UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORETTO O'REILLY, Jr., KELLY FITZMAURICE, AND HAZEL SINCLAIR	*		
Plaintiffs,	*	Case No.: 06-10788	
v.	*	Sect. C	Chief Judge Berrigan
	*	Mag. 3	Judge Knowles
UNITED STATES ARMY CORPS OF ENGINEERS,	*		
Defendant.	*		

PLAINTIFFS' MEMORANDUM IN SUPPORT
OF THEIR MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, Plaintiffs Loretto O'Reilly, Jr. and Kelly Fitzmaurice[1] respectfully submit this memorandum in support of their Motion for Summary Judgment.

[1] Hazel Sinclair does not expect to continue her participation in this case. Plaintiffs have moved for leave to amend their complaint to drop Ms. Sinclair as a party. The Court has not yet ruled on that motion.

INTRODUCTION

This is a case about the Corps' conduct in rubberstamping a project to destroy wetlands without taking the requisite hard look at its environmental impacts in conjunction with the cumulative impacts from rapid development and the resulting wetlands destruction in St. Tammany Parish. The Corps admits that "[s]imilar development activities, such as that proposed by the applicant, have already contributed to wetland losses in St. Tammany Parish," Administrative Record ("AR") 000057, and also concedes that "[t]he cumulative affect of losing this wetland type in the basin could to some extent impact the quality of human life as well as wildlife and fishery resources currently found in the area." AR 000055. But, the Corps continues to address each project in a piecemeal fashion and refuses to quantify and analyze the cumulative effects of the past, present and reasonably foreseeable wetlands destruction in St. Tammany Parish.

Wetlands loss in southeastern Louisiana is a well-documented national emergency; the state is losing wetlands at an estimated rate of between 16,000 and 22,000 acres a year[2] and seventy (70) percent of that loss is attributable to man's effect on the environment.[3] In this context, and in the wake of recent catastrophic flooding in the region, it is nothing less than irresponsible for the Corps to continue issuing permits to destroy wetlands as "business as usual" without taking a hard look at cumulative effects. To illustrate the problem: the Corps has created such a precedent of rubberstamping development projects involving wetlands destruction in St. Tammany Parish that counsel for Fairway Development Group actually "demand[ed]… that the Corps treat this Developer in substantially the same manner as other developers whose

[2] http://www.nmfs.noaa.gov/habitat/habitatconservation/publications/habitatconections/num4.htm (last visited January 16, 2006).

[3] See http://www.mvn.usace.army.mil/prj/lca/.

projects were not delayed while an EIS was performed" and insisted that the Corps only perform an environmental assessment "as the Corps has done on the vast majority of, if not all other projects within St. Tammany Parish." AR 000342.

Here, the Corps' environmental assessment fails to analyze or disclose the environmental risks and burdens that the Corps is asking residents of St. Tammany Parish to shoulder in return for whatever benefits the project may offer. Specifically, it fails to address the following fundamental questions, answers to which are necessary to determine the environmental impacts from this project:

- How many acres of wetlands has St. Tammany Parish lost to Corps-approved projects in the recent past?
- What are the effects of that wetlands loss?
- What mitigation has the Corps required to counteract that loss and how successful have those efforts been?
- How many more developments that will destroy wetlands are planned or are in the works?
- How much more wetlands loss can St. Tammany Parish handle?
- What will be the overall impact of the Terra Bella project when added with the other past and reasonably foreseeable future development?
- Are there any alternatives to meet St. Tammany Parish's housing needs that don't involve destroying sixty-five (65) acres of wetlands?
- How does the Corps know its mitigation plan will compensate for the cumulative wetlands loss?

The Corps' issuance of a Section 404 permit[4] for the Terra Bella project is illegal because: ***1)*** the Corps failed to examine the cumulative impacts of the project, as required by the National Environmental Policy Act (NEPA), before determining whether to prepare an environmental impact statement; ***2)*** the Corps allowed Fairway to define the basic project purpose unreasonably narrowly and therefore circumvent NEPA's requirement that Fairway demonstrate there are no practicable alternatives that would allow it to meet its basic project purpose without destroying sixty-five (65) acres of wetlands; ***3)*** the Corps failed to prepare an environmental impact statement despite the fact that the environmental assessment revealed the Terra Bella project may significantly impact the human environment by, among other things, increasing flooding, decreasing water quality, and destroying wildlife habitat; and ***4)*** the Corps based its decision not to prepare an environmental impact statement on mitigation measures that the Corps failed to show will compensate for the increased flooding, decreased water quality, and loss of wildlife habitat that the Terra Bella development will cause. Thus, because the Section 404 permit issued by the Corps violates NEPA, Plaintiffs respectfully move this Court to enter summary judgment as a matter of law and remand the permit to the Corps to comply with NEPA requirements.

BACKGROUND

On April 26, 2005, the Corps received an application from Fairway Development Group seeking a Clean Water Act Section 404 permit to fill in wetlands in conjunction with its proposed

[4] Section 404 of the Clean Water Act establishes a program to regulate the "discharge of dredge or fill material into the navigable waters." 33 U.S.C. § 1344(a)(2). The term "navigable waters" includes wetlands. 33 C.F.R. § 328.3. Thus, section 404 requires parties wishing to discharge dredge or fill material into wetlands to obtain a permit from the Corps. 33 U.S.C. § 1344. The presumption against unnecessary destruction and alteration of wetlands "is very strong." *Buttrey v. U.S.*, 690 F.2d 1170, 1180 (5th Cir. 1982). This presumption "create[s] 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).

Terra Bella subdivision near Covington, Louisiana. AR 000113. According to the Terra Bella Group's Complaint for Intervention, filed December 22, 2006 (Doc. 11), "Fairway sold, transferred, and assigned all rights and obligations of the Section 404 permit that is the subject of this dispute to Terra Bella." Complaint for Intervention at 2. Terra Bella proposes to build a residential subdivision on a 376-acre tract along on the west bank of the Tchefuncte River and through which the Soap and Tallow Branch runs. AR 000036, 000040. Wetlands cover nearly half of the 376-acre parcel. AR 000049. Despite the fact that the area is already susceptible to flooding,[5] Terra Bella plans to destroy 65 acres of wetlands by filling them with 80,000 cubic yards of fill material and 150,000 yards of concrete. AR 000047, 000141.

On May 27, 2005, the Corps issued a public notice and accepted comments on the project. AR 000141. The U.S. Environmental Protection Agency ("EPA") submitted comments on the proposed development June 23, 2005. AR 000093. In the Decision Document, the Corps summarized the EPA's concerns. EPA recognized the value of the wetlands on the project site, noting that the "wetlands which would be impacted by this project not only provide good quality habitat … but also perform valuable water quality maintenance functions…" and "provide floodwater storage." AR 000059. EPA cautioned that functional losses to the wetlands caused by the impervious surfaces replacing the wetlands would "lead to adverse downstream impacts such as decreased water quality and increased flooding." AR 000059-60. EPA also noted that "wetland areas such as those proposed to be impacted have experienced a tremendous decline in Louisiana," AR 000059, and expressed concern that "the proposed project would add to cumulative development-related wetland losses in St. Tammany Parish." AR 000060. EPA

[5] *See* AR 000048 ("The project site has very little relief and water tends to pond following rainfall events.").

recommended that the Corps not issue Fairway a permit until Fairway "addresses the need for the project to be located in a wetlands area." AR 000060.[6]

The Louisiana Department of Wildlife and Fisheries likewise noted in its June 10, 2005 comments that Fairway had yet to provide adequate justification for the project. In particular, the Department noted that Fairway needed to "clearly show if there is a real need to locate this activity in the wetlands." AR 000078. Nearby residents and property owners, along with the Lake Pontchartrain Basin Foundation, also opposed the project because of the potential environmental impacts. AR 000061-62. Despite requests that the Corps prepare an environmental impact statement, the Corps instead issued its Permit Evaluation and Decision Document, which contained the Corps' Finding of No Significant Impact ("FONSI"), on March 23, 2006 and issued Fairway a Section 404 permit for the project. AR 000068-73.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings … show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The adverse party "may not rest upon mere allegations or denials" but rather "must set forth specific facts showing that

[6] After receiving EPA's comments, the Corps requested additional information from Fairway to answer EPA's concerns. AR 000161-163. Fairway submitted a needs and alternatives analysis on the proposed Terra Bella project. AR 000209-218; 000243-340. Both analyses failed to explain why the project must be situated on wetlands and why the project is required to be on a major waterway. The Corps the requested from Fairway "a more detailed alternative sites map" and implored further review of and adequate responses to EPA's comments. AR 000164-65. Fairway's second response failed to justify why the project must be constructed on wetlands and located on a major waterway. Despite Fairway's lack of explanation about why the project needs to be located on a major waterway or in wetlands, in a February 14, 2006 memo, the EPA "stated no further objections or concerns with the project." AR 000108.

there is a genuine issue of [material fact] for trial." Fed. R. Civ. P. 56(d); *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *see Taita Chem. Co., Ltd. v. Westlake Styrene Corp.*, 246 F.3d 377, 385 (5th Cir. 2001). Otherwise, summary judgment should be entered for the moving party. *O'Hare v. Global Natural Res., Inc.*, 898 F.2d 1015, 1016 (5th Cir. 1990).

Under the Administrative Procedure Act, courts "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) & (D).

ARGUMENT

I. The Corps Violated NEPA by Failing to Examine Cumulative Impacts.

NEPA specifically mandates that the Corps carefully consider cumulative impacts, defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions…" 40 C.F.R. § 1508.7. In this case, the Corps failed to quantify and carefully consider the number of Section 404 permits issued to destroy wetland acreage in areas nearby Terra Bella.[7] The Corps' failure to carefully consider the cumulative impacts from other developments in the area renders the Corps' Finding of No Significant Impact arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (finding that "[n]ormally, an agency rule would be arbitrary and capricious if the agency … entirely failed to consider an important aspect of the problem….").

[7] Plaintiffs submitted a FOIA request from the Corps trying to obtain this information but were unsuccessful in obtaining any information. *See infra* n. 12.

A. NEPA requires agencies to consider cumulative impacts when determining whether to prepare an EIS.

NEPA mandates that federal agencies must take a "hard look" at the environmental consequences of their actions. *Baltimore Gas & Elec. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). Specifically, NEPA requires a federal agency to prepare an environmental impact statement for all "proposals for … major federal actions significantly affecting the quality of the human environment…" 42 U.S.C. § 4332(2)(C). Section 404 permits issued by the Corps under the Clean Water Act for proposed activities affecting waters of the United States are "major Federal actions." 40 C.F.R. 1508.18(b)(4); *see* 33 C.F.R. § 325.2(a)(4) ("A decision on a permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion"); *Stewart v. Potts*, 996 F. Supp. 668, 672 (S.D. Tex. 1998) (finding that "[t]he issuance of a section 404 permit by the Corps of Engineers is deemed to be a 'major federal action' to which NEPA's mandates apply").

According to the Corps' own regulations, the Corps must at least prepare an environmental assessment for permit actions. *See* 40 C.F.R. § 1501.4(a)-(b) (stating that "In determining whether to prepare an environmental impact statement, the Federal agency shall… prepare an environmental assessment" unless the "proposal is one which normally requires an environmental impact statement" or is covered by a categorical exclusion); 33 C.F.R. § 230.7 (listing permit actions as "[a]ctions normally requiring an EA, but not an EIS"). An environmental assessment will trigger an environmental impact statement when the study shows that "the project ***may*** have a significant impact on the human environment." *Fritiofson v. Alexander*, 772 F.2d 1225, 1238 (5th Cir. 1985) (emphasis added), *abrogated on other grounds by Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669 (5th Cir. 1991).

To determine whether the project may have a significant impact on the human environment, the agency must determine "whether it is 'reasonable to anticipate cumulatively significant impacts' from the specific impacts of the proposed project when added to the impacts from 'past, present and reasonably foreseeable future actions,' which are 'related' to the proposed project." *Fritiofson*, 772 F.2d at 1243 (quoting 40 C.F.R. §§ 1508.7, 1508.27). The Fifth Circuit in *Fritiofson* explained that a meaningful study of cumulative impacts in an environmental assessment must identify:

> (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, present, 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.

772 F.2d at 1245.

B. The Corps failed to examine the cumulative impacts of this project in consideration of past and reasonably foreseeable future development.

The Corps failed to fulfill the Fifth Circuit's test to determine whether an agency has conducted a meaningful cumulative impacts study. The Corps made no attempt to identify the area in which the project's effects will be felt, to actually examine the impacts to the wetlands,[8] or to quantify the amount of development within St. Tammany Parish in the recent past. Unlike with other similar projects the Corps has approved in the recent past in the same geographic area, the Corps failed to even calculate how many permits to fill wetlands it has approved in the area in the recent past. *See O'Reilly v. U.S. Army Corps of Engineers*, 2004 WL 1794531 at *2 (E.D. La. Aug. 10, 2004) (remarking when granting summary judgment to the plaintiffs on their claim

[8] In the section designated for describing impacts to the wetlands, the Corps merely described the type of vegetation present at the site, mentioned several species that rest, nest, feed, and breed at the site, and then concluded by describing the consequences of "[i]mplementation of the no action alternative" on the vegetation and wildlife. AR 000048-49.

that the Corps failed to comply with NEPA when granting a permit to fill 37.5 acres of wetlands in St. Tammany Parish to build a residential subdivision, the Court noted that "the Corps has issued a total of 87 permits within a three-mile radius of the proposed site…").

In its cursory acknowledgement of cumulative impacts, the Corps noted that unspecified "[s]imilar development activities, such as that proposed by the applicant, have already contributed to wetland losses in St. Tammany Parish." AR 000057. The Corps also admitted that "the change in land use could precipitate further development within this corridor," AR 000055, that "continued development within the basin could seriously affect the area's suitability to sustain [water related recreation]," AR 000053, and that "[a]dditional development of similar nature would further limit the possibility of restoring and/or managing areas such as this within this region." AR 000057. Ultimately, the Corps stated—without analysis or support in the record—"that cumulative impacts directly associated to this project would be negligible" and that "[i]t is not anticipated that impacts attributable to this project will be significant in scope but rather that they will add to the continuing impacts within this region of South Louisiana." AR 000058.

The Corps' assertion that "cumulative impacts ***directly associated*** with this project would be negligible" illustrates the Corps' misapplication of NEPA regulations to this project and resulting failure to perform a meaningful cumulative impacts study. Basically, the Corps concluded that the project itself will have minor impacts and admitted that there will be cumulative impacts when the project is considered in the context of other development—but refused to quantify those cumulative impacts. A "[c]umulative impact is 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." 40 C.F.R. 1508.7. Cumulative impacts are not limited to impacts directly associated with the project, but instead extend to "impacts… from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. 1508.7. Therefore, even when the Corps concludes that a project itself has only minor impacts, NEPA obligates it to examine the cumulative impact of the project in light of the other past, present and reasonably foreseeable development in St. Tammany Parish. The Corps' failure to do so violates NEPA. The Corps' violation in this and similar instances is part and parcel of the environmental catastrophe of wetlands loss in southeastern Louisiana. Louisiana's wetlands loss does not stem from one or two major governmental decisions; instead, our wetlands are dying a death of a thousand cuts. The Corps makes repeated decisions that it says are "not anticipated . . . [to] be significant," but never steps back to take a hard, rigorous look at the cumulative impacts of these decisions.

II. The Corps Violated NEPA by Failing to Require the Applicant to Clearly Show that No Practicable Alternatives Exist.

The Corps violated NEPA by issuing Fairway a Section 404 permit without requiring a demonstration that there are no practicable alternatives to destroying sixty-five (65) acres of wetlands to meet St. Tammany Parish's housing needs. Specifically, Fairway's unreasonably narrow alternatives search failed to satisfy requirements that it demonstrate there are no practicable alternatives to the project. By signing off on the unreasonable search, the Corps violated federal regulations designed to protect wetlands.

A. NEPA regulations require that the applicant must show no practicable alternatives exist.

Under applicable regulations, the Corps may not issue a Section 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a).[9] In order to protect "special aquatic sites," which include wetlands, 40 C.F.R. § 230.41, the regulations also presume that practicable alternatives are available if the project is not water-dependent.[10] Therefore, before the Corps may issue a permit to fill in wetlands for a non-water dependent project, such as a housing development, the applicant must clearly demonstrate that there are no practicable alternatives that would have fewer impacts on the aquatic ecosystem.

B. The Applicant cannot unreasonably narrow the project purpose.

When conducting an alternatives analysis, "[t]he stated goal of a project necessarily dictates the range of 'reasonable' alternatives and an agency cannot define its objectives in unreasonably narrow terms." *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Indeed, it is well settled that neither the applicant nor the agency may unreasonably narrow the basic project purpose. *See Simmons v. U.S. Army Corps of*

[9] Although the Corps administers the Section 404 permitting program, EPA promulgated regulations establishing "404(b)(1) guidelines" to assist the Corps in issuing Section 404 permits. The Corps, in turn, adopted regulations stating that "a permit will be denied if the discharge that would be authorized by such a permit would not comply with the 404(b)(1) guidelines," 33 C.F.R. 323.6, converting the "404(b)(1) guidelines" into binding regulations.

[10] If a project "proposed for a special aquatic site … does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (*i.e.* is not 'water dependent'), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3)

Engineers, 120 F.3d 664, 669-670 (7th Cir. 1997) (finding that an agency cannot restrict its analysis to those alternative means by which a particular applicant can reach his goals) (internal citations omitted)). As the Eighth Circuit recognized, "[t]he cumulative destruction of our nation's wetlands that would result if developers were permitted to artificially constrain the Corps' alternatives analysis by defining the projects' purpose in an overly narrow manner would frustrate the statute [NEPA] and its accompanying regulatory scheme." *Nat'l Wildlife Fed'n v. Whistler,* 27 F.3d 1341, 1346 (8th Cir. 1994).

C. Housing developments are not water-dependent.

Two courts have already rejected developers' assertions that housing developments are water-dependent. In both *Korteweg v. Corps of Engineers of U.S. Army*, 650 F. Supp. 603 (D. Conn.1986), and *Shoreline Ass'n. v. Marsh*, 555 F. Supp. 169 (D.C. Md. 1983), developers planned to build housing developments with boat slips or launches and applied to build those housing developments on land adjacent to a river and bay, respectively. In both cases, the Corps found that the developer had failed to demonstrate that there were no alternative sites that had fewer aquatic impacts. Both courts upheld the Corps' permit denial. The *Shoreline* court noted that "Shoreline has failed to show, in compliance with the regulations, why it is necessary for the townhouses to be located on the wetlands rather than the uplands, except for its preference to build on the wetlands." 555 F. Supp. at 179. Likewise, the *Korteweg* court noted that the developer has "no fixed right to locate a residential project, nor the right to put it on his choice of aquatic sites. The question is whether the site involved may be despoiled from an aquatic environmental view if the same project can be reasonably located elsewhere with substantially less adverse environmental impact." 650 F. Supp. at 605.

D. Fairway unreasonably narrowed the project purpose, rendering the alternatives analysis invalid.

In Fairway's original permit application, it described the project's purpose as "provid[ing] a variety of housing price ranges and various other commercial and residential needs to western St. Tammany Parish." AR 000116. However, in its alternatives analysis, as summarized by the Corps in the Decision Document, Fairway defined the "basic project purpose" as "provid[ing] affordable single-family residential lots ***located on a major waterway***, on at least 300 acres, to facilitate a traditional neighborhood design community… to be located near a major interstate system, north of I-12, and located near Covington." AR 000037 (emphasis added).

By Fairway's own admission, its consultants only examined alternative sites "that were determined to compete with the subject property in regard to location, amenities, and desirability." AR 000039. When examining the alternatives, Fairway measured how each site compared to the target site in terms of ***amenities***, not in terms of environmental impact. For example, the alternatives analysis states that the target site is "located less than 2 miles from the I-12 Hwy 21 interchange" and is "within 2 miles of St. Tammany Parish Hospital," AR 000211, and then, when examining Alternative Site 2, states that it "is not located within 2 miles of both Interstate interchanges" and is "not within 2 miles of St. Tammany Parish Hospital." AR 000213. After searching "the property north of I-12, west of Hwy 190, and within 5 miles of Covington," Fairway concluded that "there are no other feasible tracts available in the study area, which offers all of the ***amenities*** of the proposed site." AR 000039 (emphasis added).

On its face, Fairway's alternatives analysis fails to demonstrate that there are no practicable alternatives that would have less of an impact on the aquatic ecosystem than their proposed site. By including its entire wish-list of amenities in its "basic project purpose,"

Fairway unreasonably narrowed its alternatives search so as to effectively make the alternatives analysis meaningless and circumventing NEPA. *See City of New York v. U.S. Dept. of Transp.* 715 F.2d 732, 743 (2nd Cir. 1983) (holding that "an agency may not narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered"); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (finding that the Corps may not define the alternative site criteria so narrowly "that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality.").

Moreover, by limiting its alternatives analysis to sites located on a major waterway, Fairway attempted to convert the housing development into a water-dependent project. However, nothing in Fairway's permit application or alternatives analysis explains why the project must be located on a major waterway.[11] And unlike the developers in *Korteweg* and *Shoreline*, where the Corps and the courts found that the developers failed to show there were no practicable alternatives, Fairway has not even proposed to build boat launches on the river. Thus, by accepting Fairway's unreasonably narrow alternatives analysis as proof that no practicable alternatives exist, the Corps violated 33 C.F.R. 323.6(a).

III. The Corps Violated NEPA by Failing to Prepare an EIS After Identifying Significant Environmental Impacts.

As explained above, NEPA requires a federal agency to prepare an environmental impact statement for all "proposals for … major federal actions significantly affecting the quality of the

[11] Neither does the permit application or alternatives analysis explain why Fairway restricted its analysis to sites that were 300 acres. Terra Bella does not plan to develop the entire 375 acres of the proposed site; it has agreed to place approximately 172 acres of the site in a conservation easement.

human environment," 42 U.S.C. § 4332(2)(C), and Section 404 permits are major federal actions subject to NEPA. The Corps may prepare an environmental assessment first to determine whether or not an environmental impact statement is necessary. An environmental assessment will trigger an environmental impact statement when it reveals that there may be significant impacts to the human environment. *See Fritiofson*, 772 F.2d at 1238.

A. The project will have serious and severe long-term impacts.

The Corps admits that "[d]irect impacts to area soils would ***severely*** affect the wetland's ability to function as a flood retention area" and those "impacts would be ***long-term, major***, but localized." AR 000044 (emphasis added). The project will also cause "***severe, long-term*** but localized" impacts to the area's drainage patterns. AR 000044 (emphasis added). Changes in the drainage pattern would lead to "[s]econdary and cumulative impacts such as increased sediment loads being introduced into the Tchefuncte River, reduced storm-water storage capacity, reduced contaminant uptake, and higher levels of contaminants associated with similar developments… [that] could be serious, long-term and localized." AR 000044-45. Further, because the project would cause "minor turbidity and non-point source releases of contaminants in runoff," the Corps acknowledges that "[t]he cumulative effect of these releases could seriously affect water quality in adjacent water bodies." AR 000056.

The Corps also predicted that "[w]ildlife species dependent upon forested wetlands will suffer a long-term loss of habitat." AR 000050. Such habitat loss would force "individuals into saturated or dissimilar quality habitats, [which] would result in increased competition for food and cover," which in turn would "lead to environmental stress and reduce carrying capacity." AR 000051. The project's secondary impacts "on areas adjacent to the project site may reduce and permanently displace certain species." AR 000051. The Corps noted that, "[a]s proposed,

the project would cause ***serious, long-term adverse impacts*** to the existing wildlife habitat type at the project site." AR 000051 (emphasis added).

The Corps acknowledged that the soils in the area are poorly drained and subject to periodic flooding. *See* AR 000048. Despite the obvious threat of increased flooding, the Corps only devoted one paragraph in its Decision Document to this issue and that discussion focused only on suggesting that Fairway comply with the local drainage authority's typical requirements. AR 000047.

The Corps also predicted that the project will have "minor, long-term, but localized" impacts on turbidity levels in adjacent waterways, aquifer recharge, baseflow, and traffic. AR 000046, 000048, 000054. The Corps failed to define any of the descriptors it used—"severe," "serious," "minor," and "localized"—or to explain why those impacts were not significant under NEPA. *See Sierra Club v. Mainella*, 2006 WL 3040508 *24 (D. D.C. Oct. 25, 2006) (finding that an environmental assessment violated NEPA because the agency failed to explain how it reached its conclusions and there was "no basis in the administrative record for accepting NPS's conclusion that even a 'minor' impact is not significant under NEPA, because there are no determinate criteria offered for distinguishing a 'minor' impact from a 'moderate' or 'major' impact other than NPS's conclusory say-so.").

The Corps also admitted that "[t]he cumulative affect of losing this wetland type in the basin could to some extent impact the quality of human life as well as wildlife and fishery resources currently found in the area," AR 000055, but failed to quantify to what extent it would impact the quality of the human environment. Thus, on its face, the Corps' admission raises the possibility that "that the project ***may*** have a significant impact on the human environment" and should have triggered an environmental impact statement. Because the Corps identified serious

and severe long-term impacts and admitted the project could impact the quality of human life, the Corps should have prepared an environmental impact statement.

B. Proposed mitigation measures do not justify the Finding of No Significant Impact.

The Corps attempts to justify its decision not to prepare an environmental impact statement despite the project's serious impacts by relying on Fairway's agreement "to employ 'mitigation measures' that will lower the otherwise significant impacts of an activity that otherwise would require preparation of a full-blown EIS." *See O'Reilly v. U.S. Army Corps of Engineers*, 2004 WL 1794531 at *3 (E.D. La. Aug. 10, 2004) (discussing the role of mitigation in findings of no significant impact). Specifically, Fairway has agreed to contribute funds to Bayou Lacombe Mitigation Bank for the restoration of 73.5 acres of pine savannah/flatwood in an attempt to "compensate for the direct and secondary loss of wetland functions attributable to construction of the proposed project…." AR 000058. The Corps fails, however, to explain how those mitigation measures actually compensate for the increased flooding, decreased water quality, and loss of wildlife habitat in the project area. This failure renders the mitigation measures arbitrary and capricious, and the Corps' decision to forgo an environmental impact statement based on those mitigation measures likewise arbitrary and capricious.

Just as in *O'Reilly v. U.S. Army Corps of Engineers*, in which Judge Zainey rejected the Corps' contention that proposed mitigation obviated the need for an environmental impact statement because the Corps provided "no support for [its] conclusion that the mitigation measures would remove or reduce the identified adverse impacts of the project," *O'Reilly*, 2004 WL 1794531 at *5, here the Corps likewise has failed to provide support for the efficacy of its mitigation measures. Like the environmental assessment in *O'Reilly*, this "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 [Decision] Document connects the two together." *Id.* As Judge Zainey recognized, "[t]he Corps must provide enough analysis and data so that a reviewing court can insure that the Corps has complied with NEPA." *Id.* Thus, just as in *O'Reilly*, "the Corps' failure to employ any analysis or gather any data with respect to its mitigated FONSI render[s] its decision arbitrary or capricious." *Id*.; *see W. Land Exch. Project v. U.S. Bureau of Land Mgmt.*, 315 F.Supp.2d 1068, 1094 (D. Nev. 2004) (quoting *Nat'l Parks & Conservation Ass'n v. Babitt*, 241 F. 3d 722, 735 (9th Cir. 2001)) (finding an "EA's speculative and conclusory statements are insufficient to demonstrate that the mitigation measures would render the environmental impact so minor as to not warrant an EIS.")

Furthermore, unlike *O'Reilly*, where the Corps actually quantified the number of permits issued within a three-mile radius of the proposed project site within the past seven years, *O'Reilly* 2004 WL 1794531 at *2, here, the Corps has failed even take this first step to looking at cumulative impacts. *See supra* part I.A.[12] Without examining the cumulative impacts of the project, the Corps cannot possibly designate mitigation measures that would adequately compensate for impacts it has not yet quantified.

[12] Plaintiffs submitted a Freedom of Information Act request to the Corps in an attempt to obtain this information. Specifically, the Plaintiffs asked for "[a]ll Clean Water Act § 404 permits issued within the last seven years within a three-mile radius of Highway 1085 and Bricker Road in St. Tammany Parish near Covington, Louisiana" or, in the alternative "all Clean Water Act § 404 permits issued within the last seven years near Covington, Louisiana" or lastly "all Clean Water Act § 404 permits issued in St. Tammany Parish." The Corps responded that their "database is not indexed in such a manner that would identify records responsive to your request."

IV. Plaintiffs Have Standing to Prosecute this Action.

To satisfy the standing requirements in Article III of the Constitution, a plaintiff must show (1) the plaintiff has suffered an "injury in fact," (2) which is "fairly traceable to the challenged action of the defendant," and (3) that it is likely that the "injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Envtl. Serv., Inc.* 528 U.S. 167, 180-81 (2000). Plaintiffs Kelly Fitzmaurice and Loretto O'Reilly, Jr. satisfy all standing requirements.

A. Plaintiffs are suffering and are threatened with "injury in fact."

To satisfy the standing requirements a plaintiff must show that he has suffered an "injury in fact." *Laidlaw*, 528 U.S. at 180-81. The Supreme 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). "[E]nvironmental 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." *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. at 735.).

The Plaintiffs satisfy the "injury in fact" requirement. Loretto O'Reilly, Jr. and Kelly Fitzmaurice have both submitted declarations describing how they enjoy the aesthetic beauty of the Little Tchefuncte River and the surrounding areas. *See* Declaration of Loretto O'Reilly, Jr., Ex. C ¶ 6; Declaration of Kelly Fitzmaurice, Ex. E ¶ 6. The 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* Ex. C ¶ 4; Ex. E ¶ 4.

Furthermore, Loretto O'Reilly owns an interest in land near the project site. *See* Ex. C ¶ 2. The 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 Ex. C ¶ 5; Ex. E ¶ 5. The 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* Ex. C ¶ 7; Ex. E ¶ 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).

The declarations of Loretto O'Reilly, Jr. and Kelly Fitzmaurice demonstrate concrete, particularized, actual or imminent injuries to the Plaintiffs. Therefore, the Plaintiffs meet the "injury in fact" requirement for Article III standing. Further, "the harm flowing to the[se] plaintiffs from the defendant's non-compliance with NEPA is of a kind with which NEPA is concerned." *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 676 (5th Cir. 1992); *see also Vieux Carre Property Owners v. Brown*, citing *Cady v. Morton*, 527 F.2d 786, 791 (9th Cir.1975) (holding that "an interest in widely shared aesthetic and environmental concerns falls within the zone of interests to be protected by NEPA").

Further, Plaintiffs' injuries fall within the "zone of interest" protected by NEPA. *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 675 (5th Cir. 1992), quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1991). NEPA's Congressional declaration of purpose states that it is to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation…." 42 U.S.C. § 4321. NEPA is "drafted to ensure that federal agencies 'carefully consider detailed information concerning significant environmental impacts,' and at the same time 'guarantee [ ] that the relevant information will be made available to the larger audience that may also play a role in both the

decision-making process and the process and the implementation of that decision." *Sabine River Auth.*, 951 F.2d at 676, quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Plaintiffs have standing because "the harm flowing to the[se] Plaintiffs from the defendant's non-compliance with NEPA is of a kind with which NEPA is concerned." *Sabine River Auth.*, 951 F.2d at 676.

B. Plaintiffs' injuries are fairly traceable to the Corps.

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

C. This Court has authority to redress Plaintiffs' injuries.

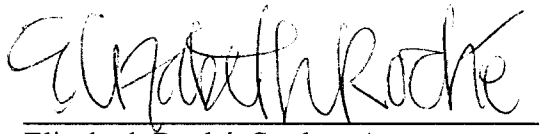
The final element to satisfy standing requires the plaintiff to show that it is likely that the "injury will be redressed by a favorable decision." *Laidlaw,* 528 U.S. at 181. Here, the Court can redress Plaintiffs' injuries by requiring the Corps to comply with the requirements of NEPA. Further, because "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or of long duration, *i.e.*, irreparable," *See Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 545 (1987), this Court may remedy Plaintiffs' injuries by vacating the current §404 permit and remanding it back to the Corps with directions for the Corps to comply with NEPA.

CONCLUSION

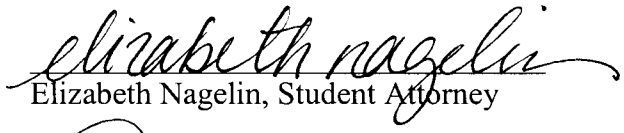
For all of the foregoing reasons, this Court should GRANT Plaintiffs Loretto O'Reilly, Jr. and Kelly Fitzmaurice's Motion for Summary Judgment.

Respectfully submitted this 16th day of January, 2007,

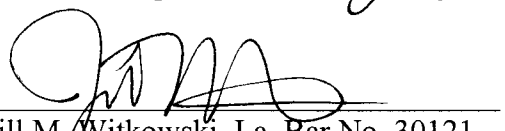
TULANE ENVIRONMENTAL LAW CLINIC



Elizabeth Roché, Student Attorney



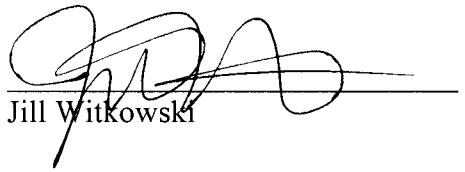
Elizabeth Nagelin, Student Attorney



Jill M. Witkowski, La. Bar No. 30121
Adam Babich, La. Bar. No. 27177
6329 Freret Street
New Orleans, Louisiana 70118
Telephone (504) 862-8814
Fax (504) 862-8721
Counsel for Plaintiffs

Certificate of Service

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record by electronic means on this 16th day of January, 2007



Jill Witkowski