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U.S. DISTRICT COURT  
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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

LORETTO O'REILLY, JR.

CIVIL ACTION

VERSUS

NO. 04-940

UNITED STATES ARMY CORPS OF ENG'RS

SECTION "A"(5)

**ORDER AND REASONS**

Before the Court are **Plaintiffs' Motion for Summary Judgment on Standing and the Merits (Rec. Doc. 16)** and **Defendant's Motion for Summary Judgment (Rec. Doc. 12)**. Intervenor, Eric A. Bopp, has adopted and joined in Defendant's motion. Both motions are opposed. The motions, set for hearing on July 28, 2004, are before the Court on the briefs without oral argument. For the reasons that follow, Plaintiffs' motion is GRANTED and Defendant's motion is DENIED.

**I. BACKGROUND**

Plaintiffs filed this suit challenging a permit issued by the defendant, the U.S. Army Corps of Engineers ("the Corps") pursuant

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to § 404 of the Clean Water Act ("CWA"). The permit authorizes the permittee, August Hand, Jr.,<sup>1</sup> to dredge and fill 81.58 acres in St. Tammany, Parish. Mr. Hand intends to create a residential development on the site. 39.54 of the total acreage is protected pine flatwood/savannah wetlands.

The permitting process originally began in 1999 when the applicant sought to dredge and fill 147 acres, 91.94 acres of which were wetlands. That application described development of a subdivision in three phases. The applicant later withdrew that application and Mr. Hand submitted a revised application in September 2000. The revised application was for 81.58 acres, which included the 39.54 of regulated wetlands at issue here. The project was termed "Phase I of Timber Branch II." A public notice went out and comments were received.

In December 2003, the Corps issued the § 404 permit. The Corps performed an Environmental Assessment ("EA") in lieu of an Environmental Impact Statement ("EIS") based upon its conclusion that the proposed development would not have a significant impact on the environment in light of the mitigation measures upon which the permit was conditioned. In other words, the Corps issued a mitigated "finding of no significant impact" or "mitigated FONSI."

<sup>1</sup> Mr. Hand is a representative member of the Planche family who currently owns the property.

Plaintiffs filed this suit seeking to enjoin the permit. They claim that the permit was illegally issued because the Corps did not prepare an EIS, that the Corps did not consider the cumulative effects of the permit, and that the LDEQ water qualification certification, which is a prerequisite to the issuance of a § 404 permit, was subsequently invalidated in a state court proceeding.

On June 30, 2004, the parties, including the Intervenor, participated in oral argument before this Court regarding Plaintiffs' motion for a preliminary injunction. At the hearing, the Corps informed the Court that it was not contesting Plaintiffs' standing to bring this suit, and based upon the Corps' motion for summary judgment, that position has not changed. The parties also confirmed that the Court's resolution of this matter is to be based solely upon the administrative record developed by the Corps without consideration of new evidence. Finally, because the Court's decision is to be based solely upon the administrative record and applicable law, the parties agreed that this matter is appropriate for determination via cross motions for summary judgment.

## **II. DISCUSSION**

### **1. The Parties' Contentions**

Plaintiffs contend that the Corps' decision to issue the permit without the benefit of an EIS was arbitrary and capricious.

Plaintiffs argue that the Corps's EA does not address the cumulative impacts of the project in light of past and reasonably foreseeable development. In particular, Plaintiffs point out that the Corps has issued a total of 87 permits within a three mile radius of the proposed site and that Phases II and III of the Timber Branch II development are reasonably foreseeable. Plaintiffs also argue that the Corps' EA describes the significant environmental impacts associated with the project yet the EA merely recites the offsetting mitigation measures without analyzing how those mitigation measures will actually reduce or offset the significant impacts to acceptable levels.<sup>2</sup>

In opposition, the Corps and Intervenor argue that Plaintiffs have failed to show that the Corps' decision not to conduct an EIS was arbitrary, capricious, or contrary to law. The Corps argues that its decision to prepare an EA in lieu of an EIS was reasonable. According to the Corps, any significant environmental impacts are being compensated for and mitigated through a host of mitigation

<sup>2</sup> Plaintiffs also argue that the permit was unlawfully issued because the state water quality certification upon which it was based had been subsequently vacated. On July 30, 2004, the Intervenor filed into the record a water quality certification dated July 28, 2004, which was issued by the Louisiana Department of Environmental Quality. Based on the newly issued certificate, the Court concludes that Plaintiffs' argument with respect to the vacated water quality certification is now moot. Therefore, the Court need not address this issue.

measures. The Corps argues that the mitigation measures were adequately addressed in the EA.

The Corps further argues that the depth of its consideration of the cumulative impact of the project was appropriate. While Plaintiffs contend that the project is only Phase I of III, the Corps points out that the permit is limited only to Phase I, and that any other development requires completely new and separate permitting. The Corps points out that Phase I has nothing to do with any future aspects of the project, which are wholly speculative at this stage, and that the project therefore has *independent utility* apart from any future phases of the project.

## **2. Applicable Law and Legal Analysis**

Section 404 of the Clean Water Act authorizes the Corps to issue permits for the discharge of dredged or fill material into the navigable waters of the United States. 33 U.S.C.A. 1344(a) (West 2001). Wetlands are considered navigable waters subject to the permitting process. See Tull v. U.S., 481 U.S. 412, 414 (1987).

The National Environmental Policy Act ("NEPA") is a separate piece of federal legislation designed to force federal agencies to consider the environmental impacts of their actions, i.e., issuing a § 404 permit. The Supreme Court recently explained NEPA as follows:

Signed into law on January 1, 1970, NEPA establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment," and was intended to reduce or eliminate environmental damage and to promote "the understanding of the ecological systems and natural resources important to" the United States. "NEPA itself does not mandate particular results" in order to accomplish these ends. Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.

Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204, 2209 (2004)

(citations omitted).

NEPA dictates that federal agencies undertaking "major Federal actions significantly affecting the quality of the human environment," must prepare a detailed statement on (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. A. § 4332(2)(C) (West 2003). This detailed statement is called an Environmental Impact Statement or EIS. Dep't of Transp., 124 S. Ct. at 2209.

On occasion, the permitting agency will issue a Finding of No Significant Impact or FONSI and decline to prepare an EIS

notwithstanding that the proposed project will have significant environmental impacts. See Spiller v. White, 352 F.3d 235, 241 (5th Cir. 2004). In such a situation, the permittee agrees to employ "mitigation measures" that will lower the otherwise significant impacts of an activity to a level of insignificance. Id. In this way, a FONSI can issue for an activity that otherwise would require the preparation of a full-blown EIS. Id. The Fifth Circuit has expressly approved of the use of a so-called "mitigated FONSI." Id. An agency's decision not to prepare an EIS can be set aside only upon a showing that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. at 2213 (citing 5 U.S.C. § 706(2)(A); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 375-76 (1989); Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)).

In the instant case, the Corps does not challenge Plaintiffs' contention that its issuance of the § 404 permit is a "major Federal action" subject to NEPA. Further, the Court does not glean from the Corps' memoranda that the Corps is disagreeing with Plaintiffs' contention that there are significant environmental impacts associated with the proposed Timber Branch II project. Rather, the crux of the dispute is whether the Corps' FONSI, which was predicated upon the permittee agreeing to certain mitigation measures, was arbitrary, capricious, or an abuse of discretion.

As noted above, premitting mitigation, the Corps does not dispute that the proposed project entails significant environmental impacts. The Corps noted that the project would likely cause "substantial, long-term, adverse effects" to the project site substrate. R. 952 (Dep't of the Army Permit Evaluation and Decision Document). These adverse effects would likely result from anoxic and anaerobic conditions caused from redistribution of the native soils, chemical changes in the soil resulting from compaction, and decreased flood storage capability resulting from the addition of impervious materials for road surfaces, housing pads, etc. Id. Further, the site currently hosts a plethora of Louisiana aquatic organisms including various amphibians and reptiles. R. 957. Some species would be able to relocate into a designated 100 foot wide buffer zone around the proposed subdivision but many others would be completely eliminated. Id. These adverse impacts would be long-term but localized. Id. at 958.

The site is also home to a thriving wildlife habitat including deer, squirrels, rabbits, raccoons, songbirds, and other species far too numerous to mention. These inhabitants will have to relocate to areas adjoining the proposed subdivision but those dependent on forested wetland habitat would suffer long-term loss of breeding, foraging, and/or cover habitat. R. 958. Those able to relocate potentially face physiological stress because the smaller remaining



habitat area will support few individuals. Id. The Corps concluded that the adverse effects to the wildlife habitat would be moderate to major. Id. The impacts would be long-term but localized. Id.

The Corps summarized that the proposed project would result in adverse secondary, cumulative, and "induced" impacts to the local aquatic ecosystem in that *inter alia* wildlife and wetland habitat would be destroyed and species diversity will be diminished. R. 963. The Corps noted that these aquatic impacts could be compounded when the cumulative effects of other developments and the inducement of additional support services in conjunction with Phase I are considered. Id.

The Corps recognized that the proposed project will add to the cumulative loss of wetland area in St. Tammany Parish and consequently diminishment of associated values of wetland functions. R. 964. The Corps also noted that when considered in conjunction with the potential for additional tentative phases of Timber Branch II, the cumulative effects would be major. Id. Further, each additional development of wetlands contributes to their increasing fragmentation. Id. Any future phases would add to the cumulative impact. R. 965.

Undoubtedly, the environmental impacts associated with the Timber Branch II project are significant even when future phases and

cumulative impacts are not taken into consideration. No other conclusion could reasonably be reached based on the findings in the Corps' Decision Document. The question now is whether the Corps acted arbitrarily or capriciously or abused its discretion in concluding that the mitigation measures, upon which the permit was conditioned, reduced the otherwise significant impacts of the project to a level of insignificance. In making such a determination the Court cannot substitute its own judgment for that of the Corps' but can only ensure that the Corps has performed as mandated by Congress via NEPA. That said, the Court is persuaded that Plaintiffs' arguments have merit.

As noted above, issuance of the permit in the absence of an EIS was based solely upon the mitigation measures identified in the permit. Those mitigation measures include compliance with parish or local floodplain ordinances and regulations, a 100 foot vegetative buffer zone around the subdivision and the purchase of mitigation credits to compensate for any remaining and unavoidable adverse impacts associated with the project. R. 988-89. The permittee must also obtain separate approval from the Corps if the project requires work outside of that described in the permit. R. 988.

The Court agrees with Plaintiffs' contention that the administrative record contains no support for the Corp's conclusion

that the mitigation measures would remove or reduce the identified adverse impacts of the project. Moreover, the EA contains little or no analysis or data with respect to the mitigation measures. Instead, the EA discusses the project's adverse impacts and describes the associated mitigation measures but nothing in the Document connects the two together. Without the collection or analysis of relevant data, the Court is left to assume that the Corps based its decision on speculation that the impacts would be successfully mitigated. For instance, one of the mitigating measures is that the permittee comply with all local flood plain ordinances and regulations. Not only does the Corps fail to explain how such compliance serves to mitigate the adverse environmental impacts, the Corps does not even enumerate the pertinent ordinances or reference what the contemplated ordinances require. The discretion afforded the Corps under the law to make the mitigation determination in the first instance does not mean that a decision is unimpeachable simply because the Corps has reached a particular conclusion. The Corps must provide enough analysis and data so that a reviewing court can insure that the Corps has complied with NEPA. In short, the Corp's failure to employ any analysis or gather any data with respect to its mitigated FONSI rendered its decision arbitrary or capricious.

The Corps also abused its discretion in failing to give an in

depth analysis to the cumulative effects of the project, including the potential Phases II and III of Timber Branch II. The Court agrees with Plaintiffs' contention that the EA merely recites the potential cumulative effects of the project in light of other wetlands destruction in the area but the EA is supported by no real analysis or data with respect to cumulative effects of this project. In light of the already 72 permits issues within a 3 mile radius of the project site, and the continued rapid growth and urbanization in St. Tammany Parish, the Corps acted arbitrarily or capriciously in concluding that the cumulative effects of the project were sufficiently mitigated.

Moreover, the Corps should have considered the other two phases of the Timber Branch II project. In 1999, when the property owners attempted to obtain permitting for the entirety of the three-phase project, the Environmental Protection Agency and the United States Fish & Wildlife Service recommended that the permit not be issued. Both agencies stated that the implementation of the activity may result in substantial and unacceptable impacts to aquatic resources of national importance. R. 966-967. The applicant's revised application, the one ultimately approved by the Corps and ultimately concurred in by those agencies, utilized the largest acreages of non-wetlands on the project site. R. 974. The Decision Document expressly notes that the other phases are a possibility and that the

addition of those other phases would cause some cumulative effects to become "major." R. 964. In fact, the Corps devotes nearly an entire page of its Decision Document to addressing why it need not concern itself with Phases II and III given their "independent utility." R. 976.

The Corps cannot, however, consider Phase I in a vacuum under these facts. The Corps points to no obstacles, the permitting process aside, that have rendered Phases II and III impracticable, financially unattractive, or generally not feasible. The record blaringly suggests that the sole reason that Phases II and III were eliminated from the permitting application was to facilitate the issuance of the permit so that the project could get underway. The only conclusion to be reached based on the record is that Phases II and III are going to be financially viable in light of the expanding urbanization in St. Tammany Parish. Even though additional permitting would be required for Phases II and III, Phase I represents the proverbial "foot in the door" with respect to developing the entire project. In short, the other two phases are "reasonably foreseeable" and the current project represents a "piecemealing approach for implementing the totality of the Timber Branch II project." R. 976. Therefore, the Corps acted arbitrarily or capriciously in issuing the permit without considering the effect of the other two phases.

**III. CONCLUSION**

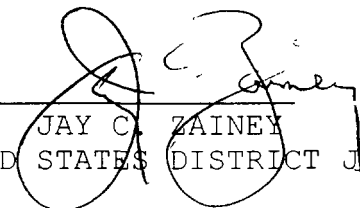
The Corps acted arbitrarily, capriciously, or abused its discretion by issuing the § 404 permit without preparing a full EIS as required by NEPA. In light of the long-term and irreversible environmental impacts associated with this project, the Corp's action is wholly at odds with NEPA. Because the permit was issued without an EIS in violation of NEPA, Plaintiffs are entitled to an injunction.

Accordingly;

**IT IS ORDERED** that **Plaintiffs' Motion for Summary Judgment on Standing and the Merits (Rec. Doc. 16)** should be and is hereby **GRANTED**. The § 404 permit no. EC-19-990-2020-1 issued by the Department of the Army is hereby **ENJOINED**;

**IT IS FURTHER ORDERED** that **Defendant's Motion for Summary Judgment (Rec. Doc. 12)** should be and is hereby **DENIED**.

New Orleans, Louisiana, this 10<sup>th</sup> day of AUGUST, 2004.

  
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JAY C. ZAINERY  
UNITED STATES DISTRICT JUDGE