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DENYING THE ENVIRONMENT A STAY OF EXECUTION IS PAR FOR THE COURSE: THE TENTH CIRCUIT'S ANALYSIS OF THE CWA AND NEPA IN GREATER YELLOWSTONE COALITION v. FLOWERS

I. INTRODUCTION

Wetlands are an indispensable and fragile element of a healthy aquatic ecosystem. They mitigate the effects of floods, limit erosion and purify water. Additionally, wetlands serve as a nesting habitat for a variety of birds, including the bald eagle. Suburban sprawl and industrial and commercial development have emerged as dual threats to the wetland ecosystem and the life that it supports.

Historically, wetlands were perceived as unproductive. Commonly known as marshes or swamps, wetlands cannot be used for traditional agricultural or industrial purposes. During the nine-

1. See Timothy D. Searchinger, Wetlands Issues 1993: Challenges and a New Approach, 4 Md. J. Contemp. Legal Issues 13, 40 (1992/93) (noting that wetlands safeguard integrity of aquatic ecosystem). An aquatic ecosystem is defined as waters, including wetlands, that provide habitat for populations of plants and animals. See 40 C.F.R. pt. 230.3(c) (2005). Wetlands are defined as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . a prevalence of vegetation." Section 404 of the Clean Water Act: How Wetlands are Defined and Identified, www.epa.gov/owow/wetlands/facts/fact11.html (last visited Mar. 24, 2005) [hereinafter Section 404 Overview] (defining wetland). The Corps and the EPA have used this definition since the 1970s. See id.


3. See id. (indicating habitat function of wetlands).


5. See Ausness, supra note 2, at 354-55 (noting historical view of wetlands).


(183)
teenth and twentieth centuries, federal and state governments promoted the reclamation of wetlands to stimulate economic growth.\footnote{See Ausness, \textit{supra} note 2, at 354-55 (noting federal, state reclamation of wetlands).} Not until the 1960s did the unique value and utility of wetlands become apparent.\footnote{See \textit{id.} at 358-59 (acknowledging initial wetland regulations).} Today, many view the destruction of wetlands as contrary to public policy because wetlands are a "productive and valuable public resource."\footnote{See 33 C.F.R. pt. 320.4(b)(1) (2005) (discussing why wetlands destruction is contrary to public policy).}

The Clean Water Act (CWA) and the National Environmental Policy Act (NEPA) protect wetlands and the ecosystems they support.\footnote{See Sierra Club v. Marsh, 714 F. Supp. 539, 589 (D. Me. 1989) (acknowledging that CWA and NEPA protect wetlands).} The CWA imposes substantive restrictions on agency action, and NEPA imposes procedural requirements on agency action.\footnote{See \textit{Greater Yellowstone Coalition v. Flowers}, 359 F.3d 1257, 1273 (10th Cir. 2004) (explaining functional difference between CWA and NEPA).} Section 404 of the CWA sets forth guidelines for "dredge and fill" activities and delegates authority for their implementation to the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA).\footnote{See \textit{Section 404 Overview, supra} note 1 (indicating agencies involved in CWA implementation).} NEPA establishes guidelines for determining when federal agencies must complete an environmental impact statement (EIS).\footnote{See 42 U.S.C. \textsection 4332(2)(C) (2000) (requiring EIS when major federal action significantly affects "quality of the human environment").} \textit{Greater Yellowstone Coalition v. Flowers}\footnote{See Utah Shared Access Alliance v. United States Forest Serv., 288 F.3d 1205, 1207 (10th Cir. 2002) (arguing Forest Service failed to take "hard look" at environmental consequences of proposed plan); Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001) (examining decision not to complete EIS for plan to increase vessel traffic in Glacier Bay, Alaska); Friends of the Earth v. Hintz, 800 F.2d 822, 827 (9th Cir. 1986) (determining whether Corps properly determined that no practicable alternative existed to proposed fill of wetlands); Middle Rio Grande Conservancy District v. Norton, 294 F.3d 1220, 1231 (10th Cir. 2002) (holding EIS was necessary).} is the most recent decision in a series of cases evaluating the process the Corps follows when overseeing development within CWA and NEPA guidelines.\footnote{See \textit{Id.}} In \textit{Flowers}, two environmental organizations opposed the Corps' is-
suance of a dredge and fill permit for a housing and golf course development, citing the likely negative impact on the area wetlands, a nearby river and bald eagles. The Tenth Circuit held that the Corps did not arbitrarily or capriciously issue a dredge and fill permit under the CWA. Additionally, the court held that the Corps was not required to complete an EIS under NEPA.

This Note discusses the Tenth Circuit's decision in Flowers. Section II summarizes the underlying facts and the relevant procedural history of Flowers. Section III discusses CWA and NEPA requirements and relevant case law. Section IV of this Note summarizes the Tenth Circuit's decision. Section V critiques the Flowers decision and asserts that although the Tenth Circuit properly decided the NEPA claims, it did not adequately consider the environmental groups' CWA claims. Finally, Section VI discusses the impact this case has on national wetlands.

II. FACTS

In 1994, the Edgcombs purchased the River Bend Ranch in Snake River Canyon near Jackson, Wyoming. The Ranch contains wetlands and is situated near three bald eagle nesting territories. In 2000, the Edgcombs sold 286 acres of the ranch to Canyon Club, a development company, to construct an eighteen-hole golf course and housing development.
Construction required the dredge and fill of wetlands on the property and the positioning of structures, known as bendway weirs, in the Snake River to prevent erosion. 28 To dredge and fill, Canyon Club submitted an application to the Corps for a section 404 permit. 29 Initially, the public opposed the project because of its possible effects on area bald eagles, its impact on the Snake River and its noncompliance with land development regulations. 30 To mitigate these concerns, Canyon Club purchased additional acreage from the Edgcombs to relocate some features of the development, bringing the total purchased land to 359 acres. 31 Canyon Club submitted a new proposal to the Corps requesting authorization to dredge 1.71 acres, fill 1.45 acres of jurisdictional wetlands and place twelve bendway weirs in the Snake River for construction purposes. 32

The Corps requested that Canyon Club submit three documents to assess the project's environmental impact. 33 Pioneer Environmental Service (Pioneer), an environmental consulting firm, completed the requested documents on Canyon Club's behalf: (1) a biological assessment (BA); (2) an environmental assessment (EA); and (3) a section 404(b)(1) analysis. 34 In its BA, Pioneer

See id. at 1262. For the Ranch to remain in operation, the Edgcombs needed the earnings generated by the development. See id.


29. See Flowers, 359 F.3d at 1263 (discussing original Canyon Club proposal). This proposal requested authorization to fill 1.5 acres and dredge 2.75 acres of jurisdictional wetlands. See id.

30. See id. at 1264 (discussing public opposition). The United States Fish and Wildlife Service (FWS) expressed concern regarding the effects of the bendway weirs on the Snake River. See id. at 1271, n.14. EPA noted that the "weirs may cause channel migration or erosion downstream, on the opposite bank," or an island located on this segment of the river. See id.

31. See id. at 1264 (noting solution to public opposition).

32. See id. (describing acres involved in dredging and filling). Of the 1.45 filled acres, .87 were for home site development, .06 for golf cart path construction, .43 for hole and tee construction, .08 for water feature construction and .01 for bendway weir construction. See id. The 1.71 dredged acres were for water feature construction. See id. In addition, the proposal described mitigating measures such as a reconstructed pond, three new ponds, buried utility lines, conservation easements and restrictive easements on incoming property owners. See id. at 1264-65.

33. See id. at 1265 (indicating Canyon Club's responsibility in assessing environmental impact).

34. See Flowers, 359 F.3d at 1265 (describing documents necessary in permit application process). A BA is an examination of the possible effects of a project on proposed, endangered or threatened species. See Glossary of Energy Terms, http://egov.oregon.gov/energy/renew/glossary.html (last visited Feb. 9, 2005). An EA is a document that evaluates the "significant environmental impacts" of a federal
concluded that the proposed development was likely to adversely affect area bald eagles, possibly causing the eagle pairs to desert their nests. In its EA and section 404(b)(1) analysis, Pioneer concluded that the "proposed action is the least damaging practicable on-site alternative."36

After examining the BA, the United States Fish and Wildlife Service (FWS), in its consultation role with EPA, issued a biological opinion (BiOp), stating that the proposed action was not likely to threaten the bald eagle's existence as a species even if the three pairs on the land were lost. Additionally, FWS issued an incidental take statement noting the expected loss of three nesting territories and the loss of twelve juvenile bald eagles. Nevertheless, the

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35. See Flowers, 359 F.3d at 1265 (explaining conclusion that construction and amplified human presence would adversely impact bald eagles). The BA focused on endangered species, particularly the bald eagle, taking into consideration construction activities and the increased presence of humans using the golf course and residing in the housing development. See id. The Corps informed the public that the land development would likely adversely affect bald eagles and sought public opinion on the matter. See id. No one requested a public hearing. See id.

36. See id. at 1266-67 (explaining determination of other Pioneer documents). In determining that no practicable alternative existed, Pioneer examined golf course design requirements, land development regulations and the development's purpose. See id. at 1266. The first was a no-action alternative, which Pioneer concluded would have a greater environmental impact because it may lead to the sale of the entire Ranch and the development of a 250-house residential complex. See id. This alternative, however, would have less impact on the bald eagles. See id. at 1267. The second alternative was a nine-hole golf course, which was also deemed impracticable because the low demand for such a course would make it difficult to generate finances needed to operate the course. See id. Also, it would result in decreased value of the residences. See id. Next, Pioneer examined the original 286-acre proposal and the 286-acre proposal with the relocation of holes three and four. See id. These alternatives did not comply with land development regulations. See id. The analysis concluded the 359-acre proposal was "the least damaging practicable alternative that satisfies the project purpose." See id. at 1266. The Corps analyzed whether other sites in the County could serve as locations for the proposed development. See id. at 1266-67. The Corps concluded each site would produce a comparable impact on wetlands and would result in an increased cost. See id. at 1267.

37. See id. at 1265 (describing FWS's response to BA). The document further noted because no bald eagle critical habitat was designated, none would be affected. See id.

38. See id. (noting particulars of incidental take statement).
incidental take statement permitted the Corps to issue the permit, provided that Canyon Club fulfilled various terms and conditions.\(^3\)

On June 4, 2002, the Corps informed the FWS that Canyon Club would receive the permit.\(^4\) Ten days later, the Corps issued its official decision to grant the permit, designating the decision as each of the following: the Corps’ EA, public interest review, statement of findings and NEPA compliance determination.\(^5\) The Corps concurred with Pioneer’s findings from the section 404(b)(1) analysis, which determined the 359-acre proposal was the “least damaging practicable alternative.”\(^6\) Finally, the Corps determined that an EIS was unnecessary because the project would not have a significant impact on the human environment.\(^7\)

Two environmental groups, the Greater Yellowstone Coalition and the Jackson Hole Conservation Alliance (Yellowstone), filed suit in the United States District Court for the District of Wyoming, challenging the Corps’ decision to issue the dredge and fill permit.\(^8\) Yellowstone requested a temporary restraining order (TRO) and a preliminary injunction to stop construction.\(^9\) The district court denied the injunction, stating that Yellowstone failed to show irreparable harm to the bald eagles.\(^10\) Following Yellowstone’s appeal, the Tenth Circuit remanded the case to the district court with instructions to consider other prongs of the preliminary injunction test.\(^11\) The district court reconsidered the case, rejected Yellow-

\(^3\). See id. (noting FWS’s permission to grant permit). The terms and conditions specified Canyon Club must complete construction within two years, construction must be monitored to avoid activity within 400 meters of baby eagles’ nests and the effects of the project on eagle nests be strictly supervised during the construction period and for five years thereafter. See id. Four months earlier, the FWS responded to the Corps directly, suggesting the Corps deny the permit because of the development’s “substantial and unacceptable impacts” on wildlife and because alternatives had not yet been explored. See id. at 1265-66. FWS also recommended the Corps complete an EIS. See id. at 1266.\(^4\). See Flowers, 359 F.3d at 1266 (noting time at which Corps decided to issue dredge and fill permit). The Corps sent FWS copies of Pioneer’s BA, EA and section 404(b)(1) analysis. See id.\(^5\). See id. (noting official decision to grant permit). The Pioneer documents were attached as appendices to the decision. See id.\(^6\). See id. (observing Corps’ agreement with analysis).\(^7\). See id. at 1268 (explaining Corps decision that EIS is not required).\(^8\). See id. (discussing procedural history).\(^9\). See Flowers, 359 F.3d at 1268 (noting relief sought in district court).\(^10\). See id. (explaining why district court denied Yellowstone’s relief).\(^11\). See id. (remanding to district court). See Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250, 1262 (10th Cir. 2003) (remanding to district court to consider whether Yellowstone satisfied other factors of preliminary injunction test).
stone's NEPA claims and upheld the Corps' issuance of the dredge and fill permit.48

Yellowstone again appealed to the Tenth Circuit, alleging that the Corps' consideration of practicable alternatives failed to meet CWA standards.49 Yellowstone argued that the Corps ignored two alternatives: (1) moving features of the golf course and housing development, which would avoid the dredge and fill of wetlands, the construction of weirs in the Snake River and the adverse impact on the bald eagles; and (2) reducing the number of home sites, thereby possibly decreasing the development's wetland and bald eagle impact.50 Yellowstone further alleged that the Corps violated NEPA by failing to complete an EIS regarding adverse effects on the Snake River and the bald eagle.51 The Tenth Circuit unanimously held that the Corps did not act arbitrarily or capriciously in issuing the section 404(b) permit under the CWA.52 The court further held that the Corps properly concluded an EIS was unnecessary under NEPA.53

III. BACKGROUND

A. Clean Water Act

1. Requirements

In 1972, Congress passed the CWA, a keystone of the federal environmental protection program.54 The CWA's objective is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."55 To reach this objective, section 404(a) of the CWA sets forth guidelines for dredge and fill activities and delegates to the Corps and EPA implementation of dredge and fill discharge into "navigable waters," which includes wetlands.56

48. See Flowers, 359 F.3d at 1268 (noting final decision of district court).
49. See id. (appealing to Tenth Circuit).
50. See id. at 1269 (advancing alternatives to decrease environmental impact).
51. See id. at 1262-63 (noting Yellowstone's arguments).
52. See id. at 1273 (upholding Corps' decision to issue dredge and fill permit).
53. See Flowers, 359 F.3d at 1277 (holding EIS was unnecessary).
56. See Section 404 Overview, supra note 1 (indicating agencies involved in CWA implementation).
The CWA permit process may include notifying the public of the planned discharge, preparing an EIS and ensuring compliance with EPA’s guidelines.57 EPA’s section 404 guidelines provide that discharge activity may be permitted if four criteria are met: (1) no practicable alternatives exist; (2) there is no considerable degradation to United States’ waters; (3) reasonable mitigation efforts are exercised; and (4) no statutory violations occur.58 The Flowers opinion, in relevant part, focused on the practicable alternatives criterion.59

The practicable alternatives guideline has generated significant discussion among the federal courts.60 This guideline provides that: “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental impacts.”61 In determining whether a practicable alternative is available, the Corps’ burden is heaviest for non-water dependent projects planned for wetland areas.62 The presumption is that practicable alternatives not involving wetlands exist, and this presumption holds unless “clearly demonstrated otherwise.”63 If no practicable alternatives exist, the CWA requires the Corps to consider ways to mitigate wetland impact.64 Mitigation includes avoid-

57. See Ausness, supra note 2, at 366 (reviewing permit process).
58. See id. (citing 40 C.F.R. pt. 230.10(a), (c), (d), and (b)) (noting EPA guidelines for discharge activity).
59. See Flowers, 359 F.3d at 1269 (considering alternatives under CWA).
61. 40 C.F.R. pt. 230.10(a) (2005) (allowing dredge and fill only if there is no practicable alternative). A practicable alternative is defined as being “available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes.” Id. at 230.10(a)(2) (defining practicable alternative).
62. See Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1524 (10th Cir. 1992) (noting increased burden when project is not water dependent).
64. See Bhavani Prasad V. Nerikar, Comment, This Wetland is Your Land, This Wetland is My Land: Section 404 of the Clean Water Act and its Impact on the Private Development of Wetlands, 4 ADMIN. L.J. AM. U. 197, 211 (1990) (discussing mitigation).
ing, minimizing or compensating for losses. The Council on Environmental Quality and NEPA guide the Corps and the EPA in determining what constitutes mitigation.

2. Relevant Case Law

The following cases concern the Corps’ responsibility in determining whether a practicable alternative to a proposed project exists. These cases establish two propositions: (1) appropriate techniques must be employed to minimize any adverse effects if an adverse environmental impact, such as the fill of wetlands, cannot be avoided; and (2) the Corps is not obligated to replicate an in-depth analysis if an agency, EPA for example, conducts any such analysis of practicable alternatives.

a. Fund for Animals, Inc. v. Rice

In Rice, the Eleventh Circuit addressed whether the Corps acted arbitrarily or capriciously in granting a permit to fill seventy-four acres of wetlands, known as Walton Tract, for a landfill. The appellants, representing several environmental groups (the Fund), argued that the Corps erred in failing to choose an alternative site with less adverse wetland impact. The Eleventh Circuit held that

65. See 33 C.F.R. pt. 320.4(r) (discussing mitigation role in permit application process).
66. See id. (citing 40 C.F.R. pt. 1508.20(a)-(e) (2005)). Mitigation includes:
   (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
   (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
   (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
   (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
   (e) Compensating for the impact by replacing or providing substitute resources or environments.

68. See id. at 544 (applying mitigation standard set forth in 40 C.F.R. pt. 230.10(d)).
69. See Town of Norfolk v. United States Army Corps of Eng’rs, 968 F.2d 1438, 1447 (1st Cir. 1992) (concluding Corps is not obligated to repeat analysis under 40 C.F.R. pt. 230.10(a)).
70. 85 F.3d 535 (11th Cir. 1996).
71. See id. at 541 (noting issue).
72. See id. at 542 (noting Fund’s argument).
the Corps properly granted a permit to fill seventy-four acres of wetlands in conjunction with the landfill construction.\footnote{See \textit{id.} at 544 (stating court's holding). The Fund sought to prevent the construction of a landfill, claiming the area was "an indispensable habitat" for the Florida Panther and Indigo Snake. See \textit{id.} at 538. Sarasota County, the entity proposing construction of the landfill, submitted a proposal that included four alternative sites for the landfill. See \textit{id.} at 539. The FWS issued a BiOp, concluding the landfill was unlikely to affect the panther and indigo snake, but nevertheless included recommendations that included a monitoring program. See \textit{id.}}

Of the four proposed sites, the county least favored Walton Tract.\footnote{See \textit{id.} at 543 (discussing environmental scores of proposed alternatives). In the county's ranking system, Walton Tract received the lowest environmental score. See \textit{id.} If a site received a higher score, it was more suited for the landfill. See \textit{id.} The scores were as follows: Site D scored 39 points; Site E scored 39 points; Site F (Walton Tract) scored 34 points; and Site G scored 41 points. See \textit{id.}} The Eleventh Circuit stated that the Corps was not bound by the county's determination of the propriety of Walton Tract as the landfill site.\footnote{See \textit{id.} (concluding Corps is not obligated to follow county's ranking system). The court further noted the Corps' independent analysis requires a balancing of the applicant's need and environmental concerns and is not subject to numerical precision. See \textit{id.}} The Corps determined that Walton Tract was the most suitable site because each alternative posed its own environmental problems.\footnote{See \textit{Rice,} 85 F.3d at 543 (discussing result of Corps' analysis of practicable alternatives). For example, if the Corps chose Site D, it would result in the filling of eighteen additional wetlands than if the Corps chose the Walton Tract. See \textit{id.}} The court concluded that the Corps properly adhered to the CWA's sequencing preference regarding avoidance, minimization and compensatory mitigation in determining that Walton Tract was the most suitable site.\footnote{See \textit{id.} (applying 33 C.F.R. pt. 320.4(r) and 40 C.F.R. pt. 230.10).}

Under the avoidance provision, the Eleventh Circuit noted the Corps' determination that no site entirely avoided wetland impact.\footnote{See \textit{id.} (acknowledging Corps determination under avoidance standard).} In examining the second provision, the court concluded, because wetland fill was unavoidable, steps should have been taken to minimize the adverse impacts.\footnote{See \textit{id.} at 544 (applying 40 C.F.R. pt. 230.10(d)).} It noted that the county minimized the adverse consequences by reducing the impact on the wetlands from 120 to seventy-four acres.\footnote{See \textit{id.} (noting minimization efforts).} Under the compensatory mitigation provision, the court observed that the county planned to replace the lost wetlands with wet prairie habitat and to restore ex-
isting wetlands. Thus, the Eleventh Circuit concluded that the Corps properly granted the permit.

b. **Town of Norfolk v. United States Army Corps of Engineers**

In *Norfolk*, the First Circuit reviewed a decision to issue a permit for construction of a landfill. The court addressed whether the Corps failed to adequately consider practicable alternatives to the proposed site. In its Record of Decision (ROD), the Corps determined that the impact on the aquatic ecosystem would be inconsequential considering the negligible impact on nearby water supplies and wetlands.

The appellants, the towns of Norfolk and Walpole (Towns), argued that the CWA required the Corps to conduct an “exhaustive feasibility evaluation” of all alternative sites initially proposed for the landfill. The First Circuit held that, because two other agencies conducted exhaustive analyses of other sites and the record supported the Corps’ conclusion that no practicable alternatives existed with less adverse environmental consequences, the Corps was not required to duplicate any of these analyses.

The First Circuit relied on section 404, noting that the level of review depends on the nature and gravity of the project’s anticipated environmental impact. The court observed that EPA and the Massachusetts Water Resources Authority (MWRA) each completed an extensive analysis of the alternative sites. The court further noted that the administrative record supported the Corps’ finding that filling the 600 square foot artificial wetland negligibly impacted the aquatic ecosystem. The court held that the Corps

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81. *See Rice, 85 F.3d at 544 (discussing mitigation techniques).*
82. *See id. (concluding Corps properly granted permit).* The court stated that the Corps, FWS and EPA analyzed the project for five years and all agreed Walton Tract was the most suitable site. *See id.*
83. *968 F.2d 1438 (1st Cir. 1992).*
84. *See id. at 1442 (noting decision before court).* The fill activity, approved by EPA and the FWS, involved filling a 600 square foot area of wetlands. *See id. at 1443.*
85. *See id. at 1446 (noting issue).*
86. *See id. (noting Corps’ determination in ROD).*
87. *See id. at 1447 (noting Town response to ROD).* There were 299 alternative sites initially proposed. *See id.*
88. *See Norfolk, 968 F.2d at 1447 (holding Corps’ decision to issue dredge and fill permit was not arbitrary or capricious).*
89. *See id. (stating town rigidly interpreted CWA guidelines).*
90. *See id. at 1443 (recognizing effort of agencies in alternative site analysis).*
91. *See id. at 1447 (stating administrative record supports Corps’ decision).*
was not required to duplicate any of the analyses. It rejected the Towns' "dogmatic scrutiny" of the CWA guidelines and concluded that the Corps was not responsible for conducting an analysis of every site simply because the Towns disagreed with the specified designation of the landfill site.

c. Summary of CWA Case Law

CWA case law provides that the Corps may not issue a dredge and fill permit if there is a practicable alternative that does not have other significant adverse consequences. Although this requirement must be met, the level of documentation varies to reflect the seriousness of the activity. The case law reasons that, although the Corps is not required to examine every practicable alternative, an environmental agency, such as EPA, must do so. Furthermore, discussing mitigation is appropriate where each alternative poses its own environmental risks and adverse environmental impacts cannot be avoided.

B. National Environmental Policy Act

1. Requirements

Since its inception in 1969, NEPA has been "a pillar of environmental law." NEPA aims to assure that all governmental branches properly consider environmental effects before undertaking "major federal action that significantly affects the environment." NEPA

92. See id. (concluding Corps not required to conduct further analyses). The court noted the Corps supplemented the other agencies findings by reevaluating other sites to ensure the accuracy of the previous analyses. See id. at 1448. The Corps concluded many of the sites did not meet the landfill requirements and other sites were less preferable than the chosen site. See id.

93. See Norfolk, 968 F.2d at 1447-48 (rejecting Towns' request that Corps independently evaluate alternative sites).

94. See id. at 1446 (citing 40 C.F.R. pt. 230.10(a)) (discussing practicable alternatives).

95. See id. at 1447 (citing 40 C.F.R. pt. 230.6(a) & (b)) (noting documentation requirements).

96. See id. (concluding Corps is not obligated to duplicate analysis of EPA in determining practicable alternatives).

97. See Fund for Animals v. Rice, 85 F.3d 535, 543-44 (11th Cir. 1996) (determining no practicable alternative with less adverse environmental impact existed).


requires an EIS “for major federal actions significantly affecting the quality of the human environment.”

When determining the “significance” of the impact on the human environment, agencies must consider both context and intensity. NEPA provides that agencies should consider the following factors in evaluating intensity: (1) the extent to which the impact on the human environment will be highly controversial; (2) the extent to which the project’s impacts are unknown; and (3) the extent to which the activity may impact critical habitats or endangered species. An EA is a tool that aids in evaluating these factors. The agency may also consider mitigation techniques when determining whether an EIS is necessary. If the agency determines that the project will not significantly impact the human environment, it issues a Finding of No Significant Impact (FONSI). If, however, the activity will significantly affect the human environment, the agency is required to complete an EIS.

2. Relevant Case Law

The subsequent cases concern an agency’s responsibility in completing an EIS under NEPA. These cases advance three propositions: (1) if a document, an EA for example, states that the effects of a proposed action are attainable through further studies, an


101. See 40 C.F.R. pt. 1508.27 (requiring considerations of context and intensity). Context “delimits the scope of the agency’s actions, including the interest affected. Intensity relates to the degree to which the agency action affects the locale and interests identified in the context part of the inquiry.” Nat’l Parks and Conservation Ass’n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001).

102. See 40 C.F.R. pt. 1508.27(b)(4), (5), (9) (identifying factors to consider in determining environmental impact of proposed activity).

103. See 40 C.F.R. pt. 1508.9(a) (explaining EA’s function in NEPA context). “An EA is a ‘less formal and less rigorous’ document than an EIS.” Nat’l Parks, 241 F.3d at 728 (quoting Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988)) (noting difference in formalities between EA and EIS).

104. See Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 993 (9th Cir. 1993) (indicating role of mitigation techniques).

105. See Nat’l Parks, 241 F.3d at 730 (discussing steps taken when agency finds no significant impact on human environment).


107. See generally Nat’l Parks, 241 F.3d 722 (addressing whether action to increase tourism required EIS).
EIS is necessary;\textsuperscript{108} (2) if there is sufficient controversy regarding the proposed action's effects amounting to more than a disagreement between experts, an EIS is necessary;\textsuperscript{109} and (3) courts consider mitigation efforts in determining whether a proposed action will significantly affect the environment.\textsuperscript{110}

\begin{enumerate}
\item \textit{a. National Parks and Conservation Ass'n v. Babbitt}\textsuperscript{111}

In \textit{National Parks}, the Ninth Circuit addressed whether the proposed activity would significantly affect the human environment, requiring an EIS.\textsuperscript{112} Endeavoring to increase tourism in Glacier Bay, the National Parks Service (Parks Service) developed a vessel plan to increase the number of cruise ships in the area by thirty percent.\textsuperscript{113} The Ninth Circuit held that an EIS was necessary because the EA contained many uncertainties and controversy surrounded the proposed plan.\textsuperscript{114}

First, although the EA stated that the activity's effects were unknown, the document indicated that the unknown information was attainable through further studies and would be helpful in determining the environmental impact.\textsuperscript{115} Second, further uncertainty existed because the Parks Service's EA reflected doubt as to whether the mitigation techniques were effective and sufficiently related to the effects they were designed to alleviate.\textsuperscript{116} The Ninth Circuit concluded that because the effects were attainable through

\begin{itemize}
\item \textsuperscript{108} See \textit{id.} at 732 (requiring EIS if effects of proposed action are attainable through further studies).
\item \textsuperscript{109} See \textit{id.} at 736 (requiring EIS if action is controversial).
\item \textsuperscript{110} See \textit{Friends of Payette v. Horseshoe Bend Hydroelectric Co.}, 988 F.2d 989, 993-94 (9th Cir. 1993) (acknowledging mitigation techniques in concluding EIS was unnecessary).
\item \textsuperscript{111} 241 F.3d 722 (9th Cir. 2001).
\item \textsuperscript{112} See \textit{id.} at 730 (noting issue).
\item \textsuperscript{113} See \textit{id.} at 726 (describing proposed project).
\item \textsuperscript{114} See \textit{id.} at 739 (noting court's holding). In assessing the environmental impact, the Parks Service furnished an EA noting the effects of the proposed activity, but repeatedly stated the extent of the effects were unknown. See \textit{id.} at 728-29. The court based its decision on statutory considerations such as the unique characteristics of the area; the degree to which the proposed activity's effects were uncertain; and the degree of controversy surrounding the proposed activity. See \textit{id.} at 731.
\item \textsuperscript{115} See \textit{id.} at 732-33 (explaining why EIS is necessary). The court stated that the EA, where the agency's defense of the action is found, is undermined when it lacks data. See \textit{id.} at 732. Consequently, the court maintained the Parks Service failed to take a "hard look" as NEPA requires. See \textit{id.} at 733.
\item \textsuperscript{116} See \textit{Nat'l Parks}, 241 F.3d at 734 (explaining additional reason for uncertainty). The EA stated that various mitigation techniques could mitigate some environmental harm, but the document lacked any substantial certainty. See \textit{id.} at 735.
\end{itemize}
further studies and an agency must reasonably develop mitigation techniques, an EIS was necessary.\textsuperscript{117}

Finally, the court concluded that sufficient controversy existed to require an EIS.\textsuperscript{118} Following the EA’s publication, the Parks Service received 450 comments, eighty-five percent of which opposed the chosen alternative and favored a different one.\textsuperscript{119} The public protested the Parks Service’s uncertainty about the activity’s effect and the mitigation techniques’ sufficiency.\textsuperscript{120} Although the Parks Service stated it would implement the vessel plan and then study its effects, the Ninth Circuit concluded that this solution was inadequate to resolve the controversy.\textsuperscript{121}

\textbf{b. Friends of Payette v. Horseshoe Bend Hydroelectric Co.}\textsuperscript{122}

In \textit{Horseshoe Bend}, the Ninth Circuit addressed whether the Corps violated NEPA by issuing a dredge and fill permit without completing an EIS.\textsuperscript{123} The controversy arose when Horseshoe Bend Hydroelectric Company (HBHC) applied for a dredge and fill permit to construct a hydroelectric facility on the Payette River near Horseshoe Bend, Indiana.\textsuperscript{124} The Corps determined that an EIS was unnecessary because the proposed activity would not significantly impact the environment.\textsuperscript{125} The appellants, Friends of Payette and Idaho Rivers United (Friends of Payette), disagreed with the Corps' assessment.\textsuperscript{126} The court held that the Corps appropriately decided not to issue an EIS.\textsuperscript{127} In reaching this conclusion,  

\begin{itemize}
\item \textsuperscript{117} See \textit{id.} at 732-34 (concluding EIS was necessary due to uncertainties).
\item \textsuperscript{118} See \textit{id.} at 736 (noting court’s decision regarding controversy).
\item \textsuperscript{119} See \textit{id.} (discussing outpouring of public protest). As the court stated, “therein lay the controversy.” See \textit{id.} at 737.
\item \textsuperscript{120} See \textit{id.} (explaining reason for public protest).
\item \textsuperscript{121} See \textit{Nat’l Parks}, 241 F.3d at 737 (stating Parks Service response to controversy was not adequate to resolve controversy).
\item \textsuperscript{122} 988 F.2d 989 (9th Cir. 2003).
\item \textsuperscript{123} See \textit{id.} at 991 (noting issue in case).
\item \textsuperscript{124} See \textit{id.} (noting activity in dispute). The plan involved utilization of a canal, which previously contained wetlands. See \textit{id.} at 992. After completing an EA, HBHC obtained necessary state and federal permits. See \textit{id.} After acquiring those permits, HBHC petitioned the Corps for a dredge and fill permit. See \textit{id.} (discussing sequence of events).
\item \textsuperscript{125} See \textit{id.} (noting Corps’ decision regarding EIS). Instead, the Corps issued an EA and a FONSI. See \textit{id.} The Corps conceded the activity constituted a major federal action. See \textit{id.} Therefore, the court’s role was to decide whether the Corps properly concluded the activity would not significantly affect the environment. See \textit{id.} (referring to requirements set forth in 42 U.S.C. § 4332).
\item \textsuperscript{126} See \textit{id.} at 991 (noting dispute in case).
\item \textsuperscript{127} See \textit{Horseshoe Bend}, 988 F.2d at 993 (upholding Corps' decision not to issue EIS).
\end{itemize}
the Ninth Circuit focused on the mitigation techniques included in the permit.\textsuperscript{128}

Friends of Payette first claimed that the Corps erroneously concluded the proposed activity would not significantly affect the wetlands.\textsuperscript{129} The court disagreed, noting a mitigation plan to create 66.64 acres of new wetlands.\textsuperscript{130} Second, Friends of Payette claimed the proposed activity would adversely affect fish.\textsuperscript{131} The court rejected this claim and recognized the Corps' plan to counteract the anticipated loss of fish through specified mitigation measures.\textsuperscript{132} Finally, Friends of Payette claimed that the Corps did not evaluate the activity's impact on bald eagles.\textsuperscript{133} Again, the Ninth Circuit noted the mitigation measures the Corps and the FWS set forth.\textsuperscript{134} The Corps had conditioned the permit on the implementation of various mitigation techniques to monitor and, if necessary, enhance the status of the eagle habitat.\textsuperscript{135}

c. \textit{Summary of NEPA Case Law}

Relevant case law establishes that courts consider the factors set forth in the NEPA guidelines for determining whether an action may significantly affect the environment.\textsuperscript{136} These factors include examining: (1) the extent to which the effects are highly uncertain; (2) the level of controversy surrounding the proposed activity; and

\textsuperscript{128} See id. at 993-94 (acknowledging role of mitigating techniques on environmental impact). The court acknowledged that mitigation measures need not completely compensate for harmful environmental impacts. See id. at 993 (citing \textit{Preservation Coalition, Inc. v. Pierce}, 667 F.2d 851, 860 (9th Cir. 1982)).

\textsuperscript{129} See id. (noting wetland impact argument).

\textsuperscript{130} See id. (discussing plan to mitigate wetland impact). Grass seeding, tree and shrub planting and water channels would create the new wetlands. See id. Absent a mitigation plan, 30.99 acres of wetlands would be destroyed, as compared to the loss of 24.69 acres with a plan. See id. If the goals of the mitigation plan were not met, there was a separate plan involving monitoring and supplemental mitigation. See id.

\textsuperscript{131} See id. at 993-94 (rejecting Friends of Payette's second claim).

\textsuperscript{132} See \textit{Horseshoe Bend}, 988 F.2d at 993-94 (recognizing plan to mitigate for loss of fish). The mitigation measures included an enhanced monitoring plan, further mitigation measures if original measures were not sufficient and a plan to improve fish habitat in a nearby creek. See id. at 994 (discussing mitigation techniques).

\textsuperscript{133} See id. at 993-94 (noting appellants' other claim).

\textsuperscript{134} See id. (looking at measures to mitigate harm to bald eagles).

\textsuperscript{135} See id. at 994 (discussing mitigation measures to protect bald eagles). Moreover, the court noted the existence of other riparian zones that could serve as eale habitats. See id.

(3) the extent to which the activity may adversely affect a threatened species. Additionally, in determining whether an EIS is necessary, the court may consider the role of mitigation techniques. An EIS is necessary if the proposed activity will significantly affect the human environment.

IV. NARRATIVE ANALYSIS

In *Flowers*, the Tenth Circuit reviewed the Corps’ documentation regarding practicable alternatives and determined that the Corps’ assessment accorded with CWA guidelines. The court rejected Yellowstone’s arguments that the Corps failed to provide clear and convincing evidence that no practicable alternative existed, and that Canyon Club ignored obvious alternatives. In response to Yellowstone’s NEPA claims, the court concluded that the Corps could have justifiably found that various mitigation techniques rendered the bald eagle impact “so minor” that an EIS was unnecessary.

A. Alternatives Under the CWA

The Tenth Circuit held that it was unnecessary for the Corps to consider the other alternatives Yellowstone advanced because the Corps’ analysis contained adequate documentation given the activity’s expected impact. The court recognized that, in order to meet the project’s basic purpose, Canyon Club needed to optimize the quantity of land for the project without compromising the viability of the remaining land as a working ranch. The Tenth Circuit concluded that even though none of the alternatives contemplated whether more acreage could be devoted to the pro-

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137. See 40 C.F.R. pt. 1508.27 (setting forth intensity factors).
138. See *Horseshoe Bend*, 988 F.2d at 993 (discussing role of mitigation in determining whether EIS is necessary).
139. See id. at 992 (indicating when EIS is necessary as set forth in 40 C.F.R. pt. 1508.27).
140. See *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1271 (10th Cir. 2004) (applying 40 C.F.R. pt. 230.6(b)).
141. See id. at 1269 (highlighting Yellowstone’s argument).
142. See id. at 1276 (deciding Corps was justified in concluding EIS was unnecessary).
143. See id. at 1270 (applying 40 C.F.R. pt. 230.6(b) in concluding Corps was not required to consider other alternatives because its analysis contained sufficient level of documentation). The Corps also advanced the argument that it was not required to explore Yellowstone’s alternatives because they did not serve the project’s purpose, which was to preserve the Ranch as a cattle ranch. See id. The court rejected this argument. See id.
144. See id. at 1271 (noting steps taken to satisfy project’s purpose).
ject without compromising the ranch's viability, this oversight alone did not render the Corps' decision arbitrary or capricious because the Corps' level of documentation adhered to the CWA guidelines.145

Specifically, the court noted that the section 404 analysis detailed the discharge's effect on the aquatic ecosystem and acknowledged that any alternative would negatively affect the bald eagles.146 The court stated that even Yellowstone's alternatives would not adequately address this problem because the record indicated that any development would adversely impact the bald eagles.147 Moreover, the court concluded that the analysis was sufficient because it addressed issues that concerned Yellowstone, including the advantages of the bendway weirs and the creation and enhancement of wetlands.148 Considering the above, the Tenth Circuit concluded that the Corps' level of documentation and its designation of the 359-acre proposal as the least damaging practicable alternative were neither arbitrary nor capricious.149

B. EIS Preparation Under NEPA

In analyzing Yellowstone's NEPA claim, the Tenth Circuit relied on NEPA guidelines, which aid in determining whether an action will significantly affect the environment.150 The court focused on the controversy surrounding the project's possible effects, the uncertainty of those effects and the adverse impact on a threatened species.151 The court noted that, while EPA and the FWS raised concerns about the effect of the weirs, those concerns did not decrease the reasonableness of the Corps' decision.152 Moreover, even though the Corps concluded that the weirs would not signifi-

145. See Flowers, 359 F.3d at 1271 (concluding oversight does not render decision arbitrary or capricious). In a hearing before the district court, Mr. Edgcomb testified that committing more land to the development would destroy the Ranch's viability. See id. at n.13. Nevertheless, that statement was not part of the record before the Tenth Circuit. See id.

146. See id. at 1271-72 (noting section 404 analysis included detailed factual determinations).

147. See id. at 1273 (acknowledging Yellowstone's alternatives did not reduce overall bald eagle impact).

148. See id. at 1271 (noting discussion of improvements resulting from activity). Although EPA feared the weirs would cause harm, the court concluded the Corps can rely on its own experts, provided the decision is neither arbitrary nor capricious. See id. at n.14

149. See id. at 1273 (setting forth court's holding).

150. See Flowers, 359 F.3d at 1276 (relying on NEPA guidelines).

151. See id. (specifying factors on which court relies).

152. See id. at 1275 (noting that disagreement existed).
cantly affect the river, it adopted mitigation techniques in case its decision proved incorrect.\textsuperscript{153}

Next, the court addressed Yellowstone’s argument that the bald eagle impact necessitated an EIS.\textsuperscript{154} Relying on the uncertain effects portion of the NEPA guidelines, the court concluded that an EIS would not assist in determining the project’s impact on the bald eagles.\textsuperscript{155} The court recognized that the uncertain effects on the bald eagles stemmed from the species’ inconsistent reactions to human development.\textsuperscript{156} Furthermore, the court explained that an anticipated loss of some members of a threatened species did not automatically require an EIS.\textsuperscript{157}

Finally, in looking at the adverse impact provision of the NEPA guidelines, the Tenth Circuit emphasized the use of mitigation techniques to offset the environmental impact of the project.\textsuperscript{158} The court stated that the Corps’ finding that the mitigation techniques serve as an adequate buffer between the golf course and housing development and the bald eagles was reasonable.\textsuperscript{159}

V. CRITICAL ANALYSIS

The Tenth Circuit allowed the Corps’ violation of the CWA guidelines to stand.\textsuperscript{160} The court focused on a portion of Yellowstone’s practicable alternatives argument, ignoring its argument concerning the possible beneficial effects the other alternatives may have on the nearby wetlands.\textsuperscript{161} The court did, however, properly

\textsuperscript{153}. See id. (recognizing Corps made provisions in case its decision regarding weirs was incorrect).

\textsuperscript{154}. See id. at 1275-77 (discussing preparation of EIS in correlation with bald eagle impact).

\textsuperscript{155}. See Flowers, 359 F.3d at 1276 (acknowledging EIS would not assist in determining bald eagle impact).

\textsuperscript{156}. See id. (stating why EIS would not prove helpful).

\textsuperscript{157}. See id. (concluding that greater evidence than loss of some members of threatened species is needed before EIS will be required). Moreover, there was uncertainty as to how the bald eagles would react to the development, making an EIS futile. See id.

\textsuperscript{158}. See id. (acknowledging mitigation techniques). The techniques included daily monitoring of active bald eagle nests, cessation of construction if bald eagles were harmed and the continuation of mitigation for five years after construction ceases. See id.

\textsuperscript{159}. See id. at 1277 (concluding Corps’ decision regarding EIS was neither arbitrary nor capricious).

\textsuperscript{160}. See Flowers, 359 F.3d at 1273 (upholding Corps’ decision that proposal was least damaging practicable alternative).

\textsuperscript{161}. See id. (focusing on Yellowstone’s argument that alternatives would reduce bald eagle impact).
conclude that the Corps did not violate NEPA by determining that an EIS was unnecessary.\textsuperscript{162}

A. CWA Practicable Alternatives

The Tenth Circuit improperly found that the Corps complied with the CWA guidelines in considering practicable alternatives.\textsuperscript{163} The court gave cursory consideration to Yellowstone’s argument that the Corps should have considered whether other alternatives would have had less adverse impact on nearby wetlands.\textsuperscript{164} Instead, the court focused on, and properly rejected, Yellowstone’s argument that the alternatives may decrease bald eagle impact.\textsuperscript{165} In ignoring the former argument, the Tenth Circuit allowed the Corps to bypass considering a potential practicable alternative with less wetland impact.\textsuperscript{166} Its decision, therefore, does not coincide with CWA requirements.\textsuperscript{167}

\textit{Flowers} is distinguishable from the First Circuit’s decision in \textit{Norfolk}, which held that the Corps did not act arbitrarily or capriciously in issuing a permit to fill a 600 foot artificial wetland.\textsuperscript{168} First, in \textit{Norfolk}, the Towns did not dispute the Corps’ findings that the area had “virtually no function or value.”\textsuperscript{169} Furthermore, the Towns did not produce any evidence that the wetland had ecological value.\textsuperscript{170} Unlike the area in \textit{Norfolk}, the Canyon Club area supports bald eagles, moose, elk, mountain lions and other species, making it ecologically valuable.\textsuperscript{171}

Second, the \textit{Norfolk} court recognized that although the Corps failed to conduct an independent analysis of the 299 alternative

\textsuperscript{162} See id. at 1276 (concluding EIS would be unproductive and mitigation techniques are adequate to protect bald eagle impact).
\textsuperscript{163} See id. at 1273 (concluding Corps’ CWA analysis was proper).
\textsuperscript{164} See id. (examining documents regarding bald eagle impact).
\textsuperscript{165} See \textit{Flowers}, 359 F.3d at 1273 (indicating that although Yellowstone’s alternatives may incrementally decrease bald eagle impact, they are insignificant comparative to eagle impact of whole development).
\textsuperscript{166} See id. at 1269 (noting, but not discussing, Yellowstone’s argument that alternatives may decrease wetland impact).
\textsuperscript{167} See 40 C.F.R. pt. 230.10 (setting forth practicable alternatives requirement).
\textsuperscript{168} See \textit{Town of Norfolk v. United States Army Corps of Eng’rs}, 968 F.2d 1438, 1448 (1st Cir. 1992) (holding it was neither arbitrary nor capricious for Corps to conclude practicable alternative with less adverse environmental consequences did not exist).
\textsuperscript{169} See id. at 1447 (discussing wetland value).
\textsuperscript{170} See id. (noting Towns never asserted wetland had ecological value).
\textsuperscript{171} See \textit{Flowers}, 359 F.3d at 1263 (recognizing value of Canyon Club property to various species).
landfill sites, EPA and the MWRA did conduct analyses. The court focused on the bald eagle impact, and gave no indication that the Corps or any other agency examined whether Yellowstone's alternatives would less adversely affect area wetlands. The CWA provides that if a practicable alternative with less environmental impact on the aquatic ecosystem exists, the Corps may not issue a permit. Ostensibly, if any of Yellowstone's alternatives would avoid the dredge and fill of some wetlands, that alternative would have a less adverse impact on the aquatic ecosystem.

The *Flowers* decision is also distinguishable from the Eleventh Circuit's decision in *Rice* based on the facts of each case and the application of the CWA. In *Rice*, the Fund alleged the Corps violated the CWA by failing to choose an alternative with less adverse wetland impact. In *Flowers*, Yellowstone argued that the Corps violated the CWA by failing to even consider alternatives with less adverse impact on the wetlands, the bald eagles and the Snake River. In *Rice*, the Corps determined that each alternative proposed by the Fund had other significant adverse environmental consequences for the wetlands and that the chosen site had environmental advantages.

This decision accords with the CWA, which states that the Corps shall not issue a permit if there is a practicable alternative with less adverse environmental impact, unless the alternative has other adverse environmental impacts. The *Flowers* decision avoided any discussion as to whether Yellowstone's proposed alternatives would have other adverse environmental impacts on the

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172. *See Norfolk*, 968 F.2d at 1447 (indicating conducted analysis of alternatives was sufficient).

173. *See Flowers*, 359 F.3d at 1270-73 (explaining various analyses regarding Yellowstone's practicable alternatives and their effect on bald eagles).


175. *See Flowers*, 359 F.3d at 1269-70 (alleging Corps failed to consider practicable alternatives with less potential impact on wetlands).

176. *See Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 543 (11th Cir. 1996) (acknowledging no alternative had less adverse impact on aquatic ecosystem).

177. *See id.* at 542 (noting Fund's argument).


179. *See Rice*, 85 F.3d at 543-54 (discussing alternative's adverse environmental impacts). One environmental advantage was that the Walton Tract was large enough to provide an adequate buffer around the sides of the landfill. *See id.* at 544.

wetlands or whether the chosen alternative produced advantages for the wetlands.\textsuperscript{181}

Furthermore, the \textit{Rice} court properly discussed the role of avoidance, minimization and compensatory mitigation as set forth in the CWA.\textsuperscript{182} In contrast, the \textit{Flowers} court disregarded the first two considerations and focused on mitigation efforts.\textsuperscript{183} This reasoning is improper, however, because in the context of the CWA, the Corps should consider mitigation techniques, as the \textit{Rice} court did, \textit{after} determining that no practicable alternative exists.\textsuperscript{184} As the \textit{Rice} court stated, the CWA’s regulatory requirements cannot be ignored because of the mitigation potential of the chosen alternative.\textsuperscript{185} In sum, the \textit{Flowers} decision is inconsistent with the \textit{Rice} decision because there is no evidence that Yellowstone’s alternatives had their own adverse environmental impacts.\textsuperscript{186} Furthermore, the \textit{Flowers} court discussion of mitigation techniques was misplaced in the CWA context.\textsuperscript{187}

B. EIS Preparation Under NEPA

\begin{enumerate}
\item Highly Controversial Factor

The Tenth Circuit’s decision is consistent with prior decisions regarding the amount of controversy that would necessitate an EIS.\textsuperscript{188} In its analysis of the controversy surrounding the Canyon Club project, the Tenth Circuit properly distinguished the facts in \textit{Flowers} from those in \textit{National Parks}.\textsuperscript{189} In \textit{National Parks}, eighty-five percent of the comments the Parks Service received expressed op-

\begin{itemize}
\item \textsuperscript{181} See \textit{Flowers}, 359 F.3d at 1273 (noting only that Yellowstone’s alternatives might have other adverse environmental consequences for bald eagle).
\item \textsuperscript{182} See \textit{Rice}, 85 F.3d at 543-44 (setting forth CWA standards).
\item \textsuperscript{183} See \textit{Flowers}, 359 F.3d at 1273 (recognizing efforts to minimize adverse bald eagle impact).
\item \textsuperscript{184} See \textit{Nerikar}, supra note 64, at 211 (indicating Corps should consider mitigation after it concludes no practicable alternative exists); \textit{see also}, Thomas J. Schoenbaum & Richard B. Stewart, \textit{The Role of Mitigation and Conservation Measures in Achieving Compliance With Environmental Regulatory Statutes: Lessons From Section 316 of the Clean Water Act}, 8 N.Y.U. ENVTL. L.J. 237, 253 (2000) (stating agency cannot use mitigation to reduce environmental impacts during least damaging practicable evaluation).
\item \textsuperscript{185} See \textit{Rice}, 85 F.3d at 544 (discussing role of mitigation in considering practicable alternatives).
\item \textsuperscript{186} See \textit{Flowers}, 359 F.3d at 1269-73 (discussing Yellowstone’s alternatives).
\item \textsuperscript{187} See \textit{Nerikar}, supra note 64, at 211 (discussing role of mitigation).
\item \textsuperscript{188} See \textit{Nat’l Parks and Conservation Ass’n v. Babbitt}, 241 F.3d 722, 736-37 (9th Cir. 2001) (discussing level of controversy in response to proposed action).
\item \textsuperscript{189} See \textit{Flowers}, 359 F.3d at 1275 (distinguishing \textit{Nat’l Parks}).
\end{itemize}
position to the proposed plan. Conversely, in *Flowers*, EPA raised "general concerns" about the weirs' impact, and the Forest Service disagreed with the findings published in a report about the design and function of the weirs.

Unlike the "outpouring of public protest" in *National Parks*, the dispute in *Flowers* is characterized as a dispute between experts. This distinction supports the *Flowers* decision because, although the Corps cannot clear the "outpouring of public protest" hurdle, it can rely on its own expert. If the Corps chooses to rely on its own expert and other experts disagree, the dispute is not a controversy sufficient to require an EIS. The *Flowers* court thus properly noted that the disagreement regarding the bendway weirs was not sufficiently controversial to require an EIS.

2. Uncertain Effects Standard

The *Flowers* court properly distinguished *National Parks* under NEPA's "highly uncertain" factor in determining significance. In *National Parks*, the Ninth Circuit refused to accept the Parks Service's assertion that the environmental effects were unknown and stated that when the effects can be obtained during the preparatory process, an agency must complete an EIS. Unlike the environmental effects in *National Parks*, the bald eagle effects in *Flowers* are truly unattainable. The court properly noted that, because past bald eagle behavior cannot be used to predict future behavior, further studies would be futile. The *Flowers* court, therefore, utilized

190. See *Nat'l Parks*, 241 F.3d at 736-37 (concluding controversy standard was met).
191. See *Flowers*, 359 F.3d at 1275 (noting point of alleged controversy).
192. See id. (discussing dispute regarding bendway weirs).
193. See *Nat'l Parks*, 241 F.3d at 737 n.17 (citing *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1121 (9th Cir. 2000)) (stating agency may rely on its own expert).
194. See id. at 737 (indicating disagreement among experts not sufficient to require EIS).
195. See *Flowers*, 359 F.3d at 1275 (concluding disagreements regarding bendway weirs did not "cast serious doubt" on Corps' conclusions).
196. See id. at 1274-75 (distinguishing *Nat'l Parks' facts*).
197. See *Nat'l Parks*, 241 F.3d at 737 (stating that when information concerning effects can be reasonably obtained during preparatory process, courts will not excuse agency from completing EIS).
198. See *Flowers*, 359 F.3d at 1276 (adopting Corps' understanding that further studies will not elucidate effects on bald eagles). In *National Parks*, the Ninth Circuit concluded further studies would help in determining environmental effects. See *Nat'l Parks*, 241 F.3d at 737.
199. See *Flowers*, 359 F.3d at 1276 (acknowledging futility in conducting further studies on bald eagle response to human environment).
the standard adopted by the Ninth Circuit in *National Parks* by concluding that further studies would be fruitless.\textsuperscript{200}

3. The Role of Mitigation

The Tenth Circuit properly concluded that the mitigation techniques were sufficient to offset any adverse effects on the Snake River and the bald eagles.\textsuperscript{201} The *Flowers* court decision thus followed precedent set by other circuits.\textsuperscript{202} As the *National Parks* court stated, the proposed mitigation techniques must be reasonably developed.\textsuperscript{203} In *National Parks*, the Parks Service provided no criteria for ongoing examination and failed to provide any corrective action.\textsuperscript{204} Conversely, in *Flowers*, the mitigation techniques provided for further examination and action in case the techniques required modification.\textsuperscript{205}

The mitigation techniques implemented for the bald eagle's benefit were also more concrete than the techniques proposed in *National Parks*.\textsuperscript{206} The mitigation techniques in *Flowers* are more closely akin to the techniques advanced in *Horseshoe Bend*.\textsuperscript{207} Similar to *Flowers*, the techniques used in *Horseshoe Bend* were more certain and more comprehensive than the techniques implemented by the Parks Service in *National Parks*.\textsuperscript{208} Thus, because the techniques are certain and reasonably related to the adverse effects that they were designed to offset, the *Flowers* court did not err in concluding that an EIS was unnecessary.\textsuperscript{209}

\textsuperscript{200} See id. (concluding deficiency of information did not result from lack of thorough investigation).

\textsuperscript{201} See id. at 1275-76 (discussing mitigation techniques to offset impact on Snake River and bald eagles).

\textsuperscript{202} See, e.g., *Friends of Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 993-94 (9th Cir. 1993) (determining mitigation techniques rendered environmental impact minor); *Nat'l Parks*, 241 F.3d at 733 (concluding mitigation efforts were uncertain).

\textsuperscript{203} See *Nat'l Parks*, 241 F.3d at 733 (indicating level of development necessary for sufficient mitigation techniques).

\textsuperscript{204} See id. at 734 (discussing gaps in mitigation techniques).

\textsuperscript{205} See *Flowers*, 359 F.3d at 1265 (listing mitigation techniques for bald eagle impact). The techniques implemented to offset the effects of the bendway weirs incorporated criteria for ongoing examination and removal of the weirs if they produced adverse effects. See id. at 1267.

\textsuperscript{206} See id. at 1276 (discussing sufficiency of mitigation techniques to offset adverse bald eagle effect).

\textsuperscript{207} See *Horseshoe Bend*, 988 F.2d at 993-94 (noting mitigation techniques implemented to benefit wetlands, bald eagles).

\textsuperscript{208} See id. (assessing adequacy of mitigation efforts).

\textsuperscript{209} See *Flowers*, 359 F.3d at 1275-76 (discussing mitigation techniques to offset environmental consequences).
VI. IMPACT

As an environmentalist once said, "[t]here are no victories in the environmental movement, only stays of execution."210 Unfortunately, the Corps and the Tenth Circuit did not give the Canyon Club area wetlands such a reprieve.211 The Tenth Circuit’s holding that the Corps did not violate the CWA in determining that the 359-acre proposal was the least damaging practicable alternative will have adverse effects on the environment.212 These wetlands will soon join the 300,000 acres of wetlands that are obliterated in the United States each year.213 Furthermore, allowing Canyon Club to dredge and fill the wetlands will destroy wildlife habitats and increase water pollution.214

In discussing Yellowstone’s claim that the Corps should have considered other alternatives, the Tenth Circuit recognized the restrictions placed on Canyon Club designed to reduce the wetland impact.215 The Tenth Circuit sent a message to other jurisdictions that mitigation techniques have a role in determining the least damaging practicable alternative.216 Although mitigation techniques are crucial for a thriving environment, they have no place in assessing practicable alternatives.217 In the end, the impact of the Tenth Circuit’s decision indicates that the fight to save wetlands continues and courts need a better understanding of the proper role of mitigation when evaluating practicable alternatives.

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211. See Flowers, 359 F.3d at 1279 (upholding Corps’ decision to issue permit allowing dredge and fill of wetlands).
212. For a discussion of the impact on the environment of the Tenth Circuit’s holding, see infra notes 213-17 and accompanying text.
213. See Ausness, supra note 2, at 356 (examining damage done to wetlands).
214. See id. at 358 (noting dredge and fill effects).
215. See Flowers, 359 F.3d at 1271 (noting wetland mitigation efforts).
216. See Schoenbaum & Stewart, supra note 184, at 253 (discussing role of mitigation in practicable alternatives assessment).
217. See id. (noting that mitigation should not be considered in evaluating alternatives).