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.

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PLAINTIFFS' MEMORANDUM OF LAW ON REMEDIES

I. INTRODUCTION

On Sept. 30, 2005, the Court entered an Order on Cross Motions for Summary Judgment, ruling that the Section 404 permit was arbitrary and capricious due to an inadequate NEPA analysis, which failed to adequately analyze all direct, indirect and cumulative impacts of the project and failed to properly analyze alternatives under both NEPA and the CWA. The Court directed the parties to file legal briefs on the issue of remedies on Oct. 17, 2005. Plaintiffs' brief requests and explains the necessity and basis for an Order (1) setting aside the permit; (2) enjoining any further development authorized by the permit, and any vertical construction in jurisdictional areas already filled; and (3) directing the preparation of an EIS.

II. THE PERMIT WAS UNLAWFULLY ISSUED AND SHOULD BE SET ASIDE

The Corps must complete a proper NEPA analysis before issuing a Section 404 permit. See 33 C.F.R. § 325.2(a)(4). If an agency fails to properly analyze a project under NEPA, any permits issued must be invalidated. 5 U.S.C. § 706(2)(A). 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 Corps acted arbitrarily and capriciously in issuing a FONSI); Friends of the Earth v. Hall,

693 F. Supp. 904, 946 (W.D. Wash. 1988) (set aside 404 permit where FONSI was arbitrary).

III. INJUNCTIVE RELIEF

The granting of injunctive relief falls within the inherent equitable powers of the court. Klay, et al v. United Healthgroup, Inc., 376 F.3d 1092, 1098 (11th Cir. 2004). An injunction to preserve the status quo pending preparation of an EIS is an appropriate remedy where there has been a violation of NEPA. Fla. Keys Citizens Coalition v. U.S.A.C.E., 374 F.Supp.2d 1116 (S.D. Fla., 2005) (citing Envtl. Def. Fund v. Marsh, 651 F.2d 983, 1005-06 (5th Cir.1981)). An injunction furthers the intent of NEPA that the relevant decision-makers and the public have the opportunity to choose among alternatives before resources are committed and a decision is made. Also, it provides "the agency with an incentive to comply with NEPA in as rapid and thorough a manner as is reasonably possible." Id. at 1127.

When a court has found a NEPA violation, the remedy should be shaped so as to fulfill the objectives of the statute as closely as possible. EDF v. Marsh, 651 F.2d 983 (5th Cir.1981). One benefit of an injunction is to maintain the status quo so that the relevant decision makers and the public may still have the opportunity to choose among alternatives, as required by NEPA. Id. Another purpose is to provide the agency with an incentive to comply with NEPA in as rapid and thorough a manner as is reasonably possible. Id.

The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the discharge of any pollutant, including dredged spoil or other fill material, into navigable waters unless authorized by a CWA permit. Id., § 1311(a). Dredging and filling of the jurisdictional waters on the Mecca Farms site requires a Section 404 permit from the Corps under the CWA. 33 U.S.C. § 1344(a), (f)(2). Order at 7. As this Court found, for "a proposal that is not water dependent, as the one here, the Corps must presume that practicable alternatives exist that do not involve special aquatic sites, unless clearly demonstrated otherwise." (Order at 59) (quoting 40 C.F.R. § 230.10(a)(3)). Additionally, "the Corps may not issue a permit …if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." Id. (quoting 40 C.F.R. § 230 (10)(a) (quotation marks omitted). Accordingly, this Court found that it could not "ascertain whether these considerations were adequately addressed." Id. Thus, it has not been clearly demonstrated that "practicable alternatives" do not

exist, and thus the rule's presumption is that such alternatives do exist. The permit violates the CWA. By finding that the Corps' decision to issue the 404 permit was not supported by the record the Court has de facto revoked the permit and the Court should issue an injunction in order to meet the intent of the CWA. Friends of Earth v. Hall, 693 F. Supp. 904, 915 (D.C.W.D.W. 1988). The CWA, 33 U.S.C. § 1311(a) "contains a necessary and inescapable inference that an injunction must issue to ensure compliance when a failure to enjoin the proposed action if the proposed action would introduce a pollutant into the Nation's water. Id at 949; Amoco Production Co. v. Gambell, 480 U.S. 531, 542 (1987).

Although a procedural violation of the CWA does not bind a Court to issue an injunction, the Court is afforded broad discretion to secure prompt compliance with the Act. Amoco Production Co. v. Gambell, 480 U.S. 531, 542-543 (1987). Relief for procedural violations can include, but is not limited to, an order of immediate cessation. Weinberger v. Romero-Barcelo, 456 U.S. 305, 319 (1982). In this case, there is more than a mere procedural violation of the CWA. There is a substantive violation of the Act. In the instant case, without injunctive relief, the jurisdictional waters will be irretrievably polluted with fill material and built upon, resulting in the ultimate degradation of the waters. Failure to enjoin filling and construction upon the waters without a permit would subject the Nation's waters to a real and present danger of pollution.

Earlier this month, the 11th Circuit[1] explained that to obtain a permanent injunction a party must show (1) that he has prevailed on the merits; (2) there is no adequate remedy at law;

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[1] In an earlier case, the 11th Circuit had said:

> "A district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. [citation omitted] The factors cited above are the elements for receiving a preliminary injunction. 'The standard for a permanent injunction is essentially the same as for a preliminary injunction except that the plaintiff must show actual success on the merits instead of a likelihood of success." [citation omitted]. In addition, most courts do not consider the public interest element in deciding whether to issue a permanent injunction**…"** Klay, et al v. United Healthgroup, Inc., 376 F.3d 1092, 1098 (11th Cir. 2004)(emphasis added)."

Based on the Court's latest pronouncement, it would appear that the injunctive element of finding that "the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party" is not required in the 11th Circuit. Nonetheless, given that the Alabama, et al v. USACOE et al opinion did not expressly overrule Klay on this point, Plaintiffs will address that element as well.

and (3) irreparable harm will result if the court does not order injunctive relief." Alabama, et al v. USACOE et al, 2005 WL 2266801 (11th Cir. 2005), 18 Fla. L. Weekly Fed. C 968.[2] A discussion of the elements of injunctive relief compared to the record in this case shows that the requested injunction is the only appropriate remedy.

A. Success On the Merits

Plaintiffs have prevailed on the merits.

B. Irreparable Harm

In mandating compliance with NEPA as a means of preventing environmental harms, Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment. Davis v. Mineta (302 F.3d 1104) (10th Cir 2002)(citing 42 U.S.C. § 4321); *Sierra Club v. Marsh,* 872 F.2d 497, 500 (1st Cir.1989) (affirming injunction based on NEPA violation because "risk implied by violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation." The harm NEPA seeks to prevent is complete when agency makes decision without considering information NEPA seeks to place before decision-maker and public); *Comm. to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 448-49 (10th Cir.1996) ("injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury [NEPA] was designed to prevent."). An agency's failure to follow the procedural requirements of NEPA, *in and of itself*, constitutes irreparable injury. Town of Golden Beach v. USACOE, 1994 U.S. Dist. LEXIS 15832, 25-26, 40 Env't Rep. Cas. (BNA) 1094 (S.D. Fla. 1994) ("With regard to the balancing of irreparable injuries, it is clear that where there is a fundamental breakdown in the NEPA process…preliminary injunctive relief is appropriate"); Protect Key West, Inc. v. Cheney, 795 F.Supp. 1552, 1563 (S.D. Fla. 1992) (granting an injunction based on the inadequacy of the agency's EA because "[i]rreparable harm results where environmental concerns have not been addressed by the NEPA process").[3] A NEPA violation supports a finding of irreparable harm, given the risk to the environment from

[2] *Accord,* Keener, v. Convergys Corp., 342 F.3d 1264, 1269 (11th Circ. 2003)(permanent injunction requires (1) success on the merits; (2) continuing irreparable injury; and (3) no adequate remedy at law.

[3] See also Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1974); Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089 (9th Cir. 1975) (Irreparable damage implied from failure of the agency to evaluate fully the environmental impact of the proposed project, and consider alternative proposals before taking a major federal action.).

uninformed decision-making. High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004)(citing Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir.1985)).

In Commonwealth of Massachusetts v. Watts, 716 F.2d 946 (1st Cir. 1983), the agency asked the court to set aside a preliminary injunction stopping it from auctioning off oil drilling leases during the pendancy of the EIS required by the Court, arguing that there were several steps between the lease sale and the purported harm, and that if harm were ultimately determined, the leases could then be set aside. The Court disagreed:

> "[T]o set aside the agency's action at a later date will not necessarily undo the harm. The agency as well as private parties may well have become committed to the previously chosen course of action, and new information--a new EIS--may bring about a new decision, but it is that much less likely to bring about a different one. It is far easier to influence an initial choice than to change a mind already made up. See Alaska v. Andrus, 580 F.2d at 485; Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d at 512-13 ("So long as the status quo is maintained, so long as the environmental impact statement is not merely a justification for a fait accompli, there is a possibility that the statement will lead the agency to change its plans...."). It is appropriate for the courts to recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based--a theory aimed at presenting governmental decision-makers with relevant environmental data before they commit themselves to a course of action." 716 F.2d at 952 (emphasis added).

The Court found that the plaintiffs would suffer harm if the lease sale took place.

> "In that event, the successful oil companies would have committed time and effort to planning the development of the blocks they had leased, and the Department of the Interior and the relevant state agencies would have begun to make plans based upon the leased tracts. Each of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues. Once large bureaucracies are committed to a course of action, it is difficult to change that course--even if new, or more thorough, NEPA statements are prepared and the agency is told to "redecide." It is this type of harm that plaintiffs seek to avoid, and it is the presence of this type of harm that courts have said can merit an injunction in an appropriate case. See California v. Watt, 520 F.Supp. 1359, 1371 (C.D.Cal.1981) ("leasing sets in motion the entire chain of events which culminates in oil and gas development"), cited with approval in California v. Watt, 683 F.2d 1253, 1260 (9th Cir.1982), cert. granted, 103 S.Ct. 2083, 77 L.Ed.2d 295 (1983)." (emphasis added).

In Davis v. Mineta, 302 F.3d 1104 (10th Cir 2002), the defendants argued that plaintiffs would suffer no irreparable harm if construction began on Phase I of a multi-phase highway construction project, because the harms alleged by the plaintiffs would arise principally from the

more invasive construction of Phase II. The court held that, if construction went forward before the environmental analysis was complete, a serious risk would arise that the analysis of alternatives required by NEPA would be skewed toward completion of the entire project.

Here, Plaintiffs will suffer exactly the same type of injury if the requested injunction is not issued as was threatened, and prevented, in Commonwealth v. Watt and Davis v. Mineta. Should construction on the site continue while the necessary NEPA analysis is ongoing, alternatives to the project would be foreclosed and the siting of the project at this location will be the fait accompli the law precludes prior to compliance with NEPA.

C. No Adequate Remedy at Law

Injunctions are a common remedy in environmental cases because of the often irreparable nature of environmental injuries and the inadequacy of money damages to remedy such injuries. Amoco Prod. Co. v. Village of Gamball, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L. Ed. 2d 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 72 L. Ed. 2d 91, 102 S.Ct. 1798 (1982) (An injunction is an appropriate remedy where plaintiffs can demonstrate irreparable injury and the inadequacy of a legal remedy).

D. Balance of Harms and The Public Interest Favor The Requested Injunction

The balance of harms and the equities support an injunction. While an injunction does not automatically issue upon a finding that an agency violated NEPA, "the presence of strong NEPA claims gives rise to more liberal standards for granting an injunction." High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004). If environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment. Id. (*citing*, Amoco, 480 U.S. at 545, 107 S.Ct. 1396).

An injunction will not harm the Corps, which has the duty to ensure its action complies with federal law. Additionally, the public has an interest in avoiding harm to the environment and ensuring that government agencies comply with environmental statutes before undertaking projects that impact the environment. Morris v. Slater, 1998 WL 959658 at 5 (N.D. Tex. 1998). The public interest is in the enforcement of NEPA and in the preservation of the natural environment, and the Government's interest will not be harmed because they, as public servants, are concerned primarily with the public welfare. National Wildlife Federation v. Andrus, 440 F. Supp. 1245, *1256* (D.D.C. 1977). Nor should the injunction harm the County or Scripps. While they may have expended money and resources on this project, monetary loss by the

defendant is not a sufficient basis for forbearing to issue injunction an injunction. Stop H-3 Association v. Volpe 353 F.Supp. 14 (D. Hawaii, 1972); Highland Cooperative v. City of Lansing, 492 F.Supp. 1372 (USDC, W. D. Michigan, 1980). Moreover, if public money is spent needlessly, the public interest will be injured. Stop H-3 Association v. Volpe, supra. The State of Florida, in passing the legislation responsible for bringing Scripps to Florida, included a *force majeur* clause which provides for up to a four year delay of all project deadlines as a result of judicial proceedings, and ensures funding at current levels during the delay.:

> "Section 6….[I] f the grantee [Scripps] is prevented from timely achieving any deadlines set forth in this act due to its inability to occupy its permanent Florida facility within 2 years after entering into the memorandum of agreement …, as a result of permitting delays and related administrative or judicial proceedings, …, or other similar events beyond the control of the grantee, the deadline shall be extended by the number of days by which the grantee was delayed in commencing its occupancy ….. In no event shall the extension be for more than 4 years. Upon the occurrence of a force majeure event, the Scripps Florida Funding Corporation shall continue to fund the grantee at a level that permits it to sustain its current level of operations until the force majeure event ceases and the grantee is able to resume the contract schedule governing disbursement." Ch. 2003-420, Laws of Fla.

The County and Scripps included similar language in their Grant Agreement:

> "[I]f Scripps is prevented from achieving any of Scripps's [sic] obligations by the dates set forth herein due to its inability to occupy the Permanent Facilities as a result of permitting delays or related administrative or judicial proceedings, which are in no way caused by Scripps' actions or failure to act, then all of the dates set forth herein shall be extended by the number of days by which Scripps was delayed in commencing occupancy of the permanent facilities. Notwithstanding any other terms contained in this agreement, if County is prevented from achieving any of County's obligations by the dates set forth herein as a result of permitting delays or related administrative or judicial proceedings, which are in no way caused by the County's actions or failure to act, then all of the dates set forth herein shall be extended by the number of days by which the County was delayed." A.R. 3709

Thus, the County and Scripps anticipated the potential for delays caused by judicial proceedings, and cannot now claim to be harmed by such delays. Additionally, Scripps has the ability to continue its work at its existing facilities at Abacoa. Construction of a second temporary lab space on that site is expected to begin soon which will allow Scripps to continue its work and meet its hiring obligations for the State and County. See Exhibits A and B. Thus, any harm to the County or Scripps would be minimal.

As to the public interest, as shown below, the intent of NEPA can only be met if an injunction is issued preventing further action until the substantial issues have been looked at. The public interest in the environment, quality of life, and the efficient use of government resources warrants that the NEPA analysis occur before any irretrievable or irrevocable commitment of resources is made. Highland Cooperative v. City of Lansing, 492 F. Supp. 1372 (USDC, W. D. Mich.1980).

C.E.Q. Regulations Limit Action During The NEPA Process

"Until an agency issues a record of decision . . . no action concerning the proposal shall be taken which would: (1) have an adverse environmental impact; or (2) limit the choice of reasonable alternatives. Allowing the project to move forward pending issuance of an appropriate record of decision would violate these provisions, as further explained below. As shown below, allowing any construction to continue pending completion of the NEPA process would limit the choice of reasonable alternatives and allow significant adverse environmental impacts. 40 CFR §1506.1

Adverse Environmental Impact

As discussed on pages 4-6 *supra* and 11-15 *infra* of this brief, allowing construction of the project to continue during the necessary NEPA review would have serious adverse environmental consequences and would violate the fundamental purposes of NEPA. See, e.g. Davis v. Mineta (302 F.3d 1104) (10th Cir 2002) (failure to comply with NEPA has detrimental consequences for the environment).

Limitation of Choice of Reasonable Alternatives

If construction of project at Mecca Farms is not enjoined, the alternatives analysis required to comply with NEPA will be rendered a nullity. NEPA is intended to ensure that environmental considerations are infused into the ongoing programs and actions of the federal government. High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 644 (9th Cir. 2004). NEPA documents must be prepared early enough so that they can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made. Id. The risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation. Sierra Club v. Marsh 872 F.2d 497, 504 (1st Cir. 1989). Thus, "the difficulty of stopping a bureaucratic steam roller, once started ... [is] a perfectly proper factor for a district court to take into account in assessing that

risk on a motion for preliminary injunction." Id

In Stop H-3 Association v. Volpe 353 F.Supp. 14 (D. Hawaii, 1972), the Court emphasized that the essence of NEPA is in the presumption that the thorough re-evaluation of a project may lead to a decision to abandon or substantially alter the project. *Citing* Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109,1114 (D.C. Cir. 1971) ([L]ike the 'detailed statement' requirement, [42 U.S.C. Sec. 4332(D)] seeks to insure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) ....") Accordingly, the Court held:

> while the NEPA review is ongoing, there should be (1) no continuing commitment to the project as if it were a *fait accompli,* for it is not; and (2) no action undertaken which makes it more difficult for the reviewing agency to impartially review and subsequently, if warranted, alter the project. Certainly the halting of construction, pending the review, is critical. But so, as well, is the halting of the continued expenditure of money. As the court in Keith v. Volpe, 4 ERC 1562 (C.D.Cal., 1972) stated: "The Court would anticipate that the more the defendants spend on the freeway-whether for land acquisition or for some other purpose-the more difficult it will be to decide to abandon the project." 4 ERC 1562 at 1565.

In Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir.1972), the Court ruled that construction which had already begun on an interstate could not continue pending completion of the EIS:

> "[i]f investment in the proposed route were to continue prior to and during the Secretary's consideration of the environmental report, the options open to the Secretary would diminish, and at some point his consideration would become a meaningless formality." *Id.* at 1333. For this reason we held that an injunction against further construction should issue until the Secretary took final action on the EIS. *Id.* at 1334.

Courts should not shrink from halting construction of projects which are being erected in clear violation of the law. Named Individual Members of San Antonio Cons. Soc. v. Texas Hwy. Dep't., 446 F.2d 1013, (5th Cir. 1971). In Highland Cooperative v. City of Lansing, 492 F.Supp. 1372 (USDC, W. D. Michigan, 1980), where a highway project was envisioned as single project and implementation of any part of it would have potential environmental impact on whole area, the Court declined to limit its injunction to one segment of project:

> "[T]he piecemealing of highways, without assessing the consequential environmental effects violates the spirit and letter of NEPA. (citations omitted).

> One of plaintiffs' substantial concerns was developmental changes in land use in what is essentially a residential area. This issue, and the effect it would have on the human environment could completely evade investigation if phase one is allowed to proceed while an EIS is prepared for phase two. The … Project was conceived of as one project, initially studied as one project, and the implementation of any part of it would have potential environmental impact on the whole area. To allow defendants to make a substantial commitment of resources to one segment, while preparing the EIS for the other would be to avoid the spirit and letter of NEPA, and this Court in its discretion will not allow that to be done. Id at 1383 (emphasis added).

The instant case presents this same scenario. As the Court found, approval and construction of phase one would pre-determine the ultimate basic alignment of PGA Blvd., and "preclude[] the ability to thoroughly evaluate alternative alignments.". (Order at 27). The Court found that the approval of the project "risks foreclosing the wide range of options for building roads intended to service the entire development." (Order at 29). As the Court noted: "If proceeding with one project will, 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" (Order at 29) (citing Piedmont Heights Civic Club, Inc. v. Moreland, 637 F. 2d 430, 439 (5th Cir. 1981). If the anchor of the larger project is under construction while the impacts of the remainder are being studied, it will become impossible for the Corps to impartially review alternatives to the proposed project, and the analysis will be a "meaningless formality". See Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir.1972). The Supreme Court has held and this Court has noted that, "NEPA ensures 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, 490 U.S. 332 at 350. For this important reason, adequate environmental evaluation must occur sufficiently early in the planning process to be meaningful. North Buckhead Civic Ass'n. v. Skinner 903 F.2d 1533, 1540 (11th Cir. 1990) (Order at 61).

This purpose of NEPA cannot be met if construction is allowed to continue on the project's anchor and catalyst site while a pro forma NEPA analysis is prepared. Allowing construction to proceed would allow exactly what NEPA is intended to preclude - a "manipulation" of the independent utility concept to expedite the permitting process in order to avoid the more "troublesome" environmental issues. (Order at 28). Furthermore, a failure to enjoin the development forecloses the meaningful analysis of practicable alternatives required by

the CWA. "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." Allowing construction of the “anchor” and “catalyst” for a “proven business model of clustering biotech” will foist any reasonable consideration of practicable alternative because once this die is cast the cost and logistics of choosing an alternative site with “less adverse impact on the aquatic ecosystem” would prove unfeasible.

IV. AN EIS IS REQUIRED—THE PROJECT WILL CAUSE SIGNIFICANT DEGRADATION OF THE HUMAN ENVIRONMENT.

Judicial Precedent

The Court has the discretion to require an EIS. EDF v. Marsh, 651 F.2d 983, 999 n 19, (5th Cir. 1981). Where a Court finds the project will significantly effect the human environment, it may direct the agency to perform an Environmental Impact Statement. Fritiofson v. Alexander, 772 F.2d 1225, 1248 (5th Cir. 1985); Citizen Advocates for Responsible Expansion v. Dole, 770 F. 2d 423, 439 (5th Cir. 1985). An EIS *must* be prepared if substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor.'" Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998); accord, Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998); Ocean Advocates v. USACOE, 402 F.3d 846, 871-872 (9th Cir. 2004). "To trigger this requirement a 'plaintiff need not show that significant effects *will in fact occur*,' [but] raising 'substantial questions whether a project may have a significant effect' is sufficient." Idaho Sporting Cong. v. Thomas, 137 F.3d 1146 at 1150 (9th Cir. 1998). Accord, Ocean Advocates, *supra*.

If the Court “finds that the project may cause a significant degradation of some human environmental factor …, the court should require the filing of an impact statement or grant [the plaintiff] such other equitable relief as it deems appropriate.” Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973). In Friends of the Earth v. USACOE, 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. The instant case is remarkably similar to Friends of the Earth. In City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975) the Court required the agency to prepare an EIS on the effects of a proposed freeway interchange 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. Similarly, in the instant case an EIS is necessary to evaluate the affects of the

major roadways in wetlands, endangered species habitat, preservation areas, wild and scenic Loxahatchee River, and development impacts on wetland inundated Vavrus Ranch.

CEQ Regulations Defining Significance

Under CEQ regulations:

> "“[S]ignificance” requires consideration of both context and intensity. Context considerations include the affected region, interests, and locality, varying with the setting of the action, and include both short and long-term effects. Intensity refers to the severity of the impact, including impacts that may be both beneficial and adverse; unique characteristics of the geographic area, such as proximity to 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; and whether the action is related to other actions with individually insignificant but cumulatively significant impacts; the degree to which the action may adversely affect an endangered or threatened species or habitat; and whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27.

Significant Adverse Environmental Impact

In the instant case, the findings made by the Court's Order, and the administrative record, clearly show that the project's direct, cumulative and indirect impacts will have significant impact as defined by the CEQ regulations. The Court noted that "impacts could occur to the surface water ditches and the water catchment area to the northeast of the Mecca Farms site…." (Order at 49). The Court found that "the remainder of Mecca Farms … has jurisdictional wetlands throughout", that "numerous wetlands are located on… Vavrus"[4], and that Vavrus "contains hundreds of acres of high value wetlands." (Order at 46). The Court found that the extension of PGA Boulevard will ultimately connect through an area that includes high value wetlands[5], and that "it is abundantly clear from this record that the County's planned road extensions raise a number of important environmental concerns." Order at 30. It found that the "roads would connect to existing roads through high value wetlands"[6], that the Fish and Wildlife Service was concerned as to whether FDOT had a "specialist to address wildlife corridor issues"[7], and that "the Corps anticipated *significant environmental consequences* associated with the road expansions…." Order at 30. (emphasis added).

[4] Order at 23
[5] Order at 27
[6] Order at 36
[7] Order at 37

The Court found that the NMFS was concerned about potential secondary and cumulative impacts to adjacent wetlands caused by the project - related or induced constriction and development[8]. The Court found that "the record leads inescapably to the conclusion that the proposed project will have growth inducing effects." Order at 48. It found that the project at the Mecca site "is planned and expected to induce significant development." (Order at 29). It found that "the record reflects a dramatic and concerted effort…to develop a biotechnology industry, with Scripps as its anchor and centerpiece, that will ultimately occupy the entirety of Mecca Farms, with supporting facilities on Vavrus Ranch." (Order at 45.). All of this, the Court found was "for the express purpose of inducing growth.". Id.[9] As to the amount of growth, the Court noted that 18,896 permanent jobs are projected to result from the project. (Order at 60).

The administrative record clearly shows that virtually every factor listed in the rule is present, strongly indicating that the context and intensity of the project will result in a significant impact and degradation to and of the human environment. The entire 1919 acre Project has received state and local approval as a "Development of Regional Impact" (DRI) (R.1916-1919). The County's Scripps Project director admits that the Project will have "a significant impact" wherever it is placed. R. 2506-2507.[10] The extension of Seminole Pratt Whitney Road is a required condition for the construction of any portion of the biotech park (A.R. 6943.) and will impact wetlands and cut off Hungryland Slough from Corbett for a distance of approximately 3 miles north of the subject site. R. 6679. Additionally, construction of the project will directly impact approximately <u>151 acres of</u> <u>wetlands</u> (in addition to undetermined amounts of indirect impacts)[11] The project also will require the conversion of approximately 28 acres of the Corbett for the siting of transportation and utility facilities. R. 6736, 6760. "The Corps acknowledges that the construction of the [sic] SCRIPPS on a portion of the Mecca Farms property <u>may encourage further development in the area.</u>" R. 2677. The <u>Corps believes that adverse secondary and cumulative effects</u> of selecting this site as the preferred alternative <u>include increase in traffic, induced growth</u>, <u>potential for increase in development on private parcels, utilities and roadway expansions</u>." R. 2663. (Emphasis added). Corps' permitting staff described the "permitting

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[8] Order at 39

[9] The Court characterized this as a "gold rush of biotechnology industry growth in the area." (Order at 53)

[10] 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).

[11] These are a result of (a) Widening of SPW Road (b) an FP&L substation.; (c) extension of PGA Blvd. and (d) potential North County Airport runway re-alignment to accommodate the PGA Blvd. extension.. R. 1293-1294.

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 Vavrus, as "complicated" and "troublesome", including the "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 potential for listed species to occur on or near the site exists. R. 2641. Portions of the site appear to be located on or near Potential Habitat for Rare Species.[12] 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. (Emphasis added). Site studies have also indicated Vavrus Ranch provides habitat or potential habitat for a variety of other listed species. [13]

Development of the Research Park will increase traffic generation from the site by more than fifty times. Under the rural land use designation 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 vehicular trips per day, an increase of more than 100,000 trips per day. R. 6694-6695. As a result, more than 57 miles of roadways will be over-capacity and will fail to operate at their established level of service. R. 6804. The head of the County's engineering department stated that "it's a very significant impact as far as traffic, no doubt about that." John Pacenti, Scripps Traffic Repercussions Hover Over Hearing, The Palm Beach Post, October 15, 2005. *(emphasis added)* (Exhibit C).

Florida's Department of Environmental Protection commented that a high potential exists for impacts to the surficial aquifer due to onsite activities. R. 1446. The existing mining activities

[12] 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. The project site contains habitat for the American Alligator and foraging habitat for wading birds and birds of prey. R. 1290. Te 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 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.

[13] Site studies of Vavrus 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.

have uncovered the surficial aquifer, making it more susceptible to pollution from future stormwater runoff and industrial pollutants. R. 1445. The Project will increase excavation on the site from 27.6 acres to 48 acres. R. 2686. These impacts were not addressed in the EA.

In addition, at FN. 37 of the Order, the Court notes that the element of controversy would have to be re-evaluated by the Corps. The effects of an action are "highly controversial" when there is "a substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use." Georgia River Network v. USACOE, 334 F.Supp.2d 1329, 1338 (N.D.Ga. 2003), *Citing* Friends, *Supra*. Accord, Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (*quoting* Greenpeace Action v. Franklin, 14 F.3d 1324, 1335 (9th Cir. 1993)). Here, as in Friends, *supra*, the Corps' inadequate consideration of the direct, indirect and cumulative impacts of the entirety of the development the Corps "provided less than the full picture." Friends at 43. Similarly, as in Friends, there are "to many unanswered questions." The record, in this case, demonstrates that Corps and the County are unable or unwilling to discern the entirety of the project and its impacts. Here, the DRI and zoning amendments approved by the county incorporated the entirety of the 1919-acres, the SFWMD issued only a "conceptual permit" for the surface water management permit, and the Corps issued a permit for only 535-acres. Order at 8, 10-11. Further, the Corps questioned whether it had "control and responsibility" over this site. Order at 20. An accurate reading of the entire record demonstrates a "dispute about the size, nature or effect of the federal action."

The Court concluded that "in this case the purposes of NEPA's EIS requirement would be served by requiring the agency to consider these indirect effects." (Order at 46).

V. CONCLUSION

WHEREFORE, the Court should enter an Order (1) setting aside the permit; (2) enjoining any further development authorized by the permit, and any vertical construction in jurisdictional areas already filled; and (3) directing the preparation of an EIS which analyzes all of the impacts of all reasonably foreseeable project and impacts identified in the Court's Order of Sept. 30, 2005 or in the administrative record.

Respectfully submitted this 17th day of October, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic mail and United States mail on this 17th day of October, 2005, to all parties listed below.

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