

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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,

vs.

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

Defendants

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**PLAINTIFFS' RESPONSE TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs hereby file this Response to Defendants' Motion for Summary Judgment.

**Introduction**

Defendants' Motion for Summary Judgment fails to support the issuance of a Section 404 permit or to show that the Corps has met its NEPA requirements. The conclusory statements offered by Defendants to support the "independent utility" theory are overwhelmed by the unified scheme of funding, planning, permitting, and marketing for a far larger project detailed throughout the administrative record. The Corps provides no rational factual or legal explanation supporting a finding that it met its NEPA requirements in issuing a CWA Section 404 permit for a 535-acre segment of the 1919-acre Biotechnology Research Park on Mecca Farms. The points below respond to the points raised by Defendants and show that the Corps' action was unreasonable, arbitrary, capricious, and not in accord with NEPA and the CWA.

**The Original Application**

The Defendants' discussion of the original application for the permit fails to present a complete picture of the record. During the pre-application process, the actual overall project proposed was development of the entirety of the 1919-acres and associated roads. A.R. 1328, 262, 264-265. See also A.R. 234. It was not until after the Corps indicated to the applicant that

there would be permitting issues with the entirety of the project - “complicated” or “troublesome” “newly proposed roads [that] would connect to existing roads through high quality wetlands” - that the original application for only 535-acres was submitted to the Corps for review. A.R. 224, 226. Here, as in O’Reilly v. U. S. Army Corps of Eng’rs, 2004 U.S. Dist. LEXIS 15787 (D. La., 2004), the applicant omitted from the application planned future phases of development after learning that the entirety of the project was “complicated” and “troublesome” and potentially subject to ultimate denial of the permit. As in O’Reilly, the applicant in the instant case sought to have only a portion of the entire project permitted to expedite receipt of the permit as a “means of insulating the [applicant] from some legal challenges.” A.R. 1614, 2776.

### **Determination of Finding of No Significant Impact Fatally Flawed**

The Corps contends in its memorandum that its review:

“involved the complete analysis of the direct, secondary and cumulative impacts of the Project, including ways the project might encourage development on adjacent undeveloped areas. A.R. at 2629-2687.” Def. Memo, p. 13.

Given the admissions within the EA, this statement cannot be taken as a claim that the Corps did in fact conduct an indirect, secondary and cumulative impact assessment of the 535–acre project, the larger project of which it is part, and the reasonably foreseeable cumulative impacts of the project, including the development of the adjacent and surrounding lands. If it were such a claim, it is improper post-hoc argument that is contradicted by the four corners of the EA and thus incompetent to support the Corps’ legal position. National Wildlife Federation v. National Marine Fisheries Service, 235 F. Supp. 2d 1143, 1152 (W.D. Wash 2002) (agency may not offer a new explanation for the action, which must be judged on the rationale and record that led to the decision). More likely, the Corps is simply stating that it reviewed such impacts only of the 535-acre first phase of the Biotech Village. That fails to address the issue in this case—whether the Corps’ limited view of the project is arbitrary and capricious.

### **The Review Sought by Plaintiffs is of the Admittedly Reasonably Foreseeable Project and Impacts Acknowledged by the Corps, Not Speculative Ones**

Defendants characterize Plaintiffs’ claim as seeking an EIS on “an expansive range of conceivable environmental impacts that might be associated with possible future development scenarios for the remainder of Mecca Farms, an adjacent parcel outside County jurisdiction

known as the Vavrus Ranch, and other general areas in the County.” Def. Memo, p. 2. This effort to portray the projects and impacts as speculative fails. What the Corps refers to as the “expansive range of conceivable environmental impacts that might be associated with possible future development scenarios” are identified in its EA, although it does not analyze the affects of those impacts on the environment. A.R. 264-265, 307, 348-351, 2035-2038, 2047, 2063, 2084-2085, 2090, 2098, 2219, 6707, 6710, 6800. Next, the suggestion that development on the adjacent Vavrus Ranch should not be considered because it is within a municipality and not Palm Beach County regulatory jurisdiction is novel, wholly unsupported by any law or logic, particularly here, where the Corps acknowledges that the development of Vavrus Ranch is a reasonably foreseeable impact of the project. A.R. 2635, 2685.

Third, the “other general areas in the County” to which Defendants refer are known to include, at a minimum, Indian Trail Groves, a large farmland parcel in the same planning region of the County as the subject parcel. It is referred to in the EA and the administrative record. A.R. 2633-2634, 2653. The Corps’ Memorandum admits “that it was also processing an application for development on an orange grove southwest of the Project site. A.R. at 2653.” Def. Memo, p. 10. The claim that the unexamined impacts are not reasonably foreseeable fails.

### **The Concern over the “Federalization of Local Land Use Issues” Fails to Excuse Non-Compliance with the Federally–Mandated Indirect and Cumulative Impacts Requirements**

The Corps’ claim that Plaintiffs would use the information (about concrete development proposals) to “federalize local land use issues” is an ineffective attempt to argue that the Corps should not have to consider the indirect and cumulative impacts of its permit. This attempt fails given the mandate to consider such issues. Land use issues are central to the required NEPA analysis. 40 C.F.R. §§ 1508.27(b). An EA must analyze “indirect effects,” which:

“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).

Land use and growth impacts have long been a part of the NEPA process. In Tomac v. Norton, 240 F. Supp. 2d 45 , 50-52 (D.D.C. 2003), the court ruled that a FONSI was inadequate and the EA was lacking because the agency failed to address secondary growth resulting from the permitted development and its concomitant negative effects of the human environment.

In Friends of the Earth v. USACE, 109 F. Supp. 2d 30, 43 (D.D.C. 2000), the court held that an EIS was required because the permitted development would spur additional development, rejecting a bare statement, unsupported by any analysis, that the effects would be minimal. In City of Davis v. Coleman, 521 F.2d 661 (9<sup>th</sup> Cir. 1975), the court held that the Corps was required to perform an EIS to determine the effects of development resulting from the project. In Mullin v. Skinner, 756 F. Supp 904, 925 (E.D.N.C. 1990), the court held that a project that induced growth in an island community required an EIS analyzing in detail the direct, indirect, and cumulative impacts of the development. Consideration of the effect of federal regulation on the quality of the local human environment is required by NEPA. 42 U.S.C. §4332(2)(C). Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

**The Argument that the Corps Properly Limited Its NEPA Analysis Because It Did Not Have Sufficient Interest (Control And Responsibility) To Warrant Federal Review Fails.**

The Corps misapplies the concept of “control and responsibility” to the lands on which reasonably foreseeable impacts will occur. Def. Memo, pp. 22-27.<sup>1</sup> If, as here, the Corps will have significant permitting responsibilities over reasonably foreseeable impacts, all cumulative impacts must be assessed. The rule cited by the Corps simply prevents unnecessary analysis of cumulative impacts for federal actions that are brief and incidental in their role in future development. Where significant additional federal agency approval under the CWA, NEPA, the Endangered Species Act or other laws is expected, the mandates to analyze all direct, indirect, and cumulative impacts still apply, and the agency must consider all impacts, not just those to waters of the U.S.

Also, the argument is factually incorrect. The complete scheme for this project and secondary development and the nature of the natural resources to be impacted, as well as the repeated assertions that the impacts will be analyzed when the subsequent applications are made, makes the “limited control and responsibility” untenable. The restricted scope of the environmental analysis was arbitrary and capricious.

The Corps cites 33 C.F.R. Part 325 App. §7(b) which states that the EA or EIS should "address the impacts of the specific activity requiring a [Corps] permit and those portions of the

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<sup>1</sup> The Corps did not rely on this "control and responsibility" argument in the EA, and thus cannot rely on such a post hoc rationalization in its legal memorandum. Defenders of Wildlife v. Norton, 258 F.3d 1136, 1146 (9<sup>th</sup> Cir. 2001).

entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. Part 325 App. B § 7(b) (2005) (emphasis added). A reading of the entire CFR section shows that it cannot support the limited environmental review in this case:

33 C.F.R. Part 325 App. B § 7(b):

*“(1) In some situations, a permit applicant may propose to conduct a specific activity requiring ... permit ... which is merely one component of a larger project .... The district engineer should establish the scope of the NEPA document ... to address the impacts of the specific activity requiring a ...permit and **those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.***

*“(2) The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.”*

The “environmental consequences of the larger project are essentially products of the Corps permit action,” and there are substantial “portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review” as there are significant wetlands and waters on the remainder of the Mecca site, on the Vavrus site, and in the Loxahatchee and Hungryland Sloughs through which the project’s roads will be built. A. R. 2672 -2671, 2661.

*“b. (2) Typical factors to be considered in determining whether sufficient “control and responsibility” exists include:*

*(i) Whether or not the regulated activity comprises “merely a link” in a corridor type project (e.g., a transportation or utility transmission project).”*

In this case, the project is merely a link in the PGA Blvd. extension, and will determine the location and configuration of the remainder of the route of the roadway extension.

*“(ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.”*

This is the case. The filling authorized by the permit at issue is dictated by approved site plans calling for fill in the impacted areas, upon which the Biotechnology Park will be built.

*“(iii) The extent to which the entire project will be within Corps jurisdiction.”*

The Corps will have significant jurisdiction over the future development of the remainder of Mecca, Vavrus and the road projects. The Corps has acknowledged CWA jurisdiction will extend to “the remaining development and any proposed future road construction/expansion....”

A.R. 2686. It identified adjacent water resources (wetlands) on Vavrus ranch. A.R. 2672 -2671.

*“(iv) The extent of cumulative Federal control and responsibility.”*

*A. Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project. These are cases where the environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation, or approval (not including funding assistance solely in the form of general revenue sharing funds, with no Federal agency control over the subsequent use of such funds, and not including judicial or administrative civil or criminal enforcement actions).*

The cumulative federal control and responsibility is extensive, given the significant need for CWA permits for developing the rest of Mecca, Vavrus and the road projects.

*“B. In determining whether sufficient cumulative Federal involvement exists to expand the scope of Federal action the district engineer should consider whether other Federal agencies are required to take Federal action under the Fish and Wildlife Coordination Act ..., the National Historic Preservation Act of 1966 ..., the Endangered Species Act of 1973 ..., Executive Order 11990, Protection of Wetlands, ..., and other environmental review laws and executive orders.”*

Given the extent of wetlands and wildlife species in the affected areas, other Federal agencies are likely to be required to take action under the referenced environmental laws.

Given the facts, the Corps cannot reasonably rely on this regulation to avoid meeting its responsibility to analyze indirect and cumulative impacts.

The Wetlands Action Network v. USACOE, 222 F.3d 1105 (9<sup>th</sup> Cir. 2000) (WAN) case cited by the Corps fails to support its position that its control and responsibility in the instant case extends only to that portion of construction located on the filled land. “Deciding whether federal and non-federal activity are sufficiently interrelated to constitute a single federal action for NEPA purposes will generally require a careful analysis of all facts and circumstances

surrounding the relationship." WAN, 222 F.3d at 1116. In WAN, unlike the instant case, the Court found that the record supported a finding that the three phases of the project were not connected actions, as each had independent utility. The utility of the permitted project in WAN did not depend upon the completion of later phases, and it was not unwise or irrational to undertake the permitted project if it was determined that the later phases could not be built. 222 F.3d at 1118 – 1119. In the instant case, given the facts about the publicly–subsidized integrated biotech village project, and its required road and infrastructure extensions, it would be unwise and illogical to build the project permitted by the Corps, if the rest is not also built.

Next, the WAN opinion distinguished its facts from those of Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998), cert. denied, 527 U.S. 1003 (1999). In WAN, when the developer “applied for a permit for Phase I, many of the details and planning decisions regarding Phases II and III had not yet been completed.” 222 F.3d at 1119. However, in Blue Mountain, as in the instant case, the development of the remainder of the Mecca site is planned and approved by the state and local authorities, and the roads planned and authorized by the state and local government. A.R. 172, 233-234, 356-357, 381, 388, 1830, 1913-1919, 4354-4355.

The instant case is also much more analogous to Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985), which the Ninth Circuit in WAN recognized as good law but factually distinguishable. WAN, 222 F.3d at 1117. In Thomas, the Court required the Corps “to consider the impact of both the Phase I upland development and the specific filling activity authorized by the permit...” 222 F.3d at 1117. Among the reasons was the fact that “the Forest Service ... would need to assess the environmental impacts of both actions at some point and ... had jurisdiction over both actions.” Id. That is the situation in the instant case. Next, after discussing the “control and responsibility” rule (33 C.F.R. Part 325), the WAN Court reiterated that:

“connected or cumulative 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. Id. (Quoting Thomas, 753 F.2d at 758)(quotations omitted)(emphasis added).

The CEQ regulation provides that actions are "connected" if they:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously

or simultaneously. (iii) Are interdependent parts of a large action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(1)

In the instant case, the development of the rest of the Mecca site and its wetlands, the Vavrus site and its wetlands, and the project's roads will not proceed unless Phase I-the Scripps anchor—is built, and are interdependent parts of a larger action which depend on the larger action for their justification. Those projects were not planned prior to the advent of the Scripps project. The road projects in particular are like those in Thomas, supra, where “the logging operations and the construction of the road were connected actions” because “the timber sales [could not] proceed without the road, and the road would not be built but for the contemplated timber sales.” 753 F.2d at 759.

The Corps' finding that its control and responsibility extend only to the 535-acre site development is not entitled to deference, as it is inconsistent with and contradicted by the record, NEPA, its implementing rules and the cases interpreting them. The Court is not required to defer to an agency's decision where there is a clear error in judgment. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9<sup>th</sup> Cir. 1998).

**The Corps' Claim That It Analyzed Secondary Effects Belied By the Record. The Analysis of Indirect and Cumulative Impacts Was Inadequate**

The Corps' argument that it “evaluated several factors in reaching its determination that there would be minimal secondary effects from the Project”<sup>2</sup>, and that it fully analyzed the direct, secondary, and cumulative impacts of the 535-acre site development is contradicted by the record. The Corps also claims that the record shows that it “also considered the potential impacts associated with the widening of [SPW] Road, the location of a Florida Power & Light substation on a portion of [Corbett WMA], the extension of PGA Boulevard, and the North County Airport Runway Relocation.” Def. Memo, p. 30 (citing A.R. at 1253-59, 2634). However, pages 1253-59 show that there will be significant wetland impacts as a result of these projects. Page 2634 cites to the EA/SOF discussion that there will be impacts as a result of the FPL substation, but which defers any analysis to such time that an application is received.

The plain terms of the EA acknowledge that there are foreseeable cumulative impacts on the remaining Mecca Parcel, the roads, and Vavrus Ranch, but state that “cumulative impacts

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<sup>2</sup> Def. Memo, p. 10.

assessment will consider the fact that a permit decision has not been made on the Mecca Farms Parcel, the planned development on the Vavrus Ranch, nor any associated roads or future projects.” A.R.2635. The Corps cites to A.R. at 2632-2635, but that simply identifies reasonably foreseeable development as a result of the issuance of the permit and dismisses any analysis of the impacts until such time that the permits are received. The Corps chose not to perform such analysis now, stating that the:

“remaining development and any proposed future road construction/expansion will be evaluated and processed by the Corps under a separate permit application number once its submitted.” A.R. 2683.

Deferring the analysis of cumulative impacts to when subsequent permits are sought for the remainder of the project and Vavrus Ranch<sup>3</sup> was rejected in Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895 (9<sup>th</sup> Cir. 2002) (*citing* 40 C.F.R. §§ 1508.7, 1508.25, 1508.27(b)(7) (2001); Kern v. U. S. Bureau of Land Management, 284 F.3d 1062, 1075-76 (9<sup>th</sup> Cir.2002).

Next, the Corps claims that it evaluated secondary impacts on adjacent natural systems. However its citations to the administrative record (A.R. at 2652, 2662, 2659, 2769) reveal that its analysis was limited to the secondary impacts of only the inappropriately segmented initial phase of the project. The Corps argument on secondary impacts helps proves Plaintiffs’ case, where it states that it:

“determined the Project would not impact wildlife because wildlife does not need to travel through Mecca Farms due to the existence of preserved, undeveloped land to the west, north, and east of the Mecca Farms parcel.” (Def. Memo, pp. 10-11) (emphasis added).

It is those very lands “to the west, north, and east of the Mecca Farms parcel” that will be impacted by the impacts of the remainder of the project and its indirect and cumulative impacts. The Corps claims that the projects’ impacts will not be significant since other lands will provide the necessary protection for wildlife, but the EA found significant potential impacts to those same lands as a result of reasonably foreseeable development. A.R.2635. This major contradiction exposes the arbitrary and capricious nature of the Corps’ action. Moreover, the conclusion that wildlife does not need to travel through Mecca Farms is clearly contradicted by the existing geography of the area. As shown on the maps at A.R 365-367 and 737, the C-18

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<sup>3</sup> Def. Memo, p. 14.

canal (a significant water management feature) runs east along the northern border of the Mecca site then northeast, bisecting the Hungryland Slough from the Vavrus Ranch to the Beeline Hwy. and beyond. Thus, for the wildlife unable or unwilling to swim across this canal, the Mecca site provides the sole means of connectivity between the Corbett and Hungryland Slough, and the Loxahatchee Slough to the east.

The Defendants acknowledge that the CERP North Palm Beach County Project identified Mecca as an area for construction of a reservoir or a storm water treatment area necessary for this CERP project and conclude that because County agreed to set aside a flow way area that would transfer water to the C-18 Canal for improvement of the Northwest fork of the Loxahatchee River, the Project would not be needed by or contrary to the CERP program. Def. Memo at 8. The challenged permit, however, neither authorizes nor requires construction of the referenced flow way. As the Corps' argument implies, the project's approval is dependent upon the construction of the flow way in order to be consistent with the CERP project. As such, the Corps should have, but failed to, take the necessary "hard look" by thoroughly analyzing the impacts of the flow way as a necessary component of the project.

Obviously, the claim now advanced that the Corps "fully analyzed" secondary and cumulative impacts cannot be squared with the facts. The requirements to analyze such impacts have been violated. 40 C.F.R. § 230.11(g)(2); 40 C.F.R. § 1502.14; 40 C.F.R. § 1508.27(b)(7); Sabine River Authority v. U.S. Dept. of Interior, 951 F.2d 669 (5<sup>th</sup> Cir. 1992).

### **The Corps Improperly Segmented Its NEPA Analysis**

NEPA is aimed at preventing "agencies from dividing one project into multiple individual actions 'each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" Natural Res. Def. Council v. Hodel, 865 F.2d 288, 297-98 (D.C. Cir. 1988). The Corps improperly segmented the permitted project from future development on the remainder of Mecca Farms and the Vavrus Ranch, as well as the roads. Contrary to the Corps claims, the salient facts in O'Reilly v. USACOE, 2004 U.S. Dist. LEXIS 15787 (D. La., 2004) are not different from the situation here. While the amount of direct wetland impacts may have been greater in O'Reilly than they are for the initial phase of the project here, O'Reilly's holding was based on the relationship of subsequent phases to phase one and their reasonably foreseeable nature, not on the extent of the direct wetland impact. Moreover, in the instant case, the potential indirect, secondary impacts to wetlands for the

foreseeable road construction, airport runway re-location and FPL power station alone amount to 151 acres of wetlands (A.R. 1254-1253), defined as “high quality wetlands.” A.R. 1293, 1310. A vast majority of the 4,700-acre Vavrus parcel has wetlands and “contains a large amount of high quality wetlands.” A.R. 250, 2078. The rule against segmentation is expressly designed to prevent the argument advanced here by the Corps – that a narrowly defined project will have insignificant impacts, when the greater impacts lurk in subsequent phases. 40 C.F.R. § 1508.7; Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F.Supp 99 (D.C.Ga. 1976). Also, postponing the analysis of the impacts of the other foreseeable developments until applications are received renders the alternatives analysis useless for those projects, which will have substantially greater impacts than the initial phase. For example, when the Vavrus application comes before the Corps as an ancillary use to the Biotech Park, alternative sites would be inappropriate because the Scripps anchor will be located next door making it the most practicable site. When the application to build the roads comes before the Corps, an alternative analysis will be moot because the roads will be needed to serve the subject 535-acre parcel and the remainder of the site. The logical terminus of the portion of PGA Blvd. on phase 1A on Mecca is across sensitive wetlands (Loxahatchee Slough) to connect with PGA Blvd. east of the Bee Line Hwy and the logical terminus for SPW Road is to continue north through Hungryland Slough. A.R. 233, 152, 110, 44, 16, 354, 353, 1280, 1277, 1276, 126, 124, 122, 118, 116, 113, 6664, 6800-6802, 1908, 1897-1911, 2033, 6642, 6695, 6709, 6943.

Failing to consider these impacts now makes a “joke” and a mockery out of NEPA, and the courts have struck down attempts to frustrate the alternatives requirement in this way. Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dep’t, 446 F.2d 1013, 1028 (5<sup>th</sup> Cir. 1971).

Next, as in O’Reilly, the permitted phase is termed “Phase I” of the multi-phase project. Also, the record in this case, as in O’Reilly, “blaringly suggests that the sole reason that Phases II and III were eliminated for the permitting application was to facilitate issue of the permit” in an expedited manner. (Id. at 6)(See A.R. 1614, 2776). Defendants’ effort to distinguish O’Reilly cannot survive that opinion or this record.

Defendants’ argument that improper segmentation only occurs when two major federal agency actions are before the Corps concurrently has no legal support. A pending permit or action is not required to trigger NEPA analysis of a reasonably foreseeable indirect, cumulative

or secondary impact, and here, the remaining Mecca Farms site, Vavrus Ranch, and the accessory roads will be within the jurisdiction of the Corps due their jurisdictional wetlands and are thus subject to federal control and responsibility. *See* 40 C.F.R. 1508.18. Defendants cannot rely on Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) as precedent for ignoring impacts of reasonably foreseeable development. In Kleppe, the Supreme Court upheld the limited review of a single project because “there is no evidence in the record of an action or a proposal for an action of regional scope” and because “[i]n the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement.” *Id.* at 401-402. In Port v. Hordel, 595 F.2d 467 at 478 (9<sup>th</sup> Cir. 1979) the court, citing Kleppe, ruled that even though the details of a future planned phase of development are unsettled, when a subsequent phase of a project is within the regional planning policy and goals, it is a proposal within the meaning of NEPA, *supra*, and cannot be segmented out for purposes of environmental analysis.

Here the planning for the remaining Mecca Farms, Vavrus, and accessory roads are well defined, not speculative, and are thus subject to an impact analysis. Unlike Kleppe, a planned and approved development site plan exists for the remainder of the Mecca site, a formal application for State DRI approval exists for the Vavrus site, and the related road projects are planned and authorized by the County and the State. Mecca and Vavrus are the subject of detailed, interrelated plans being processed under the same State expedited review process in furtherance of an economic development strategy dubbed “Operation Air Conditioning” by the State and supported by over \$600,000, 000 in tax payer subsidy. To say the least, there exists a “regional plan of development” or a “proposal for an action of regional scope.”

Defendants also mistakenly rely on Coalition for a Liveable Westside v. U.S. Dept. of Hous. & Urban Dev., 1997 U.S. Dist. LEXIS 8860 (S.D.N.Y. 1997). In that case, HUD was not required to perform NEPA analysis of future development on a parcel for which it was providing residential mortgage insurance since the rest of the development was not expected to use such insurance. The court made clear that, if HUD had reasonably expected to provide insurance for future development, it would have been required to perform an EIS for the entirety of the foreseeable development. *Id.* at 19. Here, the Corps fully expects to participate in the foreseeable future development. A.R. 2686. Further, in Coalition, *supra*, there was no definitive plan for the roadways and development of the area, and therefore it could not be shown whether

any future development would be “interdependent.” Here, the foreseeable development is “interdependent” as evidenced by the extensive planning and permitting already done by the applicant. A. R. 1440, 6657, 1916-1919. Additionally, the extension of PGA Blvd. is required for this project regardless of any future development. A.R. 6943, 6642.

For the same reasons, N.W. Env'tl. Def. Ct. v. Wood, 947 F. Supp. 1371, 1386 (D. Or. 1996), and Hudson River Sloop Clearwater, Inc. v. Dep't. of the Navy, 836 F.2d 760, 764 (2d Cir. 1988) are different from this case. In both of these cases the uncertainty of the future phases exempted them from analysis. Here, there is no uncertainty as to the future phases of the project and its roads, which are included in all other state and local permits for the project.

### **The Corps Incorrectly Concluded That the Project Has Independent Utility**

The Corps knows that the County plans to develop the remaining 1365 acres of the Mecca Farms site, and relies upon the “independent utility” argument to support its action. Yet, neither the Defendants’ Memorandum, the EA, nor the Administrative Record provides any facts or other support for the bare assertion of “independent utility.” A. R. 269, 2687 – 2627. The only record information the Corps can site to is a conclusory and self-serving claim by the applicant:

“...the County has stated to the Corps that the core Scripps facility will be built at this site, whether or not any additional facilities, housing etc. [are] constructed on or near the site...” (Def. Memo, p. 38) (citing A.R. at 269).

This bare claim, unsupported by any actual evidence, and overwhelmed by the record information to the contrary, cannot support the Corps’ independent utility argument. It is overwhelmingly refuted by the voluminous information in the record about the major, planned and subsidized biotech village, related development and roads required for access. A.R. 172, 233-234, 356-357, 381, 388, 1830, 1913-1919, 4354-4355. Generalized conclusory statements, unsupported by data and facts are inadequate to comply with NEPA. Klamath-Siskiyou Wildlands Centerv. BLM, 387 F. 3d 989 (9<sup>th</sup> Cir. 2004); Blue Mountains, 161 F.3d at 1215.

Defendants’ memorandum cites to the record at A.R. 1070-1123, but those pages include nothing to support the independent utility theory. The document reported there is the applicant’s response to a request from the Corps for additional information that includes no questions or answers related to the issue of “independent utility.” Defendants also cite to the record at A.R.

1390-1494 as allegedly evidencing a commitment by the County that it intends to complete the project regardless of future phases or project. Def. Memo, p. 11. However, those parts of the record contain only letters of objection and requests for public hearing, none of which remotely supports the independent utility claim. The majority of that portion of the record consists of public comment describing the full extent of the planned, locally – permitting and funded project, evidencing the applicant’s plans for the entire project. Next, Defendants’ citation to A.R. 1564-1569 is to a letter from Plaintiffs’ lawyer explaining that phase one does not have independent utility and that the project is not limited to the 535-acre phase one.

Next, Defendants’ cite to A.R. 1584 includes only the bare claim that “the current project has independent utility; it does not require any of the future development or roadway extension/expansion to function as a stand alone residential and commercial development in the project area”, without substantiation for the claim. The Corps mistakenly relies upon A.R. 1626 – 2004 which includes a draft Statement of Findings written for the Corps by the applicants consultant; a response to the NFWS comments; an environmental assessment for the entire 1919-acre Mecca site; a state DRI application for the entire 1919-acre project and associated roads; rezoning applications for the entire 1919-acre site; a letter opposing the project by a former state everglades engineer; an evaluation of alternatives sites by the applicant – which concluded that the ability to accommodate the entire project made Mecca the superior site; a consultants’ report demonstrating the importance of all of the related uses on the 1919 acres to the project’s success; a memorandum of law regarding expediting permits for the biotech campus; a traffic study for alternative sites, an alternatives utility analysis prepared by the applicants’ consultant, miscellaneous assessments of the Briger parcel, and a memorandum from the applicants’ attorney stating that it is contractually obligated to develop Mecca Farms. Out of all 400 pages of record cited by the Corps, the term “independent utility” was used once in a summary statement to justify why the Corps does not need to perform an EA for placing an electrical substation on conservation lands. The Corps next cites the EA at A.R. 2684, 2663, 2676, and 2673 as supporting the independent utility claim. Those cites are to the EA which has been addressed.

The record citations relied upon by the Corps for its independent utility claim not only fail to support independent utility but actually demonstrate that this project does not have independent utility. In determining whether an environmental analysis has been improperly

segmented, courts consider “whether the proposed [action] (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects.” Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 298-99 (D.C. Cir. 1987) (per curium)(citing Piedmont Heights Civic Club v. Moreland, 637 F.2d 430, 439 (5th Cir. 1981)). In the Eleventh Circuit, “an inquiry into independent utility reveals whether the project is indeed a separate project, justifying the consideration of the environmental effects of the project alone.” Pres. Endangered Areas of Cobb’s History, 87 F.3d at 1247. The facts of the instant case, as shown in the EA and the remainder of the record, and as discussed in detail throughout this Memorandum and the Plaintiffs’ Initial Memorandum, show the independent utility claim to be inapplicable here.

### **Other Claimed Justifications for Failure to Analyze Cumulative Effects Are Unpersuasive**

The Corps claimed justifications for the failure to consider the project’s cumulative impacts are belied by the administrative record and inconsistent with the law. First, the Corps stresses that “Palm Beach County is under intense development pressure” Def. Memo, p. 12. However, wetlands and jurisdictional waters that are under intense development pressures warrant heightened review. Such pressure makes the additional aspects and phases of the project non-speculative and reasonably foreseeable. The use of existing development pressures to justify a failure to analyze subsequent phases of a project was rejected in O’Reilly, supra, which held that expanding urbanization in the area made additional phases financially viable and subject to a cumulative impacts analysis. 2004 U.S. Dist. Lexis 15787 at 16.

Next, the Corps argues that it has not received applications for the development of the remainder of the Mecca Farms or Vavrus Ranch properties. But the lack of an application for reasonably foreseeable projects does not excuse the requirement to analyze the potential impacts of those projects. Western North Carolina Alliance v. North Carolina Dept. of Transportation, 312 F. Supp. 2d 765, 771-773 (E.D.N.C. 2003). Third, the Corps’ stated intent to “evaluate those projects in the future if and when permit applications might be submitted” also does not excuse the requirement to analyze the potential impacts of those projects now. Id. See also, O’Reilly, 2004 U.S. Dist. LEXIS 15787 (D. La., 2004) (Id. at 16-17). The rule against segmentation is intended to prevent both of these types of arguments.

Fourth, the claim that the decision on the Project “does not preclude options to provide for continued protection of important aquatic resources on Vavrus Ranch, nor the movement of water from the C-18 Canal and the Loxahatchee Slough” is irrelevant. NEPA requires that the potential impacts on those resources be fully identified and analyzed and that the project not be analyzed in a vacuum. 40 C.F.R. § 1502.14; Grand Canyon Trust v. F.A.A., 290 F.3d 1446 (D.C. Cir. 2002); O’Reilly, supra. That it may be possible to mitigate damage or protect those resources is always the case for any future development and proves nothing.<sup>4</sup>

**The FONSI Was Arbitrary & Capricious : Emphasis on the Relatively Lesser Impact of Phases I Is What the Anti-Segmentation Rule is Designed to Prevent**

The Corps emphasizes its finding that the direct impacts of the initial phase of the project here permitted will be minor, ignoring the indirect and cumulative impacts and the larger project. This is exactly the type of overly narrow and unrealistic view of the impacts of a federal action that the rules are designed to prevent. Natural Res. Def. Council v. Hodel, 865 F.2d 288, 297-98 (D.C. Cir. 1988); Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985). Defendants emphasize that the issued permit authorizes the filling of 21.3 acres of “irrigation ditches,” suggesting that this minor impact is not substantial. Its argument relies on the erroneous premise that the only relevant impacts of the Project are those to the drainage ditches. Def. Memo, p. 6. Plaintiffs’ challenge is not premised on the direct impacts to those 21 acres or lack of adequate mitigation for those impacts. The case law and rules supporting a lack of an EIS when direct impacts are adequately mitigated is irrelevant. This action is infirm due to the failure to adequately analyze the indirect and cumulative impacts of the entire project.<sup>5</sup>

**Mitigation**

The Corps claims that it “used a standardized scoring tool ... to determine the values of the proposed mitigation measures, and that this analysis included secondary impacts to adjacent

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<sup>4</sup> The CEQ Memo cited by the Corps at page 29 of its memorandum provides no support for the action at issue, as it simply states the obvious – that environmental assessments should analyze “significant” issues, avoid “extraneous background data” and “emphasize real environmental issues and alternatives.” (citing 40 CFR 1500.2(b)).

<sup>5</sup> Defendants emphasize that the direct impacts of the initial 535 acre phase are primarily to the irrigation ditches. These irrigation ditches are also prior converted wetlands having once had high ecological value. A. R. 2661. Once it has been determined permitting jurisdiction exists, the CWA and NEPA are triggered and a realistic evaluation of the total project impacts must be performed. Grand Canyon Trust v. F.A.A., 290 F.3d 339, 342 (D.C. Cir. 2002).

projects such as Vavrus Ranch. A.R. at 2659.” Def. Memo, p. 9. However, that assessment only addressed the secondary impacts in terms of impacts that that the segmented project has on the adjacent Vavrus wetlands and not the development in its entirety. A.R. 2659. The EA makes it clear that an analysis of the indirect and cumulative impacts of the development of the Vavrus parcel was not done. A.R. 2635-2633.

### **The Alternatives Analysis Violates NEPA and the CWA**

The Corps’ claims that it “conducted an extensive evaluation of alternative sites...” and “examined in detail the rationale provided by the County as to why each of these alternatives was unacceptable, and made its own findings as to why there were no less damaging practicable alternatives...” Def. Memo, p. 8. However, the Corps’ analysis is fatally flawed as it rejects the alternatives because they could not meet the objectives of the larger project which the Corps refused to consider. A.R. 2666- 2667, *see also* A.R. 349, 480, 1210.<sup>6</sup> It rejected alternatives that would not “provide the same full economic utilization as would the Mecca Farms site for the Project.” Def. Memo, p. 8.

The Corps’ analysis of the “Briger site” alternative also reveals the contradictory, arbitrary and capricious nature of its action. It argues that siting the project at the Briger site would “induce growth and development, including development of Mecca Farms and the Vavrus Ranch.” (citing A.R. at 2664-2666). The Corps rejects an alternative because of its potential to induce growth and development in an already urban area but then fails to analyze the growth and development (in and around a highly sensitive ecosystem and farmlands) that would be induced by the Project in the currently rural and largely undeveloped area where Mecca lies. These contradictory rationales simply cannot withstand logic.

Next, the Corps suggests that the “more costly” nature of the site is important. Yet cost to the applicant is not relevant to whether an alternative is practicable. 40 C.F.R. § 230.10(a)(2). The Corps then argues that the Briger site was properly rejected because it would “remove native wetlands and forested uplands that are in communication with nearby undeveloped areas”. Def. Memo, p. 33. This is belied by the record, which shows that the Corps found that “the wetlands on “Briger” had a very low ecological value” with “a large amount of exotics.” A.R. 2302. A

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<sup>6</sup> Defendants’ argument that “Plaintiffs’ claim that the Corps’ alternatives analysis is arbitrary and capricious is based solely on an EPA letter dated August 13, 2004...” is not accurate.

Corps staffer also concluded that “in my opinion the “Briger” tract would be the least damaging practicable alternative when taking into account secondary and cumulative impacts.” A.R. 2302.

The Corps makes a wholly unsupported statement on page 9 of their Memorandum that “no less environmentally damaging practicable alternatives to the Mecca Farms site were available.” On the contrary, the EA/SOF never found environmentally damaging repercussions from building Scripps at the Park of Commerce site, which admittedly satisfies the physical requirements for Scripps and was ultimately chosen as the site alternative by the applicant. A.R. 2669-2667. Under the CWA, the Corps failed to consider whether there are practicable alternatives consistent with the purpose of the proposed project which would have a lesser environmental impact. 33 C.F.R. § 320.4(a)(2)(ii).

It also violated NEPA’s alternatives analysis requirement. “[A]n 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 the overall project purposes.” 40 C.F.R. § 230.10(a)(2) (2004). See Fund for Animals v. Rice, 85 F.3d at 542; La. Wildlife Fed’n., Inc. v. York, 761 F.2d 1044, 1047 (5th Cir. 1985). On the record, the Briger site meets this definition. At a minimum, an inadequate analysis of alternatives was done given that the alternatives were analyzed for the larger project not analyzed for the permitted project.

The CEQ regulations emphasize the importance of alternatives analysis (40 C.F.R. § 1502.14 (2004)) and require that the environmental impacts of both the proposal and alternatives to it be presented in comparative form, **providing a clear basis for choice by the decision maker**. “Consideration of other realistic possibilities forces the agency to consider the environmental effects of a project and to evaluate against the effects of alternatives.” N. Buckhead Civic Ass’n v. Skinner, 903 F.2d 1533, 1541 (11th Cir. 1990). However, in this case, the Corps’ analysis compared apples to oranges, rejecting the potentially feasible alternative sites in large part because they were not big enough to accommodate a project the Corps insists is not before it for review.

### **Prior Administrative and Judicial Proceedings Not Relevant to Federal Law Requirements**

The Corps makes reference to a number of state legal or administrative proceedings, seemingly to suggest that the favorable initial rulings by lower tribunals in those proceedings should be taken by the Court to mean that the project’s impacts are not significant. (Def. Memo. p. 15). This argument cannot be maintained. Even if any of those initial rulings were final, each

was made under legal standards and criteria and burdens of proof that are different than those established in NEPA and the CWA. Moreover, there is no information about the nature, facts, applicable legal criteria, or findings of those rulings in the administrative record, although Plaintiffs would proffer that such information would confirm that the independent utility argument cannot be maintained in this case. More to the point, those initial rulings - mentioned only in open court during the initial case scheduling conference, but not otherwise part of the record – were made under legal standards and criteria and burdens of proof that are different than those established in NEPA and the CWA.

As a matter of law, compliance with state laws and rules cannot excuse federal agencies from meeting their independent NEPA requirements. Federal agencies may not delegate their NEPA responsibilities by deferring "to the scrutiny of other [agencies]." Idaho v. Interstate Commerce Comm'n, 35 F.3d 585, 595 (D.C. Cir. 1994) (citing Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); Citizens Against Toxic Sprays, Inc. v. Bergland, 428 F. Supp. 908, 927 (D. Or. 1977) ("agency may not attempt to abdicate to any other agency merely because that agency is authorized to develop and enforce environmental standards"); Sierra Club v USACOE, 701 F.2d 1011, 1038 (2nd Cir 1983) (Corp may not delegate EIS responsibility to a state/local agency with different interests/objectives). O'Reilly v. USACOE, *supra* at 14. (Corps could not assume that compliance with local floodplain rules would be mitigate wetland impacts. In the absence of clear information about the requirements of said ordinance and how it would mitigate the project's adverse impacts, it could not be relied on to support a FONSI).

#### **The Corps' Permit Decision Violated Section 404 of the Clean Water Act**

The CWA permit has not been shown to be in "the public interest." 33 C.F.R. § 320.4(a)(1). Because of its limited analysis, the Corps also failed to balance "benefits which reasonably may be expected to accrue from the proposal" against the proposal's "reasonably foreseeable detriments." Id. § 320.4(a)(1). For the same reason it failed to consider "the public and private need" for the proposed project and "the practicability of using reasonable alternative locations and methods to accomplish the objective" of the proposal. Id. § 320.4(a)(2)(ii). The Corps failed to evaluate "the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." Id. It failed to consider "both individual

and cumulative impacts” of a project, as well as practicable alternatives that would have less adverse impact on aquatic systems. Id. §§ 230.6(c) and .10(a).

### **The Corps Action Violated The National Environmental Policy Act**

To satisfy NEPA’s “hard look” requirement, an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” Sierra Club v. USACOE, 295 F.3d 1209, 1216 (11<sup>th</sup> Cir. 2002). That did not happen. NEPA is an environmental “full-disclosure” statute and a “look-before-you-leap” statute. Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Oklahoma, 426 U.S. 776, 776-77 (1976). Here, the Corps failed to fully analyze and disclose the full impacts of the “foot in the door” phase of a project and spinoff development that the Corps knows is coming but refuses to analyze. It has leaped before taking the “hard look” required by NEPA.

### **CONCLUSION**

The Court shall overturn agency action if not satisfied that the agency “considered the relevant factors and articulated a rational connection between the facts found and the choice made.” Baltimore Gas and Elec. v. NRDC, 462 U.S. 87, 105 (D.C. Dist. 1983). In the instant case, the “searching and careful” judicial inquiry required by NEPA shows no rational connection between the facts found and the choice made by the Corps. See N. Buckhead Civic Ass’n v. Skinner, 903 F.2d 1533, 1538 (11th Cir. 1990). The approval of the permit was arbitrary and capricious because it impermissibly restricted the scope of the public interest review regarding cumulative and indirect impacts and alternatives. The Court should deny Defendants’ Motion for Summary Judgment and grant that of the Plaintiffs.

Dated this 22nd day of August 2005.

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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 22nd day of August, 2005, to all parties listed below.

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