No. 14-1415

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CURE LAND, LLC and CURE LAND II, LLC,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; TOM VILSACK, in his official capacity as Secretary of the United States Department of Agriculture; FARM SERVICE AGENCY, an Agency of the United States Department of Agriculture; and JUAN M. GARCIA, in his official capacity as Administrator of the Farm Service Agency,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado

The Honorable Judge William J. Martinez
USDC Case No. D.C. No. 1:12-CV-02388-WJM

APPELLANTS' OPENING BRIEF

Respectfully submitted:

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. 26.1, Appellants submit the following for their Corporate Disclosure Statement:

For Cure Land, LLC:

1. The following may be deemed "parent entities": Edward J. Cure 2012 Irrevocable Trust; John P. Cure 2012 Irrevocable Trust; William E. Cure 2012 Irrevocable Trust; M Cure Land, LLC.

2. There are no publicly held entities that own ten percent or more of Cure Land, LLC.

For Cure Land II, LLC:

1. The following may be deemed "parent entities": E Cure Land, LLC; J Cure Land, LLC; W Cure Land, LLC; M Cure Land, LLC.

2. There are no publicly held entities that own ten percent or more of Cure Land II, LLC.

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Statement Regarding Related Appeals

Pursuant to 10th Cir. R. 28.2(C)(1), there is an administrative appeal currently pending before the U.S. Department of Agriculture's National Appeals Division concerning the denial of Conservation Reserve Enhancement Program applications. However, that appeal does not concern the Supplemental Environmental Assessment or Finding of No Significant Impact that are at issue in this appeal.

Plaintiffs Cure Land, LLC, and Cure Land II, LLC (collectively, "Cure Land"), through undersigned counsel, respectfully petition for relief as pled in their Complaint and this Opening Brief, stating as follows:

I. INTRODUCTION

This case involves a decision by Defendants/Appellees (collectively referred to herein as the Farm Service Agency of the United States Department of Agriculture, or "FSA") to exclude a family of farmers from participating in a water conservation program, not because of any legal or factual eligibility concerns, but because of animosity within the community where the family lives. Government decisions to "single out" a particular person or group of people when making policy choices or make policy based on the perceived unpopularity of a person or group have been repeatedly held to be arbitrary and capricious. The fact that the policy choice takes place within the context of an environmental assessment under the National Environmental Policy Act ("NEPA") does not change the outcome here.

The district court was presented with an administrative record detailing how FSA had approved the inclusion of a "Target Zone" in a proposed expansion of a water conservation program in Colorado. The Target Zone would have provided financial incentives to producers in that area who stop irrigating their land to conserve water. FSA concluded in 2009 and again in 2010 that including the

Target Zone in the program expansion would not adversely impact the environment, and in fact would have significant environmental benefits.

But in 2012, FSA inexplicably reversed course and decided to remove the Target Zone from the proposed program expansion. FSA issued a much-delayed Finding of No Significant Impact ("FONSI") indicating that the Target Zone had to be removed from the program to avoid adverse environmental impacts. This decision makes no sense given FSA's prior conclusions to the contrary, and FSA did not explain the 180-degree change in position. The administrative record revealed, though, that a small but vocal group of opponents complained that a "local family" – the Cures – would unfairly benefit from the Target Zone, and they even launched personal attacks in an effort to sway the FSA. Their efforts worked.

The district court erroneously concluded that this pattern of decision-making was legally acceptable and not arbitrary and capricious, even though the FSA used NEPA's environmental assessment process to kill a program that demonstrated only environmental benefits, not adverse impacts, and did so simply to bow to political pressure to exclude one family from the proposed program expansion. Reversal is required here.

II. STATEMENT OF JURISDICTION

The district court had jurisdiction of this case as an appeal from a final judgment that was entered on August 14, 2014. (Aplt. App. at 2182.) Cure Land

timely filed its notice of appeal on October 8, 2014. (Aplt. App. at 2184.) This Court's jurisdiction arises under 28 U.S.C. § 1291.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the district court erred in holding that FSA's unexplained change in position leading to the exclusion of the Target Zone, a change contrary to all record evidence concerning the environmental benefits of the proposed Target Zone, was not arbitrary and capricious.

B. Whether the district court erred in holding that FSA was not required to demonstrate a nexus between the Target Zone and environmental impact when it issued a FONSI contingent on excluding the Target Zone from the proposed CREP expansion.

C. Whether the district court erred in holding that FSA's policy reversal based on "political pressure" was permissible when the pressure was not simply for a change in policy but to wholly exclude a particular family farming business from a conservation program.

IV. STATEMENT OF THE CASE AND FACTS RELEVANT TO THIS APPEAL

A. Background On The Republican River CREP

The Conservation Reserve Enhancement Program ("CREP") is a federal-state program in which enrolled crop producers are paid to cease irrigating their lands for agricultural purposes. (Aplt. App. at 1629, 1640-1645, 1651-1652.)

CREP is designed to conserve water, improve water quality, control soil erosion, protect threatened and endangered species, and generally benefit the environment. (Aplt. App. at 1630, 1640, 1645.) FSA is the lead federal agency charged with administering CREP. (Aplt. App. at 1639.)

On April 21, 2006, USDA, the Commodity Credit Corporation ("CCC"), and the State of Colorado ("Colorado") entered into the Colorado Republican River Conservation Reserve Enhancement Program ("RR CREP") Agreement. (Aplt. App. at 1391-1403.) The Colorado FSA office administers the RR CREP through a partnership that includes several Colorado agencies and the Republican River Water Conservation District ("RRWCD"). (Aplt. App. at 1401.) Through the 2006 RR CREP Agreement, state payments and in-kind contributions are made through RRWCD. (Aplt. App. at 1396, 1622-1623.) RRWCD also assists in monitoring, enforcement and public outreach. (Aplt. App. at 1527.)

Between June 12, 2006 and September 30, 2011, 19,675 irrigated acres were covered by the program. (Aplt. App. at 1620.) By September 30, 2011, the RR CREP annually reduced irrigation by 22,994 acre feet of water, reduced soil erosion in the previously irrigated lands by 244,962 tons, and reduced fertilizer and pesticide use by 2,576 tons. (Aplt. App. at 1624.)

B. While Proposed Amendment To RR CREP Is Discussed, Colorado Commences Pipeline Project For Compact Compliance

In or around 2007, the parties to the 2006 RR CREP Agreement began the process of drafting amendments to the RR CREP to expand the program by providing additional eligibility and enrollment opportunities for producers and increasing the number of acres that could be enrolled in CREP (the "RR CREP Amendment"). (Aplt. App. at 1380, 1385.)

Around the same time, Colorado and RRWCD developed a pipeline project to facilitate Colorado's compliance with the Republican River Compact ("Compact"), an agreement between Colorado, Kansas and Nebraska concerning water rights. (Aplt. App. at 740.) The drafters of the RR CREP Amendment took into account the pipeline project and related issue of Compact compliance by proposing additional incentives to producers in certain areas where, if their water rights were retired instead of used for irrigation, some of the conserved water would be diverted to the new pipeline and increase the water volume in the Republican River in compliance with the Compact. (Aplt. App. at 858-865.) These areas ultimately became known as the "Target Zone."

To increase the quantity of water flowing to the Republican River, RRWCD purchased additional water rights in 2008, including certain of Cure Land's rights located in the Target Zone. (Aplt. App. at 1189-1190, 1208-1209.) Cure Land and RRWCD assumed that Cure Land would participate in the RR CREP (Aplt. App.

at 1209-1212), so Cure Land factored the anticipated CREP incentives into the sale price of its water rights.

C. After Raising Questions About the RR CREP Amendment, FSA Eventually Agreed To Include A "Target Zone" For Enhanced Incentives And Environmental Benefits

In the fall of 2008, FSA questioned whether water retired for CREP could be used for Colorado's compliance with the Compact, and indicated that it would not support the proposed RR CREP Amendment if water would be used for that purpose. (Aplt. App. at 736-738, 749.) Even though any well retirement would be voluntary as to the participating producers, FSA apparently viewed Compact compliance by the state of Colorado as "involuntary," and informed then-Representative Marilyn Musgrave that CREP could not be used for "involuntary" Compact compliance. (Aplt. App. at 740.)

FSA also was not convinced that the water saved from the proposed program expansion would have environmental benefits. (Aplt. App. at 749.) Specifically, FSA told Representative Musgrave that it could not be assured that water from the Target Zone would be put to an environmentally beneficial use if it was used for Compact Compliance. (Aplt. App. at 741.)

However, after a year's worth of meetings with representatives of the state of Colorado and RRWCD (*see, e.g.*, Aplt. App. at 738, 751-752, 765, 769), FSA decided that conserved water could be used for Compact compliance. (Aplt. App.

at 791, 794, 796-797.) In October 2009, FSA announced to Colorado and its congressional delegation that it supported the RR CREP Amendment. (Aplt. App. at 796-797.) FSA also stated that it was now satisfied that the conservation benefits realized outside the Target Zone would be similarly demonstrated within the Target Zone. (Aplt. App. at 797.) Then-Representative Betsy Markey and Senator Michael Bennett issued press releases celebrating the announcement. (Aplt. App. at 819-820.)

FSA noted that NEPA required a supplemental environmental assessment ("EA") in order to finalize the RR CREP Amendment, as the initial EA performed in 2006 did not address the contemplated expansion. (Aplt. App. at 797.) However, FSA did not indicate that it had any additional concerns to address or other contingencies to be met in order to approve the RR CREP Amendment. (*Id*.)

D. Supplemental EA Concludes That Target Zone Is Beneficial And That "Local Controversy" Is Outside The Scope Of The EA

In early 2010, FSA began the process of performing a supplemental EA that would cover the RR CREP Amendment. (Aplt. App. at 816.) Meanwhile, a vocal opponent started a campaign opposing the inclusion of the Target Zone in the RR CREP Amendment based on the perception that the Cure family would unfairly benefit from the Target Zone proposal. In January 2010, the executive director of the Colorado FSA office, Trudy Kareus, emailed other federal officials to alert them that she:

> just got off the phone with a very irate President of the Yuma County Conservation District . . . about what he perceives as some back room dealings in DC with a family named Cures who says are trying to change our CREP rules so that they can have their cake and it eat too.

(Aplt. App. at 814.) Jonathan Coppess, FSA Administrator at the time, informed Kareus that there were "[n]o back room deals." (*Id*.) Kareus insisted that the person "wants to talk to someone from DC about this." (*Id*.) Eventually the person with whom Kareus spoke was referred to Lana Nesbit, CREP Program Manager, who reported that he "had a general misunderstanding" about the RR CREP Amendment, and assured him that "the amendment does not significantly change the criteria for enrollment." (Aplt. App. at 812.)

The vocal opponent was not dissuaded, however, and continued his campaign through public speeches, letters to the newspaper, petitions, phone calls to policymakers, and other avenues. (*See, e.g.*, Aplt. App. at 822, 843, 846-848.) Initially his vociferous opposition did not have a significant impact, and most conservation districts in the region wrote letters to support the RR CREP Amendment in its entirety. (Aplt. App. at 822-843.) Only two – including the opponent's own district – did not support the inclusion of the Target Zone. (Aplt. App. at 840-841.)

However, Kareus seemingly bought into the conspiracy theory being pedaled by this vocal opponent. In May 2010, Kareus emailed Nesbit to say that Senator Bennett was "opposing [the] Cures," and someone from the Senator's

office would contact Nesbit to communicate as much. (Aplt. App. at 852.) In fact, Senator Bennett's office simply called Nesbit with questions and did not even mention, much less express any opposition to, the Cures. (*Id*.) The Deputy Administrator for Farm Programs, Brandon Willis, then asked Nesbit whether the Cures were "the big family that stands to get a lot of acres in the program," to which she replied yes. (Aplt. App. at 851-852.)

The Supplemental EA proceeded, and so public comments were gathered. The same vocal opponent continued to press his case with FSA, singling out the additional benefits the Cures would receive in the Target Zone. (Aplt. App. at 885-887.) Nesbit noted in October 2010 that the level of public controversy had grown over time, even though it appeared that "only 1 or 2 people" were "stirring things up." (Aplt. App. at 854.)

FSA finalized the Supplemental EA in November 2010 and published it in December 2010. (Aplt. App. at 502-587.) The Supplemental EA concluded that providing incentives in the Target Zone would increase stream flows to the Republican River. (Aplt. App. at 526, 541.) It noted that diverting the maximum quantity of groundwater from the Target Zone into the pipeline could potentially reduce overall estimated water savings to about 51,000 acre-feet per year, but that actual water savings was likely to be higher given recent decreasing use of water in the Target Zone. (Aplt. App. at 542.)

The Supplemental EA concluded that the addition of the Target Zone with higher incentive payments would "promote enrollment in CREP in those areas determined most advantageous for increasing streamflows in the Republican River due to their more reliable water supplies." (Aplt. App. at 543.) It also found that the diverted water "would ultimately increase surface water quantity thereby improving local and downstream habitats for aquatic species." (Aplt. App. at 543.) The Supplemental EA noted that any expansion of CREP could have a negative economic impact on the local agricultural economy, due to reduced agricultural production, but that any economic losses would be offset by proposed increases in CREP funding. (Aplt. App. at 545.)

The Supplemental EA concluded that "[t]here are no expected long term significant negative impacts associated with implementation of the Proposed Amendment." (Aplt. App. at 550.) Accordingly, the Supplemental EA did not find that any particular mitigation measure was needed.

The "public involvement" portion of the Supplemental EA noted that FSA had received written comments from several individuals who argued that a party who already has sold their water rights to RRWCD should not be eligible for CREP or receive Target Zone incentives. (Aplt. App. at 567, 572-583.) The Supplemental EA indicated with respect to each such comment that "[n]o change to the EA [was] required." (Aplt. App. at 572-583.) It stated that "[n]ot all water

rights within the Target Zone have been purchased," that issues underlying Compact compliance were not within the scope of the EA, and that diverting irrigation water to the pipeline would have an environmental benefit by increasing stream flows in the North Fork of the Republican River. (*Id*.)

Alexandra Davis of the Colorado Department of Natural Resources, a partner in the Supplemental EA process, summarized the outcome for Trudy Kareus in a December 2010 email. (Aplt. App. at 882-883.) Davis noted that most of the comments and controversy involved "socioeconomic concerns," with some citing "the equity of the Target Zone." (Aplt. App. at 882.) She noted that, to respond to the public concerns, RRWCD had voted to change the proposed RR CREP Amendment to decrease the total acreage involved, and to reduce the Target Zone incentive from $189 to $100 per acre to achieve greater equity among payments in the program. (*Id*.)

A Finding of No Significant Impact ("FONSI") was drafted to accompany the Supplemental EA. (Aplt. App. at 1886-1887.) The draft FONSI indicated that the "preferred alternative" – which included the Target Zone – "would not constitute a major State or Federal action affecting the human and natural environment." (Aplt. App. at 1886-1887.) The draft FONSI listed ten reasons why FSA had concluded that the RR CREP Amendment would have no significant impact, and stated, among the reasons, that:

> The potential impacts on the quality of the human environment are not considered highly controversial. Additional public involvement measures were taken for this action given the high public interest in the action. Comments received throughout the project did not indicate a flaw in the environmental analysis but rather opposition to the details of the proposed Amendment to the Republican River CREP.

(Aplt. App. at 1887.)

However, the draft FONSI was not released with the Supplemental EA. (Aplt. App. at 1162.) Unbeknownst to the general public, Colorado FSA executive director Trudy Kareus had refused to sign it. (Aplt. App. at 1194.)

E. FSA Reverses Course On The "Target Zone" With No Public Explanation, And Internal Documents Show That Concerns About "Appearances" Vis-à-vis The Cure Family Were To Blame

After the 2010 Supplemental EA was published, Trudy Kareus informed USDA and FSA officials that she would not sign the FONSI and "ha[d] concerns that we need further review due to the controversy." (Aplt. App. at 1194.) Lana Nesbit noted that the level of controversy had grown, such that some water conservation districts had rescinded their support for the RR CREP Amendment and she had received "personal letters of protest." (Aplt. App. at 1240.)

Kareus also said she wanted to conduct a complete environmental impact statement ("EIS"). (Aplt. App. at 1194.) There was some internal support for conducting a more extensive EIS process given the amount of funding for the CREP expansion that would be involved. (*Id*.) However, a federal agency is supposed to perform an EIS only if the proposed federal action is one that always

requires an EIS, or if the agency believes that the proposed action would have a significant impact on the environment. 42 U.S.C. § 4332; 40 C.F.R. § 1504.

Accordingly, Matthew Ponish – FSA's National Environmental Compliance Manager – rejected the idea of initiating an EIS, because there was no proper justification for an EIS, and one or more "partners" could sue on that basis. (Aplt. App. at 1239.) He said that Kareus's refusal to sign the FONSI meant that the RR CREP Amendment could not move forward at all unless FSA performed yet another EA, or another FSA official signed the FONSI. (Aplt. App. at 1239.) He observed, however, that "the controversy," as well as issues around the pipeline and Compact compliance, were outside the scope of the Supplemental EA. (*Id*.)

Meanwhile, the same vocal opponent continued to agitate, and apparently even arranged to meet Lana Nesbit in Washington, D.C. (Aplt. App. at 1244.) He again complained that the proposed RR CREP Amendment would be "for the benefit of one operator." (Aplt. App. at 1244.) Another person who had opposed the Target Zone during the Supplemental EA process also wrote a State official and Senator Bennett's office to allege that a member of the Cure family had failed to pay a penalty assessed in 2007/2008 involving a well non-compliance issue, and that the person needed to "be in prison." (Aplt. App. at 1271-1272.) Clearly, the attacks were getting personal and had nothing to do with the proposed expansion of the RR CREP.

However, the personal criticism was working. In internal briefing, FSA characterized "the controversy" as involving "a local family," and said that: "Some have raised concerns that it would appear the family would be 'double dipping' by receiving payments from the State and the RRWCD for substantially the same water." (Aplt. App. at 1248.)

At the same time, federal staff sought to secure a final decision about whether to exclude the Target Zone so that the RR CREP Amendment could move forward. They drafted a decision memorandum for the Acting Under Secretary for Farm and Foreign Agricultural Services, Michael Scuse, in March 2011, that recommended removal of the Target Zone from the RR CREP Amendment. (Aplt. App. at 1255, 1555-1560.) The FSA Administrator specifically asked for the input of Trudy Kareus. (Aplt. App. at 1256.) Kareus said she "thought it was a good compromise." (Aplt. App. at 1255.)

However, the decision memo remained unsigned. The same vocal opponent continued his campaign, still pointing to "the Cure family" as unfairly benefiting from the proposed expansion. (Aplt. App. at 1280.) In October 2011, Kareus was asked about her refusal to sign the FONSI, and apparently did not realize that the RR CREP Amendment had not moved forward. (Aplt. App. at 1290.) Kareus then reviewed the public comments received the prior year during the Supplemental EA process. (Aplt. App. at 1292-1361.)

In April 2012, FSA finally broke its internal log jam. With Kareus's active involvement, FSA drafted a FONSI that removed the Target Zone from the preferred alternative, allowing the RR CREP Amendment to move forward but without the Target Zone:

> In consideration of the analysis documented in the Supplemental EA and in accordance with Council on Environmental Quality regulations 1508.27, FSA has determined that the preferred alternative would not constitute a major State or Federal action affecting the human and natural environment if the Target Zone was eliminated from the preferred alternative. Therefore the Target Zone has been removed from the preferred alternative and a Finding of No Significant Impact if being rendered.

(Aplt. App. at 499.) Kareus signed it April 16, 2012. (*Id*.) FSA announced the exclusion of the Target Zone solely in the context of the environmental assessment process, and not through rule-making or agency adjudication or any other programmatic decision. FSA did not explain why inclusion of the Target Zone would constitute a major governmental action affecting the quality of the human and natural environment. FSA made no effort to reconcile the new 2012 conclusion with the 2010 conclusion in the Supplemental EA that the Target Zone would have no material adverse impact, and if anything, would have environmental benefits.

Notably, FSA also never announced that it was considering a third alternative in the Supplemental EA process; in other words, the Supplemental EA was proposed as including all of the RR CREP Amendment or none of it ("no

action"). (Aplt. App. at 509-510.) With no alternative proposed that would implement the RR CREP Amendment excluding the Target Zone, FSA never disclosed to the public the degree of reduced environmental benefits or the impact on streamflows by excluding the Target Zone from the proposal, or explained that RRWCD had modified the acreage and payments in the proposed Target Zone.

Moreover, there was no empirical analysis of the so-called "controversy" (which was wholly outside the realm of NEPA anyway) that would have shown that Cure Land was not "double dipping," and instead that the Target Zone incentive payments would fairly make Cure Land whole after selling water rights to RRWCD for less than full value. These facts are not in the record, because they were properly outside the Supplemental EA process, and FSA did not disclose that it was contemplating a third alternative in the Supplemental EA process.

F. The District Court Finds That FSA's Treatment Of The Cure Family Was Not Arbitrary And Capricious Or An Abuse Of Discretion

Cure Land filed suit against the FSA on September 7, 2012, alleging violations of the Administrative Procedures Act ("APA") and the National Environmental Policy Act ("NEPA"). (Aplt. App. at 8.) In briefing, the FSA admitted that its initial concerns regarding the RR CREP Amendment were addressed by the fall of 2009, namely that it was not improper to use conserved water for Compact compliance, and that the conservation benefits realized outside the Target Zone would be similarly demonstrated within the Target Zone. (Aplt.

App. at 2125). FSA also admitted that its position only changed in response to comments that the Target Zone was "not equitable," would provide too much money to a single family, and was "not fair." (Aplt. App. at 2126.) In other words, the FSA conceded that the decision to exclude the Target Zone in issuing a final FONSI was not based on any environmental concern, but instead responded solely to public opinion about the Cures.

On August 14, 2014, the district court rejected Cure Land's arguments and affirmed the FSA's Supplemental EA and FONSI. (Aplt. App. at 2166.) Specifically, the court held that although Cure Land's evidence regarding the FSA's inexplicable "change of course" was "somewhat compelling," the FSA's decision ultimately was not arbitrary and capricious, because it did not involve a policy or rule that was previously established and subsequently abandoned without explanation, and instead involved a proposed program expansion. (Aplt. App. at 2173.) The court also found that the FSA did not act in bad faith or with bias when it reversed course due to the weight of local politics. (Aplt. App. at 2178-2179.) Finally, the court rejected Cure Land's argument that the exclusion of the Target Zone was an improper mitigation measure, finding "nothing in the Record that would suggest that Defendants intended the exclusion of the Target Zone to be a mitigation measure." (Aplt. App. at 2179-2180.) This appeal timely followed. (Aplt. App. at 2184.)

The RR CREP Amendment still has not been finalized and issued. However, because FSA have rejected the Target Zone in the FONSI, the RR CREP Amendment will not include the Target Zone, so Cure Land will not be able to participate in the irrigated land incentives associated with that area unless the FSA's decision is reversed.

V. SUMMARY OF THE ARGUMENT

NEPA is as a procedural statute that does not dictate any specific outcome in environmental decision-making. But the procedural protections it provides interested parties and the general public are very real, and ensure that federal agencies properly consider relevant information and provide a fair and transparent public process for making decisions that could have an environmental impact. And when the decision-making process has the integrity required by NEPA, the agency is better-positioned to reach a decision that serves environmental goals and the public good.

FSA utterly disregarded NEPA's protections when it reversed its position that the Target Zone could lawfully be included in CREP and would have environmental benefits, and instead concluded without explanation that the Target Zone must be rejected in the RR CREP Amendment. The wholesale exclusion had never been presented as an option for consideration to the public, and in any event, FSA acted in bad faith in deciding to exclude the Target Zone.

Specifically, FSA disregarded evidence that RRWCD had reduced acreage and incentive payments to address the "equity" concerns that some local producers had raised in opposing the Target Zone. FSA also presented the exclusion of the Target Zone as necessary to avoid a significant impact on the human environment, when all of FSA's own evidence and findings showed that the Target Zone would have beneficial environmental effects. And finally, FSA's internal records reveal that the about-face was simply an over-reaction to a perceived "popularity contest" and certain local hostility to the Cure Family, rather than any empirical analysis relating to the Target Zone's impact on the human environment. The administrative record simply cannot be reconciled with the well-settled requirements of NEPA.

Accordingly, Cure Land requests reversal of the district court's decision, and remand with an order directing the declaratory and injunctive relief requested.

VI. ARGUMENT

A. Applicable Legal Standards

1. *The National Environmental Policy Act ("NEPA")*

NEPA is, at its core, about the public process for evaluating the environmental impacts of federal agency actions. "The centerpiece of environmental regulation in the United States, NEPA requires federal agencies to pause before committing resources to a project and consider the likely

environmental impacts of the preferred course of action as well as reasonable alternatives." *Forest Guardians v. United States Fish & Wildlife Serv.*, 611 F.3d 692, 711 (10th Cir. 2010) (citing 42 U.S.C. §§ 4331, 4332, other citation omitted). "NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Id.* (citing *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983)).

"Under NEPA, before an agency may take 'major Federal actions significantly affecting the quality of the human environment,' an agency must prepare an environmental impact statement ('EIS') in which the agency considers the environmental impacts of the proposed action and evaluates 'alternatives to the proposed action,' including the option of taking 'no action.'" *Forest Guardians*, 611 F.3d at 711 (quoting 42 U.S.C. § 4332(2)(C), other citations omitted). However, "[w]hen it is unclear whether a proposed action requires an EIS, the agency may first prepare a less detailed EA [environmental assessment]." *Id.* (citing 40 C.F.R. § 1501.4(b), other citation omitted). "If the EA leads the agency to conclude that the proposed action will not significantly affect the environment, the agency may issue a FONSI [finding of no significant impact] and forego the further step of preparing an EIS." *Id.* (citing 40 C.F.R. § 1501.4(e), other citation

omitted). The FONSI must be made available "to the affected public." 40 C.F.R. § 1501.4(e)(1).

Even if an agency decides that there could be a significant environmental impact, it can propose a mitigation measure that would sufficiently reduce the impact, allowing for a FONSI to be issued in lieu of an EIS. *See Jones v. Gordon*, 792 F.2d 821, 829 (9th Cir. 1986); *see also Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 29 (D.C. Cir. 2008) ("If the agency decided to issue a FONSI, it must either have concluded there would be no significant impact or have planned measures to mitigate such impacts.").

However, "[m]itigation measures must be supported by substantial evidence of some kind." *Hillsdale Envtl. Loss Prevention, Inc. v. United States Army Corps of Eng'rs*, 702 F.3d 1156, 1172 (10th Cir. 2012). They also must be either "imposed by statute or regulation," or "submitted as part of the original proposal." *Id*. (citing *Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002)).

Critically, though, neither an EIS nor mitigation measure is needed if an agency determines that a proposed agency action would have no significant impact on the human environment. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4; 40 C.F.R. § 1508.13. The "human environment" categorically excludes "economic or social effects" that are independent of any environmental impact. *See* 40 C.F.R. §

1508.14 ("This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement.").

2. *Judicial Review Under The Administrative Procedure Act ("APA") And NEPA*

Cure Land has invoked both the APA and NEPA. This Court reviews district court decisions under the APA and NEPA de novo. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014); *Friends Of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1095 (10th Cir. 2004). *See also Forest Guardians*, 611 F.3d at 710-11 ("We review NEPA claims under the APA independently, giving no particular deference to the district court's review of an agency action.").

A district court reviews a challenge under the APA, as well as a challenge to an agency's compliance with NEPA, "to see whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Prairie Band Pottawatomie Nation v. FHA*, 684 F.3d 1002, 1008 (10th Cir. 2012). Under APA review, a federal court does "not hear cases merely to rubber stamp agency actions." *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000). "To play that role would be 'tantamount to abdicating the judiciary's responsibility under the Administrative Procedure Act.'" *Id*. (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995)).

"In the context of a NEPA challenge, an agency's decision is arbitrary and capricious if the agency (1) entirely failed to consider an important aspect of the problem, (2) 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, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment." *Forest Guardians*, 611 F.3d at 710-11.

"Although the scope of judicial review under this standard is narrow and deferential, a reviewing court must be certain that an agency has considered all the important aspects of the issue and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Henley v. FDA*, 77 F.3d 616, 620 (2d Cir. 1996) (citation omitted). Notably, "[r]eview of an agency action is more demanding where the challenged decision stems from an administrative about-face." *Greater Yellowstone Coal. v. Kempthorne*, 577 F.Supp.2d 183, 189 (D.D.C. 2008).

In addition, when an agency's decision to issue a FONSI is at issue, "[a] court must review whether the agency:

> (1) has accurately identified the relevant environmental concern, (2) has taken a hard look at the problem in preparing its EA, (3) is able to make a convincing case for its finding of no significant impact, and (4) has shown that even if there is an impact of true significance, an EIS is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum.

Michigan Gambling Opposition, 525 F.3d at 29 (quoting *TOMAC v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006)).

B. FSA's Decision Represents An Arbitrary And Capricious Change Of Course, Because The FONSI Is Wholly Inconsistent With Defendants' Prior Decisions That Found Environmental Benefits – Not Adverse Impacts – Associated With The "Target Zone"

The district court appropriately noted that FSA's FONSI excluding the Target Zone reflected a "change of course" given that the FSA had twice concluded that the Target Zone would have environmental benefits, and documented no adverse environmental consequences in the Supplemental EA. (Aplt. App. at 796-797 (2009 decision that the environmental benefits associated with the Target Zone were comparable to those outside the Target Zone); Aplt. App. at 541-545 (2010 Supplemental EA)). Under the APA, such a change of course without providing a reasoned explanation is inherently problematic. But the district court erroneously concluded that NEPA eliminated the APA requirement to explain such changes of course. And the district court ignored the fact that the explanation provided ran counter to FSA's own evidence that the Target Zone would have environmental benefits. This Court, exercising de novo review, should hold otherwise.

It is well-settled that an agency's about-face, with no public explanation, is arbitrary and capricious, as well as an abuse of discretion. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 48 (1983). In that required

explanation, "the agency must show that there are good reasons for the new policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). An "agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," but "[s]ometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id.* *See also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (agency decision is arbitrary and capricious and must be vacated if agency "offered an explanation for its decision that runs counter to the evidence before the agency" (citations omitted)); *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 58-59 (D.C. Cir. 2015) (agency rulemaking based on "unexplained inconsistency" violated the APA, when the agency initially based proposed rule on rates charged by 123 hospitals and later based final rule on rates charged by 50 other hospitals).

In *Motor Vehicle Manufacturers*, the U.S. Supreme Court held that the decision of the National Highway Traffic Safety Administration to abandon a rule requiring passive restraints in new vehicles was arbitrary and capricious, because the agency failed to adequately explain its abrupt policy change. The Court made it clear that the requirement to have a reasoned explanation for policy reversals is a fundamental principle of the APA. 463 U.S. at 48 ("We have frequently reiterated

that an agency must cogently explain why it has exercised its discretion in a given manner . . ."). Accordingly, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id*. at 42 (emphasis added). *See also Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2481-82 (2013) (Breyer, J., dissenting) (noting that "agency views that vary over time are accorded less weight," collecting cases).

Notwithstanding the district court's suggestion to the contrary, the requirement that an agency explain a change in position applies not just to a rescission of rules, but to any formal agency decision representing a policy change.[1] *See Sierra Club North Star Chapter v. LaHood*, 693 F.Supp.2d 958, 973-974 (D. Minn. 2010). For example, in *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172, 182-83 (2d Cir. 2005), the Second Circuit vacated a

[1] Contrary to the district court's characterization, the FSA's prior decision to include the Target Zone was not a mere "proposal." (Aplt. App. at 2173-2174.) The record shows that FSA, through its Deputy Under Secretary, affirmatively decided that "the conservation benefits realized outside the Target Zone will be similarly demonstrated within the Target Zone." (Aplt. App. at 797.) This policy statement was communicated by FSA directly to the State of Colorado through the Office of Attorney General, the Governor (then Bill Ritter), then-Representative Betsy Markey, and Colorado's two United States Senators. (*Id.*) Then-Representative Betsy Markey and Senator Michael Bennett issued press releases celebrating the announcement. (Aplt. App. at 819-820.) While there were still other aspects of the CREP proposal that needed to be refined, whether to include the Target Zone was not some undecided matter.

decision of the Environmental Protection Agency to issue an operating permit without a compliance schedule, a wholesale departure from the agency's rules and practices. The court ruled that under the APA, the agency must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored" if it decides to change the process in which operating permits are issued. *Id*. at 182.

Likewise, in *Sierra Club North Star Chapter*, the court held that the National Park Service "could not simply ignore its prior policy" reflected in a 1996 evaluation that concluded a proposed bridge "would directly and adversely affect the Lower St. Croix's outstandingly remarkable scenic and recreational values with its dramatic and disruptive visual impact." 693 F.Supp.2d at 963, 974. When the agency then issued another evaluation nine years later that came to the opposite conclusion, it was obligated to acknowledge its prior evaluation and explain its reversal. *Id*. at 974.

Many other cases reiterate the basic principle underscored by the Supreme Court in *Motor Vehicle Manufacturers* in the context of many different types of agency decisions – and it simply does not matter whether the reversal is in the context of a rulemaking or programmatic change. *See, e.g., Louisiana PSC v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999) (in vacating agency decision dismissing state public service commission complaint that represented "180 degree turn away"

from previous policy, "for the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious"); *Ramaprakash v. FAA*, 346 F.3d 1121, 1130 (D.C. Cir. 2003) (vacating agency revocation of pilot permit where agency inexplicably departed from "established precedent"); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 904 (D.C. Cir. 1995) (reversing agency order regarding rate-charging where the articulated reasons "fail[ed] to confront" agency's prior determination regarding rates).

All of the foregoing squarely applies to NEPA as well. For example, in *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.Supp.2d 1 (D.D.C. 2009), the court reversed a policy change by the Department of the Interior that allowed concealed weapons in national parks when the Department had not performed an EA or EIS under NEPA. The court found that the Department "failed to adequately distinguish its previous position that firearm restrictions were necessary to protect against environmental harms involving 'public safety' and 'protection of natural resources.'" *Id*. at 18-19. "This change of course without a reasoned explanation is the quintessential example of an arbitrary and capricious action." *Id*. at 19.

Applying settled law, FSA's decision to exclude the Target Zone from the FONSI and therefore from the RR CREP Amendment was arbitrary and capricious. FSA decided as early as October 21, 2009, that it supported inclusion

of the Target Zone in the RR CREP Amendment. FSA stated that it was satisfied that the conservation benefits realized outside the Target Zone would be similarly demonstrated within the Target Zone. (Aplt. App. at 797.) Then, in the 2010 Supplemental EA, FSA concluded that the Target Zone would have environmental benefits, including that the diverted water "would ultimately increase surface water quantity thereby improving local and downstream habitats for aquatic species." (Aplt. App. at 543.) The Supplemental EA concluded that "[t]here are no expected long term significant negative impacts associated with implementation of the Proposed Amendment." (Aplt. App. at 550.) Accordingly, the Supplemental EA did not find that any particular mitigation measure was needed.

The April 2012 decision to exclude the Target Zone from the preferred alternative had no express explanation for that reversal in position. The only hint comes from the opening paragraph under the heading "Reasons for Finding of No Significant Impact":

> In consideration of the analysis documented in the Supplemental EA and in accordance with Council on Environmental Quality regulations 1508.27, FSA has determined that the preferred alternative would not constitute a major State or Federal action affecting the human and natural environment ***if*** the Target Zone was eliminated from the preferred alternative. ***Therefore*** the Target Zone has been removed from the preferred alternative and a Finding of No Significant Impact if being rendered.

(Aplt. App. at 499, emphasis added.) But there was ***nothing*** in the Supplemental EA explaining how the Target Zone might constitute a major state or federal action

affecting the human and natural environment if it was included. Instead, the final Supplemental EA was materially identical to the 2010 draft and relied on the ***same*** evidence that had previously stated that the Target Zone would have environmental benefits and identified no adverse consequences. (Aplt. App. at 500-587.) These are precisely the circumstances the Supreme Court has held require "a more detailed justification." *See Fox Television Stations*, 556 U.S. at 515 ("a more detailed justification" required when "new policy rests upon factual findings that contradict those which underlay its prior policy"); *Nat'l Ass'n of Home Builders*, 551 U.S. at 658 (agency decision is arbitrary and capricious and must be vacated if agency "offered an explanation for its decision that runs counter to the evidence before the agency" (citations omitted)).

The district court noted that there were ten items listed in the FONSI as the basis for the determination, and relied on item 4:

> The potential impacts on the quality of the human environment are not considered highly controversial. Additional public involvement measures were taken for this action given the high public interest in the action. Comments received throughout the project did not indicate significant concern with the environmental analysis but rather opposition to the proposed incentive payments and eligibility requirements described in the proposed Amendment to the Republican River CREP.

(Aplt. App. at 499 and 2175.)

But this item 4 did not somehow satisfy the APA's requirement that the FSA explain its change of course and specifically explain why the decision to exclude

the Target Zone was the better choice. As an initial matter, the record demonstrates that the ***same language*** in item 4 was used in the draft FONSI prepared two years before the final FONSI that had ***included*** the Target Zone. (Aplt. App. at 1887.) So there is no reasonable inference that FSA drafted item 4 and its discussion of public comments to explain its change of position.

In addition, on the face of item 4, FSA recited that the comments "did not indicate significant concern with the environmental analysis." (Aplt. App. at 1887 and 499.) Yet the only explanation of the removal of the Target Zone from the FONSI is the suggestion that including it would "constitute a major State or Federal action affecting the human and natural environment." (Aplt. App. at 498.) This not only constitutes a "new policy rest[ing] upon factual findings that contradict those which underlay its prior policy," *Fox Television Stations*, 556 U.S. at 515, but it even contradicts the factual findings recited in the Supplemental EA and the FONSI itself.

Notably, the other nine reasons listed as the basis for the FONSI determination are focused on environmental factors and evidence. (Aplt. App. at 499.) There is no suggestion anywhere in the FONSI or Supplemental EA that the FONSI or identification of the preferred alternative would be contingent on what effectively became a vote on a family's popularity. That stands in contrast to *Friends Of Marolt Park v. U.S. Department of Transportation*, in which the agency

could properly make a preferred alternative contingent on a local vote that was legally required to implement that alternative. 382 F.3d 1088 (10th Cir. 2004). The district court relied on *Friends of Marolt Park* for the proposition that an agency is not required to "tie any change in that proposed action to its environmental impact, as long as it articulates the required rational connection for the change." (Aplt. App. at 2175.) But in that case, the required local vote and the need for funding to implement a light-rail alternative were acknowledged in the record of decision. 382 F.3d at 1096. There were no such factual contingencies identified in the FONSI or Supplemental EA here.

The district court also was unconcerned that the FSA had not proposed any alternative that would approve the RR CREP Amendment but exclude the Target Zone, even though there was no opportunity for public comment on that option. (Aplt. App. at 2176-2177.) Specifically, the court rejected the proposition that an agency must "specifically identif[y]" a portion of a proposal that might not be implemented "as a separate alternative before soliciting comments." (*Id.*) But the court mischaracterized the impact of the Target Zone on the overall proposal, as it was not a "mere portion" but instead one of the main focus areas of the RR CREP Amendment. (*See, e.g.*, Aplt. App. at 608-610, October 2010 Draft Supplemental EA, describing addition of incentive areas in the "Target Zone" with higher annual payments to increase streamflows; Aplt. App. at 819, October 2009 Press Release,

describing how "[t]he retirement of irrigated acreage in the Target Zone will achieve the same goals listed in the original Republican River CREP Agreement," "may assist the State of Colorado to comply with the Republican River Company," and "will increase stream flows to enhance downstream habitat"; Aplt. App. at 1440-1449, January 2010 transmittal of draft changes to RR CREP Amendment, highlighting addition of Target Zone as one of six key changes, and explaining at Section IV requirements for Target Zone participation.)

Under such circumstances, an invitation for public comment on the possibility of excluding the Target Zone was necessary to comply with NEPA, so that the public could understand the reduced environmental benefits of eliminating the Target Zone. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009) ("A public comment period is beneficial only to the extent the public has meaningful information on which to comment, and the public did not have meaningful information on the fragmentation impacts of Alternative A-modified. Informed public input can hardly be said to occur when major impacts of the adopted alternative were never disclosed. Thus, we cannot agree that the failure to thoroughly analyze the environmental impacts of Alternative A-modified in a public NEPA document was harmless.").

Accordingly, FSA's decision to exclude the Target Zone from the RR CREP Amendment necessarily is arbitrary and capricious, and must be vacated under the APA and NEPA.

C. FSA Had No Authority To Decide That The Target Zone Would Present A "Significant Impact" Under NEPA Or To "Mitigate" That Non-Existent Impact

The FONSI attached to the Supplemental EA plainly couched the exclusion of the Target Zone as a qualification needed for the agency to conclude that there would be no significant impact from the proposed agency action. The district court erred in refusing to acknowledge record evidence of the lack of any basis for the FONSI. Upon that same record, this Court should conclude that the FSA's decision was arbitrary and capricious and without legal authority.

As noted above, the FONSI's explanation for excluding the Target Zone was anemic at best, but one cannot ignore the little explanation that was given:

> …FSA has determined that the preferred alternative would not constitute a major State or Federal action affecting the human and natural environment if the Target Zone was eliminated from the preferred alternative. Therefore the Target Zone has been removed from the preferred alternative and a Finding of No Significant Impact if being rendered.

(Aplt. App. at 499.)

It is well-settled that even if an agency decides that there could be a significant environmental impact, it can propose a mitigation measure that would sufficiently reduce the impact, allowing for a FONSI to be issued in lieu of an EIS.

See Jones, 792 F.2d at 829. However, "[m]itigation measures must be supported by substantial evidence of some kind." *Hillsdale Env'tl. Loss Prevention*, 702 F.3d at 1172. They also must be either "imposed by statute or regulation," or "submitted as part of the original proposal." *Id*. (citation omitted).

FSA did not dispute below that there is nothing in the record showing that the Target Zone would have an adverse environmental impact. FSA also did not dispute Cure Land's argument that, because there was no evidence of adverse environmental consequences, there was no need to have any "mitigation measures" in order for the agency to issue a Finding of No Significant Impact. FSA gave no indication that they had any "substantial evidence" that exclusion of the Target Zone from the RR CREP Amendment was needed to mitigate any alleged significant environmental impact. Indeed, given that FSA had not previously found any negative environmental impacts associated with the Target Zone, it would be arbitrary and capricious for FSA to then conclude that the Target Zone must be excluded to mitigate non-existent impacts. Furthermore, FSA never indicated in the Supplemental EA – "the original proposal" – that exclusion of the Target Zone was needed as a mitigation measure. *See id*. FSA also did not cite to any statute or regulation as justification for the Target Zone exclusion. *See id*. The only options presented to the public were to not amend the RR CREP at all, or to amend it to include the Target Zone.

Moreover, FSA was not permitted to use the NEPA process to "mitigate" the concerns of individuals who thought that the Cure family's anticipated receipt of CREP benefits in the Target Zone was unfair. Mitigation measures can be used only to avoid having a "significant impact on the human environment." *See* 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1501.4, 1508.13. The term "human environment" categorically excludes "economic or social effects" that are independent of any environmental impact. *See* 40 C.F.R. § 1508.14 ("This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement."). *See also Stauber v. Shalala*, 895 F. Supp. 1178, 1194 (W.D. Wis. 1995) (socioeconomic effect on dairy farmers of agency decision to approve a new drug application for a bovine growth hormone drug did not require EIS); *South Dade Land Corp. v. Sullivan*, 853 F.Supp. 404, 411 (S.D. Fla. 1993) (rejecting plaintiffs' request for an EIS, as "the purportedly imminent destruction of their business interests in the land" at issue was "simply insufficient to require preparation of an EIS"); *State of N.C. v. Hudson*, 665 F.Supp. 428, 444 (E.D.N.C. 1987) (agency reasonably approved permit where "the core of the controversy relates to the advisability and legality of the interbasin transfer of water and the socioeconomic impacts of such a decision," as opposed to "the project's effects on the human environment"); *Citizens Committee against Interstate Route 675 v. Lewis*, 542 F.Supp. 496, 534 (S.D. Ohio 1982) (citing cases

from the Fifth Circuit, Sixth Circuit and D.C. Circuit, "socio-economic factors alone will not trigger the requirement of filing an environmental impact statement").[2]

The district court apparently concluded that, notwithstanding the language in the FONSI to the contrary, the exclusion of the Target Zone was not a NEPA mitigation measure, so there was "no need for the Agency's decision to meet the requirements for a mitigation measure." (Aplt. App. at 2180.) But FSA cannot have it both ways: either its explanation for excluding the Target Zone should show that it was a necessary and lawful mitigation measure in order to find no significant impact, or FSA should have offered a different, reasoned explanation for why in the context of NEPA the Target Zone would need to be excluded. It did neither.

Accordingly, FSA could not manufacture a significant environmental impact on a post-hoc basis simply by reconsidering the comments received in the Supplemental EA process regarding the Target Zone. As FSA already had

[2] If such concerns were properly within the scope of NEPA, then the FSA should have considered important information that the Colorado Department of Natural Resources sent to FSA in December 2010 that, to respond to public concerns, RRWCD had voted to change the proposed RR CREP Amendment to decrease the total acreage involved, and to reduce the Target Zone incentive from $189 to $100 per acre to achieve greater equity among payments in the program. (Aplt. App. at 882-883.) The Supplemental EA and FONSI do not make any reference to this change.

effectively concluded, these comments did not concern the "human environment." That was the correct conclusion, as the comments focused on whether it was "fair" for the Cures to receive Target Zone payments, a perceived economic issue that bears no relationship whatsoever to the environmental benefits of CREP and the Target Zone. By issuing a FONSI that necessarily found that inclusion of the Target Zone would have a significant impact on the environment, FSA's decision was arbitrary and capricious and not in accordance with law, and must be vacated for this reason as well.

D. FSA's Decision To Exclude The Target Zone Was Invalid Because It Was Motivated By Local Hostility To The Cure Family And FSA Disregarded Its Own Technical Analyses

The vacuum of explanation for the decision to exclude the Target Zone and the lack of any evidence of adverse environmental impact stands in stark contrast to internal documents showing that FSA's politically-appointed officials caved to bias against the Cures surrounding this "local controversy." In fact, over-reaction to this "local controversy" was the ***sole*** basis for FSA's decision to exclude the Target Zone from the Supplemental EA. FSA violated the APA and NEPA by disregarding its own technical evaluation and instead basing its decision on local hostility against the Cures.

Federal agencies may not use prejudice and bias to interfere with the scientific and technical evaluations and recommendations of their staff, particularly

when those evaluations are prescribed by statute. "An agency decision may be deemed arbitrary and capricious: if the agency has relied on factors which Congress has 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." *Tummino v. Torti*, 603 F.Supp. 2d 519, 542 (E.D.N.Y. 2009) (quoting *Motor Vehicle Manufacturers*, 463 U.S. at 43). "Moreover, proof of subjective bad faith by agency decision-makers, depriving a petitioner of fair and honest consideration of its proposal, generally constitutes arbitrary and capricious action." *Id*. (citing *Latecoere Int'l, Inc. v. U.S. Dept. of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994), and *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996)). *See also Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1185 (10th Cir. 2014) (in rejecting argument that agency improperly reacted to criticism by its own Office of Inspector General, distinguishing that case from those featuring improper "external political pressures").

In *Latecoere*, the Eleventh Circuit reversed a Navy decision to deny a contract to a French company that was found to be qualified during the technical review and had internally been recommended for the contract, and instead award the contract to an American company that was found to be unqualified. *See* 19

F.3d 1342. The court noted that there was "proof of subjective bad faith by procuring officials," namely "prejudice against the plaintiff." *Id*. at 1356. The court found that the Navy had artificially boosted the marginal ratings of the American company, and effectively "the books were cooked" to make sure the company "made the cut." *Id.* at 1358. The Navy also had made cost the determining factor, in violation of a statutory requirement to consider only the factors emphasized in the bid solicitation. *Id.* at 1359. Finally, and critically, Navy officials had considered an award to a French company to be a "political hot potato," and wanted to avoid the "political heat" that would come with such a decision. *Id*. at 1364-65. The court found that such evidence readily supplied an inference of bias, and the contracting decision was invalidated as arbitrary and capricious. *Id.* at 1365.

In *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1972), the D.C. Circuit held that the Secretary of the Department of Transportation had improperly decided to build a bridge in disregard of the statutory factors required to be followed for such a decision. Moreover, certain members of Congress had voiced strong support for the bridge project and had blocked funding for a mass transit alternative. *Id.* at 1245. When viewed in light of the deficiencies in the Secretary's decision, the evidence of political pressures "len[t] color to plaintiffs' contention that the repeated and public threats by a few Congressional

voices did have an impact on the Secretary's decisions." *Id.* The Secretary's "action would not be immunized merely because he also considered some relevant factors." *Id.* at 1248. Furthermore, allowing the Secretary to consider the political pressures "would effectively emasculate the statutory scheme." *Id.*

Likewise, the court in *Tummino* cited improper political influence as the basis for invalidating a decision by the Food and Drug Administration ("FDA") to impose a minimum age requirement to obtain Plan B, an emergency contraceptive, on an over the counter basis. *See* 603 F.Supp.2d 519. The court found that FDA lacked good faith in its decision based on "repeated and unreasonable delays," "pressure emanating from the White House," as well as "significant departures from the FDA's normal procedures and policies." *Id.* at 544. The White House pressured the FDA Commissioner to impose an age restriction, citing concerns over "unhappy constituents." *Id.* at 546. The FDA also had rejected its own internal scientific recommendation that no such age restriction was needed. *Id.* at 546-547. The FDA, lacking any scientific justification for its decision, invoked "fanciful and wholly unsubstantiated 'enforcement concerns'." *Id.* at 546. In so doing, the FDA's decision was found to be arbitrary and capricious under the APA. *Id.*

The district court did not distinguish any of the above cases, but instead held that "local politics" is always a fair element of consideration. (Aplt. App. at 2179.)

But the issue here is not whether FSA could consider "local politics." It is whether an agency decision is improper under NEPA when it rests ***entirely*** upon personal biases rather than an evaluation of scientific and technical data properly considered under the NEPA process.

Indeed, the record in this case readily demonstrates that FSA's decision to exclude the Target Zone was motivated wholly by a desire to avoid political heat emanating from those personal prejudices, just as in *Latecoere*. Kareus in particular was concerned with the "local controversy" involving Cure Land and the Target Zone, and she repeatedly elevated the issue to other agency officials. Kareus also discussed the issue with Colorado's congressional delegation. (*See, e.g.*, Aplt. App. at 814, 851-852, 1194, 1246-1247, 1255-1256, 1368.) Although the concerns centered on an "appearance" of preferential treatment of a local family, the Supplemental EA did not recite any investigation into the facts around Cure Land's sale of its water rights to RRWCD, or the price it received for those rights. Nor did it explain how RRWCD had reduced the proposed acreage and pricing in the Target Zone in response to local public comments.

Instead of following NEPA procedures, high-level officials deemed the Target Zone a political hot potato, and they did not treat it as an environmental issue at all, but instead as a political problem that needed resolution by any means possible. As seen in *Latecoere, Tummino and D.C. Federation of Civic*

Associations, FSA was not permitted to make the Target Zone decision based on motivations to avoid a political hot potato, or to please otherwise unhappy constituents, where NEPA requires policy decisions to be based on environmental analyses. FSA was not allowed to disregard the results of its own internal technical review showing that the Target Zone would have environmental benefits (not adverse impacts), and instead permit considerations arising from personal hostilities to infect and dominate the decision-making process. It could not use the statutory NEPA process to torpedo a proposal for non-environmental reasons. For this third and independent reason, FSA's decision cannot withstand scrutiny under the APA and NEPA.

E. The Proper Remedy In This Case Is An Order To Include The Target Zone In The RR CREP Amendment And Hold That The Target Zone Presents No Adverse Environmental Impact

The usual remedy for an APA and/or NEPA violation is to vacate the agency decision in question and remand to the agency for resolution. But this case is one in which this Court may go a step further, as the record clearly points to only one result – to include the Target Zone in the FONSI and the RR CREP Amendment. Accordingly, upon remand, FSA should be ordered to implement that result.

"Although the normal course of action when the record fails to support an agency's decision is to remand to the agency for additional investigation or explanation," U.S. Supreme Court "precedent acknowledge[s] the propriety of

remanding with instructions in exceptional cases." *Sierra Club v. United States EPA*, 346 F.3d 955, 963 (9th Cir. 2003) (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). These include situations when the record has been fully developed, and no conclusion can be reached from the record other than that proposed by the plaintiff. *See id*. ("We fail to see how further administrative proceedings would serve a useful purpose; the record here has been fully developed, and the conclusions that must follow from it are clear."); *CBS Corp. v. F.C.C.*, 663 F.3d 122, 170 (3d Cir. 2011) ("Of course, remand is not required where a proper application of the correct standard could yield only one possible result.").

For example, in *Woods Petroleum Corp. v. Department of Interior*, this Court declined to remand to the agency for additional proceedings after concluding that the Interior Secretary acted arbitrarily and capriciously in allowing certain mineral leases held by oil companies to expire so that the rights could be re-leased more lucratively. *See* 47 F.3d 1032, 1041 (10th Cir. 1995). The Bureau of Indian Affairs had approved the commutization agreement in question, but the Interior Assistant Secretary had reversed that approval. The record revealed that the Secretary's reasons for the reversal were based improper grounds. *See id*. Accordingly, this Court held that "remand for further explanation would be fruitless in this case," and ordered the agency to reinstate the Bureau's approval.

Id. *See also NLRB v. Producers Cooperative Assoc.*, 457 F.2d 1121, 1126 (10th Cir. 1972) (where NLRB already had considered all relevant information, remand for additional fact-finding not necessary, and NLRB decision reversed on its merits); *Tummino*, 603 F.Supp.2d at 550 (in ordering FDA to permit pharmaceutical company to make Plan B available to 17 year olds without a prescription within 30 days, "[a] remand would serve no purpose . . . [t]he record is clear the FDA's justification for the denial of OTC access to Plan B for women over the age of 17 - rather than 18 – 'runs counter to the evidence and 'is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" (citation omitted)).

In this case, the Supplemental EA answered the only relevant question regarding the Target Zone by identifying no adverse environmental impacts. It did so after studying all of the required NEPA factors. There is no additional data needed to analyze the Target Zone within the context of the Supplemental EA. The record also shows that the only factors FSA considered in excluding the Target Zone were not environmental. The record clearly shows that the Target Zone will not lead to a significant adverse environmental impact, and thus this Court should order FSA to issue a new FONSI that approves the RR CREP Amendment and does not exclude the Target Zone.

This Court also should direct that an injunction be entered to prevent FSA from taking any further action to exclude properties in the Target Zone from the RR CREP Amendment. "[T]he traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation." *Colo. Envtl. Coalition v. Office of Legacy Mgmt.*, 819 F.Supp.2d 1193, 1223 (D. Colo. 2011) (citing *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010)). "Under that test, a plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id*. While a NEPA violation "standing alone does not establish irreparable injury, it is a relevant factor to consider." *Id*. (finding that Department of Energy's actions both violated NEPA and would have tangible effects resulting in irreparable injury). *See also Nat'l Ski Areas Ass'n, Inc. v. U.S. Forest Serv.*, 910 F.Supp.2d 1269, 1289 (D. Colo. 2012) (multiple statutory procedural violations can help establish irreparable injury, which is reinforced by loss of water rights if agency decision not enjoined). FSA's decision to exclude the Target Zone from the FONSI and RR CREP Amendment, which violates both the APA and NEPA, has tangible effects on Cure Land, because Cure Land will be unable to receive irrigated land incentives in the

Target Zone through the RR CREP. Accordingly, FSA must be precluded from taking any other actions that would have the effect of excluding the Target Zone from the RR CREP Amendment.

With regard to the second factor for obtaining an injunction, there are no other remedies at law, so this factor also weighs in favor of Cure Land. *See Colo. Envtl. Coalition*, 819 F.Supp.2d at 1224. If the Target Zone is excluded altogether from the RR CREP Amendment, Cure Land cannot appeal any later decision regarding its ineligibility for Target Zone incentives. And as noted in *National Ski Areas Association*, federal procedural statutes such as the APA do not award money damages. 910 F.Supp.2d at 1289.

The third factor, "the balance of hardships," likewise weighs in favor of a remedy in equity for Cure Land. FSA took at face value allegations of "double dipping" without investigating the allegations, when instead Cure Land sold its water rights to RRWCD for much less than what they were worth, because Cure Land believed that it would be eligible for CREP in the Target Zone. In contrast to the uninformed assumptions made by FSA in deciding to exclude the Target Zone, Cure Land will suffer significantly under FSA's decision.

The final factor – the public interest – also favors Cure Land. More specifically, "public interest . . . would not be disserved by the issuance of injunctive relief," *Colo. Envtl. Coalition*, 819 F.Supp.2d at 1224, because FSA had

previously decided back in 2009, and again in 2010, that the Target Zone was an environmentally beneficial addition to the RR CREP Amendment. Preserving that decision through injunctive relief merely furthers that determination that serves the public interest. In addition, "there is public interest in ensuring that federal agencies adhere to" statutory procedural requirements. *Nat'l Ski Areas Ass'n*, 910 F.Supp.2d at 1290.

VII. CONCLUSION

For all of the reasons stated above, Cure Land requests reversal of the district court, with instructions upon remand that the district court order the FSA to include the Target Zone in the Supplemental EA and RR CREP Amendment, and to enjoin the FSA from taking any other action to categorically exclude properties in the Target Zone from CREP participation.

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STATEMENT REGARDING ORAL ARGUMENT

Cure Land believes that oral argument would assist the Court in this case due to the application of unique facts to NEPA and APA.

Dated: July 10, 2015

SNELL & WILMER L.L.P.

s/ *Jessica E. Yates*

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 11,408 words. I relied on my word processor to obtain the count and it is MSWord 2010. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Jessica E. Yates
Jessica E. Yates

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and these digital submissions have been scanned for viruses with the most recent version of 2015 Microsoft System Center Endpoint Protection, Version: 4.8.204.0, last updated on July 10, 2015, and, according to the program, are free of viruses.

s/Jessica E. Yates
Jessica E. Yates

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2015, a copy of the foregoing **APPELLANTS' OPENING BRIEF** was served via CM/ECF on the following:

U.S. Attorney's Office-Denver
1225 17th Street, Suite 700
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Attorneys for Defendants-Appellees

s/Martha McCleery
Martha McCleery

21447286

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 12-cv-2388-WJM

CURE LAND, LLC, and
CURE LAND II, LLC,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
TOM VILSACK, in his official capacity as Secretary of the United States Department of Agriculture,
FARM SERVICE AGENCY, an Agency of the United States Department of Agriculture, and
JUAN M. GARCIA, in his official capacity as Administrator of the Farm Service Agency,

Defendants.

ORDER AFFIRMING AGENCY'S DECISION

Plaintiffs Cure Land, LLC and Cure Land II, LLC (jointly the "Plaintiffs") bring this action against Defendants the United States Department of Agriculture ("USDA"), the Farm Service Agency ("FSA") (jointly the "Agency"), Tom Vilsack in his official capacity as Secretary of the USDA, and Juan M. Garcia in his official capacity as Administrator of the FSA (collectively the "Defendants"). (ECF No. 1.) This matter is before the Court pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, on Plaintiffs' appeal of the Agency's decision to exclude certain lands from a proposed water conservation program. (*Id.*) For the reasons set forth below, the Agency's decision is affirmed.

I. BACKGROUND

A. Statutory Background

The National Environmental Policy Act ("NEPA") is "[t]he centerpiece of environmental regulation in the United States". *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009). NEPA's "twin aims" require a federal agency "to consider every significant aspect of the environmental impact of a proposed action," and to "inform the public that it has indeed considered environmental concerns in its decision-making process." *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 97 (1983). "The Act does not require agencies to elevate environmental concerns over other appropriate considerations, however; it requires only that the agency take a 'hard look' at the environmental consequences before taking a major action." *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1207-08 (10th Cir. 2002) (citing *Baltimore Gas*, 462 U.S. at 97). That is, NEPA "'merely prohibits uninformed—rather than unwise—agency action.'" *Richardson*, 565 F.3d at 704 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)).

"Before an agency may take 'major Federal actions significantly affecting the quality of the human environment,' an agency must prepare an environmental impact statement ("EIS") in which the agency considers the environmental impacts of the proposed action and evaluate[s] 'alternatives to the proposed action,' including the option of taking 'no action.'" *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 780 (10th Cir. 2006) (quoting 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.14(d)).

However, "[i]f an agency is uncertain whether the proposed action will significantly affect the environment, it may prepare a considerably less detailed environmental assessment" ("EA") to determine whether an EIS is necessary. *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 736 (10th Cir. 2006) (citing 40 C.F.R. § 1508.9). If the EA concludes that the proposed project will have a significant effect on the environment, the agency must then develop an EIS; if not, the agency then issues a "Finding of No Significant Impact" ("FONSI"), and no further agency action is required. *Id.*

In addition to these procedural requirements, "[a]t all stages throughout the process, the public must be informed and its comments considered." *Richardson*, 565 F.3d at 704 (citing 40 C.F.R. §§ 1503.1, 1505.2, 1506.10). NEPA does not circumscribe "the substantive action an agency may take—the Act simply imposes procedural requirements intended to improve environmental impact information available to agencies and the public." *Id.*

B. Factual and Procedural Background

This action arises out of a proposed amendment to the Colorado Republican River Conservation Reserve Enhancement Program ("RR CREP"). The RR CREP is a federal-state program in which enrolled cropland owners receive federal funding in exchange for agreeing to cease irrigation of their lands, with the aim of conserving water, improving water quality, controlling erosion, and protecting wildlife. (Amended Admin. Record ("R.") (ECF No. 29) at CL01600-15.) The RR CREP Agreement involves the USDA and the State of Colorado, among other parties, and is administered by the FSA, an agency of the USDA. (*Id.* at CL01352-64.) The RR CREP Agreement

was entered into in April 2006. (*Id.*)

In June 2007, an amendment was proposed to the RR CREP Agreement ("Amendment"), which included the addition of an area of land known as the "Target Zone" within which Colorado's Republican River Water Conservation District (the "District") could purchase the water rights. (R. at CL01184-85.) The District intended to use the RR CREP funds to further incentivize landowners in the Target Zone to agree to divert water to a pipeline that would feed into the Republican River, thereby helping the State of Colorado meet its water supply obligations under a compact with Kansas and Nebraska. (*Id.*) In 2008, pursuant to this plan, the District purchased some of the water rights to lands owned by Plaintiffs in the Target Zone. (*Id.* at CL01114-15.) In the course of considering the Amendment, the Agency expressed concerns regarding the inclusion of the Target Zone in the RR CREP. Specifically, the Agency considered whether a Target Zone landowner could be a voluntary participant in the CREP if compliance with the compact was mandatory, and whether diverting water to the pipeline would have conservation benefits, given that the water could later be used by other states rather than conserved. (*See id.* at CL00615-18, 621-22.)

In October 2009, the Agency informed Colorado that it generally supported the Amendment and intended to prepare a supplemental environmental assessment to evaluate the Amendment's environmental impact ("Supplemental EA"). (R. at CL00699.) During the course of these preparations, the Agency began to receive public comments regarding the Amendment, some of which challenged the inclusion of the Target Zone. (*See, e.g.*, *id.* at CL01750.) This opposition initially came from one individual who argued that the Target Zone lands were principally owned by one family,

which would stand to profit inequitably from selling their water rights to the District for compact compliance, while also receiving RR CREP funds. (*See id.*) However, the Agency then began receiving similar comments from other individuals, indicating a broader controversy and prompting the Agency to hold a public meeting in October 2010 to solicit verbal comments on the Supplemental EA. (*Id.* at CL00806, 1690.) The Agency received several verbal comments at the public meeting, and subsequently received several written comments from individuals, letters from other conservation districts rescinding previous support for the Amendment, and a petition with 90 signatures, most of which challenged the inclusion of the Target Zone in the Amendment. (*Id.* at CL00771, 800.)

In December 2010, the Agency published the Final Supplemental EA (R. at CL00379-464), which concluded that the Amendment as a whole would have environmental benefits and would have "no expected long term significant negative impacts . . . ." (*Id.* at 00427.) The Supplemental EA reviewed the comments received in opposition to the inclusion of the Target Zone, and generally noted that no change to the EA was required. (*Id.* at CL00444, 449-460.) In a few instances, the Supplemental EA declined to respond to the commenters' concerns regarding the fairness of the incentive payments and the equity of including the Target Zone in the Amendment, because such issue was deemed "not an issue for the EA". (*Id.* at CL00452, 53.)

In December 2010, the Agency prepared a draft decision document concluding that no significant environmental impact would occur ("Draft FONSI") if the Amendment were implemented as originally proposed. (R. at CL01867.) However, the Draft FONSI

was not finalized due to concerns regarding the public controversy, amongst other factors. (*See id.* at CL01525-30.) On April 16, 2012, the Agency issued a FONSI that removed the Target Zone from the proposed Amendment. (*Id.* at CL00375-76.)

On September 7, 2012, Plaintiffs filed this action challenging the Agency's decision to exclude the Target Zone from the Amendment. (ECF No. 1.) Plaintiffs' Opening Brief was filed on May 1, 2013. (ECF No. 30.) Defendants filed their Response Brief on May 31, 2013 (ECF No. 31), and fourteen days later, Plaintiffs filed their Reply (ECF No. 32).

II. LEGAL STANDARD

The role of a court reviewing a NEPA challenge "is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious." *Baltimore Gas*, 462 U.S. at 97-98; *see also Richardson*, 565 F.3d at 704 ("As with other challenges arising under the APA, we review an agency's NEPA compliance to see whether it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'") (quoting 5 U.S.C. § 706(2)(A)).

An agency's decision is considered arbitrary and capricious if it "(1) entirely failed to consider an important aspect of the problem, (2) 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, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment." *Richardson*, 565 F.3d at 704 (quotations omitted). The Court's

"inquiry under the APA must be thorough, but the standard of review is very deferential to the agency. . . . A presumption of validity attaches to the agency action and the burden of proof rests with [the party raising the challenge]." *W. Watersheds Project v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1273 (10th Cir. 2013) (internal citations omitted).

III. ANALYSIS

Plaintiffs argue that the Agency's decision to exclude the Target Zone from the Amendment was arbitrary and capricious, an abuse of discretion, and not in accordance with law, and should therefore be vacated. (ECF No. 30 at 19.) Plaintiffs readily admit that this is not the ordinary posture of a NEPA challenge, which typically argues that an agency should have performed more environmental analysis. (*Id.* at 1.) Instead, Plaintiffs' challenge is rooted in NEPA's procedural requirements, contesting the Agency's change of position between the Supplemental EA and the FONSI. Plaintiffs raise three arguments: (1) the Agency improperly changed course to exclude the Target Zone despite its prior analyses; (2) Defendants improperly disregarded their own technical analyses and bowed to political pressures; and (3) Defendants had no authority to exclude the Target Zone as a mitigation measure. (*Id.* at 19-30.) The Court will discuss each argument in turn.

A. Change of Course

Plaintiffs argue that the Agency's decision to exclude the Target Zone was arbitrary and capricious because it was an unjustified change of course from the Agency's findings in the Supplemental EA that no adverse environmental

consequences would result. (ECF No. 30 at 19-23.) Plaintiffs contend that the decision was made with no public explanation, constituting arbitrary and capricious action and an abuse of discretion. (*Id.* at 20.)

Plaintiffs cite numerous authorities holding that an agency may not abandon a previous policy or rule without providing a reasoned explanation for its reversal. (*Id.* at 20-22.) The factual scenarios in the cases cited by Plaintiffs include an agency decision to abandon a rule requiring airbags in new vehicles, *see Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29 (1983); an agency's issuance of an operating permit without a compliance schedule in violation of prior policies and practices, *see New York Public Interest Research Group, Inc. v. Johnson*, 427 F.3d 172 (2d Cir. 2005); an agency's change of position regarding whether a bridge would adversely affect the area's scenic and recreational values, *see Sierra Club North Star Chapter v. LaHood*, 693 F. Supp. 2d 958 (D. Minn. 2010); and an agency's change of position regarding the necessity of firearm restrictions to ensure public safety in national parks and wildlife refuges, *see Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1 (D.D.C. 2010). (ECF No. 30 at 20-22.)

While Plaintiffs' argument is somewhat compelling, ultimately the Court is not persuaded. As an initial matter, the majority of the authorities Plaintiffs cite involve established policies or promulgated rules that are subsequently abandoned without explanation. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 29. The instant case is distinguishable, as it does not involve a policy or rule that was previously established and subsequently abandoned. Rather, it involves a proposed amendment to expand

the scope of a conservation program, and a change in the size of the proposed expansion between the environmental evaluation (the Supplemental EA) and the final decision (the FONSI). A case involving "the revocation of an extant regulation", wherein "[r]evocation constitutes a reversal of the agency's former views as to the proper course", does not inform the instant case, where the initial proposal was not formally promulgated. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41 (noting that a "settled course of behavior" in carrying out the agency's policies implies "a presumption that those policies will be carried out best if the settled rule is adhered to"). The proposed Amendment discussed in the Supplemental EA was neither a promulgated rule, nor an established practice constituting a "settled course of behavior". *Id.* Accordingly, the Court finds these cases inapplicable here.

Rather than requiring an explanation for the change in course, NEPA requires only that the Agency "articulate 'a rational connection between the facts found and the choice made.'" *Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1096 (10th Cir. 2004) (quoting *Baltimore Gas*, 462 U.S. at 105). In *Friends of Marolt Park*, the agency changed the scope of the proposal—the "preferred option"—between the environmental evaluation document (a draft supplemental EIS) and the decision document (a Record of Decision), wherein it explained that it modified the preferred option based on a lack of public support and due to additional costs. *Id.* at 1092, 1096. The Supreme Court held that the explanation in the decision document provided the requisite rational connection between the facts and the decision, and the agency appropriately evaluated the environmental impact of its decision. *Id.* at 1096. *Friends*

of Marolt Park thus supports Defendants' argument that an agency conducting an environmental review under NEPA has not established a policy merely by evaluating one proposed action in its environmental document, nor is it required to tie any change in that proposed action to its environmental impact, as long as it articulates the required rational connection for the change. *Id.*

The Court finds that the FONSI sufficiently articulated such a connection here. Under the title "Reasons for Finding of No Significant Impact", the Agency explains that "the Target Zone has been removed from the preferred alternative and a [FONSI] is being rendered. This determination is based on the following" ten enumerated reasons. (R. at CL00376.) Most of the listed reasons relate to the environmental impact of the proposed Amendment, but one describes public opinion, as follows:

> The potential impacts on the quality of the human environment are not considered highly controversial. Additional public involvement measures were taken for this action given the high public interest in the action. Comments received throughout the project did not indicate significant concern with the environmental analysis but rather opposition to the proposed incentive payments and eligibility requirements described in the proposed Amendment to the Republican River CREP.

(*Id.* at CL00376 ¶ 4.) The FONSI does not explicitly state that the comments received were specifically opposed to the inclusion of the Target Zone. However, the ten enumerated reasons are offered in explanation of the decision to remove the Target Zone and issue a FONSI. Thus, the cited language articulates a rational connection between the decision to remove the challenged area and the comments received, which satisfies the Agency's obligations. *See Friends of Marolt Park*, 382 F.3d at 1096.

Plaintiffs object to the application of the legal standard articulated in *Friends of Marolt Park*, and the majority of the argument in Plaintiffs' Reply is spent in distinguishing that case. (ECF No. 32 at 8-12.) First, Plaintiffs argue that the agency in *Friends of Marolt Park* had issued a draft EIS that identified both the initial proposal and the alternative that was ultimately selected, which gave the public notice and an opportunity to comment on them. (*Id.* at 9.) Here, Plaintiffs note that the Supplemental EA did not discuss an alternative that omitted the Target Zone, and thus contend that the public was not provided notice or an opportunity to comment on the potential exclusion of the Target Zone. (*Id.*) However, Plaintiffs' argument fails because the Record shows that the public was given ample opportunity to comment on any and all aspects of the proposed Amendment. Indeed, as the FONSI notes, "[a]dditional public involvement measures were taken," including holding a public meeting to receive verbal as well as written comments. (*See* R. at CL00376, CL00806-56.) Plaintiffs have cited no support for their contention that an agency may not choose to implement a portion of a proposed action unless it has specifically identified that portion as a separate alternative before soliciting comments. As a practical matter, such a requirement would be unduly burdensome for agencies, which regularly propose complex actions with many parts. Thus, the Court finds that an opportunity for public comment was properly provided in this case.

Plaintiffs next argue that, unlike *Friends of Marolt Park*, the Agency here "only considered half the story" because it failed to seek comment from Plaintiffs, who would have provided explanations to alleviate the inequity concerns raised by other members

of the public. (ECF No. 32 at 10.) However, Plaintiffs have cited no authority requiring an agency to request comment from specific members of the public who will be affected by a decision. Plaintiffs had an opportunity to comment along with all other members of the public, but provided no such comment to the Agency for its consideration. (*See* R. at CL00806-56.) Accordingly, the Court finds no indication that the Agency's consideration of public opinion was biased or that the Agency failed to consider all relevant factors because it did not seek comment from Plaintiffs.

Finally, Plaintiffs argue that *Friends of Marolt Park* is distinguishable because in that case, the proposed action required voter approval, and thus public opinion was a necessary component of the action. (ECF No. 32 at 10-11.) Since voter approval was not required to implement the Amendment here, Plaintiffs argue that the Agency's decisionmaking was flawed because there was no indication that public opinion would be a factor in its decision. (*Id.* at 11-12.) This argument ignores the fact that informing the public and considering its opinion is a core obligation of an agency in compliance with NEPA. *See Richardson*, 565 F.3d at 704; *see also* 40 C.F.R. §§ 1503.1, 1505.2, 1506.10. Plaintiffs appear to presume that NEPA requires an agency to consider only, or principally, environmental factors in its decisionmaking, when the case law states otherwise. *See, e.g.*, *Utah Shared Access Alliance*, 288 F.3d at 1207 ("[NEPA] does not require agencies to elevate environmental concerns over other appropriate considerations"); *cf. Friends of Marolt Park*, 382 F.3d at 1092 (modifying a proposed action based on public opinion and cost considerations).

Accordingly, the Court finds that *Friends of Marolt Park* is applicable here. Pursuant to the legal standard articulated by the Tenth Circuit therein, the Court finds that the Agency sufficiently articulated its reasons for modifying the proposed action and excluding the Target Zone, and that it appropriately considered public opinion in doing so.

B. Political Pressures

Plaintiffs contend that the Agency's decision to exclude the Target Zone was arbitrary and capricious because that decision was based on political pressure instead of the Agency's environmental evaluation. (ECF No. 30 at 26-29.) Plaintiffs argue that an agency may not rely on "factors which Congress has not intended it to consider", including the desire to avoid "political heat". (*Id.* (citing *Latecoere Int'l, Inc. v. U.S. Dep't of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994)*; D.C. Fed'n of Civil Ass'ns v. Volpe*, 459 F.2d 1231, 1248 (D.C. Cir. 1972); *Tummino v. Torti*, 603 F. Supp. 2d 519, 542 (E.D.N.Y. 2009)).)

Plaintiffs' cited authorities note that an agency's decision must not result from political bias, *see Latecoere*, 19 F.3d at 1364; must not involve factors that would invalidate the statutory requirements, *see D.C. Federation*, 459 F.2d at 1248; and must not be made in bad faith in departure from the agency's own policies, *see Tummino*, 603 F. Supp. 2d at 547. Here, in contrast, the Agency's consideration of public comments and controversy was not in violation of a statutory requirement to only consider other factors. NEPA explicitly permits and requires an agency to provide public notice and an opportunity to comment. *See Richardson*, 565 F.3d at 704; *see also* 40 C.F.R. §§

1503.1, 1505.2, 1506.10. Because the Agency here was permitted to consider public opinion, and there is no indication that it abandoned its own policies or invalidated the statutory scheme in doing so, the Court finds no evidence of bad faith or bias.

Plaintiffs have characterized the tenor of the public comments here as "political pressure" in order to analogize the instant case to those in which an agency caved to pressure from corporate interests or other branches of government. (*See* ECF No. 30 at 26-29.) However, if the Court were to accept Plaintiffs' exceedingly broad definition of "political pressure", that definition would swallow the entire public comment process, in which the weight of local politics can always be discerned. The Court declines to create conflict with the express language of NEPA to make such a sweeping ruling here, and rejects Plaintiffs' political pressure argument.

C. Mitigation Measure

Finally, Plaintiffs argue that the exclusion of the Target Zone in the context of a FONSI suggests that Defendants intended it as a mitigation measure that would avoid any significant environmental impact. (ECF No. 30 at 24.) Because a mitigation measure requires substantial evidence to support it and may only be used to mitigate environmental impacts, not social or economic effects, Plaintiffs contend that exclusion of the Target Zone was inappropriate as a mitigation measure here. (*Id.* at 24-26.)

Defendants do not respond to this argument, instead focusing on defending the Agency's decision in the context of the four factors that can constitute arbitrary and capricious action. (*See* ECF No. 31 at 15-26.) However, the Court finds nothing in the Record that would suggest that Defendants intended the exclusion of the Target Zone

to be a mitigation measure. Rather, the Supplemental EA is clear that no significant impacts on the human environment would result from the proposed Amendment even if it included the Target Zone, which obviates the need to mitigate any environmental impacts, whether by excluding the Target Zone or otherwise. (*See* R. at CL00427 (noting "no expected long term significant negative impacts associated with implementation of the Proposed Amendment"); CL00454 ("The findings of the EA did not result in significant impacts and no mitigation measures are required.").) Therefore, the Court finds no need for the Agency's decision to meet the requirements for a mitigation measure, and rejects Plaintiffs' mitigation argument.

In sum, Plaintiffs have failed to show that the Agency's decision to exclude the Target Zone from the Amendment should be vacated, because they have not established that the Agency failed to consider an aspect of the problem, offered an explanation that was counter to the evidence, failed to base its decision on the relevant factors, or made a clear error of judgment. *See Richardson*, 565 F.3d at 704. Therefore, the Court finds that the Agency's decision was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law, and it must be affirmed. *See id.*

IV. CONCLUSION

For the foregoing reasons, the Court ORDERS that the Agency's decision to exclude the Target Zone from the Amendment is hereby AFFIRMED. The Clerk shall enter judgment against Plaintiffs and in favor of Defendants. Defendants shall have their costs.

Dated this 14th day of August, 2014.

BY THE COURT:

William J. Martínez
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-02388-WJM

CURE LAND, LLC, and
CURE LAND II, LLC,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
TOM VILSACK, in his official capacity as Secretary of the United States Department of Agriculture,
FARM SERVICE AGENCY, an agency of the United States Department of Agriculture, and
JUAN M. GARCIA, in his official capacity as Administrator of the Farm Service Agency,

Defendants.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order Affirming Agency's Decision (Doc. 37) of entered on August 14, 2014 it is

ORDERED that judgment is entered against Plaintiffs, CURE LAND, LLC; and CURE LAND II, LLC; and in favor of Defendants Defendants UNITED STATES DEPARTMENT OF AGRICULTURE; TOM VILSACK, in his official capacity as Secretary of the United States Department of Agriculture; FARM SERVICE AGENCY, an Agency of the United States Department of Agriculture; and JUAN M. GARCIA, in his official capacity as Administrator of the Farm Service Agency. It is

FURTHER ORDERED that Defendants are **AWARDED** costs, to be taxed by the Clerk of the Court pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 14th day of August, 2014.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ Cathy Pearson

Cathy Pearson
Deputy Clerk