

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

OHIO VALLEY ENVIRONMENTAL COALITION, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 08-0979
)	
UNITED STATES ARMY CORPS OF ENGINEERS, <u>et al.</u> ,)	
)	
Defendants.)	

UNITED STATES' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs are challenging a decision by the United States Army Corps of Engineers (“Corps”) to issue an individual Clean Water Act (“CWA”) section 404 permit to Loadout, LLC (“Loadout”) to discharge dredged or fill material into streams for the purpose of conducting surface coal mining activities at Nellis Surface Mine in Boone County, West Virginia. In their motion for partial summary judgment, Plaintiffs argue that the Corps violated its obligations under the CWA and the National Environmental Policy Act (NEPA) to provide adequate public notice and comment and to involve the public in its permitting process. Plaintiffs’ motion for partial summary judgment should be denied, because the Corps has fully complied with all regulations and procedures regarding notice and comment and public involvement.

STATUTORY AND REGULATORY BACKGROUND

I. Clean Water Act

The CWA establishes a comprehensive program designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this goal, the CWA prohibits the discharge of pollutants into navigable waters unless authorized by a CWA permit. *Id.* § 1311(a). The CWA defines “navigable waters” as “waters of the United States.” *Id.* § 1362(7). *See* 33 C.F.R. § 328.3 (Corps’ definition of “waters of the United States”); 40 C.F.R. § 232.2 (EPA’s definition of “waters of the United States”). The CWA authorizes the discharge of pollutants into waters of the United States under two permit programs. Section 404 authorizes discharges of dredged or fill material, and section 402 applies to all other pollutants. 33 U.S.C. §§ 1344, 1342. Section 404 is administered by the Corps in the State of West Virginia, while Section 402 is administered by the West Virginia Department of Environmental Protection.

Section 404 of the CWA authorizes the Secretary of the Army, through the Corps, to regulate discharges of dredged and fill material through permits. 33 U.S.C. § 1344. This can include discharges of dredged or fill material associated with typical coal mining and reclamation activities. The Corps may issue individual permits or general permits. Id. § 1344(a), (e). Individual permits, such as the one at issue here, are issued on a case-by-case basis after a resource-intensive process that involves extensive site-specific documentation and review, opportunity for public hearing, public interest review, and a formal determination. See generally 33 C.F.R. Pts. 320, 325. Subject to certain criteria, the Corps will grant a permit “unless the district engineer determines that [to do so] would be contrary to the public interest.” 33 C.F.R. § 320.4(a)(1).

CWA section 404 permits must also meet guidelines issued by EPA under CWA section 404(b)(1), 33 U.S.C. § 1344(b)(1). These regulations (referred to as the “404(b)(1) Guidelines” and codified at 40 C.F.R. Pt. 230), specify that the Corps must ensure that the proposed fill will not cause significant adverse effects on human health or welfare, aquatic life, and aquatic ecosystems. 40 C.F.R. § 230.10(c)(1)-(3). To comply with this requirement, the Corps must make a written determination of the effects of a proposed activity “on the physical, chemical, and biological components of the aquatic environment.” Id. § 230.11. See 33 C.F.R. §§ 320.4(b)(4), 325.2(a)(6).

The 404(b)(1) Guidelines generally prohibit the permitting of projects where there “is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” 40 C.F.R. § 230.10(a); 33 C.F.R. § 320.4(a)(2)(ii). When a project is not water dependent, there is a presumption that practicable alternatives are available. 40 C.F.R. § 230.10(a)(3). There is also a presumption that any practicable alternative will have a lesser adverse effect on the environment unless clearly demonstrated otherwise. Id. The 404(b)(1) Guidelines also

provide that “no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.” 40 C.F.R. § 230.10(d). One way the Corps can reduce the potential adverse impacts associated with filling activities is to require mitigation as a condition of a permit. 33 C.F.R. § 325.4(a)(3); see also 33 C.F.R. § 320.4(r)(1). Mitigation includes steps to avoid or minimize an impact and to “[c]ompensat[e] for the impact by replacing or providing substitute resources or environments.” 40 C.F.R. § 1508.20(e).

II. National Environmental Policy Act

NEPA, 42 U.S.C. §§ 4321-70f, focuses the attention of federal decisionmakers and the public on potential environmental effects of a proposed federal agency action. It is purely procedural because it does not compel particular results, and it does not impose substantive obligations. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989). NEPA does not require that an agency select any particular course of action. Rather, it requires only that the agency make its decision to proceed with a particular action after taking a “hard look” at environmental consequences. Center for Marine Conservation v. Brown, 917 F. Supp. 1128, 1136 (S.D. Tex. 1996). “NEPA merely prohibits uninformed – rather than unwise – agency action.” Methow Valley Citizens Council, 490 U.S. at 351. “NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989).

When a section 404 permit application requires analysis of environmental impacts under NEPA, the Corps follows three sets of guidelines: (1) the Corps’ own NEPA guidelines, set forth at 33 C.F.R. Parts 230 and 325, Appendix B; (2) the Corps’ general regulatory policies at 33 C.F.R.

Part 320; and (3) the regulations promulgated by the Council on Environmental Quality (“CEQ”), set forth at 40 C.F.R. §§ 1500-08.

NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”) only for major federal actions that significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The EIS helps the agency to identify and understand potential environmental effects before actions are taken. To determine if a particular action requires an EIS, the Corps may prepare an environmental assessment (“EA”). 33 C.F.R. § 230.10; 40 C.F.R. § 1501.3. The Corps’ Guidelines call for EAs to be integrated into and combined with the Corps’ other analyses concerning permit issuance. 33 C.F.R. Pt. 325, App. B, § 7(a). If the Corps finds through the EA that the proposed project will not have a significant impact on human health or the environment, it then issues a “finding of no significant impact” (“FONSI”). *Id.* § 230.11. In contrast, if the Corps finds that the project will have a significant impact, it prepares an EIS, which discusses the impact in more detail. After preparing and issuing either a FONSI or an EIS, the Corps decides whether to grant or deny the permit application.

III. Relevant Corps Regulations

The CWA requires that the Corps publish public notice of an application “[n]ot later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit . . .” 33 U.S.C. § 1344(a). The Corps’ regulations implement this provision, and dictate with specificity when public notice must be issued regarding a permit application and what the notice must contain. The Corps must issue the public notice within 15 days of the receipt of the complete application. 33 C.F.R. § 325.2(d)(1). As discussed further below, an application is complete “when sufficient information is received to issue a public notice.” *Id.* § 325.1(d)(10).

After a complete application is received, “[t]he issuance of a public notice will not be delayed to obtain information necessary to evaluate an application.”). 33 C.F.R. § 325.1(d)(10). Further, the Corps’ regulations provide that the comment period “should not be more than 30 days” from the date of the public notice. Id. § 325.2(d)(2).^{1/}

The Corps’ regulations direct that the public notice “include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.” Id. § 325.3(a). The regulations identify 17 specific pieces of information that are required. Id. § 325.3(a)(1)-(17). One of these is a “description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments.” Id. § 325.3(a)(5). However, an analysis of potential environmental impacts or a mitigation proposal was not required. Id. § 325.1(d) (2007). The regulations do not require public notice of the Environmental Information Document (EID) or the Compensatory Mitigation Plan (CMP). Those documents, however, are part of the administrative record (along with many other documents considered by the Corps in the permit process) and are available to the public.

The Corps has recently amended its regulations to require that the public notice include a statement regarding proposed mitigation. Id. § 332.4(b).^{2/} The purpose of the new rule is “to establish standards and criteria for the use of all types of compensatory mitigation.” Id. §

^{1/}The district engineer may issue a supplemental, revised, or corrected public notice if in his view there is a change in the application data that would affect the public’s review of the proposal. Id. § 325.2(a)(2).

^{2/}The revised regulations codify a final rule on compensatory mitigation promulgated jointly by the Corps and EPA. 73 Fed. Reg. 19,594 (April 10, 2008). The new regulations have drawn support because they “increase[] public participation in the compensatory mitigation process.” 73 Fed. Reg. at 19,595.

332.1(a)(1). Under the new regulations, applicants for Section 404 permits are now required to include in their application “either a statement describing how impacts to waters of the United States are to be compensated for or a statement explaining why compensatory mitigation should not be required for the proposed impacts.” *Id.* § 325.1(d)(7) (2008). See also 73 Fed. Reg. at 19,670. Based on this information provided by the applicant, the public notice must contain a “statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for.” 33 C.F.R. § 332.4(b). See also 73 Fed. Reg. at 19,677. These new public notice requirements did not apply to the permit at issue here, but apply to all permit applications submitted after June 9, 2008. 73 Fed. Reg. at 19,670.^{3/}

FACTUAL BACKGROUND

Loadout filed its initial application for a CWA 404 permit on April 10, 2006, and the application was deemed complete on May 25, 2006.^{4/} The Corps issued public notice of the application on June 2, 2006 (Exh. A), describing the project and soliciting comments.

Ten comments were received in response to the public notice from interested citizens and resource agencies, including lengthy and detailed comments from the Appalachian Center for Economy and Environment (ACEE), a Plaintiff in this case. Plaintiffs’ comments included specific comments on mitigation (ACEE Comments at pp. 9-12, 25-29) and included both a Statement and

^{3/}The new regulations require that certain types of mitigation proposals go through such a process. 33 C.F.R. § 332.8(d)(4). This specified public notice/comment procedure, however, applies only to mitigation banks and in-lieu fee programs, not the in-kind mitigation such as that at issue in this case. See id.

^{4/}The application is a large document with several exhibits, including maps (apps. a, f), a summary of proposed Stream Restoration and Mitigation (app. c), General Mitigation Plan Agreement (app. d), Practicable Alternatives Determination (app. e), Cumulative Hydrologic Impact Assessment (app. g), and habitat studies (app. h). The entire application can be found in Volume I, Tab 2 of the CD containing the administrative record.

an Expert Report of Dr. J. Bruce Wallace commenting on mitigation (ACEE Comments, Exhs. L and S), an Expert Report of Dr. Margaret A. Palmer commenting on mitigation (ACEE Comments, Exh. T), and several published articles regarding restoration (ACEE Comments, Exhs. M, P, Q).^{5/} No requests for public hearing were received. Loadout submitted an Environmental Information Document (“EID”) in August, 2006 and a compensatory mitigation plan (CMP) in July, 2007 and a supplement to the CMP in December, 2007.^{6/}

The Corps carefully evaluated the proposed project, including the public comments and other information received, and described its decision in the Combined Decision Document (CDD) (Exh. B). The CDD addresses the factors required by the CWA 404(b)(1) Guidelines (CDD at 4-53) and makes a determination of compliance with the CEWA 404(b)(1) Guidelines (CDD at 86); it provides an Environmental Assessment (CDD at 53-63) and a finding of no significant impact (CDD at 8788); it includes an evaluation of cumulative impacts (CDD at 63-78), and addresses all public comments in a Statement of Findings (CDD at 78-87), including a detailed discussion of the mitigation concerns raised on behalf of Plaintiffs (CDD at 82-86). Following consideration of the comments and other materials, the Department of the Army Permit No. 2001-00895(MUR) was issued to Loadout LLC on April 16, 2008 (Exh. C).

The Loadout permit authorizes filling of 11,162 feet of ephemeral and intermittent stream channels (CDD at 3, Permit at 1). The impacts will be compensated by creating a total of 13,564 linear feet of stream channels which will be established around the valley fills (CDD at 20-21,

^{5/}The ACEE Comments are voluminous, containing several lengthy exhibits. They can be found in Volume 2, Tab 10 on the CD containing the administrative record.

^{6/}The CMP and the EID are voluminous documents with oversized maps and drawings that are difficult to copy and thus are not included as exhibits to this memorandum. Both documents can be found in the CD containing the administrative record in Volume 3, Tab 27, app. B (CMP), Volume 2, Tab 17 (Supp. to CMP), and Volume 2, Tab 13 (EID).

Permit at Compensatory Mitigation Conditions, paragraph 13) and enhancement of 8,900 linear feet of stream channel in Fork Creek by providing bank stability and improved stream morphology (CDD at 21, Permit at Compensatory Mitigation Conditions, paragraph 14). The permit also establishes performance standards to determine success of the mitigation (CDD at 22-23, Permit at Compensatory Mitigation Conditions, paragraph 17), and establishes and restrictive covenants to protect all stream mitigation sites. (Id. at paragraph 18). Mitigation will require a minimum of ten years of annual monitoring (CDD at 20-21). A variety of special permit conditions are also required. See Permit (special conditions).

ARGUMENT

I. The Corps Complied with the Public Notice and Involvement Requirements of the CWA

Plaintiffs claim that the Corps violated the CWA by failing to provide public notice and an opportunity to comment on the EID and CMP. Pltf. Mem. at 6. This claim lacks merit.

The Corps followed its longstanding CWA public notice regulations – regulations that Plaintiffs do not challenge. Upon receipt of all information required for a complete application from Loadout, the Corps issued a public notice within the 15-day time period established in 33 C.F.R. § 325.1(d)(1). The public notice set forth a clear description of the proposed project, including the magnitude and nature of the proposed stream impacts, and a conceptual description of the proposed mitigation. The public notice also described the nature of the Corps’ review, including a detailed list of the factors to be considered by the Corps, and sought “comments and information to better enable us to make a reasonable decision on factors affecting the public interest.” Exh. A at 3-4. The public notice set a 30-day public comment period, the maximum recommended by the Corps’ regulations. Id. at 1, 4. The notice further advised the public that “[a]ny person who has an interest

that may be adversely affected by the issuance of a permit may request a public hearing.” Id. at 3. Plaintiffs were provided sufficient information of the “nature and magnitude” of the project to satisfy Corps public notice requirements. See 33 C.F.R. § 325.3(a).

The public notice is a document prepared early in the permit process and which must be issued within 15 days of receipt of a permit application that is deemed complete. 33 U.S.C. § 1344(a). Its adequacy must be judged based on the relevant information available to the Corps when it issued the notice. See Great Salt Lake Minerals & Chemicals Corp. v. Marsh, 596 F. Supp. 548, 555 (D. Utah 1984) (rejecting challenge to adequacy of public notice after concluding the “Corps is not required to include detailed conclusions and findings in the notice”). Although Loadout had not submitted proposed mitigation for the project, the application was complete for purposes of issuing public notice. See 33 C.F.R. § 325.1(d) (10) (directing that Corps not delay public notice for additional information, when application is complete for notice). Having determined the application contained all the information required to issue a public notice, the Corps did not err in commencing the public notice process. See Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (recognizing that courts “must give substantial deference to an agency’s interpretation of its own regulations”).

Plaintiffs mischaracterize the Corps’ standard for issuing a supplemental public notice. Pltf.. Mem. at 8. The supplemental notice is not required; it is discretionary when the Corps district engineer determines that there is a “change in the application data” that would affect public review. See 33 C.F.R. § 325.2(a)(2). There is nothing in the regulations that requires a supplemental public notice when the mitigation plan is received. Under 33 C.F.R. § 332.4(c), a permit applicant must submit a proposed mitigation plan to the Corps’ district engineer. After receiving comments from

the district engineer, the applicant permittee must submit a final mitigation plan which must be approved before a permit can be issued. For individual permits, “district engineers may coordinate draft mitigation plans with commenting agencies during the permit application evaluation process.” 73 Fed. Reg. at 19,641. But the regulations do not require that CMPs or EIDs be circulated publicly or that notification be published in the Federal Register.

Nor did the Corps abuse its discretion in declining to issue supplemental notice. A steady line of courts have upheld decisions by the Corps not to issue supplemental public notice. See, e.g., Sierra Club v. United States Army Corps of Eng’rs, 450 F. Supp. 2d 503, 535-36 (D.N.J. 2006) (rejecting challenge to Corps’ decision not to issue supplemental notice, when “the public was well apprised by the initial notice” of the issues to which later-received documents pertained, “as evidenced by comments to the initial notice”), vacated and remanded on other grounds, 277 Fed. Appx. 170 (3d Cir. 2008). See also B&B P’ship v. United States, 133 F.3d 913 at *6-*7, 1997 WL 787145 (4th Cir. 1997) (unpublished decision) (rejecting challenge to Corps’ decision not to issue supplemental notice, although applicant submitted “plan modifications”); Fund for Animals, Inc. v. Rice, 85 F.3d 535, 545 (11th Cir. 1996) (rejecting challenge to Corps’ public notice procedures and noting that “the applicable regulations give the Corps discretion about whether to issue supplemental public notice”); Sierra Club v. United States Army Corps of Eng’rs, 935 F.Supp. 1556, 1581 (S.D. Ala. 1996) (rejecting challenge to Corps’ decision not to issue supplemental public notice, and observing that no supplemental notices are “required under the relevant CWA regulations”). Plaintiffs cite no cases otherwise interpreting the Corps’ supplemental notice regulations.

Plaintiffs' rights to meaningful comment were not prejudiced in the permit process. Plaintiffs here were well apprised of the issues pertaining to the not-yet-received CMP and EID. Plaintiffs provided extensive comments to the Corps regarding allegedly "flawed and illegal" mitigation measures, and submitted a lengthy expert's declaration that focused entirely on mitigation. See ACEE Comments Vol. 2, Tab 10 of CD containing administrative record and App. L (Declaration of Dr. J. Bruce Wallace accompanying ACEE Comments). In reaching its decision, the Corps considered Plaintiffs' comments on mitigation and provided a detailed response – including eleven pages addressing mitigation – with its permit decision. CDD at 9-20.

This case is akin to Northwest Env't Defense Center v. Wood, which rejected a challenge to the Corps' public comment procedures under the CWA. 947 F. Supp. 1371, 1381 (D. Or. 1996), aff'd, 97 F.3d 1460 (9th Cir. 1996) (unpublished decision). In Wood, the plaintiffs alleged that the Corps deprived the public of the opportunity to meaningfully comment by considering a permit applicant's alternatives analysis and proposed mitigation plan that was submitted after the official close of the public comment period. Id. The court held, however, that the Corps provided ample opportunity for public comment: the Corps provided an initial comment period, received comments addressing mitigation issues," and explicitly responded in its decision document to these public concerns. Id. Here, as in Wood, the Corps provided an appropriate public notice under its regulations, received detailed comments addressing mitigation from Plaintiffs, and explicitly responded to Plaintiffs' comments in its decision document. This is not a violation of the CWA.

Plaintiffs cite National Wildlife Fed'n v. Marsh, 568 F.Supp. 985 (D.D.C. 1983) and Friends of the Earth v. Hall, 693 F. Supp. 904, 948 (W.D. Wash. 1988) for their argument, but both are easily distinguished. Pltf. Mem. at 7. In Marsh, following a public hearing attended by more than

1,000 people, a government-created evaluation document introduced after the public comment period announced a “sudden shift in rationale” that served as the basis for permit approval. Id. at 996. This document also offered an “analysis of alternatives” that sharply differed from earlier analyses but which was relied on for the final decision. Id. at 991. Here, by contrast, Plaintiffs at no point exercised their right to request a hearing on the permit application. More importantly, although the Corps’ decision reflected consideration of Loadout’s mitigation plan, the mitigation plan did not mark any change in the project’s scope, goal, or rationale. Instead, the plan proposed implementation of familiar mitigation approaches. Although Plaintiffs may disagree with these approaches, they had ample opportunity to comment extensively regarding the proposed project, and exercised that right by filing substantial comments, including comments on mitigation.

In Hall, the court’s holding that CWA notice requirements were violated was based on the Corps’ failure to meet a requirement to include a detailed mitigation plan in an Environmental Impact Statement (EIS). In this case, by contrast, there is no EIS and no requirement for submission of a detailed mitigation plan. There is no government document, other than the CDD, that serves as the basis for the permit decision.

Finally, the Corps now requires that certain types of mitigation proposals go through specific public notice and comment procedures, see 33 C.F.R. § 332.8(d)(4). However, even the new regulation does not require that in-kind mitigation go through separate notice and comment. The new regulations, which “establish standards and criteria for the use of all types of compensatory mitigation,” id. § 332.1(a)(1), set a specified public notice/comment procedure only for mitigation banks and in-lieu fee programs. Id. § 332.8(d)(4). Nor has the Corps ever required that EIDs go through separate notice and comment. There is no reasonable basis to conclude that more sweeping

public notice/comment requirements somehow applied to all mitigation plans and EIDs before this regulation was promulgated.

II. The Corps Complied with the Public Notice and Involvement Requirements of NEPA.

Plaintiffs argue that the Corps violated NEPA requirements by failing to circulate a copy of the EID and CMP to the public before making its decision. Pltf. Mem at 9. Plaintiffs are incorrect.

The Corps fully satisfied all NEPA public notification and comment requirements. According to CEQ regulations, “[t]he agency shall involve the environmental agencies, applicants, and the public, to the extent practicable, in preparing” EAs. 40 C.F.R. § 1501.4(b). The regulations also require that agencies, inter alia, make diligent efforts to involve the public in the NEPA process, provide public notice of hearings and NEPA documents, and solicit comments from the public. 40 C.F.R. § 1506.6(a)-(c). Neither NEPA nor the CEQ regulations require that a draft EA, or any particular documents, be circulated for public comment.^{7/} 40 C.F.R. § 1501.4. See Como-Falcon Cmty. Coalition v. Dep’t of Labor, 609 F.2d 342, 345 (8th Cir. 1979) (there is no statutory requirement that an agency provide opportunity for public comment of a particular kind, and “we are unwilling by judicial decision to legislate such a requirement into the Act.”).

The Corps’ regulations implementing NEPA “provide information on the requirements for district engineers to make available certain environmental documents in accordance with 40 CFR 1506.6.” 33 C.F.R. Part 325, App. B, par. 5. With respect to EAs, the regulations direct that the “district engineer should complete an EA as soon as practicable after all relevant information is available (i.e. after the comment period for the public notice of the permit application has expired)

^{7/}The regulations also only require a draft FONSI to be circulated in certain narrow circumstances not present in this matter. 40 C.F.R. § 1501.4(e)(2).

....” Id. at par. 7(a). These regulations do not provide for any public involvement beyond that required in the regulations governing the issuance of the public notice and the opportunity for the public to request a hearing.

Multiple Circuits have rejected attempts by plaintiffs to impose a more elaborate public review process than that required by existing regulations. Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989,996 (9th Cir. 1993) (Corps process sufficient where public notice complied with regulatory requirements). Specifically, assertions that the Corps’ own draft EA must be circulated for public review have been rejected – and such a claim made earlier by these Plaintiffs was abandoned. See Bering Strait Citizens for Responsible Resource Dev. v. United States Army Corps of Eng’rs, 524 F.3d 938, 952 (9th Cir. 2008) (rejecting claim that Corps violated NEPA by failing to circulate a draft EA for public review); Alliance to Protect Nantucket Sound, Inc. v. United States Dep’t of Army, 398 F.3d 105, 114-15 (1st Cir. 2005) (“Nothing in the CEQ regulations requires circulation of a draft EA for public comment”); Pogliani v. United States Army Corps of Eng’rs, 306 F.3d 1235, 1238 (2d Cir. 2002) (concluding that only in certain limited circumstances defined in the regulations must the Corps circulate an EA for public comment); Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1279 (10th Cir. 2004) (rejecting the argument that the Corps must circulate an EA for public comment). See also Fund for Animals, Inc. v. Rice, 85 F.3d 535, 549 (11th Cir. 1996) (“there is no *legal* requirement that an Environmental Assessment be circulated publicly and, in fact, they rarely are.”). Plaintiffs have pointed to no regulation or court decision that would support their assertion that *source documents* for the Corps’ EA, a document that itself is not subject to a public review requirement, must be circulated for public review.

Thus, the Corps' public notice of the Loadout permit application satisfied NEPA's requirements for public participation "to the extent practicable" in preparing EAs. It was fully consistent with longstanding Corps regulations promulgated to implement both the CWA and NEPA. It provided ample opportunity for Plaintiffs to make concerns about this specific project known to the Corps, as evidenced by their thorough comments. Furthermore, Plaintiffs have pointed to no precedent in their favor. To the contrary, courts have consistently rejected attempts to impose requirements beyond those set forth in the Corps' regulations.

CONCLUSION

For the foregoing reasons, the Federal Defendants respectfully request that Plaintiffs' Motion for summary judgment be denied.

April 6, 2009

Respectfully submitted,

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Defendants.)	

I hereby certify that on this 6th day of April, 2009, I electronically filed the foregoing “United States’ Memorandum in Opposition to Plaintiffs’ Motion for Partial Summary Judgment,” with the Clerk of the Court using the CM/EMF system which will send notification of such filing to the following:

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