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 A PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Loretto O'Reilly, Jr., Kelly Fitzmaurice, and Hazel Sinclair respectfully request that the court grant a preliminary injunction to stay the Department of Army Permit No. EC-19-990-2020-1 pending final resolution of Plaintiffs' federal claims against the U.S. Army Corps of Engineers. Plaintiffs are entitled to a Preliminary Induction because: (1) Plaintiffs have a substantial likelihood of prevailing on the

merits, (2) denying the preliminary injunction will result in a substantial threat that the Plaintiffs will suffer an irreparable injury, (3) the threatened injury to Plaintiffs outweighs potential injury posed by an injunction to the defendant, and (4) a decision by the court to grant a preliminary injunction will not disserve the public interest.

Respectfully submitted this 4th day of May, 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 4th day of May, 2004.

Josh Borsellino

Joshua Borsellino

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs Loretto O'Reilly, Hazel Sinclair, and Kelly Fitzmaurice respectfully request that this Court issue a preliminary injunction to prevent the destruction of 39.54 acres of ecologically valuable wetlands resulting from an illegal permit issued by the U.S. Army Corps of

Engineers ("Corps"). The section 404 permit issued by the Corps contributes to the continuing loss of Louisiana's wetlands, which 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." Wetland Fact Sheet, *available at* http://www.americaswetland.com/custompage.cfm?pageid=2&cid=8. The problem is so severe that former Governor Mike Foster initiated a three-year campaign entitled "America's Wetland: Campaign to Save Coastal Louisiana" to "establish the values and significance of this vast world ecological region and will highlight the pending economic and energy security threat posted to our nation by its destruction." Background, *available at* http://www.americaswetland.com/custompage.cfm?pageid=2&cid=5.

Despite the crisis of wetlands loss, the Corps issued a section 404 permit for a residential subdivision that the Corps acknowledges "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." Exhibit A, p. 10 (Nov. 10, 2003 Decision Document). Despite these significant environmental impacts, the Corps failed to prepare an Environmental Impact Statement ("EIS") as required by the National Environmental Policy Act ("NEPA"). 42 U.S.C. § 4332(2)(C). Further, the Corps violated NEPA by failing to analyze the cumulative impacts caused by "past, present, and reasonably foreseeable future actions," 40 C.F.R. §1508.7, despite the facts that (1) the project is the first in a three-phase plan, and (2) over a seven-year period, the Corps has issued 72 permits to fill wetlands within a 3-mile radius of the project. Exhibit A, p. 20.

In addition, the Corps violated the Clean Water Act by basing the section 404 permit on an invalid water quality certification issued by the Louisiana Department of Environmental

Quality ("LDEQ"). The 19th Judicial District Court in Baton Rouge, Louisiana has vacated that certification for violations of the Louisiana Constitution. Exhibit B (State Court 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"); *see also* 33 U.S.C. §§ 1341 & 1344.

Because the Applicant has expressed a desire to begin construction as soon as possible, Plaintiffs request that this Court issue a preliminary injunction to maintain the status quo until this Court hears the merits of this case. The Fifth Circuit has established a four-part test for issuing a preliminary injunction: (1) Plaintiffs must have a substantial likelihood of prevailing on the merits, (2) denying the preliminary injunction would result in a substantial threat that the Plaintiffs will suffer an irreparable injury, (3) the threatened injury to Plaintiffs outweighs potential injury posed by an injunction to the defendant, and (4) a decision by the court to grant a preliminary injunction will not disserve the public interest. *Guy Carpenter & Co., Inc. v. Provenzale*, 334 F.3d 459, 464 (5th Cir. 2003).

In this case, Plaintiffs satisfy each of the requirements for a preliminary injunction. First, Plaintiffs will likely succeed on the merits, because the Corps violated NEPA when it issued the permit without preparing an EIS and without adequately considering cumulative impacts of the project. The Corps also violated the Clean Water Act when it issued the permit based on an invalid water quality certification.

Second, Plaintiffs will suffer irreparable injury if the injunction is denied, as they will be unable to receive meaningful relief if the wetlands are destroyed before the merits of their claim are decided. *See Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often

permanent or of long duration, i.e., irreparable."). The destruction of the wetlands will cause Plaintiffs aesthetic, economic and recreational injury, as it will displace wildlife, as well as lead to increased flooding and pollution of nearby waterways. *See* Exhibits C, D and E (Declarations of Hazel Sinclair, Loretto O'Reilly, Jr., and Kelly Fitzmaurice).

Third, issuing a preliminary injunction will not harm the Corps because the Corps, as a government agency has a duty to ensure that its action complies with federal law. *Morris v. Slater*, 1998 WL 959658 at 5 (N.D. Tex. 1998) ("Plaintiffs correctly recognize that the public has an interest in avoiding harm to the environment and ensuring that government agencies comply with federal environmental statutes before undertaking projects that may impact the environment"). Finally, a preliminary injunction will serve the public interest, as the public has a strong interest in protecting wetlands and in ensuring that federal agencies fully comply with federal law. *Whitaker v. Thompson*, 248 F. Supp. 2d 1, 16 (D.C. Cir. 2002).

BACKGROUND

I. 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. The U.S. Environmental Protection Agency ("EPA") submitted comments that identified serious concerns about the project's environmental 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.

Exhibit F, p. 1 (EPA Letter, Sept. 29, 1999). 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.*

On August 16, 2001, the Applicant resubmitted the application. As proposed in the 2001 application, the project would require dredging and filling approximately 81.39 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. Exhibit A, p. 10.

During the public comment periods, nearby residents and property owners opposed the project because of the potential environmental impacts. *Id.* at 28.

On December 18, 2003, without notifying the Plaintiffs, the Corps issued the section 404 permit for the project. The proposed project is one phase in a much larger, three phase project. The Applicant even refers to the current proposal as "Phase I of Timber Branch II." *See* Exhibit G, p. 4 (Applicant's Response to Comments, April 7, 2000).[1] The envisioned project as a whole is over twice the size of the current project. *Id.* The three phases of Timber Branch II will constitute 153 acres, and the entire project will destroy over 96 acres of wetlands. *Id.*

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." Exhibit A, p. 10. 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 13. The Corps also indicated that the area was subject to flooding, stating that the soils were "poorly drained," and that "surface water runs off slowly." *Id.* at 7-8. The Corps stated

[1] Plaintiffs have included only the relevant portion of Applicant's Response.

that the Applicant's proposal to deposit fill material "would decrease flood storage capability and recharge capability." *Id.* at 8. Despite these acknowledged significant impacts, the Corps failed to prepare an EIS.

Further, the Corps relied on an invalid water quality certification by LDEQ when it issued the section 404 permit. Exhibit B.

II. Summary of the Section 404 Permitting Process

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. § 1344(a). The term "navigable waters" includes wetlands. *Tull v. U.S.*, 481 U.S. 412, 414 (1987). The regulations specifically identify wetlands as worthy of protection. *See* 33 C.F.R. § 320.4(b) (wetlands are a "productive and valuable public resource").

The Clean Water Act and its regulations express a strong preference for wetland protection. "It would hardly be putting the case too strongly to say that the Clean Water Act and the applicable regulations do not contemplate that wetlands will be destroyed simply because it is more convenient than not to do so." *Buttrey v. U.S.*, 690 F.2d 1170, 1180 (5th Cir. 1982). The regulations provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge." 40 C.F.R. § 230.10(a). Moreover, if the permit application does not concern a water-dependent project, the Corps must assume that practicable alternatives exist unless the applicant "clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3). This presumption of practicable alternatives "is very strong." *Buttrey*, 690 F.2d at 1180. The presumption of practical alternatives "creates an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site." *Bersani v. Robichaud*, 850 F.2d 36, 44 (2d Cir. 1988).

LAW AND ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

A. The Proposed Project Is a Major Federal Action Significantly Impacting the Environment and Thus NEPA requires the Corps to Prepare an EIS.

In this case, the Corps concluded that it did not have to prepare an EIS because the project would not have a significant impact on the environment. Exhibit A. However, the Corps' own Decision Document detailed short and long-term significant impacts from the project, including loss of vital wetlands, loss of wildlife habitat, and increased flooding. *Id.* at 10, 13-14, 16.

1. NEPA requires that all federal agencies prepare an EIS prior to taking "major federal action significantly affecting the human environment."

The 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, 964 (5th Cir. 1983). An agency considering a proposal may prepare an Environmental Assessment ("EA") in order to determine whether it must prepare an EIS. 40 C.F.R. 1501.3; *see also Sabine River Auth. v. United States Dep't of Interior*, 951 F.2d 669, 677 (5th Cir. 1992) ("The CEQ regulations permit federal agencies to make a preliminary 'Environmental Assessment' aimed at determining whether the environmental effects of a proposed action are 'significant.'"). An EA must "include brief discussions of the need for the proposal, of alternatives . . . of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b). The ultimate purpose of the EA is to lead to one of two findings: "either that the project requires the preparation of an EIS to detail its environmental impact, or that the project will have no significant impact . . . necessitating no further study of the environmental

consequences which would ordinarily be explored through an EIS." *Sabine River*, 951 F.2d at 677.

According to NEPA's implementing regulations, an agency seeking to determine whether a proposed activity will have a "significant" impact on the environment must consider both the "context" and the "intensity" of the project's effects. 40 C.F.R. § 1508.27. "Context . . . means that the significance of an action must be analyzed in several contexts such as a society as a whole (human, national), the affected region, the affected interests, and the locality. . . . Both short- and long- term effects are relevant. *Id.* § 1508.27(a).

"Intensity refers to the severity of the impact." *Id.* § 1508.27(b). Any action should consider several factors, including:

> (2) The degree to which the proposed action affects public health or safety.
> . . . .
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, *wetlands, wild and scenic rivers, or ecologically critical area.*
> . . . .
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts . . . Significance cannot be avoided by terming an action temporary or breaking it down into small component parts. . . .

Id. (emphasis added).

2. Based on the Corps' Own Decision Document, the Project Will Have a Significant Impact on the Environment.

The Corps' own analysis in its Decision Document indicates that the impacts of the proposed project will be significant in light of the "context" and "intensity." First, at several points in its Decision Document, the Corps acknowledged that the proposed project would have a major impact on the surrounding area. *See* Exhibit A at 10, 13-14, 16. In its discussion of the project's impact on wetlands, the Corps stated that, "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 10. The Corps also acknowledged that the project would have serious implications for wildlife habitat: "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 13-14.

Second, the Corps indicated that the project would increase in traffic in the area. *Id.* at 16. The agency stated that changes to the highway infrastructure might be necessary "to accommodate increases in traffic volume." *Id.* The agency concluded that the project's impact on traffic in the area would be "adverse and long-term." *Id.* Any changes in the highway infrastructure would constitute related projects that might have "individually insignificant but cumulatively significant impacts." 40 C.F.R. 1508.27(a).

Third, EPA warned the Corps that the area "already experiences occasional severe flooding." Exhibit F, p. 1. Indeed, the Corps itself acknowledged that the soils in the area are poorly drained and subject to periodic flooding. *See* Exhibit A, p. 8. This finding is supported by Dr. Van Heerden's Declaration, in which he states that the destruction of the wetlands will increase flooding in areas downstream from the project site. Exhibit H, ¶¶ 11, 12. Despite the obvious threat of increased flooding, the Corps devoted less than one page in its Decision Document to a discussion of the project's impact on flooding. *See* Exhibit A, p. 10.

Thus, the project will have an "intense" impact under 40 C.F.R. § 1508.27, 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.

B. The Corps Must Consider Cumulative Impacts of the Project Since the Surrounding Area Will Undergo Foreseeable Changes Resulting from and Related to this Project.

Plaintiffs are substantially likely to succeed on their claim that the Corps violated NEPA by failing to examine the cumulative impacts of the proposed project. As explained above, the Corps failed to prepare an EIS. This failure resulted in an abbreviated two-page cumulative impacts analysis that failed to address the impact that "past, present, and reasonably foreseeable future actions," 40 C.F.R. § 1508.7, will have on the environment. The Corps' failure to address cumulative impacts is especially egregious because this project is the first in a much larger three-phase project. *See* Exhibit G, p. 4. Furthermore, the Corps admitted that over the past seven years it has approved 72 permits to fill wetlands within a 3-mile radius of the project. Exhibit A, p. 20. The Corps, however, refuses to examine the cumulative impacts from this project in light of the previous environmental damage evidenced by these permits as well as potential future projects. Its failure to do so violates NEPA.

1. NEPA requires a federal agency considering proposed action to determine the cumulative impacts that the action will have on the environment.

NEPA's implementing regulations define "cumulative impact" to include past, present and future actions:

> 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.

In analyzing cumulative impacts, an agency should consider:

> (1) the area in which effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions--past, proposed, and reasonably foreseeable--that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

Fritiofson v. Alexander, 772 F.2d 1225, 1236 (5th Cir. 1985).

2. The Corps Failed to Consider Cumulative, Direct and Indirect Impacts that the Project and Related Projects Will Have on the Environment.

The Corps failed to consider cumulative impacts from "past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. First, the Corps failed to analyze the impacts of this project in light of the impact that will result from the other two phases of the project. This is a "reasonably foreseeable future action" and the Corps' failure to analyze this impact clearly violates NEPA.

Second, the proposed site of the project, near Covington, is situated in the most rapidly developing parish in Louisiana. *See* Exhibits I (Comments by Gulf Restoration Network, Sept. 30, 1999) and J (Comments by Louisiana Audubon Council, Oct. 1, 1999). Many new residential subdivisions have been constructed in the area within the past few years, and the St. Tammany Parish Zoning Commission is currently being considering several more. *See* Exhibit C. The Corps stated that over the past seven years, it granted 72 dredge and fill permits within a

three-mile radius of the project site. Exhibit A at 20. These permits "directly affected" over 400 acres of wetlands. *Id.*

The Corps also acknowledges that the project will necessitate changes in the surrounding area's infrastructure. *Id.* In the Decision Document, the Corps noted that the project would likely lead to the construction of a sewage system, as well as changes in traffic lights and intersections to support the increased traffic volume. *Id.* at 16, 20.

Despite the fact that the residential subdivision is just one of a multitude of projects that are slowly eating away at Louisiana's wetlands, the Corps failed to examine the cumulative impacts resulting from this project. In effect, the Corps' posture is to sit idly by while Louisiana's wetlands die a death by a thousand cuts, at the same time arguing that no individual cut is significant. However, NEPA requires the Corps to examine the cumulative impacts of this project and reasonably related projects.

C. Plaintiffs are Likely to Succeed on the Merits of Their Claim that the 404 Permit Is Invalid Because the State Water Quality Certification Has Been Vacated and Remanded by the 19th Judicial District Court.

Congress intended for state and federal coordination and input when it enacted the Clean Water Act. *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991). 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) (1988). Section 1341(a) states:

> 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.

Louisiana environmental regulations provide that LDEQ is the state agency that administers water quality certification procedures. 33 La. Admin. Code pt. IX §§ 1501-1507. Therefore, in order for an applicant to obtain a section 404 permit to dredge and fill wetlands in Louisiana, the applicant must first obtain a valid water quality certification from LDEQ.

Under the section 404 permitting scheme, the water quality certification process allows states to ensure that any project will comply with effluent limitations and "with any other appropriate requirement of State law." 33 U.S.C. § 1341(d). A decision by the appropriate state agency to grant a water quality certification is important because under the Clean Water Act, the state agency's determination that the project will comply with effluent limitations is "dispositive" [i.e. the federal agency will not revisit the state agency's decision]. *Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1122 (D.C. Cir. 1971).

In this case, LDEQ granted a water quality certification for this project on May 16, 2003. However, on February 9, 2004, the 19th Judicial District Court in Baton Rouge vacated and remanded the water quality certification. Exhibit B. 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.[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. Accordingly, the Applicant currently does not have a valid water quality certification as required by 33 U.S.C. § 1341(a)(1) of the Clean Water Act.

[2] During the comment period the Tulane Environmental Law Clinic submitted comments to the Corps that raised potential water quality impacts. *See* Exhibit I at 7 (Comments to Corps, 10-04-99)

The Corps relied on LDEQ's water quality certification as a basis for its decision to grant the Applicant's section 404 permit. The Corps reliance on an invalid water quality certification violates the Clean Water Act.

III. Plaintiffs Will Suffer Irreparable Injury If the Court Does Not Grant the Injunction.

Preserving the status quo is essential in this dispute. Dr. Ivor Van Heerden, Deputy Director of the LSU Hurricane Center, explains the functions and benefits of wetlands in his Declaration. *See* Exhibit H (Declaration of Ivor Van Heerden) ¶¶ 7, 8, 10, 11, 12. Dr. Van Heerden states that wetlands such those at issue in this case reduce flooding by storing water during periods of heavy rain. *Id.* ¶ 10. He explains that wetlands also reduce the economic consequences of flooding by slowing the movement of water during floods. *Id.* ¶ 11. Furthermore, the destruction of wetlands diminishes water quality as a result of increased sedimentation. *Id.* ¶ 12.

Once the Applicant destroys the 39.54 acres of wetlands, Plaintiffs would be unable to obtain meaningful relief. *See Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or of long duration, i.e., irreparable." "When the opportunity to adequately review environmental factors is lost, the harm becomes irreparable and an injunction is necessary to preserve the decision-making process."); *Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1119 (N.D. Tex. 1985) (citing *State of Alaska v. Andrus*, 580 F.2d 465, 485 (D.C.Cir.1978)).

IV. The Harm to Plaintiff Outweighs Any Damage to Defendants Since Defendant Would Only Be Ordered to Comply With Statutorily Mandated Duties.

As discussed above, Plaintiffs will suffer substantial and irreparable harm to their recreational, aesthetic, environmental, and economic interests if the court refuses to issue a preliminary injunction. Conversely, the Corps will not experience any harm if it is required to carry out statutorily prescribed duties pursuant to NEPA. *Morris v. Slater*, 1998 WL 959658 at 5 (N.D.Tex. 1998) ("Plaintiffs correctly recognize that the public has an interest in avoiding harm to the environment and ensuring that government agencies comply with federal environmental statutes before undertaking projects that may impact the environment"). The harm to the wetlands and Plaintiffs' interests therefore substantially outweigh the absence of harm to the Corps.

V. The Injunction Will Not Disserve the Public Interest, as the Public Has a Strong Interest in Agency Compliance with Federal Environmental Laws.

The goal of the Clean Water Act is to "protect the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The Clean Water Act's implementing regulations express a concern for wetlands that indicates the strong public interest at stake in their preservation and maintenance.[3] NEPA's purpose and intent is to focus the attention of the

[3] *See, e.g.,* 33 C.F.R. § 320.4(b), which states:

> (1) Most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest . . . .
> (2) Wetlands considered to perform functions important to the public interest include:
> (i) Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;...
> (viii) Wetlands which are unique in nature or scarce in quantity to the region or local area.

federal government and the public on a proposed action so that an agency may study the consequences of the action before it is implemented. *See* 42 U.S.C. § 4321; 40 C.F.R. § 1501.1(c); *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989) (stating that NEPA prevents environmental damage by "focusing Government and public attention on the environmental effects of proposed agency action").

The public interest is served and public confidence is increased when federal agencies fully comply with federal laws and regulations that they are required to follow. The Corps did not carefully considered the cumulative impacts of this project, and it relied on an invalid water quality certification. Thus, it is in the public interest for the court to grant Plaintiffs' request for a preliminary injunction.

VI. Plaintiffs Meet the Constitutional Requirements for Standing.

The U.S. Supreme Court has interpreted Article III of the Constitution to provide a plaintiff standing in federal court to cases in which (1) the plaintiff has suffered an "injury in fact," (2) which is fairly traceable to the challenged action of the defendant, and (3) which can be redressed by a favorable decision by the court. *Friends of the Earth v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 180-81 (2000); *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Plaintiffs Loretto O'Reilly, Jr., Kelly Fitzmaurice, and Hazel Sinclair satisfy all of these requirements, and therefore they have standing under Article III.

For this reason, the public has an interest in ensuring that all alternatives to the destruction of wetlands have been considered and that unavoidable impacts on such areas are minimized.
The public also has an interest in improving their transportation systems through the construction of necessary roadways. This interest, however, includes the public interest in complying with federal environmental statutes to ensure that the impacts of constructing a roadway are considered.

A. Plaintiffs Are Suffering and Are Threatened With "Injury in Fact."

An "injury in fact" is "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). For standing purposes, "injury in fact" need not be physical or economic. To the contrary, the Supreme Court has carefully explained that, in environmental cases, plaintiffs may allege injury based on "aesthetic" or "recreational" injuries. *Friends of the Earth v. Laidlaw Envtl. Services*, 528 U.S. at 183 (internal quotation, citation omitted). The Court has long recognized that "the interest alleged to have been injured may reflect aesthetic, conservational, and recreational as well as economic values." *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (internal quotations, citations omitted). Specifically, the Court has held that environmental plaintiffs "adequately allege injury in fact when they aver that they use the affected area and are persons for whom…the values of the area will be lessened by the challenged activity." *Friends of the Earth*, 528 U.S. at 183.

In this case, Plaintiffs easily satisfy the "injury in fact" requirement. Hazel Sinclair, Kelly Fitzmaurice, and Loretto O'Reilly, Jr. have each submitted declarations describing how they enjoy the aesthetic beauty of the Little Tchefuncte River and Timber Branch Tributary, as well as the surrounding areas. *See* Declaration of Hazel Sinclair, ¶ 6; Declaration of Loretto O'Reilly, ¶ 6; Declaration of Kelly Fitzmaurice, ¶ 6. Plaintiffs stated in their declarations that they use the areas that will be affected by the project to observe wildlife including birds, ducks and deer in their natural habitat. *See* Declaration of Hazel Sinclair, ¶ 4; Declaration of Loretto O'Reilly, ¶ 4; Declaration of Kelly Fitzmaurice, ¶ 4.

Furthermore, Hazel Sinclair and Kelly Fitzmaurice indicated that they live in the immediate vicinity of the proposed project, while Loretto O'Reilly stated that she owned an

interest in land near the project site. *See* Declaration of Hazel Sinclair, ¶ 2; Declaration of Kelly Fitzmaurice, ¶ 2; Declaration of Loretto O'Reilly, ¶ 2. Plaintiffs stated that the areas surrounding the project site, including their neighborhoods, are subject to occasional severe flooding, which they fear will increase as a result of the project. *See* Declaration of Hazel Sinclair, ¶ 5; Declaration of Kelly Fitzmaurice, ¶ 5; Declaration of Loretto O'Reilly, ¶ 5. Plaintiffs indicated their fears that the proposed project would impair the future use of their land, both by increased flooding and increased noise pollution caused by the construction at the project site. *See* Declaration of Hazel Sinclair, ¶ 8; Declaration of Kelly Fitzmaurice, ¶ 7; Declaration of Loretto O'Reilly, ¶ 7. The Supreme Court has expressly held that a "threatened injury" will satisfy the "injury in fact" requirement for standing. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 556 (5th Cir. 1996); *see also Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 & n. 4 (4th Cir. 1988) (noting that affidavit establishing threat of future injury met Article III standing requirements).

The declarations of Hazel Sinclair, Kelly Fitzmaurice, and Loretto O'Reilly reflect concrete, particularized, actual or imminent injuries to Plaintiffs. Therefore, Plaintiffs meet the "injury in fact" requirement for Article III standing.

B. Plaintiffs' Injuries Are Fairly Traceable to the Corps.

To demonstrate standing, a plaintiff must show a "causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court[.]" *Bennett v. Spear*, 520 U.S. at 167. In this case, Plaintiffs have submitted declarations describing the injuries that they will suffer if the project is constructed as approved by the Army Corps of Engineers. Because the Corps granted a section 404 permit for the project, Plaintiffs'

injuries are fairly traceable to the Corps. *See Pye v. U.S.*, 269 F.3d 459, 471 (4th Cir. 2001) (finding that Plaintiffs had satisfied the "fairly traceable" requirement by showing that but for the Corps' approval of the challenged permit, Plaintiffs' injuries would be less probable to occur).

C. Plaintiffs' Injuries Are Redressable by the Court.

Plaintiffs seek relief in various forms. *See generally* Complaint, Prayer for Relief. Plaintiffs seek a declaration from the Court that the Corps violated NEPA and the Clean Water Act. Plaintiffs also seek injunctive relief preventing the Corps from issuing a section 404 permit for this project until the Corps fully complies with NEPA and the Clean Water Act. Thus, in this case the Court can redress Plaintiffs' injuries by requiring the Corps to comply with the requirements of NEPA and the Clean Water Act.

VII. Conclusion

In this case, Plaintiffs are threatened with immediate and irreparable harm. If this project is allowed to proceed, it will lead to the destruction of 39.54 acres of wetlands, which would essentially leave Plaintiffs without an effective remedy. The public has a strong interest in the preservation of wetlands in Louisiana. Accordingly, a preliminary injunction should issue immediately in order to preserve the status quo while this Court considers the merits of this case.

Respectfully Submitted this 4th day of May, 2004,

TULANE ENVIRONMENTAL LAW CLINIC

Josh Borsellino

Joshua Borsellino, Student Attorney

Counsel for Loretto O' Reilly, Jr., Kelly Fitzmaurice, and Hazel Sinclair

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Counsel for Loretto O' Reilly, Jr., Kelly Fitzmaurice, and Hazel Sinclair and Supervising Attorney of Mr. Borsellino

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 4th day of May, 2004.

Joshua Borsellino

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' PROPOSED ORDER

Pursuant to PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION to stay the Department of Army Permit No. EC-19-990-2020-1 in Civil Action No. 04-0940 Pending Final Resolution of the Case on the Merits and for good cause shown:

IT IS HEREBY ORDERED:

That Plaintiffs' motion is GRANTED and Permit No. EC-19-990-2020-1 is STAYED pending final resolution of the case on the merits.

Dated: _____, 2004.

District Court Judge Zainey

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: DEPARTMENT OF JUSTICE
Through its attorney of record
Lois Ywye
Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington D.C. 20026-3986

PLEASE TAKE NOTICE that Plaintiffs Hazel Sinclair, Kelly Fitzmaurice and Loretto O'Reilly, Jr. will bring on for hearing their Motion for Preliminary Injunction

before the Honorable Jay C. Zainey, United States District Court Judge, 500 Camp Street, New Orleans, Louisiana, on the 2nd day of June, 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 May 4, 2004

TULANE ENVIRONMENTAL LAW CLINIC

Josh Borsellino

Joshua Borsellino, Student Attorney

Counsel for Loretto O' Reilly, Jr., Kelly Fitzmaurice, and Hazel Sinclair

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Certificate of Service

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Josh Borsellino

Joshua Borsellino

SEE RECORD FOR EXHIBITS OR ATTACHMENTS NOT SCANNED