

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

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Cause No: \_\_\_\_\_

INDIANA FOREST ALLIANCE; )  
INDIANA INTERCHURCH CENTER; )  
VETERANS IN INDUSTRY AND ARTS; )  
GARY MOODY; CLARK KAHLO; )  
FELICITY KELCOURSE; KAPPA DELTA )  
PI, INTERNATIONAL HONOR SOCIETY )  
IN EDUCATION; MARY T. BOOKWALTER; )

Plaintiffs )

v. )

**1 16-cv-3297 JMS -MPB**

ROBERT A. McDONALD, Secretary of )  
Veterans Affairs; U.S. DEPARTMENT )  
OF VETERANS AFFAIRS; RONALD E. )  
WALTERS, Interim Under Secretary )  
for Memorial Affairs, National )  
Cemetery Association; NATIONAL )  
CEMETERY ADMINISTRATION, )

Defendants. )

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

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## INTRODUCTION

The central Indiana area needs additional National Cemetery space to inter the honored remains of veterans near their families. Everyone involved in this action, on both sides, supports the creation of that hallowed ground. This action is an attempt to stop the wanton destruction of the last stand of old growth forest in Indianapolis from being destroyed by the agency charged with the duty to build that cemetery. Unfortunately, Defendants used flawed procedures, issued only limited notices so the project could go quietly, and ignored the true nature of this old growth forest they have set out to destroy in their haste to build.

In 2006 a Site Assessment by the Indiana Division of Nature Preserves stated the following about the Forest that will be lost:

“ The relict flatwoods is characterized by mixed tree species characteristic of central Indiana. The stand is complex in structure and species rich, indicating ‘old-growth’ qualities. . . .

*Site significance:* As a true high quality remnant of Indiana's presettlement forest, this site carries inordinate biological and cultural value. In the context of Marion County, it is a very rare and special resource. This forest is a repository of native Indiana's biological riches. Any alteration or modification of site is highly likely to impact its overall high integrity.”

In 2008, an ecologist with the Indiana Division of Nature Preserves corroborated this description with provided the following written characterization of the Forest:

“An intact and species-rich native understory and mid-canopy, rich herbaceous layer of wildflowers, and numerous large standing snag

and den trees provide niches for increased biological diversity and lend the site true 'old growth' character. . . . This is a relict natural area, not a planting or 'restoration', but a true remnant of the once-vast hardwood forests of Indiana.”

In 2013, the Crown Hill Cemetery Foundation showcased these woods and described them in its coffee-table book, “CROWN HILL, HISTORY - SPIRIT - SANCTUARY” published jointly with the Indiana Historical Society, as follows:

“Just as the inscriptions on the grave markers are a reminder of, and tribute to, our fore bearers, the woods are a legacy of the past, linking generations. Woods of this size and quality are not found in many places in central Indiana.

These woods are special . . . At least forty-seven species of trees grow here. . . Very large and old trees hold their leaves up to the sun.

Among the largest and oldest are burr oaks. Some in the woods measure more than fifteen feet around and are likely several hundred years old. . . Trees at Crown Hill preserve the gene pool of early Indiana and so connect the past with the present.”

In its Environmental Assessment completed in 2015, the National Cemetery Administration gives the following description for these woods:

“The proposed property is wooded with many large trees. It appears to have remained undisturbed for a very long time; possibly more than 300 years, given the size and probable age of some of the trees.

This is a relatively large, old growth forest within the Crown Hill Cemetery property near downtown Indianapolis.

The project site consists of undeveloped land within the existing property of the privately owned Crown Hill Cemetery, in a forested parcel with many old growth trees in excellent health.

There is an extraordinarily large bur (sic) oak tree located within the boundary of one of the wetlands that may be more than 500 years old.”

These 14.75 acres of pre-settlement old growth hardwood forest are an irreplaceable ecological resource that is so very rare throughout most of the industrialized Midwest, yet exists here in the middle of our state's largest city. The miraculous survival of this forest sets Indianapolis apart from most other large American cities today. This action seeks to stop the destruction of this priceless resource and requests urgent review in light of Defendants' plans to begin demolition very soon.

### **NATURE OF THIS ACTION**

1. Plaintiffs seek declaratory and injunctive relief from this court for actions by the U.S. DEPARTMENT OF VETERANS AFFAIRS (VA) and the NATIONAL CEMETERY ADMINISTRATION (NCA) in use of a 14.75 acre section of old growth forest (Forest) purchased from Crown Hill Cemetery, Inc. in mid-July 2015 for the Crown Hill National Cemetery Expansion. (Project).

2. On September 8, 2015 Defendants issued a FINDING OF NO SIGNIFICANT IMPACT (FONSI) based upon publication on September 9, 2015 of its ENVIRONMENTAL ASSESSMENT, CROWN HILL NATIONAL CEMETERY EXPANSION IN INDIANAPOLIS, WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA (EA).

3. Defendants failed to provide proper notice to the public and interested parties of its proposed actions.

4. Defendants concluded the purchase of the property before completing the process necessary to authorize the purchase.

5. Defendants failed to take into account several factors under relevant regulations which required that they conduct a full Environmental Impact Statement (EIS) rather than just an EA. The EA mis-stated important facts which, therefore, led to their incorrect conclusion regarding the FONSI and lack of a need for an EIS.

6. Defendants failed to even consider, let alone take a hard look at, any alternative locations for the Project, even though numerous other alternatives are available.

7. Defendants' actions violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and implementing regulations at 40 C.F.R. Part 1500-1518 and 38 C.F.R. Part 26.

8. Plaintiffs seek an order: (1) Declaring that Defendants' NEPA process, and NEPA documents deprived the public of the opportunity for meaningful comment and participation, violated NEPA and its implementing regulations, and are agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or are illegal agency inactions, under the APA, 5 U.S.C. § 706(1) and (2)(A); (2) vacating the improper and illegal EA and FONSI; and, (3) ordering Defendants to fully comply with their duties under NEPA, including the duty to consider alternatives, the duty to solicit and consider public comments and input, and the duty to conduct a full EIS for the Project.

## **JURISDICTION AND VENUE**

9. This Court has jurisdiction over this matter under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the NEPA, 42 U.S.C. §§ 4321-4370; the Administrative Procedure Act, 5 U.S.C. §§ 701-706; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; and the Equal Access to Justice Act, 28 U.S.C. § 2412. An actual, justiciable controversy now exists between Plaintiffs and Defendants, and the requested relief is therefore proper under 28 U.S.C. §§ 2201-02 and 5 U.S.C. §§ 701-06.

10. Venue in this Court is proper under 28 U.S.C. § 1391(e) because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, the property at issue is within this district, and most of the Plaintiffs herein reside in this district as defined by 28 U.S.C. § 1391(d).

## **PARTIES**

11. Plaintiff INDIANA FOREST ALLIANCE (IFA) is an organization that places a high priority on protecting and conserving forest resources in Indiana. It undertakes a wide range of activities including education, advocacy, and scientific study in order to protect and conserve forest ecosystems in Indiana, and to communicate to the public and policy-makers about the values of that preservation.

12. IFA's members, supporters, and/or staff live, work, recreate, study, and otherwise use and enjoy forest resources throughout Indiana and the Forest in particular.

13. IFA's members, supporters, and/or staff frequently engage in wildlife watching, hiking, photography, and other activities in the Forest, and will continue to do so into the future.

14. IFA and its members and supporters also find deep spiritual satisfaction and aesthetic enjoyment in preservation of unique and irreplaceable forest resources in Indiana and the Forest in particular.

15. IFA and its members, supporters, and/or staff will suffer direct and irreparable to the organization's and their missions to conserve Indiana's forest ecosystems.

16. IFA and its members, supporters, and/or staff will foreseeably suffer direct and irreparable injuries to their recreational, aesthetic, scientific, spiritual, and other interests and activities as a result of the destruction of the Forest.

17. IFA and its members, supporters, and/or staff are also directly injured by Defendants' consistent refusal to fully disclose and evaluate the environmental impacts of their activities in destruction of the Forest, as NEPA requires.

18. IFA and its members, supporters and/or staff have a strong interest in ensuring that Defendants comply with all applicable federal statutes and regulations, including NEPA and the Clean Water Act and comparable Indiana statutes and regulations that protect forests and our environment on which they depend.

19. IFA and its members, supporters, and/or staff are directly injured and adversely affected by Defendants' failure to comply with federal law and violations of

the NEPA and APA.

20. Plaintiff VETERANS IN INDUSTRY AND ARTS (VIA) is a nonprofit organization dedicated to promoting veterans and obtaining recognition of their services as key contributors to community success. It is an incubator for veteran artists, and entrepreneurs. VIA encourages and promotes veterans' work in the community through networking, mentorships, and collaboration.

21. VIA and its members and supporters and their children use the Forest for recreation, nature study, and to enjoy the peace of the forest.

22. VIA and its members and supporters particularly value and benefit from the presence of this resource in the Indianapolis urban environment.

23. VIA and its members and supporters, including their children, will suffer direct and irreparable injuries to their recreational, scientific, aesthetic and spiritual activities as a result of the extension of the National Cemetery in the Forest.

24. VIA and its members and supporters are also directly injured by the refusal of the Veterans Administration to abide by the requirements of NEPA and the APA in the decision-making process concerning this project.

25. VIA and its members have a strong interest in ensuring that Defendants comply with all applicable federal and state law, including NEPA, the Clean Water Act, and comparable Indiana laws.

26. Plaintiff INDIANA INTERCHURCH CENTER (ICC) is a multi-tenant nonprofit center that is intended to be "a living demonstration to the world that it is

possible . . . to have unity without sacrificing freedom.”

27. The ICC facility is home two dozen organizations representing several major faith traditions and various educational, environmental, and social service/action groups. These groups include the Sierra Club and Earth Charter, two organizations which have sensitized ICC to work to preserve green spaces for the multiple ways in which they enrich our community.

28. The ICC facility is located immediately to the north of the Forest. ICC is concerned about the disruption to the watershed and drainage that could potentially occur with the planned removal of trees in the Forest.

29. The ICC and its members derive spiritual and aesthetic enjoyment from their proximity to the Forest.

30. The ICC and its members will suffer direct and irreparable injuries to their spiritual and aesthetic activities as a result of the development of the Forest.

31. The ICC and its members are also directly injured by the Defendants’ refusal to provide reasonable notice and disclosure of the environmental and human impacts, associated with the decision to develop a National Cemetery in the Forest.

32. The ICC and its members are also directly injured by the refusal of the Veterans Administration to abide by the requirements of NEPA and the APA in the decision-making process concerning the expansion of the National Cemetery into the Forest.

33. Plaintiff FELICITY KELCOURSE is a theological educator who since 1996 has taught pastoral care and counseling at The Christian Theological

Seminary, located directly north of the Forest. She holds a degree in Human Ecology from Oberlin College. and advanced degrees from the Earlham School of Religion, the doctoral program in Psychiatry and Religion at Union Theological Seminary, and Blanton-Peale Graduate Institute in New York, Dr. Kelcourse is a member of the American Academy of Religion (AAR), the Society for Pastoral Theology, Spiritual Directors International, the Association for Doctor of Ministry Education (ADME), and Quakers in Pastoral Care and Counseling.

34. Dr. Kelcourse's personal as well as professional experience have taught her to value forest land generally, and, specifically, the unique features of the Forest, which she has visited on many occasions for both aesthetic as well as scientific appreciation, including observation of the intricate interconnections of this healthy nature forest ecosystem.

35. As a professional therapist, Dr. Kelcourse is aware of psychological benefits, particularly for children, provided through access to urban nature areas such as the Forest. She is concerned on behalf of her clientele and the local neighborhood where she works that their emotional and spiritual health will be compromised by the loss of the Forest as an intact old growth forest.

36. Dr. Kelcourse has suffered, and will continue to suffer, emotional distress caused by her contemplation of the likely destruction of the Forest. She and her clients will also suffer irreparable injuries through the diminishment of the clean air, noise buffering qualities, and flood control features of the Forest.

37. Dr. Kelcourse is also directly injured by the Defendants' refusal to

provide adequate notice to local residents, employers, and employees, and to solicit their input into the decision-making process.

38. Plaintiff CLARKE KAHLO is a resident of Marion County, Indiana, and a retired city planner and administrator with the Indianapolis Division of Planning where he prepared and supervised the City's comprehensive land use plans and related activities. Mr. Kahlo's residence of forty years is located approximately one mile east of the project location. His family ancestors were first interred at Crown Hill Cemetery in 1916.

39. Mr. Kahlo served as chairman of the Alliance of Crown Hill Neighbors, which successfully remonstrated before the Indianapolis Metropolitan Development Commission in 2006 regarding proposed rezoning to allow development in the Forest.

40. Mr. Kahlo visits the Crown Hill Cemetery frequently to visit and tend his family's two burial sites and to tour the cemetery grounds, including the Forest, which have provided him quiet and relatively pollution-free scenic and spiritual benefits.

41. Mr. Kahlo values and benefits from the Forest's contribution to the quality of the local human environment through its role in lessening the City's problems with its Combined Sewer Overflow, through its contribution in reduction of climate disruption, and through the access it provides to local residents to experience the peace of an urban old growth forest.

42. Mr. Kahlo will suffer direct and irreparable injury through the loss of

the aesthetic and spiritual benefits provided by the Forest.

43. Mr. Kahlo has suffered and will continue to suffer from Defendants' failure to fulfill its legal obligations under NEPA and the APA to provide notice to the local community, including known stakeholders such as the Alliance of Crown Hill Neighbors, to explore the numerous alternatives available for the National Cemetery expansion and to fully investigate and communicate likely and potential impacts to the human environment.

44. Plaintiff GARY MOODY is a veteran and a resident of Indianapolis, Indiana. He has been a client of the VA healthcare system since 1979, the last thirteen years at Roudebush VA Medical Center in Indianapolis.

45. As a veteran, Mr. Moody is one of the targeted beneficiaries of the planned expansion of the National Cemetery.

46. At no time did Mr. Moody receive notice, directly or indirectly, through the nearby Roudebush VA Medical Center or otherwise, from the Defendants concerning the Project.

47. Mr. Moody has been and will continue to be injured by the secretive nature of the Defendants' notice process for the project. He was and will continue to be injured by the Defendants' initial refusal to allow members of the public to speak at a public meeting belatedly held on September 29, 2016. He was and will continue to be injured by the failure of Defendants to respond to the written comments and offer of assistance he submitted on September 29, 2016.

48. Mr. Moody has been and will continue to be injured irreparably by the

dishonor shown to him and to all veterans by Defendants in their refusal to provide notice to local veterans and to solicit their input about the proposed project location.

49. Mr. Moody has been and will continue to be injured irreparably by Defendants' failure to abide by the requirements of NEPA and the APA, and by their lack of transparency in the decision-making process.

50. Plaintiff KAPPA DELTA PI, INTERNATIONAL HONOR SOCIETY IN EDUCATION (KDP) is a nonprofit organization founded in 1911 to foster excellence in education. KDP is committed to equitable access to a quality education that includes an understanding of the living systems upon which our lives depend.

51. KDP's mission includes support for environmental learning experiences, which research has shown play a critical role in urban education. KDP is aware of, and supports, the use of the Forest by the local school district for field trips, precisely to provide such environmental learning experiences.

52. KDP also supports environmental learning experiences like those that have been available in the Forest for children with mental health issues and autism.

53. KDP, its members and its clientele, including teachers and students, will suffer irreparable injury from the destruction of the Forest because such destruction would deny access to this unique learning environment by local children, families, and schools, particularly those from low income neighborhoods in close proximity to Crown Hill Cemetery.

54. KDP has suffered and will continue to suffer irreparable harm from

Defendants' failure to solicit reasonable public input into the decision- making process and to explore alternatives to the proposed site.

55. Plaintiff MARY T. BOOKWALTER is a resident of Marion County, Indiana and lives some 6 miles from the Forest.

56. Ms. Bookwalter is a veteran and former officer in the U.S. Navy and Marines.

57. Ms. Bookwalter's former husband, Col. R.C. McInteer (USMC ret.) is buried in Crown Hill cemetery, where she visits regularly, and where she retires to the Forest for quiet reflection and solace.

58. In 2006-2007 Ms. Bookwalter was a participant in the Association of Crown Hill Neighbors, which opposed the commercial development of the Forest and Northeast field of Crown Hill Cemetery.

59. Ms. Bookwalter has reviewed the EA published by Defendants and disagrees completely with their FONSI

60. Ms. Bookwalter had no notice of the plans to purchase and destroy the Forest, even though she was a listed participant in the earlier hearings on the same issue.

61. Ms. Bookwalter is a member of the Indiana Forest Alliance, and is keenly involved in conservation of forest ecosystems.

62. Ms. Bookwalter asserts that, as a veteran with family in Crown Hill, the destruction of the Forest will dishonor her, her family, and all veterans, and will thereby result in irreparable injury to her.

63. Defendant ROBERT A. McDONALD is Secretary of the U.S. Department of Veterans Affairs and is sued only in his official capacity.

64. Defendant U.S. DEPARTMENT OF VETERANS AFFAIRS is the agency charged with administering affairs regarding veterans, including cemetery services.

65. Defendant RONALD E. WALTERS is Interim Under Secretary for Memorial Affairs of the National Cemetery Administration of the U.S. Department of Veterans Affairs and is sued only in his official capacity.

66. Defendant NATIONAL CEMETERY ADMINISTRATION is an agency under the authority of the U.S. Department of Veterans Affairs and has direct responsibility for development and management of veteran cemeteries.

67. All Defendants are located at 810 Vermont Ave., NW, Washington, DC, 20420.

### **LEGAL BACKGROUND**

68. NEPA is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). It requires federal agencies to “take seriously the potential environmental consequences of a proposed action” by taking a “hard look” at the action’s consequences. The statute’s twin objectives are (1) to ensure that agencies consider every significant aspect of the environmental impact of a proposed action, and (2) to guarantee that relevant information is available to the public to promote well-informed public participation.

69. NEPA's primary purposes are to ensure fully informed decision-making and to provide for public participation in environmental analyses and decision-making. *Id.* §§ 1500.1(b), (c). The Council on Environmental Quality (CEQ) promulgated regulations implementing NEPA that are binding on all federal agencies. 40 C.F.R. § 1500–1518.4. All federal agencies are required to promulgate regulations that establish the processes they will follow to ensure that their actions comply with NEPA. The Defendants' NEPA regulations are set forth at 38 C.F.R. Part 26. Agency actions taken pursuant to NEPA are reviewable by this Court under the APA, 5 U.S.C. §§ 702, 704.

70. Under NEPA, an Environmental Impact Statement (EIS) must be prepared for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). NEPA requires that the decision-maker, as well as the public, be fully informed so that “environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b).

71. NEPA requires federal agencies to prepare a detailed EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

72. One of NEPA's fundamental goals is to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321. The scope of NEPA review is quite broad, including the consideration of all reasonable alternatives, 40 C.F.R. §

502.14(a), and direct, indirect and cumulative effects on “ecological . . . aesthetic, historic, cultural, economic, social, or health” interests. 40 C.F.R. § 1508.8. NEPA requires adequate disclosure of all such impacts. The NEPA documentation must provide the decision-maker and the public with adequate information, evidence, and analyses to fully assess the potential impacts of the proposed actions. Id. § 1502.1.

73. The requirement to evaluate all reasonable alternatives is not simply procedural; the CEQ has stated that the alternatives analysis is “the heart” of the NEPA analysis. 40 C.F.R. § 1502.14; see also 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1507.2(d). The federal agency must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; . . . [d]evote substantial treatment to each alternative considered in detail including the proposed action;” and “[i]nclude reasonable alternatives not within the jurisdiction of the lead agency.” 40 C.F.R. § 1502.14(a)–(c).

74. To satisfy NEPA’s “hard look” requirement, a federal agency must present the environmental impacts of the proposed action and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among the options by the decision maker and the public. 40 C.F.R. § 1502.14. Because the purpose and need statement required by 40 C.F.R § 1502.13 defines the scope of reasonable alternatives, an agency may not narrowly construe the purpose and need so as to define away competing reasonable alternatives and foreclose consideration of a reasonable range of alternatives.

75. An agency may prepare an EA to briefly put forth sufficient evidence and analysis to determine whether to prepare an EIS or to instead issue a FONSI. 40 C.F.R. § 1508.9.

76. An agency may only issue a FONSI for actions with no significant impact on the human environment. *Id.* § 1508.13. If an action may have a significant effect on the environment, or even if there are substantial questions as to whether it may, the agency must prepare an EIS. See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (“An EIS must be prepared if substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor.” (Internal quotations omitted)).

77. NEPA defines significance in terms of context and intensity. 40 C.F.R. § 1508.27. Ten “intensity” factors help determine whether an agency action may cause significant impacts. *Id.* § 1508.27(b). The presence of even one of the factors may be sufficient to require preparation of an EIS. Factors include: “Unique characteristics of the geographic area such as proximity to . . . ecologically critical areas,” *id.* § 1508.27(b)(3); effects that are “highly uncertain or involve unique or unknown risks” or “likely to be highly controversial,” *id.* § 1508.27(b)(5), (4); cumulative impacts, *id.* § 1508.27(b)(7); and the extent to which the action threatens violation of other laws. *id.* § 1508.27(b)(10). If the agency’s action may be environmentally significant under even one of these criteria, the agency must prepare an EIS.

78. Both EAs and EISs must discuss a proposed action's direct, indirect, and cumulative effects. 40 C.F.R. § 1502.16. Direct effects are "caused by the action and occur at the same time and place," whereas indirect effects are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." Id. § 1508.8. Cumulative effects are "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." Id. § 1508.7.

79. To satisfy NEPA's hard look and public disclosure and participation requirements, an agency must evaluate in detail a project's potential site-specific impacts.

80. An agency's decision not to prepare an EIS may be overturned if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

## **STATEMENT OF FACTS**

### **A. Defendants Failed to Provide Adequate Notice**

81. The notice of the project by the VA and the NCA was totally inadequate and in violation of the NEPA and implementing regulations.

82. The VA did not hold a public hearing or a public meeting on this project despite its admission twice in the EA that the state had informed the NCA that there had been substantial environmental controversy in the past over development of the woods on this site.

83. The NCA only published notices in the legal section of the Indianapolis Star (STAR) about the EA and FONSI for this project, which notices failed to describe the project location with sufficient specificity so as to inform the public that it would encompass the Forest.

84. A first notice was the Notice of Availability (NOA) of the Draft EA, which was published in the STAR for 10 consecutive days from July 22 to August 1, 2015.

85. The NOA said the DEA was “for the proposed property acquisition for cemetery expansion and development of the Crown Hill National Cemetery within the existing Crown Hill Cemetery in Indianapolis, Indiana.”

86. The NOA did not mention any detail about where this proposed property acquisition was in the Crown Hill Cemetery nor did it mention anything about any woods, old growth or otherwise, being cleared for the cemetery expansion.

87. The NOA stated that the VA intended to issue a FONSI on the proposed cemetery expansion.

88. The NOA also announced a 30 day public comment period on the DEA but stated that comment period would end on August 7, only 16 days later.

89. A person reading this NOA would not have any idea that this project involved the old growth forest at the north end of Crown Hill much less that this old growth forest would be removed. They could easily have agreed with the idea that there was no significant impact to the environment from this project and not paid any further attention because of the lack of information that would have informed

them otherwise.

90. The second notice was the NOA of the “FINAL ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT” published in the September 12, 2015 issue of the STAR.

91. This NOA announced a “30-day” public comment period ending on October 13, 2015. The NOA states only that the cemetery expansion would occur “in a wooded parcel north of the existing national cemetery” and that “existing forested areas will be removed as each phase of development occurs”, and “there will be some tree buffers and forested areas left undisturbed to retain the character and serenity of the site.”

92. The Notice still did not indicate exactly where this wooded parcel was located, and said nothing about it being located along 42<sup>nd</sup> Street. There are several other wooded parcels in Crown Hill Cemetery “north of the existing national cemetery” that are not at the old-growth Forest.

93. The NOA was inadequate on its face, and did not tell the reader that the forest was at the north end of Crown Hill Cemetery, much less that the old growth forest within that forest was either the site for this project or that the Forest would be destroyed.

94. The EA states that the NCA solicited input only from government agencies and “did not engage in public involvement with adjacent property owners during the scoping phase of the project.”

95. People in the surrounding community simply did not know that the

NCA was planning to put its cemetery in the old growth Forest that was specifically at issue in 2005-2007 and hotly debated. Even if someone in that community had seen the inadequate legal notices, they would not have known that the old growth Forest was the location for this proposed cemetery.

96. Defendants failed to follow relevant NEPA regulations for public notice and input including:

- a. 40 CFR 1506.6 (a) which requires Defendants to “Make diligent efforts to involve the public in preparing and implementing their NEPA procedures;”
- b. 40 CFR 1506.6(b)(3) which requires Defendants to:
  - “Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected. . . (3) In the case of an action with effects primarily of local concern the notice may include:
    - (i) Notice to State and area wide clearinghouses pursuant to OMB Circular A-95 (Revised).
    - (iii) Following the affected State’s public notice procedures for comparable actions.
    - (iv) Publication in local newspapers (in papers of general circulation rather than legal papers).
    - (v) Notice through other local media.
    - (vi) Notice to potentially interested community organizations including small business associations.
    - (vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.”

c. 40 CFR 1506.6(c)(1) which states Defendants shall:

“hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is: Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.”

d. VA NEPA regulation 38 CFR 26.9 states:

“Information on and public participation in VA environmental process.” [specifically connecting the VA’s obligations to reach out to the public to the requirements in CEQ regulations]  
“During the preparation of environmental documents, the responsible VA element shall include the participation of environmental agencies, applicants, State and local governments and the public to the extent practicable and in conformance with CEQ Regulations.”

97. Defendants failed to follow relevant Executive Orders binding upon them, including:

a. Executive Order 11514, subparagraph (f) of 40 CFR 1507.2 which requires Defendants to “fulfill the requirements . . . of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

b. Executive Order 11514, subparagraph (b), which states that the heads of Defendant agencies shall:

“(b) Develop procedures to ensure the fullest practicable provision of timely public information and understanding of federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall

include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action.”

98. The EA in this matter repeatedly mentions conducting a “scoping phase” of the project. Defendants failed to follow relevant CEQ Guidance on Scoping, in its “MEMORANDUM FOR GENERAL COUNSELS, NEPA LIAISONS AND PARTICIPANTS IN SCOPING,” which requires early identification and outreach to potential stakeholders, particularly in the affected local community, to identify meaningful issues to be addressed in the EIS.

99. Before conducting its EA, Defendants failed to follow the Guidance that if no EA has been prepared, the agency should prepare an “information packet” providing information that would be provided in an EA that would “of course include the preliminary information that is needed,” along with “a description of the proposal, an initial list of impacts and alternatives, maps, drawings, and any other material or references that can help the interested public to understand what is being proposed.”

100. Defendants provided no such information in the EA, let alone distributing the required information to the interested public before the EA.

101. Defendants admitted in the EA that “previous development proposals of the property generated public outcry from surrounding neighborhoods,” yet did absolutely nothing in response.

102. Defendants completely failed to meet any of their notice requirements when they decided not to hold a public hearing or meeting, post notices in area newsletters, flyer the surrounding area, or reach out to any adjacent property

owners in this scoping process, or to notify any neighborhood associations, churches or any other neighbors to this project, or to notify any environmental organizations, despite this acknowledgement of previous controversy over development on this very site fewer than 10 years ago.

**B. Defendants Bought the Property Before Completing the Environmental Review**

103. Defendants informed some Plaintiffs herein at a public meeting that the property had been purchased on July 15, 2016.

104. The Deed recorded at the Marion County Recorder's Office was executed on September 15, 2015.

105. The Legal Notice, "NOTICE OF AVAILABILITY FINAL ENVIRONMENTAL IMPACT STATEMENT AND FINDING OF NO SIGNIFICANT IMPACT U.S. DEPARTMENT OF VETERANS AFFAIRS," published in the STAR on September 12, 2015, stated the 30 day public comment period on these documents would end on October 13, 2015.

106. Defendants purchased the property at least 28 days before it completed the environmental documentation for the development of this property, which necessarily includes the period for public comment.

107. These actions occurring before the environmental review was completed violated the NEPA requirements including:

- a. 40 CFR 1506.1 which restricts Defendants from taking any actions prior to issuing a record of decision that would:

“Limit the choice of reasonable alternatives.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) It itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.”

- b. VA NEPA regulation 38 CFR 26.7 (b) which states:

“The major decision points for VA actions, by which time the necessary environmental documents must be completed are as follows:

(6) Land acquisition for development. Prior to the Secretary’s acceptance of custody and accountability (for Federal lands), or acceptance of offer to donate or contract for purchase (for private lands).”

108. Defendants picked the property, took some, but not all, the steps required before they bought the property, then bought the property before completing the required process and review, ensuring ratification of their flawed outcome.

**C. Defendants' EA and FONSI were Flawed and Inadequate and a Full EIS was Required**

109. This project is a major federal action that will significantly impact the quality of the human environment in the area, which requires an Environmental Impact Statement (EIS) rather than an EA.

110. A "major federal action" is one that "includes actions with effects that may be major and which are potentially subject to federal control and responsibility. Major reinforces but does not have a meaning independent of significantly." 40 CFR 1508.18, 27, under which such actions include

"(a) . . . include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies;

(b) . . . tend to fall within one of the following categories:

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area."

111. This project will involve the expenditure of at least \$9 million dollars in federal funds.

112. This project will "significantly impact" this old growth Forest and the local environment.

113. Significantly is defined by 40 CFR 1508.27 as follows:

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This 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.

(b) Intensity. This refers to the severity of impact. . . . The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial. . . .

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, . . . wetlands . . . or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial . . .

(7) 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 parts.”

114. This project will clear and transform virtually all of this old growth Forest into a manicured combination of lawn, pavement, building, and cement.

115. Plaintiffs and others, including staff and visitors at the Christian Theological Seminary, teachers and their classes, individuals from the adjacent neighborhood and residents from throughout Indianapolis who visit their diseased relatives or come to Crown Hill to recreate in its greenspace, who have all enjoyed walking by and through this forest for many years, will no longer be allowed that opportunity.

116. Plaintiffs and other residents in the adjacent neighborhood, an area already deficient in parks and greenspace, will lose access to this high quality natural greenspace.

117. Plaintiffs and the residents of Indianapolis and Indiana will lose the only native old growth hardwood forest that remains in the inner city of their capitol city.

118. Plaintiffs and residents of Indiana will lose one of only a dozen old growth hardwood forests remaining in the state, reportedly less than a thousand acres of the over 23 million acres in our state.

119. Plaintiffs and residents of the Midwest will lose one of only a few dozen such tracts of native old growth hardwood forests remaining in the entire lower Midwestern United States.

120. As more and more rare greenspaces such as this one are lost, the long-term effect of the loss of this forest will be more adverse to Plaintiffs and others who must travel farther and farther to experience the enjoyment of connecting with pristine nature, a lost benefit that all agree nurtures and enlightens humankind.

121. Plaintiffs and others have opposed destruction of this very Forest now three times, as others try to destroy it.

122. The loss of this old growth Forest, added to the loss of many of the remaining tracts of old growth forest in Indiana will have an adverse cumulative effect on Indiana's ecological heritage as well as the health of the native hardwood forest ecosystem in the state.

123. This old growth Forest is clearly part of the human environment in Indianapolis, as defined in 40 CFR 1508.14: “Human environment’ shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.”

124. Defendants acknowledged in their EA the undisturbed nature of this forest at least five times, and acknowledged at least three times the unique nature of the greenspace in which this forest is located. For example, on page 5, the EA states:

“It appears to have remained undisturbed for a very long time; possibly for more than 300 years given the size and probable age of some of the trees. The only apparent disturbances are a moderate amount of dumping of cemetery landscape waste on the south edge of the woods and the presence of an unpaved access road. This is a relatively large, old growth forest within the Crown Hill Cemetery property near downtown Indianapolis. The Crown Hill Cemetery and the nearby Indianapolis Museum of Art and Butler University properties contain some of the largest contiguous acreages of greenspace surrounded by a fully developed urban environment in the state or Indiana and possibly the Midwest.”

125. Despite the repeated admission that the project would virtually destroy the Forest, Defendants’ FONSI reached the fanciful conclusion that the elimination of this old growth forest, the only old growth forest in inner-city Indianapolis, would have no significant impact on the quality of the human environment.

126. Defendants reached this conclusion of no significant impact without any explanation.

127. Defendants' EA does not explain how the replacement of this old growth forest with manicured lawn, buildings, concrete and pavement would have no significant effect on the quality of the human environment.

128. Defendants' EA claims that because there will be no change in zoning, the greenspace of the cemetery will remain, but says nothing about why the loss of the old growth forest is not significant.

129. The EA asserts on page 37 in section 3.15 "CUMULATIVE IMPACTS", in one of its incredulous and incorrect leaps in logic, that:

"If the VA does not purchase the land, it will remain for sale and eventually be purchased by another entity for another type of development. "

130. There is no support or discussion of how Defendants reached this conclusion, quite simply because it is made up.

131. The last time the public remonstrated against destruction of this Forest, the Central Indiana Land Trust, Inc. (CILT) offered to buy the entire 60+ acres in order to protect this Forest from development.

132. The CILT and the Laura Hare Charitable Trust have both again offered to buy this Forest and another 18+ acres next to it in order to protect it from development, even offering to pay Defendants back any and all their costs incurred in the entire project to date.

133. Defendants' EA and public statements give lip service to some vague effort to preserve some of the old, large trees, which any competent tree specialist will tell you is virtually impossible given the extent of work this project involves.

134. Defendants' EA does not commit to any plan or specific mitigation steps to leave any of the big trees in place. There are no locations of trees identified and no lists or inventories of trees provided or referred to in the EA or provided as appendices, and there is no plan that discusses leaving any specific trees in place.

135. Nothing in Defendants' EA or FONSI explains why or how the elimination of the only old growth forest in inner-city Indianapolis would not have a significant effect on the human environment, in violation of 40 CFR 1508.13, which states:

“Finding of no significant impact’ means a document by a federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.”

#### **D. Defendants Failed to Examine Any Alternative Sites**

136. Defendants' EA only considered alternatives by limiting the scope of the consideration to: 1) Build the cemetery on this site; or, 2) don't build the cemetery at all.

137. Defendants completely failed to consider any alternative site for this much-needed cemetery, again ensuring the outcome of their flawed process.

138. Defendants are required to consider alternative sites. Sec. 102 of NEPA [42 USC § 4332] states:

“The Congress authorizes and directs that, to the fullest extent possible: (2) all agencies of the federal government shall — (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources[.]”

40 CFR 1507.2 states:

“Agencies shall: ... (d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.”

40 CFR 1508.9 “Environmental Assessment” states that the EA,

“(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.”

139. Defendants are specifically required to comply with the requirement to consider alternative sites, yet failed to consider any alternative sites, again ensuring the outcome of their flawed process. 40 CFR 1500.6 “Agency authority” states:

“The phrase ‘to the fullest extent possible’ in section 102 means that each agency of the federal government shall comply with that section unless existing law applicable to the agency’s operations expressly prohibits or makes compliance impossible.

**E. Defendants Ignored State and Federally Protected Wetlands in the Forest**

140. Defendants' EA and FONSI failed to properly consider the presence of both federal jurisdictional wetlands and Indiana state isolated wetlands in and adjacent to the Forest.

141. Wetlands are present within the Forest.

142. Mechanized removal of trees, or discharge of any dredge or fill material, such as soil, within these wetland areas requires a permit from the U.S. Army Corps of Engineers (COE) under Section 404 of the federal Clean Water Act (CWA), 33 U.S.C. Section 1344, as well as a water quality certification from the Indiana Department of Environmental Management (IDEM) pursuant to CWA Section 401, 33 U.S.C. Section 1341, unless the COE determines the areas are not jurisdictional wetlands.

143. The wetlands within the wooded area have a direct surface hydrologic connection by ephemeral channel to an area to the west of the Forest that was determined to be an isolated an isolated wetland in a jurisdictional determination by the COE in 2006. Such jurisdictional determinations are only valid for five years. Subsequent examination of the drainage from the wetlands connected to this ephemeral channel documents their drainage through a discreet channel exiting the Forest into a valley and drainage tile in the field immediately to the east of the Forest. Absent another jurisdictional determination to the contrary from the COE, it is clear that these wetlands are connected to the waters of the United States and therefore subject to the COE's jurisdiction.

144. Defendants did not obtain any such jurisdictional determination from the COE, which is another defect in the EA.

145. Even if the wetland areas are not subject to federal jurisdiction, the removal of trees and other construction activities within those areas would require a permit or authorization from IDEM pursuant to Ind. Code 13-18-22 and the IDEM regulations at 327 IAC 17, under the Indiana state isolated wetlands program.

146. Defendants EA and FONSI falsely dismissed the existing wetlands without adequate consideration under federal and Indiana statutes and regulations, and failed to even discuss these permit requirements, which is yet another defect with the EA.

### **CLAIMS FOR RELIEF**

#### **A. Failure to Give Adequate Notice and Opportunity for Public Comment**

147. Defendants gave inadequate notice to the public and other interested parties, knowing full well that the proposed project was highly controversial due to the planned destruction of this old growth Forest.

148. This flawed and completely inadequate NEPA public involvement process violated both NEPA's specific provisions and regulations and NEPA's overall purpose and was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and in violation of 5 U.S.C. § 706(2)(A).

## **B. Acquisition of Property Before Assessment**

149. Defendants' acquisition of the Forest before it completed a full EA or EIS biased the required review in favor of a no-impact finding and violated the NEPA mandated process, NEPA's overall purpose and was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and in violation of 5 U.S.C. § 706(2)(A).

## **C. Failure to Take a Hard Look at Impact of Actions and Alternatives**

150. Defendants' EA and FONSI are inadequate because they failed to take a hard look at the direct, indirect, and cumulative impacts of the Project in violation of NEPA. Accordingly, the EA and FONSI are arbitrary, capricious, an abuse of discretion, and not in accordance with law, and must be reversed and set aside pursuant to the APA, 5 U.S.C. § 706(2)(A).

151. Defendants' EA and FONSI are inadequate because they failed to consider any alternative sites for the project and thus are arbitrary, capricious, an abuse of discretion, and not in accordance with law, and must be reversed and set aside pursuant to the APA, 5 U.S.C. § 706(2)(A).

## **D. Failure to Conduct an EIS**

152. Defendants failed to conduct a full EIS, which was required in the circumstances existing for this Project.

153. The relevant EIS factors, individually and cumulatively, demonstrate that Defendants' actions under EA and FONSI have a significant impact on the environment. Defendants' decision not to prepare an EIS was arbitrary, capricious, an abuse of discretion, and not in accordance with law, which has caused, and threatens serious prejudice and injury to, Plaintiffs' rights and interests. The EA and FONSI and must be reversed and set aside pursuant to the APA, 5 U.S.C. § 706(2)(A).

#### **E. Destruction of State and Federal Wetlands**

154. Defendants' EA and FONSI are fatally insufficient for failure to properly consider and address federal jurisdictional wetlands and Indiana state isolated wetlands on and adjacent to the Forest.

155. Defendants failed to discuss or obtain a permit from the COE under Section 404 of the federal CWA, 33 U.S.C. Section 1344, as well as a water quality certification from the IDEM pursuant to CWA Section 401, 33 U.S.C. Section 1341, unless the COE determines the areas are not jurisdictional wetlands.

156. Defendants' failure to address the wetlands on and adjacent to the site is arbitrary, capricious, an abuse of discretion, and not in accordance with law, and must be reversed and set aside pursuant to the APA, 5 U.S.C. § 706(2)(A).

## **F. Injunctive Relief**

157. Plaintiffs have been injured by Defendants' failure to comply with the NEPA and the APA and will be irreparably harmed if an injunction does not issue enjoining the Defendants from continuing with the Project and destroying the Forest prior to the determination of the merits of this action.

158. Plaintiffs have no plain, speedy, or adequate remedy at law.

159. Plaintiffs' claims for relief are ripe.

160. Defendants will suffer no prejudice by delaying the start of the project until the merits of this action are determined.

161. If not enjoined by this Court pending this action, Defendants will continue to move forward with the Project and begin demolition of the Forest.

162. Accordingly, injunctive relief is appropriate.

### **RELIEF REQUESTED**

Plaintiffs respectfully request that the Court grant the following relief:

A. A Preliminary Injunction ordering no further actions be taken on the Project and that no degradation or destruction of the Forest take place until a determination can be made by this Court regarding the merits of a this action;

B. Declare that Defendants' EA and FONSI violated NEPA for failing to take the required hard look at the effects of the proposed action, or to consider any alternative sites, and set aside the EA and FONSI under the APA;

C. Declare that Defendants' determination not to prepare an EIS, and

instead issue the EA and FONSI, violated NEPA, and order Defendants to promptly comply with NEPA by preparing a legally and scientifically adequate EIS addressing the Project;

D. Issue such other injunctive relief as may be requested hereafter by Plaintiffs;

E. Award Plaintiffs their reasonable costs, litigation expenses, and attorneys' fees associated with this litigation; and

F. Grant such further and other relief as the Court deems just and proper to remedy Defendants' violations of law and protect the public interest.

Dated December 7, 2016.

/s/ W. Russell Sipes  
W. Russell Sipes  
Attorney for Plaintiffs  
**THE SIPES LAW FIRM**  
136 East Market Street, Suite 700  
Indianapolis, Indiana 46204  
855-747-3752/fax 855-747-3940  
[wrs@workinglawyers.com](mailto:wrs@workinglawyers.com)