UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORETTO O'REILLY, Jr., KELLY FITZMAURICE, AND HAZEL SINCLAIR,	*	
Plaintiffs,	*	File Number: 04-0940
	*	Section: "A"
	*	Division: 5
v.	*	Judge Zainey
	*	Magistrate Judge Chasez
UNITED STATES ARMY CORPS OF ENGINEERS,	*	
Defendant.	*	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON STANDING AND THE MERITS

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs Loretto O'Reilly Jr., Kelly Fitzmaurice, Hazel Sinclair respectfully move for summary judgment on standing and the merits. As set forth in the accompanying Memorandum in Response to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment, there is no genuine issue of material fact and Plaintiffs are

entitled to judgment as a matter of law. Therefore, Plaintiffs respectfully request that this Court enter an order granting Plaintiffs summary judgment on standing and the merits.

Respectfully Submitted on June 28, 2004,

Karla Raettig (Bar # 27860), Trial Attorney
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Certificate of Service

I hereby certify that a copy of the above and foregoing pleading has been served by placing the same in the United States mail, postage prepaid and properly addressed on the 29 day of June, 2004 to:

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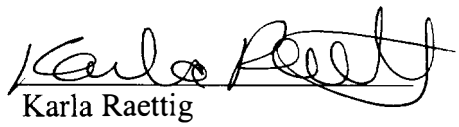

Karla Raettig

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UNITED STATES ARMY CORPS	*	
OF ENGINEERS,	*	
Defendant.	*	

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 56.1, Plaintiffs submit the following Statement of Undisputed Material Facts:

1. In 1999, the U.S. Army Corps of Engineers ("Corps") and the Louisiana Department of Environmental Quality ("LDEQ") issued a joint public notice and accepted comments on a proposal to build a subdivision. AR 24.

2. On August 29, 2001, the Applicant resubmitted the application. AR 458.

3. As proposed in the 2001 application, the project would require dredging and filling approximately 81.58 acres in St. Tammany Parish, of which 39.54 acres are

pine flatwood/savannah wetlands, in the vicinity of the Little Tchefuncte River and Timber Branch Tributary. AR 458

4. During the public comment periods, nearby residents and property owners, including Plaintiffs, opposed the project because of the potential environmental impacts. Various Comment Letters, AR 603, AR 609, AR 611, AR 613, AR 614, AR 616, AR 622, AR 638, AR 639.

5. On December 18, 2003, the Corps issued the section 404 permit for the project. AR 945.

6. The Corps did not prepare an Environmental Impact Statement for the project.

7. The proposed project is the first phase in a three-phase project. The three phases of Timber Branch II will impact 153 acres and 96 acres of wetlands. AR 947.

8. The "developed portions of the project site will result in the total loss of some functions and reduction in capability of other functions. Total and complete loss of wetland functions will occur in those areas filled . . . . Impacts would be considered localized and long-term." AR 957.

9. Further, "species that are wholly or partially dependent on forested wetland habitat would suffer a long-term loss of breeding, foraging and/or cover habitat resulting from project implementation. . . . Moderate to major adverse impacts to wildlife habitat should occur. These impacts would be long-term and local." AR 958.

10. "Transformation of the project site through removal of vegetation and topographic alterations via grading and fill activities . . . can result in increased surface

runoff volume and rate, reduction in subsurface lateral flow, storage and recharge via compaction, and reduced filtration." AR 954.

11. Over a seven-year period, the Corps has issued 15 permits within a 1-mile radius of the proposed project and 72 permits within a 3-mile radius. AR 964.

12. The Corps did not specifically analyze the cumulative impacts on the environment from the 72 permits. The Corps did not determine whether mitigation for the previous permits was successful. The Corps did not determine the likelihood that mitigation required for the current permit would be successful

13. On March 4, 2004, the 19th Judicial District Court in Baton Rouge, Louisiana vacated LDEQ's water quality certification for violations of the Louisiana Constitution. AR 1004. That certification is null and void.

14. Plaintiffs either reside or own interests in property located near the project. See Declarations of Hazel Sinclair ¶ 2, Kelly Fitzmaurice ¶ 2, Loretto O'Reilly ¶ 2.

15. The project will impair Plaintiffs economic, aesthetic, and recreational interests. See Declarations of Hazel Sinclair ¶ 9, Kelly Fitzmaurice ¶ 8, Loretto O'Reilly¶ 8.

Respectfully Submitted on June 29, 2004,

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Defendant.	*	

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs' respectfully submit the following memorandum in response to the Motion for Summary Judgment filed by Defendant U.S. Army Corps of Engineers ("Corps") on June 22, 2004. In addition, Plaintiffs submit this memorandum in support of Plaintiffs' Cross Motion for Summary Judgment:

INTRODUCTION

The loss of wetlands in southern Louisiana is a local, state, and national crisis: "Between 1990 and 2000 wetland loss was approximately 24 square miles per year, that is one football field lost every 38 minutes." Wetlands Fact Sheet, *available at*

http://www.americaswetland.com/custompage.cfm?pageid=2&cid=8. This crisis provides the backdrop for the Corps' decision in this case—to allow the destruction of 39.54 acres of ecologically valuable wetlands without analyzing cumulative impacts from previous wetlands destruction in the area. The Corps itself admits that over a seven-year period, it issued 15 permits within a 1-mile radius of the proposed project and 72 permits within a 3-mile radius. Department of Army Permit Evaluation and Decision Document ("Decision Document") (Nov. 10, 2003), AR 964.[1] "The total wetlands acreage of the issued permits is approximately 400.9 acres." Id. Yet in its Decision Document, the Corps spent a mere two-pages discussing in general terms the impacts associated with wetlands destruction, but provided no specific data or analysis. Id. Instead, the Corps has based its decision on speculation that those impacts have successfully mitigated, without collecting or analyzing relevant data. The Corp relied on this unsupported assumption of successful mitigation to avoid the legally required Environmental Impact Statement that would determine the extent to which the permit at issue and the cumulative effect of similar permits are exacerbating a national crisis.

The Corps' two-page discussion falls woefully short of the kind of well-informed decision making that the National Environmental Policy Act ("NEPA") is intended to foster. Robertson v. Methow Valley Citizens Alliance, 490 U.S. 332, 349 (1989) (NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts."). Specifically, NEPA requires that the Corps study cumulative impacts, which are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7; see also id. § 1508.25(c)(3).

[1] On Jun 21, 2004, the Corps filed the Administrative Record. The Administrative Record is cited as "AR" and then the bate stamped page number.

Clearly, issuing 72 permits within a 3-mile radius will result in "incremental impact[s]." Id. However, the Administrative Record contains no studies, staff memos, or other evidence indicating that the Corps has ever conducted studied those impacts. This failure renders the Corps' decision arbitrary and capricious. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem . . . .").

Not only did the Corps violate NEPA by failing to examine cumulative impacts, it also failed to comply with the most basic tenet of NEPA—the requirement to prepare an Environmental Impact Statement when a project has significant environmental impacts. 42 U.S.C. § 4332. According to the Corps, the project "will result in the total loss of some functions and reduction in capability of other functions. Total and complete loss of wetland functions will occur in those areas filled . . . . Impacts would be considered localized and long-term." Department of Army Permit Evaluation and Decision Document ("Decision Document") (Nov. 10, 2003), AR 957. However, the Corps did not prepare an Environmental Impact Statement for the project.

Instead, after acknowledging local, long-term impacts, the Corps relied on speculation that those impacts would be successfully compensated for by the applicant's agreement to purchase wetlands in a different area. However, the Corps never analyzed the effectiveness of this mitigation. Instead the Corps assumed without support or evidence in the record that the scientifically challenging process of mitigating wetland destruction will succeed in this instance. For example, there is nothing in the Corps's record that explains how buying wetlands in a different area compensates for the increased flooding and other "localized and long-term" impacts to the environment acknowledged by the Corps. Without such an analysis, the Corps'

reliance on an unsupported assumption that mitigation will offset impacts is arbitrary and capricious. 5 U.S.C. § 706.

In addition to violating NEPA, the Corps violated the Clean Water Act. Under the Clean Water Act, the Corps may not issue a section 404 permit without a certification from a state that the permit will not violate state water quality standards. 33 U.S.C. §§ 1341 & 1344. In this case, the Nineteenth Judicial District vacated the water quality certification, finding that it was "null and void" because Louisiana had not analyzed environmental impacts of the project. Exhibit B to Plaintiffs' Motion for Preliminary Injunction. Thus, neither the Corps nor the state has examined the water quality impacts of this project as required by the Clean Water Act. The Corps offers the excuse that it was entitled to rely on the state's assertion that it had appropriately examined impacts. But this is not a case about sanctioning the Corp for fault or wrongdoing — instead it is a challenge to a permit that, for whatever reason, was issued without benefit of the analysis that Congress mandated in section 404. Because the plaintiffs and other Louisiana residents have been denied protections mandated by law, the permit at issue is "not in accordance with law" under 5 U.S.C. § 706(2)(a), regardless of whether it was reasonable or unreasonable for the Corps' to assume that the State's certification was valid. The fact that the Corps made an honest — if in retrospect undeniable — mistake should not defeat Congress' purpose to protect the environment by requiring a full analysis of water quality impacts before destruction of wetlands.

Because the section 404 permit at issue violates NEPA and the Clean Water Act, Plaintiffs respectfully move this Court to enter summary judgment against the Corps, deny the Corps' motion for summary judgment, and remand the permit to the agency to comply with NEPA and the Clean Water Act.

FACTS

In 1999, the Corps and LDEQ issued a joint public notice and accepted comments on August J. Hand's proposal to build a subdivision. AR 24. The U.S. Environmental Protection Agency ("EPA") submitted comments that warned of a "significant increase in non-point source pollution" and other negative impacts:

> In addition to the direct, large-scale impacts that could occur to these wetlands as a result of construction activities, indirect impacts, such as an expected significant increase in nonpoint source pollution in the general area and the pressure to develop other nearby similarly forested areas with support services for the proposed activity, could be realized.

Letter from Richard Hoppers, P.E., Chief, EPA Ecosystems Protection Branch to P.J. Serios, Acting Chief, Corps Regulatory Functions Branch (Sept. 29, 1999), AR 44. EPA stated that an additional impact of the project "would be the stress (*i.e.* competition for available habitat) placed on adjacent, similarly vegetated areas as a result of the addition of avian and wildlife species displaced from the project area." Id. at 45.

On August 29, 2001, the Applicant resubmitted the application. AR 458. As proposed in the 2001 application, the project would require dredging and filling approximately 81.58 acres in St. Tammany Parish, of which 39.54 acres are pine flatwood/savannah wetlands, in the vicinity of the Little Tchefuncte River and Timber Branch Tributary. Id.

During the public comment periods, nearby residents and property owners opposed the project because of the potential environmental impacts. Various Comment Letters, AR 603, AR 609, AR 611, AR 613, AR 614, AR 616, AR 622, AR 638, AR 639.

EPA once again warned of impacts such as "decreased water quality and increased flooding,"

> [EPA is] concerned with the potential indirect and cumulative impacts of the proposed project. Construction of the subdivision as proposed will likely result in the loss of important wetland functions, including flood water abatement and water quality improvement. These functional losses, when combined with increased impervious surfaces resulting from the subdivision, may lead to adverse downstream impacts such as decreased water quality and increased flooding. Moreover, the proposed project would add to cumulative development-related wetlands losses in the area, further stressing aquatic resources within the basin.

Letter from Troy C. Hill, P.E., Chief, EPA Marine and Wetlands Section to Ronald J. Ventoala Chief, Corps Regulatory Functions Branch (Oct. 4, 2001), AR 644.

On December 18, 2003, without notifying the Plaintiffs, the Corps issued the section 404 permit for the project. AR 945. The proposed project is one phase in a much larger, three-phase project. The three phases of Timber Branch II will constitute 153 acres, and the entire project will destroy over 96 acres of wetlands. Decision Document, AR 947.

According to the Corps' own Decision Document, "the developed portions of the project site will result in the total loss of some functions and reduction in capability of other functions. Total and complete loss of wetland functions will occur in those areas filled . . . . Impacts would be considered localized and long-term." Id. at 957. Further, "species that are wholly or partially dependent on forested wetland habitat would suffer a long-term loss of breeding, foraging and/or cover habitat resulting from project implementation. . . . Moderate to major adverse impacts to wildlife habitat should occur. These impacts would be long-term and local." Id. at 958. The Corps also noted that "[t]ransformation of the project site through removal of vegetation and topographic alterations via grading and fill activities . . . can result in increased surface runoff volume and rate, reduction in subsurface lateral flow, storage and recharge via compaction, and reduced filtration." Id. at 954. Although mitigation measures would reduce the projects affects for the 25-year storm, "[s]torms exceeding the 25-year event potentially could result in flooding

of developed portions of the project site." Id. at 955. Despite these acknowledged significant impacts, the Corps failed to prepare an EIS.

Further, this is a project that has never been subject to the required environmental analysis to ensure that it does not violate water quality standards. AR 1002.

STANDARD

Summary judgment is appropriate "if the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The adverse party "may not rest upon mere allegations or denials" but rather "must set forth specific facts showing that there is a genuine issue of [material fact] for trial." Fed. R. Civ. P. 56(c); see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Taita Chem. Co., Ltd. v. Westlake Styrene Corp., 246 F.3d 377, 385 (5th Cir. 2001); Wynn v. Whitney Holding Corp., 220 F. Supp. 2d 582, 587 (M.D. La 2002). Otherwise, summary judgment should be entered for the moving party. See O'Hare v. Global Natural Res., Inc., 898 F.2d 1015, 1017 (5th Cir. 1990).

The Corps' permitting decision is should be "set aside" if it is "arbitrary or capricious" or if it is "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

LAW AND ARGUMENT

I. THE CORPS VIOLATED NEPA (1) BY FAILING TO EXAMINE CUMULATIVE IMPACTS AND (2) BY FAILING TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT DESPITE ACKNOWLEDGED SIGNIFICANT IMPACTS FROM THE PROJECT

A. The Corps Must Consider the Cumulative Impacts of this Project in Light of Past and Reasonably Foreseeable Future Development.

The proposed site of the project, near Covington, is situated in the most rapidly developing parish in Louisiana. Comments by Gulf Restoration Network (Sept. 30, 1999), AR

48 and Comments by Louisiana Audubon Council (Oct. 1, 1999), AR 53. The Corps has facilitated this rapid development by issuing 15 section 404 permits within a 1-mile radius of the project site and 72 section 404 within a 3-mile radius of the project site. Decision Document, AR 964. These 72 permits "directly affected" over 400 acres of wetlands. *Id.*

Each of the 72 permits has caused environmental impacts. Under NEPA regulations, the Corps must analyze the cumulative impacts of projects. 40 C.F.R. § 1508.25(c)(3). The regulations define "cumulative impact" as:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. Thus, in this case the Corps should have analyzed the "incremental impact" of this project in light of the "past, present, and reasonably foreseeable future actions." Id. The Corps did not do so.

Instead of analyzing cumulative impacts, the Corps simply lists impacts that result from dredge and fill permits generally and then asserts that mitigation "will remove or reduce e[x]pected impacts." AR 964. The Corps provides no specific cumulative impacts analysis with respect to the watershed or the local environment. For example, it does not mention specific water resources such as the Tchefuncte River or Timber Branch and provides no analysis of the cumulative impacts on these resources. Additionally, it provides no data or analysis of the past or future mitigation. Did all of this mitigation consist of wetlands restoration? Where are the restored wetlands located? Are these wetlands all in one area or spread out over the watershed? Are the wetlands functioning, *i.e.*, did the mitigation succeed? The Corps does not ask, much less answer, these questions.

The Corps' two-page "analysis" does not provide the agency or the public with the information to make an informed decision. "The cumulative impact analysis must be more than perfunctory." Kern v. BLM, 284 F.3d 1062 (9th Cir. 2002) (finding an Environmental Impact Statement inadequate for failure to address cumulative impacts); see also Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1379 (9th Cir. 1998) ("To 'consider' cumulative effect, some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the Forest Service's decisions, can be assured that the Forest Service provided the hard look that it is required to provide."). Thus, the Corps' abbreviated discussion violated NEPA's requirements.

Further, the Administrative Record contains no support for the Corps' conclusion that mitigation "will remove or reduce" impacts. The lack of analysis and evidence supporting the Corps render its Environmental Assessment arbitrary and capricious under NEPA. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem . . . ."); see also Seattle Audubon Society v. Moseley, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), aff'd 998 F.2d (9th Cir. 1993) ("A conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystalize the issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.").

NEPA also requires the Corps to examine cumulative impacts from "reasonably foreseeable future action," 40 C.F.R. § 1508.7, *i.e.* the two future phases of this development. The Corps did not study these impacts. The Corps' attorneys attempt to justify the Corps' failure

by relying on the "independent utility" of each phase. Defendant's Memo, pp. 15-16. However, the "independent utility" of each phase in not at issue in this case. As explained by the Ninth Circuit, the issue of "independent utility" is relevant to whether an agency must prepare one Environmental Impact Statement for related actions, but not to whether the agency must examine cumulative impacts from those actions:

> But "the obligation to wrap several cumulative action proposals into one EIS for decision making purposes is separate and distinct from the requirement to consider in the environmental review of one particular proposal when taken together with other proposed or reasonably foreseeable actions." Terence L. Thatcher, "Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment under the National Environmental Policy Act," 20 Envtl. L. 611, 633 (1990). Section 1508.25(a)(2) requires the former, necessitating the coordinated analysis of proposals that "have cumulatively significant impacts." . . . In contrast, section 1508.25(c)(3) requires the latter, namely, the analysis of the cumulative impact of the [action] together with reasonably foreseeable future [actions].

Native Ecosystems Council v. Dombeck, 304 F.3d 886, 896 n.2 (9th Cir. 2002) (finding that the Forest Service violated NEPA by failing to analyze cumulative impacts); see also Earth Island Institute v. U.S. Forest Serv., 351 F.3d 1291, 1308 (9th Cir. 2003) (same).

In other words, the issue of whether the phases of this project have independent utility goes to whether the Corps should have prepared one Environmental Assessment for all of the phases. Plaintiffs have not raised that issue and it is not before this Court. However, even assuming the independent utility of the phases, the Corps has an obligation to examine the cumulative impacts from those phases because they are "reasonably foreseeable." 40 C.F.R. § 1508.7.

The Corps' reliance on Vieux Carre Property Owners, Residents & Assocs. v. Pierce, 719 F.2d 1272, 1277-78 (5th Cir. 1983) is unavailing for two reasons. First, that case dealt with whether the agency violated NEPA by preparing separate Environmental Assessments for phases

of a project, which is not the issue in this case. Second, unlike the speculative phases in Vieux Carre, the Corps acknowledges the likelihood that the developers will implement the future phases of this project: "[from] information obtained from other sources it is known that future 'phases' to the development can be anticipated based on the success of the initial phase." Decision Document, AR 965.

Because the Corps violated NEPA by failing to examine cumulative impacts, Plaintiffs request that this Court grant summary judgment against the Corps.

B. The Proposed Project Has Significant Environmental Impacts and Thus Requires An Environmental Impact Statement.

The Corps does not dispute that issuance of a section 404 permit by the Corps is a "major Federal action" to which NEPA applies. Sierra Club v. Sigler, 695 F.2d 957, 962 n.3 (5th Cir. 1983). However, the Corps failed to prepare an Environmental Impact Statement fully analyzing the environmental impacts of the project. Instead, the Corps prepared an abbreviated document known as an Environmental Assessment. As explained in Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction ("Plaintiffs' Preliminary Injunction Memo"), pp. 7-8, an agency may prepare an Environmental Assessment to determine whether a major federal action has significant impacts and thus requires the agency to prepare an Environmental Impact Statement. If, as here, the action has significant impacts, the agency must prepare an Environmental Impact Statement. 42 U.S.C. § 4332.

In this case, the Corps' environment assessment indicated significant environmental impacts. The Corps' own analysis in its Decision Document indicates the following impacts:

- "Developed portions of the project site will result in the total loss of some functions and reduction in capability of other functions. Total and complete loss of wetland

functions will occur in those areas filled . . . . Impacts would be considered localized and long-term." Decision Document, AR 957.

- "[S]pecies that are wholly or partially dependent on forested wetland habitat would suffer a long-term loss of breeding, foraging and/or cover habitat resulting from project implementation . . . . Moderate to major adverse impacts to wildlife habitat should occur. These impacts would be long-term and local." Id. at 958.
- The agency stated that changes to the highway infrastructure might be necessary "to accommodate increases in traffic volume." Id. at 960. The agency concluded that the project's impact on traffic in the area would be "adverse and long-term." Id.
- The Corps itself acknowledged that the project would "decrease flood storage." Id. at 952.

Thus, the project will have significant impacts, affecting both the site as well as the surrounding community. Specifically, the project will (1) destroy viable wetlands which are ecologically important because they provide habitat to a wide variety of wildlife species; (2) cause public safety concerns due to traffic; and (3) cause public safety concerns due to increased flooding. Thus, the project will have a significant impact on the environment and the Corps should have prepared an EIS.

Despite these acknowledged impacts, the Corps argues that its finding of no significant impact was appropriate because the applicant agreed to mitigation. Defendant's Memo, p. 14. However, the Administrative Record contains no analysis or data for many of the mitigation measures. As described below, the Corps reliance on unsupported mitigation measures renders its decision arbitrary and capricious under 5 U.S.C. § 706(2)(A).

First, the Corps relies on the purchase of similar wetlands. Id. at 14. However, the Administrative Record is devoid of evidence as to whether the wetlands purchased would actually offset the environmental impacts of the project. See supra, p. 8.

Second, the Corps relies on drainage plans reviewed by St. Tammany Parish to mitigate flooding from the project. Id. at 14. The Corps, however, did not conduct its own analysis. NEPA, however, does not allow the Corps to delegate its responsibility to assess environmental impacts to St. Tammany Parish. Further, the Administrative Record does not contain the data or analysis supporting St. Tammany Parish's conclusion. In short, the Administrative Record contains no independent analysis of the drainage plan. Thus, the Corps conclusion that the drainage plan will mitigate flooding is unsupported by the record.

In addition, that drainage plan may only be implemented if the applicant obtains a permit allowing it to channelize a designated Scenic River. Specifically, the drainage plan includes replacing an existing bridge structure at Timber Branch with culverts. Decision Document, AR 960. Because Timber Branch is designated as a Louisiana Natural and Scenic River, it must obtain a Scenic River permit from the Louisiana Department of Wildlife and Fisheries. Id. The Applicant does not have a current permit. Id. Given the drainage plan's impacts on a designated Natural and Scenic River, it is at least questionable whether that drainage plan can be implemented.

Third, according to the Corps, "while there may be otherwise local impacts in vehicular traffic, water quality, and in sewerage, these are also matters within the control of state and local authorities that are addressed and mitigated through the permittee's compliance with state and local laws." Defendant's Memo, p. 14. The Administrative Record does not support this contention. With respect to traffic, the Decision Document states: "In a response dated April 12,

2000 the applicant has indicated that a Traffic Study would be conducted and, to mitigate adverse impacts resulting from development, that some identified improvements would be funded by the developer, subject to approval by appropriate governmental agencies." AR 960. Thus, the traffic mitigation is an unspecified promise to do something at some future time. Such a vague promise does not constitute "mitigation."

Fourth, with respect to water quality and sewerage, in its Decision Document, the Corps states that a "centeralized sewage treatment facility will be installed." AR 954. However, 11 pages later, the Corps notes that the Louisiana Department of Environmental Quality "did advise that the discharge from the proposed []sewage treatment plan may not be permittable due to location." AR 965. Yet, the Corps provides no further analysis.

Thus, the "host of measures" cited in Defendant's Memo, p. 14, is in reality nothing more than unenforceable promises or unanalyzed measures. The Corps' decision to rely on these promises renders its decision arbitrary and capricious under 5 U.S.C. § 706(2)(A).

II. The 404 Permit Is "Not is Accordance With Law" Because the Required Water Quality Analysis Has Not Occurred.

Before the Corps can issue a section 404 permit under the Clean Water Act, an applicant for such a permit must first obtain state certification that the proposed project will comply with state water quality standards. 33 U.S.C. § 1341(a)(1).[2] This requirement ensures that a project's water quality impacts are examined before the Corps issues a section 404 permit.

[2] "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . . No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be." 33 U.S.C. § 1341(a)(1).

In this case, LDEQ certified that this project would not violated water quality standards. However, on February 9, 2004, the 19th Judicial District Court in Baton Rouge vacated and remanded the water quality certification. Exhibit B to Plaintiffs' Motion for Preliminary Injunction. Specifically, the court found that LDEQ failed to complete an environmental assessment of the project as required by "La. Const. Art. IX § 1, as explained by Save Ourselves, Inc. v. Louisiana Envt'l Control Comm'n, 452 So. 2d 1152 (La. 1984) and its progeny." *Id.* at. 2. As a matter of law, therefore, the water quality certification "is null and void . . . ." In the Matter of Rubicon, Inc., 95-0108 (La. App. 1 Cir. 2/14/96), 670 So. 2d 475, 489. In other words, Louisiana Department of Environmental Quality issued a water quality certification without analyzing environmental impacts from the discharge.

The Corps does not dispute that the previous water quality certification is "null and void." Instead, the Corps argues that it should not "second guess a state certification." Defendant's Memo at 21. The Corps relies on a case from the Northern District of Ohio. City of Olmstead Falls v. EPA, 266 F. Supp. 2d 718, 721 (N.D. Ohio 2003). In Olmstead, the Court found that the Corps was entitled to rely Ohio's waiver of the right to act on a certification even if that waiver is later found invalid. The Court found that the Corps is not required to ensure that a state follows its own procedures.

Both Olmstead and the Corps sidestep the fundamental issue. By requiring that the state must certify that the project will not impair water quality standards, Congress sought to ensure that water quality impacts would be examined before the Corps issues a section 404 permit. In this case, the state did not study those impacts and neither did the Corps. To allow the section 404 permit to stand before the state examines the water quality impacts violates both the letter and the spirit of the Clean Water Act. Regardless of whether the Corps was "at fault," a permit

issued without the analysis mandated by Congress in § 404 denies the public the environmental protections guaranteed them by law. Thus, such as permit is "not in accordance with law" and therefore must be set aside under 5 U.S.C. § 706(2)(A).

III. Plaintiffs Meet the Constitutional Requirements for Standing.

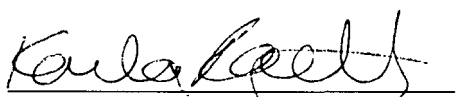
In Plaintiffs' Preliminary Injunction Memo, pp. 16-19, Plaintiffs addressed the constitutional requirements for standing and the Corps has not disputed standing. Plaintiffs incorporate that discussion by reference move for summary judgment that Plaintiffs have established standing to bring their claims.

IV. Conclusion

Because the permit at issues violates NEPA and the Clean Water Act, the Plaintiffs request that this Court enter summary judgment against the Corps and remand the permit to the agency with instructions to prepare an Environmental Impact Statement that analyzes cumulative impacts and revoke the section 404 permit until the Applicant obtains a valid water quality certification.

Respectfully Submitted this 29th day of June, 2004,

TULANE ENVIRONMENTAL LAW CLINIC



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Certificate of Service

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record by placing same in the United States mail, postage prepaid and properly addressed on the 29 day of June, 2004, to:

Devon M. Lehman
Lois Godfrey-Wye
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Karla Raettig

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORETTO O'REILLY, Jr.,	*	
KELLY FITZMAURICE, AND	*	
HAZEL SINCLAIR,	*	
Plaintiffs,	*	File Number: 04-0940
	*	Section: "A"
	*	Division: 5
v.	*	Judge Zainey
	*	Magistrate Judge Chasez
UNITED STATES ARMY CORPS	*	
OF ENGINEERS,	*	
Defendant.	*	

PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 56.2, Plaintiffs submit the following response to Defendant's Statement of Undisputed Material Facts:

Plaintiffs do not dispute Defendant's Material Facts except for number 9, which states "All material facts are contained in the administrative record submitted in this action." As explained by Plaintiffs' in the accompanying memorandum, Defendants failed to analyze material issues, such as the success of previous mitigation and the likelihood of success of mitigation required by the current permit. The lack of this analysis is a material fact. See Plaintiffs' Statement of Undisputed Material Facts, ¶ 12.

Respectfully Submitted on June 29, 2004,

Karla Raettig (Bar # 27860), Trial Attorney
Counsel for Loretto O' Reilly, Jr., Kelly Fitzmaurice, and Hazel Sinclair
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Karla Raettig

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORETTO O'REILLY, Jr.,	*	
KELLY FITZMAURICE, AND	*	
HAZEL SINCLAIR,	*	
Plaintiffs,	*	File Number: 04-0940
	*	Section: "A"
	*	Division: 5
v.	*	Judge Zainey
	*	Magistrate Judge Chasez
UNITED STATES ARMY CORPS	*	
OF ENGINEERS,	*	
Defendant.	*	

NOTICE OF HEARING

TO: Devon M. Lehman
Lois Godfrey-Wye
Department of Justice
Environmental Defense Section
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PLEASE TAKE NOTICE that Plaintiffs Hazel Sinclair, Kelly Fitzmaurice and Loretto O'Reilly, Jr. will bring on for hearing their Cross-Motion for Summary Judgment before the Honorable Jay C. Zainey, United States District Court Judge, 500 Camp Street, New Orleans, Louisiana, on the 28th day of July, 2004, at 9:00 A.M. or as soon thereafter as counsel may be heard. You are invited to appear and take such part as may be proper in the premises.

Respectfully submitted on June 29, 2004,

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