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' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Over the past seven years, the U.S. Army Corps of Engineers ("Corps") has granted 72 permits within a three-mile radius of the current project. Decision Document, AR 964. Those 72 permits "directly affected" over 400 acres of wetlands. Id. The Corps, however, has never analyzed the cumulative impacts from those permits, thus violating the National Environmental Policy Act ("NEPA"). 40 C.F.R. § 1508.25(c)(3) (requiring the Corps to examine cumulative impacts). The two pages in the Environmental Assessment purporting to discuss cumulative impacts contain no site-specific information on the environmental impacts resulting from the

previous permits. Instead, the Corps simply sets forth generalities about wetlands destruction, but cites no site-specific information. Those two pages of generalities do not satisfy NEPA. Kern v. BLM, 284 F.3d 1062, 1075 (9th Cir. 2002) ("The cumulative impact analysis must be more than perfunctory."). Further, the Corps did not include any discussion of the impacts from future phases of the development despite the Corps' acknowledgement that those phases are reasonably foreseeable. Decision Document, AR 965 ("[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."); see 40 C.F.R. § 1508.7 (defining "cumulative impacts" to include impacts from "reasonably foreseeable future actions").

To defend this lack of analysis, the Corps argues that its discussion is sufficient because Environmental Assessments are "'rough-cut,' low-budget,' preliminary look[s] at the environmental impact[s] of a proposed project." Defendant's Reply Memorandum in Support of its Motion for Summary Judgment and Response to Plaintiffs' Cross-Motion for Summary Judgment ("Corps' Reply Memo"), p. 3 (citations omitted). This argument misses the point. Environmental Assessments are intended to determine whether significant impacts, including cumulative impacts, exist. 40 C.F.R. § 1501.3. If a project has significant environmental impacts, the Corps must prepare an Environmental Impact Statement. 42 U.S.C. § 4332(2)(C). In this case, the Corps concluded that the project had no significant impacts without examining site-specific cumulative impact information. Without such information, the Corps' conclusion that the project had no significant impacts is unsupported by the Administrative Record and is thus 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 . . . .").

The Corps also violated NEPA because the Environmental Assessment reveals significant localized impacts from the project. Decision Document, AR 957 ("Total and complete loss of wetland functions will occur in those areas filled . . . . Impacts would be considered localized and long-term."); see also id. at 952, 958, 960. Instead of preparing an Environmental Impact Statement, however, the Corps concluded that mitigation rendered those impacts non-significant. Decision Document, AR 965. That conclusion is not supported by the Administrative Record, which contains no analysis that the mitigation measures will actually mitigate the localized impacts.

In addition, the Corps violated the Clean Water Act and the Administrative Procedure Act by basing its section 404 permit on a water quality certification issued in violation of the Louisiana Constitution. AR 1004, O'Reilly v. LDEQ, Civ. No. 509564, 19th JDC (Judgment, Mar. 4, 2004). The Corps relies on an Eastern District of Ohio case to argue that the state court's decision has no affect on the section 404 permit. City of Olmstead Falls v. EPA, 266 F. Supp. 2d 718, 721 (N.D. Ohio 2003). However, City of Olmstead Falls is neither controlling nor directly on point, since in that case a state court never invalidated the state's water quality certification decision. On the other hand, in this case, a state court determined that the Louisiana Department of Environmental Quality issued the water quality certification in violation of the Louisiana Constitution. AR 1004. To disregard that decision undermines the authority of that court and cuts at the very heart of the federalist structure of the Clean Water Act. See 33 U.S.C. § 1341(a)(1) (requiring state certification before the Corps issues a section 404 permit).

ARGUMENT

I. THE CORPS' FAILURE TO EXAMINE SITE-SPECIFIC INFORMATION RENDERS ITS ENVIRONMENTAL ASSESSMENT ARBITRARY AND CAPRICIOUS.

In this case, the Corps has granted 72 permits for the destruction of wetlands within a three-mile radius of the proposed project. Decision Document, AR 964. In addition, the current project is the first of three phases, which the Corps acknowledges are reasonably foreseeable: "[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; see 40 C.F.R. § 1508.7 (defining cumulative impacts 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").

Despite the environmental impacts from the previous projects and the foreseeability of the next phases of this project, the Corps failed to include a site-specific cumulative impacts analysis; instead, the Corps spent two pages discussing generalities about wetlands destruction. NEPA requires more. 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."); see also Kern v. BLM, 284 F.3d 1062, 1075 (9th Cir. 2002) ("The cumulative impact analysis must be more than perfunctory.").

The Corps argues that these generalities are sufficient because it prepared an Environmental Assessment instead of an Environmental Impact Statement. Corps' Reply Memo, p. 3. However, the point of an Environmental Assessment is to assess whether a project will

have significant impacts and thus require an Environmental Impact Statement. 40 C.F.R. § 1501.3. Without site-specific information about cumulative impacts, the Corps has no valid basis to determine that the project will not have a significant impact. In other words, the Corps cannot determine whether the "incremental impact" of this project when added to "past, present, and reasonably foreseeable future actions" is not significant without actually analyzing the environmental impacts from past and future actions.

The Corps also argues its failure to examine the cumulative impacts from the future planned phases of Timber Branch is justified because those phases are "speculative." Corps' Reply Memo, p. 5 (citing Headwaters, Inc. v. BLM, 914 F.2d 1174, 1182 (9th Cir. 1990)). But Corps' own statement in the Environmental Assessment acknowledging the likelihood of the future phases flatly contradicts the Corps' litigation position: "[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. Headwaters is inapplicable because in that case the court determined that the agency had no plans to conduct any further activity, such as logging, after building an access road in a forest. The court concluded that the agency did not have to examine impacts from activity that it did not plan to conduct. Compare Ocean Advocates v. U.S. Army Corps of Engr's, 361 F.3d 1108, 1129 (9th Cir. 2004) (holding that the Corps' failure to examine cumulative impacts from future projects was invalid and that "[t]he Corps' findings about cumulative impacts were perfunctory and conclusory and do not provide a helpful analysis of past, present, and future projects."). Here, however, the future phases are not merely speculative because they "can be anticipated." Decision Document, AR 965.

The Corps attempts to shift the focus from its lack cumulative impacts analysis to the relationship between NEPA and local planning. Corps' Reply Memo, p. 3. The Corps' citation

to Isle of Hop Historical Ass'n v. U.S. Army Corps of Eng'rs, 646 F.2d 215, 221 (5th Cir 1981) is simply irrelevant. In Isle of Hop, the court held that the Corps did not have a duty to determine whether a project complied with local zoning law. Id. at 220. The zoning of the project is not at issue in this case.

In fact, it is the Corps, not Plaintiffs, who have attempted to substitute community planning for the Corps' independent duties under NEPA. According to the Corps, "[f]lood control will be met by adherence with St. Tammany Parish drainage requirements." Corps' Reply Memo, p. 4. However, the Administrative Record contains no analysis of these drainage requirements and whether they will actually mitigate the environmental impacts from the project. In response, the Corps again attempts to shift the focus from its lack of analysis by stating: "Plaintiffs also imply that because the Corps relies on compliance with state and local requirements, the Corps' analysis is inadequate." Corps' Reply Memo, p. 6. The issue, however, is whether the Corps can rely on an Administrative Record that contains no independent analysis that the drainage requirements will mitigate the impacts acknowledged by the Corps. The answer is no. See 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."). None of the cases cited by the Corps allow an agency to delegate its duty to analyze environmental impacts to local governments as the Corps did here.

II. THE CORPS VIOLATED NEPA BY FAILING TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT AFTER ACKNOWLEDGING THAT THE PROJECT WILL RESULT IN SIGNIFICANT ENVIRONMENTAL IMPACTS.

In the Environmental Assessment, the Corps admitted that the project will have significant environmental impacts. According to the Corps, "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; see also Plaintiffs' Statement of Undisputed Material Facts, ¶¶ 8-9. However, the Corps relied on mitigation measures to conclude that the project would not have significant environmental impacts and thus did not require an Environmental Impact Statement. Decision Document, AR 964.

However, the Administrative Record lacks any analysis supporting the Corps' conclusion that the mitigation measures will actually mitigate the project's environmental impacts. For example, the Corps relies on the Applicant's purchase of compensatory credits in the same "hydrologic watershed." Decision Document, AR 978. However, the Corps provides no analysis of whether these credits will have any mitigating effect on the localized environmental impacts resulting from this project. Wetlands are not simply interchangeable--purchasing credits for wetlands in one location may or may not mitigate environmental effects. The Administrative Record, however, reveals that the Corps did not even ask the necessary questions, including the distance between the purchased wetlands and the destroyed wetlands and whether the purchased wetlands will replace the functions of the destroyed wetlands.

The Corps' reliance on Okanogan Highlands Alliance v. Williams, 236 F.3d 468 (9th Cir. 2000) is misplaced because in that case the Forest Service had actually prepared an Environmental Impact Statement that included a detailed mitigation plan supported by extensive analysis. See also Sierra Club v. Slater, 120 F.3d 623, 636 (6th Cir. 1997) (analyzing the

mitigation plan set forth in an Environmental Impact Statement). Thus, the courts in Okanogan Highlands Alliance and Slater did not address the facts present here—whether an agency can rely on vague, unanalyzed mitigation to shirk its duty to prepare an Environmental Impact Statement. In this case, the Administrative Record contains no evidence supporting the Corps' conclusion that the mitigation measures ensure that this project will not have significant environmental impacts and thus its conclusion is arbitrary and capricious. 5 U.S.C. § 706.

III. THE STATE COURT DECISION VACATING A WATER QUALITY CERTIFICATION SHOULD BE GIVEN EFFECT BY THE CORPS AND THIS COURT.

On February 9, 2004, Judge Caldwell determined that the Louisiana Department of Environmental Quality ("LDEQ") issued the Applicant's water quality certification in violation of the Louisiana Constitution. AR 1004, O'Reilly v. LDEQ, Civ. No. 509564, 19th JDC (Judgment, Mar. 4, 2004) (vacating and remanding the water quality certification based on LDEQ's failure to "prepare an environmental analysis in compliance with the La. Const. art. IX § 1"). According to the Corps, despite the fact that the court vacated the water quality certification that was a prerequisite to the section 404 permit, the section 404 permit does not violate the Clean Water Act. In short, the Corps argues that it can simply ignore the state court judgment.

The Clean Water Act is based on cooperation between states government and the federal government. Keating v. FERC, 927 F.2d 616, 622 (D.C. Cir. 1991). In Louisiana, LDEQ issues water quality certifications, 33 La. Admin. Code pt. IX §§ 1501-1507, and Louisiana law provides for judicial review of agency decisions. La. Rev. Stat. 30:2050.21(A). The Corps' refusal to give effect to the state court's judgment vacating the Applicant's water quality certification eviscerates the right of Louisiana citizens to obtain meaningful review of state

agency decisions. In this case, Plaintiffs won the state court case but are not able to obtain full relief because the Corps is ignoring the judgment.

The case cited by the Corps, City of Olmstead Falls v. EPA, 266 F. Supp. 2d 718 (N.D. Ohio 2003), is neither controlling nor on-point. In City of Olmstead Falls, the Ohio Environmental Protection Agency ("Ohio EPA") waived its right to issue or deny a certification. Id. at 721. The City of Olmstead Falls appealed the Ohio EPA's decision and the Ohio Environmental Appeals Board held that the Ohio EPA's action violated state law. Id. However, an Ohio state court reversed the Ohio Environmental Appeals Board. Id. Thus, that case did not involve a state court judgment vacating a water quality certification.

In this case, the Corps issued a section 404 permit based on a certification that lacked an analysis of impacts to the environment. Because 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.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' Cross-Motion for Summary Judgment and order the Corps to prepare an Environmental Impact Statement that fully analyzes the environmental impacts of destroying over 31 acres of wetlands, including cumulative impacts.

Respectfully Submitted this 23rd day of July, 2004,

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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 23 day of July, 2004, to:

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