

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**FILED**  
NOV 29 2001  
NANCY M. HENNINGSON, CLERK  
U.S. DISTRICT COURT

THE FUND FOR ANIMALS, et al.,

Plaintiffs,

v.

FRAN MAINELLA, et al.,

Defendants.

Civil Action No. 01-2288 (ESH)

MEMORANDUM OPINION

Plaintiffs, The Fund for Animals (the "Fund"), Channel Islands Animal Protection Association, Scarlet Newton, and Robert Puddicombe, have moved for a preliminary injunction pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq., against defendants Fran Mainella, Marshall Jones, and Gale Norton in their official capacities as the Director of the National Park Service ("NPS" or the "Park Service"), Director of the Fish and Wildlife Service ("FWS"), and Secretary of the Interior, respectively. Plaintiffs allege that defendants' plan to spray rodenticide-laced pellets by helicopter onto Anacapa Island in the Channel Islands National Park is arbitrary and capricious, in violation of the Migratory Bird Treaty Act, 16 U.S.C. § 701 ("MBTA"), et seq., the National Park Service Organic Act ("NPSOA" or the "Organic Act"), 16 U.S.C. § 1, et seq., the Park Service's own Management Policies, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq.

Having carefully considered the entire record and the arguments of counsel, the Court concludes that plaintiffs' showing on the merits is not sufficient to warrant the entry of injunctive

relief, especially given the lack of compelling evidence regarding the other equitable factors which must be considered. Plaintiffs' motion for a preliminary injunction will therefore be denied.

### BACKGROUND

#### I. Anacapa Island

Located off the coast of Santa Barbara, California, the Channel Islands National Park is home to over 2,000 species of plants and animals, 145 of which are unique to the islands. Composed of three islets, Anacapa Island is the smallest of the Channel Islands. Anacapa Island is inhabited by more than 150 species of birds, several of which are currently listed by the FWS "Management Concern," meaning that they are "likely to become candidates for listing under the Endangered

absence of "additional conservation action." 16 U.S.C. § 2912(a)(3). The island is also home to a variety of other wildlife, including lizards, sea lions, seals, and the native deer mouse, a unique species that exists only on the Channel Islands. Unfortunately, Anacapa Island also supports a population of non-native rats, which are thought to have immigrated to the island after a shipwreck more than 75 years ago. These rats serve as both prey for and predator to many of the island's native wildlife.

In the mid-1980s, the Park Service developed a plan to control the rats on the island because they were significantly impacting the breeding and continued survival of some of the native wildlife, most notably, the colonial nesting seabirds – the Xantus' Murrelet and the Ashy Storm-Petrel. Although the Park Service made some limited attempts to use elevated poison bait stations in the late 1980s and early 1990s, these efforts were discontinued in the mid-1990s because of a lack of funds.

**II. The Park Service's Anacapa Island Restoration Project**

The Anacapa Island Restoration Project ("AIRP") is a result of the combined efforts of the Park Service and other federal and state agencies. In 1994, the Channel Islands National Park began to research and plan for an effective rat eradication project on Anacapa Island, in light of its concern that island ecosystems are particularly vulnerable to extinctions and the impacts of introduced species. (Pl. Ex. 6, Environmental Impact Statement ("EIS") at 3.) In consultation with other agencies, organizations, and experts, the Park developed the Anacapa Island project to eliminate the ecological degradation occurring on the island from the non-native black rat. The purpose of the project is to eradicate rats from the island in order to restore seabirds – particularly murrelets and storm-petrels. (EIS at 3.) After considering the alternatives during the NEPA process, the Park Service chose a project involving the aerial and hand application of bait containing the rodenticide brodifacoum into all rat territories on Anacapa Island. Application of the rodenticide will occur during the fall to minimize disturbance and exposure to other resources on the island. The eradication is scheduled to occur in two phases: 1) treatment of East Anacapa and a portion of Middle Anacapa, which is planned for November and December of 2001, and 2) treatment of the remainder of Middle Anacapa and West Anacapa in late 2002. Substantial preparation, including a number of mitigation measures, has been completed in anticipation of the first phase. (See generally Def. Response, Declaration of Kate Faulkner ("Faulkner Decl."))

This project was developed over a significant period of time and with a great deal of public input. In 1999, the Park Service began contacting members of the public and interested groups regarding the plan as it prepared to draft its EIS on the use of brodifacoum on Anacapa

Island.<sup>1</sup> From late 1999 to mid-2000, the Park Service received written comments on the proposal, and in June 2000, the NPS released the draft EIS, which was subject to additional comment from the public and environmental groups for a period of three months. Pursuant to Council on Environmental Quality ("CEQ") regulations promulgated under NEPA, the Final EIS was published in October 2000, and the Park Service signed its Record of Decision finalizing the EIS the following month.

On November 7, 2001, after suit was filed, the Park Service submitted an application to the FWS for a special purpose permit to "take" migratory birds pursuant to the MBTA.<sup>2</sup> (Def. Ex. B at 1.) On November 16, 2001, the FWS issued the permit, as well as a Finding of No Significant Impact ("FONSI") with regard to issuance of that permit. (Def. Ex. A at 1; Def. Ex. B at 3.)

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<sup>1</sup>According to plaintiffs, defendants contacted environmental groups, but not humane societies, about the proposal. As a result, plaintiffs claim that they were not aware of the proposed plan during the public-comment period. At least one of the plaintiffs claims that she first learned of the project in May 2001 from a friend who had learned about it on the internet. (Pl. Ex. 14, Declaration of Scarlet Newton ("Newton Decl.") ¶ 2.)

<sup>2</sup>As explained by defendants, a new interpretation of the law in this Circuit caused the delay in NPS' submission of its application for a MBTA permit. In Humane Society of the United States v. Glickman, 217 F.3d 882 (D.C. Cir. 2000), this Circuit was the first to hold that the "take" provisions of the MBTA apply to federal agencies, and that these agencies must therefore obtain permits from the FWS before "taking" any migratory birds. *Id.* at 888. This holding, which was issued in July 2000, was contrary to case law established in the Eighth and Eleventh Circuits, which had held that the MBTA's provisions did not apply to federal agencies. See Newton County Wildlife Ass'n v. United States Forest Service, 113 F.3d 110, 115 (8<sup>th</sup> Cir. 1997); Sierra Club v. Martin, 110 F.3d 1551, 1555 (11<sup>th</sup> Cir. 1997). Given the split between the circuits – and the relative novelty of the decision in Glickman, which was issued just three months before the EIS in this case was adopted – it is not surprising that the Park Service was confused about the permit procedure under the MBTA and FWS regulations. In fact, it was not until December 20, 2000 that the Director of the FWS issued an order clarifying its policy and requiring compliance by all federal agencies with the holding of Glickman. (See Def. Ex. C.)

As noted, the first phase of the project – treatment of East Anacapa and 20 hectares of Middle Anacapa – was planned for November and December of 2001. According to defendants, the late fall is the optimum time for the project because during this period, the endangered Brown Pelicans are not breeding on the island; the rats are in decline due to a lack of available food sources, which, in turn, would cause them to eat the bait more readily; and the onset of the rainy season will promote the degradation of any residual bait not consumed by target species. (EIS at 7.)

**III. The American Trader Trustee Council and Funding for the Project**

Funding for the AIRP comes from an approximately \$3 million settlement resulting from a 1990 oil spill near the Channel Islands. That year, the vessel “American Trader” ran aground off the coast of Southern California, releasing approximately 416,598 gallons of crude oil. (See Declaration of Carol Gorbics (“Gorbics Decl.”) ¶¶ 2-3.) The oil slick affected seabirds and other natural resources. Under the Oil Pollution Act, the trustee agencies for the American Trader oil spill are the FWS, the National Oceanic and Atmospheric Administration (“NOAA”), and the California Department of Fish and Game (collectively, the “Trustees”). The Trustees have estimated that as many as 3,400 birds died and as many as 9,500 chicks were not born as a result of the spill. Over 95 percent of the birds affected by the spill were seabirds.

As part of the damage assessment process, the Trustees considered using settlement proceeds to fund various restoration projects that would benefit seabirds and other natural resources injured by the spill. (Gorbics Decl. ¶¶ 5-6.) Determining feasible restoration projects for some types of resource injuries can be relatively simple. For example, new wetlands or subtidal areas can be created using engineering techniques and appropriate grading and planting.

Seabird restoration poses a greater challenge, and the Trustees focused on habitat enhancement and predator control as reasonable types of restoration projects for seabirds. Among the projects considered for funding from the settlement, and one of four ultimately selected by the Trustees as most appropriate to address the injuries to burrow/crevice and ground nester seabirds, was the black rat eradication project on Anacapa Island. The Trustees concluded their planning effort by issuing the Final Restoration Plan and Environmental Assessment ("EA")<sup>3</sup> in April 2001, which considers various forms of rat control and identifies brodifacoum as the most efficacious form of rodenticide. The EA also discusses the adverse and beneficial consequences of the use of brodifacoum, and concludes that multiple species will benefit from the project, even though there may be some short-term impacts to some species as a result of the direct or indirect ingestion of brodifacoum. (EA at 24.)

#### IV. Procedural History of this Lawsuit

Plaintiffs filed this lawsuit on November 2, 2001. Because the implementation of the first phase of the AIRP was imminent, they moved for a preliminary injunction just three days later. Plaintiff's initial complaint alleged that defendants' plan violated the MBTA, the Organic Act, Park Service Management Policies, and NEPA. With regard to the MBTA claim, plaintiffs alleged that defendants were required to obtain a permit from the FWS to proceed with the plan. Two days after plaintiffs moved for a preliminary injunction, the Park Service applied to the

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<sup>3</sup>An EA is a document that is typically prepared by agencies regarding a project for which they find no significant environmental impact, and may be used in lieu of an EIS, which is a more substantial document. 40 C.F.R. § 1501.3-4. See Pogliani v. Army Corps of Engineers, 166 F. Supp. 2d 673, 697-99 (N.D.N.Y. 2001). The EA published by the Trustee Council did not specifically adopt the aerial brodifacoum plan, though it contemplated the use of that rodenticide for the long-term preservation of seabirds on Anacapa Island. (EA at 20-24.)

FWS for such a permit, and, as noted, the FWS issued a special purpose permit<sup>4</sup> for the taking of migratory birds on November 16. In response, plaintiffs amended their complaint to add the director of the FWS as a defendant, claiming that the FWS had violated NEPA and CEQ regulations in issuing the permit to the Park Service.

The parties agreed that defendants would refrain from implementation of the plan until December 1, 2001, in order to give the parties time to file briefs on the motion for a preliminary injunction, and to allow the Court to resolve this issue. Briefing of the issues was concluded on November 26, and a hearing was held on November 27. Two substantive aspects of the plan are of particular concern to plaintiffs. First, brodifacoum is a more toxic poison than the alternative rodenticides considered and rejected by the NPS, and the effects of brodifacoum on non-target species that may be exposed either primarily – by ingesting brodifacoum pellets – or secondarily – by eating poisoned rats – have not, in plaintiffs' view, been thoroughly assessed or documented. Second, the aerial application of brodifacoum – as opposed to the use of bait and hand application – may increase the risks to non-target wildlife. Whatever the relative merits of the parties' ecological arguments, however, this case requires the Court to focus only on whether the defendants have followed federal law in adopting the aerial brodifacoum plan. Fund for Animals v. Clark, 27 F. Supp. 2d 8, 10 (D.D.C. 1998).

## LEGAL ANALYSIS

### I. Preliminary Injunction Standard

A preliminary injunction should be issued where plaintiffs demonstrate 1) a strong

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<sup>4</sup>A special purpose permit is issued "for special purpose activities relating to migratory birds . . . which are otherwise outside the scope of standard form permits . . ." 50 C.F.R. § 21.27.

likelihood of success on the merits; 2) that without injunctive relief they will suffer irreparable harm; 3) that, balancing the hardships, the issuance of an injunction will not substantially harm other interested parties; and 4) that the public interest favors the injunction. Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-44 (D.C. Cir. 1977).<sup>5</sup>

## II. Likelihood of Success on the Merits

### A. Standard of Review

This case is brought pursuant to the Administrative Procedure Act, 5 U.S.C. § 706. Under the standards of review set forth in the APA, the Court must review whether the agency actions at issue are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

In reviewing the action of the agencies, the Court must engage in a “thorough, probing, in-depth review,” Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971), to determine whether the agencies have “examin[e]d the relevant data and articulate[d] a satisfactory explanation for its action. . . .” Motor Vehicle Manufacturer’s Ass’n v. State Farm Mutual Ins. Co., 463 U.S. 29, 43 (1983). “In thoroughly reviewing the agency’s actions, the Court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors.” Fund for Animals v. Babbitt, 903 F. Supp. 96, 105 (D.D.C. 1995) (citing Marsh v. Oregon Natural

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<sup>5</sup>As discussed *infra*, this Circuit has recently implied that courts should not use irreparable injury as a factor in determining whether to enjoin an agency in an action brought under the APA. See American Bioscience, Inc. v. Thompson, 2001 WL 1355189, at \*6 (D.C. Cir. 2001).

Resources Council, 490 U.S. 360, 378 (1989); Citizens to Preserve Overton Park, 401 U.S. at 415-16; Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1220 (D.C. Cir. 1983)).

Conclusory statements are insufficient to meet the defendants' burden in a challenge under the APA. Dickson v. Secretary of Defense, 68 F.3d 1396, 1405 (D.C. Cir. 1995).

"Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n., 463 U.S. at 43. The scope of review under this standard, however, is narrow, and a court is not to substitute its view for that of the agency. Id. Moreover, an agency's decision must be upheld under this standard "if the agency's path may reasonably be discerned" and will only be reversed where "there has been a clear error of judgment." Id. (citations omitted).

At this stage of the proceeding, the Court does not have the entire administrative record, therefore, is not being asked to determine whether the agency's decision is supported by the record. Rather, the focus is on whether the defendants have acted in accordance with law. In particular, the questions presented are whether there have been violations of the MBTA, the Organic Act, Park Service Management Policies, or NEPA. Each of these issues will be addressed in turn.

#### **B. MBTA Claims**

Section 703 of the Migratory Bird Treaty Act provides that "[u]nless and except as

permitted by regulations issued by the Secretary of the Interior, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . deliver for transportation, transport or cause to be transported, [or] carry or cause to be carried . . . any migratory bird . . .” 16 U.S.C. § 703. This prohibition applies to federal agencies. Glickman, 217 F.3d at 888. Section 704 of the MBTA authorizes the Secretary to promulgate regulations that permit the taking of migratory birds, as long as those regulations are consistent with the terms of the International Convention for the Protection of Migratory Birds (the “Convention”), which bind the United States and Great Britain to strict prohibitions on the taking of numerous migratory birds, including waterfowl, woodpeckers, wrens, hummingbirds, puffins, herons, and loons. 16 U.S.C. §§ 704, 712(2). Pursuant to section 704, the FWS has promulgated regulations that allow the taking of migratory birds after the issuance of a permit. 50 C.F.R. § 21.1, et seq. Many of the birds that inhabit Anacapa Island are migratory birds protected under the MBTA.

As noted above, plaintiffs initially argued that defendants had violated this Act by proceeding without the necessary permit. This argument has now become moot, since a permit was obtained from the FWS on November 16, 2001. See National Black Police Ass’n v. District of Columbia, 108 F.3d 346, 349 (D.C. Cir. 1997). Having received an application for the permit and supporting documentation,<sup>6</sup> the FWS issued a migratory bird special purpose permit consistent with 50 C.F.R. § 21.27. This permit authorizes the Park Service to take migratory birds as part of the AIRP. As explained in the FONSI issued by the FWS on November 16,

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<sup>6</sup>These materials were provided to the Court at its request just prior to the hearing on November 27, 2001.

2001, the permit was being issued because the project would benefit the "migratory bird resource"; and although both non-lethal and lethal takes of migratory birds might occur as a result of the project, the FWS concluded that "any effect will be inconsequential to local populations" given the risk-reduction and mitigative measures that will be undertaken by NPS and the low abundance of migratory birds on the island during the November - December time period. (Def. Ex. B.)

Plaintiffs do not concede the validity of the permit, but rather, they argue that by issuing the permit, the FWS violated its obligations under NEPA, and that the NPS also violated the MBTA by not giving it sufficient consideration in the preparation of the EIS. These arguments are more appropriately addressed under the NEPA analysis. Therefore, at least with respect to the claim that the NPS failed to obtain the necessary MBTA permit, the Court finds no likelihood of success.

### C. Organic Act and Park Service Policy Claims

Plaintiffs' claims under the National Park Service Organic Act and the Park Service's Management Policies are similarly unpersuasive. The crux of plaintiffs' argument is that Section 3 of the Act prohibits the poisoning or destruction of any wildlife in the National Park system unless such wildlife is shown to be "detrimental to the use" of the park. 16 U.S.C. § 3. Plaintiffs also argue that the rodenticide plan will violate a provision of the Act that prohibits "the wanton destruction of the fish and game found within the park," 16 U.S.C. § 22, and Park Service Management Policies that require NPS pest control programs to "avoid causing significant damage to native species" and "pos[e] the least possible risk to people, resources, and the environment." NPS Management Policies at 37-38. Finally, plaintiffs contend that the program

contravenes the General Management Plan ("GMP") of Channel Islands National Park, which states that any rat eradication program must "[e]nsure that . . . methods must be effective, be selective for rats, and have the least possible effect on native mouse populations and other forms of plant and animal life; methods should be safe for visitors; and the program should be inexpensive and simple to maintain." (Def. Ex. E. at 59.)

These arguments are without merit. "Because the Organic Act is silent as to the specifics of park management," the NPS has "especially broad discretion on how to implement [its] statutory mandate." Davis III v. Latschar, 83 F. Supp. 2d 1, 5 (D.D.C. 1999) (citing Dangerfield v. Protective Soc'y v. Babbitt, 40 F.3d 442, 446 (D.C. Cir. 1994)). All park areas should be "managed with resource protection the overarching concern." Bicycle Trail Council of Marin v. Babbitt, 82 F.3d 1445, 1453 (9<sup>th</sup> Cir. 1996). In this case, the NPS has determined that rats on Anacapa Island need to be eradicated completely in order to improve the nesting habitat of seabirds and to preserve the viability of particular species, including the Xantus' Murrelet and Ashy Storm-Petrel. (EIS at 3, 5.) The EIS demonstrates that the Park Service has carefully weighed the costs and benefits of an aerial brodifacoum program to the seabirds on the island, and has determined that such a procedure best serves the interests of the totality of the species on Anacapa Island. The plan is therefore within the discretion of the Park Service under the Organic Act, and is contrary to plaintiffs' assertions that the program will be detrimental to the use of the park.<sup>7</sup>

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<sup>7</sup>Under plaintiffs' narrow interpretation of the phrase "detrimental to the use of the park," the Park Service would never be able to undertake any extermination program that it knew posed a risk to non-target species that were not detrimental to the use of the park, no matter what the long-term benefits of the program were to the park and its inhabitants. Such an approach would unreasonably fetter the NPS in its administration of the nation's parks.

Plaintiffs' other Organic Act and NPS Management Policy arguments are also unavailing. Plaintiffs' arguments are premised on their dispute with the conclusions reached by the Park Service regarding the need for and the efficacy of its chosen alternative. It is not this Court's province to reject the conclusions reached by defendants, and thus, one cannot conclude, as plaintiffs argue, that the rodenticide plan will cause wanton destruction of fish and game, particularly given the mitigation measures outlined in the EIS. Similarly, these mitigation measures -- which include trapping and removal of non-target species prior to spraying, as well as application of the rodenticide in November and December, when rat and mouse populations on the island are at their lowest -- ensure that the program is lawful under NPS Management Policies. Finally, the brodifacoum plan meets the Channel Island GMP. For instance, the NPS found that the aerial use of brodifacoum was the only alternative that would enable the Park Service to achieve its goal of eradicating all rats from the island. (EIS at 51-52.) In addition, the EIS notes that the chosen alternative may, in fact, have fewer negative effects on non-target wildlife because the rodenticide will be applied fewer times and be present on the ground for less than would be the case with the alternatives. (EIS at 64, 73, 90.) Finally, the Park Service determined that the plan would only minimally impact visitors to Anacapa Island (EIS at 78-80) and would be both cost-effective and easy to maintain. (EIS at 28, 90.) Even assuming that the GMP is binding on the NPS, the plan survives scrutiny under the five criteria for a rat eradication program set forth in the GMP -- effectiveness, selectivity for rats, least possible impact on non-target species, safety for visitors, and cost.

#### D. NEPA Claims

The National Environmental Policy Act ("NEPA") mandates the preparation of an EIS for

any major federal action "significantly affecting the quality of the human environment . . ." 42 U.S.C. § 4332(C). NEPA mandates that the EIS shall include: "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." Id.

In reviewing a federal agency's compliance with NEPA, the Court employs a highly deferential standard of review. "Neither [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). "The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences . . ." Id. (citation omitted). A court must "enforce the statute by ensuring that agencies comply with NEPA's procedural requirements, and not by trying to coax agency decision-makers to reach certain results." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 194 (D.C. Cir. 1991).

Plaintiffs have challenged the actions of both the NPS and the FWS under NEPA. Plaintiffs allege that the NPS has violated NEPA because the EIS is deficient in a number of respects – most significantly, because it fails to concretely describe the actual loss of wildlife that is likely to result from aerial application of brodifacoum. Plaintiffs also argue that the FWS violated NEPA by adopting the Park Service's EIS without publishing the adopted statement, allowing a large section of the public to comment, considering any alternatives, or waiting the required 30 days before taking action – in this case, issuing a permit to the Park Service to

proceed with the extermination.

1. NPS

The EIS at issue in this case is a 106-page document that was prepared over the course of one year and with input from a variety of sources and after the receipt of public comments. (See Faulkner Decl. ¶7.) Unlike many environmental impact statements that have been successfully challenged, the Park Service's EIS is a thoughtful, detailed document. No matter how much work went into drafting the EIS, however, the document still must comply with the requirements of NEPA. Plaintiffs present four arguments attacking the EIS, none of which has merit.

Plaintiffs' main contention is that defendants' EIS is inadequate because it lacks a concrete description of the actual loss of non-target wildlife that is likely to occur as a result of the use of brodifacoum. Plaintiffs argue that "there is no actual estimate of the amount of wildlife that will be lost as a result of the poisoning project, no discussion of what this loss will mean for other Park wildlife and the overall ecosystem, and, therefore, no measurable way for either the public or the agency decision-maker to estimate the 'adverse environmental effects' and 'irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented' – as specifically required by NEPA. 42 U.S.C. § 4332." (Pl. Mem. at 22.) In particular, plaintiffs note that Attachment 1 to the FWS permit (see Def. Ex. A, Attachment 1) is a chart prepared and submitted by the NPS in 2001, as part of the MBTA permit application process, that provides rough estimates the casualties for a number of bird species that may be affected by the rodenticide, and they argue that such a document should have been included in the EIS.

The Court finds this argument to be unpersuasive. The EIS contains a lengthy and

detailed chapter on the environmental consequences of each of the six rat control alternatives that the NPS considered. (EIS at 52-74.) Although the EIS does not specifically quantify the risk to each species, or make any attempt to predict casualties, the document does describe in detail "the nature and extent of the impacts" on those species. Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d 121, 138 (D.D.C. 2001). Plaintiffs focus on the risk of the rodenticide to birds on the island, a subject to which the EIS devotes more than five pages. (EIS at 69-74.) The EIS recognizes the risk of primary and secondary exposure to various types of seabirds and landbirds, describes scientific studies on the toxicity of all of the alternatives to these birds, and explains how planned mitigation measures should alleviate concerns about the effects of the poisoning. The section also provides a baseline estimate for the number of different types of birds on Anacapa Island, and identifies specifically which predatory birds and scavengers are at the highest risk for secondary exposure. (EIS at 73.) In short, although the document does not attempt to predict casualties with any precision, it provides a detailed analysis of the effects of the rodenticides, and explains why those effects may occur. Such detail is the kind of "hard look" that is sufficient to meet the requirements of NEPA. See Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1379 (9<sup>th</sup> Cir. 1998) (NEPA requires "some quantified or detailed information").

Plaintiffs' other NEPA arguments are similarly unavailing. First, they claim that the EIS is inadequate because it lacks any meaningful analysis of the adverse aesthetic and recreational effects of the plan. In fact, the EIS explains in detail the impact that the program is expected to have on visitors to the park, and describes the various ways that the NPS has attempted to mitigate any aesthetic injury, including the closing of the park for three days, the timing of the

plan to coincide with the park's lowest usage, and the use of rangers to remove animal carcasses from the area. (See EIS at 73-74, 78-80.) The EIS therefore "explain[s] exactly how the measures will mitigate the project's impact." LaFlamme v. Federal Energy Regulatory Commission, 852 F.2d 389, 400 (9<sup>th</sup> Cir. 1988).

Second, plaintiffs contend that the "cumulative effects" analysis of the EIS is insufficient because it fails to address the impact of the Anacapa Island plan in conjunction with similar future operations in other parks, including a plan to eradicate rats from San Miguel Island, which is also part of Channel Islands National Park. Contrary to plaintiffs' assertions, however, there is no persuasive evidence before the Court that there is a plan for San Miguel Island that will be put into effect any time in the near future. Although the Park Service has entered into a cooperative agreement to conduct a feasibility study on the eradication of rats from San Miguel Island (Pl. Supp. Ex. 12), this report will not be completed until 2003. At that point, the Park Service will evaluate whether to proceed with such a plan. (Def. Surreply at 6; EIS at 8.) Given the uncertainty of any eradication plan for San Miguel Island, as well as the fact that there is no evidence in the record to suggest that any eradication program on San Miguel Island would affect Anacapa Island or vice-versa, plaintiff's argument falls short.

Finally, plaintiffs argue that the EIS is invalid because it contains no analysis of whether the plan may threaten federal law. 40 C.F.R. § 1508.27(10).<sup>8</sup> Again, plaintiffs' argument is based on the premise that the defendants' actions are in some way unlawful. As the EIS makes clear, the overarching purpose of the plan is to protect the non-target species that inhabit Anacapa

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<sup>8</sup>Of course, at the time that the EIS was prepared, it was unclear if the NPS was even covered by the MBTA. See *supra* note 2.

Island, which is fully consistent with the purposes of both the MBTA and the Organic Act. (See EIS at 3, 5-6.) Moreover, the EIS describes in detail the mitigation measures that will be undertaken to minimize bird casualties during the spraying (see, e.g., EIS at 18, 73), and the NPS also acknowledged the goals of the MBTA in the EIS, and described, in response to a comment by the FWS, how its project would enhance the very bird population covered by the MBTA. (EIS at 100-01.) Furthermore, the issuance of the MBTA permit by the FWS provides further proof that the EIS complies with the MBTA. Given these facts, it is difficult to argue that more should have been done.<sup>9</sup>

## 2. FWS

Plaintiffs offer three arguments that the FWS violated NEPA in adopting the EIS prepared by the Park Service. First, they contend that the FWS allowed only certain members of the public to participate in the decision to issue an MBTA permit, citing a single letter from the California Office of Spill Prevention and Response. (See Pl. Reply at 10-11; Def. Ex. F.) There is no indication in the record, however, that the FWS solicited any public comments regarding the permit application, and there is no reason to fault the FWS just because one California agency chose to submit a letter supporting the proposed plan. This argument is therefore without merit.

Second, plaintiffs contend that the FWS failed to consider any alternatives to issuing a

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<sup>9</sup>Relying on Association of American Railroads v. Surface Transportation Board, 237 F.3d 676 (D.C. Cir. 2001), plaintiffs contend that the adoption of the EIS was arbitrary and capricious because the document failed to explain how it was consistent with applicable federal laws. In Association of American Railroads, however, the defendant failed to address key relevant language in the preamble of a statute. Id. at 680. In this case, the Park Service has addressed how the project is consistent, for example, with the goals of “the protection of migratory birds,” 16 U.S.C. § 703, and “conserv[ation of] the wild life” in the National Parks “to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for future generations.” 16 U.S.C. § 1.

blanket MBTA permit. Although plaintiffs concede that the EIS did consider alternatives to the aerial use of brodifacoum, they argue that the focus of the EIS and the Park Service was on rat control, whereas the focus of the FWS in considering alternatives should have been the protection of migratory birds. To that extent, they assert that any consideration of alternatives by the FWS in the adopted EIS is insufficient.

This argument is unavailing. In "study[ing], develop[ing], and describ[ing] alternatives to recommended courses of action," 42 U.S.C. § 4332(2)(E), the Park Service and the FWS are both subject to the same requirements of the MBTA. Moreover, as the EIS notes repeatedly, the overriding purpose of the brodifacoum plan is the long-term preservation of the migratory birds of Anacapa Island, a goal that is consistent with the MBTA. (See EIS at 3, 5-6, 19-26, 52-74; 16 U.S.C. § 703) The Park Service also specifically considered and addressed the concerns of the FWS with regard to the effects of the plan on migratory birds. (EIS at 100-01.) It is therefore clear that in adopting the EIS, the FWS adopted a document that considered alternatives to the chosen plan in light of the protection of migratory birds.<sup>10</sup>

Finally, plaintiffs contend that the FWS violated the procedural requirements of NEPA and the CEQ regulations in issuing an eleventh-hour permit to the Park Service based on an EIS that was not properly "adopted" by the FWS within the meaning of 40 C.F.R. § 1506.3.

Although certain procedural requirements were apparently not followed, the Court is unwilling to

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<sup>10</sup>In response, plaintiffs argue that the fact that the FWS specifically considered alternatives to a blanket permit for the killing of cormorants in a separate instance demonstrates that it did not comply with federal law here. (See Pl. Reply at 12.) In that case, however, a state agency that had not completed an EIS was applying for a permit, and the permit which they sought was for the degradation of the birds - i.e., for their intentional killing. Such permits are subject to much stricter requirements under 50 C.F.R. § 21.41, *et seq.*, than is the special purpose permit that was granted to the Park Service.

find these deviations to be material given the Park Service's full compliance with NEPA when it adopted its EIS.

This Circuit has noted that

[b]efore an agency takes any action that threatens the environment, it must also comply with . . . NEPA, which requires the agency to prepare and issue an [EIS]. . . . Under NEPA regulations, the agency must file with the [Environmental Protection Agency] the Final [EIS] along with public comments received regarding the proposed statement, which are then published in the Federal Register. See 40 C.F.R. §§ 1506.9-.10 (1998). An agency must wait at least 30 days following publication before taking any action based on the Final [EIS], after which time NEPA regulations require the agency to prepare a Record of Decision justifying its ultimate decision. See 40 C.F.R. §§ 1505.2, 1506.10(b).

U.S. Ecology, Inc. v. Department of the Interior, 231 F.3d 20, 22 (D.C. Cir. 2000). Under 40 C.F.R. § 1506.3, “[a]n agency may adopt a . . . final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under the regulations. If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency’s statement is not required to recirculate it except as a final statement” – i.e., by having notice of the final EIS published in the Federal Register and then waiting 30 days before taking action on the EIS. 40 C.F.R. §§ 1506.3(a)-(b), 1506.10(a)-(b).

Defendants concede that the issuance of a permit to another federal agency – even an agency that has signed off on a final EIS – qualifies as a “major federal action” under NEPA, and that the FWS must therefore comply with NEPA and the CEQ regulations when issuing a permit under the MBTA.<sup>11</sup> Defendants also concede that an agency that wishes to engage in action that

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<sup>11</sup>This concession is somewhat puzzling, since it does not necessarily follow that the issuance of a permit by one federal agency to another is subject to NEPA compliance, particularly where the applicant agency has already complied with the strict requirements of that

will result in the incidental taking of birds, as in this case, must obtain an FWS permit.<sup>12</sup> In issuing its permit to Channel Islands National Park “to take, possess, and transport migratory birds in the course of the Anacapa Island Restoration Project,” the FWS adopted both the EA written by the American Trader Trustee Council, of which the FWS was a member, and the EIS that had been prepared by the Park Service. (Def. Ex. A at 1; Def. Ex. B, at 2.) Nevertheless, defendants have taken the position during oral argument that the FWS had to adopt the EIS to cure the lack of analysis of alternatives to the brodifacoum plan in the EA, and that the FWS could not comply with NEPA on the basis of the EA alone.<sup>13</sup>

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statute and the CEQ regulations. In the first place, this Circuit has suggested in another context that licensing or approval in and of itself may not constitute a federal action. See Sheridan Kalorama Historical Ass’n v. Christopher, 49 F.3d 750, 754 (D.C. Cir. 1995) (“[F]ederal authority to fund or license a project can render the project an undertaking, but the decision of the funding or licensing agency is not itself an undertaking.”). Moreover, although the CEQ regulations define a “major federal action” as, in part, the “[a]pproval of specific projects, such as construction or management activities located in a defined geographic area,” 40 C.F.R. § 1508.18, this is arguably limited to the federal approval of projects by non-federal actors, in which case it is the licensing of the project that makes the action federal in nature, and at that point subject to NEPA. Where a project is controlled by a federal agency in the first instance, however, it is already subject to NEPA, and resubjecting the identical project to the identical NEPA process a second time simply to obtain a permit from a sister agency would seem to be exactly the kind of duplicative bureaucratic excess that the CEQ regulations try to avoid. See, e.g., 40 C.F.R. §§ 1500.4-5, 1506.4.

<sup>12</sup>Here again, it is surprising that defendants concede this untested point of law. The only cases on this subject have concluded that unintentional or incidental takes by federal agencies do not violate the MBTA. See Newton County Wildlife Ass’n, 113 F.3d at 115; Sierra Club, 110 F.3d at 1555. In contrast, the Glickman case dealt with an intentional take of Canadian geese. See Glickman, 217 F.3d at 884.

<sup>13</sup>Ironically, an EIS would not be required where the major federal action is not “significant” within the meaning of NEPA, and as found by the FWS when it issued the permit to NPS, the issuance of the permit did not represent a significant impact. In such a situation, the FWS could rely on a validly issued EA in making its FONSI determination. 40 C.F.R. § 1501.4(e). Here, there is no question that the FWS issued an EA in April 2000 by participating in the preparation of the Restoration Plan and Environmental Assessment for Seabirds Injured by

Therefore, unless the FWS was a "cooperating agency" in the preparation of the EIS, it must circulate the EIS as a final statement for thirty days under 40 C.F.R. §§ 1506.3(c) and 1506.9-.10. A "cooperating agency" under 40 C.F.R. § 1501.6 – meaning that it was designated as such by the lead agency and "participate[d] in the NEPA process at the earliest possible time," including "scoping" the project, using agency funds to analyze key issues, and generally preparing large portions of the EIS – need not recirculate a final EIS that it adopts. 40 C.F.R. § 1506.3(c); Anacostia Watershed Society v. Babbitt, 871 F. Supp. 475, 485 (D.D.C. 1994). Defendants attempt to assert that the FWS was a cooperating agency in the preparation of the Park Service's EIS; however, this can only be viewed as post hoc rationalization, which is insufficient to justify agency action. Association of Civilian Technicians v. FLRA, 2001 WL 1386399, at 3 (D.C. Cir. 2001) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). At the time that the EIS was prepared, the FWS could not have known that there would be a need for it to adopt the Park Service's EIS, since the EIS was prepared before Glickman was decided. The FWS was not named as a cooperating agency by the NPS, and it participated in the EIS process only by submitting comments to the Park Service regarding compliance with the MBTA. (EIS at 100-01.) Thus, the Court finds that it cannot label the FWS as a cooperating agency within the meaning of the CEQ regulations.

As a result, in order for the FWS to adopt the Park Service's EIS under NEPA, "[i]f the actions covered by the original [EIS] and the proposed action are substantially the same, the

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the American Trader Oil Spill. This EA would not be subject to the same circulation requirement as an EIS, and "the scope of practicable alternatives analysis is narrowed considerably" where an EIS is not required. Pogliani, 166 F. Supp. 2d at 698. According to defendants, however, this EA is not sufficient under NEPA, since the FWS does not analyze the alternatives within its EA.

agency adopting another agency's statement is not required to recirculate it except as a final statement." 40 C.F.R. § 1506.3(b). Here, because the permit simply allows the NPS to proceed with the plan analyzed in the original EIS, the actions being evaluated by the two agencies are "substantially the same," if not identical. Thus, the FWS had to recirculate the EIS as a final statement, which means it must be filed with the Environmental Protection Agency ("EPA"), which publishes notice each week in the Federal Register, and then the agency must wait 30 days after publication of notice before preparing a record of decision finalizing the EIS. 40 C.F.R. §§ 1505.2, 1506.9-.10.

According to the FONSI of the FWS, the permit application was submitted by the NPS on November 7, 2001. (Def. Ex. B at 1.) The permit and the FONSI are dated November 16, 2001. (Def. Ex. A at 1; Def. Ex. B at 3.) It is therefore clear that because it did not recirculate the final EIS of the NPS and wait the requisite 30 days before taking action, as required by 40 C.F.R. § 1506.9-.10, the FWS cannot rely on the Park Service's EIS, and in the absence of an EIS, it will not be in compliance with its NEPA obligations.

Having found that the NPS issued a valid EIS but that the FWS did not validly "adopt" its EIS, the Court is confronted with the issue of whether this procedural lapse should satisfy plaintiffs' burden of showing a substantial likelihood of success on the merits. The Court concludes that it does not. Rather, the failure to reissue a final EIS that had already been subject to extensive public comment and final publication would serve no useful purpose. As recognized by the Ninth Circuit,

[t]he purpose of 40 C.F.R. §§ 1506.9 and 1506.10 is to ensure that all pertinent information is available on proposed action for a period of 30 days before final action is taken, and that interested parties have notice of that availability. The 30-

day period is not for the purpose of additional public comment and review, but . . . is to allow a sufficient review period for the final statement and comment and views of commenting agencies to accompany the proposal through the existing agency review process.

County of Del Norte v. United States, 732 F.2d 1462, 1466 (9<sup>th</sup> Cir. 1984) (emphasis added) (citing California v. Block, 690 F.2d 753, 771 (9<sup>th</sup> Cir. 1982)).

In reaching this decision, the Court is not unmindful that the primary purpose of NEPA is to "guarantee[] that the relevant information will be made available to the larger audience" so that the public can "play a role in both the decision-making process and the implementation of that decision." Sierra Club v. Watkins, 808 F. Supp. 852, 858 (D.D.C. 1991). But that purpose has been met here. As required by the CEQ regulations, the NPS filed with the EPA the final EIS, which was then published in the Federal Register, and the NPS waited at least 30 days following publication before taking action based on the final EIS. See 40 C.F.R. §§ 1502.2, 1506.10(b). This EIS was the subject of extensive public comment prior to being put in final form, and to now recirculate the same EIS as a final statement for a second 30-day period would add nothing in terms of promoting public knowledge or improving or altering the agency's decision-making process.<sup>14</sup> As noted by the Ninth Circuit, the 30-day period is not designed for making substantive changes to the final EIS in response to public comment, and even if this were the case, this has already occurred here. Thus, it must be concluded that at the end of this 30-day period, the FWS would reach exactly the same decision regarding the permit that it has already

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<sup>14</sup>Thus, this case is not analogous to Fund for Animals v. Glickman, No. 99-245 (filed Feb. 3, 1999), where Judge Kessler granted a temporary restraining order because plaintiffs had raised a "very substantial question about whether defendants ha[d] allowed sufficient opportunity for public involvement and input under the CEQ regulations and applicable case law." (Pl. Reply at 11.)

reached. See Consolidated Gas Supply Corp. v. Federal Energy Regulatory Commission, 606 F.2d 323, 328-29 (D.C. Cir. 1979) (agency decision will not be overturned based on technical error if the agency would have reached the same decision absent the error); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1971) (court will not upset agency decision based on non-material errors if the agency has taken a "hard look" at issues); Del Norte, 732 F.2d at 1466-67 and cases cited therein.

In arriving at this conclusion, the Court finds the Supreme Court's decision in Weinberger v. Romero-Barcelo, 456 U.S. 305 (1985), to be instructive. There, the Court recognized that the Navy's discharge of ordnance into the waters off the coast of Puerto Rico without a permit from the EPA violated the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq. 456 U.S. at 314-15. Nonetheless, the Court found that even where a statutory violation is established, an injunction was not necessary (as opposed to requiring the Navy to obtain a permit) because the purpose of the statute – to promote the "integrity of the Nation's waters" – was not being jeopardized by the discharge of the ordnance by the Navy, and thus, the purpose of the Act was not threatened by allowing the Navy's activities to continue without a permit. Id. at 314. So, too, in this case, to permit the project to proceed in the absence of the recirculation of an EIS for a second 30-day period will not undermine the purposes of NEPA.

### III. Irreparable Injury

Whether a court should consider irreparable injury to plaintiffs as a factor in evaluating plaintiffs' motion for a preliminary injunction against a federal agency under the APA has recently been alluded to by this Circuit. In American Bioscience, this Circuit noted that "when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal.

The 'entire case' on review is a question of law." As a result, "whether or not appellant has suffered irreparable injury, if it makes out its case under the APA it is entitled to a remedy." 2001 WL 1355189, at \*6. American Bioscience, however, appears to assume that the district court could consider the entire administrative record in ruling on a preliminary injunction, and in this case, the parties have acknowledged that the Court lacks the full record. As a result, the Court will follow the well-established rule that irreparable injury to plaintiffs is a factor to consider in determining whether to issue a preliminary injunction against an administrative agency. See Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987) (evaluating plaintiffs' claims of irreparable injury in ruling on a motion for a preliminary injunction against a federal agency).

In arguing irreparable injury, plaintiffs claim that they, like the plaintiffs in Fund for Animals v. Clark, have suffered procedural injury caused by defendants' failure to comply with NEPA, as well as "other, concrete injuries" that will result from the "aesthetic injury" of seeing dead or dying birds of prey and other poisoned birds, and from contemplating the loss of wildlife on the island. 27 F. Supp. 2d at 13. As to both claims, the Court finds plaintiffs' position to be far less persuasive than was the case in Fund for Animals.

Here, as in Romero-Barcelo, the procedural deficiencies do not jeopardize the purposes of NEPA. Those purposes were satisfied by the NPS' EIS, and thus, to jeopardize the eradication project in order to require compliance with the CEQ's technical regulations would elevate form over substance. In contrast, in Fund for Animals and Citizens Alert v. DOJ, 1995 WL 748246 (D.D.C. 1995), which plaintiffs rely on, there were substantive deficiencies in either the EIS or the EA that had been prepared by the agency. Since that is not the case here, it is far more

difficult to conclude that the procedural injury should be redressed by injunctive relief. . . .

Second, the evidence before the Court regarding the likelihood of aesthetic injury is, at best, conflicting and inconclusive. Both parties rely on affidavits of scientists who provide contradictory evidence regarding the extent of the loss of birdlife that will occur. In particular, defendants' scientists stress, based on scientific literature as well as a recent field study, that there will be limited loss due to the mitigation efforts that are already in place and the lack of birds inhabiting the island at this time of year. (See Declaration of Desley Whisson ("Whisson Decl.")).<sup>15</sup> Plaintiffs dispute these assertions by relying on the Declaration of John Hadidian, a biologist with the Humane Society of the United States who previously worked at the NPS. Dr. Hadidian challenges the efficacy of the NPS' proposal, claiming that the loss of wildlife will be far more significant due to the lethal nature of the brodifacoum, and that there is no immediate need for the project. Given the conflicting nature of the evidence, it is simply not possible for the Court to determine with any assurance the extent of aesthetic injury that plaintiffs may suffer if this project is not stopped. Obviously, any eradication program that has indirect effects on other species will thereby result in some aesthetic injury. But the Court cannot find that this aesthetic injury is sufficient to overcome the minimal showing on the merits, which consists of an insubstantial procedural defect.

#### IV. Harm to Other Parties

An evaluation of the harm to other parties – and specifically to defendants – also weighs

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<sup>15</sup>Dr. Whisson, a vertebrate ecologist at the University of California at Davis, notes, for example, that the risk of poisoning to birds is low due to the low abundance of raptors and owls, and that while deer mice on Anacapa Island will be subject to primary exposure, "a sufficient number of mice to repopulate the island will be trapped, housed in a facility on the island during the eradication program, and released afterwards." (Whisson Decl. ¶ 8.)

against injunctive relief. Defendants contend that they would be harmed by a preliminary injunction because 1) many species on Anacapa Island, including the Xantus' Murrelets and Ashy Storm-Petrel, will be progressively more impacted by rats as long as these rodents are not eradicated, and that the number of murrelets, in particular, is declining to the point of near-crisis, and 2) between \$350,000 and \$450,000 in funds from the American Trader settlement fund has been irretrievably spent on field work for the Anacapa Island Restoration Project.<sup>16</sup>

Plaintiffs dispute both claims of injury. First, they contend that the population of these birds has not declined to the point where a preliminary injunction would pose a risk to the survival of those species – and if the rats did pose a risk, defendants could take localized rat control measures to protect birds from these predators. (See Declaration of John Hadidian (“Hadidian Decl.”) ¶¶ 30-36.) Moreover, because defendants have not engaged in any rat extermination programs for at least five years, plaintiffs assert that defendants’ claim of ecological injury from a preliminary injunction is disingenuous. As noted above, plaintiffs’ scientific evidence conflicts with the declarations submitted by defendants’ scientists, who assert that the immediate eradication of rats is necessary to preserve the murrelet population on the island. (See Declaration of Harry Carter (“Carter Decl.”) ¶ 5.) As was the case with irreparable injury, the Court is not in a position to conclude, nor should it be asked to decide, whether defendants’ plan is a good one, or whether it will achieve its goals. See *Kleppe*, 427 U.S. at 410 n.21. In effect, that complex decision has been left to the agencies, and in the absence of a clear

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<sup>16</sup>This work includes ecological monitoring; construction of temporary on-island housing to support NPS personnel who will be working on the island during the project; the trapping and care of 150 deer mice; the trapping and relocation of numerous birds of prey; and the fitting of 25 rats with limited-life radio collars for monitoring. (See Faulkner Decl. ¶¶ 8-9, 11-13.)

and material violation of law, the Court will not substitute its judgment for that of defendants.

Moreover, the Court is satisfied that defendants will suffer substantial economic harm from a preliminary injunction. An injunction could cost defendants between 10 and 20 percent of the entire American Trader oil spill fund, since that money has already been expended and cannot be recouped. In contrast to the cases cited by plaintiffs, in which courts have held that the loss of government funds is insufficient to support a finding of no injunction where there is a likelihood that federal law has been violated, see Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991); Wilderness Society v. Tyrrel, 701 F. Supp. 1473, 1491 (E.D. Ca. 1988); Stop H-3 Ass'n v. Volpe, 353 F. Supp. 14, 18 (D. Haw. 1972), the instant action deals with money from a finite environmental fund established as the result of an oil spill. The Court finds this to be serious economic harm that also weighs against an injunction.

#### V. Public Interest

Finally, the Court finds that the public interest also favors denial of an injunction. Although "the public has a general interest in the meticulous compliance with the law by federal officials," Fund for Animals, 27 F. Supp. 2d at 15, that interest is significant only to the extent that compliance with the law actually furthers the policies promoted by that law. The purpose of NEPA is to ensure "that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts [and] that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). Although the FWS did not comply with the strict requirements of the CEQ regulations in adopting the Park Service's EIS, that EIS

was the product of careful consideration by another agency of detailed information concerning environmental impacts. Moreover, the public participated fully in the development of the EIS. The FWS' non-compliance with CEQ procedures regarding that EIS therefore in no way frustrated either the purpose of NEPA or the public interest.

#### CONCLUSION

The Court therefore finds that plaintiffs have failed to sustain their burden and their motion should be denied.

A separate Order accompanies this Opinion.



ELLEN SEGAL HUVELLE  
United States District Judge

11/24/01

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**FILED**  
NOV 29 2001  
NANCY S. GIBSON, CLERK  
U.S. DISTRICT COURT

THE FUND FOR ANIMALS, et al.,

Plaintiffs,

v.

FRAN MAINELLA, et al.,

Defendants.

Civil Action No. 01-2288 (ESH)

**ORDER**

Upon consideration of plaintiffs' motion for a preliminary injunction [3-1], it is hereby

**ORDERED** that plaintiff's motion is **DENIED**.

**SO ORDERED.**

*Ellen S. Huvelle*

ELLEN SEGAL HUVELLE  
District Judge

DATE: 11/29/01

