

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

OGEECHEE-CANOOCHEE	*	
RIVERKEEPER, INC.,	*	Civil Action Number: 6:06-cv-00102
	*	
Plaintiff,	*	
v.	*	
	*	Judge B. Avant Edenfield
U.S. ARMY CORPS OF ENGINEERS,	*	
LT. GENERAL CARL A. STROCK,	*	Magistrate Judge G. R. Smith
United States Army Corps of Engineers;	*	
COLONEL MARK S. HELD, United	*	
States Army Corps of Engineers,	*	
Savannah District; MIRIAN	*	
MAGWOOD, Unites States Army Corps	*	
of Engineers, Savannah District; and	*	
CYPRESS LAKE, INC.;	*	
	*	
Defendants.	*	
	*	

AMICUS CURIE BRIEF BY SIERRA CLUB, LOUISIANA ENVIRONMENTAL ACTION NETWORK, GULF RESTORATION NETWORK, LAKE PONTCHARTRAIN BASIN FOUNDATION, ATCHAFALAYA BASINKEEPER, LOWER MISSISSIPPI RIVERKEEPER, AND SURFRIDER FOUNDATION IN SUPPORT OF OGEECHEE-CANOOCHEE RIVERKEEPER’S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE ARMY CORPS OF ENGINEERS’ MOTION FOR SUMMARY DETERMINATION

This Court is faced with the novel question of when logging in a cypress tupelo forest constitutes “ongoing silviculture” exempt from Clean Water Act § 404’s permitting requirements and environmental protections. Because cypress tupelo forests are spread throughout the Southeast, this Court’s decision may have far-reaching implications as to how and when the Corps may grant exemptions for cypress tupelo logging in the waters of the United States. For this reason, Sierra Club, Louisiana Environmental Action Network, Gulf Restoration Network,

Lake Pontchartrain Basin Foundation, Atchafalaya Basinkeeper, Lower Mississippi Riverkeeper, and Surfrider Foundation—organizations actively involved in ensuring cypress tupelo forests remain a part of this nation’s environmental heritage—respectfully submit this *amicus curie* brief to assist the Court.

Cypress tupelo forests, once logged, face threats to regeneration from invasive species, herbivory, and changing hydrology, and are therefore in danger of disappearing altogether. Studies show that cypress tupelo forests need to grow from both seeds and stumps in order to fully regenerate because stump sprouting alone is not sufficient to regenerate a logged cypress tupelo forest. Fortunately, the Clean Water Act’s permitting requirements safeguard cypress tupelo forests from unregulated logging and provide a measure of protection by ensuring the logged forests will regrow.

In this case, the Corps arbitrarily and capriciously waived Clean Water Act permitting requirements and environmental protections for Cypress Lake Inc.’s (“CLI”) plan to log cypress tupelo forest without requiring CLI to take steps to assure the forest will regenerate. The Corps signed off on CLI’s logging plan, which relies on stump sprouting alone to regenerate the forest. But scientific studies agree that stump sprouting is not enough to regenerate a cypress tupelo forest, and the Corps provided no evidence to the contrary when it made its decision. Further, had the Corps required CLI to keep the water level in Cypress Lake low enough to allow for seed sprouting, the logging would have been subject to Clean Water Act permitting requirements and environmental protections because activities that reduce or impair the flow of navigable waters and bring the area into a new use require a Clean Water Act permit. These reasons render the Corps’ waiver of Clean Water Act protections for CLI’s logging plan arbitrary and capricious, and the exemption must be vacated.

I. CYPRESS TUPELO FORESTS FACE THREATS TO REGENERATION AND WILL NOT REGENERATE BY STUMP SPROUTING ALONE.

Cypress tupelo forests throughout the Southeast are valuable natural resources. They support a wide array of wildlife, including threatened and endangered species.¹ They also provide crucial flood protection, particularly in hurricane-susceptible coastal areas where one mile of cypress forests reduces storm surge by one foot.² While cypress tupelo forests provide unique benefits, they also face barriers to regeneration. Unfortunately, most private landowners who log cypress or tupelo have little understanding of the dynamics of cypress tupelo forest regeneration.³ Permitting requirements and environmental protections mandated by § 404 of the Clean Water Act are crucial tools to ensuring that cypress tupelo forests regenerate.

A. Cypress Tupelo Forests Face Threats To Regeneration After Logging.

Once a cypress tupelo forest is logged, there are several barriers to cypress tupelo dominated forest reestablishing in the same area. Both cypress and tupelo grow slowly,⁴ so faster growing species like Chinese tallow, oak, or maple are likely to grow first and out-compete the cypress and tupelo.⁵ Animals such as deer or nutria grazing on seedlings can also

¹ See Coastal Forest Wetland Science Working Group, Report to the Governor of Louisiana: Conservation, Protection and Utilization of Louisiana's Coastal Wetland Forests (Apr. 30, 2005) (“SWG Report”) at 9-16 available at <http://www.coastalforestswg.lsu.edu/THFinalReport.pdf>.

² See Ivor van Heerden, “Louisiana’s Natural Storm Protection,” Presentation to Wal-Mart Executives, Baton Rouge, LA, March 16, 2007. Dr. Van Heerden, holds a PhD in Marine Science and is Deputy Director of Louisiana State University’s Hurricane Center. See <http://hurricane.lsu.edu/>

³ See SWG Report, supra fn. 1, at v (“[T]here has been little research into optimum silvicultural practices for wet sites.”).

⁴ See SWG Report, supra fn. 1, at 30 (“Baldcypress trees should have annual growth of 0.2-0.3 inches in diameter and two feet in height per year.... Average annual growth of water tupelo is 0.3 inches in diameter and two feet in height per year.”).

⁵ See SWG Report, supra fn. 1 at 32 (“[C]ompetition from remaining understory tree and shrub species may lead to failure of regeneration to produce a new stand.”).

reduce a cypress tupelo forest's ability to regenerate.⁶ Cypress seeds cannot germinate in standing water,⁷ and both cypress and tupelo need dry periods for seedlings to establish.⁸ Therefore, in areas where the hydrology has changed—particularly where the water level has risen between the time when a cypress or tupelo tree initially sprouted to when it is cut—the seedlings may not have a long enough dry period to establish and regenerate the forest.⁹

B. Scientific Studies of Cypress and Tupelo Stump Sprouting Show That Stump Sprouting Alone Is Insufficient to Regenerate a Cypress Tupelo Forest.

In addition to sprouting from seeds, cypress and tupelo trees can sprout from buds on cut or damaged stumps. However, recent studies of the long-term success of stump sprouting or “coppicing” confirm historical studies showing that stump sprouting alone is not enough to assure a cypress tupelo forest will regenerate.¹⁰ The studies confirm that both stump sprouting and seedlings (either naturally sprouted or artificially planted) are necessary to regenerate cypress tupelo forests.

1. 2006 Louisiana Long-Term Cypress Stump Sprouting Study.

A 2006 study by a coalition of researchers from Louisiana, Alabama, Mississippi, and South Carolina concluded that stump sprouting “is not a reliable means of regenerating stands after logging....” Richard F. Keim et al. Long-term Success of Stump Sprouts in High-Graded

⁶ See SWG Report, supra fn 1, at v (“Herbivory is another problem that... directly affects regeneration.”).

⁷ See SWG Report, supra fn. 1, at v (“[B]aldcypress seeds cannot germinate in standing water, and seedlings must grow enough in short drawdown periods for their crowns to extend above the water surface to survive flooding during the growing season.”).

⁸ See SWG Report, supra fn. 1, at 40 (“[B]aldcypress and water tupelo must have dry periods for the seed to germinate and establish.”).

⁹ See SWG Report, supra fn. 1, at v (“Changes in hydrology have reduced regeneration in many stands even though overstory trees may still be thriving.”).

¹⁰ See Richard F. Keim et al. Long-term Success of Stump Sprouts in High-Graded Baldcypress-Water Tupelo Swamps in the Mississippi Delta, 234 *Forest Ecology and Management* 24-33 (2006); Cotton K. Randall et al. Factors Influencing Stump Sprouting By Pondcypress (*Taxodium distichum* var. *nutans* (Ait.) Sweet), 29 *New Forests* 245-260 (2005).

Baldcypress-Water Tupelo Swamps in the Mississippi Delta, 234 *Forest Ecology and Management* 24-33 at 32 (2006), attached hereto as Exhibit A. The long-term study surveyed stands in southeastern Louisiana that were partially logged 10 – 41 years ago to determine if stump sprouts are an important mechanism for long-term regeneration. Keim, supra at 24. The study notes that “[l]ow and spatially discontinuous sprout survival indicates stump sprouts cannot be relied upon to establish a new stand of either baldcypress or water tupelo after disturbance or logging.” Keim, supra at 31. The study ultimately concluded “that *coppice cannot guarantee successful regeneration of disturbed or logged stands.*” Keim, supra at 32 (emphasis added).

2. 2005 Short-Term Florida Cypress Stump Sprouting Study.

A 2005 study by researchers from the University of Florida concluded that stump “sprouting may be an important, but inadequate, form of regeneration” for pondcypress forests. Cotton K. Randall et al., Factors Influencing Stump Sprouting By Pondcypress (Taxodium distichum var. nutans (Ait.) Sweet), 29 *New Forests* 245-260, 245 (2005), attached hereto as Exhibit B. The short-term study, which examined stump sprouting two years following logging, found that “[t]he percentage of stumps with live sprouts 2 years after harvest ranged from 23 to 54%” and surmised that “recovery of pondcypress to original stocking densities [was] not likely for any of [the study’s] sites from stump sprouting alone.” Randall, supra, 257. The study warned that “[w]hile stump sprouting appears to be an important mechanism of regeneration in pondcypress wetlands, *seeding regeneration*, either natural or artificial, *must occur for the site to completely recover.*” Randall, supra, 257 (emphasis added).

3. Past Stump Sprouting Studies in Florida and Louisiana.

The Science Working Group on Coastal Wetland Forest Conservation, created by the Louisiana Governor's Office of Coastal Activities,¹¹ undertook a comprehensive review of all available stump sprouting studies as part of its 2005 report to the Governor of Louisiana.¹² The studies revealed that stump sprouting is not a reliable method to regenerate cypress forests. For example, a 1986 study examining baldcypress stump sprouting following logging in Louisiana in the 1980s found that 80% of all stumps sprouted initially after logging, but fewer than 25% retained live sprouts four years after logging.¹³ SWG Report, supra fn. 1, at 27. A 1996 study of pondcypress stump sprouting in Florida swamps reported only 17% survival of pondcypress stump sprouts a few years after logging.¹⁴ SWG Report, supra, fn. 1 at 27. Likewise, a study examining water tupelo stump sprouting after clearcutting in Alabama's Mobile-Tensas River Delta noted that stump sprouts represented only 7% of the first year regeneration and anticipated that stump sprout survival would decline over time.¹⁵ SWG Report, supra fn. 1, at 28. After reviewing the studies above, the Science Working Group concluded: "Coppice or *stump sprouting does not provide sufficient numbers of viable trees to reliably regenerate the forest*, even under optimum conditions." SWG Report, supra fn. 1, at v (emphasis added).

¹¹ The office also funded the 2006 Louisiana long-term sprouting study, detailed above.

¹² See SWG Report, supra fn. 1, at 27-29.

¹³ W.H. Conner et al., Natural Regeneration of Baldcypress in a Louisiana Swamp, 12 Forest Ecology and Management 305-317 (1986).

¹⁴ K.C. Ewel, Sprouting by Pondcypress (*Taxodium distichum* var. *nutans*) After Logging, 20 S. J. of Applied Forestry, 209-213 (1996).

¹⁵ E.S. Gardiner et al., Impacts of Mechanical Tree Felling on Development of Water Tupelo Regeneration in the Mobile Delta, Alabama. 24 S. J. of Applied Forestry, 65-69 (2000).

II. THE CLEAN WATER ACT PROTECTS CYPRESS TUPELO FORESTS BY REQUIRING LOGGERS TO ASSURE REGENERATION WHEN LOGGING INVOLVES DISCHARGES INTO NAVIGABLE WATERS

The Clean Water Act prohibits “discharges of dredge or fill material into the waters of the United States” without a permit.¹⁶ Loggers trying to reach cypress and tupelo growing in wet areas often build roads or stream crossings, which, as discharges of dredge or fill material into the waters of the United States, would typically require a § 404 permit from the Corps.¹⁷ Before the Corps can issue a § 404 permit, the Corps must, among other things, examine alternatives to the project,¹⁸ ensure the project will not cause or contribute to significant degradation of the waters of the United States,¹⁹ ensure appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem,²⁰ and ensure compliance with the National Environmental Policy Act²¹ and the Endangered Species Act.²²

However, § 404(f)(1)(A) exempts discharges of dredge and fill material from “normal... silviculture” from § 404’s permitting requirements. 33 U.S.C. § 1344(f)(1)(A). Clean Water Act regulations clarify that the exemption in § 404(f)(1) only applies to activities that are “part of an established (i.e., on-going)... silviculture... operation....” 33 C.F.R. § 323.4(a)(ii).

¹⁶ Section 301 of the Clean Water Act prohibits “the discharge of any pollutant” into the navigable waters of the United States without a permit. 33 U.S.C. § 1311(a). “Pollutants” include dredged spoil, biological materials, rock, and sand, among other materials. 33 U.S.C. § 1362(6). Section 404(a) authorizes the U.S. Army Corps of Engineers to issue permits allowing permit holders to discharge dredge or fill material into the waters of the United States. 33 U.S.C. § 1344(a) (“The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”).

¹⁷ See AR00133 (“Work in waters of the United States associated with this silvicultural operation would include the construction of temporary stream crossings and timber haul roads.”).

¹⁸ See 40 C.F.R. § 230.10(a).

¹⁹ See *Id.* § 230.10(c).

²⁰ See *Id.* § 230.10(d).

²¹ See *Id.* § 230.10(a)(4).

²² See *Id.* § 230.10(b)(3).

The regulations also clarify that “[a]n operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.” 33 C.F.R. § 323.4(a)(ii). The Corps has determined that cypress tupelo logging may be considered “ongoing silviculture” if “there is a reasonable assurance that a cypress-dominated forest will be re-established in harvested areas.”²³

The Clean Water Act specifies that § 404(f) exemptions do not apply to discharge of dredge or fill “incidental to any activity having as its purpose bringing an area of navigable waters into a use to which it was not previously subject, where the flow of circulation of the navigable waters may be impaired, or the reach of such waters be reduced.” 33 U.S.C. § 1344(f)(2). This “recapture” provision thus requires § 404 permits for activities that would otherwise be exempt from permitting, but for the fact that they change the use of the area and either impair circulation or reduce the reach of navigable waters.

Thus, when cypress tupelo logging involves building roads or stream crossings in waters of the United States, the project will require a § 404 permit unless the logger can prove²⁴ that their logging is part of an established, on-going silvicultural operation and that the logging would not reduce or impair the circulation of navigable waters while bringing the area into a use to which it was not previously subject.

²³ See AR000048; see also Corps’ Cross Mot. at 17 (“GFC communicated to CLI that its plan would have to ‘assure regeneration.’”).

²⁴ See U.S. v. Akers, 785 F.2d at 819 (9th Cir. 1986), cert. denied, 479 U.S. 828 (1986) (A party seeking to avail itself of an exemption under §404(f) bears the burden of proving that its activities are exempt from regulation.).

III. THE CORPS ARBITRARILY AND CAPRICIOUSLY EXEMPTED CLI'S CYPRESS TUPELO LOGGING PLAN FROM CLEAN WATER ACT PROTECTIONS.

On October 25, 2006, the U.S. Army Corps of Engineers exempted CLI's plan to log 60 acres of cypress tupelo forest in Cypress Lake from § 404 protections without articulating a satisfactory explanation as to why the logging is "on-going silviculture."²⁵ The Corps concluded that the plan was "ongoing silviculture" based on its determination that "natural regeneration of the site through stump sprouting should occur" if the "trees harvested from Cypress Lake [are] cut approximately one foot above the high water mark." AR000133. The amici parties do not challenge the Corps' position that a cypress tupelo logging operation can only be an "ongoing" silviculture operation "when there is a reasonable assurance that a cypress-dominated forest will be re-established in harvested areas." See Corps' Cross Mot. at 17 fn. 11 (citing AR000048). However, the Corps' failure to provide in the exemption determination or anywhere else in the Administrative Record evidence or explanation supporting its determination that this cypress tupelo forest will regenerate by stump sprouting if CLI merely cuts the trees a foot above the high water mark renders the exemption arbitrary and capricious.

A. The Corps' Failure to Support Its Finding That The Cypress Tupelo Forest Will Regenerate With Evidence in the Administrative Record Renders the Decision Arbitrary and Capricious.

Under the Administrative Procedure Act, agency action should be reversed if it is found to be "arbitrary and capricious, an abuse of discretion, or an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). An agency action will be reversed as "arbitrary and capricious when the agency fails to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Nelson v. United States, 64 F. Supp. 2d 1318, 1323 (N.D. Ga. 1999) (internal

²⁵ See AR000133.

citations omitted), citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). Further, “the ‘arbitrary or capricious’ standard requires an agency's action to be supported by the facts in the record.” Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994). As then-Judge Scalia explained in Association of Data Processing v. Board of Governors, 745 F.2d 677 (D.C. Cir. 1984), an agency’s factual determinations must be supported by substantial evidence because “it is impossible to conceive of a ‘nonarbitrary’ factual judgment supported only by evidence that is not substantial in the APA sense.” 745 F.2d at 683.

1. The Corps Provided No Evidence in The Administrative Record Showing That The Cypress Tupelo Forest Will Regenerate.

The Corps did not—*and cannot*—show how CLI’s plan to cut the trees one foot above the high water mark will actually assure that the cypress tupelo forest will regenerate by stump sprouting. The Corps neither examined relevant studies regarding regenerating cypress tupelo forests by stump sprouting, nor articulated a satisfactory explanation of why the Corps believes that this particular cypress tupelo forest, unlike the cypress tupelo forests researched in the studies above, will successfully regenerate by stump sprouting alone. In fact, the only place in the record the Corps claims actually supports its determination that the forest will regenerate is AR000128, post-meeting notes written by Corps employee Jason O’Kane stating: “On-site discussion supported the proposed activity being exempt as on-going silviculture (and that the trees would regenerate through stump sprouts).” AR000128.

In its Cross Motion brief, the Corps also cites each place in the record where the agencies involved reached “consensus” that the proper test as to whether the logging qualified for the “ongoing silviculture” exemption was whether or not the cypress tupelo forest will regenerate.²⁶

²⁶ For example, the Corps’ Cross Motion brief notes that “the record states that the ‘consensus was that the regulation’s reference to “ongoing” meant that trees would regenerate.’” Corps’ Cross Mot. at 16, citing AR000053. The Corps also states that “[t]he agencies reached additional

But mere unsupported conclusions by the Corps and the other agencies present at the meetings—the Georgia Forestry Commission and the EPA—are not enough to provide substantial evidence of regeneration that would provide a reasoned basis for the exemption determination. See Olenhouse, 42 F.3d at 1581 (10th Cir. 1994) (“Evidence is not substantial if... it constitutes mere conclusion.”(citations omitted)).

2. The Georgia Forestry Commission’s Letter Does Not Support the Corps’ Decision.

The Corps cannot rely on the September 20, 2006 letter by the Georgia Forestry Commission to support its decision because the Georgia Forestry Commission determined that the logging plan could assure regeneration only if it provided for both seed and stump sprouting. See AR000054. The letter noted that, in the logging plan the Georgia Forestry Commission reviewed, “the timber would be harvested one foot above the high water mark *and*... the water would be kept down until natural regeneration is twelve inches above the normal high water level.” AR000054 (emphasis added). The Georgia Forestry Commission concluded that “keeping the water level down, until such time th[at] expected *seed and coppice* regeneration is twelve inches above the normal high water level, should be sufficient to meet the ongoing forestry definition and exemption.”²⁷ AR000054 (emphasis added).

‘consensus... that the regeneration of trees meant that the tree stumps harvested would re-sprout.’” Corps’ Cross Mot. at 16-17. See also, Corps Cross Mot. at 17, fn 11.

²⁷ The Georgia Forestry Commission fails to provide evidence as to why it concluded this cypress tupelo forest would regenerate if the trees are cut a foot above the high water mark and the water level is kept down. Other than a vague reference to “available literature and field observations in Florida and Louisiana” showing that “cypress trees will regenerate naturally by seed and coppice from stump sprouts,” AR000054, the Georgia Forest Commission provides no evidence that this forest will regenerate. In particular, the Georgia Forestry Commission failed to address the threats to regeneration and how the logging plan would overcome each threat to assure regeneration. See supra at 2-3. Therefore, even if the Corps had included in the exemption the condition that the water level be kept down, the paucity of scientific evidence in the regard regarding cypress tupelo regeneration would render any silviculture exemption arbitrary and capricious.

The Corps claims that it nonetheless “reasonably relied upon” the Georgia Forestry Commission expertise because AR000128, post-meeting notes written by Corps employee Jason O’Kane, show that “it was clarified prior to the exemption that CLI’s plan called for stump sprouting alone.” Corps’ Cross Mot. at 17. These post-meeting notes conflict with the Georgia Forestry Commission letter, which clearly contemplates seed sprouting. The Corps provides no scientific evidence or analysis supporting its conclusion that the cypress tupelo forest can actually regenerate based on stump sprouting alone.

3. CLI’s Reference to “The Practice of Silviculture” Is Insufficient Evidence to Support An Exemption Determination.

CLI, the party seeking the exemption and therefore the party responsible for proving that its logging plan qualifies for the exemption,²⁸ likewise has failed to show how the logging plan will assure regeneration. The June 29, 2006 letter from CLI’s consultant, Land Management Group, to the Corps detailing the logging plan references David Martyn Smith’s 1962 book “The Practice of Silviculture.” AR000029-30. The letter references Smith’s book to support the following statement: “The timber will be harvested approximately one foot above the high water mark, as per the Georgia Forestry Commission, to insure regeneration via coppice stump sprout for a future stand.” AR000030. This reference to a forty-six year old silviculture treatise obviously fails to reflect current knowledge with respect to cypress tupelo regeneration in the southeast. Further, had the Corps conducted any meaningful evaluation of the literature it would have found that “The Practice of Silviculture” reveals that it does not support the proposition that one can ensure regeneration of cypress tupelo growing in an inundated by cutting the logs one foot above the high water mark.

²⁸ See U.S. v. Akers, 785 F.2d at 819 (9th Cir.), cert. denied, 479 U.S. 828 (1986) (A party seeking to avail itself of an exemption under §404(f) bears the burden of proving that its activities are exempt from regulation.).

On the contrary, the book's antiquated and general discussion of coppicing (the book does not specifically discuss using coppicing on cypress trees or in wet areas, nor does it address the long-term ability of coppicing to regenerate a forest) illustrates why coppicing is not an appropriate silvicultural method for cypress. See generally, Smith, David Martyn, The Practice of Silviculture at 515-532 (7th ed. 1962); Chapter 15 attached hereto as Exhibit C. First, cypress' growing cycle is too long for coppicing to be a viable silvicultural method. The book notes that "The longest rotation likely to produce satisfactory results [from stump sprouting] varies between 30 and 40 years." *Id.* at 520. According to the Declaration of Thomas Welborn submitted by the Corps with its motion for summary determination, "A tupelo cypress forest, the type of forest involved here, has a very long rotation. It can take close to 50 to 60 years for these types of trees to mature and be harvestable." Corps' Cross Mot. App. B at 3.

Second, coppicing is not an economically viable method for "ongoing" silviculture of cypress. The book notes that "[a]t least under American conditions and with the exception of redwood and the aspens, it is rarely possible to use the method continuously to grow much saw timber or even trees large enough to be harvested economically for pulpwood." Smith, supra, at 522. Instead, coppicing is used where there is a market for small, poor quality firewood because "[t]he form of the trees [produced by coppicing] is often poor, and the incidence of rot is high." Smith, supra, at 517. Moreover, aesthetically, "the coppice method is the least desirable means of regeneration because the forest is low in stature, monotonously regular, and often full of poorly formed trees." Smith, supra, at 522.

The book ultimately recommends that "*if the coppice method is to be continued, it is still desirable to obtain some reproduction from planting or natural seeding . . .*" Smith, supra, at 521 (emphasis added). Therefore, not only does "The Practice of Silviculture" not stand for the

proposition that when cutting cypress tupelo growing in an inundated area, one can insure regeneration by cutting the logs one foot above the high water mark, but it actually recommends that when using coppicing on an “ongoing” basis, foresters should supplement it with an additional regeneration method, such as seed sprouting.

4. The Corps Misunderstands Its Duties Under the Law With Respect To Creating A Record And Granting An Exemption.

The Corps’ Cross Motion brief highlights the Corps’ lack of understanding its role, and CLI’s role, in issuing a Clean Water Act exemption. The Corps’ response to Ogeechee-Canoochee Riverkeeper’s assertion that the Corps arbitrarily and capriciously omitted the condition that CLI keep the water level down is particularly telling. The Corps responded:

Riverkeeper identifies no meaningful scientific distinction between, on the one hand, calling for the stumps to remain one foot above the high water mark and, on the other hand, cutting stumps closer to the lake bottom while the spillway structure keeps water at a drained or unusually low level until sprouts grow one foot above the stumps.

Corps’ Cross Mot. at 18 (emphasis added).

First, the Corps should have required CLI to make an evidentiary showing that the logging plan qualifies for the silviculture exemption before issuing its decision. See U.S. v. Akers, 785 F.2d at 819 (9th Cir. 1986), cert. denied, 479 U.S. 828 (1986) (A party seeking to avail itself of an exemption under §404(f) bears the burden of proving that its activities are exempt from regulation.). Second, under the Administrative Procedures Act, the Corps must provide a reasoned basis for granting a silviculture exemption, and must support its factual findings with substantial evidence in the record. See Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43 (1983); Nelson, 64 F. Supp. 2d at 1323 (N.D. Ga. 1999); Olenhouse, 42 F.3d at 1575 (10th Cir. 1994); Ass’n of Data Proc., 745 F.2d at 683 (D.C. Cir. 1984).

Having failed to fulfill these obligations, the Corps argues that the absence of information undermines Riverkeeper's case. In fact, the opposite is true. It is the Corps' failure to consider the likelihood of regeneration without seed sprouting and the omission of information from the record that renders the exemption determination arbitrary and capricious. Ultimately, the Corps' failure to provide evidence in the record supporting its determination that CLI's plan to cut the cypress and tupelo trees one foot above the high water mark will ensure regeneration renders the decision arbitrary and capricious.

B. The Georgia Forestry Commission's Agreement to Monitor the Harvest Site Does Not Compensate for the Corps' Arbitrary and Capricious Decision to Remove the Condition That The Water Should be Kept Artificially Low.

Contrary to the Corps' assertion, having the Georgia Forestry Commission "periodically inspect the site to monitor regeneration" neither proves that the Corps "sufficiently addressed the issue of stump sprouting" nor does it excuse the Corps' failure to support its determination that the logging plan "assures regeneration." Corps' Cross Mot. at 18, citing AR000133. The Corps appears to argue in its brief that if it turns out the keeping the water level low is actually vital to the regeneration of the cypress tupelo forest, that it can later require that the water level be kept down.²⁹ This argument fails for several reasons.

First, the Corps should have placed an affirmative obligation on CLI to assure through its logging plan that the forest will regenerate before granting the exemption.³⁰ To the extent that the monitoring plan reflects uncertainty about whether or not the harvested trees will regenerate, the Corps should have resolved that uncertainty in favor of not granting the exemption. Instead, the

²⁹ See Corps' Cross Mot. at 18 ("If adjusting the water level proves necessary for regeneration and for CLI to remain eligible for the normal silviculture exemption, there will be ample opportunity for such adjustment.").

³⁰ See U.S. v. Akers, 785 F.2d at 819.

Corps' decision to exempt the harvest and see what happens is clearly at odds with the Clean Water Act.

Second, the exemption determination merely states that the Georgia Forestry Commission will "monitor regeneration," AR000133, and does not contain any discussion of remedial action. Significantly, neither the logging plan nor the exemption decision requires remedial action by CLI if the harvested timber fails to regenerate. The record contains no information about what the Georgia Forestry Commission's monitoring would entail or what threshold would trigger remedial action by CLI. Without such requirements in the record, the Corps' argument that it will make remedial "readjustments" of the logging plan is nothing more than a *post-hoc* rationalization of an unlawful decision.

If the Corps were entitled to demand such remedial action, it is unclear whether the obligation would fall on CLI or the Georgia Forestry Commission or both to take whatever action necessary to "assure regeneration" of the cypress tupelo forest. Further, if the responsibility for post-logging remediation falls to the Georgia Forestry Commission, the inequitable result would be that the people of Georgia would bear the cost of assuring regeneration, while CLI benefitted from the logging. Therefore, because requiring monitoring is not the same as requiring CLI to take necessary steps to assure regeneration, the monitoring requirement does not compensate for the Corps' decision to base the exemption solely on logging the trees one foot above the high water level.

C. If The Corps Required CLI To Keep The Water Level Low To Allow Cypress Tupelo Seedling Regeneration, The Logging Plan Would Not Be Subject To The Silviculture Exemption.

Even if the Corps had required CLI to keep the water level of Cypress Lake down until natural regeneration is twelve inches above the normal high water level, the logging would not

be subject to the silviculture exemption. Section 404(f)'s "recapture" provision states that exemptions do not apply to discharge of dredge or fill "incidental to any activity having as its purpose bringing an area of navigable waters into a use to which it was not previously subject, where the flow of circulation of the navigable waters may be impaired, or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2). Because this area has not been used for "ongoing silviculture" in the past, and because lowering the water level in Cypress Lake would reduce or impair the reach of Cypress Lake, §404(f)(2) would "recapture" the logging, which would be subject to § 404's permitting requirements and environmental protections.

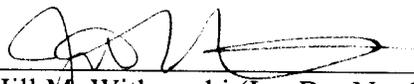
It is undisputed that the area at issue is not currently being used for "ongoing silviculture." The Corps, however, makes a half-hearted attempt in its brief to show that some trees in the area have been cut down in the past by pointing to cypress stumps. See Corps' Cross Mot. App. B at 2 ("A photograph in the Administrative Record, at page 131, is but one example of stumps from previous harvesting in the portion of Cypress Lake from which Cypress Lake, Inc. contemplated harvesting trees."). The photograph, AR000131, illustrates two important points. First, the diameter of the stump is much larger than the trees surrounding it, suggesting that the lone tree was cut because it was large enough to produce saw timber and was not part of an "ongoing silviculture" operation. Second, the stump in AR000131 has not stump sprouted. The Corps' own photo illustrates the fact that stump sprouting is not a reliable regeneration and ultimately that the prior harvesting was not "ongoing." Therefore, regardless of whether the proposed logging would be "ongoing silviculture" on a prospective basis, it would still be "bringing an area of navigable waters into a use to which it was not previously subject." See 33 U.S.C. § 1344(f)(2).

Furthermore, it is undisputed that lowering the water level in Cypress Lake would reduce or impair the reach of Cypress Lake. Coupling the fact that this logging project intends to bring the area into one of "ongoing silviculture" with the fact that lowering the lake would reduce the reach of Cypress Lake, the logging project would be subject to § 404 permitting. See 33 U.S.C. § 1344(f)(2).

IV. CONCLUSION

The Corps arbitrarily and capriciously granted CLI an exemption from § 404 permitting requirements and environmental protections without articulating a satisfactory explanation as to why the plan to log 60 acres of cypress tupelo forest qualifies as on-going silviculture. The Administrative Record indicates that the Corps failed to examine relevant scientific evidence regarding the nature of cypress tupelo forests and the unique requirements for assuring their regeneration. Because the Corps failed to provide anything other than mere conclusions to support its decision that the logging plan would assure regeneration, there was no reasoned basis for the Corps' exemption decision. For this reason, we respectfully request that this Court reverse the Corps' exemption determination as arbitrary and capricious and require CLI to obtain a § 404 permit from the Corps before logging cypress tupelo trees in Cypress Lake.

Respectfully Submitted on this 15th day of January, 2008



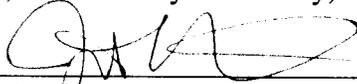
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Surfrider Foundation*

Certificate of Service

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record by U.S. mail, postage prepaid, this 15th day of January, 2008.



Jill Witkowski