

CASE ARGUED DECEMBER 9, 2019**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 19-1044

IN RE: PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY
AND HAWAII ISLAND COALITION MALAMA PONO,
Petitioners

ON PETITION FOR A WRIT OF MANDAMUS

**MOTION TO ENFORCE ORDER
GRANTING PETITION FOR MANDAMUS**

On May 1, 2020, this Court granted the Petition for Writ of Mandamus in this case, and ordered the following:

that the agencies [the Federal Aviation Administration (FAA) and National Park Service (NPS)] file with the court a proposed schedule, within 120 days of the issuance of this court's opinion, for bringing all twenty-three parks into compliance within two years. Should the agencies anticipate it will take them longer than two years, they must offer specific concrete reasons in the proposed schedule for why that is so. The court will retain jurisdiction to approve the plan and monitor the agencies' progress. After the plan is approved, the agencies are directed to submit updates on their progress every 90 days until their statutory obligations are fulfilled.

Per Curiam Order, Document #1840824; Opinion, Document #1840825 at 14-15.

Petitioners seek enforcement of the Court's Opinion and Order because it has now become apparent that the agencies are not on a path to come into

compliance with National Parks Air Tour Management Act (“NPATMA” or “the Act”) in the two-year time frame set by this Court, or possibly at all. The agencies recognize that the Act requires preparation of documents under National Environmental Policy Act (NEPA) as part of the Air Tour Management Plan (ATMP) process, and have repeatedly claimed to the Court that the process of NEPA compliance is ongoing. However, the agencies have failed to take any action to comply with NEPA with regard to the 11 draft ATMPs that have so far been issued and presented for public comment with absolutely no mention of NEPA. There is no apparent intention or plan to comply, and in fact every indication is that the agencies will finalize the draft plans after consideration of public comments with no NEPA analysis at all.

Even beyond the usual requirements of NEPA for analysis of actions that may affect the quality of the human environment, the Act specifically provides that either an Environmental Impact Statement (EIS) or Environmental Assessment (EA) must be prepared for each ATMP.

Environmental determination. In establishing an air tour management plan under this subsection, the Administrator and the Director shall each sign the environmental decision document required by section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) which may include a finding of no significant impact, an environmental assessment, or an environmental impact statement and the record of decision for the air tour management plan.

49 USC § 40128(b)(2). Thus, the statute requires an EIS or EA (possibly with a finding of no significant impact), signed by both the FAA and the NPS. It does not permit a Categorical Exclusion (CE) from NEPA for ATMPs.¹

Even if the agencies are still planning to produce NEPA documents, a NEPA review performed *after* an ATMP has been drafted and put out for public comment would not comply with NEPA. *See Oglala Sioux Tribe v. U. S. Nuclear Regulatory Com'n*, 896 F.3d 520, 532, n. 9 (D.C. Cir. 2018) (noting that NEPA requires a hard look at environmental consequences “in advance of deciding whether and how to proceed” (*quoting Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015)). Moreover, since one of the purposes of NEPA is to provide the public with environmental information to inform their advocacy and comments on proposed actions, that information should be supplied before a public comment period on a proposed action like an ATMP. *See* 40 C.F.R. § 1500.1(b) (Council on Environmental Quality (CEQ) regulation providing that “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken”).

¹ As discussed below, the agencies have not invoked CEs for the ATMPs they have drafted, but in any event a CE could not amount to compliance with the Act given the quoted language.

In fact, the NEPA process is to be undertaken at “the earliest possible time” in the planning process. 40 C.F.R. § 1501.2. An EIS must be prepared “early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made,” *Winter v. NRDC*, 555 U.S. 7, 48 (2008) (citations omitted), which would be the case if prepared after an ATMP is fully drafted. Moreover, given this Court’s two-year deadline for completion of all 23 ATMPs, even assuming it would otherwise comply with NEPA to begin the NEPA process now or at some time in the future, the delay in commencing the NEPA process would likely make it impossible to meet the Court’s two-year deadline. Thus, after reviewing the draft ATMPs that have been made public to date, Petitioners could not delay in bringing this matter to the Court’s attention.

This situation also demands Court intervention because the agencies are actively misleading the Court concerning their claimed efforts towards NEPA (and thereby NPATMA) compliance.

The agencies have always recognized the need to prepare NEPA documents, in fact arguing to this Court that the inability of the two agencies to agree on the process for and content of NEPA documents was a major factor explaining the multi-year delay in producing ATMPs. *See e.g.* Agencies’ Opposition to the Petition, Document #1795349 (July 1, 2019) at 17 (noting that the Act sets forth a

public process for the development of ATMPs, including an EIS or EA), and at 23-24 (asserting that significant differences between the two agencies regarding “the environmental review required under NEPA for a plan” prevented the agencies from issuing draft NEPA documents).

The agencies have continued to recognize their duty to prepare NEPA documents in their post-decision submissions in this case, and in fact have repeatedly claimed to be taking steps toward compliance, although they were not. On August 31, 2020, the agencies submitted their Proposed Plan for Completion of Air Tour Management Plans, Document #1859178, which set a schedule for bringing the agencies into compliance with the Act within two years with respect to 23 National Park units. Notably, the agencies recognized that the Act required them, among other things, to comply with NEPA. *Id.* at 4. They asserted that the agencies had been “meeting with each other in an effort to resolve past disagreements regarding NEPA compliance and to develop mutually agreeable language for plan and NEPA templates.” They stated they were beginning to obtain contracted services to draft NEPA compliance documents. *Id.* at 6. The Proposed Plan itself noted that in order to comply with the statute, “the agencies will initiate ATMP and NEPA documents at all parks ...” *Id.* at 10. The attached schedule contains actions concerning interagency agreements and subcontracts for NEPA compliance, *id.* at 12, and drafting NEPA documents. *Id.* at 13. Notably,

the planned actions include reviewing “completed chapters” of ATMP/NEPA documents at the same time as beginning to plan public meetings. *Id.* Yet, the agencies have now accepted public comments and held public meetings on the 11 draft ATMPs without preparing any NEPA documents whatsoever.

The agencies’ declarant, Mr. Suvajot, testified that much of the work to date at that point “focused on NEPA compliance, as this was an area that the agencies struggled to reach agreement on in the 2000s. The agencies met several times in an effort to resolve past disagreements regarding NEPA compliance and have successfully resolved key concerns.” *Id.* at 17-18. It now appears that the way the disagreements were resolved was to agree to ignore NEPA compliance altogether, despite representations to the Court to the contrary.

This Proposed Plan specifically addressing NEPA compliance was the basis for the Court’s order approving the agencies’ plan. Document 1872354 (November 20, 2020).

The agencies’ subsequent progress reports continued to claim NEPA compliance was ongoing. On November 30, 2020, the agencies claimed to have “compared their policies and approaches to the NEPA process to determine appropriate NEPA pathway considerations.” Document #1873667 at 3. On March 1, 2021, Document #1887739 at 3, the agencies claimed to have drafted the “Affected Environment” sections of NEPA documentation. On May 28, 2021,

Document #1900668, at 4, the agencies claimed to have “developed templates for NEPA compliance documents” and “agreed to a draft form and general content of Environmental Assessments that meet both agencies’ NEPA requirements.” The agencies’ most recent progress report, on August 26, 2021, Document #19111724, at 3, claims that “The agencies continued work on the general content of environmental assessments, as appropriate, to ensure both agencies’ NEPA requirements are met.”

However, the 11 draft ATMPs that the agencies have released for public comment contain not a word about NEPA and are not accompanied by NEPA documents.² None of the accompanying public materials reference NEPA documents or NEPA compliance, although some do claim that consultations under the National Historic Preservation Act and the Endangered Species Act are ongoing (though providing no evidence of these consultations and not claiming that any are concluded). *E.g.*

<https://parkplanning.nps.gov/projectHome.cfm?projectId=103440> for Bandelier

² The Agencies’ most recent Progress Report states that 13 draft ATMPs had been prepared. Document #1911724 at 3. However, only 11 are publicly available as of this writing. *See*

www.faa.gov/about/office_org/headquarters_offices/arc/programs/air_tour_management_plan/, stating that as of October 4, 2021, 11 draft ATMPs had been published. The FAA website also notes that virtual public meetings were held for each draft plan. The comment periods remain open only for Bandelier National Monument and Great Smoky Mountains National Park, until October 13, 2021.

National Monument, claiming ongoing Endangered Species Act and National Historic Preservation Act consultations, but not NEPA.³

Moreover, the draft ATMPs themselves refute any potential claim that they could double as EISs or EAs, even if such were allowable under NEPA. Instead, they clearly illustrate the lack of, and the need for NEPA compliance. Each plan follows a largely identical template that describes the environment of the park,

³ The draft ATMPs to date are available at the following web addresses. The cited pages have links to a “Document List” that contains the draft ATMP (but no NEPA documents):

Bandelier National Monument:

<https://parkplanning.nps.gov/projectHome.cfm?projectId=103440>

Great Smoky Mountains National Park:

<https://parkplanning.nps.gov/projectHome.cfm?projectId=100689>

Arches National Park:

<https://parkplanning.nps.gov/projectHome.cfm?projectId=102782>

Glacier National Park:

<https://parkplanning.nps.gov/projectHome.cfm?projectId=103520>

Canyonlands National Park:

<https://parkplanning.nps.gov/projectHome.cfm?projectId=102784>

Natural Bridges National Monument:

<https://parkplanning.nps.gov/projectHome.cfm?projectId=102783>

Bryce Canyon National Park

<https://parkplanning.nps.gov/projectHome.cfm?projectId=103148>

Mount Rainier National Park:

<https://parkplanning.nps.gov/projectHome.cfm?projectId=102920>

Death Valley National Park:

<https://parkplanning.nps.gov/projectHome.cfm?projectId=103441>

Everglades National Park:

<https://parkplanning.nps.gov/projectHome.cfm?projectId=97578>

Olympic National Park:

<https://parkplanning.nps.gov/projectHome.cfm?projectId=103431>

approves the exact same number of flights and basically the same routes currently being used; imposes at most minor restrictions, like not flying two hours after sunrise and two hours before sunset. It then claims that the plan protects visitor experience, wildlife, and wilderness, with little or no reference to any particular environmental effects of the flights that are permitted or how the stated values will be protected by the plan. There is no discussion of why the same number of flights and routes currently in use just happen to be the preferable plan in every case.

There is nothing resembling the requirements for an EIS, such as “accurate scientific analysis, expert agency comments and public scrutiny.” 40 C.F.R § 1500.1(b). Although extensive noise studies have been done in many parks, *e.g.* Agencies’ Opposition, Document #1795349 at 23, they are not referenced, and there is no discussion of those noise impacts of the allowed flights or their effect on visitor experience, tribal lands, wildlife, and other environmental values.

There is no discussion of what has been described as the “heart of NEPA,” the consideration of alternative courses of action. *E.g.* *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 37 (D.C. Ci Cir. 2015) (at the heart of NEPA is the requirement that agencies prepare an EIS and consider alternatives that might lessen environmental impacts); *accord*, *N. Alaska Env’tl. Ctr. v. U.S. Dep’t of Interior, Bureau of Land Mgmt.*, 965 F.3d 705, 715 (9th Cir. 2020); 42 U.S.C. § 4332 (C)(iii) (EIS to include consideration of alternatives to the proposed action);

42 U.S.C. § 4332(E) (federal agencies shall “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources”); 40 C.F.R. § 1501.2(c)(2) (same). The CEQ regulations require consideration of all reasonable alternatives, including a no-action alternative. *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72 (2011); 40 CFR 1502.14.⁴

EAs, as well as EISs, must include a discussion of the environmental impacts of both the proposed action and its alternatives. 40 C.F.R. § 1501.5(c)(2); § 1508.9(b); *see Birckhead v. FERC*, 925 F.3d 510, 515 (D.C. Cir. 2019) (per curiam) (“an Environmental Assessment must briefly discuss reasonable alternatives to the proposed action and compare the respective environmental impacts of each”) (citations and internal quotation marks omitted). While the discussion of the environmental effects of alternatives in an EA need not be exhaustive, it must be sufficient to permit a reasoned choice among alternatives. *Id.*

⁴ The only draft plan with a significant difference from the basic template is the one for Glacier National Park, which sets a goal of eliminating flights over the Park by attrition – i.e. when an operator ceases operations, the number of allowable flights will be reduced by the number of flights allocated to that operator. However, there is no timeline for reducing the number of flights or for when the goal of eliminating flights will be achieved, and no discussion of how environmental and visitor experience values are affected by either the current adoption of the existing flights and routes or the indeterminate attrition plan.

Not only do the draft ATMPs fail to explain why in each case the existing number of annual flights and routes was chosen, or the environmental consequences of that choice; they also fail to consider any alternative numbers of flights, routes, or other restrictions to protect the visitor experience and the environment, or to compare such alternatives to the chosen action.

The lack of NEPA documents cannot be explained by the possibility that each of the plans has been accorded a Categorical Exclusion (CE), for several reasons. First, as noted above the statute requires either an EIS or an EA signed by the heads of the FAA and the NPS. The whole purpose of the Act is to regulate the significant environmental and visitor experience effects of air tours over national parks, and Congress explicitly required that EISs or EAs be prepared for all ATMPs.⁵

Second, as also described above, the agencies have repeatedly reported to the Court that they are preparing actual environmental documents, sometimes specifically referencing environmental assessments.⁶

⁵ Park units with less than 50 flights per year are exempt from the Act unless the NPS Director determines that an ATMP or voluntary agreement is necessary to protect park resources or park visitor use and enjoyment. 50 USC § 40128(a)(5).

⁶ An “environmental document” does not include a CE. 40 CFR § 1508.10 (defining “environmental document” to include EAs, EISs, findings of no significant impact, and notices of intent).

Third, even if a CE were permissible under the statute, it must be officially adopted as part of the decision-making process and cannot be claimed after the fact in litigation. *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002) (CEs require “contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision. Post hoc invocation of a categorical exclusion does not provide assurance that the agency actually considered the environmental effects of its action before the decision was made”); *Humane Soc’y of the United States v. Johanns*, 520 F. Supp. 2d 8, 33 (D.D.C. 2007) (“An agency cannot invoke a categorical exclusion for the first time in legal briefings when no such invocation exists in the record”). There is no invocation of a CE in any of the draft ATMPs or accompanying materials.

In sum, there can be no justification for failing to comply with NEPA, and thereby NPATMA, in connection with the 11 draft ATMPs that have been released for public comment. The agencies are not complying with this Court’s decision and order and are misleading the Court concerning their NEPA compliance. The Court should exercise its continuing jurisdiction to order the agencies to comply with NEPA and the Act by preparing EISs or EAs for each ATMP.

Respectfully submitted,

/s/ Paula Dinerstein

Paula Dinerstein
D.C. Bar No. 333971
Public Employees for Environmental Responsibility
962 Wayne Ave., Suite 610
Silver Spring, MD 20910
202-265-7337 (tel)
202-265-4192 (fax)
pdinerstein@peer.org

Attorneys for Petitioners

Dated: October 12, 2021

ADDENDUM

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Petitioners certifies as follows:

A. Parties and Amici

The Petitioners are Public Employees for Environmental Responsibility (PEER) and Hawaii Island Coalition Malama Pono (HICoP). The Respondants are the Federal Aviation Administration (FAA) and its Administrator, Steve Dickson, and the National Park Service (NPS) and its Deputy Director, Shawn Bengé (exercising the authority of the Director). No Amici have participated in this court.

B. Rulings Under Review

There are no rulings under review. Petitioners sought and were granted a writ of mandamus to order the Federal Aviation Administrator and National Park Service Director to develop Air Tour Management Plans (ATMPs) or voluntary agreements for Hawaii Volcanoes National Park, Haleakalā National Park, Lake Mead National Recreation Area, Muir Woods National Monument, Glacier National Park, Great Smoky Mountains National Park, and Bryce Canyon National Park.

C. Related Cases

The petitioners previously filed a complaint in the United States District Court for the District of Columbia seeking similar relief to that sought here. *Public Employees for Environmental Responsibility and Hawaii Island Coalition Malama Pono v. Federal Aviation Administration*, No. 17-cv-2045 (D.D.C.) The action was voluntarily dismissed by the petitioners on January 19, 2018.

The Petitioners also filed a writ of mandamus in this Court, No. 18-044. That petition was dismissed on November 13, 2018 on standing grounds because the court found that Petitioners' injury was not redressable without the participation of the National Park Service as a party. Doc. 1759626.

/s/

Paula Dinerstein
Attorney for Petitioners PEER and HiCoP

CERTIFICATE OF COMPLIANCE

With Type-Volume Limit, Typeface Requirements and Type-Style Requirements

This document complies with the type-volume limit of Fed. R. App. P. 21(d)(1), and Rules 32(a)(5) and (a)(6). It is prepared in proportionally spaced typeface using Times New Roman, 14 point. This document contains 2,755 words, not including the items exempted by Federal Rule of Appellate Procedure 32(f).

/s/ Paula Dinerstein

Paula Dinerstein
Attorney for Petitioners PEER and HICoP

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 12th day of October 2021, she electronically filed the foregoing Motion to Enforce Order Granting Petition for Mandamus with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Paula Dinerstein
Paula Dinerstein