UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 24-09876

Swampland Preservation Association,

Appellant and Cross-Appellee,

v.

U.S. Army Corps of Engineers, an agency of the Department of Defense, **General Lucy Peabody**, in her official capacity as Chief of Engineers and Commanding General of the United States Army Corps of Engineers, and **Scott Zink**, in his official capacity as Division Commander of the United States Army Corp of Engineers, Utanidi Division,

Appellees and Cross-Appellants.

On Appeal from the District Court for the Eastern District of North Kingston, Dist. Ct. Consolidated Case Nos. 2424 and 2428

This matter arises from two separate proceedings regarding the Kingston Cross Transmission Line (KCT Line). The KCT Line is a proposed 333-mile, 600-kV transmission line that will move electricity from the proposed Mega Solar Array in rural North Kingston to the existing Atlantic Connector Line that connects to much of the mid-Atlantic coastal population. As approved, the east-west KCT Line will pass through Thicket Swamp in North Kingston, cross the Utanidi River, and connect with the north-south Atlantic Connector in Atlantica.

The Swampland Preservation Association (SPA) brought two separate proceedings in the district court. First, SPA challenged a determination by the United States Army Corps of Engineers (USACE) that seven depressional wetlands in Thicket Swamp (the Thicket Depressions) are not jurisdictional waters under the Clean Water Act and implementing regulations. Second, SPA challenged a Record of Decision (ROD) by USACE, which adopted the final Environmental Impact Statement (EIS) for the KCT Line and approved a water crossing over the Utanidi River.

The district court consolidated the proceedings, and ultimately granted partial summary judgment for both Defendants and SPA. The district court upheld Army Corps' jurisdictional determination, and split on SPA's challenges to the EIS and ROD. SPA appealed the grant of

partial summary judgment to Defendants, and Defendants appealed the grant of partial summary judgment to SPA.

It is hereby ordered that SPA and USACE brief the following issues[1]:

1. Whether USACE's determination that the Thicket Depressions are not jurisdictional waters under the Clean Water Act was arbitrary, capricious, or not in accordance with the law;

2. Whether USACE's decision to not consider the environmental impacts of the KCT Line on the Thicket Depressions was arbitrary, capricious, or not in accordance with the law;

3. Whether, in conducting the environmental review of the KCT Line, USACE was required to consider the environmental impacts of mining and disposing of the silicon and other hazardous materials needed for the proposed Mega Solar Array, the land use and habitat loss from the Mega Solar Array, and the emissions from transporting imported modules from China that will be used in the Mega Solar Array;

4. Whether USACE's consideration of climate change and environmental justice, and NEPA rules requiring the consideration of these items, are arbitrary and capricious and/or violate the major questions doctrine;

5. Whether the 2024 Phase 2 NEPA regulations that describe the EIS as an "action-forcing" device and require agencies to identify the environmentally-preferred alternative before taking an action improperly turn NEPA from a procedural to a substantive statute and/or violate the major questions doctrine; and

6. What standards should apply in reviewing the various agency actions challenged in these proceedings in light of the Supreme Court's recent decision in *Loper Bright v. Raimondo*, 144 S.Ct. 2244 (June 28, 2024).

SO ORDERED

Entered this 9th day of August, 2024[2]

Judge Julius Greene

[1] There are no outstanding procedural issues with regard to standing, justiciability, or compliance with procedural or administrative requirements.

[2] No decisions or documents dated after July 15, 2024 may be cited either in briefs or in oral arguments.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH KINGSTON

Swampland Preservation Association,

Plaintiff,

v. **Consolidated Case Nos. 2424 and 2428**

U.S. Army Corps of Engineers, an agency of the Department of Defense, **General Lucy Peabody**, in her official capacity as Chief of Engineers and Commanding General of the United States Army Corps of Engineers, and **Scott Zink**, in his official capacity as Division Commander of the United States Army Corp of Engineers, Utanidi Division,

Defendants.

MEMORANDUM AND ORDER GRANTING AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND GRANTING AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Swampland Preservation Association ("SPA") brought two actions challenging final agency decisions by the U.S. Army Corps of Engineers ("Army Corps" or the "Corps") regarding the proposed Kingston Cross Transmission Line ("KCT Line"). SPA first appealed the Corps' Approved Jurisdictional Determination ("AJD") that portions of Thicket Swamp in North Kingston through which the KCT Line would cross are not jurisdictional waters under the Clean Water Act ("CWA"). SPA initiated a second action challenging the Corps' Record of Decision ("ROD"), which adopted the Final Environmental Impact Statement ("EIS") for the KCT Line and approved its crossing of the Utanidi River. On joint motion of the parties, the cases were consolidated. *See* Fed.R.Civ.P. 42(a).

Defendants moved for summary judgment on all of SPA's claims, and SPA filed a cross-motion for summary judgment. As explained below, the court grants partial summary judgment to Defendants, rejecting SPA's claims that (a) the Corps' AJD was arbitrary and capricious, (b) the Corps should have considered the environmental impacts of the KCT Line on Thicket Swamp in its National Environmental Policy Act ("NEPA") review, (c) the Corps gave improper weight to considerations of climate change, and (d) the EIS should have considered the environmental impacts of mining and disposing of component materials in the panels that would be used at the Mega Solar Array. The remainder of Defendants' Motion for Summary Judgment is denied.

The court also grants partial summary judgment to SPA on its claims that (a) the Corps should have considered in the EIS and its ROD the land use and habitat loss impacts of the Mega Solar Array and the climate impacts of emissions from importing panels and certain components; (b) the Corps improperly considered, and the NEPA Rules improperly require consideration of, environmental justice ("EJ") concerns; and (c) certain 2024 NEPA Rules improperly attempt to turn NEPA from a procedural to a substantive statute. The matter is remanded for Army Corps to address these deficiencies, and the remainder of SPA's motion is denied.

FACTUAL BACKGROUND

The Kingston Cross Transmission Line Project

The KCT Line is a proposed 333-mile, 600-kV DC transmission line that will move electricity from the proposed Mega Solar Array in rural North Kingston to the existing Atlantic Connector Line that connects to much of the mid-Atlantic coastal population. The KCT Line Project was initially proposed by Mountain Power Gas & Electric ("Mountain PG&E"), a large regional public utility, in July 2020.

The Mega Solar Array is a proposed 500-megawatt photovoltaic power station. The $2.5 billion project is being developed by Mega Solar LLC, and includes nine million PV modules. In local zoning proceedings for the Mega Solar Array, it was disclosed that the modules were to be supplied exclusively by a Chinese manufacturer, TrikoSolar. The details of the agreement between Mega Solar LLC and TrikoSolar and the means for transporting the panels to North Kingston have not been disclosed by Mega Solar LLC, nor was such information demanded by federal agencies during the EIS process.

Mountain PG&E will buy the electricity produced at Mega Solar under a 25-year power purchase agreement. Mountain Power Resources, a subsidiary of Mountain PG&E, is a 45% owner of the Mega Solar Array. The CEO of Mountain Power Resources testified at deposition that the only thing delaying construction of the Mega Solar Array was final approval of the KCT Line. He also testified that, if the KCT Line was not approved, the Mega Solar Array would either not be built or would be "greatly scaled back" by "at least 50%." NKA, the regional transmission organization covering an 11-state region that includes North Kingston and Atlantica, has determined that there is a public need for the line. Mountain PG&E has obtained all the state and local approvals it needs for the line.

The KCT Line right-of-way ("ROW") would be approximately 250 feet wide. As approved, it will pass through Thicket Swamp in North Kingston, cross the Utanidi River, and connect with the Atlantic Connector in Big Rock, Atlantica. Transmission towers will be conducted between 1500 and 2000 feet apart, to heights of 150 to 200 feet tall, each with four concrete foundations 30-40 feet deep and nine feet in diameter. Access routes, including improvements to existing roads and construction of new unpaved roads to access the proposed project facilities and work areas, will be needed.

Thicket Swamp

Thicket Swamp is a large wetlands ecosystem located in an ecological province rich in depressional wetlands and ill-defined surface drainages. It is one of the largest blackwater swamps in the country and one of the world's most hydrologically intact freshwater ecosystems. It covers 338,000 acres, 70% of which are designated as wetlands. It is 44 miles at its longest point, and 34 miles at its widest.

Over half of Thicket Swamp is on state land in the southeast corner of North Kingston. The southern portion of Thicket Swamp is within the state of Kingston, and lies within Bullfrog National Wildlife Refuge and the Utanidi National Forest. (*See* Appendix A). The Utanidi River runs north-south along the eastern edge of Thicket Swamp, marking the boundary between the states of North Kingston and Atlantica, before flowing east through the state of Atlantica and connecting to the Atlantic Ocean.

Bullfrog National Wildlife Refuge was designated a wildlife refuge in 1947, and is the second largest refuge in the eastern United States. It is home to a handful of threatened frog and aquatic species, and is visited by millions of migratory birds each year. The refuge is part of the National Water Trail System, one of only 21 designated trails in the U.S. The Utanidi National Forest lies in both Kingston and Atlantica, and is intersected by the Utanidi River. The northwest corner of the Forest, on the Kingston side of Thicket Swamp, is a large, designated wilderness area. (*See* Appendix A).

Over 500,000 people visit Thicket Swamp each year to discover its wildlife and amazing landscapes. World Geographic has named the Swamp one of the 100 most beautiful places on the planet, and Outside Magazine has identified the Swamp as home to one of the top 10 canoe trips in the world. Waters in the Utanidi River basin are currently classified as having values for fishing, recreation, drinking water, and wild and scenic uses.

The portion of Thicket Swamp where the KCT Line would cross in North Kingston contains seven depressional wetlands spread over 131 hectares. These so-called Thicket Depressions are part of a broader field of depressional wetlands that extends throughout Thicket Swamp. The Thicket Swamp waters in North Kingston are upstream of and hydrologically connected to those on the federally-owned lands, as they lie in the same Utanidi River basin. The wetlands throughout Thicket Swamp all rise and fall together, affected by the seasons, the weather, and the ebb and flow of the Utanidi River. Summer is the driest season in the Thicket Swamp area, and spring is the wettest.

There are a number of relatively permanent tributaries of the Utanidi River throughout Thicket Swamp. These waters generally flow south and east, such that the upwaters of the wetlands ecosystem are in North Kingston.

Army Corps' Approved Jurisdictional Determination

In 2021, Mountain PG&E requested an AJD from the Army Corps district engineer on whether a proposed route for the KCT Line would pass through any portion of Thicket Swamp that would qualify as jurisdictional under the CWA. *See* 33 CFR §320.1(a)(2),(6). If the waters

crossed in Thicket Swamp are jurisdictional, then the developer would be required to obtain a section 404 dredge-and-fill permit from Army Corps. 33 U.S.C. 1344(a).[3] Mountain PG&E provided Army Corps with its groundwater evaluation, and Army Corps made two site visits – one in August 2022 and another on July 29, 2023 – before issuing the AJD.

In August 2023, the district engineer determined that the Thicket Depressions were not jurisdictional, and that no aquatic resources within the proposed route are waters of the United States (sometimes, "WOTUS"). The Corps did not consider Thicket Swamp in its entirety, but only the seven depressional wetlands that the KCT Line would cross. The district engineer's determination was approved by the Army Corps Division Commander Scott Zink.

The seven Thicket Depressions were determined to be beyond the jurisdiction of the CWA. Four of them were found to lack the necessary "continuous surface connection" to jurisdictional waters because there are what the Corps characterizes as "swales" between them, and the swales were observed to have no standing or flowing water during two field inspections. (AJD, p. 3). The Corps did find hydric soils at the surface, indicating seasonal saturation of extended duration. Even at the highest point within the proposed route, groundwater levels are very near the ground surface according to the hydrogeological investigation done by Mountain PG&E, so it is logical that groundwater excess flow would move through the drains in the wet season. (*See* AJD, p. 4; Robin expert report).

The other three Thicket Depressions are connected to WOTUS by an identifiable drainage path that runs to jurisdictional waters, but the Corps found that the channel did not have a "relatively permanent … or continuous flow." (AJD, p. 5). The Corps characterized the drainage path as a man-made silvicultural ditch, although the record evidence shows that it is not straight and does not follow a road or other utility. During both of the Corps' summer site visits, no water was flowing through the drainage path, though it was a clearly identifiable pathway such that water must flow through continuously at certain times. (AJD, p.5; Robin expert report). Army Corps found:

> This feature appears to be a man-dug ditch that was constructed to drain depressional wetland areas. This feature was dug through wetland WA-2, a non-adjacent wetland, and continues east through upland areas. This ditch does not appear to modify or relocate a natural channel, nor was it constructed through an adjacent wetland. Further, this ditch did not meet the flow requirements to be considered a tributary. Based on this, the ditch is best defined as a non-jurisdictional water.

(AJD, p. 6).

It is undisputed that, during some periods during the year, there is dry surface ground between four of the Thicket Depressions and tributaries, and no flowing water in the drainage

[3] The process of obtaining a section 404 permit can take years and cost millions of dollars. *See e.g., Rapanos v. United States*, 545 U.S. 715, 721 (2004)

channel connecting the other three to jurisdictional waters.[4] It is also true, however, that record evidence shows the swales "likely" do in fact "convey water through a very wet surface connection from the four Depressions to tributaries for at least part of the year," and the drainage channel "likely has a continuous flow of a relatively significant volume of water during much of the year and more than in direct response to precipitation, such as seasonally when the groundwater table is elevated." (Robin expert report, pp. 15, 18).

Development of the Environmental Impact Statement

In November 2020, DOE and Army Corps published a joint notice of intent to prepare an EIS for the proposed KCT Line. DOE served as a coordinating lead agency for the environmental review, and Army Corps was designated as the co-lead agency due to the Utanidi River crossing. As the project sponsor, Mountain PG&E took the lead in preparing the EIS.

The draft EIS was issued September 3, 2023, and the final EIS was released January 12, 2024. Although the Final EIS was issued before the NEPA Phase 2 rules were finalized, it purports to comply with the draft rules and added findings directly addressing the new standards.[5] This was at the request of the project sponsor, Mountain PG&E, as neither it nor the agencies wanted the EIS to be challenged under the new rules when they were finalized. In its ROD, Army Corps made a specific finding that the Final EIS included all considerations required under both existing and the soon-to-be-finalized draft Phase 2 rules. (ROD, p. 2).

In addition to the 'no action' alternative, the EIS considered three alternative routes for the KCT Line that had been identified by the Corps, all connecting the Mega Solar Array to the Atlantic Connector Line (see Appendix A):

- Under Alternative #1, the KCT Line would pass through rural farmland in North Kingston, continue across the state just to the north of Thicket Swamp, and pass near the City of Buckington before crossing the Utanidi and meeting the Atlantic Connector near River City.
- Under Alternative #2, the most direct route, the KCT Line would run in North Kingston right along the Kingston border, pass through the heart of Thicket Swamp, cross the river, and then run about 60 more miles within Atlantica before connecting in Big Rock City.
- Under Alternative #3, the most southern route, the line would start in North Kingston, cross over to run in Kingston for 70 miles, pass through both Bullfrog National Wildlife Refuge and the Utanidi National Forest, and cross the river within the National Forest.

[4] These findings come from not only the Corps' observations, but also groundwater analyses provided by Mountain PG&E, USGS topographic maps and photographs, and a USDA soil survey.

[5] The NEPA environmental review process has undergone several changes since the EIS for the KCT Line was first proposed. Major rule changes in 2020, in addition to allowing the project sponsor to take the lead, streamlined the review process by tightening deadlines and relaxing some standards. 85 Fed. Reg. 43304 (July 16, 2020). With a change in administrations, some of the 2020 rule changes were undone with the so-called "Phase 1" NEPA rules. 87 Fed. Reg. 23453 (Apr. 20, 2022). Several of the 2020 rule changes, however, were not only retained, but partially incorporated into the NEPA statute itself as part of the Fiscal Responsibility Act of 2023 ("FRA"). Finally, the Phase 2 Rules, proposed in July 2023 and finalized in May 2024, made several substantive changes that are being challenged in these proceedings. *See* 89 Fed. Reg. 35442 (May 1, 2024).

(*see* Appendix A). Other routes north and south of the three considered were rejected as they would have added considerable length to the line and/or required crossing a much wider expanse of the Utanidi River.

Choosing the KCT Line route

When Mountain PG&E initially proposed the project, it envisioned a route that would run to the north of Thicket Swamp. In the draft EIS, something very close to Alternative #1 was identified as the sponsor's preferred route. The draft EIS elicited public comments highlighting EJ concerns associated with passing through or near Buckington. In the meantime, the Corps had determined that the Thicket Swamp route would not require any federal permits. According to deposition testimony, these developments led Mountain PG&E to prefer Alternative #2. Alternative #3 would be easier to physically construct as it could avoid swampy wetlands and cross a narrower expanse of the Utanidi River, but Mountain PG&E preferred to avoid obtaining federal land-crossing permits.

The Final EIS identified Alternative #2 as the "environmentally-preferred" alternative. Relying on the AJD, the Corps did not consider the environmental impacts to the Thicket Depressions, as that area was beyond the ability of the Corps or any federal agencies to regulate. (EIS, p. 10-14).[6]

Alternative #1 was specifically rejected because the City of Buckington is an EJ community. (EIS, p. 10-3; ROD, p. 4). The Final EIS added findings that Buckington, an unincorporated community on the Utanidi River, was founded by freed slaves after the Civil War, has a population that is nearly 70% Black, and has experienced some of the worst air and water pollution of anywhere in North Kingston over the years. (EIS, p. 2-23). Buckington meets the definition of an EJ community. *See* E.O. 12898 (Feb. 11, 1994); 40 C.F.R. §1508.1(m).

Alternative #3 was apparently rejected because of anticipated impacts on wildlife as the line crossed federal lands. Although the Corps noted that the impacts are likely comparable throughout the Thicket-Utanidi area, and could actually be greater in the Thicket Swamp since that is where the systems upwaters lie, the Corps felt compelled to only consider the impacts to areas where it had jurisdiction. (ROD, p. 3).

The 'No Action' alternative was rejected primarily out of concerns for climate change. The EIS contained a detailed quantification of the greenhouse gas emissions that would be avoided if electricity from the Mega Solar Array displaced electricity generated 100% by coal, and if it displaced electricity generated 100% by natural gas. (EIS, p. 4-26). The Corps used the most recent social cost of carbon estimates to calculate the value of those avoided GHG emissions. (EIS, p. 4-28). Noting the need to shift North Kingston's electricity generation portfolio away from fossil fuels, and finding that the Mega Solar Array would be canceled or

[6] There is significant record evidence that constructing the KCT Line would have significant adverse impacts on Thicket Swamp. These impacts include water pollution, wetlands destruction, lost tourism dollars, disrupting migratory bird patterns, interfering with view sheds, and degrading of outdoor recreation activities. This evidence is irrelevant in light of the manner in which we dispose of the issue.

diminished if the KCT Line was not built, the Corps concluded that the KCT Line was needed in order to reduce emissions that contribute to climate change. (EIS, p. 10-2; ROD, p. 5)**.**

Army Corps issued its ROD February 24, 2024. The ROD approved and incorporated the Final EIS, and approved the Utanidi River crossing with the Alternative #2 route.

ANALYSIS

These proceedings challenge several actions by federal agencies. Both sides have moved for summary judgment, urging this court to decide the legality of the agency actions as a matter of law. Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The Army Corps' actions challenged here include the determination that the Thicket Depressions are not jurisdictional waters, the decision to not consider the environmental impacts to the Thicket Depressions in the EIS, the decision to not consider in the EIS various upstream impacts and/or indirect effects of the KCT Line, and the reliance on climate change and EJ concerns in selecting the preferred route. We are also asked to consider recent NEPA rules that were promulgated by the Council of Environmental Quality ("CEQ"). A recent decision by the Supreme Court informs how we review these agency actions.

Standards for Reviewing Agency Actions

In *Loper Bright v. Raimondo*, 144 S.Ct. 2244 (2024), the Supreme Court ended the doctrine known as *Chevron* deference, whereby courts would defer to agency interpretations of ambiguous governing statutes so long as they are reasonable. *Id.*, at 2273; *see Chevron, USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 537 (1984). Instead, the Supreme Court directed that the Administrative Procedure Act ("APA") requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law just because a statute is ambiguous. 144 S.Ct. at 2261-63.

Overturning *Chevron* does not mean that review of every agency action is now *de novo*. As the *Loper Bright* Court emphasized, Congress has passed the APA which provides standards for reviewing agency actions. *Id.*, at 2261. Under the APA, courts will set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see El Puente v. U.S. Army Corps of Engineers*, 100 F.4th 236, 246 (D.C. Cir. 2024). An agency's action is arbitrary and capricious if it has failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). As the party challenging agency action, SPA bears the burden to show that the Corps' actions were arbitrary or capricious. *UnitedHealthcare Ins. Co. v. Becerra*, 16 F.4th 867, 882 (D.C. Cir. 2021).

The *Loper Bright* Court endorsed the continuing vitality of the approach it articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, the weight to be given an

agency's determination depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Loper Bright*, at 2259, *quoting Skidmore*, 323 U.S. at 140.

Army Corps emphasizes that, as specifically recognized by the Court in *Loper Bright*, agency interpretations and opinions – "made in pursuance of official duty" and "based upon ... specialized experience" – "constitute a body of experience and informed judgment to which courts … properly resort for guidance," even on legal questions. *Loper Bright*, at 2259, *quoting Skidmore*, at 139-140; *see also Loper Bright*, at 2267, *quoting Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983) ("although an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise'"). The Corps urges that findings and conclusions in the AJD are squarely within its expertise and thus should be "particularly informative" in rejecting SPA's challenges.

With respect to SPA's challenges under NEPA, Army Corps emphasizes the Supreme Court's recognition that Congress sometimes intends for statutory standards to be interpreted by agencies charged with implementing them. *See Loper Bright*, at 2263 (some statutes empower an agency to regulate a subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," such as "appropriate" or "reasonable"). Army Corps argues that, by using terms like "reasonably foreseeable" and "environmental effects," Congress meant for CEQ and agencies conducting NEPA reviews to determine what environmental impacts must be considered in an EIS.

Historically, because NEPA is a purely procedural statute, agencies have generally enjoyed "wide latitude" when preparing an EIS. *Center for Biological Diversity v. FERC*, 67 F.4th 1176, 1181 (D.C. Cir. 2023). Courts should not reject an EIS so long as it "contains sufficient discussion of the relevant issues and opposing viewpoints and the agency's decision is fully-informed and well-considered." *Id., citing Gulf Restoration Network v. Haaland*, 47 F.4th 795, 799–800 (D.C. Cir. 2022). The D.C. Circuit has repeatedly advised that the task of reviewing courts "is not to flyspeck [the agencies'] environmental analysis for any deficiency no matter how minor," but instead "to ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *El Puente v. U.S. Army Corps of Engineers*, 100 F.4th at 246, *citing Sierra Club v. DOE*, 867 F.3d 189, 196 (D.C. Cir. 2017).

Finally, as implicated by SPA's challenges here, the major questions doctrine ("MQD") directs that, where an agency action involves a matter of vast political and economic significance, the statutory delegation of authority must be particularly clear. *West Virginia v. EPA*, 597 U.S. 697, 721 (2022).

As discussed more fully where relevant below, the only agency action here entitled to some extra persuasive weight is Corps' determination that the Thicket Depressions are not jurisdictional waters, a matter that is clearly within the agency's expertise now that the Supreme Court has resolved the meaning of the statutory terms "navigable waters" and "waters of the

United States." *See Sackett v. EPA*, 598 U.S. 651, 671-78 (2023). In contrast, the Corps' determination of what the terms "reasonably foreseeable" or "environmental effects" in the NEPA statute mean when conducting its environmental reviews is entitled to no special weight. There is also no deference for the Phase 2 NEPA Rules challenged here, and the MQD applies to the enactment of those rules which seek to effectuate fundamental changes to the NEPA review process, such as creating a race-based environmental justice program within NEPA or turning NEPA from a procedural to a substantive statute.

The AJD was not arbitrary and capricious

The court first considers the Corps' determination that the relevant portion of Thicket Swamp is beyond the Corps' permitting authority under the CWA. The AJD is a final agency action by Army Corps. 33 CFR §320.1(a)(6). SPA claims that the Corps' determination was arbitrary and capricious in that it read "relatively permanent" to require an observable surface connection or an observable flow of water at all times on all days throughout the year, and based its conclusions solely on two summer visits.

In *Sackett v. EPA*, the Supreme Court again addressed an issue that has long vexed the courts and agencies, the extent to which the CWA confers jurisdiction over intrastate wetlands. *See United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). A majority of the *Sackett* Court adopted Justice Scalia's plurality test from *Rapanos* in holding that, for wholly intrastate wetlands to qualify as "waters of the United States" subject to the CWA, they must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA. *Sackett*, 598 U.S. at 678, *citing Rapanos*, 547 U.S. at 742 (plurality opinion of Scalia, J.).[7] After *Sackett*, the determination of jurisdiction over wetlands depends upon whether there is a continuous surface connection to the connecting drains and whether the drains flow relatively permanently or continuously. 598 U.S. at 678; 33 C.F.R. §§328.3(a)(3), (a)(4), (c)(2).[8] "Ditches" and "ephemeral swales" are generally not jurisdictional connections of wetlands to downstream waters. 33 C.F.R. §§328.3(b)(3),(8).

The Corps properly characterized both the swales and the drainage channel at issue here as "intermittent." The plurality in *Rapanos* specifically stated that WOTUS "does not include channels through which waters flow intermittently or ephemerally." *Rapanos*, 547 U.S. at 739. "Intermittent streams" cannot be considered WOTUS because "such entities constitute extant 'streams' only while they are 'continuously flowing,' and the usually dry channels that contain them are never 'streams.'" *Id.*, at 733 n.6; *see also Ragsdale v. JLM Construction Services, Inc.*, __ F. Supp.3d __, 2024 WL 2933009, *6 (W.D. Tex., June 11, 2024). Similarly, a continuous surface connection does not exist where there is "only an *intermittent*, physically remote

[7] The *Sackett* Court rejected an alternative standard articulated by Justice Kennedy in *Rapanos* and sometimes applied by EPA in the years since that defined "the waters of the United States" to include adjacent wetlands that possessed a "significant nexus" to traditional navigable waters. 598 U.S. at 680.

[8] Army Corps promulgated a new WOTUS rule purporting to conform WOTUS to the *Sackett* holding. 88 Fed. Reg. 61964 (Sept. 8, 2023). EPA promulgated an identical rule. *See* 40 CFR §120.2.

hydrologic connection to 'waters of the United States.'" *Rapanos*, 547 U.S. at 742 (emphasis added); *Ragsdale*, 2024 WL 2933009, at *7.

SPA urges that waters can still qualify as "relatively permanent" despite having a seasonally intermittent flow. *See Rapanos*, 547 U.S. at 732 n. 5 ("relatively permanent" "do[es] not necessarily exclude … *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months") (emphasis added)); *San Francisco Baykeeper v. City of Sunnyvale*, slip copy, 2023 WL 8587610, *4 (N.D. Cal., Dec. 11, 2023). When the channel flows seasonally, and more than in direct response to precipitation, *Rapanos* explicitly does not exclude it from the definition of WOTUS. *San Francisco Baykeeper*, 2023 WL 8587610, at *4, *citing Rapanos*, 547 U.S. at 732 n. 5. *Sackett* also did not do away with the long-standing rule that manmade waters can qualify as WOTUS. With regard to the swales, SPA points out that "continuous surface connection" refers to a connection that is unbroken physically, not a presence that is unbroken temporally. Moreover, the issue is not whether the swales are jurisdictional, but whether a non-jurisdictional surface conveyance feature like a swale can serve as a continuous surface connection.

While SPA's arguments are not unpersuasive, the Corps' determinations of "relatively permanent" and "continuous surface connection" are firmly within Army Corps' expertise, such that we do give its findings extra persuasive weight. *See Loper Bright*, 144 S.Ct. at 2259.[9] Moreover, there is a record basis for the Corps' conclusions.[10] As such, it was not arbitrary and capricious for Army Corps to conclude that both the swales and the drainage channel are "intermittent" and thus not covered by the CWA.

Challenges to the Adequacy of the EIS

SPA contends that the EIS was required to consider the environmental impacts of (a) the proposed KCT Line on Thicket Swamp; (b) the proposed Mega Solar Array's impacts on wildlife and land use; (c) the GHG emissions associated with importing millions of PV modules from China for the Mega Solar Array; and (d) mining and disposing of materials needed for the Mega Solar Array. Army Corps argues that it need not and cannot consider such impacts because all of them are beyond its power to regulate.

The NEPA statute requires an EIS to consider the "reasonably foreseeable adverse environmental effects" which cannot be avoided from a proposed agency action. 42 U.S.C. §4332(c)(ii). The NEPA rules define "effects" to include "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. §1508.1(i)(2). Reasonably foreseeable means sufficiently likely to

[9] SPA argues that the Corps has no more expertise in interpreting the *Sackett* decision than it has in interpreting the CWA statute. We disagree. While courts are particularly well-suited to define jurisdictional-establishing terms like "navigable waters," the Corps is well-suited to determine whether there is a continuous surface connection with a wetlands, or whether a water's flow is relatively permanent.

[10] It is true that the Corps did not engage in long-term stream monitoring, and did not present evidence as to what percentage of the time the swales and the drainage channel were dry. Neither, however, did SPA present evidence as to how often the swales were saturated or the drainage channel was flowing, and the Corps correctly notes that the burden of proof is on SPA to prove the agency's action was arbitrary and capricious.

occur such that a person of ordinary prudence would take it into account in reaching a decision. 40 C.F.R. §1508.1(ii); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016).

The Corps' position that it need not consider environmental impacts that are beyond its jurisdiction to control is supported by a line of cases starting with *Dept. of Transportation v. Public Citizen*, 541 U.S. 752 (2004). The Court there held, in a case involving an agency failing to consider environmental impacts in Mexico, that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects." 541 U.S. at 770.

The Corps claims that at least five Circuit Courts of Appeals apply *Public Citizen* to reach the conclusion that an agency need not consider in its NEPA review indirect effects that are beyond the agency's jurisdiction to regulate. *See Protect Our Parks v. Buttigieg*, 39 F. 4th 389, 393 (7th Cir. 2022) (NEPA "does not require agencies to waste time and resources evaluating environmental effects that those agencies neither caused nor have the authority to change"); *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288, 1294-95 (11th Cir. 2019) (in permitting wetland discharges associated with a phosphate mine expansion, the Corps need not consider the effects of refining the phosphate ore into fertilizer or storing a radioactive refining byproduct as "it has no jurisdiction to regulate or authorize any of that"); *Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers*, 746 F.3d 698, 710 (6th Cir. 2014) ("agencies may reasonably limit their NEPA review to only those effects proximately caused by the actions over which they have regulatory authority"); *New Jersey Dept. of Environmental Protection v. U.S. Nuclear Regulatory Commission*, 561 F.3d 132, 139 (3d Cir. 2009) (because the Nuclear Regulatory Commission had "no authority over the airspace above its facilities," it did not have to study the potential environmental effects of an airplane crashing into a nuclear power plant); *Ohio Valley Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009) (the Corps did not have to consider the spoil disposal outside of jurisdictional waters because "it has no legal authority to prevent the placement of fill materials in areas outside of the waters of the United States").

The D.C. Circuit and the Ninth Circuit have reached a decidedly different result. In *Sierra Club v. FERC (Sabal Tail)*, 867 F.3d 1357 (D.C. Cir. 2017), the court held that FERC's environmental review of a natural gas pipeline project should have considered the effects of burning the gas in power plants over which FERC had no regulatory authority. 867 F.3d at 1371-72. In this way, the D.C. Circuit dropped *Public Citizen*'s focus on an agency's regulatory authority in favor of an agency's ability to foresee certain effects. *See also Center for Biological Diversity v. Bernhardt*, 941 F.3d 723, 731, 738 (9th Cir. 2019) (BOEM should have estimated emissions from foreign oil consumption when reviewing an offshore drilling facility despite the agency's inability to regulate, or even estimate the change in, foreign nations' oil consumption). In *Eagle Cty., Colorado v. Surface Transportation Board*, 82 F.4th 1152, 1180 (D.C. Cir. 2023), *cert. granted*, the court explained that the Board "cannot avoid its responsibility under NEPA to identify and describe the environmental effects of increased oil drilling and refining on the

ground that it lacks authority to prevent, control, or mitigate those developments." (*citing Birkhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2017)).

The D.C. Circuit has repeatedly affirmed this *Sabal Trail* principle that FERC and other agencies reviewing fossil fuel infrastructure projects must consider the reasonably foreseeable upstream (drilling and mining) and downstream (combusting) climate effects of such projects, even though FERC lacks regulatory power over the drilling or combusting. *See e.g.*, *Eagle Cty.*, *supra*; *Food & Water Watch v. FERC*, 28 F.4th 277, 288-89 (D.C. Cir. 2022). On the other hand, the D.C. Circuit has also consistently relied on *Public Citizen* in a line of decisions holding that FERC need not consider environmental impacts associated with LNG exports that would be enabled by natural gas infrastructure projects, because exports were controlled exclusively by DOE rather than FERC. *See Sierra Club v. FERC (Freeport)*, 827 F.3d 36, 47 (D.C. Cir. 2016); *Sierra Club v. FERC* (*Sabine Pass*), 827 F.3d 59, 68-69 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016); *Center for Biological Diversity v. FERC*, 67 F.4th 1176, 1185 (D.C. Cir. 2023) ("FERC's lack of jurisdiction over export approvals also means it has 'no NEPA obligation stemming from th[e] effects' of export-bound gas."), *citing Sabal Trail*, 867 F.3d at 1372; *Alabama Municipal Distributors Group v. FERC*, 100 F.4th 207, 213-214 (D.C. Cir. 2024). This principle is not limited to FERC. *See El Puente v. U.S. Army Corps of Engineers*, 100 F.4th 236, 249 (D.C. Cir 2024).

The D.C. Circuit has explained the distinction. While an agency has no obligation to gather or consider environmental information regarding adverse environmental effects if it has *no legal authority to prevent them,* the agency is a "legally relevant cause" of the direct and indirect environmental effects of a project it approves where it could reject the project for being too harmful to the environment. *See Sabal Trail*, 867 F.3d at 1373.

The Corps properly did not consider impacts on non-jurisdictional waters.

In light of *Sackett* and the AJD, Army Corps would be forbidden to rely on discharges into Thicket Swamp "as a justification for denying" KCT's Utanidi River crossing. *See Sabal Trail*, 867 F.3d at 1373. Because Army Corps has no legal power to prevent dredge and fill material from being placed in the waters of Thicket Swamp, "there is no decision to inform, and the agency need not analyze the effect in its NEPA review." 867 F.3d at 1372, *citing Public Citizen*, 541 U.S. at 770. Only the state of North Kingston has jurisdiction over the Thicket Depressions, and it can undertake whatever environmental review of the impacts it deems appropriate, and can allow or reject the project as it desires.[11] *See Ohio Valley Coalition*, 556 F.3d at 197 ("it is WVDEP, and not the Corps, that has 'control and responsibility' over all aspects of the valley fill projects beyond the filling of jurisdictional waters").

It would be a strange reading of *Sackett* to say that, regardless of whether particular waters are covered by the CWA, the Corps and/or US EPA must still analyze the environmental impacts from discharges into such waters. In short, with the *Sackett* decision, the Supreme Court has determined that Corps does not have jurisdiction over the waters of the Thicket Depressions,

[11] Like many states, North Kingston has no permitting program for discharges of dredge and fill material, or for wetlands generally.

so the Corps did not err when it declined to consider the environmental effects of the KCT Line as it is developed through Thicket Swamp. *See Alabama Municipal Distributors Group,* 100 F.4th at 214.

The Corps improperly failed to consider the effects on wildlife and land use from the Mega Solar Array, and the GHG emissions from importing the modules.

Just as the environmental review for a pipeline project or rail project must include the environmental impacts of extracting the gas or oil if it is foreseeable and the source is known, so too must the KCT Line consider the impact of the energy generation it will foreseeably enable. *See Eagle Cty., Colorado v. Surface Transportation Board*, *supra*; *Sabal Trail*, *supra*. That the Mega Solar Project will get built "is not just 'reasonably foreseeable,' it is the [KCT Line's] entire purpose." *See Sabal Trail*, 867 F.3d at 1372. Two undisputed consequences that will result from development of the Mega Solar Project are that it is going to take up considerable land, and it is going to involve the import of millions of modules.

The effects on land use and wildlife from the industrial-scale Mega Solar Array that will be enabled by the KCT Line are eminently foreseeable. The location, size and design of the Mega Solar Array are well-known. These impacts are proximate in time and geography, as the KCT Line will be connected directly to the Mega Solar Array. This reasonably foreseeable upstream impact of the KCT Line should have been considered by Army Corps in the EIS.

The EIS also should have considered the GHG emissions associated with transporting millions of modules and other equipment halfway around the globe. The Corps says it lacks knowledge as to how the panels would be transported, what exact route they would take, the efficiency of the transporting vehicle, whether the contract with TrikoSolar limited where the panels could be produced and assembled, and other information needed to even try to quantify the GHG emissions.[12] To that, SPA persuasively responds that the Corps did not even ask Mountain PG&E for the information. Here, the project sponsor that took the lead in the EIS is also one of the owners of the Mega Solar Array, and, thus, should have easy access to that information.

At a minimum, the Corps "must either quantify and consider the project's [upstream impacts] or explain in more detail why it cannot do so." *Eagle Cty.*, 82 F.4th at 1179, *citing Sabal Trail*, 867 F.3d at 1375. It has done neither. The Corps fails to adequately explain why it could not employ "some degree of forecasting" to identify the emissions in light of the extensive information that is available regarding the modules and equipment that will go into the Mega Solar Array. *Freeport*; 867 F.3d at 198, *citing Scientists' Inst. For Public Info. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). The Corps cannot "shirk [its] responsibilities under NEPA by labeling" these reasonably foreseeable upstream and downstream

[12] It is with some irony that Army Corps is arguing that the supposed climate benefit of bringing the Mega Solar Array online must be considered (and is arguably dispositive in rejecting the 'No Action' alternative), but that the climate impacts of transporting nine million modules from China to North Kingston should not be considered. Army Corps had little trouble using its forecasting tools to quantify the climate benefits from enabling electricity to flow from Mega Solar. Surely those tools could allow them to quantify the climate harms from putting that same solar project together.

"environmental effects as 'crystal ball inquiry.'" *Eagle Cty.*, 82 F.4th at 1180, *quoting Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

The court will grant partial summary judgment for SPA, and will direct Army Corps to supplement the EIS with a proper analysis of the land use and wildlife impacts of constructing the Mega Solar Array, and the climate change impacts of importing solar equipment for the Mega Solar Array.

The Corps correctly did not consider the indirect effect from mining and disposing of silicon and other hazardous materials used in solar PV panels.

In contrast, the impacts from mining silicon and other minerals used in manufacturing solar panels are too remote and unknowable to be reasonably considered in an EIS for a transmission line. While the source of the modules is known, there is nothing in the record regarding where the minerals that go into the solar equipment are going to be mined, what the environmental practices are in such mines, or even the countries in which such minerals will be mined. Army Corps was correct to not consider the impacts from mining silicon and other solar minerals in the EIS. *See CDB v. Army Corps, 941 F.3d at 1294-95.*

Likewise, impacts from disposing of the panels and various components are also not reasonably foreseeable. Much solar equipment has lifespans of 20 years or more. More of the materials are being recycled each year as technology improves. There is no way to know how and when the equipment at Mega Solar will be disposed of. Army Corps was correct that the impacts of such disposal are not reasonably foreseeable.

It was proper for Army Corps to consider climate change impacts, but requiring consideration of environmental justice violates the APA and the major questions doctrine.

SPA claims that both the Corps in its EIS and subsequent ROD, and the Phase 2 Rules themselves, improperly elevate atextual considerations of climate change and EJ, in violation of the APA and the MQD.[13]

Through various guidance papers and executive orders, climate change and EJ have been considered in environmental reviews in recent years. *See e.g.*, EO 13990 (Jan. 20, 2021), Protecting Public Health and the Environment and Restoring Science to Tackle Climate Crisis; EO 14096 (Apr. 26, 2023), Revitalizing Our Nation's Commitment to Environmental Justice for All; CEQ interim NEPA guidance on considering greenhouse gas emissions and climate change into NEPA regulations, 88 Fed. Reg. 1196 (Jan. 9, 2023). On May 1, less than three months after the Corps' ROD was issued, and just a week after it was challenged here, the Final Phase 2 NEPA Rules were published. 89 Fed. Reg. 35442 (May 1, 2024) (the "Phase 2 Rules"). The Phase 2 Rules now require consideration of both EJ and climate change when conducting

[13] In cross-moving for summary judgment, both sides substantively address the issue of whether the Phase 2 Rules should be invalidated; neither argues that issues regarding the Phase 2 Rules are not properly raised in these proceedings.

environmental reviews. *See* 40 C.F.R. §§1501.3(d)(1) and (d)(2)(vii), 1502.16(a)(6) and (13), 1508.1(i)(4).

The MQD applies in extraordinary cases when the history and breadth and economic and political significance of the action at issue gives us "reason to hesitate before concluding that Congress" meant to confer such authority to act on the agency. *N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gatson LLC*, 76 F.4th 291, 296 (4th Cir. 2023). The oft-cited language from the Supreme Court in rejecting an attempt by EPA to, through regulation, transform the domestic energy industry: "EPA claimed to discover an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap-filler. That discovery allowed it *to adopt a regulatory program that Congress had conspicuously declined to enact itself.*" *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (emphasis added).

SPA emphasizes that Congress, despite amending NEPA with the 2023 FRA, "conspicuously declined" to include climate change and EJ among those items that must be included in an EIS. *See* 42 U.S.C. §4332(c).

The Corps' consideration of climate change, and the Phase 2 Rules requiring consideration of climate change, do not violate the APA or the MQD. NEPA charges agencies with analyzing the "environmental effects" of an action. 42 U.S.C. §4332(c)(i). With this charge, Congress has delegated to agencies the authority to identify what those effects are. *See Loper Bright*, 144 S.Ct. at 2263. Given the evidence that (a) climate change is a threat to current and future generations, (b) GHG emissions are a primary driver of climate change, and (c) carbon-free electricity would be generated at Mega Solar, it was not arbitrary and capricious for Army Corps to identify and analyze these considerations in the EIS. By emphasizing consideration of climate change impacts, the Phase 2 Rules are merely codifying a practice that agencies and courts have long required under NEPA. Considering climate change is not some radical change or newly-found agency power. *Cf. West Virginia v. EPA*, 597 U.S. at 724. Indeed, that this has been agency practice for years, and required by the courts, makes it significant that Congress chose *not* to change the practice when it amended the NEPA statute in 2023, as if tacitly approving of this practice. Even without deference to the agency, it is not arbitrary to recognize that reasonably foreseeable climate change impacts are an "environmental effect" that should be considered when reviewing energy infrastructure projects.

On the other hand, there is no authority for Phase 2 Rules requiring NEPA reviews to consider disparate treatment or environmental justice. It is true that EJ has been a component in NEPA reviews since 1994. *See* E.O. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994); *see also El Puente*, 100 F.4th at 251; *Sabal Trail*, 867 F.3d at 1368. However, EJ was never included in or defined by the NEPA regulations prior to the Phase 2 amendments. Without deference to CEQ and EIS-preparing agencies, it is not evident that environmental effects include race-based EJ considerations. In other contexts, EJ has led to inappropriate consideration of protected factors in decision-making. To the extent the Phase 2 Rules consider race or other constitutionally suspect classes, particularly making it a "central consideration" as Army Corps appears to have done here, violates the constitutional command of Equal Protection. *See, e.g.*, *Students for Fair*

Admissions, Inc. v. President and Fellows of Harvard, 600 U.S. 181 (2023); *Ricci v. DeStefano*, 557 U.S. 557, 596 (2009) (Scalia, J., concurring).

There is no dispute that the City of Buckington is an EJ community under federal definitions. *See, e.g.*, 40 C.F.R. §1508.1(m)**.** We do not question the government's legitimate interest in remedying and avoiding environmental injustices. But there is no indication that Congress intended NEPA to be the tool for implementing anti-discriminatory objectives.

Defendants are entitled to summary judgment on SPA's claims that Army Corps and the Phase 2 Rules improperly elevate climate change as a consideration in conducting environmental reviews. SPA, however, is entitled to judgment on its claim that Army Corps and the Phase 2 Rules violate the APA and the MQD in requiring consideration of EJ when undertaking NEPA reviews.

The Phase 2 Rules improperly attempt to impose substantive NEPA requirements on agencies and courts, and violate the Major Questions Doctrine.

SPA argues that the Phase 2 NEPA rules unlawfully seek to make the EIS an "action-forcing" device and turn NEPA into a substantive rather than a procedural statute. *See* 40 C.F.R. §§ 1502.1(a), 1500.1(a)(2), 1502.12.[14]

NEPA has long been understood as a "procedural" statute aimed at ensuring a "hard look" at a project's environmental impacts but not necessarily requiring specific changes. *See Center for Biological Diversity v. FERC*, 67 F.4th 1176, 1181 (D.C. Cir. 2023) ("NEPA is a purely procedural statute"); *Gulf Restoration Network v. Haaland*, 47 F.4th 795, 799–800 (D.C. Cir. 2022); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) ("Preparation of an environmental impact statement will never force an agency to change the course of action it proposes."); *Calvert Cliffs Coordinating Comm'ee v. Atomic Energy Comm'n*, 449 F. 2d 1109, 1114-1115 (D.C. Cir. 1971). The Phase 2 Rules seek to change that understanding:

> The *primary purpose of an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA is to serve as an action-forcing device* by ensuring agencies consider the environmental effects of their action in decision making, so that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.

40 C.F.R. §1502.1(a) *(emphasis added); see also* 40 C.F.R. §1500.1(a)(2) ("Section 102(2) of NEPA … contains 'action-forcing' procedural provisions to ensure Federal agencies implement the letter and spirit of the Act"). SPA says that effectuating such a change requires an act of Congress, and that agencies lack the authority to make such a change.

[14] Army Corps argues that, even if the action-forcing language of the Phase 2 Rules is unauthorized, Army Corps did not do anything differently because of this new "action-forcing" language. The court is sympathetic to the Corps' position. A more common challenge to this part of the Phase 2 Rules would likely come when an agency permits an alternative that was not the environmentally-preferred alternative in the EIS. Under the present fact pattern, it is difficult to ascertain whether any of the Corps' determinations were motivated by the new action-forcing language of the Phase 2 Rules.

SPA also challenges the requirement that all agencies determine the environmentally-preferred alternative for all proposed projects in an EIS before issuing a final determination under NEPA, and make this determination based on new criteria that are not defined in NEPA's text. *See* 40 C.F.R. §1502.12. SPA urges that the only actions NEPA itself requires are the preparation of NEPA documents and public comments; the decision on the proposed agency action is left for other processes.

Army Corps defends the action-forcing language of the Phase 2 Rules by relying on the U.S. Supreme Court's 1978 decision in *Andrus v. Sierra Club*, 442 U.S. 347, 350, 361 (1978); *see also* CEQ's preamble to the Phase 2 Rule, 89 Fed. Reg. at 35450. A close reading of *Andrus*, however, suggests that the Court was referring to the obligation to prepare an EIS as the required action, not a broader obligation to "force" action in terms of changes to projects.

The Phase 2 Rules that seek to recast an EIS as action-forcing, and NEPA as a substantive rather than procedural statute, violate both the MQD and the APA. We are already remanding this matter back to Army Corps on several matters discussed above. We will direct Army Corps to assure that its EIS analysis regarding environmentally-preferred alternatives conforms with the NEPA regulations that existed prior to the Phase 2 Rules.

CONCLUSION

Defendants' motion for summary judgment is granted as to Counts 1, 2, 5 and 6, and denied as to the remainder. SPA's motion for summary judgment is granted as to Counts 3, 4, 7 and 8, and denied as to the remainder. The matter is remanded to Army Corps to supplement the EIS and its ROD consistent with this decision.

Jeremey A. Dodgecoin

Jeremy A. Dodgecoin, District Court Judge

Dated: July 15, 2024

APPENDIX A