

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

CASE NO. 05-80339-CIV-MIDDLEBROOKS/JOHNSON

FLORIDA WILDLIFE FEDERATION, a Florida not-for-profit corporation; and **SIERRA CLUB, INC.**, a not-for-profit corporation,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, and **COLONEL ROBERT M. CARPENTER**, District Engineer, in his official capacity,

Defendants.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

NATURE OF THE CASE

This case is brought under the National Environmental Policy Act (“NEPA”) to challenge the failure of the U.S. Army Corps of Engineers (“Corps”) to analyze all significant direct, indirect and cumulative impacts of the construction of a Biotechnology Research Park on Mecca Farms (“Research Park”), prior to issuing a permit under Section 404 of the Clean Water Act. The Corps Environmental Assessment (“EA”) and Finding of No Significant Impact (“FONSI”) concluded that an Environmental Impact Statement (“EIS”) was not required. This decision is unreasonable, arbitrary, capricious and otherwise not in accordance with federal law. The EA, and the resulting permit issued by the Corps, unlawfully segments and approves the initial phase of a major unified economic development project in order to hide the significant direct, indirect, cumulative and secondary adverse impacts. It also fails to adequately identify secondary impacts of either the permitted Project or the entire development; fails to adequately identify and properly evaluate alternatives for either the permitted Project or the entire development; fails to adequately identify the degree of mitigation necessary to off-set the direct, indirect, cumulative and secondary impacts of either the Project or the entire development; fails to adequately evaluate the direct, indirect, cumulative and secondary harm to threatened and endangered

species and habitat for either the permitted Project or the entire development; and fails to analyze the five-phase, 2000 acre, 2000 – plus home, 8.5 million square foot industrial, and one-half million square foot retail Research Park “Development of Regional Impact” approval, and enabling Palm Beach County Comprehensive Plan, Land Development Regulation and Development Order approved for the entire Project.

STATEMENT OF FACTS

Brief Factual Synopsis

Over a period of just over a month, three members of the County’s Business Development Board (BDB), representatives of the Governor’s office, and officials from the Scripps Research Institute (Scripps or TSRI), meeting secretly, negotiated a deal (which led to a \$310 million state subsidy) to open a branch of Scripps in Palm Beach County, as the anchor of a biotechnology community to consist of the 1919 acre Mecca Farms site and the adjacent Vavrus Ranch parcel, both of which were put under contract by the BDB. R 2192.

Once this agreement was reached and the site purchased by the BDB, those parties sought and received the agreement of the Palm Beach County Commission (in the form of various official acts and entry into a contract with Scripps) to buy the land from the BDB, provide its own additional subsidy to Scripps of \$200 million to purchase land and construct labs for Scripps, and process local land use approvals for the Project. R.2191. A formal agreement was entered to expedite state regulatory approvals. R 178. In addition to the \$310 million State subsidy and the \$200 million the County agreed to provide to cover the cost of land and Scripps laboratories, Palm Beach County estimates that an additional \$535,452,189.00 in public expenditures will be required in order to provide the necessary infrastructure (including water, wastewater, transportation, parks, libraries, schools, police, fire, and drainage) to support the Research Park on Mecca Farms. R 2191-2, 293-291. The proposal generated significant controversy and media coverage. See R. 2504-2314.

After the County acquired Mecca Farms, it agreed to review alternative sites, due to the significant public controversy that had arisen over the site. The alternative analysis found several other sites that would meet the Project’s objectives. R. 1742 et. seq. Although the County has continued to seek to move forward on Mecca Farms, maintaining that it alone is large enough to accommodate the full scale of the proposed project, (R. 349, 480, 1210, 6667 – 6668, 6680, 6691, 6706, 6708, 6710), local and state land use approvals that would allow the 8 million

square foot research campus, 50,000 square foot of retail space and 1000 residential units to be constructed on the Briger Parcel south of Abacoa are simultaneously being processed by the City of Palm Beach Gardens. R. 2491

After the State and County granted the necessary approvals for the entire Project on the 1919 acre Mecca site, the County sought and the Corps granted a single permit for the first 535 acre phase of the Project (known as Phase 1A). R 2772- 2765. The Corps declined to analyze the impacts from the remainder of the Project (including major thoroughfare roadway extensions through wetlands and conservation lands) as well as the impacts of the related biotech support uses on the adjacent 4700 acre (largely wetland) parcel, or the proposed development of other lands in the area. R. 2685–2683. The impacts which the Corps declined to analyze will be substantial, as the Project site is located in a remote rural area, surrounded by forests, wetlands and river ecosystems. R. 2633, 234, 232. Limiting its analysis so, the Corps found no significant impact from the Project and issued a S. 404 wetland permit without analyzing the impacts or preparing an Environmental Impact Statement. R. 2630.

Plaintiffs challenge the approval as illegal segmentation of a project in violation of NEPA requirements to consider all present and reasonably foreseeable future direct, indirect, and cumulative impacts of major federal actions.

Detailed Factual Background

The Site

This Project would be the initial urban development approval in what is currently a remote, rural region of the County, where the local land use plan authorized only limited, rural land uses and infrastructure, until those plans were substantially changed to accommodate this Project. To allow the Project, Palm Beach County amended the basic land use designations, zoning categories, infrastructure limitation policies, allowable land uses and development standards, traffic congestion limits, and virtually every aspect of development that is regulated by a comprehensive land use plan under Florida law. R. 150-156, 313-324, 327, and 6588-6986. Prior to the County’s approval of the Research Park, the maximum development potential of the Mecca Farms site was 191 residential units and very limited non-residential uses. R. 6664. As stated by the applicant, “the Comprehensive Plan did not anticipate the establishment” of this Project. R. 327.

The site and surrounding wild lands are part of a larger regional ecosystem. R. 1740. The site is five to seven miles west of the urban area and the only development in the vicinity is very low density. R. 4367, 4344, 4368. The site is bordered on three sides by environmentally sensitive lands containing a significant acreage of high quality, natural wetlands, including the J.W. Corbett Wildlife Management Area (“Corbett”) and the Hungryland Slough, which are in public ownership. Corbett is a large contiguous area of mesic and wet flatwoods, sloughs and swamps, which is known to support listed species such as the red-cockaded woodpecker, the snail kite and the Florida panther. R. 1445. The Hungryland Slough is contiguous to Corbett, contains high quality wetlands and habitat, and was been purchased by Palm Beach County for preservation. R. 1310, 3253, 3278. A portion of the Hungryland Slough known as Unit 11 is being restored to by Palm Beach County as mitigation for wetland impacts elsewhere in the region. R. 3282. Historically, the Project site was part of the Hungryland Slough and was predominantly wetland. R. 1555, 2686. The site also adjoins the privately owned Vavrus Ranch, which contains significant acreage of high quality wetlands and wildlife habitat (R. 1310, 4129-33, 4137-9, 4143-4) but which is now also being planned for support uses for the biotech development on Mecca Farms. R. 778, 1310, See also R. 4070, 4080, 4089.

The site and surrounding areas are within the watershed of the Northwest Fork of the Loxahatchee River - a designated National Wild and Scenic River - and one of the most regionally significant natural resources in Southeastern Florida. To the south and east of the Vavrus Ranch, the publicly - owned Loxahatchee Slough contains high quality wetlands and forms the historic headwaters of the Northwest Fork of the river. R. 3279. The river has been damaged by changes to the drainage patterns in its watershed to facilitate development, which has caused excessively high flows after rains, and reduced flows during the dry season, allowing saltwater to intrude upstream, altering the aquatic ecosystem and causing a change in vegetation along the riverbanks. R. 3248. The Project site discharges into the C-18 Canal, a tributary of the Northwest Fork R. 1310. “The [proposed] activity is located in a special aquatic site”, however, the activity does not need to be located in a special aquatic site to fulfill its basic purpose. R. 2651.

The (Project) site is located within the boundaries of the Comprehensive Everglades Restoration Plan (“CERP”) - North Palm Beach County Project - and has the potential to impact restoration of the Northwest Fork of the Loxahatchee River. R. 238, 1288. Restoration of the

river requires additional water storage in its watershed to compensate for the loss of storage caused by previous development. R. 3246. “[A] portion of the Mecca Farms parcel is a potential site to be either a stormwater treatment area or a reservoir within the CERP...” R. 2680. As explained by EPA, the “Mecca Farms and Vavrus Ranch sites:”

“are strategically located in the Loxahatchee River Basin. The Mecca Farms site was historically underlain by ... hydric soils and the Vavrus Ranch site still contains significant, high value wetlands. The Loxahatchee River suffers from reduced hydrologic flows The river could benefit from increased water storage in the watershed. Mecca Farms was identified as a potential site for a water storage reservoir, which could release water to the Northwest Fork of the Loxahatchee River during the dry season or periods of drought. Vavrus Ranch was identified as a site with significant wetlands in need of protection.” R. 1308, 3246.

Mecca Farms is the only large property in the CERP project area that is suitable for use as a water storage area. R. 3246. One member of the Corps’ permitting staff expressed the opinion that the entire Mecca site should be restored. R. 2277.

According to the Florida Department of Environmental Protection (“FDEP”), a high potential exists for impacts to the surficial aquifer due to onsite activities. R. 1446. The existing mining activities have uncovered the surficial aquifer, making it more susceptible to pollution from future stormwater runoff and industrial pollutants. R. 1445. The proposed Project will increase mining on the site from 27.6 acres to 48 acres. R. 2686

The EA found that “the potential for listed [endangered] species to occur on the site exists.” R. 2641. According to the Florida Natural Areas Inventory (FNAI), “[p]ortions of the site appear to be located on or near Potential Habitat for Rare Species. This potential habitat is associated with a known occurrence in the vicinity of: Florida sandhill crane, red-cockaded woodpecker, snail kite and eastern indigo snake.” R. 766. FNAI concluded that due to the site’s location, “adjacent to a significant region of natural areas and habitat for several rare species. . .extra consideration should be taken to avoid and/or mitigate impacts to these natural resources, and to design land uses that are compatible with these resources.” R. 767.

“The project site contains habitat for the American Alligator and foraging habitat for wading birds and birds of prey.” R. 1290. It is also habitat for the chicken turtle and the common moorhen. R. 469. As explained by the applicant:

“Foraging habitat for several listed wading bird species, including the Florida sandhill crane, wood stork, little blue heron, snowy egret, tricolored heron,

limpkin and white ibis, are present within the project site. *** Other listed wading bird species, including the roseate spoonbill and reddish egret, have a moderate probability of occurrence within the project study corridor due to foraging requirements similar to those of the observed species.” R. 776-777, 2653.

The U.S. Fish and Wildlife Service found that the Mecca Farms site is within the core foraging area (CFA) of an active breeding colony of endangered woodstorks, and that the loss of wetlands within a CFA may reduce foraging opportunities for the woodstorks. R. 1577. Other state or federally listed species that could be expected to either nest or use the subject lands or the vicinity for foraging include the following: threatened species -- the Florida Brown Snake, Southeastern American Kestrel and the Bald Eagle; endangered species -- the Peregrine Falcon, the Florida Panther and the Florida Mastif Bat; and species of special concern -- the Florida Pine Snake, Gopher Tortoise, Alligator Snapping Turtle, Osprey, and the Florida Tree Snail. R. 1496-1495.

Aerial maps of the Project site and surrounding areas are at R. 152-153, 361.

The “Project”

The 535 acre phase permitted by the Corps is Phase 1A of a 1919 acre, five-phase Project which has been proposed, purchased, site – planned and approved by Palm Beach County as the “Palm Beach County Biotechnology Research Park”, and anchored by the Scripps Research Institute (“Scripps” or “TSRI”). R. 172, 233-234; 356-357, 381, 388, 1830-1913-1919. The Research Park, as approved by the County and state, includes a variety of land uses related to science and technology, biotechnology, biomedical research, development, and manufacturing industries and will include a university campus, institutional uses, residential, commercial, hotel, hospital and community facilities and public services. R. 4354-4355. It is a major economic development Project being pursued with a combined state/county subsidy of over \$600,000,000.00. R. 350-352. As described by the County’s application for state DRI approval, “The arrival of [Scripps] in Palm Beach County could prove to be as significant to South Florida’s economy as the arrival of Henry Flagler’s railroad a century ago.” R. 170, 330 (Emphasis added).¹ “The arrival of [Scripps] to this area of Palm Beach County will have a

¹ The County also stated that the Project “is expected to produce an estimated 18, 814 jobs on this property by the year 2030, and some economists have estimate that up to 44,000 jobs could be created as a result of the industry clustering that is expected to surround Scripps. R. 306, 1490.

significant impact on the Treasure Coast region.” R. 311. (Emphasis added).² Florida’s Governor compared the impact to the arrival of air conditioning in the Florida swamps. R. 2197.

The entire 1919 acre Project has been approved by the State and local County government under a special expedited permitting process administered by the State’s “Office of Tourism, Trade and Economic Development.” R. 5-7, 10, 201-202, 207-220, 228, 242, 248-250, 396.³ The purpose of the expedited review permitting process is to “encourage and facilitate the location and expansion of economic development projects.” R. 2057. The expedited permitting form prepared by the County states that the Project is expected to create over 18,000 jobs as a result of the 10.5 million square feet of biotech related research and development and the associated uses on these 1919 acres, as further described below. R. 175-176, 178. A state water management permit has been issued for the 1919 acre Project, to which is attached a development plan for the entire site. R. 1280. The entire 1919 acre Project has received state and local approval as a “Development of Regional Impact” (DRI) (R.1916-1919).⁴

The Project, as approved by Palm Beach County, the State of Florida Department of Community Affairs, the South Florida Water Management District, and the Treasure Coast Regional Planning Council, authorizes 8.5 million square feet of research and development (“R & D”) uses, 440,000 square feet of retail uses, 390,000 square feet of utility uses, over 2 million square feet of educational uses (up to 2,500 elementary / secondary students and 2000 college / university students), 487,872 square feet of recreation / community facility uses, 529,254 square feet of clinic / hospital uses (up to 300 beds), and 2000 dwelling units. R. 1440, 6657. In addition, the County’s approval of the Project also authorizes up to 4000 additional homes under a transfer of development rights program, thus increasing the maximum potential number of

² The County’s Scripps Project director admits that the Project will have a significant impact wherever it is placed. R. 2506-2507.

³ The record includes information that calls into serious question the integrity of state expedited review process, including the sworn testimony of a former state biologist that he and others were threatened with dismissal if they lodged formal objections to the Project. R. 2509 - 2537, especially R. 2517-2518.

⁴ Under Florida law, a Development of Regional Impact is “any development which, because of its character, magnitude or location would have a substantial effect upon the health, safety, or welfare of citizens of more than one county.” S.380.06(1), Fla. Stat. (2004).

residences to 6000. R. 6609.

Because of the unique “mixed use” nature of the Project, state approval required that minimum densities be required “to ensure that the proposed Project will contain a functional mix of appropriate land uses.” R. 6660. Thus, a minimum of 8 million square feet of R & D, 333,000 square feet of retail, 1,587,762 square feet of educational, 100,000 square feet of recreational / community facility, and 2000 residential units must be built on the site as a condition of approval. R. 6657. The Project is intended to be a “well-planned, thoroughly integrated development that fosters the economic viability and livability of the tenants, residents and workforce of the community....” R. 229, 338. As described in the County’s application for DRI approval:

“A program has been developed for the 1,919.23 acre Research Park to include a variety of land uses that relate to, and support each other, to create a premier science & technology and research & development based project.... It is anticipated that related science & technology and research & development uses will develop around and in conjunction with TSRI.” R.350.

The project includes, “not only the new Scripps Florida facility, but also . . . sufficient area for the expected new biotech research centers and related businesses that are expected to follow TSRI to this location. Adequate land area was also needed for the support facilities including commercial services, educational facilities, civil uses, and residential development to accommodate the workforce.” R. 351. (Emphasis added).

“The presence of [Scripps], along with the influence of high-tech markets, will encourage other industries to locate their facilities at this site. [T]he Master Development Plan ... has reserved the Research & Development District for additional science & technology and research & development uses.” R. 348.

“In reference to transportation, the proposed Research Park is being reviewed as an overall project to be built out over many years.” R. 307. (Emphasis added).

As described by the County, the uses described above are “ancillary to and supportive of” the Scripps development, and are planned for the 1919 acre site to meet the needs for “co-location” that are important to the establishment of a biotechnology economic cluster. R. 169-171.

As described by the Corps, “[t]he overall project is to construct a Biotechnology Research Park with a hospital, schools, a university, commercial and residential development. The overall site is a 1900 acre site.” R. 1328. The Corps’ initial draft Fact Sheet for the Project said:

“This project proposes to develop a 1919 acre site...by constructing a biotechnological and biomedical research and pharmaceutical business park known as the SCRIPPS Park. Within the 1,919 acre site, the project also proposes to construct single – family residential areas, multi-family residential areas, commercial areas, recreation areas, a high school, a university, surface water management lakes, greenbelt areas and associated roads.” R. 264-265; See also R. 234.

The Project permitted here by the Corps is Phase 1A (R. 1297), which consists of a 183 acre research institute, a 30 acre town center with commercial uses and multi-family housing, a 27 acre clinic / hospital, a 15 acre utility site and surface water management lakes and open space. It directly impacts 21.3 acres of jurisdictional waters. R. 1234.

1919 Acre Mecca Site Chosen For its Size

According to the County, the 1919 acre Mecca site was chosen “for its size and buildable land”, and none of the alternative sites “met the size requirements” of Scripps and Palm Beach County. R. 349, 480, 1210. One of the reasons the Corps found the “Briger” alternative site to be inferior was its “limited possible future expansion areas.” R. 2666. Likewise, in rejecting the alternative “Park of Commerce” site, the Corps wrote, “this site ... would not support the level of total future development that the County anticipates on the remainder of the Mecca parcel” R. 2667. (Emphasis added).

The record also demonstrates that, for purposes of securing state growth management approval, the County justified the need for the Mecca site – as opposed to a smaller, urban parcel – by stating that:

“Mecca Farms offers the size to ensure that biotech and businesses that support biotech will have room to grow in coming decades. A similar amount of vacant industrial land is not available in the County’s eastern corridor....” R. 661.

The EA also describes the need for the entire 1919 acres to accommodate the development:

“The applicant (Palm Beach County) has shown that there is a lack of developable lands large enough to accommodate the proposed use, for which a need has been demonstrated.” R. 6667.

“The applicant has shown that no developable land is available in the already urbanized area of the County to support this use.” R. 6668.

The record also includes the County’s application for its land use changes, where it stated:

“This property was chosen because of the lack of developable land large enough to house the expected 10,500,000 square feet of biotechnology and research and development space being proposed on this property”.

In reviewing the proposed changes, the County staff⁵ concurred and stated:

“The suitability of the subject site for the proposed use is demonstrated by the lack of other developable land large enough to accommodate the proposed multiple-use research park facility and allow for economic clustering of research and development companies and the creation of a functionally integrated, sustainable community . . . a project of this scale, including the anticipated spin off industries, could not be accommodated further East.” R. 6680 (emphasis added).

“There are no viable sites of sufficient size to accommodate these types of land uses at the intensity proposed for this site.” R. 6691.

“10,500,000 square feet of building space will be required for biotechnology / biomedical research & development uses on the subject property.” R. 6710

“In Palm Beach County, there is a limited amount of developable land large enough to house the 10,500,000 square feet of space for biotechnology / biomedical research & development that is anticipated as part of the ‘research cluster’ associated with the Scripps Florida facility. To accommodate the intensity of development anticipated in the ‘research cluster’ with Scripps Florida, a large parcel of property is needed.” R 6706; See also R. 6708.

Also to justify the growth management approval of the Mecca site, the County prepared a map of “Developable Lands” within the County. R. 403. (Copy attached because record copy

⁵ In applying for, evaluating, and approving the land use changes and development orders necessary to place the Research Park on Mecca Farms, Palm Beach County staff acted as both applicant and reviewer, and the Board of County Commissioners acted as the ultimate decision maker.

was not legible.) The map identifies several sites of five hundred acres or greater which would be large enough to accommodate the 535 acre phase 1A. Id.

While Scripps will occupy approximately 100 acres of the 1900 acre Mecca Farms site, the remaining Research Park uses will replace all of the existing activities on the site. R. 6704. The County intends to make the remaining property available to other biotech related companies and support facilities in order to recover the significant public costs associated with the Project. R 351, 6704, 6709.

The Entirety of Project Impacts

In evaluating the DRI for the Research Park project, the Treasure Coast Regional Planning Council found that the project would have several significant regional impacts. Specifically, because the project is in an, “area served by a limited roadway network, lacks transportation alternatives, and is greatly distanced from interstate and rail facilities, development of the Research Park will overload the County roadway network at build-out, forcing several roadway segments over capacity. In addition, the Research Park’s proposed scale and development pattern fundamentally conflicts with the planned rural and equestrian nature of this portion of the County. Instead of preserving the “rural way of life”, the County’s infrastructure and roadway improvements could encourage and accelerate low-density development in an unplanned, sprawling manner.” R. 4357, See also R. 4370.

The development of the Research Park on Mecca Farms will increase vehicular traffic generation from the site by more than fifty times. Under the rural land use designation the site enjoyed as a citrus grove, the maximum potential traffic generation was 1920 trips per day. As a Research Park, the traffic generation would increase to 103,180 trips per day, an increase of more than 100,000 trips per day. R. 6694-6695. The “only access to the site at this time is an unpaved extension of Seminole Pratt-Whitney Road (“SPW Road”)...” R. 1297.

In an effort to accommodate the traffic to be generated by the Project, extensions of: a) Seminole Pratt Whitney Road from Northlake Blvd. to Beeline Highway, b) PGA Blvd. from Seminole Pratt Whitney Road to Beeline Highway, and c) SR 7 from Okeechobee Blvd to Northlake are required conditions of the Project’s state and local approvals. R. 6800. The conditions of approval also require expansions (widening) of several existing major thoroughfares, including (a) Indiantown Road (b) PGA Blvd. (c) Northlake Blvd. (d) Okeechobee Blvd. (e) Beeline Highway; and (f) Seminole Pratt Whitney Road. R. 6800.

Numerous other conditions of approval attempt to offset the traffic increases to be generated by the Project. R.6800-6802. Even after the roadways are expanded, they will still be significantly over-capacity, meaning there will significantly higher volumes of traffic using the roadways than the roads were designed to handle. R. 4367. As a result of the Project, more than 57 miles of County roadways will be over-capacity and will fail to operated at their established level of service. R. 6804.

Corps' permitting staff described the "permitting issues" related to the rest of the Project beyond the first 535 acre phase, and the roads needed to serve the Project and the development of the adjoining Vavrus parcel, as more "complicated" or "troublesome" than those for this initial phase. Among these complications are "newly proposed roads [that] would connect to existing roads through high-value offsite wetlands," and the fact that the "road access they are discussing would have substantial impact on high quality wetlands." R. 224, 263 (Emphasis added).

The state has identified roadway and utility projects "which would not occur but for the development proposed in this permit application." R. 1294. (Emphasis added). As stated by the County, "the roadway network providing access to the subject site will require expansion and improvement." R. 500. The Florida Department of Transportation has "been working on revisions to their planning process and budget to incorporate the roads in the vicinity of Scripps in their schedule." R. 256.

The expedited permitting form prepared by the County identifies the PGA Boulevard Extension and the SPW Extension on its maps. R. 152-153. That same document includes those two roadway extensions along with extensions of nine additional roadways that are required for the Project. R. 113. Both are shown on an attached site plan for the 1919 acre "Palm Beach County Biotechnology Research Park." R. 110. The Petition Summary for the land use change from agricultural to allow the Research Park states that the parcel will be accessed by "[t]he future extensions of Seminole Pratt Whitney Road and PGA Boulevard." R. 6664. The construction of both roads, along with numerous other roads and intersections, is a condition of the state DRI approval. R. 1908, 1897-1911. The PGA Blvd. extension "will be an essential transportation linkage for [the Mecca and Vavrus projects] as the 'grand entrance' for the Scripps Florida Facility." R. 2033. The County staff report for the local and use approval for the roadway expansions states that:

"As part of the first phase of the development of Mecca, the extension of

Seminole Pratt-Whitney Road north of Northlake Boulevard to the Beeline Highway and PGA Boulevard from Seminole Pratt-Whitney Road to the Beeline Highway is proposed. The Coconut Boulevard extension north of PGA Boulevard is shown in the second phases. In addition, the extension of SR 7 from Okeechobee Boulevard to Northlake Boulevard is also proposed....” R. 6642.

In order to provide access to the Research Park, PGA Boulevard and SPW Road need to be constructed to and through the Project site. R. 4367. Palm Beach County has planned and maintained that direct access to the Mecca Farms site will be from SPW Road and the extension of PGA Boulevard: “Access to the site will be easily obtained through the extensions of PGA Boulevard and SPW Road, which will be extended from the southern boundary of the site north to Beeline Highway.” R. 6695, 6709. The need for the extension and widening of SPW Road to Beeline Highway has been determined by the transportation analysis that was performed for the Comprehensive Plan and DRI applications, and will occur on the western boundary of the site. R. 6708, 6769. The County’s rezoning approval for the site makes the construction of SPW road a mandatory condition of the Project, as it disallows the issuance of any and all building permits after December 31, 2007 until either a contract has been let or a local government development agreement has been executed for the construction of SPW Road as a minimum two-lane cross section from PGA Blvd. to Beeline Highway. R. 6943. This condition is not linked to any number of trips or to any future phase of the Project - it is simply required as a condition of constructing any portion of the Research Park at Mecca Farms. R. 6943.

The planned extension of SPW Road will impact wetlands and cut off Hungryland Slough from Corbett for a distance of approximately 3 miles north of the subject site. R. 6679. SPW Road will initially be constructed as a four lane section with the opportunity to increase to six lanes as the Project builds out. R. 6769. The County currently owns only 60 feet of right of way for SPW Road along the western side of the Mecca site. R 6761. According to the County, the minimum right of way needed to provide the needed access to the Research Park is 120 feet, thus the additional 60 feet “must be acquired.” R. 6761. The extension of PGA Blvd. will also fragment conservation lands and directly and indirectly impact wetlands within the Loxahatchee Slough and the Vavrus Ranch property. R. 1432-1433. The master development plan also shows three roads extending east from the Mecca site onto the Vavrus property that have the potential to impact wetlands on the Vavrus property. R. 1432-1433.

The State has not granted construction permits for these road and infrastructure projects,

and has not fully analyzed their wetland impacts or mitigation requirements. This will be done in the future when construction permits are requested by the applicant. (R. 1291, 1293-1294). Those projects, which would directly impact approximately 151 acres of wetlands (in addition to undetermined amounts of indirect impacts), are (a) Widening of SPW Road from Northlake Blvd. to the Project site.(impacts to high quality wet prairies in Corbett Wildlife Refuge); (b) an FP&L substation. (impacts to high quality wet prairies in Corbett Wildlife Refuge); (c) extension of PGA Blvd. from the Beeline Highway to the Project site. (over 100 acres of impact to wetlands of varying qualities, including high quality wet prairies and freshwater marshes); and (d) potential North County Airport runway re-alignment to accommodate the PGA Blvd. extension. (impacting about 46 acres of wetlands previously preserved as mitigation). R. 1293-1294.

In addition to the significant roadway impacts, the proposed Research Park (including even the limited uses authorized by the challenged permit) requires the ability to connect to potable water and wastewater lines. The County stated in its DRI application that the Project would result in a demand for potable water of up to 6,100,000 gallons per day and for wastewater service of up to 3,176,000 gallons per day. Palm Beach County Water Utilities Department plans to extend lines to the Mecca Farms site to provide these services. R. 6698.

The proposed Project also will require the conversion of approximately 28 acres of the Corbett Wildlife Management area to urban uses to allow the siting of transportation and utility facilities to support the Research Park. R. 6736, 6760. “Due to the agreement between the State of Florida, Palm Beach County, and TSRI, the development of the Mecca property and a complementary development of a portion of the Vavrus property are now underway and, as such, adequate infrastructure must be provided.” R. 6766. Specifically, 6.73 acres are needed to allow for the construction of an FPL substation to provide power to serve the Research Park, 4.73 acres are necessary for SPW roadway improvements, with the remainder to be used for the construction of a canal and trails. R. 6737.

Palm Beach County determined that the existing FPL facilities are not adequate to serve the planned development and the proposed electrical substation is necessary to serve the Research Park on Mecca Farms “in order to provide adequate and reliable utility service”, and that the additional right of way for SPW Road is necessary to provide “adequate vehicular and pedestrian opportunities” to access the Research Park. R. 6737-8, 6752. The County identified

the substation and roadway expansion as “critical infrastructure needs for access (and) reliable power...” and state that the provision of “adequate and reliable utility service is imperative.” R. 6763 - 6764.

The Adjacent Vavrus Ranch Property

The adjacent Vavrus parcel is undeveloped but, in conjunction with the Mecca site, it is also the subject of an expedited permitting agreement with the state of Florida. R. 349, 2045, 2081. Two thousand acres of the 4700 acre site was purchased, along with the Mecca site, by the County’s Business Development Board, which is now planning the “Gardens Science and Technology Community” Project at the site. R. 349; 2051, 2081. It is planned to develop “with multiple uses in concert with those proposed for the [Mecca] site.” R. 6669. Palm Beach County has been directed by the Governor of Florida to coordinate its planning efforts for the Mecca site with those of the Business Development Board and the City of Palm Beach Gardens in developing the complementary community on Vavrus Ranch. R. 4344, 4358.

The remaining 2700 acres of Vavrus are also under contract by the developer of the 2000 acre Project, and “is being considered for development with similar and complementary uses to those proposed for the Research Park.” R. 349, 2098, 2219. The record includes substantial references to the joint planning efforts concerning Mecca and Vavrus⁶, which is intended to house amenities and uses required to support those planned for Mecca, including 7500 homes, and the middle and elementary schools needed to serve the residents and employees on the Mecca site.⁷ R. 17, 232-234, 349, 524, 738). Like the Mecca Project, the Vavrus Project is a Development of Regional Impact and will require substantial local comprehensive land use plan

⁶ While the record is replete with references to joint planning efforts for the Vavrus property, the current status of these efforts is unclear.

⁷ “The County has entered into a joint planning effort with the City of Palm Beach Gardens for the development of the adjacent property to the east with uses complementary to – and to be integrated with – those proposed for the subject site.” R. 6684. “It is assumed under the joint planning effort that a larger element of commercial and residential uses will be provided as part of the development of the Vavrus Ranch property. These commercial areas will service the community needs for the Research Park, the Vavrus Ranch, and the surrounding communities.” R. 6686. “On property to the east . . . , which will include the future extension of PGA Boulevard, a similar urban development pattern to this site is currently being planned.” R. 6690. See also R. 6688, 6689, 6693-6694, 6709.

amendments. R. 1704, 1705, 2066, 2069, 2070, 2093. A DRI application has been submitted. R. 6665.

According to the Vavrus project's application for state expedited permit review, its proposed schedule of development approvals will, "mirror" the submittals for the Mecca Project "as the two projects are intimately connected and their internal and external impacts need to be reviewed together." R. 2090, 2063. (Emphasis added). The development synergy between the Vavrus and Mecca sites is (as is the scheme for the 535 acre portion of Mecca vis-à-vis the remainder of that site) based on the unique physical "clustering" needs of the biotechnology industry. R. 2047-2050.

"This project [Vavrus] is required to deliver on the representations made by the State of Florida and Palm Beach County in this negotiation to bring the Scripps Research Institute to Pam Beach County. The benefit of this project is the provision of the residential community and the incorporation of the live, work, play, learn elements of a sustainable community that will complement and complete the Palm Beach County Biotechnology Research Park which will be anchored by Scripps Florida operations. In order to attract the R&D companies to locate around the Scripps facility, as planned, the community must offer the quality of life elements that are factors in any business locational decision such as quality schools, public safety, labor force availability, housing affordable for employees within reasonable commuting distances, recreational and cultural opportunities and sense of community. These elements will be found within the proposed Gardens Scientific Village. The economic benefit of this project, therefore, can not be separated from the anticipated economic benefit of bringing [Scripps] to Florida as it enhances the potential to successfully realize the location of a research and development cluster in Palm Beach County and South Florida." R. 2047. (Emphasis added).

The phasing of the various aspects of both the Mecca and the Vavrus projects (research and development, town center, commercial, residential, university, hospital, etc.) are being coordinated so that specific land uses on each parcel are available as needed to complement related uses on the other. R. 2035-2038. To justify the Project's land use changes, the County stated that the combined planning efforts of Mecca and Vavrus will ultimately provide residential units for employees of the Research Park and at the same time provide an employment base for future residents of the Vavrus Ranch property. . ." but went on to acknowledge, "[t]he development of the Vavrus Ranch with the proposed uses is unlikely to occur if the research and development uses on the proposed site are not approved", and that as a result of siting the Project on Mecca Farms, "the land to the east will have enhanced

development options.” R. 6679, 6684.

According to the County, “the program for the Vavrus parcel will include land area dedicated for a variety of residential housing units; a significant town center that would provide community commercial services such as a grocery store, movie theatre, etc.; commercial opportunities for science & technology and research & development; related support uses, such as accountants, law firms, etc.; and additional development areas for science & technology and research & development businesses. The mix of uses listed above for the Vavrus property, as well as those on the Mecca site, are designed to meet the overall objective, which is to create a self-contained biotechnology village in this area of the County. R. 6707.

The vast majority of the Vavrus site has wetland soils; it “contains a large number of high quality wetlands and has been identified ...as a Strategic Habitat Conservation Area for [state-threatened] Florida Sandhill Cranes, which “occurs on-site and is known to breed in some site wetlands.” R. 250, 2078. “Site studies to date have indicated the presence of ‘species of special concern’ wading birds such as the Little Blue Heron, Tricolored Heron and White Ibis, as well as the occasional presence of the endangered Wood Stork.” R. 2078. The site also has the potential to support a variety of other wildlife including several state-listed species” such as the gopher tortoise. R. 250, 1048, 2078, 2080. It also is potential habitat for the endangered Florida Snail Kite and the Bald Eagle as well as other species. R. 2078, 4129-4133, 4137-4139, 4143-4144.

According to the application for state expedited permit review “[i]t is clear that the proposed development of this site will involve environmental consequences in terms of wetlands and habitat lost directly and potential secondary effects.” R. 2078. Its wetlands and drainage ditches are jurisdictional under federal law and the Project will require a S. 404 permit from the Corps, for which application has not yet been made. R. 2094, 2097. Stormwater from the Vavrus site, like that from Mecca, will drain into the adjacent C-18 Canal, a state of Florida – designated Class 1 (highest level of protection) water body. R. 2075, 2083.

Initially, Corps permitting staff, as well as that of the Fish & Wildlife Service, were of the view that the Scripps and Vavrus projects, and “the associated road infrastructure”, should be viewed together for their cumulative and secondary impacts, particularly related to wildlife and water connection issues. R. 238, 253-256. During review of the application, the federal review agencies scheduled a meeting to review jointly the Mecca and Vavrus properties. R. 1306.

The EPA Comments

The U.S. Environmental Protection Agency (“EPA”) expressed concerns that the Project may not comply with Section 404(b)(1) Guidelines, the implementing regulations for Section 404 of the Clean Water Act. EPA noted that Section 230.11 of the Guidelines requires consideration of potential secondary and cumulative effects on the aquatic ecosystem prior to issuance of a federal wetlands fill permit, and expressed concern that approval of this application could lead to piecemeal development of significant wetland resources for other biotechnology related growth. EPA found that the Project may not be approvable under the Guidelines, and that the Project has potential significant secondary / cumulative effects and that less environmentally damaging alternatives may exist. EPA particularly expressed concerns regarding the potential significant wetland impacts associated with the expected development of (1) the rest of the site; (2) the Vavrus Ranch; and (3) the “significant transportation additions through wetlands to provide access.” R. 1309. EPA recommended an assessment of all potential secondary and cumulative effects associated with the proposal, including how the need for water storage and conveyance to the Loxahatchee River would be addressed. R. 1308-1309. EPA also expressed “concerns that the proposed mitigation will not adequately compensate for Project impacts and will result in poor habitat.” R. 1308.

The EA’s Findings Concerning Subsequent Phases, Changed Land Use Patterns and Induced Development

The EA made the following relevant findings:

“The Corps is aware that future development and construction activities may occur in the area if this permit is issued, such as the [sic] Palm Beach County may develop the remaining 1365-acre Mecca Farms parcel, the Town of Palm Beach Gardens may develop the adjacent property known as the Vavrus Ranch, the Department of Transportation, or the County may construct new roads to access the future additional proposed development, and Florida Power and Light may construct new power substations.” R. 2685. (Emphasis added).

“The Corps acknowledges that the construction of the [sic] SCRIPPS on a portion of the Mecca Farms property may encourage further development in the area.” R. 2677. (Emphasis added).

Palm Beach County does have plans to construct a power substation in the southeast corner of the J.W. Corbett Wildlife Management Area. This is the

preferred alternative to supply a permanent power source for the overall development on the Mecca Farms parcel.” R. 2673.

The Corps believes that adverse secondary and cumulative effects of selecting this site as the preferred alternative include increase in traffic, induced growth, potential for increase in development on private parcels, utilities and roadway expansions.” R. 2663. (Emphasis added).

“Spinoff development is predicted to occur in the remaining undeveloped areas not currently under preservation. This includes development on Mecca Farms and the Vavrus Ranch.” R. 2661.

“If the biotechnological research park development were to occur on the Mecca Farms site, the increase in development on the available private lands, including Vavrus Ranch, would occur because of the development pressures.” R. 2661. (Emphasis added).

“This project may entice further proposed development on the remaining Mecca Farms site or the adjacent Vavrus site.” R. 2652. (Emphasis added).

“Economic as well as quality of life benefits are expected to occur in the general area as a result of new jobs being created, home sales and homes being constructed, and potential future development of a town center with retail stores, the operation a local hospital, and educational opportunities for the public. R. 2637. (Emphasis added).

“... the Corps is aware of potential plans to develop the remaining 1,365-acre Mecca Farms parcel and the Vavrus Ranch, as well as construct several new roads to access the future proposed development.” R. 2635. (Emphasis added).

“For cumulative effects, the SCRIPPS development on the Mecca Farms parcel may promote further development on the remaining Mecca Farms parcel.” R.

2635. (Emphasis added).

“For cumulative impacts on adjacent conservation areas, it is anticipated that development on the 535-acre site would encourage development to be proposed on the remaining Mecca Farms parcel as well as the remaining adjacent private lands, including the Acreage, Loxahatchee, and the Vavrus Ranch. The Corps is also aware that the Florida Power and Light has plans to construct a power substation on a portion of the J.W. Corbett Wildlife Management Area to supply power to the future development on the 1,919 acres of Mecca Farms. This plan includes a land trade between J.W. Corbett and the Palm Beach County, which would allow the Palm Beach County to own property that would allow a connection of Seminole Pratt Whitney Road to Beeline Highway. This land trade would give the Palm Beach County the required access to Beeline Highway, thus increasing the roadways.” R. 2634. (Emphasis added).

“...further development may occur. The land use in the remaining orange groves on the Mecca parcel could possibly change to residential, industrial, and commercial as a cumulative impact.” R. 2634. (Emphasis added).

“An increase in available jobs, greater educational opportunities, and more health care facilities would encourage economic growth in the area.” R. 2633. (Emphasis added).

“The cumulative effects of the land use change include development of the neighboring residential areas...Although the land use in the Acreage would remain the same, approximately 15,000 new single-family residents may possibly move into the area.” R. 2633. (Emphasis added).

“In evaluating cumulative impacts of foreseeable future development, it must be considered that this site [the potential alternative site known as the Palm Beach Park of Commerce] would not support the level of total future development that the County anticipates on the remainder of the Mecca parcel.” R. 2667.

The Corps Approach to the Permit

The Corps is aware of the applicant’s plans for the entire Project. R. 1234. The Corps’

Statement of Findings states that it, “believes that adverse secondary and cumulative effects of selecting [the Mecca] site as the preferred alternative include increase in traffic, induced growth, potential for increase in development on private parcels, utilities, and roadway expansions.” R. 2663. The Corps recognized that the Scripps Project, “may entice further proposed development on the remaining Mecca Farms site or the adjacent Vavrus site” (R. 2652), induce “spin-off development...in the remaining undeveloped areas not currently under preservation” (R. 2661), and “may promote further development on the remaining Mecca Farms Parcel” (R. 2635). The Corps further recognized that wetland impacts could occur to neighboring sites, if development were allowed to continue. R. 2635. The Corps anticipated applications to be submitted for development on these sites, it did not analyze these cumulative impacts. R. 2633 and 2634.

Initially, the Corps intended to review what it acknowledged is “the complete project...with possibilities of evaluating the potential future development on the neighboring VAVRUS Ranch and the required road expansion” R.1328. It intended to conduct “a thorough review of the entire Project particularly as it relates to roads and other infrastructure that may ultimately be constructed as a result of Scripps .” R. 262.

Throughout the permitting process, Corps permitting staff recognized that this was “an important project” (R. 1188), and expressed their intention to, “evaluate the application as quickly as possible recognizing the importance of the Project to the local economy.” R. 263. Staff for the Corps acknowledged that this type of review would normally take a year, but, due to the expedited state process, it would try to process the permit in 5 months, perhaps by reducing the reviewed Project to only the 535 acre initial phase. R. 224, 226, 238, 242. Correspondence from the applicant expressed appreciation for the Corps “efforts to expedite [the permit’s] issuance.” R. 1069. The record contains numerous public comment letters disagreeing with the Corps’ conclusion that Phase 1A has independent utility from the remainder of the Research Park, or otherwise objecting to the issuance of the permit for the proposed Project, which further illustrates the controversial nature of the Project which is referred to in the record as “very high profile” and as a “very high visibility project in West Palm Beach and the state of Florida.” R. 244-245.

The record includes information suggesting that the applicant sought to have the 535 acre initial phase reviewed separately from the remainder of the Project to expedite receipt of the permit and as a “means of insulating the County from some legal challenges”. R. 1614, 2776.

The County's Scripps Project Director was quoted as saying that the County intentionally chose to limit the permit application for the Research Park to just 1.65 million square feet of construction – the part that the County asserts can be built without extending SPW Road and PGA Blvd. – because, “that was the only way (they) could get an expedited permit from the Corps.” R. 2776-2778.

An internal Corps briefing paper issued just prior to the EA referred to “the recent establishment of the independent utility concept.” R. 2267 (emphasis added). The EA states that:

“The [sic] Palm Beach County has requested that the Corps evaluate the proposal to construct a 535-acre biotechnology research park independently from the remaining future development on the 1,900-acre site, as well as any future planned development in the nearby area because the biotechnology research park has independent utility from any future development.” R. 2685.

In issuing the FONSI and the 404 permit for the 535 acre phase of the Project, the Corps claimed that the “Scripps portion of the overall development has independent utility from the rest of the planned development on the rest of the 1900 acre site.” R. 1328.

The EA does not analyze the cumulative impacts of the development identified above, stating that this Project has independent utility from “the future *proposed* sites,” and that, “once permit applications are submitted for future proposed projects, the Corps will have the ability to evaluate those projects,” whether on the Mecca site or on adjacent property. R. 2652; 2635; 2634. (Emphasis added). The Corps stated that “the remaining development and any proposed future road construction/expansion will be evaluated and processed by the Corps under a separate application number once its submitted.” R. 2683. It stated that “the cumulative impacts assessment will consider the fact that a permit decision has not been made on the remaining MECCA Farms Parcel, the planned development on the Vavrus ranch, nor any associated roads or future projects.” R. 2635.

ARGUMENT

A. Standard of Judicial Review

Summary Judgment

Summary judgment is proper if the record before the court shows 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: "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

"[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986). Only factual disputes that are material under the substantive law governing the case will preclude entry of summary judgment. Id. See also, Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804, 809 (11th Cir. 2004). Once the moving party demonstrates that there is no dispute as to any material fact, the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

An issue is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. Allen v. Tyson Foods, 121 F.3d 642, 646 (11th Cir.1997). An issue is "material" if it is a legal element of the claim under applicable substantive law which might affect the outcome of the case. Anderson, 477 U.S. at 248; Allen, 121 F.3d at 646. A mere "scintilla" of evidence in favor of the non-movant, or evidence that is merely colorable or not significantly probative is not enough to meet this burden. Anderson, 477 U.S. at 252.

NEPA

Reviewing courts are to conduct a "thorough, probing, in-depth review" of an agency's compliance with NEPA. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). The enquiry into the facts is to be searching and careful. Citizens to Preserve Overton Park, 401 U.S. at 416. A court shall set aside agency action under NEPA if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 376-377 (1989); North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538 (11th Cir. 1990). This standard requires the Court to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 416; Marsh, 490 U.S. at 378; North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533 (11th Cir.1990).

A NEPA plaintiffs initial burden is met when a plaintiff alleges facts which, if true, show that the proposed Project would materially degrade any aspect of environmental quality; this standard does not require the courts to determine whether a challenged Project will in fact have

significant effect; rather, the courts are to determine whether the responsible agency has reasonably concluded that the Project would have no significant adverse environmental consequences. City of Davis v. Coleman, 521 F.2d 661 (C.A. Cal. 1975).

“Courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself.” Sierra Club v. Martin, 168 F.3d 1, 4 (11th Cir. 1999) (quoting Simmons v. Block, 782 F.2d 1545, 1550 (11th Cir. 1999)). An agency “cannot ignore the requirements” of its own policies and procedures. Id. Additionally, “agency actions must 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.’” Id. at 5 (quoting Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

B. NEPA Requirements

NEPA requires federal agencies to conduct a thorough environmental review for any “major federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).⁸ NEPA requires agencies to carefully consider and publicly air environmentally significant aspects of proposed major federal actions. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

The Council on Environmental Quality (“CEQ”), an Executive Branch agency, has issued NEPA regulations that apply to all federal agencies. 40 C.F.R. §§ 1500-1508. These regulations are entitled to substantial deference from the courts. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 372 (1989). The Corps has also adopted its own NEPA regulations to supplement the CEQ regulations. 33 C.F.R. pts. 320, 325.

The first step in the NEPA process is preparation by the agency of an Environmental Assessment (EA) to “provide sufficient information ... on potential environmental effects of the proposed action and, if appropriate, its alternatives, for determining whether to prepare an EIS or a FONSI.” 33 C.F.R. § 230.10. Among other things, an EA must discuss the need for the proposal, alternatives, and the environmental impacts of the proposed action and alternatives. 40 C.F.R. § 1508.9(b). The EA is to lead to one of two findings: “either that the project requires the

⁸ The issuance of a Section 404 permit by the Corps is a “federal action” to which NEPA applies. Sierra Club v. Sigler, 695 F.2d 957, 964 (5th Cir. 1983); United States v. South Florida Water Management District 28 F.3d 1563 (11th Cir. 1994).

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 Auth. v. U. S. Dep't of Interior, 951 F.2d 669, 677 (5th Cir. 1992). In other words, an EA should analyze and explain whether a project's impacts are "significant" such that an EIS is required. 40 C.F.R. § 1508.9.

An EIS is much more extensive, and a rigorous alternatives analysis is the "heart" of an EIS. Compare 40 C.F.R. § 1508.9(b) with 40 C.F.R. § 1502.14. See Mt. Lookout--Mt. Nebo Prop. Protect Assn. v. Fed. Energy Reg. Comm., 143 F.3d 165, 172 (4th Cir. 1998) (EA evaluates alternatives less rigorously than EIS). An EIS process ensures that the agency thoroughly analyzes a project's underlying purpose and need, alternatives, and its direct, indirect, and cumulative impacts on the environment. 40 C.F.R. § 1502.14. An EIS "guarantees that the relevant information will be made available to the larger [public] audience." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). Unlike an EA, an EIS provides multiple opportunities for meaningful public involvement in the permit process, including scoping, a public hearing and publication of a draft EIS for comment by other agencies and the public. 40 C.F.R. §§ 1501.7, 1503.1(a)(4), 1506.6(c). EIS notices generate more opportunities to comment and naturally receive more attention than an EA. Sierra Club v. Marsh, 769 F.2d 868, 875 (1st Cir. 1985).

NEPA is "action-forcing" and designed to prevent agencies from acting on incomplete information and to "ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, (1989); Sierra Club v. Marsh, 872 F.2d 497, 497 (1st Cir.1989) (emphasis added). As such, an EA must include "a realistic evaluation of the total impacts and cannot isolate a proposed project, reviewing it in a vacuum." Grand Canyon Trust v. F.A.A., 290 F.3d 339, 342 (D.C. Cir.2002) (Emphasis added).

In Hill v. Boy, 144 F.3d 1446 (11th Cir. 1990), The court held that when an EA is performed on a project, the Corps must take a "hard look" and "must make a convincing case" for a Finding of No Significant Impact and decision not to perform an EIS. 144 F.3d at 1450 (11th Cir. 1990).

Similarly, in the instant case, the Corps did not evaluate the impacts of the future phases and necessary roadways. The Corps has failed to take a "hard look" and "make a convincing

case” in its determination that an EIS should not be performed. The EA is arbitrary and capricious because, by ignoring the impacts of the entire Project and its cumulative and indirect impacts, and by reviewing it in a vacuum, it presents an unrealistically narrow view of the Project’s impacts.

Significant Impact

Whether a proposed activity will have a "significant" impact on the environment depends upon both the "context" and the "intensity" of its 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." § 1508.27(b). The assessment of these issues requires consideration of several factors, including the 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 areas; the degree to which the effects on the quality of the human environment are likely to be highly controversial; the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; whether the action is related to other actions with individually insignificant but cumulatively significant impacts; and the degree to which the action may adversely affect an endangered or threatened species or its critical habitat. Id. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. Id.

Considering context and intensity for this Project easily shows its impacts to be significant, as virtually every factor mentioned in the rule is present. The record is clear that the Project would be a major, even massive, incursion of urban development and infrastructure into a heretofore rural area with minimal infrastructure, onto lands that are surrounded by and part of an important regional ecosystem. It thus represents “a decision in principle about a future consideration”; it is a decision to open up the western central region of the County, home to the ecosystems detailed above, to large – scale urban development. Its impacts would be felt on a national level as it impacts the unprecedented federal restoration effort that is focused on America’s Everglades, as well as a federally – designated Wild and Scenic River. Obviously, its proximity to the wild and scenic river, significant wetlands, other ecologically critical areas and

farmlands supports a finding of significance. The Project's approval without question will establish a precedent for future actions with significant effects, and it is unquestionably related to other actions with cumulatively significant impacts.

The Project is highly controversial. The EA noted that:

“[a]s a result of the public notice, the Corps has received several adverse comments from nearby landowners and interested parties. The majority of the commenters objected to the SCRIPPS development. R. 2638.

Corps permitting staff also received several press inquiries about the Project and discussed internally how to respond to what they anticipated would be frequent and “pointed” press inquiries. R. 261, 262, 269, 2296-2298. It knew this was a “highly controversial”, “very high profile” and “high visibility” Project in the state of Florida. R. 243, 246-247, 2268.

Finally, it is reasonable to anticipate a cumulative significant impact, and that the applicant will continue to pursue the remainder of the Project, into which it has invested over \$300 million to match the State's \$300 million and for which the County and the State have issued approvals and permits. None of these facts can be disputed. The facts and the rules show clearly and indisputably that there will be significant impacts which must be analyzed in an EIS.

The Legal Requirement to Analyze Indirect and Cumulative Impacts

Under the CEQ regulations, an agency must consider the direct, indirect, and cumulative impacts on the environment when determining whether a federal action is "significant." 40 C.F.R. §§ 1508.8, § 1508.27(b).

Indirect Impacts: Changed Land Use Patterns and Induced Growth

An EA must analyze “indirect effects”, which:

“are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. 40 C.F.R. s.1508.8(b) (emphasis added).

In TOMAC v. Norton, 240 F. Supp.2d 45, 50-52 (D.D.C. 2003), the United States District Court for the District of Columbia held that the Bureau of Indian Affairs failed adequately to analyze the potential impacts of a casino upon local growth and development patterns. The agency's assessment mentioned the creation of 5,600 permanent jobs, a projected population increase of 1,200, a demand for additional housing, an increase in school enrollment

and the potential for increased commercial development. The Court held that the assessment was lacking because (1) it does not address the “related affects on air and water and other natural systems, including ecosystems”, and (2) it did not support the finding that the Project would not have a significant impact. Specifically, the agency failed to address secondary growth as it pertained to impacts to groundwater, prime farmland, floodplains and stormwater run-off, wetlands and wildlife and vegetation. Additionally, it failed to explain how the increase in jobs, and the concurrent expansion in population due to new employees and their families, would not have a significant impact on a community of only 4,900 (almost 1,000 people less than the expect 5,600 new jobs expected to be created). The court found BIA’s conclusions inadequate because it did not explain how almost doubling the jobs in a small community would not “cross the threshold of significance.” In order to ensure that the agency did not ignore any “arguably significant consequences,” the Court held the FONSI to be inadequate for its failure to address the Project’s “indirect growth inducing effects” related to wetlands, stormwater drainage, traffic, environmental contamination, cleanup, relocation of the complex, closure wells and septic tanks.

In Friends of the Earth v. United States Army Corps of Eng’rs, 109 F. Supp.2d 30, 43 (D.D.C. 2000) The Court held that an EIS was required for a series of shoreline casinos that would spur development, and rejected the Corps’ determination that the effects of shoreline casino development would be minimal, as there was no analysis to support the conclusion. The Court held that NEPA required the Corps to analyze both the significant upland development adjacent to casino barges and the inevitable secondary development that would result from casinos, and the agency failed to adequately consider the cumulative impact of casino construction in the area. See also City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975) (requiring agency to prepare an EIS on effects of proposed freeway interchange on a major interstate highway in an agricultural area and to include a full analysis of both the environmental effects of the exchange itself and of the development potential that it would create.); Mullin v. Skinner, 756 F. Supp. 904, 925 (E.D.N.C. 1990) (Agency enjoined from proceeding with bridge project which induced growth in island community until it prepared an adequate EIS identifying and discussing in detail the direct, indirect, and cumulative impacts of and alternatives to the proposed Project).

In the instant case, as shown at pages 2-22 of this Memorandum, the location, pattern and rate of development in western, rural, Palm Beach County will be fundamentally changed by the

Project, including its land uses and transportation and utility infrastructure. The land use changes and the infrastructure extensions made for the Project will be the catalyst for several other urban developments – many of which are already proposed. The Project will transform the western – central region of the County, through the creation of a biotechnology village and the resulting creation of tens of thousands of jobs. It's future impact having been likened by the state – which is spending over \$300,000,000 to construct the Project due to its expected impact – to that of air conditioning and Flagler's railroad, the Project will (to say the least) induce growth and changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. Indeed, the County's own comparable financial subsidy and written statements confirms that this is indeed the Project's purpose.

The EA acknowledges these facts, but fails to address the significant impact of this additional development, let alone evaluate carefully and disclose fully the indirect impacts of the Project. The EA's failure to analyze the Project's far – ranging and permanent impacts on the landscape of western Palm Beach County (and the forests, wetlands, sloughs, taxpayer - owned conservation lands, wildlife, Everglades and rivers) defies the record and the law.

Requirement to Analyze Cumulative Impacts

An EA must also analyze a Project's "cumulative effects" in determining whether it will have a significant impact and thus require an EIS. 40 C.F.R. § 230.11(g)(2); 40 C.F.R. § 1502.14; 40 CFR§ 1508.27(b)(7). A cumulative 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...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 (Emphasis added).

Corps rules also mandate that, "[a]ll factors which may be relevant to the proposal must be considered including the cumulative effects thereof." 33 C.F.R. § 320.4(a)(1).

Under the cumulative impact rule:

“"[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." Western North Carolina Alliance v. North Carolina Dept. of Transp., 312 F.Supp.2d 765 (E.D.N.C. 2003)(citing 40 C.F.R. § 1508.27(b)(7)).

In Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985), rev'd on other grounds, Sabine

River Authority v. U.S. Dept. of Interior, 951 F.2d 669 (5th Cir. 1992), the Court stated that, in analyzing cumulative impacts, the 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. Id. at 1236.

Reasonably Foreseeable Future Impacts

Native Ecosystems Council v. Dombek, et al, 304 F.3d 886 (9th Cir. 2002), is directly on point with the instant case. There, the court found that future timber sales and related forest road restriction amendments were “reasonably foreseeable cumulative impacts” when (1) several such proposals were known to the agency; (2) they were all proposed in the same national forest; (3) the administrative record “evidenced a decision to consider these amendments seriously” when each subsequent proposal was reviewed; and (4) the multiple sales were all part of an overall plan to sell enough timber lands to raise the revenue needed to implement a new land acquisition initiative.

The instant case presents the same scenario. The subsequent development is part of a comprehensive plan for a unified development on land bought, planned and permitted in a unified fashion for a singular project, and the agency is aware of the future projects but says it will study the impacts of them later.

In Western North Carolina Alliance v. North Carolina Dept. of Transp., 312 F.Supp.2d 765 (E.D.N.C. 2003), the Court ruled that in considering the impacts of an interstate road project, other projects along the interstate corridor were reasonably foreseeable future actions, and NEPA required an analysis of the cumulative impacts of the overall expansion of the highway at issue. It rejected the Corps’ argument that subsequent road projects were not reasonably foreseeable and could not be analyzed for various reasons, including that they were at different points in the planning process, were geographically removed, were not certain to be funded or constructed, and were not yet the subject of finalized environmental documents. These circumstances did not, said the Court, render those projects “highly speculative or indefinite”. Instead, the Court found that the other projects were foreseeable so as to be required in the consideration of the cumulative impacts of the specific road project at issue. Similarly, in the instant case, the mere

possibility, slight that it is, that subsequent phases might not be developed does not absolve the Corps from the requirement to analyze their potential impacts. Moreover, there is no support in the record whatsoever for a conclusion that future phases of the Research Park are “highly speculative or remote”. Rather, the record clearly shows a definitive intent on the part of the State and County to move forward with future phases of Project to its full extent. See also Robertson v. Methow Valley Citizens, 490 U.S. 332, 354 (1989) (requiring agency to assess reasonably foreseeable impacts even in the face of uncertainty).

Instant Case: Arbitrary & Capricious Not to Consider Cumulative Impacts

As shown on pages 2-22 of this Memorandum, it is clear throughout the EA that future development is anticipated as a result of this initial phase of the Project. The Corps recognized that future development of the Mecca Farms site and the surrounding area are likely to occur as a result of the first phase of development but refused to analyze the cumulative impacts from those reasonably foreseeable future projects. Its failure to do so violates NEPA. As a matter of law, these impacts must be considered in determining the need for an EIS.

The Corps Illegally Segmented the Project to Avoid NEPA Requirements

Anti-Segmentation Rule in General

Under NEPA, segmentation of multi-part projects to avoid a hard look at the full impact is improper. Sierra Club v. Callaway, 499 F.2d 982, 987 (5th Cir. 1974). Connected, cumulative, and similar actions must be considered together to prevent an agency from "dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105 (9th Cir. 2000) (citing 40 C.F.R. § 1508.25).

When a project is segmented into smaller phases or segments, the result is a misleading narrow impression of its environmental impacts. Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F.Supp. 99 (D.C.Ga. 1976). The Corps cannot “evade [its] responsibilities” under NEPA by “artificially dividing a major federal action into smaller components, each without a ‘significant’ impact.” Preserve Endangered Areas of Cobb's History v. United States Army Corps of Eng'rs, 87 F.3d 1242 (11th Cir. 1996)(citing Coalition on Sensible Transportation, Inc. v. Dole, 826 F.2d 60, 68, 263 U.S. App. D.C. 426 (D.C.Cir.1987)).

In Environmental Defense Fund v Marsh, 651 F.2d 983, 999 n 19, (5th Cir. 1981), the Fifth Circuit held that the Court may prohibit segmentation or require a comprehensive EIS for two projects, even when one is not yet proposed, if an agency has egregiously or arbitrarily violated the underlying purpose of NEPA.

In Port of Astoria, Or. v. Hodel, 595 F.2d 467 (9th Cir. 1979), the Court disapproved of the segmenting of two phases of a program for constructing thermal generating plants because the federal agency had entered into a contract to supply power which made the unanalyzed phase 2 of the Project reasonably foreseeable as a result of phase 1:

“The document envisions continuation of Phase 1 thermal plants, development of new thermal plants, and sale to industry Although details of Phase 2 may remain unsettled, it is clear that Phase 2 is a long-range regional policy with definite goals and fixed roles for participants. As such, Phase 2 is a proposal within the contemplation of s 102(2)(C) of NEPA.” 595 F.2d at 478. (Emphasis added).

The essence of the rule against segmenting a phased project is that, “an agency’s EA is required to give a realistic evaluation of the total impacts and cannot isolate a proposed project, reviewing it in a vacuum.” Georgia River Network v. Corps, 334 F.Supp.2d 1329, 1339 (D.C. Ga. 2003) (Emphasis added) .

Anti-Segmentation: The O’Reilly Case

The instant case is strikingly similar to O’Reilly v. United States Army Corps of Eng’rs, 2004 U.S. Dist. LEXIS 15787 (D. La., 2004), where the Corps argument that “independent utility” absolved it from examining the cumulative effects of a multi-phased development project was roundly rejected by the Court. In O’Reilly, the Corps granted a permit for phase one of a three phase subdivision development project, without analyzing the indirect or cumulative impacts of the future phases. The Corps sought to justify its approach based upon the “independent utility” theory, arguing that the potential existed that the subsequent phases might not be developed. The Court rejected this claim, holding that:

“The Corps cannot, however, consider Phase I in a vacuum under these facts. The Corps points to no obstacles, the permitting process aside, that have rendered Phases II and III impracticable, financially unattractive, or generally not feasible. The record blaringly suggests that the sole reason that Phases II and III were eliminated from the permitting application was to facilitate the issuance of the permit so that the project could get underway. The only conclusion to be reached based on the record is that Phases II and III are going to be financially viable in light of the expanding urbanization in St. Tammany Parish. Even though

additional permitting would be required for Phases II and III, Phase I represents the proverbial "foot in the door" with respect to developing the entire project. In short, the other two phases are "reasonably foreseeable" and the current project represents a 'piecemealing approach for implementing the totality of the ... project.' Therefore, the Corps acted arbitrarily or capriciously in issuing the permit without considering the effect of the other two phases.” Id. at 16-17.

In holding that the Corps should have considered cumulative impacts of phase 1 and phases 2 and 3 of the proposed Project, O'Reilly sets clear law that, in a planned multi-phase development project, subsequent phases of the project are reasonably foreseeable and must be analyzed in determining the significance of the Project's impacts.

In the instant case, the multi-phased nature of the an already-planned larger Project, the near certainty of further phases as a result of the applicant's investment and growth pressures caused or exacerbated by the initial phase, and the limitation of review to facilitate a quick permit issuance are exactly the same as in O'Reilly.

Segmentation of PGA Boulevard

The Corps recognized the “need to look at the whole project, because of uncertainty about roads to the site” but still failed to do so. R. 224. Instead, it acted arbitrarily and capriciously by segmenting out the extension of PGA Boulevard from the project. As shown on pages 11-15 of this Memorandum, the development requires the extension of PGA Boulevard from its current terminus at Beeline Highway westward to the proposed Seminole Pratt Whitney Road Extension. R. 111. Although this roadway is an integral part of the project, the Corps, instead of considering the entire roadway, advised the applicant to revise the drawings to show the roads in cul-de-sacs rather than extending through the eastern boundary. R. 1064-1063. This is arbitrary, as the record is clear that the PGA Boulevard extension from Bee Line Highway to Seminole Pratt Whitney Road was planned and mapped as part and parcel to the entire project. R. 233, 152, 110, 44, 16, 354, 353, 1280, 1277, 1276). In fact, the only maps or plans that indicate the terminus of PGA Boulevard at the property boundaries are those resulting from the Corps instructions to the applicant to revise them to show cul-de-sacs as a terminus. R. 1064. The Corps is fully aware of the plans for the PGA Boulevard extension from Bee Line Highway to Seminole Pratt Whitney Road which were required by State and local rules. R. 126, 124, 122, 118, 116, 113). The state application could not have been approved for a project of this size and impact without this entire roadway being constructed to meet specific statutory “traffic

concurrency” requirements. § 163.3180 and § 163.3177(3), Fla. Stat.

The road alignment and terminus approved by the Corps is not a logical one, an artificial terminus intended to evade “the bigger environmental issues” in the “proposed access roads.” (R. 4, 1064). The cul-de-sacs create two distinct illogical segments of PGA Boulevard, one east of Beeline and one west of the arbitrary cul-de sac.

In Named Individual Members of San Antonio Conservation Soc. v. Texas Highway Dep't, 446 F.2d 1013, 1017 (5th Cir.1971) the Court found that the Department of Transportation arbitrarily segmented a single highway project to allow construction of two "end segments" leading up to the boundaries of a city park, supposedly postponing the "middle segment" for "further study." Construction of the two end segments would have effectively eliminated any alternatives to using park land for the middle segment and were therefore an arbitrary and capricious terminus. *See also* Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105, 117 (D.N.H.1975). Similarly, in the instant case the Corps has segmented two “end segments” on the borders of protected wetlands, postponing the “middle section” for subsequent “further study”. As in Named Individual Members, supra, the Corps has effectively eliminated alternatives for the middle segment while maintaining that an analysis in compliance with NEPA can be done later. This is arbitrary and capricious. Id.

This type of arbitrary segmentation is improper and violates NEPA. W. N.C. Alliance v. N.C. DOT, 312 F. Supp. 2d 765 (E.D.N.C. 2003). The Federal Highway Administration (FHWA) requires that road projects being considered under NEPA have a “logical termini and be of sufficient length to address environmental matters on a broad scope.” Id. “An FHWA policy and procedure memorandum has defined "logical termini" to include major crossroads, population centers, major traffic generators, or similar highway control elements.” Id., *citing* 37 Fed. Reg. 21,810 (1972). N.C. Alliance for Transp. Reform, Inc. v. United States DOT, 151 F. Supp. 2d 661, 680 (M.D.N.C. 2001).

In the instant case, there are no logical termini except Bee Line Highway where PGA Boulevard meets its second segment. First, the property line cul-de-sacs are not a major crossroad. Second, the population center lies beyond the property line in eastern Palm Beach County. Third, there is no major traffic generator or major traffic element at the end of the property line. These facts make it clear that the only reason the entire PGA Boulevard extension is segmented out of and not considered as part of the project is to expedite the permit application

and avoid the “bigger environmental issues.” R. 4. Segmenting to expedite a permit and avoid evaluation of “bigger environmental issues” is a clear violation of NEPA. W. N.C. Alliance v. N.C. DOT, 312 F. Supp. 2d 765 (E.D.N.C. 2003).

The “Independent Utility” Doctrine Is Not Applicable In This Case

As shown above, the Corps invocation of the “independent utility” theory as an excuse not to consider reasonably foreseeable cumulative impacts can not be reconciled with O'Reilly v. United States Army Corps of Eng'rs.

The Corps defines “independent utility” as “a test”:

“to determine what constitutes a single and complete project. A project is considered to have independent utility if it would be constructed absent the construction of the project in the project area [sic]. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.” R. 266-267.

In the instant case, the Corps’ attempt to rely on the “independent utility” theory is arbitrary and capricious and is starkly contradicted by the administrative record, which demonstrates that each phase of this Project on the Mecca site and the development of the Vavrus Property are inextricably related. (See pages 11-17 of this Memorandum). The claim of independent utility to avoid the full NEPA analysis is devastated by the record. The 1919-acre site was chosen (among the alternatives) and acquired because it was the only site large enough to accommodate all phases, all of which are required for the Project’s purpose - a premier science & technology and research & development based Project. R. 234, 264-265, 350, 2667. State and local approvals were granted for the entire unified 1919 acre Project, including the major road projects. R. 1897-1911, 1916-1919, 1280. The Scripps and Vavrus projects are “intimately connected.” R. 2090.

All phases of the Project are planned as part of a unified “campus” plan of development in order to meet the County’s Project objectives. R. 1916-1919. Approval of Phase I irretrievably commits future resources in the way of roads, schools, and other public projects. Additionally, the applicant’s stated reason for choosing Mecca Farms is that only that site, among the alternatives, has the necessary room to grow to meet the County’s objectives for the biotech research park, thereby limiting alternatives of where these separate phases would be

built. Further, considering the remoteness of the area and the public funds being invested to build roads, and water and sewer lines, it would be fiscally repugnant to build the separate phases in any other location. Whether looked at in piecemeal or in the aggregate, the development at Mecca Farms is unified around a single purpose: The development of a research park “campus” built to the exact specifications of Scripps intended to lure Scripps and other Biotech firms to South Florida. When the Project is considered as a whole, the phases are interconnected and dependant upon each other. Each phase of this Project is interrelated to the extent that it fulfills the “campus” objective outlined by the applicant.

The record is virtually devoid of any factual support for the contention that phase 1a of the 5 phase multi-hundred million dollar Project actually does have independent utility, besides the bare conclusions of the county’s consultants and Corps staff.

The whole 1919-acre Project must be considered together because the "dependency is such that it would be irrational, or at least unwise to undertake the first phase if subsequent phases were not also undertaken." Trout Unlimited v. Morton, 509 F.2d 1276, 1285 (9th Cir. 1974). It is clear that the segmentation of phase I of this Project and the “independent utility” claim was intended to evade consideration of the Project as a whole as well as its indirect and cumulative impacts. As in O’Reilly, supra, the applicant, upon realizing that the entire project and its concomitant roadways would be difficult or impossible to permit, sought to break up the project revised their permit to obfuscate the impacts of the entire project and facilitate a quick approval and get the “foot in the door.”

Moreover, because the research park uses are dependent on the provision of centralized water and wastewater service, (see facts at p.14 and R. 6698), the Research Park does not have independent utility from the provision of water and wastewater service to the site. The provision of these services to the subject site can be expected to generate significant additional growth that would not have occurred but for the provision of centralized water and sewer services, the impacts of which were not analyzed in any manner by the Corps.

Similarly, because the Research Park uses are dependent upon the FPL substation to provide power to the Park and dependent upon the expansion of SPW to provide access to the park (see facts at p. 14-15, and R. 6736, 6760, 6766, 6737-8, 6752, 6763 – 6764), it cannot be said that the permitted project has independent utility from the FPL substation or the roadway extension. Clearly, if SPW road is expanded and connected to the Beeline Highway and a new

power substation is constructed, future development will occur in the area at a much faster rate, and the construction of these improvements would increase the ability to develop both the Mecca site and the Vavrus Ranch and would lead to further roadway construction to increase access to these sites. These impacts were not analyzed by the Corps.

Even if Phase One Did Have Independent Utility, Its Reasonably Foreseeable Cumulative Impacts Must Still Be Analyzed

Even if the Corps was correct and the initial phase of the Project had “independent utility” from the rest, the EA is still deficient. The “independent utility” test is relevant only to the issue of whether multiple projects must be considered as one “project.” It is not a limitation of the mandate to analyze reasonably foreseeable cumulative impacts. Native Ecosystems Council v. Dombeck, 304 F.3d 886, 896 n.2 (9th Cir. 2002).

"the obligation to wrap several cumulative action proposals into one EIS for decision making purposes is separate and distinct from the requirement to consider in the environmental review of one particular proposal, the cumulative impact of that one proposal when taken together with other proposed or reasonably foreseeable actions." Terence L. Thatcher, Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment under the National Environmental Policy Act, 20 *Environmental Law* 611, 633 (1990).

Section 1508.25(a)(2) requires the former, necessitating the coordinated analysis of proposals that "have cumulatively significant impacts."... In contrast, section 1508.25(c)(3) requires the latter, namely, an analysis of the cumulative impact of the [Action] together with reasonably foreseeable [Actions]. Id (Finding that the Forest Service violated NEPA by failing to analyze cumulative impacts); *see also* Earth Island Institute v. U.S. Forest Serv. 351 F.3d 1291, 1308." Even assuming the “independent utility” of the development phases, the “NEPA always requires that an environmental analysis for a single project consider the cumulative impacts of that project together with "past, present and reasonably foreseeable future actions.” Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895 (9th Cir. 2002) (citing 40 C.F.R. §§ 1508.7, 1508.25, 1508.27(b)(7) (2001); Hall v. Norton, 266 F.3d 969, 978 (9th Cir.2001); Kern v. United States Bureau of Land Management ,284 F.3d 1062, 1075-76 (9th Cir.2002))(Emphasis added)

In Native Ecosystems Council, the Court held that the EA for the first of 12 separate timber sales pursued by a federal agency under a single revenue enhancement program was required to consider the cumulative impact of the other expected sales in the same National

Forest. The sale, which itself impacted only 226 acres, was part of a larger, Congressionally-authorized program to provide funding to acquire about 55,000 acres of privately-held land within the borders of the Gallatin National Forest. The Court rejected the Corps' claim that it could put off such analysis until each subsequent sale came up for review. The Court required that the cumulative impact of the initial timber sale *and the other subsequent sales* be considered in the EA for the initial Project even though "each ... timber sale has independent utility in that each contributes separately to the fund established by Congress to purchase private lands, and each will go forward without the others." *Id.* at 894. Thus, while the sales were not "connected actions", the agency was still required to consider their cumulative impacts when it approved the initial sale. *Id.* at 895.

In *North Carolina Alliance for Transportation Reform, Inc. v. U.S. Department of Transportation*, 151 F.Supp.2d 661 (M.D. N.Car. 2001), the Court found that the different segments of a roadway project had "independent utility". However, it ruled that the "Western and Eastern Sections constitute cumulative actions, and therefore should have been considered in the same environmental impact statement." *Id.* at 684. See also *Defenders of Wildlife v. Ballard*, 73 F.Supp.2d 1094, 1113 (D.AZ. 1999) (requiring Corps to do cumulative effects analysis of wholly disparate and geographically wide ranging permitted actions that had cumulative impacts on a species).

Why the Full Analysis Must Be Done Now: Putting Off the Impacts Analysis Renders Subsequent Alternatives Analysis Meaningless

The Corps' action is arbitrary and capricious because, by putting off the analysis of impacts of subsequent phases, the approval of the instant permit will "severely limit the number of 'feasible and prudent' alternatives that would be available for those phases", which will be for uses complementary to and supportive of the initial phase. This would "make a joke" of the reasonable and prudent alternatives process. In *Named Individual Members of the San Antonio Conservation Society v. Texas. Highway Department*, 446 F.2d 1013, 1028 (5th Cir. 1971), the Court found that "piecemeal administrative approvals" would "frustrate" the Transportation Act, which has a "*no feasible or prudent alternative*" requirement. The Court found that, in approving the two end segments of a road project without analyzing the impacts of the middle portion, the highway department made a "joke" of the alternatives requirement as it would apply

to the final, middle portion. Given the need to connect the two ending segments, there obviously would be no reasonable alternative to the approval of the middle segment when it was considered for approval.

NEPA requires that an impact assessment "be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." Native Ecosystems Council v. Dombeck et al., 304 F.3d 886 (9th Cir. 2002). NEPA requires environmental analysis "before any irreversible and irretrievable commitment of resources." Metcalf v. Daley, 214 F.3d 1135, 1142-1143 (9th Cir. 2000); see also 40 C.F.R. §§ 1501.2, 1502.5. The Supreme Court has stated that environmental assessments "shall be prepared at the feasibility analysis (go-no go) stage." Andrus v. Sierra Club, 442 U.S. 347, 351-352 n. 3, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979). See also Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1063 (9th Cir.1998), Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir.1988).

In Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir.1996), the Court enjoined work on a highway expansion project until the agency complied with NEPA, where the agency had failed to consider the cumulative environmental impacts of related projects, failed to take a hard look at the project's effects, and where any subsequent consideration of cumulative environmental impacts would have been a mere formality. In Keith v. Volpe, the court refused to exempt existing highway contracts from a NEPA-based injunction, because of "the danger that proceeding in any way with the freeway as presently planned will jeopardize the objective reevaluation that NEPA and CEQA require." 352 F. Supp. 1324, 1356 (C.D. Cal. 1972), *aff'd* on other grounds sub nom. Keith v. California Highway Comm'n, 506 F.2d 696 (9th Cir. 1974), cert. denied, 420 U.S. 908 (1975):

"The Court realizes that the delay caused by the preliminary injunction will increase the cost of the .. Freeway if it is ever completed, temporarily inconvenience many individuals, and hinder the planning programs of several of the cities along the route of the freeway. It is necessary, however, to look to the ultimate benefit which hopefully will accrue to everyone living in the Los Angeles area from compliance with our federal and state environmental protection laws. The federal and state highway authorities have not complied; that is why a preliminary injunction is necessary." *Id.* at 1356-57.

See also Sierra Club v. U.S. Dept. of Transp., 664 F. Supp. 1324, n.9 (N.D. Cal. 1987) ("it will be increasingly difficult and costly to abandon the project if its momentum is permitted

to build." In Arlington Coalition on Transp. v. Volpe, the Court noted:

“Further investment of resources ... in the proposed route would render alteration or abandonment of the proposed route increasingly costly and, therefore, increasingly unwise. If appellees were thus allowed to limit their options during their reconsideration of the location of Arlington I-66, reconsideration would be a hollow gesture.” 458 F.2d 1323, 1326-27 (4th Cir. 1972), cert denied 409 U.S. 1000 (1972).

An environmental impact statement must cover a whole project when the dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken. Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105 (9th Cir. 2000). (citing Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974)). In the instant case, the permitted Project is the reason for all subsequent phases, as it both requires and justifies them. The NEPA analysis – if the process is to have any integrity – must be done now and not before the anchor for the entire grand Project is already built. The reasoning of the cases described above clearly applies here, where the purpose and utility of subsequent phases depend directly upon Phase 1, for which they are supporting uses. If the approach taken here by the Corps is not enjoined by this Court, when the other phases are submitted for approval the assessment of alternatives will be rendered a “joke”, in the way strongly condemned in Named Individual Members, *supra*, as well as the other cases.

Arbitrary and Capricious Reliance on Local Regulations

Another reason cited by the Corps in support of its claim that it need not analyze the subsequent development impacts is that the local government determines the rate of development in Palm Beach County. R. 2676.

In O'Reilly, the court said that the Corps' reference to local regulations (in that case flood plain regulations) was inadequate because:

“Not only does the Corps fail to explain how such compliance [with flood plain ordinances] serves to mitigate the adverse environmental impacts, the Corps does not even enumerate the pertinent ordinances or reference what the contemplated ordinances require.”

A federal agency cannot satisfy the duty to explore indirect impacts by shrugging its shoulders and passing responsibility for growth-inducing effects to local government laws, regulations and decisions. Past EAs attempting such a flawed analysis have been held invalid. See Davis v. Mineta, 302 F.3d 1104, 1122-1123 (10th Cir. 2002); TOMAC v. Norton, 240 F.

Supp.2d 45, 50-52 (D.D.C. 2003) (inadequate analysis of socioeconomic indirect impacts of new casino, as well as impacts on air, water, and other ecosystems); Friends of the Earth v. United States Army Corps of Eng'rs, 109 F. Supp.2d 30, 43 (D.D.C. 2000) (Corps must prepare an EIS for a series of shoreline casinos that would spur development); Sierra Club v. Marsh, 769 F.2d at 877-882 (inadequate analysis by Corps of indirect impacts of construction of new causeway and port). The EA in the instant case is similarly flawed.

Conclusory Statements Unsupported by Facts or Analysis of Record Are Inadequate

Plaintiffs submit that the facts and law explained above dispose of the issue and amply demonstrate that the Corps' finding that the Project has independent utility which precludes the need to analyze the impacts of subsequent phases and projects is arbitrary and capricious. Plaintiffs also point out that the Corps' claim consists simply of a single statement, that "Scripps portion of the overall development has independent utility from the rest of the planned development on the rest of the 1900 acre site." R. 1328. No additional facts or explanation appear in the EA to support this claim. The Administrative Record contains no support for the claim, but instead, as shown in abundance above, proves just the opposite.

When a statute requires an agency to make a finding as a prerequisite to action, it must do so. Merely "[r]eferencing a requirement is not the same as complying with that requirement." Sugar Cane Growers Coop., 289 F.3d at 97. "Stating that a factor was considered"--or found--"is not a substitute for considering" or finding it. Getty v. Federal Savings and Loan Ins. Corp., 805 F.2d 1050, 1055, 1057 (D.C.Cir.1986) (holding that a "conclusory recitation" failed to satisfy a statutory requirement that the agency "consider" a specified factor).

In Center for Biological Diversity v. U.S. Fish and Wildlife Service, 202 F.Supp.2d 594 (W.D.Tex.,2002) the court found the Service acted in an arbitrary and capricious by failing to consider "any alternatives involving greater mitigation measures." (citing National Wildlife Fed'n v. Babbitt, 128 F.Supp.2d 1274, 1291 (E.D.Cal.2000)). The court noted that the phrase "maximum extent practicable" required the USFWS to consider an alternative involving greater mitigation. The court stated the "record should provide some basis for concluding, not just that the chosen mitigation fee and land preservation ratio are practicable, but that a higher fee and

ratio would be impracticable." *Id.* at 1292. The court found the record "nearly non-existent" on whether the HCP provided the maximum practicable mitigation fee and reserve land ratio and explained:

“There are conclusory statements in the record to the effect that ‘the common and local wisdom is that a fee in the range from \$2000 to \$2500 per acre is practicable,’ but the record is devoid of evidence that the Service subjected this assumption to any examination or attempted to determine if a higher base fee would also be practicable. There is no economic analysis, discussion of mitigation fees in similar plans and circumstances, or even representation from particular landowners. ... The plain language of the statutory provision requiring that the Plan minimize and mitigate its effect ‘to the maximum extent practicable’ is not satisfied by a fee set, as here, at the minimum amount necessary to meet the minimum biological necessities of the covered species. The record lacks adequate evidence and analysis of whether a fee higher than that initially proposed by the working group would be economically practicable.” *Id.* at 1292-1293.

It is inadequate for the Corps to conclude that an alternative is not practicable simply because the applicant has said so. In Gerber v. Norton, 294 F.3d 173 (C.A.D.C. 2002.) the Court reversed the issuance of an incidental take permit under the Endangered Species Act where the agency’s rejection of an alternative was based on the applicant’s mere assertion - unsupported by any independent analysis of the agency - that the alternative would entail additional costs and delay the process of obtaining approval from the county zoning department. *Id.* at 178. The agency's decision documents contained no analysis of whether implementation of the Reduced Impact Alternative would actually result in additional costs and delay, or whether the magnitude of such costs or delay would render the alternative impracticable. *Id.* at 185. In the instant case, the Corps mere assertion of independent utility is wholly unsupported by the record.

Failure to Properly Analyze Direct Impacts

Direct impacts “are caused by the action and occur at the same time and place” 40 C.F.R. §1508.8 The challenged permit authorizes increased mining on the site and will expand the existing mining operations by 74% (from 27.6 acres to 40 acres). The FDEP has noted that a high potential for impacts on the Mecca site exists due to the existing mining activities which have uncovered the surficial aquifer, making it susceptible to pollution from stormwater and industrial pollutants. The EA entirely fails to analyze the potential direct impacts regarding contamination of the aquifer from this increased mining activity and thus has failed to

appropriately analyze the entirety of the project's direct impacts. See factual discussion supra and R. 1445-6 and 2686.

Ultimate NEPA Conclusion: Arbitrary and Capricious

The Eleventh Circuit has adopted a four-part test to determine whether an agency's decision not to prepare an EIS is arbitrary and capricious. First, the agency must have accurately identified the relevant environmental concern. Second, the agency must take a "hard look" at that problem when preparing the EA. Third, the agency must make a convincing case for a finding of no significant impact. Fourth, if the agency does find a significant impact, preparation of an EIS can be avoided only if the agency finds that changes or safeguards in the Project sufficiently reduce the impact to a minimum. Sierra Club v. U.S. Army Corps of Engineers, 295 F.3d 1209, 1216 (11th Cir.2002).

In Inman Park Restoration, Inc. v. Urban Mass Transportation Administration, 414 F. Supp. 99 (N.D. Ga. 1975), the Court explained that an agency's duties under NEPA:

“are not inherently flexible. They must be complied with to the fullest extent. . . . Section 102 of NEPA mandates a particular sort of careful and informed decision-making [sic] process and creates judicially enforceable duties.” 414 F. Supp. at 112.

What's more, if:

“the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.” Id.

In the instant case, the challenged agency decision is arbitrary and capricious because it failed to consider all relevant factors, as it failed to consider the entire Project and the cumulative and indirect impacts of either this initial phase or the entire Project.

The Corps' treatment of the alternatives review and the definition of the Project cannot be squared and starkly expose the contradiction and fatal flaw in the FONSI. It cannot be true both that this 500 acre phase of a unique, integrated 1919 biomedical village has “independent utility” and that the alternative sites were properly rejected because they are too small to handle the entire Project. The initial Corps staff assessment of the Project revealed that it is a unique, coordinated 1919 acre Project, planned to work in conjunction with similar development on the

adjoining Vavrus parcel⁹ and requiring extensive new roads for access. The Corps' subsequent decision to artificially view the initial 535 acre phase as "independent" to comply with the applicant's desires to expedite permitting is arbitrary given the record, and does not comply with the realistic hard look required by NEPA.

It defies reason and logic for the Corps to assert that the permitted Phase 1A is not dependent upon any future phases of the project, but then evaluate and disqualify alternative sites based on their perceived inability to accommodate the full five phases of the project. The use of this contradictory double standard for the evaluation of alternatives fails to provide an adequate basis of comparison between the various alternatives and the proposed project, thus violating one of the most fundamental tenets of NEPA. 42 USC 4332(E); 40 CFR 1508.9; City of Carmel by the Sea v. U.S. Dept. of Transp., 123 F.3d 1142 (9th Cir. 1997) (With regard to NEPA requirement for alternatives analysis, stated goal of project necessarily dictates range of reasonable alternatives, and agency cannot define its objectives in unreasonably narrow terms); City of New York v. U.S. Dept. of Transp., 715 F.2d 732 (2nd Cir. 1983) (When agency action has some impact on environment, agency will not be permitted to narrow the objective of its action artificially and thereby circumvent requirement that relevant alternatives be considered).

This Project poses serious risks to the Corbett Wildlife Area, Hungryland Slough, Vavrus Ranch, Loxahatchee Slough, and the Loxahatchee River and its estuaries. The EA acknowledges that this Project will lead to development on or adjacent to, and roads through, those sensitive lands, and identifies their environmental sensitivity. An EIS "hard look" at those impacts is required.

It is difficult to imagine a clearer case of a fundamental breakdown in the NEPA process than here, where the agency has ignored the process completely, intentionally segmenting the entire Project into individual phases, and failing to consider the indirect or the cumulative impacts of even this first phase – all to avoid full review and produce a favorable result for the

⁹ The relevant impacts on the Vavrus parcel include those to its farmland as well as to its wetlands. Middle Rio Grande Conservancy Dist v. Norton, 294 F. 3d 1220, 1229 (10th Cir. 2002).(loss of 2000 acres of farmland is significant under NEPA).

applicant.¹⁰ The Corps disregarded its own regulations when it refused to perform even the most basic environmental reviews of the Project in its entirety. The NEPA analysis is fatally flawed, and the issuance of the permit violates Section 404 of the Clean Water Act, NEPA and the NEPA Guidelines and rules adopted by the administrative branch.

The burden of proof to demonstrate compliance with the Section 404(b)(1) Guidelines rests with the permit applicant. Utahns for Better Transportation v. United States Department of Transportation, 305 F.3d 1152, 1187 (10th Cir. 2002). Where insufficient information is provided to determine compliance, the Guidelines require that the permit be denied. Id. (citing 61 Fed. Reg. 30,990, 30,998 (June 18, 1996) and 40 C.F.R. § 230.12(a)(3)(iv)). Here, through its flawed NEPA analysis and failure to analyze all relevant impacts, the Corps failed to meet its procedural duties under NEPA. Each of the deficiencies in the Corps' arbitrary analysis of the direct, cumulative and indirect impacts of the Biotech Park constitutes a violation of NEPA, and a sufficient basis to vacate the 404 permit. Together, however, they show that the Corps failed to make a "convincing case" for a FONSI and of the compelling need for an EIS.

THE CORPS' SECTION 404 PERMIT MUST BE INVALIDATED

The Corps must complete a proper NEPA analysis before issuing a Section 404 permit. See 33 C.F.R. § 325.2(a)(4). When an agency fails properly to analyze a project under NEPA, any permits issued must be invalidated as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). See Save Greers Ferry Lake, Inc. v. Dept. of Defense, 255 F.3d 498, 501 (8th Cir. 2001) (invalidating permits for construction of boat docks where the Corps acted arbitrarily and capriciously in issuing a FONSI); Mullin v. Skinner, 756 F. Supp. 904, 923 (E.D.N.C. 1990); Friends of the Earth v. Hall, 693 F. Supp. 904, 946 (W.D. Wash. 1988) (setting aside a 404 permit upon a finding that the FONSI was arbitrary).

Clean Water Act Requirements

Under the Clean Water Act, it is illegal for anyone to discharge dredged or fill material into the navigable waters of the United States without a permit except under circumstances

¹⁰ While page limits do not allow a detailed discussion of this point, the internal discussions among Corps staff that are included in the record (there are several documents not disclosed based on a claim of attorney – client privilege) include far more discussion of how to best present its treatment of the application favorably in the media (including a detailed "rollout strategy" to announce the permit issuance) than of the impacts of the cumulative and indirect impacts of the Project and connected, cumulative, or similar actions (See e.g. 2540-2626.)

specifically set forth under the statute and regulations. The Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)(2). Dredged or fill materials are pollutants under the CWA. *See* 33 U.S.C. § 1362(6). Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Corps to issue permits to discharge or place "dredged or fill materials" into waters of the United States, including wetlands, only at specified sites and under prescribed circumstances and conditions.

The Section 404 program places a high priority on the control of activities that are potentially damaging to the Nation's wetlands and other waters. Regulations promulgated by the Environmental Protection Agency pursuant to section 404(b)(1) and a memorandum of understanding between EPA and the Corps further define the Corps' duty in evaluating individual permits under CWA.

The 404(b)(1) Guidelines mandate a sequential review process whereby the Corps evaluates individual permits. First the Corps must evaluate whether an activity is water dependent. If a proposal is not water dependant, the Corps must presume that an environmentally less damaging practicable alternative exists. *See* 40 C.F.R. § 230.10(a)(3).

An applicant proposing a project that is not water dependant must show that all available alternatives to the impacts resulting from the discharge of dredged or fill material have been considered, and that no practicable alternative exists which would have less adverse impact on the aquatic environment. *See* 40 C.F.R. § 230.10(a).

If the permit applicant establishes that no less damaging, practicable alternative is available, the applicant must then show that ***all appropriate and practicable steps will be taken to minimize adverse impacts of the discharge onto wetlands.*** *See* 40 C.F.R. § 230.10(d). Only after the permit applicant has shown that the avoidance and minimization criteria are satisfied can the Corps consider mitigation.

A permit may not be issued if (i) there is a practicable alternative which would have less adverse impact and does not have other significant adverse environmental consequences, (ii) the discharge will result in significant degradation, (iii) the discharge does not include all appropriate and practicable measures to minimize potential harm, or (iv) there does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Corp's Guidelines for permit issuance. 40 C.F.R. § 230.12(a)(3)(i-iv). "Practicable" is

defined at 40 C.F.R. § 230.10(a)(2) as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." Finally, a permit may not be issued "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d).

The regulations (33 CFR § 209 et seq.) promulgated to establish procedures for the issuance of permits for the placing of fill and structures in water pursuant to Section 10 of the Rivers And Harbors Act of 1899, 33 U.S.C. Section 403 provide, *inter alia*, that before a permit is issued the Corps of Engineers will evaluate "all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology and the general public interest . . ." 33 C.F.R. 209.110(d)(1).

For actions subject to NEPA, the analysis of alternatives required for the NEPA environmental documents will in most cases provide the information for the evaluation of alternatives under the CWA Guidelines. See Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1526 n.17 (10th Cir. 1992). If, however, the NEPA documents do not consider the alternatives in sufficient detail to respond to the requirements of the Guidelines, it may be necessary to supplement NEPA documents with additional information. 40 C.F.R. § 230.10(a)(4). See, Utahns v. United States DOT, 305 F.3d 1152, 1163 (10th Cir. 2002). Further, the Corps must conduct its own investigation where other government agencies indicated they were serious inadequacies in statement. Sierra Club v United States Army Corps of Engineers, 701 F.2d 1011 (2nd. Cir. 1983).

The EA's Alternatives Analysis Violates The CWA

The alternative analysis required by NEPA and the alternatives requirement for a CWA permit are distinctly different. NEPA only requires an analysis of the alternatives. The CWA requirement is more stringent. C.F.R. §230.10(a) of the EPA guidelines requires a denial of a 404(b)(2) permit which would permit discharge of dredged or fill material where a reasonably practicable alternative exists. Fund for Animals v. Rice, 85 F.3d 535 (11th Circ 1996).

Specifically, C.F.R. §230.10(a) of the EPA guidelines states:

“Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted 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.”

An alternative is considered practicable if "it is available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes." Fund for Animals, 85 F.3d at 542, *citing* C.F.R. §230.10(a)(2) . Furthermore, there is a rebuttable presumption that a practicable alternative exists when where the activity associated with a proposed discharge would occur on a wetland and is not water dependent. Fund for Animals, 85 F.3d at 542, *citing* 40 C.F.R. § 230.10(a)(3).

Next, there is a rebuttable presumption that a practicable alternative exists when where the activity associated with a proposed discharge would occur on a wetland and is not water dependent. Fund for Animals v. Rice, 85 F.3d 535, (11th Circ 1996) *citing* 40 C.F.R. § 230.10(a)(3).

In the instant case, jurisdictional waters are being filled, but the Project is not water dependent. Accordingly there is a rebuttable presumption that a practicable alternative exists. In Fund for Animals, the Court found that if a site was available to accommodate the Project (i.e. 895 acres of contiguous uplands) then it would have found that there was a presumption of a practicable alternative. Fund for Animals v. Rice, 85 F.3d 535, (11th Circ. 1996).

Palm Beach County, the applicant, entered into a contract with the Scripps Research Institute under which it is “contractually bound ... to build the proposed biomedical research park on the 1900 acre Mecca property.” R. 1628. As the County was analyzing alternative sites, it’s legal department advised the County Commission that it could not locate the Project at a site not agreed to by Scripps without risking “a major claim for damages.” R. 1627. Plaintiffs submit that this contractual obligation prevented an honest assessment of alternative sites, but that the record demonstrates that less damaging alternative sites do exist. Indeed, even the County acknowledged that “[a]ll of the sites can work as the home of Scripps Florida and the crucible of the biotechnical economic cluster within Palm Beach County.” R. 6524.

In evaluating alternative sites, the County determined that the Palm Beach Park of Commerce has existing approvals for over 4 million square feet of industrial space. R. 2799, 2801, 2831. Also, it is the least costly of all considered sites. R. 6522. The Corps violates the §230.10(a) of the Environmental Protection Agency’s guideline for §404(b)(2) permits by issuing the challenged permit authorizing wetland impacts on the Mecca Farms site when a

practicable alternative existed, namely, Park of Commerce which (1) already had Corps approval as an industrial park (R. 2799, et. seq.); (2) had already done its mitigation (R. 1588); (3) was already approved for 4 million square feet of industrial development; R. 2799, 2801, 2831 and (4) required no additional wetland impacts (R. 1588, 1726); (5) had over 600 acres of developable land available for the project. (R. 1728, R. 1582).

Here the applicants' immediate needs are fulfilled by the Park of Commerce site and the environmental concerns are much less at the Park of Commerce. The County's alternative site evaluation determined that the proposed Research Park concept could be accommodated at the park of Commerce site, and that phase 1A - the portion of the Project subject to the permit at issue in this case - could be administratively approved due to existing approvals and entitlements. R. 1737-1378.

The report also indicates that drainage infrastructure and permits are already in place, and that the owner of the site would be a willing participant. R. 1738-7 A detailed plan that was submitted to the County by the property owners included 100 acres for TSRI, 500 acres for other research and development users, 20 acres for a university campus and a 100 acre town center with 1000 workforce housing units, with additional property proposed to be obtained by the site owner to provide land for a high school and hospital. PGA Blvd. would not need to be extended through additional wetlands. R. 1729. Moreover, the County determined that the costs of developing the Research Park on the Park of Commerce site would be significantly less than at Mecca, on both a total cost and cost per gross acre basis.[1] Palm Beach County ultimately selected the Park of Commerce site as the backup site, if for any reason, the Project is unable to be constructed on Mecca. R. 2786. That the County took the official action to select this site as the backup location for the Research Park demonstrates that the construction of the Project there would be both reasonable and practicable.

The other available alternative is the "Briger" site. Its benefits as compared to the Mecca site are detailed in a memorandum from Ms. Zarbo, the Corps staff person responsible for review of the subject permit application. R. 2301-2310. In that Memorandum, Ms. Zarbo stated that "we found that the wetlands on "Briger" had a very low ecological value" with "a large amount of exotics." R. 2302. The Memorandum went further to state that "in my opinion the "Briger" tract would be the least damaging practicable alternative when taking into account secondary and cumulative impacts and the Corps would have more control over development on Mecca and

Vavrus if Scripps were built on Briger. R. 2302. Additionally the memorandum stated that many of the infrastructure and amenities that is proposed on Mecca already exist on “Briger.” Ms. Zarbo concluded her memorandum stating that she “had a difficult time trying to justify the Mecca Farms site. R. 2302-2301. Ms. Zarbo went so far as to question whether the Corps should even continue to process the application for the Mecca site given the viability of the Briger site. R. 2274.

Given these facts, a reasonably practicable alternative exists, and thus the permit violates the CWA.

CONCLUSION

The Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)(2). NEPA was designed to “put environmental impacts on an equal footing with all other factors federal agencies consider when making major decisions. 38 AMJUR POF 3d 547. The Corps action challenged here does violence to the integrity of these laws. By approving the initial phase of a massive project intended to forever change the landscape of a rural area and regional ecosystem of which the subject parcel is but a part, the Corps action sets the precedent and justification for major adverse impacts in this entire region of Southeast Florida. Unless enjoined by this Court, this action will decide the fate of several tens of thousands of acres in a watershed and ecosystem so critical that it is the subject of a major federal protection and restoration effort. The EA tells us what is coming next, as a result of the project phase it seeks to permit, but it refuses to analyze the impacts, apparently knowing that they will be exactly what the Clean Water Act was adopted to prevent.

WHEREFORE, for the foregoing reasons, Plaintiffs’ Motion for Summary Judgment should be granted. Because the EA and the record clearly demonstrate on their face that the indirect and cumulative impacts of the Project will be significant¹¹, the Court should vacate the agency action and mandate the preparation of an EIS.

Respectfully submitted this 8th day of August, 2005.

s/Richard Grosso
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¹¹ Citizen Advocates for Responsible Expansion v. Dole, 770 F. 2d 423, 439 (5th Cir. 1985).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail and United States mail on this 8th day of August, 2005, to all parties listed below.

s/Richard Grosso

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