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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SAN DIEGO NAVY BROADWAY
COMPLEX COALITION,

Plaintiff,

vs.

U.S. DEPARTMENT OF DEFENSE; et al.,

Defendants.

CASE NO. 07cv0038 JM(WMc)

ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT IN PART AND
DENYING IN PART; DENYING
DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT

Plaintiff San Diego Navy Broadway Complex Coalition (“NBCC”) moves for summary judgment on its National Environmental Policy Act (“NEPA”) claims. Defendants U.S. Department of Defense; Robert M. Gates, in his official capacity as Secretary of the U.S. Department of Defense; U.S. Department of the Navy; Donald C. Winter, in his official capacity as secretary of the U.S. Department of the Navy; Naval Facilities Engineering Command; Rear Admiral W. Greg Shear, Jr., in his official capacity as Commander of the Naval Facilities Engineering Command; Naval Facilities Engineering Command Southwest; and Captain Steve M. Wirshing, in his official capacity as Commander Naval Facilities Engineering Command Southwest (collectively “Federal Defendants”) cross move for summary judgment on the NEPA claims. Having carefully considered the record in its entirety, pertinent legal authorities, the arguments of counsel and for the reasons below, the court grants NBCC’s motion for summary

1 judgment on the public notice and participation claim and remands for further agency
2 action consistent with this order. The court also denies the remainder of Plaintiff's
3 motion for summary judgment and denies Defendants' cross motion for summary
4 judgment.

5 **BACKGROUND**

6 On January 4, 2007, NBCC commenced this action against the Federal
7 Defendants seeking declaratory and injunctive relief for alleged violations of NEPA and
8 the Administrative Procedures Act ("APA"). On August 23, 2007 the court granted the
9 Rule 12(b)(6) motion of Manchester Pacific Gateway LLC ("MPG") and dismissed it
10 as a party. MPG is the lessee to a 99 year ground lease for the Navy Broadway
11 Complex ("NBC"), located on federally owned land in downtown San Diego. The NBC
12 site presently consists of Navy administrative facilities including the Commander, Navy
13 Region Southwest, and the Fleet Industrial Supply Center San Diego. (Administrative
14 Record, "AR," 13193). The present Navy facilities, constructed primarily between
15 1921 and 1944, consists of 361,000 SF of administrative office space and 500,000 SF
16 of warehouse space.

17 The following facts are undisputed.

18 Overview

19 In 1982 the Department of the Navy considered options for the consolidation of
20 various Navy installations in the San Diego area. In light of budget constraints, the
21 Department of the Navy pursued a "co-location" program which allowed the federal
22 government to retain title to property and to lease portions of the property for private
23 revenue-generating uses that could be used to offset the cost of new administrative
24 facilities. (EA at 1-6). Congress enacted legislation in 1986, Public Law 99-661, §
25 2732, 100 Stat 3816 (1986), authorizing the Secretary of the Navy to pursue a public-
26 private venture to implement the co-location concept at the NBC site. The legislation
27 mandated that "any real property leased shall be developed in accordance with detailed
28 plans and terms of development which have been duly formulated by the Navy and the

1 San Diego community through the San Diego Association of Government's Broadway
2 Complex Coordination Group." Id.

3 To obtain the objective of updated Navy administrative facilities, an advisory
4 group, the Broadway Complex Coordinating Group ("BCCG"), formed in 1985 under
5 the auspices of the San Diego Association of Governments ("SANDAG") to serve as
6 community advisors for the planning of the NBC and to initiate consultation with local
7 government authorities. In June 1987 the Navy and the City of San Diego executed a
8 Memorandum of Understanding ("MOU") to establish the terms of potential future
9 development on the NBC site. (EA at p.3:1-8). On September 22, 1989 the BCCG
10 adopted the design principles for the NBC site and established detailed plans and
11 development terms.

12 Initial Environmental Review Proceedings

13 To comply with its environmental obligations under NEPA, the Navy completed
14 an Environmental Impact Statement ("EIS") in 1990 and issued a Record of Decision
15 ("ROD") in July 1991. The EIS evaluated six action alternatives, in addition to the no
16 action alternative, and discussed a full-range of environmental issues. The ROD
17 memorialized the Navy's decision to redevelop the NBC site and identified essential
18 uses for the site. The ROD also identified that the next step in the process was for the
19 Navy and the City to enter into a development agreement, as contemplated under the
20 1987 MOU. Among other things, the MOU provided that the Navy, in consultation
21 with the City, would prepare a development plan and urban design guidelines (i.e. land
22 uses, density, viewscales, building heights, open space, etc.). (AR 000003).

23 After review and consideration of potential adverse environmental impacts to the
24 project, the City completed an Environmental Impact Report in 1991. A mitigation
25 monitoring program ("MMP") was prepared as part of the environmental review. (AR
26 13196.). The City and the Navy agreed that all required environmental processing had
27 been completed and that no further environmental review would be required. Id.

28 Following further public review, on November 2, 1992 the City enacted an

1 ordinance approving the Development Agreement (“DA”) for the NBC site. The DA
2 incorporated, among other documents, the MMP and provided a guide to the planning
3 and approval process for the project . Adverse real estate conditions in the San Diego
4 real estate market in the early 1990s caused the Navy and City to extend the deadline
5 for recording a Developer Lease. The original DA provided for the termination of the
6 DA by January1, 2002 unless a Developer Lessee were recorded. (AR 12373).
7 Following public hearings the original deadline was extended first to January 1, 2003
8 and later to January 1, 2007. (AR 12420, 12428).

9 Subsequent Environmental Review Proceedings

10 As the real estate market in San Diego improved, the Navy took steps to
11 implement the DA. (AR 13198). Further, in 2005 the Base Realignment and Closure
12 Commission (“BRAC”) issued a directive to the Secretary of the Navy to either
13 implement the DA or close the NBC and relocate the units and functions of NBC to
14 other Department of Navy owned sites in San Diego. (AR 13188). To facilitate
15 implementation of the DA, the Navy prepared an Environmental Assessment (“EA”)
16 analyzing the environmental impacts associated with implementing the 1991 ROD and
17 the 1992 DA. Concurrently with the preparation of the EA, the Navy, on March 31,
18 2006, selected MPG to participate in exclusive negotiations for the NBC project. (AR
19 9177-78). With the selection of MPG, work commenced on the design phase
20 submissions to Centre City Development Corporation (“CCDC”).

21 Each design stage of the project had to be approved by CCDC for conformity to
22 the standards and initial consistency determination. (AR 12377). Beginning in April
23 2006, the CCDC held five public workshops to display the plan proposed by the
24 developer. (AR 9184). The CCDC also conducted public meetings wherein the NBC
25 proposals were considered. Id. At these meetings, the public provided comments to
26 CCDC. Such comments were provided to the Navy for consideration in its NEPA
27 process. (AR 21559-91; 21681-94).

28 Pursuant to NEPA, on November 22, 2006, the Navy issued a Finding of No

1 Significant Impact (“FONSI”). In summarizing the environmental effects of NBC, the
2 FONSI concluded:

3 The EA demonstrated that implementation of the proposed action, which
4 includes measures to reduce or avoid impacts to the environment as
5 defined in the Development Agreement, will not have a significant effect
6 on the human environment, and therefore an EIS is not required. The EA
7 revealed that with measures in place to reduce project impacts, and
8 associated development-related best management practices, that there
9 would be no significant impacts to environmental quality.

10 (AR 20458).

11 In its first three causes of action, NBCC alleges that Defendants (1) failed to
12 prepare an Environmental Impact Statement (“EIS”); (2) failed to prepare a
13 supplemental EIS (“SEIS”); and (3) failed to allow public participation before making
14 the FONSI. (FAC ¶14-28). The fourth claim seeks a declaration that the lease between
15 MPG and the Department of the Navy “is invalid based on the unlawful acts and
16 omissions of the other Defendants as alleged in” the FAC. (FAC ¶30). The parties now
17 cross move for summary judgment on all claims. All motions are opposed.

18 DISCUSSION

19 Legal Standards

20 Summary Judgment Standard

21 A motion for summary judgment shall be granted where “there is no genuine
22 issue as to any material fact and . . . the moving party is entitled to judgment as a matter
23 of law.” FED. R. CIV. P. 56(c); Prison Legal News v. Lehman, 397 F.3d 692, 698 (9th
24 Cir. 2005). The moving party bears the initial burden of informing the court of the
25 basis for its motion and identifying those portions of the file which it believes
26 demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett,
27 477 U.S. 317, 323 (1986). There is “no express or implied requirement in Rule 56 that
28 the moving party support its motion with affidavits or other similar materials negating
the opponent’s claim.” Id. (emphasis in original). The opposing party cannot rest on
the mere allegations or denials of a pleading, but must “go beyond the pleadings and by
[the party’s] own affidavits, or by the ‘depositions, answers to interrogatories, and

1 admissions on file’ designate ‘specific facts showing that there is a genuine issue for
2 trial.’” Id. at 324 (citations omitted). The opposing party also may not rely solely on
3 conclusory allegations unsupported by factual data. Taylor v. List, 880 F.2d 1040, 1045
4 (9th Cir. 1989).

5 The court must examine the evidence in the light most favorable to the non-
6 moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Any doubt
7 as to the existence of any issue of material fact requires denial of the motion. Anderson
8 v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). On a motion for summary judgment,
9 when “‘the moving party bears the burden of proof at trial, it must come forward with
10 evidence which would entitle it to a directed verdict if the evidence were
11 uncontroverted at trial.” Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992)
12 (emphasis in original) (quoting International Shortstop, Inc. v. Rally's, Inc., 939 F.2d
13 1257, 1264-65 (5th Cir. 1991), cert. denied, 502 U.S. 1059 (1992)).

14 Administrative Procedures Act Standard

15 In general, judicial review of actions under NEPA is governed by the
16 Administrative Procedure Act (“APA”), 5 U.S.C. §§551-559, 701-706. The APA
17 provides that any agency action that is “arbitrary, capricious, an abuse of discretion, or
18 otherwise not in accordance with law” is prohibited and shall be overturned by the
19 court. 5 U.S.C. §706(2)(A); California v. Norton, 311 F.3d 1162, 1170 (9th Cir. 2002).
20 “NEPA does not mandate particular substantive results, but instead imposes only
21 procedural requirements.” Laguna Greenbelt, Inc. v. U.S. Dept. Of Transp., 42 F.3d
22 517, 523 (9th Cir. 1994). Under this standard, the “court is not to substitute its judgment
23 for that of the agency.” Motor Vehicle Mfrs. Ass’n of U.S. Inc. v. State Farm Mut.
24 Auto Ins. Co., 463 U.S. 29, 43 (1983). Nevertheless, “the agency must examine the
25 relevant data and articulate a satisfactory explanation” for its decision and, in reviewing
26 that explanation, the court must consider whether the decision was based on a
27 consideration of the relevant factors and whether there was a clear error in judgment.
28 Id. This inquiry must “be searching and careful” but “the ultimate standard of review

1 is a narrow one.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416
2 (1971); Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 929 (9th cir.
3 1987) (the court applies deferential standard of review to Environmental Impact
4 Statements).

5 When specialists express conflicting views, an agency must have
6 discretion to rely on the reasonable opinions of its own qualified experts
7 even if, as an original matter, a court might find contrary views more
8 persuasive. On the other hand, in the context of reviewing a decision not
9 to supplement an EIS, courts should not automatically defer to the
10 agency’s express reliance on an interest in finality without carefully
11 reviewing the record and satisfying themselves that the agency has made
12 a reasoned decision based on its evaluation of the significance - - or lack
13 of significance -- of the new information. A contrary approach would not
14 simply render judicial review generally meaningless, but would be
15 contrary to the demand that courts ensure that agency decisions are
16 founded on a reasoned evaluation ‘of the relevant factors.’

17 Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1988).

18 In considering a NEPA challenge, the court “may not substitute its judgment for
19 that of the agency concerning the wisdom or prudence of a proposed action.” Laguna
20 Greenbelt, 42 F.3d at 523 (quoting Oregon Env’tl. Council v. Kunzman, 871 F.2d 484,
21 492 (9th Cir. 1987)). Under the “rule of reason,” the court determines “whether the
22 [EIS] contains a reasonably thorough discussion of the significant aspects of the
23 probable environmental consequences’ by making ‘a pragmatic judgment whether the
24 [EIS’s] form, content and preparation foster both informed decision-making and
25 informed public participation.” Id. (quoting Salmon River Concerned Citizens v.
26 Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994)). Review under the rule of reason and
27 for abuse of discretion “are essentially the same.” Churchill County v. Norton, 276
28 F.3d 1060, 1071 (9th Cir. 2001). The role of the court “is to ensure that the agency has
taken a hard look” at the environmental effects. Or. Natural Res. Council v. Lowe, 109
F.3d 521, 526 (9th Cir. 1997).

The NEPA Claims

Plaintiff raises three essential NEPA challenges to the adequacy of the
environmental review: (1) the failure to allow adequate notice, public participation and
comment prior to issuance of the EA and FONSI; (2) the failure of the EA to consider

1 a reasonable range of alternatives; and (3) the failure to prepare a supplemental
2 environmental impact statement (“SEIS”) in light of changed circumstances between
3 1990 and 2006. As the court concludes that Defendants failed to comply with the
4 public notice and participation requirement, the court does not reach the other issues
5 raised by the parties.

6 Public Notice and Participation

7 NEPA “declares a broad national commitment to protecting and promoting
8 environmental quality.” Robertson v. Methow Valley citizens Council, 490 U.S. 332,
9 348 (1989); 42 U.S.C. §4331. However, NEPA does not mandate any particular
10 substantive environmental result. See Okanogan Highlands Alliance v. Williams, 263
11 F.3d 468, 473 (9th Cir. 2000). Rather, the goal of NEPA “is to insure a fully informed
12 and well-considered decision.” Vermont Yankee Nuclear Power Corp. v. Natural
13 Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). The role of this court in
14 reviewing an agency’s decisionmaking “is to insure that the agency has considered the
15 environmental consequences; it cannot ‘interject itself within the area of discretion of
16 the executive as to the choice of the action to be taken.’” Strycker’s Bay Neighborhood
17 Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (quoting Kleppe v. Sierra Club,
18 427 U.S. 390, 410, n.21 (1976)). In keeping with the goal of informed decisionmaking,
19 the Council on Environmental Quality (“CEQ”) promulgated regulations highlighting
20 that “[t]he NEPA process is intended to help public officials make decisions that are
21 based on understanding of environmental consequences.” 40 C.F.R. §1500.1.

22 One way of achieving the goal of informed decisionmaking is by encouraging
23 “public participation in the development of information during the decision making
24 process.” Half Moon Bay fishermen’s Marketing Ass’n v. Carlucci, 857 F.2d 505, 508
25 (9th Cir. 1988) (emphasis in original). The CEQ has promulgated regulations to
26 promote public participation. “[T]he agency shall involve the public, to the extent
27 practicable, in preparing [EAs]....” 40 C.F.R. § 1501.4(b). Further “[a]gencies shall ...
28 make diligent efforts to involve the public in preparing and implementing their NEPA

1 procedures[,] ... provide public notice of ... the availability of environmental documents
2 so as to inform those persons ... who may be interested or affected[,] [and] ... solicit
3 appropriate information from the public.” 40 C.F.R. § 1506.6.

4 In analyzing an agency’s public comment and participation obligations, the Ninth
5 Circuit established “this rule: An agency, when preparing an EA, must provide the
6 public with sufficient environmental information, considered in the totality of
7 circumstances, to permit members of the public to weigh in with their views and thus
8 inform the agency decision-making process.” Bering Strait Citizens for Responsible
9 Res. Dev. v. U.S. Army Corps of Eng’rs, 524 F.3d 938, 953 (9th Cir. 2008). Once
10 adverse environmental effects are adequately identified and evaluated, NEPA places no
11 constraints on the agency “from deciding that other values outweigh the environmental
12 costs.” Robertson, 490 U.S. at 350.

13 Plaintiff argues that the notice provided by the Navy was deficient in the
14 following ways: (1) Defendants failed to provide adequate notice to the public and
15 interested parties with a sufficient opportunity to participate in the NEPA process; (2)
16 Defendants did not notify the public about the existence of the EA or FONSI until five
17 months after completion of the EA and two days after the FONSI was adopted; and (3)
18 Defendants failed to provide sufficient environmental information to the public such
19 that the public could weigh in with their views.

20 The public notice at issue, (AR 21516), informs the public about the nature of the
21 NBC project and invites public participation and comment. However, there is no
22 evidence identified by Defendants on the manner of the notice’s dissemination. That
23 is, it is unclear whether the notice is a handbill, a flyer, or a copy of a published notice.
24 Public participation is central to NEPA’s goal of achieving well-informed decision
25 making. Vermont Yankee, 435 U.S. at 538. To that end, CEQ regulations provide that
26 agencies must make “diligent efforts to involve the public in preparing and
27 implementing their NEPA procedures.” 40 C.F.R. §1506.6(a). Such efforts include,
28 where requested, mail notice to interested groups; notice to area-wide clearinghouses;

1 publication in local newspapers; notice to local media; notice to potentially interested
2 community organizations; and publication in newsletters that may be expected to reach
3 potentially interested persons. 40 C.F.R. §1506.6. In Bering Strait, notice to the public
4 consisted of “electronic or hard-copy format to federal, state and local agencies, the
5 community of Native Alaskans residing in or near Nome, the City of Nome, the
6 neighboring community of Solomon, adjacent property owners, the Nome Postmaster,
7 and any member of the community who requested a copy.” 524 F.3d at 944-45. While
8 the Ninth Circuit in Bering Strait eschewed a fixed definition or formula required for
9 adequate public notice and participation, the opinion certainly reflects the adage, “we
10 know it when we see it,” when it approvingly listed the efforts undertaken by the parties
11 to achieve broad dissemination of notice. Id.

12 On the present record, the court finds that Defendants have failed to substantiate
13 that they provided adequate notice to the public and interested groups. The court does
14 not “see” enough evidence in the record to find compliance with NEPA’s notice
15 requirements. Defendants simply fail to identify the steps taken to achieve the broad-
16 based notice requirements mandated by NEPA as reflected CEQ’s regulations, 40
17 C.F.R. §1506.6. While the administrative record is largely silent on the issue of notice,
18 at the time of oral argument, counsel for Defendants represented that the notice was
19 published on one occasion in the San Diego Union Tribune, (RT 12:22-23), and placed
20 on the CCDC’s website. Counsel for Defendants was also unaware whether any
21 interested groups received notice of the CCDC workshops, (RT 5-7), or whether the
22 notice was more broadly disseminated than that identified at the time of oral argument.
23 (RT: 8-20).

24 While the court is mindful that workshops and meetings were conducted under
25 the auspices of the CCDC, there is no indication in the administrative record of those
26 persons or organizations targeted for notice, actually noticed, or in attendance at the
27 workshops. Moreover, while Defendants assert that the proposed project was
28 extensively discussed at CCDC meetings and workshops, there is no record of what in

1 fact was specifically discussed or otherwise considered. The administrative record
2 reflects what purports to be comments or comment summaries, some with and others
3 without attribution, from various persons attending the workshops (or presented at the
4 workshops) (A.R. 9256-60; 10228-9; 11277-82; 21681-94). However, these comments
5 bear little relevance to the basic question of whether the broad-based notice required by
6 NEPA was actually provided so as to allow the public and interested groups to “weigh
7 in” with their views and thus inform the agency decision-making process. It should be
8 underscored that Bering Strait contemplates two types of notice: First, notice to
9 interested groups and persons and the opportunity to be heard, and, second,
10 dissemination of information adequate to apprise the public of what constitutes the
11 proposed project. This administrative record is lacking on these important questions.

12 The actual notice provided did not come close to satisfying 40 C.F.R. §1506.6
13 or the extensive dissemination of notice identified in Bering Strait. The policy goals
14 of NEPA are “realized through a set of ‘action-forcing’ procedures that require that
15 agencies take a ‘hard look’ at environmental consequences.” Robertson, 490 U.S. at
16 350 (quoting Kleppe, 427 U.S. at 410, n.21). Notice to the public and interested groups
17 is an indispensable component of the procedures and processes contemplated by
18 Congress to achieve NEPA’s goals. See Vermont Yankee, 435 U.S. at 538. Without
19 adequate notice to the public and interested groups, the court is not able to determine
20 whether the public and interested groups have “weigh[ed] in with their views and thus
21 inform[ed] the agency decision-making process.” Bering Strait, 524 F.3d at 953.
22 Consequently, the court grants Plaintiff’s motion for summary judgment on this claim.

23 What the Navy seeks to develop here is not just a parcel of property consisting
24 of 16 waterfront acres. The NBC site has the potential to become a signature piece
25 representing a unique and magnificent gateway to the City of San Diego. Not only is
26 it imperative that the project proceed while informed by a high level of public
27 participation in resolving environmental concerns, it is equally important that when the
28 key is finally turned the interested public may say they had a fair and full opportunity

1 to “weigh in” on environmental concerns.

2 This court is indeed aware of the passage of time from the early 1990s, when the
3 EIS issued, to the present - - in large measure a period of volitional constraint due to
4 perceived market considerations. Surely, however, if market forces justify caution and
5 prudence in going forward, additional time to secure full compliance with National
6 environmental policy mandates to provide broad notice and public participation is
7 warranted.

8 In sum, the court grants Plaintiff’s motion for summary judgment on the notice
9 claim and remands the action in order for Defendants to comply with the notice and
10 public participation requirements of NEPA. The court denies the remainder of
11 Plaintiff’s notice and public participation claims as moot.

12 Changed Circumstances and Consideration of Alternatives

13 The parties also move for summary judgment on claims that (1) Defendants
14 violated NEPA when they failed to prepare an SEIS based upon changed circumstances
15 and (2) the EA impermissibly limited the number of alternatives considered to two. At
16 the time of oral argument, both parties requested a ruling on these issues even if the
17 court were to remand the action for further consideration. The court declines to rule on
18 these two issues until after further notice, public participation, and agency
19 consideration. As further development of the record has the potential to impact the
20 parties’ claims, the court concludes that these issues are not yet ripe for consideration.
21 While the court is sympathetic to the parties’ argument for a ruling on these issues, any
22 ruling on these issues would be an advisory one. The parties must await the complete
23 development of the record.

24 In sum, the court grants in part and denies in part Plaintiff’s motion for summary
25 judgment and remands this matter for further consideration of the administrative record

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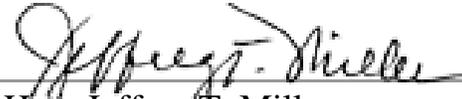
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1 upon completion of additional notice and public comment. The court denies
2 Defendants' motion for summary judgment in its entirety.

3 **IT IS SO ORDERED.**

4 DATED: June 26, 2008

5 
6 Hon. Jeffrey T. Miller
United States District Judge

7 cc: All parties

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