

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

**PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs file this Reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment.

Indirect and Cumulative Impacts

Defendants argue that only impacts "caused by" the federal action must be analyzed, and that the requisite causal effect does not exist if development pressures already exist in the affected area. (Def. Memo at 5). This is not the test for a cumulative impact analysis. Instead, if the future development cannot proceed without federal action, its cumulative impacts must be analyzed. Wyo. Outdoor Council v. USACOE, 351 F. Supp. 2d 1232 (D. Wyo. 2005). In that case, the court rejected the same "proximate cause" argument advanced here by the Corps, and required the Corps to assess the cumulative impacts likely to result from the issuance of the 404 permit. Id. at 1242. The Court ruled that, even though some development would continue without the proposed project, when an applicant proposes to discharge material into jurisdictional waters:

"the Corps ...becomes the gatekeeper for approval of the project. The project becomes 'so interdependent that it would be unwise or irrational to complete [the development] without [a permit to discharge dredge and fill material].'" Id.

The Corps relies upon cases involving extremely tenuous relationships between the

agency action and the claimed cumulative impacts, and which are thus factually inapposite.¹

The Park County test relied on by Defendants is met here². The applicant's own efforts at pursuing, planning, funding and approving the larger project, and those of the State, show that it would be unwise, irrational, and inconsistent with state laws³ not to have all of those projects in place together. The Park County court found oil drilling to be such an "extremely tentative possibility" that requiring an EIS for an exploratory lease would "result in a gross misallocation of resources." 817 F. 2d at 623. Here, no reasonable claim can be made that the development of the remainder of Mecca and the roadway extensions is an "extremely tentative possibility." The same is true of the Vavrus parcel, which, it is a state expedited project, is reasonably foreseeable. Defendants claim that the Vavrus project need not be considered because it is likely to proceed even if the Scripps project does not (Def. Memo at 5, fn 2), is legally meaningless and not supported by the record. Here, the Corps action is necessary to allow the direct impacts of the permitted project, the remainder of the site, the wetlands in the Loxahatchee and Hungryland Sloughs through which the project's roads will be built, and the Vavrus parcel. The Corps acknowledges jurisdiction over these areas. A.R.2635, 2683, 2686, 2672 -2671, 2661. Those projects are needed to meet the project objectives and are induced by the instant project.

Defendants' claim that a pending federal permit application or other proposal is a

¹ In DOT v. Pub. Citizen, 124 S. Ct. 2204 (2004), the agency was adopting safety and financial viability rules for Mexican motor carriers using US highways. The court ruled that the agency did not have to consider the impact of truck emissions, because the agency action could not prevent Mexican vehicles from entering the US. 124 S. Ct. at 2218. In Citizens' Comm. to Save our Canyons v. U.S. Forest Serv., 297 F. 3d 1012 (10th Cir. 2002) the Court ruled that a land swap and an approval of the use of forest service land for an unrelated use (one which could have occurred with the need for forest service approval) were not connected actions that needed to be analyzed in a single EIS. Id at 1029. Utahns for Better Transp. v. US DOT, 305 F.3d 1151 (10th Cir. 2002) did not require transportation projects to be considered in the same EIS because even though they were part of an overall package of projects designed to add roadway capacity, they were for separate roads with no interconnections. 305 F. 3d at 1182. It did not require analysis of the potential to add lanes to a proposed four lane road because no such plans existed. Id at 1174. Fla. Wildlife Fed. v. Goldschmidt, 506 F. Supp. 350, (S.D. Fl. 1981) did not rule that impacts that would be happening anyway categorically are not to be considered. Rather, it found that the wholly generalized concerns about induced impacts to the south Florida ecosystem were ill – defined and far removed from the construction of Interstate 75 (which the Court found would not induce any development) to be considered. Id at 360, 375.

² See Park County Resource Council, Inc. v. United States Dep't of Agric., 817 F.2d 609 (10th Cir.1987) Defendants argue that the legal test Plaintiffs rely upon is not in accord with the current law. Yet, Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985) was reversed on grounds unrelated to its rulings on indirect and cumulative impacts in Sabine River Auth. v. U.S. Dept. of Interior, 951 F.2d 669, 677 (5th Cir. 1992) (reversing previous use of "reasonableness" standard of review in NEPA cases in favor of "arbitrary and capricious" test). Sabine River Authority opinion did not reverse Fritiofson regarding cumulative impact analysis.

³ For example, Florida's transportation concurrency requirements compel adequate roads to serve the development.

prerequisite for requiring an analysis of cumulative impacts is refuted by the cases and the regulations.⁴ Defendants misread Kleppe v. Sierra Club, 427 U.S. 390 (1976) and So. La. Envt'l. Council, Inc., et al., v. Sand, 629 F.2d 1005, 1016 (5th Cir. 1980) for a blanket proposition that an agency does not have to consider the cumulative impacts of a project that is not a “pending agency proposal”. By their own terms, and as interpreted by subsequent cases, they do not support this proposition. The issue in Kleppe was whether the agency was obligated to prepare a comprehensive, regional EIS before granting leases to operate coal mines on federal land in a 90,000 square mile region which had few active or proposed mines located within 50 miles of any other mine, and only 30 active or proposed mines total. Kleppe, 427 US at 411, 414. The Court observed that NEPA “may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time,” but did not make this the trigger for cumulative impact analysis. 427 U.S. at 409. It ruled that a comprehensive EIS of potential coal mining in that entire geographic region was not required because there were no discernable projects on any specific lands to assess. Id at 412.

Airport Neighbors Alliance, 90 F. 3D 426 (10th Cir. 1996) is factually inapposite. It approved the lack of an EIS including all projects in an airport master plan because the individual projects had never been treated as one, or even interdependent, and the record showed that the specific runway project at issue would be built “even if the other components of the Master Plan never got off the ground.” 90 F. 3d 426 at 431. This distinguished the case from previous ones where a cumulative impact analysis had been required. Id. at 432.⁵ The instant

⁴ Plaintiffs submit that the instant case presents the same “egregious avoidance by the Corps of NEPA’s requirements” that caused the Court in Named Individual Members of San Antonio Cons. Soc. v. Texas Highway Dep’t, 446 F.2d 1013 (5th Cir.1971) to require the agency to analyze the third future phase of a highway project. In EDF v Marsh, 651 F.2d 983 (5th Cir. 1981), the Court did not rule that a project must be formally proposed before it must be considered as a cumulative impact, but simply found that the second waterway project was not a cumulative impact of a navigational project because the two projects were “historically distinct.” Id. at 998. In Port of Astoria, Or. v. Hodel, 595 F.2d 467 (9th Cir. 1979), the Court required analysis of Phase II of a program for constructing thermal generating plants because it was reasonably foreseeable, even though it was not yet finalized in a signed contract with the federal agency and its details were “unsettled”. 595 F.2d at 478

⁵ Also, the Court cautioned that its earlier ruling in Park County Resource Council, Inc. v. United States Dep’t of Agric., 817 F.2d 609 (10th Cir.1987) not be read too broadly: “We noted, however, that as an overall regional pattern or plan evolves, the region wide ramifications of development will need to be considered at some point: A singular, site-specific [application to drill], one in a line that prior to that time did not prompt such a broad-based evaluation, will trigger that necessary inquiry as plans solidify. We merely hold that, in this case, developmental plans were not concrete enough at the leasing stage to require such an inquiry.” Airport Neighbors Alliance, 90 F. 3D 426 at 430 fn3.

case is also not the same as Airport Impact Relief v. Wykle 45 F. Supp 89 (D. Mass. 1999), where the court rejected a claim that the potential for future airport expansion should have been considered when a permit for relocating an airport service road was issued, because there were no current plans to expand the airfield and its expansion was not reasonably foreseeable. Id. at 104-105. The absence of any plans, funds or permits for the expansion were factors in the court's decision, although it established no law requiring these things as prerequisites for requiring a cumulative impact analysis. Id. at 105.^{6 7}

Fritiofson, supra, squarely rejects the claim that only formally proposed projects need be considered as part of the cumulative impacts analysis. Explaining Kleppe, and ruling that cumulative impacts analysis in an EA must go farther than that in an EIS – and extend to foreseeable projects not yet formally proposed - it noted that “since Kleppe, new, binding CEQ regulations have been promulgated”, which make a distinction between “connected” actions and “cumulative” effects. Fritiofson, 772 F.2d at 1242.⁸

⁶ The court ruled that an “urban ring” project need not be considered, as it was not reasonably foreseeable. Id.

⁷ Defendants also cite Vieux Carre Prop. Owners v. Pierce, 719 F.2d 1272 (5th Cir.1983), but its facts are completely different. There were only 2 phases of an urban redevelopment project being partially funded by HUD, and the subsequent phases the plaintiffs sought to have HUD analyze, while originally shown on an old master plan, had subsequently “been shelved”. Id. at 1276-1277.

⁸ Distinguishing Kleppe, the Court ruled that “[i]n a case like this one, on the other hand,:

“where an EA constitutes the only environmental review undertaken thus far, the cumulative-impacts analysis plays a different role. *** This distinction is clearly recognized in the CEQ regulations. Sections 1508.7 and 1508.27 require an analysis, when making the NEPA-threshold decision ... whether it is “reasonable to anticipate cumulatively significant impacts” from the specific impacts of the proposed project when added to the impacts from “past, present and reasonably foreseeable future actions,” which are “related” to the proposed project. The regulation does not limit the inquiry to the cumulative impacts that can be expected from proposed projects; rather, the inquiry also extends to the effects that can be anticipated from “reasonably foreseeable future actions.” Cf. 40 C.F.R. § 1508.25(a)(2) (cumulative actions are “proposed actions”). In other words, when deciding the potential significance of a single proposed action (i.e., whether to prepare an EIS at all), a broader analysis of cumulative impacts is required. The regulations clearly mandate consideration of the impacts from actions that are not yet proposals and from actions-past, present, or future-that are not themselves subject to the requirements of NEPA. See 40 C.F.R. § 1508.7 (“past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions ”) (emphasis added). This requirement, moreover, is entirely consistent with Kleppe. Said the court in Adams:

‘Both footnote [20] and Kleppe itself refer to cases in which an EIS is prepared. But contemplated actions which have not reached the proposal stage may certainly play a critical role in assessing the impacts of current proposals, and CEQ regulations require that they be considered. The suggestion that those contemplated actions must also be the subject of assessments of their own “environmental effects”-for which the plaintiffs in Kleppe argued-was rejected. Defendants read footnote 20 to opine that only another project which independently requires an EIS must be considered in determining possible cumulative effects of a current proposal. Kleppe does not suggest such a narrow restriction on

Thus, a pending application for a project is not required to trigger NEPA's cumulative impact analysis requirement. The facts of the cases cited by Defendant, which have rejected broad requests for cumulative impact analyses, are worlds apart from the instant case, where the development on the remainder of Mecca, its roadways and the Vavrus parcel are specific projects on specific lands that are indeed expected to occur.⁹ The Defendants' effort to distinguish the instant case from Tomac v. Norton, 240 F. Supp. 2d 45, 50-52 (D.D.C. 2003) and Friends of the Earth v. USACE, 109 F. Supp. 2d 30, 43 (D.D.C. 2000) fails.

Independent Utility

The Corps continues to rely on the EA's bare claim¹⁰ that Phase I would be built regardless of any other phase of the project, but fails to address the point that there nothing in the record supports this assertion.¹¹ The claim that the Corps "carefully and explicitly considered" the issue of future development on the remainder of Mecca Farms and Vavrus Ranch are not supported by the offered record cites. The cites to A.R. 2631-2635 are to the EA's explanation of the likelihood of such development, stating that the impacts will not be analyzed until applications for those projects are received. The cites to EA at A.R. 2642 -2644 also say:

"the Corps will evaluate any cumulative impacts associated with future potential development on adjacent property, the Vavrus ranch, new road construction, or supporting projects (new exits on the interstate 95 of the Florida Turnpike, tri rail extension...) when applications are received that trigger their review." A.R. 2642.

EIS requirements, and the CEQ regulations clearly reject it." 477 F.Supp. at 1003 n. 19. Fritiofson, 772 F.2d at 1242-1243. (footnote omitted) (emphasis added).

⁹ An impact is "reasonably foreseeable" if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." Sierra Club v. Marsh, 976 F.2d 763, 767 (1st Cir. 1992).

¹⁰ Defendants' suggestion that a mere assertion by the developer of independent utility is enough to support a claim of independent utility, and that multiple projects must be "interdependent" before a cumulative impacts analysis is required is not supported by Coalition for a Livable Westside v. HUD, 1997 U.S. Dist. LEXIS 8860 (S.D.N.Y. 1997). The applicant's assertion of independent utility was but one of several factors (including HUD's "limited involvement" in only 4 buildings of a much larger project, and a "categorical exclusion" from NEPA for HUD planning activities) in that court's finding that that the initial project had independent utility.

¹¹ Defendants claim that Plaintiffs cannot point to any evidence in the Record or elsewhere that demonstrates that Scripps and the County will not proceed with the Project unless future development at Mecca Farms or the Vavrus Ranch takes place. Yet the State and County agreed to provide a massive subsidy in order to attract an equally massive biotech economy the effects of which the Governor likened to air conditioning in the Florida swamps. A.R. 2187-2197. The County has consistently maintained that only the 1900 acre Mecca Farms site is large enough to accommodate the full scale of the proposed project. R. 349, 480, 1210, 6667 – 6668, 6680, 6691, 6706, 6708, 6710.

The citations to 2683-85 are to the EA's claim of independent utility, which states that the Corps has reviewed this 535 acres "independently from the remaining future planned development" and that their impacts will be evaluated when application is made. A.R. 2684.

Defendants' claim that the PGA Blvd. extension was not improperly segmented is circular. The statement in a Corps' letter that it would analyze the impacts of extending PGA Blvd. when application for the extension was made proves that the Corps failed to examine reasonably foreseeable indirect and cumulative impacts. A.R. 1063-1064. Defendants' claim that PGA Blvd. will not need to be extended to serve the Phase I development misses the point – the challenged permit authorizes the construction of PGA Blvd. from SPW Road east through the project site. A.R. 2750, 2761.¹² The ultimate connection of this newly permitted portion of PGA Blvd. to the existing PGA Blvd. is clearly foreseeable, as the state and county development approvals require its construction. A. R. 6800.¹³ Moreover, by authorizing the construction of PGA Blvd. through the site, the Corps has pre-determined the ultimate alignment of the connecting PGA extension - as it will have to connect the existing portion to the newly permitted segment through wetlands - and precluded the ability to thoroughly evaluate alternative alignments.¹⁴ The example provided in the Corps' rules demonstrates the proper scope of the Corps review in this circumstance.¹⁵ In this case, as in the example, the permitting of PGA Blvd. through the site bears upon the route of the roadway outside of the project boundaries which will impact significant acreages of wetlands.

On the law, Defendants claim that as a threshold matter, under the CEQ regulations, segmentation turns on whether two or more "actions" are "connected", such that they must be analyzed in a single EIS is not supported by the law. But, "[i]f proceeding with one project will,

¹² While some maps refer to PGA through the site as "Biotech Parkway", it is clearly PGA Blvd. A.R. 356.

¹³ The record shows that the County intentionally omitted the PGA extension (which would impact over 100 acres of wetlands) from its application so it could get an expedited 404 permit. A.R. 2776-8; 1293

¹⁴ Named Individual Members of San Antonio Cons. Soc. v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir.1971)

¹⁵ [F]or those activities that require a DA permit for a major portion of a transportation or utility transmission project, so that the Corps permit bears upon the origin and destination as well as the route of the project outside the Corps regulatory boundaries, the scope of analysis should include those portions of the project outside the boundaries of the Corps section 10/404 regulatory jurisdiction. To use the same example, if 30 miles of the 50-mile transmission line crossed wetlands or other "waters of the [US]," the scope of analysis should reflect impacts on the whole 50-mile transmission line. 33 CFR Part 325 App. B S.(7)(b) (emphasis added).

because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together.” Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985) *citing* Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir. 1981). Next, Defendants argue that even interconnected roadway projects do not need to be considered as a single project, citing cases that address interconnected roads, not extensions lacking logical termini. They do not authorize segmentation where roads do not have logical termini.¹⁶ Here, the PGA Blvd. and SPW extension extensions are not massive projects of the type that may be segmented. Finally, Defendants’ effort to distinguish O’Reilly v. USACOE, 2004 U.S. Dist. LEXIS 15787 (D. La., 2004) fails. The claim that the O’Reilly “did not even focus on segmentation and independent utility, but rather on the fact that 63% of the entire project involved impacts to wetland of national importance” mis-states the opinion.¹⁷ Also, the wetlands that would be cumulatively impacted here *case over and above the direct impacts of this* project amount to 151 acres (in addition to undetermined amounts of indirect impacts) connected to the Everglades. A.R. 1293, 2643, 2685.

Under the 11th Circuit’s test, laid out in Preserve Endangered Areas of Cobb’s History, Inc. v. USACOE, 87 F.3d 1242, 1247 (11th Cir. 1996), independent utility does not exist here because the project can not and is not designed to function independently from the remaining development of the remaining Mecca Farms¹⁸, Vavrus Ranch and the associated roads and utilities. A.R. 1897-1911, 1916-1919, 1280, 2090, 234, 264-265, 350, 2667.

The Corps Did Not Adequately Assess All Reasonable Alternatives

Defendants cite AR 2660-2670, 2286 to support the claim that the Corps analyzed five alternative sites and determined that no less environmentally damaging alternatives were available, and to defend the rejection of the Briger and Park of Commerce sites. (Def. Opp.

¹⁶ Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974); EDF, Inc. v. Armstrong, 356 F. Supp. 131, 139 (N.D. Cal. 1973), *aff’d*, 487 F.2d 814 (9th Cir. 1973); and Daly v. Volpe, 514 F.2d 1106, 1110 (9th Cir.1975).

¹⁷ See O’Reilly at p. 3 (central claim concerns failure to analyze reasonably foreseeable cumulative impacts of phased development) and p. 5 (Corps abused its discretion in failing to analyze cumulative effects of potential phases 2 and 3 of the development).

¹⁸ The EA itself, in arguing that the project will have a positive economic benefit, states that, “the overall development of the site with the Scripps research biological park would be a considerable economic benefit to the area. The Scripps research park is estimated to accommodate approximately 18,000 jobs on the site.” A.R. 2645.

Memo at 16). However they cannot overcome the fatal flaw in the alternatives analysis – alternatives were evaluated against a standard different than the project for which the permit was issue. Defendants’ response to the “double standard” problem raised by finding independent utility on one hand but disqualifying alternative sites which cannot accommodate future phases on the other is wholly unresponsive. That the law allows the Corps to take into account the needs and goals of the applicant¹⁹ means nothing. Whatever those needs and goals may be, they must be compared to both the applicant’s proposal and the alternatives. The Corps’ own rules regarding the proper scope of analysis for an EA / FONSI mandate that:

“In all cases, the scope of analysis used for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal.” (emphasis added) 33 CFR Part 325 Appendix B S.(7)(b).

Here the Corps failed to analyze impacts and alternatives under the same scope of analysis²⁰ and also used a differing scope of analysis for their comparison of the project’s benefits to its impacts. The contradiction is evident in the alternatives analysis and throughout the EA, and is particularly clear at A.R. 2646. The Corps based its analysis of the economic benefits on the full development of the Mecca site²¹ yet for aesthetics, wetlands, and fish and wildlife values, and impacts to endangered species, its analysis is based upon only the 535 acre Scripps portion of the development. A.R. 2636. By failing to use a consistent project scope in the analysis of impacts, alternatives, and benefits, the Corps has violated its own rules and thus its action must be overturned. Sierra Club v. Martin, 168 F.3d 1, 4 (11th Cir. 1999).

Plaintiffs Do Not Inappropriately Rely on Facts Beyond the Administrative Record

Defendants argue that Plaintiffs have “largely relied on extra- Administrative Record evidence to set forth their version of the ‘facts’....” and ask the Court to strike all record references on pages 1-16 of Plaintiffs Memorandum above page number 2,793. However, the referenced “extra–Administrative Record” information is limited to documents that explain in detail facts and circumstances already in the record, which were placed in the record by

¹⁹ Citizens Against Burlington v. Busey, 938 F. 2d 190 (D.C. Cir. 1991) (cited at Def. Opp. Memo. at 17).

²⁰ Impact analysis based on 535 acre limited project, alternative analysis based on ability to accommodate all future phases of development. A.R. 2660-2670.

²¹ For example, the EA references the 18,000 jobs the County has estimated will result from the full development of the research park. A.R. 306, 2645.

agreement of the parties.²² The Corps agreed that these document be included in and “constitute[] the complete administrative record pertaining to this action”. A.R. 2796.

Plaintiffs do not dispute the controlling standard of review, as stated Fund for Animals v. Rice, 85 F. 3d 535, 548 (11th Cir. 1996). The Corps is required 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.” Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Ins. Co., 463 U.S. 29 (1983). A Court must determine “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Id. at 43. While ordinarily, review of agency action should be restricted to the administrative record that the agency relied upon, the court may consider additional evidence if it explains the record or if it addresses whether all relevant factors were considered. Western No. Car. Alliance v. No. Car. Dept. of Transp. 312 F.Supp.2d 765 (E.D.N.C. 2003). Here, the Corps acknowledges that it did not consider the supplemental documents, which were readily available or already in the Corps’s possession and clearly relevant. A.R. 2794. The vast majority of the information was “before the agency”²³ in that Defendants admit that the details of “the long-term plans of the County” were “all well known” by the Corps....” (Def. Memo at 3). There is no prejudice to Defendants in referring to the stipulated additional documents for context and detail. The dispute concerns the Corps treatment and analysis of that information.

Defendants rely on Save Our Ten Acres²⁴ to argue that the supplemental record is improperly before the Court, but this case holds that a Court’s inquiry is “not necessarily limited to consideration of the administrative record, but supplemental affidavits, depositions, and other proof concerning the environmental impact of the project may be considered if an inadequate evidentiary development before the agency can be shown.” Id. at 467. In this case, this test is

²² The parties agreed to supplement the record in lieu of discovery, and it is disingenuous for Defendants to now assert that the information they agreed to allow into the record should not be considered by the Court. Should the Court be inclined to not consider the supplemented portions of the record, Plaintiffs request the ability to engage in discovery to determine the Corps’ awareness, at the time of the permitting decision, of the facts demonstrated by the supplemental record. The majority of items included in the supplemental record were referenced in a comment letter submitted to the Corps during the public notice period, with a request that they be included in the record; however, the Corps failed to include them. (A.R. 1565-6) This failure and subsequent argument that these items are improperly before the Court is an attempt to limit the record so as to justify the agency’s improperly narrow scope of review. The remaining supplemental record items should have considered by the Corps. A.R. 2794-6.

²³ Asaro, Inc. v. USEPA, 616 F. 2d 1153 (9th Cir. 1980)

²⁴ Save Our Ten Acres v. Kreger 472 F. 2d 463 (5th Cir. 1973) (cited at p. 18 of Def. Opp. Memo)

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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 31st day of August, 2005, to all parties listed below.

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