. 42 [1990]; 52 [1991]; 73 [2001].

B. The Site 16 Project

In response to changing area conditions and concerns of the project sponsors, "rural water supply" was added to Site 16's official purposes in the late 1990s. See AR Docs. 110 (AR2226); 141 (AR2689); 204 (AR3172-73). Because of that and other significant changes to the project[3], NRCS prepared a supplemental Environmental Impact Statement ("2007 EIS") to "update the [1974] environmental impact statement, reassess project feasibility, and document changes in the watershed." AR Doc. 204 (AR3172). In June 2007, the State Conservationist of the NRCS issued a Record of Decision ("ROD")

[3]Other changes included deletion of "developed recreation" as a goal for Site 16, and cancellation of plans to construct Site 23, the fifth dam/impoundment originally proposed.

approving the 2007 EIS and green-lighting construction of Site 16. AR Doc. 212 (AR3527).

In November 2008, plaintiffs in this action filed the first of two lawsuits with this Court challenging approval of the Site 16 project under NEPA. ***Webster v. United States Dep't of Agric.***, No. 08-111, N.D. W.Va. (Complaint filed Nov. 10, 2008; First Amended Complaint filed Jan. 19, 2009; dismissed with prejudice May 7, 2009) (***Webster I***). NRCS subsequently withdrew the ROD which had approved the Site 16 project, notified the state and local sponsors that NRCS intended to revisit its analysis, and published a Notice of Intent to prepare a second supplemental EIS ("2009 EIS") in the Federal Register. AR Docs. 241 (AR3809); 242 (AR3810); 244 (AR3817-18).

In April 2009, NRCS finalized the 2009 Draft EIS. AR Doc. 246 (AR3825-4169). Notably, the 2009 Draft EIS includes a 35-page appendix detailing comments and concerns regarding the 2007 EIS, received both from the general public and from federal, state, and local agencies.[4] Id. at AR4134-69. The appendix also provides NRCS' responses and any actions taken pursuant to the comments and concerns received. Id. The 2009 Draft EIS was made available for a new round of public comment, and a public meeting was held "to review the revised . . . study and work plan for Lost River Site #16 with the public." AR Doc. 247 (AR4171). NRCS completed the final 2009 EIS in August 2009, and in October of that year, the NRCS issued an ROD for the Site 16 project. AR Doc. 256 (AR4679-84). Plaintiffs attack the sufficiency of the 2009 EIS under NEPA and contend that defendants

[4] Including: Hardy County Public Service District; County Commissioner; County Commission; Potomac Valley Conservation District; Hardy County Rural Development Authority; United States Environmental Protection Agency; United States Department of the Interior; Department of the Army, Corps of Engineers; and West Virginia Division of Culture & History.

violated the APA by relying on an insufficient EIS in their decision to move forward with Site 16.

STANDARD OF REVIEW

A. Summary Judgment

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23 (1986).

B. National Environmental Policy Act

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It requires all federal agencies to take a "hard look" at the potential environmental consequences of their decisions. ***Robertson v. Methow Valley Citizens Council***, 490 U.S. 332, 350 (1989). NEPA does not, however, impose any substantive environmental obligations upon agencies; it "merely prohibits uninformed – rather than unwise – agency action." ***Id.*** Because NEPA's mandate is procedural, an agency action with adverse environmental consequences can be compliant with NEPA so long as those consequences are adequately identified and evaluated. ***Id.***

The regulations implementing NEPA are promulgated by the Council on Environmental Quality ("CEQ"), a governmental body created by the statute to enforce agencies' compliance with its provisions. See 42 U.S.C. §§ 4340 *et seq*. CEQ regulations are binding on all federal agencies, and CEQ's interpretation of NEPA is entitled to "substantial deference." ***Sugarloaf Citizens Ass'n v. Fed. Energy Reg. Comm'n***, 959 F.2d 508, 512 n.3 (4th Cir. 1992).

C. Administrative Procedure Act

Claims brought under NEPA are subject to judicial review under the APA, 5 U.S.C. §§ 701 *et seq*. Pursuant to the APA, a reviewing court may reject an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); ***Citizens to Pres. Overton Park, Inc. v. Volpe***, 401 U.S. 402, 413-14 (1971), *abrogated on other grounds*, ***Califano v. Sanders***, 430 U.S. 99 (1977). This standard is highly deferential to the agency; a court performs only the limited tasks of determining "'whether the agency conformed with controlling statutes,' and whether the agency . . . committed 'a clear error of judgment.'" ***Maryland Dep't of Human Res. v. USDA***, 976 F.2d 1462, 1475 (4th Cir. 1992) (quoting ***Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.***, 462 U.S. 87, 97 (1983)). Although this inquiry into the facts must be "searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." ***Overton Park***, 401 U.S. at 416.

Review of an environmental impact statement for NEPA compliance must take a holistic view of the agency's assessment; "[c]ourts may not 'flyspeck' an agency's environmental analysis, looking for any deficiency, no matter how minor." ***Nat'l Audubon Soc'y v. Dep't of Navy***, 422 F.3d 174, 186 (4th Cir. 2005). A court reviewing an agency's EIS, therefore, must first decide whether the agency has taken the mandated "hard look" at the environmental effects of its proposed action; if the court determines that the agency has not, rendering the EIS noncompliant with NEPA, then decisions made on the basis of that EIS are impermissibly arbitrary and capricious. ***Hughes River Watershed Conservation Agency v. Johnson***, 165 F.3d 283, 287-88 (4th Cir. 1999).

DISCUSSION

NEPA requires federal agencies to prepare a detailed environmental impact statement ("EIS") before taking any "major Federal action . . . significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Preparation of an EIS serves three important purposes: first, it ensures that the agency will carefully consider detailed information about the impact of its proposed project; second, it ensures availability of that information to other parties involved in the project's planning and realization; and third, it involves the public in the agency's decision by providing information and soliciting comment. ***Robertson***, 490 U.S. at 349.

Plaintiffs in this case make numerous challenges to the adequacy of the 2009 EIS. Their allegations are as follows: (1) the statement of purpose and need, which defines the scope of the project, is based solely on the wishes of the project sponsors and is unsupported by evidence of actual need in the area [Count I]; (2) the 2009 EIS fails to describe all components of the project, and thus fails to consider "connected actions" as required by the CEQ regulations [Count II]; (3) the 2009 EIS fails to consider all reasonable alternatives to the action [Count III]; (4) the analysis of environmental impacts of the project is inadequate [Count IV]; (5) the analysis of "cumulative impacts" contained in the 2009 EIS is insufficient [Count V]; (6) the 2009 EIS fails to discuss mitigation measures in enough detail to permit a reasonably complete evaluation of the project's environmental impact [Count VI]; (7) defendants failed to involve the Army Corps of Engineers ("ACOE") in development of the 2009 EIS [Count VII]; (8) defendants failed to conduct additional scoping for the 2009 EIS [Count VIII]; and (9) defendants violated the APA by making an arbitrary and capricious agency decision on the basis of an inadequate EIS [Count IX].

Because plaintiffs attack the sufficiency of the EIS and the conclusions reached therefrom, the burden is on them to establish by a preponderance of the evidence that the EIS was inadequate. *See, e.g.*, ***N. Buckhead Civic Ass'n v. Skinner***, 903 F.2d 1533, 1543 (11th Cir. 1990); ***Sierra Club v. Morton***, 510 F.2d 813, 818 (5th Cir. 1975); ***Monroe Cnty. Conserv. Council, Inc. v. Adams***, 566 F.2d 419, 422 (2d Cir. 1977).

I. Purpose and Need Statement

An EIS must begin with a statement of the "underlying purpose and need to which the agency is responding" in proposing the federal action. 40 C.F.R. § 1502.13. NEPA places no substantive constraint on the purpose and need, instead mandating only that it be reasonable. *See* ***City of Alexandria v. Slater***, 198 F.3d 862, 867 (D.C. Cir. 1999); ***City of Carmel-by-the-Sea v. United States Dep't of Transp.***, 123 F.3d 1142, 1155 (9th Cir. 1997). Additionally, the EIS must identify and discuss "reasonable alternatives" to the proposed action. 42 U.S.C. § 4332(C)(iii). Because the definition of a project's purpose and need dictates the range of reasonable alternatives which must be considered, agencies may not attempt to circumvent NEPA by "contriv[ing] a purpose so slender as to define competing 'reasonable alternatives' out of consideration." ***Simmons v. United States Army Corps of Eng'rs***, 120 F.3d 664, 666 (7th Cir. 1997).

Plaintiffs argue that NRCS unreasonably and narrowly defined the purpose and need of the project so that only the sponsors' preferred alternative, construction of Site 16, could fit the bill. Plaintiffs further contend that the 2009 EIS is deficient even if the stated purpose and need is itself reasonable, arguing that defendants provided no evidence demonstrating an actual need for the project.

Plaintiffs' arguments are unpersuasive. The 2009 EIS defines the purpose and need

for the project as follows: "(1) Watershed protection, (2) Flood prevention, (3) Rural water supply. The underlying need . . . is tied to the recurrence of damaging floods in the watershed and the projected need for additional rural water supply through Year 2060 in the Lost River Subwatershed." AR Doc. 250 (AR4200-03). First, examination of the record reveals adequate evidentiary support for the purpose and need as defined by defendants.

The 1974 EIS, the first prepared for the Lost River Subwatershed Project, evaluates the proposal in its entirety. According to that EIS, this project began in response to water and land resource problems, including repeated flooding and sediment damage, identified by several major studies of the area described therein. See AR Doc. 26 (AR414-16). Though plaintiffs contend that defendants' reliance on 1974 studies in the 2009 EIS is impermissible, they are incorrect; "the mere passage of time rarely warrants an order to update the information considered by an agency." ***Sierra Club v. United States Army Corps of Eng'rs***, 701 F.2d 1011, 1036 (2d Cir. 1983). Furthermore, defendants prepared a series of site-specific environmental assessments as the project progressed, which considered issues relevant to the particular dam under consideration and continually reevaluated the need for the overall project. See AR Docs. 31 (AR728-67); 42 (AR855-73); 52 (AR4712-20); 56 (AR1232-49); 70 (AR1545-96); 73 (AR1597-652). When defendants made "substantial changes" to the project (deletion of Site 23 and addition of rural water supply as a purpose and need), they complied with NEPA regulations by developing a supplementary EIS that updated and reanalyzed the 1974 EIS. 40 C.F.R. § 1502.9(c)(1)(i); see AR Docs. 250 (AR4202-03); 90 (AR2090-161).

All of the studies and analyses conducted from 1974 through 2009 were explicitly

incorporated by reference into the 2009 EIS pursuant to NEPA regulations.[5] AR Doc. 250 (AR4200). Far from suggesting that NRCS abused its discretion in formulating the statement of purpose and need, the record reflects careful analysis and informed decision-making. Nor is the definition of purpose and need unreasonably narrow; nothing in its language impermissibly restricts consideration of alternatives to some slender subset of possibilities. *Cf.* ***Simmons***, 120 F.3d at 667 (agency defined purpose and need of regional water supply project as "single source" and thus failed to examine a reasonable range of alternatives).

II. Consideration of Alternatives

Plaintiffs' ancillary contention – that the range of alternatives considered for the project was too narrowly focused on meeting the sponsors' objectives – is similarly without merit. The CEQ regulations require agencies to "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). However, the obligation to discuss alternatives is bounded by a notion of feasibility; NEPA does not require the agency to include "every alternative device and thought conceivable by the mind of man." ***Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.***, 435 U.S. 519, 551 (1978); ***Coal. for Responsible Reg'l Dev. v. Coleman***, 555 F.2d 398, 400 (4th Cir. 1977). The EIS must discuss only those alternatives "that are reasonable in light of the project's stated purpose." ***Audubon***

[5]"Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action." 40 C.F.R. § 1502.21.

Naturalist Soc'y of the Cent. Atl. States v. United States Dep't of Transp., 524 F.Supp.2d 642, 667 (D.Md. 2007); *see also* ***City of Alexandria***, 198 F.3d at 867 (agency's choice of reasonable alternatives is evaluated "in light of the objectives [and goals] of the federal action").

The 1974 EIS considered seven alternatives to the proposed project: land treatment alone, land treatment combined with floodproofing and flood insurance, land treatment combined with stream channel modification and diking, land treatment combined with recreation, land treatment combined with a larger number of structural measures and recreation, purchase of all the flood plain properties, and the "no action" alternative mandated by NEPA regulations.[6] AR Doc. 26 (AR464-69). The 1989 Environmental Assessment ("EA") reevaluated and updated the 1974 EIS alternatives and considered an eighth alternative, dry-dams. AR Doc. 31 (AR744-45). The 2001 supplemental EA considered four alternatives to the water supply component of the project: streams, reservoirs, groundwater reclamation, and water purchase agreements with neighboring municipalities. AR Doc. 73 (AR1614-16). After rural water supply was added to the purpose and need of the Site 16 project, the 2007 EIS again reevaluated all of the original alternatives discussed in the 1974 EIS. AR Doc. 204 (AR3177-87). Alternatives to the water supply component were also evaluated, including not only those considered in the 2001 EA, but also two additional alternatives – water conservation and utilization of existing dam/impoundment structures. Id. Finally, in response to comments received from other agencies and from members of the public, stream bank restoration, riparian planting,

[6]40 C.F.R. § 1502.149(d).

wetland restoration, floodplain preservation, runoff management, and property relocation were also considered. Id.

After evaluating all these potential alternatives, NRCS retained only two for detailed consideration: Alternative 1, the proposed action, and the no action alternative. As required by the CEQ regulations, NRCS briefly stated its reasons for eliminating alternatives from detailed consideration; those reasons often included a particular alternative's failure to meet one or more of the three prongs of the overall project's purpose and need. See AR Doc. 250 (AR4207-20). Plaintiffs argue that defendants violated NEPA by eliminating certain alternatives which would satisfy only a "component" of the project's purpose and need. This argument is unavailing; an alternative that does not accomplish the purpose of the project is unreasonable and need not be considered in detail. ***City of Bridgeton v. FAA***, 212 F.3d 448, 456 (8th Cir. 2000); *accord* ***City of Alexandria***, 198 F.3d at 869 ("a 'reasonable alternative' is defined by reference to a project's objectives"); ***Seattle Audubon Soc'y v. Moseley,*** 80 F.3d 1401, 1404 (9th Cir. 1996) (agency need not consider alternatives "inconsistent with its basic policy objectives"). Furthermore, none of the alternatives were eliminated *solely* because they failed to meet all three prongs of the project's purpose and need; the record reflects a holistic analysis of each alternative that considered pecuniary costs, environmental costs, technical feasibility, and other considerations. See AR Doc. 250 (AR4207-20).

Nor was NRCS required, as plaintiffs contend, to consider an "alternative" of multiple projects that might fulfill the objectives of the proposed project in concert. NRCS' responsibility was to consider a range of reasonable alternatives to the proposed project actually under consideration. NEPA does not compel an agency to consider alternatives

which are remote or speculative. ***Vermont Yankee Nuclear Power Corp.***, 435 U.S. at 551 (quoting ***Natural Res. Def. Council v. Morton***, 485 F.2d 827, 838 (D.C. Cir. 1972)).[7]

III. Connected Actions

Plaintiffs further argue that the 2009 EIS fails to consider the environmental impact of all "connected actions" as required by CEQ regulations. 40 C.F.R. § 1508.25(a). They point to two general categories of alleged deficiency: first, failure to adequately describe and evaluate the construction and operation of Site 16, and second, failure to include an analysis of a water treatment plant that might be built at Site 16 in the future. Neither are "connected actions" within the meaning of the regulations.

"Connected actions" are those that (1) automatically trigger other actions that will require environmental impact statements, (2) cannot or will not proceed unless other actions are taken previously or simultaneously, or (3) are interdependent parts of a larger action and depend on the larger action for their justification. Id. While linguistically logical, plaintiffs' argument fails, because in this context the word "action" means a proposed federal project.[8] ***Kleppe v. Sierra Club***, 427 U.S. 390, 408-09 (1976) (explaining that NEPA requires a "comprehensive impact statement in certain situations where several proposed actions are pending at the same time"). As defendants correctly point out, the

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[7]Notably, the 2009 EIS responds substantively to numerous public questions and comments concerning project alternatives, several of which are nearly identical to plaintiffs' challenges, which were raised after the 2009 Draft EIS was circulated for comment. See AR Doc. 250 (AR4290-344).

[8]Under CEQ regulations, "[a]ctions include new and continuing activities, including projects and programs . . . approved by federal agencies; new or revised agency rules, regulations, plans, policies or procedures; and legislative proposals." 40 C.F.R. § 1508.18(a). Actions tend to fall into one of four categories: (1) adoption of official policy; (2) adoption of formal plans; (3) adoption of programs; (4) approval of specific projects. 40 C.F.R. § 1508.18(b).

requirement that an EIS evaluate all connected actions is designed to prevent segmentation, an evasion of NEPA requirements in which agencies attempt to avoid preparing an EIS for a synergistic project by "breaking [the project] down into small component parts." 40 C.F.R. § 1508.27(b)(7); *see also* ***South Carolina v. O'Leary***, 64 F.3d 892, 898 (4th Cir. 2009); *cf.* ***Maryland Consv. Council, Inc. v. Gilchrist***, 808 F.2d 1039, 1042 (4th Cir. 1986) ("We are committed to the proposition that when a major federal action is undertaken, no part may be constructed without an EIS."). In order to ascertain whether segmentation has occurred, courts must decide whether separate proposed actions are "connected." *See* ***Piedmont Envtl. Council v. FERC***, 558 F.3d 304, 316-17 (4th Cir. 2009).

Plaintiffs' contentions as to this regulatory requirement are misdirected. The potential future construction of a water treatment plant is not a "connected action" – indeed, it is not an "action" at all, since it is not a proposed federal project. It is equally clear that construction and operation of Site 16 are not "connected actions" – they are part and parcel of the action actually under consideration. Plaintiffs cannot argue that defendants have "segmented" Site 16 – presumably by omitting discussion of construction and operation of the dam – to avoid the preparation of an EIS, because defendants *have* prepared an EIS for the Site 16 proposal. Environmental impacts associated with construction and operation of Site 16 are direct impacts[9] of the action under consideration, not connected actions.

[9]See Part IV, *infra*.

Yet even considered from the proper angle, plaintiffs' argument is unavailing. Temporary impacts associated with construction of the dam and future impacts associated with its operation are adequately considered by the EIS. See Doc. 250 (AR4223-26, 4328, 4345-63). Every detail of the project – plaintiffs point to minutiae including the size of parking areas and the number of construction workers required[10] – need not be exhaustively set forth to achieve NEPA compliance. The proper inquiry is whether alleged deficiencies "are significant enough to defeat the goals of informed decision making and informed public comment . . .. " ***Fuel Safe Washington v. FERC***, 389 F.3d 1313, 1323 (10th Cir. 2004); *see also* ***Nat'l Audubon Soc'y***, 422 F.3d at 186. In the opinion of this Court, the 2009 EIS addresses these impacts with enough sufficiency to render any remaining deficiencies insignificant.

IV. Direct and Indirect Impacts

Though plaintiffs attack the adequacy of the environmental impact analysis contained in the 2009 EIS on numerous fronts, their challenge to its discussion of indirect impacts is the most compelling and, indeed, the closest question presented by this litigation. CEQ regulations mandate not only that an EIS discuss the direct effects of a proposed project, but also its indirect, or secondary, impacts. 40 C.F.R. § 1502.16. Indirect effects are those which "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8. Agencies must consider only those effects which are reasonably foreseeable; they need not consider potential effects that are highly indefinite or speculative. *See* ***Kleppe***, 427 U.S. at 402.

[10]Plaintiffs' Motion for Summary Judgment [Doc. 35] at 12.

Whether a particular impact is definite enough to require consideration in an EIS reflects several different factors, including how confident one can be that the impact is likely to occur and whether the impact can be described 'now' with enough specificity to make an analysis of it useful. ***Sierra Club v. Marsh***, 976 F.2d 763 (1st Cir. 1992).

Plaintiffs argue that NRCS failed to fully describe the environmental impacts associated with a potential water treatment facility that would have to be constructed in order to safely deliver the raw water stored at Site 16 to the community.[11] Notably, a comment on the 2009 Draft EIS from the Environmental Protection Agency ("EPA") lends support to plaintiffs' position. See AR Doc. 250 (AR4381-82) (" . . . the impacts of construction of the [water distribution] line and related facilities (such as pump stations or treatment) . . . should be evaluated in a single document."). Defendants counter that there is no current proposal to build a water treatment facility at Site 16, and nor may there ever be.

This Court holds, under the applicable scope of review, that NRCS did not abuse its discretion by omitting discussion of a potential future treatment plant from the 2009 EIS. Importantly, the need to add rural water supply as a purpose for Site 16 was based upon projections of future water supply need *through 2060*, as determined by several studies conducted by NRCS experts. See AR Docs. 250 (AR4202-03); 90 (AR2090-161); see

[11]Plaintiffs point further to a water distribution system that would need to be constructed. However, it is apparent that a water distribution system for the Lost River area has already been planned as part of the Hardy County Public Service District Baker/Mathias Water Treatment & Distribution System Project. See AR Doc. 80 (AR1806-2047). That project is itself subject to the requirements of NEPA. See AR Doc. 80 (AR1983). The 2009 EIS discusses the cumulative impact of the Site 16 project along with the Baker/Mathias Water Treatment & Distribution System Project. AR Doc. 250 (AR4264-80). Thus, the impact of a future water distribution system has been adequately discussed in the EIS.

also AR Doc. 73 (AR1613-14). Any potential future construction of a water treatment plant – as the EPA acknowledged in its comments on the 2009 Draft EIS – will not occur within the foreseeable future.[12] Plaintiffs argue that a water treatment facility is "related" to Site 16, and thus must be considered in the EIS. But the fact that a water treatment plant may be "related" to the raw water supply at Site 16 is not tantamount to a reasonable certainty that financial incentives will exist, at some undefined point within the next forty or fifty years, to build such a plant. This is particularly true given the fact that such a plant has been neither proposed nor funded. *See* ***N. Carolina Alliance for Transp. Reform, Inc. v. United States Dep't of Transp.***, 713 F.Supp.2d 491, 523-26 (M.D.N.C. 2010) (holding that potential future project connecting proposed highway with airport was not a reasonably foreseeable action that need be considered in the EIS because airport connection was not funded, proposed, or imminent). There is insufficient certainty about the future construction of any such plant to include it in the environmental impact calculus in a meaningful way; rather, such calculations would be speculative and contingent. This Court finds, therefore, that defendants were not obligated to discuss a future treatment plant in the 2009 EIS.

Plaintiffs' other attacks question the sufficiency of the analysis with respect to impacts on fisheries, socioeconomics, growth, and climate change. They question whether defendants' experts are indeed experts and challenge their conclusions. Plaintiffs' Response at 8. These claims are without merit; the 2009 EIS clearly identifies the experts who prepared the document and conducted the underlying studies. Those studies are

[12]It should also be noted that although the EPA expressed reservations about the analysis of indirect impacts, the rating system it assigned to the 2009 DEIS did *not* indicate perceived noncompliance with NEPA requirements. Compare "EO-2" [rating assigned to 2007 DEIS] with "EC-2" [rating assigned to 2009 DEIS], AR Doc. 250 (AR4383-84).

properly incorporated into the 2009 EIS. This Court may not "second-guess . . . substantive decisions committed to the discretion of the agency." ***Nat'l Audubon Soc'y***, 422 F.3d at 185. Defendants are entitled to rely upon the opinions of their own experts. *See, e.g.*, ***Marsh v. Oregon Natural Res. Council***, 490 U.S. 360, 378 (1989). This Court declines plaintiffs' invitation to "flyspeck" NRCS' environmental analysis for trivial deficiencies; holistic examination of the 2009 EIS shows that defendants took the "hard look" at the consequences of their action mandated by NEPA. ***Nat'l Audubon Soc'y***, 422 F.3d at 185-86.

Plaintiffs make a concomitant claim: they assert that the cost/benefit analysis performed by defendants' experts was flawed. The purpose of a cost-benefit analysis, like the purpose of the EIS generally, is to "aid in evaluating the environmental consequences" of an action. 40 C.F.R. § 1502.23. So long as the agency does not rely on "inflating and misleading economic assumptions" in calculating the benefits and costs of the project, it is entitled to "select [its] own methodology," and its subsequent calculations are entitled to deference.[13] ***Hughes River Watershed Conservancy v. Johnson***, 165 F.3d 283, 289 (4th Cir. 1999) (***Hughes River II***).

Plaintiffs contend that project costs and benefits should not have been calculated by comparing the benefits of the entire project to the cost of the entire project. This argument must be rejected. Although plaintiffs and even other experts might disagree with that methodology, the experts, not the courts, must resolve that disagreement. *See* ***Webb***

[13]This holds true even if certain factors in the analysis are generally imprecise or unquantifiable. ***Hughes River II***, 165 F.3d at 289; *accord* ***Sierra Club v. Lynn***, 502 F.2d 43, 61 (5th Cir. 1974).

v. Gorsuch, 699 F.2d 157, 160 (4th Cir. 1983). Furthermore, nothing in the record suggests that NRCS relied on biased or conclusory information to justify a decision to proceed.[14] NRCS gave detailed consideration to economic, environmental, and social costs and benefits in accordance with its watershed planning policies, and addressed its use of a watershed-level unit of analysis elsewhere in the document. See AR Doc. 250 (AR4223-26, 4291).

V. Cumulative Impacts

The CEQ regulations also require that an EIS consider the cumulative impact of the project under consideration.[15] 40 C.F.R. § 1508.25(c)(3). Cumulative impact is that which results "from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . undertakes such other actions." 40 C.F.R. § 1508.7. Plaintiffs complain that the analysis of cumulative impact in the 2009 EIS is deficient because it does not "contain an analysis of the overall impact that can be expected if the individual impacts are allowed to accumulate." Plaintiffs' Complaint at 13.

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[14]Plaintiffs rely upon ***Hughes River Watershed Conservancy v. Glickman*** (***Hughes River I***) in support of their position, but that reliance is misplaced. In ***Hughes River I***, the agencies who prepared the EIS used an inflated estimate of certain benefits derived from a study as the linchpin of their justification for the project. The study calculated *gross* benefits, but the EIS characterized them as *net* benefits, and used that misleading characterization to conclude that the overall cost-benefit ratio of the project was positive. 81 F.3d 437, 446-48 (4th Cir. 1996).

[15]It is important to note that while analyses of connected actions and cumulative impact often overlap, they ultimately occupy separate spheres. *See* ***Fritiofson v. Alexander***, 772 F.2d 1225, 1241 n.10 (5th Cir. 1985) ("It is important to remember that issues of economic and functional dependence are distinct from questions of environmental synergy").

Plaintiffs' argument appears to be that while the 2009 EIS identifies the "individual impacts" generated by past, present, and foreseeable future actions, it fails to adequately analyze them.[16] On the contrary, the 2009 EIS undertakes a analysis of the individual actions identified, which include four projects in various stages of planning or completion and potential future residential development. AR Doc. 250 (AR4275-4280). Effects of the actions identified are quantified and evaluated with respect to their impact on forestland, farmland, wildlife habitat, wetland, and perennial streams. Id. While the discussion of cumulative impacts may not have been perfect, neither was it comprised of mere "perfunctory references" or "vague and unspecified" statements. *See* ***Natural Res. Def. Council, Inc. v. Hodel***, 865 F.2d 288, 299 (D.C. Cir. 1988) (discussion of cumulative impacts inadequate where EIS "merely announces that migratory species may be exposed to risks of oil spills and other 'impacts'"); ***Fritiofson***, 772 F.2d at 1244-45. Defendants' discussion provides sufficient information to comply with NEPA's procedural requirements.

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[16]The precise turn of phrase plaintiffs rely upon is pulled from a discussion in ***Fritiofson***, 772 F.2d at 1245. In that case, the Army Corps of Engineers prepared an EA, but declined to prepare a full EIS for a proposed waterfront housing project. ***Id.*** at 1229. The issue on appeal concerned the EA's three-sentence-long discussion of cumulative impact, which stated without explanation that "[t]he cumulative effects on the aquatic ecosystem are insignificant." ***Id.*** at 1231. The record lent no support to that conclusory finding, since the Corps failed to generate a study that specifically addressed cumulative impact. ***Id.*** at 1245. The court outlined 5 topics it would expect such a study to discuss: (1) the project area; (2) the project impacts expected in that area; (3) past, present, and reasonably foreseeable actions expected to impact that area; (4) impacts from other actions; and (5) an analysis of the overall impact that can be expected if the individual impacts accumulate. ***Id*.**

The court summarized in a footnote: "The regulations require . . . that other actions and their probable impacts be identified and considered in determining whether the impacts from the specific proposal . . . may be significant." ***Id.*** at 1245 n.15. Topics (1)-(4), then, "identify"; topic (5) "considers." This process is the purpose of the cumulative impact requirement. See 40 C.F.R. § 1508.7; *see also, e.g.*, ***City of Carmel-By-The-Sea***, 123 F.3d at 1160.

In fact, when NRCS circulated the 2009 Draft EIS for public comment, the Environmental Protection Agency, while expressing reservations about other aspects of the EIS, gave its approval to the document's enhanced discussion of cumulative impact, noting its "more detailed analysis" as compared with the 2007 EIS. Compare AR Doc. 250 (AR4377-78) [EPA letter commenting on 2007 Draft EIS] with AR Doc. 178 (AR2978-79) [EPA letter commenting on 2009 Draft EIS].

VI. Mitigation

Plaintiffs next attack the discussion of mitigation contained in the 2009 EIS. Their argument focuses on the portion concerning wetlands, noting that "NRCS states that a compensatory mitigation plan will be developed" as part of its Army Corps of Engineers ("Corps") permit under the Clean Water Act; therefore, plaintiffs argue, the mitigation discussion is inadequate.[17] Defendants counter that development of such a detailed plan is outside the scope of their responsibilities vis-a-vis the 2009 EIS, and that plaintiffs' argument imposes the Corps' NEPA obligations onto NRCS.

This Court must make clear at the outset that in no way does the Corps' permitting process relieve an agency of its obligation to adequately discuss mitigation in an EIS. An agency may not "pass the buck" on part of its required analysis to circumvent its NEPA obligations. It is true that in meeting its own NEPA obligations prior to issuance of a permit, the Corps is permitted to adopt another agency's EIS after reviewing it independently. 40 C.F.R. § 1506.3(c); see 33 C.F.R. § 230.21; § 325, App. B. However, under the CEQ's

[17]The phrase plaintiffs reference is not actually located within the mitigation discussion section of the 2009 EIS – it is part of a response to a letter of comment, submitted by the West Virginia Division of Natural Resources, after circulation of the 2009 Draft EIS.

NEPA regulations, such an adoption may take place only "provided that the [EIS] . . . meets the standards for an adequate statement under these regulations." 40 C.F.R. § 1506.3. Resolution of this challenge, therefore, does not turn on whether or not a "mitigation plan" would subsequently be formulated; it turns on whether or not the discussion of mitigation in the 2009 EIS satisfies NEPA.

Section 404 of the Clean Water Act authorizes the Corps to regulate, by permit, discharges of dredged and fill material into its jurisdictional waters. 33 U.S.C. § 1344. The Corps issues permits in accordance with requirements imposed by Corps regulations, 33 C.F.R. §§ 320.1 *et seq.*, as well as the EPA's § 404(b)(1) Guidelines, 40 C.F.R. §§ 230.1 *et seq*. Individual permits are issued on a case-by-case basis after a resource-intensive process that involves extensive site-specific documentation and review, an opportunity for public hearing, and a public interest review.

As part of that process, the Corps regulations impose a detailed set of responsibilities concerning mitigation on a permittee. The required "compensatory mitigation plan" mandates not only discussion of plan objectives, site selection, legal arrangements necessary over the life of the plan, and the project site ecological baseline, but also demands an actual work plan be formulated, which must include "[d]etailed written specifications and work descriptions" for the project. 40 C.F.R. § 230.94(c). The mitigation work plan must include, but is not limited to: "the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures." 40 C.F.R. §

230.94(c)(7). This plan must be prepared by the permittee and submitted to the Corps district engineer for review, who works with the permittee until a final plan is approved, and may condition receipt of the § 404 permit upon the permittee's compliance with the obligations outlined in the plan. 40 C.F.R. § 230.94(c)(1)(i). Conditioning a permit imposes substantive obligations on a permittee.[18]

The phrase plaintiffs seize upon is unhelpful to their argument; these detailed requirements are outside the scope of NEPA's mandate. *See* ***Robertson***, 490 U.S. at 352-53. NEPA requires that an EIS contain "a reasonably complete *discussion* of possible mitigation measures." ***Robertson***, 490 U.S. at 352 (emphasis added). Those measures must be "*discussed* in sufficient detail to ensure that environmental consequences have been fairly evaluated." ***City of Carmel-By-The-Sea***, 123 F.3d at 1154 (emphasis added). There is *no* requirement, however, that "a complete mitigation *plan* be actually formulated and adopted . . . [that] would be inconsistent with NEPA's reliance on procedural mechanisms, as opposed to substantive, result-based standards." ***Robertson***, 490 U.S. at 352-53 (emphasis added). The purpose of the mitigation discussion is to allow agencies and other interested parties to "properly evaluate the severity of the adverse effects," not to require that the EIS explain in detail what specific mitigative actions will actually be taken. ***Id.***

The 2009 EIS here sets forth a reasonably complete discussion of mitigation, including both on-site and off-site proposals. AR Doc. 250 (AR4347-63). It explains the adverse effects which construction of Site 16 will have upon wetlands, streams, and

[18]Permittees may perform the mitigation themselves or pay a third party, such as a mitigation bank, to perform the mitigation. 40 C.F.R. § 230.94(c)(1)(i)-(ii).

terrestrial habitat, and sets forth enhancement plans for each area of impact. Id. Projected impact on wetlands in particular and proposed mitigation measures are also discussed in the environmental impacts section of the EIS. AR Doc. 250 (AR4247-53). The EIS also notes that more details will be provided as the compensatory mitigation plan is developed as part of its permitting process. Id. An EIS need not contain a "complete mitigation plan" that is "actually formulated and adopted." ***City of Carmel-By-The-Sea***, 123 F.3d at 1154 (quoting ***Robertson***, 490 U.S. at 352). Despite plaintiffs' criticisms, this Court cannot say that the discussion of mitigation contained in the 2009 EIS is noncompliant with NEPA.

VII. Involvement of the Army Corps of Engineers ("Corps")

Plaintiffs also take issue with NRCS' involvement of the Army Corps of Engineers in the NEPA process. They argue that defendants should have asked the Corps to participate in the preparation of the 2009 EIS, or in the alternative, that NRCS should not have issued the 2009 EIS before receiving the project permit from the Corps. Both arguments are unavailing; defendants fulfilled their obligations to the Corps.

CEQ regulations require the "lead agency" – the federal agency which has primary responsibility for preparing an EIS – to determine whether any other agencies have jurisdiction by law with respect to any aspect of the proposed project. 40 C.F.R. §§ 1501.5(a), 1501.6(a), 1501.7(a); CEQ NEPA Implementation Procedures, Appendix II, 49 FR 49750-01, 49750 (December 21, 1984) (hereafter "Appendix"). Federal agencies which have jurisdiction by law are referred to as "cooperating agencies." 40 C.F.R. § 1508.5. The lead agency is required to request the participation of all such cooperating agencies early in the NEPA process, and specifically during the scoping phase. 40 C.F.R. §§ 1501.6(a), 1501.7(a); Appendix at 49750. Nothing in the CEQ regulations suggests that

the lead agency can force a cooperating agency to participate; once the lead agency has requested participation, as mandated by the regulations, its duty is discharged. See id.

Because the Corps has authority to issue or withhold a permit for Site 16, it has jurisdiction by law over the project. See AR Doc. 168 (AR2965). Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal. 40 C.F.R. § 1508.15. Thus, the Corps is a cooperating agency under CEQ regulations, and defendants were obligated to invite the Corps to participate. The record plainly reflects that defendants did so: the Corps was asked to participate throughout the scoping phase. AR Doc. 125 (AR2610-11) [October 2005 Site 16 scoping meeting]; AR Doc. 143 (AR2692-93) [August 2006 Site 16 scoping meeting]. Whether the Corps subsequently decided to participate is irrelevant. Additionally, although it is true that the Corps "caution[ed]" NRCS from issuing a final EIS before receiving a § 404 permit,[19] they did so "[because] the design may be altered during the application review process." AR Doc. 168 (AR2965). While NRCS may have jumped the gun in issuing an ROD before it received a § 404 permit from the Corps, that portends only potential headaches during the § 404 permitting process;[20] it does not render the decision arbitrary and capricious.

VIII. Scoping

Finally, plaintiffs claim that defendants violated NEPA by failing to conduct an additional scoping process for the 2009 EIS. Their claim is without merit. The purpose of scoping, *inter alia*, is to determine the significant issues to be addressed in the EIS. 40

[19]This letter was issued before the release of the 2007 EIS.

[20]See discussion Part VI, *supra*.

C.F.R. § 1501.7(a)(3). The CEQ regulations do not require that scoping be conducted before the issuance of a supplemental EIS. 40 C.F.R. § 1502.9(c)(ii)(4). Both the EIS prepared in 2007 and the EIS prepared in 2009 are supplements to the original 1974 EIS; each individual dam/impoundment, including Site 16, is an arm of the overall Lost River Subwatershed Project. See AR Docs. 204 (AR3171); 250 (AR4201).

Nor does the fact that NRCS *did* conduct additional scoping prior to issuing the 2007 SEIS give rise to a duty to do so again prior to the 2009 EIS. The CEQ regulations leave most of the decisions regarding scoping to the federal agency. *See* ***Kootenai Tribe v. Veneman***, 313 F.3d 1094, 1116-17 (9th Cir. 2002), *abrogated on other grounds*, ***Wilderness Soc'y v. United States Forest Serv.***, 630 F.3d 1173 (9th Cir. 2011). However, "if substantial changes are made later in the proposed action," agencies should "revise the determinations made" in the initial scoping process. 40 C.F.R. §1501.7(c). Because the addition of rural water supply to Site 16's purposes was a significant change in that arm of the project, additional scoping prior to issuance of the 2007 SEIS was appropriate. See AR Doc. 125 (AR2610-11) ("The purpose of this scoping meeting is to identify . . . concerns, issues and impacts associated with the implementation of [Site 16] and the inclusion of water supply storage."). By contrast, there was no need for defendants to conduct additional scoping prior to issuing the 2009 EIS, because no significant changes were made to the Site 16 project in the interim. This Court finds that defendants did not abuse their discretion in declining to conduct additional scoping.

CONCLUSION

This Court has thoroughly reviewed the voluminous record produced in this case and has carefully weighed the arguments presented by the parties. It is this Court's view that

plaintiffs have not demonstrated that the 2009 EIS was so deficient as to be noncompliant with NEPA, or that defendants acted arbitrarily and capriciously in their decision to issue a Record of Decision approving construction of Site 16. On the contrary, the Court believes that defendants have fully complied with the procedural requirements of NEPA by taking the mandated "hard look" at the environmental consequences of their actions and allowing ample opportunity for public participation and comment on the project. Though the 2009 EIS that was the ultimate fruit of defendants' efforts may not be impeccable, neither does it contain any "clear error[s] of judgment." ***Maryland Dep't of Human Res. v. USDA***, 976 F.2d 1462, 1475 (4th Cir. 1992) (quoting ***Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.***, 462 U.S. 87, 97 (1983)). Therefore, there is no legal basis to prevent this project from moving forward. Accordingly, Plaintiffs' Motion for Summary Judgment **[Doc. 35]** should be, and is hereby, **DENIED,** and Defendants' Motion for Summary Judgment **[Doc. 40]** should be, and is hereby, **GRANTED.** As such, the Clerk is hereby **DIRECTED** to enter a separate judgment in favor of the defendants. Furthermore, this matter is **ORDERED STRICKEN** from the active docket of this Court.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: June 13, 2011.

JOHN PRESTON BAILEY
CHIEF UNITED STATES DISTRICT JUDGE