



January 20, 2006

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Public Building Service
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**RE: Environmental Assessment and Draft Finding of No Significant Impact, Comments
Potential Development of the Western Portion of the Denver Federal Center**

Dear Ms. Clubb:

Please accept these comments on behalf of Forest Guardians, Rocky Mountain Animal Defense, and Lindsey Sterling Krank. These comments respond to an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) issued by the U.S. General Administration (GSA) on December 21, 2005.

We are concerned that the Potential Development of the Western Portion of the Denver Federal Center (or, the "Proposed Action") fails to fully comply with provisions set forth in the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA). The EA indicates the Proposed Action will indeed cause significant impacts within the proposed planning area to vegetation, wildlife, sensitive species, wetlands, and the land itself. The Proposed Action requires a full Environmental Impact Statement (EIS) to address the significant and cumulative impacts (outlined below) and fully develop specific and enforceable mitigation measures to offset these impacts.

The EA described plans for a new Regional Transportation District (RTD) Light Rail facility and hospital on 60 to 65 acres of land to be disposed of by the GSA and conveyed to the City of Lakewood, Colorado by sale, long-term lease, or otherwise. It outlined three alternatives:

- 1) Convey Approximately 60 to 65 Acres of Land to the City of Lakewood for Hospital- and Transit-Related Facilities

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- 2) Convey Approximately 60 to 65 Acres of Land to the City of Lakewood for Transit-Related Facilities and Other Unknown Uses
- 3) No Action Alternative

In the Draft FONSI, GSA put forth Alternative 1 as its preferred Alternative. While our ultimate preference is Alternative 3, the No Action alternative, we do support expanding energy-saving, environmentally-friendly public transportation across the state and the Colorado public's desire for greater access to public transportation. We also believe it is important that all citizens have access to high-quality medical facilities and healthcare. Unfortunately, both the Preferred Alternative 1 and Alternative 2 allow for the destruction of grassland, riparian, and wetlands habitat as well as harm to native wildlife, including the direct lethal control of black-tailed prairie dogs and non-target species. We find it ironic that the project planners would allow prairie dog extermination—a process that entails treatment by poisons that cause extreme pain and suffering to affected animals who hemorrhage to death, often over the course of several days—on the future site of an institution specialized to advance health and healing. Undoubtedly, many of the Centura Health and St. Anthony's future patients would not be comforted knowing that their hospital beds are resting on a prairie dog gravesite. Increasingly, we as a society are discovering more ways that public health and individual human health are tied to the health of our natural environment.

The GSA must discharge its obligations under NEPA to perform a proper EA for the conveyance of the public property in question to the City of Lakewood and the development of project described in its preferred Alternative (1) as well as a range of potential Alternatives. The EA must be a short, concise public document. The EA needs to take a "hard look" at potential effects of the proposed action. The EA needs to consider adequately the cumulative impacts of the proposed action together with those of reasonably foreseeable actions. The EA needs to propose specific and enforceable mitigation measures. The EA needs to consider reasonable alternatives to the proposed action. Any actions proposed in the EA must comply with State law. If actions proposed in the EA are known to be controversial, an EIS must be conducted.

The EA Must be a Short, Concise Public Document

This point may seem trivial, but the Council on Environmental Quality (CEQ), the agency that oversees NEPA, recommends that an EA be no longer than 10-15 pages. Longer documents indicate that a full Environmental Impact Statement is needed to account for potentially significant environmental effects of a proposed action. The Potential Development of the Western Portion of the Denver Federal Center ES is 150 pages. At ten times longer than CEQ's recommended page length, this EA clearly indicates that the Proposed Action requires and EIS.

The EA Must Take a "Hard Look" at Potential Effects and Cumulative Impacts of the Proposed Action

The EA process should be used to help make determinations regarding whether a proposed action poses significant environmental impacts. As the NEPA regulations stipulate, this requires a consideration of "context" and "intensity." (40 CFR 1508.27). Context, "means that the significance of an action must be analyzed in several contexts such as society as a whole (human,

national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.” (40 CFR 1508.27(a)). Intensity, “refers to the severity of impact.” (40 CFR 1508.27(b)). Regarding intensity the regulations lay out a set of points to consider including:

- Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas (1508.27(b)(3))
- The degree to which the effects on the quality of the human environment are likely to be highly controversial (1508.27(b)(4))
- Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component part (1508.27(b)(7))
- The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973 (1508.27(b)(9))
- Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment (1508.27(b)(10))

Environmental Assessments must reveal a thorough analysis of the "environmental impacts" of proposed actions, 40 C.F.R. § 1508.9, but also the cumulative impacts. CEQ regulations succinctly define cumulative impact as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor, but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7; see also 40 C.F.R. § 1508.8 (effects include ecological, aesthetic, historical, cultural, economic, social or health impacts, whether direct, indirect or cumulative); 40 C.F.R. § 1508.25(c) (EIS shall consider three types of impacts, including cumulative effects); 40 C.F.R. § 1508.25(a)(2) (EISs must analyze the effects of actions "which when viewed with other proposed actions have cumulatively significant impacts").

The GSA cannot assess the impact of the Proposed Action in isolation. Instead, it must examine the effects of past and reasonably foreseeable development on the environment of the region, including effects on air quality, soils, vegetation, wildlife and wildlife habitat, sensitive species, wetlands, and other water resources.

The EA must include a thorough analysis of cumulative effects and take the "hard look" required by NEPA. The analysis must analyze or disclose the potential for cumulative significant impacts on any other value or resource (e.g. water quality, vegetation, etc.) on the property. One federal court has held explicitly that a limited cumulative effects analysis is blatantly illegal:

The failure to consider whether there is a potential for cumulative impacts on any aspect of the environment except wildlife species as a result of these projects cannot be characterized as a "truly informed exercise of discretion," nor can it be said to amount to the requisite 'hard look' at the environmental consequences of granting the permit in question. (Alpine Lakes Protection Society v. U.S. Forest Service, 838 F.Supp. 478, 484 (W.D.Wash. 1993).)

Without a serious cumulative effects analysis, the agency cannot be said to have taken a "hard look" at the potential effects of the Proposed Action, when taken together with those of other past, present, or reasonably foreseeable actions that affect the region. This would thwart the underlying purpose of NEPA, which is to "insure that environmental information is available to public officials and citizens before decisions are made" (40 C.F.R. § 1500.1(b); see also Sierra Club v. Watkins, 808 F.Supp. at 858). Even if 'cumulative effects' are difficult to assess, they cannot be dismissed.

The EA describes potential impacts of the Proposed Action to wildlife. A GSA study cited in the EA concludes, "(m)ore than 40 species of mammals, 300 species of birds, and 17 species of reptiles, and amphibians have the potential to occur at the DFC (GSA 2005)." (pg. 76). The EA outlines the effects to wildlife from the loss of 60 to 65 acres of grassland, riparian, and wetland habitat; these include:

- Dispersal of wildlife due to heavy equipment and resulting competition;
- Trampling of wildlife by construction equipment;
- The loss of prairie dog colonies in the planning area;
- The loss of prairie dogs and prairie dog associate species that rely on prairie dogs for food and their burrows for refugia;
- Losses of non-target species resulting from prairie dog control;
- Potential loss of open water habitat for waterfowl and wading birds;
- Loss of a coyote den known to occur on the property; and
- Disturbance of wildlife from a permanent increase in traffic. (pg. 78).

The effects of Alternative 2 would be similar. Yet, because the development plans remain uncertain it is impossible to ascertain the extent and significance of impacts based on the EA. The EA concludes that the Proposed Action would only have short-term, minor adverse impacts to wildlife and long-term minor to moderate adverse impacts.

The EA describes potential impacts of the Proposed Action to sensitive species. Of particular concern to us is the loss of habitat for federally and state listed species, the potential impacts to listed species that occur downstream, the potential and certain loss of individual members of protected species—including black-tailed prairie dogs, Preble's meadow jumping mouse, northern leopard frog, common garter snake, the Colorado butterfly plant, and Ute ladies' tresses orchid (pg. 80-81). Significant adverse impacts to the prairie dogs now residing in the planning area is guaranteed under Alternative 1 and 2.

The EA describes potential impacts of the Proposed Action to wetlands. Under Alternatives 1 and 2, there will be a loss of wetland habitat. (pg. 91-92). Under Alternative 1, the EA anticipates that .59 acre of wetland could be lost of which .23 acre must be mitigated, based on a study by the Army Core of Engineers. (in Appendix A of EA). Again, because Alternative 2 does not provided specific uses or development plans beyond the RTD facilities, it is uncertain what the effects would be to the wetlands in and around the planning area.

The EA gives almost no attention to cumulative impacts.

Given that the Proposed Action will permanently destroy at least 60-65 acres of grassland, wetland, and riparian wildlife habitat; kill the animals that are unable to relocate when construction begins, and dislocate a host of others who currently depend on the property; the effects of and Proposed Action under Alternative 1 or 2 are indeed significant. While in the context of the whole Great Plains or even the Eastern Plains of Colorado this may seem insignificant, in the highly-urbanized regional and local context this is a large, permanent loss of prairie life and habitat—a significant and cumulative impact.

The Proposed Action under Alternatives 1 and 2 wipe out what is now “open space.” The concept of “open space” implies a commitment to the public that the open space land area has been permanently set aside and off-limits to development. The net loss of open space in the highly-developed context of Jefferson County and the entire Denver Metro Area amounts to a significant impact.

Mitigation Proposed in the EA Must be Specific and Enforceable

According to NEPA regulations, “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.” (40 CFR Sec.1508.20).

An agency should not use the potential for mitigation actions as a way to side-stepped undertaking an EIS but instead take a broad approach to defining significance. (40 CFR Sections 1508.8, 1508.27). The CEQ provided more clarity on this issue, “If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, **the existence of such possible mitigation does not obviate the need for an EIS.** Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and

that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.” The CEQ’s position is supported by case law. The following is taken from the Second Circuit Court’s Opinion on National Audubon v. Hoffman, 132 F.3d 7, 17 (2nd Cir. 1997).

“When the adequacy of proposed mitigation measures is **supported by substantial evidence**, the agency may use those measures as a mechanism to reduce environmental impacts below the level of significance that would require an EIS. See Friends of the Ompompanoosuc v. F.E.R.C., 968 F.2d 1549, 1556-57 (2d Cir. 1992); Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234, 245 (D. Vt. 1992), aff’d, 990 F.2d 729 (2d Cir. 1993) (affirming for substantially the same reasons stated by the district court). In practice, mitigation measures have been found to be sufficiently supported when **based on studies conducted by the agency**, see Ompompanoosuc, 968 F.2d at 1555 (study of proposed mitigation conducted by agency along with consultation with another agency), or when they are **likely to be adequately policed**, see Abenaki, 805 F. Supp. at 239 n.9 (mitigation measures included as mandatory conditions imposed upon licenses). In Abenaki, the efficacy of the mitigation measures were assured because they were included as **mandatory conditions** in the issued permits. These conditions required implementation of a detailed plan to monitor the effects of the proposed action and the mitigation of those effects in the event wetlands were lost as a result. Further, the plan required monitoring of the mitigation efforts, if any were made, to ensure that they were effective and **required implementation of an alternative mitigation plan, spelled out in detail**, if they were not. Id.

“We emphasize the requirement that mitigation measures be supported by **substantial evidence in order to avoid creating a temptation for federal agencies to rely on mitigation proposals as a way to avoid preparation of an EIS**. That is to say, agencies should define "significance" broadly and not rely on proposed mitigation measures as an excuse to avoid preparing an EIS. See Abenaki, 805 F. Supp. at 244.”

NEPA requires that mitigation measures be reviewed in the process—not in some future decision shielded from public scrutiny. “[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the ‘action-forcing’ function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989). The EA has failed to fully explain how it plans to mitigate the damage the proposed actions will do to prairie ecosystems, including wetlands and riparian areas.

Moreover, it is also appropriate to impose enforceable mitigation measures and monitoring programs in an EA and FONSI. Even if impacts of a proposal are not deemed “significant,” mitigation actions or alternatives should be considered and adopted. In cases where mitigation is appropriate, the EA should fully describe mitigation measures and alternatives to "assist [46 FR 18038] agency planning and decisionmaking" and to "aid an agency's compliance with [NEPA] when no environmental impact statement is necessary." (40 CFR Section 1501.3(b), 1508.9(a)(2)).

We need to see a detailed proposal for the wetlands and prairie dog habitat mitigation actions that are merely mentioned in the EA. The lack of a clear mitigation plan for the wetlands and prairie dog towns as well as prairie dog habitat (all 60-65 acres of the planning area) is a primary reason the Proposed Action requires the completion of an EIS, not just an EA.

The EA describes the following mitigation measures related to wildlife and sensitive species impacts.

“Prairie dog relocation may be employed where practicable, and would have less effect than lethal control. Active relocation would require a permit from the CDOW (GSA 2005). If active or passive relocation is employed, it would be carried out in a manner that would control impacts to surrounding facilities at the DFC, as well as properties adjacent to or in the vicinity of the DFC, where necessary. To reduce potential impacts, project officials would consider ways to avoid riparian areas and wetlands to the extent practical during construction and operation of the hospital, the related facilities, and transit station/TOD, which would benefit the northern leopard frog. During construction, contractor staging areas would be limited to only those areas necessary for storing equipment and materials, parking personally owned vehicles, and setting up an office in a modular facility. Construction could be phased so that staging would occur in areas planned for subsequent development, minimizing impacts to sensitive species.” (pg. 86)

This statement tells us very little about the specific types, scope, and extent of mitigation. Where will prairie dog relocation be practicable? Why wouldn't it be practicable at a given location? What are potential impacts of prairie dog relocation to surrounding facilities? How would riparian areas be avoided? Where would the prairie dogs be relocated? Who would do the relocating? Where are the areas necessary for storing equipment? How would construction be phased? The public requires answers to these questions and more it can be expected to participate in the decision process in any meaningful way. The EA does not require the limited mitigation it does describe. Mitigation should be a requirement of this plan.

Similarly in the described potential wetlands mitigation, the EA is insufficient. This is exactly how the EA proposes to mitigate potential wetlands degradation:

“To reduce potential impacts to wetlands in the project area, project officials would consider ways to avoid such areas to the extent practical during construction and operation of the new developments.

“Although these measures are intended to protect water resources, they also serve to mitigate impacts to wetlands. The development of the proposed project will comply with federal, state, and local regulations governing construction activities. A Stormwater Management Plan will be submitted to CDPHE and certified prior to proposed construction activities. The construction contractor will comply with the terms of a general permit to discharge stormwater associated with construction

activities in accordance with the NPDES Stormwater Permit. CDPHE regulates the NPDES Program and requires that an NOI be submitted at least 15 days before starting construction. The permit specifies that BMPs be utilized during construction and operation of the proposed project. BMPs will be implemented to control runoff, erosion, and sediment transport during and after construction.

As per the July 2003 *Denver Federal Center Draft Stormwater Management Plan* (GSA 2003), GSA would review pre-construction site plans to ensure that runoff, erosion, and/or sedimentation from the activity will not have a major impact on McIntyre Gulch. This plan also recommends several housekeeping measures that will be enforced, such as hazardous materials/waste storage and spill response (GSA 2003). Spill prevention, control, and countermeasure procedures would also reduce the potential for any hazardous substances used during construction or operation to be discharged to wetlands.” (pg. 93).

Again, we need answers to important questions raised by the EA concerning proposed mitigation. Specifically, what ways would be considered by project officials to avoid wetland areas? As the NEPA regulations and caselaw history warn against, the EA relies on a set of unspecified “Best Management Practices” to give the appearance of reducing impacts.

The public must see a serious consideration and examination of mitigation measures for this project. Any prairie dogs that must be eliminated from the project areas must be humanely relocated. The GSA must comply with a common-sense standard of no-net-loss of grasslands habitat and do as the NEPA regulations recommend by “compensating for the impact by replacing or providing substitute resources or environments,” for example. (40 CFR Sec.1508.20(e)).

The EA Must Analyze a Range of Reasonable Alternatives

NEPA and regulations implementing it require agencies to consider a range of reasonable alternatives to an agency action in preparing environmental review documents. NEPA requires agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources” (42 U.S.C. § 4332(2)(E)). Council on Environmental Quality (“CEQ”) regulations implementing NEPA and the courts make clear that the discussion of alternatives is “the heart” of the NEPA process (40 C.F.R. § 1502.14).

Although an agency need not consider every possible alternative, it must consider reasonable alternatives “necessary to permit a reasoned choice.” Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174, 1180-81 (9th Cir. 1990). Put differently, it must consider those alternatives that “would alter the environmental impact and the cost-benefit balance.” Bob Marshall Alliance, 852 F.2d at 1228, quoting Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Commission, 449 F. 2d 1109, 1114 (D.C. Cir. 1971). Caselaw interpreting NEPA makes clear that the GSA must take a “hard look” at alternatives that not only emphasize different factors, but also lead to differing results. The GSA “must take a 'hard look' at alternatives which not only emphasize different factors but which lead to differing results”

(Citizens for Environmental Quality v. U.S., 731 F.Supp. 970, 989, citing California v. Block, 690 F.2d 753 (9th Cir. 1982)).

The GSA outlines three different alternatives in the EA. However, neither Alternative 1 nor Alternative 2 enable a reasonable assessment of the potential impacts (significant or not) because they do not provide evidence or an analysis of expected outcomes of the wildlife and water mitigations measures discussed in the EA. Moreover, Alternative 2 is hardly a reasonable alternative at all but merely a contingency plan in case the proposed hospital plan does not work out. Because so little is known of potential land uses in Alternative 2, it is impossible to even infer potent environmental impacts.

The EA Must Comply with Other Federal Laws

The EA must comply with numerous federal laws, rules, and regulations along with NEPA, 42 U.S.C § 4321 et seq., the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703-712, and the Administrative Procedures Act (APA), 5 U.S.C. § 706 et seq. As such, the GSA's analysis must consider the impacts of this project on air quality, soils, vegetation, wildlife and wildlife habitat, sensitive species, wetlands and other water resources, and a range of other factors.

The Clean Water Act requires the GSA's Proposed Action will not cause or contribute to violations of water quality standards in the any of the water resources within and surrounding the planning area. (See 33 U.S.C. § 1323; Northwest Indian Cemetery Protective Ass'n V. Peterson, 795 F. 2d 688, 697 (9th Cir. 1986).) However, the proposed alternative could result in CWA water quality standard violations.

Construction activities can and do degrade water quality by increasing the levels of pollutants including fuel and other fluids leaked from vehicles and other machinery and included in storm water run-off. Direct contamination of the wetlands and riparian habitat is also a risk. Increased traffic to the area after project completion makes risks to the water resources permanent and cumulative.

The EA Must Comply with State Laws and Regulations

Colorado's Constitutional Amendment 14 specifically prohibits the poisoning of wildlife. (Article XVIII Section 12b and implementing regulations at C.R.S. §§33-6-201 et. seq. Colorado Constitution Article XVIII, 12b). Prohibited methods of taking wildlife includes the following text:

- (1) It shall be unlawful to take wildlife with any leghold trap, any instant kill body-gripping design trap, or by poison or snare in the state of Colorado.
- (2) The provisions of subsection (1) of this section shall not prohibit:
 - (a) The taking of wildlife by use of the devices or methods described in subsection (1) of this section by federal, state, county, or municipal departments of health for the purpose of protecting human health or safety;

(b) The use of the devices or methods described in subsection (1) of this section for controlling:

(I) wild or domestic rodents, except for beaver or muskrat, as otherwise authorized by law; or

(II) wild or domestic birds as otherwise authorized by law;

The court proceedings of a lawsuit in Boulder District Court includes the following text:

“Even Dr. Kathy Fagerstone, another of the defendant’s prairie dog experts, conceded that a poisoner could not tell what was in a given prairie dog burrow within a few seconds or minutes on a given visit, contrary to the sworn statements of Department of Agriculture employee Mike Threlkeld (Tr. Ex. 106, p. 4). Dr. Reading testified that without nocturnal visits, it would be virtually impossible to tell what nocturnal wildlife live in the prairie dog burrows—and the chances of telling what Amendment 14-protected animal was in the burrow even then were not good.” (Rocky Mountain Animal Defense v. Colorado Division of Wildlife, Case No. 2000CV335)

In the same lawsuit, Gay Balfour, a professional prairie-dog exterminator, testified that protected species of wildlife were removed with every job he’d ever performed. With overwhelming evidence such as this, it is apparent that the application of toxins in prairie dog burrows results in the prohibited take of wildlife.

Actions Proposed in the EA Must be Non-Controversial

In Colorado, especially within the Denver Metro Area and along the Front Range, few subjects whip up a heated controversy more quickly than prairie dogs. Government actions that involve prairie dog conservation or control

We thank you for carefully considering these comments. We urge you to fulfill the obligations set forth by NEPA and continue the review of the DFC proposal with a full Environmental Impact Statement that lays out in detail specific and enforceable mitigations alternatives.

Sincerely,

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