UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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

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

INTRODUCTION

Defendant United States Army Corps of Engineers (the "Corps") hereby submits its reply in support of summary judgment and its response to Plaintiffs' Motion for Summary Judgment. As the Court is aware, this case concerns a permit to dredge and fill 37.54 acres of pine flatwood/savannah wetlands.[1]/ The Corps complied fully with the National Environmental Policy Act ("NEPA"), the Clean Water Act ("CWA"), and those statutes' implementing regulations. The Corps considered the relevant factors and objectively evaluated the environmental effects of the Project in concluding that

[1]/ Plaintiffs imply that the Corps issued a permit for 81.58 acres, which is incorrect. The Corps can only permit jurisdictional wetlands within its regulatory authority under the Clean Water Act. In this case, only 37.54 acres fall within the Corps' authority. The developer does not need a Corps' permit to construct in non-wetland areas.

with required mitigation, the Project would not have significant impacts. Further, the Corps reasonably relied on the state's valid water quality certification in issuing the permit. Accordingly, the Corps is entitled to summary judgment.

The points Plaintiffs raise are, in large part, addressed in Defendant's Memorandum in Support of its Motion for Summary Judgment and in Response to Plaintiffs' Motion for a Preliminary Injunction (hereinafter "Defendant's Brief"). The Corps, therefore, attempts to avoid restating those arguments here and focuses on responding to points specifically raised in Plaintiffs' Memorandum in Response to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment (hereinafter "Pls.' Summ. J. Br."). Specifically, this brief addresses two issues with regard to Plaintiffs' NEPA claims, and one issue with regard to the Clean Water Act. First, the Corps analyzed the reasonably foreseeable cumulative impacts of the Project and that analysis is entitled to deference. Second, the Corps complied with NEPA's mitigation requirements. In short, the Corps took a hard look at the environmental consequences of the permit, and its conclusions were not arbitrary, capricious, or otherwise not in accordance with the law. Finally, the Corps properly relied on the state's certification that the project is in compliance with state water quality standards and the state court's later action does not change that; accordingly, the permit was issued "in accordance with law."

1. The Corps Fully Analyzed the Reasonably Foreseeable Cumulative Impacts of the Project.

Plaintiffs allege that the Corps did not comply with NEPA because its analysis of the cumulative impacts of the Project was inadequate. This argument must fail because the Corps adequately analyzed the reasonably foreseeable cumulative impacts of the Project.

First, as addressed more fully in Defendant's Brief, the Corps adequately analyzed the cumulative impact of other development in the Covington area. (For a discussion on project cumulative impacts, see Corps' EA/Decision Document at A.R. 000963-000965. This discussion is in addition to the direct, indirect and cumulative impacts addressed throughout the entirety of the EA/Decision Document). The EA is to "be a 'rough-cut,' 'low-budget,' preliminary look at the environmental impact of a proposed project." Spiller v. White, 352 F.3d 235, 240 (5th Cir. 2003) (quoting Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669, 677 (5th Cir. 1992)); see also Sierra Club v. Espy, 38 F.3d 792, 802–03 (5th Cir. 1994) (describing EA as "rough-cut, low-budget environmental impact statement intended to determine whether environmental effects are significant enough to warrant preparation of an EIS"). The NEPA process is not meant to substitute, as Plaintiffs urge, for community planning. See Isle of Hop Historical Ass'n v. U.S. Army Corps of Eng'rs, 646 F.2d 215, 221 (5th Cir. 1981) (quoting Concerned About Trident v. Rumsfeld, 555 F.2d 817, 829 (D.C. Cir. 1976)); see also Fritiofsen v. Alexander, 772 F.2d 1225, 1248 (5th Cir. 1985) (abrogated on other grounds by Sabine, 951 F.2d at 677–78) (noting that NEPA is not intended to serve as a local zoning or land-use-planning guide); 33 C.F.R. § 320.4(j)(2) ("The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance.").

The U.S. Fish & Wildlife Service stated no objection to permit issuance provided compensatory mitigation was required as a permit condition. A.R. 000071. The National Marine Fisheries Service also stated it had no objection to permit issuance. A.R. 000971. The U.S. Environmental Protection Agency (EPA) expressed concern with the potential indirect and

cumulative impacts of the proposed project. EPA emphasized on-site project minimization and development of a compensation mitigation plan that fully offset wetland functions near the proposed project area. EPA also recommended the permit be conditioned to include perpetual protection of a buffer zone along Timber Branch Creek. A.R. 000971. The Louisiana Department of Wildlife and Fisheries stated that project need and lack of alterative sites should be justified, and compensatory mitigation required. A.R. 000971. These concerns were addressed in the Corps' decision document. A.R. 000945-983.

Flood control will be met by adherence with St. Tammany Parish drainage requirements. See Hydrologic Analysis, Storm Water Drainage Study & Water Surface Profiles, at A.R. 000245-000421; letter from St. Tammany Parish, Department of Engineers, at A.R. 000422; Corps' EA/Decision Document, at A.R. 000954-000955, 000963-000964; and Permit Special Conditions 8, 9, 10 & 12, at A.R. 000988-000989. The applicant also had a State Scenic River Permit (A.R. 000716) which expired due to the length of the permitting process. However, the Corps made a State Scenic River permit a legal requirement of permit issuance. See A.R. 000977-000978 and Permit Special Condition 11, at A.R. 000988.

Mitigation requirements are addressed EA/Decision Document, A.R. 000956-000957, 000978-000979, and Permit Special Conditions 12, 13, 14, 15, 16 & 17, at A.R. 000988-000989. The Corps' decision that with the compensatory mitigation for wetlands impacts, there were not significant environmental impacts for the Project is entitled to deference. See Spiller, 352 F.3d at 240.

Second, Plaintiffs argue that the Corps should have considered the cumulative impacts of possible future stages of the Project. See Pls.' Summ. J. Br. at 9–11. As discussed in Defendant's

Brief, any future stages of development are not reasonably foreseeable because they are far from certain. The Corps permitting regulations require the applicant consider reducing the project size in order to minimize adverse impacts from the Project. See 30 C.F.R. 320.4(r)(i) (noting that project modifications, including reductions in scope and size, to minimize adverse impacts should be discussed with the applicant). ***If*** the current stage is successful, the developer ***may*** choose to later file an application for a permit for future stages. If and when that occurs, the Corps will analyze the impact of that future development. Special Condition 7 in the Permit notified the applicant that any additional work not authorized by the Permit itself would require separate approval from the Corps. A.R. at 000988. The Corps' issuance of the permit does not commit any future resources or require that additional phases be built in the future. NEPA does not require that future, speculative stages of development be analyzed at this point. See Headwaters, Inc. v. Bureau of Land Mgmt., 914 F.2d 1174, 1182 (9th Cir. 1990) (noting that agency was not required to analyze cumulative impacts of speculative future developments). The Corps addressed the issue of a reduction in project size in its EA/Decision Document. See A.R. 000947, 000964, 00965, 000974, and 000976. Accordingly, the Corps did not act arbitrarily, capriciously, or otherwise contrary to law when it did not analyze the cumulative impacts of potential future phases of development.

2. The Corps' Required Mitigation Features Meet NEPA's Requirements.

Plaintiffs' argument relies in main part on their contention that the Corps relies on unsupported mitigation measures. See Pls.' Motion at 8, 12–14. Plaintiffs' argument is unfounded because NEPA does not require a fully developed mitigation plan to comply with its procedural requirements. In addition, the Corps' mitigation analysis in the Decision Document and in the

special conditions issued with the permit contains a reasonable discussion of features designed to mitigate any adverse impacts stemming from the issuance of the permit.

Because NEPA is a procedural statute, it "does not contain . . . 'a substantive requirement that a complete mitigation plan be actually formulated and adopted.'" Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 473 (9th Cir. 2000) (quoting Robertson, 490 U.S. at 352). "A mitigation plan 'need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements.'" Id. (quoting Nat'l Parks & Conservation Ass'n v. United States Dep't of Transp., 222 F.3d 677, 681 n.4 (9th Cir. 2000)). "[N]umerous cases have held that it is not necessary to have a final, detailed mitigation plan prior to approval of a § 404 permit; instead, a permit conditioned on future implementation of a mitigation plan complies with the dictates of the Clean Water Act." Sierra Club v. Slater, 120 F.3d 623, 636 (6th Cir. 1997) (citing Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Eng'rs, 87 F.3d 1242, 1248 (11th Cir. 1996); National Wildlife Fed'n v. Whistler, 27 F.3d 1341, 1343, 1346 (8th Cir. 1994); Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1528- 29 (10th Cir. 1992); Friends of the Earth v. Hintz, 800 F.2d 822, 825-26, 836-37 (9th Cir. 1986). Plaintiffs' allegations, therefore, that the Corps' mitigation features fail because they are not fully developed, are not based on the clear weight of the case law.

Plaintiffs also imply that because the Corps relies on compliance with state and local requirements, the Corps' analysis is inadequate. This is erroneous. Courts have held that agencies do not act arbitrarily or capriciously by concluding that impacts will be mitigated by the applicant's adherence to local land use planning ordinances and zoning ordinances. See Lockhart v. Kenops, 927 F.2d 1028, 1033 (8th Cir. 1991); Maryland-National Capital Park and Planning Commission v.

U.S. Postal Service, 487 F.2d 1029, 1036–37 (D.C. Cir. 1973); U.S. v. Vertac Chemical Corp., 33 F. Supp. 2d 769 (E.D. Ark. 1998) (vacated on other grounds by United States v. Hercules, Inc., 247 F.3d 706 (8th Cir. 2001) (holding that EPA's reliance on local zoning ordinances was not arbitrary and capricious); New Hope Community Ass'n v. HUD, 509 F. Supp. 523, 529–30 (D.C.N.C. 1981) (noting HUD's compliance with zoning ordinances and lack of significant effects). As stated previously, the Corps met and/or exceeded the recommendations and requirements of Federal, state and local laws and ordinances. Accordingly, the Corps reasonably determined that with the mitigation required by state and local entities, along with the requirements in the permit, the permit would not have a significant impact on the environment.

In any event, the record shows that the Corps' mitigation analysis consists of more than vague promises. The Corps required the applicant to purchase mitigation credits associated with the acquisition, enhancement, management, and administration of 47.5 acres of pine flatwood/savannah wetlands from an interagency approved mitigation bank sponsored by the Louisiana Nature Conservancy. A.R. at 000978. The banked credits will be acquired from an approved site within the same hydrologic watershed. Id. Further, the Corps required special conditions in the permit, including compliance with local floodplain ordinances, regulations, and permits. AR at 000988. The permit also requires that the permittee obtain a written approval or permit under the Natural and Scenic Rivers Program, administered by the Louisiana Department of the Natural and Scenic Rivers Program. Id. In addition, the permittee's agreement to compensate by contributing funds for the purchase of wetlands is fully documented and required by the special conditions to the permit. The permit even requires that "[t]he Louisiana Nature Conservancy will provide the Corps of Engineers verification of receipt of the contribution and the Corps of Engineers will then contact the permittee

informing him that he may proceed." Id. (emphasis in original). If the applicant does not comply with the compensatory mitigation requirements, the permit can be suspended and revoked, and the permit site restored. Id. See: Permit Special Conditions 12, 13, 14, 15,16 & 17, at A.R. 000988-000989. Clearly, the administrative record shows that the Corps' mitigation features are more than "unenforceable promises or unanalyzed measures." See Pls.' Summ. J. Br. at 14.

3. The Corps' Issuance of the Permit was "in Accordance with Law."

Without authority, Plaintiffs assert that the purpose of the Clean Water Act section 401 requirement for a certification from the state that a project complies with state water quality standards is "to ensure that water quality impacts would be examined before the Corps issues a section 404 permit." Pls.' Summ. J. Br. at 15 (emphasis in original). Plaintiffs go on to argue, therefore, also without authority, that whenever a state certification is called into question, a previously-issued 404 permit is no longer "in accordance with law," and is in violation of the Administrative Procedure Act, 5 U.S.C. § 706. Pls.' Summ. J. Br. at 14-16.

Courts, however, have found otherwise. In City of Olmstead Falls v. E.P.A., 266 F. Supp. 718, 726 (N.D. Ohio 2003),[2]/ the court specifically found that EPA's reliance on a state's initial certification under section 401 was in compliance with the Clean Water Act, and therefore "in accordance with law," even where that certification was later found to be invalid. Moreover, contrary to Plaintiffs' unsupported assertion as to the purpose of section 401, Olmstead found that the purpose of section 401is a federalism concern: "to assure that Federal licensing or permitting agencies cannot override State water quality requirements." Id. (quoting Environmental Defense

[2]/ Plaintiffs appear to simply dismiss Olmstead as wrongly decided, but provide no authority or support for their contrary view.

Fund, Inc. v. Alexander, 501 F. Supp. 742, 771 (N.D. Miss. 1980)). Nevertheless, Congress made clear that such federalism concerns could not be used to thwart the Corps' ability to act. The statute specifically requires a state to act within "a reasonable period of time (which shall not exceed one year) after receipt" of a request for certification. 33 U.S.C. § 1341(a)(1). If no action is taken within a year, the state is deemed to have waived its opportunity to comment on a project's compliance with water quality standards.[3]/ Id. The District Court for the Western District of Washington examined the legislative history behind this provision, addressing particularly Congress' decision to include the time limit as a means to "prevent a state from interminably blocking a federal permit." Airport Communities Coalition v. Graves, 280 F. Supp. 2d 1207, 1215 (W.D. Wash. 2003). The Court held that it didn't matter whether a state had failed to take any action at all or whether a state had begun the certification process but had failed to complete it within the one-year time frame: "the legislative history of Section 401 makes clear that either of those two situations was unacceptable to Congress because both result in delays in issuing Federal permits." Id. Thus the Court concluded that even where a state certification is challenged in court, action taken by the state or state courts outside the time limit did not automatically affect the validity of a 404 permit. Id. Instead, the Court cited Corps regulations stating that in such situations, it is within the Corps' discretion whether a previously-issued 404 permit may be altered in any way. Id. (citing RGL 87-03(2)(c)). Those regulations, of course, are entitled to substantial deference. United States v. Mead Corp., 533 U.S. 218 (2001).

[3]/ The Corps may set a shorter time by regulation, and indeed has done so. Corps regulations found at 33 C.F.R. § 325.2(b)(ii) require a state to respond to a request for a certification within 60 days, unless the Corps, in its discretion, determines that a longer period is appropriate. Here, the state court vacatur of the certification occurred after both the regulatory and statutory time limits had passed.

Thus it is Plaintiffs' interpretation of the statute which flies in the face of the letter and spirit of the Clean Water Act. Under Plaintiffs' analysis, any time a state changed or reversed its decision regarding a 401 certification, the Corps would be required to re-open permits already issued, regardless of when such changes are made. The federal permitting process would thus be held hostage to state action, and permit holders would never be able to rely on the validity of their permits. See also P.R. Sun Oil Co. v. EPA, 8 F.3d 73, 79 (1st Cir. 1993) (addressing a discharge permit issued by EPA, the Court held that EPA was free to disregard changes in certification that were made by Puerto Rico after both the regulatory 60-day time limit and the statutory one-year time limit has passed; under the facts of the case, however, EPA was required to explain its decision to disregard those changes.)

Thus, as discussed in Defendant's Brief, the Corps was not arbitrary and capricious in relying on the validity of the state certification when it issued the 404 permit. Nor is the permit "not in accordance with law," simply because of state action taken after the permit was reasonably issued by the Corps.

CONCLUSION

For the foregoing reasons, the Court should grant the Corps' motion for summary judgment and deny Plaintiffs' motion for summary judgment.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** on:

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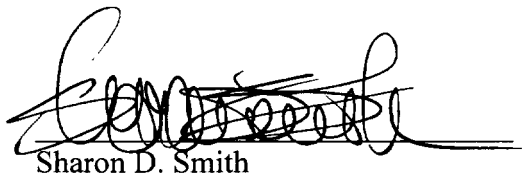
Attorneys for the Plaintiff, by causing a full, true and correct copy thereof to be sent, on the date set forth below, by mailing in a sealed, first class postage prepaid envelope, addressed to the last known mailing address of the attorney and deposited with the United States Postal Service at Washington D.C.

DATED this 12th day of July, 2004.



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