IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

LORETTO O'REILLY, JR., *ET AL.*	CIVIL ACTION
Plaintiffs	NO 04-0940
versus	SECTION "A)(5)
UNITED STATES ARMY CORPS OF ENGINEERS	JUDGE ZAINEY MAG. JUDGE CHASEZ

INTERVENOR'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

May It Please the Court:

This is an action brought under 5 USC § 701 *et seq.*, seeking to enforce alleged violations of the National Environmental Policy Act, 42 USC § 4321 *et seq.*, in that the Corps of Engineers (COE) issued August J. Hand, the developer of property belonging to Intervenor's family and known as Timber Branch II, a § 404 permit[1] to dredge and fill wetlands that form part of Timber Branch II, and the plaintiffs claim that the COE was required to prepare an Environmental Impact Statement

1. A permit for dredged or fill material to be placed in the navigable waters of the United States is required by 33 USC § 1344, which is § 404 of the Federal Water Pollution Control Act amendments to the Clean Water Act. 40 CFR § 230.3(s)(7); 33 CFR § 323.3. *See,* also, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); *Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers,* 105 F.Supp.2d 953, 967 n. 5 (S.D.Ind. 2000); *Stewart v. Potts,* 126 F.Supp.2d 423, 433 (S.D.Tex. 2000). Issuing a § 404 permit is considered to be a "major Federal action" within the meaning of NEPA, 42 USC § 4332(C). Since the amending act's permit provisions are traditionally referred to as a "§ 404 permit under the Clean Water Act," rather than the Federal Water Pollution Control Act, intervenor will maintain that designation herein.

(EIS) and that the Environmental Assessment (EA) that was prepared by the COE was inadequate to meet the requirements of the NEPA. NEPA does not require in all cases that an agency prepare an EIS. An Environmental Assessment will suffice, if the COE determines that there is no impact "significantly affecting the human environment" that would occur as a result of the project for which a § 404 permit is sought. 42 USC § 4332(2)(C). That statute provides, in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall –
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> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
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> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments which would be involved in the proposed action should it be implemented.
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> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes.

The Council on Environmental Quality has promulgated regulations that are binding on all other

governmental agencies. 40 CFR § 1507.1. In 40 CFR § 1501.4(c), an agency responsible for approving or permitting actions within its jurisdiction is accorded discretion to determine whether an EIS is required. In § 1501.4(e), the agency is required to "[p]repare a finding of no significant impact [40 CFR 1508.13], if the agency determines on the basis of the environmental assessment not to prepare [an environmental impact] statement." The COE has promulgated Appendix B to 33 CFR Part 325 which sets forth the COE's implementation procedures for compliance with NEPA. 33 CFR Part 325, Appendix B, ¶ 7 establishes the procedure for and contents of an Environmental Assessment/Finding of No Significant Impact (EA/FONSI) Document. The three alternatives the COE's ultimate decisionmaker is provided with regard to the issuance of a dredge and fill permit under § 404 of the Clean Water Act are to "issue the permit, issue with modifications or deny the permit." *Ibid.* In this case, the permit was "issue[d] with modifications." The issue thus turns to whether there are legal grounds for this Honorable Court to intervene and stay or reverse that agency action.

The Administrative Procedure Act (APA), 5 USC § 702, guarantees every person suffering a legal wrong because of agency action, for which there is no other statutory procedure to redress such alleged wrongs, a right of judicial review. The allegedly aggrieved party affords review in "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction, in a court of competent jurisdiction. 5 USC § 703. The scope of such judicial review of an agency action, findings or conclusion is provided for in 5 USC § 706, which provides, in relevant part, as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or]
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> (D) without observance of procedure required by law[.]
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> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

In *Hanly v. Kleindienst,* 471 F.2d 823, 828-829 (2 Cir. 1972), it was recognized that Paragraphs (A) and (D) limit the scope of judicial review of agency actions that do not involve an agency's rule-making or adjudication functions. In the first case to reach the Supreme Court in which the scope of judicial review of an administrative agency's decision in which NEPA was applicable, the Court held judicial review of such decisions is limited as above stated, the provisions for review to determine whether an action was "unsupported by substantial evidence" in matters involving rule-making or adjudicatory hearings or to determine whether the decision of the agency is "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court," 5 USC § 706(2)(E) and (F), respectively, being inapplicable in such a case. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 413-415, 91 S.Ct. 814, 822-823, 28 L.Ed.2d 136 (1971). The Court held that judicial review in non-rulemaking or non-adjudicatory decisions does not end with the determination that the decision is within the scope of the legislative grant of power to that official, but that the "court must consider whether the decision was made on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.,* 401 U.S. at 416, 91 S.Ct.

at 823-824. The Court held that administrative review is limited to the record of the administrative proceedings, but the court could require the administrative officials who participated in the decision to give testimony or provide other evidence explaining their action. *Id.,* 401 U.S. at 420, 421, 91 S.Ct. at 825, 826. It said the inquiry into the mental processes of administrative decisionmakers is usually to be avoided. Where the administrative findings are made at the same time as the decision, "there must be a strong showing of bad faith or improper behavior before such inquiry may be made." *Id.,* 401 U.S. at 420, 91 S.Ct. at 825-826. These limitations upon judicial review have been maintained by subsequent decisions of the Court. *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973); *Florida Light & Power Co. v. Lorion,* 470 U.S. 729, 743, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643 (1985). There has been no allegation of bad faith or improper behavior by COE in its decision to permit the construction of Timber Branch II upon intervenor's family's property so as to justify any inquiry into the "mental processes" of the official at the COE who approved this permit. Under NEPA, § 4332(2)(C)(i)-(v), the administrative agency is required to write down in an environmental statement the considerations upon which the decision was made to issue the § 404 permit in this case. This Court's review of those findings and conclusions and its action granting the permit is, as more fully shown below, limited to determining whether those findings are arbitrary or capricious on the basis of the administrative record that was made by the administrative agency. The plaintiffs have attached the portions of the administrative record and cited this Court to the portions of the attached Environmental Assessment to which they direct this Court's attention, pursuant to 5 USC § 706(2). Therefore, the record before this Court upon plaintiff's motion or a preliminary injunction is sufficient to determine whether an EIS was required and/or whether the EA made by the COE is adequate to meet the requirements of NEPA.

In *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87. 97, 103 S.Ct. 2246, 2254, 76 L.Ed.2d 437 (1983), the Supreme Court said:

> The controlling statute at issue here is the National Environmental Policy Act. NEPA has twin aims. First, it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." * * * Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. * * * Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. * * * Rather, it required only that the agency take a "hard look" at the environmental consequences before taking a major action. * * * The role of courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.

The Administrative Procedure Act, in 5 USC § 703, authorizes review of such agency determinations, under the applicable standard of review, upon, *inter alia,* applications for a declaratory judgment and/or petition for injunction. When a plaintiff seeks a preliminary injunction against agency action, he is first obliged to establish that there is "a substantial likelihood of prevailing on the merits." *Guy Carpenter & Co., Inc. v. Provenzale,* 334 F.3d 459, 464 (5 Cir. 2003); *Sylvester v. U.S. Army Corps of Engineers,* 884 F.2d 394, 401 (9 Cir. 1989) (*as amended on rehearing); Rucker v. Willis,* 484 F.2d 152 (4 Cir. 1973); *Stewart v. Potts,* 126 F.Supp.2d 428 (S.D.Tex. 2000), *aff'd w/o published opinion,* 2000 WL 496389 (Table). If the plaintiff cannot establish a substantial likelihood of success, the opponent of the injunction does not have to counter the existence of the other three elements, *viz.,* irreparable injury, threatened injury outweighs potential injury to those affected by the injunction, and disservice to the public interest. *Ibid.* If the plaintiff seeking an injunction prohibiting the exercise of an agency permit cannot establish that the issuance of that permit was arbitrary and capricious or that serious questions are raised and not adequately dealt with in the COE's determination that there is no significant impact upon the environment, he cannot prevail on his request for a preliminary injunction. *Sylvester,* 884 F.2d at

397; *Rucker,* 484 F.2d at 160; *Stewart,* 126 F.Supp.2d at 437-438; *Cobble Hill Ass'n v. Adams,* 470 F.Supp. 1077 (E.D.N.Y. 1979).

In determining whether the Corps has acted arbitrarily or capriciously, the Court must look to the issues considered and the explanation of the actions made by the official conducting the environmental assessment. If he has followed NEPA's mandate and considered the relevant environmental issues and given a rational explanation for his finding of no significant impact, then the plaintiff cannot succeed on the merits and is not entitled to an injunction. *Great Salt Lake Minerals & Chemicals Corp. v. Marsh,* 596 F.Supp. 548, 553 (D.Utah 1984) (collecting authorities); Such a showing would compel the opposite finding. It does not matter that other federal agencies might have disagreed and recommended against the action taken by the agency, provided that it is shown that the agency considered the views of those agencies and rejected them on a reasonable or nonarbitrary basis. *Akiak Native Community v. U.S. Postal Service,* 213 F.3d 1140 (9 Cir. 2000); *Stewart v. Potts, supra,* 126 F.Supp.2d at 437, quoting *Sabine River Authority v. United States Dept. of Interior,* 951 F.2d 669, 678 (5 Cir. 1992).

In this case, plaintiff contends that the COE should have considered the entire subdivision that was originally proposed for a § 404 permit because to do otherwise would constitute piecemeal permitting which is against public policy. That principle is inapplicable when the various segments of a work can stand alone and is not interdependent upon the others. *See, e.g., Stewart, supra* (golf course); *Sierra Club v. Callaway,* 499 F.2d 982 (5 Cir. 1974) (three separate dams in which Congress made appropriations in the same Act); *Stewart Park and Reserve Coalition, Inc. v. Slater,* 352 F.3d 545 (2 Cir. 2003) (various phases of highway project, not interdependent); *Center v. Biological Diversity v. Federal Highway Administration,* 290 F.Supp.2d 1175 (S.D.Cal. 2003).

Plaintiffs also complain that the COE did not properly consider the effects of run-off, decreased storage for rainwater, the destruction of wildlife habitat that would be affected by the construction of a residential subdivision where intervenor's wetland forests now stand, as well as drainage and erosion which the plaintiffs claim would cause siltation of nearby waterways and beyond. A review of the EA prepared in this case shows that the COE did consider all those factors and all others presented to it during the period of consideration. It concluded that there was no significant environmental impact, despite the initial protests of other federal agencies. Those agencies, during the second round of comments, either chose not to comment or did not object to the issuance of the permit if certain mitigation was mandated by the permit. (*See* EA, p. 27.[2]) In *Hanly v. Kleindienst, supra,* 471 F.2d at 828-829, the Court considered the parties' contention that the Court had broad powers to inquire into the issue whether a project "significantly affect[ed] the quality of the human environment" because "significantly" was a word of legal significance. It was urged that the court could consider the significance of the effect upon the environment *de novo* since that was a legal concept. The Court said (471 F.2d at 829):

> Where the court's interpretation of statutory language requires some appraisal of facts, a neat delineation of the legal issues for the purpose of substituted judicial analysis has sometimes proven to be impossible or, at least, inadvisable. Furthermore, in some cases a complete *de novo* analysis of the legal questions, though theoretically possible, may be undesirable for the reason that the agency's determination reflects the exercise of expertise not possessed by the court. *See, e.g., Moog Industries, Inc. v. FTC,* 355 U.S. 411, 78 S.Ct. 377, 2 L.Ed.2d 370 (1958), where the Court declined to overturn the Commission's discretionary determination, stating:
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> > "It is clearly within the special competence of the Commission to *appraise the adverse effect on competition* that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is

2. Plaintiffs neglected to point this out in their memorandum and exhibits from the administrative record. Instead, they have attached the EPA's letter dated September 29, 1999, which was superseded by the October 4, 2001 letter referenced in the EA at page 37.

> empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." 355 U.S. at 413, 78 S.Ct at 379 (emphasis supplied – in quoted opinion)
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> Accordingly, with respect to review of such mixed questions of law and fact the Supreme Court has authorized a simpler, more practical standard, the "rational basis" test, whereby the agency's decision will be accepted where it has "warrant in the record" and a "reasonable basis in law." *NLRB v. Hearst Publications,* 322 U.S. 111, 131, 64 S.Ct. 851, 88 L.Ed. 1170 (1944); *see Rochester Telephone Corp. v. United States,* 307 U.S. 125, 146, 59 S.Ct. 754, 83 L.Ed. 1147 (1939); 4 Davis [Administrative Law Treatise] §§ 29.01, 30.05 (1958).
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> Notwithstanding the possible availability of the "rational basis" standard, we believe that the appropriate criterion in the present case is the "arbitrary, capricious" standard established by the Administrative Procedure Act, since the meaning of the term "significantly" as used in § 102(2)(C) of NEPA can be isolated as a question of law. This was the course taken by the district court and is in accord with the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe,* [*supra*], where its review of the Department of Transportation's authorization of federal funds to finance construction of a highway through a federal park, turned on the meaning to be attributed to a statutory prohibition against such an authorization if "a feasible and prudent" alternative route exists. * * *

The permit has been appropriately conditioned upon the concerns of the cooperating agencies being met. Each of the problems discussed in the various comments of the public were considered and the reason for its action despite those adverse comments were explained in the agency's determination. (*See* EA, p. 30-34) Mitigation of the avoidable damage has been required,[3] and as to those damages that cannot be completely avoided or minimized, the COE has conditioned the exercise of the permit upon the prior purchase of credits from the Mitigation Bank.[4] In *Stewart v. Potts, supra,* cited by

3. 40 CFR § 1508.20 provides that "'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."

4. Congress has expressly recognized the value of mitigation by purchasing of credits from the Mitigation Bank. *See* Pub.L. 108-136, Div. A, Title III, § 314(b), Nov. 24, 2003, 117 Stat. 1431. It has required that the Secretary of the Army, through the Chief of Engineers, issue regulations establishing performance standards and criteria for the use of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions

the plaintiffs, the Court made the following astute observation concerning the role of the reviewing court in considering the scientific findings of an agency:

> In reviewing the agency's scientific factfindings, the Court must be especially deferential. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, [*supra*, 462 U.S. at 103, 103 S.Ct. at 2255]. "We must look at the decision not as a chemist, biologist, or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." *Ethyl Corp. v. Envtl. Protection Agency,* 541 F.2d 1, 36 (D.C.Cir. 1976) (*en banc*) (footnote omitted). The Corps must be allowed discretion to rely on the reasonable opinions of its own qualified experts even though the Court might find contrary views more persuasive. *See Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 1861, 104 L.Ed.2d 377 (1989).

All the requirements of NEPA and the COE's regulations conforming with NEPA have been complied with and followed in great detail. The COE has taken a "hard look" at this project, as evidenced by the copious and detailed response[5] to each of the concerns of everyone who commented

in permits issued by the COE under 33 USC § 1344. Congress has directed the Chief of Engineers, in the promulgation of those regulations, to "maximize available credits and opportunities for mitigation, provide flexibility for regional variations in wetland conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation. *Ibid.* Thus, the means of mitigation of the damages by off-site and in-lieu mitigation upon which the permit was conditioned clearly falls within Congress' intent under NEPA.

5. The Council on Environmental Quality's regulation governing the Environmental Assessments, 40 CFR § 1508.9, provides:

"Environmental Assessment":

(a) Means a *concise* public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare and environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include ***brief discussions*** of the need for the proposal, or alternatives as required by § 101(2)(E) [of NEPA], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

The EA prepared in this case far exceeds the requirements imposed upon the COE and was extremely solicitous in addressing every concern expressed. The detail required even in an EIS "is that which is sufficient to enable those who did not have a part in its completion to understand and consider meaningfully the factors involved." *Environ-*

during the consideration of the application for the permit, and has decided to permit it. NEPA's exhortation to federal agencies to conform with the requirements of 42 USC § 4332(C) "to the fullest extent possible," has been recognized by the courts to mean that a burden of perfection is not imposed upon the agency in drafting a statement required by that section, but the agency's obligations under that statute are subject to the "rule of reason." *Environmental Defense Fund, Inc. v. Corps of Engineers,* 492 F.2d 1123, 1131 (5 Cir. 1974); *Environmental Defense Fund v. Corps of Engineers,* 342 F.Supp. 1211 (E.D.Ark.), *aff'd,* 470 F.2d 289 (8 Cir. 1972); *Natural Resources Defense Council v. Morton,* 148 U.S.App.D.C. 5, 458 F.2d 827, 834 (1972). Unless it can be said that it was arbitrary and capricious in approving it, it has the final word. The Courts are not allowed to substitute their own judgment for the actions, findings and conclusions reached by an administrative agency to whom that power has been delegated.

By a Declaration of an expert, plaintiffs seek to interject a new problem into this case – hurricanes are not adequately provided for. First of all, we object to such an expansion of the administrative record to which this Court is confined in its review of this case. *Commonwealth of Ky. v. Alexander,* 655 F.2d 714, 720 (6 Cir. 1981) (rejecting such an expert's affidavit raising new issues).[6] The Corps did not have to consider a "worse case scenario," which is practically the same as having to consider the possibility that a hurricane will affect the area of the subdivision that has been permitted in this case. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 109 S.Ct.

mental Defense Fund v. Corps of Engineers, 492 F.2d at 1136; *Environmental Defense Fund v. Corps of Engineers,* 342 F.Supp. 1211, 1217 (E.D.Ark.), *aff'd,* 470 F.2d 289 (8 Cir. 1972).

6. Although the Supreme Court approved the submission by administrative officials of declarations explaining their actions, even the COE has been denied the opportunity to submit declarations that did not address the points for which the Supreme Court allowed such extra-record documents to be admitted. *National Audubon Society v. Butler,* 160 F.Supp.2d 1180, 1186 (W.D.Wash. 2001).

1835, 104 L.Ed.2d 351 (1989).

Because the plaintiffs have not shown the substantial likelihood of success on the merits or any important environmental issue the Corps did not appropriately deal with in conformity with NEPA and COE requirements, it would be inappropriate for this Court to grant plaintiffs an injunction to stay the Corps' permit in this case. That would constitute a substitution of this Court's judgment for that of the COE, which it clearly is not entitled to do.

It has been pointed out that the State Court has declared invalid the State Water Quality Certificate that was heretofore obtained and submitted to the COE. That certificating process is now almost completed and the reissuance of a Water Quality Certificate is expected any day. If this Court should decide to grant a preliminary injunction because of the present lack of a Water Quality Certificate, intervenor respectfully suggests that such injunction should specifically provide that upon the receipt by the COE of the required State Water Quality Certificate the injunction is vacated.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' request for a preliminary injunction.

Respectfully submitted,

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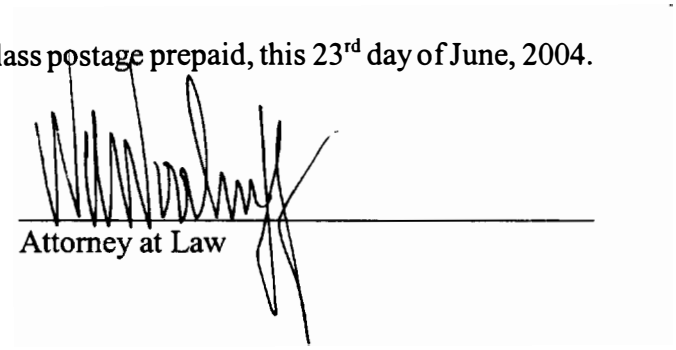
CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon all counsel of record herein by facsimile, followed by United States Mail, first class postage prepaid, this 23rd day of June, 2004.



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